

PROLIFERATION AND EXPANSION OF AMERICA'S AIRPORTS AT THE EXPENSE OF ITS TREASURED PARKS AND PRESERVES: JUDICIAL PERVERSION OF THE TERM "USE" IN SECTION 4(F) OF THE DEPARTMENT OF TRANSPORTATION ACT

Matthew J. Christian*

I. INTRODUCTION

The importance of the airline industry in modern American economics and society cannot be overstated. The airlines serviced over 665 million American passengers in 2000, representing a gross expenditure of over \$93 billion.¹ Americans rely on air transportation to conduct business, to visit relatives, and to fulfill their recreational and leisure demands. However, delays caused by airspace congestion threaten the viability of the airline industry.² Disruptions in our air transportation system, as evidenced in the days, weeks, and months following the September 11 terrorist attacks, only underline the importance of the industry.³

In order to meet the substantial needs of the American public, the air transportation system has, in recent years, demanded more airports, more runways, and more flight paths.⁴ Of course, airports and runways require sizeable tracts

* J.D., William S. Boyd School of Law, University of Nevada, Las Vegas (2002).

¹ Air Transport Association, 2001 Annual Report Highlights, at 6 (Jan. 13, 2002), *available at* <http://www.airlines.org/public/industry/bin/2001annualreport.pdf> (last visited Apr. 19, 2003).

² Air Transport Association, Economics and Statistics, Aviation Infrastructure and Capacity, Approaching Gridlock (Jan. 13, 2002), *available at* <http://www.airlines.org/public/industry/display1.asp?nid=1122> (last visited Apr. 19, 2003).

³ See, e.g., Dean E. Murphy & Joel Brinkley, *A Nation Challenged: The Airports; Rethinking The Security At Airports*, N.Y. TIMES, Sept. 19, 2001, at B1.

⁴ See, e.g., *Sierra Club v. United States Dep't of Transp.*, 753 F.2d 120 (D.C. Cir. 1985) (larger jet aircraft permitted to fly into Jackson Hole Airport in Wyoming); *Allison v. Dep't of Transp.*, 908 F.2d 1024 (D.C. Cir. 1990) (major new airport outside of Denver, Colorado approved); *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569 (9th Cir. 1998) (expansion of flight paths into Los Angeles International); *Nat'l Parks & Conservation Ass'n v. United States Dep't of Transp.*, 222 F.3d 677 (9th Cir. 2000) (expansion of Kahului Airport on Island of Maui); *Save Our Heritage, Inc. v. Fed. Aviation Admin.*, 269 F.3d 49 (1st Cir. 2001) (expansion of air service at commuter airport outside of Boston).

of land and aircraft make significant amounts of noise.⁵ The resulting impact on the environmental integrity of land near airports is obvious.

Recent examples of cities that have experienced the tension between the air transportation industry and the environment are numerous. These include Denver,⁶ Los Angeles,⁷ Jackson Hole,⁸ Boston,⁹ Dallas,¹⁰ and St. Louis.¹¹ The results of legal battles arising from the construction of new airports and/or the expansion of existing airports in these cities will be discussed throughout this note.

Other airport battles have not necessitated litigation, but are no less contentious. For example, Clark County, Nevada, which operates the airport system in and around Las Vegas, has recently proposed the construction of a second airport to supplement McCarran International.¹² Local authorities have selected a site in the Ivanpah Valley, which is adjacent to the Mojave National Preserve, roughly thirty miles from the city.¹³ Environmentalists are closely watching the development of the project and are poised to take action to prevent the construction of the airport if they feel it will threaten the fragile ecology of the preserve.¹⁴

A similar situation has recently been resolved near Miami. The closure of Homestead Air Force Base, following its near destruction in the wake of Hurricane Andrew in 1992, sparked the interest of certain local authorities who wished to transform the base into a large commercial airport.¹⁵ Environmentalists objected, citing the detrimental effects, in terms of noise and air pollution, that such a facility would have on nearby Everglades National Park, Big Cypress National Preserve, and Florida Keys National Marine Sanctuary.¹⁶ Although the plan appears to have been quashed by the Air Force, environmentalists are still closely monitoring the activities of local and state authorities.¹⁷

As will be discussed in Part II, the federal government long ago recognized the adverse effects transportation projects – including airports – can have on the surrounding environment. One statute that attempts to prevent the destruction of public parklands was passed in 1966 as part of the Department of Transportation Act.¹⁸ Dubbed “Section 4(f),” it is this note’s primary focus. Section 4(f) provides:

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

⁵ See generally *supra* note 4 and accompanying text.

⁶ See *Allison*, 908 F.2d 1024.

⁷ See *Morongo Band*, 161 F.3d 569.

⁸ See *Sierra Club*, 753 F.2d 120.

⁹ See *Save Our Heritage*, 269 F.3d 49.

¹⁰ See *City of Grapevine v. Dep’t of Transp.*, 17 F.3d 1502 (D.C. Cir. 1994).

¹¹ See *City of Bridgeton v. Slater*, 212 F.3d 448 (8th Cir. 2000).

¹² Christine Dorsey, *House OKs Sale of Ivanpah Valley Land for Airport*, LAS VEGAS REV.-J., Oct. 18, 2000, at 1A.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Tim Breen, *Public Lands: Air Force Decides Against Airport Near Everglades*, GREEN-WIRE, Jan. 17, 2001.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Department of Transportation Act of 1966, 49 U.S.C.A. § 303 (West 2003).

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
- (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.¹⁹

The protections that § 4(f) affords public parks are primarily found in subsections (1) and (2). Before a court even reviews whether an agency has complied with those sections, however, certain threshold elements must be met. For instance, the land in question must be publicly owned.²⁰ In addition, to qualify as a "park," the land must be one of several enumerated types, including "public park[s], recreational area[s], or wildlife and waterfowl refuge[s]."²¹

Another threshold requirement, the main focus of this note, stems from the term "use."²² The proposed project must "use" parkland in order to trigger the vigorous requirements of subsections (1) and (2).²³ The cases applying § 4(f), however, reflect a troubling and unsupportable inconsistency. On the one hand, a "use" has often been identified in cases involving the construction of new roads, thereby triggering the environmental protections of § 4(f).²⁴ On the other hand, a "use" has never been identified in airport cases, so § 4(f) has never been applied to prevent the construction of a new airport or to even curtail the expansion of an existing airport located near an environmentally-sensitive park.²⁵ The judiciary appears to use two separate standards depending on whether the proposed project involves a road or an airport. This note argues that the judiciary has perverted the term "use" in the airport cases, which has effectively prevented § 4(f) from fulfilling one of its congressionally-intended purposes: protecting environmentally-sensitive parklands from the damaging effects of nearby transportation projects, including airports.

This note will examine this paradox by first exploring, in Part II, the legislative history and purpose of § 4(f). Thereafter, this note will begin a detailed comparison between highway and airport cases. Part III will identify and analyze the major § 4(f) cases involving highway projects. Then, Part IV will examine cases involving airports, focusing on the differences in the standards courts apply in those cases. Finally, in Part V, this note will conclude by discussing ways in which this paradox can be remedied. In order to reverse the unfortunate current trend in airport cases, courts must interpret "use" more broadly and more flexibly, just as they do in highway cases. Courts must also reevaluate the standards under which they analyze the impact of noise. The

¹⁹ *Id.* Note that § 4(f) was formerly codified at 49 U.S.C.A. § 1653(f) (West 2003).

²⁰ *Falls Rd. Impact Comm., Inc. v. Dole*, 581 F. Supp. 678, 686 (E.D. Wis. 1984) (quoting *Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d 359, 370 (5th Cir. 1976)).

²¹ *Id.*

²² *See Adler v. Lewis*, 675 F.2d 1085, 1091 (9th Cir. 1982).

²³ *See, e.g., Monroe County Conservation Council, Inc. v. Adams*, 566 F.2d 419 (2d Cir. 1977) (proposed bypass expressway serving Rochester, New York clearly "uses" an 842 acre public park, but government sufficiently proved that it had considered all feasible and prudent alternatives).

²⁴ *See discussion infra* Part III.

²⁵ *See discussion infra* Part IV.

adoption of these suggestions is necessary in order to effectuate Congress' mandate to protect our nation's parklands from the dangers caused by nearby airports.

II. THE LEGISLATIVE HISTORY OF § 4(F)

As preliminary foundation, this note will discuss the legislative history and purpose of § 4(f). It is clear that § 4(f) arose from a growing national concern in the 1960's over the general deprivation of the environment.²⁶ To forestall man's detrimental impact on ecologically sensitive areas, the federal government implemented several environmental safeguards during that period. These included the National Environmental Policy Act of 1969, as well as § 4(f) of the Department of Transportation Act.²⁷

Section 4(f)'s policy declaration summarizes this sentiment well. It states 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."²⁸ What Congress hoped to accomplish in passing § 4(f) was the assurance "that in planning highways, railroad rights-of-way, airports, and other transportation facilities, care will be taken [by the Department of Transportation], to the maximum extent possible, not to interfere with or disturb established recreational facilities and refuges."²⁹ In so aspiring, "Congress desired that the effect on parkland and other recreational facilities be fully considered during the planning stages of major new 'facilities.'"³⁰

Additional evidence of Congressional intent may be found in the strict restrictions § 4(f) places on the executive branch of the federal government. The Secretary of Transportation may approve transportation projects *only if* he can meet two burdensome requirements.³¹ First, he must prove that no feasible, prudent alternative to the proposed transportation project exists.³² Second, the proposal must list all possible measures that can mitigate the detrimental effects the project will have on the park.³³ The Supreme Court has read these requirements to indicate Congress' strong desire to protect parklands.³⁴

²⁶ See Stanley D. Olesh, Note, *The Roads Through Our Ruins: Archaeology and Section 4(f) of the Department of Transportation Act*, 28 WM. & MARY L. REV. 155, 158-59 (1986); Barbara Miller, Case Comment, *Department of Transportation's Section 4(f): Paving the Way Towards Preservation*, 36 AM. U. L. REV. 633, 638-39 (1987).

²⁷ Miller, *supra* note 26, at 638-39.

²⁸ Department of Transportation Act of 1966, 49 U.S.C.A. § 303(a) (West 2003).

²⁹ See S. Rep. No. 89-1659 (1966).

³⁰ *Sierra Club v. United States Dep't of Transp.*, 753 F.2d 120, 130 (D.C. Cir. 1985).

³¹ See discussion *supra* Section I.

³² *Id.*

³³ *Id.* See also Matthew Singer, *The Whittier Road Case: The Demise of Section 4(f) Since Overton Park and its Implications for Alternatives Analysis in Environmental Law*, 28 ENVTL. L. 729, 732-33 (1998).

³⁴ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412-13 (1971).

III. JUDICIAL INTERPRETATION OF WHAT CONSTITUTES A "USE" UNDER SECTION 4(F) IN HIGHWAY CASES

Through a combination of judicial opinions and administrative regulations, a relatively clear definition of the term "use" has emerged. That definition has been stated fairly consistently for at least the past two decades, as demonstrated in one of the most significant § 4(f) highway cases yet decided: *Adler v. Lewis*.³⁵ *Adler* involved the construction of several miles of Interstate 90 through the heart of the Seattle metropolitan area,³⁶ which opponents argued would "use" up to fifty local parks.³⁷ In its decision, the court sanctioned the Department of Transportation's definition of "use," which stated:

A site is considered "used" whenever land from or buildings on the site are taken by the proposed project, or whenever the proposed project has significant adverse air, water, noise, land, accessibility, aesthetic, or other environmental impacts on or around the site, as per the *Stop H-3 Association v. Coleman* (opinion).³⁸

This definition is very useful because it identifies and defines the concept of "constructive use," to be discussed more thoroughly later in this section.³⁹ The court stated that "[t]he term 'use' is to be construed broadly [to incorporate constructive uses], not limited to the concept of a physical taking."⁴⁰ By incorporating constructive use into the definition, the *Adler* court indicated the breadth of § 4(f).

The *Adler* court, however, also defined the limits of constructive use, and in so doing, determined that the Secretary of Transportation's decision in this case – that not all fifty sites would be used by the proposed interstate – was not clearly erroneous.⁴¹ The court limited the definition of constructive use by emphasizing the need for courts to look at the *significance* of the impact on the park.⁴² The court stated that the term "use" turns on whether the federal transportation action "could create sufficiently serious impacts that would substantially impair the value of the site in terms of its prior significance and enjoyment."⁴³ As will be seen, courts in highway cases emphasize language in *Adler* that construes the statute broadly to find uses of parks, while courts in

³⁵ 675 F.2d 1085 (9th Cir. 1982). See, e.g., *Falls Rd. Impact Comm., Inc. v. Dole*, 581 F. Supp. 678 (E.D. Wis. 1984); *Coalition Against a Raised Expressway, Inc. v. Dole*, 835 F.2d 803 (11th Cir. 1988); *Sierra Club v. United States Dep't of Transp.*, 664 F. Supp. 1324 (N.D. Cal. 1987); *Sierra Club v. United States Dep't of Transp.*, 753 F.2d 120 (D.C. Cir. 1985); *Allison v. Dep't of Transp.*, 908 F.2d 1024 (D.C. Cir. 1990); *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569 (9th Cir. 1998); *Nat'l Parks & Conservation Ass'n v. United States Dep't of Transp.*, 222 F.3d 677 (9th Cir. 2000); *Save Our Heritage, Inc. v. Fed. Aviation Admin.*, 269 F.3d 49 (1st Cir. 2001); *City of Bridgeton v. Slater*, 212 F.3d 448 (8th Cir. 2000); *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502 (D.C. Cir. 1994).

³⁶ *Adler*, 675 F.2d at 1088.

³⁷ *Id.* at 1091.

³⁸ *Id.* at 1092 (citing *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434 (9th Cir. 1976) (expressway built in close proximity to an ancient Hawaiian petroglyph rock)).

³⁹ See discussion *infra* Part III.B.

⁴⁰ *Adler*, 675 F.2d at 1092.

⁴¹ *Id.* at 1093.

⁴² *Id.* at 1092.

⁴³ *Id.*

airport cases have construed *Adler* narrowly by requiring a significant impact before a constructive use will be found.

Before discussing “constructive use” cases, however, it is important to fully identify what types of projects will constitute “actual uses,” as demonstrated in the famous *Overton Park* case.

A. Actual Use

Citizens to Preserve Overton Park, Inc. v. Volpe,⁴⁴ one of the first cases to interpret § 4(f), is important not only in laying the jurisprudential foundation for this note, but in laying the foundation for the entire field of environmental law. In *Overton Park*, conservationists in Memphis sued under the newly-passed Transportation Act to prevent the construction of Interstate 40 through the middle of the city’s preeminent downtown park.⁴⁵ The park encompassed 342 acres and contained a zoo, golf course, trails, forests, an outdoor theater, and other recreational and cultural amenities.⁴⁶ The approved route of the proposed expressway – six lanes in all – was to pass directly through the park, isolating the zoo and destroying twenty-six acres.⁴⁷

Overton Park represents the most obvious form of “use” contemplated by § 4(f): actual, physical placement of a transportation project directly on parkland.⁴⁸ In that regard, the case does not particularly contribute to this note’s attempt at comprehensively defining the term “use.” However, the case is mentioned here because it represents the cornerstone by which further development of environmental law took place.⁴⁹ *Overton Park* opened the door to using § 4(f) and other environmental legislation to prevent unnecessary destruction of important environmental treasures.⁵⁰

Other courts have held that a major physical taking of a substantial portion of a park, like that evidenced in *Overton Park*, is not necessary to implicate § 4(f).⁵¹ Even the most miniscule taking of any portion of parkland qualifies as an actual “use.”⁵² For instance, the use of merely fifteen square feet of a

⁴⁴ 401 U.S. 402 (1971).

⁴⁵ *Id.* at 406.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See also *Monroe County Conservation Council, Inc. v. Adams*, 566 F.2d 419 (2d Cir. 1977) (constructing bypass expressway through a park near Rochester, New York constitutes “use” under § 4(f)).

⁴⁹ See, e.g., Singer, *supra* note 33, at 734-35 (discussing the “arbitrary and capricious” test, the narrow standard of review *Overton Park* imposed on courts when they review, through the Administrative Procedure Act, actions of administrative agencies).

⁵⁰ See, e.g., Olesh, *supra* note 26, at 173-74 (“[B]y virtue of *Overton Park* [sic] and its progeny, section 4(f) is already one of our strongest environmental statutes when applicable.”); ZYGMUNT J.B. PLATER, ROBERT H. ABRAMS, WILLIAM GOLDFARB, & ROBERT L. GRAHAM, *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 5 (2d ed. 1998) (the use of § 4(f) in *Overton Park* “pointed the way to subsequent improvements in official foresight and planning”).

⁵¹ *Township of Springfield v. Lewis*, 702 F.2d 426, 430 (3d Cir. 1983); *Falls Rd. Impact Comm., Inc. v. Dole*, 581 F. Supp. 678 (E.D. Wisc. 1984); *Alaska Ctr. for the Env’t v. Armbrister*, 131 F.3d 1285, 1287-88 (9th Cir. 1997), *cert. denied*, 523 U.S. 1121 (1998).

⁵² See *Lewis*, 702 F.2d at 430.

municipal park would probably suffice.⁵³ This broad construction of the statute is in line with the Supreme Court's holding in *Overton Park*.⁵⁴

B. Constructive Use

If "use" only incorporated transportation projects that actually, physically traverse parkland, the analysis would be quite simple (and the utility of § 4(f) would be quite limited). The term, of course, has been interpreted to include far more. Many courts have found that certain transportation projects, though not physically located within a park's borders, "*constructively*" use parkland by interfering in some way with the park's beneficial attributes.⁵⁵ Of primary importance to the definition, courts hold that such interference must be *significant*.⁵⁶ Examples of significant interference include: noise,⁵⁷ visual obstructions,⁵⁸ and physical barriers to access.⁵⁹ The remainder of this section will explore the many situations in which courts have found constructive uses where highway projects are at issue.

1. Highways Bordering Parkland

First, highways that border sensitive parklands have often been found to "constructively use" them under § 4(f). For instance, in *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*,⁶⁰ the United States District Court for the District of Vermont concluded that a proposed four-lane, limited-access expressway bordering a wilderness area affected the wilderness area to an extent sufficient to constitute a "use" under § 4(f).⁶¹ The wilderness area in question, referred to as the "Lye Brook Backwoods Area," consisted of roughly 11,000 acres of a remote portion of the Green Mountain National Forest.⁶² The court noted that the area was renowned as a peaceful place that residents of Vermont, including its senior United States Senator, cherished for its wilderness and solitude.⁶³ In concluding that the highway would "use" this area merely by bordering it, the court rejected the Secretary's attempts to minimize the special environmental attributes of Lye Brook by citing other detri-

⁵³ *Falls Rd. Impact Comm.*, 581 F. Supp. at 690-91; see also *Armbrister*, 131 F.3d at 1287-88 (highway using approximately 0.3% of Portage Glacier Recreation Area and approximately 3.3% of Portage Lake Recreation Area).

⁵⁴ *La. Envtl. Soc'y, Inc. v. Coleman*, 537 F.2d 79, 84 (5th Cir. 1976).

⁵⁵ See, e.g., *Coalition Against a Raised Expressway, Inc. v. Dole*, 835 F.2d 803 (11th Cir. 1988); *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434 (9th Cir. 1976); *Brooks v. Volpe*, 460 F.2d 1193 (9th Cir. 1972); *Sierra Club v. United States Dep't of Transp.*, 664 F. Supp. 1324 (N.D. Cal. 1987); *Falls Rd. Impact Comm.*, 581 F. Supp. 678; *Citizens for Mass Transit Against Freeways v. Brinegar*, 357 F. Supp. 1269 (D. Ariz. 1973); *Conservation Soc'y of S. Vt., Inc. v. Sec'y of Transp.*, 362 F. Supp. 627 (D. Vt. 1973).

⁵⁶ See, e.g., *Adler v. Lewis*, 675 F.2d 1085, 1092 (9th Cir. 1982).

⁵⁷ See, e.g., *Coalition Against a Raised Expressway*, 835 F.2d at 810; *Falls Rd. Impact Comm.*, 581 F. Supp. at 693.

⁵⁸ See, e.g., *Coalition Against a Raised Expressway*, 835 F.2d at 812.

⁵⁹ See, e.g., *Brooks*, 460 F.2d at 1194; *Falls Rd. Impact Comm.*, 581 F. Supp. at 694.

⁶⁰ 362 F. Supp. 627.

⁶¹ *Id.* at 639.

⁶² *Id.* at 638.

⁶³ *Id.*

mental uses of the area like logging.⁶⁴ In other words, despite logging and other non-environment-friendly uses then in place at Lye Brook, the court held that a new highway would significantly impact the area.⁶⁵

The *Lye Brook* court relied heavily on another “use” case involving a proposed highway that, if constructed, would have bordered a parkland.⁶⁶ In *Brooks v. Volpe*,⁶⁷ conservationists sued under § 18(a) of the Federal-Aid Highway Act of 1968, that, like § 4(f), requires the “use” of a sensitive area by a transportation project in order to trigger the statute’s environmental protection provisions.⁶⁸ The court held that the encirclement of the Denny Creek Campground, located in an alpine forest near the summit of Snoqualmie Pass in Washington State, constituted a “use” under the Highway Act.⁶⁹ Relying on *Overton Park*, the court emphasized the Supreme Court’s mandate to construe § 4(f), including the word “use,” “broadly . . . in cases in which environmental impact appears to be a substantial question.”⁷⁰ This case recognizes two categories of “constructive use:” (1) projects that border parkland and (2) projects that restrict access to parkland. The latter is the subject of the next subsection.⁷¹

It is important to note that the provisions of § 4(f) are not necessarily triggered simply because a proposed transportation project is near a parkland. In *Adler*, the Ninth Circuit held that proximity alone is not a “crucial factor.”⁷² The court emphasized that distance was not really a factor in and of itself, but, combined with the adverse impact or impairment that the transportation project may have on the protected site, it might become important.⁷³ The court distinguished *Stop H-3 Association v. Coleman*,⁷⁴ where the Ninth Circuit had earlier found that the close proximity of a highway to ancient Hawaiian petroglyphs constituted a constructive use.⁷⁵ Note, however, that, according to at least one court, if the park is “immediately adjacent” to the highway, § 4(f) is triggered because of presumed impacts.⁷⁶

⁶⁴ *Id.* at 639.

⁶⁵ *Id.*

⁶⁶ *See id.* (citing *Brooks*, 460 F.2d 1193).

⁶⁷ 460 F.2d 1193.

⁶⁸ *Id.* at 1194 (construing Federal-Aid Highway Act of 1968 § 18(a), 23 U.S.C. § 138 (2000)).

⁶⁹ *Id.*

⁷⁰ *Id.* (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412 (1971)).

⁷¹ *See* discussion *infra* Part III.B.2.

⁷² *Adler v. Lewis*, 675 F.2d 1085, 1091 (9th Cir. 1982).

⁷³ *Id.* at 1091-92.

⁷⁴ 533 F.2d 434 (9th Cir. 1976).

⁷⁵ *Id.* at 445.

⁷⁶ *Citizens for Mass Transit Against Freeways v. Brinegar*, 357 F. Supp. 1269, 1280 (D. Ariz. 1973) (proposed section of Interstate 10 through downtown Phoenix located adjacent to a Berney Park).

2. Highways Restricting Access to Parkland

In *Falls Road Impact Committee, Inc. v. Dole*,⁷⁷ a rare case involving a highway that was found *not* to use parkland, a federal district court in Wisconsin held that conservationists failed to prove that restricted access to a municipal park during the widening of a road and construction of a bridge constituted a constructive use.⁷⁸ Construction was to have been completed over the course of only 80-100 days.⁷⁹ In addition, sidewalks that had not existed prior to the construction project were found to actually increase accessibility to the park.⁸⁰ Given those facts, the court found accessibility problems too insignificant to qualify as a constructive use.⁸¹

The court in *Brooks v. Volpe*,⁸² by contrast, found access sufficiently impaired to justify a finding of a constructive use. To differentiate *Brooks* with *Falls Road*, it may have been important in the courts' reasoning that the campground in *Brooks* had been located in a quiet forest setting, far from other man-made sounds. The construction of the interstate on either side of the campground would clearly disrupt the previous ability to access and enjoy the area. In contrast, the park in *Falls Road* was an urban park, already located near streets. In addition, the access problem cited by the plaintiffs in *Falls Road* was to be only temporary, while the interstate would obviously restrict access to the campground far more permanently. In any case, the judiciary has clearly found accessibility an attribute whose impairment can constitute a constructive use.

3. Highways Disrupting Parkland Through Noise

Probably the most credible claim made by the plaintiffs in *Falls Road*, however, pertained to the noise impact the newly-widened road would have on the park. Local authorities predicted that increased traffic – including many more trucks – would increase the average decibel level to 65.5.⁸³ However, that level represented an increase of only 6.5 – 7.5 decibels (or roughly ten percent) over the levels measured prior to construction. In addition, the design noise level, which generally represents the "upper level of acceptable noise" for

⁷⁷ 581 F. Supp. 678, 694 (E.D. Wisc. 1984). This case also involved the question of whether an actual use of the parkland would occur if a mere fifteen square feet of parkland were taken by the proposed road. The court stated that it probably would.

⁷⁸ *Id.* at 694.

⁷⁹ *Id.*

⁸⁰ *Id.* at 692-93.

⁸¹ *Id.* at 694.

⁸² 460 F.2d 1193 (9th Cir. 1972).

⁸³ *Falls Rd. Impact Comm.*, 581 F. Supp. at 693. For reference, note that seventy-five decibels is "the equivalent of a household vacuum cleaner operating five to six feet away." Allison v. Dep't of Transp., 908 F.2d 1024, 1030 (D.C. Cir. 1990). Other relevant comparisons include the following: A quiet office or library produces roughly forty decibels, while a large office produces fifty decibels. League for the Hard of Hearing, *Noise Center: Noise Levels in Our Environment Fact Sheet*, available at <http://www.lhh.org/noise/decibel.htm> (last visited Apr. 19, 2003). A coffee percolator equates to fifty-five decibels, while freeway traffic is seventy. *Id.* Conversational speech from about one foot away produces sixty decibels, while a busy street or small orchestra produce roughly sixty-five. Coolmath, *Decibel Levels*, available at <http://www.coolmath.com/decibels1.htm> (last visited Apr. 19, 2003).

a "particular classification of human activity," at the park had been set at 67 decibels, 1.5 decibels higher than the projected level after the completion of the project.⁸⁴ The court found this evidence too inconclusive to prove that the noise effects would be substantial.⁸⁵ Therefore, on this issue, as well, the court found no constructive use.⁸⁶

By comparison, in *Coalition Against a Raised Expressway, Inc. v. Dole*,⁸⁷ the Eleventh Circuit found that noise did cause a constructive use.⁸⁸ The facts in that case, however, were far more egregious than in *Falls Road*. The case arose due to the proposed construction of an interchange connecting two major interstate highways in downtown Mobile, Alabama.⁸⁹ The proposal required the construction of several seventeen-foot concrete pillars within close proximity, and within sight, of three important historical buildings covered by § 4(f).⁹⁰ The court found that a significant increase in noise would result from the interchange. Citing the government's final Environmental Impact Statement, noise "would rise to between seventy-five and eighty decibels," a level "substantially greater than the Environmental Protection Agency's goal of fifty-five decibels."⁹¹

Although the court in *Raised Expressway* clearly found noise to be a significant factor, it is important to note that it did not reach a decision on whether noise *alone* would be sufficient. The court held that the combination of noise, proximity, and unsightliness made the interchange a sufficient enough "use" to trigger the requirements of § 4(f).⁹²

4. *Highways Disrupting Parkland Through Visual Obstructions or Unpleasant Aesthetics*

As indicated in *Raised Expressway*, unsightliness may be a significant factor in a court's determination that a transportation project constructively uses parkland. The Eleventh Circuit in that case noted that the elevation of the interchange would impair the view, both from downtown looking towards the Mobile River and from the river looking back towards the historic architecture of downtown.⁹³ Again, visual aesthetics alone may not have been enough, but the court certainly found the factor persuasive.⁹⁴

Falls Road helps illustrate the sort of facts found insufficient, by themselves, to constitute a constructive use due to visual unpleasantness.⁹⁵ In that

⁸⁴ *Id.* at 693.

⁸⁵ *Id.* at 694.

⁸⁶ *Id.*

⁸⁷ 835 F.2d 803 (11th Cir. 1988).

⁸⁸ *Id.* at 812.

⁸⁹ *Id.* at 805.

⁹⁰ *Id.* at 811. The historic sights included Mobile City Hall, a National Historic Landmark; the G.M. & O. Railroad Terminal, an architectural treasure listed on the National Register of Historic Places; and Government Street Park, a small parkland along the nearby Mobile River. *Id.*

⁹¹ *Id.* at 811-812.

⁹² *Id.* at 812.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 581 F. Supp. 678 (E.D. Wis. 1984); see discussion *supra* Parts III.B.2 and III.B.3.

case, neither increased traffic nor the loss of vegetation affected the aesthetic value of the park to a significant enough degree to trigger § 4(f).⁹⁶

In *Sierra Club v. United States Department of Transportation*,⁹⁷ however, the detrimental aesthetic impact of a proposed highway was enough, by itself, to convince the court to invoke § 4(f).⁹⁸ McNee Ranch State Park is located in central California along the Pacific coast.⁹⁹ The court noted that the park was primarily renowned for its scenic qualities.¹⁰⁰ The rugged mountainous terrain and views of the ocean made the scenery from the park's many overlooks "quite spectacular."¹⁰¹ In contrast with the unspoiled nature of the park's visual features, the proposed freeway would have caused many unpleasant scars on the sides of the park's mountain ranges.¹⁰² These were to include seven large "cuts" and "a number of 'fill' slopes, the largest of which would be 250 feet high."¹⁰³ In addition to the unsightly cuts and fill slopes, the highway itself would have been visible.¹⁰⁴ The court found that the aesthetic impact on campers, hikers, and sightseers would have been "significant[ly] adverse," and the court consequently held that the highway would constructively use the park.¹⁰⁵

5. Other Considerations

The *Sierra Club* case is interesting because it cites other factors that may adversely impact a park to a degree sufficient to constitute a "use" for purposes of § 4(f). In particular, the court noted that the highway would have significantly impaired the park's recreational attributes.¹⁰⁶ Hiking trails would have been relocated and the proximity of the road would have destroyed the "unspoiled wilderness through which the hikers now walk."¹⁰⁷

In addition, the court cited the adverse effect the highway would have had on the park's wildlife. The "barrier effect" created by the highway would have prevented certain wildlife from accessing important sections of their habitat, thereby leading to a decline in wildlife populations and the possibility of complete extinction for particular species from certain areas of the park.¹⁰⁸ Judicial concern for wildlife will resurface in this note's later discussion of airport cases.¹⁰⁹

⁹⁶ *Falls Rd. Impact Comm.*, 581 F. Supp. at 694.

⁹⁷ 664 F. Supp. 1324 (N.D. Cal. 1987).

⁹⁸ *Id.* at 1330.

⁹⁹ *See id.* at 1327.

¹⁰⁰ *Id.* at 1331.

¹⁰¹ *Id.*

¹⁰² *See id.*

¹⁰³ *Id.* at 1330-31.

¹⁰⁴ *Id.* at 1331.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1330-31.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See discussion infra* Part IV.B.2.

C. Summary of Highway Cases

As the highway cases reveal, a broad array of constructive use situations have been identified by the courts. Whether alone or in combination with other factors, these situations certainly include those where highways border parkland,¹¹⁰ restrict access to parkland,¹¹¹ detrimentally affect the visual aesthetics of parkland,¹¹² or heighten noise in parkland.¹¹³ These situations may also include those where wildlife or recreational opportunities are detrimentally affected.¹¹⁴ Perhaps surprisingly, these situations appear to trigger § 4(f) only when the transportation project is a highway. When an airport is involved, as the next Part of this note will show, courts appear far less ready to construe the facts in favor of finding a "use," constructive or otherwise.

IV. JUDICIAL INTERPRETATION OF WHAT CONSTITUTES A "USE" UNDER SECTION 4(F) IN NEW AIRPORT AND AIRPORT EXPANSION CASES

A. Introduction

Courts interpreting § 4(f) in an airport context generally acknowledge the broad definition of the term "use" as identified in highway cases.¹¹⁵ In other words, the "constructive use" theory applies to airport projects as well as highway projects. For example, the D.C. Circuit, in *Allison v. Department of Transportation*, stated: [A] project which respects a park's territorial integrity may still, by means of noise, air pollution and general unsightliness, dissipate aesthetic value, crush its wildlife, defoliate its vegetation, and "take" it in every practical sense.¹¹⁶

However, despite that acknowledgment and others like it,¹¹⁷ the same court is very reluctant to apply the definition in the same way it did in highway cases. The *Allison* court, for instance, comprehensively outlined the judiciary's interpretation of the term "use," as it applies in airport cases, when it stated:

The "use" of parklands within the meaning of section 4(f) includes not only actual, physical takings of such lands but also significant adverse indirect impacts as well. . . . At the same time, "not . . . every change within park boundaries constitutes a

¹¹⁰ See, e.g., *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434 (9th Cir. 1976); *Brooks v. Volpe*, 460 F.2d 1193 (9th Cir. 1972); *Citizens for Mass Transit Against Freeways v. Brinegar*, 357 F. Supp. 1269 (D. Ariz. 1973); *Conservation Soc'y of S. Vt., Inc. v. Sec'y of Transp.*, 362 F. Supp. 627 (D. Vt. 1973).

¹¹¹ See, e.g., *Falls Rd. Impact Comm., Inc. v. Dole*, 581 F. Supp. 678 (E.D. Wis. 1984).

¹¹² See, e.g., *Coalition Against a Raised Expressway, Inc. v. Dole*, 835 F.2d 803 (11th Cir. 1988); *Sierra Club v. United States Dep't of Transp.*, 664 F. Supp. 1324 (N.D. Cal. 1987).

¹¹³ See, e.g., *Coalition Against a Raised Expressway*, 835 F.2d 803; *Falls Rd. Impact Comm.*, 581 F. Supp. 678.

¹¹⁴ *Sierra Club*, 664 F. Supp. 1324.

¹¹⁵ See, e.g., *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 583 (9th Cir. 1998) (quoting the definition of "use" found in *Adler v. Lewis*, 675 F.2d 1085, 1092 (9th Cir. 1982)).

¹¹⁶ *Allison v. Dep't of Transp.*, 908 F.2d 1024, 1028 (D.C. Cir. 1990) (quoting D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1239 (D.C. Cir. 1971)).

¹¹⁷ See, e.g., *Morongo Band*, 161 F.3d at 583; *Save Our Heritage, Inc. v. Fed. Aviation Admin.*, 269 F.3d 49, 58 (1st Cir. 2001).

use" of section 4(f) lands. No "use" will be deemed to have occurred where an action will have only an insignificant effect on the existing use of protected lands.¹¹⁸

As this excerpt indicates, courts in airport cases have emphasized the far more narrow interpretation of "use" that was identified in *Adler*: no "use" will be found if "no significant impact" on the park can be identified.¹¹⁹ As the survey of airport cases outlined below will reveal, opponents of airport projects have *never* overcome this hurdle.¹²⁰ Judicial application of § 4(f) has never effectively protected a park of local, state, or federal significance from the intrusions of a nearby airport.¹²¹

B. Chronological Discussion of Airport Cases

1. Jackson Hole Airport and Grand Teton National Park

One of the first cases in which airport opponents attempted to use § 4(f) to protect a nearby park arose from a controversy involving the airport in Jackson Hole, Wyoming, located just outside Grand Teton National Park.¹²² Grand Teton is one of America's most treasured parks. Located just south of Yellowstone, the park's primary attraction is the Grand Teton mountain range, a sheer wall of solid granite rising 7,000 feet from the valley below, completely unobstructed by smaller foothills.¹²³ Vast forests and large pristine lakes offer an abundance of recreational opportunities.¹²⁴ Yet, incredibly, a relatively large commercial airport that services the tourist and skiing center of Jackson Hole is located not near but actually *within* the park.¹²⁵

The controversy arose in 1983 when the FAA approved the use of Boeing 737 passenger jets from the airport, a type of aircraft not previously used on a regular basis at Jackson Hole.¹²⁶ This prompted the Sierra Club to allege a violation of § 4(f) and other laws.¹²⁷ The Sierra Club argued that the use of

¹¹⁸ *Allison*, 908 F.2d at 1028 (quoting *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 63 (D.C. Cir. 1987)).

¹¹⁹ *Adler*, 675 F.2d at 1092.

¹²⁰ The only case in which a court has tacitly agreed that a use occurred in an airport context is *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991). In that case, however, the court did not directly address the issue, as it had no opportunity to do so. The FAA conceded that its approval of the expansion of the Toledo Airport, which would cause nighttime noise levels at a nearby campground to increase by approximately ten to fifteen decibels, would "use" parkland. *Id.* at 203. However, the FAA argued that there was no feasible alternative to the airport's "use" of the campground. *Id.*

¹²¹ See, e.g., *Sierra Club v. United States Dep't of Transp.*, 753 F.2d 120 (D.C. Cir. 1985); *Allison*, 908 F.2d 1024; *Morongo Band*, 161 F.3d 569; *Nat'l Parks & Conservation Ass'n v. United States Dep't of Transp.*, 222 F.3d 677 (9th Cir. 2000); *Save Our Heritage*, 269 F.3d 49; *City of Bridgeton v. Fed. Aviation Admin.*, 212 F.3d 448 (8th Cir. 2000); *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502 (D.C. Cir. 1994).

¹²² *Sierra Club*, 753 F.2d at 122.

¹²³ FODOR'S NATIONAL PARKS OF THE WEST: A COMPLETE GUIDE TO THE 31 BEST-LOVED NATIONAL PARKS AND MONUMENTS IN THE WESTERN UNITED STATES AND CANADA 179 (Amy McConnell ed., 3d ed. 1996).

¹²⁴ *Id.* at 179-80.

¹²⁵ The Jackson Hole Airport, in fact, is "the only airport in this country located within the boundaries of a National park." *Sierra Club*, 753 F.2d at 122.

¹²⁶ *Id.* at 122-23.

¹²⁷ *Id.* at 122.

commercial jets, where only propeller aircraft had been used in the past, constituted a "constructive use" of the park.¹²⁸ Sierra Club's argument analogized the expansion of air service to the highway projects at issue in *Brooks*, *Adler*, and *Conservation Society of Southern Vermont*,¹²⁹ which were held to constitute constructive uses of the parks in those cases.¹³⁰ The D.C. Circuit, however, rejected the argument, holding those cases inapposite since "[e]ach either involve[d] a new and actual use of parkland, or [an] activity on adjoining land that would have a severe physical impact on the parkland."¹³¹ The court found that the addition of commercial jets was not, in fact, a "new" use, since the airport had been in operation prior to Grand Teton's designation as protected land.¹³² The court further noted that other aircraft, including private jets,¹³³ had used the airport for many years prior to the action at hand.¹³⁴ Finally, the court cited *Adler*,¹³⁵ finding the type of flight scheduling change at issue "insignificant" and reasoned that Congress did not intend such minor changes to rise to the level of a § 4(f) "use."¹³⁶ The court's decision, in effect, opened the door to further development, setting a regrettable precedent at both Grand Teton and other airports located next to sensitive parklands.¹³⁷

2. Denver's Stapleton Airport and Barr Lake State Park

Another important case, *Allison v. Department of Transportation*, involved the construction of one of the largest commercial airports in the country, Denver's new Stapleton Airport.¹³⁸ Denver's previous airport had long been considered inadequate; as a result, the local government explored alternatives for the placement of a new facility throughout the late 1970s and 1980s.¹³⁹ Denver settled on a location thirteen miles from the previous airport, which placed the new facility near a recreational park and wildlife refuge called Barr Lake State Park.¹⁴⁰ Local residents sued to prevent construction of the new airport under § 4(f).¹⁴¹

In upholding the FAA's determination that the new facility would not "use" Barr Lake, the court noted that the park's location was within close proximity to the former airport and, therefore, already suffered from noticeable air-

¹²⁸ *Id.* at 130.

¹²⁹ See discussion *supra* Part III.

¹³⁰ *Sierra Club*, 753 F.2d at 130.

¹³¹ *Id.*

¹³² *Id.*

¹³³ The court summarily states that private jets at Jackson Hole Airport "create far more cumulative noise than commercial jets." *Id.*

¹³⁴ *Id.*

¹³⁵ See discussion *supra* Part III. The *Adler* court emphasized the significance of the impact when analyzing whether a proposed action would constructively "use" a parkland.

¹³⁶ *Sierra Club*, 753 F.2d at 130.

¹³⁷ Jackson Hole Airport itself continues to be the source of potential action under § 4(f). In 1998, the FAA proposed the expansion of the runway, citing safety issues. See Mark Peterson, *Rocky Mountain Regional Report*, NATIONAL PARKS, Nov. 1, 1998, at 18.

¹³⁸ *Allison v. Dep't of Transp.*, 908 F.2d 1024, 1026 (D.C. Cir. 1990).

¹³⁹ *Id.* at 1026-27.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1027.

craft noise.¹⁴² Relying heavily on its decision in *Jackson Hole*,¹⁴³ the court reasoned that the overall amount of noise would be roughly the same after the new airport's completion.¹⁴⁴ To make that determination, the court relied on FAA noise impact studies that analyzed differences in noise levels both cumulatively (the overall amount of noise audible at the park as a whole) and episodically (the amount of time various corners of the park experience high levels of noise for short periods).¹⁴⁵ In both cases, the FAA garnered sufficient evidence to support their conclusion that no noticeable increase in noise would occur.¹⁴⁶ The court thereby held that the new Stapleton would not significantly impact the park and would, therefore, not "use" the park under § 4(f).¹⁴⁷

Despite the holding in *Allison*, environmentalists concerned about the effect of noise on wildlife could find some encouragement in dicta about the faultiness of the FAA's reliance on federal noise regulations. "Part 150" is a federal guideline that identifies the maximum noise level, measured in decibels, acceptable in certain situations.¹⁴⁸ In "recreational" situations, which include nature exhibits, zoos, amusements, parks, resorts, golf courses, and riding stables, seventy decibels is acceptable under Part 150.¹⁴⁹ In *Allison*, the FAA deemed Barr Lake State Park "recreational" and then proceeded to use the standards under Part 150 to determine that the noise level at the park after the new facility was built would be acceptable.¹⁵⁰ The court found the FAA's categorization of the park as "recreational" flawed.¹⁵¹ The court differentiated purely "recreational" areas, which involve the use of land by *humans*, with "refuges," which involve the use of land by *wildlife*.¹⁵² According to the court, seventy decibels could be appropriate for amusement parks and golf courses, but may be completely inappropriate for an area dedicated to providing a natural habitat for wildlife.¹⁵³ Even though the court's decision did not turn on the FAA's misuse of Part 150, it still provides useful insight into how the judiciary may rule upon different facts.¹⁵⁴

¹⁴² *Id.* at 1028.

¹⁴³ See *Sierra Club v. U.S. Dep't of Transp.*, 753 F.2d 120 (D.C. Cir. 1985), discussed *supra* Part IV.B.1.

¹⁴⁴ *Allison*, 908 F.2d at 1030-31.

¹⁴⁵ *Id.*

¹⁴⁶ The FAA's noise level contour lines showed that "Barr Lake State Park will remain well outside the [60 decibel] noise contour," which meant that there would be "no significant difference in the impact on Barr Lake of the noise resulting from operations at the two airports." *Id.* at 1030. In addition, at two of the three locations within the park analyzed by the FAA, noise exposure would actually decrease. *Id.* However, the court also noted that at the third location, episodic noise exposure would increase by three and a half minutes per day. *Id.* In addition, another location just outside the park would begin experiencing noise where it previously had not. *Id.* The court dismissed these increases, holding that "overall," noise would actually decrease once the airport relocated. *Id.* at 1030-31.

¹⁴⁷ *Id.* at 1030-31.

¹⁴⁸ 14 C.F.R. § 150.1 (2003).

¹⁴⁹ *Id.* at Appendix A, Table 1.

¹⁵⁰ *Allison*, 908 F.2d at 1029.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 1028-29.

¹⁵⁴ See discussion *infra* Part IV.C for additional case law discussing the relevance of Part 150 in § 4(f) actions. See also discussion *infra* Part V.B (argument that Part 150 is inappli-

3. *LAX and the Morongo Band of Mission Indians*

As in the cases involving both Jackson Hole and Stapleton, the court in *Morongo Band of Mission Indians v. Federal Aviation Administration*¹⁵⁵ held that modifications to a city's air transportation system did not constitute a sufficiently significant impact to implicate the provisions of § 4(f).¹⁵⁶

The modification at issue in *Morongo* involved the eastern flight path into Los Angeles International Airport (LAX).¹⁵⁷ In 1997, the FAA, citing safety and efficiency, decided the flight pattern needed to be moved eight miles to the south.¹⁵⁸ This meant that approximately 180 flights per day would fly directly over the Morongo Reservation, located 90 miles east of the airport.¹⁵⁹ The Ninth Circuit Court of Appeals found no "use" of the reservation because the levels of noise cited in the FAA's noise analysis "would not be 'loud enough to create significant impacts anywhere along [] the proposed alternative [flight] routes. . . .'"¹⁶⁰ In its discussion of the Morongo Band's claims under the National Environmental Policy Act, the court had already concluded that the Band had failed to prove that the FAA's methodologies for determining what level of noise would constitute a "significant impact" were arbitrary or capricious.¹⁶¹ Although the facts in this case may not invite the sort of environmental sympathy inherent in a case like *Jackson Hole*,¹⁶² the decision does indicate the judiciary's continued reliance on "no significant impact" analysis and its reluctance to find a "use" under § 4(f) where an airport is concerned.

4. *Kahului Airport and Haleakala National Park*

In 2000, the National Parks & Conservation Association (NPCA) challenged the expansion of the Kahului airport on the island of Maui under § 4(f).¹⁶³ The NPCA argued that the expansion would constitute a "use" by perpetuating the introduction of non-native plant and animal species, which would disrupt the fragile ecosystem of Haleakala National Park.¹⁶⁴ The court rejected the claim, holding the NPCA could not demonstrate that the expansion would allow the introduction of so many alien species as to significantly impact the environmental value of the park.¹⁶⁵ As in other airport cases, the court here emphasized what it deemed an insignificant potential impact and refused to make use of the judicial creativity evident in some of the highway cases.

cable in § 4(f) cases and that courts should, therefore, refrain from relying on Part 150 to support decisions that find noise increases too insignificant to constitute constructive uses).

¹⁵⁵ 161 F.3d 569 (9th Cir. 1998).

¹⁵⁶ *Id.* at 583.

¹⁵⁷ *Id.* at 572-73.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 572.

¹⁶⁰ *Id.* at 583. Note also that the *Morongo* Court did not use Part 150 in its noise analysis.

¹⁶¹ *Id.* at 577-79.

¹⁶² See discussion *supra* Part IV (*Sierra Club v. United States Dep't of Transp.*, 753 F.2d 120 (D.C. Cir. 1985)).

¹⁶³ *Nat'l Parks & Conservation Ass'n v. United States Dep't of Transp.*, 222 F.3d 677, 678-79 (9th Cir. 2000).

¹⁶⁴ *Id.* at 679.

¹⁶⁵ *Id.* at 682.

5. Hanscom Field and Minute Man National Historic Park

In the most recent court decision involving § 4(f), the court in *Save Our Heritage, Inc. v. Federal Aviation Administration*¹⁶⁶ held that the expansion of air service from a small commuter airport would have only a *de minimus* effect on nearby parks, thus eliminating the necessity to comply with § 4(f).¹⁶⁷

The case involved the expansion of air service from Hanscom Field, a relatively small airport about fifteen miles from Boston.¹⁶⁸ Local officials had been allowing increases in service to and from Hanscom in an effort to relieve congestion at Boston's major airport, Logan International.¹⁶⁹ A commuter airline, Shuttle America, which had been operating from the Hanscom Field for several years, wished to expand its service from Hanscom by adding flights serving New York's LaGuardia Airport.¹⁷⁰ Conservationists protested on the basis of the airport's close proximity to Minute Man National Historic Park, Walden Pond, and the historic homes of several celebrated American authors.¹⁷¹

In finding the effect of the additional flights environmentally insignificant, the court cited the fact that the addition of only 10 flights per day, at an airport that "handled just under 100,000 flights" per year, equated to a mere two and a half percent increase in overall flights.¹⁷² The court minimized the effect that the additional flights would have on ground traffic, finding that the flight times would occur at "non-peak periods where existing levels are light."¹⁷³ The court also minimized the noise effects that larger aircraft, which were to be used in the new LaGuardia service, would have on the overall noisiness of the area;¹⁷⁴ in addition, the court found that turbo-prop aircraft may be more quiet than the private jets that had already been using the field for years.¹⁷⁵ Based on this analysis, the court found the FAA's noise, air pollution, and surface traffic studies persuasive enough to establish that the new service would have a *de minimus* effect on the surrounding parklands.¹⁷⁶

C. Other Airport Cases Involving Part 150's Noise Guidelines

As first discussed previously in Part IV of this note, judicial decisions regarding whether a significant noise impact rises to the level of a constructive use under § 4(f) may turn on Part 150 of the FAA's airport noise regulations, which lists the maximum decibel levels recommended at various locations.¹⁷⁷ As might be expected, reviewing courts have never overturned a case in which

¹⁶⁶ 269 F.3d 49 (1st Cir. 2001).

¹⁶⁷ *Id.* at 58-60. In stating the *de minimus* test, the First Circuit relied on *Adler v. Lewis*. *Id.* at 58-89. See discussion *supra* Part III.

¹⁶⁸ *Id.* at 53-55.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 58.

¹⁷³ *Id.*

¹⁷⁴ *Id.* Shuttle America planned to use its fifty-passenger turbo-prop aircraft for the LaGuardia service.

¹⁷⁵ *Id.* at 58.

¹⁷⁶ *Id.* at 59-61.

¹⁷⁷ See *Allison v. Dep't of Transp.*, 908 F.2d 1024 (1990).

the FAA uses Part 150 to deem the noise created by a proposed transportation project “insignificant.”

For example, where flights to and from St. Louis’ Lambert Airport were to create noise levels of less than sixty-five decibels (the noise level audible on a busy street or created by a small orchestra)¹⁷⁸ over an historic district, the FAA declared the impact insignificant under Part 150.¹⁷⁹ The court recognized the dicta from *Allison*, which declined to apply Part 150 standards to wildlife refuges,¹⁸⁰ but since the park in question was merely historic in nature, the court upheld the FAA’s determination.¹⁸¹ Similarly, in *City of Grapevine v. Department of Transportation*, the sixty-five decibel standard was upheld when applied to historic homes located under flight patterns approaching Dallas-Fort Worth International Airport.¹⁸² Importantly, however, the *Grapevine* court noted that the sixty-five decibel level may not be applicable to certain historic parks, especially those that serve the specific purpose of “convey[ing] the atmosphere of rural life in an earlier (and presumably a quieter) century.”¹⁸³

The court in *Save our Heritage*¹⁸⁴ also mentioned Part 150, noting that increases in flights from Hanscom Field would cumulatively increase noise levels by only one percent over the current sixty-five decibel level, which would still be “compatible with all land uses.”¹⁸⁵ The court further noted that the sensitive parklands near the airport, including Minute Man National Historic Park and Walden Woods, would lie outside the fifty-five decibel contour line.¹⁸⁶ The court presumably found that noise level acceptable.¹⁸⁷

D. Summary of Airport Cases

Reconciling § 4(f) cases involving airports is actually not a very difficult task. In sum, courts apply the “no significant impact” test,¹⁸⁸ giving it a very broad and sweeping interpretation, which effectively makes the finding of a “use” nearly impossible.¹⁸⁹ To find no significant impact, courts primarily employ a method of comparison. Courts compare the parkland before and after the airport modification.¹⁹⁰ Since airports, in one form or another, have been there first in each of these cases, a prior history of adverse effects has always

¹⁷⁸ League for the Hard of Hearing, *Noise Levels in Our Environment Fact Sheet*, available at <http://www.lhh.org/noise/decibel.htm> (last visited Apr. 19, 2003).

¹⁷⁹ *City of Bridgeton v. Slater*, 212 F.3d 448, 460-62 (8th Cir. 2000).

¹⁸⁰ See discussion *supra* Part IV.B.2.

¹⁸¹ *City of Bridgeton*, 212 F.3d at 460-62.

¹⁸² 17 F.3d 1502, 1507-08 (D.C. Cir. 1994).

¹⁸³ *Id.* at 1508.

¹⁸⁴ See discussion *supra* Part IV.B.5.

¹⁸⁵ *Save our Heritage, Inc. v. Fed. Aviation Admin.*, 269 F.3d 49 (1st Cir. 2001).

¹⁸⁶ *Id.* at 59.

¹⁸⁷ *Id.*

¹⁸⁸ See discussion *supra* Part III (Adler v. Lewis, 675 F.2d 1085 (9th Cir. 1982)).

¹⁸⁹ See, e.g., *Sierra Club v. United States Dep’t of Transp.*, 753 F.2d 120 (D.C. Cir. 1985); *Allison v. Dep’t of Transp.*, 908 F.2d 1024 (1990); *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569 (9th Cir. 1998); *Nat’l Parks & Conservation Ass’n v. United States Dep’t of Transp.*, 222 F.3d 677 (9th Cir. 2000); *Save Our Heritage*, 269 F.3d 49; *City of Bridgeton*, 212 F.3d 448; *City of Grapevine*, 17 F.3d 1502.

¹⁹⁰ See, e.g., *Sierra Club*, 753 F.2d 120; *Allison*, 908 F.2d 1024; *Morongo Band*, 161 F.3d 569; *Save Our Heritage*, 269 F.3d 49.

been proven. Therefore, opponents of airport expansions begin their quest to utilize § 4(f) at a disadvantage. In other words, to prove a "use" according to the comparison method, proponents must show that the change will have a significantly adverse effect on the parkland *over and above* the current effect already in evidence.

The importance of this critical factor cannot be overstated. The result of the judiciary's over-reliance on a comparison between adverse impacts, existing before and after airport projects are implemented, is apparent in the disposition of § 4(f) airport cases. The judiciary's "no significant impact" comparison methodology has effectively prevented environmentalists from using § 4(f) to prevent the construction or expansion of airports. This result sharply contradicts both judicial opinions interpreting § 4(f) in highway contexts and, more importantly, Congressional intent that § 4(f) be applied broadly. The next Part of this note outlines various suggestions to remedy this inconsistency in the law.

V. SUGGESTIONS FOR CORRECTING THE JUDICIARY'S PERVERSION OF THE TERM "USE" IN FUTURE AIRPORT CASES

In order for § 4(f) to serve a more effective role in protecting the environment in airport-related cases, courts must adopt a more pro-environment interpretation of the term "use." Two remedies, both entirely within the scope of the judiciary's power, should be employed to effectuate a positive change in § 4(f) airport jurisprudence. First, courts should utilize the same reasoning in airport cases that they already utilize in highway cases. Second, courts should discontinue their reliance on Part 150, which inevitably serves only to minimize the noise impact of airports on parklands. If the judiciary cannot resolve the inconsistencies it has created in § 4(f) jurisprudence, Congress should step in and clarify its intention to treat highway projects the same as airport projects.

A. *The Judiciary Should Use the Same Rationale in Airport Cases as Already Used in Highway Cases*

Judicial interpretation of § 4(f) has diverged into two completely separate lines of cases: one for airports and one for highways. There is, however, no basis in the legislative history for doing so. As the legislative history of § 4(f) indicates, Congress intended the statute to encompass all sorts of "transportation projects," including both highways and airports.¹⁹¹ In fact, the statute specifically mentions both highways and airports.¹⁹² The legislative record contains no indication that Congress meant for different types of transportation projects to be treated differently.¹⁹³ If logic were the only criterion in fact, airports should probably be held to an even *higher* standard than highways, since their impact is more far reaching than that of highways. Airports not only occupy more land, but they create far more noise. That noise stretches into areas not only adjacent to the airport, but for miles around. Neither the legisla-

¹⁹¹ See discussion *supra* Part II.

¹⁹² See discussion *supra* Part I.

¹⁹³ See discussion *supra* Part II.

tive history nor the plain language of § 4(f) justifies the disparate treatment accorded airport and highway cases.

Likewise, the disparity cannot be justified by distinguishing the factual circumstances between airport and highway cases. If anything, logic would dictate that the facts in many airport cases would be more likely to trigger § 4(f) than the facts from some of the highway cases. For instance, the court in *Coalition Against a Raised Expressway* protected a city hall, a railroad station and a small park, all of which were already located in the middle of a busy downtown area.¹⁹⁴ The court in *Grand Teton*, on the other hand, failed to protect a large national park, one of the nation's most valued natural wonderlands, from the noisy intrusion and air pollution associated with 737 jetliners.¹⁹⁵ In effect, the judiciary has told us that the noise and visual obstructions created by concrete pillars in the center of a city constitute a "use" under § 4(f), while the noise and air pollution associated with a never-before-used type of large commercial jetliner, flying over what was intended to be one of the most peaceful and "wild" places in the entire country, do not constitute a "use." The disparate rationale used by these courts cannot be reconciled.

Similarly, the *McNee Ranch* Court protected wildlife from the potential threat of decreased habitat at a state park,¹⁹⁶ while the court in the Haleakala case failed to protect the extremely fragile ecosystem at Haleakala National Park from the possibility of complete destruction.¹⁹⁷ A state park and its wildlife in central California are certainly worthy of protection from the intrusions of a highway. But then, one wonders why a court would not use the same reasoning to protect the unique flora and fauna of a national park from the threat of extinction posed by alien species introduced from an increase in international air traffic. Had the court in the Haleakala case used the same logic employed by the *McNee Ranch* court, the result would almost certainly have been different. Courts must recognize this paradox in § 4(f) case law, and then reexamine their reasoning to be more consistent with the intent of the Department of Transportation Act. Once they do so, they will recognize that their decisions in airport cases should coincide more closely with their decisions in highway cases.

The most effective means by which the judiciary could solve the paradox problem would be to curtail their use of the "significance of the impact" test from *Adler v. Lewis*.¹⁹⁸ Courts over rely on this test in airport cases, which has the effect of abrogating the cumulative impact of several smaller "expansions" at a given airport.¹⁹⁹ *Grand Teton* and *Hanscom Field* exemplify the illegitimacy of judicial reliance on this test. In those cases, the courts found that the impact, before and after the proposed expansion of air service, would not be significant enough to constitute a constructive use.²⁰⁰ In so doing, the courts

¹⁹⁴ See discussion *supra* Part III.B.3.

¹⁹⁵ See discussion *supra* Part IV.B.1 (*Sierra Club v. United States Dep't of Transp.*, 753 F.2d 120 (D.C. Cir. 1985)).

¹⁹⁶ See discussion *supra* Part III.B.4 (*Sierra Club*, 753 F.2d 120).

¹⁹⁷ See discussion *supra* Part IV.B.4.

¹⁹⁸ See discussion *supra* Part III.

¹⁹⁹ See discussion *supra* Part IV.D.

²⁰⁰ *Sierra Club*, 753 F.2d at 130; *Save Our Heritage, Inc. v. Fed. Aviation Admin.*, 269 F.3d 49 (1st Cir. 2001).

ignored the current state of the parks in question. The effect of any one expansion will not be great when compared to the state of the park immediately preceding the single expansion. However, such reasoning is illogical, given that when one looks at the cumulative impact of years and years of expansion, the effect on a park can indeed be significant.

Similar attempts to avoid environmental laws have been identified in cases involving the National Environmental Policy Act²⁰¹ that require Environmental Impact Statements whenever major federal projects impact environmentally-sensitive areas.²⁰² By segmenting a large project into several smaller projects, proponents hope to get around the requirement by arguing the project is not "major."²⁰³ Although not necessarily in the majority, a few courts have rejected these attempts to "evade" the statute by such "bootstrapping."²⁰⁴ Courts hearing § 4(f) airport cases should follow suit when looking at the cumulative impact of ongoing airport expansionism because the results are identical. The intent and purpose of environmental regulation is thwarted by looking only at the immediate consequence of a proposed project and failing to see the "big picture."

B. Judicial Reliance on Part 150 in § 4(f) Cases Should Be Abandoned

As evidenced in each of the § 4(f) cases discussed in Part IV of this note, noise consistently plays a major role in the legal determination of whether an airport constructively uses nearby parkland. The courts, through the deference they generally accord the FAA, often cite Part 150 in reaching a conclusion that noise from an airport modification will not significantly impair parkland. The utilization of Part 150, however, is unfounded and should be abandoned.

As the *Allison* court elucidated in the case involving Denver's Stapleton Airport,²⁰⁵ the use of Part 150 by the FAA, and the reliance on Part 150 by the judiciary, is inappropriate in § 4(f) cases. Part 150 "prescribes the procedures, standards, and methodology governing the development, submission, and review of airport noise exposure maps and airport noise compatibility programs."²⁰⁶ At Appendix A of Part 150, the FAA outlines its "Land Use Compatibility Table," which lists several categories of land uses and the recommended maximum decibel level with which those categories are compatible.²⁰⁷ Of the twenty-four categories listed, three are routinely discussed by courts when determining whether or not a noise increase caused by a transportation project will constitute a "use" under § 4(f).²⁰⁸ Those three are (1) nature exhibits and zoos, (2) amusements, parks, resorts, and camps, and (3) golf courses, riding stables, and water recreation.²⁰⁹

²⁰¹ National Environmental Policy Act of 1969, 42 U.S.C.A. § 4321, et al. (West 2003).

²⁰² See PLATER ET AL., *supra* note 50, at 647.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ See discussion *supra* Part IV.B.2.

²⁰⁶ 14 C.F.R. § 150.1 (2003).

²⁰⁷ *Id.* at app. A, tbl. 1.

²⁰⁸ See discussion *supra* Parts III.B.3, IV.B.2, and IV.C.

²⁰⁹ 14 C.F.R. § 150.1, app. A, tbl. 1 (2003).

These do not incorporate all of the types of lands meant to be protected under § 4(f). The *Allison* court determined that wildlife refuges did not fall under any of these categories.²¹⁰ Similarly, the court in *Grapevine* intimated that historic parks, which serve the purpose of replicating rural life from a quieter time, do not fall under any of the Part 150 categories.²¹¹ Courts in future cases should extend that reasoning and ignore Part 150 when rationalizing the relationship between noise and § 4(f). The word “park,” which is sandwiched between “amusements,” and “resorts,” cannot be read to only include national parks of such importance as Grand Teton.²¹² Given Congress’ mandate to protect sensitive land, judicial reliance on Part 150 in any § 4(f) case is highly dubious and must be abandoned.

The suspect nature of Part 150 becomes even more apparent when compared with a similar regulation promulgated to interpret § 4(f) in highway cases. Federal Highway Administration regulations, unlike the FAA’s Part 150, directly interpret § 4(f) in the context of a constructive use due to noise.²¹³ The regulation states, in pertinent part:

The administration has reviewed the following situations and determined that a constructive use occurs when . . . [t]he projected noise level increase attributable to the project substantially interferes with the use and enjoyment of a noise-sensitive facility of a resource protected by section 4(f), such as hearing the performances at an outdoor amphitheater, sleeping in the sleeping area of a campground, enjoyment of a historic site where a quiet setting is a generally recognized feature or attribute of the site’s significance, or enjoyment of an urban park where serenity and quiet are significant attributes.²¹⁴

If the same regulation applied in airport cases, campgrounds like those at Grand Teton or McNee Ranch state park, or historic sites like those near Hanscom Field, would likely be considered “used” by intrusive noise.

Beyond the issue of whether Part 150 is substantively sound, an argument could also be made that the Department of Transportation and the FAA are not the proper agencies to set noise criteria where parklands are involved. Their area of expertise is arguably confined to the construction and implementation of the nation’s transportation infrastructure. As such, their purpose inherently conflicts with the protection of the environment. A far more logical approach would be to give the Department of the Interior, the Department of Agriculture, or even the Environmental Protection Agency the responsibility for setting noise standards. The purposes of these agencies parallel the purposes of § 4(f). Therefore, courts should look to the noise standards adopted by these agencies, where they exist, to determine whether a constructive use of parkland – especially federal parkland – would occur as a result of a proposed airport. Such review would be more faithful to the plain meaning of § 4(f), which provides that the significance of the parkland is determined by the agency administering it.²¹⁵

²¹⁰ See discussion *supra* Part IV.B.2 (*Allison v. Dep’t of Transp.*, 908 F.2d 1024, 1029 (D.C. Cir. 1990)).

²¹¹ See discussion *supra* Part IV.C.

²¹² *Allison*, 908 F.2d at 1029.

²¹³ See 23 C.F.R. § 771.135(p)(4)(i) (2003).

²¹⁴ *Id.*

²¹⁵ See Department of Transportation Act of 1966, 49 U.S.C.A. § 303(a) (West 2003).

C. Legislative Intervention

Changes in the way the judiciary reviews § 4(f) airport cases may not be the only solution to this paradoxical problem. Congressional intervention could be used in several ways to better effectuate the protection of parklands from the intrusions of airports. For instance, Congress could force the FAA to discontinue its reliance on Part 150 when assessing the potential noise impacts of proposed airport expansions. Through legislation, Congress could mandate the use of Federal Highway Administration regulations interpreting § 4(f), which are far more environmentally friendly than Part 150.²¹⁶

Even more effective would be legislative adoption of those standards for determining whether a constructive use has taken place in § 4(f) highway cases. Congress could codify case law defining exactly what is and what is not a constructive use. The "significance of the impact" test from *Adler v. Lewis*²¹⁷ could be limited to its intended use by an amendment to § 4(f) that simply states something along the lines of the following:

The prior significance and enjoyment of the park in question shall not be the sole factor in determining whether a constructive use would occur; the cumulative effect of prior adverse impacts on the parkland must be considered when assessing whether a constructive use will occur.

VI. CONCLUSION AND PREDICTION FOR THE FUTURE

Given the disparities in judicial and regulatory interpretation of constructive use between airport and highway cases, it should come as no surprise that disparities exist in the dispositions of airport and highway cases. The disparity has created a completely irreconcilable jurisprudence between the two branches of § 4(f) case law. On the one hand, highway cases honor the Congressional mandate inherent in § 4(f). On the other, airport cases deviate significantly from Congressional intent. To remedy the situation, courts should begin using the same broad, liberal construction of § 4(f) employed in highway cases in the disposition of airport cases. They should also reject Part 150 as a legitimate means of determining whether increased noise levels constitute constructive uses. If the judiciary fails to correct the paradox on its own, legislative intervention may be needed.

The next chance to correct the judiciary's perversion of the term "use" may come in the form of a suit over the development of Las Vegas' second major airport in the Ivanpah Valley, located near the Mojave National Preserve. The facts surrounding the proposed airport may be more compelling, in terms of implementing the protections of § 4(f), than those of any airport case adjudicated under the Department of Transportation Act to date. Unlike the Jackson Hole Airport, this airport would be brand new, so adverse effects on the preserve could not be disregarded by comparing the preserve pre-airport and post-airport. Additionally, no other sources of noise exist that could compare to an airport. Therefore, proponents of the airport will be less able to argue that the noise generated by the airport will be "insignificant." Only time will tell if a

²¹⁶ See discussion *supra* Part V.B.

²¹⁷ See discussion *supra* Part III.

case will be filed to oppose this proposed airport. If a "use" could be established, however, local authorities, for the first time in a § 4(f) airport case, could be forced to meet the requirements of the statute: to prove that no prudent and feasible alternative to the site exists and to list all measures that will be taken to minimize the environmental impact on the preserve.

As the air transportation system in the United States continues to grow, courts may be required to reinterpret their § 4(f) jurisprudence. A correction in judicial interpretation of the "use" element in cases involving conflicts between air transportation projects and environmentally sensitive parklands may be, and hopefully will be, just around the corner.