

# Crook County Counsel's Office

267 NE 2<sup>nd</sup> St., Ste 200 • Prineville, Oregon 97754 • (541) 416-3919 • FAX (541) 447-6705

## MEMO

**FOR WORK SESSION  
NOV. 2, 2021**

TO: Crook County Court

FROM: John Eisler, Asst. County Counsel

DATE: October 29, 2021

RE: Ochoco Ranger Station FLAP Agreement  
Our File No.: Road 349

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Our office received a draft of an MOA with the Federal Highway Administration, Western Federal Lands Highway Division (FHWA-WFL) to add a 2-inch hot asphalt concrete overlay, should aggregate, guardrail adjustment, and striping to an 8.6 mile stretch of Ochoco Ranger Station Road. The total projected costs are \$2,427,000, with the County obligated for a 10.27% share, or \$249,253.

The purpose of this memo is the following: both Mr. Blaine and I made several redline changes to the original draft of the agreement, mostly to clarify terms, correct typos, and then add some of our standard boilerplate language for contracts. FHWA-WFL's representative, Craig Sanders, accepted the majority of the changes, but some of the changes will require review by their legal office. He explains a significant backlog there and the relative low priority of this MOA to their legal team—meaning review of the remaining language could take months. The timeline anticipates the required NEPA review process to begin this Fall. So the question to the County Court is: Do we accept the contract as-is and take on the potential for added risk or do we wait until their legal team can review the contract, which would jeopardize the schedule?

The redline with his comments is attached. The relevant language is on pages 9 and 10. The first item is dispute resolution, which lacks any mechanism to resolve conflicts beyond bringing together the higher-ups from each entity. Mr. Sanders feels that this is a simple project and there is little chance that things cannot be worked out between him and Mr. O'Neal. Next is termination. We added our standard opportunity to terminate if another party is in breach and does not cure. Mr. Sanders does not feel this will be an issue between two public agencies.

The remaining clauses are force majeure, waiver, merger, and counterparts. These are standard in all County contracts and should be in every contract. However, considering the counterparty, I would defer to our Road Master and the County Court on whether or not these provisions are critical. I feel the additional risk the County would be taking on is quite low and probably outweighs the certainty of messing up the schedule timeline by waiting for their legal review. One other option would be to

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sign this MOA as-is, and immediately draft and send them an amendment that adds these provisions. With the anticipated timeline, that would give their legal team time to review before any of the omitted provisions became particularly relevant.

Please let me know if you have any questions.

## Federal Lands Access Program Project Memorandum of Agreement

**Project / Facility Name:** Ochoco Ranger Station Overlay Project

**Project Route:** 123 – Ochoco Ranger Station Road

**State:** OREGON

**County:** Crook

**Owner of Federal Lands to which the Project Provides Access:** Ochoco National Forest

**Entity with Title or Maintenance Responsibility for Facility:** Crook County, a political subdivision of the State of Oregon

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**Type of Work:** The project is to include:

- Preliminary Engineering including environmental studies to support an environmental decision
- Construction Engineering / Contract Administration

This Agreement does not obligate (commit to) either party to the expenditure of Federal public funds nor does it commit the parties to complete the project as the project is described herein. Rather, this agreement sets forth the respective responsibilities as the project proceeds through the project development process and construction.

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Commented [SC(3): OK.

Commented [SC(4): OK

This agreement replaces Federal Lands Access Program Match Agreement dated: 01/22/2020 between FHWA-WFL and Crook County.

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**Parties to this Agreement:** Crook County (hereinafter "CC") and Federal Highway Administration, the Western Federal Lands Highway Division (FHWA-WFL).

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The Program Decision Committee approved this project on 01/6/21 .

**AGREED:**

\_\_\_\_\_  
Seth Crawford, Crook County Commissioner

\_\_\_\_\_  
Date

\_\_\_\_\_  
Jerry Brummer, Crook County Commissioner

\_\_\_\_\_  
Date

\_\_\_\_\_  
Brian Barney, Crook County Commissioner

\_\_\_\_\_  
Date

\_\_\_\_\_  
Western Federal Lands Highway Division, FHWA-WFL

\_\_\_\_\_  
Date

DRAFT

**A. PURPOSE OF THIS AGREEMENT:**

This agreement documents the intent of the parties and sets forth the anticipated responsibilities of each party in the development, construction, and continued maintenance of the subject project. The purpose of the agreement is to identify and assign responsibilities for Project Development, Contract Advertisement, and Construction Administration as appropriate for this project, and to ensure continued maintenance of the facility for public use if improvements are made. The parties understand that any final decision as to design or construction will not be made until after the environmental analysis required under the National Environmental Policy Act (NEPA) is completed (this does not prevent the parties from assigning proposed design criteria to be studied in the NEPA process). Any decision to proceed with the design and construction of the project will depend on the availability of appropriations at the time of obligation and other factors such as issues raised during the NEPA process, a natural disaster that changes the need for the project, a change in Congressional direction, or other relevant factors.

If Federal Lands Access Program (FLAP) funds are used for the development or construction of this project, CC agrees to provide a matching share equal to 10.27% of the total cost of the project, as detailed more fully in Section J below. When an agency other than FHWA-WFL will be expending FLAP funds, the parties agree to execute a separate obligating document. No reimbursement will be made for expenses incurred prior to execution of the obligating document.

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Commented [JE7]: I'm not a fan of this sentence. Do we need it?

Commented [SC(8R7)]: No, this is in the agreement template in the case that the County delivers the project. It can be removed since FHWA-WFL is expending the funds..

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**B. AUTHORITY:**

This Agreement is entered into between the signatory parties pursuant to the provisions of 23 U.S.C. 204.

**C. JURISDICTION AND MAINTENANCE COMMITMENT:**

CC has jurisdictional authority to operate and maintain the existing roadway facility and will operate and maintain the completed project at its expense.

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**D. OCHOCO NATIONAL FOREST COORDINATION:**

CC has coordinated project development with the Ochoco National Forest unit of the United States Forest Service. The Ochoco National Forest unit's support of the project is documented in the Project Proposal by endorsing the proposal.

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Commented [SC(11)]: OK

Each party to this agreement who has a primary role in the NEPA, the design phase, or the construction phase should will coordinate their activities with the Ochoco National Forest unit.

Commented [EB12]: This needs to be clarified.

Commented [SC(13R12)]: I'll clarify "coordination" to mean provide regular project development status updates, milestone PS&E reviews for comment and invite them to the preconstruction and regular construction project meetings.

**E. PROJECT BACKGROUND / SCOPE:**

**General:**

The proposed project is on the Ochoco Ranger Station Road and includes a proposed two-inch asphalt overlay, plus shoulder aggregate, guardrail adjustment, and striping.

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This project is proposed to be delivered by WFLHD on behalf of in collaboration with Crook County, as described in this MOA. The USFS is the primary Federal Land Management Agency associated with this project. The project is located within parts of the Ochoco National Forest and provides direct access to the Forest. It also provides access to private farms, ranches, and residences.

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This project is currently identified as a FY 2023 CN Construction ("CN") obligation project with PE Preliminary Engineering ("PE") beginning in FY 2021.

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**Background:**

The Ochoco Ranger Station Road is a two-two-lane paved rural major collector that provides access to numerous recreation sites in the Ochoco National Forest, as well as private residences.

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**Scope:**

The proposed scope includes an 8.6 mile 2-2-inch hot asphalt concrete overlay, shoulder aggregate, guardrail adjustment, and striping.

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**F. PROJECT BUDGET:**

This is the anticipated budget for the project based on information developed to date. Federal Lands Access Program funds in conjunction with matching funds provided by CC will fund this project as detailed in Section K.

Item	Total	Comments
Preliminary Engineering including scoping and NEPA	\$238,400	Verify at preliminary phase and update as needed.
Construction Engineering (CE)	\$198,600	Verify at preliminary phase and update as needed.
Construction (CN)	\$1,890,000	Verify at preliminary phase and update as needed.
Construction Modifications (CM) Contingency	\$0100,000	Reserved for construction phase.
TOTAL	\$2,427,000	

**Commented [JE21]:** Does this mean there's no contingency factored into the budget?

**Commented [SC(22R21)]:** There is a 20% contingency that was factored into the budget but was placed into the CN amount. It would be a good idea to show some of this contingency as a CM contingency instead (I'll make this change). The overall program amount and required match will remain the same.

**G. ROLES AND RESPONSIBILITIES:**

CC

- Appoint a representative who will be the primary contact for FHWA-WFL's Project Manager.
- Provide appropriate match to all FLAP funds expended on the project **even if the project is terminated prior to completion as described in this MOA (see Section K).**
- Provide existing ROW information documenting Crook County as the owner and/or maintainer of the Ochoco Ranger Station Road within the project limits.
- CC will be responsible for the acquisition of any rights-of-way and / or easements necessary to complete the project.
- Review milestone Plans, Specifications, and Estimate ("PS&E") packages and provide review comments to WFLHD.
- Provide concurrence to advertise project.
- Attend preconstruction meeting.
- Attend scheduled construction project status meetings.
- Attend pre-final construction completion project inspection to develop issue punchlist prior to project acceptance.
- Provide completed construction project acceptance.

**Commented [EB23]:** What if it's not properly constructed?

**Commented [SC(24R23)]:** FHWA-WFL will have an onsite Project Engineer to make sure the Contractor constructs according to the Plans and Specifications and administer the construction contract. Hot asphalt concrete is the main item on this project and the materials quality and construction requirements in the specifications have been tested many times and shown to result in a long lasting quality product. The control strip and intermediate sampling and testing will find any issues quickly for correction, along with an onsite FHWA-WFL inspector. As you know, problems do happen and in the event of quality or construction issues, the construction contract does have remedies, including removal and replacement or acceptance at a reduced price. CC will be invited to be a part of the construction process, including at the preconstruction meeting, any interim meetings and for a prefinal inspection and will be made aware of any quality and construction issues as they may happen. A better description can be added to both parties responsibilities to clarify.

FHWA-WFL

- Coordinate and complete the NEPA process.
- Obtain required project permits.
- Complete the project through final design PS&E.
- Advertise for and award a construction contract.

- Administer the construction contract through final project completion and acceptance.
- Keep CC informed of construction progress and quality or construction issues and be involved with issue resolutions as appropriate.
- Resolve pre-final construction completion inspection issues punchlist with CC prior to seeking project acceptance.

Commented [EB25]: Not very detailed.

**H. ROLES AND RESPONSIBILITIES – MILESTONE SCHEDULE:**

Schedule start/finish dates are estimated based on current knowledge and scheduled programmed year. Dates may be modified as the project is developed, as the parties may agree.

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Responsible Lead	Product/Service	Schedule Start/Finish
FHWA-WFL	NEPA documentation	October 2021/April 2022
FHWA-WFL	NEPA Decision	30 days after complete & satisfactory documentation is provided
FHWA-WFL	30% PS&E	October 2021/ February 2022
FHWA-WFL	95% PS&E	April 2022/ July 2022
FHWA-WFL	100% PS&E	September 2022
FHWA-WFL	Advertise/Award	November 2022/January 2023
FHWA-WFL	Construction NTP	2023

**I. PROPOSED DESIGN STANDARDS:**

Criteria		Comments
Standard	Roadway Design Manual AASHTO – A Policy on Geometric Design	
Functional Classification	Rural Major Collector	
Surface Type	Asphalt	
Design Volume	1281 ADT	

Design exceptions to standards will be documented and sent to CGC for concurrence.



**J. FUNDING:**

The project is funded by the Federal Lands Access Program administered by FHWA-WFL, with matching funds provided by the GC as described below.

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Funding Source	Amount	%	Comments
Federal Lands Access Funds	\$2,177,747		
Local Matching Share (CCGC)	\$ 249,253	10.27%	Cash
Total Projected Costs	<b>\$2,427,000</b>		

**K. MATCHING SHARE REQUIREMENTS:**

The purpose of this section is to document the intent of CC to meet its match requirement for the subject project as authorized under section 23 USC 201(b)(7)(B).

All FLAP expenditures associated with this project will need to be matched by a non-Federal source, by other Federal funds other than those made available under Titles 23 and 49 of the United States Code, or by funds made available under 23 U.S.C. 202 and 203. The matching requirement under the FAST Act will be met by CCG.

CC and other agencies have committed to the project. The forms of match shall be those consistent with the "Federal-Aid Guidance Non-Federal Matching Requirements" and as approved by FHWA-WFL. In the state of OREGON, the required match is 10.27% of the total project cost.

Commented [EB28]: What other agencies? Are these parties?

Commented [SC(29R28)]: This sentence can be deleted and CC is the only match provider.

Commented [SC(30)]: OK

This project is authorized to use a Tapered Match. Under this approach, the non-Federal match is imposed over the entire project rather than individual progress payments. Timing of all fund transfers are specified in the Funding Plan (below). Tapered Match is authorized because it will result in an earlier completion date.

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Commented [EB32]: Is this defined?

Commented [SC(33R32)]: A couples sentences above

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Estimated costs and fiscal year (FY) for the funding are based on the best budgeting and scheduling information currently known at the time. The final match will be determined based on actual expenditures at the conclusion of project work. Matching cash funds in FHWA-WFL receipt may need to be supplemented, or returned, once actual expenditures are determined. As noted under Modifications/Changes/Amendments/Addendums, if costs increase over the amount within this

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agreement, FHWA-WFL will consult with ~~the agency(ies) providing Match and obtain~~ CC's approval before ~~granting approval incurring or creating an obligation of~~ additional expenses.

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Each party will maintain all project records, including source documentation for all expenditures and in-kind contributions, for a period of three (3) years from the date of final acceptance. If any litigation claim, negotiation, or audit has been started before expiration of the three-year period, the records shall be retained until completion of the action and resolution of all issues that arise from it.

The following agencies have agreed to contribute the amounts shown which will reduce the federal share by the same amount. The **Funding Plan** is as follows:

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Agency	Phase	Form	Due (on or before)	Value	Comments
CC	PE	CASH	07/30/2022	\$24,483.68	
CGC	CN, CM	CASH	07/30/2022	\$224,769.32	

Commented [JE38]: Should these dates be the same?  
 Commented [SC(39R38)]: Yes, considering the development and construction schedule and the County's fiscal year cycle. This could be combined into one row instead of two.

**L. PROJECT TEAM MEMBERS – POINT OF CONTACT:**

The following table provides the points of contact for this project. They are to be the first persons to deal with any issues or questions that arise over the implementation of each party's role and responsibility for this agreement.

Agency	Representative	Title	E-Mail	Phone Number
CC	Seth Crawford	Crook County Judge	<a href="mailto:seth.crawford@co.crook.or.us">seth.crawford@co.crook.or.us</a>	(541) 447-4644
CC	Bob O'Neal	Road Master	<a href="mailto:bob.o'neal@co.crook.or.us">bob.o'neal@co.crook.or.us</a>	(541) 447-4644
FHWA-WFL	Craig Sanders	Project Manager	<a href="mailto:craig.sanders@dot.gov">craig.sanders@dot.gov</a>	(360) 619-7985
FHWA-WFL	Kirk Loftsgaarden	Project Management Branch Chief	<a href="mailto:kirk.loftsgaarden@dot.gov">kirk.loftsgaarden@dot.gov</a>	(360) 302-1537

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**M. CHANGES / AMENDMENTS / ADDENDUMS:**

The agreement may be modified, amended, or have addendums added by mutual agreement of all parties. The change, amendment, or addendum must be in writing and executed by all of the parties.

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The types of changes envisioned may include, but are not limited to, changes that significantly impact scope, schedule, or budget; changes to the local match, either in type or responsibility; or changes

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that alter the level of effort or responsibilities of a party. Notwithstanding the composition of project team members, whether a change is "significant" enough to require an amendment may be determined by the parties or either party. The parties commit to consider suggested changes in good faith. Failure to reach agreement on changes may be cause for termination of this agreement (see Section O below).

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A change in composition of the project team members does not require the agreement to be amended.

It is the responsibility of the project team members to recognize when changes are needed and to make timely notifications to their management in order to avoid project delivery delays.

**N. ISSUE RESOLUTION PROCEDURES MATRIX:**

Commented [JE43]: What if it can't be resolved? Venue/forum provisions?

Issues should be resolved at the lowest level possible. The issue should be clearly defined in writing and understood by all parties. Escalating to the next level can be requested by any party. When an issue is resolved, the decision will be communicated to all levels below.

Commented [SC(44R43): Bob and I will work any issues out on this simple scope project. There is no need to expand this to include a "what if" for any non-resolved issues.

<u>GC&amp;C</u>	<u>FHWA-WFL</u>	<u>Time</u>
Bob O'Neal, Road Master	Craig Sanders, Project Manager	15 Days
Seth Crawford, County Judge	Kirk Loftsgaarden, Project Manager Branch Chief	15 Days

**O. TERMINATION:**

1. This agreement may be terminated by mutual written consent of all parties.
2. This agreement may also be terminated if either the NEPA process or funding availability requires a change and the parties are not able to agree to the change.
3. This agreement may be terminated for material breach by either party if the non-breaching party provides written notice to the party in breach and that party does not cure the breach within thirty (30) calendar days.
4. Any termination of this agreement shall not prejudice any rights or obligations accrued to the parties prior to termination. If Federal access funds have been expended prior to termination, the party responsible for the match agrees to provide a match in the applicable percentage of the total amount expended on the project prior to the termination.

Commented [SC(45): Adding this language will trigger a review by our Legal office. They are backed up and it could take months. Is there really a significant concern that a public agency might try to terminate the agreement with another public agency without giving them a chance to cure?

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**P. FORCE MAJEURE:**

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Neither party to this agreement shall be held responsible for delay or default caused by fire, riot, acts of God and/or war which is beyond that party's reasonable control.

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**Q. WAIVER:**

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The failure of either party at any time or from time to time to enforce any of the terms of this agreement shall not be construed to be a waiver of such term or of such party's right to thereafter enforce each and every provision of the agreement.

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**R. MERGER:**

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This agreement signed by both parties is the final and entire agreement and supersedes all prior and contemporaneous oral or written communications between the parties, their agents, and representatives.

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**S. COUNTERPARTS:**

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This agreement may be executed in one or more counterparts, including electronically transmitted counterparts, which when taken together shall constitute one in the same instrument. Facsimiles and electronic transmittals of the signed document shall be binding as though they were an original of such signed document.

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**Commented [SC46]:** P. through S. – This additional language will definitely trigger a review by our Legal office. It will be put in the Legal review cue and could take months. Does the County see these additions as a significant Agreement risk between two public agencies? Would the County consider signing the agreement without this language?

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