

Flood Cases Finally Going to Trial

Posted 3/3/2005 04:30 AM

Judges will split up the lawsuits according to watershed areas.

Story by Juliet A. Terry [Email](#) | [Bio](#)

Floods have ravaged portions of West Virginia several times during the past few years, and the first round of lawsuits relating to flood damages at last is on its way to trial.

The July 8, 2001, flooding affected about 3,500 southern West Virginians who have been suing an assortment of mining, timbering, railroad and land-holding companies, along with other businesses, for damages sustained during the flood. Their claims were consolidated into a mass litigation managed by a three-judge panel that asked the Supreme Court of Appeals how those cases should proceed.

Late last year, the Supreme Court answered, and now those 3,500 claims will be broken up into six separate trials, the first of which will begin a year from now.

During a pretrial hearing Feb. 25 at the Raleigh County Courthouse in Beckley, two of the three panel judges -- Raleigh County Circuit Judge John Hutchison and Nicholas County Circuit Judge Gary Johnson -- told the many lawyers working on the case how the litigation was going to move forward. Ohio County Circuit Judge Arthur Recht, the third judge, was not present at the hearing.

Trial By Watershed

Hutchison said the panel decided to try the cases according to watershed.

In preliminary hearings, six major watersheds were identified Tug Fork River, Upper Guyandotte River, Upper (Middle) New River, Lower New River, Upper Kanawha River and the Coal River. The six watersheds can be broken up into 51 sub-watersheds, all of which are designated by the state Department of Environmental Protection.

The panel decided the three largest watersheds will go to trial in 2006, beginning with the Upper Guyandotte River watershed in March 2006. Hutchison will oversee that trial; Recht will preside over the Coal River watershed trial beginning in June 2006; and Johnson will handle the Tug Fork River trial beginning in September 2006. All trials will be held in Beckley.

Each trial will be bifurcated, which means general issues of liability will be determined in the first phase, and damages will be handled in the second phase.

Hutchison said the panel selected those three watersheds first because they are the largest of the six, according to watershed maps, and, theoretically, they contain most of the plaintiffs.

"We need to have the defendants' and plaintiffs' (counsel) certify within 30 days the plaintiffs and defendants participating in the Upper Guyandotte (trial), which looks like it includes Mullens, Pineville, along Route 10 and up through Wyoming County," Hutchison said.

Who is Suing Whom?

Hutchinson's request for a list of parties involved in the first trial addressed a central question the defendants posed at the beginning of the hearing -- who is suing whom?

"We need to know who is suing whom and for what," said Al Emch, CEO of Jackson Kelly and one of the lead attorneys for the defense team.

Emch said the defense team never has been provided with a detailed list of who the plaintiffs are, where they live and what their damages are.

"We need real facts with real people and an understanding of what's involved," Emch said. "The court (needs to) have a mechanism to get enough detailed, specific information to say, 'These are the plaintiffs, this is where they are and what they say they lost.'"

Stuart Calwell, lead plaintiffs' counsel, said the plaintiffs have a different issue, one of knowing which individual companies belong to what parent corporations and have operations in which county and watershed. An estimated 169 companies are involved in the case.

He said he has found that "coal companies (for example) have myriad names in doing business."

"It's one of the tactics we've encountered," Calwell said.

Hutchison said the plaintiffs must be portioned out by watershed, and any company served with a lawsuit must be listed as well.

"If you've been sued, tell me whether you have operations in that watershed and who is suing you," Hutchison told the defendants, stressing that the disclosures will generate lists for each watershed of the specific plaintiffs and defendants.

What They Already Know

When the first flood trial begins next year, the court already will have certain facts established and indisputable, conclusions the Supreme Court reached before it referred the cases for consolidation by the mass litigation panel. Some of the facts listed by the court are as follows:

- A system of storms that passed over southern West Virginia during July 8, 2001, impacted, to different degrees, certain areas in Boone, Fayette, Kanawha, McDowell, Mercer, Raleigh and Wyoming counties, along with other locations in West Virginia.
- Rainfall during July 8, 2001, impacted, to different degrees, portions of the Coal River, Lower New River, Middle New River, Tug River, Upper Guyandotte River and Upper Kanawha Valley Watershed and the sub-watersheds within them.
- The types of land uses in an area can affect volume, rate and/or timing of runoff in a particular location during and/or after a period of rainfall as can a myriad of other factors. When the volume, rate and/or timing of runoff is affected, that can result in an increase or decrease in water level elevations in particular locations following any defined amount of rainfall.

The Burden

When the Supreme Court issued its opinion late last year on how the case should proceed, it assigned a burden to the plaintiffs and also to the defendants.

The plaintiffs can try to prove the defendants used the land unreasonably or were negligent in their activities in such a way that exacerbated the flood damages. But they cannot try to convince a jury that the defendants' business activities are inherently dangerous.

"This court simply does not believe that the day-to-day activities of defendants necessarily create a high risk of flash flooding," the Supreme Court said in its Dec. 9, 2004, opinion, authored by Justice Elliott E. "Spike" Maynard. "Also, we are unconvinced that any increased risk of flooding which results from defendant's extractive activities can be greatly reduced by the exercise of due care."

The defendants, however, have their own burden. They will have to prove their activities did not cause all the flood damages.

The Supreme Court said the defendants only should have to pay for the portion of flooding caused by their activities, but they will have to prove they are not responsible for the rest of the damages. If a defendant cannot prove its specific measure of damages, it could bear the entire liability.

Copyright 2006 West Virginia Media. All rights reserved. This material may not be published, broadcast, rewritten, or redistributed.

© 2006 [West Virginia Media Holdings, LLC](#)
[WBOY-TV](#) | [WTRF-TV](#) | [WOWK-TV](#) | [WVNS-TV](#) | [The State Journal](#)
[Privacy Policy](#)

Site Development and Hosting By [Citynet](#)

