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Motion for Injunction Pending Appeal From Order Denying Injunction & Brief in Support of Motion for Injunction Pending Appeal, *TVA v. Hill et al*, Civil Action No. 3-76-48

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

HIRAM G. HILL, JR.)
ZYGMUNT J. B. PLATER)
DONALD S. COHEN)
THE AUDUBON COUNCIL OF TENNESSEE, INC., and)
THE ASSOCIATION OF SOUTHEASTERN BIOLOGISTS) CIV. 3-76-48
vs.)
TENNESSEE VALLEY AUTHORITY)

MOTION FOR INJUNCTION PENDING APPEAL
FROM ORDER DENYING INJUNCTION

Upon the complaint and all the briefs and other relevant material filed by the parties, and all the proceedings in this action to date, the plaintiffs respectfully move this Court for an order restraining defendants, pending the hearing and determining of plaintiffs' appeal to the United States Court of Appeals for the Sixth Circuit from the judgment of this Court entered May 25, 1976 dismissing the claim herein, from construction, excavation, tree-cutting and other project activities that would destroy or alter critical habitat or jeopardize the existence of the snail darter Percina (Imostoma) tanasi in violation of the Endangered Species Act; 16 USC 1531 et seq., and for other further relief as the Court deems just.

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BRIEF IN SUPPORT OF MOTION FOR
INJUNCTION PENDING APPEAL

Plaintiffs respectfully request that this Court order a cessation of ongoing construction-related activity on the TVA Tellico Project's reservoir segment on the following grounds:

1. Ongoing excavation, bulldozing, tree-cutting and construction seriously changes the status quo pending appeal to the Sixth Circuit Court of Appeals. If the courts are to give this litigation the serious consideration it received in the District Court for the Eastern District of Tennessee, they should not be faced with a mooted issue by default. This is especially true since it may be that the Sixth Circuit will not be able to hear the issue until October or thereafter.

2. The questions of law are substantial, and in light of the fact that this Court exercised its discretion so as not to enforce Congressional statutes as written, it should exercise its discretion now so as to permit a meaningful review of the statutes' application. Not to do so would facilitate the rapid mooted of the issue so that the important legal issues will never be adequately reviewed, a result that does not serve Congress's purpose in legislating nor the courts' purpose in reviewing such actions.

3. Serious questions of law also arise in the Courts' interpretation of case law, to which some of the statements in §2 above apply.

4. A delay in activity pending judicial review will not seriously burden the defendants. Defendants are using their own personnel and equipment on the project, which can be easily used elsewhere pending review; the agency has lived with many delays on this project since 1966, some caused by public criticism and litigation but others caused by the agency's own internal problems, the collapse of the Boeing Corporation's interest in the Project, other internal priorities, etc.

5. The public interest would be served not hampered by a delay. The public interests threatened by the ongoing construction activities are immediately threatened and irreplaceable: destruction of existing agricultural, recreational, historical, touristic features of the Little Tennessee Valley. The interests asserted by TVA that would be delayed are longterm and conjectural: the need for more industrial lots in East Tennessee, the need to increase barge traffic, minimal increases in river management volume and electric generating through proposed canal. Delay will in no way moot the defendants' position; it will seriously threaten plaintiffs', by practically foreclosing alternative uses for the valley in the discretion of Congress.

6. Plaintiffs have in every way tried to expedite this litigation and the administrative actions that preceded it; plaintiffs will seek the most rapid possible resolution of the issue in the near future if possible. Defendants were the cause of repeated delays in the course of this Endangered Species process, and it would be equitable if the Court did not permit them to profit from delay at this time where it threatens public policies, statutes and interests.

7. The standard for issuance of this injunction pending appeal is to preserve the status quo while the issues of law are fully considered and reviewed by the appellate systems. F.R.C.P. 62, *Ideal Toy Co. v. Sayco*, 302 F.2d 623 (2d Cir. 1962) *Russo v. Kriby*, 335 F. Supp. 122 (ED NY 1971). This equitable

standard is necessary to preserve the parties' rights, the subject matter of the petition (critical habitat in this case) and the effectiveness of judgments in the legal system. Mesabi Iron Co. v. Reserve Mining Co., 268 F.2d 782 (1959), Georgetown College Hospital Case, 331 F.2d 1000, 1010 (1964), cert. den. 377 US 978 (1964). This litigation involves enforcement of federal statutes, for which the equitable balancing of private parties' litigation is irrelevant. Further, "likelihood of success on the merits" is not a standard for issuance of an injunction pending appeal, since by definition the District Court has already indicated its view on the plaintiffs' merits in its adverse decision. Rather the Court's standard must be to protect the integrity of the judicial review system by maintaining the status quo where necessary for full resolution of the issues raised, especially where immediate and irreplaceable public values are involved. That is precisely this case.

8. Plaintiffs are fulfilling an important role set out for them by the citizen suit provisions of the Endangered Species Act. 16 USC 1531, 1540. If they are unable to raise the important issues in this case because of ongoing agency work, that role and the further intent of Congress it comprises will be frustrated.

Plaintiffs respectfully urge that this Court, though disagreeing with them on the merits, permit them to give adequate representation to the Congressional and public values of this litigation by preserving the current habitat conditions of the Little Tennessee River valley until the legal system can fully resolve the questions of law being debated.

Respectfully submitted,

W. P. Boone Dougherty