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Complaint for Injunctive Relief submitted by
Plaintiffs' Attorney, *TVA v. Hill et al*, Civil Action
No. 3-76-48

W.P. Boone Dougherty

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IN THE 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,)

VS.)

CIVIL ACTION

NO. _____

TENNESSEE VALLEY AUTHORITY,)

Defendant.)

COMPLAINT FOR INJUNCTIVE RELIEF

1. The plaintiffs are all citizens and residents of Knox County, Tennessee. In addition, the plaintiffs use the Little Tennessee River and area for fishing, floating, boating and other recreational activities. They are individuals concerned with the conservation of irreplaceable natural resources in general and in the area of the Little Tennessee River in particular. The actions of the defendant Tennessee Valley Authority hereinafter described have infringed and will infringe upon and interfere with the rights of the plaintiffs.

2. The defendant, Tennessee Valley Authority, is a corporation organized pursuant to Legislative Act of the Congress of the United States of America, said Act being known as the "Tennessee Valley Authority Act of 1933", and being designated as 16 U.S.C. § 831 (a-dd) (1933). Said defendant's principal office is located in the immediate vicinity of Muscle Shoals, Alabama, and it also has an office in Knoxville, Knox County, Tennessee. Pursuant to 16 U.S.C. § 831 (c)(b) said defendant may sue and be sued in its corporate name.

3. This action is brought seeking the issuance of a temporary and permanent injunction by this Court to enjoin further construction and implementation of the Tellico Dam and the Tellico Project by the defendant Tennessee Valley Authority, which actions by said defendant are illegal and in violation of the Endangered Species Act (16 U.S.C. §§ 1531-1543) (1973). The purpose and effect of said injunctions will be the preservation and protection of the fish known as the Snail Darter, scientifically known as Percina (Imostoma) Tanasi, a designated endangered species pursuant to said statute, and the preservation and protection of its habitat which has been deemed a critical habitat, pursuant to said Endangered Species Act.

4. Jurisdiction for this action is conferred upon this Court by 16 U.S.C. § 1540 (c) and (g) (1973), known also as the Endangered Species Act, which provides in pertinent parts as follows:

16 U.S.C. § 1540(c)

(c) The several district courts of the United States . . . shall have jurisdiction over any actions arising under this chapter.

16 U.S.C. § 1540 (g) (1) and (2)

(g) (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf -

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, as the case may be

(2) (A) No action may be commenced under subparagraph (1) (A) of this section -

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation

(3) (A) Any suit under this subsection may be brought in the judicial district in which the violation occurs

5. 16 U.S.C. § 1531 (1973), provides in pertinent parts as follows:

§ 1531. Congressional findings and declaration of purposes and policy.

The Congress finds and declares that -

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

. . . .

(5) (b) The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

6. 16 U.S.C. § 1532 (1973), provides in pertinent parts as follows:

§ 1532. Definitions.

. . . .

(4) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

(5) The term "fish or wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

...

(8) The term "person" means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.

...

(10) The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term means the Secretary of Agriculture.

...

(14) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. . . .

7. 16 U.S.C. § 1533 (1973), provides in pertinent parts as follows:

§ 1533. Determination of endangered species and threatened species - Generally

(a) (1) The Secretary shall by regulation determine whether any species is an endangered species or a threatened species because of any of the following factors:

(1) the present or threatened destruction, modification, or curtailment of its habitat or range. . . .

8. 16 U.S.C. § 1536 (1973), provides 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.

9. 16 U.S.C. § 1538 (1973), provides in pertinent parts as follows:

§ 1538. Prohibited Acts - Generally

(a) (1) . . . [w]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to -

...

(B) take any such species within the United States or the territorial sea of the United States;

...

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

10. On January 20, 1975, certain of the plaintiffs petitioned the Department of the Interior to list the Snail Darter as an endangered species. On or about October 9, 1975, after extensive scientific study and analysis by several parties and review of comments, the Secretary of the Interior, pursuant to statutory authority and direction, effected a determination by published rule and regulation that the Snail Darter, Percina (Imostoma) Tanasi, was an endangered species and that its habitat (Little Tennessee River) was critical to its survival or destruc-

tion. Said determination further provided: "The proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat." Said rule and regulation is specifically incorporated herein by reference in its entirety and attached hereto and made a part hereof as Exhibit A. The Little Tennessee River is the only habitat of the Snail Darter.

Further, the Department of the Interior, through its Director of the United States Fish and Wildlife Service, has formally issued a proposed rulemaking which will determine critical habitat for six (6) endangered species, included among which is the Snail Darter. Said proposed rulemaking dated November 12, 1975, and published in the Federal Register (Volume 40, No. 242, page 58308) on December 16, 1975, provides as follows at 58308 and 58310:

BASIS FOR DETERMINATION

SNAIL DARTER (Percina (Imostoma) SP.)

Tennessee. Critical habitat for the snail darter extends from river mile 0.5 to river mile 17 of the Little Tennessee River, Loudon County, Tennessee. River miles 0.5 through 17 are shown on a map entitled "Tellico Project", prepared by the Tennessee Valley Authority (TVA), Bureau of Water Control Planning, August 1965 (map 65-MS-453 K 501). River mile 17 is two river miles below the U.S. Highway 411 bridge over the Little Tennessee River, and is near Rose Island; river mile 0.5 on the Little Tennessee River is one half mile upstream from its confluence with the Tennessee River. Presently, this section of river is the only known existing habitat of the snail darter. In portions of this area, certain conditions exist which are required by the species, and the disruption of these conditions would lead to decline or extinction of the snail darter. . . .

. . . .

Subpart F - Critical Habitat

§ 17.81 Snail darter.

(a) The following area is critical habitat for the snail darter (Percina (Imostoma) sp.): From river mile 0.5 to river mile 17 of the Little Tennessee River, Loudon County, Tennessee, as shown on a map entitled "Tellico Project", prepared by Tennessee Valley Authority, Bureau of Water Control Planning, August 1965 (map 65-MS-453 K 501).

(b) Pursuant to section 7 of the act, all Federal agencies must take such action as is necessary to insure that actions authorized, funded, or carried out by them do not result in the destruction or modification of this critical habitat area.

The plaintiffs aver that the actions of the defendant Tennessee Valley Authority in continuing and completing the Tellico Dam and Project will permanently destroy the Snail Darter and render it extinct and will further destroy the only habitat of the Snail Darter which is absolutely critical and vital to its continued existence. The plaintiffs further aver that the defendant Tennessee Valley Authority has been given notice of its actions and the consequences thereof, and has further been given notice of its violations of the Endangered Species Act, but nevertheless continues with its actions in open violation of the law.

Critical Habitat has been defined by the Department of Interior, through its United States Fish and Wildlife Service and the National Marine and Fisheries Service, as follows (Federal Register, Volume 40, No. 78):

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→ 17764-6 *see better quotes*

"Critical habitat" for any Endangered or Threatened species could be the entire habitat or any portion thereof, if, and only if, any constituent element is necessary to the normal needs or survival of that species. The following vital needs are relevant in determining "critical habitat" for a given species:

- (1) Space for normal growth, movements, or territorial behavior;
- (2) Nutritional requirements, such as food, water, minerals;
- (3) Sites for breeding, reproduction, or rearing of offspring;
- (4) Cover or shelter; or
- (5) Other biological, physical, or behavioral requirements.

11. Notwithstanding such notice and the Secretary's determination that the Snail Darter is an endangered species and its habitat in the Little Tennessee River is critical, the defendant Tennessee Valley Authority is proceeding at full speed with utter disregard for said determination to complete

the Tellico Dam and Project, all in violation of 16 U.S.C. §§ 1531-1543 (1973). One of the more blatant and graphic demonstrations of said violation is the current extensive bulldozing and clear-cutting of trees, logs and foliage along the banks of the Little Tennessee River by the defendant Tennessee Valley Authority in the habitat area of the Snail Darter. Such bulldozing and clear-cutting of trees, logs and foliage also jeopardizes the continued existence of the Snail Darter and effects a destruction and modification of its critical habitat, the waters, shoals and gravel substrate of the Little Tennessee River, and further erodes the public interest pending the final determination of the question on the merits.

12. On or about October 20, 1975, the plaintiffs, pursuant to 16 U.S.C. § 1540 (g)(2)(A)(i) (1973), gave the requisite notice of said violation to the Secretary of the Interior and to the violator, the defendant herein, Tennessee Valley Authority. The violation has occurred and is occurring in the judicial district of this Court.

13. In addition, the construction and implementation of the Tellico Dam and Tellico Project by the defendant Tennessee Valley Authority will not only jeopardize and destroy the Snail Darter and its critical habitat, the Little Tennessee River, all in violation of 16 U.S.C. §§ 1531-1543 (1973), but will also affect adversely and derogate the quality of human life in the Little Tennessee River area, and violates the strong purpose and intent of Congress as enunciated in the Act.

14. Accordingly, the plaintiffs seek an expedited hearing before this Court as soon as practicable and the issuance by the Court, following such hearing or hearings, of a temporary and permanent injunction to enjoin said violation and specifically enjoining the defendant Tennessee Valley Authority, its agents, servants, employees and representatives, from any further work,

activity and/or construction related to the Tellico Dam or Tellico Project or the implementation thereof and requiring the immediate and permanent cessation of all work and activity in any way related to or a part of the Tellico Dam or the Tellico Project. Irreparable injury and damage will result unless this Court so acts.

WHEREFORE, PLAINTIFFS PRAY:

1. That the Court conduct an expedited hearing or hearings relative to the issues presented in this Complaint as soon as practicable.
2. That, upon such expedited hearings, the Court issue a temporary and permanent injunction as requested in said Complaint.
3. For such other relief as justice and equity may require.

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OF COUNSEL:

BERNSTEIN, DOUGHERTY & SUSANO

M O T I O N

The plaintiffs move the Court for an expedited hearing relative to the issues and matters presented in the foregoing Complaint.

This 18th day of February, 1976.

W.P. Boone Dougherty
Attorney for Plaintiffs