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TESTIMONY ON BEHALF OF THE DEFENDANTS

WITNESS:

K. C. WOFFORD (RECALLED)

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P R O C E E D I N G S

1  
2 THE COURT: This is Civil Action C-1539 regularly  
3 set for hearing on the Plaintiffs' Petition for a Temporary  
4 Injunction or Preliminary Injunction.

5 In view of the pre-trial conference had yes-  
6 terday and the stipulation of the parties as to a large portion  
7 of the facts to be determined by the Court, the evidence  
8 should not take too long.

9 After the pre-trial conference, it occurred  
10 to the Court that perhaps the parties might want to consider  
11 this as not only a hearing on the Application for a Temporary  
12 Injunction but also as a hearing on the full merits of the  
13 case and thereby eliminate the possibility of two trials.  
14 Now it is up to counsel. I won't insist on it.

15 MR. LAMM: Your Honor, Richard Lamm appearing for  
16 the plaintiffs. Our whole pre-trial conference was directed  
17 to the fact that it would be a hearing on the preliminary  
18 injunction.

19 THE COURT: That's correct.

20 MR. LAMM: Consequently, our witnesses and our  
21 whole strategy was directed to that line, and I believe that  
22 it would be impossible for us at this late date then to turn  
23 the proceeding this morning into a combined hearing on the  
24 combined preliminary injunction.

25 THE COURT: No, if you desire to have further

1 evidence in the hearing on the merits, the full merits,  
2 obviously, you should not attempt to do it here.

3 Quite often counsel will upon an application  
4 for a preliminary injunction, when they feel that all the  
5 facts are presented to the Court, eliminate the second hearing.  
6 But since that doesn't appear to be the case in the plain-  
7 tiffs' wishes, you will have your evidence on the  
8 Application for a Preliminary Temporary Injunction.

9 MR. LAMM: Your Honor, I believe the first matter  
10 we have is Mr. O'Brien in court who yesterday asked to  
11 intervene who I believe at this time has a motion to present  
12 to you.

13 MR. O'BRIEN: May it please the Court, Edward J.  
14 O'Brien, II, appearing on behalf of the Board of County  
15 Commissioners of Teller County, Colorado.

16 Your Honor, as I advised the Court yesterday,  
17 I would ask leave to intervene and would at this time submit  
18 to the Court a Motion to Intervene, a copy of which has been  
19 served upon Mr. Johnson, as attorney for the defendants  
20 appearing here this morning.

21 Your Honor, as briefly as I can, basically,  
22 we are intervening, requesting intervention under Rule 24(2),  
23 which says in effect if as a practical matter the rights of  
24 the Board of County Commissioners of Teller County will be  
25 effected by this suit, we have the right to apply for, at

1 least, make application to intervene,

2 Your Honor, the interest of Teller County,  
3 of course, will become apparent as this matter proceeds, but  
4 certainly --

5 THE COURT: Well, Mr. O'Brien, when was this motion  
6 served upon the defendants?

7 MR. O'BRIEN: Perhaps ten minutes ago, Your Honor.

8 THE COURT: All right. Are the defendants prepared  
9 to indicate their attitude toward the motion?

10 MR. JOHNSON: At the moment we are opposed to it,  
11 Your Honor. We have only had it for about ten minutes,  
12 and I have read it rather hastily.

13 THE COURT: This matter will be continued. The  
14 Court can't hear the Motion to Intervene forthwith.

15 The other parties are entitled, Mr. O'Brien,  
16 to at least a reasonable time to oppose the motion if they  
17 so desire and prepare.

18 So if you desire to have the motion heard at  
19 this time, that request will be denied. The motion will be  
20 set down for hearing in the ordinary course of the Court's  
21 business, and I think in this case I will require the defen-  
22 dants, if they oppose the motion, to oppose it in writing,  
23 substantiated by a Memorandum Brief, and Teller County will  
24 have ten days after the receipt of the Defendants' Brief in  
25 Opposition to the Motion within which to file a Motion in

1 Support, or I mean, a Memorandum in Support of the Motion, and  
2 the Court may determine the matter upon the briefs rather than  
3 upon oral hearing.

4 MR. O'BRIEN: Thank you, Your Honor.

5 THE COURT: Very well. Mr. Clerk, will you take the  
6 Motion and mark it filed today.

7 MR. JOHNSON: May it please the Court, yesterday  
8 afternoon we filed on behalf of the defendants whom I repre-  
9 sent, a Memorandum Brief in support of the Motion. I would  
10 like the record so to show that I have handed a copy of this  
11 Memorandum Brief to opposing counsel.

12 THE COURT: Very well. All right, Mr. Lamm, you may  
13 proceed.

14 MR. LAMM: Your Honor, as I understand the present  
15 posture of this case, there is a Motion to Dismiss which will  
16 not be disposed of today, and there is no verified or otherwise  
17 responsive pleadings to the Plaintiffs' Complaint whatsoever.  
18 Is that correct? In other words, we do not propose to argue  
19 the Motion to Dismiss at this time?

20 THE COURT: No, our Rules provide, Mr. Lamm, as I  
21 am sure you are well aware, that you have ten days now in which  
22 to file a Brief in Opposition to the Motion to Dismiss.

23 The only matter before the Court today is the  
24 Application for a Temporary or a Preliminary Injunction,  
25 whichever you wish to term it.

1 MR. LAMM: Right. Your Honor, then, at this time  
2 in the interest of time, I would like to ask, and I can do it  
3 one of two ways.

4 My first witness is Dr. Estella Leopold from  
5 the U.S.G.S., and I think in the interest of time, if the  
6 defendants would submit and show to Dr. Leopold without us  
7 having to put one of them on the stand first, the proposed  
8 location of the road that they propose to build, and then  
9 allow Dr. Leopold to examine that location, I believe that  
10 that would be in the interest of saving time, would be most  
11 expedient.

12 THE COURT: The Court agrees, Mr. Lamm. Mr. Johnson,  
13 do you have your plat?

14 MR. JOHNSON: Yes, I do, Your Honor. We have the  
15 roadway marked on it the best we can locate it.

16 THE COURT: All right. May I suggest, then, that  
17 the witness who can identify and explain it be sworn?

18 MR. JOHNSON: Yes, sir.

19 THE COURT: And that you identify the map and make  
20 an explanation of it?

21 MR. JOHNSON: Yes, sir.

22 THE COURT: And then that can be used by Mr. Lamm  
23 in his presentation?

24 MR. LAMM: Yes, sir. At that time, Your Honor, we  
25 would like to ask for just a five-minute recess so that Dr.

1 Leopold can examine the map.

2 THE COURT: Well, if she needs it.

3 MR. JOHNSON: Perhaps if the bailiff could post this?

4 THE COURT: And, Mr. Lamm, you may have your witness  
5 sit in the jury box, if you wish.

6 MR. JOHNSON: Mr. K. C. Wofford, will you stand and  
7 be sworn, please.

8 TESTIMONY ON BEHALF OF THE DEFENDANTS

9 K. C. WOFFORD

10 a defendant, after having been first duly sworn by the Clerk  
11 to tell the truth, the whole truth, and nothing but the truth,  
12 testified upon his oath as follows:

13 MR. JOHNSON: I would like to have the map marked  
14 as Defendants' Exhibit A, the U.S.G.S. map on the board. Do  
15 I just mark it, Your Honor?

16 THE COURT: Yes.

17 (DEFENDANTS' EXHIBIT A

18 was marked for identification.)

19 DIRECT EXAMINATION

20 BY MR. JOHNSON:

21 Q Now, would you state your name and address, please.

22 A K. C. Wofford, 2001 Stardust Drive, Colorado Springs,  
23 Colorado.

24 Q Are you one of the defendants in this action?

25 A Yes, I am.



1 Q Are you one of the partners of Park Land Company?

2 A Yes, I am.

3 Q Does Park Land Company own certain land in Park  
4 County and Teller County, Colorado?

5 A That's right.

6 Q I direct your attention to Exhibit A on the board, and  
7 I will ask you if that exhibit delineates generally in red  
8 the land in both Park County and Teller County, Colorado?

9 A Yes.

10 Q Would you indicate the perimeter boundary of that  
11 tract, just indicating with the pointer?

12 A There is one section that sets --

13 THE COURT: Would you stand on this side so she can  
14 see.

15 A (Continuing) One section sets by itself, Section 36,  
16 and the majority is contiguous starting at this (indicating)  
17 point here (indicating) in Section 9 running all the way up  
18 to Highway 24 all the way over to the Town of Florissant and  
19 a couple of little pieces by themselves out on the west edge.

20 BY MR. JOHNSON:

21 Q Now, Mr. Wofford, directing your attention specifically  
22 to proposed construction or excavation or road building which  
23 you proposed to do on this site, would you point out for the  
24 benefit of Dr. Leopold, who sits here on your right, where the  
25 proposed road will start and where it will end?

1 A Our proposal on the next portion we will develop --

2 THE COURT: Excuse me, Mr. Wofford. Maybe it would  
3 be better if you step over to this (indicating) side and maybe  
4 the Court can see easier and Dr. Leopold can still see.

5 A (Continuing) We propose to take a road off of the  
6 Lower Twin Rock Roads, almost to the center of Section 19,  
7 following the stream flow up to the western edge of Section 20;  
8 also in Section 19, we will take a road up the center of the  
9 ridge that leads up on top of the mesa or on the plateau and  
10 another road back down the valley to service this corner and  
11 get to the two-land-locked eighty acres on the east side.

12 Q Now, the Lower Twin Rock Road to which you have  
13 pointed, is that an existing roadway?

14 A Yes, that is a county highway, I believe, from --

15 Q How wide is that roadway?

16 A I would imagine it is at least a 60-foot right-of-  
17 way.

18 Q Is it graveled or hard surfaced?

19 A It is a graveled road.

20 Q How long will these proposed roads which you have  
21 indicated on Defendants' Exhibit A, what is the total length  
22 it will be?

23 A Total length?

24 Q Just approximately.

25 A Approximately two and a half; approximately.

1 Q And approximately how wide will these (indicating)  
2 roads be?

3 A A 60-foot right-of-way -- 28 to 30-foot width.

4 Q The total excavation would not be over 30 feet,  
5 would this be correct?

6 A Thirty-two to 34-foot maximum.

7 Q Thirty-two to 34 maximum. Now, is there any portion  
8 of this area which you have shown where the roadway is to be  
9 constructed to be over an existing roadway?

10 A About two-thirds of it. There is an existing  
11 road from the intersection that we have here (indicating)  
12 back up to the east edge of the property. There is a trail  
13 that has had a blade or a drag or something over it years  
14 ago that you can drive a car from this (indicating) point  
15 to clear on top to this (indicating) here (indicating).

16 There is a trail down this area here (indicating).  
17 I believe a jeep trail, and I don't believe it has ever been  
18 graded.

19 Q Is there any portion of this roadway which would  
20 cross a field or a former plowed or farmed area?

21 A From the intersection back down to Twin Rock Roads,  
22 approximately a quarter of a mile, is across an existing  
23 field that has been farmed at one time.

24 Q Does that existing field have various trenches  
25 across it?

1           A     Yes. There are ten or twelve diversion ditches,  
2 soil conservation ditches across this old potato field that  
3 was put there by the Soil Conservation.

4           Q     And has that area been farmed to the best you can  
5 determine?

6           A     Yes, it has been farmed at one time.

7           MR. JOHNSON: Your Honor, I have nothing further  
8 at this time. I don't want to get into the merits of the thing  
9 other than identifying. Do you have any questions, Mr. Lamm?

10          THE COURT: I have one question: Will you indicate  
11 the proposed boundaries of the Monument? Are they marked on  
12 there?

13          THE WITNESS: The proposed eastern boundary is this  
14 (indicating) section line here (indicating). It comes up to  
15 approximately a little bit north of Upper Twin Rock Road and  
16 continues on over to Highway -- this (indicating) highway --  
17 I don't remember the number of it for sure.

18          THE COURT: And that highway is the western bound-  
19 dary?

20          THE WITNESS: No, the proposed park area also takes  
21 the land on the west side of it.

22          THE COURT: All right.

23          MR. JOHNSON: Would the Court like the witness to  
24 mark the eastern boundary in order to show its location?

25          THE COURT: It is a little difficult for the Court

1 to see it, but if it is already on there, he need not do it  
2 again. I can see it on close inspection. All right.

3 Now, once again, re-trace for the Court the  
4 boundaries of the 1,800 acres of land which you own and are  
5 within the proposed boundaries?

6 THE WITNESS: The proportion that is in the proposed  
7 boundary, I believe, includes this (indicating) area here  
8 (indicating), excluding the 160 acres here (indicating), which  
9 would include all of this (indicating) area here (indicating)  
10 up to Upper Twin Rock Road.

11 I believe it is about a quarter of a mile north  
12 of that, continuing on from there on to the highway and then  
13 the proposed park area goes west of that. It would include  
14 all of this (indicating) area here (indicating).

15 THE COURT: All right. With your pointer, trace  
16 roughly the western boundary, if you will.

17 THE WITNESS: I am not real familiar with it. I  
18 think it is (indicating).

19 THE COURT: Well, approximately.

20 THE WITNESS: I think it is about two miles west  
21 of the road approximately, coming down to a point about like  
22 this (indicating).

23 THE COURT: That's your land?

24 THE WITNESS: No, this isn't ours over here (indi-  
25 cating).

1 THE COURT: I said trace for me once more the  
2 approximate western boundary at the 1,800 acres.

3 THE WITNESS: It would be the red line right here  
4 (indicating).

5 THE COURT: It's marked by a red line?

6 THE WITNESS: Yes.

7 THE COURT: That's fine. All right. Do you want  
8 a recess, Mr. Lamm?

9 MR. LAMM: I think it is up to the rest.

10 MR. YANNACONE: May I ask a couple of questions,  
11 Your Honor, concerning the map?

12 THE COURT: You may.

13 CROSS-EXAMINATION

14 BY MR. YANNACONE:

15 Q Would you indicate the county road where it indicates  
16 the area where you are going to excavate?

17 A This (indicating) is the county road here (indicating).

18 Q And that is designated on the map as Lower Twin Rock  
19 Road; right?

20 A That's right.

21 Q Right. Now, you are going to intersect Lower Twin  
22 Rock Road at a particular point. Would you indicate that for  
23 us?

24 A Approximately the center of Section 19 (indicating).

25 Q Is there any existing road intersecting Twin Rock

1 Road at that point?

2 A No.

3 Q Where is the existing trail that you describe?

4 A The existing trail now shows at this (indicating)  
5 intersection. There was undoubtedly a road at one time  
6 across this (indicating) when they were farming it, but when  
7 they put in the diversion ditches, they have removed that road  
8 there.

9 Q Right. And then the section between Twin Rock Road,  
10 the county road, and the bifurcation of your planned road,  
11 there is no existing visible road; is that correct?

12 A That's correct.

13 Q And the northerly portion of your proposed access  
14 road follows the route of an old road; is that correct?

15 A The eastern part follows it?

16 Q The early portion of it?

17 A Yes, sir.

18 Q The excavation of the roadway that proceeds south  
19 of the one you just described, that's going to be an entirely  
20 new road; is that correct?

21 A From this point, (indicating) ~~point~~ on will be an  
22 entirely new road. There is an existing trail or road to this  
23 (indicating) point.

24 Q Now, the area on this map that is marked in white  
25 that you have the connection to Twin Rock Road, the bifurcation

1 of your two access roads and a short portion of each section  
2 of your access road, is there any evidence of existing road-  
3 way within that white portion on the map?

4 A At one time there was undoubtedly a road just east  
5 of approximately where we have this laid out here (indicating).  
6 As I had stated, this is an old field, all of the white area  
7 here (indicating) has been farmed. The Soil Conservation has  
8 moved a lot of the surface back into the diversion ditches,  
9 resodded the ground, replanted it, therefore erasing any prior  
10 road that was there.

11 Q How deep are the existing diversion ditches?

12 A It would probably average from the bottom of the  
13 ditch to the top of the diversion, would average maybe two to  
14 two and a half feet.

15 Q Do you have written specifications for the excavation  
16 of your new roadway?

17 A No.

18 Q All right. Do you have an agreement with someone,  
19 bulldozer or what not, to excavate and clear that road?

20 A Yes.

21 Q What are the instructions on the type of road surface  
22 and the method of excavation?

23 A The method he does, it is up to him. Normally, with  
24 a bulldozer and a maintainer. We expect a 28-foot shoulder-to-  
25 shoulder finished road when it is completed.



1 Q What does a "finished road" mean in this sense?

2 A Graded. Not graveled but graded with a drainage  
3 ditch on each side.

4 Q When you say "graded" in Colorado, do you mean a  
5 road that has a slight crown to it?

6 A Yes, a slight crown.

7 Q How deep are the ditches on each side of the road?

8 A This depends upon the terrain he is going through.

9 Q Is there going to be any preparation of the sub-  
10 surface by way of tamping --

11 A No.

12 Q -- or gravel insertion or anything else?

13 A No.

14 Q How deep a cut do you expect the dozer to make at  
15 any given point along that road? What is the deepest cut you  
16 will expect?

17 A If he is going through a bank, he possibly could  
18 cut as high as three to four foot on one side and fill three  
19 to four foot on the other side.

20 Q The fill will be taken from the cut on the high side?

21 A That's right.

22 Q Now, in the area of Twin Rock Road to the beginning  
23 portion of this map which is colored green, can you tell us  
24 what the maximum depth of cut will be?

25 A The cut of that will probably be a maximum of twelve

1 inches. This is fairly level ground and will not take a deep  
2 cut.

3 Q Have you personally or has any member of your group  
4 personally ever made any examination by way, of course, digging,  
5 or otherwise of what is present in that white area on the map  
6 at a depth of twelve inches?

7 A Only to the fact that the diversion ditches are dug  
8 approximately twelve inches deep, twelve to twenty.

9 Q And in no event will your bulldozer operator go  
10 deeper than the existing diversion ditches?

11 A In the white area, probably not.

12 Q Is the area marked in white on that map still a part  
13 of any federal or state soil conservation area?

14 A I believe not.

15 Q When was the last time it was a part of a federal  
16 or state or soil conservation area, if you know?

17 A I don't know the last date that their contract ran  
18 out, but from the appearance of the land, I would say the work  
19 was done on this fifteen to twenty years ago.

20 Q And since that time, that area has lain relatively  
21 fallow?

22 A Yes.

23 Q In other words, nothing has been done to it?

24 A No.

25 Q Are there any existing agricultural operations on that

1 portion now?

2 A Livestock grazing but no farming.

3 Q And is there existing grazing evidence at the site  
4 now?

5 A There are livestock on the range, yes.

6 Q Now, is your route indicated across (indicating)  
7 this white area from the intersection of Twin Rock Road,  
8 Lower Twin Rock Road to the beginning of the green marked  
9 area on this map, has it been the subject of a survey?

10 A Not as of yet.

11 Q Is it going to be surveyed before or after the road  
12 is cut?

13 A After.

14 Q At the present time, are there any instructions to  
15 the excavator as to the route of these roads?

16 A I believe so.

17 Q What are those instructions?

18 A I was not personally there when the road was laid  
19 out. I believe two of my partners took the contractor to the  
20 area, pointed out where we wanted the roads.

21 Q Is there any evidence that you or any member of your  
22 organization is aware of any other roads or trails or paths  
23 entering these two sections that are described as your most  
24 easternly sections from points further northeast on Lower Twin  
25 Rock Road?

1 A None that I am aware of.

2 Q Is there any access --

3 MR. JOHNSON: If it please the Court -- excuse me,  
4 Mr. Yannacone.

5 MR. YANNACONE: Yes.

6 MR. JOHNSON: I believe it was only our intent for  
7 the purpose of pointing out for Dr. Leopold, and this is  
8 going way beyond the copy of that.

9 MR. YANNACONE: May we have five minutes to compare  
10 that map with the Park Service map?

11 THE COURT: You may.

12 MR. YANNACONE: Thank you.

13 THE COURT: We will be in recess for five minutes.

14 (WHEREUPON, the Court recessed at the hour of  
15 10:00 o'clock A.M.)

16 AFTER RECESS - 10:10 o'clock A.M.

17 MR. LAMM: Mr. Yannacone will proceed now.

18 THE COURT: Very well.

19 MR. YANNACONE: The plaintiffs will call Dr. Estella  
20 Leopold.

21 TESTIMONY ON BEHALF OF THE PLAINTIFFS

22 ESTELLA B. LEOPOLD

23 a witness, having been called as a witness by and on behalf  
24 of the plaintiffs, after having been first duly sworn by the  
25 clerk to tell the truth, the whole truth, and nothing but the

1 truth, testified on her oath as follows:

2 THE CLERK: State your name and address, please.

3 THE WITNESS: Estella B. Leopold, 10350 West 13th  
4 Place, Denver, Colorado.

5 DIRECT EXAMINATION

6 BY MR. YANNACONE:

7 Q Doctor Leopold, by whom are you presently employed?

8 A U. S. Geological Survey.

9 Q What is your job?

10 A I am a botanist, Research Botanist in the Paleontology  
11 Branch, Geologic Division.

12 Q How long have you been so employed?

13 A Thirteen years.

14 Q And when and where did you receive your doctorate?

15 A At Yale University, 1955, New Haven, Connecticut.

16 Q And what was your doctorate in?

17 A Botany.

18 Q Since that time, will you please describe briefly  
19 for the Court your professional activities?

20 A Since that time, I have worked --

21 THE COURT: Let me ask, do the defendants admit the  
22 witness' qualifications as a botanist?

23 MR. JOHNSON: Your Honor, I would be learning a  
24 little bit more. All I know is the picture of her in the paper.

25 THE COURT: Proceed.

1 BY MR. YANNACONE:

2 Q You do publish in other areas than to have your  
3 picture in the newspaper, don't you?

4 A Yes, sir.

5 Q Will you describe in the course of your developments  
6 since your doctorate was conferred, what you have done profes-  
7 sionally and include in them any relevant publications.

8 A My work has concerned mainly the field of plant evolu-  
9 tion in the Rocky Mountain region involving the last fifty  
10 million years.

11 I have also worked on a period of thirty to  
12 forty million years ago in the South Pacific, and we have had  
13 for a number of years a special project in the same type of  
14 work in Alaska.

15 Q And during the course of this period of time, have  
16 you had occasion to personally in your professional capacity  
17 investigate the area of the Florissant Fossil Beds?

18 A Sir, I have worked on the Florissant Beds at  
19 Florissant since my arrival in Colorado, as a Paleobotanist.

20 Q Doctor, will you please describe for the Court  
21 just what a Paleobotanist is concerned with as opposed to  
22 an ordinary botanist.

23 A A Paleobotanist, first, works on fossil plant  
24 materials as opposed to a paleontologist in general. We  
25 work on plants as opposed to animal fossils.

1           My particular area is a specialty, is that of  
2 Micropaleontology. I study very tiny microscopic remains  
3 of plant materials, those belonging to the Cenozoic era.

4           Q     When was the Cenozoic era?

5           A     It ranges from sixty-six million years ago to  
6 present.

7           Q     Now, in the course of your professional activities,  
8 in order to become a Paleobotanist, you had to be an  
9 ordinary, modern-day botanist first, did you not?

10          A     Yes.

11          Q     What, if any, is the scientific relationship between  
12 Paleobotany as a field and modern botany as a field, where  
13 are their points of contact and diversions?

14          A     The field of Paleobotany gives us a sense of;  
15 prehistoric sense of a three-dimensional picture in time  
16 of the evolution of plants and their adaptations to climate and  
17 their soil environments; the relationship of this to the  
18 study of modern botany is an important one, to taxonomy and  
19 the understanding of floristic development.

20                   During this very critical period, the Pre-  
21 Man Period ranging back to fifty million years ago, is the  
22 story of radical change in the Rocky Mountain region among other  
23 parts of the world, where modern plants, as we know them,  
24 have evolved and have shown dispersal migration patterns;  
25 these tell us a great deal for the understanding of the modern

1 distribution patterns.

2 Q In other words, you have found examples here,  
3 right here in Colorado, of plants thirty-four million years  
4 ago or thereabouts that have modern counterparts?

5 A Yes, indeed. The Florissant flora has its primary  
6 affinity in terms of living plants with the living flora of  
7 northeastern Mexico in the Highlands of the Tamulipas area.  
8 In fact, the largest proportion of plants that appear to  
9 resemble the Florissant flora are there today associated  
10 together in this particular, rather temperate, warm  
11 temperate region.

12 Q In the course of your regular professional  
13 activities, have you had occasion to determine the outlines,  
14 geographically as well as geologically of the area we have  
15 been referring to as the Florissant Fossil Beds?

16 A Yes.

17 Q And would you describe very briefly for us just  
18 what it is -- the Florissant Fossil Beds are -- from a  
19 geologic, geographic and historical point without going  
20 into great detail?

21 A Do you mean the relationship to them?

22 Q Yes.

23 A The Florissant Beds of age thirty-four to thirty-eight  
24 million years ago are a key point in floristic history of  
25 the Rocky Mountain region from the plant point of view, as



1 well as from insect point of view, because first of all,  
2 they are the really, literally the only plant locality in  
3 the Rocky Mountains of this age.

4           The only other deposits are younger, and  
5 they are in Montana, and they are quite a bit poorer both in  
6 terms of diversity and in number of fossils.

7           So Florissant Fossils depict a point in time,  
8 in time halfway between the record Colorado oil shales  
9 when we had tropical flora in Colorado . . .

10           Q     When was that in approximate time?

11           A     Forty-two to forty-six million years ago when  
12 Colorado was definitely tropical, sub-tropical, and twenty-  
13 six million years ago when we had only a modern climate,  
14 and a relatively modern vegetation.

15           Florissant gives us this key record as an  
16 intermediate point in our fossil history. It shows us the  
17 first really warm temperate flora for Colorado and for the  
18 Rocky Mountain region.

19           Q     Now, can you tell us briefly how the Florissant  
20 Fossil Beds came about?

21           A     Through a unique series of geologic and tectonic  
22 events.

23           Q     What is a "tectonic event"?

24           A     A tectonic event is a land movement event, such as  
25 an earthquake or an up-warping of the land mass.

1 Briefly, the first development of the volcanic  
2 field west of the Florissant Fossil Beds, eighteen miles  
3 away at Guffey, Colorado, apparently occurred approximately  
4 thirty-eight million years ago. A lava stream and a  
5 Tufaceous deposit developed which flowed over the landscape  
6 filling valleys and blocking low points in the drainages.

7 Thirty-eight million years is the date on  
8 the dam which stoppered up the Florissant Basin and formed  
9 the lake.

10 Q How was this date determined?

11 A By potassium Argon isotope ratios.

12 The lake which was so formed, then filled  
13 with volcanic ash which emanated from the volcano at Guffey  
14 and near Guffey; the ash dropped into the lake, preserving  
15 a rather unique large array of plant fossils, insects, various  
16 types of animals, also micro organisms, microscopic plants,  
17 filling the lake with ash and preserving this record.

18 Q When you say "fill the lake with ash" how thick  
19 was this ash layer?

20 A The thickest deposit we know of, where Florissant  
21 formation is exposed is forty feet thick, approximately.

22 Over the top of this, then, flowed again a  
23 lava from the same volcano at Guffey covering the surface  
24 of the Florissant, then lake beds, which became protected by  
25 a lava flow dating at thirty-four million years of age.

1 The sequence since then has been one of erosion and regional  
2 uplift whereby the previously, probably lower Florissant site  
3 was uplifted approximately two or three thousand feet  
4 gently into the air.

5 Q All right. Now did this uplift based on the  
6 evidence you have personally observed, generally disturb  
7 the sequence, trapped between the two lava sequence, the  
8 ash sequence?

9 A This simply tended to crack the deposit at  
10 various points -- those shown in MacGinitie's publication.  
11 Though there are some crack lines that developed through  
12 the old lake deposits, these did not disturb the sequence.

13 Q Now, the period trapped in volcanic ash between  
14 these two lava flows, covered how long a period of time?

15 A Four million years.

16 Q And is there evidence of different period within  
17 that four million years that can be observed?

18 A In two ways, yes. First, there is the change in  
19 sediment type which occurs from the base through the top of  
20 the Florissant Lake Beds as far as we can observe them at  
21 various points at the basin.

22 For example, there are especially large ash  
23 flows with coarse pumicite balls which apparently fell into  
24 the lake and then there are very, very fine series of paper  
25 shales including many remains of plant leaves and other

1 remains.

2 Q What is a "paper shale"?

3 A The paper shale is a very fine grained clay derived  
4 from ash, which apparently is deposited so slowly that it is  
5 essentially finely laminated; when weathered slightly, these  
6 laminations, as the pages of the book can be split open, and  
7 you find plant remains lying in the plane of deposition.

8 Q I see. What is the resistance, if any, of these  
9 paper shales to weather?

10 A They are very intolerant to weathering. We have  
11 noted time and time again that after paper shales have been  
12 opened up at an excavation and laid out on the surface of  
13 the ground where they are exposed to the air, and/or even  
14 at the cut where you open the soil and then the cut is  
15 exposed to the sun and to the rain, when one re-visits the  
16 locality two weeks later, one finds the shales essentially  
17 become soft and brittle and are breaking apart in to component  
18 ash. The cut itself weathers just at the surface; not as  
19 deeply as those which are more disturbed.

20 In the period of, I would say, three months  
21 during the winter period, such excavations weather completely  
22 to powder.

23 Q I see. What happens to the fossil record as a  
24 result of this weather?

25 A Of course, it is obliterated at the particular

1 site.

2 Q Now, of what meaning in the paleontological sense  
3 is the order or sequence in which this material is uncovered?

4 A I didn't fully answer your previous reference to the  
5 sequence.

6 Well, first of all, in paleontology and geology  
7 we depend very greatly on the exact sequence of the appearance  
8 of fossils.

9 In fact, we use these to infer climatic change  
10 by noting the appearance of warm and then colder and then  
11 warm types.

12 We infer climatic oscillations from this kind  
13 of evidence, but also we use these changes for correlation.  
14 If you have such changes that you note in one section you can  
15 correlate by matching the other sections, and you use these  
16 for inferring time relationships.

17 Q I see. All right. Now, with reference to the map  
18 that has been designated Defendants' Exhibit A and with  
19 particular reference to the proposed excavation roadway and with  
20 particular reference to that portion of the roadway that lays  
21 in the section of the map marked in white as opposed to green,  
22 can you tell us whether any of that portion lies within or  
23 near -- withdraw that.

24 Can you tell us where that roadway lies with  
25 respect to the old Florissant lake bed?

1           A     I will have to answer that question by two kinds of  
2 observations.

3                     First, is the observation that at the point  
4 where this road contacts the county road to the north and  
5 immediately east of there at the road cut where the county  
6 road swings around the tree line, there is a rather --

7           Q     What do you mean by "tree line", Doctor?

8           A     Well, the area on Exhibit A, which is colored green,  
9 is designated by the Geological Survey Map as forest as  
10 taken from aerial photographs --

11          Q     All right.

12          A     -- on which the map is based. Okay. At this point,  
13 there is a rather wide outcropping of Florissant shales.

14                     I should add to this second observation that  
15 according to my geological excursions in the area and my  
16 collecting experience there, that it is almost invariably  
17 true that the upper limit of Florissant outcrop in the entire  
18 basin south of the Town of Florissant follows at and immediately  
19 below the lower line of trees.

20                     We have generally included then that when we  
21 are trying to determine the edge of the Florissant formation  
22 itself, we walk along the edges of the tree line. We make  
23 small pit excavations just at the tree line to determine if  
24 Florissant materials are there, and generally we have found,  
25 yes, it is indeed true that this relationship does indeed hold.

1 Q Now --

2 A Now, at this site, I would therefore extrapolate  
3 from the outcrop I have mentioned the intersection of the  
4 county road, that we would anticipate Florissant formation  
5 occurring along the tree line crossing their road just at  
6 that point, just below the tree line.

7 Q Now, Dr. Leopold, when you talk about the Florissant  
8 formation, you are talking about that deposition of ash that  
9 has occurred and which is now trapped between two volcanic  
10 rock layers; is that right?

11 A Well, in many spots in the basin, the overlying  
12 lava has been worn away by weathering and by time. There are  
13 really only a few sites where the overlying lava is well  
14 exposed.

15 Q During the course of your regular professional  
16 activities, have you had occasion to approximately estimate  
17 the size of the original Florissant lake?

18 A Yes.

19 Q All right. And do you want to tell approximately  
20 how large it was?

21 A Ten square miles.

22 Q All right.

23 A This is the total inferred area; probably was  
24 covered by water.

25 Q Now, this is the area in particular along the edges

1       thereof in which you would find these Florissant formations  
2       which contain the fossils in which you are interested; is  
3       that correct?

4             A     Yes, sir.

5             Q     Now, Doctor, have you systematically explored any  
6       sources from a paleontological point of view any portions of  
7       the Florissant Fossil Beds?

8             A     Yes.

9             Q     Now, what areas were you personally involved in the  
10      exploration of?

11            A     I worked along the north edge of the basin, along  
12      immediately north of the town of Florissant in some detail.

13            MR. JOHNSON: Excuse me, Doctor. May I ask in order  
14      that we preserve a record of this that perhaps whether we  
15      should take the red pencil and could indicate generally on  
16      the Defendants' Exhibit A where this is taking place?

17            THE WITNESS: May I step down?

18            THE COURT: You may.

19            (WHEREUPON, the witness left the witness stand.)

20            THE WITNESS: (Continuin) We have a number of key  
21      sections where we have done especially a number of good deal  
22      of work; one of them is immediately north of the Town of  
23      Florissant at this (indicating) intersection here (indicating).

24            MR. JOHNSON: Excuse me. If you would just put your  
25      initials, if that is all right with the Court?



1 THE COURT: Yes.

2 MR. JOHNSON: And with Mr. Yannacone's permission,  
3 put your initials in red at that point.

4 THE WITNESS: (Continuing) (Witness marking exhibit.)  
5 And at this (indicating) site here (indicating), which is a  
6 notable site in the entire Florissant formation, because it  
7 was noted by MacGinitie and collectors historically that this  
8 site contains the best preservation of any of the beds ever  
9 found at Florissant. It also is the site at which the extinct  
10 genus Fagopsis is most prevalent.

11 It is one that I am deeply concerned about in  
12 terms of your future plans for development since it falls  
13 within your defendants' property.

14 MR. JOHNSON: Excuse me, Doctor, and I don't mean  
15 to usurp your examination, and my apologies to the Court.

16 MR. YANNAZONE: That's all right.

17 MR. JOHNSON: I am interested in her placing her  
18 initials at each point where we are talking about these, so  
19 in my cross-examination I can refer to them.

20 BY MR. YANNAZONE:

21 Q You might give them a number, too, as you go around  
22 and in this way they can be referred to with some particularity.

23 A Shall I number them? Arbitrarily, because I don't  
24 remember our official numbers -- I am talking about the measured  
25 sections where we have actually done a good deal of excavation.

1 (Witness marking.) That's it.

2 Q You can sit down. Now, Doctor, during the course  
3 of your regular professional activities, have you had occasion  
4 to render opinions with respect to the probable location of  
5 Florissant formations?

6 A Yes, sir.

7 Q And were these projections and estimates acted upon  
8 by your department or agency?

9 A Yes.

10 Q And do you feel that with a reasonable degree of  
11 scientific certainty, you can from the existing knowledge  
12 already developed with respect to the Florissant formations  
13 predict with some reasonable scientific certainty the general  
14 location of the Florissant formations throughout the lake  
15 acreage?

16 A Yes, sir.

17 Q Doctor, are there sometimes topographical or physical  
18 characteristics which keynote the probable existence of  
19 Florissant shales?

20 A Yes. First, the elevation --

21 Q Yes. First -- all right. Now, do these appear  
22 readily discernible to casual inspection?

23 A Well, they are easy to see.

24 Q All right. Will you describe what these criteria  
25 are?

1           A     They are easy to see after you have worked in the  
2 basin and know what to look for.

3                     First, there is an elevational conformity  
4 of Florissant formation over the basin, it is higher --  
5 generally at some points rather than others but roughly  
6 speaking, there is a topographic control, if you will, of  
7 its upper limit.

8                     Second, one can spot the volcanic ash distri-  
9 bution in part because trees don't like to grow in it; it is  
10 marked in the white tree line area of the U. S. Geologic Survey  
11 Map.

12                    Third, of course, there is the obvious site in-  
13 spection where you can see an outcrop. However, there are many  
14 sites including the area we are talking about immediately west  
15 of the proposed road. We are talking about where the Florissant  
16 formation is covered with a surface soil and cannot be spotted  
17 immediately without looking into the gulch to see where the  
18 Florissant formation particles are weathering out and coming down  
19 into the stream; in other words, it's inspection of areas such  
20 as that which are covered with topsoil, where one needs to look  
21 for sub-surface exposures that will be expected to be present.

22           Q     Now, Doctor, can you tell us or can you state with  
23 a reasonable degree of professional paleontological certainty  
24 that you most probably will not find Florissant formations in  
25 the areas designated green on that map?

1 A Generally, yes.

2 Q Now, what about the area of the interface between  
3 the edge of the green and the beginning of the portion desig-  
4 nated in white?

5 A I would say that at and just below the tree line,  
6 is the characteristic place of appearance of Florissant  
7 formation throughout the basin.

8 Q All right. Now, Doctor, with specific reference  
9 to the areas denominated 5, 6, 9, 7, and 8 on the map, these  
10 questions I am going to ask you now are specifically directed  
11 to those areas.

12 Doctor, in the course of your regular pro-  
13 fessional activity, have you performed paleontological work  
14 in those areas?

15 A Yes.

16 Q And have you made any determination of the presence  
17 or the existence of the Florissant formation?

18 A Yes, these are all collecting sites at and just  
19 below tree line.

20 Q How would you characterize them from a paleontological  
21 point of view as collecting sites?

22 A They range from excellent to wonderful.

23 Q Now, with respect to the characteristics of 8, 7,  
24 5, 9, and 6, can we infer from your location of these numbers  
25 that these excavations occurred at the interface between the

1 white and the green area?

2 A Yes.

3 Q Now --

4 A At and just below.

5 Q Now, when you say "just below" --

6 A Slightly under the white area from the lower limit  
7 of green.

8 Q And this in terms of altitude also means lower?

9 A Yes.

10 Q Can you reasonably assume or can you assume with a  
11 reasonable degree of professional paleontological certainty  
12 that the areas marked solidly green to the east of the red  
13 dotted line on this map, would most probably not contain any  
14 Florissant formation?

15 A I can assure you that they probably will not.

16 Q Now, within this red inked portion at the southeast  
17 portion of the tract, the solid contiguous tract indicated by  
18 Mr. Wofford, can you tell us or will you indicate with a new  
19 number, again, say, with "20" or "30", can you indicate the  
20 areas most likely to contain Florissant formations?

21 A They will be at and immediately below the green area.

22 Q Would you identify them, starting with number "30"?

23 A Sir, they will represent a swath along this (indicating  
24 line we are talking about here (indicating)).

25 Q All right. Would you mark that with a red pen as a

1 line?

2 (Witness left witness stand to mark exhibit.)

3 A It may go back up this way, too (indicating).

4 Q All right. Now, Doctor, you have indicated by this  
5 (indicating) red line which follows roughly slightly to the  
6 west of the border of the green marked area on the map, that  
7 the proposed road by the defendants will cut the red line at  
8 two points; is that correct?

9 A Yes, sir.

10 Q All right. Now, at the point in which the road  
11 cuts the red line, it appears that there is some change in  
12 elevation and the area proceeds to get higher from the white  
13 areas; is that correct?

14 A Yes.

15 Q Now, is it along this change of altitude that you  
16 find the areas that are paleontologically existing to you?

17 A Yes. The Great Creek and the immediate environs;  
18 yes.

19 Q Is this true of the areas within the boundaries of  
20 the land indicated by the defendants to be theirs at the present  
21 time which is the red line, along as I am outlining it,  
22 following the defendants' own red --

23 A The answer is yes.

24 Q All right. Now, can you tell us with a reasonable  
25 degree of professional paleontological certainty, how much, if

1 any, physical disturbance of the Florissant formation will occur  
2 at the point where the roads, the proposed roads, intersect your  
3 red line, the formation being tolerant from a paleontological  
4 point of view?

5 A Two points. First, the immediate area of the road  
6 will completely destroy the fossil beds locally since it will be  
7 a permanent road and it will excavate the area, a swath of the  
8 immediate width thirty-two feet.

9 Second, I think the scenic integrity of the  
10 park would be affected for roads which the Park Service did  
11 not intend to have.

12 Q We are interested, Doctor, only in your paleontologi-  
13 cal opinion as to what effect, if any, the Florissant, being  
14 the fossil beds, can tolerate at this point and still maintain  
15 its paleontological integrity?

16 A Well, the excavation will presumably go at least  
17 six inches to twelve inches in depth.

18 Q The testimony was twelve inches.

19 A The Florissant which usually outcrops just at that  
20 point along the lower limit of trees will be effected in two  
21 ways.

22 First, the actual excavation undoubtedly  
23 will contact some of the formation at each edge and the middle  
24 of the road and, second, the weathering, which will ensue  
25 after that area has been cut with the bulldozer, removing

1 the protective soil there, but the tolerance level is zero in  
2 terms of any time lasting longer than three months for such  
3 excavated and exposed materials.

4 Q In other words, then, Doctor, is the top layer of  
5 this Florissant formation as valuable to you as to the next  
6 ones down?

7 A Yes. And certainly the protective soil is what is  
8 keeping the beds in good preservational condition now and for  
9 the past millions of years.

10 Q Now, is there any evidence that you can point to  
11 within the area of the Florissant Fossil Beds where the  
12 removal of the topsoil covering or the protective covering  
13 has caused paleontological damage to the area?

14 A Yes; at any number of the collecting sites where people  
15 have moved in, excavated and removed soil, we can see over a  
16 period of years the resulting damage. I can cite you quite a  
17 number of instances.

18 Q What kind of damage is observed?

19 A Well, first, when the immediate topsoil is removed,  
20 weathering occurs from the top at the surface.

21 Second, at faces which are developed by casual  
22 fossil digging which was done carelessly and where the excavated  
23 face left open to the weather, the rock rots, like I say, over  
24 a relatively short period of time.

25 Q Now, to the best of your professional information and



1 your own personal investigations, has this been true of ex-  
2 posures of these formations throughout the area of the lake,  
3 the fossil lake?

4 A We are talking about points where popular digging  
5 has uncovered Florissant formation and the resulting weathering  
6 is notable at many of these. I hope I am answering your  
7 question.

8 Q In other words, then, Doctor, can you tell us with  
9 a reasonable degree of scientific certainty whether simple  
10 exposure of the formation will cause paleontological damage?

11 A Yes, indeed.

12 Q Now, is it possible with reasonable paleontological  
13 repair, to repair this damage once this damage has occurred?

14 A The fossils which, after having once been exposed  
15 to weather in the field, completely disintegrate.

16 Q All right. Now, Doctor, are there any examples in  
17 the Florissant Fossil Beds that you know of where only one  
18 single representative of a given species has been found?

19 A Yes.

20 Q And is the finding of a single representative of a  
21 particular species have any paleontological, paleobotanical  
22 and palynological significance?

23 A What you may be thinking of is the finding of a fossil  
24 palm leaf near the site number 8, in the eastern part of the  
25 basin. This indeed was the only palm find in the one

1 hundred years of collecting at the Florissant formation  
2 by the number of paleontologists, all of whom are listed  
3 in "Who's Who". For ninety years nobody has found a  
4 palm in the Florissant Valley until about 1966. This  
5 particular collection aids our understanding of the flora  
6 significantly.

7 Q If that fossil palm had not been found or it had  
8 been destroyed, would this have any effect on the paleontolo-  
9 gical information available from the region?

10 A Yes, sir. In the Florissant flora which is comprised  
11 of about 114 higher plant species, only two sub-tropical or  
12 quasi sub-tropical plants are found.

13 The third one is this palm. With its  
14 discovery, we understand that the climate was indeed  
15 essentially a frost-free sub-tropical climate.

16 This simply confirms our suspicion based  
17 on two previous species found by MacGinitie; I think this  
18 specimen amplifies our understanding of the flora.

19 Q Has the distribution of fossil flora and insect  
20 and faunal remains been uniform throughout the area of the  
21 Florissant formation?

22 A No.

23 Q Are there particular areas that apparently lead to  
24 finding particular species?

25 A Yes.

1 Q Doctor, can you tell us with a reasonable degree of  
2 scientific certainty and professionally, paleontological  
3 certainty, whether or not we can assume that not all the  
4 individual species groupings have been discovered yet within  
5 the Florissant lake bed?

6 A Oh, yes, because in the last -- I would say the last  
7 thirteen years while I have been working there, we have  
8 managed to uncover something on the order of fifteen new  
9 Florissant genera and species and not to mention families.

10 Q For the benefit of those not familiar, would you  
11 please explain the species.

12 A Well, let's start with species like Homo sapiens;  
13 among would-be hominoid types, "Homo" would be a genus or  
14 grouping; among the plants the genus pine and the genus  
15 spruce might be analagous as genera groups. Examples  
16 of families might be the Pinaceae (pine family) or the  
17 Hominoidea for groupings of hominoids.

18 Q Doctor, have the new findings tended to be uniformly  
19 distributed throughout the Florissant formation or were they  
20 concentrated?

21 A No, the new finds are at thirteen localities.

22 Q All right. Has the entire Florissant formation been  
23 paleontologically investigated so that a determination can be  
24 made at this time as to the various representative examples  
25 of concentrations of different groups in the beds?

1           A     On the basis of what we have just discussed, the  
2 answer is a good deal is to be done, obviously. No, I would  
3 say there is a good deal more to be done.

4           Q     Now, Doctor, can you give us an opinion, with a  
5 reasonable degree of professional paleontological certainty,  
6 whether or not the excavation, even to a depth of twelve  
7 inches of a road at two points through the area you have  
8 marked in red to the east of the sites you have designated  
9 5, 7, and 9, can cause irreparable damage to the --

10           MR. JOHNSON: Your Honor, I would object to the use  
11 of the word "irreparable".

12           THE COURT: Just a minute. He hasn't finished his  
13 question, Mr. Johnson.

14           BY MR. YANNACONE:

15           Q     -- can cause damage to the paleontological resource  
16 of the Florissant formation?

17           A     Yes, I think the --

18           Q     Now, you just can't give us an opinion. All right.  
19 Can you give us an opinion with a reasonable degree, profes-  
20 sional paleontological certainty as to whether or not, if I  
21 say, paleontological or scientific point of view that damage,  
22 if any, is irreparable or not?

23           A     At the immediate site --

24           Q     Well, can you give us an opinion.

25           A     My opinion is --

1 Q No; can you give us an opinion?

2 A Yes.

3 Q Now, Doctor, can you give us an opinion with a  
4 reasonable degree of professional paleontological certainty  
5 as to whether or not the damage, if any, that might occur  
6 from the exposure by a dig of even twelve inches into the  
7 Florissant formation at the site of the two proposed road  
8 excavations, whether or not this damage, if any, can be re-  
9 paid in the sense known to modern technology. Just answer  
10 yes or no.

11 A No.

12 Q Not whether it can; can you give us an opinion?

13 A I can give you an opinion.

14 Q Now, Doctor, would you please give us your opinion  
15 in your own words as to whether or not there will be damage  
16 to the paleontological values represented by the Florissant  
17 formations in the area where the proposed road intersects  
18 your red line?

19 A The opinion would be based upon two points. One,  
20 the assumption that Florissant would outcrop along this  
21 (indicating) line of trees under a cover of soil of not ex-  
22 ceeding twelve inches.

23 My opinion of that is, it is at least probable,  
24 based on my experience elsewhere in the southern part of the  
25 basin, that indeed that outcrop would be likely less than

1 twelve inches in depth.

2 The second point --

3 THE COURT: So I can follow your testimony --

4 THE WITNESS: Yes, sir.

5 THE COURT: What is the width of the area of des-  
6 truction? You have a line near the intersection of the  
7 tree line and the non-tree line; what is the width of that?

8 THE WITNESS: It depends, sir, on the slope.

9 THE COURT: Well, approximately?

10 THE WITNESS: On a gentle slope, such as immediately  
11 north of that area, I would say that line of exposure is  
12 stretched out over a swath of about forty to fifty feet.

13 THE COURT: And then what we are talking about on  
14 damage in the construction of the road is a piece of ground  
15 some forty or fifty feet in length, some thirty to forty feet  
16 in width, which is the width of the highway, and about twelve  
17 inches deep?

18 THE WITNESS: At two points where that road will cross  
19 that line?

20 THE COURT: Yes.

21 THE WITNESS: Yes, sir.

22 THE COURT: That is what we are talking about?

23 THE WITNESS: Yes, it is.

24 THE COURT: Very well. You may proceed.

25 A (Continuing) The second point which I was about to

1 make was that that area which is immediately covered by the  
2 road to two points will be covered by the road and unavailable  
3 for further investigation.

4 Q All right. Doctor, now to expand on the judge's  
5 question, what, if any, is the paleontological significance  
6 of removing from circulation or destroying a patch of  
7 Florissant formation roughly twenty-eight to thirty-two feet  
8 in width by approximately as much as forty feet over a  
9 vertical slope at two points?

10 A At two points. I would say, sir, it is not  
11 possible to estimate at this time what exactly would be lost  
12 until the area is actually studied in paleontological detail.

13 Q All right. Now, Doctor, would you tell us, if you  
14 can, how long it would take you or whoever else does this  
15 type of work, in the regular course of your regular course of  
16 paleontological work, to preliminarily determine:

17 (1) The extent of the existence of the  
18 Florissant formation at these two sites; and

19 (2) The relative density of fossil speciation  
20 in the area at these (indicating) two sites?

21 A Well, I think probably over a period of ten days,  
22 such a study could be made by members of our group.

23 Q And at the end of that study and at the end of those  
24 ten days, what with a reasonable degree of paleontological  
25 certainty could you tell us?

1           A     I could tell you (a) the depth of the Florissant  
2 formation at its upper interface along the line in question  
3 where the road placement will be;

4                     Second, we can tell you the approximate  
5 abundance and nature of plant fossils in these beds.

6           Q     And from this information, can you also tell us  
7 the relative value of that particular formation; vis-a-vis  
8 of other formation within the lake bed?

9           A     A full evaluation of that, sir, would take a much  
10 longer time.

11          Q     Now, you can, however, from a simple cursory  
12 inspection of this map identify a number of areas where it is  
13 reasonable to assume with reasonable professional paleontolo-  
14 gical certainty that no damage can be done to the Florissant  
15 formations?

16          A     Yes.

17          Q     Is that correct?

18          A     Yes.

19          Q     All right. And you have indicated that those are  
20 the areas that are generally colored green somewhat to the  
21 upland side of the interface between the green and the white;  
22 is that correct?

23          A     Yes.

24          MR. YANNABONE: I have no further questions.

25          THE COURT: Just a moment, Doctor. Maybe Mr. Johnson



1 has some questions.

2 CROSS-EXAMINATION

3 BY MR. JOHNSON:

4 Q Doctor Leopold, am I correct in assuming that you  
5 have lived in Denver and in the State of Colorado for the  
6 last thirteen years?

7 A Yes, sir.

8 Q Your familiarity with the Florissant area commenced  
9 about thirteen years ago?

10 A Roughly.

11 Q And have you written any articles or scientific  
12 papers about this area?

13 A Yes, sir. I have published about twenty-seven  
14 articles and papers and contributed chapters to each of two  
15 textbooks, and I would say that the work which most strongly  
16 deals with the evaluation of the Florissant flora was that  
17 that was published in -- well, a year ago in 1968.

18 Q And then would it be fair to say that the information  
19 you have gathered from exploring this area and the articles  
20 that you have written have been distributed generally to  
21 other paleontologists and botanists?

22 A Yes, these are journals and international publica-  
23 tions.

24 Q They also go to various foundations that are inter-  
25 cted in those sort of programs, too, and receive general

1 distribution among the industry; would this be fair to say?

2 A Yes.

3 Q So they are familiar with the efforts that you have  
4 made over the past thirteen years in exploring this area;  
5 correct?

6 A They are generally familiar with my conclusions  
7 concerning my own and other people's work at Florissant, yes.

8 Q Now, I assume, Doctor, that your conclusions are  
9 that this is an extremely valuable area and that the fossils  
10 contained in this area are extremely valuable and historically,  
11 otherwise?

12 A Yes.

13 Q You have conveyed that opinion through means of the  
14 publications?

15 A Yes.

16 Q Are you familiar at all with paragraph 8 of the  
17 Complaint involved in this action?

18 A No. I would have to see the paragraph, sir.

19 Q Well, it is rather lengthy. It is ten or twelve  
20 pages long. Have you read this Complaint at all?

21 A Yes, once.

22 Q Once prior to its being filed?

23 A After it was filed, I believe. Well, I think the  
24 officially typed version was not given to me until after it  
25 was filed.

1 Q But you have read what you believe to be the Complaint  
2 that was filed in this action?

3 A Yes.

4 Q And paragraph 5 deals with the proposed Florissant  
5 Fossil Beds' National Monument, and you would have read that,  
6 that's the part that talks about the geology and the paleontology  
7 and botanical aspects of this?

8 A Right.

9 Q And this would have been in your line of work, and  
10 you would have been interested in reading this, I assume?

11 A Very.

12 Q Did any of this contain information that you  
13 furnished or is this from other sources?

14 A I am available for discussion to anyone on the  
15 question of our paleontological sites, and I will answer questions  
16 to any of this.

17 Q Let's try to answer this one specific question.

18 In paragraph 5, was any of the information, as  
19 you best recall, any of the information you furnished?

20 A I would like to see the information.

21 Q Just if you remember, if you can recall anything;  
22 I am just dealing in generalities.

23 MR. YAMMOSON: We are going to object. If she  
24 wants to see the paragraph, let her see it.

25 MR. LARR: Well --

1 THE COURT: Just a moment, Mr. Lamm. We have one  
2 lawyer at a time.

3 THE WITNESS: Well --

4 THE COURT: Just a minute. Let me ask you, Mr.  
5 Johnson: That if these witnesses would testify as to the  
6 allegations of fact contained in paragraph 5; now what is your  
7 purpose of the examination of Mrs. Leopold in this respect?

8 MR. JOHNSON: Well, I am specifically interested,  
9 Your Honor, in knowing if she furnished any of this information.

10 THE COURT: I am not interested for this hearing.

11 MR. JOHNSON: All right, sir.

12 BY MR. JOHNSON:

13 Q Doctor Leopold, I am reading the paragraph on page 8  
14 from the 5th paragraph of the Complaint and merely ask if you  
15 agree with this conclusion:

16 "The beds have been a famous collecting  
17 ground by numerous scientists for nearly a century  
18 and continue to be of great value for paleontologi-  
19 cal research."

20 A Yes, I am familiar with that.

21 Q And would you be in agreement with that?

22 A I would be in agreement.

23 Q For at least the last one hundred years scientists  
24 have known of this area and the value that they had from the  
25 paleontological research --

1 A Since 1874, sir.

2 Q Since 1874. Now, on page 14 a similar statement  
3 appears about the 100-year period or the century involved and  
4 further states:

5 "Probably no formation of such limited  
6 extent has ever been the subject of as large a  
7 body of literature as the Florissant lake beds  
8 (268)."

9 And would you agree with that?

10 A Yes, sir, it is talking about the site as a small  
11 locality which has provided the subject of so many disserta-  
12 tions.

13 Q This locality, again, is approximately ten-square  
14 miles; is that correct?

15 A We are talking about that part which is preserved  
16 from an original ten-square miles.

17 Q Yes. And it's a relatively small area, but it has  
18 received rather exhaustive treatment in papers and literature;  
19 is that correct?

20 A Yes.

21 Q Would it be fair to say any number of scientists have  
22 explored through this area?

23 A A very large number, graduate students and professors  
24 are there each summer.

25 Q A very large number. Now, on page 12 of paragraph 5

1 of the Complaint, discusses the approximate thickness of the  
2 fossil beds and it says:

3 "The richest fossiliferous beds, which are above  
4 the floor deposits, are approximately 20 feet  
5 thick. Fossil leaves, seeds, and insects are  
6 most abundant and best preserved in paper-thin  
7 shales of this member."

8 Would you agree with that statement?

9 A Yes.

10 Q Would it be generally a fair statement to say that  
11 within the area which you have discussed from the map,  
12 Defendant's Exhibit A, that fossils exist to a depth of 20  
13 feet?

14 A Would you state that question again.

15 Q Below the surface of the ground, could you find  
16 fossils to a depth of 20 feet in the area generally that  
17 you have shown on the map?

18 A I would say if you are talking about this  
19 (indicating) line, yes.

20 Q Now --

21 A It is at least probable.

22 Q You don't want to leave me with the impression  
23 that all the fossils are two to three inches below the  
24 earth's surface and that's all?

25 THE COURT: No, no, Mr. Johnson. She hasn't so

1 testified. She says that there are some specimens that are  
2 in this thin ash layer, as I understand it, these are near  
3 the surface, and they may be found within twelve inches of  
4 the surface.

5 THE WITNESS: They may be.

6 THE COURT: May be.

7 THE WITNESS: Yes.

8 THE COURT: That's right.

9 BY MR. JOHNSON:

10 Q But you can also find fossils that are valuable to  
11 you being a paleontologist downward to a depth of twenty  
12 feet; is that correct?

13 A At least.

14 Q Specifically referring your attention, Doctor, to  
15 Defendant's Exhibit A, the map: You have shown various  
16 markings, and I believe you have said that these are areas  
17 that you have personally investigated; is this correct?

18 A Yes.

19 Q And would that be approximately ten, that's the  
20 last number I observed?

21 A About ten localities that we marked here, yes.

22 Q So you have observed a total of ten different  
23 localities?

24 A No. I have observed a good number of more. I  
25 have indicated these are the ones we have particularly

1 studied.

2 Q Particularly studied, but you have observed many  
3 others in the same area?

4 A Many others, yes.

5 Q I take it you have not particularly observed the  
6 area in which the proposed road is to be cut?

7 A Only the lower edge of your road at the county  
8 road intersects with it and along that road cut immediately  
9 northeast of your road.

10 Q Now, you have examined this area, the intersection  
11 of the proposed road, the Twin Rocks Road; is this correct?

12 A Yes.

13 Q And this is a field, is it not?

14 A I am talking about the -- the point I am talking  
15 about, sir, is the road cut where the county road swings  
16 around that bend and moves off to the northeast.

17 I have also observed that indeed, that is an  
18 open meadow, the area that is colored white.

19 Q Doctor, I wonder --

20 A To answer your question directly, I have not  
21 collected directly in your area at the road site.

22 Q I am going to put an "X" here on this (indicating)  
23 portion of the map, and this (indicating) is the area I am  
24 referring to, the rocks interface, that Twin Rocks Road, and  
25 that (indicating) is a field, is it not?



1 A It is an open meadow.

2 Q It is an open meadow? And there are no trees any-  
3 where close, isn't this true?

4 A At the intersection, that's right.

5 Q At that intersection. And that same situation is  
6 true for quite a distance through there, is it not, running  
7 in a general southeasterly direction?

8 A We could measure that exactly on the map but for  
9 the distance involved there, I suppose, it might be a third  
10 or a quarter of a mile.

11 Q A quarter of a mile?

12 A From the county road.

13 Q And there are no trees in that area at all?

14 A No.

15 Q And there are ditches cut through that area, isn't  
16 that correct?

17 A That's according to what you have told us, sir.

18 Q Have you observed those?

19 A I have not observed the ditches themselves.

20 Q Do you know how many years Twin Rocks Road has been  
21 in this area, Lower Twin Rocks Road?

22 A I only know it was reported in a publication, 1953,  
23 by MacGinitie, and it appeared on the 1957 Geological Survey  
24 Map.

25 Q Now, I believe it is your testimony, Doctor, that

1 you find the fossils -- you wouldn't find the fossils in the  
2 green areas, but you would find them at the tree lines,  
3 generally, approaching into the white areas?

4 A Yes.

5 Q Is this correct?

6 A Yes.

7 Q And you have indicated, as I understand the map  
8 here, there are two areas where the proposed roads would  
9 cross a red line, and this is the area where you think there  
10 would be fossil disturbance.

11 A Yes.

12 Q Is this correct?

13 A Yes.

14 Q And it is at these (indicating) two points just  
15 after the road begins to fork?

16 A At and below that point, yes.

17 Q And below that point?

18 A Yes.

19 Q How far below?

20 A Well, if I were in the field looking for the  
21 deposits, I would study an area of about forty or fifty feet  
22 extending from tree line towards the meadow?

23 Q Towards the meadow, and how far out from the tree  
24 line?

25 A To say forty or fifty feet to start with.

1 Q And that would be the area you think would be  
subject to possible damage of the fossils?

2 A Yes.

3 Q And from your familiarity with this map --

4 THE COURT: Just a minute, Mr. Johnson.

5 Doctor, you answered some of the questions by a nod of your  
6 head, and the reporter has to hear your verbal answer, if  
7 you will.

8 THE WITNESS: Thank you, sir.

9 BY MR. JOHNSON:

10 Q Doctor, what size of an area would we be talking  
11 about in terms of acreage that you are concerned with,  
12 where the road forks and where the red line crosses?

13 A I think -- it does not need to be expressed in  
14 terms of acreage since we have spoken about a definite  
15 dimension. You have spoken about the width of the proposed  
16 road, and we are probably talking about a width of five  
17 feet at and below the tree line at two points, we can  
18 multiply that out and come out with a square footage.

19 Q Could you give me just a general estimate of what  
20 area we are talking about?

21 THE COURT: Well, we will do the arithmetic.

22 MR. JOHNSON: I beg your pardon?

23 THE COURT: Fifty feet by thirty or thirty-  
24 five feet, whatever your width is going to be, the Court  
25

1 can do it.

2 BY MR. JOHNSON:

3 Q Doctor, I believe you testified that the general  
4 area of the fossil bed is about an area of ten square miles?

5 A Yes.

6 Q Some ten square miles?

7 A Well, as I say, the old lake bed extended over that,  
8 there are only remnants of the old lake bed that are left,  
9 yes.

10 Q And I believe you said the land lying at points  
11 six, seven, eight, you find it wonderful to excellent fossils  
12 through that area? Is that correct?

13 A Correct?

14 Q Now, you don't know, as a matter of fact, what you  
15 would find at and along the proposed roadway and in particular  
16 where it intersects the red line, do you?

17 A We don't know because we haven't looked there, sir,  
18 but we anticipate from the cross-section, composite section  
19 of the formation that one can encounter beds of paper shale  
20 at any point throughout the, where it has been sequenced,  
21 and in that composite section you refer to, those lake beds  
22 appear at several points through the composite section. We  
23 can assume that there is really a very reasonably good  
24 probability that we would encounter paper shales along this  
25 red line on the Exhibit A.

1 Q Yes. There have been any number of previous  
2 excavations throughout this general area that we are con-  
3 cerned with, and that you have indicated, have there not?

4 A Do you mean historical collecting sites?

5 Q Well, excavations of roads, cut through, private  
6 roads, public roads, excavation for houses; all of these  
7 things?

8 A That's true.

9 Q All through this (indicating) general area that we  
10 are talking about on this map, isn't this true?

11 A That's true. It depends exactly -- well, for  
12 example, there is a cut where the county road which you have  
13 been talking about as Lower Twin Rocks Road leaves the  
14 meadow that you have been talking about and moves off to the  
15 northeast, that is an immediate locale disturbance of the  
16 Florissant formation.

17 How many other cuts in your immediate area,  
18 I do not know. I wanted to add here, however, with respect  
19 to the record, that neither the Geological Survey Topographic  
20 Map nor the Park Service Map shows a lot of little roads  
21 and trails show, any evidence of a road that you mention as  
22 an existing roadway along your property at the lower part of  
23 the tract.

24 Q Lower part of what tract?

25 A The lower part of the Gregg Tract. You mentioned

1 previously there was a roadway on the north.

2 Q Yes. Have you attempted to drive that area?

3 A I am referring to those. No, I am simply saying  
4 that the evidence from existing maps do not indicate evidence  
5 of that road.

6 Q Would it be a fair statement to say that generally  
7 speaking the type of fossils which you find throughout this  
8 area which is generally referred to as Florissant Fossil Bed  
9 Area would be the same or similar?

10 A The first part of that question, again, sir, was --

11 Q Well, would it be fair to say that the fossils that  
12 you would find within the area generally known as a Florissant  
13 Fossil Bed Area would be the same or similar fossils?

14 A No. I think the point we were making earlier is  
15 that when one moves from one site to another, there are  
16 rather clear-cut differences in the fossil assembly.

17 Q Well, you have spoken about one of the species, I  
18 believe you said, the palm. Can you give me any other  
19 example where you found only one other species in this  
20 particular area?

21 A Well, there are quite a number of forms that I  
22 referred to earlier as unique collections which have just  
23 showed up over the past five or six years in which there is  
24 only one specimen ever has been found.

25 Q Can you give me the name of any of these?

1           A     Well, one is probably a Ribes, a gooseberry. Certain  
2 others, we have not been able to identify at all, Dr. H. D.  
3 MacGinitie, a Paleobotanist from the Museum of Paleon-  
4 tology at Berkeley, California, University of California,  
5 feels that indeed these are new findings of Florissant flora,  
6 and they are so far unidentified. They are represented by  
7 single specimens.

8           Q     Doctor, were you here at the hearing on I believe  
9 the ninth of July?

10          A     Yes, sir.

11          Q     Did you participate generally in a discussion with  
12 one of the people at counsel table as to this road?

13          A     Yes.

14          Q     Were you shown at about that time on the ninth of  
15 July where the proposed road bed would be?

16          A     It was pointed out.

17               MR. YANNACONE: I am going to object to that  
18 as to what took place as to that off-the-record discussion,  
19 as there is some dispute. My notes reflect from that debate  
20 a lot of difference to the map we see here today.

21               THE COURT: Why am I interested, Mr. Johnson?

22               MR. JOHNSON: I merely wanted to ask Dr. Leopold  
23 if she has been out looking at this. In ten days she  
24 could probably get a pretty good start on the examination  
25 of these things.

1 THE COURT: Ask her if she has been out there  
2 and looked in the last ten days.

3 BY MR. JOHNSON:

4 Q Dr. Leopold, have you been out at the site and  
5 looked during the past ten days?

6 A Which area?

7 Q The area where the proposed road lies?

8 A The area, where we discussed after the court  
9 session was pointed out as being, pointed out by finger --

10 THE COURT: Doctor, the question is: In the  
11 last ten days have you been out to look at the road location?

12 THE WITNESS: Which road location? In order  
13 to answer that question fairly, I need to make a distinction  
14 between where I thought they were going to put the road --

15 THE COURT: You went out there, but you are  
16 not sure what you saw, is where the road location is going  
17 to be; is that your statement; is that the point you are  
18 making?

19 THE WITNESS: I have not been out there for  
20 the last fourteen days. To answer the question directly,  
21 I have not been in that immediate road site shown on this  
22 Exhibit A. I have explored extensively in the past the area  
23 immediately north of it and immediately west.

24 BY MR. JOHNSON:

25 Q Doctor, are you familiar with the proposed present



1 boundaries of the Florissant Fossil Beds?

2 A Yes, sir.

3 Q Do they extend north of the Town of Florissant?

4 A North to the Town of Florissant.

5 Q North of the Town of Florissant?

6 A No.

7 Q Now, do they extend west of the Town of Florissant?

8 A That's a little southwest; yes, sir.

9 Q A little southwest. That's Florissant I am pointing  
10 to here (indicating) on the map. Approximately how far west  
11 of Florissant do the present proposed boundaries go?

12 A Two-thirds of a mile.

13 Q Two-thirds of a mile?

14 A Southwest of the Town of Florissant.

15 Q Would the proposed boundaries go north of Highway  
16 24?

17 A Not as now proposed.

18 Q I beg your pardon.

19 A Not as now proposed.

20 Q Not as now proposed.

21 MR. YANNACONE: Your Honor, just to clarify  
22 the record, the map I am looking at is Highway 24, the one  
23 that is designated Upper Twin Rock.

24 THE WITNESS: No, it is the highway east-west,  
25 east-west highway passing through the Town of Florissant,

1 Colorado.

2 MR. YANNACONE: Is that marked red and white  
3 alternately on the map?

4 MR. JOHNSON: This (indicating).

5 MR. YANNACONE: Thank you.

6 MR. JOHNSON: This (indicating) running through  
7 Crystal on up to Lake George.

8 BY MR. JOHNSON:

9 Q Now, would any of the proposed monument lie north  
10 of Highway 24?

11 A Not as presently proposed in the current legisla-  
12 tion.

13 Q Then the current, even the current legislation for  
14 a proposed monument would leave out some fossil area that you  
15 have personally examined and are familiar with.

16 A Yes.

17 Q So there is no attempt even in the current legis-  
18 lation to include within the boundaries of the proposed  
19 monument all of the fossil beds?

20 A No, sir. You will find in the Congressional Record  
21 of May 29 when the Senate Interior Committee met here in  
22 Colorado Springs for some considerable discussions on the  
23 matter of Dr. H. D. MacGinitie of the University of Colorado  
24 and Senators Allott and Dominick concerning the need for  
25 a larger monument extending it towards the north and etc.

1 is Dr. MacGinitie's conclusion that we read in this record  
2 that he indeed feels that at a later date when legislation  
3 can be expanded, that the monument ought to include some  
4 critical sites at the numbered points, as a matter of fact,  
5 that I have put on the map here.

6 Q Doctor, are you reasonably familiar with the  
7 efforts on behalf of the Park Service and the Department of  
8 the Interior to create a national monument at this point?

9 A Yes, sir.

10 Q Are you familiar that these efforts have continued  
11 at least since 1952?

12 MR. YANNACONE: I am going to object on the  
13 grounds of relevance. This witness is a technical witness  
14 on paleontology; not on Congressional inaction.

15 THE COURT: Well, if she knows, she may  
16 answer. If she doesn't --

17 A I am aware of it, sir, yes.

18 BY MR. JOHNSON:

19 Q And the United States Park Service became inter-  
20 ested in this at least as early as 1952, isn't this correct?

21 A Well, since I have not been in Colorado during  
22 those years, I only know of their work in the area, toward  
23 designing a monument since 1955; 1957, in fact.

24 Q You are at least familiar with the efforts along  
25 these lines that go as far back as 1907, are you?

1 A Yes, sir.

2 Q And are you familiar with the action and proposed  
3 action that has taken place in Congress since 1964?

4 A Yes.

5 Q And there is currently action pending in this same  
6 direction at this point, is this correct?

7 A Yes.

8 (Defense Council confers.)

9 MR. JOHNSON: I have nothing further.

10 REDIRECT EXAMINATION

11 BY MR. YANNACONE:

12 Q Just to clarify a few points, Doctor. The fossils  
13 to be found are different, are they not, at different depths?  
14 In other words, would the Florissant --

15 THE COURT: That is repetitious. She has  
16 already testified to it, Mr. Yannacone.

17 BY MR. YANNACONE:

18 Q Doctor, in the past fourteen days, you did visit  
19 the general southeasterly fossil beds, did you not?

20 A Yes.

21 Q And did you examine any specific areas in which  
22 you thought the defendants' proposed road might go?

23 A Yes, I drove over through the area on the western  
24 side of Lower Twin Rocks Road where I had generally under-  
25 stood the Central Enterprises proposed road would be.

1 Q And you did sufficient preliminary investigation  
2 to come to court today, if that was the site of the road  
3 with specific paleontological information, didn't you?

4 A I visited many times before, yes.

5 Q Well, Doctor, was today the first day you had  
6 actually seen this route for the road?

7 A Yes. Last night I made some calls to Florissant  
8 to ask the whereabouts of the conduit pipes which Central  
9 Enterprises had planned and did haul out to the road bed.

10 When I determined it, I phoned where these  
11 conduits were lying, I then understood that my previous  
12 understanding of the road position was different than  
13 apparently the planned one, and then today I see for the  
14 first time the planned route on this exhibit.

15 Q All right. Now, Doctor, just so we don't leave  
16 the hearing this morning with the impression that the only  
17 danger is that this particular road cut, can you --

18 THE COURT: Well, let's not submit the  
19 statements, Mr. Yannacone.

20 MR. YANNACONE: I am sorry.

21 THE COURT: You just ask the questions.

22 BY MR. YANNACONE:

23 Q Doctor, would you tell us with a reasonable degree  
24 of scientific certainty whether or not the excavation, even  
25 to a minimal depth of twelve inches along these intersected

1 areas where the green and white meet throughout the area of  
2 the proposed Fluorescent Fossil Beds National Monument will be  
3 of any paleontological significance?

4 MR. JOHNSON: To which we --

5 THE COURT: Mr. Yannacone --

6 MR. JOHNSON: -- object --

7 THE COURT: Just a minute, Mr. Johnson.

8 MR. YANNAZONE: Yes, your honor.

9 THE COURT: Mr. Yannacone, she answered it on  
10 direct examination. She answered it on cross-examination.  
11 She said that it's possible that it would cause damage and  
12 explained why. We don't need to repeat it.

13 MR. YANNAZONE: I have no further questions,  
14 Doctor. Thank you very much.

15 MR. JOHNSON: Nothing further.

16 THE COURT: Very well, Doctor, you may step  
17 down.

18 THE WITNESS: Thank you.

19 (Witness excused.)

20 THE COURT: Now, to both counsel, the reason  
21 the Court is being somewhat strict on its limitations, I gave  
22 you today to try this and the witness that you thought would  
23 take twenty minutes, Mr. Yannacone, has now taken an hour and  
24 a half. So proceed, gentlemen, with as much dispatch as you  
25 can.

1 MR. LAMM: Your honor, this line with the pre-  
2 trial conference statement by the court yesterday that the  
3 statement by counsel as to the present political status of  
4 the Bill in Congress covering the Florissant Fossil Beds  
5 National Monument, I would like to state that there is  
6 presently three bills in Congress; one by Representative  
7 Evans, which is House Bill 6223; one by Representative  
8 Brotzman, 5953. I take that back. There are more than  
9 three bills. There is one, I believe, by Senator Allott  
10 and one by Senator Dominick,

11 There has been one of these bills that has  
12 passed the Senate completely. It has been heard in  
13 Committee. It has passed in Committee and has passed in the  
14 United States Senate.

15 At the time on July 11, there was a hearing,  
16 1969, on a exact similar bill, a House Bill of Congress and  
17 by Representative Evans, 6223. That passed the Sub-  
18 Committee of the Interior and Insular Affairs Committee, the  
19 Parks and Recreation Sub-Committee on July 11th of 1969, and  
20 is presently scheduled, and I talked to Congressman Evans  
21 yesterday, who is presently scheduled for hearing on the  
22 Full Interior Committee tomorrow,

23 If there are any questions, I will be happy  
24 to answer, but I think the gist of the thing in summary that  
25 the Bill has passed the U. S. Senate and presently it has

1 passed the Sub-Committee of Parks and Recreation in the  
2 House and is scheduled tomorrow for the Full Committee on  
3 Interior and Insular Affairs.

4 THE COURT: Does the Bill provide a appropri-  
5 ation or authorization bill?

6 MR. LAMM: The bill is merely an authorization  
7 bill.

8 THE COURT: After it passes, do I understand,  
9 Mr. Lamm, that it will be necessary to obtain an appropri-  
10 ation before the Department of Justice can initiate eminent  
11 domain proceedings?

12 MR. LAMM: Now, your honor, I am not expert  
13 in this area, but I have checked on it, and it is my under-  
14 standing, although not as a result of my own personal  
15 research.

16 THE COURT: It is not a question of fact.  
17 But in any event, the Bill is not an appropriation bill.  
18 It is merely an authorization bill.

19 MR. LAMM: And there are contingencies funds  
20 in the Department of Interior which we have been -- and I  
21 don't want to be improper here -- but I will just state to  
22 you what our conversations have been.

23 THE COURT: No. We had better limit it to the  
24 facts, Mr. Lamm.

25 MR. LAMM: Then, the fact is, it is my



1 understanding that a notice of intention of taking on the  
2 part of the Park Service can be filed with the authorization  
3 without waiting for the appropriation.

4 THE COURT: Very well. Mr. Johnson, do you have  
5 with you the documents showing ownership?

6 MR. JOHNSON: Your honor, we endeavored to  
7 find the deed this morning. It apparently has been returned  
8 to the title company rather than to Mr. Wofford. I do have a  
9 title binder, but it is very voluminous and it isn't the  
10 actual title policy.

11 The purchase was completed and title closed  
12 on July 1. The deed was recorded immediately thereafter.

13 THE COURT: There was a deed recorded?

14 MR. JOHNSON: There was a deed recorded.

15 THE COURT: And putting the fee simple title  
16 in whom?

17 MR. JOHNSON: Park Land Company, a co-partnership.

18 THE COURT: Composed of the defendants you have  
19 mentioned?

20 MR. JOHNSON: We offer that Mr. Blue and Mr.  
21 Thornton and Mr. Barnes.

22 THE COURT: Very well. The Court will accept  
23 that statement as sufficient proof for this hearing, the  
24 same as it accepted Mr. Lamm's statement as to the status of  
25 the Monument Bill.

1 MR. JOHNSON: Your honor, I do stand corrected.  
2 I do have the actual title policy, but again it has twenty-  
3 five exceptions in it --

4 THE COURT: The reason we don't need to go into  
5 detail is because it was alleged in the Complaint that the  
6 defendants were the owners.

7 I think maybe it included some that were not,  
8 and you admit that you are the record owners but limited to  
9 a partnership composed of the four individuals named?

10 MR. JOHNSON: Correct, sir.

11 THE COURT: The Court thinks that is sufficient  
12 for the purposes of this hearing. Your next witness, Mr.  
13 Yannacone?

14 MR. YANNAZONE: Your honor, unless the Court  
15 is interested in hearing a subpoenaed representative of the  
16 Park Service on procedures following the Bill, we are pre-  
17 pared to rest at this time.

18 THE COURT: Very well. I don't know as it is  
19 actually necessary at this time. If it does appear to the  
20 court that the court should have the testimony, the court  
21 will indicate it to you.

22 MR. YANNAZONE: Thank you, your honor.

23 THE COURT: Are you ready to proceed, Mr.  
24 Johnson?

25 MR. JOHNSON: Yes, sir.

1 THE COURT: Very well.

2 MR. JOHNSON: If it please the court, I would  
3 like to recall Mr. K. C. Wofford, and I believe he was sworn  
4 earlier. It will be our only witness.

5 THE COURT: Very well. Mr. Wofford, you may  
6 take the stand.

7 TESTIMONY ON BEHALF OF THE DEFENDANTS

8 K. C. WOFFORD (Recalled)

9 having previously been sworn, testified further as follows:

10 DIRECT EXAMINATION

11 BY MR. JOHNSON:

12 Q Mr. Wofford, you recall you were sworn earlier  
13 today in these proceedings.

14 A Yes.

15 Q You realize that that oath applies to the testimony  
16 given by you at this time.

17 A Yes.

18 Q Mr. Wofford, what is your present age?

19 A Present age?

20 Q Present age.

21 A Forty-four.

22 Q And how long have you lived in the general area  
23 known as the Pike's Peak region?

24 A Lifetime.

25 Q Where were you born?

1 A Eastern El Paso County, Simla, Colorado.

2 Q And do you presently live in El Paso County?

3 A Yes, Colorado Springs.

4 Q What is your present occupation?

5 A Real estate development.

6 Q And you are a licensed real estate salesman in the  
7 State of Colorado?

8 A Yes.

9 Q How long have you been a licensed real estate  
10 salesman?

11 A About ten years.

12 Q Have you ever been engaged in the construction  
13 business?

14 A Yes.

15 Q In what phases of the construction business have  
16 you been in?

17 A Primarily all of the construction except large  
18 multi-story buildings.

19 Q And how long were you engaged in that occupation?

20 A About ten years.

21 Q Were you ever engaged in a general real estate  
22 development business in El Paso County and Teller County,  
23 Colorado?

24 A Yes.

25 Q Have you completed various real estate developments

1 in El Paso County, Colorado?

2 A Yes.

3 Q Where generally do they lie?

4 A Primarily within the City of Colorado Springs and  
5 surrounding neighborhoods and east of Colorado Springs from  
6 ten to twenty miles east of Colorado Springs.

7 Q Have you had occasion to develop land east of  
8 Colorado Springs? And sell it off in ten, twenty and forty  
9 acre parcels?

10 A Yes.

11 Q Has this been in the recent past?

12 A Yes.

13 Q Have you had occasion to sell and to buy land lying  
14 in Teller County and El Paso County over the past several  
15 years?

16 A Yes.

17 Q Has this been rather extensive?

18 A Yes.

19 Q Mr. Wofford, you are a general partner, I believe,  
20 in the Park Land Company; is this correct?

21 A That's correct.

22 Q And would you state for the record who the other  
23 partners are in this partnership?

24 A Claude R. Blue, Maurice F. Barnes, Roy Thornton.

25 Q Those are the only four persons, including yourself,

1 that are interested in this partnership?

2 A That's correct.

3 Q Is it a general partnership?

4 A Correct.

5 Q Mr. Wofford, just for the purposes of the record  
6 and briefly, would you state what the occupations of the  
7 other three partners are in addition to their partnership  
8 interest?

9 A Mr. Blue is a real estate broker, operates a real  
10 estate office in Colorado Springs. Mr. Barnes is a licensed  
11 real estate salesman. Mr. Thornton is a licensed real estate  
12 salesman. All active in land development.

13 Q Now, did Park Land Company purchase a certain  
14 acreage that we talked about here in El Paso County and in  
15 Teller County, Colorado?

16 A Yes.

17 Q When was that purchase concluded and the property  
18 deeded to the Park Land Company?

19 A The deed was recorded approximately July 1, 1969.

20 Q And the title taken in the name of Park Land  
21 Company, a co-partnership?

22 A That's right.

23 Q Was this an acquisition in fee simple of this land?

24 A Yes.

25 MR. VENTACONE: I am going to object; that

1 calls for a legal conclusion on the part of the witness.

2 THE COURT: Well, we have already had it,  
3 Mr. Yannacone.

4 MR. JOHNSON: They have alleged it anyway.

5 BY MR. JOHNSON:

6 Q Mr. Wofford, when did you first inquire into the  
7 possibility of purchasing land, land involved in this law  
8 suit in Teller County, Colorado.

9 A The first contact was for a portion of this land  
10 and the first contact made between two and two and a half  
11 years ago.

12 Q And from whom did you purchase this land?

13 A A. W. Gregg.

14 Q And was that the first contact made with Mr. A. W.  
15 Gregg?

16 A Yes.

17 Q And where does Mr. A. W. Gregg live?

18 A Kyle, Texas.

19 Q To negotiate the purchase of this land, did you  
20 make various trips to Texas?

21 A Yes.

22 Q Did your negotiations extend over this period of  
23 time that you discussed?

24 A Yes.

25 Q How many acres are involved in the purchase of the

1 Gregg land?

2 A Three thousand acres in this purchase.

3 Q Approximately how many acres of this are in the  
4 boundary of the proposed Florissant Fossil Beds National  
5 Monument as you understand it?

6 A I believe about eighteen hundred.

7 Q Now, Mr. Wofford, prior to -- excuse me. Strike  
8 that.

9 When did you reach and sign an agreement with  
10 Mr. Gregg for this purchase of the land in question,  
11 approximately?

12 A I believe the final purchase agreement was signed  
13 May 23, '69.

14 Q And then the sale was closed on July 1st, I believe  
15 you said.

16 A Right.

17 Q At the time the purchase agreement was signed with  
18 Mr. Gregg, were you familiar with the activities that have  
19 been testified to today for the formation of a national  
20 monument in this area?

21 A I was not.

22 Q When did you first become aware of these proposals?

23 A Just before our final closing, somewhat before the  
24 first of July, when they had a hearing in Colorado Springs  
25 with regards to the Florissant Fossil Beds National Monument,



1 and that was the first time I had ever seen a map of the  
2 proposed area.

3 Q This is the first time you knew any of the Gregg  
4 land you were purchasing were to be included or might be  
5 included within it?

6 A That's correct.

7 Q For what purpose did you and the other partners in  
8 Park Land Company acquire this land?

9 A To develop for resale.

10 Q And in what size parcels?

11 A We intended to start from forty to eighty tracts  
12 for the first thousand or twelve hundred acres and gradually  
13 reduce it to ten to twenty acre tracts.

14 Q Under your contract with Mr. Gregg, do you have  
15 any agreements as to where you must start on the sales of the  
16 land and where you must end?

17 MR. YANNAONE: I am going to object unless  
18 the actual contract is produced. The contract, at least, the  
19 way I understand it, the real property loss should have been  
20 merged in the deed if they are fee simple owners.

21 THE COURT: Well, it could be. You are right,  
22 Mr. Yannaone, but the contracts are the best evidence, Mr.  
23 Johnson, if it is material.

24 MR. JOHNSON: It really isn't that significant.

25 BY MR. JOHNSON:

1 Q Mr. Wofford, have you sold any of this three  
2 thousand acres that you acquired?

3 A Yes.

4 Q How much have you sold?

5 A We have sold definite sales on six hundred and  
6 forty acres lying outside of the proposed park area.

7 Q Would you go to the Defendants' Exhibit A and point  
8 on the map where this area is located.

9 (Witness leaves witness stand to exhibit map.)

10 MR. YANNACONE: Will the witness mark it with  
11 a pencil so we can identify it afterwards.

12 A It is all of section 36.

13 BY MR. JOHNSON:

14 Q Would you just place your initials on that section  
15 36.

16 A (Witness marking.)

17 Q You have sold that (indicating) entire section; is  
18 this correct?

19 A That's correct.

20 Q Have you sold any other land, or do you have any  
21 other land under contract that you purchased from Mr. Gregg?

22 A We have contracts awaiting our signature on a  
23 portion of it.

24 Q Offers have been made to you which are acceptable?

25 A Yes.

1 Q And where is that land located?

2 A It is in section 19 and 20.

3 MR. YANNACONE: Do you want to mark that, also,  
4 please.

5 A (Witness marking) 19, 20 and section 30, section 9,  
6 no, pardon me. Section 19, 30 and 20.

7 Q How many total acres would be involved there that  
8 you anticipate a sale on?

9 A Four hundred acres.

10 Q You may resume your seat if you would, Mr. Wofford.

11 (Witness resumes witness stand.)

12 THE COURT: Is that four hundred acres within  
13 or outside the proposed boundaries?

14 THE WITNESS: Within -- no, pardon me. Three  
15 hundred and twenty acres of it is within and 80 acres without.

16 THE COURT: All right.

17 BY MR. JOHNSON:

18 Q Now, Mr. Wofford, in connection with your acquisi-  
19 tion of --

20 THE COURT: The court has one other question  
21 in mind. How much of that four hundred acres lies within,  
22 if you can tell me, lies within any of the white area on the  
23 map.

24 A May I look at the map a moment?

25 THE COURT: Yes, you may.

1 (Whereupon, the witness left the witness  
2 stand to the exhibit map.)

3 THE WITNESS: Sixty to seventy acres,  
4 approximately.

5 THE COURT: And the balance is within the  
6 green area?

7 THE WITNESS: That's right.

8 THE COURT: Very well.

9 (Witness resumed witness stand.)

10 BY MR. JOHNSON:

11 Q Mr. Wofford, in connection with your acquisition  
12 of this land from Mr. Gregg, do you still owe him on a  
13 portion of the purchase price?

14 A We do.

15 MR. YANNACONE: I am going to object to that.  
16 The best evidence of that is the mortgage and deed of trust.

17 THE COURT: It is immaterial, Mr. Johnson.

18 MR. JOHNSON: I beg your pardon?

19 THE COURT: It is immaterial, Mr. Johnson.  
20 I am not interested in that.

21 MR. JOHNSON: Well, your honor, it would be  
22 our position we merely want to show the financial commit-  
23 ments that they have and an explanation of how they intend  
24 to meet these, which is through the sale and the distribution  
25 of these lands in question.

1 THE COURT: I am not interested. If the  
2 plaintiffs are interested in an injunction, they are entitled  
3 to it irrespective of the hardship it creates of the land  
4 owners.

5 The plaintiffs are not entitled, the fact that  
6 the land owners had it all paid for or whether they are  
7 scratching to pay for it, it is immaterial in the Court's  
8 opinion.

9 BY MR. JOHNSON:

10 Q Mr. Wofford, what are your immediate development  
11 plans with reference to building any roadways or doing any  
12 excavation in the area of the eighteen hundred acres that  
13 lies within the proposed National Monument boundary?

14 A As I have shown on the map, we have about two and  
15 a half miles of road proposed now, to supply roads to  
16 approximately six hundred and forty acres. Immediately on  
17 the sale of this, we can expect it to continue northward  
18 with further development in roads and sales.

19 Q In the excavation that you do, or you intend to do  
20 in this entire area principally of roads to gain access to  
21 various tracts which you wish to sell?

22 A That's correct.

23 Q Do you intend to do any construction or do any  
24 building which would involve disturbing the surface?

25 A Not at this time.

1 Q How long did your people anticipate that you would  
2 be to liquidate all of this land?

3 A We estimated about a year and a half to dispose of  
4 the whole thing.

5 Q Now, Mr. Wofford, this area that would generally be  
6 classified as in the mountains --

7 A Yes.

8 Q -- is there a season for the sale of these kind of  
9 parcels of land?

10 A Very definitely.

11 Q What is that season.

12 A Commencing in the spring about May and running to  
13 the fall about the last of September or October.

14 Q Is it difficult to sell land after October and  
15 before May in this area?

16 A Yes.

17 Q Mr. Wofford, if you were enjoined by this court  
18 from constructing any roadways on this property, including  
19 the proposed one, would this have any effect upon your  
20 opinion upon your ability to sell this land?

21 A It would be impossible or improbable to sell it  
22 for the purposes that we are selling it for.

23 Q Mr. Wofford, as the attorney of this land or one  
24 of the owners of this land, do you have an opinion as to the  
25 value of this land on a per acre basis?

1           A     Yes.

2                   MR. YANNACONE: I am going to object to the  
3 valuation of dollars here.

4                   THE COURT: Let's wait until we get the  
5 question, Mr. Yannacone.

6 BY MR. JOHNSON:

7           Q     What is your opinion on the per acre basis, on a  
8 per acre basis. Withhold your answer a minute.

9                   THE COURT: Any objections?

10                  MR. YANNACONE: I will withhold my objection.

11                  THE COURT: The court will impose an  
12 objection on the same basis, on the basis of dollars that  
13 the court is imposing (1) that we are not here to determine  
14 the value of this property.

15                  MR. JOHNSON: I don't wish to argue with the  
16 court, but I am merely eliciting this information, because I  
17 feel as far as, if an injunction, a preliminary injunction  
18 would have been granted, the Rules require a bond. I think  
19 this might go to the issue of what our monetary damages might  
20 be with reference to this in having a parcel of land which --

21                  THE COURT: Well, if the court is uncertain  
22 about bond, it can take additional evidence for that purpose  
23 if we have to.

24                   (Defendants' counsel conferred.)

25 BY MR. JOHNSON:

1 Q Mr. Wofford, would you propose to construct  
2 additional roads only as required for purposes of sale of  
3 land in this area?

4 A This is correct.

5 MR. JOHNSON: You may inquire.

6 CROSS-EXAMINATION

7 BY MR. YANNACONE:

8 Q How long have you been selling real estate in  
9 Colorado Springs vicinity, Mr. Wofford?

10 A I have had a real estate license for approximately  
11 ten years. I have been buying and selling real estate a  
12 little longer than that.

13 Q During that period of ten years, you have been  
14 buying and selling real estate in the Colorado Springs area,  
15 have you not?

16 A That's correct.

17 Q And you have lived in the general vicinity of  
18 Colorado Springs all your life, haven't you?

19 A This is right.

20 Q And we can assume that at least is more than  
21 twenty-five years, can't we?

22 A That is correct.

23 Q Now, Mr. Wofford, in that period of the past  
24 twenty-five years, have you been aware of the existence of  
25 the Town of Florissant?



1 A That is correct.

2 Q During the course of your twenty-five years of  
3 living there, have you had an occasion to sell property or  
4 buy property in the vicinity of Florissant?

5 A Yes.

6 Q And in the course of your sale of property in the  
7 vicinity of Florissant, have you ever told prospective  
8 purchasers about the existence of the Florissant Fossil Beds?

9 A No.

10 Q During the course of your regular professional  
11 activities as a real estate salesman, are you telling us that  
12 you have not been aware of the existence of the Florissant  
13 Fossil Beds in Teller County?

14 A Would you repeat that again, please.

15 MR. YANNACONE: Read it back again, please,  
16 Mr. Reporter.

17 (The reporter: During the course of your  
18 regular professional activities as a real estate salesman,  
19 are you telling us that you have not been aware of the  
20 existence of the Florissant Fossil Beds in Teller County?)

21 A I wasn't aware of the fossil bed part of it until  
22 the last ninety days. I had known there was a petrified  
23 forest -- not tying it in with a fossil bed.

24 BY MR. YANNACONE:

25 Q Do you know whether or not any of your -- withdrawn.

1                   How long has the Park Land Company been in  
2 existence?

3           A     The partnership was formed approximately one year  
4 ago, a year and a half ago.

5           Q     Do you of your own knowledge know whether any of  
6 the other members of that partnership, Messrs. Barnes,  
7 Thornton and Blue, and have been residents of Colorado Springs,  
8 State of Colorado, for more than ten years?

9           A     I believe Mr. Thornton has been and Mr. Blue has  
10 been, approximately that long.

11          Q     How about Mr. Barnes?

12          A     Approximately that total.

13          Q     And do you know whether or not any of your partners  
14 were aware of the existence of Florissant Fossil Beds?

15                   THE COURT: Well, Mr. Yannacone, I will try  
16 and be a little patient, but why am I interested?

17                   MR. YANNAZONE: All right. I will withdraw  
18 it.

19                   THE COURT: Does it make any difference  
20 whether I grant an injunction or whether I don't grant an  
21 injunction as to whether or not these people know there  
22 were fossil beds there?

23                   MR. YANNAZONE: Not on the issue of pre-  
24 liminary injunction, your honor. I will withdraw that line.

25                   THE COURT: Very well.

1 BY MR. YANNACONE:

2 Q When did you sell the area designated section 36?

3 A In the last six weeks.

4 Q And did you sell it for -- withdrawn.

5 Where is the four hundred acre tract that you  
6 allege is under contract at this time? Is that the section  
7 in which you had the two roads sketched in in pen?

8 A That is correct.

9 Q Where is the most westerly boundary of the tract  
10 that is allegedly under contract?

11 A The west edge of our ranch on section 19.

12 Q In other words, then, it includes Lower Twin Rock  
13 Road, does it not?

14 A It does not.

15 Q All right. Then where is the line?

16 A The Lower Twin Rock Road.

17 Q In other words, the parcel is contiguous with the  
18 Lower Twin Rock Road?

19 A That is correct.

20 Q Is that property presently under contract for sale?

21 A There has been a contract made out and signed by  
22 the purchasers. It has not been signed by Park Land  
23 Company.

24 Q When was it signed by the purchasers?

25 A I believe last night or this morning.

1 Q Who are the purchasers?

2 A Allied Associates, I believe was the name on the  
3 contract, to be put on the contract.

4 Q Do you know who the principals of Allied Associates  
5 are?

6 A I know a portion of them.

7 Q Tell us who they are.

8 THE COURT: Well, why am I interested, Mr.  
9 Yannacone?

10 MR. YANNACONE: Withdrawn on the preliminary.  
11 It is not relevant.

12 BY MR. YANNACONE:

13 Q At the present time, are you at liberty to sell,  
14 dispose or develop any of the other portions of the three  
15 thousand acre tract that might lie in the proposed  
16 Florissant Fossil Beds National Monument?

17 MR. JOHNSON: To which we object, your honor.  
18 That is beyond the scope of direct examination.

19 MR. YANNACONE: I am willing to be bound by  
20 his answer.

21 THE COURT: Mr. Reporter, give me the question,  
22 if you will.

23 THE REPORTER: At the present time, are you  
24 at liberty to sell, dispose or develop any of the other  
25 portions of the three thousand acre tract that might be in

1 the proposed Florissant Fossil Beds National Monument?

2 THE COURT: Better reframe the question. I  
3 don't know what you mean by "at liberty".

4 BY MR. YANNACONE:

5 Q Are you restricted -- withdrawn.

6 MR. YANNACONE: I have no further questions.

7 THE COURT: Well, along that line, Mr.  
8 Yannacone, the court would be interested -- the court can  
9 ask him a question,

10 If you have an opportunity, I assume that you  
11 will sell any portion of this three thousand acres that you  
12 bought?

13 THE WITNESS: No.

14 THE COURT: Let me put it this way: If you  
15 had an opportunity and your terms were correct, you would  
16 sell any portion of the eighteen hundred acres that is  
17 within the proposed boundaries of the monument?

18 THE WITNESS: No.

19 THE COURT: All right. What are your intents  
20 with regard to the disposal of the lands within the proposed  
21 boundaries of the monument?

22 THE WITNESS: When we get the land south of  
23 the east-west center section line of 19 disposed of, we will  
24 continue north on approximately one thousand more acres,  
25 develop it and sell that portion.

1 THE COURT: Now, is that within the boundaries of  
2 it --

3 THE WITNESS: Yes.

4 THE COURT: All right.

5 THE WITNESS: I believe the next thousand acres  
6 would all be within the boundaries of the Park Service.

7 THE COURT: Then, I don't know how to take your  
8 answer, Mr. Wofford. Do you plan on selling and disposing  
9 of the entire eighteen hundred acres?

10 THE WITNESS: Yes.

11 THE COURT: Within the boundaries of the national  
12 monument?

13 THE WITNESS: Yes.

14 THE COURT: Do you know?

15 THE WITNESS: That's right.

16 THE COURT: And as I understand it from your previous  
17 testimony, you intend to sell it in tracts, and I assume from  
18 that, that you sell it within the intent that it be used for  
19 residential purposes?

20 THE WITNESS: This is correct.

21 THE COURT: All right. Mr. Johnson, any further  
22 questions?

23 MR. JOHNSON: I have no further questions, Your  
24 Honor.

25 THE COURT: Very well. You may step down, Mr.

1 Wofford.

2 (Witness excused.)

3 MR. JOHNSON: Your Honor, that would conclude the  
4 testimony that we would offer this morning. The other would  
5 merely be repetitious by the other parties.

6 THE COURT: All right. Will there be any other  
7 evidence, Mr. Yannacone?

8 MR. YANNACONE: No, Your Honor, the plaintiffs are  
9 willing to rest on the Application for the Preliminary  
10 Injunction.

11 THE COURT: All right. Tell me how much time you  
12 wish for argument, Mr. Yannacone?

13 MR. YANNACONE: On the issue of solely of preliminary  
14 injunction, ten minutes.

15 THE COURT: Mr. Johnson?

16 MR. JOHNSON: I was going to suggest if they would  
17 agree to waive argument, I certainly would be happy to. I  
18 think the Court is familiar with this matter, and I would  
19 certainly be willing to waive it.

20 However, if they desire it, I would like a  
21 similar amount of time.

22 THE COURT: Well, if it will be of any convenience  
23 to you, gentlemen, I will take another twenty minutes and go  
24 in to the noon hour and hear you, or if you prefer to come  
25 back at 1:30?

1 MR. YANNACONE: Your Honor, I would appreciate going  
2 directly into the noon hour, and I think I can even restrict  
3 my argument just to some bare essentials.

4 THE COURT: Very well.

5 ARGUMENT ON BEHALF OF THE PLAINTIFFS

6 MR. YANNACONE: Specifically, on the Application of  
7 the Plaintiffs for the Preliminary Injunction, the plaintiffs  
8 have shown both by stipulation for the purpose of this hearing  
9 and by the testimony of Dr. Leopold, that there is a unique  
10 resource from a paleontological scientific point of view.

11 The Florissant Fossil Beds that the geological  
12 formation occurs with predictability in relatively common  
13 sites that can be identified by even cursory inspection. They  
14 can certainly be identified according to Dr. Leopold's tes-  
15 timony as relating to the interface between the green and  
16 white areas of Defendants' Exhibit A.

17 Dr. Leopold has testified that the fossil  
18 sequence and layers, order of layers, is important in the  
19 development of the investigation of the past history of this  
20 geologic region and similar regions around the world.

21 I don't think there is any contest to the  
22 plaintiffs' allegations that excavation activities including  
23 even the twelve inches which the defendants claim is all they  
24 will do in the interface area will cause some damage.

25 There is also apparently danger to other areas



1 of the proposed fossil bed park due to further activities of  
2 these particular defendants.

3 I submit, Your Honor, that the purpose of the  
4 Preliminary Injunction is simply to preserve the status quo,  
5 and as the Court is well aware, the provisional remedy is  
6 simply to preserve them until, as one Court said, "To refer  
7 to that last actual peaceable uncontested status of the parties  
8 to the controversy which preceded this suit in which the  
9 preliminary injunction is sought and which must be preserved  
10 until the final decree can be entered."

11 Now, the Court, of course, has within its  
12 discretion to grant or to withhold at this stage the Prelimi-  
13 nary Injunction.

14 However, it appears from the evidence uncontested  
15 or from the defendants and of the plaintiffs that there will be  
16 a disturbance of a resource that cannot be fully evaluated  
17 without at least a further amount of exploration. In the  
18 case of Dr. Leopold's investigation, she indicated ten more  
19 days at this site.

20 There has been no laches on the part of the  
21 plaintiff because Dr. Leopold in her capacity as a member of  
22 the U. S. Geological Survey did go out and personally investi-  
23 gate the area she understood the particular road involved  
24 today was going. It happened to be the wrong area.

25 The term "irreparable", of course, the Court is

1 well aware is simply that which cannot be adequately compen-  
2 sated in damages.

3           The loss of one or two of these unique species  
4 of fossils is that peculiar to a particular area could very  
5 well be the loss of a missing link in our geologic history  
6 that may be of some value.

7           To say that the top twelve inches is not  
8 important, is exactly the same argument as saying you can  
9 scrape the paint off the Mona Lisa because you will still  
10 have six to seven times as much canvas left.

11           True, if you want to preserve only canvas,  
12 this is quite true, but if there is something in the top  
13 layer that is of value, the plaintiffs' requests that the  
14 disposition of this matter by way of excavation or destroying  
15 the actual race which is the subject matter of the litigation  
16 be stayed until the full hearing can be had on the merits.

17           The plaintiffs are ready, willing, and able  
18 to conduct that full hearing on the merits at the convenience  
19 of this Court.

20           The question of whether or not the hearing  
21 to the merits should await the simple excavation of the road,  
22 is at this stage too critical to justify ignoring the Prelimi-  
23 nary Injunction remedy.

24           If the road were entirely in the green section  
25 of the map, as most of it is, Dr. Leopold testified she could

1 say with reasonable paleontological certainty it would do no  
2 damage.

3 However, the major portion of the beginning of  
4 the road cuts directly through the white area and the green-  
5 white interface in which the Florissant formation can be  
6 found.

7 I might submit, Your Honor, that quite simply  
8 the question before this Court at this time is whether to  
9 stay that particular activity.

10 And I point to the testimony of the defendant  
11 Wofford, they have already sold six hundred and forty acres  
12 to the south.

13 They have apparently some contract of sale for  
14 the four hundred acres which includes the area to be serviced  
15 by this road, that the area is contiguous to the existing  
16 road and that there is no further need, as I can see it, in the  
17 next ten or twenty or thirty days, whatever the convenience  
18 of the Court needs to hear this matter on the merits for dis-  
19 turbance of this priceless area pending the determination of  
20 this matter on the merits.

21 We are prepared to submit a short memorandum  
22 of law on the issue of Preliminary Injunction, if the Court  
23 desires it at this time. Thank you.

24 THE COURT: Mr. Johnson.

25 ARGUMENT ON BEHALF OF THE DEFENDANTS

MR. JOHNSON: If it please the Court, Mr. Yannacone:

1 I will try to be rather brief in my remarks, Your Honor.

2 This matter was originally presented to this  
3 Court on the 9th of July of 1969 on an ex-parte hearing.  
4 Actually, it revealed about as much light as today's hearing,  
5 I think, in what the plaintiffs claim that this land holds  
6 that is to be denominated and labeled as a national resource,  
7 and which is entitled to the drastic equity and the protection  
8 of a preliminary injunction.

9 The evidence has shown before this Court that  
10 the defendants that appear before you today, the Park Land  
11 Company and their four partners as comprise it, are the  
12 owners in fee simple of this land in question.

13 The evidence has been a complete lack of any  
14 evidence that any actions or activities contemplated and  
15 testified to today by any of these individuals would, are in  
16 any way unlawful, illegal, or in any way would constitute a  
17 nuisance and would allow owners of the adjoining properties  
18 to seek injunctive relief against them.

19 These people are pursuing a course of develop-  
20 ment and the sale of land which they have done according to  
21 Mr. Wofford's testimony for a period of many, many years.

22 The historical significance of this site has  
23 been apparently known by Dr. Leopold's caliber and profession  
24 for more than one hundred years. The Congress of the United  
25 States has been aware of this area for a period of at least

1 since 1955, I believe Dr. Leopold said, and the records indicate  
2 1952.

3 Certainly the congressional record of some sort  
4 has been proposed since 1964 without avail.

5 I am unaware of anything in the Federal  
6 Constitution of the federal laws or in the cases interpreting  
7 those which set a judicial precedent for this type of a  
8 request on behalf of persons who own no interest in your  
9 land and who seek to stop you from any use of it, as a practical  
10 matter merely because it might at some future date be included  
11 within the boundaries of a proposed national monument.

12 We don't want to make light of the project.  
13 We think that it has merit. I don't want to make light of  
14 the historical significance of the fossils. But we do want  
15 to lay emphasis on the fact that we do own them and they are  
16 ours.

17 I am not talking about the Mona Lisa, and we  
18 are not talking about the Dead Sea scrolls and the other  
19 cliché phrases that Mr. Yannacone uses. We are talking about  
20 facts. We own the fossils of whatever significance they  
21 have.

22 Now, there has been some discussion here today  
23 by Dr. Leopold as to the importance of the fossils, and  
24 they are all important, according to the paleontologists, and  
25 yet the very proposed monument is leaving out important fossils

1 that these people are familiar with.

2 In the area in which we are supposed to be  
3 accused of doing all of this damage involves so small and  
4 almost insignificant a surface area that it is almost diminuous  
5 in connection with the six thousand four hundred acres to lie  
6 within the proposed park area.

7 I submit to this Court in the absence of any  
8 showing on behalf of the plaintiff in this action, that they  
9 own any equitable or any legal interest in the land and faced  
10 with the fact that the defendants own the land in fee, that  
11 the defendants are constitutionally guaranteed a right to  
12 the enjoyment of their use of their land, as long as it doesn't  
13 work to the detriment of other persons. I say such detriment  
14 in the legal sense has not been shown by any evidence here  
15 today.

16 And that the request for this Preliminary  
17 Injunction should be denied and that the defendants should  
18 be allowed to proceed with such orderly development and sale  
19 of their lands as they are advised and as they have done and  
20 as everybody else is doing in Teller County and elsewhere  
21 throughout the State of Colorado.

22 For these reasons, we assert that the request  
23 for Preliminary Injunction should be denied.

24 THE COURT: Mr. Yannacone, I will give you two  
25 minutes further.

1                   REBUTTAL ARGUMENT ON BEHALF OF THE PLAINTIFFS

2                   MR. YANNACONE: In the U. S. Supreme Court, the  
3 decision in *Geer versus Connecticut*, 161 U.S. 519 at 526  
4 held: "There are things which belong to no one and the use  
5 of which is common to all." That is an 1896 decision.

6                   In *Hague, Mayor versus Committee for Industrial*  
7 *Organization*, 307 U.S. 496 at 515, a 1939 case -- I remember  
8 the year: "Wherever the title of streets, parks may rest,  
9 they have immorally been held in trust for the use of the  
10 public."

11                   I submit in this particular application for  
12 a Preliminary Injunction, we are simply asking the Court as  
13 one of the tri-parts of government to further the jurisdiction  
14 of Congress and prevent the destruction of the race prior to  
15 the Congress' final action which is proceeding with as the  
16 Court well knows the due deliberation of the legislature.

17                   I submit the record will show that Exhibit A  
18 of the Complaint that the congressional action in the past  
19 has never reached the level of activity it is in now nor as  
20 far along in the Congress as it is now. Thank you, Your Honor.

21                   RULING OF COURT

22                   THE COURT: Very well. There is no evidence here  
23 that this property is in the nature of a street or a park or  
24 any other kind of property that has public trust.

25                   The Court in this case, or at least at this

1 time, is not called upon to rule whether or not the damage in  
2 this case, that will be caused by the immediate development  
3 is of such a nature as to be irreparable, and so the Court  
4 will not decide that question.

5 The Court has before it a case where a property  
6 owner has property which he is using lawfully and legally,  
7 developing lawfully and legally.

8 The fact that the federal government is taking  
9 some steps toward the eventual acquisition of this property  
10 does not in the meantime deprive the property owner of his  
11 dominion and control and a right to use his property legally,  
12 even though his use may to some extent interfere with the  
13 eventual use which the government will make of the property  
14 if, as and when it acquires it.

15 The Court is aware of no authority, statute,  
16 or case law which authorizes this Court to deprive the pro-  
17 perty owner in these circumstances of the use of his property  
18 and the right to develop it, the right to dispose of it.

19 Even if the federal government itself were  
20 here asking this Court to intervene and assuring this Court  
21 that if, as and when the Executive Branch of the Government  
22 would acquire the property by eminent domain, if authorized  
23 by Congress and provided the funds by Congress, the Court  
24 would say to the federal government the same thing that the  
25 Court is saying to the plaintiffs in this case.



1           The federal government nor any private individual  
2 or any group of individuals can deprive a person of his  
3 constitutional rights and one of the constitutional rights  
4 is to use his property in a lawful manner, that he is not to  
5 be deprived of his property without due process of law and due,  
6 as the United States Supreme Court has said many, many times,  
7 is the payment of just compensation for the property taken.

8           An injunction in this case would in effect be  
9 depriving the defendants of their property and their use  
10 without due process of law, without just compensation, so  
11 the Application for a Temporary or a Preliminary Injunction  
12 is denied.

13           Gentlemen, there has been filed, as you know,  
14 a Motion to Dismiss this action. There was no Brief filed in  
15 support of it, was there?

16           MR. JOHNSON: Yesterday afternoon with the clerk,  
17 I delivered it to the plaintiffs' counsel today.

18           THE COURT: I think we discussed this yesterday,  
19 but in any event in the case, Mr. Yannacone, you are not  
20 familiar with the Local Rules of our court. You have ten days  
21 within which to file the opposing brief. You are not required  
22 to file the brief if you don't wish by the Rule, but the Court  
23 would appreciate it if you filed one.

24           Whether or not the final disposition of this  
25 case can be made upon the Motion to Dismiss, of course, the

1 the Court does not know, but if it is not determined upon the  
2 Motion to Dismiss, I would suggest for your consideration that  
3 you tender to the Court and opposing counsel a statement of  
4 what you would expect to prove upon a final hearing and,  
5 again, maybe we might shorten the number of witnesses and the  
6 amount of testimony and the length of the hearing as we did  
7 here.

8 The Court wishes to express its appreciation  
9 to counsel in the case for the conference yesterday and the  
10 resulting expedition of the trial.

11 We will be in recess subject to call, Mr.  
12 Bailiff.

13 (WHEREUPON, the hearing concluded at the hour of  
14 12:13 o'clock P.M.)  
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REPORTER'S CERTIFICATE

1  
2 I, Elvin V. Jones, Certified Shorthand Reporter and  
3 Official Reporter to this Court, do hereby certify that I  
4 was present at and reported in shorthand the proceedings in  
5 the foregoing matter;

6 That I thereafter reduced that portion of my shorthand  
7 notes reflecting the testimony of the foregoing transcript to  
8 typewritten form, comprising the foregoing Official Transcript;

9 Further, that the foregoing Official Transcript is a  
10 full and accurate record of the testimony at the time and  
11 place hereinbefore set forth.

12 DATED at Denver, Colorado, this 31st day of July, 1969.  
13  
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15

16 Elvin V. Jones  
17 Elvin V. Jones  
18 Certified Shorthand Reporter  
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