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Brief *Amicus Curiae* of Environmental Defense Fund, National Audubon Society, National Wildlife Federation, Natural Resources Defense Council, Sierra Club, and Defenders of Wildlife, *TVA v. Hill*, No. 76-1701

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No. 76-1701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

TENNESSEE VALLEY AUTHORITY,
Petitioner

v.

HIRAM G. HILL, JR., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF ENVIRONMENTAL DEFENSE FUND, NATIONAL AUDUBON SOCIETY, NATIONAL WILDLIFE FEDERATION, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, AND DEFENDERS OF WILDLIFE

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INTEREST OF AMICI

The parties to this brief *amicus curiae* are the Environmental Defense Fund, the National Audubon Society, the National Wildlife Federation, the Natural Resources Defense Council, the Sierra Club, and Defenders of Wildlife. Each of these organizations is a private, non-profit na-

tional membership organization dedicated to protecting and improving the quality of the human environment in a scientifically sound manner. Each also has a special interest in assuring the wise conservation of the nation's wildlife resources, including endangered species of wildlife. Because of that special interest, this brief *amicus curiae* is filed so that the Court will have before it a full discussion of the vital issues presented by this first case under the Endangered Species Act. Both the Acting Solicitor General, on behalf of petitioner Tennessee Valley Authority, and counsel for respondents have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This case presents the Court with its first opportunity to consider the meaning of the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. (Supp. V) 1531 *et seq.* The Court's decision, however, will constitute more than a mere exercise in statutory construction; it will also affect significantly the future of the nation's endangered species preservation program, and even more fundamentally, the whole history of efforts by which man has sought to establish his relationship with the various forms of life with which he shares the earth.

From one perspective, the narrow controversy involved in this case pits the snail darter, an endangered species of fish now found only in the swift flowing shallows of the Little Tennessee River, against Tellico Dam, a nearly complete dam under construction by the Tennessee Valley Authority as part of a water resource and regional economic development project known as the Tellico project. The trial court below found that if the Tellico Dam portion of the project is completed, the reservoir that forms behind it will inundate and destroy the habitat upon which the snail darter's survival depends. There is no disagreement among the parties as to the certainty of this fact,

nor is there any serious disagreement with the conclusion of both courts below that this fact alone constitutes a violation of Section 7 of the Endangered Species Act,[1] provided that the Act applies at all in the circumstances of this case.

From a broader perspective, this case presents the question whether the clear Congressional commitment to the preservation of as many of the earth's diverse forms of life as it is within man's power to preserve is to be qualified and diluted by implied exceptions or tenuous doctrines of implied repeal and administrative discretion. This most fundamental question is starkly presented here in what may be the first occasion in which the fate of an entire species is to be consciously decided.

The basic legal disagreement here is over whether the Endangered Species Act properly applies in the circumstances of this case so as to compel that the dam not be completed. The petitioner Tennessee Valley Authority argues that the Act does not so apply, either because it was never intended to apply in circumstances such as those presented here and should not now be so interpreted, or because it has in effect been amended by certain appropriations legislation subsequently enacted. Each of these arguments is addressed and rebutted in this brief.

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[1] Section 7 of the Endangered Species Act, 87 Stat. 892, 16 U.S.C. (Supp. V) 1536, provides in relevant part that all federal agencies "shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce, as appropriate], utilize their authorities in furtherance of the purposes of this chapter . . . by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical."

ARGUMENT

I. The Language, Purpose, And Spirit Of The Endangered Species Act Require That Section 7 Be Strictly Enforced To Prevent The Destruction Of The Snail Darter And Its Critical Habitat.

In parts of the public press and elsewhere, the decision this Court is called upon to review has been subjected to skepticism and doubt. To halt completion of Tellico Dam at an advanced stage of its construction just to perpetuate a tiny species of fish which had not even been known to exist when construction began has been seen by some as an environmental folly. Petitioner's brief reflects this view when it states that the "plain meaning" rule that guided the interpretation of the Act by the court below should be rejected because "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., p. 25). In support of this proposition, petitioner quotes the 1892 language of this Court in *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459, that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers," and that "frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment . . . makes it unreasonable to believe that the legislator intended to include the particular act" (Pet. Br., pp. 25-26, n. 19). It is remarkable that petitioner attacks the decision of the court below as yielding an unreasonable result without making any effort to discern the purposes of the Endangered Species Act, without any "consideration of the whole legislation," and without any inquiry into its spirit.

What then are the purposes of the Endangered Species Act, and what does a "consideration of the whole legislation" reveal about the meaning of the provision in question here? Had petitioner made these inquiries, it would have discovered that the Act, in a multitude of ways, represents a sweeping and uncompromising commitment to the preservation of the earth's genetic diversity. The Act does this first by boldly declaring a purpose of preserving "the ecosystems upon which endangered species and threatened species depend." [2] Neither stuffed museum specimens nor caged zoo animals nor transplanted populations in substitute ecosystems can satisfy this fundamental goal. Instead, the Act demands and requires the preservation not only of endangered species themselves but also of the habitats upon which they depend. Another major purpose of the Act is the restoration of populations of such species to levels at which the protection of the Act is no longer necessary.[3] Thus, it is not sufficient merely to take a "hands off" attitude and avoid injury to endangered species; it may also be necessary to take affirmative action to enhance their prospects for survival. Cf. *Defenders of Wildlife* v. *Andrus*, 428 F. Supp. 167, 170 (D.D.C.).

These sweeping goals are reflected throughout the Act. For example, the Act directs all federal agencies to carry out programs for the "conservation" of wildlife, 16 U.S.C. (Supp. V) 1536, and defines the term "conservation" in an all-inclusive fashion to mean "the use of *all* methods and procedures which are necessary" to accomplish the goal of restoration. 16 U.S.C. (Supp. V) 1532(2) (emphasis added). Cf. *Defenders of Wildlife* v. *Andrus*, *supra* at 170. Similarly, the Act gives to the term "take," a term that is critical to the functioning of virtually every federal wildlife conservation statute, a definition that is broader than that found in any other such statute

[2] 16 U.S.C. (Supp. V) 1531(b).

[3] 16 U.S.C. (Supp. V) 1532(2).

or in the regulations that implement such other statutes.[4] Further, the Act makes eligible for its protective provisions any species of any type by defining the term "fish or wildlife" to include "any member of the animal kingdom." 16 U.S.C. (Supp. V) 1532(5). Again, no other federal wildlife conservation statute is clearly so expansive in scope.[5] Finally, the Act expressly authorizes a balancing of the goal of preserving endangered species with other competing social goals in only one narrowly circumscribed instance, where it authorizes excepting from the protections of the Act any insect species determined "to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man." 16 U.S.C. (Supp. V) 1532(4).

Why would Congress have made such a sweeping and uncompromising commitment to the preservation of the earth's genetic diversity by enacting a law which, on its face, appears to give paramount importance to the interests of little known and apparently valueless creatures? Because, despite those superficial appearances, Congress was persuaded that the long-run interests of human welfare were best served by preserving as much of the earth's flora and fauna as possible. The legislative history is replete with examples, like that of the discovery of penicillin from a common mold, showing that even the most obscure and apparently worthless life forms may some-

[4] Compare the Act's definition of "take," 16 U.S.C. (Supp. V) 1532(14) with those found in the Marine Mammal Protection Act, 86 Stat. 1029, 16 U.S.C. (Supp. V) 1362(13), the Bald Eagle Protection Act, 16 U.S.C. (Supp. V) 668c, and the regulations of the Fish and Wildlife Service implementing the Migratory Bird Treaty Act, 40 Stat. 755, 16 U.S.C. 703 *et seq.*, the Lacey Act, 31 Stat. 187, 18 U.S.C. 42 *et seq.*, the Black Bass Act, 44 Stat. 576, 16 U.S.C. 851 *et seq.*, and other wildlife legislation, 50 C.F.R. 10.12 (1976).

[5] Compare the Act's definition of "wildlife" with those found in the Lacey Act, 83 Stat. 281, 18 U.S.C. 43(f)(3), and the general regulations of the Fish and Wildlife Service, 50 C.F.R. 10.12 (1976). Note also that the Act's protections extend even to plants.

day prove to be of incalculable benefit to man. This concern was expressed clearly in the following passage from the House Report (H.R. Rep. No. 93-412, 93d Cong., 1st Sess. 5 (1973)):

> From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.
>
> To take a homely, but apt, example: one 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.
>
> Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being [sic] those potential cures by eliminating those plants for all time? Sheer self-interest impels us to be cautious.

Congress was clearly aware that extinction is an irreversible process and that its adverse consequences may not be recognized for years, decades, or even centuries.[6]

[6] The potential for long-delayed adverse effects from extinction is illustrated well by the familiar example of the dodo bird, which was slaughtered to extinction by sailors on the island of Mauritius in the 1600's. Only in the last year has it been discovered that the large Calivaria tree, through evolutionary adaptation, had become completely dependent upon the dodo bird for the germination of its seeds. Indeed, until this discovery, it is thought that not a single seed of this once abundant and commercially valuable tree had germinated in the past 300 years because of the dodo's extinction. Temple, Plant-Animal Mutualism: Coevolution with Dodo Leads to Near Extinction of Plant, 197 *Science* 885 (Aug. 26, 1977).

Because of that awareness, Congress clearly regarded the preservation of the earth's genetic diversity as a value of fundamental importance.

Since Congress saw the preservation of the earth's life forms as a fundamental value, is it likely that it would have delegated to the various federal agencies the discretion to decide for themselves when that fundamental value could be sacrificed in favor of other interests? If Congress had meant for such agencies to have that discretion, would it not have said so clearly and would not the legislative history have demonstrated that intent? From a consideration of the whole legislation, its purpose, and its spirit, it is clear that Congress recognized that the question whether to extinguish forever an entire species, and thus relinquish for all time any possibility of deriving human benefit from the unique genetic attributes of that species, is peculiarly a question of legislative policy. Cf. *Gore* v. *United States*, 357 U.S. 386, 393; *Gregg* v. *Georgia*, 428 U.S. 153, 176. Thus, to protect the fundamental value which it recognized, Congress reserved exclusively to itself any decision to drive another species deliberately to extinction.[7] Petitioner, by claiming for itself a discretion which the Act simply does not confer, seeks to usurp the power Congress sought to retain, and thus violates the elementary principle of administrative law that agencies "are not free to ignore plain limitations on [their] authority." *Peters* v. *Hobby*, 349 U.S. 331, 345; *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 412-13.

[7] Despite this reservation of ultimate authority, the consultation mechanism Congress provided in Section 7 has been notably effective in providing a workable means of avoiding further jeopardy to the survival of endangered species without halting other federal actions and without requiring Congressional intervention. Interior Department officials testified in July, 1977, that of the more than 4,500 consultations under the Act, only this case has resulted in a true impasse. *See* Hearings on the Endangered Species Act before the Subcommittee on Resource Protection of the Senate Committee on Environment and Public Works, 95th Cong., 1st Sess., 97-101 (1977). Even here, however, according to a recent report of the General Accounting Office, the existing impasse might be broken if petitioner were willing to consider a comprehensive river-based regional development project, as an alternative to Tellico Dam. *See, Report to the Congress—The Tennessee Valley Authority's Tellico Dam Project: Costs, Alternatives, and Benefits*, Comptroller General of the United States, EMD-77-58 (October 14, 1977), pp. 40-41.

Only by examining the various provisions of the Act in the context of a decades-long history of Congressional efforts to develop effective wildlife conservation legislation can one properly be said to have undertaken a fair "consideration of the whole legislation" and to have discerned its true spirit. It is the petitioner's failure to have done so that leads it to the cramped and grudging interpretation it offers for the language of Section 7. Section 7's reference to actions "authorized, funded or carried out" by federal agencies is thus read by petitioner as a limitation on the scope of the provision, when in fact those words are words of expansion, meant to comprehend all manner of actions with which there is any sort of federal nexus, either through permit or license ("authorized"), financial assistance ("funded"), or direct undertaking ("carried out").

Similarly, petitioner's reliance on case law developed under the National Environmental Policy Act (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, to find an implied exemption for activities or projects in an advanced stage of completion evidences a fundamental misunderstanding of the purposes and spirit of the Endangered Species Act. The concern of the Act is the preservation of species in danger of extinction. If preservation efforts fail, a unique life form containing unique genetic attributes is lost forever, and the genetic diversity of the earth is irretrievably diminished. Thus, whatever the rule may be under NEPA, a project should not be considered to be in compliance with the Endangered Species Act so long as

what remains to be done can bring about the extinction of an endangered species. Put differently, the rules developed under NEPA cannot control the interpretation of the Endangered Species Act because the duty imposed by NEPA is at bottom a procedural duty to "consider" the environmental impacts of a proposed action and then to make a final decision that reflects that consideration, whereas the duty to "insure" against further jeopardy of an endangered species or destruction of its habitat is a substantive duty which circumscribes the discretion of a federal agency in its final decision making.[8]

Even assuming, however, that the rules developed under NEPA should be transferred to the Endangered Species Act, it is by no means clear that those rules dictate exempting this project from the applicability of the Act. Petitioner relies chiefly upon, and quotes extensively from, *Arlington Coalition on Transportation* v. *Volpe*, 458 F.2d 1323 (C.A. 4), certiorari denied *sub nom. Fugate* v. *Arlington Coalition on Transportation*, 409 U.S. 1000. Petitioner fails to quote, however, the sentence immediately following the passage quoted in its brief, in which the *Arlington Coalition* court notes that "doubt about whether the critical stage has been reached must be resolved in favor of applicability." 458 F.2d at 1331. Where the adverse environmental consequences are as certain and as major as they are here, and where the Congressional concern with such consequences is clearly so specific as it is here, even the *Arlington Coalition* test supports applicability of the Endangered Species Act.

[8] This fundamental difference between the duty imposed by NEPA and that imposed by Section 7 of the Endangered Species Act is clearly illustrated in the following passage from *National Wildlife Federation* v. *Coleman*, 529 F.2d 359, 373 (C.A. 5), certiorari denied *sub nom. Boteler* v. *National Wildlife Federation*, 429 U.S. 979: "In holding that the appellees have 'adequately considered' the effects of the highway on the crane, the district court misconstrued the directive of § 7. As we have pointed out, § 7 imposes on all federal agencies the mandatory obligation to insure that any action authorized, funded, or carried out by them does not jeopardize the existence of an endangered species or destroy critical habitat of such species. . . . Although the [environmental impact statement prepared pursuant to NEPA] and the administrative record indicates [sic] that the appellees have recognized and considered the danger the highway poses to the crane, they have failed to take the necessary steps 'to insure' that the highway will not jeopardize the crane or modify its habitat."

The result argued for here cannot fairly be characterized, as petitioner has suggested, as absurd or unreasonable. The Book of Genesis records that God once destroyed all of man's works, but only after first directing Noah to take with him into the ark his family "and every beast after his kind, and all the cattle after their kind, and every creeping thing that creepeth upon the earth after his kind, and every fowl after his kind, every bird of every sort." The Endangered Species Act represents a determined, perhaps even desperate, effort to keep that biblical ark afloat. Along the way, it is true that a lot of species have fallen off the ark, some have even been unknowingly crowded off by man himself; never before, however, has any species been intentionally thrown overboard.

II. The Legislative History Of The Endangered Species Act Clearly Supports The Conclusion That Section 7 Was Intended To Apply In Circumstances Like Those Of This Case.

Perhaps recognizing the failure of its attack on the "plain meaning" of Section 7 to give due consideration to the whole legislation, petitioner next resorts to the legislative history of the Endangered Species Act in an effort to avoid the clear duty which Section 7 imposes. This effort must be rejected. It is an axiomatic principle of statutory construction that where the meaning of a statute is plain and unambiguous, examination of the legislative history is not only unnecessary, but is impermissible. *Ex parte Collett*, 337 U.S. 55; *Caminetti* v. *United States*, 242 U.S. 470. Legislative history cannot be used to change

the meaning of a clear and unambiguous statute. *United States* v. *Oregon*, 366 U.S. 643. Even assuming that resort to legislative history is appropriate in this case, that history is clearly contrary to petitioner's position.

According to petitioner's brief, the legislative history of the Endangered Species Act reveals only two instances which shed any light on how Section 7 should be interpreted in circumstances such as those presented by this case, and those two instances offer conflicting interpretations of the meaning of that provision. In fact, however, the legislative history overwhelmingly supports the reading of Section 7 followed by the court of appeals.

Just as petitioner failed, in its examination of the language of Section 7, to consider the total context of the Act, so too does it fail, in its examination of the legislative history of that provision, to consider the total legislative context so essential to a proper understanding of the intent underlying the section. That fuller consideration requires an examination not only of the legislative history of the Endangered Species Act, but also of the legislation that it superceded.

The first formal national program of endangered species conservation was authorized by the Endangered Species Preservation Act of 1966, Pub. L. 89-669, 80 Stat. 926. The program initiated by the 1966 Act was modest in scope, principally authorizing the Secretary of the Interior to use various existing land acquisition authorities for the purpose of protecting endangered species. The 1966 Act did include, however, a provision imposing certain qualified duties on other federal agencies. This provision, from which Section 7 of the 1973 Act was derived, directed the Secretary of the Interior to "encourage" other federal agencies to utilize their authorities in furtherance of the purposes of the Act, but only "where practicable" to do so. Pub. L. 89-669, § 2(d), 80 Stat. 927.

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§ 1(b) "insofar as is practicable and consistent with the primary purpose of such ... agencies"

The qualified duty imposed on federal agencies by the 1966 Act, by leaving with each agency the final discretion whether to proceed with a given action, followed a familiar pattern established in the Fish and Wildlife Coordination Act of 1958, 72 Stat. 564, 16 U.S.C. 662(b), and subsequently reflected in much other environmental legislation, including Section 4(f) of the Transportation Act of 1966, 80 Stat. 934, 49 U.S.C. 1653(f), and the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321 *et seq.* Against this background of wildlife and other environmental legislation that always left an "escape route" by which agencies could avoid compliance, Congress in 1973 recognized that the fundamental goal of preserving genetic diversity required legislation which would unequivocally close off those escape routes. In 1972 and 1973, the Executive Branch introduced proposed legislation which included a provision identical to the language of Section 7 as it was subsequently enacted, except that it lacked a reference to critical habitat.[9] In hearings before a committee of the Senate, an Administration witness testified that the provision in question "for the first time would *prohibit* another Federal agency from taking action which does jeopardize the status of endangered species."[10] Elsewhere in those same hearings, the following exchange occurred between Senator Cook and Curtis

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[9] S. 1592, 93d Cong., 1st Sess., § 3(d) (1973), reprinted in Hearings on the Endangered Species Act of 1973 Before the Subcommittee on Environment of the Senate Committee on Commerce, 93d Cong., 1st Sess. 9 (1973) (hereafter "Senate hearings"); H.R. 4758, 93d Cong., 1st Sess., § 3(d) (1973), reprinted in Hearings on Endangered Species Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries, 93d Cong., 1st Sess. 171 (1973) (hereafter "House hearings").

[10] Senate hearings at 68 (emphasis added) (remarks of Mr. Wheeler, Deputy Assistant Secretary for Fish and Wildlife and Parks of the Department of the Interior).

Bohlen, Deputy Assistant Secretary for Fish and Wildlife and Parks of the Department of the Interior: [11]

> Senator Cook. What do we do in the situation that we have had to fight over on this side for the last 3 years where the Corps of Engineers has made a determination because they built a new lake that they are going to put a road right through . . . the nesting areas of wild turkeys in that part of the county, and it is the only place where they are? What is the authority under this that you can prohibit the Corps of Engineers on an interagency basis from building the road?
>
> The only way I have gone about it is to put an amendment in the public works bill that these fellows have to have an environmental impact study, and therefore, I have been able to hold it up.
>
> Do we have authority under this act that immediate steps could be taken, that you can on a bureaucratic basis say to the Corps, you can't do it?
>
> . . .
>
> Mr. Bohlen. There is a provision in the act, Senator, in section 3(d).

Section 3(d) of the Administration bill was, as discussed above, essentially identical to the language of Section 7 as it was subsequently enacted. In hearings before a committee of the House, the Administration again took the position that the provision in question constituted "the first piece of substantive law which agencies would have to adhere to in carrying out their programs and duties, as it would prevent them from taking action which would jeopardize the continued existence of endangered species." [12] Far from weakening this proposed provision, Con-

[11] Senate hearings at 67-68.

[12] The quoted language is taken from the Department of the Interior's draft environmental impact statement concerning the proposed Endangered Species Conservation Act of 1972 which was submitted by the Department of the Interior to the appropriate subcommittee of the House as part of the latter's hearing record on the Administration's essentially identical 1973 bill. *See* House hearings at 188.

gress actually strengthened it by adding to its prohibition against jeopardizing the continued existence of endangered species a further prohibition against modifying or destroying their critical habitat.[13]

The intent to establish by Section 7 an unequivocal substantive duty is clearly reflected throughout the subsequent legislative history of the Act. The House Report offered the following example of the section's import (H.R. Rep. No. 93-412, 93d Cong., 1st Sess. 14 (1973)):

> "Under the authority of this paragraph, for example, the Director of the Park Service would be required to conform the practices of his agency to the need for protecting the rapidly dwindling stock of grizzly bears within Yellowstone Park. These bears, which may be endangered, and are undeniably threatened, should at least be protected by supplying them with carcasses from excess elk within the park, by curtailing the destruction of habitat by clearcutting National Forests surrounding the Park, and by preventing hunting until their numbers have recovered sufficiently to withstand these pressures."

[13] A parallel strengthening of the 1973 Act over its 1966 predecessor can be seen in the respective statements of policy set forth in the two Acts. The 1966 Act declared the policy of Congress to be "that the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Defense, together with the heads of bureaus, agencies, and services within their departments, shall seek to protect species of native fish and wildlife, including migratory birds, that are threatened with extinction, and, insofar as is practicable and consistent with the primary purposes of such bureaus, agencies, and services, shall preserve the habitats of such threatened species on lands under their jurisdiction." Pub. L. 89-669, § 1(b), 80 Stat. 926. The 1973 Act expanded this statement of policy to encompass all federal departments and agencies, and eliminated the qualifying language relating to practicability and consistency with other purposes. *See* 16 U.S.C. (Supp. V) 1531(c).

In explaining the conference bill to the House of Representatives, Congressman John Dingell, Chairman of the House subcommittee in which the legislation had originated and House manager of the bill, reiterated the grizzly bear example offered in the House report and also offered a further example concerning Air Force bombing activities near the winter range of the whooping crane. Petitioner's brief quotes in part the remarks of Congressman Dingell concerning the whooping crane, but fails to quote his conclusion that immediately follows (119 Cong. Rec. 42913 (1973) (emphasis added)):

> "It is a pity that we must wait until a species is faced with extermination before we begin to do those things that we should have done much earlier, but at least when and 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.*"

The only instance in the entire legislative history that petitioner cites to suggest a more restricted understanding of Section 7 is the statement of Senator Tunney quoted at page 33 of petitioner's brief to the effect that each federal agency retains final authority to decide whether to go forward with those actions which it proposes. That statement, however, was interpreted in *National Wildlife Federation* v. *Coleman*, 529 F.2d 359, 371-72 (C.A. 5), certiorari denied, *sub nom. Boteler* v. *National Wildlife Federation*, 429 U.S. 979, as meaning that although the federal agency proposing to undertake the action retains the final authority to decide whether to do so, the question whether its decision satisfies the statutory standard of insuring against the further jeopardization of an endangered species is still subject to judicial review. Even if Senator Tunney meant otherwise, his statement stands at odds with all the other legislative history cited above and with the clear language of the statute itself.

III. Subsequent Congressional Appropriations For Tellico Dam Neither Repealed Nor Implicitly Amended The Endangered Species Act.

Petitioner contends that enactment of appropriations legislation for Tellico Dam in 1975, 1976, and 1977 implicitly repealed or amended Section 7 of the Endangered Species Act insofar as it applied to Tellico Dam. Petitioner's contention is based upon a misreading of these various appropriations statutes and is unsupported by persuasive legal authority.

First, as to the appropriations statute enacted in 1975,[14] it must be noted that the House Committee on Appropriations report [15] directing the completion of Tellico Dam "as promptly as possible" was issued before the snail darter was even officially designated as an endangered species. There is no evidence that when this legislation was considered on the floor of the House and Senate, either house was aware of the listing which had occurred shortly before or of the potential conflict that listing presented.

As to the appropriations statute enacted in 1976,[16] petitioner relies upon a report of the Senate Committee on Appropriations which states in part that "[t]he Committee does not view the Endangered Species Act as prohibiting the completion of the Tellico project. . . ." [17] Far from evidencing a Congressional intent to repeal or amend the Endangered Species Act, this statement clearly shows that the Committee was simply expressing its interpretation of that Act. The Committee's interpretation found support in the decision of the district court in this case,

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[14] Public Works for Water and Power Development and Energy Research Appropriation Act, 1976, Pub. L. 94-180, 89 Stat. 1035.

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

[16] Public Works for Water and Power Development and Energy Research Appropriation Act, 1977, Pub. L. 94-355, 90 Stat. 889.

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

which had been handed down only three weeks before the Committee report was issued. However, as the court of appeals subsequently found, and as we contend here, the Committee's (and the district court's) interpretation was erroneous. That, however, does not change the obvious fact that the Committee was simply interpreting legislation, not amending it.

As to the 1977 appropriations legislation,[18] it is true that Congress was by then aware of the conflict between the dam and the snail darter and that at least the Senate Committee on Appropriations believed that the dam should be completed notwithstanding the Endangered Species Act. However, the legislation that Congress ultimately enacted provided a special appropriation for such efforts to relocate the fish "as may be necessary to expedite project construction." [19] The clear implication of this language is that Congress recognized that absent some means of avoiding the existing impasse, such as by successful relocation, project construction could not continue.[20]

Wholly apart from petitioner's misreading of the various appropriations statutes discussed above, it is clear that there is no persuasive legal authority to support construing those statutes to repeal or amend the Endangered Species Act. Petitioner recognizes the well established principle disfavoring repeal by implication, and acknowledges its special force in the case of appropriations legislation (Pet. Br., p. 39). Nonetheless, petitioner argues

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[18] Public Works for Water and Power Development and Energy Research Appropriation Act, 1978, Pub. L. 95-96, 91 Stat. 797.

[19] *Id.* at 91 Stat. 808.

[20] This conclusion is supported by the fact that at the same time that the appropriations legislation was being considered and passed, Congress had, and continues to have before it proposed legislation which would specifically amend Section 7 of the Endangered Species Act so as to allow completion of Tellico Dam. *See*, H.R. 4167, H.R. 4557, and H.R. 5079, 95th Cong., 1st Sess. (1977).

that this case should be treated as an exception to that rule.

Petitioner's Procrustean effort to fit the facts of this case within the recognized narrow exceptions fails because the cases that support those exceptions are simply inapposite. The only decisions of this Court which petitioner cites in which a subsequent appropriations act has been held to change or repeal pre-existing law are ones in which the affected provision of the pre-existing law expressly concerns the payment of money.[21] It would be a major and unwarranted extension of these cases to apply them to a situation where, as here, the affected provision of the pre-existing legislation imposes a substantive duty unrelated to the payment of money.

The only other case on which petitioner rests its argument is *Friends of the Earth* v. *Armstrong*, 485 F.2d 1 (C.A. 10), certiorari denied *sub nom. Friends of the Earth* v. *Stamm*, 414 U.S. 1171. Although there the affected pre-existing provisions did not relate to the payment of money, the facts of the case clearly show that it is inapposite here. First, the pre-existing provisions, part of the Colorado River Storage Act of 1956, 70 Stat. 105, 43 U.S.C. 620 *et seq.*, were held to be inconsistent not only with subsequent appropriations measures, but also with subsequently enacted substantive legislation, including the Colorado River Basin Project Act of 1968.[22] Second, the court implied that the affected pre-existing provisions,

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[21] *I.e.*, *United States* v. *Dickerson*, 310 U.S. 554; *United States* v. *Mitchell*, 109 U.S. 146; *United States* v. *Vulte*, 233 U.S. 509; *United States* v. *Langston*, 118 U.S. 389; *Dunwoody* v. *United States*, 143 U.S. 578. Of the same character is *City of Los Angeles* v. *Adams*, 556 F.2d 40 (C.A.D.C.), also cited by petitioner.

[22] 82 Stat. 886, 43 U.S.C. 1501 *et seq.* *See* 485 F.2d at 10: "In addition to the Appropriation Acts, we have considered the other acts of Congress, described above, which concerned other dams and projects within the scope of the Storage Act in reaching our conclusions."

which directed the Secretary of the Interior to "take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument," and which expressed a Congressional intent that no reservoir constructed under the 1956 Act be within any national park or monument, were themselves inconsistent with the attainment of the very objectives of the 1956 Act.[23]

Finally, and most importantly, the court expressed some doubt whether the challenged administrative action of filling the reservoir to capacity would even have the effect of impairing the national monument. The court noted that even at maximum capacity, the water that passed under Rainbow Bridge, a natural sandstone arch which was the principal attraction of the monument, would remain within the banks of its canyon and would not cause any structural damage to the Bridge. As a precautionary measure against the possibility that the water would rise to unexpectedly high levels or that some damage might occur to the Bridge, the court "directed that the trial court retain jurisdiction of this action for ten years after the date of the mandate herein. This retention of jurisdiction will permit the plaintiffs to seek further relief within that time if either of the indicated events occurs." 485 F.2d at 12.

Here there is no doubt but that the challenged administrative action will have the effect prohibited by the Endangered Species Act. Unlike the situation in *Friends of the Earth* v. *Armstrong*, the damage to be done here cannot be undone simply by lowering the reservoir. Extinction is irreversible. This fundamental difference makes the precedent of *Friends of the Earth* inapplicable here.

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[23] *See* 485 F.2d at 10: "To so radically change the effectiveness of the principal regulating reservoir is to prevent the attainment of the objectives of the Colorado River Compacts, and to prevent the fulfillment of the objectives of the Colorado River Storage Act and the Colorado River Basin Project Act."

Based on the foregoing, it is clear that the subsequent Congressional appropriations for Tellico Dam cannot be read as repealing or impliedly amending the Endangered Species Act and that no persuasive legal authority exists on which such a reading could be based.

CONCLUSION

The language of Section 7 of the Endangered Species Act is clear. The manifestly evident purpose and spirit of the statute support the interpretation given it by the court below, as does its legislative history. For all these reasons, and to further the Congressionally declared fundamental goal of preserving the earth's genetic diversity, the parties to this brief *amicus curiae* urge the Court to affirm the decision of the court of appeals.

Respectfully submitted,

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