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REFLECTED IN A RIVER: AGENCY ACCOUNTABILITY AND THE TVA TELLICO DAM CASE

ZYGMUNT J.B. PLATER*

Introduction

Legal history is usually written from one of two time perspectives: as a narrative of events and changing conditions over a span of years or as an extended exploration of one fertile moment in time. In examining the intriguing entity known as the Tennessee Valley Authority, others in this symposium will no doubt chronicle the life of that agency-corporation since its creation in 1933. This article—which compiles some of the recollections, subjective impressions, and analytical observations of a participant1—draws upon that chronological history to some extent. To a greater extent, however, it focuses upon revealing moments in the last six years of the long-running battles over completion of the TVA’s

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* Professor, Boston College Law School, A.B., Princeton; J.D., Yale; S.J.D., Michigan. The author was petitioner and counsel for the plaintiff citizens in the last years of the Tellico Dam case, from 1974 to 1980; in Department of Interior proceedings (while teaching at the University of Tennessee College of Law); in court, Hill v. TVA, 419 F. Supp. 753 (E.D. Tenn. 1976), 549 F.2d 1064 (6th Cir. 1977), 437 U.S. 153 (1978); in the Cabinet-level interagency Endangered Species Committee; and in various proceedings in the 94th, 95th, and 96th Congresses. In those proceedings he received extraordinary support from dozens of students and colleagues at the University of Tennessee, Wayne State University, and the University of Michigan, and more than a hundred citizens of the State of Tennessee, including many within the Tennessee Valley Authority. The Tellico case also received valued support from a number of public interest advocates in Washington and around the nation. This Article benefited from the comments of Robert Abrams, William Chandler, Deborah Choly, Sharon Hamby, Ginna McMillan, Joan Peebles and David Scates, and from the research work of Kurt Brandenburg, all of whom have earned my gratitude, with no responsibility for errors that remain.

1. The essay format of this piece is a concession to the tentative nature of some of the analysis presented here. The footnoting herein is occasionally informal. The voluminous records of the Tellico controversy are being compiled in several locations at the University of Tennessee and in the author’s own files, and will undoubtedly be the subject of further analysis and theorizing in the future.

It is a premise of this article, and of modern pluralistic public law, that the role played by citizens in the Tellico debate over the years represented a particularly American phenomenon of participatory democracy. Such participation is important to the long-run rational governance of our modern technological society. See Plater, Statutory Violations and Equitable Discretion, 70 CAL. L. REV. 524, 528 n.13 (1982); Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667 (1975).
Tellico dam, which finally flooded the last remaining stretch of the Little Tennessee River Valley in the spring of 1980.2

The Tellico dam case found TVA in the late 1970's at a cusp in its existence, teetering between its national persona and its local persona, between its role as a force for progressive change and its role as an entrenched establishment. Along the way the Tellico controversy revealed much about American government and politics and the changing character of the American countryside and its people.

It should initially be clarified that the author, who had worked as a friend and ally of TVA in other contexts,3 was an active adversary during the final years of the Tellico case, from 1974-80. Because it was such a complex controversy and because the river was ultimately lost, the Tellico case inevitably became a personal as well as a professional commitment. The author's orientation, however, beginning with his first contact with the Tellico case in 1972, was that of an academic observer, concerned with the legal process through which a nation ultimately makes development decisions and incorporates social values within them. Later, in the years following the autumn of 1974, the author also became a participant, serving as attorney and petitioner in both the judicial and administrative course of the case.4

In the eyes of most Americans the Tellico case is remembered largely in terms of its last five years, and particularly as the story of the little snail darter, the endangered fish that stopped the dam. In those years, despite the unceasing efforts of the citizen critics of the project, the promoters of the dam were spectacularly successful in their characterization of the issue: the case concerned only the snail darter, a two-inch minnow misused by extremist environmentalists at the last possible moment to halt completion of a $150 million hydroelectric dam. In fact, as we will see, every element of that characterization was demonstrably false. The charm of the cliche, however, coupled with the complexity of the real life issues surrounding the project, conspired to obscure the facts and prevent them from determining the ultimate political outcome.

In fact, there were very real negatives involved in the TVA's Tellico plans and not very many positives. The Tellico dam proposal raised a host of potential problems—the broadscale disrup-

2. The gates of the Tellico Dam were finally closed on November 26, 1979, after a tortuous legal process noted hereinafter.
3. The author worked with TVA colleagues, primarily in various land-use planning initiatives for Tennessee and Alabama in the early 1970's, while a faculty member at the University of Tennessee College of Law.
4. The author was a co-plaintiff, along with the Tennessee Audubon Council, the Association of Southeastern Biologists, Professor Donald Cohen, and of course, student Hiram Hill, Jr.
tion of farmland, of rural communities, of water quality, of the venerable cultural and religious values of an Indian tribe, of historical, archaeological, and recreational resources, and of ecological values; safety problems; negative economic effects; and the loss of thirty-three miles of a beautiful river that was loved by those who knew it. Because the Tellico controversy was shaped by the attempts of citizens to be heard in the process of federal decision-making, it also raised important questions of pluralistic democracy. These issues represented an array of discrete social values, many of which had been incorporated over the years into federal and state statutes and regulations.

The story of the TVA's response to these values, facts, and laws is particularly revealing of the workings of American legal process because TVA is not a private corporation. Private corporations understandably resist the imposition of collective social values that impede their projects and programs, because private corporations owe their primary loyalty and day-to-day efforts to earning their shareholders' profit. The responsiveness of a government entity to legislated societal values theoretically stands in quite a different posture.

Nevertheless, in describing the Tellico case, it is realistic to characterize the role of the TVA as that of promoter. TVA was a powerful federal agency that had taken on a localized political perspective and had become an unrestrained booster of local construction projects.

The Tellico Project as a Public Works Proposal

The Tellico project was heir to TVA's past. It had been listed in TVA's mid-1930's survey of more than sixty potential dam sites in the TVA region as the "Fort Loudon Addition," a small dam channeling water from the Little Tennessee River into the adjoining Fort Loudoun reservoir on the Big Tennessee. (Figure 1). For thirty years, TVA and the Army Corps of Engineers built the other dams on the list, dams large enough to justify generators and provide navigation benefits. They dammed 2500 linear miles of river,

5. This is not to say, of course, that any private corporation would ever have undertaken the Tellico project as a profitable venture. In a "free market" system, the Tellico Dam would never have been seriously proposed. See note 114 infra and accompanying text.

6. Tellico was listed as a "possible" project as part of TVA's original master plan for the region. Tennessee Valley Authority, Report to the Congress on the Unified Development of the Tennessee River System 104 (1936). TVA changed the spelling of "Fort Loudon," apparently inadvertently, when it built the "Fort Loudoun" dam on the Big Tennessee, and has stuck with the new spelling for that reservoir ever since.
Figure 1—Dam projects in the Tennessee Valley region, showing dams on the Tennessee and Cumberland River systems. The majority of these dams were constructed by TVA; the remainder by the Corps of Engineers or private corporate entities.

creating a sequence of muddy reservoirs descending from the region’s mountain headwaters down to the Mississippi.7 As a result Tennessee now has more shoreline than all of the Great Lakes combined.8 TVA, which admitted that the Tellico plan had only negligible benefits in navigation, flood control, and power augmentation,9 did not move forward on the Tellico dam until it had used up all the less marginal available sites. But for reasons which will later be the subject of conjecture here,10 the agency persisted in its dam-building determination as long as dam-building sites remained. Its reputation had been made in the Depression years with its early dam building; it continued with forty more dams in the 1940’s and 1950’s. Now there are more than five dozen dams in the Valley.11 It is an axiom of bureaucratic endeavor that a rolling stone gathers momentum. If the first two dozen dams were good, more dams would be better still. As soon as local son

8. The total shoreline of TVA reservoirs within Tennessee is now approximately 10,000 miles in summer months, compared to the Great Lakes 7,870 miles. Telephone interview with TVA Public Information Office (Sept. 3, 1982); 10 ENCYCLOPAEDIA BRITANNICA The Great Lakes 774 (1973 ed.).
9. In the days when the Timberlake new town development was the major focus of TVA’s Tellico project justification, TVA Chairman Aubrey Wagner openly characterized the project’s navigation, flood control, and power benefits as “relatively insignificant.” Knoxville Journal, Sept. 23, 1964, at 1, col. 2.
10. See text accompanying note 100 infra.
11. See Figure 1.
Figure 2—Colonel Henry Timberlake's map. This 1762 map, drafted by a British officer, depicts the Little Tennessee Valley Cherokee settlements that comprised the heart of the Cherokee culture. The area includes Chote (or Echota), the holy city of refuge; Toskegee, the birthplace of Sequoyah; Toqua; Tommotley; Tennessee; Settaco (Citico); and two colonial forts. Prior to the Tellico project, Chilhowee Dam had eliminated the area above the Enemy (Smoky) Mountains. Tellico Dam, located 15 miles downriver from the Rose Island and Icehouse Bottoms sites, destroyed all of the remainder.
Senator Estes Kefauver, who had opposed the project as rank nonsense, died, the agency resurrected the Tellico dam from its project files.12

According to internal TVA documents, then-Chairman Wagner's economists could find no sufficient cost justifications for the project.13

12. Senator Kefauver was a native and resident of Madisonville, living within 12 miles of the project area. According to a member of his congressional staff, Kefauver was approached by TVA on two separate occasions in an attempt to generate his approval for the Tellico Dam, and the agency's advances were firmly rebuffed each time. TVA also unsuccessfully approached Rep. J.B. Frazier of the Third District. Subsequent to the death of Sen. Kefauver and the departure from office of Rep. Frazier, TVA reopened its congressional efforts, this time more successfully. Letter from Ms. Alice Milton to Peter Alliman (July 19, 1977) (available in Tennessee Law Review office). This account and others like it are significant, moreover, in demonstrating that the pork-barrel agencies often are not acting as mere "agents" responding to congressional directives (an excuse the author often heard from TVA officials during the Tellico case) but rather themselves have initiated and lobbied for the construction opportunities for which they then seek subsidies from the public treasury.

13. In a process similar but not identical to other pork-barrel agencies, TVA sought to justify each of its congressionally funded projects according to a benefit-cost calculus that produced a ratio of at least $1.01 in predicted benefits for every federal dollar spent, projected over the life of the project. In 1960 with a traditional analysis of power, flood control, and navigation benefits, the best benefit-cost ratio the staff was able to assert for Tellico was 1.07 to 1.00. Whether because of its small margin or dubious nature, this was deemed insufficient to justify the project at that time. Letter from Robert M. Howes, Director of Reservoir Properties (DRP), TVA, to DRP files (Aug. 4, 1960) (available in Tennessee Law Review office).

Much political controversy has been generated by the tension between the federal pork-barrel establishment's desire to build subsidized projects and recent citizen attempts to bring rational economic oversight review to these immense expenditures. Despite the free-market rhetoric of the present federal administration, however, the fiscal accountability efforts are generally overwhelmed by the public works lobby. The Tennessee-Tombigbee waterway is a four billion dollar project which has never survived outside economic scrutiny, but continues to have the annual support of fiscal conservatives. See Comptroller General of the U.S., Congressional Guidelines Needed on Federal Cost-Sharing on Water Resource Projects When Project Benefits Are Not Widespread (1980); Comptroller General of the U.S., An Overview of Benefit-Cost Analysis of Water Resource Projects—Improvements Still Needed (1978); Miller, Trickery on the Tenn-Tom, Reader's Dig., Sept. 1978, at 138.

The construction agencies' benefit-cost calculations suffer from discount interest rates projected at unrealistically low levels (ranging from 2% to 8%), inflation of benefits, systematic underestimation of costs, and regular cost overruns. Most importantly, the sympathetic appropriations committees rarely question the agencies' numbers. No official accounting is made retrospectively to determine if projects in reality ever paid off their hypothecated benefits. The agencies' benefit-cost calculations required by law have almost unanimously been the object of judicial deference and denied judicial review. See Environmental Defense Fund v. TVA, 371 F. Supp. 1004 (E.D. Tenn. 1973), aff'd, 492 F.2d 466 (6th Cir. 1974); Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346 (6th Cir. 1972);
in the usual water-related benefit categories of navigation, flood control, and power. A Tellico barge channel would merely be a rural dead end at the extremity of a twisting 600-mile transport route; any additional flood control capacity would add little to the existing network of thirty dams upstream of Chattanooga; and power augmentation through the canal to Fort Loudoun's generators would add only the equivalent of twenty-two megawatts (MW) to a system that then had a 27,000 MW capacity.\textsuperscript{14} Having recently "lost" a planned dam project on the French Broad River to North Carolina opposition,\textsuperscript{15} however, the Wagner administration was determined not to miss the opportunity to build Tellico. It ordered the economists to find benefits that would justify building the dam.\textsuperscript{16} Several TVA economists refused to invent such justifications and as a result had to leave the agency's employ. Those that remained came up with the Tellico Timberlake plan.

Most people do not realize that the major benefits by which TVA finally rationalized the Tellico project had no obvious relation to traditional dam justifications nor even any necessary relationship to the existence of a dam. One of the two major project

\textsuperscript{14} See J. Gibbons & W. Chandler, Energy: The Conservation Revolution 125 (1981). TVA emphasized in the later years that the canal would create 200,000,000 kilowatt-hours each year, a number that seemed impressive to the lay audience. To put this figure into perspective, however, this is an increment of only .0018\% to TVA's power production, at a huge relative cost. TVA has since cancelled plans for four generating units and deferred four others because they are not now needed. If an attempt were made to justify Tellico's project cost in terms of electricity production, allocating all actual project construction costs to power benefits, each kilowatt-hour has thereby cost approximately ten cents, which is twice as expensive as TVA's current delivered cost per kilowatt hour. Interview with William Chandler, in Boston, Massachusetts (Aug. 26, 1982).

\textsuperscript{15} TVA had planned a dam project for the French Broad River in the vicinity of Hendersonville for purported flood control purposes, strongly backed by the Olin Corporation which would have received water supply benefits. The project was defeated by local citizens in 1972 after an eleven-year political fight. See M. Boswell, Grass Roots Along the Upper French Broad: The Valley People Versus the Tennessee Valley Authority 1961-1972 (1973) (available from Upper French Broad Defense Ass'n). The citizens association was never disbanded and remains on "standby alert." Chairman Wagner was reportedly infuriated by the loss and resolved then not to lose Tellico.

\textsuperscript{16} See Howes' letter, supra note 13. Having not been able to find a sufficient justification for the project, Howes related that "effort will be made . . . to firm up a basis for inclusion of other benefits such as recreation and land increment," which apparently led to the subsequent development of the Timberlake new town scheme.
benefit claims was "shoreland development," based upon the condemnation and resale of land. By acquiring more than 38,000 acres for the project, only 16,000 of which would be flooded even during the summer, TVA projected that it could resell the additional 22,000 acres of condemned farmlands to a hypothetical industrial city to be called "Timberlake" and built by the Boeing Corporation with Congressional subsidies. The speculative land profits and the revenues from the hypothetical city would provide the project's official shoreland benefits. The other major projected Tellico benefit was land and water-based recreation in the project area, a benefit based upon projections that visitors to the lake would generate $1,440,000 in annual recreation revenues and economic activity. On the basis of these hypotheses, the TVA Board authorized construction of the Tellico Dam.

The process of promoting public works construction by hypothesizing such broad project benefits is not unique to TVA, although no other pork-barrel agency appears to have exercised quite so much latitude in attributing project benefits. The public

17. Office of Health and Environmental Science, Tennessee Valley Authority, 1 Environmental Statement Tellico Project I-1-49 (1972) [hereinafter cited as Tellico EIS].

18. Timberlake was named after the first British officer to map the region (see Figure 2) and was patterned after a model Minnesota city designed by Athelstan Spilhaus which was also never built. It was projected to require between $250 and $800 million in subsidies that were not included in the Tellico cost projections. The estimates of jobs and industrial locations were based upon the intuitive and unproved "Foster Hypothesis," expressed by the late Michael Foster, Director of the Division of Navigation Development and Economic Studies, that a combination of water, rail, and highway transport routes would generate such activity wherever such elements occurred together. See Tennessee Valley Authority, Timberlake New Community (1974) (draft environmental statement) [hereinafter cited as Timberlake EIS].

19. Tellico EIS, supra note 17, at I-1-49.

20. TVA is virtually unique in the federal government in its ability to self-authorize construction of major public works projects. Other agencies must first win legislative authorization of a project, then receive legislative appropriations to cover the costs. TVA, on the other hand, can build projects without the necessity of any kind of Congressional permission if it can self-finance them. Tennessee Valley Authority Act of 1933, ch. 32, §§ 4(j), 27, 48 Stat. 58, 61, 71 (codified as amended at 16 U.S.C. §§ 831c(j), 831z (1976)).

The TVA authorization of Tellico under Wagner's leadership, however, required a byzantine sequence of East Tennessee public relations efforts to build a local political constituency, including the creation and funding of a Little Tennessee River Development Association. When this group voted against the dam, it had to be disbanded and another promotion group formed. See K. Johnson, A History of the Tellico Project (1978) (unpublished manuscript).

21. A Corps of Engineers official once told the author that Corps economists, who are not noted for their restraint in benefit projections, "admired the hyperbole" of TVA benefit-cost methods on the Tellico and Columbia Dams but did not have the temerity to try such projections for Corps projects.
works pork-barrel is a widespread phenomenon in United States politics, with an intricate linkage—forged of federal dollars—between local construction, real estate and commercial interests,22 federal construction agencies, and members of Congress, coordinated by the immensely powerful House appropriations committee.23 In effect, the pork-barrel represents a tacit mutual conspiracy among all citizens of the nation: the expenditure of federal funds will be justified for projects in all corners of the United States so that each congressional district can secure its share of the public pie, and if purported benefit justifications must be enhanced beyond the real economic judgments of the marketplace, then so be it.24 In a congressional system where the re-election of each member hinges in part upon the appearance of aggrandizing one's own district and constituents, no member is immune to the force and subtle blandishments of the rolling pork-barrel and of the appropriations committee that controls it. Once proposed, construction projects take on a clientele and a life of their own. It thus presents no novelty and little controversy to identify a strong predisposition within TVA and other construction agencies toward building their projects and toward boosting purported benefits to that end.

The River, Valley, and People

Notice that up to this point the Tellico dam has been discussed only in terms of a "construction opportunity." That was the frame of reference in which the agency approached the issue throughout the case.

The public works system, however, works its physical effects upon real resources and the humans associated with them. The

22. The pro-Tellico coalition organized by TVA in the mid-1960's was composed of real estate investors in the project area, local businessmen who were persuaded by the images of wealth that would accompany the creation of Timberlake City, local politicians (especially the politicians of Monroe County), and local citizens who believed that the promised jobs would provide economic security for themselves and their children. In large part, to understand the local politics of the Tellico case one must know the land-buying activities of real estate interests in Blount and Monroe Counties, of TVA executives and of Knoxville investors.

23. Over the years, the power of the purse has led to such concentrations of parliamentary power that Congress has sometimes burdened the committees with special restrictions. (Presently representatives cannot sit on other committees if they have appropriations appointments.) At times Congress has eliminated the appropriations committee altogether. The extraordinary power and effect of the appropriations committees, surviving even after the 1974 Budget Act, deserves a major chronicle. For a partial introduction, see N. Ashworth, Pork Barreling (1982); T. Reid, Congressional Odyssey—The Saga of A Senate Bill (1980).

24. See note 13 supra.
Tellico project was sited in the remaining thirty-three miles of the Little Tennessee River and its beautiful valley, a setting which dramatically juxtaposed the pork-barrel against a context of natural and human values.

The citizens who tried to assert these values in opposition to TVA's Tellico plans over the years from 1960 to 1980 hardly fit their national image of extremist environmentalists. They were first and foremost the farmers who lived in that immensely fertile valley; 340 families would be forced off their land by the project's land condemnation. Local sportsmen were a second important component—hunters and trout fisherman who were devoted to the river's superb fishing as well as its beauty. The Cherokee Indians, whose most sacred religious and historical sites would be destroyed by the reservoir, joined the ranks of protesters in the early 1960's; they remembered the legend that predicted their culture would die if the Little Tennessee were ever to stop flowing and thus become "dead water." Other participants who objected to the project included archaeologists, for whom the valley was of national significance; biologists, for whom the river was regarded as a particularly rich, natural habitat; colonial historians, for whom the valley played a major role in the development of transmontane settlement; canoeists; arrowhead hunters; birdwatchers; hikers; campers; flower clubs; farm organizations; and several members of the local law school community.

The citizen opponents had only limited formal organization over the years. Their efforts, however, consistently made the same

25. The Tellico project area farmers were part of the Little T's defense efforts from the beginning. They did not form a specific organization to protect farmers until 1977 when Mr. Alfred Davis and Ms. Jean Ritchey, who, with their families continued to make herculean efforts in Washington as well as Tennessee, organized the Tellico Dispossessed Landowners Association.

26. See Figure 2.

27. The Cherokee opposition was centered in the Eastern Band of Cherokees located across the Smokies in North Carolina, and the United Keetooh Band in Oklahoma. In the 1960's TVA had enlisted the support of Ross Swimmer, the president of the official Cherokee government in Oklahoma, to approve the Tellico project's destruction of Cherokee sites. The eastern Cherokees and the traditional Cherokees, both east and west, never yielded in their opposition, continuing even after all statutory avenues were closed. See Sequoyah v. TVA, 480 F. Supp. 608 (E.D. Tenn. 1979); 620 F.2d 1159 (6th Cir. 1980); note 129 infra.

In sworn affidavits accompanying the plaintiffs' complaint in Sequoyah v. TVA, numerous Cherokee witnesses and other authorities described their beliefs that the flooding of the river valley would destroy or greatly diminish the Cherokees' spiritual power as well as its cultural heritage. 620 F.2d at 1162.

28. Hiram Hill, the first-named plaintiff, was an energetic law student at the University of Tennessee whose term paper on the Endangered Species Act was the genesis of the Tellico Dam snail darter lawsuit.

29. The Society for the Preservation of the Little Tennessee was the most formalized attempt to create an umbrella organization for the citizens opposed
three analytical points: that the project's claimed benefits were at the very least exaggerated, if indeed they would accrue at all; that the project’s actual cost in dollars and lost resources was excessively large but was ignored in the agency's promotional calculus; and that alternative cost-efficient river-management plans could achieve real benefits at far less cost without the dam.30

This benefits-costs-alternatives analytical approach, incidentally, probably best explains why the Tellico opponents were labeled “the environmentalists.” Environmental cases around the nation and the world have only this in common: they attempt to achieve an accounting of the real benefits, costs, and alternatives of various promotional programs and projects, scrutinizing them in broader and longer terms than the typically narrowed perspective of corporate or governmental promoters.31 In so doing, they attempt to

to the dam. Its existence as an organized entity was important to keeping hope and active efforts alive and focused during the first dozen years of the fight. At various times its role was picked up and carried on by the Fort Loudon Association, the Tennessee Endangered Species Committee, the Tellico Landowners Association, and finally the Little Tennessee River Alliance. The groups raised funds through church meetings, pot luck dinners, sales of T-shirts and donated art work, and donations. They never were solvent for long, nor did they have reliable media access. No national conservation organization acted as a financial or organizational “angel,” although the Environmental Defense Fund took over the litigation burden for an important two years in the early 1970’s. National Trout Unlimited helped raise a significant portion of the post-1977 litigation costs, and other groups donated office space, political legwork, and moral support in the final political battles.

30. See notes 33-47 & 120 infra and accompanying text.

31. It is remarkable to what an extent government decision-makers have come to share the functional frame of reference of private corporate entrepreneurs. In the classic 18th century economic model that still informs modern American business, private entrepreneurs are expected to look out for their own profits alone. Their managerial responsibility to their stockholders is to develop and implement projects which will provide maximum gain with minimum outlay; negative burdens (like pollution) will be passed on to the public at large if this can be done without facing accountability in court suits or otherwise. Ultimately, the wistful moral premise of those who still hold this theory is that their vigorous private self-aggrandizement in some fashion will trickle down to serve the greater good. To talk about the indirect or noneconomic consequences of corporate decisions—like America's multibillion dollar task of cleaning up dumped hazardous wastes, or the health and wildlife consequences thereof—is regarded as radical, or at least impolite, insofar as it threatens the basic moral premise.

Government officials, particularly in the public works agencies, often voice a similar wistful self-justification. Their “produce” is measured in tons of concrete poured, or miles of roadway built, or miles of waterway drained, dug, or dammed. Their “profit” is measured in terms of jobs gained for themselves and their contractors, federal dollars gained by their agencies from the public purse, dollars passed through to their local public works constituency, and political capital at federal, state, and local levels produced by the foregoing. To the members of the corporation and the agency both, the survival and perpetuation of the organization is a basic loyalty and a compelling managerial responsibility. Sur-
bring latent non-market and economically nonquantifiable social values into the national decisional system. This process, almost by definition, goes against the flow of the status quo in the business and governmental marketplace. Yet it has become clear in the past generation that an increasingly complex technological world cannot merely rely upon its traditional business and governmental marketplace for omniscient rational decisions. Health, safety, and social and economic responsibility in a wide variety of areas have been left ultimately to the voluntary efforts of involved citizens—the gadflies, the officious intermeddlers, the unwelcome citizen outsiders—who have gradually invaded our hesitantly pluralistic public decision-making system.32

"Benefits?"

The citizens criticized TVA’s claims for the Tellico project on all grounds noted earlier, and more.33 They disputed the benefits that TVA attributed to the hypothetical Timberlake development as a cynical exercise in local public relations. They argued that TVA had unrealistically attributed large net recreational benefits to what would merely be the twenty-fourth dam in a sixty-mile radius, especially in light of the fluctuating character of TVA lakes.

vival of both, moreover, is thought to depend upon maintaining the flow of direct "profits," not some nebulous concept of indirect net benefit accounting or vague public good. Thus many promotional projects in both sectors are “paid” for by trading off human or natural resources that do not have to be accounted for because they are unmeasurable, hence “free.” To the promoters’ minds, whether private or public, accounting for consequential negative “externalities” is dysfunctional, hence to be avoided. Rather, each private or public entrepreneur seeks to do his mission, hoping perhaps that self-interest must eventually equal public interest.

32. Notable major examples of citizen challenges that are generally recognized as legitimate, though initially regarded as maverick efforts, include the SST supersonic transport, now regarded as a narrowly-avoided economic fiasco; the Trans-Alaska pipeline, which was forced into vastly improved technology and design; the identification of the health hazards of cigarette smoking to smokers and nonsmokers; Rachel Carson’s identification of the widespread consequences of chemical contamination of the physical environment; nuclear issues; citizen attempts to halt the Teton Dam on safety grounds; and so on.

33. In the later stages of the controversy, the citizens also discovered something that TVA had known for an undisclosed time: that the flood capacity of the dam had been miscalculated, which meant that the dam could not safely withstand the design flood it had been built for. To bring the dam up to its design standard would require an additional spillway at a further cost of 14 million dollars. Perhaps the most remarkable feature of this particular aspect of the controversy is that even when TVA came to view the dam safety issue as a serious problem, Senator Howard Baker, Representative John Duncan (who represents Lenoir City, located less than a thousand yards below the dam), and local politicians argued strenuously that the dam should be finished, safety questions notwithstanding.
(which are drawn down into mudflats for six months of the year),
and the rare recreational qualities of the flowing river. The citizens
systematically criticized TVA's other project claims as insubstan-
tial or insignificant.34

"Costs?"

The citizens' major role, however, lay less in criticizing the
agency's projections for future benefits than in identifying the value
of what actually existed in the valley. They focused on the benefits
that the Tellico dam would destroy. Farmland, for example: the
heart of the project lands, which would be inundated by the dam,
represented thousands of acres of rare prime farmland with up
to twenty-five feet of rich topsoil.35 TVA had ignored the loss of
such lands, as it had also failed to account for the intrinsic human
value of an established farm community of 340 families. To the
agency, these values were subsumed only in the cost of
condemnation—cost determinations which did not have to go to
a jury but could be set by a panel of TVA condemnation commis-
sioners, pursuant to the extraordinary powers granted the agency
by the TVA Act.36 The average condemnation payment for this
rich valley bottomland, which was located adjacent to the river
and the Great Smoky Mountains National Park, was reportedly
less than $400 per acre, exclusive of structures.37 The citizens iden-
tified the extraordinary sport and recreation values of the river,
which constituted a valuable resource for canoeing, family float
trips, and fishing. The "Little T" was the finest large trout river

34. As to the purported Foster hypothesis, note 18 supra, they not only
urged the lack of any evidence of the theory's validity, but obtained outside
economic reviews that undercut TVA's assertions and showed that modern barge
traffic would require rebuilding of the antiquated locks at Fort Loudoun Dam
at a prohibitively high cost.

35. Archaeologists reported that the fertile alluvial topsoils had been
deposited in the Valley at depths ranging as deep as 25 feet. A large proportion
of these soils were classified as U.S. Department of Agriculture soil classes 1
and 2, high quality agriculture land. Interview with Dr. Jefferson Chapman, in
Knoxville (Sept. 2, 1982). Even TVA admitted that the agricultural lands alone
could produce revenues up to $6.4 million annually while at the same time
estimating, without recognizing the irony, that the Tellico project could generate
TENNESSEE VALLEY AUTHORITY'S TELLICO DAM PROJECT—COSTS, ALTERNATIVES,
AND BENEFITS (1977) (based on TVA information) [hereinafter cited as 1977 COM-
PTROLLER GENERAL REPORT].

36. Tennessee Valley Authority Act of 1933, ch. 32, § 4(i), 48 Stat. 58, 60-61
(codified as amended at 16 U.S.C. § 831ei (1976)).

37. The records of Tellico condemnations are not readily separable into
land and structure compensation classes; in several cases where solely agricultural
riverfront land was taken, condemnation compensation averaged $320 per acre.
in the southeastern United States even before TVA and the Corps eliminated the competition. Repeatedly the citizens emphasized that the Little Tennessee Valley was a treasure, not only in its own terms, but also because of its uniqueness after the dam building of the prior four decades. The citizens also attempted to argue the historical values which TVA had dismissed as nonquantifiable—the birthplace of the great Sequoyah; the trading and political heart of the Cherokee nation with its pivotal role in the development of Tennessee in colonial times and the years of early nationhood; Tenassee town, which gave its name to the river and the state; Fort Loudon; Coytee Spring; and a number of archaeological sites with a physical record of continuous human habitation extending back at least 10,000 years. The Cherokee town of Echota had more than historical value to the Cherokees—it was their Jerusalem. The sacred city of refuge had been the spot where they became Cherokees and where they returned openly or furtively over the years for religious renewal and to gather medicine. This cultural value was incalculable to both the Cherokees and to TVA, but in two very different senses. To some of the dam opponents there was real social value merely in the clean flowing water and the rich diversity of natural life forms it supported, even before they knew of the existence of a particular small perch. The river and its valley, moreover, were beautiful, restful, natural... none of which could be said of a reservoir.

These values were, however, non-market values. They may have existed in reality. They may have enriched the lives of thousands of people in the past, present, and future. But unless the loss of such values could be invoiced and accounted in financial terms, the decisional system in TVA and Congress was ill-suited and indisposed to take account of them.

"Alternatives?"

This difficulty in characterizing the valley's attributes in finan-

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38. The Rose Island and Icehouse Bottoms sites, for instance, had evidence of human occupation extending down through 10,000 continuous years of deposition. This chronological age, combined with the high quality of preservation of these and other sites in the valley, made the Little Tennessee a unique archaeological resource. See J. Chapman, Archaic Period Research in the Lower Little Tennessee River Valley—1975 (1975) (available as a TVA Publication in Anthropology); telephone interview with Dr. Jefferson Chapman (Sept. 8, 1982).

39. In TVA v. Hill, 437 U.S. 153, 157 (1978), the Supreme Court identified Echota as "the sacred capital of the Cherokee Nation as early as the 16th Century." See Figure 2. See also note 129 infra.

40. As one frustrated fisherman-dam-fighter, Larry Crisp, put it: "This damn reservoir doesn't make sense. It's like trading off an eagle just to get us another old crow."
cial terms, coupled with the agency's inclination to build projects, meant that the citizens' efforts to present feasible alternatives really found no interested audience in the agency or in its political context. This reluctance to consider alternatives is especially common in the public works context because promoters must often suspect that a fair overall accounting would suggest the superiority of the option of leaving things as they are. Nevertheless, it is important in rational decision-making terms to realize that the citizens in the Tellico case actively sought a variety of constructive development options as alternatives to the dam that they deemed to be so destructive and dysfunctional. Beginning in the earliest days of the fight, the citizens argued that TVA could achieve its recreational benefit goals better and more cheaply without the dam, through coordinated management of the flowing river and its valley. They argued for cooperative recreational development with the National Park Service, which desperately needed overflow capacity for the national park. They emphasized the political revenue-generating value of the agricultural lands that would be flooded or taken out of production by a reservoir and the economic values which could be realized through tourism at the historic and archaeological sites in the valley.

In the beginning, when little had been spent on the project by TVA, these alternatives could be discussed as relatively simple, cost-effective options. Later, as millions of dollars were poured into road building and concrete, presentation of the alternatives necessarily became more sophisticated and difficult.

By the 1970's, the citizens' arguments had evolved into a complex agriculture-tourism-recreation model of economic development, designed to capitalize upon the valley's remarkable resources and

41. In the National Environmental Policy Act cases, for example, the courts early recognized that agencies were trying to ignore the net benefits of doing no project at all, and so forced the agencies to analyze the so-called "no-action" alternative. See Swain v. Brinegar, 517 F.2d 766, 780 (7th Cir. 1975); Keith v. Volpe, 352 F. Supp. 1324, 1336 (C.D. Cal. 1972), aff'd sub. nom. Keith v. California Highway Comm'n, 506 F.2d 696 (9th Cir. 1974), cert. denied, 420 U.S. 908 (1975). Agencies, however, typically were able to find reasons why nonconstruction was not feasible. See TELLICO EIS, supra note 17, at I-1-43 to I-1-47.

42. The National Park Service recommended the river alternative over the reservoir plan as being better suited for easing the park's crowding and traffic flow problems. Letter from Larry E. Meierotto, for Richard R. Hite, Assistant Secretary, Policy, Budget, and Administration, United States Department of the Interior, to Henry Eschwege, Director, Community and Economic Development Division, United States General Accounting Office (August 2, 1977) (available in Tennessee Law Review office). See also Endangered Species Act Oversight: Hearings Before the Subcomm. on Resource Protection of the Senate Comm. on Environment and Public Works, 95th Cong., 1st Sess. 203-05 (1977) (testimony of Park Superintendent Boyd Evison) [hereinafter cited as 1977 Culver Hearings].

43. See note 124 infra.
their use for public benefit, rather than to submerge them under a shallow impoundment of water and mud.44

Basic to the citizens' suggested alternatives for flowing river development was a fact that escaped national attention and was urgently obscured by TVA and its allies throughout the long debates: the Tellico dam was only a small part of the Tellico project. Even after more than $100 million had been spent on the project; it was practical to consider a complete redesign of the Tellico project without the reservoir, because Tellico was not a $100-plus million dam. The concrete dam itself was a pipsqueak among dams, costing less than $8 million; the various earthworks, built rapidly by TVA after the discovery of the endangered species, cost only $18 million or so.45 The vast bulk of the more than $100 million in agency expenditures went for land acquisition, road building and other highway improvements, and development planning—expenditures that were readily convertible to non-reservoir uses at potentially greater value. By 1978 the value of the land alone had reportedly appreciated beyond its condemnation cost sufficiently to write off the cost of dam construction.46

In short the citizens raised issues about Tellico that had been systematically ignored by the agency and would seem objectively to have been relevant to rational decision-making. They did so, moreover, with a sophistication that was remarkable when one considers that they were only volunteers whose costs were financed by T-shirts and bake sales.47

A Basic Assessment of the Tellico Merits

By this point it is at the very least clear that some of the arguments advanced by opponents of the dam had substantial merit.

44. The citizen plans included two industrial sites as well, near Niles Ferry and near the dam site. The shallowness of the impoundment can be discerned from the fact that the river had a declination of only about 70 feet over its 33 mile length. The valley was so shallow that it had to be built up along the sides at several points to hold a reservoir. The reservoir impoundment is relatively shallow, the majority of the impoundment area averaging less than 20 feet in depth even in the summer months.

45. See 1977 COMPTROLLER GENERAL REPORT, supra note 35, at 7; 1977 Culver Hearings, supra note 42, at 875, 962 (testimony of Prof. Zygmunt Plater; TVA Exhibit 8).

46. The total cost of the dam structure proper was $4.08 million when the endangered species violation was discovered, and rose to slightly more than $6 million. Associated earthworks raised the dam-related construction costs to approximately $22.5 million. Id.

47. Over the last six years of the Tellico debate, the citizens' out-of-pocket expenses totalled approximately $26,000. Sales of T-shirts and lithographic prints contributed the largest single portion of these funds.
This fact, without more, would provide a sufficient basis for critically analyzing TVA's long-running avoidance of outside participation in its policymaking.

The Tellico case, however, presents an even stronger basis for such a review. On the Tellico record it is both feasible and analytically worthwhile to ascertain who was right on the merits and who was wrong. The citizens' arguments, it turns out, were consistently more accurate than the agency's.

The basis for such an overall assessment lies in an aspect of the case that was overlooked in the last few years of the Tellico debate: in those final years, there were no longer any promoters of the dam who pretended that the dam had been an economically justifiable project at its inception. Instead the pro-dam position of the 1970's was that the dam should be completed because so much money had been spent on the project that it would be less wasteful to finish it as planned than to redesign it. This "sunk cost" argument was Tellico's major economic battleground, particularly during the two years following the Sixth Circuit's 1977 injunction. TVA had argued in 1973, when only $4.08 million of the total Tellico project had been spent on the dam itself,48 that too much money had been sunk to turn back, and Tellico's boosters made that argument to the end, in spite of contrary economic statistics.49 The dam's opponents, on the other hand, argued that the costs were not sunk, but rather were salvageable for alternative, river-based development.50

Whichever side of the sunk-cost debate was correct after the expenditures of $100 million-plus in 1978,51—the "alternative river development" or "irretrievable sunk cost" proponents—the unspoken premise of both sides was that the project was not cost-justified prior to the bulk of that expenditure.

Further, as we will note below, the most vigorous economic review made of Tellico in late 197852 concluded that even then the reservoir plan could not pay its way and that the citizens' alter-

48. See 1977 Culver Hearings, supra note 42, at 962 (TVA Exhibit 8).
49. The tactic proved successful at the end when John Duncan, the congressman from the Tellico district, focused on this "sunk cost" argument to persuade other congressmen to support the dam: "People's land had been taken, the government had promised a dam and reservoir, and now is not time for breaking faith with the people... We have spent the taxpayers' money... I think there is no justification for delay. The project is 99% complete." Letter from Rep. John Duncan to the other members of the House (July 25, 1979).
50. See notes 41-47 supra and accompanying text.
51. See 1977 Culver Hearings, supra note 42, at 962 (TVA Exhibit 8). The current official estimated cost of the Tellico project is $135-150 million. Telephone interview with TVA Public Information Office (Sept. 7, 1982).
52. See notes 110-14 infra and accompanying text.
native development models were still attractive and feasible alternatives at that late date. As to the agency’s longstanding refusal up to that point to consider non-dam alternatives, it appears that based on any calculation of actual costs and benefits, the Tellico dam should not have been built.

**Laws, TVA, and the Snail Darter**

In a society where might does not always make right, laws represent an attempt to impose public values and principles upon the system’s powerful actors as well as its plebes. With respect to federal agency actors, there are a variety of statutory enactments that impose limits upon the potentially negative effects of federal agency programs and projects. The Tellico history demonstrates the different degrees to which such statutory constraints can be effective.

In the early years of the Tellico controversy, no statutes were readily available to enforce affected public values. During the 1960’s, the citizen critics were relegated to arguments within the Congressional appropriations process, a political forum in which neither Congress nor TVA had any interest or incentive to heed the outsiders’ concerns.

The first major statutory question arose with the passage of

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53. *Cf.* "‘The simple plan[:] That they should take who have the power, And they should keep, who can.’" *Quoted in Meeker v. City of East Orange, 77 N.J.L. 623, 638, 74 A. 379, 385 (1909).*


Theoretically TVA could have been sued for failure to obtain Corps of Engineers permits required under the Rivers and Harbors Appropriation Act of 1899, ch. 425, § 9, 30 Stat. 1121, 1151 (codified at 16 U.S.C. § 401 (1976)) and procedural clearance required prior to the destruction of historic resources under the National Historic Preservation Act, *supra*, and its associated Executive Order. As to the first, TVA had taken the position, against the judgment of the Corps, that it was impliedly exempt from the Rivers and Harbors Act. At the same time the Legal Division made plans for compliance should TVA be forced to comply with the Act. The author did preliminary research on the litigability of both statutes, but was informed (incorrectly though probably innocently) that TVA had been issued a Memorandum of Agreement constituting substantial compliance in each case.

the National Environmental Policy Act of 1969 (NEPA), which requires the filing of an environmental impact statement (EIS) for every "major federal action significantly affecting the environment."\textsuperscript{56} The EIS process could require TVA, for the first time, to make a public accounting of Tellico's adverse effects, loss of resources, and the possible alternatives.

Speaking through the legal division and Chairman Wagner's office, the position taken by the agency on NEPA compliance in the early 1970's was revealing. Their instinct was to avoid the statutory mandate in any way possible. TVA argued that it did not have to comply with NEPA because it was a federal corporation, not a federal agency; that it was exempt because of the extraordinary powers it had been granted to cope with regional poverty; and that NEPA did not apply to Tellico because the project was already underway. The courts did not accept these arguments. An injunction issued pending preparation of an EIS.\textsuperscript{57} Thereafter, in 1972, the agency prepared an EIS that was especially revealing in light of the subsequent record.\textsuperscript{58} Like many other agencies' impact statements, it understandably maximized the positive claims and minimized the negative. The losses of farmland, historical sites, and the free-flowing river were dismissed as insignificant when compared to project benefits.\textsuperscript{59} As to alternative non-dam development options, the EIS took the position that too much had been done to turn back, a position that, as we have seen, was untenable as much as six years later, even after the expenditure of an additional seventy-five million dollars.\textsuperscript{60}

The citizens' use of NEPA, however, for the first time forced TVA at least in form to address the liabilities of the Tellico project in substantive terms. The citizens won almost two years of construction delay, which might have permitted TVA's decisional system to change its mind.\textsuperscript{61} But TVA persevered, even when the Boeing Corporation pulled out of the Timberlake scheme in 1974 citing its economic infeasibility.\textsuperscript{62} Although the court ultimately rescinded the NEPA injunction, the project postponement under

\textsuperscript{56.} Pub. L. No. 91-190, § 102(c), 83 Stat. 852, 853 (codified at 42 U.S.C. § 4332(c) (1976)).


\textsuperscript{58.} See notes 109-14 infra and accompanying text.

\textsuperscript{59.} Tellico EIS, supra note 17, at I-1-42 to I-1-48.

\textsuperscript{60.} See note 70 infra.


\textsuperscript{62.} As finally hypothesized, the Timberlake scheme would have required 800 million in public and private dollars, none of which, of course, was figured into the Tellico benefit-cost ratio. See Knoxville Journal, Mar. 6, 1975, at 1, col.
the NEPA injunction solidified the citizens' resolve and showed the local community that the agency could sometimes be successfully challenged in court.

The federal Endangered Species Act of 1973 provided the Tellico project's second major statutory siege. The little snail darter, a two and one-half inch long junior member of the perch family, was discovered by Dr. David Etnier in the late summer of 1973 near Coytee Spring, at a shallow river shoal in the midst of the project area. TVA was notified almost immediately and soon had captured its own specimens of what appeared to be a previously unknown species of river darter, with its major habitat there in the Little Tennessee. According to the TVA and University of Tennessee scientists, the darter appeared to be a relict of previous populations which once had extended throughout the Tennessee River system as far as Alabama, but had been extirpated one by one by dams. The Little Tennessee was the darter's only known remaining habitat—its broad, fertile waters, flowing clear and cool over the gravel and rock shoals necessary for spawning.

Section 7 of the Endangered Species Act of 1973 established a mandatory duty that "all federal . . . agencies shall . . . insure that actions authorized, funded, or carried out, by them do not jeopardize the continued existence of . . . endangered species," nor destroy their critical habitats. The Tellico impoundment plan, according to the scientific evidence available, would do precisely what the Act prohibited.

How did the agency respond? The legal division again stepped in to coordinate TVA's position: the law did not apply to Tellico. An embargo was placed upon the agency biologists to prevent them from disclosing biological evidence as it was discovered. An embassy of attorneys and biologists went to Washington to urge the Department of Interior not to list the species as endangered. Arguments were made that the darter could not be protected until it was officially given a Latin name; that it was not really a species, but only a subspecies, although the Act also protected

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3. When Congress refused to give such sums, the concept folded, having served as a fairly effective stalking-horse in getting the project underway.


64. A "relict" population is a population of creatures surviving in their original environment while their surroundings have changed drastically. TVA tacitly admitted that the darter's prior range had been destroyed by the succession of dams on the Tennessee River system.

65. Small populations of the darter have since been discovered elsewhere, but the original fact remains true—the vast majority of the relict species had survived in its only substantial remaining habitat area, the Little Tennessee.

that the fish undoubtedly existed in many other healthy populations; that it would not be jeopardized by changing the river habitat into an impoundment, but that if it were endangered, it was already too late to save it because of ongoing river alterations. As to the law, it was argued that the Endangered Species Act was inapplicable because Tellico was an ongoing project (as TVA had previously argued in the NEPA case); that the Act had been impliedly amended by annual appropriations for Tellico; and that the law need not be followed if it would lead to such "absurd" results as stopping an important project. The biologists and TVA's press office were told to refer to the fish as the "so-called" snail darter. The "front office" directed ridicule toward the citizens who raised the statutory question, and the agency's sizeable political resources in Washington were mobilized to try to prevent the Department of Interior from listing the species.


68. The agency had, on an around-the-clock schedule, closed off the open river channel through which the juvenile darters migrated during the first year of their life cycle. Long-term survival of the species thus would require some method of transporting fish around the earthwork obstructions, a program that was temporarily and successfully implemented in 1977-78.

The policy of mooting, or attempting to foreclose challenges or alternatives to promotional projects by pushing on to a point where it can be argued that there is no turning back, is by no means limited to TVA. However, Tellico could be the subject of a primer on the subject. TVA argued that it was too late to rethink Tellico from the moment that ground-clearing began in 1967, up to 1979 when the Cabinet-level review committee found that feasible alternatives still existed despite the expenditure of more than $110 million. See notes 109-14 infra and accompanying text. In 1975 TVA argued that the project was 60% complete, based upon total dollars expended against an unrealistically low estimated total cost of $60 million. *See* Knoxville Journal, Oct. 10, 1975, at 1, col. 4. Actually only $4.08 million had been sunk in concrete at this time. *See* notes 45-46 supra and accompanying text.


70. For example, TVA still officially referred to the "so-called 'snail darter'" in letters from General Manager Lynn Seeber, to Director, U.S. Fish and Wildlife Service, August 15, 1975; Dr. Charles Hazel to Dr. Thomas Ripley, August 7, 1975; Dr. Ripley to Dr. Ronald O. Skoog, March 20, 1975.

71. When citizens attempted to present the arguments for non-dam project alternatives at the Authority's monthly public meetings, it appeared to the participants that they received equal amounts of condescension and derision, particularly from Chairman Wagner.
Meanwhile the agency apparently took the statutory threat quite seriously. TVA accelerated its construction efforts, beginning the earthworks and working around the clock to complete them.\(^{72}\) It commenced tree cutting in the valley area, beginning one morning at Coytee Spring, the sycamore-surrounded historic site beside the endangered species' prime spawning grounds. By noon that day, all the trees were down, and bulldozers were scraping through the spring, sending a cascade of mud onto the darter's prime breeding shoal in the river.\(^{73}\) When the citizens finally pushed through the endangered species listing despite the agency's political efforts, the legal division argued that TVA did not have to respect the listing until thirty days after Federal Register publication; meanwhile, the agency pushed on with construction.\(^{74}\) The Department of Interior, as lead agency under the Act, asked TVA to halt construction and commence interagency consultation, as provided for in the Act for the resolution of endangered species conflicts.\(^{75}\)

\(^{72}\) According to the farmers holding out in the valley, the land-clearing teams worked three shifts a day, at night under the glare of portable floodlights, cutting trees. See Knoxville News-Sentinel, Aug. 3, 1976, at 1, col. 1. According to one confidential source within TVA, there was a meeting that summer held with Legal Division staff and representatives of the Chairman's office, at which it was announced that "by the time Plater stands up to argue [the appeal from Judge Taylor's dismissal] in Cincinnati, there won't be a tree standing in the reservoir area." This goal was not quite achieved. Several islands escaped denudation. One is continually forced to the conclusion that the agency consciously wished to foreclose constructive alternatives to the dam prior to the time that the law could be enforced against them. In the Tellico project's seven years before the endangered species was discovered only about $35 million had been spent, mainly in recoverable land acquisition costs. In the approximately four years between the discovery of the snail darter and the 6th Circuit injunction against TVA, TVA spent over $67 million. Telephone interview with TVA Public Information Office (Feb. 7, 1977). The construction speed-up is discussed further in the 1977 Culver Hearings. See 1977 Culver Hearings, supra note 45, at 874-75 (testimony of Prof. Zygmunt Plater).

\(^{73}\) See 1977 Culver Hearings, supra note 42, at 875 (testimony of Prof. Zygmunt Plater).

\(^{74}\) Id. at 877 (testimony of Prof. Zygmunt Plater).

\(^{75}\) TVA did not agree to begin agency consultation until late 1975, more than two years after the darter was discovered, and throughout early 1976 the Fish and Wildlife Service still did not feel good faith consultation was being undertaken. See 1977 Culver Hearings, supra note 42, at 69 (testimony of Charles Warren, Chairman of the Council on Environmental Quality and Keith Schreiner, Associate Director of Fish and Wildlife, U.S. Fish & Wildlife Service (FWS)), 378-79 (testimony of Schreiner and Chairman Wagner), 890 (written response of Chairman Wagner to additional questions), 960 (letter from Lynn Seeber, TVA General Manager to Kenneth Black, Regional Director, FWS). In March of 1978, Chairman Wagner was still trying to defend the agency's position (against the FWS's complaints in TVA's Supreme Court brief) of inadequate consultation. Letter from Chairman Wagner to Cecil Andrus, Secretary of the Department of the Interior 3 (March 31, 1978) (available in Tennessee Law Review office).
The agency bluntly informed the Interior Department that it would not discuss any options except completion of the dam. The Board announced that it had no duty to comply with the Endangered Species Act until a court had ordered it to do so.

In these circumstances, what were the citizens to do? They clearly had a "small handle" problem. The Endangered Species Act and its tiny protegé seemed to constitute a minor legal violation, whimsically coincidental to the dam issue. There were a host of other negative arguments to be considered in deciding whether to sue TVA under the Act. By using the Act in court to stop construction of the dam, the citizens not only might have their serious concerns perceived as frivolous in Tennessee and nationally but also might put the world's most important wildlife law into jeopardy in the congressional pork-barrel arena. Further, they risked creating an image of extremism that could haunt environmentalists and other public-interest citizen advocates for years to come. TVA had a public relations office that dominated the local press and annually spent close to two million dollars in public funds on press relations and the institutional advertising of agency projects. The citizens' arguments on the merits, and their image, could be buried under a coordinated barrage of ridicule and the agency's version of the facts. The TVA legal division, moreover, had a budget for salaries and litigation expenses in excess of two million dollars per year. The citizens, for their part, had part-time legal volunteers and T-shirts to sell. Because the state government of Tennessee and the bulk of the State's population were held so strongly, albeit reluctantly, in thrall to the TVA establishment (the State's largest employer), the dam opponents could expect to be regarded as controversial and hence suspect in their own communities. Even so,
the citizens knew that they had the law, the facts, and the strong common sense of economic arguments on their side. What should be done about their "small-handle" problem? They would have been delighted to use the Federal Prevention of Cost-ineffective Projects Act, but so long as there is a pork-barrel that form of review statute will never exist. Similarly, there was no Farmland Protection Act, Rural Community Preservation Act, or Indian Cultural Conservation Act. There was a Wild and Scenic Rivers Act, but it was a congressional football that could not be moved by citizens in the face of agency opposition.

In short, the Endangered Species Act was the only effective litigation handle they had, small or not. On the merits it had positive attributes. Section 7 was directly mandatory, and TVA was directly

81. Congress now has passed a Farmlands Protection Policy Act (FPPA), P.L. 97-98, 95 Stat. 1341 (1981) (to be codified at 7 U.S.C. §§ 4201-4209), which directs the Department of Agriculture to "take steps to assure that the actions of the Federal Government do not cause United States farmland to be irreversibly converted to nonagricultural uses in cases in which other national interests do not override the importance of the protection of farmland nor otherwise outweigh the benefits of maintaining farmland resources." Id. at § 1540(a)(7), 95 Stat. 1341, 1341. (to be codified at 7 U.S.C. § 4201(7)). Unfortunately, despite the statute's hortatory directives (which would seem to address cases such as Tellico where outstanding farmland is wasted for dubious benefits), the FPPA, unlike the Endangered Species Act, has no directly enforceable provisions. Without strong, directly enforceable provisions, the Act is not of practical worth for addressing the problem it recognizes. While the ESA's Section 7 forces other agencies to "insure" that they protect the endangered species, the FPPA has no such strict command to protect the endangered farmland. Instead, it allows agencies to escape the grasp of the Act through the use of the balancing test provided by § 4201(7), an invitation to agency evasion.


An alternative to litigation, of course, would be arbitration. Arbitration is a much-touted process for resolving environmental controversies like Tellico by getting the parties around a table, laying out objective facts, and letting the merits decide. See Susskind, Environmental Mediation and the Accountability Problem, 6 VT. L. REV. 1 (1981); McCrory, Environmental Mediation: Another Piece for the Puzzle, 6 VT. L. REV. 49 (1981); Stulberg, The Theory and Practice of Mediation: A Reply to Professor Susskind, 6 VT. L. REV. 85 (1981). The problem with arbitration as a rational national dispute resolution process (which the Tellico citizens would dearly have preferred to enter) is that the more powerful promotion-based party has no motive to enter into the process. This is especially true where that party has reason to believe that its position will not prevail on the objective facts, while it will probably prevail in a political power process. A confidential TVA source laughed when the author suggested arbitration as a hope in 1974. Thus citizens must first get credible leverage over their opposition—an injunction, media, sit-ins, or whatever—in order to entice them into the arbitral forum.
violating it. Would their lawsuit be a "misuse" of the Act, as Howard Baker kept saying?83 Undeniably, the little fish was underwhelming as a symbolic totem. Even its name invited jokes.84 Yet 100 percent of its known established population would be eliminated by the dam, precisely the injury that Congress had sought to prevent through the Act. Moreover, beyond the ecological and ethical values it represented,85 the snail darter's natural history also made an important utilitarian point. The endangered species was intimately linked to many of the public values that made the valley such a treasure for humans. The darter's life cycle required a larger river, with clear, cool, fertile waters, flowing out of an unpolluted watershed.86 By its very existence as an endangered species in the

83. Baker, who played a pervasive role in ultimately pushing the dam through without a benefit-cost accounting, reportedly said that the Act should only be applied by the courts to "nonfrivolous species," an interpretation that is as perplexing biologically as it is legally.

The "misuse of the statute" argument was a frequently-encountered layman's argument that essentially alleged that plaintiffs were hypocritical in their support of the endangered species. See note 81 supra. Beyond the difficulties of explaining the ecological interrelatedness of all life, or the "barometer" function of the snail darter or canaries in coal mines, it was often necessary to recall that this is how our legal system works—that Al Capone was sent to jail not for racketeering (which could not be proved) but for failing to pay tax on his racketeering profits (which could). Further, as with many other federal statutes, the Endangered Species Act incorporated citizen suit enforcement as a major strategy recognizing that reliance upon agency self-enforcement might well come to naught. 16 U.S.C. § 1504(g) (1976).

84. The "snail darter" label is an oxymoron. The author originally made an attempt to urge its discoverers to name the species something more mediagenic, like "Tennessee Darter," ("Old Glory Darter"?, "Motherhood Darter"?) but had to settle for the Latin name tanasi, the Cherokee form of Tennessee. The fish's diet was distinguished from other darters' by a high proportion of small river snails, so, in English, snail darter it became.

85. Consciously creating the risk of extinction for a fellow life form (and "extinction is forever") obviously raises philosophical issues for those who are so vulnerable. In ecological terms, everything is connected to everything else in the intricate web of life, and the destruction of one element has consequences for all. These concerns were regularly raised in congressional hearings on endangered species issues, but most observers would testify that the majority of members of Congress and most lobbyist witnesses involved in the discussions were primarily interested in direct economic issues, such as fears that wildlife protection would obstruct the energy industry and the economy as a whole. See 1977 Culver Hearings, supra note 42.

86. Because its headwaters lie in protected national forests and its agricultural lands were so rich they did not require fertilizers, the Little Tennessee River's water maintained its ancient qualities; particularly in the lower half of the river's 33 mile remaining portion where the tailwaters of the upstream dam had time to warm slightly, the Little T ran very much the same as it had for aeons, while neighboring rivers were unlikely to provide a fully satisfactory environment for perpetuation of the species. See Amendment Listing the Snail Darter as an Endangered Species, 40 Fed. Reg. 47,506 (1975) (codified at 50 C.F.R. § 17.11(h) (1981)).
remaining portion of the Little Tennessee, having been eliminated virtually everywhere else by dams, the darter was a vivid barometer of human values there as well. Like the little canaries carried into nineteenth century Tennessee coal mines to detect poisonous methane gases, the fish was a sensitive natural indicator—when it started to suffer, it indicated that important human values were threatened as well.

Certainly the initial press reaction might be humorous; the darter's case, however, had such strong merits that the second and third waves of press coverage would surely expose them.

In any event, the decision was made to try a lawsuit. As old Asa McCall said, "We've never heard of this little fish before, but if it can save our farms, our rivers, our valley, I say let's try it."87 The twenty-three dollars collected in Asa’s hat that night was the start of the citizens' litigation fund, such as it was.88

In technical terms, the story of the litigation of the snail darter case is well-reflected in the judicial decisions. The trial judge did not want to hear about resource alternatives and benefit-cost accounting.89 His basic perception was that the dam itself cost $100 million.90 He found that the fish would in all likelihood be eliminated,

87. The meeting in which participants decided on the lawsuit was held at Fort Loudon in October 1974 and was attended by representatives of farmers, Cherokees, sportsmen, and other citizens. Asa McCall was a Little T farmer who had held out against TVA’s marshals, utility cutoffs and intimidation, and became a symbol of the farmers’ stout defense of their homes. He died at the age of 76, shortly after the citizens won the Sixth Circuit injunction; his widow Nellie Chambers McCall continued the fight, travelling to Washington to testify, cornering her senators in the halls, and trying to get the story across to the media. The McCall farm had 90 acres, only one of which would be needed for the reservoir—which Nell offered to give to TVA if they would leave the homestead and the remainder of the land to her and the family. The house was bulldozed on November 13, 1979, and was covered on national television as the fall of Tellico’s last redoubt.

88. See note 47 supra.

89. Judge Taylor indicated at trial that he did not want to hear any evidence about development alternatives; the citizens chose not to litigate the question of TVA’s bad faith. Thus the case was focused solely upon the statutory violation. Nevertheless in his opinion dismissing the complaint the judge made the specific finding that “[t]he nature of the project is such that there are no alternatives to impoundment.” Hill v. TVA, 419 F. Supp. 753, 758 (E.D. Tenn. 1976). The judge also found that TVA had acted in good faith. Id. at 763. Earlier Judge Taylor threw in a finding that the prior injunction had cost TVA $15,000,000, a figure that had been shouted out to him in the courtroom by a spectator, Beauchamp Brogan, who was then chief counsel for the University of Tennessee, and had been past counsel for TVA. Hill v. TVA, No. 3-76-48, at 17 (E.D. Tenn. Feb. 26, 1976) (opinion as rendered from the bench).

90. The misconception was never cleared up. In an interview with SPORTS ILLUSTRATED magazine eight months after he was reversed by the Sixth Circuit, Judge Taylor was quoted as saying “with evident pain” that “‘the thing had cost $116 million!’" SPORTS ILLUSTRATED, Oct. 17, 1977, at 11.
but he held that the law should not be enforced where only a little fish "or some red-eyed cricket" would be extinguished. As the appellate court noted, it was not perfectly clear what theory the district court decision was based upon. On appeal the Sixth Circuit reversed the decision without dissent and enjoined the construction of the dam. On certiorari to the Supreme Court the appellate decision was affirmed, on the unsurprising theory that federal agencies must obey federal statutes, and courts are to enforce the law to that end. As the citizens had realized from the onset, this judicial enforcement would effectively throw the issue into the congressional committee process for a review on the merits at long last.

A Snail Darter's Perspective on the Old TVA

Up to this point, the Tellico litigation offered a vivid demonstration of what TVA was in the mid-century, even as it was beginning to become something new. The agency's lawyering and its local and national politicking revealed a persistent adherence to its originally-defined construction mission, reinforced by the local and national public works establishment that also dated from the 1930's. This organizational single-mindedness persisted despite the presence of literally hundreds of TVA employees who privately expressed their opposition to Tellico and the Columbia dam. Internal debate within TVA about Tellico's merits and alternatives was for the most part simply not tolerated, and outside criticism from citizens was regarded as illegitimate, ill-informed, and politically suspect.

In the long run, however, for the good of society and agencies themselves, governmental powers must not be close-minded to internal or external revelations that the Emperor is not wearing any clothes. As a decisional system, however, TVA offered a classic

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91. This comment was made in chambers. W.P. Boone Dougherty, a well-respected local attorney, was instrumental in building the biological trial record upon which the court had no choice but to find that the darter was indeed endangered by the dam; it was the legal arguments crafted by the author that the judge had less trouble dismissing.


93. 549 F.2d at 1075.

94. 437 U.S. at 187-88.

95. 419 F. Supp. at 736 n.12; See also, Platter, Statutory Violations and Equitable Discretion, 70 Cal. L. Rev. 524, 528 n.13, 583-88 (1982).

96. Some of the volunteers who worked on technical aspects of the citizens' case were among those who had been forced out of TVA during the internal campaign to cost-justify Tellico. To raise questions about Tellico's benefits in the Wagner years, they reported, was a ticket to Muscle Shoals, which was apparently regarded as an undesirable post for those climbing the career ladder.
example of rigid policy-making that practically guaranteed that agency policy would not take rational account of changing contemporary conditions, values, and factual information.

This institutional doggedness produced a characteristic style in the old TVA. Theodore Sorenson has described different presidential styles in the metaphor of sports. Some presidents play government like football: they line up their teams with a set play in mind, charge into the opponent's line, pause to regroup and see what they have accomplished, plan the next play, then charge ahead once more. Others (he had John Kennedy in mind) have played President like basketball: an intricate, ever-changing, re-adjusting pattern of planning and acting. The old TVA style more closely resembled the football model, and the opponents' teams were rather sparse, while TVA put five fullbacks on the field and fifteen tackles on the line.

The tactics employed by the agency cannot be neutrally characterized by a past opponent. To some extent, however, they can be discerned in the history that has been reviewed up to this point. Suffice it to say that TVA has characteristically operated from a securely consolidated local power base—a federal entity based away from Washington, with financial, political, and personnel resources exceeding those of any of the states that fall beneath its aegis, not to mention those of citizen organizations. It is protected from the national-level scrutiny accorded most other agencies by its physical distance from Washington; by its statutory venue restriction to local federal courts, which protects TVA from the administrative law sophistication which other federal agencies must regularly face in the courts of the District of Columbia Circuit; by its regional political constituency; and by its enduring legend as the liberal New Deal's brightest surviving offspring. From this position of insulated autonomy TVA has been effectively free to call its regional tune. The ability to dominate critics in the region understandably creates a temptation to do so.

But what basic policy underlay the agency's tactics of statutory


98. The TVA Act stipulates venue for the Authority in the northern district of Alabama. Tennessee Valley Authority Act of 1933, ch. 32, § 8(a), 48 Stat. 58, 63 (codified at 16 U.S.C. § 831g (1976)).

99. As an example of TVA's extraordinary power, note the exchange of letters between the Governor of Tennessee and TVA, in which Gov. Winfield Dunn officially requested that TVA recognize "that the Little Tennessee as it now exists is a waterway too valuable for the State of Tennessee to sacrifice," i.e., that the reservoir project should be discontinued. Letter from Governor Dunn to TVA Chairman Wagner (Dec. 7, 1971), reprinted in TELLICO EIS, supra note 17, at I-1-42 to I-1-43. Though such requests are traditionally respected by other agencies, TVA told the Governor that it would not honor the State's request.
avoidance and litigation obstruction? What produced the persistent intransigence of the agency against internal debate, outside citizen concerns, evolving national values and the statutes that expressed them, in short against consideration of any but their original construction project designs?

On one hand, it is important for TVA's citizen critics not to succumb to a reciprocal "devil theory," regarding the agency as a malign conspiracy in the same way that the agency seems to have regarded citizen critics as "enemies" beyond the pale of rational recognition. In its institutional terms, TVA, like other pork-barrel agencies, reacted rationally in doing what it conceived as its historic mission. The point is that those institutional terms were unfortunately neither broad nor flexible enough to achieve rationality in the complex setting of modern resource development, modern social development, and modern government.

Once, in the throes of the local litigation effort on Tellico—a time when the citizen plaintiffs were simultaneously trying to pry important data on river alternatives out of agency files, opposing a barrage of procedural stumbling blocks crafted by the legal division, and watching trees fall as fast as the agency could cut them in an attempt to moot the statute—the author wearily asked a TVA confidant in the high middle levels of the agency why TVA could not seem to reassess Tellico in light of its own data. "You must understand," he said, "TVA today is a case of institutional menopause. A lot of these people came down here to raise the region up from backwardness. They did it their way. Now they get hot flashes at the thought that some of these local people are questioning the way they do it." He continued that TVA had never lost a major project to citizen lawsuits. If the courts stopped this last dam in a sequence of dams that has been the image, if not the reality,

Letter from Chairman Wagner to Governor Dunn (Dec. 17, 1971), id. at I-1-45 to I-1-51.

An example of its dominance of the local legal arena is revealed by TVA's boxscore in local federal court. Based upon a review of published Tennessee district court decisions since 1957 in which TVA was a party, the Authority's position appears substantially to have prevailed in more than 80% of the cases.

100. Only about 10% (10.6% in 1981) of TVA's power is generated by hydroelectric dams; the large majority is generated by steam plants. Telephone interview with TVA Information Office (Sept. 2, 1982).
planned, would have to be completed if the agency's pride and public repute were to survive.

The personal investment of so many people in and out of the agency in the traditional TVA program, as it was symbolized in Tellico, may be the best institutional explanation of why TVA was what it was in the late 1970's, as well as why Tellico came to pass. To rethink the Tellico dam would have undermined layers of promotional assertions made by Chairman Wagner over the years; it would thus have publicly undercut the agency's credibility and reputation for invincibility; it would implicitly have criticized the agency staff's internal acquiescence and lack of scientific objectivity; it would have revealed the appropriations process, and the Tennessee delegation that supported it, as uncomfortably naked of justification; and it would have made those ordinary local citizens, who had grudgingly been recruited as project supporters because of their hopes for industrial jobs and economic development, look and feel like duped pawns in a pork-barrel game. For broadly shared reasons like these, the physical monument of the Tellico dam had to be built just as planned.

TVA in Transition and the Mystery of Dry-Dam Freeman

The old TVA, however, did not survive the Tellico litigation. As Chairman Wagner and William Jenkins approached the end of their terms,\(^{101}\) it was increasingly clear that TVA would have to change. Future directors, like the newly appointed David Freeman,\(^{102}\) would have to bring more than a purely local or regional utility perspective to the office. In their last days, Wagner and Jenkins could rush to cement the agency into its established niche—tying it into several new nuclear reactor construction contracts and trying to finish the Tellico and Columbia dams before the economic reassessments of the tight-money era caught up with them.\(^{103}\) But the real-life force of higher energy capacity costs, lowered demand, energy conservation economics, water resource accounting reforms, and increased activism among ratepayers and

\(^{101}\) Wagner's term ended May 18, 1978; Board Member William Jenkins resigned that same month.

\(^{102}\) S. David Freeman was appointed July 19, 1977, confirmed August 4, 1977, made Chairman on May 19, 1978, and replaced as Chairman by President Reagan in favor of Charles Dean on June 20, 1981.

\(^{103}\) Knoxville News-Sentinel, July 29, 1977, at 13, col. 3. One of the ironies of local Tennessee politics is that Freeman struggled manfully to prevent Director Wagner and Jenkins, backed by the Tennessee political establishment, from contractually committing TVA to build the unneeded nuclear units, and later it was he, rather than Wagner, who was blamed locally for the consequent increases in electrical rates.
resources defenders meant that the old administrative dominance could not continue. The question was how far TVA would go to broaden its policy perspectives and how fast it would get there.

For the last two years of the Tellico case the dominant figure in the agency-in-transition was Director and later Chairman David Freeman. He had the burdensome task of bringing the agency into the national energy economy, into the context of late-twentieth century national values and administrative processes, and perhaps into a renewal of its national mission of demonstrating innovative development technology.

It is beyond the scope of this essay to explore deeply into the years of the Freeman chairmanship of TVA. In general it is sufficient to say that his very presence caused a polarization in the agency between local and national politics, between old and new guard, between a tightly defined organizational feudalism and a fairly flexible meritocratic approach. Many of those who would potentially have been his natural allies and expert resources within the agency had been forced out during the Wagner years. Much of the opposition and sniping which he had to endure was aided, and even directed, from within his own organization. The fact that he was able in some degree to bring new energy out of the old organization and attract new, nationally-oriented recruits to bolster the effort, instead of merely constructing his own counterclique within TVA, is a tribute to Freeman’s dedication to the mission of agency modernization.

As for Tellico, under the Freeman administration, TVA was able to make substantial departures from the old guard’s resistance to law and fact. The degree of change and the resolution of the Tellico case reveal much about the new TVA as a modern agency and as heir to the old.

TVA’s past, nevertheless, continued to play a part in its new era. A large ongoing federal agency with a broadly entrenched local political support network does not suddenly change its internal policies and processes just because its leadership introduces a new mode of decision-making. Freeman may have attempted to shift the agency to a sort of empirical rationalism that had not previously guided its policy-making, but for a variety of reasons arising from the agency’s history, its political setting, and his own particular personality, Freeman was not able to free the agency from its old instinct for going its own way.

Tellico provides a vivid example of this mixed performance.

104. See Lapham, The Energy Debacle, Harper’s, August 1977, at 58. This article is evidently the product of a contentiously critical journalistic approach, but nevertheless may reveal some insights to Freeman’s subsequent actions in going his own way on the Tellico case.
The accomplishments of the Freeman administration in handling Tellico were, in context, remarkable. The new TVA was able to take a position that had been anathema to the old TVA: even though the Tellico dam structure was now substantially finished, it might still be economically beneficial not to flood the valley. After the Supreme Court decision affirming the endangered species injunction in June 1978, TVA under Freeman did not immediately attempt to circumvent the law through a statutory amendment as the old agency undoubtedly would have done.105 Instead Chairman Freeman personally testified to the House Subcommittee on Fisheries and Wildlife Conservation that the statutory endangered species consultation process was administratively workable.106 He emphasized that Tellico was an economic development project, not primarily a water resources project. Accordingly the agency could and would explore a variety of options for completing the project without a reservoir. He was as good as his word. In the next four months the agency produced an "Alternatives" report in cooperation with the Department of Interior107 which analyzed three development options besides the reservoir. Two of these options were portrayed as financially comparable to the reservoir plan and included the option of keeping a dry-dam for occasional flood control. This option earned the Chairman the derisive tag "Dry-Dam Freeman" among local dam boosters.

In November of 1978 Congress passed the Endangered Species Act Amendments,108 in large part in reaction to the brouhaha that had accompanied the snail darter decision. The amendments, drafted by Senators Baker and Culver, provided for an elaborate review procedure empowered to grant Endangered Species Act exemptions. As Baker argued, there had to be a flexibility mechanism for avoiding economic dislocations caused by endangered species conflicts. Exemptions would be granted to projects of "regional or national significance," specifically including Tellico, if there were no "reasonable and prudent alternatives," and the project benefits

105. The old TVA had tried to slip amendatory language into congressional appropriation bills in an attempt to circumvent its responsibilities under the Endangered Species Act. The Court of Appeals strongly rejected this strategy. TVA v. Hill, 549 F.2d 1064, 1072 (6th Cir. 1977), aff'd, 437 U.S. 153 (1978).


107. This draft was submitted on August 10, 1978. TENNESSEE VALLEY AUTHORITY, ALTERNATIVES FOR COMPLETING THE TELlico PROJECT (Dec. 1978) (final report) [hereinafter cited as ALTERNATIVES REPORT].

"clearly outweigh the benefits of alternative courses of action." The review process in the Cabinet-level Endangered Species Committee (nicknamed the God Committee because of its life and death powers) offered the citizens their first opportunity to argue the full merits of their alternative economic development proposals within the governmental system.

The "God Committee" review also offered TVA an opportunity to argue actively for completion of the dam. Under Freeman, however, TVA did not do so. Instead, the agency cooperated with the Committee's investigators and expressed its intention to abide by the Committee's decision.

On January 23, 1979, the Committee unanimously denied an exemption for Tellico, specifically on economic, rather than ecological, grounds. "I hate to see the snail darter get the credit for stopping a project that was ill-conceived and uneconomic in the first place," said Chairman Andrus. The reservoir project, the committee said, deserved to be killed on its own merits. As Charles Schultze, then-Chairman of the Council of Economic Advisers and a member of the Committee said, "Here is a project that is 95% complete, and if one takes just the cost of finishing it against the [total project] benefits, and does it properly, it doesn't pay, which says something about the original design." A second remarkable feature of the last phase of the Tellico case was that at this stage the river defenders had to make their arguments on the basis of economically quantifiable values, and still, after the expenditure of millions of dollars, the non-dam alternatives compared well to the dam plan. The river and its non-dam development alternatives also had a host of nonquantifiable social values, as we have seen. These alternatives, however, were largely ignored in the governmental process toward the end of the controversy. Yet the river's latent natural resources were so rich that they could still be favorably compared to the huge sums of dollars


110. At the Endangered Species Committee (ESC) meeting which considered the Tellico exemption, Dr. Robert Davis of the ESC staff noted that "TVA has not made a recommendation to this committee. Their report makes it clear that the TVA board has not made a choice concerning either option." Endangered Species Committee, Tellico Dam and Reservoir Project 21 (Jan. 23, 1979) (unpublished transcript of public hearing).

111. Id. at 26-38.


113. Id. Note how the former front-page prominence of the "little fish stops big hydro dam" story was lost to page 12 when the real economic story came out so differently from the cliche.

previously expended. This amazing fact was overlooked by the few commentators who covered the story—the valley won its economic verdict on the basis of only its quantifiable economic resources. Its wealth of nonmarket values, so difficult to measure yet arguably even more significant, never made it into the calculus, and still the valley won.

The citizens had also been vindicated on the merits in every element of their long-running arguments against the project. The road lay open for an innovative redevelopment of that splendid valley and its river resource, demonstrating to the nation what could be done with coordinated management of prime agricultural lands and a valley’s historic, recreational, touristic, and ecological assets. It seemed during the review process that TVA as an organization had finally accepted the feasibility and desirability of such a demonstration project. Now, the citizens urged, it was time to take some practical steps in that direction—to start getting farmers back on the land, to set up a tourist route through the valley, and to begin other short-term development actions that had been discussed and planned in the prior twenty-four months.

At this point, however, TVA became strangely inert. Nothing was done in operational terms to consolidate the Committee’s statutory decision. One disturbing element that had been present during the Freeman administration’s prior handling of Tellico now became more evident and, ultimately, destructive.

Looking back over the months after the Supreme Court decision, it is obvious that the new Chairman had broadened the agency’s internal scope of review regarding Tellico. But it is also true that the agency remained remarkably closed to cooperation and factual input from the outside. The Alternatives Report, for example, in which TVA cultivated ideas that the citizens had been working on for sixteen years, was almost completely a new internally generated document written by a staff that insulated itself from the ideas and expertise that the citizens had developed. This meant that, despite some attempts by Department of Interior officials to reshape the document, the report was largely prepared by TVA staffers who over the same span of sixteen years had been personally invested in the merits of a dam. As a result, the Report contained many of the old claims and hid many of the agency’s former shortcomings. One basic hypothesis, for instance, continued to be that a reservoir would generate more industrial development

115. The Department of Interior withdrew from co-authorship of the final Alternatives Report. See note 107 supra and accompanying text. According to an Interior source, this was at least in part attributable to the TVA participants’ (who heavily outnumbered the Interior staffers) dominance of the report, particularly with regard to certain pro-dam TVA economic projections that the Interior participants found dubious.
than non-reservoir industrial parks, and this unsubstantiated hypothesis was built into the agency's comparative economic figures. The Report minimized the reservoir's potential destruction of historic resources and agricultural lands, barely mentioned the dam's violations of a variety of statutes, and included a rather sardonic "history" of the Tellico litigation that took pains to justify the legal division's posture throughout.

To be sure, the Report showed the effects of a strenuous leadership effort to present a fair choice of alternatives. Ultimately, however, the failure to integrate outside input systematically weakened the effort. The citizens' suggestions would have been useful in building a comprehensive overall analysis. Instead the internalized process produced a rather constricted document that was later deemed unreliable as a data base in the review committee's adjudicatory proceedings. The Endangered Species Committee's intensive economic review found that the reservoir's benefits continued to be inflated in the TVA report and its comparative costs understated.

TVA's continuing policy of going it alone was both insistent and dysfunctional in this process. During the internal agency proceedings on the Alternatives analysis, TVA personnel were carefully insulated against outside participation. The staff systematically ignored the work of outside economists, previously prepared land development designs, and formal and informal citizen comments.


117. Alternatives Report, supra note 107, at 20. This report also drastically undercounted the prime agricultural acreage and ignored all tourist revenue benefits.

118. Id. at 11-13.

119. Id. at 6-8.


121. According to a participant, the various substantive submissions from outside the agencies—including the economic analysis of a blue-ribbon panel convened by the Conservation Foundation of Washington—were "hardly mentioned" in the task force proceedings. See note 116 supra.

122. The University of Tennessee School of Architecture, at the request of the House Subcommittee on Fisheries and Wildlife and generously funded by the World Wildlife Fund, had prepared an elaborate land use study of the project's non-dam alternatives that focused, among others, upon the valley's enormous historic and tourist potential. University Of Tennessee School Of Architecture, Alternative Futures For The TVA Tellico Project (1978).

Among the rejected comments included in a carefully researched citizen commentary on the draft report, for instance, was the suggestion that tourism at the very least deserved some mention. According to the citizens’ research, tourism was potentially a major economic activity for the valley, since it was situated beside the Great Smoky Mountains National Park and two major interstate highways. But the agency ignored the tourism potential and the citizens’ comments, apparently dismissing the outsiders as “enemies” and their proffered suggestions as per se illegitimate or incompetent.

This fortress style of decision-making continued after the Committee’s official nonexemption decision. Although the farmers had been able to discuss the possibility of resettling the agricultural lands with Freeman prior to the decision, they were rebuffed afterwards. The Cherokees encountered the same resistance. The TVA leadership refused to meet with the Little Tennessee River Alliance to discuss commencement of the river-based development—a move the citizens sensed was necessary to prevent a pork-barrel counterattack against the Tellico decision. In part the agency’s hesitancy to deal with citizens through the final years of the case may be attributable to a realistic political sense that the river defenders would be dangerous allies—they were identified as controversial “liberals” in a region where pork-barrel “conservatives” had dominant political power, and controversy was suspect; there was also some timorousness among the agency’s leadership in fear of threats of pork-barrel retaliation. In part, the agency’s hesitancy was attributable to its traditional

This report consolidated the citizens’ research that had occurred over the past six years and was largely ignored. The only major exception to TVA’s reticence occurred in the area of sportfishing development, in which a citizen initiative, led by Joseph Congleton, Esq., was able to work with Chairman Freeman’s office. The group developed data showing a multimillion-dollar benefit if the river were managed as the superb recreational and trout-fishing river it was. These figures were incorporated in the Alternatives Report at page 81.

The agency’s longstanding reluctance to acknowledge outside comments or criticism is by no means a shortcoming of TVA alone, but perhaps is particularly pronounced in the splendid isolation of its regional setting. And like many tough individuals, the TVA as an institution has seemed to regard any small concession or redirection forced upon it as a sign of its own incipient weakness rather than a manifestation of residual strength to adapt.

See id. at 11-13.

124. If the farmers were allowed back on their lands, it was felt that the reservoir plan would never redevelop its local political momentum. Talks with Chairman Freeman had seemed to reach an agreement in principle that the farmers would be allowed to go back to their farms, perhaps initially on short- or long-term tenancies. Legal research was done on TVA’s legal authority to return land as part of an agency development demonstration project. Nothing further happened.

125.
internal self-sufficiency and distrust of outsiders. Further, it may also have been a question of leadership styles. Chairman Freeman quickly established a reputation as a man who liked to run his own shop, and so, in a sense, he replicated some of the qualities of his predecessor’s peremptory administrative style. Whatever the explanation, the failure of the new administration to utilize its potential allies—for substantive factual input or political support—bore bitter fruit.

Denouement

On June 18, 1979, late on a quiet afternoon in a virtually empty House chamber, local Representative John Duncan engineered a rider on the annual public works appropriation bill, which overrode all laws that applied to Tellico and all the economic analyses that had been done, and ordered the immediate completion of the project. By agreement with the appropriations committee, the rider was not read, described, or discussed, and in forty-two seconds the citizens’ work of sixteen years was reversed. Once tacked onto the public works bill, the exemption proved to be unstoppable. In their bitterness, the citizens blamed themselves, the President, the Congress, and the media, for the pork-barrel’s success in reversing a decision so patiently and dearly won on the merits.

126. See Plater, Those Who Care About Laws or Sausages Shouldn’t Watch Them Being Made, Los Angeles Times, Sept. 2, 1979, § V, at 5, col. 1, reprinted in Energy and Water Development Appropriations for 1982: Hearings Before a Subcomm. of the House Comm. on Appropriations, 97th Cong., 1st Sess. 314-16 (1981). The maneuver violated Rule XXI, § 834, of the rules of the House of Representatives which, evidently responding to the dangers inherent in allowing appropriations bills to amend substantive laws, provides “Nor shall any provision in any such bill or amendment thereto changing existing law be in order . . . .” L. DESCHLER, JEFFERSON’S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES 427 (1957). The amendment did nothing else but amend existing laws, but in order to enforce compliance with Rule XXI, a timely point of order had to be made. The appropriations committee engineered its move so that none of the few members present would understand what was being done, so no point of order could be made. See 125 CONG. REC. H4663 (daily ed. June 18, 1979). (Of the statements printed in the RECORD, as shown on the official videotape, Duncan actually only said the words “Mr. Chairman,” spoken in order to interrupt the Clerk’s reading of the text. Only the first seventeen words of the amendment (up to “authorized”), and none of his printed statements, were actually made on the floor, but were inserted later into the RECORD, along with much of the comments of his co-engineers Bevill of Alabama and Myers of Indiana. Of course, no references were made to “Tellico,” “Little Tennessee River,” “endangered species,” or “snail darter,” or any other phrase that would have given notice of the amendment’s content. Most students of American government do not know that the RECORD is not an actual record of Congressional debates, and thus is not properly cited as an official record. See U.S. Const. art. 1, § 5, cl. 3 (journal of each chamber as barebones statement of its proceedings).
There is also some basis for their criticism of TVA’s posture in allowing this political maneuver to happen.\(^{127}\) By shying away from the river-based development proponents as controversial, by failing to publicize the significant failings of the reservoir plan,\(^ {128}\) by failing to act on the merits of river-based development that the agency itself had finally discovered, TVA left the citizens to face the pork barrel on their own.

It may never be possible to chart the personal and political permutations of the TVA leadership in those tumultous times. Perhaps there was a residual satisfaction in seeing the agency’s antagonists humbled once again. In the denouement of the Tellico case, when the citizens mounted a last ditch constitutional law suit based upon protection of the Indian religious sites,\(^ {129}\) the agency’s leadership spared no pains in bringing the case to a surgically quick

\(^{127}\) The understandable temptation to assign personal “blame” to various individuals for destructive decisions they have made largely misses the point of this Article. To be sure, individuals can sometimes make a difference in this governmental system, both for good and ill. Only in this nation could a group of laypersons have raised Tellico to the highest levels of governmental decisionmaking. As for those who contributed to the ultimate loss of the river—Chairman, Senator, Representative, staffer, journalist, or local booster—none of these now are heard to claim pride or honor in their roles. Rather, as is usually the case, most participants in the official decisions seem to have felt enmeshed in their own particular institutional systems—the TVA organization, the pork barrel, a “Southern strategy” for presidential politics, the real estate market, the engineering guild, the local political climate or whatever—to which the factual cries of citizen outsiders were discordant and disturbing. Clearly one problem lies with making such systems more responsive; a sobering frustration on the other hand is that on a number of occasions one more person could have made a difference.

\(^{128}\) If, for example, the TVA Information Office had ever issued press releases informing the public and local media about the dam safety problem, note 33 \textit{supra}; about the evaporation of the Timberlake new town scheme with its politically impossible massive subsidies, note 18 \textit{supra}; about the need to rebuild the Fort Loudoun locks if modern bargechains were to use Tellico, note 34 \textit{supra}; and about the general problem and unlikelihood of attracting many large new employers to the area, note 130 \textit{infra}; the practical effect would have been remarkable. For the first time the citizens’ arguments, largely ignored by the local press and politicians, would have been legitimatized by TVA’s factual admissions, and the facts had such force that they would necessarily have been acknowledged and would have had an effect in the political resolution of the controversy.

For the citizens, the ultimate surprise and the most troubling feature of their attempt to raise the real issues for public debate was that the media, especially the local media, simply ignored important major stories like those noted above.

\(^{129}\) The Cherokees mounted a constitutional case based upon their first amendment right to free exercise of religion; Echota, the site of their most holy cultural place, would be destroyed. Led by two traditional medicine men descended from Sequoyah, the Cherokees filed suit to enforce religious rights that had been specifically recognized in the American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (Supp. IV 1980)). See the translation of the deposition of Ammoneta Sequoyah, written in Cherokee,
end, dropping the gates and flooding the valley. And ex-Chairman Freeman has subsequently said some very unpleasant things about

dated October 11, 1979 (available in Tennessee Law Review office):

I am a Cherokee medicine man as my father was a medicine man and my grandfather was a medicine man. . . . I still go back to Chota and to the River for my medicine. . . . If the water covers Chota and the other sacred places along the River, I will lose my knowledge of medicine. If the lands are flooded. . . . the Strength and power of the Cherokees will be destroyed. I cannot live without practicing medicine because it is what I live for.

Judge Taylor dismissed the suit on the ground that in order to exercise first amendment religious rights one must own the land on which they are asserted. Sequoyah v. TVA, 480 F. Supp. 608, 612 (E.D. Tenn. 1979). On appeal, the Sixth Circuit was understandably wary of Judge Taylor's rationale but nonetheless refused relief on the ground that Chota was not central to the Cherokee religion, a test that had not been addressed at oral argument. Sequoyah v. TVA, 620 F.2d 1159, 1164 (6th Cir. 1980). Ammoneta Sequoyah and his brother, who was also a traditional medicine man, both died the year after their river, on August 22 and January 25, 1981.

The gates were finally closed on November 29, 1979, in the presence of a delighted Aubrey Wagner. See Knoxville News-Sentinel, Nov. 30, 1979, at 1, col. 4.

The agency under Freeman's chairmanship also strenuously resisted the plaintiffs' attempt to collect expert witness and counsel fees under the provisions of the Endangered Species Act specifically authorizing such recoupment for citizens who took on the job of enforcing the federal statute. Pub. L. No. 93-205, § 11(g)(4), 87 Stat. 884, 901 (1973) (codified at 16 U.S.C. § 1540(g)(4) (1976)). The citizens' claim was rejected by Judge Taylor in Hill v. TVA, 84 F.R.D. 226 (E.D. Tenn. 1979). Especially when the decision is to be made by a district judge whose prior decision on the merits was successfully overturned by plaintiffs, the discretion to award or deny attorneys' fees raises serious questions and has been generally circumscribed by a presumption in favor of awards. See, e.g., Northcross v. Board of Educ., 412 U.S. 427 (1973) (per curiam); Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977); Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331 (1st Cir. 1973); see also King & Plater, The Right to Counsel Fees in Public Interest Environmental Litigation, 41 TENN. L. REV. 27 (1973). Despite the district court's decision, which rejected in particular the fees based upon the author's work, on the eve of the Sixth Circuit appeal TVA agreed to reimburse the fees and settled the claim. Hill v. TVA, No. 79-1465 (6th Cir., May 12, 1981) (consent order dismissing appeal). These fees were then donated to a national river conservation fund.

Since the closure of the gates, the citizen observers assess the results of the Tellico reservoir as generally following their sad predictions. The promised influx of industrial jobs has failed to materialize. See Knoxville News-Sentinel, Aug. 18, 1982, § B, at 5, col. 1. Further, the agency apparently considered that one way to put the valley to "industrial" use was to make part of the area into a toxic chemical disposal site. See Letter from TVA Chairman Charles Dean to Lamar Alexander (May 20, 1982) (available in Ten-
the citizens who had labored so hard to make a rational public decision process work in the Tellico case.\textsuperscript{131}

The Tellico story is immensely complex. It involved pressures and strategies only hinted at in these pages. Out of its complexities and ambivalences, however, comes a rather consistent pic-

nesssee Law Review office); see also Knoxville News-Sentinel, Sept. 9, 1982, § A, at 1, col. 1. The highest quality farmlands are now submerged. The waters have spread over the Cherokee sites; at Cîtico, where graves have been washed open, people have been able to scavenge beads and other artifacts along the muddy shore. Fly-fishing for trout has virtually disappeared; there has been, as is usual in new impoundments over fertile agricultural lands, a dramatic short-term increase in bass populations. The shores of the reservoir float with litter. The impoundment is beginning to have a water-weed problem which will apparently require herbicide treatments for the future. The diverted water flows to Fort Loudoun Dam's generators have produced the expected limited increment in non-peak power production. See note 14 supra. There is no commercial barge traffic since no industry that would use barge transport has chosen to locate at Tellico. The reservoir has had no appreciable utility for additional downstream flood control. It does not appear to be attracting the large net increase in reservoir recreational users prophesied in the TVA forecast studies. But some of the surrounding land that was bought by local real estate speculators has now been resold as lakeview land at a substantial profit. It would be useful to have an objective reaccounting of the reservoir's performance at regular intervals, to permit continuing retrospective assessment of the Tellico decision process.

\textsuperscript{131} A newspaper report of one such speech, before the National Association of Environmental Education, recounts that "Freeman said environmentalists should hang their causes on real issues such as the loss of prime farmland, rather than 'silly' ones like the snail darter. . . . Freeman said environmentalists led 'us down blind alleys in the mistaken belief that any means justifies a desirable end.' [sic] He said the 'snail darter alone was not a good reason to stop the dam, and everyone knows it was just an excuse that backfired badly. Environmentalists need to concentrate on the true issues and not let legal expediency dominate the way public policy issues are raised.'" Knoxville News-Sentinel, May 6, 1981, § A, at 10, col. 3. As a participant over the prior three years, Freeman well knew that the citizens had for years tried desperately to raise the prime farmland issue, among others, in the political forum, but had no chance to raise it in any legal forum. As a lawyer he well knew that there was no law on the books to protect prime farmland, or to stop economically destructive projects, by which the citizens could otherwise have sued. See notes 13 & 81 supra and accompanying text. He knew that indirect or procedural legal claims often serve in our legal system to raise and determine major policy questions. See note 83 supra and accompanying text. As a politician he perhaps misstated what he knew to be the case for other reasons. The comment is bemusing coming from an official of the agency that, having been the largest single cause of loss of prime farmland in the state, is even now persevering in its Columbia Dam project, which would destroy thousands of acres of prime farmland in central Tennessee for a dam that has never been supported by positive benefit-cost ratios even by TVA's own figures. See the House Committee on Government Operations' remarkable analytical report criticizing the ongoing Columbia Dam, TVA's Columbia Dam Project on the Duck River in Tennessee. H.R. Rep. No. 96-1533 (1980). Columbia appears to be another example of a destructive, cost-ineffective project that TVA is impelled to build by its own inertial momentum and the constraints of pork-barrel politics. So the saga continues.
ture of the entity we know as the TVA. It is an entity of expertise and power, of enormous potential, sitting astride seven states, but locked within itself. The agency represented a populist mission, but now has become part of a restricted political establishment. It was an agent for innovation and democratic development that finds it easier, no matter what its leadership, to go its own powerful way rather than to open itself to the challenges of participatory pluralistic democracy. Nevertheless, the potential remains. TVA could develop a continuing modern role as an agent for change, or it could remain little more than the free world’s largest utility company.

The Tellico case deserves a much more probing and extensive analysis than that contained in this sketch. Tellico reflected in microcosm an amazing array of substantive issues, philosophical quandaries, human dramas, and American political artifacts. In process terms it provided a vivid demonstration of the problems that federal agencies face in implementing broad-scale social values and rational decision-making in the context of a particularized public works mission. Ultimately, in a variety of ways, Tellico was an opportunity lost. In the process, moreover, a river that was a national treasure, having flowed for two hundred million years, now is dead.