

23 U.S.C. § 326 CE Assignment MOU
FHWA, Arizona Division and the Arizona Department of Transportation

**SECOND RENEWED MEMORANDUM OF
UNDERSTANDING**

between
Federal Highway Administration, Arizona Division,
and the
Arizona Department of Transportation

State Assumption of Responsibility for Categorical Exclusions

THIS SECOND RENEWED MEMORANDUM OF UNDERSTANDING (MOU) made and entered into on **January 4, 2024**, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION (FHWA) and the STATE of Arizona, acting by and through its DEPARTMENT OF TRANSPORTATION (State), hereby provides as follows:

WITNESSETH:

Whereas, Section 326 of amended Chapter 3 of Title 23, United States Code (23 U.S.C. § 326) allows the Secretary of the United States Department of Transportation (DOT Secretary), to assign, and a State to assume, responsibility for determining whether certain designated activities are included within classes of action that are categorically excluded from requirements for environmental assessments or environmental impact statements pursuant to regulations promulgated by the Council on Environmental Quality in parts 1500-1508 of title 40, Code of Federal Regulations (CFR) under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 eq seq. (NEPA); and

Whereas, if a State assumes such responsibility for making categorical exclusion (CE) determinations, the DOT Secretary also may assign and the State may assume all or part of certain Federal responsibilities for environmental review, consultation, or other related actions required; and

Whereas, on January 3, 2018, the FHWA and the State executed a MOU assigning responsibilities to the State pursuant to 23 U.S.C. § 326 for a three-year period, expiring on January 3, 2021 (“Original Section 326 MOU”); and

Whereas, on April 16, 2019, the FHWA and the State executed a separate MOU assigning certain responsibilities to the State under the Surface Transportation Project Delivery Program, 23 U.S.C. § 327 (Section 327 MOU), which is separate from and does not supersede the assignment of authority for CEs under the Section 326 MOU; and

Whereas, the Section 327 MOU expressly assigns FHWA’s responsibilities for NEPA and certain other environmental laws to ADOT with respect to specified “highway projects,” including among others: “highway projects qualifying for CEs within the State of Arizona that are proposed to be funded with Title 23 funds or that otherwise require FHWA

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approvals, and that do not qualify for assignment of responsibilities pursuant to the Section 326 MOU; and

Whereas, on January 4, 2021, the FHWA and the State renewed the Original 326 MOU assigning responsibilities to the State pursuant to 23 U.S.C. § 326 for another three-year period, expiring on January 4, 2024 (“First Renewed Section 326 MOU”); and

Whereas, FHWA and the State now seek to extend the existing assignment of responsibilities to the State pursuant to 23 U.S.C. § 326 for an additional three-year period, pursuant to a new MOU (“Second Renewed Section 326 MOU” or “MOU”); and

Whereas, on **October 28, 2023**, the FHWA published a notice of the availability of the proposed Second Renewed Section 326 MOU in the *Federal Register* and provided a thirty (30) day opportunity for comment in the USDOT Docket Management System FHWA-**2020-0022**; and

Whereas, on **December 3, 2023**, the State published the proposed notice of availability of the Second Renewed Section 326 MOU on its website at <https://azdot.gov/business/environmental-planning/ce-assignment-and-nepa-assignment> and provided a thirty (30) day opportunity for comment; and

Whereas, the State and the FHWA have considered the comments received on the Second Renewed Section 326 MOU and the State’s overall performance in the Program evaluated through ADOT self-assessments and FHWA monitoring as required by 23 U.S.C. § 326(c)(5); and

Whereas, the DOT Secretary, acting by and through FHWA, has determined that specific designated activities are CEs and that it will assign specific responsibilities with respect to CEs to the State in accordance with this MOU; and

Whereas, the State wishes to assume such Federal agency responsibilities in accordance with this MOU and applicable law; and

Now, therefore, FHWA and the State agree as follows:

STIPULATIONS

I. CATEGORICAL EXCLUSION RESPONSIBILITIES ASSIGNED TO THE STATE BY FHWA

- A. For the projects covered by this MOU, FHWA hereby assigns, and the State hereby assumes, subject to the terms and conditions set forth in 23 U.S.C. § 326 and this MOU, the responsibility for determining whether a proposed FHWA action is within the category of action that has been designated as a CE by the DOT Secretary, as specified in Stipulation I(B), and meets the definition of a CE as provided in 40 CFR 1508.1(d) (as in effect on September 14, 2020) and 23 CFR 771.117(a) and (b). This assignment applies only to projects for which

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the Arizona Department of Transportation is the direct recipient of Title 23 program funding or is the project sponsor or cosponsor within the scope of 23 U.S.C. § 326 and this MOU for a project requiring approval by the FHWA-Arizona Division Office. This assignment does not apply to any responsibilities carried out by other modal administrations of the US Department of Transportation (USDOT), the Office of the Secretary, or other Federal agencies.

- B. This assignment pertains only to the designated activities described in this Stipulation I(B).
1. The assignment includes the following:
 - a. Activities listed in 23 CFR 771.117(c);
 - b. The example activities listed in 23 CFR 771.117(d); and
 2. Any activities added through FHWA rulemaking to those listed in 23 CFR 771.117(c) or example activities listed in 23 CFR 771.117(d) after the date of the execution of this MOU.
- C. This MOU transfers to the State all responsibility for processing the CEs designated in Stipulation I(B) of this MOU, including any necessary CE approval actions. The State shall process all proposed projects that are CE candidates (CE projects), and any required reevaluations of CEs under 23 CFR 771.129 for CE projects not completed prior to the date of this MOU, in accordance with the provisions of this MOU. With respect to matters covered by and subject to the terms of this MOU, this MOU supersedes any existing programmatic agreement that is solely between the State and FHWA concerning CEs in Stipulation I(B).
- D. The State, when acting pursuant to 23 U.S.C. § 326 and this MOU, holds assigned authority to make environmental decisions and commitments pertaining to only the individual proposed projects and activities within the scope of 23 U.S.C. § 326 and this MOU. No action by the State shall bind FHWA to future action of any kind. No determination or agreement made by the State with respect to mitigation or other activities shall constitute a precedent for future determinations, agreements, or actions in the Federal-aid highway program unless FHWA consents, in writing, to such commitment.
- E. Prior to approving any CE determination, the State shall ensure and document that for any proposed project the design concept, scope, and funding are consistent with the current State Transportation Improvement Program (STIP), Transportation Improvement Program (TIP), and Regional Transportation Plan (RTP) as applicable.

II. OTHER FHWA RESPONSIBILITIES ASSIGNED TO THE STATE

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AND RESPONSIBILITIES RESERVED BY FHWA

- A. For projects covered by this MOU, FHWA hereby assigns, and the State hereby assumes, the following FHWA responsibilities for environmental review, consultation, or other related actions required under Federal laws and Executive Orders applicable to CE projects: See Appendix A for a description of the environmental responsibilities assigned to the State by the FHWA for proposed projects subject to this MOU. This assignment includes the transfer to the State of the obligation to fulfill the assigned environmental responsibilities associated with any proposed projects meeting the criteria in Stipulation I(B) that were determined to be CEs prior to the effective date of this MOU but the project has not been completed. Such projects are included in the term “proposed projects” in this MOU.
- B. The FHWA reserves any responsibility for any environmental review, consultation, or other related action that is not expressly assigned under this MOU, including:
1. All government-to-government consultation with Indian tribes as defined in 36 CFR 800.16(m). Notice from the State to an Indian tribe advising the Indian tribe of a proposed activity is not considered “government-to-government consultation” within the meaning of this MOU. If the State adequately resolves any project-specific Indian tribe issues or concerns, then FHWA’s role in the environmental process shall be limited to carrying out the government-to-government consultation process. FHWA, according to the terms of this MOU, shall initiate government-to-government consultation for an assigned project with any Indian tribe who directly contacts FHWA (via written or oral communication) to make such a request and identifies one or more highway projects in that request, in accordance with the *Coordination Procedures between FHWA Arizona Division and ADOT Environmental Planning for Government-to-Government Requests*. If FHWA determines through consultation with an Indian tribe, or an Indian tribe indicates to FHWA, that the proposed resolution of tribal issues or concerns by the State is not adequate, then Stipulation III(C) applies. This MOU is not intended to abrogate, or prevent future entry into, any written agreement among the State, FHWA, and an Indian tribe under which the tribe agrees to permit the State to administer government-to-government consultation activities for FHWA. However, such agreements are administrative in nature and do not relieve FHWA of its legal responsibility for government-to-government consultation.
- C. The State and FHWA will develop and document procedures for carrying out FHWA responsibilities retained by FHWA under Stipulation II(B), including how FHWA will communicate any decisions to the State for inclusion in the State's decision-making under Stipulations I and II(A). The procedures will ensure that:

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1. The State provides to FHWA any information necessary in order for FHWA to carry out its consultation, evaluation, or decision-making for Stipulation II(B) activities;
 2. The FHWA provides the State with a documented decision and any related information used for Stipulation II(B) decisions and needed by the State in order for the State to evaluate the project and make its decision whether the project qualifies as a CE; and
 3. As part of any request for FHWA authorization for funding or other action, the State will provide to FHWA evidence that the State processed the CE and any other environmental responsibilities assigned under this agreement in accordance with this MOU. This evidence demonstrates that (1) all NEPA review and compliance requirements have been met, (2) that the CE determination remains valid, and (3) that the scope of work of the project has not changed and that the project incorporates all environmental commitments, 23 CFR 771.109(d).
- D. The State agrees that its execution of environmental review, reevaluation, consultation, and other related responsibilities for CEs assigned under this MOU are subject to the same existing and future procedural and substantive requirements as if those responsibilities were carried out by FHWA. This includes, but is not limited to, the responsibilities of FHWA under interagency agreements such as programmatic agreements, memoranda of understanding, memoranda of agreement, and other similar documents that relate to the environmental review process for CE projects. If such interagency agreements are between the State and FHWA only, then the assignment occurs automatically upon the signing of this MOU for projects covered by this MOU. If the interagency agreement involves signatories other than FHWA and the State, then FHWA and the State will work to obtain any necessary consents or amendments (see Appendix B). Such actions include:
1. Consulting with the other parties to obtain written consent to the continuation of the interagency agreement in its existing form, but with the substitution through assignment of the State for FHWA with respect to interagency agreement provisions applicable to CE projects;
 2. Negotiating with the other parties to amend the interagency agreement as needed so that the interagency agreement continues but that the State assumes FHWA's responsibilities with respect to CE projects.
 3. If a third party does not agree to the assignment or amendment of the interagency agreement, then to the extent permitted by applicable law and regulation, the State must carry out the assigned environmental review, consultation, or other related activity in accordance with applicable laws and regulations but without the benefit of the provisions of the interagency

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agreement.

- E. The State shall carry out the assigned consultation, review and coordination activities in a timely and proactive manner. The State shall make all reasonable and good faith efforts to identify and resolve conflicts with Federal agencies, State and local agencies, Indian tribes as defined in 36 CFR 800.16(m), and the public during the consultation and review process.

III. ACTIONS, CONDITIONS, OR DETERMINATIONS THAT EXCLUDE DESIGNATED ACTIVITIES FROM ASSIGNMENT OF RESPONSIBILITIES

- A. Notwithstanding any other provision of this MOU, any activity that does not satisfy the criteria for the CE categories described in Stipulation I(B) is excluded from this assignment. Exclusion also may occur at any time during the environmental process if the State determines that the project fails to meet the CE criteria. The provisions of Stipulation IV(C) apply to such cases.
- B. Because the State assumes responsibility for environmental processing of the CEs designated in this MOU, FHWA no longer will be responsible for conducting the environmental review, consultation or other related actions assigned under this MOU (see Stipulation XI). However, in furtherance of its stewardship and oversight responsibilities, FHWA will evaluate the State's environmental processing of any project if FHWA has any reason to believe that the State's performance with respect to the project does not satisfy the terms and conditions of this MOU. The scope of the evaluation will be commensurate with the potential problem. If FHWA subsequently determines that the State's performance does not satisfy the terms and conditions of this MOU, then FHWA will take action to resolve the problem. Such action may include action to facilitate the State's compliance with the MOU, or action to exclude the project from assignment under this MOU. The provisions of Stipulation X(A)- X(E) apply to such FHWA-initiated exclusion.
- C. If a project-related concern or issue is raised in the coordination of project review with an Indian tribe, as defined in 36 CFR 800.16(m), and either the Indian tribe or FHWA determines that the issue or concern will not be satisfactorily resolved by the State, then FHWA may reassume responsibility for processing the project or an individual responsibility assumed by the State. The FHWA shall notify the State that the project will be excluded from this MOU. The provisions of Stipulation X(A)-X(E) apply to such FHWA-initiated exclusion.

IV. STATE PERFORMANCE REQUIREMENTS

- A. Compliance with governing laws, regulations and MOU. The State shall make all CE determinations under this MOU in accordance with 23 CFR 771.117(a) and (b) and succeeding regulations. All actions by the State in carrying out its

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responsibilities under this MOU shall comply with, and be consistent with, the coordination provisions of Stipulation II and all applicable Federal laws, regulations, Executive Orders, policies, and formal guidance. The State also shall comply with State and local laws to the extent applicable.

1. Failure to meet the requirements of Stipulation IV(A) is grounds for a decision by FHWA to terminate this MOU pursuant to Stipulation IX(A) if FHWA determines, after good-faith consultation with the State, that there is an irreconcilable material conflict between a provision of State law, regulation, policy, or guidance and applicable Federal law, regulation, policy, or guidance, and FHWA reasonably determines that such conflict is preventing the State from meeting its Stipulation IV(A) obligations. The grounds for such decision may include, but are not limited to, the mere existence of the conflict (i.e., on its face) and/or the effect of the conflict on the State's decision(s) on proposed CE project(s) (i.e., as applied).
2. Formal DOT and FHWA guidance and policies relating to environmental review matters of nationwide application are posted online at FHWA's website or sent in writing to ADOT electronically to NEPA@azdot.gov.
3. After the effective date of this MOU, the FHWA will use its best efforts to ensure that it communicates to the State any new or revised FHWA policies and guidance that are final and applicable to the State's performance under this MOU within ten (10) calendar days of issuance. Delivery may be accomplished by e-mail, mail, by publication in the *Federal Register*, or by means of a publicly available online posting including at the site noted above. If communicated to the State by e-mail or mail, FHWA may send such material to the party specified in this MOU to receive notices, or to the Arizona Department of Transportation Environmental Planning Administrator.
4. In the event that a new or revised FHWA policy or guidance is not made available to the State as described in the preceding paragraph, and if the State had no actual knowledge of such policy or guidance, then a failure by the State to comply with such Federal policy or guidance will not be a basis for termination under this MOU.
5. The State will work with all other appropriate Federal agencies concerning the laws, guidance, and policies relating to any Federal laws that such other agencies administer applicable to the State's performance under this MOU.
6. In order to minimize the likelihood of a conflict as described in Stipulation IV(A)(1) above, after the effective date of this MOU the State will use its best efforts to ensure that it communicates to FHWA any proposed new or revised State laws, regulations, policies, or guidance that are applicable to the State's performance under this MOU so that FHWA may review and comment before they become final. Delivery may be accomplished by e-

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mail, mail, or personal delivery. If communicated to FHWA by e-mail or mail, such material may be sent to the party specified in this MOU to receive notices for FHWA.

- B. Processing projects assigned under the MOU: State identification, documentation, and review of effects. For projects and other activities assigned under Stipulations I(A)-(B) that the State determines are included in the classes of CE assigned to the State under this MOU, the State shall:
1. Maintain a process to identify and review the environmental effects, including Environmental Justice impacts, of the proposed project.
 2. Carry out the other environmental responsibilities that are assigned under this MOU, as necessary or appropriate for the activity;
 3. Document in the project file the CE findings and completion of all applicable FHWA responsibilities assigned under Stipulations I and II;
 4. For CE's other than those designated in 23 CFR 771.117(c), carry out a review of proposed CE determinations, including consideration of the environmental analysis and project file documentation, prior to the States' approval of the CE determination. The process shall include, at a minimum, review of the documentation and proposed determination by a competent reviewer who is not a preparer of the CE documentation.
 5. Document its approval of the determination using, at a minimum, the printed name, title, and date of the State official approving the determination;
 6. Include the following determination statement when documenting the CE findings:

“The State has determined that this project has no significant impact(s) on the environment and that there are no unusual circumstances as described in 23 CFR 771.117(b). As such, the project is categorically excluded from the requirements to prepare an environmental assessment or environmental impact statement under NEPA. The State has been assigned, and hereby certifies that it has carried out, the responsibility to make this determination pursuant to 23 U.S.C. § 326 and a Memorandum of Understanding dated January 4, 2024, executed between FHWA and the State.”
 7. Document in the project file the specific categorically excluded activity, the CE finding, including the determination that the project has no significant impact(s) on the environment, there are no unusual circumstances (23 CFR 771.117(b)), and completion of all applicable FHWA responsibilities assigned under Stipulations I and II.
- C. Excluded projects and CE activities not assigned: determination and

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documentation. For projects that are candidates for CE classification but that the State determines should be excluded from processing under this assignment, the State shall:

1. Document the exclusion findings in the project file, including the reason for the finding; and
2. Proceed with documentation and review of the project under the appropriate NEPA procedures in accordance with its Section 327 MOU.

D. Required State resources, qualifications, expertise, standards, and training.

1. The State must maintain adequate organizational and staff capability and expertise to effectively carry out the responsibilities assigned to it under this MOU. This includes, without limitation:
 - a. Using appropriate technical and managerial expertise to perform the functions required under this MOU and applicable laws, regulations, policy, and guidance;
 - b. Devoting adequate financial and staff resources to carry out the responsibilities assumed by the State; and
 - c. Demonstrating, in a consistent manner, the capacity to perform the State's responsibilities under the MOU and applicable Federal law.
2. The State agrees that it shall maintain on its staff or through consultant services all the environmental and other technical expertise needed to carry out its responsibilities under this MOU and 23 U.S.C. § 326. Without limiting the foregoing, when carrying out the requirements of Section 106 of the National Historic Preservation Act, as amended, the State shall comply with 36 CFR 800.2(a)(1) and the *Final April 2020 Programmatic Agreement Pursuant to Section 106 of the National Historic Preservation Act Regarding Implementation of Federal-Aid Transportation Projects in the State of Arizona* (September 2020). All Section 106 actions that involve the identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meet the Secretary of the Interior's Professional Qualifications Standards (published at 48 FR 44738-44739). The State shall ensure that a staff member, or a consultant, who meets the Professional Qualifications Standards reviews and approves all documentation required under 36 CFR 800.11.

E. State quality control.

1. The State agrees to carry out regular quality control activities to ensure that

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its CE determinations are made in accordance with applicable law and this MOU.

2. At a minimum, the State shall monitor its processes relating to project determinations, environmental analysis, and project file documentation, and check for errors and omissions. The State shall take corrective action as needed. The State shall document its quality control activities and any needed corrective actions taken.
3. If the State implements training to meet the capability requirements of this MOU or as a corrective action, the State shall be responsible for the training. The State shall provide notice of formal training to FHWA.

F. MOU performance monitoring and quality assurance. The FHWA and the State shall cooperate in monitoring performance under this MOU and each party shall modify its practices as needed to assure quality performance by the State and FHWA. Monitoring will include consideration of the technical competency and organizational capacity of the State, as well as the State's performance of its CE processing functions. Performance considerations will include, without limitation, the quality and consistency of the State's project determinations, adequacy and capability of the resources applied by the State, and the quality and consistency of the State's administration of its responsibilities under this MOU. In support of the monitoring efforts:

1. The State shall submit to FHWA a list of the CE determinations and Section 4(f) determinations that the State approved during the previous 12 months (January 1 through December 31), within 15 business days after the end of each annual reporting period. Reduction in reporting frequency, and any revocation of such reduction by FHWA, shall not be deemed an amendment under Stipulation VIII. In the annual report, project names, locations, and decisions shall be provided for all Environmental Justice analyses.
2. The State shall develop a self-assessment report summarizing its performance under this MOU every 12 months. The report will identify any areas where improvement is needed and what measures the State is taking to implement those improvements. The report will include actions taken by the State as part of its quality control efforts under stipulation IV(E). After the State submits the report to the FHWA (electronic or in hard copy), the State shall schedule a follow-up meeting with FHWA within 30 days, at which the parties will discuss the report, the State's performance of this MOU, and the FHWA's monitoring activities.
3. The State shall maintain electronic project records and general administrative records pertaining to its MOU responsibilities and the projects processed hereunder. The records shall be available for inspection by the FHWA at any time during normal business hours. The State shall provide the FHWA with electronic copies of any documents the FHWA requests within five business

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days. The State shall retain those records, including all letters and comments received from governmental agencies, the public, and others about the performance of activities assigned under this MOU, for a period of no less than three (3) years after completion of project construction. This 3-year retention provision does not relieve the State of its project or program recordkeeping responsibilities under 2 CFR 200.333-200.337 or any other applicable laws, regulations, or policies.

4. The State shall ensure that project records are available to the public consistent with requirements applicable to Federal agencies under 5 U.S.C. § 552 (the Freedom of Information Act (FOIA), as amended in 2002) and NEPA.
 5. The FHWA periodically shall review the State's records and may interview State staff to evaluate the State's performance under this MOU. These reviews may be coordinated with the review of the State's report under Stipulation IV(F)(2). The FHWA anticipates that, under normal circumstances, it will base its evaluation of the State's performance on a modified version of a typical FHWA CE process review (to view FHWA guidance on how monitoring should occur visit <https://www.fhwa.dot.gov/hep/guidance/6004stateassumpt.cfm>). Modifications to the CE process review will include incorporation of measures specific to the responsibilities assigned to the State pursuant to 23 U.S.C. §326, and will include performance measurements of compliance and timeliness. However, the FHWA reserves the right to determine in its sole discretion the frequency, scope, and procedures used for monitoring activities. The State, by execution of this MOU, acknowledges that it is familiar with the FHWA CE Process Review procedures and with the expected modifications that will be adopted for the purpose of monitoring the State's MOU performance.
 6. Nothing in this Stipulation shall prevent FHWA from undertaking other monitoring actions, including audits, with respect to the State's performance of the MOU. The FHWA, in its sole discretion, may require the State to perform such other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with this MOU, 23 U.S.C. § 326, and other applicable Federal laws and regulations. Such requirement shall not be deemed an amendment under Stipulation VIII.
 7. The State agrees to cooperate with FHWA in all quality assurance activities.
- G. State liability. The State agrees that it is solely responsible and solely liable for complying with and carrying out this MOU, for the performance of all assigned responsibilities as provided by applicable law and for any decisions, actions, or approvals by the State, per 23 U.S.C. § 326(b)(2). The FHWA shall have no responsibility or liability for the performance of responsibilities assigned to the State, including without limitation any decision or approval made by the State.

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Where the State exercises any assigned authority on a proposed project which FHWA determined to be a CE prior to the January 3, 2018, execution of the Original Section 326 MOU, the State assumes sole environmental review responsibility and liability for any subsequent substantive environmental review action it takes on that project.

H. Litigation.

1. Nothing in this MOU affects the United States Department of Justice's (hereinafter "USDOJ") authority to litigate claims, including the authority to approve a settlement on behalf of the United States if either FHWA or another agency of the United States is named in such litigation, or if the United States intervenes. In the event FHWA or any other Federal agency is named in litigation related to matters under this MOU, or the United States intervenes in the litigation, the State agrees to coordinate with FHWA and any USDOJ or Federal agency attorneys in the defense of that action.
2. The State shall defend all claims brought against the State in connection with its discharge of any responsibility assumed under this MOU. In the event of litigation, the State shall provide qualified and competent legal counsel, including outside counsel if necessary. The State shall provide the defense at its own expense, subject to 23 U.S.C. § 326(f) concerning Federal-aid participation in attorney's fees for outside counsel hired by the State. The State shall be responsible for opposing party's attorney's fees and court costs if a court awards those costs to an opposing party, or in the event those costs are part of a settlement agreement.
3. The State will notify the FHWA's Arizona Division Office and USDOJ's Assistant Attorney General for the Environment and Natural Resources Division, within seven (7) calendar days of the State's Legal Division's receipt of service of process of any complaint, concerning discharge of any responsibility assumed under this MOU. The State shall notify FHWA and USDOJ prior to its response to the complaint. In addition, the State shall notify FHWA's Arizona Division Office within seven (7) calendar days of receipt of any notice of intent to sue concerning its discharge of any responsibility assumed under this MOU.
4. The State will provide FHWA's Arizona Division Office and USDOJ copies of any motions, pleadings briefs, or other such documents filed in any case concerning its discharge of any responsibility assumed under this MOU. The State will provide such copies to the FHWA and DOJ within seven (7) calendar days of service of any document, or in the case of any documents filed by or on behalf of the State, within seven (7) calendar days of the date of filing.
5. The State will notify the FHWA's Arizona Division Office and USDOJ prior to settling any lawsuit, in whole or in part, and shall provide the FHWA and USDOJ with a reasonable amount of time of at least ten (10) calendar days,

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to be extended, if feasible based on the context of the lawsuit, up to a maximum of thirty (30) total calendar days, to review and comment on the proposed settlement. The State will not execute any settlement agreement until: (1) FHWA and USDOJ have provided comments on the proposed settlement; (2) FHWA and USDOJ have indicated that they will not provide comments on the proposed settlement; or (3) the review period has expired, whichever occurs first.

6. Within seven (7) calendar days of receipt by the State, the State will provide notice to FHWA's Arizona Division Office and USDOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities the State has assumed under this MOU. The State shall notify FHWA's Arizona Division Office and USDOJ within five (5) days of filing a notice of appeal of a court decision. The State shall confer with FHWA and USDOJ regarding the appeal at least forty-five (45) calendar days before filing an appeal brief in the case.
7. The State hereby consents to intervention by FHWA in any action or proceeding arising out of, or relating to, the State's discharge of any responsibility assigned to the State under this MOU.
8. The State's notification to FHWA and USDOJ in subparts IV(H)(3)-(6) shall be made by electronic mail to FHWA_assignment_lit@dot.gov and NRSDOT.enrd@doj.gov, unless otherwise specified by FHWA and USDOJ. For copies of motions, pleadings, briefs, and other documents filed in a case, as identified in subpart IV(H)(4), the State may opt to either send the materials to the email addresses identified above, send hardcopies to the mail address below, or add to the distribution list in the court's electronic filing system (e.g., PACER) the following two email addresses: FHWA_assignment_lit@dot.gov and efile_nrs.enrd@usdoj.gov. FHWA and USDOJ's comments under subparts IV(H)(5)-(6) shall be made by electronic mail to FHWA.Arizona@dot.gov unless otherwise specified by the State. In the event that regular mail is determined necessary, mail should be sent by overnight mail service to:

For USDOJ: Assistant Attorney General for the Environment and Natural Resources Division at 950 Pennsylvania Avenue, NW, Room 2143, Washington, DC 20530.

For FHWA: Division Administrator, FHWA Arizona Division, 4000 N. Central Avenue, Suite 1500, Phoenix, Arizona 85012-3500

For ADOT: Environmental Planning Administrator, Arizona Department of Transportation, 205 S. 17th Ave., MD EM02, Phoenix, AZ 85007

- I. Federal Register. While the MOU is in effect, if any CE project or program documents are required to be published in the *Federal Register*, such as a notice

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of final agency action under 23 U.S.C. § 139(l), the State shall transmit such document to the FHWA's Division Office and the FHWA will publish such document in the *Federal Register* on behalf of the State. The State is responsible for the expenses associated with the publishing of such documents in the *Federal Register*, in accordance with guidance issued by the FHWA.

J. Participation in Resource Agency Reports. The State agrees to provide data and information requested by the FHWA Office of Project Development and Environmental Review and resource agencies, with a cc to the FHWA Arizona Division, for the preparation of national reports to the extent that the information relates to determinations, findings, and proceedings associated with projects processed under this MOU. Such reports include but are not limited to:

1. Archeology Reports requested by the National Park Service;
2. Endangered Species Act Expenditure Reports requested by the United States Fish and Wildlife Service and the National Marine Fisheries Service;
3. NEPA Litigation Reports requested by the Council on Environmental Quality;
4. Environmental Conflict Resolution reports requested by the Council on Environmental Quality; and
5. Environmental Justice information, including a summary of all known and potential environmental justice impacts concerns identified by project.

V. STATE CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

- A. The State hereby certifies that it has the necessary legal authority and the capacity to:
1. Accept the assignment under this MOU;
 2. Carry out all the responsibilities assigned to the State; and
 3. Agree to and perform all terms and conditions of the assignment as contained in this MOU and in 23 U.S.C. § 326.
- B. The State consents to and accepts the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary that the State assumes under this MOU and 23 U.S.C. § 326. The State understands and agrees that this consent constitutes a waiver of the State's immunity under the Eleventh Amendment to the U.S. Constitution for the limited purposes of addressing the compliance, discharge, and enforcement of matters arising out of this MOU and carrying out the USDOT Secretary's

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responsibilities that that State assumes pursuant to this MOU and 23 U.S.C. § 326. This consent to Federal court jurisdiction shall remain valid after termination of the MOU, or re-assumption of the USDOT Secretary's responsibilities by the FHWA, for any act or omission by the State relating to its compliance, discharge, or enforcement of any responsibility under this MOU or 23 U.S.C. § 326. A valid, binding, and sufficient waiver of the State's sovereign immunity must be in effect at all times that the State acts under the authority of this MOU.

As provided by Arizona Revised Statutes (A.R.S.) § 28-334, Arizona waives its immunity under the Eleventh Amendment of the U.S. Constitution. If this waiver is withdrawn, then the State's authority to participate in this MOU will end and this MOU will terminate automatically subject to applicable survival and transitional provisions of this MOU.

- C. In accordance with 23 U.S.C. § 326(e), the State agrees that it shall be deemed to be a Federal agency for the purposes of the Federal law(s) under which the State exercises any responsibilities pursuant to this MOU and 23 U.S.C. § 326.
- D. The State may not assign or delegate its rights or responsibilities under this MOU to any other agency, political subdivision, or entity, or to any private individual or entity. Without limiting the foregoing, the State understands and agrees that it must retain the environmental decision-making responsibilities assigned to it under this MOU and may not assign or delegate such decision-making responsibilities to consultants or others.
- E. With respect to the public availability of any document or record under the terms of this MOU or the State's open records law, A.R.S. § 39-101 et seq., the State certifies that the laws of the State provide that any decision regarding the release or public availability of a document or record may be legally challenged or reviewed in the courts of the State.
- F. The State certifies that the persons signing this MOU and providing certifications are duly authorized to do so and have the legal authority to:
 - 1. Enter into this MOU on behalf of the State;
 - 2. Make the certifications set forth in this MOU; and
 - 3. Bind the State to the terms and conditions contained in this MOU.
- G. The State further certifies that, in enacting the A.R.S., Chapter 2, Article 2, Section 28-334 C., the State has waived the State's Eleventh Amendment rights and consented to Federal court jurisdiction with regard to the compliance, discharge and enforcement of any responsibility of the USDOT Secretary that the State assumes under this MOU and 23 U.S.C 326.

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- H. The State's Attorney General, by issuing an opinion letter that is addressed to the FHWA Administrator and attached to this MOU, has made the requisite certifications as the State's Chief Legal Officer. A copy of the opinion letter is attached to this MOU as Appendix C.

VI. PUBLIC NOTICE AND COMMENT

- A. The execution of this MOU, and of any amendment or renewal, requires prior public notice and an opportunity for comment.
- B. The State shall publish notice of the availability of this MOU, and any proposed amendment or renewal, for public review and comment and information regarding access to the USDOT Docket Management System on its website.
- C. The FHWA Arizona Division Office shall publish in the *Federal Register* a notice of availability of this MOU and any proposed amendment or renewal of this MOU, for public review and a thirty (30) calendar day comment period. This notice will expressly request comments on any types of activities proposed for assignment under Stipulation I(B), will include a statement of the public availability of supporting documentation for any assignment under Stipulation I(B), and advise the public about how to learn about FHWA's final decision on the proposed MOU, including how to obtain a copy of any resulting final MOU. The FHWA will establish a docket in the USDOT Docket Management System to receive comments.
- D. The State and the FHWA shall consider comments provided by the respondents to the public notices before finalizing the MOU, or any proposed amendment or renewal agreement. Upon completion of the decision-making process, the FHWA shall publish a notice in the *Federal Register* that announces the agency's decision and the execution of the MOU. The notice also will inform the public of the availability in the USDOT Docket Management System of a brief summary of the results of the decision-making process and a copy of any final MOU executed by the State and the FHWA, whether initial, amended, or renewed. The notice also will advise where the final MOU is available on the State's website.
- E. The State agrees that at all times that this MOU is in effect, the State will post on its website (<https://azdot.gov/business/environmental-planning/ce-assignment-and-nepa-assignment>) a notice of the availability to the public, upon request, of copies of the State's biannual reports of CE determinations prepared pursuant to Stipulation IV(F)(1), the State's performance reports prepared pursuant to Stipulation IV(F)(2), and the FHWA performance monitoring reports prepared pursuant to Stipulation IV(F)(5). The FHWA will arrange for the posting of a similar notice on FHWA's website or create a link from FHWA's site to the State's site.

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VII. TERM AND RENEWAL

- A. This MOU shall have a term of three (3) years, beginning on the date of the last signature.
- B. This MOU is renewable for additional terms of three (3) years each if the State requests renewal and the FHWA determines that the State has satisfactorily carried out the provisions of this MOU. In considering any renewal of this MOU, the FHWA will evaluate the effectiveness of the MOU and its overall impact on the environmental review process. The FHWA may decide not to renew the MOU if the FHWA determines that the operation of the MOU has substantial adverse effects on the environmental review process. Such evaluation may include consideration of any effects from the assumption by the State of only some, but less than all, of the FHWA's environmental review, consultation, or other related responsibilities as listed in Stipulation II.
- C. At least six (6) months prior to the end of the term and of any renewed term of this MOU, the State and the FHWA shall meet to discuss the results of the monitoring and consider any amendments to this MOU. This meeting may be combined with a meeting to discuss performance under the monitoring provisions in Stipulation IV(F)(2) and (F)(5) of this MOU.
- D. If the parties do not renew the MOU, then it shall expire at the end of the term then in effect. The provisions of Stipulation X(A)(4), and X(C)-(E) shall apply.

VIII. AMENDMENTS

- A. Any party to this MOU may request that it be amended, or administratively modified to reflect non-substantive changes, whereupon the parties shall consult to consider such an amendment. Public notice and comment is not required for the parties to agree to a technical non-substantive change.
- B. If, after the required public notice and comment, the parties agree to amend the MOU, then the FHWA and the State may execute an amendment with new signatures and dates of the signatures. The term of the MOU shall remain unchanged unless otherwise expressly stated in the amended MOU. Any amendment that extends the term of the MOU shall be treated as a renewal and the FHWA must make the determinations required for a renewal under Stipulation VII.

IX. TERMINATION

- A. Termination by the FHWA
 - 1. As provided at 23 U.S.C. § 326(d)(1), FHWA may terminate the State's participation in the Program, in whole or in part, at any time subject to the

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procedural requirements in 23 U.S.C. 326 and subpart IX(A)(2) below, if:

- a. FHWA determines that the State is not adequately carrying out the responsibilities assigned to the State under this MOU;
 - b. FHWA provides to the State a written notification of its determination;
 - c. FHWA provides the State a period of at least one-hundred twenty (120) calendar days to take corrective action to comply with this MOU;
 - d. If requested by the Governor of the State, FHWA provides a detailed description of each responsibility in need of corrective action regarding any inadequacy identified by FHWA; and
 - e. After the notification and after the expiration of the 120-day period provided under this provision, the State fails to take satisfactory corrective action as determined by FHWA.
2. Failure to adequately carry out the responsibilities may include, but not be limited to:
- a. Persistent neglect of, or noncompliance with, any Federal laws, regulations, and policies;
 - b. Failure to cooperate with FHWA in conducting an audit or any oversight or monitoring activity;
 - c. Failure to secure or maintain adequate personnel and financial resources to carry out the responsibilities assumed;
 - d. Substantial noncompliance with this MOU; or
 - e. Persistent failure to adequately consult, coordinate, and/or take the concerns of other Federal agencies, as well as SHPOs/THPOs, into account in carrying out the responsibilities assumed.
3. If FHWA terminates one or more of the State's responsibilities under this MOU in accordance with 23 U.S.C. § 326, FHWA shall provide written notice of that termination to the State, and such notice shall specify the date on which the termination becomes effective. Upon that effective date, any responsibilities identified to be terminated in the notice that have been assumed by the State of this MOU will immediately transfer to FHWA.

B. Termination by the State

1. The State may terminate its participation in the Program, in whole or in part, at any time by providing to FHWA a notice at least ninety (90) calendar days prior to the date that the State seeks to terminate its participation in this Program, and subject to such terms and conditions as FHWA may provide.

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2. The Arizona Legislature and Governor may, at any time, terminate the State's authority granted to participate in this Program. In that event, FHWA and the State will develop a plan to transition the responsibilities that the State has assumed back to FHWA so as to minimize disruption to projects, minimize confusion to the public, and minimize burdens to other affected Federal, State, and local agencies. The plan will be approved by both FHWA and the State.
3. Any such withdrawal of assignment which FHWA and the State have agreed to under a transition plan will not be subject to the procedures or limitations provided for in subpart IX of this MOU and will be valid as agreed to in the transition plan.

C. Validity of the State Actions

1. Any environmental approvals made by the State pursuant to the responsibilities the State has assumed under this MOU will remain valid after termination of the State's participation in the MOU or withdrawal of assignment by FHWA. As among the USDOT Secretary, FHWA and the State, the State will remain solely liable and solely responsible for any environmental approvals it makes pursuant to any of the responsibilities it has assumed while participating in the Program.

X. **PROCEDURES FOR TERMINATION AND FHWA-INITIATED PROJECT EXCLUSIONS**

- A. Except as provided in Stipulation X(B) below, the process for termination under Stipulation IX(A)-IX(B), and for exclusion of a project from the MOU assignment by the FHWA under Stipulation III(B)-III(C), is as follows:
 1. The party wishing to initiate the termination or exclusion shall provide to the other party a written notice of intent. The notice should identify the proposed action and explain the reason(s) for the proposed action.
 2. Following the notice, the parties shall have a thirty (30) calendar-day period during which the FHWA and the State shall consult on amendments or other actions that would avoid termination or exclusion. By agreement, the parties may extend this consultation period, provided that such extension may not exceed the term of the MOU.
 3. Following the consultation period, any termination or exclusion by FHWA shall be effective as of a date thirty (30) calendar days after the date of either a post-consultation agreement between the State and FHWA or the date of the State's receipt of a FHWA notice of final determination of termination or exclusion. In the event of termination initiated by the State, the termination shall be effective ninety (90) calendar days after the date of FHWA's receipt of the State's termination notice. All responsibilities

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covered by the termination or exclusion shall revert to the FHWA as of that effective date.

4. In the event of termination or exclusion, the State and the FHWA agree to cooperate to make the transfer of responsibilities back to the FHWA effective in as orderly and administratively efficient manner as possible. The State will promptly provide FHWA any documents, records and other project-related material needed for FHWA to proceed with processing any affected project. Appropriate NEPA procedures, including those under any applicable programmatic CE agreement, shall apply to the subsequent processing of projects.
- B. The FHWA, in its sole discretion, may exclude a project from this MOU pursuant to Stipulation III(B)-III(C), without the thirty (30) calendar day consultation or final notice periods, if the FHWA determines that:
1. The State is not performing in accordance with this assignment; and
 2. Extreme conditions exist that justify immediate exclusion or termination and transfer back to the FHWA of the responsibilities covered by the exclusion or termination.

In such cases, the FHWA shall notify the State in writing of its determination and action and specify the reason for the action.

- C. The State's liability for its acts and omissions under this MOU, and the provisions of Stipulation V, shall survive the MOU. This survival clause includes, without limitation, the provisions of Stipulations IV (G)-IV(H) relating to liability and litigation.
- D. Exclusion actions, and any decision not to renew, do not require public notice and comment.
- E. Termination or other action by the FHWA in accordance with the provisions of this MOU does not limit or otherwise affect the FHWA's ability to seek any other remedy or to take action under other provisions of applicable law, including without limitation any appropriate remedies as provided in 23 CFR 1.36.

XI. STATE EXECUTION OF ASSIGNED RESPONSIBILITIES WITHOUT FHWA INVOLVEMENT

- A. The FHWA will not provide any project-level assistance to the State in carrying out any of the responsibilities assigned under this MOU. "Project-level assistance" includes advice, consultation, or document review with respect to the discharge of such responsibility for a particular highway project. However, "project-level assistance" does not include process or program-level

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assistance, discussions concerning issues addressed in prior projects, legal interpretations of any applicable law contained in titles 23 or 49 of the United States Code, legal interpretations of any FHWA or USDOT regulation, or interpretations of FHWA or USDOT policies or guidance. If a need for project-level assistance is identified as a result of the government-to-government consultation process described in Stipulation II(B)(1), then the FHWA shall reassume responsibility for the project as provided in Stipulation III(C).

- B. The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving the State's consultation or coordination with another Federal, State, or local agency with respect to the State's discharge of any of the responsibilities the State has assumed under this MOU for any particular project. However, the FHWA holds both monitoring and quality assurance obligations under this MOU and general oversight and stewardship obligations under the Federal-aid Highway Program. In furtherance of those obligations, the FHWA may elect to attend meetings between the State and other Federal agencies. Prior to attending such meetings, the FHWA will make a reasonable and diligent effort to give the State notice.

In rare or extreme circumstances and based on its observations, the FHWA may submit comments to the State and the other Federal agency if the FHWA determines such comment is necessary and in the Federal interest because:

1. The FHWA reasonably believes that the State is not in compliance with this MOU; or
2. The FHWA determines that an issue between the State and the other Federal agency has broad or unique national policy implications for the administration of the Federal-aid Highway Program.

XII. NOTICES

Any notice to either party may be given electronically so long as a paper original of the notice also is delivered to the party. The effective date of the notice shall be the date of delivery of the paper original. Paper notices shall be delivered as follows:

State of Arizona:

ADOT Director
Arizona Department of Transportation
206 S. 17th Ave
Mail Drop 100A
Phoenix, AZ 85007

Federal Highway Administration:

Division Administrator
4000 North Central Avenue,
Suite 1500

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Phoenix, AZ 85012

U.S. Department of Justice:

Office of the Assistant Attorney General
Environment and Natural Resources Division
950 Pennsylvania Avenue, NW
Room 2143
Washington, D.C. 20530

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Execution of this MOU and implementation of its terms by the State formally evidence that the parties have reviewed this MOU and determined that it complies with the laws, regulations and policies applicable to the FHWA and the State. Accordingly, this MOU is approved and is effective upon the date of the last signature below.

FEDERAL HIGHWAY ADMINISTRATION

Karla S. Petty,
Division Administrator,
Arizona Division Office

Date

STATE OF ARIZONA

Gregory Byres,
Deputy Director for Transportation/State
Engineer,
Arizona Department of
Transportation

Date

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Appendix A

List of FHWA Responsibilities Assigned

Air Quality

Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671q. *Including determinations for project-level conformity if required for the project.*

Noise

Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918
Compliance with the noise regulations in 23 CFR part 772 (except approval of the State noise requirements in accordance with 23 CFR 772.7)

Wildlife

Section 7 of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544, and 1536
Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661–667d
Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712

Historic and Cultural Resources

Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. § 306108 et seq.¹
Archeological Resources Protection Act of 1979, 16 U.S.C. § 470aa, et seq.
Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. § 138 and 49 U.S.C. § 303; 23 CFR part 774
Title 54, Chapter 3125—Preservation of Historical and Archeological Data, 54 U.S.C. §§ 312501-312508
Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013; 18 U.S.C. § 1170

Social and Economic Impacts

American Indian Religious Freedom Act, 42 U.S.C. § 1996¹
Farmland Protection Policy Act (FPPA), 7 U.S.C. §§ 4201–4209

Water Resources and Wetlands

Clean Water Act, 33 U.S.C. §§ 1251–1377.
Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f–300j–6
Rivers and Harbors Act of 1899, 33 U.S.C. § 403
Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287
Emergency Wetlands Resources Act, 16 U.S.C. §§ 3921, 3931
Flood Disaster Protection Act, 42 U.S.C. 4001–4128
FHWA wetland and natural habitat mitigation regulations, 23 CFR part 777

Parklands

Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. § 138 and 49

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U.S.C. 303; and 23 CFR part 774

Land and Water Conservation Fund (LWCF), Pub. L. 88-578, 78 Stat. 897 (known as Section 6(f))

Hazardous Materials

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675

Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. §§ 9671 – 9675

Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k

Land

Landscaping and Scenic Enhancement (Wildflowers), 23 U.S.C. § 319

Executive Orders Relating to Highway Projects

E.O. 11990, Protection of Wetlands

E.O. 11988, Floodplain Management (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 C.F.R. sections 650.113 and 650.115)

E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations

E.O. 11593, Protection and Enhancement of Cultural Resources¹

E.O. 13007, Indian Sacred Sites¹

E.O. 13112, Invasive Species

E.O. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government

E.O. 14091, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government

E.O. 14096, Revitalizing Our Nation's Commitment to Environmental Justice for All

FHWA-Specific

Planning and Environmental Linkages, 23 U.S.C. § 168, except for those FHWA responsibilities associated with 23 U.S.C. §§ 134 and 135

Programmatic Mitigation Plans, 23 U.S.C. § 169 except for those FHWA responsibilities associated with 23 U.S.C. §§ 134 and 135

Note:

¹Under these laws and Executive Orders, FHWA will retain responsibility for conducting formal government-to-government consultations with federally recognized Indian tribes. The State will continue to handle routine coordination with the Tribes and understands that a tribe has the right to request government-to-government consultation with FHWA at any time. The State may also assist FHWA with formal consultations, with the consent of a tribe, but FHWA retains responsibility for conducting formal consultation at all times.

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Appendix B

**List of ADOT Programmatic Agreements/Memoranda of Understanding
Statewide Agreements**

Programmatic Agreement between the Arizona Department of Transportation, Federal Highway Administration, the Arizona State Historic Preservation Officer, the Bureau of Indian Affairs, the Bureau of Land Management, the Bureau of Reclamation, the United States Army Corps of Engineers, the United States Forest Service, the Arizona State Land Department, Arizona State Parks, the Arizona State Museum, the Gila River Indian Community, the Hualapai Tribe and the Advisory Council on Historic Preservation.

Signatories: ADOT, FHWA, SHPO, BIA, BLM, BOR, USACE, USFS, ASLD, ASP, ASM, ACHP

Effective Date: September 23, 2020

Memorandum of Agreement between the Arizona Department of Transportation, Federal Highway Administration, Arizona Division, and the United States Army Corps of Engineers Los Angeles District Concerning Funding for the Department if the Army Corps Permit Process on Priority Federal-Aid Highway Projects

Signatories: ADOT, FHWA, CORPS

Effective Date: August 5, 2022

Memorandum of Agreement between the Arizona Department of Transportation, the Federal Highway Administration, Arizona Division, and the United States Fish and Wildlife Service

Signatories: ADOT, FHWA, USFWS

Effective Date: June 10, 2020

Memorandum of Understanding between the Arizona Department of Transportation, the Federal Highway Administration, Arizona Division, and the Bureau of Land Management, Arizona

Signatories: ADOT, FHWA, BLM

Effective Date: September 2, 2008

Memorandum of Understanding Among the Arizona Department of Transportation, the Federal Highway Administration, Arizona Division, and the USDA Forest Service, Southwestern Region Regarding the Construction, Operation and Maintenance of Highways in Arizona Crossing National Forest System Lands

Signatories: ADOT, USFS, FHWA

Effective Date: February 24, 2020

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Appendix C

**Arizona Attorney General Letter of Opinion
Dated November 7, 2017**



MARK BRNOVICH
Attorney General

Office of the Attorney General
State of Arizona

November 7, 2017

Brandye Hendrickson
Acting Administrator
Federal Highway Administration
1200 New Jersey Ave., SE
Washington, DC 20590

Subject: Certification from State Attorney General required by FHWA for assignment of NEPA and other responsibilities to ADOT (23 U.S.C. §§ 326 & 327)

Dear Ms. Hendrickson:

Pursuant to the authority provided by the Moving Ahead for Progress in the 21st Century Act or "MAP-21," and specifically 23 U.S.C. § 327 as amended by MAP-21, the Arizona Department of Transportation ("ADOT") has advised this Office that it is submitting an application to the Federal Highway Administration ("FHWA") for assignment of responsibilities for compliance with the National Environmental Policy Act ("NEPA") and other federal environmental laws for federal-aid highway projects ("NEPA Assignment"). On September 16, 2014, FHWA published rules setting forth the requirements for such applications.¹ FHWA's rules specify that a state's application for NEPA Assignment must include certain certifications by the State's Attorney General or other state official legally empowered by state law to issue legal opinions that bind the state.²

ADOT and FHWA plan to enter into a Memorandum of Understanding ("MOU") regarding the assignment of the federal environmental review responsibilities after a public review of the application. ADOT and FHWA also plan to enter into a separate MOU for the assignment of authority to make categorical exclusion determinations under 23 U.S.C. § 326 ("CE Assignment"). The purpose of this letter is to provide the certifications required by FHWA to accompany ADOT's application for NEPA Assignment as well as to enter into MOU's for both NEPA Assignment and CE Assignment.

The Attorney General serves as the chief legal officer of the state.³ In my official capacity as Attorney General of the State of Arizona, I hereby certify the following:

- As stated in A.R.S. § 28-334(C)(1), ADOT is legally authorized by state law to assume the responsibilities of the United States Department of Transportation with respect to duties

¹ 79 Fed. Reg. 55,381 (Sept. 16, 2014).

² 23 C.F.R. § 773.109(a)(6)-(7)

³ A.R.S. § 41-192

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under NEPA and any other federal environmental law pertaining to review or approval of a highway project in this state.

- The Legislature enacted A.R.S. § 28-334(C)(2), providing, “[s]overeign immunity from civil suit in federal court is waived consistent with 23 United States Code §§ 326 and 327 and limited to the compliance, discharge or enforcement of a responsibility assumed by... [ADOT]... under this paragraph.” The State’s waiver is made consistent with 23 U.S.C. § 327, which states: “[t]he United States district courts shall have exclusive jurisdiction over any civil action against a State for failure to carry out any responsibility of the State under this section.”
- The Arizona Public Records Law (A.R.S. § 39-101 *et seq.*) is comparable to 5 U.S.C. § 552 (the Freedom of Information Act), including providing that any decision regarding the public availability of a document under state law is reviewable by a court of competent jurisdiction.

Sincerely,



Mark Brnovich
Attorney General

#6581697