

WEBVTT

1 "" (0)  
00:00:00.000 --> 00:00:02.046  
Welcome.

2 "Colin O'Donovan" (3763950080)  
00:00:02.046 --> 00:00:21.440  
Everyone and this is the Minnesota attorney general's office, continuing legal education and today we have a live webinar and this 2 hour will focus on issues related to the Minnesota environmental Rights Act also known as mirror. And the topics today that we're going to be discussing will include legislation, historical documents case developments.

3 "Colin O'Donovan" (3763950080)  
00:00:21.440 --> 00:00:32.730  
Analogous to other laws in other states. Our 1st presenter is and Colin, she's a consulting attorney at the Minnesota center for environmental advocacy and her topics will be the history of mirror and early litigation.

4 "Colin O'Donovan" (3763950080)  
00:00:32.730 --> 00:00:40.320  
And Coen graduated from Yale University in 1981 and updated JD from New York University School of law in 1985.

5 "Colin O'Donovan" (3763950080)  
00:00:40.320 --> 00:01:00.320  
From 1985 until 2018, she worked for the Minnesota attorney general's office in our division, and she represented state and environmental agencies in 2018 miss Cohen, except for the staff turning position at the Minnesota center for environmental advocacy, where she primarily coordinated litigation involving the polymet proposal. Ms. Cohen retired from.

6 "Colin O'Donovan" (3763950080)  
00:01:00.320 --> 00:01:05.910  
Ca, in August 2023. congratulations. And it's currently a consulting attorney for.

7 "Colin O'Donovan" (3763950080)  
00:01:05.910 --> 00:01:08.910  
She's not only a wonderful presenter, but also a friend.

8 "Colin O'Donovan" (3763950080)  
00:01:08.910 --> 00:01:12.114  
Yeah, it's all you thanks, Colin.

9 "Ann E. Cohen" (1346064896)  
00:01:12.114 --> 00:01:16.170  
Um, yeah, I have been bad at retirement. I've only.

10 "Ann E. Cohen" (1346064896)  
00:01:16.170 --> 00:01:36.170  
I tried it twice and I, I think I'm sort of flunking, uh, both times and I'm very suspicious that, uh, Colin asked me to do this, uh, history section

of, uh, our talk today because, um, I am history. But, uh, in fact, I'm not quite that.

11 "Ann E. Cohen" (1346064896)

00:01:36.170 --> 00:01:55.710

That old, I was not involved, uh, an attorney, or even, uh, out of grade school when the Minnesota environmental Rights Act was inactive into law in Minnesota. So, uh, with Ed brief introduction, uh, let me begin, uh, with sharing my slides.

12 "Ann E. Cohen" (1346064896)

00:02:00.600 --> 00:02:20.600

All right, so, um, we are speaking today, obviously about the Minnesota environmental Rights Act, which was chapter, uh, 116 B of our state statutes and my talk concerns how it came to be passed and how the courts treated it in its early years and.

13 "Ann E. Cohen" (1346064896)

00:02:20.600 --> 00:02:40.600

And as I discuss mirror, I'm going to highlight some of the concerns of various parties who were involved with the passage of the bill. So we can all think about whether these concerns proved valid and whether the statute has succeeded in reaching its goals. So, um, just simply.

14 "Ann E. Cohen" (1346064896)

00:02:40.600 --> 00:03:00.600

Mira, what is it? It is most simply a private right of action for citizens, uh, that the legislature created to protect the environment. It's sometimes classified as a private attorney general statute authorizing private citizens to act in the public interest and it also bears.

15 "Ann E. Cohen" (1346064896)

00:03:00.600 --> 00:03:20.600

To citizen suit provisions in various federal laws, which have the same goal, the legislature at the time this statute was passed in the early 900 seventy's clearly believed that it was in the public interest to provide an adequate civil remedy for citizens to protect.

16 "Ann E. Cohen" (1346064896)

00:03:20.600 --> 00:03:26.160

Natural Resources and this remedy included recognition of each person's. Right?

17 "Ann E. Cohen" (1346064896)

00:03:26.160 --> 00:03:29.520

To the protection of such resources.

18 "Ann E. Cohen" (1346064896)

00:03:29.520 --> 00:03:49.520

So, uh, why mirror well, the perception at the time was that there were limits to common law. So what was inadequate about common law, nuisance actions, et cetera? Well, standing was.

19 "Ann E. Cohen" (1346064896)

00:03:49.520 --> 00:04:09.520

As a problem nuisance and trespass cases are hard to bring because you have to prove an unreasonable injury to your property rights and, uh, which was very difficult for widespread pollution, such as air pollution. A particular rise injury.

20 "Ann E. Cohen" (1346064896)

00:04:09.520 --> 00:04:15.990

So, common law was viewed at that time as providing only an inadequate remedy.

21 "Ann E. Cohen" (1346064896)

00:04:15.990 --> 00:04:37.220

So, why mirror I, in view of public, uh, ability our agencies, uh, why, why were those remedies deemed insufficient? What about the public trust option? Well, the public trust trust was looked at, um, with suspicion.

22 "Ann E. Cohen" (1346064896)

00:04:37.220 --> 00:04:46.709

And because although it was, and, uh, did provide an ability to bring a private right of action that could be used to protect the environment.

23 "Ann E. Cohen" (1346064896)

00:04:46.709 --> 00:04:53.399

It was sort of murky as to its scope and limited. Um, for example, the public.

24 "Ann E. Cohen" (1346064896)

00:04:53.399 --> 00:05:13.399

Trust doctrine protects navigable waters, submerged land under the concept of the state holds title to those lands, but not air. So it provided a limited remedy at best and the other concern and you'll see this as a theme. I think that runs right along through to the.

25 "Ann E. Cohen" (1346064896)

00:05:13.399 --> 00:05:22.379

Present day there was concerned about whether agencies always do the right thing and there was concern about courts deferring.

26 "Ann E. Cohen" (1346064896)

00:05:22.379 --> 00:05:42.379

To agencies even though this period of time in the 970 s was before Chevron got embedded in, uh, our, uh, general, administrative law. Of course, it might become an embedded as we know that was in 984. this is in the early 970 s. now. Some of you who.

27 "Ann E. Cohen" (1346064896)

00:05:42.379 --> 00:06:02.379

Familiar with environmental law might be saying at this point. Well, well, wait a 2nd, what about all those great federal statutes, uh, that were passed in the early 970 s, the Clean Water act the Clean Air Act, the research conservation recovery recovery? Well, 1st of all most federal statutes were not actually.

28 "Ann E. Cohen" (1346064896)

00:06:02.379 --> 00:06:15.119

Fully enacted or fully deployed, um, in the early 970. S. and again, Here's that theme folks were suspicious of agencies. True then true today.

29 "Ann E. Cohen" (1346064896)

00:06:15.119 --> 00:06:35.119

And, in fact, Professor Joseph Sachs, who is considered to be the father of what became mirror, he passed a similar statute in Michigan, which is often looked to, by Minnesota cts, construing mirror. This is what he had to say he said new environmental protection.

30 "Ann E. Cohen" (1346064896)

00:06:35.119 --> 00:06:51.809

Tattoos are abundant, but their rhetoric far exceeds their effect. Even the best agencies staffed by conscientious and environmentally sensitive appointees are gravely and inherently flawed.

31 "Ann E. Cohen" (1346064896)

00:06:51.809 --> 00:07:07.559

I might actually quarrel with him a little bit about this. I think our federal statutes have been very successful. But again, this was the few point at the time, which was what was very distrustful of, of these laws and whether they would actually get, um.

32 "Ann E. Cohen" (1346064896)

00:07:07.559 --> 00:07:15.599

Really fully enacted fully deployed and fully enforced, et cetera. And some of that suspicion is, uh, probably valid.

33 "Ann E. Cohen" (1346064896)

00:07:15.599 --> 00:07:26.909

So, the legislative history of mirror is is very interesting if you compare it to how things are being done today. Um.

34 "Ann E. Cohen" (1346064896)

00:07:26.909 --> 00:07:46.909

It was, uh, passed by Republican controlled legislature. Uh, it was started by, uh, Wendell Anderson who later became governor, but who was then a state senator and he introduced the original bill in the 9,969 legislative session.

35 "Ann E. Cohen" (1346064896)

00:07:46.909 --> 00:08:06.909

Um, thereafter it took 3 years to get this attitude pass, but that's pretty quick actually, for, uh, very well. At least the perception was very powerful tools. Such as this 1 it was supported a cross party lines. Um, and it it traveled a complicated parliamentary path with competing bills, um, which.

36 "Ann E. Cohen" (1346064896)

00:08:06.909 --> 00:08:19.379

I'm not going to go into any detail about, except to note that, uh, 1, Bill was called the lawyer's bill, and it originated through the Minnesota bar association, although the bar association did not endorse it.

37 "Ann E. Cohen" (1346064896)

00:08:19.379 --> 00:08:39.379

There was another bill, um, that, uh, was created by an environmental, uh, organization and these competing bills both got introduced. And again, as I mentioned, they traveled complicated parliamentary paths. Um, but eventually it all got done. And, uh.

38 "Ann E. Cohen" (1346064896)

00:08:39.379 --> 00:08:44.069

It was inactive into law June 7th 9,971.

39 "Ann E. Cohen" (1346064896)

00:08:44.069 --> 00:09:05.239

So, what did we get? Well, we got actually 3, new rights, uh, created, uh, the 1st, right is the right to challenge private or public conduct, either violations of law, or your permit, et cetera, or, uh, broadly material adverse.

40 "Ann E. Cohen" (1346064896)

00:09:05.239 --> 00:09:25.239

To natural resources, which is broadly defined plaintiffs, have the burden of moving forward with a prime case, and courts later are going to add some guardrails. But anyway, there was this right that was created for a citizen plaintiffs to, uh, protect natural.

41 "Ann E. Cohen" (1346064896)

00:09:25.239 --> 00:09:45.239

Resources the 2nd, right that was given was the right to intervene, uh, right to intervene in public administrative proceedings, which is very important for agencies or local units, that lack laws, providing public notice and participation. And, um, equally importantly, there was, uh, the right to change.

42 "Ann E. Cohen" (1346064896)

00:09:45.239 --> 00:09:55.079

Challenge the law itself, and, as we know the Minnesota administrated procedures act allows a challenge to a rule, for example, for certain limited reasons.

43 "Ann E. Cohen" (1346064896)

00:09:55.079 --> 00:10:14.849

But Mira allows a challenge to a rule on substance. The rule isn't good enough. The rule isn't protecting the environment. So that was a huge, uh, new right that was created. And, uh, it was very lightly, lightly used until recent times.

44 "Ann E. Cohen" (1346064896)

00:10:14.849 --> 00:10:34.849

So, um, you know, every statute, uh, that is of consequence, uh, does turn out to be something of a wrestling match and I just wanted to share this

particular slide. Because I think you can see in 1 provision, uh, hints of what the wrestling match was all about here.

45 "Ann E. Cohen" (1346064896)  
00:10:34.849 --> 00:10:38.759  
So, if plaintiff show pollution impairment.

46 "Ann E. Cohen" (1346064896)  
00:10:38.759 --> 00:10:58.759  
Destruction defendants can, of course, rebuffed the prime of case, and they can raise and no feasible imprudent alternative defense. And the, if the conduct was a lot of I permit that too, is the defense, but look, what else is in there. There is the paramount concern for protection of.

47 "Ann E. Cohen" (1346064896)  
00:10:58.759 --> 00:11:12.869  
Water and land and economic considerations alone shall not constitute a defense. So you can see the push pull, um, in this 1 particular provision of.

48 "Ann E. Cohen" (1346064896)  
00:11:12.869 --> 00:11:32.869  
So, concerns raised during its passage, um, what were the agencies and particularly the pollution control agency W. W. W. why were they worried about, um, well, I think it's fair to say finality of standards, you know, wait, you know, we.

49 "Ann E. Cohen" (1346064896)  
00:11:32.869 --> 00:11:52.869  
Worked on this rule for years we survived a challenge at the court of appeals and now you can challenge it again in district court. And the state agencies were saying, hey, wait a 2nd we are the policy makers. We get to decide, you know, what, how clean is clean. What's enough?

50 "Ann E. Cohen" (1346064896)  
00:11:52.869 --> 00:12:14.479  
Not you court, we should decide these questions and in case by case is not the way to go. Um, this stuff has statewide implications. And so I thought this, uh, uh, statement by the pollution control agency was really worth listening to the agency at that.

51 "Ann E. Cohen" (1346064896)  
00:12:14.479 --> 00:12:29.189  
And said litigation is fortuitous and timing and subject the control agency must possess considerable expertise in the area of regulation and plan ahead for anticipated problems. Courts.

52 "Ann E. Cohen" (1346064896)  
00:12:29.189 --> 00:12:49.189  
Manifestly are not endowed with either of these features further. The agency responsible must have the ability to administer a flexible program that involves remaining in contact with the party regulated to see that the agencies orders are complied with courts are simply.

53 "Ann E. Cohen" (1346064896)  
00:12:49.189 --> 00:12:57.269  
Equipped for the surveillance, the policing and preventative activities required for, uh, efficient pollution abatement.

54 "Ann E. Cohen" (1346064896)  
00:12:57.269 --> 00:13:14.009  
So industry, of course, had its concerns about the statute, uh, the industry was concerned about its scope. Um, I own this land I've decided to harvest the trees.

55 "Ann E. Cohen" (1346064896)  
00:13:14.009 --> 00:13:20.069  
Ah, I should be able to do that without outside interference. Um.

56 "Ann E. Cohen" (1346064896)  
00:13:20.069 --> 00:13:31.499  
The industry is concerned about the lack of certainty hasn't there been enough due process already in the permitting process? Aren't we looking at inconsistent decision? Making.

57 "Ann E. Cohen" (1346064896)  
00:13:31.499 --> 00:13:44.729  
And, of course, the environmental activists, they were worried that the feasible imprudent alternative defense was going to turn into the whole through which the rest of the statute would be driven.

58 "Ann E. Cohen" (1346064896)  
00:13:44.729 --> 00:13:49.199  
Is this really going to result in environmental enforcement?

59 "Ann E. Cohen" (1346064896)  
00:13:49.199 --> 00:14:11.089  
So, I think those who, um, support mirror would argue this, they said, well, the law provides, uh, balance and, uh, the balance here is that the agency, uh, gets noticed of mirror lawsuits can intervene. And it is not a stopped if a.

60 "Ann E. Cohen" (1346064896)  
00:14:11.089 --> 00:14:31.089  
Private case is lost, so, if a private party claims, somebody violated their permit, and they lost that case, that's not estoppel against the agencies. And of course plaintiffs have the initial burden of proof. It has to be material. And that is not easy to bring. Um, frankly, I mean, that's a real challenge in, in any.

61 "Ann E. Cohen" (1346064896)  
00:14:31.089 --> 00:14:51.089  
Mental case, if you're just a citizen, how are you going to prove your case? Are you going to have to go get experts? Um, and, um, the, uh, the, you know, the industry got its defenses to, um, the defendant's own property is an exception, unless it has extra territorial impact.

62 "Ann E. Cohen" (1346064896)

00:14:51.089 --> 00:15:08.069

No damages are in the statute. No penalties and of course, the, the no feasible imprudent alternative defense was there for industry. So I think there would be the, an argument that the, the statute that passed, uh, was in fact balanced.

63 "Ann E. Cohen" (1346064896)

00:15:08.069 --> 00:15:13.889

So, the next question would be did this in gender, a flood of litigation.

64 "Ann E. Cohen" (1346064896)

00:15:13.889 --> 00:15:33.889

Did it make a difference? Well, in 978, uh, a University of Minnesota law professor, David, Brighton, uh, did a study to try to answer that question looking at the 1st, 5 years. And what he discovered was, um.

65 "Ann E. Cohen" (1346064896)

00:15:33.889 --> 00:15:54.799

It really didn't make a huge difference according to the litigants themselves. Most of the litigants concluded that the same result would have occurred regardless of the mirror claim, although they felt good about having that in their back pocket. Although there was at least 1 that again who felt it was key to his success in obtaining a settlement with county officials with regard.

66 "Ann E. Cohen" (1346064896)

00:15:54.799 --> 00:16:14.799

To a road development that the plaintiffs believed would have various negative impacts on local water bodies and wildlife. So I think it's fair to say, uh, it wasn't, uh, didn't bring a flood of litigation. And I think 1 of the reasons might've been. It's still not easy to bring a case. Right? You still need to pull that information together.

67 "Ann E. Cohen" (1346064896)

00:16:14.799 --> 00:16:20.129

You might have to find an expert you need to have the resources to bring a lawsuit.

68 "Ann E. Cohen" (1346064896)

00:16:20.129 --> 00:16:40.129

So, what were the key early cases and what did they deal with? Well, it's fair to say that mostly they dealt with the basics, the mechanics, uh, relief, how to plead, uh, the Bryson litigation and you can see here that, uh, this 1 went up and down and up and down for.

69 "Ann E. Cohen" (1346064896)

00:16:40.129 --> 00:17:00.129

Several years, uh, involved, uh, Mr Bryson, who was a farmer in freeborn county and he had, uh, on his land, a beautiful swamp, which he appreciated for its wildlife. Um, and he did not want freeborn county to seize that land to build a.

70 "Ann E. Cohen" (1346064896)

00:17:00.129 --> 00:17:20.129



And so he used Mira to try to get the county to do something else with his road. And mostly this litigation concerned and whether the weather, and what under what circumstances these actions can be enjoined. And, um, eventually.

71 "Ann E. Cohen" (1346064896)

00:17:20.129 --> 00:17:40.129

Mr. Bryson, uh, prevails and the court upheld his merit claim and the highway went around. So, at this point, it feels like, uh, mira's going to have some teeth. The next early case, uh, core wine versus crowing county was use of the intervention.

72 "Ann E. Cohen" (1346064896)

00:17:40.129 --> 00:18:00.129

Uh, to get into a local zoning proceeding to stop development of a large campground on a small lake and I must say reading the case, I was impressed with the job that the plaintiffs did documenting the threat to natural resources. And in fact, the county testimony.

73 "Ann E. Cohen" (1346064896)

00:18:00.129 --> 00:18:20.129

Seem to admit that the county knew that this development would pose a threat to this small lake and the court here said, well, look, you know how much evidence do you need to make the case. Um, that's required and held. Yeah. You know, it's not the same as summary judgment.

74 "Ann E. Cohen" (1346064896)

00:18:20.129 --> 00:18:40.109

Um, verified pleadings were enough, uh, the court found the issues were supported, as I said, there were some key admissions. Um, and so this went to trial and, uh, it must have, uh, you know, gotten settled in some fashion because we don't see it again. Like Bryson. Um, another early case.

75 "Ann E. Cohen" (1346064896)

00:18:40.109 --> 00:18:52.559

How public interest group versus a white pair rotting gun club. Um, and again here, uh, if you look at the case, it felt like the defendant didn't really.

76 "Ann E. Cohen" (1346064896)

00:18:52.559 --> 00:19:02.969

Try to reboot the prime of case. It didn't really make an affirmative defense and the court does enjoy the operation of the shooting range again.

77 "Ann E. Cohen" (1346064896)

00:19:02.969 --> 00:19:06.149

Mira is feeling pretty powerful.

78 "Ann E. Cohen" (1346064896)

00:19:06.149 --> 00:19:17.789

So more early cases, uh, again, we have, uh, the use of intervention under mirror in the peer case.

79 "Ann E. Cohen" (1346064896)

00:19:17.789 --> 00:19:37.789

Um, and the case is really about harmonizing existing statutes, providing procedures, for example, power line, citing with mirror. How is Mira going to apply, or change these processes? And the court decides that mirror acts as an overlay.

80 "Ann E. Cohen" (1346064896)

00:19:37.789 --> 00:19:57.789

An overlay on the existing siting statute and holds it both apply. Um, and it remains to, uh, the, um, I guess would be the district court, uh, or the body, the environmental quality Council, uh, for findings specifically about, uh.

81 "Ann E. Cohen" (1346064896)

00:19:57.789 --> 00:20:05.459

Elements pollution impairment, uh, et cetera and whether there was an alternative route available.

82 "Ann E. Cohen" (1346064896)

00:20:05.459 --> 00:20:18.239

So, uh, floods would fine links sort of the same thing again. You know, the, the court notes, the paramount concern for natural resources means superior to all others. So wow.

83 "Ann E. Cohen" (1346064896)

00:20:18.239 --> 00:20:21.809

Feels pretty powerful.

84 "Ann E. Cohen" (1346064896)

00:20:21.809 --> 00:20:41.809

So, uh, what are the limits then, um, of mirror? Did we see any early cases that involved that? So I'm showing you a picture of a land feature that you can see from space. And if you know what, if this is, you should shout it out and disturb your pets or colleagues.

85 "Ann E. Cohen" (1346064896)

00:20:41.809 --> 00:20:46.409

Your family shout out what is this? What am I showing you here?

86 "Ann E. Cohen" (1346064896)

00:20:46.409 --> 00:21:06.409

Well, um, of course, um, what I am showing you is the milepost, 7 tailing space, and maybe some of you are still drawing a blank on what that is what are tailing. So, let's start with that. Tailings are the finely ground up material, uh, that, uh, exists after, or has been crushed?

87 "Ann E. Cohen" (1346064896)

00:21:06.409 --> 00:21:25.979

And the target minerals are removed, and most of the time in Minnesota, we use a flotation process that involves a lot of waters. So these tailings are wet. They're kind of a slurry and, uh, this is where reserve mining tailings and now in North Shore mining tailings are disposed of.

88 "Ann E. Cohen" (1346064896)

00:21:25.979 --> 00:21:40.169

And as you can see, the patient is not far from Lake superior, which is, of course, where reserve used to dump its tailings out the end of a big pipe until judge MYLES. Lord stopped it.

89 "Ann E. Cohen" (1346064896)

00:21:40.169 --> 00:21:46.199

So, um.

90 "Ann E. Cohen" (1346064896)

00:21:46.199 --> 00:22:04.139

Pardon? My Pon not a D\*\*\* big breach. I actually wrote this heading for this slide. And then I, I realized that it was kind of funny because what the issue was in the case, as it turns out, um, the concern was D\*\*\* breach. Um.

91 "Ann E. Cohen" (1346064896)

00:22:04.139 --> 00:22:24.139

So, what was this case about? Exactly? Um, it's a very famous case. We all cited in administrative law for the, uh, proposition that, uh, when you're reviewing an agency decision as an pellet court, you are, uh, subject to, uh, mappa and.

92 "Ann E. Cohen" (1346064896)

00:22:24.139 --> 00:22:44.139

You are, uh, differential to the agency under the substantial evidence standard. Um, and so, uh, what the court was doing here was reviewing where, uh, reserve was going to dump its tailings. Um, it was re, review of an agency.

93 "Ann E. Cohen" (1346064896)

00:22:44.139 --> 00:23:01.589

Decision to require reserve to use an inland space in as a feasible imprudent alternative to the milepost 7 site, which was far closer to Lake superior and of course, closer to reserve silver bay tack and I processing facility.

94 "Ann E. Cohen" (1346064896)

00:23:01.589 --> 00:23:10.709

So, uh, the court was looking at, uh, reserve, uh, having made a closure threat if it needed to, uh.

95 "Ann E. Cohen" (1346064896)

00:23:10.709 --> 00:23:26.399

Move the space and further inland than 7 and, uh, of course, as I mentioned, the case is famous for difference. But, um, as my headlines suggests, may be honored in the breach.

96 "Ann E. Cohen" (1346064896)

00:23:26.399 --> 00:23:48.379

So, it was a D\*\*\* safety issue. There were 2 choices. Milepost, 7, Ah, close to Lake superior and cheaper for reserve. And I'll post 7 further away from the lake and more expensive, uh, after an environmental review and a hearing that state agencies supported milepost.

97 "Ann E. Cohen" (1346064896)

00:23:48.379 --> 00:23:54.569

But I have to note not without some waffling on that and, uh, the hearing.

98 "Ann E. Cohen" (1346064896)

00:23:54.569 --> 00:24:14.569

Officer, uh, said in the event of a catastrophic, I'm sorry in the event of a cash catastrophe, the damage to adjoining residences and to Lake Superior would be far greater at 7 than a mile post 20. and consequently the hearing examiner concludes.

99 "Ann E. Cohen" (1346064896)

00:24:14.569 --> 00:24:26.309

Prudence would dictate the choice of a safer site. The hearing officer lacked confidence in reserve officials and questioned the likelihood of them.

100 "Ann E. Cohen" (1346064896)

00:24:26.309 --> 00:24:29.669

Building and maintaining the dam as designed.

101 "Ann E. Cohen" (1346064896)

00:24:29.669 --> 00:24:35.099

But the court said, uh.

102 "Ann E. Cohen" (1346064896)

00:24:35.099 --> 00:24:47.189

You know, looking at mirror now, uh, acknowledging no parent will be granted, where is likely to cause an pyramid of natural resources. So long there is so long as there is a.

103 "Ann E. Cohen" (1346064896)

00:24:47.189 --> 00:24:54.449

Feasible and prudent alternative. The court said we are of the opinion that this statute has no application.

104 "Ann E. Cohen" (1346064896)

00:24:54.449 --> 00:25:06.149

Where a safety of the proposed such structure is undisputed. In other words, if the design construction and maintenance of the dam, make it unlikely.

105 "Ann E. Cohen" (1346064896)

00:25:06.149 --> 00:25:14.999

That they will the dam so that they will impair natural resources. There is no need to consider feasible and prudent alternatives.

106 "Ann E. Cohen" (1346064896)

00:25:14.999 --> 00:25:36.109

So, what am I showing you in the image here? What I'm showing you in the image is a picture of a D\*\*\* failure, uh, in as you can see from the timestamp, uh, 2019 on a lovely day. Um, in Brazil this is the, uh.

107 "Ann E. Cohen" (1346064896)

00:25:36.109 --> 00:25:52.319

It is a, uh, uh, it was a facility, it was dry. Um, it had been closed for several years. Uh, and it was where iron mining tailings had been disposed of and, uh, it failed suddenly a.

108 "Ann E. Cohen" (1346064896)

00:25:52.319 --> 00:26:12.319

In, uh, January of 2019 killing almost 300 people. Uh, so the important thing to know about this type of, uh, failure of Kelly's disposal sites is that it is not an isolated event. And it has happened almost every year since the 29.

109 "Ann E. Cohen" (1346064896)

00:26:12.319 --> 00:26:32.329

Team disaster and happened before that disaster and continues to happen today. And and yet the court decided safety of the proposed structure is undisputed. So mirror doesn't apply. Don't even have to look at alternatives adjudicated. Essentially as I see it to be a failure of the case.

110 "Ann E. Cohen" (1346064896)

00:26:32.329 --> 00:26:43.649

I think the court could have analyzed it and maybe sort of did is, I know feasible and prudent alternative if it believed reserves shutdown threat. Uh, but anyway, it is fair to say.

111 "Ann E. Cohen" (1346064896)

00:26:43.649 --> 00:26:55.649

That this was not the best, Ah, moment for mirror and, uh, this case illustrates, uh, perhaps the limitations of the statutory language.

112 "Ann E. Cohen" (1346064896)

00:26:55.649 --> 00:27:15.649

So, uh, this concludes my portion and I just wanted to make sure that those of you who are history buffs and would like to do a deeper dive into some of the material have access to it. Um, so I've given you my sources here and, uh, I would note in particular.

113 "Ann E. Cohen" (1346064896)

00:27:15.649 --> 00:27:35.649

There was an oral history project to record the voices of the people who were involved with the passage of this statute. And I think that makes for very interesting listening. So, I, uh, commend those of you who are historians to, uh, take a deeper dive by, uh, listening to the thoughts of some of the people.

114 "Ann E. Cohen" (1346064896)

00:27:35.649 --> 00:27:44.249

Who were involved in passage of the statute and if there are questions, I am happy to take them.

115 "Colin O'Donovan" (3763950080)

00:27:48.441 --> 00:28:03.959

Thank you so much and I'll 2nd, that the oral history product seems to be growing. I know it started with Chuck Dayton's and, uh, additional ones have been included over time. So it's a great resource. If anyone does have any questions feel free to put them in the chat.

116 "Colin O'Donovan" (3763950080)

00:28:03.959 --> 00:28:09.418

And we'll go from there and if not, then we'll start our next presentation.

117 "Ann E. Cohen" (1346064896)

00:28:09.418 --> 00:28:15.317

Thank you for your time.

118 "Colin O'Donovan" (3763950080)

00:28:15.317 --> 00:28:24.029

Great I see. No questions. So our next presentation is mirror the middle years. Uh, that's going to be Co hosted with Max.

119 "Colin O'Donovan" (3763950080)

00:28:24.029 --> 00:28:44.029

And pizza auto, and Max Kylie graduated from Saint Olaf college in 2005 he received his JD from Saint Thomas school of law in 2008 after 3 years in private practice at Kelly and parents. Mr. Kelly spent a decade as an assistant attorney general, primarily in environmental rights. Natural Resources division, and also as well in the residential.

120 "Colin O'Donovan" (3763950080)

00:28:44.029 --> 00:28:55.289

Utilities division, he was not only a staff attorney, but also a manager, uh, while in our office and currently Mr. Kiley serves as the legal director and general counsel at friends of the Boundary Waters wilderness.

121 "Colin O'Donovan" (3763950080)

00:28:55.289 --> 00:29:09.959

Mr. will be going 2nd, but I'll introduce him as well. Pizza was a special assistant attorney general and environmental litigator in the office of the Minnesota attorney general's office and he's a fellow with the New York University School of laws, state impact center.

122 "Colin O'Donovan" (3763950080)

00:29:09.959 --> 00:29:17.039

For his appointment to this office in June 2019, or sort of was a principal and attorney at robin's caplin for 15 years.

123 "Colin O'Donovan" (3763950080)

00:29:17.039 --> 00:29:25.679

This is sort of obtained his JD from Northwestern University's school of law in 2004, go wild cats and his BA, from the University of Wisconsin. Unclear.

124 "max kielely" (590238464)

00:29:29.181 --> 00:29:37.889

Thank you, thank you for having me today. I'm going to be covering a portion of the middle years from 79 to.

125 "max kieleley" (590238464)  
00:29:37.889 --> 00:29:49.199  
Um, um, you know, 97 and, uh, pizza, I was gonna cover a case from 9,990 and, um, 2012 involving the Boundary waters.

126 "max kieleley" (590238464)  
00:29:49.199 --> 00:30:06.179  
Next slide please so, these middle years, right? Um, Mira is, um, you know, uh, growing and growing into itself and the courts sort of grapple with this inherent tension between both.

127 "max kieleley" (590238464)  
00:30:06.179 --> 00:30:12.599  
The, the promotion of the preservation and the productive use of Minnesota, natural resources, and it is a consequence.

128 "max kieleley" (590238464)  
00:30:12.599 --> 00:30:23.459  
You'll see a characteristic hallmark of, um, this time period is both the expansion and contraction of plaintiffs time of facial case under mirror section. 3.

129 "max kieleley" (590238464)  
00:30:23.459 --> 00:30:29.819  
And when and how a defendant can invoke mirrors, uh, affirmative defense, next slide.

130 "max kieleley" (590238464)  
00:30:29.819 --> 00:30:37.559  
The traditional is showing is that a plan must establish a predictable natural resource.

131 "max kieleley" (590238464)  
00:30:37.559 --> 00:30:42.059  
And, uh, pollution impairment or destruction of that resource next slide.

132 "max kieleley" (590238464)  
00:30:42.059 --> 00:30:45.779  
And the definition of a natural resource.

133 "max kieleley" (590238464)  
00:30:45.779 --> 00:30:49.889  
Um, next slide, uh, next slide.

134 "max kieleley" (590238464)  
00:30:49.889 --> 00:31:05.249  
Thank you is very broad. Um, it, it includes all of the, the traditional, um, stuff that you think, you know, land air water, but also includes, uh, it, it's not limited to that and includes a couple interesting. Uh.

135 "max kieleley" (590238464)  
00:31:05.249 --> 00:31:17.039

Uh, aspects that both myself and people cover today, including historic resources, and seen it in aesthetic resources when owned by government units or agencies.

136 "max kieleley" (590238464)  
00:31:17.039 --> 00:31:20.069  
Next slide, um.

137 "max kieleley" (590238464)  
00:31:20.069 --> 00:31:31.319  
So, this, this, during this time, the courts expanded prime official case by including buildings in open spaces is historic.

138 "max kieleley" (590238464)  
00:31:31.319 --> 00:31:49.289  
Resources next slide the 1st case, uh, that I'll be discussing is purely the Ericsson and in that case, it was a case of 1st impression it was a case, uh, W, W, where there was no supporting case law of what constituted a historical resource.

139 "max kieleley" (590238464)  
00:31:49.289 --> 00:31:57.029  
Predictable as a natural resource under mirror, and it was a, um, a case involving.

140 "max kieleley" (590238464)  
00:31:57.029 --> 00:32:17.029  
Suit by citizens to enjoy the demolition of raw losses and what the court did is the court looked to the National Register of historic sites criteria to determine factors that court should look to when determining whether, or not a structure qualifies as a historical research. And therefore protected by.

141 "max kieleley" (590238464)  
00:32:17.029 --> 00:32:25.889  
Here there is expert testimony here, um, uh, that the role houses would be eligible for nomination to the National Register.

142 "max kieleley" (590238464)  
00:32:25.889 --> 00:32:33.389  
Uh, next slide please and therefore both the district court and the minister, the Supreme Court found that the plaintiff established.

143 "max kieleley" (590238464)  
00:32:33.389 --> 00:32:39.029  
A prime aphasia mirror claim by showing that the Ro, houses were natural resources.

144 "max kieleley" (590238464)  
00:32:39.029 --> 00:32:53.159  
And the, the threatened demolition would, uh, result in their pollution impairment or destruction. I'm gonna save the, um, treatment of the affirmative defense, uh, for a couple of slides from now. So if, if we could.



145 "max kieleley" (590238464)  
00:32:53.159 --> 00:33:03.119

Uh, move to the next slide please. So, um, quarterly establishes that if something, you know, if a structure could be.

146 "max kieleley" (590238464)  
00:33:03.119 --> 00:33:10.319

In, uh, the National register that it should qualify is a natural.

147 "max kieleley" (590238464)  
00:33:10.319 --> 00:33:16.499

Resource that's protected under mirror this s. S. T. ink. The Minneapolis is an odd case.

148 "max kieleley" (590238464)  
00:33:16.499 --> 00:33:22.949

In the sense that Scotty's on 7th, right? Uh, it was a disco, uh.

149 "max kieleley" (590238464)  
00:33:22.949 --> 00:33:34.979

Uh, lounge and restaurant, it was both the inside, and the outside were already on the National Register of Historic places, due to their, um, protected architectural style.

150 "max kieleley" (590238464)  
00:33:34.979 --> 00:33:49.949

Now, the, um, there was a proposed development for the city center and, uh, it 1st Scotty's was going to be spared, but eventually it was determined that it was going to be, um.

151 "max kieleley" (590238464)  
00:33:49.949 --> 00:34:01.139

Demolished and and there's a lawsuit brought under mirror to enjoying that in the midst of a trial. There's a settlement which allowed the destruction of the exterior.

152 "max kieleley" (590238464)  
00:34:01.139 --> 00:34:10.709

Uh, in exchange for the preservation of the interior, and at that point, uh, a nonprofit friends of the forum move to intervene.

153 "max kieleley" (590238464)  
00:34:10.709 --> 00:34:18.179

Next slide, and the court found that, you know, the intervention would be only for the purposes of.

154 "max kieleley" (590238464)  
00:34:18.179 --> 00:34:25.109

Determining, uh, the, uh, propriety of the settlement. What's interesting. Here is the court.

155 "max kieleley" (590238464)  
00:34:25.109 --> 00:34:33.599

You know, the, the, the owner of Scotty's, the developer, everybody involved in this case, sort of, wanted to demolish the building or agreed to demolish the building.

156 "max kielely" (590238464)  
00:34:33.599 --> 00:34:43.169

Um, under, uh, uh, you know, arguably both the interior and the exterior are natural resources, protected under mirror.

157 "max kielely" (590238464)  
00:34:43.169 --> 00:34:55.079

The court sort of did some gymnastics to find that only the interior was a natural resource protected by mirror when in reality I think that was the long.

158 "max kielely" (590238464)  
00:34:55.079 --> 00:35:05.699

Wrong legal conclusion, um, because quarterly, even the eligibility to be included on the National Register was enough to deem a structure predictable whereas here.

159 "max kielely" (590238464)  
00:35:05.699 --> 00:35:21.359

Scotty was actually on the register. Um, I, I think it would have been more appropriate to for the district court to find that the interior and exterior or protecting natural resources and to apply a, um, uh, the affirmative defense.

160 "max kielely" (590238464)  
00:35:21.359 --> 00:35:26.189

Uh, analysis, but that was problematic because there were project alternatives.

161 "max kielely" (590238464)  
00:35:26.189 --> 00:35:30.299

Whereby, um, uh, Scotty was not demolished.

162 "max kielely" (590238464)  
00:35:30.299 --> 00:35:40.349

Next slide. Um, so in any event, uh, both s. T. and and its.

163 "max kielely" (590238464)  
00:35:40.349 --> 00:35:48.599

Uh, underscore the fact that mirror cases are really fact intensive and often expert driven and and you need to develop the facts early.

164 "max kielely" (590238464)  
00:35:48.599 --> 00:36:02.609

To obtain favorable, uh, findings due to, uh, the clearly erroneous standard that Pete will be discussing later. Um, again, I think the court reached the wrong decision. Uh, and.

165 "max kielely" (590238464)  
00:36:02.609 --> 00:36:08.219

And, uh, even despite interpreters failure, failure to submit sufficient evidence.

166 "max kieleley" (590238464)  
00:36:08.219 --> 00:36:17.789

Um, next slide please. So, um, it is an Cohen previously mentioned and is your articulates.

167 "max kieleley" (590238464)  
00:36:17.789 --> 00:36:21.689  
Uh, eh, you know, the, um.

168 "max kieleley" (590238464)  
00:36:21.689 --> 00:36:25.229  
Defendant's use of the affirmative defense.

169 "max kieleley" (590238464)  
00:36:25.229 --> 00:36:35.399  
Uh, to case under mirror is really curtailed by the state's paramount concern for the protection of the environment.

170 "max kieleley" (590238464)  
00:36:35.399 --> 00:36:47.969  
Next slide please. Um, and so the, the quarterly court basically said that, you know, in order to, for an affirmative defense to apply, it really has to be truly unusual factors.

171 "max kieleley" (590238464)  
00:36:47.969 --> 00:36:55.319  
Right to destroy natural resource. Um, and and if there is, uh, an alternative.

172 "max kieleley" (590238464)  
00:36:55.319 --> 00:37:08.519  
That alternative must have huge community disruption of extraordinary magnitude in order for, um, natural resources protected by mirror to be, um, polluted impaired or destroyed.

173 "max kieleley" (590238464)  
00:37:08.519 --> 00:37:21.269  
And in, sort of recognizing that general test quarterly, reverse the district courts, finding that the owner of the or developer of the roadhouse had established in affirmative defense and found that.

174 "max kieleley" (590238464)  
00:37:21.269 --> 00:37:29.579  
You know, destroying the, uh, row houses was not, uh, a truly an usual factors. Um.

175 "max kieleley" (590238464)  
00:37:29.579 --> 00:37:35.459  
You know, to to gain 10 parking spots does not, um, uh.

176 "max kieleley" (590238464)

00:37:35.459 --> 00:37:38.999  
It is, it's it's not sufficient to destroy a, um.

177 "max kieleley" (590238464)  
00:37:38.999 --> 00:37:46.409  
A natural resource, uh, next slide. So, um.

178 "max kieleley" (590238464)  
00:37:46.409 --> 00:37:54.209  
The courts then sort of, there's a, a tree of or a case from, uh, uh.

179 "max kieleley" (590238464)  
00:37:54.209 --> 00:38:00.509  
That expands the dependencies of the affirmative defense, uh, to a private patient case.

180 "max kieleley" (590238464)  
00:38:00.509 --> 00:38:09.569  
Under mirror in next slide and that is the pitch or city of Duluth case.

181 "max kieleley" (590238464)  
00:38:09.569 --> 00:38:14.640  
Um, and, you know, here, I think the district court got it really wrong.

182 "max kieleley" (590238464)  
00:38:14.640 --> 00:38:31.410  
The court of Appeals got it mostly right? And the Supreme Court got it somewhat right? In somewhat wrong. And there there was a wetland a creek in Woody cliffs that were, you know, natural resources that would be destroyed to develop a, um.

183 "max kieleley" (590238464)  
00:38:31.410 --> 00:38:41.310  
A strip mall district court found that due to the degradation pollution of those natural resources. They weren't protected natural resources under mirror and therefore.

184 "max kieleley" (590238464)  
00:38:41.310 --> 00:38:45.420  
In in any event the the developer met, it's affirmative defenses.

185 "max kieleley" (590238464)  
00:38:45.420 --> 00:39:01.050  
The court of appeals, like I said, got it, got it right reversed and found that, you know, federal and state standard, recognize the importance of what ones they must be preserved and protected. They constitute natural resources.

186 "max kieleley" (590238464)  
00:39:01.050 --> 00:39:04.230  
Protected under mirror, and in any event, you know.

187 "max kieleley" (590238464)  
00:39:04.230 --> 00:39:15.360

As is mirror dictates and it's quarterly articulated the balancing test for an affirmative defense must be done with a significant emphasis on saving the environment.

188 "max kieleley" (590238464)  
00:39:15.360 --> 00:39:21.630

Next slide now, the Minnesota Supreme Court reversed the court of appeals.

189 "max kieleley" (590238464)  
00:39:21.630 --> 00:39:31.050

And found that, you know, it agreed that the wetland was despite being degraded and deferring to the district courts, factual findings on that point.

190 "max kieleley" (590238464)  
00:39:31.050 --> 00:39:37.080

It was nevertheless a natural resource and in a really odd decision, the Supreme Court.

191 "max kieleley" (590238464)  
00:39:37.080 --> 00:39:48.330

You know, failed to conduct the, the affirmative defense balancing test with emphasis on saving the environment, and just sort of said, the district court considered feasible and prudent alternatives.

192 "max kieleley" (590238464)  
00:39:48.330 --> 00:39:58.110

And really, we should, um, there's no, uh, abusive discretion, and we should defer to to their determination that the affirmative defense is in that next slide.

193 "max kieleley" (590238464)  
00:39:58.110 --> 00:40:10.230

And this is a really odd case, right? I mean, how could there be no alternative site to building a strip mall, or, at least an alternative design in that current location such that natural resources we're not impacted.

194 "max kieleley" (590238464)  
00:40:10.230 --> 00:40:20.940

Also, it strikes me that this is economic consideration alone to allow the destruction of natural resources to build a, um.

195 "max kieleley" (590238464)  
00:40:20.940 --> 00:40:24.420

Uh, a strip mall and and that's prohibited under.

196 "max kieleley" (590238464)  
00:40:24.420 --> 00:40:31.470

Um, you know, moreover, uh, building a strip mall doesn't present truly unusual factors.

197 "max kieleley" (590238464)  
00:40:31.470 --> 00:40:39.180

Or, um, you know, community disruption of, uh, extraordinary magnitude. In other words.

198 "max kieleley" (590238464)  
00:40:39.180 --> 00:40:45.570

You know, the, the, the, the Supreme Court really aired in applying the, um.

199 "max kieleley" (590238464)  
00:40:45.570 --> 00:40:50.730

The balancing test with respect to, uh, the, uh.

200 "max kieleley" (590238464)  
00:40:50.730 --> 00:41:10.710

Applicability of the affirmative defense what's interesting about competition is the court applied an abusive discretion standard and what what I've seen in the cases, uh, at least in this, these middle years before and after, uh, that's the only instance of abuse of discretion with respect to the affirmative defense typically, it is, um.

201 "max kieleley" (590238464)  
00:41:10.710 --> 00:41:16.410

Uh, you know, clear or, uh, clear error for, um, uh.

202 "max kieleley" (590238464)  
00:41:16.410 --> 00:41:19.620

Fact, finding a.

203 "max kieleley" (590238464)  
00:41:19.620 --> 00:41:23.520

Or, um, for application of law.

204 "max kieleley" (590238464)  
00:41:23.520 --> 00:41:39.120

Next slide so, um, if we could go next slide please, this is, um, the, uh, what I believe, you know, doesn't explicitly say that it's.

205 "max kieleley" (590238464)  
00:41:39.120 --> 00:41:46.590

Um, writing the wrongs of, but I, I believe it implicitly does. So and in that case, the.

206 "max kieleley" (590238464)  
00:41:46.590 --> 00:41:52.410

Uh, there was a action to adjoin the, uh, uh, county.

207 "max kieleley" (590238464)  
00:41:52.410 --> 00:42:04.440

The head up and coming from demolishing the armory, right? Both the district court and the minister Supreme Court found that the Armory was predictable. Natural resource. It was on the National Register of Historic places.

208 "max kieleley" (590238464)  
00:42:04.440 --> 00:42:11.640

Right, and a great example of a rare, um, architectural style throughout the country again. This is another reason why.

209 "max kieleley" (590238464)  
00:42:11.640 --> 00:42:17.490

Is wrong, right? If something is on the National Register, it should be a protected natural resource.

210 "max kieleley" (590238464)  
00:42:17.490 --> 00:42:29.280

But in any event, the district court found that there was no mirror violation because, um, the county had met its affirmative defense under mirror next slide.

211 "max kieleley" (590238464)  
00:42:29.280 --> 00:42:49.280

But, in doing, so, um, you know, the, the Supreme Court in reversing that goes back to the paramount importance of preserving natural resources from quarterly and while not explicitly mentioning competition, it does, uh, sort of set a new standard and says that that standard it, it.

212 "max kieleley" (590238464)  
00:42:49.280 --> 00:42:54.900

To to establish an affirmative fence is an extremely high standard for defendants to meet.

213 "max kieleley" (590238464)  
00:42:54.900 --> 00:43:02.220

Um, next slide, so, in article effectively, the, um.

214 "max kieleley" (590238464)  
00:43:02.220 --> 00:43:20.190

Minnesota Supreme Court reversed the trial court, uh, because it was engaged, not in focusing on, um, a paramount concern for protecting the, um, Armory. But, because it was engaged in compensatory versus non compensatory balancing, which is not prohibited.

215 "max kieleley" (590238464)  
00:43:20.190 --> 00:43:24.180

It's my read that Archibald, correct.

216 "max kieleley" (590238464)  
00:43:24.180 --> 00:43:29.820

Corrected the weakening of the affirmative defense analysis under nearby cottage, next slide.

217 "max kieleley" (590238464)  
00:43:29.820 --> 00:43:35.220

Another instance, um, it.

218 "max kieleley" (590238464)  
00:43:35.220 --> 00:43:38.640

Of, um, the courts sort of, uh.

219 "max kieleley" (590238464)  
00:43:38.640 --> 00:43:41.970  
Circle describing the ability to use.

220 "max kieleley" (590238464)  
00:43:41.970 --> 00:44:01.970  
New firmative defenses, McGuire and McGuire involved a, um, uh, cause of action by land owner, um, within the definition of pollution impairment or destruction, where, um, it involved a challenge to noise rule and and precisely that, um.

221 "max kieleley" (590238464)  
00:44:01.970 --> 00:44:05.580  
The, uh, counties, uh, highway, um.

222 "max kieleley" (590238464)  
00:44:05.580 --> 00:44:17.640  
Project would, uh, would violate noise rule and in defense, the, um, uh, county said that, you know, there's no feasible improvement alternatives.

223 "max kieleley" (590238464)  
00:44:17.640 --> 00:44:26.670  
But the court found that the plane reading of Minnesota statute 164, which will look on the next slide.

224 "max kieleley" (590238464)  
00:44:26.670 --> 00:44:46.670  
Uh, demonstrates that when when there is a cause of action, um, not under, uh, a material adverse effect to the environment, but, um, under paragraph 8, in where, uh, it's an allegation that there is a violation of environmental quality.

225 "max kieleley" (590238464)  
00:44:46.670 --> 00:44:56.850  
Or rule that there is no, um, affirmative defense instead the only, uh, available defense is to robot the prime.

226 "max kieleley" (590238464)  
00:44:56.850 --> 00:45:05.940  
Um, next slide so, again, I think sort of like how the court.

227 "max kieleley" (590238464)  
00:45:05.940 --> 00:45:10.530  
Uh, the minister of the Supreme Court reigned in.

228 "max kieleley" (590238464)  
00:45:10.530 --> 00:45:19.980  
Uh, by passing and really clamping down and and making it a difficult standard for defendant to establish affirmative defense under mirror.

229 "max kieleley" (590238464)  
00:45:19.980 --> 00:45:27.060  
I, I think what, uh, we see next is the Minnesota Supreme Court leveling the playing field.



230 "max kieleley" (590238464)  
00:45:27.060 --> 00:45:32.760  
By making it more difficult for plaintiffs to establish a prime official a case.

231 "max kieleley" (590238464)  
00:45:32.760 --> 00:45:46.080  
Under here next slide. Um, and so effectively under again, it's a, um, uh, highway project, uh, case under mirror.

232 "max kieleley" (590238464)  
00:45:46.080 --> 00:45:54.360  
Both under the violation of noise standards and material, adverse impact in the environment.

233 "max kieleley" (590238464)  
00:45:54.360 --> 00:45:58.290  
Next slide and what's interesting in this case is.

234 "max kieleley" (590238464)  
00:45:58.290 --> 00:46:04.530  
There are sort of 2 definitions of pollution impairment or destruction under 1, 16.

235 "max kieleley" (590238464)  
00:46:04.530 --> 00:46:18.060  
Uh, or 2 subdivision 5, like I said, 1, that violates or conduct that violates, or is likely to violate a rule or conduct, which materially adversely affects, or is likely to materially adversely affect the environment.

236 "max kieleley" (590238464)  
00:46:18.060 --> 00:46:27.480  
Next slide please, um, and effectively the trial court installer.

237 "max kieleley" (590238464)  
00:46:27.480 --> 00:46:32.220  
Uh, applied, uh, the Dakota 4 part test.

238 "max kieleley" (590238464)  
00:46:32.220 --> 00:46:52.220  
That was adopted from Michigan court and, and the reasoning was that, you know, and this goes back to what I said, at the beginning, which is there's this push and pull within mirror of, you know, how much disruption of the natural environment can we do that is protected under mirror and what isn't protected under mirror and bocoda found that almost every human.

239 "max kieleley" (590238464)  
00:46:52.220 --> 00:47:08.340  
An activity has some kind of adverse impact on a natural resource, but we can't construe. Mira is prohibiting virtually all human enterprise. So effectively what Dakota and and the, the 5 factor test that, um, uh, adopts.

240 "max kieleley" (590238464)  
00:47:08.340 --> 00:47:26.610

Is to give effect to the statutory limitation that conduct must materially adversely affect the environment to be enjoined as pollution impairment, or destruction of natural resources. So, in this way, what we see is the court, uh, clamping down on what is, uh, what what a plaintiff needs.

241 "max kieleley" (590238464)  
00:47:26.610 --> 00:47:31.260

Is required to show for a time of face to face you're showing under mirror.

242 "max kieleley" (590238464)  
00:47:31.260 --> 00:47:38.250

Previous cases, sort of assumed that there was a material adverse impact when when there was.

243 "max kieleley" (590238464)  
00:47:38.250 --> 00:47:45.780

Uh, and identified, um, natural resource that was gonna be, uh, subject, pollution impairment, or destruction next slide.

244 "max kieleley" (590238464)  
00:47:45.780 --> 00:47:54.060

So these are the famous 5 factors I'm not going to read these, um, next slide.

245 "max kieleley" (590238464)  
00:47:54.060 --> 00:48:02.310

But, like I said, I think what happened here and again, the court didn't explicitly say this, but I think implicitly.

246 "max kieleley" (590238464)  
00:48:02.310 --> 00:48:08.880

Uh, made an extremely high standard for a defendant to establish a mirror affirmative defense.

247 "max kieleley" (590238464)  
00:48:08.880 --> 00:48:17.220

And the court therefore, made it more difficult for plaintiffs to establish a crime of Fisher claim under 0, buy.

248 "max kieleley" (590238464)  
00:48:17.220 --> 00:48:22.380

Imposing this 5 factor test, not all of these factors are exclusive.

249 "max kieleley" (590238464)  
00:48:22.380 --> 00:48:33.000

And each factor need not be met, uh, and Pete will, uh, will discuss, uh, whether this non exclusive balancing test really sets a standard in the next section.

250 "max kieleley" (590238464)  
00:48:33.000 --> 00:48:47.010

But 1st, before Pete goes, um, next slide, um, just quick takeaways, right? Um, these cases show that you need to win a district court, right? Uh, and if you can win on, if you're, um.

251 "max kieleley" (590238464)  
00:48:47.010 --> 00:49:03.630

Uh, uh, defendant, you want to say that there's no, um, uh, material adverse impact under, uh, if it's, uh, a case alleging material, adverse impact in the environment and you also want the court to make, uh.

252 "max kieleley" (590238464)  
00:49:03.630 --> 00:49:10.170

Uh, uh, showing, um, I'm sorry if you are a defend a plaintiff.

253 "max kieleley" (590238464)  
00:49:10.170 --> 00:49:20.970

You want to focus, uh, not just on the facts, but also, um, present claims of challenging violation of regulations that, where you can avoid mirrors.

254 "max kieleley" (590238464)  
00:49:20.970 --> 00:49:29.280

Defense, if you're defendant, you want to establish that the plaintiff fail to meet it's affirmative defense and that.

255 "max kieleley" (590238464)  
00:49:29.280 --> 00:49:36.120

Sorry, Prime official case, and that the, um, uh, affirmative defense wasn't available to, you.

256 "max kieleley" (590238464)  
00:49:36.120 --> 00:49:44.820

So, on appeal, it's necessary to consider whether it makes sense to argue for an, a piece of discretion standard for.

257 "max kieleley" (590238464)  
00:49:44.820 --> 00:49:53.280

Any issues in which the district court, and play a balancing test. Like I said, before competition has never been formally overruled. This is sort of a a weird.

258 "max kieleley" (590238464)  
00:49:53.280 --> 00:49:56.670

Uh, case, and and with that, I'll pass it to, um.

259 "max kieleley" (590238464)  
00:49:56.670 --> 00:50:00.199  
That's a bit.

260 "Peter Surdo" (1726554112)  
00:50:00.199 --> 00:50:01.170  
Hello.

261 "Peter Surdo" (1726554112)  
00:50:01.170 --> 00:50:20.820

Hi, pizza here. Um, I'm a special assistant attorney general since I am currently in the attorney general's office I need to preference my preference. My comments by saying that what I'll present today is my personal take and I'm not speaking on behalf of the office, the state or.

262 "Peter Surdo" (1726554112)

00:50:20.820 --> 00:50:40.820

Um, they weren't involved in this case I'm about to present on, but I felt like that was an important thing to get out of the way. Um, so I am presenting today on, uh, 2, uh, tower cases, 1 and FM tower case, and I don't want to sell tower case that I was involved in at this point. Uh, 13:14:years ago.

263 "Peter Surdo" (1726554112)

00:50:40.820 --> 00:50:43.980

So, it's been a while, but I did litigate it.

264 "Peter Surdo" (1726554112)

00:50:43.980 --> 00:50:53.640

And Colin had asked me to, um, make sure to talk a little bit about just the practical ways in which we marshalled evidence. And what we presented.

265 "Peter Surdo" (1726554112)

00:50:53.640 --> 00:51:04.080

So, I've got up on the screen, the theme of our trial. I was at robin's caplin at the time, and we represented the friends of the Boundary Waters Max's organization.

266 "Peter Surdo" (1726554112)

00:51:04.080 --> 00:51:11.610

We brought a lawsuit on behalf of the friends of the Boundary waters, challenging a plan to, uh, put a.

267 "Peter Surdo" (1726554112)

00:51:11.610 --> 00:51:26.370

Cell tower selling tenant tower along a corridor that runs the boundary. Water is called the from Burke road. Now that road is not itself wilderness, but it is surrounded by both the North and South, uh, areas of the Boundary Waters wilderness.

268 "Peter Surdo" (1726554112)

00:51:26.370 --> 00:51:32.850

It's designated as a wellness area, so the questions presented in that trial when we on behalf of the friends.

269 "Peter Surdo" (1726554112)

00:51:32.850 --> 00:51:38.910

Uh, to enjoy that tower, or the defendant was http 80 T and.

270 "Peter Surdo" (1726554112)

00:51:38.910 --> 00:51:46.740

Another entity called American tower the questions we had to try to win at the court was whether or not the proposed.

271 "Peter Surdo" (1726554112)

00:51:46.740 --> 00:51:54.540

Tower was going to have a material impact and could 18:18:T make edits affirmative defense you've already heard quite a bit about that from and Max.

272 "Peter Surdo" (1726554112)

00:51:54.540 --> 00:52:07.380

Our burden on the materiality question, came down to the 5 factors that I'm just going to blow through what our evidence was and how we decided to put it together according to each factor. But we did bring.

273 "Peter Surdo" (1726554112)

00:52:07.380 --> 00:52:10.470

Wilderness users and burgers and the, um.

274 "Peter Surdo" (1726554112)

00:52:10.470 --> 00:52:13.560

Witnesses they could talk about their experience.

275 "Peter Surdo" (1726554112)

00:52:13.560 --> 00:52:23.610

In the Boundary waters, we also had experts, um, we had a survey, or we had people who were connected into the eBay area in the business community. They can talk about.

276 "Peter Surdo" (1726554112)

00:52:23.610 --> 00:52:30.510

Their expert opinion about how this would affect the weather's experience for their business and the clients.

277 "Peter Surdo" (1726554112)

00:52:30.510 --> 00:52:50.510

We had an ornithologist that testified not listed here. We also had, like, a radio frequency expert who could do propagation maps and sort of explain what effect the tower was going to have on the service that 80 T was trying to provide in and around the Boundary Waters both to residents in the area.

278 "Peter Surdo" (1726554112)

00:52:50.510 --> 00:52:56.460

There were a few and to users of the wilderness who might want to sell signal while paddling in the boundary.

279 "Peter Surdo" (1726554112)

00:52:56.460 --> 00:53:01.320

There are also government publications, the U. S. Forest Service.

280 "Peter Surdo" (1726554112)

00:53:01.320 --> 00:53:18.870

It doesn't like a survey of users to find out what they valued about the wilderness experience. Um, and we also had some guidelines from the fish Wildlife service, relating to tower design. It's effect on bird populations.

281 "Peter Surdo" (1726554112)

00:53:18.870 --> 00:53:31.380

So, our low stars we thought was to try to align our case to, um, this 990 case called marks. That was a case that on a preliminary junction.

282 "Peter Surdo" (1726554112)

00:53:31.380 --> 00:53:34.590

Was affirmed by the court of appeals, um.

283 "Peter Surdo" (1726554112)

00:53:34.590 --> 00:53:38.850

After that we don't see much more traffic in West law, or in the case history. So.

284 "Peter Surdo" (1726554112)

00:53:38.850 --> 00:53:53.490

The case was probably resolved without for the litigation, but the fact pattern for that preliminary injunction was that the defendant had proposed to put a 600 foot FM radio tower up. That would be visible from the federal waters area.

285 "Peter Surdo" (1726554112)

00:53:53.490 --> 00:54:02.280

And, um, that was determined to, uh, the material impact. Now, the areas that it would, uh, determine.

286 "Peter Surdo" (1726554112)

00:54:02.280 --> 00:54:13.890

Um, I'll get to in the next slide, uh, with a diagram, but it was only a handful of spots from parks along a hiking trip. It wasn't the entirety of the Boundary waters and it wasn't the entirety of that trip.

287 "Peter Surdo" (1726554112)

00:54:13.890 --> 00:54:29.880

Um, the, he's also involved the potential for a bird kills because the tower required the tower design required guy wires to keep the tower. It also required lights at the top.

288 "Peter Surdo" (1726554112)

00:54:29.880 --> 00:54:37.650

And that would attract migrating birds and cause birds to fly into the tower or guy wires that you can't see at night.

289 "Peter Surdo" (1726554112)

00:54:37.650 --> 00:54:57.650

In that case, this is material that we were able to pull from the expert reports that were submitted in the 1990, the surveyor had put together a line of sight diagram in this example, the border route trail. The hiking trail they referenced is on the right the elevation of the tower is all the way to the left.

290 "Peter Surdo" (1726554112)

00:54:57.650 --> 00:55:09.720

And once you sort of look past the intervening ridges, you'd be able to see it from the wilderness area. The court and driven confirm that that impact was material.

291 "Peter Surdo" (1726554112)

00:55:09.720 --> 00:55:20.220

And so we were trying to align our case to it. This is the tower that was at issue in the ATM T case that I litigated back in 2011.

292 "Peter Surdo" (1726554112)

00:55:20.220 --> 00:55:28.470

This was a 450 foot tower that would require lights at the midpoint and at the top and would be supported by.

293 "Peter Surdo" (1726554112)

00:55:28.470 --> 00:55:48.240

This is 1 of our trial demonstratives. It was a bench trial, but we included this because it was a pretty effective way of demonstrating the prominence of a structural like this and especially in a wilderness area where it isn't built up, like a downtown. Um, it's actually as tall as the Great Pyramid of Giza.

294 "Peter Surdo" (1726554112)

00:55:48.240 --> 00:56:01.380

Taller than our Hennepin county government center, which, I mean, I can see from my neighborhood, um, in the South Minneapolis area, um, as well as, uh, not quite as well as the associate tower.

295 "Peter Surdo" (1726554112)

00:56:01.380 --> 00:56:06.480

Um, we did an impact of the visibility of that tower from, um.

296 "Peter Surdo" (1726554112)

00:56:06.480 --> 00:56:17.430

Uh, 9 or 10 slight sites, that's what the star pattern looks like. Um, especially if you're at a camp site or paddling along the shore opposite of where the tower would be located, you'd be able to see it from all of these.

297 "Peter Surdo" (1726554112)

00:56:17.430 --> 00:56:22.200

Lakes and water bodies, just to orient you all to this slide.

298 "Peter Surdo" (1726554112)

00:56:22.200 --> 00:56:28.860

The top half of it inside that red area area is all designated wilderness. The bottom, right?

299 "Peter Surdo" (1726554112)

00:56:28.860 --> 00:56:35.850

Quadrant also inside the red area designated wilderness and then the road along with the tower.

300 "Peter Surdo" (1726554112)

00:56:35.850 --> 00:56:52.320

Was going to be constructed and, in fact is now, uh, up and constructed is the sort of, um, light that's running left, right through the middle of this, um, area. So the tower is kind of going to be nestled by this little strip of land in, between the wilderness designated areas.

301 "Peter Surdo" (1726554112)

00:56:52.320 --> 00:56:55.980

Um, so we had a survey or go determined.

302 "Peter Surdo" (1726554112)

00:56:55.980 --> 00:57:06.930

Uh, where that power would be visible, including its blinking light. Um, there's a line of sight diagram here where the elevation is all the way on the left, the height of the towers all the way in the right.

303 "Peter Surdo" (1726554112)

00:57:06.930 --> 00:57:11.040

And then the other pictures show how those measurements were taken, because we went.

304 "Peter Surdo" (1726554112)

00:57:11.040 --> 00:57:20.040

And I went personally with the surveyor to develop the record here. We went in in the middle of winter, with a dog team, and we're able to kind of.

305 "Peter Surdo" (1726554112)

00:57:20.040 --> 00:57:31.200

Uh, complete this work and submit the expert evidence to the cord. Um, the defendant's computer simulation corroborate our own experts. The green areas here are wilderness areas in which.

306 "Peter Surdo" (1726554112)

00:57:31.200 --> 00:57:34.200

Uh, 80 T had agreed that that it would be visible.

307 "Peter Surdo" (1726554112)

00:57:34.200 --> 00:57:37.770

A couple of days, um.

308 "Peter Surdo" (1726554112)

00:57:37.770 --> 00:57:48.930

We also had the wilderness survey by the Forest Service. Uh, we have witness testimony about the importance of the scenic resources of the Boundary waters. Um.

309 "Peter Surdo" (1726554112)

00:57:48.930 --> 00:57:57.000

And we argued, so that was our shelf seller factor 1, the importance of the experience and, um.

310 "Peter Surdo" (1726554112)

00:57:57.000 --> 00:58:02.550



Then when we go back to the other smaller factors, we explained that the founder of waters.

311 "Peter Surdo" (1726554112)

00:58:02.550 --> 00:58:07.290

Was in particular rare and unique there's nothing else like it. Um.

312 "Peter Surdo" (1726554112)

00:58:07.290 --> 00:58:19.230

Anywhere in the upper Midwest, it's 1 of the largest and most visited with them is that areas in the country and wilderness, as opposed to national parks or national forest is truly a unique designation.

313 "Peter Surdo" (1726554112)

00:58:19.230 --> 00:58:24.660

We pointed out under seller's point 3, that this was a permanent structure.

314 "Peter Surdo" (1726554112)

00:58:24.660 --> 00:58:28.440

And then it would pair the business just as as long as it was. Huh?

315 "Peter Surdo" (1726554112)

00:58:28.440 --> 00:58:32.670

And we also pointed out that it was going to have a significant impact on.

316 "Peter Surdo" (1726554112)

00:58:32.670 --> 00:58:46.410

Uh, birds, geospatial, wildlife service pointed out that a lighted tower was dangerous and the guy wires were were dangerous. Our ornithologist pointed out that of the 30 species that are most vulnerable to tower kills.

317 "Peter Surdo" (1726554112)

00:58:46.410 --> 00:58:55.740

28 of them nest and or migrate through the Boundary waters. So that was our seller factor for other resources that would be impacted.

318 "Peter Surdo" (1726554112)

00:58:55.740 --> 00:59:07.530

This was our trial demonstrative and I'm not sure if they're on here, but my former colleagues at Robins Steven Tom were very helpful in getting this to me, because I didn't have access to it anymore.

319 "Peter Surdo" (1726554112)

00:59:07.530 --> 00:59:13.170

Um, but the point is, the, the proposed tower design was going to fail just about every guideline that the.

320 "Peter Surdo" (1726554112)

00:59:13.170 --> 00:59:24.510

Us fish and Wildlife Service had for shallow factor 5, whether the resources were increasing or decreasing number. We pointed out that, um.

321 "Peter Surdo" (1726554112)

00:59:24.510 --> 00:59:33.300

Wilderness is finite and it replaceable and once it's finished upon, it doesn't come back for populations are in decline. And the parties didn't really even dispute.

322 "Peter Surdo" (1726554112)

00:59:33.300 --> 00:59:36.960

Whether factor 5 supported our request for an injunction.

323 "Peter Surdo" (1726554112)

00:59:36.960 --> 00:59:44.400

80 T, had an affirmative defense they argued that the project was reasonably required for public health.

324 "Peter Surdo" (1726554112)

00:59:44.400 --> 00:59:52.800

And they would also have to prove, though, is their burdens instead of from a defense that there would be no feasible and prudent alternatives.

325 "Peter Surdo" (1726554112)

00:59:52.800 --> 00:59:59.070

So this is 1 of our trial demetric also from the defendant's documents. The, um.

326 "Peter Surdo" (1726554112)

00:59:59.070 --> 01:00:02.610

This is a map of what kind of coverage.

327 "Peter Surdo" (1726554112)

01:00:02.610 --> 01:00:10.920

18 T, expected the tower to achieve versus a shorter tower, which would be 195 feet tall.

328 "Peter Surdo" (1726554112)

01:00:10.920 --> 01:00:25.170

At that height, it wouldn't need to be written with lights at the top and it also wouldn't require guy wires and it wouldn't be visible all for all of these reasons we were proposing using a shorter tower. The shorter tower would have achieved the coverage. You can see it right here.

329 "Peter Surdo" (1726554112)

01:00:25.170 --> 01:00:35.010

Incremental benefit that going another 250 feet up and putting in the guy wires and lights where it's going to accomplish is what's shown in green that's the delta.

330 "Peter Surdo" (1726554112)

01:00:35.010 --> 01:00:45.210

Really, um, the in building signal network wasn't a particularly large difference and we think that was a very effective fact for the court to consider.

331 "Peter Surdo" (1726554112)

01:00:45.210 --> 01:00:49.500

For, um, being, uh.

332 "Peter Surdo" (1726554112)

01:00:49.500 --> 01:00:58.020

On street portal, which means you're no longer in the building. Similarly we show that the single tower would have the coverage area that you see here in red.

333 "Peter Surdo" (1726554112)

01:00:58.020 --> 01:01:05.880

Sorry, the shorter tower would have the coverage that you see here in red and the tower only provided incremental benefits in green.

334 "Peter Surdo" (1726554112)

01:01:05.880 --> 01:01:11.280

We also propose in addition to just doing 1 sort of power, they could have Co located in.

335 "Peter Surdo" (1726554112)

01:01:11.280 --> 01:01:18.600

On a new tower that was proposed to be built all the way at the end of the from brick road. And so if they use this to tower to alternative.

336 "Peter Surdo" (1726554112)

01:01:18.600 --> 01:01:34.890

They would have been able to get pretty good coverage and in fact, better coverage in the area they were trying to achieve. So we, we're really hammering on these alternatives is being eminently reasonable. We also did a financial analysis that you can see here. I'm not going to go through the details, but the bottom line was.

337 "" (0)

01:01:35.000 --> 01:01:40.310

80, and t's benchmark was to achieve a return on investment within 60 months.

338 "" (0)

01:01:40.310 --> 01:01:48.739

The 2 tower alternative we were focusing on would have achieved, uh, return on investment within 63 months. So it was right on the borderline of being reasonable.

339 "" (0)

01:01:48.739 --> 01:01:56.810

So, uh, we did get a win at the trial court. The district court issued a ruling finding that the impact it was material.

340 "" (0)

01:01:56.810 --> 01:02:00.950

And that there were reasonable improved alternatives. Um.

341 "" (0)

01:02:00.950 --> 01:02:10.910

The district court rule that the proposed tower would have a qualitative and severe adverse effect on the seat of views from at least at least 10 significant areas within the Boundary waters.

342 "" (0)

01:02:10.910 --> 01:02:16.640

And then the other factors went in our favor, the court of Appeals reversed.

343 "" (0)

01:02:16.640 --> 01:02:33.470

They agreed with 80 t that the district coordinator, as a matter of law. Remember the district court found that this is a material impact based on the facts of the survey and the testimony from the businesses and the other folks.

344 "" (0)

01:02:33.470 --> 01:02:41.600

But the court of Appeals said that the district court air doesn't matter of law, because it did not weigh and analyze the relatives severity.

345 "" (0)

01:02:41.600 --> 01:02:59.270

Of the proposed tower is the 1st, adverse effect on the senior views as required under 40 selling. That's the poll. Around this case. The district courts failure to do. So, as an apparent is apparent once 1 attempts to reconcile the district courts, factual findings with its conclusion. That the proposed power would have a severe effect.

346 "" (0)

01:02:59.270 --> 01:03:04.640

So, what is the, um, severity analysis that the court of appeals is looking for?

347 "" (0)

01:03:04.640 --> 01:03:15.590

But, typically, it thought that because there's over a 1000 lakes in the Boundary waters, and because we only had evidence that 10 of them, would it be affected, which is about 1%.

348 "" (0)

01:03:15.590 --> 01:03:23.180

And also, I think this is what my slide also that, you know, only some of the tower would be visible as opposed to whole thing. It can't reach.

349 "" (0)

01:03:23.180 --> 01:03:28.820

The severe threshold they thought that.

350 "" (0)

01:03:28.820 --> 01:03:37.340

To the extent that we've determined that even seeing the tower, or it's, like, would have a severe impact on the wilderness experience.

351 "" (0)

01:03:37.340 --> 01:03:45.020

That that was subjective and that, um, the, uh, mirror can't be applied on a subjective.

352 "" (0)

01:03:45.020 --> 01:03:48.020

Basis and therefore the district courts conclusion was erroneous.

353 "" (0)

01:03:48.020 --> 01:03:53.750

As a matter of law and short found error on just about all of the other.

354 "" (0)

01:03:53.750 --> 01:04:01.220

Smaller factors as well, they said that the building was not permanent because it could be pulled down.

355 "" (0)

01:04:01.220 --> 01:04:06.710

I mean, that's true of any building as closed. Um, they found that, um.

356 "" (0)

01:04:06.710 --> 01:04:17.300

I think that, because we couldn't quantify how many birds would for certain be killed that the factor about the impact on other resources shouldn't be credited at all.

357 "" (0)

01:04:17.300 --> 01:04:20.450

And they found that, uh, because.

358 "" (0)

01:04:20.450 --> 01:04:28.820

The district court error, uh, the discord aired, because it didn't determine whether or not the disc management diminishment would be significant.

359 "" (0)

01:04:28.820 --> 01:04:34.940

I personally disagree with the result of the court of appeals, but I think it is a.

360 "" (0)

01:04:34.940 --> 01:04:43.550

Lesson to all of us about how to mitigate these cases, which I have a background prior to joining.

361 "" (0)

01:04:43.550 --> 01:04:52.580

The office in the environmental group, and prior to doing this environmental for longcase, uh, an anti for us and 1 of the classic sites you always have to have is what's.

362 "" (0)

01:04:52.580 --> 01:05:00.680

The numerator and what's the denominator when you're defining the market? So, 1 of the challenges we have here and 1 that we didn't get over before the court of appeals.

363 "" (0)

01:05:00.680 --> 01:05:05.210

Was the Boundary Waters is big any 1 impact to the wilderness.

364 "" (0)

01:05:05.210 --> 01:05:08.780

Experience in 1 area of it might not impact the whole.

365 "" (0)

01:05:08.780 --> 01:05:17.420

And we could, I would recommend if you were a plaintiff in a mirror case to focus on establishing why the severity in the particular areas that you're concerned with.

366 "" (0)

01:05:17.420 --> 01:05:37.420

This material, um, perhaps that could be finding users of the particular lakes in the particular camp sites that would be affected and pointing out that for those particular places, it would be severe or otherwise trying to cabin the analysis that would otherwise expand the denominator that's being used by your points to say.

367 "" (0)

01:05:37.420 --> 01:05:45.920

That a small effect to the whole, um, isn't enough. So I tried to go quickly. Um, I think I did it in about.

368 "" (0)

01:05:45.920 --> 01:05:50.960

It's not a 14 minutes, and I know that we've got some folks that have been.

369 "" (0)

01:05:50.960 --> 01:05:56.540

Hop off, right when we're done. So I don't want to stay too long but, um, I just wanted to get you off with the opportunity to.

370 "" (0)

01:05:56.540 --> 01:06:02.491

Talk about a case, which brings back fond memories, even if we couldn't pull it out in the end.

371 "Colin O'Donovan" (3763950080)

01:06:02.491 --> 01:06:21.519

Thank you, Pete and Max that was wonderful. Presentation on both both topics throughout the middle years. Our next, our next topic is going to be related to deference in the modern era. And our colleague, Pete feral will be discussing it. He is not only in.

372 "Colin O'Donovan" (3763950080)

01:06:21.519 --> 01:06:41.519

Attorney general, but he has been recently promoted to the deputy solicitor general of the solicitor general section of our office, the youngest person to ever hold that. Some people have called him a visionary or a prophet but I'm happy to just call him. A colleague. He joined our office cemetery in general in 2019 and in that role, he has handled a wide variety of complex cases.

373 "Colin O'Donovan" (3763950080)

01:06:41.519 --> 01:06:45.919

Several, including beyond just the environmental area with the special focus on appeals.

374 "Colin O'Donovan" (3763950080)

01:06:45.919 --> 01:06:57.859

He successfully argued 2 cases to Minnesota Supreme Court on significant issues of state, constitutional law and public property rights and he has also litigated numerous other appeals in both state.

375 "Colin O'Donovan" (3763950080)

01:06:57.859 --> 01:07:13.549

And federal court, prior to joining our office Mr. was February Baker Daniels and DLA Piper. She's a graduate of the school of law, and the clerk for justice Paul Anderson justice g Barry Anderson and justice David stress of the Minnesota Supreme Court.

376 "Colin O'Donovan" (3763950080)

01:07:13.549 --> 01:07:18.277

And with that, I will turn it over to Mr. Charles.

377 "Pete Farrell" (1776724480)

01:07:18.277 --> 01:07:26.929

Alright, well Thank you for that. Uh, incredible introduction. Um.

378 "Pete Farrell" (1776724480)

01:07:26.929 --> 01:07:37.279

And I will try to actually share my screen, which is a technical difficulty on facing right now and apparently is not part of.

379 "Pete Farrell" (1776724480)

01:07:37.279 --> 01:07:41.407

Something I'm capable of doing, um, give me 3rd.

380 "Colin O'Donovan" (3763950080)

01:07:41.407 --> 01:07:49.597

Here we've all had, uh, I've had that and so several other presenters if it's helpful. Uh.

381 "AGO Host" (3471776000)

01:07:49.597 --> 01:07:52.489

I can also do it.

382 "Pete Farrell" (1776724480)

01:07:52.489 --> 01:07:58.129

Yeah, do you mind? I actually just pulling it up. Yep. Yep.

383 "Pete Farrell" (1776724480)

01:07:58.129 --> 01:08:06.259

All right, I'm going to dive right in and, uh, you know, being cognizant of the time and talk about a.

384 "Pete Farrell" (1776724480)

01:08:06.259 --> 01:08:14.149

Topic, I'm fascinated in it has to do with agency difference and it builds on some of the discussion that and.

385 "Pete Farrell" (1776724480)

01:08:14.149 --> 01:08:23.839

Max, and Pete have already laid the groundwork for, which is how we should think about mirror and how mirror overlaps or departs from.

386 "Pete Farrell" (1776724480)

01:08:23.839 --> 01:08:34.219

Historical principals of agency deference that we think about when we think about judicial review of agency decisions. So next slide.

387 "Pete Farrell" (1776724480)

01:08:34.219 --> 01:08:38.269

So, we're going to cover a lot of ground today and it's, it's going to be, um.

388 "Pete Farrell" (1776724480)

01:08:38.269 --> 01:08:52.009

You know, cover a lot of different types of topics, but in general, I'm going to start off by talking about what some of those core principles of agency deference are then really focus on how section 10 of nearer is different.

389 "Pete Farrell" (1776724480)

01:08:52.009 --> 01:09:12.009

With a brief detour into how section 3 and section 10 of mirror now overlap in some ways, and then conclude by discussing how mira's skepticism agency power really aligns with some modern trends that are very skeptical of agency power as well particularly in the federal courts. And particularly at the.

390 "Pete Farrell" (1776724480)

01:09:12.009 --> 01:09:13.159

Supreme Court.

391 "Pete Farrell" (1776724480)

01:09:13.159 --> 01:09:32.779

Excellent. So, just to lay the groundwork for the discussion today, I just want to go through and flag some of those core principles of agency deference that Minnesota practitioners are really familiar with Minnesota has a well developed body of case law.

392 "Pete Farrell" (1776724480)

01:09:32.779 --> 01:09:38.899



Um, in the in the administrative law area, and that case law requires courts to give.

393 "Pete Farrell" (1776724480)

01:09:38.899 --> 01:09:58.899

Substantial deference to agency decisions, so if you pick up any decision of the Minnesota court of appeals, presidential non, presidential, just a vanilla appeal of some agency decision. You'll see a lot of the following background assumptions in that opinion. So 1 of those background assumptions will be that.

394 "Pete Farrell" (1776724480)

01:09:58.899 --> 01:10:01.969

Decisions are presumed to be correct.

395 "Pete Farrell" (1776724480)

01:10:01.969 --> 01:10:21.969

Just right off the bat courts are going to assume that the agency got it right another core principle of differences that agency should get should get difference in areas of their expertise, particularly in technical areas. So, the Minnesota pollution control agency is going to get difference when it comes to water pollution regulation. That's a.

396 "Pete Farrell" (1776724480)

01:10:21.969 --> 01:10:41.969

Area that cts don't have any special expertise. Another core principle is that agencies deserve deference when they resolve conflicts and evidence. So, as is often the case, when an agency is making a decision, it's going to have competing bodies of evidence from different expert witnesses and the agency is going to.

397 "Pete Farrell" (1776724480)

01:10:41.969 --> 01:11:00.709

Resolve those conflicts in in evidence and it's going to make certain findings of facts and even courts, even if a court would resolve that conflict differently. If it was sitting as a court of 1st review, it is in general, going to give deference to the agency's resolution of that conflict. And finally.

398 "Pete Farrell" (1776724480)

01:11:00.709 --> 01:11:17.389

Although courts review agency, interpretations of statutes and rules to novo. If a core concludes that a statute or rule is ambiguous, then in general, with some caveats will discuss later and agency's interpretation is going to be upheld. If it's reasonable.

399 "Pete Farrell" (1776724480)

01:11:17.389 --> 01:11:27.349

Next slide so those are some of the core background principals that informed judicial review of agency decisions, but.

400 "Pete Farrell" (1776724480)

01:11:27.349 --> 01:11:47.349

Judicial review is also happened by statute, particularly in the environmental area many if not most decisions of Minnesota does main environmental agencies, particularly the pollution control agency are going to be reviewed under section 14.69the, Minnesota, administrative procedure act and the vehicle for.

401 "Pete Farrell" (1776724480)

01:11:47.349 --> 01:12:01.489

So is going to be a writ of certiorari. It's a fancy way of saying, a direct appeal to the court of appeals. You don't go to the district court. You just go up on the record to the court of appeals and the scope of review under mapp is narrow.

402 "Pete Farrell" (1776724480)

01:12:01.489 --> 01:12:11.179

Next slide please under section 14.69a court can only set aside the agency's decision. If.

403 "Pete Farrell" (1776724480)

01:12:11.179 --> 01:12:17.839

The petitioner shows that substantial right. Segment prejudice. So there needs to be prejudice and.

404 "Pete Farrell" (1776724480)

01:12:17.839 --> 01:12:29.119

Several statutorily defined errors happen and those errors fall into a couple of big buckets. The 1st, big bucket is the agency made some sort of fundamental.

405 "Pete Farrell" (1776724480)

01:12:29.119 --> 01:12:32.359

Legal error, um, so it, you know.

406 "Pete Farrell" (1776724480)

01:12:32.359 --> 01:12:52.359

Acted unconstitutionally it went beyond it's statutory authority. Um, the other big bucket is something procedural, some fundamental procedural flaw in how the agency made its decision. Maybe it didn't comply with the statutes or regulations that's required to when it's making a licensing or permitting decision. That can be a, a vehicle or a basis.

407 "Pete Farrell" (1776724480)

01:12:52.359 --> 01:13:10.969

Records set aside the agency's decision and the last big bucket is just sort of general record review and the 2 big ways that course review agency decisions are are for substantial evidence and under the arbitrary or capricious standards next slide.

408 "Pete Farrell" (1776724480)

01:13:10.969 --> 01:13:30.969

And those concepts, substantial evidence and arbitrary or capricious review are really important to those background principals of agency. Deference. This is where you see those principles doing a lot of work. So, you will

be able to find lots of Minnesota decisions that say, you know, as long as the agency's.

409 "Pete Farrell" (1776724480)

01:13:30.969 --> 01:13:50.969

Is supported by substantial evidence will uphold it. What a substantial evidence mean? Well, you'll find cases that described it as more than a scintilla. Some evidence, you'll even find cases that say any evidence, if there's any evidence to support the agency's decision, then it satisfies a substantial evidence standard and similarly, the arbitrary or capricious.

410 "Pete Farrell" (1776724480)

01:13:50.969 --> 01:14:07.999

Standard which I think about as a backstop for those cases, where maybe there is evidence in the record to support the agency's decision. But the court is ultimately unsatisfied for some fundamental reason with what the agency did that review is going to be limited to whether.

411 "Pete Farrell" (1776724480)

01:14:07.999 --> 01:14:12.769

The agency's decision is a reflection of its will instead of its judgment.

412 "Pete Farrell" (1776724480)

01:14:12.769 --> 01:14:28.609

Next slide so that's that's that's the principles of the initial review they're going to apply if we're inception 14.69of, Napa land, which is going to govern in a lot of.

413 "Pete Farrell" (1776724480)

01:14:28.609 --> 01:14:48.609

Different types of review of agency decision making, um, particularly when agencies are, for example, acting in a quasi judicial capacity and 14.69specified to apply. But judicial review of agency rulemaking is even narrower and alluded to this earlier the main way under mappa that you can challenge agency.

414 "Pete Farrell" (1776724480)

01:14:48.609 --> 01:15:08.609

The rules is through a declaratory judgment action in the court of Appeals those statutes authorize a petitioner to bring a challenge to an agency rule, but courts can only reverse the agencies rulemaking in very narrow circumstances. So the agency has to do something unconstitutional beyond its statutory authority.

415 "Pete Farrell" (1776724480)

01:15:08.609 --> 01:15:16.399

Or it has to really mess up the statutory rule, making procedures short of that. The agency's rule is going to be upheld.

416 "Pete Farrell" (1776724480)

01:15:16.399 --> 01:15:36.399

Next slide so that that is the background that I just wanted to in the context that I wanted to lay before we move into mirror and a fuller

discussion of how Mira departs from those background principles of agency different in some pretty significant ways.

417 "Pete Farrell" (1776724480)

01:15:36.399 --> 01:15:56.399

And I'm going to focus primarily on section 10. I will also discuss section 3 in section 9 briefly, but I'm going to focus mainly on section 10 because section 10 is really intriguing, because it provides such a different model for challenging agency action. And if you look at the history that Ann was talking about earlier, think you understand why.

418 "Pete Farrell" (1776724480)

01:15:56.399 --> 01:16:02.989

The drafters of Neuro were very skeptical that administrative agencies were going to get decisions. Right?

419 "Pete Farrell" (1776724480)

01:16:02.989 --> 01:16:22.989

Or that administrative agencies wouldn't be captured by industry or that administrative agencies weren't going, or we're going to strike the balance correctly between protection of the environment and economic considerations. So, section 10 provides a very different vehicle for challenging agency action, a different forum, a different procedure. And a different standard.

420 "Pete Farrell" (1776724480)

01:16:22.989 --> 01:16:23.749

To review.

421 "Pete Farrell" (1776724480)

01:16:23.749 --> 01:16:43.749

Next slide, so I want to start by talking a little bit about the nature of a section 10 action. I've quoted some of the some, but not all of the operative texts and I just want to break it down a little bit. So what's the section 10? Authorize 1st section 10 authorizes a civil action in district court, so right.

422 "Pete Farrell" (1776724480)

01:16:43.749 --> 01:17:03.749

Off the bat, this kind of case is going to look very different than a surgery appeal. Right? You're going to district court it authorizes certain types of relief. You can't get money damages, but you can get declaratory your equitable relief and there's an express waiver of sovereign community under section 10. you can see the state. And what can you see the state.

423 "Pete Farrell" (1776724480)

01:17:03.749 --> 01:17:06.199

Well, you can see them for a basically.

424 "Pete Farrell" (1776724480)

01:17:06.199 --> 01:17:26.199

Anything related to the environment that they might do so the statute says, you can sue or you can challenge an agency's decision to issue an environmental quality standard rule order license, a stipulation agreement,

which would be a private settlement agreement between the agency and a private settlement agreement but a settlement agreement between the agency.

425 "Pete Farrell" (1776724480)

01:17:26.199 --> 01:17:35.899

A regulated party or a permit, and you can do so, after the statutory a few period has lapsed. So, this type of challenge can be brought at any time.

426 "Pete Farrell" (1776724480)

01:17:35.899 --> 01:17:48.559

Next slide the mechanics of a section 10 action are also really interesting. So you're in district court and what do you have to do when you get there? Well, you have to prove that.

427 "Pete Farrell" (1776724480)

01:17:48.559 --> 01:18:08.449

Whatever agency action you're challenging here we'll just say it's an environmental quality. Standard isn't adequate to protect the natural resources located within the state from pollution impairment or destruction. Same definition that Max went over that you'll see in the statute that carries throughout. If a point of makes a prima facie showing.

428 "Pete Farrell" (1776724480)

01:18:08.449 --> 01:18:12.799

Then the statute says that under section 10, the district court is required.

429 "Pete Farrell" (1776724480)

01:18:12.799 --> 01:18:21.529

To remit the parties to the state agency for appropriate administrative proceeding. So the agency can consider the challenge and make findings.

430 "Pete Farrell" (1776724480)

01:18:21.529 --> 01:18:31.429

And during that remitter process, the district court is going to retain jurisdiction for the purposes of judicial review and ultimately review whatever the agency does.

431 "Pete Farrell" (1776724480)

01:18:31.429 --> 01:18:35.089

For under preponderance of the evidence standard.

432 "Pete Farrell" (1776724480)

01:18:35.089 --> 01:18:39.709

Next 1.

433 "Pete Farrell" (1776724480)

01:18:39.709 --> 01:18:44.929

So that's what section 10 is about, uh, covered some of the mechanics.

434 "Pete Farrell" (1776724480)

01:18:44.929 --> 01:19:04.339

If there's a lot, we don't know about section 10, because as as an alluded to earlier, it's rarely been used with 1 important exception that will talk

a little bit about here or here in a moment. And so, because we don't have a lot of section 10 litigation, um, we don't have a lot of judicial guidance on.

435 "Pete Farrell" (1776724480)

01:19:04.339 --> 01:19:12.769

A lot of key terms in the statute. So, for example, what is a showing that's necessary to get or agency rule.

436 "Pete Farrell" (1776724480)

01:19:12.769 --> 01:19:27.679

For example, kicked back to the agency for administrative proceedings what are those appropriate, appropriate administrative proceedings? What do they look like and how does that preponderance of the evidence standard review differ from the substantial evidence standard of review.

437 "Pete Farrell" (1776724480)

01:19:27.679 --> 01:19:34.579

How is it supposed to be different? Is it something that's more aggressive? Is it less deferential? We just don't have guidance on those questions from the courts.

438 "Pete Farrell" (1776724480)

01:19:34.579 --> 01:19:47.059

Next 1 now, and we can talk a little bit about why I think we don't have much guidance in the way of section 10 and why it's been lightly used, but we may be getting some guidance. And so.

439 "Pete Farrell" (1776724480)

01:19:47.059 --> 01:19:50.959

I neglected at the beginning to note that, um.

440 "Pete Farrell" (1776724480)

01:19:50.959 --> 01:19:54.109

This presentation, I'm giving it my personal capacity.

441 "Pete Farrell" (1776724480)

01:19:54.109 --> 01:20:14.109

Nothing should be attributed here to the office or to our clients and I particularly want to make that a parent when I'm discussing this case, because it's inactive litigation and our office is representing the DNR. So, I'm just going to talk at a very high level about everything that's on the public docket. Just as an example of how a section 10 case can proceed. So we do have 1.

442 "Pete Farrell" (1776724480)

01:20:14.109 --> 01:20:34.109

Example of section 10 case that is inactive litigation and it has to do with mining and the rainy river headwaters watershed. And the genesis of the suit is that the northeastern Minnesota wilderness group sued the DNR under section 10 alleging that a mind citing rule that the DLT DNR promulgated.

443 "Pete Farrell" (1776724480)

01:20:34.109 --> 01:20:45.379

Many years ago is inadequate to protect the Boundary waters from pollution impairment or destruction. And the thrust of the complaint is that the mind siding rule should be expanded to ban.

444 "Pete Farrell" (1776724480)

01:20:45.379 --> 01:20:59.809

Uh, non fares, metallic mineral mining in the rainy river headwaters watershed. That is, of course where the twin metals mind would be located if it ever were to be built in terms of how the case has played out so far. Um.

445 "Pete Farrell" (1776724480)

01:20:59.809 --> 01:21:19.809

Northeastern minnesotans, and for wilderness, and the DNR entered into a stipulation where they agreed that emw had met it's prima fishy burden. And then they came up with a process that would govern how the remitter process at the agency would work. They propose that to the district court to approve the.

446 "Pete Farrell" (1776724480)

01:21:19.809 --> 01:21:39.809

Order and that remand order is interesting. It provides for public comment on the rule that's been challenged. It requires the to make an additional, an initial decision on the challenge rule. It then allowed the parties to the district court litigation, which include and twin metals to petition for a contested.

447 "Pete Farrell" (1776724480)

01:21:39.809 --> 01:21:48.379

Hearing, and that's ultimately where the litigation is now that if litigation is in a contested case process so 1 example of how a section 10.

448 "Pete Farrell" (1776724480)

01:21:48.379 --> 01:21:51.829

Litigation could play out next slide.

449 "Pete Farrell" (1776724480)

01:21:56.089 --> 01:22:16.089

Bring this together how does a section 10 litigation compare to review under map? So, under map in most situations are going to be going up from the agency's decision on direct review to the court of appeals. Maybe you have a contested case hearing you age, but in a lot of situations, just direct review there are going to be strict time limits. A lot of the time.

450 "Pete Farrell" (1776724480)

01:22:16.089 --> 01:22:28.699

Those principals and agency deference are generally going to apply if you get to the record, or if you're reviewing the agencies finding substantial evidence or arbitrary or capricious review is going to be in play and once submitted.

451 "Pete Farrell" (1776724480)

01:22:28.699 --> 01:22:48.699

You're going to get a judicial decision in 90 days. 1 great feature of the Minnesota pilot courts is that there's a statute that says they have to decide cases within 90 days. I have a friend who practice and other jurisdictions that are flabbergasted by that requirement. You can have an appeal, and it takes way longer than 3 months but.

452 "Pete Farrell" (1776724480)

01:22:48.699 --> 01:23:02.719

That's not the case here in Minnesota, you're going to get a judicial decision now contrast that with section 10 now, in section 10, you're going to be in district court, there's no time limit for you to bring that challenge. You don't have judicial guidance on whether any principles of agency deference apply.

453 "Pete Farrell" (1776724480)

01:23:02.719 --> 01:23:22.719

Ultimately, the district court is going to have the authority to review the agency's decision under preponderance of the evidence standard not sure if that's different than the substantial evidence standard and you're going to get a judicial decision. But it's certainly not going to be in 90 days. You're going to be in district court with everything that entails and, you know, just to take an.

454 "Pete Farrell" (1776724480)

01:23:22.719 --> 01:23:32.989

That northeastern minnesotans, wilderness case was filed in 2020. it's 2024 now, and we're just in a contested case process so probably going to be a while before we get the final decision.

455 "Pete Farrell" (1776724480)

01:23:32.989 --> 01:23:52.989

Next slide, I'm gonna just do a brief detour on section 3. um, and really I just want to flag this, because on a cold read of mirror, it might look like, section 10 is the main vehicle to challenge state action, but that's not how the Minnesota Supreme Court hasn't.

456 "Pete Farrell" (1776724480)

01:23:52.989 --> 01:23:57.379

Completed section 3 next slide.

457 "Pete Farrell" (1776724480)

01:23:57.379 --> 01:24:17.379

So, in 2020, the Minnesota Supreme Court decided the White bear lake case. This is a case where homeowner associations sued the DNR alleging that they had mismanaged the groundwater appropriation permitting process. They sued the DNR under section 3. and the theory was that the conduct of the DNR and managing that permitting process.

458 "Pete Farrell" (1776724480)

01:24:17.379 --> 01:24:34.369

That had caused pollution and impairment of the lake. Now, the had several arguments, uh, on the merits as to why the litigation should fail. But 1 of the main ones was, that associations had sued under the wrong provision



of mirror that they had to sue under section. 10, the court of Appeals agreed with that.

459 "Pete Farrell" (1776724480)

01:24:34.369 --> 01:24:54.369

Next slide, but the Supreme Court did not, but the Supreme Court held, I think, irrelevant part that section 3 can be used to challenge administrative action of state agencies and in doing. So, it held that. If you're in section 3 land, no special deference is due to an administrative agency.

460 "Pete Farrell" (1776724480)

01:24:54.369 --> 01:25:07.369

This record is sitting as a court of 1st review and the court really emphasized that section 10 is not the exclusive vehicle for challenging agency action under mirror section 10 as an alternative remedy. Not the exclusive remedy.

461 "Pete Farrell" (1776724480)

01:25:07.369 --> 01:25:27.369

Next slide very brief note on section 9, uh, just in the entrance of interest of completeness. Uh, that is an important provision of mirror and that allows intervention and ongoing proceedings, as opposed to section 10, which, I think contemplates challenges to agency.

462 "Pete Farrell" (1776724480)

01:25:27.369 --> 01:25:47.369

Where the statutory appeal, period has lapsed. So under section 9, the mechanics are a citizen can come in say that the agency is doing doesn't protect the environment from pollution impairment or destruction through a verified pleading. And if they do, so the agency that has to consider that issue.

463 "Pete Farrell" (1776724480)

01:25:47.369 --> 01:26:03.889

Interestingly, in section 9 action, the statutes that specifies, that judicial review of the pollution impairment destruction issue is going to be in accordance with Napa. So different than section 10, which has that preponderance of the evidence language next slide.

464 "Pete Farrell" (1776724480)

01:26:03.889 --> 01:26:23.889

So, to sum up, I really think that Mira is fascinating and how it departs from those general principles of agency deference that those of us who practice in this area are really familiar with in section 3 actions the district court is going to be sitting as a court a 1st impression and there's no special deference due to the.

465 "Pete Farrell" (1776724480)

01:26:23.889 --> 01:26:43.889

Decision making, in section 10 actions citizens are able to challenge all sorts of stuff that agencies do, even if the appeal period has lapsed and can force agencies Institute administrative proceedings to justify their

decisions subject to further judicial review. Now, that's not to suggest that section 3 section 10 actions are.

466 "Pete Farrell" (1776724480)  
01:26:43.889 --> 01:26:46.939  
As Pete noted their expert.

467 "Pete Farrell" (1776724480)  
01:26:46.939 --> 01:26:54.949  
Intensive, they're very factor of them. These aren't easy cases to bring. It's a very different model for challenging agency decision making.

468 "Pete Farrell" (1776724480)  
01:26:54.949 --> 01:27:00.499  
Next slide.

469 "Pete Farrell" (1776724480)  
01:27:00.499 --> 01:27:05.479  
So, in terms of, um.

470 "Pete Farrell" (1776724480)  
01:27:05.479 --> 01:27:12.889  
This slide I just sort of puts a point on what I was just summarizing, which is that, uh.

471 "Pete Farrell" (1776724480)  
01:27:12.889 --> 01:27:32.889  
In terms of the Michigan statute expert commenters have noted what a, what a serious way in which that statute departs from general principles of agency deference and how it favors robust judicial review in the sense that courts are able to review agency action and to remedy violation.

472 "Pete Farrell" (1776724480)  
01:27:32.889 --> 01:27:36.769  
To avoid environmental damage next slide.

473 "Pete Farrell" (1776724480)  
01:27:41.089 --> 01:27:52.729  
And that sort of combination, skepticism, agency, expertise, broad judicial review does align with some current trends that you're seeing, particularly at the U. S. Supreme Court.

474 "Pete Farrell" (1776724480)  
01:27:52.729 --> 01:28:01.729  
Obviously, I am not going to say that that trend encompasses the part of mirror that involves, um, that involves, uh.

475 "Pete Farrell" (1776724480)  
01:28:01.729 --> 01:28:21.729  
Protection of the environment. I don't think that's animating. The U. S. Supreme Court's decision making. But you are seeing a real emphasis on rolling back, deference doctrines. That have governed for many, many years. So, for example, this term Chevron difference seems to be on the chopping block. If if Chevron is not.

476 "Pete Farrell" (1776724480)

01:28:21.729 --> 01:28:41.729

Reversed that seems very likely that the court is going to scale it back. The court has reinvigorated this major questions doctrine, or perhaps created a major questions doctrine where the agency where the court is saying, look, unless Congress speaks. Absolutely unequivocally clearly.

477 "Pete Farrell" (1776724480)

01:28:41.729 --> 01:29:01.729

The agency can, uh, can regulate in an area of political and economic significance. We are not going to read a statute to authorize the agency to do. So, and then you're even seeing that in terms of how courts are deferring to agency interpretations of their own regulations. That's our difference that's records generally will differ.

478 "Pete Farrell" (1776724480)

01:29:01.729 --> 01:29:21.729

To an agency's interpretation of an ambiguous regulation that regimes survived in a case called Kaiser WILKIE in 2019 justice Kagan was able to cobble together a majority, but it's really an hobble form. I mean, that decision basically says after you exhaust every single tool of statutory construction.

479 "Pete Farrell" (1776724480)

01:29:21.729 --> 01:29:33.529

Uh, if there's nothing left and you're still left with the gap, then you defer to the agency. Uh, but it's a less robust certainly a less robust difference. Difference receive next slide.

480 "Pete Farrell" (1776724480)

01:29:36.889 --> 01:29:56.889

You're also starting to see this pop up in the States. Several states, Supreme Court and outright said, we don't defer to agency decision making other states have done the same by statute. Minnesota is not 1 of them, but I would say that there are some hints that the Court's conducting a more searching review of agency action.

481 "Pete Farrell" (1776724480)

01:29:56.889 --> 01:30:08.299

In 1 of the recent polymeet decisions having to do with the permit, the National pollutant discharge elimination system permit that was at issue. The court really emphasized that, um.

482 "Pete Farrell" (1776724480)

01:30:08.299 --> 01:30:28.299

They're they, they may, but are not required to defer to an agencies interpretation of an ambiguous statute or regulation, and that the court decides difference on a case by case basis. Similarly, there are cases from the past couple of terms where the court has emphasized that it's going to defer to an agencies interpretation of an.

483 "Pete Farrell" (1776724480)

01:30:28.299 --> 01:30:35.509

The U. S regulation, but that the agency's interpretation has to be reasonable and that reasonable is review does have some teeth.

484 "Pete Farrell" (1776724480)

01:30:35.509 --> 01:30:42.319

Of the agency's interpretation has to be long standing, it has to compete with the overall regulatory structure. It's not just a rubber stamp.

485 "Pete Farrell" (1776724480)

01:30:42.319 --> 01:31:02.319

Next slide, and this is from a law review article. The last slide is a source page where you can pull the water, you article that this is taken from. But the author went through and categorized how deference doctrines are changing in the States and where there's been judicial.

486 "Pete Farrell" (1776724480)

01:31:02.319 --> 01:31:11.779

Rejection of different doctrines or legislative rejection and you'll see, the map is shifting and it's shifted in a big way, particularly over the past 10 to 20 years.

487 "Pete Farrell" (1776724480)

01:31:11.779 --> 01:31:21.379

Um, and, you know, I think mirror comports with that shift, uh, in, in the sense that it's very skeptical of agency expertise.

488 "Pete Farrell" (1776724480)

01:31:21.379 --> 01:31:39.739

Next slide. All right I am at time, so I am going to pass it over to, uh, Colin to bring us home. If you have any questions feel free to reach out to me by email. Really appreciate the opportunity to speak to everyone today.

489 "Pete Farrell" (1776724480)

01:31:39.739 --> 01:31:46.129

And, uh, thanks. Bye thanks, Pete.

490 "Pete Farrell" (1776724480)

01:31:46.129 --> 01:31:56.929

Uh, and for our final presentation, I will be leading that again, as other colleagues have stated the opinions that are presented here are my own, not those at the office.

491 "Pete Farrell" (1776724480)

01:31:56.929 --> 01:32:16.039

My name is Colin or Donovan. I am a assistant attorney general here in the environmental, natural, natural resources division. I've been here for going on my 8th year now and really enjoyed prior to that. I was figuring private practice and graduated from Northwestern law.

492 "Pete Farrell" (1776724480)

01:32:16.039 --> 01:32:29.089

Like, Pete in Chicago today, we're gonna look at sort of what are other states doing, how can practitioners in particular use that to their advantage.

493 "Pete Farrell" (1776724480)

01:32:29.089 --> 01:32:33.289

And what are the code maybe for the future here in Minnesota?

494 "Pete Farrell" (1776724480)

01:32:33.289 --> 01:32:41.389

It's 5. please. So I'd like to really discuss 4 points today. Um, and 1st is.

495 "Pete Farrell" (1776724480)

01:32:41.389 --> 01:32:52.999

Getting our handle on what really is the body of other states in case law that is going to be most representative that that would be useful to be looking at. So, which other states have sort of similar environmental protection statutes.

496 "Pete Farrell" (1776724480)

01:32:52.999 --> 01:32:56.149

That were passed around the same time in the early 970. S.

497 "Pete Farrell" (1776724480)

01:32:56.149 --> 01:33:04.669

The 2nd point I want to suggest, and sort of persuade you that it's worth considering other statutes from states and their case law.

498 "Pete Farrell" (1776724480)

01:33:04.669 --> 01:33:13.159

And we don't see it as often. Now, it takes more time and people are hurting and rushed, but hopefully after this presentation.

499 "Pete Farrell" (1776724480)

01:33:13.159 --> 01:33:16.579

You'll give it a, you'll give the least a consideration in your next brief.

500 "Pete Farrell" (1776724480)

01:33:16.579 --> 01:33:33.259

The 3rd point is, how have Minnesota courts relied on other states neuro, like, statutes or not to inform its own precedent. So, regardless of how it's been done in the past, you know, is it still viable? And should it be used by you?

501 "Pete Farrell" (1776724480)

01:33:33.259 --> 01:33:41.689

Last, what did the cases suggest for our future decisions here and possible ways that you could be using them?

502 "Pete Farrell" (1776724480)

01:33:41.689 --> 01:33:47.869

Uh, in future litigation, next slide please.

503 "Pete Farrell" (1776724480)  
01:33:47.869 --> 01:33:50.929  
So, this really sort of outlines the, um.

504 "Pete Farrell" (1776724480)  
01:33:50.929 --> 01:34:10.929  
The main other states that are worthy of sort of looking at, in depth. You're going to be doing some research trying to make an hour, an August, uh, sort of compromises and say this is what these courts did here. This is a factual, factual pattern that has already been analyzed and here's how a court ruled, and it's put them in in somewhat rank of.

505 "Pete Farrell" (1776724480)  
01:34:10.929 --> 01:34:30.289  
The likelihood of how often you're going to find cases that are either going to be persuasive or or not. But I don't want you to just sort of think we always start with Michigan and then you just go down to South Dakota. Obviously, some have more more cases than others. Next slide please.

506 "Pete Farrell" (1776724480)  
01:34:30.289 --> 01:34:36.049  
What's really important is that you have to be careful and really be thinking about the issue that you're dealing with.

507 "Pete Farrell" (1776724480)  
01:34:36.049 --> 01:34:56.049  
Um, so not all the statutes have the same provisions, sometimes they are radically different, just entire provision will not be included and sometimes it's more nuanced and depending on what issue that you're dealing with, in the case that's being presented to you that that may be the critical issue is what exactly are the terms cause this is a statute that is really text driven.

508 "Pete Farrell" (1776724480)  
01:34:56.049 --> 01:35:05.689  
And a lot of the analysis that we see the analysis that we see here in Minnesota and in the other courts is, what does the actual text say? And how does that become outcome? Determinative.

509 "Pete Farrell" (1776724480)  
01:35:05.689 --> 01:35:15.229  
More so than more, so than many other statutes. Um, and what's interesting about both our mirror and the other statutes and other.

510 "Pete Farrell" (1776724480)  
01:35:15.229 --> 01:35:19.279  
In other states is these are not statutes that have, um.

511 "Pete Farrell" (1776724480)  
01:35:19.279 --> 01:35:27.079  
See, that that have seen a lot of revision and so really they have seen some, but it is primarily, especially in Minnesota.

512 "Pete Farrell" (1776724480)

01:35:27.079 --> 01:35:30.679  
It was passed and remains in large part of the same.

513 "Pete Farrell" (1776724480)  
01:35:30.679 --> 01:35:41.629  
So you really do have to be careful and I've given 2 examples here in the 4th and 3rd bullet. So the Pre States, environmental statutes, Connecticut's and South Dakota.

514 "Pete Farrell" (1776724480)  
01:35:41.629 --> 01:35:51.019  
Um, and Florida is really are are pretty different, and you have to be careful because they don't have an explicit cause of action for the violation.

515 "Pete Farrell" (1776724480)  
01:35:51.019 --> 01:35:58.249  
Of of a regulation so when you're looking at that, I mean, if that's if that's the issue, we really have to be.

516 "Pete Farrell" (1776724480)  
01:35:58.249 --> 01:36:02.929  
Um, sort of careful on 1 is it is it worth the time to be kind of.

517 "Pete Farrell" (1776724480)  
01:36:02.929 --> 01:36:07.699  
Going, um, going into that case law at all? Probably not.

518 "Pete Farrell" (1776724480)  
01:36:07.699 --> 01:36:17.689  
Um, but also just knowing that if you're seeing some cases, and you're seeing some analysis to be skeptical as to, you know, how that, how you use that in that situation. If that's your issue.

519 "Pete Farrell" (1776724480)  
01:36:17.689 --> 01:36:27.049  
In contrast in Michigan, you have to be careful as compared to Minnesota, which in Michigan, you can get the, um, no feasible alternative.

520 "Pete Farrell" (1776724480)  
01:36:27.049 --> 01:36:40.219  
Uh, for all for all actions, whether it's a material adverse impact, or whether it's a violation of fashion, obviously, as you've heard from our prior discussions with the presenters, that's not the case here in Minnesota and that's been sort of.

521 "Pete Farrell" (1776724480)  
01:36:40.219 --> 01:36:51.409  
Changed through the the case law, so you have to be really careful not to be citing Michigan case law for that proposition under the material average impact. It just won't be persuasive.

522 "Pete Farrell" (1776724480)  
01:36:51.409 --> 01:36:58.819

What I find most helpful when I'm doing this, this, as a practitioners tip is when you're dealing with a specific issue.

523 "Pete Farrell" (1776724480)

01:36:58.819 --> 01:37:13.309

Sort of lined up, whether it's the 3:4:5 or all 6, and sort of identify what are the differences just doing your own text analysis in an Excel spreadsheet side by side and then it just pops out at you where the difference is it's 5, please.

524 "Pete Farrell" (1776724480)

01:37:17.599 --> 01:37:27.109

So, why, why should you be considering other states? And I think there's really 4 points that I think are valuable. There's a statutory argument.

525 "Pete Farrell" (1776724480)

01:37:27.109 --> 01:37:30.559

There's just the general, you know, is it persuasive authority?

526 "Pete Farrell" (1776724480)

01:37:30.559 --> 01:37:47.209

Um, looking at other states is going to significantly increase how much law you're able to sort of analyze and what arguments have already been made and been successful or not. And also, as a defendant, um, how can you defend against certain actions that are being brought against your client?

527 "Pete Farrell" (1776724480)

01:37:47.209 --> 01:37:58.759

Um, and then 4th, although it can be time consuming initially to set up the chart as to sort of what the differences are once that's done. And I'm not sure that that takes a significant amount of time.

528 "Pete Farrell" (1776724480)

01:37:58.759 --> 01:38:03.109

It's not incredibly difficult to actually look at these other statutes and I'll give you sort of.

529 "Pete Farrell" (1776724480)

01:38:03.109 --> 01:38:10.249

2 ways of looking at that that I found successful next slide please.

530 "Pete Farrell" (1776724480)

01:38:10.249 --> 01:38:22.069

So, the statutory argument, uh, here in Minnesota, we have, uh, the tens of construction that's Minnesota statute. 605 and Minnesota statute 145 dot 22.

531 "Pete Farrell" (1776724480)

01:38:22.069 --> 01:38:34.849

Is a Canon construction that says the law's uniform with those of other states shall be interpreted and construed to affect their general purpose to make uniform the laws of those stage, which knock them.

532 "Pete Farrell" (1776724480)



01:38:34.849 --> 01:38:41.929

And so, um, that the case here in peer, which was another mirror case that was discussed earlier.

533 "Pete Farrell" (1776724480)

01:38:41.929 --> 01:38:51.799

That's that's what it's exciting. And it's signing the Minnesota Supreme Court case, which is also citing the actual canon of construction. So I think it's really important to sort of, um.

534 "Pete Farrell" (1776724480)

01:38:51.799 --> 01:39:11.799

Focus on that 1 because you have some, you have some really good law and statutory and case law that is saying this is something that should be considered. So when you're looking at these other states, I think you have a strong argument to say no. Or you need to take this seriously this is not just sort of the persuasive argument. There's a statutory argument that it really shall and must be considered when, when we're presenting those other.

535 "Pete Farrell" (1776724480)

01:39:11.799 --> 01:39:22.729

Cases if they're on point, um, and again it's noted there so that when it's been adopted from another state, such as we have from Michigan, it's presumed to be taken.

536 "Pete Farrell" (1776724480)

01:39:22.729 --> 01:39:31.639

There are laws and constructions in place and so that's specific to Michigan since we were model off Michigan and not the other way around.

537 "Pete Farrell" (1776724480)

01:39:31.639 --> 01:39:37.639

So, if you'll notice here, it's this hunt versus Nevada case, still good laws from 969.

538 "Pete Farrell" (1776724480)

01:39:37.639 --> 01:39:43.819

And the central issue in that case was whether Minnesota could assert jurisdiction over non residence.

539 "Pete Farrell" (1776724480)

01:39:43.819 --> 01:39:52.940

And that was in, um, related to conspiracy to convert assets of an insurance company. Now, there were 3 defendants that were in Minnesota and 22 that were non residents.

540 "Pete Farrell" (1776724480)

01:39:52.940 --> 01:40:03.530

And the Supreme Court ultimately held that we think that the legislature's most basic interest is to, for the protection for the stage residents that are injured by non residents.

541 "Pete Farrell" (1776724480)

01:40:03.530 --> 01:40:23.530

And that's when you're dealing with an extra 2 arterial statute. That is a really strong claim. And the 1st thing that it did is it reason that the minister of law was not unconstitutional and focused largely in part that another state that had a uniform law allowed for extra territorial jurisdiction, they had been litigated. And they found the analysis by that court. And.

542 "Pete Farrell" (1776724480)

01:40:23.530 --> 01:40:33.410

Illinois was extremely persuasive and so I think that when you look at, sort of where is coming from, you have a mirror case.

543 "Pete Farrell" (1776724480)

01:40:33.410 --> 01:40:43.040

Um, that's being cited from the pier from the Supreme Court. It's setting additional Minnesota Supreme Court law that says this is really the analysis that has to be done.

544 "Pete Farrell" (1776724480)

01:40:43.040 --> 01:40:59.240

And I want to know, in the hunt case, they were not identical. Essentially. We're not identical. So uniform doesn't necessarily mean they're 1 to 1 and I think that's something that's where the nuance comes in. Is is this uniform enough or is it? It does it really make sense.

545 "Pete Farrell" (1776724480)

01:40:59.240 --> 01:41:08.810

But that's the, I think the sort of a base article you have there. Well, Cody takes us sort of a, a step further, and it's really more focused on, um.

546 "Pete Farrell" (1776724480)

01:41:08.810 --> 01:41:28.810

When when the results are sort of being taken from something that's been modeled on, we give sort of greater deference to that states analysis and construction. And so really, when you're focusing on Michigan, you have not just the 1st argument, which is all all cases and all statutes and decisions that have been made really should be given some, some level of.

547 "Pete Farrell" (1776724480)

01:41:28.810 --> 01:41:37.640

Because they're sufficiently uniform, and then with Michigan, you have the added added argument that, um, this has been modeled on Michigan and therefore.

548 "Pete Farrell" (1776724480)

01:41:37.640 --> 01:41:41.570

Um, consideration should be given to that construction next slide. Please.

549 "Pete Farrell" (1776724480)

01:41:46.010 --> 01:42:06.010

Um, so, whether that's going to carry the day, I think it's always important to be looking at the other cases for the persuasive value. Um, and in the

Katherine case, what we had was, uh, an analysis of a really sort of special, small growth of trees, and they were, as you can see Norway pine they were.

550 "Pete Farrell" (1776724480)

01:42:06.010 --> 01:42:25.040

Really old, and the DNR at trial had identified that this was really it was unique not just for the types of trees that it had, but it had survived the 918 fire, which decimated large parts of our wilderness. And so this was this was really, you know, unique trees. They were over 100 years old. Some of them.

551 "Pete Farrell" (1776724480)

01:42:25.040 --> 01:42:37.970

And it indicated that the people were using this area almost as a sacred place to sort of go and to commune to be aesthetic and to sort of understand nature in this in this grove.

552 "Pete Farrell" (1776724480)

01:42:37.970 --> 01:42:57.970

And so what, the court again, here in the Minnesota Supreme Court, again, relying heavily on Michigan is saying, wait a minute, whether or not trees are protected. We don't really even have to do a deep analysis that has been decided. Right. We have a Michigan court that has consistently said the trees constitute a natural resource under their statute, which is analogous.

553 "Pete Farrell" (1776724480)

01:42:57.970 --> 01:43:03.260

And, you know, sort of that decision as to whether or not, it's even a predictable natural resource.

554 "Pete Farrell" (1776724480)

01:43:03.260 --> 01:43:16.790

Has been decided, so, I think on that issue, if you're dealing with what is a resource is Max is talking about look to other cases because right there you want to be able to say this is sort of been decided and then focus your analysis on that.

555 "Pete Farrell" (1776724480)

01:43:16.790 --> 01:43:31.250

No, now, just to be clear that's not the end of the story here right in. And what the court ultimately did was said well, yeah, we're gonna, you know, we're going to remove some of those trees and that's not going to be. It's not going to rise to the level of impairment or destruction.

556 "Pete Farrell" (1776724480)

01:43:31.250 --> 01:43:51.250

And at 1st, you know, when you're actually reading the case, that seems pretty jarring and you think well, how do we get here? And the secret really lies in the case that's being cited here, which is the city of Portage that versus Kalamazoo county and that's the Michigan case and the facts again, going, not just to what the law was decided in that case. But the facts of that case matter, and they always matter in.

557 "Pete Farrell" (1776724480)

01:43:51.250 --> 01:44:07.220

Cases that case involved, the cutting of 74 trees that were not extremely special. In fact, there was a footnote that said many of them were already disease and it was an 8 foot swap of trees that was on both sides of an already paved road. Right? So.

558 "Pete Farrell" (1776724480)

01:44:07.220 --> 01:44:10.610

Those are very, very different.

559 "Pete Farrell" (1776724480)

01:44:10.610 --> 01:44:29.750

But, the, the court just sort of focused on it said, you know, what, we've got trees, being cut, it's been allowed. And in that case in Michigan, they ultimately said that, you know, the number of trees was not critical in from either a state or local standpoint. And the damage could certainly be repaired by replanting of trees in an area farther away from the highway.

560 "Pete Farrell" (1776724480)

01:44:29.750 --> 01:44:34.610

So, there was no showing that these trees were unique or irreplaceable, or really had any value.

561 "Pete Farrell" (1776724480)

01:44:34.610 --> 01:44:40.820

So, you know, it's, it's a double edged sword when you're making these sort of persuasive arguments that you really have to look at the cases to say.

562 "Pete Farrell" (1776724480)

01:44:40.820 --> 01:44:50.960

It may help me in 1 aspect, but is it going to get me over the threshold of actually winning the case? So, just sort of a note to the wary next case, or sorry next slide.

563 "Pete Farrell" (1776724480)

01:44:50.960 --> 01:44:59.540

And all cases are not persuasive, the city of Medicaid, versus Dickie just worth a read. If you want to have a good laugh.

564 "Pete Farrell" (1776724480)

01:44:59.540 --> 01:45:19.540

Um, I actually just know, um, 1 of the things this is not a large body of case law here in Minnesota. So, um, I think I read it in a weekend. Um, obviously before I had kids, so it's, you know, with less than 150 cases and worth digesting, but this 1, this one's worth of read. If you were looking for a chuckle. Um, it was a hazardous.

565 "Pete Farrell" (1776724480)

01:45:19.540 --> 01:45:22.160

What a house that had sort of fallen into shambles.

566 "Pete Farrell" (1776724480)

01:45:22.160 --> 01:45:42.160

And the homeowner claim that it wasn't hazardous, um, wasn't hazardous in that the decision that it had to be either repaired, or raised a violated mirror. And his claim really relied on that it was the self serve and his own self serving testimony. There was the last remaining rumble stone house in central Mankato.

567 "Pete Farrell" (1776724480)

01:45:42.160 --> 01:46:02.160

And then it was built in the mid 19th century, and its quote, uh, monuments of the craftsmanship of the immigrant pioneer masons, but the court said, you know, to Anne's point and what you heard from Pete sorretto is you really need more than just your own arguments. Right there there was no expert testimony here from Mr. Dickie and the court just said, you know.

568 "Pete Farrell" (1776724480)

01:46:02.160 --> 01:46:08.330

Those kind of bald assertions aren't aren't going to be sufficient to really create that genuine issue. A material fact.

569 "Pete Farrell" (1776724480)

01:46:08.330 --> 01:46:28.330

And as a hail Mary, he also throw in some Connecticut law. Maybe somebody else had told him that you should look to other other cases. The case. Really? Uh, it was a variance case. Just really had nothing to do with the hazardous home. Um, not on not on point at all and here's what the court had to say. Well, we also observe that particular lines in a, in that.

570 "Pete Farrell" (1776724480)

01:46:28.330 --> 01:46:44.540

In case, it's in case for a foreign jurisdiction with distinguishable facts and less than any presidential or persuasive value here. So when you're thinking about setting a case, that's about the last thing anybody wants to hear. So, again, think about it, look at it and see, is this thing actually persuasive and has has some value.

571 "Pete Farrell" (1776724480)

01:46:44.540 --> 01:46:58.790

Next slide another reason I think it's worth considering looking to other states is again, just the sheer amount of cases that you can sort of analyze and consume and make arguments from.

572 "Pete Farrell" (1776724480)

01:46:58.790 --> 01:47:18.790

So, there's only really when I started, I think it was less than 100 mirror cases and, you know, we're running around 140. so, again, not a terribly large body of case law. But when you consider, you know, you add in Connecticut, which has 200, Michigan, another 180, New Jersey, 100, it really begins to add up. And when you're looking for what kind of facts.

573 "Pete Farrell" (1776724480)

01:47:18.790 --> 01:47:38.790

It's already been decided what sort of issues have been analyzed and out of courts and litigants been posturing. Those those cases. I think it

really serves practitioner as well to be considering, um, sort of broader body to be able to make those arguments. And even if you don't like them, right? I mean, it can sort of generate your own ideas about how you can make arguments and try to find.

574 "Pete Farrell" (1776724480)

01:47:38.790 --> 01:47:50.210

Minnesota case law, that's maybe not exactly on point like that other case, but pretty closely analogous. Uh, and if nothing else a string say, okay, next slide please.

575 "Pete Farrell" (1776724480)

01:47:50.210 --> 01:47:58.280

Okay, as I mentioned once you've done your chart, you kind of looked at which, which tends to be looking at of those 6.

576 "Pete Farrell" (1776724480)

01:47:58.280 --> 01:48:18.280

It's not really terribly difficult. I mean, it's basically you can do the most basic of searches, which is insert the state's name and then it's either going to be the environmental Rights act or environmental protection act, depending right. Michigan has the, but, uh, we use the so, again, just be careful on which 1 you're doing to make sure you.

577 "Pete Farrell" (1776724480)

01:48:18.280 --> 01:48:29.120

At the right? The right statute, uh, next slide and hopefully you guys can see it's, uh.

578 "Pete Farrell" (1776724480)

01:48:29.120 --> 01:48:41.900

The little heart hopefully guys can see. So what I find actually is sometimes a slightly more persuasive way of doing it is going to the specific provision of the statute that you want to look at in the, um.

579 "Pete Farrell" (1776724480)

01:48:41.900 --> 01:49:01.900

In the state, so here, we're looking at Michigan. Um, and again we're looking specifically at 3 to 4 701. and then what I really like about, what what's blocking do for us is when you're in the notes of decision, if you've got, you know, very specific issues, for example, exhausted of administrative remedies, we can just go right here on the left hand side of the table of contents and start looking and drilling down.

580 "Pete Farrell" (1776724480)

01:49:01.900 --> 01:49:19.760

Very quickly, it's designed what are the key cases from this state and you can do that, you know, with each of once you've got the statutes, you can do it relatively quickly as for each day. So it doesn't take long. And that 1, I really find is the more precise way to do it and really, really quite helpful next slide. Please.

581 "Pete Farrell" (1776724480)

01:49:23.150 --> 01:49:36.050

Okay, I mean, is it worth? It is really the question, right? I mean, are we persuading the courts, uh, by saying to other law? And I think the answer is absolutely yes there's no, there's no doubt that, uh, that it can be influential. Um.

582 "Pete Farrell" (1776724480)

01:49:36.050 --> 01:49:56.050

That said over the last decade, we don't see the Minnesota courts referring to other course decisions nearly as often as we saw in the cases that and Colin was describing those early really core 970. S and even in the middle years, the 80 s cases. Um, and I'm not sure actually, I haven't done a deep dive on the.

583 "Pete Farrell" (1776724480)

01:49:56.050 --> 01:50:03.410

The arguments are being made, right? I mean, if if the parties aren't making the arguments, then the Court's probably going to be less inclined to be signing them.

584 "Pete Farrell" (1776724480)

01:50:03.410 --> 01:50:23.410

Um, and obviously, I think you, if you look at the brief of the early cases, I've only seen some of them. They really are relying heavily on those Michigan cases, right exciting to the Connecticut, or to the Indiana statute, and saying this is why this makes sense. So, um, I'm not sure if it's a chicken and egg, maybe we need to start doing more. And after this presentation we will. Um, but what I do, what I do say.

585 "Pete Farrell" (1776724480)

01:50:23.410 --> 01:50:35.420

What I do see, what I can say is that there's just not as much reference to them. Um, and maybe that's on practitioners, but maybe not next slide please.

586 "Pete Farrell" (1776724480)

01:50:35.420 --> 01:50:43.220

So this is, um, the White bear lake rod and gun case. Um, and I just want to highlight, um.

587 "Pete Farrell" (1776724480)

01:50:43.220 --> 01:50:50.990

A couple things here am I gonna kind of go through and, or sort of talked about what the facts were. Um, but I want to sort of highlight that.

588 "Pete Farrell" (1776724480)

01:50:50.990 --> 01:51:02.210

This is sort of 1 of the key cases where we're deciding what the rights are going to be. Right? I mean, what, once she was talking about the 3 rights, has there been a violation in the absence of an established standard.

589 "Pete Farrell" (1776724480)

01:51:02.210 --> 01:51:18.620

Um, and statute, right? That's really sort of that's a fundamental issue. That's being sort of analyzed and they're signing to the Michigan Supreme Court and Ray versus Mason right? I mean, so that's when they're looking at. What are we going to even be providing to the citizens of Minnesota? We're going right to the Supreme Court of Michigan. Um.

590 "Pete Farrell" (1776724480)

01:51:18.620 --> 01:51:30.680

And at the end of that paragraph, it notes also that the legislature spoke is precisely as the subject matter permits. And in its wisdom left to the course the important task of giving substance to the standard by developing a common law of environmental quality.

591 "Pete Farrell" (1776724480)

01:51:30.680 --> 01:51:39.680

Right there that's a pretty broad statement that their the district courts are going to get power to sort of make this law the Supreme Court to oversee.

592 "Pete Farrell" (1776724480)

01:51:39.680 --> 01:51:47.030

And then finally, this, it also allows them to fashion the standards and the remedies. Right? So this is, um.

593 "Pete Farrell" (1776724480)

01:51:47.030 --> 01:51:56.450

These are coming right from the Michigan Supreme Court, and being embedded into our law next slide. Please.

594 "Pete Farrell" (1776724480)

01:51:56.450 --> 01:52:16.450

Same thing, this is the pure case and I think really the key here again, citing to 974 to the Michigan Supreme Court and what they're, what they're finding here is that it's again, this is not just a procedural statute. This is a substantive statute. And in the context of this presentation, I think that's really important because some of the other states do, in fact.

595 "Pete Farrell" (1776724480)

01:52:16.450 --> 01:52:21.050

Only allow for procedural rights, they're not creating, especially say they're not creating.

596 "Pete Farrell" (1776724480)

01:52:21.050 --> 01:52:35.120

Uh, substantive right so, and those, you know, you really want to focus on, um, the procedural rights. So that's, I mean, that's a really critical issue that we received from another state and they were able to persuade that no, this should be a substantive right? Um.

597 "Pete Farrell" (1776724480)

01:52:35.120 --> 01:52:55.120

So, again, you see, like, they're highlighting again in the cases, these are direct quotes from the from the opinion minister's interpretation is also consistent with that taken by the Michigan course, and it's not just



reporting decisions. Right? I highlighted this, because, I mean, they even sent it to an unreported Michigan case to sort of get their point across that. You know, the issues of of a permit could be.

598 "Pete Farrell" (1776724480)

01:52:55.120 --> 01:53:08.750

You know, could be an issue, so that's, you know, it's not just how, um, how presidential it would be in their own courts. They're setting on reporting cases to a foreign court next slide. Please.

599 "Pete Farrell" (1776724480)

01:53:08.750 --> 01:53:28.750

And again, this is the McGuire case that Max talks about, and I really just want it on the 1st bullet. I want to focus on. It's the text of several states, environmental rights, right? In order to make that statement. Somebody was making arguments and doing the sort of the legwork and analysis to say, look, we've looked at these other states. It's not just Michigan or it's not just Connecticut. Several of these states are making.

600 "Pete Farrell" (1776724480)

01:53:28.750 --> 01:53:34.100

Uh, are making arguments and this is and have been deciding these cases and this makes sense.

601 "Pete Farrell" (1776724480)

01:53:34.100 --> 01:53:40.880

Here, it's, they're setting in New Jersey and to Indiana to the Indiana code.

602 "Pete Farrell" (1776724480)

01:53:40.880 --> 01:53:51.890

So, and again, this is really sort of identifying what what the critical case was is, you know, when is the affirmative defense going to apply right? And they're looking to other states. So, I think when you're dealing with.

603 "Pete Farrell" (1776724480)

01:53:51.890 --> 01:54:06.560

Issues, especially the 1st impression, and there's a lot of them still out there despite it being over, uh, 50 years old. There's a lot of them still kind of hiding in the weeds. Look to these other, look to these other courts start to make your arguments, because some of them have already been decided.

604 "Pete Farrell" (1776724480)

01:54:06.560 --> 01:54:13.700

Uh, next slide please, thank you.

605 "Pete Farrell" (1776724480)

01:54:13.700 --> 01:54:19.400

Um, again, this is, um, the case and.

606 "Pete Farrell" (1776724480)

01:54:19.400 --> 01:54:36.620

Well, could, it really is as the forebear to Scholler as Max was mentioning. But this is, I mean, taking whole cloth from Michigan the 4 standards is, um, the city of orange case that we talked about earlier. I mean, this is the trees on the side of the road.

607 "Pete Farrell" (1776724480)

01:54:36.620 --> 01:54:43.460

This is not some sort of new analysis that's being modified. They literally the court of appeals from Minnesota, it takes it and says.

608 "Pete Farrell" (1776724480)

01:54:43.460 --> 01:54:46.550

It seemed like a good way to to do it.

609 "Pete Farrell" (1776724480)

01:54:46.550 --> 01:54:56.090

Right. And then they say we're gonna adopt this test. I mean, it just sort of, uh, it makes sense and we like it. Uh, we don't need to do any monitoring monkey with it. It's already been done by another court.

610 "Pete Farrell" (1776724480)

01:54:56.090 --> 01:55:16.090

Next slide please again, shaller and this slide sort of sets up a slide later a little bit later. But what I want to note here is in they, they're not denigrating Michigan at all. Again. They are reaffirming that. Well, cool is, you know, the caps me out.

611 "Pete Farrell" (1776724480)

01:55:16.090 --> 01:55:26.810

It is a great job. It's not perfect and we're going to sort of add a 5th factor, but, you know, again, they are reaffirming that the recruiter quarter gave affects the statutory limitations and sort of did it properly.

612 "Pete Farrell" (1776724480)

01:55:26.810 --> 01:55:32.330

And that they, um, you know, here they say, we believe it's both consistent with our prior case law and harmonious.

613 "Pete Farrell" (1776724480)

01:55:32.330 --> 01:55:37.490

With those policies and objectives, underlying Minnesota, environmental Rights Act.

614 "Pete Farrell" (1776724480)

01:55:37.490 --> 01:55:56.180

Next slide, uh, the matter of, um, you about this 1, um, also worth reading. It doesn't get cited nearly as much. It's an interesting case on deference. Uh, so it's sort of out there on that 1, uh, on that issue. Um, but it's, it's really dealing with.

615 "Pete Farrell" (1776724480)

01:55:56.180 --> 01:56:02.210

The issuance of a of a permit and whether or not, they should, uh, have been able to deal with some steam.

616 "Pete Farrell" (1776724480)  
01:56:02.210 --> 01:56:05.720  
And what I like about, uh, this case.

617 "Pete Farrell" (1776724480)  
01:56:05.720 --> 01:56:16.280  
Is that what they're looking at again is sort of saying, and this is, uh, later look, what are the Michigan courts been doing here as it relates to the premium case again this is, you know.

618 "Pete Farrell" (1776724480)  
01:56:16.280 --> 01:56:36.280  
20 to 27, more than 25 years into, um, mirror and they're still looking at Michigan. Course we're, we're beyond the 70 s. we're beyond the 80. S and yet still there sort of a PM. Minnesota court of appeals is looking to them and sort of saying, what, what is Michigan done on this issue? Right? They've, they've looked at this and we want to kind of go there.

619 "Pete Farrell" (1776724480)  
01:56:36.280 --> 01:56:40.040  
Excellent.

620 "Pete Farrell" (1776724480)  
01:56:40.040 --> 01:56:47.150  
Um, white, white bear link, this case is important for this presentation in particular, because.

621 "Pete Farrell" (1776724480)  
01:56:47.150 --> 01:56:58.850  
The descent says look, there is only 1 case that is directly on point and it's the Michigan Supreme Court has already decided this issue related to whether, or not permits can be.

622 "Pete Farrell" (1776724480)  
01:56:58.850 --> 01:57:18.850  
So, to to mirror and to essentially the section 3, and the, the Michigan Supreme Court held an improper administrative decision, standing alone does not harm the environment right? It's something more it has to be, you know, the pumping. It has to be some sort of action only wrongful conduct, offends the Michigan environmental protect.

623 "Pete Farrell" (1776724480)  
01:57:18.850 --> 01:57:32.450  
Protection Act and same here. The same shouldn't be here. We need to harmonize that. And so there's something that we would adopt the administrative decisions that they don't constitute conduct. Just like Michigan next slide. Please.

624 "Pete Farrell" (1776724480)  
01:57:32.450 --> 01:57:45.140  
The majority, however, um, took a different view of how minutes of the Supreme Court has been sort of analyzing foreign case law. And this is a

quote, they said the defense invocation of a Michigan case preserved. The dunes is simply not persuasive.

625 "Pete Farrell" (1776724480)

01:57:45.140 --> 01:58:05.140

And, you know, it's sort of murky case law from Michigan, interpreting mirror and this is where I highlighted, we have always engaged in our own analysis. And I think, you know, hopefully, by some of the sides, I think that's, you know, maybe tongue in cheek. I mean, that's a pretty bold claim. I think, given how the courts have analyzed.

626 "Pete Farrell" (1776724480)

01:58:05.140 --> 01:58:20.660

Michigan in particular in other cases. So I think, um, you know, it's statement here that, uh, it's starting to Scholler as sort of the, um, Minnesota Supreme Court always takes, does its own work here? Um, I don't think that's really fair to recruiter or to.

627 "Pete Farrell" (1776724480)

01:58:20.660 --> 01:58:40.660

So just want to highlight some of those previous, uh, statements directly from those those cases because I think even though white bear lake here, we're seeing it from the Supreme Court recently saying, you know, I'm not sure. Michigan's really, uh, what we should be looking at. I think it's still I raised those because I think it still makes sense and I think it does make sense to still be making those arguments.

628 "Pete Farrell" (1776724480)

01:58:40.660 --> 01:58:46.580

Regardless of of what? Because that's the most recent case sort of analyzing foreign case law. So I want to be.

629 "Pete Farrell" (1776724480)

01:58:46.580 --> 01:59:06.580

Uh, uh, open on that 1 next slide. This is a brief example from the, um, from the smart case, against the city of Minneapolis, the 2040 plan, and I just want to say, uh, I'm not sure which, uh, which 1 of the lawyers. I mean, uh, was, um, was on it at that time. I mean, this is really, really excellent. I mean, it's just 1 it's really well.

630 "Pete Farrell" (1776724480)

01:59:06.580 --> 01:59:26.580

But it's the concise argument that I think we could all make when you're doing it and really focusing on that 2nd paragraph mirror was based on Michigan law, right? It's just 2 sentences. It's got. This is what you're doing. It's got the statute. It's a uniform law. Go ahead, you should be looking at this right? They're not beating them over the head. Really quick and punchy.

631 "Pete Farrell" (1776724480)

01:59:26.580 --> 01:59:46.810

And then what did Michigan say? Right? But Michigan not only rejects the broad interpretation suggested by the plaintiff, but it apply the narrower scope. So the courts have already right? The courts have already looked at

this. You don't need to go farther. Um, and then again, it's sort of its conclusion. So, again, just a quick example that is fantastic. Brief rewriting and how I think ideally, we could.

632 "Pete Farrell" (1776724480)

01:59:46.810 --> 01:59:52.670

I'll do it what we're doing, sort of setting up for, in cases next next slide. Please.

633 "Pete Farrell" (1776724480)

01:59:52.670 --> 02:00:06.410

Um, this is from Florida, and this is, uh, the 2nd, the last case. So, and this is a homeowner apply for a permit to get a, um, a doc and in Florida. They've already sort of analyze whether or not, um.

634 "Pete Farrell" (1776724480)

02:00:06.410 --> 02:00:20.720

Intervention should occur in an administrative proceeding. That's an enforcement action right? And Florida said, no, we're not going to let neighbors who don't like the Docs to come in. That's not what we're about. Next slide. Please.

635 "Pete Farrell" (1776724480)

02:00:20.720 --> 02:00:31.610

And if you look at the, the, the actual text, it is extremely similar to what we have in, um, Minnesota. So, um, again, in.

636 "Pete Farrell" (1776724480)

02:00:31.610 --> 02:00:48.560

Any administrative licensing or similar proceeding in any administrative licensing, or other proceeding authorized by law. So, uh, you know, again, looking, why, when you're in that case, pops up and you're dealing with him, you know, a client who wants to engage in enforcement action um, you can look to Morgan and say.

637 "Pete Farrell" (1776724480)

02:00:48.560 --> 02:00:57.590

Can we distinguish it maybe, but some court has already looked at this and said, that's probably not what we need narrow for on this 1 next slide. Please.

638 "Pete Farrell" (1776724480)

02:00:57.590 --> 02:01:15.890

And then, uh, this is Patterson versus the, um, um, township Council. Uh, this is a New Jersey case. And again, what? This is really sort of. It's, it's an interesting case, focuses on essentially what their, for a, would be equivalent to our section 10, like, was talking about whether, or, you know, when when does a claim.

639 "Pete Farrell" (1776724480)

02:01:15.890 --> 02:01:35.890

Uh, go back down and it's really only only, um, in that, because referral to such an agency entitled. The plaintiff prevails only those proceedings and that's not the case here. So, again, it can only be determined in the

1st instance, if it's being if it's going back to that agency so similar to our section 10. so, if somebody's trying to make some claims on 2nd time.

640 "Pete Farrell" (1776724480)  
02:01:35.890 --> 02:01:41.330  
You have this pattern case next slide please.

641 "Pete Farrell" (1776724480)  
02:01:41.330 --> 02:02:01.330  
And this is the final slide. What will happen um, you've heard a lot of attention from all the presenters, right? There's been a tension between what should be protected and how much it should be protected. You know, we've seen wetlands that are impaired, being told that their natural resources, but model is going over them and obviously, you know, Virgin forests that are.

642 "Pete Farrell" (1776724480)  
02:02:01.330 --> 02:02:21.330  
Also natural resources, but they're getting clear. So, I mean, that's sort of a back and forth direction and that's what we get because we have a flexible standard. Right shaller doesn't dictate what needs to be done at a grant grants. The course to sort of look at those, uh, those decisions. So, I think, in my opinion past will be prologue we're going to continue to see that tension and Court's having to make tough decisions based on the.

643 "Pete Farrell" (1776724480)  
02:02:21.330 --> 02:02:30.350  
Based on the lot, and with that, I'd say you have the ability to shape that law through your briefing and not just looking at Minnesota cases, but look and beyond.

644 "Pete Farrell" (1776724480)  
02:02:30.350 --> 02:02:38.330  
And that's all I have, and I just want to thank everybody number 3 minutes over. But this, hopefully, he'll give you guys something to think about with mirror and.

645 "Pete Farrell" (1776724480)  
02:02:38.330 --> 02:02:41.600  
Your decisions are related to your litigation.

646 "Pete Farrell" (1776724480)  
02:02:41.600 --> 02:02:52.310  
Thank you so much everybody and again, we've got we've been approved for 2.2point standard credits code codes in the box number 5:00:00 95, and plug it in.

647 "Pete Farrell" (1776724480)  
02:02:52.310 --> 02:03:03.860  
Take all of our presenters and everybody for coming out. Really? Just a wonderful presentation. I learned a lot from listening to you and I know everybody else who was on the call that as well. So thank you.

648 "Pete Farrell" (1776724480)  
02:03:03.860 --> 02:03:10.040  
But that will be done.