Nos. 22-1019 & 22-1020 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EAGLE COUNTY, COLORADO,
Petitioner,

CENTER FOR BIOLOGICAL DIVERSITY, ET AL.,

Petitioners,

v.

SURFACE TRANSPORTATION BOARD, ET AL.,
Respondents,

SEVEN COUNTY INFRASTRUCTURE COALITION
AND UINTA BASIN RAILWAY, LLC,

Respondent-Intervenors.

PETITIONER EAGLE COUNTY'S OPPOSITION TO INTERVENOR-RESPONDENTS' PETITION FOR REHEARING EN BANC

Bryan R. Treu
County Attorney
Eagle County, Colorado
500 Broadway
P.O. Box 850
Eagle, Colorado 81631
(970) 328-8685

Nathaniel H. Hunt
Robert W. Randall
Christian L. Alexander
Kaplan Kirsch & Rockwell LLP
1675 Broadway, Suite 2300
Denver, Colorado 80202
(303) 825-7000

Counsel for Petitioner Eagle County, Colorado

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GLOSSARY OF TERMS

APA	Administrative Procedure Act
Board	Surface Transportation Board
Coalition	Seven County Infrastructure Coalition and Uinta Basin Railway, LLC
EIS	Environmental Impact Statement
Final Exemption Order	The Surface Transportation Board's December 15, 2021 approval of the Railway
ICCT Act	Interstate Commerce Commission Termination Act
NEPA	National Environmental Policy Act
Opinion	The opinion issued by the panel in this case on August 18, 2023.
Preliminary Decision	The Surface Transportation Board's January 5, 2021 preliminary decision regarding the transportation merits of the Railway
Railway	Uinta Basin Railway

INTRODUCTION

The Court should deny Intervenor-Respondents Seven County Infrastructure Coalition and Uinta Basin Railway, LLC's (the Coalition) Petition for Rehearing En Banc (the Petition), ECF 2019520, because the panel's decision does not create a circuit split, nor does it raise any questions of exceptional importance.

Consistent with the two other circuit decisions addressing the so-called "presumption" favoring rail construction in 49 U.S.C. § 10901(c) and cited by the Coalition, Petition 1, the panel did consider Section 10901(c), but determined Respondent Surface Transportation Board's (Board) Final Exemption Order approving the Coalition's proposed Uinta Basin Railway (Railway) was riddled with "significant" and "numerous" legal deficiencies rendering the Board's Final Exemption Order invalid.

Specifically, the panel found that the Final Exemption Order violated the Administrative Procedure Act (APA), National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Interstate Commerce Commission Termination Act (ICCT Act). *See* Panel Opinion, August 18, 2023 (Opinion) 65-66, ECF 2013122. Under the APA's established standard of review, the panel held that the Board's "consideration of the [Railway's] impacts and benefits was cursory at best," *id*. 64, that the Board "failed to fulfill its obligation [to consider environmental impacts] under the ICCT Act," *id*. 65, and that the Board "failed to

'supply an acceptable rationale' as to its consideration of the relevant Rail Policies . . . ," *id*. (citation omitted). These legal errors rendered the Board's weighing of the Railway's benefits and impacts inherently flawed, even in light of the presumption in Section 10901(c) that the Board authorize rail construction unless the Board finds "such activities are inconsistent with the public convenience and necessity." *Id*.

Unhappy with the panel's well-reasoned findings, the Coalition seeks to manufacture a circuit court split based on the Opinion's mere omission of the term "presumption," and nothing else.[1] The panel did consider Section 10901(c) in the Opinion and at oral argument—questioning the Board's counsel on its reliance on the presumption to justify the Railway's approval, without first considering the Railway's significant environmental harm or record evidence raising serious doubt about its purported benefits.

The presumption in Section 10901(c) neither cures nor trumps the numerous legal errors in the Final Exemption Order, including the Board's failure to explain its consideration of the relevant Rail Policies, Opinion 65, in violation of the ICCT Act and APA. No circuit court, including those the Coalition cites, have held that

[1] Eagle County has coordinated with Petitioners Center for Biological Diversity et al. (the Center) in responding to the Petition to minimize duplicative arguments. The Center responds separately in opposition to the Coalition's argument for rehearing based on the panel's holding regarding certain indirect effects of the Railway. Eagle County adopts and incorporates herein the Center's opposition.

the presumption in favor of rail construction absolves the Board from compliance with federal environmental laws, the ICCT Act, or the APA's standards of review for a federal agency decision. 5 U.S.C. § 706(2).

The panel's treatment of Section 10901(c) does not conflict with the two circuit court decisions that the Coalition cites, and therefore, does not raise any questions of exceptional importance. Fed. R. App. P. 35(a)(2).

STATEMENT OF THE CASE

A. The Board approved the Railway despite significant environmental impacts.

The Coalition sought the Board's authorization for the Railway pursuant to the ICCT Act. 49 U.S.C. § 10901(a). Before issuing a certificate authorizing a rail project, the Board must consider whether a proposed activity is "inconsistent with the public convenience and necessity" and may impose any conditions necessary in the public interest. *Id.* § 10901(a), (c); *see* Opinion 4; 54-56 (discussing rail authorization process).

An applicant may seek exemption from the more stringent application process. 49 U.S.C. § 10502. The Board exempts projects from its licensing authority and application process when it finds that regulation under its licensing provisions is not necessary to "carry out" the Rail Policies under 49 U.S.C. § 10101. *Id.* § 10502(a). The Board's evaluation of Rail Policies includes consideration of environmental issues under the Rail Policy objectives of

"operat[ing] transportation facilities and equipment without detriment to the public health and safety," *id.* § 10101(8), and "energy conservation," *id.* § 10101(14). The Board calls its evaluation of whether an exemption "carries out" the Rail Policies its "transportation merits" analysis. To arrive at a final decision regarding a proposed rail project, the Board must weigh the transportation merits and the environmental impacts. Opinion 54-56.

The Board's Final Exemption Order approved the Coalition's proposal to construct the 88-mile Railway in Utah whose "undisputed purpose . . . is to expand oil production in [Utah's] Uinta Basin, by enabling it to be brought to market via the proposed rail line connecting the Basin to existing lines that run to Gulf Coast refineries." Opinion 34. The Board determined that the Railway would significantly increase rail traffic on the existing Union Pacific line between the Railway's endpoint and Denver. *See id*. 38. The Railway's new rail traffic would include up to 9.5 trains a day on the Union Pacific Line, comprised of 8 locomotives and well over 100 cars, extending up to 10,000 feet in length, JA823.

The Railway's trains would transport as much as 350,000 barrels of oil each day on the existing Union Pacific Line across the Rocky Mountains in Colorado alongside the Colorado River, including across Eagle County. Opinion 43. The Board estimates that an accident involving a loaded oil train would occur

approximately once a year on the Union Pacific line traveling through sensitive and fire-prone ecosystems in Colorado. *Id*. 38.

In issuing the Final Exemption Order approving the Railway, the Board omitted numerous environmental impacts from its analysis of the Railway—both in the Order and in its Environmental Impact Statement (EIS)—despite that Eagle County, the Center, and many others raised significant concerns over the environmental impacts. The Board "omitted the effects of increased crude oil refining on Gulf Coast communities," "omitted upline impacts on vegetation or species of increased drilling in the Uinta Basin," and "omitted downline effects of projected increases in spills and accidents from additional oil trains traveling the existing Union Pacific rail line alongside the Colorado River—including effects on water, special status species or habitats, recreation and land use." Opinion 11-12.

Notwithstanding the lack of analysis, the Board granted the Coalition an exemption from its full application procedures under the ICCT Act and determined that the transportation merits of the project outweighed the environmental impacts. *See Id*. 55-56.

Eagle County and the Center sought review in this Court. After oral argument, the panel issued its Opinion determining that the Board violated the APA, NEPA, the ESA, and the ICCT Act and vacated the Final Exemption Order. Opinion 65-66.

B. The Panel held that the Board's environmental review of the Railway violated NEPA and ESA.

The panel determined that the Board's EIS included "deficiencies" that were "significant" and "numerous," in violation of NEPA, the ESA, and the APA. Opinion 65-66.

First, the panel held that the Board "failed to quantify reasonably foreseeable upstream and downstream impacts on vegetation and special-status species of increased drilling in the Uinta Basin and increased oil-train traffic along the Union Pacific Line, as well as the effects of oil refining on environmental justice communities [on] the Gulf Coast." *Id*. 66.

Second, the panel held that the Board failed to take the necessary "hard look" at the significant increase in the risk of rail accidents downline given the increased rail traffic resulting from the Railway. Opinion 37-39 (holding that the Board "failed to respond to significant opposing viewpoints concerning the adequacy of its analyses of [rail accidents]").

Third, the panel found that the Board failed to consider the downline wildfire risks presented by the significant increase of traffic on the existing Union Pacific line. Opinion 40-42. Describing the Board's conclusion as "utterly unreasoned," the panel rejected the Board's assertion that "an increase in rail traffic of 9.5 trains a day [on the existing line] would not result in a significant

wildfire risk because it would not be a qualitatively 'new ignition source[.]" *Id*. 42.

Fourth, the panel found that the Board failed to consider the Railway's downline impacts on the Colorado River. Opinion 43-44. The panel noted that the Board "concededly fails altogether to mention the Colorado River in the Final EIS's discussion of impacts on water resources." *Id*. 43. The panel found that "there is no evidence here that the Board even considered the potential impacts on water resources downline of running up to 9.5 loaded oil trains a day on the Union Pacific Line—about 50% of which abuts the Colorado River." *Id*. 43.

Fifth, the panel held that the Board and U.S. Fish and Wildlife Service (the Service) violated the ESA by arbitrarily narrowing the analysis of potential impacts to ESA-listed fish and critical habitat and excluding consideration of spill and leak impacts from Railway operations on downline species and waterways. *Id*. 50-51. The panel held that the Service's biological opinion issued under the ESA, and the Board's Final Exemption Order, to the extent it relies on the biological opinion, are "arbitrary and capricious." *Id*. 51 (finding the Board's reliance on the biological opinion also violates of NEPA).

C. The panel held that the Board's Final Exemption Order violates the ICCT Act.

The panel found that "[i]t is clear from the Final Exemption Order that the Board failed at every juncture" in considering and applying Rail Policies it was required to consider under the ICCT Act. Opinion 58.

First, the Board arbitrarily ignored questions about the financial viability of the Railway. *Id*. The panel held that the Board "cannot ignore and, in the past, has not ignored serious concerns, about the financial viability in determining the transportation merits of a project." *Id*. 59-60. Rejecting the Board's reasoning for not considering information raising significant questions about the Railway's financial viability, the panel held that the Board's "washing its hands of any concern for financial viability is 'an inexcusable departure from the essential requirement of reasoned decision making.'" *Id*. 61. (citation omitted).

Second, the panel found several violations of the ICCT Act and APA in the Board's consideration of the Railway's environmental impacts. The panel held that the errors in the EIS—which was relied on by the Board in weighing the Railway's environmental harms and transportation merits—"infect" the Final Exemption Order. *Id*. 61. Further, the panel found the Board's lack of analysis of the environmentally related Rail Policies "separately demonstrate[s] that the Board did not adequately consider the incredibly significant environmental effects identified in the EIS in weighing those impacts against the uncertain transportation

benefits of the Railway." *Id*. 62. Among the Board's errors, it admittedly failed to evaluate the ICCT Act's "energy conservation" Rail Policy. *Id*. 62-63; *id*. 66 (finding the Board "failed to conduct a reasoned application of the appropriate Rail Policies as required under the ICCT Act").

In holding that the Final Exemption Order violates the ICCT Act and the APA, the panel found the Board "completely glossed over the objection that 'the project's many significant environmental impacts' necessitated additional scrutiny and 'more extensive proceedings.'" *Id*. 63 (quoting Final Exemption Order). The panel held that "[t]he Board's consideration of [the Railway's] impacts and benefits was cursory at best, leaving little question that the ICCT Act necessitated a more fulsome explanation for the Board's conclusion that the Railway's transportation benefits outweighed the project's environmental impacts." *Id*. 64

ARGUMENT

The Coalition fails to establish that the panel's Opinion has created a circuit split regarding the "pro-construction presumption" in Section 10901(c). Petition 3. The panel considered the presumption and determined that the Final Exemption Order's numerous, significant errors—including APA violations unrelated to the ICCT Act's requirements—prevented the Board from properly weighing the Railway's transportation merits and environmental effects. Because of those legal errors, the presumption was not a dispositive factor in the Opinion.

Further, no presumption, even applied in the manner sought by the Coalition, could overcome the Board's legal errors. The panel's consideration of the presumption while finding that the Board failed to comply with its statutory obligations is entirely consistent with the decisions from the other circuits that the Coalition cites.

Accordingly, there is no question of exceptional importance warranting *en banc* review.

A. The Coalition wrongly asserts that the panel did not consider the presumption in 49 U.S.C. § 10901(c).

Contrary to the Coalition's assertion, *see* Petition 14-15, the panel considered and accounted for the statutory presumption favoring rail construction in arriving at its decision, but correctly focused its Opinion on the significant legal flaws in the Final Exemption Order.

First, the panel properly identifies the statutory presumption in the Opinion by reciting 49 U.S.C. § 10901(c) itself: the "Board issues the certificate . . . unless the Board finds that such activities are inconsistent with the public convenience and necessity." Opinion 4 (citation omitted). The panel did not overlook Section 10901(c) by not mentioning the term "presumption," which is not found in the statute.

Second, the panel's repeated references to the presumption during oral argument clearly demonstrate that it considered that issue and, specifically,

whether the presumption excused the Board's lack of substantive evaluation of relevant factors in issuing the Final Exemption Order. The panel engaged in a thorough discussion with the Board's counsel regarding the Board's application of the presumption in weighing Railway-related harms and benefits. Oral Ar. Tr. at 68-69; 86-88, attached as Exhibit A. Counsel for the Board contended that the question is whether "the environmental impacts overcome that presumption," which, according to counsel for the Board, "they didn't here because the Board clearly [weighed] those impacts . . . ." *Id*. 87.

The panel raised concern over the Board's reliance on the presumption when the administrative record showed the Railway's significant environmental harm, stating:

> It [the Board] tells us that it has this . . . sort of strong presumption in favor of building the railroad; and given that strong presumption . . . where do you see them doing a really . . . substantive evaluation of that against . . . the extraordinary environmental and public health consequences of this? I just didn't see that. It's kind of serious balancing. I don't know that the presumption means that . . . they need something much more catastrophic before anything will ever outweigh it . . . .

Id. 117. Ultimately, the panel disagreed with the Board's reliance on the presumption, determining that the Board failed to conduct any actual or substantive "weighing" of the Railway's benefits and environmental impacts. *See* Opinion 62-66. The panel held that "[t]he Board is required

to compare both sides of the ledger, not just acknowledge that both sides exist." *Id.* 64.

Although the Coalition contends that Section 10901(c) makes a finding that environmental harms outweigh transportation merits "harder than the panel's decision admits," Petition 15, the Coalition does not explain how the panel should have applied the presumption nor how the presumption should have resulted in a different decision. The Coalition does not dispute any specific finding or conclusion in the panel's analysis under the ICCT Act. The Coalition merely raises a generalized criticism that the panel did not consider Section 10901(c). Stripped to its essentials, the Coalition's only argument is that the panel did not mention the word "presumption" in its Opinion.

Accordingly, the panel did consider Section 10901(c), and the Petition can be denied on this ground alone.

B. Section 10901(c)'s presumption cannot cure the numerous legal flaws in the Final Exemption Order and environmental review.

The Coalition's expectation that the Railway should be authorized due to Section 10901(c) does not excuse the Board's failure to conduct a substantive analysis of the Railway's environmental impacts and transportation merits and to explain its conclusion that the "transportation merits of the project outweigh the environmental impacts." JA47. Yet, the Coalition's petition essentially seeks a decision that the "pro-construction presumption" trumps or cures the panel's

findings that the Board's decision did not fully consider the project's environmental harms and the ICCT Act's rail transportation policies, in violation of the APA and ICCT Act. That proposition has no legal merit.

The Opinion clearly explains how the Board "failed at every juncture" in its analysis under the ICCT Act, Opinion 58, and was arbitrary and violated the APA on multiple grounds, *id*. 66. The Court noted that it was not its "job to decide whether the Board ultimately arrived at the right outcome in light of its findings." Opinion 64. However, the panel found that the Board, in violation of the ICCT Act and the APA, "failed to adequately consider the Rail Policies and 'articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" Opinion 65 (citation omitted).

The panel found that the Board failed to assess as part of its Rail Policy analysis the Railway's numerous environmental impacts, including: (1) reasonably foreseeable upstream impacts on vegetation and special-status species; (2) the downstream effects of oil refining on environmental justice communities on the Gulf Coast; (3) downline wildfire risks; (4) downline impacts on water resources; and (5) available information on local accident risks, Opinion 66. Relatedly, the panel determined that the Board "completely ignored" the Rail Policy regarding "energy conservation," a "policy bearing on the propriety of the exemption" in the Final Exemption Order. Opinion 64.

A presumption in favor of rail projects does not excuse the Board from complying with the ICCT Act and the APA, including the requirement that the Board provide a "reasoned application of the appropriate Rail Policies as required under the ICCT Act." *Id*. 66.

C. There is no conflict between the panel's decision and the decisions of two other circuits.

The Opinion is entirely consistent with the two circuit decisions the Coalition cites. Petition 14-15. The Coalition makes no attempt to demonstrate any conflict of substance between the decisions. The only distinction the Coalition identifies is that the Opinion does not mention the term "presumption," whereas the Eighth and Ninth Circuits do. *Id*. A closer look at the cases demonstrates there is no conflict among circuits constituting a "question of exceptional importance."

In *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 551 (8th Cir. 2003), the Eighth Circuit acknowledged the presumption in finding that the "somewhat dated" financial analysis for a proposed rail project was sufficient and rejected the challenger's argument that the data upon which the Board relied was out-of-date. *Id*. at 551-52. The Eighth Circuit's decision is consistent with the panel's bases for vacating the Board's decision. Despite acknowledging the presumption, the Eight Circuit vacated in part the Board's decision due to its failure to "explain fully its course of inquiry, analysis, and

reasoning" relating to mitigation of noise impacts from increased rail traffic, including on an existing rail line. *Id*. at 536 (citation omitted).

Similar to *Mid States*, Section 10901(c)'s presumption did not excuse the Board's legal errors here. The panel was fully aware of *Mid States*, which was discussed in briefs by parties on both sides of this dispute, *see e.g.* Board Brief at 3-4, 73, ECF 1990826. If the discussion of the "presumption" found in *Mid States* was a dispositive factor in the panel's analysis, the panel would have addressed it.

In *Northern Plains Resource Council v. Surface Transportation Board*, 668 F.3d 1067 (9th Cir. 2011), the dispute was whether a presumption in favor of rail project actually existed. The Ninth Circuit stated that "[w]e agree with the Eighth Circuit [in *Mid States*] and the Board's interpretation, and find the Board did not improperly apply a presumption for construction in [the project]." *Id*. at 1092. Despite recognizing the presumption, the Ninth Circuit vacated the Board's approval of one of the disputed rail applications, because the Board's approval was "arbitrary and capricious" in light of its failure to consider evidence relating to the "financial viability" and safety of the proposed line. *Id*. at 1098-1099.

Similarly, the panel found that the Board arbitrarily dismissed evidence raising "serious concerns" about the financial viability of the Railway. Opinion 59-60.

The decisions in *Mid States* and *Northern Plains*, reinforce—rather than conflict with—the panel's decision. All three decisions show that despite Section 10901(c), the Board must still demonstrate compliance with federal environmental laws, the ICCT Act, and the APA. Neither the panel's treatment of the presumption, nor its omission of reference to the term "presumption" when discussing Section 10901(c), created conflict between the circuit courts.

D. There are no other grounds for *en banc* review based on the Rule 35's exceptional importance standard.

The Coalition's attempt to prop the issue of presumption as a recurring issue of legal uncertainty should be rejected. *See* Petition 19.

First, although the Coalition asserts that "frequent recurrence" of a legal issue "fits [Rule 35's] other criteria," *id*. 16, the best it can muster is "[t]he presumption favoring rail construction, while not as hot a button as fossil fuel transportation, is also likely to come up again." *Id*. 19. Under that logic, any issue that is "likely to come up again" could be deemed exceptionally important and could render virtually any decision subject to *en banc* rehearing, an outcome contradicting the federal rule's mandate that "[a]n en banc . . . rehearing is not favored . . . ." Fed. R. App. P. 35(a).

Second, the Coalition's observation that two recent Board decisions *reference* the presumption, Petition 19, does not create any controversy warranting rehearing. The panel's decision focused on significant violations of federal law,

and not the scope of the presumption or whether it existed. The Coalition fails to explain what the panel got wrong in considering the presumption or how an *en banc* rehearing would correct any error.

Finally, the panel's decision does not create uncertainty about how the Board applies the presumption in the future. Nothing in the Opinion suggests that the presumption has changed or been negated, and an *en banc* rehearing revisiting the presumption would not change the panel's findings in the Opinion. Indeed, a rehearing ruling that the Coalition apparently seeks—*i.e.* that the presumption could cure a panoply of violations of the ICCT Act and the APA—would muddle the Board's clear responsibilities under each of these federal laws.

The panel's ruling demonstrates—consistent with other circuit decisions—the presumption is a fact-specific consideration that does not relieve the Board of its duties under the ICCT Act and the APA. The Board's own sitting chairman explained this clearly in the Board's Preliminary Decision: although "Board precedent holds that there is a statutory presumption that construction projects should be approved . . . , such a presumption does not obviate the Board's statutory obligation to determine whether regulation is necessary to carry out the [Rail Policies] of § 10101 . . . ." JA12 (Oberman, dissenting).

CONCLUSION

Eagle County respectfully requests the Court deny the Coalition's Petition.

Submitted on November 9, 2023.

s/ Nathaniel H. Hunt
Nathaniel H. Hunt
nhunt@kaplankirsch.com
Robert W. Randall
brandall@kaplankirsch.com
Christian L. Alexander
calexander@kaplankirsrch.com
Kaplan Kirsch & Rockwell LLP
1675 Broadway, Suite 2300
Denver, Colorado 80202

Bryan R. Treu
bryan.treu@eaglecounty.us
County Attorney
Eagle County, Colorado
500 Broadway
P.O. Box 850
Eagle, Colorado 81631

Counsel for Petitioner Eagle County, Colorado

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limit of the Court's October 4, 2023 order because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 3,811 words.

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

s/ Nathaniel H. Hunt
Nathaniel H. Hunt

CERTIFICATE OF SERVICE

I certify that on November 9, 2023, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Nathaniel H. Hunt
Nathaniel H. Hunt