1-3-1980

Sequoyah v. TVA, 6th Circuit, Docket No. 79-1633: Appellants Reply Brief

Ben Oshel Bridgers
Holt, Haire & Bridgers, P.A.

Robert M. Stivers Jr.
Leibowitz, Watson, Kressin, Stivers & Erickson

Walter Echo-Hawk
Native American Rights Fund

Kurt Blue Dog
Native American Rights Fund

Ellen Leitzer
National Indian Youth Council

See next page for additional authors

Authors
Ben Oshel Bridgers, Robert M. Stivers Jr., Walter Echo-Hawk, Kurt Blue Dog, Ellen Leitzer, and Susan Tomita

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NO. 79-1633

AMMONETA SEQUOYAH, RICHARD CROWE, GILLIAM JACKSON, Individually, and representing other Cherokee Indians similarly situated; THE EASTERN BAND OF CHEROKEE INDIANS; and the UNITED KETOOAH BAND OF CHEROKEE INDIANS,	)
APPELLANTS,	)
VS	)
TENNESSEE VALLEY AUTHORITY	)
APPELLEE,	)

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE, NORTHERN DISTRICT

APPELLANTS REPLY BRIEF

Ben Oshel Bridgers
HOLT, HAIRE & BRIDGERS, P.A.
Attorneys for the Appellants
P. O. Box 248
50 West Main Street
Sylva, North Carolina, 28779
Phone: 704/586-2121

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INTRODUCTION

The Tennessee Valley Authority takes the same position in this case that it has taken in previous litigation concerning the Tellico Project. The TVA argues that Tellico is exempt from the federal legislation cited by the Cherokees and further argues that these Indians cannot exercise their constitutional rights in Tellico. As it has for ten years, TVA argues that it is above the law -- that the acts of Congress and the individual protections of the United States Constitution do not apply to Tellico. It is precisely because of such legal arguments that the founding fathers drafted the Amendments to the Constitution -- to protect the individual citizen from infringement by the government. It is basic to our system of government that no one is above the law, not even the government itself.

We point out at the outset that TVA has not even addressed the procedural standards for dismissing the suit below. Instead, TVA has improperly brought before this Court a new issue -- laches -- which was not relied upon by the District Court and was not raised in the Cherokee Brief.

In previous litigation this Court has found that the National Environmental Policy Act and the Endangered Species Act did apply to TVA and to the Tellico Project. Even though this Court may be tired of reviewing attacks upon TVA and this project, the Cherokees ask this Court to perform its duty and again require TVA to comply with the law of this land.

I. THIS APPEAL HAS NOT BEEN MOOTED.

The TVA argues in its Brief that this controversy has now been mooted and this appeal should be dismissed. To support its position, TVA relies solely upon statements of Appellants in previous motions for injunctive relief. To the contrary, the controversy presented by this case has not been resolved and several questions remain for determination by this Court.

A. STATEMENTS OF APPELLANTS IN MOTIONS FOR INJUNCTIVE RELIEF ARE NOT CONCLUSIVE.

In order for an appeal to become moot, it must be established that some intervening event makes it impossible for the Court to grant a party any relief. United States v. Alaska S. S. Co., 253 U.S. 113 (1920). The TVA suggest that the closing of flood gates removes any further need for a ruling by this Court.

It appears that on November 29, 1979, TVA closed six hinged flap-gates over six sluice tunnels running under the Dam. These flap-gates are now being held in place only by water pressure. Therefore, it is still possible to raise these flap-gates and let water from the Little Tennessee River run through just as it has for the past four years.

However, TVA appears to be arguing that because these flap-gates have been lowered, there is no longer any time to permit the Cherokees any judicial review of their claims.

In their Brief, TVA asserts that statements of the Cherokees in their motions for injunctions pending appeal establish that the matter has been mooted. The affidavit of Robert M. Stivers, Jr., attached to this Brief, indicates that the Cherokees were factually incorrect in believing the lowering of the flap-gates by TVA was an irreversible process.

Appellants sought a deposition but were denied this discovery by the District Court. When seeking an injunction, Appellants were concerned about clear irreparable harm they would suffer from flooding and were also concerned about mootness. These concerns were partly based upon second-hand information, which was, without discovery, the only information available to Appellants at that time. In light of subsequent information, these earlier presumptions of Appellants should not now be deemed conclusive.

Furthermore, the statements of TVA concerning safety factors are of questionable validity. The affidavit of Dr. Ernest F. Brater, submitted with this Reply Brief[1], indicates that the affidavit of Robert A. Shelton, submitted by TVA to support its opposition to an injunction, does not provide factual or scientific support for the conclusions drawn by TVA. Dr. Brater points out that the TVA affidavit

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1. Because the Holiday Season coincided with the preparation period for this Reply Brief, the affidavit of Dr. Ernest F. Brater was not available for inclusion with this Brief. However, copies of this affidavit are being simultaneously mailed to the Court and Counsel.

is filled with generalizations and not always clear in making its point. The Shelton affidavit is primarily a self-serving statement by an employee of TVA without supporting data. The question of "safety" is a relative matter which is not adequately discussed in the affidavit. It should be noted that the TVA itself pointed out in its December, 1978, Report entitled "Alternatives for Completing the Tellico Project," that the Tellico Dam cannot be expected to withstand a "probable maximum flood."

> The Tellico Dam was designed on the assumption that during a very severe flood, half the flow of the Little Tennessee would pass through the Fort Loudoun spillway. Refinement in techniques for calculating these severe floods indicate that the maximum design flood is slightly larger than the maximum flood that can be contained by the Tellico Dam as originally designated with the canal open for joint operation with Fort Loudoun. The Department of the Interior's Bureau of Reclamation has reviewed the project and agrees with this conclusion. [Report, p. 13.]

The conclusion that the Dam can only be maintained safely by immediate completion of Tellico is questionable under the circumstances. The Tellico Dam has been in place with the flood gates open for the past four years without a canal open to Fort Loudoun Lake. The TVA has sat silently for these four years while the Little Tennessee River flowed through the Dam, raising no hue and cry for public safety. It is also significiant that TVA has not, even in the Shelton affidavit, stated that there is a real and present danger of waters so filling other dams that the pressure on

Tellico would be unbearable. The affidavit of Shelton is a conclusory, generalized statement void of data, submitted as self-serving to support TVA's action to flood the Tellico Project in December, 1979.

B. THE CHEROKEES ARE ENTITLED TO OBTAIN DECLARATORY RELIEF.

It is also clear that while a case may be rendered moot by subsequent events as to a request for injunctive relief, it need not also be rendered moot as to declaratory relief. The test for whether a request for declaratory relief is moot is:

> [W]hether the facts alleged, under all circumstances, show that there is substantial controversy, between the parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. Preiser v. Nerokirk, 422 U.S. 395, 402 (1975), citing Maryland Casulaty Co. v. Pacific Co., 312 U.S. 270, 273 (1941).

The question thus becomes to determine whether there remains substantial legal questions to be answered between the parties. In Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974), the Court held that the termination of a strike rendered moot the workers claim for injunctive relief against state officials. However, the Court ruled that federal courts have a duty to decide the appropriateness and merits of declaratory relief, irrespective of ruling as to the propriety of injunctive relief.

In Lawrence v. Hancock, 76 F. Supp. 1004, 1010 (S.D.W.Va. 1948), and Bohler v. Lane, 204 F. Supp. 168, 173-174 (S.D.Fla. 1962) the Courts denied injunctive relief but refused to find requests for declaratory relief as moot. Significantly, both of these cases questioned Plaintiff's right to use public

property [a swimming pool and a park] with the Courts recognizing the individual "rights" even though these Plaintiffs had no property interest in the land in question.

As the Court pointed out in Sigma Chi Fraternity v. Reagents of University of Colorado, 258 F. Supp. 515 (D.C. Col., 1966), in suits seeking declaratory relief "there is a tendency to construe the mootness doctrine more narrowly." See also, Porter v. Lee, 328 U.S. 246 (1946); Lehigh Coal and Nav. Co. v. Central R. of N.J., 33 F. Supp. 362 (E.D. Pa., 1940). Furthermore, in injunctive actions, the fact that the action complained of has been completed does not necessarily render the issue moot. See Gray v. Sanders, 372 U.S. 368 (1963); Woods v. Wright, 334 F.2d 369 (5th Cir., 1964).

In the present case, the Cherokees sought declaratory relief with respect to their religious freedoms guaranteed by the First Amendment and the American Indian Religious Freedom Act. [See paragraph 29 of Complaint; paragraph 3 in Prayer for Relief.] The Cherokees also sought an order directing TVA to return the bodies, remains and burial possessions to their resting places with proper dignity and reverence. [See paragraph 28 of Complaint.] The TVA argues that their "promise" to carry out this last action moots the issue. However, in light of TVA's past actions, they must sustain a "heavy burden" to show that relief is not warranted. See, Weinberger v. Glodgett, 421 U.S. 707 (1975).

Thus, in spite of the denial of injunctive relief, these Cherokees still seek a declaration that their First Amendment rights have been violated. There remains a "live" controversy with respect to the disposition of the bodies removed and not yet reinterred. Even though the dam has been closed, these claims present a sufficient case or controversy for the Court to entertain this appeal. See, Powell v. McCormack, 395 U.S. 486 (1969). There also remains an unsettled dispute over whether TVA is entitled to retain possession of the bodies and remains removed from the Cherokee Village sites. The Cherokees sought injunctive relief for the return of these bodies [See, paragraph 3, Prayer for Relief] and sought a declaration that TVA has not complied with the Tennessee Grave Statute and that TVA's removal of these graves, in contrast to the treatment of non-Indian graves, is discriminatory. The District Court completely ignored the issue of these graves; consequently, these questions are still very much alive. At the same time, none of the Cherokee claims are completely mooted, because the Court may order the reopening of the dam upon finding the rights of these Plaintiffs have been violated.

C. DECLARATORY RELIEF IS JUSTIFIED IN THIS CASE BECAUSE OF PUBLIC INTEREST.

Furthermore, the Cherokee request for declaratory relief is not mooted because there are important questions of "public interest" to be answered. The great weight of authority holds that an appellate court may retain an appeal for hearing and determination if it involves questions of "public interest," even though it has become moot so far as the parties to the action are concerned. See, Annotation - Public Interest as ground for refusal to dismiss an appeal, 132 ALR 1185.

The "public interest" in the present suit can hardly be questioned in light of previous litigation, congressional hearings, and the expenditure of public funds. The heart of the present suit is the question - not properly addressed by the District Court - whether the phrase "or any other law" repealed the American Indian Religious Freedom Act, the National Historic Preservation Act, and the Tennessee Grave Statute. The thrust of the Cherokee claim is to question whether Congress can repeal substantive legislation and alter its considered policy in all areas through the mere insertion of this general and all-inclusive phrase in an appropriations act.

Both TVA and the District Court conclude that the phrase in the appropriations act "notwithstanding * * * any other law" is an irrefutable statement of Congressional intent to

repeal the American Indian Religious Freedom Act and the National Historic Preservation Act. Neither the District Court nor TVA cite to a case with such holding. As we discussed in our Brief [See pp.21-26] this question was not addressed by the District Court.

Moreover, the legislative history of this appropriations act is very clear. Congress intended to exempt this project from the restrictions placed on it by the Endangered Species Act and the resulting permanent injunction entered by this Court. Under these circumstances the law can be simply stated: When Congress intends to exempt a project or program from a particular law, it grants a specific and explicit exemption. Congress did so for this project with the Endangered Species Act, and only that act has been repealed for purposes of the Tellico Project.

This view was supported by the Supreme Court in TVA v. Hill, 437 U.S. 153 (1978), and in another Indian case, Morton v. Mancari, 417 U.S. 535 (1974). In Morton the question was whether the Indian employment preference established by the Indian Reorganization Act of 1934 was repealed by the Equal Employment Opportunity Act of 1972. The Court relied upon the "Cardinal rule" that repeals by implication are not favored and concluded that Congress still rendered to support the Indian preference policy.

Since passage of the Water Appropriations Act and since the filing of this suit, Congress has reaffirmed its vital concern with Indian historical, cultural, and religious resources. On October 31, 1979, Congress enacted the Archaeological Resources Protection Act of 1979, P.L. 96-95, 93 Stat. 721, 16 U.S.C. 470aa.

The purpose of this new act is to "secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands." The act defines archaeological resources as "any material remains of past human life or activities" and provides procedural safeguards for excavation and removal from federal lands and Indian lands. The act requires the Secretaries of Interior, Agriculture, and Defense, together with the Chairman of the Board of TVA, after consultation with Indian Tribes, to establish regulations to carry out the act. Such regulations "may be promulgated only after consideration of the provisions of the American Indian Religious Freedom Act." [Emphasis added.]

It would seem clear then, that Congress still considers the American Indian Religious Freedom Act a matter of vital public policy. For the TVA to ask this Court to ignore these "fundamental principles" is offensive to our Constitution and a matter of great public interest.

II. THE DEFENSE OF LACHES DOES NOT WARRANT DISMISSAL OF THIS SUIT.

In its Brief, the TVA relied heavily on the doctrine of laches as a ground to affirm the dismissal of this case by the District Court. However, the defense of laches is not at issue in this appeal because it did not form any basis for the decision of the District Court. Even though this question is not properly before this Court, the Appellants will address this question to show its lack of applicability.

The TVA justifies the dismissal of the suit on the basis of laches and indicates that the District Court did not rely on this doctrine merely because it "found it unnecessary." [TVA Brief, p.16.] However, the record below indicates quite the opposite. At oral argument and in their Trial Brief, the Cherokees argued that laches was not a ground for dismissal because it requires factual findings before application. The District Court recognized this at oral argument.

> BRIDGERS: Now, we would submit that the very defense of laches is a factual matter. The argument with respect to TVA raising the question of when should the Cherokees have become involved in this, some of those considerations are factual considerations.
>
> COURT: If the case should be decided on that point, I think you have a point. I think we would probably have to have evidence before I could decide it on that point. [Transcript, p. 58.]

* *

> COURT: I have indicated I think you may be right on that point. And if I have to decide the lawsuit on laches I would probably have to hear proof. I think - that is my inclination right now, without holding anything, that you are right on that point. [Transcript, p. 61.]

The TVA failed to establish that the Cherokees are guilty of laches. Because TVA has raised this legal theory as a defense, it is proper to define the term. The definition itself reveals that this defense is not applicable to the present case under Rule 12(b)(6).

> Laches is a neglect or failure on the part of a party in the assertion of a right, continuing for an unreasonable and unexplained length of time, under circumstances permitting diligence, resulting in disadvantage to the other party. Rank v. United States, 142 F. Supp. 1 (D. C. Ca., 1956). [Emphasis added.]

The TVA has never proffered any evidence, in affidavit or pleading form, that TVA has been disadvantaged or suffered damage as a result of a delay by the Cherokees in instituting the present suit. The TVA has simply not satisified the necessary elements in this estoppel-type defense.

> An estoppel arises when one party by concealment or false representation intentionally deceives another party as to the true statement of facts to the detriment of the second party. Four elements are necessary: (1) the party to be estopped must know the facts; (2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) The latter must be ignorant of the true facts; and (4) He must rely on the former's conduct to his injury. California State Board of Equalization v. Coast Radio Products, 228 F.2d 520 at 525.

The TVA failed to show that these standards are met in the present case. Further more, even if TVA had properly alleged these elements, it would have accomplished no more than to show that a clear-cut factual controversy existed, which would require an evidentiary hearing for resolution. Deciding against the Cherokees on a Motion to Dismiss, where all factual questions must be resolved in favor of the Cherokees, is clearly not justified under the theory of laches.

The cases cited by TVA dealing with laches all are cases which required factual findings before the doctrine could be applied. These cases can not be controlling here, where no evidence was entertained by the District Court. Even though affidavits were submitted by both sides, the decision of the District Court was rendered under the provisions of Rule 12(b)(6), which is a decision based on only the pleadings and their legal adequacy.

It is furthermore difficult to understand how the doctrine of laches can be applied to the present suit which attacks a specific statute. The Energy and Water Development Appropriations Act of 1980 was signed by President Carter on September 25, 1979. On October 12, 1979, the Cherokees filed suit, attacking the constitutionality of Tellico portion of the Act. Thus, the Cherokees filed suit attacking the validity of the statute only seventeen days after the legislation was enacted. We know of no case that would rule waiting seventeen days to attack the constitutionality of a statute is laches.

III. A PROPERTY INTEREST IN FEDERAL LAND IS NOT A PRE-REQUISITE FOR STATING A FIRST AMENDMENT CLAIM.

Both the District Court and TVA justify dismissal of the Cherokee suit by the lack of a property interest in the Tellico lands by the Cherokees. This reasoning misses the mark. No individual or group has a property interest in land owned by the TVA or in land owned by other branches of the federal government. But the lack of such property interest has never before been construed as an absolute bar to the assertion of a constitutional right. All the parties who brought the previous suits challenging the Tellico Project under the National Environmental Policy Act and the Endangered Species Act did not have a property interest in the Tellico lands, but the Courts required TVA to comply with the provisions of those statutes. The District Court has errected a more stringent requirement for a constitutional claim than is required for statutory claims.

The issue of property ownership is actually no more than a standing question, although neither TVA nor the District Court denominated it as such. For reasons set forth in detail in our Brief [See pp. 18-20] we submit that this is a phantom issue. No appellate court has heretofore established such a barrier for the pleading of a constitutional

claim. Indeed, if the standard applied by the District Court is upheld, this would constitute an impenetrable barrier which would effectively deny anyone the possibility of exercising First Amendment rights on government owned property.

The TVA and the District Court would have this Court believe the First Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, except on government owned property.

This is not the law and is an affront to the most fundamental legal principles of this country and its government.

The cases cited by TVA in its Brief [See pp.11-12] are inapposite to the First Amendment religious freedom issues presented by the Cherokees. The cases cited by TVA all involve the First Amendment freedom of expression on public property and deal primarily with trespass statutes. The only case cited by TVA which involves religious freedom is United States v. Crowthers, 456 F.2d 1074 (4th Cir., 1972). Even in that case the religious issue is peripheral to the free speech issues. Furthermore, Crowthers shows that government owned property is not vested with the restricted power that TVA portrays, because in that case the federal government was shown to be under constitutional constraint in the operation of the Pentagon.

The TVA also argues that the government itself has "rights" to the use of its property, citing Kleppe v. New Mexico, 426 U.S. 529 (1976) and Light v. United States, 220 U.S. 523 (1911). The TVA equates First and Fifth Amendment "rights" of the Cherokee Plaintiffs with the property interest of TVA. These two cases do not support any such proposition. Both cases deal with the Property Clause of the Constitution and the power of Congress and federal agencies to regulate conduct on federal lands. The cases do not turn on constitutional questions, but on the regulatory power of Congress.

The language of TVA indicates it is asserting constitutional rights of its own on the Tellico lands. However, the TVA being a government agency, has no constitutional "rights." The only persons in this suit who have constitutional "rights" are the Plaintiff Cherokees. Therefore, on page 14 of the TVA Brief, discussing the "compelling state interest test," it should be understood that the constitutional "rights" of these Cherokees would be balanced against the governmental "interest" of TVA. Such imprecise use of language again reveals TVA's disregard for and misunderstanding of the constitutional questions presented by this case.

IV. THE RELIANCE OF TVA ON THE "MINORITY" STATUS OF THE PLAINTIFF CHEROKEES IS MISPLACED.

The TVA repeatedly emphasizes to the Court that the Cherokees who brought this suit are merely a "minority" of Cherokees. The clear implication is that a constitutional privilege may depend upon the number of persons who invoke it. This is an incredulous constitutional argument. This kind of faulty reasoning was pointed out by Mr. Justice Harlan in his dissent in Sherbert v. Verner, 374 U.S. 398 (1963). That case involved the right of a member of a minority religious sect to draw unemployment benefits while refusing to work on Saturdays because of her religious belief. In pointing out the danger of numerical considerations, Justice Harlan observed:

> [S]urely this disclaimer cannot be taken serious, for the Court cannot mean that the case would have come out differently if none of the Seventh-day Adventists in Spartenburg had been gainfully employed, or if the appellant's religion has prevented her from working on Tuesdays instead of Saturdays. 374 U.S. at 420-421, N. 2.

A constitutional right is not conditioned upon the number of persons who claim it. Nor are the Courts equipped to judge what number of persons objecting to a given law, upon religious grounds, would be sufficient to tip the balance. The protections provided in the various amendments to the Constitution were designed to protect individuals from interference of their freedoms by the government.

The TVA's continued reference to the Cherokees as a "minority" is a constitutional affront and indicates its lack of preception of the very purpose of the constitutional freedoms sought to be protected by this suit.

Furthermore, it is legally insignificant that any other group of Cherokees is not a party to this suit. The Eastern Band and the Ketooah Band of Cherokees both allege they represent "traditional" Cherokees. The Cherokee Nation, on the other hand, does not purport to represent "traditional" Cherokees and has, in fact, recently filed suit against the Ketooah Band contesting the status of the Band and allocation of federal funds. The two Plaintiff Indian bands, who themselves represent some fifteen thousand (15,000) Cherokees, together with the individual Indian Plaintiffs, are entitled to constitutional protection from arbitrary action as well as other individuals and minorities. Hall v. St. Helena Parish School Bd., 197 F. Supp. 649, aff'd, 368 U.S. 515 (1962); Teterud v. Burns, 552 F.2d 357, 360 (8th Cir., 1975). An individual has the right to complain of a constitutional violation even if other potential class members acquiesce to the infringement of the right in question. Law v. Mayor and City Council of Baltimore, 78 F. Supp. 346 (D.C.Md. 1948).

Emphasizing the "minority" status of these Cherokees reveals the extent to which TVA and the District Court failed to understand the claims presented. Neither TVA nor the District Court have acknowledged that the violation of an individual's religion may work an exceptional harm on them. But our government long ago agreed that these religious freedoms would not be denied its citizens.

Most Indian people only became citizens of this country in 1924, Act of June 2, 1924, 43 Stat. 253, 8 U.S.C. 3, and it was only in 1978 that Congress acknowledged that the First Amendment protections applied to Indian people and their native, traditional religions. American Indian Religious Freedom Act, P.L. 95-341, 92 Stat. 469, 42 U.S.C. 1996. It is not surprising that TVA and the District Court have been insensitive to the constitutional claims of these Indians, but it is legal error nonetheless.

V. THE DISTRICT COURT DID NOT CONSIDER THE CHEROKEE CLAIMS WITH THE LIBERALITY GENERALLY AFFORDED INDIAN MATTERS.

The United States maintains a unique relationship with American Indians. Worcester v. Georgia, 31 U.S. 515 (1832) During the past one hundred and fifty years the courts have recognized this relationship and the perculiar dependency of the Indian people upon the federal government. Because of this relationship, the Courts have established rules of construction to protect these aboriginal people. In construing treaties and statutes, the courts have established a rule that any doubts and ambiguities shall be resolved in favor of the Indians. Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). The courts recently applied this same rationale in halting construction of a dam on the Umatilla Indian Reservation, ruling that Indian treaty rights could not be interferred with by a general authorization for construction of a dam. Confederated Tribes v. Alexander, 440 F. Supp. 553, 555 (1977). This same policy calls for specific, and not general, repeal of the Indian rights provided for in the American Indian Religious Freedom Act.

VI. REPLY TO TVA'S OPPOSITION TO INJUNCTION.

In a separate memorandum and in their Brief proper, TVA opposes the Cherokee request to have the 1,140 bodies reburied at the Tellico site. The TVA justifies this position by citing cases dealing with eminent domain. The TVA claims an unfettered legal right to condemn burial grounds and "sacred places" and to exercise "[d]isinterment and reburial at other location[s]."

However, the actions of TVA in this case are significantly different from the situations presented in the cases on which TVA relies. First, TVA has not yet reburied the bodies and remains which it has removed from graves. Second, the Indian bodies and remains are the only bodies which the TVA has refused to rebury in a timely and decent manner. Third, the TVA has ignored and refused to honor the expressed wishes of the Plaintiff Cherokees with respect to the reburial of these 1,140 remains. Fourth, although these bodies and remains have remained unreinterred for several years, TVA does not intend to rebury these remains prior to June 30, 1981.

Clearly, all of the cases cited by TVA concerning eminent domain and removal of bodies from graves constitute cases where it is presumed that bodies will be relocated in a comparable setting. But in this case, more than a thousand bodies have been removed from their burial places only to be placed in sacks and boxes in the basement of a

university museum. Certainly none of the cases cited by TVA, nor any state or federal statute, gives TVA the legal authority to appropriate these bodies and refuse to comply with either state laws or accepted standards of human decency.

The TVA attempts to justify its actions by pointing out that the Tennessee Grave Statute would not apply to the Cherokee bodies and remains because these were "unmarked" graves. However, it is obvious that TVA knew, or should have known, of the actual existence of these graves scattered throughout these Indian village sites. The reasons for the "marked graves" language in the Tennessee act is obvious. The law does not hold persons and governmental agencies to the same standard when they are without reasonable notice of the existence of graves. However, in this case, TVA has had actual knowledge of the existence of these Indian villages and the presence of a large number of graves for many years. This knowledge is established by the actual disinterment of over one thousand graves.

The clear implication of the TVA argument is that it deems itself the <u>owner</u> of these remains. The TVA refuses to honor requests of the Cherokees, refuses to comply with the provisions of the Tennessee Grave Statute, and refuses to honor the terms or provisions of the American Indian Religious Freedom Act. [See attachments to Appellant's Brief in Support of Motion for Injunction.]

Furthermore, the supporting documentation submitted by TVA to this Court is misleading and frequently incompetent. The TVA attached to its memorandum a document referred to as "Attachment A." This document is nothing more than a self-serving interpretation and presentation of alleged facts, intended to be accepted by the Court as evidence. However, this "attachment" was undated, not identified as to authorship, unsigned, unverified, and extraneous to the record below. Such a document is completely improper and incompetent as evidence and we ask the Court to ignore this document in its entirety.

The TVA also argues that a 1974 letter written by Chief John A. Crowe proves the Eastern Band of Cherokees approved the reburial program proposed by TVA. This is incorrect. The TVA has taken this letter out of context and misconstrued its contents in order to justify its actions. For the true intent and purpose of the 1974 letter, see letter from Chief John A. Crowe to Mr. David Freeman, dated November 19, 1979, marked as Exhibit "D" and attached to Appellant's Memorandum Supporting Motion for Injunction Pending Appeal previously filed with this Court.

Furthermore, TVA has submitted a copy of an affidavit signed by Mr. Ross Swimmer, asserting that this affidavit refutes the religious claims of the Plaintiff Cherokees

and shows approval of the "reburial" plans of TVA. However, this affidavit is incompetent for all the avowed purposes of TVA. Nowhere in the affidavit does Mr. Swimmer claim to be an expert in matters concerning the Cherokee religion or Cherokee culture. Nowhere in the affidavit does Mr. Swimmer claim to be a "traditional" Cherokee. In fact, Mr. Swimmer does not even speak the Cherokee language. The only area of expertise claimed by Mr. Swimmer in his affidavit is that he is a banker, lawyer, and Indian chief.

The affidavit is furthermore no evidence of the consent of the Plaintiff Cherokees to any "reburial" and since the Cherokee "Nation" is not a party, this affidavit is improper and incompetent and should be ignored by this Court.

Because TVA is not the "owner" of the remains of these Cherokee ancestors, the Cherokees ask this Court to order TVA to comply with the rules of law and public morality, and to return these bodies to their proper resting places at the earliest possible date and with proper respect and religious ceremonies.

CONCLUSION

Both TVA and the District Court have viewed this case from the wrong end of their constitutional telescopes. The Court found government property interests to prevail over the constitutional and statutory rights of these Indians as a matter of presumption, without balancing these competing interests. The District Court has sacrificed one of this country's most fundamental constitutional principles. The District Court was more concerned with ratifying the expenditure of public funds than with the exercise of religious freedom. We know of no other case where these freedoms have been so clearly waived or where a Court has, in effect, put a price on constitutional rights.

Contrary to the contention of TVA, this case does not inhibit the future ability of the federal government to acquire land for government projects. The Cherokees merely ask the Court to determine whether the action taken in this project is constitutionally valid when it clearly interfers with religious practices of Cherokee Indians. There can be no doubt that an act of Congress may not violate rights protected by the Constitution and that the Courts have authority to determine the invalidity of such acts. Marbury v. Madison, 1 Cranch 137 (1803).

For these reasons, the Cherokees ask this Court to reverse the rulings of the District Court.

Respectfully submitted, this the 3RD day of January, 1980.

ATTORNEYS FOR APPELLANTS

Ben Oshel Bridgers
HOLT, HAIRE & BRIDGERS, P. A.
P. O. Box 248
50 West Main Street
Sylva, North Carolina 28779
(704) 586-2121

Robert M. Stivers, Jr.
LEIBOWITZ, WATSON, KRESSIN,
STIVERS & ERICKSON
703 Gay Street, S. W.
Knoxville, Tennessee 37902
(615) 637-1809

Walter Echo-Hawk
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Kurt Blue Dog
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Ellen Leitzer
NATIONAL INDIAN YOURTH COUNCIL
201 Hermosa
Albuquerque, New Mexico 87108
(505) 266-7966

*Susan Tomita
NATIONAL INDIAN YOUTH COUNCIL
201 Hermosa
Albuquerque, New Mexico 87108
(505) 266-7966

*Bar results pending.

CERTIFICATE OF SERVICE

In accordance with the requirements of Rule 25(d) of the Federal Rules of Appellate Procedure, the undersigned hereby certifies that the required copies of Appellants' Reply Brief were served upon counsel for the Appellees at the following addresses on this the 30 day of January, 1980.

Herbert S. Sanger, Jr.
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902
(615)632-2241

Justin M. Schwamm, Sr.
Assistant General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902
(615) 632-2241

James E. Fox
Assistant General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902
(615) 632-2241

Michael R. McElroy
Tennessee Valley Authority
Knoxville, Tennessee 37902
(615) 632-2241

Ben Oshel Bridgers
Counsel for Appellants
HOLT, HAIRE & BRIDGERS, P. A.
50 West Main Street
P. O. Box 248
Sylva, North Carolina 28779
(704) 586-2121

APPENDIX

AFFIDAVIT

Comes, Robert M. Stivers, Jr., being first duly sworn, and for his Affidavit says:

I.

That the affiant is one of the attorneys of record for the plaintiff-appellants in the matter of Ammoneta Sequoyah vs. Tennessee Valley Authority, said matter presently being on appeal to the United States Court of Appeals for the Sixth Circuit, and does make this Affidavit in response to certain allegations raised by the defendant with regard to the mootness of the legal issues involved in that appeal.

The affiant would state that he has served as the primary source for information among counsels for the plaintiffs regarding the practical affect of the closure of the gates in the Tellico Dam, so as to begin the flooding of the Tellico Reservior.

II.

That, prior to the filing of the lawsuit, during the pendency of the lawsuit in the District Court, and during the time of the filing of Motions for Injunctive Relief pending appeal, the affiant had received information from sources both within, and without, the Tennessee Valley Authority that once the gates on the dam were closed, they could not be reopened without serious physical damage to the dam itself, because:

1. Immediately after closure, concrete would be poured down through the top of each of the gates in question, filling the gates with both concrete and sand, rendering a massive concrete structure where water had once flowed; and

2. That the spill gates themselves would be physically locked in place with additional mechanisms which could not be subsequently removed.

Based on the information available to the plaintiffs, the only alternative for reopening the Dam, so as to drain the water, and allow the Court to render the property decision which would be forceable, involved exploding some or all of the Dam in question, which, frankly, would certainly border on mootness.

III.

After the closure of the Dam on November 29, 1979, specifically during the first week in December of 1979, the affiant received information from a reliable source that a construction executive with the defendant T.V.A., highly placed specifically on the Tellico Project, stated that the opening of the gates in question could be accomplished without structural damage to the Dam itself, and advised:

1. The concrete in question would be simply placed in the gates from tunnels within the Dam, putting concrete in the bottom of the gate only, and that this concrete could be removed manually, after using small charges of dynamite to break up the concrete itself; and

2. That the gates in question could then be lifted with a crane, allowing the water to be removed from the reservior on a schedule basis.

Under the information received after injunctive relief had been denied in the initial stages, and after the Brief of the plaintiffs-appellants had been filed, it does appear that the water may be removed from the reservior, upon orders of the Court, without the destruction of the Dam in question, and possible inherent dangers therein.

WITNESS my hand this 21st day of December, 1979.

ROBERT M. STIVERS, JR.

STATE OF TENNESSEE

COUNTY OF KNOX

I, the undersigned authority, a Notary Public in and for said State and County, do hereby certify that Robert M. Stivers, Jr., to me personally known, executed the foregoing document for the purposes contained therein, and stated that the facts contained therein are true and correct to the best of his knowledge, information, and belief.

WITNESS my hand and seal at office this 21st day of December, 1979.

Notary Public

My Commission expires:

April 23, 1983