

Montana Transportation Commission

**October 22, 2020 Meeting
Commission Room
2701 Prospect Avenue
Helena, Montana**

IN ATTENDANCE

Barb Skelton, Transportation Commission Chair
Greg Jergeson, Transportation Commissioner
Noel Sansaver, Transportation Commissioner
Mike Hope, Transportation Commissioner
Tammi Fisher, Transportation Commissioner
Mike Tooley, Director MDT
Pat Wise, Deputy Director MDT
Kevin Christensen, MDT
Dwane Kailey, MDT Engineering
Lori Ryan, Commission Secretary
Dustin Rouse, MDT
Jake Goettle, MDT
Val Wilson, MDT
Lynn Zanto, MDT
Patty Schwinden, MDT
Darin Reynolds, MDT
Jim Wingerter, MDT
Bob Vosen, MDT
Rod Nelson, MDT
William Fogarty, MDT
Lisa Hurley, MDT
Nicole Pallister, MDT
Lucia Olivera, FHWA
Marcee Allan, FHWA

Please note: the complete recorded minutes are available for review on the commission's website at https://www.mdt.mt.gov/pubinvolve/trans_comm/meetings.shtml. You may request a compact disc (containing the audio files, agenda, and minutes) from the transportation secretary Lori Ryan at (406) 444-7200 or lryan@mt.gov. Alternative accessible formats of this document will be provided upon request. For additional information, please call (406) 444-7200. The TTY number is (406) 444-7696 or 1-800-335-7592.

OPENING – Commissioner Barb Skelton

Commissioner Skelton called the meeting to order.

Approval of Minutes

The minutes for the Commission Meetings of August 27, 2020 and September 29, 2020 were presented for approval.

Commissioner Fisher moved to approve the minutes for the Commission Meetings of August 27, 2020 and September 29, 2020. Commissioner Hope seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Tentative Construction Plan (TCP)

Director Tooley said we had a long day yesterday and the work has been completed. This morning the department would like you to concur in the Tentative Construction Plan and allow staff to adjust within the fiscal year as needed based on actual obligation authority and project awards.

Commissioner Jergeson said in a couple of places following the project name there was a DB which stands for design build or CDM. I want to know if those designations had been made in a formal action of the Commission and approved for those projects or whether they are recommendations from the staff that will be brought to the Commission at some later date. In the case of the CDM business, it appears that once we've approved it the Commission never has anything more to say about it. Dwane Kailey said the way we read the rules is that the Commission prioritizes the projects and then staff goes through a process to determine the most appropriate way to deliver these projects. Through that project delivery tool we select the means, manner and method for delivering those. If you want us to advise or notify the Commission when we're selecting something for alternative contracting, I'm more than happy to do that. As of right now that authority and responsibility is the staff.

Commissioner Jergeson made a motion for that designation for the purposes of accepting this report and proceeding that that designation, wherever it exists, be removed and the department bring those specific projects to be delivered in that manner to the Commission for examination and discussion as to appropriateness. Val Wilson said I agree with the explanation of Dwane Kailey that in these cases, except for the one in Missoula, all of these projects have been selected and prioritized by the Commission. Under our current operation, the methods, means and manner in which these are sent out to bid is an MDT decision. If the document needs to be amended to remove the designations for some sort of alternate contracting, that can be done, but that doesn't mean the Commission gets to make the determination on the alternate contracting.

Commissioner Fisher seconded the motion for discussion. Commissioner Jergeson said I'm nearing the end of my fourth year on this Commission and I keep running into these situations where the department says the Commission doesn't have authority for this. The Commission is set up in the law to exercise oversight authority over the operations of the department. We apparently have no effective oversight over a major decision of departing from the normal way by which projects are let and contracted out to qualified bidders. We get these documents and we go through them in one day and then it's out of our hands? That is not the reason that this Commission was established. It's pretty obvious that nobody on the Commission in the past said don't be doing this. I think we need to have a clear picture. I don't know who adopted the rules and I don't recall in the four years I've been on this Commission that we've adopted rules that say this is how the alternative contracting methods are to be handled. So if those rules were adopted by a previous Commission, I'd like to see them and have an opportunity to amend them. Hopefully the rest of the Commission would go along with that. I think it's our responsibility to the taxpayers of the State of Montana that we exercise effective oversight. That doesn't mean we're making an accusation that somebody is doing anything untoward or illegal, it's simply that the process needs to be in place to make sure that nothing ever happens that is untoward. That's the purpose of my motion and I hope the Commission will accept.

Commissioner Fisher said the only thing I'll say in response is I think the statutes specifically allow MDT to choose the alternative contacting projects. There are two statutes that apply to that. I don't think there was anything that came before the Commission with respect to the rulemaking, I think it's a statutory exemption from what the oversight is from the Transportation Commission. I fully agree with Commissioner Jergeson that, for transparency purposes in particular for the public, these items come before the Transportation Commission for a discussion and maybe advice and consent or something like that. I think that requires a statutory change. To the extent that projects are selected to be put into a TCP that we approve but we never actually approved the projects to begin with that are alternative contracting. I would concur with the motion on that basis alone recognizing it's a statutory issue. The concerns raised are largely a statutory issue; I don't think it's a rulemaking issue.

Commissioner Skelton said, given that discussion, do we have the authority to take those projects out of the TCP. Commissioner Jergeson said I didn't say to take the projects out of the TCP, I said to take that designation out until we have been presented with them in a formal way and have received the justification that that project versus some other project be assigned that alternative contracting methodology. Commissioner Skelton said since it has been pointed out that this is a statutory issue, do we have the authority to take the designation out of the TCP. Val Wilson said it is my opinion that the Commission does not have that authority. Certainly in this case the concurrence in the TCP does set our priorities for delivering these project but the means and the methods for those alternative contracting is not within the purview of the Commission. That doesn't mean we can't work with our Chief Engineer and Chief Operations Officer to provide notice to the Commission of the designations but that is something I'd need to visit with Mr. Kailey and Mr. Christensen about exactly where that would be in the process. Generally when the Commission initially selects the projects, I don't think it's far enough along in the design to have the decisions made.

Dwane Kailey said you are right on. The process works when we get approval from the Commission to prioritize those projects, we then put it in the federal aid system. Then staff goes out and does preliminary engineering and surveying. Once we identify the majority of the risks on the projects that is when we sit down with our Design Team and go through the Project Delivery Tool and determine which means, manner and mechanism is the best way to deliver those projects. The other thing I'd like to bring up is that at times, especially with design build, we use that manner and method on projects that are of exigency in which case time is very critical on those projects and adding a one-two month delay is critical on some of those projects. I'm on board with transparency and I'm more than happy to bring any and all projects to the Commission to explain why we selected them. I just get a little nervous when we start adding more decisions and more time into selection of some of these projects.

Commissioner Sansaver said I'm a little bit confused on exactly what we're talking about. Are we saying that we should have the authority, as Commissioners, to approve or not approve a design build? As Dwane pointed out, they do bring the projects before us prior to actually doing all the work and we approve or disapprove those projects. Is the question whether we have the authority to do design build or construction management? Is that the question? Commissioner Jergeson said some of these projects were put into this priority list two or three Commissions ago and they are out there beyond the five years. When you look at all the projects we approve, they are way out there and then they start coming in. He said Commissioner Cobb was the one responsible for putting in the projects on Hwy 2. Then the department says they are going to pick this project as an alternative contracting method and you've approved the project so therefore we're going to do this alternative method and you don't get any more to say about it. The exigency thing might be an argument to be made when there's a landslide onto the road, so you ask some companies to design how you're going to fix that and give us your bid. They do it pretty quickly. Looking at Johnson Lane Interchange on a CMD a \$39 million dollar project and we haven't had a Commission discussion or a decision with the department about whether or not CMD is the appropriate way to facilitate that project. That was a decision of the department? No way! This will be at the Legislature if you don't find a way to have us have an orderly process within the Commission and the department to be making these kinds of decisions. Otherwise we're not operating as an oversight Commission. When you have the regular way by which these contracts are let, bid and then approved, the Commission gets to approve them. But you tell us "no, you've already approved these CM projects so you don't get any more to say about it." There's something wrong with that process. The argument that the leadership in our department is making is that it's not timely for you guys to look at this. That's nonsense.

Commissioner Sansaver said it has been pointed out that it's statutory. By us even voting to not approve or accept all the work that went on yesterday isn't going to do us any good. If this needs to be taken to the Legislature, then let it be done but at some point we all have to trust the people who work for us. They are the professionals who know the most and who are the best at what they do. At some point we have to trust in them and the work they're doing and the way they manage how these projects go out is the best way for it to be done. I don't know that we wouldn't be fringing upon micro-management by saying that it has to come to us. We've already approved the project; the project is approved, and we've given the go-ahead to figure out the best means or methodology to carry that project through. So, if it has to go to the Legislature, let it go there but at this point in time, I cannot vote for holding this thing up because of a statutory law.

Commissioner Jergeson said I'm not suggesting holding up this document. My amendment simply removes that designation in the parenthesis with the request that the department bring each of those projects back to us with an explanation of the rationale for putting that designation on it. The projects as prioritized in the document remain just that way. But I'll point out to you the Johnson Interchange was approved a long time ago by a Commission a long time ago and neither you nor I were on the Commission when that happened. Our Chair was on the Commission when that happened but none of the rest of us were. They made the decision and that is the way we're going to proceed, and you don't get any more to say about it. That's wrong! By our December meeting we'd have time if they bring us back an explanation of these and we can see if it makes sense and put it in there. That's not going to cause any problem. I'm asking that we actually spend a little time to make sure that is okay. Is it by rule or statute, then we want to make a recommendation to the Legislature that this be changed. I'm appalled and I think the Legislature would be appalled that a decision of this magnitude has been removed from oversight by the Commission, absolutely appalled!

Commissioner Hope said he wouldn't support the motion either. I'm not appalled. I think alternative contracting is a way to move this industry and this department forward and I think can actually save taxpayers money. That's my position.

Commissioner Jergeson moved to remove the designation of alternative contracting projects from the TCP moving forward and that the Transportation Commission have oversight over what projects are being designed and built under the alternative programming. Commissioner Fisher seconded the motion. Commissioners Jergeson, Fishers voted aye. Commissioners Hope, Sansaver and Skelton voted nay.

Motion failed.

Commissioner Skelton said I believe we need more information on this so if it is necessary to go to the Legislature to have it changed, we have the information to take it to our Legislature to have it done. Commissioner Sansaver said I understand everything Commission Jergeson was pointing out and I do think we need to take a serious look at it. My only hesitation was we need to move forward with this TCP. If Val and the staff could look at that I would appreciate it. Commissioner Skelton concurred.

Commissioner Sansaver moved to approve the Tentative Construction Plan for 2020. Commissioner Hope seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Commissioner Skelton commended everyone for the hard work they did on the plan.

Agenda Item 1: Reapproval of Project Due to Increase in Scope and Cost Belgrade – Urban Improvements (NH Project)

Lynn Zanto presented the Reapproval of Project Due to Increase in Scope and Cost, Belgrade – Urban Improvements (NH Project) to the Commission. Per Transportation Commission Policy #12, MDT is required to submit projects back to the Commission (for reapproval) when a change in scope results in a significant cost increase (beyond what was originally proposed to and approved by the Commission).

The Butte District is proposing to modify the scope for the *Belgrade – Urban Improvements* project. The project was originally scoped (and approved) as a major rehabilitation project to address operational issues along the Jackrabbit Lane corridor (from Amsterdam Road to Main Street) and on Amsterdam Road (from Jackrabbit Lane to Thorpe Road). The estimated total cost for the project (all phases) was \$4.1 million.

Early in project development, the design team noted that proposed improvements (widening, intersection improvements, signal work, etc.) would likely be ineffective in improving operations without the inclusion of a grade-separated railroad crossing on Jackrabbit Lane in Belgrade. Thus, MDT is now proposing to install a railroad underpass with this project. The estimated total cost (for all phases) is anticipated to be \$25.4 million.

Summary: MDT is requesting Commission approval to modify the scope of the *Belgrade – Urban Improvements* project to include a grade-separated railroad crossing (underpass) on Jackrabbit Lane in Belgrade. The estimated total cost (for all phases) is anticipated to be \$25.4 million. No changes are proposed to the project limits.

Engineering Division and Butte District staff have reviewed the scope change proposal and concur with the recommended improvements. Additionally, MDT's Planning Division agrees that the proposed modifications are consistent with the goals and objectives identified in the Performance Programming Process (Px3) as well as the policy direction established in TranPlanMT. Specifically, roadway system performance, traveler safety and bike/pedestrian features will be enhanced with this project modification.

Staff recommends that the Commission approve the modified scope of work and cost increase for this Butte District project.

Commissioner Hope said this project is greatly needed with the growth of Belgrade and what is going on in that area and the backup of traffic and the safety. You've got a couple of school zones, about 3500 housing permits coming into that area as well. I would commend the department and the city of Belgrade and I think in the long run this project will actually save the department money by doing it right and changing the scope of work.

Commissioner Sansaver moved to approve the Reapproval of Project Due to Increase in Scope and Cost, Belgrade – Urban Improvements (NH Project). Commissioner Hope seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Public Comment

No public comment.

Agenda Item 2: Speed Limit Recommendation MT 85 – Jackrabbit Lane

Dwane Kailey presented the Speed Limit Recommendation, MT 85 – Jackrabbit Lane to the Commission. We have three speed studies to present and all three of them are challenging. The first one is on MT 85 Jackrabbit Lane essentially from Four Corners up to Belgrade. Most of that corridor has been rebuilt over the last few years starting in 2014 and completed in 2019. We reviewed the corridor speeds. We weren't able to do an accident study on most of the corridor because with the reconstruction there hasn't been sufficient time for gathering statistically accurate data. With that we did look at the information we had available and we have the following recommendation:

A 65 mph speed limit beginning at station 155+00 – project NHTSA 85-1(10) (200' north of Durston Road – mp 1.0) and continuing north to station 308+00, an approximate distance of 2.9-miles.

A 55 mph speed limit beginning at station 308+00 – project NHIP 85-1(16) (350' south of Valley Center Road – mp 3.9) and continuing north to station 393+00, an approximate distance of 8,500 feet or 1.61-miles.

A 45 mph speed limit beginning at station 393+00 – project NHIP 85-1(16) (300' south of Pollywog Lane – mp 5.5) and continuing north to station 14+40 (metric) (100 meters south of Thunder Road) an approximate distance of 3,750 feet.

The County's letter is attached. It is as follows: "The Gallatin County Commission generally agrees with the lower speed limits along Jackrabbit and we would like to have the proposed 55 mph speed limit extended, for example, beginning at station 155 north of Durston Road and continuing north to station 393+00, 300 feet of Pollywog Lane." So they are sort of advocating for 55 mph but they are not adamant about it. Staff recommends staying with our recommendation but it is up to the Commission on how you would like to proceed.

Commissioner Hope said I recommend that we go with the County's recommendation which basically takes it 55 mph all the way. The reason I say that is because that area is becoming so urbanized out there and there are real problems at the Valley Center Road. They would want flashing lights out there but that goes against department policy at this time. So I think the real solution is to go with the county recommendation. That 55 mph will work for that area and that is what it is coming down Huffine. With six months to a year of construction, they'll be back wanting the speed reduced anyway, so let's avert that and go with the county's recommendation.

Commissioner Hope moved to approve the Gallatin County Speed Limit Recommendation for MT 85 – Jackrabbit Lane. Commissioner Fisher seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item 3: Speed Limit Recommendation MT 200 – Plains West

Dwane Kailey the Speed Limit Recommendation, MT 200 – Plains West to the Commission. This was requested by the town of Plains. They were proposing extending the 35 mph and 45 mph. We conducted our study, reviewed the traveling speeds, the accident clusters, and the citations and based on our review we are recommending the following:

A 35 mph speed limit beginning at station 161+50, project F 6-1(18) (west side of Rittenour St.) and continuing west to station 148+00, an approximate distance of 1,350-feet.

A 45 mph speed limit beginning at station 148+00, project F 6-1(18) (200' west of Lewellen St.) and continuing west to station 123+00, an approximate distance of 2,500-feet.

A 55 mph speed limit beginning at station 123+00 (300' west of Lower Lynch Creek Rd.) and continuing west to station 83+00, an approximate distance of 4,000-feet.

We did send this to the City and the County for their review and comments. The County is supporting our recommendations, however, the City is asking for extensions of our recommendations and a little bit lower speeds. Staff recommends what we have presented today. Commissioner Fisher said this is in my district and I favor the recommendation of MDT and the Sanders County Commissioners on this stretch of road.

Commissioner Fisher moved to approve the Speed Limit Recommendation, MT 200 – Plains West. Commissioner Sansaver seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item 4: Speed Limit Recommendation West Main (U605 & S205) – Belgrade

Dwane Kailey presented the Speed Limit Recommendation, West Main (U605 & S205) – Belgrade to the Commission.

The man behind the curtain that actually produces the speed studies is Doug Bailey. You only see my name and Gabe's name on these but the actual staff member who produces these is Doug Bailey. I tried to get him to join us today but he is a very quiet individual. He just retired yesterday and has moved on but he has served the Commission in producing speed studies as long as I can remember, 15-20 years. He has done a superb job. I want to thank him for his service and let you all know he has retired.

We were requested by the City of Belgrade to look at speeds in this area. We've done that. We conducted our study, looked at the traveling speeds, the ADT, as well as citation information. We are presenting the following recommendation:

A 35 mph speed limit beginning at the intersection with Jackrabbit Lane and continuing west to straight-line station 24+00 (75' west of 10th Street), an approximate distance of 2,400 feet.

A 45 mph speed limit beginning at straight-line 24+00 and continuing west to station 43+50 (1,050' west of 13th Street), an approximate distance of 1,950 feet.

A 55 mph speed limit beginning at straight-line station 43+50 and continuing west to station 61+00, an approximate distance of 1,750 feet.

A 65 mph speed limit beginning at straight-line station 61+00 (1,000' west of Bolinger Road) and continuing west to milepost 15.0, an approximate distance of 3.6 miles.

We've presented this to both the City and the County for their review and approval. They did not approve. They have offered up an adjustment to it. They are asking about a 10 mph reduction for the majority of our recommendation. To remind the Commission, we did a fair amount of research into this and at five to ten miles per hour statistically we don't see a huge change in crashes when our recommendation isn't adopted. It isn't until we get to 15 mph that we statistically see an increase in the crashes.

Commissioner Hope said he would go with the City and County recommendation. That area is growing and they are trying to calm it. Commissioner Jergeson asked Dwane when he said three percent of the citations issued on this section of road were for speeding out of 29 citations, that means one person got a speeding ticket? Dwane said that is correct. Commissioner Jergeson said I'm not sure as a Commissioner I'm qualified to make these kinds of decisions. Show me abstaining on this one.

Commissioner Hope moved to approve the City and County Speed Limit Recommendation, West Main (U605 & S205) – Belgrade. Commissioner Fisher seconded the motion. Commissioners Fisher, Sansaver, Hope & Skelton voted aye. Commissioner Jergeson abstained.

The motion passed.

Agenda Item 5: Certificates of Completion July & August, 2020

Dwane Kailey presented the Certificates of Completion for July & August, 2020, to the Commission. We are presenting them for your review and approval. If you have any questions or comments, please feel free to ask. Staff does recommend approval.

Commissioner Sansaver moved to approve the Certificates of Completion for July & August, 2020. Commissioner Fisher seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item 6: Amended Access Control Resolution Reserve Street – Missoula

Dwane Kailey presented the Amended Access Control Resolution, Reserve Street - Missoula to the Commission. We are presenting a revision to our Access Control Resolution on Reserve Street in Missoula, Montana. We own a section of land along our bridge and up to the river and basically a lot of vagrants have moved into that area and the county is in the process of attempting to fine us or require us to put in some sanitary features such as portable toilets and dumpsters. To do that we need access into the property. As this land was owned by MDT when we set up the Access Control, we did not believe that an approach was needed, however, to accommodate what the county is requesting us to do, we need an access into this property. The only way to do that is to amend the Access Control Resolution so we are asking the Commission to approve that.

Commissioner Hope said because that has become a homeless camp, do I understand that because of that we need access so we can provide services? Dwane said that is correct, we need to be able to get in there to set up a dumpster as well as portable toilets for the homeless vagrant community that is living in there right now. I will add that we hope this is not long term. We are currently working on trying to sell, convey, or gift this land to the City of Missoula so they can deal with the issue. We are not set up to deal with this kind of activity, however, that is going to take some

time so in the interim we need approach and access to get into the property. Kevin Christensen said it is a pretty big piece of property, 13.5 acres along the river. During the summer we had up to 150 people living down there in tents and shacks. There have been some fires that potentially threatened our structure. Right now the occupancy is down to about 45. As Duane said, we are working with the city and some NGO's to provide long-term housing for those folks. We are working towards conveying the property to the city because they are much better equipped to deal with this problem.

Commissioner Fisher moved to approve the Amended Access Control Resolution, Reserve Street – Missoula. Commissioner Sansaver seconded the motion. Commissioners Sansaver, Fisher, Jergeson & Skelton voted aye. Commissioner Hope voted nay.

The motion passed.

Agenda Item 7: Project Awards October 8, 2020

Jake Goettle presented the Project Awards, October 8, 2020, to the Commission. We had three contracts in that letting and we received 14 bids.

Call No. 101. Chinook to Harlem Culverts. The Engineer's Estimate was \$4,834,823.71. We had four bidders on the contract. Schillinger Construction was the low bid. They bid \$6,149,847.85. They were 27.2% over the Engineer's Estimate and had 7.26 DBE participation. We did analyze the bid for this contract. It was outside of guidelines. The guideline for award is 10% and it was 27% over. There weren't too many issues with the bids. This is a difficult project; it's a winter time culvert rehab project. Notice to Proceed date is in December. I think they'll get some work done but it will be a difficult and slow process. The fact that we received four bids that are very close together shows the Engineer's Estimate was a little low. We do recommend awarding this contract.

Call No. 102. Joplin North. The Engineer's Estimate was \$2,893,592.58. We had four bidders on this contract also. Schillinger Construction out of Columbia Falls was the low bid at \$3,163,337.65. They were 9.32% over the Engineer's Estimate and within guidelines for award. No DBE participation on this contract.

Call No.103. SF 109 Guardrail NE of Bozeman, Phase II. The Engineer's Estimate as \$740,709.60. We had six bidders on this contract. Riverside Contracting out of Missoula was the low bid at \$679,958.30. They were 8.2% under the Engineer's Estimate and no DBE participation

The department is recommending award of all three, Call Nos 101 through 103.

Commissioner Jergeson moved to approve the Project Awards of October 8, 2020. Commissioner Sansaver seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Exigency Project in Jordon

Dwane Kailey said we had the Huff Fire out by the Jordan area this summer in July. It burned fairly quickly in a fairly large area. Unfortunately it did also burn some fences along our right of way. The Commission may be aware that typically when we fence our right of way everywhere except the Interstate, we actually make the fence

the ownership and responsibility of the landowner. However, when we've had major catastrophes or major events such as fires, we fully recognize the fact that the farmers are dealing with a lot on their own anyway, and over and above that having livestock get on the highway is a fairly large risk for the traveling public. So any time we have major events like this, the most recent one prior to this was down in the Ashland area, we have initiated a federal aid contract to go in and replace fencing. We have set up an Exigency Project and we're moving forward with it and we will be presenting it to you. We will ask you for a special call on November 20th and we'll be asking you to either delegate authority to the department and/or convene a special call on November 20th to award that project so we can get in and start replacing that fence this winter. The sooner we can get it done the safer the public is as well as the landowner.

Commissioner Skelton asked if he needed a motion. Dwane said through the exigency or through the ER, every year you approve the ER program which allows us the authority to jump on these very quickly. With that we've committed to bringing any and all those projects back for your information. However, I do need a motion if you wish to delegate authority to the department either the Director, the Chief Operating Officer, or the Chief Engineer to award on your behalf or a motion to set up the November 20th conference call to award it by the Commission.

Commissioner Jergeson said in my experience we've always set up a special conference call. So I move to set up the conference call decision on November 20th.

Commissioner Jergeson moved to set up a special conference call on November 20, 2020, for the Commissioner to approve the Exigency Project in Jordon. Commissioner Hope seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item No.8: Directors Discussion & Follow-up

Director Tooley said traditionally after TCP we keep this fairly brief. The only thing I have is to attempt to answer some questions that came up yesterday regarding state match. Lynn Zanto found the information in the STIP regarding what we have pledged to Federal Highways that we will commit on state match in order to match the Federal Aid Program. In FY 2021 it is about \$64.8 million, FY 2022 is \$57.5 million, and in FY 2023 which is out right now a little bit is \$48.4 million.

That is a very high level answer to the questions asked yesterday. Larry Flynn wants to answer the question more specifically but it is very difficult to do that based on the way this whole system and this program works. We commit that we will have the match for the Federal Aid Program and then we pay for the projects as the invoices comes in from the contractors. The actual match can vary by invoices, vary by type of work, vary by where the work is done, and it goes over a very long period of time which is why it was difficult for him to actually specifically answer the question. So this is just a very high level answer. Of course, if any of the Commissioners want to know they can and come in and look at the books, we're open to that and happy to sit down with you. Thanks for all your hard work over the year and for giving us a Federal Aid Program to manage.

Agenda Item 9: Bridge Dedication – Charles Komppa Montana Highway 78 Bridge Crossing The Yellowstone River

Lynn Zanto presented the Bridge Dedication – Charles Komppa, Montana Highway 78 Bridge Crossing the Yellowstone River to the Commission. Director Tooley said we bring to you a request to nominate or dedicate a bridge in the name of Charles

Komppa. He was a Navy CB Reservist who was killed in theatre in 2006 by an IED. As you have done in the past or we suggested in the past, these requests that come in should be vetted and affirmed by a nationally recognized Veteran's organization and in this case the VFW has in fact seconded that request. With that I request that we honor Petty Officer 1st Class Charles Komppa in the way that has been requested with the dedication of a bridge over the Yellowstone River on Hwy 78; also a Kiosk at the Rest Area at Columbus.

Commissioner Sansaver moved to approve the Bridge Dedication – Charles Komppa, Bridge Crossing the Yellowstone on Montana Highway 78. Commissioner Fisher seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item No.10: Order on Petition for Judicial Review Todd Cusick v. MDT

Commissioner Fisher asked if there was a copy of the Court Order. Val Wilson said I can get a copy of that Order to Lori and she could send it to the Commissioners. Commissioner Fisher said she could not make a decision on the request without reviewing the Court Order. Is it possible to move this agenda item to the end of the meeting so that we all have time to review whatever the court's concerns were with respect to the Administrative Rules or the process? Commissioner Skelton asked if it was a lengthy Order. Val Wilson said it was around 21 pages. Commissioner Skelton asked about the timeframe the Commission has to respond by October 27th six days away. If you could get it to us then we could have a call to give you our recommendation possibly by Monday. Commissioner Fisher said that would be fine because there is no way I can assess the circumstances without reviewing the Court Order from which we're asked to decide whether to forfeit our appeal rights or do something different. Val Wilson said that would be fine. I would like to do just a brief review and then get the Order to Lori and then we can look at a Commission Call on the 27th. Commissioner Jergeson asked if the deadline was 5 pm on Tuesday. Val Wilson said yes. Commissioner Jergeson asked if they could poll the Commissioners about what days they could address this. Commissioners Skelton, Sansaver, Jergeson, and Fisher agreed on Monday at 9 a.m. Commissioner Hope was traveling on those days. Commissioner Skelton asked Commissioner Hope if he could leave his preference with Lori before his trip. He said he could do that.

Val Wilson said they received an Order from the District Court on the Todd Cusick debarment matter. Here is an overview of the case:

On March 28, 2017, MDT began debarment proceedings against Goran, LLC and its principal Todd Cusick for failure to make prompt payments to its subcontractors and suppliers. Goran and Mr. Cusick requested an administrative hearing. Goran withdrew its Notice of Appeal and Mr. Cusick's case proceeded to hearing June 27-28, 2018. The Hearings Officer issued Findings of Fact and Conclusions of Law recommending MDT debar Mr. Cusick for three years for violating prompt payment provisions.

On November 28, 2018, MDT Director Mike Tooley entered the Final Agency Decision and Order debarring Mr. Cusick for three years. Mr. Cusick appealed the decision to the Montana Transportation Commission and on August 29, 2019. The Commission upheld the Agency Decision to debar Mr. Cusick.

On December 26, 2019, Mr. Cusick filed a Petition for Judicial Review in the First Judicial District Court before Hon. Mike McMahon appealing the Commission's Decision. MDT filed its Answer and Record on Appeal. Both

parties submitted extensive briefs on the factual and legal issues. On August 6, 2020, the parties appeared before the Court for oral arguments.

On August 19, 2020, the District Court issued an Order reversing the Final Agency Decision and directed MDT to remove Todd Cusick from its debarment list. The long and short of it is that the District Court found that Goran's LLC status shield its member manager from debarment.

The Hearing's Examiner relied on a particular line of cases, the White case which indicated that the member manager was responsible for their actions but the District Court did not buy that. They disagreed with the Hearings Officer's Findings that Mr. Cusick's participation in the contract, under MDT's rules, was sufficient notice of the fact that he could be individually debarred for failing to make prompt payment to subcontractors.

The Court found that the language in the rules, the contracts, and the law were against MDT and its efforts to debar Mr. Cusick individually. The Order was very long, the court was critical of our rules, critical of our ability to hold an affiliate of a company liable under our contract language.

We did meet with the Director and Kevin on September 3rd and review the Order and made the recommendation that MDT not appeal the decision and work with rules committee to revamp our rules so that they are consistent with the federal debarment rules. We will also have the ability to look at Commissioner Jergeson's concerns about the contested case hearing language that is in these rules. Again, you'll remember that these rules are probably 25 years old. We were looking at revamping them anyway after this process was over. So that is the recommendation of your legal team that we take some time to review the Administrative Rules and perhaps look at our standard specifications to make it clear to principals that if they aren't paying promptly under the contract and under the statute that they could be subject to debarment. With that I will get this Order to Lori.

Summary: The Commission and agency have until October 27, 2020 to file an appeal to the Montana Supreme Court in the matter of Todd Cusick v. MDT.

Staff recommends the department and the Commission not appeal the order of the district court, but rather focus on amendments to administrative rules to address the rule deficiencies identified by the District Court and prevent similar debarment order reversals in the future.

Commissioner Sansaver asked if Cusack worked for Goran. Val Wilson said yes, Todd Cusick was the Member Manager of Goran LLC and he was the one who was making the decisions to not timely pay our subcontractors. Commissioner Sansaver asked if there was a family connection between Cusack and Goran. Val Wilson said yes. The way the LLC was structured is that it had two member LLCs as its members. Then if you back it up, those member LLCs were actually owned by Todd Cusick and his wife. Commissioner Sansaver asked why Goran dropped out of it. Val Wilson said the reason Goran dropped out of it was because they filed for bankruptcy so they didn't have anything to lose and really no basis to challenge the department. Commissioner Sansaver said it was just another one of those companies that appears anytime an opportunity comes up to change the name and put in a bid. Val Wilson said that is true. That is why MDT was proceeding against Todd Cusick who was the Member Manager. In the District Court's Order it acknowledges that Todd Cusick was the one who made the decisions not to pay and that the money that was not paid to subcontractors most likely ended up in his pocket but the Court was very critical of our rules and our application and our contracting. So we're taking heed with that and if our rules were drafted 25 years ago to control these kind of schemes where you have a company that has two companies that are controlled by

other people, I don't know that our rules are obviously not sophisticated enough to do that. I'm committed and I know Kevin and our Chief Engineer and Construction Engineer have already had preliminary discussions about coming up with new rules that will control this kind of behavior. Commissioner Sansaver said in other words the department is going to try and find a way to make it legal to block ghost companies from being able to bid contracts that they defaulted in the State of Montana. Val Wilson said yes.

Commissioner Jergeson said Val suggested that I was correct on my concern about the Commission not having anything to say about it and would have to go along with what the department had ordered. I think as a quasi-judicial agency we have an obligation to ensure that the due process rights of all the parties involved in these kinds of disputes, are assured. We shouldn't be losing a case that shouldn't be lost because we messed up in how we go about protecting the due process rights of all the parties. That was my concern about the way the Order was phrased and it has been born out. It's unfortunate, for six years that I was Chair of the Public Service Commission, a quasi-judicial body, and we had extensive hearings and we issued orders and there may have been orders where we interpreted the law incorrectly and the appellate court would find it, but we never had any that I recall that were overturned on the basis of process; that we somehow didn't protect all the rights of all the parties that were engaged in the hearings and in the decision.

Val Wilson said I recall from the August meeting there was some discussion about the provision in our rules that provides that these hearings before the Hearings Officer are not contested case hearings and not subject to MAPA. That was a valid concern but again that was in our rules. We selected a Hearings Examiner who did a three-day hearing in front of Todd Cusick, who had two attorneys there, and we had several witnesses including the subcontractors who had not been paid. There were also witnesses who talked about the failure of this project with Goran LLC. What I mean by failure is it was not executed promptly, none of the work was completed timely and there were a lot of issues because Red Lodge had a big tourist season that was disrupted and lots of promises that had been made by the contractor with regard to traffic and disruptions to the local businesses that had been broken. Overall, I would say that I've worked for the department for ten years, but this is certainly one of the worst contractors and worst projects in my recollection. In fact this is the first and the only contractor that MDT has sought to debar. That would be echoed by some of our folks who have been here 25 years. Yes, that language in the rule that said it was not a contested case hearing, although we did have a hearing that may not have followed the MAPA rules, but was subject to cross examination and appeals. I agree this was a bad result. Commissioner Jergeson said I don't dispute the substance of the contractor's behavior, which makes it all the more unfortunate that the outcome when it goes through judicial review, is a reversal. Not because we misread the substance but because we misapplied all the due process steps that need to be taken in these kind of orders.

Commissioner Sansaver asked Val if she was suggesting that the department is going to review our process before we go back with a reply to this. Are you suggesting this is a done deal and we've lost the case? We haven't reviewed this in 25 years so certainly there are a lot of changes that need to be made between now and then. What are you suggesting from a department perspective? Val Wilson said we certainly won't have new Administrative Rules until after the first of the year. Right now we know that the substance of our rules aren't consistent with the federal rules which adds a layer of complexity because there is no Montana case law on our rules for debarment because there have been no debar actions. So the idea would be to put our debarment rules more in line with the federal authority and then we can use their case law to assist us in making good decisions on moving forward with debarment. One of the specifics in the federal rules is the language that affiliates of companies that are debarred can also be debarred. What we had in our rules was general language that said that participation in a contract could subject an individual

to debarment and the court just did not buy that participation was enough, that language was enough or that notice was enough. The other thing that the court was unhappy with was that the way our rule was laid out, it talks about specific fraud and conspiracy and other criminal activities that you could be debarred for and then a catch all that said “and other activities that violate these rules.” Our rules are pretty complex and down in C(I)(ii) it talks about prompt payment. So the court was not buying that was sufficient notice to Mr. Cusick; that his participation and failure to promptly pay would be a basis for his individual debarment.

The other thing was the court talked about our contracts, because our contracts are signed with the entities and there’s no provision for holding the members and the managers liable for the debts, it followed that we couldn’t hold the members liable under debarment. In that way I have to accept the ruling of the court, but to me there is a difference between holding somebody liable for debts and liabilities of the corporation and for debarment because debarment doesn’t hold them liable for the corporation, it’s what we need to do so that we keep bad actors out our contractor pool. Something that Kevin and Jake have been thinking about is how we could put information in our standard specifications that would give notice to the principals of these LLCs that they can be, maybe not liable for the debts of the corporation, but they can be debarred because of their affiliation. There are some things we have thought about but certainly nothing is going to be ready to roll out; it’s going to take time to get it right with regard to the rules. With the specifications, I don’t know, certainly that could be a quicker change but I think it needs to be rolled out together.

Commissioner Sansaver said these would all be questions I would be asking on our Conference Call next Monday. I’m not an attorney like Commissioner Fisher or a judge like Commissioner Fisher, and this 21-page document would probably just swallow me up trying to understand. I just need the viewpoint of our legal team on where we would stand on the final day. It sounds to me that we are not in a position to challenge the court’s ruling and maybe Director Tooley you could give me your thought on this.

Kevin Christensen said this Order really brought daylight to the issues we have with our rules for debarment. It’s kind of unusual for an order to be 21 pages; it was pretty detailed. In discussing this with legal, it is our position that we have nothing to gain by appealing this. You can read the rule, there’s a lot of specific information in there. So the department’s position is that we do not appeal this. Moving forward we will amend our rules and our specifications to mirror the federal rules. Director Tooley said that is correct. If you look at the 21 pages, there is not a lot of room to argue against what the District Court determined. We tried to treat it like we would if we were using the federal rules, but our state rules simply didn’t back up that approach. I think the Supreme Court would probably go the same direction so I chose on the department’s behalf, to not appeal.

Commissioner Hope asked when we went through this debarment, did we even look at our rules to evaluate if we were standing on strong grounds? Why would we have depended on the federal rules for a state disbarment? Val Wilson said we did review our rules and we knew there were problems with the rules because, again, they are not set up to go after individual actors or individual affiliates but there was some broad language in there about participation in a contract that subjected individuals to the rules. So we did evaluate it. We felt that proceeding with the rules we had was certainly our only option because the rules that apply are the rules that are in place when the contract is executed. We took our arguments to the Hearings Examiner who was not biased in MDT’s favor and had what I consider a reasonable result. When it got to the District Court, they did not agree with the Hearings Examiner. I was not at that Hearing but Kevin was there. Kevin Christensen said the Judge was very emphatic that our rules did not provide the grounds to debar Todd Cusick. When we were arguing our case, he just started out by telling Carol that he did not agree with the Hearings Examiner on this. He was very emphatic with his ruling. It

was a fairly heated conversation between the Judge and our attorney. Val Wilson said certainly that is not the result the department would ever want in District Court or anywhere else. When we were moving forward with this obviously we thought there was a solid basis but the court disagreed. So our recommendation is that we will listen to that and heed that information and then use it to improve our rules and improve our process. Hopefully we'll go another 10-11 years and never use this again, but certainly we're hearing what the Judge is saying and we're ready to move forward on that.

Commissioner Sansaver said if we are looking at going to federal guidelines, why would we be doing that? Why wouldn't it be a state guideline? Is it because of the federal dollars that are being used? How do you make the perfect umbrella for this type of thing? Is it going through a federal guideline or is it establishing a state guideline? Commissioner Fisher said my thoughts are consistent with Commissioners Hope and Sansaver. We could probably look at other cases that have been reviewed by a credible jurisdiction where the issue was due process for debarment and whatever state's rules were upheld in those cases, perhaps we could look at those rules and see if those rules would be compatible with what we could utilize in Montana. I think being consistent with the federal law, with respect to debarment, is important because local jurisdictions will say or lawyers like me would argue that you're not even consistent with the federal law and they do these types of contracts all the time. So sometimes the theory is if we're consistent with federal law that is probably a better standing. I would also argue that it would be nice to see if there were any cases on debarment that have gone through the same process as we did in Montana but perhaps the statutory authority may have been written differently and where due process was upheld as being validly provided to the person being debarred and look at that statutory scheme or that rule scheme to see if it would marry well with what we would want here in Montana.

Commissioner Jergeson said in hearing the stand of our legal team and Director Tooley, certainly those 22 pages of document could be reviewed by us but I don't know that it will change the fact that whether we go back at Todd Cusick again or whether we move forward, any try to rewrite something..., I don't know that we need to have that meeting on Monday. I don't see the point in going back and reliving it for anything other than just knowing the mistakes we made that have been pointed out by the Court. Commissioner Fisher said I agree, I think we're going to come to the same conclusion of let's not appeal, let's work on the rulemaking. I think that's the exact conclusion we will probably come to. I want to make sure the record reflects that we had all the information we would need to make that decision. In order to validate our process we need to at least have the advantage of having that court order from which we're deciding or not to appeal that court order. For my purposes I just want to make sure I've read that court order and that I come to the same conclusion that Director Tooley has come to with respect to let's not appeal and let's work on the issues raised in the court order. Just for my edification I'd want to see that so the record shows that we had the full gambit of information before we made the decision before us. Commissioner Sansaver said that is a good point.

Commissioner Jergeson said I believe the legislation that created the Transportation Commission says one of our members has to be an attorney. Given Commissioner Fisher has that designation and would like to read the Order before we decide whether to accept staff recommendation, I think we ought to respect the one member of our Commission that is appointed for that criteria. All Commissioners agreed with that. Commissioner Skelton said they would look forward to getting the 22-page Order and will reconvene on this issue at 9 a.m. on Monday. She asked Lori to set up the zoom call.

Commissioner Hope asked Val Wilson if they were taken by surprise by the decision by the Judge. Val said yes I was especially with the tenor of the hearing and that the first words out of the Judge's mouth was that he disagreed with the Hearings

Examiner. After that we were expecting a decision that would vacate the debarment of Todd Cusick. Up until the hearing I didn't see any red flags and neither did my attorneys. Commissioner Hope said then it would be safe to say that we got out executed by Cusick's attorneys. Val said I don't know; I think when we were going through the process it seemed that there was a clear distinction in the mind of the Hearings Examiner between the purpose of debarment and the purpose of liability for corporate conduct. The LLC of course shields from liability but because debarment technically is just a manner of protecting the public contracting process, it was a distinction that is referenced in the federal statutes and all of the federal case law we looked at. So that would be another reason to have our rules consistent with federal. Affiliates in federal cases are routinely debarred when their companies are involved in conduct that violates their rules. We didn't have the same language as the feds and the Judge absolutely did not buy that there was a distinction between liability for corporate debt and liability for corporate actions versus this debarment. So that's good to know. I don't know that our attorneys got outmaneuvered but overall it's a result that we weren't expecting and we are overall ready to learn from that mistake and amend our rules.

Kevin Christensen said my view is we didn't get outmaneuvered by their attorneys at all. My view and my understanding, being present at the proceeding, is that the Judge read the proceedings from the Hearing we had and then he looked at our rules and the issue was liability and Todd Cusick was shielded from liability from the LLC. I really don't think we were outmaneuvered, it was just our rules in the Judge's view didn't provide us the authority to debar Cusick. Director Tooley said as a lay person and someone who was a briefed on this throughout the entire process, we won every decision along the way except the last one and boy did we lose that one. It was a surprise to all of us for it to come down this way. When you read what the District Court said, you'll probably come to the same conclusion that really the foundation of it was the issue and not necessarily anything else. I appreciate the work legal did. There's not a lot of room for argument from the District Court.

Commissioner Sansaver said it goes back to Commissioner Jergeson pointing out that this is 25 years old on how we've handled these things in the past. I'm sure there are a lot of other areas that we're going to come across that are that old that we're going to be subjected to. It's another one of those reviews that have been handled by previous Commissioners long before we got on the Commission. I want to thank our legal team for doing the job that they did. Unfortunately this sounds like one of those decisions where the courts are going to say we have to mix some federal into this as well as some state jurisdiction. I'm sure our legal team will go back to work and look at some successful states who have won these debarment issues. Thank you.

Agenda Item No.11: Change Orders July & August 2020

Dwane Kailey presented the Change Orders for July & August, 2020, to the Commission. These are informational only. If you have any questions, please feel free to ask. Commissioner Jergeson said I understand why we need to approve change orders that have a dollar amount where there was more work added and therefore they charged more or in a couple of cases like Loma East and West, where apparently they were relieved of some work and therefore saved us some money. I see on some of these the change order amount is zero. Why are we having a change order on those if it didn't cost anything?

Dwane Kailey said for clarity, as we've discussed in previous Commission meetings, these are being presented simply for your information. We're not asking for approval from the Commission for these anymore. We have to do a Change Order any time we're adjusting the contract. A lot of times the zero cost Change Orders are where

we've updated a specification and that specification is important enough to where we Change Order it into the existing contract. Again, that is a modification to the contract so we have to get the contractor's written approval for modifying that contract. Again, we're simply presenting these to you for your information.

Commissioner Sansaver said any change of scope needs to be added to that document. So again, it may not cost anything but we've changed the scope of the work so it needs to be registered that the change was made. Dwane said that is correct. We need to get the contractor's written signature that they agree with the modification and that there was no additional cost due to it.

Agenda Item No.12: Letting List July & August 2020

Dwane Kailey presented the Letting List for July & August, 2020, to the Commission. These are informational only. I need to heavily caveat this, due to timing we produce these well ahead of the TCP discussion. Changes in the TCP are not reflected in the Letting List but they are presented for you review and discussion. If you have any questions, please feel free to ask.

Agenda Item No.13: Liquidated Damages

Dwane Kailey presented the Liquidated Damages to the Commission. These are informational only. There are two projects that we had Liquidated Damages on.

SW of Lodge Grass SW. Contractor was Riverside. They had three days of liquidated damages totaling a value of \$6,198.00. They are not disputing those charges.

Secondary 359, Junction MT 69 to Harrison. Contractor was LHC, Inc. They had seven days of liquidated damages totaling \$11,438.00. They are not disputing those charges.

Next Commission Meeting

The next Commission Conference Calls were scheduled for November 2, 2020 and December 1, 2020. The next Commission Meeting was scheduled for December 17, 2020.

Adjourned
Meeting Adjourned