

IN THE MAGISTRATE COURT OF DODDRIDGE COUNTY, WEST VIRGINIA

BEFORE THE HONORABLE TIMOTHY SWEENEY

* * * * *

EQT PRODUCTION COMPANY,
A Pennsylvania Company,

Petitioner/Plaintiff,

v.

CIVIL ACTION NO. 12-C-17

DODDRIDGE COUNTY COMMISSION,

Respondent/Defendant,

v.

JOYE HUFF, AS TRUSTEE OF THE RANDY
E. HUFF DECEDENT'S TRUST B, WILLIAM
LEE HUFF, JAMES FOSTER, JENNIE FOSTER,

Respondents/Intervenors.

ORIGINAL

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APPEAL/INJUNCTION

BEFORE: The Honorable Timothy Sweeney, Judge

DATE: Friday, December 14, 2012

PLACE: Doddridge County Courthouse
West Union, WV

COUNSEL: David Hendrickson and Steve Hastings,
Counsel for Petitioner/Plaintiff, EQT
Production Company

Donald J. Tennant, Jr., Counsel for
Respondent/Defendant Doddridge County
Commission

David T. Richardson, Counsel for
Respondents/Intervenors Joye Huff, as
Trustee of the Randy E. Huff
Decedent's Trust B, William Lee Huff

**Bradley W Stephens, Counsel for
Respondents/Intervenors James Foster,
Jennie Foster**

**COURT REPORTER: Nancy S. Jarrell, Certified Court
Reporter**

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NO WITNESSES CALLED

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EXHIBITS

MARKED

ADMITTED

None marked

1 BE IT REMEMBERED, the following hearing was had before the
2 Honorable Timothy Sweeney, Judge in the Circuit Court of
3 Doddridge County, West Virginia, in the matter of EQT Production
4 Company, A Pennsylvania Company, v. Doddridge County Commission,
5 v. Joye Huff, as Trustee of the Randy E. Huff Decedent's Trust
6 B, James Foster, Jennie Foster, Civil Action No. 12-C-17 on
7 Friday, December 14, 2012 as follows, to-wit:

8 THE COURT: Now comes on for hearing the
9 matter of EQT Production Company versus the Doddridge County
10 Commission, Case No. 12-C-17.

11 The plaintiff in this case appears by David
12 Hendrickson and Steve Hastings. The defendant in this case
13 appears by Mr. Tennant, the intervenors, Joye Huff as Trustee
14 for Randy Huff Decedent's Trust B and William Lee Huff appears
15 by David T. Richardson. And the Fosters appear by their
16 counsel, Bradley W. Stephens.

17 All right. This matter comes on for hearing
18 today upon several matters, and I think what we're going to do
19 is, as a preliminary matter, take up, potentially dispositive of
20 motions, beginning with the intervenors' Huffs' motion for
21 summary judgment.

22 So Mr. Richardson, if you'd like to address that
23 you may proceed.

24 Arguments regarding Intervenor's Motion for Summary Judgment

1 **MR. RICHARDSON:** Good morning, Your Honor. I'm
2 David Richardson appearing on behalf of the Huffs, Joye Huff and
3 William Huff, arguing my motion for summary judgment based on
4 the fact that the floodplain permit at issue was issued by an
5 individual, through pursuant to the floodplain ordinance, lacked
6 the authority to issue said permit. The ordinance itself
7 specifically designates which person shall be the floodplain
8 administrator and does so repeatedly.

9 It indicates that the director of the Office of
10 Emergency Services shall be the floodplain administrator.
11 Commissioner Jerry Evans, at the time he was signing the permit,
12 says the floodplain manager was not the director of the Office
13 of Emergency Services. A gentleman named Roland Knicely was.

14 There is case law, West Virginia Supreme Court,
15 Harrison v. Town of Eleanor, which holds that building permits
16 issued in violation of the building ordinance are void as a
17 matter of law and confer no rights to the permittee.

18 So here you have a permit that's issued by a guy
19 who had no authority to issue it. Therefore, it violates the
20 Doddridge County floodplain ordinance. You can't, under the
21 ordinance, have a valid floodplain permit unless it's issued by
22 the actual floodplain administrator. So as a matter of law this
23 permit is void.

24 If you take that and then you apply it to the due

1 process, both substantive and procedural aspects of Petitioner's
2 case, well, you don't have a due process right unless you have a
3 legitimate property interest. And if you have a void permit
4 that conferred no rights, well, you have no legitimate right.
5 You have no right to due process because you have nothing.

6 And then going right along to the open government
7 procedures act or Open Governmental Proceedings Act, it has a
8 limiting factor on it in terms of who can bring that action. It
9 specifically states only citizens of the State of West Virginia.
10 Now, EQT in their response, concedes that are not a citizen of
11 West Virginia.

12 There is case law in Fourth Circuit that holds
13 that the citizens-only access provision of a law like that -- it
14 was in Virginia -- is constitutional. Admittedly, certiorari
15 had been granted the Supreme Court, but right now that's the
16 law. And just logically you can't have a commerce clause in
17 violation -- well, you can't have a privilege of immunity
18 violation because EQT is a corporation.

19 You can't have a commerce clause because a law
20 like the Open Government Proceedings Act, it doesn't affect
21 commerce. It's just about keeping public officials accountable
22 and allowing the citizens who are wronged by their behind-the-
23 scenes activities to, you know, bring it to the court's
24 attention, get the thing overturned. It's not about putting a

1 tax on something or saying you can't hire certain people or if
2 your truck comes through here, it's going to cost you a certain
3 amount of money.

4 EQT responds by conceding that Harrison v. Town
5 of Eleanor is generally the rule, but they're seeking to carve
6 out an exception with the de facto officer rule. And they say
7 that because Jerry Evans was acting under the color of the
8 authority of the floodplain administrator, and they relied on
9 that, therefore, their permit's good because the actions of the
10 de facto officer can't affect a third party.

11 Well, Harrison v. Town of Eleanor doesn't carve
12 out an exception. It's very clear. If it's a building permit
13 issued in violation of the building ordinance, it's void. And,
14 furthermore, I haven't seen any cases in the de facto thing.
15 I've only had it a couple days. I don't see anywhere it's a
16 building ordinance. All the cases I've come across are the
17 person is an individual who was wronged, who was wrongly
18 terminated or deprived of something. It's not a third party
19 who's being affected by something, potentially, a public safety
20 issue.

21 And then, because of this technicality the
22 government of a guy who shouldn't be doing the job issuing a
23 permit, these other people are now affected. It's not like
24 Jerry Evans hired me, but he didn't take an oath. And,

1 therefore, technically he's not the floodplain administrator.
2 Only the director of the Office of Emergency Services -- and
3 there's a reason for that because flooding is an emergency.
4 They want the person who is going to be dealing with the after-
5 effects of the plain, who knows about it, who can then take the
6 steps to make sure that it doesn't happen beforehand. They
7 don't want some random person just taking the job and then, you
8 know, getting a permit and signing off blindly. They want
9 someone who understands the implications.

10 If you look at Chapter 15 in the West Virginia
11 Code when it defines an emergency, flooding is one of them.
12 Chapter 15, Homeland Security Emergency, it just got amended so
13 that now it's mandatory that the floodplain administrator gets
14 training. I mean there's a correlation there. There's a reason
15 for that.

16 Furthermore, EQT, they lay out -- the de facto
17 official rule is quite complicated. There's four different
18 ones. And EQT's version of it is they combine the first one and
19 the second one. So the first one starts off you have to be
20 acting without election, without known appointment. And then,
21 you have circumstances or reputation that are calculated to
22 induce people to do something and without making it feel like
23 they need to ask questions. "Why are you asking me to do this?"
24 "Why do you want money from me?"

1 And that results in the supposing the person is
2 actually the officer that, you know, he claims to be. That's
3 the first one.

4 Now, the second one, it's under the color that
5 the guy has a known and valid appointment or election. Not to
6 pick on Jerry Evans, but he gets elected commissioner and
7 everybody knows it. But there's something where the office
8 failed to conform to a precedent or a condition. Say Jerry
9 Evans was 32 and he needed to be 35. Well, what EQT does in
10 their rule, if they take the known from the second rule and then
11 they put it in front of the first rule. So they've effectively
12 made their own rule about a de facto public official. I wish I
13 could make my own rules when I'm arguing things.

14 And, furthermore, they skip the whole beginning.
15 It's not just like this automatic inquiry and then, boom, okay.
16 There's considerations that the court has to take. The lead-in
17 is "the law upon principles of policy and justice." EQT doesn't
18 address that other than maybe just to, you know, says it. It
19 doesn't apply it to the facts.

20 When it gets down to the actual applying its
21 hybrid rule to the facts of this case, they're just conclusory
22 statements. They don't say how Jerry Evans induced them to
23 submit or invoke his actions. They just basically say a
24 sentence. "Jerry Evans induced us to submit and/or invoke to

1 his action." There's no facts there.

2 Because if you look at the deposition of Jerry
3 Evans, what he tells them is, "Y'all, I don't know. Call Kevin
4 Sneed." How is he under the color of law inducing them to do
5 anything when he tells them, "I don't know. Call Kevin Sneed"?
6 It's one of the mandatory elements -- is he's got to get them to
7 do something, submit or invoke his actions.

8 I mean the way it's phrased it's almost like
9 somebody taking advantage of the situation that people think,
10 you know, he's a tax collector. There's no election. There's
11 no appointment, but, you know, he goes around telling people
12 that he's a tax collector, and "You need to give me some money
13 because I'm a tax collector." So people give him money because
14 he's convinced them he's a tax collector. You know, Jerry Evans
15 didn't do anything. He just went, "Oh, yeah, I don't know.
16 Talk to Sneed."

17 I mean it's a complicated rule. It's about, you
18 know, that big. But if you look real close, you can see where
19 they just kind of mix and match. They just make up their own
20 rule, and that's inappropriate, especially given the gravity of
21 what we're talking about.

22 You know, we're talking about people's,
23 potentially, lives. I mean this is flooding. They're going to
24 maybe make it out to be that this is about money or property.

1 It's not. It's about flooding. It's about a community where
2 the vast majority of the people, the residents, are elderly.
3 You know, do you expect them to swim?

4 There are thoughts of justice and policy that
5 need to be taken into consideration as we go through the
6 elements. I mean it's what you need to do first.

7 And then, when you get to their argument against
8 the Open Government Proceedings Act, I mean, they basically
9 concede it to a certain extent. They do argue against it, but
10 they have no authority, while, meanwhile, I've have cited cases
11 that have said it's fine. And then, the alterative that they
12 offer is if it's not fine, then, please let Mr. Bowman, our
13 employee, take our spot because he's a West Virginia citizen.

14 I don't know of any case law. They didn't cite
15 any case law. I mean that's like the health department shutting
16 down a McDonald's, and then the cashier takes the spot of the
17 McDonald's. It doesn't make sense to me. He has no vested
18 interest. He has no legitimate property. He's not in the case.
19 He was never in the case. So for him to take the place just so
20 they can keep this thing going that they have no right to keep
21 going under the law under the strict restriction as to who can
22 bring it, I believe it's inappropriate as well.

23 If possible, I'd like to reserve some time to
24 respond to Mr. Hastings or Mr. Hendrickson.

1 **THE COURT:** All right. Thank you, Mr.
2 Richardson.

3 **MR. RICHARDSON:** Thank you now.

4 **THE COURT:** Mr. Hastings.

5 **MR. HASTINGS:** Thank you, Your Honor. Despite
6 what Mr. Richardson says, this is not a complicated issue. It's
7 a simple issue. And in considering a motion for summary
8 judgment the court is clearly well aware of the standard, and
9 you have to give the benefit of the doubt of everything we say
10 and construe those facts in a light most favorable to us.

11 Now, we are in a little bit different situation
12 because we're not going before a jury. The court's going to
13 hear all of this. And so, I'll respond to each one, but I just
14 wanted to point out what the standard is.

15 Mr. Evans was not a tax collector out there just
16 trying to collect people's money. I understand flooding is a
17 serious issue. But the reality of it is Mr. Evans was the
18 floodplain manager. We applied for and obtained the permit in
19 November 2011.

20 If you will look at -- and we put all this in our
21 response to pleading, Your Honor, but I'm going to go ahead and
22 do it for the record here.

23 If you look at the affidavit of Shirley Williams
24 -- she's a present county commissioner -- Mr. Evans was actually

1 appointed by the county commission in 2010 to be the floodplain
2 manager. Now, I think that was January 2010. I don't have the
3 exact date. He continued to act as the floodplain manager after
4 the passage of the new ordinance.

5 And what's interesting in this case, Your Honor,
6 and it's an interesting dynamic that really hasn't come out
7 between the parties, but there was an old ordinance. I'm going
8 to call them the old ordinance and the new ordinance. The old
9 ordinance was a '91 ordinance. The new ordinance was 2011.

10 Our surveying agent, Mr. Smith, Smith Land
11 Survey, will come and testify today and say that his office
12 contacted the county commission in 2010, a year before this, in
13 December of 2010. They're telling us they don't even think we
14 need a floodplain permit because our operations are temporary.

15 Nothing changed in the new ordinance to the old
16 ordinance that really changed the effect of whether we really
17 need a floodplain permit for this development. But my client,
18 being above board, went ahead and went through with it. EQT was
19 the first company in West Virginia to apply for a floodplain
20 permit for the drilling of a gas well; Wetzel County.

21 So who do we go to for this floodplain permit?
22 County commission. Who do we call? Clerk's office. Clerk's
23 office says, "Talk to Jerry Evans. He's the floodplain
24 manager."

1 So that happened in 2010. We start doing some
2 work. We do the floodplain study. All of that takes place, and
3 then, in the meantime, the new ordinance is passed. In calls
4 back we're told to call Jerry Evans. This was in November of
5 2011 after the new ordinance was in place. We contacted the
6 county commission. The county commission said, "Call Jerry
7 Evans."

8 Now, Jerry Evans, with all due respect, may not
9 know everything that goes into what's necessary for a floodplain
10 permit. We're here today because there were some missteps along
11 the way. There's no question about that. We can talk about due
12 process all day long here, Judge. There's no question our
13 client's due process rights have been violated over and over and
14 over.

15 Jerry Evans says, "Let me check. I'm going to
16 direct you to the state." Kevin Sneed is going to come here
17 today and testify to the extent the court wants to hear that
18 testimony. He's the technical advisor for Doddridge County.
19 He's the state coordinator for FEMA. He coordinates with the
20 national representatives. In the entire state if anybody knows
21 about floodplain ordinances and what you need to do, it's Kevin
22 Sneed.

23 Kevin Sneed provided us with the application
24 process, told us to turn in to Beth Rogers, the county clerk at

1 the time. We do that and Jerry Evans signs it.

2 He was, in fact, appointed as the floodplain
3 manager. Shirley Williams admits as much. And to the extent
4 that he's not, there's a question of fact of whether he meets a
5 de facto floodplain manager or de facto appointment who received
6 acting authority. And it's even confirmed after this issuance
7 of the floodplain permit in April, the letter rescinding our
8 floodplain permit came from Jerry Evans, the floodplain manager.

9 The county commission, in the open meeting --
10 which we'll get into later; we didn't have notice of --
11 rescinded it. They all acquiesced that he was a floodplain
12 manager and told him -- directed him to do that. They accepted
13 his resignation in May and appointed another one, again, not Mr.
14 Knicely, the OES director or anybody else. They appointed Dan
15 Wellings. The county commission was acting as if he was the
16 floodplain manager. It wasn't some guy off the street. He is
17 actually a county commissioner who enacted the statute, was
18 acting as a floodplain manager. He was trained by Kevin Sneed
19 through the state. He testified when we took his deposition
20 this summer that he received 30-some odd hours or something in
21 training. It's not like he doesn't know anything.

22 So I think with the specific issue of whether we
23 had a lawful permit in the first place, Your Honor, where else
24 are we supposed to go? What else are we supposed to do? If we

1 can't call the county clerk up and say, "What do I got to do to
2 get this permit?" and they don't steer us in the right
3 direction, then, what else are we supposed to do? It's doesn't
4 void, it's not void because it's unlawful.

5 And the court needs to be mindful of its
6 jurisdictional authority in this case that we're having here
7 today. We have injunction authority to enforce the provisions
8 of the ordinance. If Mr. Richardson and his clients have their
9 way with respect to this issue, here's what happens. You throw
10 this case out. We go back and apply for a new floodplain
11 permit. They're going to deny us, Your Honor. It doesn't
12 matter what we tell the county commission. They're going to
13 deny the flood plain permit. We'll come back here in another
14 year.

15 He was the floodplain manager. They ratified his
16 decisions, acquiesced in his decisions, and a question of fact
17 exists as to all that issue. So therefore, their motion should
18 be denied.

19 Mr. Richardson wants to talk about policy and
20 justice and what we don't mention or do mention. Your Honor, it
21 should be clear to everybody in this room that development is
22 allowed in the floodplain. There are people in this case that
23 act as if there can be nothing in a floodplain. If there can be
24 nothing in a floodplain, the floodplain permit -- the floodplain

1 ordinance wouldn't exist. It would just be a simple one line:
2 "You cannot develop in a floodplain," period.

3 We complied with the ordinance. We should get
4 the floodplain permit. The policy dictates that. The stated
5 public policy of the State of West Virginia is the extraction of
6 minerals. We can go all day with that kind of stuff, and I'm
7 not going to belabor it.

8 Now, regarding the Open Government Proceedings
9 Act, Mr. Richardson brings up a couple of things, and I'll be
10 the first to say, "Your Honor, we're not a citizen." However,
11 it should be noted that the county commission didn't move for
12 summary judgment on that issue. They didn't do it. The Court
13 needs to ask itself why.

14 I'm not sure the Huffs have standing even to make
15 the argument. While the Court ruled that they have a property
16 interest in the development on their property, they have no
17 property interest in what we're bringing against the county. So
18 I'm not sure they have standing to bring the claim.
19 That's the first step.

20 Second step: Mr. Richardson cited law applying
21 -- Virginia law, and says it's the law of the land. Your Honor,
22 with all due respect to Mr. Richardson, West Virginia is a
23 separate state than Virginia. And while the Court could look at
24 that to look at reasoning in considering it, it has to be a

1 violation of interstate commerce because of this. We have a
2 property interest in our minerals under that ground and a right
3 to explore those minerals.

4 The Open Government Proceedings Act is meant to
5 protect people, public, companies -- everybody that might be
6 affected by what that board might do. If there's ever a reason
7 why there needs to be an Open Government Proceeding Act, Your
8 Honor, it's this case. Because what did they do? They revoked
9 something that we had. They took action at that meeting.

10 And, again, Mr. Richardson -- you know, I didn't
11 think interstate commerce, Your Honor; we all learned that in
12 law school. It's been a while since I've been in law school,
13 and you don't think much about it. But since Mr. Richardson
14 brought it up, it is a violation of interstate commerce that
15 only citizens can bring it. Because if the county commission is
16 going to take actions that affect citizens like that of other
17 states that have rights in West Virginia, then they need to be
18 noticed of it.

19 Now, I understand what Mr. Richardson's argument
20 is on the -- quote, unquote -- "citizen needs to bring the
21 action." The language speaks for itself, Your Honor, but this
22 is not a case for strict statutory construction on that issue
23 because it's a violation -- it's unconstitutional because it
24 violates the commerce clause. It's unconstitutional because it

1 violates our due process.

2 And again, what we're talking about in this case
3 is an injunction. Today in this case we're talking about an
4 injunction. The Court can consider it. It absolutely goes to
5 unclean hands of the county commission. And quite frankly, Your
6 Honor, to the extent it gets necessary, there were
7 misrepresentations made by at least one of the intervenors
8 directly to the county commission, which resulted in the
9 rescission of the floodplain permit. So the Court can consider
10 all that.

11 If the Court requires us to strictly comply with
12 that, parties are substituting in and out of cases all the time
13 for the real party in interest. Sometimes it's done by
14 stipulation. And Mr. Bowman is a citizen of the State of West
15 Virginia. And we would ask if the Court -- to satisfy the Court
16 on the issue, that he be substituted in.

17 We don't think it's necessary and we don't think
18 the Court should allow this kind of activity to take place
19 without repercussion, Your Honor. You know, it was something
20 that the county commission did. This particular county
21 commission has done it over and over on their meetings.

22 There are concerns of people in this room that I
23 know of that specifically brought to my attention that they're
24 continuing doing it. And with all due respect to citizens and

1 these other issues, I'm here on this issue for my client. So I
2 can't do anything about that.

3 **THE COURT:** Just so I can understand your point
4 on that, are you saying that you think the Open Governmental
5 Proceedings Act is unconstitutional because it unfairly
6 discriminates against your client in as much as your client is
7 not technically a citizen nor a resident of the State of West
8 Virginia?

9 **MR. HASTINGS:** Yes.

10 **THE COURT:** Okay. I just wanted to make sure I
11 understood your argument so that's a point of clarification.

12 **MR. HASTINGS:** Just that limited aspect of the
13 statute, Your Honor. Because, otherwise, I mean, how can we
14 come and protect our rights? I mean Mr. Sneed -- in this
15 particular scenario Kevin Sneed with the state contacted the
16 county commission and said, "You need to stop this floodplain
17 development because we don't have certain information," which,
18 you know, that's clear stuff. Well, had they put it on notice,
19 and then, you know, we see the notices that come out; they're
20 published. We could come and intervene at the time and say,
21 "Wait a minute, we're willing to hold on, but let me show you
22 what we've done in all this other stuff." I mean that's why
23 that would be there for people to come and speak.

24 Mrs. Huff is not a citizen of the State of West

1 Virginia, Your Honor. We fought in this case of whether she's a
2 citizen of California or Texas -- I think it's Texas. But, you
3 know, she's not a citizen either. And Mr. Foster? A citizen of
4 West Virginia, no question.

5 **THE COURT:** Okay. I understand your argument.

6 **MR. HASTINGS:** All right. Thank you, Your Honor.

7 **THE COURT:** I'm going to ask you, I think,
8 because, at least considerably in the Intervenor's amended
9 motion for summary judgment, the issue of constitutionality was
10 raised, and I see that there's been a filing by the Plaintiff,
11 in limine, to exclude any arguments as to the constitutionality
12 of the ordinance. So what I'm going to ask you to do, if you
13 don't mind -- I hate to pull you up from your agenda into this
14 particular position in the proceedings, but I think it might be
15 appropriate to go ahead and address that now, and then we'll
16 permit Mr. Richardson a chance to respond.

17 **Arguments regarding the Plaintiff's Motion in Limine to**
18 **Exclude Argument Pertaining to Constitutionality of**
19 **Doddridge County Floodplain Ordinance**

20 **MR. HASTINGS:** Yeah, Your Honor, just for the
21 record, it doesn't matter where we go in the agenda; it's just a
22 list of everything.

23 The reason why the constitutionality of the
24 floodplain ordinance shouldn't be an issue in this case is

1 because if there's a provision in that particular statute, the
2 ordinance, that anybody doesn't like they can go get that
3 changed. Now, arguably, you're going to sit here and say to me,
4 "Well, you can go get the citizen aspect changed." But that's
5 just recently in a motion for summary judgment.

6 They could have brought the case, and, I believe,
7 originally brought the claim in this case, against the
8 constitutionality of the floodplain ordinance. And the issues
9 then are now not pending in the case because they didn't bring
10 them in the actual answer to the operative complaint.

11 The only claims in this case, Your Honor, are our
12 clients', EQT's. The Huffs intervene to defend their position.
13 They do not make a claim against EQT in this case. They do not
14 make a claim against Doddridge County Commission in this case.
15 They could have.

16 **MR. TENNANT:** Let me just correct that. They
17 actually did but they withdrew it.

18 **MR. HASTINGS:** Okay. Thanks for the
19 clarification. They withdrew that claim. And to the extent --
20 and here's what I think they're going to go with the
21 constitutionality of why it's an issue, and we can wait till it
22 comes up, if it comes up at all today, Your Honor. Obviously, a
23 motion in limine is what we think may come up. We think that
24 they may argue that they didn't have notice of our floodplain

1 permit; therefore, they didn't have appropriate time to object
2 to it, to appeal the decision. I think that's what we're
3 talking about in our motion. And so, if it's something else,
4 I'm not aware of it. We're just moving in limine, and we're
5 happy to reserve the right for everything else once the
6 testimony comes in, except this issue.

7 The ordinance does not provide for any publishing
8 or notifying the public of issuance of a floodplain permit. I
9 get that. That doesn't matter in this case. In the discovery
10 responses filed this week by Joye Huff they knew on March 16th
11 that we had a floodplain permit. Now, I have evidence to
12 suggest they knew earlier, but I'll go with their date, March
13 16th.

14 Once they know about an action of the floodplain
15 manager, they have 30 days under the ordinance to appeal it.
16 The county commission meeting was April 17th. That wasn't
17 appealed. They've never appealed it. So because they didn't
18 appeal when they knew about it, to the extent that it's
19 unconstitutional because it wasn't published, it's irrelevant.
20 It's waived. They knew about it. They had 30 days and didn't
21 do it. So now whether it's constitutional or unconstitutional,
22 you can't sit on your rights, Your Honor, and then complain
23 about it later. And so that's the crux of that argument. If
24 there's any other constitutional arguments, Your Honor, that

1 they plan on offering, I'm not aware of them, but we can address
2 those. But that's the crux of that position.

3 **THE COURT:** All right, Mr. Richardson, you may
4 respond.

5 **MR. RICHARDSON:** Okay. May I have just a little
6 bit of time? There's quite a lot to respond to there.

7 **THE COURT:** Sure.

8 **MR. RICHARDSON:** Thank you, Your Honor. Just so
9 we don't lose the train of thought, my clients found out about
10 the floodplain permit as it was inserted in a letter that
11 counsel for EQT wrote to West Virginia Department of
12 Environmental Protection. The letter itself with attachments
13 was about an inch thick. The mailing date was the 16th. It was
14 going from West Virginia to California. Trust me, it takes a
15 while. Add on the time of actually getting through it all. And
16 the 30 days, then, expired when she found out -- or when my
17 clients found out until after the permit was rescinded and
18 revoked.

19 So maybe in hindsight they could have brought an
20 appeal just to preserve the right to appeal about a permit that
21 no longer was a problem. I'm not sure what they were supposed
22 to do in that situation. There was no permit at that point.

23 If I remember how it all went down correctly -- I
24 could be wrong but I seem to remember that it was taken care --

1 I mean it was not the issue that it wasn't hanging over their
2 head. I wasn't the counsel at the time. It was previous
3 counsel. I'm not just saying that because that's the easy
4 excuse. There was a reason, whether it was the statute of
5 limitations for the state because there was litigation, I don't
6 know.

7 But as to the constitutionality, the Huffs did
8 maintain that. It's an affirmative defense in their answer.
9 And our position is as long as there's litigation, then, it
10 still hasn't been touched. And, you know, there's a lot of
11 cause of action we could have brought against the county, but
12 what was the point in pressuring them? You know, we're not
13 going to go after the county for money. An individual made a
14 mistake. A county made a mistake in letting this guy think he
15 was the floodplain administrator. He made a mistake by not
16 doing a review.

17 Going back to Mr. Evans, he said, "I told them
18 they had to get ahold of him (Sneed) and find out what they had
19 to do because I didn't know what they had to do." I mean that's
20 what I'm talking about with justice in public policy. You have
21 a guy who is not supposed to be a floodplain administrator, the
22 gatekeeper to keep you from having stuff built in their
23 floodplains and flooding them, and he doesn't know what to do.

24 Well, the correct individual, the director of

1 Emergency Services, is trained in this aspect. I mean that's
2 why it's there. And yes, he was appointed in January of 2010,
3 and that was fine under the old ordinance. Under the old
4 ordinance the president of the commission could appoint somebody
5 to be the floodplain manager.

6 Well, September of 2011 they enact the new
7 ordinance, and now the president doesn't have that power
8 anymore. So this office that was created, the president had the
9 power to do, ceased to exist. And it was Jerry Evans who made
10 the motion to enact the ordinance. And as to poor EQT being at
11 its wits end on what to find out and relying on just calling the
12 clerk, if I was going to spend \$30 million to build a project,
13 I'm going to do everything possible to make sure that it's
14 correct, that I'm talking to the right person. You can look at
15 the meeting minutes. If the guy's not answering the phone,
16 maybe that's a sign that something's not right. You could talk
17 to Kevin Sneed.

18 And as to, you know, the county ratifying it,
19 well, that goes to something interesting. EQT at no point --
20 they just assumed that the floodplain manager is an officer.
21 They don't show why he is an officer. This is some complicated
22 stuff. I mean I came across case law where superintendent of
23 schools were officers in terms of de facto.

24 So to just jump ahead and assume that floodplain

1 manager is an office, I think is inappropriate and doesn't fully
2 analyze the de facto officer.

3 But going back to the county, so at some point
4 when this all happened they went back and looked at their
5 ordinance. And on May 1st in the county meeting minutes -- and
6 I believe it's in my motion for summary judgment -- they
7 acknowledge that the director of Office of Emergency Services
8 has to be the floodplain administrator.

9 Kevin Sneed emails them shortly after and says,
10 "Hey, y'all need to amend your ordinance. Here's how you do
11 it."

12 Now, from what I understand, the reason they
13 haven't amended it is because the prosecuting attorney, the
14 county prosecutor, is very busy, and this would take a
15 significant amount of time to go through and redo. It's a
16 flawed ordinance.

17 I mean, going to the notice thing. You have
18 somebody affecting adjacent property owner, and people keep
19 thinking the Huffs are the surface owners. They're the adjacent
20 property owners to this project, too.

21 Two-thirds of the project, I mean, it's on either
22 side of their property, and then, one piece is on their
23 property. And they never got a notice. And I love the fact how
24 EQT is bemoaning the fact their due process rights are trampled

1 on, and that you shouldn't strictly construe the Open Government
2 Proceedings Act even though it says, "citizen." But when it
3 comes to somebody else's due process rights, "Oh, yeah, no big
4 deal." They waived their appeal. They have no due process
5 rights.

6 I mean the rules apply to EQT in a way that they
7 don't apply to everybody else. EQT can skirt the rules, but if
8 anybody else makes the slightest mistake, EQT's going to jump on
9 them. And when I hear this thing about EQT complying with the
10 ordinance all the way, I mean, I'm looking right now at a April
11 19th email between EQT, several employees, where the
12 representative for EQT is getting an email from one of the
13 permitting people, Wayne. "In its current format presentation
14 the submittal does not meet the requirements set forth in the
15 ordinance."

16 I mean EQT right here is saying they didn't
17 comply with the ordinance, and this is almost six months after
18 they -- well, five months after they applied for it. I mean if
19 that isn't "unclean hands" of jumping ahead, I'm not quite sure
20 what is. If you know that you did not comply and then you come
21 here and you're saying, "I complied and everybody else, they
22 messed up but give me my permit back."

23 **MR. HASTINGS:** Your Honor, with all due respect
24 to Mr. Richardson, we're going to be here all day arguing these

1 things. We submitted motions for most of them, and I would just
2 ask Mr. Richardson to move along to the constitutionality
3 question.

4 **MR. RICHARDSON:** Well, I have one more and then
5 I'll get to the constitutionality question.

6 The whole May 1st thing, you have to understand
7 the OES director resigned on May 1st, the same day that the
8 county realized that their ordinance said that their ordinance
9 said that there needed -- they didn't have anybody else to give
10 it to. Not only couldn't they amend it because their
11 prosecuting attorney is busy, they didn't have an OES director
12 until well into June.

13 All right, going back to the constitutionality,
14 again, Harrison v. Town of Eleanor, speaks for itself, the due
15 process. You have no right because your permit is void because
16 it violates the ordinance. Going back to maybe the commerce
17 clause aspect, the commerce clause, it only -- since the
18 citizens-only provision doesn't specifically say it applies to
19 commerce, you have to go to the dormant commerce clause. And
20 it's not a law that implicates economic protection as
21 principles. It's a law, the purpose of which is not to protect
22 in-state business. It's just the whole governmental official
23 accountable to the people who vote for them, the people they
24 represent. It's not saying that to keep EQT from doing

1 business. It's just there to prevent secrecy in government for
2 the actual citizens.

3 And, you know, strict construction of
4 legislature, it's pretty clear. There's no wiggle room. The
5 circuit court in the county where the public agency regularly
6 meets has jurisdiction to enforce its article upon civil action
7 commenced by any citizen of this state within 120 days. So I
8 mean it's gone for anybody else in the race. The deadline
9 passed three months ago. But it's very clear -- any citizen.

10 And Mr. Hastings says that it was a Virginia
11 court. It was the Fourth Circuit Court of Appeals that upheld a
12 Virginia Freedom of Information Act citizens-only access
13 provision. And that wasn't the only case that upheld that, but
14 that was the most authoritative in terms of its standing, I
15 guess.

16 I'm trying to think if there's anything else.
17 Mr. Hastings did throw a lot there, and I'm -- oh, we had no
18 problem getting a copy of the old ordinance and the new
19 ordinance from Kevin Sneed. And we're not a multibillion dollar
20 corporation with a legal department and an outside permitting
21 department.

22 **THE COURT:** Okay. All right, I think I've got a
23 pretty good understanding of your position on that.

24 **MR. RICHARDSON:** Thank you, Your Honor.

1 **THE COURT:** Did you want to respond on the issue
2 of constitutionality, Mr. Hastings?

3 **MR. HASTINGS:** Thank you, Your Honor. I'm going
4 to be very, very fast, Don, if you want to come after me.

5 **MR. TENNANT:** Yeah, that's fine.

6 **MR. HASTINGS:** Let me be clear on a couple
7 things, Your Honor. And again, we need to stick to the issues.
8 How much money we have and who we have in the permitting process
9 has nothing to do with this. The issue is is this floodplain
10 permit. It's what we're here for today and whether an
11 injunction, authority of this court, is appropriate.

12 And regarding Jerry Evans, let's be clear.
13 Shirley Williams, president of the county commission, appointed
14 Jerry Evans. Jerry Evans acted. The county commission, after
15 the enactment of the new ordinance, accepted his resignation.
16 If he wasn't the floodplain manager, they don't need to accept
17 his resignation. It's clear, I mean, and it's a question of
18 fact at a minimum on it, Your Honor. And so it precludes
19 summary judgment at this point in time, but we just need to move
20 forward with everything else we have here today.

21 Regarding the Open Government Proceedings Act
22 itself, again, I'm not going to belabor every point and every
23 note in our brief. You have these briefs in front of you
24 because there were responses filed. But even if you think we're

1 wrong in everything, substitution of a citizen in the stead of
2 EQT for this claim only is appropriate, and there's no prejudice
3 to anyone.

4 I mean Mr. Richardson and his clients are quickly
5 to point out in prior proceedings in this case, either in this
6 courtroom or before the county commission, that we all need
7 notice. So I think if we want to talk about policy and justice
8 that's the clearest one in the case.

9 Now, briefly, I don't think he really responded
10 to the motion that we're arguing at this point, which is the
11 motion in limine on constitutionality. And he wants to talk
12 about the date of March 16th. The DEP sent Joye Huff a letter
13 February 10th. Give her 30 days to March 10th. We got
14 notification of something March -- we sent notification at some
15 point in time in March or whenever it was. Your Honor, the
16 bottom line is they sat on their rights.

17 So that's a very limited motion in limine. The
18 purpose of a motion in limine is to limit stuff that's
19 irrelevant. And we're willing to reserve everything else until
20 the point in time that it comes up in testimony today. And we
21 just want to move forward with the rest of the motions to the
22 extent court needs it. Obviously, Mr. Tennant has something.

23 **THE COURT:** All right. Mr. Tennant?

24 **MR. TENNANT:** Your Honor, with respect to the

1 first motion, intervenors' motion for summary judgment, on the
2 issue of the validity of the permit as issued by Jerry Evans, I
3 want the court to understand and the record to be clear that as
4 representative of the Doddridge County Commission and the good
5 public servants that these commissioners are and attempted to
6 be, that I will not argue contrary to the actions of these
7 individuals and the commission itself, so I stand silent with
8 respect to that motion.

9 That motion kind of -- an argument morphed into
10 many other issues here, and I feel compelled at this stage, just
11 because I know you're taking notes, with respect to the Open
12 Governmental Proceedings Act, I think that the evidence today
13 will clearly show that on April 17th there was citizens that
14 came to that meeting which were not on the agenda and did voice
15 concerns to the county commission at that point. And the county
16 commission, without it being on the agenda, did make a decision
17 to seek at rescission by Jerry Evans, the floodplain manager, of
18 the permit that had been granted by Jerry Evans.

19 The argument that we're going to bring forward,
20 Your Honor, is under the floodplain ordinance itself, 7.7(A)(2),
21 it was unnecessary for anything to go before the county
22 commission. The floodplain manager has an unilateral right to
23 issue a stop order to cause the permit holder to stop all work
24 and progress on a planned development within the floodplain.

1 The ordinance does not require any notice to anyone. It can be
2 an absolute unilateral act by one human being, that being the
3 floodplain manager, to issue a stop order. Okay?

4 Now, did Mr. Evans use the word "stop order" in
5 his letter of April 18 of 2012? He did not. He used
6 "rescission." It's just an improper use of the word. The
7 practical effect is that the floodplain manager wanted to stop
8 this progress so that this can be further looked at based upon
9 the evidence that was presented, which were the photographs that
10 the Huffs and the Fosters brought forward that showed that there
11 was massive flooding in the zone where EQT wanted to put the
12 drill pad.

13 So with having said that, I'll sit down. If you
14 have any questions, I'd be glad to respond.

15 **THE COURT:** Before you sit down I do have a
16 question.

17 **MR. TENNANT:** Yes.

18 **THE COURT:** The people that came before the
19 county commission on -- what date did you say that was?

20 **MR. TENNANT:** April 17 of 2012.

21 **THE COURT:** April 17th. How did they know to do
22 that?

23 **MR. TENNANT:** I don't know, Your Honor.

24 **THE COURT:** They weren't given any notice.

1 **MR. TENNANT:** They were not given notice by the
2 agenda that was published correctly for the April 17, 2012
3 meeting.

4 **THE COURT:** Were they given any other kind of
5 notice of the proceeding or the permit process or any of those
6 issues?

7 **MR. TENNANT:** Not to my knowledge, Your Honor.

8 **THE COURT:** So they must have just kind of found
9 out about it and decided maybe they wanted to come and say
10 something to the commission.

11 **MR. TENNANT:** Yes. Which in the most
12 commissions around the State of West Virginia, I know in Ohio
13 County where I'm the part-time county solicitor there is an open
14 call at the end of the meeting: "Does anyone in the public wish
15 to address the county commission?"

16 **THE COURT:** Sure. What county is that?

17 **MR. TENNANT:** Ohio County.

18 **THE COURT:** Ohio County. Okay.

19 **MR. TENNANT:** And various people get up from
20 time to time and voice concerns, and the commission hears their
21 concerns and may take action later on that issue. In this
22 particular instance, unfortunately what occurred was there was a
23 presentation of concern about this permit that was issued by the
24 Huffs and the Fosters, and the county commission did, in fact,

1 move forward, unfortunately, to take a vote on ordering the
2 floodplain manager to rescind the permit.

3 But I contend that that was an unnecessary act
4 because the floodplain manager had unilateral authority to do
5 that without any presentation. So to the extent that there was
6 not agenda noticed to EQT really is immaterial, an immaterial
7 fact here, because the floodplain manager could have done it and
8 should have done it without any consideration of any
9 presentation to the commission or having the commission vote on
10 whether the permit should be rescinded or not. He has absolute
11 unilateral authority to issue a stop order, which is
12 essentially, as I said, in practicality, what occurred in this
13 instance.

14 **THE COURT:** Well, let me ask you this: Do you
15 think that's -- and I don't mean to put you on the spot here, I
16 guess, but do you think -- maybe I shouldn't ask you if that's a
17 good way to proceed, but do you think that's a legally proper
18 way to proceed, just to have this action and leave everything to
19 fate in terms of whether somebody can find out about something,
20 whether that's EQT, whether that's the Huffs, whether that's the
21 Fosters, and be able to just put it together and come in and
22 make a comment on it even though there's no requirement that
23 that be done, and the floodplain administrator, whoever he is or
24 whoever is acting in that capacity, may have the authority to

1 listen to what they say and take further action? Do you think
2 that's a good way to proceed to afford everybody their rights, I
3 guess, a legally proper way to proceed to afford everybody their
4 due process rights under an ordinance?

5 **MR. TENNANT:** I do. I do, because the stop order
6 simply stops the progress of the development in the floodplain.
7 And in this instance nothing had occurred, you know. All that
8 EQT did was do their studies, do their mapping on the surveying
9 of the land and submit it for purposes of having the permit
10 issued.

11 The testimony you're going to hear today is from
12 the date that the permit was issued to April 17th there was
13 nothing else done. There were no contracts let. There was no
14 dirt moved. There was no drill holes drilled. There was no
15 fracking that occurred, et cetera.

16 So the essential rescission or stopping of the
17 process does afford EQT an opportunity of due process because on
18 May 22 of 2012 there was an open public meeting, which EQT got
19 notice of, and they had a right to come forward and present
20 evidence at that time, and they chose not to do that.

21 So the stop order is just a timeout. It's
22 literally a timeout in the process, and it needs to be done on
23 an emergent basis, and I think that's why the floodplain manager
24 has unilateral right to do it without notice and without any due

1 concern of taking it to the commission or not. It's a stop. It
2 stops the progress, and then the parties have an opportunity to
3 bring forward evidence to the floodplain manager, or in this
4 case the floodplain appeals board, to ultimately decide the
5 issue as to whether or not the permit was valid.

6 **THE COURT:** Well, what was the legal basis for
7 that public hearing as found in the ordinance or as determined
8 by the ordinance?

9 **MR. TENNANT:** Which public hearing, Your Honor,
10 are you referring to?

11 **THE COURT:** The one you just referred to where --

12 **MR. TENNANT:** The May 22?

13 **THE COURT:** -- EQT had the right to come and they
14 -- I believe, it was the position of EQT that it was an
15 improperly convened public meeting and they opted not to
16 participate. Is that the right meeting?

17 **MR. TENNANT:** Yeah, that is.

18 **THE COURT:** You talked about it and --

19 **MR. HASTINGS:** Your Honor, we did object and we
20 stayed. Just we were there.

21 **THE COURT:** Okay. Just a minute. I've got a --

22 **MR. HASTINGS:** We lodged an objection and just
23 sat through the hearing.

24 **THE COURT:** Okay. All right.

1 **MR. TENNANT:** Yes, Your Honor, the process under
2 the ordinance is that appeals can be filed based upon the stop
3 order being issued. Here it was called rescission, but it
4 essentially stopped and had a timeout on the progress of the
5 development.

6 EQT, through their attorney, Mr. Hendrickson,
7 sent a letter to the county commission objecting to the process
8 of the rescission of the permit, which ultimately the county
9 commission took as an appeal, that they were, in fact, appealing
10 the permit rescission.

11 And while it was, again, technically not properly
12 noticed in the sense that there was a letter that went out that
13 stated that EQT could present evidence to the floodplain
14 manager, but in that particular situation Mr. Evans had already
15 resigned, Mr. Wellings had just recently been appointed, and at
16 that point the county commission took that letter from Mr.
17 Hendrickson as a request of appeal of the decision to rescind
18 the permit.

19 And at the May 22 hearing the floodplain appeals
20 board clearly stated that "We're sitting here as the appeals
21 board based upon the appeal that was lodged by EQT and we're
22 going to take evidence." Everyone had an opportunity. EQT
23 stood up and objected to the process, didn't present any
24 evidence. So they had a due process right to be heard at that

1 point on the whole issue, and they chose not to do so.

2 And I mean as far as due process generally, Mr.
3 Hastings said that this is all about due process. Well, the due
4 process, you have to even take even a level further as to
5 whether all these little mistakes that were made were cured by
6 the process that Your Honor allowed by agreement of the parties,
7 and that was to send it back to the floodplain appeals board and
8 open this back up again where everyone could be heard, any party
9 could submit further evidence to the floodplain appeals board.
10 And, ultimately, the floodplain appeals board did, in fact, then
11 rule on the issue.

12 So when you look at due process, they've had more
13 than due process. They've now had an opportunity on two
14 occasions to submit evidence to the floodplain appeals board for
15 the contest of the rescission or the stop of the progress of the
16 work based upon the permit that was granted.

17 **THE COURT:** Thank you, Mr. Tennant.

18 **MR. RICHARDSON:** Your Honor, I have to clear up
19 three sentences.

20 **THE COURT:** Just a minute. There's probably a
21 more imminent matter that Mr. Hendrickson desires to clear up.

22 **MR. HENDRICKSON:** May I respond?

23 **THE COURT:** Yes.

24 **MR. HENDRICKSON:** First of all, it wasn't a stop

1 work order. It was a rescission. There's a huge difference
2 between the two, and I know you recognize that. Second of all,
3 these folks show up at a county commission meeting, and, then,
4 you can look at their agenda if you'd like to see a copy of it
5 for that date, there's no open call. And they raised concerns
6 to the county commission about this drilling that might go on.
7 And, lo and behold, Jerry Evans is directed by a vote of the
8 county commission that's not noticed to send us a letter
9 rescinding -- not stop work -- rescinding our permit. Over
10 with. Done. Okay? That's the first point.

11 Second point: The May meeting wasn't a properly
12 constituted meeting because, number one, the floodplain
13 coordinator wasn't there; he resigned. And number two, it
14 wasn't properly noticed. And number three, as you go on through
15 this process, Your Honor, Dan Wellings was appointed by the
16 commission. Well, Dan Wellings doesn't meet the definition of
17 the ordinance. He's not the OES director. So Dan Wellings
18 wasn't properly appointed either.

19 Now, I think even today Dan Wellings is still
20 acting as the floodplain coordinator for this county even though
21 he isn't the duly authorized person under the statute or the
22 ordinance to act in that capacity.

23 So what you have, Your Honor -- it's not just a
24 little slip here and a little slip there. What you have is you

1 have the very essence of why you have the Open Meetings Act.

2 I'm the chairman of the Higher Education Policy
3 Commission. Everything we do has to be published ahead of time
4 because we give everybody an opportunity to come and voice their
5 concerns. We can't take up anything for a vote unless we let
6 the public know what's going to happen. And there's a very good
7 reason for that because we want to make sure as public policy
8 that everybody that has an interest, whether you're a citizen,
9 whether you're not a citizen, everybody that has an interest in
10 what's going to be taken up on the agenda has a right to come
11 and voice a concern.

12 And in the May meeting we didn't want to
13 jeopardize our due process rights by participating in what we
14 thought was an ill-constituted meeting of the county commission
15 or the floodplain appeals board. There was no appeal at the
16 time. We had already lodged our objection saying, "Look, you
17 had not right to rescind our permit to begin with because you
18 violated due process." We still maintained that in May. And we
19 provided information before that, Your Honor, and the evidence
20 is going to be that, despite the fact that we gave them our
21 study again because they said they lost it or didn't get it the
22 first time -- I don't know which -- despite the fact that the
23 state FEMA coordinator took it, sent it to FEMA, FEMA blessed
24 it, the state coordinator blessed it and told the county

1 commission, "It's good; reissue the permit," they still didn't
2 do it.

3 And so it's compounded due process error one
4 after the other after the other after the other. And that's why
5 we're here today.

6 **THE COURT:** And Mr. Hendrickson, what
7 organization is it that you're counsel for?

8 **MR. HENDRICKSON:** I'm the chairman of the Higher
9 Education Policy Commission.

10 **THE COURT:** Higher Education Policy Committee.
11 And what they do is a matter of public notice and --

12 **MR. HENDRICKSON:** All the time.

13 **THE COURT:** -- open proceedings.

14 **MR. HJENDRICKSON:** Yes, sir.

15 **THE COURT:** And I guess the problem I have with
16 that is this: How can a permit properly issued, that is a issue
17 or involves matters of public interest, in general, and property
18 owners' interests, specifically, without any type of public
19 notice generally to the public or specific notice to individuals
20 who may have an interest in the outcome of the proceedings and
21 have no opportunity to participate in that or otherwise exercise
22 any position that they might desire to advance prior to the
23 issuance of that permit, because they're the same positions.

24 You know, here we are. You're asking me to say

1 this permit's good when there were none of these notice
2 requirements met, in general, to the public or, specifically,
3 with regard to potentially interested individuals and say that
4 this permit ought to be good?

5 **MR. HENDRICKSON:** I understand your concern, Your
6 Honor, but it's a little different situation here, and let me
7 tell you why.

8 **THE COURT:** All right.

9 **MR. HENDRICKSON:** The ordinance as written is
10 what we have to comply with. If there isn't a notice
11 requirement in the ordinance, that's not up for us to make that
12 determination. That's up for the county commission or the
13 citizens of this county to come back and change that.

14 What we did, Your Honor, was to comply with the
15 ordinance as written. Whether or not it required notice to the
16 Huffs or the Fosters, that's not our issue. And so we complied
17 with the ordinance as written, Your Honor. If it was flawed, we
18 did --

19 **THE COURT:** I understand your position.

20 **MR. HENDRICKSON:** Okay.

21 **THE COURT:** Thank you, Mr. Hendrickson. All
22 right. Mr. Richardson.

23 **MR. RICHARDSON:** Thank you, Your Honor. There's
24 two things that, I think, inadvertently have been

1 mischaracterized that I don't want the court looking differently
2 on my clients because of.

3 The February third party notice that was
4 referenced, it doesn't mention the permit. It just says that
5 the floodplain manager has been consulted. In fact -- and this
6 is West Virginia DEP sending this to the Huffs -- the fact that
7 at one point West Virginia DEP lied to the Huffs and told them
8 that Evans had been out there and seen the place. A month later
9 Evans is out at the farm campaigning for re-election. First
10 thing out of his mouth is, "This is the first time I've been
11 down this road."

12 Second, the reason the April 17th open, end-of-
13 meeting thing happened the way it did, Kevin Sneed told Joye
14 Huff and Ann Foster to go there, take the letter they had
15 written Mr. Sneed explaining the situation and take the photos.

16 I just don't want anybody to think there's
17 something nefarious going on. They were going on instruction of
18 the guy who's in charge of implementing the floodplain
19 ordinance.

20 And I keep hearing this: "EQT complied." "EQT
21 complied." EQT right here in this April 19th, they did not
22 include the letter that you attach to your floodplain study so
23 it'll make sense to a non-engineer. It's required. You have to
24 do it. And the purpose is so that the person who's reviewing it

1 will know what they're looking at.

2 These things are about 300 pages, and it's just
3 calculations. They're basically unreadable unless you are a
4 hydrologist or you have experience with high-level engineering.
5 And they didn't comply with the ordinance. They didn't even
6 give the thing that would give the floodplain manager the
7 ability to understand what he was looking at in terms of the
8 engineering aspect.

9 So I mean really there's issues on almost
10 everybody's side, but when it comes to the permit, you know,
11 it's nefarious. They didn't even get any notice whatsoever.
12 And I like how Mr. Hendrickson says that, "We're dealing with
13 the ordinance that we have when it comes to notice, but please
14 change the Open Government Proceeding Act." It just goes back
15 to the rules are different for EQT than they are for the rest of
16 us.

17 Thank you, Your Honor.

18 **THE COURT:** All right. Thank you, Mr.
19 Richardson.

20 **MR. STEPHENS:** Your Honor?

21 **THE COURT:** Yes, sir.

22 **MR. STEPHENS:** Could I just clarify? Is the
23 court presently entertaining EQT's motion in limine to exclude
24 argument pertaining to the constitutionality of the floodplain

1 ordinance, or did I mishear? Because we've gotten off a lot.

2 **MR. HASTINGS:** Sorry, Judge. I had to laugh.

3 **MR. STEPHENS:** I mean it's all good discussion,
4 but I'm a little --

5 **THE COURT:** Well, I think probably they got into
6 that a little bit, but primarily my concern and interest in that
7 was to the extent that that is raised as a grounds in the
8 Intervenor Huff's motion for summary judgment so --

9 **MR. STEPHENS:** Okay.

10 **THE COURT:** -- but you're correct; it has been
11 argued to some extent, and if you'd like to address that you may
12 reply.

13 **MR. STEPHENS:** Okay. I hope I'm not jumping the
14 gun, but I mean just stated succinctly, I mean as a matter of
15 fundamental fairness, if EQT is going to be heard to argue
16 unconstitutionality of the Open Governmental Proceedings Act,
17 which is at best just tangentially involved in this matter, I
18 think the Huffs and the Fosters should likewise be permitted to
19 argue about the constitutionality of the floodplain ordinance
20 itself, and that's at the core of this case, Your Honor. It's
21 just simply stated. Thank you.

22 **THE COURT:** All right. Thank you, Mr. Stephens.

23 **MR. HASTINGS:** Your Honor, 15 seconds.

24 In response to Mr. Richardson, the letter he's

1 talking about if you read the language of the ordinance, the
2 floodplain administrator can request one. It's not necessarily
3 required. That was one of the things we did with Kevin Sneed
4 prior to the May 22nd meeting. We supplied that. And if we
5 want to throw out the new ordinance, let's go back to the old
6 one, Your Honor. Jerry Evans had all the authority under that
7 to issue our floodplain permit, and I mean that's what we would
8 be left with is the old ordinance if the new one's
9 unconstitutional.

10 I think we're all here today for the same
11 substantive reason. And, you know, I just wanted to add that.
12 If we do, as Mr. Stephens says, address and throw out the new
13 ordinance, then, the old one will still be in effect.

14 **MR. RICHARDSON:** Three seconds, Your Honor? Then
15 I'm done, I promise.

16 **THE COURT:** All right.

17 **MR. RICHARDSON:** They were operating under the
18 assumption of the old ordinance, all the way until May of this
19 year. In discovery I got emails where they finally realized
20 that there's a new ordinance. It's not a new ordinance. This
21 is a September 2011 ordinance. This is May 2012. So this
22 shining example of following the rules, they didn't even know
23 which rules to follow.

24 **THE COURT:** All right. Thank you, Mr.

1 Richardson. Anybody have anything further upon on the
2 Intervenor Huffs' motion for summary judgment? All right.

3 All right. We'll take up the matter EQT
4 Production Company's motion for summary judgment. If you'd like
5 to address that, Mr. Hastings?

6 **MR. HASTINGS:** Yes, Your Honor. Briefly, the
7 issue on our motion for summary judgment is very succinct, Your
8 Honor. We filed a brief, and I'll get right to the point.

9 The first issue is doctrine of unclean hands. As
10 this court is aware, this is a matter of equity, and in
11 balancing the equities in this case the court is to consider
12 unclean hands and who has clean hands and unclean hands in the
13 process.

14 If someone has unclean hands in an equity action,
15 they shouldn't be entitled to relief. You can't come to the
16 court, saying, "Well, I did all these things over here wrong,
17 but you should get me relief."

18 In this case, Your Honor, EQT did everything it
19 was supposed to do, that it was told to do, by the county clerk,
20 floodplain managers at the time and the state coordinator in
21 getting the issuance of the permit.

22 We didn't know, Your Honor, that the floodplain
23 was rescinded till we saw it in the paper the next day, April
24 18th. And let's not kid ourselves when we talk about how did

1 they know to show up at a meeting, Your Honor. You can watch
2 the video. I may have a copy of it here, Your Honor. It
3 doesn't matter. Clearly everybody in that room knew what was
4 going to happen that night because Shirley Williams said --
5 these were her words: "We're going to put a stop to EQT's
6 development." That was all before anyone else started speaking.

7 So there's no question about that. There's
8 unclean hands as far as the lack of notice. Regardless of
9 whether the Open Government Proceedings Act is lawful or not or
10 whether we can bring a claim for it, they have unclean hands for
11 rescinding it the way they did. And had they brought a stop
12 work notice and we provided the information, we worked through
13 that process, it would be different. But what we have,
14 Doddridge County, unclean hands.

15 More importantly the Huffs have unclean hands.
16 Because this case, Your Honor, is not just about the rescission
17 of this floodplain permit. It goes back further than that. The
18 reason nothing was done between November and today, quite
19 frankly, as far as the floodplain goes, is because we had the
20 floodplain permit, which we had to have consideration of, and
21 was part of the application process for the gas wells for the
22 DEP.

23 The DEP didn't issue our first gas drilling well
24 until February of 2010. Shortly thereafter in February of 2012

1 -- I'm sorry, Your Honor -- 2011 -- no, 2012, this year -- 2012,
2 Your Honor, the representatives of EQT met with, maybe actually,
3 Mr. Richardson. He wasn't counsel at the time or states he
4 wasn't acting as counsel at the time for Mrs. Huff. They were
5 at the site. They knew we were going to start drilling. What
6 does Mrs. Huff have her son-in-law, David Richardson, do? Drill
7 the water well on our well pad.

8 Your Honor, that issue was litigated before Judge
9 Bailey. You know what the answer is. He found it's unclean
10 hands. He is not going to condone such conduct. They were
11 ordered to flood -- to fill the water well. They have unclean
12 hands; no question about it. We're entitled to summary judgment
13 on the unclean hands issue.

14 **THE COURT:** Well, the federal order, did it
15 specifically say they had unclean hands --

16 **MR. HENDRICKSON:** No. No, Your Honor.

17 **THE COURT:** -- or did it just tell them that they
18 couldn't do that?

19 **MR. HASTINGS:** The order did not specifically say
20 they have unclean hands.

21 **THE COURT:** I didn't think so because that brings
22 me to a question I want to ask. Isn't unclean hands more of a
23 substantive doctrine that doesn't necessarily look at people's
24 conduct in advancing or protecting their rights or their motives

1 or their intentions as opposed to something that they may do a
2 little bit more substantively to create various inequities in
3 the proceedings as the parties' interests are viewed, vis-a-vis,
4 each other?

5 **MR. HASTINGS:** I think it can be both, Your
6 Honor. And here's why. The substantive, obviously, yes. I
7 mean you can't go out there and just do something and say,
8 "Judge, hey, we did this." But it's also procedurally and with
9 the issues in a case like this.

10 This is a perfect example as to why the unclean
11 hands doctrine exists. The unclean hands doctrine doesn't allow
12 people to go take the law into their own hands, so to speak.
13 And this overall scheme by Joye Huff is to block these gas
14 wells. She will do whatever it takes. Your Honor, she's called
15 the DEP. There's plenty of emails. She's called the Army Corps
16 of Engineers.

17 We've complied with every request that anybody's
18 asked us to supply information. Things are just clearly not
19 issue. She's trying to block them. If we get our permit today,
20 we're expecting some other activity. We know this may not be
21 the end of it, Your Honor, because we have that. And that's
22 unclean hands. You can't drill a water well in our permitted
23 well pad site. They knew where it was. We met on the site with
24 them.

1 And Judge Bailey said this. It was a gambit that
2 he's not going to condone. Did he use the word "unclean hands"?
3 No. But on a motion for summary judgment there's no question of
4 fact that that was unclean hands and improper conduct. And
5 we've got the injunction on that.

6 Now, on those two issues of unclean hands I don't
7 think there's any question that summary judgment is appropriate
8 for those two.

9 Now, regarding irreparable harm, there's no
10 question we have a property interest in exploring for and
11 attempting to and extracting this gas. We have a lease right to
12 do so. There's no question, Your Honor, that we will be
13 suffering irreparable harm if we can't drill these gas wells.

14 The question was asked to Mr. Bowman in
15 deposition a couple of weeks ago, "Did you look at any other
16 well sites?" First, there's no duty to, Your Honor. But, yeah,
17 we did. There's six different ones. We have maps; we brought
18 them today that show the locations of them. We have not been
19 able to locate any other site on her surface, Mrs. Huff's
20 surface, or off that's going to allow EQT to get the same
21 reserves. In some locations it's not geologically possible to
22 do so. There are places in the meadow where we can't put the
23 well pad.

24 If we can't get this, we lose a property right.

1 And the irreparable harm is a property right. We have the right
2 to do it. I don't think anyone's in here contesting we don't
3 have a right to drill for the gas. I mean that's an issue in
4 this case. Some cases it is. This one, it is not.

5 So as far as I'm concerned, Your Honor, it's
6 straightforward. Our motion for summary judgment will -- is
7 very simple: Unclean hands for the county commission in the
8 initial rescission, not following the ordinance, recognizing
9 some appeal that they didn't have. We can go on down the line
10 with that one, but it starts on April 17th. The Huffs with
11 unclean hands for the drilling of the water well and irreparable
12 harm, there's no question. We're just trying to narrow the
13 issues, Your Honor.

14 As you know the four-part test in a preliminary
15 injunction: Likely to succeed on the merits -- I mean
16 preliminary and permanent injunctions as consolidated -- but
17 proceeding on the merits, balance of equities, and then,
18 irreparable harm and public policy. Public policy, there's no
19 question; it's public policy. We have irreparable harm. And
20 when you balance the equities, they shouldn't be entitled to
21 equitable relief because of the issue of unclean hands.

22 Thank you, Your Honor.

23 **THE COURT:** All right. Thank you, Mr. Hastings.

24 All right. Who'd like to respond first? Go

1 ahead, Mr. Richardson.

2 **MR. RICHARDSON:** Thank you, Your Honor. Mr.
3 Hastings, I believe, is misapplying the concept of unclean
4 hands. It only involves the transaction at issue, by his own
5 words, the permit. If you look at his other motions in limine,
6 the issue is very narrow, whether EQT has the right to the
7 permit, but when he gets to the motion for summary judgment, the
8 issue becomes whether EQT has the right to drill and develop.
9 And he expanded it so he can bring the Huffs, maybe, into the
10 alternate issue of the case, not the one they've been arguing
11 the entire time.

12 The Huffs had nothing to do with the permit.
13 That's what we're here for, is the floodplain ordinance and the
14 permit. What's going on in Wheeling is going on in Wheeling.
15 And that was a preliminary injunction ruling, and everybody has
16 stopped because of this. There were technicalities in that
17 case, I probably could have got the preliminary injunction
18 vacated, but it seemed like a waste of time. They still haven't
19 properly served my clients in that.

20 Further, there is West Virginia law that says
21 that you can drill a water well to stop gas wells, and I have it
22 right here: Diversified Resources v. Bradley R. Phillips. And
23 the West Virginia Supreme Court denied cert. And to say that
24 the Huffs acted in unclean hands when they were relying on what

1 they thought was the law, you know, a legitimate law.

2 Again, the water well has nothing to do with
3 their permit. The water well didn't keep them from getting a
4 permit. And if they're going to invoke equity, equitable
5 remedies, and you're going to get an injunction, you've got to
6 have clean hands yourself.

7 And first of all, I maintain my objection about
8 this motion for summary judgment because it wasn't properly
9 noticed. There was not enough time. Different rules for
10 different people; we're talking about notice, and we only got
11 eight days instead of the normal ten, and that was with the
12 weekends not being excluded. That was a true eight days while
13 doing trial prep.

14 But I have an opposition that I wrote, you know,
15 this morning just in case we actually heard this. And it
16 doesn't have everything that I'd like on it, but it's got a few
17 things. Page 18 of the ordinance, if you're going to have a
18 development that is two acres or larger you have to delineate a
19 floodway if you're doing it in an approximated flood zone like
20 the Huffs where there isn't a floodway. You have to as part of
21 the permit application. It's ordinance section 5.4, site plan
22 criteria, (b), page 18. EQT failed to delineate a floodway.

23 And by the modeling by our expert, our 40-year
24 engineering expert, Seward Gilbert, half of the football-size

1 well pad is going to be in a floodway. And there are whole
2 different rules about putting fill in a floodway in the
3 ordinance.

4 **MR. HASTINGS:** Your Honor, just briefly, and
5 again, I don't want to step on Mr. Richardson's argument, but in
6 order to move this along today I would appreciate it if Mr.
7 Richardson responded to the motion at issue. The motion for
8 summary judgment is their unclean hands, not our unclean hands,
9 and whether we have it, and I know I argued that.

10 And it's not a floodway. We're getting way off
11 basis. The issue in this is whether the Huffs have unclean
12 hands for drilling a water well. That case does not say -- it
13 was not the same basis for the decision that Judge Bailey ruled
14 in Wheeling. I was there. Mr. Hendrickson argued it. They
15 specifically did it to stop this. And it is all one
16 transaction. The floodplain is irrelevant. I mean the drilling
17 of the water wells are irrelevant if we -- the gas wells -- if
18 we don't have a floodplain permit. It's all the transaction.
19 It's one big scheme transaction.

20 What we're here today on, the entire transaction,
21 is whether we get the floodplain permit to go ahead and move
22 forward. In fact, the DEP issued the rest of the gas wells
23 after they knew our floodplain permit was rescinded. The DEP
24 wants these wells in the ground.

1 And so with respect to the late filing of this
2 motion, Your Honor, it is that he is correct. I did not follow
3 Rule 56 with respect to the ten days on this motion. I respect
4 his position on that. And we can talk about late filings all
5 day long. We got one at five o'clock last night -- the
6 supplemental expert report. It was after five o'clock that I
7 think I got it. Mr. Hendrickson was gone. And still I didn't
8 have a chance to look at it.

9 And so if you want to defer that issue to
10 directed verdict issue -- I'm sure the courts will hear it
11 anyways -- I'm happy to do so, Your Honor, but I respect his
12 objection on the notice of that. So I want to make that clear.

13 **THE COURT:** All right.

14 **MR. RICHARDSON:** Again, Your Honor, it has to go
15 -- I mean that's how unclean hands works.

16 And going back to what they were saying that
17 they've been compliant all along, their own -- I mean I know he
18 doesn't want me to bring up the unclean hands that they have.
19 But if you're going to get the equitable remedy, your hands have
20 to be clean, and that's the only reason I'm bringing it up. I'm
21 not bringing it up just to make them look bad. That is the
22 nature of the beast when it comes to equity and especially
23 injunctions. You don't get injunctions if you have the dirty
24 hand. And there's violations of the ordinance -- the failure to

1 delineate.

2 Their expert floodplain study, the ordinance says
3 it has to be undertaken by a professional engineer. And
4 undertaken is where you personally assume. They had two CAD --

5 **THE COURT:** Well, Mr. Richardson, just a minute.
6 I understand what you're saying and your arguments with regard
7 to the impropriety of EQT's action in complying with the
8 floodplain ordinance. But I think specifically on the issue of
9 the motion for summary judgment, if you could address the
10 equities of the unclean hands as they've alleged it against your
11 client for purposes of supporting their summary judgment.

12 **MR. RICHARDSON:** Okay. Like I said, our client
13 was acting under case law, under West Virginia case law that
14 says you can drill a water well. And the judge said, "I don't
15 care. I'm not even going to consider, you know, why they're
16 doing it. It doesn't matter."

17 So for them to say that we snuck in the middle of
18 the night on our own property with no authority is absurd. I
19 mean they're making the Huffs out to be like these mastermind
20 geniuses, but they were just following what they thought the law
21 was. And whether a federal court doesn't give weight to a
22 circuit court of West Virginia, that's another matter. But as
23 far as my clients are concerned, they had authority under the
24 law to act, and I guess, yeah, if I'm not going to argue the

1 unclean hands of EQT, I will stop with that.

2 Thank you, Your Honor.

3 **THE COURT:** Okay. Mr. Tennant.

4 **MR. TENNANT:** Your Honor, for the Doddridge
5 County Commission as it relates to unclean hands as asserted by
6 EQT, in particular to the action of the Doddridge County
7 Commission on April 17th, was a mistake made of entertaining a
8 vote on the evidence that was presented by the Huffs and
9 Fosters? Yeah, that's technically a mistake.

10 But you have to remember the evidence is going to
11 show that they consulted with Mr. Sneed at the state level, who
12 is the technical advisor, and he also had the opinion that the
13 permit stop order should be granted and advised the floodplain
14 manager of that fact.

15 So my argument is that we have in Doddridge
16 County good public servants trying to do the job that they're
17 asked to do. None of them are attorneys. To my knowledge, on
18 April 17th the prosecuting attorney of Doddridge County was not
19 at the meeting, and they relied on their own instincts. They
20 did one step further, which they called Mr. Sneed, and Mr. Sneed
21 said, "Yes, issue the stop order" or, you know, "Stop the permit
22 and let's look at all this evidence that evidently was presented
23 to you because I hadn't seen it." That was essentially what
24 went on there.

1 And that's where it went to a rescission letter.
2 And then, thereafter, opportunities were had where EQT could
3 come forward with more evidence. They had filed their
4 litigation. They put their lot and their bet on the fact that
5 this Court would change the action of the floodplain appeals
6 board and decided not to present any evidence at a public
7 hearing where they had every right to do so. And they
8 understood that that hearing was going to be held and they were
9 even present.

10 So my argument is that our good public servants
11 in Doddridge County did their job and gave EQT proper
12 opportunity to present their evidence.

13 **THE COURT:** Thank you, Mr. Tennant.

14 **MR. HASTINGS:** Your Honor, if I --

15 **THE COURT:** Just a second before your jump back
16 in.

17 **MR. HASTINGS:** Sure.

18 **THE COURT:** Mr. Stephens, any reply?

19 **MR. STEPHENS:** I have nothing to add, Your Honor.

20 **THE COURT:** All right. Thank you. You may
21 proceed, Mr. Hastings.

22 **MR. HASTINGS:** Thank you, Your Honor. Yeah, just
23 so you're clear, we did not move for summary judgment on any
24 unclean hands on Mr. Foster in our motion.

1 The water well wasn't an issue until we got our
2 gas well permits from DEP, and that's the first step to stop us.
3 That's the way to stop us from that point in time. Because
4 state law says you can't drill a gas well within 200 feet of a
5 water well at the time so we couldn't move forward. They
6 stopped us.

7 And so that bought them time to go to the county
8 commission to get this overturned. And, again, let's not fool
9 ourselves. Mr. Tennant just made some interesting statements,
10 which is clear, I think, between the parties -- I'm not picking
11 on Mr. Tennant.

12 But Mr. Sneed did contact the county commission.
13 The county commission knew it was going to take place that
14 night. Joye Huff knew it was going to take place that night.
15 Mr. Foster knew it was going to take place that night. Why
16 wasn't it on the agenda? Was there a special emergency agenda?
17 If this is such an emergency that needed to be stopped then by
18 act of the county commission, do a special emergency agenda.
19 Put it on there. If we don't show up, that's our fault.

20 And what's interesting is on the stop work notice
21 argument as opposed to the rescission argument I have no
22 problems with Mr. Sneed getting information from a citizen of
23 this state saying, "None of this stuff happened; you need to do
24 something about it." And him contacting the county commission

1 and saying, "You need to do what you need to stop this
2 development because the information I'm getting is in violation
3 of ordinance." I have no problem with him making that call.

4 I have no problem with the county commission
5 relying upon that because he's obviously, as I said before,
6 probably the most educated person in this state on these issues.
7 They relied upon it. They could have issued a stop work order
8 to work through these issues. They didn't. They rescinded it.
9 There's a big difference there.

10 They want to rely upon Mr. Sneed over and over
11 and over and over to rescind the permit. Well, Your Honor, when
12 Mr. Sneed told them, "Well, wait a minute. Stop. EQT provided
13 everything to me. EQT's in compliance. I checked with our FEMA
14 representatives and they're okay. You should give them the
15 permit." Now they're running from Mr. Sneed. Now it's bad to
16 rely upon him.

17 So they either had unclean hands in relying upon
18 him to stop it improperly on April 17th -- and this farce that
19 we didn't present any evidence on May 22nd, we objected because
20 it wasn't proper. But by that time we knew that Mr. Wellings
21 had been appointed as an interim floodplain manager and Mr.
22 Sneed was an ongoing person to deal with with Doddridge County
23 because, quite frankly, the county commissioners didn't know
24 what was going on. I emailed him stuff. I'm sure they'll come

1 into evidence. He had our floodplain study. He had our site
2 plans.

3 And the letters that Mr. Richardson's asking
4 about, a engineering stamped letter, that was one thing that Mr.
5 Sneed asked us to supply, and we did, Your Honor. The first
6 one wasn't stamped. You know what he said? "It's got to be
7 stamped. Our engineer stamps it." Then Mr. Sneed says, "Good
8 to go." He calls Shirley Williams before May 22nd and has a
9 conversation with her and he sends her an email. And Mrs.
10 Williams, with all due respect, doesn't remember getting the
11 email. She doesn't deny the conversation.

12 It has to be unclean hands, Your Honor. At that
13 point in time, even if you want to give them the benefit of
14 every argument, because it's our motion for summary judgment,
15 let's construe the facts in a light most favorable to them, they
16 never had -- there's no question they didn't have authority on
17 April 17th. And then at May 22nd they had no basis to deny it.

18 Pictures of a flood, Your Honor? It's a
19 floodplain. It is going to flood. It has flooded. We're not
20 disputing that. So we could bring pictures here all day long to
21 talk about flooding. In fact, we have a motion in limine on it
22 because it's not relevant to whether we're entitled to a
23 floodplain permit.

24 So I don't think there's any question of both the

1 Doddridge County Commission and the Huffs have unclean hands.

2 Thank you.

3 **MR. RICHARDSON:** Your Honor, briefly, it's been a
4 year and this is, you know, me and my clients will be gone if
5 it's granted. May I just have one minute?

6 **THE COURT:** Go ahead. You may proceed.

7 **MR. RICHARDSON:** Thank you. The Huffs have no
8 problem with them drilling on their property. There's 20-
9 something EQT wells. They genuinely were worried about that
10 floodplain. There's an existing well that EQT drilled on the
11 other side and did a really bad job. It's all rock. It's an
12 acre. It created wetlands. That's why they have to -- they
13 were talking they can't drill on some parts of the meadow.
14 There's wetlands now. EQT's already affected the meadow. It's
15 already caused flooding. They admit right now it's going to
16 flood and now they want to put 30,000 cubic yards of fill into
17 it.

18 They wouldn't give us the floodplain study. They
19 wouldn't give my client the floodplain study. We asked
20 repeatedly just for confirmation that you're not going to flood.
21 You're not going to flood the neighbors. You're not going to
22 flood us. They refused. They refused. They refused.

23 I mean at what point -- you have nothing left.
24 Nobody's there. It's not like we were trying to get an unfair

1 advantage. They were trying to protect their land. They're
2 trying to protect the neighbors. And no one's there to help
3 them. And again, this has nothing to do with whether Doddridge
4 County revoked a permit inappropriately or whether EQT deserves
5 a permit. I mean we're litigating a case that should be in
6 Wheeling; it is ongoing. It's unrelated to what this complaint
7 says. He's bringing in new unclean hands from outside his
8 motion for summary judgment.

9 It's flooded before. It's got to right at the
10 porch. You put in that dirt, it's going to go up close to three
11 feet higher. You put in that dirt and it's three foot higher
12 and somebody gets trapped in the wrong spot, what happens?
13 Legitimate concerns. It's not like we don't want them drilling
14 just because we don't like drilling or they like their pretty
15 meadow. It's not about that. They can drill anywhere they
16 want. We love the drilling; it's great. Just not somewhere
17 that's going to cause harm to the community.

18 So if that's unclean hands, I don't know what.
19 Thank you.

20 **THE COURT:** All right. Thank you, Mr.
21 Richardson. Anybody have anything further?

22 **MR. HASTINGS:** Thank you, Your Honor. Just
23 briefly again and I apologize. I'm the one telling us to move
24 along and I keep talking. I apologize.

1 **THE COURT:** Yeah, that's always a bad question to
2 ask a bunch of lawyers anyway.

3 **MR. HASTINGS:** Yeah, next time, Your Honor, just
4 move forward. Just tell me. Briefly, the reason I talk about
5 prior flooding and that it may flood again, Your Honor, is the
6 event that the last flood -- I think it was a hurricane was off
7 the coast in the Atlantic Ocean -- I'm sure, with all due
8 respect, and we're not taking flooding lightly. That's why
9 we've paid an engineer to do this floodplain study to make sure
10 we're not increasing the risks of flooding.

11 I mean if Mr. Richardson's right, then, no one
12 can ever do anything in any floodplain. Well, let's just move
13 everybody off the Ohio River and move them in so many feet. It
14 doesn't work that way, Your Honor. It's a balance. And we're
15 not saying that it's never going to flood. What we're saying is
16 what we're doing is not having an unacceptable increased risk of
17 flooding. We're complying with the ordinance. We're
18 developing, Your Honor. And, to me, to say it's going to flood
19 again, and we want a promise that it's never going to flood
20 again, Your Honor, a storm could come right now and flood it.
21 It flooded before our gas well was there. It's my understanding
22 there's been floods in this county all over the place for things
23 that related to manmade development not. So that's not the
24 issue.

1 And just one more thing on Mr. Tennant as far as
2 unclean hands go is, this May 22nd meeting that they had was at
3 four o'clock in the afternoon. Our floodplain permit was set to
4 expire at six months from November 22nd. I mean it was issued
5 for six months to get started. We couldn't get started. And so
6 it's convenient, and I understand their schedules and
7 everything, but there wouldn't have been any time for us to do
8 anything once that decision was made or what would have happened
9 at May 22nd.

10 So they put it all the way down to the end of the
11 day, and the Court will recall we filed our motion -- I mean our
12 original petition in this case to try to stop that meeting.
13 Because, you know, the reason we filed it, Your Honor? Because
14 we knew where we would be. And where are we? And I respect the
15 Court's position to find out what happened and to see if you
16 were really going to have these issues at that time. If we got
17 our floodplain permit there, you don't have to hear me keep
18 going on and on about it.

19 **THE COURT:** All right. Anybody have anything
20 further?

21 **MR. RICHARDSON:** Yes, Your Honor.

22 **THE COURT:** All right, briefly, Mr. Richardson.

23 **MR. RICHARDSON:** Thank you, Your Honor.

24 They want to build a 12-well pad. They only want

1 to drill six, seven, maybe eight wells. They can make it
2 smaller. They've admitted that in testimony. They don't have a
3 floodplain study prepared by an engineer. They have a
4 floodplain study prepared by computer-aided drawers, people who
5 use computers to draw. When you're talking about people's
6 lives, people's safety, you think you'd have a real floodplain
7 study. And one of our experts said it took him two minutes to
8 realize that their floodplain study was wrong; it was so
9 fundamentally flawed.

10 So there's more to it than just the money.

11 **THE COURT:** All right. Well, since we've got a
12 couple dispositive motions here and we've been at it for a
13 little while, we're going to take a brief recess while the court
14 considers the matter and we will probably be in recess for 10
15 minutes or so.

16 (Recess off the record from 10:48 a.m. to 11:16 a.m.)

17 **THE COURT:** All right. The record will reflect
18 that all parties are present upon the same matter following a
19 brief recess taken.

20 With regard to the Intervenor Huffs' motion for
21 summary judgment, the Court would deny the same.

22 With regard to the Plaintiff's motion for summary
23 judgment, the Court would deny the same.

24 The Court's put in an interesting position in

1 this case of trying to unscramble an egg and that's impossible
2 to do. The issue in this case and the source of the problem is
3 the floodplain ordinance. And when people's property rights are
4 affected, that's a serious matter, and they have certain rights
5 under the constitution of the State of West Virginia with regard
6 to those rights, particularly to be afforded with notice and an
7 opportunity to be heard so that they might have the ability to
8 protect those rights. And that the protection of those rights
9 cannot be left to chance.

10 And that's what we have here. We have a
11 situation where the protection of the parties rights has pretty
12 much been left to chance and the possibility or lack of
13 possibility that they might find out what the county commission
14 is doing under a particular ordinance and have the opportunity
15 or miss the opportunity to protect those rights.

16 The Court believes those parties and those
17 individuals are necessary parties to any proceedings that would
18 affect those rights. As counsel are aware, in any matter,
19 there's certain individuals here that are necessary and
20 indispensable parties to the action. And generally under the
21 rules of civil procedure, if those parties aren't present, then
22 the matter cannot proceed. And if they are in a position to
23 maybe even be aware of the action and not desire to proceed,
24 then the action has no effect upon their rights in as much as

1 they're not a party to the proceedings.

2 I've carefully considered everything before the
3 Court. Believe me, I've got a stack probably equal to this or a
4 little bit higher in my office, and I've probably done more
5 research and thought on this case than anything that I've really
6 looked at since taking the bench a couple years ago.

7 With regard to this case, the Court would find
8 that the Doddridge County floodplain ordinance at a minimum is
9 in violation of the West Virginia Constitution to the extent
10 that the ordinance fails to provide due process to surface and
11 adjoining land owners potentially affected by the development
12 for which EQT seeks a permit, and at the outside, to the extent
13 that it fails to give notice to the public of any proceedings
14 under the floodplain ordinance.

15 To the extent that the ordinance addresses
16 surface owners, who desire to construct floodplain compliant
17 structures within relevant FEMA requirements, the ordinance is
18 constitutional in as much as it appropriately advances a
19 legitimate public interest, and is an appropriate exercise of
20 governmental authority and power.

21 The Court's familiar with why these ordinances
22 were put into effect, and the basis for these ordinances the
23 court was familiar with them as a former prosecutor representing
24 the county commission, and has been involved in drafting and

1 implementing these ordinances as well. And the purposes of
2 these ordinances is to require that structures in a floodplain
3 be built in such a manner as to not be damaged by any flood,
4 which might require the application of taxpayer dollars for
5 purposes of compensating the owners of those properties for
6 damages and to prevent that from happening. And to the extent
7 that the ordinance addresses that, it is effective.

8 However, the ordinance casts a broad shadow with
9 regard to several other matters which it is deficient to
10 address. The subject ordinance, when being applied under
11 circumstances involving the request for a permit, which it
12 potentially affects surface owners who are situate within or
13 adjoining or affected by the subject floodplain must afford
14 notice and an opportunity to be heard upon the requested permit
15 to this particular class of property owners.

16 Without such notice and opportunity to be heard
17 being afforded to this class of property owners, plaintiffs
18 would not be entitled to the relief prayed for in the form of an
19 injunction requiring the issuance of a permit for development
20 within the floodplain pursuant to the subject ordinance. And,
21 again, this defect can't be cured by the potential happenstance
22 discovery of what's been involved or what is being considered or
23 the action that is being considered.

24 Unfortunately, in the absence of a clear right to

1 the relief sought in this proceeding and proceedings requested
2 in a mandatory injunction and the issuance of a mandatory
3 injunction are considered to be the most harsh and extraordinary
4 remedies recognized to law, and in the absence of a clear right
5 to the relief sought, a mandatory injunction cannot be granted
6 by this Court.

7 The Plaintiff has no clear right to the permit,
8 not through any fault of its own, but because of the ordinance.
9 And compliance with an unconstitutional ordinance is
10 insufficient to give that right if the ordinance is
11 constitutionally defective. The Court doesn't dispute that the
12 Plaintiff in this case has done what it was supposed to do under
13 the ordinance, but if the ordinance is insufficient, it cannot
14 establish a clear right to that relief.

15 The Court also finds that given the violation of
16 due process rights of the class individual property owners
17 affected by these proceedings and the circumstances of the
18 parties, the balance of equities does not favor the Plaintiff as
19 the moving party. And the Court further finds that it would be
20 totally inequitable to award a permit under the proceedings in
21 their current form. Therefore, the Plaintiff's request for
22 injunctive relief is denied as a matter of law. There's no
23 necessity to proceed with the taking of evidence on this matter,
24 which factual arguments are regarded moot in the Court's opinion

1 under the current state and under the Court's ruling.

2 And since none of the proceedings before the
3 appeal board in the form of the Doddridge County Commission or
4 in front of the floodplain administrator provided due process to
5 constitutionally necessary parties to these proceedings, the
6 Court can take no further action in this regard.

7 Additionally, it is my position that the Court
8 has no jurisdiction, as previously ruled, to hear any appeal and
9 has no jurisdiction to make a determination on the merits of
10 whether a permit should issue, and certainly has no jurisdiction
11 to issue a permit under the floodplain ordinance. And to
12 require the administrator or the commission to issue a permit
13 under the current floodplain ordinance, I think, would be
14 improvident and not wise by this Court, or to reinstate a permit
15 that had been previously issued would not be prudent or wise by
16 this Court given the lack of constitutionality of the ordinance.

17 I think the only way to proceed in this matter
18 would be for the parties to proceed under some constitutionally
19 proper ordinance for purposes of making a valid determination
20 giving necessary parties notice and opportunity to be heard so
21 that the matter could be properly considered. And in that
22 regard, the Court finds that the granting of the mandatory
23 injunction would not be well founded as a matter of law.

24 Mr. Hendrickson?

1 **MR. HENDRICKSON:** How do we get a permit then,
2 Your Honor? I mean, we came to the county. We complied.
3 There's no one that disputes we complied. There was never a
4 question about our studies. There was never a challenge to our
5 studies. There was never any issues with our studies prior to
6 the time that it was being issued and it was issued. How do we
7 then -- as a party of interest, how do we then comply or how do
8 we get one?

9 **THE COURT:** Mr. Tennant?

10 **MR. TENNANT:** Well, Your Honor, first, I'd like
11 to state for the record so it's clear that the ordinance that
12 the Doddridge County Commission enacted on September 21, 2011
13 was an ordinance that they did not draft. It's an ordinance
14 that FEMA drafted, and, basically, promulgated all over the
15 State of West Virginia. And the reason that the Doddridge
16 County Commission, as I represented them, did not join some of
17 the particular motions is I do, in fact, believe that this
18 ordinance is unconstitutional as a matter of law at a minimum on
19 the notice of provision.

20 And we have started a process to put together a
21 constitutionally correct and valid ordinance. And I would
22 suggest to Mr. Hendrickson that once that ordinance is enacted
23 that he will have a path to properly present evidence to the
24 floodplain manager to consider for purposes of permitting this

1 particular well site and will be afforded the constitutional
2 guarantees of due process under the new ordinance.

3 **THE COURT:** All right. Thank you, Mr. Tennant.
4 Mr. Richardson?

5 **MR. RICHARDSON:** Thank you, Your Honor. Our
6 expert witness, Mr. Gilbert -- we had talked about this very
7 thing how this turned out the ordinance needed to be fixed, and
8 I know J.T. is probably not going to want to hear about the
9 meeting involved, but I'm sure if you want to talk to Mr.
10 Gilbert, he has very good ideas and the framework already ready
11 to go.

12 **MR. HENDRICKSON:** I have a motion about how good
13 an idea I think about Mr. Gilbert --

14 **MR. RICHARDSON:** I understand.

15 **MR. TENNANT:** Your Honor, just so it's also on
16 the record we have began a process of collecting information
17 from various parties even to this litigation in an attempt to
18 understand what issues others seek in an attempt to enact a
19 constitutionally valid ordinance and that needs to be done.

20 **MR. HENDRICKSON:** I mean, Your Honor, it still
21 leaves one issue out there and that's our damages. I mean, we
22 came, we complied -- we did everything that was asked of us. We
23 spent an awful lot of time and money and effort to get to this
24 point, and we should be compensated. This isn't our fault, you

1 know, whether the Doddridge County Commission wrote it or didn't
2 write it, they had the responsibility of making sure, as duly
3 sworn officers and elected officers of this county and this
4 state, to make sure that anything they enact is in compliance
5 not only with the state law, but with federal constitutional law
6 as well. And the fact that they didn't do that as the Court has
7 just properly ruled should entitle us to our damages because
8 we've done nothing other than comply with what they enacted.

9 **THE COURT:** Mr. Hendrickson, I agree that this is
10 through no fault of your own, and I guess -- and Mr. Tennant's
11 right -- the ordinance that we passed in Pleasants County when I
12 was a prosecutor was prescribed by FEMA. At the time it was
13 done, everybody understood what was being done. Nobody had a
14 problem with it and everybody was viewing it in a limited
15 context of some surface owner who wanted to build their house on
16 a floodplain -- a fishing cabin down along the creek or whatever
17 it happened to be. And that was the way it was applied.

18 Unfortunately, the language of the ordinance is
19 much, much broader with regard to the affect that it has, which
20 is what has gotten us here today. And to the extent I don't
21 know if FEMA did not contemplate these types of circumstances,
22 but I know that the federal government -- the comparable
23 legislation -- federal legislation when it has to do with
24 anything having to do with development in a floodplain provides

1 specifically for public notice and a hearing. So I don't think
2 it was because the federal government wasn't aware of those
3 issues, but I think they probably looked at it in a limited
4 context, as well, of not paying people repeatedly for damages
5 who continually want to build non-flood safe structures in
6 a floodplain, and that was what it was intended to address,
7 but --

8 **MR. HENDRICKSON:** Can I have a second, sir, if I
9 may?

10 **THE COURT:** Go ahead.

11 **MR. HENDRICKSON:** That's not exactly what I'm
12 talking about here.

13 **THE COURT:** I understand, but as far as your
14 damages are concerned, you know, I don't know. This action
15 hadn't been dismissed, and I think you have a claim for damages
16 under the current pleadings, do you not?

17 **MR. HENDRICKSON:** Yes, Your Honor.

18 **THE COURT:** All right. So all I'm saying today
19 is that, as a matter of law, I don't think it's proper to grant
20 an injunction which is going to result in you being permitted
21 under a statute, which is concededly -- maybe not by you -- at
22 least by the county and in the Court's opinion unconstitutional.
23 And I just -- I just think that it would be totally ill advised
24 for me to do that. I just don't have the basis to do that. But

1 to the extent that you want to pursue your complaint, I think
2 you can develop it. And to the extent that you want to make a
3 claim for damages then that could proceed routinely as any other
4 action would in this Court or in any other court.

5 **MR. HENDRICKSON:** Can I have a second?

6 **THE COURT:** Sure.

7 **MR. HENDRICKSON:** I'd like to go ahead and
8 proceed, Your Honor, and put a witness on.

9 **THE COURT:** You want to bring the matter on for
10 damages today?

11 **MR. TENNANT:** I'd object to that, Your Honor. I
12 think if that is going to proceed -- that's the next step in
13 this litigation, the county should be afforded an opportunity to
14 brief that issue, and perhaps bring on -- I didn't prepare
15 witnesses on the damage issue. I didn't intend that to be part
16 of the process today, and we certainly would like to have an
17 opportunity to properly defend that claim.

18 **MR. HASTINGS:** Your Honor, we notice it for all
19 issues including damages.

20 **THE COURT:** Anybody else care to respond?

21 **MR. STEPHENS:** I would just add that my client
22 doesn't have a stake in the payment of any potential damages,
23 but for what it's worth coming from the perspective of this
24 Intervenor, I believe, we would concur with Mr. Tennant that

1 none of us were prepared to even witness anything like that --
2 any kind of exchange today or evidence introduced through
3 witnesses pertaining to the damages so we would recommend that
4 the Court -- the request that the Court provide that opportunity
5 to brief on the issue.

6 **THE COURT:** All right. Thank you, Mr. Stephens.

7 **MR. RICHARDSON:** Rightly or wrongly, Your Honor,
8 we saw today as the injunction and expected it to be about the
9 injunction all day. EQT, it seemed like that was what they
10 wanted and the damages were a side issue that may or may not
11 come up, but given just the vast amount of preparation that
12 needed to go into the injunction issue, I'm not prepared to
13 discuss anything and I apologize for that, but a lot of experts,
14 a lot of documents about the injunction.

15 **THE COURT:** All right. Thank you, Mr.
16 Richardson. Mr. Hendrickson?

17 **MR. HENDRICKSON:** We're not seeking damages
18 against the Intervenor. I guess we could amend and do that,
19 but we're not doing that. So it's between us and county
20 commission. We're prepared to put a witness on and talk about
21 how much we've spent so far in this process. If Mr. Tennant at
22 that point in time then wants to brief the issue, I guess, we
23 can brief it after that fact or we can enter into a stipulation
24 as to how much damages we have and then brief the issue. I

1 don't care. I'm not trying to belabor the point, but we're here
2 today to talk about all the issues including damages.

3 **MR. TENNANT:** Your Honor, I will represent to the
4 Court that in the process of the discovery to get to this day,
5 under the irreparable harm issue, I've had an opportunity to
6 cross examine witnesses from EQT with respect to what costs they
7 had in putting together their information for the permit and
8 those types of things, but I think the whole issue has to
9 revolve around the particular way that the Court has resolved
10 this matter today, which is finding that the ordinance was
11 unconstitutional rather than finding any specific wrongdoing by
12 the county commission in any particular aspect of what action
13 they did or didn't take. So I think that's a wholly different
14 issue and that's why I'm requesting that I have an opportunity
15 to brief the issue.

16 **THE COURT:** All right.

17 **MR. HENDRICKSON:** And, again, I don't mind him
18 briefing it, Your Honor, but I don't think -- I think what Mr.
19 Tennant did was take your ruling and stretched it. All you said
20 was you thought the ordinance was -- as I understood your ruling
21 -- now, I may have misunderstood your (inaudible), but you said
22 you thought the ordinance was unconstitutional. You didn't say
23 that anybody did or didn't do something wrong. And all we're
24 saying is we think we're entitled to damages. We'd like to --

1 either we can stipulate to the figures or we can put a witness
2 on and we're more than willing to brief the issue and submit the
3 briefs to the Court.

4 **MR. HASTINGS:** The fees and costs and stuff are
5 what they are.

6 **MR. HENDRICKSON:** Because they are what they are.
7 I mean, we've given that to you in discovery.

8 **MR. HASTINGS:** No, we have not done that, but we
9 can give them the numbers.

10 **MR. HENDRICKSON:** Do you just want to work out a
11 stipulation as to the amount and then brief it?

12 **MR. TENNANT:** We can perhaps do that.

13 **MR. HENDRICKSON:** Well, I mean, I'd like to have
14 it on record if that's what we're going to do.

15 **MR. TENNANT:** Well, let me ask a question: Do
16 you intend, as EQT, to include in your damage request economic
17 expense by EQT in the necessary work that was undertaken to seek
18 the permit and the permits that were authorized?

19 **MR. HENDRICKSON:** Yes.

20 **MR. HASTINGS:** Yeah. The floodplain permit or
21 the gas permit?

22 **MR. TENNANT:** I'm asking for all permits: the DEP
23 permit and the floodplain permit.

24 (Discussion off the record.)

1 **THE COURT:** All right. Here's what I'm going to
2 do. I'm going to permit you, Mr. Hendrickson, to submit to the
3 county commission a list of what you claim your expenses are,
4 with the understanding or the representation that you believe
5 you're entitled to compensation for those damages.

6 **MR. HENDRICKSON:** All right.

7 **THE COURT:** I think whether or not you're
8 entitled to compensation for those damages is probably a legal
9 issue that the Court would have to determine. So I think to say
10 there are damages at this point might be a little premature --
11 the funds you expended for purposes of getting to this point.

12 And I think that would be a better way to proceed
13 not only given the nature of everybody's understanding as to
14 these proceedings, but also given the nature of EQT's rights and
15 now that this Court has denied them an injunction, EQT by
16 statute could go to Charleston this afternoon, find a Supreme
17 Court justice in vacation, present their arguments, and get an
18 injunction. In which case there may be no issue as to damages.
19 The expenses would stay the same -

20 **MR. HENDRICKSON:** Correct.

21 **THE COURT:** -- but arguably you would not be
22 damaged. So I don't think the matter at this point in time
23 would be mature for this Court to consider damages. And, I
24 think, probably for this Court to consider whether you would be

1 entitled to the damages we'd have to know whether you have tried
2 and failed to get an injunction from the Supreme Court or do not
3 elect to proceed in that fashion.

4 **MR. HENDRICKSON:** Fair enough. Would you be
5 issuing a written order other than what you just read on the
6 record?

7 **THE COURT:** You want a written order?

8 **MR. HENDRICKSON:** Yeah, sorry. Yeah.

9 **THE COURT:** Sure.

10 **MR. HENDRICKSON:** So I have something to take --

11 **THE COURT:** All right.

12 **MR. HENDRICKSON:** -- if we decide to go the
13 entire route.

14 **THE COURT:** All right. When do you want the
15 order?

16 **MR. HENDRICKSON:** You know, Your Honor, you're
17 the judge.

18 **THE COURT:** Okay.

19 **MR. HENDRICKSON:** Okay. Once I get it, I just
20 don't want my appellate time to run until I get a copy of the
21 written order; if that's fair.

22 **THE COURT:** Okay. All right. Well, it's my
23 understanding that the decision of the Court in denying the
24 injunction is probably not appealable, but there's an

1 alternative remedy --

2 MR. HENDRICKSON: Right.

3 THE COURT: -- independent of an appeal. I think
4 all that the Supremes need to know is that you were denied by
5 the circuit court.

6 MR. HENDRICKSON: Okay.

7 THE COURT: So in terms of -- I can give you a
8 quick order before you leave today and everybody can look at it
9 and sign it saying it was denied or if you want to wait a little
10 bit longer, I can probably get you one with the findings and so
11 forth that the Court's done today. So I would endeavor to do
12 that, if I could, the first part of the week, although, I'm
13 scheduled for court next week as well.

14 MR. HENDRICKSON: I think, Your Honor, and,
15 again, I'm not trying to burden the Court. I understand your
16 ruling. I think I'd rather have one that cites all your
17 findings and conclusions. That way I have a complete order --

18 THE COURT: All right.

19 MR. HENDRICKSON: -- because I'm afraid that if I
20 take something else, they might say, "Well, wait a minute --

21 THE COURT: "We want the whole story."

22 MR. HENDRICKSON: Correct.

23 THE COURT: Gotcha.

24 MR. TENNANT: We agree with that, Your Honor.

1 **THE COURT:** Okay. All right. Well, I'll
2 endeavor to do that early next week.

3 **MR. HENDRICKSON:** So the procedure then is I'm
4 going to submit my claim for damages to the county commission?

5 **THE COURT:** Correct.

6 **MR. HENDRICKSON:** Okay. And then we're going to
7 go from there and see what happens?

8 **THE COURT:** Right, and if you could "cc" the
9 court file with that so that we know where you are.

10 **MR. HENDRICKSON:** Sure, I'd be glad to. Okay.
11 Thank you.

12 **THE COURT:** All right. Mr. Stephens.

13 **MR. STEPHENS:** Again, at the risk of, I guess,
14 lodging a complaint by at least a presently innocent bystander I
15 would ask whether the Court might be inclined to reopen
16 discovery following that submission so that the parties can
17 inquire about the specifics underlying that claim for damages,
18 produce any documents relating to them, et cetera.

19 **THE COURT:** Well, I think, Mr. Hendrickson has
20 said he doesn't desire to seek damages against the Intervenor;
21 is that correct, Mr. Hendrickson?

22 **MR. HENDRICKSON:** That's right. I don't think he
23 has any standing to open discovery.

24 **THE COURT:** So with that representation, my

1 answer is no.

2 All right. Anything further at this time?

3 **MR. HENDRICKSON:** Nothing, Your Honor. Thank
4 you.

5 **THE COURT:** Thank you all very much. We'll be
6 adjourned.

7 (Proceedings concluded at 11:42 a.m.)

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1 STATE OF WEST VIRGINIA,

2 COUNTY OF WOOD, to-wit:

3 I, Nancy S. Jarrell, Certified Court Reporter and Notary
4 Public in and for the State of West Virginia, hereby certify
5 that the foregoing is a true and accurate transcript of the
6 proceedings reported by me, and herein translated into the
7 English language.

8 I certify further that I am neither counsel to nor attorney
9 for any of the parties herein and have no pecuniary interest in
10 the outcome of the same.

11 I certify further that the transcript within meets the
12 requirements of the Code of the State of West Virginia 51-7-4,
13 and all rules pertaining thereto as promulgated by the Supreme
14 Court of Appeals.

15 When spellings are in question, the words are spelled
16 phonetically and marked with an asterisk (*).

17 IN WITNESS THEREOF, I hereunto set my hand and affix my
18 seal of Office at Parkersburg, West Virginia, on the 19th day of
19 December, 2012.

20 _____
21 NANCY S. JARRELL

22 Certified Court Reporter

23 Notary Public

24 My Commission Expires: December 26, 2020.