PLATER

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

HIRAM G. HILL, JR., ZYGMUNT J. B. PLATER, DONALD S. COHEN, THE AUDUBON COUNCIL OF TENNESSEE, INC., and THE ASSOCIATION OF SOUTHEASTERN BIOLOGISTS Plaintiffs, VS. TENNESSEE VALLEY AUTHORITY, Defendant.	CIVIL ACTION NO. 3-76-48

POST-TRIAL BRIEF ON BEHALF OF PLAINTIFFS, HIRAM G. HILL, JR., ZYGMUNT J. B. PLATER, DONALD S. COHEN, AUDUBON COUNCIL OF TENNESSEE, and ASSOCIATION OF SOUTHEASTERN BIOLOGISTS

As the Court recognizes, this litigation presents intricate questions of biological fact, public policy and Congressional mandate. These have been articulated at great length in the course of trial. The questions of law in the case, on the other hand, are straightforward and need not be repeated at length.

Since the case to date includes extensive testimony and a multiplicity of documents, plaintiffs take this opportunity to summarize the case and to present several new authorities mentioned at trial but not previously briefed to the Court. To avoid duplication this brief is a supplement rather than a substitute for plaintiff's prior briefs.

Section I herein is an outline summary of plaintiffs' case, with references to authority in the various trial briefs.

Section II develops several new arguments establishing the violation of the Endangered Species Act.

Section III develops further authority supporting the issuance of the permanent injunction and remand to Congress.

Section IV is a brief conclusion.

I. Summary of the Case

A. BIOLOGICAL FACTS

1. The snail darter, Percina (Imostoma) tanasi, exists and is an endangered species.

This proposition(Plaintiff's Trial Brief at 4) now appears to be accepted by all parties.

The Department of Interior's listing appears in 40 Fed. Reg. 47505. At trial, this and subsequent biological facts in this section were established by Dr. Ramsey, Dr. Etnier, Dr. Suttkus, Wayne Starnes and several TVA witnesses.

2. The Little Tennessee River is critical habitat for the snail darter.

Plaintiffs' Trial Brief at 4.

Department of Interior rule, 41 Fed. Reg. 13927. Though individual specimens have been found elsewhere, the Little Tennessee is the only known established population, numbering 10,000 or more individuals. "[A]ny other critical areas found subsequent to this rulemaking will be proposed and published in the Federal Register. ..." 41 Fed. Reg. 13928.

3. Construction of the reservoir portion of the Tellico Project would jeopardize the existence of the species, destroy or adversely modify the critical habitat, and eliminate the species in the Little Tennessee River.

Plaintiffs Trial Brief, 10-11.

40 Fed. Reg. 47506: "The proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat." Testimony at trial established that the reservoir would make major changes in the size, quality and current of the Little Tennessee, and change the silt free character of the river bottom itself and the nature of the benthic organisms that currently exist there. This would also result in a high probability of eliminating the darters now existing in the reservoir.

4. The transplant program may or may not succeed; other established populations may or may not be determined.

Brief at 11.

If conclusive evidence were found for either proposition, such sites themselves would become critical habitat subject to the Act, 41 Fed. Reg. 13928, and the Little Tennessee River population would still remain fully protected by the Act. See letter from Assistant Secretary Reed to Professor Zygmunt Plater, April 27, 1976 at 3.

B. THE ENDANGERED SPECIES ACT APPLIES TO THE TELLICO PROJECT

1. There is no implied exemption for ongoing projects in the Act.

Plaintiffs Trial Brief at 6-10.

Citing this Court and the majority rule in other federal courts, etc.

2. Continued appropriations do not create an exemption.

Brief at 8-9; Section II(B) herein. Reply Br. at p. 2(3)

C. THE TELLICO RESERVOIR VIOLATES THE ACT

1. The Reservoir will jeopardize the species' existence, destroy or modify habitat, and harm the present population of the darter.

Brief at 10-12; Section II(C) herein, noting the elements of a violation of §7 and §9 of the Act; see Biological Facts, supra, §A; new authority on §9, see infra II.

D. WHERE THE ACT IS VIOLATED AN INJUNCTION SHOULD ISSUE

1. U.S. Supreme Court holdings in cases of statutory violation establish such a principle for the exercise of equitable discretion.

Brief at 13; new authority at Section III (1) herein.

2. Prior Endangered Species Act cases support that principle.

Brief at 13, discussing Coleman (Sandhill Crane Case); Coleman's construction supported by recent Froehlke case, Supplementary Brief 3-8.

3. The Congressional priority of the Act over public works projects supports the principle.

Brief at 12-13.

4. Federal cases on point support the principle -- both environmental cases and others.

Brief at 13-15; new authority at Section III (4) herein.

5. A remand to Congress via an injunction is the proper disposition of public works violations of an Act of Congress.

Brief at 14-15; new authority at Section III (5) herein.

6. By remanding to Congress the Court avoids entering the political arena and the subjective balancing of unquantifiable legislative policy and economic values.

Brief at 16, 19-20; new authority at Section III (6) herein.

7. The Administrative Procedure Act compels issuance of an injunction.

6 USC §706, at Section III (7) herein.

8. There is a presumption in favor of enforcement of the Act, and against the party seeking to continue a violation of the Act.

Supplementary Brief at 1-2.

II. Further Discussion of Violations of the Endangered Species Act

A. No Implied Statutory Exemption For Ongoing Projects

Plaintiff has previously briefed the question of the application of the Endangered Species Act to a project begun prior to the effective date of the Act. Brief, 6-9. The proposed Department of the Interior "Guidelines To Assist Federal Agencies In

Complying With Section 7 Of The Endangered Species Act Of 1973" support this Court's preliminary indication that the Endangered Species Act was intended to apply to such projects. These guidelines are included as an attachment to Secretary Reed's letter to Professor Plater dated April 27, 1976. Section I-D reads as follows:

> D. Application of Section 7 to Existing Activities and Programs
>
> 1. In considering whether section 7 applies to actions in the planning, review, or implementation stage but not completed prior to December 28, 1973, Federal agencies should determine if the action is ... (2) one being undertaken by or on behalf of a Federal entity and substantial work remains to be done which would, independent of the effect of earlier work performed, in and of itself jeopardize the continued existence of a listed species or modify or destroy critical habitat of a listed species. If the Federal presence and control remains to be felt, the Federal decision remains to be made, or such work on a Federal project remains to be performed, then the requirements of section 7 should be satisfied.
>
> 2. The requirements of section 7 shall be applied to activities and programs of Federal agencies presently in progress and initiated on or after December 28, 1973, that could affect listed species or their habitats.

The Tennessee Valley Authority itself stated that substantial work remains to be performed on the Tellico Project. The requirements of Section 7 must, therefore, be satisfied since the closure of Tellico Dam will affect a listed species and its habitat.

B. No Implied Exemption By Appropriations Acts

Plaintiffs have already addressed defendant's argument that Congress' continued appropriations indicate its tacit approval of the Tellico Project regardless of Endangered Species Act violations. Brief, 9-10. As previously noted, the matter was never debated on the floor of Congress, so that no appropria-

tion vote was cast by any legislator with full knowledge that an endangered species would be eliminated by the closing of the dam. In addition, Chairman Aubrey Wagner's comments to the House Sub-Committee on appropriations, noted in TVA's brief, were made well before the snail darter was ever listed as endangered or its habitat designated as critical. Full consideration of the Endangered Species Act could never have been given by Congress prior to the appropriations' being made. In an earlier brief, plaintiff has cited authority to the effect that an appropriations act cannot serve as a statement that a project may be completed despite violations of federal law. Congress must retain the flexibility to fund or refuse to fund projects without considering federal violations. The existence or nonexistence of a violation of federal law is a question for the courts which Congress does not address in its deliberations.

Defendants' major authority on this point, EDF v. Corps of Engineers, 492 F.2d 1123 (TVA brief at 19), does not support their position. It was not a case implying a statutory exemption from appropriations, but rather merely affirmed the principle that courts will not review a cost-benefit ratio per se once Congress has accepted it via an appropriation. See, e.g., EDF v. TVA, 371 F. Supp. 1004, 1014 (E.D. Tenn. 1973).

C. Elements of the Violation of Section 7 and Section 9

The evidence at trial has clearly established that a violation of both Section 7 (15 U.S.C. §1536) and Section 9 (U.S.C. §1538) will occur when the Tellico Dam is closed. The testimony of Drs. Etnier, Ramsey, Williams, Suttkus, Beauschung, and Mr. Starnes firmly indicates that the closure of the Tellico Dam will jeopardize the continued existence of the snail darter and will result in the destruction or modification of the critical habitat of the snail darter. Defendant has offered no credible evidence to dispute these conclusions.

In addition, as this Court knows, §1538 of the Endangered Species Act makes it unlawful for a federal agency to "take any ... [endangered] species within the United States ...." Plaintiffs have introduced into evidence regulations published in the Federal Register, Vol. 40, No. 188, on Friday, September 26, 1975, which clarify the definition of "take" which appears in 16 U.S.C. §1532 (14) as including "harass" or "harm". These clarifications update regulations published in July of 1975 and read as follows:

> "Harass" in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to signifigantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.
>
> "Harm" in the definition of "take" in the Act means an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of "harm".

The testimony has demonstrated that the closure of Tellico Dam and the consequent impoundment of the Little Tennessee River will render the snail darter extinct, or at very least, modify its critical habitat. There was extensive testimony on the effects the impoundment would have on the reproduction and feeding and sheltering processes of the snail darter. The consequences of the closure would obviously disrupt these essential behavioral patterns and would certainly constitute significant environmental modification which has the effect of significantly disrupting breeding, feeding, or sheltering. Defendant has offered no credible testimony to dispute this.

It should be noted that it is not only the determination by the Department of the Interior that the snail darter is endangered and the designation of the Little Tennessee River as its critical habitat that firmly supports the evidence adduced at

trial concerning the violation of Sections 7 and 9. The letter from Nathaniel Reed, Assistant Secretary of the Interior for Fish and Wildlife and Parks to Professor Plater, dated April 27, 1976, reiterates the Department of the Interior's strong stand on this question. Comments on pages two and three of that letter referring to earlier correspondence from Interior to TVA indicate clearly the Department's conclusions that:

> "The proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat. ... It has been determined by Fish and Wildlife Service biologists that this fish would become extinct if the Tellico Dam Project of the Tennessee Valley Authority is completed. ... The extensive fact-finding which preceeded our determination of the endangered status of this fish substantiates, in our opinion, the contention that your agency's Tellico Dam Project, if continued as presently planned, will result in destruction of the eco-system upon which this endangered species depends. This undoubtedly will result in extinction of the established natural populations of this species, a result obviously contrary to the policies and purposes of the Act. ... Closing of the Dam and filling of the reservoir ... constitutes the action which in our opinion will ultimately jeopardize the continued existence of the Snail Darter undoubtedly destroying the existing established population of the species. ... The proposed Tellico Dam would result in total destruction of the snail darter's habitat. ... The reservoir would eliminate the only known population of the snail darter, rendering the species extinct. ... Available scientific evidence indicates that the TVA Tellico Project, if completed as planned, will destroy the snail darter in its only known location."

D. Transplantation and Other Alleged Snail Darter Populations

Defendants have addressed the substance of their proof to the questions of the transplantation of snail darters into the Hiwassee River and to the alleged existence of fewer than a dozen snail darters in Watts Bar and Chicamauga Reservoirs. As this Court well knows, the Endangered Species Conservation Act of 1969, 16 U.S.C. 668 aa-cc, required that in order for a species to be protected that it be "threatened with world wide extinction." 16 U.S.C. §2. As this Court also knows, the 1973 Act defines

"endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range. ..." 16 U.S.C. §1532 (4). Congress clearly intended that a species did not have to be reduced to the last bastion of its existence in order to be protected under the 1973 Act. Congress intended that remedial action be taken before a species was eliminated in all but its last refuge.

The evidence offered by TVA to establish that a viable, reproducing population of snail darters exists in the Hiwassee River, Watts Bar Reservoir, or Chicamauga Reservoir was extremely speculative. Even if this evidence were persuasive, however, a violation of the Act would still exist. A significant portion of the range of the snail darter would still exist in the Little Tennessee River and be destroyed by the closing of the dam. Defendant's experts did not dispute this. In addition, the habitat critical to the survival of the snail darter in the Little Tennessee River would still be modified or destroyed by the impoundment of the River in January of 1977. Defendant's evidence on these points is, therefore, essentially irrelevant to the 1973 Act. This is confirmed by Assistant Secretary Reed's April 27, 1976 letter to Professor Plater:

> Recent assertions that the snail darter exists elsewhere than in that portion of the Little Tennessee River declared to be critical habitat do nothing to change the Service's position. The biological evidence remains that if the Little Tennessee River is impounded by Tellico Dam, the continued existence of the snail darter will be jeopardized and its critical habitat destroyed.

E. Mandatory Standard for Compliance With the 1973 Act - Irrelevancy of Evidence of Good Faith and the Arbitrary and Capricious Test

Part of defendant's case was directed toward establishing the proposition that good faith, reasonable efforts to comply with the Endangered Species Act of 1973 would be sufficient to

avoid a violation of it. A brief examination of the language of the Act, the legislative history, and the cases which have been decided under the Act indicates that Section 7 imposes a mandatory duty rather than merely a duty to make reasonable efforts to comply.

The trial court in National Wildlife Federation v. Coleman based its decision in part on the fact that defendants had "not been callous in their planning" and had "adequately considered the effects of the project on the crane. ..." The Court of Appeals for the Fifth Circuit reversed the trial court ruling and held the federal agency there involved to a very strict standard of compliance with the Endangered Species Act. Attaching great significance to Interior's determination of critical habitat, the Court stated that " ... §7 imposes on federal agencies the mandatory duty to insure that their actions will not either (i) jeopardize the existence of an endangered species, or (ii) destroy or modify critical habitat of an endangered species." p. 2569 (emphasis added). Emphasizing the mandatory nature of the Act, the Court quoted the House Report on the Act: "'This subsection ... requires that agencies take the necessary action that will not jeopardize the continued existence of endangered species or result in the destruction of critical habitat of those species.' H. Rep. No. 93-412, 94th Cong., 1st Sess.," p. 2569, fn. 17.

In addressing the standard for compliance, the 5th Circuit found the "adequately considered" standard under which the trial court considered the 1973 Act, to be a misinterpretation of the requirements of the Act. The Court said at page 2571:

> In holding that the appellees have "adequately considered" the effects of the highway on the crane, the district court misconstrued the directive of §7 which imposes on all federal agencies the mandatory obligation to insure that any action authorized, funded, or carried out by them does not jeopardize the existence of an

> endangered species or destroy critical habitat of such species. Although the FEIS and the administrative record indicates that the appellees have recognized and considered the danger the highway poses to the crane, they have failed to take the necessary steps "to insure" that the highway will not jeopardize the crane or modify its habitat.

Plaintiff's trial brief has already demonstrated that the recent Eighth Circuit opinion in Sierra Club v. Froehlke has also supported the mandatory nature of this provision of the Endangered Species Act.

Other factors also dictate a strict compliance standard for Section 7. First, the language of the Act itself is clearly non-discretionary in nature:

> All other Federal Dept. and agencies shall, ... , utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species ... and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species ... or result in the destruction or modification of habitat of such species which is determined by the Secretary (Interior), ... , to be critical. 16 USC §1536 (emphasis added).

Second, the legislative history of the Act in both the Senate and the House mandate a "strict compliance" test for §7 actions:

The Senate Report on the 1973 ESA states:

> All agencies, departments and other instrumentalities of the Fed. Gov. are directed to cooperate in the implementation of the goals of this Act. Each agency shall, inter alia, take steps to "insure that actions authorized, funded or carried out" by it do not jeopardize the continued existence of any such species or result in destruction of its habitat. 1973 U.S. Code Cong. & Adm News, 93d Cong., 1st Sess., 2989, 2997 (1973) (emphasis added).

The House Report on §7 states:

> This subsection ... requires that [all] agencies take the necessary action that will not jeopardize the continued existence of endangered species or result in the destruction of critical habitat of those species ... [F]or example, the Director of the Park Service would be required to conform the practices of his agency to the need for protecting the rapidly dwindling stock of grizzly bears within Yellowstone Park. H.R. Rep. No. 93-412, 93d Cong., 1st Sess., 14 (1973) (emphasis added).

Representative Dingell, one of the primary supporters of the Act, further explained §7 by citing practice bombing activities of the United States Air Force which threatened the Texas wintering grounds of the endangered Whooping Cranes:

> Under existing law, the Secretary of Defense has some discretion as to whether or not he will take the necessary action to see that this threat disappears ... [O]nce the bill is enacted, he or any subsequent Secretary of Defense would be required to take the proper steps (emphasis added).

A fair reading of the language and history of §7 thus requires a standard of "strict compliance" rather than a test of "good faith effort" for all federal agencies. The Department of the Interior has supported this conclusion. As stated on page 2 of the letter from Secretary Reed to Professor Plater:

> "Given all responsibility to implement the Act and the biological expertise within the F.W.S., we expect our biological opinions to be given great weight in a Federal agency's decision making. The expert opinions of F.W.S. biologists will be part of the administrative record before each federal agency. It then becomes the responsibility of the implementing Federal agency to decide for itself if it has taken all actions necessary to insure that the continued existence of an endangered or threatened species will not be jeopardized or critical habitat of such species modified or destroyed." (emphasis added).

Reasonable good faith efforts to comply with the Endangered Species Act were clearly not intended by Congress as establishing the standard for compliance, nor were they contemplated by the courts which have interpreted that statute thus far. To so hold would emasculate the Endangered Species Act and render its provisions meaningless.

Nor does the arbitrary and capricious test insulate TVA from compliance with the Act, as defendants argue, (TVA Brief, 20). The standard of judicial review is compliance, not some agency interpretation of "reasonableness." NWF v. Coleman, ____ F.2d____ (5th Cir. 25, 1976) slip opinion at 2569-70, states:

> "The federal agency must determine whether it has taken all necessary action to insure that its actions will not jeopardize the continued existence of an endangered species or destroy or modify habitat. . . . Once that decision is made it is then subject to judicial review to ascertain whether 'the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" (Emphasis added.)

The agency, in other words, must comply with the Act by insuring that no violation will occur. The circumscribed judicial review standard applies only where agencies determine that there will be no jeopardy, destruction or modification. In the present case TVA admits that the critical habitat will be destroyed or adversely modified, admits the possibility that the darter will be eliminated in the Tellico reservoir, and the Department of Interior's findings support such conclusions in terms of the statute. Reasonable transplant efforts do not insulate the agency from the Act or excuse a violation of the statutory terms.

III. Further Authority for Issuance of Injunction

1. U. S. Supreme Court Holdings in Cases of Statutory Violation Establish That an Injunction Should Issue in This Case.

An equity court has discretion in its granting of an injunction, but where a violation of a Congressional statute is involved, the courts balance the equities differently than in private litigation. In private litigation, equitable discretion is based upon findings that plaintiffs are likely to succeed on the merits (at preliminary injunction hearings), that irreparable harm will result to plaintiffs, that damages cannot adequately compensate for the injury, etc. But this Court is not bound by equity standards from private litigation when giving effect to public policy declared by Congress. Shafer v. U.S., 229 F.2d 124 (5th Cir. 1956) cert. denied 351 U.S. 931 (1956). "Arguments taken from whole cloth from prior equity practice in private controversies may not suit the statutory remedy that Congress has made available." Wirtz v. Harper Buffing Machine Co., 280 F.Supp. 376, 379 (D. Conn. 1968). The court's discretion

> "must be exercised in light of the large objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases. That discretion should reflect an acute awareness of the Congressional [policy]." Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944).

The standard that does apply is found in Hecht Co. v. Bowles, 321 U.S. 321 (1944), relied upon by defendants. TVA Brief at 4. In that case the Supreme Court found that an injunction was not required against violations of a price control act, because the defendant would fully comply and the law be fully enforced without an injunction. The "courts are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case. . . ." Hecht indicates that where full voluntary compliance "would be as practically effective as the issuance of an injunction . . ." an injunction need not issue. Hecht, 321 U.S. at 328, 329 [Emphasis added.] The discretion of the court is to tailor the remedy to assure compliance with the Act, not to excuse the violation. In this case, TVA has clearly indicated that it will not comply with the

Act by ceasing the reservoir operations that violate the Act, unless an injunction issues. The Supreme Court standard applies to this case and the injunction should issue.

> "[C]ourt and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action." 321 U.S. at 330.

2,3. Prior Endangered Species Act cases and the Congressional priorites in the Act support the need for an injunction. Brief at 12-13, Supplementary Brief at 3-8.

4. Other federal cases indicate that a violation of Congressional statute requires an injunction to enforce compliance.

In Akers v. Resor, 339 F.Supp. 1375 (W.D. Tenn. 1972), Judge Brown found that a Corps project on the Obion and Forked Deer Rivers violated mitigation requirements of 16 U.S.C. § 662 the Fish and Wildlife Coordination Act and NEPA, stating:

> We further conclude that the action by the Corps must, under 5 USCA § 706, be enjoined if it is arbitrary, or otherwise not in accordance with law or failed to meet procedural requirements of the statutes. Id.at 1380 (Emphasis added).

The project was enjoined without weighing the public equities.

Defendants cite Sierra Club v. Calloway (Wallisville Dam) 499 F.2d 982 (5th Cir. 1974), for the proposition that our injunction should not issue where a project is underway. That case supports plaintiffs' position, however, for though work was 72% complete, the Court reviewed the percentage of completion only to determine whether the Wallisville project was a free-standing unit of the larger Trinity River Project under NEPA, and enjoined the project solely because of a violation without weighing the investment. 499 F.2d 982, at 988,994.

Other federal cases reflect the same standard of limited equitable discretion in enjoining statutory violations -- in appropriations acts, Buscaglia v. U.S., 145 F.2d 274 (1st Cir.

1945) cert. denied, 323 U.S. 792; price controls, Hecht, supra, and Henderson v. Burd, 133 F.2d 515, 517 (2d Cir. 1943); civil rights acts, Central Presbyterian Church v. Black Liberation Front, 303 F.Supp. 894, 901 (1969) (enjoining disruption of church services); and securities acts, SEC v. Advance Growth Capital Corp., 470 F.2d 40 (7th Cir. 1972). In the last case the Court permanently enjoined the violation, citing Hecht, among others, and stating:

> [The equity] power must also be exercised in harmony with the overall objectives of the legislative scheme, and courts should be alert to provide appropriate remedies for the effectuation of the declared national policy. Otherwise, that policy may be frustrated by judicial inaction.
>
> ...It is, then, the public interest enunciated in the legislation which serves as the criterion for the proper exercise of equity power. ... Although injunctive relief is never automatic upon the showing of a violation of the Act or regulations (see Hecht Co. v. Bowles, supra), we should not hesitate to reverse an order denying such relief when it is evident that the trial court's discretion has not been exercised to effectuate the manifest objectives of the specific legislation involved.

5. A remand to Congress via our injunction is the proper disposition of public works violations of an Act of Congress.

As noted in plaintiff's Trial Brief, at 14-15, there is an established line of precedent for enjoining a statutory violation thereby transferring the legislative balancing problem to Congress for full debate and possible statutory exemption. Upon remand to Congress, the Alaska pipeline was exempted from provisions of the Mineral Leasing Act and NEPA, the San Antonio freeway from the highway acts and NEPA, and in other cases Congress decided not to exempt the project, as in the Cross Florida Barge Canal. Currently, Congress is debating an exemption to the Forest Service Act after remand from an injunction issued in the Monongahela Forest case, Izaak Walton League v. Butz, 367 F.Supp. 422 (N.D. W.Va. 1973).

Two points deserve brief mention: First, though defendant argues that injunctions should issue only where modifications are readily available and compliance easy, the

cases noted involved dramatic changes in agency plans. The pipeline injunction, for example, potentially required rerouting the pipeline a thousand miles overland over the Canadian Arctic shield instead of to shipping points in southern Alaska. In any case, defendant is hardly in a position to raise such equities since TVA has steadfastly refused to consider modification of the Project to conform to the Act, despite the fact that it knew of the statutory prohibition and modifications and alterations of the Project are thoroughly possible. Second, in two of the cases (pipeline right of way and Forest Service Act violations) no Congressional policy had been declared, yet injunctions were issued in all cases without balancing the public and private investment. Violations were enjoined despite the fact that several billion dollars were at stake, and the question was shifted to Congress to resolve. The doctrine of judicial remands to legislatures by injunctions has been noted by legal commentators as specially relevant where, as in this case, agency actions in violation of law are irrevocable for the future. See Professor Joseph L. Sax, Defending the Environment, 118-119, 152, 176-211 (1971) covering both state and federal cases.

6. By remanding to Congress the Court avoids entering the political arena, and the subjective balancing of unquantifiable legislative policy and economic values.

Consideration of a project's percentage of completion and investment (as plaintiffs' brief notes at 16, 19-20), unnecessarily opens up a balancing question that is difficult to define, much less to decide. In weighing the public interest when statutory violations are involved, the court puts itself in the position of weighing not only the amount of resources unrecoverable in a project, but also the value and weight of Congressional policy, the value and weight of a specific compliance, long-term and short-term public values (both quantifiable and unquantifiable) including ecology, etc. This is a far cry from the traditional judicial role in litigation between private parties; it is precisely the kind of decision traditionally made by legislatures.

But even if the Court decides to enter into this difficult arena, two further points remain: If the Court reviews the unrecoverable public expenditure question, TVA has admitted that the $80 million figure is a significant overstatement of the loss. Further, though plaintiffs' expert did not audit defendant's accounts to determine exact amounts, the amount lost to the public is far less than the amount that would potentially be written off on TVA's books, a maximum of $30 million or so. Offsetting that loss, without even quantifying preserved public values like agriculture and recreation, TVA has admitted that $20 million remain to be spent and would be largely saved in the event of an injunction. Plaintiffs do not believe that it would serve a useful purpose to reopen all the conflicting alternative public values reviewed in the prior Tellico litigation. The prior record is known to the Court and for present purposes simply establishes the fact that there are offsetting public values.

Second, the Calloway case cited by defendant demonstrates the principle of judicial restraint in entering the legislative balancing process. Despite the fact of 72% completion of that project, the court refrained from the weighing of policy, dollars and public values, and instead simply enforced the statute as written. 499 F.2d 982, 994.

7. The Administrative Procedure Act compels issuance of an injunction.

As Judge Brown noted in Akers v. Resor, § 4 above, Section 706 of the Administrative Procedure Act requires judicial enforcement of federal law.

Section 706 states:

> ...The reviewing court shall -
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be -

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ...
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law. ... [Emphasis added].

The U. S. Supreme Court interpreted this language in the Overton Park case: "In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural or constitutional requirements." 401 U.S. 402, 413-414 (1973) [Emphasis added]. Where a statute is substantive rather than procedural it would appear that compliance is required even more.

8. There is a presumption in favor of enforcement of the Act, and against the party seeking to continue a violation of the Act.

As noted in the Supplementary Brief at 1-2, there should be a presumption that once a violation of Congressional statute and policy is proved, it must be enjoined. If an injunction does not issue in the face of a violation, § 7 and the Act's citizen enforcement provisions would both be rendered nugatory. Rather, in the absence of constitutional bars, courts should give effect to Congressional actions.

IV. In Brief Conclusion.

This litigation has required much time and patient analysis by the Court, in addressing a new and complicated area of the law. Plaintiffs would be pleased to present any further oral argument or written exposition if such would be useful to the Court, but otherwise believe that the case is ready for decision in light of the extensive record developed to date and the defendant's continuing daily alteration of the Little Tennessee Valley.

This case presents clear violations of a novel Congressional statute. In determining the violation and the remedy, plaintiffs ask that the Court enforce the law as written, leaving it to Congress to review, debate and decide the countervailing issues of policy, public values and economics if Congress so wishes.

Respectfully submitted,

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