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## Motion for Leave to Argue as *Amicus Curiae*, *TVA v. Hill*, No. 76-1701

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IN THE  
SUPREME COURT OF THE UNITED STATES

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October Term, 1977

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No. 76-1701

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Tennessee Valley Authority,

Petitioner,

v.

Hiram G. Hill, et al.,

Respondents.

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On Writ of Certiorari To The United States  
Court Of Appeals For The Sixth Circuit

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MOTION FOR LEAVE TO ARGUE AS AMICUS CURIAE

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Pursuant to Supreme Court Rule 44(7), Pacific Legal Foundation requests leave to participate in oral argument with five minutes allotted for that purpose in addition to the time allotted to parties. Pacific Legal Foundation is a non-profit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Movant was granted leave of this court and did file a brief amicus curiae in support of petitioner Tennessee Valley Authority.

A key issue throughout the proceedings leading to this appeal has been whether the federal courts have retained traditional equitable powers in endangered species cases, including the power to withhold injunctive relief after balancing the equities of the situation. According to briefs submitted by the parties, counsel for petitioners will not address this issue at oral argument despite its significant impact on the broad public interest. Pacific Legal Foundation is prepared to address this issue at oral argument to assure a full airing of all significant issues and a thorough presentation of the broad public interest involved.

#### Background

This Court has traditionally reserved for the federal courts, in the interest of justice and equity, a degree of power to withhold injunctive relief even when there is a clear violation of the law. Indeed, in 1847 this Court stated:

[Injunction] is the strong arm of equity, that never ought to be extended, unless to cases of great injury .... Truly v. Wenzer, 46 U.S. 141, 142 (1847).

In making the determination to withhold injunctive relief, this Court has followed a balancing of the equities approach

which has been adopted by lower courts as well. (See Brief of Amicus Curiae Pacific Legal Foundation at 5-8, and cases cited therein.)

At all stages of the proceedings leading to this appeal, a key issue has been whether the Endangered Species Act stripped the federal courts of their inherent power to balance the equities and withhold injunctive relief when it would be in the public interest to do so. Both the district court and the court of appeals in this case identified as an issue the propriety of injunction in endangered species cases. Hill v. Tennessee Valley Authority, 419 F. Supp. 753, 755 (E.D. Tenn. 1976), rev'd, 549 F.2d 1064, 1069 (6th Cir. 1977). In its Petition for Certiorari, Tennessee Valley Authority clearly defined the issue in concluding its reasons why the petition should be granted:

Finally, the district court here declined to enjoin completion of the project on the basis of its careful assessment of all the competing considerations, including the extent of the project's completion, TVA's good faith efforts to conserve the snail darter and consult with other concerned agencies, and Congress' intent reflected in its continued appropriations. The court of appeals' determination that the district court abused its discretion presents the significant question whether Congress intended in the Act to deny the courts equitable discretion in deciding whether to grant injunctive remedies under the Act. Tennessee Valley Authority Petition for Certiorari at 22-23. (Emphasis added.)

Respondents also recognized the important of the "equitable discretion" issue by posing the following question to this Court:

Was the Sixth Circuit Court of Appeals correct, on the basis of the District Court's finding of facts constituting a violation of the Endangered Species Act ... (b) in prohibiting continued violation of the Act?

Respondents' Brief in Opposition to Petition for

Surprisingly, the briefs prepared and filed by the Office of the Solicitor General on behalf of Tennessee Valley Authority is completely silent on this issue. In effect, the brief assumes that the federal courts lack authority to withhold injunction on the basis of equitable considerations in cases involving the Endangered Species Act.

Basis for Request

Pacific Legal Foundation is the only participant in the briefing of this appeal to address the "equitable discretion" issue, although respondents implicitly acknowledged the issue in their brief. (Brief for the Respondents at 45-46 n. 40.) The existence of the federal courts' power to withhold injunctive relief transcends the existence of both the snail darter and the Tellico Dam; the impact of stripping the courts of their traditional equitable powers will be felt in cases throughout the country. Indeed, it is vital that this Court clarify whether Congress can rely on the traditional powers of the courts to check the over-enthusiastic administration of federal laws or whether future legislation for public works projects must expressly preclude Interior Department's authority to override congressional action.

Movant Pacific Legal Foundation is aware of this Court's reluctance to grant amici the opportunity to participate in oral argument. However, in view of the importance of resolving the issue of the scope of the federal courts power in endangered species cases, oral argument by Pacific Legal Foundation, the sole participant to address this issue, should aid the Court in evaluating the effect of its decision on the broad public interest.

Motion

For the foregoing reasons, Pacific Legal Foundation respectfully requests leave to participate in oral argument with five minutes allotted for this purpose in addition to the time allotted for the parties.

Respectfully submitted,

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Dated this 6th day of April, 1978.

CERTIFICATE OF SERVICE

I, Donald C. Simpson, a member of the Bar of the Supreme Court of the United States, hereby certify that copies of the Motion for Leave to Argue as Amicus Curiae of Pacific Legal Foundation, in No. 76-1701, has been served this 6th day of April, 1978, on each of the following by deposit in the United States mail, first-class, postage prepaid:

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