§ 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).