

# University of Michigan Journal of Law Reform

---

Volume 19

---

1986

## In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences

Zygmunt J.B. Plater  
*Boston College Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Animal Law Commons](#), [Environmental Law Commons](#), and the [Litigation Commons](#)

---

### Recommended Citation

Zygmunt J. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences*, 19 U. MICH. J. L. REFORM 805 (1986).

Available at: <https://repository.law.umich.edu/mjlr/vol19/iss4/3>

This Symposium Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mjlr.repository@umich.edu](mailto:mjlr.repository@umich.edu).

# IN THE WAKE OF THE SNAIL DARTER: AN ENVIRONMENTAL LAW PARADIGM AND ITS CONSEQUENCES

---

Zygmunt J.B. Plater\*

Everything is connected to everything else: so goes the first law of ecology. This interconnectedness is reflected in environmental law as well, extending beyond natural science and particular resource conflicts to link environmental law intimately with the politics, philosophies, economics, and societal values that form its much larger context—an ecology of human and natural systems.<sup>1</sup>

The Tellico Dam litigation<sup>2</sup> reflected this interconnectedness. On its face, it was a simple environmental confrontation; it will

---

\* Professor of Law, Boston College Law School. A.B., 1965, Princeton University; J.D., 1968, Yale University; LL.M., 1974, S.J.D., 1980, University of Michigan. The author gratefully acknowledges the very capable assistance of Scott Jordan and Jon R. Roellke, Boston College Law School Class of 1987, in preparing this Article; errors that remain are the author's own.

1. The "environmental" label is applied to an extraordinarily diverse array of issues—nuclear waste, lead paint in city tenements, national parks, pollution in all its forms, historic preservation, the Supersonic Transport (SST), occupational safety, transportation, seal puppies bludgeoned on Canadian ice floes. The only common thread discernible in this broad range is that in each case various citizen participants denominated "the environmentalists" intervene in ongoing "official" or market decisionmaking, seeking to introduce values and considerations that would otherwise be ignored: long-term residual health effects, the value of undervalued natural or historical resources, the unquantified values of quality of life and aesthetic considerations, indirect diseconomies imposed on the commons, and so on. It is in this way that environmental law presents a variety of paradigms for the analysis of modern government decisionmaking.

2. There were more than a dozen judicial decisions in the course of the Tennessee Valley Authority (TVA) campaign to build the Tellico Dam, including condemnation challenges, National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370a (1982 & Supp. II 1984) litigation, endangered species litigation, and Indian religious rights cases. See *United States ex rel. TVA v. Two Tracts of Land*, 387 F. Supp. 319 (E.D. Tenn. 1974) (condemnation challenge), *aff'd*, 532 F.2d 1083 (6th Cir.), *cert. denied*, 429 U.S. 827 (1976); *EDF v. TVA (I)*, 339 F. Supp. 806 (E.D. Tenn.) (NEPA litigation), *aff'd*, 468 F.2d 1164 (6th Cir. 1972); *EDF v. TVA (II)*, 371 F. Supp. 1004 (E.D. Tenn.) (NEPA litigation), *aff'd*, 492 F.2d 466 (6th Cir. 1974); *Hill v. TVA*, 419 F. Supp. 753 (E.D. Tenn. 1976) (endangered species litigation), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978); *Sequoyah v. TVA*, 480 F. Supp. 608 (E.D. Tenn. 1979) (Indian religious rights), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

The author was petitioner and counsel for the plaintiff citizens in the last years of the Tellico Dam controversy, from 1973 to 1980, and represented the citizens in Department

be remembered as the "extreme" case of the little endangered fish, the snail darter, that almost stopped a Tennessee Valley Authority (TVA) dam. But if one picks up the dangling threads of the story and follows them, the Tellico controversy weaves a much broader fabric. This Article chronicles the history of the controversy as a backdrop to an analysis of lessons learned in terms of legal doctrine, government decisionmaking, and media.

### *Tellico*

Tellico is the story of the long-running controversy surrounding the TVA's Tellico Dam Project. The contest represented different things to different people. To the citizens who opposed the dam, it represented an important opportunity to challenge and modify a wasteful and destructive pork-barrel project. To the proponents of the dam, it was a disturbing example of how governmental development projects can be obstructed by outsiders to the system—by environmental activists, safety nuts, consumers, whistleblowers, and others of dubious patriotism. But to most of the country then and now, the Tellico case was and remains the story of the snail darter.

As reported during the 1970's, the story consistently came down to a simple caricature: the snail darter, a two-inch minnow, misused by extremist environmentalists at the last possible moment to halt completion of a massive \$150,000,000 hydroelectric dam. In fact, each element of that summary was incorrect.<sup>3</sup> The perceived reality, however, had an immutable force of its own, then as now possessing more importance than the facts as they existed on the record, and in that irony lies one of the important lessons to be drawn from the case.

### *The Valley and Its Legal History*

A brief narrative background: The valley of the Little Tennessee River (Little T), where it flows out of the Great Smoky Mountains, was settled more than 10,000 years ago because even

---

of the Interior proceedings, in Cabinet-level interagency Endangered Species Committee proceedings, and in various proceedings before the 94th, 95th, and 96th Congresses.

3. As noted *infra* and in a 1983 symposium on the TVA. See Plater, *Reflected in a River: Agency Accountability and the TVA Tellico Dam Case*, 49 TENN. L. REV. 747 (1982).

then it was a special place.<sup>4</sup> The river's waters ran cool, highly oxygenated, fertile, and filled with fish. The valley lands were rich beyond belief, high-grade topsoil to a depth of twenty feet or more. The Cherokees became a people here over the last millennium. Their most sacred places and Chota, their holy city of refuge, were located here. The first Anglo colonists entered the valley in the 18th century, building Fort Loudon as their southwestern-most redoubt to protect them and their Cherokee allies from the French and other Indian tribes. In the 1830's, responding to the land demands of the white settlers, Andrew Jackson drove the Cherokees off their lands in the Little T Valley in a forced emigration, which culminated in the Trail of Tears to Oklahoma. The white settlers immediately moved in to take over the vacated Cherokee lands. Fort Loudon and many of those early families were still there 200 years later when the TVA arrived and began building dams.

The TVA first hypothesized the Tellico Dam<sup>5</sup> in a 1936 compilation of all dammable sites in the Tennessee Valley system. The Authority gave the site, located at the mouth of the Little Tennessee River where it flows into the Big Tennessee, lowest priority on the list of approximately seventy dam sites because of its marginal cost justification. It remained only a hypothetical site over the years while the TVA built hydroelectric dams and flood control structures elsewhere throughout the river system. All dams justifiable in terms of flood control, navigation, and power—more than forty—had been built by 1950.<sup>6</sup> The Author-

---

4. See generally J. CHAPMAN, *TELLICO ARCHAEOLOGY: 12,000 YEARS OF NATIVE AMERICAN HISTORY* (Publications in Anthropology No. 41, published by TVA, 1985). As early as 1894, Cyrus Thomas of the Bureau of Ethnology, a branch of the Smithsonian Institution, observed, "The valley of the Little Tennessee River from where it leaves the Smoky [M]ountains which form the boundary between North Carolina and Tennessee, to where it joins the Tennessee River in Loudon County, is undoubtedly the most interesting archeological section in the entire Appalachian district." *Endangered Species—Part 2: Hearings on H.R. 10883 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 668 (1978) [hereinafter cited as *House Endangered Species Hearings on H.R. 10883*] (exhibit taken from National Register of Historic Places).

5. "Tellico" is a name of Cherokee Indian origin, and the Tellico Dam Project was so named because the small Tellico River flowed into the Little Tennessee River (Little T) at a point approximately 14 miles upstream from the dam site. Both rivers would eventually be inundated by the dam but the TVA wisely avoided calling their project anything "Little." See *infra* note 167 and accompanying text.

6. Aubrey Wagner, Director and shortly thereafter Chairman of the TVA, stated in September 1961 that the remaining unbuilt dams—those on the larger tributaries like Tellico—were not economically feasible. Wagner stated, "[The] benefits [of these remaining, unbuilt dams] are not nearly great enough alone to justify the total cost of the projects." *Public Works Appropriations, 1962: Hearings on H.R. 9076 Before the Subcomm. of the Senate Comm. on Appropriations*, 87th Cong., 1st Sess. 73 (1961). Later,

ity continued building dams, however, stretching to justify each on grounds such as "economic development demonstrations."<sup>7</sup> By 1960, more than sixty dams had been built, and the TVA finally turned to the few remaining sites, including Tellico. By then what had always been a treasure had become unique. The remnant thirty-three-mile stretch of the Little T, flowing with all its ancient qualities of richness and clarity, was the last such stretch of river left.<sup>8</sup>

Congress at first refused to permit the dam to be built,<sup>9</sup> but, faced with repeated TVA requests, in 1966 the House Appropriations Committee finally passed an appropriations bill providing funds for the project.<sup>10</sup> Its primary stated purposes were not hydroelectric; they were (1) to provide recreation<sup>11</sup> and (2) to pro-

during the same hearing, Wagner stated that all dams that one could "justify" had been built, and that the other dam project proposals remaining on the original list "fall far short" of being justifiable under the TVA Act. *Id.* at 81.

7. Under the direction of Aubrey Wagner, quoted *supra* note 6, the TVA moved into a new era of dam building in the mid-1960's by justifying new projects in terms of recreational enhancement of dams and shoreline development. Underlying this new generation of dams was § 22 of the TVA Act of 1933, which empowers the Authority to undertake "studies, experiments, or demonstrations" to "aid further the . . . development of the natural resources of the Tennessee River drainage basin." 16 U.S.C. § 831u (1982). This provision has been used to justify a wide range of projects not directly relating to agriculture, flood control, power, or navigation.

8. The TVA had dammed 2500 linear miles of river, creating a sequence of reservoirs descending from the region's mountain headwaters down to the Mississippi. As a result, Tennessee now has more shoreline than all of the Great Lakes combined. The total shoreline of TVA reservoirs within Tennessee is now approximately 10,000 miles in summer months, compared to the Great Lakes' 7870 miles. Telephone interview with TVA Public Information Office (Sept. 3, 1982); 10 *ENCYCLOPAEDIA BRITANNICA*, *The Great Lakes* 773, 774 (1968 ed.).

9. The TVA originally requested funding for the dam as the Fort Loudoun Extension Dam (the TVA consistently spells Loudon with a second "u," going back to the old English form of the name) in its 1941 budget, and Congress appropriated funding in 1942. The War Materials Production Board, however, criticized the dam's cost-effectiveness and ordered the money appropriated for it to be used elsewhere. *Public Works Appropriations, 1966—Part 4: Hearings on H.R. 9220 Before the Subcommittee of the Senate Comm. on Appropriations*, 89th Cong., 1st Sess. 43 (1965) [hereinafter cited as *1966 Senate Hearings on H.R. 9220—Part 4*] (statement of Aubrey Wagner, Chairman, TVA). The dam was again proposed in 1965 as part of the Public Works Appropriations Bill for Fiscal Year 1966. H.R. 9220, 89th Cong., 2d Sess. (1965). Funding for the dam was temporarily denied, partly as a function of local opposition to the project and in larger part to allow the subcommittee chairman to commence funding for the Tims Ford Dam in his district. See *Public Works Appropriations for 1966—Part 3: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 89th Cong., 1st Sess. 14-25, 144-51 (1965) [hereinafter cited as *1966 House Appropriations Hearings—Part 3*].

10. Public Works Appropriations Act of 1967, Pub. L. No. 89-689, 80 Stat. 1002, 1014 (1966).

11. The official benefit-cost ratio showed annualized benefits of \$3.7 million with recreation as the major project benefit, estimated at \$1,440,000. *COMPTROLLER GEN. OF THE U.S., THE TENNESSEE VALLEY AUTHORITY'S TELLICO DAM PROJECT—COSTS, ALTERNATIVES, AND BENEFITS* 28 (1977). Earlier, as a matter of policy, the TVA had never included rec-

mote industrial development through the sale of large blocks of condemned farmlands.<sup>12</sup> To support the benefit-cost justification claims, the TVA projected extraordinary net recreation increases, although by this time the Little T was the last remaining stretch of high-quality recreational flowing river, with twenty-four other reservoirs within a fifty-mile radius;<sup>13</sup> and they hypothesized extensive shoreland development based on an industrial city to be called "Timberlake," which theoretically would be attracted to the project area, with a series of factories requiring hundreds of acres for industrial development.<sup>14</sup>

But more than 300 farm families then lived in the valley; hundreds of fishermen and canoeists loved it as the last, best remaining stretch of clean flowing river in the region; and the val-

---

reational benefits in the benefit-cost analysis for TVA Projects. See *Public Works Appropriations, 1960: Hearings on H.R. 7509 Before the Subcomm. of the Senate Comm. on Appropriations, 86th Cong., 1st Sess. 13* (1959). Chairman Vogel stated in a House hearing in 1961 that recreational benefits were a byproduct and not a primary objective of the TVA's reservoir construction program. *Public Works Appropriations for 1962—Part 3: Hearings on H.R. 9076 Before the Subcomm. of the House Comm. on Appropriations, 87th Cong., 1st Sess. 948* (1961).

12. "Shoreland development" was the second major projected benefit, at \$710,000 a year, the majority of which was based upon sale of lands for the projected construction of a model industrial city to be called Timberlake and built by Boeing Corporation with federal subsidies. The TVA used these expected land profits to enhance project benefits so as to improve the benefit-cost ratio. The TVA used this unique method of calculating benefits to establish an affirmative benefit-cost ratio that could not be obtained using traditional methods. See *1966 House Appropriations Hearings—Part 3, supra* note 9, at 19 (cost-benefit figures); see also *Public Works Appropriations for Fiscal Year 1967—Part 4: Hearings on H.R. 17787 Before the Subcomm. of the Senate Comm. on Appropriations, 89th Cong., 2d Sess. 47* (1966) [hereinafter cited as *Senate Hearings on H.R. 17787—Part 4*] (statement of Sen. Allen Ellender) ("[I]f [the TVA] were to use the same yardstick [as the Army Corps of Engineers] for the Tellico and Tims Ford [projects, then their] benefit-cost ratio would not be sufficient to warrant the Federal Government to put up any money."). Although the TVA claimed to have used land sale profits for the justification of previous projects, no prior use of this extraordinary technique approached the scope of its use in Tellico.

13. The majority of these lie in the Tennessee Valley but there are eight dams lying to the east in the Atlantic watershed.

14. Timberlake was named after the first British officer to map the region and was patterned after a model Minnesota city designed by Athelstan Spilhaus that was also never built. It was projected to require between \$250 million and \$800 million in subsidies that were not included in the Tellico cost projections. The estimates of jobs and industrial locations were based upon the intuitive and unproved "Foster Hypothesis," espoused by the late Michael Foster, Director of the Division of Navigation Development and Economic Studies, that a combination of water, rail, and highway transport routes would generate jobs and industrial development wherever such elements occurred together. See *TVA, Timberlake New Community* (1974) (draft environmental impact statement). Proceeding from this hypothesis, the TVA defended its dryland condemnations by predicting that the industries likely to come to Timberlake would need large, undivided tracts that the TVA wanted to be certain would be available when needed for industrial development. *1966 House Appropriations Hearings—Part 3, supra* note 9, at 22 (testimony of Aubrey Wagner, Chairman, TVA).

ley of the Little T was sacred to the Cherokees, whose most revered places would be destroyed by a reservoir. Thus, a rough citizen coalition, "The Association for the Preservation of the Little Tennessee River," was formed in 1964, and attempted to resist the project in Congress and through local political opposition.<sup>15</sup> Faced with a solid linkage between the TVA, the pork-barrel congressional committees, local politicians, and land speculators, however, the citizens had no realistic chance, legally or on the merits, to stop the project during the 1960's.<sup>16</sup> The dam structure was built in 1968, a concrete wall standing over one channel of the Little Tennessee River, costing somewhat less than five million dollars.<sup>17</sup> The National Environmental Policy Act of 1969 (NEPA),<sup>18</sup> however, gave the citizens a new lease on life, and they filed suits to stop the project.<sup>19</sup>

---

15. The Association for the Preservation of the Little Tennessee River was the most formalized attempt to create an umbrella organization for the citizens opposed to the dam. Its existence as an organized entity was important in keeping hope and active efforts alive and focused during the first dozen years of the fight. At various times its role was picked up and carried on by the Fort Loudon Association, the Tennessee Endangered Species Committee, the Tellico Landowners Association, and finally the Little Tennessee River Alliance. The groups raised funds through church meetings, potluck dinners, sales of T-shirts and donated art work, and donations. They never were solvent for long, nor did they have reliable media access. No national conservation organization acted as a financial or organizational "angel," although the Environmental Defense Fund took over the litigation burden for an important two years in the early 1970's, National Trout Unlimited helped raise an important portion of the post-1977 litigation costs, and other groups donated office space, political legwork, and moral support in the final political battles.

16. Citizen opposition consisted of attempts to dissuade the House and Senate Appropriations Committees from authorizing funds for the dam. *See, e.g., 1966 Senate Hearings on H.R. 9220—Part 4, supra note 9, at 202-44; Senate Hearings on H.R. 17787—Part 4, supra note 12, at 62-80.* Success, however, was unlikely given the momentum of the pork-barrel appropriations process and the political bloc represented by the TVA. Furthermore, no statutes existed that could be the basis of an injunction action and the only legal challenges available to the citizens were defenses to the exercise of eminent domain and blanket assertions of "arbitrariness." The former was attempted and failed, and the latter was so weak an argument that it was never the basis of a challenge. *But see infra note 148 and accompanying text.*

There were several challenges to the TVA's condemnation of land for the dam project during the late 1960's and early 1970's. Most of these challenges were summarily disposed of by the Tennessee Eastern District federal court in unreported decisions that were not appealed. *But see United States ex rel. TVA v. Two Tracts of Land, 532 F.2d 1083 (6th Cir.) (eminent domain), cert. denied, 429 U.S. 827 (1976).*

17. COMPTROLLER GEN. OF THE U.S., *supra note 11, at 7.* The total cost of the dam structure proper was \$4.08 million when the endangered species violation was discovered, and rose to slightly more than \$6 million. The valley was so shallow that it had to be built up along the sides at several points to hold a reservoir. The associated earthworks raised the dam-related construction costs to approximately \$22.5 million. *Id.*

18. 42 U.S.C. §§ 4321-4370a (1982 & Supp. II 1984).

19. *EDF v. TVA (I)*, 339 F. Supp. 806 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972). This appears to be the only decision in which the federal court of the Eastern

Litigation under NEPA produced an injunction, which held for two years but ultimately was dissolved in 1973 when the Authority produced an adequate statement of the project's destructive consequences.<sup>20</sup> In the same year, however, Dr. David Etnier, a University of Tennessee ichthyologist, discovered a small endangered perch living in the midst of the Tellico project area,<sup>21</sup> and a new round of litigation began. Section 7 of the 1973 federal Endangered Species Act prohibited federal agencies from taking any action that jeopardized the existence of an endangered species or modified a critical habitat.<sup>22</sup> The Tellico project would do both. The fish was endangered and required the clean flowing river habitat that the dam would destroy. Armed with this clear statutory violation, the dam's citizen opponents formed an ad hoc litigation group, filed administrative petitions in 1974 under the terms of the Endangered Species Act, and began court proceedings in 1975.<sup>23</sup> The TVA resisted the statute's application in every way possible, while the citizens fought hard to push the case forward, both clearly sensing that this issue was the only available legal "handle" with which the dam project as

---

District of Tennessee has enforced environmental values under federal law against the TVA. Harvey Broome, a retired attorney and founder of the Wilderness Society, was the judge's clerk at the time and appears to have been able to influence the outcome of the case.

20. *EDF v. TVA* (II), 371 F. Supp. 1004 (E.D. Tenn.), *aff'd*, 492 F.2d 466 (6th Cir. 1974). NEPA, though it may have focused a great deal of federal agency attention on avoiding environmental litigation, has two major flaws. One is that the Act has become basically procedural. If an agency sufficiently catalogues the bad environmental consequences it will cause, it may go ahead and do them. Second, NEPA depends upon a court's willingness to push an agency into compliance. Its terms are sufficiently generalized to allow a deferential court to accept agency self-justifications as within the domain of agency discretion so long as the exercise of such discretion is not arbitrary and capricious, a finding that is as rare as it is difficult to establish.

21. Dr. Etnier was swimming along with a snorkel and facemask, making a final census of the river as the dam project got back underway. He caught the fish with his fingers, surfaced, and exclaimed to an onlooker that he had discovered a previously unknown species of river darter. The Tellico project thus encountered yet another obstacle and was destined to become a subject of national attention as a new round of litigation focused on the endangered little fish.

22. 16 U.S.C. § 1536(a)(2) (1982). This section, denominated "Interagency cooperation," contains within its turgid text the barebones of two causes of action: "Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to [(1)] jeopardize the continued existence of any endangered species or threatened species or [(2)] result in the destruction or adverse modification of habitat of such species . . ." *Id.*

23. Before filing a lawsuit, the plaintiffs had to get the fish listed as an endangered species, a biopolitical process that involved numerous difficulties but culminated in a listing effective November 10, 1975. *See* 40 Fed. Reg. 47,505, 47,505-06 (1975) (current list codified at 50 C.F.R. § 17.11 (1985)). The TVA indicated that it would not alter its plans for the completion of Tellico, and suit was filed in February 1976 in Tennessee's Eastern District federal court.



a whole could be challenged. The use of the snail darter, the citizens hoped, was not a cynical fortuity. As they repeatedly tried to tell the media, not to mention the Supreme Court, the precarious existence of the endangered fish in the Little T constituted a barometer of endangered human values in this last remaining stretch of high quality river. The snail darter in the Little T was a "canary in a coal mine."<sup>24</sup>

The trial court judge found that the dam would destroy the canary but declined to issue an injunction.<sup>25</sup> The Sixth Circuit Court of Appeals<sup>26</sup> corrected the trial judge's omission, and the Supreme Court of the United States subsequently affirmed the injunction.<sup>27</sup> The case by no means ended with the Supreme Court decision, however, given the cantankerousness of the contending parties. After the Sixth Circuit decision, the media had fixed upon its "fish bites dam" characterization of the case. Congress responded with three series of hearings in the relevant substantive committees, not the Appropriations Committees, considering whether this extreme application of the law should be reversed.<sup>28</sup> Three times the committee members were convinced, much to their surprise, that the case for the river was not an example of environmental irrationality, and no amendments were passed. Finally, at Howard Baker's insistence, the controversy was transferred to a specially created "Endangered Species Committee."<sup>29</sup> Under the terms of Baker's legislation, this "God

---

24. Miners used to carry canaries into mines as an early warning indicator of dangers to humans from methane gas. If the canary died, the miners were alerted that their own lives were in danger. According to biologists, the darter used to live throughout the Tennessee River Valley, implicitly indicating that the darter's prior range had been destroyed by the succession of dams on the Tennessee River system. See *Public Works for Water and Power Development and Energy Research Appropriation Bill, 1978—Part 4: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 1st Sess. 240-41 (1977) (statement of TVA witness); *Endangered Species Act Oversight: Hearings Before the Subcomm. on Resource Protection of the Senate Comm. on Environment and Public Works*, 95th Cong., 1st Sess. 291 (1977) [hereinafter cited as *Senate Endangered Species Act Oversight Hearings*].

25. *Hill v. TVA*, 419 F. Supp. 753 (E.D. Tenn. 1976).

26. *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977).

27. *TVA v. Hill*, 437 U.S. 153 (1978).

28. *House Endangered Species Hearings on H.R. 10883*, supra note 4 (House Merchant Marine and Fisheries Comm.); *Senate Endangered Species Act Oversight Hearings*, supra note 24 (Senate Comm. on Environment and Public Works); *To Amend the Endangered Species Act of 1973: Hearings on S. 2334, S. 3122, and H.R. 8092 Before the Subcomm. on Environment of the Senate Comm. on Commerce*, 94th Cong., 2d Sess. (1976) [hereinafter cited as *Senate Commerce Comm. Hearings*].

29. The Committee is composed of seven members: the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Council of Economic Advisors, the Administrator of the Environmental Protection Agency, the Secretary of the Interior, the Administrator of the National Oceanic and Atmospheric Administration, and one presidentially

Committee," as the Endangered Species Committee came to be called, was given the power to review Tellico and other endangered species conflicts to determine whether an exemption should issue allowing a species to be extirpated because of pressing human needs.<sup>30</sup> The "God Committee," however, unanimously decided that, even with the project close to completion, developing the Valley without a reservoir would be more economically and environmentally sound.<sup>31</sup> The media, however, hardly covered this part of the story, for the fish's practical role was not so riveting as the reigning caricature. A few months later, the pork-barrel proponents, in forty-two seconds, in an empty House chamber, were able to slip a rider onto an appropriations bill, repealing all protective laws as they applied to Tellico and ordering the reservoir's completion.<sup>32</sup> Despite a half-

---

appointed representative for each of the states affected by the project in question. 16 U.S.C. § 1536(e)(3) (1982). The Tellico and Greyrocks Dams (the latter involving a critical breeding area for the endangered whooping crane) were the first and only subjects to date of the Committee's review procedure.

30. *Id.* § 1536(e)(2).

31. The Committee developed its own analysis of remaining project alternatives, using extensive citizen input and a report produced by the TVA in cooperation with the Department of the Interior that had analyzed three development options besides the reservoir, including the citizens' river development plan. TVA, *Alternatives for Completing the Tellico Project* (Dec. 1978); Office of Policy Analysis, U.S. Dep't of the Interior, *Tellico Dam and Reservoir* (Jan. 19, 1979) (Staff Report to the Endangered Species Committee). Based on the staff analysis, Charles Schultze, then Chairman of the Council of Economic Advisors and a member of the Committee, pointedly noted that even with 95% of the money spent, the benefits of Tellico did not justify spending the last 5%, "which says something about the original design." U.S. Dep't of the Interior, *Endangered Species Committee Hearing 26* (Jan. 23, 1979) (unpublished transcript of public hearing, available at Tellico Archives, Boston College Law School). Committee Chairman Cecil Andrus said, "I hate to see the snail darter get the credit for stopping a project that was ill-conceived and uneconomic in the first place." Hornblower, *Panel Junks TVA Dam; Cites Cost, Not Snail Darter*, Wash. Post, Jan. 24, 1979, at A12, col. 5.

32. See Plater, *Those Who Care About Laws or Sausages Shouldn't Watch Them Being Made*, L.A. Times, Sept. 2, 1979, § V, at 5, col. 1, reprinted in *Energy and Water Development Appropriations for 1982—Part 9: Hearings Before a Subcomm. of the House Comm. on Appropriations, 97th Cong., 1st Sess.* 314-16 (1981). The maneuver violated Rule XXI, cl. 2 of the Rules of the House of Representatives which, evidently responding to the dangers inherent in allowing appropriations bills to amend substantive laws, provides: "Nor shall any provision in any [appropriation] bill or amendment thereto changing existing law be in order . . ." H.R. Doc. No. 403, 95th Cong., 2d Sess. 525 (1979). The rider did nothing else but amend existing laws, but in order to enforce compliance with Rule XXI, a timely point of order had to be made. The House Appropriations Committee engineered its move so that none of the few representatives present would understand what was being done, so no point of order was made. More complete statements of the amendment's content were inserted in the *Congressional Record*, but none were actually made on the floor when the rider was being considered. Only the first 17 words of the amendment (up to "authorized") were actually made on the floor. Of course, no references were made to "Tellico," "Little Tennessee River," "endangered species," "snail darter," or any other phrase that would have given their fellow members

hearted veto threat by President Carter<sup>33</sup> and a last-minute constitutionally-based lawsuit brought by the Cherokee Indians,<sup>34</sup> the TVA was ultimately able to finish the dam, close the gates, and flood the valley on November 28, 1979.

This skeletal sketch of the legal proceedings does little to indicate the Tellico controversy's full drama and merits. The snail darter endangered species issue was indeed only a handle, though a philosophically important one. The merits of the endangered species case quickly raised ultimate questions about the dam's merits. Environmental controversies may only coincidentally resemble the particular legal issues upon which they proceed.

### *Beyond the Legal Arguments: Tellico's "Environmental" Case*

In the case of the Tellico Dam, the project's environmental opponents had determined early that they would have to do more than merely oppose the dam and reservoir. Instead, as so

---

notice of the amendment's content. Most students of American government do not know that the *Congressional Record* is not a complete record of congressional debates, and thus is not properly cited as an official record. See U.S. CONST. art. 1, § 5, cl. 3 (journal of each chamber as bare bones statement of its proceedings); Bleisch, *The Congressional Record and the First Amendment: Accuracy Is the Best Policy*, 12 B.C. ENVTL. AFF. L. REV. 341 (1985).

33. Carter's position with regard to the Tellico controversy exemplified the difficulties he experienced with his conciliatory and diplomatic approach to the presidency. Publicly, Carter stated that he was "convinced that this resolution of the Tellico matter [would] help assure the passage of the Endangered Species Act reauthorization" and that his cooperation in refusing to veto the bill would stimulate congressional support for benefit-cost control legislation that would allow the Water Resources Council to review the economic feasibility of water projects. Statement on Signing H.R. 4388 into Law, 1979 PUB. PAPERS 1760 (Sept. 25, 1979).

Although the House Appropriations Committee had already disappointed the President by striking most of the water resources benefit-cost control provisions, Carter apparently believed that his yielding on the Tellico issue would dissuade the Appropriations Subcommittee chairman from embarrassing the President by repeating the refusal to fund the review function. Carter thus opted against asserting his presidential prerogatives in favor of an attempt to gain congressional support through an approach that can perhaps best be characterized as one of hopeful appeasement.

Similarly, Carter's refusal to veto should also be considered in light of his political battles with Congress over the Salt II Treaty and Panama Canal legislation. Politically, the President thought he could ill-afford a tough stance on behalf of a two-and-a-half-inch fish when he needed congressional support on other issues for which he was similarly reluctant to assert effectively the prerogatives of the Executive Office.

34. The citizens' coalition was able to put together a challenge based on the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1982), which recognizes preexisting constitutional rights that are violated by federal projects that destroy sacred lands, including Indian burial grounds. *Sequoyah v. TVA*, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

often occurs in environmental cases, to have a realistic chance of prevailing in the long run, they had to base their position on a comprehensive implicit benefit-cost-alternatives accounting. Sound economic analysis, including analysis of constructive alternatives, is part of any environmental controversy's optimum strategy.<sup>35</sup> On one hand, the Tellico citizens group reviewed the purported benefits of the reservoir—recreation, industrial development on condemned lands, and various vestigial benefits in water supply, flood control, and hydroelectric capacity—and found them on the objective record to be quite insubstantial. Viewed in businesslike terms, the dam project was an economic basket case.<sup>36</sup> They then looked at the purported costs of the project, arguing that the *true* costs extended beyond the Authority's costs for cement, fill dirt, land condemnation, and roads and bridges. A realistic accounting of the true social costs would have to include the loss of all the special qualities of the river valley that had made it a treasure over the centuries. The river was a major recreational resource on its own terms, even before it had been rendered a virtually unique resource by the impoundment of 2500 linear miles of river in the surrounding region. The agricultural soils of the valley were of great economic value, the historic resources held great public value in their own right and could be capitalized monetarily in a tourist-based development if the valley's central portion was not flooded, and a major parcel of upriver project lands had particular potential for use as an access and overflow management area for the Great Smoky Mountains National Park.<sup>37</sup> The citizens' benefit-cost ac-

---

35. Environmental cases generally raise this type of conceptual benefit-cost-alternatives analysis, which attempts to achieve an accounting of costs typically ignored by corporate or governmental decisionmakers. The analysis highlights nonmarket and economically nonquantifiable social and ecological values and attempts to incorporate them into decisional systems. This process, almost by definition, goes against the flow of the status quo in the business and governmental marketplace but is nonetheless a fundamental premise of rational public decisionmaking. *See supra* note 1.

36. *See supra* note 31.

37. The citizens' proposals for alternative development were embodied in a study prepared by the University of Tennessee School of Architecture and by the God Committee staff. SCHOOL OF ARCHITECTURE, UNIVERSITY OF TENN., STUDY OF ALTERNATIVE FUTURES FOR THE LITTLE TENNESSEE RIVER VALLEY (1977); *see also* Office of Policy Analysis, *supra* note 31. The National Park Service also recommended the river development alternative over the reservoir plan as being better suited for easing the park's crowding and traffic flow problems. *Senate Endangered Species Act Oversight Hearings, supra* note 24, at 203-05 (testimony of Park Superintendent Boyd Evison). Surprisingly, in spite of the citizens' continued arguments and the economics of the situation, neither the TVA nor God Committee official reports considered what was the most profitable element of the river development option—tourism. Archeological treasures, historical sites, and the Great Smoky Mountains National Park offered a unique opportunity for a tourist industry to flourish along the existing river.

counting thus included extensive consideration of development alternatives. With increasing sophistication over the years they argued for a comprehensive river-based development project, allowing displaced families to go back onto most of the rich agricultural lands of the valley, developing a tourist highway through the valley to the Park, developing recreation to promote canoe float trips and other water-based sports, improving access to the superb trout fishing resource, and providing for two industrial parks along the river at locations where they would not disturb the other qualities of the valley. The citizens' analysis of the project consistently proved more accurate than the TVA's projections in every expert review that took place during the course of the controversy.<sup>38</sup>

### *The Valley, Six Years After the River*

Since the river was flooded out in 1979, the citizens' predictions, Cassandralike, have largely been fulfilled. The snail darter has been eliminated from its last major habitat, although a few scattered small populations have been discovered downstream in feeder streams, and the species is likely to survive.<sup>39</sup> No new industry has come to the Little T area because of the reservoir.<sup>40</sup> No significant barge freight has moved there in six years.<sup>41</sup> The

---

38. The series of economic reviews that took place during the controversy—the General Accounting Office Tellico Project Report, the God Committee Staff Report, and an analysis completed by the Conservation Foundation and the Resources for the Future economics institute—all revealed the project to be less profitable in comparison with the river development option. COMPTROLLER GEN. OF THE U.S., *supra* note 11; Office of Policy Analysis, *supra* note 31; The Conservation Found., Comments on the Draft Report “Alternatives for Completing the Tellico Project” by Tennessee Valley Authority and Department of Interior (Aug. 10, 1978).

39. On August 6, 1984, the Department of the Interior officially downlisted the snail darter from an endangered to a threatened species. 49 Fed. Reg. 27,510 (1984) (codified at 50 C.F.R. § 17.11 (1985)).

40. Five small industrial shops have moved into the valley area slated for industrial development under both the TVA's plans and the citizens' river-based alternative. Only one of these shops has any water use, an outboard boat builder that uses the impoundment for product testing—a use that was also perfectly feasible with river-based development. In justifying the reservoir, dam boosters claim any development as a success. A more rational accounting requires proof that such development would not have come to the area without the reservoir.

41. This can primarily be attributed to the fact that no industry that would utilize barge freight services has chosen to locate at Tellico. See *supra* note 40. Furthermore, the feasibility of any significant modern barge traffic is predicated on rebuilding—at a prohibitively high cost—the antiquated locks system at Fort Loudon Dam. Nonetheless, the Tellico Reservoir Development Agency (TRDA), see *infra* note 42, has recently fi-

TVA has scrapped the Timberlake City chimera and given away major sectors of project land to a "development agency" headed by local politicians.<sup>42</sup> Faced with a serious lack of development interest, their first development proposal was to use valley lands for a toxic waste dump.<sup>43</sup> The development agency then sold 4500 acres to a resort second-home development scheme and got five small businesses to come to the Tellico industrial park.<sup>44</sup> What little development has occurred, in other words, given the assets of the valley and TVA subsidies, could have been just as well or better accommodated with a flowing river. The reservoir represents a development debacle and a tragic loss, more tragic because it need not have happened.

In short, even in this purportedly extreme case, the classic assertion of a basic conflict between environment and economics was utterly wrong. Throughout the Tellico controversy it was the "environmentalists" who were marching under the banner of economic integrity, cost accounting, and rational decisionmaking; it was the dam proponents who constantly avoided reviews of the merits of the project and sought to characterize the controversy as just "the little fish versus the dam."

Ultimately, the Tellico Dam was opposed by economic fact and common sense rationality, as well as by the law, the courts, and the judgment of the extraordinary Endangered Species Committee. It was an unusually vivid environmental case. It not only represented unquantifiable, intangible values of naturalness—the traditional environmental concerns which, of course,

---

nanced the construction of a barge terminal in the hopes of attracting industries that could utilize barge freight services and to facilitate barge traffic on what is, in reality, a rural dead end at the extremity of a twisting 600-mile transport route. Telephone interview with TRDA Executive Office (Jan. 30, 1986).

42. From the beginning, one of the major forces in favor of the dam appears to have been the prospect that local leaders would be able to exercise some influence and control over any development, industrial or otherwise, that would purportedly accompany the reservoir. After failing to lure industry to the reservoir, the TVA funneled \$2.3 million of project money to the TRDA, whose membership is comprised of local leaders and businessmen. Shortly after the TRDA was formed in 1982, the TVA transferred 11,000 acres of Tellico shoreline to the Agency with a promise that it be paid \$13.8 million when the land was resold by the Agency. See *Land Sale Prompts Another Pang at Tellico Dam*, N.Y. Times, Nov. 28, 1982, at 27 (late city final ed.).

43. See letter from Charles Dean, TVA Chairman, to Lamar Alexander, Governor of Tennessee (May 20, 1982) (available at Tellico Archives, Boston College Law School); see also *Waste Dump at Tellico Possible*, Knoxville News-Sentinel, Sept. 29, 1982, at A1, col. 1 (final home ed.).

44. Cooper Communities, Inc., a private development corporation from Arkansas, acquired 4592 acres of Tellico project shoreland for a stated \$4,956,000 in a partial cash purchase. None of the businesses in the industrial park requires the presence of a reservoir.

the river incorporated aplenty with its endangered species, its historic and religious importance to the Cherokees and others—but also presented a rare case that could be economically quantified as well, showing a decisive economic advantage for the environmentally sound alternative.

Despite the array of facts, reason, and law against the dam, the pork-barrel adherents of the dam were ultimately able to prevail. This leaves us with some sobering observations, but also with some useful lessons to be drawn from the controversy from the hindsight of several years.

### *An Accounting in Three Parts*

This Article offers an updated accounting of the Tellico litigation's consequences in three separate areas. Part I examines endangered species doctrine, a subtle and important issue of conservation, balancing philosophical, utilitarian, and economic concerns. The threat of extinction as a discrete consideration in government decisionmaking got its toughest public test in Tellico, a test that could have created a backlash undercutting the endangered species protection program itself. This Article argues, however, that the snail darter has probably strengthened the legal protections for its endangered colleagues.

Part II traces Tellico's legal consequences in terms of judicial doctrine. Quite independent of the environmental character of the case, the major legal issues of Tellico lie in the areas of statutory interpretation and equitable discretion—the “retroactive” applicability of statutes, the effect of appropriations bills on substantive legislation, and the intriguing question of whether a court in equity has the power to permit a statutory violation to continue.

Part III is the broadest—an overall accounting of how our nation makes important public decisions as reflected in this one river's story. Tellico reveals some of the best and worst of our hesitantly pluralistic democracy, the cautious responsiveness of courts, the volatility of legislatures, the mixed mandate of agencies, the crude decisive power of media, and ultimately the character of the population to which the preceding institutions respond.

Much was lost when the Little Tennessee River, having flowed for 200 million years, was extinguished. It is important to recognize some positive lessons as well.

## I. INSTITUTIONALIZED CAUTION—A LEGAL SYSTEM DEALING WITH THE INTANGIBLE COST OF EXTINCTION

One of the fundamental ironies of the Tellico controversy is that the endangered fish itself for a time seemed to threaten the continued existence of the Endangered Species Act. The Act, however, now seems to have survived the strains posed by the little perch and continues its precedent-setting work in wildlife conservation.

### A. *The Endangered Species Act*

The Endangered Species Act of 1973<sup>45</sup> is a revolutionary legal document. It was the first major piece of legislation in any legal system that sought to put teeth into the protection of endangered species domestically and internationally, and has been a model for subsequent wildlife conservation efforts throughout the world.<sup>46</sup> The Act has a triple approach to the problem of conserving species threatened with extinction.

First, it provides a partial answer to the threats posed by the worldwide market in endangered wildlife by closing down the United States market. The free market fails to protect endangered species that have market value, such as leopards, turtles, rare birds for feathers, elephants for ivory, cactuses, and the like. Indeed, the market encourages the complete destruction of any endangered species that has market value by *raising* the value of each animal as it approaches extinction. As the market price per skin skyrockets, exploitation of the endangered species becomes almost impossible to stop. Either the underdeveloped countries of origin cannot afford to halt the lucrative trade, or high prices create poaching pressures that can subvert any local enforcement efforts.<sup>47</sup> The only way to prevent the elimination

---

45. 16 U.S.C. §§ 1531-1543 (1982 & Supp. II 1984). For a more complete discussion of the history, provisions, and implementation of the Act, see M. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 318-83 (rev. & expanded ed. 1983); S. YAFFEE, *PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT* (1982).

46. The Endangered Species Act was the first national endangered species statute to implement strong provisions covering commercial trade restrictions, prohibitions on public agency actions, and private actions jeopardizing endangered species. See generally M. BEAN, *supra* note 45.

47. While working in Ethiopia from 1968 to 1971 as a consultant to the Imperial Wildlife Conservation Organization, the author was bemused to discover a major poaching ring that was immune from prosecution because its lucrative profits were shared by the brother of the author's boss. The problems of enforcing wildlife protection in devel-



of the species is by shutting down the market in developed countries.<sup>48</sup> The United States was a major market for such endangered species. To the extent that it has closed down that market, the Endangered Species Act has eliminated the pressures on animals hunted to provide fur coats and other luxuries for the American fashion world's cosmopolitan tastes.

The Act's second strategy is a prohibition against "taking" any endangered species, a prohibition that attaches heavy criminal sanctions to the act of killing or capturing endangered animals.<sup>49</sup> The taking provision, which generally does not apply to plants, was further strengthened by a definition that interprets "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>50</sup> As a result, protection is extended not only to exotic species but to all endangered and threatened species within the jurisdiction of the United States.<sup>51</sup>

The third, less-heralded strategy of the Act lay latent within the statute's terms, and was the basis of the snail darter litigation. Section 7 of the Endangered Species Act is certainly not identified as a "prevention of destructive federal projects" provision. Labelled "Interagency cooperation," section 7 lay camouflaged like a snake in the grass to the major developmental interests that would subsequently have to face it. When parsed carefully, however, its words prohibit any federal agency project or program that jeopardizes the continued existence of a species, or destroys or modifies that species' critical habitat.<sup>52</sup> This pro-

oping countries facing massive human dislocations and starvation raise interesting questions of cultural relativity. See P. EHRLICH & A. EHRLICH, *EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES* 245-48 (1981).

48. The Endangered Species Act forbids any person subject to the jurisdiction of the United States to "sell or offer for sale in interstate or foreign commerce any [endangered] species." 16 U.S.C. § 1538(a)(1)(F) (1982).

49. The Act's taking prohibition is found in *id.* § 1538(a)(1)(C), and the criminal sanctions for violation of the Act are found in § 1540(b).

50. *Id.* § 1532(19); see 50 C.F.R. § 17.3 (1985) (further defining "harass" and "harm" with respect to the statutory definition of "take").

51. The Act applies to all territorial possessions of the United States, all of the continental United States, and Hawaii and Alaska. See 16 U.S.C. § 1532(17) (1982). The Act's application to federal agencies operating overseas has yet to be litigated. For example, it is not clear whether the Act applies to a dam that threatens to modify the critical habitat of endangered elephants in Sri Lanka when the dam is built by the Department of State's Agency for International Development (AID).

The Act also permits the Secretary of the Interior to extend the Act's protections to species that closely resemble endangered species. *Id.* § 1533(e). This provision relieves enforcement personnel of the burden of distinguishing a bona fide endangered species from a closely related but nonendangered species and thus further ensures the protection of the former.

52. See *supra* note 22.

vision focuses on federal agencies as major actors in the developmental forces of the United States. Over the past fifty years, a parade of federal agencies has been involved in large scale public works pork-barrel projects, many built at the expense of, and without much concern for, natural values, and other projects and programs affecting natural resources.

The strategic resemblance between the Endangered Species Act and NEPA is remarkable. Both statutes possess effective widespread strength because they target the actions of federal agencies. Both statutes contain action provisions that came as a surprise to most of the members of Congress who voted for them.<sup>53</sup> Section 7, however, has a special strength: NEPA only requires procedural compliance;<sup>54</sup> section 7 contains a flat substantive prohibition.

Another strength of section 7 is that it targets one of the major causes of the extinction of species on the face of the earth: habitat destruction.<sup>55</sup> Over the years, habitat destruction has been a far more important cause of extinction than hunting and killing because the largest number of endangered species are "nonmarket species," those that currently lack quantifiable market value. Rather, they are the often anonymous constituent parts of various food chains and ecological webs that are disrupted when a desert becomes developed for irrigated farms, a prairie is destroyed for residential development or agribusiness, a swamp is drained to produce a parking lot, and so forth. Section 7's prohibitions were the first statutory prohibitions to address clearly the problem of habitat destruction, albeit in camouflaged fashion.

---

53. NEPA's § 102(C) requirement of environmental impact statements, 42 U.S.C. § 4332(C) (1982), was clearly considered by its legislators to be a mere declaration of policy with no effective enforceability. See R. ANDREWS, ENVIRONMENTAL POLICY AND ADMINISTRATIVE CHANGE 13-16 (1976). See generally *id.* at 7-19 (presenting a legislative history of NEPA). See *supra* note 22, *infra* note 126.

54. The United States Supreme Court has noted that although NEPA established "significant substantive goals for the Nation," its actual requirements for agencies are "essentially procedural." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978).

55. Habitat destruction today is "without peer as an agent of extinction" and "there has never been as wanton nor as rapid an agent of habitat destruction as twentieth-century man." O. FRANKEL & M. SOULÉ, CONSERVATION AND EVOLUTION 29-30 (1981).

## B. Rationales for Endangered Species Protection

Given the Endangered Species Act's strengths, both patent and latent, it might well be asked why a nation might consider it sufficiently important to pass such a statute in an abstract area of natural science. The question is made all the more pointed by the fact that protection of endangered species inevitably causes a head-on confrontation with the forces of the marketplace. The effort to prohibit the sale of valuable endangered species confronts a worldwide trade involving large amounts of money.<sup>56</sup> Moreover, an endangered species lacking market value, ignored as an asset by the marketplace, may nevertheless interfere with government and private development projects especially when they involve habitat destruction.

It is easiest to say that the Endangered Species Act of 1973 was passed to satisfy a popular clamor, beginning in the 1960's, to conserve natural resources. Endangered species had the good fortune to be represented by such mediagenic figures as the bald eagle, the polar bear, whales, and whooping cranes, all of which were sentimentally appealing, fairly remote from market considerations affecting most people, and dramatic or beautiful. Further, there were international conventions ratified by the United States,<sup>57</sup> which in broad, hortatory terms expressed an international intention to conserve such species and all endangered and threatened wildlife. Part of the impetus came from the well-organized, nationally-based conservation groups that have long made the United States a leader in international conservation.<sup>58</sup>

But political pressure and aesthetics alone do not represent a

---

56. See P. EHRLICH & A. EHRLICH, *supra* note 47, at 119-26, 193-98. In Kenya, for example, government officials were found to be actively involved in the lucrative export trade of ivory, which had a devastating effect on Kenya's elephant population. *Id.* at 194-95; Tinker, *Controlling the Global Wildlife Trade*, ATLAS WORLD PRESS REV., July 1979, at 26, 27; see also *supra* note 47.

57. See, e.g., Convention Concerning the Protection of the World Cultural and Natural Heritage, done Nov. 23, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226, 1037 U.N.T.S. 151; Convention on International Trade in Endangered Species of Wild Fauna and Flora, opened for signature Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243.

58. Discreetly listed here in alphabetical order, the following groups have been effective in encouraging the formation of national species preservation policy: American Rivers Conservation Council, Defenders of Wildlife, Environmental Defense Fund, Friends of the Earth, Izaak Walton League, National Audubon Society, National Parks and Conservation Association, National Wildlife Federation, Natural Resources Defense Council, Sierra Club, Society for Animal Protective Legislation, Trout Unlimited, Wildlife Management Institute, and the World Wildlife Fund. These groups are unique among those found in industrialized nations in terms of overall membership size and lobbying effectiveness.

sufficient explanation for why the Endangered Species Act of 1973 became domestic law. The argument for protection for endangered species represented not only protection of the aesthetic beauties of certain species, but also ecological and philosophical principles asserting the value of the survival of the widest possible number of species, in the context of a continuing loss each year of hundreds of species worldwide.<sup>59</sup> The utilitarian position holds that preserving endangered species is in some way directly or indirectly important for the continued survival of human beings. An endangered species may possess chemical or medical properties that will never be discovered if the creatures are rendered extinct. We preserve species because of lessons they may teach us in the future; at some point, "they may reveal a cure for cancer."<sup>60</sup> Another argument is that the more diversity that exists in the natural world, the more adaptable that world is to continuing stresses.<sup>61</sup> This argument reflects a fundamental law of ecology that the more diverse a gene pool or ecosystem, the greater the natural bank of adaptive diversity upon which society can draw.<sup>62</sup>

Unfortunately, as repeatedly demonstrated in subsequent

59. See generally *THE PRESERVATION OF SPECIES* (B. Norton ed. 1985) (a collection of essays by, among others, Stephen Kellert, Thomas Lovejoy, and Elliott Sober). Harvard Professor E.O. Wilson has projected that by the late 1980's, the globe's extinction rate could reach one species per hour. *Habitat Protection: The Lifeline for Endangered Species*, IN BRIEF, Aug. 1985, at 1, 3 (newsletter of the Sierra Club Legal Defense Fund).

60. "Who teacheth us more than the beasts of the earth, and maketh us wiser than the fowls of heaven?" *Job* 35:11. The arguments implicit in this Biblical quote can be seen in the various Endangered Species Act Oversight Hearings and original passage hearings in Congress and represent a utilitarian principle that probably offered the most effective arguments to the pragmatic minds of the legislators. See, e.g., *Senate Endangered Species Act Oversight Hearings*, *supra* note 24. As stated by Dr. Thomas E. Lovejoy of the World Wildlife Fund, "[M]an-caused extinctions are limiting the potential growth of knowledge and constitute a form of bookburning of a very frightening sort—burning of books that have yet to be written. . . . Should we throw away the owner's manual to our car before we even know the names of all the parts?" *Id.* at 537.

61. As stated by Senator Tunney in the *Congressional Record*, "Each species provides a service to its environment [and] is a part of an immensely complicated ecological organization, the stability of which rests on the health of its components." 119 CONG. REC. 25,668 (1973); see also *infra* note 62.

62. As a general proposition there appears to be a direct relationship between diversity and ecosystem stability. S. YAFFEE, *supra* note 45, at 24. As stated by Paul and Anne Ehrlich:

[L]oss of genetic variability from any sexually reproducing populations will limit their ability, and that of the ecosystem, to evolve in response to environmental change. Such losses are especially critical in times of rapid change, which stress the evolutionary capacity of an ecosystem to the utmost. Today is just such a time of change—change induced by one species: *Homo sapiens*.

P. EHRLICH & A. EHRLICH, *supra* note 47, at 100.

hearings,<sup>63</sup> it is very difficult to show the particular utility of many species, especially species previously unknown that happen to confront a particular, valuable, market development project.<sup>64</sup> Therefore, beyond the strict utility argument often appears a variety of quasi-religious principles emphasizing the sanctity of life. This latter philosophical principle was the most difficult to articulate amidst congressional hearings or agency proceedings but reflected an important thread that runs through the endangered species cases—humans are stewards of their natural environment and ultimately are only constituent members of the community of life of the globe.<sup>65</sup> This theory sounds Taoist, and often appears to conflict with a Judeo-Christian concept of human conquest and subjugation of nature.<sup>66</sup> The Endan-

---

63. Congressional hearings on the Endangered Species Act in 1976, 1977, and 1978 included: *House Endangered Species Hearings on H.R. 10883—Parts 1 and 2*, *supra* note 4; *Amending the Endangered Species Act of 1973: Hearings on S. 2899 Before the Subcomm. on Resource Protection of the Senate Comm. on Environment and Public Works*, 95th Cong., 2d Sess. (1978); *Senate Endangered Species Act Oversight Hearings*, *supra* note 24; *Senate Commerce Comm. Hearings*, *supra* note 28.

64. In the subcommittee hearings on Tellico, for example, congressional attention focused only on the “bottom line”—the purported economic costs and benefits of flooding the Valley or saving the snail darter. General discussion of the abstract values of species preservation did not make much of a political impression on the Solons. The snail darter, however, had the benefit of representing, at least symbolically, the economic values attributed to the river-based alternatives. *See supra* notes 31 & 37. One agricultural analyst testified that the snail darter was “worth a \$37 million a year industry.” *House Endangered Species Hearings on H.R. 10883*, *supra* note 4, at 653 (statement of Daniel Burgner). Other species in other situations, however, do not have the benefit of representing economically preferable development alternatives.

65. Aldo Leopold’s articulation of a “land ethic” has been a useful starting point for attempts to inject ecological ethical considerations into the land-use decisionmaking process. A. LEOPOLD, *A SAND COUNTY ALMANAC* 237-63 (1966). In Leopold’s view, land-use problems cannot be viewed solely in economic terms. As explained in Senate hearings on the Endangered Species Act, his view was that each question must be examined “in terms of what is ethically and esthetically right, as well as what is economically expedient. A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.” *Senate Endangered Species Act Oversight Hearings*, *supra* note 24, at 626 (testimony of Dr. Michael Zagata, Representative, National Audubon Society).

66. Contrary to Eastern religious thought, the Judeo-Christian tradition teaches that God has given humanity dominion over God’s creatures. In the Book of Genesis, after the Great Flood,

God blessed Noah and his sons, saying to them, “Be fruitful, multiply and fill the earth.

Be the terror and dread of all the wild beasts and all the birds of heaven, of everything that crawls on the ground and all the fish of the sea; they are handed over to you.

. . . .

Teem over the earth and be lord of it.”

*Genesis* 9:1-2, 7.

This ethos has often led to a religious-political emphasis of human conquest, exploitation, and superiority over nature and is the basis for an unspoken but pervasive notion

gered Species Act, which made no distinction between commercially valuable and non-commercially valuable species, between species that had a direct human utility and those that did not, affirmed a variety of abstract interests in protecting species because they were endangered.<sup>67</sup> The statute gave legal value to an abstraction. The survival of species, insofar as possible, was declared a valid national goal.

### C. *The Effect of the Snail Darter on the Endangered Species Act*

The endangered snail darter threatened the entire proposition by seemingly demeaning the case for protection of endangered species. The little fish had raised up a host of antagonists ranging far beyond the TVA. Some were those who foresaw direct conflicts between endangered species and their own interests. These opponents of the snail darter included development agencies and business interests that had no direct interest in the Little Tennessee River: the Edison Electric Institute, which was concerned with endangered Florida manatees that might be sucked into power generator facilities; the forest products industry, which feared a limitation in federal forest timber cuts owing to endangered species; the Corps of Engineers; the Federal Highway Administration; and so on. Beyond those who faced potential conflicts were far more, like the Pacific Legal Foundation, for whom the darter served to fry bigger fish. The Tellico litigation presented "environmentalism," which to many had come to

---

that humanity is somehow set apart and distinct from the natural world. The *Scopes* trial, for example, demonstrated how harshly our Judeo-Christian culture responded to any notion that the human species was but a mere evolution, another constituent element in a complex chain of ecological development. See *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927).

The Biblical story of Noah, however, also represents the concept that humanity's dominion over nature is tempered by a duty of stewardship for future generations. When God decided to cleanse the earth of its human degradation, he commanded Noah to take with him aboard the ark a male and a female "of every kind of bird, of every kind of animal, and of every kind of reptile . . . so that their lives may be saved . . . [and they] may propagate their kind over the whole earth." *Genesis* 6:19-21. In this respect, Noah's story is "a symbol of the sanctity and uniqueness of every living species," S. YAFFEE, *supra* note 45, at 28, and Noah, like the species preservationists of today, faced the great task of preserving the earth's natural heritage against the onslaught of human exploits. See also FELLOWS OF THE CALVIN CENTER FOR CHRISTIAN SCHOLARSHIP, CALVIN COLLEGE, *EARTHKEEPING: CHRISTIAN STEWARDSHIP OF NATURAL RESOURCES* (1980).

67. Congress declared that "these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3) (1982).

represent a threatening intrusion of new, inconvenient public values into their business, in a setting that could easily be characterized as ridiculous.

Tellico seemed to be the extreme case, showing how environmentalists cared more about wildlife and aesthetics than about humans. Environmentalists were using an impractical, insignificant environmental argument to threaten an important project budgeted at millions of dollars. The snail darter spawned thousands of cartoons, editorials, and deprecating cocktail conversations, all emphasizing the potential imbalance represented by "extreme environmentalists" poised against the forces of progress.

In retrospect, the snail darter—or at least its caricature—served to hinder rather than help the citizens' efforts to save the Little T habitat.<sup>68</sup> For a while it even appeared that the darter would function as a destructive two-and-one-half inch wedge with which the anti-environmentalists would split apart the Act.<sup>69</sup> Nevertheless it can now be argued that endangered species protections may actually have profited overall from the Tellico Dam controversy.<sup>70</sup> The shadow of the snail darter continues to flicker behind a greatly expanded endangered species regulation program, and the Act and its administration do not appear to be suffering from that influence.

The Supreme Court decision presents an example of how the snail darter strengthened the Act. Chief Justice Burger, who assigned himself the opinion and made many caustic references to the snail darter, nevertheless wrote a strong declaration of principle reinforcing the statutory purposes.<sup>71</sup> The statute, he wrote, represented a policy of "institutionalized caution" that Congress

---

68. The brouhaha surrounding the snail darter did not help the citizens in the Tellico litigation. To the contrary, it helped the dam boosters' efforts to sidestep the dam's legal and economic obstacles. It was the boosters who waved aloft the "silly" fish, while the citizens tried to emphasize national economic common sense. The rhetoric of national debate between public interest advocates and the developmental establishment, however, has continued to reflect the damaging caricature of environmental extremism.

69. In virtually every attack on the Act made in Congress, the snail darter was portrayed as the epitome of environmental extremism, the example that demonstrated the irrationality of inflexible endangered species protection. See Wagner, *Endangered Species Law Threatens Federal Project; Amendments Contemplated*, 35 CONG. Q. 453 (1977).

70. See Erdheim, *The Wake of the Snail Darter: Insuring the Effectiveness of Section 7 of the Endangered Species Act*, 9 ECOLOGY L.Q. 629 (1981).

71. Burger's oral delivery was marked by a tone of sarcasm, inviting Congress to amend the Act quickly. His tone during oral argument was studied in Cohen, *Judicial Predictability in United States Supreme Court Advocacy: An Analysis of the Oral Argument in Tennessee Valley Authority v. Hill*, 2 U. PUGET SOUND L. REV. 89, 123-24 (1978).

had adopted for the nation in confronting the risk of extinction.<sup>72</sup> Faced with that irreversible threat, the Act established the congressional principle that human actions should defer to the threat. Extinction is forever.<sup>73</sup> Burger did not hesitate to invite Congress to legislate an exception for the snail darter, but his affirmation of the general principle was extraordinary.

After the Supreme Court case, public opinion, measured in a continuing series of polls, has continued to show extraordinary popular support for the concept of protection of endangered species.<sup>74</sup> This popular support has translated to continued reauthorizations for the Endangered Species Act, which must periodically be renewed because of sunset provisions.<sup>75</sup> The Act has been targeted for attack by a series of business and development interests over the years, but virtually all amendments passed since the snail darter case have strengthened the Act rather than weakened it, providing funding for joint state-federal protective actions,<sup>76</sup> improving provisions for interagency consultation and review in the case of potential conflicts,<sup>77</sup> waiv-

---

72. *TVA v. Hill*, 437 U.S. 153, 194 (1978).

73. Or, as one senator put it, "Extinction is quite literally a fate worse than death." 119 CONG. REC. 25,670 (1973) (statement of Sen. Stevens) (quoting former Sen. Spong).

74. A 1980 survey indicated that a majority of Americans favored protecting wildlife in general—even at the cost of foregoing additional jobs, housing, or other development projects. Kennedy, *Protecting Wildlife*, N.Y. Times, Jan. 13, 1980, at E23, col. 2. This, of course, may not necessarily be true for the particular case of the snail darter, which is still misunderstood as the little fish that blocked hundreds of millions of dollars of hydroelectric power. Stephen Kellert of Yale University designed a survey based on the Tellico scenario and measured public attitudes toward the confrontation between an obscure fish species and various development projects. As reported in a recent report from the Center for Philosophy and Public Policy published by the University of Maryland, "[T]he fish species won out handily over recreational projects, tied with projects to divert water for industrial development, but was soundly defeated by projects to produce hydroelectric, agricultural, or drinking water improvements." *Preserving Endangered Species: Why Should We Care?*, QQ—REP. FROM CENTER FOR PHIL. & PUB. POL'Y, Fall 1985, at 1, 1.

75. The congressional reauthorizations of the Act were Pub. L. No. 94-359, 90 Stat. 911 (1976); Pub. L. No. 97-304, 96 Stat. 1411 (1982). As this Article was going to press, the 99th Congress adjourned without reauthorizing the Act, apparently due to legislative "holds" imposed on the Senate bill, S. 725, by several western senators with particular local concerns, like Senator Bentsen of Texas who feared that an endangered snake listing might block the Stacey Dam public works project. Annual appropriations have nevertheless been passed into law providing for continued implementation of the statute, which has been interpreted by the Administration as an annual reauthorization of the Act itself. *But cf. infra* text accompanying note 143.

76. Pub. L. No. 95-212, 91 Stat. 1493 (1977) (codified as amended at 16 U.S.C. § 1535(c) (1982)).

77. Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3752 (1978) (codified as amended at 16 U.S.C. § 1536 (1982)).



ing time delays for listing and other protections,<sup>78</sup> and encouraging the implementation of recovery teams to target particular species for special assistance.<sup>79</sup>

The major exception to this chronology of strengthening amendments is the "God Committee" amendment added in 1978, which permits exemptions from the Act's protections.<sup>80</sup> Originally, the Act embodied an absolute prohibition, but section 7 has been amended to permit species extinction. Because preventing extinction was the purpose of the original Act, this amendment can be viewed as a diminution in the protections accorded to endangered species. Conversely, however, it can also be argued that the "God Committee" procedure has actually strengthened the Act. It introduces a note of flexibility, but that flexibility is secured by a tough, high-level review process. Three stringent tests must be applied before any species can be condemned to eternal sleep: the proposed project must be regionally or nationally important, there must be no reasonable or prudent alternative to the project, and, perhaps most important, the project's net benefits must be shown clearly to outweigh the benefits of any alternative courses of action that would avoid injury to species or their habitat.<sup>81</sup> These tests, especially the last, established an unprecedented overall functional benefit-cost analysis, including analysis of alternatives, as the basis of governmental resource decisionmaking. Given the track record of experience under the Act to date—with virtually no irreconcilable conflicts between proposed projects and endangered species—it would appear that only rarely would such a test be necessary or successfully applied.<sup>82</sup> There usually are alternative

---

78. Pub. L. No. 94-359, §§ 1, 3, 90 Stat. 911, 912 (1976) (codified as amended at 16 U.S.C. § 1539(c) (1982)); Pub. L. No. 96-159, § 3, 93 Stat. 1225, 1225 (1979) (codified as amended at 16 U.S.C. § 1533 (1982)).

79. Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (1978) (codified as amended at 16 U.S.C. § 1533 (1982)).

80. *Id.* § 3, 92 Stat. at 3752 (codified as amended at 16 U.S.C. § 1536 (1982)); see *supra* note 29, *infra* notes 81-83 and accompanying text; see also *infra* text accompanying note 104.

81. 16 U.S.C. § 1536(h)(1)(A) (1982). Note that this balancing test is not a balancing of the value of the project against the value of the species at risk. Congress intended the review to balance the net benefits of the project against the net benefits of alternative courses of action, precisely the substantive balance that environmentalists typically, though usually unsuccessfully, seek to implement. See H.R. REP. NO. 1625, 95th Cong., 2d Sess. 21-22, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 9453, 9472-73. Perhaps not coincidentally, this balancing test was inserted by a senate legislative assistant who had been a student at the University of Michigan and had taken a course in environmental law taught through the efforts of the Michigan Environmental Law Society.

82. After exhaustive surveys of Department of the Interior files done by Wayne State law students Mardi Hatcher and Deborah LaBelle, the Carter Administration was able

locations, timings, designs, or methods, by which appropriate benefits to the public can be obtained without destroying a species. If the "God Committee" votes to permit a project to continue, it must also take all appropriate mitigation measures to minimize the impact upon an endangered species.<sup>83</sup>

In light of the statute's political situation, it may well be said that had the statute *not* received such a flexibility mechanism it might have been repealed. Instead, section 7 has been secured in an overtly stringent form. It is unlikely that any such blanket restriction of federal projects would have been legislated initially, given the original lack of congressional recognition of section 7's litigability. The "God Committee" procedure secures section 7's protections, subject only to a review process so rigorous that no agencies have subsequently been willing to undertake the difficulties of advocating and obtaining an extinction exemption.<sup>84</sup> The net result is more than a pragmatic compromise. It leaves the United States with the strongest enforceable legal provisions protecting endangered species against habitat destruction that exist anywhere today.

As to statutory implementation, the Reagan Administration has been less attentive to the terms of endangered species protection than has Congress. Vice-President Bush initially made the endangered species regulatory process a target of his antiregulation committee.<sup>85</sup> Subsequently, unable to convince Congress to back away from the terms of the Act, the Administration resorted to an administrative slowdown, drastically curtailing the rate at which new species were listed and species protection programs funded in the field.<sup>86</sup> Recently, however, imple-

---

to determine that of more than 4500 potential conflicts, only three had been administratively irreconcilable, and these (including Tellico) each represented cases in which the agency refused to discuss project adjustments to alleviate the conflict. *Senate Endangered Species Act Oversight Hearings*, *supra* note 24, at 61, 63-64, 69-70.

83. 16 U.S.C. § 1536(h)(1)(B) (1982). The "God Committee" may grant an exemption only if "it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned." *Id.*

84. No such exemptions have been issued since the Greyrocks decision at the time of the Tellico review. *See supra* note 29.

85. Press Conference by Vice-President George Bush (Mar. 25, 1981) (regarding actions taken by the President's Task Force on Regulatory Relief).

86. According to a source within the Department, Interior's enforcement of the Endangered Species Act paralleled Secretary Watt's national parks policy: rather than do anything new to expand protections, both focused efforts on "developing what already existed." Many recovery plans for the protection and propagation of species were then prepared by the Department although ultimately none were budgeted. The net result

mentation has been improving.<sup>87</sup>

The courts since 1979 have been far more attentive to the Act's requirements, and again perhaps the snail darter deserves some credit. In case after case, courts have strictly interpreted the Endangered Species Act to the detriment of powerful market forces. Oil well leases have been delayed,<sup>88</sup> a major East Coast refinery was scuttled in part because of endangered species problems,<sup>89</sup> western water reclamation allocations have been changed to favor species protection over industrial and municipal use,<sup>90</sup> and the courts have written these opinions without reference to the "significance" of the species concerned.<sup>91</sup> How strong would the courts have been in these cases had not the Supreme Court held such a strong line in a highly publicized case poisoning an "insignificant" species against a purported multi-million dollar project? Judicial experience to date thus offers indications that future cases will be held to a high level of species protection. The snail darter may be subject to continued disparagement, but its precedential position seems to have secured protections to its comrades throughout the natural world.

#### D. *Some Loose Ends in the Endangered Species Act*

Three statutory issues still lie in wait. The first concerns endangered plants. Since the Endangered Species Act was first enacted in 1973, endangered plant species have been treated differ-

---

was sharply decreased protective activity in the years following the change of administrations.

87. See DEFENDERS OF WILDLIFE, SAVING ENDANGERED SPECIES: IMPLEMENTATION OF THE U.S. ENDANGERED SPECIES ACT IN 1984, at 1 (May 1985). The Defenders' review notes that more species were listed and/or proposed in 1984 than in any year since 1979. *Id.* at 2.

88. Conservation Law Found. v. Watt, 560 F. Supp. 561 (D. Mass.), *aff'd sub nom.* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983).

89. Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041 (1st Cir. 1982).

90. Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1842 (1985).

91. There have, in fact, been a few encroachments on this strict rule, most notably by the practice engaged in by a few courts of segmenting stages of a project's development, allowing the environmental impact of the project to be assessed unit by unit. *E.g.*, North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980); Stop H-3 Ass'n v. Lewis, 538 F. Supp. 149 (D. Hawaii 1982), *aff'd in part, rev'd in part sub nom.* Stop H-3 Ass'n v. Dole, 740 F.2d 1442 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2344 (1985). Such segmentation, of course, would smack of bad faith and raise the danger of the judiciary consciously setting up an exemption procedure to the Endangered Species Act. Comment, *The Effectiveness of Judicial Review Under the 1979 Amendment to the Endangered Species Act*, 7 J. ENERGY L. & POL'Y 145 (1986).

ently from animal species. The original law gave limited protection to plants. In the amendments to the Endangered Species Act, language has been added to extend protection to plants.<sup>92</sup> Endangered plants, however, currently lack some of the most basic protections given to endangered animals,<sup>93</sup> and plant species have been less frequently listed as endangered or threatened than animal species.<sup>94</sup> As plant listings increase, there is an increasing possibility of conflicts of "plants versus progress."<sup>95</sup>

The second issue is the possibility that the Act's vague hortatory provision for "carrying out programs for the conservation of endangered species"<sup>96</sup> may become a litigable requirement. In *Carson-Truckee Water Conservancy District v. Clark*,<sup>97</sup> for example, the court held that the Department of the Interior was required not only to protect existing habitats and endangered species, but also to "use programs administered by [the Department] to further the conservation purposes of [the Endangered

---

92. Such expansion of protection to plants was envisioned by the original framers of the Endangered Species Act. S. REP. NO. 307, 93d Cong., 1st Sess. 11, reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2989, 2999.

The new language extending coverage to plants was added by Pub. L. No. 96-159, §§ 1, 3, 5, 93 Stat. 1225, 1225, 1228 (1979) (codified as amended at 16 U.S.C. §§ 1531(a)(5), 1533(b)(7), 1537(b)(1), (3), 1537(c)(1) (1982)); Pub. L. No. 95-632, § 10, 92 Stat. 3751, 3762-63 (1978) (codified as amended at 16 U.S.C. § 1535(c)(2) (1982)).

93. Section 9 of the Endangered Species Act, 16 U.S.C. § 1538 (1982), continues to omit a blanket prohibition against the taking of endangered plants. Federal regulations prohibit only the import or export of, removal and reduction to possession from an area under federal jurisdiction of, interstate or foreign commerce in, and sale or offer for sale of, endangered plants without a permit. 50 C.F.R. § 17.61 (1985). The only restriction by either statute or regulation against taking endangered plants is the prohibition against removal of such plants from areas under federal jurisdiction. 42 U.S.C. § 1538(a)(2)(B); 50 C.F.R. § 17.61(c).

94. As of October 1, 1985, there had been 759 listings of animal species while there had been only 116 listings of plant species. 50 C.F.R. §§ 17.11(h), 17.12(h) (1985). If one only looks at the period of time that plants have been listed—since 1977—the figures are 166 animal species listings as opposed to 116 plant species listings. *Id.*

95. From the beginning, plants received slightly lesser protection; when originally passed, the statute did not extend the taking prohibition to the taking of plant species. In part this reflects that there were no plants listed as endangered at the time the original Act was passed. In larger part, according to people within the Department of the Interior, the omission of plants reflected a probably incorrect gut reaction on the part of many development-prone legislators that plants would be more difficult obstacles than animals, which can get out of the way of the bulldozer. This leaves the statute with some anomalies. For example, a bulldozer can smash an endangered plant with impunity, even if known to be there, but a person who attempts to transplant the plant to save it from the bulldozer could be prosecuted for moving it without a permit. Despite this lack of statutory protection, however, plants have recently received increasing attention within the Office of Endangered Species.

96. 16 U.S.C. § 1536(a)(1) (1982).

97. 741 F.2d 257 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1842 (1985).

Species Act].”<sup>98</sup> That is, the Department must “conserve threatened and endangered species to the extent that they are no longer threatened”<sup>99</sup> and “halt *and reverse* the trend toward species extinction, whatever the cost.”<sup>100</sup>

The third latent issue is potentially even more far-reaching. It is the species “taking” issue.<sup>101</sup> Section 7 clearly prohibits only federal agencies from jeopardizing the existence of a species or modifying its critical habitat.<sup>102</sup> But if section 9’s statutory prohibition against “taking” is interpreted to include conscious disruption—bulldozing, killing, displacing—of animal species, or destruction of their habitat, then the prohibitions of the statute can reach out to private actors as well. Thus, developers planning to fill a mangrove swamp containing an eagle’s nest to build a condominium project might find their enterprise halted by a conflict with the Endangered Species Act, enforced by the stringencies of civil and criminal penalties or an injunction. The definition of “taking” in the regulations permits this interpretation. The term “harm” and the definition of “take” state that such acts “may include significant habitat modification or degradation,” and extend beyond acts that result in the killing of endangered wildlife to acts that alter endangered species’ breeding, feeding, or sheltering patterns.<sup>103</sup> The focus of the issue will be upon the Secretary’s exercise of the statutory authority to permit such “incidental takings,” and judicial review thereof.<sup>104</sup> Given the widespread destruction of habitat that accompanies the day-by-day development of land and water resources in America, this provision may come to be the Act’s next *cause célèbre*. Where unpermitted takings occur or are threatened, the potential for citizen suits reinforces the Department’s enforcement of the Act.<sup>105</sup>

---

98. *Id.* at 261.

99. *Id.*

100. *Id.* at 262 (emphasis in original) (quoting *TVA v. Hill*, 437 U.S. 153, 184 (1978)).

101. 16 U.S.C. §§ 1538(a)-(b), 1532(19) (1982); 50 C.F.R. § 17.3 (1985).

102. 16 U.S.C. § 1536(a)(2) (1982).

103. 50 C.F.R. § 17.3 (1985).

104. The 1982 amendments added a provision allowing the Secretary of the Interior to issue permits for “incidental takings” under § 9 upon approval of a conservation plan if the taking “will not appreciably reduce the likelihood of the survival *and recovery* of the species in the wild.” 16 U.S.C. § 1539(a)(2)(B)(iv) (1982) (emphasis added).

105. 16 U.S.C. § 1540(g) (1982). Under this section, “any person may commence a civil suit on his own behalf . . . to enjoin any person . . . or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.” *Id.* § 1540(g)(1)(A) (emphasis added).

In sum, the Endangered Species Act has flourished in the years since the Supreme Court decision in *TVA v. Hill*.<sup>106</sup> The snail darter may not have fared well in the congressional process, but the general principles of endangered species protection have received a degree of attention and reinforcement that seems surprising in light of the array of market and political forces arrayed against them. As with NEPA, it may well be that the judicial and media attention directed to an inadvertent provision of environmental law may have resulted in making the basic statute and the principles for which it stands far more substantial as legal and political entities, even something of a "motherhood" issue. Endangered species protection seems likely to be with us for a long time.

## II. LEGAL CONTROVERSIES IN THE WAKE OF THE SNAIL DARTER

Throughout the snail darter litigation, as so often in environmental cases, the basic issues litigated were more questions of general legal doctrine than of particular environmental principle. The case presented three major legal issues. First and most important, it presented the question whether an equity court faced with a statutory violation must demand statutory compliance. Second, it presented the statutory interpretation question of retroactivity, questioning whether a restrictive statute applies to a previously commenced project. Third, it tested allegations of implied repeal, arguments that the appropriation of funds for an otherwise illegal agency project impliedly exempts the project from the statutory provisions it violates. Less directly, it raised several interesting ancillary doctrinal issues about eminent domain, the award of attorney fees in public lawsuits, and statutory interpretation.

### A. *Statutory Violations and Equitable Discretion*

Questions about equity jurisdiction are increasingly important issues for lawyers and courts, and environmental cases often provide the battleground for equity doctrine. Tellico raised anew the question of whether, in the face of a proven statutory violation, a court retains equitable discretion to deny an injunction so as to permit the violation to continue. In other words, does a

---

106. 437 U.S. 153 (1978).

court always retain its traditional power to "balance the equities" on all questions arising in the equity jurisdiction?<sup>107</sup>

1. *TVA v. Hill*— The Supreme Court's Tellico opinion had to address this question squarely, though it had been briefed in only one paragraph of the citizens' brief to the Court and in an antagonistic amicus curiae motion.<sup>108</sup> In the oral argument, the Justices were wrestling with the difficult question of whether a statute had to be applied literally when it contained a clear prohibition, despite the fact that the alleged common sense of the case seemingly supported the challenged dam rather than the protected fish. Throughout the oral argument, the Justices raised the question whether the Court had to apply a statute even if it produced an "absurd" result. The TVA and Attorney General Griffin Bell who argued the case, asserted that a court must always retain the right to deny an equitable remedy.<sup>109</sup>

The citizens, on the other hand, argued that separation of powers prevents courts from, in effect, repealing or amending statutes unilaterally. In the case of nonstatutory causes of action, an equity court can certainly determine whether it will allow a particular action to continue. The citizens argued, however, that once a legislature has made a statutory pronouncement on point, courts must abide by it. The citizens thus made the "conservative" argument that courts should not be activist but rather should follow the dictates of the words of the statutes before them. The citizens argued that their purpose in seeking court enforcement of the Endangered Species Act was to accomplish a "remand to the legislature." Adopting an argument of Professor Sax, they argued that judicial enforcement of statutory prohibitions was a proper practical leverage for public interest litigants to bring direct legislative and administrative attention to problems at hand.<sup>110</sup> If the courts did their job, citizens who are so often excluded from official decisionmaking could use statutes as leverage to obtain a hearing on important issues of public policy. If, on the other hand, courts were permitted to "legislate" exceptions to statutory prohibitions as they saw fit by denying statutory enforcement, citizens would be de-

---

107. This question spawned further research that led to an article, Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524 (1982).

108. Brief for the Respondents at 45 n.40, *TVA v. Hill*, 437 U.S. 153 (1978); see Pacific Legal Found., Motion for Leave to Argue as Amicus Curiae at 1-3, *Hill*.

109. Cohen, *supra* note 71, at 108-09.

110. Brief for the Respondents at 44, *TVA v. Hill*, 437 U.S. 153 (1978). "[T]he role of the courts is not to make public policy, but to help assure that public policy is made by the appropriate entity . . ." J. SAX, *DEFENDING THE ENVIRONMENT* 151 (1971).

nied one more opportunity to bring such public issues into the political arena. If, after a judicial decision to enforce the law, a legislature ultimately decided to override a statutory prohibition as it applied to a particular project, at least that ultimate decision might have been made on the merits after an opportunity for discussion of issues previously shielded from the official public eye.

The Supreme Court, in a ringing declaration of the separation of powers argument, declared that courts had no discretion to intrude what might well be their own ideas of common sense upon the clear, contrary language of the Endangered Species Act. Chief Justice Burger, who must have felt somewhat discomfited finding himself allied with the small fish, wrote an opinion that declared courts' subservience to the written words of statutes. In a dramatic final comment, showing why courts could not ignore the law of the land, he quoted Bolt's *A Man for All Seasons*:

The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm *not* God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.<sup>111</sup>

Coupled with prior precedents, it appeared that the Burger Court had adopted a firm position on the ascendancy of statutes over some courts' inclination to mold law as they saw fit.<sup>112</sup> The Court soon departed from this high ground, however. The subsequent case, *Weinberger v. Romero-Barcelo*,<sup>113</sup> was the story of

---

111. R. BOLT, *A MAN FOR ALL SEASONS* 65-66 (1962), quoted in *TVA v. Hill*, 437 U.S. 153, 195 (1978).

112. Chief Justice Burger had recognized the point during oral argument in *Hill*, responding to citation of his own opinion in *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975), in which he made the operative distinction between discretion as to remedy and nondiscretion as to substantive prohibition. See Plater, *supra* note 107, at 555 n.119.

113. 456 U.S. 305 (1982).



an endangered island rather than an endangered fish.

2. *Weinberger v. Romero-Barcelo*— The Governor of Puerto Rico, joined by fishermen, environmentalists, and other disaffected citizens, attempted to halt the United States Navy's practice bombing on and around the inhabited island of Vieques. The Navy's actions threatened the safety and peace of several hundred people living close to the area where bombs were dropping every day. In this case, as with the snail darter, the citizen plaintiffs were desperately seeking a legal "handle" by which they could halt the government's action or negotiate a compromise. Absent some statutory authority, it was clear they would lose. Political pressure and public petitions had proved useless in obtaining concessions from the Defense Department. But the Governor and the citizens found several relevant statutory provisions, the most direct, paradoxically, a violation of the Clean Water Act.<sup>114</sup> According to the clear statutory provisions and legislative history of the Act, Congress had made it illegal to dump munitions into the waters of the United States without a permit.<sup>115</sup> To make it even clearer that this provision of the Act applied to the military, the statute included a waiver provision for cases of military necessity—the President could issue an executive administrative exemption to permit particular activity to continue.<sup>116</sup> In the circumstances, the citizens thought that they would at the least get an opinion from the Supreme Court requiring the President to issue such a waiver; this would have forced the President to acknowledge their problem publicly, and perhaps stimulate negotiations.<sup>117</sup>

By the time the Puerto Ricans argued in the Supreme Court, the snail darter's equity argument had been further devel-

---

114. 33 U.S.C. §§ 1251-1376 (1982).

115. *Id.* §§ 1311(a), 1362(6).

116. *Id.* § 1323(a). The intent that the Executive, not the courts, was to utilize this flexibility mechanism is demonstrated by the presidential exemption's lack of a requirement of particular findings of fact, a decisive grant of power. President Reagan, however, may have wished to pass the job on to the courts to avoid having to spend the political capital that such an exemption might require. Accordingly, an injunction would have forced the President to take into account the merits of the case in determining whether to issue the politically sensitive exemption. See *infra* note 117 and accompanying text.

117. Absent a waiver, the statute was clear: the dumping of munitions was illegal unless the Navy obtained a permit, and the permit process was sufficiently difficult that it was doubtful that the Navy could have obtained one. The permit process required certification by the affected state, or in this case, Puerto Rico. 33 U.S.C. § 1341 (1982). Because the Governor of Puerto Rico and residents of the island had instigated the suit, it was unlikely that Puerto Rico would certify the permit application to allow the Navy to continue the bombing.

oped.<sup>118</sup> How could the Court square a strict requirement for judicial enforcement of statutes with a hundred years of jurisprudence applying the traditional equity balance? The citizens' argument to the Court asserted that the traditional "balance of equities" actually had always been three separate balances: first, a threshold balance to determine whether a plaintiff could proceed, involving questions of laches, clean hands, etc.; second, a balance as to whether particular conduct would be allowed or abated, as in the classic *Ducktown Copper* case,<sup>119</sup> in which the court determined that a copper smelter could continue even though it was killing neighboring farms; and third, once the decision was made to abate an activity, a balance to determine which equitable remedy was best suited to effectuate that decision.<sup>120</sup> The citizens argued that the passage of a statute by a legislature replaced only the second inquiry, leaving the court to balance threshold issues and to tailor remedies.

The declaration of what is and is not prohibited is, however, the core function of a legislature, once it has chosen to act. It is not a correlative power of the courts in such circumstances. No case was found in which any court had ever overruled a statute in this middle balance of equities. In common law cases, absent statutes, courts continued to decide what was and what was not prohibited. But where statutory violations were concerned, the scope of equitable balancing was restricted to the threshold questions, of laches, clean hands, etc., and to the question of choice of remedy to effectuate the substantive decision on abatement, the third balance. The citizens argued that, as in *Hecht Co. v. Bowles*,<sup>121</sup> the leading case, courts remained free to deny injunctions or modify injunctions as necessary so long as they accomplished whatever the statute required or prohibited. The second balance, however, was preempted by statute.

In *Hecht*, the Supreme Court had made a much-quoted declaration of a court's continuing power to balance the equities when confronted with a petition for an injunction.<sup>122</sup> But in that case,

---

118. The Tellico litigation had led to the further analysis in Plater, *supra* note 107. The author sent drafts of the Berkeley article to both parties; the law review sent galley proofs to the Court as the only piece of legal scholarship on point. Counsel for Puerto Rico made this updated Tellico argument the cornerstone of their brief and oral argument.

119. *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 83 S.W. 658 (1904).

120. See Plater, *supra* note 107, at 543-45.

121. 321 U.S. 321 (1944) (involving violations of maximum price regulations issued under the wartime Emergency Price Control Act of 1942).

122. *Id.* at 329-30. Backed by "several hundred years of history," the Court declared:

it had been established that the defendant would no longer violate the statutory price-fixing prohibition.<sup>123</sup> In *Hecht*, the Court recognized that the legislative mandate, the second area of the common law's traditional equitable balancing, was not at issue because the legislature's wish was being strictly accommodated. Thus, the balance of equities language was addressed only to the question of whether a full injunction was necessary, and the Court decided it was not. In both *Tellico* and *Romero-Barcelo*, the citizens would have been delighted if the defendants would voluntarily have complied with statutory requirements absent an injunction. In both cases, however, government agencies took the recalcitrant position that they would not comply with the law unless a court forced them to do so. In such circumstances, the citizens argued, the courts' discretion had to be exercised to achieve compliance with the law.

The Puerto Ricans' argument stressed the dangers to separation of powers if activist courts could override legislative pronouncements; in the circumstances, they understandably expected that the Court would apply the statute as written, especially because the statute provided for the flexibility of a presidential waiver. The expectations of the citizens, and scholars and analysts watching the case, were derailed when the Supreme Court, in an eight to one opinion, bypassed the equity analysis.<sup>124</sup> The Court declared, citing *Hecht*, that equitable jurisdiction meant that courts could always balance a question, even in the case of specific statutory prohibitions.<sup>125</sup> The Court thus asserted that judges could override statutory violations when, in the exercise of their discretionary judgment, they considered the statute unwise as applied to a particular case. This

---

The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

123. The Hecht Company had reimbursed all the customers who had been overcharged. For sales for which the overcharged customer could not be identified, the money was donated to charity. The Hecht Company had also changed inventory practices to prevent future violations. Thus, the Hecht Company had not only made outstanding efforts to correct the harm done by past violations, it had also done everything in its power to prevent future violations.

124. See Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513 (1984); Petruzzi & Thomas, *Equitable Discretion Under the Federal Water Pollution Control Act: Weinberger v. Romero-Barcelo*, 11 *ECOLOGY L.Q.* 73, 80-81 (1983).

125. *Romero-Barcelo*, 456 U.S. at 313.

is, needless to say, an extremely "activist" stance, indicating that judicial passivism was less a conservative principle with the majority than a pragmatic basis for reaching organic team decisions.

But the Court had to deal with the snail darter. The majority declared that the *Tellico* case had been special, one of those rare cases in which Congress had legislated a clear, decisive protection and intended it to be stringent. This reasoning was especially bemusing because most commentators would agree that Congress had no idea of what it was doing when it initially passed section 7.<sup>126</sup> The Court asserted a presumption that statutes implicitly included a recognition of the judiciary's power to override violations in the interest of a traditional balancing of equities. Only when a statute clearly abjured such judicial power would a court be restricted in its rewriting of legislation. This holding in *Romero-Barcelo* amounts to a declaration that Congress, when passing a regulatory statute, must say: (1) "it is hereby prohibited to do A, B, and C" and (2) "we really mean it!"<sup>127</sup>

In lonely dissent, Justice Stevens tracked the citizens' argument in detail, recognizing that the majority was overlooking some very important organic issues reaching beyond the question of equitable jurisdiction per se. The majority's decision, he argued, was "premised on a gross misunderstanding of the statutory scheme" of the Clean Water Act and lacked the "profound respect for the law and the proper allocation of lawmaking responsibilities in our Government" reflected in the *TVA v. Hill* opinion.<sup>128</sup>

Where does the argument on equitable discretion stand today? The matter is not clear, perhaps because the argument is fairly sophisticated. Some courts cite the *Romero-Barcelo* prece-

---

126. House and Senate Reports do not make it clear that § 7 could be the basis of injunction litigation. On the floor of Congress only one speech seems to have indicated that there might be enforcement repercussions resulting from the Act. In reference to the threat to the whooping crane from Air Force bombing practice, Congressman Dingell emphasized the mandatory nature of § 7: "Under existing law, the Secretary of Defense has some discretion as to whether or not he will take the necessary action to see that this threat disappears . . . [but] once the bill is enacted, he or any subsequent Secretary of Defense *would be required* to take the proper steps." 119 CONG. REC. 42,913 (1973) (emphasis added).

127. See 456 U.S. at 314-15. It would seem wiser and more in harmony with the constitutional separation of powers, with separate roles for legislatures and courts, to have the opposite presumption: that a statute should be deemed to bind a court unless Congress has inserted language indicating that courts may decline to enforce the statute when a balance of the equities so militates.

128. *Id.* at 333-35 (Stevens, J., dissenting).

dent and continue to follow *Tellico*.<sup>129</sup> Others cite *Tellico* for the wrong proposition,<sup>130</sup> or cite both *Tellico* and *Romero-Barcelo* approvingly, thinking that they are consistent.<sup>131</sup> The Supreme Court has subsequently echoed its reasoning in the *Tellico* case,<sup>132</sup> so that, at the highest level, it appears that the matter continues to be unresolved. The path of the snail darter on this issue will continue to be visited by the courts, for ours is a society in which statutory regulations at federal, state, and local levels continue to play a broad role, and injunctions are increasingly a favored rather than an extraordinary remedy of administrative law. The need to enforce statutes by injunction recurs constantly in our legal system, and important questions of separation of powers and activist courts ride in the balance.

### B. Retroactivity

From the beginning of the snail darter case, when the federal judge in Tennessee declined to apply the endangered species

129. See, e.g., *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 430 (1st Cir. 1985) (indicating that in the context of antitrust laws, a court must use its discretion to pick a remedy that will enforce the antitrust laws); *Manatee County v. Gorsuch*, 554 F. Supp. 778, 794 (M.D. Fla. 1982) (indicating that a court should not issue an injunction for statutory violations if the violations have ended).

One recent case virtually ignored *Romero-Barcelo* and held that an injunction is required in the case of a NEPA violation except in a "rare circumstance" in which the refusal of the injunction is necessary to protect the environment. *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984); see also *Village of Gambell v. Hodel*, 774 F.2d 1414, 1422 (9th Cir. 1985) (injunction appropriate remedy for substantive violation of environmental statute), *cert. granted sub nom. Amoco Prod. Co. v. Gambell*, 106 S. Ct. 2274 (1986).

130. See, e.g., *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 314 n.1 (9th Cir. 1982) (citing *TVA v. Hill* for the principle of equitable balancing on the merits).

131. See, e.g., *Conservation Comm'n v. Price*, 193 Conn. 414, 479 A.2d 187 (1984).

132. In *County of Oneida, N.Y. v. Oneida Indian Nation*, 105 S. Ct. 1245 (1985), the Supreme Court observed that equitable discretion should not be used to contradict the intent of federal policy as stated in statutes. *Id.* at 1257 n.16. In *Oneida*, the Oneida Indian Nation sued for damages for the occupation and use of land that had been improperly conveyed by their ancestors in a 1795 treaty in violation of the Trade and Intercourse Act of 1793. The Oneida Nation claimed that the conveyance was void because of the statutory violation and claimed damages on common law and statutory grounds. The defendants, two counties in New York, argued that the Oneida Nation's claims should be barred by the equitable doctrine of laches. Justice Powell, writing for the Court, stated: "[T]he statutory restraint on alienation of Indian tribal land adopted by the Nonintercourse Act of 1793 is still the law. . . . [This] suggests that . . . the application of laches would appear to be inconsistent with established federal policy." *Id.* (citation omitted). In dissent, Justice Stevens, while arguing that laches could be used to bar the common law claim, recognized that the Court should be cautious in using equitable doctrines in ways that risk frustrating the will of the legislature. *Id.* at 1266.

statute to the Tellico project,<sup>133</sup> there was a legal question of whether statutes apply to projects commenced before their effective date. In the Tellico case, the dam structure itself had been built in 1968, two years prior to NEPA and five years prior to the passage of the Endangered Species Act. The TVA, of course, argued that the statute did not apply, in the same way that it had argued in 1971 that NEPA did not apply to the ongoing project.<sup>134</sup>

The "retroactivity" argument, in general terms, is familiar to most American lawyers. It is clear as a matter of both constitutional and natural law that a person cannot be punished for doing something that was not illegal at the time the act was committed.<sup>135</sup> In administrative law, however, this "ex post facto" argument is twice wrong. First, it is a principle generally applicable to criminal, not civil, prohibitions. Second, it typically is considered a right of individuals, not some sort of inherent right of governmental agencies to pursue their activities unhindered by subsequent laws. Governmental agencies are regularly held to new restrictions in effect at the date of decision, on the theory that government is a servant of the populace.<sup>136</sup>

These distinctions did not deter the TVA, which argued, through the Attorney General, that the statute should be read to include an implied retroactivity provision immunizing ongoing projects from applicable federal law. The argument failed. Years of NEPA holdings had established that federal agencies could not claim an implied retroactivity immunity for ongoing projects, some sort of bureaucratic vested rights.<sup>137</sup> Additionally, the Court noted that it was future action, the proposed impoundment of the river, that would accomplish the entire evil the statute had been written to prevent. Thus, the statute was not being given retroactive application, but prospective enforcement.

Moreover, as a matter of statutory construction, the citizens argued that "retroactivity" is a misnomer. Given the direct, facial meaning of the statute, they asserted, the question was rather whether the statute should be read to include some sort

---

133. *Hill v. TVA*, 419 F. Supp. 753 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978).

134. *EDF v. TVA (I)*, 339 F. Supp. 806 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972).

135. See generally R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

136. See *Thorpe v. Housing Auth.*, 393 U.S. 268, 281-82 (1969).

137. See, e.g., *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972).

of implied "grandfather" clause immunizing ongoing projects. A statute stands on the four corners of its text, they argued. If it does not include a waiver for grandfathered projects, it should be read as it stands.<sup>138</sup>

Subsequently the courts have followed *TVA v. Hill* on this point. The courts have indicated that when substantial action remains to be taken, raising questions under a statute, the statute must be applied even though the project predated it.<sup>139</sup>

### C. *Implied Repeals in Legislation by Appropriation*

As a further twist on statutory construction, the TVA argued that regulatory statutes can be repealed by implication when appropriations are passed by Congress for projects that violate the law.

The underlying political reality was that the House Appropriations Committee, vested with jurisdiction over the pork barrel, regularly pushes forward on funding and construction for the projects that give the Committee its extraordinary power, regardless of statutory or policy considerations that stand in the way.<sup>140</sup> In the case of the Tellico Dam, the House Appropriations Committee had steadfastly refused to review economic and practical criticism of the project over the years, not to mention the "abstract" arguments made by environmentalists.<sup>141</sup> Accordingly, the House Appropriations Committee continued to provide funds for the project, continued to provide a forum for the TVA to trumpet the supposed absurdity of complying with the Endangered Species Act, and continued to include delicate phrases urging completion of the project within their annual ap-

---

138. Congress knows well how to insert grandfather clauses when it wants to and indeed has done so elsewhere in the Endangered Species Act. *See, e.g.*, 16 U.S.C. § 1539(b)(1) (1982).

139. *See, e.g.*, *League of Women Voters v. United States Corps of Eng'rs*, 730 F.2d 579 (10th Cir. 1984).

140. The incestuous relationship between pork-barrel agencies and the pork-barrel House and Senate Appropriations Committees is a crucial focus in this and many other public interest controversies; it raises an array of intriguing lines of inquiry too extensive to cover here.

141. Every economic argument had been raised before the House Appropriations Committee over the years by citizens' witnesses. However, nowhere in the legislative history is there the slightest indication that the Committee ever took economic, not to mention environmental, considerations into account.

The text refers to the Appropriations Committee as a singular entity. There is, of course, a counterpart in the Senate but, because of convention, all spending measures begin in the House and consequently that chamber exercises the predominant role in the politics of the appropriations process.

appropriations reports.<sup>142</sup>

The House and Senate Appropriations Committees, however, constitute a different kind of legislative process from congressional action in the substantive committees. They are designed to be funding committees, not substantive lawmakers. Because the power of the purse is great, Appropriations Committee members may not serve on other committees, and appropriations bills in the House and Senate are not permitted to include amendments changing provisions of substantive law.<sup>143</sup> That is supposed to be the province of the regular committees of Congress that sit in judgment over the various statutory projects and programs. In reality, however, it is the House and Senate Appropriations Committees that day-in and day-out, year-by-year, review all actions of the federal government. By shaping appropriations, they have accrued immense power in shaping the implementation of statutes.

The Supreme Court's snail darter decision declared the fundamental principle that repeals by implication are disfavored; appropriations will not be considered to repeal a statute just because money has been given for an otherwise prohibited act. The Court said, "To find a repeal of the Endangered Species Act under these circumstances would surely do violence to the 'cardinal rule . . . that repeals by implication are not favored.'" <sup>144</sup> Accordingly, the snail darter produced Supreme Court precedent requiring that the constitutional lawmaking function be channeled through the explicit legislative process of Article I.

Ironically, as we have seen, the pork barrel was able to evade this judicial precedent in *Tellico's* subsequent chapter by sneak-

---

142. Although the relevant appropriations acts did not expressly mention *Tellico*, committee reports contained language that urged completion of the dam so that its "benefits [could be] realized in the public interest, the Endangered Species Act notwithstanding." S. REP. No. 301, 95th Cong., 1st Sess. 99 (1977).

143. See, e.g., Rules of the House of Representatives, Rule XXI, cl. 2, H.R. Doc. No. 277, 98th Cong., 2d Sess. 564 (1985); Standing Rules of the Senate, Rule XVI, cl. 4, S. Doc. No. 1, 98th Cong., 2d Sess. 14-15 (1984). House Rule XXI, cl. 2 sets formal requirements for appropriations bills, including the clause, "No amendment to a general appropriation bill shall be in order if changing existing law." Senate Rule XVI is to similar effect. Over the years, the power of the purse has led to such concentrations of parliamentary power that Congress has sometimes burdened the committees with special restrictions. At times Congress has eliminated the appropriations committee altogether. The extraordinary power and effect of the appropriations committees, surviving even after the 1974 Budget Act, deserves a major chronicle. For a partial introduction, see W. ASHWORTH, *PORK BARRELING* (1981); T. REID, *CONGRESSIONAL ODYSSEY: THE SAGA OF A SENATE BILL* (1980).

144. *TVA v. Hill*, 437 U.S. 153, 189 (1978). In support of this proposition, the Court cited *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)).



ing an explicit rider onto the appropriations bill directly requiring that the project be finished immediately and repealing provisions of law to the contrary.<sup>145</sup> Although this rider was a violation of both House and Senate rules, no point of order was made to enforce the rules because the amendment was never read out loud.<sup>146</sup> Under the pressure of the pork-barrel process, President Carter subsequently caved in and the House Appropriations Committee once more was able to assert its hegemony over public works.<sup>147</sup>

On the issue of implied repeal by an appropriations bill, the snail darter thus won a court battle, but ultimately lost the parliamentary war. When the appropriations process comes under scrutiny, as it does from time to time, the track of the snail darter perhaps may again be traced in public consideration of the process.

*D. Further Notes: Condemnation and the Arbitrary and Capricious Test, Attorney Fees, and Statutory Construction*

Beyond the legal issues directly litigated in *TVA v. Hill* lie several other interesting issues in the areas of eminent domain condemnation, attorney fees, and a further statutory interpretation point.

1. *Condemnation*—Eminent domain is a drastic form of the police power that is little studied beyond the questions of defining “public use” and assessing just compensation. But *Tellico* raises a more interesting question: Why is it that condemnees cannot realistically attack a government agency’s condemnation actions on the merits, as in this case in which they can demonstrate that the project’s purported purposes—recreation and industrialization—are not rationally served by the particular taking? This line of inquiry leads to a reconsideration of applications of the arbitrary and capricious test.

It appears to be constitutionally, as well as statutorily, re-

---

145. See *supra* note 32.

146. Unless a point of order is made immediately, it is gone forever unless the full chamber can be persuaded to reconsider. Rules of the House of Representatives, Rule XXI, cl. 2, H.R. Doc. No. 277, 98th Cong., 2d Sess. § 835 (1985) (noting that the rule only *permits* a point of order to be made and thus does not expressly provide for subsequent reconsideration when no point of order is raised).

147. See *supra* note 33. In a subsequent telephone call with the citizens’ representative, the President mournfully noted that the House Appropriations Subcommittee chairman would likely force the provision down the President’s throat, a stance that demonstrated how incapable President Carter felt in controlling debate on his own domestic policies. Telephone conversation with President Carter (Sept. 25, 1979).

quired that government decisions shown to be irrational be declared null and void.<sup>148</sup> Courts, however, strenuously try to avoid judicial review of the merits of decisions to exercise eminent domain. Thus, in *Tellico* the farmers were not able to obtain meaningful review of the TVA's condemnation, which could have resolved many questions associated with the project a dozen years before the snail darter controversy.<sup>149</sup> Further, even when courts review for arbitrary and capricious action, the terms of that inquiry are not clearly understood. The arbitrary and capricious test is widely but not well known. The *Tellico* setting stimulated further analysis leading to the conclusion, reported elsewhere,<sup>150</sup> that in substantive terms, at least, arbitrariness comes down to the question of whether a rational government agency could rationally have made a particular decision. This conclusion has three facets: (1) there must be a reason, a standard, or a measurable purpose against which the action can be reviewed; (2) the means must factually serve that purpose; and (3) some consideration of proportionality is involved, where less drastic means and alternatives would avoid major net burdens on individuals.<sup>151</sup> *Tellico* thus opened up the difficult question of the limits of governmental power as applied to private property, a basic issue of democratic governance and another example of turned tables, as the purported "liberals" of environmentalism may often actually represent Burkian conservative values.<sup>152</sup>

---

148. The arbitrary and capricious test is explicitly legislated in the federal Administrative Procedure Act and many of its state corollaries, but its existence must be more than a statutory creation because courts had used the standard in judicial review of administrative action (and legislative enactment) long before the test was explicitly codified. Examination of the test in its applications over time reinforces the conviction that the arbitrary and capricious test is constitutional, reflecting a fundamental concept of procedural and substantive due process. See Plater & Norine, *Substantive Rationality Review of Government Decisions: An Exploration of the Arbitrary and Capricious Test Through the Looking Glass of Eminent Domain* (Mar. 1986 draft).

149. An undetermined number of farm families attempted to resist the condemnation suits in a series of unreported cases before Judge Robert Love Taylor, the U.S. District Court judge for the Eastern District of Tennessee. These attempts were unsuccessful, like the similar later case, *United States ex rel. TVA v. Two Tracts of Land*, 387 F. Supp. 319 (E.D. Tenn. 1974), *aff'd*, 532 F.2d 1083 (6th Cir.), *cert. denied*, 429 U.S. 827 (1976).

150. The analysis is developed further in a forthcoming article, Plater & Norine, *supra* note 148.

151. These three basic substantive inquiries in judicial review of regulatory actions were explored in a takings article, Plater, *The Takings Test in a Natural Setting: Floodlines and the Police Power*, 52 *TEX. L. REV.* 201, 224-28 (1974).

152. The citizens emphasized rational cost accounting while the conservatives, led by Howard Baker, obscured the economic merits of the controversy by characterizing the debate as little fish versus big dam, a portrait of environmental extremism. See *supra* note 68.

2. *Attorney fees*— As to attorney and expert witness fees, it is a fact of life that public interest litigants typically fulfill an important societal role at their own expense.<sup>153</sup> The expenses of public interest cases can be immense. Their factual and legal issues are typically complex, novel, challenging, and often unpopular. In these circumstances, the legal system has made some small gestures toward accommodating citizen enforcement of statutes. Though the Burger Court has acted decisively to prevent fee-shifting by federal courts sitting in equity,<sup>154</sup> state courts are able to award attorney and expert witness fees to citizens acting as private attorneys-general,<sup>155</sup> and Congress has specifically authorized such fee-shifting in more than five dozen statutes including the Endangered Species Act.<sup>156</sup>

The TVA resisted the Tellico plaintiffs' application for fees under the Act's citizen enforcement provisions. As in many public interest fee cases, the Tellico citizens had to make their petition to the same judge who had initially dismissed their case and who was less than happy to have been reversed;<sup>157</sup> they filed after the case had come to an end rather than during active litigation;<sup>158</sup> they requested fees although their efforts had ultimately been mooted by congressional action; and they claimed fees for the efforts of attorneys and experts who were otherwise em-

153. Damages usually cannot be claimed and injunctions are generally the remedy of choice. Furthermore, no profits result to the litigants for their successful efforts because, unlike most civil litigation, no commercial or property interests are being defended. See King & Plater, *The Right to Counsel Fees in Public Interest Environmental Litigation*, 41 TENN. L. REV. 27 (1973).

154. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (restricting equitable fee-shifting, in the absence of statute, to cases of bad faith and "common fund" awards).

155. *Serrano v. Priest*, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977) (applying the English rule), *aff'd sub nom. Serrano v. Unruh*, 32 Cal. 3d 621, 652 P.2d 985, 186 Cal. Rptr. 754 (1982).

156. 16 U.S.C. § 1540(g)(4) (1982).

157. Especially when the decision is to be made by a district judge whose prior decision on the merits was successfully overturned by plaintiffs, the discretion to award or deny attorney fees raises serious questions and has been generally circumscribed by a presumption in favor of awards. See, e.g., *Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427 (1973) (per curiam); *Brown v. Culpepper*, 559 F.2d 274 (5th Cir. 1977); *Natural Resources Defense Council v. EPA*, 484 F.2d 1331 (1st Cir. 1973).

158. Litigators often hold back their fee claims until the case has ended, understandably fearing that the claim might affect the decision on the merits. See *Sprague v. Ticonic Bank*, 307 U.S. 161, 168 (1939) (lower court authorized to award fees for appellate work although fee question not litigated on appeal); *Universal Amusement Co. v. Vance*, 587 F.2d 159, 172-73 (5th Cir. 1978), *aff'd*, 445 U.S. 308 (1980); *Souza v. Southworth*, 564 F.2d 609, 613 (1st Cir. 1977) (indicating preference for postappellate fee litigation). On the presumption favoring a grant of fees, see *Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968), and its progeny. Cf. *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983) (Rehnquist, J., dicta for strictness in granting fee-shifting against government).

ployed as university professors. Despite the district court's decision,<sup>159</sup> which on these grounds rejected the fee claims, and those for the author's work in particular, on the eve of the Sixth Circuit appeal in an unreported consent settlement,<sup>160</sup> the TVA agreed to pay the plaintiffs' fees and costs. The author's fees were then donated to a national river conservation fund.<sup>161</sup>

3. *Statutory extremism*—A final note on "extremism" in statutory interpretation: At many stages during the course of the litigation, and in the halls of Congress and the agencies, it was argued that statutes should not be applied if they would lead to what the particular observer considered an "absurd result." As Justice Powell said,

In my view § 7 cannot reasonably be interpreted as applying to a project that is completed or substantially completed when its threat to an endangered species is discovered. Nor can I believe that Congress could have intended this Act to produce the "absurd result"—in the words of the District Court—of this case.<sup>162</sup>

The snail darter opinion in the Supreme Court, however, emphasized the dangers of such an approach. Paralleling its argument on whether or not judges have equitable discretion to enforce their own ideas of common sense, the Supreme Court said that even when a statute led to what a court might think was an absurd result, if the facts fit the law, the statute was to be applied as it was written.<sup>163</sup> Other decisions have echoed that hold-

159. *Hill v. TVA*, 84 F.R.D. 226 (E.D. Tenn. 1979).

160. *Hill v. TVA*, No. 79-1465 (6th Cir. May 12, 1981) (consent order dismissing appeal).

161. Contributions are welcome to the Little Tennessee River Memorial River Conservation Fund, managed by National Trout Unlimited, Inc., 501 Church Street, N.E., Vienna, Va. 22180.

162. *TVA v. Hill*, 437 U.S. 153, 196 (1978) (Powell, J., dissenting) (footnote omitted). Justice Powell continued:

If it were clear from the language of the Act and its legislative history that Congress intended to authorize this result, this Court would be compelled to enforce it. It is not our province to rectify policy or political judgments by the Legislative Branch, however egregiously they may disserve the public interest. But where the statutory language and legislative history, as in this case, need not be construed to reach such a result, I view it as the duty of this Court to adopt a permissible construction that accords with some modicum of common sense and the public weal.

*Id.*

163. *Id.* at 194-95. In a recent case arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1982 & Supp. II 1984), the Supreme Court echoed this approach of applying a statute as it was written even in the face of apparently contrary legislative intent. *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275

ing.<sup>164</sup> The snail darter therefore continues to be a small jurisprudential extreme, serving as a litmus test for the proper role of courts, agencies, and Congress in our legal system.

### III. THE SNAIL DARTER AS MESSENGER: RATIONALIZING THE SYSTEM

In the course of the Supreme Court argument in *TVA v. Hill*, Justice Powell leaned over the bench and wondered what snail darters were good for, anyway: “[Are] they . . . suitable for bait?”<sup>165</sup> Then, as often through the course of the controversy, the river defenders tried to explain how the little fish was linked to the public merits of the endangered valley. The snail darter was “a canary in a coal mine.” In and of itself, it might have little importance except to those few who could appreciate its natural aesthetic. Yet like the canaries that were carried into the coal mines of old to warn human beings of the dangers of methane gas, the little snail darter was a sensitive species that, by its endangerment in the Little T Valley, acted as an indicator of endangered human values as well. The citizens repeatedly attempted to make their audience see that the snail darter was only the tip of its pyramid, the indicator of a far more complex resource controversy in the Little Tennessee Valley.

The little snail darter was a barometer of far more than its endangered valley. It also served to register how our society makes important decisions. It is from this perspective on how the American governmental system responded to the merits of a

---

(1985). In *Sedima*, the Court held that a plaintiff need not establish a “racketeering injury” in order to maintain a private civil action under RICO despite the Court’s recognition that such a literal reading of the statute contributed to the evolution of RICO “into something quite different from the original conception of the enactors.” *Id.* at 3287. For the courts to read a “racketeering injury” requirement into the statute would be a “form of statutory amendment [not] appropriately undertaken by the courts.” *Id.* Justice Powell again dissented.

164. *Griffin v. Oceanic Contractors*, 458 U.S. 564, 576 (1982) (statutory formula awarded \$23,670.40 in damages to discharged employee for employer’s refusal to pay \$412.50 in wages); *United States v. M/V Big Sam*, 693 F.2d 451, 454-56 (5th Cir. 1982) (statute was inconsistent in limiting liability of dischargers and nondischarging third parties in oil spills by allowing greater liability of nondischarging third parties), *cert. denied*, 462 U.S. 1132 (1983).

165. *Cohen*, *supra* note 71, at 104. The judiciary was not the only branch of government that failed to recognize endangered species as “barometers” or indicators of larger human values. On July 31, 1978, Representative David Bowen (D-Miss.) introduced a bill to add an economic assessment that focused only on the disruptions that species protection might create to the procedure for listing species as threatened or endangered. H.R. 13,658, 95th Cong., 2d Sess. (1978). No action was ever taken on the bill.

narrow, dramatic, discrete case, involving complexity of fact, values, law, and economics, that the snail darter may have its major lessons to teach. And because there is such a mismatch in the snail darter case between reality and common sense on the one hand, and the general perception and ultimate resolution of the issue on the other, the snail darter offers a sobering warning about the long-term needs for improvement in the way our society makes decisions.

### A. *Simplification in a Complex World*

The snail darter case represents a superb example of a recurring phenomenon in modern American government: in a world of increasing complexity, in which government plays a comprehensive and increasingly diverse range of roles, the rhetoric of national discourse often seems to become simpler rather than more complex when faced with difficult questions.

The snail darter case *was* complex. It involved a range of economic projections, social and natural as well as fiscal costs, and alternatives, that guaranteed that any rational decision would have to be a careful balance of complex factors.

Now consider the rhetoric that dominated the snail darter case. It was called the most extreme environmental case of the 1970's. Walter Cronkite referred to it as "a classic conflict between energy and environment . . . , the little fish against the massive Tellico Dam."<sup>166</sup> The image of the little fish poised against the big dam was the media's basic rhetorical framework from the beginning of the litigation until the end—six years of intense governmental consideration reduced to a chronic and ultimately misleading caricature.<sup>167</sup> This caricature was destructive, for it became the governing cliché. By reducing an important and complex debate to a mindlessly simple juxtaposition, the cliché ultimately eclipsed the merits built so carefully by the river's citizen defenders over twenty years, and allowed the dam boosters to prevail, spelling the death knell of a river that had

---

166. *CBS Morning News: Endangered Species* (five-part CBS television broadcast, Mar. 29, 1982 to Apr. 2, 1982).

167. The media's photographic coverage reflected the caricature precisely. By far the most common newspaper photo showed an inset of the little fish with a measuring scale of two-and-a-half inches beside a shot of the dam photographed with a wide angle lens so as to make the dam look immense in comparison (little fish, big dam). See, e.g., Ayres, *Controversy Over 3-Inch Fish Stalls the Mighty T.V.A.*, N.Y. Times, Mar. 14, 1977, at 31, col. 1. The fish was undeniably small, but the dam, too, was a pipsqueak among TVA dams not to mention western dams. But the catchy cliché was not to be denied.

flowed for two hundred million years.

Why was the case caricatured in such simplistic terms? Was it inevitable? It was not for lack of citizen effort to inform the media.<sup>168</sup> Having used the darter as a necessary "handle," the citizens tried desperately over the years to show what was attached to it. In part, the answer must be that the caricature was a convenient rhetorical device for those who did not wish to have the decision turn on the merits. For years the opponents of environmentalism had been arguing that "the pendulum of environmental protection has swung too far," arguing that environmental values are a necessary trade-off to economic growth. This case was too good to let pass, as an object lesson in extreme environmentalism. The forces of development that had been increasingly hampered by growing public consciousness of the costs of their activities—in terms of public health, disruption of air quality, water quality, and so forth—had long attempted to attach a stigma to environmentalism generally, a stigma of elitism, a stigma of illegitimacy, a stigma that would in any event prevent the legitimation of these outside public values being intruded into their ongoing work. The snail darter seemed to personify all of those illegitimate claims being made against the business and development community by the outsiders, the environmentalists.

One puzzling feature of our modern society is that, in the nation that has developed the most sophisticated information system ever known to human society, public debate can be characterized by such a superficial level of information coverage, reportage by quips and aphorisms. Starting from the presidency, and continuing through Congress, the newspapers, the AP wire, the evening news, and the conversations of Everyman on the street, the country may be less sophisticated in its public decisionmaking discourse than in hindsight it was, say, a century ago, in the 1850's in public discussion of slavery, or in the 1890's in discussions of monopoly systems, or in the 1930's in discussions of economic revival.<sup>169</sup> If a case as narrow in subject as this

---

168. One bumper sticker, included in the press packets distributed by the citizens, read: "Snail Darter . . . It's More Than a Little Fish!" See also *infra* note 184 and accompanying text.

169. The Lincoln-Douglas debates of 1858, which were masterpieces of logic and substantive argument as well as rhetoric, were attended by thousands and displayed and analyzed on the pages of newspapers all over the nation. See generally *CREATED EQUAL?: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858* (P. Angle ed. 1958).

These debates over slavery and union, industrialization and rural virtue, give some credibility to the idealized images of American towns, each with its newspaper, its Athenaeum Theatre and library, its respect, aspirations, and attribution of value for intelli-

one can nevertheless involve so many important and different considerations, it would appear that our society runs serious risks making decisions according to simple aphorisms because an aphorism is only as good as the analysis that preceded it. It rarely has the stuff of wisdom in and of itself.

### *B. How Decisions Are Made*

Tellico also demonstrated a decisive and instructive difference between the way environmental analysts make a decision and the way most development decisions are made in our society. The snail darter case raises the question of whether our official decisionmaking system should adopt some of the overview perspectives of environmental analysis.

How are rational decisions made? In approaching any particular controversy, it makes sense to look at the primary decisionmakers. If a factory is going to be built in a particular place using a particular process, if a particular chemical product is going to be put onto the national market, if a particular forest is

gent political discourse. Today we may know far more than they, but the automobile and television have eroded such 19th-century aspirations. As modern cars roll down our commercial strips their radios give news headlines for 60 seconds on the hour as a grudging concession to the ongoing activities of human society.

Illustrative of the lack of sophistication found in contemporary political discourse is the following excerpt from a 1976 radio program entitled, "Snail Darter" (transcript on file with U. MICH. J.L. REF.). The commentator is Ronald Reagan.

For those of you who haven't heard of or who only dimly remember hearing something about the "Snail Darter", let me offer an explanation.

The "Snail Darter" is a minnow. Now that may not be biologically accurate, but to everyone but a biologist a tiny fish two or three inches long is a minnow. There are 77 or so varieties of Darters with 77 or so names and the differences between them are indistinguishable to everyone but a student of Ichthyology.

What makes the Snail Darter unique among its cousins is that it is [on] the endangered species list, lives only (so far as we know) in a 17 mile stretch of the Little Tennessee river and has held up a \$116 million dam for four years. It is interesting to note that in this hassle it is a bureaucratic civil war—the Environmental Protection Agency versus the Tennessee Valley Authority. T.V.A. was building the dam.

The thing that brought the "Snail Darter" (I still say it's a minnow) back into the news was a recent action by the House Appropriations [Committee]. With an eye toward settling the dispute and getting the Tellico dam completed, the Committee appropriated \$9 million to transplant the fish, which they estimate number 10,000.

It only takes a little arithmetic to figure out that comes to \$900 per fish. Think about that the next time you use minnows for bait.

These words need only be read by even the most undiscerning observer to demonstrate that the distance between our current President's commentary and those embodied in the Lincoln-Douglas debate is more than merely temporal.



going to be logged or river be dammed, the same kind of decisionmaking matrix occurs: the persons who will make the decision weigh the benefits, costs, and alternatives involved in their particular proposal. As the economists who distinguish between internal and external costs have noted, however, the promoters typically weigh these rational considerations only as they affect themselves.<sup>170</sup> Thus, in deciding to release a particular chemical on the market, the decisionmaker weighs the benefits in terms of profit and corporate recognition against the costs in terms of production, distribution, and associated liabilities, to determine whether there is a net benefit to him or herself.<sup>171</sup> Implicitly, every decisionmaker also considers the options available. One such alternative is always the alternative of doing nothing. Others include variations in product, process, timing, and the like.

The genesis of environmental problems is that typically this benefit-cost-alternatives analysis is designed to be rational in the decisionmaker's own terms, but pays no attention to the broader real life consequences to society. If one were to view the decisionmaking as a ledger, decisionmakers typically only consider costs, benefits, and alternatives above the line that separates themselves from the rest of their society. Below the line are a wide range of nonaccountable costs, benefits, and alternatives that should be considered in an overall rational societal decision but are extraneous to the actual decisionmakers. If a chemical is likely to cause cumulation in the bodies of persons who are exposed to it, that cost will be recognized by decisionmakers "above the line" only insofar as there is liability or accountability for whatever negatives can be clearly proved to originate from the chemical.<sup>172</sup> In the building of a factory, benefits and burdens likewise exist below the line as well as above; the benefits of employment are felt not only by the official decisionmaker, but also by the persons who are part of that payroll. Similarly, the costs to society of polluted air—lower quality of life, health problems from water and solid waste disposal—are not part of the decisionmakers' terms of accountability, unless there is some extraordinary market accountability, such as tort

---

170. See generally J. GALBRAITH, *ECONOMICS, PEACE, AND LAUGHTER* (1971); G. HARDIN, *EXPLORING NEW ETHICS FOR SURVIVAL* 71-76 (1972); Breslaw, *Economics and Ecosystems*, in *THE ENVIRONMENTAL HANDBOOK* (G. DeBell ed. 1970).

171. See *supra* note 170.

172. Tort law is thus a primary "rationalizer" of the marketplace, though the accounting may be only coincidentally proportional to the costs externalized. See Note, *The Cost-Internalization Case for Class Actions*, 21 *STAN. L. REV.* 383 (1969).

liability and consumer boycotts, or artificially imposed governmental restraints.<sup>173</sup>

Overall it is likely that, thanks to the genius of the American enterprise system, the internal and external ledgers are *not* similar. American entrepreneurs, private and public alike,<sup>174</sup> measure their successes by the number of benefits they can capture within their accounting, and the number of costs they can avoid. The invisible hand may generate a trickle-down of both profits and costs, but it is far more democratic about distributing the latter than the former.

Environmentalists have represented an extraordinary new force within our society because they typically attempt to recognize the real costs to a society that are sufficiently long-range, indirect, or difficult to prove—or in any event outside the economic accounting realm of the decisionmakers—that they would be otherwise ignored. Environmentalists, in other words, cannot

---

173. "Good public relations" may allow a corporation to write off nonobligatory costs. A business's ultimate duty, however, is owed to its shareholders and in many industries—especially where products are components not marketed directly to consumers—"good public relations" cannot justify expenditures unrelated to the direct costs of production and distribution.

174. The extent to which government decisionmaking has come to share the functional frame of reference of private corporate entrepreneurs is remarkable. In the classic 18th-century economic model that still informs modern American business, private entrepreneurs are expected to look out for their own profits alone. Their managerial responsibility to their stockholders is to develop and implement projects that will provide maximum gain with minimum outlay; negative burdens like pollution will be passed on to the public at large if this can be done without facing accountability in lawsuits or otherwise. Ultimately, the wistful moral premise of those who still hold this theory is that their vigorous private self-aggrandizement will trickle down to serve the greater good. To talk about the indirect or noneconomic consequences of corporate decisions—like America's multibillion dollar task of cleaning up dumped hazardous wastes, or the health and wildlife consequences thereof—is regarded as radical, or at least impolite, insofar as it threatens the basic moral premise.

Government officials, particularly in the public works agencies, often voice a similar wistful self-justification. Their "production" is measured in tons of concrete poured, or miles of roadway built, or miles of waterway drained, dug, or dammed. Their "profit" is measured in terms of jobs gained for themselves and their contractors, federal dollars gained by their agencies from the public purse, dollars passed through to their local public works constituency, and political capital at federal, state, and local levels produced by the foregoing. To the members of both the corporation and the agency, the survival and perpetuation of the organization is a basic loyalty and a compelling managerial responsibility. Survival of both, moreover, is thought to depend upon maintaining the flow of direct "profits," not some nebulous concept of indirect new benefit accounting or vague public good. Thus, many promotional projects in both sectors are "paid" for by trading off human or natural resources that do not have to be accounted for because they are unmeasurable, and therefore "free." To the promoters, whether private or public, accounting for consequential negative externalities is dysfunctional, hence to be avoided. Rather, each private or public entrepreneur seeks to do his mission, hoping perhaps that self-interest might eventually equal public interest.

afford to be extreme, simplistic, or unbalanced and expect to be effective within the governing system. When the attempt is made to intrude new values or new recognitions of social costs into an ongoing system, the case must be made as carefully and realistically as possible in rational, overall terms. Environmentalists thus often ask, as in Tellico: "What is the real scope of benefits to the public overall? What are the real costs to the public overall? What alternatives would overall best serve society?" This is a very different series of questions from those that official decisionmakers pose. By intruding an overall accounting into the decisional balance, environmentalists have threatened the heart of our nation's development system, the presumption that the trickle-down theory works rationally. Environmentalists begin with the proposition that no one, no thing, is an island, that everything is connected to everything else, and that therefore no rational system can allow its decisions to be made by those whose self-interest does not take account of negative consequences throughout the system.

### C. *Decisionmaking in the Tellico Case*

From this overview perspective, let us consider the decision-making of the promoters and the environmentalists in the Tellico case.

The TVA asserted that the Tellico project would achieve the *benefits* of (1) increased recreation, (2) shoreland development through resale of private land condemned for the project, and (3) measurable but less significant benefits in water supply, flood control, navigation, and augmented power flows.<sup>175</sup> Those benefits appeared in the official benefit-cost analysis. The TVA's estimated *costs* comprised the costs of condemning the lands for the project, labor, and building small dam structures at various places in the valley. The *alternatives* officially considered by the Authority were in the nature of small dams, or slightly altered dams, or doing nothing, which the Authority's environmental impact statement declined to take seriously because it would forego all of the claimed benefits of the project.<sup>176</sup> The environmentalists, looking at these allegations, went through a classic environmental analysis: they challenged the benefits by demonstrating that recreation would be deflated rather than en-

---

175. See *supra* notes 11-14 and accompanying text.

176. 1 OFFICE OF HEALTH & ENVTL. SCI., TVA, ENVIRONMENTAL STATEMENT, TELLICO PROJECT 1-44 (1972).

couraged by the creation of just one more reservoir and the elimination of a unique river; they argued that shoreland benefits attributable to a reservoir were unlikely ever to accrue and showed the insignificant nature of the other dam-associated benefits claimed for the project. As to costs, the environmentalists insisted that one could not make a rational decision on the valley's fate without valuing the loss of farmland, tourist potential, irreplaceable historic and archaeological sites, fish and wildlife, and the value of a healthy farming community, as costs that the people and their valley would bear. Moreover, as "environmentalists," they discussed alternatives that would be more profitable to society as a whole: the no-dam alternative, proposing a river-based development with encouragement of family agriculture alongside enhanced recreation on the flowing river, tourist development along a "Cherokee Trail" through the valley to the national park upstream, and historic and archaeological parks along the river.<sup>177</sup>

In retrospect, the extraordinary feature of the prolonged course of official decisionmaking for the Little Tennessee River is the difference in accuracy between the projections made by the Authority and those of its citizen critics. No economists outside the TVA were ever found who thought the project would be worthwhile built as designed with a dam and reservoir.<sup>178</sup> Subsequent history has shown that the environmentalists were correct. The reservoir has not stimulated reservoir-based industry to locate in the valley,<sup>179</sup> and the losses in terms of resources and opportunities foregone have been incalculable. The system was faced with a decision in which the promoters of the project were consistently inaccurate in their assertions, and in which the environmentalists were consistently accurate both in economic assertions and in their other arguments about development of the valley. The environmentalists, in other words, not only had law on their side, but also economic common sense and the factual analysis of what was at stake. They also had media coverage—more, according to one analyst, than for any other environmental issue of the 1970's except, perhaps, the Alaska land issue.<sup>180</sup>

---

177. See *supra* notes 35-38 and accompanying text.

178. Cf. authorities cited *supra* note 38 (comparing profitability of the project with the river development option).

179. See *supra* note 40 and accompanying text.

180. Based upon his press coverage analyses, Professor Ron Rollet, who held a joint appointment in the Schools of Journalism and Natural Resources at the University of Michigan, repeatedly asserted that the snail darter case received more media coverage

Nevertheless, the American legal system was able to overturn the rational arguments of the environmentalists and push through the project, which, according to the Chairman of the Council of Economic Advisors, Charles Schultz, on the eve of its completion still didn't pay if "one takes just the cost of finishing it against the [total project] benefits."<sup>181</sup> How could this be?

One important lesson of the snail darter controversy is that the purported benefit-costs accounting of official decisionmaking may not reflect the actual factors motivating the official actors, the insiders who make things happen. The TVA, for instance, justified the Tellico project in terms of recreation, shoreland development, and other associated benefits, in the face of evidence that these would not occur. This is an indication that the Authority's actual benefit-cost analysis lay in a different realm altogether. The project's true benefit to the TVA was in some large part its status as an ongoing project, with all the attendant political and institutional advantages that implies. This indicates the possibility that development agencies may not be motivated primarily by a desire to produce particular discrete benefits, but rather to keep busy. The true value to the Authority, as with most pork-barrel projects perhaps, was that it represented an opportunity to build a project. An agency lives by doing things. In doing things, it builds up clientele, political momentum, budget, political IOU's, and provides an ongoing livelihood for all who comprise it. In the case of Tellico, moreover, it now seems apparent that the project symbolized a rebirth of a development mission for the TVA and its chairman Red Wagner, a strategically important opportunity to rescue the Authority from stagnation as its initial construction mission had come to an end. Tellico not only satisfied the Authority's political clientele but also helped to resurrect sagging organization morale.<sup>182</sup> These motivations are powerful, but not the kinds of benefits an agency can openly avow.

It surely is no surprise to hear that agency programs take on a

---

than any other single environmental controversy in the decade 1970-1980. Conversations with Professor Ron Rollet (Oct. 1979).

181. U.S. Dep't of the Interior, *supra* note 31, at 26.

182. These observations, and many to follow, obviously draw upon the author's reflections on the contorted political history of Tellico found in Plater, *supra* note 3, at 747-87.

A masterful and massive recent historical analysis of the TVA's campaign to promote the Tellico dam concludes that the Authority was impelled to build the project by the institutional hope that it would start up a new era of regional development construction projects, irrespective of its shaky cost justifications. W. WHEELER & M. McDONALD, *TVA AND THE TELLICO DAM 1936-1979* (1986).

life of their own. An agency is like a rolling stone: it gathers momentum. Projects are the life blood of a pork-barrel agency. Similarly, those individuals outside the TVA who supported the agency project through thick and thin against the force of fact and law and rational argument must have considered that their interests were similarly served. One cannot understand the Tellico project's story without understanding the presidential aspirations of Howard Baker, the midlife crisis of the TVA organization, the linkage of Tennessee politicians to the TVA, the local real estate industry in East Tennessee, or the concerns of labor in the Valley, constantly looking for new projects on which to work. Thus, as in many other public projects, the purported project purposes may be mere window dressing for project promoters. For them, a public works project represents an important opportunity, and a river valley appears as a cost-free resource that can support it.

Faced with this Janus problem, the environmentalists had to argue on two levels. First, they had to argue against the purported benefit-cost analysis, indicating that the official reasons for the project didn't make sense. Second, in an exercise of Realpolitik, they had to try to circumvent the hidden reasons for the project. Within the TVA they discreetly sought the support of those who were concerned with statutory compliance, motivated by the public-interest purposes of the Authority, and less concerned with the demands of the TVA's institutional momentum. Outside the Authority the citizens tried to show that local economic interests were *better* served without the dam than with it; and they tried to raise the political costs, in terms of political pressure and media criticism, for the politicians who so strongly supported the dam. Essentially, the environmentalists were unsuccessful in their second, Realpolitik endeavor. There is a powerful, unspoken assumption among most of the constituency of a pork-barrel project, even though these proponents may not believe their own official estimates of project profitability, that the federal dollars imported into a region through appropriations are the best politically available way to obtain local economic subsidies. The implicit self-condescension of those constituencies is difficult to overcome, especially when no official agency mechanism exists or is willing to undertake the various possible projects for alternative development.<sup>183</sup>

---

183. This institutional constraint is a consistent skew in the balance. One analyst discovered this with an airport NEPA process that showed low-cost alternatives to new runways. The Agency, however, was incapable of implementing the economically prefera-

There is much to support the hypothesis that environmentalists, in addressing the purported merits of various projects and attempting to provide rational refutation and suggested alternatives, basically miss the promoters' real point of view. The Tellico Dam's boosters had no great interest in the real merits of the project's benefit-cost justifications or the requirements of the law. Many apparently knew from the start that Timberlake City was a chimera. Rather, they had made institutional or personal calculations that the dam fit their own varying needs in terms of institutional momentum, political power, budgeting, or local land speculation, better than any citizen-initiated alternative would. So the promoters—the TVA leadership (at least up to the reform leadership of President Carter's appointee, David Freeman), Howard Baker, who never wavered in his behind-the-scenes efforts to build the dam regardless of economic or legal obstacles, the congressional pork-barrel committees, the local politicians and land speculators who now seem to have achieved the control over Tellico lands they had long desired—all pushed the project to its conclusion for their own ends, quite immune to persuasion on the public merits.

#### *D. The Courts and the Media*

This variance between official actors' purported and actual goals is not a novel assertion, and the citizens were certainly not surprised to encounter it. But the snail darter litigants attempted to circumvent the paradox of official decisionmaking through another calculated risk. They presumed that if the decision was left to the normal official track, the merits would never shape the outcome. By going to court and to the media, however, the citizens hoped to be able to hold the entire system to decisionmaking on the merits. The political marketplace may be the daily reality of government, but when an issue is brought into the courtroom or into the fickle eye of media coverage, the terms of dialogue change. No longer can TVA officials say, as they would privately, "We are pushing ahead because (veteran TVA

---

ble alternatives. See Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973).

Professor Bruce Hannon of the University of Illinois Center for Advanced Computation has demonstrated how pork-barrel dollars could be far more valuably invested in health care, transportation, and education, but implementation is institutionally and politically impossible. See Hannon & Bezdek, *Job Impact of Alternatives to Corps of Engineers Projects*, 99 ENGINEERING ISSUES 521 (1973).

chairman) Red Wagner doesn't like the idea of this agency getting a black eye; we have never been stopped by the public and we won't start now." Instead, they now must try to justify the project in an open forum on objective facts. Once the media undertakes intensive coverage of an issue, a congressperson no longer can say, "I will vote against the river because Howard Baker wants the dam." Rather, the decision shifts to a purported social good model: "I will vote against the river because the people need thousands of jobs that will result." As a question is elevated to the public or judicial eye, the promoters' position may not change, but the rhetoric must. And here the citizens finally have a forum that may make the decisionmaking process address the merits.

A judge is paid to listen and decide on a case's merits. The media too, if it gets into the merits and stays with them, can police government decisions. Both come under intense pressure not to do so, of course. Courts are reluctant to oppose official decisionmaking, hence the typical deference to agency discretion, the rock-hard presumption of statutory validity, and the feeble judicial constraint upon official actions embodied by the arbitrary and capricious test. The media, for its part, is to an extent an entertainment industry. News programs provide "infotainment"; accordingly, it is often difficult to provide intensive news coverage of stories that are complicated or less dramatic, or "depressing" stories that illustrate the failures and shortcomings of official decisionmaking in situations in which the system does not work, unless the reporters can find a dramatic target or punch line. The temptation is to cover things superficially if they involve stories that are deemed to be depressing, complex, or boring.

Rational arguments by public interest advocates nevertheless can occasionally be effective because official decisionmakers *do* respond on the merits when forced to by courts and the media. They respond to courts, perhaps, because courts are still regarded in our society as not openly political. One cannot argue politics to a judge overtly. For the good of all, participants try to hold to the presumption that courts will resist the pull of power politics and adhere to principle. Accordingly, judicial decisions often are able to stake out positions that are not merely reflections of ongoing political reality.

Why does the media have an effect? Perhaps because even in Washington, a city of insiders who realize that most Americans do not know more than a tiny part of the flow of information and important decisions debated every day in the nation's capi-



tal, there is a healthy regard for public opinion when it gets awakened, focused, and mobilized. Watergate is a vivid memory: a President with superb control of the Washington machinery was brought low by a news story that got out to the grass roots, a story that was comprehensible, was covered in depth over time, and ultimately made the decision on the merits an obvious conclusion.

The citizens who brought the snail darter lawsuit surmised that the first wave of media coverage would focus on the silly little fish stopping the big dam. But they trusted that over time the story would have to be explored in more depth by reporters; the river's defenders knew that at every level and turn, the merits of the Tellico controversy supported their position rather than that of the official decisionmakers. Over the years they talked with more than 140 reporters.<sup>184</sup> To the end, however, the national media never once covered the Tellico story in its real terms and its compelling logic. The dam continued to be a "massive \$150,000,000 hydroelectric dam" held up only by the little snail darter.

And the Little Tennessee River did not make it. The courts that, perhaps against their instincts, had held to the law and applied it in the endangered species litigation, dropped the ball in overtime. When the Cherokee Nation brought the constitutional case to stop the flooding of the valley in spite of the statutory override that the appropriations pork barrel had engineered, the Sixth Circuit declined the invitation, overriding the first amendment argument through a series of gyrations designed to defer to the completed political process, and the Supreme Court went along.<sup>185</sup> Shortly thereafter the dam's gates

184. The author's logbooks alone list 147 reporters contacted.

185. The Cherokees mounted a constitutional case based upon their first amendment right to free exercise of religion; Chota, the site of their most holy cultural place, would be destroyed. Led by two traditional medicine men descended from Sequoyah, the Cherokees filed suit to enforce religious rights that had been specifically recognized in the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1982). See Affidavit of Ammoneta Sequoyah (Oct. 11, 1979), *Sequoyah v. TVA*, 480 F. Supp. 608 (E.D. Tenn. 1979) (translation of original affidavit written in Cherokee) (available at Tellico Archives, Boston College Law School):

I am a Cherokee Medicine Man as my father was a medicine man and my grandfather was a medicine man.

...

I still go back to Chota and to the River for my medicine. . . .

. . . If the water covers Chota and the other sacred places of the Cherokee along the River, I will lose my knowledge of medicine.

If the lands are flooded, . . . the strength and power of the Cherokee will be destroyed.

I can not live without practicing medicine, because it is what I live for.

Judge Taylor dismissed the suit on the ground that in order to exercise first amendment religious rights one must own the land on which they are asserted. *Sequoyah*, 480

were closed and Nell McCall's house was bulldozed on the evening news, showing America, for the first time, that there was more to Tellico than a little fish.

### RETROSPECT

The overall systemic conclusions that one can draw by looking back at this one story must be measured. They certainly, however, are sobering for those who have trusted that law and fact and logic have a compelling force within our governmental system that will inevitably be served when a case is clear on the merits, no matter what the special interests arrayed against it. Readers may draw their own conclusions from the narrative, a process with which the citizen participants also continue to wrestle, seeking to harvest something useful.

Perhaps the best way to sum up the Tellico story is that only in America could citizens so lacking in money and political power have taken such a dauntingly complex issue through the legal system to the level of a national debate. And more soberingly, perhaps only in America could a nationally important case once having been so developed in fact, law, economics, and common sense, have been crushed so cavalierly as a function of media caricature. It is not practical for observers of modern public interest citizen litigation to put their trust only in the legal system, though that can carry far. The fabric of our society's decisionmaking clearly involves preponderant forces in the political process, and also a rather ham-handed but potentially critical force represented by the media, our national information system. One would hope that as the pressures of society grow more complex, the response of our national information system, as of the courts, will become correspondingly more complex, rather than increasingly simplistic.

Pluralistic democracy—viewed here as an openness of the official decisionmaking system to the rational arguments of citizen “outsiders”—emerges from this narrative not as just a nice idea or catchy epigram but as a societal strategy that is critically im-

---

F. Supp. at 612. On appeal, the Sixth Circuit was understandably wary of Judge Taylor's rationale but nonetheless refused relief on the ground that Chota was not central to the Cherokee religion, a test that had not been addressed at oral argument. *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980). Ammoneta Sequoyah and his brother, who was also a traditional medicine man, both died the year after the Valley was flooded, on August 22 and January 25, 1981, respectively.

portant for coping with the extraordinary complexities of our natural, economic, political, social, and planetary circumstances. The governing system—law, politics, media—that allowed the Little Tennessee River to die for no good reason must learn the dangers of a narrowed field of view and insulated official decisionmaking for the long-run prospects of our collective national endeavor.

Otherwise, as a *New York Times* editorial once put it, referring to the Appropriation Committee's sleight of hand that finessed so many years of the citizens' work and permitted the dam to be completed, "This sort of thing endangers more than fish."<sup>186</sup>

---

186. *Looking Down*, N.Y. Times, June 20, 1979, at A22, col. 2.