

1979

Environmental Law - Snail Darters - A Threat to Private Use of the Public Domain - Tennessee Valley Authority v. Hill

David D. Freudenthal

Follow this and additional works at: https://scholarship.law.uwyo.edu/land_water

Recommended Citation

Freudenthal, David D. (1979) "Environmental Law - Snail Darters - A Threat to Private Use of the Public Domain - Tennessee Valley Authority v. Hill," *Land & Water Law Review*: Vol. 14 : Iss. 1 , pp. 105 - 117.
Available at: https://scholarship.law.uwyo.edu/land_water/vol14/iss1/3

This Note is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

CASE NOTE

ENVIRONMENTAL LAW—Snail Darters—A Threat to Private Use of the Public Domain? *Tennessee Valley Authority v. Hill*, 98 Sup. Ct. 2299 (1978).

Last summer the U.S. Supreme Court decided to strictly construe the provisions of the Endangered Species Act of 1973, (ESA),¹ thereby protecting a species of Tennessee fish from extinction by completion of a dam constructed by the Tennessee Valley Authority. The evolution of the litigation and the expansive language of the opinion suggest extensive application of the decision and the ESA. This note discusses the shadow cast by this decision over the already complicated maze of regulation governing private use of the public domain.

Congress originally authorized the Tennessee Valley Authority (hereinafter TVA) to construct the Tellico Dam and Reservoir Project in 1966.² Tellico is a multipurpose regional development project designed to stimulate shoreline development, produce electricity, provide flood control and generally encourage economic growth in a traditionally underdeveloped region of Tennessee.³ From its inception, the project encountered extended public opposition in the political and legal arenas.⁴ Two significant events resulting in the eventual demise of the project occurred in 1973 after 35 million dollars had been expended on the project.⁵ In August, 1973, Dr. David Eitnier discovered a new variety of perch popularly known as the snail darter. Four months later Congress passed the Endangered Species Act of 1973. The 1973 ESA was the sweeping culmination of a legislative process inaugurated by the passage of the Endangered Species Preservation Act of 1966.⁶

In January, 1975, opponents of the dam petitioned the Secretary of the Interior to add the snail darter to the Endangered Species List. In November, 1975, over TVA's objections, the snail darter was designated as an endangered

Copyright©1979 by the University of Wyoming.

1. 16 U.S.C.A. 1531 *et seq.* (Supp. IV 1974).
2. *Hill v. Tennessee Valley Authority*, 549 F.2d 1063, 1067 (6th Cir. 1977).
3. *Tennessee Valley Authority v. Hill*, 98 Sup.Ct. 2279 (1978).
4. Brief for the Respondents at 6; *TVA v. Hill*, *supra* note 3. Litigation included challenges under NEPA, *EDF v. TVA*, 339 F.Supp. 806 (E.D.Tenn. 1972), *aff'd* 468 F.2d 1164 (6th Cir. 1972).
5. GENERAL ACCOUNTING OFFICE REPORT EMD - 77058, *The TVA Tellico Project—Costs, Alternatives and Benefits* October 14, 1977, quoted in Brief for Respondents at 13, *TVA v. Hill*, *supra* note 4.
6. 16 U.S.C. §§ 668aa-668cc-b (1970) as amended by Pub. L. No. 91-135 § 12(e) (1969).

species primarily because of the threat posed by the Tellico project.⁷ In the original complaint, filed in 1976, Plaintiffs sought to enjoin further construction of the Tellico Project under Section 7 of the Endangered Species Act.⁸ The relevant portion of Section 7 requires that all federal agencies utilize their authority in furtherance of the ESA "by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species" or destroy the habitat of such species. The District Court specifically found that the snail darter and its habitat had been properly designated by the Secretary of the Interior and that the Tellico project would probably destroy the species and its habitat.⁹ However, the District Court spurned the plaintiff's request for an injunction on the grounds that Congress could not have intended that a court halt impoundment of water behind a fully completed dam if an endangered species were to be found on the day the gates were scheduled to close.¹⁰ The District Court considered TVA's contention that Congressional Appropriations for the Tellico project constituted repeal by implication of any portions of the ESA inconsistent with completion thereof, but chose not to embrace it. The decision appears to rest on the district court's view that an injunction would be unreasonable.

In a "decision that may have taken many observers by surprise",¹¹ the Sixth Circuit Court of Appeals reversed.¹² The Appeals Court concurred in the lower court finding that the effect of the Tellico project was to destroy the snail darter. However, the Court quickly dismissed TVA's

7. *Hill v. Tennessee Valley Authority*, 419 F.Supp. 753, 757 (E.D. Tenn. 1976).

8. Though it was not apparent at the time of passage, Section 7 is the pivotal portion of the Act.

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this [Act] by carrying out programs for the conservation of endangered species and threatened species listed pursuant to [Section 4 of this Act] and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical. 16 U.S.C.A. Section 1536.

9. *Hill v. Tennessee Valley Authority*, 419 F.Supp. 753, 756, 757 (E.D. Tenn. 1976).

10. *Id.* at 873.

11. *Supreme Court Protects Snail Darter from TVA: Congress Poised to Weaken Endangered Species Act*. 8 ENVIRONMENTAL LAW REPORTER 10154, 10156, August, 1978.

12. *Hill v. Tennessee Valley Authority*, 549 F.2d 1064 (6th Cir. 1977).

arguments based on legislative history and implied repeal by subsequent appropriations. It found "the meaning and spirit of the Act . . . clear."¹³ The Appeals Court declined to find injunctive relief unreasonable. According to the Court, the Legislative and Executive branches were the proper places for weighing the reasonableness of alternatives.¹⁴

The Supreme Court granted a writ of certiorari and the majority opinion by Chief Justice Burger purported to focus on two narrow questions: (a) whether continued congressional appropriation constituted implied repeal of ESA as applied to Tellico and (b) whether the 1973 ESA required a court to enjoin operation of a virtually completed project authorized prior to 1973.¹⁵ Apparently disregarding this narrow statement of the issues, the court proceeded to address the broader application of the ESA and the division of responsibilities among the branches of government. The court found "nothing in the appropriations measures to support the implied repeal."¹⁶ Speaking for the majority, Chief Justice Burger reviewed the legislative history of Section 7 and stated that, "One would be hard pressed to find a statutory provision whose terms were plainer."¹⁷ Congress did not intend to grandfather projects already authorized and the "very words affirmatively command all federal agencies."¹⁸ The statute is to be strictly interpreted and it is not for the court to question "the wisdom or unwisdom of a particular course selected by the Congress."¹⁹

Justice Powell's dissent, in which he was joined by Justice Blackman charged that the majority's reading of Section 7 was "an extreme example of a literalist" approach, completely disregarding common sense and the public weal.²⁰ Nonetheless, the majority retained the view that manifest congressional intent did not recognize judicial balancing. Furthermore, the balance could never favor project continuance over loss of a single subspecies because the Congress meant to halt such extinctions, whatever the cost.²¹

13. *Id.* at 1072.

14. *Id.* at 1071.

15. *Tennessee Valley Authority v. Hill*, *supra* note 3, at 2283.

16. *Id.* at 2293.

17. *Id.* at 2291.

18. *Id.* at 2291.

19. *Id.*

20. *Tennessee Valley Authority v. Hill*, *supra* note 3, at 2297.

21. *Id.* at 2295.

A WARNING OR A TREND

One commentator has suggested that the opinion has "overtones of ridicule."²² The almost sarcastic emphasis on literal interpretation and deference to Congress is seen as a "red flag" warning that Congress should modify its approach to Endangered Species legislation and, by implication, other environmental legislation.²³ Such analysis is predicated on the illusory assumption that this case is an 'exception', somehow inconsistent with earlier decisions.

Only two cases are cited by the court in the lengthy discussion of the ESA²⁴ and neither reference appears essential to the Court's final position. However, the most carefully reasoned prior case applying Section 7 of the Endangered Species Act recognized the mandatory obligation of federal agencies to insure that their actions do not harm endangered species or their habitat.²⁵ An amicus curiae brief submitted on behalf of several national environmental groups²⁶ relies on a diverse set of cases to support the view that Congress reserved to itself the right to balance the various factors determining the fate of an endangered or threatened specie.²⁷ Justice Powell's dissent attempts to disregard these cases by embracing TVA's reliance on an 1892 case²⁸ which suggested that courts could not give statutes meanings which made it appear that the legislature intended an absurd result.²⁹ More persuasive than any single case, is the recognition that the current trend of the federal courts including the Supreme Court, is to defer to the Congress (or its delegated agency) to make the complex value judgments inherent in environmental questions. Previous opinions are replete with

22. Kerschten, *Acting on Endangered Species*, Vol. 10, No. 29 NATIONAL JOURNAL, 1176.

23. Chief Justice Burger's opinion attempts to distinguish this case from previous National Environmental Policy Act cases on ground that the statutes serve different purposes and that NEPA contains moderating language such as "weigh", "consider" and "significant". *TVA v. Hill*, *supra* note 3, 4682, N. 12.

24. *Id.* at 4681; *Ex parte Collett*, 337 U.S. 55, (1949). *Id.* at 4682, National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453 (1974).

25. National Wildlife Federation v. Coleman, 529 F.2d 359, 373 (5th Cir. 1976), *cert. denied sub nom.* Boteler v. National Wildlife Federation, 429 U.S. 979 (1976).

26. Brief Amicus Curiae of Environmental Defense Fund, National Audubon Society, National Wildlife Federation, National Resources Defense Council, Sierra Club and Defenders of Wildlife, *TVA v. Hill*, 46 L.W. 4673, 57 L.Ed.2d 117, 98 S.Ct. 1067 (June 15, 1978).

27. *Id.* at 8, 9. Cases cited include *Gore v. United States*, 357 U.S. 386 (1957), *Gregg v. Leargia*, 428 U.S. 153 (1975), *Peters v. Habby*, 349 U.S. 331, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1976).

28. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

29. *TVA v. Hill*, *supra* note 3, at 2302.

references to the Congressional policy setting role and deference to the informed discretion of administrative agencies.³⁰ While the fact situation in *TVA v. Hill* and the archly worded majority opinion have caught the popular imagination, the position of the Court was foreseeable and consistent with earlier decisions.

ESA AND PUBLIC LAND STATES

The Court's opinion makes it quite clear that the provisions of Section 7 apply to all federal actions. In public land states, such as Wyoming, nearly all major resource allocation decisions will be affected. Federal agencies control forty-seven percent (47%) of Wyoming's surface area and eighty-three percent (83%) of the State's subsurface. Federal decisions, from coal leasing to grazing permits, directly impact Wyoming citizens. Unfortunately, the number of endangered and threatened species as well as the extent of their critical habitats is largely unknown.³¹ Major inventories and surveys will have to be conducted before the necessary information will be partially available. Research in this area will continue *ad infinitum* because the ESA reflects a greatly expanded federal commitment to the preservation of endangered species.³² All members of the plant and animal kingdoms are included.³³ Similarly, the species need not be threatened with worldwide extinction, it need only be threatened or endangered within "any significant portion of its range."³⁴ There are over two million full species of animals and plants in the world. More than two hundred thousand of those may need to be listed as endangered or threatened. Furthermore, an additional fifteen to twenty thousand species are discovered each year.³⁵ These figures

30. *See*, Union Electric Co. v. EPA, 427 U.S. 426 (1976) (air pollution); *DuPont de Nemours v. Train*, ___ U.S. ___ (February 23, 1977) (water pollution), *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (environmental impact statement process).

31. Interview with Don Dexter, Assistant Director Operations, Wyoming Game and Fish Commission, August 26, 1978.

32. For further discussion see: Mallory, *Obligations of Federal Agencies Under Section 7 of the Endangered Species Act of 1973*, 28 STAN. L. REV. 1241.

33. 16 U.S.C.A. Section 1532(5)(9).

34. 16 U.S.C.A. Section 1532(4).

35. "There are approximately 1.4 million full species of animals and 600,000 full species of plants in the world. Various authorities calculate as many as 10% of them—some 200,000—may need to be listed as endangered or threatened. When one counts subspecies, not to mention individual populations, the total could increase to three to five times that number." *TVA v. Hill*, 46 U.S.L.W. 4673, 4675 at N. 8. "An additional 15,000 to 20,000 species are discovered each year." 21 ENCYCLOPEDIA BRITANNICA 729 (14th Ed. 1972).

multiply several times when subspecies are included as required by the ESA.³⁶ A subspecies may be a localized population so that a development may threaten a subspecies while not threatening the species as a whole.³⁷ The practical significance of this distinction was illustrated in *National Wildlife Federation v. Coleman*.³⁸ In that case the recent discovery that the Mississippi and Florida sandhill cranes are distinct subspecies ultimately led to the re-routing of an interstate highway.

Serious problems develop when federal agencies pursuing their primary missions take actions which contravene the purposes and directives of the ESA.³⁹ The frequency and severity of the problems will depend on the interpretation of the phrase "actions authorized, funded or carried out by" federal agencies, and the determination of the threshold impact that an agency action must have on an endangered species to trigger the application of the ESA.

The absence of qualifying language in the 1973 ESA is in sharp contrast to previous legislation in this area.⁴⁰ After reviewing the legislative history, the Supreme Court made it clear that the provisions of Section 7 applied to all federal actions.

One would be hard pressed to find a statutory provision where terms were any plainer It's very words affirmatively command all federal agencies 'to insure that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence of an endangered species or *result* in the destruction or modification of habitat of such species' This language admits of no exceptions. (Emphasis the Court's)⁴¹

36. 16 U.S.C.A. Section 1532 (12) (Supp. IV 1974).

37. For an informative discussion of specie-subspecie distinctions see G. STEBBINS, PROCESSES OF ORGANIC EVOLUTION, (2d Ed. 1971) PP. 88-90.

38. *National Wildlife v. Coleman*, 529 F.2d 359, 362 N. 3 (5th Cir. 1976).

39. "It is further declared to be the policy of Congress that all federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C.A. 1531(c). See also, Note 8, *supra*.

40. Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, §§ 1-5, 12, 83 Stat. 275, amending Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, §§ 1-3, 80 Stat. 926, repealed, Endangered Species Act, Pub. L. No. 93-205, §§ 14, 87 (Stat. 903, 1973). This act was repealed by ESA of 1973.

41. *Tennessee Valley Authority v. Hill*, *supra* note 3, at 2291.

Application of the ESA presents very different problems than the National Environmental Policy Act (NEPA). Extensive litigation of NEPA has produced a workable standard that requires federal agencies to "consider ecological factors when dealing with activities which may have an impact on man's environment."⁴² The environmental impact statement procedure only insures that such consideration take place.⁴³ Under ESA, an agency must not only insure consideration of endangered species but the agency bears the burden of insuring that its action does not jeopardize the species or its habitat. This fact, combined with the liberal ESA provisions for citizen suits⁴⁴ will no doubt lead to litigation by environmental or citizen groups seeking to halt development requiring federal action.⁴⁵

The ESA speaks only of federal agency actions but a state agency acting in cooperation with a federal agency is subject to an injunction issued against the federal agency. This is true even if the state agency is not alleged to have violated Section 7.⁴⁶ Thus, any action taken by Wyoming state agencies, such as the Highway Department, in conjunction with federal programs would appear to be covered by the provisions of ESA. Analyzing the implications of Section 7 becomes increasingly difficult when private actions *authorized* by a federal agency such as the mining of federal coal or the use of public lands for grazing are considered. Section 7 on its face would appear to cover these actions. The facts of this case did not force the court to specifically determine the issue.

The concept of a "major federal action significantly affecting the quality of the human environment" has been extensively considered by the courts in the NEPA context.⁴⁷ In *Kleppe v. Sierra Club*, the Supreme Court suggested that

42. *Zabel v. Tobb*, 430 F.2d 199, 211 (5th Cir. 1970).

43. The Fish and Wildlife Coordination Act contains mandatory language more closely paralleling Section 7. 16 U.S.C.S. 662. Violations of this Section have prompted courts to grant redress through injunctive relief. *Akers v. Resor*, 339 F.Supp. 1375 (W.D. Tenn. 1972).

44. 16 U.S.C.A. Section 1540.

45. In a case currently pending in the U.S. District Court of Nebraska, the NWF relies in part on Section 7 violations in requesting an injunction halting all further work on the Missouri River Basin Power Project located in Wheatland, Wyoming. Plaintiffs Brief at 14, *State of Nebraska, et al. v. National Rural Electrification Administration, et al.* Docket No. CV 76-L-242 (D. Neb. July, 1978).

46. *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976).

47. Phrase is found in § 102(2)(c) of National Environmental Policy Act of 1969, 42 U.S.C. § 1332(2)(c).

federal actions included steps "to issue a lease, approve a mining plan, issue a right of way permit, or take other action to allow private activity."⁴⁸ If the Court is willing to include these items within the definitions of major federal action under NEPA, it is reasonable to conclude that the same type of actions would be included under ESA, particularly since the application of Section 7 is not limited to "major" federal actions.

The majority's harsh treatment of Justice Powell's dissenting opinion⁴⁹ suggests that not only are such authorizations covered but that the private party may be in continuing jeopardy of losing the authorization. For example, a company obtaining a five (5) year permit to mine coal on public lands pursuant to the Surface Mining Control and Reclamation Act of 1977⁵⁰ would necessarily be subject to the provisions of Section 7 when the permit is granted or renewed. However, the Secretary of Interior may also be obligated to order cessation of operations,⁵¹ if an endangered or threatened species which had been properly designated at the time of the original action was subsequently identified within the permit area, without regard to the existing permit.

Indeed a District Court decision issued subsequent to *Hill*, suggests that the provisions of Section 7 apply to federal actions even if the habitat or species is designated after the federal permit or authorization is granted. In *State of Nebraska v. National Rural Electrification Administrations*, the court discussed a Section 404 permit granted by the Corps of Engineers prior to the designation of a downstream area as a critical habitat.

"The fact that a stretch that may be affected by the Project was not declared a critical habitat until after issuance of the permit does not alter the duties of the Corps as to that habitat. Colonel Ray is not faulted for not treating the area as critical habitat before it was so declared; it is simply that he must now treat it as such in accordance with the Act."⁵²

48. *Kleppe v. Sierra Club*, 427 U.S. 390, 399-400 (1976).

49. *Tennessee Valley Authority v. Hill*, *supra* note 3, at 2287.

50. Public Law 95-87, 30 U.S.C. 1201 *et seq.*

51. 30 U.S.C. 1271.

52. *State of Nebraska v. Rural Electrification Administration*, No. 78-L-90 (D. Neb., Oct. 2, 1978).

An actual example of the impacts of ESA is the Department of Interior's decision to employ the presence (or possible presence) of an endangered species (or critical habitat) as one of the criteria for making an administrative determination to designate certain federal lands as unsuitable for mining.⁵³

Preliminary data prepared by the Department of Interior suggests that 1% of the federal coal in Wyoming may not be available for mining due to the presence of the blackfooted ferret. In Utah the percentage of coal affected may be as high as 29%.⁵⁴

Neither the courts nor the administrative agencies have determined the exact level of involvement an agency action must have with an endangered species or critical habitat to trigger the provisions of Section 7. One author has analogized ESA to NEPA and concluded that the threshold should be extremely low.⁵⁵ This would be consistent with *National Wildlife v. Coleman*⁵⁶ where the court stated that Section 7 applies when any agency action "may affect" an endangered species or critical habitat.

In determining whether an action exceeds the threshold, it is necessary to decide what impacts will be included. An opinion issued by the Solicitor's Office, Department of Interior, states that: "In our view, Section 7 and the Secretary's regulations require the consideration of not only the impacts of the particular project subject to consultation, but also the cumulative effects of other activities or programs which may have similar impact."⁵⁷ Similarly, the 5th Circuit Court of Appeals has held that the Federal Highway Administration was in error for not considering the impact of potential private residential and commercial developments associated with the construction of a highway.⁵⁸

53. Inter-Agency Task Force, "Issue Papers: Intra-regional Matters Affecting Designs of A Leasing Program" Department of Interior, July, 1978.

54. See, The Preliminary Draft E.I.S. for the Federal Coal Management Program, Sept. 29, 1978, Department of Interior P. 1-45; See also, 43 Federal Register 41828.

55. Obligations of Federal Agencies under Section 7 of the Endangered Species Act of 1973, *supra* note 33, at 1269.

56. *National Wildlife Federation v. Coleman*, *supra* note 26, at 371.

57. Solicitor's Opinion M-36-905, quoted in Plaintiff's Brief at 22, *State of Nebraska v. N.R.E.A.*, *supra* note 45, at 22.

58. *National Wildlife Federation v. Coleman*, *supra* note 26.

Congress and the Courts have placed the major responsibility for compliance with ESA on the federal agencies. This results in substantial agency discretion. The American Bald Eagle, for instance, is protected as an endangered specie. In evaluating a specific tract of land for mining the Bureau of Land Management must first determine whether an eagle habitat (a nest) is present. If so, then they must determine the size of the necessary buffer zone between the habitat and any resource development. The buffer zone may range from one quarter to ten miles depending on the agency's evaluation of all factors involved.⁵⁹ This decision significantly affects mining plans and coal leases because a typical seam 70 feet thick can produce over a million tons of coal for each 8.7 acres of land disturbed.⁶⁰

ADMINISTRATIVE DISCRETION: THE STANDARD OF SCRUTINY

A party aggrieved by an administrative decision under the ESA may not find a sympathetic ear in the courts. In April, 1978, the Supreme Court issued an opinion that appears to restrict the ability of the courts to control the administrative conduct of federal agencies.⁶¹ The Court held that proper procedural review of agency actions (except in extraordinary cases) extended only to insuring that agencies adhered to the minimum procedural requirements contained in Section 5 of the Administrative Procedure Act (APA).⁶² In deciding *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, the Court reversed "a highly regarded tradition in the courts of appeals, particularly the D.C. Circuit, of requiring administrative agencies to establish hearing procedures more elaborate than otherwise required under Section 553 where necessary in the interest of fairness to the parties."⁶³ The Court also admonished the

59. Interview with Bob Brown, Deputy Director for Planning, Bureau of Land Management, Wyoming, September 10, 1978.

60. WYOMING DEPARTMENT OF ECONOMIC PLANNING AND DEVELOPMENT, COAL DEVELOPMENT ALTERNATIVES, (1974).

61. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 46 U.S.L.W. 4301 8 ELR 20288, 20297 (April 3, 1978). The opinion reviews the decisions in *Natural Resources Defense Council v. United States Nuclear Regulatory Comm'n*, 547 F.2d 633, 6 ELR 20614 (D.C. Cir. 1976) (remanding operating license issued to Vermont Yankee Corp.) and *Aeschliman v. United States Nuclear Regulatory Comm'n*, 547 F.2d 622, 6 ELR 20599 (D.C. Cir. 1976) (remanding construction permit issued to Consumers Power Corp.).

62. 5 U.S.C. § 553.

63. *Vermont Yankee: Supreme Court Sets New Limits on Judicial Review of Agency Rule Making*, 8 ENVIRONMENTAL LAW REPORTER 10103, 10107 (1977).

lower court not to "impose its own notion" of proper procedures on agencies entrusted with substantive functions by the Congress.⁶⁴

Endangered species cases in the Sixth and Eighth Circuits⁶⁵ applied the standard of review established in *Citizens to Preserve Overton Park, Inc. v. Volpe* (U.S. 1971).⁶⁶ Namely that the agency decision was to be overturned only "if it was arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" and/or it "was outside its scope of authority."⁶⁷ The two circuits arrived at different results but the Sixth Circuit's view would appear to be sounder authority since it was affirmed by the Supreme Court in *TVA v. Hill*.⁶⁸ The Sixth Circuit found TVA's decision to finish the Tellico project to be in direct violation of Section 7 and 'not in accordance with the law'. The Court discussed the role of the Secretary of Interior in insuring that the actions of federal agencies were in compliance with ESA. According to the court, compliance standards formulated by the Secretary "may properly influence final judicial review." The Court saw "positive benefit to be gained by impressing his criteria with a judicial imprimatur."⁶⁹ Increased judicial deference to administrative decision-making in the environmental area combined with the Secretary of Interior's role under ESA may make it extremely difficult to challenge agency determinations in this area.

CONGRESSIONAL RESPONSE

Severe public and political reaction to the Supreme Court's decision was to be expected.⁷⁰ Numerous amendments to the ESA were immediately introduced in both houses of Congress. On October 15, 1978, the Congress established a cabinet-level committee with power to grant exemptions from the Act. The committee would be composed of the Secretaries of Agriculture, the Army, and the Interior, the Chairman of the Council of Economic Advisors,

64. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, *supra* note 57, at 27.

65. *Hill v. TVA*, *supra* note 2, *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976).

66. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

67. *Id.* at 413-414.

68. *Tennessee Valley Authority v. Hill*, *supra* note 3.

69. *Hill v. Tennessee Valley Authority*, *supra* note 2, at 1070.

70. 8 ENVIRONMENTAL LAW REPORTER 10154, 10157.

the Administrators of the Environmental Protection Agency and the National Oceanic and Atmospheric Administration, and the governor of the state which is affected by the action for which the exemption is sought. Five members of the committee would have to agree for an exemption to be granted. The committee can exempt a project only if four conditions are met:

“(A) there are not reasonable and prudent alternatives to the agency action; and

(B) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest; and

(C) the action is of regional or national significance; and

(D) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.”

The supercommittee option was selected after the Congress rejected a proposal that projects seeking an exemption be considered on individual basis by the whole Congress. An attempt to exempt nearly all projects was also rejected. The practical effect of the Congressional amendments appears to be minor. The process remains largely the same except that a final administrative appeal may be made to the special committee. Conditions which must be met before a project can be exempted combined with the committee membership will make exemptions difficult to obtain. The sheer cost of pursuing the appeal process will probably prohibit individual operators or ranchers from seeking relief through this committee.

CONCLUSIONS

The Endangered Species Act of 1973 on its face imposes mandatory restraints on actions by federal agencies. The Supreme Court decision to strictly apply the ESA leaves lit-

tle doubt that actions authorizing private use of the public domain are included. Pursuant to Section 7 of the ESA, federal agencies must insure that authorized actions do not adversely effect endangered species or their habitats. Good faith adherence to ESA will be difficult because little is actually known about the number of endangered species or the extent of their habitats.

Private individuals in the Western States need permits to use the public domain for activities ranging from coal mining to cattle grazing. These individuals now face an added element of uncertainty. This uncertainty is created not only by the ESA, but also by the current judicial standards employed to review actions by administrative agencies. Under current standards, it appears that administrative agencies will be free to exercise their discretion with minimal interference from the courts. Similarly the Congress has indicated that it will not interfere in the operation of the ESA.

Final assessment of the ESA's impact on the private use of the public domain must be deferred until the federal agencies decide how vigorously to enforce its provisions. If federal land managers decide to zealously apply Section 7, it is likely that elected officials from public land states will be forced to support efforts to substantially undermine the strict provisions of the ESA.

DAVID D. FREUDENTHAL