

BOOK REVIEW

The Snail Darter and the Dam (スネイル・ダーターとダム)

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BOOK REVIEWED:

Zygmunt J. B. Plater. *The Snail Darter and the Dam: How Pork-Barrel Politics Endangered a Little Fish and Killed a River*. New Haven: Yale UP, 2013.

When Zygmunt Plater, the author of the book under review, finished his job as petitioner and counsel for plaintiff citizens in the Tellico Dam case from 1974 to 1980, he looked back to his legal involvement and wrote an article in 1982. At the end of this piece he concluded: “Tellico reflected in microcosm an amazing array of substantive issues, philosophical quandaries, human dramas, and American political artifacts” and the “Tellico case deserves a much more probing and extensive analysis than that contained in this sketch” (“Reflected in a River” 787). Since then, he has chaired the State of Alaska Oil Spill Commission’s Legal Research Task Force, been lead author of an environmental law casebook, and has participated in numerous citizen environmental initiatives. And now, after three decades, the professor of law and director of the Land & Environmental Law Program at Boston College Law School has published *The Snail Darter and the Dam: How Pork-Barrel Politics Endangered a Little Fish and Killed a River* from Yale University Press.

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According to Edward O. Wilson of Harvard University, this case is “the Thermopylae in the history of America’s conservation movement.” Indeed, a national poll of environmental law professors on the most important American environmental protection court decisions has ranked it the number one case (Plater, “Environmental Law” 424). Moreover, Jonathan Harr, the author of *A Civil Action*, the classic depiction of the Woburn municipal well toxic contamination cases in which Plater was involved, claims: “This is the inside story, laid out with wonderful lucidity, of a long and fascinating battle that became an icon of its era and remains instructive today. It’s a blueprint for community action and, sadly, a still-current roadmap of the way in which Washington works” (*The Snail Darter*, cover).

As a faculty member at the University of Tennessee College of Law previously Plater had a close relationship with the Tennessee Valley Authority (TVA). For him the TVA in the early 1970’s was at the crossroad:

It was an entity of expertise and power, of enormous potential, sitting astride seven states, but locked within itself. The agency represented a populist mission, but now has become part of a restricted political establishment. It was an agent for innovation and democratic development that finds it easier, no matter what its leadership, to go its own powerful way rather than to open itself to the challenges of participatory pluralistic democracy. (“Refretled in a River” 478 n.4 and 5)

Plater had worked with TVA colleagues, primarily in land-use planning initiatives for Tennessee and Alabama, before becoming a co-plaintiff, along with the Tennessee Audubon Council, the Association of Southeastern Biologists, Professor Donald Cohen, and student Hiram Hill who described to his professor what his fish biologist friends had discovered:

“The Endangered Species Act had some teeth added to it last year,” he noted, “so an endangered fish might be able to block Tellico Dam. Do you think that’s enough for a ten-page paper?”

“I said yes, I thought it was” answered Plater. (*The Snail Darater* 34)

Indeed, the Tellico story is immensely complex.

Winning the Supreme Court case, *Tennessee Valley Authority v. Hill*, Plater narrates the story behind the nation's most significant environmental law battle with compassion and anger. With great disappointment, he argues, thirty years after the legal battles to save the endangered snail darter, the little fish that blocked completion of a TVA dam is still invoked as an icon of leftist extremism and governmental foolishness. In his environmental law textbook Plater cites the provocative statement from Rush Limbaugh. "The militant environmentalist movement in America today is a new homosocialism, communism," shouts the radio talk show host on December 7, 1993:

What these people are is against private property rights. They are trying to attack capitalism and corporate America in the form of going after timber companies. And they're trying to say that we must preserve these virgin trees because the spotted owl and the rat kangaroo and whatever live in them, and it's the only place they can live, the snail darter and whatever it is. ("The Endangered Species" 672)

The realities of the darter's case, Plater asserts, have been consistently mischaracterized in politics and by the media. This book offers a detailed account of the six-year crusade against a pork-barrel project that made no economic sense and was flawed from the start. In reality the TVA's project was designed for recreation and real estate development. And at the heart of the little group fighting the project in the courts and Congress were family farmers trying to save their homes and farms, most of which were to be resold in a corporate land development scheme. Plater's fascinating story of citizens navigating the tangled corridors of national power stimulates important questions about national governance, and at last sets the snail darter's record straight.

This diminutive snail darter, *Percina tanasi*, has always been associated with the discussion of the Endangered Species Act (ESA). ESA was the first law to recognize the inherent value of living animals as part of ecological communities, regardless of any economic value they might have. The members of the House and Senate who passed the bill "could not have imagined that it would be used to protect the snail darter," a fish residing within the area proposed to be inundated by Tellico (Stoll 87).

In 1967, when the TVA began construction of the Tellico Dam on the

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Little Tennessee River, it would dam the last significant free-flowing stretch of water in the region. Opposition to the dam was immediate, with opponents claiming loss of farmland, inundation of the Cherokee Indian Nation's most sacred religious site and loss of river recreational opportunities. The resulting tangle of lawsuits succeeded in delaying the project for years. By 1973, however, the dam appeared destined to be built. The year also saw passage of the ESA, and discovery of the snail darter. A number of Tennessee scientists, conservation groups and citizens petitioned to list the snail darter as an endangered species. Based on existing knowledge, as required by the ESA, and on efforts by Plater and his allies (*The Snail Darter*, ch. 3) the species was listed as endangered in 1975 and critical habitat was designated (40 Federal Register 47506). The U.S. Fish and Wildlife Service requested the TVA halt construction and enter into interagency consultation to resolve the endangered species conflict. Consultation had been undertaken in other interagency disagreements and is for many the preferred alternative to avoid or mitigate conflicts. The TVA responded that it would not discuss any option except completion of the dam. Having lost on cultural and economic grounds, dam opponents now embraced the ESA and took the TVA to court (Tilt 511).

Thus, the drama takes place in a courtroom. A small group of citizens is defending the endangered "snail darters" threatened by Tellico, the last of 68 dams being built in Tennessee by the TVA. The agency justified the small, non-hydroelectric dam by forcing condemnation of 40 square miles of 300 family farms, allegedly for profitable re-sale and development by a Fortune 500 company, which would never happen. The only practicable way for the farmers, fishermen, and local environmentalists to force a common-sense economic review of the destructive project is to block it in court.

After their case was dismissed by the District Court (rev'd 419 F. Supp. 753 [E.D. Tenn. 1976]), the Sixth Circuit Court reversed and ordered the District Court to permanently enjoin completion of the project "until Congress, by appropriate legislation, exempts Tellico from compliance with the Act or the snail darter has been deleted from the list of endangered species or its critical habitat materially redefined" (aff'd 549 F.2d 1064 [6th Cir. 1977]).

The Supreme Court agreed to review the lower court's judgment in 1977. Next year the Supreme Court, in a 6 to 3 decision, with what Plater describes

an unlikely group in the majority including Justice Rehnquist, affirmed the lower court's decision, even though Tellico Dam was by then 90 percent completed and the TVA had spent over \$20 million on the dam and in excess of \$80 million on land development. The court made a number of findings, including that Congress intended endangered species to be afforded the highest of priorities, and that the ESA applied to all federal actions without exception, at whatever the cost (437 U.S. 153 [1978]).

Later Plater describes the Supreme Court arguments in fascinating detail highlighting the interaction of Attorney General Bell, who argued the case for a split US government, and his own interactions—some humorous, some intellectually challenging, some hostile—with the justices.

Here is one particularly interesting and legally important exchange, after Plater described Justice Rehnquist “engaged in muttered conversation to his left and right, clearly trying to stroke irritations with our impertinent arguments that the courts are bound by the statute.” Justice Rehnquist said:

I don't agree with you, Mr. Plater . . . you have a long history of equitable adjudication where, for instance, a building is built over a lot line and there has been a contest throughout, but the chancellor . . . may say, applying the common law, which has the same sanction to him as the legislative laws passed by Congress, “I will give you damages, I will not give you an injunction.” Now why isn't that an appropriate case for that sort of adjudication? (*The Snail Darter* 256)

Plater writes in his color commentary on the transcript of the hearing “Who's flailing now, me or Rehnquist?”:

Several reasons. Number one is, as Your Honor . . . noted, damages of course is not a remedy. Once a species is rendered extinct, as Congress said, it's extinct forever. . . . (*The Snail Darter* 257)

The Supreme Court opinion itself reaches its high point echoing the story of Saint Thomas More: “The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm not God”—a begrudging conclusion but one wonderful for the Endangered Species Act (*The Snail Darter* 267).

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As a direct result of the Court's decision, Congress amended the ESA in 1978. The amendments provided for the granting of exemptions to projects of regional or national significance where project benefits "clearly outweigh the benefits of alternative courses of action" (Pub. L. No. 95-632, 92 Stat. 3757 codified at 16 U.S.C. Section 1536 (h) (A) [Srpp. IV 1980]).

This review process was to be carried out by the Endangered Species Committee (ESC), a Cabinet-level committee nicknamed the "God Committee" because of its power over a species' existence. Much to the surprise of Tellico Dam supporters, the committee decided in favor of the snail darter and against completion of the dam, which the committee concluded was a poor economic investment even though it was, by that time, 95 percent completed. On January 23, 1979, the ESC unanimously denied an exemption for Tellico Dam on economic rather than ecological grounds. Concerning the ESC's decision, Chairman Cecil Andrus stated: "I hate to see the snail darter get the credit for stopping a project that was ill-conceived and uneconomic in the first place" (*The Snail Darter* 289).

However, as Plater points out, the Secretary of Interior himself conveyed the God Committee's unanimous economic findings against the dam to every member of Congress. Yet because the press frustratingly failed to carry that part of the story, Congress ultimately felt free to ignore the merits and roll the pork barrel.

Thus, pork barrel politics in America did not have to bend to the decisions of the Supreme Court and congressional-appointed ESCs. Supporters of the dam then resolved to have this decision overturned by Congress. In 1979 they succeeded in passing legislation exempting Tellico Dam from the endangered species laws and providing funding for its completion. On June 18, a rider was attached to a public works appropriation bill that overrode all other decision and authorized the completion of Tellico Dam. Tellico was reauthorized by Representative John Duncan and thus "in forty-two seconds the citizen's work of sixteen years was reversed." Although President Jimmy Carter disapproved of this circumvention of the endangered species legislation, the act reviving Tellico Dam was virtually veto-proof because it was attached to a continuing resolution to keep the government operating after October 1, 1979 and, Plater speculates, for other motives related to his weak standing at the time with the American public. Plater summarizes his conversation with President Carter who called him "the professor": "Professor

Plater? We have a call for you coming in from Air Force One, the president of the United States. Will you take it?"(*The Snail Darter* 324). Plater then hears the "voice with the Georgia accent . . . just as it sounds on the evening news clips" (327). "Professor Plater, I wanted you to know that after careful analysis and soul-searching I have determined to sign the bill. I think it's the best decision." Plater responds in what demonstrates why high-profile public interest lawyers can be effective—if not always traditionally respectful. "Mr. President, you are making the wrong decision. Hundreds of Tennessee farmers, and sportsmen and conservationists have worked hard on this, for more than ten years" (328).

The after-effects of the snail darter case continue to raise important and annoying questions about how facts are processed by government as well as media, and to put down environmental protection laws and progressive regulation still regularly use the "silly fish" caricature.

The snail darter continues to be an icon for species management. Unfortunately, environmentalists, policy makers and politicians alike poorly understand the actual events and outcomes of the case. Too often, the case is viewed as one of a tiny, insignificant fish that threatened to stop a valuable public works project. In the course of the controversy, debate did not focus on the strong arguments against completion of the dam (i.e., TVA's own cost benefit analysis) or the loss of cultural and recreational benefits, but rather on the fish. Chairman Andrus' concern for the snail darter getting the credit for stopping what the *New York Times* (1980) termed a "costly boondoggle," was misplaced. In short, the snail darter didn't get the credit, but instead it got the blame (Tilt 512). Plater tries to draw a historical lesson:

The problem with the Tellico Dam controversy was not that the media failed to run stories on the conflict between the dam and a diminutive endangered snail darter fish. Rather, it was that the media systematically got the story wrong, mischaracterizing the litigation as extremism. ("Law, Media, and Environmental Policy" 539-40)

As reported during the 1970's, the story consistently came down to a simple caricature: the snail darter, a two-inch minnow, misused by extremist environmentalists at the last possible moment to halt

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completion of a massive \$150,000,000 hydroelectric dam. (“The Wake of the Snail Darter” 806)

However, each element of that summary was incorrect. According to Plater, the Tellico Dam was:

. . . small with no generators, and was only a fractional part of a quixotic federal land development project that subsequently fell of its own weight. The river valley itself, without the dam, held the potential to produce more public profits than the project. And far from discovering the snail darter at the last moment, the TVA knew about the endangered fish in 1973, but ignored the law and spent most of its budget after 1973 in an accelerated effort to foreclose alternatives to the reservoir. The perceived media reality, however, had an immutable force of its own, possessing more importance than the facts on the record. In that irony lies one of the important lessons to be drawn from the case. (“The Endangered Species” 675)

Thus, Plater concludes:

Over a period of seven years of extraordinary efforts, the environmental plaintiffs were successful in the legal process, but in the realm of the press and public opinion were disastrously unsuccessful in getting across the dramatic facts that would have shown that good ecology made good economic sense. (“Law and the Fourth Estate” 2)

Dan Rather then of the *CBS Evening News* reportedly swore at himself and his staff for missing the true story early in its unfolding (*The Snail Darter* 345-46).

This problem of perception not matching reality did not stop with the completion of Tellico Dam. Furthermore, to the lament of Plater, it has been repeated consistently in other endangered species battles such as the northern spotted owl, *Strix occidentalis caurina*, in the Pacific Northwest and the golden-cheeked warbler, *Dendroica chrysoparia*, in Texas. Unfortunately, rather than recognizing the phenomenon and dealing with it, too many agency personnel have repeatedly ignored the snail darter’s lessons and elected

instead to stand fast by their data, deaf to public perception and politics. Such tenacity and dedication is, on one hand, admirable. On the other hand, an inflexible and rigid adherence to regulations promulgated under the ESA can make enemies of potential allies, and cause ESA issues to become so polarized that resolution becomes impossible (Tilt 512).

Plater writes:

Only in America could this kind of fish story happen. It's a case study of polarized politics, a powerful but imprudent press, and stalemated congressional procedures—a parable that highlights many of the strengths, idiosyncrasies, perils, and needs of our vexed modern system of democratic governance. (*The Snail Darter* xiii)

To a great extent this is true; however as the recent “transnational” studies of the TVA indicate, Plater’s story needs to be placed within a global context. Indeed, the TVA during the Cold War had an aggressive global “propaganda” that emphasized its democratic impulse, at least until the mid-1970s (Ekbladh). It coincided with the above-mentioned turning point for TVA’s history. Particularly on the receiving end of this propaganda, in Japan for instance, people were interested in the nature of grass-roots environmental policy-making. It was thus in 1980 that, when Plater was thirty-six years old Law Professor at Wayne State University, he was invited to the Kyoto Conference on Protecting Rivers and Lakes from Development and Destruction in Japan. Just like his mentor, Joseph Sax, who was invited to Tokyo International Conference which declared “environmental rights” for the first time in human history (Oshio and DiMento), Plater’s conference proclaimed “rights of nature” for the first time in Japanese legal history (*Asahi Shinbun*). Three months later, his round-table talk with Professor Takahisa Awaji, Rikkyo University law professor, and Yasuhiro Orita, an attorney, was published in *Hogaku Seminar*, which praised Plater for seeding this new environmental concept (“Roundtable” 87). Indeed, he was spreading the counter-propaganda against the TVA and stressed the need for the continuing mission of transnational citizen environmentalism.

As for the principal story, Plater reports that the “river ultimately became a reservoir” and that the darter became extinct in its natural habitat but survived elsewhere—although it remains threatened (*The Snail Darter* xii).

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