

Montana Transportation Commission

**August 29, 2019 Meeting
Commission Room
2701 Prospect Avenue
Helena, Montana**

IN ATTENDANCE

Barb Skelton, Transportation Commission Chair
Greg Jergeson, Transportation Commissioner
Noel Sansaver, Transportation Commissioner
Tammi Fisher, Transportation Commissioner (by phone)
Mike Hope, Transportation Commissioner
Mike Tooley, Director MDT
Pat Wise, Deputy Director MDT
Lori Ryan, Commission Secretary
Dustin Rouse, MDT
Val Wilson, MDT
Lynn Zanto, MDT
Kevin Christensen, MDT
Paul Johnson, MDT
Brian Hasselbach, FHWA
Doug Havermann, Bike Walk Montana
Davie Smith, MCA
Reginald Killsnight, Northern Cheyenne
Debbie Charette, Northern Cheyenne
Lane Spotted Elk, Northern Cheyenne
William WalksAlong, Northern Cheyenne
Hal Fuglevard, Knife River

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 with the Pledge of Allegiance. After the Pledge of Allegiance, Commissioner Skelton asked for introductions.

Director Tooley introduced a new member of the team. Last time we introduced Kevin Christensen as the Chief Operating Officer. Of course when a change like that happens it echoes through the rest of the organization. So we'd like to introduce Jake Goettle to you this morning, who is taking the place of Kevin Christensen as Construction Engineer for the State. Kevin Christensen said Jake has a lot of years with the department. He's very well rounded; he's done time in Construction in the field, the Environmental Bureau, and most recently was the Bureau Chief for our Construction Contracting Bureau. He brings a lot to the table and we're excited to have him. Commissioner Skelton congratulated him and welcomed him.

After introductions Commissioner Skelton wished Commissioner Jergeson and his wife a Happy Anniversary, 38 years.

Approval of Minutes

The minutes for the Commission Meetings of March 14, 2019, April 24, 2019, June 27, 2019, and July 23, 2019 were presented for approval.

Commissioner Jergeson raised a question on page four of June 27th minutes, we were discussing the language that I raised in the order about declaring it not to be a contested case after it had been fully operated as a contested case throughout. There

was a lot of discussion from a lot of different Commissioners that that morning was not the time or place to discuss the grave a matter and stated we would talk about it at some later meeting when we could take more time to really examine all the various issues that might be included in that. How do we get that kind of a conversation turned into an agenda item at some subsequent meeting? Val Wilson, Chief Counsel, said we have Agenda Item No. 21 at the end of the meeting today entitled “Todd Cusick Litigation Update”. With your permission that would be an appropriate time to discuss your concerns.

Commissioner Fisher moved to approve the minutes for the Commission Meetings of March 14, 2019, April 24, 2019, June 27, 2019, and July 23, 2019. Commissioner Jergeson seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item 1: Construction Projects on State Highway System Neill Avenue – Helena

Lynn Zanto presented the Construction Projects on State Highway System – Neill Avenue, Helena to the Commission. Under MCA 60-2-110 “Setting priorities and selecting projects,” the commission shall establish priorities and select and designate segments for construction and reconstruction on the national highway system, the primary highway system, the secondary highway system, the urban highway system, and state highways. This statute exists to ensure the safety of our system, protect transportation investments, and encourage coordination on public and private infrastructure improvement projects that impact MDT routes.

Neill Avenue – Helena

The City of Helena is proposing modifications to Neill Avenue (U-5812) to promote pedestrian safety at the Front Street and Fuller Avenue intersections. At Front Street, the City intends to reconstruct the intersection, modify storm drains (and gutters), and upgrade pedestrian crossing features. At Fuller Avenue, the City plans to reconstruct the intersection, modify storm drains (and gutters), upgrade pedestrian crossing features, and install bulb-outs.

MDT headquarters and District staff have reviewed and concur with the recommended improvements. The City of Helena will provide 100 percent of project funding and will be required to complete MDT’s design review and approval process (to ensure that all work complies with MDT design standards). When complete, the City will assume all maintenance and operational responsibilities associated with these improvements. Thus, MDT will not incur additional liability or maintenance costs as a result of the proposed improvements.

Summary: The City of Helena is proposing modifications to the Urban Highway System to promote pedestrian safety on Neill Avenue in Helena. Specifically, the City of Helena is proposing to reconstruct the intersections at Front Street and Fuller Avenue. Additionally, pedestrian crossing features will be improved (at both locations) and bulb-outs will be added near Fuller Avenue.

Staff recommends that the Commission approve these modifications to Neill Avenue in Helena - pending concurrence of MDT’s Chief Engineer.

Commissioner Jergeson moved to approve the Construction Projects on State Highway System – Neill Avenue, Helena. Commissioner Sansaver seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item 2: Construction Projects on State Highway Harrison Avenue – Butte

Lynn Zanto presented the Construction Projects on State Highway System – Harrison Avenue, Butte to the Commission. Under MCA 60-2-110 “Setting priorities and selecting projects,” the commission shall establish priorities and select and designate segments for construction and reconstruction on the national highway system, the primary highway system, the secondary highway system, the urban highway system, and state highways. This statute exists to ensure the safety of our system, protect transportation investments, and encourage coordination on public and private infrastructure improvement projects that impact MDT routes.

Harrison Avenue – Butte

Northwestern Energy is proposing modifications to the approaches into their facility on Harrison Avenue (N-29) in Butte. Northwestern Energy is proposing to remove three existing approaches in favor of a new single approach and NB turn-lane near the Fat Jack Road intersection with Harrison Avenue.

MDT headquarters and Butte District staff have reviewed and concur with the recommended improvements. Northwestern Energy will provide 100 percent of project funding and will be required to complete MDT’s design review and approval process (to ensure that all work complies with MDT design standards).

Summary: Northwestern Energy is proposing modifications to the National Highway System to improve access into their facility on Harrison Avenue in Butte. Specifically, Northwestern Energy is proposing to remove three existing approaches in favor of a new single approach and NB turn-lane near the Fat Jack Road intersection with Harrison Avenue.

Staff recommends that the Commission approve these modifications to Harrison Avenue in Butte - pending concurrence of MDT’s Chief Engineer.

Commissioner Hope moved to approve the Construction Projects on State Highway System – Harrison Avenue, Butte. Commissioner Fisher seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item 3: Montana Essential Freight Rail Loan Program Port of Montana – Rail Expansion Project

Lynn Zanto presented the Montana Essential Freight Rail Loan Program, Port of Montana – Rail Expansion Project to the Commission. The Montana Essential Freight Rail Loan Program is a low-interest revolving loan fund for construction, reconstruction or rehabilitation of railroads and related facilities in the state. The program was established under Montana Code 60-11-113 to 120.

Eligible applicants include railroads, cities, counties, rail companies and regional rail authorities. Port authorities may also qualify - provided they have been included in the state transportation planning process.

Eligible activities include projects that preserve and continue operation of viable railroad branch lines and projects that develop, improve, construct, purchase, maintain or rehabilitate intermodal transportation facilities, branch lines, short lines, sidings, light density railroad lines and rolling stock (including rail cars).

Rehabilitation and improvement projects require a 30 percent loan-to-value match. New construction projects require a 50 percent match.

Summary: The Port of Montana Port Authority has applied for a loan in the amount of \$495,000 for a rail expansion project that will add four transload tracks (and realign an existing track) at their facility in Butte.

Staff recommends making this loan to the Port of Montana Port Authority.

Commissioner Skelton asked where the money came from. Lynn Zanto said I don't remember when this was established in state code but it used to be federal money. We have three existing loans we've done in the last ten years that are paying back into the account. It is also in our state investment pool so it does have interest. Commissioner Sansaver asked how often people put in for that loan. Lynn Zanto said basically each January, if we have a couple of hundred thousand or three hundred thousand which we can lend, we'll solicit by sending a request application every January. We don't get a lot of interest in it. Our other three loans are to the Board of Shelby, and one to the Railroads in eastern Montana. Commissioner Hope asked what the interest rate was. Lynn Zanto said she didn't have that specifically. When we loan it out, we do it at zero interest; we're not in the money-making business with this, we're just here to help support. Commissioner Sansaver said you do it up to the extent of \$500,000 on a yearly basis, if we have \$500,000 in that loan program. Lynn Zanto said actually if we have more than \$500,000, we could lend that full amount. Right now the total account is \$1.3 million but we have to keep \$500,000 as a balance, so we have about \$800,000 to lend but the only application we received was for the \$495,000. If they wanted \$600,000, we have an adequate balance to do that.

Commissioner Fisher asked if rail use was on the rise in Montana. If the funds aren't being utilized and we only have one applicant per year, it would seem that we're missing something. Either rail use isn't continuing which hasn't been my experience, but you'd think that the rail infrastructure need was high. This is a smokin' deal for anybody who wants it. Lynn Zanto said I don't know the answer to that question. I don't think rail use is on the decline, it's probably pretty steady. Director Tooley said it changes; it has gone from crude oil to egg products, coal has been up and down, but in the end it is a wash right now. Commissioner Skelton said she works with API and we are still shipping significant oil through Montana from east to west. Our numbers show that the rail is on the increase a little bit but not significant. Eastern Montana has significant rail use.

Commissioner Jergeson said this is a transload facility which is for freight going on and off from trucking to rail and visa-versa. That's a different kind of traffic than transit running through. I've been told the number of soybean trains that go across the highline is down by five trains per day due to the trade war with China. I think all together the railroad industry is going to always be viable but the numbers will be up and down but they are going to be vital to what's going on. They have to go through Montana, they can't get around us.

Commissioner Sansaver moved to approve the Montana Essential Freight Rail Loan Program – Port of Montana, Rail Expansion Project. Commissioner Hope seconded the motion. All Commissionees voted aye.

The motion passed unanimously.

**Agenda Item 4: Interstate Maintenance (IM) Program
Project – Gore Hill Interchange, Great Falls**

Lynn Zanto presented the Interstate Maintenance (IM) Program Project – Gore Hill Interchange, Great Falls to the Commission. The Interstate Maintenance (IM) Program finances highway projects to rehabilitate, restore, resurface, and reconstruct routes on the Interstate System. Montana’s Transportation Commission allocates IM funds to MDT Districts based on system performance.

At this time, the Great Falls District is proposing to reconstruct the Gore Hill Interchange (on I-15 in Great Falls) to address congestion, safety, and operational issues in the vicinity of the interchange. The proposed project would include replacement of the bridge structure, installation of roundabouts at the northbound and southbound interchanges, realignment of the South Frontage Road, and the addition of a climbing lane on Gore Hill.

The estimated total cost for all project phases is \$16,563,000 (\$15,026,000 federal + \$1,537,000 state) – with the entirety of the federal funding originating from the Interstate Maintenance (IM) Program.

Summary: The Great Falls District is requesting Commission approval to add a reconstruction project (to improve the Gore Hill Interchange) to the Interstate Program. The proposed project is consistent with the goals and objectives identified in the Performance Programming (P3) Process – as well as the policy direction established in TranPlanMT. Specifically, roadway system performance, traveler safety and mobility will be enhanced with the addition of this project to the program.

The estimated total cost for all project phases is \$16,563,000 – with the entirety of the federal funding originating from the Interstate Maintenance (IM) Program.

Staff recommends that the Commission approve the addition of this Interstate project to the highway program.

Commissioner Jergeson moved to approve the Interstate Maintenance (IM) Program Project – Gore Hill Interchange, Great Falls. Commissioner Fisher seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item 5: Highway Safety Improvement Program Additions UPN 9797-000, UPN 9796-000

Lynn Zanto presented the Highway Safety Improvement Program Additions – UPN 9797-000, UPN 9796-000 to the Commission. The Highway Safety Improvement (HSIP) Program makes federal funding available to states to assist with the implementation of a data-driven and strategic approach to improving highway safety on all public roads. In Montana, the primary focus of the HSIP program involves identifying locations with crash trends (where feasible countermeasures exist) and prioritizing work according to benefit/cost ratios.

At this time, MDT is proposing to add 2 new projects to the HSIP program – one in District 2, and one in District 3. The projects on the attached list (Attachment A) meet the criteria set forth for HSIP-funded projects. If approved, it would be MDT’s intention to let these projects individually.

The estimated total cost for all projects is approximately \$10,508,000.

Summary: MDT is requesting Commission approval to add 2 projects (listed on Attachment A) to the Highway Safety Improvement Program. The proposed projects are consistent with the goals and objectives identified in the Performance Programming (P3) Process – as well as the policy direction established in

TranPlanMT. Specifically, traveler safety will be enhanced with the addition of these projects to the HSIP program.

The total estimated cost for all projects is approximately \$10,508,000

Staff recommends that the Commission approve the addition of these HSIP projects to the highway program.

Commissioner Fisher asked what a cable rail looked like; is it cables strung down the median to keep vehicles from crossing? Pat Wise said that was exactly it. It is the cable they run from Billings to Laurel. Commissioner Fisher asked how tall it was. Pat Wise said about 36 inches. Commissioner Fisher asked if it sits on top of a median or is it in the center grass way. Kevin Christensen said we actually have to raise the median a little bit because we can only have certain grades going into it but then all the posts are put into a sleeve so they are easily replaced when and if they are impacted. It will still be somewhat of a median but we do have to raise it up so the grade isn't as steep going into it. This is coming from the huge benefits we've seen in the reduction of crashes in the Billings area. We recently conducted a research review looking at all our Interstates where this would be beneficial and this is just a few of the locations we've identified where we want to move forward with installation. We saw a huge reduction in fatalities around of Billings because of it.

Commissioner Fisher moved to approve the Highway Safety Improvement Program Additions – UPN 9797-000, UPN 9796-000. Commissioner Hope seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item 6: Secondary Roads Program Additions to STPS Program – UPN 9520-001, UPN 9798-000, UPN 9799-000, UPN 9800-000, UPN 9801-000, UPN 9802-000

Lynn Zanto presented the Secondary Roads Program Additions to STPS Program – UPN 9520-001, 9798-000, 9799-000, 9800-000, 9801-000, and 9802-000 to the Commission. The Surface Transportation Program – Secondary (STPS) finances highway projects on the state-designated Secondary Highway System. Secondary Roads are those routes that have been selected by the Montana Transportation Commission to be placed on the Secondary Highway System.

Secondary Roads Program funding is distributed by formula and is utilized to resurface, rehabilitate and reconstruct roadways and bridges on the Secondary System. Capital construction priorities are established by the Counties and pavement preservation projects are selected by MDT (per the guidance in MCA 60-3-206).

At this time, MDT is proposing to add 6 new projects to the STPS program in District 5. The projects on the attached list (Attachment A) meet the criteria set forth for STPS- funded projects. If approved, it would be MDT's intention to let these projects individually.

The estimated total cost for all project phases is \$16,385,000 (\$14,186,000 federal + \$2,199,000 state match) – with the entirety of the federal funding originating from the Secondary Roads (STPS) Program.

Summary: MDT is requesting Commission approval to add 6 projects (listed on Attachment A) to the Secondary Roads Program. The proposed projects are consistent with the goals and objectives identified in the Performance Programming

(P3) Process – as well as the policy direction established in TranPlanMT. Specifically, roadway system performance and traveler safety will be enhanced with the addition of these projects to the program.

The estimated total cost for all project phases is \$16,385,000 (\$14,186,000 federal + \$2,199,000 state match) – with the entirety of the federal funding originating from the Secondary Roads (STPS) Program.

Staff recommends that the Commission approve the addition of these STPS projects to the highway program.

Commissioner Jergeson asked when they approved this, what year do we anticipate these projects will be bid. Lynn Zanto said I can't tell you the exact year but usually with preservation type projects, they are sooner rather than later; two to three years. If you think about the TCP, we build in preservation work and it's really about the right treatment at the right time, so timeliness of those is important.

Commissioner Fisher moved to approve the Secondary Roads Program Additions to STPS Program – UPN 9520-001, 9798-000, 9799-000, 9800-000, 9801-000, 9802-000. Commissioner Sansaver seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

**Agenda Item 7: Reapproval of Project Due to Increase
In Scope and Cost
SF 169 Kootenai Cr Rd Sfty (HSIP Project)**

Lynn Zanto presented the Reapproval of Project Due to Increase in Scope and Cost – SF 169 Kootenai Cr Rd Sfty (HSIP 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 Highway Safety Improvement Program is proposing to modify the scope for the *SF 169 Kootenai Cr Rd Sfty* project. The project was originally scoped (and approved) to install warning signals and modify jersey rail (to remove sight obstructions) at the intersection of US-93 (N-7) and Kootenai Creek Road. The estimated total cost for the project (all phases) was \$106,000

Early in project development, the design team noted that the jersey rail modifications couldn't be implemented due to safety concerns associated with the removal of handrails. In order to ensure continued bike/ped safety in the area, and to move forward with the original intent of the project (elimination of sight obstructions at the intersection), MDT is now proposing to remove all existing bike/ped features from the roadway bridge and construct a separate bike/ped bridge on the west side of US-93.

The estimated total cost for this project (all phases) is anticipated to be \$1,118,000. The revised benefit-to-cost ratio is estimated to be 9.02.

Summary: MDT is requesting Commission approval to modify the scope of the *SF 169 Kootenai Cr Rd Sfty* project (from a warning signal / jersey rail modification project) to a project that will install a new bike/ped structure on the west side of US-93 – at the request of the Highway Safety Improvement Program. The total estimated cost for the project (all phases) is anticipated to be \$1,118,000. No changes are proposed to the project limits.

Engineering Division and Missoula 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 (P3) as well as the policy direction established in TranPlanMT. Specifically, traveler safety features will be enhanced with this project modification.

Staff recommends that the Commission approve the modified scope of work and cost increase for this Highway Safety Improvement Program project.

Commissioner Skelton said it looks like the one over the bridge where there is a separate path on the capital exchange. So this will be similar to that? Dustin Rouse said the zone might be different but the intent is the same. Commissioner Fisher asked if it's an add-on widening the bridge for extra space. Dustin Rouse said it would be a separate structure; it's moving the pedestrians away from traffic out of that intersection. When they started going through scoping of the safety project with the rail revision, it wasn't addressing the pedestrian safety. So moving the pedestrians away from the traveling vehicles accomplishes that. It's a real safety issue. It is a completely separate bridge structure.

Commissioner Fisher moved to approve the Reapproval of Project Due to Increase in Scope and Cost – SF 169 Kootenai Cr Rd Sfty (HSIP Project). Commissioner Jergeson seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Public Comment

Doug Havermann, Bike Walk Montana

I wanted to report on a couple of great things that are happening since I was with you last. One thing you may have heard, there was unfortunately a fatality over on Hwy 2 over near Butte. A 72-year old cross-country rider, about 10 miles from the end of his week-long trip, was struck by the mirror of an RV and killed just outside of town on Hwy 2 going up towards Pipestone Pass. The Butte community has really responded to this. There is a really strong bicycling community there that sponsors a very large mountain bike race, the Butte 100. It's always where the Continental Divide and the Mountain Bike Trail comes through Butte. Myself and Jimmy Sullivan from Adventure Cycling met with them and they were wondering what they could do. They've had some interactions with the department in the past and I'm proud to report they will be meeting with the District Manager and talking about options. I also believe the Director is trying to schedule a meeting for all of us to come down there and talk about MDT in general and I'm very encouraged by that. I think that's how the best public comment happens when District Managers become part of the community and work on those local issues. I think that's real positive. Also two weeks ago there was a ride in Missoula with the local District Manager there and I heard great things from that. They looked at a lot of things and talked a lot; again connecting our transportation providers with the local community is the best way to go in terms of public comment.

The second thing is we do work very closely with Adventure Cycling. That organization grew out of Bike Centennial in Missoula. They are a national organization that creates bike routes and lead tours, and sells bike equipment. If you ever have a chance to be in Missoula you can visit them. They are referred to as the Mecca of cross-country cycling all across the country and its right there in Missoula. They have a beautiful office with all sorts of interesting old bikes. We've been contacted by them asking about ... there's two routes that go across Montana, the Northern Tier which traverses across Hwy 2 and the Lewis and Clark Route which is

a split route that tries to follow as closely as possible to Lewis and Clark's route through Montana. They've spent a lot of time and went a lot of places. They have a very active group of folks who use their services and arrange for tours, and because of comments from riders, they are considering re-routing the Northern Tier off Hwy 2. They've had a lot of issues with drivers and challenges up on Hwy 2 and they've asked us for input. Some of my Board members are talking about coming down Hwy 89 and hooking into the Lewis and Clark Route which traverses across near Great Falls and over to Fort Benton, etc.

I just wanted to let the Commission know. I know we have three that are on the Northern Tier Route. I have encouraged them to be directly in touch with the department and work directly to figure out where these routes would be. The department has done some great things including the map that shows the rumble strips and the shoulders. I'm planning on going up to Hwy 2 Highline later in the fall and hope to meet with our advocates up there and folks that are interested. There is economic value to these folks; they spend about twice as much as a normal tourist. They get a chance to see our great State and interact with the public. Of course we all know there are mixed reactions to bicyclists on the road but I think that's something. I'm not asking for any particular action but I just wanted to let the Commissioners know that they are considering that and I've tried to connect them with the MDT Planners to work on that. I've heard from both sides and conversations about where those routes are would be a positive thing. Thank you.

David Smith, Executive Director of Montana Contractor's Association (MCA)

I'm here to introduce myself in a more formal setting. I know many of you already and our office has been working with several of the leaders on your staff towards some exciting projects. I think we're going to be working on a partnership charter where contractors and the agency will be working closer together with common goals and agreed upon outcomes prior to the start of projects. We are really looking forward to that process. So I'm just here to introduce myself and let you know who I am. If you have any questions at any time, just give me holler. Thank you.

Reginald Killsnight, Assistant Director for the Northern Cheyenne Tribal Transportation Program

We brought our Tribal leadership up because we are in full support for the single uniform speed limit through the 212 Corridor. I'll let some of our Tribal leaders speak.

Debbie Charette, Tribal Council on the Muddy Side

I'd like to say the corridor that we're talking about for the 65 mph runs from the Interstate at Crow to Wyoming and goes, east to west, through our Reservation. Actually the Reservation is our community and we have a lot of bus stops. We have four schools that run busses every day on the 212 road. So we have kids out there and the 65 mph will make it safe for our children. We are in total support of that. Because of the semi's that come, they think they have to drive the max speed limit just because the cars get to do that. I live on 212 and sometimes it's scary trying to get to my turn off going home. They are barreling down on me, I have my blinker on and hitting my breaks, but I have to pull off to the side to get into my driveway. It's the semi's that are barreling down on all of our community and all the people traveling through our corridor.

Lane Spotted Elk, Tribal Council for the Northern Cheyenne Tribe

The Northern Cheyenne, as Councilwoman Charette mentioned, is in full support of the recommendations presented for the US 212 Corridor. To reiterate the discussions about safety, I think there needs to be a look at the signage, the pull-out areas because the truck traffic is well above the state average. We're sitting above

40% where the state average is 6%. It's a matter of safety for our Tribal members but also the people passing through. The Tribe would like further discussions on that as well. We see it every day, the passenger cars and trucks at variable speed limits, how that affects safety. We're told that the uniform speed limit would definitely help with that safety aspect. We were briefed a few weeks ago by the Glendive Administrator and explained the study to us. We appreciate that. Another piece of that is enforcement - that is another thing the Tribe is really going to advocate for, enforcement of the speed. We've been in talks with different departments and our law enforcement. Debbie Charette said the enforcement part, if we could just have Highway Patrol come and make themselves known through there, it would make a lot of difference.

Commissioner Sansaver asked, on the enforcement issue, are you guys deputized down there? Debbie Charette said not yet. Commissioner Sansaver said that would be a huge help - get cross deputized so that State Patrol has more authority. I know a lot of times on my Reservation up at Fort Peck, before we got cross-deputized, the State Patrol would be kind of absent. It was a Fort Peck issue, we'll pull you over but we have to wait for a Tribal officer to come ticket. So if you can get that done, I think you'll start seeing more presence by the State Patrol. Debbie Charette said our part is the Reservation but it also is from 94 to our Reservation, so we have that part. Then also past our Reservation to Wyoming, so if they could make a swipe through there daily or twice a day, I think it would be good. Just be visible.

Lane Spotted Elk said this is the beginning of our Reservation near Busby, so you can definitely see the trends of citations. It seems like there's citations all the way to our Reservation line but once you get to the Reservation line, according to this, there are no citations until you pick back up after Ashland. This is exactly what you're talking about. Part of it too is the systems the BIA uses aren't entered into the database either, so that data isn't being recorded.

Commissioner Fisher asked how many Tribal Officers they have doing enforcement. Lane Spotted Elk said currently we have four officers for the entire Reservation. Commissioner Fisher asked how many square miles. Lane Spotted Elk said 440,000 acres. We are looking at different resources - the Indian Safety Program and the Cross Deputization Agreement, so we're doing our research too and any recommendations this Commission would have for the Tribe would be appreciated. Commissioner Skelton asked Commissioner Sansaver if he understands how the cross deputization works and could he help with that process.

William Walks Along, Tribal Administrator Northern Cheyenne

I've been working with the Tribal Government for 27 years, worked with five presidents, and I've been the President and Vice President of the Tribal Council. So I probably have the most contact with the Montana Department of Transportation than anyone else in our Tribal Government. The first thing I would say is things have improved in our government-to-government relations with MDT. When I was the President we had an agreement sent back and forth and we were at a meeting in Billings and I had our Attorney do some slight edits. We handed it to the Director of MDT and he said it has to be on our paper; that's how petty it got back then. I told him, he's got it on his computer and you can print it out on your paper. That's how petty it was. Things have improved since then. We come through the front door now and have our flag up in the Governor's office. In comparison now, actually being invited to comment on a study. When I was there in the initial meeting and they mentioned they had done another study in northeast Montana and how it helped them improve and address issues in a corridor where they made the speed limit uniform. So I kind of knew about this. When our Morningstar basketball team goes and plays in Broadus, we all watch out for deer and try to leave in daylight. If we go east we all try to leave in the daylight hours because of the wildlife on the road. In

the fall all of our Tribal people watch out for cattle trucks. We all know that is very dangerous at that time of the year, and they go 90 mph, so it's very dangerous.

When I first got on the Council in 1992, the first time they mentioned cross-deputization, some of the old gentleman who served on the Council back then who only spoke Cheyenne, said "we can't give the state an inch. We cannot allow any kind of jurisdiction on our Reservation. They'll take it and run with it and try to have state law imposed on our Reservation." Our former Chairman told me, "when they come out and do a car crash with the non-members, do your job and get the hell off my Reservation." So I've experienced that and had discussions with former leaders who had bad experiences previously with government-to-government. I always say that to some of our staff and remind them that this is an official government-to-government meeting with our elected representatives. My office works very closely with the President and have been for years now. Transportation is a top priority for the Tribe. It is. That is why the Tribe wants to have more authority or self-determination. That's why our Tribe went with the Federal Highway Agreement. We can plan and have our roads engineered and get community input. I know they've had public meetings with our processes and with FHWA and we always like to be a good partner. I sat down with MDT officials and the guys that stop the trucks gave a presentation for us about their duties and purposes. I see them more and more on the Reservation over by Busby – weighing the trucks and checking them out. That's something I haven't seen in years. We've had some terrible fatalities on the Reservation on 212 with pedestrians getting run over. The last one that sticks in my mind was when a young man got hit over there by Muddy Custer. I know because when families lose their people, they come to the President's office and request burial assistance; that's where we see these families. They come in a state of shock. It is very important that we have something, anything that's going to improve highway safety through that corridor for us from Busby to Ashland. It would be real helpful to see you do a study on 65 mph to evaluate whether there is a positive impact. I'm for it.

The other thing is I don't go down and check my horses anymore. The trucks use that road by the roundabout, they just go right straight through, they don't even take the turn; they just thump right across the cobblestone. I've seen them multiple times. I know there's issues with law enforcement. There's been a Cross-Deputization Agreement that has come through and Chief McKinnon has stated that his legal people need to review that document. It's been a slow process. I got a copy of that in February after we made a trip to DC and got a copy of a draft that was sent by the Assistant Attorney General. Our attorney has a copy of it. We just need to move that forward and they want to limit it to that corridor because some of our Tribal members concerns about jurisdictional issue. But there is a draft Cross-Deputization Agreement circulating and we probably need to kick-start it. For a while we had less than four officers working on the Reservation; we're funded for about 12 but the background checks take more than year or more through OPM. I know the President is pressing the BIA to somehow get that period of time shortened for background checks. I read through them. We were in the process of contracting with the BIA Law Enforcement and Detention, the background checks for law enforcement is like going through military security. They get down to wanting a list of your childhood friends – down to that level, who you've associated with at every turn in your life. It's a thick pile of documents that they need to go through to review and approve you to become a BIA officer on the Reservation. That's why it takes a long time – some people drop off, they don't want to put up with that. They have families to take care of; they're not going to wait for a year or longer to have a background check done on them.

I would commit to moving this cross-deputization draft that we have forward. I don't know if the Highway Patrol has gotten it but the Big Horn and Rosebud County Sheriff have it, but we do need to start it. We need to put in the package for the 65 mph and have cross-deputization part of it and evaluate it together.

Commissioner Skelton said thank you for coming and you are welcome to come to this meeting any time we have a meeting; you are more than welcome. I think I can speak for the Director and the staff, you are always welcome to contact any of us at any time if we can help on your transportation issues. I drive that road periodically and I know there's a lot of pedestrians on it, a lot of wildlife on it, so you have the support of this Commission if there is anything we can do to make your lives safer.

Commissioner Sansaver said thank you to the members of the Tribe. If there is any way I can help you with the cross-deputization, I'd be more than happy to do that. I was in on the ground floor when we did it in Fort Peck. I'm an enrolled member of the Assiniboine so I'm very familiar with the cross-deputization issues. Also the District Administrator, Shane Mintz and I have been in touch quite a bit over the last couple of months on the corridor 212. He and I will be making a visit through there in the next couple of weeks and we intend on stopping and visiting with you all to see what else you may need. The roundabout – we've talked about building that up in the middle so the trucks have to utilize it correctly. We've been talking about it for a couple of months and it is a top priority. Thanks for coming. We truly appreciate it. We don't get to hear from a lot of people on speed results, so thanks for coming.

Director Tooley said I appreciate the work you did on the Cross-Deputization Agreement on Fort Peck. You know having received my autograph, I'm a former state trooper myself. I was cross-deputized on Fort Peck years and years ago and then later, when I became Chief of the Patrol, that Agreement had matured to the point where there was a level of comfort between the two governments where we were able to hire and station an enrolled Tribal member in Poplar. He remains there to this day. How did that work out? He was a national finalist for Trooper of the Year in 2008. So, I'm excited to hear the work is going on with that Cross-Deputization Agreement and I can't say anything for Col. Butler, but I do know he has somebody in Colstrip, Broadus, and Forsythe, and two or three in Hardin. As you move forward with that, and if you reach that agreement and that matures, maybe one day in the future where you have somebody stationed in Lane Deer that is from Lane Deer. I encourage you to continue that work because it does work. Lane Spotted Elk said we actually just had a Tribal member graduate from the Academy stationed in Fort Peck.

Agenda Item 8: Performance Programming Process – P3 Funding

Lynn Zanto presented the Performance Programming Process – P3 Funding to the Commission. This is an annual presentation to the Commission. One of your roles within statute is to approve the funding to our Tentative Construction Program scheduling. Since about the early 2000's, the department implemented what we call P3 which is our Performance Programming Process. It is an asset management based approach to coming up with an optimal funding plan that allows us to invest our funding to meet certain funding goals, primarily urban by pavement performance. We survey the public regularly on what's most important to them in terms of us investing in the highway system and pavement condition is the most important to the public. This aligns with that. I will say P3 at the national level stands for Public Private Partnership but we coined the term before nationally, but because of that and because it's getting so prominent, we have modified what we're calling it. Going forward it will be PX3 to help avoid confusion. I will turn it over to Paul Johnson.

Paul Johnson said we have some new folks here that aren't familiar with our Performance Programming Process. The short version of this particular process is it is our Asset Management Process. As we go through the slides we'll be showing you a little bit of our philosophy and how it gets integrated into our funding decisions. All questions are welcome. I will try to get to the recommendations, but we can stop at any time if you see anything that catches your interest. At times I will defer to

other folks here that are experts on the specific topic so they can add some information but for the most part, we're going to go right through it.

The topics we'll be discussing today: PX3 Process and our Tentative Construction Plan activities that will be coming up shortly. This will build to something. A lot of folks have not participated in those meetings; this is the funding framework for those meetings. So when we get to scheduling projects, we need to allocate the funds before we complete projects in the appropriate locations. This is a vital piece of that particular effort.

We're going to talk about some recent developments. There's a lot of news at the federal and state level. We're going to discuss some of the budgetary factors that drive this analysis. We're going to do a review of systems performance and then we're going to have some recommendations.

Overview of the process

There are some familiar things you have done and actions you've taken recently. We are going to concentrate on the three items in the middle.

- Common Approvals or additions of the projects to the program
- Funding Distributions
- Reserves and Other Funding Issues
- Tentative Construction Plan meeting in October
- Project award approvals – those occur typically at every meeting through the year.

Recent Developments

Reauthorization – The State of Montana is very dependent on the federal dime, so Reauthorization is critically important to us. We're just moving out of the time period where we had the FAST ACT which established our funding levels through 2020. A couple of key items about that particular act where the program structure is similar to the previous Reauthorization which was MAP21. It added some provisions for freight and included some asset management and performance requirements, and its annual apportionment increases mirrored our anticipated inflation. The short version was the FAST ACT was good for the State of Montana. It kept our proportion of the federal program in place. It kept pace with inflation or beat it slightly. It was not a bad deal for the State of Montana. However, after federal fiscal year 2020, there is going to be a high degree of uncertainty. We have some initial discussions that are underway, no firm direction yet. Current assumptions are that the new highway will be similar to the FAST ACT. There is some early activity in the Senate and program extensions are a possibility. At this time the situation hasn't changed much.

This gives you a little bit about how the program has gone over time. You've seen we've gone through some very high growth areas. If you looked at SAFTEA LU, we had some really high growth with that bill. Then it got flat with MAP21. Then we started to see some increases through the FAST ACT. One thing of note is up until the FAST ACT, you notice that the red line is below the blue line (referring to graph). The blue line is apportionment. When the federal government gives you your money to spend, it is your apportionment level. Typically they will give you an obligation amount less than that. This is an inverse of what we've seen. That means we've been able to obligate more money than has been apportioned to us. That has some consequences.

If we move forward to some of the federal and state challenges we see, we don't have any appropriations approved for 2020 yet. That's pretty typical and there is a possibility we'll get Continuing Resolutions. That means instead of getting the whole block of money for a year, it will dribble in a little bit at a time. That's pretty much how we've been operating for quite a few years. The big news is we have a federal program decision that's scheduled to happen in 2020 unless Congress acts to repeal Section 1438 of the FAST ACT. Without this Congressional repeal, MDT programs will be affected, there's no doubt. Our Administrative staff is working hard to minimize potential impacts to our program. There are efforts to repeal this section of the FAST ACT.

Lynn Zanto said on September 30th FHWA will calculate the amount that will be rescinded. They are looking at rescinding money that we didn't have enough spending enough to touch. But that balance also gave us flexibility in our program ... we have an NH project ready to go and we can move money from the primary system and vice-versa. That flexibility if the rescission sticks will be out the window. If Congress doesn't repeal it, the next year's TCP will include a lot of intense discussions on how to move our program forward. The Senate has introduced a bill to repeal the rescission and I think there's a like bill drafted on the House side. We remain hopeful but we have to move forward like it's going to happen.

Commissioner Fisher said my understanding of the FAST ACT is that it has its own expiration date. The whole point of the FAST ACT was to get from bid to build a lot quicker, so we have all these projects that are let but the permitting process is not streamlined which prevents projects to actually get built and increases the cost of building the project. My understanding the goal of the FAST ACT was to get all of the agencies that do permitting to work together to streamline that process because they were duplicating efforts across the board. There is a Counsel that is supposed to be working on that. Do we have any indication so that our Senators and Congressman can have confidence in the effect of the FAST ACT in actually streamlining the bid-to-build time period. I have seen it and I've been monitoring their dashboard and it's junk. I haven't seen anything that has done anything except create more bureaucracy or just another dashboard of stuff.

Paul Johnson said typically there will be a direction and they'll either build on it or steer away from it. MAP 21 laid some of the groundwork related to performance, and it was continued on in the FAST ACT. So they are either going to build on it or not. I would say "mixed results" is a good way to put it. There is a whole bunch of ways to measure the success or failure of a Reauthorization Act. In the early going, we only have one area that has really weighed in. Early on there is a flavor of keeping a lot of the FAST ACT going. The area you emphasized is hard to measure; it's hard to see how much and will it bear fruit a little bit later on. Did you build a good foundation and are you building on that? It is yet to be determined. The flavor is to continue that.

Lynn said you are talking about the one federal decision that federal agencies work together. I know through our work with our AASHTO, we always push to streamline to get money on the road as soon as we can. So there is continual effort with that but part of the challenge is it's not all in the Transportation Bill, there's other acts like the Clean Water Act or the Clean Air Act, that isn't handled through the Transportation Bill.

Brian Hasselbach said part of the challenge, particularly in the implementation of the federal decision effort, is that to date much of the focus has been on much larger projects with coordination with multiple federal agencies. I think the approach will evaluate some of those efforts, gather some lessons learned, and look to apply some

of those to the rest of the program. At this point part of the challenge is we are really dealing with an apples-to-oranges comparison with much of the program.

Commissioner Jergeson said after my years of experience with the legislative process, I understand the dynamics in a legislative body that it's much more difficult to repeal something. So with a rescission requirement or a sunset, which is what the state uses, it is much more difficult to repeal that sunset than not. If a program doesn't have a sunset, it's much more difficult to take it away. So this kind of concerns me because in the last couple of years the Administration has proposed reductions in funding for the Transportation Program. You say don't worry about it, our Congressional people are pretty adroit at keeping things in place and from being cut but if there's a rescission that the Administration might use to affect the cut they've proposed in the President's budget, then it's much more difficult to get that money put back in. That is kind of what we're facing.

Paul Johnson said in the rescission itself, when you look at the amount of obligation authority that was granted to us to spend versus our apportionment, to a certain degree that came from underperforming other portions of the Reauthorization Bill. So rightfully, if you're going to rescind those monies, they never expected that we would ever be able to spend this. They want to utilize the funding for transportation issues, so the money should rightfully be over here rather than in the State Highway Program. Whether they can get there or not is another question. Awareness is high, there's a lot of things at stake, and folks generally agree that infrastructure should not be punished. We've got a lot of other stakeholders, at least 49 other states that are with us, and there's going to be pain across the board. So the awareness is there and the motivation is there to a certain degree but whether they can get it done or not is another question. The stakes are very high. Across the isle there is universal agreement that this would be a good endeavor to repeal this. There's a lot of support. This is one of the few things that might not get tripped up by party politics. So the stage is set. The awareness is there. The motivation is there. Hopefully they'll get to the finish line.

Highway Trust Fund

Paul Johnson said to add to the federal uncertainty is that we haven't answered the questions on the Highway Trust Fund. Revenue historically has been gas tax related. There have been a lot of ideas that have been floated for the next Reauthorization as to what that looks like. So, at the federal level in the next year, there will be a lot of moving pieces and parts. Our Administrative staff have been staying up late at night figuring out how we can best buffer ourselves against that. For instance, one of the things we can do is leave the fewest amount of unobligated dollars on the table as we can so that so that our share is as minimal as it can be. You can't go to zero but we can get as close as we can. We just had a discussion yesterday with our federal partners and that is about all you can do. We'll wait and see. We're aware of the situation; there's contingency planning efforts that will be underway if and when these come to pass. Of course, the Commission will be front and center if we have to make any radical changes based on these things we see.

There is a slight glimmer of an improvement in one area – state revenue are fund balances of state laws. So for a while the state fund at issue was where we had the deficit. There were questions as to whether we could match our federal funds but that situation has stabilized. It seems like we can never get all the pieces at the same time but maybe that's just the way we do business. Overall, from the planning perspective, we have to plan for the most likely scenario which is that the program will continue on in these directions.

Commissioner Hope asked if we stabilized because of the gas tax increase. Paul Johnson said yes. Without our agency we took steps to minimize our state

expenditures. There are some things we can do with regard to the match we use. I can pretty much say that wherever we can save a nickel or a dime of state dollars, we did – policies, procedures, match, or whatever it was, we saved and saved and saved. The main issue was that our federal program was growing but our state funds were not for the match. It just overwhelmed at some point. So it was more of a mathematical issue but we still tried to mitigate that as much as possible and then when we exhausted all the measures that we had at our disposal, that's where the gas tax came in.

Transportation Asset Management Plan (TAMP)

There are some good pieces of news. There were a lot of requirements that had to do with performance that came from the FAST ACT and MAP 21. We had to develop a TAMP which doesn't seem like a really big deal but it was a multi-year effort to develop a Transportation Asset Management Plan. It was a major endeavor. We submitted our initial TAMP back in 2018 and got it approved in July and then we submitted our final TAMP and we just got approval of our final TAMP. This means we are not subject to a lot of the penalty provisions from the FAST ACT and from MAP 21. So we're compliant; we don't have any major issues and we have no additional burdens that we have to carry with us. That is very good news that we don't have that.

Performance Reporting

We had some additional performance requirements that we have to meet as far as establishing performance targets with our initial TAMP and the reporting on those throughout the year. We submitted last July and there were no issues identified. So as far as our Transportation Asset Management Plan and Performance Reporting and also our State Freight Plan, which was approved in 2017, we meet all the requirements at the federal level with no conditions placed upon it. It doesn't seem like a big deal but it really is. That means we're doing good business. So we can maintain the flexibility and do the things that are important to the State of Montana without any diversion of funds.

That's kind of our federal program/state program bigger issues. So now I'll talk about our budgetary issues. There's a lot of information here but I'll summarize it fairly briefly.

Budgetary Issues

From year to year there are some general assumptions we have to make when we're doing our analysis. It's a ten-year look forward. As you know, our Tentative Construction Plan is five years, and we look five years beyond that to see what our needs are on the various systems. We have to make some assumptions about what the analysis is going to look like. We have to look at our federal growth which is about three percent beyond the FAST ACT, that's pretty normal. Our obligation reduction is typically about 10%. You saw that we were getting more money than we're actually apportioned which is not going to continue. Nothing really substantial in there. Our inflation rate has been relative low recently with a few exceptions on different project types. We have an IDC and a whole other bunch of assumptions with regard to availability of state funds, maintenance contribution, and some grant aid funds. We take a look at all the available funds we have based on this model and then we do projections based on the available funding and then the existing projects that we have in the program. That analysis is in the next couple of pages.

Funding Reserves

One thing we mention every year is that we have a couple of funding reserves. We have these reserves for a number of reasons. In some cases it is because of federal requirements. In other cases it is because it is a good idea or that we had a Legislative Audit that recommended that we have certain programs.

The Annual Emergency Exigency Program

For those folks that aren't familiar with this, we reserve a certain amount of money because we have unexpected events every year. The typical number for that is \$1.5 million. Rather than run out of money and not have a pot of money, we keep that every year.

Rest Area Program

Legislative Audit many years ago required that we have a Rest Area Program and that it be managed in a certain way. Asset Management is applied to this. Over the years, the amount of needs has gone down so this has been reduced to \$4 million annually. We're getting to the point where the condition has started to improve. You've probably noticed that our rest areas have gotten better over time. As we continue to meet our needs, that number will decrease. For this year it is \$4 million. We started with our Interstate Rest Areas and then we'll work down to the other systems. There's been a lot of improvement in that area. As a matter of fact, when we've gotten feedback on rest areas recently, it's been very positive. What was a really awful eye-sore, trouble spot, many years ago now is a bright spot. We had someone the other day give us a glowing recommendation.

Wetland Mitigation/Vegetation Control/Stream Mitigation

These are programs that are required at the federal level and we continue these effort, so we reserve about \$1.5 million annually for those.

Performance Programming Process Goal

Now I'm going to talk about the Performance Programming Process and what we're trying to accomplish. The process goal is:

To develop an optimal funding allocation and investment plan based on strategic highway system performance goals and the continual measurement of progress toward these goals.

This vision was set out in TRANPLAN MT which is our long-range transportation plan, federally required, and it helps our decisions in serving the public. TRAN PLAN MT is part of an on-going process that identifies transportation issues, evaluates public and stakeholders needs and priorities, and establishes and implements policy goals and actions. The purpose of TRAN PLAN MT is to ensure that MDT continues to address customer priorities by directing resources to program and projects that reflect those priorities. This is how we listen to the public. TRAN PLAN MT, as part of that vision, we have this PX3 Process which is the tool to help us accomplish this task by directing funding to address those issues that are identified by the public.

P3 Process

To give you an idea of the framework, it governs the Interstate, NHS and Primary Routes. It is typically about 70% local funding. As mentioned, it's

the Interstate National Highway System, Non-Interstate Routes, the State Primary System and the Bridge Program that is on those routes. So you might ask – why don't we include these other areas in P3 Analysis? Well, in many cases there are restrictions at the federal or state level that don't let us do business like we'd like to do. At the federal level, we have requirements for the CMAC Program, the Safety Program and Transportation Alternatives. Those are all governed by federal regulations so we don't get to do whatever we want. For other programs at the state level, like the Urban Program or the Secondary Program, we do as much asset management as can. So we'll do activities on both secondary routes and on urban routes but we don't get to pick the capital construction priorities, so it's not truly that we get to do whatever we need to do on those systems. To the best of our ability, when the opportunities are there, we do asset management to the fullest extent.

Performance Programming Process

The annual activities, this is the general overview that is helpful to see how we get to the fund plans, we'll access data from our Bridge and Pavement Management System to determine the current conditions of the state roadways and bridges. This changes every year so we go out and inspect all our bridges, look at our pavement every year to get the latest condition on it. We analyze the effects of various funding scenarios and system performance. So we know our existing projects, we check to see what those will do for conditions and then we'll add dollars into other areas and look at other opportunities. We'll develop an Optimal Funding Plan designed to meet or exceed performance goals. We'll present this Optimal Funding Plan to MDT staff for concurrence. We just did that internally – we reviewed this plan and it got approved and now we're here presenting this to the Transportation Commission for your concurrence. It doesn't end there, we also monitor MDT's Tentative Construction Plan to ensure that future projects will end with the funding plan. For instance if we ask for a certain amount of Pavement Preservation projects, we just make sure these align with the vision we've established here.

Pavement Analysis

When we're doing our pavement analysis, as Lynn mentioned, the pavement is the 900 pound gorilla of asset management; it is the most valuable asset we have. Most of our analysis centers on that but we have other items we look at as well. Overall our goal as an agency and within the PX3 Process is to “maintain or improve pavement condition on the Interstate, the NHS and the Primary System.” Our current performance metric is called Ride Index. We may look at some additional metrics later on but this one has served us very well over time. We been using Ride Index for the better part of a decade plus and it's served us very well.

Pavement Analysis - Ride Index

Our 2019 Pavement Analysis goals are to “optimize pavement performance by maximizing Ride Index.” Our first priority is to maintain the Ride Index on the Interstate System at 80 or above. In there you see what is called a “state of good repair” which is kind of a deceptive term. That is our realistic ideal that we'd like to achieve – not an unrealistic goal, just something through our analysis of our existing conditions through our surveys, this is a reasonable goal that the public would like to see us attain and achieve and it also meets our objectives at the federal level. That number is 80 for the Interstate System. Currently, we're actually at 80. So when you're driving the Interstate System, it's in reasonably good shape especially if you go to other states. In comparison to other states when we asked the public in our surveys, they will all say Montana is a good place to be. It took us a long time to arrive at that

particular number but that means our Interstate is in very good shape and we'd like to keep it there.

If you go to our Non-Interstate National Highway System, we'd like our state of good repair to be 76. We're not there right now and we're going to actually have to improve our condition a little bit. A few years back we actually had some routes that were added to the National Highway System by an action at the federal level and they weren't as good as our normal system would be. So we're trying to work our way back up to a condition of 76. If we can improve the Ride Index on the National Highway System to 76, that's our third goal.

Priority Four is to maintain the Ride Index on the Primary System if possible. You see in this particular analysis that we're going to be able to do all of those things. So we're in a unique situation. That means, given the budgetary conditions that we see over time, given the resources and the projects we have at our disposal, we're going to be able to meet all four of these goals which is ideal.

Commissioner Fisher asked if the statute or legislature fixed your preservation funds at a certain amount, do you find that those funds for preservation are adequate to do this. It seems to me that preservation should be the key – preserve what you've got before you move on to new construction. So if that's capped, I assume that was capped because they wanted to make sure there was enough money for new construction? Is there a reason why it was capped? Paul Johnson said that regards our secondary program. We do not have caps – just the secondary. There was an interesting and long debate about what to do with secondary roads. This is where the last of the state routes meet up with the local routes. With regard to maintenance, with regard to what is a secondary road, whose jurisdiction is it – all of these issues came to a head about 2000. We used to have a federal program that had rules that talked about secondary roads and we followed that program. Then the federal program went away but we wanted to continue to manage that at the state level. The stakeholders all got together and what the counties wanted was to take control over the capital construction priorities but we don't get to pick, MDT doesn't get to pick the capital construction priorities. For each district there is a prioritization process where everybody gets together at a meeting and discusses what the priorities will be, we discuss the rules of engagement, and in the end we get a prioritization list. Each county will get a priority based on the ranking criteria agreed upon before you start.

So for the secondary roads program for the capital construction improvements, those are prioritized by each of the counties through their districts. For preservation, it was capped at 35% - not near enough. If we were going to do it, we would not pick the exact same capital construction priorities because in some cases you'll get counties that have one road which might be in great shape. It may be important to them but in the bigger picture we would not necessarily pick those priorities. For preservation, then you've got a lot of lane miles and not enough money to do the work. So, we push that as far as we can. We maximize the preservation. For these systems, it is over that number. It is typically more in the range of 35% to 45% depending on the system and the district. This is the good news – we have the flexibility to do this. You're right, an artificial cap really hampers us and also the fact that we don't get the chance to pick the priorities based on pavement needs. It's not based on that so it leads to some interesting choices. Each of the counties is choosing the best project for them but it doesn't necessarily reflect the best interest of the secondary system overall.

No Significant Difference in Ride between Districts

The last point is no significant difference in ride between the districts. We don't want to hit a district boundary and all of a sudden have really bad pavement. The Pavement Management System doesn't look at all pavements

and says these are all kind of equal so we can take money and put it over here. No it has to be evened out over time. Our Pavement Management System recommends an optimal funding mix based on prioritized pavement needs. What does that mean? Picking based on pavement needs seems really logical but some places don't do it that way – some pick by population, some pick by politics. So this is a really good system. It addresses the needs where they are and it's fair.

New Federal Performance Metrics

At the federal level there are a couple of other performance metrics that were proposed. These new federal performance metrics had to do with our percent. Interstate Pavement in good condition or poor condition and Non-Interstate and NHS pavement for good condition and poor condition. We found these new metrics are another indicator of how healthy you are. We found, when we looked at the good, fair, poor data that was the federal measure, that MDT was managing our pavements very well with our current methodology. We had near zero poor pavement, we didn't have any poor pavements and we had more good than fair. That means we were doing an exceptional job with the model that we have. While we're aware of these, we did not want to change our business model. We use Ride Index and we'll continue to do that because we're meeting these objectives very well. If you have a business process that works, stick with that and then play it from there to see how we do. The new Federal Performance Metrics and targets were unlikely to drive investment decisions for now but we will monitor over time. Lynn Zanto said we have to report on them.

Showing graphs – the fact that these graphs are flat is the best thing ever. If they go up, it's really good. This graph shows the Interstate condition. Given all the conditions that we've listed, if we run the analysis, it says we have sufficient resources to keep the Interstate condition where it's at. That means we'll meet our federal requirements and we'll make our stakeholders and residents happy. This is a good graph. The next graph shows everything by district. This shows there is no significant difference between districts; they are all getting treated equally. That doesn't mean the same amount of money is going to each district, we're just saying we will give you equal condition. Some needs are higher than others but the end result for conditions is identical. The National Highway System, given the financial conditions that we've seen and projected, if we get a Reauthorization Bill that's like what we had before and we have the state match continue, yes we can do this. This graph shows we're able to meet our performance objectives, hit our state of good repair, even though we had some challenges on the NHS System. We inherited some routes that weren't as desirable as we would like, so we're gradually working our way back. The indicators show that we're getting there a little bit faster than this graph indicates. On the Primary System our goal was to keep where we're at, so for now that is what we have to do. We have other needs, bridge needs, but for now we're going to try and keep this where it's at. For us to accomplish all four of those objectives is good news. Sometimes we don't. Sometimes we look at a graph of the Primary System and we don't have enough resources but at this point in time we're in a good position.

Bridge Condition

In regards to bridges, our bridge condition is determined by the NBI Rating System which is the National Bridge Inventory. Each year we're required to go out and take inventory on all of our bridges and report that back to the feds. Every year they have a new inspection set of data and we're getting monitored on the conditions every year over time. This NBI establishes

ratings for the deck, the super structure, and the substructure. The bridge is then rated as “good, fair, or poor” based on these ratings and the lowest rating determines the overall rating for the bridge. So if you have a really good deck, really good superstructure, and a poor substructure then the bridge is rated poor. So basically all of the elements have to be above a certain threshold to be considered “good.” So if it’s great than six, the bridge is “good”; if the overall bridge rating equals five or six, then it’s “fair”, and if the overall bridge rating is less than five then it’s “poor.” To get a “poor” rating the bridge is considered structurally deficient. So there were a lot of terms for a bridge condition in the past but it is very straight forward now. You have good, fair, and poor bridges and a poor bridge is structurally deficient. Anything that you may have heard previous to this, now this is the new language.

The next slide gives you an idea on where those things exist. With regard to our performance measures and requirements for these NHS bridges, there is a percentage of NHS bridge deck, like deck area classified in good condition, and then a similar measure in poor condition. What we want to do is keep our good bridges good and we want to keep our bridges from being in a poor condition by improving them to move out of that condition. There are federal requirements for poor structurally deficient bridges – no more than 10% of total bridge decks on NHS can be classified as poor. We’re currently at 7.3% and that is mostly bridge decks, so we’re meeting that standard. There are some states that are not. We just saw a notice the other day on states that aren’t meeting this. So there are requirements; they are going to be required to do some activities. We’re meeting the standard.

With regard to our state of good repair objectives for NHS bridges, which is which is where we want to be, we sat down with a lot of MDT staff and worked with FHWA and we’ve decided that we want to increase the percentage of good NHS bridges from 17.4 to 25% over time. Now for bridges, we have a slightly different story in that our condition has been in a downward slide, as have every state in the Union. So we’re going to have to dedicate a fair amount of resources to get this done. We want to reverse that trend. Also we’re going to decrease the percentage of poor NHS bridges from 7.3 to 3% over a ten-year period. Incremental over time. That means we have to increase the amount of funding that we give to the bridge program and we probably have to beat inflation by a lot to be able to do that. We also have to pick good projects, by work type, within that category. Inside of our Transportation Asset Management Plan, we outline the blueprint for doing that. So when we get to the TCP meetings, those funding levels have been discussed at a very high level and we’ve agreed with FHWA that this is the direction we want to go and that’s part of the TAMP that just got approved. With regard to bridges on the NHS System, that’s our direction.

With regard to on-system bridge performance, which is not on the NHS, which are Primaries, Secondary’s, and those type of bridges. We get to set the performance metrics and priorities and the strategies on those. We will utilize the good, fair and poor measures because we’re familiar with them. Our current rule is to reduce the percentage of poor SD bridges over time. We don’t want to lose any ground. So, it’s early on with these good, fair and poor designation for bridges, we’ve never had that before so that’s new. We’re going to look over time and see what’s working and what’s not and adjust accordingly as we go. This is a starting point for the on-system bridges – we’re going to try and maintain where we’re at. Available funding is a major consideration. It all comes down to funding. There is limited funding and we’ll send as much funding to this category to meet that goal as we can.

Commissioner Hope asked if they want to increase from 17.4 to 25% - do you have the dollar amount that is going to cost. Paul Johnson said that specific value is listed

in our Transportation Asset Management Plan and it will show up in the Tentative Construction Plan. Generally speaking for NHS bridges, it's in the neighborhood of about \$35-\$40 million per year for just the NHS structures. It grows at about a 3% rate every year.

Commissioner Fisher asked if it accounts for the decrease competition, the lack of bridge building contractors that are even willing to bid these contracts. Paul Johnson said it is interesting you should bring that up because we had a lengthy conversation about this issue. There's a lot of challenges – bidding and competition is one of our major challenges. I would say out of all the issues we have, my opinion is the bridge issue requires the most attention because you have limited competition, prices go up, you don't get as much bang for the buck. Suffice it to say, the number we've set it at we are going to meet and beat by a bunch. We're going to shoot for coming in at a number much higher than the number we've agreed to, over a five-year period, by probably \$40 to \$50 million. This is how tricky it gets, we would love to give the bridge program as much money as they could possibly spend but there's limitations on it. It's hard to trim the program because they are lengthy projects to develop and get into the program and also how much can they get out the door and still get it built. There seems to be a sweet spot in there. If we get a real big project or a real big group of projects or if we chop them down into smaller pieces, but that requires some attention. It's going to be tough. We've got a good objective. On the front end the money is going there but if it comes back that we don't get good competition, that can really undermine that. The other thing that can happen is if you don't get a good product in the end. All of this assumes we have good practices and get a good result, a good sturdy bridge over a long time. Other states have struggles with that end. At a nation-wide level and even at the state level, this is our biggest challenge; our bridge program is going to be our biggest challenge. You start with resources and a plan, and then if we have to adjust, we will as we go along.

Commissioner Fisher asked if there had been any analysis to try and figure out the barriers of entering that portion of the construction market other than up-front costs. Is it a deficiency in the type of structural engineers it would require? I'm not sure I see that changing. I see more contractor leaving that part of the market than entering it. Kevin Christensen said one of our bridge contractors I spoke with was trying to put together a second crew so they could bid more work but the labor market is so tight, they just couldn't do it. We've seen that across the board with our existing bridge contractors on large bridge projects; they've really struggled with the labor market. That's part of it. We do have some glimmers of light, we have seen a couple of out-of-state bridge contractors, one from Idaho and one from North Dakota, bidding with us now. There is a glimmer of hope but the concerns remain for sure.

Commissioner Hope asked him about bonding capacity. Kevin Christensen said that plays into it too. We've seen that with ... we did have a very large bridge project, \$15-\$20 million that we let in the Great Falls District. We got one bid and it was just sky-high so we chopped that into three different jobs and by reducing the project costs, it brought in some more bidders that had the lower bonding capacity.

Summary

Paul Johnson said in summary I would say this is going to be the biggest challenge we have with regard to our PX3 Process, our Asset Management Plan. I know these guys are working very hard on it. On the front we've worked with our federal partners. There are some programs that are encouraging bridge work at the federal level, discretionary programs and bridge bundling, large projects and we'll have to work through it but there will be challenges.

Kevin Christensen said Montana is not alone in this, some of our surrounding states are in the same situation. Commissioner Fisher said it seems like we get these

financial boosts, but this doesn't strike me as a money problem, it strikes me as literally as a people problem. I'm sure every DOT in the country has asked what can the DOT's do to work with private industry like the Contractor's Association in developing either recruitment or education because ultimately that is going to save taxpayer dollars to get bodies building. Kevin Christensen said that we have a really large group of projects like Toston Structures and we had eight bidders on that project and then the lower to mid-range, we see that. In the \$8 - \$12 million dollar range is where we really struggle. Duane Kailey said we have the Director from the MCA sitting here and talking to us. David Smith, MCA, said it is a labor issue and it's national. What Legislatures and Associations are starting to realize is that we need to work more with the Unions on Apprenticeship Programs, and Steelworker's groups. Then you deal with supply of material which is a challenge right now. It is coming at them from all sides right now. I think Apprenticeship Programs is a long-term way to start improving some of this. Guys working out there are making good money with great benefits, but as a society we've gone through years trying to convince our kids to go to college instead of the trades. Commissioner Hope asked about K-12 education, are you guys working with the high schools. David Smith said we are doing some of that but honestly, a lot of school districts have cut their Tech Ed programs so you don't have choices of welding, auto mechanics, carpentry, and basic skill sets that contractors can use. Schools aren't teaching that anymore or not offering it; kids aren't interested in it. The pipeline is narrowing all the time. One of the phrasings that we're using now is we're trying to talk to the 35-year old Moms about what her eight-year old kid's options are and really change that dynamic to get them to think whether they want their 24-year old kid to have \$60,000 in college debt or be making \$60,000. It's a society thing and it's not going to change very fast. Commissioner Fisher said we have to make bridge building sexy again.

Congestion

Paul Johnson said we don't have a lot of congestion or liability issues at a state-wide level. We have isolated pockets here and there. Typically MDT has viewed congestion via the Level of Service metric, FHWA mandated adoption of metric for liability. It was for travel time reliability measures and metrics. The measure was the percent of the Interstate or the NHS providing for reliable travel. The metric was Level of Travel Time Reliability. It's a really complicated set of equations but when we did the analysis we found the vast majority of the state has none of these issues. In general, congestion system reliability aren't significant issues in Montana and none of these metrics look like they drive major funding decisions. That doesn't mean we don't have areas to look at. This information was helpful in identifying and addressing locations where they do exist. We can look at these metrics and they would say Reserve Street is busy but we already know that, but then you look at the rest of the state and there's nothing else out there. Typically with regard to congestion reliability, we're aware of the issues either through a study, an environmental document, or public input; usually these areas are pretty well known and pretty well documented and there's something in the program to address them. It's moving along.

Commissioner Jergeson asked regarding Reserve Street, does the US 191 Corridor fall under that category between Bozeman and Big Sky. Paul Johnson said we are actually initiating a study on exactly that presently. Lynn Zanto said the study is from 191 Four Corners to Big Sky. It's along that corridor. We're looking at a study to see what we can do; that obviously is a pretty constrained corridor with the river and mountain. Paul Johnson said in these challenging areas we will do a premium corridor study to look at the area to find out what our options are. In some cases, we're typically between a rock and a wet place where you can only do so much, you can't expand into the river, etc. We look at the challenges, look at the options, and look at the alternatives. In most of the challenging areas we have work that's underway or is just completed, and it's just a matter of finishing up the work that is

on-going or implementing the recommendations in the future projects. We've done a pretty good job of addressing those issues over time. They are usually very costly projects, so we can only do a certain amount of them. Western Montana has a lot of these types of issues so you move them along. We are aware of those. What we don't do is let the federal metric drive how we do more funding or how we do our business because it's really such a small part at the state level and usually we have those projects underway. We've identified and we know the areas and we've started the work and we're in the process of advancing those project areas already. So basically, not a lot of new territory in regard with this topic.

Funding Recommendations

There was a lot of stuff we said we wanted to do but we found in regard to our objective of keeping the average ride index and not having undesirable pavements and meeting our other objectives, there's distribution that gets you the graphs. As I mentioned, the distribution of funding is to get everybody to maximize ride index and give everybody a relatively equivalent ride index. But the funding to do that varies by district. Why? Typically it is driven by lane miles but also by condition. This slide shows the funding distribution and if we were extrapolate it out further, this is roughly the funding that would go to the Interstate, NHS, and Primary Systems in fiscal 2024 that would accomplish what we're seeing up there today. It all leads to this and this is roughly the funding amounts that you see there (referring to graph).

PX3 Process Awards

So we've been doing this for quite a few years and our process has been recognized for superior performance over times. We've received multiple Governor's Awards for Excellence. We received a National Award for Excellence and we're consistently in the top ten in national performance rankings that look at overall performance and efficiency. So the PX3 Process delivers results.

Today we are asking for concurrence from the Commissioners for the funding distribution that you saw and the funding reserves that were mentioned earlier. Specially this graphic (showing graphic), the percentage at the bottom for Interstate, NHS, and Primary broken down by districts and these specific funding reserves.

Commissioner Skelton thanked Paul for his presentation and said they deserved the awards they received for all their hard work and even more.

Commissioner Sansaver moved to approve the Performance Programming Process – P3 Funding. Commissioner Fisher seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item 9: Speed Zone Recommendation Airport Road (U-6730) – Kalispell

Duane Kailey presented the Speed Zone Recommendation – Airport Road (U-6730), Kalispell to the Commission. We were requested to look and review the speed limits in relation to a school zone up there. We have reviewed that, we've looked at the traveling speeds, the crash history, and everything along the route. We are recommending the following:

A 45 mph speed limit beginning at straight-line diagram station 0+50, just north of the bypass roundabout and continuing north to station 17+00, an approximate distance of 1,650-feet.

A 35 mph speed limit beginning at station 17+00 (800' south of Hidden Tr.) and continuing north to station 66+50, an approximate distance of 4,950 feet. (Fines will remain doubled as posted for the Jeanette Rankin School)

Statutory 25 mph speed limit beginning at station 66+50 (350' south of 18th Street) and continuing north to station 84+00 (intersection w/ US 93), an approximate distance of 1,750-feet.

Kalispell has commented and they are asking for a little bit different configuration. The fold-out sheet shows you the configuration as it exists today, the middle is the configuration that MDT is recommending, and the one on the right is what Kalispell is requesting. The big difference in these two is that at the south end MDT recommends a 45 mph speed limit for a short distance and Kalispell is actually requesting that stay at 35 mph rather than 45 mph. We are working with Kalispell on the signage as well recommending flashing beacons for the school zone as well.

With that staff recommends approval of the speed limit as proposed by MDT. As a reminder, it is under your authority to set the speed as you choose; you are not bound by our recommendations.

Commissioner Fisher said this area is a pretty significant road in Kalispell. In fact with the addition of the elementary school, that area has grown like crazy. The Kalispell City Airport is not going to expand, so everything around there is slated for a lot of higher density housing units and things like that. I personally own property off Cemetery Road and I used to own a house off Teal Drive, so I'm very familiar with this area. When I look at the Kalispell proposal, I think that's based on the fact that even though you are going south on Airport Road at 60 mph, you still come up on a roundabout which you have slow way down to get around. So, going north there is an elementary school coming up and you're slowing down anyway. If you look at where Cemetery Road intersects with Airport Road, there is a stop sign. So you're not going to speed up to 45 mph only to have to drop down to 35 mph. It's not just that much distance. So from my perspective, especially in my experience with the Kalispell Police Department, if they say they are willing to enforce in that area, I believe them. I would propose we go with Kalispell just because of the nature of that area.

Commissioner Jergeson said going with the recommendations of Kalispell, does that go against the speed zone study? Duane Kailey said that is correct. Our staff is recommending the 45 mph instead of the 35 mph that Kalispell is requesting. We don't disagree with the development that is coming but we don't typically sign proactively for development; we sign after the congestion or after the development is built out. We totally recognize exactly what Commissioner Fisher is pointing out.

Commissioner Hope asked about their theory – since there is not development, you want to move the traffic quicker through that area. Duane Kailey said we looked at what the public is comfortable driving. What speeds, absent enforcement, they are going to drive. Even with enforcement at times, they are going to drive what they are comfortable with. We predominately look at the 85th percentile speed. Right now what we're seeing is they are traveling around that 45 mph speed today. So rather than turn them into law breakers, we are saying to sign it at 45 mph and when the development comes in you will see that natural decline as more conflict comes in. You will see that natural decline in speeds and at that point in time, we'd come back and recommend 35 mph. Commissioner Skelton asked if they could approve the 35 mph today instead of the staff recommendation. Duane said that is totally the authority of the Commission under statute.

Commissioner Jergeson said he'd struggled with the whole thing for years. In the Legislature at Neihart we had issues brought to us because they weren't getting satisfaction with the speed zone. In the last four months I've been a 4.5 mile a day pedestrian and people's comfort zone in their driving, when you're walking is pretty scary to watch how comfortable they are driving that speed on a street. So I don't know that ... there has to be some way to slow people down generally. To have these speed zones slow them down, but the department has to enforce them, I think is a good thing. We've got zero deaths, the effort going on at the State of Montana, and people who are driving 45 mph with pedestrians and children and development, I think we have to start slowing them down especially by a school.

Commissioner Sansaver asked if we were considering an alternative motion. Commissioner Skelton said if it is the pleasure of the Commission, we will consider an alternative motion.

Commissioner Fisher moved to approve the Speed Zone Recommendation by the City of Kalispell – Airport Road (U-6730), Kalispell. Commissioner Jergeson seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item 10: Speed Limit Recommendation US 12 – Harlowton

Duane Kailey presented the Speed Limit Recommendation for US 12 – Harlowton to St. Regis to the Commission. We were requested by the City of Harlowton to go up and look at speeds. We looked at the traveling speeds, the accident history, and what we found was that initially our recommendation did not recommend any changes in the posted speed limits. However, when we got into the records we found the posted speed limits were not what was approved by the Commissioner. So in working with the City we are recommending no change in the posted speed limits and the city is in concurrence. However, as a Commission, we have to adopt what is actually posted out there today since it is not in accordance with what was approved in the past. So with that, staff is recommending the following:

A 45 mph speed limit beginning at station 572+00 project F 8(15) (1,000 feet west of "M" Ave NW) and continuing east to station 7+80(m), an approximate distance of 950-feet.

A 35 mph speed limit beginning at station 7+80(m) project STPP 14-3(15) (50 feet west of "M" Ave NW) and continuing east to station 16+20(m), an approximate distance of 2,750-feet.

The City of Harlowton is in concurrence. Commissioner Sansaver asked if this was informational or is this a request to change the language. Duane said we need you to approve this because what is posted is not in concurrence with what was approved by the Commission in the past. You're actually changing the special speed zone in Harlowton, however, it will match what is actually posted out there today. Commissioner Sansaver said then we need to make a new motion. Duane said all you need to do is to make a motion for staff's recommendation, as presented, and that will supersede the previous motion from the past.

Commissioner Sansaver moved to approve the Speed Limit Recommendation for US 12 - Harlowton. Commissioner Fisher seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item 11: Speed Limit Recommendation US 212 Corridor – I-90 East to Wyoming

Duane Kailey presented the Speed Limit Recommendation for US 212 Corridor – I90 East to Wyoming to the Commission. He said a real quick history – back in about 2016, MDT completed a research project study. We are one of the only states left in the Union that still allows differential speeds on two-lane roadways. So we took a good hard look at our routes within the state and what we found in the research is we should not be having those differential speeds when two conditions exist. One is when the percentage of commercial vehicles is 10% and the average daily traffic is greater than 3,000 cars. Based on that research we started looking at routes throughout the state that had these two criteria. Hwy 212 absolutely meets this criteria and, in fact, one of the Tribal members mentioned we're up around 40% trucks. It is a large mixture of commercial vehicles with passenger vehicles. With that, we started looking at the corridor from I-90 all the way to the Wyoming border and we found, based on safety, accident crash history, we think there is a good argument to be made to reduce the speed limit to 65 mph for passenger vehicles and at the same time increase the truck speed limit to 65 mph in essence eliminating the differential speed. We made that recommendation and we are moving in that direction to make that recommendation.

Then at the Legislature there was a law passed that will increase, throughout the state, truck speed to 65 mph on rural, non-interstate routes. Then it will increase the truck speed limit on the Interstate to 70 mph. That goes into effect October 1st. With that in mind, we kind of put this on an expedited pace to get it to you prior to the October 1st deadline so that we didn't change some signs come October 1st and then have you review and approve some or all of this and have to change the signs yet again. We apologize to the counties and tribes because we threw it at them a little bit quick but we were trying to beat that October 1st deadline.

Our recommendation is that we modify the speed limit, eliminate the differential speed to 65 mph for both commercial vehicles and passenger vehicles all the way from I-90 to the Wyoming border.

It's broken up in our recommendation and the reason is because there are some special speed zones within that corridor such as Busby, Lame Deer, Broadus and most towns, but in essence we are recommending 65 mph. However, we have support from Rosebud County and Big Horn County and the Northern Cheyenne Tribe. We have opposition from Powder River County and Carter County. There is a map you can look at – I would offer this to the Commission. My staff and I talked, recognizing the opposition from a few of the counties, we would at a minimum recommend that the 65 mph go into existence from I-90 to essentially Ashland. We would like to see the 65 mph through the corridor and I want to make that clear. However, in recognition of the statute or the new law that will go into effect October 1st, reducing the differential speed moving trucks to 65 mph, we would be accepting if the Commission wanted to not change the speeds from Ashland to Alzada, essentially the Wyoming border. That would be in concert with a couple of the counties recommendation. Again, you just heard from the Tribe recommending no differential speed all the way to the Wyoming border.

Commissioner Skelton asked if they approved the speed, as long as we get it approved today, then the Legislative law that goes into effect October 1st cannot change that speed. Duane Kailey said that is correct. Director Tooley said as part of the background, the department did have a proposal to do a state-wide 65 mph, but it failed. This isn't a new concept. Commissioner Skelton said this is an opportunity we can do but the department feels it is the safest and the best. Duane Kailey said correct.

Commissioner Sansaver said he understood there has been some opposition by Carter County and Rosebud County. However, two months ago one of those two counties was in favor of changing it to 65 mph. So there had to be something in there within that two-month period where they had a bunch of people come in from the community that said they don't want it changed to 65 mph. My thought is, if their leadership initially felt this was the right thing to do then their objection to it now doesn't mean anything to me. I think we have concurrence from most of the counties moving down through there and certainly the Tribes have the greatest impact and I don't see anybody else here today talking about keeping it at 70 mph. I don't care what you say, 65 mph means 70 mph and our director will tell you that. As long as you're not going over 70 mph nobody bothers you. I think that the safest and most prudent thing to do, due to the fact that legislation will change on October 1st, I think this Commission would be making the right decision by following this directive.

Duane Kailey said one of the things the Tribal members mentioned is they would like an evaluation. Typically, we go back after a few years, after two or three years' worth of operation, and we'd be more than happy to report that to you.

Commissioner Jergeson moved to approve the Speed Limit Recommendation for US 212 Corridor – I-90 East to Wyoming. Commissioner Fisher seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item 12: Public Participation Policy

Val Wilson, MDT Legal presented the Public Participation Policy to the Commission. Agenda Items 12 and 13 are the proposed Commission Policies. We discussed these at our June 19th meeting. The first one is the Public Participation Policy. The background is that the Governor's office has directed each agency, board and commission about public participation policy to be sure the public's constitutional and statutory rights would be afforded a reasonable opportunity to participate in the operations of your meetings and prior to final decisions by the Commission. As directed, MDT staff did draft this Public Participation Policy. We followed and referenced the Attorney General's Right of Participation Procedural Rules that are set forth in the Administrative Rules. We took a look at your statutory requirements and are presenting this for your consideration, comments and approval.

Commissioner Jergeson asked what the definition of a ministerial act is. Val Wilson said a ministerial act is one that is required under the statute that did not include any discretion. For instance, if MDT received a Permit Application, that application needs to be processed. That is a ministerial act. If it makes a decision on that permit, that would be an action that would require discretion and would fall outside of that definition. As we took a look at this, I'll give you a little bit of background. I have two attorneys who are very good at policy, Carol Grell Morris is our Senior Rules and Policy Attorney, she was on the Committee that actually instituted and recommended the policy procedure that is used by the department. She and Eli Parkson looked at this very hard. When this language was included, there was nothing that came to mind that is a ministerial act by the Commission, but it was their recommendation that that language be included just for consistency with policies of other agencies and courts.

Commissioner Jergeson said he went on Google, and found things about it – it's an act where there is no discretion because a higher authority has made the decision and we have no choice but to carry that out. But the Commission itself doesn't have a higher authority or an independent agency; there's nobody to dictate to us what we have to do other than the Legislature passing a law and the Governor signing it to tell

us to do certain things. My concern is that somebody would decide to, for example, the pattern in the old days to throw a quorum of the Commission into an SUV and go tour current and future projects. There is no decision being made but it's clearly a quorum of the Commission looking at something and the discussion relates around the condition and quality of the project and potential things we might do to fix it. Would that not be considered a ministerial act? Val Wilson said it would be considered a discretionary act of the Commission to award projects or allocate funds as you did today. Commissioner Jergeson said there would be no action being taken other than the discussion about the condition of the road and possible corrective actions but you have a quorum. Commissioner Fisher said that is a public meeting, right? Commissioner Jergeson said I think it's a public meeting. Commissioner Fisher said yes it would be a public meeting but there wouldn't be a ministerial act involved because there is no action taken but you still might be in violation of the public meeting law because you have a quorum present to discuss an item of what could be business or actually is business. From my understand a ministerial act wouldn't be affected by that activity, it's whether or not that's a public meeting that needs to be noticed to the public in advance of that meeting. I don't think there's a ministerial act or any other act taking place like a decision being made. If there is a decision being made by the Commission, that can't be a ministerial act because it requires discussion, debate and discretion. I think as counsel indicated, I don't think the Commission does anything that's ministerial – I can't think of anything because any time we talk about something, we're de facto using discretion. I think what the Governor's office wanted to do is include that in case a statute changes that provides a specific ministerial act that is done by the Transportation Commission, like if they said the Chair of the Transportation Commission must sign this document but has no discretion whether the document comes forward, whether the document is true, or anything like that. They would have to change this policy in order to make that happen. So I think they are trying to give opportunity in this policy for it to be the law of the land for a long period of time rather than be manipulated based on a legislative decision to say the Chair of the Commission shall sign this document, not having a meeting or anything else. That would be a ministerial act but as it stands now, as far as what you've indicated, Ms. Wilson, there is really no ministerial act performed by the Commission, they are all discretionary. Is that right?

Val Wilson said I agree with that analysis. Possibly there would be a legislative act or some sort of possibly your own policies or internal rules could create a ministerial act. That is hypothetical. Commissioner Jergeson said in my experience Sub (2) in 2.312 is the one where if we are sued or we're suing somebody, we be talking about litigation strategy outside of the meeting, we would close the meeting for that. We have nothing to say about any department personnel so we would not have a meeting to discuss performance of department personnel that would inherently require a closed meeting except for the employee's decision. This Commission doesn't do that. Other Commissions do have authority over personnel in their department but this Commission does not. Therefore we wouldn't close a meeting to talk about personnel because we don't have any authority over anything.

Val Wilson asked if there was a question. Commissioner Jergeson said no but my experience is that you'd better carefully look at exceptions when you're adopting policies. Everything looks real good throughout here, it's going to be noticed, and then you've got exceptions. You'd better understand what the exceptions are that apply to your particular body or agency because that's where the meat hook could be. What if somebody chose to define ministerial act and put all sorts of mischief into that. I'm glad about the conversation here that would probably be a pretty limited circumstance in the case of this commission.

Commissioner Sansaver said he was trying to figure out what the point is – maybe I missed something here. What is the point that we're looking at, is it the language here? You're questioning the language of this presentation? Val Wilson said these are proposed Commission Policies and as a Commission it is within your authority to

adopt these policies and therefore we need to discuss it. Commissioner Sansaver said I understand that, so it's the definition of ministerial act you're concerned about? Commissioner Jergeson said I want there to be a general understanding of what that definition is so that it's not an exception at some future Commission since we're all pledged here on that. That could be a very limited application to this Commission but some future Commission could come in and decide to define all sorts of things as ministerial in order to have mostly closed meetings. Language is important and it is important to raise questions. Once you've established that, that is when you have a comfort level. The most important language in my experience, whether it's in statute or in a rule or an order from a contested case proceeding, exceptions are materially important. I think exceptions ought to be fairly limited. Commissioner Skelton asked if he wanted to take out the wording "or conduct a ministerial act." Commissioner Jergeson said no, I just want to make sure we have an understanding of what it is.

Commissioner Skelton asked about the legal definition of ministerial act. Val Wilson said it has been defined by our Supreme Court. There is a legal definition. If it is the pleasure of the Commission that that be included in the definition section of this policy, we can do that. I just need to have some direction and we'll try to comply. Commissioner Jergeson asked for her recommendation. Val Wilson said her recommendation is that ministerial act is defined in law. I don't believe it needs to be in this definition section based upon the rules adopted by other agencies including the one that's been adopted by MDT, it is not a separate definition. We don't seem to be stumbling over that particular issue. Commissioner Skelton said it is defined by law so the definition is there, so we should not need to add it to this. Commissioner Jergeson said it's defined by case law. Commissioner Skelton said the Supreme Court has defined it. Val Wilson said yes. Commissioner Skelton said we are mandated by the Governor's office to adopt these policies. Val Wilson said that is correct. Commissioner Skelton asked for a motion to adopt the policies unless there is something specific you want added or deleted.

Commissioner Sansaver moved to approve the Public Participation Policy.
Commissioner Sansaver seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item 13: Transportation Commission Policy 9-01-014

Val Wilson, presented the Transportation Commission Policy 9-01-014 to the Commission. This is the second policy that we're bringing forward to you today. At our June meeting, Agenda Item 18, we discussed that our current Commission practices, in regard to setting award dates, was inconsistent with what used to be known as Policy No. 14. At the request of our Chief Operations Officer who brought that issue to your attention, you directed staff to revise Policy No. 14 to comply with current contract award process. So what is before you today is Policy 9-01-014 which is a numeric system that is consistent with other policies that are adopted by the agency. In our haste to get this into this particular packet, you'll notice that there are some editing errors and I believe Lori has the current edited draft. Under Section 1.1, it fixes some errors where a period is placed. Under Section 3.1, MDT is spelled out. There is a section under 6.1 where a statute is referenced and that is your authority to award, let and prioritize contracts under 60-2-105. If there are no questions, the Commission can discuss this update.

Commissioner Fisher moved to approve the Commission Public Policy 9-01-014.
Commissioner Hope seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item 14: 2020 Project Letting List

Duane Kailey presented the 2020 Project Letting List to the Commission. These are the proposed letting dates for 2020 for your review and approval. These are standard letting dates with the advertising and award dates corresponding. We will approach you should we need to set up an expedited award or a new letting to deal with either flooding or emergency type projects.

Commissioner Fisher moved to approve the 2020 Project Letting List.
Commissioner Hope seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

**Agenda Item 15: Certificates of Completion
May & June 2019**

Duane Kailey presented the Certificates of Completion for May & June 2019 to the Commission. They are presenting them for your review and approval. If you have any questions or comments, please feel free to ask.

Commissioner Sansaver moved to approve the Certificates of Completion for May & June 2019. Commissioner Fisher seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

**Agenda Item 16: Disputed Liquidated Damages
Knife River Corporation – Yellowstone
Contract 05317 – SF 129, Roundup Lame Deer**

Duane Kailey presented the Disputed Liquidated Damages, Knife River Corporation – Yellowstone, Contract 05317 – SF 129, Roundup Lame Deer to the Commission. I will kick this off real quick and then Hal Fuglevard will speak on behalf of Knife River. In our contracts, we do allow contractors to dispute the dates charged causing liquidated damages. In this case Knife River is disputing the 32 days that we have charged on this contract for a value of \$788,400.

Hal Fuglevard said thank you for letting me come before you and speak today. I'll try to not get into too much detail. I believe most of you have documents that we have submitted previously in regard to this issue. We were assessed 32 days of liquidated damages on the roundabout project at Lame Deer which coincidentally is on Hwy 212 discussed previously. It's a new roundabout at the intersection of Hwy 212 and Hwy 39 and comes down from Colstrip. The design of the project didn't allow for any kind of detour, so all the traffic on Hwy 212 and Hwy 39 had to pass directly through the limits of the roundabout. We were constricted by a stream, by buildings, by a weather state, so there was no room to detour traffic. Everything had to pass directly through the roundabout as it was being constructed. Knife River requested on October 27, 2018 an extension of contract time under our contract, as a delay not caused by our negligence or fault. Our contract with MDT allows us to do that. That request has been denied multiple times. The basis of our request has never been addressed or disputed. In the very first request of an extension of time, we went through a pretty detailed analysis of traffic that passed through the job, especially the amount of truck traffic. We used the ADT that's in the plans and then we analyzed the effect ... essentially what happened was in November 2016, an MDT project called Ashland East was let and it was awarded to Wickman Construction. Then on March 16, 2017, about four months later, the Lame Deer job bid. The Ashland job had about 200,000 tons of aggregates and those aggregates all came from Forsythe or Moon Creek or somewhere up north, which meant all those aggregates had to pass

through the Lame Deer project as it was under construction. That's really the crux of the whole thing. We had to deal with essentially 8,000 trucks that passed through our construction project, 4,000 loaded and 4,000 empties coming back through. These were belly-up trains – a main trailer and a pup, and the disruption that additional truck traffic caused, I went through this analysis and said it increased ... In the October 27, 2018, letter addressed to Mel Mater, it essentially says that we saw a 43% increase in truck traffic over the average daily traffic counts. That started about June 1 and went right up through October. We've never asked for additional money; all we've said is that with all the additional truck traffic trying to be jammed through a roundabout, it decreased our efficiencies by 2-3 hours per day that we could not work because traffic was stacked up for a mile or mile and a half. As we let a string of traffic come through one way, we sat and waited. Then once that stream passed through, then we jumped in for maybe five or ten minutes until the next string had to pass through. That was part of the rule that we couldn't allow traffic to sit and be delayed longer than 20-30 minutes, so we just had to jump in and work during these windows. This is not complicated; you just can't get as much work done when you've got more traffic coming through than you can handle.

Commissioner Sansaver asked if they were aware, prior going into this project, that there was going to be the Ashland project coming along as well. Hal Fuglevard said yes. Commissioner Sansaver asked if they were one of the bidders on that particular project. Hal Fuglevard said no. Commissioner Sansaver said you were aware of it but you just stated in your document that you felt it would be illegal to visit with Wickins about the traffic flow and the impact on your project. Hal Fuglevard said yes. Commissioner Sansaver asked why he thought it would be illegal to talk to a contractor about traffic flow. Hal Fuglevard said about 10-12 years ago there was a number of contractors that were investigated for collusion by the federal Department of Justice and we were one of them. I was with Oftedal Construction at that time. We were questioned, we were subpoenaed, all of our documents were subpoenaed and they wanted to know if we ever discussed a project prior to letting with another potential contractor. If we did, that could have been a federal violation and you go to jail for it.

Can somebody from the MDT give me their opinion if that's an accurate statement? Duane Kailey said I'm not legal but I don't believe talking to another contractor about their hauling through the project you're bidding would not illicit collusion because you're not talking about bidding the job you're on, you're talking about his activity through the job you're about to bid. Hal Fuglevard said but you'd be talking about strategy of how you intend to bid the job based on what he tells you. Duane Kailey said if you went so far as that, I would be concerned. If all you're asking him is how many trucks he's hauling through your potential bid contract, I don't think that constitutes collusion. Hal Fuglevard said I hope that answered your question – there was a genuine concern. Commissioner Sansaver said my point is that on all the projects I've ever done, which is a multitude of them, I've always looked at the outside elements that could affect the outcome of the job. You understood going into it prior to the bid opening that you had no room for a bypass around that roundabout; you were constricted and you knew that. Secondly, you also knew there was another project coming up in four months that was going to grossly effect the impact on your work at that roundabout. So, not that I'm not sensitive to the problem you have because I certainly am and I know the weather can affect you, other projects outside your project can affect you, but I don't understand or I'm incapable of gathering a philosophy behind you going into this project knowing that there's other projects in and around you and there's only so many roads in that area that certainly they were going to affect you. That should have been acknowledged through your bid documents at the very beginning of this project. So I have difficulty accepting the fact that all of a sudden you guys woke up one morning and said "oh my God, they are moving 43% more trucks through here than what the ADT was." Well of course they were because prior to that project in Ashland, the state had stated that there was 40% truck traffic in that area. Now add something else to it like a

project and you didn't think that would impact the number of trucks going through your project prior to you bidding that? I don't understand that. I think that it was poor planning on the part of Knife River to not anticipate that and to not put in the extra time in the contract to accommodate that.

Hal Fuglevard said we can't add time to our contract. Commissioner Sansaver said I know you can't add time but you can go through your contract and see where you can cut time of other subcontractors that may be working on two or three projects at the same time and demand that they shrink their time allotted to you to complete that project knowing that you have outside impacts. I've been in construction for over 45 years; I know what I'm talking about, I'm not just throwing junk out at you. So, that's the way I look at these liquidated damages. I know sometimes there are outside things that you can't foresee but I do know in special preparation prior to putting the bid package together, that all of these outside influences should have been looked at more seriously and understood. The question you're having now should have been brought up to the state during the bid opening or at the preconstruction conference. Hey, you have another project here, don't you think you should add a lot more time to this because of the impact of the other project? That should have been brought up at preconstruction not after the project is nearly done. Then you raise your hand and say we didn't know there was going to be 43% more truck traffic. That's the part I'm missing. I'm not trying to derail your presentation here and I'm not trying to say you don't have credence in your presentation, I'm just trying to look at it from the viewpoint of what I would have looked at prior to going into that preconstruction conference.

Commissioner Fisher said the bid documents actually specifically tells you to go talk to Wickman. They tell you who got the bid and to talk to them to coordinate your construction activities. To me I would agree, I wouldn't be concerned about collusion if the department tells you to go talk to the winner bidder and tells you who it is about coordinating activities to ensure traffic is maintaining and can accommodate truck turning movements. Is there any question that you ensured traffic was maintained despite the fact that there were backups because of the additional truck traffic. Hal Fuglevard asked if it was related to the truck traffic. Commissioner Fisher said in relation to the bid requirement that you maintain traffic flow to the extent that you can. Did you do that? Hal Fuglevard said yes. In fact we did communicate with Prince who was the subcontractor and it was Prince's trucks that came through the job. We were in communication with their truck foreman every day about how things were going and what we could do to improve getting them through there. We changed some radius on curves, we put gravel in some areas that they could get a little bit wider, so we worked with those guys essentially every day trying to alleviate that. Commissioner Fisher asked if they were allowed to work at night. Were there any other opportunities to work; you were confined to daylight hours for your work? Hal Fuglevard said that is correct, we were not allowed to work at night. Commissioner Fisher said I appreciate what Commissioner Sansaver was saying but if you complied with 24 because you were able to ensure traffic was maintained and could accommodate truck turning movements, and the sheer volume of the traffic prevented the full construction to be done in the timeframe provided by MDT and you couldn't work extra hours to account for when you stopped for the truck traffic, then what could the contractor do for those incidents outside of their control which would mean the volume of the truck traffic. I agree with Commissioner Sansaver that that discussion should have happened ahead of time. If that discussion was had, would MDT have extended the time period to complete construction of this project? Is there any way to know that or is that pure clairvoyance at this point?

Duane Kailey said you're hitting on a very, very valid point. One of the issues that I was going to bring up is we have two specs in our spec book right now and we're in the process of modifying it. They contradict each other a little bit. Our main spec is our time spec. When there is a disagreement between the department and the

contractor, there is a spec in there that identifies how to file a claim against MDT. Then there's a procedure for resolving that. In that procedure, one of the things we're allowed to do is go open up their bid documents and determine if they adequately addressed the delay and could they have reasonably expected the delay. We're able to open up those bid documents. One of the challenges I have with this is Knife River chose not to file a claim. I can't tell you why because I don't know why. Unfortunately what our specs allow with liquidated damages is they don't have to. They can then come to the Commission at a later date and dispute those liquidated damages. We're actually in the process of fixing that because we want the opportunity to resolve them. If we have an area in our contract plans, we want to resolve that with the contractor; we don't want to damage that. Unfortunately that was not exercised in this case.

Commissioner Sansaver asked Duane if he felt the State of Montana did an adequate job in preparation of the time allotment for this project knowing that the Ashland projects was going to be running concurrently and have you understood or looked at the numbers of the 43% truck traffic increase through this roundabout construction? Had you done that prior to the bid letting? Duane Kailey said I could just easily say yes and leave it at that. My answer is yes but let me expand on that a little bit. What we see consistently on our projects is a couple of things: through the Q&A process, during the advertisement for bidding, contractors will notify us that they think the time is inadequate. I have to admit I did not go look at the Q&A to see if that was a question submitted. We can choose to add time. I will tell you we are going to take those a little more serious; we haven't been the best on adding time into contracts in the past but we're looking at that a lot harder now. However, irrespective of whether or not we left the time as is or whether the question was even asked, the project went forward and bid with the contract time as allotted. Therefore a contractor has a couple of choices. They can increase their hours of work which costs them overtime typically, in which case their bid goes up a little bit, or they can choose to bid the LD's into the contract and we've seen that and we know that happens. Once they bid that project, they are accepting the contract time in there; they are accepting that liability and that risk. So the short answer is yes, once they signed on the dotted line that they accepted the contract, they accepted the terms of that contract. The last point I'll make is that we have to go back and look at the bid. There were three contractors that bid this job. Knife River was the lowest. The other two were not that far off on a \$5 million job, they were \$500,000 and \$700,000 above Knife River. The concern I have, and none of us will ever know for sure, is did they bid that lower productivity rate and is that why they are not low versus Knife River. If we, after the fact adjust this contract, are we giving them an unfair advantage over those other contractors that bid the productivity rate appropriately?

Commissioner Jergeson said I know Mr. Fuglevard is anxious to get back to his presentation. We have the engineer's estimate against which the bidders are compared and used to make a determination whether or not contract for the bids submitted exceed or don't exceed the engineer's estimate. How did the engineer's estimate treat the question of traffic? Duane Kailey said the low bidder Knife River was actually 7.52% over the engineer's estimate. They were fully within guidelines and slightly above our engineer's estimate. The other two contractors were 18% over our estimate and 24% over our estimate. The one thing I'll throw out there and I'm not sure what you're trying to get to, but keep in mind that they have no idea what our estimate is. It's sealed dollar value when they bid and it's not until after we open the bids that they see our estimate, so that had no effect on their bid. Commissioner Jergeson said I know and I appreciate that but I want to know if your engineer's estimate is an estimate that you would expect to be in the range of a reasonable competitive bid on a project and various things are cost factors. If the department, in doing the engineer's estimate, is trying to have something that would represent what will happen in real life or what you think might happen in real life, how did the engineer's estimate, especially without them knowing, treat the question of the traffic? Did your engineers accommodate what turned out to be a 43% increase in the

volume of traffic that would be going through there or did they go with the standard figures for the previous 24 months that was given to all the contractors who might bid the project.

Duane Kailey said off the cuff I would say I think our engineer's estimate might have been on the low side but again we were within guidelines of the low bidder. So, given how we do an estimate versus how a contractor does, I think we actually did a really good job here. Commissioner Fisher asked if it took into account the traffic volumes at issue. That is the question. You want to be able to rely on that engineer's estimate. If the prime contractor couldn't adequately account for the growth of traffic in that area and the engineer's didn't do that either, and the prime contractor complied in all respects with the specs in the contract but the job just couldn't be completed in that time period. They have two options – they can file a claim and ask for more money or more time, or they can object to LDs which is a fine against the contractor. It seems to me from the department's perspective, since LDs are considered to be the cost the department faces in the personnel required to continue projects, the better thing you want contractors do would be to object to the LDs versus file a claim because that process is awful and expensive for everybody. To Commissioner Jergeson's point, if the engineer's estimate was lower than the prime contractors and didn't account for the full impact of the traffic volume, then how can we ask the prime contractor to do that if, in fact, they maintained traffic control appropriately and worked within the hours allotted. If they weren't allowed to work at night where you wouldn't have the truck traffic and those kind of things, how can we ask the contractors to do something that the department couldn't even account for?

Commissioner Hope said I hire contractors as a developer and that was an agreement. My personal opinion, you guys screwed up and bid too low. Commissioner Sansaver said I asked the question at the onset, if our engineer's figured in the additional traffic and he answered yes. Is that correct? Duane Kailey said yes. Commissioner Jergeson said he didn't hear that in your answer. Duane Kailey said it's kind of irrelevant what our engineer's estimate is because the contractor controls the means, manner, and mechanism of building that job. As we've tried to show you as we award this jobs, we don't estimate the same way they do. So, we miss it at times but they are in control of the means, manner and method of building the job. Rather than hold them accountable to our estimate, we look at whether they gave us a reasonable bid and is it in accordance with our policy. I respect that our estimate was low but again, they are the ones in control of their methods and means. Commissioner Sansaver said that is absolutely correct, however, you are in control of the time allotment for the contractor and my question specifically was did you allot enough time for the extra 43% of traffic flow going in prior bid. Duane Kailey said we believe so. Commissioner Sansaver said that clears all of the question. If that time was allotted by the engineers, I don't care what your estimates were as far as the monetary amount but the timeframe, as this gentleman is laying out, wasn't enough for him to complete the project. Now you're saying our engineers did consider the extra traffic flow and the time allotted by the State of Montana should have been adequate going into the bid opening and they should have understood that they had that time. Duane Kailey said I know that as a fact because the spec 24 that we put in is a spec that we typically use when contractor's projects overlap. We do not use this in a situation like this normally. So, we recognized the impact the Ashland job was going to have and we specifically noted that in this contract. We do not normally do that unless the project limits either overlap or abut and the distance between these two was significant enough that normally we would not put that spec in there. So we drew specific attention to this issue.

Hal Fuglevard said I'm not going to try to reply to everything that was said, I'll just mention a couple of things that kind of went on during this whole process. Some of the documents that came from MDT when they denied our request, one was in a letter from Mel Mater to Eric VanHemrick, our project manager, January 23, 2018.

We were making the argument about the impact of the additional traffic on the project. In the second paragraph he says “the confined area of this project dictated the traffic control thus the volume of traffic was not an issue as to the amount of work being accomplished.” The traffic control was set up to say no matter the volume – that doesn’t make any sense at all. The more traffic you have, you can put up all the signs, flaggers, lights, warnings and flashers, it doesn’t matter, it is still going to impede work in a confined space. He said it right here – “the confined area of the project dictated in traffic control” but the volume of the traffic control was not an issue. That’s completely false! Our argument is that it is the exact opposite of that. It didn’t matter how much traffic control we put up, there were just so many trucks coming through that we were just stalled out. Most of the time we sat waiting for trucks to pass through the project. Was that delay our fault? Was that part of our negligence? I say no that wasn’t our part, we didn’t do that. We’re looking for some relief on the extension of contract time just because we’re allowed to for delays that were beyond our control. Even knowing the number of trucks that were going to pass through, there was nothing we could have done. You can talk to the people on the project; they’ll all say the same thing – “we don’t know what to do.” MDT came and we talked about it and asked what we could do differently and nobody had a solution. So we were stuck. We did not want to file a claim because we weren’t asking for more money, we’ve never said that, all we said is we want some more contract days to complete this project which I think is completely fair.

A letter I got from Matt Wagner on another denial on July 8, 2018, he said “additionally if you did not believe that a change order was warranted for the additional work, it is our stance that you felt time remaining was sufficient for the work to be complete.” There was no additional work. The amount of work was the same number of tons and cubic yards and lineal feet of pipe; the amount of work never changed. That’s why we didn’t file a claim. I don’t think that takes away our right to ask for additional time. Like someone said earlier, that’s why we didn’t go the claim route, we followed the spec and we followed our contract that allows us to ask for additional time if LDs are charged. Coming before this Commission is kind of the final step in that process. That’s the whole thing from our perspective – we were delayed by the additional truck traffic. The other thing through this whole process, two years now talking about this and never once did anybody say anything about a compromise. We asked for time and everything was denied, denied, denied. In the very last document I submitted I asked if we could compromise. That’s what we’re sitting at today.

This is an email document dated July 12th to Matt Wagner with four items. It says, “MDT never discusses the potential for compromise in this subject. Knife River has disagreed with 29 of the 32 days assessed. In light of the relevant information supplied, it would seem there should be consideration given to reducing the LDs from 32 days to a more reasonable number. I would propose that the days be split in half and we be assessed 16 days.” So, members of the Commission, this is where I would like to leave this. Knife River would like to ask that the LDs be reduced to 16 days.

Duane Kailey said be advised that if you reduce any of the days, the value of that will impact state funds since FHWA does not participate in that. Commissioner Sansaver asked him to clarify. Duane Kailey said right now we followed the contract, we’ve assessed \$78,400 to the contractor that we have not paid them. If you, the Commission, approves reducing that to 16 days, that would be \$39,200 going to the contractor. That would be a payment we make to them. That \$39,200 would not be federal aid eligible, so it would be all state funds. Commissioner Hope said that is not an increase to our contract. Duane Kailey said no, that is how we pay it. Since this project is on a Reservation, the project is actually 100% federal aid funds. So instead of being federal aid, it would all be state funds. As mentioned earlier in the P3, our state funding is a challenge that we deal with. Commissioner Fisher asked if it was just a reduction of the fine, it’s not an increased ... it’s not like you’re paying the

contractor. What you're doing is paying for the extra personnel to monitor this project for that 32 days, right? Those are the costs that MDT suffers. Do you have to write a check back to the contractor? Is that what you're telling me? Duane Kailey said yes, we have subtracted \$78,400 out of what we owe them to assess those LDs. If you waive a portion or all of that, we will then issue them the check for whatever it is you waive. We withheld that from their contract. We've already paid our staff for their additional time and all the equipment they've used. Commissioner Skelton said but it doesn't change the contract price, the bid price that you got, you just subtracted the \$78,000 from the bid amount that they submitted receipts for and just held back those funds? Commissioner Hope said I would be opposed to this and agree with what the department assessed. I think that is what we should go for as a Commission. I don't think it's fair to other contractors. Duane Kailey said to be clear, the Commission need do nothing and they stand as is. You need to make a motion if you chose to give back days.

Commissioner Fisher said her reason to reduce the days was when you noted that MDT personnel, Mel Mater, said the volume of traffic was not an issue. That contradicts the statement that the volume of traffic was considered by MDT. It documents the volume of traffic was not discussed in the special provision 24, it said to ensure traffic is maintained and we don't have any evidence to indicate traffic wasn't maintained or that they couldn't accommodate truck turning movements. There are also no comments on the volumes. So if MDT knew that the volume would increase, it probably should have said that in that special provision "note volume increase" and it didn't. I think it is telling when a representative of the department said volume of traffic was not an issue and everybody agrees it was an issue. That's why I don't think this project could have been completed in the time allotted. I agree with the contractor that they weren't asking for more money. I think this is a fair compromise based upon the conflicting statements and the documents representation by MDT and where the contractor was at. That is the basis for my motion.

Commissioner Sansaver said other than the fact, and I go back to my original statement that in the very beginning prior to bid in preconstruction conference, a light should have come on for the contractor. I have a huge impact coming at me and a restricted area, the funnel effect coming down to you, that light should have come on. I agree with Commission Fisher on the reduction of the time, however, I want to send a very strong message out there that this is not going to happen on a continuum with contractors coming in and asking us to forgive LDs. The onus of the responsibility has to go back to the general contractor. Our professional people have indicated they had valued that in prior to the bid on the extra time that it would take for this increased traffic. However, as Commissioner Fisher points out, we don't see it in the document here that there was going to be a 43% increase. Part of that goes back to the state, the other part of the burden needs to be borne by the contractor. I think we're being very fair in cutting it to half.

Commissioner Hope said I don't think we're being very fair. I think we're short-changing the taxpayers by cutting it in half. I think part of the reason you want it to cut it half is you guys are contractors and you feel that if you were up there, you would want that. The reality, as an owner, I want to hold my contractor accountable for what they said they were going to do. You guys looked at it, you guys blew it; it should have been brought up earlier in the process. Other people bid a higher bid. I don't know what that bid looked like and I don't care what their engineer's estimate was because their bid didn't meet the estimate. Right away that says something was wrong anyway. I just don't think you're being responsible – it's \$39,000 of taxpayer dollars you're giving away and I have a real problem with that, a real problem. Our job is a fiduciary responsibility. I feel bad that you got fined but that's your problem. Get better next time, that's my message. So I adamantly oppose cutting it in half.

Commissioner Jergeson said on an issue like this, I think the Commission is called upon to find a just resolution of the case. I don't think the Commission can approach any of these cases with "the department is right and cannot be proven to be wrong" or "the contractor is absolutely right and cannot be proven to be wrong." Each case that comes before us, if somebody contests the case, it has to be done on that particular case and the facts involved. I seconded the motion because I think that the better case was made by the contractor in this case in particular, when I didn't hear from the answers and so much stake is put upon the engineer's estimate in the award of the contracts one after another. We have them all year around based on the engineer's estimate. That's the determining factor sometimes rather than the contractor's award and therefore the engineer's estimate ought to have clearly discussed something that would turn out to be a very specific time consideration. That has a value to it as well. So I think the compromise that was offered acknowledged that there were things that could have been done better by both sides in this and we wouldn't have to have this kind of argument. I think this is a better course here today.

Commissioner Fisher moved to reduce the Disputed Liquidated Damages for Knife River Corporation, Yellowstone, Contract 05317 – SF 129, Roundup Lane Deer to 16 days as requested by the contractor. Commissioner Jergeson seconded the motion. Commissioners Fisher, Jergeson and Sansaver voted aye. Commissioner Hope voted Nay.

The motion passed unanimously.

Agenda Item No. 17: Discussion and Follow-up

Director Mike Tooley

Interact Project Map

Director Tooley said we have a couple of staff members with some pretty exciting information. Lynn Zanto said two of my awesome staff are here, Brian Andersen and Ed Arron. They are in our Statistics Bureau and our Geospatial Information Section is what Brian manages. Through the last year the Commission has had presentations from vendors about a complete project map with all projects on it. They have been working very hard with our antiquated systems and were able to come up with an interactive project map that is now on our website. We'll send you the link so you can see for yourself. We think we have a map that has all the projects and information that is easy to access.

They gave a brief presentation to the Commission of how the map works. We've launched this live on our website. This is our standard MDT website. Down here under construction we have active projects. Underneath that we've added an actual project map. We will probably make this larger, but we wanted to make sure all our loose ends are tight up before we do that. We also have a mobile version for your phone or tablet and I'll quickly show you both of those. The mobile version is going to load faster and be more responsive but you can't do quite as many things with it. We're pulling our information from our system to MDT through engineering as well as maintenance, so we have maintenance projects on here too. It's a little bit of a manual process right now and we're planning on updating this monthly. We've been updating weekly but we will be moving to monthly. It's a little bit of a static process right now but that gives us time to assure that we're putting out there what's appropriate for the public.

In this App you can do a lot of filtering – you can filter by project status and we've broken it into "awarded for construction" and "planned projects". Under that you have the option to filter by what type of project it is and we added maintenance

projects to that as well. Under “Projects by district” you can go in by district if you’re interested in that. A couple of projects are in multiple districts and those are assigned by county, city, year, and costs. All that information is available in the context box and sortable by alphabetical order. If you click on one of the projects, you’ll get information about that project and where it’s act spatially on the right side here. Name of project, number of our projects, where it’s at, design and construction, when it’s anticipated, calendar year, and the estimated cost for construction, project location is where it’s at on our route, then also the local name. Project descriptions we’ve worked pretty hard on putting together descriptions that are appropriate for the public to understand what our project means and you don’t have to be an engineer to understand it. You can search by project, by project name. If we click on one of the projects that already has a project page, you can go to it here. You will be able to leave comments. This actually links to the project pages. If we don’t have a project page, it will send you to our normal comment forms. Basically the public has the opportunity to provide a comment about any of our projects and it will get to the appropriate people.

We have information about when it’s been updated. We have a help guide that we’ve put together and it will walk you through how to use the application. It is fairly intuitive; we tried to design it so you didn’t have to be a GIS professional to do it.

The mobile version shows you the projects but you’re not able to filter and sort. You are just able to click on these projects, you are able to search by project. It’s meant to allow you to get information about a project versus in the other version you can do some of your sorting and analysis based on what you actually want to see.

Commissioner Jergeson asked if a project was not in phase, will it still show up on the map. They answered yes. For example, the Custer Avenue Project is currently in study and hasn’t moved into PE yet, that project shows up as the estimate is to be determined and the date is to be determined. Those are showing up but we don’t have information on them yet. Commissioner Jergeson said I’m talking about a project that has been in PE and all the PE work is done but the right-of-way work hasn’t started yet and there’s nothing going on yet. It doesn’t disappear on the map does it? They said yes that is still on the map. Commissioner Jergeson said that is where a lot of the public gets concerned because they hear rumors about their home, the project has disappeared and where is it. They said projects may be two years out or longer, we’re still showing those projects all the way through the life of that project. In the project description, there will be an anticipated letting date that we’re targeting. Either it’s in the five-year plan or outside of the five-year plan.

Commissioner Jergeson said on Hwy 2 from State Line coming west there was a project authorized by the Commission a long time ago and under political pressure they authorized it for features that are not typical for building highways on Hwy 2. Is that project in there and what is the status of it? I understand the dilemma for the department is it was an authorized project, we spent some engineering money on it but can’t comply with state law and build it because that configuration takes money away from other projects in National Highway in that district. At some point that will have to be disposed of and the highway is going to have to rebuilt the way we typically rebuild a highway on US Hwy 2. Is that in there? How descriptive is it for people to understand the dilemma? Lynn said you’re referring to Baineville East, right? Commissioner Jergeson said yes. Lynn said here it is – you can see it. Brian clicked on the link in the border and there’s Baineville East and it shows that it is a reconstruction project. It shows our anticipated construction is to be determined. The estimate is \$24 million and we don’t have the money. If it is a project or a study that has had activity on it, even if it’s in a dormant period for whatever reason, it should be out there. If you play around with it and you see something missing, let us know. We have a team that has been working very hard on making sure we have everything in there.

Commissioner Jergeson asked if it will be available to the public when it's finished. Lynn Zanto said it is right now. It is a work in progress and if you see areas you want changed, we are certainly open for recommendations. If you have any concerns, we can address those as well. Commissioner Jergeson asked if the software will keep up or give us the capacity to make those kind of changes, or is it going to become old and break. Lynn said this is our interim and there is a lot of manual updating that has to go on. Brian and Ed have spent a whole week in our IT training room working on our foundational software for our system; that is one of our antiquated systems we're updating. Then we also have our software that produces the STIP that is underway for a major update. When those items are done and get in place, it will be a much easier process to keep up to date. In the meantime, we've committed to monthly updates through their manual effort and we'll do our best.

When these projects roll from preliminary engineering into active construction, we're just showing them on the map for two years. We don't have the sophistication in our software to exactly hit when construction is complete. We're taking a shot and going with two years to capture most of it. If it's in construction, it will show up for two years and then it will be taken off the map. Our investment in this technology, we've actually already paid for this technology so there was no additional cost to use it. We have done basically zero application development to create this. Our return on investment is very high. We did this all out-of-box and, as this technology changes, we change with it because we haven't over invested in that code that we now own. It gives us a few limitations, but other than staff time, there was no additional cost to the department. If something brand new comes out and is the latest and greatest, if we like that better we can certainly move this to that. So we've invested in pieces, the data and infrastructure of how we manage that, and then we can deploy that in different solutions as we need because we haven't over invested in this.

Commissioner Jergeson asked if there was any way to see the ones in Preconstruction or do you have to go to "all". We really commend the department for doing this; this is great. What is the easiest way for the public to get to this and know about the ones they can have the most impact on? If there were an easier way to get to that, I think that would be an improvement. Brian said in the upper left corner, there is "project by status" and you select "plan" – that brings up all the projects that are currently in engineering or design. You can further sort that by selecting the "projects by year". Obviously if the project were going out next year, it may be difficult for us to change course and change our scope, but if it's three year's out, if we have time, those are projects that we'd be more open to change. Commissioner Jergeson said that's what we want to do, connect the public for impact. They may not think about going by year, so if you could somehow indicate the ones where the public could have the most input and be as far ahead of the game as possible. This is great. As this is publicized, we will put this out and say go check it out. That's my only suggestion – if there is some way to look at that and know the ones the public can have the most impact on and make sure they can get right to that district office and talk directly to a human being as quick as possible.

Commissioner Hope asked if they would be able to track the number of hits. Brian said yes. Lynn said I don't know how Teresa does analytics. Lori Ryan said it depends on how far the analytics drill down. Brian said it is by use. If they are going to this directly, we'll be able to see how many views you have but if they come through our website, we'll be able to track the links. Commissioner Hope said the analytics would help you know what you might need to improve on.

Commissioner Fisher said I wish people running the FAST ACT had something like this because this is dynamite; it's great. It shows you the process and how long the process really is. Most of the public doesn't know that. So you should tell the feds all about this. The point of impact for the public may be only important for construction in that where you have the information we could put some of the Public Service Announcement saying traffic is going to be delayed for this period of time so

we suggest an alternate route so people could see where the construction is. I would use this where the projects are on-going and make alternative arrangements to get around the construction. Lynn asked if it could be connected to our traveler information. Brian said we have an active construction page and eventually we could link it up. David Smith said when you look at the map of the projects, it always looks like MDT is doing the work, is it possible to say a project has been awarded to Knife River, or Oftedal, or Schellinger, etc. In other states when you drive down the highway, it says “this project is going on, it costs X amount, and contractor is Schellinger Const.” The contractors would sure appreciate that.

Commissioner Jergeson said where it says the award of construction amount was \$912,000 so that would come from the successful bid we approved, but in one the screens it was the estimated construction amount. Did that come from the STIPP or Red Book? Where did it come from? Brian said the estimates we’re pulling into this active page are today’s estimates. So if it is updated monthly, it would be our latest, best estimate that month. Duane Kailey said we looked at trying to tie the information Dave asked about into this and there is some possibility to do that. One of the things we’re going to work on with our PI firms is putting out press on these projects and notifying the public and we’re going to start including the contractor’s name. You are a partner in all this and we will give you recognition when appropriate. Dave said it would be nice to add the economic impact of a project into this as well. You might have a \$12 million contract but the economic impact is much higher to the local community. Can you put that in there too? Commissioner Sansaver said to add the phone number of the contractor on that same page. We have roundabout projects going on in northeast Montana that has had so much rain, it’s literally a bog to get through there and the phone calls have been astronomical. I want them to know who they can call.

Director Tooley said this has been a long time in coming. I appreciate the comments. Just keep in mind that this is Version 1.2. This is out of the box software and it is basically straining to do what we’ve already asked it to do but as other IT work goes on in the background, you’ll probably see some major improvements. We wanted you to see it first before we start putting on flashing red arrows. You can play with it, it is out there and enjoy it. Commissioner Jergeson said I want to compliment the department for getting this done. I’ve been pushing you guys for a couple of years to get this where it was useful for the public. There were times I figured we were never going to get to what I would be satisfied with. I do want to offer the compliment; I think you’ve made great progress and I look forward to playing around with this.

Reauthorization Bill

On July 30th the Senate Environment and Public Works Committee passed the Transportation Reauthorization Bill out of Committee. The good news is they did it, the bad news is it is step one out of six. Other committees have to have their bite at it in the Senate which is on recess. Then it goes over the House and gets mired up in many other processes but it’s good for us right now. We’d love it if it stayed just the way it was. It’s not perfect but it’s good. It gives support for states like ours, retains the formula funding approach, it’s a multi-year bill with some regulatory reductions and some substantial extra funding. Of course, that requires appropriations that we don’t know will occur. It’s a long way away. I have to give compliments for all the work Lynn has done on this. If you look at the bullets in there, most of those are things she and the folks she works with at AASHTO have pushed through the system to basically protect the rural states. It doesn’t hurt that the Chair of the Committee is from Wyoming.

On the Appropriations side, the House has passed its 2020 Appropriations Bill, so the money for FAST ACT is at current levels for both Highway and Transit. That’s handled. We just looked at the project map and I’m very excited about that.

Speed Zones

We had some discussion on speed today and it's really interesting that we're doing that. I just got back last night from GHSA, the Governor's Highway Safety Association Meeting. Usually you hear about seatbelts and booze which are major factors, but speed management was the thing this year. The Administrator from Federal Highways kicked off the meeting but I didn't see a lot of other FHWA folks there after that. Some of the folks in the safety world are talking about speed management and they are really pushing for change. They are suggesting, and some larger communities like New York City, are adopting other approaches. When it comes time to set a speed limit, instead of straight engineering and the 85th percentile, that's what the rules are and what the book says now, but there are other ways of setting speed zones. Some of the things New York has done and is being looked at across the country, are things like what is the survivable speed to be struck by a car and it's not 45 mph. New York decided it was 20 mph, so they have a city-wide 20 mph speed limit in certain qualifications. So they are looking at things like that and also considering where there are larger numbers of vulnerable users present and taking that into consideration when it comes time for calculations. The discussion you had on the Kalispell request is exactly right on with what's being looked at across country. At some point you're going to get the same recommendation from the department as the one you just adopted because the book will be a little broader as to what you can consider if GHSA is successful in their approach.

We also talked about a speed zone change. I have to give a lot of credit to Duane Kailey regarding our state-wide 65 mph to get rid of the differential, he didn't move and he didn't quit. He pointed out some options that would give you greater authority which you used for the first time today to expand speed zones beyond 50 miles. Prior to this last legislative session, we could bring a request for exactly what you did today but it was limited to 50 miles. You just did 180 miles and that's how it should be done. Good work on Duane's part and Lynn's part and also Senator Small and some of the other folks down in that region. Representative Peppers has been pushing for this continuously for years. We kind of got what we wanted and we can use your authority to get there and save lives. I'm looking forward to the implementation of that and seeing how that goes. We have experience between Glendive and Sydney and I think we're going to see the same thing again on 212.

Agenda Item 18: Change Orders May & June 2019

Duane Kailey presented the Change Orders for May & June 2019 to the Commission. They are presented for your review and approval. If you have any questions or comments, please feel free to ask.

Commissioner Hope asked if they would have gone half way through the project and said they needed more time, would that have come through as a change order request. Would we have been involved in that process? Kevin Christensen said the Commission would not have been involved. Duane mentioned they didn't file a claim. Our claims process is just a remedy in the contract to elevate issues that we can't come to an agreement on. When a contractor files a claim, we actually put a team together and look at the issue from a department-wide perspective. Looking at it that way, it really draws attention to the issue. If the contractor would have filed a claim, it probably would have been resolved one way or the other before it would have gone to the Commission. Yes, it would be a change order especially adding contract time. Our federal partners are pretty cognizant of that because if you signed a contract and that is what you agreed to do for MDT, when things change particularly contract time, you have to be very careful about what you're doing because you can create an inequitable situation for the non-successful bidder. We

have had calls regarding that – if I would have known you were going to give them another 30 days, I would have bid it lower. So, we have to be really careful.

Stand

Agenda Item 19: Liquidated Damages

Duane Kailey presented the Liquidated Damages to the Commission. We heard the one earlier today that was contested. The others are not contested. They are presented for your review and approval. If you have any questions or comments, please feel free to ask.

Stand

Agenda Item 20: Letting Lists

Duane Kailey presented the Letting Lists to the Commission. They are presented for your review and approval. If you have any questions or comments, please feel free to ask.

Stand

Agenda Item 21: Todd Cusick Litigation Update

Val Wilson, MDT Legal, said on the 28th of June, the Commission voted to uphold the decision of the Director to debar Todd Cusick from doing business with the department for a period of three years. On June 10th Todd Cusick filed a petition for Declaratory Judgment in the First Judicial District and its being handled by Judge Kathy Seeley. This particular Declaratory Judgment was delivered to the Attorney General's Office and it named the Department, Director Tooley and the Transportation Commission. So our office did acknowledge on that. This Petition for Declaratory Judgment has been researched and staffed by my attorneys. The law regarding judicial review of agency decisions is, in their opinion, incompatible with the Declaratory Judgment that was filed. The Montana Supreme Court has held that Declaratory Judgment is not a substitute for administrative proceeding. The Court does acknowledge that Judicial Review of any agency action is available but the standard for Judicial Review of non-contested cases is arbitrary and capricious or unlawful conduct by an agency.

So the plan going forward is that our attorneys are going to prepare a Motion to Dismiss. It needs to be filed on or before the 10th of September and it is well into its final draft stage. Basically our argument is that they, of course, do have a remedy of Judicial Review; they don't have a remedy of Declaratory Judgment because the Supreme Court has held that a party cannot convert an appeal of an Administrative Decision into a lawsuit against the agency that made that decision. I don't have any other information for you but we should have follow-up information for you at our October meeting.

Commissioner Fisher said if you win the Motion to Dismiss do you get your attorney's fees. It is my experience that is going to be pretty hard to get on the declaratory action. There is a specific case, Svec vs. City of Helena started that whole litany of lawsuits where people were trying to get in under that exception. As a general rule, courts don't give the state attorney's fees very often but that doesn't mean we won't try.

Commissioner Jergeson said I raised the question in our discussion about the Commission exceeding its authority to act as a quasi-judicial body and making a determination about conclusion of a contested case proceeding on whether or not to

debar somebody. In this particular case, I think the decision related to the disposition of the contractor was appropriate but what we did in that decision by suggesting as a matter of law, then that kind of issue for any contractor will never come to this Commission again because it is all going to be handled by the department in some hearing down the road.

Val Wilson said I disagree with you. What happened is once the determination of debarment was rendered, a Hearing's Officer was appointed, and a two-day hearing that was held outside of this agency by Special Assistant Attorney General that serves as an Administrative Hearing's Officer. There were witnesses called, there were exhibits presented, and that Hearing's Officer put forth the Findings of Facts and Conclusions of Law and Recommendation to the Director to then move ahead with the debarment. Based upon that, Director Tooley had 30 days to review the record and made a determination that the Finding of the Hearing's Officer was supported by the law and the facts. Then it was appealed to you and I believe that you made that independent judgment also that it was supported. So now the contractor has the additional remedy of Judicial Review in front of the District Court. The reason we are moving to dismiss is that they filed the wrong action in asking for Declaratory Judgment and in fact suing the Commission, the Director and the Department. It is clear under Montana law that they can ask for Judicial Review of our opinion but they can't sue us so it should be dismissed and hopefully Cusick's attorney will proceed on the right path and then we'll have an additional step. I disagree with your premise that there has not been due process.

Commissioner Jergeson said the whole thing was awkward – the big document that we were given was all conducted as a contested case proceeding but then we declared at the end of it that debarments are not a contested case and therefore I see a debarment never being appealed again to the Commission because the Commission has declared, as a matter of law, that debarments are not a contested case proceeding. That's exceeding of authority that's implied. We're listed under the boards and commissions that are quasi-judicial. When you look up the definition of quasi-judicial it means that some of your decisions are made in the context of contested case proceedings. Our decision that day says that there will be no contested case proceeding related to a debarment and debarment is an enormously consequential issue because that is the taking of somebody's livelihood. I don't know how we would reassert our authority of something adopted in a legal document.

Val Wilson asked if he was saying that you, as a Commission, want to sit in the position of a Hearing – you want to have a Hearing in front of you? I don't understand your comment. Commissioner Jergeson said of course. I served on a body for eight years and that's all we did was hearings all the time. That made perfect sense. The people who sat on that Commission it made perfect sense for them to render judgments on the correctness of whatever case was brought to them. Val Wilson said I understand your concerns but I disagree. Under the current rules, this is the procedure and it was properly filed.

Commissioner Fisher said the distinction here is you sat on a fully judicial board that has decision-making authority in the administrative review process. We're just an appellate review board. We just review the record; we don't get the contested case. We are an appellate board like the Supreme Court is where you actually don't have the contest in front of you. We're just looking at the record and saying "was there sufficient process on the lower level." We don't sit like other boards do where they actually hear the case. Under Montana law, these cases are heard in front of an Administrative Law Judge and that's where they introduce evidence and do all that kind of stuff. We just review the record to see if the record provides sufficient evidence that we're comfortable with the decision. We're different than a lot of other boards; we're more like a Supreme Court rather than the District Court in that first contested controversy where you take in evidence, you review it and then you make a decision. We're just saying there was sufficient evidence from this record for this

decision to be made. The contractor gets more process than almost any other type of administrative review because they go to the ALJ where they have the opportunity for a fully contested case hearing. Then they go to the department director and say we think that this was bunk at the ALJ where the trial was held. The department director then says either yea or nay, you had sufficient evidence or not. Then there is a second layer of appeal where they come to us saying I think both the department director and the ALJ screwed up. So then we are the second appellate court. Then they get a third appellate court with the District Court asking them to review the case. Then they can go to the Supreme Court if they want. So there's like four appeals that they can go through. It's almost like a death penalty case; you get so many chances to get through the court system that by the time they're done it will be seven years in litigation. I don't see that as taking away. What our authority is in these cases is appellate not primary – so it's not where the trial is heard, it's never been that. Wherein in other cases, especially in the state boards, you may have that original jurisdiction where you're the front line, you're in the trial. I'm comfortable with that process and in fact I can't believe that there's that many. We don't even have an Intermediary Appeal in Montana for the entire state. This statute or this litigation provided in debarment procedures provides more intermediate appellate relief than anything else I've seen actually. So it's a ton of due process more so than you would get if you just filed a lawsuit.

Commissioner Jergeson asked if the practical effect of us adopting that language was no future debarments will come to the Commission. Val Wilson said no; any future debarments will come to the Commission in the same way this one came to the Commission as an appellate review of complete record and administrative record and the review of all the testimony, all of the exhibits that are actually taken by the Hearing's Office who is trained in evidence and law and has hours to make determinations. It would be very difficult for this Commission to make. How would be handle your ruling on a Motion for Summary Judgement? How would we put this Commission together to make rules on a pre-trial order and make determinations on whether exhibits came in or whether they were excluded, or ruling on objections? This Commission is not as well equipped as a Hearing's Officer to handle those issues that come forward in a primary hearing.

Commissioner Jergeson said I'm still troubled by the language because it says at the conclusion of everything that was described along the way as being a contested case proceeding, that debarment is not a contested case. So does that language adopted by the Commission then tell the department that you won't handle this with a Hearing's Examiner from DOJ or somewhere else as a contested case proceeding? Val Wilson said I understand that you're troubled by that language but it does not trouble the Supreme Court. In *Johaneson vs. DNRC, 1998*, the Montana Supreme Court held that District Courts have the inherent power to review agency decisions whether or not they involve a contested case. So the Supreme Court acknowledges that some things go through the contested case process, some of them are outside that process, but they are all covered under judicial review under the laws of our state. Commissioner Skelton thanked her for the review.

Commissioner Hope said he wanted to congratulate our engineering staff as well. I know as a contractor we might not always agree and it is so hard to know what lies beneath the surface of any project but I think they do an exemplary job of giving us enough information to make correct decisions on bid lettings and on something like we went through today with liquidated damages. I wouldn't want their job. I think they do a great job of giving us that information. I want them to know that a lot of times things aren't going to go their way and I know Duane and Kevin have come into these meetings and know it's not going to, that we understand a totally different side on the Commission as well. I just want to congratulate you on the good work you do. Duane thanked him and said they would pass it on to the staff. Commissioner Skelton said you guys wouldn't be who you are without your staff either. The staff is so critically important and they all do their work and sometimes

we forget to thank them. Please tell your staff how much we appreciate them burning the midnight hours as I know some of them do.

Next Commission Meeting

The next Commission Conference Calls were scheduled for September 17, 2019 and October 22, 2019. The next Commission Meeting was scheduled for October 24, 2019.

Adjourned

Meeting Adjourned

Commissioner Skelton, Chairman
Montana Transportation Commission

Mike Tooley, Director
Montana Department of Transportation

Lori K. Ryan, Secretary
Montana Transportation Commission