



**MEMORANDUM**

April 29, 2014

**To:** Senator Tom Coburn

**From:** David Randall Peterman  
Analyst in Transportation Policy

**Subject:** Department of Transportation Long-Term Unobligated Earmarks

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This memorandum responds to your request for information about long-term unobligated earmarks in Department of Transportation authorization and appropriations acts. Pursuant to our conversation, I have expanded the memorandum I provided on April 28, 2014, by adding information about earmark-related legislation in the 111<sup>th</sup> Congress.

In this memo, “long-term unobligated earmarks” refers to transportation projects for which Congress designated specific amounts of budget authority (i.e., earmarks) in surface transportation authorization legislation or annual transportation appropriations with budget authority that has not been committed to be spent within 10 years of the enactment of the project designation. The amount of unspent budget authority may range from the entire amount, in the case of a project that has not been undertaken, to an amount left over after the completion of the designated project.

## What is a Long-Term Unobligated Earmark?

Transportation projects typically involve many steps from planning to design to construction. For this reason, federal transportation funding typically allows recipients up to four years (the fiscal year in which the funding is provided, plus three subsequent fiscal years) to obligate (commit to spend) the funding. This four-year period is known as the “period of availability”.<sup>1</sup> But in some cases, Congress makes appropriated funding “available until expended.” Earmarked projects whose funding is available until expended are similar to outstanding checks that can be cashed at any time in the future.

In federal appropriations law, funding is obligated when it is legally committed to be spent.<sup>2</sup> For example, when the recipient of earmarked funding signs an agreement with DOT specifying how funding will be spent on the project, the funds have been obligated. In a long-term unobligated earmark, the grantee has

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<sup>1</sup> The expenditure of the funds may extend beyond the end of the period of availability.

<sup>2</sup> U.S. Government Accountability Office, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP, September 2005, “Obligations,” p. 70.

for some reason not signed an agreement with DOT to spend the federal funding available to it or has money left over after completing the designated project.

Earmarked funding for transportation projects may remain unobligated for many years for several reasons:

1. A problem with the earmarked project. Perhaps the law incorrectly stated the name of a road due to a drafting error. The state or local community may have decided not to go forward with the project. Perhaps the earmarked funding was not sufficient to complete the project, so it was never started. The project may not have been included in the state's transportation improvement plan and so was not eligible for federal funding (though Congress often included language deeming earmarked projects as eligible for funding "notwithstanding any other provision of law"<sup>3</sup>).<sup>4</sup>
2. Federal appropriations law provides that an appropriation can only be used for the purpose for which it was made. So if an earmarked project is not undertaken – or if an earmarked project is completed for less than the earmarked funding amount – the unused funds cannot be used for another purpose without congressional action.
3. In the past, it was not uncommon for DOT appropriations acts to include several provisions amending earmark designations to make unobligated money available for another project in the same area (or to correct a drafting error).<sup>5</sup> Since 2011, Congress has prohibited earmarks in legislation. This ban has been applied to reallocating existing earmarks to other projects. As a result, an existing earmark designation cannot be amended to make the funding available for another project.

## Administration Proposals to Rescind Unobligated Earmarks

In the FY2009 Budget Estimate for the Federal Highway Administration, the Administration proposed to redirect \$175 million in unobligated balances for inactive projects authorized in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), P.L. 102-240, and to cancel \$735 million in unobligated balances from inactive demonstration projects authorized in ISTEA (\$109 million) and from inactive High Priority Projects authorized in the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21), P.L. 105-178, enacted 1998. The proposed cancellation of High Priority Project funding would have applied to projects which had obligated less than 10% of their authorized funding to date, and the effective date of the proposal would have been 10 years after enactment of TEA-21.<sup>6</sup>

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<sup>3</sup> E.g., in the FY2003 DOT Appropriations Act (P.L. 108-7, Division I), at 117 Stat. 393.

<sup>4</sup> Podkul, Cezary & Gregory Korte, "'Earmarks' to nowhere: States losing billions," *USA Today*, updated January 5, 2011; [http://usatoday30.usatoday.com/news/washington/2011-01-04-earmarks\\_N.htm](http://usatoday30.usatoday.com/news/washington/2011-01-04-earmarks_N.htm).

<sup>5</sup> E.g., in the FY2003 DOT Appropriations Act (P.L. 108-7, Division I, at 117 Stat. 427): "Sec. 374. Item number 1320 in the table contained in section 1602 of the Transportation Equity Act for the 21st Century (112 Stat. 305) is amended by striking 'Reconstruct 79th Street Traffic Circle, New York City' and inserting 'Cross Harbor Freight Movement Project EIS, New York City.'"

<sup>6</sup> U.S. Department of Transportation, Federal Highway Administration, *FY2009 Budget Estimate*, (no date, but approximately February 2008), p. III-10, available at <http://www.dot.gov/mission/budget/fhwa-fy-2009-budget-estimate>.

## Legislative History of Transportation Earmark Rescissions since 111<sup>th</sup> Congress

March 16, 2010: Senate Amendment 3470 to H.R. 1586 (111<sup>th</sup> Congress), a bill to reauthorize the Federal Aviation Administration (FAA), was approved by a vote of 87-11. It would automatically rescind any Department of Transportation (DOT) earmark with more than 90% of the appropriated amount unobligated at the end of the ninth fiscal year following the fiscal year in which the earmark was made available—although it would have allowed the Secretary of Transportation to delay the rescission if additional obligation of the earmark was deemed likely to occur during the following 12 months. This provision was not included in the enacted version of H.R. 1586.<sup>7</sup>

July 14, 2010: H.R. 5730 (111<sup>th</sup> Congress), the Surface Transportation Earmark Rescission, Savings, and Accountability Act, was introduced. Its language was similar to that subsequently included in P.L. 112-10 (below), which rescinded about \$630 million in old earmarks. HR 5730 was passed by the House on July 27, 2010, but was not considered by the Senate and expired at the end of the 111th Congress.

January 27, 2011: S. 223 (112<sup>th</sup> Congress), a bill to reauthorize the FAA, was introduced. It included a provision (Sec. 1002) similar to Senate Amendment 3470 above. This same provision was added to H.R. 658 (112<sup>th</sup> Congress), the House version of FAA reauthorization legislation, by the Senate. The provision was subsequently altered, such that in the enacted version of H.R. 658 (P.L. 112-95, enacted February 14, 2012) it applied only to aviation earmarks (Sec. 825).

February 2011: S. 282/H.R. 633 (112<sup>th</sup> Congress), the Orphan Earmarks Act of 2011, was introduced. Similar to the provision in S. 223 above, it would have automatically rescinded earmarks which were less than 10% obligated after 10 years. No action was taken on either bill.

April 15, 2011: P.L. 112-10, the Department of Defense and Full-Year Continuing Appropriation Act, 2011, was enacted. It included two provisions rescinding funding for long-term unobligated earmarks:<sup>8</sup>

Sec. 2210. Unobligated balances of funds made available for obligation under section 320 of title 23, United States Code, section 147 of Public Law 95-599, section 9(c) of Public Law 97-134, section 149 of Public Law 100-17, and sections 1006, 1069, 1103, 1104, 1105, 1106, 1107, 1108, 6005, 6015, and 6023 of Public Law 102-240 are permanently rescinded.<sup>9</sup>

Sec. 2211. The unobligated balance available on September 30, 2011, under section 1602 of the Transportation Equity Act for the 21st Century (Public Law 105-178) for each project for which less than 10 percent of the amount authorized for such project under such section has been obligated is permanently rescinded.<sup>10</sup>

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<sup>7</sup> P.L. 111-226; the enacted version did not have anything to do with FAA reauthorization.

<sup>8</sup> Similar provisions had been proposed in H.R. 5730 (111<sup>th</sup> Congress), which had been approved by the House of Representatives.

<sup>9</sup> All of these rescissions applied to earmarks enacted prior to 1991.

<sup>10</sup> PL 105-178 was enacted in 1998.

These rescissions totaled a reported \$630 million,<sup>11</sup> which was recorded as a savings in the Federal Highway Administration's account for that fiscal year.

On August 17, 2012, President Obama announced that \$473 million in funding that had been designated in DOT appropriation acts between FY2003 and FY2006 for 671 earmarked projects, and which had not yet been spent, was being freed up for the states in which those earmarks were located to use for other transportation purposes.<sup>12</sup> The Administration observed that language in those appropriations acts authorized the Secretary of Transportation to make unused funds available for eligible surface transportation projects.<sup>13</sup>

## Justification for Rescinding Long-Term Unobligated Earmarks

Proponents of rescinding long-term unobligated earmarks note that many of these earmarks are still unobligated because of drafting errors that cannot be fixed under the earmark ban. They also have contended that if progress has not been made on an earmarked project after many years, it is likely that the project will not be undertaken. Construction costs normally increase over time, so the portion of the project cost covered by the earmarked funding typically shrinks with each passing year.

Generally, Congress encourages states to use all of their federal highway funding each year. Each year, Congress provides an overall level of highway spending authority (obligation limitation), which is divided among the states. Congress usually directs that shortly before the end of each fiscal year, the Secretary of Transportation shall redistribute spending authority from states that will not be able to obligate all their spending authority before the end of the fiscal year to states that will be able to obligate the additional funding in that fiscal year.<sup>14</sup> The existence of long-term unobligated transportation funding (mostly highway funding) associated with earmarked projects appears to conflict with this congressional encouragement of the rapid use of highway funding each year.

## Effects of Rescinding Long-Term Unobligated Earmarks

Rescinding a long-term unobligated earmarked project may reduce, but does not eliminate, the possibility that the project will ever be undertaken. This is because the state can still use its formula federal transportation funding to construct the project, if the project is a state priority.

Rescinding long-term unobligated earmarks frees up the amount of budget authority that was committed to those earmarks. As mentioned earlier, federal appropriations law requires that funding be used for the purpose for which it was appropriated. What happens to the funding associated with rescinded earmarks thus depends on the language associated with the rescission. In 2011, Congress rescinded a group of long-term unobligated earmarks without providing another purpose for the funding associated with those earmarks (see provisions cited in "Legislative History of Earmark Rescissions since January 2011,"

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<sup>11</sup> American Association of State Highway and Transportation Officials, *AASHTO Journal*, "Government Shutdown Averted; Transportation Suffers Significant Spending Cuts," April 15, 2011, <http://www.aashtojournal.org/Pages/041511appropriations.aspx>.

<sup>12</sup> For a list of the projects and their funding see <http://www.fhwa.dot.gov/pressroom/redisfy0306earmarks.cfm>.

<sup>13</sup> See White House, Office of the Press Secretary, "Obama Administration on Idle Earmark Projects: Use it or Lose it 'We Can't Wait' Action Helps States Put People to Work, Improve Infrastructure," <http://www.fhwa.dot.gov/pressroom/pr0306earmarks.cfm>.

<sup>14</sup> See P.L. 112-141, §1102(d).

above). As a result, the funding was treated as a savings in DOT's budget for that year, although it did not reduce the amount of money that was made available to states from the highway trust fund in that fiscal year.

Conversely, in P.L. 109-115 (2005) Congress rescinded several recently-authorized earmarks associated with Alaska's so-called "Bridge[s] to Nowhere." In the language rescinding the earmarks, Congress provided that the funding associated with those earmarks would be available to the Alaska Department of Transportation for other projects:

SEC. 186. Notwithstanding any other provision of law, any amounts made available pursuant to Public Law 109-59 for the Gravina Island bridge and the Knik Arm bridge shall be made available to the Alaska Department of Transportation and Public Facilities for any purpose eligible under section 133(b) of title 23, United States Code: *Provided*, That in allocating funds for the equity bonus program under section 105 of such title, the Secretary shall make the calculations required under that section as if this section had not been enacted: *Provided further*, That the descriptions for High Priority Projects #406, the Gravina Island bridge, and #2465, the Knik Arm bridge, in section 1702 of Public Law 109-59 are hereby deleted and in their place is inserted "the Alaska Department of Transportation and Public Facilities."<sup>15</sup>

## Policy Implications of Long-Term Unobligated Earmarks

As noted earlier, the typical period of availability for federal transportation funding is four years. Long-term unobligated earmarks become an issue not because the funding is designated to particular projects, but because of exceptions to that period of availability when Congress has made that funding "available until expended." Even if Congress did not intend the grantees to have decades to decide whether to implement the projects, there is no budgetary mechanism to call attention to projects that are extremely delayed or to reallocate funding from inactive projects.<sup>16</sup> As a result, some amount of budgetary authority that states could otherwise use to address current transportation needs is not available for that purpose.

## Current Long-Term Unobligated Earmarks

DOT reports that as of April 2014 funding associated with long-term unobligated earmarks (defined as those with less than 10% of their funding obligated after at least 10 years) totaled \$125.7 million (see **Table 1** below). This figure may rise in 2015, when the 7,000+ earmarks that were authorized in the 2005 surface transportation authorization act (the Safe, Accountable, Flexible, Efficient Transportation Equity Act- A Legacy for Users, P.L. 109-59) will reach their tenth anniversary and be subject to this analysis.

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<sup>15</sup> P.L. 109-115, 119 Stat. 2431, enacted November 30, 2005.

<sup>16</sup> Though, as noted above, the Obama Administration cited appropriations act language giving the Secretary of Transportation the authority to reallocate unused project funding as applying to unused earmarks.

**Table 1. Long-Term Unobligated Transportation Earmarks as of April 2014**  
Earmarks with less than 10% of funding obligated after at least 10 years

Act	Year Enacted	# of Earmarks less than 10% Obligated	Amount of Earmarks less than 10% Obligated	Unobligated Balance of Earmarks less than 10% Obligated
P.L. 101-164 (DOT Appropriations Act, FY1990)	1989	2	\$12,500	\$12,500
P.L. 101-516 (DOT Appropriations Act, FY1991)	1990	4	6,225,000	6,194,406
P.L. 102-240 (ISTEA)	1991	1	2,503,200	2,503,200
P.L. 102-388 (DOT Appropriations Act, FY1993)	1992	1	1,696,000	1,696,000
P.L. 103-331 (DOT Appropriations Act, FY1995)	1994	2	4,300,000	4,225,000
P.L. 105-178 (TEA-21)	1998	38	81,248,719	77,220,170
P.L. 106-346 (DOT Appropriations Act, FY2001)	2000	6	14,932,450	14,364,778
P.L. 107-87 (DOT Appropriations Act, FY2002)	2001	2	6,500,000	6,500,000
P.L. 108-7 (DOT Appropriations Act, FY2003)	2003	10	11,605,073	11,605,072
P.L. 108-447 (DOT Appropriations Act, FY2005)	2004	2	1,426,553	1,371,261
<b>Total</b>		<b>68</b>	<b>\$130,449,495</b>	<b>\$125,692,387</b>

Source: Federal Highway Administration.