

KIRKLAND & ELLIS

Energy Blog

Utah Rail Line Project Appeal in the D.C. Circuit Has Environmental Justice Implications for Oil and Gas Projects

30 March 2022

A recent challenge to the approval of a rail line in Utah's Uinta Basin on the basis of a project's impacts on the Ute Indian Tribe may serve as a litmus test for the effects of the Biden administration's environmental justice initiatives on oil and gas projects. Although the case is in the early stages and a final order is not likely for a year, the case highlights the importance of giving careful consideration to environmental justice concerns given the threat of citizen suits in the planning stages of oil and gas projects.

Background — Environmental Justice Under the Biden Administration

The U.S. Environmental Protection Agency ("EPA") [defines environmental justice](#) as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations and policies." Environmental justice considerations have become a priority under the Biden Administration. During his first week in office, President Biden issued two executive orders that direct federal agencies to promote and work toward proactively achieving environmental justice – Executive Order 13985 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government) and Executive Order 14008 (Tackling the Climate Crisis at Home and Abroad).¹

On October 1, 2021, in accordance with the Biden administration's focus on

prioritizing environmental justice in the larger context of regulatory decision-making, EPA released its [Draft Strategic Plan for 2022-2026](#) (“Strategic Plan”). The Strategic Plan emphasizes cross-agency implementation on addressing climate change and environmental justice, including, as relevant to the Uinta Basin rail line, addressing disproportionate impacts in environmental justice communities in all written agreements between EPA and states and tribes implementing delegated authorities. In order to meet its Strategic Plan goals, the Biden administration has requested nearly \$1.5 billion in its fiscal 2023 budget proposal, including \$100 million in environmental equity programs for an expansion of community air quality monitoring.² Petitioners challenging the Uinta Basin rail line argue, in part, that the project fails review under the National Environmental Policy Act (“NEPA”) in light of the project’s disproportionate and adverse impact on the Ute Indian Tribe.

Uinta Basin Rail Project Proposal Approved by Surface Transportation Board in 2021

In May 2020, the Seven County Infrastructure Coalition (“Coalition”) filed a petition with the Surface Transportation Board (“Board”) to construct and operate an approximately 85-mile rail line connecting the Uinta Basin to the national rail network.³ According to the Coalition, this line would provide operators in the Uinta Basin with an alternative method of oil transportation, as trucks are the only option currently available. The usage of railroads for hauling is reportedly less emissions-intensive than the usage of trucks.⁴ On January 5, 2021, the Board issued a decision assessing the merits of the proposed rail line and approved the proposal, subject to the completion of the ongoing environmental review.⁵

On August 6, 2021, the Board’s Office of Environmental Analysis (“OEA”), working with stakeholders, indigenous tribes and government agencies, completed its environmental analysis and released a Final Environmental Impact Statement (“FEIS”). As part of the FEIS, the OEA considered a number of alternatives to the project as required by NEPA. OEA identified the preferable alternative for the rail line to avoid or minimize major environmental impacts, and recommended additional environmental conditions to reduce the project’s environmental impacts. On December 15, 2021, relying in part on the biological opinion filed by the U.S. Fish & Wildlife Service on September 20, 2021, the Board granted final approval for construction and operation of the identified alternative, subject to OEA’s final environmental mitigation measures, finding that the project was in the public convenience and necessity and reaffirming its January 5 decision.⁶

Pending Challenge of Rail Project in the D.C. Circuit Provides an Important Environmental Justice Test Case

On February 11, 2022, the Center for Biological Diversity, Living Rivers, the Sierra Club, Utah Physicians for a Healthy Environment and WildEarth Guardians (“Petitioners”) filed a petition before the U.S. Circuit Court for the District of Columbia (the “D.C. Circuit”), asking the court to review the January 5 decision, as well as the Board’s reliance on the biological opinion generated by the U.S. Fish & Wildlife Service.⁷ The Petitioners assert that the rail line project violated NEPA due to the Board’s failure to consider that a likely significant increase in oil production in the region would occur, and that future greenhouse gas emissions would result from the presence of the rail line.

The Petitioners also focus on environmental justice concerns posed by the rail line. The rail line runs through the region where the Ute Indian Tribe lives, and the Petitioners argue that the Tribe would be disproportionately and directly impacted by the greenhouse gas emissions in the region due to the construction of the rail line. The Petitioners further assert that two species of cacti, which have cultural significance for the Tribe, would be directly impacted. The Petitioners allege that these considerations are not adequately addressed by the Board’s FEIS or by the Board’s approval. Interestingly, environmental justice concerns were addressed in the underlying Board proceeding. OEA had consulted with the Ute Indian Tribe in accordance with NEPA and the National Historic Preservation Act (“NHPA”) and did identify some potential impacts of concern. To mitigate those impacts, OEA worked with the Tribe and other consulting parties to develop and execute a Programmatic Agreement that focuses on how cultural resources would be protected if the Board authorized the rail line. The Board’s decision further noted that it had received a letter of support for the project from the Ute Indian Tribe and ultimately found that the regulatory thresholds place reasonable limits on OEA’s impact analysis because minimal increases in train traffic on existing rail lines are not likely to result in significant additional impacts.⁸ This portion of the decision is at issue in the D.C. Circuit case.

Next Steps in the D.C. Circuit and Implications for Future Projects

Following the Petitioner’s request for review of the Board’s January 5 decision, the Surface Transportation Board and U.S. Fish and Wildlife Service have until May 26, 2022, to respond.⁹ Further arguments have yet to be scheduled, but the D.C. Circuit’s issuance of a final order will likely take a year.

The case serves as a reminder that companies and investors involved in oil and gas projects should be aware of and budget for the potential for citizen suits focused on environmental justice issues. The issues raised by the Petitioners may serve as a roadmap for considerations that environmental groups may focus on for future projects and challenges. Companies should be aware that in the future oil and gas projects may need to address environmental justice concerns more directly and broadly than previously, and should plan on early community engagement, consultation with a team of legal and technical advisors, and use of screening tools (such as EPA’s geospatial climate and environmental justice platform EJScreen), to find creative, productive and protective solutions for project approval and implementation.

1. See Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 20, 2021); and Executive Order 14008, Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021).↩

2. See Budget of the U.S. Government, Fiscal Year 2023 at 105-106, available at https://www.whitehouse.gov/wp-content/uploads/2022/03/budget_fy2023.pdf.↩

3. The Surface Transportation Board is an independent federal agency that is charged with the economic regulation of various modes of surface transportation, primarily freight rail.↩

4. Jocelyn Timperley, Eight charts show how ‘aggressive’ railway expansion could cut emissions,” CARBONBRIEF (Jan. 30, 2019), <https://www.carbonbrief.org/eight-charts-show-how-aggressive-railway-expansion-could-cut-emissions>. ↩

5. *Seven Cnty. Infrastructure Coal. – Rail Constr. & Operation Exemption – in Utah, Carbon, Duchesne, & Uintah Cntys., Utah*, FD 36284, slip op. at 10 (Jan. 5, 2021).↩

6. *Seven Cnty. Infrastructure Coal. – Rail Constr. & Operation Exemption – in Utah, Carbon, Duchesne, & Uintah Cntys., Utah*, FD 36284, (Dec. 15, 2021).↩

7. *Center for Biological Diversity, et al v. STB, et al*, U.S. Circuit Court of Appeals for the D.C. Circuit, No. 22-1020.↩

8. *Seven Cnty. Infrastructure Coal. – Rail Constr. & Operation Exemption – in Utah, Carbon, Duchesne, & Uintah Cntys., Utah*, FD 36284, (Dec. 15, 2021).↩

9. *See Center for Biological Diversity, et al v. STB, et al*, U.S. Circuit Court of Appeals for the D.C. Circuit, No. 22-1020, CLERK'S ORDER [1939550] (Mar. 17, 2022).↩

-
- Read [all insights](#) from the Energy & Infrastructure Blog.
 - Read more [Environmental](#) and [Oil & Gas](#) insights.
 - [Subscribe](#) to receive future updates.

Authors

Emily Tabak

Partner / Salt Lake City

Dean Brower

Associate / Washington, D.C.

Alex Noll

Associate / Houston

Related Services

Practices

- Environmental
- Energy & Infrastructure
- Transactional

This publication is distributed with the understanding that the author, publisher and distributor of this publication and/or any linked publication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, portions of this publication may constitute Attorney Advertising.

This publication may cite to published materials from third parties that have already been placed on the public record. The citation to such previously published material, including by use of "hyperlinks," is not, in any way, an endorsement or adoption of these third-party statements by Kirkland & Ellis LLP.

© 2022 Kirkland & Ellis LLP.