

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MOUNTAIN VALLEY PIPELINE, LLC,

| | |
|------------------------------|---------------------------|
| Plaintiff, | CIVIL CASE NO.: 7:17CV492 |
| vs. | MOTIONS HEARING |
| | 9:21 AM - 7:56 PM |
| EASEMENTS TO CONSTRUCT, | ROANOKE, VIRGINIA |
| OPERATE, AND MAINTAIN | DAY 1 OF 2 |
| A NATURAL GAS PIPELINE | |
| OVER TRACTS OF LAND, et al., | |

Defendants.

Before:
HONORABLE ELIZABETH K. DILLON
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF VIRGINIA

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1 (Proceedings commenced, 9:21 a.m.)

2 THE COURT: Good morning, everyone.

3 Ms. Weeks, if you would call the case, please.

4 THE CLERK: *Mountain Valley Pipeline, LLC, versus*
5 *Easements to Construct, Operate, and Maintain a Natural Gas*
6 *Pipeline Over Tracts of Land, et al.*, Civil Action Number
7 7:17-cv-492.

8 THE COURT: All right. First some preliminary
9 matters. I am told that there were people who wished to
10 attend this hearing that were not able to fit into the
11 courtroom. We didn't have this problem at that prior
12 hearing, but I will tell you that all our courtrooms are in
13 use this morning, and the courtroom we would usually use for
14 overflow, courtroom number two, we have a Naturalization
15 Ceremony this morning. Now, that ceremony will finish up
16 about 12 o'clock. By the time everyone filters out, it takes
17 about -- usually it's about 12:30. So we can try and have a
18 remote room, but it will not be until this afternoon.

19 So I want to make sure, though, that any witnesses
20 that are to appear at the hearing and any parties to the case
21 are seated. And, Counsel, you can let me know if you have
22 witnesses or parties that were not able to be seated in the
23 courtroom.

24 And I am sure there are some members of the press
25 that are here, so it may be that if you are an observer and

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1 not a party to the case, you may have to give up your seat
2 for a party if we don't have the parties in here. But we
3 will try and set up a remote viewing location, but it will
4 not be set up sooner than 1 o'clock. So my apologies for
5 that.

6 Also, if you have a cell phone, iPad, anything like
7 that with you, you should not have it. It should not have
8 been -- unless you're an attorney or member of the press who
9 got my permission, you should not have a camera, cell phone
10 with you, and you should not be recording or taking pictures
11 of these proceedings. That's not permitted by our rules. So
12 if you do have one, you need to leave with it and do
13 something with it before you return to court.

14 Counsel, any preliminary matters that you have
15 before we begin the hearing?

16 MR. MASSIE: No, Your Honor.

17 MR. TEANEY: No, Your Honor.

18 THE COURT: Very well. We are here on six motions
19 today. We have the Howell defendants motion to dismiss for
20 lack of jurisdiction and for failure to state a claim. We
21 have four motions to stay by defendants. Those were Docket
22 Number 234, by the Howell defendants; 241 by the Blankingship
23 & Keith defendants; 247, the Lollar defendants; and 243, the
24 Waldo & Lyle defendants. And then we have Mountain Valley
25 Pipeline's motion for partial summary judgment and immediate

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1 possession. And I plan to hear those motions in that order.

2 Also, I'm going to use the same guidelines, and I'm
3 going to go over those guidelines with you again today, the
4 same guidelines that we used at the last hearing.

5 So I will note that some parties filed "me too"
6 motions. That doesn't matter for purposes of this hearing.
7 All parties will be given an opportunity to be heard with
8 regard to these issues.

9 I remind everyone again that we have a court
10 reporter with us to make a record of the hearing, so be
11 mindful of that. When you're arguing or if you're a witness
12 and you're testifying, please speak into the microphones.
13 There are speakers in the back of the courtroom, but you have
14 to be speaking into the microphone so everyone can hear you.

15 Also, please make clear your name when you are at
16 the podium or you are speaking and let me know on whose
17 behalf you are making an argument. And if you, as counsel,
18 represent multiple parties and you're making your argument on
19 behalf of all the parties you represent, you may say that
20 without listing the parties. But if you have a unique issue
21 applicable to only some of your clients, please make that
22 clear.

23 If multiple attorneys represent the same client, I
24 expect to hear from only one of those parties unless you seek
25 and receive permission otherwise. If you're going to divide

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1 up the issues, please let me know.

2 Also, there's no need to repeat the same argument
3 others have made. You may incorporate the arguments of
4 others by reference; and, of course, you may add to those
5 arguments or note any other cases or considerations that may
6 be relevant.

7 Any question with regard to the guidelines, Counsel?

8 All right. I think those served us well last time,
9 so hopefully they will this time again.

10 Also, with regard to timing in this case and how
11 long we're going to be here, I would ask counsel to advise
12 me, if there is evidence by live testimony that they -- that
13 you intend to introduce at today's hearing, I would like you
14 to tell me how many witnesses you anticipate calling and with
15 regard to what motions.

16 So first, Mountain Valley Pipeline. Mr. Massie?

17 MR. MASSIE: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. MASSIE: Wade Massie for Mountain Valley
20 Pipeline.

21 The motion on which we intend to present evidence is
22 the motion for summary judgment and immediate possession.
23 And on that motion, we expect to call two witnesses: Robert
24 Cooper and Sam Long. And there's possibly a third witness,
25 but we don't know at this time.

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1 THE COURT: Very well. Thank you, Mr. Massie.

2 And with regard to defendants?

3 MR. TEANEY: Thank you, Your Honor. My name is
4 Derek Teaney. I represent the defendants Bernard and New
5 River Conservancy in this matter.

6 We have some common fact witnesses that we will
7 present along with other defendants in response to Mountain
8 Valley Pipeline's motion for preliminary injunction.

9 We have four witnesses who will provide expert
10 testimony, including Mark Glass, Steve Noble, Pamela Dodds,
11 and Dr. Hadwin.

12 We have fact witnesses, who will be the landowners,
13 testifying about the irreparable harm to their properties,
14 including George Santucci of the New River Conservancy; and
15 if you'll forgive me, Mr. Howell will identify the other
16 landowners for the Howell defendants.

17 MR. HOWELL: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. HOWELL: We'll call Steve Hodges, Anne Bernard,
20 Del Dyer, Keith Wilson, and Mr. Don Jones as fact witnesses.
21 Oh, and perhaps Carolyn Givens.

22 THE COURT: All right. Very well.

23 So it's my understanding, then, that the only live
24 testimony we'll hear today would be with regard to the motion
25 for partial summary judgment and immediate possession. Is

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1 that accurate?

2 MR. HOWELL: For our witnesses, yes, Your Honor.

3 THE COURT: Okay. Very well. Then the first
4 motion, as I mentioned --

5 MR. CARROLL: Your Honor?

6 THE COURT: Yes?

7 MR. CARROLL: There are numerous other parties
8 besides those gentlemen who have witnesses.

9 MR. DeTURRIS: We intend to tender two declarations,
10 affidavits, in lieu of live testimony for the BK defendants.

11 THE COURT: All right. Well, if you have witnesses
12 that haven't been named, please stand up and tell me.

13 MR. LOLLAR: Charles Lollar. I represent the Lollar
14 defendants. I'm going to be calling Kathy Chandler, Thomas
15 Triplett, and Robert Jones in addition to the witnesses
16 Mr. Teaney indicated on the other issues, both factual and
17 expert.

18 THE COURT: Very well.

19 Yes, sir?

20 MR. ROBERTSON: Good morning, Your Honor. John
21 Robertson. I'm going to be calling as fact witnesses in the
22 motions for summary judgment and possession Alan Hartman, who
23 is a party, and John Garrett Baker, who is also a party.

24 THE COURT: Very well.

25 MR. CLARKE: Good morning, Your Honor. Stephen

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1 Clarke, Waldo & Lyle. I intend to call several property
2 owners as fact witnesses with regard to MVP's motions:
3 Georgia Haverty, Richard Sizemore, Fern Echols, Dawn Cisek,
4 Mike Williams, and James Scott.

5 THE COURT: Thank you.

6 Mr. Carroll?

7 MR. CARROLL: Jeremy Carroll, Glenn Feldmann Darby &
8 Goodlatte, on behalf of the Town of Chatham.

9 We have one potential witness, Tim Hammell, the
10 clerk treasurer for the town. I have spoken with Mr. Massie
11 about possibly just using a declaration, which we filed last
12 evening, for that purpose. I may not ultimately not need to
13 call him.

14 THE COURT: Very well.

15 Anyone else? Pro se parties?

16 MR. ELIJAH HOWARD: Your Honor, I'll be speaking on
17 my own behalf.

18 THE COURT: Very well.

19 MR. DELMER HOWARD: Delmer Howard. I'll be speaking
20 on my behalf.

21 THE COURT: Very well. Anyone I missed? I was
22 trying to get an idea of what to expect today.

23 All right. The first motion we have is the Howell
24 defendants motion to dismiss for lack of jurisdiction and for
25 failure to state a claim.

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1 MR. HOWELL: Your Honor, we're relying on our
2 pleadings for that and we'll incorporate some of our
3 arguments into the summary judgment motion. We'll rely on
4 the pleadings.

5 THE COURT: Very well. Thank you.

6 Any response, Mr. Massie?

7 MR. MASSIE: Excuse me, Judge. To speed things
8 along, I know you have the briefs on that, and we submit that
9 on the briefs as well.

10 THE COURT: Very well. Thank you.

11 All right. Then we have the four motions to stay,
12 and I note that three of the motions have the same argument.
13 The argument that differs slightly is the Waldo & Lyle
14 defendants. So first I'd like to hear from anyone who would
15 like to be heard on the motions to stay with regard to the
16 Howell defendants, the Blankingship & Keith defendants, and
17 the Lollar defendants, and the Waldo & Lyle defendants with
18 regard to the similar argument, and then the Waldo & Lyle
19 defendants may make an argument with regard to the additional
20 grounds. But first let's stick to the similar grounds, and
21 then we'll move on to those additional grounds.

22 So who am I going to hear from on those?

23 MR. TEANEY: May it please the Court.

24 My name is Derek Teaney. I'm with the law firm of
25 Appalachian Mountain Advocates. I'm here pro hac vice on the

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1 Court's order granting the motion of Isak Howell.

2 I'll be arguing the motion to stay proceedings on
3 the motion for immediate possession on behalf of the clients
4 that I represent, Stephen W. Bernard, Anne W. Bernard, and
5 New River Conservancy. I don't represent the others, but I
6 believe that their arguments may be similar and they may be
7 adopted by reference.

8 We filed this motion following an order of the
9 Federal Energy Regulatory Commission, or FERC, on December 13
10 that purported to grant for purposes of further consideration
11 requests for rehearing filed by the moving parties: The
12 Hodges, Gordon W. Jones, Keith N. Wilson, and the New River
13 Conservancy. And this motion is based on the, frankly,
14 inequitable situation that's created by the nature of the
15 FERC order and the FERC processes.

16 You know, in over a decade of administrative law
17 practice, I've not encountered an order like a FERC order.

18 The FERC certificate order on which Mountain Valley
19 Pipeline is basing its right to condemn these landowners'
20 property is final for some purposes -- for example,
21 proceeding in this court -- but it's not final for other
22 purposes, in that the landowners and other potentially
23 affected parties cannot get judicial review of the order at
24 this time.

25 Now, we have sought it. I don't want to mislead the

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1 Court; we have sought it. The parties have petitioned the
2 D.C. Circuit Court of Appeals for judicial review of the FERC
3 certificate.

4 I fully expect that Mountain Valley Pipeline will
5 intervene in that proceeding and move to dismiss it on the
6 basis of subject matter jurisdiction. And their argument
7 will be that the FERC certificate is not final and
8 appealable.

9 So you can see the conundrum. It's final and
10 appealable for purposes of taking property -- I'm sorry, it's
11 final for purposes of taking property, but it's not final and
12 appealable for purposes of getting at the underlying
13 substance of the order.

14 And this Court is familiar with these issues. I
15 believe that it had a case in front of it where landowners
16 came before the Court asking to challenge the right to take
17 that would come with the FERC certificate, challenging the
18 FERC processes, and this Court directed those parties to seek
19 review in the Courts of Appeals, because that's what the
20 Natural Gas Act says; and so that's what these parties have
21 done. But the Court of Appeals is going to be faced with
22 jurisdictional challenges because of the December 13 order.

23 Here's how that comes into play. When FERC issues a
24 certificate, as we observed, the certificate holder can go
25 into court and seek condemnation, but judicial review is not

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1 available until a party requests rehearing from FERC. They
2 have 30 days to ask FERC to rehear it. And Congress gave
3 FERC 30 days to resolve that request for rehearing. So
4 Congress expected that FERC certificates would be judicially
5 reviewable in about 60 days.

6 The problem comes when FERC issued its order on
7 December 13 granting rehearing for the purposes of further
8 consideration. What they purport to do -- these are commonly
9 called tolling orders. They're intended -- FERC's intended
10 purpose is to toll that 30-day period that they have to
11 review a request for rehearing. In the meantime, pipeline
12 companies condemn property, they cut down trees, they dig
13 trenches; and meanwhile, aggrieved parties who are adversely
14 affected by the FERC certificate have no forum in which to
15 address those problems.

16 We have requested -- these parties have requested a
17 stay from FERC. FERC has announced repeatedly that its
18 general policy is to deny stays for the purposes of ensuring
19 the finality of its orders. But at the same time, it tolls
20 the time for it to consider those orders which would
21 otherwise allow judicial review.

22 It's an absolutely twisted situation, where
23 landowners are faced with responding to a condemnation action
24 in which they are not allowed to, according to Mr. Massie and
25 MVP, raise issues collateral to the FERC certificate,

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1 challenge the environmental findings, the historical
2 findings, the public use, the need, the necessity. All of
3 those issues MVP will insist are not on the table for this
4 Court to consider.

5 So go to the Court of Appeals, Mr. Massie says.

6 When we go to the Court of Appeals, FERC and the
7 pipeline company will be standing there trying to bar our
8 entry on the basis of tolling order. So that leaves these
9 parties in a conundrum, where they can lose possession of
10 their properties, their trees could be felled, their streams
11 trenched, their properties trenched, bulldozers and chainsaws
12 running, and they would not have the opportunity to seek
13 judicial review of the substance of the order.

14 So what the motion that is pending before the Court
15 seeks is a narrow stay based on this Court's inherent
16 equitable authority, recognized by the United States Supreme
17 Court under *Landis*, that when a party is faced with such
18 hardship and inequity that going forward would prejudice
19 them, that the Court has the ability to manage its own docket
20 and stay proceedings.

21 We are asking the Court to stay this entire
22 proceeding, this entire action.

23 THE COURT: All right. I was going to ask you about
24 that, because it appeared from the initial motion and brief
25 that that's what the parties were seeking; but then it

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1 appeared from the reply that perhaps not.

2 MR. TEANEY: To the extent that there was language
3 in the initial motion that that was sought, it was overly
4 broad. The intent was to seek a narrow stay of proceedings
5 in the equitable relief that the plaintiff seeks.

6 The legal parts of this action, moving towards
7 condemnation, you know, I think the appropriate thing to do
8 in this case would be to issue a scheduling order, proceed
9 with a Rule 26(f) conference, proceed in the normal pace that
10 you would in an action, but stay the equitable relief
11 proceedings until such time as the landowners have the
12 opportunity to seek judicial review from a Court that has the
13 power to stay the FERC order.

14 The reason for that is, as this Court observed, you
15 know, District Courts cannot stay the order.

16 We do not want you to stay the order. We're not
17 asking you to do that. We recognize that power is reserved
18 to the Courts of Appeals. But we're afraid we can't get in
19 there yet. And I know that MVP is going to move to dismiss
20 that challenge that was filed.

21 So the FERC certificate would remain valid for all
22 other purposes. They could proceed with this action towards
23 condemnation. They could seek notices to proceed from FERC.
24 They could continue to pursue see the numerous regulatory
25 approvals that remain outstanding.

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1 The only thing we seek is to stop this early entry
2 action until such time as the landowners can get judicial
3 review. Otherwise, they are in quite a quandary that it
4 would be hard to find in any other area of law, where they
5 are going to be adversely affected by an administrative
6 order, but have no viable venue to seek relief.

7 You know, one of the great things about the American
8 justice system is that, at the end of the day, the losing
9 party can walk out and say, Well, at least I feel like I had
10 my day in court.

11 My fear is that many of the landowners here, if they
12 don't have the opportunity to challenge that FERC order and
13 they lose their forests and their streams and their
14 historical resources, they won't feel that way at the end of
15 this proceeding.

16 And so for that reason we ask this Court, in its
17 equitable authority, just as the plaintiff has invoked this
18 Court's equitable authority and asked it to step outside the
19 bounds of what Congress has provided, we ask you to exercise
20 your equitable authority and tap the brakes and allow us time
21 for FERC to have the further consideration it says that it
22 needs before it issues a final ruling on the request for
23 rehearing; and at that time, there will be no question that
24 the Courts of Appeals have jurisdiction.

25 Thank you, Your Honor.

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1 THE COURT: Mr. Teaney -- and I understand your
2 clients' frustrations, but would you agree that this is not a
3 new issue, that this has occurred in the past with the FERC
4 tolling orders, and that Congress has not seen fit to change
5 that process at this stage? Would you agree with that?

6 MR. TEANEY: I would agree that Congress has not
7 seen fit to change that process. I would -- I think, if you
8 look at the history of tolling orders, there has been a
9 change in the practice of FERC, such that, rather than the
10 tolling orders being reserved for the unique situation where
11 a complicated matter presents, you know, the need for
12 additional time to review, that FERC issues tolling orders as
13 a matter of course.

14 And so the remarkable thing is, you know, there's a
15 slew of cases cited by plaintiff in opposition to this
16 motion. And I understand that I'm swimming upstream a little
17 bit here, but I think if you look at the titles of those
18 cases, they're pretty telling.

19 One of them is the Sabal Trail pipeline. That's one
20 of those cases where they said that the tolling order wasn't
21 sufficient to stop a proceeding. Sabal Trail pipeline
22 property owners lost the property. The pipeline was
23 constructed. The D.C. Circuit ultimately found that FERC
24 violate NEPA in issuing that FERC certificate, but the
25 pipeline was already built.

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1 If you look at another title in those cases, the
2 Constitution pipeline. The Constitution pipeline runs in
3 Pennsylvania and New York. The state of Pennsylvania issued
4 the pipeline, all the approvals that it needed. The
5 Constitution pipeline went into federal court in a proceeding
6 like this in Pennsylvania and asked for permission to cut
7 down a family's maple tree syrup farm in order to lay the
8 pipeline. The Court granted them that authority. Those
9 trees were felled. That pipeline has not been built because
10 the state of New York never issued its authority.

11 These proceedings proceed too fast. And while this
12 is not a new issue -- the tolling orders, you know, they date
13 back a while -- the process has changed. The accelerated
14 rate at which the pipelines seek to move these condemnation
15 proceedings has changed.

16 I think if you look at *Sage*, that proceeding
17 occurred well after the requests for rehearing were denied
18 and that the certificate order was ripe for review.

19 This is not that case. They're going to argue that
20 the certificate order is not ripe for judicial review, but
21 they can condemn property under it.

22 While it is not a new issue, it's time to put a stop
23 to this process.

24 THE COURT: And can you cite me to any cases
25 advocating your position where the Court ruled that, because

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1 of the FERC tolling order, preliminary mandatory injunctive
2 relief was not permitted?

3 MR. TEANEY: The proceedings on the preliminary
4 mandatory relief, or the mandatory relief -- I'm sorry, the
5 injunction itself?

6 THE COURT: The injunction itself.

7 MR. TEANEY: I think there may be a case or two
8 where they didn't get an injunction. I think it turned on
9 some deficiencies in the identification of the properties to
10 be condemned. There were some problems at that first step of
11 the motion for partial summary judgment.

12 But in the vast majority of cases that are out
13 there, the unreported District Court opinions that are out
14 there, the injunction issues.

15 They're not binding on this court. A lot of times
16 they're not particularly persuasive because they don't engage
17 on the issues, they just accept, well, the FERC certificate
18 is there, it must be bullet-proof.

19 And the other issue is, in many of those cases that
20 get cited for these issues, if you read them carefully, you
21 find out nobody showed up to oppose the preliminary
22 injunction.

23 So, yes, there's a decision on the Westlaw Reporter,
24 but there was nobody there opposing it.

25 And my clients adamantly oppose this motion and they

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1 seek their time in court. If they're not going to be able to
2 present the issues that they here, allow them the time to
3 present them to a court with jurisdiction. That's all this
4 motion seeks.

5 THE COURT: Thank you, Mr. Teaney.

6 MR. TEANEY: Thank you, Your Honor.

7 THE COURT: Mr. Howell?

8 MR. HOWELL: Very quickly, Your Honor.

9 I just want to add that the appeal in D.C. is based
10 on the Affiliates Act and the affiliation of MVP and its
11 corporate parents and subsidiaries and so forth. And that
12 has not been considered by any of the courts previously with
13 regard to tolling, so that distinguishes this case from those
14 prior cases.

15 Thank you.

16 THE COURT: Anything else, Mr. Howell?

17 MR. HOWELL: No, ma'am.

18 THE COURT: All right. Thank you.

19 Any other defense counsel that wishes to be heard?

20 MR. DeTURRIS: We'll incorporate the arguments they
21 just made.

22 THE COURT: All right. Say your names, please.

23 MR. DeTURRIS: I apologize. Kevin DeTurris, on
24 behalf of the BK defendants.

25 MR. DeTURRIS: Thank you, Mr. DeTurris.

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1 MR. LOLLAR: Charles Lollar. We do the same.

2 THE COURT: All right.

3 MR. CLARKE: Stephen Clarke, Waldo & Lyle. I do the
4 same as well, Your Honor.

5 THE COURT: Very well.

6 MS. BENTLEY: Your Honor, the same. Lori Bentley,
7 with Johnson, Ayers & Matthews. We incorporate the arguments
8 for our clients.

9 THE COURT: Very well.

10 MR. ROBERTSON: John Robertson. We would also
11 incorporate the prior arguments.

12 MR. CARROLL: Your Honor, Jeremy Carroll. We will
13 as well.

14 MR. HOPKINS: Bill Hopkins. Same.

15 THE COURT: The pro se defendants, would you like to
16 incorporate these arguments also?

17 MR. ELIJAH HOWARD: Yes, Your Honor.

18 THE COURT: All right. So Mr. Elijah Howard and
19 Mr. Delmer Howard.

20 Anyone who did not incorporate the argument?

21 All right. Mr. Massie, would you like to be heard?

22 MR. MASSIE: Good morning again, Judge. Wade
23 Massie, for Mountain Valley Pipeline. And with me at counsel
24 table is Mr. Cooper, the project manager; Mr. Seth Land, who
25 is a partner with me; and Mr. Jake Richter, who is helping us

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1 with the technology.

2 Mr. Teaney said that there's no forum in which to
3 address these issues and there's, quote, no opportunity to
4 seek review. And he also said that he's not encountered this
5 situation before.

6 Actually, there are multiple forums to address this
7 situation. One, of course, is FERC itself, which they have a
8 motion pending before.

9 The second is the Court of Appeals. And in the
10 Court of Appeals, there are at least two cases pending now by
11 the same group of attorneys. One case is a direct appeal of
12 the FERC order.

13 So they say it's not final and not appealable here
14 today, but they filed a case in the D.C. Court of Appeals in
15 which they say it is final and it is appealable. So that's
16 pending.

17 At the same time, they have also filed a suit in the
18 D.C. Court of Appeals under the All Writs Act, seeking to
19 stay the decision of FERC. And both of those are pending
20 cases now, and they'll be briefed, they'll be argued, and
21 they'll be decided all on the schedule of the Court of
22 Appeals.

23 So I think to come here in this court, in this
24 condemnation case, and say there's no forum, we have no place
25 to be heard, I think is incorrect.

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1 THE COURT: I think their argument -- and I think
2 you understand it, Mr. Massie -- is, yes, they may have those
3 remedies, but they won't have a decision; if I grant your
4 requested relief, they won't have a decision before you've
5 already started clearing trees and digging trenches and the
6 like.

7 MR. MASSIE: Well, I think that that is the
8 argument. I think, however, that the Court of Appeals will
9 decide the schedule on which it hears these proceedings. And
10 it can expedite, on their request or on their own initiative,
11 those proceedings and hear their request based on whatever
12 decision this Court makes. So if this Court were to grant
13 immediate possession, I'm sure that they would take that to
14 the Court of Appeals and say: Stay the FERC order.

15 So I think there is a remedy. They're not precluded
16 from anything. And, in fact, these same arguments have been
17 made before and ruled upon in other cases before the D.C.
18 Court of Appeals. And the D.C. Court of Appeals has
19 considered these kind of preliminary challenges and said that
20 they have no merit.

21 And Your Honor's question is exactly right. To our
22 knowledge, there's no case whatsoever -- Court of Appeals,
23 District Court, anywhere -- supporting any version of what
24 they're seeking here, any version of the type of relief that
25 they're seeking. In fact, there are multiple decisions,

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1 including some that you've touched upon in earlier rulings of
2 your own, where issues about the interplay between District
3 Courts and FERC are considered and ruled upon.

4 And in these cases, the District Courts -- and they
5 are all affirmed by the Court of Appeals -- hold that the
6 District Court's job is different from the role that's being
7 asked here. The District Court's job in these cases is to
8 enforce the FERC order.

9 Now, there could be a different policy. Someone
10 could craft a system, I suppose, where the order of FERC is
11 not effective and never becomes effective until the last
12 final appeal, whenever and however made. But that's not the
13 system that is in place right now.

14 The system in place right now is these orders are
15 effective. They became effective after years of review and
16 consideration and comments and objections, and multiple
17 proceedings. And once the order is entered, the cases hold
18 that the order is effective and it remains effective.

19 So we submit that the Court's position and situation
20 should be to enforce the order in its role as the Court
21 hearing the condemnation case.

22 As far as cases, if Your Honor needs references --
23 you may have already seen them, but the Court of Appeals --
24 District Courts do not stay, of course, a FERC order. And
25 your own decision in *Berkley* stands for that. The *Town of*

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1 *Dedham* decision stands for that.

2 The Court of Appeals have jurisdiction but normally
3 don't grant stays; they allow the order to be effective after
4 it's issued. And that's the *Allegheny* case in the D.C.
5 Circuit, 17-1098. It's also the *Adorers* case in the Third
6 Circuit, 17-3163. And in the *Allegheny* case the petitioners
7 made the same arguments being made here.

8 I would also point out that there's a
9 *Transcontinental* case decided by the Eastern District of
10 Pennsylvania, August 23, 2017 -- 2017 Westlaw 3624250 --
11 making a due process argument based on the tolling order.
12 And the argument was not accepted.

13 So we'd ask the Court to go forward and let the D.C.
14 Circuit and FERC be the judge on the effectiveness of the
15 FERC order.

16 THE COURT: Thank you, Mr. Massie.

17 MR. MASSIE: Thank you, Judge.

18 THE COURT: You may reply, Mr. Teaney.

19 MR. TEANEY: Thank you, Your Honor.

20 Working backwards from plaintiff's final statement
21 about letting the process play out in FERC and the Court of
22 Appeals, the fear is that by the time relief is obtained, it
23 won't be meaningful because, of course, the trees will have
24 been cut and the streams crossed.

25 This action in which -- this action in which the

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1 plaintiff has already stepped outside the bounds of the
2 Natural Gas Act and is acting under a judicially created
3 doctrine under Rule 65 and the Court's power sitting as
4 chancellor, this action is moving so fast that it has parties
5 acting like their hair is on fire in three District Courts in
6 West Virginia and Virginia, and in the D.C. Circuit, and in
7 the Fourth Circuit, where there is an emergency or an
8 expedited briefing schedule being sought to try to get
9 expedited appeal of this Court's order in *Berkley*. I believe
10 that was filed yesterday.

11 So this is the sort of circumstance where justice
12 can't be achieved that rapidly. Now, the parties are trying
13 to obtain the relief, doing everything they can to get a
14 court to hear their arguments; and to that end, the parties
15 did file, as Mr. Massie observed, with the D.C. Circuit both
16 a petition for review of the FERC certificate and an action
17 under the All Writs Act.

18 In the alternative, in the alternative, if the D.C.
19 Circuit determines that because of the tolling order it
20 doesn't have jurisdiction, it should issue an extraordinary
21 writ to protect its future jurisdiction.

22 That action was filed this week. We hope that they
23 will act swiftly enough; but nonetheless, the chance remains
24 that they won't be able to act on that in time in order to
25 protect the trees and forests and cultural resources that are

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1 at issue here.

2 And the issues in those matters are not so frivolous
3 or run of the mill, as plaintiff wants to suggest they are
4 when he points to, I guess, what you might call FERC's
5 winning record.

6 FERC's policy states, its certificate policy states
7 that a heightened scrutiny must apply for affiliate projects.
8 And I think this Court will hear testimony today that this
9 would qualify as an affiliate project.

10 This is a unique project, and so there are unique
11 issues at issue on the merits that do deserve an opportunity
12 to be presented and shouldn't just be given the back of the
13 hand the way the plaintiff has called for.

14 And with regard to the *Transcontinental* case, where
15 due process was raised, first of all, that case is not
16 particularly persuasive, from our standpoint.

17 In that case, the Court disregarded a long line of
18 Supreme Court cases that say basically that justice delayed
19 is justice denied. The Court held there was no due process
20 issue with merely delaying the cause of action. But that is
21 contradicted by a long line of Supreme Court cases that say
22 the rights afforded by the Constitution are rights that are
23 present here and now; they're not future promises for rights.

24 And so to that extent, Transco's treatment of the
25 due process issue was simply wrong.

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1 But the other way that that case is distinguishable
2 is that the landowners there may have reached too far. They
3 asked the Court to say that there was no condemnation
4 authority at all because of the due process issue that they
5 raised. And that's not the narrow ruling we're seeking from
6 this Court.

7 Again, we're only seeking to stay proceedings on
8 this equitable proceeding where plaintiff seeks the
9 disfavored extraordinary remedy of a preliminary mandatory
10 injunction. And because of this Court's equitable authority
11 to manage its own docket under *Landis*, we respectfully
12 request that the Court stay those proceedings on the motion
13 for preliminary injunction, let the other proceedings go at
14 pace, the legal actions, set a scheduling order; but this
15 early entry action, we ask that you place that on hold until
16 judicial review is available.

17 THE COURT: Thank you, Mr. Teaney.

18 MR. TEANEY: Thank you, Your Honor.

19 THE COURT: Any other defense counsel that wishes to
20 make a reply?

21 We will still get to the Waldo & Lyle other argument
22 that was made, Mr. Clarke, so we'll still get to that.

23 Mr. Lollar?

24 MR. LOLLAR: May it please the Court.

25 Your Honor, Charles Lollar for the defendants in

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1 Virginia. And I would certainly echo --

2 THE COURT: Let me ask you to speak into the mic so
3 that people can hear you.

4 MR. LOLLAR: I will certainly echo Mr. Teaney's
5 arguments. One thing that I think is most important in
6 considering this motion -- you have a Rule 65 motion for
7 equitable relief. A tremendous amount of discretion lies in
8 Your Honor. You have a motion by the defendants seeking
9 equitable relief to stay their motion.

10 The defendants' motion is to maintain the status
11 quo. Mountain valley's motion is to change the status quo.

12 I said it at our first hearing: This proceeding is
13 moving fast. You've heard that already. It's moving
14 extremely fast. Equity, doing equity, would slow it down and
15 allow time to deal with these issues and deal with any number
16 of appeals that are going on right now. That is doing
17 equity.

18 Thank you.

19 THE COURT: Thank you, Mr. Lollar. Any other
20 defense counsel that would like to make a reply?

21 And why don't we do it this way? Is there any pro
22 se defendant or any counsel for defendants that does not wish
23 to adopt the argument on reply?

24 I see no hands, so by default, all of you have
25 adopted the arguments on reply.

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1 Anyone else have anything to add on reply before we
2 get to the separate arguments that were made by the
3 Waldo & Lyle defendants?

4 All right, Mr. Clarke, would you like to be heard
5 with regard to the arguments you made with regard to the
6 motion to stay?

7 MR. CLARKE: Yes, I would, Your Honor.

8 THE COURT: All right.

9 MR. CLARKE: Thank you, Your Honor. May it please
10 the Court.

11 Stephen Clarke, with Waldo & Lyle, on behalf of a
12 number of different property owners in this matter.

13 Your Honor, we filed a motion to stay the
14 proceedings, really because, from the beginning, MVP has
15 rushed to use eminent domain without actually ensuring that
16 they got it right. And when we're talking about divesting
17 private property owners of the fundamental right of private
18 property, especially in favor of another private for-profit
19 entity, it is this Court's obligation to strictly scrutinize
20 the proposed taking to ensure that it complies with the
21 requirements of the Fifth Amendment and other constitutional
22 and statutory protections.

23 And so, Your Honor, my clients have raised what I
24 think are important issues about the proposed route of the
25 Mountain Valley pipeline and where exactly MVP is seeking to

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1 acquire easements, where exactly MVP is seeking to enter onto
2 my clients' properties to begin construction of its pipeline.

3 And, in particular, Your Honor, I represent Mike and
4 Marnie Slayton, who are trustees of the Margaret McGraw
5 Slayton Living Trust. They have a beautiful piece of
6 property up Mount Tabor Road in Montgomery County where they
7 make their home. Their property is on what MVP has termed
8 Variation 250. And this variation was developed in part
9 because of problems with MVP's original proposed route across
10 several properties in the area.

11 Even though FERC ordered MVP to implement Variation
12 250 in its order issuing a certificate in this matter, what
13 MVP filed in its complaint did not include Variation 250.

14 With regard to the Slayton property, the route
15 identified in Exhibit 80 to the complaint, Your Honor, has
16 the pipeline path running in front of their home, between
17 their home and the road, as well as using their driveway as
18 an access road.

19 When the Slaytons were served with a copy of that
20 complaint and notice of condemnation, Dr. Slayton called me
21 up and said, They're trying to take the old route. Because
22 MVP had long ago told us it was abandoning that route and for
23 the past year or so had focused on the reroute, Variation
24 250.

25 So we raised this issue as a grounds of defense in

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1 our answer to the complaint on behalf of the Slaytons. We
2 raised it in our opposition to MVP's summary judgment motion,
3 because MVP had specifically told Dr. Slayton that it could
4 not build the pipeline on the original route because it went
5 through an enormous sinkhole on his property.

6 And MVP, in its reply brief in support of its motion
7 for summary judgment, essentially said, Well, you're right;
8 we're working on implementing Variation 250, but we haven't
9 done so yet.

10 And so that raised the question, Your Honor, in my
11 mind, in the minds of my clients, of where exactly did MVP
12 intend to enter onto their property to start cutting trees
13 and doing other construction? Because what MVP was saying in
14 its complaint and its brief in support of its motion for
15 summary judgment did not match what it was saying in its
16 reply brief.

17 So, Your Honor, I filed a motion to stay on behalf
18 of the Slaytons, on behalf of my other clients, because
19 clearly MVP, by its own admission, didn't have all of its
20 ducks in a row, and yet it was asking this Court for the
21 extraordinary remedy of mandatory injunction for immediate
22 possession. They couldn't tell the Court where the easements
23 were located on the Slayton property that it wanted immediate
24 possession of.

25 And as the Court knows, subsequent to the filing of

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1 my motion, MVP then filed an amended complaint, which
2 purports to incorporate Variation 250. And I say it purports
3 to because we don't know.

4 In fact, when I took the deposition of MVP's
5 representative on Tuesday of this week, he admitted that MVP
6 was still seeking approval from FERC for Variation 250.

7 And MVP has told us in its written discovery
8 responses that it's still working on that condition of the
9 FERC certificate, implementing Variation 250.

10 So we're still left with uncertainty, Your Honor,
11 and it's caused by MVP rushing into this immediate -- excuse
12 me, this eminent domain process without ensuring that it
13 knows exactly what it is taking.

14 Now, the Court directed MVP to file a sur-reply, and
15 it did so. And MVP's sur-reply suggests that, well, it's
16 really just not a big deal because the Slaytons knew about
17 this route long ago, so there's not a problem. And MVP also
18 suggests, in fact argues, in its sur-reply that it's
19 completely appropriate for it to file a motion for summary
20 judgment before a responsive pleading and answer has been
21 filed. Because the amended complaint was filed, I believe,
22 on January 2, and Rule 71.1(f) and (e) give my clients the
23 right to file an answer to that amended complaint within the
24 same period of time -- 21 days -- so they have a right to
25 file that answer up until January 23, 11 days from now.

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1 THE COURT: Mr. Clarke, you understand that Rule 56
2 doesn't specifically mention that motion for summary judgment
3 or partial summary judgment has to be made after an answer is
4 filed; is that right?

5 MR. CLARKE: Absolutely, Your Honor, but there's
6 authority that the defendant may file and the Court may
7 entertain a motion for summary judgment before an answer has
8 been filed. The defendant may do so, but I haven't found any
9 authority -- MVP didn't cite any authority -- that a court
10 may entertain a plaintiff's motion for summary judgment
11 before the time for filing an answer or responsive pleading
12 has run.

13 Your Honor, the cases that MVP cites in its
14 sur-reply -- and I can go through them, and I will -- they
15 don't stand for the proposition that MVP can come into this
16 court and the Court can entertain this motion before the time
17 in which to file an answer has run. And that's the issue in
18 this case.

19 The *Stein versus Oshinsky* case, which is a Second
20 Circuit case cited by MVP, 348 --

21 THE COURT: Mr. Clarke, you're welcome to go through
22 the cases. I'm familiar with the cases, and I appreciate
23 your pointing out the distinction in those cases.

24 MR. CLARKE: Well, I just think every single case,
25 Your Honor -- and I don't want to belabor the point, but if

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1 the Court has read them, then the Court has seen that in
2 every single case -- a lot of the cases, there was a 12(b)(6)
3 or some other sort of motion to dismiss that had been filed
4 by the defendant, and the Court said it's okay to proceed on
5 the plaintiff's summary judgment motion, but it wasn't an
6 issue with regard to the timing in which to file. Of course,
7 filing a 12(b)(6) would toll the time, generally, to file an
8 answer.

9 But that's not the issue in this case. My clients
10 haven't filed an 12(b)(6) in an attempt to toll the time in
11 which to file the answer; they're not being given enough time
12 to file the answer. And that's the time that the rule says
13 that they're permitted.

14 So what MVP asks of the Court is to read into the
15 plain meaning of Rule 71.1 an exception that says the
16 defendant shall have the same time in which to file an answer
17 or grounds of defense except if the plaintiff says it's in a
18 really big hurry, or except if the plaintiff promises that
19 there isn't anything that the defendant can say that would
20 change anything.

21 Your Honor, the thing about our adversarial system
22 is that MVP doesn't get to argue both sides. My clients get
23 to assert their own defenses. They don't need MVP to tell
24 the Court what those defenses likely will be. My clients get
25 to put on their own evidence, to make their own legal

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1 argument before the Court. MVP doesn't get to do that on my
2 clients' behalf.

3 Your Honor, one of the things MVP has to prove, if
4 it's going to persuade the Court today, is that it has the
5 power to condemn the easements sought, but it would be a
6 miscarriage of justice if the Court were to find that MVP has
7 the power to condemn the easements sought before the Slaytons
8 and any other affected property owner have been given their
9 full and fair opportunity to raise whatever grounds of
10 defense are justified in response to this condemnation and
11 the changed condemnation of these easements.

12 Your Honor, Dr. Slayton is a retired internist, and
13 he put it to me this way the other day. He said: Imagine
14 there's a renal surgeon -- let's call him Dr. Massie -- and
15 he gets presented with a patient who has had a scan that
16 reveals a mass on his right kidney. Now, Dr. Massie is a
17 busy surgeon, but he's booked a cruise around the world with
18 his family set to begin February 1st, for which he's paid
19 some nonrefundable costs. But he knows he needs to operate
20 on this patient and remove his right kidney, so he finds time
21 for the surgery, squeezes him in.

22 He gets into surgery and proceeds to remove the
23 patient's left kidney. And as they're stitching him back up,
24 someone tells him: You removed the wrong kidney. So
25 Dr. Massie says: Oh, my goodness, I can't believe this. And

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1 he tries to get word that they need to bring back the kidney
2 that he just removed so maybe they can save it. And he goes
3 back in while he's still in surgery and proceeds to remove
4 the right kidney, the one with the mass.

5 Your Honor, in that scenario, Dr. Massie would be
6 sued for gross negligence, and he would be liable.

7 Now, here MVP has done the same thing, and it
8 doesn't want to take responsibility for it.

9 We ask the Court to stay this, give my clients an
10 opportunity to file an answer to this new route across their
11 property. They shouldn't be obligated to anticipate MVP's
12 future filings in their previous answer. They have the right
13 under Rule 71.1 to file an answer within 21 days, and it's
14 inappropriate, Your Honor, for the Court to entertain a
15 motion for summary judgment before that time has expired.

16 So that's our motion, Your Honor.

17 THE COURT: Thank you, Mr. Clarke.

18 I don't believe -- and you can tell me if I'm
19 wrong -- that any other defendants incorporated Mr. Clarke's
20 motion to stay or said "me too" in regard to Mr. Clarke's
21 motion to stay in this regard. Is that correct?

22 MR. HOWELL: Your Honor, we did not, but I would
23 like to now on behalf of defendant Del Dyer, who is in the
24 same situation with regard to their --

25 THE COURT: And Mr. Howell is speaking now.

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1 MR. HOWELL: Sorry. Yes. Isak Howell for Del Dyer.
2 Just for this matter, I'd like to join in Mr. Clarke's for
3 Defendant Del Dyer, who is also on Variation 250.

4 THE COURT: Thank you, Mr. Howell.

5 MR. LOLLAR: Your Honor, Charles Lollar. I have
6 two, actually two parcels, and some property groups. Robert
7 and Donna Jones, they're in the exact same situation, and
8 Sandra Powell. We would adopt on their behalf the arguments
9 of Mr. Clarke with regard to Variation 250. We have not, to
10 my knowledge, been served and have not answered, and the time
11 has not expired.

12 THE COURT: Thank you, Mr. Lollar.

13 Mr. Robertson?

14 MR. ROBERTSON: Your Honor, John Robertson for John
15 Garrett and Suzanne Jane Baker. They're also similarly not
16 been served for one of the parcels on the Variation 250. And
17 we would adopt the arguments made by Mr. Clarke.

18 THE COURT: Thank you, Mr. Robertson.

19 Anyone else?

20 All right. Mr. Massie?

21 MR. MASSIE: Well, I didn't know what all to expect
22 today, but I did not -- I did not expect to get a title of
23 "doctor," and I didn't think I would get a cruise around the
24 world, either.

25 THE COURT: I didn't assume that they were referring

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1 to you, Mr. Massie.

2 MR. MASSIE: We filed the case based on the basic
3 route, the October 2016 route, that was approved by FERC.
4 And in their responsive pleadings several landowners noted
5 that this route that we filed on originally did not yet
6 include Variation 250.

7 Now, in the certificate order, at page 60, paragraph
8 152, FERC directed MVP to adopt Variation 250, and we have
9 made that filing with FERC. So it's part of the FERC order
10 that Variation 250 should be the route, is the route, and we
11 have made the filings to make sure that that is the route
12 that's shown on the maps that are exhibits to the complaint
13 and amended paragraphs.

14 THE COURT: Well, let me ask you this, Mr. Massie.
15 Are you still, indeed, awaiting FERC approval with regard to
16 Variation 250?

17 MR. MASSIE: No, Your Honor. FERC has approved
18 already and adopted Variation 250. And that's, again, at
19 page 60, paragraph 152, and maybe 153 and 154. There's
20 several paragraphs there together. But Variation 250 is the
21 route.

22 So this is not a route to be or might be, it is the
23 approved route. And our witness did not testify that it's
24 not the approved route. He said it is the approved route.

25 And, really, it's not a matter of witnesses. One

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1 can only look at the FERC order and see what the order itself
2 says. So the order says Variation 250, and that's what we
3 have incorporated.

4 So we, in part, are answering a response that was
5 filed by the defendants saying, you need to get Variation 250
6 in the case.

7 And Variation 250 is now in the case, and now they
8 want to say, because we are making the change on Variation
9 250, they need more time to study this and they're not sure
10 if this changes the case or doesn't change the case.

11 I think it is telling that not one of these
12 attorneys that stood up here has said anything new that this
13 creates. Does this create any new issue? Does it create any
14 new evidence? Are there additional facts that we need to
15 bring before the Court? Is there anything about what we have
16 done that changes a single thing in this case? And not one
17 of the attorneys has identified a single issue of any kind.

18 Now, they may have so many days to file an answer,
19 but I would think if you come to court here and ask the Court
20 to put off or stay something, that you would be able to say
21 something, show something, of why it should be put off.

22 And we rely, as the Court must also, on the rule
23 itself, which says a motion for summary judgment can be made
24 at any time, and it doesn't have to wait for some response to
25 an amended complaint, especially in a case like this, where

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1 you have many tracts and there could be various amendments of
2 one kind or another that don't really affect anything
3 substantive in the case. And I submit that's the situation
4 with Variation 250.

5 The opposition to this project is the same. Their
6 positions on all the issues are the same. It doesn't change
7 any of the issues. I doesn't change the nature of the case,
8 and it doesn't raise a single new issue.

9 So I submit that Your Honor ought to allow the case
10 to go forward on the amendment, which is an amendment for a
11 change that FERC itself directed us to adopt.

12 Thank you, Judge.

13 THE COURT: Thank you, Mr. Massie.

14 Mr. Clarke?

15 MR. CLARKE: Thank you, Your Honor. Stephen Clarke
16 again on behalf of the Waldo & Lyle defendants.

17 Your Honor, Mr. Massie has said that FERC directed
18 MVP to file and implement Variation 250. But MVP didn't do
19 that until a week and a half ago. That's the problem here.

20 If MVP were directed by FERC to implement Variation
21 250, it should have done that before it rushed into court and
22 filed this eminent domain matter.

23 What precipitated this motion is today's hearing on
24 MVP's motion for early possession. And there are -- Your
25 Honor, I'll proffer to the Court, there are route changes

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1 that MVP is still considering along this project. And some
2 of that was mentioned in my motion, Your Honor, on other
3 properties.

4 THE COURT: The Scott property, for example?

5 MR. CLARKE: Yes. And that is still unsettled.

6 So what we're asking the Court to do is ensure that
7 MVP is actually condemning the easements that it intends to
8 build, and which FERC has approved, before this Court grants
9 it this extraordinary relief of early possession and the
10 right to cut trees and begin construction of this pipeline.

11 Your Honor, Mr. Massie said nobody has said that
12 there's any difference, there's any new fact that we would
13 need to raise because of this change.

14 Well, MVP's expert appraiser, who I understand we'll
15 hear from later, didn't value Variation 250 in his analysis.
16 His analysis, at least what he told us at his deposition the
17 other day, and that we've been provided, is for the earlier
18 variation, that MVP has now moved away from.

19 But the reality is, my clients have the right to
20 file an answer and raise any defenses and objections to the
21 taking within the prescribed period under Rule 71.1.

22 THE COURT: Mr. Clarke, can you point me at this
23 time to any anticipated new issues that your answer will
24 bring to light?

25 MR. CLARKE: Well, to begin with, the issue of the

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1 valuation testimony that I understand MVP is intending to put
2 on.

3 In addition, as I said, MVP's representative told me
4 in their deposition on Tuesday that FERC hadn't officially
5 approved everything for Variation 250. There are still
6 outstanding issues for that route.

7 THE COURT: Can you address paragraph 152 on page 60
8 of the FERC order?

9 MR. CLARKE: May I go to my boxes to get that, Your
10 Honor? I don't have it with me.

11 THE COURT: Certainly. You certainly may.

12 MR. CLARKE: Excuse me.

13 THE COURT: If anyone else has it handy, I'd
14 appreciate your cooperation.

15 MR. CLARKE: Thank you.

16 THE COURT: I think he's got it now. Thank you,
17 Mr. Land.

18 MR. CLARKE: I'm sorry, Your Honor. Will you say
19 again which paragraph?

20 THE COURT: It's page 60, paragraph 152, that was
21 cited by Mr. Massie. It talks about Variation 250 and says,
22 "We agree with its conclusion. Thus, environmental Condition
23 Number 16 of this order requires Mountain Valley to adopt
24 Variation 250."

25 MR. CLARKE: Yes, Your Honor. And I agree that is

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1 what requirement 16 requires. And yet, the problem is they
2 didn't do that until just recently, and they didn't amend
3 their complaint until a week and a half ago.

4 If MVP wanted to do this the right way and ensure
5 that it was actually complying with the FERC order, it would
6 have adopted that before it came into this court and sought
7 eminent domain and sought early possession of these
8 properties. It's done it in the middle of the proceeding and
9 it's done it ten days before today's hearing.

10 And, Your Honor, my clients are prejudiced by their
11 inability to raise whatever defenses are appropriate to them
12 within the prescribed time period.

13 THE COURT: Mr. Clarke, do you have any other
14 clients other than the Scott property that have a similar
15 issue with a variation in route or an unclear route that does
16 not involve Variation 250?

17 MR. CLARKE: I don't believe so, Your Honor.

18 THE COURT: All right.

19 MR. CLARKE: No. Thank you.

20 THE COURT: Thank you, Mr. Clarke.

21 And I'll ask that of other defense counsel. Do any
22 of your clients have issues with variations with regard to
23 the route that doesn't involve Variation 250? If so, if you
24 would, let me know.

25 MR. CHARLES: Your Honor, I'm not clear what you're

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1 asking. Are you talking about something -- variations
2 specifically approved by FERC or adopted in the FERC order?

3 THE COURT: Well, for instance, in the -- I'm sure
4 you're not familiar with everyone else's properties. My
5 understanding with regard to the Scott property is that it
6 has a cemetery on it, and they've been recently sent a notice
7 of survey, so their contention is that the route that was
8 approved by FERC and that MVP put in its complaint is not
9 actually the final route with regard that property.

10 So what I'm asking -- and that doesn't involve, it's
11 my understanding, Variation 250. So what I was asking is if
12 anyone else has a property similar to that outside Variance
13 250.

14 MR. LOLLAR: Your Honor, Charles Lollar.

15 Our defendants, we -- it's my understanding we've
16 had variations but not from what FERC approved. In other
17 words, MVP has come back with a route that's not quite FERC
18 approved, and that may be the route that they take, if I said
19 that clearly.

20 In other words, it's not the route they were sued
21 under; it's not the route that FERC approved.

22 THE COURT: And can you tell me what those
23 properties are? And if you can't right now, can you tell me
24 later?

25 MR. LOLLAR: I can certainly supplement this with

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1 the Court, but Gail and Ginger Smithers is one. James and
2 Carolyn Law are another that come to mind.

3 THE COURT: Thank you.

4 MR. TERPAK: Your Honor, Paul Terpak from
5 Blankingship & Keith in Fairfax.

6 I think it's appropriate now to mention Mr. Dale
7 Angle, who has a very significant archeological site
8 involving an Indian village perhaps 10,000 years old, and
9 boxes upon boxes of artifacts found there. FERC ordered that
10 they avoid one particular area, but it is part of the appeal
11 in the District of Columbia Appeals Court seeking further
12 variation on that. There's no FERC order ordering a change
13 as of now, but he believes a change is appropriate, because
14 it's quite logical, Your Honor, once you dig up --

15 THE COURT: And that's a little different, I think,
16 that he believes a change is appropriate, versus MVP has sent
17 notices of survey and has indicated that it wants to change
18 the route.

19 MR. TERPAK: That's part of the appeal present in
20 D.C. right now. The basic fact is, once you dig up an
21 archeological site and jumble the ground --

22 THE COURT: And I know you'll be making that
23 argument later with regard to irreparable harm and the
24 balance of equities.

25 MR. TERPAK: Thank you, Your Honor.

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1 THE COURT: Thank you.

2 Mr. Carroll?

3 MR. CARROLL: Jeremy Carroll, Town of Chatham.

4 I'm not sure this is responsive to Your Honor's
5 question. Mr. Cooper testified in his deposition that he
6 would prefer for the pipeline to avoid the landfill of the
7 town's property. There has certainly been notice of
8 resurveying or anything, as the Court referenced, but given
9 the powers for variations and alterations with FERC
10 approvals, I wanted to at least call that to your attention.

11 THE COURT: Thank you, Mr. Carroll.

12 Anyone else?

13 All right. Anyone else that wishes to be heard on
14 this issue that has been argued by Mr. Clarke?

15 Anyone who does not adopt his reply who adopted his
16 earlier argument?

17 Okay. Very well. Mr. Massie, did you want to --
18 since I specifically asked about the Scott property and that
19 circumstance, did you want to address that?

20 MR. MASSIE: Certainly, Judge. And just to clarify,
21 we are not seeking possession of anything that's not
22 approved. So all we are seeking possession of are the
23 approved routes by FERC. That's period, unconditional, no
24 exceptions to that.

25 As far as Variation 250, I think we've covered that.

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1 As far as the cemetery, we would like to work with
2 the landowner to avoid issues with the cemetery, if we can
3 work with the landowner to do that. We think solutions are
4 available that will satisfy all parties.

5 But as far as today is concerned, we're simply
6 seeking enforcement of the approved route by FERC.

7 Thank you.

8 THE COURT: Very well. Thank you, Mr. Massie. All
9 right.

10 MR. CLARKE: Your Honor, may I respond to that?

11 THE COURT: Yes, Mr. Clarke, go ahead. Please
12 approach the podium, though.

13 MR. CLARKE: Thank you, Your Honor. Stephen Clarke.

14 With regard to the Scott property, Mr. Massie is
15 correct that MVP is -- has approached my clients with a
16 different route. And as I submitted to the Court, MVP has
17 sent to my clients notices that it intends to survey on their
18 properties on January 16, 17 and 18.

19 When we took the deposition of Mr. Cooper as the
20 representative of Mountain Valley Pipeline, I asked him very
21 directly: Does MVP intend to construct the route that it's
22 condemning that was issued to it in the FERC certificate?
23 And he said, I don't -- we don't know. That was his answer.
24 And he also very clearly told me that MVP prefers the
25 alternate route that has most recently been proposed to my

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1 client in a revised plat, that I received from a land agent
2 yesterday.

3 I think this is illustrative of the problem that my
4 motion is intended to address. MVP is still making pretty
5 dramatic changes to its route, and yet, Mr. Massie is saying
6 we intend -- we want the Court's permission to come on and
7 start clearing trees on the FERC approved route which, for
8 the Scott property, is the one that goes through the
9 cemetery, it goes through their son's homesite, it goes
10 through the septic drain field that's been installed for his
11 home.

12 That's why it's appropriate for the Court to stay
13 this and ensure that MVP gets these changes, gets the route
14 correct.

15 Thank you.

16 THE COURT: Thank you, Mr. Clarke.

17 Anything else, Counsel, with regard to the motions
18 to stay?

19 All right. Then it probably comes as no surprise to
20 counsel that I'm going to take all these motions under
21 advisement and hear argument on Mountain Valley Pipeline's
22 motion for partial summary judgment and immediate possession.
23 Let's go ahead and take -- we'll take a ten-minute break and
24 then we'll come back to hear argument in that regard.

25 THE MARSHAL: All rise.

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1 (Recess, 10:30 a.m. to 10:45 a.m.)

2 THE COURT: All right. Mr. Massie, before you
3 begin, just let me clarify that I am taking all of the
4 motions that I've heard argument on already under advisement.
5 And I recognize that if I were to grant those motions, that
6 it may moot this next part of our hearing, at least for
7 purposes of today, and we might have to reconvene if there's
8 subsequent motions or additional developments. But everyone
9 is here today. Everyone has briefed these issues. We have
10 witnesses. So I am going forward. And I have not ruled on
11 those prior motions yet; I've taken those under advisement.
12 So I just wanted everyone to understand procedurally where we
13 are in the case.

14 So we have plaintiff's motion for partial summary
15 judgment and immediate possession, and I would like to take
16 those separately, those issues separately.

17 First, I would like to hear argument on the motion
18 for partial summary judgment, and then I'll allow responses
19 with regard to the motion for partial summary judgment before
20 we get into the injunctive relief request.

21 Mr. Massie, you may proceed.

22 MR. MASSIE: May it please the Court.

23 I've spoken with some counsel, and I'm not sure I've
24 spoken with all about this, but one option we discussed was
25 simply deferring argument on the motions -- we have briefs

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1 that are fairly complete on those issues, the legal issues --
2 and proceeding to call the first witness, and advancing the
3 case in that way, if that's helpful to the Court.

4 THE COURT: Well, let me ask defense counsel if you
5 would like to proceed in that way. Are you comfortable
6 relying on the briefing with regard to the motion for partial
7 summary judgment?

8 MR. JOHNS: Your Honor, Chris Johns for the
9 Howell/Johns Bailey Glasser defendants. We'd actually like
10 to have argument, please.

11 THE COURT: On the motion for partial summary
12 judgment?

13 MR. JOHNS: Yes, Your Honor.

14 THE COURT: Mr. Lollar?

15 MR. LOLLAR: Your Honor, Charles Lollar. We would,
16 too.

17 THE COURT: All right.

18 Mr. Massie, you are certainly welcome to stand on
19 your brief, or you may make an argument in light of the fact
20 that defendants intend to make an argument.

21 MR. MASSIE: Thank you, Judge. Let me make an
22 argument, but I will keep it short.

23 THE COURT: Very well.

24 MR. MASSIE: Clearly, this is an important case, not
25 only for MVP, but for the defendant landowners and for the

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1 public at large. And while it is an important case, it's not
2 a complicated case, at least factually or legally.

3 Factually, MVP holds a certificate for this project.
4 The Natural Gas Act itself gives a certificate holder the
5 power or right of eminent domain when the property is needed
6 for the project and the certificate holder has been unable to
7 acquire the property by agreement. So those are basically
8 the issue on summary judgment. That's the realm of
9 questions. And on the first point, as far as I know, there's
10 no dispute whatsoever. The certificate has been issued. I
11 think all the defendants concede that fact.

12 The property is needed for the project, and that is
13 the finding of FERC itself in its approval of the route
14 through the alignment sheets. FERC has made that
15 determination. The alignment sheets show the approved route.

16 And I guess it's most obvious to everyone here that
17 MVP has been unable to acquire the property by agreement. So
18 we have acquired many properties by agreement --
19 approximately 85 percent -- but these, we have not been able
20 to acquire by agreement.

21 Now, these facts, and I submit they're
22 uncontradicted, entitle us to a ruling on summary judgment
23 that MVP possesses the right of eminent domain. And that's
24 our motion for partial summary judgment.

25 And I submit that the first part of our motion is

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1 controlled by the FERC certificate itself and the Natural Gas
2 Act.

3 The second part of our motion is controlled by the
4 Court's decision in *Sage*. And I don't know if you want to
5 address that point now or later, but I can now if you prefer.

6 THE COURT: Let's just address the motion for
7 partial summary judgment at this stage.

8 MR. MASSIE: Okay. Those are my points on that,
9 Judge. Thank you.

10 THE COURT: Thank you, Mr. Massie.

11 Mr. Johns?

12 MR. JOHNS: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. JOHNS: There are four reasons that the Court
15 should reject MVP's motion asking the Court to declare that
16 it already has the power to exercise eminent domain.

17 The first is -- and Mr. Massie has said it over and
18 over. He said, Look at the FERC certificate, see what it
19 actually says. He says that the Court's decision is
20 controlled by the FERC certificate.

21 I wish I could attack collaterally the FERC
22 certificate, but that isn't appropriate here. We have to
23 look at what the FERC certificate actually says. And part of
24 the right to take here is proving that the FERC certificate
25 actually finds a public necessity to begin building the

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1 pipeline and exercise eminent domain.

2 Congress gave FERC, under Section 7(f)(e) of the
3 Natural Gas Act, the power to impose such reasonable
4 conditions as the public convenience and necessity may
5 require. And so the conditions that they imposed are part of
6 the -- are necessary to there being a public necessity for
7 the exercise of eminent domain. And here, FERC actually
8 imposed some prerequisite conditions, not, you know, how much
9 they can charge ratepayers, not, you know, exactly where the
10 route goes, but some prerequisites that MVP has not
11 satisfied. And I'd like to give three examples.

12 MVP is supposed to complete the consultation process
13 under Section 106 of the National Historic Preservation Act.
14 MVP hasn't done that.

15 MVP has to obtain erosion and sediment control
16 permits -- a permit from the state of Virginia. MVP has not
17 done that.

18 MVP also must obtain certain surveys for threatened
19 and endangered species. MVP has not done that, either.

20 So I'd ask the Court to think about that. It can't
21 be that MVP can start cutting trees, bulldozing around
22 springs and streams, digging trenches, installing pipelines
23 first, and then comply with the other federal and state
24 protections, the laws that protect things: Historic
25 preservation, erosion control, endangered species.

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1 That's not the way to read this FERC certificate.
2 It's not what Congress intended under the Natural Gas Act.
3 And if MVP doesn't actually obtain the necessary approvals,
4 then the people's land will have been taken without a public
5 necessity. And that violates the Constitution's Takings
6 Clause.

7 So we'd ask, under the canon of constitutional
8 avoidance, to read the FERC's prerequisites as prerequisites
9 to actual exercise of the power of eminent domain.

10 So that's our first point.

11 THE COURT: All right. Mr. Johns, do you have any
12 cases to point the Court to in that regard?

13 MR. JOHNS: We have -- we've cited the Court to some
14 cases from the D.C. Circuit, from the U.S. Supreme Court,
15 that talk about -- that make the distinction between
16 conditions as limitations versus conditions as prerequisites.
17 And so we point the Court to those cases in our briefing.

18 Our second point is that under the Fifth
19 Amendment -- and there are --

20 THE COURT: Let me ask you one other question in
21 that regard.

22 MR. JOHNS: Yes, ma'am.

23 THE COURT: Do you agree that the FERC certificate
24 itself does not expressly limit eminent domain authority?

25 MR. JOHNS: It does -- I would --

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1 THE COURT: Expressly.

2 MR. JOHNS: I would admit that it does not expressly
3 do that, nor does it expressly grant it, either. It imposes
4 conditions which are necessary to there being a public
5 necessity.

6 THE COURT: All right. Thank you, Mr. Johns.

7 MR. JOHNS: Yes, Your Honor.

8 THE COURT: You can continue.

9 MR. JOHNS: So under the Fifth Amendment, there's an
10 unbroken, an old line, of Supreme Court cases that say this:
11 That before -- and that's the operative word -- before an
12 owner's occupancy can be disturbed, the owner is entitled to
13 reasonable, certain, and adequate provision for the ultimate
14 payment of just compensation. That's what the Supreme Court
15 said in *Cherokee Nation versus Southern Kansas Railway*. It's
16 what the Supreme Court said in *Sweet versus Rechel*. And we
17 ask the Court to recognize that the Constitution wins every
18 time, over any statute, over any rule, over any equity. And
19 equity follows law, and the Constitution is the highest law.

20 When the taker is the government, the public
21 treasury is a sufficient guarantee of ultimate payment of
22 just compensation. The Fourth Circuit has said that when the
23 taker is a private corporation, without access to the public
24 treasury, then the private company needs to prove two things
25 in order to begin taking under the Takings Clause. And one

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1 is they have to prove that they're amenable to suit, and the
2 second is that they have such substantial assets that just
3 compensation for the whole taking is guaranteed to a virtual
4 certainty. And that's the *WMATA versus One Parcel of Land*
5 case, Fourth Circuit, 1983.

6 And here, FERC's refused to prove that it has such
7 substantial assets to guarantee full payment of just
8 compensation in all of these cases.

9 And this is distinguishable from the *Sage* opinion,
10 where in that case, the Court looked at -- there were two
11 things that were important there. First is that the taker's
12 division, it actually had over a billion dollars in revenue
13 the year before the *Sage* decision -- well, not the decision,
14 but the District Court ruling. And second, all the
15 appraisals in those 82 or 83 cases had actually been done.

16 This has been a total rush to take. The appraisals
17 have not been done. There are 296 landowners in this case,
18 and they haven't done appraisals. We have -- the Court has
19 no basis on which to find whether the Fifth Amendment
20 guarantee of just compensation, and that guarantee when we're
21 dealing with a private corporation, whether the landowners
22 are actually protected.

23 THE COURT: Mr. Johns, are you aware that there are
24 some cases that just merely refer to estimates and not
25 appraisals? Do you have any case law that -- because I've

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1 looked. Do you have any case law that would state that
2 appraisals are required?

3 MR. JOHNS: Your Honor, I guess I'd point us back to
4 the U.S. Supreme Court cases that talked about what this
5 meant, and those are the *Cherokee Nation* and the *Sweet* case.

6 THE COURT: They don't say appraisals are
7 required --

8 MR. JOHNS: They don't.

9 THE COURT: -- to meet Fifth Amendment requirements,
10 do they?

11 MR. JOHNS: They don't. What they say, Your Honor,
12 is that in that case there were neutral arbiters who actually
13 decided what the amounts of compensation were going to be,
14 and then those amounts were doubled.

15 In this case, we don't have the neutral arbiter, at
16 least from the other side. It would have to be -- Your
17 Honor, that would have to take some evidence about what's
18 required.

19 But in this case, 296 landowners, you know, just a
20 few months after they've been, you know, sued, there hasn't
21 been time to prepare appraisals or to give Your Honor what
22 you would need in order to make the adequate assurance for
23 these landowners.

24 THE COURT: Thank you. I did want to know -- if you
25 were aware of a case, I wanted to know about it, so --

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1 MR. JOHNS: Well, if I find it, I'll certainly
2 supplement it.

3 THE COURT: I understand.

4 MR. JOHNS: I might need some help from my friends.

5 Okay. So but one of the points is the burden, under
6 the Fifth Amendment, is on MVP, and they haven't come forward
7 with that.

8 We're going to talk about the bond that they've
9 proposed and the data that they've used to try to support
10 that, but we don't think it's -- it's not sufficient. It's
11 not an appraisal technique that anybody has used, that we're
12 aware of, ever. It relies on tax assessments which, under
13 the Fourth Circuit precedent, are not allowed in just
14 compensation cases. And so we think that what they are
15 proposing to the Court as an alternative, as a way out, is
16 just woefully inadequate.

17 The third point is -- and I understand -- well, let
18 me just make it. Separation of powers. The *Sage* court did
19 not squarely deal with this issue, but the argument is that
20 Congress is who decides how eminent domain is going to be
21 exercised. Under the Natural Gas Act, it's true that
22 Congress is given power of eminent domain, but it is not
23 given the power of quick-take under the Natural Gas Act. I
24 don't think *Sage* addressed that directly.

25 THE COURT: Didn't *Sage* reject the argument that

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1 only Congress can grant immediate possession?

2 MR. JOHNS: Well, it --

3 THE COURT: That was my reading of it, anyway.

4 MR. JOHNS: Yeah. Well, to the extent it fully
5 addressed the separation of powers issue that we're raising,
6 which I don't think was fairly presented in *Sage*, I would say
7 that the Fourth Circuit got it wrong. We've got to preserve
8 our argument in order to be able to go up, if necessary.

9 THE COURT: What about the Fourth Circuit's 2017
10 case in *Columbia Gas*?

11 MR. JOHNS: My understanding in that case was that
12 it did not squarely address the separation of powers, either.
13 It held that there was a mootness problem for the landowner.

14 So our last argument is that the -- you know,
15 Section 7(f)(h) of the Natural Gas Act requires MVP to prove
16 that it tried and was unable to get landowners to agree to a
17 contract before exercising eminent domain.

18 My understanding is that some of these landowners,
19 including some of Mr. Lollar's clients, haven't even received
20 a plat from MVP. And so those are -- that would be a fact
21 issue that precludes summary judgment on the right to take.

22 Thank you, Your Honor.

23 THE COURT: Thank you, Mr. Johns.

24 All right. Anyone else that would like to be heard
25 with regard to the response to the argument on the motion for

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1 partial summary judgment?

2 MR. LOLLAR: Charles Lollar for the defendants we
3 represent, Your Honor.

4 The motion for summary judgment, even a partial in
5 this case, requires that there be no material fact genuinely
6 in dispute under Rule 56. One of the requirements of the
7 condemning provision of the Natural Gas Act, 7(h), is that
8 the gas company not be able to reach an agreement.

9 The facts are, and our clients can testify, and
10 Mr. Cooper in his deposition was not aware when I questioned
11 him on this, that there are cases where the property owners
12 did not have a plat with an easement or offer to reach any
13 sort of understanding and meeting of the minds in order to
14 enter into an agreement. And that would be a requirement.

15 If you're unable to reach an agreement, it's our
16 position under the Natural Gas Act, it's because of something
17 other than not providing the opposite party information upon
18 which any agreement can be reached. If you don't have the
19 information, you can't reach an agreement.

20 THE COURT: Is that information included in the
21 route that's contained in the FERC certificate?

22 MR. LOLLAR: The plat is, that's correct.

23 THE COURT: So could the property owners use that
24 for their information, to form their information?

25 MR. LOLLAR: Now. But they haven't had the

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1 opportunity to reach an agreement up until the suit was
2 filed. That was the first opportunity they've had.

3 THE COURT: All right. Thank you, Mr. Lollar.

4 Yes, Mr. Clarke?

5 MR. CLARKE: Yes, Your Honor.

6 Thank you, Your Honor. Stephen Clarke on behalf of
7 the Waldo & Lyle landowners.

8 Your Honor, I rise -- I associate my remarks with
9 those of Mr. Johns, but I rise to address two separate
10 issues, Your Honor. The first relates specifically to the
11 Scott property, which the Court has heard argument about
12 before, but with regard to the property of James and Karen
13 Scott, FERC directed MVP, as part of Environmental Condition
14 Number 18 in the certificate order, to file
15 landowner-specific crossing plans developed in coordination
16 with the affected landowners, which contained impact
17 avoidance, minimization, or mitigation measures, as
18 appropriate, for review and written approval of the director
19 of OEP.

20 And there's seven parcels that are specifically
21 identified, and the last of those is the property, Your
22 Honor, of James and Karen Scott.

23 The Court has heard MVP acknowledge that it's still
24 working with my clients, and so the issue with regard to the
25 Scott property is: Does MVP have the power of eminent domain

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1 with regard to their property; and if so, along what route?
2 And that, I submit to the Court, is an open question that has
3 not been answered. So I don't believe summary judgment is
4 appropriate where, as with the Scotts, there is a route
5 adjustment that's been mandated by FERC, or a route
6 consideration that's been mandated by FERC, that has not been
7 completed by MVP, that is still part of an ongoing process
8 that MVP has said it intends -- it would like to build a
9 different route, and yet the FERC-approved route is the one
10 that it's been mandated to coordinate with the landowners
11 with regard to avoiding.

12 And so the issue, Your Honor, is summary judgment is
13 not appropriate where MVP hasn't determined what the route
14 will be and is still working to determine the appropriate
15 route.

16 THE COURT: Now, let me ask you this: Is it your
17 position that summary judgment may be appropriate to some
18 properties and not other properties, or do you think this
19 is -- it has to be all or nothing?

20 MR. CLARKE: With regard to this issue, Your Honor?

21 THE COURT: Yes.

22 MR. CLARKE: I think it's not appropriate for any
23 property, because I think this is emblematic of a number of
24 issues that are occurring.

25 The Court has heard some argument about -- on other

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1 properties already today. And I think this goes into, in
2 part, the grounds for my motion to stay, Your Honor, but for
3 MVP, I think what the Court needs to do is to require MVP to
4 actually make sure it's complied with all of the routing
5 directions from FERC before it seeks summary judgment that it
6 has the power of eminent domain. But I certainly think that
7 with regard to the Scott property, I don't think it can be
8 fairly debated that the route is not certain.

9 Your Honor, the other issue that I wanted to address
10 was the issue of separation of powers. And I addressed it
11 extensively in my brief, and I don't want to belabor the
12 point, and I understand the Court --

13 THE COURT: And I've read that.

14 MR. CLARKE: -- is likely -- I understand. I
15 appreciate that, Your Honor.

16 I understand the Court is likely to feel constrained
17 by the decision in *Sage*, but on behalf of my clients, I
18 really do feel obligated to raise this issue.

19 Because, as Mr. Johns said, the power of eminent
20 domain is a legislative power. In the federal government
21 that power resides exclusively in Congress. And although
22 Congress enacted the Natural Gas Act 80 years ago, it never
23 saw fit to provide for the quick-take power to be delegated
24 to natural gas companies under the provisions of that act.

25 Your Honor, as the *Kirby Forest* Supreme Court case

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1 makes plain, there are two types of eminent domain power that
2 Congress has delegated: The straight or ordinary power, and
3 the quick-take power. And because only Congress may
4 determine how the power of eminent domain may be exercised
5 and who can exercise it, it is improper, Your Honor, for a
6 court to unilaterally authorize a private gas company to
7 exercise that additional quick-take power which has not been
8 congressionally delegated to it.

9 THE COURT: Do you have any argument with regard to
10 how this Court is not bound by *Sage*, in that regard?

11 MR. CLARKE: Your Honor, I think *Sage* does not
12 address this direct issue of separation of powers. The Court
13 in *Sage* suggests that it may be appropriate, but it does not
14 directly address -- and I will proffer to the Court that
15 during oral argument before the Fourth Circuit, the panel
16 questioned counsel for the landowners at length about the
17 separation of powers doctrine, and there was significant
18 argument about it that never found its way into the *Sage*
19 opinion one way or the other. So I think the Court can
20 recognize that omission from *Sage*, the *Sage* opinion, and
21 recognize that it's an applicable doctrine to apply here.

22 Your Honor, in the *WMATA* case that was mentioned
23 earlier, *WMATA versus One Parcel of Land*, from the Fourth
24 Circuit in 1983, the Court there specifically concluded that
25 Congress had delegated the quick-take power to *WMATA* because

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1 it had expressly authorized WMATA to exercise its power of
2 eminent domain under, quote, any other applicable Act, which
3 included the Declaration of Taking Act that does authorize
4 the use of the quick-take power.

5 And, Your Honor, if the Federal Rules of Civil
6 Procedure are to be used as the basis for a court permitting
7 a natural gas company to exercise that quick-take power, that
8 is contrary to law. The Supreme Court is given the power to
9 prescribe general rules of practice and procedures, but
10 28 U.S.C. 2072 says that such rules shall not enlarge or
11 modify any substantive right. And I think it's appropriate
12 for this Court to draw a distinction between rules of
13 procedure and the substantive quick power of eminent domain
14 that MVP claims.

15 And MVP admits that the Natural Gas Act doesn't
16 delegate the quick-take power. It's silent on it. There's
17 no question about that.

18 So when the Court uses the Federal Rules of Civil
19 Procedure to justify the grant of that quick-take power where
20 Congress has expressly withheld that grant, that, Your Honor,
21 violates the separation of powers under our Constitution. A
22 Court is thereby substituting its own policy as to how the
23 power of eminent domain should be exercised for that of
24 Congress, in which entirely resides that power.

25 And, Your Honor, I said earlier, but Sage does not

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1 address that fundamental issue of constitutional separation
2 of powers. And the *Sage* Court's reliance on the *Cherokee*
3 *Nation* case in support of its conclusion is also improper.

4 The railroad in *Cherokee Nation* was seeking
5 immediate possession pursuant to an act of Congress which
6 allowed, after an award of just compensation, for the
7 railroad in event of an appeal to pay into court double the
8 amount of the award, and then enter onto the property. So
9 *Cherokee Nation*, Your Honor, that *Sage* cites, that involved
10 possession pending appeal, after trial and an award of just
11 compensation.

12 What MVP is seeking here is of a completely
13 different stripe: Possession before trial, before the
14 determination of just compensation, before payment of just
15 compensation.

16 Your Honor, I think the fallacy on which *Sage* and
17 the other decisions that may have followed it have relied
18 on -- or, excuse me, have relied is that the pipeline company
19 has some sort of vested right or entitlement to the owner's
20 property once it has shown that it has the ordinary power of
21 eminent domain. That notion of a vested right is something
22 that is made up from whole cloth. The Natural Gas Act
23 certainly doesn't provide such a vested right or entitlement,
24 and the Rules of Civil Procedure cannot enlarge the
25 substantive rights of anyone.

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1 So, Your Honor, we ask the Court to rule that the
2 separation of powers under our Constitution bars the relief
3 sought by MVP; that MVP's relief is with the legislature, not
4 with the courts. It would be improper for the Court to do by
5 judicial fiat what Congress has expressly declined to do by
6 legislation. So, therefore, we ask for MVP's motion for
7 summary judgment to be denied.

8 THE COURT: Thank you, Mr. Clarke.

9 MR. CLARKE: Thank you, Your Honor.

10 THE COURT: Mr. Robertson?

11 MR. ROBERTSON: Good morning again, Your Honor.

12 THE COURT: Good morning.

13 MR. ROBERTSON: John Robertson, on behalf of Alan
14 Hartman and John Garrett and Suzanne Baker, and also a second
15 chair for New River Conservancy.

16 I will adopt the arguments of Mr. Johns, and also
17 Mr. Lollar, and direct the Court's attention -- and I know
18 that Mr. Massie from PennStuart has briefed this issue, on
19 the issue of good faith in the negotiation. And I think that
20 the Court needs to scrutinize whether or not and to make a
21 ruling on whether good faith is required in their negotiation
22 strategy.

23 I think that if the Court were to hear evidence on
24 this issue, the record would be peppered with exhibits of
25 less-than-honest dealings with the landowners in terms of the

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1 taking, not just in terms of providing the plats or not, or
2 the approved route, but any information regarding that.

3 I understand that Mr. Howard may have an argument
4 regarding this and how he was treated, but I think that
5 before the Court reaches the answer on whether or not the
6 right to condemn issues under the 7(h) factors, they have to
7 demonstrate some indication that they attempted good faith
8 negotiation.

9 We recognize that the Natural Gas Act is silent and
10 does not specifically mention good faith. And I think that
11 the Court is probably well aware, of the cases that do
12 mention this requirement, that there is a split in the
13 circuits.

14 I would refer to one of the cases cited in
15 plaintiff's brief, *Alliance Pipeline L.P. versus 4.360 Acres*.
16 That's at 706 F.3d 362 out of the Eighth Circuit. And they
17 highlight the division in the circuits regarding the issue of
18 good faith in that negotiation requirement.

19 I think that plaintiff, rather than the blanket
20 declaration offered by Mr. Cooper as their 30(b)(6) agent,
21 would have to put on some evidence, because Mr. Cooper during
22 the deposition specifically indicated that it wasn't his
23 purview; he just assumed that offers had been made, that they
24 had been sent, that he assumed that if there were no
25 response, that some follow-up would have taken place, such as

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1 a phone call, or perhaps even in certain instances, an
2 in-person visit, but he could not say that those had, in
3 fact, taken place. He had been informed by somebody else.
4 He didn't know who informed him, somebody on the team, but he
5 personally didn't have any knowledge of that.

6 I'm personally aware from the testimony of my
7 clients, and also from some of the pro se defendants, there
8 was less than good faith dealing. We think that that's
9 implicit; we would argue that it's implicit in the Act.

10 We would ask the Court -- since *Sage* is peppered
11 with discussion of equity jurisprudence, this Court is being
12 asked to provide an equitable solution to this problem by
13 both plaintiff and defense -- that the Court wear its hat in
14 equity to address this fact.

15 And I cited in our brief the *Moss versus Coca-Cola*
16 case out of the Fourth Circuit in 1947, which is still good
17 law, at 163 F.2d 505, that equity jurisprudence is still
18 alive and well in the Fourth Circuit, and that the clean
19 hands doctrine would apply in this instance; that if you are
20 seeking equity, you must first do equity, and that if you
21 have not done so, that you should not be provided an
22 equitable relief.

23 So with that in mind, Your Honor, we would ask that
24 the Court do read implicitly into the Gas Act that there is a
25 good faith negotiation requirement, and that if plaintiff is

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1 unable to demonstrate that through their blanket declaration
2 or generalization or without specifics of a guarantee that,
3 at the very least, it can say that the offers and the time
4 period for the offer reached each defendant prior to its
5 revocation or prior to initiating suit, that it deny the
6 relief that's being sought for condemnation under their
7 motion for partial summary judgment.

8 Thank you, Your Honor.

9 THE COURT: Thank you, Mr. Robertson.

10 Any other counsel or the pro se defendants like to
11 make an argument?

12 Delmer Howard; is that correct?

13 MR. ELIJAH HOWARD: No, it's Elijah Howard, Your
14 Honor.

15 THE COURT: I'm sorry. Elijah Howard?

16 MR. ELIJAH HOWARD: Yes.

17 I am in agreement with Mr. Robertson and a lot of
18 the other attorneys, especially on the good faith
19 negotiations.

20 I would like to argue, you know, that I also have
21 other issues with the proposed route that was submitted to
22 FERC as for the pipe, but when it comes to, in my situation,
23 the access roads, there's very limited information.

24 The maps are basically no more than sketches, with
25 no details, no surveys, and it makes it very difficult to, as

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1 some of these other attorneys have argued, figure out what
2 they are trying to take and what they do need, you know.

3 And another argument that I wanted to bring up was
4 the fact that, you know, if I'm supposed to look at what they
5 submitted to FERC of what they need, and they've already
6 acquired what they need, where is the limitations on it? Can
7 they just keep multiplying and, you know, requiring more and
8 more, even though it's not submitted to FERC what they need?

9 So that's what I intend to argue.

10 THE COURT: Thank you, Mr. Howard.

11 Anyone else like to present argument on this issue?

12 Go ahead. Mr. Delmer Howard?

13 MR. DELMER HOWARD: Yes, Delmer Howard.

14 Yes, the same agreement with these attorneys and the
15 other pro se is, I received a document that said -- on a map,
16 when I was asked to purchase a right-of-way or an easement, I
17 said I'm not interested. And I didn't know the route, as
18 Mr. Howard said.

19 I read in fine print on a map from MVP, and the
20 document stated, from MVP maps sent by mail, "MVP does not
21 warrant the accuracy of the location of any item shown on
22 this map. Property boundaries, roadways, items shown on map
23 may not have been placed using survey or GPS."

24 From this point on, I trusted nothing MVP said.

25 THE COURT: I ask everyone to be quiet, please.

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1 Go ahead.

2 MR. DELMER HOWARD: So I told the man that
3 approached me to purchase a right-of-way, Others have sold a
4 right-of-way in front of my property and near my property.
5 Go across the road; they'll be glad to take your money. I
6 don't want the money.

7 They said, Okay.

8 I showed maps of my property and other properties,
9 and he said, I didn't know those maps existed, of a 50-foot
10 right-of-way on the other side of the road of my property.
11 On the other side of my property. I'm sorry, Your Honor.
12 And so he left. And as Mr. Howard said, you never heard
13 anything from them, like, just left you hanging.

14 Next thing I know, the neighbor across the street
15 sold the right-of-way, as Mr. Howard said, and then they came
16 and said, We're suing you, Mr. Howard -- me, Mr. Howard,
17 Delmer Howard -- for the right to condemn your property and
18 take 40 more feet.

19 So I'm not a mathematician, but it seems like, are
20 they trying to bring these gas pipes sideways up this
21 mountain? I don't know, Your Honor. And that's a question,
22 along with one more. Does FERC give all of this authority
23 under the gas route, pipe route, to the same route of access
24 roads, easements? That's my question.

25 THE COURT: All right. Thank you, Mr. Howard.

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1 Anyone else for defendants? Anyone care to notify
2 me that they are adopting arguments?

3 MR. JOHNS: Your Honor --

4 THE COURT: Let me do it this way. Is there anyone,
5 defense counsel or pro se defendants, that are not adopting,
6 or adopting -- well, let's do it this way -- that are not
7 adopting all of the arguments made by the other defendants
8 with regard to this motion?

9 I see no hands raised. So all of you have adopted
10 all of the arguments made by defense counsel and by the pro
11 se defendants.

12 All right. Mr. Massie, would you like to reply?

13 MR. MASSIE: First, on the *Sage* issue, I think
14 counsel is not reading that case correctly, and I think
15 counsel has not completely read the Fourth Circuit's opinion
16 in *Columbia Gas*, which discusses the *Sage* opinion.

17 Reference was made that somehow the Fourth Circuit
18 didn't consider or didn't address this separation of powers
19 argument, but in *Columbia Gas*, the Court said, "The
20 Landowners' cross-appeal is meritless" -- meritless; that's
21 on the merits -- "because *Sage*, as a published opinion, is
22 binding on this panel. The landowners argue that *Sage* is
23 distinguishable because it did not mention," quote,
24 "'separation of powers.'" However, we stated that "the
25 Constitution does not prevent a condemnor from taking

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1 possession of property before just compensation is determined
2 and paid.'"

3 So the point was made by the Fourth Circuit itself,
4 and certainly if that decision is binding on another panel or
5 the Fourth Circuit, it's binding on the District Courts as
6 well.

7 As far as the conditions argument is concerned,
8 there are certain conditions listed in the certificate.
9 There's a section, an appendix, of those. But none of those
10 is stated in terms of a condition to the exercise of eminent
11 domain. They are all stated as conditions to construction.

12 So at some point FERC, if it's satisfied that the
13 conditions have been met, will issue the notice to proceed,
14 and we think very soon, but there is nothing in the meantime
15 that would prevent us from exercising the power under the
16 certificate to enforce a right of eminent domain and to ask
17 the Court to declare by summary judgment that we do have a
18 right of eminent domain.

19 THE COURT: Let me ask you, since you mentioned
20 this, Mr. Massie: What does MVP deem "construction" to mean?

21 MR. MASSIE: As I understand it, there is a type of
22 possession that is not deemed construction. So -- and this
23 depends on, obviously, rulings of FERC and not this Court,
24 but if there is manual tree felling, for instance, and the
25 stumps are left in place, and the trees are simply taken down

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1 to meet the environmental windows that are required, that
2 that may be considered by FERC not to be construction. So
3 that is a possibility.

4 But if there is earth-disturbing activity, the roots
5 or ground disturbance itself, beyond tree felling, I think
6 that probably would be considered construction, although
7 there are experts here that can testify to that and know more
8 about that than I do, of course.

9 THE COURT: All right. Thank you.

10 MR. MASSIE: On the issue of just compensation which
11 was raised by counsel, we agree that that is for the District
12 Court to determine, and it's really entirely for the District
13 Court to determine. It's not a FERC issue. And FERC doesn't
14 set just compensation in its orders. It merely makes a
15 finding of public convenience and necessity.

16 The Natural Gas Act confers the power of eminent
17 domain, and the Constitution and the statutes confer
18 jurisdiction on this Court to rule on that. So if the Court
19 determines that immediate possession is -- should be granted,
20 it has authority, full authority, to decide what security
21 should be met and to make certain that any compensation
22 claims will be satisfied. And we stand ready to meet
23 whatever obligations the Court deems appropriate in that
24 regard.

25 With respect to offers, I don't think anyone has

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1 said that MVP was able to acquire property by agreement and
2 didn't. I think its track record speaks for itself. It's
3 acquired 85 percent of the property, of the tracts that are
4 involved here. And the 15 say, No, you're not doing it
5 right.

6 But it's not a matter of agreeing or not agreeing;
7 it's whether we are unable to acquire. And we -- certainly,
8 I think that is the most clear thing about this proceeding
9 today, is that we are unable to acquire by agreement.

10 If a landowner, for instance, says, I don't want
11 this project, I'm not negotiating with you, there's little
12 else that a company can do at that point. And many
13 landowners -- and the record -- this is in the record, that
14 Mr. Lollar's instructions were that he's not negotiating with
15 anybody about any easements until FERC issues a certificate.

16 So there you are in this entire period of the
17 pending FERC permit, and Travis Graham, in his declaration,
18 which is uncontradicted, at Docket 219-1, says the Lollar
19 firm says they're not negotiating with anybody.

20 So I think that's more of an emotional or a
21 reactionary statement than it is a fact that would preclude
22 summary judgment.

23 So those are the points I wish to make. Thank you,
24 Judge.

25 THE COURT: All right. Mr. Massie, if you would

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1 hold on one second and let me see if I have any questions for
2 you. I just want to look at my notes.

3 Mr. Massie, do you have any case law to cite the
4 Court to with regard to the scope of the "unable to acquire
5 by agreement"? Have you seen any cases that analyze that,
6 that requirement, and define the scope?

7 MR. MASSIE: No, I don't remember looking at that
8 specifically because, frankly, I did not see that as an issue
9 or obstacle, or even a contested one. But I'd be happy to
10 look and supplement the briefs, if the Court would like, on
11 that.

12 I think it is clear that appraisals are not
13 required. You don't have to go out and have an appraisal.
14 The courts are unanimous in that there is no, quote, "good
15 faith obligation" under the Natural Gas Act. There are lots
16 of cases on that. And I think they simply take the position
17 that if, you know, an offer was made, rejected, the Court can
18 go forward. If somebody says, I'm not negotiating at all,
19 obviously the case can go forward in those circumstances.

20 THE COURT: Mr. Massie, what about the seven parcels
21 that were mentioned in Mr. Clarke's argument where FERC
22 mandated a route adjustment?

23 MR. MASSIE: I should have mentioned that as well.
24 That is, if I understand the argument, a condition or part of
25 a condition in the FERC order. And to be able to proceed --

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1 that is, before any construction commences; I think that's
2 the term -- then you need to satisfy that.

3 So we will need to satisfy that condition and all
4 the other conditions that are outstanding, most all of which
5 have been satisfied. But whatever remains, we need to
6 complete.

7 And we're asking the Court for a declaration that we
8 have a right to condemn, and then the second part is
9 possession. But, obviously, there has to be a notice to
10 proceed from FERC before there can be, quote, "construction
11 activity."

12 THE COURT: But if I give you the right to condemn
13 with regard to certain properties and we don't know the route
14 yet, FERC has mandated a route adjustment and I don't have
15 that route, how can I grant you that right to condemn when we
16 don't know what we're condemning?

17 MR. MASSIE: Well, I think we do know. We have the
18 October 2016 basic approved route, the alignment, basic
19 alignment sheet. And we have a supplemental filing that was
20 made in December 2017 which incorporates variation 250, and
21 also an unrelated required change at the Pigg River for
22 horizontal drilling there. So those were the two things that
23 FERC required.

24 THE COURT: The seven parcels, is that 250?

25 MR. MASSIE: Yes, it is.

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1 THE COURT: All right.

2 MR. MASSIE: Those seven parcels, or seven tracts --
3 I believe that's the right number -- are all -- all in 250.
4 And so every one of those is a mandated change.

5 And as I said, we're not asking for anything that's
6 not approved. We're asking simply that the Court declare
7 that we have the right to condemn what has been approved. So
8 that would be our position. And that the alignment sheets,
9 plus the variations 250 and the Pigg River, are the approved
10 route.

11 THE COURT: All right. And what about the same
12 question that I asked defense counsel? With regard to your
13 position on whether this Court has authority to grant your
14 motion in whole or in part, is it one or all? Can I divide
15 it by defendants and properties, or is it your position that
16 it's all or nothing?

17 MR. MASSIE: No, our position is the Court should
18 grant it as to the properties for which it is proper. We
19 believe those are all of the properties.

20 If there is some property that is outside of the
21 power of eminent domain, we don't have any power of eminent
22 domain as to that property, then we would understand the
23 Court would not grant the motion. But we believe, and I
24 emphasize again, that all of the properties we are seeking to
25 condemn are within the approved route, and that's all we're

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1 seeking a ruling on.

2 THE COURT: All right. And Mr. Howard mentioned a
3 question about FERC -- the access roads and the easements.
4 Can you tell me whether the route with -- that's been
5 approved by FERC specifies clearly the access roads and the
6 easements?

7 MR. MASSIE: It does. It does. And in the exhibits
8 we'll introduce here today, we've referred to these as
9 alignment sheets. They're alignment sheets, obviously, for
10 the route of the pipeline, but they are also sheets for the
11 access roads. And each of the access roads is in those set
12 of approved documents. So they are all there. This is not
13 anything outside of what FERC has accepted and approved and
14 is filed there with FERC.

15 THE COURT: That's all the questions I have. Thank
16 you, Mr. Massie.

17 MR. MASSIE: Thank you.

18 THE COURT: Any additional argument from anyone with
19 regard to plaintiff's motion for partial summary judgment?

20 Yes, Mr. Johns? I would usually let plaintiff have
21 the last word on plaintiff's motion, but since I asked some
22 questions that may have prompted some other areas, I'm going
23 to allow this. But I don't want you to repeat what I've
24 already heard.

25 MR. JOHNS: Thank you, Your Honor. I'll be brief.

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1 The first point is: Your Honor asked what MVP deems
2 "construction" to mean.

3 THE COURT: Yes.

4 MR. JOHNS: And I think that's an important point
5 for us, because I think there's a bit of a double standard
6 going on here. They're saying, Just look at the FERC
7 certificate, give us the power that's given in the FERC
8 certificate.

9 But there's no power in the FERC certificate to take
10 this land and to start exercising eminent domain before the
11 conditions are met.

12 As far as construction, if I had a house and I hired
13 a contractor to build a house, and the contractor needed to
14 clear some trees, and a tree fell and hurt somebody and I had
15 insurance on it -- it just is unreasonable to think that tree
16 clearing is not part of constructing this pipeline. It would
17 be unreasonable to say it wasn't part of constructing my
18 house. I would certainly hope that my insurance would have
19 covered it.

20 The second point is that, under the Fifth Amendment,
21 it's the defendant's burden. And I think the -- I think
22 Mr. Massie had said that that's something that the District
23 Court can decide. But I'd still say, we still have to put
24 the defendant to their burden. They're the ones that have
25 the burden of showing substantial assets, and they've refused

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1 to do that.

2 And, you know, I think if the Court would like to
3 come up with its own definition of what, you know,
4 substantial assets are, what is a sufficient guarantee, then
5 that's a process, and that's going to take time.

6 And those are our points, Your Honor.

7 THE COURT: All right. Thank you, Mr. Johns.

8 Yes, Mr. Clarke?

9 MR. CLARKE: Thank you, Your Honor.

10 I wanted to address, Your Honor -- Stephen Clarke,
11 on behalf of the Waldo & Lyle landowners. I wanted to
12 address the Court's question to Mr. Massie about the seven
13 landowners that I referenced. And I believe the Court asked
14 Mr. Massie if those were on Variation 250, and Mr. Massie
15 said they were.

16 THE COURT: Yes.

17 MR. CLARKE: Your Honor, they are not on
18 Variation 250. I believe -- Variation 250 is, I think,
19 Environmental Condition Number 16 in the FERC order. The
20 seven landowners that I was referring to are in a different
21 condition. I believe it's Environmental Condition Number 18.
22 They are not the same landowners that are affected by the --

23 THE COURT: On the Pigg River, or not?

24 MR. CLARKE: That's -- I believe that's in
25 Pittsylvania County, Your Honor, not Montgomery County.

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1 So thank you, Your Honor.

2 THE COURT: Thank you, Mr. Clarke.

3 Anything else from you, Mr. Massie?

4 MR. MASSIE: Well, I'm sorry if I misunderstood the
5 argument, or which seven he was talking about. I do think
6 there are approximately seven on 250.

7 Now, if there's seven on some other condition, our
8 same argument applies there, which is simply that FERC will
9 decide whether that condition is met. That's really not an
10 issue for the Court in this case, as we understand the
11 division of authority.

12 THE COURT: All right. Thank you, Mr. Massie.

13 All right. Counsel, or Mr. Howards, any additional
14 argument with regard to plaintiff's motion for partial
15 summary judgment?

16 Very well. Then we will hear argument on -- it's
17 one motion that was made, but the motion for partial summary
18 judgment also requests immediate possession. And I
19 understand that the parties have evidence to present with
20 regard to that issue, and I wanted to let everyone know,
21 while we have a little break in the proceedings here, that we
22 are making arrangements -- I plan to take lunch, an hour
23 lunch, around 12:30 today. And we are making arrangements --
24 the Naturalization should finish up around 12:30 on the
25 second floor. So we're making arrangements, beginning when

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1 we begin our proceedings this afternoon around 1:30, to have
2 overflow capacity in courtroom number two on the second
3 floor.

4 All right. Mr. Massie, it's your motion, so if you
5 have any evidence, you may present your evidence now and
6 we'll hear arguments --

7 MR. TERPAK: Your Honor, if I could?

8 THE COURT: Yes, sir?

9 MR. TERPAK: Since this is more in the nature of a
10 trial that's going to last quite a number of hours, the group
11 has asked me to make a brief opening statement on behalf of
12 the landowners. Is that agreeable?

13 THE COURT: I will allow brief.

14 MR. TERPAK: It will be very brief, Your Honor.

15 THE COURT: I usually don't have opening statements
16 on motions, but Mr. Massie, I'll allow you, too. If you
17 would like to make a brief opening statement, I will allow
18 that.

19 MR. MASSIE: As Your Honor noted, this is the second
20 part, I guess, of a combined motion that we filed at the
21 beginning of the case. It was styled a motion for partial
22 summary judgment and immediate possession. And the second
23 part of that motion, we submit, is controlled by the Fourth
24 Circuit's decision in *Sage*. And like this case, *Sage*
25 involved a natural gas company with a certificate from FERC.

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1 And Sage held that a company is entitled to immediate
2 possession when it can show the traditional elements for a
3 preliminary injunction, including irreparable harm.

4 The case also is significant in defining irreparable
5 harm as including unrecoupable economic losses that would
6 result from delay. That's a square holding in that case.
7 And we have that in several different categories. And I
8 don't think you have received that evidence, because it was
9 exchanged primarily during discovery, and you said you did
10 not want the discovery responses filed, so those were done
11 between counsel, and also the depositions. There have been
12 no transcripts taken, but there's been extensive, extensive
13 discovery and questioning on that; a deposition lasting, I
14 think, almost eight or nine hours, concluding very late,
15 questioning by, if you can imagine, all of these counsel of
16 our witness on these subjects. So -- and he's here today,
17 and he's prepared to present that evidence. But it falls
18 into several categories.

19 One is delayed revenues from not being able to
20 proceed with the project. And by "delayed revenues," I mean
21 the earnings that the company would achieve by putting in the
22 pipeline this year as opposed to next year. And those are
23 significant sums. It's \$40 to \$50 million a month, based on
24 the evidence.

25 Second, if this project is delayed a year, the

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1 evidence will show that the construction cost, the increased
2 construction cost alone, will be up to \$200 million for MVP.

3 And third, there's a category of overhead that the
4 company will incur, which was explained at the deposition and
5 can be explained here. But, basically, it's a cost of being
6 unable to proceed for that extra time, and it's in the area
7 of \$40 million.

8 So these are vast sums, and they are irreparable
9 harm under the *Sage* ruling.

10 On the other side, we recognize that these
11 landowners do not want to part with their property, that it's
12 sacred to them, and they do not want a pipeline; but the
13 issue on irreparable harm in that context is not whether the
14 pipeline should be built or not built. The only issue is
15 whether the pipeline should be built now or whether it should
16 be built a year from now.

17 So on that issue of irreparable harm, really nothing
18 has been shown as yet. Maybe something will come forward.
19 But I submit, if anything does come forward, it will pale in
20 comparison to what we will present as evidence of irreparable
21 harm.

22 The third factor, of course, is the public interest.
23 In this case, we have an express finding from FERC on page
24 28, paragraph 62, that this is a project that is required by
25 the public convenience and necessity. And you can disagree

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1 with that or dispute it or say it's wrong, but that's the
2 finding. And if you delay that public convenience and
3 necessity, you are harming what has been a declared public
4 interest by FERC, not to mention the benefits of this project
5 from an economic standpoint to the employees, to the
6 contractors, to the local communities, to the service
7 organizations, as well as the taxing authorities themselves,
8 who will profit. So we submit that the public interest is
9 decidedly in our favor.

10 We submit that the defendants have no solution to
11 this. We don't know what time they want this case to
12 proceed. They've never really been clear in their papers
13 what they want. Do they want to wait until all just
14 compensation trials are determined? Is that what they're
15 asking? Are they wanting to wait until all appeals of any
16 proceeding in some other court, which doesn't affect this
17 court's jurisdiction, until those are determined? They've
18 never really said which of those two, or both, that they
19 want.

20 But we submit that the proper path for the Court is
21 to award a preliminary injunction in accordance with
22 established case law and rulings in cases that we've cited.
23 Really, case after case that have come up in this context and
24 weighed this situation, the courts have decided that
25 possession should be granted. And that's what we're asking

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1 in this case.

2 Thank you.

3 THE COURT: Thank you, Mr. Massie.

4 Mr. Terpak?

5 MR. TERPAK: And good morning. I think it's still
6 morning, Your Honor. I'm Paul Terpak with
7 Blankingship & Keith in Fairfax, and we represent 34 of the
8 impacted properties here.

9 As you know, this case involved some 296 landowners.
10 We have a lot of folks at counsel table. We have followed
11 your admonition and tried to do our best to create an
12 organized presentation here, but --

13 THE COURT: And I greatly appreciate that, by the
14 way.

15 MR. TERPAK: It's been very rushed, and we will have
16 some missteps along the way. We'll do our best. But that
17 goes towards our overall theme, is that there is an unseemly
18 rush here. And that unseemly rush has been illustrated
19 already by some of what's been presented to the Court: The
20 fact that they're going in and making mistakes on Route 250;
21 the fact that there are FERC conditions still unsatisfied;
22 the fact of these many pending appeals which can't even get
23 their day in court yet. All of those goes towards primary
24 issue at this stage of the proceeding, Your Honor.

25 Even if you rule that they have the right to condemn

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1 the property, you do not need to rule that they have the
2 right to early entry. That's not required.

3 And we agree *Sage* is the leading case. If you look
4 at *Sage*, the Fourth Circuit said when you have a mandatory
5 injunction to change the status quo before final litigation,
6 it's subject to heightened scrutiny. So there's a higher
7 standard here, when they're seeking to change the status quo.
8 And it's obviously a case of great public interest. And the
9 unseemly rush needs to be slowed down.

10 Now, one of our gentlemen mentioned a tap on the
11 brakes. We need a tap on the brakes, to slow down and let
12 things mature further, to take care of these mistakes and
13 missteps already made by MVP.

14 In terms of the standards of the injunction, Your
15 Honor, as to irreparable harm, they will cite contracts
16 they've signed that are going to cause them millions of
17 dollars in penalties. They signed those contracts before
18 FERC granted its order, or at least some of them, and they
19 signed other contracts before you ruled. They're seeking by
20 their own actions to trap you in a corner of their own
21 making. That's not fair grounds to claim irreparable harm.

22 Your Honor, I've got no right to go on this
23 property, but I signed a contract that I must get on there or
24 I pay penalties; therefore, you must give me a right I don't
25 have. That's not right.

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1 As to public interest, Your Honor, in *Sage*, the
2 Court said there are people who aren't going to have gas,
3 their customers are going to run out of gas, there are
4 utilities that won't be able to serve their customers.

5 The evidence will show as you listen to it, Your
6 Honor, that is not the case here. There's plenty of gas to
7 go around. No one's heater is going to get cut off if this
8 line is delayed for eight or ten months or a year. They are
9 not going to present any evidence of any imminent public
10 need.

11 As to complying with the FERC order, the FERC order
12 gave them three years to do their work; three years from
13 October, I believe. They say they can do the work in ten
14 months.

15 If you impose a delay here before early entry, or
16 allow the just compensation trials to proceed, they can still
17 do the work and comply with the FERC order. All this will be
18 very clear from the evidence.

19 You'll also hear evidence from their appraiser.
20 And, Your Honor, in terms of the mistakes that they are
21 making through their own unseemly rush, you will see that
22 their appraiser made mistakes, and that that evidence is not
23 competent to support the bond. And you need evidence. You
24 can't pull it out of the air.

25 So for all those reasons, Your Honor, and you'll

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1 hear several hours going forward here, we believe that this
2 request for early entry, a preliminary injunction, is not
3 appropriate at this time.

4 They asked, what are we asking for? Might it be
5 appropriate at a later time? Well, if they cure a bunch of
6 their problems, maybe it will be. I'm not going to tell you
7 now that we will have all the same arguments if they come
8 back in three or four or six or eight months or whatever.
9 They may come back. But now, they do not have the evidence
10 to show that they need this preliminary injunction.

11 Thank you, Your Honor.

12 THE COURT: Thank you, Mr. Terpak.

13 Any other counsel or pro se defendants that wish to
14 make an opening statement?

15 Very well. And I assume you all adopt Mr. Terpak's
16 opening statement?

17 Very well. All right, Mr. Massie. You may proceed.

18 MR. MASSIE: We call Robert Cooper.

19 THE COURT: Mr. Cooper, if you would, come forward
20 to be sworn by the clerk, please.

21 (Witness sworn)

22 THE COURT: If you would, have a seat in the witness
23 stand, please.

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: And you may proceed, Mr. Massie, when

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1 you're ready.

2 MR. MASSIE: Thank you, Judge.

3 ROBERT JOSEPH COOPER, PLAINTIFF'S WITNESS, SWORN

4 DIRECT EXAMINATION

5 (Plaintiff's Exhibit 1 marked)

6 BY MR. MASSIE:

7 Q Would you state your name, please?

8 A Robert Joseph Cooper.

9 Q And what is your position with MVP?

10 A I'm the senior vice president of engineering and
11 construction for Mountain Valley Pipeline.

12 Q Are you the person in overall charge of this project?

13 A Yes, sir.

14 Q And what functions report to you?

15 A I have overall responsibility to complete the project:
16 Engineering, construction, the various functions to procure
17 the pipe and obtain the land rights. I either have personnel
18 that report directly to me or have personnel that are
19 responsible to the project under me to complete those tasks.

20 Q You may step back just a little bit from the microphone
21 there. Thank you.

22 What is your educational background?

23 A I have an associate's degree in drafting and design and a
24 bachelor's degree in mechanical engineering from the West
25 Virginia Institute of Technology.

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1 Q And what experience do you have in the gas industry?

2 A This is my fifteenth year with EQT. And during that
3 time, I've held various roles and been involved in the
4 construction of a couple of thousand of miles of pipeline,
5 including between 200 and 300 miles of pipeline that are
6 under FERC jurisdiction, as well as building compressors and
7 other activities for the company.

8 Q And altogether, how many pipeline projects have you
9 worked on?

10 A In terms of --

11 Q Number.

12 A Number? I would say 100; but FERC projects, about a
13 dozen, ten or a dozen.

14 Q And what do you define a FERC project to be?

15 A There are projects that don't fall under the jurisdiction
16 of FERC as being an interstate natural gas pipeline and there
17 are others that do. So those projects that fall under their
18 umbrella, then, are required to follow that process. And so
19 those are the ones that I would use the words saying they are
20 a FERC project.

21 Q Is Mountain Valley Pipeline a natural gas company?

22 A Mountain Valley Pipeline is a natural gas company. We've
23 been organized under the Natural Gas Act to build interstate
24 natural gas pipelines.

25 Q Does it hold a certificate of public convenience and

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1 necessity from the Federal Energy Regulatory Commission,
2 known as FERC?

3 A Yes, sir.

4 Q If you'd look on your left, is the document marked
5 Exhibit 1 a copy of the certificate order issued to FERC --
6 issued by FERC to Mountain Valley Pipeline?

7 A Yes, sir.

8 MR. MASSIE: We offer Exhibit 1.

9 THE COURT: Any objection, Counsel, or Mr. Howard,
10 Mr. Howard?

11 All right. Admitted without objection.

12 (Plaintiff's Exhibit 1 admitted)

13 (Plaintiff's Exhibit 2 marked)

14 BY MR. MASSIE:

15 Q All right. Also, if you would, look to your left.
16 There's a document there. What is that? It's marked as
17 Exhibit 2.

18 A Looks like a summary overview of the project.

19 Q Do you have a map of the route and some facts about the
20 pipeline?

21 A That's correct, sir.

22 MR. MASSIE: We would offer Exhibit 2.

23 THE COURT: Any objection?

24 Admitted without objection.

25 (Plaintiff's Exhibit 2 admitted)

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1 BY MR. MASSIE:

2 Q All right. May we take a look at Exhibit 2 on the
3 screen, please?

4 What are we looking at, Mr. Cooper?

5 A All right. If you look at the map portion on the
6 right-hand side, it shows the general route of the pipeline
7 from its beginning in Wetzel County, West Virginia,
8 traversing through West Virginia, and then crossing into
9 Virginia.

10 In Virginia, it covers the counties of, or some portion
11 thereof, of Giles, Craig, Montgomery, Roanoke, Franklin, and
12 Pittsylvania, where it has its terminus where it connects to
13 the Transco pipeline system.

14 Q Okay. Can we go back to the enlarged version?

15 And what is the approximate length of the pipeline?

16 A The approximate length of the pipeline is 303 miles.

17 Q And there's a diameter mentioned here. Explain that,
18 please.

19 A The pipeline diameter is 42 inches. So the pipe is a
20 round circle, and the diameter across that circle is
21 42 inches.

22 Q And the compression -- compressor stations are located in
23 Virginia or West Virginia?

24 A There's three stations for this project, all of which are
25 located in the State of West Virginia.

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1 Q And the terminus for the project is Pittsylvania County?

2 A Yes, sir.

3 Q And the right-of-way for the pipeline itself -- so I'm
4 not talking about access roads or work areas or that, but
5 what is the basic right-of-way for the pipeline?

6 A The permanent right-of-way after the pipeline is finished
7 is intended to be 50 feet.

8 Q What is the purpose of this pipeline?

9 A This pipeline's purpose is to connect gas supplies,
10 predominantly in southwestern Pennsylvania and north central
11 West Virginia, with other markets in the country by
12 traversing the route that's shown and connecting into
13 Transco's interstate system. And from there, the suppliers
14 or owners of that gas can market it to the various markets up
15 and down the Eastern Seaboard and over to the Gulf Coast or
16 into Florida.

17 Q And you described some producing regions. Do they have
18 names or designations of what they are?

19 A Typically, the formations that are currently being
20 drilled to supply this would be referred to commonly as the
21 Marcellus or the Utica shale. There's also a formation known
22 as the Upper Devonian shale. And those shales are very
23 prominent in western Pennsylvania, north central West
24 Virginia; and some of the Utica supply is even over into
25 Ohio.

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1 Q And what is the status of pipeline availability there
2 now?

3 A With the current supplies that are in that area and the
4 projected increase of those supplies, it is difficult for all
5 the gas that the producers can produce to get to market,
6 because there's not enough pipelines to carry it from those
7 areas to the areas in the country that have demand for it.

8 MR. TEANEY: Objection, Your Honor. I think there
9 wasn't foundation for the witness' knowledge of this
10 information to offer it. This sounds like opinion testimony.
11 He hasn't been qualified as an expert in natural gas markets
12 or pipeline markets.

13 THE COURT: Mr. Teaney, I would recommend you make
14 your objection when the question is asked, and not after the
15 answer is given. So I'm going to overrule your objection,
16 since he's already supplied the answer.

17 MR. TEANEY: Thank you, Your Honor.

18 THE COURT: Thank you.

19 BY MR. MASSIE:

20 Q What is the primary receipt point for the gas?

21 A There's a location in Wetzel County known as the Mobley
22 interconnect, where there are other pipelines that can bring
23 gas into the Mountain Valley Pipeline.

24 Q And you mentioned the final termination point is Transco.
25 Can you explain what that is, please?

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1 A That's correct. There's Station 165 in Pittsylvania
2 County. There are several pipelines that connect the gas
3 system up towards the Eastern Seaboard of the country, and
4 can also traverse gas backwards. Ultimately, it can go all
5 the way to the Texas-Louisiana -- you know, those other areas
6 where there are demand centers, like industrial demand, or
7 demand for power generation.

8 There's also interconnects with other pipelines that
9 could carry the gas to Florida as well.

10 Q Besides the Transco location, are there any other
11 interconnects on the pipeline?

12 A There's an interconnect with the TransCanada pipeline
13 system. The pipeline is known as the WB. And that
14 particular interconnect on the map is very close to what you
15 see is the Harris compressor station. The actual connection
16 to the pipeline is very close to the property where that
17 station will be built, and so there will be the ability to
18 take gas off of MVP onto that pipeline, should marketers
19 choose to do so.

20 Q Is there any opportunity for deliveries in this area?

21 A Yes. There will be two physical connections to the pipe,
22 sometimes called taps, for Roanoke Gas, to allow them to have
23 supplies to continue to meet the demands for their customers.

24 Q Now, you mentioned the capacity of this pipeline, I
25 think -- did you say to BCF? Have I asked you that?

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1 A You haven't yet, sir, but --

2 Q What does -- well, first, what does that mean, capacity
3 and BCF? Explain that, please.

4 A The pipeline, based upon its diameter, or the size of the
5 hole, and the pressure at which it operates, can move so much
6 natural gas through it. So, typically, capacity is
7 designated as the engineered capacity, when you combine the
8 inlet pressures, the compression capability, and the outlet
9 pressures.

10 In this case, BCF stands for 2 billion cubic feet per
11 day, where the cubic foot is a cubic foot of natural gas at
12 standard atmospheric pressure and temperature. And that gas
13 has a thermal energy content of 1,000 BTUs.

14 Q Now, 2 BCF, can you put that in context for us, what it
15 means, what kind of volume it is?

16 A This time of year, nationwide daily gas demands or
17 consumption in the United States currently are above
18 70 billion cubic feet per day, sometimes as much as
19 78 billion cubic feet a day, so...

20 Q As an interstate pipeline, is this pipeline regulated by
21 FERC?

22 A Yes, sir.

23 Q And as a FERC-regulated pipeline, what access must it
24 provide?

25 A It's called "open access," is the phrase that's used.

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1 That means marketers who can get their gas to the pipeline
2 and meet the quality requirements can move their gas on the
3 pipeline if there's space on the pipeline.

4 Q As a FERC-regulated pipeline, will MVP own any of the
5 gas?

6 A Mountain Valley Pipeline is a transporter. So our role
7 is to create the connection from one area to other areas and
8 take the gas that is owned by the shippers, and we're paid a
9 fee to move it from point A to point B.

10 Q And the terms I think you used are "transporter" --
11 meaning MVP, right?

12 A Correct. We do not have ownership of the gas. We have a
13 responsibility to take gas that's given out to us and
14 transport it to someplace else.

15 Q And what does the name "shipper" then refer to?

16 A As I used the word "shipper," I meant it to be the
17 companies that represent the owners of the gas.

18 Q Does MVP have any agreements in place with shippers of
19 gas for this pipeline?

20 A Yes. In this case, the capacity of the pipeline has been
21 precontracted with various shippers of gas; so the full
22 capacity of the pipeline has already been signed up with by
23 shipping companies that wish to move gas from its beginning
24 to the end.

25 Q May we see Exhibit 1 at pages 5 to 6? And if we could

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1 bracket the shippers listed there, please.

2 Okay. What is this showing in the FERC order?

3 A These are the names of the companies who have signed up
4 to ship gas on this pipeline. And then it shows their
5 commitment to how much gas on a daily basis that they are
6 going to ship.

7 Q All right.

8 A It is --

9 Q Go ahead.

10 A As I say, there is a difference in the units of measure
11 here. You'll notice that in the overview, we listed the word
12 "billion cubic feet," and in these ratings, it's listed as a
13 dekatherm; the difference there being that natural gas
14 doesn't all have a uniform energy content of 1,000 British
15 thermal units at standard conditions. There's some slight
16 variations that the shipping tariff that FERC's allowed into
17 that thermal content. So to sell gas on a uniform basis for
18 all players, that energy content is measured and then sold on
19 a dekatherm basis.

20 However, the point of -- if all of the gas were at
21 1,000 British thermal units at those standard conditions,
22 then it's an equal measure. This is just a way to account
23 for the variations in the energy content.

24 Q So if you add up the numbers in the right-hand column and
25 convert them to cubic feet, what does it come out to be?

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1 A At standard conditions, it would come out to the
2 2 billion cubic feet that we have stated earlier.

3 Q And have the agreements -- do they have a certain name?

4 A To get the certificate, we had to demonstrate something
5 called a precedent agreement, which is the commitment to live
6 up to the contract that you've signed up for to ship the gas.

7 Q And are those filed with FERC?

8 A They were.

9 MR. MASSIE: May I approach, Your Honor?

10 THE COURT: You may.

11 (Plaintiff's Exhibit 3 marked)

12 BY MR. MASSIE:

13 Q Mr. Cooper, I'm showing you what's been marked as
14 Exhibit 3. And I'll ask you: Are those a collection of the
15 precedent agreements that have been filed with FERC?

16 A They are.

17 MR. MASSIE: We offer Exhibit 3.

18 THE COURT: Any objections?

19 MR. TEANEY: No objection.

20 THE COURT: Admitted without objection.

21 (Plaintiff's Exhibit 3 admitted)

22 BY MR. MASSIE:

23 Q And what is the duration of the precedent agreements,
24 Mr. Cooper?

25 A Well, I believe the answer is 20 years for the service

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1 contract. The precedent agreements actually get translated
2 into an active transportation agreement once we move forward.
3 This is the commitment to move the gas, and then the
4 follow-on has to be completed prior to constructing the
5 pipeline, which we have done. But these are essentially the
6 same terms; it's just the proof that you'll do it versus the
7 actual agreement to ship.

8 Q Let me ask the question a different way. What is the
9 commitment period?

10 A The shipping period is identified as 20 years, sir.

11 Q And would that include the entire capacity of the
12 pipeline for 20 years?

13 A As I stated earlier, yes, this is what's called a fully
14 subscribed pipeline. So for the next 20 years, the shippers
15 have committed to keep the pipeline full.

16 Q Are there documents that show the approved route for the
17 pipeline?

18 A Yes, sir.

19 Q What are they? What are they called? What are they
20 known as?

21 A They're called alignment sheets. And those are what we
22 have to submit to FERC to govern the route, as well as the
23 construction of the pipeline.

24 Q And what sets do we have in this case?

25 A There's the set that established the majority of the

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1 route, which was filed in October of 2016. And then there is
2 a supplement that was filed in December to account for the
3 mandated route changes, predominantly what has already been
4 talked about here, a variation known as 250, and also changes
5 that needed to be made to complete a horizontal directional
6 drill of the Pigg River here in Virginia.

7 Q Do the alignment sheets show the approved route?

8 A Yes, sir.

9 Q Is MVP seeking possession of the approved route?

10 A Yes, sir.

11 Q Is MVP seeking possession of anything that is not on the
12 approved route?

13 A No, sir.

14 MR. MASSIE: Approach again, Your Honor?

15 THE COURT: You may.

16 (Plaintiff's Exhibit 4 marked)

17 BY MR. MASSIE:

18 Q Mr. Cooper, I've shown you a thumb drive that's been
19 marked as Exhibit 4.

20 A Yes, sir.

21 Q What is on that thumb drive?

22 A This has the alignment sheets from the two submittals
23 that we just discussed.

24 Q And have you reviewed those alignment sheets and marked
25 your initials on the thumb drive?

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1 A Yes, sir.

2 MR. MASSIE: We offer Exhibit 4.

3 THE COURT: Any objection?

4 MR. CLARKE: Your Honor, I just object because I
5 really haven't had an opportunity to review this. I
6 understand there was a thumb drive that was made available
7 for us this morning, but I don't have a computer here to look
8 at it. So I think it's improper to be introducing that in
9 this manner.

10 THE COURT: Were you provided with the alignment
11 sheets previously, pursuant to discovery?

12 MR. CLARKE: Your Honor, I've been provided with a
13 number of sets of alignment sheets. So I'm not sure what's
14 on that drive.

15 MR. MASSIE: Well, I would represent to the Court
16 that these are the alignment sheets produced in the case, and
17 also the alignment sheets on file with FERC.

18 MR. ELIJAH HOWARD: Your Honor, I'd also like to
19 object as well, due to the fact that the alignment sheets
20 that he referred to as well, after spending six hours reading
21 their instructions, I was informed by his office that they
22 were unfindable, there was no parcel numbers, even using
23 their instructions, and mine weren't even on there. So,
24 therefore, I don't understand what is even on these new ones
25 being submitted.

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1 MR. MASSIE: I just -- may I answer that, Your
2 Honor?

3 THE COURT: You may.

4 MR. MASSIE: In your case, you asked us where your
5 property was, and you were given exact locations to go to to
6 look, correct?

7 MR. ELIJAH HOWARD: Right, and they were not there;
8 they didn't exist.

9 THE COURT: I am -- since we're at a preliminary
10 injunction hearing, where the standards are not as formal,
11 I'm going to admit the thumb drive. If you find that there
12 are errors in the thumb drive that you wish to bring to the
13 Court's attention, you may do so.

14 MR. CLARKE: Thank you, Your Honor.

15 THE COURT: Thank you.

16 (Plaintiff's Exhibit 4 admitted)

17 BY MR. MASSIE:

18 Q You also mentioned acquisition, Land. Is that a group
19 that is also responsible to you?

20 A The Land Group that's responsible for obtaining the route
21 for this pipeline is responsible to me to obtain that land.
22 The direct company employees and the contractors that work in
23 that aren't directly in my supervisory chain.

24 Q Are you aware that Land is preparing maps showing the
25 approved route over individual tracts?

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1 A I am.

2 Q And have you looked at the exhibit maps filed in this
3 case?

4 A I have.

5 Q And are those exhibit maps maps that have been created to
6 show the approved route over individual tracts?

7 A Yes, sir.

8 Q Has Land attempted to acquire easements from owners
9 affected by the pipeline?

10 A Yes, sir.

11 Q And what success have you had?

12 A In the project as a whole, we've acquired approximately
13 85 percent of the tracts to build the project. The remaining
14 tracts that we haven't acquired are the tracts that are
15 involved in this court, as well as a similar proceeding in
16 northern and southern West Virginia.

17 Q And have offers been made to the people in the path of
18 the pipeline?

19 A Yes, sir.

20 Q At least \$3,000 to each?

21 A Yes, sir.

22 Q Were you able to acquire the tracts by agreement?

23 A 85 percent of them. But none that are here that we're
24 talking about today.

25 Q Do you have construction contracts in place to build the

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1 pipeline?

2 A Yes, sir.

3 Q Describe what they are, please. And unless it's
4 necessary, if you need to withhold confidential or
5 proprietary information, the Court may let you do that. But
6 just describe them generally.

7 A Okay. As we sit today, there are -- the pipeline is --
8 the main pipeline construction has been awarded to three
9 general pipeline contractors, each of them building a segment
10 or segments of the pipeline. The approximate 303-mile length
11 has been divided up into nine mainline segments and a couple
12 of minor segments that go along with it. Each of those
13 segments will be built, simply put, by a pipeline
14 construction crew.

15 In addition to that, there are 12 contractors that have
16 been identified to build the compression stations in the
17 interconnect facilities, and they're divided amongst six
18 companies to do the civil engineering and preparation work,
19 to build the site where that facility will be, and then six
20 general contractors to do the mechanical construction of that
21 facility.

22 MR. MASSIE: Approach again, please?

23 THE COURT: Certainly.

24 (Plaintiff's Exhibit 5 marked)

25 BY MR. MASSIE:

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1 Q I show you a group of documents marked as Exhibit 5.

2 What are those?

3 A These are the master construction services agreements
4 with the various contractors. And then in addition, there
5 are the purchase orders that govern the specific work, that
6 make reference to the master services agreement in terms of
7 how things will be done and what controls those things.

8 MR. MASSIE: We offer Exhibit 5.

9 THE COURT: Any objection?

10 MR. TEANEY: One moment, Your Honor.

11 MR. DeTURRIS: I would --

12 THE COURT: Mr. DeTurris?

13 MR. DeTURRIS: Well, are you admitting this as all
14 of the construction agreements, or as a sample of one?

15 MR. MASSIE: I believe the witness testified that
16 these are the construction agreements and purchase orders.

17 Just as an aside, there may have been some
18 duplication in the production of copies, but this is meant to
19 be a complete set.

20 MR. DeTURRIS: You're representing it's a complete
21 set. I just can't judge that here, standing, in one minute.
22 But you're saying it's the complete set?

23 MR. MASSIE: That's our intention and our hope.

24 MR. DeTURRIS: Okay. No objection.

25 THE COURT: All right. Admitted without objection,

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1 then.

2 (Plaintiff's Exhibit 5 admitted)

3 BY MR. MASSIE:

4 Q Okay. Mr. Cooper --

5 MR. CLARKE: Your Honor?

6 THE COURT: Yes?

7 MR. CLARKE: I'm sorry, Your Honor. Stephen Clarke.

8 THE COURT: Yes, Mr. Clarke?

9 MR. CLARKE: Could they just -- could the witness
10 just identify the documents he has by the series of Bates
11 numbers on them, just to confirm that we have the same set
12 that the witness has?

13 THE COURT: Certainly.

14 If you could do that -- do you understand what Bates
15 numbers are?

16 THE WITNESS: I do.

17 THE COURT: Very well.

18 THE WITNESS: It will take me a moment to leaf
19 through them.

20 THE COURT: Sure.

21 THE WITNESS: I'm showing the first document starts
22 with MVP001-0007. And that's the signature. I'm just making
23 sure that I haven't thumbed past the start point. Pardon my
24 delay.

25 It appears that that -- it appears the first master

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1 services agreement, the last Bates number on that would be
2 MVP001-0079.

3 MR. MASSIE: Proceed, Judge?

4 THE COURT: Well, and then there are other documents
5 after that?

6 THE WITNESS: Yes, ma'am.

7 THE COURT: All right. So my last page is
8 MVP001-0303. Is that correct?

9 THE WITNESS: That is correct.

10 THE COURT: Anything else, counsel?

11 MR. DeTURRIS: I believe his testimony was that
12 there were three master services agreements. I was just
13 wondering if he can identify where they all start and begin.
14 That would be helpful for us.

15 THE COURT: Are all three included in this exhibit,
16 sir?

17 THE WITNESS: That's what I'm leafing through now,
18 Your Honor. Give me just a moment, please.

19 THE COURT: Certainly.

20 While he's doing that, I'll let the people -- I
21 should have announced this at the beginning, and I failed to
22 do so. But if anyone is having a hard time hearing, we have
23 some headphones that might assist. So if anyone -- you can
24 raise your hand if you request a set of headphones, but I'll
25 be glad to -- we have a couple pairs here.

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1 Would anyone like a pair of headphones? I see some
2 people in the back. I'm sorry I didn't do this earlier.
3 Just make sure you don't go home with them.

4 THE WITNESS: All right. Bates numbers MVP001-0080
5 through MVP001-0152 are purchase orders, issued to one of the
6 master services agreements.

7 The next master services agreement begins with
8 MVP001-0153, and I believe its last page is MVP001-0218.

9 Bates numbers MVP001-0219 to MVP001-0226 is a
10 purchase order that's associated with one of the master
11 services agreements.

12 The next master services agreement begins with
13 MVP001-0227, and the last page for that master services
14 agreement is MVP001-0294.

15 BY MR. MASSIE:

16 Q And does that -- I'm sorry. Go ahead.

17 A One last document. There's a purchase order that begins
18 with MVP001-0295 and ends with MVP001-0303.

19 So to be clear, the documents that were presented in
20 front of me represent the master services agreements for the
21 three mainline pipeline contractors and their associated
22 purchase orders. The mechanical and civil contractors that
23 are associated with facilities, predominantly the compression
24 stations in West Virginia, are not within this group of
25 documents.

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1 Q These are the mainline contractors?

2 A This is the pipeline construction service agreements, and
3 the purchase orders that are associated with them.

4 Q Thank you.

5 THE COURT: And the stations, you said, are not in
6 Virginia; is that correct?

7 THE WITNESS: The three compression stations are in
8 West Virginia.

9 THE COURT: All right.

10 THE WITNESS: Ultimately, there will be one
11 interconnect, which is the terminus at Transco in
12 Pittsylvania County, and its contract isn't represented.

13 THE COURT: Thank you, Mr. Cooper.

14 Anything else, Counsel, Defense Counsel?

15 MR. DeTURRIS: I'm okay now. Thank you.

16 THE COURT: Very well.

17 Mr. Massie, we've come to 12:30, so I think this is
18 a pretty good break. I do want to go ahead and allow our IT
19 people to set up the courtroom number two. So let's go ahead
20 and take our lunch break now, and we will resume at 1:30.

21 But I do want to ask counsel if you can give me an
22 estimate of how long you think we will be in proceedings
23 today. How much more do you anticipate? And I know we just
24 started with this issue. So Mr. Massie, can you give me an
25 estimate?

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1 MR. MASSIE: Well, my part with this witness, I
2 estimate at 30 minutes additional. My part with the next
3 witness, I estimate at 20 minutes. I can't judge the
4 cross-examination.

5 THE COURT: I understand that.

6 MR. MASSIE: I'm not sure about that.

7 THE COURT: All right. And we'll have arguments
8 after all of the witnesses, too.

9 Counsel for defendants, any idea?

10 MR. TEANEY: I expect the cross of Mr. Cooper --
11 this is Derek Teaney, for the record. Cross of Mr. Cooper
12 could go 40 minutes to an hour, depending on how in-depth
13 Mr. Massie takes him on these documents. And then I will be
14 doing cross of Mr. Long, so I would --

15 MR. TERPAK: Mr. Long, I think not that long. Five,
16 ten minutes.

17 MR. CARROLL: And, Your Honor, Jeremy Carroll.
18 Multiple counsel may also be cross-examining, however.

19 THE COURT: I understand. I was trying to get an
20 overview.

21 MR. CARROLL: I think my cross-examination of the
22 two witnesses would be five to ten minutes.

23 MR. LOLLAR: Charles Lollar. I would think ours
24 would be five to ten minutes.

25 THE COURT: Okay. All right. That gives me a

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1 better idea. And I know you have witnesses, too, though.

2 MR. TEANEY: That's correct, Your Honor.

3 THE COURT: Any idea -- have you consulted with one
4 another? Any idea how long you'll need for your witnesses?

5 MR. TEANEY: Mr. Lovett has two of them. I don't
6 want to speak out of turn for him.

7 MR. LOVETT: Just a guess, Your Honor, I would
8 say -- we have four witnesses. Probably a half hour each, on
9 average; some longer, some shorter.

10 THE COURT: All right.

11 MR. TEANEY: To clarify, that's four experts. We
12 do --

13 MR. LOVETT: Four experts, oh, yeah. Then there
14 will be landowners after that.

15 MR. HOWELL: Right, followed by a series of
16 landowners with maybe 15 minutes each.

17 THE COURT: Okay.

18 MR. LOLLAR: I think that's right. That includes
19 our landowners.

20 THE COURT: All right. I was just trying to get a
21 general idea.

22 All right. Then let's go ahead and take a recess
23 for lunch, and we'll resume court at 1:30. And we should
24 have some extra space upstairs.

25 THE MARSHAL: All rise.

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1 THE COURT: If you could turn in your headphones if
2 you have them, and you can have them after lunch.

3 (Lunch recess, 12:31 p.m. to 1:36 p.m.)

4 THE COURT: All right. Good afternoon.

5 Mr. Cooper, if you would take a seat on the stand.

6 Oh, I hear myself.

7 Mr. Massie, do you want to try your mic?

8 MR. MASSIE: I'm afraid to.

9 THE COURT: All right.

10 (Off the record)

11 BY MR. MASSIE:

12 Q Mr. Cooper, does MVP have a proposed schedule for this
13 project?

14 A Yes, sir.

15 Q And what is its proposed schedule?

16 A The proposed schedule is to be able to begin tree
17 clearing on or about February 1st, so that we can manage the
18 species impact windows, many of which close on March the
19 31st, and complete the construction of the pipeline
20 facilities by the end of 2018.

21 Q And if you begin on February the 1st, 2018, what will be
22 the first activities that will need to be performed?

23 A On the properties in this hearing, it will be staking the
24 limits of the disturbance and felling the trees.

25 Q And what is the window of time that tree felling should

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1 occur?

2 A For properties that are impacted by various species
3 mitigation plans, the predominant ones, which are for two bat
4 species, that window, for the most part, closes March the
5 31st.

6 Q And what are the circumstances behind that?

7 A As part of the requirements, we must go out and survey
8 for the presence of bat portals, or bat hibernacula; and
9 where they are known, we need to have the trees laying down
10 before March 31st because the bats hibernate, so when they
11 come out to begin to fly around, they don't choose the trees
12 that we would cut down to roost in after they come out of the
13 cave.

14 Q And what is the period within which you can fell trees
15 without restrictions?

16 A That window opens up on November the 15th and closes
17 March the 31st.

18 Q So is that winter, in essence?

19 A That -- it could be called winter, yes.

20 Q If MVP is not able to fell trees by March 31, what are
21 the potential consequences?

22 A The potential consequences are that, depending upon how
23 many properties and where that is, the project would have to
24 be delayed for up to a year.

25 Q And the next window, then, to begin tree felling is

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1 November 15?

2 A For the most part, that's correct.

3 Q And give the Court some idea of the area to which this
4 restriction applies.

5 A As we said today, there are roughly 100 miles in
6 Virginia, a little over 100 miles in Virginia. There are
7 close to 20 that are definitely within the bat window, but
8 based upon the portals that we haven't surveyed, that could
9 expand to about 75.

10 The way this works, you have to understand if there's a
11 portal there or not, because we're outside of a window where
12 we can what's called mist-net or catch the bats. You have to
13 assume that they might live there, and then the safety zone
14 for getting the trees down to not cause damage to the species
15 is March the 31st.

16 Q And if you have possession by February 1, how would the
17 tree felling proceed?

18 A In those locations where the state of Virginia has
19 approved an erosion and sediment plan, then we would ask for
20 permission from the FERC to proceed, which would allow us to
21 do full earth-disturbing activities.

22 Should we not have erosion and sediment control plans
23 finalized in various areas from the state, then we would
24 petition FERC to approve what's called a non-mechanized tree
25 felling plan, in which, essentially, we would cut trees, but

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1 leave the stumps and roots in place for erosion control until
2 those plans are finalized from the state of Virginia.

3 Q And I think I tried to answer a question for the Judge
4 earlier about that, but was my answer correct to the Judge?

5 A If you'll repeat your answer, I'll --

6 Q Okay. I don't won't try to do that. But when you say
7 "non-mechanized," you mean what exactly?

8 A Simple answer: Take a chainsaw and cut a tree down.

9 Q And how does that interact with the erosion and sediment
10 control restrictions?

11 A Hand tree felling is not considered a soil-disturbing
12 activity, and therefore isn't required to have an approved
13 erosion and sediment control plan and those controls in place
14 to cut a tree.

15 But once you start removing the stumps and the roots and
16 disturbing the soil, you're replacing what's already there
17 with these approved erosion and sediment barriers during the
18 window of construction.

19 Q And is it practical to skip around and cut some areas at
20 one time and cut some areas at another time?

21 A It is not ideal for the tree felling to do that.
22 Building the pipeline --

23 Q I'm sorry?

24 A I said it is not ideal for tree felling. It's -- it can
25 be a little bit for tree felling. It does not work for the

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1 actual pipeline construction.

2 Q And if you are not able to achieve possession to commence
3 this tree felling and complete it within this time frame that
4 you discussed, how does that translate into a year of delay
5 and the in-service date?

6 A If the trees aren't down by the required window, that
7 means you have to wait until the window opens back up. And
8 so that leaves portions of the right-of-way that have the
9 trees standing to go through the limitations that are on the
10 project for the various species mitigation plans, meaning the
11 permit assumes that there's only so much impact on the
12 species, one of which is, in the case of bats, not disrupting
13 the trees where they might roost.

14 Depending upon how much of that tree cover is left, it
15 makes it unviable to do much construction.

16 Individual tracts that might leave it, on the surface may
17 sound like, well, that's okay, you can go around them. The
18 problem is, depending upon where that tract lies in relation
19 to the approved access roads, which are also approved and
20 part of the project, that tract might block access to much
21 larger portions of the right-of-way; and even though you were
22 able to cut trees, for instance, on land that you already had
23 the rights to be on, you can't go in and do the other
24 construction work, because you can't get through between the
25 access to do the rest of the work for the pipeline.

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1 So a discontinuous right-of-way from a tree cutting
2 standpoint can disrupt the ability to do the whole project.

3 Q Well, you're asking now to start on February 1st. And
4 the next window, you said, was November the 15th, correct,
5 for the bats?

6 A Yeah, the next fully assured window is November the 15th.

7 Q And what -- that would be called the winter season for
8 construction as well, I guess?

9 A Well, it would be the winter season for tree felling.

10 Q Right. But as far as any construction of the pipeline,
11 what are the differences in the schedule to work in the
12 winter versus work in the summer?

13 A Part of what translates into a longer delay than, say, a
14 month-for-month if you delayed on the trees, is that if you
15 don't complete the work during what we'll call the summer, or
16 spring, summer, fall, when you get into the winter months,
17 the ability to work is made much more difficult.

18 We all know what it's like to be in the cold. We've had
19 a lot of cold here recently. It's just harder to do
20 everything. It also becomes much more constraining from
21 assuring that the way we're constructing the pipe is done in
22 a safe manner. We also have different moisture content, that
23 also then makes things more difficult for us to maintain
24 those erosion and sediment controls.

25 All those examples greatly slow down the efficiency of

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1 work, particularly December, January, and February, and even
2 March, on the right-of-way.

3 So it ends up taking a lot longer to do the same amount
4 of work during that winter time frame. You have a lot more
5 days where you're just completely off the right-of-way,
6 particularly if you get a cold snap and you freeze the
7 surface and it's a little moist underneath, because it makes
8 it difficult for the construction equipment to maneuver
9 without sliding. So that winter time period becomes very
10 inefficient and lengthens the time in which the project has
11 to work.

12 Q Now, if the project were delayed a year, have you looked
13 at the financial consequences of that?

14 A We have, sir.

15 Q And what are the categories of consequences?

16 A Things that we've been able to identify include:

17 Lost revenue to the partners.

18 Penalties that we will have to pay to the various
19 contractors that we've signed up to cancel their contracts
20 for this year, because they view it as they reserved this
21 work and if we cancel it, then they've lost opportunity to
22 collect other work, so there are terms in the contract to pay
23 them penalties.

24 There are expenses that the project will incur during
25 that delay period that involve keeping the project going,

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1 managing the materials, managing the other things that are
2 necessary to be ready to go to work in the following year.
3 So those are the things for us.

4 There's also the delay in tax revenues, and the delay in
5 the money that would be spent in the area, either from the
6 construction work force, which is expected to be close to
7 6,000 during the construction time frame, and then the money
8 that they would spend in the community, everything from hotel
9 rooms to gas to meals, supplies that will be purchased by the
10 various pipeline contractors to build the pipeline,
11 et cetera.

12 Q All right. Well, let's go back to the top of the list,
13 the lost revenue. Explain what you mean by that.

14 A As we discussed earlier, this pipeline is fully
15 subscribed by the shippers. So when we can place the
16 pipeline and its facilities in service, the monthly
17 reservation charged to make the pipeline available to the
18 shippers will be between 40 and \$50 million a month. That's
19 the revenue that Mountain Valley Pipeline receives for being
20 able to transport 2 billion cubic feet of gas a day.

21 Q All right. And if you take 12 months as a delay period,
22 or possible delay period, is that 12 times the numbers you
23 just mentioned?

24 A Yes, sir. So it's -- it's a substantial amount of money
25 that is not provided back to the partners in the project for

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1 their spending the money to build it and use that revenue to
2 do the other things their businesses would do.

3 Q Well, is it possible that that money is going to be
4 earned at some point in the future, just not this particular
5 year?

6 A One can make the argument that because the revenue under
7 the project starts once you go into service and that 20-year
8 term starts then, that that \$40 to \$50 million a month is
9 received on the last year of the contract, 20 years later.

10 I have a personal opinion -- and if I'm allowed to say
11 that, I will -- that it's hard to get that back.

12 MR. TEANEY: Objection, Your Honor. It appears that
13 the witness is about to offer an opinion, and he has not been
14 qualified as an expert to offer opinions.

15 THE COURT: Mr. Massie?

16 MR. MASSIE: I think it's a calculation and it's not
17 really an opinion, but -- and I think he is qualified fully,
18 most knowledgeable on this whole project.

19 THE COURT: Well, perhaps you can establish a
20 foundation.

21 MR. MASSIE: Sure.

22 THE COURT: And I'll sustain the objection by
23 Mr. Teaney at this point.

24 MR. MASSIE: Okay.

25 Well, let me go at it a little different way, all

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1 right?

2 BY MR. MASSIE:

3 Q The suggestion has been made, right, that receiving \$40
4 to \$50 million a month 20 years from now, or some indefinite
5 time period from now, is the same as receiving that money
6 today.

7 As a manager of this project, is that a correct
8 assumption?

9 A If the revenues for that time period don't show up, each
10 of those businesses who would have had that available to them
11 to do things in 2019, they will not have it available.
12 That's the basis for my answer.

13 Q The first year that they would have that, then, would be
14 the first year that the project goes into service, correct?

15 A That's correct, sir.

16 Q You also mentioned additional construction costs. Are
17 you familiar with the construction contracts?

18 A I am, sir.

19 Q Did you negotiate the construction contracts?

20 A I was involved in negotiating the contracts, yes, sir.

21 Q Did you approve the construction contracts?

22 A Yes, sir. One of them was signed by my predecessor, but
23 I was involved in the purchase orders that -- understand,
24 there's -- the master services contract that we discussed,
25 that's the governing document of how the contractor and MVP

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1 will interact. The purchase orders govern specific items,
2 and, in particular, the pay items and how they will be
3 executed.

4 So I was involved in all the purchase orders. One of the
5 MSAs, I was not.

6 Q And are you familiar with the consequences of beginning
7 work now versus beginning work later under these contracts?

8 A I am, sir.

9 Q And would you explain those consequences to the Judge,
10 please?

11 A As I mentioned earlier, because the contractors view this
12 as a reservation charge, and have signed up to do a job and
13 be paid money to do that, there are terms in the contract
14 that allow for a couple of categories that we call delay or
15 work cancellation charges. The delay charges tend to be
16 additional compensation, as it takes longer to get started.

17 As an example, from a limited notice to proceed
18 standpoint, if we exceed a certain date and still haven't
19 allowed them to begin to cut trees, the concept is, in order
20 to get the trees down by those restriction dates, they will
21 have to hire more tree clearers than they had envisioned in
22 their base contract. They will have to pay them more
23 overtime to cut trees in a more condensed manner. Each date
24 you progress closer to the deadline, the monetary charge for
25 doing that escalates, until you get to the point that it's

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1 moot because it's nonviable.

2 Similar charges occur from the standpoint on the
3 construction of the pipeline, because the way the contract is
4 structured, the expectation is that they start and they
5 finish by their contracted date. So as you delay further out
6 letting them start construction or mainline activities, the
7 same concept applies. In order to complete by the date
8 that's anticipated, they'll have to make adjustments in how
9 they planned on staffing and operating the job. And so
10 there's additional costs to make that happen.

11 Ultimately, if we were unable to build the project this
12 year because of continued delays, the contracts also have
13 termination charges that say, I signed up to work with you, I
14 intended to work with you, I anticipated that I would be
15 having revenue and doing a job, and now you're telling me no.
16 So there's a safety net for the contractor to at least have
17 some revenue, even though we wouldn't be building the
18 project. And so those items get paid in an escalating manner
19 as we go through the spring.

20 I think the terminus date on the last one, if you got
21 that far out, is in either June or July, without referencing
22 the paperwork directly.

23 Q And have you estimated the additional construction
24 charges for an in-service date of 12-18 versus 12-19?

25 A If we had to incur all the charges that are anticipated

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1 in the contracts in aggregate for the pipeline project, it
2 would be approximately \$200 million.

3 There's a very minor amount of that that's associated
4 with the facilities. The majority of that would be for the
5 pipeline contractors.

6 Q Now, you mentioned a third category of loss. I think you
7 described it as overhead, or additional expenses of the
8 company.

9 A Yeah. There's several factors that go into that
10 category, one of which: You have individuals that are
11 working. You have to pay their wages and salaries and
12 benefits for that delay period while you thought you were
13 working and now you aren't, and then you'll have to pay them
14 on the back end.

15 There's functions that aren't contracted, or aren't at
16 least stoppable, during that window when you're not
17 constructing. So you want to retain those folks.

18 In a lot of cases, it's about retaining the talent that
19 you've acquired, because if you release them -- you've picked
20 people who you know can do this job and work in this terrain
21 to build this pipeline correctly, and if you release them and
22 say, I'm sorry, I don't have any work for you, they are going
23 to go find somewhere else to work. And they may not be
24 available to us when we want to start up, you know, in the
25 following year.

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1 There are rents on facilities we have where equipment and
2 materials are stored. There's the individuals associated
3 with running those facilities that have to be here longer.

4 There are some other things that are kind of unique to
5 this project, one of which is the pipeline material. The
6 pipeline is coated with a protective material. It's an
7 epoxy. As it sits in the sun, it ages or oxidizes and
8 actually becomes thinner. And so we have to continue to
9 monitor that and inspect it. And prior to it becoming --
10 there's some margin when you coat it, but prior to it
11 becoming too thin to use, you have to protect it from the
12 sun. And so that includes either some sort of additional
13 temporary coating, or the other thing you can do is you can
14 restack the pipe.

15 It's kind of like turning over when you're sunbathing:
16 You take the part that's seen the sun and put it on the
17 bottom and you put another part on the top. Because the
18 coating needs to be protected, you have to do that very
19 carefully.

20 And the pipe that would need to be restacked -- which
21 isn't nearly all of the job, but the pipe that would need to
22 be restacked, should we get this delay, the physical cost of
23 handling it to restack it is about \$1 million. So that's one
24 example of additional costs that occur if we get delayed.

25 Q And what is your estimate of the total such cost?

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1 MR. TEANEY: Your Honor, at this time, defendants
2 would object to the calculation or summary of these numbers,
3 and that's based on discovery in this action.

4 The total value was not provided by MVP until an
5 answer for interrogatory. They did not provide the documents
6 that supported that number. We asked about those at
7 deposition; they have not been provided to date. We don't
8 have the documents that are about to support the number that
9 I believe they're trying to elicit from the witness.

10 Because those documents would have been responsive
11 to discovery requests that were propounded, and because of
12 the ongoing obligation to supplement discovery under 26(e),
13 we believe that the number would be excludable under Rule 37.

14 MR. MASSIE: Well, may I just --

15 THE COURT: You may respond.

16 MR. MASSIE: -- inquire of the witness on this and
17 build a little better foundation for his answer?

18 THE COURT: You may.

19 BY MR. MASSIE:

20 Q All right. Was this a category of expense that was
21 discussed at your deposition?

22 A Yes, sir.

23 Q And did you go over the concept of these charges at your
24 deposition?

25 A Yes, sir.

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1 Q And multiple witnesses asking you about the same topic?

2 MR. TEANEY: Objection. I believe these are leading
3 questions at this point, on direct.

4 THE COURT: Mr. Massie, if you would refrain from
5 leading, please.

6 And I note the objection was by Mr. Teaney. If you
7 would say your name just for the record when you object, I
8 would appreciate that.

9 MR. TEANEY: Certainly. In the future I will, Your
10 Honor.

11 THE COURT: Thank you.

12 BY MR. MASSIE:

13 Q So do you remember how many attorneys questioned you on
14 this topic at the deposition?

15 A I don't, sir, but it was more than one.

16 Q And did you answer the different categories that go into
17 this topic at the deposition?

18 A I did, and I tried to explain how we had developed the
19 number.

20 Q And did you give a total number for your estimate at your
21 deposition?

22 A Yes, and that was 40 to \$45 million.

23 MR. TEANEY: Objection, Your Honor. That's the
24 number to which we are objecting.

25 THE COURT: I'll strike that.

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1 MR. TEANEY: Thank you, Your Honor.

2 MR. MASSIE: All right. I'm just leading up to it.

3 THE COURT: I understand.

4 BY MR. MASSIE:

5 Q And was this estimate also in the answer to
6 interrogatory?

7 A It was.

8 MR. MASSIE: I would only say in response, Judge,
9 that the number was given in the answer to interrogatory, and
10 it was given at the deposition and he was questioned about it
11 at the deposition. And he -- there's no new information
12 about it.

13 There was a request for an itemization of it. The
14 deposition concluded Tuesday night at 8 o'clock, or something
15 like that, and last night I was able to give an itemization
16 of it to counsel. So that's the history of the discovery
17 issue on that.

18 THE COURT: Are there any documents that support
19 that itemization, Mr. Massie?

20 MR. MASSIE: It was not -- as we understood the
21 conversation at the end of the deposition, it was a question,
22 Can you give us an itemization? I don't recall anybody
23 asking us for all documents on this.

24 That was one of the problems that we had with the
25 original request. And if you remember, the solution was that

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1 we would try to provide an answer in a deposition, and
2 hopefully that would be adequate discovery on the issue. So
3 I feel like we have provided an adequate basis for this in
4 including an extended deposition on the topic, plus an
5 itemization, which I'll grant you was not provided until last
6 night, but that's what we understood the request to be from
7 the deposition just two days before.

8 THE COURT: Thank you.

9 Mr. Teaney, anything else?

10 MR. TEANEY: Thank you, Your Honor.

11 Just to reply, my recollection of the deposition is
12 different. I believe that -- and, unfortunately, we don't
13 have the benefit of the transcript, but I believe I asked
14 Mr. Cooper about documents that supported it and asked for a
15 supplemental provision of those documents.

16 The challenge here, I think, without having the
17 documents to probe this number, I went out -- this is a
18 horrible example, but I went out for lunch today and I spent
19 \$15. And when I try to expense that, my boss will probably
20 say that's okay without a receipt. If I came back to my boss
21 and tried to expense a \$45 million lunch, he'd want to see
22 the documents from me to establish what exactly I had for
23 lunch.

24 And when we're talking about a number as high as the
25 number that they're trying to establish here, you know, I

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1 think we're entitled to see the basis for it. And that's the
2 basis for the objection.

3 We are unable to probe sufficiently that
4 information. If there are -- if documents responsive are
5 available, they should have been provided. They were not.
6 Rule 37 provides for the exclusion of the information.

7 THE COURT: I'm going to overrule the objection.
8 I'm going to -- I'm not going to preclude the testimony of
9 the estimate, but I -- that will go to the weight that the
10 Court gives that testimony.

11 MR. MASSIE: Thank you, Judge.

12 MR. TEANEY: Thank you, Your Honor.

13 BY MR. MASSIE:

14 Q So the question, which you may have already answered in
15 response to my dialogue, was: What was your total estimate
16 of this category of expense?

17 A The estimate provided was between 40 and \$45 million.

18 Q Now, in addition to these types of damages, are there any
19 intangible losses that MVP will suffer from delay?

20 A Well, certainly the ability to elicit other business from
21 other shippers that may wish us to become their transporter
22 and build them a project. It will bring great doubt in their
23 mind that we can complete the project as contracted.

24 It also has the ability to make it difficult for us in
25 our negotiations when we resume with the other pipeline

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1 contractors to come back. They're certainly going to be much
2 more wary of entering into the contract, which may either
3 make it difficult to find workers or make it difficult to
4 find workers at similar costs.

5 Q May we look at page 28 of the FERC certificate?

6 Do you recognize this provision?

7 A I've seen it, yes.

8 Q And would you simply read it for the record, please?

9 A "The proposed projects in this proceeding, are designed
10 to primarily serve natural gas demand in the Northeast,
11 Mid-Atlantic, and Southeast regions. Through the
12 transportation of natural gas from the projects, the public
13 at large will benefit from the increased reliability of
14 natural gas supplies. Furthermore, upstream natural gas
15 producers will benefit from the project by being able to
16 access additional markets for their product. Therefore, we
17 conclude that the proposed project is required by the public
18 convenience and necessity."

19 Q That is the finding of FERC in the certificate order,
20 correct?

21 A That is correct.

22 Q And are each of these items that are mentioned here
23 dependent on the in-service date for the project?

24 A That is my understanding.

25 Q That is, both the ability of producers to ship and the

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1 ability of consumers to receive are dependent on the
2 in-service date for the project, correct?

3 A Correct. The gas moves from either end until it's done.

4 Q Now, you also mentioned, I think, the total cost for the
5 project?

6 A The management committee for the project has approved a
7 capital budget of \$3.7 billion.

8 Q And you mentioned an expected employment from the
9 project?

10 A When we're into mainline construction this summer, we
11 should have approximately 6,000 workers, including the
12 construction staff, the inspection staff that oversees the
13 construction staff, and various support groups to manage the
14 different tasks that go on during the construction process.

15 Q And you also mentioned indirect effects on the economy
16 from this project.

17 A Yes. There's some. Completion of the project when it's
18 done is about \$7 million in taxes in the state of Virginia,
19 the Virginia portion of the project.

20 MR. TEANEY: Objection. I don't know if -- this is
21 Derek Teaney, for the record. I object to the question and
22 the answer and move to strike them. I think they're calling
23 for information that the foundation for his knowledge has not
24 been laid.

25 THE COURT: Again, Mr. Teaney, I would appreciate

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1 your objection when the question is asked.

2 Mr. Massie, would you like to respond?

3 MR. MASSIE: Well, I think your point is a good one,
4 Judge. But beyond that, I think as project manager, he would
5 be familiar with the prospective benefits of the project, and
6 I think he's familiar with the research that's been done on
7 these topics and published by the --

8 THE COURT: Well, maybe you can establish that
9 foundation first.

10 MR. MASSIE: Okay. I will.

11 THE COURT: I'll strike it. I'll strike it for now.

12 MR. MASSIE: All right. Thank you.

13 MR. TEANEY: Thank you, Your Honor.

14 BY MR. MASSIE:

15 Q Just as far as the tax figure is concerned, where does
16 that come from?

17 A There were studies and reports that were done as part of
18 building the pipeline. It's my understanding those are
19 reports that have been filed with FERC and are available.
20 And I'm repeating the numbers that I've seen from those
21 reports.

22 Q All right. And it is your understanding those are filed
23 reports with FERC?

24 A That is my understanding, yes.

25 Q So they would be a public record of this number?

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1 A That's my understanding, yes.

2 MR. MASSIE: All right. We offer the number:
3 7 million.

4 THE COURT: All right. It appears there's no
5 objection, so that will --

6 MR. TEANEY: No objection.

7 THE COURT: The Court will accept that. Thank you.

8 MR. MASSIE: Thank you, Judge.

9 BY MR. MASSIE:

10 Q All right. If the Court allows possession, possession of
11 the property, can you tell us how the work will proceed?

12 A Yes. It might be helpful if I had a diagram, but in
13 general --

14 Q Hold on. I'll get you one.

15 MR. MASSIE: May I approach, please?

16 THE COURT: You may.

17 (Plaintiff's Exhibit 6 marked)

18 BY MR. MASSIE:

19 Q Okay. Mr. Cooper, I'm showing you what's been marked as
20 Number 6.

21 MR. MASSIE: For counsel's reference, this is part
22 of the project -- yeah, you've got it. Okay. You're ahead
23 of me.

24 BY MR. MASSIE:

25 Q Tell me what Exhibit 6 is, please.

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1 A Exhibit 6 is a drawing with some labels that provides the
2 basic steps of how a pipeline is constructed from the
3 beginning until restoration is complete.

4 Q And is it a reasonably accurate depiction of the process
5 in this case?

6 A Yes, it is.

7 MR. MASSIE: We offer Number 6.

8 THE COURT: Any objection?

9 MR. TEANEY: No objection.

10 THE COURT: Admitted without objection.

11 (Plaintiff's Exhibit 6 admitted)

12 MR. MASSIE: May we display it, please?

13 BY MR. MASSIE:

14 Q Okay. Mr. Cooper, take us through the process, please.

15 A All right. Starting with the portion that's labeled
16 Number 1, the first steps that you do is you go out and stake
17 the right-of-way; survey where you're going, and then stake
18 accordingly.

19 In our particular case, we'll go out and stake the limits
20 of the disturbance prior to knocking the trees down.

21 Obviously, during that process, you'll have to go back and
22 re-stake that before you start doing the other activities,
23 because you'll knock a lot of them down as the trees fall.

24 The next step will be clearing the trees, which then
25 we'll go next with grading. Sometimes there's a word known

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1 as "grubbing." That's where you're actually removing the
2 stumps and the various things that are there to prepare the
3 other activities.

4 Block 4 depicts stockpiling the topsoil. The way we
5 build these pipelines, we preserve the topsoil, because it
6 helps in restoration, and then we have to preserve it in a
7 pile so it's there to use at the back end. It just doesn't
8 get mixed in with the other earth that we disturb.

9 And then in 5, then we'll, as it depicts -- it says
10 re-stake the center line. There's also a lot of other
11 staking that goes on. We'll have to stake all the various
12 boundaries, limits of the disturbance, various restrictions
13 around wetlands and water bodies and other things that we're
14 required to under the permits.

15 And then, after we've got things surveyed off, in here,
16 we've also installed the erosion and sediment control plans
17 as approved by the two state agencies, so that as we have
18 removed the soil, we have other controls to protect the
19 various hillsides and land while we have taken away its
20 natural cover.

21 And then we begin ditching. Slightly different than the
22 picture in Number 6. This shows a trencher that's done by a
23 wheel. We probably will not do very much of that because of
24 the terrain and because of the fact that we're not flatland
25 in Oklahoma, where you can just plow through it very quickly.

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1 Most of ours will be done by excavators, so they will scoop
2 the right-of-way essentially a bucket at a time.

3 There will also be some places where there's rock, and in
4 a lot of cases that can be removed with an excavator. And we
5 have other approved techniques in the process to do that if
6 the excavator can't.

7 Then we prepare the trench bottom. So as we put the pipe
8 back in, imagine that it needs support, but you also have
9 this protective coating on it. So you don't want to leave
10 sharp edges and rocks and other things in the right-of-way,
11 because that then impedes your ability to protect it from
12 corrosion years down the road. So we'll prepare the trench
13 bottom and smooth it out and get it padded.

14 And then we do this step called stringing the pipes, and
15 that's where we take the pipe from storage and we lay it out
16 on the right-of-way.

17 Once we do that, in step 10, what that is depicting is,
18 even though this pipe is large, we can actually bend it in
19 the field. So to begin to manage the contours, both
20 left-and-right and up-and-down, we -- for lack of a better
21 word, we custom-fit the pipeline to the trench that we're
22 able to dig.

23 In places, there's limitations on the bend, because, as I
24 said, there's a coating that we've put on it. On those
25 places where we can't bend sharp enough to stay within the

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1 approved right-of-way, we have purchased premade fittings
2 that are of a sharper angle that then get welded in and
3 substitute for bending of the pipe.

4 So once we've figured -- you know, laid those all out,
5 then we begin to line those up and weld them together. So
6 you are beside the ditch; you weld several components
7 together. You have to test those welds to make sure they've
8 been installed correctly, and then you provide a coating on
9 those welded joints to make sure they're protected from
10 corrosion as well.

11 There's several steps to that. This pipeline will have
12 both manual welding, where you have individual men and women
13 who lay weld material, and we'll also be using automated
14 machines that will put the welding in as well.

15 Once that's done, step 13 basically shows us surveying so
16 that we know what pieces of the pipe are where. That's
17 called as-building the footage. That helps us true-up from
18 minor deviations from the original design drawings.

19 Then we inspect it. Volumetrically, we'll either use
20 what's called an X-ray or a radiograph. There are some
21 techniques where you use ultrasound. And you validate that
22 that weld has been made according to the procedures you've
23 done so that it is strong and being able to be used in the
24 ground.

25 Then once we've done those steps, we'll go along --

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1 step 16 shows us inspecting that coating. And there are
2 repair techniques if there are minor damages that occur.

3 And then in 17, we take those segments that we've built,
4 and in certain groups, we lower that into the ditch. And
5 then, again, we make sure that we know where it's surveyed
6 from a depth-of-cover standpoint, and then we begin the
7 backfilling process.

8 And then when that's done -- and backfilling also
9 includes standards and specifications to make sure what goes
10 in on top of the pipeline doesn't have material in it that
11 will damage the pipe. It's also done in the beginnings of
12 how we install the various controls to manage water intrusion
13 onto this disturbed right-of-way until we get it revegetated.

14 Then we will test the pipeline in segments. That's known
15 as hydrostatic testing. We'll essentially fill the pipeline
16 with water, raise it to the required pressures to validate
17 that the pipe has the integrity to hold the gas when we put
18 it in it, both from the pretested spiral welds and
19 straight-seam welds that the manufacturer of the pipe made,
20 as well as the welds that we installed and have already
21 looked at them volumetrically. Now we test them for
22 strength. Then we have to dry that pipe, clean it up, get it
23 ready for service.

24 And then once we've completely got the top in place,
25 ultimately then what we do is we put the topsoil back, we put

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1 the vegetation back as it's required, and then we have to
2 continue to monitor that until such time as we get the
3 vegetation back that the various permits require us to be
4 before we can leave the right-of-way.

5 We have to manage the erosion and sediment control
6 devices that are keeping the soil there until we get enough
7 natural growth that it replaces that. Then we can remove
8 those erosion and sediment control devices and ask to be
9 released from further monitoring of the right-of-way from,
10 ultimately, FERC, but also the state environmental control
11 agencies.

12 Q Now, to reach an in-service date, how many of these steps
13 would have to be completed?

14 A We have to be out through 20, item 20. We've got to be
15 hydrotested and tied in, meaning the pipe is connected from
16 beginning to end, and all of the tests have been associated.
17 And then we can begin the in-service process.

18 Q Even though there's some reclamation to be done?

19 A Correct. There will be an initial reclamation as you put
20 the pipe together, but we'll have to monitor the pipe to the
21 requirements of the certificate, and also from the various
22 state agencies.

23 In this case, the National Forest and the other federal
24 agencies we'll be crossing each have their own requirements
25 on making sure that before we're released from managing the

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1 right-of-way, that it has been revegetated.

2 Those steps can go on after the pipeline begins its
3 service life, and always does, or in my experience has always
4 done that.

5 Q Now, is there a term "menial construction," or "menial
6 construction method"?

7 A That's essentially what I've described here. Because, as
8 you see in the drawing or as I've described it, there are
9 several different types of pieces of equipment, and so as you
10 break these steps down, what you're essentially doing is
11 starting at a point, and you wish to go to that point and go
12 to another point, and work each of these steps in sequence,
13 so that the folks that are doing, for example, the trenching
14 are staying ahead of the people that need to be preparing to
15 bond the ditch, who are staying ahead of the people that are
16 stringing the pipe, bending the pipe, welding, and so on.

17 So you start the train, if you will, and then that train
18 works along the way. And then, if you can't go somewhere,
19 you have a property that you didn't get the trees cleared on,
20 or that you don't own, you're left with the option of you
21 have to stop that, and then gather up all these various
22 segments as they get to that endpoint and remove them off of
23 the right-of-way and move them around to the next place that
24 they can work. And that may not just be the next property.
25 Depending upon where the next access road is and the terrain

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1 between those two, it may block off a much longer linear
2 segment of the route that you can begin to then come back in
3 and do these detailed steps.

4 Obviously, if you do skip around, then at some point when
5 you're capable of coming back to that, then you repeat all
6 these steps at the places in between. But you can't get,
7 essentially, step 20 and then in-service completed until
8 you've connected the segments from beginning to end.

9 Q And is it practical to skip around a large number of
10 properties like those involved in this case?

11 A It is not.

12 Q This certificate was issued on October 13, 2017, correct?

13 A Yes, sir.

14 Q And since that time, has the company filed implementation
15 plans with FERC about completion of the work or describing
16 its progress towards beginning the work?

17 A Yes.

18 MR. MASSIE: Sorry, I forgot to ask.

19 THE COURT: That's fine. You don't need to ask each
20 time.

21 MR. MASSIE: It's okay to walk around?

22 THE COURT: Yes.

23 (Plaintiff's Exhibit 7 marked)

24 BY MR. MASSIE:

25 Q Okay. Mr. Cooper, I've shown you what's been marked as

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1 Exhibit 7. Can you tell us what that is, please?

2 A The beginning of it is the implementation plan as filed
3 on October the -- October of 2017.

4 Q And was that your first implementation plan?

5 A Yes, sir.

6 Q And in it, does the document describe the status of
7 conditions, for instance?

8 A Yes, sir.

9 Q And what other information is provided? Just general
10 topics.

11 A It's the supporting documents that support what we're
12 saying on those items. As part of the certificate, there are
13 certain requirements of things that FERC wishes to see done
14 before you can work; most usually in a specific area, but
15 some of these conditions involve some administrative and
16 other things that you have to do globally with a project.
17 And so these documents provide the basis whether we go back
18 to FERC. And they establish the condition; we provide them
19 either our evidence that we believe we've satisfied it and
20 turn that in to them, or we provide them an update on the
21 status of that at the time of the filing.

22 Any of those that are left open or unresolved require
23 supplemental filings as you go forward and complete those
24 activities and the work.

25 Q And has MVP made a supplemental filing?

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1 A Yes. I have to look and see if it's attached in here.

2 (Plaintiff's Exhibit 8 marked)

3 BY MR. MASSIE:

4 Q Is it Exhibit 8 in front of you?

5 A Why, yes, it is.

6 So on December 20th of this year, we supplemented the
7 initial filing. The certificate had 40 items in which they
8 wished us to complete or do certain activities. So as of
9 this filing here in December, it only addresses those items
10 that were remaining open and that needed additional support
11 as of this filing.

12 Q All right. And I believe Number 8 -- you can correct me,
13 but is that an abbreviated version without all of the
14 exhibits, to cut back on some -- to save some space?

15 A Yes. This appears just to be the text of the conditions
16 and the status, without all of the supporting documentation
17 that goes with it.

18 MR. MASSIE: We offer 7 and 8.

19 THE COURT: Any objection, Counsel? Or Mr. Howards?

20 MR. TEANEY: No objection, Your Honor.

21 THE COURT: Admitted 7 and 8 without objection,
22 then.

23 (Plaintiff's Exhibits 7 and 8 admitted)

24 BY MR. MASSIE:

25 Q And based on your work to date, when does the company

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1 expect to receive a notice to proceed from FERC for the
2 initial work of tree felling?

3 A In Virginia, or at all?

4 Q Well, project-wide.

5 A Project-wide, we've requested a limited notice to proceed
6 to start some work in West Virginia. We had requested that
7 staff reply to us by today. They had asked some other
8 questions earlier this week; we believe we've responded to
9 those. So we will be expecting their response either today
10 or the first of the week, unless there's some other question
11 that they need answered. I --

12 Q And in Virginia?

13 A In Virginia, we haven't asked for anything yet,
14 predominantly because we need to work through this
15 proceeding.

16 As has been stated in my deposition, and I think already
17 here by some of the other folks, we currently don't have the
18 approved erosion and sediment control plans from the Virginia
19 Department of Environmental Quality. We obviously have been
20 working with that staff and that department for many months
21 on getting those approved.

22 And to explain what those are, as you get to wetlands or
23 water bodies or stream crossings or the general things for
24 the right-of-way, there are different techniques on how we
25 manage erosion of that bare soil off of the area that we're

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1 allowed to disturb.

2 You'll hear the term "limits of disturbance." The idea
3 is that's the maximum boundary in which we're allowed to work
4 in, and we need to keep the soil and those erosion activities
5 inside of that. It also identifies things like, as we get
6 close to a stream crossing, how we manage that.

7 Storm water management is a supplement -- or not
8 supplement, but it's related -- on how you're going to manage
9 not just the erosion during the work, but how you're going to
10 manage storm runoff up until the point that full restoration
11 is done.

12 So the status of where we are now with them is we have
13 worked with them on modifications and variations to those
14 various standardized techniques. We believe we have
15 submitted everything they want in the final modifications;
16 expecting any day the first of the plans back.

17 The plans are broken up by work segments. So at the
18 state's request, and we agreed, we worked in great detail on,
19 one, to get the master techniques, if you will, approved,
20 that then they can be reapplied to the others.

21 We essentially have all of the plans in their hands. We
22 believe we've come to agreement on what all the controls are.
23 So we would expect one back relatively soon, the others
24 following.

25 The reason we haven't asked for specific work in Virginia

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1 yet depends largely on the outcome of what we're doing here.
2 If we have access to all of the properties, then we can go to
3 the FERC and ask permission to begin tree felling; and not
4 just tree felling by hand, but we can actually ask to go in
5 and do the work that would include mechanized tree felling.

6 If we don't receive them relatively soon, because hand
7 tree felling is not considered an earth-disturbing activity
8 and it does not require erosion and sediment plans, we will
9 apply to the FERC for a non-mechanized tree felling plan that
10 will allow us just to cut the trees without the erosion and
11 sediment plans, then followed behind that with establishing
12 those controls and doing the rest of the work.

13 So we're fast approaching the window where going ahead in
14 a normal work plan will not be viable by the species windows,
15 and we'll have to ask for that more limited set of work to
16 start.

17 THE COURT: Mr. Massie, can I ask a few questions
18 here? I just have a couple questions.

19 MR. MASSIE: Oh, sure.

20 THE COURT: Mr. Cooper, you said you had -- with
21 regard to West Virginia, you had requested FERC permission.
22 Is that for tree felling only, mechanized or non-mechanized?

23 THE WITNESS: We've asked for -- it's a limited
24 notice to proceed. It's for mechanized tree felling.
25 Currently, we asked for some work on access roads and laydown

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1 yards as the beginning steps.

2 In a similar manner to what I've described we're
3 doing with Virginia, we asked for a limited scope, because
4 there's a lot of information that the project exchanges with
5 the FERC staff, and if this was a way for them to do a
6 relatively quick review and give us feedback to tell us the
7 specific information they want to see to grant the notices to
8 proceed, because they are the master controller of going to
9 work; and they have several things they need to verify that
10 are in place, including the environmental conditions for the
11 area we're asking.

12 THE COURT: Let me ask you this: You said -- so
13 you've asked for mechanized tree felling in West Virginia.
14 But you noted, in Virginia, you've not asked yet because of
15 the need to work through this proceeding.

16 I understand there are West Virginia proceedings
17 that have not reached this point yet. Is that correct?

18 THE WITNESS: It -- well, yes. There's two pieces,
19 Your Honor.

20 In West Virginia, I have the approved erosion and
21 sediment control plans from the state environmental control
22 agency, so I'm allowed to do earth-disturbing activities
23 where I have the right to be on the land. And so this
24 limited notice to proceed only included properties that are
25 in that 85 percent of the project that we have, versus in

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1 Virginia, because I need to know which way I'm here. If I
2 get clear to be able to work straight through, I will likely
3 ask for notices to proceed to do mechanized tree felling if I
4 have the Virginia DEQ piece.

5 If not, if I have the properties, then I will
6 include them in the non-mechanized tree felling request, so
7 that we can go into February and March and cut trees.

8 THE COURT: Thank you for explaining that. I
9 appreciate it.

10 Thank you, Mr. Massie.

11 (Plaintiff's Exhibit 9 marked)

12 BY MR. MASSIE:

13 Q Okay. One more exhibit, Mr. Cooper. What is Number 9?

14 A Number 9 is a weekly status report. Once we have a
15 certificate, the FERC staff require us to provide them
16 updates on where things are, what work is going on.

17 Let me make sure I'm reading this correctly.

18 Yes, this is a weekly status report from November the
19 8th.

20 So in addition to supplements when we believe we have
21 completed the environmental conditions, from the beginning of
22 the project to the end, we are required to provide them a
23 weekly update of the various activities on the project, and
24 this is one of those reports.

25 Let me see if there's more than one in this paperwork

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1 group.

2 Q So this stack runs from November 8, 2017 to when?

3 A I'm getting down to the last one, sir.

4 Through January the 3rd.

5 MR. MASSIE: We offer number 9.

6 THE COURT: Any objection, Counsel, or the two
7 Mr. Howards?

8 MR. TEANEY: No objection.

9 MR. CLARKE: Your Honor, I would just ask, similar
10 to before, if the witness could confirm the Bates numbers or
11 the sequence of the Bates numbers, because the document that
12 I have, they sort of skip around. I just wanted to confirm
13 that I have what's been handed to him.

14 THE COURT: Mr. Massie, can you tell me, are the --
15 did you skip around in the Bates numbers here? Are these --

16 MR. MASSIE: I didn't mean to. I meant to copy
17 sequentially the Bates numbers.

18 THE COURT: It looks like we go from 9276; the next
19 one is 11132. Are each -- is each weekly report a different
20 set of Bates numbers?

21 MR. MASSIE: That may be true. I'm not certain of
22 that answer.

23 THE WITNESS: I can segregate them, Your Honor, if
24 you wish.

25 THE COURT: Mr. Clarke, is that what you require?

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1 Do you want him to go through and segregate these, or can you
2 take a look at it and then, on cross perhaps, ask him
3 questions about it?

4 MR. CLARKE: That's fine, Your Honor. I'd be happy
5 to do that.

6 THE COURT: That's fine. Let's do it that way.

7 BY MR. MASSIE:

8 Q If the Court is willing to grant immediate possession,
9 will MVP post a bond to secure the amount of just
10 compensation set by the Court for purposes of the bond?

11 A Yes. We're willing to do what the Court requires to
12 assure there's just compensation for the landowners.

13 Q Now, I believe with our original filing in this case, you
14 gave a declaration; is that true?

15 A I did, sir.

16 Q And are the statements made in your declaration correct?

17 A Yes, sir.

18 MR. MASSIE: Those are all the questions I have.
19 Thank you, Judge.

20 THE COURT: All right. Let me just note that
21 Exhibit 9 is admitted.

22 MR. MASSIE: Thank you. I forgot to ask that.
23 Thank you again.

24 (Plaintiff's Exhibit 9 admitted)

25 THE COURT: Counsel, have you agreed who is going to

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1 go first with regard to cross-examination? Mr. Teaney?

2 MR. TEANEY: Your Honor, I believe I have that
3 privilege, or burden, I suppose.

4 THE COURT: Very well.

5 MR. TEANEY: Thank you, Your Honor.

6 I'll note that we've gone a little bit longer than
7 the estimated time for direct for --

8 THE COURT: I'm shocked by that.

9 MR. TEANEY: Yes. You'll probably be equally
10 shocked when I note that I may not be able to conform to my
11 earlier estimate of cross.

12 CROSS-EXAMINATION

13 BY MR. TEANEY:

14 Q Good afternoon, Mr. Cooper.

15 A Hello, sir.

16 Q Let me first note or ask, who is your employer?

17 A Pardon me one second, sir.

18 Q Certainly.

19 A My employer is EQT Gathering, LLC.

20 Q Okay. So you are not paid by Mountain Valley Pipeline,
21 LLC?

22 A I am dedicated over to that project fully, and I am paid
23 by EQT Gathering, LLC. However, the project in total
24 reimburses the various partners if they have employees that
25 are assigned to it.

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1 Q Okay. And we'll use the term "partners," but I believe
2 they may also be known as "members," just because it's an
3 LLC. I don't want to quibble with you on that.

4 So can we just agree that we'll use "members" and
5 "partners" interchangeably?

6 A I am fine with that, sir.

7 Q Who are MVP's members or partners?

8 A There are -- there's EQT, one of its entities, whom I
9 work for, and in essence is the lead partner in the
10 partnership, who has been designated to construct, build, and
11 ultimately operate the project.

12 There's the subsidiary of NextEra, an energy corporation.

13 There's the subsidiary of Consolidated Edison
14 Corporation, which is a utility that serves the metropolitan
15 New York area.

16 There's the subsidiary of Washington Gas & Light, which
17 is -- serves kind of the Washington metropolitan area; I
18 don't know the exact extents of their service area.

19 And then there's Roanoke Gas.

20 There's also -- because Washington Gas & Light was
21 involved with another company called Vega, there's a company
22 called Vega that still has a revenue interest in the project.

23 Q Okay. Pardon me just a moment. Let me grab a document.

24 I believe you have up there with you as Exhibit 1,
25 Plaintiff's Exhibit 1, the FERC certificate. And I think

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1 Mr. Massie directed your attention to pages 5 and 6 of the
2 FERC certificate.

3 Can you take a look at those?

4 A Yes, sir.

5 Q And these list the shippers with whom you have precedent
6 agreements and now have firm contracts with; is that correct?

7 A That's my understanding, sir.

8 Q These names look really similar to the members that you
9 just identified of Mountain Valley Pipeline. Are these
10 shippers related to the members of Mountain Valley Pipeline?

11 A With the exception of Vega, those are other subsidiaries
12 of those same companies.

13 Q Okay. Is there -- all right. Is this what would be
14 known as an affiliate type pipeline? Is that a term that
15 you're familiar with?

16 A I believe that's the term that may be used.

17 Q What is an affiliate pipeline?

18 A Well, an affiliate would be another portion of the same
19 parent company, in my understanding.

20 Q Okay. Would it be correct to say that these shippers,
21 then, are paying to ship their gas on a pipeline that they in
22 some form, or at least they have a similar parent with, that
23 there's similar ownership there; is that correct?

24 A There's some corporate connection, yes, sir.

25 Q Okay. How common are affiliate pipelines in the pipeline

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1 industry, in your experience?

2 A I can't answer in the industry as a whole, because nearly
3 every project that I've built and worked on is either for my
4 own company or we have done a few projects for specific
5 companies that aren't affiliated with us.

6 Q Okay. So you've done some affiliate pipelines for EQT
7 and then worked on pipeline projects for folks who weren't
8 affiliated with EQT; is that correct?

9 A Correct. We've gone out and solicited other companies to
10 build pipelines to ship their gas.

11 Q Okay. We'll talk more about that as we work through your
12 testimony here today.

13 Now, you offered some testimony that there may be some
14 constraint on pipeline capacity out of the Marcellus shale
15 region, I believe. What is your basis for making that
16 assertion?

17 A I believe, as I had testified at my deposition, that was
18 a basis upon reading various industry documents that discuss
19 the various points in the system where shippers are being
20 paid less than a measured standard basis because there's more
21 gas trying to get into that portion of the pipeline network
22 than there is space available.

23 I believe I also testified that my own company has
24 various update meetings where they provide us information on
25 their perspective of the market conditions.

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1 Q Okay. So it's based on things you've heard from within
2 your own company and documents you've read in market -- in
3 industry press; is that correct?

4 A That's an accurate summary, yes, sir.

5 Q Okay. Not based on any expertise that you have by way of
6 education or experience?

7 A I do not work as a shipper or in any commercial capacity.
8 I manage projects and operate and build pipelines.

9 Q Certainly. You mentioned -- I think you mentioned that
10 the total project cost was \$3.7 billion; is that correct?

11 A I testified that the management committee of the
12 partnership has approved a budget of \$3.7 billion.

13 Q Is that based on an engineering estimate of how much the
14 construction costs would be?

15 A Yes, sir.

16 Q And do I understand that when engineers do estimates,
17 they do them at a certain level; there are Class 1, Class 2,
18 up through, like, 5, I think?

19 A Okay. That's one technique you can use, yes.

20 Q Okay. And those generally have a plus or minus with
21 them; is that correct?

22 A That's correct.

23 Q Is there a plus or minus with this \$3.7 billion estimate
24 on which the budget was based?

25 A As one might expect, as we've gotten this close to the

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1 beginning of large-scale construction, a lot of the
2 uncertainty in those earlier level of estimates goes away.
3 For example, this \$3.7 billion budget is based upon the costs
4 that are in the approved purchase orders that we discussed
5 earlier. So prior estimates would have been upon budgetary
6 estimates, and you have less knowledge about the details of
7 how you're going to build the project. So this one is much,
8 much closer to an accurate number.

9 There's a small amount of that that we call contingency,
10 meaning there are things that we expect to encounter in the
11 field but we can't count the specific footage.

12 One example would be there's an estimate in the project
13 based upon all the information we've learned of how much of
14 the right-of-way may need a technique beyond an excavator to
15 deal with rock. So you allow a little extra in that approved
16 budget so that, if you encounter more rock than what you
17 estimated, you can continue to pay for it without having to
18 go back to the partners and say, I ran into some more rock, I
19 need a little more money.

20 That number, as we expect to see it right now, I think
21 it's about 180 million out of that 3.7 billion is our money
22 to use for the things that you just can't know until you
23 start digging the ditch and deploying the equipment in the
24 field.

25 Q Is there a percentage, plus or minus, that's associated

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1 with that estimate, that 180?

2 A I mean, that's the number. Out of \$3.7 billion, it's
3 roughly 180 million that isn't allocated to a specific or
4 known cost.

5 Q Doing math on the fly is always dangerous. That looks
6 like it's about 5 percent?

7 A That's roughly so, yes.

8 Q And that other technique you were discussing, that's, in
9 fact, blasting, isn't it?

10 A Well, that's one of the techniques we can use, yes. We
11 can also use a mechanical hammer. And depending upon the
12 rock that you run into, how much you have to do, you would
13 choose the technique that suits where you are and what you're
14 permitted to do.

15 Q And what you encounter in the field?

16 A Correct. Correct.

17 Q Okay. I think you testified that y'all have acquired
18 approximately 85 percent of the tracts that are necessary, or
19 acquired 85 percent of the easements across the tracts that
20 are necessary, to construct the project?

21 A That's what I testified to yes, sir.

22 Q In your experience, is that an unusually low number of
23 voluntary participation?

24 A As I said in my deposition, the number of properties that
25 are represented here and in West Virginia is much higher than

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1 my experience base, yes.

2 Q And by "represented here," you mean here in these
3 condemnation proceedings?

4 A Yes.

5 Q Including the one --

6 A I'm sorry I didn't make that clear. Yes, that's -- for
7 the -- the purpose of why we're here.

8 Q Okay. These precedent agreements, they're with the
9 shippers. And I think we've established that the shippers
10 have an affiliate relationship with MVP or with its members;
11 is that correct?

12 A I concurred with that, yes.

13 Q Yes. Okay. And the precedent -- so under the terms of
14 the precedent agreements, they have committed to pay for a
15 certain percentage of capacity once the pipeline goes in
16 service; is that correct?

17 A Yes, sir.

18 Q Okay. And they will pay for that capacity regardless of
19 whether they ship that gas; is that correct?

20 A That's correct.

21 Q Okay. So the revenue, then, is coming from one affiliate
22 to another affiliate; is that correct?

23 A It's coming from several affiliates to several
24 affiliates, but yes.

25 Q Okay. There's no third party from whom shipping revenues

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1 will be received by MVP that's not in that affiliate
2 relationship?

3 A I can't answer. As I have said, I don't do the
4 commercial portion. If those affiliates produce all of that
5 gas themselves, or if they're going to obtain it from
6 shippers and sources on the market, I don't -- I don't know
7 that part of the system.

8 Q You don't know the upstream part of it, if you will?

9 A Yes.

10 Q Okay. And I believe you testified that it -- the
11 duration of the term is 20 years for these precedent -- the
12 precedent agreements that are now firm agreements, correct?

13 A That's correct.

14 Q And I believe that you admitted that -- well, strike
15 that.

16 I think you testified that it would be 40 to \$50 million
17 a month in revenue that would come to MVP from its affiliates
18 during -- once the pipeline is in operation; is that correct?

19 A That's correct.

20 Q How did you come to the number 40 to \$50 million, and why
21 is it a range?

22 A As we've said, the pipeline capacity has been fully
23 subscribed. The agreements contemplate a rate to be paid for
24 moving the gas. There are adjustments to that rate built
25 into the agreements for, predominantly, variations in the

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1 ultimate construction cost; if you will, a safety on either
2 end. If costs for some reason went beyond a certain amount
3 that was expected, it's -- the people spending that money
4 expect a certain return on it. There was some protection
5 that they would get additional revenue.

6 Likewise, there's a cap to that protection, where at some
7 point the shippers are protected in saying, Yeah, we knew
8 that there was some variability when we signed up because
9 you're early in the process, you don't know everything, but
10 at this point, you as the transporter have to carry that
11 additional burden for the cost of building the project.

12 So there's a range depending upon what the final cost of
13 the project is.

14 Q Okay. Does the shipping rate turn at all on the
15 commodity price of natural gas? If that question makes
16 sense.

17 A It does. And I don't know if there's a calculus in there
18 that sets the rate. My understanding is there's a rate for a
19 dekatherm of gas. So if there's some variability in the
20 commercial terms based upon the commodity prices, well,
21 again, I'm not testifying to that piece of the equation.

22 Q I understand. So it's possible, then, that the price of
23 natural gas would affect the monthly or annual revenue under
24 these contracts, correct?

25 A If it's already in there, yes, sir.

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1 MR. TEANEY: Okay. Beg your pardon while I grab my
2 copy of the precedent agreement?

3 THE COURT: Certainly.

4 BY MR. TEANEY:

5 Q When does the 20-year term of these agreements start to
6 run?

7 A When the pipeline is placed in service.

8 Q Under the terms of the precedent agreement, isn't it true
9 that MVP has until June 2020 to place the pipeline in
10 service?

11 A I believe that's the date that is the -- where shippers
12 could exit the agreement if the pipeline isn't finished, yes.

13 Q But before that, the shippers have no exit; is that
14 right? Well, based solely on in-service date?

15 A Solely on in-service date. There's other clauses in
16 there, yes, sir.

17 Q But doesn't the contract also provide that in the event a
18 shipper leaves because the in-service date of June 2020 is
19 missed, there is no liability to MVP? Correct?

20 A I believe that's the language, yes, sir.

21 Q So you're not testifying that MVP will experience any
22 harm under the terms in any penalty provisions of the shipper
23 agreement if they miss their targeted in-service date of fall
24 2018, correct?

25 A As I said in my deposition, I think those partners have

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1 great harm. There is a protection clause in there that if
2 you've spent several billion dollars and you don't get to the
3 date, that those shippers have an obligation to at least
4 reimburse you for what you've spent as a management fee.
5 Obviously, that reimbursement pales in comparison to building
6 a pipeline and operating it for 20 years.

7 Q Okay. Well, let's turn your attention, if you would, to
8 what looks to be page 8 of the first precedent agreement
9 there. And I apologize for not remembering what exhibit the
10 precedent agreements are.

11 THE COURT: That would be Exhibit 3.

12 MR. TEANEY: Thank you, Your Honor.

13 BY MR. TEANEY:

14 Q Exhibit 3.

15 A I'm sorry, sir. I missed the page number.

16 Q That's okay. It's page 8 of the precedent agreement.
17 The Bates number is 000-8028.

18 A I'm there, sir.

19 Q Okay. Can you read for the record paragraph -- what
20 would be paragraph 7C immediately above paragraph 8,
21 beginning with "Transporter shall"?

22 A Yes, sir. "Transporter shall not be liable in any manner
23 to the shipper due to the Transporter's failure to complete
24 the construction of the project within the time frame
25 contemplated herein."

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1 Q Okay. So under that provision, MVP would owe no monetary
2 penalty to its shippers if it fails to complete construction
3 on time; is that correct?

4 A That's the way I would understand that.

5 Q Okay. If you'll turn your attention to page 11 of that
6 same precedent agreement, Bates number 000-8031, I'm looking
7 at paragraph 11C, three little Is.

8 This provides that, in fact, if the contract is
9 terminated because of a failure to meet an in-service date of
10 June 1st, 2020, the shippers actually pay MVP back for the
11 costs that it's incurred to date, don't they?

12 A That's what the statement says, yes, sir.

13 Q Okay. And so just in sum, this 40 to \$50 million per
14 month of lost revenue, that would be paid from affiliates of
15 MVP to MVP, correct?

16 A Yes, sir.

17 Q Okay. And MVP could make that 40 to \$50 million a month
18 up on the back end if construction were -- or if the
19 in-service date were delayed by a year; isn't that correct?

20 A Assuming no other changes, yes, sir.

21 Q And the shippers are bound to adhere to these so long as
22 the in-service date is prior to June 1st, 2020; is that
23 correct?

24 A That's the way the contract is written.

25 Q So, in fact, that 40 to \$50 million a month would merely

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1 be delayed revenue, rather than lost revenue; isn't that
2 correct?

3 A That's one way to describe it.

4 Q Thank you. And in all events --

5 THE COURT: For everyone in the audience, I want you
6 to be nondisruptive, please.

7 Go ahead.

8 MR. TEANEY: Thank you, Your Honor.

9 BY MR. TEANEY:

10 Q And in all events, that revenue, once again, is coming
11 from one affiliate to another that share a common parent;
12 isn't that correct?

13 A Not directly from one affiliate to another, but from a
14 group of companies affiliated with the companies that entered
15 the partnership.

16 Q Okay. Does MVP have any employees?

17 A No, sir.

18 Q So it doesn't have any payroll that it has to make during
19 the delay, correct, that it would use those revenues for?

20 A Well, it has to make payroll for the employees that are
21 assigned to it. As I stated earlier, there are employees
22 from my company and some others who are working on the
23 project and assigned to it, and all of the partners through
24 funding the project pay for all of those workers as if they
25 were employees. But it's a fee that gets reimbursed outside

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1 of the project back to the company that's supplying the
2 employees.

3 Q But, in fact, that's just a question of which ledger of
4 the books of the ultimate parents that's assigned to, because
5 EQT, your -- the employer that pays you, is providing money
6 to MVP under the terms of its membership agreement, right?

7 A Correct.

8 Q MVP then pays back to your employer the money by which
9 you are paid?

10 A Right, but all --

11 Q Okay.

12 A All of the partners supply the money, that then goes back
13 to the workers. The majority of the workers assigned to the
14 project work for EQT, and there are a few that are assigned
15 that work for NextEra. And so the other partners contribute
16 to those costs, and then that pool of money then reimburses.

17 Q Okay. Do you have any educational background in
18 economics?

19 A I testified in my deposition, I do not.

20 Q I appreciate that. And I appreciate you clarifying that
21 we've talked about these things in the deposition, and I'm
22 not trying to be repetitive.

23 THE COURT: Mr. Cooper, I haven't seen the
24 deposition transcript, so I don't have the benefit of that
25 right now, so --

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1 THE WITNESS: So you wish me not to answer?

2 THE COURT: Well, no, you're welcome to answer that
3 way. I was just explaining that, for purposes of this
4 hearing, I don't have that background, so --

5 THE WITNESS: I understand. Thank you.

6 BY MR. TEANEY:

7 Q Right. So the questions are largely for the Court's
8 benefit, and I just -- I didn't want you to develop an
9 animosity towards me for asking questions we've already
10 talked about.

11 A I apologize if my demeanor seemed adversarial.

12 Q I apologize if mine does.

13 Okay. But you do not have an educational background in
14 economics, correct?

15 A I do not.

16 Q Okay. And for purposes of this, you have not calculated
17 any estimate of the time value of money that would be lost
18 because of the delay in the revenue rather than the loss of
19 the revenue, correct?

20 A I have not.

21 Q And you're not offering that today as an example of the
22 irreparable harm?

23 A I did not.

24 Q Okay. Thank you.

25 Let's talk a little bit about the bats and the bat

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1 deadline in the schedule that you are under.

2 There are properties that are the subject of this action
3 that you can conduct tree felling on in April and May and
4 August; is that correct?

5 A I think the better answer is, there are properties we may
6 be able to, if we -- if -- I apologize for a second.

7 If we've completed the appropriate surveys and determined
8 that there aren't potential places where the bats have
9 hibernated, then there is the opportunity to tree clears --
10 clear trees in a more expanded window that excludes June and
11 July, because June and July are the windows when the bats
12 would be roosting in the trees in what's known as the pupping
13 season, where there's juvenile bats, and until they're big
14 enough to fly on their own, they don't want you to cut any
15 trees at all.

16 Q Did you personally review each parcel to determine the
17 dates on which tree cutting was available?

18 A Me personally?

19 Q Yes.

20 A Members of the staff have created tables and lists of
21 windows. Windows are blocked, and as surveys get completed
22 during this time of year, one of the things we have to look
23 for is what's known as a portal. So a feature in the ground,
24 most likely. Could be even, in some cases, abandoned mining
25 or other things that have created a cave, if you will, that

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1 could contain bats. Then, this time of year, you can't
2 survey to see if it does or not.

3 So you have a couple of choices. You can assume that the
4 bats are there, and then in the right-of-way that's near that
5 portal, you take the conservative approach and you clear
6 those trees by March 31st; and that way you're assured that
7 you're not impacting them at all.

8 If you survey a tract and it turns out that there are no
9 portals, then you can be afforded this expanded window for
10 the bats, as long as you're far enough away from other
11 portals that existed to where you might be able to then clear
12 some tracts and trees, at least on portions of those tracts,
13 in that more expanded time frame which includes, for our
14 purposes, really April and May.

15 Q Well, you've completed most of the bat surveys in
16 Virginia, haven't you?

17 A I believe many of them are done. There's a tracking list
18 that shows if those surveys are complete or not.

19 Q But nonetheless, a lot of the surveys have been complete,
20 haven't they?

21 A They have. I think I tried to describe in my testimony
22 earlier that in the state of Virginia, there's about 16 miles
23 of the pipeline in the state where we know for certain that
24 those trees have to be cut down before March 31st. There's
25 another 50-some miles where the portal surveys have not been

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1 completed; and at worst case, if you found portals on those
2 surveys that would impact those, that would bring that total
3 to about 76.

4 It's likely that there's some balance between 16 and 76
5 that will be the amount of mileage that's mandated down by
6 March 31.

7 Q And how many miles -- so 76 out of how many miles?

8 A A little over 100. I forget the exact breakdown.

9 Q So there's 25 to 30 miles, then, that the bat restriction
10 does not apply to?

11 A That's correct.

12 Q Okay. And so you would be free to fell those trees after
13 March 31st; is that correct?

14 A That's my understanding, unless there's another species
15 restriction, and I'd have to refer to the table to make sure
16 there isn't. But yes; speaking to bats, the answer is yes.

17 Q Okay. So you've -- your declaration -- strike that.

18 You're seeking access to all of the properties along the
19 Virginia line in this action by February 1st, regardless of
20 whether they're in bat country or not; isn't that correct?

21 A That's correct.

22 Q Okay. But nonetheless, some of the mileage isn't in bat
23 country, is it?

24 A It is not.

25 Q So you wouldn't need to fell all those trees by March 31,

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1 would you?

2 A Just for the bats, that is correct.

3 Q I believe you testified about a limited notice to proceed
4 in the State of West Virginia that you've requested. Did I
5 understand that that does not involve any properties that are
6 subject to the West Virginia condemnation actions?

7 A That is correct, sir.

8 Q Okay. And, in fact, it just involves some access roads
9 and laydown yards in the northern counties of West Virginia;
10 is that correct?

11 A Yeah. It's like a first step.

12 Q Okay. And when did you submit that request?

13 A I don't remember the exact date, but I believe it was the
14 first part of January.

15 Q Okay. Well, let's -- allow me to --

16 MR. TEANEY: May I have just a moment to gather that
17 exhibit and approach?

18 THE COURT: You may.

19 MR. TEANEY: Thank you.

20 Mark this as Exhibit 1. And I have a copy for you
21 and a copy for the Court.

22 (Defendants' Exhibit 1 marked)

23 MR. TEANEY: This is marked as Defense Exhibit 1.

24 THE WITNESS: Okay.

25 BY MR. TEANEY:

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1 Q I was telling others as I was away from the microphone
2 that I'd like to mark this document as Defense Exhibit 1.
3 And this is a request for notice to proceed, number 1, is
4 what it's styled as.

5 Mr. Cooper, can you take a look at this document?

6 A Yes, sir.

7 Q Have you seen this before? Are you familiar with it?

8 A I have seen it before.

9 Q Can you tell me what it is?

10 A This is the limited notice to proceed that we submitted
11 to the FERC asking us to go to work, submitted on January the
12 5th.

13 Q Thank you.

14 MR. TEANEY: At this time I'd like to move the
15 admission of defense Exhibit 1.

16 THE COURT: Any objection?

17 MR. MASSIE: No objection.

18 THE COURT: Admitted without objection.

19 MR. TEANEY: Thank you.

20 (Defendants' Exhibit 1 admitted)

21 BY MR. TEANEY:

22 Q When did you -- did you ask FERC to respond to this
23 request by a certain time?

24 A I believe we did.

25 Q And when did you ask for their response?

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1 A I believe it's stated in the cover letter: January the
2 9th.

3 Q And have you received a response from FERC?

4 A Yes. We've had a couple of conversations with the staff,
5 as I testified here earlier, as to the form of data they wish
6 to see, and we resubmitted additional supporting data that
7 they wanted to see this week.

8 Q Do you recall the date that that data was submitted?

9 A I'm trying to -- I believe it was Wednesday, because
10 Tuesday was my deposition, so the day -- it was turned in on
11 Wednesday. So was that the 7th; 8th, maybe.

12 Q They're starting to run together, aren't they? I believe
13 it was the 10th.

14 A Yes, okay. I'm sorry. I apologize for not keeping track
15 of my calendar.

16 Q It's partially my fault. You can't keep track of the
17 time -- of the dates.

18 So, but nonetheless, you requested them to issue this by
19 January 9, and FERC did not, right?

20 A That's correct.

21 Q I believe you testified at your deposition that this was
22 a relatively limited and straightforward request for a notice
23 to proceed, didn't you?

24 A I even mentioned it here as such, that's it's the trial
25 meant to establish the standard format that the FERC staff

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1 would like to see the data in. So as you submit larger
2 groups of information, we have a much better assurance that
3 we give them everything they need at the beginning of the
4 request.

5 Q Sure. Because sometimes it can take quite some time to
6 get a notice to proceed issued by FERC; isn't that correct?

7 A Depending upon the nature of the request, I believe
8 that's correct.

9 Q Okay. And I think this demonstrates, doesn't it, that
10 it's difficult for y'all to predict the time frame by which
11 FERC will respond, isn't it?

12 A I have no ability to make the FERC give me anything by a
13 date. I can request its support.

14 Q Understood. Have you submitted a request for any notice
15 to proceed that would allow you to conduct tree felling of
16 any kind in the state of Virginia?

17 A I believe I've just testified, the answer to that is no.

18 Q When do you intend to submit such a request?

19 A I believe I testified we're fast approaching the date,
20 pending a couple of factors. One is, can we ask for earth
21 disturbing activities or not? And then one was to understand
22 the results of these proceedings, if possible, because it
23 changes the nature of the request.

24 Q So you are, in part, waiting to see what this Court does
25 before you submit a request to fell trees to FERC; is that

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1 correct?

2 A It's a possible choice, yes.

3 Q But yet -- you're asking this Court to give you
4 permission to have access as of February 1st, yet you don't
5 have permission at this time, nor have you requested such
6 permission, to cut trees as of February 1st?

7 A That's correct.

8 Q And it's, in fact, possible that even if you were to
9 request that notice to proceed tomorrow, you wouldn't have it
10 by February 1st, correct?

11 A That is possible.

12 Q In fact, it's likely, based on the amount of time that
13 FERC takes to review notices to proceed in your experience,
14 isn't it?

15 A I can't speculate if it's likely or not. As we talked
16 about in the construction diagram, part of doing the tree
17 clearing would involve surveying. That needs to occur in
18 front of the tree clearing.

19 So access to the properties on February 1st provides time
20 to complete the flagging and surveying on the properties that
21 we can't access yet, while we're finishing up the approvals
22 to either do full mechanized tree clearing in those places
23 that we had the ability to do earth-disturbing activities or
24 submit and get approved the plan to do non-mechanized tree
25 clearing in those same areas.

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1 Q It's, in fact, true that you may not have a notice to
2 proceed to conduct tree felling before March 31st; isn't that
3 true?

4 A I can't speculate when I'll get one. So the answer to
5 your question is, it's possible.

6 Q And the longer you wait to apply for one, the more
7 probable that becomes; isn't that true?

8 A There's a delay factor, yes, sir.

9 Q Let's probe a little bit about the earth disturbance
10 prong of what we were just talking about. And that turns on
11 whether or not the Virginia Department of Environmental
12 Quality approves your erosion and sediment control plans; is
13 that correct?

14 A That's what I've testified to.

15 Q And the -- you are required to obtain those approvals as
16 a condition of your Section 401 certification from the state
17 of Virginia; isn't that correct?

18 A We were, yes.

19 Q And isn't it true that the conditions on Virginia
20 Section 401 certification become conditions of your FERC
21 certificate?

22 A Yes, sir.

23 Q So one of the conditions that you must satisfy under your
24 FERC certificate now is that you get these erosion and
25 sediment plans approved by Virginia DEQ, correct?

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1 A That's correct, and I testified to that here as well.

2 THE COURT: And I would just note, Mr. Teaney, that
3 I am able to remember the things he's testified to earlier.
4 It hasn't been that long. So if we could not just have
5 repetition.

6 MR. TEANEY: Certainly. It's not my intention to
7 replot old ground.

8 THE COURT: Otherwise we're going to be here a long
9 time.

10 MR. TEANEY: It's not my intention to. And I will
11 try not to. I will try not to replot old ground.

12 THE COURT: Thank you.

13 MR. TEANEY: You're welcome.

14 BY MR. TEANEY:

15 Q I do not believe we have talked about some of the other
16 conditions on your FERC certificate, however, one of which is
17 Condition 15, which requires you to complete certain -- or
18 get concurrences from the state historical agencies; is that
19 correct?

20 A That's correct, for specific locations that we may
21 impact.

22 Q And, in fact, you must -- FERC recently asked you for
23 more information about your satisfaction of that condition,
24 didn't it?

25 A I believe that's correct.

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1 Q And is one of the things that they asked for that you all
2 do an effects assessment of the pipeline's effect on the Bent
3 Mountain Apple Orchard?

4 A I believe that's one of the areas, yes.

5 Q Did you, in fact, provide that effects assessment to FERC
6 by the deadline that they requested it?

7 A I don't recall if we made the date or not, sir.

8 Q Have you provided an effects assessment to FERC regarding
9 the Bent Mountain Apple Orchard?

10 A There's a status report that would show that. As I sit
11 in this chair, I don't recall the status of that particular
12 item.

13 MR. TEANEY: Okay. I would like to introduce an
14 exhibit that I need to pull from my boxes, so I beg the
15 Court's pardon.

16 THE COURT: Go ahead.

17 MR. TEANEY: May I approach, Your Honor?

18 THE COURT: You may.

19 MR. TEANEY: Thank you.

20 I'd like to mark --

21 THE COURT: Like Mr. Massie, you don't need to ask
22 each time.

23 MR. TEANEY: Okay. Thank you, Your Honor.

24 I'd like to mark this as a Defense Exhibit 2. I
25 have a copy for the Court.

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1 THE WITNESS: Thank you, sir.

2 MR. TEANEY: Thank you.

3 (Defendants' Exhibit 2 marked)

4 BY MR. TEANEY:

5 Q Do you recognize this document, Mr. Cooper?

6 A I do, sir.

7 Q What is this?

8 A This is a data response, or basically responses to data
9 requests, to FERC.

10 Q And is this the response that you provided to FERC after
11 it requested more information about your satisfaction of
12 Condition 15 of the FERC certificate?

13 A I believe that to be correct. They send us a data
14 request, and then they give us a time frame in which they
15 wish us to reply. And we supply the information, and supply
16 it back, yes.

17 Q Are you aware of any further supplements to FERC in
18 response to their request on Condition 15 other than that
19 provided on January 5, 2018?

20 A I am not at this time.

21 MR. TEANEY: Okay. At this time I'd like to move
22 Exhibit 2.

23 MR. MASSIE: No objection.

24 THE COURT: Admitted without objection.

25 (Defendants' Exhibit 2 admitted)

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1 BY MR. TEANEY:

2 Q Mr. Cooper, I would direct your attention to page 19 of
3 MVP's response to FERC.

4 A Yes, sir.

5 Q And in looking at your response there in the middle of
6 the page, isn't it true that you told FERC that MVP did not,
7 in fact, submit an additional effects assessment to Bent
8 Mountain as requested, because MVP didn't think it was
9 necessary?

10 A That's a reasonable outtake summary of the words on the
11 page, yes, sir.

12 Q Thank you.

13 FERC also asked you to provide it with time frames by
14 which you were going to have certain -- obtain certain
15 concurrences from the Virginia State Historic Preservation
16 Office; isn't that true?

17 A I believe that's correct, sir.

18 Q And isn't it true that, on a number of occasions, MVP did
19 not provide such time frames to FERC?

20 A Without reading the whole document, I can't say yes or
21 no. If you say so.

22 Q Okay. Well, let's -- by way of example, looking at
23 page 30, does this page reflect that FERC asked you to
24 provide a copy of Virginia's review of avoidance plans for
25 certain archaeological sites, and then you say that comments

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1 will be filed with FERC when received, but without an
2 estimate of when MVP would actually be able to do that?

3 A That's a correct statement.

4 Q So, at this time, you haven't provided FERC with any
5 basis to know when you might be able to satisfy Condition 15
6 of your FERC certificate; isn't that correct?

7 A Correct, because you're working with the local agency
8 that you have to evaluate that resource with and get their
9 concurrence or not, and then provide that report. So without
10 it in hand, there's the inability to say, We've agreed and
11 we're waiting on the administrative letter, or that we
12 haven't. So we can't give them a date.

13 Q Sure. So -- and that happens anytime you're dealing with
14 an agency, right?

15 A For the most part, yes.

16 Q For the most part. So in dealing with FERC on the
17 notices to proceed, or with DEQ on the E&S plans, or with
18 Virginia's historical resource agency on the 106
19 concurrences, you simply can't estimate when you'll obtain
20 those things, right?

21 A I believe in most of these cases, I have no ability to
22 enforce a time frame for their response or concurrence.

23 Q So it's possible that any of those items could delay you
24 or delay MVP from actually cutting the trees to make the
25 March 31st deadline; isn't that true?

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1 A It is possible, yes.

2 Q Let's talk about the construction contracts that you've
3 entered into. I believe these were marked as Exhibit 5. Do
4 you have that with you?

5 A I do. Give me a moment.

6 Q Certainly.

7 Do you have them?

8 A Yes, sir.

9 Q Okay. And I believe your testimony was that as a result
10 these contracts, if you aren't able to start -- if you have
11 to wait until November 2018 to start tree felling, you could
12 incur up to \$200 million in penalties?

13 A Penalties and delay charges.

14 Q Penalties and delay charges?

15 A At a maximum, yes.

16 Q Was MVP coerced into entering into this contract?

17 A No, sir.

18 Q So it was a result of arm's length negotiations?

19 A Yes, sir.

20 Q Does MVP -- do MVP or any of its affiliates have
21 affiliate relationships with the contractors that you've
22 retained?

23 A No, sir.

24 Q So they were third party, arm's length transactions.

25 Okay.

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1 Isn't it true that if this Court were to deny the early
2 access injunction, you could simply terminate those master
3 services agreements without incurring any of the penalties
4 that are otherwise spelled out in them?

5 A I don't know the answer to your question. I believe I
6 have to pay them as they're written in the purchase orders.

7 Q You participated in the negotiations of these contracts?

8 A I participated in the negotiations.

9 Q And you signed two of them; is that correct?

10 A I did, yes.

11 Q Okay. I would direct your attention to -- I guess it
12 would be page 17 of the first master services agreement.
13 This is the one between Mountain Valley Pipeline and --
14 blacked-out -- November 22, 2017.

15 I direct your attention to page 17 of that, which is
16 Bates number 001-0029. And I direct your attention to
17 provision 6.3.1, and I'd ask you to read it into the record.

18 A "The Company shall have the right to terminate the work
19 or any part thereof under any purchase order or any such
20 other applicable contract documents for its convenience,
21 without cause, at any time, by providing 48 hours' prior
22 written notice to the Contractor. Upon receipt of such
23 notice, the Contractor shall immediately cease the
24 performance of the work, except as may be authorized by the
25 Company as being necessary to preserve or protect the work

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1 previously performed. In the event of termination under this
2 section, the Contractor shall be entitled to a percentage of
3 the purchase order price for the project work reflecting the
4 percentage of the work actually completed, in accordance with
5 the contract documents, prior to the effective date of such
6 termination. Payment of such terms hereunder from Company to
7 the Contractor shall be subject to any conditions, precedent,
8 or charges set forth in the contract documents."

9 Q Under the purchase orders that you have issued, has any
10 work been performed -- strike that. I can see the confusion.

11 Under the purchase orders that you've issued under these
12 master construction agreements for mainline pipeline
13 construction, has any work been performed?

14 A The reason I'm hesitating is I'm trying to see if there's
15 been any that's commenced, and I believe the only thing
16 that's in there is the equipment hold charges, and some other
17 things that are in there from the perspective of preparation
18 to go to work.

19 So there's minor things, but there's not, like, physical
20 people in the field yet, if that's what you're asking.

21 Q Right. So if you were to be denied this injunction, one
22 of MVP's options would be to terminate these contracts,
23 wouldn't it?

24 A It would be my understanding -- because this particular
25 paragraph, I've been involved in using before. You see the

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1 way it's written, it really talks about being in the middle
2 of the job. And for us, if, for some reason, we wish to not
3 have that contractor finish it, my understanding would be the
4 language that we put in the purchase orders for delay and
5 cancellation was our way to define what would be argued by
6 the contractor that they should be entitled to something.

7 Q Can you point me to anything in the purchase orders that
8 you've issued that would be contrary to this termination
9 provision?

10 A I have not -- I cannot.

11 Q You cannot? You have them with you, right there in front
12 of you. Would you like to take a look?

13 A Can you repeat the question to make sure I answer it
14 correctly?

15 Q Well, I asked you if there was any reason that you
16 couldn't simply terminate the master services agreements
17 without incurring the penalties that you talked about, and
18 you suggested that the purchase orders may in some way --
19 that this termination provision may not be applicable in that
20 circumstance, because of the terms of the purchase order.

21 And I'm asking you if you can point me to the terms in the
22 purchase order that would negate this termination provision.

23 A And without reading every one of the details here, I
24 can't say in the affirmative that there is something.

25 I can say, in my detailed discussions with the

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1 contractors when we wrote the purchase orders, that was one
2 of the major concerns, was that we each entered into an
3 agreement in light of the fact that by the time the purchase
4 orders were written, which the first were issued after the
5 certificate was received, because it was in October, after
6 the date of the certificate, even though the master services
7 agreements, which are the governing documentation were
8 signed -- one of them was signed prior -- the concern was
9 there were still a lot of things at that time that were
10 unknown, from a federal permitting standpoint and others that
11 might let us go forward, so we entered into agreements in the
12 purchase orders to govern how to exit to provide those
13 contractors some fair compensation for their -- for their
14 reservation.

15 If you're saying, what's the plain language reading of
16 this paragraph, I would have to concur with what you have
17 explained.

18 Q I would direct your attention to purchase order -- I
19 guess it starts at Bates number 10080.

20 A You said 80, sir?

21 Q Yes, sir.

22 A Okay, I'm there.

23 Q What's the date of this purchase order?

24 A 10-10.

25 Q What's the date of the FERC certificate?

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1 A 10-13.

2 Q So you, in fact, issued the purchase orders before the
3 FERC orders were issued, didn't you?

4 A I did, so I conflated the dates. But they were very
5 cogent. We anticipated that.

6 Q Could you have terminated the contract if FERC didn't
7 issue the FERC certificate?

8 A I believe we could have, yes.

9 Q Under what provision? The termination provision we just
10 talked about, right?

11 A Yes, sir.

12 Q Notwithstanding the fact the purchase order had been
13 issued, and the crews reserved, right?

14 A Correct.

15 Q Okay. In all events, under the delay charges of the
16 purchase order, if you failed to direct them, the crews, to
17 go out and cut trees on a particular spread, you'll incur a
18 charge; is that correct?

19 A Correct.

20 Q You have access to 85 percent of the properties along
21 this line, correct?

22 A Correct.

23 Q You could mitigate those delay charges by directing the
24 crews to conduct tree felling on those properties that you do
25 have access to, couldn't you?

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1 A That's an option, yes.

2 Q Did you describe the \$200 million calculation as a
3 worst-case scenario during your deposition?

4 A I said "maximum." That's -- you know, everything were
5 paid for delays, and termination didn't occur until the end
6 of the summer, that's the aggregate of all those combined.

7 Q You know, I will confess that in this accelerated
8 process, I didn't have time to add up all of the charges that
9 I could find. But just again looking at the purchase order
10 that begins on 100080, let me just proffer that I calculated
11 the delays for just one -- so there's a delay charge per
12 spread, correct?

13 A There are delay charges for delayed tree clearing. There
14 are delay charges for starting a mainline construction. And
15 there are termination charges, with a schedule that escalates
16 in cost as time goes forward.

17 Q But -- okay. And so the sooner that you cancel the
18 contract, the greater the mitigation of that \$200 million
19 figure, correct?

20 A That's correct.

21 Q Okay. Would you remain employed if you let all of those
22 \$200 million in charges accrue, without canceling the
23 contracts sooner?

24 A I would hope that if I got out to that point, there were
25 reasons that the project committee would want us to not have

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1 done them earlier. If I made those decisions on my own, sir,
2 your assertion is probably correct.

3 Q Okay. So there are ways to mitigate, and the prudent
4 thing would be to mitigate those delay charges, correct?

5 A As the facts on the ground presented themselves, that's
6 why there's an escalation schedule, yes, sir.

7 Q In all events, even if, in the worst-case scenario, you
8 incur the \$200 million in charge penalties, that's roughly
9 equivalent to the 5 percent contingency that you testified
10 about earlier that's in your final estimate, correct?

11 A Roughly, sir, yes.

12 Q In your experience, is a 5 percent construction increase,
13 you know, over the course of the life of a project unusual?

14 A It is not. But there's still the other things you
15 haven't done, if you take these and go on. So it'd be more
16 than 5 percent, probably, to finish this job.

17 Q Understood. But that \$200 million is 5 percent, and
18 5 percent is not an unusual increase on a project of this
19 scale, correct?

20 A Yeah, I just said it is not.

21 MR. TEANEY: I beg your pardon while I grab a
22 document off the table.

23 THE COURT: Mr. Teaney, can you tell me about how
24 much longer you're going to be? I try and take a break about
25 every two hours.

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1 MR. TEANEY: Understood. If we are at two hours
2 now, if I could finish one line of questioning on the
3 quantification of the irreparable harm, the next thing I want
4 to explore is the schedule as they discussed it, and then
5 I'll be wrapped up. So this might be a natural breaking
6 point.

7 THE COURT: Yeah, let's go ahead and take -- we'll
8 take a ten-minute recess now, if you would declare that.

9 THE MARSHAL: All rise.

10 (Recess, 3:38 p.m. to 3:52 p.m.)

11 THE COURT: You guys are going to have to be quicker
12 about being quiet, please.

13 Mr. Teaney, before you start back up again, Counsel
14 and Mr. Howards, I was wondering how long -- we're limited
15 somewhat in how long we can go this evening, because we have
16 certain persons here that, you know, engage in physical labor
17 while they're sitting here, and there are limits to physical
18 capacities. But I didn't know with regard to availability of
19 counsel, availability of witnesses, so I'd like to address
20 that. And I doubt that we're going to finish today. So then
21 we need to talk about whether we're available to be here
22 either Saturday, Sunday, or Monday, which is a federal
23 holiday, or Tuesday morning, perhaps. But after Tuesday at
24 noon, I am not available.

25 So, first of all, let's address this evening. Is

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1 there anyone that would be -- would not be available, of
2 counsel or the pro se defendants or witnesses, who would not
3 be able to be here? I can't see going later than 8 o'clock,
4 7 or 8 o'clock. It depends on what we can do.

5 MR. TERPAK: Your Honor, I've asked our counsel
6 table here, and I think we're all content to keep going this
7 evening as long as you can. We do some have elderly clients
8 that we'd like to respect. But I think if we're going to
9 continue another day, perhaps they can be excused and come
10 back the next day.

11 THE COURT: All right.

12 Mr. Massie?

13 MR. MASSIE: Certainly, Your Honor, we're here to go
14 as long as the Court can have us tonight, or tomorrow or
15 Sunday or Monday or Tuesday. Any of those days, we're ready
16 to proceed.

17 I will say this, that I know a lot of witnesses have
18 been identified on the other side. And we're going to call
19 those people, but the issues, we think, are pretty narrow,
20 and some of the subject matters that we've seen, I don't know
21 will fit the Court's evidentiary rulings.

22 I'm thinking that, if there are disagreements with
23 the certificate or project and those kind of things, that
24 type of evidence may not be admitted.

25 THE COURT: All right. Thank you, Mr. Massie.

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1 With regard to defendants, are there any limitations
2 with regard to Saturday, Sunday, Monday, or Tuesday morning?

3 MR. ROBERTSON: Respectfully, Your Honor, I will not
4 be available on Monday.

5 MR. CLARKE: Your Honor, this is Stephen Clarke. I
6 have a hearing in Chesapeake on Tuesday morning, so I will
7 not be available on Tuesday morning.

8 MR. LOLLAR: Your Honor, Charles Lollar. I have
9 plane reservations and was planning on flying out Tuesday, so
10 I would have to change that.

11 THE COURT: So not available on Tuesday?

12 MR. LOLLAR: Not available Tuesday.

13 MR. ELIJAH HOWARD: Your Honor, just as a
14 suggestion: I am available, but Sunday is the Lord's day,
15 so...

16 THE COURT: So you'd prefer not Sunday?

17 MR. ELIJAH HOWARD: I would prefer that.

18 THE COURT: I understand that.

19 MR. CLARKE: Your Honor, Stephen Clarke again. I
20 don't know if it would be possible for us at a break to
21 consult with some of our clients. I know I have several
22 clients who are here and are expecting to testify. I hope
23 they will be available on one of the days the Court is
24 talking about, but at this point I don't know what my
25 clients' availability is, so...

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1 THE COURT: All right.

2 MR. LOVETT: Your Honor, Joe Lovett. That's also
3 true for our witnesses, our experts. I haven't talked with
4 them about their availability and don't know when it is.

5 THE COURT: I'm going to take another brief recess
6 so you can do that, because I have to let people here know
7 this evening if we're going to need people here Saturday,
8 Sunday, or Monday. So I'm going to take another -- I'll take
9 another ten-minute recess. Please discuss that amongst
10 yourselves, with your clients, and then I can let the
11 Marshal's office know whether we're going to need people here
12 on Saturday, Sunday, or Monday.

13 So let's take a ten-minute break for that purpose,
14 then.

15 THE MARSHAL: All rise.

16 (Recess, 3:57 p.m. to 4:07 p.m.)

17 THE COURT: All right. What's the consensus,
18 Counsel?

19 MR. TEANEY: If I understand the consensus, and I'm
20 sure that the other folks at this table and this table will
21 correct me if I'm wrong, but I believe that nearly everyone
22 is available on Saturday -- is that correct? -- to continue
23 these proceedings.

24 I believe Mr. Clarke may have an exception.

25 MR. CLARKE: Your Honor, I have one client who is

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1 heading to Richmond after this for the weekend.

2 THE COURT: Well, perhaps we can call that --

3 MR. CLARKE: I agree, Your Honor.

4 THE COURT: -- witness out of order when we finish
5 with Mr. Cooper's testimony. Would that be possible, to call
6 that witness out of order?

7 MR. CLARKE: That would be fine with me, Your Honor.

8 THE COURT: Anyone object to that? All right.

9 MR. MASSIE: Who is that witness?

10 MR. CLARKE: Mr. Williams. Dowdy Farm, LLC, Michael
11 Williams.

12 THE COURT: All right. Then let's plan -- we'll go
13 tonight for a while. We'll see how we do. We will plan to
14 start up again tomorrow morning at 9 a.m.

15 And if we go beyond tomorrow, everybody is in
16 trouble. That's all I have to say. There's no reason we
17 should go beyond tomorrow, no reason at all.

18 All right. Mr. Teaney, then you may resume your
19 cross-examination of Mr. Cooper.

20 Are you doing okay, Mr. Cooper?

21 THE WITNESS: I'm fine, Your Honor.

22 THE COURT: All right.

23 MR. TEANEY: Thank you, Your Honor.

24 BY MR. TEANEY:

25 Q Mr. Cooper, I just want to come back and clarify a point

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1 regarding the \$200 million in potential contractual charges
2 or cancellation penalties.

3 Is that a global number across the entire route?

4 A Yes, sir.

5 Q So that's not just Virginia; that's if you didn't get
6 access for West Virginia as well, correct?

7 A Correct, it's the aggregate of the project.

8 Q Okay. Thank you.

9 Okay. I believe the final quantified item that you
10 testified about -- and I'll call them "administrative costs,"
11 for lack of a better word. These are kind of the carrying
12 costs that MVP will incur because of a delay. And I believe
13 you quantified that to be in the neighborhood of \$40 million
14 for the period between -- if you were delayed until
15 November 2018; is that accurate?

16 A That's correct, sir.

17 Q Okay. And are there documents that support this? Would
18 it -- strike that.

19 How did you come up with that number?

20 A As I've stated, that number was looked at from the items
21 that we will have to continue to do, even though we wouldn't
22 be doing the mainline construction activities and the
23 facilities activities, if we were suspended until we got out
24 into the fall of this year to start trees.

25 And so those examples include the staff and the employees

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1 that we would keep; it includes various charges, like we have
2 warehouse and materials holding facilities, so the rents on
3 those; the personnel that you hire there to manage the
4 equipment; certain inspections that have to go on. I've
5 illustrated one example with coating on the pipe that's
6 exposed to the sun and activities we may have to take there.

7 Because we would be assuming that we would be starting
8 again in the fall, we currently are aiding the contractors in
9 holding the leased equipment. Most of these contractors have
10 some construction equipment of the appropriate size to build
11 this project, but most of them also get extra equipment, or
12 lease it for a period of time.

13 Because of the amount of that equipment that's currently
14 being used in the country, leasing agencies have started
15 charging a reservation fee. And so currently we're incurring
16 some of those, and our current status is we're sharing that
17 cost with the contractor. The assumption that I put this in
18 includes we would still share it. I could likely see a
19 negotiation where, if they know they're going to use it for
20 months, but they still need to hold it, they would ask us to
21 up our proportion. But that wasn't included in the estimate
22 yet.

23 I'm trying to remember all the other categories.

24 I think I budgeted over the summer that we would incur
25 incremental legal fees, because I'm quite sure that those

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1 companies and others would be challenging what had occurred.
2 Even though there's language in the contract, I still have to
3 hire the appropriate representation to work through all those
4 things.

5 So it's a -- the forecast that we have of the things that
6 we know we have to do, and some of the items that we would
7 likely incur if we weren't working.

8 Q You say you budgeted for increased legal fees. How did
9 you come up with the number?

10 Well, first, what number did you assign to increased
11 legal fees?

12 A Through the summer, the forecast has \$2 million in it.

13 Q And how did you come up with \$2 million?

14 A That's a number that's already in our budget for some of
15 the legal fees that we anticipated we might incur. It is not
16 a specific accounting of firm X for X dollars for X hours of
17 use of the attorney's time. It is a forecast, a placeholder
18 in the budget, for likely expenses. It is not a specific
19 accounting.

20 Q It's included in the budget. Is it included in the
21 \$3.7 billion budget that's been already approved by your
22 board?

23 A In this estimate, it's what we believe would be
24 incremental because we aren't working for the summer. I have
25 other fees of things we believe we would have to continue to

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1 have legal representation on if we're building the project.

2 Q Are any of these items that are included in your
3 \$40 million estimate already included also in the
4 \$3.7 billion budget?

5 A The work items are, like the employees. But because the
6 project isn't working, they have to be retained, and then
7 you'll start up again and do that. So you're paying them
8 through the summer not to do what you thought you would have
9 them doing. They're doing other activities.

10 And as I've explained, some of those activities are
11 things that we'll incur to just manage the assets we have,
12 and then they'll need to be here longer on the back end.

13 So the number I provided is what I think it will cost me
14 to bridge that gap of not working on the project from the
15 spring of this year until the fall of this year. So they're
16 the same items, in some cases, that are in the budget now
17 that are assumed we're working, because they're the same
18 things. It's the same person: Me. You know, I'll be
19 assigned to this project longer if we don't get to work, as
20 an example.

21 Q Understood. Is there anything different about the items
22 you placed into this -- this "bucket," for lack of a better
23 term, that wouldn't be in the same bucket for a delay
24 attributable to a failure to obtain a notice to proceed from
25 the FERC or the failure to obtain the DEQ approval, or the

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1 failure to obtain the Virginia historic commission's
2 approval? Same kind of delays, same kind of costs, right?

3 A I don't believe any are different.

4 Q Okay. So there's nothing special about property access
5 to these items?

6 A Nothing unique. I think the question that I was asked to
7 answer, not from you, but globally, was: What would you
8 incur if the delay occurred in the context of not having
9 property access? But there's nothing unique if there was
10 another substantial cause for the same time period of delay.
11 Does that make sense to you?

12 Q Is approximately half that \$40 million estimate for
13 project staff, salaries, wages, et cetera?

14 A Roughly, sir, yes.

15 Q Okay. Those people, as you testified, won't be sitting
16 around doing nothing, though, right?

17 A That's correct, sir.

18 Q So EQT will receive value for those services, for the
19 money that they pay those folks?

20 A I believe that's a correct answer, yes.

21 Q And though they may not be reassigned to other projects,
22 at least some portion of their time may be available to
23 advance other interests of MVP, or do other work unrelated to
24 the caretaking costs of just keeping the project in
25 suspension; wouldn't that be true?

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1 A You're speculating how I might use them. My intention
2 would be they'll do activities on the project, but it is
3 theoretically possible that you could reassign someone, yes.

4 Q Okay.

5 And again, \$40 million, that's less -- that's around
6 1 percent of a \$3.7 billion project, correct?

7 A Even though the hour grows late, I can agree with your
8 estimate.

9 Q Thank you. Would you ever, as a project manager,
10 recommend that a group abandon a project based on a 1 percent
11 incremental increase in the cost of the project?

12 A In most likelihood, no, I would not.

13 Q Okay. This pipeline is going to be built,
14 notwithstanding a delay until November 2018, isn't it?

15 A That would be my hope. If we get delayed, we'll have to
16 evaluate the other portions of how that comes out, but it's a
17 possibility that we would continue and incur those costs,
18 yes. It still means that we'll spend more to build it and
19 those partners then will receive less return on the
20 investment of the -- their dollars.

21 Q Sure. But the project is most likely still going to be
22 built, right?

23 A The answer to that question would be yes.

24 Q Thank you.

25 What are some other ways that you might be able to

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1 mitigate that \$40 million administrative cost that might
2 involve the 85 percent of properties that you have access to?
3 Are there things that you could do on those projects or those
4 properties that would allow you to reduce this \$40 million
5 number?

6 A I guess the answer to your question is yes. The basis on
7 the numbers was based upon the project schedule that we had
8 talked about. It assumed if we couldn't meet the tree
9 clearing window, that the project delayed through the summer.

10 There were two scenarios: One in which it prevented us
11 from doing the work in its entirety, one in which we were
12 able to work on the facilities in West Virginia.

13 We evaluated both of those to look at what it does to the
14 start date. And, in essence, there's about a month's
15 difference if you're trying to work on the compression
16 earlier in '18, because ultimately, delaying a year, the
17 mainline construction of the pipeline becomes the driving --
18 driver of the date.

19 So we would have to do the detailed evaluation at some
20 point if we were unable to go this year and make the best
21 choice overall for the project of, would we attempt to do
22 some of the things that we might have permission for, or
23 would we be better off to accomplish what we could and then
24 pick up what we can't?

25 Q So the company has already considered a schedule that

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1 would begin in the fall, or begin with tree clearing in the
2 November 2018 window; is that correct?

3 A Yes, we have.

4 Q When did you all start contemplating that schedule?

5 A I believe the first of these two models that we're
6 discussing was in the summer of 2017. I don't remember the
7 specific date, but let's say July, plus or minus a month.
8 Pre-certificate.

9 Q Pre-certificate, pre-master services agreement entry;
10 would that be accurate too?

11 A Right, yes. So this summer, if I recall, there was not a
12 quorum with the Federal Energy Regulatory Commission. So
13 there was a lot of uncertainty around when certificates would
14 be issued.

15 Q And so the company prudently planned for an alternate
16 schedule, correct?

17 A That's correct.

18 MR. TEANEY: Okay. At this time, I'd like to use a
19 couple of documents to discuss these alternative schedules
20 with you, but at the same time, I understand that I've agreed
21 to a protective order that I need to raise an issue with
22 opposing counsel on.

23 I would propose that we use as exhibits the two
24 alternative schedules that were used during the deposition.
25 They are marked confidential, and per the terms of the

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1 confidentiality -- the protective order, I don't want to get
2 crossways with Mr. Massie.

3 MR. MASSIE: May we have a moment?

4 THE COURT: Certainly.

5 MR. MASSIE: We release the designation.

6 THE COURT: Very well.

7 MR. TEANEY: Okay. I have two exhibits. So I would
8 like to mark this one, Bates number 001-3638, as Exhibit --
9 it's Exhibit 3. And I have a copy for the Court.

10 And I'd like to mark Bates number 001-3639 as
11 Defendant's Exhibit 4. I have a copy for the Court.

12 (Defendants' Exhibits 3 and 4 marked)

13 MR. TEANEY: I have marked this as 3. And I have
14 marked this as 4.

15 (Handing documents to Mr. Massie)

16 BY MR. TEANEY:

17 Q Mr. Cooper, do you recognize the document that's been
18 marked as Defense Exhibit 3?

19 A I do, sir.

20 Q Can you identify what it is?

21 A This is a high-level schedule, the one I discussed that
22 was created in the summer as kind of a look at a what-if
23 scenario if things were delayed.

24 Q Okay. And can you examine what's been marked as Defense
25 Exhibit 4? Do you recognize this document?

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1 A I do.

2 Q Can you identify what it is?

3 A Yes. It's a similar scenario that was created a little
4 later. And the difference, the primary difference between
5 the two, was the first one contemplated building the
6 compression facilities throughout the summer of 2018.

7 This one contemplated that you didn't be able to begin to
8 do any of the work until the fall of 2018, including with the
9 compression.

10 Q Understood. And I'll probably discuss them a little bit
11 more in-depth with you.

12 MR. TEANEY: But at this time, Defendants would move
13 for the admission of Exhibits 3 and 4.

14 MR. MASSIE: No objection.

15 THE COURT: Admitted without objection.

16 MR. TEANEY: Thank you, Your Honor.

17 (Defendants' Exhibits 3 and 4 admitted)

18 BY MR. TEANEY:

19 Q Starting with Exhibit 3, I believe this is the one that
20 you said reflected a schedule where you would do some work on
21 the compressor stations during calendar year 2018; is that
22 correct?

23 A That's the idea, yes, sir.

24 Q And the compression stations are located in the State of
25 West Virginia. Do you own those -- I'm sorry.

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1 Well, let me -- do you own those properties?

2 A Yes, sir, we do.

3 Q Okay. And you own them in fee? These aren't easements;
4 these are property you've had to acquire all rights on,
5 correct?

6 A That's correct, we own the properties.

7 Q Okay. So you have access to them at this time?

8 A Yes, other than I haven't -- I haven't yet asked for the
9 ability to go forward. As we have discussed, we did this
10 trial to make sure we had the format right, and we are
11 prepared to ask permission to go to work on those facilities
12 imminently.

13 Q Okay. And so looking at this schedule, if you were able
14 to comply with this schedule, which -- what would be the
15 in-service date of the Mountain Valley Pipeline?

16 A The turn-in-line, in-service date, that this schedule
17 shows would be -- pardon me -- November, I do believe it's on
18 this copy the 28th, of 2019.

19 Q Okay. And if you were able to place the Mountain Valley
20 Pipeline in service by November 28, 2019, that would comply
21 with the service commencement date in the precedent
22 agreements with the shippers, correct?

23 A It would, sir.

24 Q And that would also comply with your FERC certificate,
25 wouldn't it?

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1 A It would be completed before the certificate had expired,
2 yes, sir.

3 Q Correct. How long is your certificate good for?

4 A The date is in 2020, I believe in June, but I'd have to
5 refer to it.

6 Q Was it three years from the issuance of the certificate?

7 A Of October, yes.

8 Q So October 13, 2020. Okay.

9 If you were to -- does this schedule that you have in
10 front of you show reclamation activities on the pipeline?

11 A I don't see them on here. It shows the turn-in-line
12 date, which as we talked about before, reclamation occurs
13 after that date.

14 Q Certainly. But nonetheless, reclamation, even under this
15 schedule, could be completed in compliance with the FERC
16 deadline of October 2020 under this schedule, correct?

17 A Most likely.

18 Q Okay. Under your existing schedule, the one -- the
19 target schedule that you're operating under and that
20 motivated you to come to this Court, when would you complete
21 reclamation activities?

22 A I will describe a little bit about what they are to try
23 to quantify that.

24 So as I discussed earlier, we finish the mainline
25 construction work, we restore the right-of-way, and we aren't

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1 released from, for simple terms, managing the right-of-way
2 and the erosion and sediment controls until the appropriate
3 amount of revegetation has occurred.

4 In this area, usually that takes two growing seasons, so
5 the right-of-way that you restore earlier in the year
6 generally has plenty of time to revegetate. In that first
7 season, you take care of it through the winter, you see the
8 spring growth, and you can apply to have those portions
9 released.

10 A right-of-way that's completed late in year, or
11 certainly in winter, doesn't have much revegetation. So you
12 have your first growing season, those areas that need some
13 help being revegetated or whatever, you go through the
14 winter, and then you have the second growing season. So,
15 unless there are issues that are difficult to manage, two
16 growing season manages.

17 So if you finished in December of this year, you would be
18 expecting as you exit next year to have most released; and
19 sometime in the 2020 range, you could release the rest of the
20 right-of-way as having been vegetated.

21 Q But there's no reason you couldn't finish reclamation by
22 October 2020 under the schedule marked as Exhibit 3, right?

23 A Ultimately, it's the judgment of the various regulatory
24 agencies that let me release the controls and be done. But
25 it would be reasonable to have two growing seasons, in my

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1 experience, in this area.

2 Q And so you would have those two growing seasons, right?

3 A We should, yes.

4 Q Okay. Under schedule 3, just to be clear?

5 A Yes, sir.

6 Q The schedule marked as 3. Let me be clear. I apologize;
7 that's my fault. I don't want to identify this as
8 schedule 3.

9 Okay. So let's look, then, at the schedule -- or what's
10 been marked as Defense Exhibit 4. Now, is this the schedule
11 that contemplates tree felling to begin with the reopening of
12 the bat window in November 2018? Is that correct?

13 A Yes, I believe both of these, for the mainline, assume
14 that.

15 Q Okay. This one differs from Exhibit 3 in that compressor
16 station activity would not occur in calendar year 2018 under
17 Exhibit 4; is that correct?

18 A Correct, sir.

19 Q Okay. Nonetheless, they achieve remarkably similar
20 in-service dates, right?

21 A Yes. As we have discussed, there's about a month
22 difference, because the delay in start of the tree clearing
23 makes the pipeline construction the controlling path to
24 completion versus, where we are now, the compression is sort
25 of leading that path. We expect they will be a little bit

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1 ahead with the pipeline on the scheduled February start, and
2 then the compression is what's lagging into December of this
3 year.

4 Q Okay. And under the -- what is the in-service date that
5 would be achieved under the schedule on Exhibit 4?

6 A The turn-in-line or in-service date is listed as
7 December the 7th.

8 Q So just about 90 days different from the exhibit on the
9 schedule?

10 A Very much close, yes.

11 Q Okay. And again, that would comply with the FERC
12 certificate and with the precedent agreements, correct?

13 A The same conditions would apply, sir.

14 Q Okay.

15 THE COURT: And that's 2019?

16 THE WITNESS: Yes, Your Honor.

17 BY MR. TEANEY:

18 Q And you discussed with Mr. Massie the findings of FERC
19 and the certificate that this was in the public service
20 and -- or public convenience and necessity; is that correct?

21 A Yes, sir.

22 Q But FERC gave you three years to build that. So FERC
23 thought that if it were completed by October 2020, that would
24 still be in the public convenience and necessity, right?

25 A I don't know that I'm qualified to know what FERC thinks,

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1 but they gave me that long to finish the job.

2 Q Fair enough. Your construction agreements contemplate
3 the ability of MVP to direct its contractors to do
4 move-arounds; is that correct?

5 A Yes, sir.

6 Q And a move-around, if I understand it, is where you run
7 into a barrier, perhaps property access, which requires you
8 to move the construction spread to a different location on
9 the pipeline route? Is that --

10 A That's a good description.

11 Q Thank you.

12 If you were to give your contractor the instructions to
13 move around, would the contractor be able to ask for more
14 time, under the terms of the contract?

15 A As it's written now, that's not expected. They're
16 expected to still finish in the date. It's more cost to
17 cover that expense of stopping and moving.

18 Q So the contracts provide that MVP will pay additional
19 sums of money if they direct a move-around, but it's still
20 completed on the same schedule, correct?

21 A Yes, sir.

22 MR. TEANEY: Thank you.

23 I believe I may be near the end, if I may be allowed
24 to confer with co-counsel for just one thing.

25 THE COURT: Certainly.

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1 BY MR. TEANEY:

2 Q My boss informed me I forgot some of his instructions,
3 which is not unusual, so I have one more subject I'd like to
4 explore.

5 You testified about the difference between mechanized and
6 non-mechanized tree clearing, and I think you described
7 non-mechanized tree clearing as cutting with chainsaws, but I
8 don't think you talked about mechanized tree clearing.

9 What sort of equipment do you use to do mechanized tree
10 clearing, and what are its results and impacts?

11 A Well, mechanized tree clearing is using machinery to do
12 both cutting activities and some of the processing of the
13 trees while you're there, versus knocking the tree over and
14 then starting that processing of the tree later. So it's
15 equipment that has hydraulic arms, to where it can grab a
16 tree and cut it down and then lay it down and another piece
17 of equipment can come along.

18 The reason they're separated is because, since you're
19 operating machinery out on the right-of-way, some of them are
20 tracked, some of them are big rubber-tired vehicles, and
21 you're likely to be manipulating the surface, you know,
22 slipping, spinning, and creating areas that would pool water
23 and do other things that begin to disturb the right-of-way
24 from an erosion and sediment control standpoint.

25 Q So there's an increased risk of erosion and sedimentation

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1 that would result from mechanized tree clearing; is that
2 correct?

3 A Correct. It's assumed to be part of the earth-disturbing
4 activities.

5 Q Okay. And do you have Plaintiff's Exhibit 6 up there
6 with you? I believe it to be a graphic that describes --

7 THE COURT: Exhibit 6?

8 THE WITNESS: Yes.

9 BY MR. TEANEY:

10 Q Can you read the heading for Exhibit 6? What's the
11 header on that graphic?

12 A Item number 6?

13 Q No, I'm sorry. Exhibit 6, what's the header of the --

14 A Oh, I'm sorry.

15 Q That's all right.

16 A "Typical Pipeline Construction Sequence."

17 Q "Typical Pipeline Construction Sequence." Okay.

18 Is tree felling indicated on that as part of the typical
19 construction sequence?

20 A Well, it's listed here as clearing, and the picture shows
21 trees being cut.

22 Q So it's part of the construction sequence?

23 A No. You're distinguishing between clearing and tree
24 felling, which are two different activities.

25 Tree felling, as I have tried to describe in simple

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1 language, would be individuals walking along the right-of-way
2 and cutting down a tree. Then where it falls, it lays.

3 Tree clearing is an activity that's reserved for
4 earth-disturbing activities. And the two would be separated
5 by the requirement to have the erosion and sediment controls
6 in place.

7 Q But in either event, for tree felling or for tree
8 clearing, you're going to need a notice to proceed from FERC
9 to conduct either activity, correct?

10 A That's correct.

11 Q Thank you.

12 I think you mentioned that you'd like to -- I'm sorry.
13 Would it be your preference to get a notice to proceed with
14 full construction from FERC prior to starting?

15 A The preference would be to be released to do the
16 activities, yes, without further controls and restrictions
17 other than those already on the project.

18 Q And did I understand that if you receive approval from
19 DEQ of the E&S controls, that's what you'll seek in Virginia,
20 is permission to do full construction and a full notice to
21 proceed?

22 A Yes, sir.

23 Q Okay. So if that occurs, well, I guess at that point
24 trenching will follow on these properties; is that correct?

25 A At the appropriate part of the sequence, yes.

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1 Q Okay. And if significant rock is encountered, will MVP
2 use blasting to dig the trench to bury the pipe?

3 A Blasting is one of the approved techniques under this
4 project to remove rock, yes.

5 Q Okay. What are the impacts of blasting along the trench
6 line?

7 MR. MASSIE: Excuse me, Judge, but I object. I
8 don't think this is responsive to anything -- I don't think
9 this is responsive to anything on direct, and I don't think
10 it's relevant to the issues before the Court.

11 THE COURT: Mr. Teaney?

12 MR. TEANEY: I believe that it is within the scope
13 of direct, because Mr. Massie asked a question which elicited
14 a response from the witness that got into, you know,
15 activities beyond excavation that he would need to engage in,
16 should he encounter rock. And I just wanted to explore
17 further what those activities were and what their
18 consequences would be.

19 THE COURT: I'll allow a very limited inquiry in
20 this regard.

21 MR. TEANEY: I appreciate it. Thank you, Your
22 Honor.

23 BY MR. TEANEY:

24 Q I believe the question is: Can you describe the impacts
25 of blasting that would occur on the pipeline route?

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1 A Okay. Blasting would be used in those cases where an
2 excavator bucket with more difficulty can't pick or flick the
3 rock out where the trench may occur. At that point, you
4 would make an examination as to whether or not it's a small
5 place, in which case you can use, essentially, a hydraulic
6 jackhammer and bust up a small area of rock -- some people
7 call this hoe-ramming -- and then you crack the rock enough
8 to get it out.

9 If those two techniques aren't going to work, then the
10 next thing that you would do is you would take a series of
11 holes, put some charges in those holes, with the total
12 perspective of just to break up the rock enough that the
13 excavator can remove it.

14 This isn't putting in charges that blow up the whole
15 mountainside. There's a calculation that go into them.
16 There's some blanketing we put on in case there's a little --
17 you know, there's some fly chips that come out in debris, so
18 you want to make sure that you don't have things flying
19 around.

20 But the purpose or impact of the blasting would be just
21 to fracture the rock enough in the trench that your normal
22 excavator techniques could then take the rock you encounter
23 and remove it.

24 Q What material, what types of explosives, would you
25 anticipate would be used on the MVP pipeline?

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1 A I'll have to go look at what's in the plan. Typically,
2 there's ammonium nitrate, or some other commercial version of
3 that. I'm not a certified blaster, so we go to the firms
4 that have those and deploy techniques. We turn the firm
5 into -- I'm sorry, we turn that plan into FERC, and they
6 approve what we can do and not do.

7 MR. TEANEY: Thank you very much. I have no further
8 questions for this witness, but I imagine that other defense
9 counsel may.

10 THE COURT: Thank you, Mr. Teaney.

11 Who would like to proceed next?

12 Very well. Mr. DeTurris?

13 MR. DeTURRIS: Good afternoon, Your Honor.

14 THE COURT: Go ahead.

15 MR. DeTURRIS: Kevin DeTurris, on behalf of the
16 Blankingship & Keith defendants. Fortunately for everybody,
17 Mr. Teaney has asked most of my questions, so I will try and
18 be brief.

19 CROSS-EXAMINATION

20 BY MR. DeTURRIS:

21 Q Good afternoon, Mr. Cooper. Do you still have Exhibit 5
22 in front of you?

23 A The original Exhibit 5, or the one that --

24 Q It's the construction contracts.

25 A Oh, the contracts. Okay. I do now.

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1 Q May I ask you to flip to page MVP001-0153?

2 A I'm there.

3 Q And do you recognize that document as one of the three
4 master construction service agreements?

5 A I do, sir.

6 Q And what is the effective date of that contract?

7 A It's July the 6th of this year.

8 Q 2017?

9 A I'm sorry. Not of this year. Of 2017. My apologies.

10 Q And may I ask you to turn to MVP001-0227?

11 A You said 227, sir?

12 Q Yes, please.

13 A I am there.

14 Q Is that the second of the three master construction
15 service agreements?

16 A I believe that's correct.

17 Q And what is the effective date of that contract?

18 A November the 13th.

19 Q And lastly, can you look at the first page, MVP001-0007?

20 A Yes, sir.

21 Q And is that the third of the three master construction
22 agreements?

23 A That is correct, sir.

24 Q And what is the effective date of that?

25 A That's November the 22nd.

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1 Q Okay. When MVP entered into this contract, the first of
2 the three contracts, on July 6, 2017, it did not have the
3 FERC certificate granted yet, did it?

4 A We did not.

5 Q Right. And you didn't have the property rights to
6 access, the property rights that are affected in this
7 lawsuit?

8 A Except for those -- oh, in this lawsuit, no.

9 Q And for the second and third contracts, you did have the
10 FERC certificate, but you didn't have the property rights
11 that you're seeking in this action; is that correct?

12 A That's correct.

13 Q And even knowing that, MVP willingly and voluntarily
14 entered into these contracts; isn't that correct?

15 A Yes, sir.

16 Q And it assumed the risks that would be associated with
17 not obtaining early entry through this proceeding, correct?

18 A Yes, sir.

19 MR. DeTURRIS: I have no further questions, Your
20 Honor.

21 THE COURT: Thank you, Mr. DeTurris.
22 Anyone else for cross-examination?

23 Mr. Carroll?

24 MR. CARROLL: Good afternoon, Your Honor.

25 THE COURT: Good afternoon.

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1 MR. CARROLL: I'll try to be as brief as
2 Mr. DeTurris.

3 CROSS-EXAMINATION

4 BY MR. CARROLL:

5 Q Good afternoon, Mr. Cooper.

6 A Hello, sir.

7 Q One of the properties that's subject to this litigation
8 is owned by the Town of Chatham, situated in Pittsylvania
9 County, correct?

10 A Yes, sir.

11 Q And that 6.5-acre parcel, it's your understanding that it
12 has a landfill on it?

13 A That's what I've been informed.

14 Q You wouldn't disagree with the town's evidence to that
15 effect?

16 A I do not.

17 Q That landfill, is it your understanding it's been
18 discontinued or out of use for some 30 years? Are you aware
19 of that?

20 A That's what I understand, yes.

21 Q During your deposition you testified that, all things
22 being equal, you prefer to avoid landfills when constructing
23 a pipeline; is that accurate?

24 A That's correct.

25 Q Can you inform the Court why that is, why you usually

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1 prefer to avoid a landfill?

2 A It's predominantly three --

3 MR. MASSIE: Your Honor -- I better stay here,
4 excuse me, for the microphone.

5 Again I object. This is a site in the approved
6 route and the questions are, you know, are there going to be
7 difficulties with it, or should it be in the approved route,
8 or what problems you may have, all of which is outside the
9 scope of this proceeding. And we object based on the FERC
10 certificate and the approved FERC route.

11 THE COURT: Mr. Carroll?

12 MR. CARROLL: Your Honor, this goes right to the
13 issue of the balancing of harms or the balancing of equities
14 under the preliminary injunction test. The town could be
15 exposed to environmental liabilities if -- we've already
16 looked at Exhibit 6, and we know that they're going to trench
17 out in these areas.

18 If this pipeline ultimately runs through a landfill,
19 there will be environmental risks that could impact
20 downstream parcels. There's a creek, as the town's evidence
21 will indicate, right next to this parcel. And, ultimately,
22 that is a harm that could be felt by the town and its
23 citizens.

24 And so it is appropriate for the Court to consider
25 those competing harms when conducting the balancing test.

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1 And I think the reasons why Mr. Cooper believes he would
2 prefer to avoid a landfill, if possible, are relevant to this
3 case.

4 THE COURT: Mr. Massie?

5 MR. MASSIE: I hate to talk from his behind.

6 THE COURT: I understand, because it's hard for me
7 to see you back there too.

8 MR. MASSIE: I know.

9 Well, I do think this is an important question, and
10 it's one that will recur probably time and time again.
11 There's not any landowner that doesn't think here today that
12 this is probably a bad idea for their property and their
13 property is going to be harmed, and they have artifacts on it
14 or they have a spring or a stream or trees that they like.
15 In this case, it's a landfill that he doesn't want disturbed.

16 But the fact is that FERC has approved this route.
17 The fact is, the town could have intervened in that case,
18 made its objections known. It may have; I don't know. But
19 it had the opportunity. And if it didn't intervene, it
20 shouldn't come here and say, Well, this is not a appropriate
21 route, it's a harmful route.

22 I think FERC has made that judgment, and I think the
23 Court has to just accept this route as being the route and
24 proceed with the case on that basis. So that's our point on
25 that.

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1 MR. CARROLL: Again, Your Honor, we're not
2 challenging the FERC order. This is not a collateral attack
3 on the FERC order. Our primary concern is the harm this
4 could bring to the town, a small town, and its taxpaying
5 citizens, if there are contaminants from this landfill after
6 they do their trenching.

7 If it rains, water builds up in the trench, it could
8 flow into other properties. You could have exposure
9 downstream. And that is just a concern that we think is a
10 harm that needs to be balanced upon -- prior to allowing
11 initial entry.

12 The other thing I would add, Your Honor, is if you
13 look at Exhibit 6 that Mr. Cooper has talked about, there's
14 no indication of environmental testing. I was going to ask
15 Mr. Cooper that question, but Exhibit 6 starts right in with
16 tree clearing and then going from there, if they get their
17 construction permit and the authorization from FERC.

18 And I wanted to explore with him whether there was
19 going to be environmental testing. And I believe in his
20 deposition, he testified about possibly altering the route in
21 certain circumstances; maybe not this one, but in certain
22 circumstances. And I think the Court should hear that
23 information as well, as far as, again, balancing the harms.
24 It's not a collateral attack on the permit.

25 MR. MASSIE: But just to finish, the harm is not the

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1 harm of entering the property and doing the work. I mean,
2 because that's going to occur. The irreparable harm that the
3 landowners must show is some irreparable harm from doing it
4 now versus doing it at some later time. And the fact that
5 we're going to do it is only -- that's the only harm being
6 talked about here.

7 MR. CARROLL: This Court has broad discretion in
8 granting an injunction, and the condition it could impose on
9 a preliminary injunction would be that their access, if
10 granted, is limited to that environmental testing. And
11 that's one of the things we intend to ask this Court to do if
12 it grants an injunction. I mean, if there's trenching, Your
13 Honor.

14 THE COURT: I understand the parties' positions.

15 Mr. Teaney, I see you're standing up. I don't know
16 that this is your fight, but --

17 MR. TEANEY: I understand, Your Honor. To the
18 extent that Mr. Wade -- I'm sorry, Mr. Wade Massie was saying
19 that this was going to be a recurring objection that was
20 going to occur time and time again, I wanted to be sure that
21 we had the opportunity to preserve our objections to
22 Mr. Massie's argument as well. And I'm happy to present
23 those to the Court.

24 THE COURT: Well, I don't know that this is the
25 time, because I understand that Chatham is not your client.

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1 So --

2 MR. TEANEY: That's correct. I just want to be sure
3 that my clients weren't prejudiced by this ruling.

4 THE COURT: I understand.

5 I understand both parties' positions, and I
6 understand that it's not up to this Court to change the FERC
7 order or the route that FERC has approved. But I also
8 understand that this is a preliminary injunction hearing.
9 And one of the factors that the Court looks at is the balance
10 of equities.

11 And I also note that the Fourth Circuit recently
12 said in the *Grimm* case -- that case involved whether the
13 Court could hear hearsay at a preliminary injunction hearing,
14 and the Court noted that it is an informal hearing and the
15 Court had the power to do so.

16 So I am going to allow limited testimony offered by
17 Mr. Carroll with regard to his client. I may determine when
18 I make my decision that it's not relevant to my decision, but
19 I'm going to -- I haven't made that determination yet, so I'm
20 going to allow limited evidence in this regard, with regard
21 to the balance of equities, for the preliminary injunction
22 standard.

23 And I note your objection, Mr. Massie.

24 MR. MASSIE: Thank you.

25 MR. CARROLL: Thank you, Your Honor.

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1 BY MR. CARROLL:

2 Q Mr. Cooper, before we started with the objections and
3 ensuing argument, you were going to mention, I believe, three
4 things that you focused on when dealing with --

5 A Certainly. Three factors, just to kind of put them in a
6 family of things to do.

7 I certainly want to start with saying, the route I have
8 is the route that I have to go on, and anything that would
9 deviate from that must be approved by FERC as a variance. So
10 I don't have the ability to change that without their
11 oversight and permission. And if I misled you in any way, or
12 maybe if we misunderstood each other at the deposition, I
13 wish to clarify that with you now.

14 Q Thank you.

15 A Having said that, there are some things that we would be
16 concerned about that we would have to manage as part of the
17 construction process through something like a landfill. And
18 there I'll give an example of an area that we went through on
19 a previous project to try to illustrate those ideas.

20 On a previous FERC project, there was a closed coal
21 tailings landfill that was under a monitoring agreement to
22 ensure that there wasn't increased acid mine drainage into a
23 nearby river, and they had their systems in place to manage
24 that. The route that ended up being approved transited that
25 landfill. So as part of crossing that landfill, we had to

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1 take into consideration the conditions that would be impacted
2 by opening it and putting the pipeline in place.

3 In particular there, their main concern was they had a
4 special sealant, a clay cap, to prevent rainwater intrusion,
5 so that the rainwater didn't become subsurface water and
6 drain out at the bottom of the mountain, go through the
7 tailings, and become acidic. Because at the bottom of the
8 hill, the surface water they had coming out, they had a
9 treatment plant where they had to neutralize the water before
10 it entered the river. So as we crossed this, there were
11 conditions put on us on: How we opened it up, how we crossed
12 through it and managed it while it was open, and how we
13 restored it to protect those conditions. And that was one
14 that was established and bonded.

15 I believe in your situation, you're talking about one
16 you're aware of, and you may not have information about how
17 it's closed.

18 So in a truly hypothetical discussion of things that
19 would be considerations for the pipe itself, obviously
20 there's the issue of what's been put in there and how it was
21 restored. Because part of what you're looking for on the
22 right-of-way is what's underneath it won't continue to
23 subside and stop supporting the pipeline. So if there's
24 undecayed biological material or other things that over time
25 would continue to decay and shrink, then the earth under the

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1 pipeline doesn't support it, so we would have to take that
2 into consideration in how we restored that right-of-way or
3 things we did through there to assure that the pipeline could
4 support itself.

5 The pipe has self-bridging capabilities. And as I said
6 here, I don't know the distance that you're talking about.

7 There would be the issue of what you would find in the
8 trench from soil conditions as they may impact the life of
9 the corrosion protectant on the pipe. So we talked about the
10 coatings a couple of times here.

11 In addition to that, we have active systems that assure
12 that any attempt to have corrosion occurs off of the pipe
13 itself and in a dedicated location.

14 If the soil conditions there make that harder, we may
15 have to change the corrosion protection system on the pipe to
16 manage it in that location, up to and including putting
17 special fittings, called electrical isolators, that would
18 just have us controlling that segment because it's so much
19 different than everywhere else.

20 The other thing that I would need to look at is, are
21 there any things in there that would shorten the lifetime of
22 that coating, from either a --

23 Q Is that the same epoxy coating you were talking about?

24 A Yes. Yes, it's -- the epoxy coating on the outside of
25 the pipe is the predominant barrier to assure the pipe

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1 doesn't corrode.

2 Q Okay. And I believe there was a water contamination
3 issue you would be concerned about?

4 A Well, certainly, just as we talked about with the cap
5 issue. We would need to make sure that we're not allowing a
6 water flow to change that then could impact something down
7 the road.

8 Q These are factors you don't know about this parcel right
9 now? You're asking for immediate possession when you've not
10 done any testing, you don't know how much of the landfill
11 you're traversing or any of those aspects; is that correct?

12 A Right. And what I am describing are the incremental
13 actions to the standard way you would put the pipeline in
14 that we will have to consider when we cross this approved
15 route.

16 Q What's -- oh, I'm sorry.

17 A You know, there's a standard way you put things in, and
18 then there are the incremental things that you do when you
19 encounter the conditions in the field. You don't know the
20 history of this landfill, as you have said, and so as we
21 would get there, we would have to accommodate what we find.

22 Q And you engage in these accommodations because these
23 landfills present a risk that other parcels may not present?

24 A I engage in them if that's where the pipeline has to go.
25 I have to manage the conditions I find where the pipeline is.

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1 Q Do you disagree that a landfill presents risks that other
2 parcels may not have?

3 A I'm not saying that at all.

4 Q But you agree with that statement?

5 A I've agreed that, all things being equal, it would be
6 nice not to be in a landfill. I've also said that if that's
7 the approved route, I have techniques and mechanisms
8 available to me to deal with the conditions that I find, and
9 I would have to deploy them based upon what I find in the
10 field.

11 Q And one available technique is to go back to FERC and ask
12 for a route variation?

13 A Any change that I make to the design has to be approved
14 by FERC.

15 Q Depending on the results of your environmental testing,
16 one option for you is to seek a variation in the route?

17 A Yes, sir.

18 Q The example you were discussing earlier, was that the OVC
19 pipeline --

20 A Yes.

21 Q -- we discussed in your deposition?

22 Was that an easement by take or an easement by agreement?

23 A In this case, it was an easement by agreement.

24 Q And did you in that agreement agree to indemnify the
25 landowner for environmental contamination?

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1 A I don't know that.

2 Q You don't remember testifying to that in your deposition?

3 A What I said was we agreed that we would have to take on
4 some of their additional costs to neutralize the water if our
5 actions increased that. I don't know if that word equated in
6 the agreement to indemnification.

7 Q And I may have misremembered, and I apologize. I thought
8 you had mentioned environmental liabilities as well, but
9 just --

10 A As I mentioned, that particular landfill has to have
11 sodium hydroxide to bring the pH of the water back close to
12 neutral. And our agreement upon procurement with the
13 landowner was that when the work was all done, they had a
14 history of how much leaching they had, and if these actions
15 didn't seal the cap back, that we would have to compensate
16 them for their additional costs to manage the water.

17 Q In the absence of an indemnification provision, what
18 protection does a landowner like the Town of Chatham have if
19 MVP, despite its best efforts, releases some waste
20 contaminants from the landfill onto adjoining parcels and
21 those owners sue everybody?

22 MR. MASSIE: Excuse me, Your Honor, but I object.
23 This is completely hypothetical right now, and there's no
24 evidence --

25 THE COURT: I'll sustain as to speculation.

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1 MR. CARROLL: Yes, Your Honor.

2 BY MR. CARROLL:

3 Q Mr. Cooper, where on the timeline of MVP 6 -- I think I
4 know what you're going to say, but I just want to make sure I
5 understand.

6 Where on the timeline of Exhibit 6 does this
7 environmental testing occur? Does it happen throughout the
8 duration, or does it happen before you engage in
9 land-disturbing activities?

10 A What testing are you speaking of?

11 Q You said -- "testing" is my word, and I apologize. You
12 said you would have to comply with those conditions over time
13 through the process of making sure that you're not causing
14 damage -- strike the question. I'll withdraw it. It's
15 getting late. I apologize.

16 Will there be any environmental testing with regard to
17 the Town of Chatham's parcel?

18 A As I sit here today, I don't know the answer to that.
19 Certainly, if we began excavation and found something in the
20 field that needed addressed, we would have to address it
21 then.

22 Q So you would not know until after you started excavating
23 the town's former landfill if you needed to do environmental
24 testing?

25 A I said, as I sit here today, I don't know if there's any

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1 in the plans for this parcel, but as a worst-case, which we
2 have to do everywhere, if we find something unusual then we
3 have to deal with what's there.

4 MR. CARROLL: Thank you very much. No further
5 questions.

6 THE COURT: Thank you, Mr. Carroll.

7 Mr. Lollar?

8 CROSS-EXAMINATION

9 BY MR. LOLLAR:

10 Q Charles Lollar for the Lollar defendants.

11 Mr. Cooper, in response to -- with reference to
12 Defendants' Exhibit 2 -- can you get that in front of you? I
13 believe it was 2.

14 A Mr. Lollar, is this the one you're speaking of?

15 Q No. It's the January 5, 2018 letter from Mountain Valley
16 Pipeline to FERC.

17 THE COURT: Defendant's, not plaintiff's.

18 MR. LOLLAR: Defendants' 2. Sorry.

19 THE WITNESS: January 5 letter, correct?

20 BY MR. LOLLAR:

21 Q Yes.

22 A I have it now, sir.

23 Q I understood you to say that this was a request by FERC
24 that MVP had replied to but you hadn't heard back from FERC
25 on it; is that correct?

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1 A To the best of my recollection, we haven't heard their
2 response.

3 Q And this relates to historic districts that the pipeline
4 is going through?

5 A I believe that's correct.

6 Q It would include the Bent Mountain Apple Orchard Rural
7 Historic District?

8 A If you know the specific item here, you could help speed
9 us along. Otherwise, I'll have to look through the record to
10 find that one.

11 Q That was what you responded to.

12 A Oh, for -- then okay, yes, it's in here.

13 Q All right. And did it also include the Coles-Terry Rural
14 Historic District?

15 A I don't know, sir. I can look through here and see.

16 Q And although MVP has responded with this January 5
17 letter, there's been no response back from FERC, correct?

18 A To the best of my knowledge, our responses to FERC is
19 contained herein. None of the responses have come back from
20 the staff at the FERC.

21 Q And sitting here today, you can't tell whether you will
22 satisfy Condition 15, which this relates to, correct? It's
23 the clearance you need to go through areas that are overseen
24 by the state historic preservation offices, correct?

25 A Through those specific areas that are covered by the

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1 items in the condition, then I have to follow through with
2 the things that are in the conditions in the certificate and
3 get the concurrences that they require.

4 I believe your original question was -- I have no way of
5 knowing when they respond. The process works in that they
6 ask for a data request, we pull together the information we
7 have, we submit it to them; and then if they have further
8 questions, they'll continue to ask those questions until such
9 time that they believe they have been satisfied.

10 I have no reason to believe that they aren't, but I have
11 no way to know other than, as we continue to work with them
12 and we ask them a specific question: Where are you in your
13 review of this question? Do you need additional information?
14 When can we expect you to respond?

15 We certainly can interact with the staff to identify
16 items that are becoming impactful to the project schedule,
17 and say, If you aren't working on these items, please move
18 them up on the list.

19 But ultimately, as the applicant, I cannot control or
20 manage their response to these items.

21 Q And you would not disagree that once MVP starts
22 construction in these areas, these rural historic district
23 areas, they will -- the trenching, the blasting, all the
24 construction work, the preclearing that will be done once the
25 pipeline building construction starts, will change these

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1 areas irreparably? Would you agree with that?

2 A Yes, sir.

3 MR. LOLLAR: Thank you.

4 THE COURT: Mr. Clarke?

5 Do you need a break, or are you okay?

6 THE WITNESS: I'm okay. Thank you for asking, Your
7 Honor.

8 THE COURT: You let me know if you need a break.

9 THE WITNESS: I will, Your Honor.

10 Mr. Clarke?

11 MR. CLARKE: Thank you, Your Honor. Stephen Clarke
12 with Waldo & Lyle.

13 CROSS-EXAMINATION

14 BY MR. CLARKE:

15 Q Mr. Cooper, good evening, I suppose.

16 A Nice to be speaking to you in an evening again.

17 Q We stayed late into the night on Tuesday.

18 I'd like to ask you to turn first to this drawing that
19 Mr. Carroll was having you look at. I think it's labeled
20 Plaintiff's Exhibit 6.

21 A I have it, sir.

22 Q Have you got that in front of you?

23 A I have it.

24 Q You didn't create this drawing, I take it, right?

25 A No. It's a summary to be able to explain the processes

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1 in a visual manner.

2 Q It wasn't created specifically for the Mountain Valley
3 Pipeline project, either, correct?

4 A Correct. I believe I highlighted that one of the
5 trenching techniques highlighted here is likely not to be
6 used here.

7 Q Right. But the flatland doesn't really look like much of
8 the route that this pipe is going through on this project,
9 right?

10 A That's correct, sir.

11 Q And this graphic shows construction during daylight
12 hours, but MVP has authorization to build 24 hours a day;
13 isn't that right?

14 A I don't believe that's correct at the moment. I believe
15 that there's typical construction, and we actually have to
16 ask permission to work 24/7. I don't know about dusk and
17 dawn; we'd have to look at those reports. But I believe I
18 have to ask to work around the clock.

19 Q In this drawing -- there was some discussion earlier
20 about blasting, but this doesn't show blasting as part of the
21 trenching or excavating technique, right?

22 A No, because this is illustrative for purposes. It
23 doesn't talk about every possible technique you may use.

24 Q But MVP expects that it may have to use blasting on this
25 project, correct?

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1 A I would expect we will have to use blasting in some
2 locations.

3 Q And the drawing doesn't show fencing that would have to
4 be installed to maybe keep livestock away from the
5 construction area, does it?

6 A It does not.

7 Q Where would that occur during this construction sequence?

8 A I believe those types of items would be covered under our
9 agreements with the landowners. Certainly if it's keeping
10 livestock in, before we take down the barriers they have, we
11 would have to create the barriers that are needed, that we
12 agree to, because the livestock can't be interacting with the
13 construction sequence.

14 Q So would that occur before number 1, survey and staking?

15 A It would occur before we would -- the last possible date
16 it could occur is before we would take away the barriers that
17 the existing landowner has.

18 And the example we're using here is livestock retention,
19 so whether we're out surveying or cutting some trees, as long
20 as the fencing that we need to replace or move over or
21 restrict isn't needed, it may not occur until then, I guess
22 is what I'm trying to say.

23 Q Well, I guess really my question, Mr. Cooper, is: Would
24 it occur at some point within the sequence between items 1
25 and 21 here on Plaintiff's Exhibit 6?

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1 A Well, certainly it would occur before you're out there
2 with machinery or doing something that the livestock could
3 interact with.

4 Q And this drawing doesn't show impacts or crossings of
5 streams or wet areas, right?

6 A No, it does not.

7 Q It doesn't show construction that would have to occur in
8 those areas, right?

9 A It does not.

10 Q And sometimes the construction has to -- y'all have to do
11 more specific and more detailed construction when you're
12 crossing a stream, for example, correct?

13 A Correct.

14 Q And this doesn't show what would happen if the
15 construction encountered an underground utility line on a
16 property, does it?

17 A It does not. Those are items that you go out as part of
18 your survey, that in June we had done at this date, and try
19 to pre-identify those and work with them.

20 And currently the project, in aggregate, I believe has a
21 little over 1,000 utility poles that are going to have to be
22 relocated. So those are activities that you identify.

23 Same thing with underground utilities. This project
24 isn't exempt from the One Call requirements to call before
25 you dig and have the underground utilities that are there

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1 identified and dealt with.

2 Q How is MVP going to identify private utility lines,
3 though?

4 A In most of those cases, the idea is to work with the
5 landowner and understand what facilities they may have so we
6 can get them marked and identified. And then you work
7 through each of those, whether you relocate it before you're
8 there, or you work with the landowner, have a disruption, and
9 then put it back when you're back. Those are kind of
10 case-by-case handled, since they're not covered under the One
11 Call statutes.

12 Q And so has MVP done that with all the landowners that are
13 parties to this case?

14 A Probably not.

15 Q When is MVP going to do that coordination with those
16 landowners?

17 A That's part of what happens as you come forward and you
18 begin those conversations. Those are the things that you
19 identify.

20 We have a file, it's a landowner requirement file, that
21 usually goes into the agreement when we're obtaining the
22 easement, and those -- that's where those specific things
23 around, I need a fence restored here, I need a smaller fence
24 on the edge of your limits of disturbance, and then you have
25 to put it back where you had it. All those little things

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1 that need to be done are generally done as part of the
2 negotiations of acquiring the tract.

3 Q And so if MVP is unable to acquire a tract by
4 negotiation, those things don't get done?

5 A I'm not reporting that. I believe getting the tract then
6 still doesn't mean we don't want to communicate with the
7 landowner and try to manage the things that might be
8 impactful.

9 I mean, all that goes into this whole process. And so,
10 you know, it's certainly not my intention -- if the landowner
11 has use of their property, if they'll work with us and help
12 us identify those things, then we -- like we would with the
13 landowners that we acquire, we try to manage what those
14 processes are. If I don't know they're there, the
15 individuals on the team can't do anything about mitigating
16 that impact to the landowner.

17 Q I understand. Item number 21 on this exhibit is labeled
18 "Replace topsoil, final clean-up, and full restoration."

19 Do you see that?

20 A Yes, sir.

21 Q All right. And it shows an image. The last image all
22 the way to the right is a bunch of trees in the right-of-way.

23 Do you see that?

24 A There's trees on the picture, yes, sir.

25 Q So is MVP replanting trees in the right-of-way as part of

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1 this construction process?

2 A We are not.

3 Q So when it says "full restoration," that means something
4 less than what might have been there beforehand; is that
5 right?

6 A Within the limits of disturbance, that is correct. There
7 won't be trees planted back in that area where there were
8 trees that are part of the limit of disturbance. Obviously,
9 a permanent right-of-way will be maintained in some sort of a
10 grasslike state, where you can access it with vehicles. And
11 then we don't control what happens with the permanent
12 revegetation on those boundary areas that were used
13 temporarily during the construction. We restore it back from
14 the perspective of erosion control.

15 Q Now, Mr. Cooper, I want to turn to a different topic and
16 talk to you about the property that's owned by my clients,
17 James and Karen Scott, in Roanoke County.

18 Are you familiar with that property?

19 A I believe I am.

20 Q And we talked a little bit about it at your deposition.
21 Do you recall that?

22 A Yes.

23 Q And I take it you're also familiar with Condition 18 in
24 the FERC order that requires MVP to coordinate with a number
25 of landowners with regard to specific crossing plans on their

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1 properties, correct?

2 A It does.

3 Q And one of those properties is owned by the Scotts, is it
4 not?

5 A It is, yes.

6 Q And so MVP has been coordinating with the Scotts in order
7 to address specific issues with crossing their property;
8 isn't that correct?

9 A That's correct.

10 Q And those issues are the homesite under construction, the
11 septic drain field, and a historic cemetery on the property,
12 correct?

13 A Those are the three that I know about, yes.

14 Q And as a result of that, MVP has come back to the Scotts'
15 property and done some additional surveys in the past few
16 months; isn't that correct?

17 A Yes.

18 Q And as a result of those survey work, MVP has produced a
19 new proposed route for its pipeline over the Scotts'
20 property; isn't that correct?

21 A That is correct.

22 Q And that proposed new route would avoid the septic drain
23 field, it would avoid the home under construction, and it
24 would avoid the cemetery, right?

25 A It does, yes.

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1 Q And that final, or I guess the most recent proposed new
2 route from MVP, I should say, was given to the Scotts just a
3 few days ago, wasn't it?

4 A I believe you are correct. I think a route very close to
5 what they've had -- there's been discussions for some time,
6 but the final plat was given recently. I know we're still
7 working with them now; so yes.

8 Q So MVP is still working to satisfy that condition,
9 Condition 18 of the FERC order, correct?

10 A Yes.

11 Q And that route, that most recent route proposed by MVP
12 over the Scotts' property, that's the route that MVP wants to
13 build; isn't that right?

14 A From the perspective that it also -- from the
15 FERC-approved route, you have this cultural resource, this
16 historic cemetery. Obviously, attempting to go through there
17 will require some very detailed activities and approval from
18 the Historic Preservation Office. There's techniques -- one
19 that's available, maybe, to go underneath it and not disturb
20 the graveyard itself or the surfaces. Those obviously are
21 challenging. It's not impossible, but they are challenging.

22 I believe the reason we're in Condition 18 is the
23 property owners brought up these other issues around the
24 house and the septic field and said, Wait a minute, we'd like
25 to have you do that.

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1 And it's typical for FERC to take some of these things
2 and say, Can you get something done with the landowner? That
3 doesn't mean I don't have an approved route that I build and
4 have to work through all the approvals to go on that route.
5 We're being asked to try to cooperate with the landowner and
6 see if we can come to an amicable solution that solves their
7 questions and then still gets the pipeline built. So that's
8 why we're in negotiations.

9 It would be highly likely, if we submit a variance, that
10 FERC would approve it, because they asked us to consider it;
11 and the landowner now has agreed, I think. But if the
12 landowner doesn't agree, my approved route is -- I can't vary
13 what I'm asking to condemn without FERC's approval. If the
14 landowner won't agree on another route, the approved route I
15 have is what I will have to work through.

16 Q So you're here saying and you're asking the Court to
17 allow MVP to enter onto the Scotts' property and start
18 felling trees along the approved route, which is the route
19 that goes through the cemetery, through the homesite, through
20 the septic drain field, correct?

21 MR. MASSIE: Excuse me, Judge, but I object to the
22 repetition.

23 MR. CLARKE: I'm not sure what I'm repeating, Your
24 Honor.

25 THE COURT: Let's move it along.

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1 MR. CLARKE: Okay. May I have the answer to this
2 question, Your Honor?

3 THE COURT: Go ahead. You can answer the question.

4 THE WITNESS: If I'm unable to reach an amicable
5 agreement to vary the route that's approved, I present all
6 that information to the FERC, and I say, We've tried to do
7 all these things to manage what you wanted in the certificate
8 condition with this landowner, I'm unable to do those things,
9 ultimately, they and the historic preservation governance in
10 that area related to the cemetery will then control when I'm
11 allowed to actually go do activities to deal with those items
12 that we have found.

13 BY MR. CLARKE:

14 Q But MVP prefers the new route because it's better for MVP
15 environmentally; isn't that correct?

16 A I believe I've said we would prefer to change the route
17 on the property because it appears to be in all of our best
18 interests. The property owners want to maintain the house
19 and the septic system; it reduces the challenges in dealing
20 with the cultural resource. So it's an area where FERC has
21 asked us to try to work together and find a solution.

22 So in the context of what I would prefer, yes, because it
23 solves issues for all of us.

24 Q Mr. Cooper, I want to talk to you a little bit about your
25 testimony about capacity in the existing natural gas pipeline

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1 system. You recall that, correct?

2 A I do, sir.

3 Q All right. And you've testified, I believe, that
4 capacity in the current system is constrained, and that
5 essentially means that shippers of gas have to compete for
6 space in the existing transmission lines, correct?

7 A That's correct.

8 Q And that -- one of the effects of that is that it
9 suppresses prices for shippers as they are trying to compete
10 for that limited amount of space in the existing pipeline
11 network; is that right?

12 A That's one of the effects, yes.

13 Q Because there's a lot of gas being extracted in some of
14 the Marcellus and the Utica fields that you were talking
15 about, but if there's not enough capacity to get it where it
16 needs to go, then there's a sort of a race to the bottom
17 among the shippers?

18 A It creates competition, and individuals are willing to
19 take less to move their product.

20 Q And you testified earlier that MVP is a consortium, an
21 LLC made up of affiliates of shippers, correct?

22 THE COURT: Mr. Clarke, I'm going to tell you the
23 same thing I told Mr. Teaney: I remember his testimony, and
24 I think he does too.

25 MR. CLARKE: I appreciate that, Your Honor. Thank

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1 you, Your Honor.

2 THE COURT: So just move on to your question.

3 MR. CLARKE: Okay. That's fine, Your Honor. Excuse
4 me.

5 BY MR. CLARKE:

6 Q The shippers that got together to create MVP, in part, so
7 they could have their own dedicated space in a pipeline;
8 isn't that right?

9 A I don't know that that's true. I believe that what you
10 find is, is that people are trying to manage, on the end,
11 their overall cost. They know they have to ship their gas
12 from point A to B. If they are a partner in the pipeline,
13 then the pipeline's operation helps reduce their net cost,
14 because they are participating in the project and its
15 revenue.

16 So I made the statement -- maybe you can ask your
17 question again and I'll see if I answered it. I apologize.

18 Q My question is, though, it's a powerful incentive for
19 shippers to be able to get together to build a pipeline that
20 they know that they can then subscribe to, correct?

21 A Yes, sir, but there's an open season to begin the
22 process, and any of the shippers can participate in that. In
23 this case, these shippers offered contracts at the best rates
24 and filled the pipeline up.

25 Q So it was just random chance that the shippers whose

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1 affiliates got together to build MVP are the same ones who
2 subscribe to the pipeline?

3 A I didn't say "random chance." I said there was something
4 called an open season.

5 Remember, we've talked about FERC pipelines being open
6 access. So in the beginnings of this project, you have to
7 advertise and tell the market, I'm going to build this
8 project; I anticipate it going from point A to B; this is
9 what it will do. Would you like to participate in the
10 project? And then individuals then can sign up, ultimately
11 culminating in these precedent agreements that we have
12 discussed, that then become the basis for saying, I need to
13 build the project.

14 And I've also testified I'm not part of the commercial
15 part. So I don't know who, which companies, how many were
16 involved, how many looked at it and chose not to bid, or not.
17 It did end up that the companies that are affiliates of the
18 project ended up signing up for the capacity.

19 Q Now, MVP, in choosing to undertake this, this pipeline
20 development project, did an analysis, I take it, of the risks
21 that were involved in the proposed development actually not
22 coming to fruition; isn't that right?

23 A I would believe that would be prudent, yes.

24 Q And in particular, MVP had to weigh the risk that the
25 project might not get approval from FERC, correct?

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1 A That's correct.

2 Q And had to weigh the risk that maybe the supply of
3 natural gas might dry up, right?

4 A From MVP's perspective, that's why we -- you know, in
5 this case, you sign up these firm shippers. There are ways
6 you negotiate in extreme situations, but the fact that these
7 shippers have signed up to deliver gas and pay for the space
8 that the pipeline creates, it's up to them to get the gas
9 there. They will still pay to reserve that space in the
10 pipeline.

11 Q And MVP had to weigh the risk that the government would
12 ban the use of fossil fuels, right?

13 A Absolutely.

14 Q It had to weigh all sorts of risks for a project of this
15 magnitude, correct?

16 A Yes, sir.

17 Q As would any developer?

18 A Correct.

19 THE COURT: Mr. Clarke, can you get to the point
20 where you connect this to one of the *Winter* factors?

21 MR. CLARKE: Yes, Your Honor. Absolutely,
22 absolutely.

23 BY MR. CLARKE:

24 Q Sometimes, Mr. Cooper, it's true that development
25 projects fail, correct?

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1 A Yes, sir.

2 Q And sometimes external forces, despite a developer's best
3 efforts, combine to make a project unsuccessful; isn't that
4 correct?

5 A Yes, sir.

6 Q And so for taking on a risk like this project, a
7 developer like MVP expects to be paid a profit, correct?

8 A Correct.

9 Q All right. That's a payment that a company like MVP gets
10 for taking on the risk of a project of this type, right?

11 A Yes, sir.

12 Q And MVP evaluated all of those, the expected profits and
13 the anticipated risks, in determining whether to move forward
14 with this, correct?

15 A Yes, sir.

16 Q Now, this pipeline isn't going to serve any power plants,
17 is it?

18 A The gas that will go through it can be marketed by the
19 shippers to power plants.

20 Q My question, though, is: The pipeline isn't going to
21 directly serve any power plants, correct?

22 A I can't say the answer to that, because as a transporter,
23 those shippers sell their gas once it gets out to wherever
24 that's going to go. And so if one of those shippers has or
25 intends to have power plants use that gas, they'll connect

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1 the shipping contracts. Their source begins at us, we'll be
2 the first one, and they'll connect through the rest of the
3 interconnecting pipes, ultimately to guarantee service to a
4 power plant.

5 Q Which are the power plants that you're aware of that are
6 going to be served by --

7 THE COURT: Mr. Clarke, I've been patient, and I'm
8 missing the connection. So perhaps you can explain that to
9 me.

10 MR. CLARKE: Sure, Your Honor. I think this goes to
11 the issue of the imminent public need for this. I mean, it
12 goes directly to the issue in *Sage* as to what will be the
13 harm to --

14 THE COURT: Because there's no power plant involved?

15 MR. CLARKE: Absolutely, in part, yes, Your Honor.
16 That was absolutely one of the factors that the Court cited
17 in *Sage*.

18 MR. MASSIE: If the Court please, I would object to
19 this line of questioning. If that is the reason -- and I
20 couldn't tell what he was driving at, either, but if that's
21 the reason, the public need and necessity has been determined
22 by the FERC certificate. That's not at issue in this case.

23 MR. CLARKE: Your Honor, it's one of the factors
24 that the Court has to consider, and absolutely that's one of
25 the factors that the Court considered in *Sage*. If the

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1 pipeline wasn't --

2 THE COURT: So aren't you indirectly attacking and
3 asking me to overturn the FERC order in that regard?

4 MR. CLARKE: No, absolutely not, Your Honor.

5 THE COURT: How would I not do that?

6 MR. CLARKE: The issue is about the irreparable harm
7 to MVP or the irreparable harm to the public, Your Honor.

8 THE COURT: Now, we're talking about different
9 *Winter* factors here, and you just told me you were focusing
10 on -- you were focusing on whether it's in the public
11 interest --

12 MR. CLARKE: Your Honor, may I --

13 THE COURT: -- which is -- which would be
14 indirectly -- I see it indirectly attacking the FERC order,
15 or directly attacking the FERC order.

16 MR. CLARKE: Your Honor, may I go retrieve my copy
17 of *Sage* so I can cite for the Court a specific --

18 THE COURT: You may.

19 MR. CLARKE: Thank you.

20 Your Honor, this is from the decision in the Fourth
21 Circuit, *East Tennessee Natural Gas versus* --

22 THE COURT: I'm familiar with *Sage*.

23 MR. CLARKE: Okay. I just wanted to make it clear
24 for the record, Your Honor. And this is -- excuse me, Your
25 Honor -- page 829, I believe, of *The Federal Reporter*. And

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1 the Court states, Your Honor, ETNG is "under contractual
2 obligation to provide natural gas to several electric
3 generation plants and local gas utilities by certain dates.
4 Without a preliminary injunction, ETNG would be forced to
5 breach these contracts. ETNG's inability to satisfy these
6 commitments would have negative impacts on its customers and
7 the consumers they serve. For example, two electric
8 generation plants will not be able to operate at full
9 capacity without natural gas from the Patriot Project. A
10 North Carolina gas utility may not be able to meet its
11 customers' demand for gas if ETNG does not complete the
12 project on time."

13 THE COURT: Okay. That's fact-specific to *Sage*.
14 That does not mean that you have to have the exact facts; in
15 this case, that there have to be power plants involved.

16 MR. CLARKE: No, but --

17 THE COURT: I've seen the contracts. I know what
18 the contracts are here, and we've talked about what they are,
19 and that it's for the purpose of transporting for the
20 shippers. So I don't know that we have to take facts that
21 are specific to other cases and say you can't meet that
22 requirement because you don't have power plants.

23 MR. CLARKE: No, I think, Your Honor, it's just
24 illustrative of what it is that MVP is saying its purpose is,
25 what need it's meeting, versus a need that the Fourth Circuit

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1 said in *Sage* was appropriate for injunctive relief.

2 THE COURT: Mr. Massie, will you stipulate that all
3 of the facts in *Sage* are not the same facts as in this case?

4 MR. MASSIE: I will.

5 THE COURT: All right.

6 MR. MASSIE: I will.

7 THE COURT: Okay.

8 MR. CLARKE: Your Honor, may I ask if Mr. Massie
9 would stipulate that no homeowner in Virginia is going to
10 have his or her power turned off if the pipeline doesn't go
11 into service in November of 2018?

12 MR. MASSIE: I don't know that. I mean, a lot of
13 things could happen between now and then.

14 MR. CLARKE: Well, that's my line of questioning,
15 Your Honor.

16 THE COURT: Well, I don't think Mr. Cooper can
17 answer that question, either. We don't know what will
18 happen.

19 MR. CLARKE: Then I think I'm entitled to have him
20 say he doesn't know that. That's what I'd like him to do.
21 If he doesn't know the answer --

22 THE COURT: Then I'm going to strike the question as
23 calling for speculation, so --

24 MR. CLARKE: Please note my exception, Your Honor.

25 THE COURT: I do. If you have some other questions,

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1 you may ask those, but --

2 MR. CLARKE: No, that's it for now. Thank you.

3 THE COURT: All right. Thank you, Mr. Clarke.

4 Anyone else for cross-examination of Mr. Cooper?

5 Yes. And this is Mr. Elijah Howard?

6 MR. DELMER HOWARD: Delmer Howard. I'm sorry.

7 THE COURT: I'm going to get it right sometime.

8 MR. DELMER HOWARD: I have two questions for

9 Mr. Cooper.

10 CROSS-EXAMINATION

11 BY MR. DELMER HOWARD:

12 Q Mr. Cooper, you stated earlier that in regards to the
13 pipeline's ending, I was -- I thought I heard you say
14 something about Canada. Will this pipe go out of our
15 country, and could you work out of our country if you had to
16 hold back for a time until the Court's rulings or the people
17 gather everything they need as their defense?

18 A Mr. Howard, I think what I said is one of the connections
19 with Mountain Valley Pipeline is another pipeline owned by
20 the TransCanada company.

21 Q Okay.

22 A TransCanada bought Columbia Gas a few years ago and took
23 over the pipelines that Columbia Gas had. This pipeline goes
24 from Wetzel County, West Virginia to Pittsylvania County in
25 Virginia. And then we connect to a couple of other places,

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1 but that's the only place we're going.

2 Q Okay. That was one question.

3 And the other one: You mentioned blasting. If this
4 route is approved by FERC, by my property, and if there's an
5 immediate possession or an early entry onto my property
6 40 feet after the pipeline has acquired other footage, let's
7 say behind me, and there is a fault line on this 40 feet and
8 there's blasting, it's possible my whole house will be
9 condemned because it will fall down.

10 Is this something FERC would consider on bypassing my
11 388 feet of property, to avoid an earthquake? And --

12 A I guess to answer your question, FERC has approved the
13 route. They've also approved the plan that if there's rock
14 and we have to crack the rock by blasting, the things that we
15 must do in terms of how close we are to a structure and to
16 make sure that we don't damage the things around there. The
17 goal of blasting on a pipeline -- and I know that word sounds
18 huge -- is really just to crack the rock up enough that it
19 can be excavated out of the ditch.

20 Q If there is a major -- it assumes -- I mean, I assume
21 there is already cracked rock. It looks like an earthquake
22 has already happened. The platelets do not line up. A
23 geologist seven or eight years ago wanted to bring a crew
24 from Richmond and study this fault line. He said --

25 MR. MASSIE: Excuse me.

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1 THE COURT: Mr. Howard, I'm going to stop you here,
2 because if you want to take the stand and testify, you can do
3 that later.

4 MR. DELMER HOWARD: Okay.

5 THE COURT: But now is your time just to ask
6 Mr. Cooper questions.

7 MR. DELMER HOWARD: Okay.

8 BY MR. DELMER HOWARD:

9 Q So you say that FERC already approved it, so I would have
10 to give MVP time to mention a fault line, or --

11 A I believe what I said is the route that has been approved
12 by FERC is where we would build the pipeline. You asked
13 about blasting and concerns of something off of that.

14 Q Yes.

15 A And I tried to explain that the blasting plan
16 contemplates that there are things nearby that could be
17 damaged, depending upon the size of the charge that you use,
18 the goal of which the plan would be is we only do enough to
19 fracture the rock to dig it out.

20 Q Okay.

21 A And if we're that close to a fault, a lot of this should
22 already -- if there was an earthquake, a lot of that rock
23 should be broken up, and we may be able to avoid that.

24 MR. DELMER HOWARD: Yes, sir. Thank you. No more
25 questions.

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1 THE COURT: Thank you, Mr. Howard.

2 Any other cross-examination of Mr. Cooper?

3 MR. ELIJAH HOWARD: I just have a few.

4 THE COURT: Certainly. This is Mr. Elijah Howard.
5 I got that right.

6 MR. ELIJAH HOWARD: Yes.

7 I apologize I don't have multiple copies, but I
8 entered in an exhibit as answering to the plaintiff's first
9 interrogatories and requests, and in that was a final impact
10 statement taken from FERC's website.

11 I have a copy, if he would like to see it.

12 THE COURT: Can you show that to me first, so I can
13 see if I have a copy?

14 MR. ELIJAH HOWARD: I can.

15 THE COURT: Because I have some of your things
16 that --

17 MR. ELIJAH HOWARD: It's actually an 84-page paper
18 where they're all consistent. They all are the exact same.

19 THE COURT: I've got a copy.

20 All right. So we'll have the clerk mark this copy,
21 and then you can give it to him to take a look.

22 MR. ELIJAH HOWARD: That's fine.

23 THE CLERK: This will be Defendants' Exhibit 5.

24 (Defendants' Exhibit 5 marked)

25 THE WITNESS: Thank you, Mr. Howard.

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1 BY MR. ELIJAH HOWARD:

2 Q Mr. Cooper, I just had, actually, one question. I was
3 wondering if you could read -- or do you recognize that, that
4 paper? It's basically a list of the access roads MVP --

5 A Yes.

6 Q -- submitted to FERC for their final environmental impact
7 statement?

8 A I actually believe it's the appendix out of there. It's
9 the same thing.

10 Q Well, right. Yeah, exactly. Sorry.

11 In that, under all those easements, can you give me the
12 max proposed width of those proposed roads?

13 A Our standard, and in this case what is shown as maximum,
14 is generally 40 feet.

15 MR. ELIJAH HOWARD: 40 feet. Okay.

16 That's all I needed.

17 THE COURT: All right. And did you want that
18 exhibit admitted into evidence?

19 MR. ELIJAH HOWARD: Yes, Your Honor.

20 THE COURT: All right. Any objection, Mr. Massie?

21 MR. MASSIE: May I see it?

22 THE COURT: Certainly. It's Appendix E-1, Access
23 Roads, Mountain Valley Project.

24 MR. MASSIE: If it's a file, then we have no
25 objection. We have no objection.

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1 THE COURT: Admitted without objection, then.

2 (Defendants' Exhibit 5 admitted)

3 THE COURT: And if you need that copy -- do you need
4 that copy back?

5 MR. ELIJAH HOWARD: I have another copy.

6 THE COURT: All right, then.

7 Any other cross-examination of Mr. Cooper?

8 All right. Mr. Massie, how long do you anticipate
9 your redirect will be?

10 MR. MASSIE: I hesitate to make predictions, but no,
11 I do believe this will be very short.

12 THE COURT: All right. Mr. Cooper, are you okay to
13 go ahead, or do you want a break?

14 THE WITNESS: I'm fine, Your Honor.

15 THE COURT: All right.

16 MR. MASSIE: You can blame me.

17 THE WITNESS: Understood, sir.

18 MR. MASSIE: Hold me accountable.

19 May we pull up Exhibit 1, page 19?

20 REDIRECT EXAMINATION

21 BY MR. MASSIE:

22 Q This is a page from the FERC certificate, correct?

23 A Yes, sir.

24 Q And in it, is FERC addressing this issue of precedent
25 agreements with affiliated shippers that Mr. Teaney talked

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1 about?

2 A Yes, sir.

3 Q And in the interest of time and paraphrasing, does 44
4 address a complaint by Mr. Teaney's firm, Appalachian
5 Mountain Advocates, that there should be some kind of
6 heightened scrutiny because there are affiliated shippers?

7 A Yes, sir.

8 Q All right. Let's go to the next page, if we can. And up
9 at the top, the first part, what was FERC's conclusion in
10 regard to that contention?

11 A In paragraph 45?

12 Q Yes, sir.

13 A It says, "We disagree."

14 Q And it goes on with an explanation, including citing case
15 law, does it not?

16 A Yes, sir.

17 Q Now, if I understand your testimony, there are two things
18 you need to proceed through Virginia. One is possession,
19 correct?

20 A Yes, sir.

21 Q And the other is a notice to proceed from FERC, correct?

22 A Correct.

23 Q And is the company proceeding on a dual track in an
24 effort to obtain both of those?

25 A Yes, sir.

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1 Q And if the Court rules that MVP is entitled to
2 possession, it will need to have still a notice to proceed,
3 correct?

4 A Yes, sir.

5 Q And if FERC were to grant a notice to proceed, you would
6 still need possession, right?

7 A Yes, sir.

8 Q So you need both together?

9 A Yes, sir.

10 Q Now, you were asked about the construction contracts and
11 penalties and delay charges and so forth. I won't repeat all
12 that. But you were also asked about a right to terminate.
13 Do you recall that discussion?

14 A Yes, sir.

15 Q And the suggestion was made, well, if you just terminate
16 the contract, you can mitigate your losses.

17 What situation would the company be in if it terminated
18 its construction contracts with these companies?

19 A Well, you certainly would be severing your relationship
20 to work with them. That's what the master services agreement
21 is for. It's the building block on which then you enter into
22 projects.

23 Q And as far as being able to complete the project without
24 these contractors lined up, what is the possibility there?

25 A It's zero.

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1 Q In situations like this, with contractors and building
2 projects like this, can a company trying to build a project
3 just go out and grab another crew?

4 A Not usually, particularly on a project of this size.
5 There's a limited pool of contractors that have the equipment
6 and the experienced workers to work on these. So there's
7 only a few crews -- I say "a few." There's probably 50-plus
8 nationwide. There are several projects ongoing now. And
9 most of those that are capable of doing this work have work
10 aligned.

11 Q And did any of those factors enter your decision to make
12 these contracts, even in advance, in one case, of getting the
13 FERC certificate?

14 A Absolutely. We do an analysis to look at the available
15 pool of workers, and it's a balance of, you would like to
16 have all the assurances done before you enter the contract
17 and take that risk, but you also need to have them in place;
18 otherwise, they won't be available when you have all of the
19 permissions to go to work.

20 Q All right. I mean, there was a great deal of discussion
21 about harm to historic districts and harm to folks that the
22 project is going to cause, and harm to cemeteries, harm to
23 landfills.

24 If we can look at the FERC certificate at page 28,
25 please, and if we could look specifically at paragraph 64.

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1 Did FERC make a finding as to all of those concerns in its
2 certificate?

3 A It did.

4 Q What did FERC find?

5 A It says, "Conclusion: We find that the benefits that the
6 MVP project will provide to the market outweigh any adverse
7 effects on existing shippers, other pipelines and their
8 captive customers, and landowners or surrounding communities.
9 Consistent with the criteria discussed in the certificate
10 policy statement and NGA Section 7(e), and subject to the
11 environmental discussion below, we find that the public
12 convenience and necessity requires approval of Mountain
13 Valley's proposal, as conditioned in this order."

14 Q And that was after a lengthy, lengthy proceeding with
15 thousands of comments, intervenors, objections?

16 A Yes, sir.

17 Q Now, there were also a number of concerns raised about
18 crossing streams, cutting trees, blasting rock. And my
19 question to you: Will all of those things have to occur at
20 some point to build the project?

21 A Yes.

22 Q Whether it's this year or next year, you're going to have
23 to cross streams, right?

24 A Yes, sir.

25 Q You're going to have to cut trees; you're going to have

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1 to blast rock, correct?

2 A Yes, sir.

3 MR. MASSIE: All right. That's all I have. Thank
4 you.

5 THE COURT: Thank you.

6 Short leash.

7 MR. TEANEY: Understood. If the Court will indulge
8 me, I have two questions, with possible follow-ups.

9 FURTHER CROSS-EXAMINATION

10 BY MR. TEANEY:

11 Q Mr. Cooper, with regard to the construction contracts and
12 what would happen in the event that you exercised your rights
13 to terminate the construction contracts, it is possible that
14 you could get either get a new contract with that same
15 contractor to build at a later date or obtain a new
16 contractor? Isn't that possible?

17 A It is possible.

18 Q Thank you.

19 The second question regards whether this harm -- the
20 blasting and the trenching and the tree felling -- will occur
21 now, or will it occur later.

22 Are you aware that the certificate order is the subject
23 of a federal court challenge?

24 A I am.

25 Q Is it possible that the federal court could in some way

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1 reverse or suspend or otherwise invalidate the FERC
2 certificate?

3 MR. MASSIE: Object to the legal conclusion.

4 THE COURT: I'm going to overrule your objection.
5 Go ahead and answer.

6 THE WITNESS: Could you rephrase the question?

7 BY MR. TEANEY:

8 Q Certainly. It is possible that the federal courts
9 hearing the challenges to the FERC certificate could
10 invalidate or otherwise alter the certificate, resulting in
11 the pipeline not being built, right?

12 A I believe that's correct.

13 MR. TEANEY: Thank you, Your Honor. No further
14 questions.

15 THE COURT: Anyone else?

16 All right. Mr. Cooper, you may step down.

17 THE WITNESS: Thank you, Your Honor.

18 Give these to the clerk?

19 THE COURT: Sure. We're going to take a break, and
20 she'll get those.

21 And I understand next we're going to have a witness
22 out of order. Is that correct, Mr. Clarke?

23 MR. CLARKE: Yes, Your Honor, if the Court will
24 indulge.

25 THE COURT: Let's go ahead and take our ten-minute

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1 break now, and then we'll take your witness out of order,
2 Mr. Clarke.

3 MR. CLARKE: Thank you.

4 THE MARSHAL: All rise.

5 (Recess, 5:49 p.m. to 6:01 p.m.)

6 THE COURT: Mr. Clarke, you may call your witness.

7 MR. CLARKE: Call Michael Williams.

8 THE COURT: Mr. Williams, if you would come forward
9 to be sworn by the clerk, please.

10 MICHAEL WILLIAMS, DEFENSE WITNESS, SWORN

11 THE COURT: You may have a seat in the witness
12 stand, please.

13 You may proceed, Mr. Clarke.

14 MR. CLARKE: Thank you, Your Honor.

15 DIRECT EXAMINATION

16 BY MR. CLARKE:

17 Q Good evening, Mr. Williams. Would you just state your
18 name for the record, please?

19 A Michael Williams.

20 Q And are you a managing member of Dowdy Farm, LLC?

21 A I am, yes, sir.

22 Q Is the other managing member your wife, Melissa Williams?

23 A She is, yes.

24 Q And is Dowdy Farm, LLC the owner of properties in Giles
25 County that are known as Giles County tax map numbers 46-52

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1 and 46-52A?

2 A I believe that's correct, yes.

3 Q How are those properties used?

4 A As part of the farm.

5 Q And does Dowdy Farm, LLC own other properties which are
6 part of its larger farm property?

7 A They do, yes.

8 Q At some point, did MVP contact you about acquiring rights
9 over the Dowdy Farm properties for its proposed pipeline?

10 A Yes, they did.

11 Q And are you familiar with the plats that are attached to
12 the complaint filed by MVP in this lawsuit, which show the
13 proposed easements which MVP seeks to acquire across the
14 Dowdy Farm properties?

15 A I've seen maps of it, yes.

16 Q Based on the information on those plats, do you have an
17 understanding of how the MVP project would affect your use of
18 those properties?

19 MR. MASSIE: Excuse me, Judge. I'm mindful of what
20 you said earlier, but we do object and reserve objection as
21 to testimony of this nature in this case.

22 THE COURT: I note your objection for the record,
23 and I'll make the same ruling. So I'll allow limited
24 testimony in this regard.

25 MR. CLARKE: Thank you, Your Honor. And I will make

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1 it clear how this ties into the irreparable harm with regard
2 to the timing issue.

3 THE COURT: All right.

4 BY MR. CLARKE:

5 Q Would you like me to repeat the question for you?

6 A I would, please, yes.

7 Q Based on the information in the plats that you've seen,
8 do you have an understanding of how the MVP project would
9 affect your use of these properties?

10 A Somewhat, yes.

11 Q And what is that?

12 A Well, it would make my farm -- cut my farm in half. The
13 line goes right through the middle of the farm. As far as
14 farming and stuff like that, I don't exactly know how that
15 would affect it, but I'm sure it's going to with the pipeline
16 coming through. The water situations that are there --

17 Q What do you mean by "the water situations"?

18 A Well, there's three water crossings that they're going to
19 have to make on my property. And the farm is spring water.
20 The spring feeds four houses there. And they're going to
21 cross those three water lines putting the pipe in. So it
22 would -- you know, it's a possibility it could affect the
23 water.

24 Q And is there water on the property that also provides a
25 drinking source for livestock?

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1 A It is.

2 Q What animals are those?

3 A It's cattle.

4 Q What would happen if the water was no longer available or
5 accessible to the livestock as a result of this construction?

6 A Well, I'd have to provide them water or they would die.
7 And that would be, you know, either renting the place,
8 another place to move the cattle to, or hauling in water once
9 or twice a day; find them some source of water somehow,
10 somewhere.

11 Q What about cutting off water to the houses and the
12 springs that you were talking about?

13 A Same situation. I guess the people in the house would
14 die if they didn't have any water, so...

15 THE COURT: I would hope they would have the
16 wherewithal to go out and get some.

17 THE WITNESS: Well, I would. But, you know, I have
18 good spring water right now, so there's plenty there.

19 BY MR. CLARKE:

20 Q What about fencing? Are there fencings on the property
21 right now?

22 A There is fencing on the property, yes.

23 Q And do you expect that fencing to be impacted by this
24 construction?

25 A From the route I've seen, yes, it will affect the

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1 fencing.

2 Q And has MVP indicated to you that it will install fencing
3 to contain your livestock?

4 A I've not heard that or seen that, no.

5 Q Now, if MVP is granted the right that it's seeking today
6 to come onto your property and begin construction, how would
7 you be harmed?

8 A Well, first of all, water, possibly.

9 Secondly, I would have to build some fences and stuff to
10 keep the cattle out of their construction area. That would
11 cost me money.

12 Q How would you expect to pay for those kinds of things?

13 A Maybe win the lottery, but I doubt it. I guess I'd have
14 to borrow some money or take some out of my savings to build
15 a fence.

16 Q And if MVP were not permitted to begin construction
17 until -- excuse me, on the Dowdy Farm properties until after
18 a trial and payment of just compensation, how would that
19 change things?

20 A Well, I would have money to build a fence or keep the
21 cattle out of the construction area, or haul water, or, you
22 know, whatever I needed to do to keep the farm operational.

23 Q Would you anticipate you would use some of that
24 compensation to do those things that you're talking about?

25 A Well, sure, yes.

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1 MR. CLARKE: That's all the questions I have. Thank
2 you, Mr. Williams.

3 THE WITNESS: Thank you.

4 THE COURT: There may be some cross-examination.
5 Mr. Massie?

6 CROSS-EXAMINATION

7 BY MR. MASSIE:

8 Q Mr. Dowdy, how are you?

9 A I'm Mr. Williams. Mr. Dowdy is my grandfather.

10 Q Oh, I'm sorry. Excuse me.

11 A That's okay. We all make mistakes.

12 Q All right. I'm sorry.

13 You believe the pipeline is not a good thing for your
14 property, correct?

15 A I do, yes.

16 Q You're opposed to it?

17 A I'm opposed to it going through my property, correct.

18 Q And you didn't want to negotiate any easement to put it
19 in, correct?

20 A I listened to the offer from the MVP guy, yes, I did. So
21 I don't know if that's not negotiating, or what.

22 Q But you turned it down?

23 A I did, yes.

24 Q And did you file some comments or objections with FERC
25 about the project?

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1 A Personally, I did not, no. I don't --

2 Q Did someone file on your behalf some comments or
3 objections or --

4 A That is possible, yes.

5 THE COURT: I'm going to ask you two not to talk
6 over each other.

7 MR. MASSIE: I'm sorry. I apologize.

8 THE COURT: So, Mr. Massie, you finish your
9 question. And Mr. Williams, if you would answer the
10 question. Thank you.

11 BY MR. MASSIE:

12 Q Did someone file on your behalf objections or comments
13 with FERC?

14 A Yes, they did.

15 Q All right. And you'd be opposed to the project whether
16 it's built now or whether it's built two years from now,
17 correct?

18 A I would be, correct.

19 MR. MASSIE: All right. That's all I have.

20 THE COURT: All right. Any redirect, Mr. Clarke?

21 MR. CLARKE: None, Your Honor.

22 THE COURT: Any questioning by anyone else of
23 Mr. Williams?

24 Mr. Williams, you may step down. Thank you.

25 THE WITNESS: Thank you.

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1 THE COURT: All right. Mr. Massie, you may call
2 your next witness.

3 MR. MASSIE: Call Mr. Sam Long.

4 THE COURT: Mr. Long, if you would come forward to
5 be sworn, please.

6 MR. TERPAK: Your Honor, while he's walking forward:
7 I've been the one selected from the group to deal with
8 Mr. Long. In a normal proceeding, I have some matters that
9 would come up in the nature of a motion in limine. I think
10 they're very significant in this case. I'd like to address
11 them in voir dire of the witness before he testifies, because
12 I believe some of his testimony is flat-out inadmissible.

13 THE COURT: Mr. Massie?

14 MR. MASSIE: Well, I think Your Honor has commented
15 on the nature of this proceeding and how it should go
16 forward, and I would suggest that, in the interest of time,
17 that we be presented -- be permitted to present his testimony
18 and then it be cross-examined, and the Court can decide at
19 that point on any questions that arise.

20 THE COURT: Mr. Terpak?

21 MR. TERPAK: Your Honor, there's part of what he did
22 which is admissible. He's appraised nine, and only nine,
23 properties. The rest of what he did simply relies on tax
24 assessments which, under a Fourth Circuit case, are not
25 admissible.

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1 I understand what you mentioned earlier, that
2 occasionally hearsay testimony is allowed, and there's some
3 looser standards in an injunction context. But I've read
4 those cases as well. And those go toward things like
5 affidavits, which sooner or later the witness would come in
6 and give admissible testimony.

7 Under federal law, Your Honor, an appraiser may not
8 rely on tax assessments for valuation testimony, period.

9 And Mr. Long knows this. We asked him this at the
10 deposition. He knows very well, and he knows why it's
11 unreliable.

12 THE COURT: Well, Mr. Terpak, given that there's no
13 jury here, I trust myself to be able to determine what's --
14 what I can properly consider and what I can't properly
15 consider. So I'm going to allow you to bring that up on
16 cross-examination and in any argument that you make.

17 MR. TERPAK: Thank you, as long as you reserve
18 judgment on admissibility until I have a shot at him.

19 THE COURT: I understand that, yes.

20 MR. TERPAK: Thank you, ma'am.

21 THE COURT: Now, Mr. Long, if you would be sworn in,
22 please.

23 SAMUEL BYRON LONG, PLAINTIFF'S WITNESS, SWORN

24 THE COURT: And Mr. Long looks like he's going to
25 stay here for a while.

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1 THE WITNESS: I hope not as long as Mr. Cooper.

2 THE COURT: He's got his bags ready.

3 All right, Mr. Massie, you may proceed.

4 MR. MASSIE: Thank you, Judge.

5 DIRECT EXAMINATION

6 BY MR. MASSIE:

7 Q State your name, please.

8 A Samuel Byron Long.

9 Q And what is your business or occupation?

10 A I'm a commercial real estate appraiser with Miller,
11 Long & Associates, Incorporated.

12 Q And where is your firm located?

13 A The firm is located at 435 McClanahan Street, Roanoke,
14 Virginia.

15 Q And what are your -- what are your professional
16 qualifications and licensures?

17 A I currently hold the MAI designation with the Appraisal
18 Institute, the CRE designation with the Counselors of Real
19 Estate, the SRA designation with the Appraisal Institute, and
20 I'm a general certified appraiser with the state of Virginia.

21 Q And how long have you been practicing?

22 A Since February 1978. Almost 40 years.

23 Q And what are the areas of your practice?

24 A Primarily commercial property and land valuation and
25 medical office buildings.

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1 Q Are you sometimes involved in matters that are in dispute
2 in litigation?

3 A Sometimes, yes, sir.

4 Q Do you testify for one side or the other in those kind of
5 cases?

6 A Doesn't matter to me.

7 Q Have you testified in various courts in this area before?

8 A I have.

9 Q Have you been accepted as an expert witness on real
10 estate issues?

11 A Yes, sir, I have.

12 Q Have you testified in both state and federal courts?

13 A I have.

14 Q Have you done appraisals for state agencies?

15 A I have.

16 Q Have you done appraisals for federal agencies?

17 A I have.

18 Q Have you done any appraisals of where we are right now?

19 A I appraised this building. I saw the judge's office.
20 It's very nice.

21 THE COURT: I know that.

22 THE WITNESS: They like to show your office off.

23 MR. MASSIE: I want to show you a document.

24 (Plaintiff's Exhibit 10 marked)

25 BY MR. MASSIE:

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1 Q What is Exhibit 10?

2 A This is my qualifications.

3 Q And is it an accurate statement of your educational
4 background and the courses that you've attended, seminars and
5 so forth?

6 A Yes, sir, it is.

7 MR. MASSIE: I offer Exhibit 10.

8 MR. TERPAK: No objection, Your Honor.

9 THE COURT: Admitted without objection.

10 (Plaintiff's Exhibit 10 admitted)

11 MR. MASSIE: And I offer Mr. Long as an expert on
12 real estate valuation and appraising.

13 MR. TERPAK: We have no objection to Mr. Long
14 testifying as an appraiser in this case, Your Honor.

15 THE COURT: Very well. He's accepted as an expert
16 in that field, then, without objection.

17 BY MR. MASSIE:

18 Q Now, Mr. Long, you understand that one of the issues the
19 Court may have to consider in this case is the amount of a
20 bond?

21 A Yes, sir.

22 Q And the purpose of the bond is to ensure the payment of
23 just compensation?

24 A Potential just compensation, yes, sir.

25 Q Have you prepared some information for the Court's

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1 consideration on that issue?

2 A I have.

3 Q Before you pull it out, I have it here, so I'll give
4 you --

5 A Oh, okay. Yes, sir, I have.

6 Q And have you prepared a document or an estimate of
7 potential compensation in this case?

8 A Potential just compensation, yes, sir.

9 Q And did you do it tract by tract and county by county?

10 A I did.

11 Q And have you reduced it to writing?

12 A Yes, sir.

13 Q And what did you call it?

14 A I called it a bond hearing estimate.

15 Q Is it an appraisal?

16 A No, sir, it is not.

17 Q Have you appraised, however, some of the properties
18 involved in this case?

19 A I have, nine of them.

20 Q And you made a view of those, at least what you could see
21 from the road; you didn't have permission to enter, correct?

22 A Correct, yes, sir.

23 Q So you've done some appraisals, and then you did this
24 hearing estimate as well, correct?

25 A That's correct.

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1 (Plaintiff's Exhibit 11 marked)

2 BY MR. MASSIE:

3 Q Okay. I show you what's been marked as Plaintiff's
4 Exhibit 11. Are these the documents you just described?

5 A I'm just going through looking at revision dates, but I
6 believe so, yes, sir.

7 Q All right. Well, take your time. Look through it.

8 A Yes, sir.

9 Q All right.

10 MR. MASSIE: Just so folks can follow along, may I
11 display this at this time, Judge, and I'll move for its
12 admission at a later date?

13 THE COURT: You may.

14 MR. TERPAK: And, Your Honor, as it's being
15 displayed, perhaps it's time for me to note my continuing
16 objection. I understand your ruling, and I won't be jumping
17 up and down every time he talks about tax assessments, but I
18 object to anything at all having to do with tax assessments
19 being admitted in this case.

20 THE COURT: Understood, and your objection is
21 preserved for the record.

22 MR. TERPAK: Thank you, Your Honor.

23 THE COURT: Certainly.

24 BY MR. MASSIE:

25 Q You can either look at the monitor, Mr. Long, or the hard

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1 copy of Number 11, or maybe both, but just -- let's start
2 with Giles County, and just kind of orient us to what this
3 estimate shows, please.

4 A All six spreadsheets are set up identical. In the first
5 column is the property owner. The second column is the tax
6 map number, then the MVP ID number. Next is the acreage of
7 the parcel, and --

8 Q Go slow.

9 A I'm sorry.

10 Q All right. So we're moving left to right?

11 A Yes, sir.

12 Q Okay. And you're on which column now?

13 A Parcel acreage.

14 Q Okay.

15 A Okay. Then we have the land assessment from the Giles
16 County assessment office, the improvement assessment, and
17 then the total assessed value.

18 Q All right. So let me stop you there. The total assessed
19 value, that would be the value on the tax records of the
20 county for that tract, the entire tract?

21 A That's correct.

22 Q Okay. Continue then on from there, please.

23 A Assessments in the state of Virginia have to be within
24 80 percent of market value or 100 percent of value. And the
25 state of Virginia performs an assessment ratio study every

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1 year. The most recent completed one is 2015.

2 So I went and researched the 2013, 2014, and 2015
3 assessment ratios, and I took the average of those three
4 years. And for Giles County, you can see up there where it
5 has total assessed value divided by sales ratio, that
6 ratio -- their assessment was higher than the properties were
7 selling for. So that ratio is 103.84 percent. So if you
8 take the assessed value divided by the assessment ratio, that
9 should equate to a -- closer to an accepted value range.

10 So that would be -- next would show the adjusted assessed
11 price per acre; in other words, that's taking the acreage
12 price divided by the sales ratio to give you that. And then
13 the next --

14 Q Let me stop you there.

15 A I'm sorry.

16 Q Okay. On that column, we're now on adjusted assessed
17 price per acre?

18 A Yes, sir.

19 Q That's a land-only price?

20 A That's the land-only price.

21 Q And that would be the assessed price as adjusted? Am I
22 understanding that correctly?

23 A Yes. That's correct. In that particular case, it would
24 be \$7,107.

25 Q And that would be for the top tract there?

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1 A Yes, sir.

2 Then we looked at the permanent easements on that
3 particular tract. In this case, it was 0.01 acres. They --

4 Q Hold on.

5 A I'm sorry.

6 Q So you're saying on this particular tract, the take, the
7 permanent physical easement, is 0.01 acres?

8 A Correct.

9 Q And that is from what source?

10 A That would be from the maps provided in the complaint,
11 the MVP maps provided.

12 Q The complaint in this case?

13 A Yes. Yes, sir.

14 Q All right.

15 A Then the -- now, you can see down there I've got
16 90 percent of adjusted assessed price per acre. When I
17 accepted this assignment, I started trying to research damage
18 studies, published information. Four of them are cited in
19 the reports that I prepared. And I -- I utilized 90 percent
20 of the fee simple value of the land as a compensation for the
21 permanent easement.

22 Q Okay. So if I'm following what you're saying, there's a
23 court order for the pipeline?

24 A Yes, sir.

25 Q It occupies so many acres permanent; you total up the

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1 acres, you get a price per acre before any take?

2 A Yep. I mean, yes, sir.

3 Q And then you apply a factor for the easement?

4 A It's less than 100 percent. The property owner still
5 owns the property, can still cross over it. It can serve as
6 a buffer area. And in rural areas, as I think Mr. Cooper
7 stated, the trees will be cut down, but sometimes hunters
8 want a clear-range shot, if they can put a tree stand up and
9 have a shot down the line.

10 But -- but so I used 90 percent of the assessed value, in
11 that particular case, for a permanent easement.

12 Q All right. So it's not 100, but close to it?

13 A Yes, sir.

14 Q All right. And then you have a column, "Temporary
15 Easements." If you'd explain that, please.

16 A Temporary easements would be either temporary
17 construction easements, temporary workspace easements, or
18 temporary access easements. I added those acreages together,
19 and in this particular case, it would be 0.17 acres.

20 I studied some damage -- I looked at what net and -- net
21 and ground leases are getting in the market. I also looked
22 at a study provided -- prepared by Myers & Woods. And in
23 this particular case, it appeared that 8 percent per year
24 based on the value of the land is a reasonable rental rate.

25 The MVP documents state that this project will be a

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1 three-year project -- or that's what I saw, but we're hearing
2 less than that now, but -- so I utilized eight times three,
3 or 24 --

4 Q You're talking about the FERC order that has a three-year
5 period in it?

6 A Well, yes, sir.

7 Q All right.

8 A And so I used 8 percent a year for three years, or
9 24 percent, of the adjusted assessed price per acre.

10 Q So this is -- this column "Temporary Easements" is
11 property that will be used, but will return to the
12 landowner --

13 A At the end.

14 Q -- without an easement?

15 A That's correct. That's exactly right.

16 Q At the end of the construction and reclamation?

17 A That's right.

18 Q And what was your factor there? 24 percent?

19 A 24 percent.

20 Q All right. And then over to the next column, we have a
21 reserve: 20 percent. What is that?

22 A That's a reserve for any inconveniences, damages that
23 might take place to a property. I've got studies that show
24 it from zero to 30 percent. Typically, they'll run 10 to
25 31 percent. We selected 20 for the case of a bond hearing

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1 estimate here for just compensation.

2 So the fee -- the total adjusted assessed value times
3 20percent, would be applied, or 20 percent to the entire
4 parcel.

5 Q And so in the case of this top line, Haverty, Giles
6 County, the tract, the take is 0.1 acres permanent, right?

7 A Yes, sir.

8 Q And 0.17 temporary?

9 A Yes, sir.

10 Q And what amount in the estimate column did you have for
11 that?

12 A \$40,199.

13 Q And what makes that number so large for a take that seems
14 small in acres?

15 A Well, the reserve factor is plugged in on the
16 improvements, as well as the total land value. So that's
17 where that would, you know, get larger.

18 Q So in this case, the reserve factor was how much?

19 A The reserve factor was \$39,845. So, what does that
20 leave? About -- well, not much. I got to get close on this.

21 Q Doesn't leave too much, does it?

22 A No. 39,800 versus 40,200. So most of it's in the
23 reserve.

24 Q Now, does that describe generally the process that you
25 did for each tract in each county?

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1 A That explains exactly what I did in each county.

2 Q And if we turn to the second page of Exhibit 10 -- excuse
3 me, 11, is there a total for Giles County?

4 A Yes, sir: \$1,824,842.

5 Q And then we move forward -- if we move forward to the
6 next page, we have Craig County?

7 A Yes, sir.

8 Q And then going on forward, Montgomery County, right?

9 A Yes, sir. Do you want these totals as we go?

10 Q Well, they'll be with the judge.

11 A Okay.

12 Q Roanoke County?

13 A Yes, sir.

14 Q Franklin County?

15 A Yes, sir.

16 Q Correct?

17 A Yep.

18 Q And then, finally, Pittsylvania County?

19 A And Pittsylvania County, correct.

20 Q Now, if you were to go out and appraise each tract, what
21 would be -- what else would you have to do?

22 A Well, if we were -- of course, we'd want to go on the
23 property. We would want to measure any improvements on the
24 property. We would want interior inspections. We would look
25 at all things involved in a normal appraisal.

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1 We're going to look at the topography. We're going to
2 look at environmental, if it's available. We're going to
3 look at any surveys. We're going to -- the things you would
4 do in a normal appraisal to estimate market value.

5 I state these are not appraisals; these are only for the
6 bond hearing estimates to help the judge.

7 Q Okay. Now, did you do, however, some appraisals?

8 A Yes, sir, I did.

9 Q And how many did you do?

10 A Nine.

11 Q And are they some of the properties on this Exhibit 11?

12 A Yes, sir, they are.

13 Q And after you did those appraisals, did you compare what
14 the appraised prices were to these estimated prices?

15 A Yes, sir.

16 Q And without going through each one, what did you find?

17 A That -- let me -- hold on here just a second, please.

18 Well, they were fairly close. If the reserve figure had
19 been 21.5 percent, they would have been within \$29 of each
20 other.

21 Q Now, there's some that are different, right?

22 A Yes, sir. Some are higher, some are lower.

23 Q Okay. So like the first one, this -- if you had done
24 Haverty, that might have been higher than an actual
25 appraisal?

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1 A That's true.

2 Q But there's some that you factored at a higher percentage
3 than 20 percent?

4 A There's some we factored at a higher percentage, yes,
5 sir.

6 Q 30 percent, did you use that?

7 A Yes, sir, 30 percent.

8 Q On your actual appraisal?

9 A Yes, sir.

10 Q And you used 20 percent -- did you actually use that
11 number before you did your appraisals?

12 A Did I use what number before?

13 Q Did you use the 20 percent reserve before you completed
14 your appraisals?

15 A Yes, sir. Well, I think we did the appraisals -- well,
16 we were working on them at the same time, but -- doesn't
17 matter. I mean, 20 was -- we used that just as a modifier,
18 to try to recognize that there was a reserve factor in there.

19 Q And would the reserve factors take into account claims
20 like damages to the residue of the property?

21 A Yes, sir.

22 Q And explain, if you would -- and I apologize if it's
23 going too far, Judge, but how close did the 20 percent come?

24 A 20 percent, I don't have that one here, but it was very
25 close. I want to say it was within, like, \$29,000 when you

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1 added the highs and the lows.

2 Some were significantly higher, some were significantly
3 lower, but they averaged out at a lesser number. But at
4 21.45 percent, they were within \$29.

5 Q So the actual appraised value, versus this estimate that
6 you did at 21 -- if you'd run it at 21 percent, it would have
7 been on the money?

8 A Yes, sir.

9 MR. MASSIE: All right, Judge, we would offer
10 Plaintiff's Number 11.

11 THE COURT: I'm going to admit it over the
12 objection, but I will --

13 MR. TERPAK: Your Honor, I hope we would keep with
14 our discussion just about ten minutes ago that you let me
15 have my say before you admit it.

16 THE COURT: I'll let you have your say. It's marked
17 for identification now. I'll let you have your say first.

18 (Plaintiff's Exhibit 12 marked)

19 BY MR. MASSIE:

20 Q All right.

21 A Okay.

22 Q Mr. Long, I've shown you what is marked as Exhibit 12,
23 Plaintiff's Exhibit 12. Can you tell me what this is,
24 please?

25 A That is a hearing estimate of all -- by county, and a

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1 total of all counties.

2 Q So this is kind of a one-page picture of Number 11?

3 A Yes, sir. Now, on the left-hand side, that's the hearing
4 estimates by county and total. On the right-hand side, some
5 properties had been settled, so that's a deduction of those
6 property values from this amount.

7 Q And so you removed those out on that column? Can we show
8 that, please?

9 So if we look at this column, less properties as of
10 1-10-18, do you see that?

11 A Yes, sir.

12 Q So you're saying you had some in 11 that actually have
13 been taken out of the case at this point. So what did you
14 do?

15 A We deducted those out to show an adjusted hearing
16 estimate.

17 Q And the column at the far right, then, is what?

18 A The total hearing estimate, less the properties that had
19 been settled as of 1-10-2018. And that total is \$9,873,127.

20 MR. MASSIE: We offer Number 12.

21 THE COURT: I'll hear Mr. Terpak before I determine.
22 It's been marked.

23 MR. TERPAK: Thank you, Your Honor.

24 MR. MASSIE: And those are all my questions. Thank
25 you, Mr. Long.

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1 THE WITNESS: Thank you.

2 CROSS-EXAMINATION

3 BY MR. TERPAK:

4 Q Hello, Mr. Long. We met the other day.

5 A Yes, sir.

6 MR. TERPAK: Your Honor, I'm going to do something a
7 little bit personal just for one second.

8 There are a lot of people in this room with a lot of
9 strong feelings, and I just want to have them to understand
10 how extraordinary it is for you to take your Friday night and
11 work late and give your Saturday up. And I hope everybody in
12 this room appreciates what the Judge has done here and you
13 understand how special this is. I've never seen the federal
14 court do this before, working on a Saturday.

15 THE COURT: Well, I would tell you that in the
16 Western District it's not uncommon, because I like to think
17 of us as a kinder, gentler court, which I've expressed to
18 attorneys upon their admission to this court. And we try to
19 have a good relationship, collegial relationship, with the
20 community and with the bar. And so we accommodate parties;
21 we accommodate attorneys.

22 MR. TERPAK: Thank you, Your Honor.

23 THE COURT: I thank you for your comments.

24 BY MR. TERPAK:

25 Q Mr. Long, we met the other day. Nice to see you again.

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1 A Good seeing you.

2 Q First question: When were you first contacted by
3 Mountain Valley Pipeline about possibly working in this case?

4 A Actually, May of 2017.

5 Q May was the very first time you were contacted?

6 A Yes.

7 Q All right. And you've already said you're a Virginia
8 licensed appraiser?

9 A Yes, general certified.

10 Q As a Virginia licensed appraiser, you understand that you
11 need to comply with Virginia law?

12 A Yes, sir.

13 Q And Virginia law requires that any appraiser complies
14 with USPAP --

15 A Yes.

16 Q -- Uniform Standards of Professional Appraisal
17 Practice -- whenever giving any testimony about valuation,
18 correct?

19 A That's true.

20 Q And no one but a Virginia licensed appraiser is allowed
21 to testify about valuation in Virginia?

22 A True.

23 Q You understand that, under USPAP, you're required to
24 perform an appraisal before you give valuation testimony,
25 correct?

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1 A What I gave was -- it states on it it's not an appraisal.
2 It's an estimate for just compensation for the hearing only.

3 Q Which, according to the interrogatory answer from MVP, is
4 designed to achieve just compensation, the amount of just
5 compensation due, as an estimate, correct?

6 A I don't know. I didn't do that interrogatory.

7 Q Well, their interrogatory answer also cites to something
8 called the Uniform Appraisal Standards for Federal Land
9 Acquisitions, called the Yellow Book?

10 A Yes, sir.

11 Q Are you familiar with that as well?

12 A Yes, sir.

13 Q And under the Yellow Book as well, an appraiser has to
14 follow full appraisal methodology before giving a valuation
15 in a federal case, correct?

16 A I -- I guess so, yes. I've had the course.

17 Q Pardon me?

18 A I've had the course and I've prepared Yellow Books. Yes,
19 sir.

20 Q Great. And those appraisals have to go through all of
21 the steps in an appraisal, correct?

22 A Yes.

23 Q And that's designed to ensure accuracy, correct?

24 A That's correct.

25 Q You performed nine appraisals here, and only nine?

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1 A Yes, sir.

2 Q You were only asked to perform nine appraisals here?

3 A Yes, sir.

4 Q MVP made a decision not to have you perform any more than
5 nine appraisals, didn't they?

6 A Yes.

7 Q You're an experienced trial appraiser? Have you been in
8 federal court, state court?

9 A Yes, sir.

10 Q You know that assessed valuation is not admissible into
11 evidence, and you don't use it in your other cases, do you?

12 MR. MASSIE: Excuse me, but I object to the legal
13 conclusion.

14 THE WITNESS: Your Honor, I don't know the answer to
15 that.

16 BY MR. TERPAK:

17 Q Have you ever, in any appraisal you performed in any
18 capacity, substituted the assessed valuation for your opinion
19 of value generated by an appraisal?

20 A I can't think of any, no.

21 Q And the reason is that tax assessments are extremely
22 unreliable in relation to determining fair market value,
23 aren't they?

24 A Well, that's why I used the assessment ratio to modify
25 those.

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1 Q Well, besides assessment ratio, there are lots of things
2 a tax assessor does not do which are part of a normal
3 appraisal, aren't there?

4 A Yeah, I -- I can't answer that. I don't know.

5 Q Well --

6 A I'm not a tax assessor.

7 Q Well, we talked about this in your deposition. I don't
8 have a transcript, but you called it "the mass appraisal
9 approach"?

10 A Yes, that's what they use.

11 Q And among other things, the tax assessor does not
12 consider land, like a farm, which may be in land use, to
13 maintain farm status and pay lower taxes, right?

14 A Could you repeat that?

15 Q Aren't there parcels of land which are taxed at a lower
16 rate in order to encourage continued farm use?

17 A Yes, but they're also assessed at what they call market
18 value. That's true.

19 Q Based on farm use?

20 A Based on -- on comparable sales that they have.

21 Q Right. And that may or may not be the highest and best
22 use of that farm?

23 A Well, zoning is going to -- zoning is going to determine
24 that. They're going to look at the zoning, they're going to
25 look at other comparable sales, in order to come up to that

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1 land value for the assessment.

2 Q All right. But there may be a farm which has been used
3 for a farm which has the capacity to be used for a
4 subdivision?

5 A Correct.

6 Q And that would not be reflected in the assessment until
7 the subdivision occurs?

8 A But what you just said earlier is exactly right. That's
9 why the land use valuation is there. It allows the land to
10 be used as a farm and not have the owners taxed as if it was
11 a subdivision.

12 Q Correct. And the actual fair market value after an
13 appraisal process may be many, many times higher than the
14 farm value?

15 A It may be, yeah.

16 Q Besides farms, any piece of land could have a change in
17 highest and best use which may increase its value that would
18 not be reflected in the assessment?

19 A Any change in highest and best use? Well, typically I'm
20 going to appraise based on the existing zoning; so when we're
21 saying change in highest and best use, I'm going to appraise
22 what's there, and that's what the assessor is doing also.

23 Now, if you're looking at changing a property from an A-1
24 to a business zoning, yeah, that's going to probably change
25 the value.

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1 Q And there are pieces of property where someone has,
2 perhaps, a comprehensive plan for a much higher density, but
3 they don't want to pay the extra taxes yet, until it's time
4 to change the use?

5 A And that's why there's land use valuation.

6 Q And besides land use, that can apply to other people
7 besides farms; you don't want to pay the extra taxes until
8 you change the use in development, correct?

9 A Well, unless you want to sell it and get a higher
10 assessment to be able to use that as a marketing tool.

11 Q But that's another thing an assessor would not look at,
12 which an appraiser would and use his judgment and determine
13 the true highest and best use?

14 A Okay.

15 Q Agreed?

16 A Agreed.

17 Q Besides that, in terms of damage to the residue, you're
18 familiar with the larger parcel theory; we discussed that at
19 your deposition?

20 A That's correct.

21 Q The larger parcel theory is when damages may, in fact,
22 apply to a much larger number of parcels than just the one
23 parcel that has the gas line on it, correct?

24 A That's correct, yes, sir.

25 Q And your damage figure did not consider whether there

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1 might be other parcels other than the single assessed parcel
2 which are subject to a damage claim, correct?

3 A All properties should have been included in the list I
4 was given, as far as the acreage that's there.

5 Q If the gas line crosses one piece of land of a 200-acre
6 farm, that's just one 50-acre tract, and there's 150 more
7 acres, part of the same farm, those would not have been
8 considered in your assessment spreadsheet?

9 A If they weren't on the list, they would not have been
10 considered.

11 Q But an appraiser in his appraisal, considering the larger
12 parcel theory --

13 Which you agree applies here?

14 A Yes.

15 Q -- would consider all the parcels which have the unity of
16 lands applied to it for damages?

17 A That's correct. Same highest and best use, same unity,
18 same adjacency.

19 Q For all these reasons, you know that a tax assessment
20 does not accurately provide the same information that an
21 appraisal does in terms of evaluation of a condemnation case,
22 correct?

23 A Appraisal would be a better way to do it, yes, I agree.

24 Q When we were at your deposition, we asked why you did it
25 this way, and your answer was: I didn't know what else to

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1 do.

2 A To do 300 parcels, in order to come here to prepare an
3 estimate for a bond hearing, this was about the only way that
4 I could think that would be reasonable to do that and would
5 make sense.

6 Q Because they only asked you to do these appraisals in
7 December, right?

8 A That's correct.

9 Q And you got nine of them done between December and --
10 what was the date in December you were asked to do them?

11 A First part of December.

12 Q So between -- so you got nine of them done between
13 December and this hearing now, correct?

14 A Right. Actually prior to this, but that's true.

15 Q The appraisals were done before that?

16 A Yes.

17 Q Because we've got copies of them.

18 A Right.

19 Q So how long did it take you to do nine appraisals?

20 A We did nine appraisals in about 11 days.

21 Q All right. You were first hired over six months ago,
22 weren't you?

23 A Yes, sir.

24 Q But they didn't get you to work on appraisals of these
25 parcels?

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1 A No.

2 Q Are you aware of any circumstance, whether in court or
3 not in court, whether for a bank loan or for anything else,
4 that a Virginia licensed appraiser would submit a tax
5 assessment as a valuation to be considered by the user of
6 that appraisal?

7 A Bank loans, a lots of times they will do -- they'll use
8 tax assessments when they're doing home equity or something
9 like that, yes.

10 Q Isn't the assessment data you used just the opinion of
11 the tax assessor in each county?

12 A Yes. Well, and the staff. That's true.

13 Q The tax assessor and his staff?

14 A Yeah.

15 Q And they do something called mass appraisal?

16 A Yes, sir.

17 Q And we've discussed the things that a tax assessor does
18 not consider, correct?

19 A They're supposed to consider everything, and I hope that
20 that is the case; but what I worked off was the assessed
21 values, yes, sir.

22 Q When we talked, you agreed that they didn't consider
23 changes in highest and best use, right?

24 A If it's a -- well, I can't state that categorially,
25 because I know in the City of Roanoke, they do do that. But

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1 I can't state for the other counties.

2 Q Right. And they do not consider farms that are in land
3 use that have a lower value on purpose to lower the taxes,
4 right?

5 A Well, they appraise those at market value, and then take
6 them down to a land assessed value, a land use assessed
7 value. That's how they can keep the taxes down.

8 Q And you don't know what each assessor precisely did in
9 each of these counties to arrive at these values, do you,
10 because it was someone else's work?

11 A That's true.

12 MR. TERPAK: I have no further questions, Your
13 Honor. But I have argument at the appropriate time.

14 THE COURT: All right. I'm going to finish -- we're
15 going to finish with Mr. Long, and then I'll hear argument.

16 MR. TERPAK: Yes, Your Honor.

17 THE COURT: All right.

18 Any other counsel wish to cross-examine Mr. Long?

19 Ms. Bentley?

20 CROSS-EXAMINATION

21 BY MS. BENTLEY:

22 Q Good evening, Mr. Long. Lori Bentley --

23 A Hello, Ms. Bentley.

24 Q -- for some landowners.

25 Mr. Long, you testified earlier that when working --

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1 you've done appraisal work both for landowners and condemning
2 authorities in the past, correct?

3 A That's correct.

4 Q And when working for condemning authorities other than
5 MVP, you always perform appraisals; is that fair to say?

6 A That's true.

7 Q Okay. And this is the first time you have ever in your
8 career been asked to perform an estimate, a formula, such as
9 what you've presented to the Court today?

10 A Come up to a potential just compensation by county.

11 Q Okay. And the appraisals, the nine appraisals, that you
12 did perform in this case are not done to the typical standard
13 that you would perform an appraisal, correct? In other
14 words, you didn't visit the property, you didn't meet with
15 the landowners --

16 A Oh.

17 Q -- to discuss potential concerns, you didn't take
18 measurements; you just observed these properties from the
19 street?

20 A That's correct.

21 Q And that is not what you would do in a typical appraisal?

22 A No, but I have done that before, when people don't want
23 you to know that you're looking at a property.

24 Q Okay. Now, Mr. Long, would it be fair to say that six of
25 the nine appraisals that you did perform resulted in a higher

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1 figure than your formula estimate?

2 A One, two, three, four, five -- well, I'm getting five,
3 but --

4 Q Okay. And so the majority of the appraisals that you
5 performed came out at a higher dollar figure than your
6 estimate; fair to say?

7 A Yes, ma'am.

8 Q Okay. And you only performed nine appraisals out of the
9 297 parcels that are affected by this project?

10 A That's correct.

11 Q Now, neither your estimates nor your appraisals take into
12 account any expenses that the landowners may incur because of
13 the construction, correct? Any cost-to-cure type items?

14 A No, they don't.

15 Q Okay. So if an owner has livestock or horses on the
16 property that are impacted and new fencing will have to be
17 constructed, neither your estimate nor your appraisals have
18 taken into account those costs?

19 A And I think that's stated in my report, actually.

20 Q And you would agree that payment for those types of items
21 would have to be included in any just compensation award in
22 these cases?

23 A Yes.

24 Q Okay. Likewise, you did not consider any payments --
25 again, as an example, of people with livestock, any payments

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1 for the inability of their animals to graze on the property,
2 say, that's being used for a temporary construction easement
3 during the construction period, correct?

4 A I did not.

5 Q And you would agree with me, then, that those are also
6 items that would need to be compensated?

7 A That might be already in the reserve number, for that
8 matter.

9 Q And Mr. Long, would you also agree with me that neither
10 your estimates nor your appraisals take into account any
11 temporary or permanent loss of access to property as a result
12 of the project?

13 A Can you help me a little bit with what you mean by that?

14 Q Say, for example, this project is crossing a landowner's
15 driveway.

16 A Okay.

17 Q And that provides his or her only access to their home,
18 only means of ingress and egress. Obviously, if they're
19 digging a trench and building a pipeline through there, they
20 are going to have a loss of access, correct?

21 A That would be the case there. But it's an easement, so
22 they have to make sure that that person also has access to
23 their property.

24 Q And how about loss of access in a permanent sense, to the
25 extent that there are weight limitations or restrictions that

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1 are going to apply to being able to cross over a pipeline?

2 A After my deposition -- you asked that question -- I went
3 back and searched. The limit is 40,000 pounds that can pass
4 over the pipeline.

5 Q Yes, sir.

6 A So 20 tons.

7 Q Okay. So if they needed to have a delivery of something
8 that weighed more than that, they would certainly have the
9 inability to do that after this pipeline is constructed,
10 correct?

11 A That's something we would certainly look at, yes.

12 Q And that would be something they would need to be
13 compensated for as part of just compensation, wouldn't it?

14 A Well, part of that might be in the damage, but that's
15 something we'd certainly look at, yes, ma'am.

16 Q But it's something you have not looked at for purposes of
17 your testimony here today?

18 A That's correct.

19 Q Mr. Long, Mountain Valley Pipeline has not provided you
20 with any title reports on the properties; is that fair to
21 say?

22 A Yes.

23 Q And they've not provided you any surveys of the
24 properties?

25 A Only surveys that show the pipeline and accesses and

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1 temporary and permanent easements.

2 Q Okay. And the -- well, I think there's a distinction
3 between a survey and a map.

4 A Correct.

5 Q They provided you with maps, but not actual field
6 surveys?

7 A That's correct.

8 Q Is that fair to say?

9 A Yes, that's true.

10 Q Okay. So you don't have any way to determine the
11 accuracy of the alignment sheets or the maps that they have
12 provided to you, correct?

13 A We looked at what they had on there, we looked at the
14 assessed records, and I think we pulled the deeds on them,
15 too.

16 Q Okay. Would you agree with me, Mr. Long, that if the
17 alignment sheets or the maps that you were provided are
18 inaccurate or they inaccurately depict the property that's to
19 be taken from the landowner, that the estimate is more likely
20 to be inaccurate as well?

21 A You've got to have good information to do the appraisal.
22 Yeah, I would want correct information.

23 Q So if the maps or the alignment sheets show, for example,
24 that someone's driveway to their home is actually on their
25 neighbor's property, you would have included that acreage in

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1 the neighbor's estimate instead of that landowner's estimate?

2 A Well, it's the neighbor's land. They probably have an
3 easement over it, but it's the neighbor's land.

4 Q What if the property line shown on the alignment sheet is
5 inaccurate?

6 A Well, then certainly we would take that into account.

7 Q But it hasn't been taken into account as we sit here
8 today?

9 A Yeah, I'm not aware of that particular case, no.

10 Q Mr. Long, isn't it true that with regard to the temporary
11 construction easements, in cases that you have provided
12 appraisals for in the past both for landowners and for
13 condemning authorities, that you have assigned a 10 percent
14 damage, as opposed to the 8 percent that you assigned on
15 these parcels?

16 A No. Usually -- I used to look at it as a set amount, and
17 that would be anywhere from 10 to 25 percent. It made more
18 sense to me to do it on a market rent basis. It's a
19 three-year period, and we gathered information to give us an
20 annual market rent.

21 Q But in prior situations, you have always used a 10 to a
22 25 percent rate?

23 A Yes.

24 MS. BENTLEY: Your Honor, those are all the
25 questions I have. Thank you.

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1 THE COURT: Thank you, Ms. Bentley.

2 Additional cross?

3 Mr. Lovett?

4 MR. LOVETT: Thank you, Your Honor. Joe Lovett.

5 I'll be brief, I hope.

6 CROSS-EXAMINATION

7 BY MR. LOVETT:

8 Q Good evening, Mr. Long.

9 A Good evening.

10 Q The mass appraisal process that you used, you said it was
11 a product of necessity, essentially, right? You thought of
12 it yourself when faced with the situation where you had to
13 come up with a lot of appraisals?

14 A Well, when we had to come up with the bond estimate,
15 since this is a bond hearing, the only way that you could do
16 that is to have some type of values. We looked at the
17 assessed value, we modified it, and then plugged in, as I
18 stated, the land areas and the reserve.

19 Q And you came up with this method yourself, as the best
20 quick and dirty way to do that?

21 A Well, it made the most sense to me.

22 Q It's not something that you ever learned in an appraisal
23 class, is it?

24 A Using assessed values? We always look at assessed
25 values; but no, it's not something I learned in an appraisal

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1 class.

2 Q You're, in fact, told not -- from what I understand,
3 you're told not to use assessed values in an appraisal class,
4 right?

5 A This was not an appraisal.

6 Q Okay. Right. But all I'm saying is that the method that
7 you used isn't a standard method used by anybody else,
8 because you were faced with this unique situation, correct?

9 A Correct.

10 Q Okay. So it's not something that the rest of the
11 profession that you're a part of relies on when forming
12 opinions as to the value of a piece of property, correct?

13 A Yeah, but I believe -- if you put this out to my peers, I
14 believe you would find that they would understand and find
15 this to be a reasonable way to come up to an estimate.

16 Q It's never been put out to your peers, though, has it?

17 A No.

18 Q Now, you didn't go to any piece of property -- let me
19 strike that.

20 Did you go to any piece of property?

21 A Went to all of them.

22 Q You went to all of them?

23 A Yes, sir. Didn't go on the property.

24 Q You drove past each of the 200-and-some parcels?

25 A Oh, no, sir. Nine.

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1 Q Okay. I'm talking about the other parcels.

2 A No, sir.

3 Q Not the nine that you appraised, but the others.

4 A No, sir.

5 Q You didn't go near them, right?

6 A Well, I'm sure I did.

7 Q Okay. But you don't know where they are, do you?

8 A Yeah, I didn't do an inspection of them.

9 Q Now, a big part of an appraiser's job is to determine, I
10 take it, what the highest and best use of a property is when
11 performing the -- doing the appraisal?

12 A Certainly.

13 Q So you didn't do that for any property here?

14 A No.

15 Q And to do an appraisal, you have to appraise it according
16 to its highest and best use, right?

17 A Yes.

18 Q Okay. Now, on the properties that you appraised, you
19 didn't go into the houses or talk to the people who owned the
20 property, correct?

21 A No, sir.

22 Q That's not an appraisal that you would rely on, then, to
23 determine the valuation, even of those properties, correct --
24 strike that -- an accurate valuation?

25 A Well, I've done it before. It's not the first time I've

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1 ever done this.

2 Q I understand you've done it before, but it's still not as
3 accurate a valuation as a real -- as an appraisal as laid out
4 in the manuals and methods of your profession, correct?

5 A Yeah. And making an interior inspection of the property
6 would be desirable, yes.

7 Q Do you know of any -- have you dealt with any large
8 pipeline projects like this, going through mountainous areas
9 in West Virginia and Virginia?

10 A No, sir.

11 Q You don't have any firsthand experience of how much it's
12 going to devalue the property at all, do you?

13 A I've never done one, so no.

14 Q Did you evaluate timber value?

15 A No, sir.

16 Q There's going to be timber loss, though, according to --
17 in this pipeline, right?

18 A Correct.

19 Q That wasn't part of your valuation, correct?

20 A That's typically in the price per acre of -- you know,
21 timber value would be included with it. It's a dual
22 component, land and timber.

23 Q You didn't assess the timber value here, did you?

24 A I did not.

25 Q Okay. Did you assess what water source each house relied

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1 upon?

2 A I did not.

3 Q And if springs or wells were disrupted by a pipeline,
4 would that affect the value of the property?

5 A Yes.

6 Q Significantly, wouldn't it?

7 A Well, yeah.

8 Q In fact, if a house lost its well or its spring it relied
9 on, it could become completely valueless, couldn't it?

10 A Well, the land would still remain, but yes.

11 Q And did you assess whether livestock relied on springs?

12 A I did not.

13 Q And if livestock lose their water, presumably the
14 valuation of the property would be significantly lower as
15 well, wouldn't it?

16 A Yes.

17 Q Okay.

18 A Now, there is a cost to cure, and that's what I believe
19 that someone was talking about earlier. And you could put a
20 well in, a commercial well. You could sign up for the CREP
21 program, Creeks, Rivers, Environmental Protection, and that
22 allows wells to get water feeders, so it keeps livestock out
23 of the water.

24 Q Sometimes wells aren't very good, though, are they, water
25 quality-wise?

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1 A Possibly.

2 Q You don't have any idea about --

3 A Well, I have a well. And mine's fine.

4 Q You don't have any idea about the wells related to any of
5 the properties at issue in this case?

6 A I do not.

7 Q Or the springs, do you?

8 A No, sir, I do not.

9 Q And if a pipeline goes closer to a house, instead of just
10 on an unoccupied pasture, that could significantly affect the
11 value of that house, couldn't it?

12 A Yes, sir.

13 Q And you didn't consider that on any individualized basis,
14 except for, perhaps, the appraisals, the nine appraisals, you
15 did, correct?

16 A The nine appraisals we did, yes, sir.

17 MR. LOVETT: Okay. Thank you.

18 THE WITNESS: Yes, sir.

19 THE COURT: Mr. Carroll?

20 CROSS-EXAMINATION

21 BY MR. CARROLL:

22 Q Good evening, Mr. Long.

23 A Hello.

24 Q You had some particular difficulties applying your
25 methodology to the Town of Chatham, did you not?

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1 A Yes, sir.

2 Q The Town of Chatham is a tax-exempt organization, and
3 because of your reliance on assessed values, you first
4 reported a value for that property of zero; is that correct?

5 A That's correct.

6 Q And so your application of an assessment ratio, which I
7 believe you testified earlier on cross-examination is a means
8 of trying to make up for the use of assessment, your
9 application of that assessment ratio here is not even to an
10 assessed value for the Town of Chatham; is that correct?

11 A That's correct.

12 Q Instead, you utilized assessed values of -- was it nearby
13 properties, or adjoining parcels?

14 A What I did now?

15 Q Yeah. What did you do now?

16 A Yeah, okay. After this was brought to our attention at
17 the deposition, I went back and pulled the information on
18 the --

19 Q Did you call the Commissioner or anybody at the county to
20 see if there was an assessed value for the town's parcel?

21 A As a matter of fact, the parcel that shows is not even
22 under the correct name. Y'all are trying to get that taken
23 care of in the Town of Chatham.

24 Q Well, it's in Pittsylvania County, isn't it? The parcel
25 is in Pittsylvania County?

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1 A Oh, okay. Yeah, but --

2 Q So are you saying that the parcel records have incorrect
3 information on them?

4 A Yes, sir.

5 Q Was any of the assessment information incorrect?

6 A There was no -- well, it only showed it as 0.82 acres,
7 which is incorrect. And so what I did was find five
8 properties completely surrounding the 6.54-acre parcel.

9 Q And you utilized their assessments, rather than any
10 assessment for the town's parcel, to work your methodology?

11 A Well, there was no assessment for the town's parcel.

12 Q But that was your option, that was your choice, was to
13 use that methodology, this revised methodology?

14 A Yes, sir.

15 Q You say it was five parcels in the vicinity?

16 A Yes, sir, uh-huh. Do you want me to talk about them, or
17 no?

18 Q Is this a methodology that your peers have utilized?

19 A Well, it would be like using comparative sales. We're
20 using assessed values rather than comparative sales in this
21 case.

22 Q Well, there were no comparable sales, though; is that
23 correct?

24 A Pardon?

25 Q There were no comparable sales?

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1 A To a landfill, but yeah.

2 Q Did you factor that into your consideration?

3 A I did not.

4 Q You didn't factor it. Okay.

5 Did you factor the environmental risk of unearthing a
6 landfill?

7 A I did not.

8 Q Did you factor the risk for contamination to adjacent
9 properties into your bond estimate?

10 A I did not.

11 Q You would agree that that would be damage to the residue,
12 to unearth a landfill that had been out of use for 30 years,
13 would you not?

14 A I did not plug that in, no.

15 Q You would agree that would be damage to the residue,
16 however?

17 A It's going to be a cost to cure, yeah. You'll have to
18 put the cap back on it.

19 Q And so the application of your 20 percent figure for
20 damages to the residue across the board is probably not
21 appropriate for the Town of Chatham's parcel?

22 A I haven't seen the property, so I can't tell you. I
23 can't answer that question.

24 MR. CARROLL: Nothing further. Thank you.

25 THE COURT: Thank you.

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1 Any additional cross? Mr. Clarke?

2 MR. CLARKE: Thank you, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. CLARKE:

5 Q Stephen Clarke, on behalf of Waldo & Lyle defendants.

6 Good evening, Mr. Long.

7 A Hello.

8 Q I want to take you back to a little discussion you were
9 having with Mr. Terpak about the Uniform Standards of
10 Professional Appraisal Practice, USPAP. Do you recall that?

11 A Yes, sir.

12 Q And you complied with USPAP in the nine appraisal reports
13 that you did produce with regard to this project, I take it;
14 is that right?

15 A That's right.

16 Q But you didn't follow USPAP with regard to your just
17 compensation estimate, or your bond estimate -- I'm not sure
18 exactly what you're calling it -- is that right?

19 A Potential just compensation or bond hearing estimate,
20 yes, sir.

21 Q And you -- are you aware of how USPAP defines the term
22 "appraisal"?

23 A Yes.

24 Q Do you have a copy there with you, or would you like me
25 to hand --

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1 A I do not have a copy here with me.

2 MR. CLARKE: If I could have this marked as
3 Defendants' Exhibit 6.

4 (Defendants' Exhibit 6 marked)

5 BY MR. CLARKE:

6 Q Mr. Long, I've given you a document that's been marked
7 for identification purposes as Defendants' Exhibit Number 6,
8 and the first page looks like this. It's the cover page for
9 the USPAP. Would you agree?

10 A Yes, sir.

11 Q All right. But the document I've given you is not the
12 entire book of USPAP; it's only a selection. Is that
13 correct?

14 A That's correct.

15 Q All right. And if you'll turn with me to the page
16 number 1, right after that cover page.

17 A Okay.

18 Q That is the definitions section of USPAP, is it not?

19 A It is.

20 Q And the very first definition is of the term "appraisal,"
21 correct? Do you see that?

22 A Yes, sir.

23 Q Would you read for me that first definition of an
24 appraisal, the noun?

25 A "The act or process of developing an opinion of value; an

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1 opinion of value."

2 Q So, under USPAP, an opinion of value is an appraisal. Do
3 you agree with that?

4 A Yeah.

5 Q And what you've given here today, that's not an opinion
6 of value?

7 A It's not an appraisal.

8 Q Is it an opinion of value?

9 A It's an opinion of potential just compensation, is all it
10 is. It's a mathematical calculation utilizing the assessed
11 value modified by the sales ratio.

12 Q Well, but you did apply some analysis to it. You
13 determined that the permanent easements would be valued at
14 90 percent of the assessed value, correct?

15 A Yes, sir.

16 Q And the temporary easements, you testified about that.
17 You thought it was a reasonable rental rate of 8 percent a
18 year for three years, and that's how you came up with
19 24 percent, correct?

20 A Right. That's correct.

21 Q And then you said, Well, I think it's appropriate to
22 include this reserve of 20 percent, correct?

23 A That's correct.

24 Q And all of those were your opinions applied to the values
25 in this case --

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1 A That's correct.

2 Q -- were they not?

3 A That's correct.

4 Q But, nonetheless, this is not an opinion of value?

5 A That's not an opinion of value. It's -- flip to the
6 second page. It states there it's not an appraisal.

7 Q I understand that. But if it walks like a duck and it
8 quacks like a duck, at some point, you have to start saying
9 it's a duck; don't you agree?

10 A An appraisal would have to meet all the -- what you've
11 got here is just a definition. The actual appraisal, to meet
12 USPAP, has a number of things it has to meet. This does not
13 meet those.

14 Q Well, I agree with that.

15 If you'll turn with me in the next -- the next page in
16 that Exhibit Number 6 that I've given to you, that's USPAP
17 standard number 1, correct?

18 A Okay.

19 Q It's numbered on the bottom of the next several pages,
20 pages 17 through 21, of the USPAP 2016-2017 edition.

21 Do you see that?

22 A Yes, sir.

23 Q And standard 1 is what you have to comply with as an
24 appraiser if you're preparing and developing a real property
25 appraisal; isn't that right?

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1 A That's correct.

2 Q And you didn't comply with standard 1 in doing the work
3 you did for this hearing, correct?

4 A I didn't apply -- I didn't prepare a real property
5 appraisal. That's what I'm trying to tell you.

6 Q So you didn't -- excuse me. You didn't comply with,
7 really, any of the standards. There's standards rule 1-1,
8 standards rule 1-2, 1-3, 1-4 -- you didn't -- 1-5 and 1-6.
9 You didn't comply with any of those, is what you're saying,
10 correct?

11 A That's pretty much right, yes, sir.

12 Q And your testimony is you didn't need to; is that right?

13 A Not for this particular case, no.

14 MR. CLARKE: Your Honor, I would move to admit
15 Defendants' Exhibit 6.

16 THE COURT: Any objection, Mr. Massie?

17 MR. MASSIE: No objection.

18 THE COURT: All right. Admitted without objection.

19 (Defendants' Exhibit 6 admitted)

20 BY MR. CLARKE:

21 Q I think you heard you say earlier, Mr. Long, that you've
22 never appraised a pipeline in an eminent domain case before;
23 isn't that right?

24 A That's correct.

25 Q And that may be part of the reason why you selected this

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1 sort of unorthodox methodology; is that right?

2 A No.

3 Q The reason was really just kind of the time constraint, I
4 take it?

5 A Well, I had to come up to some reasonable estimate of
6 value of just shy of 300 parcels.

7 Q And you were asked to do the appraisal of those nine
8 parcels in early December, right?

9 A That's correct.

10 Q And you completed the reports in late December, I take
11 it; somewhere around then?

12 A Mid.

13 Q So maybe it took you three weeks to prepare those nine
14 appraisals; is that a fair estimate?

15 A That's correct.

16 Q That's three appraisals per week, correct?

17 A Yes.

18 Q That's a lot of work, isn't it?

19 A It certainly is.

20 Q And when we're talking about 300 properties, at the rate
21 of three appraisals a week, that's 100 weeks of work; isn't
22 that right?

23 A That's correct.

24 Q So you just didn't have the time to do it, and so you
25 went with this approach, I take it, correct?

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1 A Well, that made sense to me.

2 Q You're familiar with the Virginia Appraiser Regulations,
3 are you not?

4 A Somewhat. In what instance?

5 Q Well, in particular, there are regulations that govern
6 the practice of real estate appraisal within the Commonwealth
7 of Virginia, and one of those regulations requires that if
8 you're preparing an appraisal, that you comply with USPAP,
9 correct?

10 A That's probably right.

11 Q But, nonetheless, what you did was not an appraisal,
12 correct?

13 A That's correct.

14 MR. CLARKE: All right. No further questions.
15 Thank you.

16 THE COURT: Thank you.

17 Mr. Lollar?

18 CROSS-EXAMINATION

19 BY MR. LOLLAR:

20 Q Charles Lollar for the Lollar defendants.

21 Mr. Long, it's getting late. I'm not going to belabor
22 the point.

23 You said it repeatedly: You did not do an appraisal.

24 And the reason for the total values you arrived at, and the
25 reason you didn't do an appraisal, is because you didn't have

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1 time, correct?

2 A Well --

3 THE COURT: Mr. Lollar --

4 MR. MASSIE: I object.

5 THE COURT: -- you're not -- you said you weren't
6 going to tread on the ground we've already tread. That's
7 exactly the ground we've tread.

8 MR. LOLLAR: I'll rephrase my question.

9 THE COURT: Okay.

10 BY MR. LOLLAR:

11 Q You said you did an estimate of just compensation?

12 A An estimate of potential just compensation, yes, sir.

13 Q And just compensation is the value before, under the
14 federal rule, and compared to the value in the after, under
15 the federal rule; it's valuing the -- comparing the values of
16 the two after the project is complete?

17 A That would be the difference of the two, yes, sir.

18 Q Right. And in Virginia and under the federal
19 compensation rules, the value is fair market value, correct?

20 A Correct.

21 Q And you estimated just compensation; you didn't arrive at
22 a value, correct?

23 A That's correct.

24 MR. LOLLAR: All right. That's all I have. Thank
25 you.

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1 THE COURT: Thank you.

2 Mr. Teaney?

3 MR. TEANEY: I promise not to cover the same ground,
4 Your Honor.

5 CROSS-EXAMINATION

6 BY MR. TEANEY:

7 Q Mr. Long --

8 MR. MASSIE: Excuse me, Judge, but is counsel from
9 the same group of firms going to double the examination of
10 the witness?

11 THE COURT: Mr. Lovett did cross-examine already.

12 MR. TEANEY: That's true. I was going to ask on
13 behalf of one particular client, with one specific question,
14 that I will be handling the landowner for. We may have
15 missed that boat. If --

16 THE COURT: Is that a different client than
17 Mr. Lovett's client?

18 MR. TEANEY: Because we're Appalachian Mountain
19 Advocates, he too represents New River Conservancy for
20 purposes. So we may have missed that opportunity, but --

21 THE COURT: One question? Is that all, one
22 question?

23 MR. TEANEY: I guess it would probably be two. It's
24 just one to establish, and then --

25 THE COURT: You can ask one question.

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1 BY MR. TEANEY:

2 Q If the assessed value failed to account for the existence
3 of a conservation easement that would be extinguished as a
4 result of the condemnation, then the assessed -- then your
5 valuation will have underestimated the value of that
6 property, correct?

7 A Could you run that one by me again, please?

8 Q I tried to do it in one.

9 If a conservation easement --

10 MR. MASSIE: That's two questions. I'm sorry.

11 BY MR. TEANEY:

12 Q If a conservation easement on a property resulted in a
13 lower assessed value by the tax assessor --

14 A Correct.

15 Q -- and you relied on that information, then you would
16 have arrived at a valuation or an estimate of potential just
17 compensation that is lower if the conservation easement ends
18 up being extinguished as a result of the condemnation?

19 A I guess. That's -- that question's -- let me see if I'm
20 understanding it.

21 Q Okay.

22 A If I look at the assessed value of a property that has a
23 conservation easement on it, and utilize that, that will show
24 a lower value?

25 Q Uh-huh.

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1 A Is that your question?

2 Q If that condemnation easement ends up being extinguished
3 as a result of the condemnation --

4 A Right.

5 Q -- did you account for the extinction of a --
6 extinguishment of a conservation easement?

7 A Correct me if I'm wrong, but pretty much if they did
8 that, wouldn't they -- I know VOF has looked at some of this.
9 Wouldn't they do a swap on some of that? That's what I think
10 they do. I think they take that property, whatever is taken,
11 and then they purchase another property to swap with it.

12 Q But your proposed bond here doesn't account for that,
13 does it?

14 A No, it doesn't.

15 MR. TEANEY: Thank you, Your Honor.

16 THE COURT: Any other cross-examination of Mr. Long?
17 You may. And this is Mr. Delmer Howard.

18 MR. DELMER HOWARD: Delmer Howard. I have two
19 questions; maybe three.

20 Exhibit A of a map -- I think you have it, Your
21 Honor.

22 THE COURT: All right. Can you get that for me?

23 MR. DELMER HOWARD: I have the exhibit letter, Your
24 Honor.

25 THE COURT: Is it this, this map?

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1 MR. DELMER HOWARD: I think so. There's a little
2 article on the left side.

3 THE COURT: Yes. Natalie Cox?

4 MR. DELMER HOWARD: Natalie Cox.

5 THE COURT: Okay.

6 MR. DELMER HOWARD: I'd like to read it.

7 THE COURT: Let me show this -- let me give this to
8 Mr. Long.

9 MR. DELMER HOWARD: Okay. Thank you, Judge.

10 THE WITNESS: It's this road right here, Reese
11 Mountain.

12 THE COURT: We'll have him ask his question, and
13 then that might direct you to what he's after.

14 BY MR. DELMER HOWARD:

15 Q Okay. Have you performed any appraisals in Montgomery
16 County or near Fort Lewis Mountain?

17 A Yes, sir.

18 Q Okay. Did you perform the ones on Reese Mountain Road in
19 the orange, the one you can see the orange line?

20 A Your property? Is that you, Mr. Howard?

21 Q Yes. Delmer Wayne Howard is the only name on it.

22 A Gosh, you know, I've done thousands of appraisals. And
23 this was the land Jim Woltz split up on top of the mountain?

24 Q Yes, in the '70s; no, that was a different split.

25 A Okay. That was over on Porter? Is this Porter?

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1 Q No. It's the same Fort Lewis, up on the top, where the
2 gas line will be coming through.

3 A I may have, but I just don't know.

4 Q Okay. I'm sorry.

5 The article on the left that the judge showed you, I'll
6 read it. It says, "Natalie Cox, a spokeswoman for Mountain
7 Valley, said deed easement payments recently reviewed in the
8 region for pipeline rights-of-way ranged from an apparent
9 high of \$357,880 for an easement affecting a large parcel
10 along the Reese Mountain Road in the Fort Lewis Mountain area
11 of Montgomery County."

12 And if you read on --

13 This article was in *The Roanoke Times*.

14 A Okay.

15 Q -- it said that land areas in other counties, Giles or
16 whatever, were a lot lower.

17 In your experience as an appraiser, and since you work
18 for MVP, I'm thinking gas that is running underneath of a
19 poor county or running underneath of a rich county, making
20 MVP rich, that value shouldn't differ.

21 A Well, the only -- and first off, let me state that I'm an
22 independent fee appraiser. You -- I've worked for and
23 against property owners. It doesn't matter to me. But in
24 this case, I'm working for MVP.

25 But the value would be based upon comparable sales in the

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1 area. If -- in a poorer county or a richer county, as you
2 stated, if the land sales are all the same per acre, the
3 estimate of value is going to be the same.

4 Q Okay. That's good for that question.

5 MR. DELMER HOWARD: And in the Exhibit B, which is a
6 different map, Your Honor --

7 THE COURT: Did you want this first map marked as an
8 exhibit, sir?

9 MR. DELMER HOWARD: Yes, ma'am.

10 THE COURT: And that would be Exhibit 7.

11 (Defendants' Exhibit 7 marked)

12 THE COURT: Is there any objection?

13 MR. MASSIE: May I just look?

14 THE COURT: Sure.

15 MR. MASSIE: I have no objection.

16 (Defendants' Exhibit 7 admitted)

17 THE COURT: All right. Why don't you go ahead and
18 look at this one, Mr. Massie? This is the next one.

19 MR. MASSIE: I have no objection to that.

20 THE COURT: All right. Did you want that one
21 admitted too?

22 MR. DELMER HOWARD: Yes, ma'am.

23 THE COURT: That will be Exhibit 8, then.

24 (Defendants' Exhibit 8 marked)

25 (Defendants' Exhibit 8 admitted)

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1 MR. DELMER HOWARD: There was one question for
2 Mr. Long, and that's all I have.

3 BY MR. DELMER HOWARD:

4 Q The bright highlighted orange shows my property, and it
5 says rock wall and flagpole near my property line that MVP
6 wishes to take 40 feet of, when across the road, there is
7 plenty of right-of-way they already have.

8 Well, when you look at a property that there is a big,
9 giant flagpole with all these rock walls and everything, do
10 you reflect that upon your estimate of what that little area
11 of road they call little --

12 A We would.

13 Q They would? Okay. Well, the offers I received weren't
14 close to that, so you must have not have appraised it.

15 A No, I've never seen your property, Mr. Howard.

16 MR. DELMER HOWARD: Okay. All right. That's all I
17 have. Thank you.

18 THE COURT: Thank you, Mr. Howard.

19 Mr. Robertson?

20 MR. ROBERTSON: One question.

21 CROSS-EXAMINATION

22 BY MR. ROBERTSON:

23 Q Did your valuation account for any commercial business
24 interests that may have been on any of the properties?

25 A No, sir.

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1 MR. ROBERTSON: Thank you.

2 THE COURT: All right. Any other cross-examination
3 of Mr. Long?

4 Do you have any redirect, Mr. Massie?

5 REDIRECT EXAMINATION

6 BY MR. MASSIE:

7 Q Just so I understand, Mr. Long, how are assessed values
8 arrived at?

9 A The assessor uses a mass appraisal method. They look at
10 comparable sales, they develop linear regression models, and
11 they -- based on that, they come up with price per acres, and
12 they use cost approach to come up with values of
13 improvements.

14 Q And are appraisers involved in that process?

15 A Assessors are.

16 Q Assessors. Those are the officials in each county,
17 correct?

18 A Yes, sir.

19 Q Now, are those values checked for accuracy?

20 A My -- checked for accuracy by?

21 Q As to whether they are reflective of fair market value of
22 the properties?

23 A Well, I would say they are, because they keep -- most
24 counties keep a running list of what things sell for, what
25 they were assessed for, and what that ratio is. That's part

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1 of what these studies about this thick for the state show.

2 Q And when you say "for the state," what are you talking
3 about?

4 A Well, they're real estate assessment ratio studies that
5 the state of Virginia prepares.

6 Q That's what you referred to earlier?

7 A That's -- that's --

8 Q What is the purpose of those?

9 A The purpose of those is to check the assessments against
10 actual sales data.

11 Q But why?

12 A If they fall below 80 percent, the counties start losing
13 funding for state -- for schools. But they would like to
14 have them as close as they could get to 100 percent.

15 Q And that's where your factor came in; if they were too
16 low, you factored one thing, and if they were too high based
17 on these studies, you factored something else?

18 A Yes, sir.

19 Q Now, you were asked whether this is a unique assignment.
20 Have you ever testified at a hearing to establish a bond
21 before in a case?

22 A I never have.

23 Q Do you know anyone else who has?

24 A No, I don't.

25 Q All right. And you were asked about the work you did on

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1 behalf of MVP. In addition to these estimates and in
2 addition to these appraisals, were you also commissioned
3 initially to do other work in the form of land surveys?

4 A Yes, sir. We did a survey of all six counties. We
5 searched from 2013 to present for --

6 MR. TERPAK: Your Honor, objection. This goes
7 beyond the scope of cross-examination. It's bringing up a
8 new matter on redirect.

9 MR. MASSIE: It's responsive to the question that he
10 wasn't allowed to do anything and didn't do anything in this
11 period after he was hired until the time --

12 THE COURT: I'll allow it.

13 THE WITNESS: We prepared studies in each of the six
14 counties of land sales that had taken place. Then we went
15 back and found the ones with mobile homes on them; they don't
16 show up on assessed value. We pulled off any others with
17 improvement to come to the land values.

18 BY MR. MASSIE:

19 Q And how long did that take?

20 A Months.

21 Q And how many people did you have involved in that
22 project?

23 A Five -- six.

24 Q Over a period of two months, several months?

25 A On and off, yeah, but six.

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1 Q All right. And will that database be useful in making
2 appraisals later on of these properties?

3 A Yes, sir.

4 MR. MASSIE: All right. That's all.

5 MR. TERPAK: May I ask just two questions about the
6 new matter, Your Honor?

7 THE COURT: You may.

8 MR. TERPAK: I'll bring it up in argument, too.

9 RECROSS-EXAMINATION

10 BY MR. TERPAK:

11 Q Hello again, Mr. Long.

12 A Hello.

13 Q When we discussed your studies, you agreed that they
14 might be useful in future appraisals, but you have not
15 utilized them to achieve any value yet?

16 A That's correct.

17 Q So they are not evidence that you intend to present now
18 in the context of the bond estimate?

19 A No, sir.

20 MR. TERPAK: That's all I have on that matter, Your
21 Honor.

22 THE COURT: All right. Thank you.

23 Anyone else?

24 Very well. You may step down, Mr. Long. Thank you.

25 The clerk will get them. You can just leave them

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1 here.

2 THE WITNESS: Oh, I'm sorry.

3 THE COURT: That's fine.

4 There you are. Can't see over that monitor there.

5 Yes, Mr. Lovett?

6 MR. LOVETT: I also have an argument, a different
7 argument, after he's finished.

8 THE COURT: All right. Well, let me ask you this:
9 How long is your argument?

10 MR. TERPAK: Not long. I'm quick.

11 MR. LOVETT: Me too.

12 THE COURT: You may proceed. If it goes too long,
13 I'm just going to stop you.

14 MR. TERPAK: Yes, ma'am.

15 We have discussed *Sage*, and I've listened very
16 carefully to everything you've said the entire day, and I'm
17 not going to quote you a case which I think you know well,
18 but I think there's something in *Sage* which is very
19 important, which deserves to be read into the record, which
20 is on page 824.

21 In terms of the bond, what the Court in *Sage* said
22 was, "but the owner is entitled" -- this is on page 824, if
23 you'd like to read along.

24 THE COURT: Let me find it here.

25 MR. TERPAK: It's note 10.

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1 THE COURT: Okay.

2 MR. TERPAK: About six lines into note 10.

3 "but the owner is entitled to reasonable, certain,
4 and adequate provision for obtaining compensation before his
5 occupancy is disturbed," citing *Cherokee Nation*.

6 So part of this hearing, before you can disturb
7 occupancy, that's a constitutional entitlement related to due
8 process under law and just compensation under the Fifth
9 Amendment. And that comes from a very old case, *Cherokee*
10 *Nation*, which has been cited many, many times.

11 And what happened in *Sage*, for instance -- not that
12 that is the one and only way, but in *Sage*, they got
13 appraisals.

14 THE COURT: I'm sorry. They got?

15 MR. TERPAK: Appraisals. That's the following
16 sentence. "Rule 71A provides the procedure for determining
17 just compensation" -- that's an eminent domain trial -- "and
18 ETNG has deposited cash with the court in an amount equal to
19 the appraised value of the interests condemned."

20 MVP was given a roadmap in *Sage* what to do and how
21 to do it: Appraise these things.

22 Is it a big job? Yes. They hired this gentleman
23 six months ago, but only asked him to perform appraisals in
24 December. Is he the only appraiser in town? No. Could they
25 have hired many people, a team of people, in a multibillion

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1 dollar project? Yes. That is what they should have done,
2 because that's how you know the value.

3 Let's go towards whether they have provided the
4 *Cherokee Nation* standard of reasonable, certain, and adequate
5 provision. The law is absolutely clear that in federal
6 courts, in the Fourth Circuit, assessed values are not
7 admissible.

8 And may I pass a case up, Your Honor?

9 THE COURT: You may.

10 MR. TERPAK: Unfortunately, yours is not
11 highlighted, but the one I'll give to counsel is. And
12 everybody who does eminent domain work, from the lawyers to
13 the appraisers, all know assessed values don't come into
14 evidence. They don't come in under Virginia law; they don't
15 come in under federal law. You have to have a
16 USPAP-compliant appraisal under the Virginia regulations.
17 And clearly Mr. Long knew that, but he was put in a jam by
18 the client, by MVP, who said, Hey, it's December; you got to
19 come up with some way of giving us something to say in court
20 on the 12th.

21 And remember that this hearing was originally
22 scheduled for an earlier date and it was pushed back.

23 So MVP made a decision not to get appraisals. Why?
24 To save some money in this multibillion dollar project. And
25 what's the effect? It prejudices these individuals.

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1 Let's look at the case I've handed up, Your Honor.
2 And it's not very long, and I hope you will read it before
3 you make your decision. But what the Fourth Circuit said
4 is -- I want to read a few quotes. They cite jurisdictions
5 all over America. They cite *Am Jur*, and they say, "We are of
6 the opinion that the trial court was in error in the
7 admission of testimony as to the assessed value of property."

8 Unquestionably, the law is and ought to be that the
9 valuation placed on property by a public official for
10 purposes of taxation only is not competent evidence to go to
11 a jury on a litigated question on the value of land.

12 Some courts have based this action on the statement
13 that assessments for taxation are notoriously unreliable as a
14 criterion of true value.

15 And the Fourth Circuit concluded, "We think the
16 sound reason is it merely represents the opinion of someone
17 not in court, not called as a witness, and not subject to
18 cross-examination."

19 So this is invalid, both as a hearsay opinion of
20 expert that is not here, and it is invalid because tax
21 assessments have all sorts of reasons why they're just a
22 rough shot at general value for taxation purposes. They are
23 not admissible in any court, under any circumstance, as to
24 just compensation.

25 I have read the cases you mentioned about sometimes

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1 estimates are in. And I believe you and I have probably read
2 a number of the same cases; I don't know if they're
3 identical. Sage had appraisals.

4 THE COURT: Would you agree there are cases that
5 just mention estimates?

6 MR. TERPAK: They mention estimates without any
7 challenge to the value. And sometimes in those cases, they
8 specifically say the landowner did not challenge the
9 estimate. Well, here, there certainly is a challenge.

10 THE COURT: Do you have -- Mr. Terpak, do you have
11 any cases that -- any authority for the position that
12 appraisals are required under these circumstances?

13 MR. TERPAK: I've looked very hard, and I cannot
14 find a case either way. But what I can tell you is there is
15 no case anywhere that admits tax assessments for any purpose.
16 I can tell you that. I can also tell you --

17 THE COURT: You would concede that the Fourth
18 Circuit case that you handed to me involved a final
19 determination of just compensation, would you not?

20 MR. TERPAK: Yes, ma'am. I understand that.

21 THE COURT: All right. And the appraisal -- the tax
22 assessment, excuse me, was used to determine the final amount
23 of just compensation in that case.

24 MR. TERPAK: Yes, ma'am.

25 THE COURT: All right.

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1 MR. TERPAK: I understand that. But, for instance,
2 one of the cases that maybe you've read as well is *Columbia*
3 *Gas Transmission*. I have the WestLaw cite.

4 THE COURT: I'm familiar with that case.

5 MR. TERPAK: Okay. And they said no defendant
6 contested Columbia's valuations.

7 I have not found any case where tax assessments were
8 admitted for this purpose, or where estimates were challenged
9 and admitted without competent evidence.

10 You'll be breaking new law, Your Honor, and judges
11 make new law all the time.

12 THE COURT: I hope I'm not breaking law.

13 MR. TERPAK: You'll be making some new law.

14 THE COURT: Making, maybe, but not breaking.

15 MR. TERPAK: Making some new law to let tax
16 assessments in for any purpose, because they really are
17 unreliable. There are all sorts of things they don't look at
18 which an appraiser -- and you've heard the evidence; I won't
19 repeat it. A real appraisal does something very different
20 than a tax assessment. And here, where there's so much at
21 stake -- and MVP, they're big boys. They've been down this
22 road before. They know how to do this. They read *Sage*.

23 THE COURT: I thought they were a new company.

24 MR. TERPAK: I don't think that there's -- I think
25 the gentleman on the stand all morning was saying how many

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1 pipelines he's built over the years, so they're very
2 experienced. They're a new specially created entity for
3 this, but their parent companies have certainly been around
4 the block. They knew how to do it; they know what they
5 should have done. They made an intentional decision not to
6 do it. Why? They wanted to cut corners and do things quick,
7 which is part of the problem we've been talking about all day
8 long. And it comes into fruition now, when they ask for a
9 bond with no valid evidence to back it up.

10 Thank you.

11 THE COURT: Thank you, Mr. Terpak.

12 MR. TERPAK: Oh, I'm sorry.

13 THE COURT: No, I said thank you.

14 MR. TERPAK: Oh, I'm sorry. I thought you had a
15 question.

16 THE COURT: Mr. Lovett?

17 MR. LOVETT: Thank you, Your Honor.

18 In addition to the issues raised by Mr. Terpak, I
19 think that the *Daubert* standard does not allow the admission
20 of this evidence. As the Court knows, under Rule 702, it
21 performs a gatekeeper function under *Daubert*, and the tests
22 are -- and remember, the witness testified that this was a
23 unique process that he invented, that it hadn't been
24 subjected to peer review, that he didn't learn it from other
25 appraisers; it was something that he developed for this case

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1 for this purpose.

2 It's precisely the kind of evidence that *Daubert* and
3 its progeny would exclude from this action. The standards to
4 look at are whether the technique employed by the expert is
5 generally accepted in the scientific community. He testified
6 that it's not been used by anyone else, and it's not been
7 subject to the second one, not been subject to peer review.

8 Third, whether it's been tested -- it has not been
9 tested; it's unique -- and whether the potential rate of
10 error is acceptable. And we have no idea what that is.

11 And lastly, and I think very importantly, whether
12 the research was conducted independent of the particular
13 litigation or dependent on an intention to provide the
14 proposed testimony.

15 And following up on that, the Seventh Circuit, in
16 *Sheehan versus Daily Racing Form*, 104 F.3d 940, at page 942,
17 said that an important standard is whether the expert is,
18 quote, "being as careful as he would be in his regular
19 professional work outside his paid litigation consulting,"
20 end quote.

21 So what I heard here is classic testimony that the
22 gatekeeper would not allow under *Daubert* or its progeny.
23 It's a quick and dirty method developed for this litigation,
24 not subject to peer review, and not the product of any other
25 professional that the witness has worked with.

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1 THE COURT: Thank you, Mr. Lovett.

2 Mr. Carroll?

3 MR. CARROLL: Your Honor, if it's appropriate -- I
4 know we went through this exercise earlier, but I'd certainly
5 join in these objections as well. And I don't know if --

6 THE COURT: I was going to ask that question. But
7 thank you for the reminder.

8 Does anyone else wish to be heard?

9 Is there anyone who does not adopt the arguments
10 that we've just heard on behalf of certain of the defendants?
11 Raise your hand if you do not wish to adopt that argument.

12 No one has raised his or her hand. All right.

13 Mr. Massie? Mr. Massie didn't raise his hand, but I
14 was only asking about defendants.

15 MR. MASSIE: As Your Honor can see, the consequences
16 of this argument by Mr. Terpak and others are that on any
17 hearing on a bond on a preliminary injunction, there's only
18 one method of valuation or determination or estimation of a
19 bond, and you have to bring a licensed real estate appraiser
20 in. And I suppose if you had a project this big, you'd
21 probably have to bring in maybe 20 or 30 real estate
22 appraisers, and you would spend several weeks going through
23 each property and putting on evidence of the appraisal on
24 that property and cross-examination on the value of that.
25 That would be the consequence of what they're asking you to

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1 hold.

2 And as best I can tell in looking at this, there's
3 not a single case anywhere that says that's required. And
4 there are multiple cases that accept estimates, different
5 ways of looking at this, some way to help the Court in a
6 practical sense to get to an amount of bond.

7 And the defendants, of course, have an interest in
8 this, as we do. And to sit back and sharp-shoot whatever we
9 put on is one thing, but they also have an obligation to come
10 forward to the Court, to present evidence, and let the Court
11 set the bond, as you made clear in the past, that the Court
12 will set the bond. MVP won't set the bond. Mr. Long won't
13 set the bond. But collectively from this effort -- and we
14 hope the defendants come forward with some proof on this, and
15 they're certainly welcome to, but just to strike out what
16 we've presented here, which is a rational, reasonable way, I
17 submit, of looking at this, based on real numbers, objective
18 numbers, that have nothing to do with this case, made by the
19 tax assessors in each county, with a kicker on it of
20 20 percent, and proof that it comes out to be very close to
21 what actual appraisals are, this method of doing it -- no one
22 questioned that, if you noticed, when Mr. Long testified and
23 he said this came out -- if you use 21 percent instead of 20,
24 this would be right on the money. Not one person questioned
25 that.

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1 They've had all the appraisals. They've been in
2 their hands. They've had these estimates. They could have
3 compared them, looked at them, picked them apart; and if his
4 testimony was wrong in that respect, they had every
5 opportunity to contradict it. And they haven't done it.

6 So we submit that this is relevant, reliable
7 information that the Court can consider in setting the amount
8 of the bond, and the Court ought to admit it for that
9 purpose.

10 This is not a trial on just compensation. And
11 bringing cases in from the Fourth Circuit that says, in a
12 trial, this is not competent evidence to go to a jury on a
13 litigated question on the value of the land -- so they're
14 talking about some jury trial on the issue of just
15 compensation. The cases do not deal with the situation we're
16 in, which is trying to set a reasonable amount to protect the
17 landowners on this issue.

18 THE COURT: Thank you, Mr. Massie.

19 Mr. Massie, before you leave, I noted that in a
20 recent filing, MVP did argue that the burden is on the
21 defendants to establish the amount of just compensation and
22 defendants bear the burden of establishing the amount of the
23 bond.

24 MR. MASSIE: We believe that to be entirely true. I
25 think there are cases, maybe one of Your Honor's, that

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1 addresses that point. It says that --

2 THE COURT: I'm familiar with that case.

3 MR. MASSIE: -- as the party subject to the
4 injunction and most knowledgeable about the consequences of
5 this issue to themselves, they should have the burden of
6 coming forward and establishing something on a bond. And
7 it's -- you would think there would be a cooperative effort
8 on their part to do this. But all we've ever received from
9 them are some individual estimates here and there, sprinkled
10 in these answers to interrogatories, well, I think my
11 property was worth X, I think mine was worth Y. They made no
12 attempt to come forward in any kind of comprehensive way to
13 help the Court on setting this amount.

14 THE COURT: Thank you, Mr. Massie.

15 Do the defendants have any cases for me with regard
16 to burden on that issue?

17 MR. JOHNS: Your Honor?

18 THE COURT: Mr. Johns? And if you don't, then you
19 can do some work tonight.

20 MR. JOHNS: I'm happy to do more work.

21 It's a different situation here. We're talking
22 about a constitutional proceeding where we're taking people's
23 property, and under the Fifth Amendment, it's not the
24 defendant's burden under the Fifth Amendment to show the
25 reasonableness of the bond. And we've cited the *Cherokee*

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1 *Nation*, the *Sweet* case that I cited earlier. Both of those
2 are --

3 THE COURT: And do those cases specifically
4 reference this situation and a bond in this situation?

5 MR. JOHNS: They don't represent the -- they don't
6 put it in terms of bond. They put it in terms of making sure
7 there's a sufficient fund. So the *Washington Metropolitan*
8 *Area Transit Authority* case, as well, all put this on the
9 condemnor to come up -- to prove that they have sufficient
10 assets.

11 So that in order to do that, we need to know what it
12 is that's being guaranteed and secured.

13 So I think those three cases: *Cherokee Nation*,
14 *Sweet versus Rechel*, and the *Washington Metropolitan Area*
15 *Transit Authority* case.

16 Thank you, Your Honor.

17 THE COURT: Anyone else have any cases for me in
18 that regard?

19 MR. TERPAK: Your Honor, perhaps if we could have
20 some time to do some additional looking and get it to you as
21 quickly as we can?

22 THE COURT: That would be wonderful. If anyone
23 could find a case exactly on point that addresses these
24 issues, I would appreciate it.

25 Yes, Mr. Lovett?

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1 MR. LOVETT: Your Honor, I appreciate that my
2 *Daubert* arguments would have got lost in the mix there --

3 THE COURT: It did not get lost. Mr. Massie didn't
4 address it.

5 MR. LOVETT: Well, he sort of did. He said that it
6 was a valid theory. And I would maintain still it's an
7 arbitrary theory. It has to be. It's inadmissible, and I
8 don't --

9 THE COURT: But if they don't have the burden,
10 then --

11 MR. LOVETT: They have the burden, certainly, to
12 come forward with some value under Rule 65. Rule 65 requires
13 the Court --

14 THE COURT: And can you show me a case that says
15 that?

16 MR. LOVETT: It's what Rule 65 says, that the Court
17 has to have -- has to be satisfied. And if there's no
18 evidence in the record at all on the issue, which would be
19 the case if this isn't admitted, I don't understand how a
20 court or anybody else could make a decision that -- under
21 Rule 65.

22 THE COURT: Well, I'm hoping that some of you will
23 stay up late tonight or get up early in the morning and find
24 something helpful in that regard.

25 Thank you, Mr. Lovett.

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1 I did want to note for the record, because I didn't
2 know -- Mr. Terpak, you may have cited to this, put the cite
3 into the record, but I'm not sure the case that you handed
4 me, though, was -- in case you didn't, it was *United States*
5 *versus Certain Parcels of Land in Arlington County, State of*
6 *Virginia*, 261 F.2d 287, and that's a 1958 case out of the
7 Fourth Circuit. I just wanted to make sure that was in the
8 record, and I wasn't sure if it was or not.

9 Mr. Clarke?

10 MR. CLARKE: Your Honor, I'm sorry to make us
11 belabor things, but I do feel like this is sort of the end
12 result of the Court's ruling precluding the defendants from
13 getting into the assets and financial information of MVP.
14 Because I think that would be an alternate means by which the
15 Court could address the ability and adequate assurance of the
16 landowners to receive just compensation.

17 THE COURT: Well, I'll give you another question to
18 ponder this evening, and you can think about it for
19 tomorrow's purposes, and that's deposit versus bond versus
20 combination of the two, and whether there are any additional
21 assurances given with regard to that issue. So you can
22 ponder that this evening.

23 And it may not be that the Court ever reaches that
24 issue, but I certainly -- if I do, I would like the benefit
25 of your analysis.

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1 So I think with that, Mr. Massie, I will ask you if
2 you have any additional witnesses to call. We're not going
3 to call them tonight, though. But will you have additional
4 witnesses to call tomorrow?

5 MR. MASSIE: Your Honor, I expect not. But if I may
6 just have the evening to think about that and advise you in
7 the morning, if that's all right?

8 THE COURT: You may.

9 MR. MASSIE: Thank you.

10 THE COURT: All right. Then -- yes?

11 MR. DeTURRIS: Your Honor, before we adjourn, two
12 housekeeping matters that might alleviate the need for
13 witnesses to come tomorrow, if I can hand out two
14 declarations and avoid them testifying.

15 THE COURT: Certainly.

16 MR. LOVETT: Also, Your Honor, I don't know -- we
17 don't know --

18 THE COURT: Just for the record, that was
19 Mr. DeTurris, and now Mr. Lovett.

20 MR. LOVETT: Mr. Lovett, I'm sorry. Your Honor, can
21 you hear me from here?

22 THE COURT: I can if you stand right there and talk
23 into the mic.

24 MR. LOVETT: Is it okay if I --

25 THE COURT: That's fine.

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1 MR. LOVETT: Just a simple question. It would be
2 nice if we could know Mr. Massie's potential witnesses
3 tomorrow -- we'd be glad to tell him ours, and we have --
4 just so we can prepare and make the day go more quickly,
5 possibly.

6 THE COURT: I'll ask you -- after we adjourn, I'll
7 ask you both to let each other know who you anticipate or you
8 may call as witnesses tomorrow.

9 MR. LOVETT: Thank you, Your Honor.

10 THE COURT: And to the extent you can eliminate
11 calling witnesses by agreement of some kind, I would also
12 appreciate that, and I think everyone else would too.

13 MR. LOVETT: Thank you.

14 MR. MASSIE: Your Honor, Mr. DeTurris has handed me
15 two declarations, and I think I addressed our position on
16 both of them.

17 One is from a landowner, which is similar to the
18 other testimony that we've objected to, but --

19 THE COURT: Can you talk into the microphone?

20 MR. MASSIE: Yes, I'm sorry.

21 -- which is similar to the other testimony that
22 you've already ruled upon. We would object to it as outside
23 the scope of this case and contrary to the FERC certificate.

24 THE COURT: Understood.

25 MR. MASSIE: And the second one, we object to on the

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1 same ground. This person purports to testify as an expert in
2 the field of archeology and complains that certain sites have
3 not been adequately investigated and that the route of the
4 pipeline shouldn't go across these properties until this
5 investigation that he says should be made is complete.

6 We object to this on the substantive grounds that
7 I've stated, but agree that the declarations can be submitted
8 in lieu of live testimony, subject to those objections.

9 THE COURT: All right. And this will -- I'll review
10 those declarations, but I've already allowed limited
11 testimony from landowners, so I know that I'm going to allow
12 the one declaration from the landowner.

13 What landowner is that?

14 MR. DeTURRIS: It's Mr. Robert Pegram -- Robert A.
15 Pegram, P-E-G-R-A-M.

16 THE COURT: Pegram. All right. And I saw the
17 archaeology report.

18 MR. DeTURRIS: That was attached to our -- as a late
19 addition to our motion.

20 THE COURT: I'll have to look at that and let you
21 know. Do you have the archeologist here?

22 MR. DeTURRIS: I don't know if he's still here, but
23 he's in town, and he's available if we need him.

24 THE COURT: I'll take a look at that this evening,
25 but why don't we go -- we'll put those -- if I allow the

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1 archaeologist, we'll put the other declaration in evidence in
2 the morning. Just remind me, and we'll do that in the
3 morning.

4 MR. DeTURRIS: All right. Thank you.

5 THE COURT: Anything else?

6 MR. MASSIE: Thank you, Judge.

7 THE COURT: All right. Then, with that, I will see
8 everyone at 9 a.m. in the morning. And if you would declare
9 us adjourned for the day, please.

10 THE MARSHAL: All rise.

11 (Proceedings adjourned, 7:56 p.m.)

12 CERTIFICATE

13 I, JoRita B. Meyer, certify that the foregoing is a
14 correct transcript from the record of proceedings in
15 the above-entitled matter.

16 /s/ JoRita B. Meyer

Date: 1/16/2017

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