In the United States Court of Appeals for the District of Columbia Circuit

Nos. 10-1389 and 10-1407 (consolidated)

SUMMIT LAKE PAIUTE TRIBE, ET AL.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

RESPONDENT'S OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING REVIEW

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JANUARY 19, 2011

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GLOSSARY

BLM	Bureau of Land Management
Commission or FERC	Federal Energy Regulatory Commission
Certificate Order	*Ruby Pipeline, LLC*, 131 FERC ¶ 61,007 (2010) (A42)
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
NHPA	National Historic Preservation Act
Order Denying Stay	*Ruby Pipeline, LLC*, 134 FERC ¶ 61,020 (2011) (A117)
Preliminary Determination Order	*Ruby Pipeline, LLC*, 128 FERC ¶ 61,224 (2009) (A1)
Project	Ruby Pipeline Project, consisting of facilities capable of transporting up to 1.5 million dekatherms per day of natural gas from Wyoming to Oregon.
Rehearing Order	*Ruby Pipeline, LLC*, 133 FERC ¶ 61,015 (2010) (A94)
Ruby	Ruby Pipeline, LLC
Ruby Answer	Answer of Ruby Pipeline, LLC in Opposition to Motion Requesting Stay of Construction, filed in FERC Docket No. CP09-54 on January 12, 2011
Tribe	Petitioner Summit Lake Paiute Tribe of Nevada

The Summit Lake Paiute Tribe ("Tribe") asks this Court for the extraordinary remedy of indefinitely delaying the completion of a natural gas pipeline that the Federal Energy Regulatory Commission ("FERC" or "Commission") has determined, in its expert judgment and after thorough consideration of an extensive record, is needed to meet the Nation's energy needs. This request comes more than three months after the Commission denied rehearing of its conditional approval of the pipeline, and more than two months after the Tribe appealed that approval to this Court. This delay alone counsels against the extraordinary relief sought. *See, e.g., Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (44-day delay in seeking injunctive relief is inexcusable). Further, as the Commission found in its January 12, 2011 Order Denying Stay, *Ruby Pipeline, LLC*, 134 FERC ¶ 61,020 (2011) ("Order Denying Stay"), A117,[1] the Tribe has failed to justify issuance of a stay pending judicial review.

This case concerns a proposal by Ruby Pipeline, LLC ("Ruby") to construct a 675 mile-long natural gas pipeline running from a hub in western Wyoming, through northern Utah and Nevada, to an interconnection in Oregon (the "Project"). *Ruby Pipeline, LLC*, 128 FERC ¶ 61,224, P 6 (2009) ("Preliminary Determination Order"), A3. The Project will supply lower-priced natural gas from the Rocky Mountains to customers in the Pacific Northwest and California that

[1] Citations to "A" refer to the Appendix accompanying this response.

currently depend upon steeply declining western Canadian supplies. *Id*. PP 20, 41, A7, A16. In light of these benefits, the Commission found the Project to be required by the public convenience and necessity under § 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(e). *Id*. PP 41-42, A16.

The Tribe is seeking to stay construction of 40 miles of the Project route in Nevada, from mileposts 509.9 to 549.9. The Tribe contends that the Commission failed adequately to analyze the impacts of pipeline construction on historic and sacred sites within the Tribe's aboriginal homeland, and that it will be irreparably harmed if the stay is not granted. Motion at 2.

These unsupported assertions fail to justify a stay. Indeed, the Tribe's chief complaint – that the pipeline would pass through "the pristine and sacred strip of land that separates [its] Reservation from the Sheldon National Wildlife Refuge," *id*. at 4, – has already been addressed. Ruby, in coordination with the Bureau of Land Management ("BLM"), proposed a route variation that would avoid construction in that area, which the Commission approved. Order Denying Stay, P 20, A124. Thus, the potential harm that the Tribe claims requires action by this Court has already largely been avoided.

The Tribe's remaining contentions likewise fail to establish that it is likely to succeed on its claims that the Commission violated its statutory obligations, or that any specific irreparable injury will result from the Project. Conversely, delaying

construction will cause significant harm to Ruby and to the customers who will benefit from the increased gas supplies. The Tribe's stay request is thus contrary to the public interest.

ARGUMENT

"A stay pending appeal is always an extraordinary remedy." *Bhd. of Ry. & S.S. Clerks v. Nat'l Mediation Bd.*, 374 F.2d 269, 275 (D.C. Cir. 1966). In order to obtain such extraordinary relief, the Tribe must establish: (1) a strong showing that it is likely to prevail on the merits of its appeal; (2) that, without such relief, it will be irreparably injured; (3) the lack of substantial harm to other interested parties; and (4) that the public interest favors a stay. *Washington Metro. Area Transit Comm. v. Holiday Tours, Inc*., 559 F.2d 841 (D.C. Cir. 1977). The Tribe cannot rely on bald assertions to meet this stringent standard, but must instead "justify the court's exercise of such an extraordinary remedy." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985).

A. The Tribe Has Not Established Irreparable Injury.

A claim of irreparable injury absent a stay must be "both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). *See also Reynolds Metals Co. v. FERC*, 777 F.2d 760, 764 (D.C. Cir. 1985) (citing *Wisconsin Gas*). Implicit in this requirement is the "further requirement that the movant substantiate the claim that irreparable injury

is 'likely' to occur." *Wisconsin Gas*, 758 F.2d at 674. "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future." *Id*. As the Commission found, the Paiute Tribe does not meet this rigorous standard. Order Denying Stay P 18, A123.

1. The pipeline route was realigned to avoid the Traditional Cultural Property between the Reservation and the Sheldon Refuge.

The Tribe's only specific allegation of irreparable injury is that the pipeline will run through the "pristine and sacred strip of land that separates the Reservation from the Sheldon National Wildlife Refuge," a Traditional Cultural Property that, the Tribe states, is sacred for worship and contains unmarked graves. Motion at 5, 8, 16.[2] The Tribe faults the Commission for failing adequately to address this issue in the final Environmental Impact Statement ("FEIS") for the Project.

This Traditional Cultural Property was not fully addressed in the final EIS because it was belatedly raised by the Tribe. As the final EIS notes, this area was "not identified in any of [the Tribe's] numerous previous correspondence, during

[2] "Traditional Cultural Property" is a term "used by the National Park Service to refer to properties of traditional religious and cultural importance that may be eligible for listing on the National Register under 16 U.S.C. §470a(d)(6)(A)." *Te-Moak Tribe of Western Shoshone of Nev. v. U.S. Dep't. of Interior*, 608 F.3d 592, 608 n.16 (9th Cir. 2010). The term "describes land that Native American tribes have identified as having religious or cultural significance." *Id*.

our October 28, 2008 meeting, nor in the tribe's own [ethnographic] study." FEIS at 4-259, A223.

Nevertheless, the Commission made clear in the final EIS that any information regarding this area "would [be] consider[ed] during the Section 106 process." *Id*. Section 106 of the National Historic Preservation Act ("NHPA") requires federal agencies to "take into account" the effects of federal undertakings on historic properties. 16 U.S.C. § 470f. In doing so, the agency must consult with the Advisory Council on Historic Preservation, state historic preservation offices, and Native American tribes, among others. *See* Order Denying Stay P 3 (citing 36 C.F.R. 800 (2010)), A118; *City of Alexandria v. Slater*, 198 F.3d 862, 871 (D.C. Cir. 1999) (discussing NHPA consultation process).

To assure that no historic or cultural resources were affected prior to completion of that process, Condition No. 44 to the Commission's approval provided that "Ruby **shall not begin construction**" until, among other things, it receives Commission approval of all (a) required reports (which are subject to agency and tribal comment) and (b) finalized treatment or mitigation plans for historic and cultural resources. *Ruby Pipeline, LLC*, 131 FERC ¶ 61,007 (2010) ("Certificate Order"), Appendix A, P 44 (emphasis in original), A92.[3]

[3] Conditioned approvals such as this do not violate the NHPA. *City of Grapevine v. Dept' of Transp*., 17 F.3d 1502, 1509 (D.C. Cir. 1994) ("because the FAA's approval of the West Runway was expressly conditioned upon completion of

In particular, following an ethnographic study that identified a potential Summit Lake Traditional Cultural Property in the stretch of land north of the reservation and south of the Sheldon Refuge, Ruby, in coordination with the BLM, developed a proposed route variation that would avoid construction in this Traditional Cultural Property, which the Commission approved. Order Denying Stay at P 20, A124.

Thus, the original authorized route was realigned to avoid impacts to the potential Summit Lake Traditional Cultural Property. *See* Answer of Ruby Pipeline, LLC in Opposition to Motion Requesting Stay of Construction (filed Jan. 12, 2011 in FERC Dkt. No. CP09-54) (Ruby Answer) at 6, A271. Moreover, Ruby's cultural consultants found no evidence of unmarked graves in the realigned Project's area of disturbance. *Id*. In any event, as has been the case on other portions of the pipeline, if additional cultural resource sites are discovered along the pipeline route, impacts on the resources will be appropriately addressed. Order Denying Stay at PP 3-4, 20, A118, A124. Any such discoveries may be addressed either under the unanticipated discovery plan developed with the Advisory Council on Historic Preservation and the Nevada State Historic Preservation Officer, or by adjusting the pipeline route pursuant to environmental Condition No. 5, which permits Ruby to make variations to the approved pipeline route to respond to later-

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the § 106 process, we find here no violation of the NHPA").

received information. *Id*. Thus, the Tribe's one specific allegation of irreparable injury provides no basis for granting a stay.

2. The Tribe's remaining generalized allegations of injury are insufficient to support the grant of a stay.

As the Commission found, the Tribe's remaining generalized allegations of harm likewise are insufficient. Order Denying Stay at P 18, A123. Ms. Cowan's affidavit lists 19 locations that she believes will be harmed by the pipeline, but she does not identify the alleged injury she believes the pipeline may cause. *Id*. Five of the identified locations are valleys, canyons, or creeks that would be crossed by the pipeline. *Id*. The EIS and the Certificate Order discuss procedures, restoration and revegetation plans, and construction mitigation plans to minimize and mitigate any potential construction impacts. *Id*.

Ms. Cowan also identifies Barrel Springs as a resource that would be harmed. *Id*. As discussed in the final EIS, Barrel Springs itself is over three miles from the approved pipeline route, although the approved route does traverse the broader Barrel Springs traditional cultural property, which encompasses the spring. *Id*. The pipeline route through the Barrel Springs traditional cultural property is located, however, within an existing utility corridor for electric transmission lines. *Id*. Any discovery of unanticipated cultural resources, such as unmarked graves, will be addressed by the Nevada unanticipated discovery plan. *Id*.

The Commission further found that the assertion by Mr. Barlese and Mr.

Cowan, that pipeline construction will result in more roads and increased vandalism, is unfounded. *Id*. P 19, A123. In fact, between the Tribes' reservation and the Sheldon National Wildlife Refuge, Ruby will not construct any new roads. *Id*. The Certificate Order authorized Ruby, during pipeline construction, temporarily to grade and widen existing roads up to 30 feet, although not all roads will need this level of improvement. *Id*. After construction of the pipeline, Ruby is required to restore the roads to their original condition. *Id*. In addition, BLM has indicated that it will require Ruby to remove some existing roads and restore the natural landscape. *Id*. After construction, therefore, there may be fewer roads in this area than there were before approval of the pipeline route. *Id*.

Thus, while the Tribe cites several cases for the proposition that harm to human remains and artifacts constitutes irreparable injury, *see* Motion at 7 nn. 4 & 5, the Tribe has provided only unsupported allegations of harm from pipeline construction near the Tribe's cultural resources. Order Denying Stay, P 21, A124. The Tribe's allegations of generalized possible impacts fail to account for the fact that, in approving the Project, the Commission placed numerous environmental conditions on construction and required mitigation measures to minimize the environmental impacts, including provisions designed to address discovery of unanticipated cultural or environmental issues. *Id*. P 20, A123-24. Granting the Tribe's motion would require the unjustified assumption that the cultural resources

measures required by the Commission in its expert judgment and with the cooperation of the Advisory Council on Historic Preservation and the Nevada State Historic Preservation Officer will not be effective. *Id*. P 20, A123-24.

The Tribe cites *Elrod v. Burns*, 427 U.S. 347, 373 (1976), for the proposition that the loss of First Amendment freedoms, even for minimal periods of time, constitutes irreparable injury. Motion at 7 n.4. The Tribe does not identify any specific First Amendment infringement, but, presumably, the Tribe is suggesting that its religious freedoms and spiritual fulfillment may be impaired by pipeline construction. Order Denying Stay P 21, A124. The standard for determining whether a government action inhibits First Amendment freedoms is whether the action imposes a substantial burden on the free exercise of the Tribe's religion. *Id*. (citing *Navajo Nation v. U.S. Forest Serv*., 535 F.3d 1058, 1068 (9th Cir. 2008)). Government action that diminishes subjective spiritual fulfillment does not "substantially burden" religion. *Id*. (citing *Navajo Nation*, 553 F.3d at 1070). *See also Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449-53 (1988) (disturbance to public lands of religious significance does not substantially burden the exercise of religion as it does not coerce persons into violating their beliefs nor penalize their religious activity).

B. The Tribe Has Not Shown A Likelihood Of Success On The Merits.

1. FERC's analysis complied with the National Historic Preservation Act.

a. FERC used reasonable and good faith efforts to identify historic and cultural resources.

The Tribe contends that the Commission violated Section 106 of the NHPA by failing "to use 'reasonable and good faith efforts' to identify all traditional religious and cultural properties" that could be impacted by the Project. Motion at 17. The record belies this assertion.

A cultural resource literature review and pedestrian survey for the proposed route was conducted in order to identify areas of potential historic or cultural significance. In general, "a 300-foot-wide corridor was surveyed for the pipeline and a 100-foot-wide corridor was surveyed for access roads," which was intended to "encompass the maximum variable width of the project area of potential effect." FEIS at 4-233, A197. Ethnographic studies of Native American tribes who claimed traditional territory along the pipeline route were also conducted in order to identify culturally-significant resources. *Id*.

With respect to Nevada in particular, a report summarizing the survey of the roughly 350 mile in-state route was subject to numerous rounds of review and comment by FERC, BLM, and other appropriate parties, including the Tribe. *Id*. at 4-235 – 4-236, A199-200. Related geoarcheological and visual impact studies were also completed, along with ethnographic studies for the Shoshone and Paiute

Tribes of the Duck Valley Indian Reservation and the Fort McDermitt Indian Reservation. *Id*. at 4-237 – 4-238, A201-02. The Tribe indicated that it preferred to conduct its own internal ethnographic study, which was funded by Ruby. *Id*. at 4-239, A203. The resulting report, however, "contained no ethnographic analysis nor information on [Traditional Cultural Properties]." *Id*.

The record similarly "evidences a long and thorough consultation process for cultural resources along the pipeline route." *Ruby Pipeline, LLC*, 133 FERC ¶ 61,015, P 26 (2010) ("Rehearing Order"), A104. *See also* FEIS at 4-242 – 4-259 (discussing Native American consultation process), A206-23. The process was completed with the execution of memoranda of agreement with the pertinent state historic preservation offices and advisory councils on July 30, 2010. *Id*. P 27, A105. The memoranda reflect the culmination of the section 106 consultation process, govern the Project, and "evidence[] the agency official's compliance with section 106" and the Act's implementing regulations. 36 C.F.R. § 800.6(c).

The Tribe attempts to cast doubt on this extensive research and consultation by claiming that a May 2010 report found "[d]ouble the number of prehistoric and historic sites that will be impacted in Nevada" as compared to the final EIS (881 sites vs. 443 sites). Motion at 16. This contention was not raised in the Tribe's petition for rehearing. *See* Rehearing Request, filed May 4, 2010, at 3-5 (listing purported errors), A226-28. As a result, the Court lacks jurisdiction to consider it.

15 U.S.C. § 717r(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in a application for rehearing unless there is reasonable ground for failure to do so."). In any event, the Tribe's contention misrepresents the record. The final EIS actually identifies 838 sites: 443 sites in the pipeline route, 240 sites for access roads, 107 sites for pipeline reroutes, 38 sites for ancillary facilities, and 10 sites for the main construction camp. FEIS at 4-235 – 4-237, A199-201.

b. FERC reasonably addressed the Summit Lake Traditional Cultural Property.

The only specific omission claimed by the Tribe is the purported failure to recognize the Summit Lake Traditional Cultural Property north of its Reservation. Motion at 16. As noted above, the final EIS could not fully address this issue because it was belatedly raised by the Tribe. *Id*. at 4-259, A223. The Commission nonetheless made clear that any information regarding this area "would [be] consider[ed] during the Section 106 process." *Id*. In order to ensure that no historic or cultural resources were affected prior to completion of that process, Condition No. 44 to the Commission's approval provides that "Ruby **shall not begin construction**" until, among other things, it receives Commission approval of all (a) required reports (which are subject to agency and tribal comment) and (b) finalized treatment or mitigation plans for historic and cultural resources. Certificate Order P 44, A92. Condition No. 5 similarly provides a mechanism for

Ruby to make post-approval route variations to avoid cultural resources or environmentally sensitive areas. *Id*. Appendix A, P 5, A83. *See also* Order Denying Stay, PP 4, 20, A118, 123-24.

Consistent with Condition No. 44, a treatment plan to mitigate impacts to identified cultural resources in Nevada has now been filed, along with an unanticipated discovery plan – developed with the Advisory Council and the Nevada State Historic Preservation Officer – to address matters such as unmarked graves. Order Denying Stay, PP 3, 18, A118, 123. And consistent with Condition No. 5, Ruby, in coordination with the BLM, developed a proposed route variation that would avoid construction in the identified Summit Lake Traditional Cultural Property area, which the Commission approved. *Id*. P 20, A124.

c. FERC reasonably employed a phased approach for identifying cultural resources

The Tribe's claim that all historic and cultural sites should have been identified in the final EIS is likewise unavailing. Motion at 15. NHPA regulations permit an agency to "defer final evaluation of historic properties" where, as here, such a phased approach is provided for in the memoranda of agreement with state historic preservation offices and the Advisory Council on Historic Preservation. 36 C.F.R. § 800.4(b)(2).[4] In such circumstances, the agency need only initially

[4] *See*, *e.g*., Memorandum among FERC and Nevada State Historic Preservation Office, *et al*., executed July 28, 2010, at pp. 2-4 (providing for phased

"establish the likely presence of historic properties within the areas of potential effects." *Id.* The Commission's analysis in advance of the Certificate Order satisfied this standard.

2. FERC's analysis complied with the National Environmental Policy Act.

a. The final EIS addresses the Project's potential impact upon historic and cultural resources.

The Tribe contends that the Commission violated the National Environmental Policy Act ("NEPA") by failing adequately to describe the Project's potential impact on historic and cultural resources. Motion at 17-19. This claim was not presented to FERC in a petition for rehearing and is thus beyond this Court's jurisdiction to consider. 15 U.S.C. § 717r(b); *see supra* p. 11.

In addition, this claim ignores the extensive discussion in the final EIS regarding the Project's potential impacts upon Native American cultural resources. For instance, the final EIS notes concerns that the Project could:

- effect "migration patterns of big game, principally deer, a chief form of sustenance to the tribal community;" FEIS 4-238, A202;
- destroy stacked rock features, *id.*;
- have an "adverse effect to the sensory experiences of individuals who might visit the area for ceremonial or other purposes;" *id.*,
- lead to the "[d]egradation of biotic species" which could inhibit the ability "to follow traditional practices associated with hunting, gathering, and religious ceremon[ies];" *id.* at 4-238 – 4-239, A202-03; and

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identification), A251-53.

- "disturb human remains and disrupt the spiritual integrity of place, which in turn affect the well-being of the community and lead to social problems;" *id*. at 4-239, A203.

With respect to the Tribe specifically, the final EIS notes their concern that the Project could prevent them from "conducting spiritual ceremonies in the area immediately north of their reservation" (*id*. at 4-245, A220), an issue subsequently addressed through a re-routing of the pipeline. Similarly, the final EIS discusses the Project's potential impact "on Northern Paiute foods, medicines, and other current or historic subsistence resources," and the mitigation measures intended to address that concern. *Id*. at 4-253, A217. *See also id*. at 4-165 – 4-167 (discussing Project's impact upon agricultural land), A193-95. There is likewise an extensive discussion of the Project's potential impact upon Lahontan cutthroat trout (*id*. at 4-134 – 4-135, A191-92), which has "an especially spiritual meaning for the tribe" (*id*. at 4-253, A217), and potential impacts to the migration patterns of large game animals hunted by the Tribe. *Id*. at 4-256, A220. Potential impacts to One Mile Spring, the water source for the Tribe's Reservation, and mitigation measures for those impacts, are also discussed in detail in the final EIS. *Id*. at 4-44 – 4-47, 4-253, A187-90, 217. There can thus be no claim that the Commission failed to identify the Project's potential impact upon Native American cultural resources.

b. FERC reasonably analyzed project alternatives.

NEPA requires federal agencies to "study, develop and describe appropriate

alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). The breadth of the agency's analysis is dictated by the nature and scope of the proposed action. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196-97 (D.C. Cir. 1991). "[A] rule of reason governs both which alternatives the agency must discuss, and the extent to which it must discuss them." *Id*. at 195.

Here, the Commission evaluated 15 alternatives to the pipeline route proposed by Ruby. Alternatives were recommended for inclusion in the Project's design if they conferred a significant advantage over the proposed route. In the absence of such advantages, "an alternative merely represents a shift in impacts from one area or resource to another." FEIS 3-10, A140. The Commission's analysis of route alternatives is summarized in a 45-page discussion in the final EIS. *See id*. at 3-9 – 3-54, A139-84.

The Tribe does not identify any information it believes was overlooked by the Commission. It simply contends that the alternatives section is too short, citing the three-page discussion of the Jungo-Tuscarora Alternative as evidence. Motion at 20-21. But that discussion summarizes the Commission's extensive analysis of the Jungo-Tuscarora Alternative and explains that it does not offer significant environmental benefits as compared to the Project:

> The overall footprint of the alternative (51.9 extra miles; 18.7 extra miles of pronghorn [antelope] crucial winter habitat; 50.0 extra miles of mule

> deer crucial winter habitat; and an additional compression station facility) would create a larger environmental footprint which we conclude would not significantly outweigh the benefits to be gained in certain individual resources areas.

FEIS at 3-51, A181.

Rather than alleviating impacts associated with the Project, the Jungo-Tuscarora Alternative would shift them "to pronghorn crucial winter habitat, mule deer crucial winter habitat, national historic trails, [Wilderness Study Areas], [National Wildlife Refuges], recreation [and] air quality." *Id*. *See also* Certificate Order P 65 (discussing Jungo-Tuscarora Alternative), A65, Rehearing Order P 55 (same), A115. The Commission also observed that "it appears that the route alternative is not economically feasible," FEIS at 3-51, A181, which is a permissible consideration when evaluating alternatives. *See, e.g., Mt. Lookout – Mt. Nebo Property Protection Ass'n v. FERC*, 143 F.3d 165, 172-73 (4th Cir. 1998) (affirming FERC orders rejecting alternative under NEPA because it was not economically feasible); *City of Grapevine*, 17 F.3d at 1506 (rejecting argument that "it was improper for the FAA . . . to consider the economic goals of the project's sponsor"). The Tribe offers nothing to question these conclusions.

In a footnote, the Tribe asserts that FERC should not have studied the Sheldon Alternative – which it describes as a "red herring" – because it was opposed by the U.S. Fish and Wildlife Service. Motion at 20 n.50. *See also* Certificate Order P 85 (discussing legal requirements applicable to the Sheldon

Route Alternative), A71-72. But the route was studied at the specific request of the BLM and the Nevada Department of Wildlife. FEIS at 3-32, A162. The Commission ultimately concluded that the Sheldon Alternative "may result in less environmental impacts on some resources," but determined that it would not be feasible in light of the Fish and Wildlife Service's continuing opposition. FEIS at 3-42, A172. Consideration of this alternative was entirely reasonable. Indeed, the NEPA regulations require agencies to "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency." 40 C.F.R. § 1502.14(c).

C. A Stay will Substantially Injure Other Parties

The Court must also consider whether "a stay would have a serious adverse effect on other interested persons." *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Here, a stay would obviously interrupt Ruby's construction efforts. This Court has recognized a substantial interest in continuing with approved construction activities in light of the costly nature of construction interruptions. *See, e.g., 3883 Connecticut LLC v. District of Columbia*, 336 F.3d 1068, 1074 (D.C. Cir. 2003) ("the permit holder has a substantial interest in the continued effect of the permit and in proceeding with a project without delay"); *Tri County Indus. v. District of Columbia*, 104 F.3d 455, 461 (D.C. Cir. 1997) ("The property interest here – the entitlement to continue construction without unfair interference – is substantial; any interruption of construction is likely to be very

costly."). Ruby estimates that, for every month of delay, it would experience an irreversible revenue loss of $18.7 million per month, ramping up to a revenue loss of $28 million per month over time. Ruby Answer at 7, A272.

A stay will also injure customers in California and the Pacific Northwest, who are currently subject to "declining imports of Canadian gas supplies." Preliminary Determination Order, P 37, A14. They will benefit from improved "reliability and flexibility of service" as a result of access to the Project's "abundant supply of competitively priced domestic gas." *Id*. P 41, A15. Delays would frustrate this objective. Order Denying Stay, P 22, A125.

D. The Public Interest Does Not Favor A Stay

The public interest is a "crucial" factor in "litigation involving the administration of regulatory statutes designed to promote the public interest." *Virginia Petroleum Jobbers*, 259 F.2d at 925. The Natural Gas Act charges FERC with regulating the transportation and sale of natural gas in the public interest. *See, e.g., Columbia Gas Transmission Corp. v. FERC*, 750 F.3d 105, 112 (D.C. Cir. 1984). Because the Commission is the "presumptive[] guardian of the public interest," its views "indicate[] the direction of the public interest" for purposes of deciding a request for stay pending appeal. *North Atlantic Westbound Freight Ass'n v. Federal Maritime Comm'n*, 397 F.2d 683, 685 (D.C. Cir. 1968).

Here, the Commission found that the public interest would not be served by

a stay of construction in northwestern Nevada. Notices to proceed have been issued for construction on all but approximately 80 miles of the 677-mile-long Project. Order Denying Stay, P 22, A125. Any delay in construction will delay delivery of needed gas supplies to West Coast markets, which would ultimately harm consumers. *Id*. Further, based on the Commission's extensive environmental analysis, construction and operation of the Project in compliance with the conditions imposed in the Certificate Order would result in limited adverse impacts upon environmental resources. Certificate Order P 107, A79. Construction of the Project is thus in the public convenience and necessity. The public interest, therefore, does not support issuance of a stay.

CONCLUSION

For the foregoing reasons, Petitioner's motion should be denied.

Respectfully submitted,

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January 19, 2010

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 19th day of January, 2011, filed the foregoing with the Court via the Court's CM/ECF system by noon as required by the Court, and served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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