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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

Determination of Contract Authority With Respect to Funds ^{10,387} Derived From Highway Trust Fund

FILE: B-164497(3)

DATE: June 6, 1979

MATTER OF: Great River Road--Contract Authority

DIGEST: Great River Road statute (23 U.S.C. § 148) authorizes appropriations out of (1) Highway Trust Fund and (2) General Fund of Treasury. Funding of federally-aided highway projects in title I of 23 U.S.C. is by contract authority; see sections 118 and 106(a). No reason appears to treat section 148 differently from other authority in title I. Moreover, Congress and Executive have in different contexts identified Trust Fund portion of section 148 as contract authority. GAO agrees that Trust Fund portion of section 148 results in contract authority; General Fund portion requires annual appropriation before availability.

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John S. Hassell, Jr., Deputy Administrator, Federal Highway Administration (FHWA), Department of Transportation, has asked whether section 148 of title 23, United States Code, "Development of a national scenic and recreational highway," provides contract authority with respect to those funds derived from the Highway Trust Fund.

The Deputy Administrator explains that--

"Section 148 of title 23, U.S.C., provides for the development and construction of the Great River Road. The section provides for split funding. It has been the consistent position of the Department of Transportation that the portions of the Great River Road which are financed out of the Highway Trust Fund are done so under the terms of contract authority while those portions financed from the General Fund of the Treasury are considered to be available consistent with annual budget authority, i.e., requiring an appropriations act before being available for commitment and expenditure.

"The specific authority for considering section 148 of title 23, U.S.C., as conveying contract

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authority in this instance rests upon the section's inclusion in chapter 1 of that title. Section 118(a) of title 23, U.S.C., clearly states that, 'On and after the date that the Secretary has certified to each State highway department the sums apportioned to each Federal-aid system or part thereof pursuant to an authorization under this title, or under prior acts, such sums shall be available for expenditure under the provisions of this title.'

"Section 106(a) of title 23, U.S.C., further makes it clear that, 'The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project [including projects pursuant to section 148] shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto.'

"These provisions read together provide the basis for, and define, contract authority for the purposes of Federal-aid highway programs. This interpretation is consistent with the provisions of the Budget Control Act of 1974, 31 U.S.C. 1351, Pub. L. 93-344, 88 Stat. 317. Section 1351(d)(1)(B) of title 31, U.S.C., provides an exception to this Act's general prohibition of 'backdoor spending' in the case of outlays from certain trust funds. The Highway Trust Fund meets the test set forth in this subsection. It is the operation of the Budget Control Act of 1974 which precludes the existence of contract authority with respect to those funds authorized for the Great River Road out of the General Fund of the Treasury.

"This long-standing interpretation by this Department has been most recently recognized and acknowledged by the Congress in the Department of Transportation and Related Agencies Appropriation Act of 1979, Pub. L. 95-335, 95 Stat. 435, Aug. 4, 1978. Title I of this Act provides certain appropriations expressly for the 'National Scenic and Recreational Highway

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(Liquidation of Contract Authorization).'
(Parenthetical remark in the original.)

"Therefore, as stated above, it has been, and is, our position that contract authority exists with regard to the Great River Road insofar as funds derived from the Highway Trust Fund for this purpose are concerned."

The Federal-Aid Highway Act of 1973 (Pub. L. No. 93-87, Title I, section 129(b), August 13, 1973, 87 Stat. 265) specifically amended chapter 1 of title 23 of the United States Code, by inserting at the end thereof the new section 148, "Development of a national scenic and recreational highway." Section 148 authorizes the location and construction and reconstruction of the Great River Road by the 10 States bordering the Mississippi River. With regard to funding, subsection (g) of 23 U.S.C. § 148 (1976) provides as follows:

"(g) There is authorized to be appropriated to carry out this section, out of the Highway Trust Fund, for construction or reconstruction of roads on a Federal-aid highway system, not to exceed \$10,000,000 for the fiscal year ending June 30, 1974, \$25,000,000 for the fiscal year ending June 30, 1975, and \$25,000,000 for the fiscal year ending June 30, 1976, for allocations to the States pursuant to this section, and there is authorized to be appropriated to carry out this section out of any money in the Treasury not otherwise appropriated, not to exceed \$10,000,000 for each of the fiscal years ending June 30, 1974, June 30, 1975, and June 30, 1976, for construction and reconstruction of roads not on a Federal-aid highway system."

We find nothing in the language or legislative history of 23 U.S.C. § 148 or in chapter 1 of title 23 generally that would support a finding of congressional intent to distinguish the Great River Road from other projects in the Federal-Aid Highway Program by excluding the Great River Road project from the funding mechanism of the Federal-Aid Highway Program as set forth in chapter 1. That

mechanism is, generally, that the Congress authorizes funds to carry out programs in title 23. Typically, these authorizations are couched in terms essentially similar to those used in 23 U.S.C. § 148(g), supra; that is, they authorize appropriations "out of the Highway Trust Fund." See, e.g., section 104(a), Pub. L. No. 92-87, 87 Stat. 251. The authorizations are apportioned among the States. 23 U.S.C. § 104. Then, as the Deputy Administrator points out, the sums apportioned become "available for expenditure under the provisions of [chapter 1 of title 23]." 23 U.S.C. § 118.

More specifically, the States submit programs for construction after the apportionment of authorizations. 23 U.S.C. § 105. Once it has an approved program, a State may submit individual projects. Approval by FHWA of a project "shall be deemed a contractual obligation of the Federal Government * * *." 23 U.S.C. § 106(a). FHWA may then make payments to the States for the Federal share of construction costs of approved projects. 23 U.S.C. § 121. These payments are made from liquidating appropriations, pursuant to the authorizations, to meet the Government's contractual obligation. We see no reason to treat the authorization in section 148(g) of appropriations from the Highway Trust Fund any differently from those under other portions of chapter 1 of title 23. (Section 148(g) also contains an authorization of appropriations from the general fund of the Treasury which, FHWA agrees, requires an appropriation before being available for obligation and expenditure.)

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Actions by the executive branch and Congress have been consistent with this view. Section 1012 of the Impoundment Control Act of 1974 (Pub. L. No. 93-344, July 12, 1974, 88 Stat. 332), requires a special message from the President to the Congress reporting any proposed rescission of budget authority. In July 1975, the President transmitted Rescission Proposal No. R 76-1 to the Congress. The proposed rescission targeted the National Scenic and Recreational Highway authorization provided under section 148 of title 23 of the United States Code, and specifically identified the type of budget authority involved as "contract authority." House Document No. 94-206, 94th Cong., 1st Sess. 16.

Moreover, as the Deputy Administrator points out, the Department of Transportation and Related Agencies Appropriation Act of 1979 (Pub. L. No. 95-335, August 4, 1978, 92 Stat. 435) provides, under the rubric "National Scenic and Recreational Highway (Liquidation

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of Contract Authorization)," for payment of obligations incurred in carrying out the provisions of 23 U.S.C. § 148, "to remain available until expended, \$19,000,000, of which \$13,000,000 shall be derived from the Highway Trust Fund." Also, The Budget of the United States Government, Appendix, Fiscal Year 1980, at page 715, specifically sets out in the Program and Financing description of the National Scenic and Recreational Highway account the "Status of Unfunded Contract Authority," providing figures and estimates on the unfunded balance at the start of the year, and subsequent appropriations to liquidate contract authority.

Therefore, we concur in the determination that section 148 of title 23, United States Code, "Development of a national scenic and recreational highway," when read together with sections 106 and 118 of that title, provides contract authority with respect to those funds derived from the Highway Trust Fund.


Deputy Comptroller General
of the United States