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In the

Supreme Court of the United States

Air Polution Variance Board
Of The State Of Colorado,

Petitioner,

73-690

v.

Western Alfalfa Corporation,

Respondent.

Pages 1 thru 16

Washington, D. C.
April 25, 1974

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IN THE SUPREME COURT OF THE UNITED STATES

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO, Petitioner,	:	
v.	:	No. 73-690
WESTERN ALFALFA CORPORATION, Respondent.	:	

Washington, D. C.,

Thursday, April 25, 1974.

The above-entitled matter came on for argument at 10:02 o'clock, a.m.

BEFORE:

WILLIAM O. DOUGLAS, Associate Justice [presiding]
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WILLIAM TUCKER, ESQ., Assistant Attorney General of Colorado, 104 State Capitol Building, Denver, Colorado 80203; for the Petitioner.

EDMUND W. KITCH, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C., 20530; for the United States as amicus curiae.

DONALD D. CAWELTI, ESQ., Lee, Bryans, Kelly & Stansfield, 990 Public Service Company Building, Denver, Colorado 80202; for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. JUSTICE DOUGLAS: The Chief Justice is unavoidably absent this morning, but hopes to be able to participate in the decision on the case on the basis of the recorded argument and the briefs.

No. 73-690, Air Pollution Variance Board versus Western Alfalfa Corporation.

Mr. Tucker.

ORAL ARGUMENT OF WILLIAM TUCKER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. TUCKER: Mr. Justice Douglas, and may it please the Court:

I am William Tucker, Assistant Attorney General of the State of Colorado, representing the petitioners in this case.

This case arises out of a situation involving a violation of the Air Pollution Control law in the State of Colorado.

The Western Alfalfa plant had been under investigation and surveillance by the State authorities for approximately two years prior to June 4, 1969, at which time an investigator for the State made a trip into the area where the plants are located, and made emissions and opacity readings.

The opacity readings exceeded the limits which were allowed by the State at that time, which were 40 percent

opacity, or a No. 2 Ringlemann by approximately 40 and 45 percent.

The Ringlemann and opacity readings which were taken by the inspector were double in some instances what were allowed by the State.

The inspector made these opacity readings by driving up to the plant from a county or public road, driving onto the parking lot of the particular plant, taking the opacity readings, recording them, and taking photographs. He got into his car and returned -- or went on his route of investigation.

QUESTION: Where was he when he took the opacity readings?

MR. TUCKER: He was in the parking lot of the Western Alfalfa plant.

QUESTION: He was in the parking lot?

MR. TUCKER: Yes, he was.

QUESTION: And that parking lot was for employees and authorized visitors to the plant, was it?

MR. TUCKER: Yes, that's correct.

QUESTION: But he did not leave the parking lot, did he?

MR. TUCKER: He did not enter the plant itself.

QUESTION: No, I know that. But did he approach the plant from the parking lot? Or --

MR. TUCKER: No. He simply drove up to the plant

on the county road, and the parking lot abuts the county road, drove off onto the parking lot, got out of the car, took the opacity readings, recorded them in writing, and made his report at the time, got back in the car, drove on the county road and went to another plant.

QUESTION: How far was the parking lot from -- or how far was the point at which he took the opacity readings from the plant itself, from the building, from the nearest building?

MR. TUCKER: Approximately four to five hundred feet, as I recall. From the nearest building of the plant itself.

QUESTION: Right. Right. Thank you.

QUESTION: Mr. Tucker, was there any fence around the parking lot?

MR. TUCKER: No, there was not.

QUESTION: Were there any signs up, "No Trespassing", or signs indicating that members of the public were not allowed to come on?

MR. TUCKER: No, there were not. As the photographs which are a part of the record on file with the Court, but are not a part of the Appendix, indicate and show there are no signs, there are no fences around the plant itself, and there are no signs saying "No Trespassing". In fact, Western Alfalfa sells its product, which is a cattle feed product, from the

plants.

The inspector then filed his report with the health department, and on June 16, 1969, a cease and desist order was issued to Western Alfalfa.

The cease and desist order was then appealed, so to speak, to the Air Pollution Variance Board, and Western sought a hearing before the Air Pollution Variance Board for a determination of whether it was or was not in violation of the law.

QUESTION: And as of what date, what was the critical date of the violation in those proceedings, Mr. Tucker?

MR. TUCKER: The June 4, 1969 date.

QUESTION: Was that the issue before the Commission or the Board, whether it was in violation on that particular day?

MR. TUCKER: That's correct.

QUESTION: Under Colorado law, could the respondents here, Western Alfalfa, have introduced evidence of a similar test on some other day close by but not the same and had it at least considered by the Board?

MR. TUCKER: Certainly.

The hearing before the Variance Board was held in October and November of 1969, and the Board reached the decision that Western's operations were in fact in violation of the law.

QUESTION: Was there any evidence when it was Western Alfalfa first learned of the readings being taken on June 4th?

MR. TUCKER: Yes, when it received the cease and desist order, dated June 16, 1969.

QUESTION: That issued without any hearing, then?

MR. TUCKER: That's correct. The law provides that upon the receipt of a cease and desist order, the party may request a hearing before the Variance Board for a determination of whether its operations are in violation of the law, and whether it desires a variance from the law.

QUESTION: But meanwhile must -- in compliance with the cease and desist order, must the plant discontinue the operations to which the cease and desist order are addressed?

MR. TUCKER: No, Mr. Justice Brennan. When the cease and desist order is issued, the party has ten days within which to request a hearing on it, and that order is stayed or suspended until the Variance Board has reached a decision.

The decision of the Variance Board was appealed to the District Court in Weld County. After a hearing before the District Court and a limited amount of testimony, the District Court affirmed or reversed the decision of the Variance Board, and held in effect that the Western Alfalfa Corporation was denied due process of law because the observations in question

were made in secret and without its knowledge. And the District Court's decision was appealed to the Court of Appeals in Colorado, and the Colorado Court of Appeals affirmed the decision of the District Court, and reversed the decision of the Variance Board, and held that the -- that Western was denied due process of law because the readings in question, the opacity readings were taken without its knowledge and that it had no notice of the readings; and, in addition, that Western's rights under the Fourth Amendment were violated because they did not consent to the inspector being on the premises, or there was no warrant for his presence there and the opacity readings which he subsequently took.

QUESTION: This involves, does it, a so-called ambient air quality standard?

MR. TUCKER: The ambient air quality standards are what the health department determines is the levels of pollution which human beings and plant and animal life can stand without any bad effects to them.

QUESTION: What size areas?

MR. TUCKER: It includes the entire State.

QUESTION: Then a reading taken anywhere in the State would be of evidentiary value?

MR. TUCKER: Yes, if the emission standards, which were the 40 percent opacity, are exceeded anywhere in the State, it's a violation of the law.

QUESTION: Then the fact that he was nearby becomes irrelevant.

MR. TUCKER: That's correct.

QUESTION: Except as it might bear upon the accuracy of the reading.

MR. TUCKER: Well, he was at the required distance from the emissions that is accepted as the standard distance to be from the emission to take an accurate reading.

QUESTION: Who determines that standard?

MR. TUCKER: It's set out in the textbooks on taking Ringlemann readings, the distance and where the sun should be, and the wind, et cetera, to obtain an accurate opacity or Ringlemann reading.

QUESTION: Were any other tests taken anywhere in the ambient area?

MR. TUCKER: Well, the --

QUESTION: For this violation.

MR. TUCKER: The ambient area itself had been tested and is continually monitored by the State in various locations around the State, and the emission standards are the standards that the State says you cannot violate or you will cause the ambient area of the atmosphere, in other words, to be degraded to the extent where it will not be healthful for the citizens and animal life in the State, and plant life.

QUESTION: Is the Ringlemann test incorporated by

name in the statute, or recognized in the statute?

MR. TUCKER: Yes, it is, Mr. Justice Rehnquist.

QUESTION: In the State statute, not the Federal.

MR. TUCKER: In the State statute, that's correct.

This -- the Attorney General's office then petitioned the Colorado Supreme Court for a writ of certiorari, which was denied by that Court. We then petitioned the U. S. Supreme Court, and this Court granted certiorari on January 21st.

It is our position that the Fourth Amendment is not involved in this case at all. The observations which were made were not unreasonable, there was no invasion of privacy of the Western Alfalfa plant. Its personnel were not disturbed, its operations were not curtailed, no offices were searched, and there was no disruption of its activities. And the Fourth --

QUESTION: They didn't even know he was there!

MR. TUCKER: That's correct, Mr. Justice Powell. They did not even know that the inspector was on the premises.

And the Fourth Amendment --

QUESTION: Well, that's true in much electronic surveillance.

MR. TUCKER: That's correct. And in the electronic surveillance case, where the agents put the recording device in the telephone booth, this Court held that that was -- fell within the purview of the Fourth Amendment.

But I think the difference there is that in the telephone booth case this Court said that when the individual closed the door, he expected his conversation to be private. Western could have no reasonable expectation of privacy to emissions which it was putting into the atmosphere for anyone who desired to see to simply look and see.

It was a different situation from the telephone case, because there the party did expect his conversation to be private. And here Western could have no reasonable expectation of privacy.

QUESTION: Well, there was a trespass, wasn't there?

MR. TUCKER: He was on Western's property without their consent or knowledge.

QUESTION: Well, it was an -- there was no consent to the entry.

MR. TUCKER: That's what they're maintaining, that's correct.

QUESTION: Well, what do you maintain?

MR. TUCKER: Well, we maintain --

QUESTION: You mean there was an open invitation to come on their property?

MR. TUCKER: Well, our inspectors had been going on the promise -- on the property for a period of approximately two years, in an effort to voluntarily bring Western Alfalfa

operations into compliance. And during this two-year -- approximate two-year period of time --

QUESTION: Well, that's a little different argument than saying that this isn't -- that the Fourth Amendment doesn't reach it, isn't it?

Are we relying on consent or not?

MR. TUCKER: On implied consent, yes, we are.

QUESTION: Well, it's expectation -- you don't -- if there's no expectation of privacy and the Fourth Amendment doesn't apply, you don't even need to worry about consent. Now, which one are you pushing, both of them?

QUESTION: Either or both.

MR. TUCKER: Well, I think that, No. 1, the Fourth Amendment does not apply because there can be no reasonable expectation of privacy. If it should apply, then we are arguing that there was an implied consent for the --

QUESTION: Well, no expectation of privacy, you mean on that parking lot? For example, in the case -- would you be making the same argument if they had gone into one of the buildings and made those tests?

MR. TUCKER: No. There would be, I think, a different situation if they had actually entered the building.

QUESTION: Well, then you must -- then this argument would rest on the fact that all they did was go to the parking lot. Now, is it implied consent to go on the parking lot

and take these tests?

MR. TUCKER: Well, I think that they --

QUESTION: What does that derive from?

MR. TUCKER: Pardon?

QUESTION: What does that derive from?

MR. TUCKER: It derived from a period of approximately two years' activity, wherein Western had an opportunity during that period of time, at any time, to object to the presence of the inspectors from the State; which it did not. And they --

QUESTION: What did the inspectors do during those two years?

MR. TUCKER: They made periodic visits to all of the plants owned by Western Alfalfa, and made opacity and Ringlemann readings, and would go into the plant actually and confer with the officials in regard to what equipment had been installed, what effect it was having, and they were making some progress toward bringing the operation into compliance.

QUESTION: Well, in those two years were all the tests, whatever the tests were, taken only on the parking lot?

MR. TUCKER: Oh, no, they were -- well now, the readings have to be taken outside of the plant premises, because the emissions are going up into the atmosphere from

the outside of the plant. And so you could not take opacity readings while you were inside the plant.

And the opacity -- the emissions are what violates the law.

So those readings have to be taken outside of the physical plant premises.

QUESTION: Well, did you make this argument to the Colorado courts?

MR. TUCKER: We argued -- well, actually, before the Colorado Court of Appeals, the Fourth Amendment was not argued by the --

QUESTION: Well, did you argue this implied consent matter?

MR. TUCKER: No, because the Fourth Amendment was actually not a question in the case at that time. Neither the District Court nor the Court of Appeals had -- of course, the Court of Appeals' decision hadn't come down, but they did not have the Fourth Amendment question in it. The Fourth Amendment question just came out of the blue from the Court of Appeals.

QUESTION: But then you petitioned to your Supreme Court, didn't you?

MR. TUCKER: That's correct.

QUESTION: Raising this Fourth Amendment question?

MR. TUCKER: That's correct.

QUESTION: And argued it, and they turned it down.

MR. TUCKER: Well, we didn't argue it.

QUESTION: Well, I know, you didn't argue it, but you put it in your petition for review, or whatever you call that?

MR. TUCKER: Well, yes, we did.

QUESTION: And did you -- how about the consent, did you argue that?

MR. TUCKER: The implied consent?

QUESTION: Yes.

MR. TUCKER: No, we did not.

QUESTION: Mr. Tucker, suppose the Ringlemann test tomorrow were revised and improved so that it could be effected from across the highway, and one didn't have to go into the parking lot. Would you have a different case at all?

MR. TUCKER: Well, I think that's the absurdity of the respondent's position, because the Ringlemann readings could have been taken from the county road. He merely pulled onto the parking lot, to get his car off the road and on the parking lot. And he -- and the opacity readings can be taken from off the property owned by the party in question.

QUESTION: Is Western a corporation?

MR. TUCKER: Yes, it's a Kansas corporation.

Next, I would like to get into the due process question. Western objects here, because it -- asserts that

because it did not receive notice that the readings were being taken, that it could not effectively rebut the State's case.

And this reasoning is not logical for two basic premises.

No. 1, Western had an opportunity at the hearing before the Board to put on whatever evidence it desired. What it did put before the Board was testimony from a vice president that he had hired a Mr. Richard Ronning some months before this June 4, 1969 incident, to take readings, and that it was hi opinion that their emissions did not exceed the 40 percent opacity limited by the State, but there was no evidence that Mr. Ronning was qualified to take opacity readings.

They also hired a local engineering firm to do a study of their emissions after the cease and desist order was issued, but they did not comply with the statute.

Now, the statute provides that if you're going to have an emission particulate study that you must notify the division and the division must be present during the time that the study is made, so that it can determine what the methods used have some correlation to the Ringlemann and opacity readings.

So Western put evidence before the Board which was not competent evidence. It could have had a qualified opacity or Ringlemann reader on its premises, taking readings every

day. It's required to have its operation in compliance every day. In fact, the law provides that if the emissions exceed the 40 percent opacity for three minutes during any one hour, then it's in violation of the law.

QUESTION: How much skill does it take -- what special skills are required to take these readings?

MR. TUCKER: The State conducts a school, and it's a very inexpensive thing. They have what they call a smoke generating machine, which has an electronic eye in it, and it simply shoots up puffs of smoke which are measured by the electronic eye, and the reader is -- watches the smoke until he becomes trained to read the smoke within a five percent error. And he must take 50 readings that do not exceed five percent on either side, and if he has any one reading out of the fifty that exceeds twenty percent he must receive more training until he attains that accuracy.

QUESTION: How long, ordinarily, does this training take?

MR. TUCKER: It takes about a week.

QUESTION: Does this mean that it's purely visual?

MR. TUCKER: Yes.

QUESTION: Purely visual, no device at all?

MR. TUCKER: No.

QUESTION: So he could have stood, if he were trained well enough, could have stood half a mile away and

been able to take the reading?

MR. TUCKER: Well, they do have a recommended distance from the opacity -- or from the emissions, within which an inspector should be, to obtain the best accuracy.

Now, I would point out that in this case, of course, these emissions, as the pictures show, which are on file with the Court, could be observed from some distance, and in fact some of the pictures were taken some distance from the plant. So the inspector observed the violation before he ever entered onto the plant premises.

And after he had observed the violations as he drove up to the plant, he pulled off on the parking lot and took the readings which were the subject of the hearing.

QUESTION: What do you think the decision of the Colorado court was, that the Fourth Amendment was violated, or that there was an unfair trial, in that there was unrebutable evidence presented?

Let's assume that there had been -- that the inspectors had come on the premises, called them up and said, "We're going to come on to inspect", and they said, "Stay off"; and they said, "No, we're coming on, we just want to let you have notice; you can be there, with your own machine if you want." And took the same readings, except that the company was there with its own machine. Then they had the very same proceeding, and the company contending that they had violated the Fourth

Amendment by coming on the premises and obtaining this evidence. It seems to me that the Court of Appeals might have come out differently.

MR. TUCKER: Well, of course it's speculation, and it could have.

QUESTION: Well, didn't they -- how do you read it, that the lack of notice was the fundamental error, or what?

MR. TUCKER: No, the Court of Appeals, Mr. Justice White, seemed to be disturbed by the lack of notice and the fact that the readings were taken without their consent or without a warrant. All three seemed to disturb the Court of Appeals, and so I don't -- I can't pick one of them out and say if we moved that, the Court of Appeals would have probably affirmed the Air Pollution Variance Board.

QUESTION: Well, has the agency changed its procedure since the decision of your Court of Appeals?

MR. TUCKER: No, the agency has not.

QUESTION: They're still doing it the same way?

QUESTION: There's been a change in the law, hasn't there?

MR. TUCKER: There's been a change in the law, that's correct.

QUESTION: Right.

MR. TUCKER: But as a matter of course people don't object, and I don't know of any instance where they have

obtained a warrant. They simply follow the same procedure.

QUESTION: But the law now does require a warrant if the property owner objects?

MR. TUCKER: That's correct. Yes, the air pollution law does.

QUESTION: Well, at least, then, you must give a notice that you're coming.

MR. TUCKER: Pardon?

QUESTION: At least, don't you give a notice now that the inspector is coming to the plant?

MR. TUCKER: No, they do not.

QUESTION: Well, then, how -- if there's an objection, how is it registered?

MR. TUCKER: Well, it would be registered at the time of the hearing.

QUESTION: And then you have to stop and get a warrant and do it all over again, if he objects, then?

MR. TUCKER: That's correct.

I would like to reserve the remainder of my time.

QUESTION: Can you get a warrant ex parte?

MR. TUCKER: Yes.

QUESTION: Mr. Tucker, if you view the change in the law, what is the relevancy of this case now?

MR. TUCKER: I think the relevancy is to -- the water pollution and other laws, and of course, as you know,

there are 34 States and the Federal Government in this case as amicus, and many of them have laws that are similar to Colorado's law as it existed at the time of this particular incident.

QUESTION: But Colorado is the only party. Isn't it?

MR. TUCKER: Well, if this Court should agree with the Court of Appeals, it would have a drastic effect upon water pollution enforcement and other health laws in the States, which many of them do not require a warrant or consent. They simply provide, as the air pollution law did, for entry and inspection.

QUESTION: But the only thing that's at issue here -- remaining at issue, is this particular cease and desist order; the validity of the prior statute is not here because the prior statute is gone.

MR. TUCKER: Well, I think the validity of the reading taken on June 4 of 1969 was taken under that --

QUESTION: I understand.

MR. TUCKER: -- particular statute. And the question is whether that reading violated the Fourth Amendment rights of the Western Alfalfa at that time.

QUESTION: Nevertheless, the only thing that's at issue is this particular cease and desist order, I gather.

MR. TUCKER: That's correct.

QUESTION: And that hinges, in turn, on the prior statute.

MR. TUCKER: That's correct.

MR. JUSTICE DOUGLAS: Mr. Kitch.

ORAL ARGUMENT OF EDMUND W. KITCH, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. KITCH: Mr. Justice Douglas, and may it please the Court:

This case is here on writ of certiorari to the Colorado Court of Appeals, Division II.

That Court held that a cease and desist order entered by the Air Pollution Variance Board of the State of Colorado against Western Alfalfa was unconstitutional, because based on observations of three plants of Western Alfalfa, made in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States.

The Court held that these observations had been made in an unconstitutional manner, because, first, the inspector making the observations had entered onto the premises of the respondent without obtaining consent or a warrant; and, second, because the observations were made without prior notification to Western Alfalfa.

The observations made by the inspector on June 4th, 1969, showed that the opacity of the dry emissions from two of the plants was 90 percent, and one of the plants was 85 per-

cent.

These emissions were very substantially in excess of 40 percent opacity permitted by the Colorado statutes then in effect.

QUESTION: But, as I understand, this procedure simply involves having a Ringlemann chart in front of you, which has various shadings, and it's a color-matching process, a visual color-matching process; is that it?

MR. KITCH: I think the -- first of all, the inspectors who have been trained do not use the chart.

QUESTION: They have ten days of training.

MR. KITCH: They simply observe the smoke.

Second, the Ringlemann standard itself was developed for use with carbon smoke and it's a black-white standard. The standard here, which was also incorporated in the statute is an opacity standard, rated on percentage of opacity, essentially the percentage of light which is transmitted through the emission plume. It's not correctly a Ringlemann test here, and the inspector is simply trained to observe the plume and determine the extent to which light is able to --

QUESTION: So not even a color chart was used, it was just simply --

MR. KITCH: That's right.

QUESTION: He just looked at it.

MR. KITCH: That's correct.

QUESTION: No device, no chart, no nothing.

MR. KITCH: That's correct.

QUESTION: Except his naked eye; right?

MR. KITCH: That's correct.

QUESTION: Why did he pull off the road?

MR. KITCH: Mr. Justice Marshall, you're turning to the search and seizure aspect of the case, and --

QUESTION: No, you said that all he does is look up there and he doesn't have a chart or anything, so he's driving down the road and he looks up there and that's it.

MR. KITCH: Oh, the --

QUESTION: Why does he stop the car?

MR. KITCH: It says it's a judgmental process. In order to make accurate and reliable observations, there are certain standard procedures which are followed.

First of all, it's important for the observer to be in certain position in relation to the plume, and second, it is considered appropriate for him to make a number of observations over a period of time, in order to increase the reliability of his observation.

QUESTION: He looks in the direction of the sun, does he, through the plumes?

MR. KITCH: No, the sun is to be behind him. The -- I do not know what the Colorado --

QUESTION: Well, then, how does he know about the

light coming through the smoke? I would think it would be --

MR. KITCH: Apparently the literature shows that you're able to judge this quality of reflected --

QUESTION: The source of the light is the sun.

MR. KITCH: Yes, the reflected light coming back. I am not fully able to --

QUESTION: How bright a sun do you need?

MR. KITCH: I've seen nothing in the material in this case to indicate that brilliance is a problem. Background is a problem. If you have a background the same color as the emission, you have a rather difficult --

QUESTION: There's no question there was an entry on the property here, and the observations were made from on the property.

MR. KITCH: Well, --

QUESTION: And let's assume, for the moment, that it was essential to go on the property to get it, to make a proper observation.

MR. KITCH: As your questions and those of your brethren to the State of Colorado indicate, the nature of the place from which these observations were made is rather critical, to any development of Fourth Amendment issue here.

Fourth Amendment issue in this case was developed in a most awkward procedural posture. It was not raised and argued before the Board, it was not argued before the District

Court, it was not argued before the Court of Appeals. As we have learned this morning, the Court of Appeals simply suddenly decided that there was a Fourth Amendment problem.

The only thing in the record that provides any answer to where the inspector went is his answer on direct examination in the record, page 25, that he went, quote, "On the premises." Close quote.

The more detailed answers, which have been provided to you here in oral argument today reflect information not to be found in the record.

Now, it's our position in this case --

QUESTION: I understood there were some pictures in the original record. Is that right?

MR. KITCH: There are pictures in the record. There's no testimony tying those pictures to the --

QUESTION: To where he was --

MR. KITCH: -- place where he made the observation.

QUESTION: Unh-hunh.

MR. KITCH: The fact that the pictures don't show a "No Trespassing" sign doesn't tell you whether there's a "No Trespassing" sign somewhere else.

QUESTION: Well, I would assume, from the issue you want decided, you would like to have them on the property?

MR. KITCH: Sir, our -- we don't want any issue --

QUESTION: Well, you filed in the brief.

MR. KITCH: -- decided. It's our view that the burden in this case, of asserting Fourth Amendment claims and developing a record, lay on Western Alfalfa, which claims now to have been the object of an illegal Fourth Amendment search.

All they developed was -- in fact, all the State developed for them was that the inspector was on the premises. That's fully consistent with the view that the inspector was on an area of the premises fully accessible to the public.

And absent a better developed record, it seems to me that that is --

QUESTION: Well, that isn't the view of the Colorado Court of Appeals.

MR. KITCH: The Colorado Court of Appeals, it seems to me, --

QUESTION: Otherwise it wouldn't have found any Fourth Amendment problems.

MR. KITCH: I don't -- it is possible to take a view of the Fourth Amendment, that any time you cross a property line and you're a State official, you have entered private property, it's a Fourth Amendment problem. And I think that view, which is an erroneous view, was the view of the Colorado Court of Appeals.

Now, on that quite elementary ground, we urge that the decision be reversed.

QUESTION: Let me ask you the question I asked your

colleague. If there had been notice here, do you think that would have satisfied any objections that the Court of Appeals might have had?

MR. KITCH: No. No, their reliance upon Camara and See, it seems to me, indicates that they thought there was a separate Fourth Amendment problem.

QUESTION: And that the evidence was just excludable?

MR. KITCH: That's right, under the decisions of this Court. They apparently thought they were bound by the precedents of this Court.

I think that the fact that they decided the case on this issue without argument on the point, they went straight.

QUESTION: And your whole point is that the record simply doesn't support an entry at a place where consent would be required?

MR. KITCH: That's right. As far as the record shows, the entry was onto an area open to the public, and our contention is that the inspectors for the State --

QUESTION: Well, well -- no, no, if I -- maybe I misunderstand you, Mr. Kitch. You say there's nothing in the record except the testimony of some witness, or perhaps of the inspector, that he was on the premises, period.

MR. KITCH: Yes, there's that testimony and there are the pictures, which I have not seen, and which are not

connected with --

QUESTION: Well, okay, can you tell from looking at the pictures where the pictures were taken from?

MR. KITCH: I assume so, but you cannot relate the place where the pictures were taken to where the observations were made.

QUESTION: Were the pictures taken by the inspector or by somebody else?

MR. KITCH: Yes. Yes.

QUESTION: The same day?

MR. KITCH: Apparently they are sequenced. When he was some distance from the plant, he stopped and took a shot; as he got closer, he took another shot. And then he took another shot.

He took his observations, and, as far as the record shows, he then went down and chatted with the plant managers, at least two of the locations about what they were doing to come into compliance with the statute. And went home.

There are issues, potential constitutional issues about the power of inspectors of this type to enter various parts and aspects of industrial premises, to cross fences, to disregard "No Trespassing" signs, and they may be issues this Court will have to face some day. They are simply not presented by this case.

They are purely interesting hypothetical questions

on this record. And since the right being asserted is Western Alfalfa's --

QUESTION: Well, what's the concern of the United States if this is affirmed?

MR. KITCH: Well, if it's affirmed, then the only possible construction is that whenever an inspector enters private property, even though there's a general holding out to the public to enter it, that we have Fourth Amendment problems, and Fourth Amendment procedures must be adhered to. And it will just complicate the process of making these kinds of observations and other observations related to the enforcement of regulatory statutes.

QUESTION: We've also a due process problem here, which is kind of combined --

MR. KITCH: That's correct.

QUESTION: -- combined in the Court of Appeals opinion with the Fourth Amendment problem.

MR. KITCH: Yes, if there is Fourth Amendment rights, then there has to be notice, they either get consent or serve the warrant, and --

QUESTION: And there is --

MR. KITCH: -- it's closely related.

QUESTION: And this observation was made at a period on, whenever it was, June 4th, 1969, if that's the date --

MR. KITCH: Yes.

QUESTION: -- and under your statute an emission of more than the designated opacity for as long as three minutes in any hour is a violation, and this whole violation, this whole charge was based upon that particular day, and the people in the Western Alfalfa Corporation had no idea that any test was then being made, and no opportunity to have their own people there.

MR. KITCH: We find this due process contention quite extraordinary. Law enforcement officials daily observe without notice illegal acts, which are fleeting and unreproducible, and their observations are, nevertheless, considered to be admissible evidence.

QUESTION: Well, generally -- generally --

MR. KITCH: I can think of many common --

QUESTION: -- generally these are -- the ordinary -- this is a matter of expert testimony, is it not?

This isn't an eyewitness who said, "I saw that man hit the other man over the head" or pull his gun, or whatever.

MR. KITCH: This is a matter -- this required testimony by --

QUESTION: This is a matter of an expert going out there.

MR. KITCH: -- a trained observer.

QUESTION: Right.

MR. KITCH: Well, an example that occurs to me is

speeding, where observations are made of the speeding car, whether they be based on time or the use of radar, requires certain training and competence. The police come out and flag the car down. That stops the movement. Where is the driver left?

QUESTION: Yes, but where is the radar here? It's just the man and his naked eye.

MR. KITCH: Well, that goes to the question as to whether this is a reliable kind of observation, which is probative enough to be admissible into evidence.

It's a separate point. There's a due process attack upon the use of the test. On that, as far as the United States is concerned, I would like to emphasize that the inclusion of these types of emission standards in State implementation plans, under the Federal Air Pollution Control Act, has been required by the Environmental Protection Agency, because they, in the judgment of that agency, offer the only feasible type of standard and means of testing which can be feasibly enforced against a broad range of emission sources on a continuing basis.

QUESTION: What now? What has been required? I missed it.

MR. KITCH: The use in State -- the States must submit implementation plans which meet the federal standards, which were set out by the Administrator of the Environmental

Protection Agency under the Federal Act. And one of the things that a State implementation plan must have is visible emission standards. And that means opacity and Ringlemann type standards. It's the only type known in the field.

The reference is 40 Code of Federal Regulations, Section 51.19 sub (c).

QUESTION: Two kinds of standards are opacity and density, or what's -- what's the other one called?

MR. KITCH: No. There are visible emission standards, which are essentially you see what it looks like.

QUESTION: Right.

MR. KITCH: And there are certain --

QUESTION: You see black smoke --

MR. KITCH: Yes.

QUESTION: -- and you say, Gee, that smoke's black, so --

MR. KITCH: That's one type of standard. Another type of standards are those which relate to the actual quantity of various kinds of material in the emission, which require very expensive and complex testing. All of the emission flow during the actual operation of the plant in question.

QUESTION: Over a long period, quite a long period, isn't it?

MR. KITCH: No, it can be -- once you set up

operating, it doesn't take a long period. You have to set up the equipment, and often new testing equipment is brought in for this purpose, and then removed, because of its expense, its delicate nature, and so on.

QUESTION: And that's called what? Not density.

MR. KITCH: That's test -- that's actual testing of what is there, actual --

QUESTION: Particulates.

MR. KITCH: The particulates, that's correct.

QUESTION: Right.

MR. KITCH: Now, that type of testing simply can't be done without the cooperation, advance notice to the plant. It's expensive, and it's the judgment of the federal agency that if they have to rely on that kind of testing alone, there can be no feasible air pollution control program which is applicable to all emissions of all types.

QUESTION: Mr. Kitch, --

MR. KITCH: It's been shown -- the case -- let me say this -- the case in the Court of Appeals for the District of Columbia, Portland Cement, which has been remanded and which the agency is working on, involves an opacity standard of ten percent, which is very close to clear. And the question that the Court raised was whether that, with that low a standard you could make reliable observations such as to make it a workable, feasible standard.

The standard here was 40 percent, which is kind of half dark smoke. And the observations here were 90 percent, which means that they practically completely obscured the view.

The factual question at ten percent is quite different from the factual question presented on this record.

Mr. Justice Powell?

QUESTION: I will ask you one --

MR. KITCH: My time has run.

QUESTION: Right. Well, I'll ask you one question. This company had notice, in effect, in twelve days, as I recall, after these tests were made. That gave it some opportunity to go out and have tests of its own made.

Would you be troubled if the first time the company heard of this was, say, six months later? The quality of air is rather ephemeral condition, and it wouldn't have done the company much good so far as preparing to defend itself, if, six months later, it had been told that on a certain day in June it had violated the law.

MR. KITCH: Well, the general problem of passage of time, as it affects the ability of the defendant to defend himself, is one that's come before this Court in a number of different contexts, and the general approach has been that there must be some showing of prejudice.

Now, if, for instance, they didn't get notice for

six months, and there's no showing of any reason why they shouldn't have had notice more promptly, and they showed that in that period they had quite innocently made significant changes in the plant, so that they weren't in the position to make any effort to reproduce this operation and demonstrate that it in fact operated within the standards, that, for instance, seems to me to be prejudice.

Or if they got notice in six months and they had to have the hearing in thirty days thereafter, and they said, "Well, the crop season's over, we would like to run the plant and we will get experts out and we will show that when it's running like it runs, it's clean," and the State says,"Well, you have to have the hearing now, we're sorry it's winter." It seems to me that would be prejudice.

But what is notably absent from this record is any effort by the company to conduct, by its own experts, a Ringlemann opacity observation, and introduce it into evidence.

Indeed, on page 73 of the record you find that counsel for Western Alfalfa states -- he says: "judging from the testimony I heard here at the first hearing, unless there is some change in the method of operation of these dehydrationg plants, I will expect the staff to come out and say we are finding Ringlemann violations."

His view seemed to be that if we were going to go through this again, the staff would come out and they will

look at the plants, and they will say that this is more than 40 percent. And they --

QUESTION: Well, the Court of Appeals opinion indicates that Western had its own Ringlemann testimony.

MR. KITCH: They offered the observation, a written letter to them from their hired consultant, one Mr. Ronning, who was not qualified, the letter didn't -- he was not called to testify, not subject to cross-examination. He did not -- his letter didn't indicate the conditions under which the plants were operating. It was just totally deficient as an evidentiary offer and was made -- in fact, the observations were taken some period of time before.

QUESTION: Well, the Court of Appeals opinion says Western countered this evidence with Ringlemann readings taken by a consulting engineer hired by Western, which showed no violation.

Then they also offered the results of the sophisticated test conducted at their plant by an independent engineering firm some months after they were issued the cease and desist order.

MR. KITCH: Well, both offers are defective for reasons shown in the record, Your Honor.

QUESTION: Yes, well, the first doesn't seem to have been an offer, it seems to have been the introduction of evidence.

MR. KITCH: It was simply they submitted a letter, this was an -- there were no applicable rules of evidence here. They let every -- if they wanted to put something in, they put it in.

But if you look at the letter, I think, --

QUESTION: Of course, they couldn't meet the charge vis-a-vis June 6th, because they had no idea any test was being made on that day. And that's what troubled the Court of Appeals, as I understand it.

MR. KITCH: Well, I think they could have met it by showing that, by evidence, that under those operating conditions then in effect on June 6th, that these plants don't emit emissions of this --

QUESTION: Well, you wouldn't have the same objections, though, would you, if, freed from Fourth Amendment overtones, some court would decide there was a denial of due process?

MR. KITCH: Oh, we certainly would. The --

QUESTION: Well, why, for heaven's sake?

MR. KITCH: Well, the -- we have reports, the Environmental Protection Agency, from inspectors that when they do come on some plants, when they give notice, it suddenly turns out the plant finishes its run, and it seems they are going home for the day. And the inspector can wait, maybe he can sit around, and, well, the next day -- or he has many

other inspections to make and he leaves. And when he leaves, we get word the plant is running again.

QUESTION: Well, of course, the federal statute seems to require presentation of credentials.

MR. KITCH: That's correct. And we do present credentials. But we would like to leave the option for statutory flexibility, if their experience under these Acts shows that there are problems of particular types.

Also I think there's an open question under the federal statute as to whether these kinds of opacity observation -- presumably under the federal statute, these kinds of opacity observations can be made under the Fourth Amendment from property open to the public, and which no special governmental right of entry has to be asserted.

And the due process area would require that the opacity observation made from a public highway not be made, unless notice is given in advance. And some of these plants, they can turn on the scrubbers, turn off the scrubbers, the precipitators and so on, and it saves them money not to have them on.

And our inspectors can't be everywhere at all times.

QUESTION: That's the same kind of argument that's made in every constitutional case, the argument of necessity and practicality, --

MR. KITCH: That's correct.

QUESTION: -- and that you can't catch wrongdoers without busting into their houses in the middle of the night without warrants and so on.

MR. KITCH: Well, we're not -- yes, it's always a question of degree.

QUESTION: That's all the same argument.

MR. KITCH: We're not doing it. That's right. Thank you.

MR. JUSTICE DOUGLAS: Mr. Cawelti.

ORAL ARGUMENT OF DONALD D. CAWELTI, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. CAWELTI: Mr. Justice Douglas, may it please the Court:

I am Donald D. Cawelti, and I'm the attorney for the respondent, and have been throughout these long proceedings.

I have some remarks that I'd like to proceed with in some order, but I think, particularly in view of the questions that have been addressed to the Court, I'd like very much to point out what this record shows and what it does not show.

QUESTION: I gather from reading the proceedings before the Board, and some of the statements that you've made, that this has been an on-going controversy between the State authority and the respondent.

MR. CAWELTI: No, it's been on-going, I would not characterize it as a controversy. Justice White went into

this with Mr. Tucker. This had been going on for some two years previous in this implied consent discussion that was had.

Certainly these personnel from the enforcement department of the division of health had been on Western's premises during, I believe, two season previous to this occurring. This was during that period of time which is referred to in the statute as the conference, conciliation and persuasion phase of enforcement.

They were on there, announced their presence, discussed what was going on, suggested improvements. This is all shown in the record, and indeed, as the inspector admitted, substantial improvements had been made. They were looking much better.

In fact, I think they had, in view of the remarks that they have made, intended to lull Western into a sense, particularly with Mr. Ronning's report, their own examiner, that they were in compliance or very close to compliance.

So this had been going on in a very cooperative way, I think the record shows, for the previous two years. These two years before that they were on there, they were not there to gather evidence when they came on the premises, they were there in an effort for conciliation.

QUESTION: Your comment that the hearing, that apparently respondent did not satisfy the Ringlemann require-

ments, was that as a result of tests that -- I'm referring to page 73 -- the tests that you --

MR. CAWELTI: I don't recall that remark in the context it was made in, Mr. Justice Douglas. We did deny in a number of places throughout the record --

QUESTION: You say there, "that the staff feels there are Ringlemann violations, visual violations".

MR. CAWELTI: Well, it was clear the staff of the enforcement people did feel that --

QUESTION: And "that Western Alfalfa must at its expense perform these particulate tests and judging from the testimony I heard here at the first hearing, unless there is some change in the operation, I will expect the staff to come out and say we are finding them."

I mean, this is not a surprise --

MR. CAWELTI: Well, the staff was insisting right at this --

QUESTION: -- raid, like on a bootleg establishment, for example.

MR. CAWELTI: No. No. The staff was saying right at this hearing, where I made this remark, that there were violations, and I suspect my remark was made in that context: I expect the staff to continue with that expression.

QUESTION: Did you offer at any time any evidence that the company was complying with these tests? Did you have your

own tests made?

MR. CAWELTI: Here's what we offered, which is really all we felt we could: that they had been out there the year before, 1967, and observed very marginal violations, 40 to 50 percent at these plants. The violation being 40 percent. We offered a letter in evidence they had written the following summer, in 1968, that they had noticed marked improvement in the operation of the plants.

We offered the evidence of Mr. Ronning's examination that following fall, in 1968, finding them in compliance with visual standards.

Now, granted, this was all before the critical June 4th date. We offered the results of a particulate examination made August following the June when the State was out there, showing that from a particulate point of view they were in compliance.

And I do wish to disagree with Mr. Tucker's remark that the State would entertain evidence as to what occurred after June 4th.

I'd like to refer to page 77 of the record, where I had, myself, an exchange with Mr. Heaton, one of the Board members. He stated:

"Let me talk about the law on June 4. The specific law on June 4. As the law reads on that date, and on June 16. Could you have been in violation?"

I replied: "Yes. Our own view is that we were not, and our own testimony is we were not."

Mr. Heaton stated to me: "No, your testimony was in fact that you were not in violation in August. I don't have the date of that report," -- he's correct, it was August.

And so forth.

"Your testimony is that you didn't think you were in violation" -- "you didn't think you were in violation of the law on that date".

And there is another reference in there, but I couldn't find it during -- since this came up. There's one other reference in the record somewhere, that June 4 was their date.

QUESTION: What was before the -- what did you offer before the court?

MR. CAWELTI: When this went to the District Court, about the only thing that -- we did have an evidentiary hearing. The only thing that hearing was concerned with was the adequacy and constitutional validity of the Ringlemann test. We did not try to rehash -- I didn't feel we were permitted to introduce further evidence that the Variance Board had not considered.

QUESTION: What evidence did you put in on the Fourth Amendment? Or should I say: what, if any?

MR. CAWELTI: Not very much. Not very much.

The only thing that's in the record, the Justice Department attorney was correct, we don't have any -- there's no reference to a parking lot in the record. Nowhere. That expression isn't in the record. Where this comes from in the briefs and arguments, I have no idea.

The record -- all it says is that the observations were made by an entry to the premises of Western. There's nothing further than that. Unfortunately, perhaps; but that's all it says.

QUESTION: Mr. Cawelti, your reference to your colloquy with Mr. Heaton at page 77, I take it the Board is probably a lay board, it doesn't consist entirely of attorneys. In my own experience with those kind of boards is that frequently a member of the board may not properly conceive exactly what the legal issue is, but generally before they make their decision they are advised by their counsel.

I wonder if it's entirely fair to attribute to Mr. Heaton what's the ultimate position of the Board as to the issue of when, when the violation was --

MR. CAWELTI: No, it's not. It's not fair to attribute that to Mr. Heaton what other Board members may have felt but not said. He happened to have been one of the more outspoken members of the Board, as the record shows.

The decision of the Board itself found a violation

on the date in question. I think that will be shown in the appendix, in the record.

QUESTION: Is there in the appendix what might be the judgment or the order of the Board?

MR. CAWELTI: Yes, I think that was attached to the original petition for cert; it's not in the appendix, but attached to the original petition. And that refers to the date in question.

QUESTION: Mr. Cawelti, getting back again to that colloquy on page 77, at the bottom of the page you say that you couldn't possibly reproduce a defense for June 4, but that what you had offered, whether it was August or whatever date it was that it was taken, that there was testimony the conditions on the August day were identical, or the same as on June 4, and therefore you had done the best you could with your particulate evidence to establish that since, as of August, you were in compliance and the conditions were the same as on June 4; therefore, the Board should take as your defense that on June 4 you were in compliance. Isn't that it?

MR. CAWELTI: That's what we tried.

QUESTION: Unh-hunh.

MR. CAWELTI: The Board apparently didn't accept it. It took the visual observations made on June 4 in preference to --

QUESTION: Incidentally, getting back now to page 73,

your discussion of -- was this a sort of burden-of-proof thing? I'm looking at the bottom of the page, where you say that you'd expect the staff to come out and say, well, there were Ringlemann violations, and the only way you'd be able effectively to defense against that would be by making expensive particulate tests?

MR. CAWELTI: Yes.

QUESTION: Unh-hunh.

MR. CAWELTI: Now, there was a confused period of time here involved that I think is difficult to understand. On June 4th, when the violation was charged, the only standard to determine whether or not there was a violation was this visual opacity reading.

At the end of June, first of July a law became effective, which permitted a person accused of a violation to, at his own expense, make a particulate test, which is more expensive and more difficult, and --

QUESTION: Well now, to make it when? As of the same day that the visual readings were taken?

MR. CAWELTI: Well, it couldn't, obviously --

QUESTION: I see.

MR. CAWELTI: -- do it.

QUESTION: Not unless you knew about it.

MR. CAWELTI: No, not unless you knew about it. And had the equipment in place to do it.

The problem here, of course, is that we felt so -- we were taken advantage of, that we didn't know until two weeks afterwards, they made the analogy there and elsewhere that it's like receiving a citation in the mail that two weeks ago you were observed speeding on a highway. It's pretty hard to remember just what you were doing two weeks ago. Although if you get a ticket right now, you probably know right now whether you were violating or weren't violating.

QUESTION: Mr. Cawelti, in the findings of fact of the Variance Board, in the petition for certiorari Appendix E-2, one of the findings of fact, No. 6, is that petitioner performed a test pursuant to section such-and-such of the Colorado statutes, "but the Board finds that Petitioner did not comply with the statute in performing said test" et cetera. I don't get any implication from that finding or any of the others, that the fact the test may have related to a different date would have meant that the Board would have excluded it.

MR. CAWELTI: No, I don't find it there. Really, they excluded it because the staff of the department had not approved of the method of taking, nor the correlation that existed between particulate and visual.

That has to kind of remain unanswered, what the effect would have been of a later test. We had the impression,

with the discussion, as you can see, that we were not getting very far in talking about later tests.

QUESTION: As a matter of Colorado law, what does the -- what's the aftermath of a denial of variance by the Board?

MR. CAWELTI: Well, then you're expected, if you were denied a variance, and you of course operated in violation, you would be issued a cease and desist order, and if you violated that you'd be subject to criminal penalties.

Now, we had a little confusion in this case. The Board denied Western a variance when it hadn't actually asked for one, and I think they admitted their error in that. When Western was charged with this violation, it came in and said, We're not guilty.

And the hearing was held on that basis. Well, the Board said, You are guilty and you can't have a variance.

Well, there hadn't been any variance hearing, and this was, I think, more a procedural mixup than anything else, and nothing ever came of it.

One other factual matter -- I do have something organized here, if I can get to it in a minute -- but one other factual matter I'd like to address myself to is Mr. Tucker's statement that this could have been seen from the highway, or the charge could have been made from the highway. Or from a nearby open field.

We don't know that. We know that he entered the

premises. We know that he felt he must enter the premises, or else he presumably could have taken the judgment, the readings from a highway or a nearby open field.

QUESTION: Well, are you denying this? You must know your plants, certainly, whether the plumes are visible.

MR. CAWELTI: They are highly visible. As the record indicates here; at times. It's a drying operation, there are 22,000 gallons of water dried an hour through this gas-fired dryer, and they put up huge billows of steam frequently, particularly in the early-morning hours.

But there's a lot of water evaporated, and you can sometimes, as one of these pictures show, even from a good distance away -- the inspector, one place or another in the record here, talks about what he judges it because of the blue haze trailing off after the steam has evaporated.

Well, that can't be done from a long ways away, I submit. And apparently the inspector didn't feel it could be done from a long ways away. The State must feel that it's important to be on the premises, or we wouldn't be right here now. I think that --

QUESTION: So far as the record shows, he might have been one foot on the premises.

MR. CAWELTI: Pardon?

QUESTION: He might have only been one foot on the premises. So far as the record shows.

MR. CAWELTI: So far as the record shows, --

QUESTION: And so far as the record shows, one foot off of the premises would have been the same.

So far as this record shows.

MR. CAWELTI: That's right.

QUESTION: So I kind of lose what you're arguing about.

MR. CAWELTI: I'm saying that we -- the point seemed to be made -- being made, that he could have seen this violation without having been on the premises.

QUESTION: Right.

MR. CAWELTI: And therefore, because he came on the premises, there can't be any Fourth Amendment violation or need to give notice or anything like that.

I think my point is, if in fact these observations had been made off of the premises, we wouldn't have anything really here to talk about today.

QUESTION: Isn't it true that you -- all your position is that solely because he was one foot on the premises, you don't have to worry about anything, you win? Isn't that what you're arguing?

Even if you were 90 percent in violation, the fact that he was one foot on there, you're free. That's your argument?

MR. CAWELTI: I'm concerned -- all right, I suppose,

in a blunt way it could be put that way, Justice Marshall.

I think what we're talking about here --

QUESTION: Oh, you're willing for us to go that way?

MR. CAWELTI: I don't care. The law has been changed in Colorado. As far as I'm concerned, this case is moot.

QUESTION: Why do you say that?

MR. CAWELTI: The law now requires that their consent of warrant can be obtained.

QUESTION: But there's been an order issued denying a variance.

MR. CAWELTI: But I don't know how in the world -- denying a variance; finding a violation, I think is --

QUESTION: Well, you said you didn't ask for a variance.

MR. CAWELTI: No, we didn't ask for a variance.

QUESTION: But the order grants -- denies one.

MR. CAWELTI: Well, it didn't -- we --

QUESTION: But that's one of -- you know, you're ignoring your strongest point. The District Court in Colorado overturned the administrative decision, said it wasn't even supported by substantial evidence.

MR. CAWELTI: Yes. I'd like to come to that in just a minute here, if I can.

QUESTION: Yes.

QUESTION: You're not bound by what Mr. Justice White tells you is your strongest point, so go ahead.

[Laughter.]

MR. CAWELTI: No, I really wasn't going to address that substantial evidence thing right away, I think my strongest point is the two cases decided by Justice White in 1967, Camara and See. And I don't know why we haven't talked more about them. But it's time --

QUESTION: The Court -- the Court decided those.

MR. CAWELTI: Yes, it's written by him; sorry. Yes, decided by the Court.

QUESTION: Well, let me ask you a question about those cases, if I may, Mr. Cawelti.

In our California bankers case that this Court had about the beginning of the month, we referred to the United States vs. Morton Salt case, which was decided in the late Forties, to the effect that corporations don't have quite as extensive Fourth Amendment rights as individuals.

Now, as I recall, Camara and See were both cases of individual householders, weren't they? At least noncorporate businesses.

MR. CAWELTI: They were not corporations. One was a business and one was an individual. The significance of the See case was that a businessman, with respect to his private

property has just as fundamental rights as an individual with respect to his house. That there is no distinction between business interests owned by an individual, true, and his own residence.

Neither involved a corporation. These two cases did hold, though, that an administrative search of private property, whether it's residence or business, without proper consent is per se unreasonable, and in violation of the Fourth Amendment, if no search warrant has been obtained. Except in certain special circumstances, which the Court discussed in these two cases.

And we -- impliedly, all the way through here, the State seems to be arguing that these two cases don't apply or shouldn't apply. And they've offered a number of grounds in that respect.

I think it's important to focus on just what the search of inspection was here. We do know, as Justice Marshall points out, that the inspector did go on the premises. He didn't go on for conference of conciliation, he didn't go on for a cup of coffee, he went on there to get evidence this time. He was there at least ten minutes, it may have been more. The EPA indicates you should be there thirty minutes, to make a proper Ringlemann examination.

He did take pictures. The State, for reasons known to it, decided not to introduce those pictures in support of

the State's case. The inspector said, I believe, that they really don't show anything; and I don't think they do. I put them in because I think, to demonstrate the steam and so forth.

This did constitute a search, I believe, as the Court said in the Katz case, involving the telephone booth, that the Fourth Amendment not only extends to the seizure of tangible things but also extends to intangibles, such as, in that case, a recording of a conversation. I'm sure a photograph would be search.

QUESTION: A search of the sky.

MR. CAWELTI: Well, it had to be somewhere.

QUESTION: But it was the sky.

MR. CAWELTI: It was -- what was being emitted from this equipment and plant of --

QUESTION: Well, once it left the plant, it didn't belong to the plant, did it?

MR. CAWELTI: No, it certainly didn't. It was responsible for it, I agree, but it didn't belong to the plant.

QUESTION: It didn't belong to it.

MR. CAWELTI: No.

The inspector took a mental image of it, took a picture of it. I don't think a search is any less a search because of --

QUESTION: Well, Mr. Cawelti, if you feel so strongly that it was a search, why wasn't this raised in the Colorado court?

MR. CAWELTI: Well, it was in the Court of Appeals, it was not raised and no proper record was made before the Variance Board.

I've got to be quite candid, that I found out an awful lot about search and seizure in the whole course of this argument than I ever knew before I started in this case. And there are -- it's unfortunate the record is not more complete, and it could have been.

The evidence itself that we're talking about here is the degree of opacity of this particular emission. It would be ideal if that could be preserved and brought into court. But of course it can't be.

Pictures of it I suppose could be, if they showed something. It happens the pictures here didn't show anything.

Second-best evidence is what we had here, the visual description of what the inspector saw.

I think the government conceded in its brief that if particular measuring equipment had been installed, that the results of that would have been a search if it had been brought into court.

I don't think it's any less of a search because the method of observation, reporting the evidence was in a sense

proved.

The inspector apparently felt it necessary to go on the premises, and, as I've said, the State now feels it's necessary to defend his going on the premises. At one point in this case the argument was made that the open-field doctrine defense, application of the Fourth Amendment here.

Well, perhaps it would, if we had a factual background to apply it to. This -- these observations were not made from an open field; we do know that. They were made from the premises. We don't know much about the nature of the premises, whether they're open to the public or not. There's no indication.

The federal, Justice Department refers to the fact there was no fence around it. A question was asked, was any sign up?

Well, I submit, to assure your privacy, it's not necessary to put up a fence to insure that you won't be intruded upon with unnecessary investigations. It shouldn't be necessary to put up signs or hire dogs to keep people off.

We don't know. There doesn't appear to be a fence involved. We don't know where he was on the premises.

QUESTION: Do you think the right of privacy depends at all on who else besides government inspectors you make welcome? I mean, if you make buyers and sellers and visitors welcome to the premises, do you think you still have a right of

privacy as against government inspectors?

MR. CAWELTI: This comes into the plain-view doctrine, I mean, you can't ignore what is in plain view. I think that is where we have to seek the answer to this. Certainly anybody, whether a police officer or not, has got the right to walk up and down the aisle of a grocery store, to see what's showing there.

The extent to which you expect a person to be there and see what they're seeing, I think is important. The Court addressed itself, most recently, to, I think, what this problem was in the Coolidge case, vs. New Hampshire. And it was in that case that, in discussing what may be in plain view, that a couple of limitations were discussed by the Court.

First of all, they indicated that the officer involved should have a prior justification for being where he was. A legitimate reason to be there, unconnected with the search that is being made.

It reiterated again, the case did, that the plain-view doctrine didn't -- it was still true that no intrusion is justified without a careful determination of necessity, and that the discovery of the evidence involved must be an inadvertency; that, where do you go on to a person's property, looking for something, as the inspector did here, knowing that he was going to make a search, it can be hardly said that what

he found was -- he justified it because it was in plain view. I think in this case, or one other one similar to it, the Court indicated that if you poke around long enough you can always find something in plain view.

That's about as close as I can get to what that problem is, and the answers that I've found by this Court.

QUESTION: Of course, the open-field case you mention is that Hester case by Holmes.

MR. CAWELTI: Yes. Sometime ago, and still standing as good law in this Court, as far as I can determine.

But we don't seem to be having an open field here. From which the observations were made. The case would be very simple if we did.

QUESTION: It's an open sky, yes.

MR. CAWELTI: Yes.

QUESTION: Do you have -- are you familiar with the case of United States v. Lee? Decided about the same vintage as Hester, a little later, the prohibition era, where the Coast Guard cutter shined its light on the rum-runner?

MR. CAWELTI: No. I don't --

QUESTION: And it was held that that was not a violation of the Fourth Amendment.

MR. CAWELTI: Yes.

QUESTION: By means of a searchlight on the Coast Guard cutter, they discovered grain alcohol aboard the

rum-runner.

MR. CAWELTI: Yes, there were a lot of stills discovered in those days, too, that may or may not have been in plain view.

QUESTION: There were.

MR. CAWELTI: And I think a lot of law was made on that account.

I don't think the present status of our law would allow a revenue agent to go poking around in my backyard or somebody else's field to see if he could find a still, tucked away behind a lilac bush. I don't believe our law presently permits that, in recent decisions of this Court. Perhaps it may have been different in the Twenties.

QUESTION: There are some lower court cases that say that if there's enough smoke coming from the still, that's grounds to go in.

MR. CAWELTI: Grounds to go in --

QUESTION: I hate to use the word "smoke" on you. But that's what it was.

MR. CAWELTI: Where there's smoke, there's --

QUESTION: Fire.

MR. CAWELTI: -- a still.

[Laughter.]

QUESTION: Mr. Cawelti, may I ask, put this hypothetical question to you: Suppose that the government had

reason, let's say the federal government had reason to believe that some criminal activity was going on in your client's building, in addition to its legitimate operation. We've been talking about stills, assume that it had some reason to believe a still was being operated. There are counterfeit operations.

And that an FBI agent had come on the premises to the same extent as the Colorado inspector did here, and taken photographs. Would your position be the same?

MR. CAWELTI: Now, I understand that the inspector came on, lawfully, with a warrant or otherwise, looking for something else and found the still --

QUESTION: No, no, no. No. All that was done was the government wanted photographs of the building. Instead of taking them with a long-lens camera, say, from the highway, the government officer stepped on the parking lot and took pictures of the building that was suspect as a possible base for criminal operation.

MR. CAWELTI: Unh-hunh.

QUESTION: Would the government have committed a Fourth Amendment violation? It would have engaged in a trespass, but would the Fourth Amendment have been violated?

MR. CAWELTI: I think in a technical sense these things can always be pushed to a line where they seem ridiculous. I think these cases have said that any invasion

of property, any intrusion, without judicial review in advance, except in certain circumstances -- which we can get to -- is prohibited by the Fourth Amendment. I think Camara and See have said that.

Most of the time has been spent in what these exceptions are. The case of Katz approached this problem that we've both been discussing now. A minimum, a minimal invasion. And in that case the Court allowed that here they were overhearing a conversation in the phone booth; that this was about as minimal an invasion of privacy as you can have. But still this was forbidden under the restrictions of the Fourth Amendment, because there had not been a prior judicial review of the invasion of privacy which occurred in making that search.

Now, these fine lines are always difficult, but I would have to say that that perhaps approaches what we're talking about.

We were on the Coolidge case and the plain-view doctrine, and a number of other statements made by the Court in that case in connection with the right of privacy and so forth. I'd like to return a minute to the Camara and See cases, which were important in the particular context of saying that these restrictions imposed by the Fourth omendment to secure privacy and guard against intrusion apply with equal force to administrative inspectors as they do to police

officers.

In pointing out in that case that the additional body of law that has developed outside of our earlier traditions, which is involved with these administrative type of compliance, inspections, and so forth; and certainly in this day and age that we're in now, we're coming into what, more and more, are environmental matters particularly.

And I think the Court was concerned in these cases in 1967 that the people enforcing these laws were not going to be as concerned with, or they weren't aware that they should be as concerned with rights of privacy and security as in the conventional law enforcement way. And that is the import of these cases, as saying to fire inspectors, building inspectors, and so forth: You have to be just as concerned about rights of individuals as people involved in more direct criminal activities.

QUESTION: Well, what do you do about Colonnade and Biswell?

MR. CAWELTI: All right. I'd like to do something about this. Colonnade. Colonnade is a little like the situation we have here, where the inspectors were denied access to a liquor stock, I believe it was, and forced their way in and seized the liquor stock, which indeed was improperly labeled bottles.

Justice Douglas, author of the opinion in that case,

suppressed that evidence.

QUESTION: But he --

MR. CAWELTI: I think the Court -

QUESTION: -- only -- only -- would that have happened if the door hadn't been locked?

MR. CAWELTI: I don't know. I think the Court --

QUESTION: Well, what about the next case?

MR. CAWELTI: Biswell? Biswell involved, as the Court is aware, the situation of a businessman who desired to go into a business involving sales and distribution of guns, requiring him to obtain a license, knowing that it was a pervasively regulated business, I think was the language of the Court, and that he would indeed be subject to investigations, and investigations made without a warrant.

Now, I think Biswell is quite a bit different situation than we have here. I'm surprised it hasn't come up earlier in our discussion. But here, of course, there's no federal license involved, there's no license at all involved in operating an alfalfa dehydrating plant. Anybody can start one up. It's a necessary adjunct to the agricultural economy of the area. Instead of baling it and selling it, they dry it, pelletize it, stock it, and sell it.

No license is necessary. There's no regulations applicable to the business, other than the regulations that all of us are subject to, in terms of fire codes, building

codes, zoning, and so forth; air pollution, which we're all subject to.

There's no regulations unique to the business, as in the Gun Control Act, as in the Biswell case.

I don't think there's anything can be drawn from that, saying that the exception made from Camara and See by Biswell should be extended to this situation. I see no rationale for it.

Colonnade, to return to that for just a minute, there the evidence was gathered, was pressed, because there was no statutory scheme set forth for warrantless inspections. I think, as I look at the statute involved in that case, I find it identical with the statute of Colorado in this case. Entry is authorized, but no scheme involved, no requirement for identification, no limitation on time, no limitation on scope. The Court in that situation said: there may be a statutory scheme authorizing entry without warrant, but as long as no particulars are spelled out, no limitations are spelled out, requirements of the Fourth Amendment still apply.

Well, the same could be said in this situation.

Now, throughout the course of briefing and argument in this case, there have been a number of remarks about the burden of obtaining a search warrant. In the first place, I think we should realize the warrant is going to be an isolated

situation. I think Mr. Tucker indicated, most people -- no percentage is given -- but most people in the situation where a person identifies himself is going to allow the inspector to come in.

QUESTION: Well, I have a great problem. What are you going to search?

MR. CAWELTI: You're going to walk anywhere you want to on this person's premises, as this inspector did, he had to go from one location to another to get the sun and the wind and the --

QUESTION: There's nothing in the record --

MR. CAWELTI: -- and so forth in the right place.

QUESTION: There's nothing in the record that said he moved around.

MR. CAWELTI: I believe it was, Justice Marshall, it might --

QUESTION: I thought the only thing was that he entered the premises. One sentence. He said that's all there was.

MR. CAWELTI: As to the nature of the premises, that's all there was. Whether it was a parking lot or whether it was open to the public, or otherwise; that's all it said.

The record did say that he moved from one location to another on the premises.

QUESTION: Well, I missed that. I'll find it.

MR. CAWELTI: Yes. I'm making --

QUESTION: Well, I still want to know -- all I know he searched was the skies.

MR. CAWELTI: What was going into --

QUESTION: In plain view.

MR. CAWELTI: What was going into them, yes.

Well, -- oh, I lost my train of thought. Oh, I was talking about search warrants.

QUESTION: Right.

MR. CAWELTI: Would this have hindered -- would this requirement hinder making these type of inspections.

Most of the time not. People will consent. If the consent is withheld, you go on and identify -- the inspector goes on, identifies himself. If consent is withheld, then the inspector has got to decide: well, can I do it from the open field? Go over and stand over there and get my job done, or is it necessary I be here on the premises?

And I think Camara and See require that if he must be on the premises, if he's going to intrude for the purpose of gathering evidence, go get a warrant.

There's been some talk that the timeliness that's needed and so forth. In Colorado, Rule 41, a warrant -- there is no limitation on how long you can get a warrant for. For a reasonable time, presumably. Get one and it lasts you

for two weeks. And any time you go by you're ready to go there with a warrant.

And if you have any reason to be -- think you're going to be refused, get your warrant before you go. There's no indication, for example, in this case, the inspector setting out on this June 4th morning, June 6th, to visit these three plants and issue citations. He could have taken a warrant along with him. The result of the case would have been exactly the same; the evidence would have been the same.

I don't think it can be said that the lack of -- that his having to get a warrant would have impeded him, his activity.

We've talked about, he insisted, indeed, all the way through this that the accused should have notice of the inspector being there.

Now, aside from this affording the right to object to an inspection being made, evidence being gathered, I think it should be noted that this is not an uncommon statutory scheme. It is referred to in the government's brief. Generously provided, and gives more examples than I could have thought of, where the credentials must be shown before you can go on.

Indeed, the federal Clean Air Act for just these type of inspections, Federal Water Pollution Act, the Mine Safety Act, all require that before you make an inspection

you show your credentials. This is not uncommon.

The Colorado law, as it now reads, you must get consent or a warrant. Well, obviously, you can't get your consent if you don't even ask. If a person doesn't know you're there, so it, in effect, requires you to come up and give notice that you are there.

A curious example, speaking of the Colorado law, is that if you're going to take a tangible sample of whatever you're looked at in air pollution, you're required to give it to the person you took it from. It's strange that the Colorado law says if you're going to take a visual impression of whatever you're charging the evidence of, there's no requirement that the person from whom, or on whose property you take this visual impression, hasn't got a right to be there simultaneously and look at the same thing.

"Look, this is what I'm going to charge you with." That's all we've asked in this case. And so you'd have a chance to look yourself and see what's there. Have some way of answering. If you did complain bitterly, maybe at too much length, our people going to the smoke school run by the State of Colorado were not certified that they were competent, that they had taken the smoke school, so that they could testify with the same degree of credibility the State inspectors did.

But perhaps that's nit-picking.

The point is we had no opportunity to look at that dissipating, evanescent, here now and gone forever evidence that the violation is based on.

We spent a good deal of time in our brief talking about the constitutional adequacy of the Ringlemann test. I don't propose to go into that in greater detail. The Court, by its questions, has indicated its concern with the sufficiency of that as a test.

We did direct the Court's attention and perhaps aware of already, the situation in the Pennsylvania Power case. I only have the report in the Environmental Law Reporter, where -- and State implementation plan was turned down by the federal court, the federal Appeals Court, because the instrument of enforcement was the Ringlemann test. And I'm sure that case is going to end up here before it's finished, because the Justice Department attorney indicated this is a very common omission in the implementation plans.

There's a crude test, granted it's quick, speedy, get-it-and-go sort of thing, but it's not a very good indication of how much actual emissions, pollutants, if you please, are involved.

I can't help but think it's important that the Colorado law has changed since this all came up, and, as Mr. Tucker has indicated, they can't do what they're trying to justify and urge this Court they should be able to do, even

now under Colorado law. It makes me wonder why we're here.

QUESTION: You're here because you petitioned for certiorari and it was granted.

MR. CAWELTI: The State petitioned for certiorari. I'm here, because I was called here.

QUESTION: Oh, that's right. You're quite right.

MR. CAWELTI: I think the effect of a reversal by this Court of what the Colorado court has done would be a very open invitation to all people engaged in this area of law enforcement that you can go on with you want to, without telling anybody, and make your investigations in secret and advise them later. How much later is up to you, of what you found. And leave them to their own devices as to how to defend.

QUESTION: What -- to the extent the court's decision rests on due process or some ideas of fundamental fairness, there wasn't any mention of any federal standard there, was there, no Fourteenth Amendment that was -- we might as well as assume it was some sort of a State standard of fairness?

MR. CAWELTI: I think, Justice White, the Appeals Court viewed the issue on two things --

QUESTION: I know they've gone on the Fourth Amendment.

MR. CAWELTI: -- on due process, fundamental require-

ments of procedure of due process, that would be the Fourteenth Amendment.

QUESTION: Well, it didn't -- the District Court didn't give its frame of reference on fundamental fairness, did it?

MR. CAWELTI: It did, it --

QUESTION: What did it --

MR. CAWELTI: -- did on almost the same language as the Court of Appeals. I think what the Court of Appeals did --

QUESTION: Well, but did it refer to the Fourteenth Amendment?

MR. CAWELTI: Thos fundamental elements of due process, I think that's about the way it referred to it.

QUESTION: Well, you have a constitution in Colorado, also, don't you?

MR. CAWELTI: Yes. I think in this --

QUESTION: With some due process attached to it?

MR. CAWELTI: Indeed we do.

QUESTION: Yes.

MR. CAWELTI: And of course the Court of Appeals carried it one step forward. I think it's the -- as I found in going into this case further and further, this notice argument under the Fourteenth Amendment does tend to lead you right into the search problem under the Fourth Amendment,

identifying yourself, letting it be known what's going on, giving a chance to either object or, if nothing else, to be able to defend.

My time is well up, isn't it?

Thank you very much.

MR. JUSTICE DOUGLAS: I think you have about three or four minutes remaining, Mr. Tucker.

REBUTTAL ARGUMENT OF WILLIAM TUCKER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. TUCKER: Thank you, Mr. Justice Douglas.

I think, to answer your question that you asked earlier, Mr. Justice White, the fact that there was a trespass doesn't make any difference, as this Court articulated in the Katz case. And the Court said:

"Assuming that the officers were both trespassers and lacking in probable casue, Fourth Amendment protections do not extend to the open field area surrounding a dwelling and the immediate adjacent curtilage, and therefore, information gained as a result of the civil trespass on open field is not constitutionally tainting?"

The pictures and the testimony of Inspector Taylor showed that he observed this plume of smoke, before he was actually on the premises of Western Alfalfa. He had justifiable cause to enter onto the premises and obtain the evidence which he did. And that was an opacity reading by the smoke plume,

or the plume which they were putting into the atmosphere.

Counsel has stated in his argument that the evidence would be the same if a warrant had been obtained. And that's exactly correct. And therefore a warrant would serve no useful purpose.

If the State had had a warrant or had obtained consent, the evidence would be exactly the same, because Western Alfalfa or none of these operations have a trained smoker on the premises. They would not have been able to take opacity readings of their own on that particular day. And, in fact, after they received the cease and desist order some twelve days later, they still didn't take any opacity readings.

So consent or a warrant would not change the fact situation at all, and would not change the evidence.

So it is a useless gesture to require the State to go through the process of obtaining a warrant. The inspector here was merely observing what was being put into the atmosphere for anyone who desired to look and see.

The due process question is no different than an individual who is speeding. Counsel has used that as an example. You're not warned by an officer prior to your speeding that he's going to observe you, and if you speed you're going to get a ticket. He stops you after the fact.

QUESTION: But it's generally very soon after the

fact. It's not ten days or two weeks later.

MR. TUCKER: That's correct. But what Western is complaining about here is they're saying, We did not have notice at the time, so that we could have an independent observer present.

You're not -- you do not have any right to have an independent observer present on the highway. So that you have an independent third party to testify against the officer, saying you were not speeding.

QUESTION: But you're in the car and you have a speedometer, and --

MR. TUCKER: That's correct.

QUESTION: So at least -- and it happens the arrest generally happens very soon after the event, as I said.

MR. TUCKER: That's correct.

QUESTION: Yes. And here Western Alfalfa didn't have a speedometer.

MR. TUCKER: No. But that's not the fault of the public. Both of the laws are to protect the public interest, welfare and safety, and that is you must operate your car on the highways in a manner that you do not endanger the safety of other people using the highway. Western Alfalfa cannot use the atmosphere in a manner that it endangers the health and safety of the rest of the --

QUESTION: How does Colorado administratively

handle these problems? Would they require a plant, assuming you find the plant has violated the law, to put in certain kinds of new equipment?

MR. TUCKER: They require a plant to submit a plan whereby they are going to bring the operation into compliance, and they have a choice of numerous equipment that can be installed on the plant to either catch the particulate matter before it escapes into the atmosphere, or some manner to prevent it from going into the air.

QUESTION: This pertains only to the particulate matter?

MR. TUCKER: That's correct.

QUESTION: Nothing to do with sulphur and things of that kind?

MR. TUCKER: Well, sulphur, of course, would be a more toxic material and they would not be allowed to allow that to escape in the atmosphere.

Thank you.

MR. JUSTICE DOUGLAS: The case is submitted.

[Whereupon, at 11:39 o'clock, a.m., the case in the above-entitled matter was submitted.]