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In the

Supreme Court of the United States

TENNESSEE VALLEY AUTHORITY,

PETITIONER,

v.

HIRAM G. HILL, JR., ET AL.,

RESPONDENTS.

No. 76-1701

Washington, D. C.
April 18, 1978

Pages 1 thru 62

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IN THE SUPREME COURT OF THE UNITED STATES

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TENNESSEE VALLEY AUTHORITY,	:	
	:	
Petitioner,	:	
	:	
v.	:	No. 76-1701
	:	
HIRAM G. HILL, JR., ET AL.,	:	
	:	
Respondents.	:	
-----X	:	

Washington, D. C.

Tuesday, April 18, 1976

The above-entitled matter came on for argument at
10:12 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

GRIFFIN B. BELL, ESQ., Attorney General of the
United States, Department of Justice,
Washington, D. C.; on behalf of the Petitioner.

ZYGMUNT J.B. PLATER, ESQ., Wayne State University
Law School, Detroit, Michigan 48202; on behalf
of the Respondents.

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C O N T E N T SORAL ARGUMENT OF:PAGE

Attorney General Bell, Esq.,
for the Petitioner

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Zygmunt J.B. Plater, Esq.,
for the Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We'll hear arguments first this morning in Tennessee Valley Authority against Hiram G. Hill.

Mr. Attorney General.

ORAL ARGUMENT OF ATTORNEY GENERAL GRIFFIN

BELL, ESQ., ON BEHALF OF PETITIONER

ATTORNEY GENERAL BELL: Mr. Chief Justice, and may it please the Court:

I appear on behalf of the government in this case. My colleague, Mr. Daniel Friedman, appears with me, as does Mr. Herbert S. Sanger, Jr., who is the General Counsel of the TVA.

In this unusual case, as Attorney General I agreed that the Secretary of Interior could take a position opposite our position in this Court. And I've included--I've stated his position in writing as an appendix to our brief. I understood that this was not violating any policy of the Court; historically, going back into the Eisenhower Administration, on a rare occasion, this has been done.

I will, of course, not argue the Secretary of Interior's position, but it is well stated, and I know the Court will take note of it.

This case presents a conflict between the snail darter, an endangered species under the Endangered Species

Act, and the Tellico Dam project, which is part of the TVA system.

The Tellico Dam project is just that, a project, a multipurpose project, designed to free a navigable body of water, electric power, industrial development, flood control, and recreation on the Little Tennessee River.

The Little Tennessee River has its origins in the mountains of north Georgia; flows in a northwest direction generally; in the Knoxville, Tennessee, area; finally into the Tennessee River.

There are many dams in the TVA system on the Tennessee River. There are 12 dams on the Little Tennessee River already. There is not a dam in the last 34 miles of the Little Tennessee before it reaches the Tennessee, so you've got 34 miles of open, free-flowing stream now.

The dam in question, the Tellico, is located at the confluence of the Little Tennessee and the Tennessee. It will impound a body of water, rather large at the point of the dam, backing up the river for the 30 or 31 of the 34 miles to some extent.

It will not--that dam itself will not generate electrical power, because this dam, Tellico, is very near the Ft. Loudoun Dam on the Tennessee, and there is a canal connection of some 850 feet where this extra water that will be impounded on the Tennessee--Little Tennessee--will

go over into the Ft. Loudoun impoundment, and there will be used to generate electricity in the Ft. Loudoun generating plant, and will generate enough electricity to supply roughly 20,000 homes.

QUESTION: General Bell, am I right in thinking that the Tellico Dam itself is on the Little Tennessee prior to its confluence with the Tennessee?

ATTORNEY GENERAL BELL: Right, just before the confluence.

Now, I think it will help if I give a brief chronology of the project.

It was authorized by Congress in 1966. Construction began in 1967. In 1972, there was a lawsuit commenced based on the fact that they had not filed an environmental statement. That litigation went on for about a year and a half, went to the District Court, the Court of Appeals twice; finally TVA prevailed. It commenced working again working on the Dam and on the project.

QUESTION: That was before the discovery of the existence of the snail darter, was it?

ATTORNEY GENERAL BELL: Yes, sir. In '72 that began. In August, '73, the snail darter was discovered.

The snail darter is of the darter--of the perch family. There are 130 known varieties of darters. There are 85 to 90 in Tennessee alone. There are 11 in the

Little Tennessee River. There have been 8 to 10 darters discovered these past five years.

It is known as a snail darter because it eats fresh water snail which is found on the bottom of the Little Tennessee.

I have in my hand a darter, a snail darter. It was Exhibit No. 7 in the case when it was filed. And we brought that with us so you could see it. It's three inches. It is supposed to be a full grown snail darter, about three inches in length.

QUESTION: Is it alive?

ATTORNEY GENERAL BELL: I've been wondering what it's in if it is.

[Laughter.]

ATTORNEY GENERAL BELL: It seems to move around. I've been puzzled over that.

QUESTION: Mr. Attorney General, your exhibit makes me wonder. Does the Government take the position that some endangered species are entitled to more protection than others?

ATTORNEY GENERAL BELL: Well, I don't take it this morning, because I don't have to. I don't have to reach that point.

QUESTION: Your argument would apply to every endangered species, American Eagle, no matter what it might be.

Is that right?

ATTORNEY GENERAL BELL: I say that's what the Sixth Circuit held. I wouldn't say that.

QUESTION: The statute, the Endangered Species Act, doesn't distinguish as among various priorities in the different species, does it?

ATTORNEY GENERAL BELL: It does not. It looks to the list. Once it gets on the list, it is an endangered species. And then this case goes much farther, because its critical habitat is the thing.

QUESTION: And the snail darter is on the list; there's no question about it.

ATTORNEY GENERAL BELL: It's on the list, and this particular area has been designated as a--

QUESTION: Critical habitat.

ATTORNEY GENERAL BELL: --critical habitat.

QUESTION: Right.

ATTORNEY GENERAL BELL: Which means that under the order of the court, we can't move the snail darter as we have. That wouldn't be enough. You have to save the habitat.

QUESTION: Attorney General Bell, there is something in the briefs about efforts at transplantation. And I wondered, can you bring us up to date on that? Have they been successful? And secondly, I would like to know whether the construction already done to the dam has so endangered the

species that it is not going to survive anyway.

ATTORNEY GENERAL BELL: There has been a transplant going on since '75. And the best information I have-- this is an unusual record. There are a lot of things you can find out by looking at the petitions to the Secretary and those sorts of things. It has been successful. There are some 700 transplanted, and there are about 2,000 there now. It's been going on two years. The argument is, it takes three to five years to be sure it's been successful.

QUESTION: Where are they transplanted?

ATTORNEY GENERAL BELL: They are transplanted from the Little Tennessee to the Hiwassee. And there they found a similar body of water, a stream, and fresh water snails for a diet.

QUESTION: You say this is in the--it's not in the record in this case.

ATTORNEY GENERAL BELL: Some of it's in the record-- not the success story. It's in public documents that were filed with the Secretary when they tried to take the--there's a petition filed to take the snails--

QUESTION: Of course, everything in those documents may not be true. /

ATTORNEY GENERAL BELL: Exactly. Exactly. So I'm not asserting it as the truth; it's what I've been--

QUESTION: But TVA did ask for it to be taken off?

ATTORNEY GENERAL BELL: They did, and after a year, the Secretary denied it, just in the last two or three months. Maybe in December.

After this darter, snail darter, was discovered--of course TVA is an unusual agency. They only have authority to do whatever they can get money to do. They are authorized--self-authorizing, it's known as in the Government. And they have to get money every year. There has been money appropriated for this dam every year, through '77. And there's a figure, small figure, in the '79 budget, FY '79 budget, to complete it.

The dam itself is completed. All you have to do is shut the gate, close the gate, it's over with. It's just sitting there.

If you'll notice in one of the amicus briefs, Southeastern Legal Foundation, they've got some data they've developed, dredged out of the Secretary of Interior's records, that say that the snail darter is gone anyway, that once they built these sluice gates, and beginning with the coffer dams that they--the larvae drift downstream and they are unable to get back.

So it's not enough to just leave it, and walk off. You'd have to do something to the dam, take part of it out, to restore the natural habitat.

Well, in the chronology, there were various things said in the Congress which I will mention in my argument.

The issues presented is over the construction of the Endangered Species Act, Section 7 of the Act. The District Court went about it on a balancing of equities, taking the position that it was not to be applied completely retroactively, that you ought to consider the stage of development of the project.

The Sixth Circuit said that because there was no other way to preserve the habitat, much less the darter, that they had to give literal effect to the statute, and enjoin the project, no matter what stage of completion.

The statute itself is set out on page 2 of our brief, and the critical language is, number one, "shall consult." But then it says that the agency--that would be the TVA here--in carrying out programs, it refers to taking such actions, the agency must take such action, actions, necessary to ensure that actions authorized--this is the key language--funded, or carried out by them, do not jeopardize the continued existence of such endangered species.

Now, we--our argument is that by the way--the language of the statute itself can be construed to support the District Court and allow this dam to be completed and operated, and then there are certain other things that I'll argue that support that.

The District Court used a hypothetical, which already draws the issue better than anything I've found in the

whole case.

The District Court said that if the plaintiff's argument were taken to its logical extreme, the Act would require a court to halt the impoundment of water behind a fully completed dam if an endangered species were discovered in the river on the day before the impoundment was scheduled to take place. And the District Court said that would be too extreme.

The Circuit Court said, we disagree; that would-- that's what the Act means. You'd have to shut down the dam the day before.

We say that that's so extreme that it would prohibit an agency from maintaining a facility that was found to threaten the habitat of a newly discovered endangered species.

We not only say that by way of argument, the Secretary put it in his regulations, 50 C.F.R. 402.03; just that, that Section 7 applies to all activities where Federal control or involvement remains which in itself could jeopardize an endangered species or critical habitat.

So that's the issue that is presented, the issue that must be resolved: Can there be a balancing of the equitable factors in deciding whether this action taken in the meaning of the statute can be taken.

QUESTION: General, when you say "balancing

the equitable factors," is one of the ways that that would be done the decision of the District Court or the Court of Appeals whether an equitable injunction would issue?

ATTORNEY GENERAL BELL: That's it, yes, sir.

We think these--the three key words--actions modified, governed, by the words, "authorized, funded, or carried out."

If you give carried out the same meaning on a pari materiae basis, as "authorized" or "funded", it would read then that the agency had to have choices. What are the alternatives?

Now, ordinarily, there are choices. Here there were none. It's one or the other. It's just as both courts saw it.

The two cases that really were choices were the Sandhill Crane case in the Fifth Circuit, where the choice and the option and the alternative available to the Director of Transportation was, simply, to move an interchange and save the Sandhill Crane. That's the National Wildlife Federation v. Coleman.

The other case was the Indiana bat case, which is in the Eighth Circuit. And there the--and I got into this thinking, what is the scheme of this statute? The Secretary admits in his regulations, the Coleman case holds, as does this Eighth Circuit case, Sierra Club v. Froehlke, that the

Secretary of the Interior does not have the veto power, that the Act also allows a suit by a citizen. So a citizen can go into court and get the court to veto. That's what happened here. That's what happened here; just said, you can't use this project.

So I started looking trying to find the scheme of the project, so somebody's got to face this somewhere along the line. And it seems to me the Eighth Circuit, in Sierra Club v. Froehlke, had it right. That case, they said that this impoundment behind this dam would fill keys with water and destroy the Indiana bat. There were some facts showing that there were a lot of bats in other parts of the country; not all the bats there in this area in Missouri would be destroyed.

And the court said, the way to approach this is, first, have in mind that the Secretary of the Interior does not have a veto. All the duties on the acting agency is to consult, consider all the alternatives, and then we test it--that's reviewable in court--and we test it on an abuse of discretion, was there an abuse of discretion.

I think, in essence, that's what the District Court judge here did, he took all the factors. He said this dam is finished for all intents and purposes. They have moved these darters, snail darters, over to another place. We do not think that the statute was intended to applied

retroactively; at least there's a presumption it shouldn't be applied retroactively. Taking all these things into consideration, I hold that the dam can be used, and the project go forward.

In other words, he applied the Endangered Species Act.

QUESTION: What you're saying, I take it, is that the Endangered Species Act is not to be applied, was not intended by Congress to be applied, to projects that were already underway.

ATTORNEY GENERAL BELL: Well, I think it does apply--no, I'm not saying it doesn't apply. It does apply, but then you consider what stage of development is the project in. What are the reasonable alternatives? Could you change it? Could you change the design?

QUESTION: Is one of the factors to be weighed the fact that \$120 million has been spent --

ATTORNEY GENERAL BELL: Exactly.

QUESTION: --at this point.

ATTORNEY GENERAL BELL: That would be one, and the District judge weighed that.

I think this kind of language is the strongest kind of argument in favor of my position that I've been able to find, in the Secretary's own regulation, which was in effect when the District Court decided this case.

This was what they called a tentative regulation; it's not a final regulation. But this is what it said:

"Neither Federal Wildlife Service nor the National Fishery Service--that's part of the Department of Interior--intends that Section 7 bring about the waste that can occur if an advanced project is halted." This is on a footnote on page 28 of our brief.

"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...."

Now, that's when the Secretary had a chance to write a regulation before he ever found out about the Sixth Circuit opinion. He didn't know they were going to hold as they did. The regulation has since been changed to cite the Sixth Circuit opinion, the Sixth Circuit ruling. But this was before we had any ruling. He thought this is what the record of the statute meant.

Now, that's one--one argument. The next argument, first is--you can read this language itself as a line, the District Court result, and is avoiding the harsh result of the Circuit Court.

The second one is the Secretary's own regulation at that time.

The third is that Congress three times--'75, '76, and '77--said go forward with this project. We know about the

snail darter. This was in committee reports, granted not on the face of this statute. Go forward; we intend for you to complete this project.

That was--we don't have to argue it was a pro tanto modification of the endangered species statute. We say that that is persuasive of the construction that the District Court--

QUESTION: So on any of the grounds that you are suggesting, you're suggesting that the statute itself be construed so that there's no violation here if these gates are closed?

ATTORNEY GENERAL BELL: That's it.

QUESTION: There's no violation of the statute at all?

ATTORNEY GENERAL BELL: Right.

QUESTION: And although the statute applies, you construe the statute based on various facts.

ATTORNEY GENERAL BELL: The balance in the factors; I would say it applies.

QUESTION: Your argument isn't that it's a violation of the statute, but an injunction isn't authorized.

ATTORNEY GENERAL BELL: That's it.

QUESTION: That isn't your argument, is it?

ATTORNEY GENERAL BELL: That is my argument.

QUESTION: You don't concede there's a violation

of the statute, though.

ATTORNEY GENERAL BELL: No, not unless-

QUESTION: You construe the statute so that closing the gates wouldn't violate the statute?

ATTORNEY GENERAL BELL: That would prevent there being a violation. The factors, the facts, taken as a whole, would prevent there being a violation of the statute.

I don't concede--I concede the statute applies, though. I think it does apply.

I--excuse me.

QUESTION: Mr. Attorney General Bell, I understood your principal argument to be that the statute could not fairly be construed to apply to a project that was either completed or substantially completed.

ATTORNEY GENERAL BELL: Well, but that would be like--now if a court has jurisdiction, Bell v. Hood, you have to have a hearing to find out if you have jurisdiction. You'd have to have a hearing to see if the statute could be read as applying to these particular facts.

QUESTION: I understand you'd have to have a hearing. But if the facts were simply this, that the main dam in the Tennessee Valley is completed--nobody argues that it is not completed; it's been 30 or 40 years.

ATTORNEY GENERAL BELL: Right.

QUESTION: Suppose they found a snail darter down

in that lake tomorrow. The Secretary of the Interior claims you must remove the dam.

ATTORNEY GENERAL BELL: That's exactly right.

QUESTION: Now do you think the statute applies to that?

ATTORNEY GENERAL BELL: Well, I don't think the statute can be applied to that.

QUESTION: Do you think it could be construed reasonably to think that the Congress of the United States would require that that dam be removed?

ATTORNEY GENERAL BELL: I do not. That would be a completed project, farther than our case.

QUESTION: My question was addressed to a completed project or one substantially completed. And you told us that at the beginning of this argument that all that was necessary to be done was to close the gate.

ATTORNEY GENERAL BELL: Close the gate plus--that's the dam. Now, there are roads to be completed. There's a little--there's a million point--\$1.8 million in the '79 budget, but that's to complete some roads and bridges.

The dam itself is finished. All the landscaping has been done and that sort of thing. So it is completed.

But I've not argued that it's the sort of thing, say, where a road has been finished, and five years later they found something there, an endangered species, and they

say, would they remove the road.

Here, a good example would be if they found a plant growing on the bank of this lake. Sometimes when they had the water down during the winter time, they'd lower the water five feet, and they found this plant. And they say, you never raise the water back up; because there's still action to be taken. There was a little action left to be taken here.

QUESTION: A tiny, little bit?

ATTORNEY GENERAL BELL: A little, just very little, but a little.

QUESTION: How much money has the Government spent on this project?

ATTORNEY GENERAL BELL: \$110 million.

QUESTION: \$110 million. The government has appropriated \$2 million to transplant these darters.

ATTORNEY GENERAL BELL: I hadn't gotten to that.

QUESTION: Very important.

ATTORNEY GENERAL BELL: In the 1977 appropriations act, they actually appropriated \$2 million to transplant the snail darter. That was--I view that as a consultation by Congress. Not only by the agency, the Congress got into it and tried to resolve the problem.

QUESTION: Well, three times this project and the snail darter problem has been called to the attention of the Congress, has it not?

ATTORNEY GENERAL BELL: It has been everytime they said, go forward.

Now that would be the last argument that I would argue if I needed to argue it.

QUESTION: Did Congress ever grant an exemption from the Endangered Species Act for the snail darter?

ATTORNEY GENERAL BELL: They have not.

QUESTION: And they were very much aware of this problem, weren't they?

ATTORNEY GENERAL BELL: They are aware of it and--

QUESTION: Might it have been the most unambiguous way to resolve the whole thing?

ATTORNEY GENERAL BELL: That would be it, and that's my last point.

QUESTION: Much better than just hiding it in a committee report in an appropriations bill.

ATTORNEY GENERAL BELL: Well, the last--in '77 they put it on the face of the statute, \$2 million to move--

QUESTION: \$2 million; so they thought the snail darter was worth \$2 million, but not \$130 million.

ATTORNEY GENERAL BELL: I would say that would be a fair inference --

QUESTION: Generally, it is easier to dump it on us, and we've never even seen the snail darter.

QUESTION: Yes, we have.

QUESTION: There's one, we don't even know whether he's alive or not.

ATTORNEY GENERAL BELL: That's right.

QUESTION: Mr. Attorney General, can I ask one question about your argument about why the statute doesn't apply?

Are you saying that the statute merely requires consultation? Or are you saying that completing the dam would not be an action within the meaning of the statute?

ATTORNEY GENERAL BELL: I'm saying that completing the dam would be--I'm saying it would be an action.

QUESTION: You're admitting it would be an action?

ATTORNEY GENERAL BELL: Right, because there's still some action to be taken. But I'm saying that when you do--whether you're violating the statute, whether there ought to be an injunction. Now that's all a citizen is entitled to get, is an injunction under this Endangered Species Act, you have to consider all the factors before the chancellor acts. And I think the statute does not prevent considering all the factors. And one fact is that this dam is virtually completed. Another fact is that they have moved the snail darter over to another place, in an effort to accommodate the snail darter. The third is, the law is very clear that the Secretary of the Interior does not have a veto. Has the TVA consulted in good faith and done all it can do under these circumstances?

QUESTION: Well, the statute requires more than just consultation in good faith. It does require consultation, but then it requires, in rather clear and unambiguous words, the agency to take such action necessary to insure that actions authorized, funded, or carried out by it do not jeopardize the continued existence of the endangered species, or the destruction or modification of its critical habitat. "Action necessary to insure...."

ATTORNEY GENERAL BELL: Well, if you--

QUESTION: "--that their actions do not jeopardize the continued existence."

And as I understand it, it's conceded that the completion of this dam will jeopardize the continued existence of this endangered species, or the modification of its critical habitat.

ATTORNEY GENERAL BELL: We don't concede--we concede it will modify this critical habitat.

QUESTION: Which has been found to be the critical habitat, as I understand it.

ATTORNEY GENERAL BELL: Well, unless this moving over to the Hiwassee River makes that into a noncritical habitat.

QUESTION: But the Secretary has determined this to be the critical habitat, has he not?

ATTORNEY GENERAL BELL: At the time, yes.

QUESTION: And has determined this little fish to be an endangered species.

ATTORNEY GENERAL BELL: Right.

QUESTION: It seems--the language of the statute that I just read aloud for my own information and to refresh your memory seems to me to be an unambiguous requirement.

ATTORNEY GENERAL BELL: Well, that's what the Sixth Circuit said.

QUESTION: Yes, well, isn't that what the words say?

ATTORNEY GENERAL BELL: Not to me.

In the first place, I don't--I think you very often say, is a statute intended to be retroactive? There is a presumption against retroactive construction of a statute?

This is certainly retroactive. It is being--has been applied retroactively.

QUESTION: Mr. Attorney General, what would happen if they found snail darters in the basement of this building? Would they tear the building down, this building?

ATTORNEY GENERAL BELL: I don't know; you'd have to ask the Sixth Circuit that. I think they'd enjoin you from functioning if they found it to be a critical habitat.

QUESTION: Has there been any proposal in Congress to amend Section 7 of the Endangered Species Act?

ATTORNEY GENERAL BELL: Yes, there has; to exclude this snail darter.

QUESTION: Not to generally amend the language,
but--

ATTORNEY GENERAL BELL: Not that I know of.

QUESTION: --specific exemption, exclusion of
this--

ATTORNEY:GENERAL BELL: Of the snail darter.

QUESTION: And what's the status of that bill?

ATTORNEY GENERAL BELL: It's pending in the
committee, and has not come out of the committee, as I
understand it.

QUESTION: Of course that would still be possible,
Mr. Attorney General, if we were to sustain the injunction.
Congress could always exclude the snail darter later. But
if we let the snail darter be extinguished, I guess the
choice is irrevocable.

ATTORNEY GENERAL BELL: Well, if you did that--but
I don't know of anybody that's trying to extinguish the
snail darter.

QUESTION: Well, the Secretary has found that he
will be extinguished if the dam is closed.

ATTORNEY GENERAL BELL: Well, but--

QUESTION: But don't we have to assume that's the
fact for the purposes of the decision?

ATTORNEY GENERAL BELL: No, no, the record shows
clearly that the snail darter has been transplanted to the

Hiwassee River.

QUESTION: Oh, therefore, it is not the critical habitat? Is that right?

I mean, what assumption do we make for the purposes of deciding? Is the snail darter going to be extinguished or not?

ATTORNEY GENERAL BELL: We can't find that. Only the Secretary under the law can find that.

QUESTION: And he has found it will be, hasn't he?

ATTORNEY GENERAL BELL: That's what he found at one time.

QUESTION: But don't we have to assume that when we decide the case?

ATTORNEY GENERAL BELL: Well, I don't think so. I think it does violence to the statute. It violates the presumption against retroactivity to apply this finding to this completed project, virtually completed project.

I think the statute means that you have to have some choices, and that--

QUESTION: Mr. Attorney General, to what agency was that \$2 million appropriated?

ATTORNEY GENERAL BELL: TVA.

QUESTION: And what is TVA supposed to do with it?

ATTORNEY GENERAL BELL: Carry on with their project to transplant the snail darter.

QUESTION: In other words, to see if they can do something which will not jeopardize the continued existence of the species.

ATTORNEY GENERAL BELL: Right, which they have been doing.

QUESTION: And if they fail?

ATTORNEY GENERAL BELL: Well, they haven't failed. But there's never been a hearing on that.

QUESTION: Well, I know. The fact that Congress said, here, here's \$2 million; see if you can do something about preventing jeopardy to the continued existence of the species. I would think that that suggests that Congress intended if they can't, then they can't go on with the dam.

ATTORNEY GENERAL BELL: I say that Congress is trying to accommodate both problems.

QUESTION: Well, all we know is a one-line appropriation, I take it, is it?

ATTORNEY GENERAL BELL: That's right, that's it.

Then you know what's in the committee reports. The committee reports three times in three years have said, go forward.

QUESTION: Well, I know, but--

ATTORNEY GENERAL BELL: But it hasn't been in the statute.

QUESTION: --did the committee report the statute?

If it came to the President to veto, what would he veto, the committee report or the statute?

ATTORNEY GENERAL BELL: He'd veto the statute.

And he couldn't--

QUESTION: He could veto the appropriations, could he not, and stop the project, anytime since 1975?

ATTORNEY GENERAL BELL: Right. He has not done that. He has put it in the 1978 budget.

QUESTION: Well, Mr. Attorney General, why shouldn't there--why shouldn't the Court remand this case to have the record brought up to date?

ATTORNEY GENERAL BELL: Well, I--

QUESTION: A lot of things have happened since the Court of Appeals decided it.

ATTORNEY GENERAL BELL: That's exactly right.

And you might well want to do that. I'm not objecting to it. I'm not advocating that. I think that the Sixth Circuit is in error.

QUESTION: Well, has anybody--is the Secretary's refusal to remove the fish from the list--he's done that in the last two or three months, you say. Or is it the habitat?

ATTORNEY GENERAL BELL: Well, he didn't have a hearing on it.

QUESTION: Well, he refused, though, didn't he?

ATTORNEY GENERAL BELL: He refused.

QUESTION: Is that subject to judicial review?

ATTORNEY GENERAL BELL: I don't know.

QUESTION: If it is, is it--has review been sought?

ATTORNEY GENERAL BELL: I think it could be--I think you could have a review on denial of due process, to begin with, if you couldn't get a hearing.

QUESTION: Well, I know, but is the Secretary-- you just don't know whether there are procedures to secure review of the Secretary's refusal to remove the snail darters--

ATTORNEY GENERAL BELL: Right, I know--I'm satisfied you can review it under the Administrative Procedure Act. But this, the case--

QUESTION: By a suit in a District Court, or by-- probably, I guess.

ATTORNEY GENERAL BELL: I think it would go to the District Court.

QUESTION: But that's not a change; that's just a maintenance of the status quo.

ATTORNEY GENERAL BELL: Well, it's a denial of--

QUESTION: It's a refusal of the Secretary to change the status quo.

ATTORNEY GENERAL BELL: Right.

QUESTION: It's not a change.

ATTORNEY GENERAL BELL: Right. I haven't even looked into that, because the case is pending up here, and I thought we'd come up here with the case and see what happens before we get to worrying about the--getting the Secretary to change.

The Secretary at one time took the position that you had to wait three years to know if the transplant was successful. It's been--we're in the third year now; it has not been three years now.

QUESTION: Mr. Attorney General, may I ask you a friendly question?

Let's assume that in order to resolve this issue, somebody introduced a bill in Congress saying explicitly that Section 7 shall apply to every completed Federal project in the United States. Do you think many Congressmen who voted for that clarification of this statute would be re-elected?

ATTORNEY GENERAL BELL: No, but they wouldn't vote for it to begin with.

QUESTION: That's my point. And doesn't that suggest that nobody, really no one, rationally, could apply this to a completed project?

ATTORNEY GENERAL BELL: It does to me, and under the Sixth Circuit holding, it would have to be applied. And that regulation says now--

QUESTION: May I ask you one other, maybe less

friendly, question? You commenced your argument, and I felt for you, by saying that it was not without precedent for two departments of the Government to come to our Court in an antagonistic position.

It's not easy for us to resolve--I speak for myself--it's not easy for me to resolve issues of vast importance to our country when two Cabinet-level departments are at swords' point. I wonder why these things aren't determined at the Cabinet level rather than submitting them to us.

ATTORNEY GENERAL BELL: You say that's not so friendly. It's a very friendly question. It gives me an opportunity to say that I do not favor this system. We have one Attorney General and one Solicitor General, and I think that ought to be it.

But as long as you can do it, people will ask you to do it.

QUESTION: Perhaps you may have heard that when Mr. Justice Frankfurter was here he thought that was just outrageous on behalf of the Solicitor General to come here and offer us conflicting views of two Cabinet departments. And he said so.

ATTORNEY GENERAL BELL: I don't favor it myself.

QUESTION: Well, the trouble is that in some instances Congress has expressly authorized it.

ATTORNEY GENERAL BELL: Oh, they have.

QUESTION: Well, the Interstate Commerce Commission--

QUESTION: ICC is the only one.

ATTORNEY GENERAL BELL: Well, in this case, where we should speak with one voice, we speak with two, because the Court will permit it, is the argument made to me. It's the only time we've done it since I've been Attorney General.

I don't favor it. But I'm glad I had a chance to say so.

QUESTION: Mr. Attorney General, did you have any obligation to present the views of the Secretary of the Interior, or was that merely a matter of comity as one Cabinet officer to another?

ATTORNEY GENERAL BELL: Well, it was more than that. It was a request.

QUESTION: Request by whom?

ATTORNEY GENERAL BELL: By the Secretary.

QUESTION: But has it not been historically true that the United States Government in this Court, and in all Federal courts, speaks through only one voice, namely, through the Attorney General of the United States?

ATTORNEY GENERAL BELL: That's what it ought to be.

QUESTION: Historically, that's been the case?

ATTORNEY GENERAL BELL: That is, and that's historically been the case with me, except in this one instance.

QUESTION: But Mr. Attorney General, are you suggesting that if the Secretary of the Interior has placed a species on the endangered species list, that the Attorney General should have the power to take it off the list.

ATTORNEY GENERAL BELL: No, no; I'm not suggesting that.

QUESTION: No matter what we do, that part of the record is before us. The Secretary of the Interior has determined that this is an endangered species. And we have to accept that.

ATTORNEY GENERAL BELL: And that this is a critical habitat.

QUESTION: Yes.

ATTORNEY GENERAL BELL: And that's his prerogative. I'm not denying that.

QUESTION: We can't second guess him on that, can we?

ATTORNEY GENERAL BELL: No.

QUESTION: Any more than you can.

ATTORNEY GENERAL BELL: No. If you see his brief, he's not complaining about that. He's--he thinks we're trying to change the substance of the law by an appropriations bill, and that we are contesting his regulations. That's his main point.

QUESTION: Mr. Attorney General, with regard to your

statement a moment ago about other agencies of the Government taking there own position here contrary to what the Solicitor General might be, I indicated that Congress has expressly authorized it in some instances.

ATTORNEY GENERAL BELL: Right.

QUESTION: And I just suggested that this afternoon or tomorrow we're hearing a case in which the Federal Communications Commission is taking a position flatly contrary to the Department of Justice on a case. It's not a rarity.

ATTORNEY GENERAL BELL: The Interstate Commerce Commission does it. But those are by statute. This is not a statute.

QUESTION: Okay, exactly, right.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Mr. Plater.

ORAL ARGUMENT OF ZYGMUNT J.B. PLATER, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. PLATER: Thank you, Mr. Chief Justice, and may it please the Court:

I am Zygmunt Plater for respondents.

In this case respondents quite simply support the unanimous decision of the Sixth Circuit Court of Appeals that the TVA must obey the law.

Although the case arises from a conservation issue, it essentially turns on traditional questions of separation of powers and administrative law.

QUESTION: Mr. Plater, Judge McCree did write separately below, didn't he? Do you feel that he was, however, joining the majority opinion?

MR. PLATER: Yes, Your Honor. Judge McCree below said that he concurred with the result of the Court's opinion; the fact, also, that indeed the TVA project must be enjoined because it would eliminate the species from the face of the Earth.

QUESTION: Well, many times when we appear particularly to concur in the result, it means we think the majority opinion was rather poor, and we have reasons of our own.

MR. PLATER: Your Honor, I don't want to second guess Judge McCree, but it might be noted--

QUESTION: Well, you said it was a unanimous opinion. It may be a unanimous judgment, but I wanted to--

MR. PLATER: Unanimous position taken by the Sixth Circuit that this project should be enjoined. Thank you, Your Honor.

The unanimous position, then, taken by the Sixth Circuit, and the position taken by the Department of the Interior and by respondent, comes down essentially to two basic points.

The first point is that Congress in 1973, when this

species was discovered, wrote a mandatory statute to the agencies that it, itself, Congress, had created, prohibiting those agencies from taking actions which would jeopardize or destroy endangered species. And that section is clearly violated by this dam portion of the Tellico project.

And secondly, Congress has not changed the law. Although Congress is reviewing public interest resolutions for the conflict, Congress hasn't changed the law, and this Court should not amend the law.

And yet that is precisely what TVA's position is asking the Court to do, to construct some form of implied, informal grandfather clause exemption for this project. Back in 1973 as well as at the present. And to construct some sort of informal statutory amendment, overriding the Endangered Species Act, based on appropriations funding.

QUESTION: Suppose you found snail darters around Chickamauga Dam on the TVA; what would you do?

MR. PLATER: Your Honor, that is a question also like the question asked by Mr. Justice Powell. And the point is, biologists tell us that if you could find a species in a completed project, that would be a biological indication that that population was not endangered by the dam, because, indeed, it was living there, established there, and breeding; and of course, no completed dam would have to be taken down.

QUESTION: Well, suppose the Department of the

Interior said it was?

MR. PLATER: Your Honor, the Department of the Interior--

QUESTION: You'd have to tear Chickamauga Dam down.

MR. PLATER: No, your Honor, all they have is biological authority to assert that the endangered species is there, and is threatened by the present circumstances.

QUESTION: Well, suppose they say that?

MR. PLATER: Well, Your Honor--

QUESTION: And they're wrong?

MR. PLATER: If they're wrong, then this answers a question posed also by Mr. Justice White. There are proceedings currently underway in District Court in Tennessee challenging another listing of an endangered species, arguing that the Department of the Interior is wrong.

That is the way to do it. The biological opinion of the Secretary, once established, is established, and is not to be overturned by lawyers trying to debate biology.

QUESTION: You concede there is judicial review of the Secretary of the Interior's action?

MR. PLATER: Yes, Your Honor.

QUESTION: Whether in putting a species on the endangered list, or in saying that a certain area is its critical habitat.

MR. PLATER: The current pending action seeks a

delisting of the species that has already been--

QUESTION: Is there judicial review of either finding?

MR. PLATER: There appears to be. And respondent said there is no legal argument--

QUESTION: Under the Administrative Procedure Act, or--

MR. PLATER: I'm not sure what the basis of the claim is, Your Honor; I only know that the case is pending.

QUESTION: Let me pursue a question that Mr. Justice Marshall put to you. Suppose that you have a \$3- or \$400 million dam--I don't know the value of the--the cost of the one he mentioned--and you are confronted with a showing that originally there were 300,000 of a particular species, and now by the operation of the dam over a period of years, it's down to 10,000, and it's about to become extinct.

Are you suggesting that Congress intended that that dam should be torn down?

MR. PLATER: Your Honor, that of course is not this case--

QUESTION: Well, I know; I'm asking you hypothetical questions, to test your argument. As we did with the Attorney General.

MR. PLATER: Your Honor, the question is whether there is a remaining prospective Federal action which will

jeopardize a species. It's clear under the Act that the Agency does have a statutory duty to take measures to try to conserve the existence of the darter.

But the question of whether, in a situation where there are no Federal actions remaining, nevertheless--

QUESTION: The Federal action is the continuance of the dam.

MR. PLATER: In that situation, Your Honor, that is certainly a question that would have to be raised. We do not take a position on that argument.

But the point is, Congress appears to have cared very clearly about the prevention of the extinction of species. There were two prior statutes, in 1966 and 1969, which gave agencies discretion, and the courts reviewing them, to balance the question, and those statutes did not work; so that Section 7 was written in 1973 as mandatory.

Your Honor's question is one that is certainly difficult to handle. I think that the easiest way to handle that is perhaps to take the hypothetical that General Bell ably brought out, and that is this: There may be cases where the public interest is so intimately involved with a case, and a species would be jeopardize, that indeed, there must be a hard decision taken, and the species rendered extinct.

Now, that's never had to occur. There's never in human history been a conscious extinction of a species.

But we say that indeed that may be the case.

The point is, however--

QUESTION: Do we know the facts right now? Do we know how many snail darters are there?

MR. PLATER: We know approximately, Your Honor. And this is--

QUESTION: Well, how many have been removed?

MR. PLATER: In the present case, Your Honor, we do not have a full record on the transplantation. But--

QUESTION: Do we need that? Don't we need that? Suppose where they're now living, they are six and eight inches long, and just having a ball. Would you all--

[Laughter.]

QUESTION: --would your argument be the same?

MR. PLATER: Your Honor--

QUESTION: Would your argument be the same?

MR. PLATER: No, Your Honor, it would not be, if the Secretary of the Interior--

QUESTION: You wouldn't have any argument, would you?

MR. PLATER: Your Honor--

QUESTION: Shouldn't we find that out?

MR. PLATER: Your Honor, if the Secretary of the Interior changes the listing of the species and the critical habitat, then clearly this case is no longer--

QUESTION: That was not my question.

MR. PLATER: Excuse me, I misunderstood.

QUESTION: My question was: Should we know what the transplanted snail darters, how they're faring? Shouldn't we know that before we decide this case?

MR. PLATER: Your Honor, the situation --

QUESTION: I'm not talking about the Secretary of the Interior; I'm talking about us.

MR. PLATER: All right. Your Honor, the factual situation presented in our brief is up to date as well as is known by anyone. And that is this situation.

TVA claims that approximately 2,000 fish now exist in the Hiwassee. But as they revealed in the Senate hearings, and noted at footnote 26 in our brief--

QUESTION: Well, then, how can we--you're now getting ready to say that what they say is not true.

MR. PLATER: Your Honor, that is based--

QUESTION: How can we know what's true?

MR. PLATER: Because-- a fact finding body.

QUESTION: We're not a fact finding body.

MR. PLATER: Your Honor, that's correct. The TVA's biological data perhaps is determinative here. In December of last year, they did transects in the Hiwassee River, and they revealed, out of 710 fish that were put in, 5 fish left in the transects on the original shoals, and I

believe it was 9 juveniles near the flowage of the Ocoee River. That is the latest scientific evidence on how many fish are in the Hiwassee.

TVA therefore concluded that the transplant--

QUESTION: If I may correct you, that's the latest scientific evidence that you know about.

MR. PLATER: Your Honor, I've checked the records of the Secretary of Interior.

QUESTION: Well, I mean, suppose there are some other records available. Do you seriously object to this going back?

MR. PLATER: Your Honor, there may be reasons for this case to be remanded. However, transplantation is not a fulfillment of the Act, and therefore, that would be an incidental inquiry. We believe--

QUESTION: Do you mean that even if a successful transplant took place, you'd still be opposing the functioning of this dam?

MR. PLATER: Not at all, Your Honor. But we would request that legal procedures be followed. If the transplantation were a success so that the species were no longer endangered, the Secretary of Interior, petitioned by TVA, would review the biological data for this Court and for Congress; would certify that it is no longer endangered; would take it off the list; and that would be the end of the case.

QUESTION: Or else he could simply say that this is no longer its critical habitat.

MR. PLATER: Your Honor, under the Act, I believe that both of the elements are separate violations. That is to say, it is illegal for an agency either to render a species extinct, or to destroy its critical habitat.

QUESTION: Or to modify its critical habitat.

But if this--this could continue to be an endangered species, but if the area flooded by the dam is no longer its critical habitat, there would be no violation of the statute.

MR. PLATER: Unless--

QUESTION: If the fish thrive in the Hiwassee River.

MR. PLATER: Your Honor, if the fish thrive in the Hiwassee River, then indeed, as Mr. Chief Justice Burger suggested, through this procedure, this case would come to an end.

But that does not appear to be the biological evidence. As a matter of fact, it appears that the best place for a species to live is in its only known natural habitat.

I would indicate to the Court--

QUESTION: Well, that's not historically true for every species.

MR. PLATER: Well--

QUESTION: There have been all sorts of species

into new areas where they did much better than they ever did in their original homes.

QUESTION: Isn't that the history of evolution?

MR. PLATER: Your Honor, however, apparently the Hiwassee River is connected geographically to the Little Tennessee. And biologists tell us that if the Hiwassee were a good habitat for the species, it would be there, by the process of evolution; but that rather, this species turns out to be a highly sensitive indicator of precisely the qualities of the habitat that the citizens fighting about in this case for years before the snail darter were known to exist.

QUESTION: Mr. Plater?

MR. PLATER: Yes.

QUESTION: May I interrupt you right there?

Apart from the biological interest, which I said we do not challenge, what purpose is served, if any, by these little darters? Are they used for food?

MR. PLATER: No, Your Honor. When Congress passed the law, it made it clear that the purpose of the Act was to prohibit the extinction of species for a variety of reasons. One of them was where there was a food value or a direct economic value; others, for scientific study; and a philosophical question that, indeed, a species should not be eliminated; biological diversity. But ultimately, there's

a utilitarian purpose that is served precisely by the snail darter. That is to say, even though it doesn't have food value, as I was indicating, it is highly sensitive to clean, clear, cool flowing river water. And after 68 dams through the TVA river system, 68 of them, one after the other, the range of the snail darter has apparently been destroyed, one by one, until this last 33 river miles is the last place on Earth where the species, and human beings as well, have the quality of the habitat.

QUESTION: So that's the last place it's been discovered, I take it?

MR. PLATER: Your Honor, TVA has looked everywhere for snail darters.

[Laughter.]

QUESTION: They haven't searched the basement of our building yet; that's what I'm worried about.

MR. PLATER: Your Honor, if snail darters were in the basement of this building, then I suspect they would be in danger. They would have found them, your Honor, and there would be a bounty on the snail darters' heads.

QUESTION: Mr. Plater?

MR. PLATER: Yes, Your Honor.

QUESTION: Are they suitable for bait?

MR. PLATER: Your Honor, they are not--

QUESTION: I'm a bass fisherman.

MR. PLATER: Your Honor, the Little Tennessee River has a fine bass population in its lower stretches, both small mouth and large mouth; but they don't appear to be interested in the snail darter, which perhaps is why the snail darter has survived also.

QUESTION: They're indigestible.

MR. PLATER: Pardon me? Your Honor, the snail darter holds over very shallow shoals. It's a highly specialized fish, as I was indicating, an indicator of water quality.

Instead of a dead one, I've left with the clerk several prints, which were Exhibit No. 12 at trial, which show the species in its natural habitat along the bottom of the water; and this would be eliminated.

There are now 2,500 miles of dammed up river in the Tennessee area, more than twice the coastline of all the Great Lakes combined. And this is the last such stretch of river which is left.

The Hiwassee transplant, in the evidence that Justice Marshall was discussing, does not currently appear to be successful. And this Little Tennessee River appears to be the only place where the fish would live.

QUESTION: Mr. Plater, isn't it at least an arguable part of the intent of Congress that the Government simply leaves certain areas of nature alone, without necessarily having a

reason for leaving them alone, but just that they didn't want any more elimination of species and so forth.

MR. PLATER: The Devil's Hole pupfish case, which this Court decided, was such a case, where there was one small area that was made into a reserve. This Court unanimously upheld that reservation.

QUESTION: We weren't faced with the conflict between the pupfish and a \$120 million dam, though.

MR. PLATER: Your Honor, that isn't the conflict in this case either. The \$120 million which your Honor refers to is the total project cost. But the project is not primarily the dams; as a matter of fact, the dam structure cost \$5 million, a large part of which was labor, plus earthwork. It is talked about as a dam, because that was certainly the focus for TVA's planning.

The \$120 million, Your Honor, is for the purchase of 38,000 acres of land, less than half of which was to be flooded; that was condemned for resale at a profit to pay off the cost of the project. 25,000 acres of those are prime agricultural land, and to say that that would be lost by destroying this darter--excuse me--yes, not to consider the fact that the project includes land purchases, roads and bridges which are immensely beneficial to the people, and to focus on the dam itself, which Congress itself is now reassessing completely, is to lose sight of the realities of the situation.

The conflict, in this case, is between an agency which has, since 1973, when there was only a little bit of that concrete there, out of \$120 million to be spent, in 1973 they took the position that they would not comply with the Endangered Species Act, and, as we noted on page 13 of our brief, doubled its rate of expenditure--excuse me, trebled the rate of expenditure, doubled the amount of money spent.

That is to say, the conflict in this case is between an agency that did not want to consider anything but the original dam as proposed.

QUESTION: I take it--what did you mean when you said Congress is now reconsidering what?

MR. PLATER: Yes, Your Honor. Once the injunction came down, the Sixth Circuit said the law will be enforced, that is the rule of the courts. And the biological violation has been clearly shown. There were immediately a series of actions taken in the proper committees with jurisdiction over the Act; that is to say, the House Merchant Marine and Fisheries Committee, and the Senate Public Works and Environment Committee. They requested a GAO study to review the cost evaluation of the dam project, and they found it was highly unreliable; and secondly, to look at what alternatives there were, even today, for resolving this issue.

Mr. Justice Powell talked about it as a dam which is fully completed, and no other alternatives. That is

the way petitioner would characterize it.

But Congress is not doing so. The GAO study indicates that there are a series of project modifications which were suggested to TVA as early as 1974, which they have rejected again and again, which still today appear to be even more profitable than the dam.

Farming, for instance, is the first industry of Tennessee, and it would be destroyed in this valley area. Tourism is the second, and I note in Appendix B, this dam project is up against the Smoky Mountains.

QUESTION: You couldn't call roads endangered species, could you?

MR. PLATER: No, not at all, Your Honor.

QUESTION: Well, that's what we're talking about. We're not talking about closing down roads.

MR. PLATER: Your Honor, the Congress is weighing on one hand, the original dam project, which includes valuable investment in roads, bridges in the valley, and--

QUESTION: Well, I thought the question was, is Congress considering what was going to be done about this particular matter, including snail darters--

MR. PLATER: Precisely.

QUESTION: --like this one here. Not roads.

MR. PLATER: That's exactly right.

QUESTION: Are you suggesting, Mr. Plater, that

Congress may finally decide, we better abandon this whole dam? At least the dam?

MR. PLATER: Yes, Your Honor, The dam has always been only a small portion of the project. The project wasn't passed--not for hydropower purposes. Electrical power, barge--those were all minor. It was passed to create industrially subsidized lots, and more recreation, in an area where you've already got 22 recreational lakes within 60 miles.

Congress, indeed, is saying that although we've lost, not \$120 million, but something far less than half of that, the value of the remainder may be several times greater than the purported claims for the dam.

That is to say, Congress is reviewing it, and I'm pleased to announce that the agencies are reviewing it as well. In the reply brief of TVA, it is noted that the new director of TVA has agreed, the dam is not integral to this project. The project has benefits which can be achieved as well or better without the destruction of the valley by a reservoir. And secondly, I was informed just today, Your Honors, that the Secretary of the Interior has requested--

QUESTION: Well, just speaking for myself, I'm not interested in what you discovered today. I've got a record here.

MR. PLATER: Your Honor, our case is fully

sufficient on the record. It shows that there is a violation, it shows that Congress, in the law-making committees, is considering exactly the question Your Honor--

QUESTION: But doesn't the record also show that this dam was not for hydraulic purposes?

MR. PLATER: That's exactly right, Your Honor.

QUESTION: Why don't you say that instead of what you were told today? Because that's in the record.

MR. PLATER: Your Honor, it's clear in the record that this project was being made for general regional economic development. It's the last dam in Tennessee Valley Authority's history. It's the most marginal. It's the last one on the list of 1933 dams to be built.

QUESTION: Mr. Plater, let me interrupt you with just one question. Because there's been an awful lot of discussion about things that have happened since the District Court tried this case.

Is any of that relevant to our decision? Anything the Attorney General said, or anything you've been telling us in response to all these questions? We have a finding of fact that this closing the dam would result in total destruction of the snail darter's habitat. Do we have to know anything else?

MR. PLATER: No, Your Honor. I agree completely with Your Honor's question.

QUESTION: Well, let me put another question to you that I think is in addition to that. You haven't discussed it yet, and you don't have much time left.

Do you suggest that any of the legislation passed here has abrogated the normal equity function of a United States District Judge in granting an injunction, the very extraordinary relief that is sought here--

MR. PLATER: Not at all, Your Honor.

QUESTION: --that--are you suggesting that he should not function as he does with any other application for an injunction?

MR. PLATER: Your Honor, that question is an important one. We do not advocate the stripping of this Court or any court of the equitable powers. And indeed, Your Honor, we rely on Your Honors' decision in Rondeau v. Mosinee Paper Corporation, and that is to say, the equity courts have the full panoply of powers required to enforce the laws of Congress.

QUESTION: But Hecht against Bowles says you don't get an injunction automatically for a statutory violation.

MR. PLATER: That's correct, Your Honor. And we do not insist on an injunction. If petitioner agreed to obey the law voluntarily, as the Hecht Corporation did in that case, or as the Mosinee Paper Corporation agreed

in Your Honor's case--

QUESTION: Then you don't need an injunction?

MR. PLATER: That's precisely right.

QUESTION: It's academic.

MR. PLATER: And the law would be complied with.

QUESTION: But the question that I'm putting to you is, should not the District Court, confronted with an application to enjoin the operation of a dam in which \$122 million worth of money, one way or the other has been invested--

MR. PLATER: 110, your Honor.

QUESTION: 110? All right. \$110 million has been invested--exercise the ordinary functions of an equity judge weighing and balancing the equities.

MR. PLATER: Let me--yes, Your Honor, it seems to me that the Court does have equitable discretion. Let me describe, however--

QUESTION: And that includes the equitable discretion not to enforce the statute?

MR. PLATER: No, Your Honor, it does not.

QUESTION: You think it does not.

MR. PLATER: Let me take the far out hypothetical, taking the Tellico Dam today, and advancing it to the point of completion--that is to say, they would still have to cut down trees, bulldoze, scrape, and strip the valley, they

would have to construct the canal, they would have to get the gates ready for closing--at that point , if, for instance, Your Honor, it were discovered that the whooping crane required that valley to breed, and that if the valley were closed, breeding would be eliminated--breeding is considered important for the continuation of the species--and the District Court could not, it seems to us in that case, Your Honor, take on the question, which is essentially a very legislative question, of what should be done with the Tellico Dam.

For instance, the court would then have to go into the full cost accounting. Your Honor, it would have to consider, now what is the true value of this dam--

QUESTION: I don't agree with you Mr. Plater. Because you have a long history of equitable adjudication where, for instance, a building is built over a lot line, and there has been a contest throughout, but the chancellor doesn't reach a decision until the building is finally built. And he may say, applying the common law, which has the same sanction to him as the legislative laws passed by Congress, I will give you damages, I will not give you an injunction.

Now why isn't this an appropriate case for that sort of an adjudication?

MR. PLATER: Several reasons; number one is, Your Honor noted, damages of course is not a remedy. Once a species is rendered extinct, as Congress said, it's extinct

forever.

Secondly, of course, that would be involving private parties under the common law. This Court has repeatedly said that in cases which involve a Congressional statute, that indeed, the principle which guides the Court in the exercise of its discretion is enforcing the law, which has not been set up by common law but by statute.

QUESTION: It's completely opposite in Hecht against Bowles.

MR. PLATER: No, Your Honor; we are not arguing that an injunction must be issued. Under the Hecht case--

QUESTION: That is, if there were voluntary compliance, and an injunction wouldn't be necessary. And that was Hecht v. Bowles.

MR. PLATER: Yes, Your Honor. The Hecht case said, if compliance with Congressional statute would otherwise be achieved, the court of course need not issue an injunction. We would be pleased if an injunction would not have been necessary in this case. Because in 1973, when all options were fully open--although Congress appears to indicate, and the GAO study indicates, that options are still open today--we would be in a much better position to review the question.

Yes, Your Honor.

QUESTION: May I come back to an argument you were making a few minutes ago that this dam, after all, is not

important to what Congress intended. I read a few words from the Senate Appropriations Committee report last year: the project will provide needed flood control, water supply, recreational opportunities, improved navigation.

Now without the dam and the water in it, would any of those objectives of Congress be attainable?

MR. PLATER: Your Honor, it should be noted that the Appropriations Committee at no time has ever reviewed the GAO study, the reviews taking place in the other committees, and so on.

It turns out--

QUESTION: That wasn't my question.

MR. PLATER: Your Honor, it is true that there would be no flood control, there would be no electric power in the project--

QUESTION: No recreation?

MR. PLATER: No, that is not so, Your Honor. The river is the last place left in the river system that has high quality water conditions. It's the finest trout stream in the Southeast of the United States. People come from Alabama, Georgia, and all over to fish--

QUESTION: You've got Mr. Stewart's vote already.

MR. PLATER: Your Honor, it is the last place for flowing water recreation. And as the GAO noted, because there have been so many impoundments--

QUESTION: Do you think the Senate of the United States, or the Senate Appropriations Committee, was thinking about maintaining this stream when it was appropriating money to close the dam?

MR. PLATER: Your Honor, I believe that the relevant discussion is in the committee that has lawmaking jurisdiction over the Act, and they clearly are concerned about recreation; in the House side as well.

QUESTION: Is there any record that the members of that committee voted against this appropriation?

MR. PLATER: Your Honor, the appropriations bill, on its face, does not purport to treat Tellico. It says nothing about Tellico.

QUESTION: I understand the bill on its face doesn't. But do you think any rational person could read the reports of the committees for the last four or five years and conclude that there was any intention on the part of the Congress other than to complete this project?

MR. PLATER: Your Honor, I believe that one reading those reports would find clearly and specifically that, indeed, Congress had no intent to amend the Act. And that is one of the requirements for taking an appropriations bill, or an Appropriations Committee report, and reading out of it an informal, implied amendment. There must be some indication of an intent to amend.

As a matter of fact, in 1977, Senator Stennis specifically said, if we put such an amendment in here, it would be subject to a point of order. I think Your Honor's question, however, reflects the fact that certainly the Appropriations Committee, or certain members of it, probably didn't agree with the Endangered Species Act, or wish that it didn't apply in this case.

But there was no intention expressed to amend, and that is the only basis on which we could use that to change the law.

QUESTION: Do you think that reflects any indication on the part of the Congress not to construe Section 7 as applying to completed projects?

MR. PLATER: I believe, your Honor, that the appropriations bill--as every appropriations bill is passed--presumes that the agency will comply with all applicable relevant laws. Because the agencies are creatures of Congress.

QUESTION: You apparently didn't hear my question, so I'll put another one to you.

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. The consequences of that, of course, would--

QUESTION: In what respects, Mr. Plater, would it apply? It would apply only to future action, wouldn't it?

MR. PLATER: Well, Your Honor, as we--

QUESTION: It doesn't ever require anybody to tear anything down, does it?

MR. PLATER: It certainly says nothing about that

in the Act, Your Honor. And that's why--

QUESTION: It says you can't undertake certain actions in the future if they're going to extinguish a species. That's what it says, doesn't it?

QUESTION: The actions might be the continued operation of the dam.

QUESTION: Or raising or lowering of the water, which is done on cyclical levels--

QUESTION: There's nothing that would require you to tear a dam down.

MR. PLATER: If that situation would arise, Your Honor, it would probably be a biological rarity, in the sense that if the species comes when the water goes up and down, then it's established that it's not endangered.

Maybe the way to answer this is on the basis of the administrative record. Because in the hearings last summer, the Culver hearings in the Senate, it was again and again noted that the biological expertise of the Department of the Interior is capable of handling many sophisticated such questions. And there has never been a case that could not be resolved through good faith and administrative consultation. There have been 4,500 potential conflicts. There have been hundreds of actual conflicts. But only TVA testified that the Act was unworkable. Every other administrative agency said that, although the Act was sometimes a bother,

that they could resolve these conflicts.

QUESTION: Getting back to--why don't you rely on the fact that even though a facility is all built, if you knew about it when you started building--isn't that what you say?

MR. PLATER: That was the situation in this case, Your Honor.

QUESTION: That's what I mean.

MR. PLATER: In 1973--

QUESTION: You're not leaving that, are you?

MR. PLATER: No, of course not, Your Honor. Thank you for reminding me.

QUESTION: Well, when this litigation--when this litigation first began to block the development of the project, there was no snail darter problem involved, was there?

MR. PLATER: The NEPA suit, Your Honor, which was filed in 1971, noted that there possibly were endangered species in the river. TVA had notice. But at that time, of course, Your Honor, it was the old Act, which allowed the TVA to have the discretionary flexibility that they're now trying to read into this Act, applied.

QUESTION: When the snail darter was discovered, and became a handy handle to hold onto.

MR. PLATER: Your Honor, the question of the snail darter clearly went specifically to the qualities of this

habitat, that as you suggest, the citizens have been concerned about for years; that is to say, the last free flowing clear such big river left in the region.

QUESTION: I'm sure that they just don't want this project, for a combination of reasons.

MR. PLATER: Your Honor, there are a combination of plaintiffs in this case, many with different points of view. As I noted, the snail darter is integral to the environmental conservation balance question, which has been litigated over the years.

One of our plaintiffs, for instance, is the Association of Southeastern Biologists, has no interest in the valley for conservation purposes, but for biological purposes, is taking what I believe is its first public stand to show that a biological statute of Congress is important to be enforced; that agencies should not violate the law with impunity.

As a matter of fact, Your Honor, that's where we would leave this case. The Act is working on the record except in this case. This is the only agency that has persistently declined to comply with the law. And of course, in 1973, there were all options open. That is the relevant time to question when, indeed, TVA should have looked at this Act and decided if, like every other Federal agency, would abide by the law.

QUESTION: Well, I understand what your position is and what the law means. But if somebody happened to disagree with you as to how to construe the Act, it might be that the agency isn't violating the law at all.

Your argument is what the law means.

MR. PLATER: Only TVA is making that argument.

QUESTION: Nevertheless, your statement is absolutely incorrect unless the Act is construed the way you say it should be construed.

MR. PLATER: Yes, your Honor, if this Act is discretionary the way the old law was written, if this Act doesn't mean what it says, then, indeed, this--

QUESTION: But one of the issues in the case is, what does the Act mean.

MR. PLATER: The regulations of the Department of the Interior; every holding in the case so far--

QUESTION: I understand. You're arguing that it should be construed in a certain way. But some other people disagree with you.

MR. PLATER: They do.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:22 a.m., o'clock, the case in the above-entitled matter was submitted.]

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