The Tennessee Valley Authority yesterday said it had rejected a final proposal for a compromise settlement of the legal battle pitting a tiny fish, the snail darter, against a huge TVA project, the Tellico Dam.

But a significant dissenting view within TVA’s board of directors raised the possibility that TVA’s long-standing position in support of completing the Tellico project might soon be changed.

In a statement released at its Knoxville headquarters, Board Chairman Aubrey J. Wagner said he had written to Interior Secretary Cecil D. Andrus rejecting Andrus’ proposal for new consultations on the Tellico project and the snail darter, a fish species that could become extinct if the dam is completed.

Accordingly, a federal appeals court last year decided that the dam would violate a federal law that prohibits any governmental action threatening “endangered species” of life such as the snail darter. The court stopped work on the $127.5 million dam, which was more than 90 percent completed.

On April 18, the Supreme Court is scheduled to hear arguments on TVA’s appeal of that decision. It was the impending oral argument that prompted Andrus last month to write TVA’s board proposing one more round of discussions toward a settlement of the dispute.

In his statement yesterday, TVA Chairman Wagner said he had turned down Andrus’ request, citing congressional appropriations acts calling for completion of Tellico.

Wagner said a second board member, William L. Jenkins, shared his view.

But the third member of the TVA board, S. David Freeman, broke with his colleagues in a separate letter to Andrus.

Freeman expressed a willingness to compromise, noting—in a statement that conflicts with TVA’s long-standing position on the subject—that creation of the reservoir, which would doom the snail darter, “is not vital to the Tellico project.”

Although Freeman represents a minority on the issue, that position could change quickly. Wagner, the chairman, will leave the board when his present term expires on May 18. His successor will be appointed by President Carter, and it was Carter who appointed Freeman to the board last year.

“The same guy who appointed Dave Freeman is going to appoint the new member,” said a Senate aide who has followed the Tellico case closely. He asked not to be quoted by name.

The gates of a relatively obscure fish species stopping a major flood control and hydroelectric power project show that environmental protection has been over-emphasized.

Freeman’s letter suggested a compromise that could preserve certain uses of the dam without eliminating the snail darter’s habitat. He proposed that Tellico be used as a “dry dam” with its gates normally left open so that no permanent reservoir would be created.

The gates could be closed when floods were threatened, Freeman said. Thus the dam would serve one of its intended functions—flood control—but would not offer the hydroelectric power or the recreational reservoir it had been designed to provide.
Critics Move to Change Endangered Species Act

By CHARLES MOHR
Special to The New York Times
WASHINGTON, April 6—The Endangered Species Act may be an endangered law.

Because the provisions of the 1973 act have been invoked to hold up completion of a $116 million dam that environmentalists say would destroy the population of a small fish called the snail darter, Senate critics of the act moved today to prepare possible amendments that would permit Federal projects in some cases to result in the elimination of a species of life. The dam is being built by the Tennessee Valley Authority.

The move in the Senate had been expected by organizations of environmentalists and conservationists. Both groups have expressed strong opposition to any steps to weaken the act, which is meant to prevent the elimination of species.

Senator Howard H. Baker Jr. of Tennessee, the Republican leader in the Senate, has been urging that a bipartisan amendment to extenuate the law's provisions be considered. He has argued that the law would give Federal officials too much power over local decisions.

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MEMORANDUM FOR MR. JUSTICE POWELL

FROM: Bob Comfort          DATE: April 9, 1978
REF: TVA v. Hill, No. 76-1701

The posture of this case has not changed very much since the Court made the decision to grant. The SG's brief does an excellent job of elaborating the argument that formed the basis of your proposed concurrence last fall: the Endangered Species Act does not by its terms apply to projects that are substantially completed. The only new argument to emerge on Respondents' side is that the GAO did a study in which it determined that there were alternatives to closing the dam that might
prove economically feasible, but that TVA refused to consult with the Interior Department about them. Of course, the district court declared that the "nature of the project is such that there are no alternatives to impoundment of the reservoir, short of scrapping the entire project." Respondents claim that that statement was not a finding of fact binding upon this Court. It is difficult to see what else it could be, however. If you conclude that it might be worthwhile to pursue the GAO study, then a remand would probably be called for.

If the GAO study does not alter your perception of this case, then little has been said to move you from your position of last fall. For that reason, this can be quite a short bench memo.

I

THE SG'S POSITION

The SG places major reliance upon the principle that even the unambiguous meaning of a statute will not be accepted when such a reading would be unreasonable in view of the statute's purpose. He advocates reading the phrase "taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of endangered species" to apply only to prospective actions -- actions with respect to
which the agency still has reasonable decisionmaking alternatives before it. This reading is compelled by the unreasonable result of a contrary interpretation: if the Act applied to completed projects, then agencies would be forced to sit by and permit a completed highway or military installation revert to a wilderness condition if it were determined that maintenance would endanger some newly discovered endangered species. The more reasonable view, says the SG, is that the Act applies only to actions about which the agency can still make choices that are consistent with commitments it has already made and that do not require substantial waste of unrecoverable resources.

In support of this position, the SG cites the same cases cited in your concurrence of last fall, to the effect that statutes are usually read so as to avoid retrospective application. E.g., Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1331 (CA4), cert. denied, 409 U.S. 1000 (1972) ("At some stage, federal action may be so 'complete' that applying the Act NEPA could be considered a 'retroactive' application not intended by the Congress.") The SG also cites the statement by one of the bill's sponsors, Senator Tunney, to the effect that the agencies would be free, after considering the alternatives, to decide to go ahead with the challenged actions regardless of the consequences for the endangered species. This also was cited
in your concurrence of last fall. The legislative history contains several statements, however, that cut the other way.

The SG also places some reliance on the subsequent appropriations for the project, just as your concurrence are did. Two reports quoted that we did not have before us last fall. The 1977 reports of the House and Senate appropriations committees specifically express the view that the Act is not intended to apply to projects substantially completed. The House Report stated: "It is the Committee's view that the Endangered Species Act was not intended to halt projects such as these in their advanced stage of completion . . . ." SG Br. 35 n.26. And the Senate Report declared: "This Committee has not viewed the Endangered Species Act as preventing the completion and use of these projects which were well under way at the time the affected species were listed as endangered. . . . If the Act has such an effect, which is contrary to the Committee's understanding of the intent of Congress in enacting the Endangered Species Act, funds should be appropriated to allow these projects to be completed and their benefits realized in the public interest, the Endangered Species Act notwithstanding." Ibid. All this adds up to at least strong evidence that the appropriating Congress did not believe that the Act would require the halting of the project.
The SG's second argument is that the subsequent appropriations acts impliedly amended the Endangered Species Act so as to omit the Tellico Dam project from its application. This argument has three bases. First, the SG says that the Endangered Species Act and the subsequent appropriations acts are in irreconcilable conflict, since we cannot assume that Congress would have appropriated money for a project that would never be built. Thus, if one accepts the Court of Appeals' reading of the Act, one must assume that the subsequent Congress intended to amend it with respect to Tellico Dam.

Second, the SG emphasizes the Senate Appropriations Committee Report, quoted above, in which it is stated that the Committee does not view the Act as applying to Tellico, but if it does, then the Committee recommends appropriating the money and going ahead with the project anyway. Other statements in other reports also indicate that Congress wished the project to continue, no matter what the relevance of the Act.

Third, the SG relies on several cases in which the Congress has used appropriations legislation to modify existing substantive law that depended upon such appropriations for its implementation. Although most of these cases involved specific references to the prior enactments in the body of the appropriations legislation, the SG argues
6.

that it is sufficient if the committee reports clearly
evidence congressional intent that the money be used for
a purpose obviously at odds with the older law.

II

RESPONDENTS' POSITION

Respondents echo CA6's view of the Act's language
as mandatory -- applying to all actions the agency has before
it, including those to which substantial resources already
have been committed. They cite the countervailing statements
in the legislative history that cast doubt on Senator Tunney's
comment about the ability of the agency to go forward with
a challenged action once it has weighed all the alterna-
tives.

Respondents argue that if Congress wished to create
an exemption for "substantially completed" projects, it
could easily have done so in so many words. Indeed, cer-
tain exemptions were added to the Act in express terms,
e.g., the "Scrimshaw Act," exempting from the Act trade in
pre-Act whale ivory products. See Resp Br. 36. Moreover,
the Secretary of the Interior has primary responsibility
for implementing the Act, and it is his belief that it
applies to the Tellico project, as well as to any other
substantially completed project. The final regulations,
which modify the more flexible ones cited in your concurrence
of last fall, make it clear that the Secretary believes the Act to apply to all agency projects, in whatever stage of completion. Resps Br. 37-38.

Respondents argue that this is not retrospective application. The Act applies only to actions remaining to be taken, which threaten to extinguish endangered species. (This is a word game; it does not meet the SG's point that such an interpretation would require the cessation of maintenance of a long-complete facility, if the mere existence of that facility was discovered to threaten the existence of some newly discovered endangered species.)

Respondents' strongest argument on this score is that there is no need to apply a pragmatic "substantially completed" exception in this case because there are alternatives to the closing of the dam that would not result in the waste of tens of millions of dollars. For example, they cite a GAO study indicating that in cost/benefit terms, development options not involving impoundment of the river may be preferable. Resp Br. 43. Thus, they advocate a "remand to the legislature" to permit Congress to weigh these alternatives.

Also, Respondents argue that NEPA cases finding "substantially completed" exceptions are inapplicable here. NEPA is basically procedural, so that a project very near completion is unlikely to be affected by a requirement
that the agency merely consider all the other choices. The Endangered Species Act, however, is substantive. It must be applied to preserve the particular species even if a project is nearing completion. As CA6 observed, permitting the agency to proceed and eradicate the species moots the controversy; it is too late for Congress to weigh the desirability of proceeding with the project against the interest in preserving the species. Thus, the Act must be applied even to substantially completed projects so that the balancing effort can take place in Congress, where it belongs.

Respondents take issue with the argument that the subsequent appropriations acts impliedly amended the Endangered Species Act. They point out, rightly, I believe, that the appropriations acts and the CA6 reading of the Endangered Species Act are not in irreconcilable conflict. One may interpret the former as evidencing congressional belief that TVA's efforts to transplant the snail darter would be successful, so that no halt of the project would ever be necessary. This interpretation adheres to the doctrine disfavoring implied repeals and favoring interpretations that reconcile seemingly conflicting acts, rather than finding such implied repeal. That doctrine offers the greater protection against the power of a relatively small appropriations committee to generate legislative history that will have the effect of overthrowing substantive
enactments the entire Congress might not be ready to jettison.

Moreover, the appropriations acts do not in terms apply to the Tellico Project, so that there is no guarantee that the whole Congress knowingly participated in the supposed implied repeal. Finding implied repeal where the statute itself does not refer back to the prior enactment, say Respondents, grants too much power to appropriations committees.

III
CONCLUSION

As you know, I favor affirmance. I believe that CA6 correctly identified the dispositive factor when it observed that the proper arena for balancing the conflicting claims of endangered species and public works projects is Congress. If the courts give the go-ahead for the extinction of the species, Congress is left with no responsibility to discharge. Creating an exemption for "substantially completed" projects will not prevent nuisance litigation, since the courts will still be asked to decide whether any given project has reached the stage of "substantial completion." If the court says yes, and the agency moves to exterminate the species, it may turn out that the problem has been irrevocably dealt with in a way that Congress would not have approved. Holding up the project and forcing...
Congress to perform its self-imposed balancing responsibility seems a preferable course of procedure.

This may be especially true with regard to the Tellico Dam. It has virtually no hydroelectric capacity, but was built instead for recreational and development purposes. Congress is now engaged in a study to determine whether alternatives to closing the dam might not produce a better return on the resources already invested, while at the same time preserving this ridiculous fish. Apparently, much of the funding for the project did not go into the dam, but into on-shore development.

If you remain of your view of last fall -- that the Act does not stand in the way of completing the dam -- then you should reach that result by way of your reasoning of last fall: it is unreasonable to read the Act as applying to substantially completed projects. This rationale has a grounding in common sense and precedent. Following the approach of an implied repeal opens the flood gates to manipulation of regulatory schemes by the appropriations committees. And following Justice Rehnquist's "balancing of the equities" approach is an invitation to judicial nullification, not to mention a blatant exercise in the application of "unneutral" principles.

RDC
Dear Dr. Carter,

I am pleased to receive your application for a position in the Records Department. It is a position of great interest to me, and I am pleased to consider your application.

I regret that it is not possible to interview you for the position at this time. However, I will keep your application on file and will contact you if an opening should arise.

Thank you for your interest in the position.

Best regards,

[Signature]

THE CHIEF JUSTICE

CHAMBERS OF

Supreme Court of the United States

333
and to identify the "critical habitat" of these creatures. When a species or its habitat is so listed, the following portion of the Act—relevant here—becomes effective:

"The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species

Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man." 16 U.S.C. § 1532 (4).

"The Act covers every animal and plant species, subspecies, and population in the world needing protection. There are approximately 1.4 million full species of animals and 600,000 full species of plants in the world. Various authorities calculate as many as 10% of them—some 200,000—may need to be listed as Endangered or Threatened. When one counts subspecies, not to mention individual populations, the total could increase to three to five times that number." Keith Shreiner, Associate Director and Endangered Species Program Manager of the U. S. Fish and Wildlife Service, quoted in a letter from A. J. Wagner, Chairman TVA, to Chairman, House Committee on Merchant Marine and Fisheries, dated April 25, 1977, quoted in Wood, On Protecting An Endangered Statute: The Endangered Species Act of 1973, 37 Federal Bar Journal 25, 27 (1978).

"The Act does not define "critical habitat," but the Secretary of the Interior has administratively construed the term:

"'Critical habitat' means any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion." 50 CFR § 402.02, 43 Fed. Reg. 874.
A few months prior to the District Court's decision dissolving the NEPA injunction, a discovery was made in the waters of the Little Tennessee which would profoundly affect the Tellico Project. Exploring the area around Coytee Springs, which is about seven miles from the mouth of the river, a University of Tennessee ichthyologist, Dr. David A. Etnier, found a previously unknown species of perch, the snail darter, or *Percina Inostoma tanasi*. This three-inch, tanish-colored fish, whose numbers are estimated to be in the range of 10,000 to 15,000, would soon engage the attention of environmentalists, the TVA, the Department of the Interior, the Congress of the United States, and ultimately the federal courts, as a new and additional basis to halt construction of the dam.

Until recently the finding of a new species of animal life would hardly generate a cause celebre. This is particularly so in the case of darters, of which there are approximately 130 known species, eight to 10 of these having been identified only in the last five years. The moving force behind the snail darter's sudden fame came some four months after its discovery, when the Congress passed the Endangered Species Act of 1973, 87 Stat. 884, 16 U. S. C. 1531 et seq. 1976 (“Act”). This legislation, among other things, authorizes the Secretary of the Interior to declare species of animal life “endangered.”

The snail darter was scientifically described by Dr. Etnier in the Proceedings of the Biological Society of Washington, Vol. 88, No. 44, at 469-488 (Jan. 22, 1976). The scientific merit and content of Dr. Etnier's paper on the snail darter were checked by a panel from the Smithsonian Institution prior to publication. See App., at 111.

In Tennessee alone there are 85 to 90 species of darters, App., at 131, of which upward to 45 live in the Tennessee River system. App. 130. New species of darters are being constantly discovered and classified—at the rate of about one per year. *Id.*, at 131. This is a difficult task for even trained ichthyologists since species of darters are often hard to differentiate from one another. *Id.*

A "endangered species" is defined by the Act to mean "any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the
Bell (AG of U.S.)

The darter has been designated an "endangered species" of the river in its "habitat." The latter isumps, because removal of the darter would not be sufficient.

Damn is completed— all that remains is to close gate.

Can't just leave damn if U.S. loses. The "habitat" already has suffered. Part of damn would have to be removed.

Secretary's Rags say that even after damn has been operating, it could be shut down.
Affirm 4  BHW - Passed
Reverse 4 3  CF - Passed on
second vote.

76-1701 TVA v. HILL  Conf. 4/21/78

The Chief Justice Reversed
Balance equation.
Would hold that the prior authorization
of the Board controls.
Intent of Congress is crystal clear.
But would join eight to affirm
in P.C. saying then in Congress' means.

Mr. Justice Brennan Affirm
Language is mandatory - regardless
of degree of completion.
Congress intended the "darker" to
prevail - this is clear from appropriation
of $2 million for preservation. This
necessitates any other intent.

Mr. Justice Stewart Affirm
Language is controlling.
Equitable considerations are
appropriate - but can't override language.
Mr. Justice White

Mr. Justice Marshall

affirm

Congress can be "jackass" if it wants to. Result here is absurd - but we are stuck with language.

Mr. Justice Blackmun

Revere

Closed case. Common sense on side of TVA.

Appropriations bills. Committee reports are convincing ev. of intent. The $2,000,000 app. is consistent with TVA's position.
Mr. Justice Powell: Reverse.

Intent of Congress, if clear, would control. If language were clear, this would be regarded as best ev. of intent. But language not clear. Petitioners claim it applies to all completed projects. No one - as I view it - can claim this view is required by language. Appropriation Acts do not control, but are strong ev. of intent.

Mr. Justice Rehnquist: Reverse.

Could agree with my view, but prefer her only "eq. relief" analysis. The party who invokes eq. relief has burden of proving entitlement to a jury. The DC had discretion in his exercise of it, should not have been disturbed by CA6

Mr. Justice Stevens: Affirm.

Agree essentially with W.J.B.
Re: 76-1701 - Tennessee Valley Authority v. Hill

Dear Chief,

My vote is to affirm in this case.

Sincerely yours,

The Chief Justice

Copies to the Conference