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## TVA's Brief in Reply to Plaintiffs' Post-Trial Brief, *TVA v. Hill et al*, Civil Action No. 3-76-48

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Civil Action No.  
CIV. 3-76-48

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

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HIRAM G. HILL, JR.,  
ZYGMUNT J. B. PLATER and  
DONALD S. COHEN

Plaintiffs

v.

TENNESSEE VALLEY AUTHORITY

Defendant

---

TVA'S BRIEF IN REPLY TO PLAINTIFFS'  
POST-TRIAL BRIEF

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POST-TRIAL BRIEF

We wish to respond briefly to two arguments raised in plaintiffs' post-trial brief: (1) the question of whether completion of the Tellico project violates section 9 of the Endangered Species Act (16 U.S.C. § 1538 (Supp. IV, 1974)); and (2) the question of whether public policy dictates the completion or scrapping of the Tellico project.

1. Completion of the Tellico Project  
Will Not Violate Section 9  
of the Act.

In their trial brief (p. 10) and their brief in support of motion for temporary injunction (p. 9), plaintiffs took the position that section 9 was not applicable and that the only applicable directive to federal agencies was section 7 (16 U.S.C. § 1536 (Supp. IV, 1974)). In their words:

The penalty provisions of § 1538 apply to private parties; the only directive to Federal agencies appears in § 1536 . . .  
[emphasis added].

In their post-trial brief (pp. 6-7), plaintiffs reverse that position and contend that the closure of the Tellico Dam will "take" snail darters in violation of section 9, by modifying

the darter's critical habitat. This new contention is without merit.

Section 9 does not prohibit the modification or destruction of critical habitat. Section 9(a)(1)(B) provides in pertinent part that:

. . . it is unlawful for any person subject to the jurisdiction of the United States to--

\* \* \*

(B) take any such [endangered] species within the United States . . . .

As stated in TVA's post-trial brief, Congress consciously and deliberately deleted the "destruction, modification, or curtailment of its habitat or range" from the definition of the word "take." Section 3(6) of proposed Senate Bill 1983, as introduced by Senator Williams, defined the term "take" as follows:

The term "take" means (A) with respect to fish or wildlife, to threaten, harass, hunt, capture, or kill, or attempt to threaten, harass, hunt, capture, or kill; or the destruction, modification, or curtailment of its habitat or range . . . [emphasis added].

This language was rejected, and section 3(14) of the statute as passed provides that;

The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

Clearly, completion of the dam will not result in the "taking" of snail darters as defined by the Act because modification of habitat does not constitute a "taking." See also Sierra Club v. Froehlke, No. 75-1252, pp. 33-34 (8th Cir., April 23, 1976), where the court held that an attempt to harass the Indiana bat could not reasonably be found to be among the purposes of the Meramec Park Lake Dam.

2. Public Policy Dictates That the  
Tellico Project Be Completed.

Plaintiffs concede, as they must, that this Court has discretion as to whether or not to grant the equitable remedy of an injunction. Plaintiffs admit that "injunctive relief is never automatic upon the showing of a violation of the Act" (p. 16) and that "[a]n equity court has discretion in its granting of an injunction" (p. 14); but they contend that the Court must give "effect to public policy declared by Congress" and issue an injunction (p. 14).

The authorities cited and relied upon by plaintiffs are not in point. Plaintiffs' argument ignores the basic fact that in our case there are competing public policies and interests, policies and interests which TVA has attempted to resolve by doing everything possible to conserve the snail darter while completing the Tellico project. In this, TVA has acted under the direction and with the acquiescence of Congress. These are the actions and circumstances which the Court must review and consider in balancing the equities in exercising its traditional equitable powers.

As previously stated, TVA has already taken the problem to Congress to resolve the ultimate issue of public policy and public interest in either completing or scrapping the Tellico project. This is essentially a legislative issue, and the Court should honor the expressed intention of Congress and deny plaintiffs' request for an injunction. If plaintiffs were not satisfied with what Congress decided, they should have sought to block congressional appropriations. As said in Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728, 740 (E.D. Ark. 1971), aff'd, 470 F.2d 289 (8th Cir. 1972), with respect to the question of costs and benefits (also a legislative issue):

The plaintiffs and others are free to bring such matters to the attention of the legislative branch at the time any new appropriation for this project is proposed. Indeed, they could bring the matter to the attention of Congress at this time with the hope of obtaining legislation which would prevent the expenditure of funds already appropriated (which would obviously include those needed for the construction of the dam proper and the clearing of the lake).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has been served upon plaintiffs by hand carrying a copy thereof to their attorney, W. P. Boone Dougherty, Suite 1200, Hamilton Bank Building, Knoxville, Tennessee 37902, this 11th day of May, 1976.

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Attorney for Defendant