

**City/State Memorandum of Agreement
N 27TH City Conduit
Billings, Montana
September 2019**

This Memorandum of Agreement (Agreement) is made and entered into by and between the city of Billings (“the City”), a self-governing municipality operating pursuant to its Charter and the laws of the State of Montana, 210 North 27th Street, Billings, MT 59101 and the Montana Department of Transportation (“MDT”), a department of the State of Montana, P.O. Box 201001, Helena MT 59620-1001 together referred to as “the Parties.”

The Purpose of this Agreement is to set forth the respective responsibilities and duties of the City and MDT associated with the installation, maintenance, and use of City owned fiber optic cable within a MDT installed conduit on N 27th Street (N-53) from the I-90 westbound ramps, Reference Post (RP) 0.000 to the intersection of Airport Road (U-1014) RP 2.99 roadway right-of-way in the City of Billings, hereafter referred to as “the Project”. This Agreement sets forth terms necessary to provide maintenance of the facility. Any rights granted to the City by this Agreement is explicitly subject and subordinate to the rights and title of MDT and the State of Montana.

WHEREAS, MDT is responsible for planning, designing, constructing and maintaining Commission-designated State Highways and roadway associated transportation facilities, including associated pull-offs, parking areas, and rest areas for the use and benefit of the traveling public, in a safe and efficient manner in accordance with Title 23 United States Code (U.S.C) and Title 60 Montana Code Annotated (MCA) including N 27th St (N-53).

WHEREAS, N 27th St (N-53) is on the National Highway System within the State of Montana and is eligible to receive Federal Highway Funds; and

WHEREAS, in accordance with the State’s agreement with the Federal Highway Administration (FHWA) of the U.S. Department of Transportation, MDT must ensure that certain requirements are met in order for MDT to fulfill its obligations to the FHWA and for the N 27th Street Corridor (N-53) to be eligible for federal funds; and

WHEREAS, the Project includes installation of conduit by MDT and the future installation of fiber optic cable by the City within the MDT installed conduit on N 27th from 1st Ave S to Airport Road Billings City limits, per the approved project location (Attachment B); and

WHEREAS, The City has agreed to maintain, or cause to be maintained, the conduit, pull boxes, and fiber optics cable the N 27th Street (N-53) roadway right-of-way within the Billings City limits subject to this agreement; and

WHEREAS, The City and MDT have agreed to an in-kind exchange of service in lieu of payment, as the City has agreed to reserve fiber for future MDT use for MDT fiber optic cable or conduit for the traffic signals or other uses as determined by MDT; and

WHEREAS, The City has agreed to limit the use of the remaining fiber optic cable for public use including: city offices, emergency service providers, public schools, University system, and law enforcement; and prohibit commercial use of the fiber optic cable; and

WHEREAS, This Agreement must be fully executed before the initiation of construction of the Project within MDT right-of-way; and

NOW, THEREFORE, The Parties set forth the fundamental duties and responsibilities necessary for the encroachment of the Project into roadway right-of-way. In consideration of the following mutual promises the parties agree as follows:

ARTICLE I. OBLIGATIONS OF THE CITY

1. The City shall coordinate any installation for the Project with MDT.
2. The City agrees that no fixture, building, structure, or other permanent installation shall be constructed or placed within MDT right-of-way without prior written approval from MDT.
3. The City shall submit and receive approval from the MDT Billings District Maintenance Chief (406-657-0217) for a traffic control plan prior to working within MDT right-of-way.
4. Before initiating any construction work within MDT right-of-way, the City shall schedule a preconstruction meeting with the MDT Billings District Maintenance Chief (406-657-0217) to discuss construction related activities and coordination. The MDT Billings Maintenance staff must be notified, and an approval received a minimum of 14 calendar days prior to commencing any construction or maintenance work within MDT right-of-way.
5. The City shall complete the necessary environmental processes for modification to the state highways and roadways and demonstrate that all, if any, environmental issues associated with the proposed Project have been identified and mitigated. The City agrees it will prepare and file any required environmental documents and apply for and obtain any permits required by other governmental agencies at no expense to MDT prior to construction taking place within MDT right-of-way.
6. The City agrees to be responsible for any and all damages to MDT's facilities caused by The City, the City's staff or contractors, or resulting from the City's operations. The City must repair any and all damages, at its sole expense, after notification of damage by MDT and approval of repair work needed, method of repair, and schedule of repair.
7. The City agrees it will fund any additional costs MDT may incur for MDT projects which impact the amenities the City places in the MDT right-of-way.

8. The City is responsible for maintaining the Fiber Optic Cable and Conduit to ensure they do not negatively impact the safety and operation of N 27th (N-52).
9. The City agrees the fiber is only to be used for the public benefit including MDT use, and not for commercial use. The City must not receive payment for use of the fiber.
10. The City agrees to reserve a minimum of 12 count fiber, if the fiber cable 72 count or greater the City agrees to reserve 24 count fiber for MDT's use.

ARTICLE II. OBLIGATIONS OF MDT

1. MDT agrees to review all future plans, design, and data submitted by the City for fiber installation to ensure all MDT safety and design standards are met, and if found acceptable, approve such plans and designs.
2. Once the plans and designs are found acceptable, MDT will issue the appropriate encroachment permit following MDT's standard processes.
3. MDT agrees it will review and, if acceptable, approve the City's Traffic Control Plan.
4. MDT agrees it will conduct final inspection of the Project within MDT right-of-way upon completion and request any improvements or corrections necessary to comply with MDT standards.

ARTICLE V. GENERAL TERMS AND CONDITIONS

1. **Term** – The initial term of this Agreement is ten (10) years. The City shall have the right to extend the term of this by additional ten (10) year renewal terms by giving MDT not less than one hundred eighty (180) days written notice prior to the end of the term. Prior to the commencement of any renewal term of this Agreement, MDT shall notify the City of revisions to Agreement. This Agreement may be extended after the renewal term only by mutual consent of both parties.
2. **Termination** – This Agreement may be terminated by MDT if: 1.) The City has violated or breached any term, condition, or article of this Agreement and has failed to correct the same within 30 days of receiving notice in writing addressed to the City, at the address shown above, from MDT of such violation or breach of any term, condition, or Article of this Agreement.
3. **Hold Harmless & Indemnification**
The City agrees to protect, defend, indemnify, and hold MDT, its elected and appointed officials, agents, and employees, while acting within their duties as such, harmless from and against all claims, liabilities, demands, causes of action, and judgments (including the cost of defense and reasonable attorney fees) arising in favor of or asserted by the

City's employees or third parties on account of personal or bodily injury, death or damage to property, arising out of the acts or omissions of the City, its agents, or sub-contractors, under this Agreement, except the negligence of MDT.

The State and Department of Transportation agrees to protect, defend, indemnify, and hold the City, its elected and appointed officials, agents, and employees, while acting within their duties as such, harmless from and against all claims, liabilities, demands, causes of action, and judgments (including the cost of defense and reasonable attorney fees) arising in favor of or asserted by the MDT's employees or third parties on account of personal or bodily injury, death or damage to property, arising out of the acts or omissions of MDT, its agents, or sub-contractors, under this Agreement, except the negligence of the City.

1. Insurance

- a. General Requirements: Each party shall maintain for the duration of this Agreement, at its own cost and expense, insurance against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the duties and obligations in this Agreement by each party, its agents, employees, representatives, assigns, or sub-contractors. This insurance shall cover such claims as may be caused by any negligent act or omission.
- b. General Liability Insurance: Each party shall purchase and maintain occurrence coverage with combined single limits for bodily injury, personal injury, and property damage of \$1 million per occurrence and \$2 million aggregate per year to cover such claims as may be caused by or arising out of any negligent acts or omissions in work or services performed under this Agreement, or as established by statutory tort limits as provided by a public entity self-insurance program either individually or on a pool basis as provided by Mont. Code Ann. Title 2, Chapter 9.
- c. General Provisions: All insurance coverage must be with a carrier licensed to do business in the State of Montana or by a public entity self-insured program either individually or on a pool basis. Each party must notify the other immediately of any material change in insurance coverage, such as changes in limits, coverage, change in status of policy, etc. Each party reserves the right to request complete copies of the other party's insurance policy or self-insured memorandum of coverage at any time.
- d. Workers' Compensation Insurance: The City must maintain workers' compensation insurance and require its contractors and its contractor's sub-contractors to carry their own workers compensation coverage while performing work within MDT right-of-way in accordance with Mont. Code Ann. §§39-71-401 and 39-71-405. Neither the contractor nor its employees are employees of MDT. This insurance/exemption must be valid for the entire Agreement period.

2. Public Safety:

- a. If any repairs to the Project must be done to prevent a public hazard, the City will immediately protect the area from public access, contact MDT Billings Area Maintenance, and take corrective action to repair the hazard.

- b. If MDT incurs any costs as a result of a public emergency that necessitates action on MDT's part concerning the maintenance or repair of the Project, MDT shall be compensated for such costs by the City, and the City shall pay the same within thirty (30) days of its receipt of such invoices.
6. Section 17-1-106, MCA, requires any state agency, including MDT, which receives non-general funds to identify and recover its indirect costs (IDC). These costs are in addition to direct project costs. MDT's IDC rate is determined annually as a percentage of the project's direct costs to cover the project's share of MDT's IDC as defined by 2 CFR Part 200, Appendix VII. MDT's current IDC rate is 10.41% for fiscal year 2020 (July 1, 2019 to June 30, 2020). If the work occurs or extends into fiscal year 2020 or beyond the IDC rate will be charged at the rate agreed to by MDT and the Federal Highway Administration (FHWA).

7. Invoice will be sent to the appropriate party according to the Agreement:

City of Billings
Attention: IT Director
PO Box 1178
Billings MT 59101

8. Payments shall be made to:

Montana Department of Transportation
Attention: Collections
2701 Prospect Avenue
PO Box 201001
Helena, MT 59620-1001

9. Choice of Law – This Agreement shall be governed by the laws of Montana
10. Venue – The parties agree that any litigation concerning this Agreement must be brought in the First Judicial District Court, in and for the County of Lewis and Clark, State of Montana, and each party shall pay its own costs and attorney fees, except as otherwise noted in this Agreement on Indemnification. In case of conflict between the terms and conditions of this Agreement and the laws of the State of Montana, the laws of the State of Montana shall control.
11. Binding Effect – The benefits and obligations set forth in this Agreement shall be binding upon, and inure to the benefit of, their respective successors, administrators and assigns of the Parties.
12. Relationship of Parties – Nothing contained in this Agreement shall be deemed or construed (either by the Parties hereto or by any third party) to create the relationship

of principal and agent or create any partnership joint venture or other association between the Parties.

13. Non-Discrimination – The City will require that during the performance of any work arising out of this Agreement the City, for itself, assignees, and successors shall comply with all applicable non-discrimination regulation set forth in Attachment “A” attached hereto and made part of this Agreement.

MDT requires that any construction or maintenance resulting from this Agreement must include appropriate pedestrian facilities that meet or exceed current MDT standards for accessibility as set forth by the United States Department of Justice 2010 ADA Standards for Accessible Design, United States Access Board Proposed Guidelines for Pedestrian Facilities in the Public Right-of-Way (2011 PROWAG), and MDT’s Detailed Drawings, 608 series.

14. Audit – The Legislative Auditor and the Legislative Fiscal Analyst may, without prior notice and during normal business hours, audit, at their own cost and expense, all records, reports, and other documents the City maintain in connection with this Agreement.
15. Access and Retention of Records – The City agrees to provide the State, Legislative Auditor, or their authorized agents access to any records necessary to determine compliance with this MOA (Mont. Code Ann. §18-1-118). The City agrees to create and retain records supporting this Agreement for a period of three years after the completion date of this Agreement or the conclusion of any claim, litigation or exception relating to the Agreement taken by the State of Montana or a third party.
16. Highway Modifications – If MDT modifies or improves N 27th (N-53) highway or roadway facilities, the City will modify, upon reasonable notice at no expense to MDT, the Project accordingly.
17. Revocation – This Agreement is revocable by MDT in the event that the Project facilities within the right-of-way cease to be used by the City for a period of one year or abandoned otherwise. Upon revocation or abandonment, the system facilities must be removed in compliance with this Agreement.
18. Utilities – The right of any private or public utility now lawfully occupying the right-of-way to operate and maintain utility facilities supersedes any right granted by this Agreement to the City. Copies of existing utility permits may be obtained from the MDT Billings District Utility Agent.
19. Amendment and Modification – The Parties may modify or amend this Agreement only by a written Addendum signed by the Parties. The Addendum will control any conflict between the Agreement and Addendum shall control, unless prohibited by law.

20. Counterpart Execution- This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same Agreement. The counterparts of this Agreement may be executed and delivered by facsimile or other electronic signature by any of the parties to any other party and the receiving party may rely on the receipt of such document so executed and delivered by facsimile or other electronic means as if the original had been received.

(Signature Pages to Follow)

IN WITNESS WHEREOF, the Department's authorized representative has hereunto signed on behalf of the State of Montana, and the Mayor of the City of Billings, on behalf of the City, has signed and affixed hereto the seal of the City.

STATE OF MONTANA, DEPARTMENT OF TRANSPORTATION

By _____, 2018
Montana Department of Transportation

Carol Hall-Morris
Approved for Legal Content

Patti Schurman 10-16-19
Approved for Civil Rights

CITY OF BILLINGS

By _____, 2019
William A Cole, Mayor
City of Billings, Montana

ATTEST:

City Clerk

(SEAL)

ATTACHMENT A

MDT Nondiscrimination and Disability Accommodation Notice

**MDT NONDISCRIMINATION
AND
DISABILITY ACCOMMODATION NOTICE**

Montana Department of Transportation (“MDT”) is committed to conducting all of its business in an environment free from discrimination, harassment, and retaliation. In accordance with State and Federal law MDT prohibits any and all discrimination and protections are all inclusive (hereafter “protected classes”) by its employees or anyone with whom MDT does business:

Federal protected classes

Race, color, national origin,
sex, sexual orientation, gender identity,
age, disability, & Limited English Proficiency

State protected classes

Race, color, national origin, parental/marital
status, pregnancy, childbirth, or medical
conditions related to pregnancy or childbirth,
religion/ creed, social origin or condition,
genetic information, sex, sexual orientation,
gender identification or expression, national
origin, ancestry, age, disability mental or
physical, political or religious affiliations or
ideas, military service or veteran status

For the duration of this contract/agreement, the PARTY agrees as follows:

(1) Compliance with Regulations: The PARTY (hereinafter includes consultant) will comply with all Acts and Regulations of the United States and the State of Montana relative to Non-Discrimination in Federally and State-assisted programs of the U.S. Department of Transportation and the State of Montana, as they may be amended from time to time, which are herein incorporated by reference and made a part of this contract.

(2) Non-discrimination:

- a. The PARTY, with regard to the work performed by it during the contract, will not discriminate, directly or indirectly, on the grounds of any of the protected classes in the selection and retention of subcontractors, including procurements of materials and leases of equipment, employment, and all other activities being performed under this contract/agreement.
- b. PARTY will provide notice to its employees and the members of the public that it serves that will include the following:
 - i. Statement that PARTY does not discriminate on the grounds of any protected classes.
 - ii. Statement that PARTY will provide employees and members of the public that it serves with reasonable accommodations for any known disability, upon request, pursuant to the Americans with Disabilities Act as Amended (ADA).
 - iii. Contact information for PARTY’s representative tasked with handling non-discrimination complaints and providing reasonable accommodations under the ADA.

- iv. Information on how to request information in alternative accessible formats.
- c. In accordance with Mont. Code Ann. § 49-3-207, PARTY will include a provision, in all of its hiring/subcontracting notices, that all hiring/subcontracting will be on the basis of merit and qualifications and that PARTY does not discriminate on the grounds of any protected class.

(3) Participation by Disadvantaged Business Enterprises (DBEs):

- a. If the PARTY receives federal financial assistance as part of this contract/agreement, the PARTY will make all reasonable efforts to utilize DBE firms certified by MDT for its subcontracting services. The list of all currently certified DBE firms is located on the MDT website at mdt.mt.gov/business/contracting/civil/dbe.shtml
- b. By signing this agreement, the PARTY assures that:

The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

- c. PARTY must include the above assurance in each contract/agreement the PARTY enters.

(4) Solicitation for Subcontracts, Including Procurement of Materials and Equipment: In all solicitations, either by competitive bidding, or negotiation, made by the PARTY for work to be performed under a subcontract, including procurements of materials, or leases of equipment, each potential subcontractor or supplier will be notified by the PARTY of the PARTY's obligation under this contract/agreement and all Acts and Regulations of the United States and the State of Montana related to Non-Discrimination.

(5) Information and Reports: The PARTY will provide all information and reports required by the Acts, Regulations, and directives issued pursuant thereto and will permit access to its books, records, accounts, other sources of information and its facilities as may be determined by MDT or relevant US DOT Administration to be pertinent to ascertain compliance with such Acts, Regulations, and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish the information, the PARTY will so certify to MDT or relevant US DOT Administration, as appropriate, and will set forth what efforts it has made to obtain the information.

(6) Sanctions for Noncompliance: In the event of a PARTY's noncompliance with the Non-discrimination provisions of this contract/agreement, MDT will impose such sanctions as it or the relevant US DOT Administration may determine to be appropriate, including, but not limited to:

- a. Withholding payments to the PARTY under the contract/agreement until the PARTY complies; and/or
- b. Cancelling, terminating, or suspending the contract/agreement, in whole or in part.

(7) Pertinent Non-Discrimination Authorities:

During the performance of this contract/agreement, the PARTY, for itself, its assignees, and successor in interest, agrees to comply with the following non-discrimination statutes and authorities; including but not limited to:

Federal

- Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*, 78 stat. 252), (prohibits discrimination on the basis of race, color, national origin); and 49 CFR Part 21;
- The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. § 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
- Federal-Aid Highway Act of 1973, (23 U.S.C. § 324 *et seq.*), (prohibits discrimination on the basis of sex);
- Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794 *et seq.*), as amended, (prohibits discrimination on the basis of disability); and 49 CFR Part 27;
- The Age Discrimination Act of 1975, as amended, (42 U.S.C. § 6101 *et seq.*), (prohibits discrimination on the basis of age);
- Airport and Airways Improvement Act of 1982, (49 U.S.C. § 471, Section 47123), as amended, (prohibits discrimination based on race, creed, color, national origin, or sex);
- The Civil Rights Restoration Act of 1987, (PL 100-209), (broadened the scope, coverage, and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms “programs or activities” to include all of the programs or activities of the Federal-aid recipients, sub-recipients, and contractors, whether such programs or activities are Federally funded or not);
- Titles II and III of the Americans with Disabilities Act, which prohibits discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131-12189) as implemented by Department of Transportation regulations at 49 CFR parts 37 and 38;
- The Federal Aviation Administration’s Non-Discrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which prevents discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations;

- Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of Limited English Proficiency (LEP). To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP persons have meaningful access to your programs (70 Fed. Reg. at 74087 to 74100);
- Title IX of the Education Amendments of 1972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 U.S.C. § 1681 *et seq.*).
- Executive Order 13672 prohibits discrimination in the civilian federal workforce on the basis of gender identity and in hiring by federal contractors on the basis of both sexual orientation and gender identity.

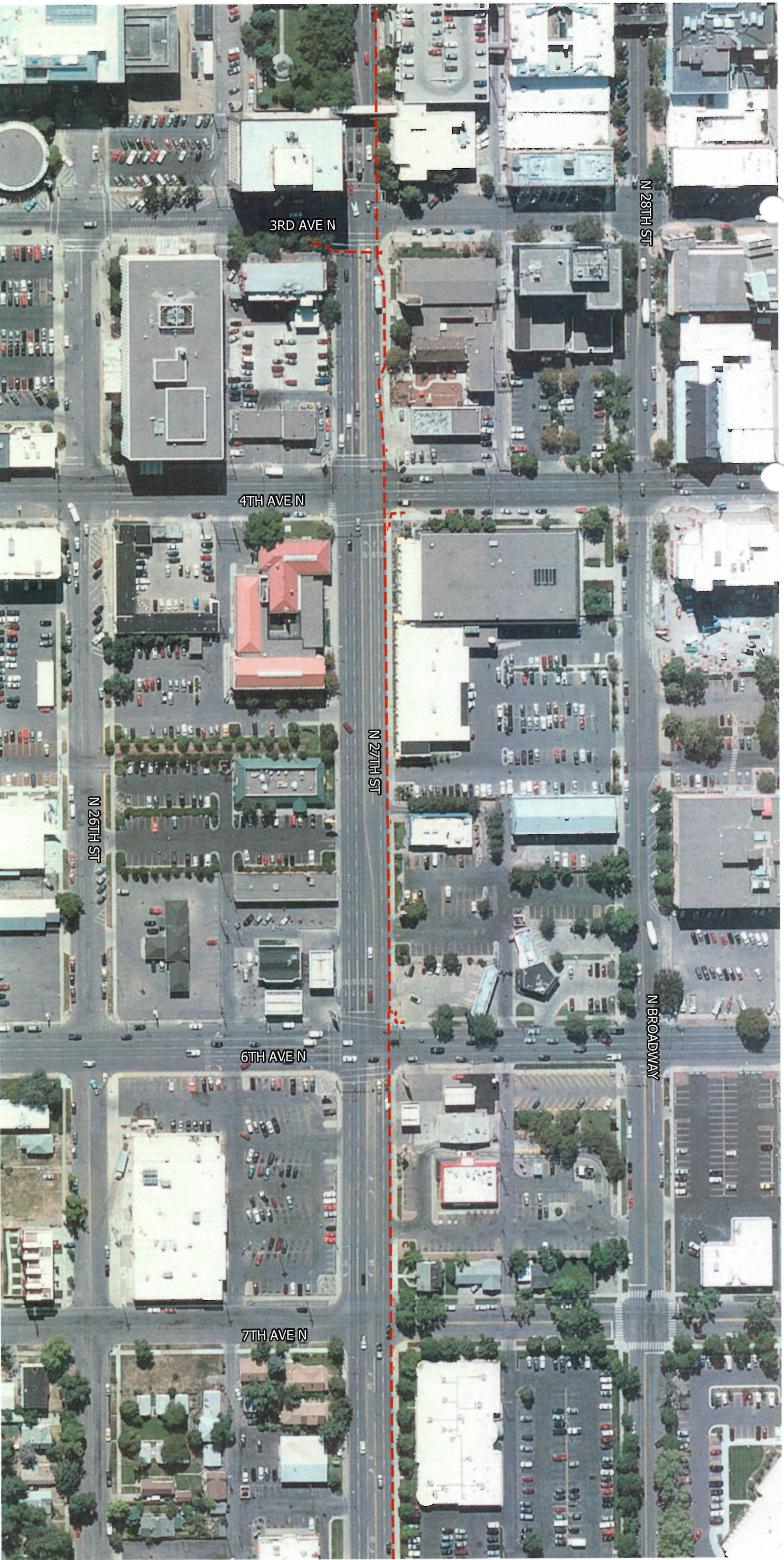
State

- Mont. Code Ann. § 49-3-205 Governmental services;
- Mont. Code Ann. § 49-3-206 Distribution of governmental funds;
- Mont. Code Ann. § 49-3-207 Nondiscrimination provision in all public contracts.

(8) Incorporation of Provisions: The PARTY will include the provisions of paragraph one through seven in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Acts, the Regulations and/or directives issued pursuant thereto. The PARTY will take action with respect to any subcontract or procurement as MDT or the relevant US DOT Administration may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the PARTY becomes involved in, or is threatened with litigation by a subcontractor, or supplier because of such direction, the PARTY may request MDT to enter into any litigation to protect the interests of MDT. In addition, the PARTY may request the United States to enter into the litigation to protect the interests of the United States.

ATTACHMENT B

Project Location



DATA SOURCE: Montana Cadastral, MDT, ESRI
 Montana State Library, USDA

LEGEND

MILE MARKER

MDT FIBER

0 200 Feet



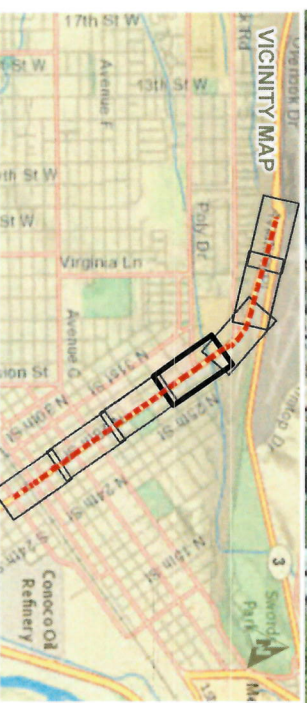


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 Montana State Library, USDA

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DATA SOURCE: Montana Cadastral, MDT, ESRI
 Montana State Library, USDA

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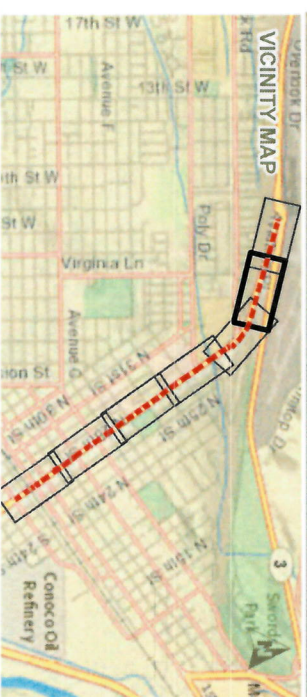
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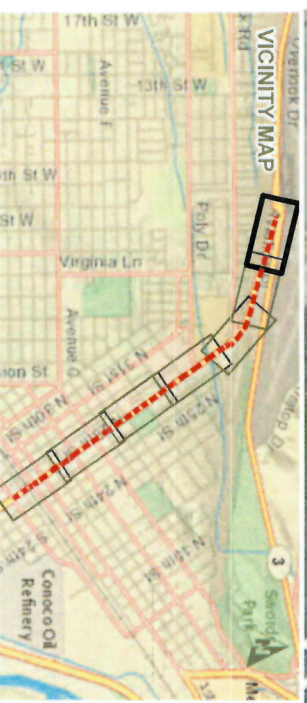


DATA SOURCE: Montana Cadastral, MDT, ESRI
 Montana State Library, USDA

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