

TRANSPORTATION PLANNING AND THE ENVIRONMENT

ROSS D. NETHERTON*

When Congress approved the Department of Transportation Act in 1966, it enunciated and gave the force of law to a new national policy that "special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites."¹ The provisions for implementation of this policy were set forth in Sec. 4 (f) of the act, as follows:

"The Secretary shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge, or historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

This legislation was, in one sense, a response to the statement in the President's Message calling for establishment of the Department of Transportation, in which were listed certain shortcomings of the Nation's transportation system, and specifically said that "[I]t is not good enough when it lays out new freeways to serve cities and suburbs—and carelessly scars the irreplaceable countryside."² In a larger sense, however, Congress was addressing a problem which lies much

*B.A., M.A., J.D., University of Chicago; LL.M., University of Michigan; S.J.D., University of Wisconsin. Admitted to bar, State of Illinois, U.S. Supreme Court.

1. PUB. L. No. 89-670 (October 15, 1966).

2. H.R. Doc. 399, 89th Cong., 2d Sess., March 2, 1966.

deeper in the nation's system for the management of resources through the investment of public funds. This problem involves the task of determining priorities in managing the nation's growth, including the specific problem of reconciling competing public uses of land and other resources. By "managing the nation's growth," I mean conserving as well as exploiting, maintaining as well as changing the face of the land, with applications to the man-made environment of urban areas as well as the natural environment of all types. It was, therefore—and still is—a problem which touches both the basic needs of the public and the basic powers of government. The policy set forth in the Department of Transportation Act was not the first expression of Federal concern for the values of recreation land, environmental quality and the country's cultural history. One month before the Department of Transportation Act, the President had signed the Federal-Aid Highway Act of 1966, which declared that in carrying out the highway program there should be a "maximum effort to preserve Federal, State, and local government parklands and historic sites, and the beauties and historic values of such lands and sites."³ Implementing this policy, the act provided that after July 1, 1968, approval of highway projects using such lands would be predicated on a showing that the project was based on "all possible planning, including considerations of alternatives to the use of such land, to minimize any harm to such park or site resulting from such use."⁴ This feature of the 1966 Federal-Aid Highway Act was largely the work of Senator Jackson of Washington, Chairman of the Senate Committee on Interior and Insular Affairs, and Senator Yarborough of Texas.

THE TROUBLE WITH HIGHWAYS

The problem which these Senators sought to deal with was stated by Senator Yarborough in proposing to amend the 1966 Highway Act. He said:

State and Federal Governments have on the whole performed superbly in building the highway system Yet in recent years, it must be recognized, there has been some sharp discontent—not with the highway system as a whole, but with a series of specific cases in which the highway threatens to become a destroyer rather than a creator, to rob assets rather than add them, to blight rather than build

3. PUB. L. No. 89-574 (Sept. 13, 1966).

4. *Ibid.*

Up to now the highway system has moved well in the open country-side where more elbow room, less costly land rights-of-way and lower density of population have given the highway planner the opportunity to lay out modern highways with least hurt to other interests and maximum gain to all What has happened is that the highway planners and engineers have tried to apply what can be well, effectively and most easily done in the open countryside, to the more heavily built-up and populated areas

It is ironic that at the same time the Congress has encouraged and provided funds for the acquisition and development of parks and other open spaces, it has permitted the highway program to take away just such spaces. It hardly seems consistent to pay Paul while robbing Peter.⁵

The Senator went on to suggest that the trouble was that there was no guiding policy for planning the highway program in such a way as to save the other assets of the environment. To this end, he offered an amendment to the highway act which stated such a policy and provided that after July 1, 1968, approval of highway projects which required land being used for federal, state or local parks or historic sites would be conditioned on "no feasible alternative to the use of such land," on the project including "all possible planning to minimize any harm to the park or site resulting from such use," and, "where possible and appropriate," providing substitute land for the park or site.

Senator Yarborough returned to this topic several more times in the days that followed, building the case for his amendment with examples of what he cited as the highway program's disregard for environmental and cultural values. Destruction of an 1840 seawall in St. Augustine, a proposed six-lane expressway along the Mississippi in front of New Orleans' French Quarter, Los Angeles' Elysian Park and San Antonio's Brackenridge Park, 150 historic buildings in Philadelphia, the Embarcadero Freeway and San Francisco's waterfront—all these and more were marched through the record to demonstrate the observation that "[In] an undeveloped area perhaps any road can be a good road, but in an overdeveloped area any road can be a bad road."⁶

The considered judgments of some of the nation's most articulate observers of the urban scene were also cited. Analyzing New Orleans'

5. 112 CONG. REC. 14,073 (1966).

6. 112 CONG. REC. 17,632 (1966), *quoting from The Headless Horseman Rides Again*, HISTORIC PRESERVATION, 128 (July-August, 1965).

plight, Wolf Von Eckhardt pointed up an important facet of the total problem when he noted that:

As elsewhere, study after highway department-sponsored study 'proved' the infallibility of the highway department's decision. As elsewhere, the city planners failed to do any planning and therefore could not propose any alternatives.⁷

Lawrence Halprin saw the problem this way:

The problem in handsome freeway design has been thought to be primarily one of the design of structures, but this has been overemphasized. Most freeways, no matter how beautifully structured, cannot overcome the enormous damage and destruction which these vast and complex arteries cause in the heart of a city by their very presence and, more importantly, by the fact of their dumping cars into the downtown core. The real problem is how to integrate freeways into the fabric of the city without destroying important civic values. It is the fragmentation of outlook, the inadequate attention to integrated overall environmental planning, rather than the architectural design of the structures, that has resulted in serious errors. . . .

The design of urban freeways, on the whole, must follow a design approach which is diametrically opposite to rules laid down for scenic highways in the country If these [scenic highway] criteria are applied in the heart of cities, they result in havoc. The long, sinuous curve destroys innumerable houses, the wide right-of-way creates barriers of incredible width between neighborhoods, and the continuous curves are completely unsympathetic and visually destructive to the predominant linear qualities of the cities. The scenic highway in the city is antiurban and destructive of urban values. Urban freeways must be designed as part of the urban environment, with narrower rights-of-way, linear qualities, and multiple levels; . . .⁸

He went on to suggest in detail how freeways could become integral parts of the cityscape utilizing design which blended them into the man-made design of urban areas and recognized that the entire function of transportation inside cities differed from that of transportation outside these areas.

RURAL PARKLANDS AND WILDLIFE AREAS

While the case for the Yarborough amendment was thus being built on alleged failure of the highway program to provide the right kinds

7. 112 CONG. REC. 14,386 (1966).

8. 112 CONG. REC. 17,632-33 (1966), *quoting from* L. HALPRIN, *CITIES*, (1964).

of highways for cities, the problems of highway route location in rural areas were also coming under increasingly critical scrutiny. As in the case of the city, the countryside had its share of illustrative situations which dramatized the problems of building highways without destroying environmental values—the court battle over attempts to build a four-lane highway through Prairie Creek Redwoods State Park in California, the negotiations between the Bureau of Public Roads and the Forest Service over protection of the trout stream in Utah's Logan Canyon in connection with reconstruction of the highway along the canyon floor, the public demonstrations against the East Hudson Parkway Authority's construction crews cutting down trees for parkway improvement in Westchester County (leading to the arrest of 16 persons who linked arms in front of the bulldozers), and proposals to build roads through the Everglades, the University of Oklahoma's wildlife refuge, the western shore of Lake Tahoe, and the Wheeler National Wildlife Refuge in northern Alabama.⁹

There do not appear to be any statistics on exactly how much recreation land, wildlife and scenic areas, and reserved open space have been taken for highways since the accelerated road construction program began in 1956. Estimates that nationwide one million acres are passing from rural to urban status each year indicate something about the overall magnitude of the process involved, but not the amount of land highways consume.¹⁰ Such data would have to be compiled from land-using agencies of the Federal, State and local government, and various special instrumentalities of government. To date, it apparently has not been undertaken.

Another facet of the criticism of highways focused on the destructive effects which were alleged to result from the way they are designed in relation to streams and other bodies of water. These effects arise from cut and fill operations which straighten meandering watercourses, alter the drainage pattern of stream basins, and often lead to erosion. The harm which these effects may have on fish and wildlife is well documented;¹¹ but, again, the data is regional and selective. Thus, the assertion that in the Pacific Northwest more than 50 prime trout

9. 112 CONG. REC. 17,640-44 (1966).

10. U.S. DEPARTMENT OF AGRICULTURE, *Major Uses of Land and Water in the United States*, AGRICULTURAL ECONOMIC REPORT No. 8, (Washington G.P.O., 1962), 9.

11. 112 CONG. REC. 19,476 (1966).

streams have been ruined by poor highway design,¹² is merely suggestive, as is the report that:

"A survey of 24 Montana streams showed 78.4 miles of stream had been lost to highway and railroad construction. The national loss from straightening meanders must be in the thousands of miles."¹³

In 1964, hearings on this problem were held before the Senate Committee on Public Works. As a result, the Bureau of Public Roads issued a policy directive requiring consultation between highway departments and State wildlife agencies whenever federally-owned lands were being crossed by a highway project.¹⁴ However, this has not been the case with the effects of highway construction with other aspects of ecology, which have little documentation.¹⁵

THE COMMON LAW AND STATUTE BACKGROUND

Still another facet of the background of the Yarborough amendment involved the provisions of the common law and State legislation for reconciling the competing interests of environmental values and transportation. Proponents of the amendment claimed the state of the law heavily favored the highway.¹⁶

The question of whether a public agency could, through eminent domain, take land already devoted to public use was not a new one. It had arisen by the 1840's when the outburst of demand for railroad right-of-way brought eminent domain into prominent (and sometimes promiscuous) use. Illustrative of these times is the case of *Inhabitants of Springfield vs. Connecticut River RR*,¹⁷ in which the Massachusetts Supreme Court found it necessary to enjoin the railroad from laying its tracks down the middle of a public road, unless, upon remanding the case, it was found to be really necessary.

In these days of free-for-all railroading, things got considerably worse before they got better—if one is to believe the court cases. There

12. DOUGLAS, *The Public Be Damned*, 16 PLAYBOY 143, 182 (July 1969).

13. 112 CONG. REC. 19,477 (1966).

14. UNITED STATES BUREAU OF PUBLIC ROADS, COORDINATION OF PUBLIC INTERESTS OF HIGHWAY IMPROVEMENTS WITH THOSE OF FISH AND WILDLIFE RESOURCES, INSTRUCTIONAL MEMORANDUM 21-5-63, June 12, 1963.

15. CONG. REC. *supra* note 13.

16. See, e.g., FORER, *Preservation of America's Park Lands: The Inadequacy of Present Law*, 41 N.Y.U. L. Rev. 1093 (1966), TIPPY, *Roads and Recreation*, 55 Ky. L. J. 799 (1967).

17. 58 Mass. (4 Cush.) 63 (1849).

are numerous records of such disputes, including instances where railroads were stopped from going through public parks,¹⁸ and even one California decision in 1863 which had to stop one railroad from condemning the right-of-way of another railroad.¹⁹

From these cases came the doctrine of prior public use, which held, in substance, that where prior public use exists, only an unambiguous and positive act of the sovereign can sustain the taking of such land through eminent domain. Over the years, this doctrine has developed refinements. One such refinement holds that prior public use is protected only if the land is publicly owned or subject to an obligation of public service imposed by the sovereign state. Another is that no prior public use is protected against condemnation by the United States,²⁰ and that the sovereign States and their agencies may condemn land owned and publicly dedicated by non-sovereign units of government.²¹ These refinements indicate that the doctrine of prior public use is not a constitutional limitation on the inherent sovereign power of eminent domain, but rather a doctrine controlling the interpretation of the uses of that power—specifically, the legal effect of acts by the sovereign or its delegate at two different points in time.²² Or, to put the question differently, when does the law recognize that the sovereign has changed its mind concerning the substitution of one public use for another on the land?

Whatever the state of the common law might be, proponents of the Yarborough amendment argued that in numerous instances State legislation often weighted the law in favor of highway use of the land. Citing the California and New York statutes as instances in which the highway departments' authority for use of eminent domain was worded to give a clear preference in favor of roads over parks,²³ they argued that if this was in fact the State law it was unfair and unwise. In other instances, such as the ruling of the Texas court in the

18. *In re Boston & Albany R.R.*, 53 N.Y. 574 (1873).

19. *Contra Costa Coal Mines R.R. v. Moss*, 23 Cal. 324 (1863).

20. *United States v. Carmack*, 329 U.S. 230 (1946).

21. *State Highway Comm'n v. City of Elizabeth*, 102 N.J. Eq. 221, 140 A. 335 (N.J. Ch. 1928), *aff'd mem.*, 103 N.J. Eq. 376, 143 A. 916 (N.J. Ct. Err. & App. 1928); 1 P. NICHOLS, *EMINENT DOMAIN* § 2.2 at 203 & n. 51 (3d ed. 1950).

22. *State Highway Comm'r v. Union County Park Comm'n* 89 N.J. Super. 202, 214 A.2d 446 (Super. Ct. L. Div. 1965), *appeal dismissed as moot*, 48 N.J. 246, 225 A.2d 122 (1966). See also 68 COLUM. L. REV. 155, 157 & n. 16 (1968).

23. CAL. STS. & H'WAYS CODE § 103.5 (West 1956); N.Y. H'WAY § 10(28) (McKinney 1962); N.Y. PUB. LANDS § 3(4) (McKinney 1951).

controversy over San Antonio's Brackenridge Park, they argued that courts had improperly expanded the meaning of State statutes which merely gave the highway department a general authority to condemn for right-of-way acquisition.²⁴

Also cited as unfairly weighting the balance of power in favor of the highway program was Sec. 108 of the Federal highway law, authorizing Federal condemnation where the State could not do so, and the instances where this procedure had been used to acquire right-of-way through land reserved by State law to other public or quasi-public services.²⁵

Admittedly, the state of the law was not minutely scrutinized in the debates on the Federal-Aid Highway Act of 1966. If it had been, there might have been some discussion of the signs for hope that the courts themselves will work their way out of the dilemma of the prior public use problem. It obviously is not in the interest of an orderly system of laws to encourage easy displacement of one public use by another, or to allow a merry-go-round of litigation to get started among several contending agencies of a State which all have condemnation powers. The decisions in *Texas Eastern Transmission Corporation vs. Wildlife Preserves, Inc.*²⁶ and *Board of Education vs. Pace College*,²⁷ in 1965 and 1966 respectively, suggest that there still remains some room for flexible handling of the claims of competing public uses without putting the court into the unenviable position of weighing communal benefits from present or proposed public uses and judging such cases as they interpret community needs.

Be this as it may, the current state of both common law and statute law was presented as offering little protection to the environmental values of the community, and the case for the Yarborough amendment was thus strengthened.

EXTENSION OF THE NATIONAL POLICY

The issues raised by Senator Yarborough and proponents of his amendment were not answered or rebutted either in the hearings or debates. In its report, the Senate Committee on Public Works noted

24. 23 U.S.C. § 108 (1966).

25. *United States v. Certain Parcels of Land*, 209 F. Supp. 483 (S. D. Ill. 1962) *Aff'd sub. nom.* *United States v. Pleasure Driveway, and Park Dist.*, 314 F.2d 825 (7th Cir. 1963).

26. 48 N.J. 261, 225 A.2d 130 (1965), *aff'd* 230 A.2d 505 (1967).

27. 27 App. Div. 2d 87, 276 N.Y.S.2d 162 (1966).

that it had considered two matters beyond the original proposal: one was the protection of wildlife refuge areas, which it recommended; the other was the addition of a provision authorizing as part of right-of-way cost the acquisition of substitute land as "reimbursement" for parkland taking, which it did not recommend because of the indeterminate cost involved.²⁸ However, neither of these features was adopted by the Senate.

In the Senate-House Conference Committee, the amendment was agreed to, with deletion of the requirement that there be no feasible alternative to use of the land for highway purposes, and addition of the requirement that planning must include consideration of alternatives to use of the land for highway purposes.²⁹

This new provision of the 1966 highway law presented its administrators with three problems: (1) the need for clear definitions of the parklands and historic sites covered by the act; (2) the need for procedures to assure that the spirit of the law was honored in case administrative decisions were disputed; and (3) the need for a mechanism of liaison and coordination between the Federal agencies involved—the Bureau of Public Roads, and various agencies in the Departments of Agriculture, the Interior, and Housing and Urban Development.

Before these questions could be fully explored, however, the Congressional policy and mandate were altered by passage of the Department of Transportation Act.³⁰ With this act, the national policy was extended to include wildlife and waterfowl refuges, the requirement of no feasible or prudent alternative to use of the land for highways

28. S. REP. No. 1410, FEDERAL-AID HIGHWAY ACT OF 1966, 89th Cong., 2nd Sess. 38, 45 (1966).

29. H. R. REP. No. 1903, 89th Cong., 2nd Sess. 11, 12 (1966).

30. PUB. L. No. 89-670 (October 15, 1966).

As finally enacted, 23 U.S.C. 138 read as follows:

Preservation of Parklands.

It is hereby declared to be the national policy that in carrying out the provisions of this title, the Secretary shall use maximum effort to preserve Federal, State, and local government parklands and historic sites and the beauty and historic value of such lands and sites. The Secretary shall cooperate with the States in developing highway plans and programs which carry out such policy. After July 1, 1968, the Secretary shall not approve under section 105 of this title any program for a project which requires the use for such project of any land from a Federal, State, or local government park or historic site unless such program includes all possible planning, including consideration of alternative use of such land, to minimize any harm to such park or site resulting from such use."

became a condition of project approval, and all transportation projects (rather than just highways) became subject to the policy and approval procedure.³¹

The House of Representatives accepted Sec. 4 (f) cautiously, and, in its debate on adoption of the conference report, warned that it should not be "misinterpreted to mean that preservation of natural and man-made resources would be the overriding consideration in highway construction. It was made clear at the time that as desirable as parkland preservation might be, other important factors must be considered."³²

In the conference, the term "prudent" was added to "feasible" for the purpose of emphasizing that environmental considerations should not exclude all others. On this, Rep. Kluczynski said:

To do so would result in as many inequities as justifying transportation plans merely on the basis of economy or efficiency. Other considerations would include the integrity of neighborhoods, the displacement of people and businesses, the protection of schools and churches, and the myriad of other social and human values we find in our communities.

Attempting to define "feasible alternative" in light of all of these considerations is virtually impossible, and may result in hampering and otherwise unnecessarily delaying transportation progress I am glad to see the words 'and prudent' added to this section by the conference committee. With 'prudent' as the operable word, this section now becomes workable and effective³³

Equally pointed concern for the administration of Sec. 4 (f) was shown in the Senate as Secretary Alan Boyd took office as the first head of the new Department of Transportation. In hearings on his confirmation, he answered a series of questions regarding his interpretation of this law. As to coordination in planning, he noted that the Bureau of Public Roads had asked the State highway departments to develop procedures for obtaining comments on highway route plans from other agencies responsible for parks, fish and game refuges and historic sites. Where divergent views could not be reconciled in the field, questions would be submitted to BPR headquarters for decision. As to the meaning of the term "feasible and prudent alternative," he

31. *Ibid.* § 4(1).

32. 112 CONG. REC. 26651 (October 13, 1966).

33. *Ibid.*

declared that "the proper implementation of the congressional intent will depend upon deciding when to accept higher monetary or social costs in order to preserve our natural, aesthetic and historic heritage."³⁴ As to whether transportation planners had the "burden of proving the need to construct an alternate route" around parklands, he felt this was a matter for mutual cooperation by all concerned. And as to his plans for consulting with the Secretaries of the Interior, Agriculture and Housing and Urban Development, he read the law as applying generally rather than to individual projects.

This colloquy was recalled by Senator Jackson in April 1967 in a letter to former Secretary Boyd which noted the Senator's concern that these views did not adequately reflect the purpose and intent of the law.³⁵ Senator Jackson noted that Sec. 4 (f) applied to all forms of transportation projects, not merely highways, and required the Secretary of Transportation to consult with the states and Secretaries of Interior, Agriculture and Housing and Urban Development for several purposes, including the determination of what constitutes a "feasible and prudent alternative" and "all possible planning to minimize harm." Moreover, this consultation requirement applied not only to "plans and programs" but also to "any program or project." He expressed the opinion that such consultation would be most helpful to the Secretary of Transportation in deciding controversial cases, which ultimately was his responsibility under the law, and urged that a formalized review and appeal procedure be established at the Secretarial level for such controversies.

In the year that followed, the new Department of Transportation engaged in the necessary tasks of organizing itself and establishing its working relations with Congress and the other Federal departments. Day-to-day administration of the Federal-aid highway program continued much as it had. No new policy and procedure memoranda or instructional memoranda were issued regarding Sec. 4 (f), for it was the view of the Bureau of Public Roads that its existing directives to the state highway departments and its own field offices already provided adequate means for assuring consideration of environmental factors in planning and construction.

As visualized by the Bureau of Public Roads, its existing administrative machinery would handle "Sec. 4 (f) cases," and implement the

34. *Hearings on Nomination of Alan S. Boyd to be Secretary of Transportation before the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 54, 55 (1967).

35. Letter, Senator Henry M. Jackson to Hon. Alan Boyd, Secretary of Transportation, April 20, 1967.

national policy generally, in the following manner: Initial responsibility for determining the involvement of parkland, wildlife refuges and historic sites rested with the State highway departments. As their planners and designers developed locations for highway corridors, and, thereafter, plans for right-of-way lines and design specifications, the state's engineers would contact other governmental agencies and public or private organizations whose parks, refuges or historic sites were encroached or affected. The interests of these parties would be ascertained, and their positions compiled and considered by the State in preparing its project proposal. Alternative routes, if any, suggested by non-highway agencies would be included in the analysis.

Ideally all positions would be finalized before the State prepared its recommendations for submission to the Bureau of Public Roads. Thus supported, the recommendation of the State could be reviewed by BPR Division and Region Engineers and Washington headquarters. Relying on completed and coordinated work in the field, BPR's headquarters has no need for further consultation with the headquarters offices of other Federal agencies in order to determine the conditions of its approval of projects, even where the State highway department had not been successful in resolving all controversial aspects of the projects.³⁶

The only statutory exception to this procedure for advising the Secretary of Transportation on highway project approval applied where historic sites were involved. Under PUB. L. 89-665, the so-called Historic Preservation Act of 1966,³⁷ the heads of Federal agencies responsible for Federal or federally assisted programs must afford the President's Advisory Council on Historic Preservation an opportunity to comment on projects which affect historic sites and landmarks listed in the National Register. Since the establishment of this 17-member council in 1967, these review activities have been confined to controversial cases, but several of these have occurred, and the Council's advice has been utilized to good effect.

THE LAW IN ACTION

The logic of this administrative system seems eminently sound. Experience since 1966, however, has indicated that in many instances

36. Summary based on interview with John Kessler, Office of Right of Way and Location, U.S. Bureau of Public Roads, Washington, D.C., July 10, 1969.

37. PUB. L. No. 89-665 (October 15, 1966).

the law in action does not conform to its theory. In practice it has turned out that the positions of the contending parties are seldom final when submitted to BPR by the state highway departments. Moreover, decisions by highway authorities, even by the Secretary of Transportation, were not accepted as final by those who disagreed with them. Throughout the entire process of administrative review, issues not fully settled by the state highway departments have remained negotiable, and parallel to this process there frequently has been recourse to the political authorities, the courts, and the press for attempted relief.

A number of causes may contribute to this condition. One, no doubt, is a "never-say-die" spirit among people who are aroused over what they regard as the unnecessary taking or damaging of land having values which surpass its use for transportation purposes. Another is the fact that interagency consultation on programs and projects has never been encouraged by a formalized arrangement—a point stressed by Senator Jackson.³⁸ Another is the fact that it has not been clear whether Sec. 4 (f) applied to projects in progress when the law was passed.³⁹ And, most recently, it is not entirely clear what effect the two-hearing procedure for route location and highway design may have on the handling of environmental conservation issues which may be involved.

Against this background, it is to the credit of the state highway departments, the Bureau of Public Roads, and the various recreation land-managing agencies that they have been able to reconcile the great majority of their mutual problems in the field. Periodically, a log is compiled by the Bureau of Outdoor Recreation, which shows active transportation projects having impact on parks, refuges and historic

38. *Supra*, note 34.

39. During debate on acceptance of the Conference Report on the Department of Transportation Act, Rep. Cramer noted that Sec. 4(f) became effective 90 days after appointment of a Secretary or whenever declared by the President, whereas the Federal-Aid Highway Act of 1966 specified that "conforming highways to the preservation of parks should not be effective until July 1, 1968." In reply to Rep. Cramer's query as to which law controlled, Rep. Holifield, floor manager of the bill, and Rep. Hardy, replied as follows:

"Mr. HARDY: I think it would be correct to say, would it not, that it was not our intention to accelerate this date that had been decided on past the statutory law?"

"Mr. HOLIFIELD: That is certainly true that it was not our intention to accelerate this date, and we were unaware that we were accelerating the date in this language." 112 Cong. Rec. 26652 (October 13, 1966).

sites. The log for June 1969 shows some 47 highway and 6 airport projects in 25 states, the District of Columbia and the Virgin Islands. The status of these projects ranges from the stage of location selection by the state, through submission to and approval by BPR, to projects under construction. This compilation has no official status as a roster of Sec. 4 (f) cases, for in some instances the projects listed do not come within the scope of Sec. 4 (f) as currently amended. Also, it is limited to those situations which have been formally called to the Bureau's attention by public or private agencies. Their listing does not imply any position by the Department of the Interior. However, the record shows that consultation and negotiation over controversial aspects of some projects continues after BPR approval of routes and designs, sometimes even after construction is underway. It thus suggests the complexity of the administrative task involved in giving full effect to the national policy declared by Congress in Sec. 2 (b) (2) of the Department of Transportation Act, and an underlying cause for re-examination of Sec. 4 (f) in 1968.

THE FEDERAL-AID HIGHWAY ACT OF 1968

Hearings on the Federal-Aid Highway Act of 1968 included the following testimony by the American Association of State Highway Officials:

At the risk of being charged as insensitive to recreation, conservation and historical sites, we believe there is an overemphasis and overenthusiasm in administering Sec. 4 (f) of the Transportation Act of 1966, to the point that needed highway improvements are being delayed and complicated, and that section 4 (f) is being used to reopen decisions previously made or slow down the program. . . . We believe that the Congress wrote its intent regarding the administration of section 4 (f) in the legislative history, but now we feel that that intent should be spelled out in legislation.

We are conscious of an involvement by nonhighway oriented attorneys and policy planners in the Department of Transportation in writing minutia and details in instructional and procedural memorandums pertaining to section 4 (f), and that much of this detail definitely encroaches on the authority and responsibility vested by the States in their highway commissions.⁴⁰

In hearings before the Committee on Public Works of the House of Representatives, the AASHO witnesses were questioned for details

40. *Hearings on H. R. 17134 Before the Subcomm. on Roads of the House Comm. on Public Works*, 90th Cong., 2d Sess. 271 (1968).

of this matter. Projects involving a Potomac River bridge for Washington, parks in Memphis and San Antonio, a primitive area in Colorado, and New Orleans' waterfront expressway were cited as illustrating the situations causing trouble.⁴¹ It was implied that in practice Section 4 (f) was being interpreted as a prohibition against use of parks, refuges and historic sites rather than a mechanism for facilitating consideration of all relevant interests and alternatives.⁴²

In its report, the House Committee on Public Works stated what it considered the basis for implementing the policy of both Sec. 138 of the 1966 Highway Law and Sec. 4 (f) of the Department of Transportation Act, as follows:

Neither section 138 nor section 4 (f) stands alone as the beacon lighting the way to wisdom in the administration of our resources. Both are intended to broaden, not narrow, the perspective in decision-making. Parklands and historic sites, as well as the other kinds of areas listed in these sections, have very real value; if that were not so, neither section of law would exist. No rational person would suggest, however, that that value is the only one to be considered in a judgment as to the best public interest. In weighing alternatives for highway location, equal consideration must be given to other factors—to whether people will be displaced; to whether existing communities will be disrupted; to whether the established demand for adequate transportation facilities for people, goods, and services will be met; and to the preferences of the people of the area involved. Preservation for use is sound conservation philosophy, and it is in that perspective that both section 138 and section 4 (f) should be administered.⁴³

Having said this, the committee recommended striking out the provision that the Secretary of Transportation's approval of projects must be based on no feasible and prudent alternative, and all possible planning to minimize harm, and substitution of the single requirement that a project include "all possible planning, including consideration of alternatives to the use of such land, to minimize any harm

41. House Hearings on "Federal-Aid Highway Act of 1968" *supra* note 40, at 279-80.

42. *Id.*, specifically the following colloquy:

"Mr. GRAMER . . . Is it your position that you feel that the comparative costs and advantages and disadvantages should be considered rather than this being administered as a prohibition, in effect?"

Mr. JOHNSON: The States should take a look at every alternative location. In this matter that we had down in San Antonio, where the local people actually approved the location and ordered the bond issues to buy the right-of-way, I do not think it should have been opened up again."

43. H. R. REP. No. 1584, 90th Cong., 2d Sess. 12 (1968).

to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."⁴⁴

One dissenting voice was recorded in the House Report,⁴⁵ but the House as a whole adopted the committee recommendation. In the Senate, however, the Committee on Public Works urged retention of the basic structure of Sec. 4 (f), with minor modifications of the definition of "construction costs."⁴⁶ In the conference committee, a compromise was reached on the basis of amending both Sec. 4 (f) of the Department of Transportation Act and Sec. 138 of Title 23, US Code, "Highways," to make them identical as follows:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside, and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.⁴⁷

The Conference Committee added the following explanation:

This amendment of both relevant sections of law is intended to make it unmistakably clear that *neither* section constitutes a mandatory prohibition against the use of the enumerated lands, but rather is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that clearly enunciated local preferences should be overruled on the basis of this authority.⁴⁸

44. *Id.* at 43.

45. *Id.* at 63-4.

46. S. REP. No. 1340, 90th Cong., 2d Sess. 18-19 (1968).

47. H. R. REP. No. 1799, 90th Cong., 2d Sess. 31-32 (1968).

48. *Id.* at 32.

In this form, and with this explanation, the Federal-Aid Highway Act of 1968 was passed.⁴⁹ Aside from emphasizing Congressional intent the chief substantive change was the limitation of application of Sec. 4 (f) and Sec. 138 to publicly owned lands.

AN INTERIM ASSESSMENT

This recounting of attempts to reconcile the Nation's needs for transportation and its needs to preserve and enhance its natural and cultural resources may suggest that an interim assessment of the law must, on balance, be a pessimistic one. Despite the efforts that have been made to clarify the national policy and mandate for administration, it is evident that much needs to be done before the "wisdom and reason" called for by the Conference Committee in 1968 can be expected to prevail sufficiently to anticipate and resolve the competition that exists for space in the cities and the countryside.

The process of establishing such a system of administration is, moreover, likely to be a lengthy one. Experience, research, and a willingness to experiment will have to be combined to produce criteria for comparing and evaluating social, economic and political goals and programs involving public investment. When transportation decisions are fully considered, they involve engineering aspects, socio-economic aspects, and environmental aspects. In the past, transportation planners, recreation and conservation planners, and urban planners all have appeared to use different yardsticks in measuring their claims on our land resources. It is time they all agreed on a coordinated approach to their common goals.

On the brighter side, the mere fact that Sec. 4 (f) is written into the law favors the ultimate development of such a coordinated viewpoint. It has had, and will have, the effect of compelling transportation and conservation planners to give more attention to each other's work, and of bringing about more contact between them. As time goes on, it seems predictable that an increasing number of potential controversies over transportation route location and design will be reconciled in the field. Certainly this is to be hoped.

But there remains an urgent need to improve the administrative machinery for authoritatively interpreting the policy Congress has provided, and resolving controversies efficiently and acceptably when they occur. Here the questions which were put to Secretary of

49. PUB. L. No. 90-495, (August 23, 1968).

Transportation Boyd in hearings on his nomination remain as valid today as they were in 1966.

Congress has said that the Secretary of Transportation shall consult with the States and the Secretaries of the Interior, Agriculture and Housing and Urban Development in developing transportation plans and programs that include measures to maintain or enhance environmental quality. Steps to permit establishment of formal arrangements for such consultation have been taken by the Department of the Interior through a delegation of authority therefor to the Bureau of Outdoor Recreation.⁵⁰ Establishment of formal consultative machinery could facilitate working out realistic and acceptable interpretations of several aspects of the Federal-Aid Highway Act of 1968. Specifically, the limitation of Sec. 4 (f) and Sec. 138 to "publicly owned" land apparently precludes their application to protect numerous valuable lands, such as Philmont Ranch, an outstanding primitive area owned by the Boy Scouts, or the lands of The Nature Conservancy, which are privately acquired for future transfer to public ownership. The National Grange, the 4-H Clubs and the Audubon Society all have extensive areas open to public use, and present additional cases clearly within the scope of the national policy expressed in Sec. 2 (b) (2) of the Department of Transportation Act but apparently not within the scope of amended Sec. 4 (f). Deepdene Park and the Stone Mountain Expressway, near Atlanta, owned by a quasi-public body but administered by a county agency, illustrate another type of hard case.

While statutory responsibility for approval of transportation projects rests ultimately with the Secretary of Transportation, it seems clear that his position is made unnecessarily difficult if he must perform the role of an arbitrator between contending governmental agencies in an adversary atmosphere, and without the aid of an impartial advisor. In this regard the advisory activity of the President's Council on Historic Preservation relating to Federal or federally assisted programs deserves careful evaluation as an instrument of conciliation which might be copied.

The mechanisms for consultation and coordination among Federal agencies responsible for meeting transportation, environmental and recreation needs must have their counterparts at State and local levels of government. Public agencies at these levels feel most directly the

50. 32 Fed. Reg. 4030 (1967).

pressure of public demand for facilities and programs serving the recreational and cultural needs of an American society which has more leisure time than ever before, and has the means to actively seek a style of life which affords the amenities of an environment which is both healthful and pleasant. The coincidence of recent demands for participatory democracy in programing the improvement of urban areas, the rise of advocacy planning, the loosening of historic judicial restraints against questioning the technical bases of executive and administrative decisions for implementing public policies suggests that development of interagency and public-private consultation cannot be delayed much longer.

The interest which lawyers have in the development of improved machinery of administrative coordination in the handling of environmental aspects of highway location and design is very clear and direct. If controversies of this nature cannot be settled administratively, it seems clear they will tend to be taken into the courts. The long history of court decisions relating to the doctrine of prior public use has already been referred to. To this form of recourse, must be added to the varied list of cases arising out of projects such as those centered in San Antonio's Brackenridge Park, New Orleans' French Quarter, Minneapolis' Minnehaha Park, and the Hudson River Expressway.⁵¹ A third form which this basic issue of competing demands for land may take is suggested by the California eminent domain statute which establishes a rebuttable presumption that the most necessary public use for property appropriated for public use as a State, regional, county or city park is such use, and declares that this presumption affects the burden of proof.⁵² The statute also gives a public agency owning parkland the right to initiate action for a declaratory judgment on the best use of the land prior to initiation of highway route location studies. For this purpose the statute compels advance notification and consultation between the highway department and other affected land-managing agencies of governmental bodies.

The form and operation of administrative law, statute law, and

51. *Citizens Committee for the Hudson Valley v. Volpe*, 297 F. Supp. 804 (S.D.N.Y. 1969); *See also* *Road Review League v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967); *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

52. CAL. CIV. PRO. CODE § 1241.7 (Deering Supp. 1969); CAL. STS. & H'WAYS CODE § 210.1 (Deering Supp. 1969).

judge-made law relating to highways and environmental factors thus tend to be interrelated. When good law is made in any of these forms, all forms benefit. Good law, in this instance, inevitably reflects good planning, and acts as a stimulant for it. This is a subject in which both lawyers and planners serving the functions of transportation and recreation have a deep mutual interest, and in which the entire Nation has an increasingly important stake for the future.