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Reply Brief on Behalf of Plaintiffs, Hiram G. Hill, Jr.,
Zygmunt J.B. Plater, Donald S. Cohen, The
Audubon Council of Tennessee, Inc. and The
Association of Southeastern Biologists with Notice
of Appeal, Bond for Costs on Appeal, Motion for
Injunction Pending Appeal from Order Denying
Injunction, and Brief in Support of Same, 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
DONALD S. COHEN
THE AUDUBON COUNCIL OF TENNESSEE, INC. and
THE ASSOCIATION OF SOUTHEASTERN BIOLOGISTS

Plaintiffs

vs.

TENNESSEE VALLEY AUTHORITY

Defendant

CIVIL ACTION NO.
3-76-48

REPLY BRIEF ON BEHALF OF PLAINTIFFS,
HIRAM G. HILL, JR., ZYGMUNT J. B. PLATER,
DONALD S. COHEN, THE AUDUBON COUNCIL
OF TENNESSEE, INC. and THE
ASSOCIATION OF SOUTHEASTERN BIOLOGISTS

As previously noted, plaintiffs believe that this case has now been comprehensively developed in both fact and law and earnestly hope that it is ripe for a decision in favor of issuance of a permanent injunction.

Nevertheless, defendant's post-trial brief, while primarily reasserting arguments treated in plaintiffs' previous briefs, has raised several misstatements of fact and law that are sufficiently important to be corrected for the record and for purposes of the Court's consideration of the lawsuit on the merits.

(1) On pages 3, 9, 10 defendants assert that TVA, and by implication this Court, have "but two choices: either scrap the project entirely, or continue with its construction to completion" (10). This statement is totally without support on the record. Further, it is demonstrably inaccurate. This litigation does not re-open the entire Tellico Project question -- that is up to Congress. But one premise of various testimony given by TVA witnesses as well as plaintiffs' was that alternative uses for the reservoir lands do exist. That premise was part of Mr.

Kimmons' testimony for TVA on the costs recoverable if the reservoir were enjoined; it was mentioned in potential recreational and agricultural uses for the land; and without opening up new ground it can be noted that the prior Tellico litigation reviewed a variety of possible project modifications. Recreation and shoreline investment, the major justifications for the Tellico Project, can be developed with minor modifications, without a lake.

The only reason TVA claims it has only two extreme choices is that TVA does not wish to consider a modified project.

(2) On pp. 4-5 defendants attempt to distinguish the injunction in the Alaska pipeline case because there the agency was acting beyond statutory authority, rather than in violation of statutory limitations as here. Section 706 of the Administrative Procedure Act, however, enjoins both, in equal measure, in the same clause:

Courts shall "hold unlawful and set aside agency action ... (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. ..." [emphasis added].

The caselaw holdings on permanent injunctions and "remands to Congress" are equally strong in either case. The proper procedure in every case of violation of the Endangered Species Act is specific Congressional consideration of each case after injunction, to determine whether a specific legislative exemption should be made.

(3) At pp. 5, 12, defendants re-emphasize their argument that Congress has exempted the Tellico Project from the Act by passing appropriations. Without repeating prior refutation of this point (Plaintiffs Brief at 6-10, Post-Trial Brief 5-6) we note that the only congressional group that heard about a possible conflict with the Act was the public works subcommittee. That subcommittee did not even mention the issue in its report, which it could have done explicitly and easily if it had intended the appropriations act to be a statutory exemption. (Even then the subcommittee would have had to request the House of Representatives to suspend House Rule 21. Plaintiffs' brief at p. 8).

And the condemnation case cited at 5 merely used appropriations to support the existence of TVA's authority to condemn, an issue not relevant here. 456 F.2d at 267.

(4) At pp. 7, 10, defendants reassert that the "arbitrary and capricious" test must be applied broadly to the entirety of their program in continuing the project as planned. A re-reading of the Act and the Coleman opinion indicates that the arbitrary and capricious test applies only to an agency's finding of fact that a project will not jeopardize, take, harm, etc. endangered species, or destroy or modify critical habitat. TVA has never made such a finding, and has admitted that at least some of those effects will occur. Therefore, the applicable statutory standard is strict compliance with the Act.

(5) At p. 9, defendants launch an argument that the Act does not prohibit destruction or modification of critical habitat because such is not mentioned in Section 9. This implies that a violation of Section 7 is not a violation of the Act, an argument ^{demolished} refuted by the Coleman opinion, the statutory language and the legislative history of the Act.

(6) Other arguments -- that ongoing projects should not be enjoined, that transplant efforts are sufficient compliance, etc. -- have been adequately refuted earlier.

Plaintiffs apologize for the need to correct the foregoing points. Our position has previously been fully developed in the trial, supplementary, and post-trial briefs. If further oral argument is necessary, we will be pleased to address the Court in the near future. If not, we trust that the Court's judicial scrutiny will reveal the merits of plaintiffs' presentation of law and fact -- and the shortcomings of defendants' position -- and support the enforcement of federal law via a permanent injunction.

Respectfully submitted,

Attorney for Plaintiffs

OF COUNSEL:

W. P. BOONE COUGHERTY
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1200 Hamilton National Bank Bldg.
Knoxville, Tennessee 37902

CERTIFICATE OF SERVICE

I hereby certify that the foregoing reply brief has been served upon defendants by hand delivery to their place of business, this 11th day of May, 1976.

Attorney for Plaintiff

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

<u>HIRAM G. HILL, JR.,</u>)	
<u>ZYGMUNT J. B. PLATER,</u>)	
<u>DONALD S. COHEN,</u>)	
<u>THE AUDUBON COUNCIL OF</u>)	
<u>TENNESSEE, INC., and</u>)	
<u>THE ASSOCIATION OF SOUTHEASTERN</u>)	
<u>BIOLOGISTS,</u>)	
Plaintiffs,)	
)	CIVIL ACTION
VS.)	NO. 3-76-48
)	
<u>TENNESSEE VALLEY AUTHORITY,</u>)	
Defendant.)	

NOTICE OF APPEAL

Notice is hereby given that Hiram G. Hill, Jr., Zygmunt J. B. Plater, Donald S. Cohen, The Audubon Council of Tennessee, Inc. and The Association of Southeastern Biologists, the plaintiffs above named, hereby appeal to the United States Court of Appeals for the Sixth Circuit in Cincinnati, Ohio, from the Order and Memorandum entered in this action on the 25th day of May, 1976.

Dated this 2nd day of June, 1976.

HIRAM G. HILL, JR.

ZYGMUNT J. B. PLATER

DONALD S. COHEN

THE AUDUBON COUNCIL OF TENNESSEE,
INC.

THE ASSOCIATION OF SOUTHEASTERN
BIOLOGISTS

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IN THE UNITED STATES DISTRICT COURT FOR THE
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Plaintiffs,)

CIVIL ACTION

NO. 3-76-48

VS.)

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Defendant.)

BOND FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, Hiram G. Hill, Jr., Zygmunt J. B. Plater, Donald S. Cohen, The Audubon Council of Tennessee, Inc. and The Association of Southeastern Biologists, as Principals, and Bernstein, Dougherty and Susano, Attorneys at Law, as Surety, are held and firmly bound unto Tennessee Valley Authority in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said Tennessee Valley Authority, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, assigns, heirs, executors and administrators, jointly and severally by these presents. Sealed without seals and dated this 2nd day of June, 1976.

WHEREAS, on May 25, 1976, in an action pending in the United States District Court for the Eastern District of Tennessee, Northern Division, between Hiram G. Hill, Jr., Zygmunt

J. B. Plater, Donald S. Cohen, The Audubon Council of Tennessee, Inc. and the Association of Southeastern Biologists as plaintiffs and Tennessee Valley Authority as defendant, an Order and Memorandum were entered against the said plaintiffs and the said plaintiffs having filed a Notice of Appeal from said Order and Memorandum to the United States Court of Appeals for the Sixth Circuit;

NOW, THEREFORE, the condition of this obligation is such that if the said plaintiffs shall prosecute their appeal to effect and shall pay costs if the appeal is dismissed or the Judgment affirmed or such costs as the Court of Appeals may award/said plaintiffs if the Judgment is modified, then this obligation to be voided; otherwise, to remain in full force and effect.

HIRAM G. HILL, JR.

ZYGMUNT J. B. PLATER

DONALD S. COHEN

THE AUDUBON COUNCIL OF TENNESSEE,
INC.

THE ASSOCIATION OF SOUTHEASTERN
BIOLOGISTS

By: _____
Principals

BERNSTEIN, DOUGHERTY & SUSANO

By: _____
Surety

IN THE UNITED STATES DISTRICT COURT FOR
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THE ASSOCIATION OF SOUTHEASTERN BIOLOGISTS) CIV. 3-76-48
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MOTION FOR INJUNCTION PENDING APPEAL
FROM ORDER DENYING INJUNCTION

Upon the complaint and all the briefs and other relevant material filed by the parties, and all the proceedings in this action to date, the plaintiffs respectfully move this Court for an order restraining defendants, pending the hearing and determining of plaintiffs' appeal to the United States Court of Appeals for the Sixth Circuit from the judgment of this Court entered May 25, 1976 dismissing the claim herein, from construction, excavation, tree-cutting and other project activities that would destroy or alter critical habitat or jeopardize the existence of the snail darter Percina (Imostoma) tanasi in violation of the Endangered Species Act; 16 USC 1531 et seq., and for other further relief as the Court deems just.

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1200 Hamilton Natl. Bank Building
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Attorney for Plaintiffs

OF COUNSEL:

BERNSTEIN, DOUGHERTY & SUSANO

IN THE UNITED STATES DISTRICT COURT FOR
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HIRAM G. HILL, JR.)
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BRIEF IN SUPPORT OF MOTION FOR
INJUNCTION PENDING APPEAL

Plaintiffs respectfully request that this Court order a cessation of ongoing construction-related activity on the TVA Tellico Project's reservoir segment on the following grounds:

1. Ongoing excavation, bulldozing, tree-cutting and construction seriously changes the status quo pending appeal to the Sixth Circuit Court of Appeals. If the courts are to give this litigation the serious consideration it received in the District Court for the Eastern District of Tennessee, they should not be faced with a mooted issue by default. This is especially true since it may be that the Sixth Circuit will not be able to hear the issue until October or thereafter.

2. The questions of law are substantial, and in light of the fact that this Court exercised its discretion so as not to enforce Congressional statutes as written, it should exercise its discretion now so as to permit a meaningful review of the statutes' application. Not to do so would facilitate the rapid mooted of the issue so that the important legal issues will never be adequately reviewed, a result that does not serve Congress's purpose in legislating nor the courts' purpose in reviewing such actions.

3. Serious questions of law also arise in the Courts' interpretation of case law, to which some of the statements in §2 above apply.

4. A delay in activity pending judicial review will not seriously burden the defendants. Defendants are using their own personnel and equipment on the project, which can be easily used elsewhere pending review; the agency has lived with many delays on this project since 1966, some caused by public criticism and litigation but others caused by the agency's own internal problems, the collapse of the Boeing Corporation's interest in the Project, other internal priorities, etc.

5. The public interest would be served not hampered by a delay. The public interests threatened by the ongoing construction activities are immediately threatened and irreplaceable: destruction of ^{the banks and} existing agricultural, recreational, historical, touristic features of the Little Tennessee Valley. The interests asserted by TVA that ^{to Congress} would be delayed are longterm and conjectural: ~~the need for more industrial lots in East Tennessee, the need to increase barge traffic, minimal increases in river management volume and electric generating through proposed canal.~~ ^{the project is designed justified by flood and power benefits but rather to private promoting and recreation flood control} ~~the need to increase barge traffic, minimal increases in river management volume and electric generating through proposed canal.~~ Delay will in no way moot the defendants' position; it will seriously threaten plaintiffs', by practically foreclosing alternative uses for the valley in the discretion of Congress. ^{Stat. alternatives}

6. Plaintiffs have in every way tried to expedite this litigation and the administrative actions that preceded it; plaintiffs will seek the most rapid possible resolution of the issue in the near future if possible. Defendants were the cause of repeated delays in the course of this Endangered Species process, and it would be equitable if the Court did not permit them to profit from delay at this time where it threatens public policies, statutes and interests.

7. The standard for issuance of this injunction pending appeal is to preserve the status quo while the issues of law are fully considered and reviewed by the appellate systems. F.R.C.P. 62, Ideal Toy Co. v. Sayco, 302 F.2d 623 (2d Cir. 1962) Russo v. Kriby, 335 F. Supp. 122 (ED NY 1971). This equitable

standard is necessary to preserve the parties' rights, the subject matter of the petition (critical habitat in this case) and the effectiveness of judgments in the legal system. Mesabi Iron Co. v. Reserve Mining Co., 268 F.2d 782 (1959), Georgetown College Hospital Case, 331 F.2d 1000, 1010 (1964), cert. den. 377 US 978 (1964). This litigation involves enforcement of federal statutes, for which the equitable balancing of private parties' litigation is irrelevant. Further, "likelihood of success on the merits" is not a standard for issuance of an injunction pending appeal, since by definition the District Court has already indicated its view on the plaintiffs' merits in its adverse decision. Rather the Court's standard must be to protect the integrity of the judicial review system by maintaining the status quo where necessary for full resolution of the issues raised, especially where immediate and irreplaceable public values are involved. That is precisely this case.

8. Plaintiffs are fulfilling an important role set out for them by the citizen suit provisions of the Endangered Species Act. 16 USC 1531, 1540. If they are unable to raise the important issues in this case because of ongoing agency work, that role and the further intent of Congress it comprises will be frustrated.

Plaintiffs respectfully urge that this Court, though disagreeing with them on the merits, permit them to give adequate representation to the Congressional and public values of this litigation by preserving the current habitat conditions of the Little Tennessee River valley until the legal system can fully resolve the questions of law being debated.

Respectfully submitted,

W. P. Boone Dougherty