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Excerpts from Interview with David Harlow

by

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Tape I, Side A

National Environmental Policies Act 1969

North Carolina Environmental Procedures Act, and whether had to consider environmental policy issues, sociology

In a sense you can almost say that everything is sociology-based when you're dealing with trading one resource for another. There is obviously a finite set of resources in the world, and it's all a balancing act.

Tape I, Side B

Litigation is not just a dry analysis. (begin side B) These concepts were not important in an analytic way, that you can sit down and write a law review article about it. Because that's not what the cases turned on. That's not the way the analysis flowed. Raising those issues in a legal-academic-scholarly sense appeared to be futile. But I'm saying as a trial lawyer and a litigator that's false, and that's why most law professor-type people are not ultimately of the general nature of successful litigators. That's the wrong way to focus. In two very significant indirect ways they had an impact. One of which was that it gave them the will to fight. They had something that they were really fighting for. If you don't have the will to fight, if you don't have the commitment in that kind of situation, you're not going to make it.

The second thing is, you sometimes raise issues in litigation that you argue for -- you may realize that you've got a slim chance of succeeding on that issue, but that issue helps you a great deal from an advocacy point of view. The opportunity to put that to the judge, jury, hearing officer, whoever the trier of fact is, allows you a scope that allows you to make your case come alive and present it from a point of advocacy. There are two essential elements of advocacy, and it met one of those. And that is, that you've got to convince the trier of fact that you ought to win. The second element is simply telling him how he should find for you. But you want to convince him first of all that you ought to win, that it's right. And then once you've done that, it's a heck of a lot easier to show him a reasonable basis upon which to find for you.

What the other side was doing from an advocacy point of view was political, or political manipulation, or you ought to win because this is what Chapel Hill and the university want to do. That's really what's driving their train, and that's how they won. They made that point, that was convincing enough to the people that ultimately made the decision. The rest is you're rationalizing back. You're saying O.K., this law applies in this way. Not all lawsuits are decided that way, I don't mean that. But, in most cases lawsuits exist to some degree, or ones that are that hard fought, because it's not one hundred percent crystal clear that one side is entitled to the judgement from a legal point of view. What the hell are we being paid to do if there's not some question about it?

That's also compounded, I think, any time you're dealing with something that's public policy. It's not just money. It's public policy. You're going to settle cases where there's money at stake, quite often, if there's a reasonable difference of opinion. But when we're talking about how

governments should act, or how communities should act, or what the inter-relationship is from a public policy point of view, you can argue lots of things. And you can find law that's going to support you, or find a different interpretation, or an ambiguity or something else. So what you have to do, in addition to arguing that, what you're really doing is trying to convince somebody first of all why you ought to win, why your client ought to win. And if you can convince the trier of fact that your client ought to win, and it's a public policy kind of case, it's usually relatively easy to find some reasonable justification in a legal framework as to why your position is correct.

Strategically I think it was the communication of the same basic arguments and values: the value of the community that was there and would be destroyed, the availability of alternatives that were perfectly logical, and the lack of any solid scientific basis for the water quality conclusions that were advanced as the reason for going to Cane Creek. I think those were the same fundamental strategic pillars. In a tactical sense, things would change. Later on, as we went along, the opportunity to use the quarries as an alternative became more viable and was put forth more. We also always as a strategic concept hoped that time might compel OWASA to go somewhere else, or to give up, or that politics might change over time. Tactics changed. We changed witnesses, we developed theories. We discovered that some of the preliminary engineering work in terms of the earthen dam to be at Cane Creek were flawed during the course of the second trial. So you switch and you attack weaknesses that you see. You explore new opportunities as you see them. But the overall strategic thing I think was pretty much the same.

(At the 404 hearing) I always thought it was interesting, I think the colonel always looked like he thought people were going to stand up and

charge the stage and assault him. He didn't know what a bad hearing looked like. I'd been to some for the Corps.

If we'd had significantly greater resources, yes I think we could have fought it (more??). Certainly that was a severe limitation in what we were able to do. Obviously the lawyers who fought it did it on a very minimal basis, but even so there were limits to the amount of time we could devote on that kind of a basis. There were all kinds of resource and logistical limitations. If we had had a multiple of the amount of money available that we did, yes -- in heavy, protracted, multi-issue litigation of this type, a well-funded operation is always much better than one that's very under-funded. Certainly if we'd had a multiple of resources available over what we did, we could have done more from an expert witness, scientific and engineering (point of view). We had some good experts, and I think presented very good, credible things, but it was not any in-depth development stuff. We certainly could have done more in that regard, developing other alternatives, attacking their scientific theories, chopping up on their engineering stuff better. From a legal point of view what we could have done would have been to have assaulted them on a wider front over a greater period of time. We could have pursued more things at a greater depth and in parallel to a greater degree. We could have put a lot more pressure on them in that regard, and there's some things that we simply never pursued. When you're dealing with such a limited set of financial resources, obviously you're betting on the fastest ponies you can find, and hope that they come in. You can't bet on every horse in the race.