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

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check with
David E. Hines

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.)

Civil Action
No. 3-76-48

TENNESSEE VALLEY AUTHORITY)

Defendant)

TVA's

STIPULATION OF FACTS

Pursuant to the Court's order of February 26, 1976, the parties hereby stipulate, for purposes of this case only, that the following statements are true:

1. Plaintiffs, Hiram G. Hill, Jr., Zygmunt J. B. Plater, and Donald S. Cohen, citizens and residents of Knox County, Tennessee, seek to enjoin the completion of the Tellico Project on the grounds that completion will jeopardize or destroy the snail darter, Percina (Imostoma) tanasi, or its habitat, which acts are alleged to be illegal and in violation of the Endangered Species Act of 1973 (16 U.S.C. §§ 1531-1543) (Supp. IV, 1974).

2. Defendant Tennessee Valley Authority (TVA), a wholly owned corporation of the United States created by the TVA Act (16 U.S.C. §§ 831-831dd (1970; Supp. IV, 1974)), is engaged in the construction of the Tellico Dam and Reservoir Project on the lower portion of the Little Tennessee River in Blount, Loudon, and Monroe Counties, Tennessee.

3. The Tellico Project was authorized by Congress on October 15, 1966, as a multipurpose water resource and regional development project to develop navigation; control destructive floods; generate electric power; provide water

supply and produce other benefits including recreation, fish and wildlife use, and shoreline development; create new job opportunities; promote industrial development; and foster improved economic conditions.

4. The project involves, among other things, the construction of Tellico Dam, a concrete and earthfill structure which will create a 16,500-acre reservoir on the lower 33 miles of the Little Tennessee River.

5. Construction of the dam began March 7, 1967, and is scheduled for completion in January 1977.

6. In its present state, the streamflow in the lower Little Tennessee River is partially controlled by a series of 20 upstream dams which cause the water to be cleaner and colder than it was before the dams were built. Today the sediment load is 254,000 tons per year. Prior to the dams, the silt load was about 800,000 tons per year; and prior to colonial times, in its natural pristine state, the silt load was about 250,000 tons per year.

7. The Endangered Species Act of 1973 was signed into law on December 28, 1973, at which time Tellico Project was more than half completed, and Congress had appropriated \$45,465,000 out of a then estimated cost of \$69,000,000 for the project.

8. By April 1975 construction was about 60 percent complete; about 90 percent of the land had been acquired; about \$60 million (of an estimated \$100 million cost) had been invested in the project; and the dam scheduled for closure in January 1977. (Testimony of TVA Chairman Wagner, Hearings Before a Subcomm. of the House Comm. on Appropriations, 94th Cong., 1st Sess., pt. 7, at 19, 437, 466 (1975)).

9. Today approximately \$80 million has been invested, over 99 percent of the land has been acquired, and the project is nearly 80 percent completed.

10. The environmental and economic impacts of the Tellico Project are adequately discussed in TVA's Final Environmental Impact Statement, and the Court upheld TVA's decision to proceed with the project after a good faith consideration and balancing of environmental factors and costs and benefits of the project. (Environmental Defense Fund v. Tennessee Valley Authority, 371 F. Supp. 1004 (E.D. Tenn. 1973), aff'd, 492 F.2d 466 (6th Cir. 1974)).

11. While the snail darter was not mentioned by name in the impact statement or the litigation, the effect of the project on rare or endangered fish species was one of the issues considered.

12. In the first Tellico trial, which involved TVA's draft environmental statement, this Court found that the Little Tennessee River ". . . is the likely habitat of one or more of seven rare or endangered fish species" which ". . . will be destroyed by the impoundment of the river . . ." (Environmental Defense Fund v. Tennessee Valley Authority, 339 F. Supp. 806 (E.D. Tenn. 1972); aff'd, 468 F.2d 1164 (6th Cir. 1972)).

13. In August 1973, Dr. Etnier discovered a new species of darter, which he subsequently named the snail darter. He located this small, tan-colored fish, about three inches long, at Coytee Springs on the Little Tennessee River at mile 7. The fish was described as Percina (Imostoma) tanasi by Dr. Etnier in the January 22, 1976, issue of Proceedings of Biological Society of Washington (Vol. 88, No. 44, pp. 469-488).

14. TVA's final environmental statement, which was approved by the court after the September 1973 trial, contains a detailed discussion of rare or endangered fish, and lists 11 species of darters known to occur, or which may occur, in the portions of the Little Tennessee River to be impounded: greenside darter, redline darter, Tennessee

snubnose darter, speckled darter, gilt darter, dusky darter, bluebreast darter, spotted darter, banded darter, dust-tail darter, and tangerine darter (EIS II-12-2,-3). Among other things, the EIS contains extensive comments received from Dr. David Etnier, Assistant Professor at The University of Tennessee, which state that the Little Tennessee River system contains "at least three endangered species" and "an undescribed darter"; and also that "new species continue to be discovered in Tennessee at the rate of about one per year" (EIS I-3-63, -64). As of 1970, there were 109 described species of darters, 63 of which existed in the state of Tennessee, and 43 in the Tennessee River system.

15. Over the objections of TVA, the U.S. Fish and Wildlife Service listed the snail darter as an endangered species, under the Endangered Species Act, effective November 10, 1975 (40 Fed. Reg. 47505-506 (Oct. 9, 1975)).

16. On December 16, 1975, the Fish and Wildlife Service published a proposed rule in the Federal Register, seeking comments on the designation of Little Tennessee River miles 0.5 to 17 as the critical habitat for the snail darter. All of this segment of the river will be inundated by the waters of Tellico Reservoir. As yet, there has been no final determination of critical habitat.

17. TVA scientists have found the snail darter in substantial numbers at the mouth of the Little Tennessee River below river mile 0.5 in the headwaters of Watts Bar Reservoir in waters from 20 to 30 feet deep. It is not known whether this darter exists elsewhere, and scientists disagree as to whether it could continue to exist in the Little Tennessee after impoundment of Tellico Reservoir.

18. In December 1973, Dr. Etnier submitted a research proposal to TVA, requesting that TVA fund a biological study of the snail darter, including its life history and habitat, and the possibility of transplanting

the darter to other locations, including the Hiwassee River. TVA's scientists, in consultation with Dr. Edward C. Raney of Cornell University, and President of Ichthyological Associated of Ithaca, New York, reviewed this proposal, and concluded that such a research program, with modifications, would be worthwhile. Accordingly, on September 13, 1974, TVA entered into a contract with The University of Tennessee, to conduct such a program through the Graduate Program in Ecology.

19. In June 1975, TVA began its own program to scientifically study this darter's life history, to transplant it to a new habitat, and to search for new populations of it in other areas. This program was prepared and is being conducted with the assistance of Dr. Edward C. Raney, and Jones and Stokes Associates, Inc., of Sacramento, California, specialists in fisheries biology. These, and other conservation actions, are being coordinated in consultation with the U.S. Fish and Wildlife Service.

20. As a part of its conservation effort, TVA has transplanted 771 snail darters to the Hiwassee and Nolichucky Rivers.

21. The transplanted fish are being studied by TVA biologists. Their growth and reproductive development has paralleled that of the Little Tennessee River population, and so far as is known the transplants are successful. Dozens of species of fish have been successfully transplanted over the years, including darters.

22. TVA has coordinated its conservation program and consulted with the U.S. Fish and Wildlife Service and the State of Tennessee's Wildlife Resources Agency concerning the preservation of the snail darter, through a series of meetings, letters, comments, phone calls, proposals, reports, permit requests and other means.

23. During the latest congressional appropriation hearings involving the Tellico Project, held in April and May 1975, TVA informed both the House and the Senate committees of the discovery of the snail darter, what effect the Tellico Dam would have on it, and the efforts TVA was making to preserve the darter. TVA also explained to both committees that because of the advanced stage of completion of the project, TVA was of the opinion that even if the darter became listed as endangered, and its habitat be destroyed, altered or curtailed by completion of the project, the Endangered Species Act of 1973 should not be so construed as requiring construction of the project to be halted. TVA stated it would do its best to preserve the darter, but that 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 (1975); Senate Hearings Before a Subcomm. of the Comm. on Appropriations, 94th Cong., 1st Sess., pt. 4, at 3775-77 (1975)).

24. Being thus advised, Congress appropriated over \$29 million for the project through September 30, 1976. The appropriation bill was signed by the President on December 26, 1975. In recommending these appropriations, the House Committee on Appropriations said:

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)].

25. TVA is proceeding with construction of the project; and the dam is scheduled for closure in January 1977.

26. In connection with its budget request for fiscal 1977, TVA has informed the President, through the Office of Management and Budget, about the listing of the snail darter, the opposition to the project, TVA's

conservation efforts, and TVA's determination to complete the project while doing its best to preserve the darter.

27. On January 21, 1976, the President submitted to Congress a budget request of \$9.7 million for fiscal 1977 to complete the Tellico Project.

Approved:

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