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Brief for the Respondents, *TVA v. Hill*, No. 76-1701

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In the Supreme Court of the United States

OCTOBER TERM, 1977

TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

HIRAM G. HILL, JR., ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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INDEX

CITATIONS

Cases:

Statutes:

Miscellaneous:

No. 76 - 1701

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OPINIONS BELOW

The opinion of the court of appeals (A. 81) is reported at 549 F.2d 1064. The opinion of the district court (A. 31) is reported at 419 F. Supp. 753.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1977 (A. 97). The petition for a writ of certiorari was filed on May 31, 1977, and granted on November 14, 1977 (A. 566). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 7 of the Endangered Species Act of 1973 contains an implied exemption for a component of an ongoing federal project:

   a.) Where, when the Act took effect and the endangered species was discovered, only a small fraction of project expenditures had occurred, primarily in purchase of farmlands and road and bridge improvements; and

   b.) So as to excuse an agency from full consultation with regard to project modifications for protection of endangered species.

2. Whether the Endangered Species Act was impliedly amended by subsequent appropriations, where no intent to amend was expressed in the bills or legislative history.

STATUTE INVOLVED

Section 7 of the Endangered Species Act of 1973, 87 Stat. 892, 16 U.S.C. (Supp. V) 1536, provides in pertinent part:

INTERAGENCY COOPERATION

. . .All. . .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 Act by carrying out programs for the conservation of endangered species . . . 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 . . . 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.

STATEMENT

The Little Tennessee River arises in the mountains of northern Georgia, and flows through the national forest lands of North Carolina into Tennessee, where it joins the Big Tennessee near Knoxville. The valley's last undammed stretch adjoins the Great Smoky Mountains National Park in Tennessee, and comprises 33 river miles of fertile farmland, forests, and clear cool flowing waters. The Tennessee Valley Authority has acquired this valley land for its 38,000-acre Tellico economic development project. This case involves one component of that project, a dam which would impound 16,500 acres of the project area.

As the district court noted in an earlier Tellico litigation:

> [The] free-flowing stretch of the Little Tennessee River as it exists in its present natural state. . . is acknowledged to be the largest and best trout fishing water east of the Mississippi River. On the south bank of the Little Tennessee is Fort Loudon, built in 1756 as England's southwestern outpost in the French and Indian War. The river bottomlands also contain several village sites of the Cherokee Indian Nation that have considerable archeological significance. They include Chota, the ancient

> capital of the Cherokees, Tuskeegee, the birthplace of Sequoyah, and Tenassee, from which Tennessee derives its name. These archeological stores are virtually untapped. The free-flowing river is the likely habitat of one or more of seven rare or endangered fish species. The winding, free-flowing Little Tennessee River lies in a picturesque, pastoral setting untouched by urban and industrial blight and pollution. The evidence shows that all of these benefits of the present Little Tennessee River Valley will be destroyed by impoundment of the river . . . as will some of the most valuable and productive farm land in East Tennessee.

[*Environmental Defense Fund v. Tennessee Valley Authority*, hereafter *EDF v. TVA*, 339 F. Supp. 806, 808 (E.D. Tenn. 1972).][1] After the construction of 68 dams throughout the Tennessee Valley, (22 within 60 miles of Tellico) the Tellico area is the last such high quality stretch remaining in the region, and the last habitat of the endangered species here concerned, the snail darter *Percina Imostoma tanasi*.

The Tellico Project. The Tellico Project is a multipurpose regional development project, authorized by TVA and funded by Congressional appropriations beginning in 1966.[2]

[1] Since the present case was litigated as an enforcement action, leaving economic and policy analysis to the Congressional forum, much of the project information here is drawn from prior Tellico litigation and from subsequent Congressional materials (Hearings before a Subcommittee of the Senate Committee on Environment and Public Works, 95th Cong., 1st Sess., July 1977, chaired by Senator John Culver (hereafter "1977 Culver Hearings"); Comptroller-General (General Accounting Office) Report EMD-77-58, "The TVA Tellico Project — Costs, Alternatives and Benefits" (hereafter "GAO Report"), submitted October 14, 1977. For textual clarity, most such authorities are cited in footnotes.

[2] TVA, unlike other agencies, is self-authorizing in its projects so that it can undertake such actions without specific Congressional authorization provided that funds are included in its yearly lump sum budget grant. Section 4(j), 27, Tennessee Valley Authority Act, 48 Stat. 61, 71, 16 U.S.C. 831c(j) and 831z (1933).

The Tellico dam, the project component which has attracted the most public opposition over the years, was planned and justified as part of the project's regional development objective. The two primary benefits claimed for the impoundment were stimulation of shoreline development, and flat-water recreation. Traditional water project benefits were limited. There was no irrigation function, negligible water supply, and limited flood and navigation benefits.[3] The dam has no electric generators, but to a degree could augment flows through a small canal to an adjacent impoundment's generators.[4] The project's claimed benefits have recently been the subject of a critical analysis by the General Accounting Office (*infra*, at 14).

The Tellico dam itself is a relatively small portion of the project. The concrete dam spillway cost approximately

[3] The project's benefit-cost ratio showed annual claimed benefits of $3.7 million in the following categories:

Recreation	$1,440,000
Shorelands development	710,000
Flood control	505,000
Navigation	400,000
Power	400,000
Fish and wildlife	220,000
Water supply	70,000
Redevelopment	15,000
Annual benefits	$3,760,000

GAO Report at 28. The only claimed benefit that GAO found to be accurate was the last. GAO Report at 36; 1977 Culver Hearings at 973.

[4] The canal flowage, on TVA's figures, could produce 22 megawatts of power capacity. TVA's present system comprises 22,223 MW, and will have 47,798 MW on line in 1985. 1977 Senate Hearings at 869, 872-73, from material supplied to witnesses by TVA. Tellico thus would add 0.0008 to present capacity and 0.00046 to 1985 capacity, using TVA figures.

$5 million including labor; the total project's present estimated cost is about $120 million, of which $103 million had been spent prior to the injunction.[5] The largest single category of project expenditure to date has been for roads, bridges and other adjustments, closely followed by the cost of buying up the valley's lands through condemnation or purchase.[6] The proposed impoundment would cover only 16,500 of 38,000 acres at peak, although this includes most of the valley's prime class agricultural lands.[7] The remaining 21,500 acres was to have been developed with the Boeing Corporation as a separately-subsidized "Timberlake New Town", with development of commercial, residential, and industrial areas to be resold at appreciated values. Timberlake provided the majority of Tellico's shoreline development benefit claims, and was effectively halted as a project in 1974-1975 when Congress refused to appropriate further subsidies and Boeing Corporation withdrew, citing problems of economic infeasibility.[8]

Prior Litigation And Public Opposition. The Tellico Project has encountered continued delay over the years, at the hands of Congress which initially refused to fund it,

[5] GAO Report at 5, 7. Earth dikes, constructed after 1973, cost about $17 million, primarily labor. *Id*. The small concrete spillway was poured in 1967; the dam would impound 70 feet of water at its foundation point. The presently appropriated budget for Tellico is $116 million with a present proposed budget expansion of $3 million, primarily for new items. The GAO noted that the actual project budget was likely to exceed $120 million. GAO Report at 37.

[6] Land costs and roads and bridge improvements alone comprise 60% of expenditures to date ($61.2 million). GAO Report at 6, 7.

[7] The valley contains 25,500 acres of prime class farm land. GAO Report at 25, 64. Like other TVA lakes, a Tellico impoundment would be "drawn down" for six months a year, creating an extensive mudflat sector and reducing surface area.

[8] TVA Timberlake Environmental Impact Statement, (1974). The federal budget prepared in 1974 eliminated the funds requested for the joint venture, and Boeing withdrew shortly thereafter. (Knoxville *Journal*, March 6, 1975, page 1.)

through internal agency postponements, and in protracted public opposition. Opposition to the project over the years has been centered on the dam portion of the project, and has emphasized the potential loss of the valley's land and flowing water resources. Noting the arguably marginal nature of the reservoir's functions, the public critics have urged development of nonimpoundment economic options for the project area. Governor Winfield Dunn of Tennessee officially requested the Authority to modify the project for such river-based development without the impoundment in 1971, but was rebuffed.[9] When TVA declined the Governor's request, local citizens and national conservation groups went to court and successfully sought an injunction against the reservoir for violation of NEPA. *EDF v. TVA*, 339 F. Supp. 806 (E.D. Tenn. 1972), *affirmed* 468 F.2d 1164 (C.A. 6, 1972). Other litigation challenged the Authority's condemnation of non-reservoir private farm lands for resale. *U.S.A. ex rel. TVA v. Two Tracts of Land containing 146.4 Acres in Loudon County, Tennessee, et al.*, 532 F.2d 1083 (C.A. 6, 1976). The NEPA injunction remained in effect until late 1973. *EDF v. TVA*, 492 F.2d 466 (C.A. 6, 1973). Since 1974, when it became apparent that the project with impoundment would extinguish the endangered species, public efforts have focused on other economic development options that are consistent with species preservation: development of the valley's 25,500 acres of farm land; the clear flowing river resource; tourist development of the valley's recreation lands, forts and Cherokee sites in conjunction with the National Park; industrial parks; and other river-based development.[10]

[9] Request for halt to reservoir project, Governor Dunn to Chairman Wagner, December 7, 1971; Rejection of request, Chairman Wagner to Governor Dunn, December 17, 1971; in Tellico Environmental Impact Statement, at I-3-42 to I-3-51.

[10] GAO Report at 19-25.

The Endangered Species Act. The present Endangered Species Act was proposed in 1972, intensively debated, and passed by Congress in 1973, pursuant to seven international conventions and treaties for the protection of species, and in recognition of severe and increasing threats to wildlife in the United States and abroad. 87 Stat. 884, 16 U.S.C. (Supp. V) 1531 *et seq.* (1973). The Act included extensive provisions for listing and protecting endangered species. Section 7 of the Act made these protections mandatory upon federal agencies, replacing the discretionary federal provisions of the previous statute, 83 Stat. 275 (1969). Section 7 prohibits federal actions which —

> jeopardize the continued existence of such endangered species . . . or result in the destruction . . . of [the critical] habitat of such species. . . . [87 Stat. 892, 16 U.S.C. (Supp. V) 1536 (1973).]

The Congress expressed multiple purposes for the Act:

> Consideration of this need to protect endangered species goes beyond the aesthetic. In hearings before the Subcommittee on the Environment it was shown that many of these animals perform vital biological services to maintain a "balance of nature" within their environments. Also revealed was the need for biological diversity for scientific purposes. [Senate Report No. 93-307, 93d Cong., 1st Sess. 2990 (1973).]
>
> From all evidence available to us, it appears that the pace of disappearance of species is accelerating. As we homogenize the habitats in which these plants and animals evolved . . . we threaten their — and our own — genetic heritage. From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of

> genetic variations. . . . [O]ne of the critical chemicals in the regulation of ovulation in humans was found in a common plant. Once discovered, and analyzed, humans could duplicate it synthetically, but had it never existed — or had it been driven out of existence before we knew its potentialities — we would never have tried to synthesize it in the first place . . .Sheer self-interest impels us to be cautious. . . . Our ability to destroy, or almost destroy, all intelligent life on the planet became apparent only in this generation. A certain humility, and a sense of urgency, seem indicated. [H.R. Rep. No. 93-412, 93rd Cong., 1st Sess. 4, 5 (1973).]

Species protection is thus a utilitarian function. As Senator Cranston noted in a prior set of hearings, species can act as indicators of threatened habitat quality for humans as well:

> If we undertake measures that will insure the preservation of other life forms, we will also insure the survival of man. As we take steps to preserve the environment of endangered fish and wildlife in some livable form . . . we will in the process preserve at least some of our own environment in a condition where we and our children can survive. [Hearings on Endangered Species Conservation Act of 1972 before a Subcommittee of the Senate Committee on Commerce, 92d Cong., 2d Sess. 124 (1972).]

The act became effective on December 28, 1973.

The Endangered Species Litigation. TVA had notice as early as 1971 of the likelihood that the Tellico project area contained endangered species. *EDF v. TVA*, 339 F. Supp. at 808. The facts underlying the present litigation came to light with the discovery of the snail darter in August, 1973

by Dr. David Etnier, a noted University of Tennessee ichthyologist. Shortly thereafter TVA received notice of the discovery and itself began to collect individuals of the species.[11]

The snail darter, it developed, is a highly sensitive indicator of special habitat qualities which now remain extant only in the Little Tennessee River. The fish is streamlined in shape, adapted to life on the cobbled bottom of the Little Tennessee's flowing waters, and it requires a large, cool high-quality river flow over shallow shoals for its spawning habitat.[12] There does not appear to be any equivalent stretch of river remaining in the region. At one time the fish apparently was broadly distributed in the large flowing rivers of eastern Tennessee, prior to the construction of dams throughout the region.[13] Now the fish survives only in the river system's last such clean undammed stretch.

As the trial court later noted, the scientific community had never before known this fish, it was highly adapted

[11] A.255. By November 1973, Dr. Etnier's work in the project area had led to a proposal for research funded by TVA. A. 112-113, 239-241.

[12] A. 21-22, 108, 113-114. The fish relies upon small river snails (also dependent on flowing river conditions) for a primary part of its diet, hence the species' popular name "snail darter." Exhibit 12 at trial, a detailed print depicting the fish and its habitat, has been deposited with the Clerk.

[13] The snail darter's prior range probably extended throughout the upper main Tennessee River and the lower reaches of its major tributaries above Chattanooga — the Hiwassee, Little Tennessee, Clinch, Holston, and French Broad Rivers, all now covered by successions of impoundments. See map from 1977 Senate Hearings, Appendix A, *infra*. Testimony of TVA Witness at hearings on the 1978 public works bill, before a subcommittee of the House Committee on Appropriations, 95th Cong., 1st Sess., Part 4, 240-241 (1977); 1977 Culver Hearings, 291. The system now has more than 2500 miles of impounded river. Hearings on Public Works . . . Bill, 1973, before a Subcommittee of the Senate Committee on Appropriations, 92d Cong., 2d Sess., Part V, 334 (1972).

to river conditions, and its only known breeding population was located squarely in the midst of the proposed impoundment.[14] Active searches by TVA in more than 60 water courses failed to find other such populations.[15]

After unsuccessfully urging the Authority to comply with the Act voluntarily in 1974, and urging action through the Department of Interior in 1975, the present respondents (a regional association of biological scientists, local citizens and users of the valley, and a Tennessee conservation group) filed suit against the impoundment portion of the project. In a trial that was essentially an enforcement action they argued that the impoundment would threaten the fish with extinction and destroy its critical habitat.

The trial court found that the impoundment portion of the project would

> result in the adverse modification, if not complete destruction, of the snail darter's critical habitat. . . [I]t will jeopardize the continued existence of the snail darter. Almost all of the known population of snail darters will be significantly reduced if not completely extirpated. . . . [I]t is highly doubtful that it would reproduce in a reservoir environment. [A. 35, 36.]

[14] Although there are about two dozen darters in the genus *Percina*, only the snail darter and one other are on the endangered species list (50 C.F.R. 17.11). The snail darter is a highly unusual case where 100% of an endangered fish population is within, and would be extirpated by, a federal project. Another genus also called darters, Etheostoma, numbers about a hundred, of which six are listed as endangered though none are similarly threatened by federal projects.

[15] A. 36; (partial list of rivers searched), A. 410-412.

The Sixth Circuit accepted the district court's findings of fact, and unanimously reversed the lower court's denial of an injunction, on the ground that appropriations bills had not impliedly amended the Act to allow extinction of the species, that the Act could still be applied to the ongoing project, and therefore that the court would enforce the law. (A. 81.)

The snail darter case moved into the Congressional forum, as noted below, and to this Court by writ of certiorari issued on November 14, 1977. (A. 566.)

Project status at the time of discovery of the endangered species, and after. There is a basic discrepancy between the parties' interpretation of the factual record with regard to the actual status of the project in 1973 when the endangered species was discovered. The Authority alleges as fact that the project was "50% complete" or "nearly finished"[16] in 1973, apparently with regard to budget expenditures rather than physical actions.

[16] Pet. Br. 5, 29. The allegation is cited from a passing reference in a statement by TVA Chairman Wagner to the House appropriations subcommittee. [Hearings before a Subcommittee of the House Committee on Appropriations, 94th Cong., 2d Sess., Part 5, 260-262 (1976).]

The following chart shows the actual per year expenditures on the Tellico project upto 1973 and thereafter:

Year	Funds Expended, in Thousands	Cumulative Running Total	
1967	$ 4,821	---	
1968	6,794	(11,615)	
1969	5,767	(17,382)	
1970	5,176	(22,558)	
1971	4,816	(27,374)	
1972	5,374	(32,748)	Discovery of the endangered species; Act takes effect.
1973	2,857	(35,605)	
1974	7,687	(43,292)	
1975	17,127	(60,419)	
1976 June	24,928	(85,347)	
1977 Jan.	15,651	(100,998)	
1977 Feb.	(ca 2,200)	(103,198)	

$103,198,000. TOTAL TO FEB. 28, 1977

[1977 Culver Hearings, 875, (962),provided to witnesses by TVA Public Information Office, Feb. 7, 1977; GAO Report, 10.]

This chart shows that the majority of project expenditures to date occurred after 1973; the Authority spent nearly twice as much in the four years after the discovery of the endangered species and passage of the Act as it had in the preceding seven years.

By the end of 1973 the project had spent $35.6 million dollars out of the present total cost for the project of about $120 million. In physical terms, this project expenditure in 1973 primarily comprised the purchase of project lands, and road and bridge improvements; construction of a $5 million concrete dam spillway constituted most of the remainder.[17] When the species was discovered the project had been halted for a year and a half by an injunction under NEPA.

[17] *EDF v. TVA*, 339 F. Supp. at 808 (1973); 1977 Culver Hearings, 962. At the present time completion of the impoundment would require tree-clearing and vegetation scraping in the reservoir area, excavation and construction work on the inter-reservoir canal, and road work, as well as the closing of spillway gates.

Project options and modifications available in 1973 and thereafter. In the record and decisions below it was established that the endangered darter could not survive the impoundment of the valley, so that protection of the species would require non-reservoir project development options. There is an issue between the parties as to the existence of various project options and alternatives in 1973 and thereafter. Since the present case was litigated as an enforcement action, there is no testimony anywhere in the record concerning the availability or non-availability of such alternatives.[18]

Congress, however, is presently considering available alternatives for the development of the valley with and without an impoundment. The primary basis of this review is the 1977 study prepared by the Comptroller General at the request of the House Committee on Merchant Marine and Fisheries (General Accounting Office Tellico Study, *supra*, 4, at note 1.) The Report concluded that alternatives presently exist that require study, that the Tellico impoundment project's claimed benefits were unreliable, and that the impoundment project should not be pursued until after full comparison with a "comprehensive river-based regional development project" option and the preparation of reliable economic figures for both.[19] Substantial portions of the project

[18] The district judge included a statement in his opinion that no alternatives existed for the impoundment short of scrapping the project. (A. 38.) Since no evidence was presented anywhere in the trial record as to such a lack of alternatives, nor such a finding requested, the judge's comment must be viewed as a limited statement of the *impoundment's* total incompatibility with preservation of the species, or as an unsupported dictum. The only incidental references to that issue at trial noted the existence of potential alternatives. (A. 351, 230, 236.) The Court of Appeals did not mention the comment and appeared to recognize the existence of alternatives. (A. 89, 90.)

[19] GAO Report at 40, 41.

budget were found to be of directly recoverable benefit, and potential project values without an impoundment were found to be significant and comparable to the impoundment project.[20]

The presently available non-reservoir project options noted by the GAO included: *agriculture*, through cultivation of the project's 25,500 acres of prime farmlands instead of impounding them; *tourism*, noting the proximity of the Great Smoky Mountains National Park, and the major Cherokee historic sites leading to the Park along the river; and *recreation*, noting that flowing water recreation is increasingly in demand and increasingly scarce, that the valley lands could be developed in conjunction with Park recreation traffic, and that other recreational potentials existed.[21] Industrial development, cultural-historical resources, and other river-based development potentials were also noted. The local economic impact of these options was discussed as cumulative, since the various development alternatives do not appear to be incompatible. A second Tellico development report was requested in May by the House Subcommittee on Fisheries and Wildlife, to be prepared by the University of Tennessee School of Architecture (hereafter the "Hanson Study"[22]). Both the GAO Report

[20] *Id.* at 39-41. As an example, agriculture in the valley might alone produce nearly twice as much return on present project assets than an impoundment. TVA admitted that agricultural management could produce annual yields that "would not total more than about $6.4 million annually" — the TVA impoundment is projected to produce $3.7 million annually. GAO Report 26, 28.

Extensive tourist and recreation benefits for a river alternative, drawing upon the adjacent Great Smoky Mountain National Park, were stated in testimony by the Park Superintendent, 1977 Culver Hearings, 203-205. See also *Id.*, 866, map of valley historical sites, reprinted at Appendix B, *infra*.

[21] *Id.* at 20-26.

[22] Requested of Dean Donald Hanson, University of Tennessee School of Architecture, to be presented in House hearings this spring; preliminary report presented at 1977 Culver Hearings, 197-203.

and the Hanson Study focused upon project alternatives that are available at the present time and were available in 1973.

TVA reviewed several Tellico project alternatives in the project's final 1973 impact statement. The statement considered and rejected several forms of impoundment and a "scenic stream" corridor along the river banks.

TVA has not considered the development options noted above, and has not considered any mode of development for the project's 38,000 acre area without some form of reservoir.[23]

Interagency cooperation. The Endangered Species Act requires agency consultation with the Secretary of Interior to insure the protection of species and their critical habitat. [Guidelines, A. 397; Regulations, 50 C.F.R. 402.03, 43 Fed. Reg. 870 (1978).] Since 1974, the snail darter has been the subject of communication between TVA and the Department of Interior's Fish and Wildlife Service, chiefly through TVA's Division of Forestry, Fisheries and Wildlife Development and the Service's Office of Endangered Species. To date, the content of TVA's communication with Interior under the Endangered Species Act has been limited to objections and requests to transplant the species.

Petitioner filed extensive comments and objections against the listing of the snail darter and its critical habitat.[24] Interior reviewed the material and thereafter placed the fish on the endangered list by final rule-making under Section 1533 of the Act in 1975, and designated the Little Tennessee River as its critical habitat. [A. 377-389, 40 Fed. Reg. 47505, 41 Fed. Reg. 13926-28, 1975, 1976.]

[23] GAO Report 15-17, 40; A. 139-140, 192, 240.

[24] A. 362-368, 33.

TVA also continuously urged transplantation of the population to any of a number of other waters. A limited transplant took place but its results are speculative.[25]

Formal "consultation" between TVA and Interior was delayed until February 1976, and still to date has been limited to TVA's proposals for transplanting the fish somewhere else. TVA's consultations with Interior have not included consideration of non-impoundment project modifications which would permit the survival of the species.[26] Interior has suggested such river-based development options to TVA in the past, and the Secretary's dissenting brief notes that viable project

[25] 710 snail darters were transplanted to the upper Hiwassee River, water that comes closest to resembling the Little Tennessee, beginning in 1975. [A. 264.] The Hiwassee has only a fraction of the amount of shoal habitat present in the Little Tennessee, [A. 145-146] and has water quality problems from its polluted Ocoee River tributary. TVA has asserted that the transplant has been successful, but its estimates are based on arithmetical progression of the original 1975 numbers, not on field data. [1977 Culver Hearings, 904-905.] Actual TVA field data was recently reported to the Department of Interior: "Transects were run at the original Hiwassee transplant sites in early December 1977, and mean numbers [found] per transect were 0.00, 0.13, and 0.20 for the upper, middle and lower transplant sites respectively. All darters observed at these sites were adults." The field teams located some juveniles near the Ocoee confluence. The Coytee shoals in the Little Tennessee had 68% of original population numbers. Letter from TVA to Office of Endangered Species, January 25, 1978, in Departmental files. It may require 5-15 years to establish probable success for transplantation even where favorable initial evidence is present. GAO Report, 4.

[26] A. 192, 249, 395; 1977 Culver Hearings, 69, 378-79, 890. TVA took the position that no detriment would occur to the species or its habitat until impoundment closure itself, so that "there will be ample opportunity to obtain the views of the scientific community . . . as well as to examine further the possibilities of transplantation and the present existence of the darter at other locations." 1977 Culver Hearings, 977, Letter from Interior files, March 12, 1975; A. 250.

alternatives exist for reconciling project objectives with preservation of the species.[27] TVA's consistent position has been that

> we shall be glad to consult further if you have any additional suggestions or plans to conserve the darter which will also allow completion of the project. . . . The alternatives which you suggest . . . do not allow completion of the project [as originally planned].[28]

Based upon the position taken by the Secretary in the dissent to TVA's brief, the Department of Interior appears ready to continue substantive discussions with TVA "to comply fully with the 'consultation' requirements of Section 7 of the Endangered Species Act."[29]

The Tellico case in Congress. Since January 1977 when the Sixth Circuit Court of Appeals enjoined the impoundment portion of the Tellico project, Congress has initiated extensive review procedures on the controversy. To prepare a background economic analysis for subsequent hearings, the House Merchant Marine and Fisheries Committee, which has jurisdiction over the Endangered Species Act, requested preparation of the GAO Report previously cited (*supra*, 4, at note 1). The Committee requested information on the alternative options and economics of the project, with and without the dam component; the final report was transmitted October 14, 1977. Shortly thereafter, the Subcommittee on Fisheries and Wildlife requested preparation of the University of Tennessee's Hanson Study to elaborate the development options for a river-based project (*supra*, 15).

[27] Pet. Br., 3A-4A.
[28] 1977 Culver Hearings, 960.
[29] Pet. Br., 4A.

Oversight hearings on the Endangered Species Act, with a special session on Tellico, were held in July, 1977 in the committee that has Senate jurisdiction over the Act. [Hearings in the Subcommittee on Resource Protection of the Senate Committee on Environment and Public Works, 95th Cong., 1st Sess. (1977), hereafter "1977 Culver Hearings"] and further hearings are being scheduled. At these Senate hearings the General Accounting Office and the Hanson study group presented their findings in preliminary form, by leave of the House committee. The reports verified the existence of available project options for protecting the endangered species while obtaining project benefits. They suggested resolution of the issue based upon a comparison to be developed between comprehensive river-based development options and the original impoundment project updated and with corrected benefit figures.

At the Culver hearings there was extensive testimony from the lead agencies, the Departments of Interior and Commerce, that the Endangered Species Act has been working well to resolve project species conflicts if agencies consulted in good faith. In four years experience there have been 4500 potential conflicts, and only three failed of administrative resolution and came to court.[30] Of these three only Tellico has come to Congress. No examples were shown by any witness of project/species conflicts arising under the Act that were not resolvable by good faith consultation. A series of federal agency witnesses testified that Section 7 was occasionally burdensome, but was a workable statute. TVA was the only agency taking an opposite position.[31] The session specifically devoted to Tellico focused primarily upon the value of existing project resources in the unflooded valley and the advantages of alternative project options.

[30] 1977 Culver Hearings, 61, 63-64, 69-70.
[31] *Id.*, 366.

Several specific amendments to the Endangered Species Act have been proposed in Congress to resolve the Tellico conflict. Of the bills submitted, one would specifically exempt the Tellico impoundment from the Act. [H.R. 4457, 95th Cong., 1st Sess.] Three would exempt Tellico along with other projects underway in January 1967. [H.R. 4167, H.R. 5002, H.R. 5079, 95th Cong., 1st Sess.] No action has been taken on these bills.

As the petitioner's brief notes, the appropriations committees have also had the Tellico issue before them over the years, and, as part of the Authority's annual lump sum grant, the project received funding each fiscal year. On various occasions TVA witnesses informed one or both of the committees of the existence of the snail darter, the Authority's opinion that the Act did not apply to Tellico, and their belief that successful transplants would resolve the issue. The House appropriations committee added a comment in its 1975 report stating that the dam "should be completed as promptly as possible"[32] without mentioning the endangered species issue.

In 1975-76 the House and Senate committees with jurisdiction over the Endangered Species Act held hearings on suggested amendments to the Act, including an amendment to relieve ongoing business enterprises from restrictions on certain pre-Act inventories. TVA did not attend or raise its endangered species issue in either hearing.[33] The 1976 Senate appropriations report noted

[32] H.R. Rep. No. 94-319, 94th Cong., 1st Sess. 76 (1975).

[33] Hearings on Endangered Species Act Amendments, before the Environment Subcommittee of the Senate Committee on Commerce, and before a Subcommittee of the House Committee on Merchant Marine and Fisheries, 94th Cong., 1st Sess. (1975). The hearings led to the Endangered Species Act Amendments, P.L. 94-359 (1976) (the "Scrimshaw Act"). S. Rep. No. 94-960, 94th Cong., 2d Sess. 96 (1976).

the endangered species issue, and added that the committee "does not view the Endangered Species Act as prohibiting the completion of the Tellico project at its advanced stage. . ."[34]

The 1977 House appropriations report repeated this view, and recommended that agencies cooperate with Interior on species relocation to resolve project conflicts.[35] In the 1977 hearings, TVA witnesses informed the appropriations committees that transplantation was likely to succeed and that TVA had requested delisting of the species by Interior to resolve the issue.[36]

The subsequent Senate appropriations report stated that it had "carefully reviewed" Tellico and approved appropriations "based on the Committee's view of the Endangered Species Act and its [limited] application" to Tellico.[37] The 1977 appropriations act itself did not refer to the project, but included an extra grant of $2 million to TVA generally, "to carry out the purposes of the . . . Act . . . as amended, including cooperative efforts as contemplated by that Act to relocate endangered . . . species to other suitable habitats as may be necessary to expedite project construction."

The same provision was inserted in other agencies' grants.[38] On the House floor Congressman Bevill

[34] S. Rep. No. 94-960, 94th Cong., 2d Sess. 96 (1976).

[35] H.R. Rep. No. 95-379, 95th Cong., 1st Sess. 103 (1977).

[36] The transplant's results to date have been unclear. See *supra*, 17, note 25; the delisting petition was rejected on its biological facts by the Department of Interior on December 5, 1977.

[37] S. Rep. No. 95-301, 95th Cong., 1st Sess. 98-99 (1977).

[38] P.L. 95-96, 91 Stat. 797, 800, 802, 808 (1977).

expressed the committee's confidence in the success of relocations, doubts about the motivation of citizen enforcement of the Endangered Species Act, their encouragement to TVA to find equitable solutions to the endangered species problem, and their recommendation that funding continue. On only one occasion, in 1976, an appropriations committee heard a statement in opposition to the project concerning the endangered snail darter.[39]

House and Senate hearings on Tellico and Section 7 are currently being scheduled by the committees with jurisdiction over the Act, for review of the GAO Report, of agency implementation of the Act, and of public policy resolutions for the longstanding Tellico issue.

SUMMARY OF ARGUMENT

Petitioner seeks to persuade this Court to fashion some form of implied amendment for it, on any of several attenuated theories, so as to relieve it of a statutory duty to prevent extinction of species which it has consistently refused to comply with since 1973.

I

Despite the past and present availability of viable project modifications for reconciling Tellico's economic benefits with species preservation, petitioner argues that

[39] Hearings on Public Works for Water and Power Development and Energy Research Appropriations Bill, 1977, before a Subcommittee of the House Committee on Appropriations, 94th Cong., 2d Sess., Part 8, 979-984 (1976), testimony by respondent Hiram Hill, Jr.. The two members present asked two questions, one doubting Mr. Hill's interpretation of the law and one doubting that the fish did not live elsewhere.

it should be impliedly exempted from the Act because the project was underway when the Act was passed and the darter discovered. The Act, however, is quite clear in its mandatory application to all federal agencies. It *requires* species protection and good faith consultation concerning all prospective federal actions which threaten the destruction of a species and its critical habitat. There is no express grandfather clause in Section 7, and in light of legislative history and subsequent Congressional action it is clear that one was not implied.

On the facts here, the large majority of project actions remained to be taken when the Act was passed and the endangered species discovered, further major action still remains to be taken, and viable project modifications still exist. Since discovery of the species, TVA has consistently refused to consult with Interior as required by the Act on any project modifications that did not include an impoundment, has accelerated construction and doubled its expenditures, and now urges that all project options have been foreclosed.

TVA's request for an implied exemption attempts to extend statutory construction law far beyond existing holdings. To date, courts have consistently refused to exempt federal projects from federal statutes where substantial actions remained and the law could be meaningfully applied so as to effectuate Congressional intent. In such circumstances, as cases under the National Environmental Policy Act and in other areas of administrative law demonstrate, the law is to be applied. Where a federal agency declines to comply with the law, the courts must enforce it, after which "[T]he appropriate forum to resolve this complex and controversial issue is not the court's but the Congress." (A. 93-94, citing *West Virginia Division of Izaak Walton League v. Butz*, 522 F.2d 945, 955 (C.A. 4, 1976).)

Congress' response to Tellico since the Sixth Circuit's decision reinforces the wisdom of this separation of powers rationale. The application of the Act to the Tellico case has prevented the very extinction of endangered species that Congress sought to prevent, and is permitting Congress to study and consider a variety of compromises and alternatives that would reconcile the competing public interests.

II

Similarly, Petitioner's arguments for an implied amendment by appropriations are not supported by the facts, the law, or Congress' subsequent actions on Tellico. Amendments by implication are disfavored generally, but are especially suspect when the alleged amendment arises from a subsequent appropriations bill. *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 785 (C.A.D.C.).

On the appropriations record here, the implied amendment argument for the Tellico project is particularly tenuous. The only statutory mention of the Endangered Species Act in a TVA appropriations was a special grant of additional funds for carrying out the purposes of the Act, a provision which does not mention Tellico, is identical to those included in other agencies' grants, and which does not reflect an intent to amend any provision of the Act. Similarly the legislative history of the TVA appropriations reflects the appropriations committees' desire to fund the project, their opinion that the Act should not stop public works projects, and their belief that transplantation would solve any conflicts — not their intention to change existing law. To be even colorable, an implied amendment argument must show evidence of Congressional intent to amend; where none exists, the argument is doubly unfounded.

Given the presumption against implied amendments by appropriations and the House and Senate rules against substantive amendments in appropriations bills, it is not surprising that the large majority of cases reaching the argument have rejected it. In some very limited situations, appropriations acts have been allowed to have substantive effect, as when used by some courts in ambiguous circumstances to ratify an agency's expanded interpretation of its authority under enabling acts, or to ratify an executive order on reorganization. The presumption is far more rigid where the implied amendment argument is used to attempt to reverse an express Congressional statute. Appropriations acts have been allowed to repeal a substantive act of Congress in only a few extremely rare cases, where strict and narrow tests were met: the text of the appropriations act itself must include language that shows Congress' intent to amend the substantive statute, there must be a clear unambiguous legislative history expressing an intent to amend existing law, and the two Congressional acts must be mutually irreconcilable. TVA meets none of these tests.

The appropriations committees, finally, do not have Congressional jurisdiction over the Endangered Species Act and did not review the Tellico case's administrative record or project options under the Act. The House and Senate committees which *do* have proper jurisdiction over the Act are now actively reviewing the case and do not appear to consider the Act repealed by appropriations.

In short, the Tellico case is presently being weighed in all its political, economic, and biological complexity by Congress, the proper forum in our system for making the difficult decision of how best to reconcile conflicting public policies, economics, and agency actions. In seeking an implied amendment on this record, petitioner asks the Court to act as a super-legislature, a role it has long and properly declined.

ARGUMENT

I.

SECTION 7 OF THE ENDANGERED SPECIES ACT PROHIBITS THE IMPOUNDMENT PORTION OF THE TELLICO PROJECT

In 1973, when Congress by overwhelming margins enacted the Endangered Species Act, with strong enforcement provisions, it declared a serious and farsighted national policy of protecting endangered species from extinction.

> These species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people. . . .[1]

> From all evidence available to us, it appears that the pace of disappearance of species is accelerating . . . Our ability to destroy, or almost destroy, all intelligent life on the planet became apparent only in this generation. A certain humility, and a sense of urgency, seem indicated.[2]

Tennessee's snail darter presents a dramatic example of the Act accomplishing its special purposes. Having been successively eliminated from its prior range in the unimpounded Tennessee river system, the snail darter survives now as a sensitive barometer of the extraordinary qualities of the Little Tennessee River's last undammed stretch, for humans as well as wildlife. It is difficult to consider the species separately from the environmental qualities it depends on which motivated the public defense of the valley long before the existence of the darter was known. If the darter is extinguished in its last

[1] Section 2, 87 Stat. 884, 16 U.S.C. §1531 (Supp. V, 1973).

[2] H.R. Rep. No. 93-412, 93d Cong., 1st Sess. 4,5 (1973).

remaining habitat, humans as well will have lost the last such river and valley resources in the region. If, on the other hand, the agency enters into full consultation with the Secretary and complies with the law, those resources can be preserved and developed for public benefit, and the species and its habitat will survive.

Petitioner has sought to avoid the application of Section 7 since 1973 when it learned of the endangered species' existence.[3] Alone among federal agencies it has consistently refused to enter into meaningful consultation to achieve Congress' purposes. Now TVA asks the Court to weaken the Act by fashioning some theory to relieve it of its duty to obey the law. Respondents respectfully submit that the Sixth Circuit was right in unanimously rejecting such requests for judicial legislation. TVA's arguments would result in the first conscious extinction of a living species in human history, and as the current review in Congress is demonstrating, Tellico is no place to start such a sad precedent.

A. SECTION 7 PROHIBITS FEDERAL ACTIONS WHICH WOULD RENDER AN ENDANGERED SPECIES EXTINCT.

Petitioner no longer contests the finding of the district court that closure of the dam would "result in the adverse modification, if not complete destruction" of the critical habitat of the species, eliminating its requirements for life and reproduction, and thus jeopardizing its continued existence.[4] The plain meaning of section 7 forbids this result.

[3] Statement, *supra*, notes 26-29, 31. *See also* Argument I B, *infra*.

[4] Opinion of the District Court, 419 F. Supp. 753, 757. As the Court of Appeals stated, "TVA concedes the existence of a predictable causal nexus between the impoundment of the Little Tennessee and the ultimate depletion of the snail darter population." [549 F.2d 1064, 1070.]

The language of the Act is clear and mandatory. Section 7 requires that "all Federal departments and agencies shall insure" that their actions do not jeopardize the existence of endangered species or destroy their critical habitat. As the Fifth Circuit Court of Appeals held in *National Wildlife Federation v. Coleman*, 529 F.2d 359, 371 (C.A. 5), *cert. denied, sub nom. Boteler v. National Wildlife Federation*, 429 U.S. 979, "Section 7 imposes on federal agencies the mandatory duty to insure" protection of endangered species.[5] The mandatory language is a marked departure from the less stringent provisions of the 1966 and 1969 predecessors to the 1973 Act.[6] Those prior Acts were "limited to a few designated agencies and . . . hedged by considerations of what was 'practicable and consistent with the primary purposes' of those agencies."[7]

The 1966 and 1969 statutes, in other words, permitted the sacrifice of endangered species to the missions of the various federal agencies — precisely the result that petitioner seeks here. The report of the House Merchant Marine and Fisheries Committee on the present Section 7, however, emphasized the different course taken in the 1973 Act. Section 7 —

> *requires* the Secretary and the heads of all other Federal departments and agencies to use their

[5] In *Coleman*, the Court of Appeals enjoined the Department of Transportation from continuing the construction of an interchange and 5.7 mile segment of interstate highway. The court found that construction threatened the existence of the Mississippi Sandhill Crane, an endangered species, and also threatened the modification and destruction of its critical habitat. *See also*, Note, *Obligations of Federal Agencies Under Section 7 of the Endangered Species Act*, 28 Stanford L. Rev. 1247, 1252-58 (1976).

[6] Endangered Species Preservation Act of 1966, Pub. L. 89-669, 80 Stat. 926; Endangered Species Conservation Act of 1969, Pub. L. 91-135, 83 Stat. 275, *repealed* Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq*.

[7] Bean, *The Evolution of National Wildlife Law*, 387 (1977); *see also* Note, *Obligations of Federal Agencies Under Section 7 of the Endangered Species Act*, 28 Stanford L. Rev. 1247, 1253-54 (1976).

> authorities in order to carry out programs for the protection of endangered species, and it *further 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.[8]

Petitioner nonetheless reads the legislative history of the 1973 Act as requiring agencies to engage in a "balancing process," permitting them to proceed with a project even though it would destroy an endangered species, if the agencies "concluded that the public interest warranted it." (Pet. Br., 33.) Petitioner has found "two relevant discussions" in the legislative history of the Act to support this far-reaching view. In one, Congressman Dingell, author of the present Section 7, emphasized its mandatory nature during House debate, by referring to the threat to the whooping crane from Air Force bombing practice. Petitioner cites (at Pet. Br., 34) the following portion of Mr. Dingell's statement [119 Cong. Rec. 42913 (1973)]:

> Under existing law, the Secretary of Defense has some discretion as to whether or not he will take the necessary action . . . to see that this threat disappears. . . . [O]nce the bill is enacted, he or any subsequent Secretary of Defense would be required to take the necessary steps.

Mr. Dingell, however, went on to say (*Id*.)

> It is a pity that we must wait until a species is faced with extermination . . . but at least when and

[8] H.R. Rep. No. 93-412, 93d Cong., 1st Sess. 14 (1973) (emphasis supplied).

> if that unfortunate stage is reached, the agencies of government can no longer plead that they can do nothing about it. They can, and they must. The law is clear.[9]

The other discussion involved a question by Senator Cook of Kentucky, who wanted to be sure that the Army Corps of Engineers would not be able to build a proposed road through a nesting area for wild turkeys. In Senate hearings on a draft bill with language essentially identical to that of Section 7, Senator Cook was told by Administration witnesses that the provision "for the first

[9] Petitioner suggests the law is not clear, particularly urging that the term "actions" is ambiguous (Pet. Br. 25-26). Even beyond this, TVA states, ". . . it is well established that even the unambiguous meaning of statutory words does not control when such a reading would be unreasonable in view of the statute's purpose" (Pet. Br. 25). The cases offered in support of this proposition, however, do not suggest such a liberal approach to statutory construction. Petitioner cites *Church of the Holy Trinity v. United States*, 143 U.S. 457, as principal support for its rule of judicial interpretation. This Court, however, in the later case of *Crooks v. Harrelson*, 282 U.S. 55, explained that the *Holy Trinity* principle is strictly limited in application to ". . . rare and exceptional circumstances . . . And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." 282 U.S. at 60.

Courts have chosen to enforce other than the literal meaning of statutory language only when that literal meaning was "plainly at variance" with the purposes of the statute, *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543, or where such a reading "would generate constitutional doubts," *United States v. Witkovich*, 353 U.S. 194, 199. Application of Section 7 to the impoundment portion of the Tellico project raises no constitutional questions (see notes 28, 29 *infra*), and it is not the plain meaning of "actions," but rather TVA's forced construction that is in conflict with the important and urgent purposes of the Endangered Species Act. The Court of Appeals wrote:

> To countenance so restrictive a construction of §1536, in the absence of reinforcement from the Act's legislative history, would, in our view, be inimical to achieving its objectives. We choose instead to give the term "actions" its plain meaning in the belief that this best effectuates the will of the Congress. [549 F.2d at 1070-71, A. 88.]

See also Note, *Obligations of Federal Agencies Under Section 7 of the Endangered Species Act*, 28 Stanford L. Rev. 1247, 1252 (1976).

time would prohibit another federal agency from taking action which does jeopardize the status of endangered species."[10] Petitioner relies on Senator Tunney's doubts, expressed in floor debate, that a slightly different bill[11] would prohibit that same road in Kentucky (Pet. Br., 32-33). In weighing Senator Tunney's opinion, it is relevant that part of the Senate version of Section 7 to which he referred implied some agency discretion, providing that they must carry out "such programs *as are practicable* for the protection of species listed."[12] The conference committee selected the House version of Section 7 in preference to the Senate version.[13]

In a case involving a similar substantive statutory mandate, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, this Court rejected a claim that the special parklands protection statutes allowed the Department of Transportation to build an interstate highway through a public park after balancing various competing interests. The Court said "if Congress intended these factors to be on an equal footing with preservation of parkland, there

[10] Section 3(d) of S. 1592, 93d Cong., 1st Sess. (1973), *reprinted in* Hearings on the Endangered Species Act of 1973 Before the Subcommittee on the Environment of the Senate Committee on Commerce, 93d Cong., 1st. Sess. 7, 68 (1973).

[11] Section 7 of S. 1983, 93d Cong., 1st Sess., 119 CONG. REC. 25664 (1973).

[12] *Id.* (emphasis supplied).

[13] *Compare* Section 7(a) of H.R. 37, 93d Cong., 1st Sess., 119 CONG. REC. 30159 (1973) *with* Section 7 of S. 1983, *supra* note 11, *and with* Section 7 of the Endangered Species Act.

Despite this legislative history, Petitioner argues that the subsequent committee discussion and appropriations to TVA suggest that Congress did not intend Section 7 to apply to ongoing projects. (Pet. Br. 34-38). Petitioner's reliance on the language of later legislation is open to question. Argument II, *infra*. Moreover, the cases cited by petitioner are not applicable. Both *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116, and *Brooks v. Dewar*, 313 U.S. 354, 360, permitted subsequent ratification of an agency interpretation only where that interpretation was consistent with the purpose of the primary statute. Surely TVA cannot intend to argue that impoundment will advance the purposes of the Endangered Species Act.

would have been no need for the statutes." 401 U.S. at 412. Just as those statutes gave special protection to parklands in *Overton Park*, Section 7 of the Endangered Species Act of 1973 (unlike its predecessors) was designed to give special substantive protection to endangered species.

The Endangered Species Act is clear. Neither its language nor its legislative history leaves any room for TVA's view that its mission gives it discretion to subordinate the protection of the species to closure of the dam. Section 7 prohibits petitioner from rendering the species extinct.

B. SECTION 7 REQUIRES PETITIONER TO CONSULT WITH THE SECRETARY OF INTERIOR CONCERNING MODIFICATION OF THE TELLICO PROJECT TO INSURE PRESERVATION OF THE SPECIES.

Congress recognized in adopting the Endangered Species Act that many federal agency actions would potentially jeopardize the existence of endangered species. To resolve these potential conflicts in the most expedient way possible, Section 7 requires that "all . . . Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities" for the preservation of endangered species. Since the Act was passed in 1973, there have been more than 4,500 such potential conflicts, and hundreds of formal or informal consultations.[14] Interagency consultation has failed, resulting in litigation, only three times. Of these, only in this case has the conflict been presented to Congress for resolution.[15] Petitioner's unreasonably narrow construction of the mandatory consultation requirement has led inevitably to that result.

[14] 1977 Culver Hearings, 61, 63-64, 69-70.

[15] *Id.*

The consultation requirement is an integral part of the Section 7 prohibition against the eradication of endangered species by federal agencies. Consultation is not satisfied by paper shuffling and symbolic gestures; it must be entered with an open mind and continue until the existence of the species is no longer in jeopardy.[16] As the Fifth Circuit stated in *Coleman, supra*, "[f]ederal agencies are required to consult and obtain the assistance of the Secretary before taking any actions which may affect endangered species or critical habitat." 529 F.2d at 371. This provision, as the Secretary has stated, requires full consultation on project alternatives and modifications. "Section 7 of the Endangered Species Act, as applied to on-going projects, was intended to insure a rigorous review of alternatives in the event completion of a project would extirpate a listed endangered species." [Pet. Br. at 4A.]

In emphasizing that such consultation must be "meaningful," the *Coleman* court enjoined construction of the highway

> 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 [its] critical habitat. [529 F.2d at 371, 375.]

Petitioner has thus far failed to comply with this requirement, and has continued and increased its impoundment work since 1973 with full notice of the threats it was creating for the endangered species.[17] TVA

[16] ". . .[G]ood faith consultation shall preclude a federal agency from making an irreversible or irretrievable commitment of resources which would foreclose the consideration of modifications or alternatives to the identified activity or program." 50 C.F.R. 402.04, 43 Fed. Reg. 875.

[17] Statement, *supra*, 10, at note 11.

has been in communication with the Department of Interior since 1974, but the communications have largely been limited to objections against Interior's protective actions and listing, and TVA's requests that the species be put somewhere else. The only project modification[18] that TVA has been willing to consider to effect the purposes of the Act is transplantation of the species out of its natural habitat, and there is no available scientific evidence indicating that these darters can be successfully transplanted. (*supra*, 17, at note 25.) When asked during the 1977 Culver hearings to characterize TVA's cooperation, Mr. Keith Schreiner, Associate Director of the Department of Interior's, Fish and Wildlife Service, responded:

> I am, of course, reluctant to be highly critical of a fellow federal agency so let me simply say this: By and large cooperation with other Federal agencies has been quite good. . . . For the most part federal agencies have been cooperative and openminded, during the consultation process. TVA was, in my view, cooperative so long as we were not discussing in any way preventing the closing of the dam. Most of their consultation was preceded with this thought: "we will consult until you guys are sick of it as long as we don't talk about not closing the dam. But it's going to close. . .". That is not full cooperation, Mr. Chairman, in my view. [1977 Culver Hearings, 377-378.]

In its failure to consult with the Secretary concerning the full range of project modifications available and necessary to protect the continued existence of the species, petitioner has violated Section 7.

[18] Petitioner has had ample opportunity to modify the Tellico project so as to comply with Section 7, and to consult with the Secretary toward that end. An agency with full knowledge of statutory law and material facts cannot foreclose alternatives by proceeding with construction, and then claim that it would be unreasonable and wasteful to apply the law. *Steubing v. Brinegar*, 511 F.2d 489 (C.A. 2).

C. SECTION 7 APPLIES TO ONGOING PROJECTS SUCH AS TELLICO.

1. The Act Does Not Contain an Implied Exemption for the Impoundment Portion of the Tellico Project.

Section 7 contains no grandfather clause, nor is it proper to imply one here. When Congress believes it is necessary to relieve ongoing projects or enterprises from its legislation, it inserts a grandfather clause or other express language providing that the statute shall not affect particular projects commenced before a certain date.[19] In light of the urgency Congress has attached to preventing the extinction of living species, it is unlikely that Congress intended an unexpressed exemption for ongoing projects. "To the extent that these long range remedial objectives can be realized in continuing projects, it cannot be expected that Congress would forsake them without even a hint to that effect."[20]

[19] *Cf*. Department of Transportation Act of 1966, *as amended*, 82 Stat. 824, 49 U.S.C. §1653(f): "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. . .", and the recent act on Design and Construction of Public Buildings to Accommodate Physically Handicapped, 42 U.S.C. §4151, Definitions: ". . . the term 'building' means any building . . . to be leased . . . [or] to be financed . . . by the United States after Aug. 12, 1968. . . ."

In considering the applicability of the National Bank Enabling Amendment of 1930, 46 Stat. 809, 12 U.S.C. 90, this Court stated in *McNair v. Knott*, 302 U.S. 369, 371:

> The amendment does not expressly exclude existing contracts from its field of operation. . . . If Congress had desired to limit the remedial grant to subsequent security contracts, it would doubtless have provided an additional limitation relating to prior agreements. Congress alone had the power to write such a limitation in the bill. This it did not do.

[20] *Jones v. Lynn*, 477 F.2d. 885, 889 (1st Cir.); *see also McNair v. Knott, supra* note 19; *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 469; *James v. Milwaukee*, 83 U.S. (16 Wall.) 159, 161.

That the absence of an express exemption reflects a conscious decision not to restrict the application of Section 7 is indicated by the fact that Congress did include an express exemption clause elsewhere in the Act. Under Section 10(b)(1), 16 U.S.C. §1539(b)(1), the Secretary may allow hardship exemptions for private citizens who entered into contracts prior to notice in the Federal Register of consideration of species for protection under the Act.[21] In 1976, when Congress decided that a limited exemption was necessary to relieve the prohibition on trade in certain pre-Act whale ivory products, it passed a specific amendment to do so. [Endangered Species Act Amendments, P.L. 94-359, 90 Stat. 911 (1976), the "Scrimshaw Act".] Most significantly, Congress is now considering several bills to accomplish what petitioner asserts Congress has already impliedly done — exemption of the impoundment portion of the Tellico project from the Act. [H.R. 4457, 4167, 95th Cong., 1st Sess. (1977).][22]

[21] The omission of any express exemption for ongoing agency projects has even greater significance in light of another fact. Congress had just concluded a review of the National Environmental Policy Act; it knew well the issue of implied exemptions for ongoing agency projects. If it wished to exempt such projects, it would have done so expressly. Joint Hearings Before the Senate Committee on Interior and Insular Affairs and the Committee on Public Works on the Operation of the National Environmental Policy Act of 1969, 92d Cong., 2d Sess. 427 (1972).

[22] It is not at all unusual for Congress to enact legislation to exempt a specific project or type of project from the application of a prior general statute. For example, the right-of-way limitation of the Mineral Leasing Act of 1920 was amended in 1973 to permit construction of the trans-Alaska oil pipeline, Pub. L. No. 93-153, 87 Stat. 576; the enjoined San Antonio freeway was exempted from NEPA by Federal-Aid Highway Act of 1973, Section 154 of 87 Stat. 250; Congress also provided certain exemptions to NEPA requirements in the Disaster Relief Act of 1974, §405, 42 U.S.C. §5175 and in the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C §1371(c).

The regulations and guidelines issued by the Secretary of Interior, who has "primary responsibility for implementing Section 7," *Coleman, supra*, 529 F.2d at 373, confirm the application of the Act to Tellico.[23] The Interior Department has interpreted Section 7 as fully applicable to federal actions which were planned or partially completed prior to enactment of the Act in 1973. The original guidelines issued under the Act make this view explicit, requiring agencies to comply whenever

> substantial work remains to be done which would, independent of the effect of earlier work performed, in and of itself jeopardize the continued existence of a listed species or modify or destroy critical habitat. . . . If the Federal presence and control remains to be felt . . . or such work on a Federal project remains to be performed, then the requirements of Section 7 should be satisfied.[24]

The final Regulations issued on January 4, 1978 by the Secretary to implement the Act confirm this long standing interpretation by the Department:

> Section 7 applies to all activities or programs where Federal involvement or control remains which in itself could jeopardize the continued existence of a listed species or modify or destroy its critical habitat.[25]

[23] *See also, Views of The Secretary of the Interior,* (Pet. Br. 2A).

[24] *Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973*, I (D) (1) (A. 402).

[25] 50 C.F.R. 402.03, 43 Fed. Reg. 870, 875.

Petitioner implies that President Carter disagreed with this standard: "President Carter, however, . . . stated: . . . 'Major projects now underway that are found to pose a serious threat to endangered species should be reassessed on a case-by-case basis." (Pet. Br. 28-29, note 21). This comment was made prior to the 1977 Senate Hearings, in which the Administration made clear that this review was to be conducted by Congress. Therefore, language in the preamble to the prior Administration's proposed regulations, that implied an exemption for some ongoing projects, was stricken.

Since significant proposed federal actions remain to be taken on the proposed Tellico impoundment — excavation and construction on the interreservoir canal, tree cutting and ground scraping in the reservoir area, as well as closure of spillway gates — the Department of Interior's administrative determination, made clear through its guidelines and regulations, requires the application of Section 7 to Tellico. This determination is entitled to considerable judicial deference.[26] As the Department of Interior has concluded, "Petitioner's exemption argument would, if adopted, undermine the effective implementation of Section 7 of the Endangered Species Act" (Pet. Br., 5A).

In the face of this clear applicability of the Section 7 requirements to the impoundment portion of the Tellico project, petitioner urges that the Court invoke a presumption against retroactive application of statutes (Pet. Br., 29). Petitioner's reliance on this presumption is misplaced.

First, the Endangered Species Act is being applied only *prospectively*, where significant Federal agency actions remain to be taken which will jeopardize endangered species. It is irrelevant to Congress' public purpose that the remaining actions are later phases of an ongoing project.[27]

[26] *Udall v. Tallman*, 308 U.S. 1; *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315.

[27] *Jones v. Lynn*, 477 F.2d 885, 889 (C.A. 1) (application of NEPA to redevelopment project well underway held not retroactive); *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d. 1275, 1282 (C.A. 9) (application of NEPA to power plant project); *EDF v. TVA*, 468 F.2d. 1164, 1171 (C.A. 6) (application of NEPA to Tellico project). *See also FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (application of Housing Act of 1954, 68 Stat. 610, 12 U.S.C. §1731(b) (Supp. V) to FHA mortgage insurance obtained in 1949 held to be prospective only since future action alone was affected); *Fleming v. Rhodes*, 331 U.S. 100, 107 (application of Price Control Extension Act of July 25, 1946, 60 Stat. 664, to enjoin eviction held to be regulation of future action only although landlords had obtained state judgments before enactment).

Second, courts invoke the presumption to avoid retroactive interference with *private* rights protected by a specific Constitutional provision, most commonly the Due Process Clause or the Contract Clause.[28] Even if this application were retroactive, TVA, as an instrumentality of the Federal government, does not possess private property interests protected from retroactive application of subsequent legislation.[29] The presumption, therefore, does not apply.

Petitioner is asking this Court to legislate an exemption from the well-defined requirements of Section 7. Such an exemption is contrary to the language of the Act, the legislative history, its judicial and administrative interpretation, and principles of statutory construction.

2. Analogous Decisions Under NEPA Clearly Support Application of Section 7 to the Impoundment Portion of the Tellico Project.

Contrary to the petitioner's repeated suggestion, analogous cases under NEPA overwhelmingly support application of the Endangered Species Act to the impoundment actions which remain to be taken. Indeed, the history of the development of NEPA case law is

[28] E.g. *McNair v. Knott*, 302 U.S. 369; *Louisville Joint Stockland Bank v. Radford*, 295 U.S. 555; *Norman v. Baltimore & O.R. Co.*, 294 U.S. 240; *League v. Texas*, 184 U.S. 156. *See* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 694 (1960).

[29] As a creature of Congress, initiated, regulated, and subject to liquidation if Congress so chooses, TVA can acquire no vested interest in continued Congressional authorization. *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21; *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1; *Monolith Portland Midwest Co. v. Reconstruction Finance Co.*, 282 F.2d 439 (C.A. 9). Even private property interests may be subject to subsequent legislation. *F.H.A. v. The Darlington, Inc.*, 358 U.S. 84; *Norman v. Baltimore & O.R. Co.*, 295 U.S. 240; *Union Bridge Co. v. United States*, 204 U.S. 364. See Hochman, *supra* note 28.

particularly instructive in indicating how little judicial support exists for petitioner's approach to the ongoing project question.[30] A few early NEPA decisions did suggest that a similar exemption from the environmental impact statement requirement might be implied if the "critical action" had occurred prior to NEPA's passage.[31] But the overwhelming majority of courts have explicitly rejected that approach, holding NEPA applicable to an ongoing project as long as any action remains to be taken which, in the words of the statute, would be environmentally "significant."[32] Thus, in an earlier Tellico case, the Sixth Circuit denied another TVA claim of implied exemption, and adopted the standard of the NEPA guidelines issued by the CEQ:

> . . . Congress envisaged on-going agency attempts to minimize environmental harm caused by the implementation of agency programs. This could encompass not only constant reevaluations of projects already begun to determine whether alterations can be made in existing features or whether there are alternatives to proceeding with projects as initially planned, but also the

[30] Petitioner advances two allied arguments, without clearly delineating them. It is argued, first, that Section 7 should not apply to actions that are "functionally a part of actions already carried out." (Pet. Br. 20). This argument is similar to the "critical action" formula of a few early NEPA cases, which refused to apply the statute where some identifiable action, usually design or funding approval, had taken place prior to enactment.

Petitioner also suggests, through closely allied but somewhat more general reasoning, that Section 7 should not "apply to projects at an advanced stage of construction." (Pet. Br. 30). *See generally*, ANDERSON, NEPA IN THE COURTS, Ch. V (1973).

[31] E.g. *Pennsylvania Environmental Council v. Bartlett*, 454 F.2d 613 (C.A. 3).

[32] E.g. *EDF v. TVA*, 468 F.2d 1164, 1177 (C.A. 6); *Scherr v. Volpe*, 446 F.2d 1013, 1033 (C.A. 7).

> consideration of the environmental impact of all proposed agency action. [*EDF v. TVA*, 468 F.2d 1161, 1177 (C.A. 6).]

The critical factor, in short, is the possibility of meaningful application of the statute. Cases illustrating this approach (rejecting as irrelevant the fact that decisions to proceed with a project were made prior to NEPA) are so numerous that the issue can be viewed as settled.[33]

The only qualification that courts have suggested is in cases where compliance with the statute could not possibly affect the decision to complete. Thus, in *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323 (C.A. 4), *cert. denied sub nom. Fugate v. Arlington Coalition on Transportation*, 409 U.S. 1000 (1973), the court applied NEPA to a project that was long underway. The court noted, however, in language cited by TVA, that:

> At some stage of progress, the costs of altering or abandoning the project could so definitely outweigh whatever benefits might accrue therefrom

[33] *Jones v. Lynn*, 477 F.2d 885 (C.A. 1) (urban redevelopment project: seven years in planning, some sites cleared prior to NEPA, approximately two-thirds of project appropriations spent or encumbered); *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323 (C.A. 4) (highway: ten years in planning and design, 84% of right of way purchased for $28 million); *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013 (C.A. 5) (highway: seven years in planning and design, funds authorized); *EDF v. TVA*, 468 F.2d 1164 (C.A. 6) (Tellico project: two-thirds of property purchased, one-fourth of roads relocated, construction begun on all major components, $29 million spent); *Scherr v. Volpe*, 466 F.2d 1027 (C.A. 7) (road widening: contracts let, construction begun); *Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army*, 470 F.2d 289 (C.A. 8) (flood control project: two-thirds complete when NEPA enacted, $10 million spent; Corps held to good faith compliance); *Keith v. California Highway Commission*, 352 F. Supp. 1324 (C.D. Cal.) *aff'd* 506 F.2d 696 (C.A. 9) (highway: 55% of right of way acquired, $88 million spent).

to give effect to NEPA

> that it might no longer be "possible" to change the project in accordance with [NEPA's] Section 102. [458 F.2d at 1331.]

If NEPA's impact statement procedures can have no "possible" or meaningful effect, the project may continue without a §102 statement.[34] Doubts whether that stage has been reached, however, "must be resolved in favor of applicability." (*Id.*)

[34] None of the implied exemption standards, it should be noted, turns on percentage tests. It is the foreclosure of meaningful project choice that is relevant, not the mere fact that some percentage of project funds are spent. *Supra*, note 33. Here, TVA had spent only $35 million of the expected total of $120 million when the threat to the species was discovered, and the vast majority of project expenditure had been for the purchase of valuable land and for road and bridge improvements (*supra*, 13). The project was hardly, as petitioner alleges, "substantially completed" (Pet. Br. 21) or "more than 50% complete" (Pet. Br. 19).

The NEPA cases cited by TVA are not inconsistent with this rule of meaningful applicability. In *Ragland v. Mueller*, 460 F.2d 1196 (C.A. 5), there was no modification possible. On the Act's effective date, 16 of 20 miles of highway were complete and NEPA's decision making procedure could have had no meaningful effect. The court in *Pizitz, Inc. v. Volpe*, ___ F. Supp. ___, 2 ELR 20378 (M.D. Ala.), *aff'd* 467 F. 2d 208 (C.A. 5), had no need to discuss the applicability of NEPA. An impact statement had already been prepared, distributed, and approved before construction was begun.

In *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412 (C.A. 2), the construction of two power lines was allowed to proceed not based upon the degree of completion, but primarily because there had been no "obstinate refusal to comply with NEPA," plaintiffs had waited too long to raise objections, and there was no "significant potential for subversion of the substantive policies expressed in NEPA," unlike the proceedings for a third power line which the court did enjoin. 455 F.2d at 425.

The two cases previously arising under the Endangered Species Act are similarly consistent with this rule. Construction was enjoined in *National Wildlife Federation v. Coleman*, 529 F.2d 359 (C.A. 5), though the highway project had been in progress for years. An injunction was denied in *Sierra Club v. Froehlke*, 534 F.2d 1289 (C.A. 8), because the plaintiffs did not demonstrate that the listed species was threatened by the construction.

This pragmatic exception does not apply in this case for two reasons. First, as the ongoing Congressional review indicates, there are development alternatives available even at present, allegations to the contrary notwithstanding.[35] There is, moreover, considerable doubt that the "benefits" to be obtained by impoundment outweigh the benefits of other alternatives. The recently submitted GAO report on the Tellico project concluded that valuable development options not involving impoundment presently exist for the project. The study found that the public value of a river-based development project (capitalizing upon the valley's agricultural, recreational, industrial and tourism potential)[36] may be several times greater than the $3.7 million in yearly benefits claimed for the impoundment. TVA itself has noted that the unflooded valley could yield up to $6.4 million per year in agricultural revenues alone if its prime farmlands were developed, and other observers have made higher estimates.[37] It should be evident from the existence of alternatives today that TVA had such alternatives available in 1973, when the threat to the endangered species became known and the Act became law. At the present time, with the Tellico case before

[35] There is a statement in the District Court's opinion that "there are no alternatives to impoundment of the reservoir, short of scrapping the entire project." [419 F. Supp. at 758.] This statement is not presented as a finding of fact. Indeed, the court was not requested to make such a finding and no evidence was presented. It is not supported in the record and does not bind this Court. *Interstate Circuit, Inc. v. United States*, 304 U.S. 55; *United States ex rel. Paxos v. Rundle*, 491 F.2d 447 (C.A. 3). See *supra*, 14, at note 18.

[36] GAO REPORT, *supra* at 21-27.

[37] GAO REPORT, *supra* at 26.

Congress, this Court should not presume that Congress will not select one of these alternatives rather than permit impoundment.[38]

Second, the purposes of the Endangered Species Act are even more clearly frustrated than in the case of NEPA, if completion decisions are made without attention to the Act's requirements. NEPA is basically procedural. A project very near completion is unlikely to be affected by adding a new procedural requirement on top of the prior decision-making process. The Endangered Species Act, in contrast, embodies the express substantive command that federal agencies may not act so as to jeopardize the continued existence of endangered species. It can meaningfully be applied — and must be — even if a project is nearing completion.[39] The Act is not primarily

[38] The principle of "legislative remand" would have courts leave to Congress the obligation of declaring its true intent. "[T]he role of courts is not to make public policy, but to help assure that public policy is made by the appropriate entity." SAX, DEFENDING THE ENVIRONMENT 149, Ch. 6 (1970).

[39] It must be noted that TVA's argument is not limited to projects initiated prior to the Act's effective date. TVA's reasoning would exempt any project underway before an endangered species was discovered. The Court of Appeals refused to undermine the Act by opening so large a loophole:

> The complexity of the ecological sciences suggests that the detrimental impact of a project upon an endangered species may not always be clearly perceived before construction is well underway. . . . For Congress or the Secretary of Interior to be able to make meaningful decisions in furtherance of the purposes of the Act, the opportunity to choose must be preserved. Once a living species has been eradicated, discretion loses its significance. . . [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 the most complex. This expedient strategy would frustrate effective enforcement of the Act and hinder efforts to prevent the wanton destruction of vulnerable species. (549 F.2d at 1071, A. 88-89).

concerned with procedure nor limited in scope to decision-making. It is possible for TVA to avoid the eradication of the snail darter, and the clear language of the Act requires that it do so.

> [A]ny judicial error in a NEPA case is subject to later review and remedial reversal before permanent damage is done to the environment. The same cannot be said for an erroneously granted exemption from the Endangered Species Act. If we were to err on the side of permissiveness here, and allow TVA to complete and close the dam as scheduled, the most eloquent argument would be of little consequence to an extinct species. [549 F.2d at 1072, A. 91.]

Petitioner, in consultation with the Secretary, is obligated to modify its existing economic development plan for the valley area, in order to effectuate both the development and conservation purposes of Congress. Any other resolution would permit TVA to evade compliance with the Act. As the Court of Appeals concluded:

> Our responsibility under [the Act] is merely to preserve the status quo where endangered species are threatened, thereby guaranteeing the legislative and executive branches sufficient opportunity to grapple with the alternatives. [549 F.2d 1071, A. 89.][40]

[40] The district court took the same position on its judicial role where violations of federal law are found. "Balancing such interests is a legislative and not a judicial function." A. 46. In light of the diverse Congressional objectives involved in this case and the variety of economic, social and environmental issues that it turns on, the district court properly declined to take on such a legislative decision. The judge accordingly based his refusal to enforce the Act on his opinion that it did not apply to the case. Courts sitting in equity have broad powers to shape remedies to effectuate Congress' statutory objectives, and injunctive relief is required as and where necessary to achieve compliance with federal law. *Hecht Co. v. Bowles*, 321 U.S. 321, 328-329;

(continued on next page)

In short, neither the facts, the case law, nor Congress' policies, actions, and statutory language justify the allegation that the dam component of the Tellico Project was impliedly exempted from Section 7 of the Act.

II

SECTION 7 HAS NOT BEEN IMPLIEDLY AMENDED BY CONTINUED APPROPRIATIONS FOR THE TELLICO PROJECT

Petitioner admits that "courts ordinarily should not infer from appropriations acts an intent by Congress to repeal or modify substantive law". (Pet. Br., 39). Petitioner also admits that this "doctrine disfavoring repeals by implication 'applies with full vigor . . . when . . . the subsequent legislation is an appropriations measure.' "

[*Id.*, citing *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 785 (C.A.D.C.).] Petitioner even acknowledges that it is building its argument primarily on the "committee reports recommending the legislation," rather than on the appropriations acts themselves. (Pet. Br., 36-7.) Despite these basic defects in its position, petitioner asks this Court to find that Congress in the "particular and unusual circumstances of this case" has impliedly amended Section 7 to exempt the impoundment portion of the Tellico Project. Petitioner's burden is a heavy one.

(continued from preceding page)

Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 59 and 60. Where a law is violated, the equitable power of the court "must be exercised in light of the large objectives of the Act," *Hecht*, 321 U.S. at 330, 331, through "the principled application of standards consistent with these purposes." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417. The Court of Appeals cited *Hecht* in holding that, a violation of Congress' mandate being shown, petitioner must comply with federal law. A. 95, 89-90. See also, Hearings on Endangered Species Oversight, before a Subcommittee of the House Committee on Merchant Marine and Fisheries 94th Cong., 1st. Sess. 97-98 (1975).

This Court for more than 130 years has held to a presumption against implying amendments to Acts of Congress. *Wood v. United States*, 41 U.S. 343, 362. The Court echoes the words of Mr. Justice Story in that 1842 decision by continuing to hold that where two statutes are

> capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. . . A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled.[1]

Because this standard derives from the principle of separation of governmental powers, the Court has said it will honor both statutes "unless a 'clear intention otherwise' can be discerned. . .". *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154. Even assuming that legislative history were as authoritative as a statute, there is no evidence of Congressional intention to amend Section 7.

[1] *Regional Railroad Reorganization Act Cases*, 419 U.S. 102, 134 quoting the Special Court in that case, 384 F. Supp. 895, 943, and *Morton v. Mancari*, 417 U.S. 535, 551. Petitioner attempts to avoid this rule by arguing that the appropriations act is "specific" to Tellico, while the Endangered Species Act is "general". Quite to the contrary, TVA appropriations are made in a single undifferentiated lump sum yearly grant for all agency expenditures, and the 1977 provision on endangered species program funding was shared with other agencies. Moreover, if a semantic argument is to be made, Section 7 is "specific" in its prohibition of jeopardy to a species arising from federal destruction of its critical habitat. Petitioner's distinction seems to be specious as well as unhelpful.

The provisions of the appropriations acts and the Endangered Species Act are not repugnant. These conclusions are supported by the presently continuing Congressional review of the Tellico project.

A. SUBSEQUENT APPROPRIATIONS ACTS CONTAIN NO EXPRESSION OF INTENTION TO AMEND SECTION 7.

Petitioner urges an implied amendment based upon a "mere appropriations law" *Minis v. United States*, 40 U.S. 423, 445, and such alleged amendments are particularly suspect. *Committee for Nuclear Responsibility, Inc. v. Seaborg, supra*, 463 F.2d at 785.

Judicial reluctance to find implied amendments by appropriations acts reflects a recognition of the functional separation between appropriations committees and the substantive lawmaking committees, embodied in the legislative rules of both chambers. House Rule XXI sets formal requirements for appropriations bills, including the clause: "Nor shall any provision in any such bill or amendment thereto changing existing law be in order. . . ." Senate Rule XVI is to similar effect.[2] In light of the rules, the differing nature of appropriations acts and substantive laws, and the separation of powers between Court and Congress, many courts have simply declined to permit appropriations acts to alter existing law.[3]

The application of that principle to this case is particularly compelling. The 1973 act was drafted and reported to Congress by the Subcommittee on the

[2] Rule XXI (2), Manual of the House of Representatives; Rule XVI (4), Standing Rules of the Senate.

[3] *EDF v. Froehlke*, 473 F.2d 346, 355 (C.A. 8); *D.C. Federation v. Airis*, 391 F.2d 478, 482 (C.A.D.C.); *EDF v. TVA*, 468 F.2d 1164, 1182 (C.A. 6); *National Audubon Society v. Andrus*, (No. 76-0943 Dec. 9, 1977, D.C.D.C., (11 ERC 1057, 1060)); *Atchison, Topeka & San Francisco Ry. v. Callaway*, 382 F. Supp. 620 (D.C.D.C.).

Environment of the Senate Commerce Committee, and the Fisheries and Wildlife Subcommittee of the House Merchant Marine and Fisheries Committee. These same committees were responsible for the Endangered Species Act Amendments in 1976. These committees have also held oversight hearings and hearings on amendments to the Act. They have thus developed substantial expertise in the administration and purposes of the Act. The public works subcommittees of the House and Senate appropriations committees, by contrast, have no expertise with the Act. Their familiarity with the endangered species issue has been largely limited to the testimony of petitioner concurrent with its funding requests, with no other information on biological conditions or economic alternatives, and no notice of the ongoing GAO and Hanson Studies.[4] The appropriations committees' central function is to distribute money to the programs and agencies created through the substantive legislative process. To permit the appropriations activities of these committees to amend substantive statutes is to invite them to second guess the legislative committees which possess the statutory expertise, background, and substantive jurisdiction. As Senator Kennedy, a sponsor of the 1976 amendments to the Act said, in debate on those amendments:

> Any legislation which amends the Endangered Species Act . . . must be carefully drawn to assure that the Congress' commitment to the protection of endangered animals is not diminished. The amendment we approve today has been under

[4] In this light the Senate appropriation committee report's comment that the committee had been fully informed and had carefully reviewed the case (S. Rep. No. 95-301, 95th Cong., 1st Sess. 98-99 (1977)) must be considered to reflect that the committee had fully reviewed TVA's case for continued project funding, not that it had reviewed the endangered species consultations in all their complexity.

> consideration for a year and a half, has been the subject of public hearings, and has had the . . . input of . . . animal protection groups. As a result, we were able to draft this amendment to the Endangered Species Act which reaffirmed and strengthened the resolve of the Congress to protect [the species there threatened] the whale. [122 Congr. Rec. S 10367 (June 24, 1976).]

Although it is true that the public works subcommittees of the Congressional appropriations committees continued funding for the Tellico project, various references to the project in the legislative history fall far short of an intent to amend the 1973 Act. Petitioner's strongest evidence for an implied amendment is the 1977 appropriations act, which does not show any such intent. The act did not refer to Tellico, and provided:

> That not to exceed $2,000,000 of this appropriation is available to carry out the purposes of the Endangered Species Act of 1973 . . . including cooperative efforts as contemplated by that Act to relocate endangered or threatened species to other suitable habitats as may be necessary to expedite project construction.[5]

The provision is beneficial, granting an additional sum to TVA to carry out the purposes of the Act including transplantation experiments. The text of this appropriations act, however, does not purport to amend the Act as to Tellico. The identical provision, for example, also appears in other agencies' grants.[6] Rather, the clause reflects the appropriation committees' belief that transplantation experiments would successfully resolve

[5] P.L. 95-96, 91 Stat. 808 (1977).

[6] *Id*, 91 Stat. 799, 802.

project/species conflicts, as they had been told. Far from changing the Endangered Species Act, the 1977 appropriations clause expresses positive support for the Act's purposes.

The 1977 appropriations act, moreover, was accompanied by committee reports that make explicitly clear that the funding was *not* intended to amend the law:

> This Committee has not viewed the Endangered Species Act as preventing the completion and use of these projects which were well underway at the time the affected species were listed as endangered. *If the Act has such an effect . . . legislation should be enacted* to allow these projects to be completed. . . ." [H.R. Rep. No. 95-379, 95th Cong., 1st Sess. 104 (1977), (emphasis added).]

The 1977 reports reflect the committees' intention to continue funding for the project, their confidence in transplantation attempts[7] and their opinion that the Act was of limited application to ongoing projects. As Senator Stennis acknowledged in the hearings, this appropriations bill was not the proper forum to exempt Tellico from the Act, and any attempt to do so would be met with a point of order.[8]

[7] TVA also had reported that it had petitioned Interior to delist the Little Tennessee as critical habitat, because 1975 earth dike construction in the river's North channel had blocked the return of downstream juveniles to their spawning habitat. Interior rejected the petition on its biological facts and persuaded petitioner to transfer the fish around the obstacle. See *supra*, 21, at note 36.

[8] Hearings on Public Works for Water and Power Development and Energy Research Appropriations Bill, 1978, before a subcommittee of the Senate Committee on Commerce, 95th Cong., 1st Sess. Part 5, 347 (1977). Congressman Bevill added a further note on the floor that the committee distrusted citizen enforcement of the Act, and that "[w]e . . . are confident that the endangered species can be sufficiently protected through relocations and other efforts." [123 Cong. Rec. H 5760-H5766 (daily ed., June 13, 1977).] There was no debate of the issue on the floor of the House, nor was it mentioned in the Senate.

The statements in the 1975 and 1976 appropriation committee reports also fall far short of establishing a Congressional intention impliedly to amend the Endangered Species Act. The 1975 hearings and committee reports (see Pet. Br., 7-8) took place many months before the snail darter was even listed as an endangered species. At the time of consideration by the appropriations committees, Section 7 did not present a barrier to closure of the dam at Tellico. The 1976 appropriations hearings took place after the district court's decision in this case. The Senate committee directed the completion of the Tellico project on the strength of that decision. (Pet. Br., 8-11). The committee reports for these two years reflect the committees' opinion on the changing legal status of the impoundment portion of the Tellico project. They do not, however, indicate any intent to alter the Endangered Species Act.[9]

B. THE PROVISIONS OF THE APPROPRIATIONS ACTS ARE NOT INCONSISTENT WITH SECTION 7.

None of the appropriations acts contains any reference to the Tellico project. The only language which refers at all to the Endangered Species Act, found in the 1977 appropriations act, is actually supportive of the applicability of Section 7 to the Tellico project, as noted at p. 49, *supra*. It does not seem reasonable to suggest that appropriating funds to permit Section 7 compliance is evidence of irreconcilability. In the absence of inconsistency between these statutes, the appropriations acts may not be read as impliedly amending the 1973 Act. See *Mercantile National Bank v. Langdeau*, 371 U.S.

[9] See also, *Greene v. McElroy*, 360 U.S. 474, 504-508; *Ex Parte Endo*, 323 U.S. 283, 303 n. 24; *Airis, supra*, at 391 F. 2d 478, 481-482 (C.A.D.C.). Such knowledge and intention is of course the basic requirement for a finding of implied changes of substantive law.

555, 565-6; *Posadas v. National City Bank*, 296 U.S. 497, 503.

Petitioner asserts, however, that notwithstanding the lack of any amending language, the purpose of appropriations is necessarily inconsistent with Section 7 because the project as planned would jeopardize the species. This proposition neglects TVA's own assurances to the appropriations committees that it was doing its best to preserve the snail darter, (Pet. Br., 8-10, 14-16), and that transplantation of the fish seemed likely to succeed (Pet. Br., 14). In light of TVA's statements, it would not be inconsistent for the appropriations committees to continue funding the project, believing that compliance with the Endangered Species Act was achievable, as it is.

Furthermore, petitioner's argument would have far-reaching and potentially disastrous consequences for regulatory legislation in general. Petitioner urges, in effect, that court challenges to wage and hour laws, civil rights requirements, contracting standards, and other regulatory schemes could be defeated by continued Congressional appropriations for projects contravening these acts. This proposition puts an unreasonable burden on Congress and particularly on the appropriations committees, and has been rejected by prior case law. "Congress must be free to provide . . . appropriations . . . even though claims of illegality . . . are pending in the courts. There is, of course, nothing inconsistent with adoption of appropriations . . . measures on the *pro tanto* assumption of validity, while leaving any claim of invalidity to be determined by the courts." *Seaborg, supra*, 463 F.2d at 785.[10] "If the separation of powers doctrine is

[10] A long series of NEPA cases support this stand. Appropriations have been continually provided for projects undergoing NEPA litigation, yet respondents are not aware of any case where a mere appropriations bill has been held to exempt a project from the duty to comply with NEPA. *EDF v. Froehlke*, 473 F.2d 346, 350 (C.A. 8); *EDF v. TVA*, 468 F.2d 1164, 1182 (C.A. 6); *EDF v. Corps*, 492 F.2d 1123 (C.A. 5); *Seaborg, supra*, 463 F.2d at 785 (C.A.D.C).

to retain its vitality," the Sixth Circuit wrote, "Congress must be free to appropriate funds for public works projects with the expectation that resulting executive action will pass judicial muster." [A. 92]

C. PETITIONER'S ARGUMENT FOR IMPLIED AMENDMENT EXTENDS FAR BEYOND EVEN THE MOST EXCEPTIONAL PRIOR CASE LAW.

Petitioner puts great reliance upon *U.S. v. Dickerson*, 310 U.S. 554, and *Friends of the Earth v. Armstrong*, 485 F.2d 1 (C.A. 10), but as the Secretary of Interior notes in his dissenting brief, petitioner is asking the court to go far beyond those exceptional cases.

> We do not contend, nor do we understand the court of appeals to hold, that express words of exemption must appear on the face of the appropriations statute. Nor do we understand the court of appeals to hold that repeals must be enacted by specific reference to the statute from which exemption is sought. However, we have found no case in which a repeal or exemption was held to flow from a statute which is silent on the subject matter. To the extent that any general rule can be derived from cases involving argued exemptions from substantive requirements of other law, it is that implied exemption by appropriation is strongly disfavored and will only be held to occur when the statute itself, together with its legislative history, manifests a consciousness of the requested exemption and a clear intention to grant it. [Pet. Br., 8A-9A.]

In *Dickerson*, this Court sustained the War Department's denial of reenlistment bonuses to soldiers who claimed under a 1922 statute, because the 1938 appropriations act

there had specifically provided that no such bonuses should be paid "notwithstanding the applicable portions of [the 1922 Act]." 310 U.S. at 555. In addition to the clear statutory language, *Dickerson's* legislative history revealed a full and specific discussion of the act's repealing effect.[11] The re-enlistment bonuses were the only part of the 1922 act that had not been expressly repealed, and in Depression circumstances, despite a vigorous effort to save the bonuses, Congress decided that the nation did not have enough money to pay for them. After forceful debate, the bill was passed with the amending provision which, though contrary to the rules of both the House and Senate, was not subject to a point of order because it was inserted only in the conference version.[12]

Dickerson, which stretched the implied amendment concept to its extreme, still falls far short of the present case. *Dickerson* involved the express withholding of funds

[11] The same provision was inserted in various appropriations bills for eight successive years. Apparently the reason Congress did not repeal the previous act expressly was a desire to recommence paying the bonuses as soon as the country could afford to.

[12] Congress had clear and specific knowledge of the effect of the appropriations bill on the Economy Act. Immediately before the full House voted on the bill, they were told by Congressman Izaac that they were legislating by subterfuge. [83 Cong. Rec. 8679 (June 16, 1938).]

The statutes in *Dickerson* were necessarily repugnant and inconsistent. Where the first statute authorizes the payment of bonuses, the second statute states that these bonuses should not be paid, notwithstanding the first statute. This is the kind of repugnancy between provisions of two statutes that this court has required before finding a repeal by implication. Even where the provisions of the two statutes were so necessarily irreconcilable, that Court went into the legislative history to insure that Congress fully intended to suspend the substantive effects of the previous bill. Absent any language in an appropriations bill which is not inconsistent, let alone not repugnant with a previous statute, a court has never found a repeal by implication.

authorized by a prior statute.[13] This was a funding decision applicable to a single year, to be reconsidered and relegislated each year thereafter. TVA's argument is based on a statute and record that are silent on Congressional intent to amend. Further, the impact of the amendment that TVA urges will render a species extinct. There would be no opportunity for reconsideration.

Friends of the Earth v. Armstrong, supra, does not go even as far as *Dickerson*. The issue in *Armstrong* was whether the waters of Lake Powell would be kept out of Rainbow Bridge National Monument, as required by a 1956 Act, by construction of a coffer dam at the edge of the Monument. Subsequent substantive statutes, as well as appropriation acts, retreated from this requirement. (Colorado River Basin Act of 1968, 43 U.S.C. §§1501, 1521(a).) The hearings and debates on the appropriations bills showed extensive Congressional review of the question. Since twelve successive bills provided that "no part of the funds herein appropriated shall be available for construction or operation of facilities to prevent waters of Lake Powell from entering any National Monument," and unambiguous legislative history demonstrated that Congress fully intended the amendment, the court held that the requirement of the 1956 Act was suspended for 1973. The court noted:

> This is not really a situation of repeal by implication . . . but more a reversal of a previous position after considering it fully in the public

[13] The same circumstance distinguishes *City of Los Angeles v. Adams*, 556 F.2d 40 (C.A.D.C.), where an authorization for appropriations for the Los Angeles airport was specifically reduced by a limitation in subsequent appropriations, after protracted Congressional discussions extending over several years. Cf. *New York Airways, Inc. v. United States*, 369 F.2d 743 (1966), where a specific reduction of appropriations was held not to limit the airway's rights.

> hearings and after members apparently came to the conclusion that the protective works would be more detrimental than the presence of water in the monument. [485 F.2d at 9.]

In brief,

> . . .[R]eliance upon *Friends of the Earth v. Armstrong* . . . is misplaced. There, congressional intent was quite explicit both on the face of the facts in question and in the accompanying legislative history. Similarly, in *United States v. Dickerson* . . . congressional intent was manifestly clear from both the language of the Act and the legislative history. [*Sierra Club v. Morton*, 400 F. Supp. 610, 638 (N.D. Cal.)]

The cases cited by petitioner are narrow, exceptional extensions of the traditional rule against implied amendments by appropriation. On the facts of the present case, petitioner's argument would require far greater departures from established principles if petitioner is to persuade this Court that such an amendment should be found.

The case law, in other words, is overwhelmingly aligned against the judicial extension requested by petitioner. There have indeed been some cases over the years where actions *less* than repeals of substantive law have been allowed to define implied amendments. In cases where parts of the executive branch sought to expand their authority through broad construction, appropriations have sometimes been permitted to ratify their claims.[14] More recently, however, even implied ratification has generally been rejected by the courts.[15]

[14] *Fleming v. Mohawk*, 331 U.S. 111; *Brooks v. Dewar*, 313 U.S. 354.

[15] Cases cited *supra*, 48, at note 3.

The argument here goes beyond mere ratification or extension of authority by appropriation, however, to an attempt to override a substantive Congressional statute. No case has been found where such repeal of a direct Congressional prohibition has been allowed, absent the restrictive statutory language and clear expressions of intention which existed in the exceptional *Armstrong* and *Dickerson* cases.

D. PETITIONER SHOULD SEEK ITS LEGISLATIVE REMEDY DIRECTLY IN THE LAW-MAKING COMMITTEES WHERE THE ISSUE NOW LIES, RATHER THAN BY SEEKING TO PERSUADE THIS COURT TO FASHION AN IMPLIED AMENDMENT FROM APPROPRIATIONS.

The Tellico case has been undergoing intensive Congressional review in the committees that properly exercise jurisdiction over the Act. Hearings were held in 1975, 1976, and 1977.[16] In 1975 and 1976 those hearings extensively reviewed the implementation of the Act, administrative problems encountered, and proposed amendments. Petitioner, however, did not attend or attempt to raise the Section 7 issue in these substantive hearings, instead restricting its comments and testimony to the funding forum of the appropriations committees. In 1977 the House committee initiated the GAO Tellico study and the University of Tennessee's Hanson Study on Tellico alternatives, exemption bills were introduced, the Senate resource protection subcommittee held extensive oversight hearings with a focus on Tellico, and further hearings in both House and Senate were scheduled for this session.

[16] Hearings on Endangered Species Oversight, before a Subcommittee of the House Committee on Merchant Marine and Fisheries, 94th Cong., 1st Sess. (1975), and Hearings cited *supra*, 19, 20, at notes 30, 33.

Tellico and the Act, in other words, have been and are now receiving extensive Congressional consideration on their merits in the committees that have substantive jurisdiction over the matter, and those committees clearly do not believe that the Tellico case has been pre-empted from their jurisdiction by the appropriations process.

It is in those committees that petitioner should now make its case for an amendment to Section 7, continuing its arguments made in the 1977 Culver Hearings, that it was now too late to reconsider the Tellico impoundment, that the remaining costs and benefits support the project, and that it need not consider project modifications that would protect the endangered species in the critical habitat. Respondents, supported by the recommendations of the GAO Report and the Hanson Study, will continue to suggest the development of constructive economic options for the project which capitalize upon the valley's valuable and unique assets, instead of the impoundment of one last reservoir. Petitioner's argument, which would forestall that Congressional review, requests this Court to extend disfavored theories farther than ever before, on a record that does not support them. To indulge those arguments would be neither necessary nor proper.

It is the political process, not the appellate court system, that should review and decide the complex questions of Congressional policy, economic cost accounting, agency responsibility, and the public interest here involved.

CONCLUSION

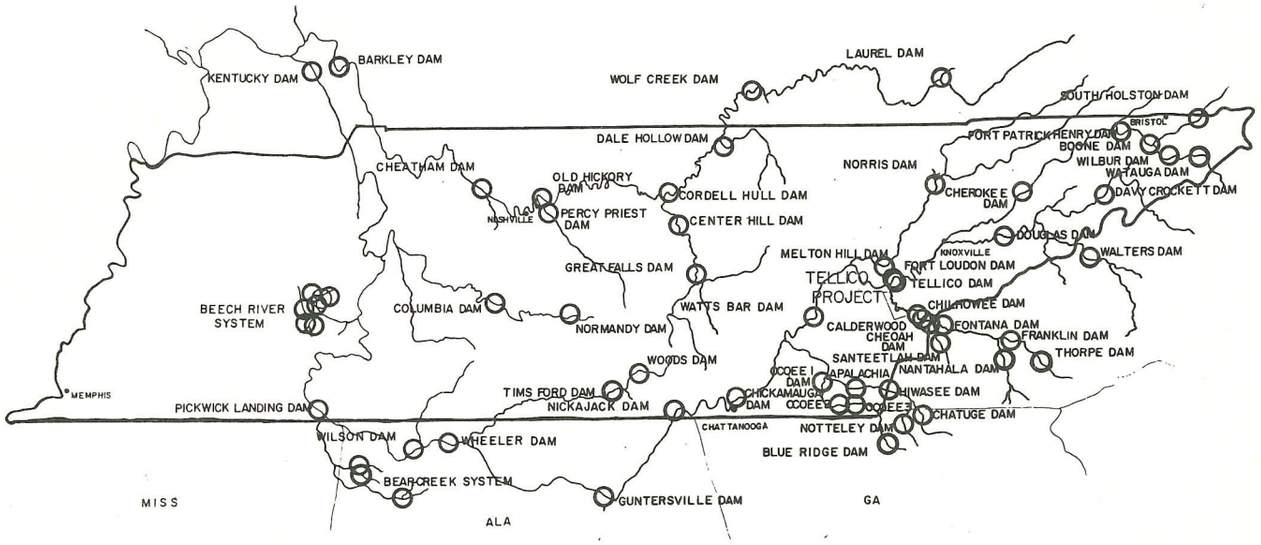
This action was brought to compel petitioner to comply with Section 7 of the Endangered Species Act. The litigation to date has preserved the species, while generating Congressional and inter-agency discussion of constructive project development alternatives. The Court should permit this review to continue by affirming the judgment of the Court of Appeals.

Respectfully submitted,

Zygmunt J. B. Plater
W. P. Boone Dougherty
Donald S. Cohen

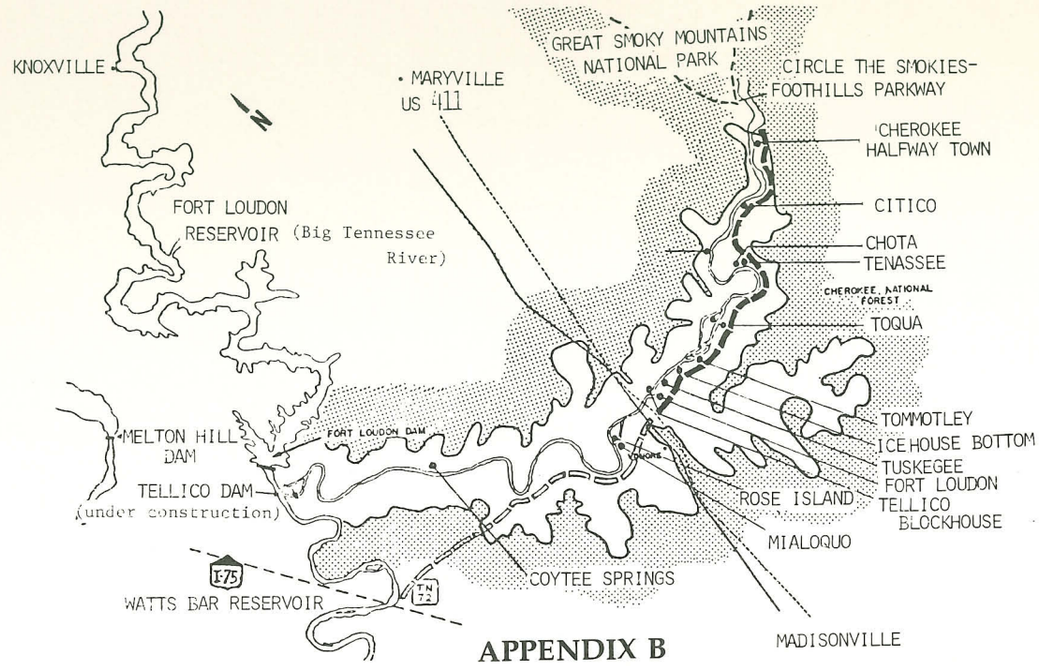
March 1, 1978

APPENDICES



APPENDIX A

Tennessee River System, Showing more than 60 dams which have impounded the river system from its headwaters (right) to the Mississippi (left). From 1977 Culver Hearings, at 871.



APPENDIX B

Tellico Project Area on the Little Tennessee River, Showing major Cherokee historic sites, a potential Cherokee trail tourist route (— — —) existing route 72 (□ □ □), and Coytee Springs, the primary habitat of the snail darter *Percina Imostoma tanasi*. From 1977 Culver Hearings, at 866.