

2-22-2020

PREVIEW—United States Forest Service v. Cowpasture River Preservation Association: Can the Pipeline Cross the Trail?

Alizabeth Bronsdon
alizabeth.bronsdon@umontana.edu

Follow this and additional works at: <https://scholarship.law.umt.edu/plrlr>

 Part of the [Administrative Law Commons](#), [Agriculture Law Commons](#), [Animal Law Commons](#), [Cultural Heritage Law Commons](#), [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), [Indian and Aboriginal Law Commons](#), [Land Use Law Commons](#), [Natural Resources Law Commons](#), [Oil, Gas, and Mineral Law Commons](#), [Science and Technology Law Commons](#), and the [Water Law Commons](#)

Recommended Citation

Bronsdon, Alizabeth (2020) "PREVIEW—United States Forest Service v. Cowpasture River Preservation Association: Can the Pipeline Cross the Trail?," *Public Land & Resources Law Review*. Vol. 0 , Article 4. Available at: <https://scholarship.law.umt.edu/plrlr/vol0/iss11/4>

This Article is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Public Land & Resources Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

**PREVIEW—United States Forest Service v. Cowpasture River
Preservation Association: *Can the Pipeline Cross the Trail?***

Alizabeth A. Bronsdon*

The Supreme Court of the United States will hear oral argument in this matter on Monday, February 24, 2020, at 10 a.m. in the Supreme Court Building in Washington, D.C. Anthony Yang, Assistant to the Solicitor General, will likely argue for the United States. In a divided oral argument, Paul D. Clement will likely appear for Atlantic Coast Pipeline, LLC, the petitioner in consolidated case No. 18-1587, *Atlantic Coast Pipeline, LLC v. Cowpasture River Preservation Association*. Michael K. Kellogg will likely appear for the Respondents.

I. INTRODUCTION

This case presents a narrow statutory interpretation question of federal public land law with broad implications regarding state sovereignty, private property rights, and the nation’s energy trajectory. The United States Forest Service¹ (“Forest Service”) and pipeline builder Atlantic Coast Pipeline, LLC (“Atlantic”) petitioned the Supreme Court for certiorari after the Fourth Circuit vacated a Forest Service-issued natural gas pipeline right-of-way across the Appalachian National Scenic Trail (“Appalachian Trail”) pursuant to the Mineral Leasing Act² (“MLA”) in favor of Cowpasture River Preservation Association and a cadre of environmental groups³ (collectively “Respondents”). *United States Forest Service v. Cowpasture River Preservation Association* asks whether the Forest Service has the authority to grant rights-of-way under the MLA through lands traversed by the Appalachian Trail within national forests.⁴

* Alizabeth Bronsdon, J.D. Candidate 2021, Alexander Blewett III School of Law at the University of Montana.

1. Federal petitioners, the United States Forest Service, an agency of the United States Department of the Agriculture, Kathleen Atkinson, in her official capacity as Regional Forester of the Eastern Region, and Ken Arney, in his official capacity as Acting Regional Forester of the Southern Region, were respondents in the court of appeals.

2. 30 U.S.C. §§ 181–287 (2018).

3. Respondent non-profit groups Cowpasture River Preservation Association, Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Virginia Wilderness Committee, and Wild Virginia, Inc. were petitioners in the court of appeals.

4. Br. for Fed. Pet’rs at I, Dec. 2, 2019, No. 18-1584 & 18-1587.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Mineral Leasing Act authorizes “the Secretary of the Interior or appropriate agency head”⁵ with “jurisdiction over [the] Federal lands”⁶ at issue to grant rights-of-way “for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom.”⁷ The MLA defines “Federal lands” as “all lands owned by the United States *except* lands in the National Park System.”⁸

In 1968, the National Trails System Act⁹ (“Trails Act”) established the statutory framework for the Appalachian Trail, which traverses more than 2,000 mountainous miles from Maine to Georgia.¹⁰ The Act charged the Secretary of the Interior (“Secretary”) with overall administration of the Appalachian Trail.¹¹ The Secretary then designated the National Park Service (“Park Service”) as the trail’s “land administering bureau.”¹² The United States Forest Service (“Forest Service”), an agency within the Department of Agriculture, administers federal lands in the National Forest System, through which approximately 1,000 miles of the Appalachian Trail crosses.¹³ In 1971, pursuant to the Trails Act, the Park Service and Forest Service agreed on the locations and “the width of the right-of-way for approximately 780 miles of [the] route within national forests.”¹⁴ The Appalachian Trail’s remaining 1,000-or-so miles traverse a combination of state and privately-owned lands, under appropriate easements,¹⁵ and other federal lands, like national parks.¹⁶

The Atlantic Coast Pipeline (“ACP”) is a proposed 604.5-mile, 42-inch diameter natural gas pipeline from West Virginia to North Carolina.¹⁷ The Federal Energy Regulatory Commission (“FERC”) approved the pipeline in 2017 with twenty-one miles of the ACP’s

5. 30 U.S.C. § 185(a).

6. *See id.* § 185(b)(3) (“Agency head” means the head of any Federal department or independent Federal office or agency, other than the Secretary of the Interior, which has jurisdiction over Federal lands”).

7. *Id.* § 185(a).

8. *See id.* § 185(b)(1) (emphasis added).

9. 16 U.S.C. § 1241–1249 (2018).

10. *Id.* § 1244(a)(1).

11. *Id.*

12. Br. for Resp’ts at 5, Jan. 15, 2020, No. 18-1584 & 18-1587; *see* 34 Fed. Reg. 14,337, 14,337 (Sept. 12, 1969).

13. Br. for Fed. Pet’rs at 11.

14. Br. for Fed. Pet’rs at 10.

15. Br. for Fed. Pet’rs at 9 (citing Bureau of Outdoor Recreation, *Trails for America: Report on the Nationwide Trail Study*, U.S. DEP’T OF THE INTERIOR 26 (1966) <https://go.usa.gov/xpKnp>); *see* S. REP. NO. 1233, 90th Cong., 2d Sess. 2 (1968) (stating that agencies should “obtain scenic or other easements for rights-of-way necessary for the . . . public use of the trail, and the protection of the scenic and other qualities of the trail”).

16. *See* Br. for Fed. Pet’rs at 8–9.

17. *Cowpasture River Pres. Ass’n v. U.S. Forest Serv.*, 911 F.3d 150, 155 (2018).

proposed route crossing the George Washington and Monongahela national forests.¹⁸ Atlantic submitted plans that include clear-cutting a 125-foot right-of-way for most of that distance, digging a trench to bury the pipeline, and blasting and flattening ridgelines across mountainous terrain, directly impacting nearly 12,000 acres of national forest.¹⁹ To cross the Appalachian Trail, Atlantic proposed drilling a one-mile-long hole approximately 700 feet beneath the surface of a 0.1-mile stretch of trail.²⁰ In January 2018, the Forest Service issued Atlantic a right-of-way and special-use permit for the ACP to cross two national forests under perceived MLA authority.²¹

Following administrative appeals, Respondents petitioned the United States Court of Appeals for the Fourth Circuit alleging violations of the MLA, the National Environmental Policy Act²² (“NEPA”), and the National Forest Management Act²³ (“NFMA”) for the Forest Service’s failure to comply with its 2012 Forest Planning Rule and 2016 Planning Rule amendments.²⁴ The Fourth Circuit held that the Forest Service had violated NEPA and NFMA, and because the trail is administered by the Secretary of the Interior as part of the National Park System, “the Forest Service [did] not have statutory authority to grant pipeline rights-of-way across the [Appalachian Trail] pursuant [to] the MLA.”²⁵

The Fourth Circuit denied an en banc rehearing on February 25, 2019. On June 25, 2019, the Forest Service and Atlantic petitioned for certiorari. The Supreme Court of the United States granted the petitions and consolidated the cases on October 4, 2019. The sole issue before the Court is whether the Forest Service has authority under the MLA to grant rights-of-way through lands traversed by the Appalachian Trail.

III. SUMMARY OF ARGUMENTS

The parties disagree about whether the Forest Service has the authority to grant rights-of-way across the Appalachian Trail. Petitioners contend that national forest lands traversed by the Appalachian Trail remain in the National Forest System and the Forest Service has statutory authority to grant pipeline rights-of-way through national forest lands. Respondents argue that the Appalachian Trail is a unit of the National Park System and the MLA excludes all federal lands in the National Park System. Therefore, a pipeline cannot cross federal land within the National Park System without congressional authorization.

18. *Id.*

19. *Id.*

20. Br. for Pet’r Atlantic at 12, Dec. 2, 2019, No. 18-1587; Fed. Pet’rs’ Pet. for Cert. at 7, June 25, 2019, No. 18-1584.

21. *Cowpasture*, 911 F.3d at 160.

22. 42 U.S.C. §§ 4321–4361 (2018).

23. 16 U.S.C. § 1604 (2018).

24. *Cowpasture*, 911 F.3d at 161; *see also* Planning Rule, 77 Fed. Reg. 21,162 (U.S. Dep’t of Agric. April 9, 2012); 36 C.F.R. §§ 219.8–219.11.

25. *Cowpasture*, 911 F.3d at 181.

A. *The Forest Service's Arguments*

The Forest Service contends the MLA's exclusion for "lands in the National Park System" does not apply in this case because the "National Park System" definition only encompasses (1) areas of "land" (or "water") that are (2) "administered" by the Secretary of the Interior, acting through the Park Service.²⁶ The Forest Service claims the Trails Act defines the Appalachian Trail as a "footpath," or "trail"—but not "land"—and the authority to administer the trail is different than the authority to administer the lands traversed by the trail.²⁷ The Forest Service relies upon the Weeks Act,²⁸ which solidified its administrative jurisdiction over all national forest lands when it "permanently reserved, held, and administered" the federal lands at issue "as national forest lands."²⁹ The Forest Service argues that federal lands traversed by the Appalachian Trail remain under the administrative jurisdiction of other federal agencies.³⁰ The Forest Service claims that where Congress intended to transfer administrative jurisdiction over federal land from one agency to another, it has done so clearly in the statutory text.³¹ Because the Trails Act does not provide for agency land "transfer[s]," the Forest Service argues that it is the appropriate authority to grant an underground pipeline right-of-way through federal lands in a national forest under the MLA, even when those lands are traversed by the Appalachian Trail.³²

26. Br. for Fed. Pet'rs at 21 ("The 'National Park System' includes 'any area of land and water administered by the Secretary, acting through the Director [of the Park Service], for park, monument, historic, parkway, recreational, or other purposes.'" (citing 54 U.S.C. § 100102(2), 100501 (Supp. V 2017) (enacted 2014)); *see* 16 U.S.C. § 1(a) (1970) (materially similar; repealed 2014)).

27. Br. for Fed. Pet'rs at 17, 19 ("Congress spoke clearly in the Trails Act: The Appalachian Trail is 'a trail'—not land—and the Act directs the Secretary of the Interior only to 'administer[]' the 'trail' primarily as a 'footpath.' 16 U.S.C. 1244(a)(1).") ("Congress expressly provided in the Trails Act that its assignment of 'overall administration of a *trail*' across the surface of lands does not 'transfer among Federal agencies any management responsibilities established under any other law for federally administered *lands*.' 16 U.S.C. 1246(a)(1)(A) (emphases added).").

28. Br. for Fed. Pet'rs at 5 ("In 1918, President Woodrow Wilson established [the George Washington National Forest] . . . pursuant to the Weeks Act, which provides that the relevant lands 'shall be permanently reserved, held, and administered as national forest lands' . . .") (internal citations omitted); 16 U.S.C. § 521 (2018).

29. Br. for Fed. Pet'rs at 20 ("The Secretary of Agriculture is vested with administrative 'jurisdiction of the national forests,' *United States v. New Mexico*, 438 U.S. 696, 709 n.18 (1978); *see* 16 U.S.C. 472, and the Secretary has delegated to the Forest Service that authority to 'administer[] and manage[]' the federal 'land in the National Forests,' 36 C.F.R. 200.3(b)(2)."); 16 U.S.C. § 521.

30. Br. for Fed. Pet'rs at 30.

31. Br. for Fed. Pet'rs at 17.

32. Br. for Fed. Pet'rs at 16–17.

The Forest Service further contends that the Secretary's responsibility for the "overall administration" of the trail³³ "quite plainly does not grant authority to the Secretary to administer all of the state, local, and private 'lands' that the Trail traverses."³⁴ In fact, it claims Congress's language in the Trails Act indicates the Secretary's limited authority is based on the need to "insure continuity" of the route and to "coordinate the efforts of the participating [federal and state] agencies."³⁵

Critically, the Forest Service maintains the Fourth Circuit's ruling would significantly alter the legal framework governing public land administration within national parks and national monuments.³⁶ It argues that interpreting the Trails Act as the Fourth Circuit suggests would require transferring administrative jurisdiction over all state, private and federal lands beneath a nationally designated trail—an "obviously incorrect" conclusion—with the Pacific Crest National Scenic Trail ("Pacific Crest Trail") underscoring that point.³⁷

The Pacific Crest Trail is a national trail that extends approximately 2,350 miles "from the Mexican-California border northward generally along the mountain ranges of the west coast States to the Canadian-Washington border."³⁸ At its inception, the Trails Act granted the Secretary of the Interior the authority to administer the Appalachian Trail and the Secretary of Agriculture the authority to administer the Pacific Crest Trail.³⁹ Under the Fourth Circuit's logic, the Forest Service argues that grant of authority would have consequentially removed the land beneath the Pacific Crest Trail from the National Park System.⁴⁰ Taken to its logical conclusion, the Forest Service argues this would authorize the Secretary of Agriculture to grant pipeline rights-of-way pursuant to the MLA under the route of the Pacific Crest Trail through national parks and national monuments.⁴¹

Finally, the Forest Service contends the logic of the Fourth Circuit's decision would effectuate a "sweeping prohibition against pipeline rights-of-ways under the MLA for all federally owned land crossed by the roughly 2000-mile-long Appalachian Trail."⁴²

33. 16 U.S.C. § 1246(a)(1)(A).

34. Br. for Fed. Pet'rs at 34.

35. Br. for Fed. Pet'rs at 35 (citing Bureau of Outdoor Recreation, *Trails for America: Report on the Nationwide Trail Study*, U.S. DEP'T OF THE INTERIOR 25, 32 (1966), <https://go.usa.gov/xpKnp>).

36. Br. for Fed. Pet'rs at 36.

37. Br. for Fed. Pet'rs at 36, 40.

38. Br. for Fed. Pet'rs at 36; 16 U.S.C. § 1244(a)(2); *see* 16 U.S.C. § 1241(b).

39. 16 U.S.C. §§ 1244(a)(2), 1246(a)(1)(A).

40. Br. for Fed. Pet'rs at 37; *cf.* 54 U.S.C. § 100102(2), 100501 (Supp. V. 2017) (defining "National Park System" as the areas of land or water "administered" by the Secretary of the Interior though the Park Service).

41. Br. for Fed. Pet'rs at 37; *see* 30 U.S.C. §§ 185(a), (b)(1).

42. Br. for Fed. Pet'rs at 41.

B. Atlantic's Arguments

Atlantic's argument hinges on similar statutory interpretation and the premise that overall administrative authority and administration or jurisdiction over federal lands are not the same.⁴³ Atlantic claims that although the Trails Act designates administrative authority over the Appalachian Trail footpath itself, it does not divest federal agencies of ownership or jurisdiction over the federal lands through which the trail passes.⁴⁴ Moreover, Atlantic argues an agency's responsibility to administer a national trail should not displace the jurisdiction of other federal agencies over the federal lands, and agencies have historically understood that it does not.⁴⁵ Supporting its claim, Atlantic points to § 1246(a)(1)(A) of the Trails Act, which states that "[n]othing contained in [the Act] shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands."⁴⁶

Comparing the Trails Act to the National Wild and Scenic Rivers Act⁴⁷ ("Rivers Act"), which Congress enacted on the same day in 1968, Atlantic contends Congress "knew how to effect a land transfer between federal agencies and did not do so in the Trails Act."⁴⁸ Atlantic argues the Rivers Act differs from the Trails Act in several key respects. First, while the Trails Act empowers the Secretaries of the Interior and Agriculture to negotiate rights-of-way for national trails, the Rivers Act authorizes them to acquire federal lands⁴⁹ and "transfer to the appropriate secretary jurisdiction over such lands."⁵⁰ Crucially, Atlantic claims the Rivers Act specifies that if the lands are transferred to the Secretary of Agriculture, then the lands "shall upon such acquisition or transfer become national forest lands."⁵¹ On the other hand, "[a]ny component of the national wild and scenic rivers system that is administered by the Secretary of the Interior through the National Park Service shall become a part of the national park system."⁵² Thus, Atlantic maintains that under the Trails Act, the Secretary selected and negotiated rights-of-way to create the trail, but the state and private lands he selected did not consequently become federal lands when they were designated part of the trail's route.⁵³

Illustrating this idea, Atlantic points to the Appalachian Trail itself, which traverses sixty state game lands, forests, and parks; one national wildlife refuge; six national parks; eight national forests; and

43. Br. for Pet'r Atlantic at 18.

44. Br. for Pet'r Atlantic at 20.

45. Br. for Pet'r Atlantic at 49.

46. Br. for Pet'r Atlantic at 2.

47. 16 U.S.C. §§ 1271–1287 (2018).

48. Br. for Pet'r Atlantic at 18.

49. *See* 16 U.S.C. § 1277.

50. *Id.* § 1277(e).

51. *Id.*

52. *Id.* § 1281(c).

53. Br. for Pet'r Atlantic at 24.

privately held lands.⁵⁴ Atlantic notes days after enacting the Trails Act and designating the Appalachian Trail as a footpath to be administered by the Secretary, Congress extended the Blue Ridge Parkway, and in doing so, directed the Secretary to “relocate and reconstruct portions of the Appalachian Trail . . . that may be disturbed by the parkway extension . . . upon national forest lands with the approval of the Secretary of Agriculture.”⁵⁵ Atlantic argues Congress expressly gave the Park Service authority to grant rights-of-way through the Blue Ridge Parkway, thus ensuring that the Parkway “would not be a 469-mile barrier to development.”⁵⁶ Atlantic contends that if Congress intended the Trails Act to place an impermeable wall between western resources and the coast, it would not have included such specific language when it created the Blue Ridge Parkway.⁵⁷

Finally, Atlantic maintains the Fourth Circuit’s decision produces illogical results, which are inconsistent with land management to date.⁵⁸ As examples, Atlantic cites a Forest Service regulation, a directors order, a department manual, an Environmental Assessment, and a Record of Decision—all demonstrating the Park Service’s unambiguous understanding that the Appalachian Trail is “multi-jurisdictional,” with only select “segments of the trail under the primary land management responsibility of the National Park Service.”⁵⁹ In addition to the more than fifty pipelines that currently cross national forest lands beneath the Appalachian Trail, Atlantic claims the Forest Service has granted rights-of-way for electrical transmission lines, telecommunications sites, municipal water facilities, roads, and grazing areas.⁶⁰

Atlantic concludes that because the Trails Act did not divest the Forest Service of its jurisdiction over the land beneath the Appalachian Trail, as Respondents contend and the Fourth Circuit held, the Forest Service has clear statutory authority to grant pipeline rights-of-way under the MLA.⁶¹ To hold otherwise, Atlantic claims, would constitute a massive land transfer between federal agencies and stifle much-needed energy and infrastructure development.⁶²

54. Br. for Pet’r Atlantic at 24.

55. Br. for Pet’r Atlantic at 31 (citing 16 U.S.C. § 460a-7(3) (2018) (emphasis added by Atlantic)).

56. Br. for Pet’r Atlantic at 22.

57. Br. for Pet’r Atlantic at 18.

58. Br. for Pet’r Atlantic at 19.

59. Br. for Pet’r Atlantic at 34; 48 Fed. Reg. 30,253 (June 30, 1983); Director’s Order No. 45: National Trails System 6–8 (2013); Dep’t of the Interior, 710 Department Manual 1.4(C)(4) (1977); FERC, Giles Cty. Project Envtl. Assessment, Dkt. No. CP13-125-000 (Nov. 2013), at *5; Dep’t of Agric., Mountain Valley Pipeline Project Record of Decision (Dec. 2017), *22–24, available at <https://bit.ly/35fkn2k>.

60. Br. for Pet’r Atlantic at 49.

61. Br. for Pet’r Atlantic at 11.

62. See Br. for Pet’r Atlantic at 43, 48.

C. Respondents' Arguments

Respondents' alternative interpretation suggests that as a "unit" of the National Park System,⁶³ the entire Appalachian Trail corridor is outside the scope of the MLA.⁶⁴ Respondents contend the Trails Act, the National Park Service Organic Act⁶⁵ ("Organic Act"), as well as legislative history and agency publications, confirm the Park Service's administration over the Appalachian Trail, which is among "lands in the National Park System" and thus exempt from agency approval pursuant to the MLA.⁶⁶ Respondents argue Congress's directive for the Park Service to administer lands "in such a manner and by such means as will leave [it] unimpaired for the enjoyment of future generations"⁶⁷ leaves no question of intent.⁶⁸ Therefore, Respondents maintain, Congress clearly and intentionally required its "direct" and "specific" approval for pipeline rights-of-way over lands in the National Park System.⁶⁹

Respondents contend Petitioners mistakenly distinguish between "footpath" and "land" to further their argument that the trail is only a right-of-way and not a "unit" of the National Park System.⁷⁰ Respondents argue this is an illogical distinction because "neither the Trails Act nor the Organic Act distinguishes between 'land' and 'footpaths' any more than they distinguish between 'land' and the various monuments, historic buildings, parkways, and recreation areas that are also units of the National Park System."⁷¹ Congress's use of the term "footpath," they argue, means only that the trail is "intended primarily for use by pedestrians, as opposed to mountain bikers or ATV drivers."⁷²

Respondents claim the Trails Act carefully distinguishes between trail "administration" and "management" of trail segments.⁷³ The entire Appalachian Trail is "administered" by the Secretary, who delegated that

63. Br. for Resp'ts at 2, 24 (citing 54 U.S.C. § 100102(6) ("Lands administered by the Park Service are defined as Park "System unit[s].")).

64. Br. for Resp'ts at 14 (citing 30 U.S.C. § 185(b)(1) ("Federal lands" means all lands owned by the United States except lands in the National Park System.)).

65. 16 U.S.C. § 1-18(f) (2018).

66. Br. for Resp'ts at 5 ("The Organic Act that established the System in 1916 now defines it as 'any area of land and water administered by the Secretary, acting through the [Park Service] Director, for park, monument, historic, parkway, recreational, or other purposes.'") (citing 54 U.S.C. § 100501)).

67. Br. for Resp'ts at 3; 54 U.S.C. § 100101(a).

68. Br. for Resp'ts at 15.

69. Br. for Resp'ts at 6 ("The Park Service's authorities 'shall be construed . . . in light of' and not 'exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress.'") (citing 54 U.S.C. § 100101(b)(2)).

70. Br. for Resp'ts at 2.

71. Br. for Resp'ts at 3.

72. Br. for Resp'ts at 3.

73. Resp'ts' Br. in Op. at 33, Aug. 28, 2019, No. 18-1584 & 18-1587.

authority to the Park Service.⁷⁴ Under Respondents' theory, the Trails Act assigns different roles to agencies that administer land surrounding a trail ("administering lands through which the trail route passes"),⁷⁵ agencies that manage trail segments ("management responsibilities"),⁷⁶ and trail administrators ("administering and managing the trail").⁷⁷ Administration, Respondents maintain, encompasses duties such as selecting, acquiring, and regulating the land that makes up the trail.⁷⁸ While they acknowledge the administrator can transfer "management" responsibility for segments to other agencies, Respondents argue he cannot transfer congressionally assigned "administration" of the entire trail.⁷⁹

Respondents contend that, because in administering National Park System units such as the Appalachian Trail the Park Service is prohibited from exercising its authority "in derogation of the values and purposes for which the System units have been established,"⁸⁰ the plain statutory text of the MLA logically precludes agency approval across national park lands for pipelines carrying toxic oil, natural gas, synthetic liquid or gaseous fuels.⁸¹ Thus, Respondents assert that oil and gas pipelines can only obtain new rights-of-way across federal lands in the National Park System through case-by-case legislation.⁸²

Finally, Respondents push back against Petitioners' policy arguments, pointing out that new pipelines can cross the Appalachian Trail on state or private land, and also across federal lands with existing easements, which are unaffected by the MLA.⁸³ Criticizing another of Petitioners' arguments, Respondents argue the Fourth Circuit's decision in this case does nothing to obstruct or prohibit other essential infrastructure across national park lands because Congress granted the

74. Br. for Resp'ts at 5 ("The Trails Act left ownership and day-to-day management of Trail lands with existing owners rather than condemning those lands for federal ownership . . . But Congress charged the Secretary of the Interior (the 'Secretary') with the 'administ[r]ation' of the entire Trail, no matter who owns the land. The Secretary in turn designated the Park Service as the Trail's 'land administering bureau.'" (internal citations omitted)); *see* 16 U.S.C. § 1244(a)(1); 34 Fed. Reg. 14,337, 14,337 (Sept. 12, 1969).

75. Resp'ts' Br. in Op. at 33 (quoting 16 U.S.C. § 1246(d)(1)).

76. Resp'ts' Br. in Op. at 33 (quoting 16 U.S.C. § 1246(a)(1)).

77. Resp'ts' Br. in Op. at 33 (quoting 16 U.S.C. § 1246(a)(1)(A)).

78. Resp'ts' Br. in Op. at 3 (quoting 16 U.S.C. §§ 1246(a)–(c), (h)–(i)).

79. Resp'ts' Br. in Op. at 33 (quoting 16 U.S.C. § 1246(a)(1)(B)).

80. Br. for Resp'ts at 6; 54 U.S.C. § 100101(b)(2).

81. Br. for Resp'ts at 14; *see* 30 U.S.C. §§ 185(a)–(b)(1).

82. Br. for Resp'ts 7–8 ("Congress has authorized pipeline rights-of-way crossing System units 'at Denali National Park, Glacier National Park, Great Smoky Mountains and Gateway National Recreation Area.'" (citing *Hearing Before the Subcomm. on Energy and Mineral Resources of the H. Comm. on Natural Resources on H.R. 2295* (May 20, 2015) (statement of Timothy Spisak, Senior Advisor, Minerals and Realty Management, Bureau of Land Management, U.S. Dep't of Interior))).

83. Resp'ts' Br. in Op. at 16–17.

Secretary express authority under the Organic Act to secure rights of way for power lines, telephone lines, and certain “canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits,” but not for pipelines that carry oil or gas.⁸⁴

IV. ANALYSIS

This argument involves a narrow issue hinged on technical statutory construction, precise language, and congressional intent. However, buried below the legal and legislative clutter lie the broader issues of state sovereignty and private property interests, which are tied to the nation’s energy trajectory. As evidenced by the litany of states that have expressed interest in the case, the Court will ultimately decide whether the Fourth Circuit’s holding⁸⁵ implicates overreaching Park Service authority over other federal agencies, states, and private entities that currently own or manage national trail components.⁸⁶ The Court’s analysis will likely involve a deep dive into the public lands statutes that consume much of the parties’ arguments; however, Petitioners’ policy arguments and stated consequences of upholding the Fourth Circuit’s decision may persuade a majority of the Court to reverse so the pipeline company can make another attempt at environmental compliance.

A. *Statutory Interpretation*

The Court will likely uphold the Fourth Circuit’s decision denying the Forest Service authority to grant the pipeline a right-of-way across the Appalachian Trail. The Court’s dicta in *Sturgeon v. Frost*⁸⁷ indicates it will find Respondents’ statutory interpretation persuasive.⁸⁸ In that case, which involved the regulation of an Alaskan river through a national park, the unanimous Court noted “statutory grants of power make no distinctions based on the ownership of either lands or waters (or lands beneath waters) . . . rules about mining and solid-waste disposal, for example, apply to all lands within [national park] system units ‘whether federally or nonfederally owned.’”⁸⁹ *Sturgeon* involved regulations on water, not land, and was further complicated by the Alaska National Interest Lands

84. Br. for Resp’ts at 7 (quoting 54 U.S.C. § 100902).

85. *Cowpasture*, 911 F.3d at 181 (holding “the Forest Service does not have statutory authority to grant pipeline rights of way across the [Appalachian Trail] pursuant to the MLA”).

86. Br. of Amici Curiae State of W.Va., et al. in Sup’t of Pet’rs at 32, Dec. 9, 2019, No. 18-1584 & 18-1587.

87. 139 S. Ct. 1066 (2019) (holding non-public lands within Alaska’s national parks are exempt from the Park Service’s ordinary regulatory authority).

88. *Id.* at 1076 (“[T]he Secretary, acting through the Director of the Park Service, has broad authority under the National Park Service Organic Act (Organic Act), 39 Stat. 535, to administer both lands and waters within all system units in the country” (citing 54 U.S.C. §§ 100751, 100501, 100102)).

89. *Id.* (citing 36 C.F.R. §§ 6.2, § 9.2).

Conservation Act⁹⁰ (“ANILCA”), but this statement, among others,⁹¹ supports broad Park Service authority, which the Court limited in *Sturgeon*, only because “Alaska is different.”⁹²

Petitioners’ alarmist claim that the Fourth Circuit’s rule would suddenly convey all National Park System jurisdiction to the Forest Service along the Pacific Crest Trail, paving the way for future pipeline development across it, is unlikely to resonate with the Court. The Trails Act mandates cross-agency consultation and grants both Secretaries the authority to negotiate appropriate cooperative management agreements.⁹³ These requirements mean that both Secretaries are empowered and constrained by the Trails Act, not to mention their respective Organic Acts, which prescribe limitations on land use that is inconsistent with Congress’s stated national interests of preservation and enjoyment of outdoor areas.⁹⁴ The Forest Service cites the 1971 Pacific Crest Trail agreement, in which it and the Park Service determined that the trail’s segments crossing eight national parks and national monuments traverse lands that should remain under the “administrative jurisdiction[] of . . . the National Park Service.”⁹⁵ However, this quote does not support what Petitioners contend. To the contrary, the document confirms both Secretaries agreed Park Service authority would best secure the necessary protection for those parks and the resources therein.⁹⁶ Considering these clear statutory safeguards, the Court is likely to find Petitioners’ unintended consequences argument too attenuated.

If the Court sides with Petitioners on the threshold question that the trail is not “land” under the law, then Respondents’ statutory analysis fails. However, Petitioners’ position in this regard is problematic as the Appalachian Trail Conservancy highlights in its amicus brief supporting

90. 16 U.S.C. §§ 3101–3233 (2018) (ANILCA provides “protection for the national interest in the scenic, natural, cultural and environmental values on public lands in Alaska. . .”).

91. *Sturgeon*, 139 S. Ct. at 1080 (“Alaska is often the exception, not the rule”; “[i]f *Sturgeon* lived in any other State, his suit would not have a prayer of success”).

92. *Id.* at 1069 (quoting *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (“*Sturgeon I*”).

93. *See* 16 U.S.C. §§ 1246(a)(1)(A), (a)(2).

94. *See id.* § 1241(a); *see also id.* §§ 1, 475.

95. Br. for Fed. Pet’rs at 36–37 (citing United States Forest Service, *Comprehensive Management Plan for the Pacific Crest National Scenic Trail* U.S. DEP’T OF AGRIC. App. D, at 1 (1982) <https://go.usa.gov/xpKnh>).

96. *Comprehensive* at 2, *supra* note 104, *Characteristics of Pacific Crest Trail*, adopted by Advisory Council May 16, 1980, (“[The] Pacific Crest National Scenic Trail is . . . located, designed, constructed, and maintained to a standard commensurate with its National significance, while reflecting the type and volume of traffic planned: limited by the standards established for special legislated areas (national parks, national monuments, wilderness, state parks) through which it passes.”).

neither party.⁹⁷ Citing a House Report from 1968 precisely on point, the Conservancy notes the statute's use of the term "footpath" means only that the Appalachian Trail is meant for foot traffic.⁹⁸

Finally, Petitioners' argument that there is nothing in the text to indicate Congress intended to transfer federal land management across the entire Appalachian Trail might be compelling to those justices who feel the Court should not be a roadblock to nation-wide development.⁹⁹ The Court may decide the Fourth Circuit went too far in denying the Forest Service authority to grant pipeline rights-of-way under the MLA because under that reasoning, the MLA would give no federal agency that power.¹⁰⁰ However, because Congress has acted in the past to secure rights-of-way across national park lands, it is unlikely the Court will agree with Petitioners. In light of the statutory construction, and the high value Congress placed on the nation's scenic and historic trails, the Court will likely find that an act of Congress is both the intended and appropriate path to natural gas pipeline approval through national parks.

B. State Sovereignty and Private Property Rights

West Virginia and a coalition of sixteen states submitted an amicus brief in support of Petitioners, warning that to deem all federal land crossed by the Appalachian Trail as "lands in the National Park System" would severely limit state and private property rights and inhibit pipeline development against Congress's intent at the expense of the states and national economy.¹⁰¹ The Court is likely to reject this argument on statutory grounds. The states' claim, which Atlantic also promotes, that the Fourth Circuit's decision could subordinate state agencies that manage the land across which thousands of miles of national trails traverse is unfounded because the MLA only applies to "land owned by the United States,"¹⁰² and expressly exempts national park lands from that definition. The Fourth Circuit's decision does not constitute uncompensated takings of state or private land because those lands remain under state or private

97. Br. of Amicus Curiae the Appalachian Trail Conservancy in Sup't of None of the Parties at 18, Dec. 9, 2019, No. 18-1584 & 18-1587.

98. See H.R. REP. NO. 90-1631, 90th Cong. 2d Sess. at 10 (1968) (noting that "primarily as a footpath" meant the Trail "primarily" for hikers but might be appropriate for travel such as horseback riding where such uses were "accepted and customary").

99. See Br. of Amici Curiae State of W.Va., et al. in Sup't of Pet'rs at 25-26.

100. Br. of Amici Curiae State of W.Va., et al. in Sup't of Pet'rs at 21 ("The practical consequences of this decision give life to Congress's concerns in 1920 and 1973 about undue restrictions on needed energy development.").

101. Br. of Amici Curiae State of W.Va., et al. in Sup't of Pet'rs (citing *Cowpasture*, 911 F.3d at 181).

102. 30 U.S.C. § 185(a), (b)(1).

ownership and those landowners have and may continue to grant rights-of-way for pipelines under state law.¹⁰³

Implicating another approach to the state sovereignty debate, the Commonwealth of Virginia, which sides with Respondents, argues that the writ of certiorari should be dismissed as Virginia neither needs nor desires the ACP.¹⁰⁴ Virginia contends that the pipeline company's environmental record supports its concerns that the pipeline would do more harm than good to Virginia's prized national resources and its economy.¹⁰⁵ Virginia, a state with significant coal production,¹⁰⁶ attacks Atlantic's argument that a massive natural gas pipeline is needed to meet growing energy demands.¹⁰⁷ Citing, among other sources, a 2017 report from the United States Energy Information Administration, Virginia contends the demand for natural gas in Virginia and North Carolina is projected to decrease between 2015 and 2020.¹⁰⁸ Interestingly, Virginia's coal output increased for the second-straight year in 2018, and Virginia now ranks thirteenth among the nation's twenty-four coal-producing states, with a 1.7 percent share of the national total.¹⁰⁹

It is unlikely that the Petitioners' private property takings argument will persuade the Court because all of the land along the Appalachian Trail corridor was obtained through purchase for just compensation or negotiated land easements and cooperative agreements. Therefore, the Secretary's regulatory authority under those respective agreements, which the Court recognized in *Sturgeon*¹¹⁰ is significant, is not suddenly implicated because of the Fourth Circuit's ruling.

C. *Energy and Environmental Implications*

Ultimately, the Constitution's separation of powers doctrine dictates that the judiciary is not the proper branch of government to debate whether the Atlantic Coast Pipeline is a project worth pursuing—that is a political debate for Congress. However, should the Court confirm the

103. Br. for Resp'ts at 47.

104. Br. of Amicus Curiae Va. in Sup't of Resp'ts at 2, Jan. 22, 2020, No. 18-1584 & 18-1587.

105. Br. of Amicus Curiae Va. in Sup't of Resp'ts at 8 (“In Virginia alone, the proposed route crosses three celebrated national features: the George Washington National Forest, the Blue Ridge Parkway, and the Appalachian Trail . . . attract[ing] more than three million visitors per year.”).

106. *Coal Production in Virginia*, VA. DIV. OF GEOLOGY & MINERAL RES., <https://www.dmme.virginia.gov/dgmr/coal.shtml> (last visited Feb. 7, 2020) (“Mining operations in Virginia produced 13.0 million short tons of coal in 2018 with an estimated market value just over \$1.0 billion.”).

107. Br. of Amicus Curiae Va. in Sup't of Resp'ts at 5.

108. See Br. of Amicus Curiae Va. in Sup't of Resp'ts at 5–7.

109. *Coal Production in Virginia*, *supra* note 112.

110. *Sturgeon*, 139 S. Ct. at 1076 (“[The] Park Service ‘has broad authority . . . to administer both lands and waters within all system units,’ and it sometimes ‘impose[s] major restrictions’ on ‘non federally owned lands’ (frequently called ‘inholdings’) ‘within [System unit] boundaries.’”).

Fourth Circuit's holding, the pipeline project's viability would turn bleak. Atlantic argues the Fourth Circuit's decision is a "statutory impediment" to all pipeline rights-of-way on federal lands.¹¹¹ The completed ACP would transport up to 1.5 million dekatherms (about 1.5 billion cubic feet) of natural gas daily to markets in Virginia and North Carolina for which the government contends existing infrastructure, renewable energy, and conservation were not "practical alternatives."¹¹² Pipeline advocates argue the Fourth Circuit's decision is "profoundly wrong, entirely definitive, and imposes enormous real-world costs."¹¹³ Despite these implications for pipeline developers, the Court will not likely succumb to Petitioners' political arguments because such a decision would constitute judicial intrusion into the operations of the other branches of government.¹¹⁴ As Respondents argue, "[W]here the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'"¹¹⁵

The Fourth Circuit found clear and consequential deficiencies in the Forest Service's evaluation of the ACP's potential environmental impacts.¹¹⁶ Notably, the Forest Service altogether failed to follow established statutory and regulatory mandates, like the duty to explore alternative routes across vulnerable and valuable federal forest lands.¹¹⁷ Atlantic contends these longstanding statutory protections for land in the National Park System are "costly and time-consuming."¹¹⁸ However, the Court is unlikely to be swayed by the noisy boom of natural gas development, and should side with the Fourth Circuit and Respondents in order to protect the national interests recognized by Congress when it enacted the Trails Act over fifty years ago.

V. CONCLUSION

The Court will likely consider the Appalachian Trail "land" within the National Park System and uphold the Fourth Circuit's statutory interpretation of the Mineral Leasing Act, which prohibits pipeline development on such land absent express approval by Congress. The Court's recent and unanimous support of the strong language in *Sturgeon* points to a consensus among the justices that congressional intent behind federal public land statutes remains a powerful force in safeguarding national treasures from the demands of irresponsible development.

111. Reply Br. for Pet'r Atlantic at 11, Sept. 11, 2019, No. 18-1584 & 18-1587.

112. Br. for Fed. Pet'rs at 13.

113. Reply Br. for Pet'r Atlantic at 12.

114. ERWIN CHERMINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 144 (6th ed. 2019).

115. Br. for Resp'ts at 46 (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))).

116. See *Cowpasture*, 911 F.3d at 150.

117. *Id.* at 168.

118. Reply Br. for Pet'r Atlantic at 12.