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A. Introduction

Chairman Inhofe, Ranking Member Cardin, and members of the Committee, thank you for inviting me to testify today. My name is Geoff Yarema. I am a partner in the Infrastructure Practice Group at the law firm, Nossaman LLP.

While the views I express here today are my own and not necessarily those of any colleague or client of the firm, my testimony reflects a long career representing units of state and regional governments across the country, all struggling to solve their mobility challenges in a period of ever-shrinking federal gas tax revenues. In that capacity, I have had the honor of advising on the wide array of innovative approaches to deliver and finance large transportation projects that minimize reliance on federal funding.

I have also had the privilege to serve on the National Surface Transportation Infrastructure Financing Commission, which carried out a bipartisan, Congressional mandate under SAFETEA-LU. The Commission's final report recommended numerous approaches to addressing the major deficits affecting passenger and freight mobility in the United States.

As our Commission reported at the time, "The nation faces a crisis. Our surface transportation system has deteriorated to such a degree that our safety, economic competitiveness and quality of life are at risk." That view remains true today.

Thanks largely to this Committee's action and, Mr. Chairman, to your leadership in particular, the last two authorization bills – MAP 21 and the FAST Act – represent real progress. There is still much work to do, however, which is why we are all here, collectively determined to seize the opportunity.

If we are to remain the leader of the global economy, we must have, as Chairman Barrasso has repeatedly noted, a significant supplement to existing federal infrastructure funding. How much that supplement should be and how it is to be paid for

are critically important questions I will leave to other witnesses or another time to address. Whatever the size of the new program, however, it will almost certainly fall far short of what we need to clear our infrastructure backlog, defined by the major deficits in our state of good repair and the sheer expense of needed capacity expansions.

Instead, I would like to focus today on the equally important question of how to spend new discretionary funds in the most impactful way possible. Can we do it in a way that recognizes this historic opportunity and achieves a more lasting impact than can be reached either through arbitrary federal selection of "shovel ready" projects or by providing a marginal increase to existing transportation programs? I respectfully suggest the answer is yes.

By working together, Congress and the Administration can achieve this paradigm shift through what I call the **Infrastructure Incentives Initiatives**, or "***In3***."

B. Infrastructure Incentives Initiative

In3 would expend new discretionary resources expressly to spur the following outcomes:

- **Creating significant leverage** by incentivizing infrastructure owners to secure and commit their own revenue measures, bond programs and project revenues well beyond traditional federal-state funding splits.

- **Assuring long term performance of all new capital improvements** by incentivizing infrastructure owners to avoid future deferred maintenance and to instead capture lifecycle cost efficiencies through outcome-based specifications and strong funding commitments.

- **Modernizing business practices** by incentivizing infrastructure owners to update outmoded procurement policies and project delivery approaches to better reflect 21st Century models, including public-private partnerships ("P3s"), and to capture the best of private sector capabilities.

- **Incorporating new and rapidly evolving technology** by incentivizing infrastructure owners to design their capital spending programs in ways that maximize the benefits of innovation, including autonomous and connected mobility.

Applying these principles to the allocation of new federal funds would move the federal government away from selecting specific projects. Instead, the federal role would be to use its resources expressly to spur its non-federal partners to achieve better long term infrastructure outcomes and program-wide enhancements.

In3 will work effectively to provide the necessary support and incentives to deliver needed highway reconstruction, transit capacity and freight and supply chain improvements not just in urban areas, but in rural areas as well. It can be scaled to

match whatever size funding program is created and can be adapted to other government-owned infrastructure classes, not just transportation.

C. Digging Deeper

So how would *In3* work in practice?

The federal government would use new funds to create a discretionary program that rewards and assists non-federal project sponsors in achieving the four outcomes identified above.

These new funds would be allocated towards programs of projects, not individual projects. Each project sponsor would demonstrate in their applications how they planned to achieve these four outcomes and the specific steps they planned to take to make these outcomes a reality. For programs of projects that received funding, the funding would be contingent upon the project sponsor achieving the progress benchmarks outlined in their application.

To maximize the impact of this approach, federal discretionary funds should be paid out over a period of years, smoothing federal budgetary impacts, laying the foundation to attract non-federal investment and allowing for project sponsors to allocate resources optimally instead of artificially advancing the most “shovel-ready” projects.

Using this approach, project sponsors could use the funding commitments as instruments to borrow against, further leveraging limited non-federal funds to achieve outsized results.

D. Rural and Urban Areas

In3 can and should be implemented to incentivize outcomes for the benefit, not just of urban areas, but for the rural areas as well. The degree of funding leverage might be different than what’s achievable in urban areas, but *In3* can be designed specifically to incentivize the tough political decisions inherent in “self-help” revenue decisions in less populated but interstate highway-intensive regions.

The state gas tax increases Wyoming, Idaho, Nebraska, Georgia, Vermont, Tennessee, and Indiana have all recently implemented to supplement existing federal funding provide models that other states should emulate. Along with such efforts as Measure M in Los Angeles, California, Proposition 1 in Austin, Texas, the transportation ballot initiative in Charleston, South Carolina and Sound Transit 3 in Seattle, Washington, these “self-help” actions demonstrate how state and regional governments can generate billions of dollars of supplemental transportation investment – results that are entirely replicable around the country with the right incentives.

Funding is only part of the solution, however. *In3* would build on the progress rural states have already made to leverage additional infrastructure funds by incentivizing the other three outcomes as well.

While *In3* would incentivize the use of the right business tool in the project delivery toolbox for each project, one of those tools could be P3s. I believe that there is a general misunderstanding about the potential value of P3s in rural areas, however.

There are two primary types of P3s – those that require a revenue steam, such as a toll road, and those that do not. The latter type of P3, known as an availability or performance payment P3, is the most common type in the market today. It requires no project revenues and presents a different value proposition than the conventional contracting approach of telling a contractor not just what to do but how to do it, and then compensating the contractor for construction progress, without warranty for the resulting product, in most cases.

A performance payment P3, by contrast, compensates the contractor only for infrastructure performance. Akin to a supercharged warranty, government parties to these transactions generally make no payments until the contractor completes the project and the government owner accepts the work. Upon acceptance, the government owner commences making maximum "performance payments" on a level basis through the P3 contract life. Payments are subject to adjustment downward to the extent the infrastructure underperforms on any number of issues, including quality, safety, or availability. At the end of the life of the contract, the contractor is required to hand back the infrastructure asset in accordance with a predetermined condition.

This tool ensures that the companies that design and build a project are on the hook for the long term performance of the infrastructure, are required to take lifecycle cost into account in bidding on the project and are rewarded for innovative delivery solutions.

I respectfully suggest these outcomes are just as valuable in the rural setting as they are in the urban contracting environment.

F. Complementary Reforms

For maximum effect, *In3* should be coupled with the following complementary policies:

- Make impactful changes to federal environmental review and permitting processes that have unduly limited and delayed the delivery of needed infrastructure. This effort should include reshaping the role of the Council on Environmental Quality and should achieve greater consistency and predictability in environmental review and permitting processes.

- Increase the size of the TIFIA program to meet all projected eligible demand and significantly reform the program to improve efficient administration and borrowing flexibility.

- Remove the cap on private activity bonds for transportation and authorize private activity bonds for other classes to better enable private investment in publicly-owned and privately-managed infrastructure.

- Update long out-dated federal tax incentives to encourage at-risk equity and debt capital investment in publicly-available infrastructure projects.

- Empower state and regional governments to make their own highway tolling decisions, which are currently under undue and unneeded federal restrictions.

- Reduce federal procurement and contract oversight burdens on state and regional governments, relying instead on well-established owner practices and capabilities to self-certify performance and avoiding regulatory inefficiencies and redundancies.

G. Conclusion

In3 would have our Nation be more ambitious for the outcome of its hard fought infrastructure investment than just to fund a federally-selected basket of shiny new projects. It would expressly urge every state and city with major infrastructure challenges to partner more aggressively with the federal government in exchange for new funding. That partnership would result in outsized program responses, with each area around the country selecting for itself, in accordance with its own unique programmatic and project-driven needs, what kind of "self-help" leverage to commit and what projects are most worthy of completion.

At the same time, *In3* would spur state and regional owners to make commitments to new and future technology, private sector innovation, modern business models and lifecycle cost performance.

Thank you for your kind attention. I stand ready to assist the Committee as it pursues its legislative efforts.