

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Utah Board of Water Resources

Project No. P-12966-000

**MOTION OF THE KAIBAB BAND OF PAIUTE INDIANS  
TO INTERVENE IN PRELIMINARY APPLICATION  
FILED BY UTAH BOARD OF WATER RESOURCES**

Pursuant to the *Notice of Application Accepted for Filing and Soliciting Motions to Intervene, Protests, and Comments* (Nov. 2, 2007) (“Notice”), and 18 C.F.R. § 385.214, the Kaibab Band of Paiute Indians (“Tribe”) hereby moves to intervene as a party in the instant matter. As required by 18 C.F.R. § 385.214(b), the Tribe demonstrates that it is entitled to intervene because of the potential impact of the proposed Lake Powell Pipeline upon tribal resources.

**I. BACKGROUND**

The Kaibab Band of Paiute Indians is a federally recognized Indian tribe organized under the Indian Reorganization Act of June 18, 1934, 25 U.S.C. § 476. The Kaibab Indian Reservation is located near Fredonia, Arizona, in Coconino County, Arizona. The Reservation, which is adjacent to the Arizona-Utah border, was established by the Executive Order of June 11, 1913, and the Executive Order of July 17, 1917. The July 17, 1917 Executive Order describes the Kaibab Indian Reservation as follows:

Beginning at the northwest corner of section 6, township 41 north, range 2 west; thence east to the northeast corner of said section 6; thence north 47.12 chains to the boundary line between Arizona and Utah; thence west along said boundary line to the northwest corner of section 34, township 42 north, range 5 west; thence south to the southeast corner of section 33, township 41 north, range 5 west; thence east along the northern boundary of section 4, township 40 north, range 5 west, to the northeast corner thereof; thence south to the southwest corner of section 27, township 40 north, range 5 west;

thence east to the southeast corner of section 28, township 40 north, range 2 west; thence north to the northeast corner of section 4, township 40 north, range 2 west; thence west to the southwest corner of section 31, township 41 north, range 2 west; thence north to the place of beginning.

The Kaibab Indian Reservation continues to be held in trust for the benefit of the Tribe and its members by the United States.

On August 21, 2007, the Utah Board of Water Resources filed its *Application for Preliminary Permit, The Lake Powell Pipeline Project* (Aug. 21, 2007) (“Application”), by which the Commission commenced the instant proceeding. In the Application, the Utah Board of Water Resources seeks a preliminary determination that it may construct a pipeline to transport a portion of Utah’s Colorado River water allocation from storage in Lake Powell to St. George, Utah and Cedar City, Utah, and to include hydroelectric power generating facilities as part of the pipeline. The pipeline will cover a distance of approximately 135 miles, and will cross into Arizona for a distance of 20 to 30 miles. The pipeline will be buried, requiring significant trenching and excavation along its entire length.

The Application identified the Tribe as potentially being affected by the pipeline project. This is so because one of the three possible routes for the pipeline would follow Arizona State Highway 389 as it crosses the Tribe’s Reservation. Utah does not have a right-of-way along the Arizona highway alignment, and neither Utah or Arizona has a right-of-way to the subsurface of the highway alignment. If Utah wishes to follow the highway route for construction of the pipeline, it must obtain the consent of the Tribe as well as of the Department of the Interior as trustee for the Tribe. The proposed pipeline route immediately to the south of the Reservation would mostly follow the Western Utility Corridor, which crosses the Tribe’s aboriginal territory

and would potentially adversely affect tribal interests. The proposed pipeline route to the north of the Reservation would also cross the Tribe's aboriginal territory and would potentially adversely affect tribal interests. Accordingly, the Tribe has a direct interest in the instant proceeding.

## **II. REGULATORY REQUIREMENTS FOR INTERVENTION**

The Commission's regulations for intervention of parties in preliminary application proceedings are set forth at 18 C.F.R. § 385.214. To be entitled to intervene, the Tribe must (1) state its position, and (2) show that its interest may be directly affected by the outcome of the proceeding. *Id.* § 385.214(b). As set forth below, the Tribe satisfies all of the regulatory requirements for intervention as a party in the instant proceeding.

### **A. A MOTION TO INTERVENE MUST STATE, TO THE EXTENT KNOWN, THE POSITION TAKEN BY THE TRIBE AND THE BASIS IN FACT AND LAW FOR THAT POSITION. 18 C.F.R. § 385.214(b)(1).**

The Tribe's position regarding the Lake Powell pipeline is one of concern for the protection of tribal interests along the proposed routes for the project. The Tribe's Reservation lies in the path of one of the proposed routes for the pipeline, which would follow Arizona State Highway 389, and extend somewhat beyond that highway right of way and underlie it. The Tribe's interests are, therefore, directly affected by Utah's proposal. The southern and northern routes would cross the Tribe's aboriginal territory, and, therefore, would directly affect the Tribe's interests.

The extent of the Tribe's aboriginal territory was at issue before the Indian Claims Commission in *Southern Paiute Nation v. United States*, 14 Indian Claims Comm'n 618 (Jan. 18, 1965). The Indian Claims Commission determined that,

the area occupied by the Southern Paiute Nation was bounded on the south by the Colorado River and extended northward. Its westernmost boundary touched upon Death Valley in California. It reached northward into Beaver County of Utah and eastward to the region of the Escalante River in Utah. The area claimed included the Virgin River drainage, the Muddy River area, and around the present location of the city of Las Vegas, Nevada.

*Id.* at 619. The Tribe's Reservation lies in the heart of its aboriginal territory and Arizona State Highway 389 -- one potential route for the pipeline -- crosses the Reservation. The alternative southern route for the pipeline lies immediately to the south of the Reservation, and also lies in the heart of the Tribe's aboriginal territory. Similarly, the alternative northern route passes through tribal aboriginal territory. Merely because the proposed southern and northern routes are outside the Reservation does not lessen the potential impact of the pipeline on the Tribe's interests.

Accordingly, the Tribe's concern for the protection of archaeological and cultural resources associated with the proposed pipeline routes justifies its intervention as a party in the instant proceeding. The Tribe seeks party status with respect to the Commission's consideration of the Application so that it may actively participate in the analysis and protection of its historical and cultural resources.

**B. THE TRIBE'S PARTICIPATION IS IN THE PUBLIC INTEREST. 18 C.F.R. § 385.214(b)(2)(iii).**

The Tribe has demonstrated its interest in this matter: the proposed Lake Powell pipeline will cross either its Reservation lands; or it will cross lands immediately to the south of the Reservation or to the north of the Reservation -- in the heart of the Tribe's aboriginal territory -- which lands have significant historical and modern-day importance to the Tribe. Whichever of the routes is selected for the pipeline, the Tribe's interests are directly, and potentially adversely, affected.

Direct tribal participation in matters that affect tribal members and tribal trust resources is in the public interest. Congress repeatedly has determined that tribal participation serves the public interest, and the federal government has embraced that congressionally-determined policy:

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450a(a)-(b); *accord* Indian Financing Act of 1974, 25 U.S.C. § 1451 ("It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.").

Congress has expressly provided for direct tribal participation in various statutes. For example, under the Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa to 470mm, "[a]ny exchange or ultimate disposition . . . of archaeological resources excavated or removed

from Indian lands shall be subject to the consent of the Indian or Indian tribe which owns or has jurisdiction over such lands.” 16 U.S.C. § 470dd. Indeed,

[i]f a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, as determined by the Federal land manager, before issuing such permit, the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance.

16 U.S.C. § 470cc(c). Additionally, Congress has declared that Indian tribes should be direct participants in the process of protection of historical resources under the National Historic Preservation Act:

The Secretary shall establish a program and promulgate regulations to assist Indian tribes in preserving their particular historic properties. The Secretary shall foster communication and cooperation between Indian tribes and State Historic Preservation Officers in the administration of the national historic preservation program to ensure that all types of historic properties and all public interests in such properties are given due consideration, and to encourage coordination among Indian tribes, State Historic Preservation Officers, and Federal agencies in historic preservation planning and in the identification, evaluation, protection, and interpretation of historic properties.

16 U.S.C. 470a(d)(1)(A). Given that all of the proposed pipeline routes would affect tribal historical and cultural interests, as demonstrated above, there is no question that participation by the Tribe in the Application serves the public interest and is consistent with Congress’s repeated declarations that tribal participation is necessary in matters affecting tribal interests. *See Confederated Tribes & Bands of Yakima Indian Nation v. Fed. Energy Regulatory Comm’n*, 746 F.2d 466, 469 (9<sup>th</sup> Cir. 1984) (Having demonstrated an interest in protecting a fishery on the Columbia River that would be affected by a hydroelectric facility, “there is no question [the Yakima Indian Nation and National Wildlife Federation] qualified as “interested persons.”).

### **III. CONCLUSION**

As demonstrated herein, the Tribe satisfies the regulatory requirements for intervention in this proceeding before the Commission. Accordingly, the Tribe respectfully requests that the Commission grant the instant motion and permit the Tribe to intervene as a party in this proceeding.

Dated: 1-2-08

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that I have placed a true and correct copy of the foregoing *Motion of the Kaibab Band of Paiute Indians to Intervene in Preliminary Application Filed by Utah Board of Water Resources*, in the U.S. Mail, first-class postage prepaid thereon, on this 2nd day of January, 2008 to all contacts on the Service List and the Contact List for P-12966.

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