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NOTES

THE ROADS THROUGH OUR RUINS: ARCHAEOLOGY AND SECTION 4(f) OF THE DEPARTMENT OF TRANSPORTATION ACT

During the last few decades, the federal government has used two types of statutes to address the problem of archaeological resource preservation. The first type specifically protects archaeological resources.¹ The second type involves broad, multi-purpose legislation that attempts to preserve archaeological, environmental and historical resources under the umbrella of a single preservation provision.² This legislation commands preservation of a broad range of resources from a particular danger, often by requiring that the government consider environmental issues when fulfilling the major legislative purpose of a particular statute.³

Section 4(f) of the Department of Transportation Act of 1966,⁴ which limits the use of parklands and historic sites for transportation projects, fits within this latter category of legislation. Congress enacted section 4(f) to avoid the danger of an over-enthusiastic

1. See Antiquities Act of 1906, Pub. L. No. 34-209, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431, 432-33 (1982)); Archaeological and Historical Preservation Act, Pub. L. No. 93-291, 88 Stat. 174 (codified as amended at 16 U.S.C. §§ 469-469c (1982)) (amending the Reservoir Salvage Act of 1960, Pub. L. No. 86-523, 74 Stat. 220); Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (codified at 16 U.S.C. §§ 470aa-470ll (1982)).

2. The most comprehensive protection acts are the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (NEPA), and the National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915 (1985) (NHPA).

3. See, e.g., Surface Mining Control and Reclamation Act of 1977, § 522, 30 U.S.C. § 1272 (1982) (restricting surface mining in or near parks, wildlife refuges, recreation areas and historic sites). Section 18 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138 (1982), is identical to the present codified version of section 4(f). See *infra* note 7.

For a discussion of issues common to statutes in this category, and specifically to NEPA, NHPA and section 4(f), see Note, *Federal Historic Preservation Law: Uneven Standards for Our Nation's Heritage*, 20 SANTA CLARA L. REV. 189 (1980).

4. Pub. L. No. 89-670, § 4(f), Act of October 15, 1966, 80 Stat. 931, 934 (1966) (current version codified at 49 U.S.C. § 303 (Supp. 1985)).

agency. The Department of Transportation Act of 1966 created a new Cabinet-level agency whose major mission is to build roads. More than two million linear miles of the United States are now paved,⁵ and this figure excludes land used for airports, parking lots, railroads, and other transportation projects. Such massive road building, however, poses a particularly acute danger to archaeological resources. In addition to the possibility of damaging the artifacts, road construction also destroys the relative location of the artifacts to each other, rendering the site scientifically worthless.⁶ These dangers underscore the need to protect archaeological resources from irrevocable destruction in the national zeal for an efficient transportation network.

At one time section 4(f) provided sufficient protection. Both the judicial branch and administrative agencies, however, have weakened it. This Note first examines the legislative history and early judicial interpretation of section 4(f). The Note then considers how administrative agencies and courts have weakened the statute. The Note concludes that this trend is neither valid nor wise. The current trend runs contrary to congressional intent, selectively ignores case precedent, and ignores the needs and requirements of archaeologists.

THE ARCHAEOLOGICAL APPLICATION OF SECTION 4(F) IN CONTEXT

The Conflict

By its language, section 4(f) creates a special protection for certain named classes of land.⁷ These protected lands cannot be used

5. FEDERAL HIGHWAY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, 1984 HIGHWAY STATISTICS 113 (1985). An additional 1,753,023 miles of road are unpaved. *Id.*

6. "It isn't possible to read significance into a layer or level until you know how it lies, how it was formed, what its composition is, and what its relationship is to the layers above and below it." M. JOUKOWSKY, A COMPLETE MANUAL OF FIELD ARCHAEOLOGY 172 (1980).

7. Section 4(f) of the Department of Transportation Act provides, in part:

The Secretary may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

(1) There is no prudent and feasible alternative to using that land; and

for transportation projects unless two requirements are met. First, a "prudent and feasible alternative" must not exist. Second, harm to the site must be minimized. The use of "and" after the first requirement indicates that these requirements are cumulative; if one requirement is not met, the proposed project fails even if it meets the other.

In 1980, the Department of Transportation adopted a regulation that applies section 4(f) to archaeological sites.⁸ In this regulation the DOT carves out an exception to the lands protected by section 4(f). The Regulation excepts any site from application of section 4(f) if the site is important primarily for the information contained in each artifact and has minimum value for preservation in place.⁹ If the DOT determines that the regulatory exception to section 4(f) applies, archaeological sites may be used for a proposed transportation project without considering whether any "prudent and feasible alternatives" exist.¹⁰ The only remaining limit on the use

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

49 U.S.C. § 303(c) (Supp. 1985).

8. The "Archaeological Regulation" states:

(1) Section 4(f) applies to all archaeological sites on or eligible for inclusion on the National Register, including those discovered during construction, unless the Administration, after consultation with the State Historic Preservation Officer and the Advisory Council on Historic Preservation, determines that the archaeological resource is important chiefly for the information it contains and has minimum value for preservation in place. Such archaeological resources which do not warrant preservation in place may be recovered in accordance with a resource recovery plan developed in compliance with 36 CFR Part 800.

(2) For sites discovered during construction, where preservation of the resource in place is warranted, the Section 4(f) process will be expedited. In such cases, the evaluation of feasible and prudent alternatives will take account of the level of investment already made and the review process, including the consultation with other agencies, will be shortened as appropriate.

23 C.F.R. § 771.135(f) (1985).

9. *Id.*

10. The regulation appears to make a further exception by stating that section 4(f) applies to those sites "on or eligible for inclusion on the National Register." *Id.* The National Register is an inventory, kept by the Department of the Interior, of "districts, sites, buildings, structures and objects significant in American history, architecture, archaeology, engineering and culture." 36 C.F.R. § 60.1(a) (1985). One of the possible criteria that makes sites eligible for inclusion on the Register is if the sites "have yielded, or may be likely to yield, information important in prehistory or history." 36 C.F.R. § 60.4(d) (1985). This description applies to any worthwhile archaeological site. This particular distinction, there-

of such sites is that the DOT must undertake an immediate excavation, or "salvage dig," of the endangered site before any construction is begun.¹¹ This Regulation presents the question of whether such an exception to the protection of section 4(f) is justified as a matter of law or of policy.¹²

Legislative History

Congress enacted section 4(f) when the general public began to realize the disturbing consequences brought about by the development boom following World War II.¹³ These consequences included the loss of important archaeological and historic resources.¹⁴ Historic preservation laws were passed with increasing frequency beginning in the 1950's, apparently carried by the rising tide of the general environmental movement.¹⁵

Section 4(f) was one of the laws riding that tide. The immediate impetus behind section 4(f) was a 1960 proposal for an expressway that would have cut through Brackenridge Park in San Antonio, Texas.¹⁶ In response to that city's great public outcry to save the park, Senator Ralph Yarborough of Texas introduced an amend-

fore, does not preclude applying section 4(f) to archaeological sites. Raab & Klinger, *A Critical Appraisal of "Significance" in Contract Archaeology*, 42 AMERICAN ANTIQUITY 629, 631 (1977).

11. 23 C.F.R. § 771.135(f)(1) (1985).

12. Other important issues involving section 4(f) include the question of what is a "use" of the land, and whether a site is historically "significant." For a discussion of these issues, see Wilburn, *Transportation Projects and Historic Preservation: Recent Developments under Section 4(f) of the Department of Transportation Act*, 2 PRESERVATION L. REP. 2017 (1983).

13. Gray, *Section 4(f) of the Department of Transportation Act*, 32 MD. L. REV. 327, 332 (1973).

14. See Rosenberg, *Federal Protection for Archaeological Resources*, 22 ARIZ. L. REV. 701, 710-11 (1980); see also Bullock, *Preservation Features: The Headless Horseman Rides Again*, 17 HIST. PRESERVATION 128 (1965), reprinted in 112 CONG. REC. 17,631 (1966) (recounting examples of the eruption of public outcry over highways constructed through historic areas).

15. For a discussion of the interrelationship between environmentalism and historic preservation, see Baldwin, *Historic Preservation in the Context of Environmental Law: Mutual Interest in Amenity*, 36 LAW & CONTEMP. PROBS. 432 (1971).

16. For details and background on the proposed project and the litigation surrounding it, see *Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013 (5th Cir. 1971), cert. denied, 406 U.S. 933 (1972).

ment to the Federal-Aid Highway Act of 1966.¹⁷ The amendment was practically identical to the present section 4(f).¹⁸ The proponents of the amendment opined that the DOT was overusing parks and other publicly owned lands for transportation projects, due to the relatively low cost of using public lands as opposed to acquiring privately owned lands through condemnation.¹⁹ The Senate passed the bill with the amendment,²⁰ but the House of Representatives did not.²¹ A House-Senate Conference Committee substituted a diluted version, which did not require the DOT to accept "prudent and feasible alternatives" to using public parklands or historic sites. Instead, the compromise provision required only that the harm to the lands be minimized.²² According to Congressman Kenneth Gray of Illinois, the House opposed the provision mandating the acceptance of prudent and feasible alternatives because the Committee on Public Works lacked the opportunity to study the impact of such a requirement on a state's authority over state parks and historic sites.²³ Both houses accepted the Conference Committee substitute, and that version became law.²⁴

17. Pub. L. No. 89-574, Act of September 13, 1966, 80 Stat. 766 (1966) (current version codified in scattered sections of 23 U.S.C.).

18. The only substantive difference between the Yarborough amendment and the present section 4(f) is that the Yarborough amendment did not include recreational areas or wildlife refuges in the category of lands protected. 112 CONG. REC. 17,631 (1966).

19. *See id.* at 17,630-44 (1966).

20. *Id.* at 17,460.

21. *Id.* at 19,098.

22. The Conference Committee substitute stated:

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 of any land from a Federal, State, or local government park or historic site unless such program includes all possible planning, including consideration of alternatives to the use of such land, to minimize any harm to such park or site resulting from such use.

Pub. L. No. 89-574, Act of September 13, 1966, 80 Stat. 766, 771 (1966).

23. 112 CONG. REC. 19,098 (1966) (colloquy between Congressman Gray and Congressman James C. Cleveland of New Hampshire).

24. *See id.* at 21,192, 21,340-41.

Two months later, Senator Henry Jackson of Washington offered the Yarborough amendment²⁵ as an amendment to the proposed Department of Transportation Act. The provision again included the mandatory acceptance requirement for prudent and feasible alternatives. House discussion focused upon the meaning of the language of section 4(f), particularly the "prudent and feasible alternatives" requirement.²⁶ Concern centered on the possibility that the requirement would impose binding limitations upon the Secretary of Transportation in deciding where to build a proposed transportation project. Congressman Dan Rostenkowski of Illinois stated that "it is not the intent of Congress to tie the Secretary's hands,"²⁷ and that "as desirable as parkland preservation might be, other important factors must be considered."²⁸ Nevertheless, the Jackson amendment emerged from the Conference Committee intact and became the present section 4(f).

Although the legislative history reflects congressional reluctance to restrict the discretion of the Secretary of Transportation, it does not justify the DOT's Archaeological Regulation. The Regulation essentially exempts a broad class of land from the protection of

25. Senator Warren G. Magnuson of Washington credited Senator Jackson with offering the amendment while the Act was still under committee consideration. *Id.* at 26,565.

26. *See id.* at 26,651-52. The objections voiced two months previously did not emerge. A possible reason for this new receptiveness was that some members of Congress may have engaged in political logrolling. The main purpose of the Department of Transportation Act was to consolidate all of the transportation-related bureaus and agencies into one Cabinet-level department. The House of Representatives was adamantly opposed to the transfer of the Maritime Administration to the new Department of Transportation, as the Senate-passed bill provided. One commentator speculates that the Senate seized the opportunity for a trade-off and pushed its strong version of section 4(f) on the recalcitrant House, in exchange for allowing the House to keep the Maritime Administration out of the new DOT. *See Gray, supra* note 13, at 337-38. *See generally* Gray, *Environmental Requirements of Highway and Historic Preservation Legislation*, 20 *CATH. U.L. REV.* 45, 47-55 (1970).

27. 112 *CONG. REC.* 26,651 (1966).

28. *Id.* Congressman John Kluczynski, also of Illinois, echoed Mr. Rostenkowski's sentiments:

There is no question in my mind that the protection of our parks, open spaces, historic sites, fish and game habitats, and the other natural resources with which our nation is so richly endowed, is of the utmost importance and urgency, but not to the total exclusion of other considerations. To do so would result in as many inequities as justifying transportation plans merely on the basis of economy or efficiency.

Id.

section 4(f).²⁹ Participants in the congressional debate did not consider giving the DOT the discretion to totally avoid section 4(f). The discretion Congress sought to preserve was the discretion to define "prudent and feasible."³⁰ Even those who spoke out against limiting the Secretary's authority acknowledged that both requirements contained in section 4(f) must be applied to any proposed transportation project involving any lands described in the section.³¹ Congress understood the word "prudent" to permit the Secretary to use protected land for transportation projects when the "feasible" alternative required "displacing hundreds of families,"³² or when foregoing the project for environmental preservation would risk human life.³³ The discretion to consider the prudence of using an alternative transportation site was not envisioned to extend to the discretion to avoid considering any alternatives when the Secretary deemed certain land unprotected.

In 1968 Congress reaffirmed the policies contained in section 4(f). The legislators returned to the forerunner of section 4(f), the diluted Yarborough amendment to the Federal-Aid Highway Act of 1966,³⁴ but inserted a prudent and feasible alternatives requirement, thereby making it identical to the two-year-old section 4(f).³⁵ Statements made during debate on the amendment reinforce the intent of blanket coverage of section 4(f) whenever protected lands are involved.³⁶ In addition, the Conference Committee Report on the 1968 bill indicated that the Secretary retained discretion to define "prudent and feasible" when applying section 4(f),³⁷ and pro-

29. See *infra* note 72 and accompanying text.

30. As understood by Congressman Kluczynski, the word "prudent" supplied the necessary discretion for the Secretary of Transportation: "[w]ith 'prudent' as the operable word, this section now becomes workable and effective. . . ." 112 CONG. REC. 26,651 (1966).

31. "This approval [of the use of land protected by section 4(f)] is made contingent on two factors: That there is no feasible and prudent alternative to the use of such land, and that such program includes all possible planning to minimize harm to those areas." *Id.* (statement of Congressman Rostenkowski).

32. *Id.* at 26,652.

33. *Id.* at 26,651-52.

34. See *supra* note 22.

35. Federal-Aid Highway Act of 1968, § 18, Pub. L. No. 90-495, 82 Stat. 815, 823 (1968).

36. Congressman Chester Holifield of California succinctly described the intent of section 4(f): "In 1966 a dedicated Congress told these [highway, airline, maritime, and railroad] interests: 'You may go so far and no farther.'" 114 CONG. REC. 19,916 (1968).

37. The conferees stated:

vided illustrations of situations when choosing an alternative route for a transportation project would not be prudent.³⁸ The Report's use of these specific examples demonstrates that Congress did not intend the Secretary's discretion to extend to the creation of categorical exceptions to section 4(f).

The legislative history behind the DOT Act and the Federal-Aid Highway Act of 1966 demonstrates that congressional opposition to section 4(f) arose from concern that the section would force the Secretary of Transportation to choose alternative routes whenever transportation projects intersected protected lands. Use of the word "prudent" in section 4(f) broadened the Secretary's decision-making authority to prevent automatic route changes. Congress intended, however, that the Secretary engage in the decision-making process provided in section 4(f) whenever transportation projects involve protected lands. Broadened discretion over the final decision does not necessarily translate into discretion to exclude certain lands from the prescribed decision-making process.

Judicial Interpretation

Most litigation involving section 4(f) has concerned parklands, paralleling the major concern voiced in the legislative history. *Citizens to Preserve Overton Park, Inc. v. Volpe*³⁹ is the leading judicial interpretation of section 4(f). *Overton Park* involved a suit by a citizen's conservation group to enjoin the Secretary of Transportation from issuing federal funds to build a segment of Interstate Highway 40 through a city park in Memphis, Tennessee. The Secretary had approved the funds for the highway and had released a report of his factual findings, but had not included a report indicating why he believed no prudent and feasible alternatives ex-

This amendment of both [section 4(f) and 23 U.S.C. § 138] is intended to make it unmistakably clear that *neither* section constitutes a mandatory prohibition against the use of the enumerated land, 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.

CONF. REP. NO. 1799, 90th Cong., 2d Sess., reprinted in 1968 U.S. CODE CONG. & AD. NEWS 3538.

38. *Id.*

39. 401 U.S. 402 (1971).

isted. The plaintiffs contended that section 4(f) required such a formal report. In addition, they also claimed that, even if such a report was not required, prudent and feasible alternatives to the Overton Park route in fact existed.

The Court construed the "prudent and feasible alternatives" requirement strictly, describing it as a "plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted."⁴⁰ The Court concluded that Congress must have intended the "prudent and feasible alternatives" requirement to apply every time protected lands were involved in a proposed transportation project;⁴¹ therefore, the Secretary must produce an administrative record in order to facilitate judicial review of the Secretary's application of the section 4(f) criteria.⁴² In addition, the Court limited the Secretary's discretion to define "prudent." The Court applied a "thumb-on-the-scale" standard, requiring the Secretary to give the detriment resulting from the destruction of parkland more weight than such factors as cost, directness of route, and even community disruption.⁴³ This "thumb-on-the-scale" approach has been followed, with only minor variations, in subsequent section 4(f) cases involving parkland.⁴⁴

The section 4(f) analysis in parkland cases also applies to disputes involving archaeological sites. For section 4(f) purposes, courts have treated archaeological and other types of historic sites

40. *Id.* at 411.

41. "If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems." *Id.* at 413.

42. *Id.* at 419. This administrative record need not be a formal finding of fact if other evidence is adequate. *Id.*

43. "[I]f Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes." *Id.* at 412. See generally Note, Citizens to Preserve Overton Park, Inc. v. Volpe: *Environmental Law and the Scope of Judicial Review*, 24 STAN. L. REV. 1117 (1972) (*Overton Park* is one of a series of decisions limiting administrative discretion in order to protect environmental resources.).

44. See, e.g., *Druid Hills Civic Ass'n, Inc. v. Fed. Highway Admin.*, 772 F.2d 700 (11th Cir. 1985); *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2344 (1985); *Louisiana Env'tl Soc'y v. Dole*, 707 F.2d 116 (5th Cir. 1983); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972); see also *Maryland Wildlife Fed'n v. Dole*, 747 F.2d 229 (4th Cir. 1984) (if all available alternatives will impact on 4(f)-protected lands, statute requires balancing process to see which impact is least).

the same as parks and other preserved lands, lumping all such lands under the general rubric of "protected lands."⁴⁵ In 1984 the United States Court of Appeals for the Fourth Circuit demonstrated its belief that section 4(f) applies to all protected lands in *Maryland Wildlife Federation v. Dole*.⁴⁶ The court in *Dole* rejected the notion that one type of protected land has priority over another, stating that the Supreme Court's analysis in *Overton Park* applied to all section 4(f)-protected property.⁴⁷ The cases that had applied section 4(f) to archaeological sites before the adoption of the DOT's Archaeological Regulation essentially followed this approach.⁴⁸

The first case involving application of section 4(f) to an archaeological site arising after the adoption of the DOT Archaeological Regulation was *Arizona Past and Future Foundation, Inc. v. Lewis*.⁴⁹ The case suggests an alternative interpretation of the Archaeological Regulation, although the validity of the Regulation was not at issue because the Secretary voluntarily applied section 4(f) to the project involved.

The dispute involved a proposed route chosen by the DOT for the completion of Interstate Highway 10 near Phoenix, Arizona. The route, however, jeopardized three Native American archaeological sites. The Arizona State Historic Preservation Office hired two archaeological research organizations to investigate whether the sites contained structures that warranted preservation in

45. See, e.g., *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434 (9th Cir.) (prohibiting freeway construction next to petroglyph rock), *cert. denied*, 429 U.S. 999 (1976); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971) (enjoining construction of a bridge across Potomac that would affect Georgetown Historic District until further findings made), *cert. denied*, 405 U.S. 1030 (1972); *Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013 (5th Cir. 1971) (Indian artifacts contained in parkland), *cert. denied*, 406 U.S. 993 (1972).

46. 747 F.2d 229 (4th Cir. 1984).

47. *Id.* at 236.

48. See *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976); *Indian Lookout Alliance v. Volpe*, 345 F. Supp. 1167 (S.D. Iowa 1972), *remanded*, 484 F.2d 11 (8th Cir. 1973); see also *Thompson v. Fugate*, 347 F. Supp. 1167 (E.D. Va. 1972) (temporarily enjoined condemnation of colonial mansion of historic architectural significance to have been used in freeway project).

49. 722 F.2d 1423 (9th Cir. 1983).

place.⁵⁰ The organizations concluded that such preservation was not required.⁵¹ Secretary of Transportation Drew Lewis, however, nevertheless applied section 4(f) and determined that no "prudent and feasible alternative" route existed.⁵² The Department of Transportation, in conjunction with the Arizona State Historic Preservation Office and the President's Advisory Council on Historic Preservation, then developed an archaeological salvage plan for the sites. The DOT used section 4(f)'s minimization of harm requirement⁵³ as the source of authority for the plan.⁵⁴ The central issue in the case was whether the Secretary had acted properly in concluding that no prudent and feasible alternatives to the proposed route existed.⁵⁵ The United States Court of Appeals for the Ninth Circuit concluded that, on the basis of the administrative record, the Secretary could have concluded reasonably that the proposed route was the only alternative able to provide the necessary transportation service to the central Phoenix area.⁵⁶

Although this holding may read *Overton Park*'s "thumb-on-the-scale" approach too narrowly, it illustrates that section 4(f) does not "tie" the Secretary's hands, even if he applies the provision to sites that are not deemed to warrant preservation in place. *Overton Park* demonstrates that the Secretary retains significant discretion to define "prudent."⁵⁷ The fear that, under an interpretation of section 4(f) that would protect *all* archaeological sites, a truly necessary and beneficial highway project could be stymied by the acci-

50. The organizations were the State Museum of Arizona and the Museum of Northern Arizona. *Id.* at 1427.

51. *Id.*

52. *Id.*

53. See *supra* note 7 and accompanying text.

54. The stated purpose of the salvage operation was "to avoid or satisfactorily mitigate the adverse effect [that the project would have on the sites]." Memorandum of Agreement between the President's Council on Historic Preservation, the Federal Highway Administration, the Arizona State Historic Preservation Office and the Arizona State Department of Transportation (Dec. 29, 1981) (available on file at the U.S. Department of Transportation).

55. 722 F.2d at 1427.

56. *Id.* at 1428.

57. The statute gives the Secretary of Transportation an "escape hatch" by allowing him to decide whether a particular alternative is "prudent" in light of the goals of the transportation project under consideration. Such a scheme is founded on a preference of "guided common sense to unguided common sense." 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8.7, at 187 (2d ed. 1979). Professor Davis believes that the use of "escape clauses" in rulemaking is "one of the best ways of controlling discretion." *Id.* at 185.

dental discovery of a few pottery fragments therefore is unfounded.

Against this background, the United States Court of Appeals for the First Circuit dealt with the conflict between the DOT's Archaeological Regulation and section 4(f) in *Town of Belmont v. Dole*.⁵⁸ *Belmont* involved a proposed freeway bypass in New Hampshire that would run through an archaeological district containing thirteen sites of Native American occupation and eighteen sites of European settlement. When the director of the historic preservation program in New Hampshire nominated the district to be included in the National Register,⁵⁹ he had noted in his report that the district's significance was "strictly archaeological."⁶⁰ The DOT interpreted the report to mean that the artifacts contained in the district did not warrant preservation in place. Unlike the situation in *Arizona Past and Future Foundation*, the Secretary of Transportation made no attempt to apply the "prudent and feasible alternatives" requirement of section 4(f). Two New Hampshire towns near the archaeological district, Belmont and Tilton, brought suit to force the Secretary to apply section 4(f), claiming that the DOT's Archaeological Regulation was invalid because it conflicted with the language and purpose of section 4(f).⁶¹ The court upheld the Regulation, concluding that the Secretary's decision not to apply section 4(f) to sites not deemed to warrant preservation in place was reasonable.⁶²

The court relied primarily upon two arguments. First, the court pointed out that section 4(f), by its terms, applied to historic sites "of national, State, or local significance."⁶³ If a site is significant only for the archaeological data it contains and not for the location of the site itself, then, the court reasoned, once the data is removed the site is no longer significant. The court further stated that sec-

58. 766 F.2d 28 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 792 (1986).

59. The nomination of sites to the National Register can be made either by Federal agencies or state historic preservation program officials. 36 C.F.R. §§ 60.5., .6, .9-.11 (1985).

60. *First Circuit Upholds Federal Highway Administration Regulation Governing Treatment of Archaeological Sites*, 4 PRESERVATION L. REP. 3043 (1985).

61. 766 F.2d at 29-30.

62. *Id.* at 31-32. For a discussion of the "reasonableness" standard of review, see R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* § 7.5 (1985).

63. 766 F.2d at 31.

tion 4(f)'s prohibition on the "use" of certain lands prevents only those uses that are "adverse in terms of the statute's preservationist purposes."⁶⁴ A salvage dig does not harm archaeological resources but protects and preserves them. The court concluded, therefore, that the DOT's Archaeological Regulation actually promotes the process of archaeological preservation.⁶⁵

A second way that the Regulation carried out the purpose of section 4(f), according to the court, was by taking archaeological sites out of private hands. The court noted the limited legal protection of privately owned archaeological sites. If a proposed transportation project involved an archaeological site that the Secretary deemed not to warrant preservation in place, then the DOT would obtain the site through condemnation proceedings and institute a salvage dig to recover the artifacts before beginning construction. If, on the other hand, the DOT could not use that site because a "prudent and feasible alternative" existed, then the DOT would not obtain the land at all. The site would be left in the hands of the private owner, who, the court feared, would be "free to ignore, or even to harm, its archaeological value."⁶⁶

ERRORS OF THE CURRENT INTERPRETATION

The current interpretation of section 4(f), as embodied in the DOT's Archaeological Regulation and in *Belmont*, is erroneous in two ways. The first error is in the misinterpretation of congressional intent in determining the role, under section 4(f), of the Secretary of Transportation. The second and less obvious error concerns the policies that justify archaeological preservation itself.

Legal Errors

The *Belmont* decision rested on the assumption that the resolution of the possible conflict between the statute and the Regulation turned upon the application of the standard "reasonableness" test for the validity of discretionary administrative regulations.⁶⁷ The reasonableness standard approach, however, misconceives the ex-

64. *Id.* at 32.

65. *See id.* at 32-33.

66. *Id.* at 32.

67. *See supra* note 62 and accompanying text.

tent of discretion granted the Secretary of Transportation by section 4(f). The court characterized the effect of the DOT's Archaeological Regulation as "pick[ing] out those archaeological sites whose significance lies only in the data they contain that will be at least equally well preserved outside the site."⁶⁸ This interpretation implies that Congress granted the Secretary authority to "pick out" such sites. Congress, however, only gave the Secretary limited discretion to determine whether a particular alternative to a proposed route is prudent and feasible if that proposed route would adversely affect an archaeological site.⁶⁹ Authorization to define "prudent" is not equivalent to the discretion to carve out exceptions to section 4(f) not stated explicitly in the statute itself.

The court in *Belmont*, however, did not consider the legislative history of section 4(f). Instead, it relied on the policy behind the Regulation⁷⁰ and determined that the Regulation is consistent with section 4(f)'s preservationist purpose because the Regulation mandates salvage digs for artifacts threatened by road construction. Additionally, the court stated that salvage digs preserve artifacts better than leaving them in place.⁷¹ A similar statement appears in the DOT's comment accompanying promulgation of the Regulation. The DOT stated that "[a]pplying section 4(f) to archaeological sites where data recovery is appropriate would impose the section 4(f) test to sites for which all interested agencies have agreed that removal of the archaeological material is in the best public interest."⁷² Naturally, this reasoning includes the problematic assumption that salvage digs are always in "the best public interest."⁷³

The statements made by the court in *Belmont* and by the DOT in its comments to the Archaeological Regulation overlook the congressional policy decision to protect parklands and historic sites.⁷⁴

68. 766 F.2d at 31.

69. See *supra* notes 26-37 and accompanying text.

70. See 766 F.2d at 30-33; see also *supra* notes 61-65 and accompanying text.

71. 766 F.2d at 32.

72. 45 Fed. Reg. 71,976 (1980).

73. See *infra* notes 76-79 and accompanying text.

74. "It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the country-side and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." 49 U.S.C. § 303(a) (1982). See also *supra* notes 16-37 and accompanying text.

Congress established specific protections; agency denial of protection to entire categories of land therefore exceeds legislative authorization. Past judicial constructions of section 4(f) that treat all historic sites and parkland alike as meriting protection reinforce their interpretation.⁷⁵

The court in *Belmont* also failed to address a common maxim of statutory construction. Resorting to judicial interpretation of a statute is unnecessary if the statute is clear and unambiguous on its face.⁷⁶ The Supreme Court's opinion in *Overton Park* clearly shows that the Court considered section 4(f) to mean exactly what it says: the DOT cannot use certain lands for transportation projects unless no prudent and feasible alternative exists.⁷⁷ Congress included no exceptions, and the DOT should not fashion one.

Policy Errors

The court in *Belmont* also relied on erroneous policy justifications in upholding the Archaeological Regulation. The major premise in *Belmont* was that a DOT-instituted salvage dig would preserve archaeological resources contained on the site, and the preservationist policies behind section 4(f) would be furthered rather than harmed. Although this view has superficial appeal, it overlooks the basic nature of salvage digs. In the archaeological community, such digs are generally viewed as a last resort, to be commenced in emergency situations when the archaeological resources will be irretrievably lost if they are not recovered immediately.⁷⁸ For the most part, salvage archaeology is a hurried operation, the main goal being to save as much as possible as quickly as possible. Even when conducted by the most respected archaeologists, the quality of the end product suffers.⁷⁹ Authorities in the

75. See *supra* notes 39-47 and accompanying text.

76. 2A SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION § 46.01 (4th ed. 1984). But see *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (stating that in interpreting a statute the court opts for a restricted rather than literal meaning of the statute's words whenever a literal interpretation would lead to "absurd results").

77. See *supra* notes 39-43 and accompanying text.

78. M. JOURKOWSKY, *supra* note 6, at 4-7 (1980); Lipe, *A Conservation Model for American Archaeology*, in CONSERVATION ARCHAEOLOGY: A GUIDE FOR CULTURAL RESOURCE MANAGEMENT STUDIES 20 (M. Schifter & G. Gumerman eds. 1977).

79. In this situation we are faced with the choice of securing inadequate data or no data at all. By inadequate data we mean that less than an optimum sample is

profession have come to accept salvage work as a necessary evil, and have promulgated guidelines to help distinguish acceptable shortcuts from unacceptable ones.⁸⁰ The archaeological resources involved, however, are still exposed to a greater risk of being overlooked or destroyed during a salvage dig conducted under rules imposed by a road building agency than they would be during an excavation instituted subject to pure "research archaeology" standards.

The quality of data extracted from a dig also suffers when the archaeologist has no control over its location. As in any other science, the direction of research in archaeology depends upon prior discoveries. A significant finding on one archaeological site may change the approach taken on other sites. Allowing the DOT to build roads over salvaged archaeological sites rather than forcing the acceptance of prudent alternatives deprives archaeologists of the option to preserve those sites for future reappraisal. An archaeologist researching a particular theory⁸¹ may learn more from one site by undertaking an excavation in an older site first. In addition, he may wish to preserve intact a site containing particularly delicate or minute artifacts, in order to excavate them with improved technology in the future.

obtained at a greater speed than is the custom in problem-oriented archaeology. No lowering of excavation standards is implied.

Hester, *A Training Program for Salvage Archaeology*, 28 AM. ANTIQUITY 392-93 (1963) (citations omitted).

80. See THE MANAGEMENT OF ARCHAEOLOGICAL RESOURCES: THE AIRLIE HOUSE REPORT 64-77 (C. McGimsey & H. Davis eds. 1977); King, *Resolving a Conflict of Values in American Archaeology*, in CONSERVATION ARCHAEOLOGY: A GUIDE FOR CULTURAL RESOURCE MANAGEMENT STUDIES 87-95 (M. Schifter & G. Gumerman eds. 1977). See generally M. JOURKOWSKY, *supra* note 6, at 10-12 (ethical considerations for archaeologists).

81. The perception of archaeologists as mere collectors and cataloguers is based on an erroneous understanding of archaeological research. The archaeological method of research is based on problems like any other science. Archaeologists identify problems, glean information from sources related to that problem, and formulate a theory on the basis of that information. See generally S. DANIELS & N. DAVID, THE ARCHAEOLOGY WORKBOOK (1982) (example research problems). Pure research archaeology strives to disturb the site only to the extent necessary to extract needed information. Lipe, *supra* note 78, at 42. Salvage work forces an archaeologist to depart from this systematic methodology by requiring him to find quickly everything present on a particular site. Some authorities fear that this lack of focus leads to a further decline in information quality. CONSERVATION ARCHAEOLOGY: A GUIDE FOR CULTURAL RESOURCE MANAGEMENT STUDIES 9-11 (M. Schifter & G. Gumerman eds. 1977).

The court in *Belmont* embraced the argument that the DOT's Archaeological Regulation actually promoted the preservation of archaeological resources. The court stated that if the DOT decided to use alternative land, no excavation of any kind would be instituted, and the site would be left in private hands, unprotected from development and vandalism. The court noted correctly that section 4(f) fails to prevent the misuse of archaeological resources found on privately owned land. However, the underinclusive nature of statutory protection should not be used as a basis for reducing the protection of archaeological resources found on public lands. Instituting salvage digs on recently acquired public property before starting transportation projects also fails to protect the bulk of archaeological resources found on private lands.⁸² Section 4(f) was meant to protect publicly owned land⁸³ and should not be applied to another, wholly distinct problem.

Congress or the state legislatures should face the problem of misuse of archaeological resources found on private lands by instituting land-use limitations on private lands containing known archaeological sites.⁸⁴ Constitutional considerations may prevent

82. Even if salvage digs do preserve archaeological resources, the Regulation would cover only those sites about to be affected by a transportation project. In addition, during the congressional debate over the amendment to the Federal-Aid Highway Act (23 U.S.C. § 138) in 1968, Senator Lee Metcalf of Montana suggested that the private-hands argument cuts both ways. If section 4(f) is weakened, owners interested in preserving such lands would no longer donate them to the public domain. 114 CONG. REC. 24,025 (1968).

83. See 114 CONG. REC. 24,026 (1968); 112 CONG. REC. 14,073 (1966).

84. Private land use restrictions designed to protect archaeological sites would be similar in effect and purpose to zoning laws, which are the province of state and local governments as a part of the state police power. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). State governments, therefore, are probably better equipped to institute such restrictions than Congress. One commentator reached the same conclusion concerning preservation of historic structures in urban areas. Note, *Local Historic Preservation Measures as an Alternative to Federal Preservation Efforts*, 3 VA. J. OF NAT. RESOURCES L. 263 (1984).

Some states now have use-control laws protecting archaeological sites on private land, but these are usually contingent upon owner consent. See, e.g., ALA. CODE § 41-9-249.1 (Supp. 1985); ALASKA STAT. § 41.35.060(b) (1983); FLA. STAT. ANN. § 267.11 (West 1975); GA. CODE ANN. § 12-3-53(3) (Supp. 1985); HAWAII REV. STAT. § 6E-10 (1976); IDAHO CODE § 67-4115 (1980); IND. CODE ANN. § 14-3-3.4-8 (Burns Supp. 1985); KY. REV. STAT. § 164.730, .735 (1980); LA. REV. STAT. ANN. § 25:523 (West 1975); MASS. GEN. LAWS ANN. ch. 9, § 27 (West 1976); MINN. STAT. ANN. § 138.35(2)(c) (West 1979); MISS. CODE ANN. § 39-7-13 (Supp. 1985); N.M. STAT. ANN. § 18-6-10(c) (1980); N.C. GEN. STAT. §§ 70-1, 70-11 (1985); R.I. GEN. LAWS § 42-45.1-10 (1984); S.D. CODIFIED LAWS ANN. § 1-20-30 (1980); TENN. CODE ANN.

imposing an unqualified ban upon disturbing such sites.⁸⁵ Nevertheless, less oppressive measures exist that are both constitutional⁸⁶ and workable.⁸⁷

The policy basis of section 4(f) is preservation. The *Belmont* opinion supports the proposition that archaeological resources can be preserved best by digging them up and moving them out of the way of highway projects. Archaeologists, however, derive little utility from such "preservation." Archaeological resources are non-re-

§ 11-6-110 (Supp. 1985); UTAH CODE ANN. § 63-18-26 (Supp. 1985); VT. STAT. ANN. tit. 22, § 763 (1978); VA. CODE § 10-150.7 (1985); WASH. REV. CODE ANN. § 27.53-060 (1982).

Alaska is most protective of archaeological resources and most restrictive of landowners' property rights. Its relevant provision states:

If an historic, prehistoric, or archaeological property which has been found by the department . . . to be important for state ownership is in danger of being sold or used so that its historic, prehistoric or archaeological value will be destroyed or seriously impaired, . . . the department may establish the use of the property in a manner necessary to preserve its historic, prehistoric or archaeological character or value. If the owner of the property does not wish to follow the restrictions of the department, the department may acquire the property by eminent domain under AS 09.55.240-09.55.460.

ALASKA STAT. § 41.35.060(b) (1983).

For a description of the options available to state and local governments for archaeological resource preservation on both public and private land, see Rosenberg, *Archaeological Resource Preservation: The Role of State and Local Governments*, 1981 UTAH L. REV. 755, 774-802.

85. Courts have firmly established that if public regulation goes too far in restricting the private property rights of landowners, the regulation will constitute a "taking" without just compensation, which is prohibited by the fifth and fourteenth amendments of the United States Constitution. See C. PRITCHETT, CONSTITUTIONAL CIVIL LIBERTIES 289-92 (1984); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-2 (1978).

86. A land use regulation is constitutionally acceptable if the owner is not deprived of all reasonable economic return from the land. See, e.g., *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

87. Even if the government involved forsakes the zoning power and relies exclusively upon the power of eminent domain to protect archaeological sites in private hands, such a program need not be more expensive to the taxpayers than the current system. Presently, the DOT provides all funding for emergency salvage digs instituted under the Archaeological Regulation, either directly or through individual state governments. See 23 U.S.C. § 104(a) (1982). If the DOT avoided all archaeological sites for transportation projects, this salvage cost is also avoided. These governmental savings could then be used to purchase sites purely for their archaeological merit. This method eliminates the need for hurried salvage work on the site. Archaeological research organizations interested in the site, therefore, may obtain funds for the data extraction process through private channels as part of normal fundraising efforts. For a description of the different funding techniques available to such organizations, especially museums, see H. HUDSON, MUSEUMS FOR THE 1980s 166-76 (1977).

newable.⁸⁸ These resources, therefore, must be preserved as long as possible in order for them to continue yielding useful information.

RECOMMENDATIONS

Judicial Solution

The Supreme Court recently denied certiorari in the *Belmont* case.⁸⁹ A judicial overruling of *Belmont*, therefore, is not possible in the short run. Unfortunately, even this alternative would be an incomplete solution. If the erroneous assumptions and conclusions in *Belmont* were overturned, although the law would better preserve archaeological sites on public lands, those archaeological sites on private lands would still face the danger of destruction by the owner. The salvage digs mandated by the DOT's Archaeological Regulation do not cure this problem. Judicial solution therefore appears impossible.

Administrative Solution

Administrative resolution supplies the simplest alternative; the DOT can rescind its Archaeological Regulation. Such administrative action would appear to undo the main source of damage to section 4(f). Even this alternative is incomplete, however. The *Belmont* decision may perpetuate the erroneous and damaging interpretation of section 4(f) embodied in the Regulation, acting as precedent for further exemptions from section 4(f). Mere rescission only partially compensates for the damage caused by the Regulation. Rescission should be accompanied by affirmative statements directly opposing the concepts for which the Regulation stood.

Legislative Solution

Amending section 4(f) is probably both dangerous and unnecessary. The Supreme Court construed the language of section 4(f) to be crystal clear in *Overton Park*.⁹⁰ By virtue of *Overton Park* and its progeny, section 4(f) is already one of our strongest environ-

88. Lipe, *supra* note 78, at 19.

89. 106 S. Ct. 792 (1986).

90. See *supra* notes 39-43 and accompanying text.

mental statutes when applicable. Thus, we must not endanger the *Overton Park* interpretation by amending section 4(f). Recognizing *Belmont* as an anomaly in the history of section 4(f) is a far more desirable solution. Congress should attack the problem directly by strengthening a statute dealing solely with archaeological resources, such as the Antiquities Act,⁹¹ the Archaeological Resources Protection Act,⁹² or another similar statute.⁹³ Congress should add provisions declaring that, in the event of any federal action significantly affecting an archaeological site,⁹⁴ the administrative agency in charge must treat the archaeological resources contained in such site as warranting preservation "on site." In effect, such an amendment would codify the *Arizona Past and Future Foundation* interpretation of section 4(f).⁹⁵

A legislative remedy best solves the problems of the administrative exceptions to section 4(f) and the lack of protection of archaeological resources found on private lands. It preserves the

91. 16 U.S.C. §§ 431, 432-33 (1982).

92. 16 U.S.C. §§ 470aa-470ll (1982).

93. Although not strictly dealing with archaeology, another statute that Congress may use for this purpose is the National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified at 16 U.S.C. § 470 (1982)). Amending this statute would negate a subsidiary point made in *Belmont*. The court reasoned that because the NHPA was enacted the same day as the Department of Transportation Act, the court should interpret the DOT's Archaeological Regulation in light of section 106 of the NHPA, which requires merely that federal agencies "take into account the effect" of a federal undertaking on historic properties. 766 F.2d at 30.

94. To ensure consistency among environmental statutes, the meaning of key words such as "federal" and "significantly affecting" may be defined in uniformity with similar words and phrases in another selected statute. The best candidate for this "standard" statute is probably the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970). NEPA is by far the most comprehensive environmental statute, with an enormous body of case law defining its particular terms.

95. See *supra* notes 49-56 and accompanying text.

The amendment should also contain incentives for the states to pass laws instituting private land use restrictions in order to avoid potential ill effects from leaving archaeological sites in private hands. One effective incentive is a provision in the law that provides increased highway and other public works funding to those states that enact such restrictions. Another such incentive is a provision that reduces existing highway funding in those states that do not enact any such restrictions by a certain date.

Recently, a similar approach to the second suggested incentive plan proved effective in persuading state legislatures to raise their legal drinking age to 21. See *House Bill Ties Highway Aid, Drinking Age*, Wash. Post, June 8, 1984, at A1, col. 4; *D.C., Virginia Seen Raising Drinking Age: Officials Note Funds for Highways at Stake*, Wash. Post, June 29, 1984, at C1, col. 5.

legislative intent behind section 4(f) and at the same time complements the functions of the other archaeological statutes involved. Additionally, it preserves the intellectual freedom of archaeologists, while still granting the Secretary of Transportation sufficient discretion to define the "prudent and feasible" test to be applied to individual alternatives. Moreover, the solution will have the practical benefit of speeding the construction process. When the Secretary chooses highway routes that do not require salvage digs, the DOT can begin construction immediately, rather than prodding harried archaeologists to finish their dig.⁹⁶

CONCLUSION

Section 4(f) of the Department of Transportation Act is no longer the strong preservationist statute that Congress envisioned. The Department of Transportation's Archaeological Regulation and the decision in *Belmont* have weakened section 4(f) by excluding certain kinds of archaeological resources from its protection. These archaeological resources remain part of our nation's heritage and deserve adequate protection.

Creating a fast, efficient, and inexpensive transportation network that binds our nation together and contributes to commerce is certainly a laudable goal. Even before modern American culture put a premium on mobility and speed, ease of travel was very important.⁹⁷ Yet the values represented by archaeology are also important.⁹⁸ Section 4(f) stands for the proposition that we should sacrifice other important values for the sake of the roadbuilders only if no other "prudent and feasible alternative" exists.

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96. Archaeological excavations require extreme care and attention to detail. Thus, even an emergency salvage dig may take years. See, e.g., R. MARSHALL, HIGHWAY ARCHAEOLOGY REPORT NUMBER ONE 2 (1965) (three years between initial survey of proposed route to the first published report). Quality research and preservation in a non-salvage situation takes even longer. For a description of the meticulous care taken in the excavation of Colonial Williamsburg, see Wertenbaker, *The Archaeology of Colonial Williamsburg*, 1953 ANNUAL REPORT OF THE BOARD OF REGENTS OF THE SMITHSONIAN INSTITUTION 447 (1954).

97. The recurring allegorical image of roads or paths as symbols of the course of life itself indicates how important ancient man considered safe travel. See, e.g., *Proverbs* 4:26 ("Make level paths for your feet/and take only ways that are firm.").

98. "For everything that was written in the past was written to teach us." *Romans* 15:4.