

Tiny Fish/Big Battle: 30 Years After TVA and the Snail Darter Clashed, the Case Still Echoes in Caselaw, Politics and Popular Culture

Zygmunt J. B. Plater

Boston College Law School, 885 Centre St., Newton, MA 02459
plater@bc.edu

It is perhaps the most dramatic national legal story to come out of Tennessee in the past 75 years—the controversy called *Hiram Hill, et al. v. Tennessee Valley Authority*—the endangered Snail Darter versus TVA's Tellico Dam.¹ Developing over the course of most of a decade, the Tennessee lawsuit became a cultural icon, famous or infamous around the world.

Thirty years later the case still reverberates in caselaw, politics, and as an ironic reference in popular culture.² Here is the iconic caricature of the case that most people, if they've heard of the Snail Darter, will probably have internalized:

A two-inch endangered minnow, pulled out of a hat at the last possible moment—and the federal Endangered Species Act—were misused by extremist environmentalists to block completion of an economically beneficial \$150 million TVA hydroelectric dam.

It turns out that every single element of that caricature is inaccurate.³ The force of the caricature, however, carried far beyond Tennessee to affect major political and policy battles at the national level. The Tellico Dam case traveled north to become a chess piece on the national political chessboard, around which major political forces swirled and clashed, with continuing consequences today.

Although it is still perhaps lingeringly controversial in the Valley to confront the facts revealed on the objective public record, 30 years later the elements of the controversy have become broadly clear. Though your author was a committed citizen advocate, privileged to represent the darter and its allies throughout those years of the case, the full merits now can and should be addressed objectively in the academic forum, and lessons drawn. The case's merits, however, are radical enough in objective historical perspective to make any accurate analysis quite one-sided.

It Wasn't Really a Hydro Project

TVA's Tellico Project was situated on the last undammed part of the Little Tennessee River, 33 miles of flowing river ending at Fort Loudoun Dam, Fort Loudoun Reservoir, and Watts Bar Reservoir, the last such high-quality stretch of big river left, surrounded by 24 dams within 50 miles. From its beginning in 1959, Tellico was designed and justified by TVA to carry an unusual array of novel economic development claims. As the marginal last of 69 buildable damsites, it could not be justified for normal hydro-project purposes—electric power generation, flood control, barge traffic, etc.—so TVA's leadership focused Tellico on recreation and land development benefits.

An essential part of the agency's justification for Tellico was to condemn more than 300 private family farms—more

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than three times as much land as was needed for a reservoir, most of the farms untouched by the impoundment—and resell the land to private developers, in a sense anticipating the 2006 *Kelo v. New London* controversy. By hypothesizing a Model City to be called “Timberlake New Town” to be built by the Boeing Corp. with close to \$1 billion in hoped-for taxpayer subsidies, the agency was able to project substantial “shoreland development” benefits in its official benefit-cost justification, and by manipulating economic projections could estimate high net recreation benefits.⁴

The reservoir part of the project may have been the agency’s actual motivational purpose, but the primary elements of the project on the record never required a dam. This is why the project’s citizen opponents, though consistently and pointedly ignored by the agency, its allies, and the national press, could argue realistically for highly beneficial non-dam river-based alternative development plans that would preserve the endangered darter.

The Fish’s Little T River Habitat and its Valley Were Public Treasures

The flowing Little Tennessee River and its valley were extraordinary public resources that would be lost—rich in agricultural lands, history, and tourism and sporting potential, offering broad-based economic opportunities for the people of East Tennessee and the nation, as well as the last major natural habitat of the endangered Snail Darter. The special qualities of the river—cool, clear, highly oxygenated water flowing over broad, shallow graveled riffles—had preserved the fish in the Little T as its similar habitats elsewhere were destroyed one by one by dams. Its valley had been a treasure for humans for more than 10,000 years, with archaeological relics beneath more recent Cherokee sites revealing it as having the oldest continuous human habitation in the United States.

In its natural flowing state the river was used and beloved by thousands. The river was a major recreational resource on its own terms, attracting anglers from all over the Southeast and flotillas of weekend family float trips even before it had been rendered a virtually unique resource by the impoundment of 2,500 linear miles of river in the surrounding region. The agricultural soils of the valley were of great economic value, with more than 15,000 acres of prime-grade agricultural soils. The valley contained a dozen Cherokee religious and historical sites still visited by herb-gathering medicinemen from the Cherokee, North Carolina, reservation. The valley’s historic resources held great public value in their own right

and could be capitalized monetarily in a tourist-based development if the valley’s central portion was not flooded. A major portion of upriver project lands had particular potential for use as an access and spillover management area for tourists coming to the Great Smoky Mountains National Park, which attracted more than 10 million visitors a year.

The Dam Project’s Economic Merits

The Tellico Dam project was a mistake from the beginning that never should have been started. As the internal agency files indicate,⁵ and two comprehensive and intensive federal economic reviews subsequently demonstrated, the project was patched together by the TVA leadership primarily with exaggerated agency claims of benefits, deflated estimates of costs, and a staunch aversion to consideration of any alternatives for development of the river and its valley *without* a dam and reservoir. The Timberlake New Town idea fell apart when Boeing realized that Congress would not fund it and the project made no economic sense on its own, though TVA remained adamant. The U.S. GAO did a study of the project in 1977 that warned that *all* of TVA’s benefit-cost figures for the project were unreliable.⁶ Contrary to its public image, the dam has no generators and produces a relatively small amount of power via canal. After the Supreme Court decision, under Senator Baker’s prodding, Congress’s ESA Amendments⁷ of 1978 sent Tellico into an intensive economic scrutiny process in the Cabinet-level God Committee tribunal. After six months of full-dress inquiry into the merits of the dam and the darter’s river valley, the tribunal unanimously concluded that the dam did not make economic sense even after almost all the project’s budget had been spent. An accurate assessment of TVA’s design was that from the start the Tellico Project would lose 76 cents for every dollar invested.⁸ Even on purely economic grounds, as Charles Schulze, chair of the President’s Council of Economic Advisors concluded, the total benefits of the nearly completed project still did not add up to the mere 5 percent of costs remaining to be spent:

Here is a project that is 95 percent complete, and if one takes *just the cost of finishing it* against the benefits, and does it properly, it doesn’t pay—which says something about the original design! [Laughter.]⁹

The large majority of project expenditures were found to have public value even without completion of the dam. The Snail Darter was found to represent recreational, touristic, and developmental values including \$40 million worth of prime

A Snail Darter Timeline

1936 TVA lists Tellico site on Little Tennessee River (at confluence with Watts Bar and Ft. Loudoun reservoirs on Big Tennessee), as one of 69 potential dam sites.

1940-67 TVA builds more than 5 dozen dams.

1959 TVA Chair Red Wagner posits a Tellico Dam to be primarily justified by land development and recreation benefit claims.

1968 TVA begins Tellico Dam, based on land development for “Timberlake New Town” to be built by Boeing Corp.; concrete dam built, \$4 million.

1972 Farmers and environmentalists get NEPA injunction, based on TVA’s lack of EIS.

1973 New EIS deemed sufficient—NEPA injunction lifted. Aug. 12: Dr. David Etnier discovers Snail Darter at Coytee Springs shoal on Little T. Dec. 28: Richard Nixon signs Endangered Species Act [ESA].

1975 Boeing abandons Timberlake project, citing economic impracticality. Citizens’ petition to federal Department of Interior granted for listing of Snail Darter as endangered, critical habitat, under ESA §7.

1976 District Judge Robert Taylor finds facts of ESA §7 violation, declines injunction.

1977 Sixth Circuit grants injunction.

1978 April 18: Oral argument in Supreme Court. June 15: Supreme Court upholds injunction.

1979 Jan. 29: Cabinet-level God Committee, created by Baker-Culver ESA Amendments, unanimously upholds Snail Darter injunction on economic grounds. July-Sept.: Sen. Baker and Rep. John Duncan push appropriations rider over-ruling ESA and other laws. Pres. Jimmy Carter fails to veto override. Cherokees file religious freedom lawsuit; Judge Taylor dismisses lawsuit; 6th Cir. affirms; S.Ct. denies cert. Nov. 29: Reservoir completed and river impounded.

1982 No economic activity; TVA proposes use of valley as regional toxic waste facility; citizens’ public outcry sinks proposal.

1984 TVA begins cooperation with Walmart-linked developers to create high-income resort home development.

1984ff Some light industrial development locates near Highway 411; extensive flatwater recreation around lake; several communities of high-income resort homes; darter transplants allow downlisting of the darter to “threatened” status.

agricultural lands. The press, however, largely ignored this dramatic example of how, far from hindering economic progress, good ecology made good economics.

Economic Environmental Alternatives to a Tellico Dam

With increasing sophistication over the years, the citizen coalition opposing the dam argued for a comprehensive river-based development project. The citizens’ alternative river-based development plans drafted by the University of Tennessee¹⁰ were strenuously ignored by the agency. They would have allowed the displaced farm families to go back onto most of the rich agricultural lands of the valley; channeled potentially millions of tourists up a “Cherokee Trail” route from I-40 and I-75 through the valley with its Cherokee and archaeological sites and old Fort Loudon into the Smokies National Park; developed the flowing river fishing resource (Arkansas’ White River recreational development, with an inferior river, generates \$300 million in annual economic activity); provided enhanced locations for light industrial development; and the like.

The Law of the Snail Darter

Without a court injunction, there was and is no governmental forum practically accessible to challenge the dubious economic merits of public works projects like the Tellico reservoir. Judges are consistently loathe to scrutinize the economics of porkbarrel projects launched and sustained in the other co-equal branches of government.¹¹ The farmers’ and sportsmen’s appeals to TVA, Congress, the state and federal agencies, and the media fell on unresponsive, deaf ears. It is difficult to get political power establishments to scrutinize their essential mistakes. Common sense is not self-executing.

The citizen plaintiffs’ coalition was a motley assemblage of obstinate farmers, frustrated fishermen, history buffs, environmental law students and their untenured professor, and other volunteers from the community. T-shirts were sold and potluck suppers were held. Not very extremist. Under the ESA’s citizen-enforcement provision—a proud, very American innovation widespread in public-interest laws after the ’60s—by filing a 60-day notice, the darter’s defenders had statutory standing to enforce the federal law in court against even a powerful federal agency like TVA.

The legal case began on statutory terms and ultimately turned on equity canons. ESA §7 presented two veiled causes of action: a prohibition against agencies putting species into

jeopardy of extinction, or destroying critical habitat. Making the legal case quite easy to prove, the little endangered species was intimately linked ecologically to its river habitat's special qualities, a habitat that had been eliminated everywhere else by 2,500 linear river miles of dammed reservoirs. Thus it operated as a legal "canary in the coal mine," a vivid indicator of the special values of the river and valley habitat for humans as well. To change the river into a narrow, shallow, warm-water lake would eliminate the darter's major remaining population and drown most of the valley's most valuable assets under mud and low-quality algae-laden waters.

While TVA accelerated its bulldozing and construction to moot the case, and tried to block legal enforcement of the Act, the little citizen coalition, with help from several citizens groups in Washington, persuaded the Department of Interior to list the species and its Little T habitat as endangered under the ESA. In court, with the deft efforts of masterful local litigator Boone Dougherty, Judge Robert Love Taylor was forced to find that the dam jeopardized the darter and destroyed its critical habitat. Judge Taylor's reluctance to enjoin the ongoing ESA violation, as an exercise of equitable forbearance, was corrected by the Sixth Circuit, and by the Supreme Court after arguments on Aug. 18, 1978. As Chief Justice Burger said, a court's equity powers could not override statutory commands.

The Darter Swims Into a National Political Whirlpool

The federal ESA injunction effectively created a "remand to Congress," triggering prolonged battles at the national political level. For the next three years the citizens' defense of the darter and its river required a permanent presence in Washington.¹² The Snail Darter became a pawn on the national chessboard, focusing the attention of major political power blocs and agendas. Larger political forces took over TVA's burden. The Tellico ESA injunction raised the specter of increased scrutiny for a host of other far more significant porkbarrel realms. By potentially creating a unique legal forum for economic scrutiny of projects, the ESA caused a "Pork Panic."¹³ The water projects establishment—agencies and tied-in market interests—feared that revelations about the falsified economics of Tellico would undermine far bigger resource projects across the nation in the public's eye.

Most directly, the Tellico precedent raised reverberating fears in Washington for the Tennessee-Tombigbee Waterway, a \$4 billion boondoggle that would never withstand transparency

if ever it was scrutinized; the "Tenn-Tom" happened to contain three endangered fish species. If the ESA prompted people to inquire into pork-barrel economics, those projects were in trouble.

And the darter flushed up even more potent enemies. Beyond the water projects establishment were political allies in other resource establishments like the Forest Service/timber industry coalitions, BLM/ranchers and miners, and the FERC/Edison Electric Institute establishment.¹⁴ These industry lobbies joined forces to discredit the darter injunction because the not-coincidental presence of endangered species conflicts could potentially bring unwelcome public scrutiny into such a wide range of agency-industry projects and programs.

The track of the Snail Darter case may even be discernible at the highest macro level of American politics! In the '60s the political blocs of the industrial establishment and the GOP had been sent reeling by the twin shocks of the devastating Goldwater defeat and the hugely popular anti-Establishment civic movements culminating with the first Earth Day. The "Establishment" and traditional authority institutions were being widely regarded with populist aversion, but they began to fight back in the later Nixon years. The Powell Memorandum¹⁵ identified a need for "free market forces" to launch a coordinated reaction, discrediting and marginalizing the popular "anti-business" civic movements—environmentalism, consumer protection, labor and civil rights. The Snail Darter was a godsend, seized upon as an example that could be framed as extreme, irrational, leftist, activism that called into question not only citizen-based populism but meddling governmental civic regulation in general. As Sen. Baker's chief aide and political agent, Jim Range, perhaps the single most effective ESA opponent then on the Hill, lectured me, "Public support for endangered species is a mile wide these days ... but it's *only an inch deep*. If we can show the public how this kind of regulation hurts people in the pocketbook, they'll turn away real quick."¹⁶

It was imperative to cast the darter case as a joke and prevent public opinion from seeing the ESA's economic merits in the Snail Darter case. If in this, supposedly the most extreme environmental case ever, it turned out that the environmentalists were the ones making sober economic sense, and the agency was the miscreant, then the reverberations could be disastrous. If, on the other hand, the darter case could be framed as environmental extremism, it could become a handy wedge tool for industry and market force lobbyists—led by the U.S. Chamber of Commerce, the National Association of Manufacturers, and their industry-funded "Public Interest

Law Foundations”¹⁷—to undercut the ESA and other environmental regulations hampering industry, and marginalizing citizen environmentalists by tagging them as love-beaded hippies and silly grannies. The icon of the extremely irrational darter could be used to discredit progressive civic regulations far beyond environmental issues.

Inside Out: The Darter Icon in the Press and Politics

Ultimately the pork-barrel coalition in Congress, with a rider pushed onto an appropriations bill by Rep. John Duncan and Sen. Baker, overturned the ESA’s protections for the darter,¹⁸ and President Jimmy Carter retreated from his promised veto of the bill (which also had prohibited economic analysis of water projects by the President’s water resources council). After 200 million years, the river ended on Dec. 29, 1979.

The critical failure in the darter’s final defense probably lay with the inability of the citizens to bring public recognition to the dramatic real economic merits of the darter’s case and the dysfunctional economic demerits of TVA’s dam. Before the rider vote, every Member of Congress was given a personal letter from Secretary of Interior Cecil Andrus, chair of the economic review ordered by Congress that had unanimously decided against the dam. But although every member knew of the Tellico Dam’s economics, they also knew that the American public did not know, so the pork barrel was free to roll. And the President was told by his political liaison, Frank Moore, that he could not withstand the ridicule a veto would receive from the press and public opinion that viewed the Snail Darter as an economically irrational, environmentally extreme technicality.¹⁹

And so it was. With Sen. Baker’s assistance the congressional pork barrel was able to roll, and even the President of the United States was dissuaded from asserting the economic merits by the media mockery of the case.

Despite the law and despite the economic record, in other words, the darter’s last major natural population and its river were ultimately lost because their national political opponents were successful in framing the case in the public eye as an icon of foolishness, the caricature that still continues in press commentary and political discourse today. (Fortuitously for the fish, a massive transplant to two locations and the discovery of a small relic population in a downstream tributary have reduced the risk of extinction to the point that the darter is now listed as “threatened” rather than “endangered.”²⁰)

How did the public, and thereby the political process, fail to get the dramatic essential facts of the darter’s case? In part it was TVA’s public relations department, persistently side-stepping criticism of the dam on its merits, but continually distributing a flood of press materials that reinforced the cliché—a photo-clip handout showing the dam (photographed with a wide-angle lens to increase its mass) juxtaposed against a close-up of a dead darter lying on a stiff cold lab table alongside a ruler calibrating its diminutive size. The dam was continually represented as a hydroelectric dynamo, with nary a word that it was essentially a project for recreation, and development by private companies on condemned private farmlands.

More significantly, the anti-regulatory industrial community and its talk-radio adjuncts kept up a drumroll of the silly-fish-versus-huge-hydroelectric-dam caricature at the national level, in press releases, lobbying materials and political commentary.

And the national media no less than the local Tennessee press failed to investigate the dramatic realities of one of the three most-covered environmental stories of the decade, and so got it backwards. Why?

In some cases the media’s missing of the Tellico dam’s faulty merits undoubtedly reflected political biases in the press. Local reporters in Tennessee reported that their editors did not welcome the idea of investigative stories about Tellico. One reporter from the Lenoir City paper confessed to us, “I know a lot about the Tellico project, and you are right, it’s nuts. But my publisher won’t let me write a word about this.” Local stories continuously reflected superficial reporting on the latest maneuvers between the fish and the dam, often basically reprinting TVA’s dismissive press releases.

At the national level, too, the “liberal media” was strangely inert. Having solicited coverage from more than 120 reporters, some of whom I spoke with more than a dozen times, we never got a national investigative story on the real merits of the Tellico Dam/Snail Darter conflict. We once spent half a precious afternoon in Washington with a *Wall Street Journal* reporter. He pored through the maps and data, obviously taken with the case. In economic terms, he declared with surprise that Tellico and its private land condemnations vividly illustrated the corruptions of the pork barrel. “So what will you write about Tellico?” we asked. He paused, shook his head, and told us regretfully, “Nothing. It’s against our editorial policy.” “But you don’t write for the editorial page. You are a news reporter!” He sighed and said that was correct, but the *WSJ* editors didn’t want to run news stories where environmentalism made economic sense.

From a different perspective, more than one “liberal” reporter mentioned to us that they had been raised on the progressive New Deal image of TVA dams bringing social progress to a benighted region, and were distressed that the case reflected TVA as a just another calcified giant utility, albeit vested with extraordinary governmental powers over its region.²¹

And finally there is the fact that the media’s news departments today are just another business, selling “infotainment” to a public deemed incapable of or uninterested in understanding complex controversies that cannot be reduced to jazzy, 10-second sound bites.

If the press is to be democracy’s informational lifeline, however, the failures illustrated by the denouement of the darter are troubling. “This sort of thing endangers more than fish.”²² An important part of lawyering, it appears, especially public interest lawyering, is an ability to leverage the merits of the case into the public consciousness. The legal process does not exist in an idealized vacuum sealed off from the realities of politics and media, and public interest lawyering skills must be multiplexed, playing simultaneously in all the relevant theaters.

In Sum, to Be Continued . . .

Looking back after 30 years, we can celebrate that only in America could a little group of citizens so lacking in money and power (and tenure) have carried such a case to the highest levels of the society’s governance, digging so deep into the guarded complexities of interlocking economic and political establishments. Today, however, the Tellico reservoir sits there as just another TVA lake, with localized development features falling far below the extraordinary alternative promises presented by the treasures of the flowing river.²³ The river ultimately was narrowly lost through an unlaudable insider maneuver, but as the story gradually becomes better known, the saga of the Snail Darter in law, science, economics, media process and policy, still evokes lessons that are worth winnowing in conversations to come.

Notes

¹ There were more than a dozen judicial decisions in the course of the TVA campaign to build Tellico Dam, including condemnation challenges, NEPA litigation, endangered species litigation and Indian religious rights cases. See *United States ex rel. TVA v. Two Tracts of Land*, 387 F. Supp. 319 (E.D. Tenn. 1974) (condemnation challenge), aff’d, 532 F.2d 1083

(6th Cir.), cert. denied, 429 U.S. 827 (1976); *EDF v. TVA* (I), 339 F. Supp. 806 (E.D. Tenn., 1972) (NEPA litigation), aff’d, 468 F.2d 1164 (6th Cir. 1972); *EDF v. TVA* (II), 371 F. Supp. 1004 (E.D. Tenn.) (NEPA litigation), aff’d, 492 F.2d 466 (6th Cir. 1974); *Hill v. TVA*, 419 F. Supp. 753 (E.D. Tenn. 1976) (endangered species litigation), rev’d, 549 F.2d 1064 (6th Cir. 1977), aff’d, 437 U.S. 153 (1978); *Sequoyah v. TVA*, 480 F. Supp. 608 (E.D. Tenn. 1979) (Indian religious rights), aff’d, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980).

The case was also subject to the first-ever economic review scrutiny by the Cabinet-level Endangered Species Committee that unanimously decided in favor of the darter on economic grounds. U.S. Department of the Interior, Endangered Species Committee, Record of Hearing of Jan. 23, 1979.

For fuller background: see Plater, “Reflected in a River: Agency Accountability and the TVA Tellico Dam Case,” 49 *Tenn. L. Rev.* 747 (1982), and William Bruce Wheeler and Michael J. McDonald, *TVA and the Tellico Dam, 1936-1979: A Bureaucratic Crisis in Post-Industrial America* (1986). See also Kenneth Murchison, *The Snail Darter Case: TVA versus the ESA* (2007). For an essay with photo slides on this case, see <http://www.law.mercer.edu/elaw/zygplater.html>.

² In an online poll of environmental law professors from across the country seeking a consensus on the 10 most important court cases in the history of environmental law, *TVA v. Hill* received the highest number of votes, almost twice as many as the two cases that placed second: *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir. 1976). See post of James Salzman to envlawprofs@darkwing.uoregon.edu (Oct. 26, 2001; copy on file with author). On the other hand, the Snail Darter is regularly presented by business and conservative commentators and lobbyists as a paradigm of regulatory foolishness and environmentalists’ extremism:

“America today is a new homosocialism . . . What these people are is against private property rights. They are trying to attack capitalism and corporate America, . . . trying to say that we must preserve . . . the snail darter and whatever it is.” —Rush Limbaugh, *The Rush Limbaugh Show* (Dec. 7, 1993).

³ The caricature’s inaccuracies: The project’s official design was primarily as a recreation and shoreland redevelopment project; the concrete dam itself cost only about \$5 million, and most of the \$150+m. project costs were for land purchase and the cost of useful new infrastructure, roads, bridges, etc.;

the project was ultimately found to have been diseconomic from the beginning; the case was brought, not by extremists, but by a coalition of farmers, fishermen, history buffs, and environmentalists making the conservative argument that river-based developments were economically preferable; the citizen efforts to enforce the federal Endangered Species Act began over TVA's protests in 1974, long before most of the project expenditures were made; and finally the fish (*Percina tanasi*) is a perch, not a minnow, and fully 2½ inches long when mature, not just 2 inches. "This is the only fish story I know of," said Secretary of Interior Cecil Andrus, "where the fish keeps getting smaller!"

⁴ See Murchison, at 16-18. TVA condemned more than 38,000 acres of private land for Tellico, of which slightly more than 10,000 acres was for reservoir purposes. Land redevelopment and recreation benefit claims together created almost 60 percent of annual claimed benefits; more traditional hydro benefits comprised the rest (see TVA, Tellico Dam Project EIS I-1-49 [1972]), though the subsequent economic reviews denied those as well. See Comptroller-General of the United States, "Report to the Congress: The TVA's Tellico Dam Project—Costs, Alternatives, and Benefits," EMD-77-58 (Oct. 14, 1977).

Federal construction projects require affirmative benefit-cost justifications, at that time under the terms of Senate Document No. 97, 87th Cong., 2d Sess. (1964). The appropriations committees could not release public funding without an affirmative B-C ratio, which understandably encouraged inventive agency economic projections.

The Model City idea was copied from plans by Athelstan Spilhaus for a new town in Minnesota, also deemed impractical and never built. See TVA, "Tennessee Valley Authority Environmental Statement: Timberlake New Community" (1976). Swatara, Minnesota, also considered building a Spilhaus utopia in the form of a 20,000-acre domed city, which, after approximately \$1.5 million in private and public money spent on planning throughout the 1960s and early 1970s, was finally defeated in the 1973 Minnesota legislature due to stiff opposition and budgetary constraints. See "Once a Dead and Buried Idea . . ." *Chicago Tribune*, Jan. 27, 1987, at 3C. TVA planners named the hypothetical city "Timberlake" after Lt. Henry Timberlake of George III's colonial army, who visited the valley and produced the first map of the area in 1762.

⁵ See William Bruce Wheeler and Michael J. McDonald, *TVA and the Tellico Dam, 1936-1979: A Bureaucratic Crisis in Post-Industrial America*, 3-33 (1986).

⁶ Comptroller Gen. of the U.S., "The Tennessee Valley Authority's Tellico Dam Project—Costs, Alternatives, and Benefits" (1977).

⁷ Pub. L. No. 95-632, 92 Stat. 3751 (1978). On the Baker-Culver ESA Amendments of 1978, see Murchison at pp. 151-154.

⁸ The federal interagency economic review was led by Robert K. Davis, an emeritus economist at the University of Colorado, who has published extensively on the flawed economic processes of public works projects.

⁹ U.S. Dep't of the Interior, Endangered Species Committee Hearing 26 (Jan. 23, 1979), at pp. 25-26, Statement of Charles Schultze, Chairman of the President's Council of Economic Advisors. [emphasis added]

¹⁰ The citizens' proposals for alternative development were embodied in a study prepared by the University of Tennessee School of Architecture and by the God Committee staff. School of Architecture, University of Tenn., "Study of Alternative Futures for the Little Tennessee River Valley" (1977); see also TVA, "Alternatives for Completing the Tellico Project" (Dec. 1978); Office of Policy Analysis, U.S. Dep't of the Interior, Tellico Dam and Reservoir (Jan. 19, 1979) (Staff Report to the Endangered Species Committee). The National Park Service also recommended the river development alternative over the reservoir plan as being better suited for easing the park's crowding and traffic flow problems. Senate Endangered Species Act Oversight: "Hearings Before the Subcomm. on Resource Protection of the Senate Comm. on Environment and Public Works," 95th Cong., 1st Sess. 291 (1977) (testimony of Park Superintendent Boyd Evison). Surprisingly, in spite of the citizens' continued arguments and the economics of the situation, neither the TVA nor God Committee official reports considered what was the most profitable element of the river development option—tourism. Archeological treasures, historical sites, and the Great Smoky Mountains National Park offered a unique opportunity for a tourist industry to flourish along the existing river.

¹¹ NEPA cases have consistently demonstrated the judicial reluctance to pry into the accuracy of public works projects.

¹² The author, thanks to an understanding dean in his new academic position in Michigan, was able to spend 2½ days of every week on the case, working out of donated space in national citizen groups' offices—special honor to Friends of the Earth, Sierra Club, National Wildlife Federation, American Rivers—and sleeping on couches and guest beds volunteered by NGO activists in the capital.

¹³ Ward Sinclair, "'Pork Panic' Sweeping Congress in

Wake of Darter's Rescue," *Washington Post*, June 28, 1978, p. A2.

¹⁴These political establishments form "Iron Triangles," as the political scientists call them: political bonds between the agencies that get taxpayer dollars, the private market forces that build the programs and projects, and the congressional blocs that deliver the money in return for power and campaign finance.

¹⁵The Powell Memorandum was prepared by Lewis Powell for the U.S. Chamber of Commerce shortly before he went on to the Supreme Court. In it he decried the creeping socialism dominating America, as exemplified by civil rights, consumerism, and environmentalism, and he called for business to begin funding academic and representational programs and foundations to counteract the 1960s ideologies in American society. The memorandum led directly to the founding of the Heritage Foundation and other similar initiatives. See Lewis F. Powell Jr., "Confidential Memorandum: Attack on American Free Enterprise System" (Aug. 23, 1971).

¹⁶Conversation with Jim Range, Fall, 1978, during hearings on Baker-Culver bill, paraphrased.

¹⁷See Oliver Houck, "With Charity for All," 93 *Yale Law Journal* 1415 (1984) (analyzing how industry has created and financed "public interest law firms" as "charitable organizations" to promote business interests against governmental regulation in the public interest).

¹⁸See Murchison at pp. 165, 180.

¹⁹When he called me the evening of the non-veto, apparently seeking absolution, the President indicated that the appropriations committee was able to mobilize too much political force against the darter, despite the actual merits of the economic record.

²⁰See 49 Fed. Reg. 27,510 (Aug. 6, 1984) (codified at 50 C.F.R. § 17.11 (1985)). Does the darter's currently stabilized survival generally undercut arguments for species protection, or mean that the citizens' litigation seeking to save its last major natural population was a mistake? Not if Justice Burger's reading of "institutional caution" was correct, and the darter, like the canary in the coal mine, served a larger societal function as a sensitive indicator of threatened human interests as well.

²¹There had been many earlier warnings that the media was subject to political pressures from TVA. In 1969, the year that Congress passed NEPA, Justice Douglas wrote an extended expose of Tellico, with photographs, analyzing the project's deficits and the extraordinary development potential available for river valley agriculture and tourism, strongly hinting that it should be enrolled in the Wild and Scenic

River System. *The National Geographic* agreed to publish it! The citizens thought they had scored a coup, and now America would see what really was at stake in the valley. But TVA found out about the article's imminence, called the *Geographic's* editor, Frederick G. Vosburgh, and persuaded him to cut it. TVA carried its suasion to other magazines. Justice Douglas ultimately was able to find only one national periodical to publish the article. He added fishing details and some heavy sarcasm and published it in *True*, a men's magazine, where it ran behind a cover of a bathing beauty on the beach, and needless to say it did not build an informed public debate. William O. Douglas, "This Valley Waits to Die," *True: For Today's Man*, May 1969, p. 40.

²²See Plater, "Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance," 32 *Environmental Law* 1 (2002).

²³Faced with a serious lack of development interest, TVA's first development proposal was to use valley lands for a toxic waste dump. See letter from Charles Dean, TVA Chairman, to Lamar Alexander, Governor of Tennessee (May 20, 1982) (available at Tellico Archives, Boston College Law School); see also "Waste Dump at Tellico Possible," *Knoxville News-Sentinel*, Sept. 29, 1982, at A1, col. 1 (final home ed.). We citizens quickly blocked that toxic facility with an embarrassing leak to the media.

Since then the Tellico Project has become primarily a second-home development project for wealthy retirees, on land transferred on advantageous terms to a development corporation owned in part by Walmart's Sam Walton. As on other TVA lakes, motorized recreation abounds. The industrial park, smaller than that proposed in the citizens' alternative development plan, has attracted a number of industries for which barge transit has been totally irrelevant. With the demise of the Timberlake scheme the farmers were unable to repurchase their condemned lands and now can go onto their old properties only in the capacity of servants or employees. The silos of their demolished barns still stick up forlornly here and there from the murky waters of the shallow reservoir. 🚫

Zygmunt J. B. Plater is a professor at Boston College Law School. He received his law degree from Yale and his LL.M. and S.J.D. from the University of Michigan. Plater teaches and writes in the fields of environmental law, property and land use law, and administrative process. He has handled national endangered species litigation, most notoriously six years spent on the case of the Snail Darter vs. TVA's Tellico Dam in administrative and congressional proceedings and federal litigation up through the U.S. Supreme Court. Plater was chair of the State of Alaska's Oilspill Commission Legal Research Task Force after the stranding of the Exxon-Valdez, and has been a legal consultant in many environmental law cases, including the toxic litigation, Anderson et al. v. W.R. Grace et al., the subject of the book and movie A Civil Action.