



Board of County Commissioners - Staff Report

Meeting Date: March 20, 2018

Presenter: Sean O'Malley

Submitting Dept: Public Works

Subject: Consideration of a Cooperative Agreement with WYDOT for Tribal Trails Road

Statement / Purpose: Consideration of entering into a Cooperative Agreement between the Wyoming Department of Transportation (WYDOT) and Teton County for WYDOT to perform, in coordination with Teton County, the Project Charter for Tribal Trails Road, as outlined in the Integrated Transportation Plan (ITP), as well as the planning, design, and potential construction of Tribal Trails Road.

Background / Description (Pros & Cons): A transportation corridor connecting South Park Loop Road and Highway 22, now known as Tribal Trails Road, was originally identified as an important community transportation link at least as early as the 1982 Rural and Urban Design Assistance Team (R/UDAT) study. This corridor has been highlighted in all subsequent County transportation studies, including the 2015 Integrated Transportation Plan (ITP). Tribal Trails Road was identified in the ITP as both a Group 1 and Group 4 major capital project. Group 1 capital projects are intended to address lack of connectivity, redundancy, and capacity in the WY-22 corridor from West Jackson to WY-390 while Group 4 projects are intended to provide local connectivity.

Right of way, granted to Teton County, was secured September 2, 1992 as part of the master plan and platting of the Indian Springs Ranch.

On June 12, 2017, the Teton County Commissioners voted to send a letter to WYDOT requesting that WYDOT conduct the Project Charter process and undertake preliminary planning and design for Tribal Trails Road. WYDOT prepared a draft cooperative agreement and sent it to Teton County on November 6, 2017. Following review by Engineering and Legal, Deputy County Attorney Keith Gingery made several changes and returned the draft to WYDOT on November 8th. We received version 2 from WYDOT on January 10, 2018. It was significantly modified from their original document as well as the County's response. After several more iterations, staff is now comfortable with the version included with this staff report.

Significant items in the Agreement include:

3. Terms of Agreement:

"This Agreement may be terminated, without cause, by either party upon thirty (30) days written notice ..."

4.A-C – Participation of Project Costs: Attached Exhibit B shows a preliminary estimate of \$7,250,000 for the entire project, not including work to be performed by WYDOT within the Highway 22 right of way. 4.C specifically states:

"The costs shown on the Exhibit "B" are estimates only and the County understands that the final costs may be higher or lower. If actual costs go over by twenty (20) percent of the total estimated costs, both parties must agree and sign an amendment for additional costs."

5. Reimbursement –

"If the County ends the project, this Agreement is terminated and the County will reimburse WYDOT for all expenses incurred on the project. All work completed will be provided to and become the property of the County."



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6.A. – Responsibilities ...:

“Design will follow the applicable requirements for the functional classification of the roadway and Teton County Road Standards, for that portion of the roadway outside of the highway right-of-way.”

“Work will be pursued consistent with the Project Charter process established in the County’s Integrated Transportation Plan (ITP) and in two phases; Concept Design Phase and Final Design Phase.”

At the conclusion of each phase, the County shall vote on whether to proceed with the project and Agreement. *“No further work shall be done by WYDOT until the County approves the Concept Design, concurs in the Preferred Alternative and gives their approval to continue to the Final Design Phase.”*

6.E. Utilities and Pathways –

“The County agrees to reimburse WYDOT for the total cost needed for utility or pathway relocations.”

6.F. – Project Letting –

“The County shall approve the estimates prior to the advertisement of bids by WYDOT. If the County votes to not approve the estimates as presented, then the project will be reviewed for possible modification or shall end. Likewise, the County shall concur in the award of this project to the lowest qualified bidder prior to WYDOT awarding the contract. If the County votes to not concur in the award to the lowest qualified bidder, then this project will then be reviewed for possible modification or shall end. As a result of signing the letter of concurrence, the County agrees to amend the costs shown on Exhibit “B” to match the actual amount bid. Said concurrence letter shall become part of this Agreement.”

Stakeholder Analysis & Involvement: County and WYDOT staff have worked on this agreement.

Fiscal Impact: A cost estimate is being prepared by WYDOT (Exhibit “B”) and will be distributed prior to the meeting on March 20th.

Staff Impact: Engineering and Planning staff will have significant responsibilities related to the Project Charter process.

Legal Review: Gingery

Attachments:

Cooperative Agreement ARS3905 between the WYDOT and Teton County Commissioners
Exhibit A - Vicinity Map
Exhibit B – Preliminary Cost Estimate

Suggested Motion: I move to approve the Cooperative Agreement ARS3905 between the Wyoming Department of Transportation and the Teton County Board of County Commissioners for Tribal Trails Road.

**COOPERATIVE AGREEMENT
BETWEEN THE
WYOMING DEPARTMENT OF TRANSPORTATION
AND THE
TETON COUNTY BOARD OF COUNTY COMMISSIONERS**

State Project ARS3905
Tribal Trails Connector
Teton County

1. **Parties.** The parties to this Agreement are the Wyoming Department of Transportation, hereinafter referred to as "WYDOT"; whose address is 5300 Bishop Blvd., Cheyenne, Wyoming 82009, and the Teton County Board of County Commissioners hereinafter referred to as the "County" whose address is P.O. Box 3594, Jackson, Wyoming 83001.
2. **Purpose of Agreement.** The County and WYDOT desire to participate in the construction of the Tribal Trails Connector to connect the South Park Loop Road to WYO 22. The existing road would extend north and west from its current terminus at Cherokee Lane. The County has designated a general location for the construction of the Tribal Trails Connector as shown on the attached map, dated February 1, 2018, marked Exhibit "A", and which by this reference is hereby made a part of this Agreement; and WYDOT, the County, and the traveling public shall derive a benefit and advantage by reason of having the Tribal Trails Connector constructed.
3. **Term of Agreement.** This Agreement shall commence upon the day and date last signed and executed by the duly authorized representatives of the parties to this Agreement and shall remain in full force and effect until terminated. This Agreement may be terminated, without cause, by either party upon thirty (30) days written notice, which notice shall be delivered by hand or certified mail.
4. **Participation of Project Costs**
 - A. The County agrees to pay the entire actual cost for all preliminary and construction engineering work associated with this project. The County also agrees to pay the entire cost for the construction of this project that is outside of WYDOT's right-of-way. This includes all indirect costs through the current Indirect Cost Allocation Plan (ICAP) rate as approved by the Federal Highway Administration (FHWA), within thirty (30) days after billing for the Tribal Trails Connector, which estimated costs are more particularly set forth on the Exhibit "B", attached hereto. ICAP is a rate built into WYDOT's accounting system for overhead expenditures for administering a project. The ICAP rate is developed by WYDOT and approved by the FHWA. The current rate of eleven (11) percent is effective until September 30, 2020 at which time the rate is subject to change based on FHWA approval. The ICAP rate will be charged on total direct costs on this project, as shown on the attached Exhibit "B". Billing will occur on a monthly basis unless otherwise agreed upon between the parties.

- B.** WYDOT will pay the entire cost for all construction, within its own right-of-way, necessary to connect the new Tribal Trails Connector to WYO 22.
 - C.** The costs shown on the Exhibit "B" are estimates only and the County understands that the final costs may be higher or lower. If the actual costs go over by twenty (20) percent of the total estimated costs, both parties must agree and sign an amendment for the additional costs.
- 5.** **Reimbursement.** If the County ends the project, this Agreement is terminated and the County will reimburse WYDOT for all expenses incurred on the project. All work completed will be provided to and become the property of the County.
- 6.** **Responsibilities of the Parties and General Conditions of Preliminary Engineering, Right-of-way Acquisition, Utility Adjustments, Letting, Construction Engineering, Construction and Maintenance.**

- A.** WYDOT, or their engineering consultant, will conduct preliminary survey work, engineering investigations, environmental and right-of-way studies and will develop final design plans, specifications and estimates necessary to construct this project. Design will follow the applicable requirements for the functional classification of the roadway and Teton County Road Standards, for that portion of the roadway outside of the highway right-of-way. Design within the WYO 22 right-of-way will be designed in accordance with the applicable AASHTO design guides. Environmental studies and public involvement will follow NEPA. Work will be pursued consistent with the Project Charter process established in County's Integrated Transportation Plan (ITP) and in two phases; Concept Design Phase and Final Design Phase.

Concept Design Phase will initiate the necessary preliminary work, environmental review and public involvement to reach a decision on the preferred alternative for the new road. Alternatives will be developed to the point that all impacts can be adequately determined. WYDOT, or their engineering consultant, will present the design and work product from the Concept Design phase at a public meeting of the Teton County Board of County Commissioners. The County shall then vote on whether to proceed with this project and Agreement. No further work shall be done by WYDOT until the County approves the Concept Design, concurs in the Preferred Alternative and gives their approval to continue to the Final Design Phase.

Final Design Phase will further develop the selected alternative and project plans to be able to produce final plans, specifications and estimate for construction.

The County shall be responsible for all public outreach throughout the project, and WYDOT will assist with the public meetings as part of the NEPA, design and construction processes. In advance of release of printed public information, all parties will be notified.

- B.** If determined by WYDOT that consultant services are necessary, the consultant selection will be a joint participation between WYDOT and the County. WYDOT and the County will work in cooperation to develop the scope of work for the consultant.
- C.** The County hereby designates the Teton County Engineer as the County's representative to answer questions and make decisions regarding the development of the plans and specifications, construction activities, and to sign documents concerning the construction of the Tribal Trails Connector. The County shall participate in conference calls, review meetings, site meetings and inspections, review documents or plan issuances within two (2) weeks of receipt, and provide input back to WYDOT. This will be at no cost to WYDOT.
- D.** Right-of-Way acquisition will be performed by WYDOT or their Consultant. WYDOT will acquire all necessary rights-of-way in the name of the County, and provide any relocation assistance necessary to construct the work shown on Exhibit "A". The County will review and approve costs associated with right-of-way acquisitions. In accordance with W.S. 1-26-801(a), the County shall be responsible for acquiring rights-of-way by condemnation proceedings with the understanding any settlements reached out of court must be justified and supported. WYDOT will assist the County in condemnation proceedings by preparing exhibits and displays. The County agrees to reimburse WYDOT for the total cost needed to clear the right-of-way. The County shall keep easements across private property in force for perpetuity. Under the terms of this Agreement, if right-of-way acquisition is not required for this project, all references to such acquisition herein are considered null and void.
- E.** WYDOT agrees to make all arrangements for the adjustment and/or relocation of utilities and pathways in conflict with this project. Arrangements will be made by separate agreement(s) with the affected utility or pathway owner not covered by this Agreement. Utility relocation costs will be pro-rated according to the most recent State, County or Municipal policies and regulations. The County will review and approve costs associated with utility relocations. The County agrees to reimburse WYDOT for the total cost needed for utility or pathway relocations.
- F.** The letting of this project will be performed by WYDOT in accordance with WYDOT policies and procedures. The County shall approve the estimates prior to the advertisement of bids by WYDOT. If the County votes to not approve the estimates as presented, then the project will be reviewed for possible modification or shall end. Likewise, the County shall concur in the award of this project to the lowest qualified bidder prior to WYDOT awarding the contract. If the County votes to not concur in the award to the lowest qualified bidder, then this project will then be reviewed for possible modification or shall end. As a result of signing the letter of concurrence, the County agrees to amend the costs shown on Exhibit "B" to match the actual amount bid. Said concurrence letter shall become part of this Agreement.

- G. Construction engineering and contract administration for this project will be performed by and under the immediate direction, control and supervision of WYDOT or their consultant in accordance with the plans and specifications.
- H. Upon completion and acceptance of this project, the County shall maintain, at its sole expense, all features constructed under this Agreement within their own right-of-way. Maintenance shall include all repairs necessary to keep the improvement in its functional constructed condition.
- I. Upon completion and acceptance of the project by WYDOT and the County, the County shall return, within thirty (30) days of WYDOT Resident Engineer's request, WYDOT's Acceptance Certificate, or any other required WYDOT documents. Once this Acceptance Certificate has been completed, all National Pollutant Discharge Elimination System (NPDES) General Permits related to the project will be transferred to the County. The County shall then be responsible for all storm water runoff on the project and storm water monitoring until a Notice of Termination (NOT) can be submitted for the project by the County. In the event petroleum contaminated soil or water is encountered on this project, the required work associated with mitigation of the contamination will become part of this project.

7. **General Provisions**

- A. **Amendments.** Any changes, modifications, revisions or amendments to this Agreement which are mutually agreed upon by the parties to this Agreement shall be incorporated by written instrument, executed and signed by all parties to this Agreement.
- B. **Applicable Law, Rules of Construction, and Venue.** The construction, interpretation, and enforcement of this Agreement shall be governed by the laws of the State of Wyoming, without regard to conflicts of law principles. The terms "hereof," "hereunder," "herein," and words of similar import, are intended to refer to this Agreement as a whole and not to any particular provision or part. The Courts of the State of Wyoming shall have jurisdiction over this Agreement and the parties. The venue shall be the First Judicial District, Laramie County, Wyoming.
- C. **Assignment Prohibited and Agreement Shall Not be Used as Collateral.** Neither party shall assign or otherwise transfer any of the rights or delegate any of the duties set out in this Agreement without the prior written consent of the other party. The County shall not use this Agreement, or any portion thereof, for collateral for any financial obligation without the prior written permission of WYDOT.
- D. **Audit and Access to Records.** WYDOT and its representatives shall have access to any books, documents, papers, electronic data, and records of the County which are pertinent to this Agreement.

- E. Award of Related Contracts.** WYDOT may award supplemental or successor contracts for work related to this Agreement or may award contracts to other contractors for work related to this Agreement. The County shall cooperate fully with other contractors and WYDOT in all such cases.
- F. Compliance with Law.** The County shall keep informed of and comply with all applicable, federal, state and local laws and regulations in the performance of this Agreement.
- G. Confidentiality of Information.** Except when disclosure is required by the Wyoming Public Records Act or court order, all documents, data compilations, reports, computer programs, photographs, data, and other work provided to or produced by the County in the performance of this Agreement shall be kept confidential by the County unless written permission is granted by WYDOT for its release. If and when the County receives a request for information subject to this Agreement, the County shall notify WYDOT within ten (10) days of such request and shall not release such information to a third party unless directed to do so by WYDOT.
- H. Entirety of Agreement.** This Agreement, consisting of nine (9) pages, and Exhibit "A", Tribal Trails Vicinity Map; and Exhibit "B", Estimated Costs, consisting of one (1) page each, represents the entire and integrated Agreement between the parties and supersedes all prior negotiations, representations and agreements, whether written or oral.
- I. Ethics.** The County shall keep informed of and comply with the Wyoming Ethics and Disclosure Act (Wyo. Stat. § 9-13-101, *et seq.*) and any and all ethical standards governing the County's profession.
- J. Extensions.** Nothing in this Agreement shall be interpreted or deemed to create an expectation that this Agreement will be extended beyond the term described herein. Any extension of this Agreement shall be initiated by WYDOT and shall be accomplished through a written amendment between the parties entered into before the expiration of the original Agreement or any valid amendment thereto, and shall be effective only after it is reduced to writing and executed by all parties to the Agreement.
- K. Force Majeure.** Neither party shall be liable for failure to perform under this Agreement if such failure to perform arises out of causes beyond the control and without the fault or negligence of the nonperforming party. Such causes may include, but are not limited to, acts of God or the public enemy, fires, floods, epidemics, quarantine restrictions, freight embargoes, and unusually severe weather. This provision shall become effective only if the party failing to perform immediately notifies the other party of the extent and nature of the problem, limits delay in performance to that required by the event, and takes all reasonable steps to minimize delays.

L. Indemnification. Each party to this Agreement shall assume the risk of any liability arising from its own conduct. Neither party agrees to insure, defend nor indemnify the other.

M. Independent Contractor. The County shall function as an independent Contractor for the purposes of this Agreement and shall not be considered an employee of the State of Wyoming for any purpose. Consistent with the express terms of this Agreement, the County shall be free from control or direction over the details of the performance of services under this Agreement. The County shall assume sole responsibility for any debts or liabilities that may be incurred by the County in fulfilling the terms of this Agreement and shall be solely responsible for the payment of all federal, state, and local taxes which may accrue because of this Agreement. Nothing in this Agreement shall be interpreted as authorizing the County or its agents or employees to act as an agent or representative for or on behalf of the State of Wyoming or WYDOT or to incur any obligation of any kind on the behalf of the State of Wyoming or WYDOT. The County agrees that no health or hospitalization benefits, workers' compensation, unemployment insurance or similar benefits available to State of Wyoming employees will inure to the benefit of the County or the County's agents or employees as a result of this Agreement.

N. Insurance Requirements. The County is protected by the Wyoming Governmental Claims Act, Wyo. Stat. § 1-39-101, et seq., and certifies that it is a member of the Wyoming Association of Risk Management (WARM) pool or the Local Government Liability Pool (LGLP), Wyo. Stat. § 1-42-201, et seq., and shall provide a letter verifying its participation in the WARM or LGLP to WYDOT.

O. Nondiscrimination. The County shall comply with the Civil Rights Act of 1964, the Wyoming Fair Employment Practices Act (Wyo. Stat. § 27-9-105 *et seq.*), the Americans with Disabilities Act (ADA), 42 U.S.C. 12101, *et seq.* and the Age Discrimination Act of 1975 and any properly promulgated rules and regulations thereto and shall not discriminate against any individual on the grounds of age, sex, color, race, religion, national origin or disability in connection with the performance under this Agreement.

P. Notices. All notices arising out of, or from, the provisions of this Agreement shall be in writing either by regular mail or delivery in person at the addresses provided under this Agreement.

Q. Patent or Copyright Protection. The County recognizes that certain proprietary matters or techniques may be subject to patent, trademark, copyright, license, or other similar restrictions, and warrants that no work performed by the County or its subcontractors will violate any such restriction. The County shall defend and indemnify WYDOT for any violation or alleged violation of such patent, trademark, copyright, license, or other restrictions.

R. Prior Approval. This Agreement shall not be binding upon either party, no services shall be performed under the terms of this Agreement, and the Wyoming State Auditor shall not draw warrants for payment on this Agreement until this Agreement has been reduced to writing, approved as to form by the Officer of the Attorney General, and approved by the Governor of the State of Wyoming, or his designee, if required by Wyo. Stat. §9-2-1016(b)(iv).

S. Publicity. Any publicity given to the projects, programs or services provided herein, including, but not limited to, notices, information, pamphlets, press releases, research, reports, signs, and similar public notices in whatever form, prepared by or for the County, shall identify WYDOT as the sponsoring agency and shall not be released without prior written approval from WYDOT.

T. Severability. Should any portion of this Agreement be judicially determined to be illegal or unenforceable, the remainder of this Agreement shall continue in full force and effect, and either party may renegotiate the terms affected by the severance.

U. Sovereign Immunity and Limitations. Pursuant to Wyo. Stat. § 1-39-104(a), the State of Wyoming and WYDOT expressly reserve sovereign immunity by entering into this Agreement and the County expressly reserves governmental immunity. Each of them specifically retains all immunities and defenses available to them as sovereign or governmental entities pursuant to Wyo. Stat. § 1-39-101, *et seq.*, and all other applicable law. The parties acknowledge that the State of Wyoming has sovereign immunity and only the Wyoming Legislature has the power to waive sovereign immunity. Designations of venue, choice of law, enforcement actions, and similar provisions shall not be construed as a waiver of sovereign immunity. The parties agree that any ambiguity in this Agreement shall not be strictly construed, either against or for either party, except that any ambiguity as to immunity shall be construed in favor of immunity.

V. Taxes. The County shall pay all taxes and other such amounts required by federal, state, and local law, including, but not limited to, federal and social security taxes, workers' compensation, unemployment insurance, and sales taxes.

W. Termination of Agreement. This Agreement may be terminated, without cause, by WYDOT upon thirty (30) days written notice. This Agreement may be terminated by WYDOT immediately for cause if the County fails to perform in accordance with the terms of this Agreement.

X. Third-Party Beneficiary Rights. The parties do not intend to create in any other individual or entity the status of third-party beneficiary, and this Agreement shall not be construed so as to create such status. The rights, duties and obligations contained in this Agreement shall operate only between the parties to this Agreement and shall inure solely to the benefit of the parties to this Agreement. The provisions of this Agreement are intended only to assist the parties in determining and performing their obligations under this Agreement.

- Y. **Time is of the Essence.** Time is of the essence in all provisions of this Agreement.
- Z. **Titles Not Controlling.** Titles of sections and subsections are for reference only and shall not be used to construe the language in this Agreement.
- AA. **Waiver.** The waiver of any breach of any term or condition in this Agreement shall not be deemed a waiver of any prior or subsequent breach. Failure to object to a breach shall not constitute a waiver.
- BB. **Counterparts.** This Agreement may be executed in counterparts. Each counterpart, when executed and delivered, shall be deemed an original and all counterparts together shall constitute one and the same Agreement. Delivery by the County of an originally signed counterpart of this Agreement by facsimile or PDF shall be followed up immediately by delivery of the originally signed counterpart to WYDOT. The County's failure to deliver, either personally or via US Mail, postage prepaid, the originally signed counterpart to WYDOT within five (5) business days shall be considered a material breach and may result in immediate termination of this Agreement by WYDOT.

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8. Signatures. In witness whereof, the parties to this Agreement, either personally or through their duly authorized representatives, have executed this Agreement on the days and dates set out below and certify that they have read, understood, and agreed to the terms and conditions of this Agreement.

The effective date of this Agreement is the day and date last signed and executed by the duly authorized representatives of the parties to this Agreement shown below.

ATTEST:

**TETON COUNTY BOARD OF
COUNTY COMMISSIONERS:**

Sherry L. Daigle, Teton County Clerk

By: _____
Mark Newcomb, Chairman

(SEAL)

Date

ATTEST:

**WYOMING DEPARTMENT
OF TRANSPORTATION:**

Sandra J. Scott, Secretary
Transportation Commission of Wyoming

By: _____
Gregg C. Fredrick, P.E., Chief Engineer

(SEAL)

Date

Approved as to form:

By: _____
Michael T. Kahler
Senior Assistant Attorney General
State of Wyoming

Date Agreement prepared: 2-13-18

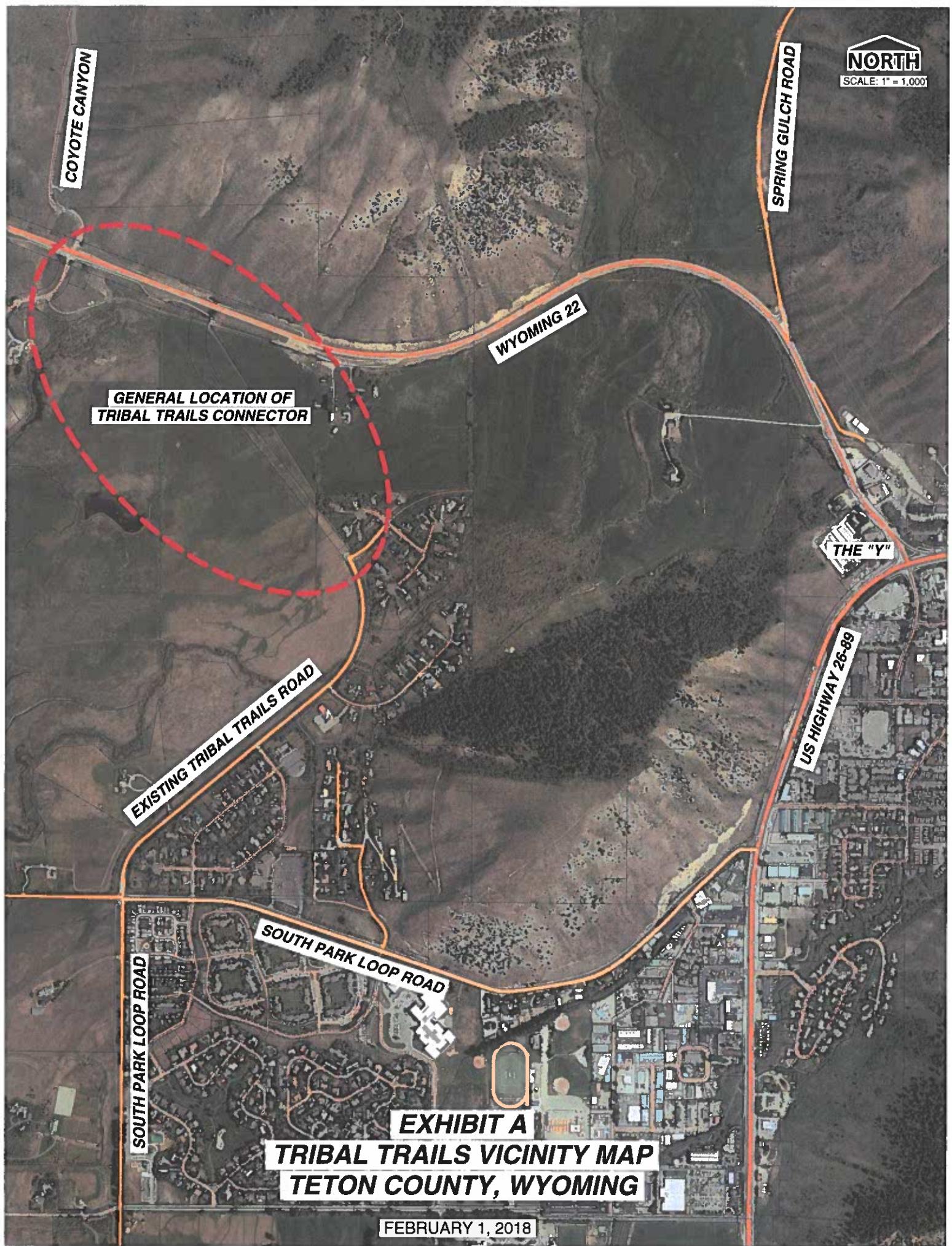


EXHIBIT “B”

State Project ARS3905
Tribal Trails Connector
Teton County

March 13, 2018

Costs were prepared by WYDOT.

<u>Item</u>	<u>Cost</u>
Estimated Construction Costs (Outside of WYDOT's R/W)	= \$4,650,000.00
Preliminary Engineering	= 1,000,000.00
Construction Engineering	= <u>500,000.00</u>
Total Direct Costs	= 6,150,000.00 [1]
Indirect Cost Allocation Plan (ICAP) (6,150,000.00) (0.1100)	= <u>676,500.00</u> [2]
Total ARSCT Project Costs = [1] + [2]	= <u>\$6,826,500.00</u>

NOTE: All costs shown are rounded to the nearest even dollar.

The above figures are for estimating purposes only and are subject to revision throughout the life of this project.