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Subject: Motion to interview and submission
Date: March 11, 2021 at 8:52:47 PM EST
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Submission Description: (doc-less) Motion to Intervene of
NATHAN DERSHOWITZ under P-15056-000. And
submission in opposition to the instant proposal.

Submission Date:

Filed Date:

3/11/2021

Dockets

P-15056-000

Premium Energy Holdings, LLC Ashokan PSP under
P-15056.

Application for Preliminary Permit for Document of Filing
Party/Contacts:

Filing Party

Other Contact (Principal)

NATHAN DERSHOWITZ

Basis for Intervening:

NATHAN DERSHOWITZ seeks to intervene in this proceeding. He is a landowner in Woodland Valley and if the Woodland Valley site is chosen, he will no longer have access to his property. Accordingly, Nathan Dershowitz has a substantial interest in this matter. No other party represents Nathan Dershowitz, and no other party is authorized to represent Mr. Dershowitz's unique interests. For the foregoing reasons, Mr. Dershowitz respectfully requests that the Federal Energy Regulatory Commission grant this motion to intervene.

Merits objection.

As I understand the Preliminary Permit application, a private party, Premium Energy Holding, seeks to secure the federal eminent domain power to potentially flood a large section of Woodland Valley. The claimed purpose is to store water to supplement energy needs. The proposal does not make clear who would own the condemned property. More importantly, it is unclear as to whether there will be any public benefit from this project. The proponent is a for-profit entity and will presumably sell the energy to the city, state or federal Government. Thus, this proposal is not a standard creation of a reservoir, for a public use or the public good. It is a private entities effort to make money. The project will not create additional energy, but by arbitrage, the private

company will make money and may or may not make energy minimally cheaper for the public. Even if sold at a cheap price the economic benefit to the public seems disproportionately low, compared to the cost and public harm of this project. This and other legitimate objections have and will be raised throughout these proceedings by me and others.

I write now to raise additional constitutional objections. First, the Fifth Amendment to the Constitution states 'nor shall private property be taken for public use, without just compensation.' By its terms, the Fifth Amendment does not authorize the taking of state land by eminent domain. Here, the New York State Constitution Article XIV makes certain State land forever wild. The State Constitution requires that certain state land shall not be taken by any corporation, public or private. To circumvent this provision is a long and timely process, which very rarely is successful. Some State land in Woodland Valley would be flooded by this project. The Tenth Amendment provides "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The issue of whether, even if prior Supreme Court decisions would allow Federal eminent domain to be used over the objection of a state for the confiscation of state land, the present proposal is extremely suspect as a basis for exercising eminent domain over State land now being used for the public good. The "public use" requirement of the Fifth Amendment is hard to justify here and the State Constitutional establishment of the public good of keeping the property forever wild cannot be ignored. There are serious questions as to whether the present Supreme Court of the United States would allow this project to proceed by

use of eminent domain. The present composition of the Court will, I believe, view the Tenth Amendment as being more significant as applied to the facts of this situation, than prior courts did in clearer “public use” cases and will defer to the State Constitutional assertion of the benefit of forever wild land use.

Similarly, using or delegating eminent domain to and for a private party for the private party’s personal profit—when the actual benefit to the public is so speculative—raises other constitutional issues. The public use or benefit does not flow here from the creation of the reservoir. If there is any public benefit it would come from the private party selling its energy. Whether that would be a public benefit would depend on what the parties negotiate in the future. That is too speculative and variable a bases for asserting a public benefit. The Supreme Court’s five-to-four decision in *Kelo v. City of New London*, 545 U.S.469(2005) will, in my view, not be extended by the present members of the Court for a private-to-private transfer in the present situation. Even if the flooded property is thereafter owned by the Federal or State Government, herein a private purpose is afoot. Justice Stevens expressly noted for the majority that “a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise.” The present situation seems to present that open question. Private property will be taken to allow another private party to make a profit and the hoped for increase in cheap energy will be in the hands of the second private party. Equally importantly, the four-

member dissent in *Kelo* seems to reflect the view of the present majority of the Supreme Court, more than does the majority opinion in *Kelo*.

My view is that the FERC should evaluate these constitutional issues before an expensive and extensive expenditure of time and money is wasted on a project with speculative public benefit and clearly articulated Constitutional declared harm to public area used extensively for the public good. Pumped storage hydro plants appear to be an important part of our goal to use renewable energy. But the present proposal presents a very bad set of facts upon which to proceed.

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