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# Sequoyah v. TVA, USDC Northern District of TN, Docket No. 3-79-418: TVA's Brief in Support of Its Motion to Dismiss, or, for Summary Judgment, and in Opposition to Plaintiffs' Motion for restraining Order or Preliminary Injunction

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Civil Action  
No. 3-79-418

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
NORTHERN DIVISION

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AMMONETA SEQUOYAH, ET AL.

Plaintiffs

v.

TENNESSEE VALLEY AUTHORITY

Defendant

---

TVA'S BRIEF IN SUPPORT OF ITS MOTION  
TO DISMISS, OR, FOR SUMMARY JUDGMENT,  
AND IN OPPOSITION TO PLAINTIFFS'  
MOTION FOR RESTRAINING ORDER  
OR PRELIMINARY INJUNCTION

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UNITED STATES DISTRICT COURT  
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STATEMENT

This is at least the ninth time that this Court has been asked to decide the legality of TVA's Tellico Dam and Reservoir project.<sup>1</sup> The project has been before (or attempted to be brought before) the Supreme Court three times, and before the Sixth Circuit six times. Besides being probably the most litigated project in the country, Tellico has been debated at least annually in

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1 Environmental Defense Fund v. Tennessee Valley Authority, 339 F. Supp. 806 (E.D. Tenn.), aff'd, 468 F.2d 1164 (6th Cir. 1972) (Tellico I); Environmental Defense Fund v. Tennessee Valley Authority, 371 F. Supp. 1004 (E.D. Tenn.), stay pending appeal denied, 414 U.S. 1036 (1973), aff'd, 492 F.2d 466 (6th Cir. 1974) (Tellico II); United States ex rel. TVA v. Two Tracts of Land, Etc. (Davis), 387 F. Supp. 319 (E.D. Tenn. 1974), aff'd, 532 F.2d 1083 (6th Cir.), cert. denied, 429 U.S. 827 (1976); United States ex rel. TVA v. McCall, Civil No. 3-74-270 (E.D. Tenn. Sept. 13, 1974), appeal dismissed, No. 77-1239 (6th Cir. Aug. 24, 1977); United States ex rel. TVA v. Standridge, Civil No. 3-74-290 (E.D. Tenn. Nov. 13, 1974); United States ex rel. TVA v. 119 Acres of Land, Etc. (Ritchey), Civil No. 3-74-357 (E.D. Tenn. Jan. 22, 1975), appealed solely on value and aff'd, No. 77-1080 (6th Cir. Oct. 12, 1978); United States ex rel. TVA v. Three Tracts of Land, Etc. (Starritt), 415 F. Supp. 586 (E.D. Tenn. 1976), appeal pending, No. 78-1098 (6th Cir.); Hill v. Tennessee Valley Authority, 419 F. Supp. 753 (E.D. Tenn. 1976), rev'd, 549 F.2d 1064 (6th Cir. 1977), aff'd, 437 U.S. 153 (1978).

Congress since 1965. The first construction funds were appropriated in 1966 and actual construction began in March 1967 (1967 TVA Ann. Rep. 25-27).<sup>2</sup> The most recent congressional debates resulted in the passage of a statute (Pub. L. No. 96-69) directing TVA to complete, operate, and maintain the project "notwithstanding . . . any other law." Construction of the dam is complete, and the reservoir area is ready for impoundment. Affidavit of Edward H. Lesesne at 2.

Plaintiffs in this case are three individual Cherokee Indians and two Cherokee Indian Bands. The Cherokee Nation has refused to join as a plaintiff, although it has over 50,000 members who are the descendants of the Cherokees who emigrated West over the Trail of Tears. Affidavit of Principal Chief Swimmer at 1, 2; Eastern Band of Cherokee Indians v. United States & Cherokee Nation, 117 U.S. 288, 303, 309-10 (1886).<sup>3</sup>

Plaintiffs' complaint (¶ 12) admits the recent congressional mandate to TVA to fill the reservoir. Notwithstanding, they seek an injunction against such filling. They also seek to enjoin disturbance of Cherokee burials in the area, although, at the request and with the knowledge of the Eastern Band, TVA stopped the removal of Cherokee burials over a year ago. Lesesne aff. at 9.

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2 For the Court's convenience, copies of these and other judicially noticeable materials cited are supplied herewith, identified as numbered exhibits--the 1967 Annual Report is exh. TVA 1.

3 Plaintiffs note at ¶ 6 of their complaint that the Eastern Band of Cherokee Indians was "federally recognized" by 43 Stat. 376 (1924), but that statute recognizes no claim by them to any lands or rights in the Little Tennessee Valley. The Keetooah Band cites no statute at all to support its claim of federal recognition, and as noted in Principal Chief Swimmer's affidavit (at 1) this band is now being sued by the Cherokee Nation because of its activities which are regarded as not in the best interests of the Cherokee Nation.

Plaintiffs claim that closure of the dam, and the consequent flooding of a 33-mile stretch of the Little Tennessee River, will infringe on their rights to free exercise of their religion in violation of the First Amendment.<sup>4</sup> They also charge violations of rights under the Fifth and Ninth Amendments, as well as violations of a number of statutes--primarily the American Indian Religious Freedom Act, but also the National Historic Preservation Act, and Tenn. Code Ann. § 46-401 (1964 repl.) which relates to closure of cemeteries. TVA has moved to dismiss the action, or, alternatively, for summary judgment. Plaintiffs have moved for a temporary restraining order or a preliminary injunction. At the conference with the Court on October 17, it was agreed that both motions would be heard on October 26, without oral testimony.<sup>5</sup>

In view of the previous extensive litigation of this multipurpose regional development project, we will not burden the Court with a detailed recital of the public purposes which it serves, and which this Court has time and again upheld and been affirmed in so doing. See e.g., the Davis case, n. 1 supra, 387 F. Supp. at 321. This Court described the project and its purposes in Tellico II (371 F. Supp. 1004) as follows:

This litigation stems from the construction of a concrete and earthfill dam near the mouth of the Little Tennessee River. TVA will ultimately acquire thirty-eight thousand acres for

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4 As the Court knows, the entire upstream portion of the river, which was also subject to Cherokee occupation, has long been flooded by a series of dams built by TVA and the Aluminum Company of America, whose Chilhowee Dam flooded the Cherokee sites of Chilhowee and Tallassee in the 1950's.

5 TVA's alternative motion for summary judgment is supported by affidavits from Principal Chief Ross O. Swimmer of the Cherokee Nation, and from Edward H. Lesesne, Director of TVA's Division of Water Resources, and John E. Linn, a TVA title attorney.

development of the project. Sixteen thousand, five hundred acres will be inundated upon completion of the reservoir; the remaining acreage will be developed for industrial, commercial, residential, and recreational purposes. . . .

\* \* \*

The Tellico Project is a multi-purpose water resource and regional development project. The reservoir and connecting canal with Fort Loudoun reservoir will serve to develop navigation, flood control, and electric power generation. Other direct benefits claimed by the project are recreational development, fish and wildlife use, water supply, shoreline development, and redevelopment. . . . Construction on the concrete portion of the dam . . . was completed on March 28, 1969 [at 1006].

TVA's 1967 Annual Report summarized some of the project's benefits:

Flow of the Little Tennessee River . . . will be used through the turbines at the Fort Loudoun powerhouse, producing about 200 million kilowatt-hours annually.

The Tellico and Fort Loudoun Reservoirs will be operated jointly for flood control through use of the canal. The 126,000 acre-feet of flood storage in Tellico Reservoir will more than double the total storage at this point in the multiple-use system, with particular benefit to Chattanooga, Tenn., the most flood-vulnerable point on the Tennessee River.

The Tellico Reservoir will bring commercial water transportation to several thousand acres of favorable industrial sites which will also have ready access to rail and highway transportation. Development of these industrial sites will provide jobs and income for younger people who now tend to migrate out of the area [exh. TVA 1 at 27].<sup>6</sup>

As of September 30, 1978, over \$111 million of appropriated funds had been spent on the project. 1978 TVA Ann. Rep., vol. II, at 28 (exh. TVA 2).

The plaintiff Eastern Cherokees themselves have been aware that the former sites would be flooded at least since 1965, when they presented Justice William O. Douglas with a petition against the project (Lesesne aff. at 5-6). A similar plea was made to Congress in

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<sup>6</sup> Emphasis added unless otherwise noted.

1966, showing them as "actively opposed" to the project, and stating in part that they "will suffer the final desecration of their ancient homelands if Tellico Dam is built," and "[t]he Cherokees have petitioned that the place of their forebears be preserved as a part of their rightful heritage." Hearings on H.R. 17787 Before the Subcomm. of the Senate Comm. on Appropriations, 89th Cong., 2d Sess. 73, 78, 79 (1966).

Exhibit B to plaintiffs' brief shows that the project area has a long history of use and occupation by different groups of Indians, and 285 sites have been identified. Over 60 of these are Archaic period sites (7500 B.C. to 1000 B.C.); at least 80 are Woodland sites (500 B.C. to 900 A.D.); and others cover varying time periods, including the comparatively short period of Cherokee occupation (1700 A.D. to 1805 A.D.) (plaintiffs' exh. B at 20-23). As this Court noted in *Tellico I*, the project area contains

. . . several village sites of the Cherokee Indian Nation that have considerable archaeological significance. They include Chota, the ancient capital of the Cherokees, Tuskegee, the birthplace of Sequoyah, and Tennessee, from which Tennessee derives its name [339 F. Supp. at 808].

Cherokee occupation of the area officially ended with the signing of Calhoun's treaty in 1819, 7 Stat. 195 (exh. TVA 3). See 117 U.S. at 298. By that treaty, the Cherokees ceded to the United States all of their lands in this area, with the exception of small parcels which were retained by individual Cherokees. These parcels were quickly sold, the last in 1838. (Affidavit of John Linn at 2.) Indeed, the plaintiff Eastern Band themselves stated to the Supreme Court in the snail darter litigation (Hill v. Tennessee Valley Authority, supra, n. 1), that their last residence in the Valley dated from a time "[p]rior to the Treaty of New Echota in 1835 and



the cession of their remaining lands east of the Mississippi River," and that they reside on a reservation in North Carolina created in 1924.<sup>7</sup>

The relationships between the United States Government and the Cherokee Indians were traced in detail by the Supreme Court in Eastern Band of Cherokee Indians v. United States & Cherokee Nation, 117 U.S. 288, 297-303 (1886). In the words of the Supreme Court, the Cherokees who remained in the East were "without organization or a collective name. They ceased to be part of the Cherokee Nation, and henceforth they became citizens of and were subject to the laws of the State in which they resided" (117 U.S. at 303). Their former land remained in private non-Cherokee ownership, utilized primarily as farm land which was fenced and inaccessible to the public, until TVA began acquiring the land for Tellico (Linn aff. at 2; Lesesne aff. at 2-3). By then, all surface traces of Cherokee occupation had been erased by flooding, farming, erosion, and vandalism. See TVA's Environmental Impact Statement (EIS) on Tellico at 1-1-8; Lesesne aff. at 2-3.

The effect of the project on these former village sites and the Cherokees' heritage was a major point of litigation in this Court in Tellico I and II. Plaintiffs there complained that a number of "historic and sacred Cherokee village sites would be destroyed by the Tellico Project," including among others "Chota, the sacred capital of the Cherokee Nation." They contended that the project, "by flooding the sacred homeland of the Cherokee Nation, would destroy not only the historic homeland of the Cherokee Tribe, but also a portion of the heritage of

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<sup>7</sup> Brief of amicus curiae, Eastern Band of Cherokee Indians in support of respondents at 1, 3 (exh. TVA 4); brief of amicus curiae, Eastern Band of Cherokee Indians in support of respondents at 1 (exh. TVA 5).

each citizen of the United States" (complaint ¶ 12).<sup>8</sup> They further complained that TVA had not made appropriate efforts to "preserve important historic, cultural, and natural aspects of our national heritage" (¶ 31); that TVA had "wholly failed to consider the archaeological, historical and environmental costs of the project," (¶ 46); and that the project's completion would violate their rights under the Fifth and Ninth Amendments of the Constitution "to preserve the history of this nation and the heritage of one of the great American Indian tribes" (¶ 58). Standing was claimed "to preserve and protect the outstanding historical, archaeological and environmental values of the area . . . on behalf of all . . . citizens and residents of the State of Tennessee and surrounding areas who have an interest in the preservation and enhancement of . . . the Little Tennessee River" (¶ 4), as well as "all other citizens of the United States" (¶ 6). Standing to litigate such claims was upheld by the Sixth Circuit, 468 F.2d at 1171-72.

After trial on the merits, this court dissolved its preliminary injunction and dismissed the action in its Tellico II decision (371 F. Supp. 1004). The court discussed at some length plaintiffs' major contention about the former Cherokee sites, stating:

Testimony at trial for plaintiffs attacked the sufficiency of the statement's treatment of the historical and archeological loss to be incurred by completion of the project. Two sections in the body of the final impact statement deal with these impacts and a supplemental section further details the discussion.

Plaintiffs' witness stated that the project area is the most important archeologically in Tennessee. It was his opinion that the EIS minimized this importance. The most

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<sup>8</sup> Judicial notice can of course be taken of those proceedings here. National Fire Ins. Co. v. Thompson, 281 U.S. 331, 336 (1930); United States ex rel. TVA v. Two Tracts of Land, Etc. (Davis), 532 F.2d 1083, 1085 (6th Cir.), cert. denied, 429 U.S. 827 (1976).

significant impacts in this regard will be the inundation of several Indian villages built during the occupation of the region by the Cherokee and other earlier peoples. Similarly, Fort Loudoun, an eighteenth century English fortification, will be disjoined from its historic setting by the resulting reservoir.

The impact statement recognizes that the area is of considerable archaeological value and that to some degree these values will be adversely affected by the project. TVA has, as is noted in the statement, initiated and financed archaeological teams to survey the area. Already more than five hundred thousand artifacts have been unearthed. Chota, a recently identified Cherokee village, will be preserved through filling. Fort Loudoun will be likewise preserved, but it will lose its river setting.

Three nationally known archaeologists have reviewed the statement's treatment of this topic and feel the discussion is adequate. Dr. Guthe of the University of Tennessee, who is in charge of the salvage surveys and excavations of the area, testified that he has reviewed the EIS and feels that it contains an objective detailed discussion of the significant impacts of the project concerning this topic. The controversy in this area concerned the emphasis to be placed on the loss. Little evidence was presented demonstrating a lack of disclosure on the part of TVA or a lack of objective analysis of the loss. We find the impact statement's discussion of the historical and archeological impact resulting from the project to be adequate [371 F. Supp. at 1007-08; footnotes omitted].

The court further found that TVA had made a good faith, reasonable balancing of the government's interests in completing the project against the competing interests urged, holding:

There has been on the part of TVA in reaching its decision [to complete the project] a good faith consideration and balancing of environmental factors. An attempt has been made to mitigate certain of the environmental losses inherent in proceeding with the project. . . . [T]he actual balance of costs and benefits struck was not arbitrary and gave sufficient weight to environmental values. The Tellico project has engendered a great deal of controversy. However, this Court cannot substitute its judgment for that of TVA as to the wisdom of proceeding with a project in which almost one-half of the funds have been appropriated [at 1015].

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9 The Sixth Circuit specifically approved this Court's conclusion:

"This involves of course a balancing process which we think the district court correctly recognized and

Having been unsuccessful in securing a stay from this Court or the Sixth Circuit, pending appeal, plaintiffs applied for such a stay to Justice Potter Stewart. In their application, they argued that "the nature of the irreparable harm" which they would suffer lay in the fact that:

[T]he Little Tennessee Valley is of great historical importance. It was the sacred homeland of the Cherokee Indians, and is the site of numerous Cherokee villages. . . . Each of these sites will be inundated. . . . Accordingly, a consideration of irreparable harm in the present instance goes far beyond the mere movement of dirt or condemnation of land. It goes, of necessity, to the heritage of a proud and ravished people and to an historical continuity of importance to all Americans. . . . Never has it been so true that a river and its valley, once gone, can never be replaced, but a reservoir can always be constructed [exh. TVA 6 at 9].

Mr. Justice Stewart referred the application to the whole Supreme Court, which denied it on November 19, 1973, 414 U.S. 1036.

The historical and cultural aspects of the Cherokee sites were also fully presented in the Supreme Court in the course of the Hill litigation by the Eastern Band which was given leave to and did file two amicus briefs, 434 U.S. 954; 435 U.S. 920. They were represented by Mr. Bridgers, who continues to represent them here. Their first motion for leave stated that the Band "has unique historical and cultural interests in the lands sought to be impounded . . . and that Congress is the proper forum for weighing these interests against those of [TVA]" (exh. TVA 5 at 1-2). Their first brief elaborated on this theme. It listed the sites involved and discussed their "unique and profound significance in the

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9 (cont.) applied to this multi-purpose project, a project admittedly entailing considerable ecological damage and disturbance but many off-setting economic and social benefits" (492 F.2d at 468 n.1).

history and culture of the Cherokee people" (at 2). Noting the "special relevance" to understanding "Indian cultures" of "[a]rcheological deposits and burial grounds" (at 3-4), it concluded:

If the petitioner is successful in this case, these lands will be flooded and further research and study, further recourse to this valley will be lost forever to the Cherokee people. If this Court leaves the decision of the Court of Appeals standing as a final ruling, the questions raised by petitioner may be balanced by Congress [emphasis in original] against the values represented by the Respondents together with the unique values to the Cherokee people. In the Congressional forum the Cherokee people can point out that:

The white man saves the whooping crane, he saves the goose in Hawaii, but he is not saving the way of life of the Indian.

On behalf of the Cherokee people and other Indian people who continue to have sacred land damaged and destroyed, the Eastern Band of Cherokee Indians urges the Court to deny certiorari in this case and leave these political questions to be resolved by Congress.

The Supreme Court in Hill did leave the "political questions" involved in completing Tellico to be resolved by Congress, 437 U.S. at 194-95. In the debates which preceded the recent congressional resolution of the matter, the interests of the Cherokees were forcefully presented. See, e.g., 125 Cong. Rec. S9632 (daily ed. July 17, 1979) (remarks of Senator Kennedy); 125 Cong. Rec. S7551 (daily ed. June 13, 1979) (statement of Charles Schultze); and id. at S7552 (remarks of Senator Chaffee). And after balancing the various governmental interests involved, Congress passed and on September 25, 1979, the President signed the law we have previously noted--Public Law No. 96-69--which states:

Provided, That notwithstanding the provisions of 16 U.S.C., chapter 35 or any other law, the Corporation is authorized and directed to complete construction, operate and maintain the Tellico Dam and Reservoir project for navigation, flood control, electric power generation and other purposes, including the maintenance of a normal summer reservoir pool of 813 feet above sea level.

TVA's longstanding archaeological commitment and some of the archaeological work done at Tellico are summarized in TVA's 1973 Annual Report, at pages 95-97 (exh. TVA 7). As this Court has found, these investigations have resulted in a wealth of cultural and other information about the Cherokee people. Well over \$3 million has been spent in this effort, in which TVA has worked closely with both the Cherokee Nation in Oklahoma and the Eastern Band of Cherokees. See 1973 TVA Ann. Rep. at 96; affidavit of Principal Chief Swimmer at 2-4; Lesesne aff. at 5-8. In 1973, TVA and The University of Tennessee were specifically commended for their work by the Cherokee Nation (affidavit of Principal Chief Swimmer at 2-3). And in 1974, the Eastern Band of Cherokees, through Principal Chief Crowe, an affiant for plaintiffs in this case, gave TVA a written "official endorsement of the Indian Project at Tellico Dam" (Lesesne aff. at 7). This project includes the preservation of the historic site of the Townhouse at Chota, so that Cherokees and the public generally can have access to this site, as well as arrangements for a memorial site for the reinterment of Cherokee burials (id. at 7-8; affidavit of Principal Chief Swimmer at 4). The archaeological investigations are continuing, but TVA has not permitted the removal of any Cherokee burials since June 1978, when the Eastern Band of the Cherokees asked that the removal and study of such burials be stopped (Lesesne aff. at 9). As Mr. Lesesne's affidavit shows, individual Cherokees had previously participated in such activities.

As recently as June 29, 1979, the Cherokees again commended TVA for its responsiveness to Cherokee concerns at Tellico. In a public hearing held on the American Indian Religious Freedom Act, Duane King, one of the affiants on behalf of the plaintiffs in this action

(exh. H), stated that "TVA has been very cooperative and very receptive" as to the Cherokee sentiments in this matter and noted that "The Native American Rights Fund attorneys feel that TVA has been one of the more cooperative federal agencies." (A transcript of this hearing is attached as exh. TVA 8.) As noted at 3-4 of Mr. Lesesne's affidavit, plaintiffs' affiant King has personally participated in the excavation of Cherokee burials at Tellico, and in a recent published article based on his experience there has noted the "highly important" nature of such research.

The record thus clearly shows that TVA's activities have expanded--not infringed--plaintiffs' opportunities for their claimed religious expression. Over the last 13 years, the alleged cultural, historical, and archaeological importance and sacred nature of the former Indian sites--sites which TVA itself found--have been urged on Congress and the courts time and again by plaintiffs and others. Congress has now itself directly weighed and balanced the Government's interests in completing the project against the competing interests urged, and has mandated TVA to complete the project, "notwithstanding . . . any other law."<sup>10</sup> Plaintiffs have known of the impending flooding since 1965, have sat back while construction went forward, and others sued, and have even expressly approved TVA's plans and actions with respect to the sites they now sue about. The undisputed facts show that there is no infringement of their claimed religious rights, and that this suit, and their motion, would be barred by laches and estoppel even if it otherwise had merit, which it does not.

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<sup>10</sup> Such congressional balancing is, of course, conclusive. Texas Comm. on Natural Resources v. Bergland, 573 F.2d 201, 209-10 (5th Cir. 1978); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 492 F.2d 1123, 1140 (5th Cir. 1974).

ARGUMENT

I

Plaintiffs' Claim that Completion of Tellico  
Dam and Reservoir Will Violate Their  
Constitutional Rights Is Without  
Merit.

A. Plaintiffs' First Amendment Claim

Plaintiffs' basic First Amendment claim is that completion of Tellico Dam will interfere with the free exercise of their religion by inundating and denying their right of access to graves and other sites which they regard as sacred (complaint ¶ 15). This claim, we submit, is without basis for at least three reasons:

First, contentions that gravesites regarded as sacred cannot be utilized for public projects have often been advanced by parties who actually owned the sites in question, as plaintiffs here do not. Even in that setting, such claims have been rejected. Thus, in United States v. Sixty Acres More or Less, of Land, 28 F. Supp. 368 (E.D. Ill. 1939), the court upheld the taking of such sites for the Crab Orchard Creek Dam and Reservoir. The court recognized that "grounds for the burial of the dead are sacred places" (at 374), but nevertheless rejected the contention that the existence of such sites could prevent construction of the dam and reservoir. The court stated:

That it must be the law that lawful governmental progress or functions cannot be stayed by giving public cemeteries a permanently inviolable locus perpetually beyond the reach of the sovereign power of eminent domain, whether exercised by state or government, is apparent to one who gives the subject any mature consideration [at 374].



The court also quoted with approval the following excerpt from Campbell v. City of Kansas, 13 S.W. 897, 899 (Mo. 1890):

"If every portion of ground which has been made a burial place for man should be devoted in perpetuity for burial uses, the most populous and cultivated districts of the world, where millions upon millions of the human race have sunk into the earth in the countless ages of the past, would have to be abandoned as a dwelling-place or means of support to the living inhabitants of the present day. The devotion of land to any particular use must be subject to the changes and vicissitudes which time may bring to it" [28 F. Supp. at 374].

See also 29A C.J.S. Eminent Domain § 85, at 345-46 (1965), citing numerous cases.

As for denial of plaintiffs' right of access, plaintiffs have had no such right for over 125 years. Indeed, the locations of the grave and town sites were not even known in modern times until TVA's archaeological work for the Tellico project revealed them. Now, as a result of Tellico, the Townhouse site at Chota, which plaintiffs claim to be most important to them, will be preserved and made accessible for the first time to the public generally, including plaintiffs. Indeed, TVA's plans to preserve this site from flooding, as a part of the project, were specifically approved by the plaintiff Eastern Band (Lesesne aff., exh. 11).

Second, plaintiffs' contentions here go far beyond those which were rejected in the eminent domain cases. Title to lands within the Tellico reservoir area has been in non-Cherokee ownership for over 125 years. Plaintiffs in effect contend that the First Amendment prevents a party who does own land--in this case the United States--from exercising normal incidents of

ownership if to do so would conflict with what plaintiffs say are their religious practices.<sup>11</sup>

None of the cases cited by plaintiffs deal with such a contention. Plaintiffs have not cited the one case which has--Badoni v. Higginson, 455 F. Supp. 641 (D. Utah 1977), appeal pending, No. 78-1517 (10th Cir.). And that case rejected the contention in the face of religious claims a great deal stronger than those advanced here. In Badoni, Navajo Indians and organizations contended that operation of Glen Canyon Dam and opening up of a related area to tourists was resulting in "the destruction of holy sites; the drowning of entities recognized as gods by the plaintiffs; prevention of plaintiffs from performing religious ceremonies; deseccration of holy sites, especially abodes of gods of the plaintiffs, by tourists; and, by virtue of all this, injury to the efficacy of plaintiffs' religious prayers, and entreaties to their remaining gods" (at 644). There, as here, plaintiffs sought injunctive relief based on the free exercise clause of the First Amendment despite their lack of any property interests in the land involved. In denying an injunction and granting summary judgment for defendants, the court stated:

The court feels that the lack of a property interest is determinative of the First Amendment question and agrees with defendants that plaintiffs have no cognizable claim under the circumstances presented.

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To hold that a person may assert First Amendment rights to the disruption of the property rights of others, even if the other person is a government, could and likely would lead to unauthorized and very troublesome results. An example suggested by defendants Utah and the Central Utah Water Conservancy District is

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<sup>11</sup> As hereinafter noted, plaintiffs' affidavits and the Eastern Band's amicus briefs in Hill indicate that their concerns are actually broadly cultural and historical rather than religious. See infra, pp. 17-19.

exaggerated but instructive and illustrative of the problem presented by plaintiffs' claim: A person might sincerely believe that he or a predecessor encountered a profound religious experience in the environs of what is now the Lincoln Memorial in Washington, D.C., and that experience might cause him to believe that the Lincoln Memorial is therefore a sacred religious shrine to him. That person, however, could hardly expect to call upon the courts to enjoin all other visitors from entering the Lincoln Memorial in order to protect his constitutional right to religious freedom. The weakness in plaintiffs' claim is apparent [at 644-45].

Plaintiffs' position here is weaker still. Not only were the Navajos' religious claims stronger, but the land involved was within the boundaries of the Navajo Indian Reservation, although not a part of it (455 F. Supp. at 644). Here, Tellico Reservoir is some 50 miles from the reservation occupied by the Eastern Band in North Carolina, and many times that distance from any lands inhabited by members of the United Katoah Band in Oklahoma.

Third, even if plaintiffs' claims were cognizable under the First Amendment, they are certainly not of a type which, under established judicial tests, could outweigh the Government's interest in completing and operating Tellico Dam. As the Court noted in Badoni, citing Wisconsin v. Yoder, 406 U.S. 205 (1972), even clearly cognizable First Amendment claims--such as those related to governmental restrictions on individual conduct as distinguished from governmental use of public property--must be balanced against the conflicting governmental interests.<sup>12</sup> In assessing the weight to be given to free exercise claims, the Badoni court pointed out that in Yoder

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<sup>12</sup> The Supreme Court made clear in Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940), that the free exercise clause of the First Amendment "embraces two concepts,-- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."

. . . the Amish claim [to exemption from state compulsory education requirements beyond the 8th grade] qualified for protection under the Constitution because,

. . . the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living [455 F. Supp. at 645; emphasis the court's].

In Badoni, on the other hand:

The individually-named plaintiffs have attended a combined total of nine religious ceremonies within the boundaries of Rainbow Bridge Monument since 1965 (question 5(c), at p. 7) and the same plaintiffs had attended religious ceremonies within the boundaries of Rainbow Bridge Monument only infrequently prior to 1965 (question 5(d), at p. 8). None of the individually-named plaintiffs answering interrogatories could identify times at which other ceremonies were held or how many individuals attended (question 5(i)(1), at p. 9). The eight individually-named plaintiffs had visited the monument a combined total of eleven times since 1965, and such visits were infrequent. Taking the information supplied by the plaintiffs as true, there is nothing to indicate that at the present time the Rainbow Bridge National Monument and its environs has anything approaching deep, religious significance to any organized group, or has in recent decades been intimately related to the daily living of any group or individual.

\* \* \*

. . . Plaintiffs fail . . . to demonstrate in any manner a vital relationship of the practices in question with the Navajo way of life or a "history of consistency" which would support their allegation of religious use of Rainbow Bridge in recent times [id. at 646].

The plaintiffs here have shown even less. The 1977 and 1978 Eastern Band submissions to the Supreme Court in the Hill case (exhs. TVA 4, 5) made no mention of religious importance whatsoever. Plaintiffs' affidavits here describe no religious ceremonies at all, at least since "the late nineteenth or early twentieth century" (plaintiffs' exh. H, at 5). A few individuals indicate that they have visited the area sporadically, but as individuals (and necessarily as trespassers or at best

licensees during the 125 years or more of private ownership) and not in a manner intimately related to daily living. Ammoneta Sequoyah does state that he goes to Chota three or four times a year to get medicine (although how he could have done so before TVA's archaeological investigations revealed its location is not apparent), but adds that he has to do so because "some of the medicine and herbs I can not find in Cherokee, in North Carolina, because it grows there high in the mountains and I cannot climb there because of my age" (plaintiffs' exh. D at 1). This statement not only does not support, but expressly negates, any special religious significance in medicine from Chota.

Some of plaintiffs' affidavits are based simply on the proposition that the lands in the Tellico area really belong to the Cherokees despite their lack of title--e.g., the statement, "I feel that the Little Tennessee Valley is Cherokee lands, no matter who thinks they own them. This is Cherokee land and we must keep it" (plaintiff's exh. CC). Some contain obvious inaccuracies--as, e.g., the statement, "I visited the Tellico area several years ago, our guide showed us where the Cherokees crossed during the Death March or Trial [sic] of Tears" (plaintiffs' exh. X, at 1). In fact the Trail of Tears crossed the Hiwassee rather than the Little Tennessee River and did not approach within miles of the Tellico area.

Virtually all of plaintiffs' affidavits confuse cultural history with religion. This point is emphasized by the statement in the affidavit of Ross O. Swimmer, Principal Chief of the Cherokee Nation, filed in support of TVA's motion that:

A Cherokee who follows the religious traditions of the Cherokee people is not required by those traditions to visit any particular place or

area in the eastern United States in the exercise of his beliefs. The village sites in the lower Little Tennessee River are important to the cultural history of the Cherokee Nation, but are not a part of its religion [at 4-5].

The Cherokee Nation, which comprises the great majority of Cherokees in this country, has declined to participate as a plaintiff in this suit and it has commended TVA for its archaeological efforts in the Tellico area. This seems to us in itself highly important if not dispositive with respect to whether the claims asserted here could overbalance the Government's interest in the project.

Also of importance is the fact that although Congress' initial appropriations for the project date from 1966, and although the Eastern Band publicly opposed the project in 1965, even before its funding, as well as since, not until now has any claim based on an alleged First Amendment violation been asserted. To the contrary, prior objections have been phrased solely in terms of cultural history, or archaeological value, and the Eastern Band has expressly approved TVA's plans for preservation of the Chota Townhouse site against flooding when the reservoir was closed, and for reinterment there of Cherokee skeletal remains--plans which they now condemn as violating their beliefs.

Moreover, as already noted, plaintiff Eastern Band filed two amicus briefs in the Supreme Court in the Hill case (437 U.S. 153) in which they raised and discussed the question of the Cherokee sites, not as having a religious context, but "because this land which would be impounded by [TVA] is of unique and profound significance in the history and culture of the Cherokee people" (exh. TVA 5 (brief) at 2). See also exh. TVA 4 (brief) at 2.

The cultural and historical importance of the Cherokee sites was covered in TVA's Environmental Impact Statement and considered at length by the court in *Tellico II*, 371 F. Supp. 1004, 1008. These matters were considered in the prior *Tellico* litigation, which plaintiff Eastern Band says it supported. These plaintiffs certainly are not entitled to relitigate them simply by redesignating them at the last minute as religious.

Finally, it must be remembered that these lands, including the sites about which plaintiffs complain, are the property of the United States. The Supreme Court has made clear, with respect to whether a proposed land use under the TVA Act serves a public purpose, that "when Congress has spoken on this subject, 'Its decision is entitled to deference until it is shown to involve an impossibility'" (*United States ex rel. TVA v. Welch*, 327 U.S. 546, 552 (1946)). Congress here has spoken, not only through the TVA Act and its annual appropriations for the project, but through Public Law No. 96-69, which mandates the flooding of the reservoir to "a normal summer reservoir pool of 813 feet above sea level," expressly "for navigation, flood control, electric power generation and other purposes." Plaintiffs attempt to denigrate the value of the project for these purposes, as contrasted with their claimed religious values. But this they cannot do, as the Supreme Court explicitly held in *Kleppe v. New Mexico*, 426 U.S. 529 (1976):

[W]e note that the evidence before Congress on this question was conflicting and that Congress weighed the evidence and made a judgment. . . . What appellees ask is that we reweigh the evidence and substitute our judgment for that of Congress. This we must decline to do. *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940); *Light v. United States*, 220 U.S. 523, 537 (1911); *United States v. Gratiot*, 14 Pet. 526, 537-538 (1840). See also *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 594 (1939) [at 541 n. 10].

B. Plaintiffs' Fifth and Ninth Amendment Claims

We do not believe plaintiffs' claims based on the Fifth and Ninth Amendments call for extended argument.

As to the first, plaintiffs have neither a property interest in lands within the Tellico Reservoir area, nor a liberty interest in preventing the owner of such property from exercising the normal incidents of ownership. There is thus obviously no deprivation of either. And, as Mr. Lesesne's affidavit shows (at 8-9), TVA certainly is in no way discriminating against graves or artifacts in the Tellico Reservoir as compared with its treatment of graves and artifacts in other reservoirs which it has constructed since its inception in 1933.

As to the second, the Ninth Amendment, like the Fifth, gives citizens no rights either to use the property of others or to limit its ordinary use by its owners. Contentions to the contrary have often been advanced in environmental cases by plaintiffs who claimed a Ninth (or Fifth) Amendment right to a protected environment. Such claims have been rejected by every court which has considered them, including the Sixth Circuit, which affirmed this Court's rejection of such a claim in Tellico II, a rejection which the plaintiffs there had appealed. See also Environmental Defense Fund v. Tennessee Valley Authority, 4 E.R.C. 1892 (E.D. Tenn. 1972), aff'd sub nom. Duck River Preservation Ass'n v. Tennessee Valley Authority, 529 F.2d 524 (1976). Moreover, the land here is all property of the United States, and the Supreme Court has specifically held that the Ninth Amendment does not limit the Government's rights to deal with its property under the TVA Act. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 330-31 (1936).



## II

### Plaintiffs' Religious Claims Are Barred In Any Event by Laches and Estoppel.

Plaintiffs already knew in 1965 that Tellico would flood the Valley (Lesesne aff. at 1-2, 5-6). When Congress initially appropriated construction funds in 1966, they obviously could have sued at once to test their religious claims, and the cause of action they now assert therefore arose, if at all, at that time. See Lathan v. Volpe, 455 F.2d 1111, 1122 (9th Cir. 1971); Mansfield Area Citizens Group v. United States, 413 F. Supp. 810, 824-25 (M.D. Pa. 1976).

Construction of the project went forward until January 1972, when this Court preliminarily enjoined continued construction because of TVA's failure to file an environmental impact statement. 339 F. Supp. 806. No claims based on religion were advanced in that suit, although plaintiff Eastern Band was publicly opposing the project and cooperating with the plaintiffs in it.

On October 25, 1973, the preliminary injunction was dissolved. 371 F. Supp. 1004. Construction resumed and went forward until the Sixth Circuit's 1977 decision in the Hill case again enjoined it because of the possible extinction of the snail darter (549 F.2d 1064). When TVA petitioned the Supreme Court to review that decision, plaintiff Eastern Band filed a brief in opposition. That brief discussed the importance of the Little Tennessee River to their history and culture, but never mentioned any religious claims. They also told the Supreme Court that whether the dam was to be completed was a political question which should be decided by Congress.<sup>13</sup>

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<sup>13</sup> Their subsequent brief on the merits also did not mention religion, although again discussing the cultural,

Now, after Congress has made its decision, plaintiffs seek to advance their religious claims for the first time.

We think it clear that under all accepted principles of equity, parties cannot thus sit back while over \$111 million is spent on construction of a project over a period of 13 years and then--when construction is complete and the project ready to operate--seek to halt it on the basis of religious claims advanced for the first time.

The situation in this case--except that plaintiffs' delay here is in years rather than months after construction began--parallels that in Clark v. Volpe, 342 F. Supp. 1324 (E.D. La.), aff'd, 461 F.2d 1266 (5th Cir. 1972), in which the court stated:

Plaintiffs characterize themselves and the class represented by them as persons vitally concerned with the affairs of the Park and persons who visit the Park frequently. It is inconceivable that plaintiffs, charged with knowledge of approximately fifteen years of publicity concerning the highway, were not on notice as of May 25, 1971 that actual construction would soon proceed unless legal action was promptly initiated. Nevertheless, plaintiffs stood idly by during the remaining months as bulldozers and chain saws stripped and leveled the land and as vast sums of public money were expended on highway construction. Finally, after the area had been laid barren of trees or grass, and after several million dollars had been spent for highway development, plaintiffs, on February 24, 1972, belatedly filed suit to halt construction. The Court holds that, under the circumstances of this particular case, plaintiffs' delay in filing suit, during which delay the very acts of which they complain were being performed, was unreasonable, and defendants and intervenors would be substantially prejudiced if plaintiffs were allowed injunctive relief [at 1329].

Accord, Lathan v. Volpe, 455 F.2d 1111, 1122 (9th Cir. 1971) (constitutional claim barred); Barthelmes v. Morris, 342 F. Supp. 153, 159-61 (D. Md. 1972) (constitutional

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13 (cont.) historical, and archaeological importance of the Little Tennessee Valley to them. See exhs. TVA 4, 5.

claim barred); Mansfield Area Citizens Group v. United States, 413 F. Supp. 810, 824-25 (M.D. Pa. 1976) (reservoir project); Baskin v. Tennessee Valley Authority, 382 F. Supp. 641, 645-46 (M.D. Tenn. 1974), aff'd, 519 F.2d 1402 (6th Cir. 1975).

In applying laches, federal courts normally look to the applicable state statute of limitations. As the Supreme Court said in Benedict v. City of New York, 250 U.S. 321, 327 (1919), "While . . . federal courts sitting in equity are not bound by state statute of limitations . . . they are, under ordinary circumstances, guided by them in determining their action on stale claims." See also Davidson v. Grady, 105 F.2d 405, 408 (5th Cir. 1939). Cf. General Elec. Co. v. Sciaky Bros., Inc., 304 F.2d 724, 727 (6th Cir. 1962).

In this instance, the applicable statute is the provision in 28 Tenn. Code Ann. § 28-304 that

Actions for . . . injuries to the person . . . shall be commenced within one (1) year after cause of action accrued.

See Boles v. Fox, 403 F. Supp. 253, 254 (E.D. Tenn. 1975) (constitutional claim); Robinson v. Tennessee Valley Authority, Civil No. 3-77-163, at 8 (E.D. Tenn. Aug. 12, 1977) (constitutional claim); Erwin v. Neal, 494 F.2d 1351, 1352 (6th Cir. 1974) (constitutional claim); Carney v. Smith, 437 S.W.2d 246, 247-48 (Tenn. 1969) (desecration of family cemetery); Brown v. Dunstan, 409 S.W.2d 365, 367 (Tenn. 1966).

Applying this statute, plaintiffs' claims were barred by laches 12 years ago.

Here, apart from laches, there is the further fact that, as previously noted, the Eastern Band, as well as the Cherokee Nation, gave express approval to the Tellico archaeological project involving preservation of

the site of the Townhouse at Chota against the contemplated flooding, and the reinterment of Cherokee dead on a hillside overlooking the site. Such approval was given after extensive meetings and discussions, and modifications of the project to accommodate plaintiffs' interests.

As also noted, the Eastern Band, in its amicus brief opposing certiorari in the Hill case expressly urged that the decision whether to complete Tellico should be made by Congress, which in fact has done so by enacting Public Law No. 96-69. Now, plaintiffs are attacking the very project they approved and the congressional decision which they sought. Having strenuously urged in the Supreme Court that the decision as to the project should be left to the Congress, the Eastern Band and its members should not be permitted to again turn to the courts because they dislike Congress' decision. See 28 Am. Jur. 2d Estoppel and Waiver §§ 51, 55, and 58 (1966); Wilkie v. Brooks, 515 F.2d 741, 748 (6th Cir.), cert. denied, 423 U.S. 996 (1975); Minerals & Chems. Philipp Corp. v. Milwhite Co., 414 F.2d 428, 430 (5th Cir. 1969); Central Bank & Trust Co. v. General Finance Corp., 297 F.2d 126, 129 (5th Cir. 1961); Gullett v. Best Shell Homes, Inc., 312 F.2d 58, 61 n.2 (5th Cir. 1963); United States v. Aetna Cas. & Sur. Co., 480 F.2d 1095, 1099 (8th Cir. 1973); American Security & Trust Co. v. Fletcher, 490 F.2d 481, 486 n.3 (4th Cir.), cert. denied, 419 U.S. 900 (1974).

### III

Plaintiffs' Contentions That Public Law  
No. 96-69 Violates Their Rights Under  
Other Statutes and the Constitution  
Is Baseless.

As already noted, Public Law No. 96-69 provides that:

[N]otwithstanding the provisions of 16 U.S.C., chapter 35 or any other law, the Corporation is authorized and directed to complete construction, operate and maintain the Tellico Dam and Reservoir project for navigation, flood control, electric power generation and other purposes, including the maintenance of a normal summer reservoir pool of 813 feet above sea level.

Plaintiffs contend (complaint ¶¶ 21, 23) that this violates their rights under the Fifth Amendment, the American Indian Religious Freedom Act, the National Historic Preservation Act, and a Tennessee statute relating to closure of cemeteries. (They say also that the disinterment of burials violates these same provisions, a contention we do not discuss since TVA prohibited further disinterments over a year ago when plaintiff Eastern Band objected, although its members had been participants in the digging.)

So far as the Fifth Amendment is concerned, Public Law No. 96-69 simply directs TVA, a federal agency, to utilize federal property in the manner Congress deems desirable. Under the property clause of the Constitution, art. IV, sec. 3, cl. 2, Congress certainly has authority to so direct. As the Supreme Court stated in Kleppe v. New Mexico, 426 U.S. 529 (1976):

[T]he Clause, in broad terms, gives Congress the power to determine what are "needful" rules "respecting" the public lands. United States v. San Francisco, 310 U.S., at 29-30; Light v. United States, 220 U.S., at 537; United States v. Gratiot, 14 Pet., at 537-538. And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that "[t]he power over the public land thus entrusted to Congress is without limitations." United States v. San Francisco, *supra*, at 29. See Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 294-295 (1958); Alabama v. Texas, 347 U.S. 272, 273 (1954); FPC v. Idaho Power Co., 344 U.S. 17, 21 (1952); United States v. California, 332 U.S. 19, 27 (1947); Gibson v. Chouteau, 13 Wall, 92, 99 (1872); United States v. Gratiot, *supra*, at 537.

\* \* \*

In short, Congress exercises the powers both of a proprietor and a legislature over the public domain [at 539-40].

Federal dams have also been constructed at other locations on publicly owned land throughout the country. The fact that Congress also chose to direct construction of this dam at a particular publicly owned location certainly involves no "discrimination" as plaintiffs claim.<sup>14</sup>

With regard to the statutes they cite, Congress similarly has clear authority to amend or partially repeal them--in this case expressly, not impliedly as plaintiffs suggest--by an appropriation act. As the Supreme Court held in United States v. Dickerson, 310 U.S. 554 (1940):

There can be no doubt that Congress could suspend or repeal the authorization contained in § 9; and it could accomplish its purpose by an amendment to an appropriation bill, or otherwise. United States v. Mitchell, 109 U.S. 146, 150; Mathews v. United States, 123 U.S. 182; Dunwoody v. United States, 143 U.S. 578; Belknap v. United States, 150 U.S. 588, 593; United States v. Vulte, 233 U.S. 509, 515 [at 555-56].

Plaintiffs further invite the Court to examine the manner in which this provision of Public Law No. 96-69 was adopted and whether its enactment was "arbitrary and capricious." These, of course, are matters into which a court will not go. See, e.g., Field v. Clark, 143 U.S. 649, 672-73 (1892).

Plaintiffs then cite D.C. Federation of Civic Ass'ns v. Volpe, 434 F.2d 436 (D.C. Cir. 1970), as indicating that perhaps the words "any other law" in the statute do not mean what they say. In the first place, that 2-1 decision of the District of Columbia Circuit has

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<sup>14</sup> Actually, for the Government to abandon for the special benefit of plaintiffs a project determined by Congress to be in the interests of the public at large would represent discrimination in favor of plaintiffs and against the public. Further, such action involving public property would, if undertaken on religious grounds, raise serious questions under the establishment clause of the First Amendment. See Meek v. Pittenger, 421 U.S. 349, 363-72 (1975); Gillette v. United States, 401 U.S. 437, 449-50 (1971); cf. Anderson v. Salt Lake City Corp., 475 F.2d 29, 33-34 (10th Cir. 1973).

been discredited even as to what it holds. When certiorari was sought from a subsequent D.C. Circuit decision in the same case, 459 F.2d 1231 (1971), the Supreme Court denied it and Chief Justice Burger--the Circuit Justice for that circuit--appended to the denial the following statement:

I concur in the denial of certiorari in this case, but solely out of considerations of timing. Questions of great importance to the Washington, D.C., area are presented by the petition, not the least of which is whether the Court of Appeals has, for a second time, unjustifiably frustrated the efforts of the Executive Branch to comply with the will of Congress as rather clearly expressed in § 23 of the Federal-Aid Highway Act of 1968 . . . . If we were to grant the writ, however, it would be almost a year before we could render a decision in the case. It seems preferable, therefore, that we stay our hand. In these circumstances Congress may, of course, take any further legislative action it deems necessary to make unmistakably clear its intentions with respect to the [Three Sisters Bridge] project, even to the point of limiting or prohibiting judicial review of its directives [405 U.S. 1030-31 (1972)].

Further, the statutory language there was deemed by the court to be ambiguous (434 F.2d at 438); the legislative history was thought to support the court's interpretation (id. at 444); and such interpretation was also supported by the contemporaneous administrative construction (id. at 445).

Here none of these elements are present. The language is clear. The administrative construction accords with it. And the legislative history shows--without dispute or contradiction--that Congress meant just what it said. For example, Senator Chaffee stated during the Senate debate on the Tellico amendment:

Mr. President, I merely note that this is extraordinary language. It provides that notwithstanding the provisions of 16 U.S.C., or any other law, TVA is authorized to proceed with this.

It means they are exempt from all other laws--workmen's compensation, clean water, historic preservation, Davis-Bacon--any other law that exists in the books, they are exempt from under

the extraordinary language we are considering here [125 Cong. Rec. S12,279 (daily ed. Sept. 10, 1979)].

Senator Culver similarly stated:

What we are talking about here, make no mistake about it, is not only the waiver of the Endangered Species Act, . . . but also waiving all laws--all laws and all Federal statutes entered into that impact on this project [id. at 12,275].

See also 125 Cong. Rec. S9631 (July 17, 1979), remarks of Senator Heinz ("Besides exempting the project from the endangered species law, it would also exempt the project from any other law that might in some way affect the project"); id. at S9630, remarks of Senator Chaffee ("It says that notwithstanding the Endangered Species Act or any other act--any other act, whether it is the Clean Water Act, the Historic Preservation Act, whatever it might be, any other law that is on the books--this dam can go ahead"); id., remarks of Senator Culver ("Now we are ordering TVA to go ahead and build the dam, whether TVA wants it or not, waiving everything").

Finally, the rights claimed by plaintiffs under the statutes they cite do not even exist. Thus, the American Indian Religious Freedom Act, on which they principally rely, states only that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise their traditional religions." Section 2 of the Act contemplates that the President, after obtaining evaluations from federal agencies of their policies on these matters, shall notify Congress of any implementing legislation he deems necessary.

Meanwhile, the agencies are not obligated to make any changes in their policies or practices which would interfere with their statutorily authorized programs, and Congress did not intend that they should. The Act's legislative history makes this perfectly clear. As



originally proposed, the legislation would have required federal agencies both to evaluate their policies and implement changes. See 124 Cong. Rec. H6879 (daily ed. July 18, 1978). After the implementation requirement was severely criticized by the Department of Justice (S. Rep. No. 95-709, 95th Cong., 2d Sess. 10 (1978)), it was stricken. Id. at 1, 6; 124 Cong. Rec. H6879-80 (daily ed. July 18, 1978). As Congressman Udall, the sponsor of the legislation in the House, explained:

I have sent the bill to the desk with a modest amendment to strike a phrase requiring Government agencies to implement changes in the law to accommodate religious practices of Indians where infringements have been identified. That is the responsibility of Congress.

\* \* \*

Where the underlying law is determined to be the reason for such restrictions [on Indians] and where these restrictions are determined to be unwarranted and unnecessary, the bill contemplates that the President, in his report to the Congress, would request appropriate legislative changes.

\* \* \*

. . . All this simple little resolution says to the Forest Service, to the Park Service, to the managers of public lands is that if there is a place where Indians traditionally congregate to hold one of their rites and ceremonies, let them come on unless there is some overriding reason why they should not.

\* \* \*

. . . It has no teeth in it. It is the sense of Congress [id. at H6871-73].

The National Historic Preservation Act similarly does not prohibit projects affecting archaeologically or historically important sites, but rather requires programs to ameliorate their effects. We have already noted that more than \$3 million has been spent for that purpose in connection with the Tellico project. As for the Tennessee statute, it is too well established to call for extended argument that the Supremacy Clause of the Constitution renders it inapplicable. As stated by the Sixth Circuit

in Commonwealth of Ky. ex rel. Hancock v. Ruckelshaus,  
497 F.2d 1172 (6th Cir. 1974), aff'd, 426 U.S. 167 (1976):

The TVA defendants do not claim sovereign immunity from suit, but do maintain that the Supremacy Clause of the United States Constitution exempts federal agencies and officials in the performance of their duties from state and local regulations. From the time of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), this has been a settled principle of our federalism. See Mayo v. United States, 319 U.S. 441, 445-448, 63 S.Ct. 1137, 87 L.Ed. 1504 (1943). The doctrine has been held applicable to TVA. Posey v. Tennessee Valley Authority, 93 F.2d 726, 727 (5th Cir. 1937) [at 1176].

Accord, Tennessee Valley Authority v. Kinzer, 142 F.2d 833, 837 (6th Cir. 1944); Rainbow Realty Co. v. Tennessee Valley Authority, 124 F. Supp. 436, 441 (M.D. Tenn. 1954) (three-judge court).

#### CONCLUSION

For the foregoing reasons, plaintiffs' motion should be denied, defendant's motion granted, and the case dismissed.

Respectfully submitted,

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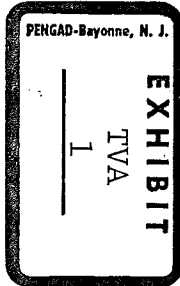
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Michael R. McElroy

Attorneys for Tennessee  
Valley Authority

**ANNUAL REPORT**  
**OF THE**  
**TENNESSEE VALLEY AUTHORITY**

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**FOR THE FISCAL YEAR ENDED JUNE 30 . 1967**

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last 7 years. The total investment in both private and public water-front plants and facilities since 1933 is estimated a \$4.3 billion.

The investments announced by private industry in 1966 will create approximately 3,000 new jobs, and will help in bringing to market additional supplies of chemicals, tire cord, air conditioners, steel pipe, polyester fiber, metal products, grain mill products, pulpwood and newsprint to supply customer demands. The \$1.4 billion investment since 1933 has created more than 33,000 jobs with an annual payroll of \$185 million. It is estimated that in addition another 30,000 jobs were created in related industries.

#### ***Report to the President***

Under section 22 of the TVA Act, TVA prepared and sent to the President a report entitled "Navigation and Economic Growth—Tennessee River Experience." The report examines the broad relationship between navigation and economic growth and concludes, in part: "The Nation has in the Tennessee waterway a living demonstration that river navigation is a mighty lever in achieving its goals for the future."

#### ***Improving and Extending the Waterway***

Construction was started in March 1967, on the Tellico project at the mouth of the Little Tennessee River, which will extend navigation 33 miles up that stream and provide flood control and power benefits as well. Meanwhile, construction continued on Nickajack Dam on the Tennessee River, to replace Hales Bar Dam, and closure was scheduled for December 1967.

Dredging was completed to extend the channel for 9-foot navigation upstream on the Hiwassee River to favorable industrial sites upstream from Charleston-Calhoun, Tenn. The channel was thus extended to 20.4 miles above the mouth of the Hiwassee River, a reach made navigable over most of its length by Chickamauga Dam and Reservoir. A total of 5.8 miles of dredging was required to make the extension, and 3.3 miles were completed this year.

Dredging was also carried on to remove hazardous rocks from the edge of the navigation channel in a restricted section of Hales Bar Reservoir (soon to be incorporated in Nickajack Reservoir).

#### ***Tellico Project***

Barges of equipment and materials arrived at the Tellico project site on March 7, 1967, and preliminary construction—site clearing, cofferdam construction, access roads and bridges, and erection of construction plant facilities—commenced immediately.

The Tellico Dam, which will be operated jointly with Fort Loudoun Dam, just upstream on the Tennessee River from the mouth of the Little Tennessee, will be an earth fill structure with a concrete gravity spillway. It will be nearly a mile long, with a maximum height



*This view shows preliminary construction activities at the site of the Tellico project on the Little Tennessee River, which was started late in the fiscal year. The Tellico Dam, for which the site is being cleared, will extend navigation 33 miles upstream on the Little Tennessee River to areas favorable for industrial development. An 850-foot-long canal will connect Tellico reservoir with the reservoir of Fort Loudoun Dam, shown in the upper left background, and the two installations will be operated jointly to provide navigation, flood control, and power.*

of about 105 feet. The dam will have no powerhouse or lock, making use of such facilities at Fort Loudoun Dam.

The Tellico and Fort Loudoun Reservoirs will be connected by a canal 500 feet wide and 850 feet long. River traffic to and from the Tellico area will use the existing lock at Fort Loudoun Dam and the connecting canal. Flow of the Little Tennessee River will be diverted through the canal into Fort Loudoun Reservoir and will be used through the turbines at the Fort Loudoun powerhouse, producing about 200 million kilowatt-hours annually.

The Tellico and Fort Loudoun Reservoirs will be operated jointly for flood control through use of the canal. The 126,000 acre-feet of flood storage in Tellico Reservoir will more than double the total storage at this point in the multiple-use system, with particular benefit to Chattanooga, Tenn., the most flood-vulnerable point on the Tennessee River.

The Tellico Reservoir will bring commercial water transportation to several thousand acres of favorable industrial sites which will also have ready access to rail and highway transportation. Development of these industrial sites will provide jobs and income for younger people who now tend to migrate out of the area.

#### **Nickajack Dam**

The first stage cofferdam at this project was breached as scheduled, about mid-January, after major construction had been completed on the locks, powerhouse, spillway, and other structures, and cofferdam work was started to close off the diversion channel for construction of the rest of the dam. The project at the end of the fiscal year was substantially on schedule, with closure and operation of the first three generating units scheduled for late 1967.

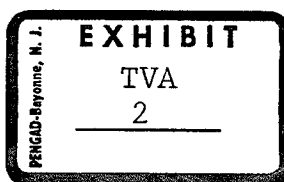
The 800-foot long main lock, as yet uncompleted, was opened on a temporary basis in March to carry traffic which had been using the diversion channel. Work continued on the 600-foot long auxiliary lock to have it ready for opening in November.

Nickajack Dam, which will be about 3,700 feet long and 83 feet high, with locks having a 42-foot lift, is being built to replace Hales Bar Dam, completed in 1913. Hales Bar, 6.4 miles upstream, was built on a poor limestone foundation, and both the former owner—a power company—and TVA were unable to permanently stop leaks which developed under it.

When both locks are completed Nickajack will have two large lock chambers, both 110 feet wide, one 800 feet and the other 600 feet long. The larger main lock will have the capacity to handle 12 of the "jumbo" barges now generally used on the inland waterways. With the impoundment of Nickajack Reservoir late in 1967, large locks will be available to river traffic on the Tennessee from the Ohio River to Chattanooga, Tenn., a distance of 454 miles. Large locks, with 600- by 110-

Tennessee  
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Appendixes



TENNESSEE VALLEY AUTHORITY  
 CONSTRUCTION AND INVESTIGATIONS IN PROGRESS,  
 NUCLEAR FUEL, AND MINE AND MILL DEVELOPMENT COSTS  
 SEPTEMBER 30, 1978

SCHEDULE B

	<u>Power program</u>	<u>All programs</u>
CONSTRUCTION AND INVESTIGATIONS IN PROGRESS		
Construction in progress		
Generating facilities		
Sequoyah Nuclear Plant	\$1,066,553,290	\$1,066,553,290
Watts Bar Nuclear Plant	947,386,414	947,386,414
Bellefonte Nuclear Plant	889,488,805	889,488,805
Hartsville Nuclear Plant	611,252,059	611,252,059
Phipps Bend Nuclear Plant	152,116,443	152,116,443
Yellow Creek Nuclear Plant	150,581,989	150,581,989
Raccoon Mountain pumped storage project	294,681,583	294,681,583
Total generating facilities	<u>4,112,060,583</u>	<u>4,112,060,583</u>
Transmission lines, substations, and other additions to power facilities	<u>464,449,083</u>	<u>464,449,083</u>
Pickwick new lock		<u>7,372,851</u>
Other navigation facilities		<u>7,784,120</u>
Flood control facilities		<u>1,124,598</u>
Multipurpose facilities		
Tellico Dam and Reservoir	-	111,144,368
Columbia Dam and Reservoir	-	37,678,791
Bear Creek water control system	-	22,719,796
Other	476,096	1,145,161
Total multipurpose facilities	<u>476,096</u>	<u>172,688,116</u>
Chemical plant		<u>9,709,133</u>
Recreation and environmental education facilities		
Land Between The Lakes		3,860,583
Other recreation facilities		1,143,402
Total recreation and environmental education facilities		<u>5,003,985</u>
General plant		
General construction equipment and materials	-	1,486,878
Other additions to general plant	1,476,454	9,111,917
Total general plant	<u>1,476,454</u>	<u>10,598,795</u>
Total construction in progress	<u>4,578,462,216</u>	<u>4,790,791,264</u>
Investigations for future power facilities	<u>8,088,439</u>	<u>8,088,439</u>
Total construction and investigations in progress	<u>\$4,586,550,655</u>	<u>\$4,798,879,703</u>
NUCLEAR FUEL		
Nuclear fuel in process		
Browns Ferry	\$ 33,210,346	\$ 33,210,346
Sequoyah	48,681,373	48,681,373
Watts Bar	47,465,762	47,465,762
Bellefonte	43,003,096	43,003,096
Enrichment	46,885,417	46,885,417
Total nuclear fuel in process	<u>219,245,994</u>	<u>219,245,994</u>
Nuclear fuel in stock	<u>108,689,190</u>	<u>108,689,190</u>
Nuclear fuel in reactor		
Browns Ferry	<u>150,498,226</u>	<u>150,498,226</u>
Spent nuclear fuel in cooling		
Browns Ferry	<u>7,429,714</u>	<u>7,429,714</u>
Total nuclear fuel	<u>\$ 485,863,124</u>	<u>\$ 485,863,124</u>
ACCUMULATED AMORTIZATION		
Browns Ferry	<u>\$ 92,817,800</u>	<u>\$ 92,817,800</u>
MINE AND MILL DEVELOPMENT COSTS		
Coal mine development and leases	\$ 34,278,030	\$ 34,278,030
Uranium mine and mill development and preoperations	<u>42,209,237</u>	<u>42,209,237</u>
Total mine and mill development costs	<u>\$ 76,487,267</u>	<u>\$ 76,487,267</u>

TREATY WITH THE CHEROKEE, 1819.

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Major William Glover; his x mark, [L. s.]	Immaaklusharhopoyea, his x	
Hopayahaummar, his x mark, [L. s.]	mark, [L. s.]	
Imnouklusharhopoyea, his x	James Colbert, [L. s.]	
mark, [L. s.]	Cowemarthlar, his x mark, [L. s.]	
Tuskaehopoyea, his x mark, [L. s.]	Illackhanwarhopoyes, his x mark, [L. s.]	
Hopoyahaummar, jun. his x	Col. George Colbert, his x mark, [L. s.]	
mark, [L. s.]		

In the presence of—

Robert Butler, adjutant-general and secretary,	Thos. H. Shelby, of Kentucky,
Th. J. Sherburne, agent for the Chickasaw nation of Indians,	R. K. Call, Captain U. S. Army,
Malculm McGee, interpreter, his x mark,	Benjamin Smith, of Kentucky,
Martin Colbert,	Richard I. Easter, A. D. Q. M. General.
J. C. Bronaugh, assistant inspector-general S. D.,	Ms. B. Winchester,
	W. B. Lewis.

TREATY WITH THE CHEROKEE, 1819.

*Articles of a convention made between John C. Calhoun, Secretary of War, being specially authorized therefor by the President of the United States, and the undersigned Chiefs and Head Men of the Cherokee nation of Indians, duly authorized and empowered by said nation, at the City of Washington, on the twenty-seventh day of February, in the year of our Lord one thousand eight hundred and nineteen.*

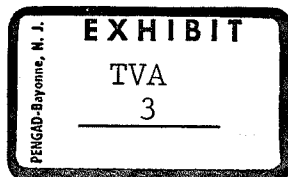
Feb. 27, 1819.  
7 Stat., 195.  
Proclamation, Mar. 10, 1819.

WHEREAS a greater part of the Cherokee nation have expressed an earnest desire to remain on this side of the Mississippi, and being desirous, in order to commence those measures which they deem necessary to the civilization and preservation of their nation, that the treaty between the United States and them, signed the eighth of July, eighteen hundred and seventeen, might, without further delay, or the trouble or expense of taking the census, as stipulated in the said treaty, be finally adjusted, have offered to cede to the United States a tract of country at least as extensive as that which they probably are entitled to under its provisions, the contracting parties have agreed to and concluded the following articles.

Preamble.

ART. 1. The Cherokee nation cedes to the United States all of their lands lying north and east of the following line, viz: Beginning on the Tennessee river, at the point where the Cherokee boundary with Madison county, in the Alabama territory, joins the same; thence, along the main channel of said river, to the mouth of the Highwassee; thence, along its main channel, to the first hill which closes in on said river, about two miles above Highwassee Old Town; thence, along the ridge which divides the waters of the Highwassee and Little Tellico, to the Tennessee river, at Tallassee; thence, along the main channel, to the junction of the Cowee and Nanteyalee; thence, along the ridge in the fork of said river, to the top of the Blue Ridge; thence, along the Blue Ridge to the Unicoy Turnpike Road; thence, by a straight line, to the nearest main source of the Chestatee; thence, along its main channel, to the Chatahouchee; and thence to the Creek boundary; it being understood that all the islands in the Chestatee, and the parts of the Tennessee and Highwassee, (with the exception of Jolly's Island, in the Tennessee, near the mouth of the Highwassee,) which constitute a portion of the present boundary, belong to the Cherokee nation; and it is also understood, that the reservations contained in the second article of the treaty of Tellico, signed the twenty-fifth October, eighteen hundred and five, and a tract equal to twelve miles square, to be located by commencing at the point formed by the intersection of the

Cession of lands by the Cherokees.





boundary line of Madison county, already mentioned, and the north bank of the Tennessee river; thence, along the said line, and up the said river twelve miles, are ceded to the United States, in trust for the Cherokee nation as a school fund; to be sold by the United States, and the proceeds vested as is hereafter provided in the fourth article of this treaty; and, also, that the rights vested in the Unicoy Turnpike Company, by the Cherokee nation, according to certified copies of the instruments securing the rights, and herewith annexed, are not to be affected by this treaty; and it is further understood and agreed by the said parties, that the lands hereby ceded by the Cherokee nation, are in full satisfaction of all claims which the United States have on them, on account of the cession to a part of their nation who have or may hereafter emigrate to the Arkansaw; and this treaty is a final adjustment of that of the eighth of July, eighteen hundred and seventeen.

The lands hereby ceded are in full satisfaction, etc.

United States to pay for improvements on ceded lands.

ART. 2. The United States agree to pay, according to the stipulations contained in the treaty of the eighth of July, eighteen hundred and seventeen, for all improvements on land lying within the country ceded by the Cherokees, which add real value to the land, and do agree to allow a reservation of six hundred and forty acres to each head of any Indian family residing within the ceded territory, those enrolled for the Arkansaw excepted, who choose to become citizens of the United States, in the manner stipulated in said treaty.

Grant of land to each person on the list annexed to this treaty, except Major Walker.

ART. 3. It is also understood and agreed by the contracting parties, that a reservation, in fee simple, of six hundred and forty acres square, with the exception of Major Walker's, which is to be located as is hereafter provided, to include their improvements, and which are to be as near the centre thereof as possible, shall be made to each of the persons whose names are inscribed on the certified list annexed to this treaty, all of whom are believed to be persons of industry, and capable of managing their property with discretion, and have, with few exceptions, made considerable improvements on the tracts reserved. The reservations are made on the condition, that those for whom they are intended shall notify, in writing, to the agent for the Cherokee nation, within six months after the ratification of this treaty, that it is their intention to continue to reside permanently on the land reserved.

Notice to be given of intention to continue residence.

Reservations.

The reservation for Lewis Ross, so to be laid off as to include his house, and out-buildings, and ferry adjoining the Cherokee agency, reserving to the United States all the public property there, and the continuance of the said agency where it now is, during the pleasure of the government; and Major Walker's, so as to include his dwelling house and ferry: for Major Walker an additional reservation is made of six hundred and forty acres square, to include his grist and saw mill; the land is poor, and principally valuable for its timber. In addition to the above reservations, the following are made, in fee simple; the persons for whom they are intended not residing on the same: To Cabbin Smith, six hundred and forty acres, to be laid off in equal parts, on both sides of his ferry on Tellico, commonly called Blair's ferry; to John Ross, six hundred and forty acres, to be laid off so as to include the Big Island in Tennessee river, being the first below Tellico—which tracts of land were given many years since, by the Cherokee nation, to them; to Mrs. Eliza Ross, step daughter of Major Walker, six hundred and forty acres square, to be located on the river below and adjoining Major Walker's; to Margaret Morgan, six hundred and forty acres square, to be located on the west of, and adjoining, James Riley's reservation; to George Harlin, six hundred and forty acres square, to be located west of, and adjoining, the reservation of Margaret Morgan; to James Lowry, six hundred and forty acres square, to be located at Crow Mocker's old place, at the foot of Cumberland mountain; to Susannah Lowry, six hundred and forty acres,

Additional reservations.

to be located at the Toll Bridge on Battle Creek; to Nicholas Byers, six hundred and forty acres, including the Toqua Island, to be located on the north bank of the Tennessee, opposite to said Island.

ART. 4. The United States stipulate that the reservations, and the tract reserved for a school fund, in the first article of this treaty, shall be surveyed and sold in the same manner, and on the same terms, with the public lands of the United States, and the proceeds vested, under the direction of the President of the United States, in the stock of the United States, or such other stock as he may deem most advantageous to the Cherokee nation. The interest or dividend on said stock, shall be applied, under his direction, in the manner which he shall judge best calculated to diffuse the benefits of education among the Cherokee nation on this side of the Mississippi.

The reservations, etc., to be sold, and proceeds vested in stock.

Interest, how to be applied.

ART. 5. It is agreed that such boundary lines as may be necessary to designate the lands ceded by the first article of this treaty, may be run by a commissioner or commissioners to be appointed by the President of the United States, who shall be accompanied by such commissioners as the Cherokees may appoint, due notice thereof to be given to the nation; and that the leases which have been made under the treaty of the eighth of July, eighteen hundred and seventeen, of land lying within the portion of country reserved to the Cherokees, to be void; and that all white people who have intruded, or may hereafter intrude, on the lands reserved for the Cherokees, shall be removed by the United States, and proceeded against according to the provisions of the act passed thirtieth March, eighteen hundred and two, entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."

Boundary lines to be run by commissioners.

White intruders to be removed.

1802, ch. 13.

ART. 6. The contracting parties agree that the annuity to the Cherokee nation shall be paid, two-thirds to the Cherokees east of the Mississippi, and one-third to the Cherokees west of that river, as it is estimated that those who have emigrated, and who have enrolled for emigration, constitute one-third of the whole nation; but if the Cherokees west of the Mississippi object to this distribution, of which due notice shall be given them, before the expiration of one year after the ratification of this treaty, then the census, solely for distributing the annuity, shall be taken at such times, and in such manner, as the President of the United States may designate.

Division of annuity to Cherokee Nation.

ART. 7. The United States, in order to afford the Cherokees who reside on the lands ceded by this treaty, time to cultivate their crop next summer, and for those who do not choose to take reservations, to remove, bind themselves to prevent the intrusion of their citizens on the ceded land before the first of January next.

Intrusion of citizens to be prevented.

ART. 8. This treaty to be binding on the contracting parties so soon as it is ratified by the President of the United States, by and with the advice and consent of the Senate.

Treaty binding when ratified.

Done at the place, and on the day and year, above written.

J. C. Calhoun.

Ch. Hicks,	[L. s.]	Gideon Morgan, jr.	[L. s.]
Jno. Ross,	[L. s.]	Cabbin Smith, his x mark,	[L. s.]
Lewis Ross,	[L. s.]	Sleeping Rabbit, his x mark,	[L. s.]
John Martin,	[L. s.]	Small Wood, his x mark,	[L. s.]
James Brown,	[L. s.]	John Walker, his x mark,	[L. s.]
Geo. Lowry,	[L. s.]	Currohee Dick, his x mark,	[L. s.]

Witnesses:

Return J. Meigs,  
C. Vandeventer,  
Elias Earle,  
John Lowry.

## TREATY WITH THE CHEROKEE, 1819.

*List of persons referred to in the 3d article of the annexed Treaty.*

Richard Walker, within the chartered limits of North Carolina.		John Brown,	do.	Tennessee.	
Yonah, alias Big Bear,	do.	Elizabeth Lowry,	do.	do.	do.
John Martin,	do.	George Lowry,	do.	do.	do.
Peter Linch,	do.	John Bengé,	do.	do.	do.
Daniel Davis,	do.	Mrs. Eliz. Peck,	do.	do.	do.
George Parris,	do.	John Walker, Sr.	do.	do.	do.
Walter S. Adair,	do.	John Walker, Jr. (unmarried,)	do.	do.	do.
Thos. Wilson,	do.	Richard Taylor,	do.	do.	do.
Richard Riley,	do.	John McIntosh,	do.	do.	do.
James Riley,	do.	James Starr,	do.	do.	do.
Edward Gunter,	do.	Samuel Parks,	do.	do.	do.
Robert McLemore,	do.	The Old Bark, (of Chota)	do.	do.	do.
John Baldrige,	do.	No. of reserves within the limits of			
Lewis Ross,	do.	North Carolina,			2
Fox Taylor,	do.	Georgia,			5
Rd Timberlake,	do.	Alabama Terr.			4
David Fields, (to include his mill,)	do.	Tennessee,			20
James Brown, (to include his field by the long pond,)	do.	Total No. of reserves,			31
William Brown,	do.				

I hereby certify, that I am, either personally, or by information on which I can rely, acquainted with the persons before named, all of whom I believe to be persons of industry, and capable of managing their property with discretion; and who have, with few exceptions, long resided on the tracts reserved, and made considerable improvements thereon.

RETURN J. MEIGS,  
*Agent in the Cherokee nation.*

Mar. 8, 1813.

(COPY.) *Cherokee Agency, Highwassee Garrison.*

We, the undersigned Chiefs and Councillors of the Cherokees in full council assembled, do hereby give, grant, and make over unto Nicholas Byers and David Russell, who are agents in behalf of the states of Tennessee and Georgia, full power and authority to establish a Turnpike Company, to be composed of them, the said Nicholas and David, Arthur Henly, John Lowry, Atto. and one other person, by them to be hereafter named, in behalf of the state of Georgia; and the above named persons are authorized to nominate five proper and fit persons, natives of the Cherokees, who, together with the white men aforesaid, are to constitute the company; which said company, when thus established, are hereby fully authorized by us, to lay out and open a road from the most suitable point on the Tennessee River, to be directed the nearest and best way to the highest point of navigation on the Tugolo River; which said road, when opened and established, shall continue and remain a free and public highway, unmolested by us, to the interest and benefit of the said company, and their successors, for the full term of twenty years, yet to come, after the same may be open and complete; after which time, said road, with all its advantages, shall be surrendered up, and reverted in, the said Cherokee nation. And the said company shall have leave, and are hereby authorized, to erect their public stands, or houses of entertainment, on said road, that is to say: one at each end, and one in the middle, or as nearly so as a good situation will permit: with leave also to cultivate one hundred acres of land at each end of the road, and fifty acres at the middle stand, with a privilege of a sufficiency of timber for the use and consumption of said stands. And the said Turnpike Company do hereby agree to pay the sum of one hundred and sixty dollars yearly to the Cherokee nation, for the aforesaid privilege, to commence after said road is opened and in complete operation. The said company are to have the benefit of one ferry on Tennessee river, and such other ferry or ferries as are necessary on said road; and, likewise, said company shall have the exclusive privilege of trading on said road during the aforesaid term of time.

In testimony of our full consent to all and singular the above named privileges and advantages, we have hereunto set our hands and affixed our seals, this eighth day of March, eighteen hundred and thirteen.

Outahelce, his x mark,	[L. s.]	Chulio,	[L. s.]
Naire, above, his x mark,	[L. s.]	Dick Justice,	[L. s.]
Theelagathahee, his x mark,	[L. s.]	Wausaway,	[L. s.]
The Raven, his x mark,	[L. s.]	Big Cabbin,	[L. s.]
Two Killers, his x mark,	[L. s.]	The Bark,	[L. s.]
Teeistiskee, his x mark,	[L. s.]	Nettie Carrier,	[L. s.]
John Boggs, his — mark,	[L. s.]	Seekeekee,	[L. s.]
Quotiquaskee, his — mark,	[L. s.]	John Walker,	[L. s.]
Currihee, Dick, his — mark,	[L. s.]	Dick Brown,	[L. s.]
Ooseekee, his — mark,	[L. s.]	Charles Hick,	[L. s.]
Toochalee,	[L. s.]		

Witnesses present:

Wm. L. Lovely, assistant agent,  
 William Smith,  
 George Colville.  
 James Carey,  
 Richard Taylor,  
 Interpreters.

The foregoing agreement and grant was amicably negotiated and concluded in my presence.

Return J. Meigs.

I certify I believe the within to be a correct copy of the original.

Charles Hicks.

WASHINGTON CITY, *March 1, 1819.*

CHEROKEE AGENCY, *January 6, 1817.*

Jan. 6, 1817.

We, the undersigned Chiefs of the Cherokee nation, do hereby grant unto Nicholas Byers, Arthur H. Henly, and David Russell, proprietors of the Unicoy road to Georgia, the liberty of cultivating all the ground contained in the bend on the north side of Tennessee river, opposite and below Chota Old Town, together with the liberty to erect a grist mill on Four Mile creek, for the use and benefit of said road, and the Cherokees in the neighbourhood thereof; for them, the said Byers, Henly, and Russell, to have and to hold the above privileges during the term of lease of the Unicoy road, also obtained from the Cherokees, and sanctioned by the President of the United States.

In witness whereof, we hereunto affix our hands and seals, in presence of—

John McIntosh,	[L. s.]	The Gloss,	[L. s.]
Charles Hicks,	[L. s.]	John Walker,	[L. s.]
Path Killer,	[L. s.]	Path Killer, jr.	[L. s.]
Tuchalar,	[L. s.]	Going Snake.	[L. s.]

Witness:

Return J. Meigs, United States agent.

The above instrument was executed in open Cherokee council, in my office, in January, 1817:

Return J. Meigs.

CHEROKEE AGENCY, *8th July, 1817.*

The use of the Unicoy road, so called, was for twenty years.

Return J. Meigs.

I certify I believe the within to be a correct copy of the original.

Ch. Hicks.

WASHINGTON CITY, *March 1, 1819.*

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 76-1701

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TENNESSEE VALLEY AUTHORITY,  
*Petitioner,*

*v.*

HIRAM G. HILL, JR., ET. AL.,  
*Respondents,*

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

MOTION FOR LEAVE TO FILE AND  
BRIEF OF AMICUS CURIAE,  
EASTERN BAND OF CHEROKEE INDIANS  
IN SUPPORT OF RESPONDENTS

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Sylva, North Carolina 28779  
704-586-2121

*Attorney for Amicus Curiae*

HOLT, HAIRE & BRIDGERS, P.A.  
*Of Counsel*

PENGAD-Bayonne, N. J.

EXHIBIT  
TVA  
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In The  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

NO. 76-1701

TENNESSEE VALLEY AUTHORITY.

*Petitioner,*

*v.*

HIRAM G. HILL, JR., ZYGMUNT J. B.  
PLATER, DONALD S. COHEN, THE  
AUDUBON COUNCIL OF TENNESSEE, INC.,  
THE ASSOCIATION OF SOUTHEASTERN  
BIOLOGISTS

*Respondents.*

MOTION FOR LEAVE TO FILE  
BRIEF OF AMICUS CURIAE

The Eastern Band of Cherokee Indians respectfully moves the Court for leave to file the attached brief of an amicus curiae in this case.

The Eastern Band previously filed an amicus brief with the Court in this case, but that brief addressed only the question whether the Court should grant certiorari to the Petitioner in this particular case. Since the Court has now granted certiorari the Eastern Band wishes to comment on the merits of the case presented by the

Petitioner and point out its own interest in the interpretation of the Endangered Species Act proposed by the Petitioners.

This the day of February, 1978.

HOLT, HAIRE & BRIDGERS, P.A.

BY:

Ben Oshel Bridgers  
Attorneys for Amicus Curiae  
P. O. Box 248  
Sylva, NC 28779  
704-586-2121

In The  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

NO. 76-1701

TENNESSEE VALLEY AUTHORITY,

*Petitioner,*

*v.*

HIRAM G. HILL, JR., ZYGMUNT J. B. PLATER,  
DONALD S. COHEN, THE AUDUBON COUNCIL  
OF TENNESSEE, INC., THE ASSOCIATION OF  
SOUTHEASTERN BIOLOGISTS,

*Respondents.*

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

BRIEF OF AMICUS CURIAE,  
EASTERN BAND OF CHEROKEE INDIANS  
IN SUPPORT OF RESPONDENTS

The Eastern Band of Cherokee Indians is a federally recognized Indian tribe, occupying a reservation located in the mountains of western North Carolina. Prior to the Treaty of New Echota in 1835 and the cession of their remaining lands east of the Mississippi River, the Cherokees had resided in Tennessee along the Little Tennessee Valley, the site of the Tellico Dam, which is the subject of the present lawsuit.

This Valley contains a number of historical and archeological sites important to Cherokee culture and heritage. Within an eight mile area are found two eighteenth century Anglo-American sites (Fort Loudoun and Tellico Blockhouse), four "overhill" Cherokee town sites (Chota/Tanasi, Toqua, Tommotly and Tuskegee) and archeological sites of the Late Mississippian era (Toqua, 1330 - 1550 A.D.), Early Mississippian era (Martin Farm, 900 - 1300 A.D.), Middle Woodland era (Iceland Bottom, 300 - 700 A.D.), Early Woodland era (Bacon Bend, Patrick site, Calloway Island, 500 B.C. - 300 A.D.), Late Archaic era (Patrick, Icehouse Bottom and Harrison Branch, 2500 - 1000 B.C.) and Middle to Early Archaic era (Thirty Acre Island, Icehouse Bottom, Calloway Island, Howard site, 7500 - 4500 B.C.). Each of these sites could conceivably be protected by the National Historical Preservation Act.<sup>1</sup>

In his brief, the Solicitor for the Secretary of the Interior points out that the Petitioner's arguments regarding the Endangered Species Act "set a dangerous precedent for agencies to exempt their on-going projects from compliance with other 'consultation' laws such as the Historic Preservation Act."<sup>2</sup> Indeed this case appears to present just such precedent for this very act. In addition to the question of the Endangered Species Act, there is some doubt that TVA complied with the Historic Preservation Act. That Act required consultation<sup>3</sup> by a federal agency, such as TVA, prior to construction to determine adverse effect of construction on historic sites. Such consultation appears not to have been done for all of these sites and a number of historical and archeological sites

<sup>1</sup> 16 U.S.C. §470 et. seq. (1970).

<sup>2</sup> Brief for the Petitioner, Appendix, p. 5A.

<sup>3</sup> 16 U.S.C. §470 f.

eligible for the Historic Register will be destroyed, including all but three of the sites listed in the previous paragraph.

Such destruction is important to the Cherokee people because this is the last valley available with such historical and archeological remnants available for study and preservation.

The Eastern Cherokees also note the arguments provided by the Petitioner and amici curiae on behalf of the local governments within Monroe County, Tennessee, that the economic realities of this case support their interpretation of the Endangered Species Act. However, the Cherokees believe that most of the people in the Little Tennessee Valley have no idea of the extent of the historical and cultural significance of this Valley. The local residents quite naturally fear only the economic consequences portrayed to them by the Petitioners.

The North Carolina Cherokee Reservation is located in the Smoky Mountains adjoining the Blue Ridge Parkway. The economy of the Tribe is heavily dependent upon the tourist industry and many members of the Tribe are actively engaged in businesses on the Reservation. During 1977 some 8.6 million people came onto the Cherokee Reservation and spent approximately 20.5 million dollars in Cherokee. The success of the Cherokee people in the tourist industry is due to a number of factors, not the least of which are their ready access to the Parkway and being adjacent to a National Park which funnels tourists into Cherokee. Inasmuch as the Little Tennessee Valley contains some of the same geographical features, the Cherokees believe the potential for the economic development of the Little Tennessee Valley area is excellent.



Paralleling this litigation, the General Accounting Office conducted a study of the Tellico Project and issued a report in October 1977. The GAO Report found that the project area has potentially valuable alternative development options that have not been considered and the Report stated that "[N]umerous alternate uses exist for the Little Tennessee River if the reservoir is not completed."<sup>4</sup>

Because the Little Tennessee Valley is also adjacent to the Blue Ridge Parkway and the Cherokee historical and archeological sites lie along the river in close proximity, based on Cherokee's own experience in the tourist industry under similar geographical conditions, they conclude that the economic disaster portrayed by Petitioner is inaccurate and misleading. Based on the alternatives discussed in the GAO Report, there is every reason to believe the economy can grow in the Valley even if the Court denies the relief sought by Petitioners.

In short, the scope of historic preservation and endangered species could be dramatically short-circuited by the legal position of the Petitioner. The Cherokee people are sensitive to the goals of the Endangered Species Act since their own survival was a matter of serious concern in the last century.

It is implicit from the enactment of the National Historic Preservation Act and the Endangered Species Act that cultural and biological patterns of the past have value and are worth remembering. Obviously they can

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<sup>4</sup> GAO Report: "The TVA's Tellico Dam Project - Costs, Alternatives and Benefits." EMD - 77 - 58, Oct. 14, 1977 at p. 26.

best be remembered by keeping them visible and intact. By standing on the shoulders of the past we can see more clearly into our future.

For these reasons the Cherokee people ask the Court to enforce the Endangered Species Act and affirm the Sixth Circuit decision.

Respectfully submitted,

HOLT, HAIRE & BRIDGERS, P.A.

BY:

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704-586-2121

*Attorney for Amicus Curiae*

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1701

TENNESSEE VALLEY AUTHORITY, *Petitioners*

v.

HIRAM G. HILL, JR., ZYGMUNT J. B. PLATER,  
DONALD S. COHEN, THE AUDUBON COUNCIL OF  
TENNESSEE, INC., THE ASSOCIATION OF  
SOUTHEASTERN BIOLOGISTS, *Respondents*

Petition for Certiorari from Decision of United States  
Court of Appeals for the Sixth Circuit Granting  
Permanent Injunction Against Petitioner

MOTION FOR LEAVE TO FILE BRIEF AND  
BRIEF OF AMICUS CURIAE  
EASTERN BAND OF CHEROKEE INDIANS  
IN SUPPORT OF RESPONDENTS

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The Eastern Band of Cherokee Indians respectfully  
move the Court for leave to file the attached brief of  
an amicus curiae in this case.

The Eastern Band would show the Court that it has  
unique historical and cultural interests in the lands  
sought to be impounded by the Petitioners, and that

Congress is the proper forum for weighing these interests against those of the Petitioners.

This the 25th day of July, 1977.

HOLT, HAIRE & BRIDGES, P.A.

BY:

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 IN SUPPORT OF RESPONDENTS  
 —

The Eastern Band of Cherokee Indians is a federally recognized Indian tribe entitled to the benefits and standing afforded other Indian tribes by the United States.<sup>1</sup> The purpose of this *amicus* brief, which is filed by leave of this court, is to point out to the Court that its decision in this case would have an im-

<sup>1</sup> See, Act of June 4, 1924, 43 Stat. 376; *United States v. Wright*, 53 F.2d 300 (4th Cir. 1931), *cert. den.* 285 U.S. 539; *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957).

portant effect on historical, archeological and cultural matters of great concern to the people of the Eastern Band of Cherokee Indians.

The Eastern Cherokees believe the Sixth Circuit Court of Appeals was correct and that it is important that this decision be allowed to stand. By denying certiorari in this case, the Court will enforce the Endangered Species Act. The political implications which have been raised by petitioner are matters which should be considered by Congress rather than this Court. The very questions raised by petitioner are being reviewed by Congress through a General Accounting Office review, through pending legislation (H.R. 4557, H.R. 5079, 95th Congress, 1st Session), through hearings by the Senate Subcommittee on the Environment and by the House Subcommittee on Fish and Wildlife. The questions urged by petitioner are political questions which fall short of raising justiciable issues requiring resolution by this Court.

The Eastern Band supports the Respondents in this case because this land which would be impounded by petitioner is of unique and profound significance in the history and culture of the Cherokee people. The area within the Tellico Project includes the site of the sacred Cherokee town of Echota, a legal sanctuary to Indians and whites alike and capitol of the Cherokee Nation as early as the Sixteenth Century. This project also encompasses the site to the Cherokee Town of Tenmase, from which the State of Tennessee derived its name, as well as the other Cherokee towns of Citico, Toqua, Tommotley, and Toskegee, the birthplace of Sequoya, the only individual in the history of the civilized world to devise an alphabet. Also within this area

was Fort Loudon, the first English military trading post west of the Appalachians.<sup>2</sup>

Of all the cultures comprising America, only the Indian is indigenous. Archeological deposits and burial grounds have special relevance to an understanding of Indian cultures. The significance of areas such as this, for the Indian as well as for non-Indians, is in sharpening the awareness and appreciation for the unique values and institutions of the Indian people.

If the petitioner is successful in this case, these lands will be flooded and further research and study, further recourse to this valley will be lost forever to the Cherokee people. If this Court leaves the decision of the Court of Appeals standing as a final ruling, the questions raised by petitioner may be balanced by *Congress* against the values represented by the Respondents together with the unique values to the Cherokee people. In the Congressional forum the Cherokee people can point out that:

The white man saves the whooping crane, he saves the goose in Hawaii, but he is not saving the way of life of the Indian.<sup>3</sup>

<sup>2</sup> An extensive account of Cherokee culture in the valley of the Little Tennessee may be found in James Mooney, *Myths of the Cherokee and Sacred Formulas of the Cherokee*, Nineteenth Annual Report of the Bureau of American Ethnology (1900); see also, Henry Timberlake, *Memoirs, 1756-1765*, (Johnson City, Tennessee: Watauga Press, 1927); Alberta and Carson Brewer, *Valley So Wild: A Folk History*, (Knoxville: East Tennessee Historical Society, 1975).

<sup>3</sup> V. Armstrong, *I Have Spoken*, p. 160 (1971), quoting Arnett and Faas, *In Search of America*, Chicago Sun Times, April 18, 1971, § 2 at 16.



IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1973

\_\_\_\_\_  
No.  
\_\_\_\_\_

Environmental Defense Fund, et al.,  
PETITIONERS,

v.

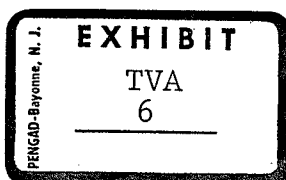
Tennessee Valley Authority, et al.,  
RESPONDENTS.

Application for Stay of Mandate  
of the United States District Court for  
the Eastern District of Tennessee

To the Honorable Potter Stewart, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit:

Petitioners, the Environmental Defense Fund, et al., pray that an order be entered staying the mandate of the United States District Court for the Eastern District of Tennessee, which issued on November 1, 1973. Thereafter, the United States Court of Appeals for the Sixth Circuit refused to stay said mandate pending a final determination of the matter by the Court of Appeals and, if necessary, the filing of a petition for a writ of certiorari and a final determination of the matter by this Court. In support of this application, petitioners respectfully show as follows:

1. This suit was initiated in late 1971 by the Petitioners in the United States District Court for the Eastern District of Tennessee



seeking (a) a preliminary injunction preventing the Respondent Tennessee Valley Authority from continuing the construction of the Tellico Project, a major water resource development project on the Little Tennessee River, unless and until the Respondent had complied with various Federal laws and regulations, and (b) a permanent injunction against all such construction activities unless and until the Respondent had demonstrated full compliance with all applicable Federal laws and regulations.

2. On January 11, 1972, the United States District Court granted a preliminary injunction per the request of the Petitioners upon a finding, inter alia, that the Respondent had violated applicable Federal laws and regulations and that certain and irreparable harm would occur to the Petitioners in the absence of the injunction. The Respondent appealed the granting of the preliminary injunction to the United States Court of Appeals for the Sixth Circuit.

3. The United States Court of Appeals for the Sixth Circuit upheld the issuance of the preliminary injunction by the United States District Court and, in so doing, accurately described the nature and impact of the Tellico Project as follows:

The Little Tennessee River rises in the mountains of western North Carolina and flows northwesterly to its confluence with the Tennessee River in eastern Tennessee. On the Tennessee, just north of the mouth of the Little Tennessee, is the Fort Loudon Dam and Reservoir. The Tellico Project involves the construction of a dam on the Little Tennessee below its mouth. The dam is to be an earth embankment with a concrete spillway, and when it is operational (in 1975), it will impound the Little Tennessee and create a reservoir 33 miles long. In lieu of a navigation lock, an 850-foot long navigation canal will connect the Tellico Reservoir with the Fort Loudon Reservoir. And, a nine-foot-wide navigable channel will extend 30 miles up the Little Tennessee from the Tellico Dam to a point three miles downriver from the existing Chilhowee Dam. TVA will acquire 38,000 acres of land for the project, of which 16,000 acres of Little Tennessee bottomland will be inundated by the reservoir, including 2,100 acres of the present river bed.

The purpose of the project is to foster the economic development of the three Tennessee counties through which the Little Tennessee flows. TVA has estimated that the commercial water transportation to be provided by the 30-mile channel will result in private investment of \$265 million in new commercial enter-

prise in the Tellico area over the next 25 years and the concomitant creation of 6,600 new jobs. It also asserts that the project will provide additional flood control, electric power, and recreation in the area. Further, a planned community of 50,000 people is envisioned for the area. At the project's inception, TVA placed the benefit-cost ratio at 1.4:1.

The District Court found that the free-flowing stretch of the Little Tennessee to be impounded "is acknowledged to be the largest and best trout fishing water east of the Mississippi River". 339 F. Supp. at 808. There are several sites of major historical and archaeological significance along the banks and bottom-land of the Little Tennessee, such as Fort Loudon, which was build by the English in 1756, and former Cherokee Indian villages that include the ancient capital of the Cherokee nation. The District Court found that "(t)hese archaeological stores are virtually untapped." The court further found that the river is the "likely habitat" of one or more of seven rare or endangered species, that it exists in a pristine state, and that all these benefits will be destroyed by its impoundment, as will much valuable farm land. 339 F. Supp. at 808. Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d 1164, 1169-1170, (6th Cir., 1972).

The matter was thereupon remanded to the United States District Court for a trial on the merits of Petitioners' request for permanent injunctive relief.

4. Pursuant to the order of the United States Court of Appeals for the Sixth Circuit, a trial on the merits was held before the United States District Court for the Eastern District of Tennessee from September 17 through September 20, 1973. On October 25, 1973, the District Court issued its Memorandum Opinion (Exhibit A), holding that Respondents had complied with the Federal laws put in issue by Petitioners and that the preliminary injunction should be dissolved. The Order was entered on November 1, 1973, by the District Court, and that same day Petitioners filed their Notice of Appeal, (Exhibit B), a Motion for Injunction Pending Appeal (Exhibit C), and a Memorandum in Support of Motion for Injunction Pending Appeal. Although the motion was denied, the court did suggest that Petitioners be given a one week period to seek a Court of Appeals stay of the November 1, Order pending appeal, during which period the Respondents would refrain from initiating construction activities.

5. Petitioners applied to the United States Court of Appeals for



the Sixth Circuit for a stay pending appeal and, in the same Motion, applied for an expedited briefing and hearing of schedule in the matter. On November 9, 1973, the United States Court of Appeals issued an order (Exhibit D) granting Petitioners' motion to expedite appeal and concluding further that ". . . in view of such expedited hearing a stay pending appeal is neither required nor advisable."

6. The Respondent, having agreed to defer commencement or resumption of construction activities on the Tellico Project during the pendency of the application for stay pending appeal to the United States Court of Appeals for the Sixth Circuit, resumed and commenced such construction activities on November 12, 1973, according to counsel for Respondent, who was contacted by the undersigned on that date.

7. While the expedited appeal, granted at Petitioners' request, may be in the interest of all concerned and may serve to alleviate or diminish some of the damage and irreparable harm alleged and complained of by the Petitioners, it is not sufficient to protect the interest of the Petitioners or the public since a great deal of the harm and damage complained of by the Petitioners will surely be accomplished during the period established for briefing and arguing this matter before the United States Court of Appeals. The schedule presently calls for argument of this matter on December 7, 1973. However, it is anticipated that a much longer period will be required for the deliberation by that Court and the issuance of a final appellate decision. In this regard, Petitioner wishes to point out that, when this matter was initially before the United States Court of Appeals for the Sixth Circuit for review of the preliminary injunction, the matter was argued on April 18, 1972, but no decision thereon was issued until December 13, 1972. Should a similar delay occur in the decisional process during this phase of the proceeding, much, if not all, of the environmental damage and irreparable harm and injury will have occurred before a final determination of the matter on its merits.

The trial on the merits of this matter before the United States District Court was a highly complex matter consisting of highly technical and scientific testimony from some 16 witnesses from a number of differ-

ent scientific disciplines appearing on behalf of either the Petitioners or the Respondents. The transcript, consisting of several hundreds of pages and the record which includes some 127 exhibits, will probably not be available for weeks, according to the court reporter. Absent the availability of the transcript and records, the Petitioner is severely handicapped in briefing the matter adequately and the Court of Appeals will be unable to make a full and informed judgment on the merits of the appeal if the decision is based solely on the briefs of the parties and without reference to the record on appeal. Nevertheless, unless this Court grants the stay herein requested, Petitioners are given no choice but to conform to the present schedule and proceed without benefit of transcript of record. Their only alternative is to seek an extended briefing schedule and incur the irreparable harm found by the District Court and affirmed by the Court of Appeals, and thereby effectively moot this matter before it is decided by the United States Court of Appeals for the Sixth Circuit or ultimately by the Supreme Court of the United States.

8. Should the decision of the United States Court of Appeals for the Sixth Circuit be adverse to the Petitioners, the Petitioners will file a petition for a writ of certiorari with this Court. The jurisdiction of this Court to review the case on petition for a writ of certiorari rests upon 28 U.S.C., § 1254(1). Jurisdiction to issue the stay requested herein is granted by 28 U.S.C., § 2101(f).

Substantial Harm Would Accrue to  
The Appellants in the Absence of  
an Injunction Pending Appeal.

9. The District Court, in its Order of January 11, 1972, granting Petitioners' Motion for Preliminary Injunction, expressly found that the Petitioners would suffer irreparable injury as a result of the further construction of the Tellico Project. Indeed, such a finding was necessary in order to justify issuance of the injunction. Rule 65, Federal Rules of Civil Procedure. Further, the issuance of the preliminary injunction required a balancing of the respective equities of the parties and a finding that the equities possessed by the appellants were greater than those of the appellees. That finding was made by the District Court, and the injunction issued. As stated by the court, in adopting

the findings of Environmental Defense Fund v. Corps of Engineers, 324 F. Supp. 878, 880 (D.D.C. 1971):

The public interest in avoiding, if possible, any irreversible damage to the already endangered environment is paramount. (emphasis added).

The findings of the district court with respect to irreparable harm were specifically upheld by the United States Court of Appeals. The Court stated (Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d 1164, (6th Cir. 1972):

Appellants' (TVA's) final contention is that the District Court erred in granting the preliminary injunction without making a specific finding that plaintiffs would suffer irreparable harm if the injunction were not granted, and that the court should have refused to grant the injunction so that the "status quo" could be maintained pending final resolution and so that a costly delay in completing the project could be avoided. This contention is clearly without merit.

In their motion for a preliminary injunction, Plaintiffs alleged that they would suffer irreparable harm from the continuation of the construction activities of appellants that were permanently defacing the natural environment. Submitted along with this motion were affidavits of residents in the project area and other observers concerning activities of appellants such as the cutting and burning of timber, the movement of massive amounts of earth, the construction of large earthworks, and the relocation of roads and bridges. Plaintiffs' motion also referred to the condemnation of land and the resulting eviction of the former owners of the condemned properties. The District Court found that the activities relating to irreparable defacement of the environment were continuing, 339 F. Supp. at 808, and recognized that it had to consider the interests and injuries asserted by the parties, 339 F. Supp. at 812. Thus, the court clearly considered the allegations of irreparable harm made by plaintiffs as well as the harm that would allegedly result from issuing the injunction, and it concluded that the scales tipped in favor of plaintiffs. Plainly, the court found that plaintiffs would suffer irreparable harm if the injunction were not granted, and this finding is supported by the record.

More important, appellants misconceive the purpose of a preliminary injunction in this context. As the court stated in Scherr v. Volpe, 336 F. Supp. 882, 886 (W.D. Wis. 1971):

the continuing construction work by defendants and those working in concert with them, if allowed to continue, will make it impossible to restore the area in question to its previous environmental status. Thus, plaintiffs' rights would be sacrificed before a complete hearing and determination on

the merits of their contention. The purpose of granting the preliminary injunction is to preserve the subject matter of this controversy in its existing condition.

In addition, the more time and resources appellants are allowed to invest in this product, the greater becomes the likelihood that compliance with section 102 of the NEPA, and the reconsideration of the project in light of the provisions of section 101, will prove to be merely an empty gesture. Arlington Coalition on Transportation v. Volpe, supra, 458 F.2d at 1327, 1332-34. Accordingly, "unless the plaintiffs receive now whatever relief they are entitled to, there is danger that it will be of little or no value to them or to anyone else when finally obtained." Lathan v. Volpe, 455 F.2d 1111, 1117 (9th Cir. 1971).

Finally, the preliminary injunction, as we stated earlier in this opinion, is the vehicle by which a declared congressional policy can be effectuated. Sufficient irreparable harm, even apart from the considerations discussed above, can be found in the continuing denial by appellants of appellees' right under the NEPA, Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287, 295 (D.D.C. 1971); City of New York v. United States, supra, 337 F.Supp. at 160, and this is enough to justify issuing the injunction. Lathan v. Volpe, supra, 455 F.2d at 1116-17. (emphasis added).

The critical facts which existed at the time of the Court of Appeals' decision have not changed. The same irreversible damage which was enjoined by the District Court below and affirmed on appeal, is still threatened; the same injuries to the Petitioners and the public interest as determined previously are likely; and the same threat to the legal rights of the Petitioners exists if the order dissolving the injunction is not stayed pending appeal.

A resumption of construction of the Tellico Project would inflict irreparable injury on the Petitioners in at least two ways. First, construction might well influence prejudicially the pending appeal. It is not unreasonable to assume that the total monetary resources invested in the Tellico Project by the Respondents may be a factor in the decision by the United States Court of Appeals, as it was in the decision of the District Court below. If, indeed, this factor is an appropriate consideration in the judicial review of the project, it would be manifestly unjust to allow the Respondent to continue to commit addi-

tional millions of dollars of resources to the project, when each dollar so spent would inexorably strengthen the Respondents' position on appeal.

As set forth in the evidence presented at trial, the Respondents presently have available for immediate expenditure some \$7.5 million for the further construction of the project. And, as indicated by counsel for the Respondents in the hearing below, the bulldozers are ready to commence construction. Expenditure of these additional millions of dollars for construction work during the pendency of a perhaps lengthy appeal would clearly destroy the status quo and prejudice the rights of the Petitioners in such an appeal.

Second, even if a favorable judgment on appeal were obtained by the Petitioners under such circumstances, continued construction of the project would preclude the Circuit or eventually this Court from affording appropriate relief. The purpose of NEPA and the rights of the Petitioners established by the Court of Appeals thereunder require the Respondents to make a meaningful reconsideration of the Tellico Project in light of its impacts and alternatives. As observed by the Circuit Court in its initial consideration of this matter, the commitment of additional time and resources to the project would make such reconsideration an "empty gesture". Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d at 1183, 1184. Moreover, it would progressively destroy the very subject matter of the appeal and render meaningless the subsequent exercise of jurisdiction by this Court. Accordingly, even the most favorable determination on appeal will render the ultimate relief progressively less meaningful if the judgment of the court below is not stayed.

In a balancing of the equities of the parties, the injuries which would be suffered by the Petitioners as a result of the resumption of construction far outweigh any potential harm to the Respondents. Nearly two years have already passed since the entry of the preliminary injunction. The principal reason for the delay of the trial on the merits was the Respondents' own appeal of that Order. Certainly, the Respondents cannot show that they have suffered irreparable injury by the

continuation of an injunction pending appeal. Indeed, if the evidence of the Respondents is accepted, the benefit-cost ratio of the project continues to escalate with the passage of time; consequently, the further delay of a resumption of construction, if the Respondents are correct, would serve only to increase the overall economic benefits of the project.

Moreover, allowing Respondents to proceed with construction could prove wasteful in the extreme. Not only would the ecosystem of the project area be damaged beyond repair, but millions of dollars of public funds would be committed irretrievably and unlawfully if the Circuit Court or this Court subsequently finds that TVA is proceeding in violation of NEPA and other Federal statutes in its prosecution of the Tellico Project.

Finally, it is important to look critically at the nature of the irreparable harm which would be inflicted if the Respondents are allowed to proceed. As the Circuit Court has noted previously, the Little Tennessee Valley is of great historical importance. It was the sacred homeland of the Cherokee Indians, and is the site of numerous Cherokee villages, including Chota, the capital city; Tuskegee, the birthplace of Sequoyah; and Tenasi, the village from which the State of Tennessee derived its name. Each of these sites will be inundated by the Tellico Project, including that of Chota-Tenasi, which has just recently been added to the National Register of Historic Places. Accordingly, a consideration of irreparable harm in the present instance goes far beyond the mere movement of dirt or condemnation of land. It goes, of necessity, to the heritage of a proud and ravished people and to an historical continuity of importance to all Americans. Indeed, the Valley of the Little Tennessee River is of such importance, and the mandate of NEPA so strong, that the threat to its existence is, by itself, sufficient to warrant the issuance of a stay pending the appeal of these proceedings. Never has it been so true that a river and its valley, once gone, can never be replaced, but a reservoir can always be constructed. In light of the overriding historical and cultural importance of the Little Tennessee Valley, we urge that a stay issue by this Court in order to

preserve the status quo and afford a complete opportunity for judicial review of the actions of the Respondents.

Basis for Stay

10. In determining the appropriateness of a stay of a mandate pending appeal to the United States Court of Appeals and probable certiorari proceedings in this Court, a Circuit Justice must inquire as to whether any of the matters proposed to be raised in the appeal and eventually in the petition for certiorari "are sufficiently debatable to lead to the belief that at least four members of the Court would vote to grant certiorari" or some form of interim relief. See Edwards v. United States, \_\_\_\_\_ U.S. \_\_\_\_\_. Petitioners submit that there are major issues to be raised on appeal and eventually in certiorari proceedings which warrant a stay under this standard:

(a). As was observed by the District Court on several occasions, the field of environmental law is a rapidly expanding body of jurisprudence in which few inflexible rules presently obtain. This fact is perhaps best demonstrated by the clear conflict between the decision of the court below and that of the United States District Court for the Northern District of Alabama in Montgomery v. Ellis, Civ. No. 71-655, (N.D. Ala., September 11, 1973), (Exhibit E). The decision of that Court, and of other appellate courts which the court below did not apply in the present case, clearly demonstrate that the Petitioners possess probable grounds for an appeal which would protect rights which would be prejudiced by the failure to issue a stay of the judgment of the district court. The situation may well result in a clear conflict between the decisions of appellate courts wherein the United States Supreme Court will be called upon to resolve the ultimate issue. However, if the status quo is not preserved in the present case, this Court may well be denied the opportunity, in large measure, to evaluate the relative merits of the decision of the Court below and those of other courts whose opinions have been directly contrary thereto.

The District Court implicitly expressed the dilemma well in its Memorandum Opinion of October 25, 1973, stating that the scope of review under NEPA is "narrow". Other courts, such as in Montgomery v. Ellis,

supra, have determined that the scope of judicial review is much broader, particularly where, as expressed by the District Court in its earlier opinion, the interest in preventing "any irreversible damage to the already endangered environment is paramount."

Thus, the clear conflict between the opinion of the court below and that of other Federal courts establishes that the petitioners possess probable grounds for a successful appeal to protect their rights. Combined with the irreparable harm which they will suffer inevitably in the absence of a stay, we submit that this is all that is required to establish the necessity and the equity for an injunction pending the appeal of these proceedings.

(b). Because of the substantial irreparable injury which will be suffered by the Petitioners in the absence of a stay in these proceedings, the Petitioners believe that a lengthy and complex discussion of the merits of the appeal would be premature and an undue imposition upon the time of this Court. Nevertheless, it may be contended that a showing of the meritorious nature of the appeal is necessary in order to justify the issuance of a stay. Accordingly, we will discuss briefly the grounds upon which the Petitioners are likely to prevail.

The initial, and perhaps most compelling, basis for reversal of the decision below springs from the constricted scope of judicial review applied by the District Court. While it is impossible from a reading of the opinion to determine precisely the scope of review which was applied, it is clear that the review was unnecessarily and incorrectly narrow, and wholly failed to consider the importance of the environmental - economic testimony presented at trial. As noted candidly by the Court, such a scope of review is in direct contradiction to that adopted by the district court in Montgomery v. Ellis, supra. Moreover, it is specifically contrary to the standards of review prescribed by the Eighth and Fourth Circuits:

When NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors. The Court



must then determine, according to standards set forth in Section 101(b) and 102(1) of the Act, whether 'the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.' (Citing Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971)). (Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289, 300 (8th Cir. 1972); Environmental Defense Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972); Conservation Council of North Carolina v. Froehlke, 473 F.2d 664 (4th Cir. 1973)).

While purporting to adopt a standard of review apparently somewhat similar to that enunciated in the cases cited, the District Court in actuality held that the benefits and costs of a project were not reviewable by the Court. Opinion, page 24. Such a holding is contrary to all the cited cases, which specifically require review of "the actual balance of costs and benefits . . .". Anything less than such a review would amount to a judicial deference to agency discretion which is impermissible under NEPA, particularly when the District Court itself, in its initial opinion, criticized the benefit-cost analysis as consisting "almost entirely of unsupported conclusions". 3 ERC 1554-55.

Of prime importance also is the decision of the Northern District of Alabama entitled Montgomery v. Ellis, supra. The District Court there held that the adoption of a 3 1/8% discount rate and a 100 year project life was arbitrary under the standards of NEPA and the Administrative Procedure Act. However, the figures were not given consideration in a vacuum by the Court, but were related to the arbitrary and unrealistic impetus given to the project by their use, and the consequent de-emphasis of environmental factors contrary to NEPA. We urge that, in light of the fact that TVA has employed the identical 3 1/8% discount rate and 100 year project life for the Tellico Project, the likelihood of prevailing on this dispositive issue alone is substantial.

An issue of analogous character is presented by the Respondents' failure to review the benefits of the Tellico Project since the enactment of NEPA. The footnote at page I-1-49 of the environmental statement for the project established this beyond dispute; indeed, it is

freely and candidly admitted. Such a refusal, we submit, is specifically contrary to the admonition and direction of the Circuit Court in its earlier opinion that the Tellico project be reconsidered "in light of the provisions of section 101 (of NEPA)". 468 F.2d at 1183-84. Evidence to this effect was presented by the Petitioners below through Dr. Paul E. Roberts, who specifically testified as a professional economist that the refusal and failure to recalculate the benefits of the project subsequent to the enactment of NEPA would, perforce, be arbitrary and without sufficient consideration of environmental costs. However, all of Dr. Roberts' testimony below was relegated by the District Court to a single footnote, stating that it concerned matters "unreviewable under NEPA". We submit that if NEPA does not contemplate a review of the benefits and costs of a project pursuant to the national policies and goals enunciated by the Congress in section 101 of NEPA, then it will become, in the words of one District Court,

a minor nuisance for agencies imposing one more obligation of paperwork before they can get on with the projects they intend to build. That approach will simply pave (or at least litter) the road to environmental chaos with the full disclosures of countless impact statements. (Committee to Stop Route 7 v. Volpe, 4 ERC 1329, 1333; 346 F. Supp. 731 (D. Conn. 1972)).

We submit, therefore, that the scope of review adopted by the Court below was far too narrow, given the "paramount" importance of the environment, and presents a substantial likelihood that the Petitioners will prevail on appeal.

An additional consideration with respect to the likelihood of success concerns the refusal of the District Court to apply its own salutary standards adopted in the opinion issuing the preliminary injunction. Of critical importance is the failure to require a detailed analysis of the environmental impacts of the project to be caused by the industrialization, recreational development and commercialization of an essentially pastoral valley. In its initial opinion, the District Court criticized TVA for the failure to include a detailed assessment of such impacts in the draft statement. 339 F. Supp. 809. Yet, by the time of the trial, the Court had fully reversed itself and found that the preparation of

"one or more supplemental environmental statements, as appropriate, for Tellico land development" as promised by TVA was sufficient consideration of the impact of the project upon the valley.

Such cursory treatment of these impacts clearly is reversible error under NEPA. For example, the present Guidelines of the Council on Environmental Quality require in-depth analysis of the impacts of population shifts and other similar matters resulting from a project. 38 Fed. Reg. 20553, para. 1500.8(a)(3)(ii). The environmental statement for the Tellico Project contains no such analyses, and the determination of adequacy by the District Court, accordingly, is clearly incorrect.

This is particularly the case where TVA has taken credit for such industrialization and purported job-expansion to increase the benefit-cost ratio from 1.7 - 1 to 3.0 - 1, yet, at the same time, alleges that the specification of particular industries is so speculative that their environmental impacts cannot be included in the environmental impact statement for the project. Such a position is merely illustrative of the bias in favor of the project which pervades the entire environmental impact statement, and which was disregarded by the District Court below.

Other important deficiencies are apparent from a review of the environmental impact statement and were set forth in the Petitioners' case below. For example, the massive agricultural losses to be caused by the project were glossed over and, indeed, misrepresented in the environmental statement. Petitioners presented the evidence through the county agent of Monroe County, Tennessee, one of the counties within the project area. Neither his testimony nor the deficiencies of the environmental statement in that regard were even mentioned in the opinion of the District Court. Accordingly, for these and numerous other reasons, we submit that the likelihood of success on the issue of compliance with NEPA is substantial.

One final point should be made with respect to NEPA. The District Court's consideration of the provisions of section 102(2)(D) of NEPA regarding the development of alternatives to the Tellico Project is woefully inadequate and incorrect. Opinion, pp. 16-19. The Petitioners'

evidence with respect to the inadequacy of TVA's discussion and development of alternatives was overwhelming. A cursory review of TVA's discussion discloses, indisputably, that at no place in the statement is there a detailed analysis of such alternatives as flood plain zoning, flood insurance, levees at Chattanooga to alleviate flooding, development of a recreational river and the like. Similarly, no discussion exists of the environmental impacts of these alternatives compared to those of the project. Such an analysis is clearly required by NEPA, Natural Resources Defense Council v. Morton, 458 F.2d 834 (D.C. Cir. 1972); CEQ Guidelines, 36 Fed. Reg. 7725, para. 6 (iv), and 38 Fed. Reg. 20554, sec. 1500.8, para. (a)(4). The failure to require this analysis is at direct odds with the Congressional mandate in NEPA to ameliorate impacts upon the environment by the development and good faith consideration of alternatives to resource projects. Such a failure clearly constitutes reversible error.

Similarly, the District Court below wholly disregarded the Petitioners' cause of action under the Federal Water Pollution Control Act Amendments, finding that it "has no application under the facts of this case." Opinion, p. 26. Such a finding is unreasonable and incorrect, especially in light of the District Court's previous refusal to dismiss the claim and the acceptance of extensive testimony thereon from appellants' witness Dr. Edward Thackston. Essentially, the Petitioners' claim under the Act that section 313, 33 U.S.C. Section 1323, prohibits the violation of state water quality classifications by agencies of the Federal government. The Petitioners' uncontradicted evidence showed that at least one water quality standard for the Little Tennessee River would be violated by construction of the Tellico Project. Accordingly, a violation of the Act was apparent. Thus, the District Court erred for two reasons; first, it failed to conclude that the Respondents' activities would violate the Act; second, and equally important, the District Court failed to articulate in any detail whatsoever its rationale for finding that the Act "has no application". Such a failure deprives the Petitioners and this Court of any standard for evaluating the correctness of the decision and, for that reason alone, is defective

and constitutes reversible error.

(c). Orderly judicial administration requires that the construction of the Tellico Project be stayed until:

(1) The United States Court of Appeals for the Sixth Circuit can pass upon the scope of review under Section 101 of the National Environmental Policy Act and review the scope of review accorded by the District Court in light of the standards set forth in Montgomery v. Ellis, supra. If the standards set forth in the latter case are adopted by the Sixth Circuit in the appeal pending in these proceedings, the Tellico Project is most assuredly being constructed and completed in violation of Federal laws and regulations. Therefore, the stay should issue until the Sixth Circuit Court of Appeals has an opportunity to rule upon the clearly conflicting standards applied by the United States District Court in Montgomery v. Ellis, and those applied by the United States District Court in the instant proceedings.

(2) The question of the scope of review under section 101 of the National Environmental Policy Act is also pending before the United States Court of Appeals for the Fifth Circuit in a case involving another Federal public works project known as the Tennessee - Tombigbee Waterway. (Environmental Defense Fund v. Corps of Engineers, Appeal No. 72-2874).<sup>\*</sup> The latter case, involving as it does the principles enunciated in Montgomery v. Ellis, supra, could provide either clear direction for the United States Court of Appeals for the Sixth Circuit in this case, or, in the alternative, create a clear and open conflict between the rulings of the two circuits which would warrant review of these matters in certiorari proceedings before this Court.

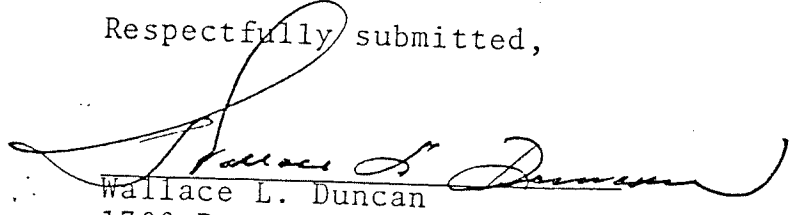
WHEREFORE, Petitioners pray that the Order of the United States District Court for the Eastern District of Tennessee, which was issued on November 1, 1973, be stayed pending the prosecuting of an appeal to the United States Court of Appeals for the Sixth Circuit, a final

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\* Note: The Tennessee-Tombigbee Waterway case was argued on May 28, 1973, and is now under submission to the United States Court of Appeals for the Fifth Circuit.

determination of this matter by that Court, and, if necessary, pending the filing of a petition for for a writ of certiorari, and a final determination by this Court.

Respectfully submitted,



Wallace L. Duncan  
1700 Pennsylvania Avenue, N.W.  
Washington, D. C. 20006

Counsel for Petitioners

November 13, 1973

CERTIFICATE OF SERVICE

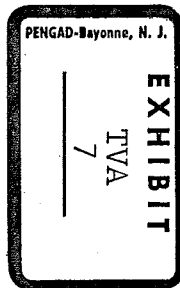
I hereby certify that I have on this date served a copy via air-mail of the foregoing Application for Stay of Mandate of the United States District Court for the Eastern District of Tennessee upon Beauchamp Brogan, Esquire, Tennessee Valley Authority, Knoxville, Tennessee.

  
Wallace L. Duncan  
Counsel for Petitioners

November 13, 1973

**ANNUAL REPORT  
OF THE  
TENNESSEE VALLEY AUTHORITY**

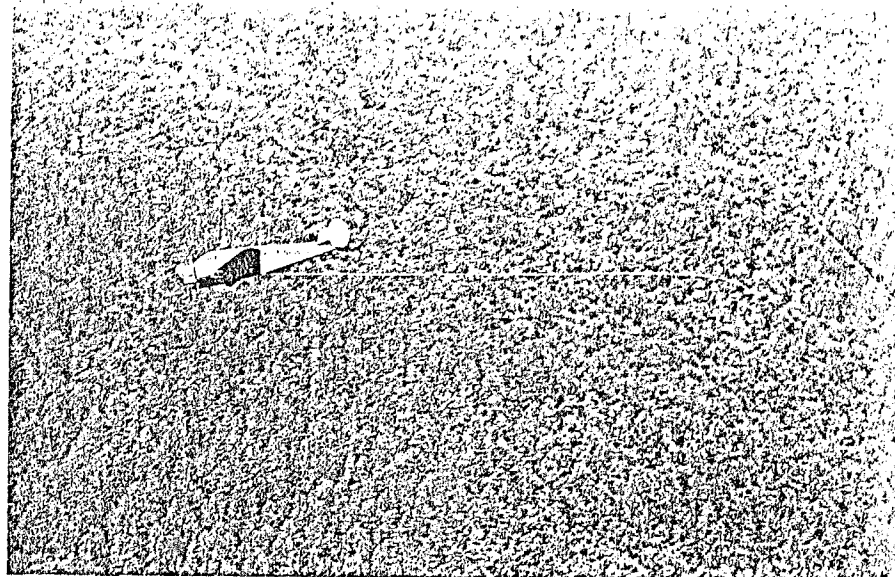
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**VOLUME I - TEXT  
FOR THE FISCAL YEAR ENDED JUNE 30, 1973**

For sale by the Treasurer, Tennessee Valley Authority  
Knoxville, Tenn. 37902 Price 50 cents





This TVA plane, trailing an aeromagnetic sensing device, is surveying parts of middle Tennessee and western North Carolina this year in a geophysical mapping project with state agencies to help indicate promising areas for mineral explorations.

that will permit the data recorded on magnetic tape to be fed into a computer which will make the necessary corrections and produce magnetic maps not only superior to those made from ground observations, but much more quickly and at a fraction of the cost.

### Archaeology

TVA's archaeological program has been a long-term effort to increase man's knowledge of himself and ensure that valuable archaeological information is preserved and evaluated.

It began in 1934 when sites of Indian habitation in the area to be inundated by Norris Reservoir were carefully excavated and studied. Since then, in conjunction with other governmental agencies and area universities, archaeological investigations have been conducted in connection with many TVA reservoirs, steam plants, substation sites, and transmission lines. As a result, the Universities of Alabama, Kentucky, and Tennessee have some of the Nation's finest and most extensive collections of artifacts and other materials with which to reconstruct Indian cultures and history. TVA's initiative in the 1930's also was the beginning of a national program conducted by other agencies in connection with projects in other parts of the United States.

In 1973, the McClung Museum at the University of Tennessee continued its extensive investigations in the Little Tennessee River valley under contract with the National Park Service and TVA. Begun in 1967 as construction started on the Tellico Dam and Reservoir, this investigation has resulted in the recovery of well over one-half million



Archaeology students from the University of Tennessee carefully explore an Indian burial site in the area of TVA's Normandy Dam project on the Duck River in Tennessee. TVA was an early pioneer among Federal agencies in contracting with universities and colleges to conduct archaeological studies in project areas.

artifacts. It has identified the site of the Town or Council House in the 18th century Cherokee capital of Chota. What is believed to be the burial place of Oconastota, a noted Cherokee chief, has also been found.

In pursuing this work, TVA and the University have kept in touch with the Cherokee Nation in Oklahoma and the Cherokees of Qualla Boundary Reservation in North Carolina. An official body from Oklahoma, representing the Principal Chief, visited the project in 1972 and commended TVA and other parties involved for the archaeological work on the Cherokee sites. On May 10, 1973, a delegation of over 100 Cherokee Indians from the Qualla Boundary Reservation in North Carolina met with the TVA Board at the Chota site. Religious ceremonies were held, after which a Cherokee elder rekindled the council fire on the spot where the hearth stood over 200 years ago when the Council House was the center of the Cherokee Nation. TVA later informed both the Qualla Boundary and the Oklahoma Cherokees that the Chota site will be protected from the waters of the Tellico Reservoir, and the Council House will be restored in a manner that portrays the original structure. A cemetery will be established in which Cherokee remains removed during the archaeological investigations will be reburied.

Other important archaeological developments:

1. Archaeological investigations conducted by the University of Tennessee in the Normandy Dam and Reservoir area of TVA's Duck River project revealed several large house structures built during the late Woodland period (500 A.D.-900 A.D.). They were considered important because they filled gaps in man's knowledge of this period in the Southeast.

2. Work at the proposed Columbia Dam and Reservoir area, also part of the Duck River project, disclosed a site approximately 500 yards long which may contain the remains of a Paleo-Indian camp. (The Paleo-Indian period extended roughly from 20,000 B.C.-10,000 B.C.). If further investigations confirm what appears from surface material, this would be an extremely significant find.

3. Archaeological investigations in the Bear Creek watershed area, conducted since 1967 by the University of Alabama, uncovered a large stone mound containing remains of human cremations, pottery and pipe fragments, and other intentionally burned and deposited artifacts. Evidence indicates a mortuary practice not previously defined for this area.

4. Excavations by the University of Tennessee at TVA's Watts Bar Nuclear Plant site uncovered six to eight levels of occupation dating back to 1200 A.D.

5. One of the transmission line surveys resulted in the discovery of a Mississippian town in the Black Prairie area of northeastern Mississippi, the first such town site located in this area.

6. Intensive archaeological investigations were started in May 1973 at the Widows Creek Steam Plant in northeastern Alabama where a new ash pond is being constructed in conjunction with installation of a sulfur dioxide scrubber system. At one site, an unparalleled sequence of Woodland occupation ranging roughly from 1500 B.C. to 900 A.D. is evident. Occupational remains extend to a depth of eleven feet below the present ground surface.

An archaeological consulting board comprising three outstanding archaeologists advises TVA concerning its archaeological program.

June 29, 1979

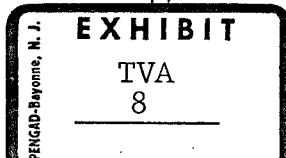
Qualla Civic Center

Members Present: Woody Blaine Sneed  
Bob Blankenship (Tribal Planner)  
Bill Fields  
Dwayne King  
Bennett Graham (Rep. TVA)  
Jim Ryan (Park Service)  
Joe Watkins (Inter-Agency Archeologist)  
Roger Millan (Great Smoky Mtns. National Park)

Tish Oliveiras

Mr. Sneed called the meeting to order on the American Indian Religious Freedom Act of 1978. One of a series of consultations that a Task Force from the Executive Branch of Government is held to run the country with Indians to hear from Indian Tribes, how they have problem with Federal agencies practicing traditions, having access to religious sites, protecting religious objects and artifacts and other things that relate to their culture. We're meeting here in Cherokee, North Carolina today. The Southeastern Tribes have been invited and have representatives from the Park Service, TVA, BIA, Historic Preservation Trusts from the Department of the Interior.

Dwayne King - The constitution of the United States guarantees religious freedom for all Americans. American Indians are the only ethnic group which special legislation has been passed to affect their religious rights. The reason for this is that American Indians are the only group whose rights have been infringed upon by United States Government policies. In 1887 the Dolls Act which had the purpose of alienating Indians from their land, had in it a religious crimes code which divided up the reservations among various missionary groups. It also forbade American Indians from practicing their native religion. It was alright for non-Indians to practice native religions but not for Indians. The rationale behind this was since American Indians were not citizens they did not have any rights. However in 1924 all American Indians became citizens of the United States, at least in theory entitled to all the privileges of their own. All religions consist of belief and rituals. The rituals are the over expressions of beliefs. In traditional Cherokee culture rituals have been suppressed by two centuries of intent contact with the dominant society which had little tolerance for ideas that different from the tone. However the beliefs and values of traditional Cherokee culture have survived and are still strong today. The idea of harmony with nature, the idea of sharing with others, the Cherokee concept of Duyukhta. Righteous, upright, doing the right thing. But it reflects a traditional Cherokee concept of the norms of the society, and this concept still is maintained whether or not its described (using that word) but in the center of Cherokee values is the idea of showing reverence with things sacred and part of the things that are sacred are sights, with geographical boundaries. In the early part of the 18th century the Cherokees controlled 40,000 square miles of land in eight present southeastern states. In that vast territory there were a few spots that were considered sacred. One of these was a habitation site on the Little Tennessee River, which between 1753 and 1788 was the political capital of the Cherokee nation. This site called Chota was also a town of refuge, peace town. Any one who committed a crime could go there and avoid punishment. It was considered sacred in the 18th century and recognized as such, not only by the Cherokees but also by the Whites as well. This town is in the literature from the 18th century on is described as a sacred location. (The location of the site is in Monroe County, Tennessee) In 1819 the land which Chota and other 18th century sites of the Little Tennessee River were occupied, this land was deeded to the Federal government and during the early 19th century the policy of the Federal government was to systematically extinguish Indian title to land east of the Mississippi River. So this land session was won in a series of 36 that the Cherokees made between 1721 and 1835. The last one The Treaty of New Echota which was signed on December 29, 1835 ceded the entire remaining Cherokee territory east of the Mississippi. So within a period of a little over a



century the Cherokees went from the status of the largest land holders in the eastern United States to bury and impoverish people moving to distant wilderness in the West or hiding out in the mountains in Western North Carolina. But the land that Chota situated on even tho it was ceded never became less sacred. The first time that I worked in the Little Tennessee Valley in 1969 I heard stories from the local whites about Cherokees visiting the Little Tennessee Valley as early as the 1880's, collecting reeds for baskets and also apparently making pilgrimages to the sites that they considered to be sacred. Since 1819 the Cherokees have been denied access to these locations because of private land ownership and in recent years because of federal ownership TVA. TVA has been very cooperative and very receptive as to the Cherokee cinamas in this matter. The Tribe has been opposed to the innovation of the Tellico Reservoir because of the sacredness of these sites and the Tribe has been a party to the lawsuit against it TVA which has run the full gamut of the court system and a decision of the Supreme Court was handed down in June of 79. The day before the Supreme Court decision came out we were in David Freeman's office, the Chairman of the Board of EDA, Bob Blankenship, John Crowe, Mr. Muskrat, Ed Taylor, all expressed the Cherokee sentiments on this issue. Mr. Freeman was very receptive and very understanding of why the Cherokees felt so strongly about this matter. This was prior to the Indian Religious Freedom Act, a joint resolution of congress which was passed in August of 78 seemed to offer some additional hope that the Cherokee claim that these sites were sacred. It might have some polity of guaranteeing access to the sites by Cherokee people and preserving these sites for the future. As I read the joint resolution of Congress it makes it clear that the sites are considered sacred include not only locations of ritual significance but also sites that I think include cemeteries. All of these 18th century Cherokee towns on the Little Tennessee River do include cemeteries. By that I would suggest that the law or the intent of Congress applies not only to locations where rituals take place but also cemetery sites of which include all of these. In May of 1979 the Tribal Council passed another resolution concerning the Tellico Project. This one dealt specifically with the issue of the sacredness of these sites. The Tribal Council feels that the preservation and the access to these sites is essential to the cultural integrity of the Cherokee people and has called upon the Tennessee Valley Authorities to acknowledge this and to offer whatever help it can in guaranteeing access and also guaranteeing that these sites will be preserved for future generations. In recent weeks I attended two meetings with other directors of Native American Museums and on the agenda was this particular piece of legislation which was the utmost concern of many Indian groups across the country. I also talked with two attorneys for the Native American Rights Fund, Walter Ecklehawk in Denver and had several lengthy phone conversations with Kirk Bluedo who is also concerned about the situation the Cherokees are faced with. He sent me a copy of a report that the TVA prepared concerning this particular piece of legislation. The Native American Rights Fund attorneys feel that TVA has been one of the more cooperative federal agencies insuring that this particular act is complied with. I think this is especially encouraging for us since TVA seems to be the primary federal agency that is going to be concerned with the Cherokee problem.

Bill Fields asked Mr. King how many sites there were? Dwayne - There are at least 12, 18th century sites that would be affected by the Tellico Reservoir.

Tish asked if all of these sites had burial cemeteries on them? Dwayne - As far as I know there has been archeological work conducted at all of the sites. With the exception of Kahatee, on the Tellico River which was a late 18th century site burials have been formed.

Joe asked what burial sites had been excavated? Dwayne - At Kahatee there were no burials encountered but it appears that there was a very small population there for a very short period of time, but there are some unmarked graves in the Corn Castle Church yard which is just a short distance away which might be connected with that site.

Joe asked Dwayne how he thought the burial sites should be handled?

Dwayne - I think this is up to each individual tribe and this is something that is of great concern to the tribal leaders and something that has not been worked out fully with TVA of the University of Tennessee.

Woody - Is that assuming that that will be built? Bob - It won't be built.

Bill - Even if it won't be built they will still want them re-intered.

Bob - They want to go ahead and put them back so that's a worthless problem again.

Woody - No objections to excavating for preservation of religious artifacts or cultural artifacts as long as the bodies are re-intered.

Dwayne - In 1978 excavation of burials in lower Tennessee Valley was stopped at the request of the Tribe so some archaeological work was conducted. After that at Ceticco burial pits were encountered but they were not excavated.

Tish - If the area is flooded do the Cherokees want the burials moved or to be flooded?

Dwayne - I don't think anybody in the Tribe has accepted the possibility of it being flooded. In that originality I would think that preference would be for something like national cemetery.

Tish asked if any special handling would be required? Dwayne - Yes. Tish - Some tribes have expressed concern that burials should be handled ceremonially.

Bob - This statement that Dr. King has made does not only represent his view personally but also as Director of the Museum and Cultural Center in which it preserves the past, present and future and also it is a tribal position meaning that he and I were appointed by Tribal Council to represent the area of Tellico.

Joe asked what he wanted with the burials where those bodies are already in possession or in storage. Dwayne - They should be re-intered.

Woody asked if Tish would like to bring us up to date on TVA's discussion about Cherokee concern.

Tish - I think there is probably pretty much to say. I met with Dwayne, Bob, Dan M. about a month or so ago and discussed this very thing. TVA is working out the policy of the re-burial of the human remain. It is the intent that of course pending on, we don't know yet which way the reservoir will go, but at any rate I believe that the demonstrable Cherokee burial will probably be re-intered. TVA has made a commitment to this tribe.

Dwayne - One of the burials that was excavated at the site of Chota was believed to be Ocomasdota. I think TVA has some plans to erect an appropriate monument over his grave, is that correct? Between 1710 and 1783 and in 1760 after the massacre of the Fort Loudon - Garrison he ordered all of the bones of the victims to be buried out of respect for human remains and his remains have been out of the ground since 1969 which is a decade. The time has come to show respect for his remains and get him back in the ground as quickly as possible.

Woody asked who was at war? Dwayne - The Cherokees and the British.

Bob - If they don't have no sacredness to save could they save the regular land itself?

Dwayne - No that should be addressed. When James Mooney visited the Eastern Cherokee reservation in the 1880's He surprisingly found myths or sacredness concerning the Little Tennessee Valley. In fact the Cherokee equivalent to the Jonah and the Whale story about a man being swallowed by a large fish according to Cherokee tradition it took place in the Little Tennessee River out from the town of Touka. In fact the town Touka comes from the Cherokee word for the mythological fish Dakwa, which was also used in translating the Bible, used for the word whale in the Bible. So that spot in the river has significance in the Cherokee sacred mythology. Between the sites of Chota and Citico is a bluff, which according to myths and James Mooney collected of the giant hawks which also figure prominently in Cherokee mythology. So in addition to the habitational sites in the cemeteries in the Little Tennessee Valley there are other locations which have sacred significance and beliefs.

Bill asked if they had that place vacant? Dwayne - The site is located and it has been excavated. It's in Monroe County, Tennessee, the second town downstream from Chota. The town in between Chota and Touka is Tanase which gave its name to the state of Tennessee, that was the capital of the Cherokee nation between 1721 and 1730. So that site should have some significance for the state of Tennessee in addition to whatever significance it has to the Cherokees.

Woody - That may conclude our discussion about Tennessee Valley, TVA and the Cherokees. Since we have so many Park Service representatives here does anyone from Cherokee have anything that they would like to address to them?

Bob - I don't know if it's religion or sacred is the gathering of the ramp annually for the Cherokees. This past year we did have some problems with the park service. They were going to limit one person to 12 ramps or something. I think that the Chief met with the Superintendent and they worked out something. That is almost a religion of the Cherokees, the gathering of ramps.

Tish - But you were able to work out something agreeable? Roger - as far as we know that's right.

Joe asked what a ramp was? Bob - It's a member of the lily family. It's like a leak it grows wild in the mountains. About March or April you'll smell it on the people, it has quite an odor to it. They eat it raw or either they cook it.

Tish asked if it had ever been used ceremonially? Woody - They eat it at the festival.

Bill asked if there was a season on squirrels where you had to wait a certain time of the year to get them?

Bob - The tribes ruled so far on reservation lands are pretty flexible, they've been able to hunt any time the meat was good. They have adopted some rules of their own recently. We're in the process but I don't think they're enforcing them.

Woody - I'd like to ask if anybody knows why it was proposed a limit on ramps be placed less?

Jim - Actually the limit has been part of our management policy for a number of years not just for the Cherokees but for many other citizens. I think the problem came in the definition of a mess. We didn't know what a mess amounted to and no one else had told us until we had a discussion with the members of the Tribe. We became aware of the fact that there was a real problem here in quantity.

Woody - I would guess that when the Tribe collects ramps for its festival that that would not, a mess, or certainly not as 12 ramps per individual in the area they might want to gather them, which is to say that probably you can provide ramps to the Tribe without exceeding that 12 per individual limit except for management purposes.

Jim - I think the gathering is not described on the basis of a festival as much of that to satisfy individuals or individual families.

Woody - You wouldn't want one person going in there and gathering up a truck load for example, you have to prevent that.

Jim - We have plants, in terms of park management are treated broadly and the preservation of them. That's the origin of the exercise of control in terms of quantity. Now we better understand what the individual needs are.

Bob - I don't know of any that's not inside the park.

Woody - I guess they go to seed don't they, and if you don't gather them then they replenish themselves. If they are all pulled when they're young, then you wouldn't have a ramp crop next year.

Tish asked about the Cherokees interacting with the Fish and Wildlife Commission?

Bob - The Tribe has its own fishing program and stocking program and they charge a license fee.

Jim asked if there were any ceremonial sites in the Park that they should be aware of?

Bob - I'm not aware of any. There could possibly be some.

Bill - I think that it would be a good idea if these points are documented, or a map, some similar descriptive item that shows where the religious and sacred places, mountain tops, peaks.

Woody - Do you suppose that existing medicine men would talk about these things which may be secret to them? Is it possible to identify traditional practices that still exists?

Bob - They might talk about some and others they might not.

Meeting was adjourned.

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
NORTHERN DIVISION

AMMONETA SEQUOYAH, ET AL.

Plaintiffs

v.

TENNESSEE VALLEY AUTHORITY

Defendant

Civil Action  
No. 3-79-418

AFFIDAVIT OF JOHN E. LINN

STATE OF TENNESSEE )  
COUNTY OF KNOX ) SS

John E. Linn, being first duly sworn, deposes and says:

I am a Title Attorney employed by the Tennessee Valley Authority and have been so employed since 1964. I supervised the title work in connection with the acquisition of approximately 38,000 acres of land by TVA for the Tellico project and performed much of the title work myself. I have read the complaint which has been filed in this cause, and I have personal knowledge of the matters stated in this affidavit.

I am familiar with the lower Little Tennessee River Valley, including the area in which a number of Cherokee Indian villages formerly existed. The land on which the Cherokee villages were formerly located was ceded to the United States by the Cherokee Nation under the terms of the Calhoun Treaty of February 27, 1819. History shows that almost all of the Cherokees had moved from the Valley prior to that time, and the capital of the Overhill Cherokees had been relocated from Chota to New Echota in north Georgia. The treaty reserved several 640-acre tracts to individual members of the Cherokee Nation. Two of those reservations involved lands on which Cherokee villages had formerly existed, namely, Chota and Tanasee, roughly opposite Four



Mile Creek and Mialoquo, adjoining Rose Island. My search of the county records discloses that Chota-Tanasee was sold in 1823 and 1825, and the last of these Cherokee ownerships ended in 1838 with the sale of over 900 acres at Mialoquo by Lewis Ross to Thomas McGhee. Certified copies of these deeds are attached to this affidavit as Exhibit 1. Thereafter, and until the date on which TVA began acquisition of land for the Tellico project, a span of 129 years, the land in the lower Little Tennessee Valley was privately owned and farmed by non-Indians.

  
John E. Linn

Sworn to and subscribed before me  
this 19<sup>th</sup> day of October, 1979.

  
  
Notary Public

My commission expires: 1-18-83

The second day of June in the year of  
 1827 the undersigned and hereby these presents  
 the Board of Directors of the County of Blaine  
 of the first and second of the year of Blaine  
 and State of Ohio for and in consideration of the sum of five hundred  
 and no cents to him in hand paid the receipt whereof is with this  
 acknowledgment hath and by these presents with grant bargain sell  
 conveyance and power of sale unto the said John W. Miller his heirs  
 assigns forever of parcel of land situated in the County of Blaine  
 State of Ohio containing more or less than one acre of land more or less  
 as the same is more fully described in the certificate of the Surveyor  
 General of the County of Blaine State of Ohio bearing date the 15th day  
 of July 1827.

John W. Miller  
 of the County of Blaine  
 State of Ohio  
 do hereby certify that the above  
 described premises were the  
 property of the said John W. Miller  
 at the time of his death and  
 that he has by his will devised  
 the same unto the said John W.  
 Miller his heirs assigns forever  
 of the County of Blaine  
 State of Ohio.

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8<sup>th</sup> 1851.

111. N. B. 1851

Register

Deeds  
1851  
To  
1851

The Subscribers, into the 25<sup>th</sup> day of October in the ninth year of the reign of our said Majesty Queen Victoria, the County of Bristol, and State of Devon and Cornwall, and John W. Allen of the County of Devon and State of Devon, for and in behalf of the said parish of St. Andrew, do hereby certify that the said parish is situated in the County of Devon and State of Devon, and that the said parish is bounded on the north by the parish of St. Andrew, on the south by the parish of St. Andrew, on the east by the parish of St. Andrew, and on the west by the parish of St. Andrew.

1851

of the parish of St. Andrew, in the County of Devon and State of Devon, and that the said parish is bounded on the north by the parish of St. Andrew, on the south by the parish of St. Andrew, on the east by the parish of St. Andrew, and on the west by the parish of St. Andrew. The said parish is situated in the County of Devon and State of Devon, and that the said parish is bounded on the north by the parish of St. Andrew, on the south by the parish of St. Andrew, on the east by the parish of St. Andrew, and on the west by the parish of St. Andrew. The said parish is situated in the County of Devon and State of Devon, and that the said parish is bounded on the north by the parish of St. Andrew, on the south by the parish of St. Andrew, on the east by the parish of St. Andrew, and on the west by the parish of St. Andrew.

REGISTER OF DEEDS.

I, Sue L. Tullent REGISTER OF DEEDS OF MONROE COUNTY DO HEREBY CERTIFY THAT THE FOLLOWING INSTRUMENT IS A TRUE COPY AS SHOWN BY THE RECORDS OF THIS OFFICE.

WITNESS MY HAND & SEAL THIS 24<sup>th</sup> October, 1979

REGIS 52

Sue L. Tullent

my, the reservation to them by John W. Wolf under the Treaty of 1830, the 1819-1820 also, the south most fractional quarter of section thirty five, three fractional townships in Clark County each.

Also the north east fractional quarter of section thirty five, three townships in Clark County each.

Also the south east fractional quarter of section twenty eight, three fractional townships in Clark County each of the reservation, land survey in all three hundred and ten acre, which tract of land, together with the

hundred and eighty seven, thirty one, the mill land Wolf for himself and his heirs, so to the said John W. Wolf his heirs, and assigns

with marks and former defined, against the lawful claim of all and every persons or persons whatsoever, by their heirs, as an undivided

interest in said lands.

In testimony whereof he the said John W. Wolf hath hereunto set his hand, and seal, this day and year first above written

signed, sealed and delivered in presence

of, Thomas Ferguson

John W. Wolf

State of Mississippi Personally appeared before me, J. R. Jackson Clerk of the Court and

Notaries Public for the County of Adams, Thomas Ferguson, John W. Wolf

the two subscribing witnesses to the within deed of conveyance, after being duly sworn and depose and say, they are personally acquainted with said John W. Wolf and the contents

herein recited, signs and delivers the same, on this day, & bears date & for the, before stated contents of the instrument.

Witness my hand at Oxford, Mississippi this 28<sup>th</sup> day of Oct: 1879 J. R. Jackson (Clerk)

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
NORTHERN DIVISION

AMMONETA SEQUOYAH, ET AL.

Plaintiffs

v.

TENNESSEE VALLEY AUTHORITY

Defendant

Civil Action  
No. 3-79-418

AFFIDAVIT OF ROSS O. SWIMMER

STATE OF OKLAHOMA )  
COUNTY OF CHEROKEE ) SS

Ross O. Swimmer, being first duly sworn, deposes and says:

I am the Principal Chief of the Cherokee Nation, which consists of over 50,000 members with headquarters in Tahlequah, Oklahoma. I am also an attorney and am president of the First National Bank of Tahlequah. I have read the complaint which has been filed in this matter, and I have personal knowledge of the matters stated in this affidavit.

The Cherokee Nation is not a party to this suit. The United Kettoah Band of Cherokee Indians, one of the plaintiffs in this action, is a group located primarily in the counties of eastern Oklahoma. The Kettoah Band does not speak for or on behalf of the Cherokee Nation. Indeed, the Cherokee Nation has recently sued this Band for activities which we do not believe are in the best interests of the Cherokee Nation.

Similarly, the Eastern Band of Cherokee Indians, located at Cherokee, North Carolina, is not a part of the

Cherokee Nation, and it does not speak for or on behalf of the members of the Cherokee Nation. See Eastern Band of Cherokee Indians v. United States and Cherokee Nation, 117 U.S. 288 (1886).

The allegation of the individual Cherokees in the complaint that this action is on behalf of "all those present or future Cherokee Indians who practice the traditional Cherokee religion and adhere to Cherokee Indian religion and culture" is unfounded, since members of the Cherokee Nation centered in Oklahoma practice the traditional Cherokee religion and the Cherokee Nation, after specifically having been asked to do so, has declined to participate in this suit.

The Cherokee Nation has been aware for many years of TVA's plans for the former Cherokee village sites in the Tellico Project area. TVA and The University of Tennessee have worked with the Cherokee Nation and solicited our participation in formulating those plans. We commended them for the archaeological work being done at these sites. Principal Chief W. W. Keeler, my predecessor, sent a subcommittee from the Cherokee Nation to inspect the archaeological work at some of these sites on April 10 and 11, 1972. TVA's plans, which include the preservation of the historically significant site of the Townhouse of the 18th Century capital of the Overhill Cherokees at Chota, were explained to the subcommittee. The report of the subcommittee, prepared by Colonel Martin A. Hagerstrand, is attached to this affidavit as Exhibit 1. The report states that the purpose of the visit was to:

observe the activities of TVA with respect to archaeological investigations and preservation plans involving the ancient Cherokee historic sites along the Little Tennessee River; to assess the commitment of TVA to such identification and preservation; to analyse to the extent practicable any pertinent factor involved in the current controversies regarding future development of the Little Tennessee River; and to make recommendations to the Committee with respect to the controversies surrounding this development.

The subcommittee concluded that there was "no rational basis for further injecting the Cherokee Nation or Cherokee people into the controversial questions involving further development by TVA of the Little Tennessee River basin" and that the "TVA organization and The University of Tennessee, along with the National Park Service should be commended for efforts to date to explore and develop those identifiable Cherokee historic sites and to recover satisfactory evidences of the Cherokee past." This report was adopted by the Committee and by Chief Keeler on behalf of the Cherokee Nation as its official position on the matter, and it continues to be our position today.

There are a number of areas in the Eastern United States, including many former Cherokee village sites, which are historically and culturally significant to the Cherokee people, and which will not be affected by the Tellico project, particularly the capital at New Echota, Georgia. Before TVA acquired the lands involved in the Tellico Project, the Cherokee people had only limited information about the history and culture of their ancestors in the Tellico project area, and the locations of the various town sites in the vicinity were known only in a general way. The land in the Tellico area was privately owned by non-Indians until TVA acquired it, and the Cherokees have had no access to the area since the early 1800's, either individually or collectively.

Although few of us have visited the Tellico area, we are grateful to TVA, because when it acquired the land for the Tellico project, it caused extensive archaeological work to be performed in the area. This led to the discovery of the exact location of several Cherokee town sites, including Chota, the capital of the Overhill Cherokees; the precise location of the Townhouse at Chota; the burial site of Oconastota, one of the Cherokee Nation's noted Chiefs, and much other culturally and

historically significant information about the Cherokee people. TVA has agreed to make a representative collection of the archaeological materials recovered available for study and display in the museum of the Cherokee Nation at Tahlequah. In addition, TVA has agreed to preserve the site of the Townhouse at Chota, and has allowed Cherokee youth to participate in the archaeological work in the area, including the removal of Cherokee burials for study. We also appreciate TVA's commitment to reinter Cherokee skeletal remains in a memorial park overlooking Chota and regard this as additional consideration of the cultural and historic traditions of the Cherokee people.

The importance of this area to the Cherokee people lies in the increased knowledge of Cherokee culture and history that has been made available to all Cherokees through TVA's efforts. If it were not for the Tellico project, much of this knowledge might never have been recovered. TVA's preservation of the Townhouse site at Chota and its putting it in public ownership for the first time affords all Cherokees the opportunity to visit at will this very significant, but previously inaccessible site.

While the great majority of the Cherokee people long ago adopted the Christian faith as their religion, some Cherokees adhere to the religious traditions of our people. Just as is the case with Christians, it does not matter where they live or worship. A Cherokee who follows the religious traditions of the Cherokee people is not required by those traditions to visit any particular place or area in the eastern United States in the exercise of his beliefs. The village sites in the lower

Little Tennessee River are important to the cultural history of the Cherokee Nation, but are not a part of its religion.

\_\_\_\_\_  
Ross O. Swimmer  
Principal Chief  
Cherokee Nation  
Tahlequah, Oklahoma

Sworn to and subscribed before me  
this \_\_\_ day of \_\_\_\_\_, 1979.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_







W. W. KEELER  
PRINCIPAL CHIEF  
118 SO. DEWEY  
BARTLESVILLE, OKLAHOMA

CHEROKEE NATION

EARL BOYD PIERCE  
GENERAL COUNSEL  
P. O. BOX 498  
FEAT BRASSON, OKLAHOMA 74433

April 17, 1972

Honorable W. W. Keeler  
Principal Chief, Cherokee Nation  
c/o Phillips Petroleum Co.  
Bartlesville, Oklahoma 74003

Dear Chief:

I am pleased to transmit herewith photocopy of  
the Report of the TVA Sub-Committee of April 14, 1972.

Copies of same are being mailed this date to the  
Members of the main Cherokee Nation TVA Committee with  
the suggestion that if any Member of the main Committee  
desires to take an exception to any statement made in  
the Report that they either phone or write me immediately.

If within three days of the mailing of this Report  
to you no exception has been taken, it is my wish that  
you consider this Sub-Committee Report as the Report of  
the main Committee. I will phone Mr. Angel on Friday of  
this week to announce the receipt of any objection.

Speaking for the full Committee, we wish to thank  
you for this opportunity to serve the Cherokee Nation.

Sincerely,

*Earl Boyd Pierce*  
EARL BOYD PIERCE  
General Counsel and  
Chairman of the Cherokee  
Nation TVA Committee

EBP:lmw

Enclosure

## R E P O R T

TO: The Cherokee Nation TVA Committee  
FROM: The Cherokee Nation TVA Sub-Committee  
DATE: April 14, 1972

On February 13, 1972, you elected a Sub-Committee to visit and observe at first hand the situation with respect to ancient Cherokee historic sites on the banks of the Little Tennessee River development area.

Because of the limited resources of the Cherokee Nation, a request was made to the TVA for transportation which was provided by that Authority to and from Knoxville, Tennessee. Committee Members and others who made the trip are as follows:

Johnnye Chopper, Jay, Chairman; Rex Presley, Mrs. Marion Hagerstrand, Mr. Oscar Welch, all of Tahlequah; and Miss Annie Meigs of Fort Gibson; and Mr. Hiner Doublehead of Stilwell. In addition the following persons accompanied the Committee: Mr. Earl Boyd Pierce, General Counsel, Cherokee Nation, and Chairman of the main TVA Committee; Dr. and Mrs. Robert Collins of Muskogee (guests of Mr. Pete Claussen, TVA Attorney); and Colonel Martin A. Hagerstrand, Executive Vice President, Cherokee National Historical Society and student of Cherokee archaeology.

The Sub-Committee departed from Muskogee at 8:15 a.m., Monday, April 10, arriving at Knoxville at 11:45 a.m. TVA Board Member Don McBride, and TVA Attorney, Pete Claussen, accompanied the Committee en route to Knoxville. We returned April 11th at 7:30 p.m.

After an orientation covering the developments on the Little Tennessee River, the Committee toured the length of the River by air, noting those identified historic Cherokee sites, as well as construction progress on the project.

The following day, the Committee toured the area by car visiting some of the historic sites, including the restored historic Fort Loudon and the site of ancient Chota. The purposes

Report to Cherokee Nation TVA Committee  
Page 2  
April 14, 1972

of the visit as identified by your Sub-Committee were to observe the activities of TVA with respect to archaeological investigations and preservation plans involving the ancient Cherokee historic sites along the Little Tennessee River; to assess the commitment of TVA to such identification and preservation; to analyse to the extent practicable any pertinent factor involved in the current controversies regarding future development of the Little Tennessee River; and to make recommendations to the Committee with respect to the controversies surrounding this development.

The Sub-Committee was briefed by various specialists and by representatives of the University of Tennessee regarding Cherokee historical research. The history of TVA development in the area was presented, along with the record of five years of TVA interest and investment in archaeological investigations along the River.

It is the judgment of the Sub-Committee that all presentations were factual and objective, as well as open and fair. Questions asked were answered with complete candor in so far as could be determined. Economic factors behind the proposed development were outlined along with proposed future plans. The bases for opposition to further development were enumerated. We reviewed by slide presentations and discussion a partial record of archaeological excavations in the area to date and saw some of the articles recovered and in the custody of the McClung Museum of the University of Tennessee.

In final conference with Mr. A. J. Wagner, Chairman of the Board of TVA, Board Member Don McBride, Mr. Robert H. Marquis, General Counsel, R. Lynn Seeber, General Manager, and other TVA managerial representatives, along with Dr. Alfred K. Guthe, Director of the McClung Museum, University of Tennessee, who is in charge of archaeological investigations on the Little Tennessee River, it was stated and agreed by TVA that (1) archaeological investigations would be continued; (2) the sites of Fort Loudon, Tellico Block House, and Chota could be and would be protected by appropriate means for future development; (3) mutually satisfactory arrangements could be made regarding custody and display of appropriate artifacts important to the Cherokee Nation.

Report to Cherokee Nation TVA Committee  
Page 3  
April 14, 1972

CONCLUSIONS:

1. Representations by TVA to the Committee and Sub-Committee appeared factual, objective and candid.
2. Based on the breadth and depth of the facts presented to the Sub-Committee regarding the extent of TVA past and present interest in historical aspects involved, the visiting Cherokee Sub-Committee found no rational basis for further injecting the Cherokee Nation or Cherokee people into the controversial questions involving further development by TVA of the Little Tennessee River basin.
3. An opportunity has been offered to representatives of those opposed to further development of the Little Tennessee basin to be heard by the Sub-Committee.
4. TVA organization and the University of Tennessee, along with the National Park Service should be commended for efforts to date to explore and develop those identifiable Cherokee historic sites and to recover satisfactory evidences of the Cherokee past.

RECOMMENDATIONS:

1. Based on findings to date the Cherokee Nation should not become involved in any way in the current controversies over future development of the Little Tennessee River basin.
2. Continuing follow-up effort should be made by the Cherokee National Historical Society to secure an adequate and representative collection of Cherokee artifacts excavated from the ancient Cherokee towns for display in the Cherokee National Museum.

The above report, prepared by Colonel Martin A. Hagerstrand, was read, considered, and adopted this 14th day of April, 1972

Johnnie Hopper (Chairman)

Martin A. Hagerstrand

ATTEST:

Carl Boyd Pierce

Bennie S. Meigs

Oscar Welch

Henry Doublehead

Pat Wesley

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
NORTHERN DIVISION

AMMONETA SEQUOYAH, ET AL.

Plaintiffs

v.

TENNESSEE VALLEY AUTHORITY

Defendant

Civil Action  
No. 3-79-418

AFFIDAVIT OF EDWARD H. LESESNE

STATE OF TENNESSEE )  
COUNTY OF KNOX ) SS

Edward H. Lesesne, being first duly sworn, deposes and says:

I am the Director of the Division of Water Resources, Office of Natural Resources of the Tennessee Valley Authority, and my office is in Knoxville, Tennessee. With the exception of some of the war years, I have been employed by TVA throughout my professional career since 1941. I became an Assistant to the Director of the Division of Water Resources in 1965 (then called the Division of Water Control Planning) and Director in 1974. As Director, I am responsible for the formulation and execution of plans, policies, and programs relating to preparation of TVA project planning reports, the surveying and mapping of project areas, cemetery relocation (including grave removal and inundation), and the conduct of archaeological and historical research programs related to TVA's projects. I have read the complaint which has been filed in this case, and I have personal knowledge of the matters stated in this affidavit.

The Tellico project planning report was formulated in 1963, and TVA's plan to construct the project was made known to the public in 1964. Construction of the project was authorized

by Congress on October 15, 1966, and the TVA Board formally approved construction on November 8, 1966. Land acquisition for the project began in early 1967, and construction started later in that year. The fact that the lower Little Tennessee River Valley had once been the site of a number of villages of the Overhill Cherokee was known by TVA, and this fact, plus the indication of earlier Indian habitations evidenced by the remains of a number of mounds, were considered by TVA in planning the project. At that time the National Park Service had the responsibility for the conduct of archaeological investigations in areas to be affected by federal water projects, including the funding of such investigations, under the supervision of the Committee for the Recovery of Archaeological Remains. At the annual meeting of that Committee on February 5, 1965, representatives of TVA advised the Committee and the archaeological staff of the National Park Service of the planned construction of the Tellico project and provided them with maps showing the project area and the general location of the village sites. Annual reports also were made to the Committee as the project proceeded. Construction of the dam is complete and the reservoir area is ready for impoundment.

#### THE ARCHAEOLOGICAL RESEARCH PROGRAM

The Department of Anthropology of The University of Tennessee was selected to conduct the archaeological research program at Tellico by the National Park Service and TVA. At that time the location of the former village sites was known only in a general way, and there were no structures, markers, monuments, or other physical evidence above the surface of the ground to indicate their precise locations. Indeed, the only evidence of Indian occupation were the remains of a few mounds which were not built by the Cherokees, but were constructed by earlier peoples of the Dallas (Mississippian) and Woodland Indian cultures, and differences in soil coloration and bone, shell,

flint, and an occasional glass trade bead brought to the surface by cultivation. Until the Tellico project area was acquired by TVA, the land had been in private ownership by whites for more than 125 years. All of the lands were a part of working farms with the majority of the area in cultivation. Access to the property was controlled by the owners, and most of the lands were posted against trespassing and hunting. Aerial photographs showing the localities in which the sites were believed to be located and typical access control signs are attached hereto as Collective Exhibit 1.

For a number of years, the subsurface record of Indian occupation, including that of the Cherokees, was being progressively destroyed by cultivation, flooding, erosion, and unscientific digging by relic hunters. The initial archaeological investigation by the University, under the direction of Dr. A. K. Guthe, was undertaken in 1967 with funding provided by the National Park Service. In 1968, when funding available through the National Park Service proved to be insufficient to finance an adequate program of archaeological research, TVA began to voluntarily supplement National Park Service grants.

As a result of the archaeological program undertaken by TVA, the precise locations of all seven of the Cherokee village sites which will be affected by impoundment of the reservoir have been determined. A great wealth of information has been obtained, including the collection of hundreds of thousands of archaeological specimens, thereby adding greatly to the knowledge of the history and culture of the Cherokee people in the lower Little Tennessee Valley. Recognition of the importance and significance of the Tellico archaeological program is illustrated by a recent article by Duane King, Director of the Museum of the Cherokee Indians at Cherokee and an affiant for plaintiff (plaintiffs' Exhibit H). Mr. King participated in the archaeological program at Citico in 1968, when 34 of 224 burials removed were identified as Cherokee, and at Chota in 1969, when



an additional 17 Cherokee burials, including that of Oconastota, a noted Cherokee chief, were excavated. Writing in Early Man, The Magazine of Modern Archaeology, Summer 1979, Mr. King points out that

Rarely do archeologists have the opportunity to compare detailed studies of bones and artifacts found in an individual's grave with historical records about that person. And, when the written records are diary notations and reports of conversations set down years after they took place, the archeological research can be highly important in verifying or even supplementing that historical record [at 17].

A copy of the article is attached hereto as Exhibit 2.

Although the earlier Dallas, Woodland, and Archaic cultures have also been extensively investigated, the former Cherokee village sites have received the most attention by the archaeologists and persons doing historical research. The former Overhill capital at Chota has been intensively investigated beginning in 1969 and ending in 1974. The location of the Townhouse was discovered, as was the nearby grave of Chief Oconastota. Expenditures for archaeological and historical research at the project, together with related expenditures for preservation of three important sites, including Chota, have exceeded \$3 million. I know of no other similar project in the United States in which so much has been spent on archaeological and historical research and preservation.

#### COOPERATION WITH THE CHEROKEE NATION

Upon receipt of a report from The University of Tennessee confirming the location of the Townhouse at Chota, TVA invited the Cherokee Nation, with headquarters at Tahlequah, Oklahoma, to confer with TVA and University officials in regard to this important discovery and the Tellico archaeological program in general. In February 1972, Mr. W. W. Keeler, then Principal Chief of the Cherokee Nation, named a committee to look into the entire matter and designated a subcommittee to come to Knoxville for that purpose. On April 10 and 11, the subcommittee

toured the area and conferred with the TVA Board and General Manager, officials of The University of Tennessee including Dr. A. K. Guthe, principal investigator for the Tellico archaeological project, and others. Plans for Chota and the possibilities for future display in the national museum at Tahlequah of appropriate artifacts important to the Cherokee Nation were discussed. The subcommittee submitted a report on the project to the full Committee and to Chief Keeler, who approved the report and the subcommittee's recommendations. Those recommendations included a commendation of TVA, the University, and the National Park Service for their efforts to explore and develop identifiable Cherokee historical sites and to recover satisfactory evidences of the Cherokee past, and a recommendation that the Cherokee Nation decline to become involved in the litigation about the project--including the former Cherokee sites, which was then pending (Environmental Defense Fund v. Tennessee Valley Authority). A copy of the report is attached hereto as Exhibit 3.

Subsequently, Colonel Martin A. Hagerstrand, Director of the Cherokee Nation's historical complex at Tahlequah, was retained by TVA as a consultant, and in September 1972 he submitted detailed recommendations in regard to the future development at Chota and elsewhere in the project area. Those recommendations have assisted TVA in planning historical aspects of the completion of the Tellico project. The Cherokee Nation will be consulted by TVA on the final decision as to the form of restoration of the Chota Townhouse and other appurtenant facilities.

#### COOPERATION WITH THE EASTERN BAND OF CHEROKEE INDIANS

The Eastern Band of Cherokee Indians with headquarters at Cherokee, North Carolina, announced its opposition to the Tellico project in early 1965, and on April 4, 1965, sent a delegation to meet with then Supreme Court Justice William O.

Douglas, Mrs. Alice W. Milton of the Fort Loudoun Association, and Dr. A. K. Guthe of The University of Tennessee to oppose inundation of the former village sites in the project area. A contemporaneous newspaper account of the meeting is attached hereto as Exhibit 4.

Notwithstanding opposition by the Tribal Council, in 1972 the Cherokee Historical Association of Cherokee, North Carolina, proposed to The University of Tennessee that the Association fund an archaeological investigation at Chota to be conducted by Cherokees under supervision of the University. The University agreed to this proposal, and TVA also approved it. The Association selected and compensated the Cherokee field crew, and the University was reimbursed for salaries, transportation, supplies, and preparation of a final report. Field supervision of the work was performed by Duane King, now Director of the museum at Cherokee. Following study at the University, archaeological material which was excavated was to be delivered to the Association for use in the museum at Cherokee. A photograph of the work in progress is attached hereto as Exhibit 5.

Continued interest by the Cherokees in the archaeological work at the Tellico project was evidenced by individual members of the Band. Worth Greene, field supervisor for the University on a number of sites, made several reports to members of the Tribal Council on the progress of the work at the project. Attached hereto as Exhibit 6 is a photograph showing Mr. and Mrs. Israel Davis of Cherokee, the adoptive parents of Mr. Greene, with him during excavation of a Cherokee burial at Chota. A number of Cherokees worked under Mr. Greene's supervision at Tanasee and Chota, during which time many Cherokee burials were discovered and removed. Exhibit 7 attached hereto is a photograph which shows Mrs. Viola Wachacha Lane, daughter of long-time Tribal Council member Mose Wachacha, excavating a Cherokee burial. Exhibit 8 is a photograph of Moses Walkingstick

and Bobby Crowe removing Cherokee burial 26 at Chota. The attached photographs in Collective Exhibit 9 show other Cherokees engaged in similar work.

At the request of the Eastern Band, a meeting to discuss the archaeological work at the project was arranged between the TVA Board and the leaders of the Band. On May 10, 1973, two busloads of Cherokees, including Tribal Council members, met at Chota with the TVA Board, officials of the University including Dr. Guthe, and others. The Tellico archaeological program was explained to the Cherokees during the meeting with particular emphasis on the investigation of the Overhill Cherokee village sites. Preliminary plans for the Chota restoration were also outlined. A photograph of this meeting is attached hereto as Exhibit 10.

As Chota restoration plans proceeded, the Eastern Band Tribal Council was informed by TVA officials of the progress of the work and allowed to comment and submit proposals. The Tribal Council officially endorsed "the Indian Project at Tellico Dam" on September 6, 1974. Chief Crowe of the Eastern Band informed me of the Council's formal approval by letter dated September 14, 1974, which is attached hereto as Exhibit 11. A photograph of a scale model showing the proposed Chota restoration which the Eastern Band approved is attached hereto as Exhibit 12, and a recent aerial photograph showing the status of construction to date is attached hereto as Exhibit 13. As this last photograph shows, the access road to the site and the parking area have been constructed, and the fill to raise the Townhouse site above the operating levels of the reservoir and for the connecting causeway to the parking area and visitors center has been placed. Riprap has been installed, and preliminary grading and clearing have been completed for the memorial park. At the request of the Eastern Band of Cherokees and with the concurrence of the Cherokee Nation, Cherokee skeletal remains will be reinterred in the park and an appropriate marker placed. The

Eastern Band has requested that the remains of Chief Oconastota be reinterred near the Townhouse restoration rather than in the memorial park, and the concurrence of the Cherokee Nation in this request will be sought before a decision is made.

Although much historical research has been performed, only limited information is available to supplement the archaeological evidence as to the shape and size of the Townhouse. The final decision as to the type of restoration has not been made at this time, and the views of both the Eastern Band and the Cherokee Nation will be considered before actual construction. Two proposed plans are presently under consideration. A cost estimate for the Chota restoration prepared in 1973 and 1974 totalled \$690,000. Although figures have not been compiled on actual expenditures to date, it is believed that total costs for the restoration when completed will range from \$750,000-\$800,000, depending upon which plan is followed.

#### TVA POLICY ON GRAVE REMOVAL AND INUNDATION

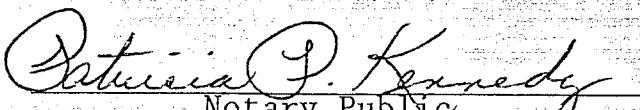
From its inception, it has been TVA's policy to relocate known and established cemeteries from reservoir project areas when persons charged with care of those cemeteries desired that they be moved. Efforts have consistently been made by TVA to locate descendants of persons buried in marked and identifiable graves to ascertain the descendants' wishes as to whether they wanted the graves relocated or left in place to be inundated by reservoir waters. Where such identification was not possible and no persons charged with caring for the cemeteries could be found, the graves were usually left in place. TVA records show that 4,947 identifiable graves in such cemeteries have been inundated in 16 reservoirs. An unknown number of unmarked additional graves were also flooded, and this number is believed to be quite large. In addition, 13,681 known graves are isolated, have no road access, and can be reached only by boat or by hiking in from the nearest public road.

It was not the custom of the Indian inhabitants of these areas to concentrate the burials of their people in defined and marked cemeteries. No individual Indian graves were marked. They were made at random and at points scattered throughout the reservoir areas, including the Tellico project area. Since the graves were unmarked and their locations could be determined only by archaeological investigations, there was no way TVA could follow the same practice as that which has been employed as to the marked and identified graves interred in known cemeteries.

TVA's procedure for reinterment is the same as that followed by the Corps of Engineers, the Bureau of Reclamation, and by private companies building similar projects. Although archaeologists and anthropologists learn much about both historic and prehistoric Indian inhabitants through the study of burial techniques, grave goods, and skeletal remains, TVA and the National Park Service have acceded to the request of the Eastern Band Cherokees that no additional Cherokee burials be removed after June 14, 1978. As previously mentioned, with the concurrence of the Eastern Band and the Cherokee Nation, skeletal remains identified as belonging to the Cherokee culture will be reinterred after study in the Chota Memorial Park.

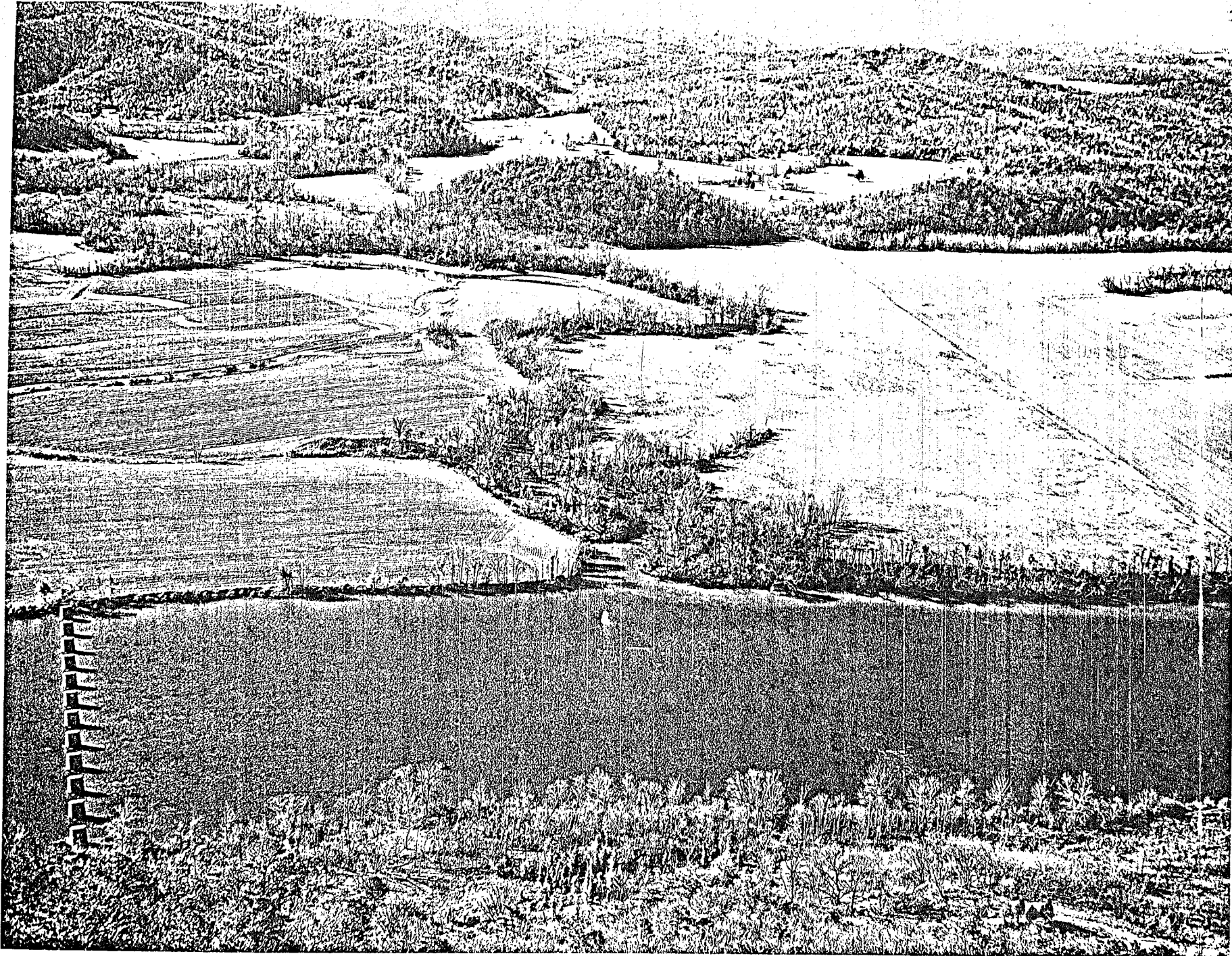
  
Edward H. Lesesne

Sworn to and subscribed before me  
this 24<sup>th</sup> day of October, 1979.

  
Notary Public

My commission expires: 5-1-81

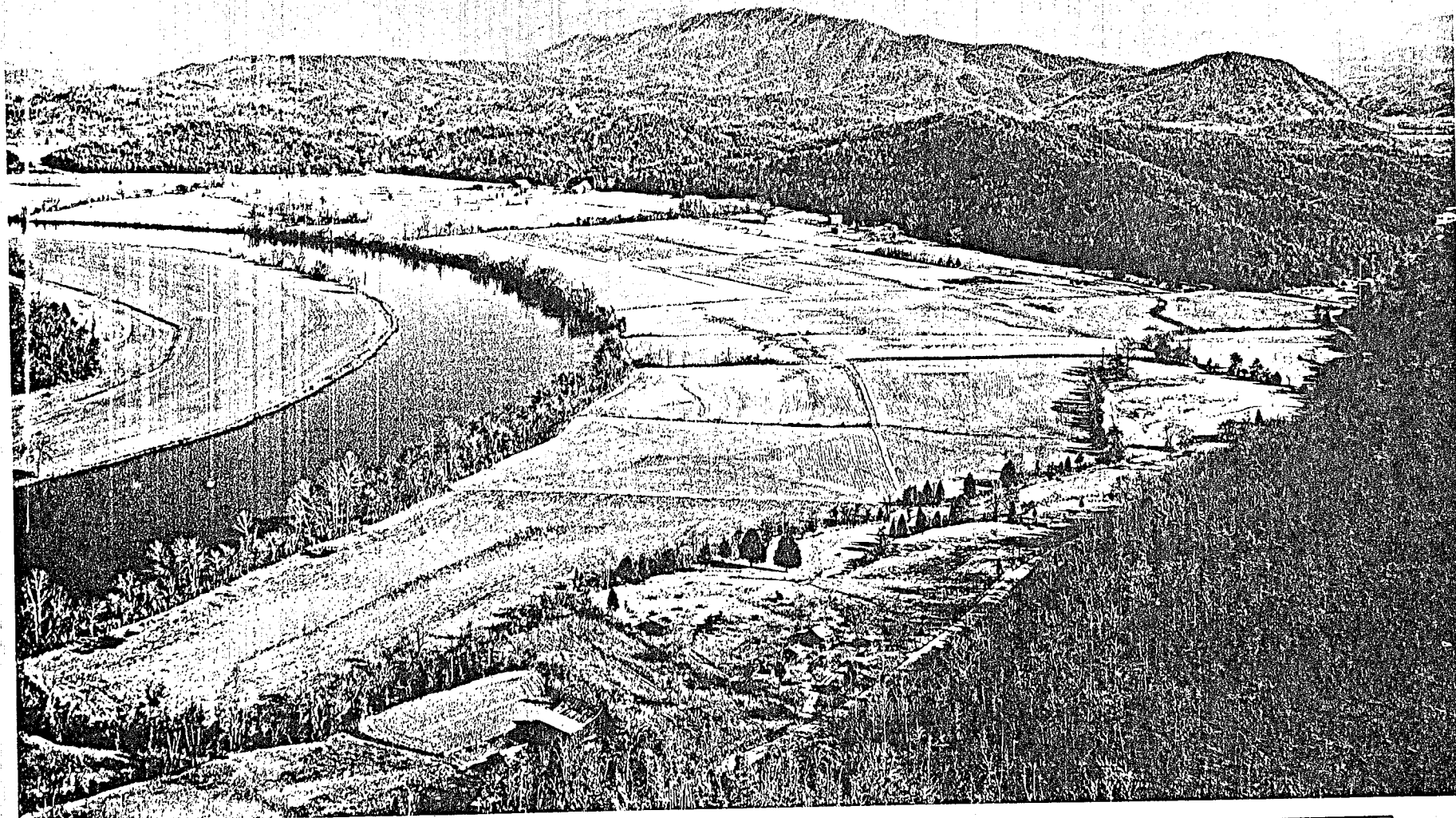
- Collective Exh. 1 Eight photographs showing areas in which former Cherokee village sites were believed to be located including two typical access control signs
- Exh. 2 Article on "Oconastota's Grave" by Duane H. King from Early Man, The Magazine of Modern Archaeology, Summer 1979
- Exh. 3 Report of Cherokee Nation subcommittee to Principal Chief W. W. Keeler, April 17, 1972
- Exh. 4 Knoxville Journal story of April 5, 1965, of meeting of Eastern Band of Cherokees with Justice Douglas
- Exh. 5 Photograph of Cherokees from the Eastern Band excavating at Chota, 1972
- Exh. 6 Mr. and Mrs. Israel Davis of the Eastern Band with Worth Greene, their adopted son, examining Cherokee burial
- Exh. 7 Mrs. Viola Lane of the Eastern Band excavating Cherokee burial at Chota
- Exh. 8 Moses Walkingstick and Bobby Crowe of the Eastern Band excavating Cherokee burial at Chota
- Collective Exh. 9 Two photographs showing additional members of the Eastern Band excavating at Chota
- Exh. 10 Members of the Eastern Band meeting with TVA and University officials at Chota, May 10, 1973
- Exh. 11 Letter to Lesesne from Principal Chief Crowe dated September 13, 1974, advising of formal approval of the Tribal Council of the Indian project at Tellico
- Exh. 12 Photograph of scale model of Chota restoration
- Exh. 13 Aerial photograph showing current status of Chota restoration



TELLICO DAM PROJECT  
Tennessee Valley Authority  
65R325-60 January 12, 1972  
Arvillee Burnette Knoxville

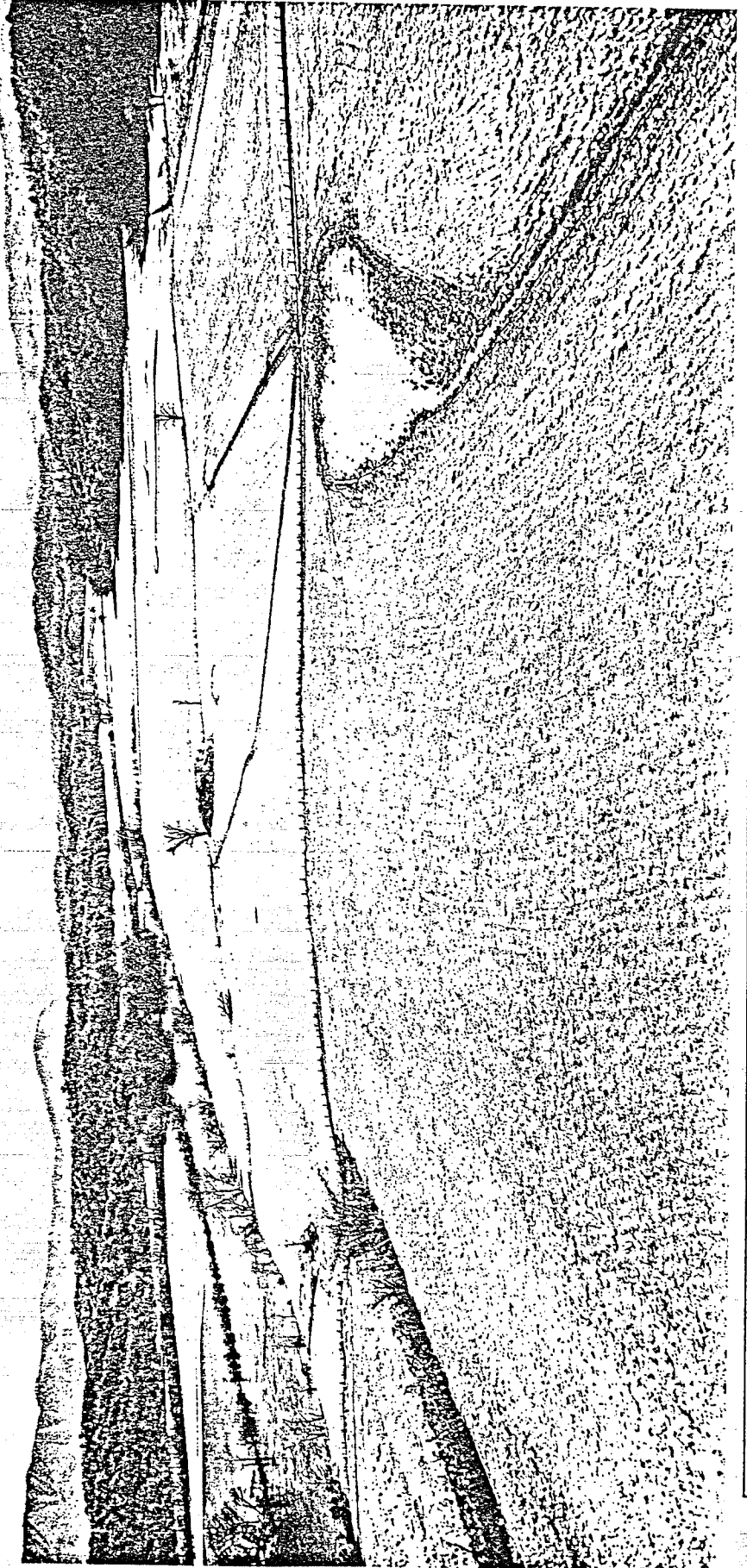
Citico (Settaco) Town Site.





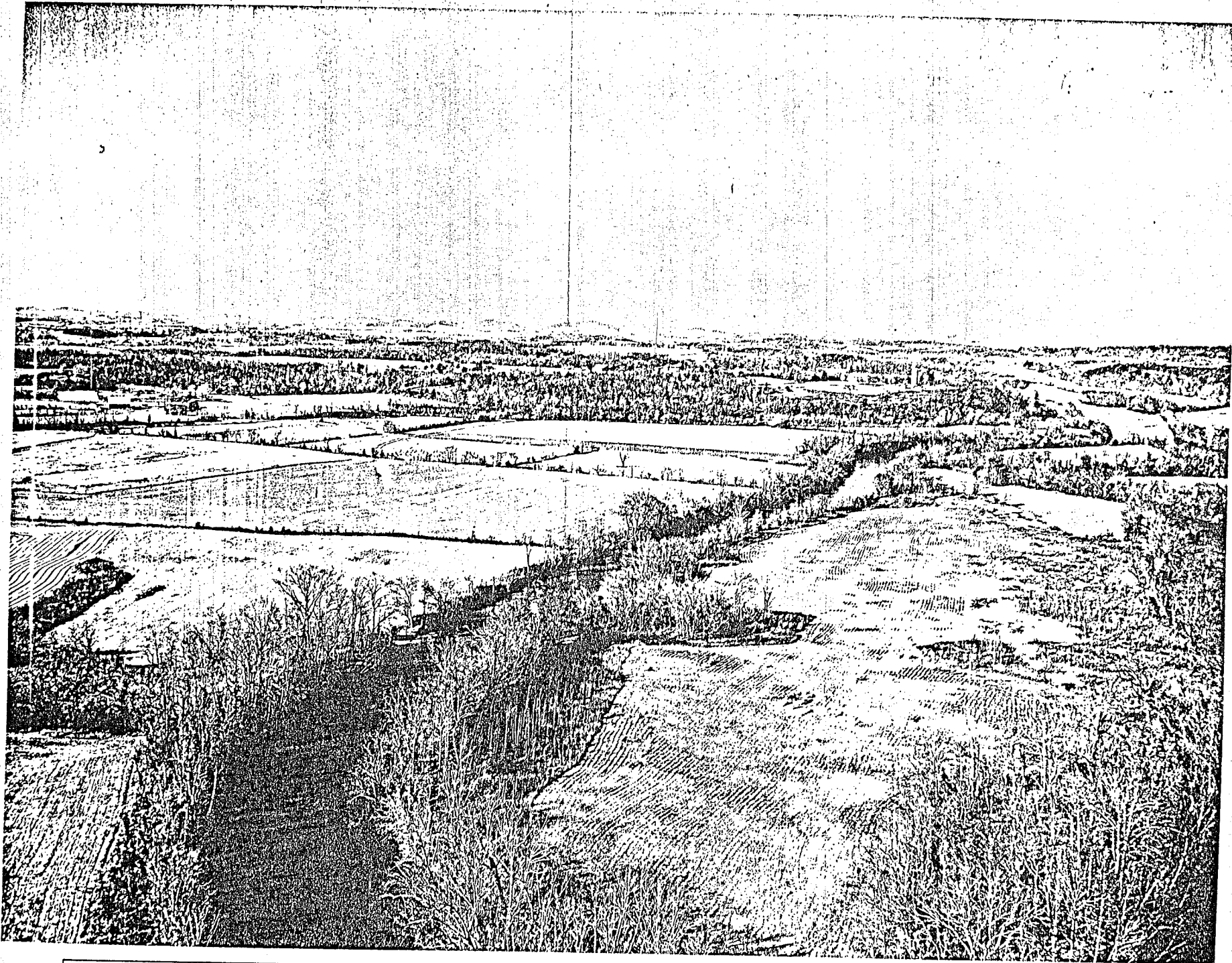
TELLICO DAM PROJECT  
Tennessee Valley Authority  
65R325-71 January 12, 1972

Little Tennessee River, Bacon Bend Area, Tennessee Chota Town Site Area.



Little Tennessee River, Toqua Town Site, Indian Mound  
Area on left bank opposite Calloway Island.

TELLICO DAM PROJECT  
Tennessee Valley Authority  
65R325-81 January 12, 1972  
Arvillee Burnette Knoxville



TELLICO DAM PROJECT  
Tennessee Valley Authority  
65R325-77 January 12, 1972  
Annie Lee Burnett, Knoxville

Little Tennessee River, Toqua Area, Tommotley Town Site.



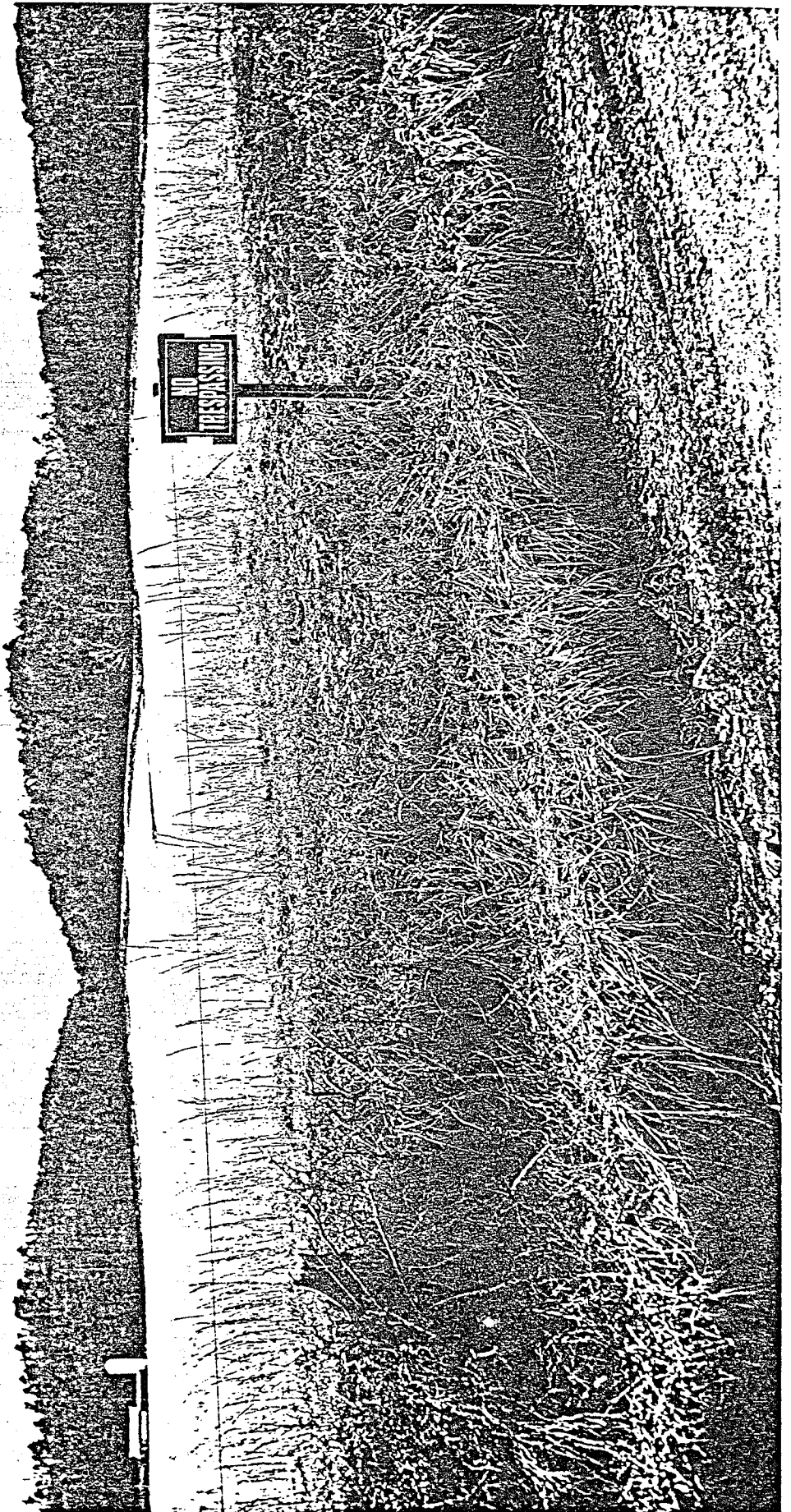
TELLICO DM PROJECT  
Tennessee Valley Authority  
65R325-85 January 12, 1972  
Aurilio Burnett Knoxville

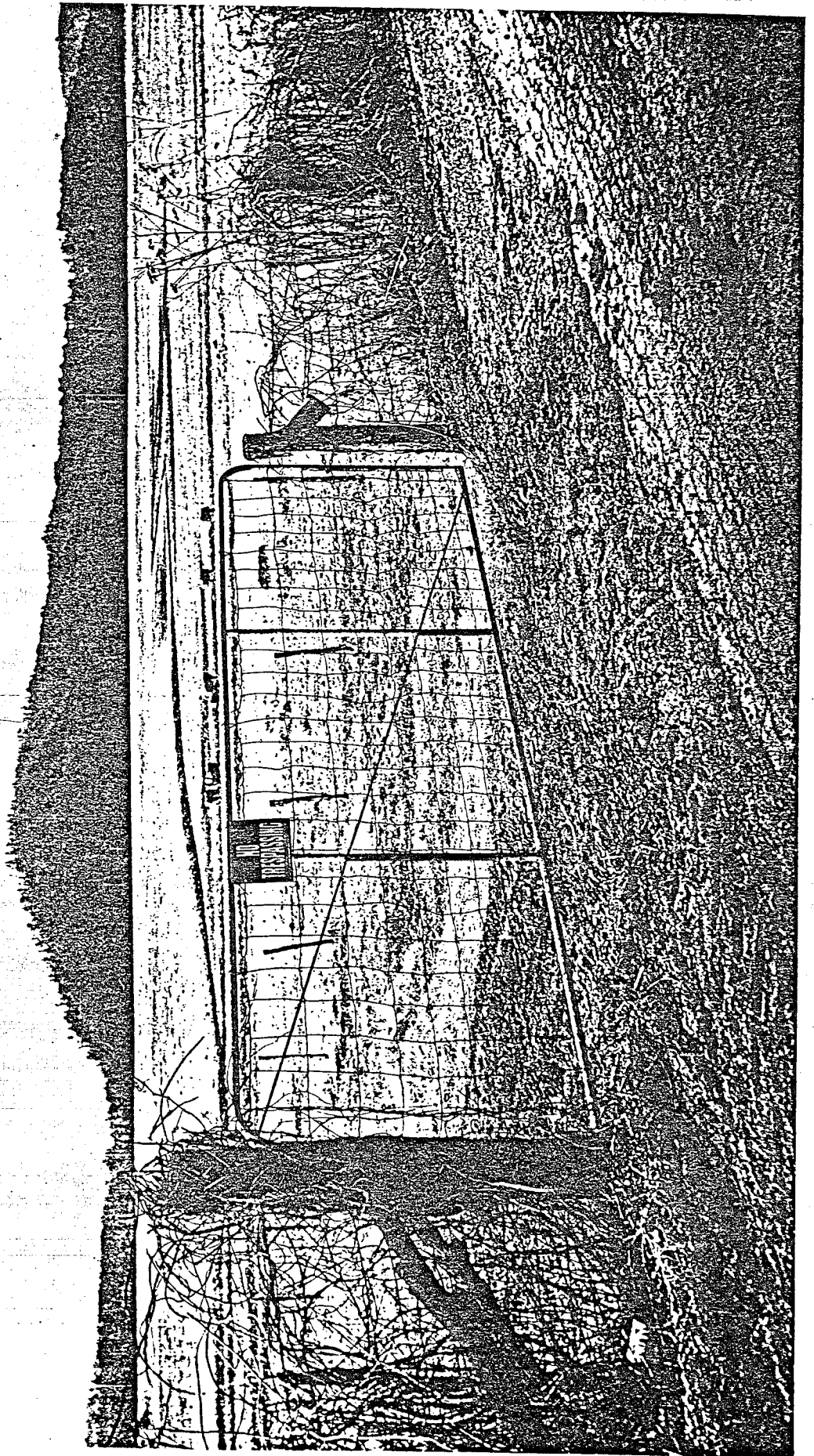
Little Tennessee River, Toskegee Town Site.



TELLICO DAM PROJECT  
Tennessee Valley Authority  
65R325-103 January 12, 1972

Little Tennessee River, Mialaqqo Town Site.





# MEMORANDUM

3

TO : [Illegible]

FROM : [Illegible]

SUBJECT : [Illegible]

DATE : [Illegible]

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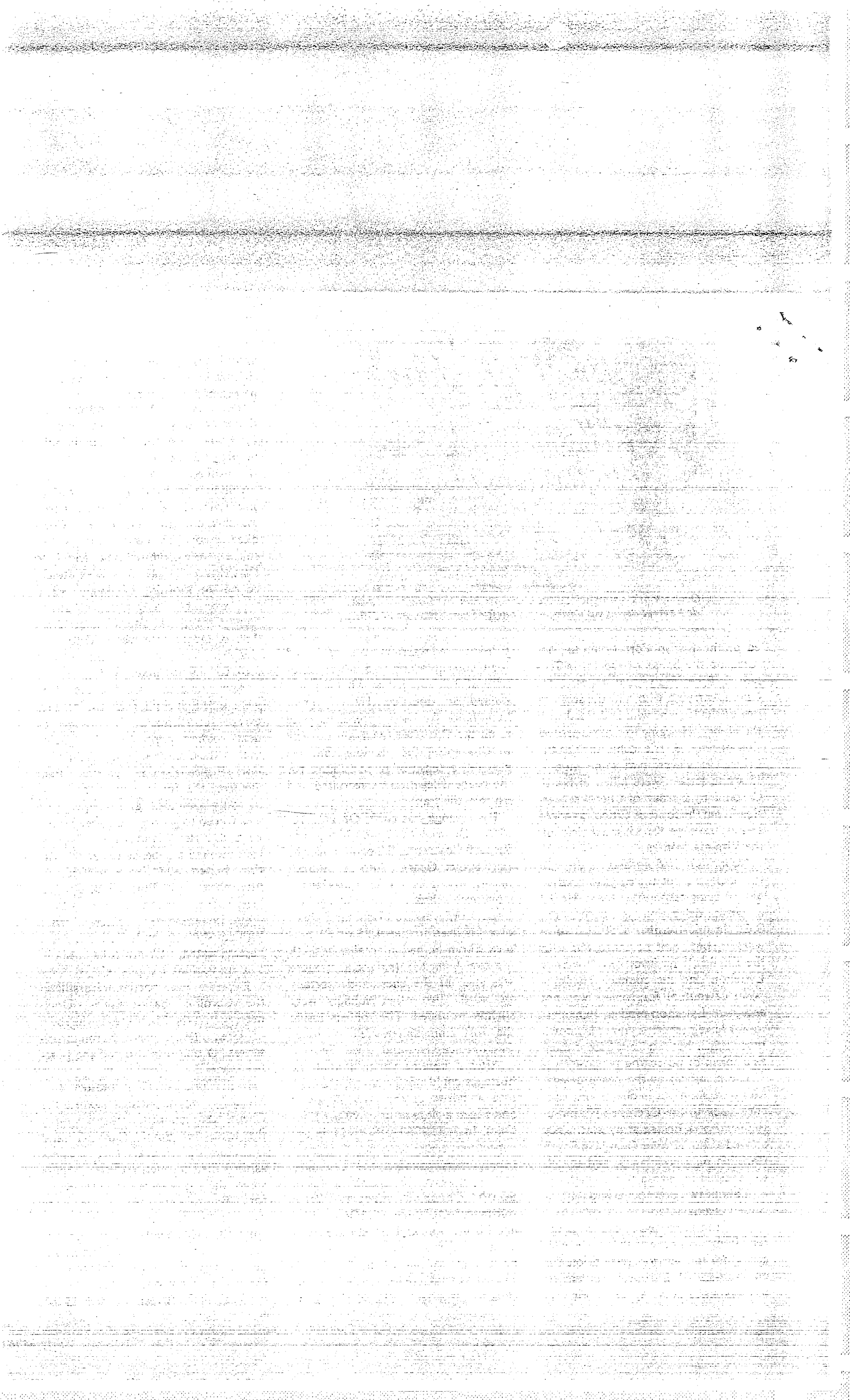
17. [Illegible]

18. [Illegible]

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20. [Illegible]





their towns, destroyed 1,500 acres of corn, and, by the account of the general in charge, "drove 5,000 Cherokees into the mountains to starve."

The war between the English and the Cherokees ended in disaster for the Cherokees, but not for Oconastota. It enhanced his power in the nation. Because of the surrender of Fort Loudoun, Oconastota had restored luster to the tarnished martial reputation of his people.

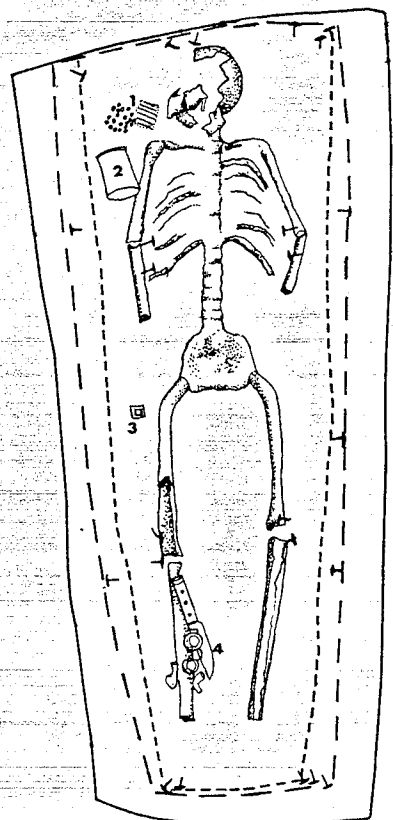
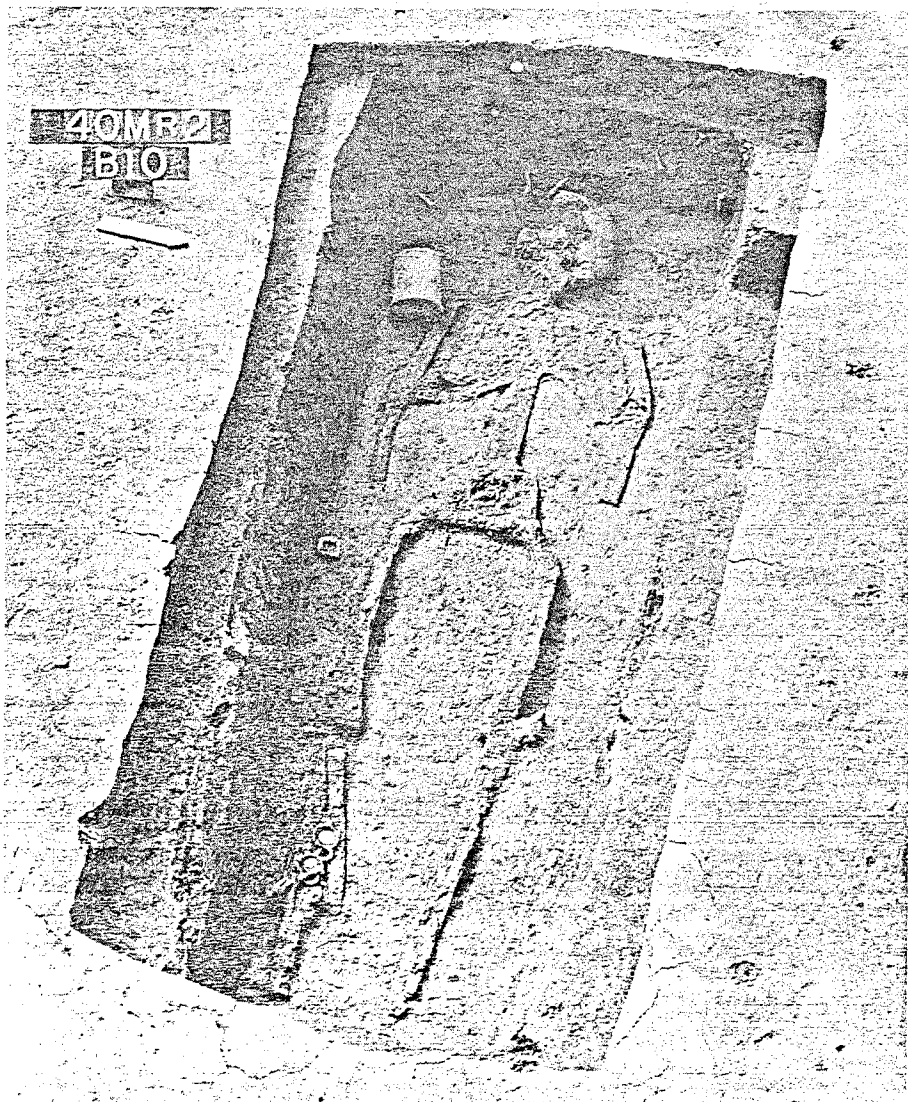
Oconastota spent most of the rest of his life in diplomatic endeavors to achieve peace between Indian tribes and with the Europeans. On March 2, 1768, at a conference in New York, Oconastota told the Iroquois deputies, "We buried the hatchet with the Senecas once, but it rose again. We now, by this belt, bury it so deep that it can never rise to hurt us, for our flesh and

blood being alike it is a pity we should kill one another." He gave a belt of white wampum to each of the six tribes as well as one from the Cherokee women to the Iroquois women and one from the Cherokee boys to the Iroquois boys.

The archeologists who excavated Oconastota's grave found evidence to compare with the historical record. First, his body was oriented three degrees south of east with the head to the west. He had asked his Indian-Agent friend, Joseph Martin, "to have him buried like the white people with his face toward the Long Knife," a name the Cherokees gave Virginia. The use of a coffin and the orientation of the body corresponded with traditional Christian burial practices of the time. The archeologists interpreted the east-west direction as pointing to the trail

to Virginia that entered Chota from the West.

One of Martin's sons related many years later that his father made a coffin for Oconastota out of an old canoe "and interred him according to his wish." Cherokee canoes were generally made of pine or poplar, some 30 to 40 feet long with flat bottoms and sides and both ends alike. There is archeological evidence to suggest that the container in which the body was found may have been a modified canoe fragment. Although the wood had almost entirely deteriorated, several iron nails used in the construction of the container were around the perimeter of the top and at the west end. There were no nails in position to indicate that the bottom, or east end, was thus fastened together. There were, however, two nails at each elbow



**KEY**

- Top of coffin
- Bottom of coffin
- T T T Nails
- 1 Beads
- 2 Iron cup
- 3 Buckle
- 4 Knife, glasses, siltstone pipes

*Burial believed to be that of Oconastota.*

and knee, apparently driven through blocks of wood into the bottom of the coffin. The intended purpose may have been to stabilize the corpse during its transportation to the grave site.

The sides and east end of the container sloped slightly toward the bottom of the pit and the width of the box increased slightly from the east end to the west end. Its height and width were similar to that of two preserved canoes from the period. One, found in 1797, is now in the McClung Museum at the University of Tennessee. The other is in the Museum of the Cherokee Indian at Cherokee, North Carolina.

No pictures were made of Oconastota during his lifetime, but physical descriptions of him consistently stressed his large size and muscular frame. The poorly preserved skeletal material in the grave suggests an individual of Oconastota's reputed stature, physique, and age. Physical anthropologists, who have examined the body, conclude that this individual was a male between the ages of 69 and 72 who stood about six feet tall. The skull is of larger than average size, and the thickness of the back of the skull indicates a heavily muscled person.

Only four extremely worn teeth remain of the original dentition. These consist of two pre-molars, an upper incisor, and a non-serviceable lower incisor. Since chewing must have been difficult for a man with so few teeth, his diet would have been restricted toward the end of his life. A microscopic examination of the skeleton revealed evidence of an affliction, osteomyelitis, which may have resulted from tuberculosis. If so, this is a new fact about the chief's life that archeologists have added to the historical record.

His last public appearance was at the treaty of Chota, Oct. 10, 1782. He was then reported to be very old and almost blind. Among the grave items was a pair of "temple" spectacles, which appear to date to the middle 1700s. Several pairs of eyeglasses may have been brought back from London by Ostenaco, Standing Turkey, and Pigeon, Cherokees who were there in 1762. Lieutenant Henry Timberlake, who accompanied the Indians, wrote, "Mr. W-the optician's bill being to the

amount, as near as I can remember, of fifty odd pounds in these costly playthings for the Cherokees."

Underneath the glasses in the burial was an iron sheath knife with a bone handle and pewter pommel. A good knife was essential to every hunter and warrior in the 1700s. Also among the grave goods was a small iron buckle, possibly from a bridle similar to the one used in the fateful signal that sealed the doom of the Cherokee hostages at Fort Prince George.

Two siltstone pipes found in the grave could have been used on Oconastota's many diplomatic missions. Certainly the string of 72 white glass beads that were placed near the right shoulder of the corpse were not intended as a body ornament. Such strings of white beads were often exchanged between the negotiating parties at treaties during the 1700s, and on several occasions in the last two decades of his life, Oconastota took part in such exchanges.

An iron cup found in the grave might have reflected Oconastota's well-known fondness for strong drink. After an aborted military expedition against the French-supporting Indians along the Ohio River, in 1756, the Cherokee Attakullakulla complained of bad omens and placed the blame on William Gerard DeBrahm, who gave Oconastota some "punch" immediately prior to his departure. DeBrahm said Oconastota drank very freely, and the warrior should have been "a better Judge of the sacredness of his martial Religion than the Author had a right to be."

The only items that belonged to Oconastota during his life that were not in the grave and have been preserved over the years were his personal papers, seized during the Sevier-Campbell military expedition conducted by the recently established United States government. This expedition destroyed Chota late in 1780. On Jan. 15, 1781, Campbell informed Virginia's Governor Thomas Jefferson, "We found in Oconastota's baggage, which were left behind in his flight, various manuscripts, copies of treaties, commissions, letters, and other archives of the Nation, from

which shews the double game that the people have been carrying on during the present war."

Among these papers was Oconastota's commission as *Captaine grand chef medaille de la fond*, secured when he concluded an alliance with the French in New Orleans after he was chained and released by the British at Fort Prince George. The commission was awarded in 1761. The document, throughout 1977, was featured in an impressive exhibit at the National Archives in Washington, D.C., *The Written Word and Doers*.

Archeological studies have their great value in clarifying the patterns, trends, and changes in people and their cultures as opposed to specific persons through the great time depth of the human past. However, in this rare instance, archeology has surpassed the impersonal level because of the available historical data. Likewise, the historical record has been enhanced by the work of archeologists.

Today, Oconastota is highly revered by the Cherokee people as one of the great leaders of the past. His story is part of Cherokee heritage and Cherokee identity. In 1760, out of respect for human remains, Oconastota ordered that the bones of the Fort Loudoun garrison be buried. Today, the hopes of many Cherokees that the bones of Oconastota will be reburied at his chosen place beside the Chota townhouse may be realized in the plans for reconstructing a small portion of Chota with funds from the TVAs Tellico dam project.

#### For further reading:

- Brown, John P. *Old Frontiers*. Southern Publishers: Kingsport Tenn., 1938.  
Kelly, James C. "Oconastota," *The Journal of Cherokee Studies*, Vol. III, No. 4, 1978.  
Williams, Samuel Cole (editor). *Lieutenant Henry Timberlake's Memoirs*. Watauga Press: Johnson City, Tenn., 1927.  
Woodward, Grace. *The Cherokees*. University of Oklahoma Press, 1962.



W. W. KEELER  
PRINCIPAL CHIEF  
116 SO. DEWEY  
BARTLESVILLE, OKLAHOMA

CHEROKEE NATION

EARL BOYD PIERCE  
GENERAL COUNSEL  
P. O. BOX 498  
FORT BRISON, OKLAHOMA 74434

April 17, 1972

Honorable W. W. Keeler  
Principal Chief, Cherokee Nation  
c/o Phillips Petroleum Co.  
Bartlesville, Oklahoma 74003

Dear Chief:

I am pleased to transmit herewith photocopy of  
the Report of the TVA Sub-Committee of April 14, 1972.

Copies of same are being mailed this date to the  
Members of the main Cherokee Nation TVA Committee with  
the suggestion that if any Member of the main Committee  
desires to take an exception to any statement made in  
the Report that they either phone or write me immediately.

If within three days of the mailing of this Report  
to you no exception has been taken, it is my wish that  
you consider this Sub-Committee Report as the Report of  
the main Committee. I will phone Mr. Angel on Friday of  
this week to announce the receipt of any objection.

Speaking for the full Committee, we wish to thank  
you for this opportunity to serve the Cherokee Nation.

Sincerely,

*Earl Boyd Pierce*  
EARL BOYD PIERCE  
General Counsel and  
Chairman of the Cherokee  
Nation TVA Committee

EBP:lmw

Enclosure

R E P O R T

TO: The Cherokee Nation TVA Committee  
FROM: The Cherokee Nation TVA Sub-Committee  
DATE: April 14, 1972

On February 13, 1972, you elected a Sub-Committee to visit and observe at first hand the situation with respect to ancient Cherokee historic sites on the banks of the Little Tennessee River development area.

Because of the limited resources of the Cherokee Nation, a request was made to the TVA for transportation which was provided by that Authority to and from Knoxville, Tennessee. Committee Members and others who made the trip are as follows:

Johnnye Chopper, Jay, Chairman; Rex Presley, Mrs. Marion Hagerstrand, Mr. Oscar Welch, all of Tahlequah; and Miss Annie Meigs of Fort Gibson; and Mr. Hiner Doublehead of Stilwell. In addition the following persons accompanied the Committee: Mr. Earl Boyd Pierce, General Counsel, Cherokee Nation, and Chairman of the main TVA Committee; Dr. and Mrs. Robert Collins of Muskogee (guests of Mr. Pete Claussen, TVA Attorney); and Colonel Martin A. Hagerstrand, Executive Vice President, Cherokee National Historical Society and student of Cherokee archaeology.

The Sub-Committee departed from Muskogee at 8:15 a.m., Monday, April 10, arriving at Knoxville at 11:45 a.m. TVA Board Member Don McBride, and TVA Attorney, Pete Claussen, accompanied the Committee en route to Knoxville. We returned April 11th at 7:30 p.m.

After an orientation covering the developments on the Little Tennessee River, the Committee toured the length of the River by air, noting those identified historic Cherokee sites, as well as construction progress on the project.

The following day, the Committee toured the area by car visiting some of the historic sites, including the restored historic Fort Loudon and the site of ancient Chota. The purposes

Report to Cherokee Nation TVA Committee  
Page 2  
April 14, 1972

of the visit as identified by your Sub-Committee were to observe the activities of TVA with respect to archaeological investigations and preservation plans involving the ancient Cherokee historic sites along the Little Tennessee River; to assess the commitment of TVA to such identification and preservation; to analyse to the extent practicable any pertinent factor involved in the current controversies regarding future development of the Little Tennessee River; and to make recommendations to the Committee with respect to the controversies surrounding this development.

The Sub-Committee was briefed by various specialists and by representatives of the University of Tennessee regarding Cherokee historical research. The history of TVA development in the area was presented, along with the record of five years of TVA interest and investment in archaeological investigations along the River.

It is the judgment of the Sub-Committee that all presentations were factual and objective, as well as open and fair. Questions asked were answered with complete candor in so far as could be determined. Economic factors behind the proposed development were outlined along with proposed future plans. The bases for opposition to further development were enumerated. We reviewed by slide presentations and discussion a partial record of archaeological excavations in the area to date and saw some of the articles recovered and in the custody of the McClung Museum of the University of Tennessee.

In final conference with Mr. A. J. Wagner, Chairman of the Board of TVA, Board Member Don McBride, Mr. Robert H. Marquis, General Counsel, R. Lynn Seeber, General Manager, and other TVA managerial representatives, along with Dr. Alfred K. Guthe, Director of the McClung Museum, University of Tennessee, who is in charge of archaeological investigations on the Little Tennessee River, it was stated and agreed by TVA that (1) archaeological investigations would be continued; (2) the sites of Fort Loudon, Tellico Block House, and Chota could be and would be protected by appropriate means for future development; (3) mutually satisfactory arrangements could be made regarding custody and display of appropriate artifacts important to the Cherokee Nation.

Report to Cherokee Nation TVA Committee  
Page 3  
April 14, 1972

CONCLUSIONS:

1. Representations by TVA to the Committee and Sub-Committee appeared factual, objective and candid.
2. Based on the breadth and depth of the facts presented to the Sub-Committee regarding the extent of TVA past and present interest in historical aspects involved, the visiting Cherokee Sub-Committee found no rational basis for further injecting the Cherokee Nation or Cherokee people into the controversial questions involving further development by TVA of the Little Tennessee River basin.
3. An opportunity has been offered to representatives of those opposed to further development of the Little Tennessee basin to be heard by the Sub-Committee.
4. TVA organization and the University of Tennessee, along with the National Park Service should be commended for efforts to date to explore and develop those identifiable Cherokee historic sites and to recover satisfactory evidences of the Cherokee past.

RECOMMENDATIONS:

1. Based on findings to date the Cherokee Nation should not become involved in any way in the current controversies over future development of the Little Tennessee River basin.
2. Continuing follow-up effort should be made by the Cherokee National Historical Society to secure an adequate and representative collection of Cherokee artifacts excavated from the ancient Cherokee towns for display in the Cherokee National Museum.

The above report, prepared by Colonel Martin A. Hagerstrand, was read, considered, and adopted this 14th day of April, 1972

Johnnie Shappert (Chairman)

Martin A. Hagerstrand

ATTEST:

Earl Boyd Pierce

Ann S. Meigs

Oscar Welch

Harriet O'Connell

Pat Wesley

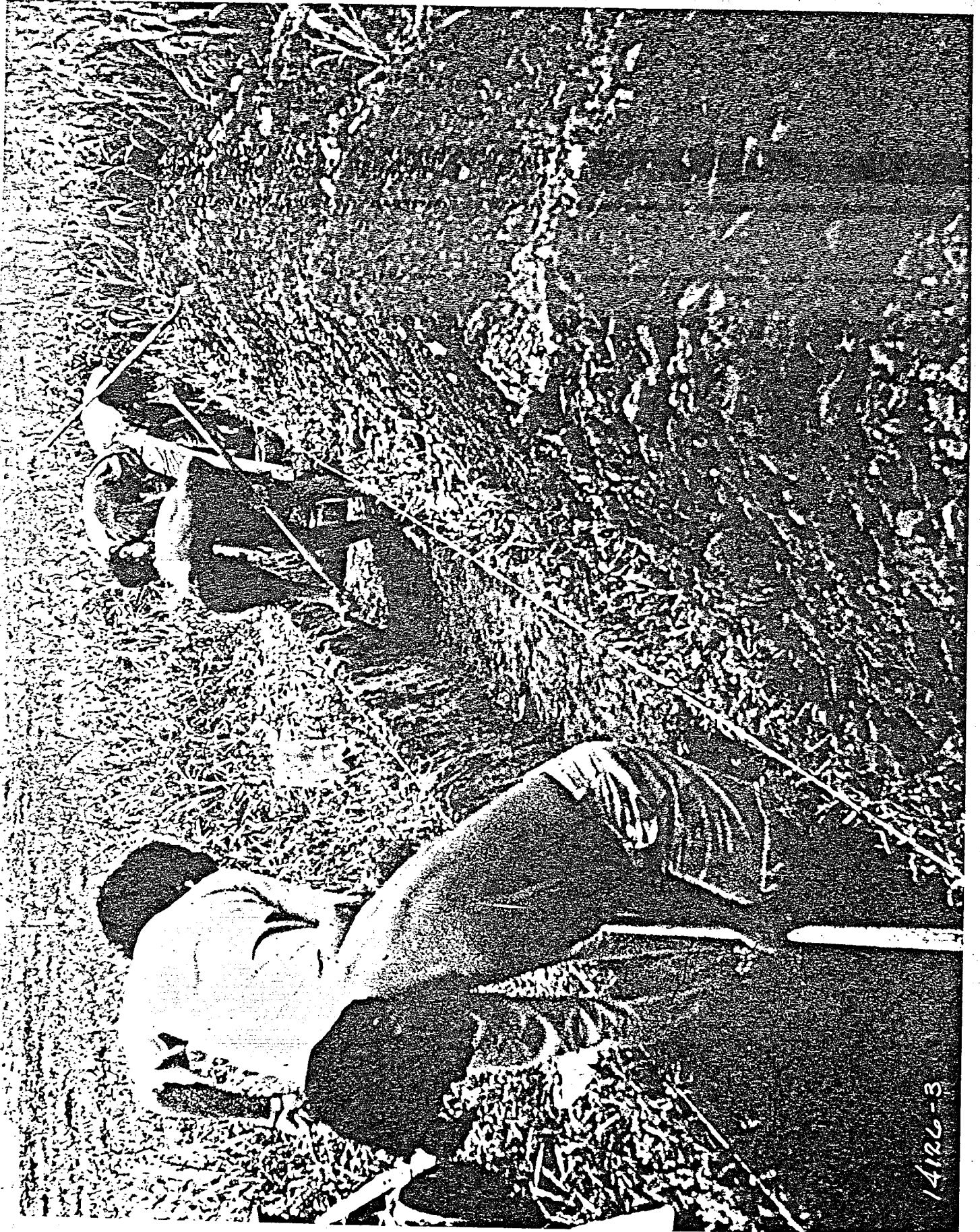


Exhibit 5



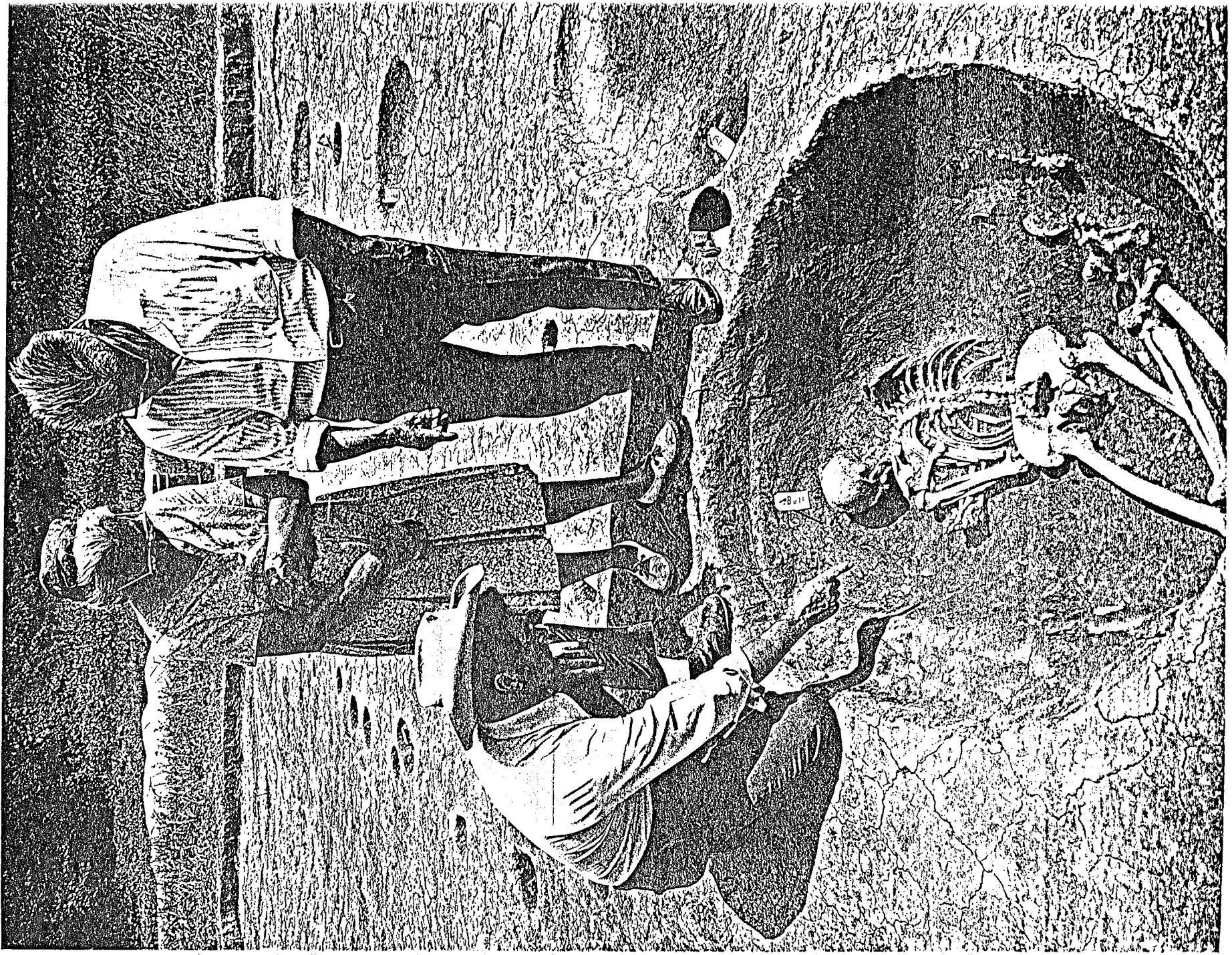


Exhibit 6

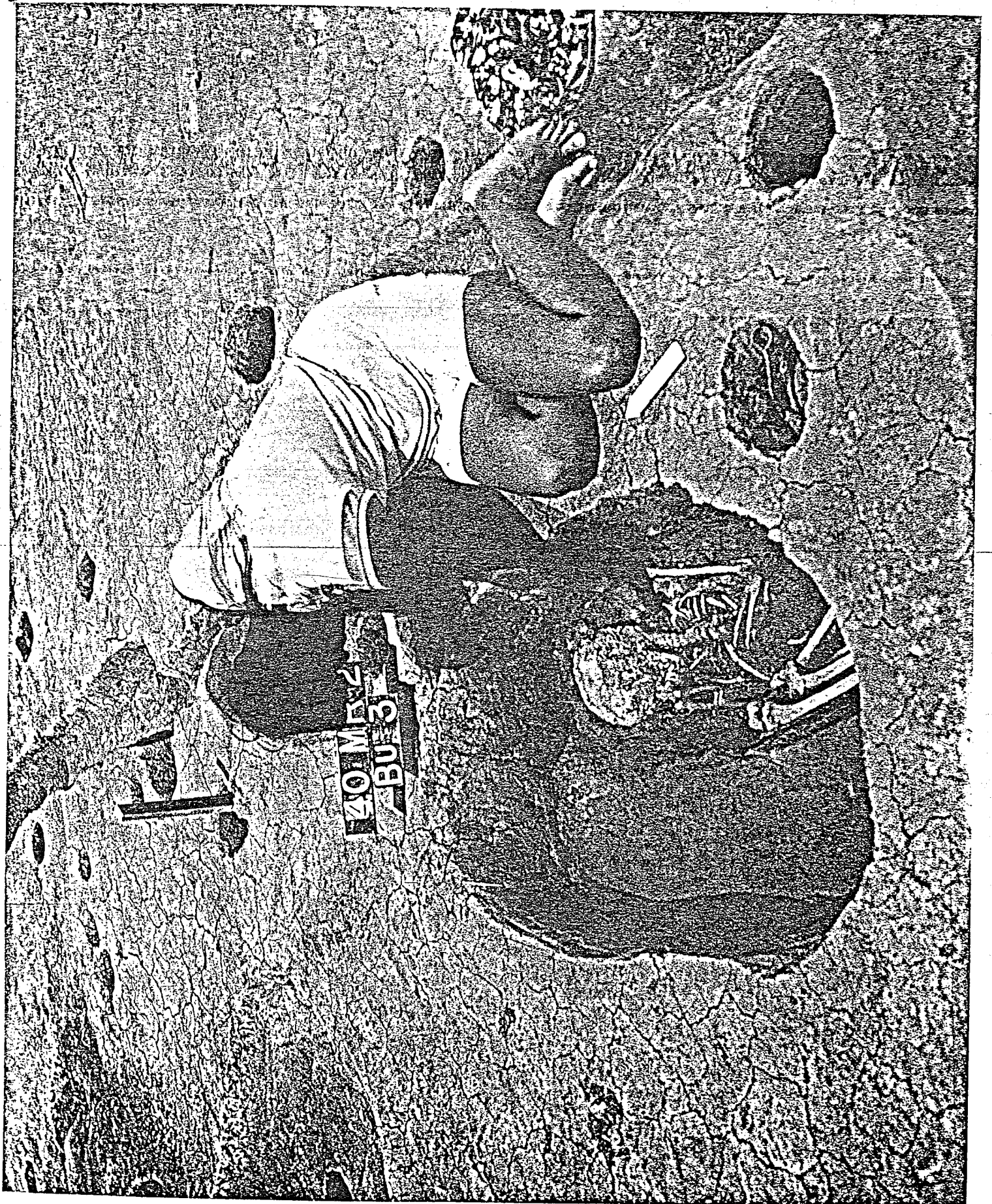
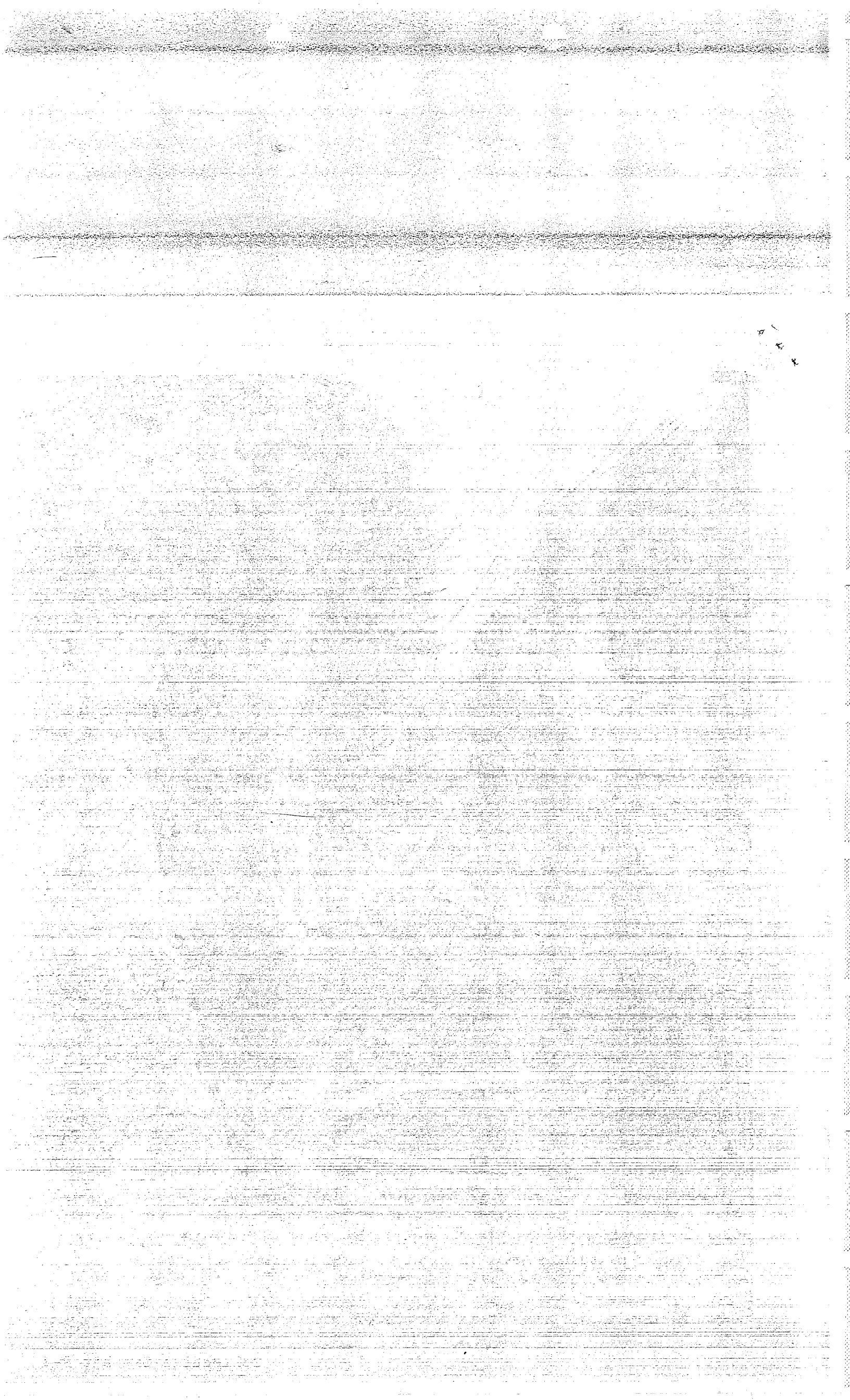


Exhibit 7



Exhibit 8





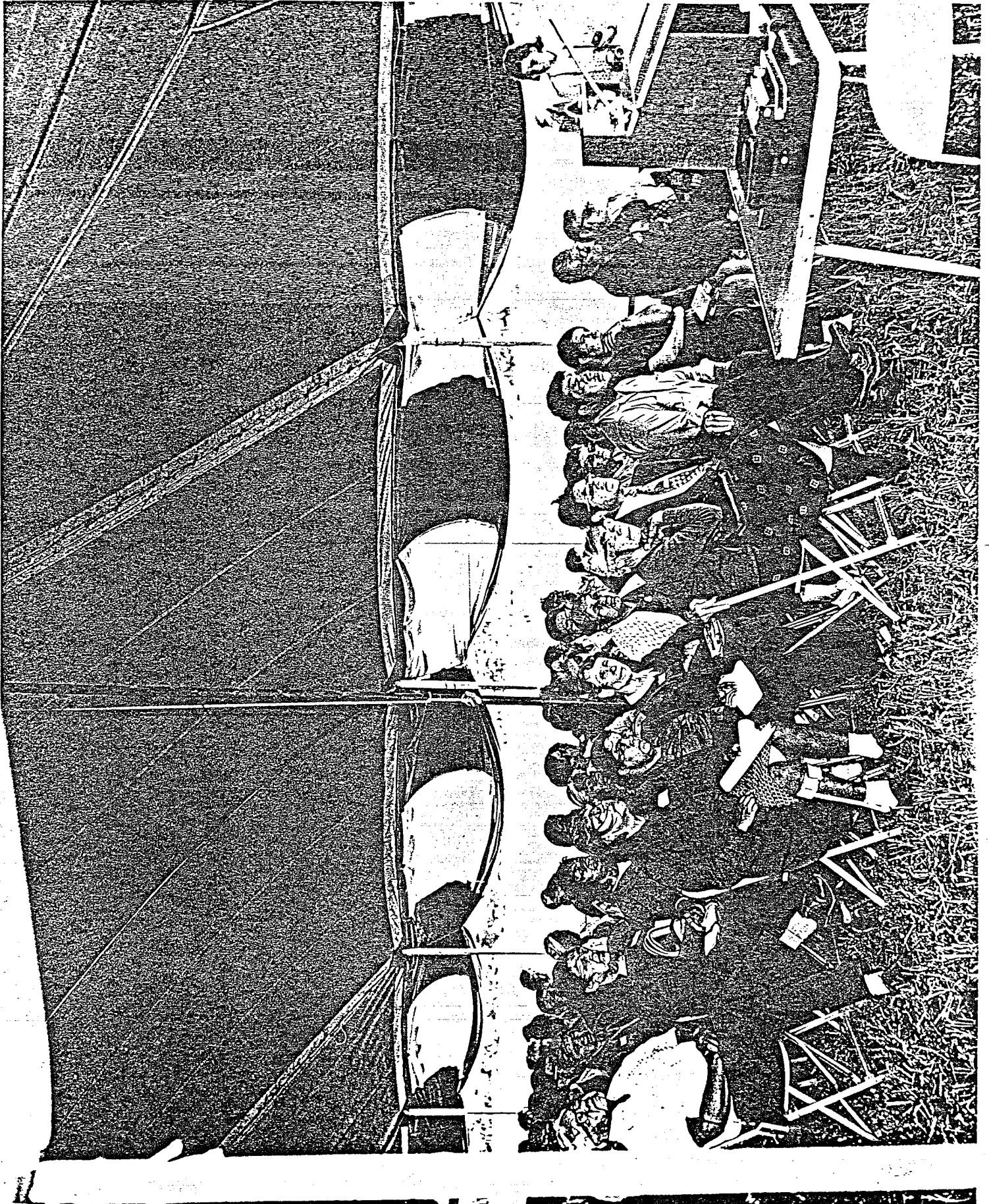
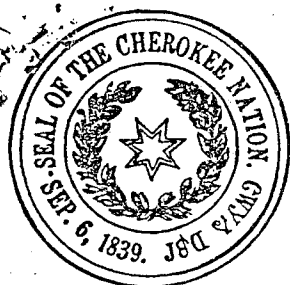


Exhibit 10



## THE EASTERN BAND OF CHEROKEE INDIANS

QUALLA BOUNDARY / P. O. BOX 455, CHEROKEE, N. C. 28719 • PHONE (704) 497-2771, 497-4771

John A. Crowe <i>Principal-Chief</i>	Leroy Wahnetah <i>Vice-Chief</i>	Jerome Parker <i>Executive Advisor</i>	June Maldonado <i>Office Manager</i>	Mildred Jessan <i>Enrollment Officer</i>
Alice Lambert <i>Administrative Assistant</i>	Robert Blankenship <i>Tribal Planner</i>	Patricia Smith <i>EDA Secretary</i>	Elsie Arch <i>Receptionist</i>	

September 13, 1974

DIVISION OF WATER CONTROL PLANNING		
SEP 17 1974		
To		Noted
2	Lesesne	✓
1	Brown	✓
3	Dell	[initials]
	Sherwood	
	Buchanan	
	Driver	
	Kelberg	
	Massa	[initials]
	O'Neal	
	Shelton	
	Smith	
	Wunderlich	

Mr. Edward H. Lesesne  
Tennessee Valley Authority  
448 Evans Building  
Knoxville, Tennessee 37914

Dear Mr. Lesesne:

This letter is an official endorsement of the Indian Project at Tellico Dam. In the event that any uncertainty exists regarding official reaction to the proposed project, please note that the Tribal Council of the Eastern Band of Cherokee Indians reviewed the proposed action regarding road improvement, interment, and reconstruction and protection of the Chota Townhouse and dwelling. On September 6, 1974, at 12:45 P.M., Council member Jonathan Ed Taylor moved that all plans attending the aforementioned project be approved. Mr. Taylor's motion was approved, and the Tribal Council officially endorsed the following:

1. that all road construction plans, visitor's facilities construction, and Chota Townhouse reconstruction plans be approved;
2. that construction which is essential for the protection of Chota Townhouse, and related dwellings, grounds and walkways be approved;
3. that plans for Burial Marker and Interment Area be approved, and that the method of interment be designated "mound burial".

In addition to this official endorsement of the Indian Project at Tellico Dam, the Tribal Council wishes to make the following request; that artifacts removed from Tellico which have historical and cultural significance shall be returned to the Eastern Band of the Cherokee Indians. Such artifacts will be placed in the Cherokee Museum and Cultural Center which is now under construction. Further, the Tribal Council requests additional information regarding the current status of these artifacts, and any recommended procedures for assuring their return to the Eastern Band.

Exhibit 11

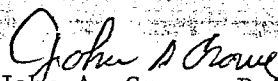
**TRIBAL COUNCIL MEMBERS:**

Joe Bradley, *Chairman*; Jonathan Ed Taylor, *Vice Chairman*; Gerard Parker, Edmund Youngbird, Bertha Saunooke, John Young, Tom Bradley, Wilbur Sequoyah, Bill Ledford, Dan McCoy, Bailey Coleman, Albert Martin, Charles E. Craig, *Door Marshal*; Lula Nicey Welch, *Janitress*; Eugene Littlejohn, *Messenger*; Wenonah Digh, *English Clerk*; Maggie Wachacha, *Indian Clerk*; Mark Reed, *Interpreter*.

In conclusion, the Tribal Council appointed Mr. Robert Blankenship, Tribal Planner, and Mr. William Ledford, Council Member, as the official representatives of the tribe who will assist the Tennessee Valley Authority in the completion of this project.

Your help and consideration in this matter will be appreciated.

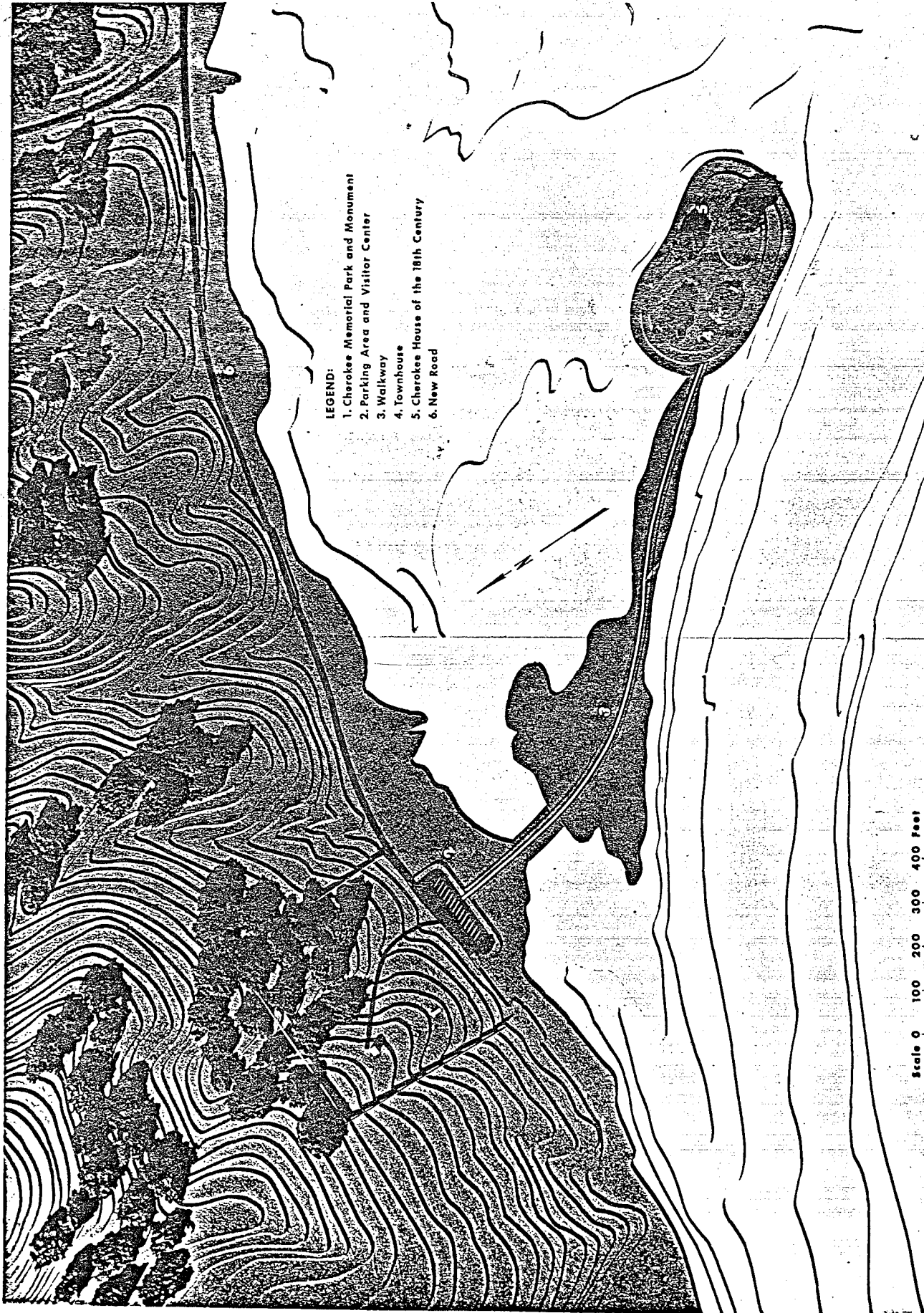
Sincerely,

  
John A. Crowe, Principal Chief

JAC:pd

cc: Mr. Ralph D. Ford  
Mr. J. Bennett Graham  
Mr. Tom D. Waller  
Mr. Corydon W. Bell, Jr.





LEGEND:

- 1. Cherokee Memorial Park and Monument
- 2. Parking Area and Visitor Center
- 3. Walkway
- 4. Townhouse
- 5. Cherokee House of the 18th Century
- 6. New Road

Scale 0 100 200 300 400 feet

# CHOTA RESTORATION

