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Tribe Sues EPA, Corps For Delegating Mine Permit Review

Share us on: By Danielle Nichole Smith
Law360, New York (January 23, 2018, 6:53 PM EST) -- The Menominee Indian Tribe of Wisconsin sued the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers in Wisconsin federal court Monday claiming the agencies shirked their duty to review a mine permit application by delegating the review to the state of Michigan.

The EPA granted Michigan the authority to review wetlands permits under a Clean Water Act statute in 1984, but the tribe said the state's authority does not apply to the proposed location for Aquila Resources Inc.'s Back Forty Mine project and asked the court to force the federal agencies to oversee the application.

A review by the Army Corps could carry additional obligations, including requiring discussions with tribes under the National Historic Preservation Act, the complaint said.

"With federal jurisdiction there are certain important requirements with respect to consultation with the tribe that are supposed to be taking place, and that's why we filed this suit — to really get this permit within federal jurisdiction and control," Janette K. Brimmer, counsel for the tribe, told Law360 on Monday.

Permits for projects on the Menominee River like the one requested by Aquila warrant federal oversight under the Clean Water Act because the river can be used for interstate commerce, the tribe said. Though the Clean Water Act allows for states to be delegated the authority to review wetland permits, the law has an exception for waters and wetlands used in interstate and foreign commerce.

The Menominee Indian Tribe said in its complaint that the proposed sulfide mine could negatively affect the area around the mineral deposits in Michigan, including the wetlands in Wisconsin where the tribe is based. The tribe has a number of cultural sites in the area, including burial mounds and ancient agricultural sites, according to the complaint.

"This permit affects the interests of so many people and the environment in Wisconsin and Michigan, including sites critical to the tribe's culture and history. Therefore, it is important that this process follow the Clean Water Act and not solely be controlled by the state of Michigan," Menominee Tribal Chairman Gary Besaw said in a release on the tribe's website.

The Menominee Indian Tribe sent the federal agencies notice that it was going to sue over the permit application in November. In September, the Army Corps of Engineers had told the tribe that it would not take over the permit and that the EPA would use its authority to review and comment on the permit at a later date, according to the complaint.

The tribe also said that the EPA offered to "consult" with the tribe in October, but never addressed its contentions that the Menominee River was used for interstate commerce.

"It's important to note that the United States Environmental Protection Agency has delegated permitting authority to the Michigan Department of Environmental Quality. To maintain this authority, Michigan's laws and regulations must remain consistent with the Clean Water Act," Chantae Lessard, director of social performance and engagement for Aquila Resources, which is not a party to the suit, told Law360 Tuesday. "Even though MDEQ has this authority, they gather input from various regulatory agencies, including from the EPA, on permit decisions like the Back Forty Mine wetland application."

A representative for the Army Corps of Engineers and the EPA declined to comment Monday.

The suit seeks a finding that the agencies violated the Clean Water Act by refusing to take over the review for the permit and that the permit be moved to federal jurisdiction.

The Menominee Indian Tribe is represented by tribal counsel Lindzey Spice, and by Janette K. Brimmer and Stephanie K. Tsosie of Earthjustice.

Counsel information for the EPA and Army Corps was unavailable Tuesday.

The case is Menominee Indian Tribe of Wisconsin v. U.S. Environmental Protection Agency et al., case number 18-cv-00108, in the U.S. District Court for the Eastern District of Wisconsin.

--Editing by Jack Karp.