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Post-Trial Brief of Tennessee Valley Authority, *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

POST-TRIAL BRIEF OF TENNESSEE VALLEY AUTHORITY

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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
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HIRAM G. HILL, JR. ZYGMUNT J. B. PLATER and DONALD S. COHEN Plaintiffs v. TENNESSEE VALLEY AUTHORITY Defendant	)	Civil Action No. CIV. 3-76-48

POST-TRIAL BRIEF OF TENNESSEE VALLEY AUTHORITY

INTRODUCTION

This case involves a direct collision of two philosophies as to how the Endangered Species Act of 1973 should be applied, if at all, to the Tellico project. Plaintiffs advocate a strict literalistic approach to the Act. While they admit that in completing the project TVA has done everything humanly possible to conserve the snail darter, they contend that the Act should be applied without regard to the circumstances of this case; that TVA has violated the Act; and that an injunction must issue regardless of the consequences and loss of public investment. TVA insists that under the circumstances of this case, TVA has not violated the Act; that the Act must be interpreted and applied in light of reason so as to effectuate the intent of Congress; and that this Court sitting as a court of equity should apply the traditional principles of equity in considering all of the circumstances of the case, weighing and balancing the equities as they affect the parties and the public interest,

and exercise its sound judicial discretion in determining whether to grant or deny an injunction.

The two issues framed by the Court are (1) will the completion of the Tellico project result in a violation of the Endangered Species Act under the circumstances of this case, and (2) should the Court in its sound discretion grant or deny an injunction.

Inasmuch as the Court has already ruled on the question of the retroactivity of the Act, we shall forego further discussion of that subject without waiving the point.

TVA has recognized from the outset that there is no way the Tellico project can be completed without altering or modifying the critical habitat as presently described. It is TVA's position, however, that the modification of the critical habitat does not constitute a violation under the peculiar circumstances of this case, and that even if it did constitute a technical violation, the Endangered Species Act does not mandate an injunction, and that the Court in the exercise of its sound judicial discretion should deny plaintiffs' request for an injunction.

ARGUMENT

I

Completion of the Tellico Project Will Not Violate the Endangered Species Act.

A. Congress intended the project to be completed.

The goal the Court is seeking is to effectuate the intent of Congress. The problem is not so much the general question of what the Endangered Species Act means in the abstract sense, but rather the specific question as to what

extent, if any, Congress intended that Act to apply to this project. More specifically: Did Congress intend the Act to apply so as to halt the Tellico project?

Given the fact that Congress knew the project was in its final stages of completion, and the further fact that there is no possible way the project could be completed without altering or modifying the snail darter's critical habitat, it is difficult to understand how any one could seriously question what Congress intended when it appropriated funds for the project. It certainly could not be contended that the funds were to be used to demolish the dam and start up some new project. The only possible use to which the funds could be put was to go forward with the project. That, of course, is exactly what the House committee instructed TVA to do after TVA had brought the problem to Congress, as was more fully discussed in our two previous briefs. The committee expressed its view in these terms:

> 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 [H.R. Rep. No. 94-319, 94th Cong., 1st Sess. 76 (1975)].[1]

This unequivocal language is not open to doubt as to what the committee intended. The committee consisted of Congressmen from thirty-two states, including the Valley States of Tennessee, Mississippi, Alabama, Kentucky, Georgia, and Virginia; and there was not a single dissent as to this decision. The Senate committee was similarly representative.

As we have stated in our previous briefs, TVA fully explained this entire snail darter controversy, not just once

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1 Emphasis added unless otherwise noted.

but twice, to both the House and the Senate committees in appropriation hearings, pointing out, among other things, that TVA did not interpret the Act as requiring the project to be halted; that the critical habitat would necessarily be altered or modified; that TVA would do "our best to conserve the darter while completing the project"; but that "[i]n any event, however, we believe the Tellico project must be completed on schedule." It is our view that when a fully informed Congress takes action in the form of appropriating funds under such circumstances, it is the strongest possible evidence of congressional intent short of a special act of Congress specifically exempting the project entirely from the provisions of the Endangered Species Act.

Plaintiffs concede, if we understand their position, that if the intent of Congress is that the project go forward the Court should honor that decision. They argue, however, that this is a "political" decision and that the only way the intent of Congress can be shown would be for TVA to persuade Congress to enact a special law exempting Tellico from the provisions of the Endangered Species Act. We disagree completely with that view and consider that suggestion to be a misunderstanding of the legislative process. Plaintiffs have suggested no reason whatever why Congress cannot make known its intention that a previously authorized project shall go forward to completion under such conditions as Congress desires, or why such intent cannot be revealed through the appropriation process. Plaintiffs can draw no support whatever from the case of Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), which they cite in their brief. As the Supreme Court pointed out at page 244 of its opinion, the sole basis of the court of appeals' decision regarding the agency's "violation" was that the

agency lacked statutory authority to grant the pipeline right of way, and an act of Congress was required to confer the necessary authority. It is elementary law that a government agency cannot act beyond its statutory authority. There is no question but that TVA has statutory authority to construct the Tellico project.

What Congress has done in our case is not to undertake an amendment to the Endangered Species Act, but simply to acquiesce in or ratify TVA's interpretation of that Act as it applies to the Tellico project and to support TVA's view that TVA should complete the project while doing the best it could to conserve the darter. The recent case of United States ex rel. TVA v. Two Tracts of Land, 456 F.2d 264 (6th Cir.), cert. denied, 409 U.S. 887 (1972), is direct authority for the proposition that a court may look to appropriations hearings in seeking the intention of Congress as to statutory construction, and also for the proposition that the appropriating of funds by Congress to enable the agency (TVA) to carry on a certain program "demonstrated its intention" as to how a statute should be construed.

It is clear to us that when Congress appropriates funds for a project under the circumstances of this case it certainly cannot be said that TVA has "violated" the law. Call it what you will--congressional interpretation of the Act, acquiescence, endorsement, ratification, or whatever--the plain fact is that Congress has approved the action TVA has taken. Such action on the part of Congress does not constitute legislation, for none is needed, nor does it constitute an amendment to the Endangered Species Act, for no such amendment is required, despite what plaintiffs would have us believe.

Plaintiffs' argument that the action of the appropriation committees of the House and Senate in recommending the requested presidential appropriations does not reflect the will of Congress is utterly devoid of merit. These special committees are selected by Congress for the specific purpose of delving into all the "pros" and "cons" of appropriating funds for each of the various projects. Their hearings and reports are published and made available for congressional use.

These congressional committees were confronted with a basic question of public policy. Would the public interest be best served by proceeding with the Tellico project in its present stage of completion, or by strict preservation of the snail darter's habitat under the Endangered Species Act? That was clearly a legislative or political question, and the Court should honor the congressional decision thereof.

TVA does not contend that the mere appropriation of funds, without more, indicates an intention on the part of Congress that the project should be continued to completion. Any cases relied upon to that effect are wholly beside the point. But when Congress has been informed of the specific problem and has been advised by the agency what action it proposes to take (in this case, complete the project on schedule), and then appropriates funds for that very purpose, coupled with the statement of one of the committees that the committee "directs" the agency to complete the project as quickly as possible "in the public interest," there can be little doubt as to the intent of Congress. The case then falls squarely within the principle applied in the case of Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123 (5th Cir. 1974), involving the Tennessee-Tombigbee project in which the court said Congress was the

decisionmaker and that while the court had the power to review the question, judicial review was "inapposite and unnecessary." The scope of judicial review will be discussed in the following sections of this brief.

B. TVA has not acted arbitrarily, capriciously, or otherwise not in accordance with law.

The standard of judicial review to be applied in this case as stated in Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971), is whether the action of the agency was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In applying this test, however, the Supreme Court noted that:

> Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency [at 416].

This is the test that has been uniformly followed and was applied in the most recent case of Sierra Club v. Froehlke, No. 75-1252 (8th Cir., April 23, 1976), involving the Indiana bat, which points out that the Endangered Species Act must be construed in a reasonable manner. In the words of the court:

> This Act, as any other, must have a reasonable construction [at 34].

Also with respect to the duty of the agency under section 7 of the Act to consult with Interior, the court in the Indiana bat case said:

> Consultation under Section 7 does not require acquiescence. Should a difference of opinion arise as to a given project, the responsibility for decision after consultation is not vested in the Secretary but in the agency involved. National Wildlife Federation v. Coleman, ____ F.2d ____, No. 75-3256 (5th Cir. filed March 25, 1976) [at 32].

Applying these basic principles to our case, it is abundantly clear that TVA has not acted arbitrarily, capriciously, or otherwise not in accordance with law. The record is overwhelming and undisputed to the effect that TVA has cooperated with Fish and Wildlife (FWS) one hundred percent. TVA has furnished FWS with virtually every minute piece of information it has with respect to the snail darter from the date TVA learned of its discovery (November 1973) to the present time.

Even before the Act became law (December 28, 1973), TVA was considering a request submitted by Dr. Etnier for TVA to fund a program to study the life of the snail darter and to prevent its possible extinction by transplanting it to other rivers. This culminated in an agreement between TVA and The University of Tennessee (September 1974) whereby TVA would fund such a program. Following that, TVA set up its own large-scale conservation program to transplant the darter and also to search for its existence elsewhere (June 1975). This was five months before the darter was officially listed as an endangered species (November 1975).

As a result of TVA's conservation program and research, over 700 of these snail darters have been transplanted to the Hiwassee River;[2] and TVA has found it below Tellico Dam and as far as 10 miles downstream in the Watts Bar Reservoir and in Chickamauga Dam Reservoir, 85 miles downstream from the Tellico Dam.

Since December 1974, TVA has been in constant communication with the FWS with respect to the Act and this fish. There has been an extensive exchange of correspondence, together with meetings, telephone conferences,

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2 Section 3(2) of the Act (16 U.S.C. § 1532(2) (Supp. IV, 1974)) defines the term "conserve" to include "transplantation" of species.

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 undisputed that TVA has done everything humanly possible to conserve the darter except to scrap the entire project. We can concieve of no factual basis on which it could be said that TVA has acted in an arbitrary or capricious manner, or otherwise not in accordance with law.

Moreover, contrary to plaintiffs' contention, modification of critical habitat is not a prohibited act under the Endangered Species Act.[59] Section 9, which lists the acts prohibited under the Act, prohibits the "taking" of endangered species. However, Congress expressly deleted "the destruction, modification, or curtailment of its habitat or range" from the list of prohibited acts. (Compare the original language of section 3(6) of Senate Bill 1983, which ultimately became law, with section 3(14) of the Act.) Section 7 (entitled "Interagency cooperation"), on the other hand, directs federal agencies to utilize their authorities in furtherance of the purposes of the Act by taking affirmative action to conserve endangered species in actions "authorized, funded, or carried out by them," with the ultimate decision to be made by the agency subject to appropriate review by the court. See Sierra Club v. Froehlke, No. 75-1252 (8th Cir., Apr. 23, 1976). It is TVA's position, as more fully developed in its previous briefs, that TVA has fully complied with section 7, since in carrying out the congressionally mandated Tellico project, TVA has, in consultation with Interior, used its authority in furtherance of the purposes of the Act by doing everything humanly possible to insure the continued existence of the snail darter while

carrying out the project. This position is in no way inconsistent with the Mississippi sandhill crane case. There the program could be carried out, with slight changes, without modifying the critical habitat, and to not modify the project under the circumstances of that case would indeed be arbitrary, capricious, and violative of the purposes of the Act.

We think there is no substance to plaintiffs' contention that TVA has violated the Endangered Species Act by continuing with the construction of the project under the circumstances of this case. As we have stated above, TVA had but two choices: either scrap the project entirely, or continue with its construction to completion. Faced with this choice, TVA promptly took the problem to Congress, and the decision was to complete the project as authorized in accordance with the congressional mandate. Under these circumstances, any consultation with Interior with respect to that course of action would obviously be a futile gesture. It is clear that the ultimate decision of whether or not to complete the project rests with TVA. Sierra Club v. Froehlke, supra. It is equally clear that Congress agreed with that decision and that, in the light of such congressional endorsement or ratification, TVA's action can by no stretch of the imagination be characterized as arbitrary, capricious, or otherwise not in accordance with law.

II

The Court in Its Sound Judicial Discretion Should Deny Plaintiffs' Request for Injunction.

In their trial brief at page 16 plaintiffs open their argument on "Balancing the Equities" by saying:

> [T]he plaintiffs do not consider it appropriate for the Court to probe into or consider the public values, benefits, and costs nor the percentage of completion of the Tellico Project in order to enforce the law by issuing an injunction. To in any way permit the defendant TVA to present evidence to the Court in this cause relative to the amount of money spent on the Tellico Project and the percentage of completion to date will, in reality, open up the whole issue of the benefits and values of the Project versus the detriments and disadvantages of same.
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> Again, at page 17, plaintiffs say: The fact that a project is 60% or 80% complete has no per se relevance to balancing the equities . . . .

This philosophical approach is basic to plaintiffs' entire case, and we respectfully submit that it is patently fallacious and that without this argument plaintiffs have little else to stand on. The law is clear that the stage of completion of a project is an important factor to be weighed by the Court in applying the Act and exercising its equitable discretion. Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d 1164 (6th Cir. 1972) (Tellico I); Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972) (Gillham Dam), cert. denied, 412 U.S. 931 (1973); Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974) (Wallisville Dam); Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir.), cert. denied, 409 U.S. 1000 (1972).

In affirming the district court's decision which dissolved a previously granted injunction for the plaintiffs, the Eighth Circuit, in the Gillham Dam case said:

> We have reached this conclusion after a serious consideration of the arguments in favor of and against completion of the project. In large part this had necessitated a balancing, on the one hand, of the benefits to be derived from flood control, and, on the other, of the importance of a diversified environment.

> We have also taken into account, as we must, that the overall project was authorized by Congress eleven years prior to the passage of NEPA, and was sixty-three percent completed at the date this action was instituted. Almost ten million dollars has been expended and would be lost if the project were completely abandoned now [470 F.2d at 301].

Not only is this an established principle of law, but Congress was informed of the threat of litigation on the issue involved in this case for the purpose of obtaining congressional direction on the course TVA was to follow. Congress responded by its decision to appropriate funds for the continued construction of the project.

In recommending the full amount requested for Tellico, the committee stressed the "enormous contribution to America" that has been made by various 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 [Id. at 5].

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].

As we have said previously, the guiding star for the Court's decision is the effectuation of the intent of Congress. It is Congress that speaks for the public, and it is Congress that establishes public policy. It weighed the effect of the Endangered Species Act on this project, and it decided that the project should go forward in the public interest.

In exercising its discretion, the Court should take into account, among other things, the advanced stage of completion of the Tellico project (80%); the enormous public investment at stake (approximately $80 million); the late discovery and listing of the snail darter as endangered (November 1975); TVA's good faith efforts to conserve the snail darter through scientific study (the UT contract and TVA studies); transplantation (to the Hiwassee and Nolichucky Rivers); existence of the darter elsewhere (the Watts Bar and Chickamauga finds); and most importantly, the action of Congress in appropriating over $29 million for the Tellico project with full knowledge of the Endangered Species Act and the effect of the project on the snail darter.

Since plaintiffs have conceded that the Court has inherent equitable powers to exercise its sound discretion to grant or deny an injunction under the Endangered Species Act, we shall not brief that matter further but simply rely upon the authorities cited in our earlier briefs.

As we pointed out in our trial brief, TVA brought this snail darter to the attention of both the House and Senate appropriation committees. A copy of TVA's statement was attached as an appendix to that brief, and for the Court's convenience is also attached as an appendix to this brief.

CONCLUSION

For the foregoing reasons, and under all the circumstances of this case, we respectfully submit that the Court, in the exercise of its sound judicial discretion, should deny plaintiffs' request for an injunction and that the action should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has been served upon defendants by hand carrying a copy thereof to their attorney, W. P. Boone Dougherty, Suite 1200, Hamilton Bank Building, Knoxville, Tennessee 37902, this 6th day of May, 1976.

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