MEMORANDUM TO THE CONFERENCE

Enclosed is the Final Assignment Sheet.

I have decided to come down on the side of separation of powers and serve notice on Congress that it should take care of its own "chestnuts." Accordingly I will take the case myself, even though my bid to "join 8" to affirm failed to get 8.

Regards,

[Signature]
May 4, 1978

Memorandum to the Conference

The attached clipping from yesterday's Washington Star may be of interest, if you have not already seen it.

P.S.
Panel OKs Bill Allowing Harm To 'Endangered Species'

A Senate subcommittee has unanimously approved a bill that would allow for construction of major federal projects even though they harm "endangered species" such as the celebrated fish known as the "snail darter."

The darter, a tiny member of the perch family, is at the center of an environmental controversy in which a federal court has enjoined the Tennessee Valley Authority from continuing construction of its Tellico Dam because the dam would destroy the fish's habitat and wipe out the species.

Under the Endangered Species Act, certain "critical habitat" are designated for species, and federal agencies are forbidden from taking action that would harm the area.

The snail darter case is before the Supreme Court, and the legislation approved yesterday by the resource protection subcommittee is designed to meet that conflict and several others.

The full Environment Committee plans to vote on the bill Friday. The House has no such legislation under consideration.
MEMORANDUM

TO: Bob

FROM: Lewis F. Powell, Jr.

No. 76-1701 TVA v. Hill

As you will see from my revision of your first draft, I became wound up a bit and did substantial rewriting. I do feel strongly about this case, and I have let off a little "steam" in the process of dictating the revision. Perhaps both of us will temper and refine some of the things I have said, and yet I do want this to be a strong, vigorous dissent that — without implying that my Brothers need psychiatrists — at least makes clear that as a lawyer I view their interpretation of this statute as not compelled by its language, and as an interpretation which disregards the presumption against retroactivity and the mountain of evidence as to congressional intent.

I was prompted, in part, to redictate much of your draft because it seemed desirable to address the "plain language" argument at the outset.

As you will observe, I have omitted some of your helpful citations, and will count on you to restore these at appropriate places. Nor did I try, in the course of dictation, to put the footnotes where they belong. I attach hereto a couple of possible additional footnotes.
Also, Bob, unless you think it futile, I would appreciate your going back to the books with the view to finding opinions of this Court that support the following:

1. The primary purpose of statutory construction by a Court is to ascertain an effectuate legislative intent.

2. Even where the language seems "plain", a court will try to interpret it avoid an unreasonably or "absurd" result - especially where such a result is not necessary to the essential purpose of the statute. The SG cites Church of the Holy Trinity v. United States, 143 U.S. 457, at 459.

3. Certainly where language is ambiguous or more than one rational interpretation may be made, a court should construe the statute as reflecting reasonable legislation.

I used to have Frankfurter's little volume on interpretation of statutes. I can't find it, and it may not have anything helpful - but take a look at it. There may be some other treatises on the subject.

I may well have omitted some important thoughts from your draft. Feel free to restore them.

L.F.M. Dr.

Bob. There is a bit too much repetition in my draft. You may use your knife - but with due restraint!
MEMORANDUM

TO: Bob 
FROM: Lewis F. Powell, Jr.

DATE: May 12, 1978

No. 76-1701 TVA v. Hill

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L.F.P., Jr.
No. 76-1701 TVA v. Hill

MR. JUSTICE POWELL, dissenting.

In my view § 7 of the Endangered Species Act, 16 U.S.C. (Supp. V) § 1536, cannot reasonably be interpreted as applying to a project that is substantially completed when its threat to an endangered species is discovered. It seems to me that the Court, in reaching a different conclusion, reflects seriously, however unintentionally, on the judgment and commonsense of the Congress of the United States. The result in this case hardly can be viewed in any other light. The Telico Dam and Reservoir Project (Telico Project), serving important public purposes, was duly authorized by Congress in 1966, and since has been funded by annual appropriations to the extent of $110,000,000. This project, substantially completed, is now to be halted by court injunction because the planned impoundment of water may endanger a recently
discovered species of small perch that are largely
indistinguishable from a number of other species of the
large perch family.

If it were clear, from the language of the
Endangered Species Act of 1973 (the Act), and its
legislative history, that Congress intended to authorize a
result that fairly may be called irrational, this Court
would be compelled to enforce it. It is not our province to rectify policy
or political judgments by the legislative branch, however
egregiously they may disserve the public interest. But
where the statutory language and legislative history, as
in this case, need not be construed to reach an absurd
result, I view it as the duty of this Court at least to
adopt a construction that accords with some medium of
commonsense and compatibility with the public interest.

As the Attorney General agreed in oral argument, a member
of Congress desiring to be reelected would not think of
voting to abandon a concededly needed project on which
$110,000,000 has been expended for the sole purpose of
assuring preservation of a small number of three-inch fish
that serve no known useful purpose. Yet abandonment
is precisely what this Court holds Congress did intend. I
dissent from this holding.
I

I restate the facts, as they show

demonstrate beyond reasonable doubt—at least for me—that Congress never intended this bizarre result.

In 1966, Congress authorized and appropriated initial funds for the construction by the Tennessee Valley Authority (TVA) of the Telico Dam and Reservoir Project (Telico Project), a federal multi-purpose dam and reservoir on the Little Tennessee River in eastern Tennessee. The project is a comprehensive water resource and regional development project designed to control flooding, provide water supply, promote industrial and recreational development, generate some additional electric power within the TVA system, and generally improve economic conditions in an economically depressed area. As recently described, the area is "characterized by under-utilization of human resources and out migration of young people".

Construction began in 1967, and Congress has voted funds for the project in every year since.

In August 1973, when the Tellico Project was half completed, a new species of fish known as the snail darter was discovered in the portion of the Little
Tennessee River that would be impounded behind Tellico Dam. The Act of 1973 was passed the following December.

87 Stat. 884, 16 U.S.C. (Supp. V) 1531 et seq. More than a year later, in January 1975, pursuant to § 4 of the Act, respondents, joined others in petitioning the Secretary of the Interior in January 1975 to list the snail darter as an endangered species. On November 10, 1975, when the Tellico Project was 75% completed, the Secretary placed the small darter on the endangered list and concluded that the "proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat." 40 Fed. Reg. 47506 (1975). In respondents' view, the Secretary's action meant that completion of the Tellico Project would violate § 7 of the Act, 16 U.S.C. (Supp. V) § 1536:

"All . . . 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 chapter by carrying out programs for the conservation of endangered species listed pursuant to section 1533 of this title 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 and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical."

TVA nevertheless determined to continued with the Tellico Project in accordance with the prior authorization by
Congress. In February 1976, respondents filed the instant suit to enjoin its completion. By that time the Project was 80 percent completed.

In March 1976, TVA informed the House and Senate appropriations committees about the Project's threat to the snail darter and about the lawsuit. Both committees were advised by TVA that it was engaged in attempts to preserve the snail darter by relocating them to the Hiwassee River, which closely resembles the Little Tennessee. It stated explicitly, however, that the success of those efforts could not be guaranteed.

In a decision of May 25, 1976, the District Court for the Eastern District of Tennessee held that "the Act should not be construed as preventing completion of the project." 419 F. Supp. 753, 755 n. 2 (1976). An opposite construction, said the District Court, would be unreasonable:

At some point in time a federal project becomes so near completion that a court of equity should not apply a statute enacted long after inception of the project to produce an unreasonable result. Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1331-32 (4th Cir.), cert. den. 409 U.S. 1000, 93 S. Ct. 312, 34 L. Ed. 2d 261 (1972). Where there has been an irreversible and irretrievable commitment of resources by Congress to a project over a span of almost a decade, the Court should proceed with great circumspection." Id., at 760.
Observing that respondents' argument, carried to its logical extreme, would require a court to enjoin the impoundment of water behind a fully completed dam if an endangered species were discovered in the river on the day before the scheduled impoundment, the District Court concluded that Congress could not have intended such a result. Accordingly, it denied the prayer for an injunction and dismissed the action.

In 1975, 1976 and 1977 Congress, with full knowledge of the Telico project's effect on the snail darter and the alleged violation of the Endangered Species Act, continued to appropriate money for the completion of the project. In doing so, the Appropriations Committees expressly stated their view that the Act did not prohibit the project's completion, a view that Congress presumably accepted in approving the appropriations each year. For example, in June 1976, the Senate Committee on Appropriations released a report noting the District Court decision and recommending approval of TVA's full budget request for the Tellico Project. The Committee observed further that it did "not view the Endangered Species Act as prohibiting completion of the Tellico project at its advanced stage," and it directed "that this project be
completed as promptly as possible in the public interest." The appropriations bill was passed by Congress and approved by the President.

The Court of Appeals for the Sixth Circuit nevertheless reversed the District Court in January, 1977. It held that the Act was intended to create precisely the sort of dramatic conflict presented in this case: "Where a project is on-going and substantial resources have already been expended, the conflict between national incentives to conserve living things and the pragmatic momentum to complete the project on schedule is most incisive." 549 F.2d 1064, 1071 (1977). Judicial resolution of that conflict, reasoned the Court of Appeals, would represent usurpation of legislative power. It quoted the District Court's statement that respondents' reading of the Act, taken to its logical extreme, would compel a court to halt impoundment of water behind a dam if an endangered species were discovered in the river on the day before the scheduled impoundment. The Court of Appeals, however, rejected the District Court's conclusion that such a reading was unreasonable and contrary to congressional intent, holding instead that "[c]onscious enforcement of the Act requires that it
be taken to its logical extreme." Ibid. It remanded with instructions to issue a permanent injunction halting all activities incident to the Tellico Project which would modify the critical habitat of the snail darter.

In June 1977, and after being informed of the decision of the Court of Appeals, the Appropriations Committees in both Houses of Congress again recommended approval of TVA's full budget request for the Tellico Project. Both Committees again stated unequivocally that the Endangered Species Act was not intended to halt projects at an advanced stage of completion:

"[The Senate] 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." #1

"It is the [House] Committee's view that the Endangered Species Act was not intended to halt projects such as these in their advanced stage of completion, and [the Committee] strongly recommends that these projects not be stopped because of misuse of the Act." #2

Once again, the appropriations bill was passed by both Houses and signed into law.
Today the Court, like the Court of Appeals below, adopts a myopic reading of §7 of the Act, giving it a retroactive effect and disregarding 12 years of consistently expressed congressional intent to complete the much-needed Telico project. With all due respect, I view this result as an unnecessary act of legalism. The result is not compelled by the language of the Act, and it ignores established criteria for construing legislation.

The starting point in statutory construction is, of course, the language itself of §7. I agree that the language of this Act reflects little credit on its draftsmen. It can be viewed as a textbook example of fuzzy language, that can be read according to the "eye of the beholder". The critical words direct all federal agencies to take "such action [as may be] necessary to insure that actions authorized, funded or, carried out by them do not jeopardize the continued existence of . . . endangered species . . . or result in the destruction or modification of [a critical] habitat of such species . . ." Respondents - as did the Sixth Circuit - read these
words as sweepingly as possibly to include all "actions" that any federal agency ever may take with respect to any federal project whether completed or not. Although the Court today seems reluctant to project the shadow of its opinion quite this far, it offers no logical stopping place for the effect of its interpretation. The hypothetical example posed by the District Court identifies the dilemma unanswered by the Court's opinion: if the Act is applied to alter a project 80% complete, it must also halt a great dam project the day before impoundment is scheduled to take place. And, as respondents insist, the "actions" that an agency would be prohibited from "carrying out" also would include maintenance necessary to preserve the continued operation of a completed billion dollar hydroelectric plant or the nation's most essential defense installation. The only precondition, according to respondents, to thus destroying the usefulness of even the most important federal project in our country would be a finding by the Secretary of the Interior that a continuation of the project would threaten or critical habitat the survival of a newly discovered species of water bug or cockroach.
"[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892). The absurd result produced in this case by virtue of the Court's reading of § 7 makes it unreasonable to believe that Congress intended that reading. Without doing violence to its language, § 7 may be construed in a way that avoids irrationality.
When statutory language can be interpreted to bring about nonsensical results, this Court traditionally has sought a construction that assumes rationality on the part of Congress. The Act before us may be so construed without doing violence to its language. The critical word is "actions" and its meaning is far from "plain". As the Attorney General argued persuasively, Br. "actions" is part of the phrase: "Actions authorized, funded or carried out". If the verb "carried out" is read in pari materia with "authorized" and "funded", as it should be, it seems evident that the actions referred to are not all actions that an agency can ever take, but rather actions that the agency is deciding whether to authorize, to fund, or to carry out. In short, these words reasonably may be read as applying only to prospective actions, i.e., actions with respect to which the agency has reasonable decision-making alternatives still available.

Putting it differently, where a wholly unreasonable construction is not compelled by the language, I think this Court has a duty to avoid it.

Section 7 of the Act, considered in its entirety, fairly

Bob: There are cases that hold we must construe statutes to achieve reasonable results consistent with purpose and intent of legislature. Let's cite several.
may be read as meaning that "actions" to be "carried out" refers to what may be done at those points in the decision-making process where the agency still has the opportunity of making choices consistent with commitments already undertaken by the government and that do not require the abandonment of completed or substantially completed projects. At the time respondents brought this law suit, the Tellico project was 80% complete at a cost of approximately $88,000,000. Completing the project involved no new actions within the meaning of the statute; it only involved carrying forward to completion an inseparable portion of actions already authorized. This is a reasonable construction of the language and also is supported by the presumption against construing statutes to give them a retroactive effect. As this Court stated in United States Fidelity & Guaranty Co. v. Struthers Wells Co., 209 U.S. 306, 314 (1908), the "presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other."
environmental impact statement cannot reasonably be applied
to projects substantially completed. E.g., Pizitz, Inc. v.
Volpe, 467 F.2d 208 (CA5 1972); Ragland v. Mueller, 460
F.2d 1196; Greene County Planning Board v. FPC, 455 F.2d
412, 424 (CA2), cert. denied, 409 U.S. 849 (1972). The
Court of Appeals for the Fourth Circuit explained these
holdings:

"Doubtless Congress did not intend that all
projects ongoing at the effective date of the Act
be subject to the requirements of Section 102.
Act some stage of progress, the costs of altering
or abandoning the project could so definitely
outweigh whatever benefits that might accrue
therefrom that it might no longer be 'possible' to
to change the project in accordance with Section
102. At some stage, federal action may be so
'complete' that applying the Act could be
considered a 'retroactive' application not
intended by the Congress." Arlington Coalition on
Transportation v. Volpe, 458 F.2d 1323, 1331
(CA4), cert. denied sub nom.; Fugate v. Arlington
Coalition on Transportation, 409 U.S. 1000 (1972).

Similarly under §7 of the Endangered Species Act, at some
stage of completion of a federal project the basic action
long since taken is merely being continued at a time when
the agency no longer has a reasonable choice to terminate
the project. When that point is reached, as clearly it was
in this case, the presumption against retrospective
interpretation is at its strongest. The Court today gives
no weight to the rule of construction that presumes a
congressional intent that major, new legislation is to be
applied prospectively.
In my view, however, this silence reinforces the conclusion that the Court's reading of § 7, which produces an unreasonable result, could not have been intended by Congress. If the Members of Congress who voted for the Endangered Species Act had been aware that it could be used to halt multimillion dollar projects authorized years earlier and nearly completed, or to require the abandonment of essential and long completed federal installations and edifices, there surely would have been hearings, testimony, likely and debate concerning the extent and desirability of those consequences. The absence of any such consideration indicates rather clearly that the legislators must not have had these consequences in mind when they voted.
The Court also essentially ignores the rule that the first purpose of statutory construction is to ascertain the intent of the legislature. There is no evidence of an intent to apply §7 to projects completed or substantially completed, and the only relevant intention is clearly and indisputably to the contrary.

To be sure, the record evidence at the time the Endangered Species Act was adopted does not address with any degree of specificity the issue of retroactive application. There are statements by Senator Tunney, chief sponsor of the legislation, that reflect his reading of the Act as mandating only a balancing or cooperative process. Moreover, the title of the Act refers to "interagency cooperation", reflecting a plain intent to assure cooperation between the Secretary of the Interior and other agencies responsible for carrying out and maintaining federal projects. Under the view taken by the Court today there can be no cooperation. The Secretary of the Interior has a veto power. The Court holds, in effect, that one man - the Secretary - whenever he chooses, may bring to a wasteful halt any project at any stage of completion or, even as respondents argue, at any time in the future that continued operation of a completed project requires some action that threatens an endangered species.
repeated actions and expressions by Congress afford unmistakable evidence of legislative intent. As noted above, in each of the three years since this controversy developed—in 1975, 1976 and 1977—with full knowledge of the asserted effect on the snail darter, Appropriation Committees of both Houses explicitly recorded their understanding that the Endangered Species Act does not prohibit the completion of this project "at its advanced stage". With this interpretation before it, in the Committee reports, Congress approved the recommended appropriations and the President also approved.

We have held, properly, that post-enactment statements by individual members of Congress as to the meaning of a statute are entitled to little or no weight. See, e.g., Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1975). The Court also has recognized that subsequent appropriation acts themselves are not necessarily entitled to significant weight in ascertaining original congressional intent. See ________
v. __________, ___ U.S. ___. But these precedents are inapplicable. There is no effort here to "bootstrap" a post-enactment view of prior legislation by
RIDER P. X 16:

isolated statements of individual congressmen. Nor is this a case where Congress, without explanation or comment upon the statute in question, has continued to include financial support in subsequent appropriations acts. Rather, we have a situation where the intention of Congress is little short of being as clear as if it formally had adopted amendatory language to §7. Testimony on this precise issue was presented before congressional committees, the committee reports for three consecutive years addressed the problem and affirmed their understanding of congressional intent. We cannot assume that Congress, when it continued each year to approve the recommended appropriations, was unaware of the contents of the supporting Committee Reports.

The Court — perhaps uneasy about its own handiwork, invites Congress to amend the Endangered Species Act to prevent the folly above described. I have no doubt that Congress will accept this invitation. Few if any members of that body will wish to defend the spending of $110,000,000 on a much needed dam which now stands as useless as if it were one of the pyramids relocated in the Tennessee hills. The dam would stand as a monument, perhaps attracting a few incredulous tourists, to the
ineptitude of government. There would be no lake, no regional water resource, no flood control, no additional electric power, none of the recreational benefits that flow from a great impoundment of water, and no improvement from this expenditure of economic conditions in this depressed area. All of this, the Court today holds in effect must have been intended by the language Congress chose to use.

If Congress now acts expeditiously to correct what I believe to be the error of this Court, perhaps the delay in the denial of these benefits caused by this litigation will have no lasting effect. But this is hardly the way our system should work.
I have little doubt that Congress will accept the Court's invitation, ante, at ___, to amend the Endangered Species Act in order to prevent the irrational result of today's decision. Few Members of that body will wish to defend the waste of $53,000,000 on a dam which would stand, useless, as a monument to this Court's illusory literal meaning in preference to a reasonable interpretation of § 7. If Congress acts expeditiously, the delay occasioned by the Court's decision probably will have no lasting effect. But surely it is not the province of this Court to goad Congress into otherwise unnecessary action by interpreting statutes so as to produce obviously unintended results.
MR. JUSTICE POWELL, dissenting.

In my view, because I believe that § 7 of the Endangered Species Act, 16 U.S.C. (Supp. V) § 1536, cannot reasonably be interpreted as applying to a project that is substantially completed when its threat to an endangered species is discovered, I respectfully dissent.

In 1966, Congress appropriated initial funds for the Tellico Dam and Reservoir Project, which was planned to stimulate shoreline and industrial development, create new job opportunities, and generally improve economic conditions in "an area characterized by underutilization of human resources and outmigration of young people." Construction began in 1967, and Congress has voted funds for the project in every year since.
In August 1973, when the Tellico Project was half completed, a new species of fish known as the snail darter was discovered in the portion of the Little Tennessee River that would be impounded behind Tellico Dam. The 1973 was passed the following December. 87 Stat. 884, 16 U.S.C. (Supp. V) 1531 et seq. Pursuant to § 4 of the Act, several persons, including respondents, Petitioned the Secretary of the Interior in January 1975 to list the snail darter as an endangered species. On November 10, 1975, when the Tellico Project was 75% completed, the Secretary placed the snail darter on the endangered list and concluded that the "proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat." 40 Fed. Reg. 47506 (1975). In respondents' view, the Secretary's action meant that completion of the Tellico Project would violate § 7 of the Act, 16 U.S.C. (Supp. V) § 1536:

"All . . . 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 chapter by carrying out programs for the conservation of endangered species listed pursuant to section 1533 of this title 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 and threatened species or result in
the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical."

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The Court of Appeals for the Sixth Circuit reversed the District Court in January, 1977. It held that the Act was intended to create precisely the sort of dramatic conflict presented in this case: "Where a project is on-going and substantial resources have already been expended, the conflict between national incentives to conserve living things and the pragmatic momentum to complete the project on schedule is most incisive." 549 F.2d 1064, 1071 (1977). Judicial resolution of that conflict, reasoned the Court of Appeals, would represent usurpation of legislative power. It quoted the District Court's statement that respondents' reading of the Act, taken to its logical extreme, would compel a court to halt impoundment of water behind a dam if an endangered species were discovered in the river on the day before the scheduled impoundment. The Court of Appeals, however, rejected the District Court's conclusion that such a reading was unreasonable and contrary to congressional intent, holding instead that "[c]onscious enforcement of the Act requires that it be taken to its logical extreme." Ibid. It remanded with instructions to issue a permanent injunction halting all activities incident to the
Tellico Project which would modify the critical habitat of
the snail darter.

In June 1977, following the decision of the Court
of Appeals, the appropriations committees in both Houses
of Congress again recommended approval of TVA's full
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again expressed the view that the Endangered Species Act
was not intended to halt projects at an advanced stage of
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notwithstanding." 6/

"It is the [House] Committee's view that
the Endangered Species Act was not
intended to halt projects such as these in
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[the Committee] strongly recommends that
these projects not be stopped because of
misuse of the Act." 7/

Once again, the appropriations bill was passed by both
Houses and signed into law.

II

Today the Court, like the Court of Appeals below,
reads § 7 of the Act with retroactive effect, applying it
to a project that, for all practical purposes, is complete. I cannot agree that the Act was intended to set the stage for the dramatic confrontation presented here.

Respondents, and the Court, insist that the language of § 7 directing federal agencies to insure that "actions authorized, funded, or carried out by them do not threaten endangered species" must be read to embrace every action, including dedication of a project one day short of completion and maintenance of a project already in operation. Thus, if it were learned that continued occupation of a military installation was having a gradual but deleterious effect on the critical habitat of a recently discovered species of insect, the Government would be required to let the base revert to a wilderness condition.

This construction strikes me as unreasonable, for I cannot believe that members of Congress who voted for the Endangered Species Act contemplated placing in jeopardy every federally operated and federally funded project in the Nation. The congressional reports cited above support this belief. They made it clear that the committees responsible for overseeing the funding of the
Tellico Project were distressed to learn that the Act was being read as applying to projects at advanced stages of completion. Since full appropriations for the Project were approved in each year that the committee reports discussed the snail darter problem, it reasonably can be inferred that other Members of Congress must have shared that distress and believed that the Act could not be so applied. While this subsequent congressional action might not be specific enough to amount to an implied repeal of § 7 - assuming it were necessary to contend for such a repeal - it is strong evidence that TVA's interpretation of the Act as not applying to substantially completed projects was correct ab initio. See, e.g., Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 116 (1947); Brooks v. Dewar, 313 U.S. 354 (1941).

The better interpretation of § 7 - one which precludes the unreasonable results of the Court's construction and accords with the apparent congressional view of the Act's reach - is to read the verb "carried out" in pari materiae with "authorized or funded." Thus, the "actions" that the agency is directed to insure do not threaten endangered species do not include every possible
action an agency might take, but only those the agency is about to authorize, fund, or carry out - prospective choices as to authorization, funding, and execution actions. Where the action is already carried out and the project completed, the agency's reasonable choices are withdrawn, and § 7 cannot be held to apply. Any other reading requires a conclusion that Congress intended abandonment of commitments already made and substantial waste of unrecoverable resources. I would not reach such a conclusion unless the evidence of such an intent were far stronger than that presented here.

My reading of § 7 is supported by cases under the National Environmental Policy Act, 42 U.S.C. § 4331 et seq., holding that the requirement of filing an environmental impact statement cannot reasonably be applied to projects substantially completed. E.g., Pizitz, Inc. v. Volpe, 467 F.2d 208 (CA 5 1972); Ragland v. Mueller, 460 F.2d 1196 (CA 5 1972); Greene County Planning Board v. FPC, 455 F.2d 412, 424 (CA 2), cert. denied, 409 U.S. 849 (1972). The Court of Appeals for the Fourth Circuit explained these holdings:
"Doubtless Congress did not intend that all projects ongoing at the effective date of the Act be subject to the requirements of Section 102. At some stage of progress, the costs of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be "possible" to change the project in accordance with Section 102. At some stage, federal action may be so "complete" that applying the Act could be considered a "retroactive" application not intended by the Congress." Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1331 (CA 4), cert. denied sub nom.: Fugate v. Arlington Coalition on Transportation, 409 U.S. 1000 (1972).

Likewise under § 7 of the Endangered Species Act, at some stage of progress the costs of abandonment are so great that it is no longer "possible" to take the steps outlined in that section - the choices are not reasonably available. The federal action is so complete that application of § 7 must be considered retroactive.

For these reasons, I would hold that § 7 cannot reasonably be interpreted as applying to projects already completed or substantially completed. Because the Tellico Dam is substantially completed, I would find it outside the reach of § 7.
There are approximately 130 species of darters, which are members of the perch family. Record 107, 131. Eighty-five to ninety darter species are found in Tennessee alone, id., at 131, forty to forty-five in the Tennessee River system, id., at 130, eleven in the Little Tennessee, id., at 38, n.7. New species of darters are discovered in Tennessee at the rate of about one per year. Id., at 131. Eight to ten have been discovered in the last five years. Ibid.
It is difficult even for ichthyologists familiar with the snail darter to tell it from several related species. Id., at 131, 138. The darter is not a sport-fishing fish, it is not edible, and is not suitable either as bait or for fertilizer. See note 1 supra.
The Court of Appeals interpreted the District Court opinion as holding that TVA's continuation of the Tellico Project would violate the Act, but that the requested injunction should be denied on equitable grounds. 549 F.2d 1064, 1069-1070 (CA 6 1977). This interpretation of the District Court opinion appears untenable in light of that opinion's conclusion that the Act could "not be construed as preventing completion of the project," 419 F.Supp. 753, 755 n. 2 (ED Tenn. 1976). Moreover, the District Court stated the issue in the case as whether "it is reasonable to conclude that Congress intended the Act to halt the Tellico Project at its present stage of completion." id., at 760, and it concluded that the "Act should be construed in a reasonable manner to effectuate the legislative purpose,"
ibid., and "that the Act does not operate in such a manner as to halt completion of this particular project," id., at 763. From all this, together with the District Court's reliance on cases interpreting the National Environmental Policy Act as inapplicable to substantially completed projects, see id., at 760-761, it seems clear that the District Court interpreted § 7 as inapplicable to the Tellico Project.


9/ Opinion of the Court, ante, at . At oral argument, respondents clearly stated this as their view of § 7:

"QUESTION: ... Do you think -- it is still your position, as I understand it, that this Act, Section 7, applies to completed projects? I know you don't think it occurs very often that there'll be a need to apply it. But does it apply if the need exists?

MR. PLATER: To the continuation --

QUESTION: To completed projects. Take the Grand Coulee dam --

MR. PLATER: Right. Your Honor, if there were a species there --

QUESTION: I'm not asking --

MR. PLATER: -- it wouldn't be endangered by the dam.

QUESTION: I know that's your view. I'm asking you not to project your imagination --

MR. PLATER: I see, Your Honor.

QUESTION: -- beyond accepting my assumption.

MR. PLATER: Right

QUESTION: And that was that an endangered species might turn up at Grand Coulee. Does Section 7 apply to it.

MR. PLATER: I believe it would, Your Honor. The Secretary of the Interior --

QUESTION: That answers my question.

MR. PLATER: Yes, it would."

Tr. Oral Arg. at 57-58.

The legislative history of the Endangered Species Act does not shed much light on this question, but the Senate sponsor of the bill, Senator Tunney, apparently thought that it would not withdraw from the agency the final decision on completion of the project:
"... [As I understand it, after the consultation process took place, the Bureau of Public Roads, or the Corps of Engineers, would not be prohibited from building a road if they deemed it necessary to do so.

As I read the language, there has to be consultation. However, the Bureau of Public Roads or any other agency would have the final decision as to whether such a road should be built. That is my interpretation of the legislation at any rate." 119 Cong. Rec. 25689-25690 (1973).

The initial set of proposed regulations under the Act made it quite clear that such an interpretation was not intended:

"Neither [the Fish and Wildlife Service] nor [the National Marine Fisheries Service] intends that section 7 bring about the waste that can occur if an advanced project is halted. . . . The affected agency must decide whether the degree of completion and extent of public funding of particular projects justify an action that may be otherwise inconsistent with Section 7." 42 Fed. Reg. 4868, 4869 (1977).

After the decision of the Court of Appeals in this case, however, the quoted language was withdrawn, and the agencies adopted the view of the court. 43 Fed. Reg. 870, 872, 875 (1978).
"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."