Message

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Sent: 3/22/2018 4:37:32 PM
To: Boydston, Michael [Boydston.Michael@epa.gov]; Logan, Paul [Logan.Paul@epa.gov]
Subject: FW: article - Oglala Sioux Tribe - Powertech oral argument this week

This article has a summary of the good parts of the oral arg this week.

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From: Matsumoto, Kimi
Sent: Thursday, March 22, 2018 10:27 AM
To: Chin, Lucita <Chin.Lucita@epa.gov>; Sutin, Elyana <Sutin.Elyana@epa.gov>; Perkins, Erin <Perkins.Erin@epa.gov>; Schefski, Kenneth <Schefski.Kenneth@epa.gov>
Subject: article - Oglala Sioux Tribe - Powertech oral argument this week

Note references to NEPA and EPA permit...

Tribe, NRC Spar Over Uranium License Challenge In DC Circ.

By Bryan Koenig

Law360, Washington (March 20, 2018, 5:24 PM EDT) -- The Oglala Sioux Tribe insisted Tuesday in oral arguments at the D.C. Circuit that a uranium mining license under review by the Nuclear Regulatory Commission also can be challenged at the appeals court because the license remains "effective" and in place during the review.

A lawyer for the tribe, Jeffrey C. Parsons, told the appeals panel that the NRC is wrong to argue the D.C. Circuit currently lacks jurisdiction over the license granted to Powertech USA Inc. because the commission has not issued a final order for a proposed South Dakota project. Instead, Parsons asserted, the tribe can bring its court challenge because Powertech has NRC's permission to begin construction while the agency takes another look, although the project remains held up by reviews from other federal agencies.

Powertech first won approval in 2014, and while a December 2016 NRC decision found environmental law noncompliance, "it left that license in full force and effect" while directing further scrutiny, said Parsons, an attorney with the Western Mining Action Project. That should be enough, he argued, for the circuit to weigh in to safeguard the "exceptional" cultural and historical treasures, including burial sites, on the 13,000 acres of land in western South Dakota proposed for the mine.

The tribe has said that the site of the mine, which lies in South Dakota's Fall River and Custer counties, is within the tribe's traditional territory.

Circuit Judge Merrick B. Garland seemed the most receptive to Parsons' arguments, challenging the NRC on the "pragmatic" nature of finality, while the tribe received the most pushback from Circuit Judge Thomas B. Griffith. Rounding out the panel was Circuit Judge Karen LeCraft Henderson, who participated via teleconference.

The Oglala Sioux have claimed that the NRC failed to adequately assess the effects of storing, moving and disposing radioactive waste, failed to require the collection of baseline water quality data and failed to mandate a requisite discussion over mitigating the impact on cultural sites and the environment.

On Tuesday, Judge Griffith repeatedly pressed Parsons on the fact that the license, while currently effective, could still be revoked. The judge also asked if the challenge clock really started with the 2014 staff-issued license, rather than the 2016 commission decision, potentially meaning the instant challenge was brought too late, even if the original license was deemed unlawful, particularly under the National Environmental Policy Act, or NEPA.

With further adjudication still possible, "do we still have a final order before us?" Judge Griffith said.

The answer remains yes, Parsons argued, contending that Powertech still at least has permission from the NRC and its Atomic Safety Licensing Board to begin construction. He further waved off as "an inadequate remedy" the NRC's argument that the tribe is in a harmless situation, because it can simply ask the agency to pause the project it has long contested.

Powertech has already been found in violation of NEPA, Parsons said. "And yet we're forced to come in and achieve an extraordinary remedy." He also argued that while the project remains held up by other state and federal reviews, it still has the greenlight from the NRC.

On the timeliness issue, Judge Garland noted that when the 2014 license was issued, Powertech was not found in violation of NEPA, a finding that only came later, meaning a case brought then, instead of early 2017, would not have been able to make the same arguments. Parsons further argued that an earlier challenge could have impermissibly disrupted the NRC proceedings.

Judge Garland appeared to save his hardest questions for the NRC and Powertech itself. When an attorney for the agency, James E. Adler of the U.S. Department of Justice, argued that the NRC proceeding remains ongoing, meaning there is no final order, Judge Garland said that under U.S. Supreme Court precedent, "finality is pragmatic."

The judge further argued that the license moved forward even after NEPA violations were found.

"Under NEPA, you can't just go forward without an appropriate [environmental impact statement]," Judge Garland said, even though there wasn't one. The judge argued that the NRC's contentions, in trying to duck court review, could essentially inoculate such eventualities from court oversight.

Adler however argued that nothing in the NEPA indicates what to do if a violation is found after a license is issued. He argued that the court needn't step in to resolve an issue that can be handled at the agency level, and he asserted that the tribe itself was partially responsible for the initial lack of information when the requested permit was under NRC review.

Judge Garland also pressed Powertech attorney Christopher S. Pugsley on the actual harm posed to the company if the license were revoked, given that it has been unable to move forward while awaiting other permits, including from the Environmental Protection Agency.

Pugsley, an attorney with Thompson & Pugsley PLLC, argued the company faces financial harm having been burning through cash with no income. But Judge Garland continued to press, noting that Powertech has been stymied anyways and wondering why NRC action on the license would change that.

Circuit judges Merrick B. Garland, Karen LeCraft Henderson and Thomas B. Griffith sat on the panel.

The Oglala Sioux is represented by Jeffrey C. Parsons of the Western Mining Action Project and Travis E. Stills of Energy & Conservation Law.

The NRC is represented by James E. Adler of the U.S. Department of Justice.

Powertech is represented by Christopher S. Pugsley and Anthony J. Thompson of Thompson & Pugsley PLLC.

The case is Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission et al., case number 17-1059, in the U.S. Appeals Court for the District of Columbia Circuit.

--Additional reporting by Chris Villani, Michael Phillis and Juan Carlos Rodriguez. Editing by Nicole Bleier.