

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1608

TITLE SOUTH-CENTRAL TIMBER DEVELOPMENT, INC., Petitioner v.
ESTHER WUNNICKE, COMMISSIONER, DEPARTMENT OF NATURAL
RESOURCES OF ALASKA, ET AL.

PLACE Washington, D. C.

DATE February 29, 1984

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(202) 628-9300

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SOUTH-CENTRAL TIMBER DEVELOPMENT, INC., :

4 Petitioner :

5 v. : No. 82-1608

6 ESTHER WUNNICKE, COMMISSIONER, DEPART- :

7 MENT OF NATURAL RESOURCES OF ALASKA, :

8 ET AL. :

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10 Washington, D.C.

11 Wednesday, February 29, 1984

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 1:00 p.m.

15 APPEARANCES:

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17 on behalf of Petitioner.

18 KATHRYN A. OBERY, ESQ., Washington, D.C.;

19 on behalf of the United States as amicus curiae.

20 RONALD W. LORENSEN, ESQ., Juneau, Alaska;

21 on behalf of Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in South-Central Timber Development against LeResche.

Mr. DeVeaux, you may proceed whenever you're ready.

ORAL ARGUMENT OF LeRCY EUGENE DeVEAUX, ESQ.,
ON BEHALF OF PETITIONER

MR. LEE: Mr. Chief Justice and may it please the Court:

The issues in this case are basic commerce clause issues: Can a state, in selling natural resources to private parties, insist that those resources be processed before the resources can be shipped in interstate or foreign commerce? Can Congress' consent to such a restraint be implied from a U.S. Forest Service policy governing federally owned natural resources?

The facts of this case are clear and they are not in dispute. In 1980 the State of Alaska noticed, sent out prospectuses and sample contracts offering to sell 49 million board-feet of mixed spruce and hemlock in Icy Bay, Alaska. A special condition to the contract in this case stated that before the logs out of this sale could be shipped in interstate or foreign commerce

1 they must be primarily processed.

2 The State reason for primary processing is to
3 encourage in-state construction of lumber mills and to
4 support existing lumber mills within the state.

5 South-Central, a bidder and a potential bidder
6 in this case, cuts, sells, and ships logs in interstate
7 and foreign commerce, particularly, in fact virtually
8 all of them, in foreign commerce to Japan, and that is
9 noted even in the state's brief at page 34. At the time
10 of this sale, South-Central did not at that time have a
11 functioning mill within the State of Alaska.

12 The first question that probably should be
13 addressed is whether Congress has consented to state
14 activity which would otherwise be a violation of the
15 commerce clause. The district court, United States
16 Court of Appeals for the Ninth Circuit, and the State of
17 Alaska in this Court have all conceded that Congress has
18 not expressly consented to the primary manufacturing or
19 primary processing requirement at issue in this case.

20 Instead, the Ninth Circuit created a novel
21 doctrine of implied consent, saying in effect that
22 federal consent can be implied from Forest Service
23 policies governing only national forests. With all due
24 respect to the Ninth Circuit Court of Appeals, that is
25 simply wrong and this Court has never so held.

1 The Solicitor General's office in this
2 argument -- in its argument will deal primarily with the
3 consent question and with the foreign commerce
4 question.

5 Under traditional commerce clause analysis,
6 this case would be easily dealt with. We have a case of
7 requiring in-state processing or in-state manufacturing
8 before an item of commerce can be shipped out of the
9 state. Traditionally this Court has held that those
10 kinds of regulations, those kinds of requirements, are
11 virtually per se unconstitutional and a violation of the
12 commerce clause.

13 But the state raised an issue, and has
14 continually raised that issue until this very time, that
15 it fits within a narrow exception, a doctrine called the
16 market participation exception to commerce clause
17 scrutiny.

18 We must first look at what this case is not.
19 It is not a case of a state manufacturing a good. It is
20 not a state just concerned with interstate commerce, but
21 predominantly foreign commerce. It is not a simple
22 refusal to deal or to choose who one is to deal with.
23 It is not a case where the state has taken any great
24 risk, used its own industry or foresight, or expended
25 any great labor or entered into a complex process.

1 It is not a case of police power for health,
2 welfare, the safety of its citizens. It is not a case
3 of a traditional governmental function or state
4 sovereignty. It is not a case of cleaning up roads or
5 building public projects.

6 And it's not a case where the state created
7 any market. The State of Alaska is simply not a market
8 participant in any normal or theoretical sense of the
9 word. Alaska argues in its brief that it's simply a
10 seller of timber, and you can find that in their brief
11 at page 28.

12 QUESTION: Well, that's true, isn't it?
13 Doesn't Alaska own the timber we're talking about?

14 MR. DeVEAUX: Yes, it does. What it's saying
15 in effect by saying that is that it's a simple seller of
16 timber when it requires someone to process it
17 downstream.

18 If they were a simple seller of timber, Your
19 Honor, would they forego over 90 percent of the value of
20 that timber in cash for some political or social
21 function for the state that no seller of timber in the
22 private marketplace would do?

23 QUESTION: How much more could Alaska get for
24 its timber sales if it didn't have the in-state
25 processing requirement?

1 MR. DeVEAUX: In the state's brief, in its
2 appendix, pages -- I believe it's page A-8 -- when later
3 looking to sell the same timber the state forester, the
4 state expert in this area, states in numbered paragraph
5 3:

6 "Increased Revenue. The revenue to the state
7 by not requiring primary manufacture will be
8 substantially increased from \$216,000 to \$2,440,000."
9 And as that sale has been completed, the state made a
10 woefully small estimate. In fact, it increased more
11 than twice the amount that they estimated. So we're
12 talking about something in the neighborhood between \$4
13 and \$6 million.

14 QUESTION: Could Alaska sell its timber
15 without the requirement and turn around and use the
16 extra money to somehow subsidize in-state processing?

17 MR. DeVEAUX: I think they somehow could do
18 that.

19 QUESTION: Well then, why can't they do it
20 this way?

21 QUESTION: Because to encourage in-state
22 processing rather than discouraging business from
23 exporting logs in the round are entirely different
24 matters. This state has always looked -- this Court has
25 always looked with great scrutiny and care where states

1 have required some kind of activity to be taken within
2 the state.

3 But there is nothing to be said that a state
4 can't encourage industrial development, and using money
5 to encourage it is one thing. Building a barrier at the
6 border is another. I think those are entirely different
7 matters.

8 Did that answer your question, Your Honor?

9 (Laughter.)

10 QUESTION: Time will tell.

11 (Laughter.)

12 MR. DeVEAUX: I'm sure that's true. I hope it
13 answers your question, I should say.

14 They are not in any sense of the word what a
15 normal market participant would do. No business would
16 give away 90 percent of its value in its natural
17 resource that it was selling for some social end. In
18 fact, Justice Powell noted in his dissent in Reeves that
19 states are oftentimes and will often look to different ends
20 than a normal market participant would look at or a
21 private enterprise.

22 Let me make the point more precisely, maybe.
23 In a free market environment with this particular
24 resource, logs, timber, if you will, logs are hauled
25 from where they are cut down to a mill site, and they

1 are put in at one end of the mill and they come out the
2 other end of the mill as finished lumber. All the
3 lumber that can be made out of that log that the market
4 needs at that time based on that particular piece of
5 wood will be made.

6 Not so with what the state has done here.
7 They've created an artificial second milling. In other
8 words, instead of having a one-step process we have now
9 a two-step process. The logs now come into mill and are
10 cut up into chunks of wood 8-3/4 inches thick, and then
11 have to be shipped to another mill where the finished
12 products are made.

13 I cannot see under those kinds of facts how
14 the state can say they are simple market participants,
15 particularly when you take and do this two-step tier
16 that does not exist in the normal marketplace, that the
17 value of the log is less when it comes out of the first
18 tier than it was when it went in, and that I refer the
19 Court to the Kenai Lumber briefs in the lower court
20 which in fact say that is true, and they are an
21 Intervenor on the side of the state.

22 That is why the price differential is so
23 great. The logs are worth so much less and so much more
24 difficult to market after they have had this primary
25 manufacturing. All this is clear from a memorandum

1 attached to the state's brief. Again referring to the
2 state's addendum or appendix to their brief, page 5,
3 we're discussing primary manufacture:

4 "Primary manufacturing policy limits the
5 options of the logging industry in marketing their
6 products on the world market."

7 Further, on page 8 of that same gentleman's
8 memorandum to the state he says:

9 "Since the sale is appraised to be
10 competitive, anyone in the private sector can bid on
11 it. This gives a much larger segment of the forest
12 products industry an opportunity to bid on that sale."

13 And then it follows in the very next
14 paragraph, again refers to the rate differential in
15 plus.

16 QUESTION: Mr. DeVeaux, what percentage of the
17 timber lands in Alaska are state-owned as opposed to
18 federal or privately owned?

19 MR. DeVEAUX: The Federal Government owns the
20 majority, and I believe 20 percent is owned by the
21 state, and some of those are in the interior, which at
22 some time in the future -- those are primarily white
23 spruce forests -- will be of great value. 75 percent I
24 believe is owned by the Federal Government and then a
25 very small percentage is in private hands, principally

1 the natives and some small holdings.

2 How can the state, when its own forester,
3 their own expert, puts forth such evidence, state that
4 this is a market participant, that they are merely a
5 seller of timber? What this case really is is a case of
6 downstream economic control of a milling business.

7 QUESTION: The state could mill it itself,
8 couldn't it?

9 MR. DeVEAUX: Yes, it could, Your Honor. In
10 fact --

11 QUESTION: If it had --

12 MR. DeVEAUX: If it had a functioning mill.

13 QUESTION: Yes, a functioning mill. And you
14 say that it would have to operate it itself; it couldn't
15 lease it out?

16 MR. DeVEAUX: Yes, that's -- I don't know that
17 it couldn't lease it out.

18 QUESTION: Well, it could lease it out. But
19 then could it require that all the logs be run through
20 that mill before they enter interstate commerce?

21 MR. DeVEAUX: No, Your Honor, I don't think
22 they could. What they could do is make an incentive so
23 that someone in the private sector would find it both
24 efficient and expedient or economically feasible to do
25 it.

1 QUESTION: Well, their rental, their lease,
2 their rental under the lease, let's assume, was a
3 percentage rental of everything that was sold, and then
4 it says everything, all the logs, are going to have to
5 go through that mill. You still say that would be
6 downstream control?

7 MR. DeVEAUX: It's not our case, but in
8 attempting to answer the Justice's question --

9 QUESTION: And that's frequently the case in
10 these questions.

11 (Laughter.)

12 MR. DeVEAUX: Yes, Your Honor.

13 I suppose that is a much closer question than
14 the one we have. I don't believe this is at all a close
15 question. This is more, the case we have is more akin
16 to what happened in Foster-Fountain Packing Company,
17 where the state of Louisiana --

18 QUESTION: I suppose your fundamental argument
19 is that this kind of an arrangement that you actually
20 have in this case just insulates the local processor
21 from any kind of competition anywhere else?

22 MR. DeVEAUX: Yes, it does, and it forces the
23 timber company who purchases those logs to deal with a
24 competitor, if you will, and to ship those logs to a
25 competitor if he buys them, or not to buy at all, or to

1 expend great funds to build a mill within the state when
2 it could be more efficiently done wherever the logs are
3 going, the lumber is going to be used for its ultimate
4 purpose.

5 And I think that's the basic problem with this
6 case, is that it forces something to be done that could
7 be more efficiently done somewhere else.

8 QUESTION: Well, do you suppose the state
9 could say, none of the logs that we own and sell to
10 anybody will ever be used outside the state of Alaska?

11 MR. DeVEAUX: I think that's very similar to
12 the cases involving natural gas, which are very early
13 cases in this century, principally the Kansas Natural
14 Gas case and also the case of Pennsylvania versus West
15 Virginia.

16 QUESTION: We're talking about state-owned
17 logs.

18 MR. DeVEAUX: Yes, but this Court has always
19 said something's different about natural resources, and
20 there's been a continual comment that something is
21 different --

22 QUESTION: Well, what about natural
23 resources? What about the cement case, the South
24 Dakota?

25 MR. DeVEAUX: The Reeves case poses a question

1 on that, but even in the Reeves case both the majority
2 and the minority agreed about one thing: that somehow
3 natural resources were different and they had to be
4 treated different, because they go to the very basis for
5 the commerce clause itself.

6 QUESTION: Well, there the state made the
7 cement, though, didn't it?

8 MR. DeVEAUX: Yes, it did. If the state made
9 the lumber here I think they could sell it to whomever
10 they wish.

11 QUESTION: Well, the timber is a renewable
12 resource and I would hope Alaska's in the business of
13 replanting and growing its timber.

14 MR. DeVEAUX: Well, I hope so.

15 QUESTION: I don't see that that's like
16 natural gas, which you can't reproduce.

17 MR. DeVEAUX: But still, natural resources are
18 by happenstance within the state. Even if they're
19 timber, they're only there because that was the luck of
20 the draw.

21 QUESTION: What about fish?

22 MR. DeVEAUX: Sometimes those can be
23 non-renewable if you overfish them. But they again are
24 the same thing, and this Court has said in Hughes versus
25 Oklahoma that that's hanging on an awful slender reed

1 when we say that the fish are owned. They're owned by
2 who catches them, and I think the Court is correct.

3 And I would like to reserve whatever little
4 time I have left for rebuttal. Thank you, if there are
5 no further questions.

6 CHIEF JUSTICE BURGER: Ms. Oberly.

7 ORAL ARGUMENT OF KATHRYN A. OBERLY, ESQ.,

8 ON BEHALF OF THE UNITED STATES

9 AS AMICUS CURIAE

10 MS. OBERLY: Mr. Chief Justice and may it
11 please the Court:

12 The primary federal interest in this case is
13 in the implicit approval theory that the Court of
14 Appeals invented out of whole cloth as far as we're
15 concerned to validate Alaska's otherwise clearly
16 impermissible burden on interstate and foreign
17 commerce.

18 QUESTION: If the Court were to resolve this
19 case on the market participation theory, then the
20 Federal Government takes no position on that?

21 MS. OBERLY: No, that's not correct, Your
22 Honor. We briefed all of the issues in this case,
23 including the market participant doctrine, and support
24 South-Central's position on that issue. But since the
25 Court of Appeals did not decide that issue, our primary

1 interest is in the validity of the implicit approval
2 doctrine. But we are in agreement with South-Central on
3 this case not falling within the market participant
4 doctrine.

5 On the implicit approval theory, we think that
6 the reasons for requiring a rule of express
7 Congressional consent are fairly obvious and they're
8 well demonstrated by this case. Without such a rule,
9 the courts are left to guess from a welter of federal
10 enactments what Congress had in mind on a subject that
11 it hasn't spoken about.

12 Here the Court of Appeals looked to federal
13 policy relating to federal timber on national forest
14 lands, recognizing, as the state itself recognizes, that
15 there is no Congressional policy for state timber on
16 state-owned lands. The Court of Appeals looked at the
17 federal policy for federal logs and concluded it was
18 sufficiently similar to the state policy that that was
19 implicitly a validation of the state policies.

20 But what the Court of Appeals didn't do and
21 what its implicit approval theory would necessarily
22 require is that a court comb through the entire U.S.
23 Code and probably all U.S. treaties as well to find out
24 whether there are other federal policies that are or are
25 not consistent with the state policy that a state is

1 attempting to uphold in the absence of express
2 Congressional consent.

3 QUESTION: Ms. Oberly, why can't we rely on
4 counsel to do that combing for us? I assume they'll
5 find it.

6 MS. OBERLY: No one found it in this case,
7 Your Honor, for one thing. And more importantly, I
8 don't think that it's the Court's role, when it's
9 Congress' job to speak to national commerce. I mean,
10 there's basically nothing more important on Congress'
11 agenda.

12 QUESTION: No, but conceptually is there
13 anything different about an implicit approval theory and
14 an implied cause of action theory? It's the same sort
15 of analysis, isn't it? Sometimes Congress isn't as
16 articulate as we wish they would be, but if we thought
17 they really intended to approve this sort of thing we
18 still shouldn't agree with them?

19 MS. OBERLY: There are many cases where the
20 Court has to figure out what Congress had in mind when
21 it hasn't spoken as clearly as it might have. But in
22 the area of sanctioning what would otherwise be clear
23 burdens on interstate commerce, this Court has
24 consistently required Congress to speak clearly and to
25 speak expressly, and it's done so for a number of

1 reasons.

2 QUESTION: Clearly and expressly don't really
3 mean the same thing, do they?

4 MS. OBERLY: I meant them to mean the same
5 thing, Your Honor. It's required express language from
6 Congress twice --

7 QUESTION: Well, if it's implicit enough or
8 clear enough you call it express.

9 MS. OBERLY: Twice last term, Your Honor, the
10 Court actually required express Congressional consent.
11 That was not the first time. This doctrine goes back at
12 least as far as this Court's decision in H.P. Hood &
13 Sons versus DuMond, in which the same -- similar
14 implicit approval theory was advanced and the Court
15 rejected it, saying the fact that the state policy may
16 be harmonious with federal policy is not sufficient. If
17 Congress wants to authorize a state burden on commerce,
18 it has the power to do so by passing legislation, and
19 that's the way it has to act.

20 QUESTION: Would you say it's express if
21 Congress said that a requirement that logs owned by a
22 state be processed before they're shipped out of the
23 state shall not be considered to be a burden on
24 commerce?

25 MS. OBERLY: That would clearly be express.

1 QUESTION: Well, that's not an approval of a
2 burden.

3 MS. OBERLY: It's express sanction for the
4 state to do --

5 QUESTION: No, it's not. It's not an express
6 approval of a burden. It just says it isn't a burden.

7 MS. OVERLY: That's correct. But without that
8 Congressional enactment --

9 QUESTION: Well, what if the Court says it's a
10 burden?

11 MS. OBERLY: When Congress has spoken, it's
12 Congress' judgment as to whether it wishes to permit
13 that burden under the commerce clause. Here the problem
14 is that Congress has not spoken about Alaska's policy.
15 It's only spoken about federal policy, and we're left to
16 infer from what, what would Congress think about this
17 state policy.

18 The principal problem that we have with the
19 Court of Appeals' decision is that it's ignored
20 significant other federal policies that Congress has
21 passed and talked about in statutes, particularly the
22 export control laws. It's quite clear that Alaska's
23 primary manufacture requirement is a violation of
24 Congress' express statutory policy against imposing
25 export restraints on U.S. products.

1 QUESTION: Why does the Federal Government
2 impose the restraint, the very restraint you're talking
3 about, on timber exported from Alaska?

4 MS. OBERLY: The federal policy began in 1928,
5 when the United States ran Alaska as a territory, and
6 essentially its origins are for the same reasons that
7 Alaska now wants to have the same requirement.

8 QUESTION: Well, was it to encourage the local
9 industry or to see to it that the Federal Government had
10 local processing for its own needs? What was it?

11 MS. OBERLY: In 1928 it was both, because in
12 our capacity -- in the United States' capacity as
13 running Alaska as a territory, it had a legitimate
14 concern in encouraging local employment, as well as
15 providing sufficient timber processing capacity for
16 federal timber.

17 QUESTION: And what is it now?

18 MS. OBERLY: Today the policy applies to all
19 of the states west of the hundredth meridian, including
20 Alaska, although in Alaska it's by regulation and in the
21 other lower 48 states it's by statute. And today the
22 policy is basically to ensure jobs for Americans, but
23 it's on a national collective basis that Congress has
24 made that decision, rather than on a single state
25 protectionist basis.

1 And this Court has repeatedly invalidated
2 single state protectionist legislation when a state has
3 attempted to do it. There's no reason to assume that
4 Congress would approve of the same thing, the same
5 action by a state. When Congress makes that judgment,
6 it's taking the entire national welfare into account, as
7 is properly its function under the commerce clause.

8 When a state makes that judgment, it's only
9 considering its own parochial interests, and Congress
10 may or may not find those compatible with the national
11 welfare. That's why we think it is quite important that
12 there be express Congressional sanction for something
13 that would otherwise clearly be a burden.

14 There may be some inconsistency here, in that
15 the Federal Government is doing something that on its
16 face appears harmonious with what Alaska's doing. But
17 at least it's a decision at the federal level by the
18 representatives of the entire nation that that's the
19 policy they want.

20 In Alaska's case of Alaska's regulation, it's
21 a decision by one state to cut off competition
22 residents or corporations attempting to compete within
23 Alaska who are not represented in Alaska, and it has its
24 principal effect here, which makes it even more serious
25 in our view, on foreign commerce since 90 percent of

1 Alaska's timber is exported to Japan.

2 The subject of log export restraints is a
3 constant subject of negotiation between the United
4 States and Japan, between the U.S. Trade Representative
5 and Japan, and something those two countries discuss on
6 a government to government level.

7 It's not something that the United States
8 Trade Representative's negotiations are helped by having
9 states add. Even if their voices are harmonious,
10 they're still a second voice rather than the Federal
11 Government speaking with one voice, as this Court has
12 clearly said must be the case in matters affecting
13 foreign affairs.

14 So that if Congress chooses, knowing all the
15 things it's weighing in the balance, to have both a
16 policy of in-state processing for federal timber and to
17 be against export restraints, it does so with full
18 awareness of the needs of the entire country. When
19 Alaska makes that decision, it's just simply not the
20 part of our federal union that the Constitution has
21 entrusted that decisionmaking process to.

22 I might also add that two important points in
23 our view are that, in response to the district court
24 decision in this very case, Congress has been asked by
25 the western states to pass legislation that would

1 specifically authorize exactly what Alaska now does. It
2 has not passed that legislation.

3 To take from -- this is not simply a case of
4 Congressional silence. It's a case where Congress is
5 fully aware of the issue and yet it hasn't acted.

6 QUESTION: And still remains silent.

7 MS. OBERLY: And still remains silent. Under
8 those circumstances, it we think exceeds the judicial
9 function for the courts --

10 QUESTION: Knowingly silent.

11 MS. OBERLY: It's knowingly silent, that's
12 correct.

13 -- for the courts to assume that even though
14 Congress knows about the issue but hasn't spoken,
15 Congress would be pleased or at least not dissatisfied
16 with what Alaska has decided to do.

17 My time has expired. Thank you.

18 CHIEF JUSTICE BURGER: Mr. Lorensen.

19 ORAL ARGUMENT OF RONALD W. LORENSEN, ESQ.

20 ON BEHALF OF RESPONDENTS

21 MR. LORENSEN: Thank you, Mr. Chief Justice,
22 and may it please the Court:

23 I want to stress a few facts for the Court and
24 then outline briefly the three legal points which I will
25 be urging upon the Court today.

1 The requirement of primary manufacture on
2 public lands in Alaska has been in existence for over 50
3 years. It was adopted at a time when the State of
4 Alaska was not a state; it was a federal territory. But
5 the purpose at that time was to encourage the
6 development of a timber processing industry in the
7 remote coastal regions of Alaska.

8 That policy for primary manufacture in the
9 national forests in Alaska continues today under
10 regulations of the Forest Service which have the
11 explicit purpose of keeping and assuring that there is a
12 continued existence of a forest processing industry in
13 Alaska. The effect of the federal policy has been at
14 least twofold:

15 First of all, it has provided an economic
16 basis for the development of communities in rural
17 southeast Alaska; and secondly, coupled with the primary
18 manufacture requirement imposed on other federal timber
19 exports in the Pacific Northwest, it has had the effect
20 of creating a market for processed timber with a number
21 of Pacific Rim nations for both pulp and for cants.

22 Since statehood, Alaska has itself enunciated
23 a primary manufacture requirement for sales from state
24 land. The purpose of the state requirement is identical
25 to that of the federal requirement. It is to keep the

1 timber industry in the remote areas of coastal Alaska in
2 operation and to keep the communities which depend on
3 them both socially and economically in existence.

4 The three points which I will cover today
5 are: First of all, that we do believe the Ninth Circuit
6 was correct when it found -- impliedly found
7 Congressional consent to the state's primary manufacture
8 requirement.

9 Secondly --

10 QUESTION: Do you think that kind of -- that
11 consent which you say Congress gave would cover an
12 Alaska statute that related not only to state-owned
13 timber, but to privately owned timber?

14 MR. LORENSEN: No, Your Honor, I certainly
15 would not take that position. It simply applies to
16 public timber in this case, state as well as federal
17 timber.

18 QUESTION: You think that's the limit of the
19 consent?

20 MR. LORENSEN: I think so, yes.

21 QUESTION: And that if Alaska attempted to
22 require that privately owned timber be processed before
23 it was exported, you think that would be a burden on
24 commerce that would be illegal?

25 MR. LORENSEN: There would certainly be an

1 argument that there is a burden. Whether it would be
2 illegal or not, obviously we would argue in a different
3 case. I think under the various natural gas cases that
4 have been decided that, unless Alaska could show some
5 independent policy power or safety justification for the
6 requirement, that it probably would not be.

7 Even if there has not been Congressional
8 consent to the state's requirement here, we believe that
9 the state is in fact a market participant and is
10 therefore not subject to the commerce clause.

11 And thirdly, even if ultimately it is
12 determined that the state is not a market participant,
13 but is subject to the commerce clause, we believe that
14 the primary manufacture requirement imposed by the State
15 of Alaska satisfies traditional commerce clause
16 analysis.

17 QUESTION: When does -- how does Alaska sell
18 its timber, do you know?

19 MR. LORENSEN: At a request for bids.

20 QUESTION: And they take the highest bidder,
21 and when does title pass, or when is the sale complete,
22 do you know?

23 MR. LORENSEN: Well, the sale and title are
24 two different -- the sale is complete at the time the
25 contract is signed.

1 QUESTION: Well, I'll take the answer to both
2 of them.

3 MR. LORENSEN: The sale is complete at the
4 time the contract is signed. Title is passed at the
5 time that the logs are cut and --

6 QUESTION: When is payment made?

7 MR. LORENSEN: Payment is made after they are
8 cut and cleaned and I believe removed.

9 QUESTION: But the buyer, then, who then has
10 the timber, who's cut the timber and owns the timber,
11 then can't do anything with them unless he processes
12 them first? Well, if he wants to ship them out of the
13 state he has to have them processed first.

14 MR. LORENSEN: That's correct, Your Honor.
15 That is a term of the contract.

16 The Petitioners and both the Solicitor General
17 have argued with respect to this question of implied
18 consent that this Court has required in a number of
19 cases that this consent must be express and clear, and
20 they have cited cases for that proposition. But the
21 real inquiry that this Court has applied in the past,
22 and we believe is the inquiry which should continue to
23 be applied, is whether or not -- well, the question is
24 really what did Congress have in mind, what was its
25 intent in a particular area.

1 And we think that, therefore, the issue is not
2 whether Congress properly expressed its intent, but
3 really the underlying question is in fact what its
4 intent was. For instance, I can give the Court a couple
5 of examples where Congress has not itself spoken
6 clearly, but yet where this Court has approved what
7 would otherwise be considered a burden on interstate
8 commerce.

9 Last year in this Court's decision in the
10 White case, the Court approved the City of Boston's
11 requirement for local employment when it was challenged
12 with respect to the use of federal funds on the grounds
13 that there was a federal regulation adopted by a federal
14 agency which required that preference. There was no
15 express Congressional requirement or permission for the
16 preference.

17 Similarly, in the case of Marion versus
18 Hicarilla Apache Tribe, this Court found consent as the
19 result of a scheme of federal checkpoints established by
20 federal officials, and again not something that was
21 established expressly by Congress.

22 The Ninth Circuit examined the record and the
23 legislation and the legislative history and determined,
24 upon taking them as a whole, that Congress was aware of
25 the requirement of primary manufacture for public

1 timber, that it had determined that such a policy was in
2 the national interest, and that it intended that the
3 State of Alaska as well as the Federal Government be
4 able to impose primary manufacture in selling its
5 timber.

6 Now, despite assertions by both the
7 Petitioners and the Solicitor General, to the contrary,
8 there can be no doubt that Congress does and has
9 expressly and clearly indicated its view that a primary
10 manufacture requirement for national forest timber in
11 Alaska is in both the nation's and Alaska's interests.

12 Although we have not referred to it as clearly
13 as we might have in our brief, the clearest and most
14 recent expression of Congressional concern regarding the
15 local interests at stake in Alaska and the health of the
16 timber industry is the Alaska National Interest Lands
17 Conservation Act of 1980. That can be found as Public
18 Law 96-481, and we would refer the Court in particular
19 to Sections 705 and 706.

20 Those sections call upon the United States
21 Forest Service to monitor and report to Congress on an
22 annual basis on the timber supply and demand that is
23 available in southeast Alaska for the purpose of
24 ensuring that there is an approximately 450 million
25 board foot availability of public timber, national

1 timber, which is available to dependent industry -- and
2 "dependent industry" is the language of the statute --
3 in that area. Funds are provided by Congress in Section
4 705 for that express purpose.

5 A further record of Congress' concern and its
6 purpose in adopting these provisions in the Alaska
7 National Interest Lands Conservation Act can be found in
8 House Report 96-97, Part 1 at page 504, and Senate
9 Report 96-413 at page 399. There both the House and
10 Senate Committees respectively describe that maintaining
11 the timber industry employment in southeast Alaska was
12 "an overriding consideration of both committees".

13 Other specific references to the need for
14 primary manufacture in southeast Alaska to provide jobs
15 in the local Alaska economies can be found at pages 398
16 and 401 of the Senate report.

17 QUESTION: Mr. Attorney General, do you think
18 that a lot of this timber that is sold by the state from
19 its own forests would be exported without processing
20 except for this law?

21 MR. LORENSEN: I'm quite sure that would be
22 the case, Your Honor, yes.

23 QUESTION: What kind of processing are you
24 talking about?

25 MR. LORENSEN: The processing -- in most

1 cases, we're talking about either reducing the logs to
2 pulp for processing as pulp or we are talking about
3 reducing it into large slabs of wood, usually
4 four-sided, which are referred to as cants and are
5 usually somewhere in the area of 10 to 15 feet long.

6 QUESTION: And are those in turn used for
7 pulp, making pump?

8 MR. LORENSEN: No. Those are then used in
9 turn to process into smaller pieces of finished grade
10 material.

11 QUESTION: And how -- if timber would be
12 exported without processing except for this law, how
13 would it be exported? Is it on ships?

14 MR. LORENSEN: It would be exported on ships
15 and most of it would likely go to Japan, that's
16 correct.

17 QUESTION: And even if it had been made into
18 pulp?

19 MR. LORENSEN: If it had been made into pulp
20 -- there are two pulp plants in southeast Alaska. One
21 is owned by the Japanese and most of that pulp goes to
22 Japan. The other is owned by an American company and
23 most of that is distributed, both in the international
24 and the national market.

25 QUESTION: So that to the extent that it's

1 made into pulp it would probably be processed in Alaska
2 anyway.

3 MR. LORENSEN: That's correct.

4 QUESTION: Just because of the economics.

5 MR. LORENSEN: That's correct. Your Honor,
6 what's really at issue here is the cant market, not the
7 pulp market.

8 QUESTION: Right, right, right. And that --
9 you just don't save that much money on freight or
10 anything else by -- on the difference between logs and
11 cants? I mean, there's no economic incentive
12 necessarily to process the logs into cants in Alaska.

13 MR. LORENSEN: Your Honor, I don't actually
14 know what the facts are. It's been represented to me
15 that it is more economical to ship cants than it is to
16 ship round logs.

17 QUESTION: Well then, why would anybody ever
18 want to ship logs?

19 QUESTION: It's for packing purposes, isn't
20 it? They can get more in a given space.

21 MR. LORENSEN: Well, it's the efficiency of
22 the processing process itself, not the transportation.

23 QUESTION: Well, I know, but all you're
24 telling me is that even without this law it would be
25 more efficient to process the logs into cants in Alaska

1 than to ship logs.

2 MR. LORENSEN: Well, to process them into
3 cants, yes. I had to take -- you're asking me to take
4 the position of South-Central in terms of the --

5 QUESTION: No, no, I'm not. I'm just
6 wondering how much difference this law makes at all.
7 And I'm wondering why South-Western is so upset by it if
8 it's more efficient to make the logs into cants right
9 there in Alaska.

10 MR. LORENSEN: Well, South-Central is upset
11 because they don't have a processing facility in the
12 state and therefore would not have been able to bid on
13 this contract.

14 QUESTION: Alaska could get a lot more money,
15 though, if it sold them without that requirement.

16 MR. LORENSEN: On a purely financial return
17 that is correct, yes.

18 QUESTION: Are any of them floated down on the
19 inland waterway to Canadian destinations?

20 MR. LORENSEN: I don't believe any go to
21 Canada, but I have --

22 QUESTION: You could float them down to
23 Canada, couldn't they, with tugs?

24 MR. LORENSEN: I understand that some are
25 barged every now and then to the northwestern Washington

1 area, but not to Canada. I'm not sure that Canada would
2 accept the import.

3 QUESTION: General, may I ask this question:
4 What market is Alaska participating in?

5 MR. LORENSEN: Well --

6 QUESTION: You say Alaska is a market
7 participant. What is it marketing?

8 MR. LORENSEN: There are various ways to
9 describe the market. Our position is that we are
10 participating in the processed timber market.

11 QUESTION: Does Alaska process timber? Do you
12 have any pulp plants?

13 MR. LORENSEN: Alaska does not own any
14 manufacturing facilities, no, Your Honor.

15 QUESTION: Does it process the logs after
16 they're cut?

17 MR. LORENSEN: No. We own the good which is
18 then processed. We own and sell the good which is
19 processed.

20 QUESTION: But you have no participation in
21 the processing?

22 MR. LORENSEN: At this time we do not.

23 QUESTION: You don't have an interest in the
24 logs when they're processed.

25 MR. LORENSEN: Under the terms of the contract

1 as presently written, that's correct. We could always
2 amend the contract or rewrite our contract to provide
3 for title passing after the processing, I suspect.

4 QUESTION: How far down the line would the
5 processing go? Suppose the statute were enlarged to
6 embrace the processing into furniture? Would that be
7 equally valid in your opinion?

8 MR. LORENSEN: To the extent that we could
9 enforce that requirement as a result of privity, I
10 believe yes, it would be valid. To the extent that that
11 requirement could not be enforced within the terms of a
12 contract -- I think the real answer as a practical
13 answer is that no one would bid on timber if they had to
14 turn it into furniture in Alaska.

15 QUESTION: But in terms of theory, there's no
16 limit to your argument with respect to market
17 participant, is there? In other words, a statute would
18 be valid if it said no timber product, in whatever form,
19 could ever be exported; it would have to be manufactured
20 into its final form within the state?

21 MR. LORENSEN: Your Honor, I'm sure there
22 would be some limit. How far that limit goes beyond
23 market contract privity, I'm not sure. I think it would
24 depend to a large extent on just how the transaction,
25 the sale transaction, was constructed. I think there

1 becomes a practical problem, which is it becomes
2 impossible to construct a --

3 QUESTION: What if the limit was just
4 debarking under water pressure? Would that be a
5 sufficient processing, do you think?

6 MR. LORENSEN: Not under the state's
7 processing requirements, Your Honor, no, it would not
8 be.

9 QUESTION: No. We're talking about other than
10 local requirements. Suppose the state permitted them to
11 be moved just with debarking. Would that be all right?

12 MR. LORENSEN: We certainly would take that
13 position. Yes, I believe it would be.

14 QUESTION: Well then, how far down to what
15 Justice Powell was addressing, to the making of chairs
16 and tables?

17 MR. LORENSEN: Well, I think again the limit
18 becomes one of how the transaction was structured. If
19 we had a transaction which was structured as a result of
20 imposing direct contractual obligations on the purchaser
21 which that purchaser himself had to abide by, I think
22 that's how far we could structure it.

23 If we create a situation where the purchaser
24 ultimately becomes responsible for the conduct of
25 others, I think that's when we as a market participant

1 lose, or begin to lose certainly, the basis for the
2 argument that we are just another trader.

3 QUESTION: Do you think your argument is any
4 different than an argument -- maybe you're making this
5 argument -- the state could just refuse to sell any logs
6 except to Alaska processors?

7 MR. LORENSEN: Certainly, Your Honor, we could
8 refuse to sell logs at all, and I think we could
9 certainly refuse to sell --

10 QUESTION: They just pick and choose their
11 customers. They don't have any contract that says they
12 have to be processed, but they just go out and sell
13 their logs to Alaska processors.

14 MR. LORENSEN: I think we could do that as
15 long as they're our logs. Again, as a practical matter
16 we'd never sell any logs.

17 QUESTION: You just take bids from people who
18 are Alaska processors.

19 MR. LORENSEN: That's correct.

20 QUESTION: And you don't have any contract at
21 all that requires it to be done, but you just sell to
22 Alaska processors, that's all. Is that any -- you
23 certainly would say they could do that?

24 MR. LORENSEN: I certainly would, depending on
25 your definition of Alaska processor. We've got a

1 different problem, I think, if we're talking about a
2 resident Alaska processor as opposed to a company which
3 is present in the state.

4 QUESTION: Well, I'm talking about somebody
5 who has a processing establishment in the state.

6 MR. LORENSEN: Yes, I think in that case we
7 could do it.

8 QUESTION: Whether he's an Alaska corporation
9 or not.

10 MR. LORENSEN: I think in that case we could
11 do it.

12 Alaska's primary manufacture requirement
13 parallels that of the Federal Government, both in its
14 purpose and in its effect, and given the 50-year history
15 of the federal requirement for primary manufacture in
16 Alaska, that in 1980 Congress clearly intended and
17 expected that primary manufacture on Forest Service land
18 in Alaska promote local economic activity, coupled with
19 the existence of Alaska's own longstanding primary
20 manufacture requirement, we believe that the Ninth
21 Circuit fairly and properly inferred that Congress also
22 intended, and perhaps Congress may also have expected,
23 that the State of Alaska would be able to impose the
24 same kind of primary manufacturing requirement.

25 The position of both the Petitioners and the

1 Solicitor General with regard to explicit consent causes
2 us to be a little bit concerned in that it creates what
3 we think is a troubling asymmetry with traditional
4 preemption analysis. On the one hand it is argued with
5 respect to commerce clause that in order for a power to
6 be granted to a state it must be expressly stated. On
7 the other hand, when the question is whether or not a
8 power is being withdrawn from a state, the traditional
9 analysis which this Congress has applied is: first, is
10 there express preemption; but secondly, can the Court
11 reasonably imply preemption in a particular situation.

12 I'm not sure at all why the rule should be any
13 different with respect to inference as to the particular
14 action or intent of Congress when we are talking about
15 granting a power as opposed to taking one away.

16 What is the danger of inquiring into
17 Congressional intent in commerce clause cases? We
18 submit that there is none. Unlike a number of other
19 areas of constitutional jurisprudence, the Court's put
20 -- the Court's decision on the question of Congressional
21 consent is not final. If Congress disagrees with the
22 Court's decision and believes that the Court has
23 misinterpreted its intent, Congress obviously can take
24 steps to rectify the misinterpretation.

25 Even if the Court concludes that Congress has

1 not consented to Alaska's primary manufacture
2 requirement, we believe that Alaska is a market
3 participant and therefore exempt from commerce clause
4 scrutiny. We are as much traders in timbers as South
5 Dakota was in cement in Reeves, as Maryland was in hulk
6 cars in Alexandria Scrap, or as the City of Boston or
7 the City of Camden are in public construction in either
8 White or Camden.

9 The applicable inquiry as to whether or not
10 the state is a market participant was stated by the
11 Court last year in White, and that is whether or not
12 Alaska's primary manufacturing requirement covers a
13 discrete, identifiable class of economic activity in
14 which Alaska is a major participant. Alaska satisfies
15 that test. As the owner of the timber which is sold
16 subject to the primary manufacture requirement, Alaska
17 is clearly a major participant in the transaction.

18 Additionally, the primary manufacture
19 requirement is imposed, as I indicated earlier, by the
20 terms of the contract on the sale itself, so that there
21 is in fact in this relationship, with respect to this
22 requirement, formal privity of contract.

23 As has already been brought out, because the
24 state imposes this primary manufacture requirement the
25 state does receive a lower price for its timber than it

1 would receive if it permitted timber to be exported in
2 the round. The difference between those prices operates
3 in effect as a subsidy by the state or a subsidy by the
4 Federal Government, because the Federal Government takes
5 the same reduced price for its timber as a result of its
6 requirement, as a subsidy by the state in support of the
7 continued existence of an Alaska timber processing
8 industry and the communities which depend on it both
9 economically and socially.

10 I think in an abstract sense we might
11 characterize this subsidy as an alternate and presumably
12 far better and more desirable form of federal and state
13 welfare.

14 The Petitioner claims that we are not a market
15 participant because we provide this subsidy, and
16 therefore we cannot be treated as a private trader. But
17 the Petitioner we believe is misconstruing the thrust of
18 the market participant inquiry. The correct inquiry is
19 whether we are acting like any private trader similarly
20 situated could act, not whether we act with the same
21 profit motives that the private trader does.

22 The Petitioner has made reference to findings
23 of the state forester, but I would like to make clear
24 the state forester does not have the job or the
25 responsibility of making social policy in Alaska.

1 That the rule suggested by Petitioner is
2 incorrect can be quickly seen by considering the
3 activity of the involved governments in the other market
4 participant cases which this Court has addressed. In
5 Alexandria Scrap, what private trader would pay more for
6 a wreck than it's worth? In the Reeves case, what
7 private trader would allocate scarce cement on any basis
8 other than price? And in the White case, what private
9 trader would make a decision as to whom to hire on a
10 construction project other than who was the most
11 qualified for the job?

12 Both the Petitioner and the Solicitor General
13 have suggested that there is something constitutionally
14 significant about state-owned natural resources which
15 requires denying a state market participant status when
16 it is disposing of those resources.

17 QUESTION: General Lorensen, may I just ask
18 this question on your market participant theory. Is it
19 not true that in each of those cases the purchaser,
20 after he acquired whatever he was getting from the state
21 as market participant, was free to do with the product
22 whatever he wanted to?

23 MR. LORENSEN: As a result of the nature of
24 the transaction, I think that is correct, Your Honor,
25 yes.

1 QUESTION: Are there any cases -- are there
2 any other market participant cases in which the
3 purchaser is not free, having bought it from the state,
4 to do anything he wants? In other words, isn't there a
5 distinction between this case and a case in which you
6 just decided to sell to people who had lumber mills or
7 whatever you call the facilities in Alaska?

8 MR. LORENSEN: There may be a distinction, but
9 I don't think it's important. I don't think it rises to
10 legal levels. Certainly, if you look at the White case,
11 the requirement there was imposed on the building
12 contractor, but the requirement was that he agree to
13 hire certain people.

14 Here what we are doing is imposing a
15 requirement on a timber cutter that he agree to cut the
16 logs in the state. In other words, we are imposing,
17 just as in White, we are imposing this. You might refer
18 to it as a second tier requirement, but it is still
19 within the privity of the contract itself. It is a
20 contractual term required.

21 QUESTION: White, the city is the purchaser.
22 Here the sovereign is the seller.

23 MR. LORENSEN: That's correct, but I'm not
24 sure --

25 QUESTION: And after the city acquires the

1 building or whatever's being built, that's the end of
2 the transaction.

3 MR. LORENSEN: That's certainly correct.

4 QUESTION: Nobody can comply with your
5 requirement who doesn't have a processing plant there,
6 can he?

7 MR. LORENSEN: That's not correct, Your Honor,
8 because that function could certainly be subcontracted
9 out to an existing processor.

10 QUESTION: So you really are doing more than
11 just refusing to sell to anybody except with a
12 processing plant. You are saying, even if we sell to
13 somebody without a processing plant, he has to get it
14 processed in Alaska.

15 MR. LORENSEN: We put potential purchasers on
16 notice at the time of the sale --

17 QUESTION: So you are doing more than just
18 choosing people. You're choosing -- you're doing more
19 than just choosing customers who have processing
20 plants.

21 MR. LORENSEN: We don't choose the customer at
22 all. We indicate the terms upon which we are willing to
23 sell our timber.

24 QUESTION: So you are doing much more.

25 MR. LORENSEN: The distinction which has been

1 proposed between manufactured goods and natural
2 resources is illogical, we believe, and analytically
3 unsound. No matter what the nature of the good, they
4 are still state-owned items.

5 The logical end, as some of the questioning
6 has indicated, of proposing that the market participant
7 doctrine only be applied to states who are involved in
8 manufacturing goods is to require the State of Alaska to
9 develop its own business bureaucracy as a government
10 agency to cut the trees and then process them before it
11 is willing to sell them.

12 If the state can accomplish that result
13 indirectly, why should the state not be able -- if the
14 state can accomplish that result by doing it directly
15 and getting itself in the business of cutting timber,
16 why can the state not accomplish the same result
17 indirectly? By insisting that the state become a
18 processor, a government-owned processor, in effect we
19 will end up competing with the private sector and
20 potentially putting some of those processors out of
21 business, and the only true result we've obtained is to
22 enlarge the size of government.

23 The proposed distinction between manufactured
24 goods and natural resources for commerce clause market
25 participant analysis is deeply flawed and we urge the

1 Court not to adopt it.

2 What about the foreign commerce issue that has
3 been raised? First of all, I would like to make clear
4 that the assertions of the Petitioner and the Solicitor
5 General that our primary manufacturing requirement is an
6 export ban simply misconstrues the facts. If we
7 actually banned the export of timber from the State of
8 Alaska, we would not be able to sell it. There simply
9 is an inadequate market for the timber within the
10 state.

11 All interested parties understand when a sale
12 is proposed that Alaska's timber will be exported from
13 the state when it is sold. We only require that before
14 it is exported it receive primary processing within the
15 state.

16 This is no more a ban on the export of timber
17 than were the price control programs for raisins, milk,
18 or natural gas a ban on the export of those items on
19 sellers who might have been willing to sell them at a
20 lower price and export them from their states in the
21 cases of Parker versus Brown, Milk Control Board versus
22 Eisenberg at 306 U.S., and Cities Services Gas versus
23 Peerless at 340 U.S.

24 On the foreign commerce question itself, our
25 position is that as a market participant the state's

1 actions are not subject to the commerce clause, whether
2 that commerce is foreign or interstate. The state's
3 status in foreign commerce is like that of any other
4 private trader, and therefore it is subject to the same
5 restrictions that are imposed by the Federal Government
6 upon any other private trader who embarks on foreign
7 commerce.

8 If, nonetheless, the Court feels that the
9 state must comply with the one-voice doctrine under the
10 finding affairs powers of Congress, we believe that the
11 record is more than adequate to demonstrate that we are
12 speaking with one voice with the Federal Government.
13 Container Corp. makes that clear, Container Corp. which
14 this Court decided last term, makes it clear that the
15 inquiry with respect to one voice is whether or not the
16 challenged action has merely a foreign resonance or does
17 it have foreign policy implications. Neither the
18 Petitioner nor the Solicitor General have addressed the
19 Container Corp. standard.

20 We think it is clear from the record that at
21 most what Alaska does in requiring primary manufacture
22 before export is to create some foreign resonance, a
23 resonance, by the way, which is totally in harmony with
24 the same resonance which is created as a result of the
25 federal primary manufacture requirement on timberlands

1 would could very well be directly adjacent to state
2 lands.

3 Given that situation that the Federal
4 Government has in effect created the processed timber
5 market, that the Federal Government supplies timber in
6 cant form in the foreign commerce market every day, we
7 find it incredulous to believe that the Solicitor
8 General would suggest that the State of Alaska is not
9 speaking with the same voice that the Federal Government
10 is speaking in this regard.

11 Finally, Your Honor, we wish to offer that if
12 the Court determines that we are not a market
13 participant, that Congress has not consented to our
14 primary manufacture requirement, that nonetheless under
15 the facts here the state's primary manufacture
16 requirement satisfies traditional commerce clause
17 analysis under the Pike versus Bruce Church case.

18 The requirement applies evenhandedly, it
19 applies to all purchasers regardless of their origin, be
20 they Californian or Alaskan, be they Korean or Japanese,
21 and it applies to interstate as well as foreign
22 commerce. But more importantly, it effectuates an
23 important local interest, that is of sustaining the
24 existence of a local timber industry and sustaining the
25 underlying economic base and social base which depends

1 so heavily upon that timber industry in rural Alaska.
2 This is not economic protectionism, as it is
3 so pejoratively referred to by both the Solicitor
4 General and the Petitioner.

5 Thank you.

6 CHIEF JUSTICE BURGER: Do you have anything
7 further? You have three minutes remaining here.

8 REBUTTAL ARGUMENT OF
9 LEROY EUGENE DeVEAUX, ESQ.
10 ON BEHALF OF PETITIONER

11 MR. DeVEAUX: I hope not to even use them,
12 Your Honor.

13 QUESTION: What about the legality of Alaska
14 just choosing to sell its timber only to processing
15 plants that are located in Alaska?

16 MR. DeVEAUX: Well, Your Honor, I think that
17 we come back to the same thing. That's in fact what
18 they're doing. Either you sell it to someone who is
19 required to use an in-state processing plant or --

20 QUESTION: Well, that's something more. If
21 they just sold to -- if they just absolutely refuse to
22 sell any timber except to a processing plant customer,
23 couldn't the state do that?

24 MR. DeVEAUX: You're saying a simple refusal
25 to deal kind of situation?

1 QUESTION: Yes, yes.

2 MR. DeVEAUX: The Court has --

3 QUESTION: That isn't what they're doing.

4 They're doing more than that.

5 MR. DeVEAUX: That's right.

6 QUESTION: They're saying, even if we accept a
7 bid -- whoever we accept a bid from, we require them to
8 get the processing done in Alaska.

9 MR. DeVEAUX: Right. I think in that case the
10 Court would have to look behind at their motives, and I
11 think we're dealing with a natural resources, and that
12 would be the same if -- in fact, I believe that footnote
13 31 of our reply brief addresses that kind of question
14 from a different point of view.

15 What if it was something other than timber?
16 The state has every intention, it would seem from the
17 regulations, to require this over other natural
18 resources. In fact, in royalty oil and gas or gas
19 liquids, we have the same requirement. They've just
20 changed the name from timber to oil and gas.

21 Now, that would be the same kind of thing to
22 require to sell those natural resources only to an
23 in-state processor. And the question I have there is
24 something from Reeves, is that when a person buys it
25 could he then not process it at his processing plant,

1 his timber facility if he had it, and ship it away?

2 QUESTION: Well, if the state took that risk,
3 but nevertheless just chose to sell to people who have
4 processing plants in Alaska, you wouldn't find much of a
5 problem with that, would you?

6 MR. DeVEAUX: No, I think that's a very much
7 closer question and certainly would be more difficult to
8 deal with. You would have to look behind that.

9 QUESTION: That's the same distinction we make
10 in the vertical price-fixing cases under the antitrust
11 laws, the Colgate case on the one hand and Dr. Miles on
12 the other, isn't it? One time you tie them up
13 contractually to resell at a fixed price, another one
14 you just say I won't sell to you next time.

15 MR. DeVEAUX: Yes, that is like the --

16 QUESTION: That's certainly a distinction
17 that's --

18 MR. DeVEAUX: The place for commerce and the
19 antitrust laws to get together is not to stop
20 competition, is to allow competition, and I think the
21 refusal to deal is a much more difficult question to
22 deal with.

23 There is something -- one of the questions
24 asked by the Court is round log shipping. You cannot
25 ship blocks of wood, you cannot float them. Once you've

1 decided to primary manufacture them, they must be
2 dry-handled all the time, and they become very difficult
3 to deal with. You can get them into the ship, but you
4 can't put any on the decks because they'll get wet, and
5 logs that have been primarily manufactured are no longer
6 safe.

7 And my time is up.

8 CHIEF JUSTICE BURGER: Thank you, gentlemen.
9 The case is submitted.

10 (Whereupon, at 2:02 p.m., oral argument in the
11 above-entitled case was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:
#82-1608-SOUTH-CENTRAL TIMBER DEVELOPMENT, INC., Petitioner v. ESTHER WUNNICKE, COMMISSIONER, DEPARTMENT OF NATURAL RESOURCES OF ALASKA, ET AL.

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

Pine Annand

(REPORTER)

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