



Fall 1977

Application of Endangered Species Act to an Ongoing Project

Sue B. McDowell

Recommended Citation

Sue B. McDowell, *Application of Endangered Species Act to an Ongoing Project*, 17 Nat. Resources J. 679 (1977).

Available at: <https://digitalrepository.unm.edu/nrj/vol17/iss4/11>

This Recent Developments is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsloane@salud.unm.edu, sahrk@unm.edu.

APPLICATION OF THE ENDANGERED SPECIES ACT TO AN ONGOING PROJECT

ENVIRONMENTAL LAW—ENDANGERED SPECIES ACT: Applicability of 16 U.S.C. §1536 to an ongoing project. Evidence of jeopardy to the continued existence of the snail darter, an endangered species of small fish, held sufficient to halt construction of the Tellico dam and reservoir, although the project was in the final stages of development. Ongoing projects of departments and agencies are not exempt from scrutiny for compliance with the Endangered Species Act. *Hill v. Tennessee Valley Authority*, 549 F.2d 1064 (6th Cir. 1977).

The Endangered Species Act of 1973 (hereafter ESA),¹ the result of an upsurge in commitment to the protection of international wildlife, was enacted as a replacement to the Endangered Species Conservation Act of 1969,² which served as the structural basis for the current Act. The ESA empowers the Secretary of the Interior to compile lists of threatened and endangered species³ for the conservation⁴ of such species through federal regulation. The decision to place a species or subspecies on the list is based on several factors, including “the present or threatened destruction, modification, or curtailment of its habitat or range.”⁵ The Act also sets forth the requirement that all federal agencies and departments take “such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species . . . or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical.”⁶

Hill v. TVA was instituted by a group of private citizens seeking to permanently enjoin completion of the Tellico Dam on the Little Tennessee River, located in that state,⁷ as violative of §7 of the ESA.⁸ The construction of the dam, begun before the enactment of the

1. 16 U.S.C. §1531, *et seq.* (Supp. V 1975).

2. 83 Stat. 275 (1969), 16 U.S.C. §688 (cc) (1)-(6) (1970).

3. 16 U.S.C. §1533 (Supp. V 1975).

4. *Id.* §1531 includes a declaration by Congress that the United States pledges itself to the conservation of endangered species “to the extent practicable.”

5. *Id.* §1533(a)(1)(1).

6. *Id.* §1536.

7. *Id.* §1540(g)(1)(A) authorizes suits by private citizens seeking to enjoin anyone who is allegedly in violation of the ESA.

8. *Id.* §1536.

ESA,⁹ would result in the destruction of the exclusive range of a small fish known as the snail darter, whose habitat consists of seventeen miles of the Little Tennessee River.

The snail darter was first discovered and identified in August of 1973 and was designated the following November as an endangered species pursuant to 16 U.S.C. §1536. Soon after this designation plaintiffs brought suit against the Tennessee Valley Authority in United States District Court for the Eastern District of Tennessee to halt construction of the dam. The court found in favor of the defendants concluding that a finding for the plaintiffs would be unreasonable in light of the ongoing nature of the project, recalling that construction had begun in March 1967 and noting that the suit was not commenced until February 1976. In addition, approximately 90 million dollars and nearly ten years had been expended on this project.¹⁰ However, the Sixth Circuit reversed the district court and remanded the case with instructions to permanently enjoin TVA from completing the dam as proposed. The court based its decision on two separate rationale: the separation of powers and the mandatory nature of §1536.

First, the court analyzed the language of and the policy behind §1536 and determined that the opportunity to review the impact of a project on the continued existence of a species of wildlife must be preserved even to the "terminal phases of ongoing projects" to assure that "actions authorized, funded, or carried out by [federal departments and agencies]" are in compliance with this section.¹¹ The court, by reiterating and affirming a hypothetical situation presented by the district court, emphasized that the degree of completion of a project was *not* to be considered in determining whether it would result in the extinction of an endangered species.

If Plaintiff's argument were taken to its logical extreme, the Act would require a court to halt impoundment of water behind fully completed dam if an endangered species were discovered in the river on the day before such impoundment was scheduled to take place.¹²

The second aspect of the court's decision was dependent upon the well-entrenched doctrine of separation of powers among the different branches of government. The court concluded that the continued effectiveness of this doctrine depends upon Congress' ability to

9. Construction began in March, 1967. The Act was not passed until December 28, 1973.

10. 549 F.2d 1064, 1067 (6th Cir. 1977).

11. *Id.* at 1070.

12. Memorandum opinion and order, *Hill et al. v. Tennessee Valley Authority*, Civil No. 3-76-48 at 23-24 (E.D. Tenn., May 25, 1976).

appropriate funds for projects, the validity of which may be reviewed by a separate branch of government. Even after Congress received evidence of the plight of the snail darter, it continued to allocate funds to the Tellico project. The court's conclusion obviates the argument that this action by Congress should be interpreted as precluding judicial review of apparently ratified action, although in noncompliance with existing law. The court refused to allow Congress to delegate to the TVA the power to interpret and administer the ESA by acquiescing to noncompliance without the appropriate legislation.

The conclusion of the court may seem inequitable considering the time and money involved and may seem idealistic in its commitment to a statutory policy that the court states is designed to "foreclose all activities antithetic to the preservation of the 'esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people'¹³ of vulnerable species of fish, wildlife and plants."¹⁴ However, the court is merely demonstrating that it is not within the power of the court to change the policy and targets of legislation. Rather it points out that the power to determine whether the snail darter remains on the endangered list and whether the section in question of the Little Tennessee River continues to be designated as a "critical habitat"¹⁵ lies with Congress and the Secretary of the Interior and not with the courts. Therefore, the court granted a permanent injunction against the Tellico project until the snail darter is removed from the endangered species list or Congress expressly exempts this project, through its legislative activities, from compliance with the Endangered Species Act. °

SUE B. McDOWELL

13. *Supra* note 1, §1531(3).

14. *Supra* note 11, at 1073.

15. Defined at 40 Fed. Reg. 17764-17765 (1975).

*Subsequent to this case report going to press, the U.S. Supreme Court granted certiorari for this case, 46 U.S.L.W. 3316 (1977).