No. 05-3117

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Flint Hills Tallgrass Prairie Heritage Foundation, Inc.
Plaintiff-Appellant

v.

Scottish Power, plc, PacifiCorp, PPM Energy, Inc.,
Greenlight Energy, Inc., Elk River Windfarm, LLC and
The Empire District Electric Company
Defendants-Appellees

Appeal From The United States District Court
For The District of Kansas
Case No. 05-1025-JTM
The Honorable Judge J. Thomas Marten

BRIEF[1] OF PLAINTIFF-APPELLANT

ORAL ARGUMENT REQUESTED

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[1]Attached only in writing is the Memorandum Opinion required by 10th Cir. R. 28.2 (A)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for appellant Flint Hills Tallgrass Prairie Heritage Foundation, Inc. certifies the following:

1. The full name of every party or amicus we represent is:

   Flint Hills Tallgrass Prairie Heritage Foundation, Inc.

2. The parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public, of the party we represent are:

   None

3. No other attorney has appeared for appellee in any prior trial court or administrative proceedings sought to be reviewed, or in any related proceedings.

s/Greg A. Drumright
Terry L. Malone, #11169
Greg A. Drumright, #20743
Flint Hills Tallgrass Prairie Heritage
Foundation, Inc.

TABLE OF AUTHORITIES

CASES

STATUTES

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United States Court of Appeals

for the

TENTH CIRCUIT

FLINT HILLS TALLGRASS PRAIRIE HERITAGE FOUNDATION, INC., *et al.*

Plaintiffs

Civil Action Case Nº 05–1025 –JTM

v

SCOTTISH POWER, PLC, PACIFICORP, *et al.*,

Defendants

Plaintiffs' Brief

Plaintiff FLINT HILLS TALLGRASS PRAIRIE HERITAGE FOUNDATION prays this Honorable Court for an order remanding this action to the United States District Court for the District of Kansas with a direction to conduct a hearing on the merits of Plaintiffs' application for equitable relief in the nature of a Temporary Restraining Order, a Preliminary Injunction, or a Permanent Injunction as the interests of justice determine.

Plaintiff Flint Hills Tallgrass Prairie Heritage Foundation, Inc. filed a class action complaint[1] alleging that the construction of industrial wind turbine power generating facilities will cause permanent and irreparable damage to the Flint Hills regional environmental system. According to the District Court Memorandum and Order,[2] All the corporate defendants filed Motions to Dismiss[3] under Rule 12(b)(6) of the *Federal Rules of Civil Procedure*.

Without hearing any testimony or permitting formal argument, the District Court granted the motion and dismissed the complaint stating "that there is no state action because plaintiff failed to identify an established federal right and failed to show that

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1 Docket Nº 1, *Verified Complaint.*

2 Docket Nº39.

3 Docket Nºs20, 26 and 27.

defendants acted under color of law"; that "[t]he court could not entertain plaintiff's case under the MBTA because plaintiff failed to demonstrate that it is entitled to bring a private cause of action under the statute"; and "[f]inally, based on plaintiff's complaint and response to the motion to dismiss, the court does not find this case to warrant federal equitable intervention."[4]

In its Memorandum and Order the District Court's "Analysis" addressed only two issues, "A. Federal Jurisdiction",[5] and "B. Jurisdiction in Equity".[6] In determining there was no federal jurisdiction the District Court addressed only two issues, "1. Under Color of State Action"[7] as that phrase is construed in the context of actions brought under *The Civil Rights Acts* and "2. *The Migratory Bird Treaty Act*".[8]

Assuming all the facts of the Complaint to be true as alleged, the national and international significance of maintaining the Flint Hills Tallgrass Prairie Regional Ecosystem ecologically intact as a sustainable environmental system is uncontroverted, as is the allegation of imminent danger of serious permanent and irreparable damage represented by the industrial wind turbine commercial electric power generation facilities proposed by the Corporate Defendants.

Dismissing the Complaint under Rule 12(b)(6) is error as a matter of law. The decision of the District Court should be reversed with the matter remanded to the District Court for a hearing on the merits as originally suggested by the lower Court. The plaintiffs are prepared to proceed with that hearing now as they were prepared to begin on February 15, 2005. The Plaintiffs are ready for trial.

PLAINTIFFS' STATEMENT OF ISSUES

This action raises a number of triable issues, all of which are questions of fact and require development of the record.[9] None were addressed in the District Court Memorandum and Order.[10]

- Is the Flint Hills Tallgrass Prairie Ecosystem a unique and irreplaceable national and international natural resource treasure?
- What is the extent of the Flint Hills Tallgrass Prairie Ecosystem that is vulnerable

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4 Docket N°39 at page 8.
5 Docket N° 39, at page 2.
6 Docket N° 39, at page 6.
7 Docket N° 39, at page 2.
8 Docket N° 39, at page 4.
9 Docket N° 29 at pages 1–2.
10 Docket N° 39.

to the kind of damage associated with development of industrial wind turbine commercial electric power generation facilities such as those proposed by the Corporate Defendants?

- What is the value of the Flint Hills Tallgrass Prairie Ecosystem in its present natural condition to the sovereign people of the State of Kansas and the sovereign people of the United States?
- Is the damage which will be inflicted upon the Flint Hills Tallgrass Prairie Ecosystem by the development of industrial wind turbine commercial electric power generation facilities such as those proposed by the Corporate Defendants serious, permanent and irreparable?
- What, if any, damage will be caused to the Corporate Defendants if they are restrained from developing industrial wind turbine commercial electric power generation facilities within the Flint Hills Tallgrass Prairie Ecosystem?
- Is the damage which will be inflicted upon the Flint Hills Tallgrass Prairie Ecosystem by the development of industrial wind turbine commercial electric power generation facilities such as those proposed by the Corporate Defendants substantially greater than any damage that might occur to the Corporate Defendants if they are prohibited from developing industrial wind turbine commercial electric power generation facilities in the Flint Hills Tallgrass Prairie Ecosystem? [11]

THE THREAT OF IRREPARABLE HARM
THE RISK OF HARM TO THE PUBLIC INTEREST

The complaint is replete with facts which clearly establish that serious, permanent and irreparable damage will occur to the unique and irreplaceable national and international natural resource treasure that the intact Flint Hills Tallgrass Prairie Ecosystem represents to the sovereign People of the United States and to the world. The fragmentation of habitat and resulting compromise of the regional ecological system that will occur from the industrial wind turbine commercial electric power generation facilities about to be constructed by the corporate defendants is an imminent danger. The affidavits of Professors Timothy Keane, PhD, Terry Bidwell, PhD, Thomas Eddy, PhD, and James Hoy, PhD amplify and support the allegations of the Complaint.

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[11] *See*, Docket Nº 1, *Verified Complaint*, Prayer for Relief.

IMMEDIATE EQUITABLE RELIEF IS NECESSARY

The Declaration of Peter Van Alderwerelt, Vice President of corporate defendant PPM Energy, Inc. states the "Need For Immediate Determination."

> ¶27. PPM must evaluate whether to terminate the PPA against the possibility of completing construction of the Project before December 31, 2005 to qualify for the FTC [Federal Tax Credit]. The construction window for this Project is approximately six to nine months. Weather and other logistic considerations require that the Project be completed on or about October 31, 2005. This means that Project construction should begin sometime in March of 2005.[12]

THE ABSENCE OF HARM TO THE CORPORATE DEFENDANTS

At this time no stay is in effect and the Defendants are proceeding with their plans to develop industrial wind turbine commercial electric power generation facilities in the Flint Hills Tallgrass Prairie Ecosystem. The hearing on the merits sought by the Plaintiffs will only temporarily inconvenience the corporate defendants.

In the event the District Court should grant the equitable relief sought by the Plaintiffs, there is still no significant harm to the corporate defendants because there are alternative sites for industrial wind turbine facilities in Western Kansas where the high plains have been identified as a "Class 5" Wind Resource.[13]

The Wind Resource Map [Plaintiffs' Appeal, Exhibit 1] clearly indicates that the Western Kansas area is more than five times larger than the Flint Hills Region. It is close to the Denver Regional Metropolitan area, one of the fastest growing "Metroplexes" in the United States and desperately in need of "clean" energy to continue development.

In May, 2004, the Kansas Field Office of The Nature Conservancy which has as its mission statement, "Saving the Last Great Places on Earth," prepared a

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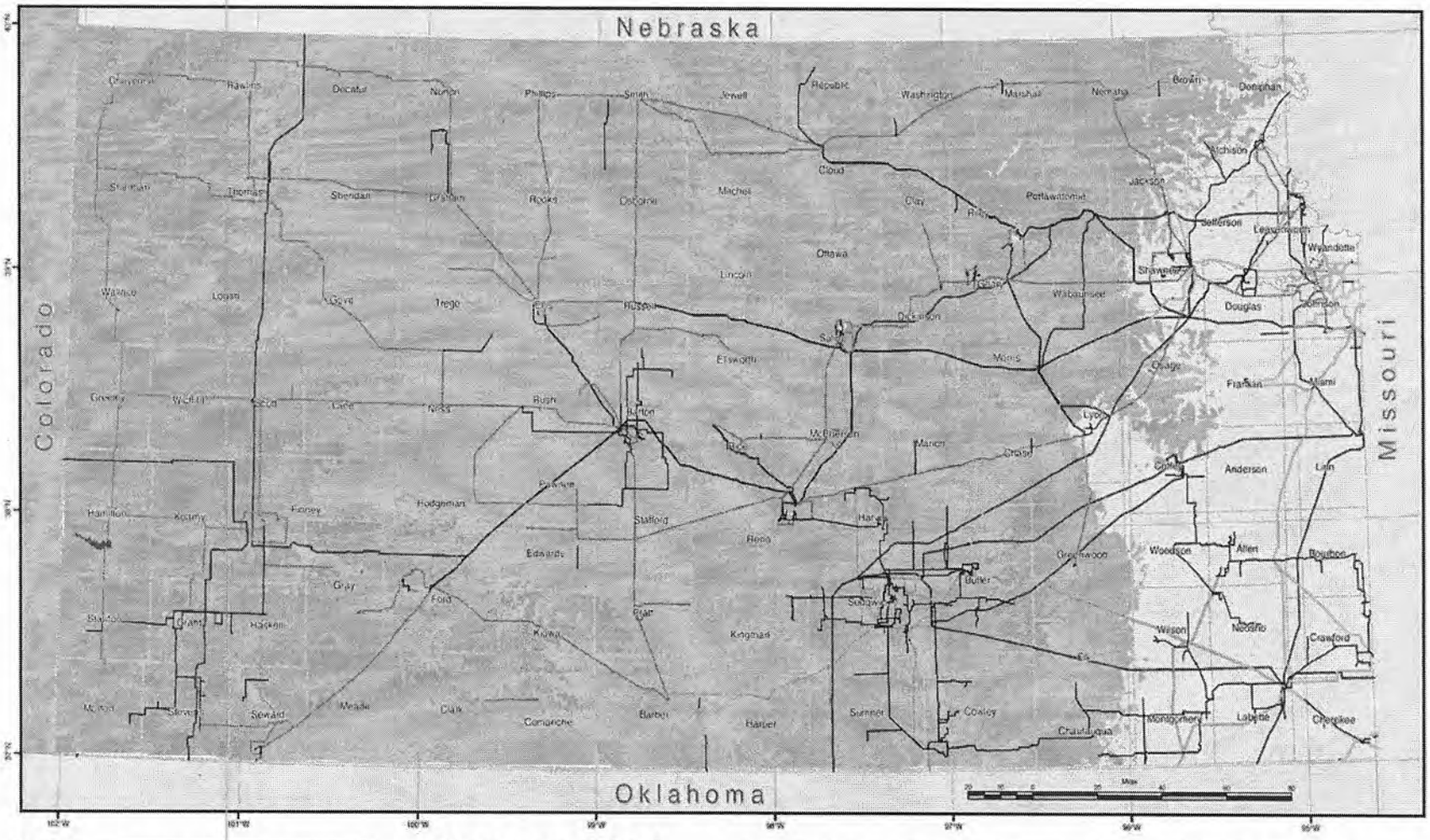
[12] Docket Nº 22, *Declaration of Peter Van Alderwerelt* ¶27, at page 6..

[13] The determination was made by by Coriolis AE using WindMap™, a program developed by BrowerCo. WindMap™ is a mass conserving model based on NOABL, a program developed in the 1970s by the U. S. Department of Energy. Development of this map was performed under contract with the Kansas Corporation Commission Energy Program with funding from the U. S. Department of Energy's Wind Power America Program. The original of that map can be found at http://www.kcc.state.ks.us/energy/kswindmap.pdf



Electric Transmission Lines	Wind Speed at 50 meters (m/s)	(mph)	Wind Power Density at 50m W/m²
345 - KV	Class 1: 0.00 - 5.60	0.00 - 12.5	0 - 200
230 - KV	Class 2: 5.60 - 6.40	12.5 - 14.3	200 - 300
161 - KV	Class 3: 6.40 - 7.00	14.3 - 15.7	300 - 400
138 - KV	Class 4: 7.00 - 7.70	15.7 - 16.8	400 - 500
115 - KV	Class 5: 7.50 - 8.00	16.8 - 17.9	500 - 600
69 - KV	Class 6: 8.00 - 8.80	17.9 - 19.7	600 - 700
	Class 7: > 8.80	> 19.7	> 700

Kansas Wind Resource Map

Coriolis

N W E S

Kansas Corporation Commission
Energy Programs

The wind resource estimates presented on this map were developed by Coriolis-AE using WindMap TM, a program developed by BrowerCo. WindMap TM is a mass conserving model based on NOABL, a program developed in the 1970s by the U. S. Department of Energy. The spatial grid resolution is of 1000 (app) meters.

The resource estimates have NOT been validated by the National Renewable Energy Laboratory (NREL) or independent meteorologist. All wind energy development projects should confirm wind resources by direct measurements in accordance with wind energy industry standards.

Development of this map was performed under contract with the Kansas Corporation Commission Energy Program with funding from the U. S. Department of Energy's Wind Power America Program.

This map may be viewed on the web at: http://www.kcc.state.ks.us/energy/wind.htm

Kansas Corporation Commission
26 March 2004

detailed map entitled, *Largely Intact or "Untilled" Natural Community Landscapes in Kansas.*[14]

Even cursory review of these maps indicate that the obvious and appropriate location for industrial wind turbine commercial electric power generation facilities is the high plains of Western Kansas. The Plaintiffs have never opposed locating such facilities in that part of the State.

THE LIKELIHOOD OF SUCCESS ON APPEAL

There is a substantial likelihood of success on this appeal because the relief sought—a hearing on the merits of the application for equitable relief—is within the discretionary power of this Honorable Court to grant and should never have been denied by the District Court on a Rule 12(b)(6) Motion to Dismiss.

ANALYSIS OF ERRORS BY THE DISTRICT COURT

The District Court failed to consider that the Plaintiff Flint Hills Tallgrass Prairie Heritage Foundation asserts federal question jurisdiction under federal common law and seeks equitable relief on behalf of the sovereign people of the United States to prevent serious, permanent and irreparable damage to a unique and irreplaceable national and international natural resource treasure, the Flint Hills Tallgrass Prairie Ecosystem.[15]

The *Migratory Bird Treaty Act*

The lower Court erred in assuming that the Plaintiffs were attempting to assert a cause of action under an essentially strict liability criminal or quasi-criminal statute, the *Migratory Bird Treaty Act*, and concluded "that plaintiff fails to state a cause of action under the MBTA."[16]

The *Migratory Bird Treaty Act* is part of this litigation[17] only because it clearly establishes the national and international interest in one of the significant elements of the Flint Hills Tallgrass Prairie Regional Ecosystem—it's importance to the migrating birds protected under the Act, particularly raptors and birds of prey such as the American bald eagle and the Golden eagle.[18]

The *Migratory Bird Treaty Act* and the treaties upon which it is based stand as

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[14] Docket Nº 1, *Verified Complaint* ¶40.1.

[15] Docket Nº 1, *Verified Complaint*, ¶¶ 3–5.2 and Prayer for Relief.

[16] Docket Nº39 at pages 5–6.

[17] Docket Nº 1, *Verified Complaint* ¶2; *See*, *Shouse* v *Moore*, 11 FSupp 784, 785).

[18] Docket Nº 1, *Verified Complaint*, "Killing Birds" ¶¶ 131–137.4.

eloquent evidence of the federal, state, national and international concern for the health and safety of migratory birds moving from Canada through Latin America and back on their annual journeys to and from breeding, nesting, and feeding grounds. Journeys, which for many species involve travel from the Arctic to Tierra del Fuego. The *Migratory Bird Treaty Act* is evidence of sufficient national interest to support federal question jurisdiction[19] and call for application of federal common law.

The Plaintiffs could also have directed the attention of the Court to the *Endangered Species Act of 1973*[20] and the action by the United States Supreme Court to cancel the nearly completed *Tellico Dam* on which more than $78 million of taxpayer money had already been spent[21] because of potential damage to the "snail darter" a species of small fish that was only questionably endangered.[22]

The verified complaint alleges substantial evidence in the form of uncontroverted facts[23] consistent with the national interest expressed in the plethora of legislative enactments directed toward environmental protection since enactment of the *National Environmental Policy Act of 1969*[24] (*NEPA*), by means of which Congress has clearly announced its overriding concern and deep commitment to environmental values.

Plaintiff respectfully refers this Honorable Court to national legislation not to

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19 28 U.S.C. § 1331.

20 87 Stat. 884, 16 U.S.C. § 1531 *et seq.*

21 The Court found that if the Tellico Project was permanently enjoined, "... a large portion of the $78 million already expended would be wasted. *Tennessee Valley Authority* v. *Hill et al.*, 437 U.S. 153, 166 (1978).

22 "Although the snail darter is a distinct species, it is hardly an extraordinary one. Even icthyologists familiar with the snail darter have difficulty distinguishing it from several related species ... Moreover, new species of darters are discovered in Tennessee at the rate of about 1 a year; 8 to 10 have been discovered in the last five years. ... All told, there are some 130 species of darters, 85 to 90 of which are found in Tennessee, 40 to 45 in the Tennessee River system, and 11 in the Little Tennessee itself. ... *Tennessee Valley Authority* v. *Hill et al.*, 437 U.S. 153, [fn3] Page 197 (1978).

23 Docket N° 1, *Verified Complaint,* ¶50. "Federally listed threatened and endangered species ... ; ¶¶51–55 The Flint Hills Tallgrass Prairie Ecosystem; ¶¶55.1–55.2 The Flint Hills; ¶55.3 Flint Hills Tallgrass Prairie Preserve; ¶55.4, *National Geographic* Map; ¶56. the largest area of native prairie grassland in a unit of the National Park System.

24 83 Stat. 852, 42 U.S.C. § 4321 *et seq.*

establish a right of action against these corporate defendants under those statutes, but to indicate the extent of national concern with the equitable issues of environmental justice that are the subject matter of this litigation.

Federal Jurisdiction and *The Civil Rights Acts*

In its effort to avoid federal jurisdiction, the District Court relies upon a line of cases that have their origin and rationale in *The Civil Rights Act of 1871*, particularly 42 USC §1983. However, plaintiffs did not bring this action under *The Civil Rights Acts*. Nevertheless, the corporate defendants and eventually the lower court insisted on treating this action as just another "1983" case.[25]

Under Color of State Action

Citing *Lugar*[26] and *Flagg Bros.*,[27] the cases from which the concepts of "state actor "and "acting under color of state law" were developed, the District Court cited a number of cases which all reiterate the principle that the subject matter of *Civil Rights Act* litigation has to be action taken "under color of state law."[28]

The question of whether the Federal courts can act only where a constitutionally protected right is infringed "at the hands of an entity or person that can fairly be described as a state actor" arises from efforts by the Supreme Court of the United States to impose some kind of uniformity in adjudication of claims brought for alleged violations of *The Civil Rights Acts*.

There can be no more clear statement that these corporate defendants act "under color of state law" than the "Declaration" submitted by Peter Van Alderwerelt, Vice President, Business Development and Origination, of Corporate Defendant PPM Energy, Inc. under the boldface heading, "**Tax Incentives for Wind Energy and for the Project**"

¶10. Wind energy projects qualify for certain federal and state tax incentives. The Federal Production Tax Credit, 26 USC § 45 ("PTC"), provides a tax credit of 1.8 cents per kilowatt hour ("kwh") of electricity generated at, and sold from, qualifying wind energy turbines if those turbines can be brought into production by December 31, 2005. Without the PTC, the price at which PPM would sell power from the Project would be substantially higher than

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25 Docket Nº39 at page 2.

26 *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

27 *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 156 (1978).

28 Docket Nº 39, at pages 3–4

negotiated in the current PPA [Power Purchase Agreement].

¶11. In addition to the PTC, Kansas exempts renewable energy projects from the requirement to pay property tax. KSA 79-201. There also is a bill currently being considered by the Kansas legislature that would exempt renewable energy projects from having to pay otherwise applicable sales and use taxes.

The lower Court also ignored the fact that his Declaration confirms and supports the statements contained in ¶¶ 151–166 of the Complaint.[29]

¶12. This package of federal and state tax incentives is key to making renewable wind-generated electricity economically competitive with other sources of energy generation and without it PPM could not have successfully marketed the Project output to Empire.[30]

It is just this need for support from federal and state law and federal and state agencies that meets the test of "under color of state action." The declaration of Peter Van Alderwerelt goes further in support of the allegations of the Complaint by affirming that *but for* such federal subsidies and state and local real property tax exemptions, the project would not go forward, nor would it have even been undertaken.

In attempting to distance the corporate defendants from the State of Kansas and the obvious relationship that exists between them, counsel for the corporate defendants cite a number of cases: *Gallagher*,[31] *Johnson*,[32] *Jackson*,[33] and *Wagner*.[34]

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29 Docket Nºs 22 *Declaration of Peter Van Alderwerelt*, ¶¶10, 11.

30 Docket Nºs 22, *Declaration of Peter Van Alderwerelt*, ¶12.

31 *Kelly Gallagher, et al.*, v. *"Neil Young Freedom Concert," et al.*, 49 F.3d 1442; 1995 U.S. App. LEXIS 3983 (1995 CA 10), an action complaining that a stadium concert "pat down" by a private security guard violated *The Civil Rights Act* §1983 because uniformed officers from the University of Utah, a State institution stood by while the pat down occurred. .

32 *Victor Johnson*, v. *Monica Rodrigues (Orozco), et al.*, 293 F.3d 1196; 2002 U.S. App. LEXIS 12657 (2002 CA 10), in which this Honorable court heard oral argument on the question of whether the Appellee acted under color of state law in an action involving termination of parental rights by adoption.

33 *Jackson* v. *Metropolitan Edison Co.* 419 U.S. 345; 95 S. Ct. 449; 42 L. Ed. 2d 477; 1974 U.S. LEXIS 50; 8 P.U.R.4th 1 (1974), a claim under *The Civil Rights Act of 1871* §1983 involving termination of electric power for non-payment.

34 *David Wagner, et ano.* v. *The Metropolitan Nashville Airport Authority, et* al., 772 F.2d 227; 1985 U.S. App. LEXIS 22752 (1985 CA 6), another action under 42

The "state actor" criteria.

In *Johnson*, this Honorable Court clearly affirmed its earlier position in *Gallagher* that to determine whether private parties should be deemed state actors there are four tests to be applied in the process of conducting a state action analysis: (1) the public function test, (2) the nexus test, (3) the symbiotic relationship test and (4) the joint action test.[35] quoting extensively from *Gallagher*,

> The Court has taken a flexible approach to the state action doctrine, applying a variety of tests to the facts of each case. . . .In addition, the Court has held that if a private party is a "willful participant in joint activity with the State or its agents," then state action is present. [**14] Finally, the Court has ruled that a private entity that exercises "powers traditionally exclusively reserved to the State" is engaged in state action. . . .[36]

The lower Court in this action stated that it "cannot discern a deprivation of a federal right based on defendants' use of federal and state tax incentives" [37] Yet, *but for* the federal and state subsidies and tax benefits the corporate defendants would not be attempting to construct industrial wind turbine commercial electric power generation facilities in the Flint Hills Tallgrass Prairie Ecosystem.

The "nexus" and "symbiotic relationship/entwinement" tests

The rule in this Circuit is that "a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[38] Such a "nexus" exists in this case according to the Declaration of defendant's Peter Van Alderwerelt.[39]

USC §1983, where the Plaintiff claimed that an airport security search of his baggage put the contents in disarray and soiled some jewelry samples causing him to injure his back when he undertook to repack his belongings.

35 *Johnson*, v. *Rodrigues (Orozco)*, 293 F.3d 1196 at 1202; (2002 CA 10).

36 49 F.3rd at 1447 (citations omitted).

37 Docket Nº39, page 4.

38 *Gallagher, et al.*, v. *"Neil Young Freedom Concert," et al.*, 49 F.3d 1442, 1448; (1995 CA 10), citing *Jackson*, 419 US at 351 and *Blum* v. *Yaretsky*, 457 U.S. 991, 1004, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982), a case involving professional health care judgments imposed on Medicaid patients in New York nursing homes.

39 Docket Nº 22, *Declaration of Peter Van Alderwerelt* at pages 3–4, "Tax Incentives for Wind Energy and for the Project", ¶¶ 10–12; "Policy Support for Wind Energy

There can be little doubt that *but for* the direct involvement of the State of Kansas the corporate defendants could not and would not proceed with development of industrial wind turbine commercial electric power generation facilities in the Flint Hills Tallgrass Prairie Ecosystem.

The "joint action" test

State action is also present if a private party is a "willful participant in joint action with the State or its agents."[40] According to this Honorable Court,

> Most decisions discussing this concept hold that if there is a substantial degree of cooperative action between state and private officials, or if there is "overt and significant state participation" in carrying out the deprivation of the plaintiff's constitutional rights, state action is present.[41]

There can be no greater example of "overt and significant state participation" than exercising the power of eminent domain in favor of these corporate defendants. By favoring these corporate defendants with preferential use of the power of eminent domain, the State of Kansas and its municipal subdivisions have established that the corporate defendants are indeed engaged in "state action." The Complaint clearly establishes that the actions of the corporate defendants are and will be taken "under color of state law."[42]

Actions against the State for providing tax exemptions

The lower Court stated,

> As defendant notes, the proper defendant for a challenge to a state exemption would be the government that enacted the exemption, rather than the private

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and the Project", ¶¶13–16.

40 *Johnson*, v. *Rodrigues, et al.* 293 F.3d 1196 at 1205; 2002 U.S. App. LEXIS 12657 (2002 CA 10) citing, *Gallagher*, 49 F.3d at 1453 (citing *Dennis* v. *Sparks*, 449 U.S. 24, 66 L. Ed. 2d 185, 101 S. Ct. 183 (1980)).

41 *Johnson*, v. *Rodrigues, et al.* 293 F.3d 1196 at 1205; 2002 U.S. App. LEXIS 12657 (2002 CA 10) citing, *Gallagher*, 49 F.3d at 1454 (citing *Hoai* v. *Vo*, 290 U.S. App. D.C. 142, 935 F.2d 308, 313 (D.C. Cir. 1991)).

42 See, Docket Nº1, *Verified Complaint*, ¶151 "Serious, permanent and irreparable damage to the Economy"; ¶¶ 152–154 "It is all about tax avoidance and subsidies"; ¶¶155–157 "Renewable Portfolio Standards–Shifting Costs to Consumers... Again"; ¶¶158–162 "The Production Tax Credit"; ¶¶163–166) "Guaranteed Markets".

recipient."[43]

The *Peden* case demonstrates the futility of attempting to challenge local tax legislation, no matter how discriminatory it might be because the Kansas Supreme Court has adopted the "rational basis standard" which it declares is a

> very lenient standard. All the court must do to uphold a legislative classification under the rational basis standard is perceive any state of facts which rationally justifies the classification.[44]

The federal and state subsidies, incentives, tax exemptions and other inappropriate largesse to multinational conglomerate corporations engaged in wind energy speculation are offered as evidence of national and international interest sufficient to establish federal question jurisdiction, not to support a claim for damages under *The Civil Rights Acts.*

The Conditional Use Permitting (CUP) Process

It is undisputed that the industrial wind turbine commercial electric power generation facilities of these corporate defendants are part of a larger plan to develop the entire Flint Hills Tallgrass Prairie Regional Ecosystem with 24 to 26 such developments. But there is no provision for equitable relief under the Kansas land use laws and therefore no way to challenge to the Conditional Use Permit on the fundamental issue of fragmentation of the Flint Hills Tallgrass Prairie Regional Ecosystem.

There is also no way under Kansas law to consider the impact of the proposed industrial wind turbine electric generating facilities upon the unique and irreplaceable national and international natural resource treasure that is the Flint Hills Tallgrass Prairie Ecosystem which natural biogeochemical processes have caused to extend far beyond the arbitrary political bounds of Butler County, Kansas. Any effort to move under state land use legislation and local administrative implementation of such legislation is an exercise in futility.

There can be little doubt, however, that if overt federal agency action were involved in the despoilation of the Flint Hills Tallgrass Prairie Ecosystem by the industrial wind turbine commercial electric power generation facilities, The *National*

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[43] Docket Nº39, at page 4.

[44] *Penden* v. *Kansas*, 261 Kan. 239, at 258, 930 P.2d 1 (1996) citing, *Kellems* v. *Commissioner of Internal Revenue*, 58 T.C. 556, 558 (1972), *aff'd* 474 F.2d 1399 (2d Cir.), *cert. denied* 414 U.S. 831 (1973).

Environmental Policy Act[45] would require an extensive Environmental Quality Assessment followed by preparation of a thorough Environmental Impact Statement.

The "Constitutional Rights" argument

Again relying on the misapprehension that the Plaintiffs are claiming some kind of violation of *The Civil Rights Acts*, the District Court looked for satisfaction of another one of the *Lugar/Flagg Bros.* tests,

> Furthermore, plaintiff fails to cite a case beyond Lugar itself that would allow the court to press forward in recognition of a constitutional right to a "salubrious environment. . . . "[46] Thus far, the courts have not recognized such a federal right, and this court declines to imply one.[47]

The lower Court relied upon cases cited by counsel for the corporate defendants which derive from a 1971 decision from the Fourth Circuit, *Ely* v. *Velde*,[48] an action by local residents to halt construction in their neighborhood of a Medical and Reception Center for Virginia prisoners. The homeowners alleged failure to observe procedures mandated by the *National Historic Preservation Act* (*NHPA*) and the *National Environmental Policy Act of 1970* (*NEPA*), and the Fourth Circuit held "that NEPA, no less than NHPA, must be followed."[49] That simple statement is the holding of the case because, as the Court went on to say, "The merits of the respective contentions are not the issue before us."[50]

By way of *dicta*, The Fourth Circuit went on to reject the local residents' claim that under *The Civil Rights Acts* and declined "the invitation to elevate to a constitutional level the concerns voiced by the appellants," because, "this newly-advanced constitutional doctrine has not yet been accorded judicial sanction; and *appellants do not present a convincing case for doing so*." [italics added][51] A failure of proof, not a statement of principle, and certainly not a precedent binding upon this Court.

The Ninth Amendment

The Ninth Amendment was added to the *Bill of Rights* because most state Legislatures refused to ratify the Constitution until there was some guarantee that

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45 83 Stat. 852, 42 U.S.C. § 4321 *et seq.*

46 [omitted citation] Docket Nº29, at p. 11.

47 Docket Nº39 at page 4..

48 *Ely et al.* v. *Velde, et al.*, 451 F.2d 1130; 3 ERC (BNA) 1280; (1971, CA4).

49 *Ely* v. *Velde,* 451 F.2d 1130, 1137 (1971 CA 4).

50 *Ely* v. *Velde,* 451 F.2d 1130, 1138 (1971 CA 4).

51 *Ely* v. *Velde,* 451 F.2d 1130, 1139 (1971 CA 4).

there are fundamental rights that are not explicitly set forth in the first eight amendments to the Constitution but which belong to all of the people of the United States by virtue of their inherent sovereignty derived from their human nature.

The Flint Hills Tallgrass Prairie Ecosystem is an area so important *to* the sovereign people of the United States *as* the sovereign people of the United States that it can and must be protected by the federal courts when it faces imminent danger of serious permanent irreparable damage.

The fundamental rights that are entitled to the protection of the Ninth Amendment have been described as "those so basic and important to our society that it would be inconceivable that [they are] not protected from unwarranted interference," and those rights "that...would be a natural subject of constitutional protection."[52] Such fundamental rights are entitled to protection by the federal courts against infringement from private action as well as government. In the words of James Madison who drafted the Ninth Amendment, this right is to be protected from "whatever quarter. the greatest danger lies."[53] In the words of the Colorado Supreme Court,

> [Ninth Amendment] rights should be protected from infringement or diminution by any person as well as any department of government. It is the solemn responsibility of the judiciary to 'fashion a remedy' for the violation of a right which is truly 'inalienable' in the event no remedy has been provided by legislative enactment.[54]

Like the right to privacy established in *Griswold,*[55] unenumerated human rights subject to protection under the Ninth Amendment cannot be explicitly defined outside the context of a particular case. However, the courts—after the appropriate adversary proceeding to determine whether a particular instance of damage was unreasonable—can provide equitable relief unless an otherwise compelling and contrary state interest can be established.[56]

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52 *United States* v *Laub Baking Co.* 283 F Supp 217 (1968, DC Ohio).

53 *The Annals of Congress, House of Representatives*, First Congress, 1st Session, pp 448-460, *op cit.*

54 *Colorado Anti-Discrimination Comm.* v *Case,* 151 Colo 235, 380 P.2d 34, 40 (1962).

55 *Griswold et al.* v. *Connecticut,* 381 U.S. 479; 85 S. Ct. 1678; 14 L. Ed. 2d 510.

56 A compelling interest is required before any action which infringes certain "basic" rights will be upheld. See, e.g., *Williams* v *Rhodes*, 393 U.S 23, 21 L Ed 2d 24, 89 5 Ct 5 (1968) *United States* v *Guest*, 383 U.S 745, 16 L Ed 2d 289, 86 5 Ct 1170

All Ninth Amendment cases must be considered in a context of the circumstances under which they arise. Many of the decisions that have commented negatively on Ninth Amendment rights arose in the context of inconsequential and even trivial efforts to seek relief from the federal courts on matters where the substantive nature of the damages alleged or actions sought to be restrained were of less than national significance and often did not even rise to the level of a serious federal question. Those cases never addressed threats of serious, permanent and irreparable damage to unique and irreplaceable national and international natural resource treasures such as the Flint Hills Tallgrass Prairie Ecosystem.

Counsel for the corporate defendants argued, and the lower Court apparently agreed, that, "it is not the importance of the right that determines whether it is fundamental but rather whether that right is implicitly or explicitly guaranteed by the language of the Constitution."[57]

***Pinkney* and the *San Antonio Independent School District* cases**

The *Pinkney*[58] Plaintiffs had an adequate remedy at law and chose to ignore it. They also raised a claim under *The Civil Rights Act* and the Court found that,

> The criteria for determining whether an interest is a fundamental right under the Constitution so as to be subject to strict scrutiny was discussed recently by the Supreme Court in *San Antonio School District v. Rodriguez*,[59]... five members of the Court agreed that the importance of a right is not the critical determinant in ruling whether that [**11] right is fundamental.[60]

The Supreme Court in *San Antonio* in 1972 was bitterly divided over the test for determining whether economic equality in public education was a fundamental right under the Constitution.[61] Neither of these cases is relevant to consideration of

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(1966) *Carrington* v *Rash*, 380 U.S 89, 18 L Ed 2d 675, 85 5 Ct 775 (1965)

57 Docket Nº 35, at page 5, citing *Pinkney* v. *Ohio Environmental Protection Agency*, 375 F.Supp. 305, 310 (1974 ND Ohio), which was citing, *San Antonio School District* v. *Rodriguez*, 411 US 1 (1973).

58 *Pinkney* v. *Ohio Environmental Protection Agency*, 375 F.Supp. 305 (1974 ND Ohio).

59 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973).

60 *Pinkney*, 375 F.Supp. 305, 309–310 (1974 ND Ohio), citing *San Antonio*, 411 U.S. 1, 33, 93 S. Ct. 1278, 1297, 36 L. Ed. 2d 16, 43.

61 Mr. Justice Powell delivered the opinion of the Court, in which Chief Justice Burger, and Justices Stewart, Blackmun, and Rehnquist, joined. (411 U.S. 1) Mr.

whether there is equitable jurisdiction in the Federal courts to restrain serious, permanent and irreparable damage to a unique and irreplaceable national and international natural resource treasure.

The other cases cited by counsel for the corporate defendants as precedent for preventing the Federal courts from protecting the Flint Hills Tallgrass Prairie Ecosystem, *Concerned Citizens of Nebraska*,[62] the *Cossatot Dam* litigation,[63] and the MDL *Air Pollution Control Antitrust* cases,[64] do not support the lower court in dismissing the Plaintiffs' Complaint on a Rule 12(b)(6) motion. However, the Eighth Circuit on the Ninth Amendment issue in *Concerned Citizens* pronounced a rule which is certainly reasonable and consistent with the intentions of the Founders.

> To be considered fundamental, an unenumerated right must be "deeply rooted in this Nation's history and tradition."[65]

The Flint Hills Tallgrass Prairie Ecosystem has been a stable element of the Region from the Osage Hills in Oklahoma to Fort Riley in Kansas for thousands of years. It is in imminent danger of being lost as all the other tallgrass prairie was lost over the last 200 years, but this time, not to the plow, but the bulldozer

Protection of the agrarian values of the Great Plains is a right deeply rooted in this Nation's history and tradition. It is a right that is entitled to protection under the equitable jurisdiction of the federal courts. It is a right that is certainly entitled to be

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Justice Stewart filed a concurring opinion. (411 U.S. 1, 59) Mr. Justice Brennan filed a dissenting opinion. (411 U.S. 1, 62) Mr. Justice White filed a dissenting opinion, in which Justices Douglas and Brennan joined. (411 U.S. 1, 63) Mr. Justice Marshall filed a dissenting opinion in which Mr. Justice Douglas joined. (411 U.S. 1, 70).

62 *Concerned Citizens of Nebraska (CCN); et al.* v. *United States Nuclear Regulatory Commission (NRC), et al.* 970 F.2d 421; (1992 CA 8), the low-level nuclear waste storage litigation in which the Plaintiffs' ignored an adequate remedy at law.

63 *Environmental Defense Fund, Inc., et al./* v. *Corps of Engineers*, 325 F. Supp. 728; USDC WDArk 1971) which arose under NEPA and under NEPA it was decided.

64 *In re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment*, MDL No. 31, 52 F.R.D. 398; (USDC/CDCa, 1970), another action brought under *The Civil Rights Act of 1871.*

65 [omitted citation] *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977) (Powell, J.); *Bowers* v. *Hardwick*, 478 U.S. 186, 192, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986); *Henne* v. *Wright*, 904 F.2d 1208, 1215 (8th Cir. 1990), *cert. denied*, 112 L. Ed. 2d 682, 111 S. Ct. 692 (1991).

considered in a hearing on the merits not dismissed out of hand on a motion under Rule 12(b)(6).

Sovereignty and the Ninth Amendment

If the right is important enough, then the Ninth Amendment assures that it is retained by the sovereign people of the United States. The unenumerated rights retained by the People were those which the political philosophy at the time the United States Constitution was ratified are inextricably associated with the sovereignty of the People of the United States.

In 1793 the Supreme Court of the United States was called upon to consider the nature of sovereignty in the United States.[66] Chief Justice Jay recognized that it was the people of the United States, not the federal government, that were sovereign.[67]

JURISDICTION IN EQUITY

The District Court was well aware of its equitable powers and that the Plaintiffs were addressing their cause to the equity jurisdiction of the Court.

> In resisting the motion to dismiss, plaintiff asks the court to review this case under its equitable jurisdiction. Although federal district and appeals courts are creatures of statute, they possess the inherent equitable power of common law courts. . . . "If they are ever stripped of judicial discretion in equitable proceedings they will be relegated to the standing of mere administrative enforcement agencies." . . .[68] "appeal to the equity jurisdiction of the federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity."[69]

Yet the lower Court did not seem to heed the words of Mr. Justice Douglas, writing for the Supreme Court in *Hecht*,[70]

> We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated

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66 *Chisholm* v. *Georgia,* 2 U.S. (2 Dall.) 419, 456 (1793).

67 *Chisholm* v. *Georgia,* 2 U.S. (2 Dall.) 419, 470–472 (1793).

68 [omitted citation] *United States* v. *Fred A. Brown and Jennie B. Brown, doing business as Gem Dairy,* 331 F2d 362, 365 (1964 CA 10). Docket Nº 39, at 6.

69 [omitted citations] *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324, 1333 (10th Cir. 1982) citing *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 591, 88 L.Ed. 754 (1944). Docket Nº 39, at page 6.

70 *Hecht Co.* v. *Bowles*, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944).

that "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity."[71]... The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private [Page 330] claims. ... It is therefore even more compelling to conclude that, if Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain.[72]

Directly contrary to this lower Court's holding that there is no federal equity jurisdiction, is the opinion of Mr. Justice Harlan in *Mitchell*,[73] where

> The court below took as the touchstone for decision the principle that to be upheld the jurisdiction here contested "must be expressly conferred by an act of Congress or be necessarily implied from a congressional enactment."[74] In this the court was mistaken. The proper criterion is that laid down in *Porter* v. *Warner Co.*,[75] ...

The decision of the Supreme Court of the United States in *Porter* is controlling on the issues raised by the Complaint in this action.

> Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.[76] Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the

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71 *Meredith* v. *Winter Haven*, 320 U.S. 228, 235 (1943).

72 [omitted citation] *United States* v. *Morgan*, 307 U.S. 183, 194 and cases cited.

73 *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 290–92, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960).

74 [omitted citation] 260 F.2d, at 933.

75 [omitted citation] 328 U.S. 395.

76 [omitted citation] *Virginian R. Co.* v. *System Federation*, 300 U.S. 515, 552.

> necessities of the particular case."[77] ... In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.[78]
>
> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."[79]
>
> But where, ...the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief ...[80] [Page 400][81]

Even the dissenters in the *Mitchell* case agreed with the majority that,

> It is not be doubted that an equity court, proceeding under unrestricted general equity powers, may decree all the relief, including incidental legal relief, necessary to do complete justice between the parties.[82]

The entire substance of the complaint states and the Plaintiffs will establish in a hearing on the merits all the classical elements of a cause of action in equity: imminent danger of serious, permanent and irreparable damage *to* the unique and irreplaceable national and international natural resource treasure that is the Flint Hills Tallgrass Prairie Ecosystem *from* the industrial wind turbine commercial electric power generation facilities being constructed *by* the corporate defendants; and lack of any plain and adequate remedy at law.

In other cases cited by the lower Court, we find that the Supreme Court of the United States noted that,

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77 [omitted citation] *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329.

78 [omitted citation] *Camp* v. *Boyd*, 229 U.S. 530, 551–552.

79 [omitted citation] *Brown* v. *Swann*, 10 Pet. 497, 503. See also *Hecht Co.* v. *Bowles*, 321 U.S. 321, 330, 64 S.Ct. 587, 88 L.Ed. 754 (1944).

80 [omitted citation] *Alexander* v. *Hillman*, 296 U.S. 222, 241–242.

81 *Porter* v. *Warner Co.*, 328 U.S. 395, at 399–400.

82 *Mitchell* v. *Demario Jewelry*, 361 U.S. 288, at 299 (1960)

> Emphasis on broad equity power, even in the face of a silent statute, also appears [83] and is sometimes related to the *All Writs Act* . . . [84]

No plain and adequate remedy at law

The Supreme Court of the United States has said that "The absence of a plain and adequate remedy at law, is the only test of equity jurisdiction," [85] and "the application of this principle to a particular case must depend on the character of the case as disclosed in the pleadings." [86] The cases dealing with the phrase "plain and adequate remedy at law" return, directly or indirectly to the words of Mr. Justice Johnson in the matter of *Boyce's Executors* [87]

> It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. [88]

It is only where:

> there is a plain and adequate remedy at law, and the case is one peculiarly of the character where, for that reason, a court of equity will not interpose. This principle in the English equity jurisprudence is as old as the earliest period in its recorded history. [89]

Suggesting futile efforts to challenge State tax legislation in the State courts simply establishes the lack of any plain and adequate remedy at law The lower court has

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83 [omitted citation] *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 290–291 (1960); *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4 (1942); *Arrow Transportation Co.* v. *Southern R. Co.,* 372 U.S. 658, 671 n. 22 (1963); see L. Jaffe, *Judicial Control of Administrative Action* 659 (1965).

84 [omitted citations] , 28 U.S.C. §1651(a), *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 603–604 (1966).

85 *Thompson* v. *Railroad Companies*, 73 U.S. 134, 137 (1867).

86 *Arrowsmith* v. *Gleason,* 129 U.S. 86 (1889)

87 *James Boyce's Executors* v. *Felix Grundy*, 28 U.S. (3 Peters) 210 (1830)

88 *Boyce's Executors* v. *Grundy*, 28 U.S. 210, at page 215 (1830)

89 *Lewis* v. *Cocks*, 90 U.S. 466, 469 (1874), citing Spence's *Equitable Jurisdiction of Courts of Chancery*, 408, note b, " . . . you do call before you both parties . . . and their cause heard, that you do unto them both right and equity and in especial that you see that the poorer party suffer no wrong, but that you make such an end in this matter that we [Henry V] be vexed hereafter with their complaints. . . ." (Philadelphia, Lea and Blanchard, 1846)

recognized that the Plaintiffs have no adequate remedy at law.

Federal equity jurisdiction

As recently as 1999, the Supreme Court of the United States had occasion to affirm its longstanding respect for the equity jurisdiction and equitable powers of the federal courts. In *Grupo Mexicano*,[90] Mr. Justice Scalia reviewed the history and nature of equity jurisprudence in the Federal courts.

> The Judiciary Act of 1789 conferred on the federal courts jurisdiction over "all suits . . . in equity." . . . We have long held that "[t]he `jurisdiction' thus conferred . . . is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."[91]
>
> "Substantially, then, the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789. . . ."[92] "[T]he substantive prerequisites for obtaining an equitable remedy as [Page 319] well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction." . . . [93]

Justice Ginsburg and the other dissenting Justices,

> . . . long ago recognized that district courts properly exercise their equitable jurisdiction where "the remedy in equity could alone furnish relief, and . . . the ends of justice requir[e] the injunction to be issued.[94]

explaining, without any contradiction from the majority of the Court,

> From the beginning, we have defined the scope of federal equity in relation to the principles of equity existing at the separation of this country from

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90 *Grupo Mexicano De Desarrollo* v. *Alliance Bond Fund*, 527 US 308 (1999).

91 [omitted citation] *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U.S. 563, 568 (1939). See also, e.g., *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 382, n. 26 (1949); *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 105 (1945); *Gordon* v. *Washington*, 295 U.S. 30, 36 (1935).

92 [omitted citation] A. Dobie, Handbook of Federal Jurisdiction and Procedure 660 (1928).

93 *Grupo Mexicano De Desarrollo* v. *Alliance Bond Fund*, 527 US 308, 319 (1999).

94 [omitted citation] *Watson* v. *Sutherland*, 5 Wall. 74, 79 (1867).

> England,[95] ... we have never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor.
>
> Since our earliest cases, we have valued the adaptable character of federal equitable power.[96] ... We have also recognized that equity must evolve over time, "in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed."[97] ... [Page 337] ... As we observed more than a century ago: "It must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them."[98] ... On this understanding of equity's character, we have upheld diverse injunctions that would have been beyond the contemplation of the 18th century Chancellor.[99]

The Plaintiffs call upon the fundamental equitable jurisdiction of the federal courts which has continued to stand for more than 200 years as a bulwark against serious, permanent and irreparable damage from whatever source whenever there is no plain and adequate remedy at law. There is certainly no plain and adequate remedy at law which can protect the Flint Hills Tallgrass Prairie Ecosystem.

Equity jurisdiction, "federal question" and "social property"

"Federal question" jurisdiction can be predicated upon the character of the Flint Hills Tallgrass Prairie Ecosystem as property so vested with a national character and the public interest that the region itself can be considered dedicated to public use as grazing land that is unique and irreplaceable anywhere in the World—social property.

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95 [omitted reference] see, e.g., *Payne* v. *Hook*, 7 Wall. 425, 430 (1869); *Gordon* v. *Washington*, 295 U.S. 30, 36 (1935).

96 [omitted reference] See *Seymour* v. *Freer*, 8 Wall. 202, 218 (1869) "[A] court of equity ha[s] unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944) "Flexibility rather than rigidity has distinguished [federal equity jurisdiction]".

97 [omitted citation] *Union Pacific R. Co.* v. *Chicago*, R. I. & P. R. Co., 163 U.S. 564, 601 (1896) (internal quotation marks omitted); ...

98 [omitted citation] *Union Pacific R. Co.*, 163 U.S., at 600–601.

99 *Grupo Mexicano De Desarrollo* v. *Alliance Bond Fund*, 527 US 308, at 337 (1999).

The concept of social property has been with civilization from its earliest days,[100] and still can be found in some form in most cultures today. The prime agricultural lands of the United States are property vested with sufficient public interest to claim equitable protection by and on behalf of the people of the United States. Enforcement of the public trust in the fertile soils of America, particularly the unique and irreplaceable national and international natural resource treasure that is the Flint Hills Tallgrass Prairie Ecosystem is one of the great objects of equitable jurisprudence.

As the nominal owners of property so vested with the public interest the corporate defendants have become trustees of the property with the fiduciary obligation to assure its highest and best use. The corporate defendants are obligated to exercise their rights as nominal owners in a manner consistent with maintaining the land and landscape as what it is now and has been since the great glaciers retreated thousands of years ago.

Of course the land and landscape of the Flint Hills Tallgrass Prairie Ecosystem may be appropriated by individuals and business entities for private pecuniary profit. The extent of the appropriation and the uses permitted, however, must accord with and not impair, damage, or destroy, the unique and irreplaceable character of the Ecosystem and its highest and best use as grazing land.

Equity can be called upon to protect the rights of the sovereign people of the United States in and to the full benefit, use and enjoyment of property vested with the public interest long after it has come into nominally private ownership even if it means limiting the rights of the nominal "owner" of the property. Judicial declaration of the rights and interest of the people in and to the benefit, use and enjoyment of certain property was not unknown at common law. Courts often declared the public right to privately held lands.[101]

Many fundamental changes in the American legal system have already taken place case-by-case along the way toward social justice. Through the law of equity, the

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100 See H.S. Maine, *Ancient Law, its Connection with the Early History of Society and its Relation to Modern Ideas* ch. VIII (1861).

101 See, *Irwin* v. *Dixion*, 50 U.S. (9 How.) 10 (1850); *New Orleans* v. *United States*, 35 U.S. (10 Pet) 662 (1836); *Cincinnati* v. *White*, 31 U.S. (6 Pet) 431 (1832). See also, *Longley* v. *City of Worcester*, 304 Mass. 580,-, 24 N.E.2d 533, 537 (1939); *Dickinson* v. *Ruble,* 211 Minn. 373, 375–76, 1 N.W.2d 373, 374–75 (1941). See, also, 3 J. Pomeroy, *A Treatise on Equity Jurisprudence* 1060 (2d ed. 1899); 2 *Id.* §958.

courts have imposed restraints on anti-social exercise of the incidents of property ownership, passing from preventing unconscionable exercise of legal rights against individuals to limitations on the anti-social exercise of those legal rights. The American courts have gradually limited what the French call "abusive exercise of rights" as the law of equity has been moving toward a doctrine that the law should secure satisfaction of the reasonable wants of a property owner with respect to the use of property, but only to the extent that such use is consistent with the interests of society.

Federal common law

Among the historical factors that have determined much of the early course of the evolution of an American common law have been the concepts of justice, law, and sovereignty that prevailed during the period the English common law was being made over in the American courts.

It is not inappropriate that litigation over the "federal common law" should involve questions involving natural resources and *Hinderlinder*,[102] one of the earliest cases to address the question of a federal common law, arose in the Tenth Circuit.

The leading cases considering a federal common law, *Illinois* v. *City of Milwaukee*[103] and *Milwaukee* v. *Illinois*,[104] both derive from a single sentence in a much earlier case, *Clearfield Trust*,[105] "We agree with the Circuit Court of Appeals that the rule of *Erie R. Co.* v. *Tompkins*[106] does not apply to this action."

> Those who maintain that state law governs [in matters which present questions of federal common law] overlook the fact that the *Hinderlider*[107] case was written by Mr. Justice Brandeis who also wrote for the Court in *Erie R. Co.* v. *Tompkins*,[108] the two cases being decided the same day.[109]

In *Illinois*, Mr. Justice Douglas delivered the opinion for a unanimous Court, quoting Chief Judge Lumbard, speaking for the panel in *Ivy Broadcasting Co.* v.

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102 *Hinderlider, et al.* v. *La Plata River & Cherry Creek Ditch Co.* 304 U.S. 92 (1938).

103 406 U.S. 91 (1972).

104 451 U.S. 304 (1981).

105 *Clearfield Trust Co., et al.* v. *U.S.*, 318 U.S. 363 (1943)

106 304 U.S. 64.

107 *Hinderlider* v. *La Plata* Co., 304 U.S. 92, 110.

108 [omitted citation] 304 U.S. 64.

109 *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 105 [n7]; 92 SCt 1385, 1394; 31 LEd2d 724; 1971 US LEXIS 107 (1972).

American Tel. & Tel. Co.,[110]

> "We believe that a cause of action similarly under federal law if the dispositive issues stated in the complaint require the application of federal common law . . . . The word 'laws' in § 1331 should be construed to include laws created by federal judicial decisions as well as by congressional legislation. The rationale of the 1875 grant of federal question jurisdiction — to insure the availability of a forum designed to minimize the danger of hostility toward, and specially suited to the vindication of, federally created rights — is as applicable to judicially created rights as to rights created by statute." (Citations omitted.)
>
> We see no reason not to give "laws" its natural meaning,[111] and therefore conclude that § 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.[112] * * * as *Texas* v. *Pankey*,[113] recently held. " . . . The range of judicial inventiveness will be determined by the nature of the problem."[114]

As the *Agent Orange* litigation was proceeding before Judge Pratt in New York,[115] the Supreme Court of the United States reconsidered the issues in the controversy between the State of Illinois and the City of Milwaukee, Wisconsin.

In the years between the decision in *Illinois*[116] in 1972 and *City of Milwaukee*[117] in 1981, Congress had enacted legislation which covered the areas of concern which the earlier Court had been forced to address by relying upon federal common law. Still, the later Court affirmed the existence of federal common law and its role in resolving cases and controversies involving matters of significant national concern and upon which Congress had not yet promulgated legislation.

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110 391 F.2d 486, 492.

111 [omitted reference] see *Romero* v. *International Terminal Operating Co., supra*, at 393 n. 5 (Brennan, J., dissenting and concurring).

112 *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100–101; 92 SCt 1385, 1391; 31 LEd2d 721–722; 1971 US LEXIS 107 (1972).

113 [omitted citation] 441 F.2d 236.

114 [omitted citation] *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456-457.

115 Docket N° 29, Appendix.

116 *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 92 SCt 1385; 1971 (1972)

117 *City of Milwaukee et al.* v. *Illinois et al.*, 451 U.S. 304 (1981).

Equitable jurisdiction and equitable relief to prevent waste

The remedy of injunction to prevent "waste" moved from the Roman Law[118] directly into English Chancery as early as Richard II (1377–1399). By the reign of Edward VI (1547–1553) and Elizabeth I (1558–1603), injunctions were regularly granted to prevent waste. Those injunctions included prohibitions against "ploughing ancient meadow and pasture land."[119]

In 1892, the United States Supreme Court examined the jurisdiction of the federal courts to grant equitable relief to prevent waste holding,

> The Coosaw Mining Company, unless restrained, will not only appropriate to its use property held in trust for the public, but will prevent the proper administration of that trust, for an indefinite period, by obstructing others, ... Proceedings at law ... will not adequately protect the public interests in the future. ...[120]

The United States Supreme Court went on to hold that "The grounds of equity jurisdiction ... are, substantially, those upon which courts of equity interfere in cases of waste, public nuisance and purpresture. [121]

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118 *The Institutes of Justinian*, Book IV, Title XV, *De Interdictis*, J A C. Thomas, ed (Oxford, North-Holland Publishing Company 1975). .

119 Spence, George, *The Equitable Jurisdiction of The Court of Chancery*, 672, note d, citing "Tothill William. *The transactions of the High Court of Chancery, both by practice and president* [*sic*], 114, 209, 210; and see 156 and 285. *Atkyns* v. *Temple*, 1 Car. I.; 1 Rep Ch. 8; in one case, though it was insisted that the nature of the ground was for tillage, and that it had formerly been ploughed." Tothill's treatise was found in the library of Thomas Jefferson. (1783 Catalog of Books, [circa 1775-1812], page 100, [electronic edition].) Thomas Jefferson Papers: An Electronic Archive. Boston, MA: Massachusetts Historical Society, 2003. http://www.thomasjeffersonpapers.org/ Original manuscript: Jefferson, Thomas. 1783 Catalog of Books, [circa 1775-1812]. 246 pages; from the Coolidge Collection of Thomas Jefferson Manuscripts, Massachusetts Historical Society.

120 *Coosaw Mining Co.* v. *South Carolina*, 144 U.S. 550 (1892)

121 [omitted citation] *United States* v. *Gear*, 44 U.S. (3 How.) 120, 121, 133 (1845). According to Lord Coke, purpresture, is a close or enclosure, that is, when one encroaches or makes several to himself that which ought to be in common to many; ...[citations omitted] Source: *Bouviers Law Dictionary* 1856 Edition.

Federal Courts will suffer no wrong to be without an equitable remedy

Counsel for the corporate defendants exceeds the bounds of reasonable argument when they claim that plaintiffs are maintaining "this action based on the platitude that there can be no wrong without a remedy."[122] This statement is no platitude. It is the fundamental principle of equity jurisprudence. It is older than Magna Carta. It is derived from concepts of the Roman Law that were well known in England at the time of Henry II and Thomas Becket.

The *Florissant Fossil Beds* Litigation

The lower Court apparently agreed with counsel for the corporate defendants who called the *Florissant Fossil Beds* litigation "irrelevant" and found reference to it, "puzzling,"[123] Nevertheless, The *Florissant Fossil Beds* litigation is one of the most dramatic applications of federal equity power that occurred in the Twentieth Century. It provides guidance for this Honorable Court if the Flint Hills Tallgrass Prairie Ecosystem is to be saved from serious, permanent and irreparable damage. The two decisions and orders by the this Honorable Court during the summer of 1969 represent some of the finest moments in the history of American Equity Jurisprudence as the subsequent development of the *Florissant Fossil Beds National Monument* confirms.[124]

Without considering the merits of Plaintiffs' claims.[125] and without any real knowledge of the comparable nature of the resources at risk, the lower Court

> "stops short of finding the Flint Hills Tallgrass Prairie case to be analogous. Several important differences should be highlighted. First, the Florissant Fossil Beds included 6,000 acres of Oligocene period remains that had been remarkably well-preserved. The Flint Hills Tallgrass Prairie Ecosystem, on the other hand, has undergone substantial development with the construction of roads, power lines and towns.[126]

These are findings of fact that the District Court should not have made without a hearing on the merits.

The last remaining substantial intact tallgrass prairie ecosystem in the entire world

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122 Docket N° 35 at page 2.

123 Docket N° 35 at page 12.

124 Meyer, Herbert W., *The Fossils of Florissant* (Smithsonian Books, 2003)

125 Docket N°39 at page 6–7.

126 Docket N°39 at page 7.

has been remarkably well preserved in the Flint Hills by the efforts of the ranchers and others who hold title to the property and have been caring for it during the last century. The roads, power lines and human communities that exist within and about the Flint Hills Tallgrass Prairie Ecosystem are not a source of serious, permanent and irreparable damage as they now exist.

The substantial credible scientific evidence will clearly establish that the unique ecology of the Tallgrass prairie can continue for another century or more if it is permitted to remain in essentially the state it is in today, but that further disturbance, especially fragmentation of habitat will result in irrevocable loss for which there can be no practical replacement and which cannot be mitigated with existing technology.

As some kind of basis for denying Plaintiffs a hearing on the merits of the issues raised by the Flint Hills litigation, the lower Court claimed "the legislature has made considerable efforts to preserve the tallgrass prairie in the Flint Hills." [127] and concluded,

> With the national preserve and the tax incentives, the state and federal legislatures are attempting to balance development with preservation. Since the legislative branch has already engaged in weighing priorities for the State of Kansas, the court will not engage in a re-weighing of these initiatives. [128]

This is a declaratory judgment action seeking equitable relief

The *Flint Hills Tallgrass Prairie* litigation is not a collateral attack upon a local land use decision through a federal court action. This action is a *de novo sui generis* appeal to this Court's fundamental equity jurisdiction under federal common law to protect a unique and irreplaceable national and international natural resource treasure from serious and permanent and irreparable damage. Plaintiffs seek a declaration of rights and injunctive relief, [129] not damages for alleged discrimination under *The Civil Rights Acts*.

CONCLUSION

The Plaintiffs pray for the opportunity to plead their case for the Flint Hills Tallgrass Prairie Ecosystem. The lower Court cannot cavalierly dismiss the Complaint under Rule 12(b)(6) if all the allegations of the Complaint are deemed admitted. What the Court effectively did was dismiss the Complaint under its summary judgment

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127 Docket Nº39 at page 8.

128 Docket Nº39 at page 8.

129 Docket Nº 1, *Verified Complaint*, Prayer for Relief.

power without a hearing on the merits. As Mr. Justice Black, speaking for a unanimous Supreme Curt stated, [130]

> As a general ground for dismissal, the District Court held that the complaint failed to state a claim upon which relief could be granted. In considering the correctness of this ruling the allegations of the complaint are to be taken as true, and indeed...the [Plaintiff] stands ready to produce much evidence tending to prove the truthfulness of all the allegations in the complaint. We have no doubt whatsoever that it was error to dismiss the complaint without a trial. * * * The allegations of this complaint were too serious, the right to vote in this country is too precious, and the necessity of settling grievances peacefully in the courts is too important for this complaint to have been dismissed. [131] ... The case should have been tried. It should now be tried without delay.

The representative Plaintiff Flint Hills Tallgrass Prairie Heritage Foundation respectfully prays this Honorable Court to remand this matter to the District Court of Kansas forthwith for a trial or hearing on the merits of the issues raised in Plaintiffs' complaint.

Dated at Wichita, Kansas this 18th day of April 2005.

Respectfully submitted,

s/Victor John Yannacone, jr.
Victor John Yannacone, jr. (VY6405)
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Attorneys for the Plaintiffs

STATEMENT OF NECESSITY FOR ORAL ARGUMENT

Plaintiff requests oral argument be allowed to enable counsel to better explain the issues concerning the need for immediate injunctive relief. In addition, the legal issues are numerous and oral argument would be helpful to the Court.

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130 *United States* v. *Mississippi*, 380 U.S. 128, 143, 13 L. Ed. 2d 717, 85 S. Ct. 808 (1965).

131 [omitted reference] Compare *Davis* v. *Schnell*, 81 F. Supp. 872 (D.C. S.D. Ala.), *aff'd*, 336 U.S. 933; *Louisiana* v. *United States*, [380 U.S.] *post*, p. 145.

CERTIFICATE OF SERVICE

I, **Terry L. Malone, attorney for appellant**, hereby certify that on **18th day of April, 2005,** I sent a copy of the foregoing, by way of United States mail and electronic mail, to the following:

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I further certify that all required privacy redactions have been made and the digital submissions are free of viruses.

s/Terry L. Malone