

STEWARDSHIP OF PUBLIC LANDS AND CULTURAL RESOURCES IN THE TENNESSEE VALLEY: A CRITIQUE OF THE TENNESSEE VALLEY AUTHORITY'S "NEW DEAL"

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INTRODUCTION

In the 1930's, the South was a poverty-stricken section of America that had escaped the wealth accumulated in other regions of the country. In 1933, for example, the per capita income in the Tennessee Valley was only

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45 percent of the national average.¹ Thousands of rural southern people had no electricity, or running water, suffered failing crops year after year from depleted and eroding soils and lived in abject poverty.² Additionally, the large timber companies had cut the best timber using the common practice of “high-grading” and clear-cutting. The nation as a whole was reeling from the devastating impacts of the Great Depression, and the South, particularly, the rural South, was in a desperate struggle for survival.

The Tennessee Valley Authority (or “TVA” or “The Corporation”) is generally known as one of Franklin D. Roosevelt’s New Deal solutions to the Great Depression. The idea, however, was one FDR shared with Senator George Norris, Chairman of the Senate Agriculture Committee in 1933.³ Senator Norris envisioned a government power project at Muscle Shoals, Alabama, site of two federally-owed nitrate plants, as a way to thwart the growth and expansion of private power monopolies championed by Republican Wendell Wilkie.⁴ President-elect Roosevelt visited Muscle shoals, Alabama, in January of 1933 and gave an impromptu speech in which addressed power projects in general.

[W]e have an opportunity of setting an example of planning, not just for ourselves but for generations to come, tying in industry and agriculture and forestry and flood prevention, tying them all into a unified whole over a distance of a thousand miles so that we can afford better opportunities and better places for living for millions of yet unborn in the days to come.⁵

In March 1933, in the depths of the Great Depression, Roosevelt took office. The most pressing issue at that time was the nation's economy.⁶ The TVA Act was part of a legislative initiative within the first 100 days of the Roosevelt Administration to solve this problem.⁷ Uniquely, it incorporated Theodore Roosevelt’s principle of using natural resources to benefit people and Franklin Roosevelt’s “view of an active government in which

1. *Public Works Appropriations for 1967, Hearings Before A Subcomm. of the Comm. on Appropriations for the House of Representatives: Part 2 of Hearings on H.R. 17787, 89th Cong. 759 (1966)* (Statement of Aubrey Wagner, Chairman, TVA).

2. ALANSON A. VAN FLEET, *THE TENNESSEE VALLEY AUTHORITY* 22–23 (1987).

3. *See generally* T. H. WATKINS, *THE GREAT DEPRESSION* 149–155 (1993).

4. *Id.* at 150.

5. *Id.* at 150–151.

6. Van Fleet, *supra* note 2, at 29.

7. *Id.* at 29.

government agencies would work with people to help overcome social and economic problems.”⁸

Sadly, however, the idealism of Franklin Roosevelt’s TVA has evolved (or eroded) into a business enterprise which today functions more like the private company. Senator Norris had feared this result.

In November, 1933, Congress enacted the TVA Act and mandated the new federal agency to provide, in the Tennessee River drainage basin (1) the maximum amount of flood control; (2) the maximum development of the Tennessee River for navigation purposes; (3) the maximum generation of electric power consistent with flood control and navigation; (4) the proper use of marginal lands; (5) the proper method of reforestation of all lands in said drainage basin suitable for reforestation; and (6) the economic and social well-being of the people living in the Tennessee River basin.⁹

Of these six congressional purposes, only the third makes direct reference to power generation and then only when consistent with flood control and river navigation. Power production really did not become an important part of TVA until World War II. The TVA’s other five stated purposes have become known in the Valley as the non-power programs.

To accomplish the statutory purposes, Congress gave TVA unprecedented powers of eminent domain to acquire lands for dams, reservoirs, power production, navigation projects, public recreation, and industrial development for “the economic and social well being of the people.”¹⁰ Congress also restricted how and for what purposes TVA could dispose of land after being acquired in the name of the United States of America.¹¹

This article looks briefly at the purposes for which land was acquired and then explores the limits of TVA’s power to dispose of public lands taken by eminent domain and held in the name of the United States of America. The scope of this article is narrow and addresses a practice initiated by TVA in the mid 1980’s of selling publicly owned lands for private residential development along the shoreline of reservoirs. This practice brings into question what is meant by “the proper use of marginal lands,” and providing for “the economic and social well-being of the people living in said river basin.”¹²

Additionally, the article examines the resurgence of concerned Native American Tribes, non-tribal associations and grass-root environmental

8. *Id.*

9. 16 U.S.C. § 831v (1994).

10. 16 U.S.C. § 831c (1994).

11. These restrictions are contained in 16 U.S.C. § 831c(k) and 16 U.S.C. § 831dd (1994).

12. 16 U.S.C. § 831v (1944).

organizations for protecting and preserving Native American burial grounds and other sacred sites. Including TVA's responsibilities to preserve and protect archaeological resources on public lands entrusted to it.

Historically, lands now owned by the United States and managed by TVA were the home of many southeastern tribes. Among the most notable are Cherokee, Creek, Choctaw, Chickasaw, and Shawnee. A predecessor, the Euchee probably inhabited a portion of eastern Tennessee during the Mississippian archaeological period.¹³ Another Mississippian Tribe, the Quapaw, lived in scattered villages along the Mississippi River from northeast Missouri through Tennessee from about 1300 AD to 1500 AD.¹⁴ As a federal agency, TVA is bound to recognize the National Historic Preservation Act,¹⁵ the Archaeological Resource Protection Act,¹⁶ the Native American Graves Protection and Repatriation Act (NAGPRA),¹⁷ and the American Indian Religious Freedom Act,¹⁸ should any human remains or artifacts of cultural significance be uncovered.

The public land issues addressed in this article have not been judicially litigated in the context of the TVA Act. The large majority of land issues litigated by TVA over the years are associated with the right of eminent domain.¹⁹ For these reasons, this article looks at federal court decisions which generally discuss TVA's legal status relative to the language of the statute and draws heavily on personal interviews with knowledgeable persons within and outside of TVA. Additionally, a sincere effort was made to include commentary and analysis from Tribal representatives, with limited success. The hesitancy of Native Americans to discuss the impact of the sale or lease of public lands which may contain sacred sites may be due in part to their not wanting to divulge the location of these sites for fear of pillage and looting by artifact collectors.²⁰ Additionally, the hesitancy could relate back to the hard-fought legal battles waged by the Eastern

13. The Mississippian Period is described from 1000 AD to about 1540 AD. Interview with Corky Allen, Repatriation Officer, Euchee Tribe of Oklahoma (Sept. 6, 1998).

14. The Quapaw, Dheghian Souian people originally from the Ohio Valley, are believed to have migrated south and settled along the river in the west Tennessee counties of Dyer, Obion, Lake, Tipton, Lauderdale and Shelby. Telephone interview with Carrie Wilson, NAGPRA Director, Quapaw Tribe of Oklahoma (Dec. 23, 1998).

15. 16 U.S.C. § 470(1994).

16. 16 U.S.C. § 470aa (1994).

17. 25 U.S.C. § 3001 (1994).

18. 42 U.S.C. § 1996 (1994); *See also* 18 C.F.R. § 1312 (1998).

19. *See generally* United States of America ex rel Tennessee Valley Authority v. Two Tracts of Land, et al., 456 F.2d 264 (1972); United States of America v. Carmack, 329 U.S. 230 (1946); Illinois Central Railroad v. Tennessee Valley Authority, 445 F.2d 308 (1971).

20. Interview with Albert Bender, Cherokee, Attorney and Teacher of Cherokee History, Nashville, Tennessee (Dec. 23, 1998).

Band of Cherokees, from Qualla Boundary, NC, against TVA over the flooding of the Little Tennessee River Valley and subsequent construction of the Tellico Dam.²¹ The Cherokees lost the lawsuits and suffered the indignity of seeing their historical tribal homeland and many grave sites, inundated.²²

Regardless of these limitations, this Article argues that public lands entrusted to TVA management and taken by eminent domain for public purposes declared by Congress, cannot be sold legally and deeded directly to developers for private residential use. This article does not take the position that Congress should amend the Act. Rather, because the TVA is a creature of its statute and cannot lawfully act outside the range of permissible choices allowed by Congress, the article concludes that TVA is required to comply strictly with the land management restraints placed on it by Congress in fulfilling the six mandates.

I. PUBLIC LANDS IN THE TENNESSEE VALLEY AND TVA'S CHANGING MANAGEMENT PARADIGM.

A. *The Early Years*

In the formative years, TVA acquired thousands of acres of land for reservoirs, and marginal land around them. Additionally, TVA acquired or leased land for transmission lines. All told, TVA Chairman Aubrey Wagner reported in 1966-67 Congressional Hearings, that TVA owned twenty multipurpose dams and reservoirs and initially owned 955,000 acres, plus an additional 155,000 acres in leased easements, but of the lands originally acquired, TVA had already disposed of approximately 40 percent by sale or transfer to other federal agencies and state or local entities.²³ During those congressional hearings when TVA sought continued funding to purchase lands that now comprise the Tellico Reservoir in Tennessee, members of the House Subcommittee on Appropriations challenged Chairman Aubrey Wagner as to the necessity of acquiring many acres of marginal lands. The

21. See generally *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

22. *Sequoyah v. Tennessee Valley Authority*, 480 F.Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (4th Cir. 1980). There was also a very large outcry by many individuals, environmental organizations, grassroots and mainstream, sportsman clubs, Farm Bureaus and other objections to the flooding of the Little Tennessee River Valley. TVA completed the dam and reservoir in the face of the overwhelming public protest. See generally WILLIAM BRUCE WHEELER & MICHAEL J. McDONALD, *TVA AND THE TELLICO DAM, 1936 – 1979* (University of Tennessee Press, 1986).

23. Wagner, *supra* note 1, at 757. It wasn't clear whether the 40 percent included transmission line easements.

Chairman responded that use of the marginal lands around reservoirs would be planned in conjunction with local interests for industrial development.²⁴ He noted, for example, that the Kentucky Reservoir totaled 228,000 acres; Norris Reservoir 145,000 acres; Gunter'sville Reservoir 109,000 acres; Wheeler Reservoir 103,000 acres; and Tellico 45,000 acres.²⁵ TVA's report to the House Subcommittee, which included both Chairman Wagner's testimony and TVA's written statement inserted into the record, repeatedly emphasized the use of marginal lands for recreation and industrial development.²⁶

II. THE TVA ACT, CASE LAW AND CONGRESS

The TVA Act, as amended, makes explicit provision for how TVA may use land acquired by eminent domain²⁷ and how and for what purposes TVA may dispose of land.²⁸ The lands, however, are owned in fee by the United States of America and "entrusted to the Corporation as the agent of the United States to accomplish the purposes of the Act."²⁹

The Act authorizes TVA to acquire lands for construction of dams, reservoirs, transmission lines, power houses, and other structures and navigation projects at any point along the Tennessee River or its watershed.³⁰ The Act also gives TVA a broad power of eminent domain "to condemn all property that it deems necessary for carrying out the purposes of this chapter [the TVA Act]."³¹

The Act also provides for the disposal of lands acquired for specific purposes. Title 16 U.S.C. § 831c(k) provides four ways in which TVA may convey lands. The focus of this article is on Section 831c(k)(a).³² That section reads:

[The Corporation]

24. *Id.* at 757.

25. *Id.*

26. Wagner, *supra* note 1. In fact, during the hearings, Congressman Joe Evins, (D. Tenn.) stated: "That has been the history of the TVA whenever water and power have been made available for new industry. The economy has grown and expanded [sic]." *Id.*

27. 16 U.S.C. § 831 (h)(i)(j) (1994).

28. 16 U.S.C. § 831c(k) (1994) and 16 U.S.C. § 831dd (1994).

29. 16 U.S.C. § 831c(h) (1994).

30. 16 U.S.C. § 831c(i) (1994)

31. *Id.*

32. The other three ways are: for shipping purposes, manufacturing, or storage of products; for use by another agency of the United States; and to states, cities, counties and public utility companies to replace lands taken for dam and reservoir construction. 16 U.S.C. § 831c(k)(b) (1994).

[s]hall have power in the name of the United States –

to convey by deed, lease or otherwise, any real property in the possession of or under the control of the Corporation to any person or persons, for the purpose of recreation or use as a summer residence, or for the operation on such premises of pleasure resorts for boating, fishing, bathing, or any similar purpose[.]³³

The language of this subsection was added to the Act in 1941 as a result of a compromise between the House and the Senate.³⁴ This language has not been amended since that time. It is noteworthy that the use of the word “shall” is directive, not permissive.

One other section in the Act also provides for disposal of public lands. Section 831dd provides that TVA may declare as surplus any lands “purchased by the Authority and not necessary to carry out plans and projects actually decided upon...” and in that event, TVA shall publicly auction such lands to the highest bidder. TVA has rarely selected this option.³⁵

As discussed later in this article, it is the opinion of the author that TVA has already exceeded its congressional mandate on how it should convey real estate and that the Corporation continues a questionable land policy today. However, the courts have interpreted TVA’s specific mandates broadly.

There is a paucity of legal decisions on this issue. As a result, it is necessary to review decisions which directly discuss TVA’s right of eminent domain to take private lands for a public purpose and to examine how TVA has extrapolated the meaning of public purpose to the sale of public lands.

In 1944, in a case unrelated to TVA, the U.S. Supreme Court stated that “[e]very acquisition holding or disposition of property by the federal government, depends upon the proper exercise of a constitutional grant of power.”³⁶ The court reaffirmed that the Supremacy Clause of the

33. 16 U.S.C. § 831c(k)(a) (1994).

34. H.R. Conf. Rep. No. 77-913, at 1 (1941). The House bill would have granted to TVA authority to make certain specific real estate conveyances. H.R. Conf. Rep. No. 77-931, at 3 (1941). The Senate Bill would have allowed TVA “under certain limitations to convey real estate generally.” H.R. Conf. Rep. No. 77-913, at 3. The conference agreement accepted the Senate language with an amendment providing “real estate to be used for recreation purposes.” H.R. Conf. Rep. 77-913, at 3.

35. Telephone interview with Reuben Hernandez, Vice President of Land Management, TVA (Sept. 15, 1998).

36. *United States v. Allegheny County, Pa.*, 327 U.S. 174, 182–83 (1944).

Constitution gave Congress the power to dispose of and make the rules respecting property belonging to the United States.³⁷

In 1946, the Court issued the landmark decision of *United States ex rel Tennessee Valley Authority v. Welch* in which TVA sought to condemn six tracts of land for the construction of Fontana Dam located also on the Little Tennessee River segment in North Carolina.³⁸ All six tracts were outside the proposed reservoir and comprised part of the marginal lands.³⁹ The district court held TVA could not condemn lands not needed for the dam and reservoir proper and the United States Court of Appeals for the Fourth Circuit affirmed.⁴⁰ The Supreme Court reversed, holding that Congress authorized TVA to do far more than build isolated dams.⁴¹ The court identified TVA's responsibilities to include "navigation, flood control, reforestation; marginal lands and agricultural and industrial development."⁴² The Court determined that the Act empowered TVA to make contracts and purchase and sell property deemed necessary or convenient in the transaction of its business.⁴³ The crux of this decision is that the Court seemed to narrow the scope of judicial review of what is a "public purpose" where the Court believed Congress had spoken on the subject in the TVA Act. In his concurring opinion, Mr. Justice Reed argued that TVA had the right to take but faulted the majority for narrowing the scope of judicial review.⁴⁴

In a later case, *Hardin v. Kentucky Utilities Co.*, the Court relented somewhat and held that a determination by the TVA Board was entitled to acceptance *unless* it lies outside the range of permissible choices contemplated by the statute.⁴⁵ The court upheld the TVA Board's decision regarding the extent of its service area to provide electricity, but signaled a

37. *Id.* at 183.

38. *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 548 (1946).

39. *Id.* at 549.

40. *Id.* at 548.

41. *Id.* at 553.

42. *Id.*

43. *Id.*

44. *Id.* at 556 (Reed, J., concurring). "It is my opinion that the TVA is a creature of its statute and bound by the terms of that statute, and that its every act may be tested judicially by any party with standing to do so, to determine whether it moves within the authority granted to it by Congress. Of course, the legislature or administrative determination has great weight but the constitutional doctrine of the Separation of Powers would be unduly restricted if an administrative agency could invoke a so-called political power so as to immunize action against judicial examination. . ." *Id.* (Reed, J., concurring).

45. *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 8 (1968).

willingness to examine whether TVA acted within the scope of its congressional authority.⁴⁶

Perhaps the most controversial litigation in the Tennessee Valley took place in the 1970's after TVA announced it would flood the Little Tennessee River valley, ancestral home of the Cherokee Nation, in order to build the Tellico Dam and Reservoir. That action spawned three federal lawsuits: one by the Cherokees, one by the Environmental Defense Fund and one by TVA seeking to condemn certain lands.⁴⁷ So controversial was the Tellico that it was the chief topic of discussion during the 1966-67 House Subcommittee Hearing.⁴⁸

The 1966-67 House Subcommittee Hearings are particularly revealing on what Congress was told about how TVA planned to use its public lands. As noted, these hearings were held for TVA to justify its continuing need for public funds and to report to Congress on the progress of its various dam and reservoir projects.⁴⁹ Although TVA reported on all twenty of its multipurpose dams, a great deal of testimony was heard regarding the Tellico Reservoir due to its controversy.⁵⁰

Chairman Wagner, while fielding questions from the subcommittee, touted the assets of Tellico for industrial and recreational development.⁵¹ He justified the construction of Tellico by claiming that TVA expected a return of \$10.9 million from future land sales emphasizing manufacturing operations and shoreline development for recreation.⁵² When questioned about land sales, the Chairman repeatedly stressed that the marginal lands around the shoreline were being acquired for private and public industrial and recreational development, depending on what the local community wanted.⁵³ Chairman Wagner placed heavy emphasis on industrial development and at did not describe plans for private residential development of the shoreline.⁵⁴

46. *Id.* at 9.

47. *Sequoyah v. Tennessee Valley Authority*, 480 F.Supp. 608 (ED Tenn. 1979); *Environmental Defense Fund v. Tennessee Valley Authority*, 492 F.2d 466 (6th Cir. 1974); and *United States ex rel. Tennessee Valley Authority v. Two Tracts of Land Containing a Total of 146.4 Acres More or Less in Loudon County, Tennessee*, 532 F.2d 1083 (6th Cir. 1976).

48. Wagner, *supra* note 1.

49. Wagner, *supra* note 1, at 757.

50. WILLIAM BRUCE WHEELER & MICHAEL J. McDONALD, *TVA AND THE TELLICO DAM 1936-1979* (1986).

51. Wagner, *supra* note 1, at 760-65.

52. *Id.* at 771.

53. *Id.* at 771-72.

54. *Id.*

In 1976, the Sixth Circuit heard the condemnation lawsuit.⁵⁵ Citing *United States, ex rel Tennessee Valley Authority v. Welch*, and other decisions, the Sixth Circuit ruled that its power to examine whether land taken by TVA for a public purpose is extremely narrow.⁵⁶ The Court, therefore, deferred to the legislative history and avoided a factual analysis. The court relied upon the 1966 Hearing before the House Appropriations Committee in which TVA presented a written statement concluding that “the plan to acquire key lands for industrial and recreational development and resell them as demand for *such property* increases reflects the public purpose of the project. . . .”⁵⁷ (emphasis added). TVA could not have received a greater *carte blanche*.

A. TVA’s Application of “Public Purpose”

Since the virtual retreat of the federal courts from examining TVA’s use of land for a public purpose, it is little wonder that the TVA Board has decided that public purpose is often what the Board says it is. Ten years after the Sixth Circuit’s decision, TVA allowed the development of Tellico Village, a sprawling development over 4600 acres of shoreland sold to private persons as permanent residential homesites.⁵⁸ The Village contains two private golf courses, recreation center, fitness room, yacht and country club all accessible to property owners and their guests.⁵⁹ TVA had the audacity to name the various “neighborhoods” within the Village with the names of the historical Cherokee towns inundated by tons of water: Coyatee, Tanasi, Chota, Toqoa and others.⁶⁰ The streets in the Village all have Native American names as well.⁶¹ To many Native Americans, such use of Indian names is insulting and amounts to “cultural appropriation.”⁶²

55. *United States, ex rel, Tennessee Valley Authority v. Two Tracts of Land Containing A Total of 146.4 Acres More or Less in Loudon County, TN*, 532 F.2d 1083 (6th Cir. 1976)

56. *Id.* at 1084.

57. *Id.* at 1085. Emphasis is added to direct the readers’ attention to the limited purpose for which “key lands” may be used if resold.

58. Map of Tellico Village promoted by Cooper Communities, Inc. a licensed real estate firm (on file with author).

59. Welcome to Tellico Valley Brochure, Recreational Fees for Property Owners and Guests 2–4 (effective Jan. 1995).

60. Map, *supra* note 58.

61. *Id.*

62. “Cultural appropriation” is a term used to describe the taking of Indian names and places for use in a different context (such as street names, vehicles, athletic teams, etc.). This use predominantly occurs in residential developments or commercial culture of the racial majority. As a result of such appropriation, the cultural significance of the name shifts from the minority culture to dominant society. Thus, the minority culture becomes subsumed and “owned” by the majority.

TVA carefully notes on its public brochures that the narrow strip of land, “between the lakeshore property line and the water line of the reservoir, is public property.”⁶³ Yet a non-resident is charged a higher recreational fee for fishing than a resident.⁶⁴

How does the Tellico Village fit into the restrictions placed on TVA by Congress in Section 831c(k)(a)? “Person” is not defined in the TVA Act; therefore, the term can reasonably include any individual or group of individuals. Certainly the facilities of Tellico Village provide for recreation, boating, fishing, and swimming; but the sticking point is the sale of public land for exclusively private use. The homes in the Tellico Village exceed any notion of a summer residence.

Where is the congressional authority in the TVA Act to sell land taken from private persons by eminent domain for a public purpose, to private developers or private individuals for private residential use? There appears to be none unless TVA first declares the land surplus and sells to the highest bidder. TVA did not do this.⁶⁵ In his lengthy report to the House Subcommittee, at what point did Chairman Wagner tell Congress about the Tellico Village or plans to sell public lands for private residential use? He did not.⁶⁶

Tellico is, however, only the tip of the iceberg. In 1997, in the face of an avalanche of protest from the public, environmental groups and Native Americans, the TVA Board removed the deed restrictions on a Special Warranty Deed given to the YMCA in 1963 for a camp on the shores of the Guntersville Reservoir in Alabama.⁶⁷ For several years, the YMCA had pled its case to TVA that the camp was in disrepair.⁶⁸ The only way the YMCA claimed it could raise the money for renovation was to sell 49.8 acres of its total 111 acres -- land it had purchased from TVA -- to a private developer for construction of private residential homes.⁶⁹ The deed specifically mentions Section 831c(k)(a) as authority for the restriction that the property would be used exclusively for private recreational purposes

Interview with Tom Kunesh, Standing Rock Lakota in Chattanooga, Tennessee (Dec. 28, 1998). Mr. Kunesh is a Council member of the Chattanooga Inter-Tribal Council.

63. Map, *supra* note 58.

64. Brochure, *supra* note 59.

65. Hernandez, *supra* note 35.

66. Wagner, *supra* note 1.

67. Special Warranty Deed, Register of Deeds Office, Marshall County, Alabama, Book 420, 193–196 (on file with author).

68. Letter from Camp Barber Committee, *Huntsville YMCA*, to Timothy Gilbert & Norman Zigrossi, TVA (Dec. 5, 1994) (on file with author).

69. *Id.*

and as a summer residence by the YMCA and its members, and for no other purposes.⁷⁰

TVA lifted the deed restrictions and allowed the sale on two conditions. One, that the anticipated \$1 million from the sale would go into a trust fund and be used solely for improvements to the camp; and two, that the sale serve a public purpose by aiding in the renovation of the YMCA's camp.⁷¹

Prior to lifting the restrictions, TVA's staff prepared an Environmental Assessment (EA), which received overwhelming public comment against the proposed sale. The final EA advised against the sale.⁷² The 49.8 acres sold was forested, known to be the habitat of bald eagles during their winter migratory visits⁷³ and was removed from the public domain. The TVA Board, however, ignored its staff's recommendations and the protest of valley residents.

Other controversial shoreland in the TVA system is located on the Nickajack Reservoir in Tennessee. There, TVA is currently considering sales for private residential development.⁷⁴ The Nickajack proposal deserves a careful look. In many respects, the Nickajack development proposal bears a striking resemblance to the Tellico Village.

The Nickajack Dam and Reservoir lies on the Tennessee River a few miles downstream of Chattanooga, Tennessee. It was begun in 1963 and finished in 1967. During the House Subcommittee Hearings, Chairman Wagner asserted that Nickajack Dam was being built to replace the Hales Bar Dam located six miles upstream.⁷⁵ It was also one of 20 multipurpose reservoirs in which 60 percent of the land was to sustain natural forest cover, 15 percent was to consist of meadows or pasture land, and 25 percent was to be set aside for intensive public use.⁷⁶ These public uses included parks, group camps, cabin sites, boat docks, swimming, hunting, and fishing.⁷⁷ Other uses included reforestation, forest fire protection, timbering, farming, grazing and wildlife refuges.⁷⁸ The primary purpose of

70. Special Warranty Deed, *supra* note 67.

71. Draft "Communication Strategies" prepared by TVA (Dec. 11, 1996) (on file with author).

72. TVA FINAL ENVIRONMENTAL ASSESSMENT, PROPOSED DEED MODIFICATION HUNTSVILLE YMCA – CAMP BARBER, MARSHALL COUNTY, ALABAMA 22 (Mar. 1996). The US Fish and Wildlife Service especially criticized the proposed sale commenting that high-density residential housing and related shoreline development had negative individual and cumulative impacts on the reservoirs. Appendix E to the Final Environmental Assessment.

73. *Id.* at 19.

74. TVA promotion, Land Development Opportunity, Request for Proposals (Apr. 1997) (on file with author).

75. Wagner, *supra* note 1, at 782.

76. *Id.* at 795.

77. *Id.* at 796.

78. *Id.*

such reservoirs are full public use and the benefits to the nation from building Nickajack would be navigation and flood control, according to Chairman Wagner.⁷⁹

Again, TVA looked to the rich Cherokee heritage of the region and named the Dam and Reservoir for the historic Cherokee town which was located at almost precisely the same place in 1779 – 80.⁸⁰ The Cherokee towns of Nickajack and Running Water were the homes to Dragging Canoe, probably the most famous Cherokee Chief prior to The Removal Act of 1830 passed during the administration of President Andrew Jackson.⁸¹ Chief Dragging Canoe defied an overwhelming enemy, and he never surrendered himself or his warriors.⁸² That defiance and determination is seen today in the grassroots environmental, citizen and Native American resistance which has come together in southeast Tennessee to oppose TVA's plans for the Nickajack shoreland development known as Little Cedar Mountain.⁸³

In early 1997, TVA announced plans to develop 740 acres of shoreland on the Nickajack Reservoir. After reviewing plans from several would-be developers, TVA chose a British corporation to develop a \$100 million residential and recreational complex.⁸⁴ The initial plans called for 500 homes and cabins, 120-room resort lodge, an 18-hole golf course and a 300-slip marina.⁸⁵ TVA has explained the sale and long term lease as "trying to leverage private investment for public recreation."⁸⁶

But it becomes imperative to ask: What "public" is TVA seeking? How many members of the general public will be able to afford the fees to

79. *Making Appropriations for Certain Civil Functions Administered by the Department of Defense, the Panama Canal, Certain Agencies of the Department of the Interior, the Atomic Energy Commission, the Atlantic-Pacific Interoceanic Canal Study Commission, the Del. River Basin Commission, the Saint Lawrence Seaway Development Corporation, the Tennessee Valley Authority, and The Water Resources Council for the Fiscal Year Ending June 30, 1967, and for Other Purposes, Before the Subcommittee on Appropriations of the Senate Commission on Appropriations: Part 4 of hearings on HR 17787, 89th Congress 41 (1966) (Statement of Aubrey Wagner, Chairman, TVA).*

80. Interview with Raymond Evans in Chattanooga, Archaeologist in Chattanooga, Tennessee (Aug. 14 – 15, 1998).

81. *Id.*

82. *Id.*

83. Little Cedar Mountain property is the only portion of the historic Cherokee town of Nickajack which remains above water. It adjoins a tract which TVA has proposed for development of private residential units and which may contain Indian burials and artifacts of cultural significance. Intense opposition has developed among some Native Americans to stop any further desecration of this land. *Id.*

84. Dave Flessner, *TVA Making Big Plans for Little Cedar*, CHATTANOOGA TIMES, Nov. 1, 1997, at A1.

85. *Id.*

86. *Id.* at A4.

recreate at Little Cedar Mountain? Certainly, at least 500 housing units comprising approximately 300 acres will be off limits to the public. Again, this proposed development must be critically analyzed in light of Section 831c(k)(a) and the congressional intent expressed in the mandate to provide for “the economic and social well-being of the people living in the Tennessee River Basin.”⁸⁷

B. Analysis and Commentary

To the TVA’s credit, the agency has done and continues to do an enormous good for the South as a region and to the Tennessee Valley in particular. To those who have lived in the Tennessee Valley all of their lives, it is easy to take for granted the many benefits derived from the TVA. It is not the purpose of this article to extol the virtues of the agency nor to discredit it.

In 1933, Congress mandated TVA to accomplish the six purposes in the Tennessee River watershed discussed in the Introduction, *supra*.⁸⁸ The Tennessee River watershed includes all of Tennessee and parts of Kentucky, Virginia, North Carolina, Georgia, Alabama and Mississippi. In the opinion of the author, TVA has accomplished all of the six purposes to various degrees of success.

Today, TVA manages 480,000 acres of public land including Land Between the Lakes (LBL).⁸⁹ Of those acres, 80 percent is allocated to recreation and resource conservation.⁹⁰ Today, TVA operates a total of 54 dams and reservoirs including 35 multipurpose dams on both the Tennessee River and its numerous tributaries.⁹¹ A full 52 percent of 480,000 acres is located along 11,000 miles of shoreline.⁹² TVA estimates that visitors each year to TVA reservoirs and marginal lands contribute \$1.25 billion to the Valley’s economy.⁹³

87. 16 U.S.C. § 831v (1994).

88. *Id.*

89. Hernandez, *supra* note 35 (This figure does not include power line easements).

90. *Id.*

91. TVA publications on *Water Management and Land Management, 1997*, distributed at a Public Hearing in Nashville, Tennessee, on Apr. 21, 1997 (on file with author).

92. Tennessee Valley Authority, www.tva.gov/orgs/landmgmt.html (last visited Jan. 24, 1999).

93. *Id.*

C. TVA's Argument

With those facts and figures in mind, why has TVA embarked on a questionable policy of selling portions of its public lands for private residential use? According to Reuben Hernandez, Vice President of Land Management for TVA, residential land use allocation is not on any land management plan.⁹⁴ It is a “component” coupled with other objectives, including financial, “to provide for the social and economic development of the region.”⁹⁵ Residential land use, however, has stirred the ire of many people, activists and non-activists. It is both a legal and a policy question.

TVA's view seems to be that in an environment of declining federal funding for its non-power programs, expanded public recreation on some reservoirs is not economically feasible without a residential component.⁹⁶ Regarding the proposal at Little Cedar Mountain (Nickajack Reservoir), TVA would allow portions of the tract to be developed for residential and/or commercial recreation use compatible with public recreation objectives by “leveraging private investment to develop the project.”⁹⁷ Elsewhere, TVA spokespersons are quoted as saying “We have to by law get a fair return on the use of any of these lands;”⁹⁸ and “we're trying to maximize the value of this property.”⁹⁹

D. Public Land Management Values

Maximizing returns or yields on property, or planning for a “fair return” for use of property may be good business and smart planning for a for-profit corporation, but TVA is not a for-profit-corporation; it is a public corporation!

The lands it manages are not private lands; they are publicly owned and paid for. The public and the local economy benefit greatly by these lands remaining in the public domain, rather than the private domain where only persons with enough money can take advantage of the recreation offered. Nothing in the philosophy of FDR suggests that his vision of a public corporation¹⁰⁰ would or could legally take lands by eminent domain

94. Hernandez, *supra* note 35.

95. *Id.*

96. Letter from Lee J. Carter, Facilitator / Project Leader to Nickajack Lake Users, *Chickamauga Land Management Office* (Nov. 17, 1995).

97. Victor Miller, *TVA Moves Ahead with Little Cedar Mountain Project*, CHATTANOOGA FREE Press, Nov. 1, 1997, at C1 (quoting Reuben Hernandez).

98. *Id.*

99. Flessner, *supra* note 84 (quoting Michael R. Crowson, a regional planner for TVA).

100. Van Fleet, *supra* note 2.

ostensibly for a public purpose and later sell them to private developers for a profit far beyond their original cost. That is hardly a “fair return.” It is, in fact, “maximizing the value” of the property.¹⁰¹

Of course, TVA has its supporters. The Corporation paid to the State of Tennessee \$169.8 million in 1997 as payments in lieu of taxes for sales of electricity, part of which goes to counties in which public lands are located.¹⁰² However, the speculation of getting additional property and sales tax dollars from private development of public lands seems to whet the appetite of county governments. For example, Marion County's lawmakers and other businessmen support the Little Cedar Mountain proposed development, claiming a need for a larger tax base for new schools and new growth.¹⁰³ The legitimacy of removing public property from the public domain for the benefit of a single county, however, is questionable. TVA would likely respond that the private investment would legitimately fund more recreation, private and public; therefore, the ends justify the means. But do they? How much public land will be required to justify the insatiable desire for a larger tax base or for more private investment? What are TVA's limitations?

E. Application of the TVA Act

The TVA Act has been amended 19 times through 1997, but the provision dictating how TVA may dispose of public lands held in the name of the United States has not been amended since 1941.¹⁰⁴ How that amendment came about has been discussed, but how should it be applied 57 years later is the question remaining. When asked to describe TVA's vision of land management today, Mr. Hernandez said that the vision is the same as it was in 1933.¹⁰⁵ That vision, he stated, was to support all of the objectives declared by Congress and to consider what the public wants: an “integrated resource management vision with emphasis on environmental sensitivity.”¹⁰⁶

It is logical that if the vision in 1998 is the same as 1933, the language of the Act must be honored too.

101. Flessner, *supra* note 84 (quoting Michael Crowson).

102. *TVA Pays \$271.5 Million Into State*, CHATTANOOGA TIMES, Oct. 8, 1997.

103. Betty Stallard, *Little Cedar Mountain Projects Miracle for Marion County*, THE HUSTLER, Feb. 12, 1998, at 2; Linda Rector, *County Commission Supports Little Cedar Project*, THE JASPER JOURNAL, Nov. 4, 1997; Noble Sprayberry, *TVA Going Ahead on Development of Little Cedar*, CHATTANOOGA TIMES, Apr. 8, 1997.

104. 16 U.S.C. § 831c(k) (1994). See also H.R. Conf. Rep. No. 77-913 (1941).

105. Hernandez, *supra* note 35.

106. *Id.*

It is my opinion that the TVA is a creature of its statute and bound by the terms of that statute, and that its every act may be tested judicially . . . to determine whether it moves within the authority granted to it by Congress.¹⁰⁷

A careful reading of 16 USC 831c(k)(a) does not define the sale of public lands for private residential development as a component of recreation, public or private. A warranty deed to a private investor for development of private residential homesites on the shoreland of a TVA reservoir, regardless of the anticipated revenue, far exceeds any common understanding of the term “summer residence” or “pleasure resort.” Certainly, the several thousand permanent homesites already in existence on the Tellico Reservoir are not “summer residences.”¹⁰⁸

Additionally, the author has searched the TVA Act for any reference or requirement that TVA “maximize the value”¹⁰⁹ of its public lands or that it must “get a fair return on the use of any of these lands.”¹¹⁰ TVA, by regulation promulgated on February 13, 1995, may assess an administrative cost for the use, disposition of, and activities affecting real property in TVA’s custody including “conveyances and abandonment of TVA land or landrights.”¹¹¹ However, at TVA’s discretion, there are waivers and exemptions and no reference to a fair or maximized return.¹¹² Section 831y of the TVA Act provides that from “July 1, 1936, the proceeds for each fiscal year derived by the [TVA] Board . . . from the disposition of any real property, shall be paid into the Treasury of the United States. . .” except that which the Board shall deem necessary for the continuing operation of its dams, reservoirs, and other business.¹¹³ That language is certainly vague enough to allow TVA to pump private investment dollars back into recreation or for most anything; but again, there is no suggestion that TVA is required as a matter of law, to achieve a stated return.

F. TVA’s New Vision is Not Acceptable

Congressman Bob Clement, Democrat from Tennessee and a former member of the TVA Board of Directors, believes that “TVA should do all it

107. United States, ex rel, Tennessee Valley Authority v. Welch, 327 US 546, 556 (1946). (Reed, J., concurring).

108. 16 U.S.C. § 831c(k)(a) (1994).

109. Flessner, *supra* note 84 (quoting Crowson).

110. Miller, *supra* note 97 (quoting Hernandez).

111. 18 C.F.R. § 1310.2(1) (1998).

112. 18 C.F.R. § 1310 (1998).

113. 16 U.S.C. § 831y (1994).

can to avoid the sale of public lands for personal or private commercial and residential development,” but refrained from stating that to do so would be outside its Congressional authority.¹¹⁴ Congressman Clement acknowledged that TVA has deeded or transferred land for residential development, but stated strongly:

. . . there must be an open forum where members of surrounding communities and various stakeholders can voice their opinions before the TVA Board of Directors. TVA is a public entity. Any decision to transfer public property to private owners must be seriously contemplated. Public support is a crucial element. As public servants, the TVA Board of Directors should adhere to the will of the people.¹¹⁵

Adherence “to the will of the people,” however, does not appear to be the direction of the Board of Directors. The opposition is overwhelmingly against the proposed Little Cedar Mountain development, not unlike earlier public opposition to lifting covenants and restrictions running with the land on the 1963 YMCA deed on Guntersville Reservoir, Alabama.¹¹⁶ Newspaper articles from nearby communities routinely criticize the proposed development.¹¹⁷ For the past two Septembers, environmentalists and Native Americans have held a seven-mile march and demonstration protesting the project.¹¹⁸ In April, 1998, 11 organizations met in Nashville and formulated a Tennessee Valley Stakeholders Group that expanded to 44 member organizations.¹¹⁹ These organizations met three times within one month, and in May, 1998, produced a consensus document advising Congress of five principles or recommendations that are important to the future of TVA’s non-power generations programs regardless of the funding

114. Interview with Bob Clement, Congressman from Tennessee in Nashville, TN (Aug. 28, 1998). Letter from Bob Clement, Congressman from Tennessee to author (Sept. 7, 1998) (on file with author).

115. *Id.* The author tried unsuccessfully to solicit comment from both parties of the Tennessee Congressional delegation. Republican Congressman Zack Wamp, Republican Senator Bill Frist and Democratic Congressman Bart Gordon did not return telephone calls.

116. Deed, *supra* note 67.

117. Betty Stallard, *Indians Declare War on TVA*, THE HUSTLER, Dec. 18, 1997; Betty Stallard, *Evans and Wilkey discuss the Little Cedar Mountain Development Project*, THE HUSTLER, Dec. 18, 1997, at 3; David Flessner, *Conservationists Hit TVA Plan*, CHATTANOOGA TIMES, April 17, 1997; Victor Miller, *Group to Protest TVA Plan on Nickajack Development*, CHATTANOOGA FREE PRESS, Sept. 2, 1997.

118. Linda Rector, *Protest Walk to Save Little Cedar Mountain*, JASPER JOURNAL, Sept. 16, 1997, at 1–2. In September 1998, the author participated in the seven-mile walk.

119. Dave Flessner, *Critics Back TVA Funds*, CHATTANOOGA TIMES, June 8, 1998.

options.¹²⁰ The fifth guiding principle is that “Congress require the TVA to cease from the selling or leasing of public lands for private uses, for one year.”¹²¹ That recommendation also applies “to public lands that contain natural, cultural, historical and archeological resources.”¹²² At the date of this writing, the TVA Board seemed undeterred, sparking criticism that it no longer was in touch with residents of the Tennessee Valley and that absent Congressional intervention, federal litigation may be the only available step.

Litigation is certainly on the minds of other citizens in the valley whose ancestral families occupied what is now Land Between the Lakes. The area is a 170,000 acre tract of mostly forest land formed by the construction of the Kentucky Dam on the Tennessee River by TVA and of the Barkley Dam on the Cumberland River by the U. S. Army Corps of Engineers.¹²³ In 1963, President John F. Kennedy created the Land Between the Lakes National Recreation Area “to demonstrate how an area with limited timber, agricultural and industrial resources could be converted into a recreation asset that would stimulate economic growth in the region.”¹²⁴ TVA opened LBL in 1964 and today touts it as a focal point of a \$500 million tourism industry.¹²⁵

Yet in November, 1995, TVA produced a document for public comment which proposed to sell or lease lands for private residential developments and commercial recreation in the LBL.¹²⁶ The public outcry was immediate. In the years following that publication, a vocal group of citizens, most descendants of those who were moved off the land by eminent domain, organized to prevent the conversion of LBL to private residential use and commercial development.¹²⁷ In the waning days of the

120. THE TENNESSEE VALLEY STAKEHOLDER GROUP REPORT TO THE 105TH CONGRESS, THE FUTURE OF FLOOD CONTROL, NAVIGATION AND LAND AND WATER STEWARDSHIP PROGRAMS OF THE TENNESSEE VALLEY AUTHORITY, 3–4 (Michael A. Butler, ed., May 29, 1998).

121. *Id.* at 6.

122. *Id.*

123. TVA, Land Between the Lakes, www.lbl.org (last visited Jan. 23, 1999); About LBL, [www2.lbl.org/lbl/about LBL.html](http://www2.lbl.org/lbl/about%20LBL.html) (last visited Jan. 23, 1999).

124. *Id.*

125. *Id.*; See generally United States, ex rel, the Tennessee Valley Authority v. Two Tracts of Land, John B. Egeron, 456 F.2d, 264 (6th Cir. 1972) (The Court upheld the condemnation action of TVA based on, 16 U.S.C. Section 831u and on the announcement by the President that the tract would be a demonstration of outdoor recreation, waterfowl habitat, and management of upland game – all to stimulate economic growth of the region).

126. TVA, *What is The Shape of Our Future – Preliminary Concepts of a Public Use Plan* (Nov. 1995) (on file with author).

127. The group adopted the name “Concept Zero Task Force” and has a website at: www.apex.net/blcrisis/index.html#home. The organization is a non-profit corporation with officers and members from Kentucky and Tennessee. One of the chief spokesmen for the group is David L. Nickell

105th Congress, S.2237 was made a part of the huge Omnibus Appropriations Bill and included language to the effect that LBL would be transferred to the Department of Agriculture and made a part of the National Forest System, if the Congress did not appropriate at least \$6 million to TVA for LBL.¹²⁸ Fortunately, TVA received the appropriation for 1999.

G. Adherence to the Will of the People

TVA was created in the New Deal era and worked as an efficient mechanism for over 60 years contributing significantly to the rural South's rise from economic despair to prosperity. In the mid 1980's, TVA appears to have launched its own New Deal. TVA began utilizing private investment to fund recreation by attempting to unburden itself of certain public lands. However, that new vision is not the vision of old, nor does it have statutory support. The public lands of the Tennessee Valley are dear to its residents, and those lands have become a battlefield.

In 1998, TVA engaged in land management planning of 20,000 acres of the Melton Hill, Boone and Tellico Reservoirs.¹²⁹ Given the clear displeasure expressed by hundreds (if not thousands) of Tennessee Valley residents over TVA's "New Deal" of selling and leasing public lands, TVA would be well advised to follow the leadership of Congressman Bob Clement and others who have strongly suggested the TVA Board should not only provide a forum for surrounding communities and diverse stakeholders in the Valley, but actually *listen* to them and "adhere to the will of the people." That same advice applies to the Tennessee Valley States' Congressional delegation as they confront the current trend in Congress to eliminate all funding of TVA's land and water management programs.

who "lost a six generation farm dating to the Revolutionary War" when TVA acquired the land as part of LBL. Interview with David Nickell (Sept. 7, 1998).

128. H.R. 4328, *Making Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal year 1999*, pp H11127 – H11131; Title V – Land Between the Lakes Protection Act, Section 541 (S. 2231). Another 12,800 acres of TVA land south of LBL near Columbia, Tennessee was proposed as the Columbia Dam and Reservoir in the late 1970's. However, issues involving certain endangered mussels in the Duck River below the proposed dam and other issues caused TVA to re-evaluate the project and conclude that the benefit to cost ratio would be less than 1:1. TVA then decided not to complete the project. (The author had the pleasure of participating in those issues together with a prominent Tennessee attorney, Mr. Frank Fly of Murfreesboro, Tennessee).

TVA's recent proposal to transfer the land to the Tennessee Wildlife Resources Agency has received widespread support from the public. *TVA Wants to Transfer 12,800 acres to State*, CHATTANOOGA TIMES, Dec. 3, 1997.

129. Hernandez, *supra* note 35.

II. THE CULTURAL SIGNIFICANCE OF PUBLIC LANDS IN THE TENNESSEE VALLEY

A. Prehistoric

Indian cultures which lived and flourished in the Southeast before the coming of the Europeans were diverse and left a rich heritage. Thousands of years before the Cherokee migrated south and the Muscogeans (Creek, Choctaw, Chickasaw) migrated west into what is now the Tennessee Valley watershed, a prehistoric people inhabited a village called Eva during the Archaic period (beginning 8000 BC).¹³⁰ Eva was located on a channel of the Tennessee River very near today's LBL in the Tennessee Valley approximately 100 miles northwest of Nashville.¹³¹ Archaeological findings at Eva suggests that the people consumed large quantities of mussels, deer and nuts.¹³²

Similarly, archaeologists have documented extensive Archaic remains to a depth of 12 to 15 feet on a site immediately across the Tennessee River from the Little Cedar Mountain property and on another site directly below the Nickajack Dam, on a tract which is part of the Little Cedar Mountain property.¹³³ Here, as at Eva, the diet consisted of game animals and mussels as evidenced by the large quantities of discarded shell heaps called "middens."¹³⁴

In 1990, an archaeological team from the University of Alabama, hired by TVA, performed an archeological assessment of cultural resources on the Little Cedar Mountain property.¹³⁵ Based on the University of Alabama assessment, TVA has declared the site to have no cultural significance even though the survey did find in two of its seven prehistoric lithic sites, "Archaic material ranging from LeCroy to Cotaco Creek style projectile points."¹³⁶ That assessment has been sharply criticized by Evans and Wilkey, who conducted their own independent archaeological survey and

130. See generally Tom Lewis & Madeline Lewis, *Eva: An Archaic Site*, Dep't of Anthropology, UT Knoxville (1961).

131. *Id.*; See also PHILIP KOPPER, *THE SMITHSONIAN BOOK OF NORTH AMERICAN INDIANS, BEFORE THE COMING OF THE EUROPEANS* 145 (1986).

132. Lewis, *supra* note 130; Evans, *supra* note 80.

133. Evans, *supra* note 80. According to Evans, the depth of the material found is strong evidence of an extensive period of occupation.

134. *Id.*

135. *Id.*

136. BOYCE DRISKELL & TIM MITOVITCH, OFFICE OF ARCHAEOLOGICAL RESEARCH, UNIV. OF ALABAMA, *CULTURAL RESOURCES OF NICKAJACK RESERVOIR – SITE REPORT* (1990).

assessment in 1997.¹³⁷ Evans and Wilkey also found sufficient evidence of “intensive occupation throughout the Woodland period”¹³⁸

B. Mississippian to 1830

The Mississippian period of archaeological history is characterized by the building of mounds.¹³⁹ According to most archaeologists, mound building probably began in the late Woodland period.¹⁴⁰ Mounds were used for burials, temples or defensive earthworks.¹⁴¹ According to Evans, two well-documented Mississippian town sites are known to exist just below Little Cedar Mountain at the mouth of the Sequatchie River. Additionally, the University of Tennessee has documented two Mississippian houses immediately upstream of Little Cedar Mountain. Both of these studies suggest that such scattered homes or village sites were located all along the river.¹⁴² One present day Native American, Corky Allen, Repatriation Officer and Councilman for the Euchee (Yuchi) Tribe of Oklahoma (non-federal) advises that the Euchee Tribe occupied nearly all of present day Tennessee (east of the Tennessee River) and North Carolina during the Mississippian period long before the arrival of the Cherokee or the Muscogean Creeks.¹⁴³

Although there are no known sites on Little Cedar Mountain, Upper Creeks were known to have occupied much of the Tennessee Valley in what is now southeast Tennessee and northern Alabama between 1500 to 1750 AD.¹⁴⁴ The Cherokee were the most notable Native American presence occupying the area from 1779 to 1819.¹⁴⁵ Evans reports that the Little Cedar Mountain property, approximately 1000 acres, “is all that remains above water of the historic Cherokee town of Nickajack, built in 1779 and

137. RAYMOND EVANS & BRUCE WILKEY, *ARCHAEOLOGICAL RESOURCES AT THE LITTLE CEDAR MOUNTAIN PROPERTY, MARION COUNTY, TENNESSEE* (1997). The Evans & Wilkey assessment concluded that the seven prehistoric sites were in reality one continuous site occupied by successive groups of people over a long period of time.

138. *Id.* (The Woodland Period is identified as between 1000 BC and 900 AD, generally).

139. Kopper, *supra* note 131, at 147; Evans, *supra* note 80; Wilson, *supra* note 14.

140. Kopper, *supra* note 131, at 147; Evans, *supra* note 80.

141. Evans, *supra* note 80; Interview with Michael Sims, American Indian Movement, Middle Tennessee Group (Sept. 4, 1998).

142. Evans, *supra* note 80.

143. Interview with Corky Allen in Jasper, TN (September 6, 1998). Corky Allen was interviewed during a protest demonstration at the Nickajack Reservoir. Officer Allen said that the Euchee Tribe is the only tribe to his knowledge which has preserved a cultural ceremony known as the “Lizard Dance,” a reference to an earlier age during which the Tribe believed there existed large lizard creatures.

144. Driskell & Mitovitch, *supra* note 136; Evans, *supra* note 80.

145. Evans, *supra* note 80.

the second largest of the five lower towns of the Cherokees.”¹⁴⁶ Evans believes, based on his familiarity with Cherokee burial customs during this period, it is “highly likely” that unmarked graves exist on the property near ancient home sites.¹⁴⁷ The Cherokees and other Native Americans were removed from Tennessee and Georgia beginning with the Removal Act of 1830. This Act gave the President authority to make treaties with Indian tribes east of the Mississippi River exchange their land for other land in Indian Territory, now Oklahoma.¹⁴⁸

To date, TVA continues to ignore the findings and expertise of cultural anthropologist and archaeologist Raymond Evans, a native Tennessean. TVA’s position is that it has not paid Evans for his survey of the property and thus his opinions are his own.¹⁴⁹

C. TVA’s Actions and Responsibilities

The controversy that has swirled over TVA’s proposed development of the Little Cedar Mountain property is only a small part of the bigger picture. All over Tennessee, whether on public land or not, development is beginning to encroach on lands heretofore shunned for more choice locations. In Middle Tennessee, commercial and residential development is now moving to the alluvial flood plains along the major rivers and tributaries, resulting in frequent uncovering of Indian burial sites and often entire villages.¹⁵⁰ The Federal laws (NAGPRA and others)¹⁵¹ designed to protect cultural resources on public lands and Indian lands, do not apply on private lands except in narrow circumstances. Additionally, the archaeological laws of Tennessee are prejudicial against Native Americans because the law does not protect cultural sites from being opened and the contents removed.¹⁵²

146. *Id.*

147. *Id.*

148. DUANE H. KING, MUSEUM OF THE CHEROKEE INDIAN, CHEROKEE, NC 88, 89–91 (1984) (A small group of Cherokees signed the Treaty of New Echota in December, 1835, and the United States began forced removal in 1838).

149. Hernandez, *supra* note 35. While this is true, Raymond Evans is well-respected and well known in the fields of anthropology and archaeology, having been previously employed by the U. S. Army Corps of Engineers, City of Chattanooga, States of Tennessee, Georgia and South Carolina. He also served as the archival investigator for research relative to the Cherokee removal of 1838 and as field director for several state test excavations of historic and prehistoric sites in Tennessee.

150. The author has represented litigants and counseled with opponents at five such sites within the past two years.

151. 16 U.S.C. § 470 (1994); 16 U.S.C. § 470aa (1994); 25 U.S.C. § 3001 (1994); 42 U.S.C. § 1996 (1994); *See also* 18 C.F.R. § 1312 (1998).

152. *See* Tenn. Code Ann. §11-6-101 to 119; § 46-4-101 (1992). Regarding this latter law captioned *Termination of Land as a Cemetery*, Tennessee lower courts have held that Indians today do

It is these insults to Native American culture which have given rise to vocal groups composed mostly of persons with some degree of Native American blood.¹⁵³ These groups are effectively making their presence known in the Tennessee Valley. Public lands in the control of TVA are sacred to the residents of the Tennessee Valley and are worth fighting for; the Indian burial sites and other cultural resources on these lands are no less sacred.

Officially, TVA declares its cultural resources program protects any site identified within the boundaries of its 480,000 acres.¹⁵⁴ The program is designed to identify, evaluate, and preserve historic and archaeological resources; protect such resources from looting, vandalism, and erosion; and protect Native American sites.¹⁵⁵ It is undeniable, however, that TVA inundated the ancestral home of the Cherokee nation when it dammed and built the Tellico Reservoir on the Little Tennessee River over the strenuous objections of the Cherokees. Prior to the actual flooding, numerous Native American gravesites were opened and the remains given to the University of Tennessee.¹⁵⁶ According to Evans, the University did repatriate to the Eastern Band Cherokees from Qualla Boundary, North Carolina, all of the remaining and funerary objects identified as Cherokee, but more have been retained because no federally-recognized tribe has come forward demanding repatriation.¹⁵⁷

There are local newspaper accounts of pot hunters coming onto public lands and digging into burial sites, throwing out bones, and taking property and arrowheads in the Nickajack Reservoir and public and private lands on Moccasin Bend across the river from Chattanooga, Tennessee.¹⁵⁸ These accounts have sickened and enraged members of the Chattanooga-Inter-Tribal Association (CITA) and state officers.¹⁵⁹ TVA, to its credit, has issued warnings to persons caught digging into burial sites around the

not have standing to challenge the opening of ancient Indian graves and removal of the remains because they cannot prove consanguinity to the person buried. There are efforts under way to change these laws.

153. Such groups are the Chattanooga Inter-Tribal Association, Alliance for Native American Indian Rights, American Indian Movement, Middle Tennessee Support Group. Other more traditional environmental groups, such as Earth First!, have joined the fight.

154. Tennessee Valley Authority, *supra* note 92.

155. Hernandez, *supra* note 35.

156. Evans, *supra* note 80. Additionally, TVA apparently does not have an artifact repository, contracting instead with the Universities of Tennessee and Alabama for these services. The number of artifacts and/or human remains held by these Universities could not be confirmed.

157. *Id.*

158. Beena A. Hyatt, *Graves Robbed of Artifacts: Indian Burial Sites Rifled in Marion, Bones Discarded*, June 6, 1996, at B1.

159. *Id.*

Nickajack Dam and requested an FBI investigation;¹⁶⁰ however, there have been no prosecutions.¹⁶¹ Ironically, relic-hunters have complained that they have the right to go onto public lands, dig into the dirt and take whatever they find.¹⁶² Relic-hunters have criticized TVA's new authority granted in a 1994 amendment to the TVA Act, to police TVA's lands and reservoirs and enforce federal law.¹⁶³ Clearly they are ignoring NAGPRA and other aforementioned federal laws protecting Native American artifacts and other historic properties.

D. The First Nations' Response

The Native American reaction to federal, state and private desecration of Indian burial grounds has already been discussed in this article. However, tribes are at last making formal declarations and demands for respect for their sacred burial sites and culturally sensitive resources. On July 10, 1998, the Five Civilized Tribes of Oklahoma (the Cherokee, Chickasaw, Choctaw, Muskogee Creek and Seminole Nations) representing 300,000 Native people nationwide and acting through its Inter-Tribal Council, formally issued Resolution 98-28 captioned *NAGPRA Policy Statement*.¹⁶⁴ "Recognizing and affirming the sovereignty of each member nation," the document itemizes a consensus agreement among the five Tribes.¹⁶⁵ Noteworthy principles include (1) the recognition that federal, states and private landowners who now occupy the ancestral homes treat graves and sacred resources as spoils, "thus defiling, desecrating, demoralizing and dehumanizing Native American Peoples;" (2) an affirmation that the Tribes "did not abandon our ancestral/relatives' graves and sacred sites" but the forced removal prevented the visitation, preservation and protection of those sacred sites throughout all of the Southeastern states and Oklahoma; (3) an agreement and affirmation that "by the preponderance of geographical, kinship, biological, archaeological, anthropological, linguistic, folklore, oral tradition and historical evidence, we share the Southeast region of the United States;" (4) an agreement and affirmation to actively pursue human remains and culturally-sensitive artifacts of the Southeast cultures now in various repositories; (5) an

160. *Id.*

161. Evans, *supra* note 80.

162. Dave Flessner, *TVA Men in Blue Have Some Folks Seeing Red*, CHATTANOOGA TIMES, June 21, 1996, at B4.

163. *Id.*

164. The Inter-Tribal Council of the Five Civilized Tribes, Resolution Number FY 98-28, NAGPRA Policy Statement (July 10, 1998).

165. *Id.* at 2-3.

agreement and affirmation to support and defend sacred burial sites of ancestors and relatives “who by consanguinity, we claim a shared group identity which can be reasonably traced to historic and prehistorical ‘Paleo cultures;” (6) an agreement and affirmation that a two foot perimeter around the skeletal remains and funerary objects constitute part of a person, and any cleaning or washing of bone fragments or articles is a violation of human rights; and (7) an affirmation “separately and as a whole agree to claim ‘Culturally Unidentifiable’ Native American human remains and other cultural items from the Southeastern United States” and “designate a tribe or repository for temporary management of human remains or culturally-sensitive materials until a reasonable determination of cultural affiliation can be established. . . .”¹⁶⁶

These agreements and affirmations are certainly welcomed and long sought by activists, Indian and non-Indian, in the Southeast and in the Tennessee Valley. However, one should not lose sight of the fact that the traditions of Andrew Jackson still remain strong in this region, and “Old Hickory” is an honored man in the dominant culture. Achieving the policies and recognition sought by the Inter-Tribal Council will not be easy and will require a willingness to challenge the status quo in the halls of legislatures and in the courts. Hopefully, the power in the strongly worded Resolution will not fade and its message shall be pursued vigorously.

CONCLUSION

The United States Supreme Court has said that Congress makes the rules on how and under what condition land owned by the United States is transferred or disposed. The Court has given TVA broad discretion to carry out the mandates of Congress, and confirmed that TVA may acquire marginal lands to meet its multiple purposes. TVA did that but more recently the agency has stretched its broad authority and unilaterally declared that the sale of some of those marginal lands to private developers is permissible because it may “leverage private investment for recreation.”¹⁶⁷

Nothing in the TVA Act passed by Congress in 1933 or since authorizes TVA to sell its public lands along reservoirs to developers for private residential development to finance the opportunity for recreation or any other benefit. Congress laid out the rules for how TVA may dispose of its

166. Many other and related agreements are powerfully declared in this document, but space limitations prevent a recitation of the entire Resolution.

167. Hernandez, *supra* note 35.

lands in 1941, but private residential development as a “component” of public recreation is not among the choices. Furthermore, the overwhelming voice of the users of TVA public lands have cried in unison, “No!” TVA is well advised by Congressman Bob Clement to listen to the Valley residents and “adhere to the will of the people.”¹⁶⁸

Another equally important duty of TVA and each of its watershed states is the recognition, protection and preservation of the rich Native American cultural heritage, which has played a prominent role in the history of the Region. TVA has an obligation from which it cannot retreat, to protect cultural resources on public lands including federal prosecutions of violators. Furthermore, now that the Inter-Tribal Council of the Five Civilized Tribes has forthrightly stated a claim of consanguinity by shared group identity with the remains of their Indian ancestors, it is incumbent upon TVA, as a trustee of federal lands, to meet with representatives of the Council as sovereigns and resolve the many issues sensitive to First Nations, primarily respect for their ancestral lands and sacred sites. This is particularly imperative if TVA persists down the path of selling public lands.

In its rich history, TVA has greatly promoted the South. In recent times, however, TVA has become embroiled in power-generation versus non-power generation issues and has forgotten its most treasured ally: the Tennessee Valley resident who is the user of its public lands and the beneficiary of its public policies. TVA has lost touch with its statutory mandates and the people it was created to benefit. Although this distance does not have to be fatal, it does need serious attention.

168. Clement, *supra* note 115.

