Minnesota Foundational Environmental Laws
Oral History Project

Narrator:
Byron Starns (BS)

Interviewer:
Stephanie Hemphill (SH)

Recorded:
February 8, 2017

Stephanie Hemphill (SH): The following interview was recorded with Byron Starns on behalf of the UMD [University of Minnesota Duluth] Kathryn A. Martin Library Archives for the Minnesota Foundational Environmental Laws Oral History Project. It took place on February 8, 2017, at Mr. Starn's office in downtown Minneapolis, Minnesota. The interviewer is Stephanie Hemphill.

SH: Byron, thank you so much for taking the time to talk to me

Byron Starns (BS): My pleasure.

SH: It's going to be fun.

BS: Yes.

SH: Where were you born and where did you grow up?

BS: I was born in the country in Georgia, the state of Georgia, rural Georgia, an unincorporated town called Carrs Station–C-A-double R-S, Station, Georgia. It was about fifteen miles from the county seat of Hancock County, Georgia, which is Sparta, and about twenty-five miles from Milledgeville, Georgia, which was the capital during the Civil War, before it was moved to Atlanta.

SH: Really?

BS: Right. So, my mother was descended of some cotton farmers in that county, so, and I was there, she was pregnant and was fired from her job as a school librarian and the only place that she could–because my dad was overseas–the only place she could go to live was back to the family farm. So, that's where I was born during World War II.

SH: During the war.

BS: Yes, yes, born, so my dad was overseas.

SH: So, did you grow up there, too?

BS: No, I didn't. I grew up, for the most part, in the South. Both my parents went to University of Oklahoma after the war–my mother had a degree from there, my dad, we went back to Norman and I stayed–went through the second grade in Norman, Oklahoma, and then we went to Gainesville, Florida, where both my parents worked for the University of Florida. My mom was a college, or university librarian, and my dad was a college bookstore manager. So, most of my growing up years were in Gainesville, Florida, with one year in Atlanta, at Georgia Tech, and then–but I would go back to the family farm in the summers for a couple weeks and hang out with my uncles, who were farmers, and we'd go fishing and I'd help them with the chores. And so, it was a throw-back, it was like, throw-back look to the way agricultural life in the South was probably in the '30s and the '40s, you know, still.

SH: I guess.

BS: Yes, really, really.

SH: And did going back there, being in the country, kind of generate an interest in the environment for you, do you think?

BS: Ah, I mean, it did generate an interest in the outdoors, for sure. And I don't know that environment was particularly, I mean, at that early stage, I wasn't really conscious of it. I mean, I don't think people really took, they took the environment for granted. They didn't really think about what they were doing, you know. And, it was very sparsely populated area, so it was very clean and nice. [Laughs]

SH: Yes. Wow.

BS: Yes, yes.

SH: But hot, I bet.

BS: It was hot, but you know, when you–that was before air conditioning was prevalent, so essentially, you just kind of, you adjusted, I think.

SH: Right.

BS: Yes, right.

SH: My mother was a librarian, too.

BS: Oh, yes.

SH: So, I think it's very noble profession.

BS: It is, I agree, I agree, yes.

SH: So, then where did you go to college and what degrees did you get?

BS: I went to college at Duke University in Durham, North Carolina, and I got a bachelor of arts in political science.

SH: In political science?

BS: In political science, right.

SH: And then the law degree?

BS: The law degree was from the University of Chicago. While at undergraduate, I took a lot of chemistry, I took botany. I was thinking about pre-med, but I decided that I really liked Perry Mason and I read, [laughs] I read, I read To Kill A Mockingbird and then a book that was very influential was Gideon's Trumpet, which was about Abe Fortas' taking on that case, Gideon v. Wainwright on a pro bono basis and enlisting, and Walter Mondale figured prominently as the only attorney general [AG] in the fifty states to support the right of an indigent criminal defendant to counsel. And so, that case, so reading those stories kind of, you know, from an idealistic point of view gave me a real interest in becoming a lawyer. And then the wonderful thing was, I ended up working at the Minnesota attorney general's office ultimately, and meeting Walter Mondale. And so, that was pretty cool.

SH: That's amazing.

BS: Yes, yes. But, when I went to law school, in undergraduate school, environmental law wasn't–didn't exist, it really, there wasn't a lot of consciousness about it other than the Rachel Carson book. You know, it came out, I think in '61 or '62, I think?

SH: Um-hmm.

BS: And that was prominent, but the awareness just started, kind of–I think in law school, when I went to law school at the University of Chicago, there was no course in environmental law. Administrative law was taught, and I took that, and–

SH: Well, when did you get your law degree? Was that in about '60–?

BS: 1969.

SH: '69.

BS: Yes.

0:05:08.9

SH: So, that was really at the very beginning of environmental awareness.

BS: Very beginning. It was.

SH: –in the nation.

BS: Right. And then, but it was really an opportunity because, I came to work for the attorney general's office and I worked in the [Minnesota] Highway Department doing eminent domain litigation, but when they established the PCA [Pollution Control Agency] the AG assigned attorneys in the Highway Department to help the MPCA with its legal work. And so, I had some exposure to environmental law for the first time, in like, '69. And I even worked on the state version of the Reserve case, in a supporting role to Jerry Truhn and Lane Fridell, who were under Doug Head who was the attorney general and the state was bringing a state revocation hearing against Reserve because the color of the lake indicated that the discharge material was getting outside the zone of discharge under the permit. So, that was an enforcement action that started in 1969 and ultimately got, ultimately I think it was delayed or merged into the federal trial that happened in '72. So, I first touched that environmental in, like, 1969 as kind of in a support role with that litigation team. I wasn't up in Two Harbors at the trial, but I was helping them from St. Paul. And then I jumped I with both feet with the Reserve Mining case in 1973, I think it was, 1973. Yes, '73, I think, right.

SH: Well, we'll definitely talk about that in a few minutes, but it's interesting when you mention the Highway Department, because, and you were with condemnation–

BS: Yes.

SH: But building highways was one of the, seen later as one of the most environmentally destructive things we did.

BS: Right, right.

SH: –as a society. And also, I believe that the federal highway law was one of the first environmental laws, because they required Environmental Impact Statements [EIS] all of a sudden, didn't they?

BS: Yes, and then, yes, and then the case, Overton Park? Overton Park led to the federal – what is it, 4E?–anyway, the federal regulations that played out here recently in connection to light rail, and that is that under, federally funded projects under that, federally funded transportation projects are required to avoid parks and natural resources, even if it's more expensive. And so, it's a really tough law to protect resources and that case evolved because they wanted to build a freeway through, I think, a park in Nashville, I think it was Nashville, Tennessee, called Overton Park. And so, that's how that started. So, that law, adopted with freeways in mind, has been kicked around here in the Cities [Twin Cities of Minneapolis and St. Paul, Minnesota] with respect to light rail right of ways.

SH: Hmm.

BS: I even worked on a case to help the park district a little bit with their concerns with the, is it the line that goes southwest–

SH: Hmm.

BS: –that goes through the lakes park district, that issue, and MPR, [Minnesota Public Radio] you know the light rail through downtown St. Paul. Because it protects historic structures as well as natural resources, anyway, I digress.

SH: La plus ca change….

[Both laugh]

SH: Um so, you said you weren't involved with the passage of either of these laws, but you were working with the AG's office.

BS: Working wit the AG's office, was aware of them, and I got particularly involved with MERA [Minnesota Environmental Rights Act] in connection with historic preservation. That was probably the, but that would have been, yes, that was sort of contemporaneous with Reserve. Reserve didn't involve those statutes, that was just a straight up kind of water pollution, you know, case. And it was filed before the Water Pollution Act of '72, I think. It didn't apply and so it was common law, the Refuse Act, some of the old laws to protect the environment were the legal underpinnings of that case.

SH: So–

BS: So, MERA was, MERA and MEPA [Minnesota Environmental Policy Act] were new, because they were, I'm thinking, '72, '73, '74, somewhere in there?

SH: Right, '71 and '73.

BS: Yes. Yes.

SH: So, thinking about that and comparing them to those old laws, would you say your thoughts about how–at least MERA let's start with–has played a role in environmental protection?

0:09:58.9

BS: Well, I think MERA has taken, has played a big role because it, as you know, John Herman and Chuck Dayton, who authored that, I think, and got it through, it incorporated the common law, the public trust doctrine, and it also, which was a way at common law for people to get standing, to challenge activities that damage common resources and it basically codified the common law principle of public trust. And then it gave express standing to any citizen to protect it, and it gave the rights of intervention in any proceeding, you know, administrative or whatever, that could affect the environment.

SH: Intervention for individuals?

BS: Individuals, yes, or organizations. So, the Reserve case itself, was, the Save Lake Superior Association and those groups, used intervention, intervened in those cases and may have–I can't remember–but I think they may have cited MERA as one basis for it, even though it was a federal action. But, so that would enable a citizens' group that was opposed to something, if I'm going to put in a facility and I'm seeking a permit from an agency, the proceeding is agency versus the party seeking the permit, and then the citizens' group can organize itself and get involved as a party and try and make a record for why the permit shouldn't be granted or why it should have different mitigation factors and so forth. So, that was a substantive, a real substantive aid to protecting the environment.

SH: And what do you mean by "substantive"?

BS: Well, they gave you a cause of action–

SH: Is that a legal term? [Laughs]

BS: Yes, it's a legal, basically it gives you a claim, you know, a claim, it gave you standing, so you could be in court. You know, you didn't have to establish a particularized harm and you had standing as a citizen and then it gave you a substantive claim that was based upon the element that if the conduct is likely to damage the environmental resource then the burden would shift to the person trying to, who is seeking to do the damage, to prove there was no feasible or prudent alternative with no, economic considerations alone are not a defense. So, that was very different than maybe common law standards of nuisance and other things would have been.

SH: Because in the common law, you would have had to shown that you personally would be damaged by the harm?

BS: Exactly, exactly.

SH: And, do you remember thinking about this and thinking, "Well, this is a really good idea." Or, "This is a crazy idea." Or–

BS: You know, I thought it was a good idea, but we were, at that time, in the AG's office, we were looking for creative things to do to protect the environment and so we did, we used the public trust doctrine, we filed a law suit to challenge the building of condominiums on the Wisconsin bank of the St. Croix River on the basis that Minnesota had a, Minnesota owned the water, or the public owned the water and there was a public, it was a violation of the public trust to impair the vistas from the public water, which was kind of creative. And that then led to a settlement of the, related to the project. But that lawsuit was filed before the Wild and Scenic Rivers protection went through, designed as sort of, to maintain the status quo until that protection could come in.

SH: Hmm.

BS: So, we were doing things like that. And then the Bryson case was handled by the attorney general's office, Geoff Jarpe, I think, did the lead on it, but I was aware of that one.

SH: Okay.

BS: And that was an important case.

SH: So–

BS: Ironically, both Geoff and I worked in the Highway Department, so to your point about highways are damaging, so the irony is that the attorneys that were involved in that were representing the state in the Bryson litigation, to basically force the county to change the alignment of the road to avoid the natural resource.

SH: Right, and so you were with the AG's office and you were aware of that case–

BS: Yes.

SH: And was the Bryson case, and I believe, do you remember if it was, I think it got a fair amount of attention in the newspapers.

BS: It did, it did, it did.

SH: So people knew that that was significant?

BS: Yes, yes. I think they did. And it was also, kind of, stopping the juggernaut of "the roads go wherever they damn well want to put them." [Laughs]

SH: Uh-huh, yes.

BS: So, I can't remember the exact date of that.

SH: But, it felt like a turning point?

BS: It did, it did. And also, you had a government turning point in the sense that the government was becoming more of a steward of the resources, I think.

SH: Taking more responsibility?

BS: Yes, in terms of taking responsibility for doing things in the least damaging way; so, in that way, consistent with the policy of mitigation and avoidance of harm where you can. So, the Bryson case, in my mind, stands for the proposition that the government is actually held to a higher standard than the private sector, because it's a government. I think Justice Yetka says that in the opinion.

0:15:30.1

SH: Yes. I think–

BS: So, in that sense, and that's often used, you know, by attorneys, I think, at least I've used it, in environmental litigation and cases where the government's an actor. Say,

"Look, you have a higher level of responsibility to find the alternative that's least damaging and to avoid the resource damage." And so, you know, you can use that in a lot of contexts. And the language is there in the case.

SH: So, you've used that?

BS: Yes. Yes.

SH: Do you remember a particular case where you used it?

BS: Um, well, I think it was used in that, in the Walser litigation, which was the creation of a new Best Buy headquarters on the top of, right by 494, Highway 494 and 35W, a very busy intersection. And the site was assembled through condemnation by the city of Richfield under the urban blight statutes. And so that was fairly complex litigation that went on two directions; one, challenging the validity of the condemnation on the grounds that the land wasn't blighted, and the other going to the adequacy of the environmental review, where in the alternative analysis, in the environmental review document. And so, one of the arguments against, one of the arguments made that the alternative analysis wasn't done correctly was, it didn't require the city of Richfield to actually look at options for exercising condemnation other than that particular site. So, what happened was, that's where Best Buy wanted to do it; that's what was condemned for blight; there were a number of other sites in Richfield where the headquarters could have been built theoretically that would have been less damaging to the environment– created less congestion on the freeway, et cetera. And so, you could use that argument that because, unlike a private company that has a limited footprint to do a project, so it's the nature of the alternatives that were required of that private company, might be design related or location on the plot, as opposed to going out and finding another plot. But, when you've got the government which has the power to pick the alternative, it should be held to the higher standard. So, that sort of was–

SH: So, you argued that–

BS: Yes, that's sort of the argument we were, one of the arguments we were pushing.

SH: And how did that go?

BS: Well, the EIS [Environmental Impact Statement] was found adequate, I think, was my memory.

SH: So, the judge kind of rejected your argument?

BS: Yes, the arguments, the alternative analysis argument did not win the day, you

know, in the argument.

SH: And is that the one where the judge basically said, "We need to defer to the agency's decision."

BS: Yes.

SH: Which is a criticism that a lot of environmental activists bring to how this whole thing has been used.

BS: Yes. Well, I think that's, I mean, the theory behind the deference has to do with the technical expertise of the agencies. So, it seems to me it's on a kind of continuum, it's really strong, the deference is, there's a strong reason to defer when it relates to scientific expertise that the court doesn't have. It becomes weaker and weaker as you move away from that and get into process and other issues which are more, more appropriate for the courts to resolve. So, one of the arguments about the deference, you could defer to the agency's decision that a particular level of pollution can be mitigated appropriately. But the adequacy of alternative analysis I don't think deserves the same degree of deference. Particularly where you argue there is no affective alternative analysis. And that's what the purpose of an EIS is.

SH: And isn't, or do you think another problem is that the no-build alternative or the "no action" alternative is really not considered seriously usually, is it?

0:19:57.8

BS: I think it, I think the thing that always go back to is, the purpose of environmental review is to put the information out there so it can be used by opponents or used in permitting or whatever, so that the function of the no-build analysis is to provide kind of a baseline for deciding whether you're going to go forward with the project or not. So, it would be more likely than not, it wouldn't be considered, you know, in terms of the ultimate decision. But, the main thing for environmental review is, did it get considered? I mean, so the theory behind, if you're trying to defend the adequacy of environmental review, what you want, or the adequacy, yes environmental review for any type of project, what you want to avoid is omissions.

SH: Um-hmm.

BS: Because where, if you omit the study of something, than the courts are much more likely to go back and refer it back. Though on the other hand they're not going to get involved in the detail of weighing the adequacy of the consideration. So, they were very unlikely, very hard to get a court to go in and say, "The no-build, the quality of the no-

build analysis was not good." As opposed to, "The fact, the mere fact, that there was a no-build analysis–even though it was poorly done–would be enough to survive the challenge to the adequacy of the environmental review on that basis." So, and that's sort of a form of deference.

SH: But, doesn't that get to the difference between process and substantive–

BS: Yes.

SH: –which you touched on a little bit earlier.

BS: Um-hmm.

SH: The Minnesota law has a substantive requirement that "No action will be taken if there is damage to the environment." Whereas, I think, on the federal level–

BS: Yes.

SH: –simply, you have to show that you went through the study.

BS: Right, yes, that's right. There's a difference, the Minnesota, the MEPA, Minnesota Environmental Policy Act has a substantive standard that includes that if there's reasonable and prudent alternative that's less damaging to the environment, that's what should be favored. And that's different than NEPA [National Environmental Policy Act], the national, the federal one, right.

SH: Okay. Well, this is fascinating stuff. And, for you as a lawyer, you touched on this just now a little bit, the thing to avoid is an omission.

BS: An omission, right, right.

SH: Yes, but as you're preparing to argue a MERA case, what do you think about?

BS: Well, I think a good example would be some of the historic preservation cases that I've worked on. So, if you're trying to protect a resource, you've got the prima facie case which is, "Is this resource protectable? Is it an environmental resource? And is the conduct proposed going to damage it?" Well, usually that's pretty easy, because it's going to tear it down or you know, dig it up or something. So, that, the prima facie case is pretty easy, then the hard part is how do you respond to the, "there is no feasible and prudent alternative, economics alone shall not make an alternative infeasible?" So, often I would try and, in addition to prepare your prima facie case, rather than just rely on where the defendant is going to meet his burden, whether you want to affirmatively

put into your case that there are alternatives and that they are economically feasible, just to make sure it's in there. That's a, and so, I always felt more comfortable doing that. Because then I've shown the court that there's an alternative that works, and so in one of these historic preservation cases that I was involved in in the '70s, we actually proved–it was a demolition of a historic row house in Red Wing–and we actually put on evidence that those row houses could be redeveloped for rental property and that money could be made on them, as a way to, you know–

SH: So, you did some research on that?

BS: Yes, yes. Well, just read the statute and you say, and you're sitting there thinking, well, what's the other side going to do? So, you've got to be ready anyway, so you could just put it on, so you put your whole complete case in.

SH: Um-hmm.

BS: So, that type of thing.

SH: And did that sway the court? Did that show them that alternatives–

BS: I think it did, yes. I think it did.

SH: So, that's something you do in the courtroom and not during the EIS process, because you weren't involved in the EIS process.

BS: Yes, well yes, exactly. I think that one was, that was a straight up MERA claim.

SH: Right.

BS: Yes, that one was just to prevent the demolition. So, it would be a challenge to a demolition permit. And, I don't know if there was, I don't recall that we did an EIS or EAW [Environmental Assessment Worksheet] for that demolition permit, whether one was required.

0:25:14.3

SH: So, that was Powderly?

BS: Powderly, yes.

SH: In Redwing.

BS: In Redwing.

SH: In 1979.

BS: Yes.

SH: And, I have a note here that that case established that historic preservation is a protectable resource. But there was another case two years earlier on Summit Avenue [in St. Paul, Minnesota].

BS: Yes. The Powderly case established that, the question was whether the MERA and MEPA, for that matter, protected only "natural" resources as opposed to "man-made" resources, which had environmental, and aesthetic, and historical purposes. So, one of the things we established in the Powderly case was historically designated buildings were protectable resources under that statute. So, that was the first case to establish that. The Summit Avenue case that preceded it, we never got to that point, what that case was, was a, involved the Summit Hill historic district on Summit Avenue and Ramsey Hill, and the older large, one of those majestic homes had been torn down, there was a vacant lot and a person wanted to develop a multiple, like condos or apartments, multiple unit development there, and the design was kind of, looked like it belonged in California, low and kind of, the windows were more horizontally oriented than vertically, and so it just didn't fit the scale of the surrounding buildings and so, the [Minnesota] Historical Society was interested in protecting that historic district because it was one of the flagship historic districts in the state. And so, we, that was the application, we applied MERA, we used MERA to suit out that case and we argued that that design was incompatible, you know, and there were alternatives to redesign and so we got a temporary, I think we got a, we took discovery and we got a temporary injunction and then we ended up settling the case based upon redesign of the building so that it looked, its mass and orientation were more compatible with the district. So, that was kind of an interesting case. But, that didn't really go, it was settled and resolved, didn't go as far as Powderly, which went to trial, and appeal, and then appeal again. So, that case got appealed twice, Powderly did.

SH: Hmm.

BS: So, and ultimately we won in Powderly in terms of enjoining the demolition but the court was concerned about the impact of the restriction on property rights for privately owned property. This gets back to this point about the government held to a higher standard than a private entity, and so it basically said, "We're going to enjoin it, but not forever. And we [the court] encouraged the parties interested to try and get legislation to condemn it or you know, something to take it over." And that didn't happen, primarily because the owner was adamant that he wanted to tear them down; he was

kind of stubborn. And so, he then came back and moved to have the injunction removed, it was removed, we appealed that to the Supreme Court again, and we lost. So, that, that sort of stands for the proposition that you can prevent historic demolition for a period of time, if it's privately owned, but ultimately, it'll probably be torn down.

SH: Hmm.

BS: And that's sort of the way my general feeling is that historic preservation cases, if you're trying to preserve the resource, if you can't come up with a viable reuse program that is economic, for private property, you can, because there are ways to preserve it by photographs and other things, it ultimately will be demolished.

SH: Hmm.

BS: On the other hand, if it's a government property, I think you can be successful, maybe in permanently enjoining it from demolition.

SH: Hmm. But then the city or whatever would have to maintain it forever?

BS: Then they're stuck with it. Yes, they maintain it, so that was I think, the Armory case, you know, was publicly owned property, so–

SH: Yes, we have an armory in Duluth, too.

BS: Yes, yes.

SH: So, establishing that these man-made structures are subject to MERA and MEPA, did that feel like, could you tell at that time, when it happened, that it was a big step?

BS: Um, I mean, I thought it was an important step, particularly to protect, I mean the whole mission there was to protect historic resources and I hadn't really thought about the ramifications for other types of man-made structures, but, or the reach of the use of historic preservation efforts.

0:30:19.2

SH: But the article in Minnesota History magazine which you sent me a copy of, seemed to imply that the Historical Society was a little bit leery of being involved in this case.

BS: They were, they were. I mean, I think it was a, I mean, Russell Fridley was the executive director–a great guy–and he had hired a young attorney at the time, Charles Skrief, who was a, there's a master's program at the University of Virginia in historic

preservation law and I think he had done that. And so, he was quite interested, and I think Russell was interested in maybe having the Historical Society be a little bit more active in terms of protecting resources and so Charles and I worked up these two cases. But, clearly, up to that point the Society had been pretty reluctant to get out front and to do something independently. But what we did was we worked closely with preservation organizations and supported them as well as took our own position. So, we worked closely with, there was an attorney, Don Heffernan and an organization in Red Wing that was interested in protecting that particular area. It's that beautiful area; it's a boulevarded area that runs down, up the hill from downtown. It's just surrounded, it's got historic buildings all–it's very nice. And this row house was right at the corner, kind of a pivotal corner, and there was a gasoline station with a fast, you know, stop-and-shop type operation that was, in effect, blocked from view from that by the row house. And the owner of the gas station wanted to turn, wanted to tear down and turn it into a parking lot for the gas station, so that's what was going on there.

SH: [Laughs] Could you give me some spellings on these names? Charles–

BS: Yes, Skrief is S-k-r-i-e-f.

SH: And who was the Heffernan?

BS: Don. Donald Heffernan. H-e-f-f-e-r-n-a-n.

SH: Okay.

BS: Yes.

SH: Okay, and I asked you what you think about when you prepare for a case and you mentioned when you're trying to defend an environmental resource.

BS: Right.

SH: What about when you have, are arguing for the other side? Does it change?

BS: Yes, it does. I mean, I think there's, when you're trying to push a project through, or help somebody get a project done, the first question is, "What's your, what do you want to do with respect to environmental review?" And so, environmental review is expensive, and it takes some time. On the other hand, if you make the wrong decision, it can take even more time. And so, one of the classic, I think, decisions is, if you think the project is going to be opposed, and people who have resources are going to oppose it, then you should probably not fight the battle on environmental review. You should do it. And you should probably not fight the battle on whether it's an EAW or an EIS, but

just go right to the EIS and do it.

SH: Wow.

BS: Because then, then you've got more control of the schedule, you know, and the risk of not doing that is that if you lose on whether an EIS should have been done, you have to go back to square one and do it.

SH: Um-hmm.

BS: So, that would be an example, kind of a strategic thinking on the other side. Whereas if you're trying to oppose a project, what you want to do is challenge every, it's sort of like the United States in 1776, you lose every battle, but you win the war. You want to just fight every little detail that you can, because delay can help you. And, you know, circumstances can change that will make the project not economic, or whatever. So, that's, so obviously, if you're trying to prevent something and it's not reviewable as a right, because of its size, it doesn't meet the criteria for mandatory EAW or EIS, then you want to do a petition, you know, to try and get that to happen. So, you go through that process, and then you want to move it from an EAW to an EIS, if you can. And then, when you get to permitting you want to ask for a contested case.

SH: Yes. What's that, "Delay, delay, delay?"

[Both laugh]

BS: Yes, right, right, right. That's sort of, I mean, you have to do it in good faith, but I mean, you can usually do that. So, that's one side, and so the other side where you're trying to make it more efficient, what you want to do is try to expedite the process, rather than trying to fight–

SH: Go through it.

BS: Go through it, but just go through it.

SH: Let it work.

BS: Yes, let it work smoothly as possible and completely. So, that would be the approach that I would take. At least, you always talk about that, whether the client ends up making that decision is another question. You know, whether it's a public client or a private client, you know.

0:35:23.9

SH: Um-hmm. Well, it sounds a little contradictory, so that probably means I don't understand it. And that brings me to your mineral leases case from 2013-

BS: Um-hmm.

SH: -where the DNR [Department of Natural Resources] said that an EAW was not required in conjunction with some sale of mineral leases, and you represented the client who agreed with that.

BS: Right, yes. We represented two of the parties that were rewarded leases, so yes.

SH: But, you just told me that normally you would advise a client to go ahead and do an EAW.

BS: Yes, but that's, that's different, I think in a lease context I would not because the whole, you can't really invest in a project until you have the right to the property. And so, the real estate, having to spend several hundred thousand dollars in order to do an EIS to get the lease, would in effect, mean you wouldn't do the lease. And so, I think the issue on that case was whether the decision to give them the lease caused environmental, led to environmental damage. And the point that was made was that the granting of the lease doesn't give you a permit to do anything. In fact, the only thing you can do is sort of a superficial level of exploration, that's permitted; that, which itself is permitted, so, that there is a chance for environmental review when you do the actual action, like drill a well.

SH: You have to apply for a permit?

BS: You have to apply for a permit–that gets reviewed. And then the other factor was that of the leases that are granted, only a small percentage ever get even explored you know, to any kind of invasive–usually the first level of exploration is pretty non-invasive, it's either electromagnetic surveys which are wires, and some hand samples. And it can be done by airplane or it can be done on ground, there'll be some trees that'll be taken down, so you can lay the grids out. But, pretty minimal impact and so, I would say the difference was it wasn't a project, the obtaining the lease is not a project. That's sort of the argument that you'd make on that. And so, in that sense, and I think the public policy argument behind it is that the state leases are in effect, a trust resource for schools or perhaps county governments, that's tax exempt, so the state doesn't have the money to go and determine whether the leases contain anything of value that royalties could be paid upon. And so, the state policy would be to let exploration to take place in order to get the information as to what's there. And hopefully it will lead to royalty payments, or not, but sometimes that information gets used decades later, to

find the valuable resource. So, it has some public benefit from the point of view of the public's interest as kind of a fiduciary in developing the economic side of those land holdings, be it a school district, trust funds, or, you know, the mineral interests that are owned as a result of tax forfeiture.

SH: And that these mineral leases have been very controversial in recent years, and I'm sure you know this, maybe this was one of the cases, and I read a little bit about that and this attorney Paula Maccabee, whom you probably know.

BS: Yes, she's a great attorney.

SH: She pushed to, her argument was, "Well, how will anyone ever know about the permit application for the actual drilling?" Because nobody knows about that kind of thing.

BS: Right. Um-hmm.

SH: It's not public information, generally. So now, apparently [Governor Mark] Dayton has set up a system where people are notified if they want to be.

0:39:47.7

BS: Right, right. And so, the way it worked prior to that, I mean, so she accomplished something important there. The way it worked before then was that the notices, the companies were required to negotiate with landowners within the lease area, upon which they wanted to conduct some type of investigation and pay, whatever they could negotiate, to do that. And there wasn't a requirement to do broad-based public notice and so, essentially this sort of created a system now, where there's a broader-based notice. So, one of the arguments in that appeal was that I think most of the parties, well one, there wasn't any decision about what was going to be done with the lease property at the time. And two, I think the practice was that there was notice going to anyone whose property was going to be used for investigation within the lease area. But, what resulted from that case, and the executive council's consideration of the objections that Paula Maccabee and her clients brought was to make the notice broader.

SH: So, that seemed like a good outcome to you?

BS: Yes. I think that's fine, yes. I mean, theoretically someone could, if you were energetic you could keep up with that, you would know about, you just get on the notice list from [the] DNR and go over and either do data practices or you know, tell them you want to be notified of any applications to drill a hole anywhere on that lease property. You could probably have done that, but his makes it more user friendly.

SH: How do you decide what side of a case you're going to take?

BS: It's whatever client comes in the door. I mean, we have a professional obligation to make ourselves available, you know, for clients that need us. So, as long as we don't have a conflict, I mean, we have to keep information confidential, you know, from one client to the other, so there's no reason we couldn't represent, be on both sides of an issue. So I've, in my career, I've represented, you know, environmental enforcement for the government, I've represented citizens groups challenging activities, and I've defended, I've represented businesses challenging activities under environmental grounds, and I've represented industry trying to accomplish something, like get a lease without environmental review, or get a permit. So, I've done all of that.

SH: Yes.

BS: I think, to me that's how I thought lawyers were going to operate. I remember when I was coming out of law school, I was quite interested in, I worked in a firm in Chicago that did a lot of labor law at the time. That was before the environmental statutes, I mean, I'm sorry, the employment law statutes were adopted. So, I wanted to be a litigator, and there really wasn't much litigation, because labor law was primarily regulated and negotiated and arbitrated, it wasn't tried in court, because there weren't all these rights, these statutory rights to fairness in the workplace and stuff. And so, so that kind of, but the other thing I didn't like was that you either was on the management side or the labor side, and I thought, well, that's kind of, that seems inconsistent, because in essence, if you've worked on one side, you are probably a more thoughtful advocate for the other one and vise versa. Because you're trained, as a lawyer to kind of understand both sides of the case, so I understand it from the client's perspective–is there some concern that you're heart isn't in it or you're kind of disloyal or something because you represented the other side? So, I think, I've never understood that.

SH: So, you like–

BS: I liked, yes, I liked that, yes, because it's really trying to assist a client in achieving their objectives and I think that's what the adversary system is all about. And that leads to better decisions. The better informed and better qualified the advocates are on both sides, the better decisions that come out of it. So, that's, I mean, so it's great to have smart, aggressive, active attorneys like Paula Maccabee in the environmental community, and before her, Chuck, and me to some extent, and others in there, that's a good thing, you know, so I don't mind that at all. And, I mean, I think you have to put your personal views aside and only if they can't, if you can't properly represent someone do you kind of get out of the ball game.

SH: Have you ever done that?

BS: Ah, there's some cases that I haven't wanted to do, yes, and I've told people, you know, "You have to hire lawyers that, you know, really believe and want to give their all to what you're doing."

SH: Can you tell me about any?

BS: I can't really, I can't, but I've done that, yes.

SH: Oh.

BS: But, it doesn't come up that much, because usually, I mean one of the things you find out is these cases, once you dig into them, there's often, digging down and getting to the facts and applying laws, it's not as clear as you might think at first blush.

0:45:17.3

SH: You can see, you can see a benefit where you hadn't seen one at the beginning, once you dig in.

BS: Yes, yes. Once you dig in you can find stuff that can improve stuff.

SH: Hmm. Well, let's talk just a little about, earlier you mentioned some early environmental laws that weren't MEPA or MERA.

BS: Yes.

SH: Water Pollution Act or some other ones like that.

BS: Yes.

SH: And then you mentioned that this was an extremely, the '70s, the early '70s, extremely busy time for enacting environmental laws.

BS: Yes.

SH: And hasn't been so much since then, why do you think that is? Have we got all the laws we need now?

BS: Ah, I think there's been a sea change in people's attitude toward government. I

mean, that's been a change. But, I do think we put a lot of laws in place, it took a while to get them implemented and to get them sort of into the regulatory context and I think the scope of what people were interested in doing in the '70s was pretty broad. So, I think it did cover a lot of the waterfront. But, I think it wasn't as popular a thing to do after, since the '70s.

SH: Um-hmm.

BS: I don't really have a theory about why.

SH: To me it seems part of the shift of politics to the right, generally.

BS: Probably right.

SH: You know, in the last twenty years, I'd say, say Reagan, since Reagan, maybe?

BS: Well, people are not, people have lost a lot of confidence in government or trust in it. I mean, I always, I think I always felt honored to have an opportunity to work in government. I mean, and the people I worked with were highly motivated, worked hard, and all that and I really didn't like it when people started denigrating people who work in government. And I think [Governor Rudolf "Rudy"] Perpich did it first, because he, and he actually went after state employees as a scapegoat, I think, for political reasons. So, you see that happening and then [Governor James "Jesse"] Ventura, and I think, and Reagan, I mean, there's a tendency to kind of demonize the government employees, which I think is really, and that lowers people's lack of confidence in them. And it's troubling. You know, people in government deserve respect for what they're sacrificing and what they're doing and I think ninety-nine out of a hundred times, their motivations are pure; they're trying to do the right thing. It doesn't mean they don't get kind of locked in on some things that you have to try and turn them around on, but I don't doubt that they're trying to do the right thing. So, I find it, I think part of the issue is that people in the public sector need to show that they respect themselves. It's sort of like, if you don't respect yourself, no one else will respect you. So, when you're in a public position, whether it's a judge, or the president, or the governor, or whatever, and you start running down your office, or people, then people lose confidence in the office. And so everything gets, and it's really hard to it build back up. And I think that was one of the things that [Governor] Arne Carlson was criticizing Ventura on, was he was refereeing professional wrestling matches and kind of, in effect blowing off some of the ceremonial stuff and the symbolic stuff that the governor does, and that diminishes, sort of, the respect that the public has for the office. And I think that's caused, that sort of is a trend line of things that lead people to sort of think they could do better without government. And I think government is needed, you know, to help people and to help with difficult situations, like environmental problems, and move us. So, I think if you look at how far

we've come, whether it's race or environment, it's really been an amazing progress since the '60s. And it's sounds like, maybe Pollyanna, but I think I'm sort of like [President Barack] Obama; I'm very optimistic. We've done a lot and we've come a long way. We've got a ways to go, but it's not like everything's a disaster or carnage or whatever, that's just baloney. So, I think that would be maybe one reason why regulation, I think regulation got, people's perception of regulation was, it was ever-increasing, because a lot of these laws got implemented, you know, through a lot of detailed regulation over a long period of time. And then it got harder to get things done, and so, perhaps the fault lies in not making the regulation more responsive, more flexible in terms of time lines and so forth, and less malleable for people like me that want to try to use the process to stop something. [Laughs] You know, as, and so, like these requirements to get a permit issued in 120 days are really honored in the breach. It's great to say that, but it'll never happen because the agencies don't have the resources to process them in that period of time and the permit, the permit requesting entity is not going to insist on it. You know, because they need the agency to kind of give them the permit. So, I think that's part of it.

0:51:10.3

SH: Yes. And I'm following you, but is there something then, that should be changed, is one of my questions, about MERA or MEPA to address that, or is it more a matter of resources that aren't there?

BS: Well, I think it's, I mean, I would agree with my friends Chuck and John, Chuck Dayton and John Herman, that the alternative analysis part of MEPA never really has gotten off the ground, the way it should be. Because, and that's really the most fundamental thing that should be accomplished by that review is, is there another way to do this that is less damaging? That's really, and so in effect, by putting it into the EIS part as opposed to the EAW part, you're subordinating it. And yet, from a policy point of view, it should be prioritized. So, it ought to be the other way around, the alternative analysis ought to be at the initial cut. You know, and it's not necessarily saying you got to put it there; it's just, what are the alternatives to this? And it may well be that there aren't any, you know. But, it needs to be thought, it needs to be at least identified as something that's important.

SH: So, you're saying that they could require an alternative analysis in the EAW?

BS: Yes, of some kind, at some level.

SH: And especially since, it seems to be that the EAW–[clears throat] excuse me–has sort of replaced the EIS.

BS: Yes, it's the final word. Yes, for most projects, yes.

SH: Yes, it's final word for most projects, because very few EISs are conducted.

BS: Yes, right, and the other problem is, they're so expensive. I mean, if you look at, some of these EISs have taken a decade and, you know, cost millions, millions. The regional copper-nickel study was done in the '70s, you know, it was from, I think '76 to '79, maybe three or four years, and I think it was five or six million bucks, which was a lot of money to do it. And it was a very thorough study, and if you compare that to some of the more recent environmental reviews, you know, there's some inefficiency there of some, I mean, even with considering inflation. And the other thing I would say for environmental review is, we need to pay more attention to history and not repeat. So, for example, a lot of work has been done on environmental impacts of mining, and so all that information is there and some of it needs to be updated, but probably a lot of it, some of the basic science is probably pretty solid. So, the problem is, the people, we tend to repeat history every thirty years, because that's sort of our working life, and so essentially, the people that are doing environmental review today, don't know what happened in 1970 and can't find it, because it's probably in hard copy, and don't think it's worth while. So, I mean, there's an efficiency issue. It's sort of this concept of tiering in environmental review, which is if you're able to use relevant environmental review that's done in one context, as you do a current environmental review project. So, tiering needs to be, that concept is an efficiency concept and I think that could be utilized perhaps, particularly in the NEPA, the federal context. I think the federal environmental review context is more cumbersome, you know, and probably frustrating for people who have to go through it, than the state process.

SH: Hmm.

BS: Ours is much faster.

0:55:01.9

SH: Well, I don't know much about tiering, but there's the scoping process that's supposed to kind of limit how deep or how wide the study has to go.

BS: Yes, right, right. That's good for efficiency, but I think there's a lot of repetition, a lot of repeating history that goes on.

SH: Yes.

BS: So, people could think about looking for–

SH: Okay. Tell me a little more about what you've said about alternative study, you said, I think you said, "You don't even have to analyze alternatives in detail, you just have to show that there are some alternatives."

BS: I think, yes, I think you should, you mean in an EIS? You mean to satisfy, in what context do you mean?

SH: Yes, I think to satisfy an EIS.

BS: Oh, well I think there has to be an alternative analysis and I think it should, it should have some level of detail, but I don't know that it has to, you know, be as complete level of review as what the proposal is.

SH: Hmm.

BS: So, but I think that what's missing in the EAW is you don't have to do any alternative analysis at all.

SH: Um-hmm.

BS: Ah, and so, I think every project could be sort of run through a, "Is there an alternative?" And many of them, there wouldn't be, you know, I think, other than to downsize it or to not do it at all.

SH: Yes, that's what I was just going to bring up, that for instance, I'm not very familiar with the PolyMet EIS, but what alternative could there be, other than not doing a mine?

BS: Yes. That's right, that's right. So, usually in the context of a project, it's, the alternatives relate to mitigation, primarily, I think. And, as I say, there's some situations, the other problem is that some projects, the site is unique, it has to be on that site if it's going to be at all. So, a mine is a good example. The resource is wherever it is, and so that, you can't really say, "Go mine it somewhere else." Because that's the only deposit.

SH: Yes.

BS: And so, my Walser analogy was a situation where because of the way the site is assembled, it was kind of, it was a public assembly, plus the public power to condemn would give you the ability to move to different footprints. You know, different sites, as opposed to changing the footprint within a site.

SH: Um-hmm.

BS: Whereas a typical, you know, industrial project, there's a site and so then the alternative analysis relates to changes the footprint, or process, or whatever.

SH: Right, or it could address mitigation, then I suppose.

BS: Mitigation primarily, and you look at no-build, but usually that's sort of, well, if you don't build it then you don't produce whatever it is or you don't employ the people or whatever, you know. I mean, I think where we really fell down on, another place [we] really fell down on environmental alternative analysis is the Superfund law, which really, in effect, took out of the equation the alternative of reusing industrial property. And so, as a result, when you're going to build, it really forced, it gave companies an incentive to do greenfield development for new facilities as opposed to look at older industrial facilities.

SH: The Superfund law did that?

BS: The Superfund law did that, yes.

SH: How did it do that?

BS: It did that because the way it assigned liability. So, essentially, it basically assigned liability based upon any kind of ownership interests and so–

SH: So, nobody wants to own this place.

BS: Nobody want to own it because once you're a current owner you potentially are liable for all the sins of the past, and then if you'd ever touched it, you know, then you were liable for the whole thing even if you didn't really, your ownership is only a small part. So, what that did was basically make those kind of poison, those sites poison, and they were tied to infrastructure, you know, which, and so, you end up with the, my interpretation of Superfund is, contrary to basic principles of environmental law, which have to do with avoiding proliferation, because if you have it, because usually you're talking about an industrial use which per se, is going to have an adverse impact. Either it's using up greenfield land or just the mere operation of the facility will create environmental problems. So, the idea that the law is going to force companies to do the alternative that opens up a new site to that, is wrong-headed, and so they didn't think through that, and that impact, I think, has affected our central cities, because it's turned around because of, I think, good work like what John Herman did, which created the, um, the voluntary cleanup law in some of these hold harmless letters, which were needed in order to make it possible, economically possible, and from a liability point of view, possible, for a company to consider redeveloping a contaminated site as opposed to going to Tennessee in the middle of a cotton field and building something, you know.

So, I think that's been a failure, I think. And it's basically also driven, because it's so liability-based, and it was underfunded, so they never really funded the public Superfund you end up with all the effort gets spent in trying to avoid liability and avoid cleanup, and delay cleanup. And, once you get into the process, the cleanup is really dictated not by market and innovation, but by regulatory decisions, which tend to be conservative and go with the old, so essentially you get a lot of dig-and-haul stuff as opposed to in-situ remediation.

1:01:09.8

SH: You get a lot of what stuff?

BS: Dig-and-haul. So, essentially if you get a contaminated industrial site, the easiest thing to get approval for is to dig it up and put it in a landfill and then to fill it back in with clean dirt, as opposed to taking that dirt and processing it on site, to in effect, distill out the bad stuff and put it back in.

SH: Hmm.

BS: And so, that's an overly simplified explanation. So, I think that that I say is a difference between doing a Superfund cleanup and doing a voluntary cleanup. You get a better shot if you're doing a voluntary cleanup to negotiate with the state agency about some creative way to solve the problem than you do under the formal Superfund, which puts all kinds of layers of requirements and oversight which tend to drive you to the least innovative, the most conservative, and often more likely than not, the most expensive remedy.

SH: Hmm.

BS: So, that hasn't worked, in my mind, very well.

SH: Interesting.

BS: I mean, we got some clean sites to show for it, but we also have some sites that will never be developed, because once you have the liability, and you have the ability to control the site, why would you ever redevelop it?

SH: Just cheaper to let it sit there.

BS: Yes, the insurance policy to avoid a future problem is probably more expensive than holding costs, depending on the site.

SH: Yes.

BS: So, that's, that hurts communities, because that, usually those sites, those legacy sites are in pretty prime locations within communities. Maybe not the best location for industrial activity, but nonetheless, prime locations.

SH: Like along rivers?

BS: Yes, along rivers or in central cities and so, the emphasis, the policy emphasis should have been what, you know, John worked on, which is trying to proactively trying to get those things recycled.

SH: And–

BS: And that's how you fund the cleanup.

SH: Yes, and I think he told me about that. I'm not familiar with it, but I think he said that Minnesota is the only state that has that.

BS: Well, I think other states have followed Minnesota's example.

SH: So, it was the first, then?

BS: Yes, I think it was the first and I'm not sure every state has it, but I am working on some cases in Oklahoma and they have a voluntary program down there, so–

SH: I see.

BS: And brownfields redevelopment program down there.

SH: Hmm, I see.

BS: But, I think, and brownfields redevelopment, most of the states now have something going, but that's sort of the, what the popular name for what's going on, but they call it the "voluntary cleanup program" or whatever. And so that's, what you do is you avoid about three duplicate levels of engineering and design oversight, [laughs] which saves you a lot of money and you know, and you can get the schedule more finite. And you can kind of get the work done.

SH: Hmm.

BS: And then you, if you can get a hold-harmless letter for the new owner, then you're

more likely to attract that new activity, I think, to the site.

SH: Hmm. Well, I would like to shift conversation just a little bit to ask you about a couple laws that, as far as I can tell, don't have anything to do with, I mean a couple of cases that don't have to do with MERA or MEPA.

BS: Okay.

SH: But, they're important cases and you were involved with them and I wonder if you could describe them in terms of how they might be different from a MERA or MEPA case, if that makes sense?

BS: Sure, I'll try and do that.

SH: And that is the Reserve Mining case.

BS: Okay.

SH: Which was terribly important.

BS: Yes.

SH: And then the Clover Leaf Creamery case–

1:05:02.3

BS: Okay. So, the Reserve Mining case was a classic environmental enforcement case, so you had this sort of, it was filed by the Justice Department–we had a state action prior to it, but the case was filed by the Justice Department–along with several other cases on, really kind of talismanic kind of discharges that looked really bad. And so, essentially you had the Houston Ship Channel was one where it was just all messed up, and so that was one of them. And they sued the chemical companies for all the pollution that was going into the ship channel. And then you had Reserve Mining which was this discharge of waste, sixty-seven thousand tons a day, this grey, ugly looking waste going into this pristine lake [Lake Superior]. And so that was, it was part of the response to, you know, the burning of the Cuyahoga River [1969, Northeast Ohio], and you know, [Carl] Stokes, the mayor [who] became a congressman, sort of rode that pony politically and made it a high profile thing. And then that led to creation by [President Richard] Nixon of the EPA [Environmental Protection Agency], you know, and then the hit list of cases that the Nixon administration with the Justice Department pushed through. And one of them was Reserve.

SH: And not long after that the passage of the Clean Water Act.

BS: The Clean Water Act.

SH: But this Reserve case was before the Clean Water Act?

BS: Yes, it started under the old multi-state enforcement process, which was kind of an administrative process involving the governors and conferences and so forth, to get to an enforcement stage. And so, that happened and so the litigation was filed, and after it was filed, or shortly after, or shortly before, they passed the Water Pollution Control Act of ’72.

SH: Hmm.

BS: But, the case really went on the old law, which was public nuisance, and the Refuse Act, which was from the 1800s, which was basically a law designed for navigability purposes, to keep waterways open for navigation. So, you couldn’t throw garbage in there and stuff that would impair navigation, but it was broad enough to apply to pollution, and so that was used.

SH: And the act that they passed in ’72, you said, Water Pollution Control Act?

BS: Federal Water Pollution Control Act, yes.

SH: And that predated the Clean Water Act? Or was that essentially the Clean Water Act?

BS: That’s the Clean Water Act, yes.

SH: Okay, okay.

BS: And so, I’m trying to remember if the complaint was amended to add the ’72 act or not; I can’t remember without looking it up. But, the Reserve case really went off on stopping this sort of ugly looking discharge into the lake. And it was originally started as a water quality, or aesthetic kind of case, because this, the fishing went down; the lake was looking green in large areas for quite a distance.

SH: For quite a distance.

BS: The green area was moving south towards Duluth and other cities and their water intakes. And so, a lot of effort, the EPA spent a lot of money doing basic research, scientific research about the lake and what was happening there. And so it was all set to

go as this classic pollution case, sort of akin to the one Minnesota had brought earlier, which was that the quid pro quo for allowing Reserve to use the lake was that the tailings would sink to the bottom of the lake and stay confined within, I think, a four or three square mile area, called the tailings discharge zone. And so, the state, in '69 instituted an enforcement thing because of the visual evidence that stuff was leaving that zone, and so they, that was the premise there. And so the government case was sort of moving along that line, and of course that kind of last minute change just before the thing was scheduled for trial was that people realized that the geology of the tailings waste was similar to asbestos waste, and so, it morphed into a public health case. And so, that really gave it a lot more momentum and notoriety. And so, that's how it developed. What it established, I think it's significant–it's an often-sited case–and I think what it established is what's called the precautionary, sort of the basis for the precautionary principle of environmental regulation and enforcement. And that is that you don't have to prove causation, direct causation, you have to, if something is, if there is a real risk of a significant public health or environmental harm, and there's a reasonable to tie that to that harm, then it's reasonable to regulate it. So, it's a kind of a different than a kind of a tort liability concept. It's more of a, what's the point at which the government can step in and force conduct that a wise person would engage in to, as a precaution to avoid a really bad outcome? And so, in a way that sort of supports what people want to do with climate change. You know, you have the climate change deniers, but there's enough there to think there is a contribution. We can't really say exactly what it is, but the outcome is so, the risk of harm is so great that it supports doing something from a regulatory point of view. So, we did that with ozone, and that proved to be a good decision. You know, the ozone in propellants, we scientifically thought it was damaging the ozone holes, and so, as a precaution, banned that propellant, and now thirty years later, the ozone layer is better.

1:11:04.9

SH: So, do you think in the Reserve case it would have gone more slowly or maybe not succeeded if it hadn't been for that human health issue?

BS: Yes. I think it would have been a different case without that. For one, I think it created a sense of urgency and it also, it would have, you know, human health trumps animals, plants, [laughs] and so, I think that's why it was, it helped. But, you know, I mean, the other interesting thing about Reserve to me was always that the state of Minnesota had this figured out in 1947 when it did the original permitting. It, the original permit there was a contested case, testimony by the commissioner, in front of the Commissioner of Conservation, now the Department of Natural Resources, and people were testifying in that hearing that they had heard that silica caused lung damage and silica caused health problems in miners and they were concerned that the waste product going into the lake would cause problems like that. And so, they were

concerned about it getting into the water supply in Duluth. It was very prescient testimony and so that was all in the record in 1947 and that then led to the company representing that the stuff was not, was going to sink to the bottom and was, you know, not going to get into the water supply and that it wasn't the same thing. And I'm sure they believed that at the time. And that also led to the zone of discharge thing, and so, consistent with that representation, it had to stay put. And so, they thought what they were doing was, the lake was nine hundred feet deep and they thought this stuff would sink and so it would be down there and sort of not going to disturb anybody and it would sink so it wouldn't get into the water supply, it wouldn't be floating around. And they thought that was probably safer from an environmental point of view than pouring it out on the landscape into a tailings basin somewhere. And they also were concerned about whether they had enough water, because it was the very first taconite plant, the whole process was developed at the U of M [University of Minnesota] by Dr. [Edward W.] Davis, so the plant [was] the E.W. Davis works. And so, I think, one reason they wanted to located it on the lake was they thought they'd have enough water and that would overcome the inefficiency of having the mine, you know, forty-seven miles away and hauling everything down without taking the waste product out and doing it all at the lake; they thought that would work. I think, history proved they were wrong, because all the other companies did it up on the Range [Iron Range of Minnesota] and had enough water. But, so I think that was part of it. But in any event, they had, to get back to my original point, the concern was expressed in '47 in the hearings and representations were made and the permit conditions were made, to try and address that problem and sort of the interesting things was it turned out to be very close to what happened. You know, which is really, really interesting.

BS: So, a funny story, I'm sitting at my desk after the case was over, over in the state capitol, the trial was over; we were in appeals and stuff like that. And I got a phone call, I got a phone call at my desk, and I said, "Hello." And identified myself and I said, "Who's this?" And he said, "Well, I can't tell you." He said, "I can't tell you my name," And I said, "Well, what's up?" [Laughs] And he said, "Well, I'm dying of cancer." And he said, "I've been a projectionist, a projectionist here in a theater here in the Twin Cities." And he said, "In 1947 I worked for the company that did the video of the tailings. They did a little mock thing that showed the tailings go down and sink to the bottom of a tank." He said, "I did the video for that." And he said, "It's bothered me ever since, because they couldn't get the tailings to sink to the bottom. So, they kept heating the water and they were doing all this stuff until they got it right, so that they got the right movie of that stuff going to the bottom." I said, "Well, that's great. What's your name?" "Oh, I don't want to get involved." And so, I'm sitting there, I couldn't do anything with it, but I thought, isn't that wild! Who knows if it's really true, but at least it seemed authentic at the time.

1:15:32.7

SH: Oh! And this video was something that the showed during the permitting phase–

BS: –showed during the permit hearings to show that the tailings would sink. So, I mean, this was, I mean, who knows, if it really happened or not, but it was interesting. And, of course, the problem came out, and I'm not even sure they would have known this in 1947, but the crushing process made those tailings so small–I mean they were micron–I mean, they were so small that they floated, they did not sink, they wouldn't. And that's, so the aesthetic contamination problem was not algae, it was light refraction off those little, tiny particles that were like the same size or smaller as a water molecule, that didn't sink. That's what was going on. So, so it probably, in 1947, they couldn't even see those little particles.

SH: Well, not in a small tank while they were filming something, no.

BS: Not in a small tank, yes, right, right, right. So, anyways, interesting. But, I always thought that was ironic to get that, that phone call.

SH: Wow.

BS: But anyway–

[Both laugh]

BS: But, it's sort of like, the process needs to, you need to do the best you can with the evidence and science, and then you have a permit, and then you have conditions, and then you need to try and enforce them, which is what the state tried to do. And ultimately, was successful. And essentially, the stuff came out of the lake, and went on land, the plant got renovated, it basically stayed in business longer than many of them, before, and then there was a downturn, and it's still operating today.

SH: Hmm.

BS: So, I think if you had to do it over again, to the point of view of the importance of MEPA, environmental review, is you would never locate an industrial facility on Lake Superior today. Sort of like, and I think the reason is, is that, the reason that we would make those kind of mistakes in the past and continue to make them, is our human life span is too short. So, essentially, we're not thinking about three hundred or a hundred years, we're thinking about twenty, or thirty, or one generation. And so, if you, the benefit of an environmental review and good alternative analysis is to make the longer term perspective come to play on a decision, including land use, because, I mean essentially, the environmental premise is all based upon land ethic or land use kind of

concepts, which is that you want to not proliferate stuff that does damage to the land, and you want to put stuff in the best location. And so, one of the things Reserve ended up establishing in addition to the precautionary principle, was the non-proliferation doctrine. Because that is what they used to, the Supreme Court of Minnesota used to reject the DNR's preferred tailings basin location, because Reserve really wanted it to be close to the plant, which I understand from an operational point of view. And they had proposed the Palisade Head location, which is where Tettegouche State Park is, and so we opposed that one. And then they, they then proposed one at Milepost Seven, Lax Lake, where it now is. And the DNR permit hearings ended up approving Milepost Thirty, which was half way up the railway in the middle of the Superior National Forest. And the reason that was selected by [the] DNR was concerns about dam safety and you know, the tailings getting out of the basin and getting into the watersheds of some of those rivers and then getting back into the lake; which the whole purpose was to get it out of the lake.

SH: But it ended up at Milepost Seven.

BS: At Milepost Seven, yes. And that's, that was a lot better than Palisades.

SH: Yes.

BS: And it's also a lot better than in the lake directly.

[Both laugh]

SH: Well, what would you say are the implications of that argument about applying it to PolyMet or to–

BS: Well, I'd say, the non-proliferation doctrine would support permitting at PolyMet, because it's essentially a brownfield location.

SH: Okay, but–

BS: It's the old Erie Mining, ah, Erie Mining, you go up there, it's pretty well trashed. I mean, it's old run-down mining facilities. So, I would say, if you're looking at, what Reserve, so, Reserve establishes non-proliferation, then you go to the power line cases that came afterwards? And those cases said, you can build a new power line, but you have to put it in an existing corridor. That's, and so, and you apply it to bridges, I worked on something on the St. Croix River, where they wanted to, like this new bridge they built, should never, you know, I mean, that was defeated primarily on the non-proliferation argument, but it was brought back to life through politics, because [Congresswoman] Michele Bachmann wanted it and [Senator] Amy [Klobuchar] and

[Senator Alan "Al"] Franken were afraid she might run against Amy. So, I don't know if that's true, but–

1:20:39.9

SH: And that's the bridge over the St. Croix River?

BS: Yes, right. The one they're building right now.

SH: Yes.

BS: And so, the argument was, the non-proliferation argument tied to bridges was, if you're going to build another bridge across the St. Croix, put it in an existing corridor. So, put it next to the I-94 bridge or replace the Stillwater lift bridge with a new bridge there. Then you haven't proliferated bridge damage or visual damage to the river. Or run the thing north/south and link up to 94.

SH: But getting back to the mining question, what about Twin Metals, which is not in a brownfield?

BS: Yes, right, right.

SH: So–

BS: Well, I think the issue, the issue with mining wouldn't necessarily relate to whether you have to develop a resource where it is, because that's nothing to do about that. It would have to do with where you locate the facilities. The proliferation argument would probably apply there.

SH: Um-hmm.

BS: So, in other words, can you mine it without, if you mine it where your facility is going to go, and can they be put in a place that would do less damage? That would probably be the theoretical argument to make there.

SH: Okay.

BS: But, I mean, I think, I would say that once, I mean, once you've got something that's caused damage in the area, the courts are tending, not going to basically object to re-using that area. You know, because the alternative is to put it somewhere where there hasn't been that activity that's damaging. So, that's sort of the whole non-proliferation principle. It make sense to me in terms of what the ethic is that's underlying all of this,

which is to minimize the human damage to the resource, to the greatest extent possible. Which is why the alternative analysis is important. So, it's kind of a combination of land use, kind of, decisions. Good, kind of, long-term land use decisions, which have to do with, where's the best place to put stuff, I mean, realizing that civilization is going to require you to do certain stuff that's going to take up land, or, you know, potentially do damage. So, what's the best way to do it? So, that's kind of your initial land use decision. And once you've made those, kind of, good planning decisions [laughs] in theory, then the proliferation occurs, you know, in those locations. Otherwise, you end up with bridges from, you know, Hastings all the way up to Taylor's Falls, you know, so–

SH: About the Reserve Mining case, is there any way to say how that would have been different if it had been under MERA or MEPA? Or, is that just irrelevant?

BS: Well, the enforcement case could have been an alternative ground to enforce it. MERA could have been filed as part of the complaint today.

SH: MERA could have been used to argue that case?

BS: –could have been used to argue as a claim that, and seek injunctive relief, and you could do that under the common law, you could do it under the, you know, the water statutes that were used.

SH: I see, okay.

BS: So, essentially, it would have been supplementary. And so, in essence, MERA is a duplicate of the common law public trust doctrine with more clarity and more, sort of, standing rights are resolved, and intervention rights are resolved. So, you can intervene under MERA in any administrative proceeding, whether you're a party or not, if it's got some impact on the environment.

SH: I see.

BS: So, I could–

SH: So, it's an easier way, it's a way to make it easier for citizens to be involved.

BS: Yes, yes. And yes, absolutely.

SH: Well, tell me about the Clover Leaf Creamery case.

BS: Oh, so the Clover Leaf Creamery was interesting case because that, that was another

example of sort of the legislative activism in the '70s to protect the environment. So, one of the big concerns was packaging waste, and just waste volume in general and we were learning about the adverse effect of land filling, which at the beginning of the time was a savior. Because, essentially, the landfill progression went from open dumps, which were creating air pollution problems, like burning leaves or garbage burning, and rodents and all kinds of vermin, so the theory was let's just put land on top of it, so that, without understanding the underlying geology of the locations. So, the state went on this landfill program and required companies to put hazardous waste in landfills that were not adequately researched for the geology or even designed with impermeable bases. And so, that all happened, but anyways, this is all going on, people are sitting, starting to rethink landfills and there's a capacity problem. And so, one of the strategies was to create a societal change and require companies to reduce the packaging they were offering and hopefully encourage people to use less packaging. So, they passed this special law to ban the sale of milk in plastic, non-returnable containers, so, think, the gallon of milk. And the scientific rational–

1:25:49.7

SH: The way most of us buy it now!

BS: Yes, right! And the rational, the scientific part was that you could crush those plastic bottles, but in the landfill they expand back to their original shape and take up space, plus they were using plastic. So, that was the rationale, that was the rational basis for the statute. So, the milk industry challenged the constitutionality of that statute and, on the grounds of equal protection, that, they said, "If you're going to do that statute, you've got to ban plastic bottles for everything."

SH: Or also ban cardboard cartons for milk?

BS: Maybe, yes, or cardboard cartons for milk. You're picking one type of container and you can't do that, and you also can't pick one product; you have to do it for anything in plastic–so, that was the argument. So, our argument was, "That's not the right standard." Equal, you could start down the road to regulation if there is a rational basis for it, so, it makes, there's rational basis to pick milk cartons because they are high volume, they're particularly damaging because they take up a lot of space, so that's a legitimate first step. We lost in the trial court, and there was no court of appeals, we lost in the Minnesota Supreme Court, but we got Judge Rosalie Wahl's vote. So then, and we thought it was an incorrect application of the equal protection standard, which is a rational basis, and so, we petitioned cert to the US Supreme Court and–real long shot, we thought–and it turned out it was the [President James "Jimmy"] Carter administration, and they had people in the Justice Department that were kind of out looking for cases to support appeals to the Supreme Court on issues that they thought

were important. So we somehow got it to their attention, or maybe they found it, but anyway, they joined, they supported our petition for certiorari and so it was granted and it went to the Supreme Court and the Supreme Court reversed eight-zip, so basically, completely, you know, overruled the Minnesota courts on it; felt it was constitutional on the theory that we had argued, which is that there was a rational basis for it, you don't have to, in effect, right all wrongs; you could do it in steps. And so we won that and then the next session, the law was repealed. [Laughs] So, it was a great exercise, but it didn't last long. But, anyway, I think that's just an example of how active the state was in passing legislation trying to deal with environmental problems and be an activist state, maybe get out ahead of the federal government, and so we did that in a couple of areas, you know, we did it on plastic milk bottles, we did it on propellants in consumer products, the fluorocarbon stuff, as well.

SH: And when you mentioned landfills and that whole sequence of events, it makes me think, well, we really have come quite a long ways since the '70s.

BS: Um-hmm.

SH: And so, I've got two last questions, and one is, is there anything that I haven't asked you about that you want to be sure to talk about?

BS: The only think I'd say about landfills, raises a topic, and that is, I think there's a tendency, just like I say, you know, one of the problems with environmental regulation is, we don't live to be three hundred years old, so we tend to be too short term, we repeat stuff, we forget stuff. So, I think that landfills are a good example of how we're always looking for the silver bullet before we understand the effects of the silver bullet. And so, my interpretation of what happened in Minnesota with landfills is that, for all the right reasons, we started out with covering it up as opposed to open burning. Then we figured out there are these problems. So, once we figured out there were these geological problems, we passed a bonding bill and funded, funded counties to actually go out and investigate the best location in the county for a landfill using geological information, and to acquire the property and create a large buffer around it, so that it didn't create any inconsistencies with other land uses. Got down the road on that and all of a sudden people got enamored with incineration of garbage. So, they just abandoned that effort, and of course, there're still landfills, there always will be, but I would say at a time when we were beginning to really understand how to engineer landfills and monitor them to make sure they were not causing a problem, so we kind of, in a way, diminished or threw away that technology, adopted incineration and now we found that's got problems, too, because there's a lot of air pollution issues. So, in a way, it's kind of going back–the original start of the landfills was to get rid of open burning [laughs] and then we get back to–

1:30:43.2

SH: Back to where we came from.

BS: –we're back here. And so my theory is, what you need is diversification, just like your stock portfolio. So, you need to have a series of technologies that are being applied, some of which are fully understood, you know, and you have the maximum degree of controls on them; some are halfway there and some are very innovative–and so that you don't have all your eggs in one basket. And so, I think that's important. So, maybe in energy we're kind of getting there because we're really downgrading coal as a percentage, we're really looking, natural gas we're using because the price is right–and that could change if the price goes up–solar and wind, you know, have been given the time to get over the hump, you know, there's a curve, they call it, some curve, you know, a cost curve, anything innovative is going to be more expensive for a while until it gets, and then it's going to start dropping and be competitive with the traditional process. So, I think the energy market is a better example of what we ought to be doing, which is really stimulating innovation and, but not throwing anything away that we understand and can manage well. And then, [at the] same time, making really good decisions about where things go, which is hard.

SH: Yes.

BS: But, that's sort of the importance of, say, regional environmental review, or alternative analysis in a more defined context. So, I mean, we're going to need bridges across the St. Croix–where should they go? And, they're going to go, and at some point we're going to need something to replace ground water, I mean, I'm working on the White Bear Lake case; we're going to need something to replace groundwater. So, what ought to happen is we need to figure out a way to move public policy towards planning for what's needed in the future and allowing for innovation. So, in the groundwater use area, we need to, there's a systematic problem because we don't have regional management of groundwater appropriation. We have regional management of sewers, but we don't have, the water that goes into the sewers, there's no management of that–where it comes from. So, as a result we got it out of balance. We're basically pulling sixty percent of our water is coming out of the groundwater, which is being mined, it doesn't replenish itself as fast, and we've downgraded the use of the Mississippi River. So what the communities that are now groundwater are to be doing, is planning together for moving to a surface water, renewable water supply system, just like Minneapolis and St. Paul have always had. Because it's not sustainable to keep taking it out of the ground, out of the aquifer.

SH: Well, the Met Council is supposed to do that, aren't they?

BS: They don't have control. It's, that's why I say it's a systemic problem, they only have half the loop, so they don't have–

SH: Oh, they deal with wastewater but not intake water?

BS: Yes, the actual appropriation process is municipal wells that are approved by the DNR. That's what the White Bear Lake place is all about.

SH: Yes.

BS: And so, and the Met Council understands the problem, but there's so much political opposition in Met Council that getting them authority to do anything is pretty unlikely.

SH: Yes, yes.

BS: But, essentially, so you've got the situation where we're taking groundwater out at a rate that's leading, making the aquifers go down, and instead of making sure it gets back and to recharge the aquifer, we're putting it in the river and it's going to New Orleans. So, we're mining our groundwater at a rate that's not sustainable and then when that runs out, we need to use surface water. So, we also ought to be protecting the upper Mississippi, because that's our resource long-term if this theory is right, for drinking water in the Twin Cities. So, Minneapolis and St. Paul and all these urban communities ought to be fighting that fight up north, about agricultural development and buffer zones for the Mississippi River watershed. Because you want that to be as clean as possible.

SH: Or keeping land in wilderness.

BS: Yes, well you know, the other thing municipalities could do is they can condemn outside their boundaries for public purpose, so you could basically, if you had a real–this is Walter Mitty dream–but if you had a real aggressive, you know, city government that was interested in preserving long-term, its water supply, I think it could go try and condemn buffer zones along the Mississippi River to protect its quality in order to ensure that its long term water supply was clean.

1:35:22.3

SH: Huh. Well, I think they have something like that in New York State.

BS: Yes.

SH: They've got a huge reserve, preserve, reserve to protect the water for cities.

BS: Yes, yes, right. And they do in California–they do it. There's areas like near San Francisco, south of San Francisco there're reservoirs that are preserved areas that no development and no activities that would contaminate the resource. But, I think water is the next big, big, big issue. That's pretty obvious, but I mean, and I think it calls for people thinking systematically and really working together as opposed to alone, rather than being Balkanized, and to, "This is my turf. I'm running my water department, I'm making money, you know, I'm going to keep doing it."

SH: Yes.

BS: So, that's one of the thing that hopefully comes out of this White Bear Lake case is some movement, you know, in that area.

SH: Hmm.

BS: So, it'll be interesting to see how that goes.

SH: Well, you are obviously still up on many of the current issues and you've seen a lot of issues come and go over the years, and I wonder if you could just end by telling me how you *feel* about the work that you've done over the years?

BS: Um, I feel really good about it. I mean, the Reserve Mining case was the opportunity of a lifetime, it was really just serendipitous and I was so lucky to be a part of that and be able to stay with it. And I got in it at such a young age that I basically was sort of the last man standing on the thing, which is unusual and very–

SH: What do you mean by that, "last man standing"?

BS: Well, I mean, essentially the people that were in the trial, none of, very few of them, none of them were in the appeal. And, you know, now many of them are gone. You know, so it's interesting.

SH: I see.

BS: That's the point. But, that was an incredible opportunity because that was kind of the beginning of the movement. And then to work with people like Chuck [Dayton] and John [Herman], you know, just incredible. And to see, you know, work in the areas as they developed in the law, in the environmental law has been priceless opportunity; so my timing was good. It's sort of like that book by, I can't remember, the guy who writes about the ten thousand hours to become a golf pro, you have to play golf for ten thousand hours, he's a popular writer, I can't remember his name [Outliers by Malcolm

Gladwell]. Anyway, he's done a book, it's when you're born, or what your birth order is that determines a lot of your opportunities, so he has this theory where these two guys, both went to Harvard Law School, top of their class, one was born in 1910, or something like that, and the other was born in 1960, and the difference–and it's a father and son–and the difference is the son who was born, you know, maybe in 1945 and then had this incredible career because he was born at a time when there was this huge need for lawyers and so much area was developing. So, I benefited from that type of break, in the sense that I got out of law school right when the stuff started developing and essentially it was a new area so there wasn't any, uh, you know, established–

SH: Experienced people?

BS: –experienced people in the area and it was driven by government and I just happened to be in the right place. You know, you could have been in Washington [D.C.] the same thing. But, I mean, in government was where it really started, so that was, and in the public interest, you know, Chuck and John started in the public interest side. And then I was in a state where that was really important, you know, people really committed to doing something about it, so it has really, really be great. And it's been fun. All of the cases have been fascinating. I mean, I'm working one right now, it's sort of like, you have to, my theory is you have to frame your work so that it provides energy and so if you go into a project with high expectations that you're going to get something out of it, you will. If you go into a project with dread, you won't get anything out of it. So, one of the things I can say is that the public policy driven, kind of, environmental stuff regardless of which side of the "versus" I'm on, provide a lot of energy for me. And I've been blessed to have that and good health. So, it's been wonderful and, you know, I hope to keep at it for a while longer. [Laughs]

SH: I guess so. Well, thank you very much for taking the time to talk with us about it.

BS: Yes, you're welcome. My pleasure, my pleasure.

SH: So fascinating.

BS: Yes, good.

1:40:08.1

[End of interview]