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Trial Brief of TVA, *TVA v. Hill et al*, Civil Action No. 3-76-48

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Civil Action No.
CIV. 3-76-48

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

HIRAM G. HILL, JR.,
ZYGMUNT J. B. PLATER and
DONALD S. COHEN

Plaintiffs

v.

TENNESSEE VALLEY AUTHORITY

Defendant

TVA
TRIAL BRIEF OF TENNESSEE
VALLEY AUTHORITY

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INTRODUCTION

Because the pretrial order adequately and concisely states the nature of the case, the theories and contentions of the parties, and the issues presented, we see no need for a detailed statement of the case at this time. Instead, we shall simply incorporate the pertinent factual material as a part of the discussion under the appropriate issues. The six issues will be discussed in the same sequence as set out in the pretrial order.

ARGUMENT

Although, for the sake of completeness, each issue will be discussed separately, it is recognized that they are not distinct unrelated entities but are simply different facets of the total picture. They must all be weighed together in deciding the ultimate issue of whether under all the circumstances of the case, the court after weighing and balancing all the equities, should grant or deny plaintiffs' request for an injunction (Issue 2).

In viewing the total picture, certain overriding factors must be recognized. This is an extreme case. Extreme in the sense of the public investment involved. Extreme in the sense of public benefits from the project. Extreme in the sense of the stage of completion of the project. Extreme in the sense of the competing factors--a \$100 million project against a three-inch fish. It is also a case without any direct precedent.

It is against this extraordinary background that the issues must be evaluated.

1. Will the Further Implementation of the Tellico Project and the Completion of the Tellico Dam and Water Impoundment Result in the Total Destruction of the Snail Darter and the Snail Darter's Habitat?

TVA does not believe that the Tellico impoundment will result in the total destruction of the snail darter, but it does concede that a significant portion of its presently known habitat will be altered or modified by the impoundment. There are three basic reasons for this belief: (1) there is good evidence that the darter will survive impoundment; (2) TVA's conservation program to preserve the darter by transplanting it to other areas will be successful; and (3) TVA has found the darter existing below Tellico Dam in Watts Bar Reservoir in areas unaffected by the Tellico impoundment (outside its presently described "critical habitat") and has reason to believe it exists in still other areas.

It is not feasible within the limits of this brief to summarize in any meaningful manner the scientific research which TVA has undertaken in these areas. Suffice it to say that TVA has already transplanted over 700 snail darters to the Hiwassee River, and there is every indication that these

transplants are successful; and also that TVA has found snail darters living in Watts Bar Reservoir more than 10 miles below Tellico Dam under such conditions as to lead TVA scientists to believe that they thrive and reproduce there and other places outside the Little Tennessee River.

2. Whether a Violation of the Endangered Species Act by the Defendant TVA Should Result in the Issuance of the Requested Injunctive Relief When That Situation Is Weighed in Relation to the Tellico Dam and Tellico Project?

TVA does not believe that it is in violation of the Endangered Species Act but rather that it is doing everything feasible to conserve the snail darter while completing the project in accordance with its congressional mandate and, in so doing, has complied with the Act and has not acted in an arbitrary or capricious manner. This phase of the case will be discussed later under Issue 6.

Even if completion of the Tellico project would result in a technical violation of the Endangered Species Act, it is clear that such violation, under the circumstances of this case, would not warrant the issuance of an injunction. The "injunctive relief" authorized by the Act obviously means injunctive relief in the traditional sense as requiring the exercise of judicial discretion and restraint. Such relief is not granted automatically. As said by the Supreme Court in Truly v. Wanzer, 46 U.S. (5 How.) 140, 142 (1847):

There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury¹

See also Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, 471 F.2d 872, 876 (6th Cir. 1972).

1 Emphasis added herein unless otherwise noted.

As pointed out in Reliable Transfer Co. v. Blanchard, 145 F.2d 551, 552 (5th Cir. 1944), an injunction is an extraordinary remedy, and it is hornbook law "that whether an injunction will or will not issue rests within the sound discretion of the court."

The case of Hecht Co. v. Bowles, 321 U.S. 321, 322 (1944), is instructive on this issue. It involved the Emergency Price Control Act which stated in effect that if the administrator found that any person had violated the Act, he could apply to the court "for an order enforcing compliance" with the Act; and upon a showing that the person had engaged in such acts, "a permanent or temporary injunction, restraining order, or other order (shall be granted without bond.)" The administrator established such a violation and the question was whether he was entitled to an injunction as a matter of right "or whether the court has some discretion to grant or withhold such relief."

The district court found that the violation was made in good faith and refused to grant an injunction. The court of appeals reversed on the ground that the Act required the issuance of an injunction as a matter of course once the violation was found. The Supreme Court reversed the court of appeals saying in part:

We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." Meredith v. Winter Haven, 320 U.S. 228, 235. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of

mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied [321 U.S. at 329-30; emphasis by the Court].

This case demonstrates that all violations of statutes authorizing injunctions do not mandate their issuance and, what is more important, that when a statute speaks of "injunctions" and "restraining orders," those terms are deemed to be used in their traditional sense as invoking the "sound discretion" of a court of equity.

We wish to emphasize that nowhere in the Endangered Species Act is there any mandate that the court shall issue an injunction for any violation of the Act--it merely confers on the court's appropriate jurisdiction to grant or deny injunctive relief. Whether it is granted or denied rests in the sound discretion of the court to be exercised in accordance with well-settled equitable principles and in the light of all the facts and circumstances in the case. As shown in subsequent sections of this brief, it is our view that the granting of an injunction in the case at bar would not be appropriate nor in the public interest.

Of course, one of the factors the court should take into consideration is the stage of construction of the project. In Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974), in which the project was 27 percent completed, the court said:

In considering the overall equities, the extent to which Wallisville has been completed is a factor to be carefully weighed [at 988].

Before closing this portion of the argument, we wish to comment briefly on the recent case of National Wildlife

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citing
Arkington Coal.
on Stamp v. U.S. Dep.
458 F.2d 1323, 137
470 F.2d 289, 291
Ryder v. Minella
460 F.2d 1146

Fed'n v. Coleman, No. 75-3256 (5th Cir., Mar. 25, 1976), involving the Mississippi Sandhill Crane, to which plaintiffs made reference in their brief for a temporary injunction. The action was brought to enjoin the construction of a section of an interstate highway (I-10) through a portion of land in southern Mississippi which constituted the critical habitat of the Mississippi Sandhill Crane, an endangered species, only 40 of which are still in existence. The district court denied plaintiff's request for an injunction and dismissed the complaint. The court of appeals reversed and directed the district court to enter an order enjoining the construction of an interchange connection which was proposed as part of the interstate highway, and also enjoining the excavation of certain burrow pits in the critical habitat area. The court did not order a permanent injunction against construction of the highway.

ct said whatever was required

The case is a classic example of a situation in which a court could order relatively minor adjustments in a large project without halting or impeding construction of the main project. Unfortunately that is not the situation as to the Tellico project. There is no way that the Tellico project can be completed without altering or modifying to some degree the currently designated critical habitat of the snail darter. It does not afford the same degree of flexibility and adjustment as does the construction of a highway. Moreover, the equities in the two cases are totally different. The Sandhill Crane case involved a large land bird which was about to become extinct. Its existence was known to all before the highway was ever begun. The snail darter is a small fish which lives on the bottom of the rivers or reservoirs where it can scarcely be found without special diving equipment nor can it be distinguished from many other species of

darters except by a small group of ichthyologists. No one was ever aware that it existed until the project was more than half completed. It was not put on the endangered species list until the project was almost 80 percent completed. Its presently known critical habitat (as designated by the Fish and Wildlife Service effective May 3, 1976) is between miles 17 and 0.5 of the Little Tennessee River, but TVA scientists believe its range is much wider than the Little Tennessee. These are some of the basic considerations which distinguish the Sandhill Crane case from the case at bar.

3. Is the Endangered Species Act Applicable to the Tellico Project and the Tellico Dam?

It is elementary law that the question of whether a statute operates retrospectively, or prospectively only, is one of legislative intent. Hassett v. Welch, 303 U.S. 303, 314 (1938); Shwab v. Doyle, 258 U.S. 529 (1922); 73 Am. Jur. 2d Statutes § 350 (1974). As said by the Sixth Circuit in Taliaferro v. Stafseth, 455 F.2d 207, 209 (1972):

It is well settled that a statute will not be given retroactive effect in the absence of a clear declaration of retroactivity by Congress. Rushton v. Schram, 143 F.2d 554 (6th Cir.). It is incumbent upon the person who argues for retrospective application to show that Congress intended for the Act to be applied in that fashion.

There is nothing in the Endangered Species Act of 1973 to indicate that Congress intended it to operate in such a way as to completely halt and prevent the construction of a major congressionally authorized project that was near completion when a species of plant or animal, which is affected by the project, is listed under the Act. As said in Taliaferro, it is incumbent upon the plaintiffs to show that Congress intended the Act to be applied in that fashion.

The Endangered Species Act of 1973 became effective on December 28, 1973. This was more than seven years after the Tellico project was authorized by Congress and nearly seven years after construction began. The project was then more than half completed, and Congress had appropriated over \$45,000,000 out of a then estimated cost of \$69,000,000 for the project. This Court had already approved TVA's Final Environmental Statement, which fully assessed the environmental effects of the project, including the loss of one or more rare or endangered fish species, after a week's trial in September 1973 (371 F. Supp. 1004).

The snail darter was officially listed as an endangered species under the Act effective November 10, 1975, and the description of its critical habitat will become effective May 3, 1976. 41 Fed. Reg. 13928 (1976). Today approximately \$80 million has been invested, and the project is about 80 percent completed.

Did Congress intend the Act to apply under these circumstances? We think not. There can be no doubt that there comes a time at some stage of a project when the federal action becomes so complete as to make the application of a subsequently enacted federal statute to that project retroactive in nature and contrary to congressional intent. The principle is well stated in Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir.), cert. denied, 409 U.S. 1000 (1972), involving the National Environmental Policy Act:

Doubtless Congress did not intend that all projects ongoing at the effective date of the Act be subject to the requirements of Section 102. At some stage of progress, the costs of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be "possible" to change the project in accordance with Section 102. At some stage, federal action

may be so "complete" that applying the Act could be considered "retroactive" application not intended by the Congress [at 1331].

Whether the statute applies to a particular project will obviously depend upon the circumstances of the case. The basic question is: What did Congress intend? The legislative history of the latest appropriation bill appropriating funds for fiscal year 1976 clearly demonstrates that Congress, with full knowledge of the snail darter and the Endangered Species Act, intended this project to go forward to completion. At those hearings TVA's Chairman of the Board, Mr. Wagner, testified in support of the President's recommended \$23,742,000 budget for this project. In the course of this testimony Congressman Evins, Chairman of the Subcommittee, asked him:

Explain the environmental problem with a species of minnow that you are now experiencing in connection with the Tellico project. How do you plan to resolve this problem [Hearings Before a Subcomm. of the House Comm. on Appropriations, 94th Cong., 1st Sess., pt. 7, at 466 (1975)].

In his statement Mr. Wagner, after explaining the collection of the snail darter in August 1973, and the extensive litigation involving the environmental consequences of the Tellico project, said in part:

There is no litigation presently pending concerning the Tellico project. It appears, however, that opponents of the project may again be planning to litigate its completion on the ground that such completion would destroy the habitat of the darter in question, which they say would violate the Endangered Species Act of 1973 if the fish is eventually listed as endangered. That act, which became law in 1973, certainly requires us to do what we can to preserve endangered species. But it does not repeal prior congressional approval and funding of the Tellico project, or any other lawfully, congressionally authorized project, because the habitat or range of an endangered species will necessarily be destroyed, altered, or curtailed by the completion of the project. To so construe the act would mean that the Secretary of the Interior would have absolute veto power over any congressionally authorized and

funded project, regardless of its stage of completion, if any opponent of the project could obtain additions to the endangered species list of any species of fish, wildlife, or plant which could not be conserved except by stopping the project. If the act were so construed, the Secretary of the Interior could halt the Tellico project, the Duck River project, the Army Corps of Engineers' Tennessee-Tombigbee project and Gillham Dam project, or any other Government project.

* * *

In summary, we believe the environmental consequences of the Tellico project have been fully and adequately disclosed; that while we will do our best to preserve the darter if it in fact proves to be a distinct species and is listed as endangered, the project should be completed in any event; and that the President's full appropriation request for fiscal year 1976 should be approved [Id. at 467].

This exact statement was made before both the House and Senate committees.

In recommending the full amount requested for Tellico, the committee stressed the "enormous contribution to America" that has been made by projects for water supply, power development, flood control, navigation, reclamation, and recreation saying that they represent "a substantial investment in the future of our Nation, an investment that will pay rich dividends in services and economic benefits for the American people" (H.R. Rep. No. 94-319, 94th Cong., 1st Sess. 3, 4 (1975)). It also pointed out the lasting value of such projects.

The committee believes that the jobs created by the construction funds in this bill are more beneficial to the American people than those jobs created by temporary public service programs. The results of the productive jobs created by this bill--electric power on line, flood control facilities constructed, improved harbors and navigation, expanded irrigation--will benefit the American people for decades to come.

* * *

Through the years the Committee has strongly supported the Tennessee Valley Authority. The committee reflects with great pride on its consistent and constant support of the vital and important programs of this agency which have, among other accomplishments and achievements, prevented much flood damage, promoted navigation, produced electric power, created reforestation, encouraged industrial development and generally improved economic conditions of the Tennessee Valley area [Id. at 5, 75-76].

These are some of the considerations which led the committee to conclude, despite its knowledge that the project would destroy, alter, or curtail the habitat of the snail darter, that the project should be completed:

The bill provides the budget request of \$23,742,000 for construction of the Tellico dam reservoir. The Committee directs that the project, for which an environmental impact statement has been completed and provided the Committee, should be completed as promptly as possible for energy supply and flood protection in the public interest [Id. at 76].

It is clear from the law, and from this legislative history, that Congress has considered the benefits of this project in the form of navigation, flood control, electric power, jobs, new industrial development, recreation, shoreline development, etc., in which nearly \$80 million have already been invested; has weighed them against the benefits of the snail darter; and has determined that the Endangered Species Act was not intended to apply to this project.

4. If Applicable, Does the Endangered Species Act Prevent the Completion of the Tellico Project and Dam?

Even if applicable, the Endangered Species Act does not prevent completion of the Tellico project. Before discussing the specific reasons, we wish to make some basic observations. It is clear from the Act and its legislative history, that Congress intended to commit to TVA the authority and

*Sounds great:
Clearly gives
Congressman no
warning about the
issue of End Species
Act*

[

responsibility for deciding whether the project should go forward after the consultation process with the Secretary of the Interior has taken place. Although Interior has no veto power over TVA's decision to complete the project, TVA's decision is, of course, subject to judicial review to determine whether it was arbitrary or capricious or otherwise not in accordance with law. That aspect of the case will be discussed under Issue 6.

Moreover, the Act must be construed in a reasonable manner so as to carry out the expressed intent of Congress. This is a basic principle of statutory construction. In Environmental Defense Fund, Inc. v. Corps of Engineers, 342 F. Supp. 1211 (E.D. Ark.), aff'd, 470 F.2d 289 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973), the court applied this rule of reason to the National Environmental Policy Act, saying:

Congress, we must assume, intended and expected the courts to interpret the NEPA in a reasonable manner in order to effectuate its obvious purposes and objectives. [342 F. Supp. at 1217].

Section 7 (16 U.S.C. § 1536 (Supp. IV, 1974)) of the Endangered Species Act reads as follows:

§ 1536. Interagency cooperation.

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

As stated above, this section and its legislative history make it clear that Congress intended to commit to TVA the authority and responsibility for deciding what action should be taken to conserve the snail darter and whether the project should go forward after the consultation process has taken place. The following colloquy between Senator Tunney, floor manager of the bill in the Senate, in explaining the meaning of this section to Senator Cook of Kentucky, leaves no doubt that such was the intent of Congress:

MR. COOK. . . . The point I have in mind is that we have the Pioneer Weapons Hunting Area in the State of Kentucky. It is the only one of its kind in the United States. There is no other. It is a tremendous nesting area for wild turkeys.

I might suggest that the Corps of Engineers decided that it would build a road right through the middle of this area. We have tried our best to have them change the route of the road. They had alternate routes, but they decided, despite their alternative routes, that this is where they would build the road.

This language means that they have to consult with the respective agencies under this bill, and they have to consult with the respective State agencies in order to work out this problem. This is exactly what it means. And I would be less than candid if I did not explain that the Senator.

MR. TUNNEY. Mr. President, as I understand it, after the consultation process took place, the Bureau of Public Roads, or the Corps of Engineers, would not be prohibited from building such a road if they deemed it necessary to do so.

MR. COOK. The point is that they would then be doing it after consultation with the respective agencies, rather than making that decision on their own.

MR. TUNNEY. But they would have the final decision after consultation.

MR. COOK. The Senator has put me in a rather bad light. Under the terms of this, it would have to be under an agreement worked out with the respective agencies.

MR. TUNNEY. Mr. President, as I understand the legislation, just reading the language:

All other departments, agencies, and instrumentalities of the Federal Government shall, in consultation and with the assistance of the Secretary--

(b) take such action as is necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of any endangered or threatened species, or result in the destruction or modification of any habitat of such species which is determined by the Secretary, after consultation to the extent appropriate and necessary with affected States, to be a critical habitat of such species.

So, as I read the language, there has to be consultation. However, the Bureau of Public Roads or any other agency would have the final decision as to whether such a road should be built. That is my interpretation of the legislation at any rate [119 Cong. Rec. S. 14536 (daily ed., July 24, 1973)].

In supporting the President's request for appropriations to continue construction of this project, TVA informed both the House and the Senate of the problem and explained to both that "the habitat or range of an endangered species will necessarily be destroyed, altered, or curtailed by the completion of the project." TVA also told Congress that the Act should not be construed to allow the project to be halted and that

. . . while we will do our best to preserve the darter if it in fact proves to be a distinct species and is listed as endangered, the project should be completed in any event
[Hearings Before a Subcomm. of the House Comm. on Appropriations, 94th Cong., 1st Sess., pt. 7, at 467].

TVA further told the Senate Subcommittee that

. . . certain groups are unwilling to still admit that project is going ahead, and there is a movement that has been started where someone has found a 3-inch minnow that they call a snail dart. They are making efforts to have this included in the endangered species list by the Secretary of the Interior, and some actions have been taken there to again try to interfere with this project.

This is the kind of thing that also can happen on the Duck River with some snails and mussels that are considered to be possibly on the endangered species list. We do not acknowledge that they are--that is the only place you find them. We think the claims are not justified, but while this goes on, and while that project has been delayed, the cost of it has gone up by \$31 million to \$100 million. And we have been losing 200 million kilowatts of electricity a year that could be generated there. And we feel that this is a use of this Endangered Species Act now that was not intended by the Congress, and that can play havoc with any number of projects that might come up in the future--not only ours, but others. We hope that we can get that worked out satisfactorily. We would like to place a statement about this in the record [Senate Hearings Before the Comm. on Appropriations, 94th Cong., 1st Sess., pt 4, at 3775].

Being thus advised, Congress appropriated the requested funds, and the appropriation bill was signed by the President on December 26, 1975. In approving TVA's budget request, the House subcommittee "directed" that the project "be completed as promptly as possible . . . in the public interest" (H.R. Rep. No. 94-319, 94th Cong., 1st Sess. 76 (1975)).

It is clear from this legislative history of both the Endangered Species Act and the appropriation bill, that Congress has agreed with TVA's interpretation that due to the advanced stage of this project, the Endangered Species Act does not require that the project be halted, but simply that TVA should do the best it can to preserve the darter while at the same time completing the project as promptly as possible. We think this interpretation is in keeping with both the letter and spirit of the Act as applied to a project in an advanced stage of construction at the time the Act was passed. As stated previously, the Act should be given a reasonable construction. The Act should be read and construed as a whole, in the light of the purposes for which it was enacted. As

said by the Supreme Court in the leading case of Richards v. United States, 369 U.S. 1 (1962):

We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy" [at 11].

Section 7 of the Act requires federal agencies to "utilize their authorities in furtherance of the purposes" of the Act. Those purposes are stated in section 1531 entitled "Congressional findings and declaration of purposes and policy." This section notes that various plants and animals have been rendered extinct as a result of "economic growth and development untempered by adequate concern and conservation." Those four words "untempered by adequate concern" are the very evil at which the Act is directed. That same section points out that the United States has pledged itself "to conserve to the extent practicable" these various species of plants and animals. It further states that the purposes of the Act are to provide a means whereby the ecosystems upon which these "species depend may be conserved." And finally it states that the federal agencies "shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." "Seek" means "to make an attempt: Try" (Webster's Third New Internat'l Dictionary Unabridged (1961)).

These stated policies and objectives are the guides by which all sections of the Act are to be construed in carrying out the congressional intent. The Act must be read as a whole. No section can be read in isolation. Nor can the Act be read as though it operated in a vacuum. It was obviously not intended to supplant an agency's primary responsibilities,

nor to abolish all other congressionally authorized projects or programs. Neither should it be construed as a mandate to halt a congressionally authorized project without regard to its stage of completion. This would reduce it to an absurdity. Congress certainly did not contemplate the abandonment of large ongoing projects near completion for which it is currently appropriating funds--and the Act should not be so construed. A statute is never literally construed so as to produce an "absurd" or "unreasonable" result. United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940); International T & T Corp. v. General T & E Corp., 518 F.2d 913, 917-18 (9th Cir. 1975); Natural Resources Defense Council, Inc. v. Tennessee Valley Authority, 459 F.2d 255 (2d Cir. 1972).

The details of TVA's program to preserve the snail darter will be discussed under Issue 6 dealing with the question of whether TVA has been arbitrary or capricious.

5. What Effects, if Any, Should Be Given to Presidential Action Requesting Appropriations and Congressional Action Appropriating Funds To Complete the Tellico Project After Being Informed of Its Effect on the Snail Darter?

In our view, the effect of presidential action in requesting appropriations and congressional action in appropriating funds to complete the Tellico project after being informed of its effect on the snail darter cannot be overestimated. The mere appropriation of funds for a project, in and of itself, has been held not necessarily expressive of congressional intent. See Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d 1164, 1182 (6th Cir. 1972). But when Congress has been specifically alerted and informed about a special problem which might be used as grounds to halt the project, and has inquired about the problem and how the agency

proposes to solve it while continuing to complete the project, and has then appropriated the requested funds with the direction that the project be completed as quickly as possible, these actions are certainly of the utmost importance and cannot be ignored by the court.

Thus, the Sixth Circuit, in deciding whether the TVA Act authorized TVA to condemn certain property looked to the legislative history of the appropriation hearings to see what objections had been made by various landowners to TVA's right to take, and concluded that, since Congress had appropriated funds for the project over those objections, this supported the construction of the Act that TVA had the right to take the property. United States ex rel. TVA v. Two Tracts of Land, 456 F.2d 264 (6th Cir.), cert. denied, 409 U.S. 887 (1972).

We are here seeking the intent of Congress as to how the Endangered Species Act is to be applied to a specific project which is in its final stages of completion. Congress, fully informed of the Act and the effect of the project on the snail darter, appropriated funds for fiscal year 1976. In addition, the President has requested funds for fiscal year 1977² to complete the project, not merely to continue construction. This is certainly compelling evidence as to how the Act should be applied to such a project. We are not here dealing with the application or interpretation of the Act generally to proposed projects--for that is not the issue here. If Congress did not want the project completed under such circumstances, all it had to do was say so, or simply

2 During the latest congressional appropriation hearings involving the Tellico project, held in March 1976, TVA again informed both the House and Senate appropriation committees of the current status of the snail darter controversy. That statement is attached hereto as Appendix A.

decline to appropriate funds for that purpose. The same can be said for the action of OMB in approving TVA's request for funds to complete the project. OMB speaks on behalf of all the federal agencies, the President, and the public.

Not only is this presidential and congressional action highly significant in so far as it bears on the application of the Act to the Tellico project, but it is equally significant on the issue of who speaks for the public. It certainly cannot be said that these plaintiffs, who sue in their private individual capacity, speak for the public.

The congressional appropriation of funds under the circumstances of this case is not only important on the question of how the Act applies to Tellico, and who speaks for the public, but also on the issue of who was the decisionmaker as to completion of the project--was it Congress or TVA? The effect of congressional appropriations under similar conditions was considered in Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123 (5th Cir. 1974), involving the Tennessee-Tombigbee project. At the trial of that case, plaintiffs challenged the adequacy of the Corps' environmental statement. One of the grounds for challenge was the method used to calculate the economic benefits and costs. The district court refused to review the method of calculation on the ground that it was a legislative matter not subject to judicial review. On appeal, the district court's opinion was affirmed. In doing so, the court of appeals held that it was not necessary for it to pass on the district court's decision as to the economic analysis because Congress, in appropriating funds with the Corps' environmental statement before it, has "displaced the necessity and propriety" of judicial review. The court said that Congress was fully informed about the environmental effects of the project, since they were discussed

in the environmental impact statement, and therefore when it appropriated funds for the project, Congress became the decisionmaker:

With the Corps' Tennessee-Tombigbee impact statement before it, the details of detriments and benefits of the project were extensively discussed, the three-part method used by the Corps to comply with the Act was thoroughly aired, and Congress determined that the waterway should be built. Congress thus became the ultimate decisionmaker [emphasis in original]. . . .

. . . the impact statement met the requirements of the Act. It gave Congress the factual background and information contemplated by NEPA so that Congress could make the final decision that construction of the Tennessee-Tombigbee Waterway should proceed. This informed and deliberate legislative action, while not barring court review for procedural compliance, nevertheless effectively supplants the Corps' recommendation that the project be built. Hence, even severely circumscribed judicial review is both inapposite and unnecessary [492 F.2d at 1140-41].

The situation in the case at bar is almost an exact parallel; and we respectfully submit that Congress, as the ultimate decisionmaker, has determined that construction of Tellico should proceed.

6. Was TVA's Decision to Proceed with Construction of the Project Arbitrary, Capricious, or Otherwise Not in Accordance with Law?

We think it clear from the facts and law of this case that TVA's decision to proceed with construction of the Tellico project, in accordance with the congressional mandate, was not arbitrary, capricious, or otherwise not in accordance with law.

The facts are virtually without dispute. Dr. Etnier first found this fish in the Little Tennessee River on August 12, 1973--five weeks before the trial involving the adequacy of TVA's Final Environmental Statement. Dr. Etnier did not testify at the trial, and TVA did not learn of the discovery

until the middle of November 1973 when Dr. Etnier informed TVA that he had found it and requested TVA to fund a biological study of the darter, to be followed by the transplantation of it to other rivers, including the Hiwassee River. The proposal was studied by TVA scientists, with the assistance of its consultants, and culminated in an agreement between TVA and the University of Tennessee. The following June (1975) TVA began its own conservation program to conserve the snail darter by conducting research on its life history and habitat and by transplanting it to other areas. As a result of TVA's conservation program and research, over 700 of these snail darters have been transplanted to the Hiwassee River, and TVA has found it below Tellico Dam and as far as 10 miles downstream in the Watts Bar Reservoir.

Since December 1974, TVA has been in constant communication with the Department of the Interior (U.S. Fish & Wildlife Service) with respect to the Act and this fish. There has been an extensive exchange of correspondence, together with meetings, telephone conferences, reports, etc., with respect to every phase of the problem. TVA has furnished the Department of the Interior with all relevant and requested information, too voluminous and extensive to summarize here. Indeed, it is virtually undisputed that TVA has done everything humanly possible to conserve the darter while completing the project. We can conceive of no factual basis on which it could be said that TVA has acted in an arbitrary or capricious manner.

Neither do we think there is any substance to plaintiffs' contention that TVA has violated the Endangered Species Act. The extent, if any, to which that Act applies to this project is a question upon which reasonable minds may disagree. Obviously the principal factor to consider is the

stage of completion of the project. The importance of this factor is aptly pointed out by the Sixth Circuit in Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d 1164 (1972), in affirming this Court's decision in the first Tellico case:

. . . the amount of completed construction or investment will certainly affect the ultimate determination whether modifications should be made in the project or whether the project should be abandoned . . . [at 1179].

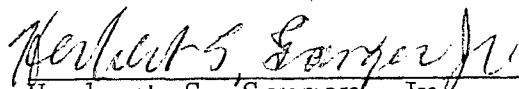
Moreover, what would constitute a violation for a newly begun project might not constitute a violation for a project that is virtually completed. What constitutes a "violation" is a mixed question of law and fact which will depend upon the circumstances of the case. Certainly Congress has indicated there is no violation. So has OMB. After the House appropriations committee "directed" that the project "be completed as promptly as possible . . . in the public interest," was TVA at liberty to halt the project? TVA's primary responsibility has been to construct and complete the project as authorized. If that primary responsibility cannot be carried out without modifying or altering the snail darter's habitat and Congress, well-knowing this fact, directs that the project be completed, then perhaps it is true, as said in Tennessee-Tombigbee that Congress has become the decisionmaker. Or perhaps Congress is saying that the Act does not apply or, if it does, that TVA's actions should not be interpreted as a violation.

CONCLUSION

Under all the circumstances of this case, the Court in the exercise of its sound judicial discretion, should deny

plaintiff's request for an injunction and the action should
be dismissed.

Respectfully submitted,



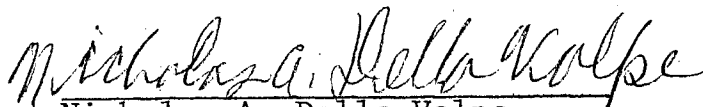
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CERTIFICATE OF SERVICE

I certify that the foregoing brief has been served on plaintiffs by hand delivering a copy thereof to the offices of W. P. Boone Dougherty, Esq., Bernstein, Dougherty & Susano, 1200 Hamilton National Bank Building, Knoxville, Tennessee 37902.

This 20th day of April, 1976.



Attorney for Defendant

Mr. WAGNER. Our total capability for the Bear Creek project for fiscal year 1977 is estimated at \$16,049,000, the same amount as the budget request.

TELLICO DAM

Mr. EVINS. Give the committee a report on the current status of the Tellico Dam project.

Mr. WAGNER. The overall project is about 80 percent complete. Work is continuing on construction of the main earth fill dam in the east channel area where the river flow was diverted on August 17, 1975. Rock excavation for the canal and construction of the canal bridge have begun. Construction of saddle dams is well advanced. Reservoir clearing operations are underway and work is continuing on the relocation of highways, bridges, and utilities. The dam is scheduled for closure in January 1977 and the project is scheduled for completion in December 1977.

Mr. EVINS. Your level of funding for Tellico was \$23.6 million in fiscal year 1976 and your fiscal year 1977 budget request is \$9.7 million—a decrease of \$13.9 million. Is this your capability for fiscal year 1977?

Mr. WAGNER. Our capability for fiscal year 1977 is \$9.7 million, the same as the budget request.

Mr. EVINS. Explain the environmental problem with the snail darter. Give the committee a report on any litigation pending in connection with the Tellico project.

Mr. WAGNER. There have been problems, Mr. Chairman, and I would like to submit a detailed response for the record.

[The information follows:]

STATEMENT ON LITIGATION ON TELLICO PROJECT

Last year at the appropriation hearings we informed both the House and Senate committees that opponents of the Tellico project were again planning to commence litigation, under the Endangered Species Act, to halt the project on the ground that its completion would destroy the snail darter and its presently known habitat. The darter is a small 3-inch fish which was discovered in August 1973. It was collected in the Little Tennessee River by Dr. David A. Etnier and Mr. Robert Stiles prior to completion of the litigation involving the environmental consequences of the Tellico project. The possible presence of "undescribed" species of darters in the portion of the Little Tennessee River to be impounded and the possible adverse impacts of the project on them were specifically recognized in testimony before the court and also in TVA's environmental impact statement for the project. Following a 4-day trial in September 1973, the district court upheld the adequacy of TVA's environmental impact statement and the validity of TVA's decision to proceed with the project. *Environmental Defense Fund v. Tennessee Valley Authority*, 371 F. Supp. 1004 (E.D. Tenn. 1973). The district court's decision was affirmed by the Court of Appeals for the Sixth Circuit. 492 F. 2d 466 (6th Cir. 1974).

We informed both committees last year that TVA did not construe the Endangered Species Act as preventing the completion of the Tellico project; that we believed the environmental consequences of the Tellico project had been fully disclosed; and that TVA was doing and would do its best to preserve the darter; but, in any event, that the project should be completed on schedule. The committee in appropriating the President's full appropriation request of \$23,742,000 for fiscal year 1976 and \$5.4 million for the transition quarter, directed TVA to complete the Tellico project "as promptly as possible for energy supply and flood protection in the public interest" (House Rep. No. 94-319, 94th Cong., 1st Sess. 76 (June 30, 1975)).

Since our last report to the committee, several events have brought the Tellico snail darter issue to a head. Despite some controversy over the procedures

used, the snail darter has been scientifically described as a separate species of fish (*Percina (Imostoma) tanasi*). Effective November 10, 1975, it was listed as an endangered species by the Department of the Interior through the U.S. Fish and Wildlife Service. (40 Federal Register 47505-506) (Oct. 9, 1975). On December 16, 1975, the Fish and Wildlife Service published a proposed rule in the Federal Register (40 Fed. Reg. 53308-312) that would list that portion of the Little Tennessee River lying between miles 0.5 to 17 as the critical habitat for the snail darter. Finally, on February 18, 1976, three individuals (two University of Tennessee law professors and a law student) filed suit in the U.S. District Court for the Eastern District of Tennessee, seeking a temporary and permanent injunction against further construction and completion of the project, claiming that these actions are illegal and in violation of the Endangered Species Act. On February 25, 1976, the district court refused to grant a preliminary injunction and set the case for trial on April 23, 1976. It is our opinion that the suit is without merit.

It is TVA's position that the ultimate decision to proceed with this project rests with TVA, and that TVA has acted responsibly, and in good faith in reaching its decision to complete the project. We believe that Congress did not intend the Endangered Species Act to be retroactively applied to existing projects like Tellico, which was over 50 percent complete at the time of the act's passage and the fish's discovery, and which was 70 to 80 percent complete at the time of the official listing of the snail darter as an endangered species. Even if applicable to Tellico, TVA construes section 7 of the Endangered Species Act to require Federal agencies to take reasonable measures, in consultation with the Secretary of the Interior, to conserve endangered or threatened species of fish, wildlife, and plants. The act was not intended to supplant an agency's primary responsibilities, or to repeal prior congressional approval and funding of authorized projects, such as Tellico, because the habitat of an endangered species would be altered or destroyed by completion of the project. TVA certainly does not construe the act as a mandate to halt an authorized project without regard to its stage of completion or the fact that \$80 million in public funds has been appropriated by Congress and invested in a regional development project to provide flood control, navigation, hydroelectric power, water supply, and to produce other benefits, including recreation, fish and wildlife use, shoreline development, new job opportunities, industrial development, and to foster improved economic conditions in an area characterized by underutilization of human resources and outmigration of young people.

While we believe the present suit lacks merit, the general question raised is of grave concern to us. The Tellico project is not alone in facing possible legal challenges based on the Endangered Species Act. TVA believes that almost any major Government project could be attacked on similar grounds if project opponents are willing to search hard enough to find a particular species of plant, insect, or animal life heretofore not even discovered—much less recognized as a separate species or as endangered or threatened. The act does not explicitly distinguish the societal value of species like the eagle or the whooping crane from other minor forms of insects, plants, or mollusks, many of which have not undergone extensive study or attempts at classification or subclassification. The Duck River project could face similar litigation. On September 26, 1975, the Department of the Interior proposed endangered species status for several species of midwestern pearly mussels which may be present in the Duck River (40 Fed. Reg. 44329).

TVA is conscious of its resource conservation mission and of the national policy to protect the environment. We are doing our best to conserve the darter while completing the project. TVA began funding a University of Tennessee study of this darter in September 1974, over a full year prior to the listing of the fish as endangered by the Department of the Interior. In the spring of 1975 TVA biologists initiated a conservation program which includes transplantation of this fish to the Hiwassee and other rivers. They have been assisted in this program by nationally recognized consultants, Dr. Edward C. Ramey, professor emeritus of Cornell University, and Jones and Stokes of Sacramento, California. Our biologists have consulted and cooperated with the Endangered Species Office of the Fish and Wildlife Service and with the State of Tennessee's Wildlife Resources Agency. As part of our conservation effort, we have transplanted over 770 snail darters to the Hiwassee and Nolichucky Rivers to date. The fish appear to be doing very well in this new habitat.

We are doing our best to preserve the snail darter, and the results to date have been very encouraging. We cannot guarantee that the transplant will ulti-

mately be a success. In any event, however, we believe the Tellico project must be completed on schedule. Project costs have risen by millions of dollars as a result of earlier delays. Construction has been underway since March 1967 and approximately \$80 million of public money has been invested to realize the project's benefits. We ask the committee to approve the \$9.7 million requested by the President to complete the project.

OTHER WATER RESOURCES

Mr. EVINS. Explain why your request for additions and improvements at multipurpose dams has increased from \$779,000 in fiscal year 1976 to \$1,002,000 in fiscal year 1977.

Mr. WAGNER. The increase is for facilities and equipment used in operating multipurpose dams and reservoirs. The major item is to begin replacement of hoisting equipment for the 21 spillway gates at Wilson Dam. This dam was placed in service in 1924 and operation of existing methods to raise and lower spillway gates has become a problem especially during flood control operations.

Mr. EVINS. You are asking for \$28,000 to make improvements to insure safe working conditions for employees.

Mr. WAGNER. The spillway deck at Wilson Dam needs to have safety handrails installed.

Mr. EVINS. You are requesting \$236,000 for improvements to visitors' facilities at nine locations. Provide details of your plans for each location.

Mr. WAGNER. I would like to submit a list for the record.
[The information follows:]

1. Norris Reservation: Develop trails and wildlife enhancement plantings.
2. Watauga Reservation (two locations): Install sanitary facilities, picnic units, and develop parking and improve road and boat ramp.
3. Chickamauga Reservation: Install launching facility.
4. Fontana Reservation: Construct hikers' bathhouse.
5. Hiwassee Reservation: Paving of road and parking area.
6. Wilson Reservation (two locations): Install landing, float for ramp, chain link fence, and trail improvements.
7. Wheeler Reservation (two locations): Improve and pave roads and parking area.
8. Kentucky Reservation: Install sanitary facilities.
9. Melton Hill Reservation: Install picnic facilities.

Mr. EVINS. Why has the Federal cost of the Decatur railway bridge project increased from \$6.2 million in fiscal year 1976 to \$8.3 million in fiscal year 1977?

Mr. WAGNER. The major part of the increase is for 500 tons of additional bridge steel, at a cost of \$1 million, which was recommended by our engineering design consultant after detailed design drawings were available. General industry price increases for bridge operating machinery account for \$300,000 of the increase; projected delays in steel deliveries will require a stretchout of the project, with resulting escalation effects of \$400,000. The remaining increase of \$400,000 is made necessary by increased requirements in design, inspection, and general costs.

Mr. EVINS. Provide details of locations and plans for each item for development of recreation facilities for which you are requesting \$803,000 in fiscal year 1977.

Mr. WAGNER. I would like to submit a listing of our present plans, recognizing that circumstances could arise that would alter this schedule.