

## Notes

# Avoiding the Pitfalls of Public Private Partnerships: Issues to be Aware of When Transferring Transportation Assets

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### I. INTRODUCTION

The idea of a free transportation system in the United States is quickly becoming a thing of the past. The I-35W Bridge collapse in Minneapolis demonstrated that deteriorating roads and bridges are an emerging problem for states, while congestion rules the day in almost every urban area. Instead of embracing the unpopular, like raising the gasoline

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tax, property taxes, or motor vehicle registration fees to resolve these problems, states are looking to something completely different: Public-Private Agreements or PPP's.<sup>1</sup> These agreements between a state and a private company can provide the desperately needed funds to alleviate state's transportation woes.<sup>2</sup> The Bush Administration views PPP Agreements as the solution to the problem and is heavily encouraging states to enter into them.<sup>3</sup> But where do states and private companies start? What types of agreements are there? How should any potential pitfalls be avoided? This paper will discuss these issues and provide the proper tools to make the correct choices when the decision has been made to enter into a PPP agreement for the purpose of leasing or selling a transportation asset.

## II. THE PROBLEMS STATES ARE FACING

The tragic collapse of the I-35W bridge in Minneapolis brought a great deal of attention on our country's deteriorating transportation infrastructure and problems concerning its maintenance and repair. Prior to the collapse, Minnesota Governor Tim Pawlenty vetoed legislation to raise the state's gasoline tax in order to pay for road maintenance. After the collapse, Governor Pawlenty considered the option of raising the tax with offsets in other taxes, like the income tax.<sup>4</sup> When Congress passed SAFETEA-LU,<sup>5</sup> the \$286 billion transportation bill, experts stated that it was "\$100 billion short of the investment needed to maintain the nation's roads and bridges."<sup>6</sup> Gasoline taxes have not changed since the early 1990's.<sup>7</sup> As a direct result of the unwillingness of legislators to raise gasoline taxes, the country will likely face a \$4 billion deficit by 2009 unless

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1. See Michael Saunders, *Bridging the Financial Gap With PPPs*, FED. HIGHWAY ADMIN., July/August 2006, <http://www.tfhr.gov/pubrds/06jul/01.htm>.

2. See generally *id.*

3. Mary Peters, Federal Highway Administrator, Speech at the 16th Annual ARTBA Conference (December 9, 2004), <http://www.fhwa.dot.gov/pressroom/re041209.htm>.

4. Jason Hoppin, *Minnesota's Eyes Are On I-35W Bridge, But Look Again: Across State, Lesser-Known Spans Deteriorate, Wait For Replacement*, ST. PAUL PIONEER PRESS, Dec. 16, 2007, at A1. On February 25, 2008, the Minnesota House and Senate voted to override Governor Pawlenty's veto of the \$6.6 billion transportation bill that will raise the gasoline tax by five cents, and another three and half cents over the next five years. There will also be an increase of the metro sales tax by a quarter percent, and new car buyers will have to pay more to register them. See Tom Scheck, *House and Senate Override Governor's Veto*, MIN. PUBLIC RADIO, Feb. 25, 2008, at <http://minnesota.publicradio.org/display/web/2008/02/25/veto/> (last visited March 10, 2008).

5. Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 119 Stat. 1144 (2005).

6. Matt Stearns, *Governments Ponder Ways to Fix Nation's Roads and Bridges*, KAN. CITY STAR, Aug. 10, 2007, at A4.

7. *Id.*

Congress and individual states can generate new sources of funding.<sup>8</sup>

As more people move into urban areas, states are experiencing increasingly congested streets and highways and the deterioration of that infrastructure. Solving these problems will require significant investment by local and state governments to improve the roads and highways. However, current funds allocated to such an endeavor fall considerably short of the levels needed to improve the infrastructure.<sup>9</sup>

For example, a report by the American Society of Civil Engineers rated 42% of Pennsylvania's bridges unsafe, and gave the state an overall grade of D for its infrastructure.<sup>10</sup> It also found that out of the state's 22,276 bridges, 25% are considered structurally deficient, and 18% are considered functionally obsolete.<sup>11</sup> In order to improve our transportation system "to a level that benefits the nation's economic productivity, all levels of government must invest \$288 billion in 2006, \$368 billion in 2015, and \$561 billion in 2030;<sup>12</sup> and estimates currently show that by 2015 the United States will be facing a \$1.1 trillion transportation budget shortfall."<sup>13</sup>

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8. *Id.*

9. See U.S. Chamber of Commerce-National Chamber Found., *Future Highway and Public Transportation Financing Study Release Event*, 1 (2005), <http://www.uschamber.com/events/ViewEvent.htm?eventID=444>.

10. See American Society of Civil Engineers, *Report Card for America's Infrastructure-Pennsylvania*, <http://www.asce.org/reportcard/2005/page.cfm?id=78> (last visited Nov. 27, 2007); see also *We've Been Warned: State's Bridges Given a D Grade*, PITTSBURG POST, Aug. 12, 2007, at B2.

11. *Id.*; see Ariel Hart, *Transportation Leaders Tell Feds Tolls Needed*, ATLANTA J. CONST. (Feb. 22, 2007), available at <http://www.cobbrides.com/pdfs/Transportation%20leaders%20tell%20feds%20tolls%20needed.pdf> (Georgia Transportation Commissioner Harold Linnenkohl stated that the state had a \$7.7 billion deficit for projects intended for the next six years, and 500 projects have had to be pushed out into long range plans); see also Mal Leary, *Condition of State's Bridges Growing Worse, DOT Says*, BANGOR DAILY NEWS (Feb. 24, 2007), available at <http://www.bangordailynews.com/news/t/default.aspx?a=146761&template=print-article.htm> (A recent DOT survey revealed that 288 bridges (out of around 2,600) in the state are in poor condition and could face traffic limits or be closed altogether within the decade).

12. U.S. Chamber of Commerce-National Chamber Found., *supra* note 8, at 2. "Improve" means additional spending on highway and transit systems, which will both have a positive benefit/cost ratio and will improve the country's economy. To simply *maintain* our current transportation infrastructure "all levels of government must invest \$235 billion in 2006, \$304 billion in 2015, and \$472 billion in 2030." "Maintain" means that road and traffic levels will remain the same, and anything below this level will cause road conditions to deteriorate, and congestion to grow. *Id.* at 1.

13. *Id.*

Further, it is unlikely that future federal expenditures will continue to support state transportation budgets as most of these funds will be reallocated to maintain Social Security and other similar social programs.<sup>14</sup> The lack of funding necessary to maintain road maintenance can be contributed to the gasoline tax losing its purchasing power; the inadequacy of the current structure of transportation finance to meet the state's current transportation needs; and the emergence of more fuel efficient vehicles.

The collapse of the I-35W Bridge in Minneapolis has exposed the ugly fact that states are in desperate need of funds simply to keep up with the basic repairs that the daily wear and tear on highways cause. Prior to the tragedy, legislators focused their efforts on other pressing issues and redistributed the funds intended for transportation infrastructure maintenance elsewhere. Before the collapse, Representative James Oberstar authorized a press release regarding the funds Minnesota received for transportation needs from the House Appropriations bill.<sup>15</sup> Though the total amount procured for the state was approximately \$12 million, \$10 million was appropriated for Northstar, a commuter rail-line through Minneapolis, while the remaining was to be divided among a bike path, a walking path, and other similar projects which included road work and interchange reconstruction.<sup>16</sup>

Most of the \$286 million in the 2005 transportation bill was earmarked to pet projects in chosen Congressional Districts, which left states without the funds to maintain the existing transportation infrastructure. Senator Charles Schumer commented that most of the earmarks were "almost always for new construction and not maintenance," and that "[t]he bottom line is that routine but important things like maintenance always get shortchanged because it's nice for somebody to cut a ribbon for a new structure."<sup>17</sup>

In the Federal Governments absence on transportation infrastructure maintenance, states are starting to take the initiative to ensure that their roads receive at least basic maintenance. For example, the legislature of Louisiana provided over \$70 million towards road and bridge repair<sup>18</sup> and Missouri passed both a multi-billion dollar bill for road repair<sup>19</sup> and a bill that authorized the Department of Transportation to

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14. See U.S. Gen. Accounting Office, *States' Expanding Use of Tolling Illustrates Diverse Challenges and Strategies* 1 (2006).

15. Susan Saulny & Jennifer Steinhauer, *Minneapolis Bridge Disaster Draws Attention to Neglect of US Infrastructure*, HERALD TRIB., Aug. 7, 2007, at A1.

16. *Id.*

17. *Id.*

18. See H.R. 1, Gen. Assem., 1st Reg. Sess. (La. 2007).

19. See H.R. 4, 91st Gen. Assem., 1st Reg. Sess. (Mo. 2007).

enter into a design-build project contract to fix or replace all 802 state bridges within five years.<sup>20</sup> The state will pay the contractor once the bridges are complete and the winning contractor must maintain the bridges for 25 years.<sup>21</sup>

At one time, the federal motor fuel tax was the primary source of funding for the nation's roads, but as the fuel tax rates are fixed per gallon and are not indexed for inflation, they have lost one-third of their purchasing power since 1993.<sup>22</sup> Of the sixty cents per mile that drivers pay to operate their motor vehicle, only one cent of that is paid towards the motor fuel tax.<sup>23</sup> Nevertheless, the federal government has not considered an increase in the tax since 1993. Meanwhile, twenty eight states have raised their gasoline tax between 1993 and 2003, but they are still facing the same fuel tax degradation the federal government is experiencing.<sup>24</sup>

A recent report by the U.S. General Accountability Office (GAO) points out that even if the federal and state gasoline taxes kept pace with inflation, the increasing use of hybrid and fuel efficient vehicles will further reduce the revenues received from the tax.<sup>25</sup> Hybrid vehicle sales grew twentyfold between 2000 and 2005 and are estimated to grow to 1.5 million vehicles by 2025 because of increasing fuel prices.<sup>26</sup> The owners of these cars will pay less fuel taxes because their cars use less fuel per mile than vehicles with gas only engines, but the vehicles will contribute to congestion and wear and tear on roads.<sup>27</sup>

The loss of purchasing power has caused state and local governments to turn to increased matching requirements, ballot proposals to draw on local property and sales taxes, and bonding of new capital investments against future state and federal tax revenues to make up for this gap in funding.<sup>28</sup> Even though the funds raised by these techniques can result in marked improvement in local transportation infrastructure, they have to

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20. See H.R. 2, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007); Mo. Dep't of Transp., *Safe & Sound Bridge Program Moves Forward* (Dec. 20, 2007), [www.modot.org/safeandsound/SafeandSoundPressReleases.htm](http://www.modot.org/safeandsound/SafeandSoundPressReleases.htm).

21. Office of the Governor: Missouri Governor-Matt Blunt, *Gov. Blunt Sings Bill to Dramatically Improve 24 Bridges in St. Louis Area* (Sept. 6, 2007), [www.gov.mo.gov/cgibin/corantol/viewnews.cgi?id=EEIAPAlZEZevqNFFTo&style=Default+News+Style&tmpl=newsitem](http://www.gov.mo.gov/cgibin/corantol/viewnews.cgi?id=EEIAPAlZEZevqNFFTo&style=Default+News+Style&tmpl=newsitem).

22. See U.S. Chamber of Commerce-National Chamber Foundation, *supra* note 8, at 2. In 1993 the tax was raised to 18.5 cents per gallon.

23. *Id.* If the tax was raised another half a cent it would fully fund the federal governments share to maintain the nation's highway and transit systems. Nevertheless, while this would take care of our current needs, it would be insufficient for our future needs. *Id.*

24. See U.S. Gen. Accounting Office, *supra* note 13, at 15.

25. See *id.* at 16.

26. See *id.* at 15-16.

27. See *id.* at 16.

28. National Governor's Association, *Issue Brief, State Policy Options for Funding Trans-*

compete with other government services such as, “schools, housing, police, fire and rescue . . . for which revenues often are formally reserved.”<sup>29</sup>

Congestion is also adversely affecting this county’s economy. “Thirty-six percent of major urban highways are congested during peak travel times”<sup>30</sup> and the Department of Transportation estimates that delays in the country’s transport system cost the country \$200 billion annually, or around 2% of the Gross Domestic Product.<sup>31</sup> Drivers in major urban areas lost 47 hours sitting in the automobile in 2003,<sup>32</sup> and the trucking industry loses more than 200 million hours per year, costing the industry \$8 billion because of the cost related to congestion.<sup>33</sup> As the nation continues to grow the problem will only get worse. Approximately 80% of the nation’s population currently lives in urban areas.<sup>34</sup> These figures will likely increase as our society continues to become more service-oriented and less agriculturally-oriented. The amount of cars on the road will also increase since most Americans change what the car they drive every two years, and the automobiles they used to drive will then be transferred to those who could not afford them a few years prior. As a result, the cost of vehicle registration has increased by 17% from 1993 to 2003.<sup>35</sup> Also, more Americans are living on the edges of urban society in new homes, which increase the distance people drive, further adding to congestion.<sup>36</sup>

The way the motor fuel tax is structured exacerbates its decline by “taxing fuel consumption, rather than street and highway use, [and] disconnects the price travelers pay for using the transportation system from the actual cost of providing the capacity they use.”<sup>37</sup> This encourages

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portation, 3-4, 8, 16 (Feb. 2007), available at <http://www.nga.org/Files/pdf/0702TRANSPORTATION.PDF>.

29. *Id.* at 4.

30. *Id.*

31. John D. Schulz, *Time to Treat Transportation Funding as a Business*, DOT Secretary Peters Tells U.S. Commerce Leaders, LOGISTICS MGMT., Feb. 14, 2007, available at

32. U.S. Gen. Accounting Office, *supra* note 13, at 11.

33. Shultz, *supra* note 30.

34. See U.S. Census Bureau, *PEOPLE: Basic Counts* (Jan. 19, 2005), [http://factfinder.census.gov/jsp/saff/SAFFInfo.jsp?\\_pageId=TP1\\_basic\\_counts](http://factfinder.census.gov/jsp/saff/SAFFInfo.jsp?_pageId=TP1_basic_counts) (last visited Feb. 27, 2007) (stating that 80.3% of the population lives in metropolitan areas).

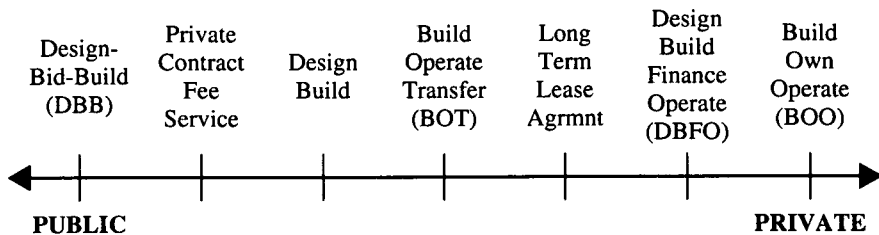
35. See U.S. Gen. Accounting Office, *supra* note 13, at 12.

36. *Id.* at 13. According to the General Accounting Office, “[r]oad usage, as measured by vehicle miles traveled (VMT), grew at a steady annual rate of 2.8 percent from 1980 through 2003. For the 10-year period between 1994 and 2003, the total increase in VMT was 22 percent.”

37. National Governor’s Association, *supra* note 27, at 4.

discretionary trip taking at times of peak demand causing a variety of productivity, environmental, and community problems.<sup>38</sup> Currently, states such as Oregon, Minnesota, and Kansas are looking into alternative methods to entering into PPP's, including mileage based tax programs.<sup>39</sup>

FIGURE 1: PUBLIC TO PRIVATE AGREEMENT SPECTRUM



The funds available for transportation are being increasingly earmarked for specific projects, which severely reduces their ability to be flexible with funds and can drive up costs.<sup>40</sup> For instance, Congressional earmarking of transportation reauthorization bills has increased from 10 to 6,371 between 1982 and 2005,<sup>41</sup> which means that less money is available for discretionary projects. Further, states have been borrowing to make up for the shortfalls they are currently experiencing.<sup>42</sup> At one time this made sense because of the costs saved by accelerated construction, plus future project revenues exceeded the amount of interest owed on the borrowed funds.<sup>43</sup> However, recently states have been borrowing against future gas tax revenues (both state and federal) or general revenues to fund current needs.<sup>44</sup> This could lead to disastrous results for states due

38. *Id.* Free parking also exacerbates the problem. *Id.* This is because people looking for parking spaces create air pollution, street congestion, and accidents. See Donald Shoup, *The High Cost of Free Parking*, S.F. CHRON., June 3, 2005, at B9. Studies of traffic in downtown areas have shown that people searching for parking cause up to 74 percent of traffic. *Id.* Another study showed that looking for a parking space generates 1 million excess VMT or 38 trips around the earth per year. *Id.*

39. See Mo. Dep't of Transp., *Staff Funding: Non-Traditional Transportation Funding 1-2* (May 2007) available at <http://168.166.124.22/RDT/reports/UnNumbrd/ss07003.pdf>; Scott Rothchild, *Options Sought for Funding New Roads*, LJWORLD.COM, Jan. 8, 2008, [http://www2.ljworld.com/news/2008/jan/28/options\\_sought\\_funding\\_new\\_roads/](http://www2.ljworld.com/news/2008/jan/28/options_sought_funding_new_roads/).

40. See National Governor's Association, *supra* note 27, at 4.

41. Ronald D. Utt, *A Primer on Lobbyists, Earmarks, and Congressional Reform*, HERITAGE FOUND., Apr. 27, 2006, available at <http://www.heritage.org/research/budget/bg1924.cfm>.

42. National Governor's Association, *supra* note 27, at 4.

43. *Id.*

44. *Id.*

to the loss of purchasing power of the gasoline tax, which could in turn lower bond ratings and make borrowing for transportation needs in the future more expensive.<sup>45</sup>

Unfortunately, the nation's current transportation funding process is inefficient and ineffective and cannot be corrected quickly or cheaply. States must quickly find solutions to these problems. One solution available to states is the Public Private Partnership Agreements requiring private sector companies to own and or lease the roads they build, or providing maintenance to some or all of the state vehicles. States would then receive much needed funds and the companies acquire the rights to run (and profit from) state owned transportation assets for a specified period of time.

### III. PUBLIC PRIVATE PARTNERSHIP AGREEMENT OPTIONS/ALTERNATIVES

There are some options when deciding on what type of PPP to use when leasing transportation assets. There is the Design-Bid-Build agreement, which is where the state awards a construction contract to the lowest bidder, but handles the financing, operations, and maintenance of the transportation asset. There is also the Build-Own-Operate agreement where the state awards the highest bidding private entity the right to use their finances to build and operate the transportation asset. Of the options laid out in Figures 1 and 2 below, only the Private Contract Fee Service and the Long Term Lease Agreement deal with existing roads and or facilities. (Figure 1 displays the amount of state involvement for the following PPPs, while Figure 2 describes the features of the PPPs in more detail.)

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45. *Id.* at 5.



**FIGURE 2: PPP OPTIONS TABLE<sup>46</sup>**

PPP OPTION	OVERVIEW
Design - Bid – Build	This has been the traditional model for most of the 20th century to procure public works. This option segregates design and construction responsibilities by awarding an engineer and a private contractor. The public remains responsible for financing, operating and maintaining the infrastructure.
Private Contract Fee Services	Here the public sector has turned to the private sector to take over duties that have been traditionally left to public agencies. This can provide access to innovative technology applications and specialized expertise by opening these duties up to the private companies. Operations and Maintenance may be used to transfer responsibilities for a single highway facility or facilities. Duties can involve snow removal, grass mowing, and or other major repairs. Program and Financial Management consists of transferring all planning responsibilities to a private entity. This is usually most beneficial with large and complex projects. Private entities can coordinate environmental studies and approvals, engineering, construction, and financial planning.
Design – Build	This option combines two separate services into one fixed-fee contract for both architectural/engineering services and construction. SAFETEA-LU eliminated the \$50 million floor on the size of contracts and the prohibition that an agency had to wait until the NEPA process was completed.
Build-Operate-Transfer or Design-Build-Operate-Maintain	Under this option the state or local government, using public funds, contracts with a single entity to provides long term operation and/or maintenance services. The governmental entity retains the operating revenue risk and any surplus operating revenue. With these types of contracts, government entities need to take care to specify all standards to be met by the private entity because unless needs are not identified up front, they will usually not be met.
Long Term Lease Agreements	This entails a long term lease of existing toll road facilities to a private party for a specified number of years. During this time the private party has the right to collect tolls, however has to maintain the facilities, and in some instances, make improvements.
Design-Build-Finance-Operate	Here, the responsibilities of designing, building, financing and operating are transferred to the private sector. These types of projects are mainly financed by debt leveraging finance streams like tolls, vehicle registration fees, or bonds.
Build-Own-Operate	Here, the private entity has the right to develop, finance, build, own, operate and maintain an entire project, which it owns completely.

Currently, Pennsylvania, New Jersey, and Texas are considering long term leases on existing roads.<sup>47</sup> On the other hand, the state of Indiana

46. U.S. Dep’t of Transp.: Fed. Highway Admin., *PPP Options - Public Private Partnerships - FHWA*, available at <http://www.fhwa.dot.gov/ppp/options.htm> (last visited Feb. 12, 2007) (this footnote applies to both the continuum drawing and the table, the information in the table is hyperlinked from this cite).

47. See Jennifer Hawks, *Taking a Toll: The Privatization of Our Nation’s Highway*, TRUCKER’S CONNECTION, available at <http://www.jenniferhawks.com/articles/HTML/TakingToll/TakingToll.htm> (last visited Jan. 26, 2008). Governor Ed Rendell is actively seeking to lease the Pennsylvania Turnpike. See Joe Grata, *Rendell Touts Transportation Funding Plan*, PITTSBURG

has already leased the Illiana Expressway to the ITR Concession Company for \$3.8 billion for a term of 75 years.<sup>48</sup>

Another option that California, Colorado, and Texas have taken advantage of is converting their carpool lanes into High Occupancy Tolls or HOT lanes.<sup>49</sup> According to Safe Accountable Flexible Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), states can charge low occupancy vehicles a fee for using the lane and either allow high-occupancy vehicles to use the lane or lanes for free or charge a lower price.<sup>50</sup> These types of pricing schemes are to help reduce congestion during peak driving hours by offering a faster paced alternative to drivers who are willing to pay the price.

Another option California and Texas are looking into is creating privatized Truck only Toll lanes or TOT roads to help alleviate their transportation budget shortfalls. Currently, the California Department of Transportation is suggesting a toll road for trucks that would go from the Port of Long Beach serving both Riverside and San Bernardino counties and a toll road at the Mexican border that would have its own crossing.<sup>51</sup> The reason behind TOT lanes, especially in California and Texas is competition for goods shipped from Asia.<sup>52</sup> If Texas can create a private network of highways solely for trucks, which is not always in a state of disrepair (like some Southern California freeways), it can entice shippers to use its ports instead of California's.<sup>53</sup> By creating TOT roads or lanes, states can reduce the congestion on public roads and quicken the pace that imported goods can be shipped to the United States' market.

Ultimately, no single project is the same as the next, but states have to be aware of certain issues when entering into a lease, a design-build-operate agreement, or a build-own-operate agreement. The first impor-

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POST-GAZETTE, Mar. 20, 2007, available at <http://www.post-gazette.com/pg/pp/07079/770919.stm>. He mentioned on March 19, 2007, that he has received bids from anywhere from \$10 to \$15 billion for the road. *Id.*

48. *Indiana Toll Road Concession and Lease Agreement*, 29, available at <http://www.in.gov/ifa/pdfs/4-12-06-Concession-Lease-Agreement.pdf>. (last visited Mar. 26, 2007).

49. See U.S. Dep't of Transp.: Fed. Highway Admin., *Value Pricing Pilot Program Converting High-Occupancy Vehicle (HOV) Lanes to High-Occupancy Toll (HOT) Lanes*, available at [http://ops.fhwa.dot.gov/tolling\\_pricing/value\\_pricing/projtypes/hovhotlanes.htm](http://ops.fhwa.dot.gov/tolling_pricing/value_pricing/projtypes/hovhotlanes.htm) (last visited Mar. 26, 2007).

50. *Id.*; See e.g. Co. Dep't Transp., *I-25 HOV/Tolled Express Lanes - Toll Rates*, <http://www.dot.state.co.us/cte/expresslanes/fees.cfm> (last visited March 26, 2007) (On Interstate 25 in Denver, Colorado, drivers are charged as low as \$0.50 for non-peak driving and as high as \$3.25 for the use of a 7 mile stretch of road between Downtown Denver and US-36); see also 23 U.S.C. § 166(b)(4) (2006).

51. Evan Halper, *California's Future May be Paved with Fees*, L.A. TIMES, Feb. 13, 2007, at A1.

52. See *id.*

53. See *id.*

tant issue is the non-compete clause. States should be cautious of clauses that can be too restrictive by preventing *any* maintenance of *any* road in a certain distance from the private toll road. For instance, when Indiana entered into an agreement with the ITR Concession Company, the state agreed not to build any road twenty miles in length and within ten miles of the new toll road for fifty-five years.<sup>54</sup> The agreement also stipulated that US-20, which runs east to west through the state, is not a competing highway, but will be considered one if the state expands or improves it, and it comes within ten miles of the toll road.<sup>55</sup> Therefore, if Indiana needs to do repairs or adjust the road because of congestion problems, they would be in breach of the contract.<sup>56</sup>

An example of how a non-compete agreement can go sour is when the state of California wanted to improve State Route 91 (SR-91). In 1995, Orange County California leased the former median of SR-91 to the California Private Transportation Company, and the county agreed not to make improvements to the parts of the freeway that were not operated by the toll road company.<sup>57</sup> However, in the late 1990s, the public's attitude changed with regards to the toll road.<sup>58</sup> The toll road agreement's non-compete clause prevented the increase of highway capacity within a one and a half mile area along the side of the toll road, but the state wanted to add merging lanes between the free lanes and the toll lanes to improve traffic safety.<sup>59</sup> The non-compete clause allowed this, but the toll road company disputed the state's safety analysis.<sup>60</sup> In the end, the state was forced to buy the road back for \$207.5 million.<sup>61</sup> Though the situation in Orange County has not arisen in other jurisdictions, it is an illustration of what could take place.

In toll road agreements, there needs to be some flexibility so that the state can get the funds it needs, and the private company can make a profit. Nevertheless, states need to bargain for agreements that give them the ability to make, at a minimum, repairs to highways and roads within the vicinity of the toll way so that the state owned assets still have

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54. Indiana Toll Road Concession Agreement by and between The Indiana Finance Authority and ITR Concession Company LLC (Apr. 12, 2006) available at <http://www.in.gov/ifaf/pdfs/4-12-06-Concession-Lease-Agreement.pdf>.

55. *Id.*

56. See *supra* note 13, at 14. Currently Indiana does not have any plans in its long range transportation outlook to build such a road.

57. Orange County Grand Jury 2004-2005, *Review of 91 Toll Road Funding 1*, <http://www.ocgrandjury.org/pdfs/91TollRoad.pdf> (last visited Feb. 1, 2008).

58. *Public-Private Partnerships: Financing and Protecting the Public Interest: Hearing on public-private partnership (PPP) Before the H. Subcomm. on Highways & Transit*, 110th Cong. (2007) available at <http://transportation.house.gov/hearings/hearingdetail.aspx?NewsID=51>.

59. *Id.*

60. *Id.*

61. *Id.*

a viable life after the term of the lease expires. A lease agreement spanning several decades could allow competing roads to go into disrepair. Therefore, according Robert Poole, director of transportation studies at the Reason Foundation,

it makes sense to spell out in the agreement procedures for dealing with future needs, such as major additions to the toll road or allowances for a future administration to buy it back before the end of the agreement. The more the risk of unknowns can be minimized through such provisions, the better the deal that the State will be able to secure.<sup>62</sup>

States should also be aware of how fast and by how much tolls can increase. Obviously, states should not leave it up to the private entity to come with the amount of the toll increases, but they should be aware of how toll increases will affect the users of the toll road in the future. For example, according to the Chicago Skyway sale agreement, toll prices started out at \$2.00 (for passenger cars), went up to \$2.50 beginning in 2005, and will stay there until 2008 when the price will rise to \$3.00; in 2011, the price will increase to \$3.50 and will increase fifty cents every two years until 2017.<sup>63</sup> Then, the toll price will be \$5.00 and will increase either two percent, the percentage rate of the Consumer Price Index, or the nominal Gross Domestic Product every year, whichever is greater.<sup>64</sup> Since February 2006 the Consumer Price Index in the United States has increased 2.4%,<sup>65</sup> however, the Gross Domestic Product was up 6.3% in 2005 and 2006.<sup>66</sup> If commuters realized wage increases like that there would not be much to complain about, but it is quite rare for an American worker to see a yearly increase in salary like that. If something similar was applied to the Pennsylvania Turnpike 67 years ago it would cost around \$553 to travel from the Delaware River to the Ohio border, instead of the \$22.75 it costs now.<sup>67</sup> To combat such enormous toll increases states should insist on a ceiling amount that tolls can increase every year. This way the toll company is not seen as taking advantage of

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62. Robert Poole & Peter Samuel, *The Return of Private Toll Roads*, 69 PUB. ROADS, Mar. 2006, available at <http://www.tfrc.gov/pubrds/06mar/06.htm>.

63. Goldman Sachs, *Public-Private Partnerships, The Skyway Sale and its Implications for Municipal Finance* 18, (Dec. 8, 2005) (presentation handout to the National Conference of State Legislatures).

64. *Id.*

65. U.S. Dep't of Labor: Bureau of Labor Statistics, *Consumer Price Index*, <http://www.bls.gov/cpi/home.htm> (last visited Apr. 4, 2007).

66. U.S. Dep't of Commerce: Bureau of Economic Analysis, *Gross Domestic Product - Percent Change from Preceding Period*, <http://www.bea.gov/national/index.htm#gdp> (last visited Jan. 30, 2008).

67. Emily Thornton, *Road to Riches - Investors Clamor to Take Over America's Highways, Bridges, and Airports*, BUS. WK., Apr. 30, 2007, <http://www.msnbc.msn.com/id/18396534/> (stating that it would cost \$185 to go through the Holland Tunnel if such a scheme was imposed, instead of the current rate of \$6).

commuters, and public officials are perceived as being in tune to the needs of their constituents.

For states looking to lease or sell assets to private entities, generally large scale highways, bridges, and tunnel projects are well suited for such transactions as they are the most difficult to construct and maintain.<sup>68</sup> A project like this can cost over two billion dollars, an amount extremely difficult to amass from public funding sources. If a beneficial agreement can be worked out between the state and private party for a long-term right to toll, then the state may only be responsible for a small portion of the total project cost.<sup>69</sup>

#### IV. ESTABLISHING TOLL ROADS

Since establishing PPP Agreements is fairly new for states, the state legislature must either give an administrative agency the authority to enter into PPP Agreements for certain state projects, or establish a new agency or council within an existing agency to enter into the agreements. States used to be blocked from selling or leasing their roads until recently. On August 10, 2005, President Bush signed into effect the Safe, Accountable, Flexible, Efficient Transportation Safety Act: A Legacy for Users or SAFETEA-LU.<sup>70</sup> Along with guaranteeing \$244.1 billion for the national highway system and other forms of transportation, SAFETEA-LU allows states to loan an equal share of their revenue from the act to a public *or* private company for the purpose of building a toll or non-toll facility on an interstate highway, thereby increasing the state's opportunities to raise revenue by converting federal highways into toll roads.<sup>71</sup> In order to receive the loan, the Secretary of Transportation must permit federal participation, and the private company must ensure compliance with the SAFETEA-LU's guidelines and other federal laws.<sup>72</sup> According to Tyler Duvall, the Assistant Secretary of the Department of Transportation (during a presentation before the Committee on House Transportation and Infrastructure Subcommittee on Highways, Transit and Pipelines hearing in February of 2007), the federal government's role is to give away the majority of the responsibilities of running the highways and to ensure that the national transportation objectives are being achieved.<sup>73</sup> "This includes ensuring that freight and passenger traffic can

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68. Poole & Samuel, *supra* note 61.

69. *Id.*

70. See 23 U.S.C. § 101 et seq. (2006); see also U.S. Dep't of Transp.: Fed. Highway Admin., *A Summary of Highway Provisions in SAFETEA-LU* (Aug. 2005), available at <http://www.fhwa.dot.gov/safetealu/summary.htm>.

71. See 23 U.S.C. § 129(a)(7)(A) (2006).

72. 23 U.S.C. § 129(a)(3), (7) (2006).

73. *Public-Private Partnerships: Financing and Protecting the Public Interest: Hearing Testi-*

flow easily across state and international boundaries, and that the national connectivity of the highway system is maintained.”<sup>74</sup> This means that the federal government will be watchful the possibility of states impeding interstate commerce by how they structure their toll pricing.

Nevertheless, the Chairman of the Subcommittee on Highways and Transit, Peter DeFazio implied that Congress might intervene if a state impedes interstate commerce by preventing individual states from entering into lease agreements over other forms of PPPs.<sup>75</sup> For example, if a state was executing a Build-Own-Operate contract, but Congress determined the agreement might interfere with interstate commerce, Congress would step in and direct the state to enter into a Lease Agreement or a Build-Operate-Transfer type of agreement. However, can Congress require a state to enter into a different type of contract if they do not like the one the state is executing? According to the Commerce Clause, Congress has the power “to regulate commerce . . . among the several states,”<sup>76</sup> which means that “Congress may regulate when the commerce has interstate effects, even if the commerce occurs within a state.”<sup>77</sup> The Supreme Court articulated in *Gibbons v. Ogden* that Commerce “is traffic, but [also] something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”<sup>78</sup> More precisely, commerce is business, and Congress is concerned that interstate commerce will be disrupted by truckers taking longer routes to avoid tolls because one state is charging higher tolls than another.

The Tenth Amendment states that powers not afforded to the United States by the Constitution are reserved for the states.<sup>79</sup> The Constitution only gives Congress the police power in very few instances, but not over the states.<sup>80</sup> According to the Supreme Court, the question would be whether the federal action “will impermissibly interfere with the integral governmental functions . . .” of the state.<sup>81</sup> Nevertheless, in *United States v. Ohio Department of Highway Safety*, the Sixth Circuit stated that “a

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*mony on public-private partnership (PPP) Before the H. Subcomm. on Highways & Transit*, 110th Cong. (2007), available at <http://transportation.house.gov/Media/File/Highways/20070213/Duval.pdf> (Statement of Tyler D. Duval, Assistant Secretary, Transportation Policy, U.S. Dept. of Transportation).

74. *Id.* at 13.

75. Ken Orski, *The Debate on Public-Private Partnerships has been Joined*, 18 INNOVATION BRIEFS, Feb. 15, 2007.

76. U.S. CONST. art. I, § 8.

77. Erwin Chemerinsky, *Constitutional Law Principles and Policies* 241 (2nd ed. 2002).

78. *Gibbons v. Ogden*, 22 U.S. 1, 189-190 (1824).

79. U.S. CONST. amend X.

80. See U.S. CONST. art. I, § 8, cl. 17 (noting, among other things, that Congress has the power to “exercise exclusive legislation” over the District of Columbia and the U.S. Territories).

81. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 851 (1974).

scheme which seeks to enforce state cooperation in an effort to deal with a national problem will not fall under the Tenth Amendment if it leaves the states free to make choices which are essential to their function as states.”<sup>82</sup> Here, the Environment Protection Agency (“EPA”) was suing the state of Ohio because Ohio failed to abide by the Clean Air Act by refusing to deny vehicle registration if a vehicle did not pass an emissions test.<sup>83</sup> The court ruled that since air pollution is a national problem and “[t]he federal interest in controlling air pollution far outweighs any state interest in permitting non-complying vehicles to use public streets and highways.”<sup>84</sup> The states are bearing the brunt of the nation’s transportation budget shortfall since they are the owners of the roads that run through their state. Therefore, the state’s interest in ensuring its transportation infrastructure has enough funds to sustain itself into the future outweighs the federal government’s interest in interstate commerce. In order to guarantee that states and private toll road companies do not overstep their bounds in their PPP Agreement, the Department of Transportation needs to stay abreast on how that agreement might affect interstate commerce, and require states to amend them if they do so.<sup>85</sup> As of yet, PPPs for toll roads are in their infancy and there has not been any real test of how a state has structured one.

Most importantly, for a state to have the authority to lease or sell its transportation assets to a private entity, the legislature will first have to pass authorizing legislation. In order to assist states in this process, the Federal Highway Administration has posted model legislation on its website, which is a survey of different states legislation.<sup>86</sup> The legislation allows the state’s Department of Transportation to “solicit, receive, consider, evaluate, and accept a proposal” for a PPP.<sup>87</sup> It also establishes criteria for the evaluation process each state should utilize for each proposal and offers the state two options on how the state will keep confidential or proprietary information exempt from disclosure under a state’s freedom of information act or open records act.<sup>88</sup> Nevertheless, states must be careful to keep most, if not all, the records open once the bidding

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82. U.S. v. Ohio Dep’t of Highway Safety, 635 F.2d 1195, 1205 (6th Cir. 1980).

83. See *id.* at 1197.

84. *Id.* at 1205.

85. For example, a state could impede interstate commerce by charging higher than normal tolls, thereby forcing truckers to find less expensive, but longer routes. A state could also charge the same price as other states, but either have more tolls, or charge tolls for exiting the toll road at certain popular points as the Pennsylvania Turnpike Authority is considering doing now.

86. U.S. Dep’t of Transp.: Fed. Highway Admin., *Public Private Partnerships: Model Legislation Working Draft*, [http://www.fhwa.dot.gov/ppp/legis\\_model.pdf](http://www.fhwa.dot.gov/ppp/legis_model.pdf) (last visited Feb. 7, 2008).

87. *Id.* at § 1-102(b).

88. *Id.*

process is complete.<sup>89</sup> This assures the public that the selection and contracting process is fair.<sup>90</sup>

A problem that has arisen in states like Texas and Indiana in regards to authorizing statutes is that the Departments of Transportation have too much authority when entering into PPP agreements.<sup>91</sup> For example, the Texas Department of Transportation currently has the sole authority to enter into development agreements “that provides for the financing, development, design, construction, or operation of a facility or a combination of facilities on the Trans-Texas Corridor,”<sup>92</sup> and also has the sole authority to negotiate all of the terms with a private entity.<sup>93</sup> This amount of power has troubled both the legislature and the public to the point where the Texas House passed a bill last year that would impose a two year moratorium on the construction of toll roads.<sup>94</sup> The bill would create a “legislative study committee” that would

conduct . . . hearings and study the public policy implications of including in [the development agreement] a provision that permits the private participant to operate and collect revenue from the toll project. In addition, the committee shall examine the public policy implications of selling an existing and operating toll project to a private entity.<sup>95</sup>

According to the bill’s sponsor, Representative Louis Kolkhorst, the moratorium allows the state to take a closer look “before we leap into contracts that last 50-plus years.”<sup>96</sup> Indiana also gave oversight of any contract entered into between the state and a private entity to two separate review committees for any toll road purpose.<sup>97</sup> Legislative maneuvers like the moratorium in Texas and the oversight committee in Indiana are the result of legislatures trying to bring some balance back to the contracting process where it is not only the state executive branch having control over PPP agreements.

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89. See Poole & Samuel, *supra* note 61, at 10.

90. See *id.*

91. See *id.* at 6-7.

92. TEXAS TRANSP. CODE ANN. § 227.023(c) (2007).

93. *Id.* at § 227.208(a).

94. See H.B. No. 2772, 80th Leg. (Tex. 2007) (which passed by a 123-17 vote on April 10, 2007, and has yet to pass in the Senate, where 26 of 31 senators support it); see also Gary Scharer, *Toll Road Moratorium Gets Overwhelming Support in the House*, SAN ANTONIO EXPRESS NEWS, Apr. 11, 2007, at 9A.

95. *Id.* at § 223.210(e).

96. Jake Batsell, *Toll-Road Freeze Exempts Region: Legislature House Backs 2-Year Moratorium on Private Deals, but Outcry Spares 121 Plans*, DALLAS MORN. NEWS, Apr. 11, 2007, 1A.

97. See e.g. Press Release, Indiana State Democrats, *Illiana Expressway Legislation Approved by Senate* (Feb. 12, 2007) (committees would be composed of eight legislators who would each advise and oversee the project’s progress).



## V. THE PROS AND CONS OF PPP AGREEMENTS

## A. PROS

States that either sell or lease their transportation assets can generate much-needed funds from the purchasing private entity. For the right to create the Illiana Expressway, the ITR Concession Company paid the state of Indiana \$3.85 billion dollars in a single lump sum payment.<sup>98</sup> Indiana is using the funds it has received to completely fund its “Major Moves” transportation project, retire more than \$225 million in debt, and has deposited the remaining \$3 billion.<sup>99</sup> States can also get considerably more. For instance, Pennsylvania Governor Ed Rendell is seeking anywhere from \$2 to \$30 billion for the Pennsylvania turnpike; however, he stresses that anything on the lower end is clearly unacceptable.<sup>100</sup>

A huge lump sum payment for the sale or lease of a road can seem like winning the lottery to the state. This can be dangerous because a lump sum payment can disappear in a matter of years, while the private entity is left making money off of the toll road from anywhere from thirty to ninety-nine years. In order to avoid this, Governor Rendell said that any lease or sale would contain a limitation that would direct that the proceeds would only be spent on the transportation needs of the state.<sup>101</sup> Further, at the Subcommittee on Highways and Transit hearing on Public-Private Partnerships in February of 2007, Chairman DeFazio and the witnesses all agreed that long term revenue sharing is favored over receiving a lump sum payment.<sup>102</sup>

Toll roads built by the private sector, HOT lanes, and TOT lanes also have the capacity to reduce the congestion on all types of roads, public or private. Congestion increasingly worsened over the past fifteen years in urban areas in the United States.<sup>103</sup> The White House contends that by building new roads and charging drivers to use them, congestion will decrease.<sup>104</sup> “If a roadway is priced - that is, if drivers have to pay a fee to access a particular road - then congestion can be avoided by adjusting the price up or down at different times of day to reflect changes in demand for its use.”<sup>105</sup> If a driver has a choice either to take a value priced lane,

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98. Matt Sundeen, *The Money Road*, ST. LEGISLATURES, May 2007.

99. *Id.* at 14.

100. Larry King, *Rendell: Make an Offer for PA Turnpike Private Operators Can Bid on the Road Until Dec. 22*, PHILADELPHIA INQUIRER, Dec. 7, 2006, at A01.

101. *Id.*

102. See Public-Private Partnerships, *supra* note 57.

103. See Poole & Samuel, *supra* note 61, at 2-3 (discussion of the problems congestion has created).

104. See Tom Dogget, *White House Slams Carpooling, New Road Fees Better*, REUTERS, Feb. 12, 2007, available at <http://www.reuters.com/article/politicsNews/idUSN1229128020070212>.

105. *Id.*

that is a HOT lane, or a toll road instead of a traffic-jammed freeway for a price, she might be more inclined to pay for her drive home instead of being stuck in traffic. Nevertheless, the White House emphasizes that value priced lanes and toll roads should only be focused in areas “where drivers demonstrate a willingness to pay a fee that is higher than the actual cost of construction,” which will allow communities to avoid raising taxes to build the lanes or roads.<sup>106</sup> To accomplish this, states will have to commence feasibility studies that, among other things, focus on a rate the toll should be set to encourage users.<sup>107</sup> Currently, this may be the only way to ensure that drivers want to use the lanes or road to avoid congestion.

With PPP Agreements, the risk of completing a project on time can be shifted to the private party since the flow of revenue depends on the project being completed. Therefore, the private entity has a strong incentive in ensuring the project is completed on time.<sup>108</sup> Mega-projects have substantially higher risks of overrun costs, schedule slippage, and traffic shortfalls under public ownership.<sup>109</sup> According to Tyler Duvall’s congressional testimony, a recent study conducted by the United Kingdom found that 88% of PPP projects were completed on time or earlier with no overrun costs, while public projects were completed on time 70% of the time, and were over budget 73% of the time.<sup>110</sup> Lastly, private companies are more willing to take risks when encountering difficult situations than public entities.<sup>111</sup> For instance, the private company operating California’s 91 Express Lanes in Orange County created value-priced congestion relief by charging different prices at different times of the day.<sup>112</sup> Further, a private transportation company in Melbourne, Australia came up with the idea of using a sound tube for noise abatement instead of the sound wall used in the United States.<sup>113</sup>

## B. CONS

The differences in motives between the public and private sector can quickly lead to problems. With the sale or lease of transportation assets, there must be a balance between a fair price the state needs for the road, and the profit desired by private companies.

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106. *Id.*

107. *See, e.g.* Cambridge Systematics, Inc., *MnPASS System Study Final Report* 12, Apr. 7, 2005.

108. *See generally* Halper, *supra* note 50.

109. *See generally id.*

110. Public-Private Partnerships: Statement of Tyler D. Duval, *supra* note 72.

111. *See* Halper, *supra* note 50.

112. *Id.*

113. *See e.g.* Tollroads News, *Melborne Oz Innovative Sound Tube*, <http://www.tollroadnews.com/node/2207/> (last visited Feb. 11, 2008).

For example, when the state wants to get a project going they will solicit proposals from private companies. These proposals are to be assessed on things such as the project's life, the inflation rate, the rate of revenue growth, and sometimes vehicle operating speeds.<sup>114</sup> These proposals can cost a great deal of money, but to insulate themselves from these costs, private entities will put together a proposal that is not overly costly in order to maximize their profits.<sup>115</sup> Putting together an inexpensive development plan can lead to surprises later, such as unexpected cost overruns.

Such a case is exemplified in the consortium that submitted the winning bid for the Channel Tunnel.<sup>116</sup> The team of five banks and the developer contributed £47 million to the project, which represented only 0.96% of the £4.8 billion of the total projected cost.<sup>117</sup> Yet, when the cost continued to grow, it became clear that no one had any idea on how much the project was going to cost.<sup>118</sup>

States need to be careful to take private entities at their word about their proposals. To avoid this, Governor Corzine of New Jersey is emphasizing that his administration partake in careful due diligence.<sup>119</sup> The purpose of such in-depth due diligence is to ensure that the state is equipped with the best possible understanding of the true value of the assets by the time states engage in negotiations.<sup>120</sup>

With the rising concern of global warming and rising fuel costs it seems more appropriate for states to find more environmentally conscientious alternatives. It is predicted that the world will reach peak oil<sup>121</sup> anytime between 2008 and 2018,<sup>122</sup> when most of the toll road leases will

114. Craig E. Roco, *Predicting the Conditional Viability of Build-Operate-Transfer Contracts for Transportation Facilities Without Forecasting Revenues*, 33 *TRANSP. L. J.* 339, 341 (2006) (citing Fed. Highway Admin., Dep't of Transp., Manual for Using Public-Private Partnerships on Highway Projects 35 (2006)).

115. *Id.* at 344.

116. *See id.* at 345-46.

117. *Id.* at 345.

118. *Id.* at 345-46. The Eurotunnel co-chairman even admitted financing had been sold so that no one had any idea on how much the Chunnel would cost, which is true since it cost almost twice as much as they forecasted.

119. Ken Orski, *Beyond the Tipping Point IX*, *INNOVATION BRIEFS*, Feb. 1, 2007.

120. *Id.*

121. "Peak Oil, or Hubbert's Peak as it is sometimes referred to, is the point in time when global production of crude oil reaches in pinnacle and then enters into a permanent decline. While experts cannot say with exact certainty when Peak Oil will arrive, many believe that it may have already been surpassed. However, their [sic] are other petroleum experts who subscribe to the belief that Peak Oil hasn't been witnessed yet but will within the near future." Peak Oil Portal, *What is Peak Oil?*, <http://www.peakoilportal.com/> (last visited Apr. 20, 2007).

122. Adam Jensen, *When the Oil Runs Out*, *TAHOE DAILY TRIB.*, Apr. 20, 2007, available at <http://www.tahodailytribune.com/article/20070420/NEWS/104200078> (mentioning a recent study conducted by Swedish physicist Fredrik Robelius which says that world oil fields will de-

still be in their infancy. Gasoline prices could easily be above ten dollars per gallon by then, and in order to get to their desired destination, drivers will be paying exorbitant tolls.<sup>123</sup> Rising gasoline prices and more fuel efficient cars are why some states are turning to toll roads.<sup>124</sup> However, the private entities that own/operate the toll roads could be facing the same predicament states are facing now if oil prices continue to rise. This is because drivers will not have a choice about putting fuel in their automobiles, but they will have an alternative to the way they get to their desired destination.

Instead of only offering toll roads as the sole transportation solution to dwindling budgets, states should also consider entering into PPP agreements with both bus and rail companies in order to develop improved transit systems.<sup>125</sup> Further, both states and private entities should carefully consider how much tolls can increase over time in order to keep the toll roads competitive with both alternative roads and alternative forms of transportation. By doing this toll roads can ensure that they make a profit and states can ensure that they are not exacerbating this country's dependence on foreign sources of oil.

Some toll road critics are claiming that toll roads will not create a significant reduction in highway congestion because of the increasing number of drivers and cars on the road.<sup>126</sup> In Indiana, critics against the Illiana Expressway have pointed to a 1992 Northwestern Indiana Regional Planning Commission study that shows a new expressway would do nothing to reduce congestion.<sup>127</sup> The study says traffic would actually increase on the toll roads because much of the toll road's capacity would be absorbed by vehicles coming from other congested roads.<sup>128</sup> Other more recent studies completed for other states have shown that toll roads in fact increase congestion and promote disinvestment in urban areas by aggravating urban sprawl.<sup>129</sup> In Texas, the San Antonio Toll Party points

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cline sometime between 2008 and 2018. The study looked at 333 large oil fields and also small oil fields).

123. See *infra* note 125 on discussion about toll increases on the Chicago Skyway.

124. See, e.g. Mike Leidemann, *Kapolei-To-Honolulu Toll Road May Be Next*, HONOLULU ADVERTISER, Jan. 30, 2007, available at <http://the.honoluluadvertiser.com/article/2007/Jan/30/ln/FP701300338.html>.

125. See, e.g. Jeffrey Leib, *RTD Opens Door to Tech*, DENVER POST, Apr. 15, 2007, at A1 (noting that the Denver RTD is seeking both federal and private support to construct a maglev or magnetic levitation train to the Denver International Airport and to other points in the city).

126. Vicki Urbanik, *Illiana Toll Road: Stop The Spin, Let's Have An Honest Public Debate*, CHESTERTON TRIB., Mar. 9, 2007, available at [http://www.no-illiana.com/illiana-facts/articles/article\\_07.html](http://www.no-illiana.com/illiana-facts/articles/article_07.html) (last visited Apr. 20, 2007).

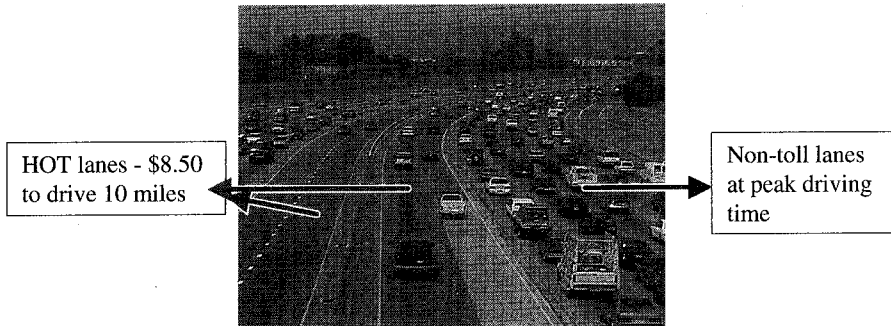
127. *Id.*

128. *Id.* The author points out that decisions should not be based on a 15 year-old study, but there are not any recent comparable studies to whether or not toll roads can reduce congestion.

129. *Id.*

to SR-91 in Orange County California as to how toll roads cannot reduce congestion.<sup>130</sup> This picture illustrates their point.<sup>131</sup>

FIGURE 3: ORANGE COUNTY HOT AND NON-TOLL LANES



The picture makes it clear that during the peak travel time of the day a large number of drivers are choosing not to use the HOT lanes even though the road is jam packed. This picture, if an accurate representation of SR-91 at peak travel time, flies in the face of toll proponents arguments that drivers will choose to drive on a toll road or in HOT lanes if traffic is congested.

## VI. CONCLUSION

Since PPP agreements for the sale or lease of roads in the United States are still in their infancy, it is still undetermined whether the benefits outweigh the costs, or vice versa. Nevertheless, as a result of the transportation budget shortfalls and deteriorating infrastructure states are facing, selling or leasing current or future transportation assets is certainly a viable way to maintain roads in at least minimal conditions. Additionally, with rising fuel prices and additional motor vehicles on the roads, states also need to develop alternatives to the current transportation infrastructure. In the end, it would be wise for states to heed what critics have to say about toll roads and then try to mitigate whatever problems could or do arise.

130. San Antonio Toll Party, *Toll Roads: Can You Trust 'Em?* (Feb. 23, 2006), at 20, available at <http://www.satollparty.com/> (last visited Apr. 20, 2007).

131. *Id.* (picture taken by Edward C. Sullivan, California Polytechnic State University, San Luis Obispo, CA).

