By: Zygmunt J.B. Plater

30 Years of Notoriety: A Kaleidoscope of Lessons from the Eastern District of Tennessee’s Biggest Fish Story Ever

Perhaps the most dramatic national legal story ever to come out of the Eastern District was the controversy called Hiram Hill, et al. v. Tennessee Valley Authority — the little endangered snail darter fish versus the TVA's Tellico Dam — a Tennessee lawsuit that went national and in fact became famous (or notorious) around the world. The case still echoes today almost thirty years later, in caselaw, politics, and as an ironic, iconic reference in popular culture.1

The UT College of Law’s April 18th symposium, “A 30-Year Retrospective on the Legendary Snail Darter Case,” offers an engaging opportunity to finally put the case in accurate perspective, free of the spins, disinformation, and politicking that graced its years of notoriety, 1973-1980.

For those who don’t know much about the case, [see text box for the snail darter/Tellico Dam case chronology—Eds.] how, if at all, is it remembered today? Probably like this:

— A two-inch threatened minnow, pulled out of a hat at the last possible moment — and the federal Endangered Species Act — were mis-used by extremist environmentalists to block completion of the economically beneficial $150-million hydroelectric Tellico Dam.

On the objective retrospective record, however, it turns out that every single element of that caricature was inaccurate.2 The UT conference sessions explores this fascinating case’s twists and turns in terms of law, science, policy, politics, and media.

THE DARTER CASE’S KALEIDOSCOPE...

Consider the remarkable array of different focal points, legal and otherwise, reflected in the intricate snail darter-Tellico Dam saga —

• Citizen standing for statutory enforcement.

Only in America does a legal system allow citizens from any walk of life with no money or political power to walk into court and take on the role of private attorneys-general to enforce public laws. The snail darter case explicitly illuminated some remarkable changes in governmental dynamics triggered by the citizen standing reforms from the Sixties.

• Natural, historical, recreational, and cultural treasures... how do you value these?

Any society's quality of life is built up of values ranging far beyond marketplace economics. Although the case for the darter turned out to be dominant in hard cash register economic terms as well, it nevertheless involved many public values that were difficult to weigh in legal process terms. The “remand to Congress” effect of Endangered Species Act enforcement provided an unusual forum for consideration of many of these values.

• Public policy-making: benefits/costs/alternatives

The legal process of public policy decisionmaking sometimes tracks basic human rationality — weighing a proposal’s true benefits, costs, and alternatives — and sometimes does not. The darter case reveals the internal agency pressures that make that rationality process difficult to implement.

• The difficulties of litigating economics in court.

In the branches of modern government, the courtroom provides the least effective forum for scrutinizing the specific economic details of a complex public case. Judges in general are institutionally and personally ill-suited to analyze the contentious and policies-laden specifics of project and program economics.

Ultimately it was a novel new Cabinet-level agency, the “God Committee” created by the 1978 Baker-Culver ESA amendments, that dug deep into the economics of Tellico Dam and the darter's

river-based alternatives. As Committee member Charles Schulze, chairman of the President’s Council of Economic Advisers, put it: 3

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

• Iron Triangles and the difficulties of democratic transparency.

Throughout modern American government, political establishments form “Iron Triangles,” as the political scientists call them. In the darter saga, the efforts to overturn the ESA were ultimately carried to conclusion by a coalition of iron triangles including the Corps of Engineers concerned about the $4 billion Tennessee-Tombigbee Waterway, and other resource establishments like the Forest Service/timber industry coalition, BLM/ranchers and miners, and the FERC/Edison Electric Institute establishment. All these interest blocs were extremely worried that the ESA would open their projects and programs to transparency and economic scrutiny.

• The Fourth Branch of Government: the Media.

Perhaps the most decisive element of the successful battles to dam the Little Tennessee River was the Press. The citizens assumed that, at the start, the media would ballyhoo the “silly-little-fish-against-huge-hydro-dam” caricature and the case’s supposed “environmental extremism.” But we also assumed that the Press, as modern American government’s most significant source of

A SNAIL DARTER TIMELINE

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
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<tbody>
<tr>
<td>1936</td>
<td>Tellico site listed by TVA as one of 69 potential dam sites.</td>
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<tr>
<td>1940</td>
<td>TVA begins construction of Tellico Dam.</td>
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<td>1947</td>
<td>Boeing abandons Timberlake project citing economic impracticality.</td>
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<tr>
<td>1959</td>
<td>TVA Chair Red Wagner posits a Tellico Dam to be primarily justified by land development and recreation benefit claims.</td>
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<td>1968</td>
<td>Farmers and environmentalists get NEPA injunction, based on TVA's lack of EIS.</td>
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<td>1972</td>
<td>TVA builds Tellico Dam; based on land development for “Timberlake New Town” to be built by Boeing Corp.; concrete dam built, $4 million.</td>
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<tr>
<td>1973</td>
<td>New EIS deemed sufficient—NEPA injunction lifted.</td>
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<td>1975</td>
<td>Boeing abandons Timberlake project citing economic impracticality.</td>
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<tr>
<td>1977</td>
<td>Sixth Circuit grants injunction.</td>
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<tr>
<td>1978</td>
<td>Tellico site listed by TVA as one of 69 potential damsites.</td>
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<tr>
<td>1979</td>
<td>Cabinet-level God Committee, created by Baker-Culver ESA Amendments, unanimously upholds snail darter injunction on economic grounds. Cherokee file religious freedom lawsuit; Judge Taylor dismisses; 6th Cir. affirms.</td>
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<td>1980</td>
<td>Judge Rob't Taylor finds facts of ESA §7 violation, declares injunction.</td>
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<td>1982</td>
<td>TVA proposes use of valley as toxic waste facility; citizens' public outcry sinks proposal.</td>
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<tr>
<td>1984</td>
<td>TVA begins cooperation with Wal-Mart-linked developers to create high-income resort homes.</td>
</tr>
<tr>
<td>1984</td>
<td>Some light industrial development locates near Hwy. 411; extensive flatwater recreation around lake; several communities of high-income resort homes.; darter transplants allow downlisting of the darter to “threatened” status.</td>
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1. This is the case of Hiram Hill, et al. v. Tennessee Valley Authority, decided in the Eastern District of Tennessee.
2. This is the case of Hiram Hill, et al. v. Tennessee Valley Authority, decided in the Eastern District of Tennessee.
3. Charles Schulze, member of the President’s Council of Economic Advisers.

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DICTA

April 2008

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The 2008 High School Mock Trial Competition was held on February 16th and February 23rd. Eight teams competed this year, with West High School defeating Bearden High School in the final round to win first prize. West will go on to compete in the state mock trial competition in Nashville.

The Mock Trial Committee would like to thank all of the volunteers who assisted with this year’s competition. Special thanks go to Hon. Bruce Guyton, Howard Jarvis, Thomas Dickenson, Adrienne Anderson, Robert Murrian, Amye King, Greg McMillan, and Penny Arning for volunteering to serve as judges of the preliminary rounds of the competition, and to Hon. Michael Moyer for presiding over the championship round.

Other KBA members who volunteered to help with this year’s competition are: Ben Jones, Hillary Jones, Mark Castleberry, Ed Meade, Michael Stanuszek, Meghan Morgan, Eric Butler, Latisha Stubblefield, Katrina Atchley, Jason Steinele, Chris Sanders, Chris McCarty, Shelley Breeding, Ryan Stinnett, Steve Johnson, Daniel Headrick, Preston Hawkins, Matt Grossman, Matt Birdwell, Sherri DeCosta, Keith Allen, Benjamin Mullins, Kenny Saffles, Joe Christian, Tasha Blakney, and Tim Housholder. Additionally, several members of the Knoxville Association of Legal Professionals also assisted with this year’s competition, including Lita Ferrell, Susan Porter, Mary Lou Freeman, Tina Lolfin, and Julie May.

If you are interested in coaching a local high school team for next year’s competition, or if you are interested in volunteering to serve as a judge, scorer, or bailiff for the 2009 competition, please contact Sonda Gifford or Mike Baisley at 215-1000.

A R O U N D  T H E  B A R  (Continued from Page 18)

public information, would pretty quickly start digging deeper into the intriguing and surprising merits of the case, and the nation would see the truth. But it never happened. The darter story, then and now, offers a sobering lesson for lawyers, particularly public interest lawyers, about the need to shape not only the legal profile of a case, but also the media transparency that allows the public to see the real merits.

• and further Selected Short Subjects...

Exploring the history of the snail darter case 30 years later opens up a host of other useful analytical doors:

—The canons of equity and how statutes invoke a very different injunctive balancing process than with the common law.
—The “canary-in-the-coalmine” statutory design, with sensitive endangered species acting as legal barometers of threatened human welfare qualities.
—State-federal interactions, illustrated in TVA’s repulse of Gov. Winfield Dunn’s request for a non-dam design for the project development.
—Perspectives on legal hesitancy about Native American religions, and the American Indian Religious Freedom Act, 42 U.S.C. § 1996; the river and State-federal interactions, illustrated in TVA’s repulse of Gov. Winfield Dunn’s request for a non-dam design for the project development.
—The evolution of a federal agency’s internal dynamics, from idealistic innovative mission to inertial institutional persistence.

In an online poll of environmental law professors from across the country seeking a consensus on the ten most important court cases in the history of environmental law, TVA v. Hildreth received the highest number of votes, almost twice as many as the two cases that placed second.

There were more than a dozen judicial decisions in the course of the TVA campaign to build the Tellico Dam. See United States ex rel. TVA v. Two Tracts of Land, 367 F. Supp. 316 (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.) (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) (condemnation challenge), 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).


For an essay with slides on this case, see http://www.law.mercer.edu/elaw/zygplater.html.

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+ million 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 mossomia tanae) is a perch, not a minnow, and fully 2½ inches long when mature, not just 2 inches.

1 U.S. Dep’t of the Interior, Endangered Species Committee Hearing 43 (Jan. 23, 1979), at pp. 25-26; Statement of Charles Schultz, Chairman of the President’s Council of Economic Advisors. (emphasis added).


West High Mock Trial Team:
Erin Gormley, Carrie Cox, Reedy Swanson, Ally Diaz, Corey de Robhan, Chancellor Michael Meyers, Noelle Harb, Amanda Swanson, Evangelene Mee, Les LaCamera, Laura Poland and Sammy Murrian. Carrie Cox was Best Witness and Noelle Harb was Best Attorney

Bearden High Mock Trial Team:
Julia Huskin, Brittany Smith, Katie Morse, Erica Moore, Katherine Mencer, Amanda Bischoff, Jennifer Dobkins, Parker Dabbs, Sally White, and Arielle Notte. Chancellor Michael Moyer is also included in the photo.

Zygmunt J. B. Plater, Professor, Boston College Law School, A.B., Princeton University, J.D., Yale University, LL.M., S.J.D., University of Michigan. Professor Plater has taught on seven law faculties, and handled national endangered species litigation—most notoriously six years spent on the case of the endangered snail darter fish vs. TVA’s Tellico Dam in administrative and congressional proceedings and federal litigation up through the U.S. Supreme Court.

April 2008