

# BOOK REVIEW

## FROM THE HALLS OF CONGRESS TO THE SHORES OF THE LITTLE T: *THE SNAIL DARTER AND THE DAM: HOW PORK-BARREL POLITICS ENDANGERED A LITTLE FISH AND KILLED A RIVER*

BY ZYGMUNT J. B. PLATER

By  
Sara Blankenship\*

*The snail darter has become a symbol of environmental extremism. In reality, however, the farmers, members of the Cherokee Nation, and concerned citizens were simply fighting to keep the Tennessee Valley Authority (TVA)'s Tellico Dam from destroying the last free-flowing miles of the Little Tennessee River. This Book Review examines the work of Zygmunt J.B. Plater, the law professor who, along with ordinary citizens, fought their case all the way to the United States Supreme Court in defense of their river, the snail darter, and the Endangered Species Act. Plater reveals the truth behind the landmark TVA v. Hill case in The Snail Darter and the Dam: How Pork-Barrel Politics Endangered a Little Fish and Killed a River, by recounting the history of the region and evolution of the case. He also exposes the perverse pork-barrel politics behind the Tellico Dam, and reveals the power of media on the public's perception of the snail darter case that resonates to this day. This Review highlights the most important aspects of Plater's story, but it also examines the ways in which Plater and his team could have improved the public perception of the TVA v. Hill controversy. This Review urges everyone who wishes to enter the public sphere to have their voices heard to read The Snail Darter and the Dam for its inspirational and instructive importance.*

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\* © Sara Blankenship 2013. Sara Blankenship is a 2015 J.D. candidate at Lewis & Clark Law School. She received a Master of Arts in Law and Diplomacy from The Fletcher School of Law and Diplomacy at Tufts University in 2012 and a graduate certificate in International Environmental Policy from Monterey Institute of International Studies in 2010. She graduated from the University of Georgia with a Bachelor of Arts in Journalism in 2002. She would like to thank Professor Rohlf for his insight and Aaron Blankenship for his support.

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## I. INTRODUCTION

Zygmunt J.B. Plater's *The Snail Darter and the Dam: How Pork-Barrel Politics Endangered a Little Fish and Killed a River* is a compelling read deserving of a wide audience.<sup>1</sup> Readers already familiar with the landmark Endangered Species Act (ESA) case, *Tennessee Valley Authority (TVA) v. Hill*,<sup>2</sup> will not be disappointed as Plater faithfully recounts the case's journey through the courts. However, this book is also an essential read for anyone interested in the role of citizens in shaping our nation's laws and politics. Plater, a law professor, along with students Hank Hill and Sara Grigsby, University of Tennessee scientist and snail darter discoverer David Etnier, local farmers, members of the Cherokee Nation, recreational fishermen, and many others, banded together and used the ESA's citizen-suit provision against TVA's Tellico Dam project. The Tellico Dam project was an ill-conceived, as well as an economically, environmentally, and socially backwards development project fueled by Congressional pork-barrel spending. *The Snail Darter and the Dam* could easily have been a dry, academic, legal jargon-filled account of the appeals process, statutory interpretation, and the United States (U.S.) Supreme Court case. Instead, Plater deftly weaves together the legal, political, social, and economic realities he, his clients, and supporters contended with—realities that are just as true today as they were in the 1970s. Plater does this in an interesting and accessible way that provides just enough background information for the reader to journey with the protagonists through the twists and turns, and successes and failures, of the litigation and its aftermath.

Told through Plater's voice, *The Snail Darter and the Dam* offers an earnest, firsthand account of the decades-long efforts of a dedicated band of ordinary citizens. These efforts sought to preserve the Little Tennessee River—the Little T—and its resident endangered snail

<sup>1</sup> Zygmunt J. B. Plater, *The Snail Darter and the Dam: How Pork-Barrel Politics Endangered a Little Fish and Killed a River* (Yale U. Press 2013).

<sup>2</sup> *TVA v. Hill*, 437 U.S. 153 (1978).

darter from the monolithic TVA's Tellico Dam project and its associated land grabs.<sup>3</sup> These citizens' efforts would eventually culminate in the landmark environmental Supreme Court case, *TVA v. Hill*.<sup>4</sup> At the outset, the media framed the case as a David and Goliath battle, not between family farmers and the autonomous TVA, but between the tiny three-inch-long "minnow" snail darter and a falsely touted modern, massive hydroelectric dam.<sup>5</sup> But Plater pulls away the curtain to reveal the many facets and complexities of the case at all stages of litigation. He also introduces readers to the integral figures in the case, from private citizens and local farmers like Nell and Asa McCall and Beryl Moser<sup>6</sup> to President Jimmy Carter,<sup>7</sup> all of whom played a role in determining the future of the dam, the snail darter, the valley, and the ESA. While the TVA ultimately prevailed in completing the Tellico Dam project—thus extinguishing the free-flowing Little T and drowning hundreds of acres of family farms, Cherokee heritage sites, and the snail darter's original critical habitat—it was not for lack of effort or failure on the legal and factual merits.<sup>8</sup> *TVA v. Hill* was a stunning victory for the snail darter, the ESA, and the Little T supporters.<sup>9</sup> However, the force of pork-barrel politics was simply too entrenched and too strong.<sup>10</sup> The congressional will to continue the cycle of appropriating millions of dollars to the Tellico Dam project, regard-

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<sup>3</sup> Plater, *supra* n. 1, at 19 (“[A] substantial majority of the land that would be seized—almost two-thirds of the sixty square miles, more than 23,600 of the 38,000-plus acreage total—would be condemned for nonreservoir uses, primarily Boeing’s Timberlake real estate development scheme.”); *see also id.* at 2–3 (recounting a conversation between the McCalls, who owned a family farm, and the TVA, which sought to condemn their entire farm: “[T]his Tellico project is for a recreational reservoir, plus we’re going to have Boeing Corporation come in and build a model city on this land. That’s why we have to take all of your farm, not just the three acres we’ll be flooding.” As Nell McCall would later recount, “If people looked at this project . . . they’d see it’s nuthin’ but a crooked land grab.”).

<sup>4</sup> *TVA*, 437 U.S. at 153.

<sup>5</sup> *See e.g.* Plater, *supra* n. 1, at 168 (“The darter continues to appear almost daily in newspapers and newscasts around the nation, but the coverage is shallow and dismissive, feeding a drumbeat of ridicule.”); *id.* at 170 (insert showing various “anti-snail darter” headlines from national newspapers).

<sup>6</sup> *See e.g. id.* at 39–41 (describing the potluck dinner with Little T farmers, anti-dam citizens, and others who had served as plaintiffs in the prior TVA National Environmental Policy Act case, at which Plater and Hill revealed the existence of the endangered snail darter and the possible ESA claim).

<sup>7</sup> *See e.g. id.* at 324–33 (recounting the phone call between President Carter and Plater when President Carter decided not to veto the 1979 appropriations bill that exempted the Tellico Dam project from compliance with the ESA).

<sup>8</sup> Holly Doremus, *The Story of TVA v. Hill: A Narrow Escape for a Broad New Law*, in *Environmental Law Stories* 109, 140 (Richard J. Lazarus & Oliver A. Houck eds., Found. Press 2005).

<sup>9</sup> Plater, *supra* n. 1, at 266–69 (recounting the reaction and events following the Supreme Court decision upholding the ESA and protection of the snail darter on the morning of June 15, 1978).

<sup>10</sup> *See id.* at 78–79 (describing pork-barrel spending, special interests, and the “iron triangles” of Washington insider alliances).

less of its economic feasibility or value,<sup>11</sup> proved to be an insurmountable force that not even a 6–3 Supreme Court victory,<sup>12</sup> a scathing U.S. Government Accountability Office economic report,<sup>13</sup> numerous Congressional hearings,<sup>14</sup> or a well-meaning President, could overcome.<sup>15</sup>

## II. THE HISTORY OF THE VALLEY

*Tennessee Valley Authority (TVA) v. Hill* has its roots in the rolling hills, fertile valleys, and meandering oxbow rivers of the Tennessee Valley. In the foothills of the Smoky Mountains in Loudon County outside of Knoxville runs the Little Tennessee River. The Little T and its valleys are the ancestral homeland of the Cherokee Nation.<sup>16</sup> Hundreds of years after the Cherokee established agrarian communities on the banks of the Little T, the British arrived from over the Smokies.<sup>17</sup> The Cherokee and British formed an alliance and the British built Fort Loudoun.<sup>18</sup> A century later, a nation was born. Tragic events struck the region, from the Civil War, to the Trail of Tears, to the Great Depression. The region was economically stagnant for decades and was viewed as an impoverished backwater.<sup>19</sup> In an attempt to bring hope and economic and social progress to one of the poorest regions in America, President Roosevelt, through the New Deal, established the

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<sup>11</sup> The interagency Endangered Species Committee specifically considered the Tellico Dam project, including the economics. *See e.g. id.* at 287 (Charles Schultze, chair of the Council of Economic Policy, found that “[t]he interesting phenomenon is that 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!” (emphasis in original)).

<sup>12</sup> *TVA*, 437 U.S. at 153.

<sup>13</sup> Plater, *supra* n. 1, at 201; *see Rpt. from Elmer B. Staats, U.S. Comptroller General, U.S. Govt. Acct. Office., to Pres. of the Sen. & Speaker of the H., The Tennessee Valley Authority’s Tellico Dam Project—Costs, Alternatives, and Benefits*, EMD-77-58 38 (Oct. 14, 1977) (available at [http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1003&context=darter\\_materials](http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1003&context=darter_materials) [<http://perma.cc/0KsifxCs3rR>] (accessed Nov. 16, 2013)) (“[W]e recommend that until the remaining cost and remaining benefit information on the Tellico project is received . . . Congress prohibit by law the expenditure of existing appropriations . . . . We further recommend that the Congress not act on the proposed [ESA] exemption legislation until it has had time to assess the updated information.”).

<sup>14</sup> *See TVA*, 437 U.S. at 163–64 (outlining the various congressional committee hearings that took place months before Congress approved the TVA’s general budget, which ultimately contributed funds to the Tellico Dam project).

<sup>15</sup> The author found it interesting to consider President Carter’s “regrettable decision” to veto the bill in the context of political science studies on presidential legacies. *See James E. Anderson, Public Policymaking: An Introduction* 91–92 (6th ed., Wadsworth 2006) (“In his study of presidential agenda setting, Professor Paul Light found that in selecting major domestic issues on which to advocate action, presidents are motivated by three primary considerations. The first is electoral benefits . . . . The second concern is historical achievement. . . . The third consideration is good policy.” (internal footnotes omitted)).

<sup>16</sup> Plater, *supra* n. 1, at 7.

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 12–13.

Tennessee Valley Authority (TVA).<sup>20</sup> An autonomous federal public utility, the TVA was intended as a panacea for the region's economic and development woes.<sup>21</sup> The TVA was to transform the Southeast into an American utopia, first and foremost through construction of large hydroelectric projects to electrify the region.<sup>22</sup> It fulfilled its mission by building hundreds of dams, primarily on the Tennessee River.<sup>23</sup> The energy capacity and labor force in the valley were thus primed for the war effort as the U.S. entered World War II.<sup>24</sup> As the region grew and demanded more and more electricity, the TVA, having created so many big hydroelectric dams, switched its focus to constructing and operating coal-fired power plants and by the 1960s to nuclear reactors.<sup>25</sup> However, as Plater describes, by this time the TVA was showing signs of a mid-life crisis.<sup>26</sup>

### III. TVA AND THE TELLICO DAM

Following World War II, the Tennessee Valley Authority (TVA), led by Chairman Aubrey "Red" Wagner, was struggling to find a new bureaucratic direction that would allow the TVA to retain its autonomous relevancy in the region.<sup>27</sup> The Tellico Dam project, which had been put on the back burner during World War II,<sup>28</sup> was Wagner's so-

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<sup>20</sup> *Id.*

<sup>21</sup> See Roy Talbert, Jr., *FDR's Utopian Arthur Morgan of the TVA* 8 (U. Press of Miss. 1987) ("When the Tennessee Valley Authority and the Rural Electrification Administration brought power to the farms and small towns of an impoverished South in the 1930s, people spoke in terms, not of power, but of light. . . . They meant an absolute change in their standard of living, a remarkably fundamental revolution in status and thinking.").

<sup>22</sup> *Id.*

<sup>23</sup> Plater, *supra* n. 1, at 13.

<sup>24</sup> *Id.* ("During World War II much of the hydropower was dedicated to defense necessities, such as processing aircraft aluminum and nuclear materials.").

<sup>25</sup> *Id.* ("War needs quickly outstripped hydro capacity, so in the 1950s, with all the favorable hydro sites built, TVA shifted to coal-fired power plants for the bulk of its power output; in the 1960s it began adding a half-dozen nuclear reactors.").

<sup>26</sup> *Id.* at 29 (quoting a conversation Plater had with a TVA staffer regarding why the TVA "was still pushing such a mistaken dam project": "It's *male menopause*: Wagner and his headquarters guys came down here thirty years ago and saw themselves as saviors lifting this region up from nothing. They desperately want to lead the pack again. Tellico's become an obsession. They get hot flashes when local people start questioning their decisions." (emphasis in original)).

<sup>27</sup> *Id.* at 14–15; see also James Q. Wilson, *The Rise of the Bureaucratic State*, 41 *Natl. Affairs* 77, 80 (Fall 1975) (available at [http://www.nationalaffairs.com/doclib/20080527\\_197504106theriseofthebureaucraticstatejamesqwilson.pdf](http://www.nationalaffairs.com/doclib/20080527_197504106theriseofthebureaucraticstatejamesqwilson.pdf) [<http://perma.cc/0iBTi6J2kKF>] (accessed Nov. 16, 2013)) ("There are at least three ways in which political power may be gathered undesirably into bureaucratic hands: by growth of an administrative apparatus so large as to be immune from popular control, by placing power over a government bureaucracy of any size in private rather than public hands, or by vesting discretionary authority in the hands of a public agency so that the exercise of that power is not responsive to the public good.").

<sup>28</sup> Doremus, *supra* n. 8, at 116 ("TVA had contemplated eventually adding a second dam [the future Tellico Dam] just above the mouth of the Little Tennessee. . . . Congress

lution.<sup>29</sup> The Tellico Dam represented the iconic hydroelectric dam projects of the TVA's past.<sup>30</sup> However, this project was not simply a reboot of the New Deal era. In fact, it was not really a hydroelectric project at all.<sup>31</sup> What little hydroelectric energy the dam would generate was a very minor component of the overall project.<sup>32</sup> Rather, the project was to be the first in a line of purely economic revitalization efforts.<sup>33</sup>

Building the Tellico Dam would create a reservoir that would supposedly bring recreation and tourism to the Little T valley,<sup>34</sup> despite the fact that the Little T was already celebrated as one of the nation's best trout fishing rivers.<sup>35</sup> Furthermore, rekindling the TVA's "utopian" past, the project also included the creation of a model industrial city, the "Timberlake New Town."<sup>36</sup> Yet from its very inception, the project was not economically justifiable.<sup>37</sup> As one of the last enduring vestiges of the New Deal, the TVA was desperately trying to retain its relevancy in the region it shaped, and more importantly, in the eyes of the Congressmen whose pork-barrel spending provisions bankrolled its bureaucracy.

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appropriated money for this proposed Fort Loudoun Extension during World War II, but the War Production Board nixed it in favor of higher priority projects." (internal footnote omitted)); *Morning Edition*, Radio Broad., (Natl. Pub. Radio Apr. 18, 2008) (91.9 FM WUOT Knoxville, Tenn.) (audio available at <http://sunsite.utk.edu/wuot/mt/podcast/041808Snail.mp3> (accessed Nov. 16, 2013)) ("The TVA first mentioned the dam as a potential project in 1936.").

<sup>29</sup> Plater, *supra* n. 1, at 15–17.

<sup>30</sup> *Id.* at 15 ("But Wagner had an idea that might rekindle the agency's spirit and dynamism, resurrecting the image of mighty dams that had characterized TVA's glory days and giving the agency, he said, a 'new mission.'").

<sup>31</sup> *Id.* at 17 ("But Tellico Dam would actually be quite small, with no generators. Wagner himself . . . admitted to a reporter that 'any power or flood control benefit would be insignificant.'").

<sup>32</sup> *Id.*; see also Doremus, *supra* n. 8, at 116 ("Power capacity would increase only 22 megawatts in a system with a total capacity exceeding 22,000 megawatts . . .").

<sup>33</sup> Doremus, *supra* n. 8, at 111 ("To revitalize the vision of regional economic development, with cheap power the means to that larger end, Wagner pushed TVA toward development of the Tennessee River's tributaries. The Tellico Project, approved by TVA's Board of Directors in 1962 as the first large tributary project, was 'the showcase' of this new mission.").

<sup>34</sup> Plater, *supra* n. 1, at 17 ("Recreation quickly became the leading candidate for project justification . . . Wagner's staffers hypothesized net recreation benefits at more than a million dollars a year.").

<sup>35</sup> *Id.* at 32.

<sup>36</sup> *Id.* at 18.

<sup>37</sup> See e.g. *id.* at 19 ("The proposal doesn't make economic sense,' argued Kerry Schell, a TVA economist who was asked to produce claimed benefit figures in a series of doubtful categories. 'In economic terms it's indefensible, a big mistake.'"); *id.* at 17 ("The internal TVA cost accounting showed that, after adding together total benefits for flood control, barge navigation, and power, the dam would still lose forty to fifty cents for every dollar spent.").

## IV. THE ENDANGERED SPECIES ACT

*A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It's wrong when it tends otherwise.*<sup>38</sup>

The Endangered Species Act (ESA) was passed in a wave of bipartisan environmental legislation in the 1970s.<sup>39</sup> When passed in 1973, it was viewed as a seemingly innocuous Act that built off of previous legislative attempts to protect endangered species.<sup>40</sup> As with the prior conservation acts, iconic species such as the bald eagle and more charismatic species like the black-footed ferret and the blue whale were easily understood as requiring protection.<sup>41</sup> However, the new ESA shifted away from prior legislation's "vertebrate-centric" view by expanding the possibility of protection to nearly all species,<sup>42</sup> regardless of public opinion.<sup>43</sup> In addition to this expansion of endangered species protection, the ESA, like other recently passed environmental legislation such as the Clean Water Act (CWA)<sup>44</sup> and the National Environmental Policy Act (NEPA),<sup>45</sup> was viewed as progressive for its citizen-suit provision.<sup>46</sup> Generally speaking, this means that citizens can bring claims against alleged violators of the ESA. Citizen-suit provisions thus empower the public to enforce the very laws designed to benefit the public interest. It was this statutory empowerment of citizens that paved the way for the supporters of the snail darter and the

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<sup>38</sup> Aldo Leopold, *A Sand County Almanac: And Sketches Here and There* 224–25 (Oxford U. Press 1987) (originally published 1949); see also Plater, *supra* n. 1, at 208 (referring to Audubon Society's Mike Zagata, who concluded his comments at a July 1977 Senate hearing about the Endangered Species Act with this Aldo Leopold quote).

<sup>39</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

<sup>40</sup> See The Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (1966) (repealed 1973) (a predecessor of the 1973 ESA); The Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (repealed 1973) (same); see also *TVA*, 437 U.S. at 174–77 (describing at length previous legislation concerning the preservation of endangered species: "When Congress passed the Act in 1973, it was not legislating on a clean slate."); Richard J. Tobin, *The Expendable Future: U.S. Politics and the Protection of Biodiversity* 84–94 (Duke U. Press 1990) (detailing the evolution of endangered species protection legislation and the Department of the Interior's listing decisions, funding, etcetera, under each incarnation up to the 1973 ESA).

<sup>41</sup> Tobin, *supra* n. 40, at 84–85.

<sup>42</sup> *Id.* at 91 ("Rejecting [the Department of the] Interior's preference for vertebrate species, the [ESA]'s definition of fish and wildlife was expanded to include any member of the animal kingdom, except those insects determined to be pests . . . . The department was also given authority . . . to list any member of the plant kingdom.")

<sup>43</sup> *Id.* ("The public and politicians alike might be sensitive and responsive to the desirability of protecting well-known animal species; the same could not be said about the likely support for the listing of insect species, like the valley elderberry longhorn beetle, or plant species, like the rhizome fleabane or Canby's dropwort. These are species that most people have never heard of and will never see.")

<sup>44</sup> Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251–1387 (2006).

<sup>45</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

<sup>46</sup> 16 U.S.C. § 1540(g).

Little T to sue the Tennessee Valley Authority (TVA) for violating the ESA.

However, as Plater explains, many events occurred prior to Plater and company bringing the citizen-suit claim. For one thing, the Tellico Dam project had already survived numerous attacks before the then-new law professor, Plater, had even arrived at the University of Tennessee's College of Law. The most recent of those attacks against the Tellico Dam project was a citizen-suit brought under NEPA.<sup>47</sup> As a result of that lawsuit, the TVA was enjoined from further constructing the dam while it conducted an environmental impact statement.<sup>48</sup> This was a temporary victory for the Tellico farmers—the project was delayed for over a year until the court, in a subsequent NEPA case, determined that the TVA's environmental impact statement complied with the statute and lifted the injunction.<sup>49</sup>

After the NEPA cases, potential plaintiffs, namely the Tellico farmers and the Cherokee, were skeptical that the dam could ever be stopped.<sup>50</sup> However in 1974, University of Tennessee ichthyologist David Etnier discovered the snail darter,<sup>51</sup> a full six years after construction had begun on the Tellico Dam.<sup>52</sup> With Etnier's discovery, now there was a possible claim under the ESA. But Plater, Hill, and Etnier had to first get the snail darter listed under the ESA before they could even think of claiming a violation of the Act.<sup>53</sup>

Remarkably, the U.S. Fish and Wildlife Service (FWS) listed the snail darter faster than anticipated.<sup>54</sup> With this, Hank Hill's theoretical term paper for Professor Plater on the snail darter, ESA, and Tellico Dam<sup>55</sup> was looking more like a viable, legal argument for a citizen suit under the ESA against the TVA.<sup>56</sup> As Plater recounts, this was still a hard sell to their potential plaintiffs—the very citizens who had

<sup>47</sup> Plater, *supra* n. 1, at 27; *Envtl. Def. Fund v. TVA*, 339 F. Supp. 806 (E.D. Tenn. 1972).

<sup>48</sup> Plater, *supra* n. 1, at 27; *Envtl. Def. Fund v. TVA*, 339 F. Supp. at 806.

<sup>49</sup> *Envtl. Def. Fund v. TVA*, 468 F.2d 1164 (6th Cir. 1972); *see also* Doremus, *supra* n. 8, at 118 (describing the NEPA cases, the injunctions, and the courts' decisions).

<sup>50</sup> *See* Plater, *supra* n. 1, at 36–49 (recounting Tellico farmers, Cherokee Nation representatives, recreational fishermen, and other Tellico Dam opponents expressing concern about an ESA lawsuit).

<sup>51</sup> Plater, *supra* n. 1, at 33–34.

<sup>52</sup> *Id.* at 26 (“In 1968, at the bottom of the valley where a channel curved around Bussell's Island, TVA poured the concrete structure of Tellico Dam to show the world that the reservoir was inevitable.”).

<sup>53</sup> *Id.* at 56 (“If [the snail darter] is not on the list, it's not legally an endangered species and the law won't apply.”).

<sup>54</sup> *See id.* at 56–87 (discussing how the listing process can take “months or years”; the snail darter listing process took one year).

<sup>55</sup> *Id.* at 34.

<sup>56</sup> *Id.* at 36 (“By late September Hank and I, along with a couple of bemused volunteers, decided that we had the law and scientific facts necessary for a legal campaign to stop the destruction of the darter and its river.”).



endured the NEPA cases and the recent dissolution of the injunction.<sup>57</sup> After what could have been a sad, defeated potluck dinner, Plater, Hill, and the Little T supporters soon found themselves back in the fight that would work its way up to the highest court in the land, the U.S. Supreme Court.

#### V. FRIENDS IN HIGH PLACES—WASHINGTON, D.C.

Plater's personal account of his crash course in operating inside the Beltway should serve as a "how-to-guide" for all citizens seeking to advance their causes and become active participants in shaping government. Seemingly an outsider wherever he went, whether as a "carpetbagger" in Tennessee<sup>58</sup> or a naively optimistic legal scholar in the District of Columbia (D.C.),<sup>59</sup> Plater had the unique ability of finding and reaching out to those who were dedicated to both the snail darter and Little T cause and knew the rules of the game. Amassing such a support system, Plater, in earnest detail, captures the speed, brokering, patience, perseverance, and strategy needed to advance his case through the halls of Congress, as well as how he sold his bleak, citizens versus Tennessee Valley Authority (TVA), David and Goliath battle to frequently underfunded and understaffed environmental and public interest groups.

Carrying out a citizen suit, especially under such controversial circumstances—using the new Endangered Species Act (ESA) to protect a tiny endangered fish against the entity that gave electricity and life to the region—requires heart, conviction, and, as Plater consistently demonstrates, critical personal connections. All the legal theories, legislation, economic reports, and Congressional hearings undertaken to protect the snail darter, the Little T, and those who live in and love the Tennessee Valley are nothing without people who can translate these factors into political willpower. Plater does not make his first-person account the "hero lawyer" tale that it so easily could have been. Instead, *The Snail Darter and the Dam* reads more like a heartfelt thank you note to all those who put their convictions, expertise, years of their lives, and careers on the line in order to fight an unnecessary pork-barrel project.<sup>60</sup> For example, Anne Wickham, the Conservation Director of Friends of the Earth<sup>61</sup> and later staff member in the State Department's Office of Ocean and International Environmental Affairs,<sup>62</sup>

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<sup>57</sup> Plater, *supra* n. 1, at 37–41 (recounting the Little T supporters at the potluck and their statements regarding the previous NEPA lawsuit, the dissolved injunction, and litigation fatigue).

<sup>58</sup> *Id.* at 37.

<sup>59</sup> *See id.* at 120–23 (Plater noting that for his case and the ESA to survive, he and the plaintiffs would have to focus on convincing the agencies, media, Congress, and national environmental groups of the reality behind the Tellico Dam project).

<sup>60</sup> *See e.g. id.* at 162 (describing confidential sources within various federal agencies and the pseudonyms Plater used).

<sup>61</sup> *Id.* at 122.

<sup>62</sup> *Id.* at 181.

taught Plater, Hank Hill, and others the “rules of the game.” Without her dedication, knowledge, and patience, the snail darter, the family farms, the Cherokee heritage sites, and even the ESA itself could have long been dead in the water.<sup>63</sup> Instead, Wickham’s determination to rally key environmental advocates and organizations,<sup>64</sup> her well-established connections on Capitol Hill,<sup>65</sup> and her uncanny ability to read the political tea leaves, enabled Plater and company to slow down the grinding congressional appropriations machine just enough to give the snail darter its day in court. They were also able to make connections and generate the political will to hold congressional hearings and compel Executive Branch agency determinations, exposing the fabricated economics behind the Tellico Dam project. These efforts ultimately gave the snail darter, the family farms, the Cherokee, and all those who loved a free-flowing Little T close to a decade of continued use and enjoyment.

Ready to fight for the snail darter and the Little T, Plater eagerly takes the reader on a tour of his slice of the Beltway universe: from his shared space at the Friends of the Earth office and the American Rivers Conservation Council encampment above the Roy Rogers fast food restaurant<sup>66</sup> to the daily grind of drafting and distributing press releases, working up chain of commands through federal agencies, and pitching and glad-handing whichever Congressional staffer would even make eye contact.<sup>67</sup> Plater’s account of his experience on Capitol Hill encapsulates the sheer scale and scope of the effort a small citizen activist group put forth in order to be heard by elected officials while simultaneously counteracting the well-oiled machine of the TVA’s political arm. What started out as a novel legal theory—using the recently passed, untested ESA to stop the Tellico Dam project and protect the snail darter—quickly transformed Plater from law professor to policy entrepreneur.<sup>68</sup> Plater conveys a sense of urgency due to the looming threat that the TVA would not only finish the dam, meaning an end to the snail darter, farms, and Cherokee and early colonial

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<sup>63</sup> See Plater, *supra* n. 1, at 124–30 (detailing Plater’s first meeting with Wickham and her insights on who to talk to, what to talk about, how to engage the media, how to make connections, and even how to dress).

<sup>64</sup> See *id.* at 166–67 (“For their part, the animal rights groups aren’t happy about coordinating with more middle-of-the-road groups. ‘I’m going to try to head off a split,’ Anne says. She persuades five groups, led by the Sierra Club, to call a gathering of all the citizen organizations to hammer out a group consensus for the House and Senate hearings on endangered species and [the] Tellico Dam.”).

<sup>65</sup> See *id.* at 128 (“Back at Friends of the Earth I ask Anne for her advice on where to go from here. ‘Interior,’ she says. ‘Cynthia will get you a meeting. The White House, too. I think I can get you a meeting in the President’s Domestic Council.’”).

<sup>66</sup> *Id.* at 124.

<sup>67</sup> See generally *id.* at 120–59, 160–87 (describing a year of tireless snail darter and ESA advocacy in Washington, D.C.).

<sup>68</sup> Anderson, *supra* n. 15, at 92 (“Members of Congress, interest-group representatives, agency officials, and citizens who push policy proposals are often referred to as *policy entrepreneurs*.” (emphasis in original)).

cultural sites, but that its completion could also set the stage for the extirpation of the ESA itself. Through Plater and company's persistent efforts, however, the holy grail of policy making—the policy window—was opened and the snail darter swam in.

## VI. CITIZENS UNITED

*Then my cousin came up from Knoxville and he taught me a thing or two . . . .*<sup>69</sup>

Plater also faithfully recounts the numerous times ordinary people dedicated what little resources they had to fight for the Little T.<sup>70</sup> As demonstrated throughout the decades-long saga, it was imperative that citizens generated awareness of the Tellico Dam's negative impacts, shedding light on how the Tennessee Valley Authority (TVA)'s refusal to adhere to the ESA endangered the future of the snail darter, its human neighbors, and their mutual critical habitat—the Little T Valley. Additionally, nothing gets elected officials' attention, absent a high profile scandal, more than a face-to-face meeting with their constituents.<sup>71</sup>

One notable example involved citizens who were not directly involved in the case, but who had such a vested interest in the Little T that they traveled to D.C. to fight for it. An appropriations bill containing an amendment had been proposed that mandated the completion of the Tellico Dam project and exempted it from the ESA.<sup>72</sup> In the days leading up to the final votes on the appropriations bill, Plater, the Little T supporters, and environmental groups frantically tried to secure votes to defeat the bill.<sup>73</sup> At the eleventh hour, eight members from Trout Unlimited Georgia, who loved fishing the Little T, showed up to lobby their Southern legislators.<sup>74</sup> Despite their short time in D.C., these committed citizens were actually able to deliver a single vote against the bill—from Georgia's Newt Gingrich.<sup>75</sup> With Plater and the Little T supporters at such a financial and political disadvantage, the

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<sup>69</sup> Steve Earle, CD, *Oxycontin Blues*, in *Washington Square Serenade* (New West Recs. 2007).

<sup>70</sup> See Plater, *supra* n. 1, at 171 ("Every month a few carloads of farmers or representatives of the Eastern Band of Cherokees come to Washington.")

<sup>71</sup> See *id.* at 178–79 (describing the Little T supporters' interactions with Mississippi Senator Stennis, a dedicated supporter of funding Army Corps of Engineers' dam projects, and Tennessee Senator Howard Baker, supporter of funding the Tellico Dam project).

<sup>72</sup> Energy and Water Development Appropriation Act, Pub. L. No. 96-69, Title IV, 93 Stat. 437, 449 (1979); see also Doremus, *supra* n. 8, at 133–34 (discussing the appropriations bill and the amendment).

<sup>73</sup> See generally Plater, *supra* n. 1, at 290–323 (detailing the legislative bargaining, political tactics, and House and Senate votes that mandated the completion of the Tellico Dam project and exempted it from complying with the ESA).

<sup>74</sup> *Id.* at 316.

<sup>75</sup> *Id.* at 320.

importance of the contributions of committed citizens, through their time, energy, and efforts cannot be overstated.<sup>76</sup>

## VII. *TVA v. HILL* AT THE U.S. SUPREME COURT

On April 18, 1978, the snail darter controversy officially reached the U.S. Supreme Court.<sup>77</sup> In perhaps the most compelling portion of *The Snail Darter and the Dam*, Plater's transcript-like account of the oral arguments, coupled with his internal monologue, truly takes the reader inside both the courtroom and Plater's psyche. Plater honestly details the immense pressure, confusion, insecurities, and even paranoia that the Court leveled against the select attorneys who made it before the nine Justices. Plater's account of the *TVA v. Hill* proceedings is courtroom drama at its best, with highlights including the Attorney General bringing in a jar containing a preserved snail darter,<sup>78</sup> outbursts from the gallery,<sup>79</sup> and "back chamber" alliances between the Justices that fluctuated with each question asked.<sup>80</sup> It is here that the reader finally gets a glimpse at just how close to impossible success was for the supporters of the Little T. All those represented under Hill's namesake were not only battling the Tellico Dam project, but were thrust into the heart of numerous fights—the struggle against the Tennessee Valley Authority (TVA) as an institution, an inter-agency feud between the TVA and the U.S. Fish and Wildlife Service (FWS) over project consultation,<sup>81</sup> and a battle over what exactly the Endangered Species Act (ESA) means. *TVA v. Hill* also raised profound questions over the role of Congress as the body that drafted the ESA yet systematically approves pork-barrel projects, as well as society's greater internal struggle over what it values: economic development in all its forms, including expensive congressionally funded projects, versus the conservation of a species, no matter how small.

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<sup>76</sup> See also *Morning Edition*, *supra* n. 28 (recounting *TVA v. Hill*, Hank Hill states, "I'd do it again. Probably do it a little more aggressively than last time, but I'd do it again.").

<sup>77</sup> *TVA*, 437 U.S. at 153; see generally Plater, *supra* n. 1, at 211–69 (discussing *TVA v. Hill* reaching "the highest, toughest court in the land").

<sup>78</sup> Plater, *supra* n. 1, at 224.

<sup>79</sup> *Id.* at 233.

<sup>80</sup> *Id.* at 254 (Plater speculating whether Justice Rehnquist and Justice Burger had an agreement over the setup of questions asked during argument); see also Doremus, *supra* n. 8, at 130–31 (describing the views and positions of the Justices before and after oral argument).

<sup>81</sup> See Plater, *supra* n. 1, at 207 (quoting Department of the Interior's Keith Schreiner on the second day of the 1977 congressional hearings on the ESA and the Tellico Dam: "We vigorously pursued an effort with TVA to consider alternatives," Schreiner says, "including not closing the dam, using the project area for other purposes. . . . I am of course reluctant to be critical of a fellow federal agency. . . . Most of their consultation with us was preceded with this thought: 'We will consult until you people are sick of it as long as we do not talk about not closing the dam, because the gates of that dam are going to close January 1.'" (omissions in original)).

Ultimately, the Supreme Court handed down the decision of a lifetime for the snail darter, Plater, and the Little T supporters—a 6–3 decision upholding the ESA and rejecting the Tellico Dam project.

### VIII. POLITICS, JOURNALISM, AND FRAMING THE ISSUE

*Isn't everyone going to say it's ridiculous, using a little fish like this against the dam?*<sup>82</sup>

While the many facets of *TVA v. Hill* are compelling, one critical issue that runs throughout Plater's experience is that of dealing with the media, including how the snail darter case was framed and what effect this had on the politics. In securing political and public support, properly framing the issue is absolutely crucial.<sup>83</sup> Once the issue has been framed, public buy-in occurs and critical thinking inertia sets in, rendering it next to impossible to adjust the framing, let alone to re-frame it entirely.<sup>84</sup> Sadly, at least initially, as Plater's experience with his case indicates, no amount of facts, figures, or scientific data will meet the media's insatiable appetite for black and white, dichotomous, hero–villain storylines.<sup>85</sup> Plater and company endured years of frustration and disappointment with the media through either its starkly negative “minnow versus hydro” coverage, or its failure to acknowledge their press releases, Capitol Hill visits, or congressional hearings. By the time the media did start paying attention to the farmers, the Cherokee, and the cold economics—near the end of the *TVA v. Hill* saga—the “darter versus dam” framing was firmly in place.<sup>86</sup> So successful and so powerful was this framing that it in fact remains in place to this day, as conservative politicians and commentators continue to lambast the “asinine” David and Goliath battle as evidence of environmental extremism.<sup>87</sup> “Snail darter” has even entered the

<sup>82</sup> *Id.* at 43.

<sup>83</sup> See Dennis Chong & James N. Druckman, *Framing Public Opinion in Competitive Democracies*, 101 *Am. Pol. Sci. Rev.* 637, 637 (Nov. 2007) (“[A] speaker ‘frames’ an issue by encouraging readers or listeners to emphasize certain considerations above others when evaluating that issue. A framing ‘effect’ occurs when individuals arrive at different positions on the issue, depending on the priority given to various considerations.”).

<sup>84</sup> *Id.* at 652 (“Public opinion may simply favor the side with greater resources at its disposal . . . [T]he strongest frames to emerge from this process will not necessarily be the most sound or meritorious arguments according to empirical, analytic, or normative standards.”).

<sup>85</sup> *Id.*

<sup>86</sup> Plater, *supra* n. 1, at 334–35 (quoting Phil Shabecoff of the *New York Times* at a press conference regarding the Cherokees' constitutional claims: “How come it's only now we hear about all this? About the farmers' land being taken for real estate development, about benefits getting so inflated, about Cherokees? Why didn't you tell us this long ago? This is a story that the American people needed to hear!” (emphasis in original)).

<sup>87</sup> See Zygmunt J.B. Plater, *Classic Lessons from a Little Fish in a Pork-Barrel—Featuring the Notorious Story of the Endangered Snail Darter and the TVA's Last Dam*, 32 *Utah Env'tl. L. Rev.* 211, 213 (2012) (available at <http://www.epubs.utah.edu/index>

American lexicon—or at least conversations regarding environmental protection—as something to be avoided, a worst-case scenario that is simultaneously extreme yet trivial.<sup>88</sup> Over three decades later, people are still railing against *TVA v. Hill*, not so much for the Supreme Court decision, but rather the “story” in general as one of environmental extremists trying to make a statutory end-run around economic development. The longevity of the “snail darter story” serves as the ultimate testament to the power of framing.

Plater clearly had every right to be frustrated by the media’s consistent refusal to report on any other facets of *TVA v. Hill*—the economics behind the dam, the interagency turf wars over snail darter listing and Endangered Species Act (ESA) compliance, or the politics driving the appropriations for the Tellico Dam. However, the delayed realization of the importance of the public relations or the need to set the tone and maintain control of the story is equally frustrating.<sup>89</sup> Granted, Plater and Hill recognized at that initial potluck, where the Little T supporters first learned of the snail darter’s existence and potential ESA claim, that the case would be much more compelling in the eyes of the public if the Tellico farmers were the named plaintiffs.<sup>90</sup> Numerous attendees voiced concern over the sure-to-be media firestorm<sup>91</sup> that a case using a three-inch-long snail darter to stop a

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.php/jlrel/article/viewFile/786/591 [http://perma.cc/N4YR-QSQM] (accessed Nov. 16, 2013)) (“Rush Limbaugh has called the citizens who brought the case “homosocialists” but [Sean] Hannity thinks “fringe lunatics” more accurate.” (quoting Rush Limbaugh, *The Rush Limbaugh Show*, Radio Broad. (Infinity Radio Dec. 7, 1993); Sean Hannity, *Hannity’s America*, Radio Broad. (ABC Radio Dec. 7, 2008)).

<sup>88</sup> See e.g. *On Point with Tom Ashbrook*, Radio Broad., “The Endangered Endangered Species Act” (Natl. Pub. Radio Oct. 4, 2005) (audio available at <http://onpoint.wbur.org/2005/10/04/the-endangered-endangered-species-act> [http://perma.cc/0aKvHCe5RB7] (accessed Nov. 16, 2013)) (For example, guest Sheila Olmstead, a professor at Yale University, stated that she uses NPR in her environmental economics class as an example of a public good. Host Tom Ashbrook replied, “I hope we’re not snail darters.”).

<sup>89</sup> Plater, *supra* n. 1, at 173 (quoting Charles Eisendrath, professor of environmental journalism and former *Newsweek* reporter: “You’ve got to start a *news climate* rolling . . . and the articles you’ve gotten just aren’t doing it. The story needs to have *legs*, you need to find *hooks* for a continuing series of articles digging into the case.” (emphasis in original)); see also Zygmunt J.B. Plater, *Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance*, 32 *Envtl. L.* 1, 13–14 (Winter 2002) [hereinafter *Law and the Fourth Estate*] (regarding the first meeting of the potential *TVA v. Hill* plaintiffs: “You did not have to be a genius to sense from the very start that the public perception of the case would be important to its resolution . . . . But we decided that night to go ahead, (in)completely aware of the risks.”).

<sup>90</sup> Plater, *supra* n. 1, at 54 (“‘But you farmers are the ones who are losing the most, and it’s your story that people need to hear,’ we say. ‘If people see that Tellico’s a TVA land grab, taking land away from farm families to give it to a big corporation for real estate development, they’ll see that it’s not about environmentalist tree huggers. The case needs to be called *Tellico Farmers versus TVA*.’” (emphasis in original)).

<sup>91</sup> See e.g. *id.* at 44 (“‘You’re going to set off a real hullabaloo in the papers about this “silly little fish,”’ said local Sierra Club chair Will Skelton when we told him about the darter. ‘The local papers all eat from TVA’s hand. They’ll play up the fish angle and you aren’t going to hear anything about the dam’s fake economics.’”).

\$116 million Tennessee Valley Authority (TVA) dam project<sup>92</sup> would likely generate.<sup>93</sup> However, once the farmers decided that they would not be the named plaintiffs, resulting in Hank Hill's surname being forever associated with the case,<sup>94</sup> the attorneys did not—or perhaps more fairly, were not able to—overshadow TVA's public relations department. Nor did they win over any local, regional, or national journalists who were either instinctually, lazily, or forcibly picking up on the “little fish, big dam” dichotomy.<sup>95</sup> This would prove to be a fatal flaw and one that Plater and company would not be able to recover from, even in the afterglow of the *TVA v. Hill* victory.<sup>96</sup> By the time the press finally picked up on the snail darter story in its entirety, it was too little, too late.<sup>97</sup>

All too often, it seems that when it comes to pressing environmental issues, scientists, legal practitioners, and others working in highly specialized fields tend to over-rely on the optimistic notion that the science, the hard facts, or the merits of the case will be given due deference by the media and that these elements alone will suffice to convey the message.<sup>98</sup> Granted, while these professionals are not pundits or media experts, they and their work do not exist in a vacuum. Sometimes, as Plater's experience in the *TVA v. Hill* case indicates, an issue and those experts working on it will be thrust into the political arena and the public eye, or such experts will be needed to inform policy and policy makers. In either case, the framing of the issue is absolutely

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<sup>92</sup> Robert Wilson, *Tellico Dam Still Generating Debate*, Knoxville News Sentinel, <http://www.knoxnews.com/news/2008/apr/13/tellico-dam-still-generating-debate> [<http://perma.cc/07iEozhYWh>] (Apr. 13, 2008) (accessed Nov 16, 2013); see also Plater, *supra* n. 1, at 342 (quoting CBS News anchorman Dan Rather as stating that the Tellico Dam project cost \$150 million).

<sup>93</sup> See generally Plater, *supra* n. 1, at 42–50 (detailing the reservations a number of potluck attendees had regarding how a snail darter-centric case would be viewed by the media and the public).

<sup>94</sup> *Id.* at 54–55.

<sup>95</sup> See *e.g. id.* at 172 (recounting how a *Wall Street Journal* reporter, after a long interview with Plater, stated that he could not run the story because it went against the paper's “editorial policy.” The *Wall Street Journal* shortly thereafter ran an editorial against the ESA.).

<sup>96</sup> See *id.* at 268–69 (describing the post-Supreme Court decision press conference: “Our press conference, which could have captured the national moment, didn't, because it was boring. There's another media lesson here. Why aren't we learning?”).

<sup>97</sup> See generally *id.* at 342–46 (recounting Dan Rather's frustrated response to a *CBS Evening News* piece on the Tellico Dam and the now flooded and condemned farmland in 1981, nearly two years after the Dam was completed: “We missed the fucking story! How in the hell, over all those years, did we miss *the whole fucking story!*” (emphasis in original)).

<sup>98</sup> Many of the ideas in this paragraph are inspired by a Science Communications workshop hosted by Stanford University, Monterey Area Research Institutions' Network for Education (MARINE), and Communications Partnership for Science and Sea (COMPASS). The workshop was part of the series *What Do Policy Makers Need to Know about Climate Change and the Oceans?* COMPASS et al., *Science Communications Workshop* (unpublished workshop proceedings, Cal. St. U., Monterey Bay, Dec. 5, 2009) (workshop agenda on file with *Animal Law*).

critical.<sup>99</sup> However, the stark reality is that absent an environmental catastrophe, more likely than not, the media will either frame the issue one-sidedly<sup>100</sup> or not even pick up the story. This is because environmental issues are often complex, amorphous, and have impacts that will most likely happen somewhere else, to someone else, in the future. Even when the media does seek out or pick up the story, the practicality is that there is a limited window of opportunity in terms of timing, relevance, and just sheer space. Headlines and sound bites rule the day, regardless of the commitment, sincerity, or dependability of the journalist or news outlet.

Environmental attorneys, citizen groups, and environmental organizations must realize that while the best legal hook in the world might secure a court victory, the framing of the issue can be the determining factor.<sup>101</sup> *TVA v. Hill* is the quintessential example of such legal success, yet media failure. Plater and his citizen clients were successful in that they had a solid legal argument and made it to the Supreme Court, where they argued and won in a 6–3 decision for the preservation of the endangered snail darter, the Little T, and all who depend on it. Yet despite such a resounding legal victory, Plater, by his own admission, missed out on a critical opportunity to reframe the issue.<sup>102</sup> Instead of capitalizing on the victory and the media’s newfound interest in the case to set the record straight on the economics of the Tellico Dam, the plight of the family farmers, or the reality that Cherokee sites and snail darter habitat that had existed since time immemorial would be destroyed under an unnecessary, pork-barrel reservoir, Plater cringingly lectured the press on the importance of statutory interpretation.<sup>103</sup> Plater and company again failed to connect with the media. As Plater’s colleague Rafe Pomerance put it, “These are *report-*

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<sup>99</sup> See generally Chong & Druckman, *supra* n. 83, at 637–55 (detailing a study examining the frequency, strength, accessibility, and psychology surrounding the framing of issues by politicians and media and its effects on public awareness and informing public policy).

<sup>100</sup> Framing an issue includes two general dimensions, “relative frequencies” and “relative strengths.” If there are two competing views, then framing with a “one-sided” relative frequency means that the public or media consumer is receiving only one side of the story. In Plater’s case, the pro-snail darter story was actually an “unequal two-sided” framing because the snail darter, ESA, and Tellico dam opponents did receive some positive coverage, though it did not generate traction. See Plater, *supra* n. 1, at 173 (noting that “pro-snail darter” stories did occasionally run in the *Washington Post*, the *Atlanta Journal Constitution*, and the *New York Times*).

<sup>101</sup> *Id.* at 53 (Plater stated, “Of course, the law alone will not be enough to bring sense to the Tellico project and salvation to the darter and its valley. We’re not foolish enough to think that. Law is only a tool. In this particular context, with such powerful political forces arrayed against us—not just TVA but all its public works pork-barrel allies in national politics—the law can only buy us leverage.”); see Plater, *Law and the Fourth Estate*, *supra* n. 89, at 1 (Plater directly addressing the importance of the media in an article that eventually contributed to portions of *The Snail Darter and the Dam*).

<sup>102</sup> Plater, *supra* n. 1, at 268 (“But we’re blowing it, again.”).

<sup>103</sup> *Id.*



ers! You have to *grab 'em by the balls.*"<sup>104</sup> Sadly, Plater's belief that the truth would ultimately prevail in the media never fully materialized. His experience should serve as a cautionary tale for citizens, public interest groups, and others seeking to effect political change.

## IX. THE ACCOMPLISHMENTS OF *TVA V. HILL*

While the Tennessee Valley Authority (TVA) ultimately prevailed in completing the Tellico Dam, *The Snail Darter and the Dam* is not a depressing tale. Rather, Plater's work serves as a tribute to the dedication and determination of ordinary citizens and their accomplishments in the face of the massive political machine, the entrenched bureaucracy of the administrative state, and a state of journalism fixated on profit over product. While the following accomplishments are notable, they should by no means be considered comprehensive. Instead, it is hoped that the following will entice readers to read *The Snail Darter and the Dam* to reach their own determination as to whether *TVA v. Hill* and the snail darter are worthy of their place in the history of the Endangered Species Act (ESA) and landmark Supreme Court decisions.

### A. *Citizen Suits*

*TVA v. Hill* demonstrates the power of the citizen-suit provision. Had it not been for Plater, Hill, and their clients, the interagency turf war between the U.S. Fish and Wildlife Service (FWS) and the TVA over the ESA's mandated "interagency consultation" most likely would not have resulted in years of successfully delaying the project,<sup>105</sup> let alone a Supreme Court decision that unequivocally upholds the Act.<sup>106</sup> As Plater shows, the TVA time and time again acted with impunity, defying legislative mandates and court injunctions, and implementing a "sunk cost" strategy<sup>107</sup> as it proceeded with the construction of the Tellico Dam,<sup>108</sup> land condemnations,<sup>109</sup> river bank alterations,<sup>110</sup> and

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<sup>104</sup> *Id.*

<sup>105</sup> Doremus, *supra* n. 8, at 122–23 (discussing why the FWS was unlikely to fight for enforcement of the ESA against the TVA).

<sup>106</sup> *TVA*, 437 U.S. at 180 ("As it was finally passed, the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.").

<sup>107</sup> See Plater, *supra* n. 1, at 112–13 ("It's called the 'sunk cost' strategy. Worried about citizen opposition, project promoters try to get as much construction done and spend as much money as possible before opponents can bring effective questions to bear.").

<sup>108</sup> *Id.* at 137 ("Apparently claiming they had received no official notice of the injunction order, TVA continued working on dam construction after the court of appeals decision and kept bulldozing the valley.").

<sup>109</sup> *Id.* at 113.

<sup>110</sup> *Id.*

snail darter transfers.<sup>111</sup> Without the ESA's citizen-suit provision allowing citizens to enforce legislation designed to promote the public interest, Plater and company could not have taken on such bureaucratic intransigence, and the TVA would have likely completed the Tellico Dam project in record time, leaving the FWS to pick its fight another day.<sup>112</sup>

### B. Institutional Change

Institutions, especially large, historically autonomous bureaucracies, are almost impossible to change.<sup>113</sup> While the TVA may have won the battle over the Tellico Dam, this victory did not come without a price. One of *TVA v. Hill*'s unsung victories is the internal culture change it brought about within the agency.<sup>114</sup> The completion of the Tellico Dam did not, as Red Wagner had hoped for his lasting legacy, usher in a new era of massive economic development projects. Rather, since that project, the TVA has cancelled similar projects,<sup>115</sup> no longer egregiously shuns interagency consultations,<sup>116</sup> and considers the environmental impacts of its projects and agency actions.<sup>117</sup> Effecting such culture change within an agency so steeped in tradition and so entrenched in regional and national politics is nothing short of a miracle.

### C. Upholding the ESA and the Snail Darter's Survival

Plater and company's work on Capitol Hill and the Supreme Court victory also solidified key provisions of the ESA and firmly established the FWS's role in the ESA consultation process. Without a doubt, *TVA*

<sup>111</sup> See e.g. *id.* at 86 (“[W]ithout telling the Fish and Wildlife Service, TVA captures approximately two hundred darters from the Little T shoals and transplants them into the Hiwassee River near Chattanooga.”).

<sup>112</sup> Conversation between Dan Rohlf, Prof. of Law, Lewis & Clark L. Sch., and Sara Blankenship, Author (Aug. 5, 2013) (personal notes on file with *Animal Law*) [hereinafter Conversation with Dan Rohlf].

<sup>113</sup> Wilson, *supra* n. 27, at 93 (“What was created in the name of common good is sustained in the name of the particular interest. Bureaucratic clientelism becomes self-perpetuating, in the absence of some crisis or scandal, because a single interest group to which the program matters greatly is highly motivated and well-situated to ward off the criticisms of other groups . . .”).

<sup>114</sup> Plater, *supra* n. 1, at 351 (“‘Completion of the Tellico Dam project,’ wrote Tennessee historians Bruce Wheeler and Michael MacDonald in their 1986 book on the Tellico project, ‘marked the death of the agency as it had been known. . . .’” (omission in original)).

<sup>115</sup> *Morning Edition*, *supra* n. 28 (David Etnier, University of Tennessee scientist who discovered the snail darter, stated: “[TVA] decided that going through the same fight over a major dam on the Duck River in Columbia, Tennessee was probably not going to be worth the effort and they gave up on it.”).

<sup>116</sup> *Id.* (David Etnier stated, “TVA became very sensitive about environmental issues and I think we forced that on them.”).

<sup>117</sup> Doremus, *supra* n. 8, at 137–38 (“*TVA v. Hill* ensures that action agencies must continue to consult on the operation of dams and irrigation projects, and to address the impacts of project operations on listed species.”).

*v. Hill* upholds the applicability of the ESA to *all* endangered species. The opinion's language is nothing short of revolutionary as it found that "beyond doubt . . . Congress intended endangered species to be afforded the highest of priorities."<sup>118</sup> Furthermore, the Court highlighted Congress's concern "about the *unforeseeable* place such creatures may have in the chain of life on this planet."<sup>119</sup> The Court also pointed out that, "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."<sup>120</sup> With this decision, the Court resoundingly upholds the ESA while underscoring the Act's underlying values that are akin to recognizing a species' intrinsic value (though the ESA does have its limitations). It is important to note that this intrinsic valuation of a species is not to the detriment of humanity; rather, it acknowledges that there is value in a species' existence despite the fact that it is impossible to truly calculate such a value in purely economic terms.<sup>121</sup> Though the ESA has changed since *TVA v. Hill*, the Supreme Court's opinion continues to serve as precedent.<sup>122</sup>

#### D. Lingering Questions Surrounding *TVA v. Hill*

Forty years after the passage of the ESA and thirty-five years after *TVA v. Hill*, both the Act and the case continue to evoke controversy. One cannot help but wonder if the ESA would be so controversial had another case set the tone—perhaps one that had more "friendly" facts, such as a more charismatic species or a questionable development project that was not already 80% completed.<sup>123</sup> Plater makes no attempt to hide that this was a constant concern voiced by the environmental groups.<sup>124</sup> Nor does he ignore the fact that, had the stars not aligned at numerous points during the ten years of legal battles and political wrangling, the ESA could have very well been thrown out with the snail darter's bathwater. While that did not happen, *TVA v. Hill* did not so much save the snail darter<sup>125</sup> as it did transform a sleek, three-inch native fish into at worst, an example of unbridled environmental extremism and at best, an example of a worst-case scenario for effective ESA advocacy.

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<sup>118</sup> *TVA*, 437 U.S. at 174.

<sup>119</sup> *Id.* at 178–79.

<sup>120</sup> *Id.* at 184.

<sup>121</sup> *Id.* at 187 ("[T]he plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.'").

<sup>122</sup> See Doremus, *supra* n. 8, at 136–40 (discussing the lasting legacy of *TVA v. Hill* and the ESA despite the completion of the Tellico Dam); see also Conversation with Dan Rohlf, *supra* n. 113 (discussing the importance of the case to environmental law).

<sup>123</sup> Doremus, *supra* n. 8, at 124.

<sup>124</sup> See e.g. Plater, *supra* n. 1, at 143–50 (account of Plater visiting a number of environmental groups, trying to win them over for the snail darter case).

<sup>125</sup> Ultimately, it did not, though other populations were later found elsewhere. See *id.* at 346 ("A small remnant population was discovered in Chickamauga Creek near Chattanooga.").

As the first major ESA case, *TVA v. Hill* cuts to the perennial question surrounding nearly all ESA cases: Is the case about saving the species or is it about using the ESA as a means to an end?<sup>126</sup> Plater honestly details how he wrestled with this question throughout the case.<sup>127</sup> By all accounts, the ESA claim was, from its inception in Hank Hill's term paper,<sup>128</sup> a tool to stop the dam.<sup>129</sup> Yet by the same token, there was a legitimate concern that the snail darter population in the Little T was the only remaining population.<sup>130</sup> For all of its merits, application of the ESA will often result in a "damned if you do, damned if you don't" scenario. On the one hand, filing a citizen suit to stop a \$116 million dam project for the sake of protecting a three-inch snail darter was (and still is) seen as ludicrous, extremist, and a goal that only a Luddite with a vendetta against economic progress would pursue. On the other hand, filing an ESA claim that arguably uses the snail darter as just a convenient means to stop a dam is seen as disingenuous and insincere.<sup>131</sup>

Finally, this author cannot help but wonder what the case, the media spin, Congress's view, or the public opinion would have been had *TVA v. Hill* included the constitutional claims that the Cherokee plaintiffs had pushed to include from the start.<sup>132</sup> While this may not have resulted in the cleanest framing of the snail darter claim with its focus on the plain language of the ESA, the Cherokees' claims certainly could have put a spotlight on the human interest elements for stopping the Tellico Dam project. Granted, this author is looking at a 1970s case through a 2013 lens, but it seems that had the complaint included the Cherokee claims, the human element and thus the true impacts of the

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<sup>126</sup> Conversation with Dan Rohlf, *supra* n. 112.

<sup>127</sup> See e.g. Plater, *supra* n. 1, at 49–50 (detailing the concern that using the ESA and snail darter to stop the Tellico Dam would be seen as a technicality, result in backlash, and paint Plater and the plaintiffs as "hypocritical extremists").

<sup>128</sup> *Id.* at 34 ("The Endangered Species Act had some teeth added to it last year," [Hank Hill] noted, 'so an endangered fish might be able to block Tellico Dam. Do you think that's enough for a ten-page paper?").

<sup>129</sup> See e.g. *id.* at 43 ("Isn't the fish just a fortuitous coincidence that gives us a handy weapon to fight the dam?").

<sup>130</sup> *TVA*, 437 U.S. at 173–74 ("Accepting the Secretary's determinations, as we must, it is clear that TVA's proposed operation of the dam will have precisely the opposite effect, namely the *eradication* of an endangered species." (emphasis in original)); Conversation with Dan Rohlf, *supra* n. 112.

<sup>131</sup> See e.g. Plater, *supra* n. 1, at 169 ("[T]he citizens resisting the 'more than \$100 million' dam are identified as 'the environmentalists' who either care only about the fish, or care about the fish only to stop development . . . ."); *id.* at 43 ("What would people assume about the citizens who take up the darter's cause? Probably that we're hypocrites as well as fools, environmental extremists manipulating the darter to misuse the law over a technicality. . . . No one would step up for years of painful effort if the Tellico project made economic sense and the fish alone was at stake.").

<sup>132</sup> *Morning Edition*, *supra* n. 28 (Bruce Wheeler, Professor of History at University of Tennessee stated, "There was great worry about the Native American burial sites that were excavated.").

reservoir in their entirety, would have been front and center legally, publically, and politically.

## X. CONCLUSION

*Tennessee Valley Authority (TVA) v. Hill*, the snail darter, and the Tellico Dam project will forever be controversial. As Plater honestly and openly admits throughout his book, nearly every aspect of the case was contentious. Ordinary citizens went up against the entrenched TVA. A small, endangered snail darter ended up commanding and deserving the same amount of protection under the Endangered Species Act (ESA) as more iconic and charismatic creatures. And the ESA's revolutionary "intrinsic value" language went up against a pork-barrel-approving Congress. Moreover, the story behind the snail darter case was simultaneously simple yet so complex that a fast-paced, headline- and profit-driven media could not or did not want to sort it out. Such a story was all the more controversial given that Plater and the Little T supporters were a shoestring operation with zero political insight or status. With these limited resources, they fought to convince a special interest-driven Congress and agencies trying to avoid controversy on legislative mandates so new that the ink was still wet, that not only was the snail darter worth saving, but so were the ESA, the family farms, the ancient Cherokee sites, and the last free-flowing thirty-three miles of the Little T. Plater's *The Snail Darter and the Dam: How Pork-Barrel Politics Endangered a Little Fish and Killed a River*, as a first-hand, truly public account of the entire story behind *TVA v. Hill*, deserves a wide audience. Plater's account is a testament to the citizens and supporters of the Little T and their deep-seated convictions and commitment to the public good. Their story and legacy should inspire all who seek to enter the public discourse and actively engage in our legal and political systems to ensure that they represent and uphold the will of the people.

