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Brief of Tennessee Valley Authority in Support of Motion to Dismiss and in Opposition to Motion for Injunction, *TVA v. Hill et al*, Civil Action No. 3-71-48

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Civil Action No. CIV-3-71-48

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

BRIEF OF TENNESSEE VALLEY AUTHORITY IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO MOTION FOR INJUNCTION

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STATEMENT

1. Introduction

Plaintiffs seek a preliminary and permanent injunction to halt construction of the Tellico project for alleged violation of the Endangered Species Act of 1973 (87 Stat. 884, 16 U.S.C. §§ 1531 et seq. (Supp. IV, 1974). The gist of the complaint is that in the summer of 1973 a small fish called the "snail darter" was found in that portion of the Little Tennessee River which will be impounded by Tellico Dam; that the fish was listed as an endangered species under the Act; that the impoundment of the Tellico

Reservoir will destroy the fish's only known habitat and result in its extinction; and that TVA's construction and timber clearing operations jeopardize the continued existence of the snail darter in violation of section 7 of the Endangered Species Act (16 U.S.C. § 1536).

TVA has filed a motion to dismiss the action because of plaintiffs' failure to give the statutory notice required as a condition precedent to invoking the court's jurisdiction. This brief is in support of the motion to dismiss, and also in opposition to plaintiffs' motion for a preliminary injunction.

It is TVA's position that:

1. The action should be dismissed for lack of jurisdiction;

2. The Endangered Species Act does not apply to the Tellico project;

3. The Endangered Species Act, if applicable, does not prevent completion of the Tellico project;

4. Congressional action has made judicial review unnecessary and inappropriate; and

5. Plaintiffs are not entitled to injunctive relief.

2. Factual Background

The Tellico project was authorized by Congress on October 15, 1966, as a multi-purpose 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. Construction on the dam began March 7, 1967. 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)). Today approximately $80 million has been invested, and the project is nearly 80 percent completed.

The environmental impacts of the Tellico project have been exhaustively examined. They were fully discussed in TVA's Environmental Impact Statement, and have been litigated twice before this Court (1971 and 1973) and twice before the court of appeals. The basic facts concerning the project are set out in the reported decisions of the two courts (Environmental Defense Fund v. Tennessee Valley Authority, 339 F. Supp. 806 (E.D. Tenn.), aff'd, 468 F.2d 1164 (6th Cir. 1972); 371 F. Supp. 1004 (E.D. Tenn. 1973), aff'd, 492 F.2d 466 (6th Cir. 1974)).

Although the snail darter was not mentioned by name in that litigation (it was discovered in August 1973), the

general subject of rare or endangered fish was an important issue. The court found in the 1971 trial that:

> The free-flowing river is the likely habitat of one or more of seven rare or endangered fish species [339 F. Supp. at 808].

TVA's final environmental statement, which was approved by the court in the 1973 trial, contains a detailed discussion of rare or endangered fish, and lists eleven 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, dusttail 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).

In the summer of 1973, Dr. Etnier announced he had discovered the snail darter, a small tan-colored fish about three inches long. The Endangered Species Act of 1973 became law December 28, 1973. The snail darter was placed on the endangered species list effective November 10, 1975.

More than a year before the snail darter was placed on the list of endangered species, TVA began a program to

perpetuate this darter. On September 13, 1974, TVA entered into a contract with the University of Tennessee to fund a study of the life history and habitat of the fish and to investigate the possibility of transplanting the species into other rivers. Thereafter, TVA commenced its own intensive program to scientifically study its life history, to transplant it to a new habitat, and to search for new populations of snail darters in other areas. This program is underway today. These, and other conservation actions, have all been coordinated in consultation with the U.S. Fish and Wildlife Service and the Office of Endangered Species.

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 these committees that TVA was of the opinion that the enactment of the Endangered Species Act of 1973 and discovery of the darter did not warrant halting construction of the project and that the Act should not be so construed. Being thus advised, Congress appropriated over $29 million for the project. The appropriation bill was signed by the President on December 26, 1975. In recommending these appropriations, the House Committee on Appropriations remarked:

> 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]

TVA is proceeding with completion of the project in accordance with the congressional mandate.

ARGUMENT

It is basic law that plaintiffs have the burden of establishing jurisdiction of the court; of proving that TVA has violated the Endangered Species Act; and of proving by a preponderance of the evidence that they have met the four prerequisites established for the issuance of a preliminary injunction. It is TVA's position that plaintiffs cannot carry the burden as to any of these matters and that: (1) the action should be dismissed for lack of jurisdiction ; (2) the Act does not apply to this project; (3) the Act, if applicable, does not prevent completion of this project; (4) Congressional action in appropriating funds for the project with knowledge of the darter has made judicial review unnecessary and inappropriate; and (5) plaintiffs are not entitled to injunctive relief.

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1 Emphasis added herein unless otherwise noted.

1. This Court Is Without Jurisdiction Since Plaintiffs Have Failed to Comply with the Jurisdictional Prerequisites of the Endangered Species Act.

It is elementary that the jurisdiction of a federal district court is limited to that jurisdiction specifically granted to it by Congress. As stated by the Supreme Court in Kline v. Burke Constr. Co., 260 U.S. 226 (1922):

> Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution [at 234].

It is also well established that the party invoking the district court's jurisdiction has the duty of affirmatively alleging jurisdiction and if his allegations are controverted, has the burden of establishing such jurisdiction. 1 J. Moore, Federal Practice ¶ 0.60[4], at 609 (2 ed. 1975); McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936).

This Court's jurisdiction in this case, as alleged by plaintiffs, rests solely on the Endangered Species Act of 1973, 16 U.S.C. § 1540(c) and 1540(g). That jurisdictional grant is conditional and certain procedural prerequisites must be met before such jurisdiction may be invoked. Section 11(g), 16 U.S.C. § 1540(g), provides that:

> No action may be commenced . . . prior to sixty days after written notice of the violation has

> been given to the Secretary, and to any alleged violator . . . .

Where, as here, Congress has provided a statutory procedure to be followed as a condition precedent to invoking the jurisdiction of the federal court, that procedure must be strictly followed. Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411, 422 (1965); Lichter v. United States, 334 U.S. 742, 789-92 (1948). As the court stated in Munro v. United States, 303 U.S. 36 (1938):

> Suits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed [at 41].

In this case plaintiffs have failed to follow the prescribed statutory procedure in that they failed to give the requisite statutory notice. First, the complaint does not allege that notice of the violation was given to the Secretary of Interior as required by the Act. This alone defeats the court's jurisdiction. Second, the snail darter was not officially listed as an endangered species at the time the alleged notice to TVA was given. A "violation" could not occur until the snail darter was listed as endangered. Plaintiffs' notice was given on October 20, 1975, but the effective date of the listing of the snail darter did not take effect until November 10, 1975. It is obvious that the Act contemplates that there must first be a violation, followed by a written notice to the Secretary and the alleged violator of such violation, followed by a 60-day waiting

period before any court action can be maintained. Since plaintiffs' alleged notice was given before there could conceivably be a violation, it could not constitute "notice of the violation" as required by the Act.

Plaintiffs' failure to strictly comply with the statutory notice requirements deprives this Court of jurisdiction and requires dismissal of this action. Dismissal for this reason was granted in West Penn Power Co. v. Train, 378 F. Supp. 941 (W.D. Pa. 1974), aff'd, 522 F.2d 302 (3d Cir. 1975), where the petitioner did not give the required 60-day statutory notice under the Clean Air Act. The court stated:

> It appears from the complaint and the admissions of the parties that no such notice was given prior to the institution of this suit. We agree with the defendant that the Congress can specify in legislation terms upon which the government consents to be sued and such terms must be strictly followed. Hence, the court has no jurisdiction of this suit under that Section [at 944].

See also Peabody Coal Co. v. Train, 518 F.2d 940, 943 (6th Cir. 1975); City of Highland Park v. Train, 374 F. Supp. 758 (N.D. Ill. 1974), aff'd, 519 F.2d 681, 691, petition for cert. filed, 44 U.S.L.W. 3265 (U.S. Oct. 22, 1975) (No. 75-610); Pinkney v. Ohio Environmental Protection Agency, 375 F. Supp. 305, 308-09 (N.D. Ohio, 1974).

2. The Endangered Species Act Does Not Apply to the Tellico Project.

The Endangered Species Act of 1973 became effective on December 28, 1973. This was more than seven years after

the Tellico project was authorized and nearly seven years after construction began. The project was more than half completed when the Act became law, and Congress, by then, had appropriated $45,465,000 out of a then estimated cost of $69,000,000 for the project. TVA's Final Environmental Statement already had been approved by this court (371 F. Supp. 1004) and that opinion was later affirmed by the court of appeals (492 F.2d 466). Today the project is nearly 80 percent completed.

Did Congress intend the Act to apply in these circumstances? We think it clear that it did not.

The basic question is whether Congress intended this legislation to operate retroactively as to this project. 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, 1331 (4th Cir. 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.

Whether the statute applies to a particular project will obviously depend upon the circumstances of the case; but as to Tellico, we submit that the project has reached such a stage of completion that the application of the Endangered Species Act would constitute an impermissible retroactive application not intended by Congress. The legislative history of the latest appropriation bill appropriating funds for this project 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 fiscal 1976 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.[2] 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.

3. The Endangered Species Act, If Applicable, Does Not Prevent Completion of the Tellico Project.

Even if applicable to Tellico, the Act should not be interpreted as a straight-jacket which can be imposed to halt its construction. Rather, the Act should be construed

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2 The appropriation bill as finally passed included slightly over $29 million for Tellico to carry through September 30, 1976. The $23,742,000 figure represents the amount appropriated through June 30, 1976.

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, 1217 (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.

Section 7 (16 U.S.C. § 1536) 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.

If applicable, this section directs TVA to "consult" with the Secretary of the Interior and secure his "assistance" in taking action in furtherance of the "purposes" of the Act. But this section and its legislative history also make

it clear that Congress intended to commit to TVA the authority and responsibility for deciding 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 to 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 short, the primary thrust of section 7 is that TVA must undertake meaningful "consultation" with Interior before taking any action which may affect the darter; but, once having done that, the final responsibility for decision-making rests with TVA.

TVA decided to proceed with the project but would do the best it could to preserve the darter, even though the present habitat would necessarily be altered or destroyed.

In supporting the President's request for appropriations to continue construction of this project, TVA

informed Congress (both House and 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).

Moreover, it is clear that not every violation of the Act would 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, 141 (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 injury . . . .

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

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."

All of these considerations support TVA's interpretation of the Act as acquiesced in by the Congress. Chairman Wagner assured Congress that TVA would utilize its authority in furtherance of the purposes of the Act when he told both houses that "we will do our best to preserve the darter," but we believe "the project should be completed in any event."

4. Congressional Action Has Made Judicial Review Unnecessary and Inappropriate.

In the circumstances of this case it would appear that congressional appropriations have made judicial review unnecessary. Here we have a situation in which the project is nearly 80 percent complete. A detailed environmental statement describing the environmental impacts of the project has been prepared and submitted to Congress. The environmental statement has been approved after extensive litigation by the district court and the court of appeals. Congress has been informed about the darter and what effect

the project will have on it. Knowing all this, Congress has appropriated funds to continue its construction.

The effect of congressional appropriations under such 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 the 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.

5. Plaintiffs Are Not Entitled to Injunctive Relief.

The prerequisites for granting a preliminary injunction are well known and aptly stated in the recent case of Canal Authority of Florida v. Callaway, 489 F.2d 567, 572-73 (5th Cir. 1974):

> The grant or denial of a preliminary injunction rests in the discretion of the district court. Johnson v. Radford, 5 Cir. 1971, 449 F.2d 115. The district court does not exercise unbridled discretion, however. It must exercise that discretion in light of what we have termed "the four prerequisites for the extraordinary relief of preliminary injunction." Allison v. Froehlke, 5 Cir. 1972, 470 F.2d 1123, 1126. The four prerequisites are as follows: (1) a

> substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest. Di Giorgio v. Causey, 5 Cir. 1973, 488 F.2d 527; Blackshear Residents Organization v. Romney, 5 Cir. 1973, 472 F.2d 1197.

The court emphasized that the plaintiff carries the burden of proof on all of these issues:

> The burden of persuasion on all of the four requirements for a preliminary injunction is at all times upon the plaintiff.
>
> * * *
>
> First and foremost, we reemphasize the importance of the general requirements for a preliminary injunction. It is an extraordinary remedy, not available unless the plaintiff carries his burden of persuasion as to all of the four prerequisites. The primary justification for granting a preliminary injunction is to preserve the court's ability to render a meaningful decision after a trial on the merits [Id. at 573, 576].

These same principles are recognized by the Sixth Circuit Court of Appeals. North Avondale Neighborhood Ass'n v. Cincinnati Metropolitan Housing Authority, 464 F.2d 486, 488 (6th Cir. 1972).

The above principles are well established and clearly demonstrate that plaintiffs are not entitled to such relief.

1. There is certainly no "substantial likelihood" that plaintiffs will prevail on the merits. The Endangered Species Act became effective December 28, 1973--more than seven years after Tellico was authorized, and more than 6-1/2 years after construction began. The snail darter was officially put on the endangered species list November 10, 1975--more than nine years after Tellico was authorized. The extent to which that Act applies to the Tellico project in its present state of completion would alone raise questions of sufficient uncertainty to defeat plaintiffs' claim of substantial likelihood of success. Moreover the action of Congress in appropriating over $29 million for construction of this project through September 30, 1976, after being fully informed of the snail darter, and after the House appropriation committee said it "directs that the project . . . should be completed as promptly as possible," removes all likelihood of plaintiffs' success on the merits.

2. Neither is there any substantial threat that plaintiffs will suffer irreparable injury if an injunction is not issued. There is no present threat to the darter. To the contrary, the proof is that there is less silt going into the river from the project area today than there was before the project was authorized in 1966. The dam will not be closed until January 1977; and there is a good likelihood that by the time of closure, the darter may be safely transplanted to other habitats or that new populations of darters may be found elsewhere.

3. On the issue as to whether the threatened injury to plaintiffs would outweigh the harm an injunction would do to TVA, it is clear that plaintiff cannot prevail. The proof shows that halting of this project in this period of spiraling costs would cause the laying off of many workers, the expense of storing and protecting large quantities of equipment and machinery against rust and weathering, the loss of time and money in shutting down and starting up, and the loss of thousands of dollars due to escalating construction costs while the project stands idle. No harm would be caused to plaintiffs if an injunction were not issued.

4. Finally it is clear that the issuance of a preliminary injunction would not be in the interest of the general public. As stated above, the House Committee on Appropriations directed that this project be completed as promptly as possible "in the public interest." The Congress has already committed nearly $80 million to this project so that the public may realize the enormous benefits that will be derived in the form of navigation, flood control, electric power, recreation, jobs, new industrial growth, etc. These benefits should be realized without further delay. Moreover, since TVA is an agency of the government and is constructing this project for the public with public funds, any increase in the cost of construction necessarily involves the public interest. Congress speaks for the public, and it has spoken.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the action should be dismissed or, if not dismissed, that plaintiffs' motion for preliminary injunction be denied.

Respectfully submitted,

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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	)	Civil Action No. CIV-3-71-48

MOTION TO DISMISS

Defendant Tennessee Valley Authority moves the Court to dismiss this action on the ground that the Court lacks jurisdiction because plaintiffs have failed to comply with the statutory notice requirements for invoking the jurisdiction of this Court under the Endangered Species Act of 1973.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing motion, together with brief in support of motion to dismiss and in opposition to motion for injunction, 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 23rd day of February, 1976.

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Attorney for Defendant