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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-16

TITLE KENNETH CORY, LEO T. MCCARTHY AND JESSE R. HUFF,
Appellants V. WESTERN OIL AND GAS ASSOCIATION, ET AL.

PLACE Washington, D. C.

DATE February 26, 1935

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IN THE SUPREME COURT OF THE UNITED STATES

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KENNETH CORY, LEO T. McCARTHY :
AND JESSE R. HUFF, :
Appellants :

V. : No. 84-16

WESTERN OIL AND GAS :
ASSOCIATION, ET AL. :
- - - - - x

Washington, D.C.
Tuesday, February 26, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:52 o'clock p.m.

APPEARANCES:

DENNIS M. EAGAN, ESQ., Deputy Attorney General
of California, San Francisco, California;
on behalf of the Appellants.

PHILIP K. VERLEGER, ESQ., Los Angeles,
California; on behalf of the Appellees.

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1 This is a remarkable decision. The decision accords
2 second class status to the state as a lessor. It means
3 that the state in many instances will be constrained to
4 take less in the way of rent than would another lessor in
5 similar circumstances.

6 QUESTION: Do you think the result would have
7 been the same under the reasoning of the Court of Appeals
8 if the measurement had not been related to traveling over
9 California territory but simply a percentage of the volume
10 of material taken out?

11 MR. EAGAN: Well, of course, Your Honor, this
12 is one fact that we would like to drive home to the maximum
13 extent possible. The charge is not made merely for the
14 entry of goods into the political jurisdiction of California.
15 It is tied explicitly only to those parcels of property
16 limited in number which are made -- privately appropriated
17 by the lessees to their own use for commercial gain.

18 I really don't know what type of rent the Ninth
19 Circuit would have considered permissible other than a non-
20 variable, flat annual rent such as the Commission also
21 charges.

22 There is a final line tossed off in the opinion
23 concerning this is not to say that all forms of volumetric
24 rent are forbidden, but there is really no analytical clue
25 in the decision of the Ninth Circuit concerning what type

1 of variable rent it would have found permissible.

2 It seems to me the thrust of the Ninth Circuit's
3 decision is that any form of variable rent, at least with
4 regard to the state and when it deals with interstate or
5 foreign lessees, any such variable rent is prohibited
6 to them.

7 QUESTION: May I ask, Mr. Eagan, is the rent
8 calculated on the basis of volume of oil in transit?

9 MR. EAGAN: Well, another point, Your Honor, it
10 is not limited to oil. That is one commodity.

11 QUESTION: Or whatever goods.

12 MR. EAGAN: In this case, given the Plaintiffs,
13 we are talking about oil and petroleum products.

14 Let me just tell you what the facts are. I don't
15 know quite the direction Your Honor is taking with the question
16 The goods --

17 QUESTION: Well, you didn't expressly mention
18 the export/import clause, did you?

19 MR. EAGAN: Yes, I did, Your Honor. That was
20 the second aspect of the Ninth Circuit's holding, that
21 apart from the problems it found --

22 QUESTION: Well, the considerations would be dif-
23 ferent whether that clause was violated from the consideration
24 of if the commerce clause is violated.

25 MR. EAGAN: Well, certainly the import/export

1 clause is different. In fact, it is so different that we
2 don't see there is any application in this case because
3 it does deal with taxes and this Court in Michelin versus
4 Wages, for instance, that even with regard to taxes the
5 question there is what type of taxes? Is it merely for
6 the privilege of entry or is it tied to some service the
7 government provides?

8 We submit it is an a fortiori case, if you will,
9 when you are talking not about a tax at all but a form of
10 rental.

11 What the decision in effect calls for is a subsidy,
12 a subsidy to these oil companies. The decision is also
13 unfair to the other lessees of the Commission because what
14 this ruling of the Ninth Circuit means is that certain
15 lessees, among them these oil companies, are entitled to
16 special treatment and these other lessees, the lessees of
17 the state that are engaged in intrastate commerce, yes,
18 they may be asked to pay a variable rent, whereas this special
19 class, they cannot be asked to pay such a rent.

20 QUESTION: Mr. Eagan, would the situation be any
21 different if the State of California either owned or
22 controlled every parcel of land through which the products
23 could enter to go to the refineries?

24 MR. EAGAN: If, indeed, there was a monopoly.
25 Of course, we think it is very clear there is no such monopoly,

1 but if there were a monopoly, I think the only bearing that
2 might have on the arguments made by the state in this case
3 it might preclude assertion of the market participant
4 doctrine. Cases of this Court are not all that clear that
5 you have got to have competitors in order to avail yourself
6 of a doctrine.

7 But, that would get us then into the question
8 of reasonableness. Certainly the state is entitled to charge
9 rent, no question. The oil companies concede that. And,
10 if you concede that --

11 QUESTION: What percentage of this product annually
12 coming into California passes through sources other than
13 state land or does the record tell us?

14 MR. EAGAN: Well, it is not in the record, Your
15 Honor. I do have some figures, but I can say this, the
16 majority of petroleum and petroleum products either coming
17 into California or going out of California does not pass
18 over state lands. I think the largest single port in terms
19 of petroleum and petroleum products is Long Beach and this
20 is revealed in our cite to the Corps of Engineers' Waterborne
21 Commerce Study.

22 QUESTION: Mr. Eagan, can I ask kind of a basic
23 question here which is whether we should look at this as
24 a tax case or property private rental case? Would you agree
25 that if it were a tax case and yet a tax formula just like

1 this for entry into the state that it would fall or would
2 you defend it any way?

3 MR. EAGAN: Not at all, Your Honor. Of course,
4 it is not a tax, but if it were it seems to me that would
5 lead this Court into application of some of the formulas
6 for evaluating taxes that it has come up with, both in the
7 interstate commerce field and the foreign tax field. I
8 am thinking of complete Auto Transit versus Brady, Michelin
9 versus Wages, and the import of those cases is that inter-
10 state commerce must pay its own way.

11 QUESTION: But here it pays a lot more than its
12 own way, doesn't it?

13 MR. EAGAN: Not at all, Your Honor. The problem
14 is -- That is the diversionary issue if you will that the
15 oil companies have consistently tried to introduced into
16 this case.

17 QUESTION: Yes, and the Court of Appeals.

18 MR. EAGAN: Excuse me?

19 QUESTION: And the Court of Appeals.

20 MR. EAGAN: Well, the Court of Appeals realized
21 that really the issue was the form or mode of rent rather
22 than amounts. But, what seemed to bother the Court of Appeals
23 was not so much the initial lease where at time one there
24 is no lease at all and the question is should the oil company
25 enter into the lease based on volumetric rental. That

1 situation, at least in terms of what the Court said, didn't
2 seem to bother it. What it focused on was this renewal
3 context where you have a refinery -- and there are some
4 of them with internal leases that do involve this situation --
5 a refinery on the upland, hard by the wharf site that is
6 leased from the state.

7 And, what the Court seemed to be concerned about
8 was a perceived potential for the state demanding and getting
9 extortionate rents. Now, I think there are some ready answers
10 to that concern of the Ninth Circuit, but we don't think
11 analysis under the commerce clause provides answers to those
12 questions.

13 First, if indeed there is a potential for
14 extortionate rents, that concern, it seems to us, applies
15 regardless of the form of rent that you are talking about.
16 It applies as well that type of concern with a flat annual
17 rent based on a stated percentage of fee value. What if
18 the stated percentage proposed by the state is 90 percent?
19 The oil companies certainly would be taking issue with that
20 kind of proposal.

21 So, it is not really the mode of rent, it is the
22 amount, regardless of mode, that could present a problem
23 in those situations.

24 Secondly --

25 QUESTION: In your view, does the Constitution

1 oppose any limit on the amount you can charge even if you
2 regard this rent?

3 MR. EAGAN: If the market participant clause is
4 indeed applicable, Your Honor, no, the Constitution does
5 not provide any limits. And, this is not an amounts case
6 either.

7 QUESTION: Either form or amount?

8 MR. EAGAN: Excuse me?

9 QUESTION: It would not pose any limit as to either
10 form or amount, method of computation or amount.

11 MR. EAGAN: That is correct.

12 QUESTION: If you went on market participant.

13 QUESTION: Why do you have to win on market
14 participant theory so to speak? Isn't the state as a general
15 proposition entitled to rent the same way a private landlord
16 is unless there is some commerce clause implication or unless
17 there is some export/import clause? And you say the commerce
18 clause argument of your opponent is defeated by the market
19 participant argument?

20 MR. EAGAN: There are a number of alternative
21 responses to it, Your Honor. One is we are a participant
22 in the market. We are not taxing, we are not regulating,
23 which had been the traditional concerns of the commerce
24 clause, not a proprietary activity of the state, and, there-
25 fore, we argue the market participant line of cases of this

1 Court takes us out from under any application of the commerce
2 clause. But, we don't have to win on that point to prevail
3 in this lawsuit.

4 If we concede for whatever reason the market
5 participant clause isn't applicable, we are nonetheless
6 entitled to charge rent. The question then becomes a two-
7 fold question, is there some type of monitoring function
8 that this Court has with regard to either modes or amounts
9 and if there is what should the test be?

10 QUESTION: Well, of course, what if the State
11 of California owned all of the -- owned a half-mile strip
12 all the way around the coastline and all the way around
13 the eastern border of state and northern border and southern
14 border and said, you know, everybody that is bringing any
15 goods in here, we are going to have to charge them a little
16 rent to cross this land? Now, there would there not be
17 perhaps some commerce clause implications in a way there
18 wouldn't be if you were simply renting property in downtown
19 San Francisco?

20 MR. EAGAN: Well, the example used -- It is hard
21 to conceive a mere transit use being something that could
22 generate a rent. But, conceding somehow that the state
23 could construct things where it could set up a legitimate
24 or colorable lease for that type of situation, yes, the
25 state would be subject to the commerce clause. The question

1 then becomes where is the remedy, is it with Congress solely
2 or is there some monitoring role that this Court has to
3 perform?

4 And, if there is a monitoring role this Court
5 has, we are quite willing to subject to scrutiny the amounts
6 of particular rents that may be charged in the future by
7 the State Lands Commission with regard to particular ground
8 leases.

9 QUESTION: What sort of scrutiny would be imposed?

10 MR. EAGAN: This Court very well might be reluctant
11 to get into that thicket, because in the tax field it
12 occasionally has demonstrated some reticence about getting
13 into numbers, calculations. Commonwealth versus Edison
14 is a prime example. The Court was content there to say
15 there has to be some apparent relationship between benefits
16 provided by the state and the tax in that case paid for
17 the severance of coal. And, this Court very well might
18 say, geez, we really don't think that is an appropriate
19 function for this Court and we are going to defer to Congress.
20 And, Congress -- that is not an idle alternative. Congress
21 does review these things and does respond when pressure
22 is brought concerning this type of consideration.

23 I think the Evansville case is a good example.
24 In that case, this Court upheld a user tax authorizing or
25 validating a volumetric charge, if you will, in the form

1 of a tax by the Evansville Airport Authority.

2 QUESTION: Mr. Eagan, supposed a state owned a
3 lot of land and part of it is cut up by a deep canyon and
4 they built a bridge across that canyon. What is there that
5 would interfere with the state charging any fee they wanted
6 for crossing that bridge?

7 MR. EAGAN: Well --

8 QUESTION: No navigable stream involved, just
9 a dry, great big dry hole.

10 MR. EAGAN: Well, one, they would be entitled
11 to charge something for it, no question. No question, Your
12 Honor, they would be entitled to charge something.

13 In terms of what constraints there might be, there
14 very well might be a practical constraint, as we maintain
15 there is in this case. Are there other alternatives?

16 QUESTION: Suppose they charged on the basis of
17 tonnage, weight?

18 MR. EAGAN: That is not uncommon. Apparently
19 for coal rights-of-way that is a common means of charging
20 for use of a --

21 QUESTION: You might charge an automobile that
22 weighed about two tons at most, you charge one fee, but
23 if a great big truck is going to cross that weighs 20 tons,
24 you charge him a good deal more. Is there any barrier to
25 that that you know of?

1 MR. EAGAN: Well, let's assume that we have analyzed
2 the market participants -- or at least the availability
3 of other practical alternatives and the Court has found
4 there are none. It seems to me if there are, then the Court
5 may not concern itself. There are other alternatives that
6 the persons had.

7 But, if there are no alternatives, then the decision
8 is is there a role for this Court to play and, if so, what
9 is the test it should apply in evaluating that type of per
10 ton of vehicle moving across this bridge in Your Honor's
11 example?

12 QUESTION: Yes, but the Chief Justice's question
13 was couldn't the state charge based on the amount of tonnage,
14 in short, a charge commensurate to how the bridge was used?

15 MR. EAGAN: Yes, Your Honor, I think they could.

16 QUESTION: There wouldn't be any problem about
17 that, would there?

18 MR. EAGAN: I --

19 QUESTION: But, that isn't in this case, is it,
20 because it doesn't make any difference about wear and tear
21 on the state's property, how much volume is carried.

22 MR. EAGAN: Well, there is volume, of course,
23 depending on --

24 QUESTION: Yes, there is, but the state's property
25 that is used in this case isn't going to deteriorate because

1 twice as much volume is in one year than in another.

2 MR. EAGAN: Your Honor, that is true of any ground
3 lease.

4 QUESTION: Well --

5 MR. EAGAN: And, if you --

6 QUESTION: So it is true of this one, right?

7 MR. EAGAN: It is certainly true of this ground
8 lease. It is true of every ground lease. And, where that
9 type of focus leads is back into the user tax cases where
10 the person is limited to cost reimbursement solely and no
11 type, no type of ground lease is so limited, whether we
12 are talking about variable rent or fixed annual rent of
13 the type endorsed here by the oil companies.

14 QUESTION: Mr. Eagan, do you recognize any con-
15 straints on rent by reason of the import/export clause?

16 MR. EAGAN: Not by reason of the import/export
17 clause, no, Your Honor.

18 QUESTION: None at all?

19 MR. EAGAN: It just is not applicable to rent
20 if we are dealing in fact with a ground lease and indisputably
21 that is what we are dealing with here.

22 QUESTION: Of course, that clause and the tonnage
23 clause both were intended, weren't they, to prevent coastal
24 states like California from exploiting their geographic
25 positions at the expense of sister states, do they not?

1 MR. EAGAN: But, the corollary -- It is true enough,
2 Your Honor, but the corollary --

3 QUESTION: Yet you say there is no concern at
4 all in measuring a propriety of the rent with that considera-
5 tion?

6 MR. EAGAN: This concern of the framers of the
7 Constitution finds expression in a number of clauses and
8 three of them probably central are the commerce clause and
9 the import/export clause. Now, we will concede that they
10 are all trying to get at the same potential problem, but
11 they focus on different means that might be used by the
12 states to affect this.

13 QUESTION: Well, let me put it this way. If you
14 are clear under the commerce clause, does that mean you
15 are also clear under the import/export clause?

16 MR. EAGAN: The analysis proceeds independently.
17 It seems to us when you are talking about rent there is
18 a clear quid pro quo. Even if you are talking about a tax,
19 you are entitled to that under the import/export clause.
20 Clearly a ground rent a fortiori is out from under the
21 import/export clause.

22 The real issue in this case is whether the commerce
23 clause has anything to say about the rent, the mode of rent
24 that is being used here by the Commission.

25 QUESTION: Well, do you think you could just refuse

1 to lease at all?

2 MR. EAGAN: Yes, Your Honor. One example might
3 be -- suppose we are approached by --

4 QUESTION: And whether it is commerce of import/
5 export clause considerations. You could still just say,
6 sorry, but you can't come across our --

7 MR. EAGAN: There might be health and safety con-
8 cerns, really governmental concerns that they want to
9 lease --

10 QUESTION: Just like off-shore oil drilling.

11 MR. EAGAN: I am not saying --

12 QUESTION: Which wouldn't be fencible, would it?

13 MR. EAGAN: That is not in my section, Your Honor.

14 QUESTION: Yes.

15 (Laughter)

16 MR. EAGAN: If there is a monopoly, which there
17 clearly is not here, but if there were a monopoly, indeed,
18 you may get into motivation. Certainly though in our view,
19 if there is a good faith motive for saying to an oil company
20 we are not going to lease to you because where you want
21 to lease there is environmental considerations that cut
22 against that type of use.

23 But, if you had a situation such as Oklahoma versus
24 Kansas Natural Gas Company, where clearly what the state
25 was trying to do was to use its property in a way that was--

1 QUESTION How does the oil company use the state
2 property?

3 MR. EAGAN: Well, the prime example and obvious
4 example would be Standard Oil's Longworth in Richmond.
5 It is on the East Bay and I think currently is about 33
6 acres of property. Standard takes that property, constructs
7 a wharf on it and underneath the wharf are pipelines and
8 then also included within the metes and bounds description
9 area of the lease are berthing areas. Both as to the wharf
10 and -- as to the berthing areas Standard is entitled to
11 the exclusive use of that property, to that extent excluding
12 both the state and other members of the public from this
13 land which is subject to certain common law public trust.

14 QUESTION: Well, does the property or leasing
15 deteriorate from year to year because of the use that you
16 permit the oil company to put it to?

17 MR. EAGAN: I don't think you can make that
18 generalization, no, Your Honor.

19 QUESTION: So, it is not like a highway, for
20 instance?

21 MR. EAGAN: No, this is a ground lease. Con-
22 ceivably there might be situations where some damage or
23 erosion occurs, but we are not grounding any of our arguments
24 on any kind of wear and tear and that is where we think --

25 QUESTION: Who provides the police and fire

1 protection?

2 MR. EAGAN: Well, that particular example, probably
3 the City of Richmond, California.

4 QUESTION: It is public at any rate?

5 MR. EAGAN: The public. I don't know if any state
6 agency is involved and I assume that Standard probably has
7 some of its own personnel.

8 QUESTION: Does the Commission take the position
9 that it may charge any rent that is applicable there?

10 MR. EAGAN: No, Your Honor.

11 QUESTION: What limits does it recognize?

12 MR. EAGAN: Well, again, it wants to lease its
13 property, at least if it has a piece of ground that it thinks
14 is appropriate for that use. And, if it were to propose
15 very high rents, it wouldn't have many takers in terms of
16 potential lessees.

17 And, certainly in the renewal context, which seemed
18 to concern the Ninth Circuit, there are legal limitations
19 in the lease itself. There is a breach of contract action
20 there on behalf of the oil companies if they think what
21 is being proposed in the way of a new rental is unreasonable.

22 QUESTION: But, what about -- Do you think there
23 are any federal constitutional limitations on the amount
24 of the rent that the state may charge?

25 MR. EAGAN: In a monopoly --

1 QUESTION: Any at all. Well, on the facts of
2 this case.

3 MR. EAGAN: On the facts of this case --

4 QUESTION: You can charge anything you want to
5 as far as the federal Constitution is concerned, isn't that
6 your case?

7 MR. EAGAN: There is no monopoly and, therefore,
8 the constraints will be practical constraints, not con-
9 situational constraints.

10 QUESTION: Well, Mr. Eagan, you say there is no
11 monopoly. I guess the courts below both found there was.

12 MR. EAGAN: No, Your Honor. There were statements
13 by both the District Court and the Ninth Circuit made in
14 the context of the renewal situation where you have an
15 adjacent refinery and there is something to the effect that
16 in that circumstance the companies must, must use the
17 adjacent tidelands. There was no general statement by either
18 court below that could be interpreted as saying the state
19 has a strip all the way along the coast.

20 QUESTION: I guess whether there is a monopoly
21 depends on how you define the market and how you define
22 the market is going to determine the answer to the question
23 and how big a chunk of the coastline do we look at in
24 defining the market?

25 MR. EAGAN: Well, we have cited in our briefs

1 the shoreline mileage that is subject to local control.
2 We do not have a figure for private control, but the locally
3 controlled -- local government controlled shoreline mileage
4 in California is approximately 418 miles.

5 Now, the Corps of Engineers has a report out of
6 1971 which indicates that if you include the entire coast
7 of California, including the bays, that the total is about
8 1500 miles.

9 QUESTION: What do you say is the relevant market
10 for our purposes?

11 MR. EAGAN: I am not sure it is confined to marine
12 terminal sites. There are alternative means for transporting
13 and dispatching petroleum and petroleum products from these
14 facilities. Rail is one. On-shore pipelines are another.
15 The citation we have to the Atlas of California shows you
16 where these on-shore pipelines are and how the crude oil
17 and also the products move in those pipelines.

18 QUESTION: But, from a well to a pipeline going
19 ashore.

20 MR. EAGAN: Yes.

21 QUESTION: That would be crossing state property
22 too.

23 MR. EAGAN: Not in all cases, Your Honor.

24 QUESTION: Not in all cases, but it certainly --
25 Some wells located in some positions are going to have to

1 have to cross state property.

2 MR. EAGAN: Not necessarily. There are grants
3 to the local governments that do go out to the three mile
4 limit and they are --

5 QUESTION: I know, but if a well is in a certain
6 location, it won't be in any position to do that.

7 MR. EAGAN: Well, as a practical matter, Your
8 Honor, most of the offshore --

9 QUESTION: Unless you take a terrific detour.

10 MR. EAGAN: As a practical matter the OCS develop-
11 ment in California is off the southern part of the coast
12 and that is where many of the grants are that go out to
13 the three mile limit.

14 QUESTION: The right-of-way on which the pipeline
15 is located is how much area, how much on either side of
16 the pipeline?

17 MR. EAGAN: I don't know a precise --

18 QUESTION: It is a substantial amount I would
19 assume.

20 MR. EAGAN: It is. It is a center line description
21 and it may be 20 to 50 feet on either side. I just don't
22 know.

23 QUESTION: Does that have possible impact on real
24 estate development if that land -- assuming it is otherwise
25 highly suitable for real estate development? Do people

1 want to have their house backing up on a pipeline?

2 MR. EAGAN: Well, in many instances where that
3 pipeline crosses up on property, which in most cases is
4 private land, that might very well present a problem.
5 Generally, the pipelines anyway as opposed to the wharfs
6 that the Commission leases are located under water.

7 QUESTION: Would the possible diminution, if it
8 could be demonstrated, diminution in assessed valuation
9 of land for residential purposes and, therefore, a lower
10 tax revenue on the part of the states or local governments
11 be a factor to be taken into account in fixing this rent
12 or this charge?

13 MR. EAGAN: We view taxes of whatever source or
14 whatever type as really entirely independent. The state
15 is acting as a landowner, it is leasing its property, and
16 it seems to me it is entitled to do so and should do so
17 independent of other considerations such as that.

18 Your Honor, I would like to reserve some of my
19 time for rebuttal.

20 QUESTION: Well, Mr. Eagan, as I understand it,
21 your position is that subject to only the commerce clause
22 that there is a monopoly. The state can charge what the
23 market will bear. And, I take it it is also your position
24 that the courts below didn't decide whether there was a
25 monopoly despite language in the opinion.

1 MR. EAGAN: That is correct. And, if they had --

2 QUESTION: So, we would have to remand to the
3 courts below for that determination in your view?

4 MR. EAGAN: No at all, Your Honor. This case
5 came up not after a trial on the merits but after cross
6 motions for summary judgment. And, there are undisputed
7 material facts and the loose language frankly used with
8 regard to the renewal contacts about must use really is
9 not germane to the issue which is what is wrong with this
10 mode of rent? Again, this is not an amounts case. The
11 decision here forecloses any volumetric rent.

12 QUESTION: They expressly said to the contrary
13 in the last sentence of their opinion.

14 MR. EAGAN: Excuse me?

15 QUESTION: They expressly said the contrary in
16 the last sentence of their opinion. They said they didn't
17 outlaw volumetric. Maybe they didn't mean it, I guess.

18 MR. EAGAN: Your Honor, with deference to the
19 Ninth Circuit, that seems to me to be a throw-away line.
20 It is really not --

21 QUESTION: They also limited their holding to
22 tide and submerged lands. I guess you don't think that
23 is --

24 MR. EAGAN: Certainly the regulation is not so
25 limited. I guess --

1 QUESTION: No, but the holding is.

2 MR. EAGAN: Well, the wording is so limited, but
3 the principle, it seems to me, carries you back much farther
4 than inland, than the tidelands. It seems to me the critical
5 factor is who it is you are dealing with in the court's
6 view. If you are dealing with a person engaged in interstate
7 or foreign commerce, that is the critical consideration.
8 As to those lessees, you cannot charge this type of rent.
9 The intrastate people, the state courts have said it is
10 okay to charge them this type of rent, but when we get to
11 the Ninth Circuit, no, you have a special class entitled
12 to special treatment.

13 These companies charge this form of rent to their
14 own service station lessees. They pay it to the ports, but
15 it is the state somehow that can't make this charge. It
16 is the state that has to give them a subsidy.

17 This Court down through the years has consistently
18 accorded a wide range of discretion to governmental entities
19 in terms of the measure of the charge that they are entitled
20 to make of persons engaged in interstate commerce.

21 The Parkersburg and Keokuk cases you had a rental
22 charge based on the tonnage of the vessel. Now, the obvious
23 argument which was made by the vessel people in that case,
24 well, this is a duty of tonnage. The court said no, it
25 is not, it is rent.

1 QUESTION: They said that was proportionate to
2 the amount of use, but here you have got vacant land.

3 MR. EAGAN: Well, it seems to me if we are going
4 to try to draw a distinction between improved property,
5 where, say, the state provides the wharf, and the situation
6 that usually obtains here, unimproved ground, all that goes
7 to, it seems to me, Your Honor, is the amount that is likely
8 to be negotiated for the charge. It is clear from the record
9 that even though they provide improvements, a portion of
10 the volumetric return that the ports gets is a return on
11 the land. There is no question about that.

12 And, there are also clear instances in the record
13 where the ports themselves lease unimproved land and where
14 the company provides the improvements, yet nonetheless a
15 volumetric charge was made.

16 QUESTION: I don't understand why you draw a
17 difference between whether there is a monopoly or not.
18 It seems to me that we have to make up our mind whether
19 we are going to credit this statement of the Court of Appeals.
20 The permanency of Plaintiff's facilities does not permit
21 them to shop around. There is no other competitor to which
22 they can go for the rental of the required strip of
23 California coastline. The Commission has a complete monopoly
24 over the sites used by the oil companies. Now, assume we
25 credit that. What are we supposed to do then under your

1 view?

2 MR. EAGAN: I assume you would interpret that,
3 Your Honor, the monopoly statement or the must use is con-
4 fined to the context the court has discussed there, the
5 renewal situation, the refinery adjacent to the lease.

6 QUESTION: Well --

7 MR. EAGAN: I think it is clear the court is not
8 there talking about or implying that the state has a monopoly
9 up and down the California coastline. It's demonstrably untrue,
10 it does not.

11 QUESTION: I agree, but it doesn't have a monopoly
12 over these particular sites because of the permanency of
13 these facilities, refineries, etc.

14 MR. EAGAN: The critical consideration seems to
15 us in deciding whether a monopoly exists --

16 QUESTION: Let's just assume that there was a
17 monopoly, that we said that the state has a monopoly at
18 least with respect to a lot of these sites, what are we
19 supposed to do then under your view?

20 MR. EAGAN: It is a threshold response. It seems
21 to me that that is not a common use of the word "monopoly,"
22 but if the state does have a monopoly, then this Court may
23 very well say market participation is out the window,
24 we have got to step in and look at this mode of rent and
25 ask ourselves is this mode, under some principle under the

1 Constitution is this mode of rent bad? Is there something
2 in the Constitution that legitimizes solely flat, annual
3 amounts of rent? Is that, as a matter of constitutional
4 principle, the only mode of rent that the State of
5 California may use?

6 QUESTION: Thank you very much.

7 MR. EAGAN: We are not saying there is no scrutiny.
8 Excuse me, Your Honor, do I have any time for
9 rebuttal?

10 CHIEF JUSTICE BURGER: We will see.

11 Mr. Verleger?

12 ORAL ARGUMENT OF PHILIP K. VERLEGER, ESQ.

13 ON BEHALF OF THE APPELLEES

14 MR. VERLEGER: Mr. Chief Justice, thank you, and
15 may it please the Court:

16 Let me start with this point, I think, and sort
17 of pick up where we were a minute ago. As successors to
18 the English Crown, the original 13 states, we are thought
19 generally considered to have acquired the tide and submerged
20 lands underlying the harbors and the rivers of each of their
21 states from the moment when those 13 states were formed.
22 It also, I think, has not been disputed on this record,
23 and I don't believe can be, that as the other states joined
24 the Union they came to acquire similar rights. If one
25 needs to have a citation, one is Shively v. Bolby at 153

1 U.S., but there are many cases that state that proposition
2 and I won't belabor it.

3 Now, the second point, one has this basic picture
4 that the states started out owning the tide and submerged
5 lands that underlay the harbors and the adjacent coastline.
6 Now let me say that in U.S. v. California it was established
7 they didn't own out to the three mile limit, but Congress
8 promptly in effect reversed that decision with the Submerged
9 Lands Act and it has since been clear -- and this, I believe,
10 corresponds pretty well to the general thinking about the
11 law at an earlier date -- that they had this band that borders
12 along the ocean. Now that is the first basic proposition.

13 A second basic proposition is that the commerce
14 clause, the import/export clause and the tonnage clause
15 were of fundamental importance in the very adoption of the
16 Constitution. Every historian that I have read and many
17 of the cases of this Court, including Michelin Tire and
18 others, speak strongly of the fact that in the years of
19 the Articles of Confederation, the first ten years roughly
20 of the Republic, they are proliferated, there grew a bale
21 of assorted tariffs, barriers, and restraints of one kind
22 or another that the states adopted not only with respect
23 to foreign imports but with respect to each other.

24 And, the Constitutional Convention was caused
25 preeminently because of disagreement and through that condition

1 and dissatisfaction with it. And, one of the fundamental
2 objectives of the founders was to end it.

3 Now, those founders were lawyers and if one looks
4 at the basic characteristics of the charges we are dealing
5 with here, one has to say that if the state's interpretation
6 is correct, then it must have been intended by the founders
7 that those provisions which were so important be totally
8 ineffective, because the facts are these. If one wishes
9 to import any commodity, if one wishes to bring it in inter-
10 state commerce by transportation by vessel, one is going
11 to have to have a dock, some sort of facility. It can't
12 fly through the air from the ship into the land.

13 Today petroleum, which wasn't thought of then,
14 is one of the major commodities that moves in the world.
15 It is a major commodity that moves in vast quantities into
16 the coast of California. California, as it happens, uses
17 about two million barrels a day of petroleum and it only
18 produces something on the order of 800,000 from the internal
19 sources. Today it is commencing to produce a great deal
20 on the outer continental shelf.

21 All of that requires pipeline transportation and
22 that pipeline has to be laid in tide and submerged land
23 and quantitatively most of that land belongs to the State
24 of California. The numbers are in our brief. They come
25 to 93 percent of the total if you include -- If you exclude

1 the cities. It is our view that the cities are political
2 subdivisions of the state and you need to count them. I
3 don't think a tariff becomes more permissible because one
4 agency of the state chooses to adopt it along with a portion
5 of the border it controls and --

6 QUESTION: What is the percentage of private?

7 MR. VERLEGER: Private ownership is on the order
8 of two percent.

9 QUESTION: What is the breakdown between the City
10 of Los Angeles, say, and then the state in Southern
11 California?

12 MR. VERLEGER: The City of Los Angeles in general
13 owns the tidelands. I can't from memory state the exact
14 seaward border although I believe it is somewhere in the
15 vicinity of the breakwater. When you move up to Long Beach,
16 Long Beach owns it. You move down to Huntington Beach and
17 Seal Beach and in general those little municipalities own
18 some along the coast. Then when you get farther out between
19 there and the three mile limit generally, and I can't speak
20 to each individual situation, the state has it.

21 The facts are that up in the bay area where the
22 refineries are they are almost entirely dependent on state
23 land. The fact is that all of this vast new oil production
24 comes on stream in Santa Barbara, which looks like it may
25 ultimately aggregate somewhere between a third as much and

1 as much as Alaska, all depends on pipelines across the state
2 owned property in order to come ashore.

3 I would add --

4 QUESTION: How does it break down on the shore-
5 line as such?

6 MR. VERLEGER: The shoreline, I won't quarrel --
7 if you are just going along the beach, I would not quarrel
8 with the figures that the Attorney General has given us.
9 You wind up with more than it looks like because of the
10 intricacy of -- You measure the thing along and --

11 QUESTION: That doesn't tell the whole story.

12 MR. VERLEGER: No, it doesn't.

13 QUESTION: You have to look out in the ocean a
14 little bit.

15 MR. VERLEGER: You have to look out in the ocean
16 and that is the reason for the difference between the 400
17 versus 1200 miles or more that they quote in the 92 versus
18 98 percent we quote.

19 QUESTION: Well, Mr. Eagan, do you think the position
20 that the state must grant a right-of-way.

21 MR. VERLEGER: Mr. Verleger, but I don't mind.

22 QUESTION: Excuse me, yes, Mr. Verleger.

23 MR. VERLEGER: Your Honor, our position that
24 certainly the state has discretion when it came to particular
25 decisions as to where rights-of-ways would be taken. We

1 don't say a company has a right to put a right-of-way wherever
2 they want. But, if the state adopted a policy which
3 effectively precluded use of the tide and submerged lands
4 for pipelines to bring the oil ashore, that is very like
5 what was done in one of the old cases. I think Hardin was
6 the last name and it was in the Eighth Circuit and we have
7 cited it, where the state said that you couldn't use the
8 streets which the state owned for pipelines to carry gas
9 out of the state. That was held unconstitutional. In my
10 view, it would be just as plainly unconstitutional for the
11 state to do the same thing here.

12 The harbors are the great highway it seems to
13 us of the world and today the outer continental shelf has
14 become the same.

15 And, the decisions that deal with whether North
16 Dakota or some other state wants to have a cement plant
17 have very little application to this sort of property. This
18 is a very different situation.

19 QUESTION: It is different for what reason in
20 your view, Mr. Verleger, because of the connection with
21 the coastline?

22 MR. VERLEGER: The state's own decisions say that
23 the state holds this property as trustee for purposes of
24 commerce and navigation. I think that ties back in a way
25 to the ownership of the original English Crown. It would

1 be my belief that the reason that this land was held
2 appertain to the public is because it has a public use.

3 QUESTION: Well, is that a state law point that --

4 MR. VERLEGER: There is a state constitutional
5 provision in addition that says the same thing.

6 QUESTION: Is part of your argument based on state
7 law? I didn't think the Ninth Circuit's opinion was based
8 at all --

9 MR. VERLEGER: I would use that -- Well, I guess
10 it is accurate to say that that fragment of my argument
11 mentions that proposition. I think that that is a proposi-
12 tion that follows independently of the state law. I do
13 not think that the states are free to use their tide and
14 submerged lands to defeat commerce, to create a barrier,
15 and that, indeed, is the holding of the case I have just
16 referred to.

17 QUESTION: So, your reasoning that you submit
18 to us is limited to tide and submerged lands?

19 MR. VERLEGER: Our lawsuit relates to tide and
20 submerged lands. That is all we sued over.

21 QUESTION: That is all you are leasing from the
22 state.

23 MR. VERLEGER: At least it is all we are leasing
24 in this case. I won't guarantee that somebody doesn't have
25 an oil lease somewhere or something else. But, that is

1 what we are talking about here.

2 QUESTION: And those leases cover lands that are
3 used to carry oil from somewhere else?

4 MR. VERLEGER: Those leases cover basically lands
5 that are used for pipelines to bring oil from ships that
6 are anchored either by docks or in some instances out at
7 sea in water that is two or three hundred feet deep, to
8 bring that in to the refinery. They are used to carry oil
9 from offshore platforms.

10 And, one of the interesting features in the argument
11 that has been made by a lessee in this case is that it points
12 to the absolute necessity of a commerce clause review and
13 import/export review of these various -- of these terms.
14 They have said there are all these little municipalities
15 that have similar positions.

16 Well, we have a brief from Santa Monica which
17 deals with one of them. It is true enough as they point
18 out that there is a pipeline that comes ashore and it then
19 goes down through a half a dozen municipalities and finally
20 reaches a refinery. They say, one, that we are about half
21 way decided we don't want to allow any such pipelines; and,
22 two, they are free to charge anything they want.

23 Now, I submit that unless some principle such
24 as that found in the user cases continues to be applicable
25 to pipelines, to the very mechanism and means of interstate

1 transportation, one is going to wind up with a situation
2 where a shipper in the United States is going to be roughly
3 in the same position as a trader in the Middle Ages when
4 he had to pay a duty at every little castle that he passed
5 from Frankfort, let's say, down to Italy.

6 QUESTION: Well, supposing that California had
7 totally socialized real property, that only the state owned
8 real property, and your clients wanted to lease a place
9 from the state to have a service station and it was in
10 Bakersfield, it had nothing to do with the coastline at
11 all. Nonetheless, obviously, the cars that pulled in there
12 if it were a service station were going to be moving in
13 interstate commerce. Would you say that the state couldn't
14 charge whatever it wanted to ground lease that land to an
15 oil company for a service station?

16 MR. VERLEGER: When it comes to leasing land they
17 owned in Bakersfield for a service station, I don't know
18 of any barrier to their leasing whatever they want.

19 The think the basic difference here is we are
20 talking about a means of commerce. We are talking about
21 the mechanism by which property comes across the border
22 into the state, and we are saying that the state cannot,
23 by calling what it collects rent, collect exactly the same
24 charges it would as a tariff and legitimatize the charge
25 by changing its label.

1 QUESTION: Well, can the state, Mr. Verleger,
2 charge a reasonable rent under your view?

3 MR. VERLEGER: There is no question in my mind
4 but that they can. Let me say in that connection --

5 QUESTION: Well, the state court said this was
6 a reasonable rent.

7 MR. VERLEGER: Well, the state court was reviewing
8 that in terms of its standard for the review of an
9 administrative agency, its decision, which at least in
10 California -- and actually a legislative decision. And,
11 in California the rule under those circumstances is -- gives
12 the agency so much discretion that I don't know -- All you
13 can do is treat it as a finding that the agency didn't use
14 its discretion. It is a different issue.

15 QUESTION: Well, if a volumetric rent is a typical
16 sort of a rent for pipeline use --

17 MR. VERLEGER: It isn't.

18 QUESTION: It is not?

19 MR. VERLEGER: No.

20 QUESTION: If it were, would it be reasonable.

21 MR. VERLEGER: In this particular instance I would
22 say not because the Constitution -- take imports first.
23 Expressly under the import/export clause it forbids a duty
24 or an impost. A duty or impost is, let us say, in round
25 figures a dollar collected for every barrel that comes in.

1 And I submit that a dollar collected for every barrel that
2 has come in is the same thing regardless as to what you
3 call it.

4 Now, beyond that I would submit that we have a
5 very close analogy in the tonnage tax cases which dealt
6 very much with that problem. The founders of the Constitution
7 were concerned over the problem of evasion of the provision
8 forbidding impost and duties and they adopted the tonnage
9 clause because they were fearful that it would be evaded
10 by charging the ship instead of the cargo.

11 Now, the --

12 QUESTION: Counsel, what would you consider to
13 be a reasonable rent?

14 MR. VERLEGER: Well, I would consider -- They
15 fixed one before, Your Honor. The rent was fixed in this
16 way. They appraised the value of the property as industrial
17 property. They used comparable industrial property. They
18 then determined the going rate of rental for industrial
19 property in the area which they fixed at eight percent of
20 its value and they charged it and our people paid it.

21 Now, in this instance, the leases still require
22 that reasonable rate of rent. Then they go on and file
23 on to it the percentage rent, the through-put rent -- what
24 we call the tariff -- as something extra. We have no quarrel
25 with the rental based on the reasonable value of the property.

1 QUESTION: You consider the other more rental?

2 MR. VERLEGER: The other is more rent and the
3 answer is since it is fixed on the basis of the commodity --

4 QUESTION: And, it is unreasonable.

5 MR. VERLEGER: More than unreasonable. We think
6 it is unconstitutional because essentially if you look at
7 both of the cases that deal with imposts -- Michelin Tire
8 was very careful to say that this was not a charge for
9 simple entry into the country.

10 In the tonnage tax cases the court was explicit
11 in saying the state or the city -- because those cases treat
12 the state and the city as the same -- could charge for
13 facilities they provided but could not charge for the use
14 of the unimproved bank of the river and that is essentially
15 what we have here.

16 Now, if -- Let me say as I go further in that
17 connection that one of my puzzles in this connection has
18 been the degree to which this case raises issues of the
19 Montana Power and the Louisiana v. Maryland and the issues
20 raised in the commerce clause and in import cases generally.

21 My reasons for uncertainty is simply that first
22 of all in the first sentence of their brief the state recites
23 that we do not -- the first sentence of the reply brief --
24 that we do not contend -- the words are "without question
25 a simple charge for the privilege of bringing merchandise

1 into the country would be prohibited under the import/export
2 clause." That is the first sentence of the reply.

3 And, similarly, while I see no such concession
4 as to commerce, I see no connected argument anywhere that
5 this kind of a charge is all right under the commerce clause
6 and I hesitate, therefore, to embark on a debate that may
7 not be before this Court at this time at all and yet I am
8 a little concerned that if I say nothing on it the subject
9 may be the subject of a decision to which I have contributed
10 very little because one hesitates to answer an argument
11 that hasn't been made.

12 Let me say, therefore, simply these things. That
13 is it is my belief that the Court's most recent cases
14 recognize the necessity of preserving something like the
15 doctrine of the user tax cases here, to start with Evansville
16 which says that the charge of one dollar per passenger at
17 an airport was all right because it didn't exceed cost.
18 It is a 1982 decision. It is a relatively modern decision.

19 To continue, in Montana Power this Court speaks
20 of the invalidity of a tax which bears no relationship to
21 the taxpayer's activities and it goes forward and refers
22 to Nippert v. Richmond and Michigan-Wisconsin Pipeline v.
23 Calvert. Now, both of those cases were cases where
24 impractical operation they taxed more severely on interstate
25 commerce.

1 And, let me say simply that if one looks at the
2 Army Engineers' statistics that our friends and the others
3 have cited, it will practically appear that quite literally
4 when it comes to crude oil this law has its application
5 essentially 100 percent to imports and to interstate commerce
6 and as to products it must be in the order of 90 percent.

7 QUESTION: Mr. Verleger, I guess there is no doubt
8 that Congress couldn't allow California by statute to charge
9 these rents.

10 MR. VERLEGER: Congress could.

11 QUESTION: And there would be no commerce or --

12 MR. VERLEGER: There would be no commerce clause
13 problem clearly on import/export.

14 QUESTION: Oh, really?

15 MR. VERLEGER: Well, I --

16 QUESTION: Did Congress authorize that?

17 MR. VERLEGER: Well, I hadn't thought since --
18 The two are different, that is all I mean to say. My belief
19 is that if Congress expressly did it it would be all right.

20 QUESTION: There is nothing the Submerged Lands
21 Act or any other statute would suggest --

22 MR. VERLEGER: I have found no congressional act.
23 I think the question of how this would affect the application
24 to the oil brought in from federal leases, if it became
25 prohibitively high, is a question that was involved in

1 Louisiana v. Maryland, but not decided, and I don't think
2 it is presented on the record here.

3 QUESTION: Incidentally, suppose California sold
4 this whole coastline to private interest. Could those people
5 charge you any rent they wanted?

6 MR. VERLEGER: The answer is I think I don't know.
7 If it got too high, I expect I would be in court, but the
8 truth is I haven't analyzed that problem, so I hesitate
9 to speak to it.

10 QUESTION: You would probably find a right of
11 immanent domain in a pipeline company.

12 MR. VERLEGER: Some have it that might be used.
13 The problem is we don't have it against the state.

14 QUESTION: Exactly, you don't.

15 QUESTION: May I ask just one question on your
16 theory?

17 MR. VERLEGER: Sure.

18 QUESTION: Are you taking the position that no
19 matter how reasonable the level of the rent might be, they
20 can never use the volumetric formula?

21 MR. VERLEGER: It is our sense that -- particularly
22 under the import/export clause that the volumetric formula
23 applied on imports produces exactly the same result as a
24 tariff in the same amount. Now, it is very clear that the
25 state could not apply a tariff no matter how reasonable

1 it was. And that, I think, irrespective of all the criteria
2 in complete thought of transit because you have got an express
3 prohibition. So, they can't have a reasonable tariff.

4 I have trouble with anything that permits them to do the
5 same thing because it is obvious that from the beginning
6 they owned all this real estate and while they have sold
7 off some of it they have still got most of it.

8 The cities I count as the same thing. It seems
9 to me no defense at all to say that the cities are doing
10 the same thing.

11 QUESTION: And, is it your understanding of the
12 Ninth Circuit that that is what they held; that you cannot
13 use this formula for the tidelands and the submerged lands
14 on the border of the state.

15 MR. VERLEGER: I believe they so held.

16 QUESTION: Regardless of amount? I mean, even
17 if they had --

18 MR. VERLEGER: Also I have found -- I think their
19 view was that the amount was unreasonable too.

20 QUESTION: I understand, but I couldn't quite
21 tell whether one would have done it without the other.

22 MR. VERLEGER: One never knows for sure, but my
23 view is --

24 QUESTION: But your view is that it is that on
25 either ground independent of the other.

1 MR. VERLEGER: I also urge, even though the cases
2 I have to rely on are older, that a straight tariff, something
3 that says you have got to pay fifty cents a bushel or a
4 barrel to come into a state -- into California from Nevada,
5 for instance, unless justified under the rules of the user
6 taxes, would be bad. The Michigan-Wisconsin Pipeline case
7 is a good example.

8 QUESTION: You defend the lower court's commerce
9 clause holding as well as the import/export?

10 MR. VERLEGER: I do.

11 QUESTION: But, you would prefer a decision on
12 the latter.

13 MR. VERLEGER: Well, we are concerned with both
14 because --

15 QUESTION: Well, I know, but in the commerce clause
16 one -- That argument wouldn't necessarily -- You wouldn't
17 necessarily win on that based on any volumetric no matter
18 how small.

19 MR. VERLEGER: No. I think that in the commerce
20 clause the critical question is the relation to cost idea
21 that appears in the user tax cases. I think that because
22 of the special situation of transportation across state
23 lines that -- It seems to me the constitutional necessity
24 that there be a prohibition on a simple set of tariffs that
25 are put up by states at the border, that that doctrine remains

1 essential and I note that in Footnote 12 in the Montana --
2 in the Commonwealth Edison v. Montana Power this Court gives
3 a continued effect of that doctrine in situations that are
4 sort of quasi proprietary. That is what the note said.
5 And this is pretty much that situation.

6 So, I would conclude that that doctrine arranged
7 an essential there as to interstate commerce as well as
8 foreign commerce.

9 It seems to me that the use of title as a vehicle
10 for the imposition of creation of a barrier, however small,
11 at the state border is just as undesirable for interstate
12 commerce as it is for foreign and I note that in Michelin
13 Tire this Court has sought to amalgamate the concepts of
14 the import/export clause and the commerce clause to the
15 extent feasible. In that case what was done was to take
16 commerce clause ideas and apply them to the import/export
17 clause, but I would submit as one looks at the necessity
18 of a protection against a true sort of barrier at the border
19 that the same logic applies.

20 Let me add that there are plenty of situations
21 that illustrate the necessity. It is a fact, for instance,
22 that oil from Alaska comes ashore in Long Beach. It then
23 is put into what is known as the four-corner pipeline.
24 It traverses the City of Los Angeles, it crosses the state's
25 highways, it crosses the land of probably a hundred or a

1 thousand maybe assorted cities and counties as it goes between
2 Los Angeles and Midland, Texas. And, every time it crosses
3 a street or a highway, it is crossing some state's property.

4 If the rule is that the state -- I say simply that
5 if the rule is that the state can charge anything it wants
6 for the use of its property, then I submit we will be back
7 in the same situation as a peddler in the Middle Ages.

8 Thank you.

9 CHIEF JUSTICE BURGER: You have two minutes remain-
10 ing, Mr. Eagan.

11 MR. EAGAN: Thank you, Your Honor.

12 ORAL ARGUMENT OF DENNIS M. EAGAN, ESQ.

13 ON BEHALF OF THE APPELLANTS -- REBUTTAL

14 MR. EAGAN: I think from some of the questions
15 from members of the Court there is some obvious concern
16 with whether there is a monopoly. I was able to find the
17 reference to the Corps of Engineers' report. It is entitled
18 "National Shoreline Study, California Regional Inventory,"
19 published in August 1971. That report indicates there are
20 approximately 1513 miles of coastline including the interior
21 bays in California and of that amount 418 miles is in the
22 ownership, the frontage, of local public entities pursuant
23 to grants from the state legislature.

24 Now, of course, that 418 figures doesn't include
25 the frontage that is owned by private parties and I just

1 don't have a figure for that.

2 I should also say that the proportion of local
3 cities to state ownership is probably even greater if we
4 focus on what is desirable or useful. That northerly 350
5 miles between San Francisco and the Oregon border really
6 is not necessary or needed for this type of lease.

7 Second, I do want to clarify -- and I can do it
8 by reference to the record -- that we are not talking about
9 a volumetric charge here that is added on to an eight percent
10 return. This is just like a percentage lease. There is
11 a minimum rent, but that minimum rent is applied as a credit
12 against the volumetric rent and you very well may have
13 situations where all that is paid is the minimum rent because
14 the volume has not been sufficient enough to generate a
15 volumetric rent over the minimum.

16 The citations to the record for this are to two
17 leases that talk about the minimum application at page 42
18 of the Joint Appendix, also page 64, a Union and a Standard
19 lease, and also in the affidavit of the Commission at pages --

20 QUESTION: Mr. Eagan, can I ask just one question?
21 Is it your position here the same privileges with regard
22 to rental charges in the land in dispute in this case as
23 you would in any land any place in the state?

24 MR. EAGAN: That is correct, Your Honor.

25 Just to underscore what is the contention of

1 the Plaintiffs in this case, I quote again from the remark
2 at oral argument before the District Court by counsel for
3 the oil companies, "To us what this case is about is just
4 the validity of a through-put charge per se, whether the
5 state can charge even one-millionth of a mil as a through-
6 put fee." That is the import of the Ninth Circuit's decision,
7 not even one-millionth of a mil is permitted to the state
8 in this circumstance.

9 CHIEF JUSTICE BURGER: Your time has expired now.

10 MR. EAGAN: Thank you.

11 CHIEF JUSTICE BURGER: Thank you, gentlemen.

12 The case is submitted.

13 (Whereupon, at 2:57 p.m., the case in the above-
14 entitled matter was submitted.)

15 * * * * *

CERTIFICATION

erson Reporting Company, Inc., hereby certifies that the
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ectronic sound recording of the oral argument before the
reme Court of The United States in the Matter of:
4-16 - KENNETH CORY, LEO T. MCCARTHY AND JESSE R. HUFF, APPELLANTS V.

WESTERN OIL AND GAS ASSOCIATION, ET AL.

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