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The Honorable Jeff Bingaman
Chairman, Subcommittee on Energy,
Natural Resources, and Infrastructure
Committee on Finance
United States Senate

Subject: *Inclusion of Public-Private Partnership Roadways in Calculating Total Lane Miles When Apportioning Highway Trust Funds*

Dear Mr. Chairman:

This responds to the Subcommittee's request for GAO's legal opinion regarding whether the Department of Transportation ("DOT") has authority, in calculating highway lane miles under 23 U.S.C. § 104(b) as part of its annual apportionment of highway funds to states, to include mileage for roadways operated or maintained by private third parties under long-term public-private partnership agreements with a state (so-called "P3 agreements").¹ As discussed below, we conclude that DOT has reasonably construed 23 U.S.C. § 104(b) as permitting inclusion of privately operated or maintained mileage.²

BACKGROUND

Section 104(b) of Title 23 of the U.S. Code requires the Secretary of Transportation to make an annual apportionment among the states of federal-aid highway funds authorized to be drawn from the Highway Trust Fund. The Highway Trust Fund is funded from federal highway user tax receipts and is the principal mechanism for

¹ For a discussion of the use of P3 agreements in constructing, maintaining, and operating highway infrastructure, see GAO, *Highway Public-Private Partnerships: More Rigorous Up-front Analysis Could Better Secure Potential Benefits and Protect the Public Interest*, GAO-08-44 (Washington, D.C.: Feb. 8, 2008).

² Consistent with our practice in preparing legal opinions, see GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <http://www.gao.gov/legal/resources.html>, we asked DOT for its legal position on these issues. Letter from Susan D. Sawtelle, Managing Associate General Counsel, to D.J. Gribbin, General Counsel, U.S. Department of Transportation (DOT), January 8, 2009. DOT responded by letter of May 6, 2009. Letter from Rosalind Knapp, Acting General Counsel, DOT, to Susan D. Sawtelle, Managing Associate General Counsel, GAO, May 6, 2009 ("DOT Response").

funding federal highway programs.³ Based in part on specified formulas, and after making certain required set-asides, 23 U.S.C. § 104(b) directs the Secretary to apportion the authorized sums for the following highway-related programs using formulas based on “total lane miles”:

- the National Highway System Program, apportionment to be based in part on 25 percent of the ratio of the “total lane miles” of principal arterial routes “in each State” (excluding Interstate system routes) to the “total lane miles” in all states;⁴
- the Surface Transportation Program, apportionment to be based in part on 25 percent of the ratio of the “total lane miles” of federal-aid highways “in each State” to the “total lane miles” for all states;⁵
- The Interstate Highway Maintenance Program, apportionment to be based in part on one-third of the ratio of the “total lane miles” of interstate system routes “in each State” open to traffic to the “total lane miles” for all states;⁶ and
- the Highway Safety Improvement Program, apportionment to be based in part on one-third of the ratio of the “total lane miles” of federal-aid highways “in each State” to the “total lane miles” for all states.⁷

A summary of how the apportionment process evolved is helpful in understanding its current requirements. The process has its roots in the Federal Highway Acts of 1916⁸ and 1921.⁹ Under those acts, apportionment of highway funds was based in part on the ratio of a state’s geographic area to total area of all states, the ratio of a state’s population to total population of all states, and the ratio of a state’s mileage of post routes (designated postal service routes¹⁰) and star routes (designated contractor-supported postal routes¹¹) to total route mileage of all states. Each state was

³ See generally GAO, *Highway Financing: Factors Affecting Highway Trust Fund Revenues*, GAO-02-667T (Washington, D.C.: May 9, 2002).

⁴ 23 U.S.C. § 104(b)(1)(A)(i). A second National Highway System factor assigns a 10 percent weight to the ratio of the per capita total lane miles of principal arterial routes (not excluding Interstate system routes) to the per capita total of such lanes miles for all states. *Id.* § 104(b)(1)(A)(iv).

⁵ *Id.* § 104(b)(3)(A)(i).

⁶ *Id.* § 104(b)(4)(A).

⁷ *Id.* § 104(b)(5)(A)(i). Section 104 also directs how DOT shall apportion funding for the Congestion Mitigation and Air Quality Improvement Program. See 23 U.S.C. § 104(b)(2).

⁸ Act of July 11, 1916, ch. 241, § 4, 64th Cong., 1st Sess., 39 Stat. 355, 357.

⁹ Act of November 9, 1921, ch. 119, § 21, 67th Cong., 1st Sess., 42 Stat. 212, 217.

¹⁰ *Blackham v. Gresham*, 16 F. 609, 610-12 (C.C. N.Y. 1883).

¹¹ For a description of star routes see Smithsonian National Postal Museum, at http://www.postalmuseum.si.edu/starroute/sr_02.html.

guaranteed a minimum state apportionment of $\frac{1}{2}$ of 1 percent.¹² In the Federal-Aid Road Act of 1944, Congress enacted two additional funding authorizations: one for secondary and feeder roads and the other for highways in urban areas.¹³ Section 7 of the 1944 act authorized the designation of—but not construction funding for—an interstate highway system, to be added to the then-existing federal-aid highway system.¹⁴ Authorization for construction funding came with the Federal-Aid Highway Act of 1956, which addressed construction of a limited-access nationwide Interstate Highway System. Construction funding was to be apportioned among the states based on comparative cost of construction, and was to be paid from the Highway Trust Fund established by companion legislation, the Highway Revenue Act of 1956.¹⁵ In 1958, the apportionment provisions were codified as positive law at 23 U.S.C. § 104.¹⁶

Use of the term “lane miles” as an apportionment factor first appeared in 1976. Following completion of much of the interstate system, Congress recognized a need to provide for its maintenance. Congress also recognized that needs would vary from state to state, reflecting such factors as time in service, system size, and other variables. It therefore enacted the Federal-Aid Highway Act of 1976,¹⁷ adding a new provision to 23 U.S.C. § 104 based on “lane miles.” Initially, § 104(b)(5)(B) directed the Secretary to apportion highway funds for “resurfacing, restoring, and rehabilitating the Interstate System” based on:

“the ratio which the *lane miles* on the Interstate System which have been in use for more than five years (*other than those on toll roads*) in each State bears to the total of the *lane miles* on the Interstate System which have been in use for more than five years (*other than those on toll roads*) in all States.”

(Emphasis added.)

Congress revised this funding formula again in 1978 to recognize that highway maintenance costs are a function not only of natural deterioration but of highway use. An additional weighting factor, therefore, was added based on estimated vehicle miles traveled.¹⁸ Notably for present purposes, in both the 1976 and 1978 acts,

¹² Act of November 9, 1921, note 9, above.

¹³ Federal-Aid Road Act, ch. 626, § 4, 78th Cong., 2nd Sess., 58 Stat. 838, 840 (1944).

¹⁴ *Id.* § 7, 58 Stat., 842.

¹⁵ Pub. L. No. 627, ch. 462, title II, § 209, 70 Stat. 374, 397 (1956).

¹⁶ Act of August 27, 1958, Pub. L. No. 85-767, § 104, 72 Stat. 885, 889-91.

¹⁷ Pub. L. No. 94-280, § 106(b), 90 Stat. 425, 429-430 (1976).

¹⁸ Federal-Aid Highway Act of 1978, Pub. L. No. 95-599, § 116(b), 92 Stat. 2689, 2699, which provided for a 75/25 weighting of the lane miles and vehicle miles traveled factors. This weighting was amended by the Act of December 29, 1981, Pub. L. 97-134, § 5, 95 Stat. 1699, 1701, becoming 55/45.

Congress excluded states' toll-road miles from DOT's calculation of "lane miles."¹⁹

In the 1998 Transportation Equity Act for the 21st Century ("TEA-21"),²⁰ Congress greatly expanded the use of lane miles as an apportionment factor. First, following the approach Congress had adopted in 1976 for the Interstate Highway Maintenance Program, TEA-21 added lane miles as an apportionment factor for both the National Highway System and the Surface Transportation Program. Second, Congress substituted the term "total lane miles" for "lane miles" throughout section 104(b). Third, Congress eliminated the exclusion for toll-road lane miles that it had included in the 1976 and 1978 acts.

Congress's most recent revisions to the apportionment process were enacted in 2005, in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).²¹ SAFETEA-LU added "total lane miles" as an apportionment factor to a fourth major highway funding program—the Highway Safety Improvement Program—in new 23 U.S.C. § 104(b)(5)(A)(i).²²

DISCUSSION

DOT interprets its authority under 23 U.S.C. § 104(b) as requiring it to apportion highway funding to the states based on total system lane miles, whether those miles are maintained and operated by the state or by third parties. DOT Response at 1-2. DOT's reading of the statute relies on what it characterizes as the "plain meaning" of "total lane miles," noting that "[t]he formulas make no distinction with regard to whether the facilities are under a State transportation department's operation and control or under the operation and control of a third party under a public-private partnership agreement or otherwise." DOT Response at 1-2. DOT contrasts this with cases where a statute distinguishes between the public and private status of a transportation facility in directing the department's apportionments; in those cases, DOT indicates, it follows Congress's directive and includes only the public facilities in its calculations. DOT Response at 3, citing 23 U.S.C. § 130(f).²³

¹⁹ The general rule since 1916 has been that highways built using federal-aid highway funds may not be tolled, *see* 23 U.S.C. § 301, but a number of exceptions have been added over the years. *See, e.g.*, 23 U.S.C. §§ 129, 149 note, 166. Under the 1976 and 1978 amendments noted above, toll roads were excluded from DOT's calculation of "lane miles" if they were not subject to a Secretarial agreement under section 105 of the Federal-Aid Highway Act of 1978. That provision, 92 Stat., 2692-93, provided that resurfacing, restoration, and rehabilitation project costs could be reimbursed even if a road were tolled, provided that the state had reached a pre-project agreement satisfactory to the Secretary that the toll road would become free to the public upon collection of tolls sufficient to liquidate the cost of the road or outstanding bonds, plus the cost of maintenance, operation, and debt service.

²⁰ Pub. L. No. 105-178, § 1103(b), 112 Stat. 107, 119-1122 (1998).

²¹ Pub. L. 109-59, 119 Stat 1144 (2005).

²² *See* SAFETEA-LU, § 1401, 119 Stat. at 1225.

²³ Section 130(f) directs DOT to apportion 50 percent of funds set aside for the Highway Safety Improvement Program to the states "in the ratio that total *public* railway-highway crossings in each State bears to the total of such crossings in all States" (emphasis added).

DOT also points to the fact that in TEA-21, Congress expanded the basis for apportionment from “lane miles” to “total lane miles” and eliminated the exclusion of toll-road miles from “lane miles” for highway maintenance fund apportionments. The department believes this confirms its reading of the statute as including miles regardless of whether the state incurs operation and maintenance costs. As an example of how DOT’s apportionment determinations have changed based on changes in the statutory formulas, the department points to West Virginia. According to DOT, before TEA-21, it excluded the 400+ miles in the West Virginia Turnpike system from its Interstate Highway Maintenance Program “lane miles” calculations because it was a toll road. Immediately after enactment of TEA-21, which eliminated the toll-road miles exclusion, West Virginia’s total qualifying lane mileage increased by 478 miles. DOT Response at 2.

We believe that DOT’s reading of 23 U.S.C. § 104(b)—to require (or at least permit) inclusion of privately operated or maintained lane miles in the calculation of “total lane miles”—is reasonable.²⁴ As DOT notes, there is nothing in the language of that provision specifically excluding private miles. Further, as amended by TEA-21, the statute directs DOT to base its calculations not on “lane miles” but “*total* lane miles,” and, read naturally and in accordance with its plain language,²⁵ the word “total” includes all components, meaning in this case all types of lane miles. Further, the statute refers to miles of roadways “*in each State,*” not miles controlled or maintained *by* each state. Finally, Congress’s removal of the exclusion for toll-road miles from “lane miles” in TEA-21 suggests congressional intent to broaden apportionment determinations beyond direct costs.

We recognize that “total lane miles” could be interpreted to exclude “P3” miles or other miles whose operation or maintenance is not paid in full by a state. Such a reading would assume that Congress intended to align apportionment with states’ highway costs by including lane miles—a measure of the comparative extensiveness of states’ highway systems—as a measure of state need. Under this interpretation, P3 lane miles would be excluded because states incur few operating or maintenance costs for them. While both this interpretation and the one adopted by the department can be viewed as reasonable, in our view, the legislative history of 23 U.S.C. § 104 weighs in favor of the department’s interpretation.

As discussed above, section 104 originally directed the apportionment of highway funds largely on the basis of geographical area, population, and post road considerations. Only the apportionment of interstate system maintenance money

²⁴ Even if it is assumed, *arguendo*, that the term “total lane miles” is ambiguous, we note that where statutory language is ambiguous, the interpretation given by a government agency charged with its administration is entitled to deference if it is a reasonable reading of the statute—even if not the only reasonable reading. *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

²⁵ See, e.g., *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1997) (it is a fundamental principle of statutory construction that words in a statute must be given their ordinary or natural meaning whenever possible).

was based on lane miles, which (coupled with vehicle miles traveled) was deemed an appropriate measure of the extent of that need. By the early 1990's, however, and based in part on prior GAO work,²⁶ Congress began considering the use of lane miles beyond the Interstate Highway Maintenance Program in order to better align apportioned funds with states' highway needs, and a bill to this effect was introduced in 1991.²⁷ While that provision was not enacted at that time, Congress did enact the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA") which, among other things, mandated a study by GAO and the Bureau of Transportation Statistics examining and recommending "a fair and equitable apportionment formula for the allocation of Federal-aid highway funds."²⁸ GAO's findings were issued in a 1995 report where we recommended use of measures such as lane miles, vehicle miles traveled, and diesel fuel consumed.²⁹ Our 1995 report referred to these measures as "proxies of need," rather than measures of actual need such as miles of poor pavement or numbers of deficient bridges, or cost. We pointed out that relying on direct measures of need could be problematic because such an approach could have the perverse effect of encouraging states to permit their infrastructure to worsen, increasing their apparent need for and share of federal highway funds.³⁰

Congress enacted TEA-21 3 years later, adopting measures and terminology reflecting GAO's recommendations. As noted above, the act expanded the use of the lane miles test to additional programs and changed "lane miles" to "total lane miles." In our view, these amendments, as well as SAFETEA-LU's expansion of "total lane miles" to a fourth highway program in 2005, indicate congressional intent to take a "high level" approach to apportionment—an approach based on states' highway system needs taken as a whole, not on direct state highway system construction or operating costs. Congress's elimination of the toll-road miles exclusion in TEA-21 likewise supports this interpretation, because tolls are a mechanism commonly proposed to repay private capital needed for P3 roadways.

Finally, Congress's intent that "total lane miles" and the highway fund apportionment process not be based strictly on state costs is indicated by provisions such as 23 U.S.C. § 105, also enacted as part of TEA-21.³¹ As amended by SAFETEA-LU,³² 23

²⁶ See testimony of Linda G. Morra, reported at 137 Cong. Rec. 14485 (1991), based on GAO, *Highway Funding: Federal Distribution Formulas Should be Changed*, GAO/RCED-86-114 (Washington, D.C.: March 31, 1986).

²⁷ H.R. 2950, included in H. Rep. 102-171, Pt. 1, 102nd Cong., 1st Sess. p. 48 (July 26, 1991).

²⁸ Pub. L. No. 102-240, § 1098, 105 Stat. 1914, 2025; see also 137 Cong. Rec. 36115 (1991) (comments by Sen. Sanford on need for objective study of the best way to ensure a fair formula).

²⁹ GAO, *Highway Funding: Alternatives for Distributing Federal Funds*, GAO/RCED-96-6 (Washington, D.C.: Nov. 25, 1995).

³⁰ GAO/RCED-96-6 at 6, 32.

³¹ Pub. L. No. 105-178, § 1104, 112 Stat., at 127.

³² Pub. L. No. 109-59, § 1104, 119 Stat. at 1163.

U.S.C. § 105 establishes an “equity bonus program” which is independent of states’ costs or needs and which supplements the apportionments made under section 104(b). The effect of the bonus program is to guarantee each state a minimum level of funding, substantially offsetting some of the differences that otherwise would flow from apportionments based on section 104(b) alone. Such provisions reinforce that DOT’s apportionment determinations are not to be based directly on states’ actual costs.³³

CONCLUSION

For the reasons discussed above, we conclude that DOT may include privately operated or maintained highway lane miles in the calculation used to apportion highway funds to states under 23 U.S.C. § 104(b). We note further that pending legislation—S. 884, the Transportation Equity for All Americans Act, which you have introduced—would change the statutory apportionment formulas. Among other things, the bill would explicitly exclude lane miles traveled on privatized highways from most of DOT’s apportionment determinations under 23 U.S.C. §§ 104 and 105.

If there are any questions concerning these matters, please contact Managing Associate General Counsel Susan D. Sawtelle at (202) 512-6417 or SawtelleS@gao.gov. Assistant General Counsel Hannah R. Laufe and Senior Attorney Bert Japikse also made key contributions to this opinion.

Sincerely yours,

A handwritten signature in black ink, appearing to read "D. Gordon", with a long horizontal flourish extending to the right.

Daniel I. Gordon
Acting General Counsel

³³ Apportionments for other Title 23 highway programs also are not based on lane miles. These include the congestion mitigation and air quality improvement program, the operation lifesaver and high speed rail corridors program, the metropolitan planning program, and the recreational trails program. In addition, except for the Interstate Highway Maintenance Program, principal parts of the lane miles-based highway programs discussed here are subject to minimum apportionments that guarantee each state a minimum of ½ of 1 percent of the funds apportioned. 23 U.S.C. §§ 104(b)(1)(B), 104(b)(2)(D), 104(b)(3)(B), 104(b)(5)(B).