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Supreme Court of the United States

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Transcript:

Argument of Griffin B. Bell

Chief Justice Warren E. Burger: We will hear arguments first this morning in Tennessee Valley Authority against Harem J. Hill.

Mr. Attorney General.

Mr. Griffin B. Bell: Your Honor and may it please it the Court.

I appear on behalf of the government in this case.

My colleague, Mr. Daniel Freidman is here with me, as does Mr. Herbert S. Sanger, Jr. who is a general counsel to the TVA.

In this unusual case, as Attorney General, I agree that the Secretary of Interior could take a position opposite our position in this court and I have included -- I have stated his position in writing as an Appendix to our brief.

I understood that this is not violating any policy of the Court.

Historically going back into the Eisenhower Administration, on -- on a rare occasion, this has been done.

I am, of course, not arguing the Secretary of Interior's position, but it is well-stated in our note to Court, the court will take note of it.

Now, this case presents a conflict between the snail darter, an endangered specie under the Endangered Species Act and the Tellico Dam Project which is part of the TVA system.

Tellico Dam Project is just not a project, it is a multipurpose project designed to create an amicable body of water, lake to power, industrial development, flood control, and recreation on the Little Tennessee River.

The Little Tennessee River had its origins in the mountain, mountains of North Georgia, flows in the northwest direction generally, in the Knoxville Tennessee area and finally into the Tennessee River, and meets the dams in the TVA system or the Tennessee River.

There are 12 dams on the Little Tennessee River already.

There is not a dam in the last 34 miles of the Little Tennessee before it reaches Tennessee.

So you have got 34 miles of open free-flowing stream now.

The dam in question, Tellico, is located at the confluence to the Little Tennessee and Tennessee.

It will impound a body of water, rather large at the point of the dam, bagging up the river for the 31 of the 34 miles to some extent.

It will not -- that dam itself will not generate electrical power, but this dam, Tellico would then there, the Fort Loudon Dam on the Tennessee, near the canal connection, some 850-Feet where this extra water will be impounded on the Tennessee, little Tennessee will go over into the Fort Loudon impoundment and there it will be used to generate electricity in the Fort Loudon generating plant and will generate enough electricity to supply roughly 20,000 homes.

Justice William H. Rehnquist: General Bell, am I right in thinking that the Tellico Dam itself is on the Little Tennessee prior to its confluence with the Tennessee?

Mr. Griffin B. Bell: Right, just before the confluence.

I think it will help if I give a brief chronology of the project.

It was authorized by Congress in 1966.

Construction began in 1967.

In 1972, there was a lawsuit commenced based on the fact that they had not filed an environmental statement.

That litigation went on for about a year-and-a half.

It went to the District Court, Sixth Circuit Court of Appeals twice and finally TVA prevailed.

They commenced working again on the dam and on the project.

Chief Justice Warren E. Burger: That was before the discovery of the existence of the snail darter, was it?

Mr. Griffin B. Bell: Yes, sir.

It was in December of '72 that it began, August '73, the snail darter was discovered.

The snail darter is a darter of the perch family.

There are 130 known varieties of darters.

There are 85-90 in Tennessee alone.

There are 11 in the Little Tennessee River.

There had been 8-10 darters discovered in this last five years.

It is known as a snail darter because it eats fresh water snail which are found on the bottom of the Little Tennessee.

I have in my hand a darter, a snail darter, it was Exhibit 7 in the case when it was tried and we brought it with us so that you can see it.

It is 3 inches.

It would be a full grown snail darter, about 3 inches in length.

Justice John Paul Stevens: Is it alive?[Laughter]

Mr. Griffin B. Bell: I have been wondering where its end is, if it is.[Laughter]

But it seems to move around.

I have been puzzled with all that.

Justice John Paul Stevens: Mr. Attorney General, your exhibit makes me wonder.

Does the government take the position that some endangered species are entitled to more protection than others?

Mr. Griffin B. Bell: Well, we have -- I -- I do not take it as one because I do not have to.

I do not have to reach that point.

Justice John Paul Stevens: Your argument would apply to every endangered species, American eagle, no matter what it might be, is that right?

Mr. Griffin B. Bell: Absolutely, that is what the Sixth Circuit held.

I would not say that.

Justice Potter Stewart: The statute -- the statute, the Endangered Species Act, does not distinguish as among various priorities of endangered species, does it?

Mr. Griffin B. Bell: It does not.

It looks to the list.

Justice Potter Stewart: Yes.

Mr. Griffin B. Bell: Once it gets on the list, it is a -- it is an endangered specie and then this case it goes much further because a critical habitat is a thing.

Justice Potter Stewart: The snail darter is on the list?

Mr. Griffin B. Bell: It is on the list and this particular area has been designated as a critical habitat, which means that under the holding of the Court we cannot move the snail darter as we have.

That would not be enough.

You have to save the habitat.

Unknown Speaker: General Bell, there is something in the briefs about efforts of transplantation and I wondered can you bring us up to date on that?

Have they been successful?

And secondly, I would like to know whether the construction already done to the dam has so endangered the species that it is not going to survive anyway?

Mr. Griffin B. Bell: There has been a transplant.

It has been going on since '75.

The best information I have is, this is an unusual record.

There is a lot of things that you can find out by looking in the petition to the Secretary and all sorts of things, it has been successful.

There are some 700 transplanted.

There are about 2,000 there now.

It has been going on for two years.

The argument is it takes 3-5 years to be sure that there has been a successful transplant.

Unknown Speaker: Where were they transplanted?

Mr. Griffin B. Bell: They were transplanted from the Little Tennessee to the Hiwassee and, there, they found a singular body of water, stream, and snail -- fresh water snail for darters.

Justice Byron R. White: This is in the -- it is not in the record of this case?

Mr. Griffin B. Bell: Some of it is in the record, not the success story.

It is in public documents that we filed with the Secretary when we tried to take the -- the petition filed to take the snail off of the list.

Justice Byron R. White: Of course, everything in those documents may not be true?

Mr. Griffin B. Bell: Exactly.

I am not saying it is the truth.

Truth is what I found.

Justice Thurgood Marshall: But TVA did ask for it to be taken off?

Mr. Griffin B. Bell: They did and, after a year, the Secretary denied it just in the last two or three months, maybe in December.

After this darter, snail darter was discovered, of course, TVA had unusual agents and they only have authority to do whatever they can get money to do.

They are self-authorizing known in the government and they have to get money every year.

There has been money appropriated for this dam every year through '77 and it is a small figure in the '79 budget to complete it.

The dam itself is completed.

All you have to do is shut the gate, close the gate just all the way.

It is just sitting there.

If you will notice in one of the amicus briefs, Southeast Legal Foundation, they have got some data they have developed out of the Secretary of Interior's record that the snail darter is gone anyway that once they built these sluice gates in -- again in the (Inaudible) dams, the lava drift downstream and they are not able to get back.

So, it is not enough to just leave it or hold if you have to do something to the dam to take part of it out to restore the natural habitat.

In the chronology, they were various things said in the Congress which I will mention in my argument.

The issue presented is all the construction of the Endangered Species Act Section 7, the District Court wanted to buy it on the balance of equities, taking the position that it was not to be applied completely retroactively that you ought to consider the stage of development of project.

The Sixth Circuit said because there was no other way to preserve the habitat, much less the darter, that they had to give literal effect to the statute and enjoin the project no matter what stage of completion.

The statute itself is set out on page 2 of my brief and the critical language is number one; shall consult, but then says that the agency, that would be the TVA here, in carrying out programs refers to taking such action, the agency must take such action necessary to ensure that actions authorized, this was the key language, funded or carried out by them do not jeopardize the continued existence of such endangered species.

Now, our argument is that by the way that -- the language of the statute itself can be construed to support the District Court and allow this dam to be completed and operated and in the end they have cited other things that I will argue to support that.

The District Court used a hypothetical which draws -- really draws the better than anything I found in a whole case.

The District Court said if the plaintiff's argument were taken into its logical extreme, that will require court to hold impoundment of water behind a fully completed dam if an endangered species was discovered in the river on the day before the impoundment was scheduled to take place.

The District Court said that would be too extreme.

The Circuit Court said "we disagree."

That is what the Act means.

You would have to shut down the dam the day before.

We say that that is so extreme that it would prohibit an agency from maintaining a facility that was found to threaten a habitat of a newly discovered endangered species.

We not only say that by way of argument, the Secretary has put it in his regulations, 50 CFR 402.03, just that.

That Section 7 applies to all activities where a federal control or involvement remains, which in itself could jeopardize an endangered species or critical habitat.

So that is the issue that is presented.

It is the issue that must be resolved.

Can there be a balance in the equitable factors in deciding whether this action taken in the meaning of the statute can be taken.

Justice William H. Rehnquist: General, when you say balance in the equitable factors, is one of the ways that that would be done, the decision of the District Court or the Court of Appeals whether an equitable injunction would issue?

Mr. Griffin B. Bell: Yes sir.

We think the three key actions modified, governed by the ways authorized, funded, or carried out.

If you give carried out the same meaning on a para material basis as authorized or funded, it would read then that the agency had to have choices.

What are the alternatives?

Now, ordinarily there are choices.

Here, there were none.

It was one or the other as justices at both courts saw it.

The two cases where there were choices was Sandhill Crane case in the Fifth Circuit where the choice and option and alternative available to the Director of Transportation was simply to move another change and save the Sandhill Crane.

Now, that is the National Wildlife Federation versus Coleman.

The other case was the Indiana Bat case which was in the Eight Circuit and there the -- and I got into this thinking what is the scheme of this statute.

The Secretary admits in his regulations that the Coleman holds as does this Eighth Circuit case Sierra Club versus Froehike that the Secretary of Interior does not have the veto power, but the Act also allows a suit by a citizen.

So, the citizen can go in court and get the court to veto.

That is what happened here.

They said you cannot use this project.

So, I started looking and try and find the scheme of the statute because somebody has got to face it somewhere along the line and it seems to me the Eight Circuit in Sierra Club versus Froehike had it right.

That -- that -- that case in -- they said that this impoundment behind this dam would fill caves with water and destroy the Indiana bat.

There were some facts showing it.

There were a lot of bats in different parts of the country

Not all the bats in this area -- within Missouri would be destroyed.

The court said the way to approach this is, first, have in mind that the Secretary of Interior does not have a veto.

All the duty on the acting agencies is to consult.

Consider all the alternatives and then retest it and that is reviewable in court, and retest it on an abusive discretion, was it an abusive discretion?

I think in essence, that is what the District Judge did.

He took all the factors.

He said this dam is finished for all intents and purposes.

They have moved these darters, snail darters over to another place.

We do not think that the statute was intended to be applied retroactively, at least it was a presumption that it should not be applied retroactively, taking all these things into consideration, I hold that the dam can be used and the project move forward.

In other words, he applied the Endangered Species Act.

Chief Justice Warren E. Burger: What you are saying, I take it, is that the Endangered Species Act is not to be applied or was not intended by Congress to be applied to projects that were already under way?

Mr. Griffin B. Bell: Well, I think it does apply.

No, I am not saying it does not apply.

It does apply but then you consider what stage of development is the project in, what are the reasonable alternatives?

Could you change it?

Could you change the design?

Chief Justice Warren E. Burger: Is one of the factors to be weighed the fact that \$120 million has been spent at this point?

Mr. Griffin B. Bell: Exactly.

That would be one and the District Judge weighed that.

I think this kind of language is the strongest argument in the favor of my position that I have been able to find as I found the Secretary's own regulation which was in effect when the District Court decided this case.

This was what they call a tentative regulation.

It was not a final regulation, but this is what it said "Neither Federal Wildlife Service or the National Fishery Service as part of the Department of Interior intends that Section 7 bring about the waste that can occur if an advanced project is halted."

This is on -- on a footnote on page 28 of our brief.

The effective agency must decide whether the degree of completion and extent of public funding of a particular project to justify an action that may be otherwise inconsistent.

That is when the Secretary had a chance to write a regulation before he had ever found out about the Sixth Circuit opinion.

He did not know they were going to hold as it did.

His regulation has since been changed, to recite the Sixth Circuit opinion or the Sixth Circuit ruling, but this was before we had any ruling, he thought this is what directly the statute meant.

Now, that is one -- one argument.

The next argument, first is, you can read this language itself as a line that the District Court result and is avoiding the highest result of the Circuit Court.

This second one is the Secretary's own regulation at that time.

Third is that Congress, three times: '75, '76, '77, said "go forward with this project.

We know about the snail darter."

This was in a committee report, granted in the figures of this statue, "Go forward.

We intend for you to complete this project."

That was a -- that was a -- we do not have to argue it was a pro tanto modification of the endangered species statute, we say that that is persuasive of the construction that the District Court had found.

Justice John Paul Stevens: So any of the -- on any of the grounds that you are suggesting -- you are suggesting that the statute itself be construed so there is no violation here if these -- if these gates are closed?

Mr. Griffin B. Bell: That is right.

Justice John Paul Stevens: There is no violation of the statute at all?

Mr. Griffin B. Bell: No violation.

Justice John Paul Stevens: And although the statute applies, you construe the statute based on the various facts?

Mr. Griffin B. Bell: Balancing the factors, I would say it applies.

Justice John Paul Stevens: Your argument is not that there is a violation of the statute, but an injunction is not authorized?

Mr. Griffin B. Bell: That is it.

Justice John Paul Stevens: That is not your argument, is it?

Mr. Griffin B. Bell: That is my argument.

Justice John Paul Stevens: You do not concede there is a violation of the statute though?

Mr. Griffin B. Bell: No, I do not concede there is a violation.

Justice John Paul Stevens: You are saying you construe the statute so that closing the gates would not violate the statute?

Mr. Griffin B. Bell: That would prevent there being a violation.

The facts, taken as a whole, would prevent there being a violation of the statute.

I do not concede it.

I say this.

I concede the statute applies though.

I think it does apply.

Excuse me.

Justice Lewis F. Powell: Mr. Attorney General, I understood your principle argument to be that the statute could not fail to be construed to apply to a project that was either completed or substantially completed?

Mr. Griffin B. Bell: Well, that would be like -- I don't know if a court has jurisdiction, *Bell v. Hood*.

You have to have a hearing to find out if you have jurisdiction.

You would have to have a hearing to see if the statute could be read as applying to these particular facts.

Justice Lewis F. Powell: I understand you would have to have a hearing, but if the fact were simply this, that the main dam in the Tennessee Valley is completed, nobody argues that it has not been completed because it has been 34 years, suppose they found the snail darter down in that lake tomorrow, the Secretary of the Interior claims you must remove the dam?

Mr. Griffin B. Bell: That is exactly right.

Justice Lewis F. Powell: Do you think the statute applies to that?

Mr. Griffin B. Bell: I do not think the statute can be applied to that.

Justice Lewis F. Powell: Do you think it could be construed reasonably to think that the Congress of the United States would require that that dam be removed?

Mr. Griffin B. Bell: I do not.

That would be a completed project.

That is farther than our case.

Justice Lewis F. Powell: My question was addressed to a completed project, one substantially completed and you told us at the beginning of this argument that all that was necessary to be done was to close the gate?

Mr. Griffin B. Bell: Close the gate, plus, that is a dam.

Now, there are some roads to be completed.

That is a \$1.8 tens of millions in the '79 budget, but that is to complete some roads and bridges.

The dam itself is finished, all the landscaping has been done, and that sort of thing.

So it is completed.

I have not argued that it is a sort of a thing, say, where a road has been finished and five years later they found something there, an endangered species, and they say would they remove the road.

Here, a good example would be if they found a plant growing on a bank of this lake, sometimes when they have the water down, during the winter time they would lower the water 5-feet and they find this plant and say you will never raise the water back up because there is still action to be taken.

There was a little action left to be taken here.

Justice Lewis F. Powell: Tiny little bit.

Mr. Griffin B. Bell: [Laughter]Very little, but a little.

Justice Lewis F. Powell: How much money has the government spent on it?

Mr. Griffin B. Bell: \$110 million.

Justice Lewis F. Powell: \$110 million.

The government has appropriated \$2 million to transplant these darters.

Mr. Griffin B. Bell: I have not gotten to that.

In the 1977 Appropriations Act, they appropriated \$2 million to transplant the snail darter.

I view that as a consultation by Congress, not only by the agency, but the Congress got into it and tried to resolve the problem.

Chief Justice Warren E. Burger: Three times, this project and the snail darter problem has been called to the attention to Congress, has it not?

Mr. Griffin B. Bell: It has been and every time they said "go forward."

That would be the last point that I would argue if I need to argue.

Justice John Paul Stevens: Did Congress ever grant an exemption from the Endangered Species Act for the snail and they were very much aware of this problem, were they not?

Mr. Griffin B. Bell: They were aware of it.

Justice John Paul Stevens: It would not have been the most unambiguous way to resolve the whole thing?

Mr. Griffin B. Bell: That would be it and that is my last point.

Justice John Paul Stevens: Much better than just hiding it in the committee report and appropriations?

Mr. Griffin B. Bell: In '77, they put it on the face of the statute, \$2 million to move it.

Justice John Paul Stevens: \$2 million, so they thought the snail darter was worth \$2 million, but not \$130 million?

Mr. Griffin B. Bell: I would say that that would be fair --[Laughter]

Justice John Paul Stevens: What?

Mr. Griffin B. Bell: Fair to fair inference.

Justice Thurgood Marshall: Mr. General, it is easy to dump it on us and we have never even seen the snail darter?

Unknown Speaker: Yes, we have.[Laughter]

Mr. Griffin B. Bell: That one.

Justice Thurgood Marshall: That one, you do not even know if he is alive.

Mr. Griffin B. Bell: [Laughter]No, that is right.

Justice John Paul Stevens: Mr. Attorney General, can I ask one question about your argument about why the statute does not apply.

Are you saying that the statute merely requires consultation or are you saying that completing the dam would not be an action within the meaning of the statute?

Mr. Griffin B. Bell: I am saying that completing the dam would be -- I am saying it would be an action.

Justice John Paul Stevens: You are admitting it would be an action?

Mr. Griffin B. Bell: Right, because there is still some action to be taken.

But I am saying that when you view what -- whether you are violating the statute, whether there ought to be an injunction, now that is all a citizen is entitled to get as an injunction under this Endangered Species Act.

You have to consider all the factors in before the Chancellor acts and I think the statute does not prevent considering all the factors.

One fact is that this dam is basically completed.

Another fact is that they have -- they have moved the snail darter over to another place in an effort to accommodate snail darters.

Third is that the law is very clear that the Secretary of Interior does not have the veto.

Has the -- has the TVA consulted in good faith and done all they can do under these circumstances?

Justice Potter Stewart: The statute requires more than just consultation in good faith.

It does require consultation, but then it requires a rather clear in unambiguous words, "the agency to take such action necessary to ensure that actions authorized, funded, or carried out by it do not jeopardize the continued existence of the endangered species or the destruction or modification of its critical habitat," action necessary to ensure that -- that their actions do not jeopardize the continued existence and as I understand it, it is conceded that the completion of this dam will jeopardize the continued existence of this endangered species or the modification of its critical habitat?

Mr. Griffin B. Bell: We do not concede.

We concede it will modify this critical habitat.

Justice Potter Stewart: Which has been found to be the critical habitat, as I understand it.

Mr. Griffin B. Bell: Well, unless this moving over to the Hiwassee River makes that into a non-critical habitat.

Justice Potter Stewart: The Secretary has determined this to be the critical habitat, has he not?

Mr. Griffin B. Bell: At the time.

Justice Potter Stewart: Yes and has determined, this little fish to be an endangered species?

Mr. Griffin B. Bell: Right.

Justice Potter Stewart: And it seems the language of the statute that I have just read aloud from my own information, and to refresh your memory, it seems to me to be an unambiguous requirement?

Mr. Griffin B. Bell: Well, that is what the Sixth Circuit said.

Justice Potter Stewart: Yeah, I know, but it is not what the word is saying?

Mr. Griffin B. Bell: Not to me.

In the first place, I -- I do not -- I think you very often say is a statute intended to be retroactive?

There is a presumption against retroactive construction of the statute.

This is certainly retroactive.

It has been applied retroactively.

Justice Thurgood Marshall: Mr. Attorney General, what would happen if you found some snail darters in the basement of this building?

We tear the building down, this building?

Mr. Griffin B. Bell: No.

I do not know.

You would have to ask the Sixth Circuit.

I think they would enjoin you from a function if they found it to be a critical habitat.

Justice Potter Stewart: Has there any been any proposal in Congress to amend Section 7 of the Endangered Species Act?

Mr. Griffin B. Bell: Yes, they asked to exclude this snail darter.

Justice Potter Stewart: Not to generally amend the language?

Mr. Griffin B. Bell: Not that I know of.

Justice Potter Stewart: Specific exemption or exclusion of this?

Mr. Griffin B. Bell: Of the snail darter.

Justice Potter Stewart: What is the status of that?

Mr. Griffin B. Bell: It is pending on a committee and it has not come out of the committee as I understand.

Justice John Paul Stevens: Of course that would still be possible, Mr. Attorney General, if we were to sustain the injunction Congress could always exclude the snail darter later, but if we let the snail darter be extinguished, I guess the choice is irrevocable, is it not?

Mr. Griffin B. Bell: If you did that, but I do not know of anybody trying to extinguish a snail darter.

Justice John Paul Stevens: The Secretary has found that they will be extinguished if the dam is closed.

You disagree with the facts, but do we not have to assume that is the fact for purposes of decision?

Mr. Griffin B. Bell: No.

The record shows clearly that the snail darter has been transplanted to the Hiwassee River.

Justice John Paul Stevens: Therefore, it is not the critical habitat, is that right?

What assumption do we make for purposes of deciding? Is the snail darter going to be extinguished or not?

Mr. Griffin B. Bell: We cannot find that.

Only the Secretary, under the law, can find that.

Justice John Paul Stevens: He has found that it will be, has he not?

Mr. Griffin B. Bell: That is what he found at one time.

Justice John Paul Stevens: But do we not have to assume that when we decide the case?

Mr. Griffin B. Bell: Well, I do not think so.

I think it does violate the statute.

It violates presumption against retroactivity to apply this finding to this basically completed project.

I think the statute means that you have to have some choices.

Unknown Speaker: Mr. Attorney General, to what agency was that \$2 million appropriated?

Mr. Griffin B. Bell: TVA.

Unknown Speaker: What is TVA supposed to do?

Mr. Griffin B. Bell: Carry on with their project to transplant the snail darter.

Unknown Speaker: In other words, to see if they can do something which will not jeopardize the continued existence of the species?

Mr. Griffin B. Bell: Right, which they have been doing.

Unknown Speaker: And if they fail?

Mr. Griffin B. Bell: They have not failed.

There has never been a hearing on that.

Unknown Speaker: I know.

The fact that Congress said here, "Here is \$2 million.

See if you can do something about preventing jeopardy to the continued existence of the species."

I would think that would suggest that Congress intended as I "cannot" and then they cannot go on the dam?

Mr. Griffin B. Bell: I would say that Congress is trying to accommodate both problems.

Unknown Speaker: All we know is there is a one-line appropriation, I take it, is it not?

Mr. Griffin B. Bell: That is right.

That is it.

Then you know what is in the committee reports.

The committee reports, three times three years, have said go forward.

Unknown Speaker: I know, but --

Mr. Griffin B. Bell: But, it have not been in the statute.

Unknown Speaker: If it came to the President to veto, what would be vetoed, the committee report or the statute?

Mr. Griffin B. Bell: He will veto the statute.

Chief Justice Warren E. Burger: He can veto the appropriations, could he not, and stop the project any time since 1975?

Mr. Griffin B. Bell: He has not done that.

He has put it in the 1978 budget.

Justice Potter Stewart: Mr. Attorney General, why should the court remand this case to have the record be brought up to date?

A lot of things happened since the Court of Appeals decided.

Mr. Griffin B. Bell: That is exactly right.

It might well want to do that.

I am not objecting to it.

I am not advocating that.

I think that the Sixth Circuit is in error.

Justice Potter Stewart: Is the Secretary's refusal to remove the fish from the list, he has done that in the last few months you say, or is it the habitat?

Mr. Griffin B. Bell: Well, he did not have a hearing on it.

Justice Potter Stewart: He refused though, did he not?

Mr. Griffin B. Bell: He refused.

Justice Potter Stewart: Is that subject to judicial review?

Mr. Griffin B. Bell: I do not know.

Justice Potter Stewart: If it is, has reviewed been sought?

Mr. Griffin B. Bell: No, I think you could have a review on the denial of due process, to begin with, that you cannot get a hearing.

Justice Potter Stewart: I know, but is the Secretary --

Mr. Griffin B. Bell: The case is pending on him.

Justice Potter Stewart: You just do not know whether there are procedures to secure review of the Secretary's refusal to remove the snail darter?

Mr. Griffin B. Bell: I know.

I am satisfied you can review it on an administrative procedure act.

Justice Potter Stewart: By a suit in the District Court or by methodically, I guess?

Mr. Griffin B. Bell: I think it would go to District Court.

Unknown Speaker: But that is not a change, that is just the maintenance of the status quo?

Mr. Griffin B. Bell: It is a denial of a --

Unknown Speaker: It is a refusal of the Secretary changes the status quo.

Mr. Griffin B. Bell: Right.

Unknown Speaker: That is not a change?

Mr. Griffin B. Bell: I have not even looked into that.

I thought we would come up here with the case and see what happens before we get to worrying about getting the Secretary to change.

The Secretary, at one time, took the position that you had to wait three years to know if the transplant was successful.

We are in the third year now.

It has not been three years.

Justice Lewis F. Powell: Mr. Attorney General, may I ask you a friendly question?[Laughter]

Let us assume that in order to resolve this issue somebody introduced a bill in Congress saying explicitly that Section 7 shall apply to every completed federal project in the United States.

Do you think many congressmen who voted for that clarification of this statute would be reelected?

Mr. Griffin B. Bell: No, but they would not vote for it to begin with.

Justice Lewis F. Powell: That is my point.[Laughter]

Does that not suggest that nobody, really no one, rationally could apply this to a completed project?

Mr. Griffin B. Bell: It does to me.

Under the Sixth Circuit holding, it would have to be applied.

That regulation is saying now.

Justice Lewis F. Powell: May I ask you one other, maybe a less friendly question.

You commenced your argument and I felt for you by saying that it was not without precedent for two departments of the government to come down to court in an antagonistic position.

I speak for myself but, it is not easy for me to resolve issues of vast importance to our country when two cabinet level departments had sought to fight.

I wonder why these things are not determined that the cabinet level rather than submitting it to us?

Mr. Griffin B. Bell: You say that is not so friendly.

It is a very friendly question.

It gives me an opportunity to say that I do not feel with this system.

We have one Attorney General and one Solicitor General, and I think it ought to be it.

As long as you can do it, people will ask you to do it.

Unknown Speaker: Perhaps you may have heard that when Mr. Justice Frankfurter was serving.

He thought that was just outrageous on behalf of the Solicitor General to come here and offer us conflicting views of two cabinet departments, and he said so.

Mr. Griffin B. Bell: I do not favor it myself.

Unknown Speaker: The trouble is that, in some instances, Congress has expressly authorized it.

Mr. Griffin B. Bell: They have?

Unknown Speaker: Under the Interstate Commerce Commission.

Justice Thurgood Marshall: The ICC is the only one.

Mr. Griffin B. Bell: But in this case, we should speak with one voice.

We speak with two because the court will permit it is the argument made to me.

At no one time we have done it since I have been Attorney General.

I do not favor it, but I am glad I had a chance to say so.

Chief Justice Warren E. Burger: Mr. Attorney General, did you have any obligation to present the views of the Secretary of Interior or was that merely a matter of comity as one cabinet officer to another?

Mr. Griffin B. Bell: It was more than that.

It was a request.

Chief Justice Warren E. Burger: Request by whom?

Mr. Griffin B. Bell: By the Secretary.

Chief Justice Warren E. Burger: Has it not been historically true that the United States government in this court and in all federal courts speaks through only one voice, namely through the Attorney General of the United States?

Mr. Griffin B. Bell: That is what it ought to be.

Chief Justice Warren E. Burger: Historically, that has been the case.

Mr. Griffin B. Bell: That is and I started in the case of Meeks, there has been this one instance.

Justice John Paul Stevens: But, Mr. Attorney General, are you suggesting that if the Secretary of Interior has placed a specie on the Endangered Species list that the Attorney General could have the power to take it off the list?

Mr. Griffin B. Bell: No.

I am not suggesting that.

Justice John Paul Stevens: No matter what we do, that part of the record is before us.

The Secretary of Interior has determined that this is an endangered specie.

We have to accept that.

Mr. Griffin B. Bell: And that that is a critical habitat.

Justice John Paul Stevens: Yes.

Mr. Griffin B. Bell: That is his prerogative, not mine.

Justice John Paul Stevens: We cannot second guess him on that, can we?

Mr. Griffin B. Bell: No.

Justice John Paul Stevens: Anymore than you can.

Mr. Griffin B. Bell: If you will see his brief, he has not complained about that.

He thinks we are trying to change the substantive law about appropriations bill and that we are contesting his regulations.

That is his main point.

Justice Byron R. White: Mr. Attorney General, with regard to your statement a moment ago about other agencies of government taking their own position here contrary to what the Solicitor General might be, I indicated that Congress had expressly authorized in some instances.

I just suggested this afternoon or tomorrow we are hearing a case in which a Federal Communications Commission is taking position flatly contrary to the Department of Justice on a case.

So, it is not a rarity.

Mr. Griffin B. Bell: The Interstate Commerce Commission does, but those are about statute.

This is about a statutory action.

Justice John Paul Stevens: Exactly.

Chief Justice Warren E. Burger: Thank you, Mr. Attorney General.

Mr. Plater.

Argument of Zygmunt J. B. Plater

Mr. Zygmunt J. B. Plater: Thank you, Mr. Chief Justice, and may it please the Court.

I am Zygmunt Plater for respondents.

In this case, the respondents quite simply support the unanimous decision of the Sixth Circuit Court of Appeals that the TVA must obey the law.

Although the case arises from a conservation issue, it essentially turns on traditional questions of separation of powers in administrative law.

Justice Lewis F. Powell: Mr. Plater, Judge McCree did write separately below, did he not?

Do you feel that he was however joining the majority opinion?

Mr. Zygmunt J. B. Plater: Yes, Your Honor.

Judge McCree, below, said that he concurred with the result of the court's opinion, the fact also that, indeed, the TVA project must be enjoined because it would eliminate the species from the face of the Earth.

Justice Lewis F. Powell: Many times up here, particularly concur in the result, that means we think the majority opinion is rather poor and we have reasons of our own?

Mr. Zygmunt J. B. Plater: Your Honor, I do not want to second guess Judge McCree, but it might be noted --

Justice Lewis F. Powell: Well, you said that it was a unanimous opinion --

Mr. Zygmunt J. B. Plater: Excuse me?

Justice Lewis F. Powell: -- it may be an unanimous judgment?

Mr. Zygmunt J. B. Plater: Unanimous position taken by the Sixth Circuit that this project should be enjoined, and thank you, Your Honor.

The unanimous position then taken by the Sixth Circuit and a position taken by the Department of Interior and by respondents comes down essentially two basic points.

The first point is that Congress in 1973 when these species were discovered, wrote a mandatory statute to the agencies that it, itself, Congress had created prohibiting those agencies from taking actions which would jeopardize or destroy endangered species.

And that section is clearly violated by the dam portion of the Tellico Project and secondly, Congress has not changed the law, although Congress is reviewing public interest resolutions for the conflict, Congress has not changed the law, and this Court should not amend the law.

That is precisely what TVA's position is asking the Court to do.

To construct some form of implied informal grandfather clause exemption for this project back in 1973 as well as at the present, and construct some sort of informal statutory amendment overriding the Endangered Species Act based on appropriations funding.

Justice Thurgood Marshall: What would you have done if snail darters are on Chickamauga Dam under TVA?

What would you do?

Mr. Zygmunt J. B. Plater: Your Honor, that is a question also like the question asked by Mr. Justice Powell and the point is the biologists tell us that if you could find the species in a completed project, that would be a biological indication that that population was not endangered by the dam because indeed it was living there, established there, breeding and then, of course, no completed dam would have to be taken down.

Justice Thurgood Marshall: But suppose the Department of Interior say it was, it appeared in Chickamauga Dam?

Mr. Zygmunt J. B. Plater: No, Your Honor.

All they have is biological authority to assert that the endangered species is there and is threatened by the present circumstances.

Justice Thurgood Marshall: But suppose they say that --

Mr. Zygmunt J. B. Plater: Well, Your Honor --

Justice Thurgood Marshall: -- and they are wrong?

Mr. Zygmunt J. B. Plater: If they are wrong, then this answers the question posed also by Mr. Justice White.

There are proceedings currently under way in District Court in Tennessee challenging another listing of an endangered species arguing that the Department of Interior is wrong.

That is the way to do it.

The biological opinion of the Secretary, once established, is established and is not to be overturned by lawyers trying to debate biology.

Justice Potter Stewart: But to say you concede there is judicial review of the Secretary of Interior's action?

Mr. Zygmunt J. B. Plater: Yes, Your Honor.

Justice Potter Stewart: Either in putting species on the endangered list or in saying that for certain areas it is critical habitat?

Mr. Zygmunt J. B. Plater: The current pending action seeks a delisting of a species that has already been listed.

Justice Potter Stewart: Is there a judicial review of either finding?

Mr. Zygmunt J. B. Plater: There appears to be and respondents have no legal argument.

Justice Potter Stewart: Under the Administrative Procedure Act?

Mr. Zygmunt J. B. Plater: I am not sure what the basis of the claim there is, Your Honor.

I only know that the case is pending.

Chief Justice Warren E. Burger: Let me pursue a question that Mr. Justice Marshall put to you.

Suppose you have \$300- or 400-million dam, I do not know the value of the one he -- the cost of the one he mentioned and you are confronted with the showing that, originally, there were 300,000 of a particular species and now by the operation of the dam over a period of years, it is down to 10,000 and it is about to become extinct.

Are you suggesting that Congress intended that that dam should be torn down?

Mr. Zygmunt J. B. Plater: Your Honor, that of course is not this case.

Chief Justice Warren E. Burger: No, we are asking you a hypothetical questions to test your arguments?

Mr. Zygmunt J. B. Plater: That is a good point.

Chief Justice Warren E. Burger: As we did to the Attorney General?

Mr. Zygmunt J. B. Plater: Your Honor, the question is whether there is a remaining prospective federal action which will jeopardize the species.

It is clear under the Act that the agency does a statutory duty to take measures to try to conserve the existence of the darter, but the question of whether in a situation where there are no federal actions remaining, nevertheless the agency -

Chief Justice Warren E. Burger: The federal action is the continuance of the dam?

Mr. Zygmunt J. B. Plater: In that situation, Your Honor, that certainly is a question that would have to be raised.

We do not take a position on that argument, but the point is Congress appears to have carried -- cared very clearly about preventing the extinction of species.

There were two prior statutes, in 1966 and 1969, which gave agencies discretion and the court is reviewing them to balance the question and those statutes did not work.

So that Section 7 was written in 1973 as mandatory. Your Honor's question is one that is certainly difficult to handle.

I think that the easiest way to handle that is perhaps to take the hypothetical that General Bell ably brought out and that is this.

There may be cases where the public interest is so intimately involved with -- with the case and a species would be jeopardized that indeed there must be a hard decision taken and the species rendered extinct.

Now, that has never had to occur.

There is never, in human history, been a conscious extinction of the species, but we say that indeed that may be the case.

The point is, however --

Justice Thurgood Marshall: Do we know right now how many snail darters are there?

Mr. Zygmunt J. B. Plater: We know approximately, Your Honor and this is --

Justice Thurgood Marshall: Well, how many have been removed?

Mr. Zygmunt J. B. Plater: In the present case, Your Honor, we do not have a full record on the transplantation, but these are the facts as best we know them.

Justice Thurgood Marshall: Do we not need that?

Suppose where they now live and they are six and eight inches long and they are just having a ball --[Laughter]-- would your -- would your argument be the same?

Mr. Zygmunt J. B. Plater: Your Honor --

Justice Thurgood Marshall: Would your argument be the same?

Mr. Zygmunt J. B. Plater: No, Your Honor, it would not be if the Secretary of Interior changed --

Justice Thurgood Marshall: You would not have any argument, would you?

Should we not find that out?

Mr. Zygmunt J. B. Plater: Your Honor, if the Secretary of Interior changes the listing of the species and the critical habitat then clearly this case is no longer --

Justice Thurgood Marshall: That was not my question.

Mr. Zygmunt J. B. Plater: Excuse me, I misunderstood.

Justice Thurgood Marshall: My question was, should we not know what the transplanted snail darters, how they are faring?

Should we know that before we decide this case?

I am not talking about the Secretary of Interior, I am talking about us.

Mr. Zygmunt J. B. Plater: All right.

Your Honor, the factual situation presented in our brief is up to date as well as is known by anyone and that is, in this situation, TVA claims that approximately 2,000 fish now exist in the Hiwassee, but as they revealed in the Senate hearings and noted in footnote 20 of our brief --

Justice Thurgood Marshall: How can we accept it when you are now getting ready to say that what they say is not true?

Mr. Zygmunt J. B. Plater: Your Honor, that is based on arithmetic.

Justice Thurgood Marshall: How do we know what is true?

We are not a fact-finding body.

Mr. Zygmunt J. B. Plater: Your Honor, that is correct.

The TVA's biological data perhaps is determinative here.

In December of last year, they did transects in the Hiwassee River and they revealed out of 710 fish that were put in, five fish left in the transects on the original shawls and I believe it was nine juveniles near the flowage of the Ocoee River.

That is the latest scientific evidence on how many fish are on the Hiwassee.

TVA, therefore, concluded that the transplant is working well, but dispersed.

Justice Thurgood Marshall: If I may correct you, that is the latest scientific evidence you know about.

Mr. Zygmunt J. B. Plater: Your honor, I have checked the records of the Secretary of Interior (Voice Overlap)

Justice Thurgood Marshall: Suppose there is some other records available, do you seriously object to this going back?

Mr. Zygmunt J. B. Plater: Your Honor, they may be reasons for this case to be remanded, however, transplantation is not a fulfillment of the Act, and therefore, that would be an incidental inquiry.

We believe that in --

Chief Justice Warren E. Burger: Do you mean that even if a successful transplant took place, you would still be opposing the functioning of this dam?

Mr. Zygmunt J. B. Plater: Not at all, Your Honor, but we would request that the legal procedures be followed.

If the transplantation were a success so the species were no longer endangered, the Secretary of Interior petitioned by TVA would review the biological data for this Court and for Congress, would certify that it is no longer endangered, would take it off of the list and that would be the end of the question.

Justice Potter Stewart: Or else -- else he could simply say that this is no longer its critical habitat?

Mr. Zygmunt J. B. Plater: Your Honor, under the Act, I believe that both of the elements are separate violations, that is to say it is illegal for an agency either to render a specie extinct or to destroy its critical habitat.

Justice Potter Stewart: Or to modify its critical habitat, but if this -- this continue to be an endangered species, but if the area to be flooded by the dam is no longer its critical habitat, there would be no violation of the statute.

Mr. Zygmunt J. B. Plater: Unless the Secretary --

Justice Potter Stewart: If the fish thrived in the Hiwassee River?

Mr. Zygmunt J. B. Plater: Your Honor, if the fish thrives in the Hiwassee River, then indeed as Mr. Chief Justice Burger suggested, through this procedure this case would come to an end, but that does not appear to be the biological evidence.

As a matter of fact, it appears that the best place for species to live is in its only known natural habitat.

I would indicate to the Court that --

Justice Potter Stewart: Well, that is not historically true for every species.

There had been all sorts of species imported in the new areas where they do much better than they ever did in their original homes?

Chief Justice Warren E. Burger: And that is history of evolution?

Mr. Zygmunt J. B. Plater: Your Honor, however, apparently the Hiwassee River is connected geographically to the Little Tennessee and biologists tell us that if the Hiwassee were a good habitat for the species, it would be there by the process of evolution.

But, rather, this species turns out to be a highly sensitive indicator of precisely the qualities of the habitat that the citizens were fighting about in this case for years before the snail darter was known to exist.

Justice Lewis F. Powell: Mr. Plater may I interrupt you right there.

Apart from the biological interest, which I say you do not challenge, what purpose is there, if any, by these little darters, are they used for food or --?

Mr. Zygmunt J. B. Plater: No, Your Honor.

When Congress passed the law, it made it clear that the purpose of the Act was to prohibit the extinction of species for a variety of reasons.

One of them is where there is a food value or direct economic value, others for scientific study and a philosophical question that indeed a specie should not be eliminated, biological diversity, but ultimately, there is a utilitarian purpose which is served precisely by the snail darter.

That is to say, even though it does not have food value, as -- as I was indicating, it is highly sensitive to clean, clear, cool flowing river waters and after 68 dams through the TVA river system, 68 of them, one after another, the range of the snail darter has apparently been destroyed, one, by one until this last 33 river miles is the last place on Earth where the species and human beings as well have the qualities of the habitat.

Justice Lewis F. Powell: Last place has been discovered, I take it?

Mr. Zygmunt J. B. Plater: Your Honor, TVA has looked everywhere for snail darters.[Laughter]

It searched -- it appears that this river system --

Justice Thurgood Marshall: They have not checked the basement of our building here?[Laughter]

Mr. Zygmunt J. B. Plater: Your Honor, if snail darters were in the base of this building then I suspect they would not be in danger.

Justice Thurgood Marshall: They would not have found him?

Mr. Zygmunt J. B. Plater: They would have found them, Your Honor, and there would be a bounty on the snail darter's head.

Unknown Speaker: Mr. Plater?

Mr. Zygmunt J. B. Plater: Yes, Your Honor?

Unknown Speaker: Are they suitable for bait?

I am a bass fisherman.

Mr. Zygmunt J. B. Plater: Your Honor, the Little Tennessee River has a fine bass population in lower stretches both small mouth and large mouth, but they do not appear to be interested in the snail darter which is, perhaps, why the snail darter had survived also.

Unknown Speaker: They are indigestible.

Mr. Zygmunt J. B. Plater: Pardon me?

Your honor, the snail darter holds over very shallow shawls.

It is a highly specialized fish as I was indicating, an indicator of water quality.

Instead of a dead one, I have left with the clerk several prints which were exhibit 12 at trial which show the species in its natural habitat along the bottom of the water and this would be eliminated.

There are now 2,500 miles of dammed up river in the Tennessee area, more than twice the coastline of all the great lakes combined and this is the last such stretch of river which is left.

The Hiwassee transplant in -- in the evidence that Justice Marshall was discussing does not currently appear to be successful and this Little Tennessee River appears to be the only place where the fish would live.

Justice William H. Rehnquist: Mr. Plater, is it not at least unarguable part of the intent of Congress that the government simply leaves certain areas of nature alone without necessarily having a reason for living them alone, but just that they did not want any more elimination of species and so forth?

Mr. Zygmunt J. B. Plater: The Devil's Hole Popfish case which this Court decided was such a case where there was one small area which was made into a reserve.

This Court unanimously upheld that reservation --

Chief Justice Warren E. Burger: We were not faced with the conflict between the popfish and \$122 million-dam though?

Mr. Zygmunt J. B. Plater: Your Honor, that is not the conflict in this case either.

The \$120 million which Your Honor refers to is the total project cost, but the project is not primarily the dam.

As a matter of fact, the dam structure cost \$5 million, a large part of which was labor plus earth works.

It is talked about as a dam because that was certainly the focus for TVA's planning.

The \$120 million, Your Honor, is for the purchase of 38,000 acres of land, less than half of which was to be flooded.

That was condemned for resale at a profit to pay off the cost of the project.

25,000 acres of those are prime agricultural lands.

And to say that that would be lost by destroying this darter, excuse me, by -- not to consider the fact that the project includes land purchase, roads and bridges which are immensely beneficial for the people and to focus on the dam itself which Congress itself is now reassessing completely is to lose sight of the reality of the situation.

The conflict in this case is between an agency which has since 1973, when there was only a little bit of that concrete there, out of \$120 million to be spent, in 1973 they took the position that they would not comply with the Endangered Species Act and as we noted on page 13 of our brief, doubles the rate of expenditure, excuse me, trebled the rate of expenditure, doubled the amount of money spent.

That is to say the conflict in this case is between an agency which did not want to consider anything, but the original dam as proposed.

Unknown Speaker: Mr. Plater, what did you mean when you suggested Congress is now reconsidering, what --?

Mr. Zygmunt J. B. Plater: Yes, Your Honor.

Once the injunction came down, the Sixth Circuit said the law will be enforced, that is the role of the courts and the biological violation has clearly been shown.

They were immediately a series of actions taken in the proper committees with jurisdiction over the Act, that is to say the House Merchant Marine and Fisheries Committee and the Senate Public Works and Environment Committee.

They requested the GAO study to review the cost evaluation of the dam project and they found that it was highly unreliable and second, to look at what alternatives there were even today for resolving this issue.

Mr. Justice Powell talked about it as dam which is fully completed and no other alternatives.

That is the way the petitioner would characterize it, but Congress is not doing so.

The GAO study indicated that there are a series of project modifications which were suggested to TVA as early as 1974 which they rejected again and again, which still today appear to be even more profitable than the dam.

Farming, for instance, is the first industry of Tennessee and it would be destroyed in this valley area.

Tourism is the second, and I note in Appendix B, this dam project is up against the Smokey Mountains.

Justice Thurgood Marshall: You could not call roads endangered species, could you?

Mr. Zygmunt J. B. Plater: No, not at all, Your Honor.

Justice Thurgood Marshall: That is what we are talking about.

We are not talking about closing down the roads.

Mr. Zygmunt J. B. Plater: Your Honor, Congress is weighing one hand the original dam project which includes valuable investment in roads, bridges, in the valley and the purchase of lands.

Justice Thurgood Marshall: I thought the question was, was Congress considering what was going to be done about this particular matter, including snail darters like this one here?

Mr. Zygmunt J. B. Plater: Precisely.

Justice Thurgood Marshall: Not roads?

Mr. Zygmunt J. B. Plater: That is exactly right.

Justice Lewis F. Powell: Are you suggesting, Mr. Plater, that Congress may finally decide we better abandon the whole dam, at least --?

Mr. Zygmunt J. B. Plater: Yes, Your Honor.

The dam has always been only a small portion of the project.

The project was passed not for hydro power purposes; electrical power, barge, those were all minor.

It was passed to create industrially subsidized lots and more recreation in an area where you have already got 22 recreational lakes within 60 miles. Congress, indeed, is saying that although we have lost not \$120 million, but something far less than half of that, the value of the remainder may be several times greater than the purported claims for the dam.

That is to say Congress is reviewing it and Your honor I am pleased to announce that the agencies are reviewing it as well.

In the reply brief of TVA, it is noted that the new director of -- of TVA has agreed, the dam is not integral to this project, the project has benefits which can be achieved as well or better without the destruction of the valley by a reservoir.

Secondly, I was informed just today, Your Honors, that the Secretary of Interior has requested TVA and TVA have agreed to consult --

Justice Thurgood Marshall: Just speaking for myself, I am not interested in what you discovered today.

I have got a record here?

Mr. Zygmunt J. B. Plater: Your Honor, our case is fully sufficient on the record.

It shows that there is a violation.

It shows that Congress and the law-making committees is considering exactly the question Your Honor suggested --

Justice Thurgood Marshall: Does the record not also show that this dam was not for hydraulic purposes?

Mr. Zygmunt J. B. Plater: That is exactly right, Your Honor.

Justice Thurgood Marshall: Why do you not say that is what you are told today because that is in the record?

Mr. Zygmunt J. B. Plater: Your Honor, it is clear in the record that this project was being made for general regional economic development.

It is the last dam in the Tennessee Valley Authority's building history.

It is the most marginal.

It is the last one on a list of 1933 dams.

Justice John Paul Stevens: Mr. Plater, let me just interrupt you with one question.

There has been an awful lot of discussion about things that have happened since the District Court tried this case.

Is any of that relevant to our decision, anything the Attorney General said or anything you have been telling us in response to all these questions?

We have a finding of fact that this closing the dam would result in total destruction of the snail darter's habitat.

Do we have to know anything else?

Mr. Zygmunt J. B. Plater: No, Your Honor, I agree completely with Your Honor's question.

Chief Justice Warren E. Burger: Let me put another question to you that I think is an addition to that.

You have not discussed it yet and you do not have much time left.

Do you suggest that any of the legislation passed here has advocated the normal equity function of the United States District Judge in granting an injunction, a very extraordinary relief that is sought here?

Mr. Zygmunt J. B. Plater: Not at all, Your Honor.

Chief Justice Warren E. Burger: Are you suggesting that he should not function as he does with any other application for an injunction?

Mr. Zygmunt J. B. Plater: Your Honor, that question is an important one.

We do not advocate the stripping of this Court or any court of the equitable powers.

Indeed, Your Honor, we rely on Your Honor's decision in *Rondeau versus Mosinee Paper Corporation* and that is to say the equity courts had the full panoply of powers required to enforce the law of Congress.

Justice William H. Rehnquist: But *Hecht against Bowles* says you do not get an injunction automatically for a statutory violation?

Mr. Zygmunt J. B. Plater: That is correct, Your Honor, and we do not insist on an injunction.

If petitioner agreed to obey the law voluntary as the *Hecht Corporation* did in that case or as the *Mosinee Paper Company* agreed in Your Honor's case.

Chief Justice Warren E. Burger: Then you do not need an injunction because that is academic?

Mr. Zygmunt J. B. Plater: That is precisely right and the law will be complied with.

Chief Justice Warren E. Burger: But the question that I am putting to you is should not the District Court confronted with

an application to enjoin the operation of a dam in which \$122 million worth of money, one way or the other has been invested?

Mr. Zygmunt J. B. Plater: \$110 million.

Chief Justice Warren E. Burger: \$110 million?

Alright.

\$110 million has been invested, exercise the ordinary functions of an Equity Judge weighing and balancing the equities?

Mr. Zygmunt J. B. Plater: Yes, Your Honor.

It seems to me that the court does have equitable discretion.

Let me describe, however --

Chief Justice Warren E. Burger: That includes the equitable discretion not to enforce the statute?

Mr. Zygmunt J. B. Plater: No, Your Honor, it does not.

Chief Justice Warren E. Burger: You think it does not?

Mr. Zygmunt J. B. Plater: Let me take the far out hypothetical.

Unknown Speaker: I am sure it still does.

Mr. Zygmunt J. B. Plater: Taking the Tellico Dam today and advancing it to the point of completion, that is to say they will still have to cut down trees, bulldoze, scrape and strip the valley, they would have to construct the dam -- the canal, they would have to get the gates ready for closing.

At that point if, if for instance Your Honor, discover that the whooping crane required that valley to breed and that if the valley were closed the breeding would be eliminated.

Breeding is considered important for the continuation of the species and the District Court could not, it seems to us in that case, Your Honor, take on the question which is essentially a very legislative question of what should be done with the Tellico Dam?

For instance, the court would then have to go into the full cost accounting, Your Honor.

It would have to consider what is the true value of this dam as originally made?

Justice William H. Rehnquist: I do not agree with you, Mr. Plater because you have a long history of equitable adjudication where, for instance, a building was built over a lot line and there has been a contest throughout out, but the Chancellor does not reach a decision until the building is finally built and he may say apply the common law which is -- has the same sanction to him as the legislative law passed by Congress, "I will give you damages.

I will not give you an injunction."

Now, why is this not an appropriate case for that sort --?

Mr. Zygmunt J. B. Plater: For several reasons.

Number one is, as Your Honor noted, damages of course is not a remedy.

Once a species is rendered extinct as Congress said, it is extinct forever.

Secondly, of course that would be involving private parties under the common law.

This Court has repeatedly said that in cases which involve a congressional statute that, indeed, the -- the principle which guides the court in the exercise of its -- of its discretion is enforcing the law which is not been set up by common law, but by statute.

Justice William H. Rehnquist: It said it is just the opposite in Hecht against Bowles.

Mr. Zygmunt J. B. Plater: No, Your Honor.

We are not arguing that an injunction must be issued.

Under the Hecht case --

Justice Potter Stewart: That is if there were voluntary compliance, an injunction would be necessary and that was Hecht against Bowles?

Mr. Zygmunt J. B. Plater: That was precisely in the Hecht case.

Yes, Your Honor.

The Hecht case said if compliance with congressional statute would otherwise be achieved, the court of course need not issue an injunction.

We will be pleased if an injunction would not have been necessary in this case, because in 1973 when all options were fully open, although Congress appears to indicate and the GAO study indicates that option still are open today, we will be in a much better position to review the question.

Yes, Your Honor?

Justice Lewis F. Powell: May I come back to the argument you are making a few minutes ago that this dam after all is not important to what Congress intended.

I read a few words from the Senate Appropriations Committee Report last year.

The project will provide needed flood control, water supply, recreational opportunities, and improved navigation.

Now, without the dam and the water in it, will any of those objectives of Congress be attainable?

Mr. Zygmunt J. B. Plater: Your Honor, it should be noted that the Appropriations Committee at no time has ever reviewed the GAO study, the reviews taking place in the other committees, and so on.

It turns out --

Justice Lewis F. Powell: That was not my question?

Mr. Zygmunt J. B. Plater: Your Honor, it is true that there would be no flood control and there would be no electric power in the project.

Justice Lewis F. Powell: No recreation?

Mr. Zygmunt J. B. Plater: No, that is not so, Your Honor.

The river is the last place left in the river system that has high quality water conditions.

It is the finest trout stream in the southeast of the United States.

People come from Alabama, Georgia, and all over to fish because --

Justice Lewis F. Powell: You have Justice Stewart's vote already.[Laughter]

Mr. Zygmunt J. B. Plater: Your Honor, it is the last place for flowing water recreation, as the GAO noted, because there had been so many impoundments --

Justice Lewis F. Powell: Do you think the Senate of the United States or the Senate Appropriations Committee was thinking about maintaining the streams when it was appropriating money to close the dam?

Mr. Zygmunt J. B. Plater: Your Honor, I -- I believe that the relevant discussion is in the committee that has law-making jurisdiction over the Act and they clearly are concerned about recreation, and the house side as well.

Justice Lewis F. Powell: Is there any record that the members of that committee voted against this appropriation?

Mr. Zygmunt J. B. Plater: Your Honor, the appropriations bill, on its face, does not purport to treat Tellico.

It says nothing about Tellico.

Justice Lewis F. Powell: I understand that the bill on its face does not, but do you think any -- any rational person could

read the reports of the committees for the last four or five years and conclude that there was any intention on the part of Congress other than to complete this project?

Mr. Zygmunt J. B. Plater: Your Honor, I believe that one reading those reports would find clearly and specifically that indeed Congress had no intent to amend the Act, and that is one of the requirements for taking an appropriations bill or an appropriations committee report and reading out of it an informal implied amendment.

There must be some indication of an intent to amend and as a matter of fact in 1977, Your Honor, Senator Stennis specifically said "if we put such an amendment in here it would be subject to a point of order."

I think Your Honor's question, however, reflects the fact that certainly the appropriations committee or certain members of it probably did not agree with the Endangered Species Act or wished that it did not apply in this case, but there was no intention expressed to amend and that is the only basis upon which we could use that to change the law.

Justice Lewis F. Powell: Do you think that reflects any indication on the part of Congress not to construe Section 7 as applying to completed projects?

Mr. Zygmunt J. B. Plater: I believe, Your Honor, that the appropriations bill as every appropriations bill is passed, presumes that the agency will comply with all applicable relevant law.

The agencies are creatures of Congress.

Justice Lewis F. Powell: You kind of did not hear my question so I will put another one to you.

Mr. Zygmunt J. B. Plater: Thank you.

Justice Lewis F. Powell: Is it still your position, as I understand it, that this Act, Section 7, applies to completed projects?

I know you say you do not think it will occur very often, but there will be a need to apply, but does it apply if the need exists?

Mr. Zygmunt J. B. Plater: To the continuation of --?

Justice Lewis F. Powell: To completed projects.

Take the Grand Cooley Dam?

Mr. Zygmunt J. B. Plater: Your Honor, if there were species there --

Justice Lewis F. Powell: I am not -- I am not asking --

Mr. Zygmunt J. B. Plater: -- it would not be endangered by the dam.

Justice Lewis F. Powell: I know.

That is your view.

I am asking you --

Mr. Zygmunt J. B. Plater: I see Your Honor --

Justice Lewis F. Powell: -- not to project your imagination into the future beyond accepting my assumption and that is that an endangered specie might turn up at Grand Cooley, does Section 7 apply to it?

Mr. Zygmunt J. B. Plater: I believe it would, Your Honor.

The Secretary of the Interior --

Justice Lewis F. Powell: That is your answer to my question.

Mr. Zygmunt J. B. Plater: Yes, it would.

The consequences of that of course --

Justice John Paul Stevens: In what respects, Mr. Plater, would it apply?

It would apply only to future action, would it not?

Mr. Zygmunt J. B. Plater: Well, Your Honor as we --

Justice John Paul Stevens: The statute does not ever require anybody to tear anything down, does it, no matter how --?

Mr. Zygmunt J. B. Plater: It certainly says nothing about that in the Act, Your Honor.

Justice John Paul Stevens: It certainly cannot conduct certain actions in the future if they are going to extinguish the species, that is what it says.

Justice Potter Stewart: But actions might be the continued operation of a dam?

Justice William H. Rehnquist: Or raising and lowering of the water which is done on cyclical level --

Justice John Paul Stevens: But there is nothing that would require you to tear a dam down?

Mr. Zygmunt J. B. Plater: If that situation would arise, Your Honor, it would probably be a biological rarity in the sense that if the species comes when the water goes up and down then it is established there and it is not endangered.

Maybe the way to answer this is on the basis of the administrative record, because in the hearings last summer, the Culver hearings in the senate, it was again and again noted that the biological expertise of the Department of Interior is capable of handling many sophisticated such questions and there has never been a case that could not resolved through good faith in administrative consultation.

There had been 4,500 potential conflicts.

There had been hundreds of actual conflicts, but only TVA testified that the Act was unworkable.

Every other administrative agency said that although the Act sometimes was a bother, that they could resolve these conflicts.

Justice Thurgood Marshall: Why do you not rely on the fact that even though a facility is all built, if you knew about it when you started building, is that what you say here?

Mr. Zygmunt J. B. Plater: That was the situation in this case, Your Honor.

Justice Thurgood Marshall: That is what I mean --

Mr. Zygmunt J. B. Plater: In 1973, TVA knew about it.

Justice Thurgood Marshall: You are not (Voice Overlap), are you?

Mr. Zygmunt J. B. Plater: No, of course not, Your Honor.

[Laughte]Thank you for reminding me.

Chief Justice Warren E. Burger: When this litigation first began to block the development of the project, there was no snail darter problem at all, was there?

Mr. Zygmunt J. B. Plater: The Nipa (Ph) suit Your Honor, which was filed in 1971 noted that there possibly were endangered species in the river.

TVA had noticed, bu, at that time of course, Your Honor, it was the old Act which allowed TVA to have the discretionary flexibility that now they are trying to read into this Act, applied.

Chief Justice Warren E. Burger: Then the snail darter was discovered and it became a handy handle to hold on to?

Mr. Zygmunt J. B. Plater: Your Honor, the question of the snail darter clearly went specifically to the qualities of this habitat, that is as you suggest, the citizens have been concerned about for years.

That is to say, the last free flowing clear -- clear such big river left in the region.

Chief Justice Warren E. Burger: I am sure they just do not want this project for a combination of plaintiffs?

Mr. Zygmunt J. B. Plater: There are combinations of plaintiffs in this case, many with different points of view.

As I note, the snail darter is integral to the environmental conservation balance question which has been litigated over the years, but one of our plaintiffs, for instance, is the association of southeastern biologists has no interest for conservation purposes, but for biological purposes, it is taking what I believe is its first public stand to show that a biological statute of Congress is important to be enforced.

The agency should not violate the law with impunity.

As a matter of fact, Your Honor, that is where we would leave the case.

The Act is working on the record except in this case.

This is the only agency that is persistently declined to comply with the law and of course, in 1973, there were all options open.

That is the relevant time to question when indeed TVA should have looked at this Act and decided that it like every other federal agency, would abide by the law.

Justice Byron R. White: Mr. Plater, I understand what your position is and what the law means, but if somebody happen to disagree with you as to how to construe the Act, it might be that the agency is not violating the law at all?

Your argument is what the law means?

Mr. Zygmunt J. B. Plater: Only TVA is making that argument.

Justice Byron R. White: Well, nevertheless, your statement is absolutely incorrect if the Act is not -- unless the Act is construed the way you say it should be construed?

Mr. Zygmunt J. B. Plater: Yes, Your Honor, if this Act is discretionary, the way the old law was written, if this Act does not mean what it says then, indeed, this lawsuit was false.

Justice Byron R. White: But one of the issue in this case is what does the Act mean?

Mr. Zygmunt J. B. Plater: The regulations of the Department of Interior, every holding in the case so far, and every other agency.

Justice Byron R. White: I understand you are arguing that it should be construed in a certain way?

Mr. Zygmunt J. B. Plater: Yes, Your Honor.

Justice Byron R. White: But, some other people disagree with you?

Mr. Zygmunt J. B. Plater: Yes, they do.

Justice Byron R. White: Yes.

Mr. Zygmunt J. B. Plater: Thank you, Your Honor.

Chief Justice Warren E. Burger: Thank you, Gentlemen.

The case is submitted.