
FINAL
THE STATE OF MONTANA'S RESPONSE
TO PUBLIC COMMENTS ON THE DRAFT 2006
UPPER CLARK FORK RIVER BASIN
RESTORATION WORK PLAN

PREPARED BY:

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DECEMBER 2006

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Attachment 1: 11/03/06 Letter from John VanDaveer of Butte-Silver Bow to Larry Curran, Chairman of the UCFRB Remediation and Restoration Advisory Council

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APPENDIX 2: Comments received after the public comment period

Acronyms or Abbreviations

Advisory Council	Upper Clark Fork River Basin Remediation and Restoration Advisory Council
B-SB	Butte-Silver Bow
<i>Draft Work Plan</i>	<i>Draft 2006 UCFRB Restoration Work Plan</i>
<i>Final Work Plan</i>	<i>Final 2006 UCFRB Restoration Work Plan</i>
NRDP	Natural Resource Damage Program
RPPC	<i>Restoration Plan Procedures and Criteria</i>
UCFRB	Upper Clark Fork River Basin

**STATE OF MONTANA'S RESPONSE TO PUBLIC COMMENTS ON
THE DRAFT 2006 UPPER CLARK FORK RIVER BASIN RESTORATION WORK PLAN
December 2006**

Introduction

On September 7, 2006, the State of Montana released the *Draft 2006 Upper Clark Fork River Basin Restoration Work Plan (Draft Work Plan)* for public comment. The State advertised the release of this plan for public comment in three newspapers in the Upper Clark Fork River Basin (UCFRB) and posted it on the Montana Natural Resource Damage Program's (NRDP) website. In addition, the State sent either copies of the plan or notices that it was available to individuals or entities that, in the past, have demonstrated a special interest in this matter. Those individuals included grant applicants, members of the UCFRB Remediation and Restoration Advisory Council (Advisory Council), environmental groups, members of the public, and local governmental entities in the Basin.

A total of eight individuals, including representatives of five entities, submitted formal comments during the public comment period. The State held a public hearing on the *Draft Work Plan*. Three individuals commented at the Butte hearing held on October 2, 2006. The State received four comment letters before the public comment period closed on October 10, 2006. Appendix 1 provides summary tables on the comments and copies of the public comment letters and hearing transcripts.

This document provides the State's responses to these comments. The NRDP prepared these responses on behalf of the Governor based on his final funding decisions.

Each of the comment letters and hearing comments have been numbered and each comment has been assigned an alphabetic designation so that readers of this document can readily refer to the precise text of the various comments to which the NRDP is responding. Similar comments are listed and addressed together. Under the "Category" heading, the NRDP summarizes these comments. Under the "Response" heading, the NRDP indicates what changes to the *Draft Work Plan* will be incorporated in the *Final 2006 Upper Clark Fork River Basin Restoration Work Plan (Final Work Plan)*.

The State received five additional comment letters after the public comment period ended that were specific to the Bonner Bridge project. Appendix 2 provides a copy of those letters for reference purposes.

CATEGORY 1: Support for the Bonner Bridge Project. The NRDP received three letters supporting the Bonner Bridge project (letters 1, 2, and 3). Reasons provided for support include, but are not limited to:

- The bridge is a crucial component of the Bonner community, its development and its growth.
- Bonner and Milltown need to have safe passage between the two communities for residents, students, and tourists.
- The project will provide long-lasting and important benefits for natural resource restoration, public health and safety, and public recreation.
- The project fits the goals of furthering the ecological and recreational values of the Blackfoot and Clark Fork Rivers and promoting a safe, healthy and enriching environment for the communities of the two rivers.
- The project replaces lost recreational services by connecting the communities east and west of the Blackfoot River with recreational trails that are part of the Phase I Redevelopment Plan.

The NRDP also received five letters after the public comment period that were specific to the Bonner project. Four letters supported the proposed project design. The other letter requested the Governor defer a funding decision in order to allow for more public input on the choice of replacing or upgrading the bridge. These letters were provided to and discussed at the December 4, 2006 Trustee Restoration Council meeting.

RESPONSE: The Governor has approved the Bonner Bridge project for funding as recommended in the *Draft Work Plan*. These commenters' support of this project will be noted in the *Final Work Plan* under the Public Support criterion. The *Draft Work Plan* generally covers the ecological restoration, recreational service, safety, and community benefits highlighted by these comments. Regarding the bridge design issue, the analysis of alternatives provided in the application adequately justified the selection of the proposed replacement design and ample opportunity for public input was provided by the county during the project planning phase and by the State during the application review process. Therefore, no other changes will be made to the criteria evaluation for this project based on these comments.

CATEGORY 2: Comments about Butte Waterline Project Procurement Issues. The NRDP received three comments about procurement issues associated with the Butte waterline project. Two commenters were opposed to the use of county crews to do waterline construction work (letter 4 and PH-1B) and the other commenter stressed the need to focus on conducting the work in the most cost-effective manner (PH-3).

COMMENT: State Representative Jim Keane, business manager for the Operating Engineers Union, commented in opposition to the use of county crews do to the construction work instead of private contractors (PH-1B). He believes such use of county crews is an unfair situation because private contractors are required to pay prevailing wages and taxes on fuel, equipment, property, and other items they use to do the work, but Butte-Silver Bow (B-SB) is not required to pay prevailing wages or such taxes. He suggests setting a policy that prevailing wages be paid

for the waterline and other projects since the project funding resulted from a state settlement and is state money.

Rep. Keane also questions why the 2005 project was not re-bid after the first bid was deemed too high. He suggests bidding work much earlier in the year than what occurred under the 2005 project and re-bidding future projects if the bid(s) received are out of line, noting that an engineer should be able to get a handle on what is a fair estimate. In the past when both the county and contractors did work at the same time, he heard complaints that areas where B-SB conducted work involved easier work than the areas where contractors conducted work. He requests that a third party compare costs of work done by county crews vs. private contractors and that the costs of the Anaconda and Butte waterline projects be compared.

COMMENT: Rob Stoltz of the Montana Contractor's Association comments that the use of county crews to do waterline work is unfair to Montana Contractors due to the inequities of prevailing wages and taxes on equipment, vehicles, and property that are required of contractors, but not counties (letter 4). He suggests that the inappropriate timing of the bid process on the 2005 project was the possible reason why the sole high bid was received.

COMMENT: Jean Pentecost, operations manager for B-SB water division, comments that what should matter is that the work gets done most cost-effectively, not who does the work. In response to Rep. Keane's comments, she notes that: 1) the decision to use county crews on the 2005 project was in the best interests of the ratepayers since the only bid was \$1 million over the available grant funding and had they awarded the bid, the ratepayers would have had to make up the difference; and 2) that the wages and benefits associated with Butte's labor agreements are likely to be at or above the prevailing wage. She notes that the effort now underway associated with the 2005 project will provide a cost comparison of the county costs vs. private contractor costs reflected in the one bid received.

RESPONSE: Several of these comments pertain to a situation that arose with the 2005 Butte waterline project. The Governor approved this project in December 2005 and it is not one of the projects proposed for funding in the *2006 Draft Work Plan*. In August 2006, B-SB sought an amendment to its contract for this project to allow county crews to do the work since they only received one bid for the waterline work and that work was about \$1 million over the estimated costs of the project. NRDP recommended that B-SB re-bid the project, but B-SB reasoned they may lose a field season if the bid was still too high to fund after they re-bid the project. After the consideration of the Advisory Council, the Trustee Restoration Council, and the general public, the Governor approved this request for modification since it was a legally allowable option that would result in the whole project being completed within the approved Restoration fund budget. Concerns raised in the public input on this decision were similar to those noted in Rep. Keane's and Rob Stolz's comments.

In its 2006 waterline project application, B-SB indicated its intent to competitively bid the engineering and construction work to be conducted for this project. Subsequently, B-SB requested consideration of an amendment to the application that would allow B-SB the option of performing the construction work in-house in the event that the competitive bids received from contractors all exceed the estimated costs of the project. The Advisory Council voted to

recommend approval of this amendment and the TRC concurred in this recommendation. In the *2006 Draft Work Plan*, the 2006 Butte waterline project was recommended for one year of funding, subject to a funding condition that allows the waterline replacement work to be performed in-house by B-SB in the situation where the competitive bidding process indicates that all of the bids exceed the available funding. The following responses address the various issues raised by these commenters that are specific to this funding condition.

Timing of Bid and Option to Re-Bid: It is reasonable to assume that a lower bid could be obtained if the project is placed out for bid prior to the most interested bidders obtaining a full workload for the season. This did not occur with the 2005 project, which was bid in June 2006. B-SB has committed to bidding future projects earlier in the year (Attachment 1). Bidding earlier in the year would also allow more time to re-bid the project and still get it done the same field season.

Prevailing Wages: Prevailing wages requirements are not applicable if B-SB does the work in-house but do apply if B-SB awards a public works contract for construction services (18-2-403 MCA). A full analysis of what the total labor cost difference would be between the in-house vs. contracted-out scenario for the Butte Waterline project is beyond the scope of this response document. NRDP made a preliminary investigation into the differences of B-SB wages being paid for the 2005 project now underway versus the applicable Montana Prevailing Wage Rates that became effective March 10, 2006. On average, an excavator operator for B-SB earns \$26.44/hour (including benefits), which appears to be about \$2.20/hour less for wages and benefits than comparable work at the state prevailing wage rate including fringe. On average, a laborer for B-SB earns \$23.82/hour (including benefits), which appears to be about \$1.00/hour more than the prevailing wage for labor activities. These cost differences cannot necessarily be applied to the project as a whole. Since waterline replacement requires more than excavator operators and laborers to complete the project and because the wages of the operators can vary for different pieces of equipment according to the prevailing wage rates, further analysis would be needed to determine the precise labor cost difference for the entire project. A full analysis of the labor cost difference could not be completed until the 2005 waterline project has been completed and without further consultation with the Department of Labor and Industry.

The suggestion that the State consider a policy that requires grant recipients to pay prevailing wages is outside the scope of the *2006 Draft Work Plan* and instead relevant to State's restoration policy document, the *UCFRB Restoration Plan Procedures and Criteria (RPPC)*. As set forth in the *RPPC* and reflected in grant agreements between grant recipients and NRDP, expenditures of grant funds must comply with applicable state procurement laws and regulations. State agencies must comply with the provisions specific to state agencies; counties must comply with the provisions in state law specific to counties and any other applicable local procurement regulations. For a private or non-profit entity applying in partnership with a governmental entity, that governmental entity procures services in compliance with state procurement laws that are applicable to that entity. A private or non-profit entity that is the sole grant recipient must meet the procurement regulations specific to state agencies, when such agencies determine to bid out work. Thus, NRDP's existing policy for grant funding requires that governmental entities comply with the applicable legislatively imposed contracting requirements and does not require prevailing wages to be paid as a condition of funding. NRDP believes that the legislative forum

has been and should continue to be the venue for debate and legal guidance on what construction work should be bid out or conducted by state and local governmental entities in-house and when prevailing wages should be required.¹ The Restoration Fund is held in trust for the people of Montana; the State has a duty to preserve the corpus of that fund. By following State contracting law, the NRDP believes it is fulfilling that duty.

Comparison of county vs. private contractor costs: NRDP and B-SB have worked out a detailed cost-tracking system for the 2005 project currently being implemented by B-SB in-house. B-SB is conducting the same project that a contractor would have been conducting. Thus, the concern raised about past work conducted by B-SB being easier than work being done by contractors is moot. NRDP will be able to compare the costs of these projects directly and determine if and how much of a cost savings was realized. The commenters make a valid point that private contractors pay taxes on equipment, fuel, property and other items that counties do not. The cost accounting will make it clear that B-SB's costs do not reflect the costs of these taxes. The cost-accounting will be public and presented to both the Advisory Council and Trustee Restoration Council.

Comparison of Anaconda waterline and Butte waterline costs: The total project cost for the proposed 2006 Butte waterline project to replace 17,000 feet of waterlines is \$2,462,108, with \$1,819,581 requested in Restoration Funds and \$642,527 (25%) in matching funds. The total project cost for the proposed 2006 Anaconda waterline project to replace 5,670 feet of waterlines, 208 services lines, and a booster pump is \$2,028,343, with \$1,964,263 requested in Restoration funds and \$64,080 (3%) in matching funds.

A lineal foot-by-foot cost comparison of the engineer's estimates for the Anaconda and Butte waterline projects cannot be made without considering the details of each project. The site conditions in Butte vary from conditions Anaconda. Butte rarely requires special bedding material to be placed under and around the waterline as it is constructed because Butte has naturally-occurring degraded granitic sand which makes good waterline bedding material. Anaconda must haul in bedding material because the ground is much rockier in the areas of waterline replacement. The additional cost is not just in hauling the material, but also in the process of placing the bedding material. These additional costs are not easily measured since the costs due to the different site conditions are not a line item in the engineer's estimate; however, Anaconda has a 15% construction contingency versus Butte's 10% construction cost contingency, which may be to account for the differing conditions.

The majority of the cost difference between Anaconda and Butte seems to be the amount of work that is proposed on the service lines that connect the water mains to the residences. Under the 2006 proposal, Anaconda would replace 208 services lines at estimated cost of \$715,000, which includes engineering costs. In addition, Anaconda has included a booster pump to solve low pressure problems on South Birch Street. The additional cost of the pump including engineering is approximately \$109,000. The total cost of Anaconda's service line and pump costs are

¹ Such a debate about whether counties can do construction work or have to bid out the work occurred in the 2003 legislative session. As a result, the legislature revised the Montana Code to make it easier for local governments to perform construction work in-house. For more information, refer to the 07/24/06 legal analysis provided by Rob Collins of the NRDP to Bruce Nelson, Chairman of the Trustee Restoration Council (Attachment 2).

\$824,000, compared to Butte's service line costs of approximately \$250,000 including engineering costs.

When the service line costs (and pump cost in Anaconda) are removed, the cost in Anaconda is approximately \$158 per lineal foot for 5,670 feet of water main versus \$128 per lineal foot in Butte for 17,000 feet of water main, which is a difference of \$30 per lineal foot. The difference prior to removing the additional service line and pump costs is over \$200 per lineal foot higher in Anaconda than in Butte per lineal foot. The reason for the \$30 cost difference is not completely clear, although the differing site conditions, discussed above, are likely the reason.

Changes to Draft Work Plan: The concerns raised by commenters in opposition to county crews doing the waterline work will be noted in the *Final Work Plan* under the Public Support criterion. The Governor approved the Butte Waterline project as recommended in the *Draft Work Plan*, with the funding condition that allows the work on the 2006 waterline project to be performed in-house by B-SB in the situation where the competitive bidding process indicates that all of the bids exceed the available funding. Under those limited circumstances, this option is likely to be the most cost-effective in terms of Restoration funding. As indicated in Attachment 1, B-SB will competitively bid the project and has committed to releasing the bid package early in the year to obtain maximum competition/best price.

CATEGORY 3: Support for the Butte Waterline Project. The NRDP received two comments in support of the Butte Waterline (PH-3 and PH-4A). Commenters noted that replacement efforts to date have significantly decreased the high frequency of leaks and that infrastructure projects such as this waterline replacement are a good fit with NRDP and important type of projects to fund.

RESPONSE: The Governor approved Year 6 of the Butte waterline project for funding as recommended in the *Draft Work Plan*. These commenters' support of this project will be noted in the *Final Work Plan* under the NRDP's analysis of the Public Support criterion. Since these comments about the benefits and good fit of waterline projects with NRD funding criteria are covered in the *Draft Work Plan*, no additional changes are warranted.

CATEGORY 4: Support for all projects and general funding program. The NRDP received two comments indicating support of and appreciation for the overall restoration funding program that will bring substantial benefits to the valley well into the future (PH-1A) and support of all the projects proposed for funding (PH-4A).

RESPONSE: The Governor has approved all five projects for funding as recommended in the *Draft Work Plan*. The support for all the projects will be noted under the Public Support criterion for all the projects in the *2006 Final Work Plan*. The State appreciates the recognition of the substantial benefits of the restoration program funding.

November 3, 2006

Mr. Larry Curran, Chairman
UCFRB
Remediation and Restoration Advisory Council
c/o NRDP
PO Box 201425
Butte, MT 59620-1425

RE: Butte-Silver Bow
NRD Waterline Replacement

Dear Larry:

Butte-Silver Bow began installing replacement waterline mains this fall under the temporary authority granted by the Governor for the 2005 Project. We have completed the most difficult projects and will begin the remainder of the work as early as possible this spring. A detailed tracking procedure has been developed with the assistance of Tom Mostad that will report all activities and cost of the waterline replacement work performed by Butte-Silver Bow.

Pioneer Technical is currently performing the design requirements for 2006 Project. This effort is scheduled to be complete and reviewed by the Department of Environmental Quality in January. Our intent is to issue the request for bids during the month of February, 2007 in order to receive multiple and competitive responses. Butte-Silver Bow is committed to this action consistent with the current NRD program. We reiterate, herein, that our objective is to upgrade our waterline infrastructure in the most efficient and fiscally responsible process with respect to all of our stakeholders.

It is not Butte-Silver Bow's intent to eliminate or be in direct competition with the contractor community. Our efforts for the 2006 work (2005 Project) are focused toward the effective completion of the work under the unique circumstances, only, for this scope. For future waterline project grant submittals to the DNRP, Butte-Silver Bow intends to competitively bid the work and would only rely on in-house performance if all bids exceed available grant funds or unforeseeable circumstances warrant this option.

Butte-Silver Bow, again, recognizes the Council's actions in response to our situation for the 2006 waterline replacement scope. We also will engage in any opportunity to discuss the current grant process and schedules for appropriate actions that will benefit the current process.

Regards,

John C VanDaveer
Public Works Director
Butte-Silver Bow

STATE OF MONTANA
DEPARTMENT OF JUSTICE
Natural Resource Damage Program
1301 East Lockey
P.O. Box 201425
Helena, MT 59602-1425
(406) 444-0205/FAX 444-0236

MEMORANDUM

TO: Bruce Nelson, Chairman
Trustee Restoration Council

FROM: Rob Collins

DATE: July 24, 2006

SUBJECT: Butte Silver Bow's Request to Perform Waterline Replacement Work In-House
without Contracting with the Lowest Competitive Bidder

Summary

In December 2005, the Governor approved Butte Silver Bow's (B-SB) grant application to expend Restoration Funds in an amount up to \$1,539,269 on replacement of 17,000 feet of waterlines in Butte. Consistent with B-SB's application, the grant agreement between B-SB and the State, which implements the Governor's approval, requires B-SB to procure a general contractor to perform this work under applicable State procurement laws. B-SB put this project out for competitive bid in June; however, only one bid was received and that bid was approximately \$1 million over the estimated cost of the project. B-SB now seeks the option to perform the work using county labor and equipment and believes it can do so at a cost that would remain within the original budget. To allow this to occur, the grant agreement must be amended and, for reasons explained later in this memorandum, this amendment, in my opinion, should be approved by the Governor, acting as the trustee for the Restoration Fund. The principle question, however, that this memorandum addresses is whether State procurement laws allow B-SB to perform this project in-house, or do they require that the work be performed by an outside contractor who is procured by competitive bidding? In my opinion, Montana law does not preclude B-SB from performing this work in-house.

Background

According to the UCFRB Restoration Plan Procedures and Criteria (RPPC), it is the responsibility of the NRD Program to ensure that each project, “as implemented, is consistent with the project as proposed and funded.” In doing so, the Program “must see all contracts funded comply with the State’s contracting and procurement laws.” In addition, “the Applicant must enter into a grant agreement with the NRDP before any funds can be expended or received.” The grant agreement at issue between the State and B-SB provides that B-SB shall “select the general contractor through a competitive public bidding process.” B-SB asks that this provision be amended to give B-SB the option to do the work in-house.

The NRD Program received a similar request from B-SB regarding a 2001 approval of Restoration Funding for its waterline replacement project that was to be constructed in 2002.¹ At that time, the Program’s Restoration Program Chief took the position that she had the delegated authority to make this change in the grant agreement without first obtaining the approval of the Governor, since we believed that this was not a “material change” in the funding conditions and was otherwise legal. Before any such amendment was effectuated, however, the Montana Contractor’s Association filed suit against B-SB and the State, claiming that B-SB did not have the right to perform the waterline work in-house and was required to contract the work out to the lowest responsible bidder. The Association also claimed that the State could not legally fund such in-house work.

The Association relied most heavily on MCA § 7-5-2301 in arguing the project could not be performed by county crews. At the time, this section provided that projects for “the construction, repair, or maintenance of any building, road, or bridge, in excess of \$50,000” must be contracted by a county to the “lowest and best responsible bidder.” The Association argued that because the waterline project includes road reconstruction and repair, this section was applicable. The Association also argued that, because State funds would be used to pay for part of the project, the project must be awarded to the lowest responsible bidder, under MCA § 18-1-102, which provides:

State contracts to lowest bidder-reciprocity (1) in order to provide for an orderly administration of the business of the State of Montana in awarding public contracts for the purchase of goods and for construction, repair and public works of all kinds, a public agency shall award: (a) a public contract for construction repair or public works to the lowest responsible bidder, without regard to residency...

The Association filed a motion for preliminary injunction to enjoin the county from doing the work and to preclude any change in the grant agreement. The motion was heard by Judge Sherlock in Helena. On May 20, 2002, the Court issued an order denying the Association’s motion, finding that MCA § 7-5-2301 does not apply to waterline replacement projects, such as the one then at issue. The Court held:

¹ At this time, the situation did not involve a bid that was much higher than the waterline budget.

As is clear from the statutory language, the legislature did not intend to include all county construction, repair, or maintenance contracts over \$50,000 in the category of contracts that must be awarded pursuant to competitive bidding. Rather, the legislature limited the requirement of competitive bidding to “certain” contracts, including those contracts for the construction, repair, or maintenance of any road. The Court concludes that, by providing such a limitation, the legislature intended to include only those contracts that have as their main purpose the construction, repair or maintenance of a road.

As to the second issue, the Court found: “Section 18-1-102, MCA, does not require public agencies to contract all public work projects to the lowest responsible bidder. ...In order to harmonize these statutes, the Court must construe Section 18-1-102 (1), MCA, to simply require that, *when a State agency chooses to award a public contract by competitive bidding, it shall award it to the lowest responsible bidder without regard to residency.*” (Emphasis added.)

On the same day that Judge Sherlock issued his opinion, Governor Martz delivered a letter to Carol Fox, stating that she disagreed with Ms. Fox’s tentative decision to revise the grant agreement with B-SB to allow the work to be performed in-house. The Governor stated, “I have given very careful consideration to this matter and have concluded that the long-term interests of the Program will be best served by retaining the requirement for competitive solicitation of bids in the present case.” As a result of this letter, B-SB withdrew its request to amend the grant agreement and subsequently entered into a contract to have the waterline work done by the general contractor who submitted the lowest competitive bid. Subsequently, Judge Sherlock dismissed the Association’s lawsuit on grounds that all issues were mooted by the Governor’s letter and subsequent actions of the parties in the award of the waterline contract.

In 2002, after the above events, we were told by the Contractor’s Association that it would attempt to get the legislature to amend MCA § 7-5-2301 to require that all county construction projects in excess of \$50,000 be subject to a competitive contracting requirement. In 2003, the legislature did amend this section of the Montana code, but did quite the opposite. The amendment, in fact, removed the requirement that county building, road, and bridge projects in excess of \$50,000 be competitively bid. This legislation, Senate Bill 46 (Introduced by Senator Gephardt) was entitled “An Act Removing the Requirement that a County Must Enter into a Contract for Certain Large Purchases or Construction Contracts.” The bill was initially vetoed by Governor Martz. However, the legislature overrode the Governor’s veto and the bill became law as Chapter 523, Laws of 2003. MCA § 7-5-2301 was again amended in 2005, but this time in only minor ways. It now provides, in relevant part, as follows: “A contract for...construction, repair, or maintenance in excess of \$50,000 may not be entered into by a county government body without first publishing a notice calling for bids...[and] every contract subject to bidding must be let to the lowest responsible bidder.” By amending this statute, as it did, the legislature was bringing the statute, which is applicable to counties, into parallel with the statute applicable to State agencies, MCA § 18-1-102, which Judge Sherlock also ruled on in the Contractor Association lawsuit. Thus, like for State agencies, the rule is that when a county, in its discretion, chooses to award a contract in excess of \$50,000, it may not do so without going through the competitive bidding process and awarding the contract to the lowest responsible bidder. Neither statute, however, requires a county or a state agency to contract out a project.

Conclusion

I bring this rather lengthy background to your attention because it, in effect, answers the questions posed at the beginning of this memorandum. First, in my opinion, the fact the former Governor felt it was appropriate to weigh in on whether the provision of grant agreement requiring competitive bidding should be revised demonstrates that this poses a significant policy question that the Restoration Program Chief likely does not have the authority, under her delegated powers, to resolve. Second, although Judge Sherlock's ruling was only for purposes of the denying preliminary injunction and related to a prior version of MCA § 7-5-2301, I do believe the Court's opinion still offers guidance in considering the legal question of whether the county may perform and the State may fund the waterline replacement work in-house. If another lawsuit were filed by the Contractor's Association, in my opinion, it is likely that the Court would come to the conclusion that Montana statutes do not preclude the county from doing this kind of work in-house. This was my opinion in 2002 and I believe this opinion has been strengthened by the recent amendments to MCA § 7-5-2301.

APPENDIX 1

Guide to Comments and Public
Comments Received During the Public
Comment Period

List of Letters

Letter No.	Organization	Author	Date
1	Bonner Schools	Doug Ardiana	10/12/06
2		Senator Max Baucus	10/2/06
3	Friends of Two Rivers	Chuck Erickson & Gary Matson	10/4/06
4	Montana Heavy Contractors Association	Rob Stoltz	10/5/06

List of Public Hearing Comments

Comment No.	Organization	Commenter	Date
PH-1	Operating Engineers Union	Rep. Jim Keane	10/02/06
PH-2	Butte-Silver Bow Public Works	Jean Pentecost	10/02/06
PH-3	Self	Jean Pentecost	10/02/06
PH-4	Butte-Silver Bow Planning	Cindy McIlveen	10/02/06

Public Comment Summary Table

Category 1: Support for the Bonner Bridge Project	Letters 1, 2, and 3
Category 2: Comments on Procurement Issues tied to Butte Waterline Project	Letter 4; PH -1B, PH-2
Category 3: Support for Butte Waterline Project	PH-3 and PH-4B
Category 4: Support for all projects and general funding program	PH-1A and PH-4B

RECEIVED

OCT 12 2006

NATURAL RESOURCE
DAMAGE PROGRAM

Carol Fox
Restoration Program Chief
Natural Resource Damage Program
Montana Department of Justice
1301 E. Lockey
PO Box 201425
Helena, MT 59620

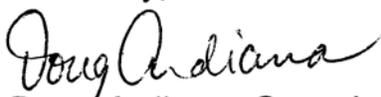
Dear Ms. Fox:

Bonner Schools is pleased to provide a letter of support for the pedestrian bridge project in the Bonner/Milltown communities.

Bonner Schools are committed to working with the community to assist in growth and development. This pedestrian bridge is crucial component of our community, its development and its growth. There are a large number of people looking to relocate in the area because of our school and community. Bonner and Milltown need to have a safe passage between the two communities for residents, students and tourist.

Please give our application a great deal of consideration when evaluating our needs and constraints. If there are questions please do not hesitate to contact me at 258-6151.

Sincerely,



Doug Ardiana, Superintendent

United States Senate

WASHINGTON, DC 20510-2602

INTERNET:
max@baucus.senate.gov
<http://www.senate.gov/~baucus>

September 28, 2006

RECEIVED

OCT 02 2006

NATURAL RESOURCE
DAMAGE PROGRAM

Ms. Carol Fox
Restoration Program Chief
Natural Resource Damage Program
Montana Department of Justice
131 E. Lockey
PO Box 201425
Helena, Montana 59620-1425

Dear Carol:

I am pleased to offer my full support and recommendation for funding of the Bonner Pedestrian Bridge Project through the Montana Natural Resource Damage Program. I applaud Missoula County and the Milltown Redevelopment Working Group for their hard work in developing this project and obtaining funds through the Natural Resource Damage Program, U.S. Environmental Protection and Agency and the recent Federal Transportation Bill.

This project will be one of the first and most visible improvements for the Bonner and Milltown community associated with the Milltown Superfund Site cleanup and restoration. It will provide long-lasting benefits for natural resource restoration, public health and safety. It will also provide a critical link to a pedestrian trail system in Missoula County that will benefit public health and provide recreational opportunities for visitors and residents alike. I am proud to have secured funding through the recent Federal Transportation Bill that to help fund this pedestrian bridge project and the trail system that it will connect to.

Thank you and your staff for working closely with the Redevelopment Group and Missoula County to make this project successful, and for taking the initiative to make the Superfund remediation and restoration project into a successful project that we can all be proud of for generations to come. In closing, strong support this application.

If I can be of further assistance, please don't hesitate to contact me.

With best personal regards, I am

Sincerely,



MSB/jj



RECEIVED

OCT 04 2006

NATURAL RESOURCE
DAMAGE PROGRAM

Friends of Two Rivers PO Box 376 Milltown MT 59851

2 October 2006

Natural Resource Damage Program
Montana Department of Justice
PO Box 201425
Helena MT 59620

Dear Sir or Madam,

This letter is an expression of strong support for Missoula County's funding proposal to the Natural Resource Damage Program for replacement of the Bonner Bridge. We are grateful that the proposal has successfully progressed through all but the last stage of the NRDP grant process and want to take this opportunity, prior to the Governor's decision, to re-state our support

The project as outlined by the County would not only contribute towards natural restoration of the Blackfoot River but also would provide important recreational benefits for the local area community.

Two provisions in the Friends of Two Rivers (FOTR) Mission Statement are:

- Further the ecological and recreational values of the Blackfoot and Clark Fork Rivers
- Promote a safe, healthy and enriching environment for the communities of the two rivers

The County's proposal for replacing the Bonner Bridge fits FOTR goals as an organization serving community residents, and we are very pleased to again have an opportunity to offer our support.

The County's proposed bridge would enhance the natural restoration that is planned for the river, which we have supported from the beginning. Removing the current Bonner Bridge piers from their location in the river bed that would exist after restoration and replacing them with piers outside the restored river bed is an important restoration enhancement. A further benefit would occur because the County proposes to restore the river bank using vegetation consistent with the NRD Restoration Plan.

The proposed bridge would be a major component in replacing lost recreational resources because it would connect the community east and west of the Blackfoot River with recreational trails which, along with replacement of the Bonner Bridge, are part of Phase I redevelopment planned by the Redevelopment Working Group and Missoula County and funded by the Transportation Bill earmark obtained by Senator Baucus. The availability of NRDP funding for Bonner Bridge replacement would conserve earmark funds that could then be used for the construction of the recreational trails planned for Phase I.

Sincerely,

Chuck Erickson, President

Gary Matson, Secretary/Treasurer

Montana Heavy
Contractors Association
Chairman, Rob Stoltz
1800 Sixth Avenue North
Billings, Montana 59101

MHCA

October 5, 2006

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OCT 10 2006

NATURAL RESOURCE
DAMAGE PROGRAM

Heavy Civil

Utility Industry

Water Treatment

Mine Maintenance

Refinery Maintenance

Coal and Hydro Power
Plants

Commercial Structures

Power Plant Maintenance

Power Plant Construction

Heavy Lift and Craning

Rural and Mainline
Water

Design/Build

Ethanol and Coal
Facilities

Advisory Board
Kathy Coleman
Natural Resource Damage Program
PO Box 201425
Helena MT 59620-1425

To Whom It May Concern:

The Montana Heavy Contractor's Association is deeply concerned about Butte Silverbow being granted a water line replacement contract under the Natural Resource Damage Program. We feel it is unfair to Montana Contractors for several reasons. Butte Silverbow will not be paying prevailing wage to workers on the project as is a requirement to Contractors bidding the project. Butte Silverbow does not pay taxes on equipment. In any bidding process, equipment costs and rates (owned or rented) must be considered as relevant to the bid. The Contractors who bid this work pay taxes on equipment, vehicles and property and are not subsidized by the public in any way. These items alone give Butte Silverbow an unfair advantage which would not be allowed in any bidding process for this type of work anywhere that we know of. It is our understanding that there was only one bidder on the current contract and we believe a possible reason could have been because of the inappropriate timing of the bid.

We would appreciate the Board's consideration in this matter. We believe that bidding work is in the best interest of both Montana Contractors and Montana workers.

Sincerely,



Rob Stoltz
MHCA Chairman

Cc: Governor Brian Schweitzer

MHCA

MONTANA DEPARTMENT OF JUSTICE
NATURAL RESOURCE DAMAGE PROGRAM
PUBLIC COMMENT PERIOD
ON THE DRAFT 2006 UPPER CLARK FORK RIVER BASIN
RESTORATION WORK PLAN

Held at:
Red Lion Inn
2100 Cornell Street
Butte, Montana

Monday, October 2, 2006

ORIGINAL

REPORTED BY:
Kimberly C. Carpenter
Butte-Silver Bow County Courthouse
155 West Granite Street
District Court, Department 2
Butte, MT 59701
(406) 497-6422

1 Monday, October 2, 2006
2 P R O C E E D I N G S
3 -000-
4 THE FACILITATOR: we'll go to the formal
5 public hearing portion of this meeting. So, this will be
6 your opportunity to give us testimony that Kim Carpenter,
7 our court reporter, will record.
8 And we will pass this testimony on to our
9 Citizen's Advisory Council, to the Governor's Trustee
10 Restoration and to the Governor. And, actually, that
11 public comment will be passed on to those folks, those
12 two councils that make recommendations to the Governor,
13 and to the Governor, so it can be considered when the
14 Governor makes his final decision on these funding
15 recommendations for these five projects in December.
16 So, how we'll run the hearing, we'll just
17 ask Jim. Like I know -- let's go ahead and start with
18 Jim, and he can -- I hope that the others of you will
19 offer testimony. You can come up to the podium and state
20 your name and address, and if you have an affiliation
21 please identify that. And if you have any written
22 testimony, you can also give that to Kim Carpenter. And
23 we'll just take volunteers.
24 And, Jim, I think you're ready to go.
25 would you like to come up and give your oral testimony.

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5 CAROL FOX, FACILITATOR

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10 JEAN PENTECOST 8
11 CINDY MCILVEEN 10

1 MR. JIM KEANE: Okay.
2 THE FACILITATOR: Thank you.
3 MR. JIM KEANE: Thank you.
4 My name is Jim Keane. I live at 2131 Wall
5 Street in Butte. I'm a business manager for the
6 Operating Engineers Union, and I represent House
7 District 75, which is on the east side of Butte, north
8 of -- north of Ottawa Street.

9 What I would like to testify on is the
10 Butte waterline project. And, first, I would like to say
11 the program's a great program. I mean, it's -- we're
12 very fortunate to have this money. Over a period of
13 time, into the future far beyond any of our lives, I
14 think we will be seeing the benefits of this program and
15 the significant change to the valley in ways that none of
16 us can even imagine today because of the management of
17 the money. **PH-1A**

18 With that in mind, I think my concern over
19 the waterline issue is, I think, as most of you are
20 aware, is the way that Butte Silver Bow is working to do
21 the work on that project. And it's kind of been
22 happening in the past. But I would liken it to if we
23 said that the Department of Transportation, we feel you
24 can do this -- or if they felt they could do the work
25 cheaper than contractors, then they would just do

1 construction projects on the highways in the state of
2 Montana. While they do the engineering and design and
3 all the other things, they would start doing the
4 construction.

5 And I think what happens, it's an unfair
6 situation. Under state and federal law, we're required
7 to pay prevailing wages to the workers. When Butte
8 Silver Bow does this, they aren't paying prevailing wages
9 to the workers, so they can do it significantly cheaper
10 because they aren't paying the people a prevailing wage.

11 Second, it's unfair to the taxpayers of the
12 community. If they're going to work on a construction

13 project, there's work that would be done by those
14 employees in the community that doesn't get any better.
15 I guess I would say filling potholes, maybe other repair
16 jobs, get brushed aside for a year or two.

17 The other thing, the contractors, when they
18 come in, they pay taxes on the equipment, they pay taxes
19 on their fuel, they pay taxes on all the things that they
20 do use, and which we all use -- which benefit all of us.
21 And, yet, the City and the -- the City doesn't have to do
22 that.

23 I think under this proposal -- I think we
24 need to get a handle on this type of thing, not for just
25 this project, but for the ones into the future that --

PH-1B

PH-1B

6 PH-1B

1 where the committee will actually take a look at a policy
2 of what people are paid. And in this, when it came in,
3 "we can do it cheaper," I guess, was the motto I heard
4 why we're doing this. I think if the bid was out of
5 line, it would have been very simple to say, "wait a
6 minute, we're going to rebid this."

7 And if the bid was out of line -- I think
8 there is the current data in the program. We should be
9 able to figure out how much it costs a foot of waterline
10 in Anaconda or Butte, anywhere in the community, even
11 escalating for increased prices of material. It should
12 be very simple for an engineer to get a handle what is a
13 fair estimate. The Department of Transportation does it
14 all the time.

15 And, possibly, I would like to see you have
16 some third party people, engineers, looking at this, not
17 only comparing costs, which they're doing now, but I
18 would like to see what the costs in Anaconda are as
19 compared to Butte.

20 One other complaint I heard when both
21 parties were doing it, both contractors and the City -- I
22 think there was a complaint. And this may or may not be
23 true -- is that the City would take some of the easier
24 jobs and then the tougher jobs were left for the
25 contractors. But that may or may not be true. But I

PH-1B

1 think those are fair assumptions. There should be a
2 different price on putting in a waterline up on the top
3 of the hill or going down Front Street, which would be
4 somewhat easier. And I think -- I think in the areas
5 you're working in, I think the cost has to change. That
6 can all be evaluated.

7 But prevailing wage. It's unfair for the
8 City to take work from the contractors. In order to do
9 that, I think that the bid for the work has to go out at
10 a much earlier date so that the contractors, in a year
11 like today, this year, when we have a ton of work out
12 there -- they're all booked up. I think they have to

13 fill those books of business that they have at an earlier
14 date, which gets the NRD a better price.

15 So, I think this will be an ongoing issue.
16 And I think we have to set some policies. But people
17 need to be paid at prevailing wage, because it is, again,
18 a state settlement and state money.

19 Thanks.
20 THE FACILITATOR: Are there other
21 individuals in the audience who would like to testify for
22 the hearing?

23 Jean, are you coming up here?
24 MS. JEAN PENTECOST: Yes, I am.
25 THE FACILITATOR: There you go.

PH-1B

8 PH-2

1 MS. JEAN PENTECOST: My name is Jean
2 Pentecost. I'm with Butte Silver Bow. I'm the
3 operations manager for the water division.

4 And I would like to testify that I think
5 that the water main removal program is a very good
6 program. The 17,000 feet per year we're using the
7 funding from NRD, I don't think it should be a question
8 on who does the work, just as long as the work gets done.

9 I respect your opinion, Mr. Keane. But I
10 represent the ratepayers of Butte Silver Bow. And when
11 it came to a million dollars over the estimated amount,
12 Butte-Silver Bow does not have that kind of funding to
13 make up that difference. And if there wasn't a funding
14 available, it would come directly from the ratepayer.
15 So, you have to do what's right for the ratepayers out
16 there.

17 You mentioned prevailing wages. We're
18 under contract. You know, we're under labor agreements.
19 And that's what dictates what we pay our people. But I
20 think you would be surprised if you would factor in all
21 of our benefits that we give our union people that we
22 probably meet or exceed the prevailing wages. And that
23 could be easily calculated.

24 Right now, we are doing the construction of
25 the waterlines. And I think this is a great opportunity

1 for Butte-Silver Bow to make a comparison and a baseline,
 2 to see if we can do the water main replacement at a
 3 reasonable rate, and do a comparison with what the bid
 4 did come in at. You know, everybody says, well,
 5 Butte-Silver Bow can do it cheaper. Well, this is going
 6 to prove if we can or if we can't do it cheaper.
 7 And I guess that's about all I have to say
 8 as an operations manager. PH-2

1 formal comment period.
 2 (whereupon, the formal comment period was concluded.)
 3 *****
 4
 5
 6
 7
 8

9 And I'm going to have a dual personality
 10 here, as a ratepayer. My name is Jean Pentecost. I live
 11 at 1018 Utah. And I remember the days when in every
 12 block in Butte there was a leak. It was on every corner
 13 there was a leak happening. We're not seeing that
 14 anymore. I mean, we've met great strides and great
 15 progress with the water main renewal program, and I just
 16 really don't want to jeopardize it. PH-3
 17 Thank you.

18 THE FACILITATOR: Thanks, Jean.
 19 Any other folks who would like to offer
 20 formal comment?
 21 Cindy, do you want to come on up?
 22 And one thing I didn't mention in my
 23 introduction is that we will respond in writing to all
 24 the formal comments in a Response to Comments document
 25 that you will be provided after the Governor's Decision.

1 okay. Cindy, go ahead.
 2 MS. CINDY MCILVEEN: Cindy McIlveen,
 3 431 West Mercury. I'm actually here representing the
 4 Butte-Silver Bow Planning Department. PH-4A
 5 And even though, yes, I'm here to support
 6 the waterline replacement, I think all the projects are
 7 fantastic. It's good to see the ones that are here.
 8 And, mainly, right now, Butte-Silver Bow,
 9 we're undergoing a huge push on our restoration efforts
 10 all over Butte, especially Uptown. And it's often -- PH-4B
 11 infrastructure projects are often not -- not looked over,
 12 per se, but they're not as exciting as other projects.
 13 And so I really thank NRD for recognizing the importance
 14 of a project like the water main replacements and
 15 waterline replacements. And we are focusing hard on
 16 other infrastructure projects, so you'll see us in the
 17 future.
 18 Thank you.
 19 THE FACILITATOR: Thank you, Cindy.
 20 All right. Norm? You're okay?
 21 Laurie, Milo or Dan? Okay.
 22 All right. You folks have been through
 23 several comments.
 24 All right. Well, with that, since we've
 25 covered every individual here, I'm going to close the

1 REPORTER'S CERTIFICATE
 2 STATE OF MONTANA)
) ss.
 3 County of Silver Bow)
 4 I, KIMBERLY CARPENTER, an Official Court
 5 Reporter and Notary Public in and for the State of
 6 Montana, do hereby certify:
 7 That said public comments were taken down
 8 by me in shorthand at the time and place therein named
 9 and thereafter reduced to typewriting under my direction
 10 and control.
 11 I further certify that the foregoing,
 12 consisting of Pages 1 through 12, contains a full, true,
 13 and correct transcript of the proceedings had,
 14 transcribed by me to the best of my knowledge and
 15 ability.
 16
 17
 18
 19
 20 DATED this the 6th Day of October 2006.
 21
 22
 23 (Signature) *Kimberly C. Carpenter*
 24 Kimberly C. Carpenter
 25 Notary Public for the State
 of Montana, residing at
 Butte. My commission
 expires: July 17, 2010.
 (Seal)

APPENDIX 2

Public Comments Received
After the Public Comment Period

Coleman, Kathleen

From: Sue FUrey [tfurey@montana.com]
Sent: Friday, December 01, 2006 11:09 PM
To: Natural Resource Damage Program
Subject: Milltown Pedestrian bridge

Dear NRDP Trustees,

I am a resident of Bonner (just behind Bonner School) and I appreciate your support to restore the rivers. I understand you are having the final hearing on the replacement of the old pedestrian bridge that crosses the Blackfoot River in Milltown. I regret that I cannot attend the hearing on Monday, but would like to voice my support, again for the replacement of the bridge. I know that it is really wonderful to keep old things and repair them, and try to keep them safe for pedestrians, but the current bridge really needs to be dismantled and a new bridge put in to replace it. I know that Missoula County has checked into the various alternatives and decided that the best alternative is to replace the old bridge. I agree. I know that you have received many positive comments about replacing the bridge.

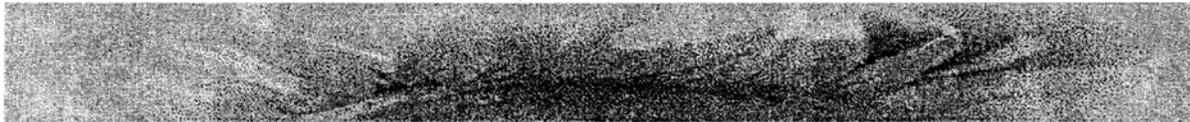
I have watched with enthusiasm the plans for the trails and replacement of the bridges in the future. I am most concerned with safety of people of all ages. The proposed trails and new bridges are a very attractive alternative for our community.

Thank you for your support. I urge your support of the bridge replacement project.

Sincerely,
Sue Furey
280 Hellgate Dr.
Missoula, MT 59802

Sue Furey

tfurey@montana.com



Coleman, Kathleen

From: Kevin Furey [kevin.furey@gmail.com]
Sent: Friday, December 01, 2006 10:03 PM
To: Natural Resource Damage Program
Subject: Bonner Black Bridge

I am in support of removing the "black bridge" in the Milltown Reservoir redevelopment process. The bridge does represent important history of our community, however the benefits of a new bridge greatly outweigh the historical value from the old bridge.

Thanks,

Representative Kevin Furey
1861 E Broadway
Missoula, MT 59802
406.546.6027

"The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding..." - Justice Brandeis, dissenting in *Olmstead v. United States* (1928)

Coleman, Kathleen

From: Mary Erickson [mary@theinnonbroadway.com]
Sent: Friday, December 01, 2006 8:36 AM
To: Natural Resource Damage Program
Subject: Bridge replacement Milltown

It has come to my attention that some very few individuals in our "community" are attempting to rally to "save the Black Bridge". Mostly I suspect it is an yet one more attempt by the same small contingent to stall any available part of the redevelopment process. A great deal of community discussion and research has gone in to the proposed plan to replace the bridge.

Simply put the bridge has little if any historical significance, it is the 2nd or even 3rd bridge to sit in this location

Bringing it up to a functional standard would be as expensive as replacing it AND You then would have huge maintenance issues in perpetuity.

Important environmental issues are addressed by removing the piers from the river, both old and the ones currently in use and replacing the bridge with some thing deemed to be healthier for the river and easier to maintain not to mention attractive, safer and more functional.

The fact that this proposal for the replacement bridge has reached this level of decision indicates a lot of support and research has gone into the project. It is not some idle fly by night request. There are several years of background on this project at this point. The homework has been done, the community at large has approved it in open house settings, the county has approved it....we hope you will also.

Thank you to the trustees for your time and consideration.

Mary Erickson

Friends Of 2 Rivers

Working Group member

Resident of Milltown/Bonner

Mary Erickson
Director Of Sales
Broadway Inn Conference Center
1609 W. Broadway
Missoula, Mt. 59808
Ph: 406-532-3351

TRUSTEE RESTORATION COUNCIL

With the interest shown by some of the citizens in repairing the old Blackfoot bridge for sentimental reasons, I really wonder if they could have seriously looked into it. Research shows that the cost of repairing this old bridge as it is, or replacing it, are about the same. Either way, if kept in place it would require expensive future maintenance.

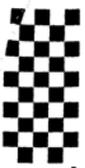
A new bridge has economical advantage in having no piers in the Blackfoot. That means no more expensive future maintenance of underwater footings. The new bridge would be an all around plus, eye appealing, safe for children and environmentally sound. All at no cost to the taxpayers.

In addition to the above safety factors, in a few short years, the Blackfoot can return to its original functions of providing an upstream passage for migrating fish and cleaner, fresher cold water flow into the Clark Fork.

For those interested in the historical preservation aspects, the bridge is receiving a high level of documentation, conducted by professionals.

I would also like to thank the Trustees for their efforts and forward looking plans to restore the rivers, as much as possible, to their normal functioning.

Joe Devlin
P.O. Box 579
Bonner, MT 59823



ATTN: Sandi Olsen

SAVE OUR BRIDGE COMMITTEE

10070 Hwy 10 East
Missoula, MT 59802
November 24, 2006

COPY

Dear Governor Schweitzer,

We understand that in December you will be making decisions on requests for funding projects through the Natural Resource Damage Program (NRDP). It is also our understanding that one of the funding requests was submitted by Missoula County for the replacement of the "Bonner Bridge". We request that you defer a decision on this funding request.

There are many reasons for our making this appeal. Foremost is the lack of public participation that went into deciding the fate of this landmark structure. As a grass-roots committee we do not believe that the residents of the affected community, as defined by Bonner School District 14, has had the opportunity to weigh-in on the subject of whether to replace or rehab the structure.

The Bonner Truss Bridge has been a feature of the community for 86 years. The bridge currently provides safe pedestrian access across the Blackfoot River. While Missoula County intends to replace the bridge, their decision does not take into consideration the historic significance of the existing bridge nor what we believe is a decision that is not embraced by residents of the Bonner and Milltown community.

According to the book Conveniences Sorely Needed: Montana's Historic Highway Bridges 1860-1956, the Bonner Bridge is significant for several reasons. It is one of the few steel truss bridges remaining from the Commission's initial flurry of state-sponsored bridge construction between 1915 and 1921. It is the first bridge in Montana constructed entirely of State funds with no county bonds needed to finance. The Bonner Bridge was the largest and most massive steel truss bridge built by the Commission up to that time. The bridge was also a critical component of the Yellowstone Trail, which was renamed US Highway 10 in 1926. The Bonner Bridge stands today as one of the finest examples of this type of bridge in the state.

According to Dr. Abba G. Lichtenstein, P.E., recipient of the prestigious John A. Roebling Medal for Lifetime Achievement in Bridge Engineering, "No deserving bridge in this country should be demolished without some effort undertaken to save it."

Sincerely,
SOB committee

Committee chair person : Paul Layton 258-6979

Cc: Mark Baumler, SHPO