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Sequoyah v. TVA, 6th Circuit, Docket No. 79-1633: Brief of Defendant-Appellee Tennessee Valley Authority

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOCKET NO. 79-1633

AMMONETA SEQUOYAH, ET AL.

Plaintiffs-Appellants

v.

TENNESSEE VALLEY AUTHORITY

Defendant-Appellee

On Appeal from the United States District Court
for the Eastern District of Tennessee,
Northern Division

BRIEF OF DEFENDANT-APPELLEE TENNESSEE VALLEY AUTHORITY

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COUNTERSTATEMENT OF THE ISSUES

The issues originally presented were:

1. Did the district court correctly hold that the Government's use for Tellico Dam and Reservoir of land acquired from private parties for that project did not violate the First, Fifth, or Ninth Amendment?

2. Should the district court's decision be upheld in any event because of plaintiffs' delay in advancing their constitutional claims until after 13 years had elapsed and over $111 million of public funds had been expended on the project?

3. Did the district court correctly hold that Tellico was exempted from other laws repugnant to its completion by the direction in Public Law No. 96-69 that TVA complete and operate Tellico "notwithstanding the provisions of . . . any other law," and were the other laws cited by plaintiffs of a kind which would not have prevented TVA from closing the dam in any event?

We believe all of these questions would be answered "yes."

The plaintiffs, a minority of Cherokees, demanded in their second (November 29) motion for injunction pending appeal that disinterred Cherokee remains be reinterred in the original burial sites (rather than in a site above Tellico Reservoir as planned by TVA and approved in 1972 by the Cherokee Nation representing the great majority of Cherokees, and approved in 1974 by the Eastern Band themselves although they, unlike the Cherokee Nation, have since changed their minds). They further demanded that the Court direct the operation of Tellico and other TVA dams and reservoirs to accommodate such reinterment.

We believe they are not entitled to any such relief.

The plaintiffs, in moving this Court and the Supreme Court for an injunction pending appeal, have stated that closure of Tellico would render the appeal moot.

Their motions were not granted, and Tellico has been closed.

COUNTERSTATEMENT OF THE CASE

Plaintiff Eastern Band has expressed opposition to Tellico since 1965,[1] a year before the initial appropriation for its construction. Not until this suit, however, have they or other Cherokees based such opposition on religious grounds.

In so doing in this suit, plaintiffs express the views of only a minority of Cherokees. The Cherokee Nation, which has over 50,000 members, has refused to join as a plaintiff; has commended TVA for its archaeological program aimed at finding and preserving Indian artifacts in the area, including the elevation of a portion of the Chota site above reservoir level; and takes the position that

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1 The Knoxville Journal, Apr. 5, 1965, vol. 89, no. 81, at 1.

the land involved is important from a historical and cultural standpoint, but has no religious significance.[2]

Plaintiffs brought this suit, in the words of the first sentence of the complaint, to "save their sacred Little Tennessee River Valley from destruction by the TVA" (app. 1). As stated in the complaint, in their supporting affidavits, in their oral argument to the district court, and in their various briefs until their most recent one in support of their second motion for an injunction pending appeal, plaintiffs' whole purpose was to prevent flooding of burial and other sites by the waters of the reservoir. Their basic claim was that such inundation of the sites and their lack of future access to them would infringe their right to the free exercise of their religion, and that Public Law No. 96-69,[3] which directed the completion of Tellico, was therefore unconstitutional.

The district court denied plaintiffs' motion for a preliminary injunction and dismissed the suit. The district court's basic holding was that plaintiffs' rights

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2 Affidavit of Principal Chief Ross O. Swimmer at 4-5; see also 1973 TVA Ann. Rep. at 95-96. Chief Swimmer's affidavit is included in the certified record on appeal as a part of item 5 and is reprinted as an appendix to this brief.

3 Energy and Water Development Appropriation Act, 1980, 93 Stat. 437, 449 (Sept. 25, 1979).

under the First Amendment do not extend to preventing the Government's legitimate use of its own lands, as to which neither plaintiffs nor their ancestors have or have had any ownership interest or any right of access for at least 140 years.

Plaintiffs appealed and sought to enjoin closure of the dam and flooding of the reservoir pending appeal. Their applications for such an injunction were successively denied by the district court, a panel of this Court, and Justices Stewart and Brennan of the Supreme Court. Plaintiffs then filed a petition for rehearing of the denial by this Court.

On November 29, TVA closed Tellico and began filling the reservoir. Since then, the water has risen from elevation 739 to elevation 800 (as of December 17). TVA expects that the reservoir will be at full winter pool (elevation 807) before the end of December.

On November 29, plaintiffs served a new motion in this Court for an injunction pending appeal. In so doing, they changed their position in three basic respects:

First, plaintiffs had previously stated to both this Court and the Supreme Court that closure of Tellico would "make moot all of the questions raised by this suit."[4]

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4 Reply brief of appellants in response to brief of appellee TVA in opposition to motion for injunction pending appeal (at 2). Other such statements by plaintiffs are noted infra at 36-37.

Tellico has been closed. Plaintiffs nevertheless sought a second injunction pending appeal, this time to compel reinterment of Indian remains in the original burial sites and operation of Tellico to permit this.

Second, the complaint and plaintiffs' presentations to the district court, this Court, and the Supreme Court, had sought to prevent flooding of the Tellico Reservoir altogether. As previously noted, their case was based on the argument--supported by their affidavits--that inundation of burial and other sites would violate their First Amendment rights. Although they did ask that previously removed remains be reinterred, this was incidental to their basic contention that all burial sites must be left uncovered by water. Indeed, they advanced this contention in their brief on the merits in this Court (at 18, 27-28).

Having thus originally claimed that it was the inundation of burial sites--disturbed or undisturbed--which would interfere with their religious freedom, they changed their position in the memorandum supporting their November 29 motion to state that if previously removed Indian remains were reinterred in the original burial sites, TVA would "then be free to continue flooding the Valley" (at 5).

Third, although plaintiffs originally sought to prohibit creation of a reservoir at Tellico, their second

injunction motion asked instead that the Court direct the operation of Tellico. Moreover, as pointed out infra (at 34-35), the manner of operation they demanded would be incompatible with the TVA Act and with the public interest.

It is TVA's belief that none of the positions taken by plaintiffs has merit, and that the district court's decision should either be affirmed, or the appeal dismissed as moot.

ARGUMENT

I

Plaintiffs' Original Claims Are Without Merit.

A. The district court correctly held that plaintiffs could not prevent the Government from using its land for a dam and reservoir project by a claim that such use will violate their rights under the First, Fifth, and Ninth Amendments.

Plaintiffs have no property interest in the land involved, and neither they nor their ancestors have had any property interest in it or right of access to it for 140 years. Cherokee occupation of the Tellico area did not begin until about 1700.[5] It officially ended with the signing of Calhoun's treaty in 1819, 7 Stat. 195,

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5 Plaintiffs' exhibit B at 22.

by which the Cherokee Nation ceded to the United States all of their lands in the area. The Cherokees ceded their remaining lands east of the Mississippi to the United States by the Treaty of New Echota in 1835, 7 Stat. 478. Most of them thereafter traveled over the Trail of Tears to the lands set aside for them west of the Mississippi River. Individual Cherokees who did not do so "dissolved their connection with their Nation when they refused to accompany the body of it on its removal" Eastern Band of Cherokee Indians v. United States & Cherokee Nation, 117 U.S. 288, 309 (1886).

The county land records show that any lands held by individual Cherokees in the Tellico area were sold by 1838,[6] and title to all land in the area was thereafter in private non-Cherokee ownership until the United States acquired it for the Tellico project.[7] Indeed, the plaintiff Eastern Band themselves stated to the Supreme Court in an amicus brief filed in Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978), that their

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6 Affidavit of John Linn; these records are, of course, also subject to judicial notice.

7 Section 4(h) of the TVA Act, 16 U.S.C. § 831c(h) (1976), provides that title to all land acquired for TVA projects shall be taken in the name of the United States, and that such land shall be entrusted to TVA as the agent of the United States to accomplish the purposes of the TVA Act.

last residence in the Little Tennessee River 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.

The district court, in dismissing this suit, noted the holdings in Abington School Dist. v. Schempp, 374 U.S. 203, 222-23 (1963), and other cited cases, that some form of coercion of actions contrary to religious beliefs is an essential element of a claim under the Free Exercise Clause of the First Amendment.[8] It then held:

> The Court has been cited to no case that engrains the free exercise clause with property rights. The free exercise clause is not a license in itself to enter property, government-owned or otherwise, to which religious practitioners have no other legal right of access [app. 19].

This holding is supported by the one case in which, to our knowledge, a similar religious claim has

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8 Plaintiffs state that the district court erred in describing such cases as requiring a showing of coercive governmental action in a First Amendment free exercise case because these cases "talk in terms of the coercive 'effect,' not of coercive action" (brief of appellants at 16).

This is mere semantics and a distinction without a difference. When the Supreme Court said in Abington that "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion," it obviously meant governmental action through legislation having a coercive effect. This could certainly be referred to, without error, as "coercive action."

been directly raised, and by a long line of decisions dealing with the Government's power under the Property Clause of the Constitution (art. IV, § 3, cl. 2) with respect to its own property.

The one case dealing with a similar religious claim is Badoni v. Higginson, 455 F. Supp. 641 (D. Utah 1977), appeal docketed, No. 78-1517 (10th Cir.) (notice of appeal filed May 25, 1978). In Badoni, Navajo Indians and organizations contended that operation of Glen Canyon Dam and use of a related area by tourists were resulting in

> . . . destruction of holy sites; the drowning of entities recognized as gods by the plaintiffs; prevention of plaintiffs from performing religious ceremonies; desecration 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].

In denying an injunction sought on the basis of the Free Exercise Clause of the First Amendment and granting summary judgment for the Government, 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 [id.].

There, moreover, the land involved was within the boundaries of the Navajo Indian Reservation, although not a part of it (id.). Here, Tellico is some 50 miles from the reservation occupied by the Eastern Band of Cherokee

Indians in North Carolina, and of course many times that distance from any lands occupied by the plaintiff United Ketooah Band in Oklahoma.

The Property Clause and cases interpreting and applying it were discussed at length in Kleppe v. New Mexico, 426 U.S. 529 (1976). The Supreme Court there reaffirmed the basic principle stated in Light v. United States, 220 U.S. 523 (1911), which it cited and relied on, that:

> "The government has with respect to its own land the rights of an ordinary proprietor to maintain its possession and prosecute trespassers. It may deal with such lands precisely as an ordinary individual may deal with his farming property. . . ."
>
> The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely . . . [220 U.S. at 536].

The availability of public property for First Amendment expression depends, as the Supreme Court made clear in Adderley v. Florida, 385 U.S. 39 (1966), on the use to which such property is dedicated. If it constitutes a "public place" or "public forum," it is available for use on a basis free from discrimination or unreasonable regulation. If it does not, the public may be wholly excluded. As the Supreme Court stated in Adderley, in rejecting petitioners' claim that they had a constitutional right of access to jail grounds for demonstration purposes:

> Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not. . . .
>
> * * *
>
> . . . The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this "area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate . . . ." Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, Cox v. Louisiana [379 U.S. 536, 539]. We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose [at 41, 47-48].[9]

Adderley has been followed in numerous subsequent decisions. See, e.g., Knight v. Anderson, 480 F.2d 8, 10 (9th Cir. 1973); Benson v. Rich, 448 F.2d 1371, 1373 (10th Cir. 1971), cert. denied, 405 U.S. 978 (1972); United States v. Cassiagnol, 420 F.2d 868, 874 (4th Cir.), cert. denied, 397 U.S. 1044 (1970); United States v. Crowthers, 456 F.2d 1074, 1079 (4th Cir. 1972); Hurley v. Hinckley, 304 F. Supp. 704 (D. Mass. 1969) (three-judge court), aff'd sub nom. Doyle v. O'Brien, 396 U.S. 277 (1970);

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9 Emphasis added unless otherwise noted.

Jones v. District of Columbia Armory Bd., 438 F.2d 138, 140-41 (D.C. Cir. 1970).

The First Amendment cases cited by plaintiffs are in no way inconsistent and afford no support for their position. Those cases fall without exception into one of two categories: first, those which involve regulation of personal conduct rather than use of government property;[10] and second, those which deal with government property but hold only that the exercise of First Amendment rights cannot be arbitrarily or discriminatorily excluded from property dedicated for use as "public fora" or "public places" (such as streets and parks).[11]

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10 McDaniel v. Paty, 435 U.S. 618 (1978); Procunier v. Martinez, 416 U.S. 396 (1974); Wisconsin v. Yoder, 406 U.S. 205 (1972); New York Times Co. v. United States, 403 U.S. 713 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969); Epperson v. Arkansas, 393 U.S. 97 (1968); United States v. Seeger, 380 U.S. 163 (1965); Sherbert v. Verner, 374 U.S. 398 (1963); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Kennedy v. Meacham, 540 F.2d 1057 (10th Cir. 1976); Teterud v. Gillman, 385 F. Supp. 153 (S.D. Iowa 1974), aff'd sub nom. Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975); People v. Woody, 394 P.2d 813 (Cal. 1964).

11 Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Neimotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cantwell v. Connecticut, 310 U.S. 296 (1940); Hague v. CIO, 307 U.S. 496 (1939); Women Strike for Peace v. Morton, 472 F.2d 1273 (D.C. Cir. 1972); A Quaker Action Group v. Hickel, 421 F.2d 1111 (D.C. Cir. 1969); United States v. Silberman, 464 F. Supp. 866 (M.D. Fla. 1979); United States v. Boesewetter, 463 F. Supp. 370 (D.C. Cir. 1978). Some of these cases, e.g., Murdock and Chaplinsky, also involve elements of plaintiffs' first type of case.

Plaintiffs contend that a "compelling state interest test" should be applied by balancing Tellico against plaintiffs' desire to keep burial and other sites uncovered by water. Plaintiffs are mistaken. In the two types of cases they cite, where there is a direct clash between rights possessed both by individual plaintiffs and the Government, a balancing is of course required. An example related to their first type of case is whether the right of parents to educate their children in accordance with their religious or other convictions is outweighed by a compelling governmental interest in the education of children generally. This was the kind of question presented in Wisconsin v. Yoder, 406 U.S. 205 (1972)--and much earlier in Pierce v. Society of Sisters, 268 U.S. 510 (1925). An example related to their second type of case is whether the right of individuals to use the public streets for parades or other purposes is outweighed by a governmental interest in keeping particular streets clear for vehicular traffic. Compare Cox v. New Hampshire, 312 U.S. 569, 575-78 (1941) and Grayned v. City of Rockford, 408 U.S. 104, 113, 115-16 (1972) with Hague v. CIO, 307 U.S. 496, 515-16 (1939) and Shuttlesworth v. Birmingham, 394 U.S. 147, 155-56 (1969).

Where, on the other hand, the Government is simply using property it owns for a purpose which is

incompatible with its availability for First Amendment expression, no question of balancing arises. Adderley and the cases following it accordingly do not utilize any "compelling State interest test" nor engage in any "balancing" of public and private interests in such a situation.

Here, of course, the lands involved were acquired for just one purpose--the construction and impoundment of Tellico. As the district court correctly noted, since the Government owns the property and the exclusion from it by reason of the impoundment will apply equally to plaintiffs and everyone else, plaintiffs have no arguable claim under either the First or Fifth Amendment.[12] As it further noted, the Ninth Amendment certainly does not restrict the Government's exercise of the normal incidents of ownership of its property. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 330-31 (1936). Such Ninth Amendment claims were rejected with respect to Tellico in earlier litigation over the

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12 Moreover, for the Government to use the lands involved to accommodate plaintiffs' religious beliefs rather than for public benefit through completion of the project would discriminate against the public and raise serious questions under the Establishment Clause of the First Amendment. See, e.g., Meek v. Pittenger, 421 U.S. 349, 363-72 (1975); Gillette v. United States, 401 U.S. 437, 449-50 (1971); O'Malley v. Brierley, 477 F.2d 785, 789 (3d Cir. 1973).

project. Environmental Defense Fund v. Tennessee Valley Authority, 492 F.2d 466 (6th Cir. 1974), aff'g Civ. No. 7720 (E.D. Tenn. Mar. 20, 1973). See also Duck River Preservation Ass'n v. Tennessee Valley Authority, 529 F.2d 524 (6th Cir. 1976), aff'g 4 E.R.C. 1892, 1893-94 (E.D. Tenn. 1972).

Indeed, if the law on these points were otherwise, no land could be acquired for any federal, state, or municipal public purpose--whether a dam and reservoir, an office building, a jail, or a military reservation--with any assurance that it could be so used if any group were to assert that such use would conflict with their religious beliefs or needs.

B. The district court's dismissal of plaintiffs' religious claims was correct in any event because of plaintiffs' laches.

The district court found that:

> [P]laintiffs have known about the project and its attendant First Amendment issues since 1965. Although enjoined twice by the courts, the project has been free from any injunction for at least nine of the last fourteen years. It is difficult to understand why plaintiffs have waited until now to raise their constitutional arguments in court [app. 15].

Although the district court found it unnecessary to decide whether laches bar plaintiffs' claims (app. 20), we submit that laches would be an alternative ground for upholding its decision.

Plaintiffs could have sued to test their religious claims when construction funds for the project were first appropriated in 1966. Their cause of action therefore arose, if at all, at that time. 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).

The Eastern Band's past opposition to the project has been expressed to both Congress and the Supreme Court. A presentation to Congress in 1966, immediately preceding the initial appropriation for Tellico, stated that they were "actively opposed" to the project; that they "will suffer the final desecration of their ancient homelands if Tellico Dam is built"; and that "[t]he Cherokees have petitioned that the place of their forebears be preserved as a part of their rightful heritage."[12]

Actual construction of Tellico began in March 1967.[13] Construction proceeded until 1972, when it was halted by an injunction based on TVA's not having filed an environmental impact statement after the effective date of the National Environmental Policy Act and in support of its subsequent requests for appropriations for

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12 Hearings on H.R. 17787 Before the Subcomm. of the Senate Comm. on Appropriations, 89th Cong., 2d Sess. 73, 78, 79 (1966).

13 1967 TVA Ann. Rep. at 25-27.

the project.[14] An impact statement was then filed, the injunction was dissolved, and applications for an injunction pending appeal were filed in and denied by the district court, this Court, and the Supreme Court. The applicants for that injunction, with whom the Eastern Band actively cooperated throughout the litigation, contended in their applications in this Court and the Supreme Court 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 earth 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.

This Court denied a stay on November 9, 1973 (No. 74-1139). Mr. Justice Stewart, to whom the application was then directed, referred it to the whole Supreme Court, which denied it on November 19, 1973, 414 U.S. 1036.

The Eastern Band again presented their views in two amicus briefs filed with the Supreme Court in Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978). See 434 U.S. 954 (1977); 435 U.S. 920 (1978). Their

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14 Environmental Defense Fund v. Tennessee Valley Authority, 339 F. Supp. 806 (E.D. Tenn.), aff'd, 468 F.2d 1164 (6th Cir. 1972).

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]" (at 1-2). Their first brief elaborated on this theme. It listed the sites involved and discussed their "unique and profound significance in the history and culture of the Cherokee people" (at 2). Noting the "special relevance" to understanding "Indian cultures" of "[a]rchaeological deposits and burial grounds" (at 3), 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 [at 3-4].

Congress did resolve these questions, after debates in which the interests of the Cherokees were forcefully presented. See, e.g., 125 Cong. Rec. S9632 (daily ed.

July 17, 1979) (Senator Kennedy); 125 Cong. Rec. S7551 (daily ed. June 13, 1979) (statement of Charles Schultze); and id. at S7552 (Senator Chaffee).[15]

Then, disappointed with the congressional determination they themselves sought, and with construction of the dam completed and the reservoir ready for flooding, plaintiffs filed the present suit in which they raised for the first time objections predicated on religious grounds.

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 is ready to operate--seek to enjoin it on the basis of religious claims advanced for the first time. The courts have often so held in comparable situations. E.g., United States ex rel. Arant v. Lane, 249 U.S. 367, 372 (1919); Clark v. Volpe, 342 F. Supp. 1324, 1329 (E.D. La.), aff'd, 461 F.2d 1266 (5th Cir. 1972); Lathan v. Volpe, 455 F.2d 1111, 1122 (9th Cir. 1971) (constitutional claim barred); Barthelmes v. Morris, 342

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15 Congress' determination of the public policy issue involved is of course conclusive. See United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 340 (1897). Accord, Kleppe v. New Mexico, 426 U.S. 529, 541 n.10 (1976); Tennessee Valley Authority v. Hill, 437 U.S. 153, 194 (1978).

F. Supp. 153, 159-61 (D. Md. 1972) (constitutional claim barred); Mansfield Area Citizens Group v. United States, 413 F. Supp. 810, 824-25 (M.D. Pa. 1976); Baskin v. Tennessee Valley Authority, 382 F. Supp. 641, 645-46 (M.D. Tenn. 1974), aff'd, 519 F.2d 1402 (6th Cir. 1975).[16]

Plaintiffs argued below that laches should not apply because they were diligent in pursuing other remedies; because such an application would frustrate public policy; and because laches are not applicable to constitutional claims (plaintiffs' reponse to defendant's motion to dismiss, or in the alternative for summary judgment at 31-36). These arguments are without merit for a number of reasons.

First, plaintiffs have sought to assert individual rights, not those of the public. In fact, they represent only a minority of the Cherokee people since

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16 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 statutes of limitations . . . they are, under ordinary circumstances, guided by them in determining their action on stale claims."

In this instance, the applicable statute is the provision in Tenn. Code Ann. § 28-304 (1955) 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); Erwin v. Neal, 494 F.2d 1351, 1352 (6th Cir. 1974) (constitutional claim); Robinson v. Tennessee Valley Authority, Civ. No. 3-77-163, at 8-10 (E.D. Tenn. Aug. 12, 1977), appeal dismissed, No. 77-1661

the Cherokee Nation has declined to participate in this suit. Second, the expressed public policy, as plainly set out by Congress in Public Law No. 96-69, is that the project shall be completed and operated. Third, even if plaintiffs represented "the public," laches will bar claims on behalf of the public. Organizations United for Ecology v. Bell, 446 F. Supp. 535 (M.D. Pa. 1978); Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); Sierra Club v. Cavanaugh, 447 F. Supp. 427, 429 (D.S.D. 1978); Woida v. United States, 446 F. Supp. 1377, 1390 (D. Minn. 1978). Fourth, pursuing other remedies is an inadequate excuse for delay. Organizations United for Ecology v. Bell, supra; Davis v. Tennessee Valley Authority, 214 F. Supp. 229, 232-33 (N.D. Ala. 1962), "aff'd on the able opinion of the trial court," 313 F.2d 959 (5th Cir. 1963). Neither is ignorance of remedies, or even faulty advice of counsel. Baskin v. Tennessee Valley Authority, 382 F. Supp. 641, 646 (M.D. Tenn. 1974), aff'd, 519 F.2d 1402 (6th Cir. 1975). Finally, laches do apply to constitutional claims, as shown by the cases cited supra at 20-21, and note 16.

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16 (cont.) (6th Cir. Sept. 6, 1978) (constitutional claim); Carney v. Smith, 437 S.W.2d 246, 247-48 (Tenn. 1969) (desecration of family cemetery). And a motion to dismiss is the proper way to raise laches when, as here, the facts are apparent--indeed admitted--on the face of the pleadings. Baskin, supra; Russell v. Thomas, 129 F. Supp. 605 (S.D. Cal. 1955).

C. The district court correctly held that Public Law No. 96-69 exempted Tellico from other laws repugnant to its completion, and the other laws would not have prevented its completion in any event.

(1) The Exemption Is Clear.

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 [93 Stat. 449-50 (1979)].

This language is certainly clear and unambiguous. As the district court held:

> There is nothing implied or ambiguous about this language . . . .
>
> . . . The language exempting the Tellico Dam project from "any other law" is clear and explicit. The creation of a reservoir will necessarily prevent access to many of plaintiffs' sacred sites. If the statutes cited by plaintiffs do guarantee access to these sites, as argued by plaintiffs, they are unavoidably repugnant to Congress's order to complete the dam. Congress has clearly and expressly exempted the Tellico Reservoir from any law repugnant to its completion [app. 17-18].

In such cases,

> . . . if [the language of the statute] is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms [Caminetti v. United States, 242 U.S. 470, 485 (1917)].

Accord, Minnesota Mining & Mfg. Co. v. Norton Co., 366 F.2d 238, 242 (6th Cir. 1966), cert. denied, 385 U.S. 1005 (1967); Hilliard v. United States, 310 F.2d 631 (6th Cir. 1962). The continuing vitality of this plain meaning rule was reaffirmed in Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 n.29 (1978).

Here, moreover, the statutory language accords with the clear legislative purpose of Public Law No. 96-69 to mandate completion of a virtually completed project. As stated by its sponsor, Representative Duncan of Tennessee:

> The purpose of my amendment is to establish in law the Congress desire to see that the Tellico Dam and Reservoir is completed and used as designed. . . .
>
> . . . My amendment would make it clear that the Congress intends for this project to be 100 percent complete and used as designed [125 Cong. Rec. H4663 (daily ed. June 18, 1979)].

Courts will go to great lengths to carry out such clearly expressed legislative purposes. See Church of the Holy Trinity v. United States, 143 U.S. 457, 459-65 (1892); Markham v. Cabell, 326 U.S. 404, 408-09 (1945).

Plaintiffs point to D.C. Fed'n of Civic Ass'ns, Inc. 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 been discredited even as to what it holds. See Chief Justice Burger's statement at 405 U.S. 1030-31 (1972):

> 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 in this respect.

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 is 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 provision:

> 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 S12,275].

See also 125 Cong. Rec. S9631 (daily ed. 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"); 125 Cong. Rec. H7215 (daily ed. Aug. 2, 1979), remarks of

Representative Breaux (This bill "exempts the Tellico project in Tennessee from all laws").[17]

Plaintiffs also relied on Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978). That case is inapposite since, as the district court noted, it involved the question of whether an exemption could be implied, and not, as here, whether an express exemption should be given effect in accordance with its terms.

(2) The Statutes Cited by Plaintiffs Did Not Confer on Them the Rights Which They Claim.

The three statutes cited by plaintiffs were the American Indian Religious Freedom Act (Pub. L. No. 95-341, 92 Stat. 469 (1978)), the National Historic Preservation Act (16 U.S.C. §§ 470 et seq. (1976)), and a Tennessee statute regulating graves (Tenn. Code Ann. § 46-401 (1964 repl.)) (app. 8, ¶ 23).

The American Indian Religious Freedom Act, on which they principally relied, conferred no such rights

---

17 Plaintiffs attempted to downgrade this legislative history by arguing that the statements were made by opponents rather than proponents of the Tellico project. But these statements were in no way contradicted by proponents. And as the Supreme Court made clear in a similar situation, statements of opponents are "relevant and useful, especially where, as here, the proponents of the bill made no response to the opponents' criticisms." Arizona v. California, 373 U.S. 546, 583 n.85 (1963). Accord, United States v. Board of Comm'rs of Sheffield, Ala., 435 U.S. 110, 130-31 (1978); Parlane Sportswear Co. v. Weinberger, 513 F.2d 835, 837 (1st Cir.), cert. denied, 423 U.S. 925 (1975).

as they claim. The Act simply expressed a general policy and does not obligate federal agencies to make any changes which would interfere with their statutorily authorized programs. Indeed, plaintiffs themselves stated in their response to TVA's motion in the district court that this Act did not "impose[] specific changes upon the TVA" (at 43).

The Act's legislative history makes this perfectly clear. As originally proposed, it would have required federal agencies, after evaluation, to implement changes in their actions. 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). Congressman Udall, the sponsor of the legislation in the House, made the effect of this change crystal clear:

> 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.
>
> * * *
>
> Mr. Speaker, it is not the intent of my bill to wipe out laws passed for the benefit of the general public or to confer special religious rights on Indians. . . .
>
> * * *

> . . . 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 the Congress [id. at H6871-73].

He thereafter asked for inclusion in the record of a letter from the Department of Justice, saying:

> The letter states that it is the Department's understanding that this resolution in and of itself, does not change any existing State or Federal law. That, of course, is the [House] committee's understanding and intent [id. at H6872].

The National Historic Preservation Act similarly does not prohibit projects affecting archaeologically or historically important sites, but rather requires programs to ameliorate their effects. More than $3 million has been spent for that purpose in connection with the Tellico project.

As for the Tennessee statute, plaintiffs apparently have abandoned on appeal any claim with respect to it. In any event, it is too well established to call for extended argument that the Supremacy Clause of the Constitution renders it inapplicable. As stated by this Court 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).

Finally, plaintiffs contend that exemption of Tellico from these statutes would in itself raise a constitutional question. Since the statutes do not confer on plaintiffs any rights which would interfere with the use of the federal lands involved for statutorily authorized programs or projects, no constitutional question can be raised by a statute which mandates completion of a project on lands acquired for that purpose. In any event, under the authorities cited the constitutional authority of Congress to direct that particular federal property be used for a designated public purpose is not open to reasonable question.

II

Plaintiffs Are Not Entitled To Demand Reinterment of Remains in Original Sites and Operation of Tellico To Accommodate Such Reinterment.

Plaintiffs are not legally entitled to demand any reinterment of remains in original sites or direction by the Court of the operation of Tellico to accommodate such reinterment. In addition, the factual situation would compel rejection of the demand in any event.

Their demand is wholly without basis from a legal standpoint because of the well established rule that the Government can, in connection with a public project, remove remains from one location and reinter them at another.

Thus, burial grounds are subject to condemnation even though recognized as "sacred places." As noted in United States v. Sixty Acres, More or Less, of Land, 28 F. Supp. 368 (E.D. Ill. 1939):

> [G]reat governmental projects, like the Norris Dam in Tennessee, similar in their essential physical needs and results to the project here involved, could not and would not have been constructed had the law prevented the condemnation of public cemeteries and the removal of the bodies of the dead therefrom [at 374].

Accord, United States ex rel. TVA v. Vogle, 28 F. Supp. 454, 455 (W.D. Ky. 1939); City of New Orleans v. Christ

Church Corp., 81 So. 2d 855, 859-60 (La. 1955); In re Bd. of St. Openings & Improvement, 31 N.E. 102, 104 (N.Y. Ct. App. 1892); 29A C.J.S. Eminent Domain § 85, at 345-46 (1965). Disinterment and reburial at other locations are common in situations of various types. See, e.g., Travelers Ins. Co. v. Welch, 82 F.2d 799, 801 (5th Cir. 1936); Radomer Russ-Pol Unterstitzing Verein v. Posner, 4 A.2d 743, 745 (Md. Ct. App. 1939); Cf. Mallen v. Mallen, 520 S.W.2d 736, 737 (Tenn. Ct. App. 1974). Indian-owned lands generally are as subject to condemnation as any others. Cherokee Nation v. Southern Kan. Ry., 135 U.S. 641, 655-56 (1890); 1 Nichols on Eminent Domain § 2.212, at 2-126 (3d rev. ed. 1976). The Supreme Court has even held on two occasions that where the Wyandotte Indians ceded their lands to the United States, specifically excepting a parcel to be used in perpetuity for burial purposes (as the Cherokees did not), the United States could nevertheless remove the burials and sell the parcel. Conley v. Ballinger, 216 U.S. 84, 90-91 (1910); City of Kansas City v. United States, 192 F. Supp. 179, 181-82 (D. Kan. 1960) (three-judge court), summarily aff'd, 365 U.S. 568 (1961).

The following factual considerations would necessitate rejection of plaintiffs' demands even apart from the legal principles stated above:

1. Plaintiffs' November 29 memorandum gives the impression that all 1,140 disinterred remains are Cherokee remains. In fact, only 185 are Cherokee remains. The other 955 are remains from earlier and different cultures, as to which plaintiffs have no special interest.

2. None of the remains were originally interred in marked graves. They were disinterred, along with portions of sites, in accordance with a careful archaeological study undertaken to carry out the policies stated in the National Historic Preservation Act and other legislation, and in Executive Order No. 11,593. (Plaintiffs have suggested that the disinterments were improper--and even, in one of the attachments to their November 29 motion, that they amounted to "grave robbing." We appended for the Court's information as Attachment A to our memorandum in opposition to that motion a statement outlining the reasons for the disinterments and the manner in which they were made.)

3. TVA long ago made plans for the eventual reinterment of the Cherokee remains in a memorial park at the site of the principal Cherokee village of Chota, to which Cherokees will have access. See 371 F. Supp. 1004, 1008 and n.9. A portion of this site has been raised well above the level of Tellico Reservoir. These plans were approved by the Cherokee Nation and by plaintiff

Eastern Band itself (see letter from Principal Chief Crowe included in Attachment A, supra). Plaintiff Eastern Band has since changed its mind. The Cherokee Nation, which comprises the great majority of Cherokees, has not, and to the contrary continues to support these plans (see affidavit of Principal Chief Ross O. Swimmer reprinted as an appendix to this brief).

Plaintiffs, in advancing their demands, are thus speaking for only a minority of Cherokees themselves.

4. It would be physically impossible to comply with plaintiffs' demands. A number of Cherokee as well as other Indian remains were disinterred from sites which have since been altered. Other sites were at elevations which are already flooded by the reservoir, and still others will be so flooded within a few days.

5. Operation of Tellico to partially comply with plaintiffs' demands would be incompatible with the TVA Act and the public interest.

Section 9a of the TVA Act provides that:

> The board is hereby directed in the operation of any dam or reservoir in its possession and control to regulate the stream flow primarily for the purposes of promoting navigation and controlling floods. So far as may be consistent with such purposes, the board is authorized to provide and operate facilities for the generation of electric energy . . . [16 U.S.C. § 831h-1 (1976)].

The recently enacted Public Law No. 96-69 further provides that:

> [T]he 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 [emphasis added].

What plaintiffs demand is, in essence, the non-operation of Tellico for its statutory purposes. Tellico is now an integral part of TVA's entire unified system of dams and reservoirs. To control the future operation of Tellico so as to comply with plaintiffs' demands would be wholly at variance with the statute and--particularly at the beginning of the season of winter floods and peak power demands--with the public interest. The reasons are spelled out in the affidavit of Robert A. Shelton appended as Attachment B to TVA's memorandum in opposition to plaintiffs' November 29 motion. As Mr. Shelton there pointed out, operation of Tellico in accordance with its planned design requires that a canal be opened between it and TVA's Fort Loudoun Reservoir and the two reservoirs operated together as soon as Tellico Reservoir reaches elevation 807, which is expected to occur before the end of this month. This is necessary from a safety standpoint in the event of a major flood, as well as to obtain Tellico's designed power and navigation benefits. Meanwhile, because of the need to discharge water from the key Fontana Dam above Tellico in preparation for the

imminent winter flood season, Tellico could not safely be drawn below its present level (and is actually in the process of rising toward the 807 level).

The control of TVA's dam and reservoir system requires exercise of the highest degree of engineering judgment and discretion. See, e.g., Douglas Dev. Corp. v. Tennessee Valley Authority, 595 F.2d 1222 (No. 77-1154) (6th Cir. 1979); Spillway Marina, Inc. v. United States, 445 F.2d 876, 877 (10th Cir. 1971); Atchley v. Tennessee Valley Authority, 69 F. Supp. 952, 954-56 (N.D. Ala. 1947). Accepted legal principles would preclude in any event control through injunction of the performance of such discretionary engineering functions affecting the well-being of millions of people. Cf. Huntt v. Government of V.I., 382 F.2d 38, 45-46 (3d Cir. 1967), and cases cited.

III

The Appeal Should Be Dismissed as Moot.

The plaintiffs have represented to both this Court and the Supreme Court that closure of Tellico would render the appeal moot. Their November 9 application to the Supreme Court for an injunction pending appeal (at 3) and their November 16 petition for a rehearing by this Court of its November 9 denial of such relief (at 4) each contained the following statement:

> Once flooding commences the [TVA] will have started an irreversible process which will result in the destruction of holy and religious sites which are fundamental to the traditional Cherokee religion and belief system. The legal and constitutional questions raised by this case will then be mooted and the [plaintiffs] will have been denied any possibility of relief without benefit of the appeal process.

Similar statements were made in their November 4 memorandum in support of their first motion in this Court for an injunction pending appeal (at 10, 25); their November 5 reply to TVA's brief in opposition (at 2); their November 9 memorandum in support of their application to the Supreme Court (at 5-6, 20); and their November 16 motion in this Court to expedite the hearing (at 2).

Plaintiffs' various requests for an injunction to prevent closure of the dam and commencement of flooding were denied. Tellico was closed, flooding began, and the level of the water has since risen 61 feet.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed or the appeal dismissed as moot.

Respectfully submitted,

Herbert S. Sanger, Jr.
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee

Justin M. Schwamm, Sr.
Assistant General Counsel

James E. Fox
Assistant General Counsel

Michael R. McElroy

Attorneys for
Tennessee Valley Authority

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has been served on appellants by mailing two copies thereof, properly addressed and postage prepaid, to their counsel of record as follows:

Kurt Blue Dog, Esq.
Walter Echo-Hawk, Esq.
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Robert M. Stivers, Jr., Esq.
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Stivers & Erickson
703 Gay Street, SW.
Knoxville, Tennessee 37902

This 18th Day of December, 1979.

Michael R. McElroy
Attorney for Tennessee
Valley Authority

APPENDIX

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)
) SS
COUNTY OF CHEROKEE)

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 Ketooah Band of Cherokee Indians, one of the plaintiffs in this action, is a group located primarily in the counties of eastern Oklahoma. The Ketooah 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
110 SO. DEWEY
BARTLESVILLE, OKLAHOMA

CHEROKEE NATION

EARL BOYD PIERCE
GENERAL COUNSEL
P. O. BOX 490
FORT GIBSON, OKLAHOMA 7443

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

EXHIBIT 1

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

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.

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

(Chairman)

ATTEST: