National Wildlife Federation v. Coleman: Endangered Species and Highway Planning

I. INTRODUCTION

The environmental movement and its resulting offspring, environmental legislation, are having a profound impact on many segents of our economy. Particularly affected are those industries directly regulated by the federal government or indirectly controlled by the "purse-string power" of the federal government.

The highway construction industry is one that has been affected by the National Environmental Policy Act (NEPA).[1] The courts interpret the Act to require that "every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment".[2] To assure such consideration, the Act requires an environmental impact statement which takes into account the various ecological factors involved in the particular project. Although the requirements of NEPA have not been a part of the legal scenery for very long, the arms of government and the sectors of private industry affected have adjusted to the requirements imposed on them by NEPA.

One piece of environmental legislation which has not been encountered until recently is the Endangered Species Act (ESA) of 1973.[3] First, it is a recent legislative enactment so that opportunities for its interpretation had not come through the judicial system. Second, since these species are indeed rare, as their designation as "endangered species" by the Department of Interior indicates, the chances of encountering them during a construction project have been slim, even though accelerating growth and urbanization increases the likelihood of a confrontation with such species.[4]

The key provision of the ESA is section 7, which seeks to insure that actions taken by federal agencies do not threaten the continued existence of endangered species. Nor can such actions destroy or modify habitat of endangered species which has been designated as critical by the Secretary of the Interior.

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1. 42 U.S.C. §§ 4321-4331 (1974 Supp.).
2. Zabel v. Tabb, 430 F.2d 199, 211 (5th Cir. 1970).
3. 16 U.S.C. § 1536 (1973).
4. National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir. 1976); Hill v. TVA, [1977] 7 ENVIR. REP. (BNA) 20172 (6th Cir.).

II. Section 7 of the Endangered Species Act

The case of *National Wildlife Federation v. Coleman*[5] sheds considerable light on the judicial interpretation of section 7 of the Endangered Species Act (16 U.S.C. § 153) which states:

> The Secretary (of Interior) shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title and by taking such *action necessary to insure* that actions authorized, funded, or carried out by them *do not jeopardize the continued existence* of such endangered species and threatened species *or result in the destruction or modification of habitat of such species which is determined* by the Secretary, after consultation as appropriate with the affected States, *to be critical*.[6]

The opinion of the Fifth Circuit in the *Coleman* case and of the Sixth Circuit in the recent case of *Hill v. Tennessee Valley Authority*[7] are the

5. National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir. 1976).

6. 16 U.S.C. § 1536 (emphasis added).

7. Hill v. TVA, [1977] 7 Envir. Rep. (BNA) 20172 (6th Cir.). This case concerned the Tellico Dam project on the Little Tennessee River on which construction started in March, 1967. This multimillion dollar project was more than 80% completed at the time of the court decision. In August 1973 a University of Tennessee ichthyologist discovered a unique and previously unknown species of fish, the snail darter (*Percina Imostoma tanasi*), thriving in the Little Tennessee River. On November 10, 1975, over TVA's objections, the snail darter was designated as an endangered species primarily because of the threat posed by the Tellico dam to destroy the species and its only known habitat.

Appellants brought suit in the United States District Court for the Eastern District of Tennessee seeking to permanently enjoin completion of the dam. Hill v. TVA, 419 F. Supp. 753 (E.D. Tenn. 1976). Soon after suit was brought the United States Fish and Wildlife Service, acting pursuant to rulemaking authority originally granted to the Secretary of Interior, designated the river sections involved as critical habitat of the snail darter. The district court acknowledged that the completion of the dam would probably result in the complete destruction of the snail darter's critical habitat. However, the district court weighed the equities of the situation and thought it would be unreasonable to halt a project so near completion for which Congress had continued to appropriate funds.

The Sixth Circuit reversed and permanently enjoined all activities relating to the project until either Congress exempted it from the Act or the Department of Interior delisted the snail darter or redefined its critical habitat. The court refused to consider the fact that the dam was nearing completion saying that even if the dam was completed and an endangered species was discovered before impoundment of water was scheduled to start, section 7 of the Endangered Species Act would require permanently enjoining the impounding of water.

The Sixth Circuit used the same reasoning as the Fifth Circuit did in *Coleman* to interpret section 7 as being an absolute mandate that the survival of endangered species and their critical habitat must be insured. The Sixth Circuit followed Interior's construction of an action affecting designated critical habitat to the point of being violative of the ESA. *See* note 16 *infra*, emphasized section. The Fifth Circuit also relied on this standard, although not as explicitly as the Sixth Circuit. In *Hill* the court stated a preference that this standard be applied to adjudication of all future cases involving the ESA. This would assist the Secretary of the Interior in achieving a uniform federal conservation posture with minimal reliance upon the courts.

Hill takes the *Coleman* decision further and makes section 7 of the ESA a very strong federal protection of endangered species and their critical habitat. In other words, the value placed on endangered species is higher than any millions of dollars expended on a highway or dam.

landmark decisions in the interpretation of section 7. The position of the Sixth Circuit is essentially the same as the one that the Fifth Circuit took in *Coleman*. The Supreme Court has yet to interpret section 7, but it did refuse to hear an appeal from the *Coleman* decision, so it is fairly safe to assume that the current status of the law in this area is as stated in these decisions.

A. BACKGROUND OF THE COLEMAN CASE

The endangered species in *Coleman* was the Mississippi Sandhill Crane (*Grus canadensis pulla*), which closely resembles the Florida Sandhill Crane (*Grus canadensis pratensis*). There are approximately forty of these birds left. (A January aerial survey spotted thirty-seven.)[8] Their range is estimated to be about 40,000 acres. This population is the remnant of a population that at one time extended from western Louisiana to Georgia.[9] The birds are non-migratory, although they seem to prefer certain areas for roosting and breeding. During the winter they congregate on farmed feeding areas. Their preferred habitats are savannas, which in simple terms could be called wet prairies and swamps. It is this preference for these environments that makes the Mississippi Sandhill Crane distinct from other cranes.[10]

The highway involved in the *Coleman* case was Interstate Route 10 (I-10), a limited access, divided highway which is part of the National System of Interstate and Defense Highways. Plans call for this highway to traverse the southern United States between the cities of Jacksonville, Florida on the east and Los Angeles, California on the west. In the state of Mississippi, I-10 will be about 77.1 miles long. By the time this case reached the Fifth Circuit Court of Appeals approximately 58.2 miles of I-10 from the Louisiana border to Mississippi state highway 57 was near completion. The remaining 18.9 miles of I-10 extended eastward from state highway 57 to the Alabama line and contained the 5.7 mile segment in controversy.[11]

The conflict arose because this uncompleted segment of I-10 crossed the habitat of the Mississippi Sandhill Crane. A wildlife refuge for the protection of the birds has been proposed by the U.S. Fish and Wildlife Service, which is currently in the process of acquiring the land. The Service, on August 30, 1973, approved the acquisition of 11,360 acres of land in Jackson County, Mississippi. The first tract was obtained in December 1975, and through the fall of 1976, 2,226 acres had been purchased. An additional area of 4,800 acres was approved for acquisition on April 22, 1976. This additional area includes important habitat of the crane and also

8. Letter from the Mississippi Wildlife Federation to the author, February 2, 1977.
9. Valentine & Noble, *A Colony of Sandhill Cranes in Mississippi*, 34 THE JOURNAL OF WILDLIFE MANAGEMENT 761, 764 (1970).
10. Turcotte, *The Mississippi Sandhill Crane*, 34 MISSISSIPPI GAME & FISH 1, 3 (1971).
11. 529 F.2d at 362.

includes the very important proposed Earl Bond Road/I-10 interchange.[12] This planned interchange became a focal point of the appellate court decision.

There are two units to this proposed refuge. The western unit, Ocean Springs, was not involved in this controversy. The eastern unit, Fountain Bleu, would be bisected by I-10. Included in this portion of the refuge are lands which the Nature Conservancy, a private organization, acquired and held at the request of the Fish and Wildlife Service until the Service obtained adequate funding from Congress to purchase that land and make it a part of the refuge. In late 1974, the Conservancy acquired about 2,000 acres pursuant to this request.[13]

Part of this proposed refuge is land held in trust by the State of Mississippi for the Jackson County School System. The Jackson County School Board has agreed to sell this land to the Fish and Wildlife Service "at a fair market value which can be determined when you need the property."[14] Thus, I-10 crosses the crane refuge, albeit the land is still in the acquisition stage and not yet a legal entity.

In *Coleman*, both the Federal District Court and the Fifth Circuit Court of Appeals focused on the applicability of two statutes to the facts of the case: section 7 of the Endangered Species Act and section 4(f) of the Department of Transportation Act.[15]

B. Fifth Circuit's Interpretation of Section 7 of the ESA

The plaintiffs charged that the construction of I-10 and the interchange at Earl Bond Road would threaten the well being of the Mississippi Sandhill Crane and would result in the modification or destruction of its critical habitat and therefore violate section 7 of the Endangered Species Act of 1973. The determination that this habitat was "critical" to the survival of the crane was made on June 25, 1975.[16]

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12. Department of the Interior, Current Status of the Mississippi Sandhill Crane Interstate Highway I-10 Controversy (Sept. 1976).

13. 529 F.2d at 363.

14. Mississippi Press, Dec. 6, 1976, at 10A.

15. 49 U.S.C. § 1653(f) (1970).

16. The following interpretation of "critical habitat" as it pertains to section 7 of the Endangered Species Act was published by the Department of the Interior and the Department of Commerce:

> The term habitat could be considered to consist of a spatial environment in which a species lives and all elements of that environment including . . . land and water area, physical structure and topography, flora, fauna, climate, human activity, and the quality and chemical content of soil, water and air.
>
> "Critical" habitat for any Endangered species . . . could be the entire habitat or any portion thereof, if, and only if, any constituent element is necessary to the normal needs or survival of that species.
>
> Actions by a federal agency which result in the destruction or modification of habitat considered "critical habitat" for a given Endangered . . . species would not conform with Section 7 of the Endangered Species Act . . . if such an *action might be expected* to result in a *reduction* in the *numbers or distribution* of that species of sufficient magnitude to place the species in *further jeopardy, or restrict the potential and reasonable expansion or*

The Endangered Species Act is unique in that standing to sue is *automatic*.[17] Usually the courts and the Congress cast a jaundiced eye toward allowing easy access to the federal judiciary. Under this Act, all one need do is allege a violation and give notice sixty days before suit is filed to the Secretary of the Interior and the alleged violator.[18]

In *Coleman*, the district court held that the plaintiffs failed to meet their burden of proof that the project in controversy would jeopardize the continued existence of the crane or result in the destruction or modification of its critical habitat. According to the district court, the defendants adequately considered the effects of the project on the crane and its habitat. The Fifth Circuit did not agree with the district court on these points. Its decision indicates a different construction as to what the burden of proof for the plaintiffs in a section 7 case entails. According to the Fifth Circuit, the plaintiffs have the burden of proving that the defendants failed to take the "action necessary to insure"[19] that construction of I-10 would not jeopardize the existence of the crane or will not destroy or modify critical habitat. Thus, the mere fact that the defendants adequately considered the potential effects of the highway on the crane was not sufficient.

One important factor in the decision holding that the requirements of section 7 were not met was the defendants' own Final Environmental Impact Statement (FEIS) which NEPA, as previously mentioned, requires of most federal construction projects. This statement, prepared by the defendants (and thus possibly self-serving), had weaknesses as pointed out by the Department of the Interior.[20] Yet, key parts of it were used to back up the circuit court's conclusion that the cranes as well as some important habitat were indeed being threatened by this project.

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recovery of that species. [A]pplication of the term "critical habitat" *may not be restricted to the habitat necessary for a minimum viable population*.

40 Fed. Reg. 17764-65 (1975) (emphasis added).

17. 16 U.S.C. § 1540(g) (Supp. 1974). The relevant provisions on standing are as follows:

(g)(1) Except as provided in paragraph two of this sub-section *any person* may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the constitution), who is *alleged* to be in *violation* of any provision of this chapter or regulation issued under the authority thereof . . . .

The district courts shall have jurisdiction, *without regard to the amount in controversy or the citizenship of the parties*, to enforce any such provision or regulation as the case may be . . .

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary [of the Interior], and to any alleged violator of any such provision or regulation . . . .

Id. (emphasis added).

18. *Id*.

19. 529 F.2d at 371.

20. Letter from Stanley Doremus, Deputy Assistant Secretary of the Interior, to E.L. Shaw, Division Engineer of the Federal Highway Administration (Apr. 3, 1975) [hereinafter cited as Doremus letter].

The court also felt that inaccuracies were present in the report. One such error was the following: "This section of Interstate Route 10 would commit approximately 40 acres of the cranes best nesting and feeding range to highway right of way. Other than this loss of habitat, the direct effects of a highway facility on the existence of the crane are relatively unknown."[21] In addition to this acreage, the FEIS acknowledged the loss of 140 acres of roosting and feeding range. The circuit court seemed impressed by the letter of Deputy Assistant Secretary of the Interior Stanley Doremus who wrote to defendant E.L. Shaw, Division Engineer of the Federal Highway Administration, commenting on the FEIS and opposing the highway because of the likelihood of adverse effects on the habitat of the crane. Doremus thought the acreage affected by I-10 was larger than the amount claimed by the FEIS. The following statements from the letter illustrate this:

> Apparently, the 40 acres referred to here considers only the direct loss of habitat on the proposed crane refuge. Since the sandhill crane utilizes most of the habitat through which this entire section of highway passes, we do not feel the FEIS adequately describes the total impact of this project . . . [I]t appears that the proposed I-10 route will result in the direct loss of at least 406 acres of sandhill crane habitat that is presently used . . . [A]n additional direct loss of habitat will result from excavation of borrow pits. Other effects of borrow pits, beyond the direct loss of land, are disruptions to drainage patterns, lowering of the water table in the vicinity of the pits. . . .[22]

Mr. Doremus' analysis points out that although the Mississippi Highway Department and other involved parties have no direct control over private development outside of the highway right-of-way, they do have an indirect and important control over such development by the routing of the highway and the placement of interchanges along the highway. As an example, exclusion of the planned interchange at Earl Bond Road would greatly retard commercial and residential development along that segment of the highway.[23]

The FEIS admits that there are known hazards in growth along a newly constructed superhighway. In this particular instance the effects on the crane seem obvious: "The crane cannot survive in built up areas, and a certain amount of private development will always accompany construction of a major highway facility. *This new development within the crane's habitat is the most significant effect to be feared.*"[24] These considerations as to the effect of the highway on the crane are open to some argument as they deal with a problem that cannot be answered with certainty, but the fact remains

21. FEDERAL HIGHWAY ADMINISTRATION, FINAL ENVIRONMENTAL IMPACT STATEMENT: INTERSTATE ROUTE NO. 10 31 (1975).

22. Doremus letter, *supra* note 20, at 5.

23. *Id.* at 6.

24. *Supra* note 21 (emphasis added).

that section 7 imposes on federal agencies the affirmative duty[25] to insure that their actions will not jeopardize the continued existence of an endangered species or destroy or modify critical habitat of an endangered species.

The court views the primary responsibility for the implementation of section 7 as resting with the Secretary of the Interior who is to be consulted by other federal agencies when they are contemplating action which could threaten endangered species or their critical habitat. Once such consultation has taken place, the final decision on whether to go forward with the project, and with what modifications, rests with the agency itself and not with the Secretary of the Interior. In other words, the Secretary has no veto power. The agency itself has to take all steps necessary to *insure* that its actions are not jeopardizing the involved endangered species or its habitat. However, once the agency's decision to go ahead with the project has been made, it is still subject to judicial review to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[26]

In the opinion of the Fifth Circuit, the district court's determination that the defendants had "adequately considered" the effects of the highway on the crane was a misconstruction of section 7. As earlier mentioned, section 7 imposes on all federal agencies the *mandatory duty to insure* that their actions do not threaten the continued existence of an endangered species or destroy habitat "critical" to that species. In this instance the administrative record and the FEIS indicated that the defendants did recognize and consider the threat posed by the construction of I-10 to the well being of the crane but they *failed* to take the necessary steps "*to insure*" that the highway would not jeoparize the Mississippi Sandhill Crane or its critical habitat.

It is apparent that the district court put undue emphasis on parts of the testimony of an expert on the cranes, Jacob M. Valentine. He estimated that the direct loss of habitat to the crane would be 300 acres which the district court viewed as an insignificant number. But the evidence presented, including Mr. Valentine's testimony, indicated that the effects of the highway on the crane would be far greater than the loss of 300 acres of habitat. Additional loss of habitat would come from the borrow pits and the resulting drainage of wetlands caused by the excavation of these pits.

More importantly, Mr. Valentine's views had changed since the 1963 report he authored and upon which the district court relied in part. There he said that timber management was the biggest danger to the crane. At the

25. H.R. REP. NO. 412, 93rd Cong., 1st Sess. 14 (1973) emphasizes the mandatory nature of the duty imposed on federal agencies: "This subsection requires . . . that those agencies take the necessary action that will not jeopardize the continuing existence of endangered species or result in the destruction of critical habitat of those species."

26. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

trial, he testified that in addition to the creation of a refuge the most important things that could be done to save the crane from an early and untimely end would be the elimination of the planned Earl Bond Road interchange and of borrow pits in crane habitat areas.[27] Thus, two courts examining the same testimony seemed to arrive at different conclusions and found support for their respective positions.[28] The record does, however, seem to support the Fifth Circuit's conclusions regarding the dangers to the crane from construction of I-10 as originally planned.

A good statement on the precarious position of the crane can be found in the letter of Assistant Deputy Secretary of the Interior Stanley Doremus to defendant Shaw:

> It is our opinion that the Mississippi Sandhill Crane has survived primarily because the land it occupies has been considered unmanageable for agriculture, timber and residential purposes. However, because of recent industrial developments and population increases, the economic base of the region has changed and lands formerly considered unmanageable are now valuable. Encroachment by highways, residences, tourist facilities, industry, and timber management have now reached the point that every acre of actural or potential habitat is vital to the survival of the cranes. The crane is very shy, particularly during the breeding season, and the disturbance during construction and by vehicular traffic after completion of the highway will remove additional habitat from crane use.[29]

It appears that perhaps the crane could survive the loss of 300 acres of habitat if that would be the only result of the construction of I-10. But the evidence and defendants' FEIS indicate that the loss to the crane would be far greater than 300 acres of habitat. It is questionable whether the Mississippi Sandhill Crane could survive the additional loss of habitat caused by some of the aforementioned indirect effects of the highway.

In the words of the Fifth Circuit, "the relevant consideration is the total impact of the highway on the crane."[30] As the Court of Appeals for the District of Columbia has stated, "a far more subtle calculation than merely totaling the number of acres to be asphalted is required."[31] Viewing the situation in its entirety, the Fifth Circuit came to its conclusion that the highway builders had not lived up to the requirement of section 7, namely, they have to take all action necessary *to insure* their actions would not jeopardize the crane or its habitat.

C. *Relief: Requested and Granted*

The relief sought by the plaintiffs was modification of the project to satisfy the Secretary of the Interior that the highway would not jeopardize the crane. The modifications which plaintiffs desired were (a) the elimination of

27. 529 F.2d at 372-73.
28. *Id.* National Wildlife Federation v. Coleman, 400 F. Supp. 705, 711-12 (S.D. Miss. 1975).
29. Doremus letter, *supra* note 20, at 6.
30. 529 F.2d at 373.
31. D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (1972).

the Earl Bond Road interchange (b) the elimination of borrow pits in the area determined to be critical habitat and (c) the acquisition of land by the Federal Highway Administration to mitigate the loss of "critical" land taken by the highway. The first two were key points made by almost everybody who was familiar with the crane and its predicament. The last point, which the court ignored,[32] was based on a program within the Federal Highway Administration (FHWA) known as "functional replacement," by which the FHWA buys land to replace valued public resources (*e.g.*, parks, schools) lost through the highway right-of-way.[33] The cost of buying replacement land for harm done to publicly important resources is viewed by highway authorities as a legitimate cost of a highway project. The plaintiffs believed that this power should be used by the federal government to mitigate the harm done to the crane and its habitat. This argument is made more compelling since Congress, by enacting the Endangered Species Act, put special importance on endangered species such as the Mississippi Sandhill Crane. However, whether or not this power should be exercised by court imposition was left for future resolution.

The Fifth Circuit did agree with the plaintiffs on their first two requests for relief. It directed the district court on remand to enter an order restraining and enjoining the defendants:

> (a) From initiating or carrying out any further work or incurring any further contractual obligations with respect to the interchange at the Earl Bond Road.
>
> (b) From excavating any borrow pits in the area determined to be critical habitat for the Mississippi Sandhill Crane under the notice published on June 30, 1975, at 40 Fed. Reg. 27501-27502.
>
> This injunction is to remain in force until the Secretary of the Department of Interior determines that the necessary modifications are made in the highway project to insure that it will no longer jeopardize the continued existence of the Mississippi Sandhill Crane or destroy or modify critical habitat of the Mississippi Sandhill Crane.[34]

The court deferred to the Department of the Interior as to what modifications were necessary since the Department has primary jurisdiction for administering the Endangered Species Act. Also, the Department has expertise in the field of wildlife and habitat which the court deferred to in its injunction.

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32. "We do not reach a decision as to whether the FHWA can be ordered to acquire land to replace that taken by the highway project, since we are confident that the Secretary of Transportation and the Secretary of Interior will take all actions necessary on remand to protect the continued existence of the Mississippi Sandhill Crane and its habitat." 529 F.2d at 375.

33. Authority for this program, according to defendants' answers to interrogatories, comes from statutes and regulations (23 U.S.C. § 315 (1970), 42 U.S.C. § 4633 (1970), and 23 C.F.R. § 1.32 (1976)) which provide for the issuance of regulations and such actions as would fulfill the mandates of the Federal Highway Act. These regulations are at 23 C.F.R. § 712.601-606 (1976). Section 712.604(b) says: "[F]unctional replacement is defined as the replacement of real property . . . acquired as a result of a highway or a highway related project with land or facilities, or both, which will provide equivalent utility." For a detailed discussion of this issue, *see* Brief for Appellants at 28 n.25.

34. 529 F.2d at 375.

There is an inconsistency between the opinion and the relief granted. The opinion states that the Department of the Interior does not have a veto power over other federal agencies once those agencies have made the necessary consultations with the Department.[35] However, the relief provides that the injunction is to remain in effect until the Secretary of the Interior determines to his satisfaction that the modifications necessary "to insure" that the highway will no longer threaten the continued existence of the crane or destroy or modify its "critical habitat" have been made.

III. Section 4(f) of the Department of Transportation Act

Looking at section 7 of the Endangered Species Act and its application here in *Coleman*, one would be tempted to call this decision a clear, resounding victory for environmental concerns. As far as section 7 is concerned, this is true. However, the plaintiffs tried to use section 4(f) of the Department of Transportation Act to help the cranes, but both the district court and the Fifth Circuit court said it could not be applied to this case. The regrettable aspect of this case is that it presented an excellent opportunity to expand the application of section 4(f).

The Fifth Circuit's holding on section 4(f) is an important, yet generally overlooked, facet of this case. Section 4(f) of the Department of Transportation Act states:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfoul refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.[36]

The district court held that 4(f) was inapplicable to the lands affected by the construction of I-10 in that: (1) there are no lands which fit the 4(f) definition to be crossed by the highway, and (2) that an opinion given by the Office of the Attorney General of Mississippi that the lands in dispute are not publicly owned lands from a public park, recreation area or wildlife and waterfowl refuge within the meaning of 4(f) was binding on the Secretary of

35. *Id.* at 371.
36. 49 U.S.C. § 1653(f) (1970).

Transportation.[37] The Fifth Circuit agreed with the first conclusion but did not agree with the second.[38]

A. *Authority of Local Officials Under 4(f)*

To support their disagreement as to the authority of the opinion from the Mississippi Attorney General's Office, the Fifth Circuit looked at several other court cases including an earlier opinion rendered by it.[39] In that case they stated that Congress in enacting Section 4(f) clearly "did not intend to leave the decision whether federal funds would be used to build highways through parks of local significance up to the city councils across the nation."[40] Otherwise, if state or local officials with jurisdiction over the publicly owned lands proposed for a federally funded highway were allowed the authority to make a final and binding determination, then the expressed national policy in 4(f) could easily be defeated.

The Fifth Circuit's analysis of this question indicates that the initial or threshold determination as to the significance of these lands should be made by those state and local officials who are most likely to be aware of the land's importance to the local community. However, this initial determination is not binding.[41] It is subject to reversal by the Secretary of Transportation who is not limited to information supplied by local officials.[42] In fact, the Supreme Court has stated that the Secretary of Transportation must go beyond the information supplied by state and local officials to reach "his own independent judgment."[43]

Although siding with the plaintiffs on this point, the Fifth Circuit made it academic by saying that the land in question could not be considered as being protected by 4(f). The court stated it as follows:

> Section 4(f) as amended is applicable only if two conditions are satisfied by the land in question: *first*, except for land from an historic site, the land to be used by a project must be *Publicly owned* land and *second*, the land must be from one of the *enumerated types of publicly owned land*, i.e. a public park, recreational area, or wildlife and waterfowl, refuge. None of the land in question satisfied both of these conditions at the time of the trial.[44]

B. *Legal Status or Actual Usage of the Land*

These requirements for inclusion under section 4(f) appear to be formalistic. As an example, the land held in trust by the State of Mississippi for

37. 400 F. Supp. at 709.
38. 529 F.2d at 368, 370.
39. Named Individual Members of the San Antonio Conservation Soc'y. v. Texas Highway Dep't., 446 F.2d 1013 (5th Cir. 1971).
40. *Id.* at 1026.
41. Harrisburg Coalition Against Ruining Environment v. Volpe, 330 F. Supp. 918, 929 (M.D. Pa. 1971).
42. EDF v. Brinegar, [1974] 6 ERC (BNA) 1577, 1593-1594 (E.D. Pa.)
43. *Id.*
44. 529 F.2d at 370.

the Jackson County School District was never designated or administered as a wildlife refuge, so even though it was public land and was in fact being used by the cranes as a refuge, this land was held not to qualify for inclusion under section 4(f). The land held by the Nature Conservancy was specifically obtained for future transfer to the Fish and Wildlife Service as a wildlife refuge for the benefit of the cranes. It could be argued that the Conservancy was acting as a constructive trustee for the Fish and Wildlife Service in its acquisitions of properties for the proposed refuge. Yet, this property did not qualify for inclusion under section 4(f) because the Fifth Circuit held that only after the Fish and Wildlife Service declared land as a wildlife refuge through publication in the *Federal Register* would the land qualify for the application of section 4(f).

The Service purchased 1,708 acres from the Nature Conservancy during the period of deliberation by the Fifth Circuit. Since this purchase occurred after the start of highway construction it was considered to be after the fact by the court and thus not protected by section 4(f). This property, as well as the school district land, was being used as a de facto sanctuary or refuge and was determined by the Department of the Interior to be "critical habitat" necessary for the continued survival of the crane. Some of this land will become part of an "official" refuge even though not yet acquired by the Service. It appears to be a question of timing.

In this case, a wildlife refuge is in the process of creation. Whether the land is publicly owned or not, at the moment it is in fact being used as a sanctuary. One could say, with justification, that the land constitutes a de facto refuge. Is it the legal status of the land which is important, or is the true nature of the property as it is being used more important? Must the courts and agencies involved wait for that magic moment of *Federal Register* publication before section 4(f) can be applied?

Support for the position that the factual usage of the land is of equal or more importance than the formalized legal status of the property is found in the positions taken by the Department of Transportation, which administers the statute and whose interpretations are therefore entitled to great weight.[45] In *Goleta Slough*, an administrative decision by Secretary of Transportation Volpe on April 11, 1970, it was stated:

> No part of Goleta Slough or Tecolotito Creek has been formally declared a recreation area, wildlife and waterfowl refuge, or historic site by federal, state, or local officials having jurisdiction thereof. In fact, however, the creek and slough are publicly owned, and have been determined by the Department of Interior to be a recreational area, a wildlife and waterfowl refuge, and an historic site of some significance. I therefore find that your project will require the use of publicly owned land from a wildlife and waterfowl refuge and an historic site of national significance.[46]

45. Udall v. Tallman, 380 U.S. 1 (1965).

46. For further discussion of this case, *see* Gray, *Section 4(f) of the Department of Transportation Act*, 32 MARYLAND L. REV. 327, 350-51.

Another example of the actual use of land being determinative is the following quote from a Department of Transportation order: "Where lands are being administered for multiple uses, the federal official having jurisdiction over the lands shall determine whether the subject lands are *in fact* being used for park, recreation, wildlife, waterfowl, or historic purposes."[47]

Using the standard expressed in the Volpe decision above, it would appear that at least some of the lands in *Coleman* could be considered as falling under the protection of section 4(f). The Department of the Interior had determined this land to be critical habitat for the survival of the crane and is in the process of obtaining land for a wildlife refuge for the crane. The Fifth Circuit has deemed the crane "significant" enough to intercede on its behalf under section 7 of the ESA. Under *Goleta Slough* these factors would seem to be more than enough to bring the lands under question within the protection of section 4(f). This protection would require the Secretary of Transportation to make the determination that I-10 is the only "feasible and prudent alternative". If he made this determination, all efforts would be undertaken to minimize the harm done to the crane and its habitat.

Section 4(f) was not applied in *Coleman* despite the strong case made for its application. If there were no section 7 of the ESA to be applied, the Fifth Circuit might have looked at the applicability of section 4(f) of the Department of Transportation Act with a more favorable eye. But the court already had one statutory vehicle which was more than adequate.

Since the court did not view section 4(f) as applying to a situation such as *Coleman* it missed the most important time for application of this statutory provision. The most delicate time for a wildlife refuge is in its land acquisition and formation stage. Once established as a refuge it is a legal, effective haven and sanctuary for the flora and fauna that reside within its boundaries. However, before this cloak of protection descends, the intrusion of man and his instruments of habitat destruction could eliminate the wildlife which the refuge would protect. If section 7 of the ESA was not applied in *Coleman*, that very well could have happened.

IV. Conclusion

The decisions by the Fifth Circuit and the Sixth Circuit in *Coleman* and *Hill v. TVA* respectively make it clear that endangered species are going to be protected as fully as a fair reading of the statute will allow. These courts have not restricted any of the statutory provisions of section 7 of the ESA. Even multi-million dollar projects which are nearing completion will be halted if necessary. An excellent example of this is *Hill*. The Tellico project, a $90 million dollar dam on the Little Tennessee River, was eighty percent completed. A three inch fish called the snail darter was discovered after construction had already started and later this fish was put on the endangered species list. The Sixth Circuit used the same standards and interpretation of

47. Department of Transportation, Order 5610.1B, Attachment 2, Paragraph 4b(2).

section 7 that the Fifth Circuit had used in *Coleman* and thus enjoined further construction on the dam. The court even said that under section 7 they would be compelled to halt impoundment of water behind a fully completed dam if an endangered species were discovered in the river on the day before the impounding of water was scheduled.[48] In the words of the Sixth Circuit: "[T]he welfare of an endangered species may weigh more heavily upon the public conscience, as expressed by the final will of Congress, than the writeoff of those millions of dollars already expended for Tellico in excess of its present salvageable value."[49] Thus it appears that the words "to insure" in section 7 mean exactly that. The survival of endangered species and their habitat is to be guaranteed.

One obvious result of these decisions on section 7 of the ESA is the large role to be played by the Department of the Interior. It is not the judiciary, but the Secretary of the Interior who bears the responsibility for maintaining the official endangered species list and designating the critical habitats of these species. The Secretary is to be consulted by other agencies if a project may affect an endangered species or critical habitat of that species. Although the Secretary does not have a veto power over the decisions of the other agencies, the fact that anyone can sue under section 7 leaves the door open for Interior to make its impact through the judicial process as it did in *Coleman*. Courts really do not have much expertise in the environmental field and as a result will give weight to the views of the Department of the Interior. In *Coleman* the injunction allowed the Department to determine when the modifications in the highway were sufficient to insure the survival of the crane, and only then could construction of the highway proceed.

Although section 7, as interpreted, is a strong weapon in the battle to save endangered species, it is limited in its application. Section 7 applies only to species officially listed as endangered species under the federal criteria established for such listing. As the decision turned out, the Mississippi Sandhill Crane was "fortunate" to have been officially endangered. Otherwise, there was little that could legally be done to save it from the negative aspects of I-10 as originally planned.

But the potential scope of section 4(f), especially if the *Coleman* decision had sided with the actual usage of the land instead of its legal title, is

48. [W]ere we to deem the extent of project completion relevant in determining the coverage of the Act, we would effectively defeat responsible review in those cases in which the alternatives are most sharply drawn and the required analysis most complex. This expedient strategy would frustrate effective enforcement of the Act and hinder efforts to prevent the wanton destruction of vulnerable species.

Current project status cannot be translated into a workable standard of judicial review. Whether a dam is 50% or 90% completed is irrelevant in calculating the social and scientific costs attributable to the disappearance of a unique form of life. Courts are ill-equipped to calculate how many dollars must be invested before the value of the dam exceeds that of the endangered species.

[1977] 7 ENVIR. REP. (BNA) at 20174.

49. *Id.* at 20176.

greater than section 7 of the ESA. Even using the standards set up by the Fifth Circuit, there are many thousands of parks and wildlife refuges, recreational areas and historic sites across the country. Section 4(f) would give its protection to those tracts of land. This protection is reasonably strong since the highway must be the only "feasible and prudent alternative," and if it is, harm must be minimized to the land that is used.

If section 4(f) would have been held to include the situtation in *Coleman* the scope of 4(f) would have been expanded considerably and would have afforded protection where and when needed the most. From an environmental standpoint, the *Coleman* decision on section 4(f) is negative and a setback when one considers the strong equitable and de facto nature of the refuge in *Coleman*.

The really important consideration in *Coleman* is whether the actions taken under section 7 of the ESA and the proposed wildlife refuge will be sufficient to save the Mississippi Sandhill Crane from extinction. Society's understanding of the importance of endangered species has increased tremendously in the last fifteen years. Section 7 and the judicial interpretations of it are an excellent example of the increased awareness of the value of these species. For some species this happened too late. Hopefully, the actions taken by the crane's friends will be enough to leave it an island of safety in our increasingly urbanized world.

John Zadvinskis

HAROLD S. SHERTZ ESSAY AWARD CONTEST

The Film, Air and Package Carriers Conference of the American Trucking Association in conjunction with the Motor Carrier Lawyers Association, in an endeavor to encourage interest within the legal education community in the field of transportation, annually hold the Harold S. Shertz Essay Award Contest. The contest title was selected to honor Harold S. Shertz, Esq., of the Philadelphia, Pennsylvania, Bar for his long service to the transportation industry and to the legal profession.

Submission of manuscripts must be in conformance with the competition's rules as follows:

1. *Eligibility*:

The contest is open to any law student of a school in the United States or Canada other than student members of the staff of the *Transportation Law Journal*. An essay may be written in collaboration with another student provided there is full disclosure.

2. *Subject Matter*:

A contestant may write on any area of transportation law.

3. *Determination of Award*:

Essays will be judged on timeliness of the subject, practicality, originality, quality of research, and clarity of style. The Board of Governors of *Transportation Law Journal* shall act as judges. In the discretion of the judges, no prize may be awarded. The decision of the judges shall be final.

4. *Prizes*:

A prize of $250.00 will be paid and the winning essay will be published in the *Transportation Law Journal*.

5. *Right of Publication*:

Each contestant is required to assign to the *Transportation Law Journal* all right, title, and interest in the essay submitted, and shall certify that the essay is an original work and has not had prior publication. Papers written as part of a contestant's law studies are eligible provided first publication rights are assigned to the *Transportation Law Journal*.

6. *Formal Requirements*:

Essays must be submitted in English and be typewritten (double space) on 8½ x 11 paper with 1 margins. Footnotes shall be typed separately and all citations must conform to the Harvard Law Review citation booklet (12th Edition). The essay shall be limited to forty pages including text and footnotes.

7. *Submission Requirements*:

Three copies of the essay should be enclosed in a plain envelope and sealed. Contestant's name should not appear on either the envelope or the essay. The envelope containing the essay should be placed in another envelope with a letter giving the name and address of the contestant and stating that the article is submitted for the contestant and that the author has read and agrees to be bound by the Rules of the contest. Enclosed with this letter must be the certification set forth in Rule 5 above and a brief biographical sketch of the contestant.

8. *Closing Date*:

Papers must be received by March 1, 1978. The winner will be announced by June 1, 1978.

All correspondence, including the submittal of entries, and questions should be directed to Professor Andrew F. Popper, Transportation Law Journal, University of Denver College of Law, 200 West 14th Avenue, Denver, Colorado 80204.