

## **Proceeds from the Sale or Lease of Real Property**

### 23 USC 156

This past year, the Office of General Counsel of the Department of Transportation issued its analysis and opinion of FHWA's interpretation of 23 United States Code Section 156, the use of proceeds from the sale or lease of real property acquired with Federal-aid funds. The Departments' review by the Office of General Counsel affirms FHWA's interpretation and implementing regulations that the Federal share of sale or lease proceeds do not constitute Federal funds, but must be used by a State for projects eligible for funding under Title 23. The analysis validates the position that the use of the proceeds on a subsequent Title 23 project does not create a Federal-aid project.

The General Counsel's analysis advises that "the State's share (of the sale or lease proceeds) should be treated as State funds, and the use of those funds governed by State law. The Federal share should be considered State funds subject to the Federal condition that they must be used for a project (or projects) that are eligible for funding under Title 23, United States Code".

The following are excerpts from that opinion:

- The proceeds of such sale are not federal funds.
- The only constraint is that such proceeds must be used on projects that could be eligible for federal assistance under title 23.
- Where the property is excess to project needs, and such proceeds are used for title 23 projects, a Federal-aid project is not created.
- Although the statutory language in §156 provides specific requirements that a State must follow to ensure that the intent of Congress is carried out relative to the net proceeds of a sale, that language does not make R/W proceeds federal funds.
- FHWA has held the position that a limitation on the reuse of funds to title 23 purposes does not give rise to federal participation as a matter of law.

In December 2002, the General Accounting Office (GAO) issued a report detailing the findings of its investigation into the State's use of proceeds from the sale or lease of real property acquired with Federal funds. The GAO studied all 51 state DOT's, including the District of Columbia, and found that some states did not have restrictions on how the federal share of proceeds should be used. This may have allowed some proceeds to be used on projects not eligible for federal-aid. The Federal share of net income must be held in an appropriate state account. It does not have to be a unique account, as long as records are adequate to document ultimate use of the funds. When the State is ready to use the funds, the total amount of such funds shall be used on Title 23 eligible projects. States should have an accounting system in place which documents: (1) the amount of the Federal share of net income deposited in an appropriate state account (a state transportation fund) during the fiscal year, and (2) the amount of the Federal share of net income expended on Title 23 eligible projects during the fiscal year.

The regulations found at 23 CFR 710.403 (d) and (e) remain unchanged. Additional questions and answers can be found on the ORES website at the following address:

<http://www.fhwa.dot.gov/realestate/tea21dw5.htm>