

# Montana Transportation Commission

June 24, 2014 Meeting  
Helena, Montana

## IN ATTENDANCE

Kevin Howlett, Transportation Commissioner, Chairman  
Rick Griffith, Transportation Commissioner  
Barb Skelton, Transportation Commissioner  
Carol Lambert, Transportation Commissioner  
John Cobb, Transportation Commissioner  
Mike Tooley, Director MDT  
Pat Wise, Deputy Director MDT  
Dwane Kailey, MDT Engineering  
Tim Reardon, MDT  
Lynn Zanto, MDT  
Kevin Christenson, MDT  
Patti McCubbins, MDT  
Lori Ryan, MDT  
Katherine Orr, Department of Justice  
Kevin McLaury, FHWA  
Paul Harker, FHWA  
Chris Riley, FHWA  
Ron Trout, MCA  
Trent Baker, Nelcon  
Sam Wyers, Nelcon  
Mike White, Nelcon  
Deb Poteet, Poteet Construction  
Scott Long, H&L Construction  
Paul Thompson, Gilman

*Please note:* the complete recorded minutes are available for review on the commission's website at [http://www.mdt.mt.gov/pubinvolve/trans\\_comm/meetings.shtml](http://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 [lrayn@mt.gov](mailto:lrayn@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 Kevin Howlett**

Commissioner Howlett called the meeting to order. After the pledge of allegiance, Commissioner Howlett offered the invocation.

## **Approval of Minutes**

The minutes for the Commission Meetings of May 9, 2014, May 20, 2014, May 29, 2014, and June 3, 2014 were presented for approval.

Commissioner Griffith moved to approve the minutes for the Commission Meetings of May 9, 2014, May 20, 2014, May 29, 2014, and June 3, 2014. Commissioner Lambert seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

## **Elk Park**

Dwane Kailey presented Elk Park to the Commission. He said he truly regretted that we've arrived at this juncture and apologized to the Commission. The discussion that took place at the May 29<sup>th</sup> meeting surrounded materially unbalanced analysis. I don't know that the department got you all the information it should have during the award meeting to discuss the materially unbalanced. I'd like to present that information

today and ask you to reconsider your motion at the last meeting. Mathematically and Materially Unbalanced is a difficult issue. The definitions are as follows:

“Mathematically Unbalanced is a bid that contains lump sum or bid items that do not reasonably reflect the actual cost plus reasonable profit, overhead costs, and other indirect costs to construct the items.”

“Materially Unbalanced is a bid that generates reasonable doubt that award to that bidder would result in the lowest ultimate cost to the government.”

In general terms “mathematically” means they shifted money around in the bid but it doesn’t mean that they aren’t the lowest bidder. “Materially” means there is a potential the contractor, when the project is completed, will not be or may not be the lowest bidder. Under federal regulations we may award a mathematically unbalanced bid, however, we may not award a materially unbalanced bid. Those are the two big distinctions here.

With that I want to recap the bids we’re talking about. There are three main bid items that are paramount to this discussion. First is the ACB or the Asphalt Cement Binder bid item which Nelcon bid \$350.00/ton while Gilman bid \$718.00/ton, a difference of about \$1,762,720.00. Second, Nelcon bid \$38/ton for mix surfacing while Gilman \$26.70/ton, a difference of \$949,810.00 in the favor of Gilman. Third, Nelcon bid \$1,000,030.34 for mobilization while Gilman bid \$750,000 for mobilization, a difference of \$350,000.30 in the favor or Gilman. This comes to a sum total difference of \$462,880.00 while the bid difference at bid was \$442,188.00. So all but \$20,000 in the bid difference between these two contractors is wrapped up in these three bid items.

The main issue here is the asphalt bid bond. The first thing I want to draw your attention to is that we sent you a map of actual AC percentages that we’ve seen in pits throughout the state. Referring to the map, here is Helena, here is Butte, here is Boulder and here is the project. If you look at the AC percent values, you will see predominately 6%, 5.8%, 5.4%, 6%. The lowest value we see on this entire map is 4.43% in Ennis. That is a very key issue here.

In our analysis for Nelcon to be materially unbalanced we had to look at the asphalt cement percentages. We bid the project out at 5.7%. Here’s Nelcon’s bid, Gilman’s bid, and here is their bid value for oil only (referring to handout). As you can see Nelcon is still low at the bid value. When we get down to 4.3% you can see Nelcon is still low by about \$10,000. It’s not until we get down to an AC percentage of 4.2% that Nelcon is no longer low. Nelcon’s bid assumed at 4.2% is \$8,216,965.80 and Gilman’s was \$8,195,573.33. So there is a difference of about \$21,000 at 4.2%. All of our reasonable information tells us that is not a likely scenario. By far we anticipate that we’re going to be up around 5.3%. When we go back to the federal rules there is a reasonable doubt that their oil will be down around 4.2% which would make it materially unbalanced.

Last but not least, the question was raised by one of the contractors about disincentives. I would caution about going down that road. There are a ton of scenarios that we can look at that can make up whatever we want. First off, it is highly unlikely that a contractor is going to get maximum incentive; it typically does not happen. We have analyzed that information and we find if we assume that both contractors produced their mix with the same exact oil, if they both have the opportunity or both achieved maximum incentive, then the bid would become materially unbalanced at 4.8%. Again those are some very huge assumptions and I would strongly caution us from going down that road because just as we can assume in this instance Nelcon got maximum, we can also assume that Nelcon might get a disincentive which deducts from their ultimate bid. I don’t believe incentive/disincentives on this project should enter into the discussion relative to materially unbalanced. It is a very slippery slope and I don’t think it’s one we can defend against.

With that I'll open it up to the Commission for questions. We cannot reasonably anticipate that this oil is going to achieve a percentage of 4.2, therefore we can't make the assumption that it is materially unbalanced. Commissioner Howlett asked if procedurally it was within their right to reconsider. Katherine Orr said the motion would be whether you want to rescind the previous vote of cancellation. You have three votes you made in the May 29<sup>th</sup> meeting, one to cancel the award, one to reject all bids, and one to re-advertise. The idea would be to vote on each one of those. Commissioner Howlett said I don't think we had all the information. I don't think we had an appropriate explanation of everything that was in front of us and I feel a little bit scared by that for lack of another term. I think I'm a reasonable person and this Commission is reasonable. If there is more information that goes into this decision then that's what we need.

Commissioner Griffith said Dwane and his staff have done a really good job of trying to frame the argument unbiasedly. However, my thought is that had we done this prior to awarding it the first time, I think it's totally within our power to pull the project and rebid it. My numbers come up to about \$660,000 versus \$400,000 offset which would put the second contractor low assuming 4.3%. It gives the inference that this is the standard and this is how we want contractors to bid. The case to be made is this is a critical part of the award process and every time we get a mathematically unbalanced bid we ought to know about it so we know the potential is there for a problem. Since this project there have been three other projects that are mathematically unbalanced. Somehow we have to fix what I think is the problem; fix what's going on. A long time ago we separated plant mix and oil content so the department didn't get hurt and so the contractor didn't get hurt. We put inflation clauses in for oil. We did lots of different things to try and make sure everybody was on the same playing field. When the imbalance comes, it's either going to make everybody on the same playing field because we reasserted our authority and fixed it or you're going to find other contractors start to do the same thing. I don't think that's what we want. I'm personally trying to avoid that. A mathematically unbalanced bid is not good for the department or for competition with the other contractors that try to put somebody at a disadvantage.

Commissioner Cobb asked Commissioner Griffith if he was counting mathematically unbalance to include the incentives too. Commissioner Griffith said yes at \$600,000. Commissioner Cobb said if it did include the incentives, would it be okay or not. Commissioner Griffith said if both contractors made maximum incentives because the oil price is so significantly unbalanced that the low bid contractor would get a \$265,000 adjustment that the second contractor wouldn't get.

Commissioner Cobb asked Katherine Orr if the Commission could reject for any reason. Katherine Orr said under the statute they could. Commissioner Cobb said then we could reject because it is mathematically unbalanced or just for any reason. Katherine Orr said that is what the specification says but that is not what the federal CFR provision says. Commissioner Cobb asked what the conflict was. Katherine Orr said the statute gives the Commission the authority to reject. Then the question becomes on what basis and you can follow the specifications which says "either or" but the guidance says if it is materially unbalanced. Commissioner Cobb asked if they have to give a reason to reject. Katherine Orr said that was a guidance.

Dwane Kailey said it becomes a question of federal participation. Kevin McLaury asked for clarification of the question. Commissioner Cobb said we have statutes that say we can reject for any reason but if we do reject can Federal Highways tell us we can't do that? Kevin McLaury said he wouldn't say you can't do that. The program is set up to be state administered and federally funded; this is your program but it's federally funded. The question comes down to – you can do as you wish but I may not participate federally. So if you want to move forward with a project, it can be state funded and that's okay with me. Commissioner Cobb said but we won't

know until you say if you're going to participate. If we reject Nelcon and we rebid it are you taking any position on what will happen; whether you will participate? Kevin McLaury said we have not been formally requested to review this so I'm just using what I've seen to date. Given there is no documentation to not award, there is a high probability I will not participate in this project and we would be requesting any federal funds back for the development. Never say never; we've not had the ability to analyze this but given my knowledge of this situation, we're far enough down the line, there is nothing in statute that would say that we shouldn't award it.

Commissioner Griffith asked if he was saying the Commission should just be a rubber stamp for the department. Kevin McLaury said the Commission has to do what you feel is correct. My role here is to answer questions for the Commission but my main role is to protect the federal investment and federal interest. Until we have the ability to analyze this fully, I cannot give you a full answer. What I told you is what I've heard from the state. I can't give you a full answer. Is the potential there that we will not participate? Yes. Commissioner Griffith asked if that meant the Commission did something wrong. Kevin McLaury said it was not about right or wrong; this is about whether the Commission takes an action that from a federal view ... I'm protecting the federal interest and we don't agree. It's not about whether it's right or wrong. Commissioner Griffith said we would not be in compliance with the federal regulations. Kevin McLaury said in looking at the federal interests we feel the Commission made a decision we don't agree with and it's not right or wrong. Commissioner Griffith said with all the things we talked about, we don't have in front of us the federal view. We were within our rules as a Commission to do what we did. We don't have anything in front of us to say there is a violations of federal rule. Commissioner Howlett said we shouldn't be looking over our shoulder to see if the feds are going to approve of our action; that's not what this Commission is established to do. Kevin McLaury agreed with him. The Commission needs to do what they feel is right for this body and for this state. I have a separate role. I don't work for you and you don't work for me; we are at arm's length. That is the relationship I have with MDT – an arm's length relationship. I protect the federal interest. You make your decisions based on what you feel is most appropriate and I make my decisions based on the information I have in order to protect the federal interest. It's not a right or wrong issue. Commissioner Howlett said it is if you can deny funding for a project then it is a right or wrong issue. Kevin McLaury said he didn't see that; I don't look at it like that.

Commissioner Skelton asked if the CFR stated they can reject only if it is materially unbalanced not mathematically unbalanced? Katherine Orr said that is basically right. Kevin McLaury said if it was materially unbalanced, we wouldn't be here. We wouldn't be this far down the road. Mathematically unbalanced is just an indicator and you can award on mathematically unbalanced but it is the first step in the indication that there is something potentially more. Commissioner Cobb said in our specifications the unit price contained is mathematically and/or materially unbalanced, so if it is mathematically unbalanced we can reject. Katherine Orr said yes. Commissioner Cobb said it seems the department is saying they have to be both. Everybody seems to have a different interpretation of this and it is confusing to me. So if it is mathematically unbalanced, we can just reject. Katherine Orr said, under the state specifications, you can. Commissioner Cobb said the way he was reading it, if we were materially unbalanced there is no way we can award that contract with the fed's participation. That is an absolute and everything else is a maybe. If it is materially unbalanced and we approve it you are pretty much going to say no to that.

Commissioner Griffith asked where the threshold was. Commissioner Howlett asked Kevin McLaury if this was the card you hold in your pocket. There are going to be other projects that come in with this same scenario. We want to know if these things are going to happen. It seems to me that we ought to have some certainty in the decisions we make and not have a federal agency pulling this card or not pulling this card. Kevin McLaury said he wholly agreed with that. I ask you to think about this -

if you were going to reject, what are you standing on to reject it? I understand you are saying it is mathematically unbalanced, but what is “mathematically unbalanced” – how do you define it, how do you set a process in place, was it in place when this contract was bid? Commissioner Howlett said that is the explanation that Mr. Kailey and Mr. Christensen are obliged to provide that I don’t think we had when we made the decision. Knowing that we had the authority to reject it because it had the appearance of being unbalanced, that’s what precipitated the motion.

Dwane Kailey said to date I’m not aware that MDT has recommended or the Commission has acted on rejecting a bid for being mathematically unbalanced. We’ve done a fair amount of research, we have not exhausted all options, but I will tell you in most everything I read so far that most states are very reluctant to reject bids that are mathematically unbalanced. Everything I’ve found involved materially unbalanced. It is a slippery slope. We did find some case law, 28 CFR specifically prohibits rejecting mathematically unbalanced unless two issues are met. I’m finding very little case law where states are rejecting bids for mathematically unbalanced. When we recommended award to the Commission we did not bring this information forward. We reviewed it and we believed it was mathematically unbalanced not materially unbalanced. We have now put a process in place when we see this type of action taking place, we will present that information and it will be included in your information. That was an area of improvement for MDT; we will step that up. To my knowledge we have not rejected a mathematically unbalanced in this department to date.

Commissioner Griffith said my original motion said that the bid was mathematically unbalanced with the potential to be materially unbalanced. The numbers I generated, the \$400,000 issue on oil and incentives, the potential was there to be materially unbalanced. That was the original motion. That was the way it was framed. I don’t want to make this issue difficult for Federal Highways; I want to do the right thing for the Commission and for the department. If we don’t have federal funding, Elk Park doesn’t get done for a long time and I can’t take the risk of that happening. I think there is a problem here that exists. This Commission followed its own rules but apparently those aren’t the rules that make us comply with federal rules. There ought to be some synergy for that to happen and I’m not feeling that. To be honest this has been out there for almost two months and I would have hoped that by now Federal Highways would have said yes or no to federal funding. That being said, I’m not willing to take the risk for my district to lose \$8 million of federal dollars.

### *Mike White, Nelcon*

I appreciate the opportunity to be here a second time. He thanked Dwane Kailey and Kevin McLaury for their efforts. I find them to be unbiased and I think you’ve done a great job. Thank you on behalf of 130 Nelcon employees and my sons who would be working on this project.

First of all, assumptions and probabilities reference things like 4.3%. It is very unlikely that, using the information the department used... I have a booklet of mixed designs since I started in the asphalt business in a three-ring binder and I have nothing like that. I figured the oil at 5.3% and it was bid at 5.7%. Another thing you might consider is on March 21, at 16:04 in a Q&A Forum on another federally funded project called Hardin, we had another contractor set a precedent prior to Nelcon’s bid. The contractor, Denny DeVoe of Riverside Contracting, asked the department if they could utilize rap for the mix. The department said yes you can but the quantity that would have been represented in that bid originally did not change from the Q&A Forum. They therefore allowed the contractor to use a procedure to use less oil. Nelcon has figured out a way to save the state money – we used less oil. The oil is what costs the federal government all the money; the rock is pretty cheap. So we figured, through processes, how to come up with unique procedures to create the finds cleaner. The cleaner the finds are in crushing, the less oil it takes and we

pass those savings on to the state, \$442,000. In other bids I've saved you \$3 million than the next bidder. That's our job and if you stop the process of allowing us to use engineering and techniques and 30 years of experience, then you stop the competitive process. On the Hardin job, you've set a precedent and you have federal funds. The bid for the oil by that contractor where the quantity did not change is exactly the same price as my price of \$350. So you have already set a precedent. By the way I was second bidder on that job. By the way I did not protest. I thought it was a brilliant move by a brilliant contractor to save the state of Montana \$600,000. That contractor wrote an email to this Commission and said Nelcon cannot be materially unbalanced until the oil gets to 4.3%. I have no alliance with that contractor. I happen to know Marvin Raybine; I respect him very much and he respects me for starting my business on a home equity loan and accruing \$20 million of debt which I still have a lot to pay for. This project is of extreme importance to me and my family which are my employees. It is very important for you to know that you have already set a precedent on March 27<sup>th</sup> in a previous letting on a federally funded job on the Interstate the same as this Interstate project at the same exact oil price. Not only did you award that job but you facilitated, by a change in methodology in the Q&A Forum, to use less oil. Last time I told you that amount of oil change wouldn't be 50%, it would be 15%.

Commissioner Griffith said you did tell me that but I don't believe it because I do these designs myself. That was my business for 15 years so I know how much oil recycled asphalt takes. Mike White asked how much less would you think?

Commissioner Griffith said it is somewhere around 4%. Mike White said I have some information on that particular matter. I had Rimrock Engineering look at this. Commissioner Griffith said he wasn't going to argue about it. The difference is apples and oranges. Mike White said it was not. Commissioner Griffith said yes it is; there is asphalt in the reclaimed oil that you get to take advantage of as a contractor by bidding rap. On this project the same question was asked whether you could use rap and the answer was no by the department. So you couldn't use rap, so you've got apples with rap at Hardin and oranges with no rap at Elk Park. Mike White said in both cases the results of whether their techniques that require less oil. The fact of the matter is the department didn't change the quantity of oil following a Q&A question. I have an email that is written by someone who is an expert that I've worked with for 15 years in helping Nelcon build mix designs to meet the requirements of Grade S mix – Paul Brown from Rimrock Engineering. I respect him greatly. This was written Sunday, June 8<sup>th</sup> written at 1:06 pm.

Hi Sam, over the last two years our firm has prepared two asphalt mix designs utilizing rap. One of the mixes was a 75% Bull Marshall Mix designed based on MPW modification criteria. The second mix was a Grade S Gyrotory Mix proposed for use on an MDT project. For both of these mixes .9% of the total asphalt oil was generated from the rap. .9% equates to approximately 15% percent less oil overall.

That is what I was eluding to last time. So what happened on Hardin is you set a procedure up to allow the use of rap and you did not change the bid quantity and you allowed an unbalanced mathematically bid at a price of \$350/ton. That's the exact price used on the Elk Park project. That's all I wanted to point out to you. You asked if there had been a precedent set and there has been and it's on a federal project as well.

***Paul Thompson, Gilman Construction, Butte***

Gilman has been doing business with MDT since 1969. I've been an Engineer and Estimator with Gilman for 31 years. We have a few comments on this. We've always tried to bid pretty much straight up and have the bids we submit reflect the actual unit cost of doing the work. There are times we think the quantity may be a little off but we refrain from taking advantage of that. Around 10 years ago MDT had some problems with unbalanced bidding and took some steps to try and reduce that. That's back when they were getting penny bids for traffic control and just generally

unbalanced bids. Some of the things that came out of that were the Q&A Forum and also Specification 102.06. That specification doesn't talk about unbalanced bidding it just says that the bidder shall not take advantage of an error or perceived error in the quantities or plans and, if they spot one, they are required to bring those to the attention of the department prior to the bid. The preferred way to do that was through the Q&A Forum. The Q&A Forum was implemented as part of that whole program. That program was successful for a long time.

At that time there were a couple of jobs that were not awarded to the apparent low bidder. I don't know the details on the question of materially or mathematically unbalanced but I know those issues came into it and there were jobs that were not awarded. When the Specification was changed and the Q&A put in, the unbalanced bidding was greatly reduced. The department was very aggressive for a period of time in policing it. What would happen after bidding, if we were the apparent low bidder, we would get contacted by the department prior to award. They would say "this unit price seems high, it's outside the standard deviation, or this one seems too low and can you explain it." I remember writing dozens of short explanations to the department. They were usually reasonable explanations and we would provide those to the department and then they would finish their analysis. In the cases of the jobs we bid, they were all awarded and there was no question. MDT wouldn't only ask those questions on big projects but they would ask them on relatively small projects too. What I've noticed over the years is the department has become less aggressive in policing that. We haven't had any of those inquiries about our bids for at least 3-4 years now. I don't think the rules have changed, Specification 102.06 is still in the Spec Book and the Q&A Forum is still there, but I think the department has become a little bit passive and isn't investigating those like they once did. What I see is unbalanced bidding creeping back in. I see some penny bids for traffic control again and some bigger unbalances especially on asphalt that involves a lot of money.

When companies take advantage of perceived quantity error in this manner, two things happen. One, they lower the unit price they are bidding for something and on the portion of that material that they think they are going to have to buy, they put money to cover the rest of that in other items of the bid. On the portion of material or items they don't think they are going to buy because it was misestimated, they are able to reduce their bid by that difference. Commissioner Howlett said they don't want to get into the mechanics of what companies do; that's part of the business venture that you're in. I'd like you to state your position on this particular project because we need to move on.

Paul Thompson said that I don't think the Commission's action at the last meeting was strictly about materially unbalanced. If it was, logic would have dictated that you would have moved to award the job to the second bidder which you didn't do. If it was strictly about materially unbalanced, that would have happened. I appreciate you hearing us out. My only other statement is if this process is going to be allowed it is going to force all bidders to adopt the same tactics in order to compete whether we want to or not. It forces us to do that in order to remain competitive. Thank you.

Commissioner Griffith said it was with a heavy heart that he was doing this. It's only because we're put between a rock and a hard spot by the federal funding issue. As I said I'm not willing to do that and while I feel the Commission did right on this project but I'm not willing to see Elk Park go another four to five years without treatment.

Commissioner Griffith moved to rescind the May 29<sup>th</sup> Motion. Commissioner Lambert seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Commissioner Griffith moved to accept MDT's original request to award the project as reported by the department. Commissioner Lambert seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Commissioner Lambert said the comment was made that the department was getting a little more lax. I don't think we had the information we should have had. If the department is not as aggressive as they used to be, I request they review their actions and get more aggressive and get us the information we need. Commissioner Howlett said I appreciate the desire to bring some creativity to the process and to potentially save the state money; I think that's good thing. If it means that procedurally in house as we review these that it takes a little more work then so be it. I don't think it's a bad thing that we bring a little more complexity to this because it is a very competitive market.

Commissioner Griffith said regarding Kevin McLaury's comments, bidding half the cost of oil is not right. That \$1.7 million difference between what it cost them to buy the materials is not right; we have to fix that. So there is an issue that the department somehow needs to fix. Traffic control is a big issue. We added traffic control and we did it as a unit price because we didn't want people getting hurt. Traffic control gets done, there's no more accidents but when you bid it on the cheap, you tend to do it on the cheap to try and save money, that's not what we want. That wasn't the intent. With oil prices, we need to fix that. It's 25% of the project. The difference between those two bids under what it costs for the product, that's not right. There is something wrong with the bidding process if we allow that to happen. I hope somehow that, not just projects like this that has oil but projects that bid a dollar for traffic control and any other major issues that play to the favor of ... We can't allow that to happen.

Commissioner Griffith said the only thing that I feel bad about the way I handled this is that I didn't do it at the first meeting. I apologize for that. I should have handled it before we awarded the project. Frankly we're going through a time when we're running out of money and we're delaying projects. We have a myriad of reasons why we don't need to award a project. The point is we need to fix this. I understand you think Hardin was the same but I don't. Regarding Hardin I said to Dwane and Kevin that we ought to have a unit price for rap, either an alternate or something because I want everybody to be on the same playing field. I hope we go from here and by the next meeting we can have some solid answers. Number one, there is a discrepancy on the 29<sup>th</sup> that we didn't know about regarding our rules versus federal rules. Somehow we have to weigh that out and rectify that because the Commission shouldn't be on a different playing field than the federal government. We need to make those corrections because if we don't then the next time we get bids in we will have more issues to deal with at the next couple of lettings until we fix the problem.

Commissioner Cobb asked Dwane if he was going to put in place a process to address mathematically unbalanced and materially unbalanced. Dwane Kailey said MDT researched it and I'm very concerned with the lack of case law out there. Commissioner Cobb asked if he was going to get a process in place and get back to the Commission. Put it in writing also because someday we'll get in a court fight and we'll need it in writing. Secondly, on materially unbalanced and mathematically unbalanced, it seems like the department has a view point about what it is and the contractors certainly seem to do it. So maybe you could give us some examples of what you mean by that so they all know what it means. For example, Riverside is really good about asking why this is short but in Nelcon's case you just said "Hardin did it" with no further explanation. The department is actually defending you in trying to explain what they are but the contractors need to explain it in writing. An

explanation works much better for everyone to understand. So the contractors need to defend themselves in writing and Riverside is a good example of doing that. Dwane Kailey said MDT does have a process of analyzing the bids but we haven't had a process for presenting that information to the Commission and we will adopt that.

Katherine Orr said you also made motions at the May 29<sup>th</sup> meeting to the effect that all other bids would be rejected and you would re-advertise the Elk Park project. You may want to vote to rescind those votes as well. Commissioner Cobb asked if she had any other comments for the Commission. Katherine Orr said she had read all the minutes and documents and the way I see it in the first go-around on May 6<sup>th</sup> there wasn't a discussion of these factors. Then on May 29<sup>th</sup> there was a discussion but it wasn't from the department. I agree that there should be a process in place so the Commission has a baseline for votes.

Commissioner Griffith moved to rescind the May 29<sup>th</sup> Motion. Commissioner Lambert seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

### ***SF129 - Guardrail N Polson & SF109 – Guardrail/CBR – S of Somers, H&L Construction***

Dwane Kailey said on the May 20<sup>th</sup> second letting we held out one of the projects because we identified a project that was mathematically unbalanced. Given the discussion on Elk Park I felt it was most appropriate to hold that project knowing we were going to have this meeting to make sure we had a good discussion on the project and answer any questions the Commission may have. Kevin Christensen will read the bid to you.

Kevin Christensen said we conduct a detailed analysis of every bid and we do write the letters, we do make the phone calls to the contractors, it is just something that hasn't been visible to the Commission in the past. We understand that is an area that we need to improve. We have been giving the bids that scrutiny, it's just something that is not publicly visible.

This a guardrail and concrete barrier rail project south of Somers. The engineers estimate is \$390,339.00. We had three bidders. The low bidder is H&L Construction, Inc. They bid \$363,135.30. H&L Construction is a Disadvantaged Business Enterprise. The reason we held this bid out is because it is mathematically unbalanced. They bid \$.01 on traffic control. I called H&L Construction and they indicated to me that for this particular project it was easier for them to bid a daily rate and put that in their mobilization rather than looking at the units and trying to figure a unit cost. It was just an accounting thing. To add to that discussion a little bit more, on certain projects we went to a lump sum traffic control quite a while back. That was met with a lot of controversy. The contracting community is split down the middle on whether they love it or hate it. We're trying to find a balance. Right now we like to put lump sum but as I said some of the contractors don't like it. So when we find a job that is fairly well defined operation-wise, we tend to put a lump sum on that. When we have the bigger jobs like big grading jobs, we put units on them. This was a job that was right on the border and it could have been either/or. I suspect that during the border review because we get a lot of flak when we in put lump sum we decided to go units on this.

Analyzing this bid it is mathematically unbalance but not materially unbalanced. You can take the traffic control item completely out and H&L Construction is still the low bidder. You can suppose there will be one million units of traffic control and H&L Construction is still the low bidder. In all the scenarios we ran through H&L

Construction is the low bidder. We would normally have recommended award in our conference call but, given the issues of Elk Park, we thought we'd have the discussion today.

Commissioner Griffith didn't agree. He said one million at \$.70 would be \$500,000. Kevin Christensen said H&L Construction would still be the low bidder. The point I'm trying to make is, regardless of the fluctuation in traffic control units, H&L Construction is still the low bidder. Commissioner Griffith agreed with that. Kevin Christensen said therefore this is not a materially unbalanced bid. Regardless of the fluctuation, Mountain West Holding is going to be high every time no matter what. Commissioner Howlett asked if the project was on 35 or 93. Kevin Christensen said it's on both. Commissioner Howlett said they would have gotten it either way but we don't want them to cheapen up on traffic control. I know it is easier for the department if it's a lump sum because you don't have to track all the candles but maybe that is just part of being the department.

Dwane Kailey said he agreed. We are trying to find a balance with the contracting community. I think we're there because we did see a number of bids a couple of years ago coming in with really low traffic control bids. I spoke at the MCA meeting and told them we did not want to see that. So that ended it for a while. We have seen some but it's been fairly sporadic. Commissioner Griffith said at one time they used to put the bid price in for all the contractors. Kevin Christensen said they used to do that but again I don't think that is fair to the taxpayer. If this continues and becomes a pervasive problem, it is something we are going to look at. One of the things we've done is for the last two years we've been having an MDT/MCA Traffic Control Summit off site. We've been able to solve a lot of problems in those and I think this will be a topic for the upcoming meeting.

Dwane Kailey said it is our recommendation to award the project to H&L Construction.

Commissioner Griffith moved to award SF 129 Guardrail N Polson & SF 109 – Guardrail/CBR South of Somers. Commissioner Skelton seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Commissioner Howlett asked MDT to keep the Commission apprised of awards. Maybe on our award notice there could be an asterisk if you think it is mathematically unbalanced but still recommend award. Kevin Christensen said it is our intention to make sure that the Commission is apprised of any kind of issues along those lines. Commissioner Howlett said anybody who bids \$1 for a manhole cover, even though it is mathematically balanced ... to be honest the reason we've gone as far as we've gone without much input from the Commission is there is a level and a sense of how good a job MDT is doing. As a Commission we didn't look into as much as we should have because of the sense of comfortability that you guys give us. If we open the communication a little bit so we can see that, I think that would be good.

Commissioner Cobb said it would help if the federal government would say how they are doing things so that when they challenge something, they know what our rules are ahead of time so if we say no to something they will know why. That will help to have a record of the Commission's involvement in things earlier.

***Scott Long, H&L Construction***

I just want to say thank you to the Commission for making the decision. I appreciate it. Thank you.

## Agenda Item 1: Letting List

Kevin Christensen presented the Letting List to the Commission. We have eight projects for your consideration.

No. 101 is College – Main to S 19<sup>th</sup>, Bozeman. Engineers Estimate was \$5,187,583.96. We had two bidders, the low was Knife River Corporation out of Belgrade. They bid \$5,780,777.25. They were 11.43% over the Engineer's Estimate. There as a 0% DBE Goal and we had 5.32% participation. This project was a little over 1% outside of our guidelines. We took a look at the project. This is an urban project in tight quarters and we underestimated some items such as street excavation and special borrow and RCP. There is an explanation attached to your packet that explains some of the areas where we were able to bring the project within guidelines. We are recommending that award.

No. 102 is Storm Drain NE of Kalispell. Engineer's Estimate is \$4,228,926.65. We had three bidders and the low bid was LHC, Inc. out of Kalispell. They bid \$3,616,122.10. They were 14.49% under the Engineer's Estimate. There was a 0% DBE Goal and we had 2.72% participation.

No. 103 is Sheridan – Southeast. Engineer's Estimate is \$3,417,530.45. We had three bidders and the low bid was Helena Sand and Gravel, Inc. out of Helena. They bid \$3,282,745.75. They were 3.94% under the Engineer's Estimate. There was a 0% DBE Goal and we had 0% participation.

No. 104 is Little Peoples Creek/MT 11-1. Engineer's Estimate is \$3,165,367.06. We had two bidders and the low bid was TCA, Inc. out of Bozeman. They bid \$2,883,633.50. They were 8.9% under the Engineer's Estimate. There was a no DBE participation.

No. 105. Girard E&W. Engineer's Estimate is \$2,879,645.20. We had three bidders and the low bid was Riverside Contracting, Inc. out of Missoula. They bid \$2,751,414.10. They were 4.45% under the Engineer's Estimate. There was no DBE participation.

No. 106. Silverbow Creek – 4 miles South of Opportunity. Engineer's Estimate is \$1,761,196.19. We had two bidders and the low bid was Dick Anderson Construction, Inc., Great Falls. They bid \$1,266,832.77. They were 28.07% under the Engineer's Estimate. There was a 0% DBE Goal and we had 6.93% participation. For the Commission's information we had a decimal error on the Engineer's Estimate on "remove structure" item. We meant to have in the estimate \$50,000 and a decimal error made that \$500,000 and that is why this bid is so much lower than the Engineer's Estimate. Commissioner Griffith asked if it was still within guidelines. Kevin Christensen said yes.

No. 107. SF 119 – Jct. US 93/Skalkaho Road & SF 109 – Flasher – N of Lost Trail. Engineer's Estimate is \$120,097.05. We had two bidders and the low bid was Mountain West Holding Company out of Billings. They bid \$131,255.43. They were 9.29% over the Engineer's Estimate. There was a no DBE participation.

No. 108. Slide Repair – West of Brockway. Engineer's Estimate is \$238,396.00. We had six bidders and the low bid was Riverside Contracting, Inc. out of Missoula. They bid \$179,690.25. They were 24.63% under the Engineer's Estimate. There was no DBE participation.

Staff recommends awarding projects 101 through 108.

Commissioner Howlett asked about the Little Peoples Creek project. Is that on the Fort Belknap Reservation? Kevin Christensen said yes. Commissioner Howlett asked if TERO was in place on that project. Kevin Christensen said yes there was a project specific agreement required on every project.

Commissioner Lambert moved to approve the Letting List. Commissioner Griffith seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

### **Agenda Item No. 2: Secondary 238 - Lewistown Southeast**

Dwane Kailey said at the last meeting we presented the speed zone for Secondary 238, Lewistown SE. With your review and approval, your motion and subsequent approval was for the interim speed limit. After the meeting it was pointed out to me that the last two plus mile segments of the roadway actually had a posted 35 mph speed limit which was not part of the interim. However, we cannot find anything in our files that substantiates or justifies that 35 mph special speed zone. I need the Commission to adopt a special speed zone for that segment. Staff's recommendation is to do that.

Commissioner Griffith asked if we changed the recommendation. Dwane Kailey said you chose to adopt the existing interim speed zone. If you recall we had an individual from the area testify regarding the speed limit and he was in favor of the interim rather than going to the higher speed of staff recommendation. However, as you see on the map, you will notice there is a two-mile segment that isn't covered under the interim. So based on your motion, we were uncomfortable with moving forward with the 35 mph speed zone.

Staff's recommendation, based on our review of the roadway, traveling speeds, accident history, nature of the roadway, access, is for a 45 mph speed limit. Currently it is posted 35 mph but we can find no action by the Commission that established that 35 mph. We suspect the county or some other individual that purchased a sign and put it up. It would be 45 mph from MP 9.7 to the end of the pavement about 1.4 miles long. Commissioner Lambert asked if that tied it all together. Dwane said yes.

Commissioner Lambert moved to adopt the 45 mph speed zone as recommended by the Department on Secondary 238, Lewistown Southeast. Commissioner Griffith seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

### **Agenda Item No. 3: Ronan Urban**

Dwane Kailey said he got a note today that is excellent news for the Commission. It is an MOU between the Department of Transportation and the City of Ronan. As you are aware, we have had some challenging discussions with the City of Ronan as it related to impacts or non-impacts to the Park on First Avenue in Ronan. With a lot of blood, sweat, and tears and hard work by the District staff as well the Consultant and staff here in Helena, we now have agreement with the City of Ronan. The City of Ronan signed the MOU and most importantly they have signed the letter of Diminimus which was key for us to keep this project moving. So at this time we have a very viable project in Ronan Urban. Furthermore, I have sitting on my desk the signed Agreement and Contract with Morrison-Maierle and KLJ Consultants for Post Creek Hill. I also have the schedule for Post Creek which is very preliminary but at this point in time but does show viability for 2019. So we're in accordance right now with the Red Book as you established last fall. As far as staff

recommendations for any changes of priorities, my recommendation would be that we hold off on any prioritization changes until we have a Red Book this fall. Everything is back on track and we have a viable project in Ronan as well as Post Creek Hill. Commissioner Howlett thanked Dwane for his persistence.

Commissioner Lambert asked if they were recommending that the Commission do nothing. Dwane Kailey said at this point in time I recommend the MDT staff stay in accordance with the direction you gave us last fall in the Red Book and make no change at this time. Commissioner Howlett said the Commission's decision at the last meeting stated they needed a decision by Ronan today. We have that decision, so we can put that issue to rest.

Director Tooley said he appreciated the hard work of the staff. I've pushed them harder than they appreciated to make sure this question was answered by today. As a matter of fact Administrator Toavs drove up to Ronan to get the documentation this morning to make sure he had it in hand before this meeting. Commissioner Howlett said he appreciated that.

#### **Agenda Item No. 4: 2014 Standard Specifications Book**

Dwane Kailey said we have presented you with our Spec Book as relayed in our previous meeting on May 29<sup>th</sup>. The majority of changes relative to the Spec Book are associated with adopting the Standard Specifications which are already included in contracts we let today. With that we have sent to you a subsequent EO showing the process we go through as well as concrete section 511 that we have updated in accordance with the MCA and the concrete industry. It is a savings and a benefit to the agency to adopt the new Spec Book. As you recall there was a substantial portion of the contract that is supplemental specifications and it will allow us to remove those supplementals out of those contracts and make them a part of our standard specification which will be a savings to the agency as well to the contractors in dealing with that. It is staff's recommendation to approve this Spec Book as presented.

Commissioner Howlett asked if some of the discussion this morning was included in the specifications regarding baseline data or baseline spec. Should those be added to that? Dwane Kailey said my recommendation is that we do more research on that. I'm assuming you are referring to "mathematically unbalanced and materially unbalanced" specifications. I believe we need to do research on that. Everything I found so far is leaning away from putting in a hard line stance on mathematically unbalanced. Commissioner Howlett said he was referring to the content of oil and gravel and having some baseline that is required. Dwane Kailey said that is what I am referring to. We are talking about mathematically unbalancing of projects and I feel we need to research on that and then bring that back to the Commission with a recommendation as well as the MCA. Commissioner Howlett said then we could add that as we go along. Dwane Kailey said that is correct; we would adopt that with approval as a supplemental specification or a special provision, whichever is appropriate. My recommendation would be that we not hold the adoption of the new Spec Book until that is completed.

Commissioner Lambert moved to adopt the 2014 Standard Specification Book. Commissioner Skelton seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

#### **Agenda Item No. 5: Project Specific Agreements (PSA)- Tribal (MOU)**

Pat Wise, Deputy Director, presented this agenda item. She said there was some question about having percentage DBE's in Project Specific Agreements. Patti McCubbins will talk more about the DBE Program and the methodology they have been developing for DBE goals. Today we wanted to talk about Project Specific Agreements (PSA's) and how they relate to Memorandums of Understanding (MOU's) with Tribal Governments around the state. As you probably know MDT has MOU's with Tribal Governments around the state. These MOU's are government-to-government relations to help qualify our relationships with Tribal Governments concerning construction of contracts through MDT. They are a five-to-ten year agreements where we renegotiate the language in those channel provisions and what they are going to look like with the Tribes. We are currently up to date with all of those MOU's with Reservations around the state. Each MOU has particular language about Project Specific Agreements.

Now we don't do a lot of work on Reservations but where we do the intent of the PSA was to revisit again the specific and general provisions in the MOU to make sure we're on the same page with the Tribe before we advertised the contracts for bid through MDT. What Eli did for you in the materials he presented, was to give you a sample of both a Memorandum of Understanding and then a Project Specific Agreement that is applicable for a project that will be let this summer.

Generally PSA's include spec provisions out of the MOU that cover TERO percentages, an indication that MDT will apply existing TERO payments, that we will look at hiring preference employment on the Reservation, and that we will work with ... for example in Crow there is a specific provision about the environmental officer on the Reservation and our obligation to work through that agency, our obligation to work with the TERO officer if there is a pre-bid conference and during that conference to walk through all of the provisions of the MOU. In the Crow MOU there is also a small paragraph that talks about encouraging DBE participation in this contract. The Project Specific example that Eli provided for you does not include that DBE preference but remember in the context of the MOU there is language that says that the PSA's will not include language that is not consistent with the MOU. So in general, we say will participate with whatever the DBE goals are in the state and that hasn't changed. The PSA cannot obligate the department to any higher DBE participation than whatever our obligation is under the DBE Program but it applies.

You were concerned about seeing the percentage goal taken out of the PSA's. I think Eli's letter to the Commission indicates that he didn't feel that was an appropriate place to have that and I would rely on his legal interpretation of that. Whether it's in there or not, we can't exceed the obligation we have towards finding Disadvantaged Business Enterprises to engage in contract work with MDT but I think we can hold that line. Commissioner Howlett said we can't exceed it if they are meeting their goal but if they are not we can exceed it. Pat Wise said yes that is right. I think that's an obligation between the contracting community and MDT not in the MOU attached to the PSA.

We've had this conversation within the organization as to why the DBE Project Specific Goals were in the PSA's at one point. I would guess that over the history of the DBE Program when contractors weren't meeting the race-neutral goal that we probably included the language to remind contractors they had an obligation to meet our state DBE goal particularly for that project. I would rely on our legal staff's interpretation that it was not the appropriate place to have language about DBE in the PSA's. Continued notification of the fact that the DBE Program exists in the state and that we have obligations as the transportation department to meet those goals is important. We should be providing information and education about that and I think that goes to the contractors. In all of our contracts at this point there is very specific language referring to DBE's. Patti will talk to you a little bit more about stepping up some of the education opportunities for the contracting community.

Commissioner Griffith said the problem is that literally at one time it was 10% but more recently it is 6% and then it changed to 3.56% but it happened without Commission involvement or discussion. That's a big range for not involving the Commission because we have to enforce the contracts with DBE goals. I remember a project in my district we had to take it away from the low bidder because they didn't meet their DBE goal. Pat Wise said all of a sudden it changed and we didn't have specific goals anymore. Patti will walk you through that timeline because it's confusing and it has changed.

The point to talk about the MOU's and PSA's and TERO is to show you that we have a process in place for our TERO obligations and to make sure that contractors know that on Reservations we have a process through pre-bid conference, award conference, and language in the contracts that talk very specifically about our TERO percentage obligations and preference employment. In the Crow example that you have, there is specific language about gravel obligations to buy gravel on the Reservation when they can and that language is included in the PSA. The environmental piece isn't in the PSA but it is included in the MOU's. So there's quite a process that engages the TERO side of this. The DBE language in your example is not specific to a goal but just indicates that we will work with the Tribe to ensure the DBE's are utilized.

Commissioner Howlett said part of my confusion with this thing was really not understanding the difference between DBE and PSA because obviously you have training programs that are training people in heavy industries and those provide some opportunity to gain employment. It's kind of like pouring water down the drain. There are a couple of things: you said we don't do many projects on the Reservations. We've done more projects on Reservations in the last five years than we probably did in the previous 50 years. That's good because those people are dying on those roads as well. I think understanding the Tribe's being at the table, working with those PSA's that bring big construction companies into Reservation communities with their own crew when you've got Tribal people trained to do some of the things they need. Patti did take the time to stop and visit me in my office and explain more of the DBE program and I'm anxious to hear her presentation today. I just want to do everything we can to make sure we provide opportunities to disadvantaged businesses to do work with the state of Montana and when we're dealing with Tribal Nations that they are afforded every opportunity they are entitled to under the law. That's my position.

Commissioner Lambert asked if there was an MOU with each project and are they project specific. Pat Wise said with each project there is a new Project Specific Agreement. Commissioner Lambert asked if there was an overall one. Pat Wise said the MOU applies, it's negotiated, and they run from five-to-ten years and all of them are affected. We are current with our negotiations with the Tribes on MOU's. The Project Specific Agreements would refer them back to the MOU's that are in effect for that time period. Yesterday Kevin and I looked at an on-Reservation contract as an example, the PSA is there and signed by the Tribal Chief as well MDT and that's part of the legally binding contract. Commissioner Howlett asked if the Guardrail North of Polson project had a PSA in the contract. Dwane Kailey said yes.

### ***DBE Discussion – Patti McCubbins, MDT Civil Right Bureau***

Patti McCubbins thanked the Commission and apologized for not being at the last meeting. I listened to the last recording and visited with Chairman Howlett because I wanted to be very specific in answering your questions so I can make this as clear as possible. It is a very difficult program and has a lot of different components and there are lots of various federal regulations that apply to this program. I will do my best to answer your questions and if I don't have the answers we'll research it and get back to you.

You received a variety of documents in your packets. The first one describes the DBE Program as a whole. I want to give Dave Fuller credit for that because he has been our right arm in working through the DBE Program and all the components of it. The next piece of information you have is the goal methodology that we have submitted. Megan Handle who is the person who makes sure we are in compliance with federal regulations and she worked through the DBE Goal and Methodology this year for us. The program has to do a new Goal and Methodology every three years and that's why you see a lot of the changes. We had the 10% goal at one point because that was a national goal. That changed with the Ninth District Court when we lost the lawsuit in Washington and put us in a different position. So we then had to validate having other than the 10% goal; we had to make it specific to the state and what disparity we had within the state. That's when things started to change.

One of the questions Commissioner Cobb had is if we go "race neutral" which is where we are with our new Goal and Methodology, do we have any kind of penalty or follow-through with that. With "race neutral" we do not other than to work very closely with MCA, our own construction and engineering firms, to make sure we reach and attain that goal. The penalty applies if we don't reach and attain that goal, then we have to report to FHWA whether we've met it or whether we haven't and if we haven't explain what are we going to do to meet that goal. If we've exceeded it then we want to capitalize on that and continue to move in that direction. To answer that, and I'm sorry to say, we don't have.

We do have the new Disparity Study that we are putting out for RFP at this point. We have involved two of our DBE's. One is a Native American and the one is a woman and one is an MCA contractor that works a lot with our DBE folks. They are going to be a part of the RFP process. The Disparity Study is to identify any disparity that we have in the state of Montana. Montana is relatively small and our despaired groups continue to show up – its women and its natives. That is what we'd expect and that is where we focus the majority of our attention.

I shared with you a simple little graph that shows the ups and downs. You can see we have a big gap between 2006 and 2010 where we weren't meeting the goal and that's what put us out of compliance. Because we are at "race neutral" and the Disparity Study will probably not be done for 18-24 months, we will maintain the race neutral part which gives us an opportunity to capitalize and put more work into our supportive service fees. We get approximately \$102 to administer the program through the supportive service fees. Supportive service fees do not go to staffing or anything to maintain my office; it all goes back to the DBEs. So that money is used for training for anything to develop and increase their business opportunities in the bidding process. Shannon goes out twice a year to all the Reservations and is heavily involved with all the economic development folks across the state. We are looking at doing more in those areas to see what their needs are.

Commissioner Howlett said in order to be a qualified DBE you have to make application and meet a certain economic threshold. When you go to the Reservations what kind of plan or capitalization plan is in place for people to get training? It's one thing to go there and say we want you to participate but if you have no economic means to participate then ... Patti McCubbins said that is what they use the supportive service dollars for. We have a reimbursement program. So when we have someone who contacts us because they want to go to training in Denver, Colorado, and it is a benefit to increase their business opportunities in Montana, then we pay for that. Commissioner Howlett said he was talking about capitalization for a small company. Is there SBA or anybody out there who can help with that? Patti McCubbins said that is part of what Shannon does. She works with the SBA, the E200 folks, and all the economic development folks to see if there are grants available. Her job is to help them make those connections.

The other component we have is the fact that Shannon Hahn does have the ability to reach out and make those partnerships happen. What we have lacked is a program to highlight our successes. We need to do that and share that with you. We do have successes and have used those dollars to increase that. One of the things FHWA has added to their expectation of us is the Business Development Plan. Each business has to submit a Business Development Plan which is the same thing they would submit to SBA or a bank for a loan. We take that and help them to build upon that. That is not a component that we've used before.

Commissioner Howlett asked if they have any interaction with the Governor's State Economic Development Office. There are a lot of people looking at how you do economic development on Reservations. I just don't know if we are talking to each other. Patti McCubbins said they are talking to each other. I can include that in the reports. We are going to be giving you some pretty detailed reports from this point on that I hope will answer all those questions. Shannon Hahn can include that with the Supportive Service piece on how many she's made contact with and what kind of success we've had. She is very good at building partnerships and getting the word out there. I appreciate the fact that FHWA has put in those extra requirements because it helps us administer that.

Commissioner Lambert said how would I know that there is a program? Do you have posters; how do you get the word out that there is help out there? Patti McCubbins said currently on the Reservations we advertise in the Native American newspapers. We advertise in areas that focus on a particular group like Veterans. Veterans are a big highlight right now. Veterans that are coming back with disabilities. Because it is a national effort, it is also a state effort and the Governor has been very proactive in that as well. Senator Tester's office also has concerns in those areas. So we are creating more opportunities in those areas.

Patti McCubbins said I gave you a long spread sheet that is a breakdown of how many dollars are being used in the different categories. You won't see any disabilities on there because it's not a category that we have focused on so there isn't a lot of data prior to the last couple of years. Thank goodness for our IT Department and construction folks who have helped establish a data collection system! Prior to a year and half ago, things were done by pencil and paper leaving lots of room for error and not very much clarity on those.

Research will be heading up the RFP Committee that we've formed. So the Disparity Study will have input from all parties. Commissioner Howlett asked what she would do to make this program better. What can we do to strengthen the program because it is very valuable? It doesn't belong to the Contractors Association. I think when we look at the schedule of participation, we see a lapse in participation and that evidences something is wrong. I would like to know about training programs, apprenticeships – what are the opportunities that might exist? Patti McCubbins said I have not gotten to the root of all of the programs out there. Dwane Kailey might be able to tell you more about the NSTI Program. We do have the OJT Supportive Services Program that is split between Fort Peck and Salish Kootenai that we've done for the last two years. It is for highway construction trades. That money has decreased dramatically so there is not a tremendous amount of money there. The colleges have been very good at doing phenomenal things with a small amount of money. The other thing that we've not done is to build a very strong relationship with MCA. That is a task that I need to take on and I'm fully prepared to do that. We've already started a focus group, a support group basically of the DBE's so that we can hear from them exactly what they want. I can have lots of big ideas but if it isn't relevant to the DBE's and what they see need to grow their business, it doesn't work. Because this time of year is really busy for everyone, I'm not anticipating that happening much before construction starts to slow down a little bit. To answer your question, I need to get more information and get that back to you on what's available out there and what those look like.

Commissioner Howlett said this is such a complex issue but Commissioner Griffith hit on it earlier when we went from 10% to 6% to 3% and our inability to keep track of what was going on was extremely confusing. I told the department that when these kind of things are being contemplated, we need to know. It may not be in our purview to approve but certainly when it comes to the approval of contracts, we need to know where we are with this. I think constant communication is key. If you have questions, we're more than willing to answer them. I would like to see more participation from the DBE's with the Contractors Association and to actually become part of the process not some afterthought because they have to meet a goal but they actually become part of the process of contracting. I don't know how that would occur; I'll leave that to the Engineering mind to figure out.

Commissioner Cobb said that without project specific goals, I don't believe it's going to work. If you look at the information list, it was 7.46% from April to June but more than half that came from prime contractors; they just got the contract because they were the lowest bidder. I just see that when you had projects with specific DBE goals, the contractor had to find someone but now they don't have to find anyone. There is no incentive for them to do anything now. I just think this thing is going to collapse. Some prime contractors are DBEs and you see them getting some jobs. You can do an annual report but I think you ought to do a monthly report and if you don't meet the goal, at the end of four months if you don't meet the goal of 3.55%... I'm not talking about the prime contractors, I'm talking about the little subcontractors ... then we ought to put it back to project specific goals. Then everybody would know after four months if we're not meeting the goal then we automatically go right back into project specific goals. Now the feds could say no but why do we have to wait a year to find out it's not working when after two months we could know that. The longer you wait, the more DBE contractors don't even have a chance. If it's working, then fine but if it's not working, go back to project specific goals to make it work for all the subcontractors not just the prime contractors. That's my viewpoint right now. Patti McCubbins said she respected that but I don't think FHWA can do that if we don't have a race-conscious and race-neutral; we can't do project specific goals until we have a race conscious. That's what the federal regulations guide us to do. I don't know what kind of liability we would have if we do that.

Kevin McLaury said they were governed by law on this. We had a flat 10% nationwide. The two cases helped shape this program specifically for the Ninth Circuit states which Montana is a part of. The Disparity Study is the key element that helps determine where there is disparity in the DBE community. In a perfect world we wouldn't have any of this but obviously there is some disparity but we don't know what that is because our Disparity Study is no longer valid. So given the most recent history available, that's how we got to the numbers we have today – the 3.55%. So for lack of more detailed information that would get us to the point that says we have a disparate situation, the only way we can get it is through a race-conscious ID project specific goal. The law is pretty clear. I believe in the DBE Program, I do and I'm a supporter of it. We also have a law and if we don't follow what the law has established ...the courts will tell us how the process is supposed to work. Commissioner Cobb said but we're already doing 3.55% now so you can't do anything to us. Kevin McLaury said I applaud your efforts here but we would ask you to go to the monthly report. I would love to see a monthly detailed analysis detailing exactly where the money is going, who's getting it and who's not getting it. I'd love to see that. That's where we differ. My suggestion to the Commission would be that we give you money to go out and aggressively help DBE's to work with non-DBE prime contractors. Work on the positive side of this and use the carrot, don't use the stick. If we can get the contractors on the carrot side of this to see that this is truly a beneficial program for everyone and help them understand we can meet the goal, then we don't have an issue. Make them a part of process.

Commissioner Cobb said I just heard you say it will be okay to go to the monthly; you'd allow that. Kevin McLaury said that is just a report. Commissioner Cobb said but if you're not meeting it, you can basically do the carrot for a while but at some point the feds are saying we can't use the club. Kevin McLaury said you need a Disparity Study. Commissioner Howlett said wouldn't the cumulative effect of the monthly report give you justification. Kevin McLaury said that's only a part of it but it's not holistically the only issue. Where we stand with this is you have to have something that shows you that there is disparity. We are in the Ninth Circuit and our hands are tied without a Disparity Study. Commissioner Howlett said but you've got the evidence of six months of study that we're not meeting it, then it becomes meaningless to even have it if we can't do anything about it. Kevin McLaury said that is where the discussion comes in and we would go back to the department and say the industry is not meeting the goal, and ask what efforts the department is doing to increase the knowledge, increase the relationships, promote, and do whatever because obviously at that point the department's program is not working. Commissioner Howlett asked why we're putting the responsibility for contractors to use DBE's back on the department. Kevin McLaury said that is where the law puts it; it's your program.

Commissioner Cobb asked about projects using state money. Kevin McLaury said I don't know. Commissioner Cobb said we could do a monthly report so we can see what's going on. If we're clearly not meeting it then we'll ask the department what they can do and if the contractors are not going to do anything then at some point something is going to happen. At least we'd be doing it now and not waiting a year to find out this whole thing fell apart. Kevin McLaury said there is concern there. Yes because obviously past history has shown us that when we don't have project specific goals, race conscious goals, that the industry has not tended to participate as much as they could have. I was quite pleased that the eight projects you approved today, three or four which had zero goals had upwards of 6-7% participation. They were not the prime DBE, it was the sub to the prime. I continue to ask the department to work with the industry to educate and help the DBE's to have them set up plans, work on marketing plans, and work with contractors. Commissioner Cobb said I recommend we go to monthly reports and get the information more quickly.

Kevin McLaury said my understanding is if a DBE gets a project whether they bid it as a prime or they've gotten it as a sub, the goal of the program is to uplift that portion of the population. Commissioner Cobb said if the same contractor is the prime, then the little guy isn't getting that much. On June 30<sup>th</sup> there was 7.46% participation but 4.42% was the prime contractors. Kevin McLaury said but they were still DBE's. Commissioner Cobb said there is no incentive for contractors to higher DBEs. If you don't have to do something, you don't do it.

Kevin McLaury said the department is trying to carve out specific projects that the DBE community can bid on and can bid as the prime. So I think the department is doing some really good work here. Are we there yet? Absolutely not. Are we headed in the right direction? I think we are. Commissioner Cobb said before we had specifics then the contractors had to find people. When you don't have specifics, the contractors are not bound to find someone. Logically, at some point, they think they don't have to go out and find a DBE. You can do all the training you want, but I just want to do the monthly planning then it puts everybody on notice that we're all watching this.

Commissioner Howlett said he wanted to know what the options were. We need to do what we think is the right thing. Let's explore what options we have. There was a period of time where there were no participants and that's pretty damning; it's historic. I agree with Commissioner Cobb. At some point if they don't have to do it then there not going to do it. That's the indicator. We need to know what our next

step is. Katherine Orr said legal works well with Civil Right Bureau and we can certainly look into those questions.

Commissioner Cobb moved to have the Department of Transportation give the Commission a monthly DBE status report. Commissioner Skelton seconded the motion. All Commissioners voted aye.

The motion passed unanimous.

### ***Deb Poteet, Poteet Construction***

I have a response to the DBE Program from 16 DBE contractors. It is a response to the proposed methodology that you've been discussing. I've been asked to bring it forward. I can't take the credit for writing this but I did help to put it together last night. It has a lot of information that I think will be helpful to you. Part of the concern of the DBE community is the timeframe it will take to do a Disparity Study. Commissioner Howlett said 18 months is a long time. Deb Poteet said a lot of contractors think they will be left behind when that happens because of the history. Commissioner Griffith said they'll be broke.

Deb Poteet said the history has been the project specific goals are an incentive to use DBEs. Commissioner Griffith said we're not going to drop the program. Deb Poteet said but it's going from 5.8% to 3.5%. Patti McCubbins said they are concerned about the difference between the race neutral and the race conscious. Commissioner Howlett said that is the same concern the Commission has. Commissioner Lambert said but it's the law. That's the end of the story; it's the law. There is nothing we can do about it except change the law. Commissioner Howlett said I'm not sure there is nothing we can do about it; that's how laws gets changed, people challenge them. I don't know the scope of what can be done. I want to see the participation. I think Commissioner's Cobb motion to look at it monthly begins to give us some aggregate data that we can go to MDT and say we're not meeting it and we have no means to meet it. Commissioner Griffith said but in this case it's not really the law but it's the court order that we're bound by. It's not really the law that's killing us, it's the program. Commissioner Cobb said if we show its not working then we can go back and formally ask them to change it. Then the federal government has to come back and say they aren't going to do it. We've done our study and done our work and when they say no to us, then it's the federal government saying they refuse to do anything about DBEs which pretty much tells the entire state they don't have to do it. At least we did our part to try and make it work in Montana. Pat Wise said the contracting community as a whole, the prime contractors, have contacted me and said we don't know the rules from month to month, from quarter to quarter, so it's causing confusion throughout the entire contracting community. You see it when you have disputes over the last six months on contracts. When the Disparity Study is finalized we'll have some hard numbers we can work with, we know where we're going to go, and everybody can be on the same page and understand the rules. Prime contractors do not have a problem using DBEs but they need to know the rules.

Commissioner Howlett asked why it takes 18 months to do a Disparity Study. Patti McCubbins said that's what they say the national average is. Commissioner Howlett said I can see it in California but not Montana. It should be specified that it should be done in a certain period of time. Director Tooley asked if that time included the RFP process. Patti McCubbins said she didn't know. Commissioner Howlett said 18 months is too long. We're not doing an Environmental Impact Statement, we're doing a Disparity Study. Patti McCubbins said for the RFP we've asked Ms. Poteet if she would be a part of that in addition to S&K Environmental and Terri and one of the MCA folks from Dick Anderson Construction. I would imagine they would try and speed that process up as much as possible.

The monthly Status Report will give us a picture of actual award amounts to primes and subcontractors and DBEs, but it doesn't help us establish that gold standard of whether there is discrimination in the state that allows us to go to race conscious. So it doesn't help make the case, per se, to the feds. It wouldn't make the case because we still don't have the gold standard to establish the disparity or the discrimination. Commissioner Cobb said he didn't figure the study would do that, we just have to get some information. The only information I have right now is who's getting the contract and who isn't. This will give me an idea of what is going on out there. Pat Wise said they would include in that the availability, the DBE list, of who's been utilized and who's not been utilized so you can see that. I will also include where the jobs are located so you can see if they are close to Reservations. Commissioner Cobb said the contractors are confused because if they have a certain goal to meet, they do it. If they don't have a goal, then what do they do. It puts everybody in a bind and they just want to know what the rules are.

## Director Discussion & Follow-up

Director Tooley said since last time we met you've seen some stories in the press about federal funding for highways. Commissioner Cobb mentioned he is concerned about it and I'm sure all of you are as well. Last meeting I brought up the fact that we have a Contingency Plan should FHWA have to slow down or delay payments to the State of Montana for reimbursement for highway projects. There is some detail behind that and I've asked some staff to come and explain that to you. I've asked Lynn Zanto to be the architect of our Contingency Plan and she and other staff have worked on this for months. I'm very confident, although concerned on the federal side, but confident that we're going to be okay for this construction season because of the work they've done and the plans they have.

With that being said there is a lot of stuff moving, even today they are marking up bills in Washington D.C. to move funding forward for highway programs. It doesn't mean it's a done deal but we are highly confident we're going to see at least an extension for 2-6 months of federal funding before we even have to implement the harder parts of the Contingency Plan. Larry Flynn, the Administrator of the Administrative Division, and the man who handles the money is here to let you know exactly what the cash flow looks like should this scenario come up.

### *Lynn Zanto*

As the Director mentioned we have been working for months on our Contingency Plan and we have been tracking actions in Congress and their efforts very closely. Two issues have come up. The first is MAP 21 expires September 30<sup>th</sup> and there is conversation going on. The Senate marked up their bill which holds at the current levels with some inflationary increases and keeps things for the most part the same. The issue that is more complicated and more in our face is the Highway Trust Fund Insolvency and that's what has been in the paper. Right now FHWA has projected the Trust Fund to be insolvent in late July or August. That is what our Contingency Plan is primarily focused on. We received Notice from Secretary Fox that it could be within a month if Congress doesn't take action. Then we'll have to go to cash management procedures and those will likely be delaying payments. That means that Montana and other states have to cover those federal expenditures longer and that starts to impact our cash management and cash flow.

With that said, as we approach this, our position is we're moving our program but we're moving it cautiously. We're not stopping anything at this point, however, we are taking some minimal actions to help us with the cash flow side of things. A couple of actions we're taking: we know we have pay bond payments regardless so we are paying our Highway 93 Bond payment in this schedule fiscal year and then there are a few annual programs that are necessary for the on-going options of our Agency.

We're also obligating those in 2014. Other than that we're moving our TCP Plan forward. If you recall when we developed the TCP and you concurred in that, our first year we over-obligated intentionally. We put a plan together where we over-obligated our program so we have more projects ready to go than the obligation authority that is paid regardless of the trust fund issue. So that's the part we're working on.

In the Contingency Plans we looked at three things: state fund health and cash flow, federal revenue protections and status, and project lettings. So in July we will bring the Letting to you and at that point we will know whether Congress has taken action and we'll adjust the Letting List accordingly.

***Larry Flynn, Administrator of the Administration Division***

Larry Flynn handed out the Long Range Planning Document. It is the status report on the Highway State Federal Revenue Fund more commonly known as the Gas Tax Fund. I'll spare you the detail of this document but it's fairly self-explanatory. The top is the revenue stream that comes into the fund and the bottom is all the expenditures that come out of the fund. We use this document to project what the status of this Fund would be into the future. Obviously this is the fund that pays for the operation of the department as well as our part of the Federal Aid Construction Program. We project fairly conservatively, in other words, we project minimal revenue growth, full expenditure of our budget. History has shown that we typically underestimate our revenue and overestimate our expenditures. So this is more of a "worst case scenario" if you will. The particular scenario that I've placed in front of you today assumes that for state fiscal year 2015, starting in August of this year and running through the state fiscal year June 30, 2015, we would only receive about 80% of our federal reimbursement. That 20% we would have to absorb within the State's Special Revenue Fund equates to about \$70 million. That's what's before you today and as you can see with that estimate we would be in the hole and eating off the General Fund to support the State Special Revenue Fund by about February 2015. The fund, for all intents and purposes, would be bankrupt.

As you can see from this document, we're not the only user of the fund. A good share of the expenses come out of Department of Transportation but there are also other agencies that are funded through the State Special Revenue Fund. The biggest one is the Department of Justice, the Highway Patrol Division and the Motor Vehicle Division. They are funded through this pot of money as well. With that I'll entertain any questions you might have.

Commissioner Lambert said they've been talking about raising the Gas Tax \$.18 over two years, do these projections include those numbers? Larry Flynn said this Fund would not be impacted by raising the Federal Gas Tax. This is supported by the State Gas Tax at \$.27 per gallon. This is strictly state funding.

Commissioner Howlett asked what efforts were underway so this has a more solid base. Larry Flynn said there are two sides to that question. One is we take a look at our internal management. We take that responsibility very seriously and we're very proud of the success we've had in maintaining the balance in this Fund. We haven't had a gas tax increase since 1993 and we hope to continue that into the future. So we will look at our internal operations and see what efficiencies we can gain. Obviously our main goal is to keep our staff employed and not send people home. That's first and foremost in the Director's mind. In addition we also want to maintain the match to the Federal Aid Program. We get a 6:1 ratio back on our state investment and we'd like to maintain that.

We do have some purely state funded programs. We have a State Funded Construction Program that is run out of Maintenance. We typically use that to ebb and flow with the revenue stream. Our standard level is about \$10 million. If

revenues are a little shy, we try to scale that back. In the years where we have some surpluses, we try to increase that expenditure. Beyond that we would be working with our policy makers over in the Capital starting in January of this year during the Legislative Session to try to come up with some solutions.

Commissioner Cobb asked about the Department of Justice \$65 million – all that money is per year. Is that from the Special Revenue Fund? Larry Flynn said it's about \$35-36 million. Commissioner Cobb said then the rest is just broken down. So the issue that is going to come up in the Legislature is that we've got a surplus General Fund, then move that to these departments ... it goes back and forth all the time, you pay Highway Patrol or give the money to state highways. Is that what happens? Director Tooley said the Highway Patrol has been funded out of the Gas Tax for quite a long time for at least my entire career over there. The issue comes if you're short of money, you've got a surplus in the General Fund and use some match money, you can always move the General Fund to this and free up the money to use for match – that's what the argument will be. I've already had some of those discussions with the DOJ because Mr. Flynn showed them the same spreadsheet. Things need to change on the Gas Tax side and MDT isn't the one leading the Gas Tax. They are having those internal discussion right now.

Commissioner Howlett asked about the match for the federal aid. Am I right in understanding that projects you do on Indian Reservation are 100% federal? Larry Flynn said that was correct. Commissioner Howlett asked if the feds were paying their fair share for the bonding issue on the Flathead Reservation. Larry Flynn said yes they are. The balance we try to maintain in this Fund is about \$40 million. That funds us about two weeks. As you see in this document, we started with a balance in excess of \$100 million, that's largely due to the timeframe that we were expanding our dollars because that came with an out-of-state match. So we spared the state match through that time, it ramped up a cash balance and the decision was made to substantially increase the State Funded Construction Program. We went from a \$10 million annual program to a \$40 million annual program for one biennium to try and get those dollars out on the road. Obviously dollars in the bank represent taxpayer dollars that we haven't returned a service to them. So we don't like to see large cash balances any more than we like to see very small cash balances. We did make a policy decision with the Budget Subcommittee to expend those dollars out on the roadway. We have been trying to inch down toward that \$40 million target and we're making some headway on that. We project our balance at the end of this year to be \$69 million but of course without federal aid reimbursement that does not last.

### ***Opportunity to Meet with Director Tooley***

Commissioner Howlett asked Director Tooley about the possibility of getting together off campus. He thought it would be a good idea to look at a retreat of some kind to identify some issues. He asked the Commission to give some thought to things the Commission has observed or would like to have more discussion on. We could look at doing something like that this fall. Director Tooley said he would welcome that opportunity.

### ***Next Commission Meeting***

The next Conference Calls were scheduled for July 22<sup>nd</sup>. The next Commission Meeting was scheduled for July 31<sup>st</sup>.

### **Adjourned**

Meeting Adjourned