

Flood Litigation Gets Under Way

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Opening statements show diverging opinions on who, what caused 2001 damage.

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BECKLEY -- The first stage in what could be years of litigation stemming from the destructive 2001 floods in southern West Virginia got under way this week at the Raleigh County Courthouse.

The opening statements ended with the plaintiffs asking the judge to declare a mistrial.

Scott Segal, a Charleston lawyer who is representing some of the plaintiffs, asked Raleigh County Circuit Judge John Hutchison to grant a mistrial because some of the defense attorneys' opening remarks "created a manifest necessity for a mistrial," according to the plaintiffs' motion, submitted at the end of the day March 14.

"The comments of defendants' counsel, Mr. (Al) Emch and Mr. (Henry) Jernigan, were grossly prejudicial and were calculated to mislead and prejudice the jury. If a mistrial is not declared, the trial will likely result in manifest injustice and a waste of judicial resources," the motion stated.

Hutchison overruled the motion early March 15.

Flood Trial Background

A consolidated lawsuit involving as many as 4,000 southern residents has been pending since late 2001. Altogether, the plaintiffs are suing hundreds of mining, timbering, railroad and land companies, accusing them of altering the land in such a way that made the July 8, 2001, flood far more disastrous than it would have been without the companies' activities.

The claims are spread across six watershed areas, but a three-judge panel overseeing the litigation broke the case down into at least three major trials. The trial that began with opening statements March 13 is considered a "test trial," in a way, because it involves just two sub-watershed areas -- Oceana and Mullens -- and fewer than 1,000 of the plaintiffs. This trial is the first time a jury will be asked to decide three issues:

- whether each defendant's operations caused a material increase in the rate of surface water runoff that left that area during the July 8, 2001, storm compared to the amount of runoff that would have happened anyway during the flooding;
- whether the water from the defendant companies' operations caused a material increase in streams overflowing their banks; and
- regardless of the findings in the first two areas, whether the defendants used their property unreasonably.

In the days and weeks leading up to the trial, the plaintiffs dismissed claims against a number of defendants, including about half a dozen March 12-13.

'Relatively Simple' Case

Segal presented the plaintiffs' first opening statement of the day March 13.

"Our case is a relatively simple one," Segal said. "We all have a responsibility to be good neighbors to each other and good stewards of the land. Go back as far as the Old Testament to find that. In this case, the proof will be that the unreasonable use of land caused foreseeable damage to the landowners' neighbors."

He singled out one defendant, Western Pocahontas Properties, the company his plaintiffs are suing, and said it "failed to properly take care of its land," causing "water, garbage (and) debris to be washed onto little neighbors' property."

To explain to jurors how water flows in the Mullens sub-watershed, he likened the area to a bathtub, with Mullens as the drain. When the companies took too much material from the steep hills surrounding the town, he said, it created conditions for more substantial flooding than one would have expected during heavy rains.

Western Pocahontas timbered more than 40 percent of the land in that area, he said, thereby increasing the peak flow of water into the drain -- Mullens.

"The proof will be that if Western Pocahontas had cleaned up its mess or required the people it allowed on its property to clean up its mess, one of the tragedies of this flood would not have occurred in July of 2001," he said.

Attorney Stuart Calwell spoke next on behalf of the plaintiffs. He said he wished he had not called the lawsuit a "flood case" several years ago because it is about more than just traditional flooding.

"This is not about the river coming up; this is about the water running down the hills. It ... carried with it saw logs, carried with it tree tops, carried with it all manner of waste and debris that were left behind from the timbering and coal mining," Calwell said.

Attorney Randolph McGraw presented the plaintiffs' third and final opening statement. He told the jurors no one is trying to shut down the defendant companies' operations or prevent them from providing jobs in southern West Virginia. The plaintiffs want the defendants to pay for the damages they caused and conduct their businesses responsibly.

"One of the concerns that I have about this upcoming trial is that opponents of accountability and responsibility are going to come here ... (and) through exaggerations, convince you that, I suppose, (their actions don't) lead to a material increase in runoff of the rain," McGraw said.

"I just have a real hard time imagining that. I mean, to me, it's very much akin to someone bringing a giraffe into this courtroom and telling you that he's an elephant."

Unprecedented Storm

Attorney J.H. Mahaney, representing Pocahontas Land Co., which is not connected to Western Pocahontas Properties, spoke first for the defense.

"The evidence will show that mining and timbering are reasonable activities," conducted completely in accordance with state and federal laws, Mahaney said. Those activities did not cause the flooding of July 8, 2001, he said.

Simply put, the storm that fateful day was unprecedented. It overwhelmed the land, he said.

To illustrate his point, Mahaney showed the jury a series of Doppler radar images that began in the early hours of July 8, 2001, and advanced at half-hour intervals throughout the duration of the storm, showing how the storm front grew in intensity over the Mullens and Oceana areas.

"It was an epic storm. ... It was a natural disaster," he said, showing that 4 to 6.5 inches of rain fell in Oceana and 3.5 to 6.3 inches of rain fell in Mullens within an eight-hour period. "... Once you get that much rain, it all runs off."

He said none of the plaintiffs' experts studied that land owned by the properties when making their determinations about what contributed to flooding.

"Look closely at all the experts," Mahaney told the jury. "... You're not going to hear anyone from the plaintiffs' side who looked specifically at Pocahontas Land Co. Properties."

Richard Bolen, representing Western Pocahontas Properties, spoke next. He took issue with claims Segal made about the amount of land the company timbers. Segal said 40 percent, but Bolen explained the company does not even own 40 percent of the land in that area. In 10 years, the company timbered just 14.8 percent of the area, he said.

Bolen took the jurors through a series of documents that showed specific instructions for logging crews to perform work necessary to remove all debris, prevent stream obstruction and minimize runoff.

"We are good neighbors," he said. "We are good stewards."

Speaking for Pioneer Fuels, a mining company, Henry Jernigan said the intensity of the storm simply overwhelmed the land, regardless of the defendants' activities.

He also told the jury that none of Segal's plaintiffs is suing Pioneer, and the company has no operations in Mullens. He said one of the challenges in this case will be for the jury to "keep straight who's suing whom" and what claims and evidence the plaintiffs have against specific defendants.

Above all, he told the jury, Pioneer, like all defendants, is mindful of its duty to the residents of southern West Virginia.

"If the cost of mining coal is, as the plaintiffs have claimed, the regular flooding and destruction of homes and properties, that cost may be too high," he said.

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