1-1-1976

Brief of Plaintiffs in Support of Motion for Temporary Injunction and in Opposition to Defendant's Motion to Dismiss, *TVA v. Hill et al*

W.P. Boone Dougherty

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. CIV 3-71-48
TENNESSEE VALLEY AUTHORITY,	)	
Defendant.	)	

BRIEF OF PLAINTIFFS IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION AND IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

The plaintiffs filed their Complaint for Injunctive Relief on Wednesday, February 18, 1976, seeking a temporary and permanent injunction with regard to the defendant's continuation of work and construction activity on the Tellico Dam and Tellico Project. Of immediate concern, along with the construction activity on the Tellico Dam, is the extensive bull-dozing and clear-cutting of trees, logs and foliage presently being carried on by the defendant along the banks of the Little Tennessee River. This action has been filed pursuant to the Endangered Species Act (16 U.S.C. §§ 1531-1543) (1973), and has as its primary purpose the preservation and protection of the Snail Darter, scientifically known as Percina (Imostoma) tanasi. As the Court knows, the Snail Darter has been designated an endangered species pursuant to said statutory provisions. In making this determination, the Secretary of the Interior indicated that such was made after extensive study and analysis and was based upon the "best scientific and commercial data available", as required

by 16 U.S.C. § 1533(b) (1). As clearly indicated in the Endangered Species Act, and specifically pursuant to 16 U.S.C. § 1540 (g) (1), the district courts have jurisdiction to grant injunctions to enjoin any person, including United States and any other governmental instrumentality, who is alleged to be in violation of any provisions of the Act. The plaintiffs are prepared to show, and the Secretary of Interior's determination so indicates, that the actions of TVA in engaging in said bull-dozing and clear-cutting, as well as the continued construction activity on the Tellico Dam is in violation of, and will further violate, the Act's requirements in connection with the endangered species. The Court should take note of the fact that TVA vigorously fought the listing of the Snail Darter as an endangered species and tried to take the position in its comments to the Secretary of the Interior that, among other things, the Snail Darter existed elsewhere and was not properly an endangered species. The defendant TVA has, in essence, been shown to be incorrect with regard to their previous positions.

Suffice it to say in brief, the Complaint filed by the plaintiffs clearly provides a basis for temporary injunctive relief in this cause. The plaintiffs, in addition, are prepared to present testimony and evidence at the preliminary injunction hearing scheduled for Wednesday, February 25, 1976, in support of the positions set forth in the Complaint.

A. STATUTORY NOTICE.

The defendant TVA has filed a Motion to Dismiss setting forth one ground, namely, that the Court lacks jurisdiction because the plaintiffs have allegedly failed to comply with the statutory notice requirements. The plaintiffs will at this time respond to said Motion and, in general, to the brief filed by the defendant.

The initial point presented by the defendant is that the plaintiffs have failed to comply with the 60-day written notice requirement. The first point presented by the defendant

is that: "First, the Complaint does not allege that notice of the violation was given to the Secretary of the Interior as required by the Act." This point is clearly erroneous as noted by paragraph 12 of the Complaint which states as follows: "On or about October 20, 1975, the plaintiffs . . . gave the requisite notice of violation to the Secretary of the Interior and to the violator, the defendant herein, Tennessee Valley Authority."

The defendant next responds that the Snail Darter was not officially listed as an endangered species at the time the alleged notice to TVA was given. In response thereto, the plaintiffs would refer the Court to 16 U.S.C. § 1540 (g)(1) and (2), which indicates that the 60-day written notice requirement is more, in reality, an issue of standing rather than jurisdiction per se. First of all, it is clear that there is no precise requirement that the statutory notice only be given after the final and effective date of the Endangered Species Listing. In this situation, we have the Secretary of Interior's determination and the listing of the Snail Darter as an endangered species published in the Federal Register on or about October 9, 1975. Said listing does state therein that the amendment will be effective on November 10, 1975. Plaintiffs contend that the key concern with the statutory notice is actual notice to the violator and the Secretary of the Interior and not some rigid hypertechnical notice consideration which is unrealistic in the intent and purpose of the statute. A corollary to this proposition is demonstrated by National Wildlife Federation v. William T. Coleman, U. S. District Court, Southern District of Mississippi, opinion filed August 4, 1975, wherein the Court in discussing this notice aspect under the Endangered Species Act, states as follows:

> On March 21, 1975, the plaintiff, National Wildlife Federation, wrote to the defendant, Tiemann, expressing its opposition to the project and alleging violations of both

Section 7 of the Endangered Species Act and Section 4(f) of the Department of Transportation Act. (Exhibit FD-1(39)) Copies of that letter were sent to three different offices within the Department of the Interior. It is true, as the Federal defendants argue, that this letter does not specifically purport to be the notice required by 16 U.S.C. § 1540(g), but this section does not require the notice to be in any particular form. The Court is convinced that the letter of March 21 was sufficient to place the Secretary of Interior on notice of the alleged violations of Section 7.

It is interesting to note that this case involved the Endangered Species Act and its application to a request to halt construction of a segment of Interstate Highway 10 through the habitat of the Mississippi Sandhill Crane in Jackson County, Mississippi.

It seems clear that the important concern of the statutory notice provision relates to actual notice to the Secretary of the Interior and the alleged violator prior to the institution of an action so that conceivably certain informal or administrative action can be effectively taken prior to the institution of any suit. It is interesting to note that in the instant case the defendant TVA responded to the written notice of the plaintiffs of October 20, 1975, by a letter directe to them bearing date of October 28, 1975, a xerox copy of which is attached hereto as Exhibit 1. Under the circumstances it seems somewhat absurd for the defendant TVA to raise this notice argument.

The notice of October 20, 1975, forwarded by the plaintiffs was clearly anticipatory and subsequent to the actua publication in the Federal Register on October 9, 1975. Nothi further was required for the final effectiveness of the listing of November 10, 1975. Secondly, the violation involved, the continued construction of the Tellico Dam and Tellico Project was not a mere wisp in the air as might be occasioned by air See West Penn Power Co. v. Train, 378 F.Supp. 941 (W.D.Pa. 197 pollution of one sort or another occurring on one occasion./ H we have the dramatic continuation of a project which the plain contend will necessarily, by its conclusion, render the Snail

Darter extinct and has and will clearly violate the Endangered Species Act.

In addition, this is not something new and strange. The matter of the Tellico Dam and Tellico Project during the period 1973 through 1975, 1973 being the date of discovery of the Snail Darter, was clear and continuing and the question of the possible violation of the Endangered Species Act by TVA with respect to the Snail Darter and the Tellico Project had been debated extensively between the parties and by written comments before the Secretary of the Interior.

The defendant cites the case of West Penn Power Company v. Train, 378 F.Supp. 941 (Western Dist. Pa. 1974), aff'd 522 F.2d, 302 (3d Cir. 1975), for the proposition that failure to give such notice requires a dismissal of the action. However, in that case, there apparently was no notice given at all. The plaintiffs contend that they did comply with the notice requirement of the statute. Their notice of October 20, 1975, specifically stated therein that it was intended as notice under the statute.

B. THERE IS NO IMPLIED EXEMPTION FOR ONGOING PROJECTS.

Further, the argument that the Endangered Species Act contains an implied exemption for ongoing projects has no merit. The statute on its face is clear, with a mandatory application to all Federal actions. There is no grandfather clause or other exemption for projects that are underway at the time of the Act. Many Federal projects are funded and commenced many years before their completion and to imply exemption for such projects would, in large part, emasculate the Act and thwart its policies and purposes. This clear reading of the statute is supported by administrative interpretation by the leading Federal agency, and by the courts. The Department of Interior has interpreted § 1536 as fully applicable to Federal actions which were planned or partially completed prior to enactment of the 1973 Act. Wood, § 7 of the Endangered Species Act of 1973:

A Significant Restriction for all Federal Activities, 5 ELR 50189, 50196 (1975), citing letter of June 6, 1975, from Department of Interior to Department of Transportation. Since Interior is primarily responsible for enforcing the Act, that Department's endorsement of application of the Act to ongoing projects is entitled to considerable judicial deference. Udall v. Tallman, 381 U.S. 1, 16 (1965). Furthermore, in cases involving the Endangered Species Act, the Act has been applied to ongoing projects by the Courts. In U.S. vs. Cappaert, 508 F.2d 313 (9th Cir. 1974), which involved the Devil's Hole Pupfish, a two-inch fish which lives exclusively in an underground cavern in Death Valley National Monument, the court enjoined continued pumping for irrigation which was lowering the critical water table of the fish. The ongoing activities involveda multimillion dollar investment and vested private property rights as well as Federal action. In National Wildlife Federation v. Coleman, (Civil Action No. J 75-129) (SD Miss. August 4, 1975), the trial court was presented with a petition to enjoin highway construction through the only known nesting area of the Mississippi Sandhill Crane, an endangered species. The District Court refused to grant an injunction on the basis that plaintiffs had not shown harmful effect on the species, and the Court did not hesitate to consider application of the Act to the project on the ground that it was an ongoing project. Further, that case is now on appeal to the Fifth Circuit, and a temporary injunction has been granted pending a determination on the merits.

Finally, the allegation that the Endangered Species Act contains an implied exemption for ongoing projects is refuted by the reasoning of this Court in the NEPA litigation over the Tellico Project. This Court stated, "[T]he omission of the traditional grandfather clause in [the subject Act] as the Act's stress on the inclusive applicability of the policy promulgated by the Act indicates a strong legislative intent to imply [the Act] to [ongoing] Federal action. . .

and, citing Morningside-Lenox Park Assn. v. Volpe, 334 F.Supp. 132 (ND Pa. 1971) this Court stated that application of the Act ". . . is required as to an ongoing Federal project on which substantial actions are yet to be taken, regardless of the date of 'critical' Federal approval of the project." EDF v. TVA, 339 F.Supp. 806, 811, 812 (ED Tenn. 1972). The Court of Appeals supported this Court, stating that "we believe it more consonant with Congressional intent to hold that an agency must [comply with the relevant statute] whenever the agency intends to take steps that will result in a significant environmental impact, whether or not those steps were planned before [the effective date of the Act] and whether or not the proposed steps represent simply the last phase of an integrated operation most of which was completed before that date." EDF v. TVA, 468 F.2d 1164, 1177 (6th Cir. 1972).

C. NO EXEMPTION IMPLIED BY CONTINUED CONGRESSIONAL APPROPRIATIO

Further, no exemption can be implied to the Act based upon the fact of continued appropriations, or continued appropriation for the specific project. The proposition that such an exemption is implied for ongoing projects where Congres continues to appropriate funds for a challenged project is str ly rejected in EDF v. Froehlke, 473 F.2d 346 (8th Cir. 1972), where the Court held that House Rule XXI specifically prevente such an argument. House Rule XXI is specific in providing tha in the case of appropriation bills, "2. No appropriation shal be reported in any general appropriation bill, . . . Nor shal any provision in any such bill or amendment thereto changing existing law be in order, . . .". (Emphasis added.) See 473 F.2d 346, 354. "An appropriation act cannot serve as a vehi to change that requirement [that a project be completed in accordance with applicable Federal law]", EDF v. Froehlke, 473 F.2d 346, 353.

In CNR v. Seaborg, 463 F.2d 783, (DC Cir. 1971), the Court found that continued funding of AEC tests did not void the need to comply with applicable Federal law. "Congress must be free to provide authorization and appropriations for projects proposed by the executive even though claims of illegality on grounds of compliance with NEPA [the applicable law in that case] are pending in the courts. There is, of course, nothing inconsistent with adoption of appropriations and authorizations measures on the pro tanto exemption of validity, while leaving any claim of invalidity to be determined by the courts." CNR v. Seaborg, 463 F.2d 783, 785.

Finally, in the NEPA case involving the Tellico Project the Sixth Circuit Court specifically stated that "[W]e are unimpressed with appellant's argument that Congress authorized appropriations for Tellico in 1970 and 1971, even though environmental impact statements had not been filed. To paraphrase Mr. Justice Douglas, ... 'Congress did not intend, by approving funds for the [Tellico Project] to repeal NEPA as it applied to the [Project] . . . .' Other Federal courts have similarly concluded that Congressional appropriations for a project subject to NEPA are not to be taken as expressing any view with respect to compliance with NEPA." [Citations omitted]. EDF v. TVA, 468 F.2d 1164, 1182 (6th Cir. 1972).

Defendants have alleged that conversations in the House Appropriations Committee constituted a specific exemption for the Tellico Project. This argument has no merit. First, the potential conflict between the Project and the Act was only mentioned in the course of committee discussions. It was never reported to Congress in floor debates, in the official House Report on the appropriations bill, and, therefore, Congress could not even have considered the question in passing the appropriations bill. To argue that such occurrences constitute a Congressional amendment of the Endangered Species Act would be to invite legislation by subterfuge, by permitting implication of statutory immunity for any potential project litigation mentioned in the course of a committee discussion.

The cases cited above directly support this conclusion. Appropriations bills cannot be held to create implied amendments to prior Federal statutes, at the very least not in the absence of some specific reference to the statutory conflict by Congress. Finally, it is to be noted that the alleged conversations took place in April and March of 1975, seven months prior to the effective date of the Snail Darter Listing, and, therefore, were essentially speculative since no statutory violation was possible until the Secretary had determined the applicability of the law. At the time of these conversations, moreover, the official position of TVA was that the Snail Darter was not officially listed nor endangered and therefore that no violation of the Act existed.

MANDATORY EFFECT OF SECTION 1536

The Tennessee Valley Authority argues that the effect of § 1536 is merely to require consultation, instead of direct compliance with the Federal statute by Federal agencies. This argument fails to recognize that § 1536 is mandatory in its language, not only to consultation with the Secretary, but also actively "to insure that actions . . . do not jeopardize . . . endangered species" etc.

The penalty provisions of § 1538 apply to private parties; the only directive to Federal agencies appears in § 1536 and if TVA's argument were to prevail, it would mean that no Federal agency has to comply with the Act. Furthermore, § 1536 does not "give a veto over any Federal project to the Secretary of Interior." All the Secretary need/is list the species on the Endangered Species List. Beyond that it is the duty of every Federal agency as well as the Department of Interior to comply with the Federal law.

PRELIMINARY INJUNCTION

On the basis of scientific fact and the findings of the Department of Interior, it appears clear that the Tellico

Dam Project is in violation of the Federal Endangered Species Act. Pending a full hearing on the issuance of a permanent injunction, a temporary injunction must issue to support the strong and clear Congressional directives of the Act. Not to issue a temporary injunction would be to permit further irreparable destruction of the unique habitat of this endangered species, through continued destruction of the riverine environment, sediment-free water/and watershed conditions. Further, continued activity and expenditure on the Project poses the direct threat of irretrievable losses to the public and prejudices the ability of this Court to protect the public interest by a future permanent injunction. The public interest would be best served by a temporary injunction at this time and a permanent injunction thereafter.

Cessation of dam construction does not pose injuries to the public. The citizens of Tennessee have successfully existed without a Tellico Dam for the past 200 years, and will not be threatened if the Dam is further delayed another 200 years. The amount of money expended on the Project to date is largely retrievable to the direct benefit of the public; only a small portion is irretrievably sunk into the concrete and earthen construction work. The courts were not able to assess the economic costs and benefits of the Project in prior cases; under the provisions of the Endangered Species Act there is a substantive directive that the Act be enforced by all Federal agencies, and in pursuance of that mandate the injunction must issue. If any modification is to be made in the Endangered Species Act, it must be by Congress as the only body which can amend applicable Federal law.

Respectfully submitted,

W. P. Boone Dougherty

W. P. BOONE DOUGHERTY
Attorney for Plaintiffs