№ 05–3117

United States Court of Appeals
for the
TENTH CIRCUIT

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

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

On appeal from the
United States District Court for the District of Kansas
The Honorable Judge J. Thomas Marten
Case № 05–1025–JTM

Plaintiff–Appellant's Reply Brief

ORAL ARGUMENT IS REQUESTED

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4 All Eng 20, 37 [1941] A C 1 3

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THE ISSUES ON APPEAL

While the procedural issue of whether the District Court properly dismissed the Complaint with prejudice pursuant to Rule 12(b)(6) of the *Federal Rules of Civil Procedure* may appear uncomplicated, the underlying issue of whether the Plaintiff Flint Hills Tallgrass Prairie Heritage Foundation has stated a cause of action is much more complex than counsel for the corporate defendant wind power speculators would have this Court believe.

A Rule 12(b)(6) motion to dismiss should be granted only if it appears beyond a doubt that the plaintiff is unable to prove any set of facts entitling the Plaintiff to relief under any theory of recovery. On the motion, the court must accept all the well-pled allegations of the complaint as true and must construe them in the light most favorable to the plaintiff.

Defendants' position

At long last, Finally, counsel for the corporate defendant wind power speculators unequivocally identified the basis of their defense, the ultimate extreme position of legal positivism: Unless there is some federal statute (or perhaps state statute under certain circumstances) which expressly protects the Flint Hills Tallgrass Prairie Ecosystem from the serious, permanent and irreparable damage associated with development of industrial wind turbine commercial electric power generation facilities, there can be no access to the Courts of this Nation. Counsel for the corporate defendants would have this Court believe that without a statute specifically addressing the issues, the doors to the Courthouses of this land are closed to those who seek protection of

unique and irreplaceable national and international natural resource treasures such as the Flint Hills Tallgrass Prairie Ecosystem.

For the first time it appears that the fundamental philosophical issues of legal and judicial positivism have been raised in the federal courts in the context of equity litigation.

The Equitable Basis of Plaintiffs' Complaint

The Plaintiffs' complaint opens with a clear statement of Equitable Jurisdiction.[1] Counsel for the corporate defendant wind power speculators finally recognize that the equity elements of Plaintiff's cause of action include reliance on the "concept of social property; resort to federal common law; and a contention that federal courts have equitable jurisdiction to prevent waste,"[2]

Nevertheless, counsel for the corporate defendant wind power speculators continue to deride Plaintiffs reliance upon well established principles of equity jurisprudence and they continue to argue that there is no real equity jurisdiction in the federal courts. They fall back on the positivist argument that without some legislative act to protect the Flint Hills Tallgrass Prairie Ecosystem from the damage that will result from their development of industrial wind turbine commercial electric power generation facilities in the region, the Courts are powerless.

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1 ¶3, Restraining from Damage or Degrading, ¶3.1, Restraining Injury to Ecosystem, ¶3.2, Declaratory judgment, ¶4, No Adequate Remedy at Law, ¶4.1, No Affordable Remedy, ¶4.2, Equitable Relief Sought, ¶5, Unique National and International Resource Treasures, ¶5.1, Public Trust, and ¶5.2,Administrative Agencies allege sufficient facts upon which to establish the equity jurisdiction of the Court.

2 Answering Brief of Defendants-Appellees, page 28.

Equity has neither fixed boundaries, nor logical subdivisions and its origin, both in Rome and in England, was that there was a wrong for which there was no remedy at law.[3] Equity supplements the deficiencies of the common law, by applying, where otherwise there would result a wrong, those principles of natural justice, which are analogous to settled principles of the common law.[4] As Lord Chancellor Cottenham observed, in 1841,

> I think it is the duty of this court, [equity], to adopt its practice and course of proceeding to the existing state of society and not, by a strict adherence to forms and rules, under different circumstances, to decline to administer justice and enforce rights for which there is no other remedy. * * * If it were necessary to go much further than it is in opposition to some sanctioned opinions in order to open the doors of this court to those who could not obtain it elsewhere, I should not shrink from the responsibility of doing so.[5]

The words of Lord Atkin are no less compelling:

> "When those ghosts of the past stand in the path of justice clanking their medieval chains, the proper course for the judge is to pass through them undeterred ... The common law does not go on the theory that a case of first impression presents a problem of legislative as opposed to judicial power."[6]

And yet another eloquent expression of the common law equity principles reflects the character of our American nation during the time when agrarian values were well understood and the men and women who tilled the soil,

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3 Story, *Commentaries on Equity Jurisprudence* §§ 49, 50 (1836).

4 Story, *Commentaries on Equity Jurisprudence* § 671, note.

5 *Wallworth* v *Bolt*, 4 Myl & C 619, 41 Eng Rep. 238 (1841).

6 *United Australia, Ltd.* v *Barclay Bank, Ltd.* 4 All E.R. 20, 37 [1941] A C 1, 29. See, *El Chico Corp.* v. *Poole*, 732 S.W.2d 306 (Tex. 1987)* * * It is the duty of the courts of this state to resolve disputes between parties who invoke the authority of the judiciary. * * *" citing Lord Atkin in support of their decision.

husbanded livestock and protected the land and landscape of our nation were respected,

> The law will protect a flower or a vine as well as an oak. . . These damages are irreparable too, because the trees and vines cannot be replaced.[7]

Sic utere tuo ut alienam non laedas

In their drive for wealth rooted in favored treatment by federal state and local government, corporate persons such as these corporate defendants may not ignore the equitable obligations toward their fellow citizens which attach to them in all the relations of their corporate existence.

Among the maxims which define those obligations, none is of higher authority or wider application than that golden rule of the law, *Sic utere tuo ut alienum non lædas*. Let every man use his own so as not to interfere in any way or degree which he can avoid with the enjoyment by his neighbor of that which is his.

> The familiar maxim, *Sic utere tuo ut alienum non laedas* — literally translated, "So use your own property as not to injure that of another person," but by more proper interpretation, "so as not to injure the rights of another," (Broom's Leg. Max., 8th ed., 289) — applies to conflicting rights of every description.[8]
>
> It would be idle and trite to say that no right is absolute. *Sic utere tuo ut alienum non lædas* is of universal and pervading obligation. It is a condition upon which all property is held.[9]

and

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[7] *Campbell* v *Seaman*, 63 NY 568 (1876).

[8] *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U.S. 229 (1917)

[9] *Orient Insurance Company* v. *Daggs*, 172 U.S. 557 (1899)

> There is no doubt of the general proposition that a man may do what he will with his own, but this right is subordinate to another, which finds expression in the familiar maxim: *Sic utere tuo ut alienum non lædas*. His right to erect what he pleases upon his own land will not justify him in maintaining a nuisance, or in carrying on a business or trade that is offensive to his neighbors. Ever since *Aldred's case*[10] in 1610 it has been the settled law, both of this country and of England, that a man has no right to maintain a structure upon his own land, which, by reason of disgusting smells, loud or unusual noises, thick smoke, noxious vapors, the jarring of machinery or the unwarrantable collection of flies, renders the occupancy of adjoining property dangerous, intolerable or even uncomfortable to its tenants. No person maintaining such a nuisance can shelter himself behind the sanctity of private property.[11]

It is this last statement by the United States Supreme Court that is relevant and material to consideration of the issues on this appeal. The complaint alleges[12] and the Plaintiff Foundation is prepared to establish by a fair preponderance of the substantial credible evidence that the industrial wind turbine commercial electric power generation facilities proposed by the corporate defendants will impose upon the landscape structures causing "loud or unusual noises" and the "jarring of machinery" as well as all the other elements of classic common law nuisance.

The Constitution of the United States

"It cannot be presumed that any clause of the Constitution is intended to be

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10 9 Coke, 57b, 77 Eng. Reprint 816.

11 *Camfield* v.*United States*, 167 U.S. 518, 522–523 (1897)

12 ¶138, industrialization, strobe lights, noise; ¶¶140–141, Destruction of Habitat; ¶¶142–152.1, Serious, permanent and irreparable damage to the quality of life.

without effect."[13] Thus we must actually consider the Ninth Amendment as a source of rights which belong to the sovereign people of the United States and which, as James Madison, the author of the Ninth Amendment clearly stated are to be protected from "whatever quarter . . . the greatest danger lies."[14]

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.[15]

The concept of sovereignty in and of the people is controlling

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.[16]

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

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13 *Marbury* v *Madison,* 1 Cranch (5 US) 137, 174, 2 L Ed 60 (1803).

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

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

16 Docket N° 1, *Verified Complaint*, ¶¶ 3–5.2 and Prayer for Relief.

imminent danger of serious permanent and irreparable damage.

When a right is important enough *to* the sovereign people of the United States 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 reflected the political philosophy upon which our independence as a nation was declared and which were the intellectual foundation for the debates at the Constitutional Convention and in the State Houses at the time the United States Constitution was ratified.[17] The evolution of the American common law is 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.[18] Chief Justice Jay recognized that it was the people of the United States that were sovereign.

> From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion that the unappropriated lands which belonged to that crown, passed not to the people of the colony or States within whose limits they were situated, but to the whole people; . . . It is remarkable that in establishing [the Constitution of the United States], the people exercised their own rights and their own proper sovereignty, and, conscious of the plenitude of it, they declared with becoming dignity, "We, the

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[17] From lists of holdings and other historical sources it is evident that the writings of Ambrose, Aristotle, Francis Bacon, Bellarmine, Blackstone, Bracton, Burke, Calvin, Cicero, Coke, Dante, Gaius, Glanville, Gratian, Gregory the Great, Grotius, Sir Matthew Hale, Thomas Hobbes, Chief Justice Holt, Isidore of Seville, Justinian, Livy, John Locke, Machiavelli, Marcus Aurelius, Montesquieu, Plato, Polybius, Pufendorf, Rousseau, Sallust, Sophocles, Suarez, Tacitus, Thomas Aquinas, Ulpian, and Voltaire, among many others, as well as *The Bible* were all familiar to the "founding fathers" and many of their wives, sons and daughters as well.

[18] *Chisholm* v. *Georgia,* 2 U.S. (2 Dall.) 419, 456 (1793).

people of the United States, do ordain and establish this constitution." Here we see the people acting as sovereigns of the whole country, and, in the language of sovereignty, establishing a constitution by which it was their will that the state governments should be bound, and to which the state constitutions should be made to conform . . .

[T]he sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the prince as the sovereign, and the people as his subjects; it regards his person as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a court of justice or elsewhere. That system contemplates him as being the fountain of honor and authority; and from his grace and grant derives all franchises, immunities and privileges;. . . The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the prince and the subject. No such ideas obtain here; at the revolution the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects and have none to govern but themselves; the citizens of America are equal as fellow-citizens, and as joint-tenants in the sovereignty.

From the differences existing between feudal sovereignties and governments founded on compacts, it necessarily follows that their respective prerogatives must differ. Sovereignty is the right to govern; a nation or state sovereign is the person or persons in whom that resides. In Europe the sovereignty is generally ascribed to the prince, here it rests with the people; there, the sovereign actually administers the government, here, never in a single instance; our governors are the agents of the people, and, at most, stand in the same relation to their sovereign in which regents in Europe stand to their sovereigns. Their princes have personal powers, dignities, and pre-eminences, our rulers have none but official; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens.[19]

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

Plaintiffs Have Identified a Constitutionally Protected Right

In its most elemental form, the constitutional right that Plaintiffs assert is the right of all the sovereign people of the United States, not only of this generation, but of generations yet unborn, to the full benefit, use and enjoyment of the unique and irreplaceable national and international natural resource treasure that is the Flint Hills Tallgrass Prairie Ecosystem subject only to wise use by those who hold nominal title to the land and landscape.

For more than a century the owners of property in the Flint Hills Tallgrass Prairie Ecosystem have wisely maintained their property so as to protect and preserve the unique tallgrass prairie ecosystem in the Flint Hills of Kansas.

This Flint Hills Tallgrass Prairie Ecosystem is the only ecologically intact representative of the tallgrass prairie that once spread over 400,000 square miles from Texas to Canada as the map on the following page so clearly indicates.

Disturbing the fragile soils of the Flint Hills Tallgrass Prairie Ecosystem will irrevocably commit the land and landscape toward an inexorable succession of shortgrass plants and other flora that will prevent return of the tallgrass prairie certainly during this generation and the next and perhaps forever.

Remnants of the once vast TALLGRASS PRAIRIE

Shaded area represents presettlement extent of tallgrass prairie ecosystem. Brown dots indicate preserved remnants: . less than 20 acres, • 20 to 200 acres, ● more than 200 acres. Dashed line marks a zone of transitional vegetation from tallgrass to mixed grass.

Scattered pockets of tallgrass are found beyond the shaded area.

Nebraska's Sand Hills, a 19,000-square-mile region of moist sandy soils, contain limited areas of tallgrass prairie.

Forest vegetation intrudes far into the prairie along streams and rivers.

The Flint Hills region includes extensive areas of privately owned prairie. Brown squares show proposed national park sites.

Destruction of the prairie was hastened by the introduction of the steel plow (1837) and fencing that confined livestock and intensified grazing.

A sea of tallgrass covered 400,000 square miles before farm, town, and road took nearly all of it. While cultivation destroys prairie, prudent grazing does not, the reason for the survival of the largely unplowed Flint Hills. The proposed park bill would allow owners to transfer property within the immediate family indefinitely. But the government would have first option to buy on the open market.

SAMUEL H. ORDWAY, JR., MEMORIAL PRAIRIE · BIGELOW · FORT NIOBRARA NATIONAL WILDLIFE REFUGE · CAYLER PRAIRIE · JAMES WOODWORTH PRAIRIE PRESERVE · GENSBURG-MARKHAM PRAIRIE · KONZA PRAIRIE

MAP ADAPTED FROM A. W. KUCHLER
DRAWN BY JOHN R. TREIBER
RESEARCHED BY BRIAN H. MORGAN
NATIONAL GEOGRAPHIC ART DIVISION

The Corporate Defendants Are "Government Actors"

To paraphrase Shakespeare, counsel for the corporate defendant wind power speculators protest too much[20] that they are not "government actors." The corporate defendants do not deny that *but for* the federal and state subsidies and tax benefits the industrial wind turbine commercial electric power generation facilities would never be located in the Flint Hills Tallgrass Prairie.

Instead, counsel for the corporate defendant wind power speculators seek to frighten this Honorable Court with the claim that "The policy implications of the Foundation's position are dramatic."

> If the Foundation is correct that receipt of a tax benefit or permit turns private actors into state actors, then every private developer and, theoretically, a broad array of private individuals would be subject to constitutional claims.[21]

The logical *non sequitur* in counsel's argument justifies the appellation, "nonsense," or perhaps, "utter nonsense."

The tax benefits and direct subsidies are the only rational economic justification for this otherwise ill-considered attempt to develop industrial wind turbine commercial electric power generation facilities in the Flint Hills Tallgrass Prairie Ecosystem. The permits granted by local municipal subdivisions or even by the State of Kansas are not the real issue.[22] It is the

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[20] *Hamlet* III, ii, 239.

[21] Answering Brief of Defendants-Appellees, page 18, n.10.

[22] In *Juanita Bay Valley Com.* v. *Kirkland*, 9 Wash. App. 59, at 72 (1973), 510 P.2d 1140, as the Courts were interpreting the extent of the Congressional intent and national interest in the "Environment," the Court found, "There is, however, a line of cases which were decided shortly after the passage of the *National Environmental Policy act of 1970* which have held that the granting of a permit to a private party is an

direct cash subsidies and the tax benefits which are little more than thinly disguised subsidies that are the issue. Those subsidies and tax waivers are "special legislation" which benefits only these corporate defendant wind power speculators. As special legislation they are unlike more general and constitutionally acceptable provisions of the federal and state tax codes and the kind of social legislation which promotes economic activities to further well-defined public interests.

Counsel for the corporate defendant wind power speculators again deliberately misrepresents to this Honorable Court the plain intent of the Plaintiff Foundation, claiming that "Moreover, the Foundation appears to have abandoned its claim that the federal and state tax incentives are unconstitutional."

To the extent that the federal and state tax incentives are "special legislation" for the benefit of only these corporate defendant wind power speculators then they are properly at issue in the context of siting industrial wind turbine commercial electric power generation facilities in the Flint Hills Tallgrass Prairie Ecosystem rather than in Western Kansas where they are needed as an additional source of power for the rapidly expanding Denver Metroplex and

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"action" subject to NEPA and which therefore have enjoined the issuance of such permits in instances where an Environmental Impact Statement was not prepared. *Citizens for Clean Air, Inc.* v. *Corps of Engineers*, 349 F. Supp. 696 (S.D.N.Y. 1972); *Kalur* v. *Resor*, 335 F. Supp. 1 (D.D.C. 1971). Similarly, there is a line of decisions which make the provisions of NEPA applicable to the issuance of licenses, permits, or authorizations for private activities. See *Davis* v. *Morton*, 469 F.2d 593 (10th Cir. 1972); *Greene County Planning Bd.* v. *Federal Power Comm'n*, 455 F.2d 412 (2d Cir. 1972); *Calvert Cliffs' Coord. Comm.* v. *United States Atomic Energy Comm'n,* 449 F.2d 1109 (D.C. Cir. 1971). See generally 1 V. Yannacone, Jr., B. Cohen & [Page 72] S. Davison, *Environmental Rights & Remedies* § 5:6 (1972)."

where they will not cause serious, permanent and irreparable damage to a unique and irreplaceable national and international natural resource treasure.

It is the siting issue that is at the heart of this case. That issue has been properly pleaded in all its myriad aspects and should not be cavalierly dismissed on a motion under Rule 12(b)(6).

The plaintiff Foundation does not seek to set aside any State legislation as unconstitutional. It is the location of these industrial wind turbine commercial electric power generation facilities in the Flint Hills Tallgrass Prairie Ecosystem that Plaintiffs challenge. The legislation seems reasonable for industrial wind turbine commercial electric power generation facilities located in Western Kansas where they are both acceptable and will have little impact on the regional ecosystem of the high plains. The awesome bird kills that will surely occur in the Flint Hills international flyway area are not likely in the high plains. Damage associated with construction and maintenance in the high plains of Western Kansas will not be serious, permanent and irreparable damage such as will occur in the Flint Hills.

Segmentation

As sad experience with many highway and waterway projects throughout this nation and the world has demonstrated, "segmentation"— considering the environmental impact of only small portions of a large project— leads to serious, permanent and irreparable damage even ecocatastrophe.

The argument by counsel for the corporate defendant wind power speculators that proceedings before the Butler County Board of Commissioners would have been an adequate remedy for the Plaintiffs overlooks the simple fact that the

elected officials of Butler County are sworn to consider the interests of Butler County alone and not the entire Flint Hills Tallgrass Prairie Ecosystem. Yet what the Butler County Board of Commissioners has done will cause serious, permanent and irreparable damage to an entire regional ecosystem that extends far beyond the essentially arbitrary—in an ecological sense—geopolitical boundaries of Butler County.

Challenging the otherwise lawful action of a local government entity on regional grounds is not only futile but an unconscionable abuse of the legal system. The issue is national and international not local. The geopolitical municipal subdivision which is Butler County is but a small, albeit important element of the much larger Flint Hills Tallgrass Prairie Ecosystem.

The *Migratory Bird Treaty Act*

The corporate defendants continue to try and convince this Court that the Plaintiffs were attempting to assert some private right of action under the *Migratory Bird Treaty Act*. Plaintiffs never asserted such a claim nor is such a claim being made at this time.

There is a long standing and continuing national interest in the protection and preservation of unique and irreplaceable elements of our national heritage and our national natural resource treasures. The *Migratory Bird Treaty Act* together with all the other statutes promulgated by Congress for the purpose of protecting the unique and irreplaceable national and international natural resource treasures of this nation since the days of Theodore Roosevelt, and

Gifford Pinchot[23] are just specific expressions of that national interest.

The Florissant Fossil Beds Litigation

Since the *Florissant Fossil Beds* litigation is so obviously relevant to this litigation, the materials counsel has requested are attached hereto as an appendix. They have always been available as previously cited in 1 *Environmental Rights & Remedies* §§ 2:9, 2:11–2:14.[24]

Argument and the District Court

Counsel for the corporate defendant wind power speculators seek to prevent the Plaintiffs from arguing equity issues on this appeal because, "arguments not raised before the district court are barred on appeal."[25] The District Court would not hear arguments on the motion. Now, however, this Honorable Court of Appeals can determine the legal sufficiency of the Plaintiffs' complaint *de novo* and as the Plaintiff Foundation has requested hear oral argument on the issues..

The Plaintiffs are asking this Honorable Court to remand this case to the District Court to conduct an evidentiary hearing and consider Plaintiffs' application for a Preliminary Injunction,

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23 *e.g.* the Act of June 8, 1906, ch. 3060, 34 Stat. 225, popularly known as the *Antiquities Act of 1906* and is also known as the *National Monument Act*; 16 U.S. Code Chapter 1A which deals extensively with conservation of "Historic Sites, Buildings, Objects, and Antiquities; the *National Environmental Policy Act of 1970* and the wave of environmental protection legislation which followed including the *Endangered Species Act*. There is also the *Florissant Fossil Beds National Monument*, Colorado, Pub.L.91–60, Aug. 20, 1969, 83 Stat. 101. These are but a few of the Congressional expressions of national interest and concern for the natural resource treasures of the United States.

24 The Lawyers Cooperative Publishing Co./Bancroft-Whitney Co. (1972)

25 Answering Brief of Defendants-Appellees, page 28.

If the lower Court in the interests of justice and judicial economy believes that the Preliminary Injunction proceeding should be treated as a motion for summary judgment or partial summary judgment as well, the Plaintiffs have no objection.

CONCLUSION

The interests of the sovereign people of the United States in maintaining the unique and irreplaceable national and international natural resource treasure that is the Flint Hills Tallgrass Prairie Ecosystem deserve a day in Court.

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 10th day of June 2005.

By:____________________________________

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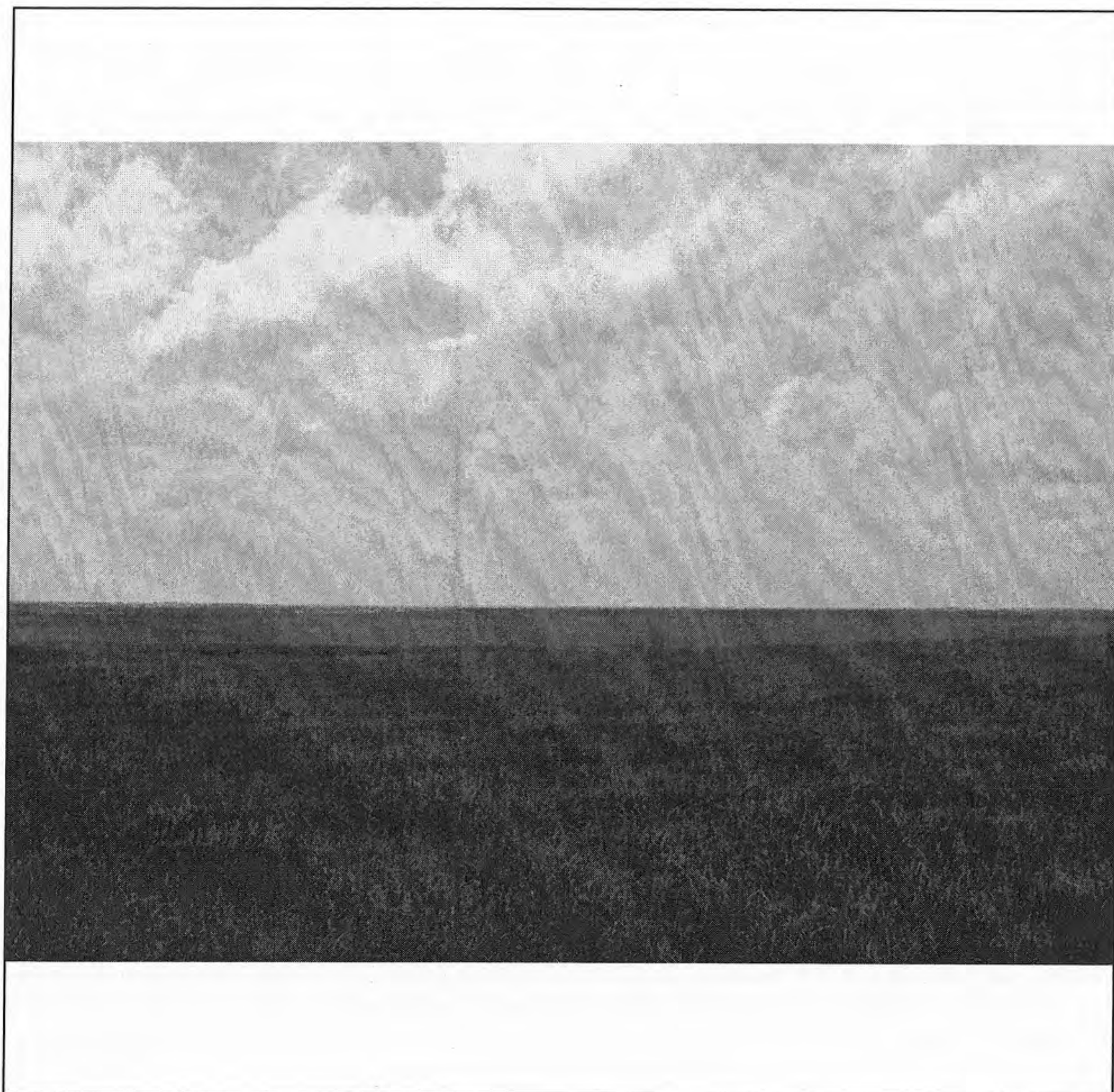
STATEMENT REGARDING ORAL ARGUMENT

The corporate defendants have already begun destruction of the Prairie and the imminent danger of serious, permanent and irreparable damage is illustrated by the following photos. The Plaintiff Foundation believes that oral argument before this Honorable Court of Appeals will aid the Court.



Wherefore, the Plaintiff Foundation respectfully requests the opportunity to present oral argument on this Appeal.

Certificate of Compliance

In accordance with Rule 32)(a)(7)(C) of the *Federal Rules of Appellate* Procedure I certify that this Reply Brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the *Federal Rules of Appellate Procedure* because it is proportionally spaced and contains 3,937 words, excluding the parts of the brief exempted from the word count limits by Rule 32(a)(7)(B)(iii) of the *Federal Rules of Appellate Procedure*. I relied on the "Properties command from the "File" Menu of *WordPerfect* version 11to obtain this count. This Reply Brief complies with the typeface requirements of *Federal Rules of Appellate Procedure* Rules 32(a)(5)(A) and Rule 32(a)(6) in that it is set in *Times New Roman* a proportionally spaced roman style serif typeface greater than 14 points.

I certify that the above information is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

____

TERRY L. MALONE #11169

CERTIFICATE OF SERVICE

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and I further certify that all required privacy redactions have been made, that with the exception of any such redactions the document submitted in Digital Form is an exact copy of the written document filed with the Clerk, and that the digital submission has been scanned for viruses and other malware by means of Norton Symantec System Works and AntiVirus with "Live Update" having successfully run before transmission and according to Symantec the submission is free of viruses and other malware.

Dated at Wichita, Kansas on this 10th day of June 2005.

____

Terry L. Malone

ADDENDUM

The *Florissant Fossil Beds* litigation

Reproduced from 1 *Environmental Rights & Remedies* , Chapter 2

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CHAPTER 2

THE TRUST DOCTRINE

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§2:9. Case study: Defenders of Florissant, Inc. v Park Land Company[20]

The Florissant fossil beds, located a short distance west of Colorado Springs, Colorado, are found in an ancient lake bed of more than 6,000 acres where seeds, leaves, plants and insects from the Oligocene period (34 million years ago) are remarkably preserved in paper-thin layers of volcanic shale which, unfortunately, disintegrate when left exposed to weather unless properly protected.[1] A number of bills had

20. Defenders of Florissant, Inc. v Park Land Co. (1969, DC Colo) No. C-1539 (D Colo, July 9, 1969) No. 340-69 (10 Cir., July 10, 1969) No. 403-69 (10 Cir., July 29, 1969).

1. 113 Cong Rec 3613 (1967).

Dr. Estella R. Leopold, paleontologist with the United States Geological Survey, who at the present time is the principal investigator of the Florissant fossils, stated, "no site equivalent to the Florissant Fossil Beds in diversity of fossil species or fossil density has been found in the United States or Western Hemisphere . . ."

The original National Park Service report on the Florissant Fossil Beds, made in April, 1962, stated: "The insect fossils at Florissant are of primary significance. They represent the evolution and modernization of insects better than any other known site in America. In addition, the fossil flora, emphasized dramatically by the petrified tree stumps and in more subtle tones by the great variety of leaf fossils, greatly adds to the primary values. The site itself has great significance in being a classic location known to many scientists—it has historic significance to the geologist, the paleontologist, the entomologist, the botanist; it is the home source for the numerous fossil insects and

been introduced in Congress to protect the Florissant fossil beds[2] but did not receive extensive consideration until the United States National Park Service promulgated a master plan detailing the paleontological, paleobotanical and palynological values of Florissant.[3]

At the time the Florissant fossil beds National Monument bill passed the Senate[4] Park Land Company, a Colorado Springs real estate company had already contracted to purchase 1,800 acres of the ancient lake bed.[5] While the House of Representatives was deliberating its version of the National Monument bill, Park Land Company announced it would bulldoze a road through a portion of the proposed national monument to open their land holdings for development and immediate sale to anyone interested in recreational housing in the area. A group of Colorado conservationists met with the principals of the Park Land Company in an attempt to persuade them to withhold excavation in the area to be included within the Florissant Fossil Beds National Monument at least until the House of Representatives acted on the bill. This request was refused as was a similar request to confine development activities to the area lying outside the ancient lake bed. The only

leaves that grace the exhibition halls and the research rooms of so many institutions of learning."

2. HR 11834, 88th Cong, 2d Sess (introduced by Rep. Chenoweth) HR 8031, 89th Cong 1st Sess (introduced by Rep. Evans).

3. Master Plan for the Florissant Fossil Beds National Monument, National Park Service, Department of the Interior (May, 1967).

In 1967, Congressman Evans of Colorado introduced a bill to establish the Florissant Fossil Beds National Monument (HR5606, 90th Cong, 1st Sess (introduced Feb. 16, 1967); reported favorably, HR Rep. No. 622, 90th Cong, 1st Sess, 1967) warning prophetically that there is "imminent danger that it will be developed for cabin sites." (113 Cong Rec 3613, 1967). That bill passed the House but not the Senate. (114 Cong Rec 835 Jan. 24, 1968). Senators Allott and Dominick of Colorado had introduced a companion bill in the Senate (S3524, 90th Cong, 2d Sess) on which no action was taken.

Efforts continued during the 91st Congress when Senators Allott and Dominick again introduced Legislation. (S 912, 91st Cong, 1st Sess, 1969.) Senator Allott in his argument supporting the bill noted: "There is urgency . . . in taking action to preserve this paleontological treasure trove. The bulldozers are almost poised on the boundaries of the proposed monument. Mountain-home type commercial developments have come . . . right up to the north boundary and are on the south boundary of the monument site. Recent information indicates that a contract of sale has been entered into covering 1,800 acres of land included within the proposed monument and lying generally along the eastern boundary. This accounts for nearly one-third of the monument area. The proposed use of this land is subdivision and development. In view of the imminence of this planned incompatible development, it is essential that the Senate and the House of Representatives move as quickly as possible to enact S 912 in order to give the Secretary of Interior the appropriate tools with which to take action to preserve this important scientific deposit." (115 Cong Rec S 6854 (daily ed. June 20, 1969).)

Representative Evans introduced a companion bill in the House of Representatives. (HR 6223, 91st Cong, 1st Sess, 1969).

4. 115 Cong Rec S 6853 (daily ed. June 20, 1969).

5. 115 Cong Rec S 6854 (daily ed. June 20, 1969).

alternative offered the conservationists was the opportunity to purchase the land—for cash immediately—at $300 per acre, twice what Park Land Company had contracted to purchase the land for a week before, and a price considerably in excess of any appraised value for the land based on recent land sales in the area.

Faced with the irreparable loss of a substantial portion of the unique and irreplaceable fossil beds, a small group of concerned citizens formed a non-profit, public benefit corporation called the Defenders of Florissant and commenced an action for declaratory judgment and injunctive relief against the Park Land Company and all the other landowners and contract vendees in the area to be included within the proposed National Monument.[6]

The United States District Court for the District of Colorado heard the Defenders of Florissant application for a temporary restraining order of July 9, 1969, and although the plaintiffs' proof that the proposed excavations for the roads and culverts would result in the destruction of some of the most valuable fossil areas in the proposed national monument was uncontradicted and unchallenged, the district court held that there was nothing in the United States Constitution preventing the owner from using his property in any way not prohibited by law. The District Court denied the application for a temporary restraining order and a subsequent application for a stay pending appeal, but did, however, note the importance of preserving the fossil beds.[7]

Following the District Court decision, representatives of the plaintiffs held an informal conference in the Courtroom with two of the partners in the Park Land Company who agreed to postpone excavation until Monday, July 14, if the plaintiffs gave some assurance of raising the purchase price on that day.[8] Refusing to accept an offer they felt was a form of community blackmail, the Defenders of Florissant appealed to the Tenth Circuit Court of Appeals the following morning, July 10. At the hearing before three judges of that Court in the afternoon, the Court questioned whether it had authority to issue a restraining order in the absence of any statute protecting the fossils.

Admitting that Congress, "in its infinite wisdom, had not seen fit to pass legislation protecting fossil beds in general," plaintiffs' counsel argued that "... if someone had found the original Constitution of the

6. Defenders of Florissant, Inc. v Park Land Company, No. C-1539 (D. Colo., July 9, 1969) No. 340-69 (10 Cir., July 10, 1969) No. 403-69 (10 Cir., July 29, 1969).

7. Official transcript, Defenders of Florissant, Inc. v Park Land Co., (No. C-1539, D. Colo., July 10, 1969) pp. 18, 24-25, 36, 37.

8. See Denver Post, July 11, 1969, p. 1.

United States buried on his land and then wanted to use it to mop a stain on the floor, is there any doubt . . . they could be restrained?"[9]

Legally, plaintiffs argued that the right to preservation of the unique and irreplaceable Florissant fossils, a national, natural resource treasure, was one of the unenumerated rights retained by the People of the United States under the Ninth Amendment of the Constitution and protected by the due process and equal protection clauses of the Fifth Amendment, and the rights, privileges and immunities, due process and equal protection clauses of the Fourteenth Amendment. Plaintiffs also asserted that the Florissant fossil beds were subject to protection under the Trust Doctrine and while the defendants could profit from their nominal title to the land and make reasonable use of the area, they were under a duty to maintain that portion of the property vested with the public interest, the 34 million year old fossil shales. Procedurally, the Defenders invoked the federal equity jurisdiction relying on the fundamental equitable maxim, "there shall be no wrong without a remedy."

In summation, counsel for the Defenders of Florissant picked up a fossil palm leaf that had been uncovered at Florissant, and holding it up to the Court, pleaded: "The Florissant fossils are to geology, paleontology, paleobotany, palynology and evolution what the Rosetta Stone was to Egyptology. To sacrifice this 34 million year old record, a record you might say written by the mighty hand of God, for 30 year mortgages and the basements of the A-frame ghettoes of the seventies is like wrapping fish with the Dead Sea Scrolls."[10] After a short recess, the Court returned and announced that it was issuing an order restraining the defendants from "disturbing the soil, subsoil or geological formations of the Florissant fossil beds by any physical or mechanical means . . ." until a hearing and determination by the District Court on the application for a preliminary injunction.[11]

After a trial on July 29, 1969, the District Court denied the Defenders application for a preliminary injunction for the same reasons it had previously denied the application for a temporary restraining order, and the Park Land Company announced that the bulldozer would begin excavation that afternoon.[12] Several hours later, the Plaintiffs filed a motion for an emergency stay with the Tenth Circuit Court of Appeals, citing defendants threat,[13] and the Court of Appeals for the

9. Oral argument, Defenders of Florissant, Inc. v Park Land Co. (No. 340-69, 10th Cir.), Victor John Yannacone, Jr.

10. Id.

11. Defenders of Florissant, Inc. v Park Land Co., No. 340–69 (10 Cir, July 10, 1969).

12. See: Denver Post, July 30, 1969, p. 28; Rocky Mountain News, July 30, 1969, p. 5.

13. No. 403-69 (10 Cir. 1969, filed July 29, 1969).

Tenth Circuit dramatically issued an order extending the restraining order of July 10 until further order of the Court of Appeals.[14]

On July 31, 1969, the House Interior and Insular Affairs Committee, through its Subcommittee on Parks and Recreation favorably reported an amended version of the Florissant Fossil Beds National Monument bill,[15] and floor action by the House of Representatives was scheduled for August 4.

During the argument of the appeal before the Tenth Circuit Court of Appeals, the plaintiffs extended their legal position, asserting that the Federal Courts had a duty to cooperate with Congress, and that by issuing the preliminary injunction, pending the final deliberation of the Congress of the United States, they would be aiding the orderly operations of the Legislative and Executive branches of government.[16] Plaintiffs pursued their original theory that the Trust Doctrine protected the fossil beds by arguing that the land had acquired a public character due to the actions of Congress with regard to the bills pending to dedicate the land as a national monument.[17] The Court reserved

14. "It is ordered that the temporary restraining order entered on July 10, 1969 is extended and continued in full force and effect until further order of this court.

It is further ordered that the appeal from the order of the United States District Court for the District of Colorado denying a preliminary injunction will be heard on the merits in Denver, Colorado at 9:30 A.M. on Monday, August 4, 1969.

It is further ordered that the parties file no later than 9:30 A.M. on August 4, 1969, typewritten briefs on the merits of the appeal."

15. HR Rep No 411, 91st Cong., 1st Sess (1969), reported at 115 Cong. Rec. H 6691 (daily ed, July 31, 1969).

16. Appellant's brief at 12 "... This federal court is being asked by the public to lend aid to the public's elected representatives, the United States Congress, as that body moves with all deliberate speed. The federal government is a trinity, and by acting promptly to prevent imminent, serious, permanent, and irreparable damage to a national, natural resource pending due deliberation of the problem by the Congress and the Executive branch of the federal government, this federal court will be acting in support of the jurisdiction of Congress and the Executive branch, as well as acting in the public interest.

The Fifth Circuit has stated it to be "... our duty to cooperate with Congress and with the Executive in enforcing Congressional objectives. . . ." United States v Jefferson County Board of Education, 372 F2d 836, 848 (5 Cir. 1966), corrected 380 F2d 385, cert. denied sub nom. Caddo Parish School Board v United States, 389 US 840, cert denied sub nom. Board of Ed. of City of Bessemar [v United States], 398 US 840.

"The claims of dominant opinion rooted in sentiments of justice and public morality are among the powerful shaping-forces in lawmaking by courts. Legislation and adjudication are interacting influences in the development of law. A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process."

National City Bank of New York v Republic of China, 348 US 356, 360 (1955), rehearing denied 349 US 913 (1955). ". . . it is a sound principle that in every well organized government the judicial power should be co-extensive with the legislative . . ." Kendall v United States, 37 US 524, 619 (1838).

17. Appellant's brief at 15 citing Block v Hirsch, 256 US 135, 154, 155 (1921). The appellant's brief also relied upon cases in the area of the First Amendment stating that certain property, such as streets and parks, no matter who has title, was recognized as

decision at the close of the arguments and continued the temporary restraining order. That afternoon the House of Representatives passed its version of the bill as a number of concerned Congressmen from all over the country turned out to suspend the rules and consider the bill out of the regular order because of the pending threat to the fossils.[18] The Senate agreed to the House version of the bill on August 7,[19] and the President signed the bill on August 14, 1969.[20] The preliminary restraining order issued by the Tenth Circuit Court of Appeals remained in effect while the United States of America instituted suit to acquire the Park Land Company land by condemnation. The Florissant fossil beds were saved.

In this most dramatic recent court intervention to protect a national natural resource treasure from the bulldozer, the court order prohibiting excavation of the fossil beds may have deprived the landowners of the most profitable use of their land, but did not prohibit all uses of the land consistent with the protection of the fossil beds. The landowners were free to develop the land for tourism, scientific research, or other uses compatible with maintenance of the paleontological integrity of the area. Such uses, while perhaps not the most profitable use of the land, would still return a reasonable yield on the defendants' speculative investment.

The mere fact that the landowner might not wish to use the land for this purpose does not make the restraint on the land development an unreasonable taking where the public interest in the land is so great.

Counsel should never forget to advance the argument that the judicial declaration of the land in question as a national natural resource treasure, with the attendant national publicity from the proceedings, would certainly add to the value of the land as a tourist attraction.

Certainly where a natural resource is as unique as the Florissant fossil beds were, the value to the public of protecting such a resource is so substantial as to justify the resultant burden on the private property interests involved, even if it could be shown that there was no

held in trust for the use of the public, Hague v Committee for Industrial Organization, 307 US 496, 515 (1939); Kunz v People of State of New York, 300 US 290, 293, (1951) Barney v Keokuk, 94 US 324, 340 (1876). Brief for Appellant, supra, at 14. The appellant's brief also cited Evans v Newton, 382 US 296, 301 (1966); Marsh v Alabama, 326 US 501, 506 (1946); and Amalgamated Food Employees Union v Logan Valley Plaza, 391 US 308, 325 (1968), for the proposition that property to which broad public interest attaches or which is public or municipal in nature is treated as though publicly held for purposes of regulation under the Constitution.

18. 115 Cong Rec. H 6808 (daily ed. August 4, 1969).

19. 115 Cong Rec. S 9378 (daily ed. August 7, 1969).

20. P.L. 91-60, 91st Cong., 1st Sess., signed, 115 Cong Rec. S 10001 (daily ed. August 14, 1969).

reasonable expectation of profitable use of the property from tourism or other ancillary commercial development.

The message of the Florissant litigation is that judicial protection of unique, national, natural resource treasures such as 34 million year old fossil beds warrants restraint upon the absolute rights of private property ownership, particularly during the period of due deliberation by Congress or other legislative body representative of the people.

The mere fact that Congress could not move as fast at the developer's bulldozer does not prevent a federal court of equity from acting to protect a national natural resource treasure threatened with irreparable damage.[1]

In meeting the defense that private property rights are to be protected in the Courts above all other rights, except perhaps, the right to life itself, counsel should remember that private property is protected because such protection answers a demand of human nature and provides for substitution of the rule of law for the rule of force in civilized communities, and private property rights are not forever enshrined in law, but may be modified as the needs of the public welfare

1. "It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion it may have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but, if Congress fail to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the question, is it not the duty of the court . . . to decide it in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past? . . . That this court and the other federal courts, in this situation and by right of their own powers, may decline to enforce the ancient rule of the common law under conditions as they now exist, we think is not fairly open to doubt.

"In Hurtado v California, 110 US 516, 520, [28 L Ed 232, 4 S Ct 111] this court, after suggesting that it was better not to go too far back into antiquity for the best securities of our liberties, said: 'It is more consonant to the true philosophy of our historic legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self government.'

"This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law . . . . And as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experience of our own situation and system will mould and shape it into new and not less useful forms.

. . . To concede this capacity for growth and change in the common law by drawing 'its inspiration from every fountain of justice' and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions of a particular time, is to deny to the common law in the place of its adoption a 'flexibility and capacity for growth' which was 'the peculiar boast of excellence' of the system in the place of its origin." Funk v United States, 290 US 371, 381–382, 383, 78 L Ed 369, 54 S Ct 212, 93 ALR 1136 (1933).

demand. The Constitution was intended to preserve practical and substantial rights, not to maintain theories. The right of the people to the protection of their national natural resource treasures is such a substantial right.[2]

2. Property is protected because such protection answers a demand of human nature, and therefore takes the place of a fight. But that demand is not founded more certainly by creation or discovery than it is by the lapse of time, which gradually shapes the mind to expect and demand the continuance of what it actually and long has enjoyed, even if without right, and dissociates it from a like demand of even a right which long has been denied. . . . "Constitutions are intended to preserve practical and substantial rights, not to maintain theories." Davis v Mills, 194 US 451, 457, 48 L Ed 1067, 24 S Ct 692 (1904).

". . . [W]hile the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. . . . a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles. . . ." Euclid v Ambler Realty Co. 272 US 365, 387, 71 L Ed 303, 47 S Ct 114, 54 ALR 1016 (1926).

§2:11. Form of notice of motion for temporary restraining order

UNITED STATES DISTRICT COURT
for the
DISTRICT of COLORADO

DEFENDERS of FLORISSANT, *Inc.*, individually and on behalf of all those entitled to the full benefit use and enjoyment of the national natural resource that is the proposed *Florissant Fossil Beds National Monument*, and all those similarly situated,
Plaintiff

-against-

PARK LAND COMPANY, CENTRAL ENTERPRISES, *Inc.*, CLAUDE R. BLUE, *et al.*
Defendants

NOTICE OF MOTION

PLEASE TAKE NOTICE that the Plaintiffs will move this Court at the United States District Court House, Denver, Colorado, on the 8th day of July, 1969, at half past nine o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order:

RESTRAINING the Defendants from any actions which may cause serious permanent or irreparable damage to the national natural resource that is the area included within the proposed Florissant Fossil Beds National Monument; or in the alternative,

DIRECTING, the immediate hearing on the merits of the Plaintiff's application for a temporary injunction,

TOGETHER with such other and further relief as to the Court shall seem just and proper under the circumstances.

Respectfully submitted,

____
Attorney for Plaintiff

§ 2:12. Form of complaint based on Trust Doctrine

VERIFIED COMPLAINT

The Plaintiffs, complaining of the Defendants by their attorney,——————, set forth and allege: *Name of Attorney*

1. Jurisdiction

Jurisdiction of this Court is invoked under Title 28, United States Code, section 1331(a), "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

This action arises under Article VI, section 2, of the Constitution of the United States, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," and involves the declaration and interpretation of the Plaintiffs' rights secured by the Ninth Amendment of the Constitution of the United States, "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people," and under the *due process* and *equal protection* clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States, ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . .", ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The matter in controversy, exclusive of interest and costs, exceeds the value of Ten Thousand ($10,000.00) Dollars.

2. Jurisdiction.

Jurisdiction of this Court is invoked under Title 28, United States Code, section 1343(3): "To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

This action is authorized by Title 42, United States Code, section 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress," and by Title 42, United States Code, section 1981, providing, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

3. Jurisdiction

This is also a proceeding for Declaratory Judgment under Title 28, United States Code, sections 2201 and 2202, declaring the rights and legal relations of the parties to the matter in controversy, specifically:

(a) That the proposed Florissant Fossil Beds National Monument is a national natural resource.

(b) The right of all the people of the United States in and to the full benefit, use and enjoyment of the unique values of the proposed Florissant Fossil Beds National Monument, without diminution or degradation resulting from any of the activities of the Defendants or their Successors in interest, sought to be restrained herein.

(c) That the degradation of the unique National Natural Resources of the proposed Florissant Fossil Beds National Monument by the Defendants or their Successors in interest violates the rights of the Plaintiffs, guaranteed under the Ninth Amendment of the Constitution of the United States and protected by the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States.

4. Class Action

The Plaintiff, DEFENDERS OF FLORISSANT, INC., is a non-profit, public-benefit corporation duly organized and existing under Colorado law. DEFENDERS OF FLORISSANT, INC. is made up of scientists and other citizens dedicated to the protection of the environment generally and the paleontological values at or near Florissant, Colorado, specifically.

Policy for DEFENDERS OF FLORISSANT, INC. is set by a Board of Trustees composed of scientists, distinguished citizens and counsel. Its concern with the area at or near Florissant, Colorado, is founded on broad ecological grounds and a conviction that the ecological values represented there are unique and irreplaceable.

This action is brought by DEFENDERS OF FLORISSANT, INC., on behalf of all those entitled to the full benefit, use and enjoyment of the particular natural resources herein described without diminution by the actions of the Defendant, as a class suit in accordance with the provisions of Rule 23(a) of the Federal Rules of Civil Procedure.

The members of this class are so numerous as to make it impracticable to bring them all before this Court. There being common questions of law and fact and common relief sought, this action is a proper class suit. The members of this class are fairly and adequately represented by the Plaintiff and the Plaintiff has no interest adverse to that of any individual who might be entitled to the full benefit, use and enjoyment of the natural resources herein described without diminution resulting from the actions of the Defendant.

5. The Proposed Florissant Fossil Beds National Monument[3]

The proposed national monument comprises an area of 6,000 acres on the east slope of the Rocky Mountains. Located in a region of high recreation use and

3. The very heart of environmental litigation is the complaint, and the key to any successful complaint seeking to protect a national natural resource treasure is the description of that resource in such detail as will persuade the court that the subject matter of the litigation is of national import. Unless the allegations of these descriptive allegations are properly denied they will stand and often support applications for extraordinary provisional remedies.

If any of the descriptive allegations are denied, they immediately raise a substantial issue of fact to be determined by hearing on the merits before any procedural motion to dismiss can be decided.

relatively close to a fast growing metropolitan complex, heavy visitation is expected.

The primary resources are the unique Oligocene lake beds with their plant and insect fossil-bearing layers and related geological features. These resources, combined with a scenic setting and secondary recreational and biological resources, constitute a relatively compact natural unit.

The ancient lake beds of Florissant preserve more species of terrestial fossils than any other known site in the world. The insect fossils are of primary significance. They represent the evolution and modernization of insects better than any other known site in America. In addition, the fossil plants, emphasized dramatically by the petrified tree stumps and the great variety of leaf fossils, add greatly to the primary values. Fossils of spiders, other invertebrates, fish, and birds also have been found at Florissant.

The beds have been a famous collecting ground by numerous scientists for nearly a century and continue to be of great value for paleontological research.

The present-day vegetation is one of pine-covered hills and grassy meadows. In good years the wildflower display in June and July may be spectacular and is an acknowledged tourist attraction.

The wildlife of the area includes many species of large and small mammals and birds; but though varied, it is in no sense unique and like vegetation is secondary in importance to the geological resources.

The recreational resources are related to the mild summer climate, the pleasant open terrain and the resources discussed above. Their values are supplemental in making the visitor's experience a richer one.

Physiographic and Geologic Setting: The Florissant Fossil Beds are located in a depression of the undulating surface of the Rocky Mountain Peneplain which flanks Pikes Peak on the west at a general elevation of about 9,200 feet. The landscape is dominated by Pikes Peak, whose summit is 5,000 feet higher than the level of the peneplain and about 15 airline miles southeast of Florissant. The Florissant depression, elevation 8,200 feet at the village, has been eroded from several hundred to a thousand feet below the general level because of the presence of less resistant Tertiary sediments. The edges of the depression rise irregularly to the erosion surface of the peneplain which is slightly over 8,800 feet at its highest point within the proposed national monument. To the west and northwest is South Park, separated from the Florissant depression by a narrow mountainous ridge.

The depression is irregularly sickle-shaped, the arc being about 10 miles long and 2 miles wide, and concave toward the southwest. Only the south arm of the basin is included within the proposed national monument. It is drained by Grape Creek, a small, intermittent stream. The southernmost portion of the basin

To properly plead a description of a national natural resource treasure requires thorough familiarity with all the published material concerning the resource and a compilation of all the statements contained in such material that can be supported with competent scientific evidence. When in doubt it is better to avoid making a statement than to raise an issue of fact that can be decided against the plaintiff.

The above description of the Proposed Florissant Fossil Beds National Monument was taken in large measure from the published scientific literature compiled by Dr. Estella Leopold of the United States Geological Survey and material distributed by the United States Geological Survey and the National Parks Service.

Pleading material from these sources also lessens the burden of producing expert witnesses from the government services involved on the trial of the action. All that is necessary is to show them the Complaint, indicate the source of the allegations and invite the government expert to support the material already published by the agency.

(within the monument) is approximately 300 feet higher than it is at the north boundary.

The tertiary deposits of the Florissant Valley are largely of volcanic origin. They were deposited on the eroded surface of the Pikes Peak granite which forms the higher parts of the landscape surrounding the basin deposits. The Florissant lake bed shales form the most prominent outcrops, but they constitute only a minor part of the total thickness. These lacustrine beds contain one of the richest known deposits of warm-temperate fossil flora and insects.

Geologic History: Subsequent to the birth of the Rocky Mountains, 60 million years ago, a period of erosion ensued. By Oligocene time, 40 million years ago, the mountains in the Florissant region had been reduced generally to a broad, gently rolling hill land—a piedmont of low relief and moderate elevation.

Volcanic eruptions covered the region with pyroclastics to a depth of 40 to 60 feet or more, and the drainage of the area was blocked, thus forming the Florissant Lake. The rolling slopes and the lakeshore were mantled by many types of deciduous trees and immense Sequoia groves.

Explosive eruptions and mud flows eventually filled the lake. The mud flows engulfed and buried the lakeshore trees which were gradually petrified. Insects, leaves, and other forms of life were carried to the lake bottom and preserved between alternating layers of volcanic ash. The source of the volcanic material appears to have been the Guffey volcano, 15 miles southwest of Florissant. The life cycle of the Florissant Lake perhaps never exceeded 5,000 years.

After the lake was filled or "dried up," the surface was covered by a deposit of light-colored pumiceous tuffs. Then followed erosion of the surface, and stream deposition of pebble conglomerate containing rounded fragments of the basic lavas.

This total depth of sediments was deformed by gentle folding and complex faulting, which was followed by erosion and channeling of the surface layers, the channels then being filled with lava flows from the Guffey volcano.

All of this, from the first deposition on the eroded granite surface to the latest volcanic activity, occurred in Lower and Middle Oligocene times, an approximate duration of 10 million years. Since that time there has been a long period of erosion which has reduced the terrain to its present character.

Description of the Geological Resources: The geological resources are the rock components making up the deposits in the Florissant basin. They also include outcrops of granite, the basement rock upon which the deposits were made. The present outline of the beds is due to complex faulting and subsequent erosion, and does not represent, in any sense, an old lake margin. The lake covered a much greater area than that shown within the outline on the map. A portion of the deposits have been eroded away since the faulting, leaving the fragmentary remains clinging to the borders of the basin. In nearly every place where the actual contact with the granite can be seen along the fault lines, the beds are upturned.

The succession of the deposits is as follows, beginning at the top:

Lithologic Divisions Numbered From Base to Top	Approximate Thickness (in feet)
7. Trachy-andesite	0–50
Hiatus	
6. Basic breccia with augite andesite (Thirty-nine Mile volcanics)	10–100
Hiatus	
5. Pumiceous andesite tuffs, shales, and	

	agglomerates, and volcanic river gravels	30
	Hiatus	
4.	Rhyolitic tuff	±20
3.	Lake shales and associated volcanic sediments	±50
2.	Bedded andesite tuffs (mudflows)	±55
1.	Basal water-laid pebbly arkose	±10

The beds, instead of forming a single unit, comprise a complex and varied series of sediments and volcanics which can be divided easily into at least five members (Nos. 1–5, in above listing). The total thickness is approximately 165 feet. However, in no one place is the total thickness exposed. The plant and insect-bearing member (No. 3) makes up less than a third of the total thickness, and it alone is of lacustrine origin. The remaining beds are mudflows and reworked river-deposited tuffs.

The richest fossiliferous beds, which are above the floor deposits, are approximately 20 feet thick. Fossil leaves, seeds, and insects are most abundant and best preserved in paper-thin shales of this member. Because of the thinness of these shales they curl and disintegrate when dried upon exposure. This characteristic would make it difficult to prepare an in-place exhibit of the insect and leaf fossils.

The andesite tuffs of member No. 2 represent the great mudflows which destroyed the trees which were in their path. The lowest petrified trees are about 25 feet below the top of this member. Standing Sequoia stumps up to 10 feet in diameter and 14 feet tall are found. Between 10 and 15 feet above these appears another layer of fossil trunks which are smaller—not more than 5 feet in diameter—and lying prostrate. Scattered trunks are also found in the uppermost layers of the tuffs.

The petrified Sequoias are suggestive of the California redwood (*Sequoia sempervirens*), but because it differs somewhat, the wood has been named *Sequoioxylon pearsallii.* Other trees represented by fossil stumps and leaves are pine and several deciduous species such as walnut, beech, willow, oak, and maple.

A number of the tree stumps, including large Sequoias, are exposed at the two commercially operated petrified forest areas. Some of these have been exposed by excavating around them. Many other stumps could be exposed by removing a very shallow over-burden. Some of the exposed stumps have fallen apart as a result of exposure; some are wired together by steel cables.

In addition to the insect, leaf, and wood fossils, the beds contain numerous microfossils. These occur in light-colored diatomite and sapropel laminae which alternate with one another, and in some places with light-colored pumice and graded tuff laminae. Ranking below the fossil insects and leaves in numbers of specimens found here are thin-shelled mollusks, and fresh water fishes. Several bird feathers and a few bird carcasses have been found.

Significance of Geological Resources: These deposits represent a small chapter of the geological history of the earth, but one very closely related to the present. What happened here in Oligocene times—the environmental conditions that existed, the life forms that prevailed, the whole story—is written into the Florissant deposits. Scientists have revealed parts of this story, more remains to be told.

The rare quality of the Florissant site lies in the delicacy with which thousands of fragile insects, tree foliage, and other forms of life—completely absent, or extremely rare in most paleontological sites—have been preserved. There is no known locality in the world where so many terrestrial species of one time have been preserved. A total of 144 plant entities or species have been found there. Thirty of these are of uncertain affinity, but the remaining 114 are identifiable with modern species. Approximately 60,000 specimens of insect fossils have been collected here, the site having a world-ranking second only to the Baltic

amber site in Europe. Almost all the fossil butterflies of the new world have come from this site. Even the presence of fresh water diatoms in the Florissant beds is their earliest known occurrence.

The Florissant site has been visited by scientists for nearly a century, and almost all have expressed admiration for the quantity and remarkable perfection of the fossils discovered here. Textbooks of paleontology, historical geology, and entomology cite Florissant as an outstanding locality for fossil insects. Fossil leaves from here are noteworthy and have been described in paleontological and botanical literature. Probably no formation of such limited extent has ever been the subject of as large a body of literature as the Florissant lake beds (226 papers).

The petrified Sequoia stumps are themselves not unique; but they possess high visitor interest and are an especially noble representation of a rather large assortment of Tertiary fossil forests in the western United States. Too, they and other plant fossils represented here are significant to the total Florissant story.

The Oligocene lake beds rest directly upon crystalline rocks, mostly Pikes Peak granite of Pre-Cambrian Age. The Pikes Peak granite is one billion years old, the Oligocene lake beds only 40 million. This unconformity represents a geologic time gap of a billion years. This hiatus in time could be made to have much visitor interest, encompassing, as it does, the entire Paleozoic and Mesozoic Eras, during which time the great deposits of the Grand Canyon and the Utah plateaus were accumulating. This great series of sediments which once covered the Pikes Peak granite had been eroded away long before the Florissant lake deposits began to settle upon the granite.

The insect fossils at Florissant are of primary significance. They represent the evolution and modernization of insects better than any other known site in America. In addition, the fossil flora, emphasized dramatically by the pertified tree stumps and in more subtle tones by the great variety of leaf fossils, greatly adds to the primary values. The site itself has great significance in being a classic locality known to many scientists—it has historic significance to the geologist, the paleontologist, the entomologist, the botanist; it is the home source for the numerous fossil insects and leaves that grace the exhibition halls and the research rooms of so many institutions of learning.

VEGETATION

The Florissant basin lies in the Montane Life Zone, here characterized by tree-covered hills and ridges surrounding small grassland meadows. The hills and ridges, which rise 200 to 400 feet above the meadows are covered predominantly with stands of ponderosa pine. The stands are denser on the north slopes than on the south. The meadows occupy most of the area which falls within the outer limits of the existing Florissant lake beds. Native meadow vegetation, in some places, has been intermixed with domestic grasses and other exotics.

The forest may be characterized ecologically as the yellow pine-aspen association. The yellow pine (*Pinus ponderosa* var. *scopulorum* Engelmann) forms an open grassy forest of small trees and constitutes about 90 per cent of the coniferous trees. The aspen (*Populus tremuloides* Michaus) is the only deciduous tree of importance. It forms scattered groves in moist situations in the pine forest, sometimes occupying large tracts on cool, damp slopes or on burnt-over places. Four other conifers are moderately common and occur as scattered individuals or, very rarely, in small groves: Douglas fir (*Pseudotsuga menziesii* var. *glauca*), Engelmann spruce (*Picea engelmannii*), blue spruce (*Picea pungens*), and limber pine (*Pinus flexilis*). White fir (*Abies concolor*) and lodgepole pine (*Pinus contorta*) are rare. Aspen, thinleaf alder (*Alnus tenuifolia*), water birch (*Betula occidentalis*), and several species of willow (especially *Salix stricta*) form a crowded growth along the streams.

Several shrubby species are also found most abundantly along the watercourses. Wild roses (*Rosa woodsi* var. *fendleri* and *Rosa* spp.), bush cinquefoil (*Potentilla fruticosa*), chokecherry (*Prunus virginiana* var. *melanocarpa*), golden current (*Ribes aureum*), boulder raspberry (*Rubus deliciosus*), and red raspberry (*Rubus idaeus* var. *strigosus*) are the common species in this habitat. On well-watered rocky slopes, serviceberry (*Amelanchier alnifolia*), cliff jamesia (*Jamesia americana*), wax current (*Ribes cereum*) bearberry or "kinnikinnick" (*Arctostaphylos uva-ursi*), and common juniper (*Juniperus communis*) are usually abundant. Mountain-mahogany (*Cercocarpus parvifolous*), snowbrush ceanothus (*Ceanothus velutinus*), ninebark (*Physocarpus intermedius*) skunkbush sumac (*Rhus trilabata*) black sagebrush (*Artemisia nova*), and rubber rabbitbrush (*Chrysothamnus nauseosus*) are confined to dry, warm slopes.

In years of average or better rainfall, the wildflower display in June and July is truly spectacular; every open area is carpeted with paintedcup, many penstemon and crazyweed species, composites, mariposas, harebells, and other varieties. Under the aspens and in wet meadows may be found columbines, pedicularis, iris, shooting-stars, and many others. In August and early September, various sunflowers, groundsels, and fireweed take the place of the earlier flowers, and if there is a late summer rain, frequently this display is as spectacular as the earlier one.

ANIMAL LIFE

There are many species of large and small mammals, including deer, antelope, elk, mountain lions, bobcats, coyotes, beaver, cottontail and jack rabbits, porcupines, one or more bat species, badgers, goldenmantled ground squirrels, chipmunks, Abert squirrels, whitetailed prairie dog, various mice species, and probably well over 100 bird species. In addition, there are numerous insect and butterfly species.

6. The Defendant

That upon information and belief, the defendants, individually and collectively, as their interests may appear are the owners in fee of lands included within the proposed Florissant Fossil Beds National Monument.

Upon information and belief the defendants individually and collectively as their interests may appear are subject to the exercise of eminent domain by the United States of America upon final action by The Congress of the United States which, upon information and belief should occur during the current session of The Congress.

7. Defendants' Actions

That upon information and belief, unless restrained by order of this Court, the Defendants, individually, or their Successors in Interest, will develop the area to be included within the proposed Florissant Fossil Beds National Monument, in such a way as to cause serious, permanent and irreparable damage to the unique national natural resource that is the Florissant Fossil Beds.

That the development of the region of the Florissant Fossil Beds in any way which involves road building, excavation or covering with permanent dwelling units or building structures, the fossil beds, will cause serious permanent and irreparable damage to the unique paleontological resource that is by the Florissant Fossil Beds.

That there are uses of the area compatible with the private ownership thereof, and the preservation of the unique national natural resources, that are the proposed Florissant Fossil Beds.

That the Board of County Commissioners of Teller County have determined the highest and best use of the lands to be included within the proposed Florissant Fossil Beds National Monument, by resolution dated June 9, 1969, and that any

development by the Defendants will be contrary to the stated policy of the Board of County Commissioners of Teller County as set forth in the resolution of June 9, 1969, a copy of which is annexed hereto and made a part hereof designated, Exhibit B.

That upon information and belief the operation of conventional building construction methods, will cause serious permanent and irreparable damage to the unique national paleontological resource represented by the Florissant Fossil Beds.

That the development of the area encompassed within the proposed Florissant Fossil Beds National Monument by Defendants is not compatible with the maintenance of the unique national natural resources, that is the Florissant Fossil Beds.

Upon information and belief, the defendant Park Land Company, Claude R. Blue, Kenneth C. Woffard, J. R. Fontan, and M. L. Barnes, jointly or severally intend to commence construction operations immediately which will cause serious permanent and irreparable damage to the National Natural Resource which is the Florissant Fossil Beds.

That upon information and belief, the defendants, individually and collectively, in particular Park Land Company, Central Enterprise Inc., Claude R. Blue, Kenneth C. Woffard, J. R. Fontan, and M. L. Barnes, are preparing to commence immediate construction operations which will cause serious, permanent and irreparable damage to the unique national natural resource, the Florissant Fossil Beds, in violation of the Resolution of the Board of Commissioners of Teller County, annexed hereto and made a part hereof designated, Exhibit B.

8. Equitable Jurisdiction

That this action is properly brought in equity before this court on the following grounds:

(a) The subject matter of the dispute is equitable in nature. This action is brought for the purpose of restraining the Defendants individually, and their Successors in Interest, from damaging or degrading the unique national natural resource that is, the Florissant Fossil Beds, within the area proposed for inclusion in the Florissant Fossil Beds National Monument. The injury which may be inflicted by the Defendants individually or their successors in Interest, if they are permitted to develop the area, without regard for the unique national natural resources represented thereby, will be irreparable, in that it cannot be adequately compensated in damages. The declaratory judgment demanded by the Plaintiffs, together with the equitable relief related thereto are equitable remedies in the substance of character of the rights sought to be enforced or historically, in the province of the Court of Chancery.

(b) There is no adequate remedy at law. The law does not afford any remedy for the contemplated wrong to the American people resulting from the degradation of the unique national natural resources represented by the Florissant Fossil Beds from the development thereof by the Defendants and/or their Successors in Interest, in a way inconsistent with the protection of the paleontological, paleobotanical and palynological resources represented thereby. There is no plain adequate and complete remedy at law as practicable and efficient as the equitable relief sought herein. Nor would the damages sustained by the people of the United States as a result of the improper development of the area, by the Defendants or their Successors in Interest, be capable of measurement and determination in any action at law.

9. Trust

That the Defendants individually and their Successors in Interest, hold the unique national natural resource of the Florissant Fossil Beds, with respect to its paleontological, paleobotanical and palynological values in trust for the full

benefit, use and enjoyment of all the people of this generation, and those generations yet unborn.

That the maintenance of this trust is compatible with the proper efficient development of the resource represented by the area encompassed within the proposed Florissant Fossil Beds National Monument area.

That the administrative agencies of the Federal and State governments are incapable of preventing the irreparable damage which will result from the improper development of the region by the Defendants or their Successors in Interest without regard for the protection of the unique paleontological, paleobotanical and palynological values represented by the Florissant Fossil Beds.

That the maintenance of the trust is consistent with private ownership of the property and does not constitute any taking of the Defendant's property.

WHEREFORE, the plaintiffs individually and on behalf of all those entitled to the full benefit, use and enjoyment of the national resource that are the proposed Florissant Fossil Beds National Monument, respectfully pray:

That this Court take jurisdiction of the matter, and that a three judge court be convened to hear and determine this cause as provided by Title 28 U.S. Code, Section 2281, et seq. and upon such hearing:

(a) Grant judgment declaring the right to the Plaintiff and all others in and to the full benefit, use and enjoyment of the national natural resources that are the proposed Florissant Fossil Beds National Monument without any degradation resulting from the improper development thereof by the Defendants and/or their Successors in Interest.

(b) That the Court issue such orders as will protect the unique paleontological, paleobotanical and palynological values encompassed within the Florissant Fossil Beds, pending the final hearing of determination of this action.

(c) That the Court issue such orders as will protect the unique paleontological, paleobotanical and palynological values encompassed within the Florissant Fossil Beds.

(d) Together with all such other and further relief as to the Court may seem just, proper and necessary under the circumstances to protect the unique national natural resources that are in the Florissant Fossil Beds.

Attorney for Plaintiff

§ 2:13. Form of affidavit in support of complaint based on Trust Doctrine

STATE OF COLORADO
CITY AND COUNTY OF DENVER ss.

AFFIDAVIT

Estella B. Leopold, being duly sworn deposes and says:

1. That she is a Paleontologist presently employed by the United States Geological Survey, and is personally familiar as a research scientist with the area to be included within the proposed Florissant Fossil Beds National Monument, and in particular the land and area presently being threatened by the activities of the Defendants with respect to excavation and road building.

2. That your deponent submits this affidavit at the request of the attorneys for the Plaintiffs herein in lieu of testifying under subpoena duly issued by the Plaintiffs this day. That your deponent was present in the United States District Courthouse at Denver this day prepared to testify substantially in accordance with the statements hereinafter set forth, which statements were duly made by me to the attorneys for the Plaintiff this date.

3. That your deponent was advised personally by the defendants Claude R. Blue, J. R. Thornton and their counsel Robert Johnson, that the proposed road building is to commence Thursday, July 10th, 1969, at the south end of the area to be included within the proposed Florissant Fossil Beds National Monument proceeding in a roughly southeasterly direction from an existing road named and designated on the United States Coast and Geodetic Survey Topographic Map of the area as Twin Rocks Road.

4. Your deponent explained in detail, the unique paleontological and educational resource value of the area to be excavated and destroyed by the proposed road, and was advised by the counsel for the Defendants and the two Defendants Claude R. Blue and J. R. Thornton personally that "this was the way they made their living," and they indicated they were not interested in the development rights or value of the area, but were merely interested in holding it for the shortest period of time and selling it at the highest possible price.

5. Your deponent can state to this court, with a reasonable degree of professional scientific paleontological certainty, that no area equivalent to the Florissant Fossil Beds in diversity of fossil speciation or fossil density has been found in the western hemisphere of the United States from the Oligocene period which occurred thirty-four to thirty-eight million years past. Your deponent can further state with reasonable scientific paleontological certainty, that the Florissant Fossil Beds are the result of a unique combination of circumstances involving complex and geologic developments including alternate volcanic activity, with peaceful intervulcan periods, coupled with mountain building, and general regional vulcanism. Your deponent can further state with reasonable scientific certainty that this unique combination of geologic happenings has not occurred elsewhere in the western hemisphere according to reports published in the scientific literature.

6. Your deponent believes, that the availability of the diverse fossil speciation found in the Florissant Fossil Beds within the area to be included within the National Monument, and in particular those areas which will be totally, permanently and irrevocably destroyed by the proposed road building activities of the Defendant which are due to commence tomorrow morning, are of such singular value that their full potential worth can only be determined by subsequent generations.

7. That the instant of geological time trapped for permanent record in the Florissant Fossil Beds paper shales is of great value in understanding the evolution of many forms of life now present in the continental United States and the western hemisphere. It is particularly important to note that the fossil insect records contained and trapped within the Florissant Fossil Beds paper shales can hold the key to determining the mechanisms of functional adaptation and insect development to the ultimate in calculable benefit of mankind. A single example should suffice: It is well known at this time that insect resistance to modern chemical pesticides has become of increasing concern in areas that were thought to be malaria free following the first extensive uses of DDT in 1946. The key to continued insect control and the ultimate elimination of those centurial scourges of mankind, malaria, typhus, encephalitis, and yellow fever are dependent upon the information concerning functional adaptation and insect evolution trapped by the mighty hand of God acting through eons of geologic time and geologic processes for the ultimate benefit of mankind.

WHEREFORE, your deponent respectfully prays that this Court take immediate action to prevent the disturbance of sub-soil area to be included within the proposed Florissant Fossil Beds National Monument in the interest of justice, and the ultimate future of man. The Florissant Fossil Beds National Monument is to geology, paleontology, ecology, and evolution, what the Rosetta Stone was to Egyptology and the Dead Sea Scrolls to Christianity. The value of the Rossetta

Stone is known to few outside the field of Egyptology, and non-Christians tend to minimize the value of the Dead Sea Scrolls. The record of Florissant can mean the protection of children yet unborn everywhere in the world, the advancement of human knowledge across a broad front and a continuing means of dialogue between the world of the geologist and his interest in the record of history written in the rocks where an instant geological time may mean millions of years, and the Ecologist, who must, today, furnish the information necessary to make wise use of the natural resources the earth gives to man, and furnish the scientific basis to predict the potential effects of alternative resource management uses.

Subscribed and sworn to before me this 9th day of July, 1969.
My commission expires May 27th, 1973.

Notary Public

§ 2:14. Form of temporary restraining order

FOR THE TENTH CIRCUIT
COURT OF APPEALS

DEFENDERS OF FLORISSANT, INC., Individually and on behalf of all those entitled to the full benefit, use and enjoyment of the national natural resource that is the proposed FLORISSANT FOSSIL BEDS NATIONAL MONUMENT, and all those similarly situated,
Plaintiffs

vs.

PARK LAND COMPANY; CENTRAL ENTERPRISES, INC., CLAUDE R. BLUE, KENNETH C. WOFFARD; J. R. FONTAN, M. L. BARNES; W. NATE SNARE, A. W. GREGG, R. MITSCELE, MARILDA NELSON; DELBERT and EMMA WELLS; E. D. KELLY, JOHN BAKER and successors in interest, if any, as their interest may appear,
Defendants

No. 340–69

Upon reading and filing the application of the plaintiffs herein for a temporary restraining order, together with transcript, the hearing on the application of plaintiffs for similar relief before the United States District Court, District of Colorado on July 9, 1969, together with the oral application of counsel for the plaintiffs before this Court on this date, including a complete recital of all the efforts by counsel for the plaintiffs to secure the appearance of the defendants, Claude R. Blue and J. R. Thornton, individually and as partners of the Park Land Company, the principal defendant herein, including recital of the substance of the conference held among the parties in the United States District Courthouse, Courtroom "C" on July 9, 1969, in which counsel for the plaintiff indicated he would secure further immediate temporary relief from the Circuit Court of Appeals for having jurisdiction of this Circuit and the United States Supreme Court and the representations by counsel for the defendants upon information and belief, Robert Johnson of Colorado Springs, that he would not enter a formal appearance under any circumstances in this action at this time, together with telegraphic notice at 10:00 A.M. and 12:00 P.M. on July 10, 1969, to Attorney Johnson, Claude R. Blue and J. R.

Thornton, at the address in Colorado Springs furnished to plaintiff's counsel at the conference of July 9, 1969 and to which no reply had been received.

AND IT APPEARING TO THE COURT from the representations of counsel and the information contained in the verified complaint and exhibits annexed thereto, the affidavits submitted therewith of Dr. Estella Leopold, Paleontologist for the United States Geological Survey, that the Florissant Fossil Beds represent a unique national natural resource and that the excavation with road building or other construction equipment of these fossil beds will result in serious, permanent, irreparable damage and render the action for preliminary injunction pending for trial in the United States District Court on July 29, 1969, moot, and it appearing from the uncontradicted statements contained in the transcript of the hearing of July 9, 1969, conducted in the presence of defendants and their counsel and the similar representations of plaintiff's counsel before this Court, and that there will be no damage to the defendants by order of this Court restraining construction activities at the area of the Florissant Fossil Beds,

IT IS ORDERED that the defendants, jointly or severally, individually or collectively, or by their agents, servants or employees, their contract vendees or their successors in interest, be and are hereby restrained from disturbing the soil, or sub-soil or geologic formations at the Florissant Fossil Beds by any physical or mechanical means including, but not limited to excavation, grading, road-building activity or other construction practice until a hearing on the merits of the plaintiff's application for preliminary injunction to be heard in the United States District Court, District of Colorado, on July 29, 1969, at 9:30 A.M.

IT IS FURTHER ORDERED that service of this order shall be made by the United States Marshal on any workman engaged in construction activities at the Florissant Fossil Beds forthwith and that personal service shall also be made on each of the defendants subject to the jurisdiction of the Court.

ALFRED P. MURRAH, Chief Judge
United States Court of Appeals

JEAN S. BREITENSTEIN, Judge
United States Court of Appeals

JOHN J. HICKEY, Judge
United States Court of Appeals
Dated: July 10, 1969

JULY TERM, JULY 10, 1969

Before Honorable Alfred P. Murrah, Chief Judge, Honorable Jean S. Breitenstein and Honorable John J. Hickey, Circuit Judges.

JULY TERM, JULY 29, 1969

Before Honorable Alfred P. Murrah, Chief Judge; Honorable Jean S. Breitenstein and Honorable John J. Hickey, Circuit Judges.

Defenders of Florissant, Inc., etc., et al.,
Plaintiffs,

v.

Park Land Company, etc., et al.,
Respondents.

It is ordered that the effectiveness of the temporary restraining order issued by this court this date is conditioned upon the filing by the plaintiff with the Clerk

of the United States District Court for the District of Colorado a cash bond in the amount of $500.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully restrained during the period of the temporary restraining order.