

End of the Trail: Supreme Court to Hear Atlantic Coast Pipeline Appeal

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On October 4, 2019, the Supreme Court of the United States granted certiorari to hear an appeal of the Fourth Circuit's decision vacating the United States Forest Service's special use permit authorizing the Atlantic Coast Pipeline (ACP) to cross beneath a segment of the Appalachian National Scenic Trail. In *Cowpasture River Preservation Association v. Forest Service*, 911 F. 3d 150 (4th Cir. 2018), a three-judge panel from the Fourth Circuit Court of Appeals ruled that the United States Forest Service lacked the statutory authority pursuant to the Mineral Leasing Act (MLA) to grant a pipeline right-of-way across the Appalachian Trail. The Fourth Circuit's decision halted the construction of the ACP. If the decision stands, it could impede the completion of the ACP and affect other current and future pipeline projects along the east coast, like the Mountain Valley Pipeline, that would also cross the Trail.

Background

The ACP is a 600-mile proposed pipeline that will transport natural gas from the Marcellus and Utica Shale plays of West Virginia to consumers in eastern Virginia and North Carolina. The proposed pipeline route winds through private, state and federal lands, including two national forests and a national trail. At a point in the George Washington National Forest, the pipeline's proposed path crosses 600 feet beneath the Appalachian National Scenic Trail, a 2,000-mile footpath that extends through 14 states from Georgia to Maine.

After obtaining FERC approval, the Forest Service, having administrative jurisdiction over national forest lands, issued a special use permit authorizing Atlantic Coast Pipeline, LLC (Atlantic) to construct its pipeline through the George Washington National Forest, including beneath the forest lands traversed by the Appalachian Trail. The Forest Service also granted Atlantic a right-of-way for pipeline purposes through the same lands. Several environmental groups, led by Cowpasture River Preservation Association, petitioned the Fourth Circuit to vacate the Forest Service's decisions on multiple grounds.

Fourth Circuit Decision

In December 2018, the Fourth Circuit granted Cowpasture's petition and vacated the special use permit and right-of-way issued by the Forest Service.¹ The court's opinion largely faults the Forest Service's decision-making process in granting the special use permit and right-of-way, and castigates the Forest Service for having a change of "tenor" during its administrative review, stating that the Forest Service modified its stance on the amount of information it needed before it would make a decision.² Additionally, and perhaps an even larger impediment to the ACP's progress, the court ruled that the Forest Service lacked the authority under the MLA to grant a pipeline right-of-way through land in the George Washington National Forest traversed by the Appalachian Trail.³

¹ See *Cowpasture River Preservation Association v. Forest Service*, 911 F. 3d 150, 155 (4th Cir. 2018).

² *Id.* at 158.

³ *Id.* at 155.

The MLA authorizes “the Secretary of the Interior or appropriate agency head” to grant pipeline rights-of-way across “Federal lands”.⁴ Under the Act, “Federal lands” are defined as “all lands owned by the United States except lands in the National Park System.”⁵ National Park System lands are “any areas of land and water” administered by the Secretary of the Interior through the National Park Service.⁶

The National Scenic Trail Act (Trails Act) charges the Secretary of Interior with the overall administration of the Appalachian Trail, and the Secretary has assigned management authority of the Trail to the National Park Service.⁷ The Trails Act provides that the Appalachian Trail is to be administered “primarily as a footpath” by the Secretary, in consultation with any other Federal agencies whose land the Trail traverses.⁸ The Park Service has acknowledged “[w]hile responsibility for overall Trail administration lies with the National Park Service,” Federal agencies, such as the Forest Service, retain their jurisdiction⁹ over the lands through which the Trail passes.¹⁰

The Fourth Circuit, however, viewed the Appalachian Trail and its underlying lands as being under the administrative jurisdiction of the National Park Service. The court held that the segment of land in the George Washington National Forest that the Appalachian Trail traverses is land within the National Park System and therefore is exempt from the MLA. In the court’s view, because Congress, through the Trails Act, designated the Appalachian Trail as a National Scenic Trail to be administered by the Secretary of the Interior, who delegated that authority to the National Park Service, the Appalachian Trail is land in the National Park System.¹¹ Because the Trail is land in the National Park System, the court held that the Forest Service was not the “appropriate agency head” under the MLA to grant a right-of-way across the Appalachian Trail, notwithstanding the fact that National Park lands are outside the scope of the MLA.

The Fourth Circuit’s decision ostensibly converts National Forest lands underlying the Appalachian Trail, which are generally considered to be under the jurisdiction of the Forest Service, into lands in the National Park System, under the jurisdiction of the National Park Service. Because the court categorizes the land traversed by the Trail as National Park land, it considered this land to be excluded from the MLA. Under the court’s decision, authority to grant a right-of-way across the Trail would need to come from another statute authorizing pipeline rights-of-way across National Park lands.

Arguments on Appeal to Supreme Court

On appeal, Atlantic and the Forest Service (Petitioners) argue that the Forest Service has jurisdiction over the forest lands traversed by the Trail and that, pursuant to the MLA, it is the appropriate federal agency to grant pipeline rights-of-way beneath these lands.

⁴ 30 U.S.C. §185(a).

⁵ 30 U.S.C. § 185(b)(1).

⁶ 54 U.S.C. § 100501.

⁷ 16 U.S.C. § 1246(a)(1)(A).

⁸ 16 U.S.C. § 1244(a)(1).

⁹ Jurisdiction, as used throughout, includes the right to exercise the incidents of ownership, including the right to grant rights-of-way or easements.

¹⁰ See Nat’l Park Serv., *Appalachian Trail Management Plan* 12-13 (1981); Nat’l Park. Serv., *Appalachian Trail Management Plan* III-1 (2008); General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30,252.01-30,253 (June 30, 1983); Director’s Order No. 45: National Trails System, 6-8 (2013).

¹¹ *Cowpasture*, 911 F.3d at 179.

Petitioners assert that the Weeks Act provides the Forest Service with jurisdiction over the forest lands at issue. The Weeks Act, signed into law in 1911, empowers the Secretary of Agriculture to acquire land to be “permanently reserved, held, and administered as national forest lands.”¹² Pursuant to such authority, the Secretary of Agriculture acquired lands to form the George Washington National Forest. The Secretary, who is vested with administrative jurisdiction over national forests, delegated such authority to the Forest Service.¹³ Petitioners argue that Congress intended for the Weeks Act to preserve all land in the George Washington National Forest as permanent national forest lands, to be forever under the jurisdiction and control of the Forest Service. The segment of forest land traversed by the Trail, they argue, is no exception.

Petitioners argue the fact that the Appalachian Trail traverses the Forest does not alter the Forest Service’s jurisdiction over the land. In their briefs, the Petitioners point to a section of the Trails Act expressly providing that “nothing contained in [the Act] shall be deemed to transfer among Federal agencies any management responsibilities under any other law for federally administered lands which are components of the National Trails System.”¹⁴ Further, Petitioners note that the Trails Act provides that the “Appalachian Trail shall be administered primarily as a footpath” and argue that this designation of responsibility to administer the Trail neither converts the lands through which the Trail passes into Park System lands nor displaces the Forest Service’s jurisdiction to administer such lands.¹⁵ Petitioners suggest if Congress intended for the Trails Act to transfer jurisdiction over federal lands between federal agencies, it would have expressly stated that in the text of the statute, like it did in the Rivers Act, enacted the very same day.¹⁶

In opposition, Cowpasture urges the court to affirm the Fourth Circuit’s decision. It maintains that the circuit court’s decision was correct on the merits and no dispute exists as to whether this segment of the Appalachian Trail is part of the National Park System. The group claims that the issue before the Court does not rise to a level of national importance and that Atlantic can seek alternative routes to circumvent the Trail.¹⁷

Multiple environmental groups and trade associations filed amicus briefs. A coalition of 18 states, led by West Virginia, submitted an amicus brief supporting the Petitioners arguments and urging the Court to allow the pipeline’s construction.¹⁸

Conclusion

The Fourth Circuit’s ruling in Cowpasture, if upheld, poses a potentially significant barrier to the ACP and other current and future pipeline projects planned to traverse national scenic trails. Pipelines like the ACP are a safe and environmentally-friendly solution for transporting critical resources to customers. The high Court heard oral argument on February 24, 2020 and its decision is expected by early July. The case is styled before the Court as *United States Forest Service, et al. v. Cowpasture River Preservation Association, et al.*, No 18-1584.

¹² 16 U.S.C. § 521.

¹³ See 16 U.S.C. § 472 and 36 C.F.R. 200.3(b)(2).

¹⁴ See Atlantic’s brief, 2019 U.S. S. CT. Briefs Lexis 7158, pg. 37, citing 16 U.S. C. §1246(a)(1)(A).

¹⁵ *Id.*

¹⁶ The Rivers Act expressly provides that “[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.*” 16 U.S.C. § 1281 (c) (emphasis added).

¹⁷ See generally Respondent’s brief, 2019 U.S. S. CT. Briefs Lexis 3597.

¹⁸ 2019 U.S. S. CT. Briefs Lexis 7305.