



# **A Brief Legal History of TVA**

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# TVA Act

- Enacted in 1933, the TVA Act established TVA as a corporation which is part of, and wholly owned by, the United States Government.
- The TVA Act sets forth TVA's multifaceted purposes and responsibilities in the areas of
  - Navigation
  - Flood Control
  - National Defense
  - Providing Ample Electric Power at Rates as Low as Feasible
    - And to set the rates at which such power is sold
  - Industrial (“Economic”) Development
  - Environmental Stewardship
  - Technological Innovation
  - Agricultural Development
  - Reforestation



# TVA Act

To enable TVA to achieve its broad-ranging missions, when proposing the draft legislation which ultimately became the TVA Act, President Franklin Roosevelt called upon Congress:

*“ . . . to create a Tennessee Valley Authority--a corporation clothed with the power of government but possessed of the flexibility and initiative of private enterprise.”*

But, is this new statutory creature Constitutional?

*Ashwander v. TVA*

297 U.S. 288 (1936)

**TVA's sale of surplus energy from Wilson Dam  
is constitutional.**

# Ashwander v. TVA



**Wilson Dam**



# Ashwander v. TVA

“The Wilson Dam and its power plant must be taken to have been constructed in the exercise of the constitutional functions of the federal government.”



# Ashwander v. TVA

“The power of falling water was an inevitable incident of the construction of the dam. That water power came into the exclusive control of the federal government . . . and the electric energy thus produced constitute property belonging to the United States.”



# Ashwander v. TVA

**“Authority to dispose of property constitutionally acquired by the United States is expressly granted to the Congress by section 3 of article 4 of the Constitution.”**

“The United States owns the coal, or the silver, or the lead, or the oil, it obtains from its lands, and it lies in the discretion of the Congress, acting in the public interest, to determine of how much of the property it shall dispose.

We think the same principle is applicable to electric energy.”





# Ashwander v. TVA

“We know of no constitutional ground upon which the federal government can be denied the right to seek a wider market. . . . [T]he transmission lines for electric energy are but a facility for conveying to market that particular sort of property . . . .”



# Ashwander v. TVA

“The government is not using the water power at the Wilson Dam to establish any industry or business. . . . The government is disposing of the energy itself which simply is the mechanical energy, incidental to falling water at the dam, converted into the electric energy which is susceptible of transmission.”

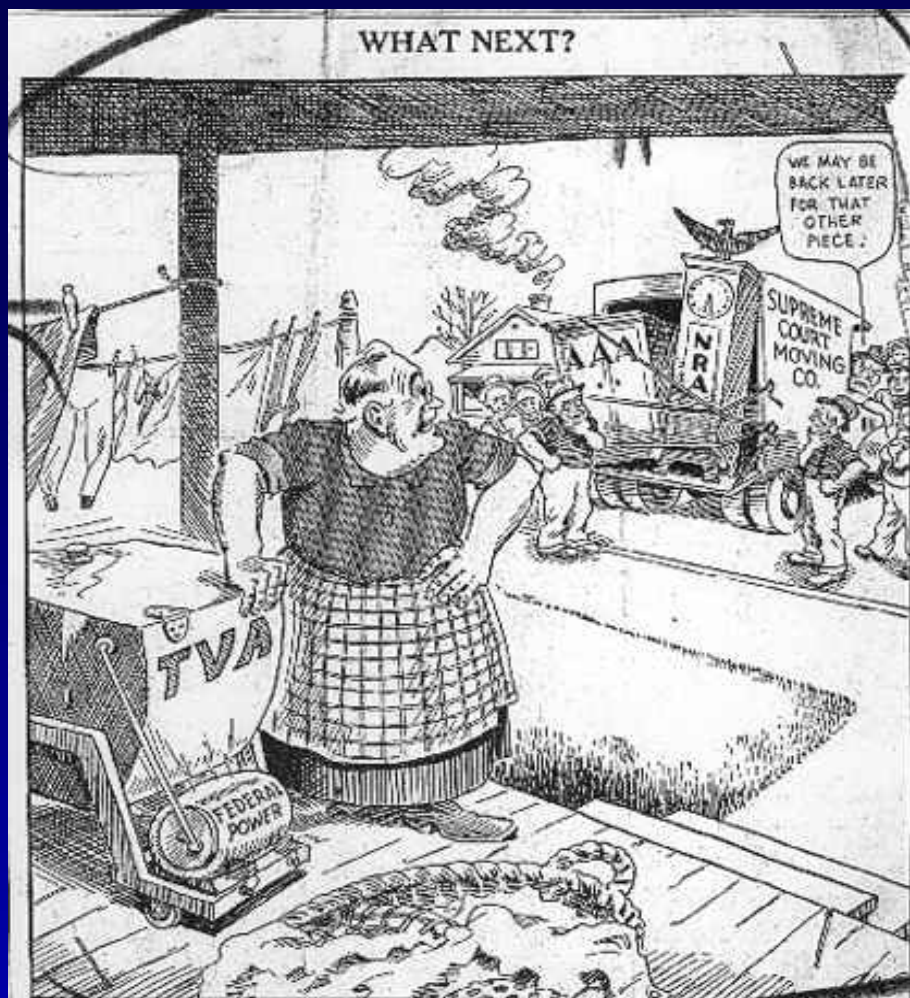
# Ashwander v. TVA



## Franklin's Successful Experiment

February 18, 1936, Kansas City Star

# Ashwander v. TVA



## What Next?

January 23, 1936, Jersey City Journal

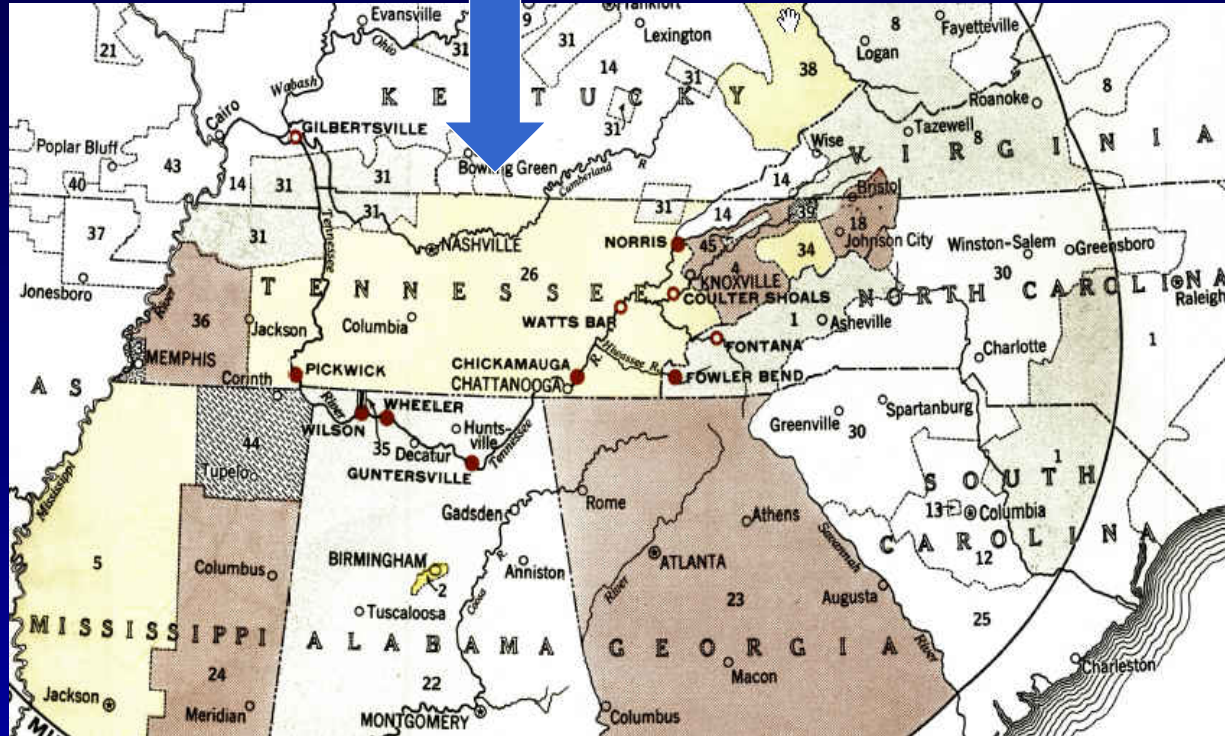
# *Tennessee Electric Power Co. v. TVA*

**306 U.S. 118 (1939)**

**Utilities lack standing to complain about competition from TVA.**

# Tennessee Electric Power Co. v. TVA

Tennessee Electric Power Co.



Mississippi Power & Light

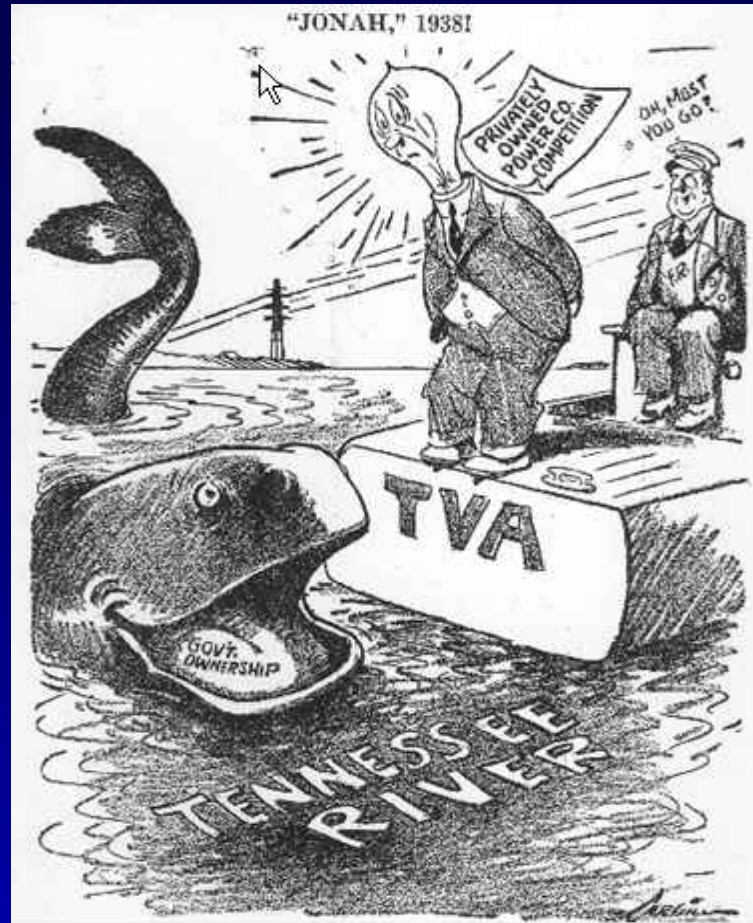


Alabama Power



Georgia Power

Electric Companies in TVA Region c. 1938



## Jonah, 1938!

March 9, 1938, Mansfield, Ohio News Journal



# Tennessee Electric Power Co. v. TVA

“The appellants urge that the Tennessee Valley Authority, by competing with them in the sale of electric energy, is destroying their property and rights without warrant, since the claimed authorization of its transactions is an unconstitutional statute. The pith of the complaint is the Authority’s competition.”





# Tennessee Electric Power Co. v. TVA

“The sale of government property in competition with others is not a violation of the Tenth Amendment.”

***United States ex rel. TVA v. Welch***

**327 U.S. 546 (1946)**

**TVA's condemnation powers under the TVA Act are to be broadly construed.**



**Fontana Dam Construction**



# United States ex rel. TVA v. Welch



**Fontana**

“[The] Act does far more than authorize the T.V.A. to build isolated dams. The broad responsibilities placed on the Authority relate to navigability, flood control, reforestation, marginal lands, and agricultural and industrial development of the whole Tennessee Valley.”

# 1959 Amendments to the TVA Act

These Amendments gave TVA authority to issue its own bonds for financing

- Not obligations of, or guaranteed by, the United States
- Limited total debt that can be outstanding at any given time (“debt cap”)
  - Debt cap initially set by Congress at \$750 million
  - Provided Congress with mechanism for periodic review of power program as TVA made future requests to increase debt cap to meet load growth
  - Debt cap increased four times; last increase in 1979 to current \$30 billion

# 1959 Amendments to the TVA Act

- TVA issues bonds pursuant to Board-approved Bond resolutions pledging income and assets
- Required that \$1 billion of appropriations invested in power program be repaid over time, with remainder to be permanent U.S. Government equity
- Established a TVA service territory (“Fence”) outside which TVA can only sell surplus power to certain neighboring electric systems

# *Hardin v. Kentucky Utilities Co.*

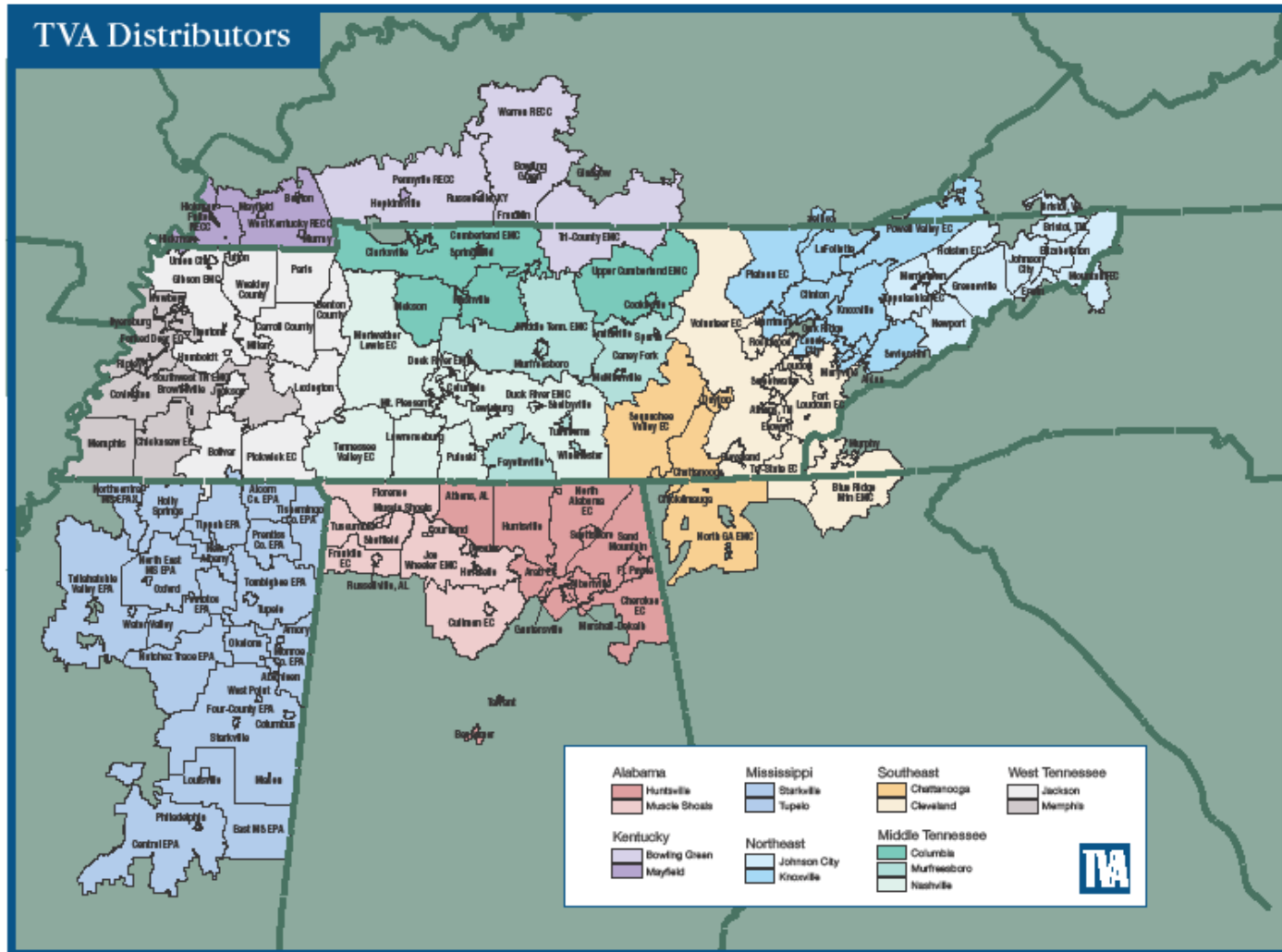
**390 U.S. 1 (1968)**

**The TVA Board's determinations of its service territory should be set aside only when they lack reasonable support in relation to the TVA Act.**





# Hardin v. Kentucky Utilities Co.





# Hardin v. Kentucky Utilities Co.

“[O]ur problem is therefore the narrow one of deciding whether these villages . . . are part of an ‘area’ for which TVA was the primary source of power on the crucial date.”



# Hardin v. Kentucky Utilities Co.

“[W]e think it is more efficient, and thus more in line with the overall purposes of the Act, for the courts to take the TVA’s ‘area’ determinations as their starting points and to set these determinations aside only when they lack reasonable support in relation to the statutory purpose of controlling, but not altogether prohibiting, territorial expansion.”

*Mobil Oil Corp. v. TVA*

387 F. Supp. 498 (N.D. Ala. 1974)

**TVA's electric power rates are not subject to  
judicial review.**



# Mobil Oil Corp. v. TVA

“Indeed, the nonseparability of power rates and the customer’s contract to pay those rates is made clear by the TVA Act itself, as well as by the terms of the contract here involved and by materials showing the general practice in the industry.”



# Mobil Oil Corp. v. TVA

“The fixing of rates which will balance the . . . objectives [of the TVA Act] is a matter Congress entrusted to the TVA Board and involves the clearest sort of commitment to agency discretion . . . **[I]t is not subject to judicial review.**”

## *TVA v. Hill*

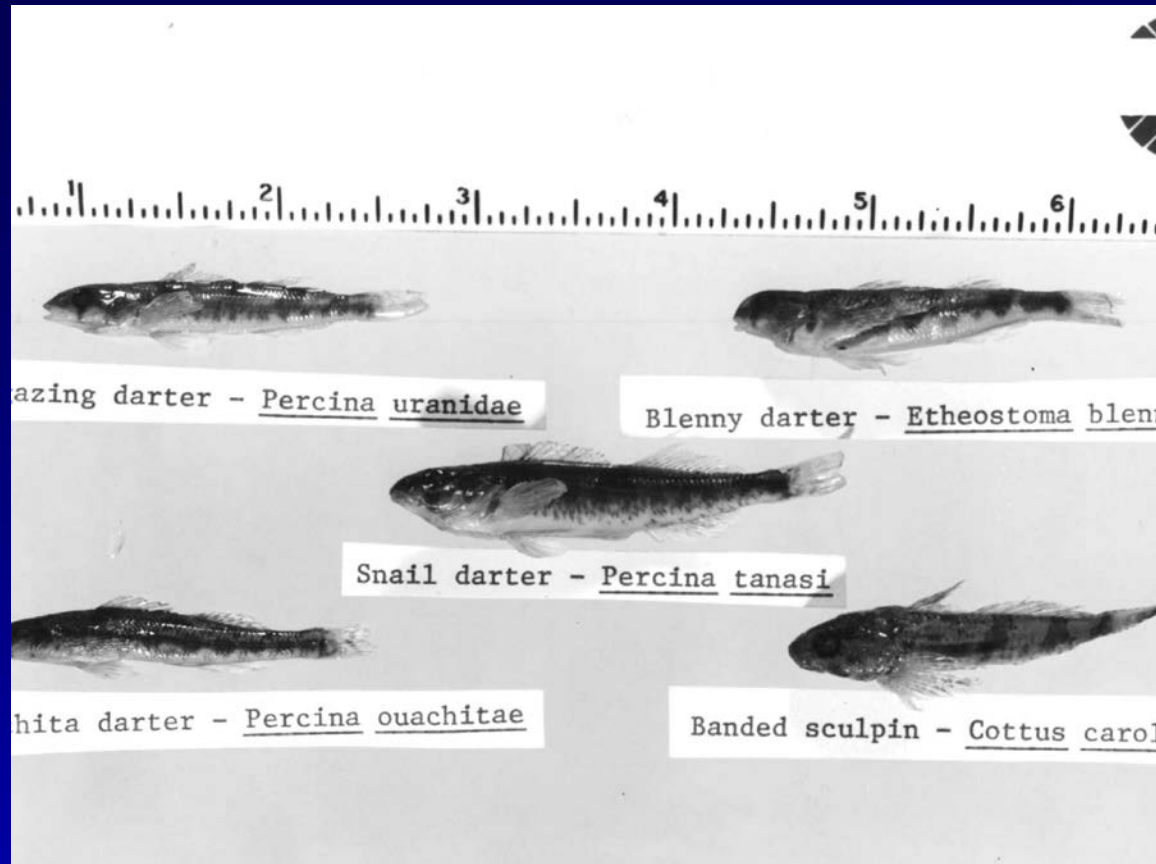
**437 U.S. 153 (1978)**

**The Endangered Species Act requires that endangered species be afforded the highest priorities.**



**Tellico Project**



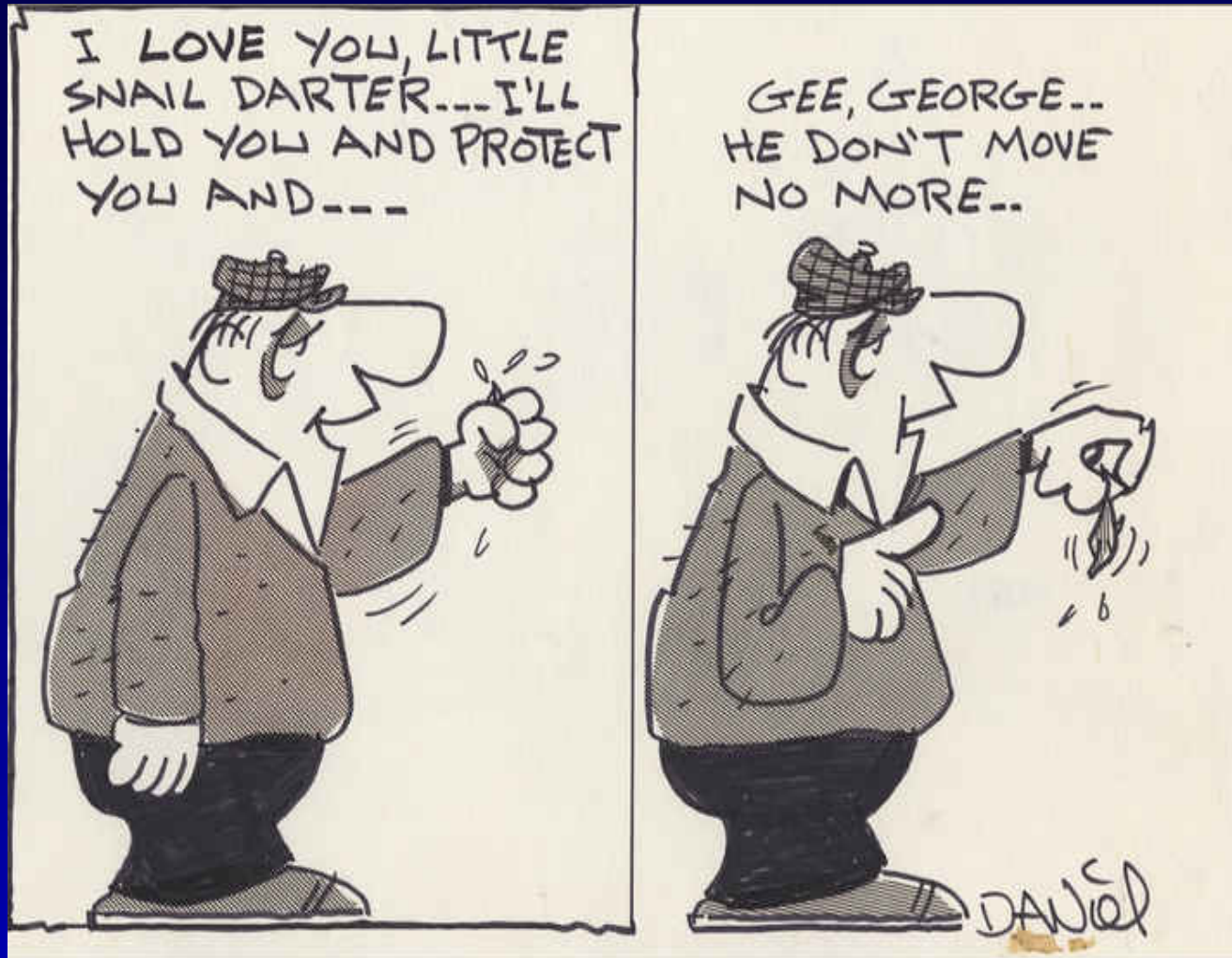


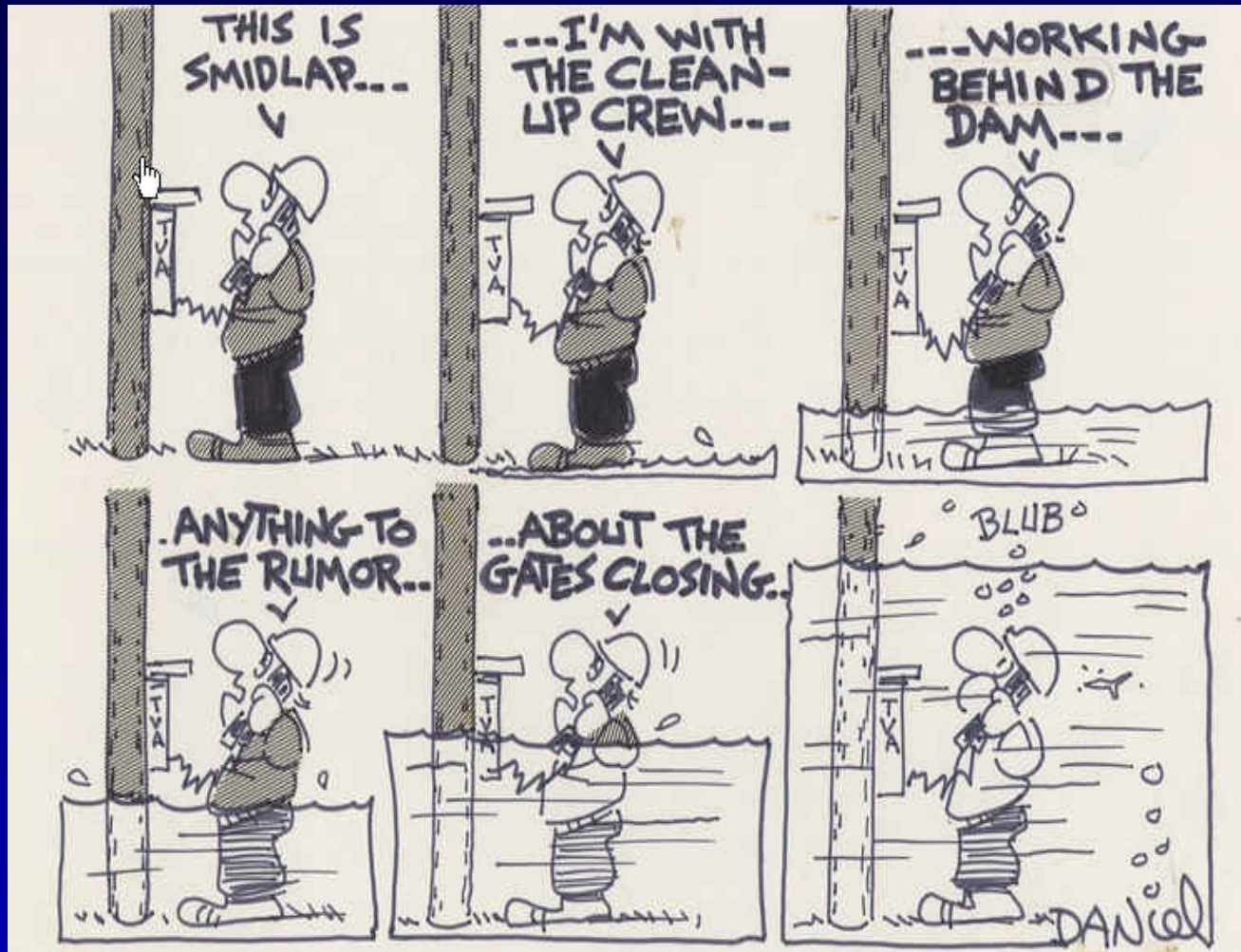
## Types of Snail Darters



# TVA v. Hill

“It may seem curious to some that the survival of a relatively small number of three inch fish among all of the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million. . . . We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.”





***TVA v. United States***

**69 Fed. Cl. 515 (2006)**

**TVA is awarded a judgment of \$34.9 million  
against the United States.**



**Spent Fuel Dry Cask Storage**



# TVA v. United States

“In the case at bar, it is plain that there exists a concrete controversy between adverse parties. This is not a fight over policy. It is a dispute over money—a circumstance virtually guaranteed to break up family harmony.”

## ***North Carolina v. TVA***

**615 F.3d 291 (4th Cir. 2010)**

**Nebulous rules of nuisance law cannot  
supplant regulatory decisions.**



# North Carolina v. TVA



**Fossil Plants - Bull Run, John Sevier,  
Kingston, Widows Creek**



# North Carolina v. TVA

“If courts across the nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern. Energy policy cannot be set, and the environment cannot prosper in this way.”

Restructured TVA's Governance to replace TVA's 3-person, full time Board with a 9-person part-time "policy" Board

Requires the Board to:

- Appoint a CEO with responsibility for day-to-day operations
- Establish an Audit Committee and others as appropriate
- Establish annual budgets, compensation plan, and long range goals and strategies

# 2004 Amendments to the TVA Act

The Board members are appointed by the President, confirmed by the Senate, and serve 5-year terms

The Board has established 5 standing committees (Audit, Risk, and Regulation; External Relations; Finance, Rates, and Portfolio; Nuclear Oversight; People and Performance)

The Board has adopted Bylaws and Board Practices



# So, What is this animal “TVA?”

An “executive agency” . . . but a corporation

A corporation . . . but issues no stock

Exempted from Civil Service . . . but many federal employment laws apply

Not subject to general labor laws (NLRA, FLRA) . . . but must pay minimum wages subject to DOL review

Not subject to federal property management laws . . . But manages 300,000 acres of land owned by the USA

No longer receives appropriated funds . . . but part of annual federal budget



# So, what is this animal “TVA”

TVA is “neither fish nor fowl.” But “whatever it is, it will taste awfully good to the people of the Tennessee Valley.”

President Franklin Roosevelt

“TVA is controversial because it is consequential.”

Gordon Clapp, TVA Chairman (1946-1954)



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