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Flood case gets under way

Jurors listen to opening arguments

By Audrey Stanton

Register-Herald Reporter

Were the landowners who allow timbering and mountaintop removal mining on their property near Mullens and Oceana irresponsible neighbors, or was the flood of July 8, 2001 caused by rainfall so catastrophic that it would have overwhelmed the land regardless of its use?

Attorneys in the first phase of the largest mass litigation ever to come before a West Virginia court argued on both sides of that debate Tuesday in Raleigh County Circuit Court.

Jurors who spent the entire day listening to opening arguments from nine lawyers are likely to have gleaned from all of them that their job in this case will be to answer three questions: Did the land use increase peak flow, that is the rate at which any rainwater on those sites ran off those sites? Did an increase in peak flow cause a material increase in the flooding of the streams? And was the landowners' use of the land reasonable?

What they'll spend the next six weeks hearing is evidence from experts — foresters, meteorologists, hydrologists, and site inspectors — that will help them decide what those answers should be.

It may sound complicated, but plaintiffs' attorney Scott Segal said the issue is a relatively simple one.

"We all have a responsibility to be good neighbors to each other and good stewards of the land," he said. " ... In this case, the proof will be that the unreasonable use of land caused foreseeable damage to the landowners' neighbors."

He said when a company timbers incorrectly it is foreseeable that thunderstorms will increase run-off and that Western Pocahontas Properties, one of eight remaining defendants in this first part of the flood case, "allowed water and garbage and debris to be washed onto its neighbors' property."

"And it's that simple," he said.

" ... Logging is a good thing. It makes furniture, builds our houses. ... It is a good thing, if done reasonably," Segal said.

But Western Pocahontas wasn't reasonable when it dragged logs and ran bulldozers on more than 300 miles of roads above Mullens, he said. He said the company did not follow the appropriate practices to protect its neighbors from its logging operation, and he compared the landowner's property to a bathtub.

"The little town of Mullens is the drain to that bathtub," he said, "and if you take too much where it's too steep and too close, you are going to flood that little town, and you are going to wash your garbage into that little town."

Photos



Richard Bolen, counsel for Western Pocahontas Properties, talks to the jury during the trial against coal and timber industries alleging responsibility for the 2001 flooding in Judge John Hutchinson's, background, courtroom. Lew Whitener/The Register-Herald (Click for larger image)

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" ... What happens if you aren't a good neighbor and you don't clean up your mess? Your neighbors wind up with your debris and garbage."

But Western Pocahontas attorney Richard Bolen said there was no mess and that the flooding could have not been prevented regardless of land use.

"The water would have come rushing down Slab Fork whether any trees had ever been cut," he said.

He explained that the company used only selective cutting in order to grow a larger forest over time, which it has. And he said inspection reports prove the timber companies working on the property cared about the land.

He said he agreed with plaintiffs' attorneys that no one should use land unreasonably, and he said Western Pocahontas did not.

" ... This storm overwhelms everything else," he said. "It really doesn't matter what the land use is."

But plaintiffs' attorneys, who represent some 900 residents, said the type of land use does matter.

Plaintiff attorney Stuart Calwell, who used water and a funnel to demonstrate how mountains handle water, said the defendants "wrecked" the land and "changed it so water doesn't run downhill into these creeks and streams like it's supposed to."

He said the defendants created artificial funnels — funnels clogged with waste and timber debris — that caused the water to run downhill faster and caused the creeks to fill faster.

"It's unreasonable to do the kinds of things that do that," he said.

"It's not a question of whether it's reasonable to mine coal. It's utterly reasonable to mine coal. And it's not a question of whether or not it is reasonable to timber. It's absolutely reasonable to timber. The issue is was it reasonable to direct water off your property the way the coal companies and the timber operators and the people who owned the land did," Calwell said.

Plaintiff attorney Randolph McGraw said such action by those companies should not be allowed.

"All of this activity, all of this disturbance, is basically aimed at the town of Mullens," he said, as he displayed pictures of mountaintop removal and timbering projects, including a Pioneer Fuel site just above Oceana.

"Nobody wants to try to shut down these operations," McGraw said. "Nobody wants to try to prevent them from creating jobs that we know we need as southern West Virginians. It's about doing it responsibly, being accountable for your conduct and your action."

He warned jurors that evidence they hear from the defense will be like "someone bringing a giraffe into this courtroom and telling you it's an elephant."

"In order to be reasonable, in order to be accountable, you have to follow the rules, because in the end, if you don't, this is what you're left with," he said as he displayed a photo of a single resident standing in murky waist-high water in the middle of a downtown Mullens street.

Defense attorney after defense attorney said the companies they represent took appropriate steps to control their activities responsibly and acted in accordance with the law. They also said nothing could have prevented the degree of flooding that hit residents within the Mullens and Oceana sub-watersheds.

" ... The storm, an unprecedented storm, overwhelmed the land ... and nothing anybody did on the land mattered at all," said J.H. Mahaney, who represents Pocahontas Land Corporation, which is not related to defendant Western Pocahontas.

"We're going to show you that this was no ordinary summer thunderstorm," he said. " ... It was a catastrophic storm, the most intense storm that Mullens and Oceana had ever seen as far back as they keep records. This storm was a natural disaster."

Mahaney used a Doplar radar to show jurors how the storm progressed across these two watersheds between 3 a.m. and 1 p.m. July 8, 2001. He said Accu-Weather Meteorologist Dr. Joseph Sobel will testify that the storm was an incredibly rare one, "the type of storm that overwhelms everything."

" ... At that point, once you get that much rain in that short of time, it all runs off," Mahaney said. "Land use doesn't matter. ... The land simply can't hold anymore."

Other defense attorneys promised jurors they would prove terrible floods happened in Mullens long before mountaintop removal mining took place, that the companies they represent took extreme measures to not only care for the land, but to improve it, and that they abided by laws governing their practices.

"Using your land in southern West Virginia to mine coal and timber is a reasonable use of your land," said defense attorney Al Emch, who represents landowner A.Z. Litz LLC.

Other defendants include Eastern Coal Company, White Oak Land Company, White Oak Lumber Company, Western Pocahontas Corp., and Pioneer Fuel, which operates two surface mines in the watershed. A number of others have settled out of the case.

Originally, there were 31 defendants in this portion of a much larger case that involves six watersheds. This trial involves only one of those watersheds, the Upper Guyandote.

Defense and plaintiffs lawyers agreed in pretrial motions not to mention the other cases, but one did, prompting Segal to move for a mistrial at the close of Monday's proceedings.

"This litigation is very important for those 4,000 plaintiffs represented by counsel and it is absolutely critical to those companies that have been sued and to the timbering industry and the coal industry," Ench told the jury.

"This was a huge, major storm that you've heard a lot about," he continued. "Flooding occurred throughout southern West Virginia and they have sued all these companies about those floods. And guess what, you get to hear the first case. The first case out of what could be a very long series of cases."

Raleigh County Circuit Court Judge John Hutchinson will review the transcript before ruling on Segal's motion.

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