Bloomberg BNA

Daily Report for Executives™

NUMBER 17 JANUARY 27, 2016

Transportation

Few insiders, a year ago, thought Congress could pass a surface transportation bill in 2015, or at least one that President Barack Obama would sign. And yet, the ''Fixing America's Surface Transportation (FAST) Act'' was passed with overwhelming bipartisan support. Author Timothy Lynch of Morgan Lewis analyzes the first significant multi-year, comprehensive surface transportation reauthorization law since 2005, assessing how it affects the federal (versus state) role in transportation policy; the funds available for the nation's enormous infrastructure needs; the outlook for new funding sources; and a host of controversial safety issues.

Remaining challenges are daunting and urgent, he says, but so were the impossible politics of 2015.

FAST Act Keeps Congress in Its Leading Role on Transportation

BY TIMOTHY P. LYNCH

On Dec. 4, President Barack Obama signed into the law the ''Fixing America's Surface Transportation (FAST) Act'' authorizing the nation's highway, transit and rail programs for a five-year period. This marks the first significant multi-year, comprehensive surface transportation reauthorization law since enactment of the 2005 statute.

Perhaps the most notable aspect of the FAST Act is the simple fact that it got done. At the start of the 114th Congress in January 2015, it's a safe bet the doubters (including this author) outnumbered the optimists by a wide margin on whether Congress could pass a surface transportation bill, or at least one that Obama would sign in 2015. And it passed with truly bipartisan support, marking it as one of the more significant legislative accomplishments of the First Session of the 114th Congress.

It's probably premature to assess where the FAST Act ranks in terms of previous surface transportation reauthorization laws—or what used to be simply called, ''The Highway Bill.'' It falls short of the Surface Transportation Assistance Act of 1982 with its large-scale expansion of the program and the accompanying revenue increases (taking the gas tax from 4 cents to 9 cents) to support that expansion. Or the major policy changes contained in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA, forever memorialized by Sen. Daniel Patrick Moynihan's (D-N.Y.) pronouncement that, ''the era of the Interstate Highway Program is over!''). And as far as program acronyms—a hallmark of Highway legislation—the FAST Act comes in somewhere in the middle. Far more imaginative than STAA but way behind the all-time winner—the Safe Accountable Flexible Efficient Transportation Equity Act: A Legacy for Users or as it's better known: SAFETEA-LU, which passed in 2005.

So what does the FAST Act do and where is it leading our nation's surface transportation policy? Let's look at this from several key components: the federal (versus state) role; infrastructure funding; financing; and safety.

Federal Role in Infrastructure

Ever since Moynihan observed that the era of the Interstate Highway program was over, there has been a continuing debate over the proper role of the federal government in transportation infrastructure planning

 ISSN 0148-8155

and financing. In one corner are the so-called ''devolutionists'' who believe with completion of the Interstate Highway program, the federal role should be significantly reduced and responsibility for maintaining the system—and the supporting taxes—devolved to the states. Their principle argument is the nation no longer is building large-scale, multi-state surface transportation projects so we don't run much risk of states independently building things that don't connect.

In the other corner are the proponents of a more robust federal role who typically point to factors like international trade as a justification for continued federal involvement. The latter group's position is made significantly more difficult to support by the fact there is no political will at the federal level to increase revenues in the form of raising the gas tax to fund the program.

Despite not bringing in more federal money, the FAST Act actually maintains—and in some cases enhances—a strong federal role in transportation infrastructure planning and support.

Without more money, it's very hard to justify an enhanced federal role. And the FAST Act—at least in terms of raising the gas tax—does not provide those revenues.

But even without that additional revenue, a strong argument can be made that the FAST Act actually maintains—and in some cases enhances—a strong federal role in transportation infrastructure planning and support. In addition to continuing the National Highway Performance Program (NHPP)—a program designed to ensure that states demonstrate progress toward achievement of performance goals—the FAST Act funds two programs aimed at facilitating the movement of goods in interstate commerce: the National Highway Freight Program and the National Significant Freight and Highway Projects. Taken together, these two programs recognize the important role that highway freight movement—trucks—play in transporting the nation's commerce and backs that up with real dollars ($1.26 billion per year for the former and roughly $900 million per year for the latter).

Looking somewhat futuristically, the FAST Act dedicates an entire title to the subject of ''Innovation'' and the need to recognize the changing interface between the vehicle—whether it be car, truck, or bus—and highway infrastructure. The Act creates an Advanced Transportation and Congestion Management Technologies Deployment initiative that will promote the deployment of new transportation technologies and encourage the installation of vehicle-to-infrastructure equipment to reduce congestion and improve safety. While only modestly funded relative to the potential demand ($60 million per year), the program will provide grants to eligible entities to among other things, accelerate the deployment of vehicle-to-vehicle, vehicle-to-infrastructure, and autonomous vehicles technologies.

New programs to encourage and coordinate technological innovations that facilitate interstate commerce give the Feds a brand new justification for a big role in highway planning and construction.

So, in much the same manner as one of the original justifications for the federal role in highway construction—to ensure that states were building highways that connected to those of neighboring states—these new technologies will enhance the federal role by encouraging innovations that facilitate interstate commerce, a function deeply rooted in the nation's history.

Finally, tucked within the Innovation title is a small—but very important—section directing the National Academy of Sciences to conduct a study on the actions needed to upgrade and restore the Dwight D. Eisenhower National System of Interstate and Defense Highways to its role ''as the premier system that meets the growing and shifting demands of the 21st century.'' This study holds the promise of potentially adding capacity—either additional lanes to existing highways or actual new highways—to the system. Keep in mind, the Interstate system as we know it today was designed at a time when not as many people were living in places like Phoenix, Dallas, Houston, and Atlanta. If done properly, this will not be ''just another study'' but something that future surface transportation legislation can build on by providing a justification for enhanced capacity.

Infrastructure Funding

The current highway program is funded at approximately $40 billion per year and the transit program at just short of $11 billion per year. The FAST Act increases those numbers by 2020 (the 5th and final year of the FAST Act authorization) to $46.4 billion for highways and $12.6 billion for transit. Certainly not huge increases but significant nonetheless given the general flat funding of most other federal government programs.

The gap between FAST Act authorized spending levels for highways and transit programs and "needs" in 2020 could be as much as $26 billion.

Unfortunately, highways, bridges and transit systems wear out and need to be replaced. And virtually all forecasts for the cost of those "needs"—whether to simply maintain in a "state of good repair" or actually upgrade and add new capacity—far exceed the funding levels authorized under the FAST Act. By one estimate, the gap between FAST Act authorized spending levels for highways and transit programs and "needs" in 2020 could be as much as $26 billion.

To put this in a larger perspective, in 2007 something called the National Surface Transportation Policy and Revenue Study Commission issued a comprehensive report on the infrastructure needs of the nation over the next 50 years. That report pegged the number at a minimum of $225 billion annually for the next 50 years to upgrade our existing system—highway, rail, and transit—to a state of good repair. That same report provided the very sobering observation: we are spending *less than 40 percent of that amount.* By approving a five-year authorization under the FAST Act, Congress has certainly provided a stable and predictable funding program but one that unfortunately only begins to scratch the surface of what needs to be invested.

Financing

The FAST Act arrives at its spending total ($305 billion over 5 years) by maintaining the existing tax structure supporting the Highway Trust Fund (gas and diesel tax and various excise tax/user fees on the motor carrier industry) and transferring funds from the General Fund ($70 billion) to make up the shortfall. In other words, none of the traditional Trust Fund taxes or fees were raised to generate the additional revenue. Congress previously has used General Fund revenues to address what were viewed as short-term funding gaps in the Highway Trust Fund but the FAST Act is the first time Congress essentially has acknowledged that the dollars coming into the fund cannot support the nation's highway and transit programs. The reasons for the shortfall are well documented—more fuel efficient cars, trucks and buses, more vehicles powered by non-fossil-fuels—but the trend is clearly away from the "user pays" concept.

Between now and 2020, someone is going to have to come up with a new funding source or Congress will be looking at a nearly impossible political challenge with the fuel tax.

If there is a dark cloud hanging over the FAST Act, this $70 billion is it. A simple rule of thumb: one cent in the fuel tax raises $1.5 billion in revenue. That's roughly a nine to 10 cent fuel tax increase just to offset the $70 billion in General Fund transfers for the Act. And the sources for that $70 billion—e.g., selling off oil from the Strategic Petroleum Reserve—are not likely to be replicated again.

Fast forward to 2020 and the next surface transportation reauthorization bill. Years of deferred maintenance costs plus new capacity to meet the needs of a growing population and economy plus $70 billion in General Fund replacement funds equals fuel tax increases that could easily be in the range of 25-50 cents a gallon. In the current political environment that is simply not feasible. Between now and then, someone is going to have to come up with a new funding source or Congress will be looking at a nearly impossible political challenge with the fuel tax.

Safety

The safety provisions of the FAST Act are certainly among the most controversial provisions that were debated during the various committee deliberations, be it car (National Highway Traffic Safety Administration), truck (Federal Motor Carrier Safety Administration) or rail (Federal Railroad Administration). Depending on one's political point of view, all three agencies were viewed as either being over-zealous in their regulatory schemes and thus in need of being reined in or asleep at the switch and in need of additional tools to regulate.

For rail, it was the positive train control issue; for trucks it was the truck safety rating system; and for cars, equipment and vehicle recall protocols. The truth, undoubtedly, lies somewhere in the middle and ultimately the desire to have a multi-year reauthorization won out. Or as one senator who had been highly critical of many of the safety provisions but who nonetheless voted in favor of the FAST Act observed, "compromise was necessary."

Congress clearly intends to take a very active role in setting—and monitoring—transportation safety policy.

Regardless which perspective you take, one thing is very clear from the FAST Act: Congress intends to take a very active role in setting—and monitoring—transportation safety policy. For rail, the rail safety title has 15 sections requiring an assortment of rulemakings, reports, and studies on subjects ranging from the aforementioned positive train control, model highway-rail grade crossing safety programs, effectiveness of locomotive horns at grade crossings and evaluating rail track inspection programs. For trucks and its primary regulator the Federal Motor Carrier Safety Administrator, the list covers virtually every aspect of truck safety regulation: drug testing; new safety technologies; high risk carriers; carrier and driver safety ratings; safety data certification; and minimum insurance requirements. If there is one theme running through all of this it appears to be: if the rule or requirement is improving safety, then keep doing it; if it's not, then don't.

What's Next?

The FAST Act will certainly keep the Department of Transportation and all of its related agencies quite busy over the next several months and years with its requirements for a wide range of studies and mandated rulemakings with deadlines stretching from one day to annual reports for five years. The subjects include: environmental streamlining, project delivery, alternative financing, the freight corridor initiative and safety.

While it would be challenging to pinpoint one particular rulemaking or study that might be considered seminal to the entire program, there is one FAST Act initiative that could have far-reaching consequences: the National Surface Transportation and Innovative Finance Bureau. This newly created bureau is charged with administering a number of current DOT programs on project financing as well as promoting innovative financing best practices, reducing delays in environmental reviews and permitting and reducing costs in project delivery and procurement. That's quite a portfolio!

There seems to be a growing sense within the highway/transit community that tax reform may be the most viable option for addressing the revenue shortfall in the Highway Trust Fund, either by increasing taxes or developing an alternative taxing scheme.

Perhaps the most important action over the next two years will occur well outside the confines of the FAST Act: the deliberations before the House Ways and Means Committee and Senate Finance Committee on tax reform. There seems to be a growing sense within the highway/transit community that tax reform may be the most viable option for addressing the revenue shortfall in the Highway Trust Fund, either through an increase in the current taxes or developing an alternative taxing scheme. In the latter category would fall the concept of a vehicle mileage tax or VMT. The VMT carries the benefit of maintaining the ''user pays'' concept and would capture the vehicles powered by energy not currently taxed but raises significant issues of compliance and administrative costs.

Conclusion

So is the glass half full or half empty? Given the political constraints within which Congressional transportation leaders had to operate to arrive at the FAST Act, it's as much as could be expected and probably more. Increasing revenues into the Highway Trust Fund (e.g., raising the gas tax) were essentially non-starters for the Obama Administration and many members of Congress. General Fund transfers had to be off-set with spending cuts and/or revenue enhancers and there's a limit to how far you can go with that. And for a program that unfortunately has become defined by its excesses (the funding of hundreds of questionable projects), there remains a large block of congress members and senators who simply would not support a massive expansion of highway and transit spending. Any one of those factors would have been difficult. All three combined were nearly impossible to overcome. And yet the FAST Act was approved 359 to 65 in the House and 83 to 16 in the Senate.

And while it may sound trite, the FAST Act is evidence that if Congress collectively decides it wants to get something done, it can.

How else to explain conservative Republican Sen. Jim Inhofe (Okla.) teaming up with liberal Democratic Sen. Barbara Boxer (Calif.) to shepherd through the Senate EPW Committee a highway reauthorization proposal. Or Senate Majority Leader Mitch McConnell (Ky.) essentially telling the Senate Commerce Committee, ''we're going to the floor with a highway bill and you're either going to get moving or we're leaving you out.'' Or House Transportation Committee Chairman Bill Shuster (R-Pa.) and Ranking Democrat Peter DeFazio (Ore.) sitting through a six hour markup with 150 filed amendments and jointly opposing—sometimes with pained expressions given the fact they may have personally supported a particular amendment—them to get a bill to the House floor. Or the leadership of the House Ways and Means Committee and Senate Finance Committee (with a big boost from Financial Services) finding a significant revenue offset in the form of a ''limitation on surplus funds of Federal reserve banks'' in order to pay for the bill.

In the end, perhaps the most amazing fact about the FAST Act is that in a 490 page highway reauthorization law, there is not one page, not one paragraph, not one sentence of a Congressional office earmark. Wow!

   ISSN 0148-8155

   ISSN 0148-8155