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Order & Opinion as Rendered from the Bench Denying Preliminary Injunction and Denying TVA's Motion to Dismiss, *TVA v. Hill et al*, Civil Action No. 3-76-48

Robert L. Taylor

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

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

FEB 26 1976

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

v.

CIV. 3-76-48

TENNESSEE VALLEY AUTHORITY

O R D E R

For the reasons stated in an Opinion As
Rendered From The Bench and this day passed to the
Clerk of the Court, it is ORDERED that plaintiffs'
motion for a preliminary injunction be, and the
same hereby is, denied and that TVA's motion to
dismiss at this time be, and the same hereby is,
likewise denied.

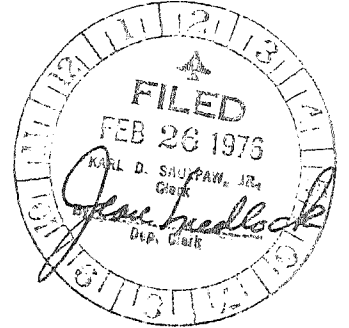
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Bowen, Joyce

United States District Judge

Filed 26 day of Feb 1976
Ent'd Order Book 73 p. 185
by KARL D. PAULSON, CLERK
John McLeod Dep. Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
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OPINION AS RENDERED FROM THE BENCH

Arguments on each side have been informative and interesting and show careful consideration by counsel of the legal and factual questions that are involved. Counsel only agree on one thing, and that is the rules to be followed by a trial court in issuing or denying a temporary injunction.

These rules, which have been stated and discussed by respective counsel, are as follows:

1. The moving party has raised a substantial question on the merits of the lawsuit;
2. The moving party has demonstrated a probability of success on the merits;

3. The injury that will be suffered by the moving party without preliminary relief is irreparable and outweighs the resulting harm to his adversary; and
4. Judicial consideration of the public interest.

Plaintiffs seek a temporary and permanent injunction to stop the construction of the Tellico Project. This is the third time the Project has been in litigation in this Court as indicated by counsel during the argument. In the first case, the plaintiffs contested the building of the dam because of an insufficient impact statement. The Court heard extensive proof at that hearing and heard Dr. Etnier testify at length about the species of fish known as darters.

In that first case, the Court issued a temporary injunction which prohibited further work on the dam because of an inadequate impact statement.

As indicated by counsel, that case went to the Court of Appeals and was affirmed; thereafter, the TVA amended its impact statement. The amendment caused a second hearing at which time the Court heard detailed proof about that impact statement.

The Court, after extensive proof and arguments of counsel, held that the impact statement complied with

the provisions of the National Environmental Protection Act. Thereupon, the plaintiffs in that case appealed to the Court of Appeals and, as also stated by counsel, that decision was likewise affirmed.

Section 1536 of the Endangered Species Act of 1973 (16 U.S.C. §§ 1531-1543) provides, in pertinent part, that all Federal agencies

"shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by. . . taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of. . . 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."

The legislative history of this section states that

"[a]ll agencies, departments and other instrumentalities of the Federal government are directed to cooperate in the implementation of the goals of this Act."

S.Rep.No. 93-307, 93rd
Cong., 1st Sess., 2 U.S.Code
Cong.& Admin. News, p. 2997.

On October 9, 1975, the Secretary of the Interior determined that the snail darter was an endangered species, that its habitat, the Little Tennessee River, was critical to its survival or destruction, and noted that

"[t]he proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the Snail Darter's habitat." Exhibit A to the Complaint. In reaching this conclusion the Secretary of the Interior considered the objections of T.V.A. to listing the snail darter on the Endangered Species List. Some of the objections raised and apparently rejected by the Secretary are as follows:

1. The snail darter is not a new and distinct species;
2. No present threat to the snail darter exists since there is scientific opinion that it exists in other parts of the Tennessee River System;
3. TVA and others are undertaking a scientifically recognized program to conserve the snail darter;
4. The Fish and Wildlife Service of the Department of Interior should not inject itself into "the longstanding controversy surrounding the wisdom of the Tellico Project." The federal courts have already passed on the sufficiency of TVA's impact statement which considered undescribed species of darters;
5. Impoundment of the lake is set for January 1977;
6. Congress continues to fund the project; and

7. There "is no scientific basis to support listing the snail darter, there is no environmental need for such action, and that nothing positive would be accomplished."

In spite of the objections made by TVA, the Secretary placed the snail darter on the Endangered Species List.

The only case found by this Court which deals with an entity of the federal government as a defendant was Sierra Club v. Froehlke, 392 F.Supp. 130 (E.D.Mo. 1975). In that case, the plaintiff alleged that the construction of a certain dam by the Army Corps of Engineers would modify or destroy the habitat of the Indiana Bat. The District Judge held, among other things, that the Corps of Engineers' activities had not resulted in harassing or endangering the Indiana Bat. The Court also found that when the lake was impounded, no caves presently inhabited by the bats would be affected, even if the lake were not impounded, the Indiana Bat faced extinction within fifteen or twenty years. 392 F.Supp. at 144. The trial judge declined to interfere with the construction of the dam and found as a fact that the "Corps of Engineers has been, and is, making all possible reasonable good faith efforts to comply with the provisions of the Endangered Species Act of 1973." 392 F.Supp. at 138.

That decision is now pending in the Court of Appeals for the Eighth Circuit. Counsel for plaintiffs also mentioned the case of United States v. Cappaert, 508 F.2d 313 (9th Cir. 1974). We have examined that case and are of the opinion that the case dealt more with the enforcement of the Government's right to certain ground water than it dealt with enforcement of the Endangered Species Act. Counsel also mentioned an unreported case arising in the Southern District of Mississippi, but the Court has not had an opportunity to examine the opinion.

In the present case, one of the issues is whether the TVA has taken "such action necessary to insure that" the impoundment of Tellico Lake does not "jeopardize the continued existence of" the snail darter "or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical." 16 U.S.C. § 1536.

The Secretary, as previously indicated, has determined that impoundment of the Tellico Lake would totally destroy the snail darter's habitat. Thus, the Secretary's position is seemingly that if the Tellico Project is prosecuted to completion the snail darter will be rendered extinct.

Plaintiffs allege that TVA is attempting to "take" the snail darter in violation of Title 16 § 1538(a)(1)(B) and (G), and that such violation may be enjoined pursuant to 16 U.S.C. § 1540(g)(1)(A).

The plaintiffs' arguments in support of the motion for a temporary injunction may be summarized as follows:

- (1) That plaintiffs will be irreparably harmed if the snail darter is rendered extinct by the actions of TVA in bulldozing and clear-cutting trees which may destroy the critical habitat of the darter before the case can be heard on the merits; and
- (2) the public interest requires preservation of this endangered species.

The arguments in opposition to the motion are set forth in definitive form in the brief of the TVA. The first point TVA makes in that connection is that the Court does not have jurisdiction of the case because proper notice was not given to it or to the Secretary of the Interior in accordance with the provisions of the Act. See 16 U.S.C. § 1540(g)(2)(A)(i).

The Secretary of the Interior and TVA received notice more than 60 days before the suit was filed. TVA's argument is highly technical and, in the opinion of the Court, it is lacking in merit. If such a defense were plausible this Court would hesitate to base a decision on such a procedural technicality rather than on the merits of the case.

The second argument made by TVA is that the Endangered Species Act does not apply to the Tellico Project. It is assumed that TVA intends to convey the idea that the Act is not retroactive and that the Congress did not intend for it to apply to projects begun before the Act was passed.

The Tellico Project was started or discussed as early as 1967 and, with the exception of the interruptions caused by the courts, has continued toward completion since that time.

In the opinion of the Court, the Endangered Species Act does apply to the Tellico Project; but whether or not Congress intended the Endangered Species Act to permit the halting of the Tellico Project after approximately \$80-million has been spent on it is another question, a question that will not be decided by the Court at this time.

The Court will give the parties an opportunity, if they desire, to present proof on the merits of the case at which time further discussion of this point as well as several other points in the brief will be heard.

In this connection, if the parties take advantage of a hearing on the merits, the Court expects them to stipulate as many facts as possible and to formulate with clarity the disputed questions of fact, if any. At this point, it appears to the Court that the decision on the merits will turn on questions of law rather than on questions of fact.

The Court cannot say at this time that plaintiffs have demonstrated a probability of success on the merits. The Court is of the opinion that this is highly doubtful. Nor can the Court find at this time that the injury which plaintiffs will suffer unless a preliminary injunction is granted outweighs the harm that would result to TVA.

During the argument the Court was advised by counsel that the prior injunction issued by this Court cost the TVA approximately \$15 million, an amount which was shocking to the Court. As indicated, the Court cannot find at this time that the injury to plaintiffs would outweigh the harm to TVA if a temporary injunction were to be issued.

Of course, the public interest is involved in this case. The plaintiffs are interested in preserving the environment. The TVA says that it is likewise interested in the environment, but says the harm that would be done by the issuance of an injunction would greatly outweigh the good that it would do plaintiffs and other citizens of the United States.

The Court is of the opinion and finds that the issuance of a temporary injunction cannot be justified

on the present record.

Accordingly, plaintiffs' motion is denied.

Order Accordingly.

Robert Taylor

United States District Judge