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Tiny Fish/Big Battle: 30 Years After TVA and the Snail Darter Clashed, the Case Still Echoes in Caselaw, Politics, and Popular Culture

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It is perhaps the most dramatic national legal story to come out of Tennessee in the past 75 years — the controversy called *Hiram Hill, et al. v. Tennessee Valley Authority* — the little endangered snail darter fish versus TVA’s Tellico Dam.¹ Developing over the course of most of a decade, the Tennessee lawsuit became a cultural icon, famous or infamous around the world.

Thirty years later the case still reverberates today in caselaw, politics, and as an ironic reference in popular culture.² Here is the iconic caricature of the case that most readers, if they’ve heard of the snail darter, will probably have internalized:

A two-inch endangered minnow, pulled out of a hat at the last possible moment — and the federal Endangered Species Act — were misused by extremist environmentalists to block completion of an economically beneficial $150 million TVA hydroelectric dam.
It turns out that every single element of that caricature is inaccurate. The force of the caricature, however, carried far beyond Tennessee to affect major political and policy battles at the national level. The Tellico Dam case traveled north to become a chess piece on the national political chessboard, around which major political forces swirled and clashed, with continuing consequences today.

The University of Tennessee College of Law’s 30-year darter-versus-dam symposium offers a beneficial opportunity finally to put the case into an academic forum and accurate perspective, free of the spins, disinformation, and politicking that graced its years of notoriety, 1973-1980. [UT College of Law’s “Symposium on TVA v. Hill: a 30-Year Retrospective on the Legendary Snail Darter Case,” is April 18, exactly 30 years after the U.S. Supreme Court arguments. See more information about the symposium on page 21 and at http://www.law.utk.edu/news/08snail.htm.] Although it is still perhaps lingeringly controversial in the Valley to confront the facts that are revealed on the objective public record, 30 years later the elements of the controversy have become broadly clear. Though your author was a committed citizen advocate, privileged to represent the darter and its allies throughout those years of the case, the full merits now can and should be addressed objectively in the academic forum, and lessons drawn. The case’s merits, however, are radical enough in objective historical perspective to make any accurate analysis quite one-sided.

The Case’s Merits

It Wasn’t Really a Hydro Project. TVA’s Tellico Project was situated on the last undammed part of the

A Snail Darter Timeline

1936: TVA lists Tellico site on Little Tennessee River (at confluence with Watts Bar and Ft. Loudoun reservoirs on Big Tennessee), as one of 69 potential dam sites.

1940-67: TVA builds more than 5 dozen dams

1959: TVA Chair Red Wagner posits a Tellico Dam to be primarily justified by land development and recreation benefit claims.

1968: TVA begins Tellico Dam, based on land development for “Timberlake New Town” to be built by Boeing Corp.; concrete dam built, $4 million.

1972: Farmers and environmentalists get NEPA injunction, based on TVA’s lack of EIS.


Aug. 12: Dr. David Etnier discovers snail darter at Coytee Springs shoal on Little T.

Dec. 28: Richard Nixon signs Endangered Species Act [ESA]

1975: Boeing abandons Timberlake project, citing economic impracticality. Citizens’ petition to federal Department of Interior granted for listing of snail darter as endangered, critical habitat, under ESA §7.


1977: Sixth Circuit grants injunction.

1978: April 18: Oral argument in Supreme Court.

June 15: Supreme Court upholds injunction.

1979: Jan. 29: Cabinet-level God Committee, created by Baker-Culver ESA Amendments, unanimously upholds snail darter injunction on economic grounds.


Nov. 29: Reservoir completed and river impounded.

1982: No economic activity; TVA proposes use of valley as regional toxic waste facility; citizens’ public outcry sinks proposal.

1984: TVA begins cooperation with Walmart-linked developers to create high-income resort home development.

1984ff: Some light industrial development locates near Highway 411; extensive flatwater recreation around lake; several communities of high-income resort homes; darter transplants allow downlisting of the darter to “threatened” status.

Snail darter illustrations by Dolores Roberson

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Little Tennessee River, 33 miles of flowing river ending at Fort Loudoun Dam, Fort Loudoun Reservoir, and Watts Bar Reservoir, the last such high-quality stretch of big river left, surrounded by 24 dams within 50 miles. From its beginning in 1959 Tellico was designed and justified by TVA to carry an unusual array of novel economic development claims. As the marginal last of 69 buildable damsites, it could not be justified for normal hydro-project purposes — for electric power generation, flood control, barge traffic, etc. — so TVAs leadership focused Tellico on recreation and land development benefits.

An essential part of the agency’s justification for Tellico was to condemn more than 300 private family farms — more than three times as much land as was needed for a reservoir, most of the farms untouched by the impoundment — and resell the land to private developers, in a sense anticipating the 2006 Kelo v. New London controversy. By hypothesizing a Model City to be called “Timberlake New Town” to be built by the Boeing Corp. with close to $1 billion in hoped-for taxpayer subsidies, the agency was able to project substantial “shoreland development” benefits in its official benefit-cost justification, and by manipulating economic projections could estimate high net recreation benefits.4

The reservoir part of the project may have been the agency’s actual motivational purpose, but the primary elements of the project on the record never required a dam. This is why the citizen opponents, though consistently and pointedly ignored by the agency, its allies, and the national press, could argue realistically for highly beneficial non-dam river-based alternative development plans that would preserve the endangered darter.

**The Fish’s Little T River Habitat and Its Valley Were Public Treasures.**

The flowing Little Tennessee River and its valley were extraordinary public resources that would be lost — rich in agricultural lands, history, and tourism and sporting potential — offering broad-based economic opportunities for the people of East Tennessee and the nation, as well as the last major natural habitat of the endangered little darter. The special qualities of the river — cool, clear, highly oxygenated water flowing over broad, shallow gravelled riffles — had preserved the fish in the Little T as its similar habitats elsewhere were destroyed one by one by dams. Its valley had been a treasure for humans for more than 10,000 years, with archaeological relics beneath more recent Cherokee sites revealing it as having the oldest continuous human habitation in the entire United States.

In its natural flowing state the river was used and beloved by thousands. The river was a major recreational resource on its own terms, attracting anglers from all over the Southeast and flotillas of weekend family float trips even before it had been rendered a virtually unique resource by the impoundment of 2,500 linear miles of river in the surrounding region. The agricultural soils of the valley were of great economic value, with more than 15,000 acres of prime-grade agricultural soils. The valley contained a dozen Cherokee religious and historical sites still visited by herb-gathering medicinemen from the Cherokee, North Carolina, reservation. The valley’s 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. A major portion of upriver project lands had particular potential for use as an access and spillover management area for tourists coming to the Great Smoky Mountains National Park, which attracted more than 10 million visitors a year.

**The Dam Project’s Economic Merits.**

The Tellico Dam project was a mistake from the beginning that never should have been started. As the internal agency files indicate, and two comprehensive and intensive federal economic reviews subsequently demonstrated, the project was patched together by the TVA leadership primarily with exaggerated agency claims of benefits, deflated estimates of costs, and a staunch aversion to consideration of any alternatives for development of the river and its valley without a dam and reservoir. The Timberlake New Town idea fell apart when Boeing realized that Congress would not fund it and the project made no economic sense on its own, though TVA remained adamant. The U.S. GAO did a study of the project in 1977 that warned that all of TVAs benefit-cost figures for the project were

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unreliable. Contrary to its public image, the dam has no generators and produces a relatively small amount of power via canal. After the Supreme Court decision, under Senator Baker's prodding, Congress's ESA Amendments of 1978 sent Tellico into an intensive economic scrutiny process in the Cabinet-level God Committee tribunal. After six months of full-dress inquiry into the merits of the dam and the darter's river valley, the tribunal unanimously concluded that the dam did not make economic sense even after almost all the project's budget had been spent. An accurate assessment of TVA's design was that from the start the Tellico Project would lose 76 cents for every dollar invested. Even on purely economic grounds, as Charles Schulze, chair of the President's Council of Economic Advisors concluded, the total benefits of the nearly completed project still did not add up to the mere 5 percent of costs remaining to be spent:

Here is a project that is 95 percent complete, and if one takes just the cost of finishing it against the benefits, and does it properly, it doesn't pay — which says something about the original design! [Laughter.]

The large majority of project expenditures were found to have public value even without completion of the dam. The darter was found to represent recreational, touristic, and developmental values including $40 million worth of prime agricultural lands. The press, however, largely ignored this dramatic example of how, far from hindering economic progress, good ecology made good economics.

Economic Environmental Alternatives to a Tellico Dam. With increasing sophistication over the years, the citizen coalition opposing the dam argued for a comprehensive river-based development project. The citizens' alternative river-based development plans drafted by UT were strenuously ignored by the agency. They would have allowed the displaced farm families to go back onto most of the rich agricultural lands of the valley; channeled potentially millions of tourists up a “Cherokee Trail” route from I-40 and I-75 through the valley with its Cherokee and archaeological sites and old Fort Loudon into the Smokies National Park; developing the flowing river fishing resource (Arkansas’s White River recreational development, with an inferior river, generates $300 million in annual economic activity); providing enhanced locations for light industrial development; and the like.

The Law of the Snail Darter. Without a court injunction, there was and is no governmental forum practically accessible to challenge the dubious economic merits of public works projects like the Tellico reservoir. Judges are consistently loathe to scrutinize the economics of porkbarrel projects launched and sustained in the other co-equal branches of government. The farmers' and sportsmen's appeals on the merits to TVA, Congress, the state and federal agencies, and the media fell on unresponsive deaf ears. It is difficult to get political power establishments to scrutinize their essential mistakes. Common sense is not self-executing.

The citizen plaintiffs' coalition was a motley little assemblage of obstinate farmers, frustrated fishermen, history buffs, environmental law students and their untenured professor, and other volunteers from the community. T-shirt sales and potluck suppers. Not very extremist. Under the ESAs citizen-enforcement provision — a proud, very American innovation widespread in public-interest laws after the '60s — by filing a 60-day notice, the darters' defenders had statutory standing to enforce the federal law in court against even a powerful federal agency like TVA.

The legal case began on statutory terms and ultimately turned on equity canons. ESA §7 presented two veiled causes of action: a prohibition against

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agencies putting species into jeopardy of extinction, or destroying critical habitat. Making the legal case quite easy to prove, the little endangered species was intimately linked ecologically to its river habitat's special qualities, a habitat that had been eliminated everywhere else by 2,500 linear river miles of dammed reservoirs. Thus it operated as a legal “canary in the coal mine,” a vivid indicator of the special values of the river and valley habitat for humans as well. To change the river into a narrow, shallow, warm-water lake would eliminate the darter's major remaining population and drown most of the valley's most valuable assets under mud and low-quality algae-laden waters.

While TVA accelerated its bulldozing and construction to moot the case, and tried to block legal enforcement of the Act, the little citizen coalition, with help from several citizens groups in Washington, persuaded the Department of Interior to list the species and its Little T habitat as endangered under the ESA. In court, with the deft efforts of masterful local litigator Boone Dougherty, Judge Robert Love Taylor was forced to find that the dam jeopardized the darter and destroyed its critical habitat. Judge Taylor's reluctance to enjoin the ongoing ESA violation, as an exercise of equitable forbearance, was corrected by the Sixth Circuit, and by the Supreme Court after arguments on Aug. 18, 1978. As Chief Justice Burger said, a court's equity powers could not override statutory commands.

**The Darter Swims into a National Political Whirlpool.** The federal ESA injunction effectively created a “remand to Congress,” triggering prolonged battles at the national political level. For the next three years the citizens' defense of the darter and its river required a permanent presence in Washington, persuading the Department of the darter and its river required a permanent presence in Washington.

The snail darter became a pawn on the national chessboard, focusing the attention of major political power blocs and agendas. Larger political forces took over TVA's burden. The Tellico ESA injunction raised the specter of increased scrutiny for a host of other far more significant porkbarrel realms.

By potentially creating a unique legal forum for economic scrutiny of projects, the ESA caused a “Pork Panic.” The water projects establishment — agencies and tied-in market interests — feared that revelations about the falsified economics of Tellico would undermine far bigger resource projects across the nation in the public's eye.

Most directly, the Tellico precedent raised reverberating fears in Washington for the Tennessee-Tombigbee Waterway, a $4 billion boondoggle that would never withstand transparency if ever it was scrutinized; the “Tenn-Tom” happened to contain three endangered fish species. If the ESA prompted people to inquire into pork-barrel economics, those projects were in trouble.

And the darter flushed up even more potent enemies. Beyond the water projects establishment were political allies in other resource establishments like the Forest Service/timber industry coalitions, BLM/ranchers and miners, and the FERC/Edison Electric Institute establishment. These industry lobbies joined forces to discredit the darter injunction because the not-coincidental presence of endangered species conflicts could potentially bring unwelcome public scrutiny into such a wide range of agency-industry projects and programs.

The track of the snail darter case may even be discernible at the highest macro level of American politics! In the '60s the political blocs of the industrial establishment and the GOP had been sent reeling by the twin shocks of the devastating Goldwater defeat and the hugely popular anti-Establishment civic movements culminating with the first...
Earth Day. The “Establishment” and traditional authority institutions were being widely regarded with populist aversion, but they began to fight back in the later Nixon years. The Powell Memorandum identified a need for “free market forces” to launch a coordinated reaction, discrediting and marginalizing the popular “anti-business” civic movements — environmentalism, consumer protection, labor and civil rights. The snail darter was a god-send, seized upon as an example that could be framed as extreme, irrational, leftist, activism that called into question not only citizen-based populism but meddling governmental civic regulation in general. As Sen. Baker’s chief aide and political agent, Jim Range, perhaps the single most effective ESA opponent then on the Hill, lectured me, “Public support for endangered species is a mile wide these days … but it’s only an inch deep. If we can show the public how this kind of regulation hurts people in the pocketbook, they’ll turn away real quick.”

It was imperative to cast the darter case as a joke and prevent public opinion from seeing the ESA’s economic merits in the snail darter case. If in this, supposedly the most extreme environmental case ever, it turned out that the environmentalists were the ones making sober economic sense, and the agency was the miscreant, then the reverberations could be disastrous. If, on the other hand, the darter case could be framed as environmental extremism, it could become a handy wedge tool for industry and market force lobbyists — led by the U.S. Chamber of Commerce, the National Association of Manufacturers, and their industry-funded “Public Interest Law Foundations” — to undercut the ESA and other environmental regulations hampering industry, and marginalizing citizen environmentalists by tagging them as love-beaded hippies and silly Grannies. The icon of the extremely irrational darter could be used to discredit progressive civic regulations far beyond environmental issues.

Inside Out: The Darter Icon in the Press and Politics. Ultimately the pork-barrel coalition in Congress, with a rider pushed onto an appropriations bill by Rep. John Duncan and Sen. Baker, overturned the ESA’s protections for the darter, and President Jimmy Carter retreated from his promised veto of the bill (which also had prohibited economic analysis of water projects by the president’s water resources council).

After 200 million years, the river ended on Dec. 29, 1979. The critical failure in the darter’s final defense probably lay with the inability of the citizens to bring public recognition to the dramatic real economic merits of the darter’s case and the dysfunctional economic demerits of TVA’s dam. Before the rider vote, every Member of Congress was given a personal letter from Secretary of Interior Cecil Andrus, chair of the economic review ordered by Congress that had unanimously decided against the dam. But although every member knew of the Tellico Dam’s economics, they also knew that the American public did not know, so the pork barrel was free to roll. And the president was told by his political liaison, Frank Moore, that he could not withstand the ridicule a veto would receive from the press and public opinion that viewed the snail darter as an economically irrational, environmentally extreme technicality.

And so it was. With Sen. Baker’s assistance the congressional pork barrel was able to roll, and even the president of the United States was dissuaded from asserting the economic merits by the media mockery of the case.

Despite the law and despite the economic record, in other words, the Continued on page 20
In some cases the media's missing of the Tellico dam's faulty merits undoubtedly reflected political biases in the press. Local reporters in Tennessee reported that their editors did not welcome the idea of investigative stories about Tellico. One reporter from the Lenoir City paper confessed to us “I know a lot about the Tellico project, and you are right, it's nuts. But my publisher won't let me write a word about this.” Local stories continually reflected superficial reporting on the latest maneuvers between the fish and the dam, often basically reprinting TVA's dismissive press releases.

At the national level, too, the “liberal media” was strangely inert. Having solicited coverage from more than 120 reporters, some of whom I spoke with more than a dozen times, we never got a national investigative story on the real merits of the Tellico Dam/snail darter conflict. We once spent half a precious afternoon in Washington with a Wall Street Journal reporter. He pored through the maps and data, obviously taken with the case. In economic terms, he declared with surprise, Tellico and its private land condemnations vividly illustrated the corruptions of the pork barrel. “So what will you write about Tellico?” we asked. He paused, shook his head, and told us regretfully, “Nothing. It's against our editorial policy.” “But you don't write for the editorial page. You are a news reporter!” He sighed and said that was correct, but the WSJ's editors didn't want to run news stories where environmentalism made economic sense.

From a different perspective, more than one “liberal” reporter mentioned to us that they had been raised on the progressive New Deal image of TVA dams bringing social progress to a benighted region, and were distressed that the case reflected TVA as just another calcified giant utility, albeit vested with extraordinary governmental powers over its region.21

And finally there is the fact that the media's news departments today are just another business, selling “infotainment” to a public deemed incapable of or uninterested in understanding complex controversies that cannot be reduced to jazzy, 10-second sound bites.

If the press is to be democracy's informational lifeline, however, the failures illustrated by the denouement of the darter are troubling. “This sort of thing endangers more than fish.”22 An important part of lawyering, it appears, especially public interest lawyering, is an ability to leverage the merits of the case into the public consciousness. The legal process does not exist in an idealized vacuum sealed off from the realities of politics and media, and public interest lawyering skills must be multiplexed, playing simultaneously in all the relevant theaters.

In Sum, to Be Continued …

Looking back after 30 years, we can celebrate that only in America could a little group of citizens so lacking in money and power (and tenure) have carried such a case to the highest levels of the society's governance, digging so deep into the guarded complexities of interlocking economic and political establishments. Today, however, the Tellico reservoir sits there as just another TVA lake, with localized development features falling far below the extraordinary alternative promises presented by the treasures of the flowing river.23 The river ultimately was narrowly lost through an unlaudable insider maneuver, but as the story gradually becomes better known, the saga of the snail darter in law, science, economics, media process and policy, still evokes lessons that are worth winnowing in conversations to come.

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from Yale University; his LL.M. and S.J.D., from the University of Michigan. Plater is a member of the bars of Tennessee and the District of Columbia, and teaches and writes in the fields of environmental law, property and land use law, and administrative process, with further interests in comparative international law and public interest litigation. He has taught on seven law faculties, and handled national endangered species litigation — most notoriously six years spent on the case of the endangered snail darter fish vs. TVA's Tellico Dam in administrative and congressional proceedings and federal litigation up through the U.S. Supreme Court. Plater was chair of the State of Alaska's Oilspill Commission Legal Research Task Force after the stranding of the M/V Exxon-Valdez, and has been a legal consultant in many environmental law cases including the Woburn, Mass., toxic litigation, Anderson et al. v. W.R. Grace et al., the subject of the book and movie A Civil Action.

Notes

1. There were more than a dozen judicial decisions in the course of the TVA campaign to build the Tellico Dam, including condemnation challenges, NEPA 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. 1972) (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 case was also subject to the first-ever economic review scrutiny by the Cabinet-level Endangered Species Committee that unanimously decided in favor of the darter on economic grounds. U.S. Department of the Interior, Endangered Species Committee, Record of Hearing of Jan. 23, 1979.

For more details, see Plater, “Reflected in a River: Agency Accountability and the TVA Tellico Dam Case,” 49 Tenn. L. Rev. 747 (1982).

2. In an online poll of environmental law professors across from across the country seeking a consensus on the 10 most important court cases in the history of environmental law, TVA v. Hill received the highest number of votes, almost twice as many as the two cases that placed second (Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) and Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1 (D.C. Cir. 1976)). See post of James Salzman to envlawprofs@darkwing.uoregon.edu (Oct. 26, 2001) (copy on file with author). On the other hand, the snail darter is regularly presented by business and conservative commentators and lobbyists as a paradigm of regulatory foolishness and environmentalists’ extremism:

America today is a new homosocialism … What these people are is against private property rights. They are trying to attack capitalism and corporate America, … trying to say that we must preserve … the snail darter and whatever it is.


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For fuller background: see Plater, “Reflected in a River: Agency Accountability and the TVA Tellico Dam Case,” 49 Tenn. L. Rev. 747 (1982), and William Bruce Wheeler and Michael J. McDonald, TVA and the Tellico Dam, 1936-1979: A Bureaucratic Crisis in Post-Industrial America (1986). See also Kenneth Murchison, Continued on page 22

A Symposium on Tennessee Valley Authority v. Hill: A 30-Year Retrospective on the Legendary Snail Darter Case

April 18 at the UT College of Law

Speakers include Dr. David Etnier, the UT professor who discovered the snail darter; Dr. Jeff Chapman, the director of UT’s McClung Museum and expert on the archeological treasures of the Little Tennessee River valley; Tennessee attorneys Hank Hill and Peter Alliman (Hill one of the original plaintiffs in the case and Alliman a researcher and student activist in the litigation); Boston College Professor of Law Zygmunt Plater, who argued the case in the federal agencies, congressional process, and three courts including the U.S. Supreme Court; UT History Professor Bruce Wheeler who wrote a book on TVAs internal perspective on the dam; University of Vermont Professor of Law Patrick Parenteau, formerly with the National Wildlife Federation and nationally recognized expert on the Endangered Species Act who aided the Tennessee citizens in Washington; LSU Law Professor Ken Murchison, author of The Snail Darter Case — TVA v. the Endangered Species Act; and landowners from the Valley who were displaced by the dam. Admission is free. For more information go to http://www.law.utk.edu/news/08snail.htm
Snail Darter continued from page 21

The Snail Darter Case: TVA versus the ESA (2007). For an essay with slides on this case, see http://www.law.mercer.edu/elaw/zygplater.html

3. The caricature’s inaccuracies: The project’s official design was primarily as a recreation and shoreland redevelopment project; the concrete dam itself cost only about $5 million, and most of the $150+m. project costs were for land purchase and the cost of useful new infrastructure, roads, bridges, etc.; the project was ultimately found to have been diseconomic from the beginning, the case was brought, not by extremists, but by a coalition of farmers, fishermen, history buffs, and environmentalists making the conservative argument that river-based developments were economically preferable; the citizen efforts to enforce the federal Endangered Species Act began over TVA’s protests in 1974, long before most of the project expenditures were made; and finally the fish (Percina imostoma tanasi) is a perch, not a minnow, and fully 2½ inches long when mature, not just 2 inches. “This is the only fish story I know of,” said Secretary of Interior Cecil Andrus, “where the fish keeps getting smaller!”

4. See Murchison, at 16-18. TVA condemned more than 38,000 acres of private land for Tellico, of which slightly more than 10,000 acres was for reservoir purposes. Land redevelopment and recreation benefit claims together created almost 60 percent of annual claimed benefits; more traditional hydro benefits comprised the rest (see TVA, Tellico Dam Project EIS I-1-49 (1972)), though the subsequent economic reviews denied those as well. See Comptroller-General of the United States, “Report to the Congress: The TVA’s Tellico Dam Project — Costs, Alternatives, and Benefits” (1977).


8. The federal interagency economic review was led by Robert K. Davis, an emeritus economist at the University of Colorado, who has published extensively on the flawed economic processes of public works projects.


10. 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 TVA, “Alternatives for Completing the Tellico Project” (Dec. 1978); Office of Policy Analysis, U.S. Dept of the Interior, Tellico Dam and Reservoir (Jan. 19, 1979) (Staff Report to the Endangered Species Committee). The National Park Service also recommended the river development alternative over the reservoir plan as being Continued on page 38
Value Definition Clauses  continued from page 37

developments in that area, but for now, we can take much comfort, and do much good planning, from the law we have. 

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Notes
1. Briefly, a VDC is useful when an irresistible force (i.e., a transfer of wealth, especially when difficult to value, such as a family limited partnership), encounters an immovable object (i.e., a fixed exemption or exclusion such as the annual gift tax exclusion or the federal estate tax exemption). The best known example is a marital deduction formula clause under a will, which allocates a fixed dollar amount to family and the balance to a marital share. A VDC, which can be either inter vivos or testamentary, can either (1) simply allocate a fixed dollar amount to family; or (2) allocate a fixed dollar amount to family and the balance to another entity that causes no further gift or estate taxation, such as spouse outright, marital trust, charity, “zeroed-out” Grantor Retained Annuity Trust (GRAT), or “zeroed-out” Charitable Lead Annuity Trust (CLAT).
4. I say “properly prepared” VDCs because the IRS still can, and no doubt will, attack such clauses that are not within the guidelines set out in McCord and Christiansen. And I say “most” VDCs because even some formula clauses within the spirit of McCord and Christiansen might have unusual facts that give pause.
5. The facts as stated are oversimplified. The will provided that 75 percent of any portion disclaimed would pass to a Charitable Lead Annuity Trust (CLAT) and only 25 percent would pass to the foundation. A substantial portion of the opinion (and the primary issue for which this case was discussed in the media) involved whether or not the amount passing to the CLAT would qualify for any charitable deduction (it did not), but that portion of the opinion is irrelevant for this purpose. The much broader issue was whether or not the 25 percent portion passing outright to charity would qualify for estate tax charitable deduction, to the full extent of the increase in estate value upon IRS audit and settlement (it did not).

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better suited for easing the park’s crowding and traffic flow problems. Senate 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) (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.

11. The NEPA cases have consistently demonstrated the judicial reluctance to pry into the accuracy of public works projects.

12. The author, thanks to an understanding dean in his new academic position in Michigan, was able to spend 2½ days of every week, working out of donated space in national citizen groups’ offices — special honor to Friends of the Earth, Sierra Club, National Wildlife Federation, American Rivers — and sleeping on couches and guest beds volunteered by NGO activists in the capital.


14. These political establishments form “Iron Triangles,” as the political scientists call them: political bonds between the agencies that get taxpayer dollars, the private market forces that build the programs and projects, and the congressional blocs that deliver the money in return for power and campaign finance.

15. The Powell Memorandum was prepared by Lewis Powell for the U.S. Chamber of Commerce shortly before he went onto the Supreme Court. In it he decried the creeping socialism dominating America, as exemplified by civil rights, consumerism, and environmentalism, and he called for business to begin funding academic and representational programs and foundations to counteract the 1960s ideologies in American society. The memorandum led directly to the founding of the Heritage Foundation and other similar initiatives. See Lewis F. Powell Jr., “Confidential Memorandum: Attack on American Free Enterprise System” (Aug. 23, 1971).


17. See Oliver Houck, “With Charity for All,” 93 Yale L. J. 1415 (1984) (analyzing how industry has created and financed “public interest law firms” as “charitable organizations” to promote business interests against governmental regulation in the public interest).

18. See Murchison at pp. 165, 180.

19. When he called me the evening of the non-veto, apparently seeking absolution, the president indicated that the appropriations committee was able to mobilize too much political force against the darter, despite the actual merits of the economic record.

20. See 49 Fed. Reg. 27,510 (Aug. 6, 1984) (codified at 50 C.F.R. § 17.11 (1985)). Does the darter’s currently stabilized survival generally undercut arguments for species protection, or mean that the citizens’ litigation seeking to save its last major natural population was a mistake?

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