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Argument preview: Supreme Court pipeline case nears

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MONTEREY — Is a trail considered land, or not?

The question of whether a wilderness trail could actually be land lies at the heart of a legal appeal case going before the U.S. Supreme Court next week.

The court will hear an hour of arguments on the question Monday, Feb. 24, on whether the proposed Atlantic Coast Pipeline can cross under the Appalachian Trail.

Solicitor General Noel Francisco, the fourth highest official in the Department of Justice, represents the government's side in favor of the crossing and the pipeline, along with pipeline company petitioner counsel Paul Clement of Kirkland and Ellis LLP.

On the opposing side is the Southern Environmental Law Center, representing private citizens who have mounted an offensive effectively blocking the project and leading to the high-court appeal.

According to a brief filed last week by petitioner U.S. Forest Service, at issue is whether the Forest Service has authority to grant rights of way, under the Mineral Leasing Act, through lands traversed by the Appalachian Trail within national forests.

Trail 'fiction'

The Fourth Circuit decision favoring the respondents — citizen and environmental groups including Allegheny Blue Ridge Alliance members — “rests on the proposition that, in the National Trails System Act, a designated ‘trail’ is itself ‘land,’” the brief says.

“The National Trails System Act states that ‘the Appalachian Trail shall be administered ... by the Secretary of the Interior,’ who delegated that duty to the Park Service, the respondents argue. “Accordingly, the Appalachian Trail is among the ‘lands in the National Park System’

administered by the Park Service, and the Forest Service lacks authority under the Leasing Act to grant a pipeline right of way across the trail on federally owned lands. All of petitioners' arguments to the contrary rely on a fiction that attempts to divorce the Appalachian Trail from the land it encompasses. The Park Service administers the former, they argue, but not the latter. That elusively metaphysical distinction is inconsistent with the relevant statutes and multiple federal regulations, and contradicts the government's own longstanding approach to administering the trail," the respondents said.

The Forest Service, represented by Francisco, argues in a brief filed last week that a trail is not "land," but a human-made route across the surface of lands that is not inherently fixed and can be relocated to traverse different land. The brief further states the pipeline is in the public interest.

"Because Congress did not authorize the Secretary of the Interior to administer National Forest lands traversed by the Trail, that responsibility remains vested in the Forest Service. The Mineral Leasing Act accordingly provides the Forest Service with authority to grant a pipeline right of way through those lands," the brief states.

Additionally, "The Forest Service, as the land-managing agency charged with administering National Forest lands, thus retains its jurisdiction to administer such lands traversed by the trail."

Francisco continued, "Respondents do not even try to deny that their statutory position would be a death knell for the Atlantic Coast Pipeline and the countless jobs, tax revenues, and energy savings it promises ... Never mind the thousands of hours that expert federal agencies have spent studying energy needs, pipeline routes, and environmental impact; in the view of respondents and their amici, the Federal Energy Regulatory Commission cannot be trusted to assess energy needs, and the federal government cannot be trusted to know whether a stretch of trail is on park land or forest land."

The brief continues, "Unfortunately, a panel of the Fourth Circuit has adopted the same view, second-guessing every decision of federal regulators and deciding that it must speak for the trees. The cost of that approach in terms of lost jobs, foregone tax revenues, and unmet energy needs is real."

Francisco's motion for divided argument — to allow the Forest Service 15 minutes and the pipeline company 15 minutes — was granted Feb. 14.

The Supreme Court is expected to rule in May or June.

Pipeline in a pickle

The case is one of several permitting barriers to the \$8 billion pipeline project.

Managing partner Dominion Energy expects the pipeline to enter operation in 2022, CEO Thomas Farrell said in a recent earnings call.

The U.S. Fish and Wildlife Service's Biological Opinion and taking statement on threats to endangered species was vacated twice by the Fourth Circuit. The court cited the inadequacy of the agency's analysis of the ACP's impact on several species.

Construction was suspended in December 2018 in the wake of the first opinion being vacated. Dominion Energy has said it would resume construction whenever the third is issued. The agency is currently in the midst of writing the third opinion and taking statement.

Both SELC and ABRA have filed comments with the agency.

The Park Service asked the court to vacate the previously issued permit for the ACP to cross the Blue Ridge Parkway so the agency could “consider whether issuance of a right of way permit for the pipeline to cross an adjacent segment of the Parkway is appropriate.”

The Fourth Circuit granted that motion on Jan. 23.

Accordingly, there is no permit for the ACP to cross under the Blue Ridge Parkway.

The U.S. Army Corps of Engineers filed a motion Jan. 18 in the Fourth Circuit for a remand and vacating of the permit the Huntington District of the Corps had issued for the ACP to cross rivers and streams in West Virginia.

The court previously issued a stay of the Nationwide 12 permit issued by the Huntington District, as well as other NWP12 permits issued for the project by Corps districts in Pittsburgh, Norfolk, and Wilmington, that have jurisdiction over other portions of the project.

Fourteen conservation groups, represented by SELC and Appalachian Mountain Advocates, contended FERC failed to look behind the affiliate agreements that Dominion Energy and Duke Energy use to say the pipeline is needed in Virginia and North Carolina markets in support of the project’s licensing.

The D.C. Court of Appeals case arguments are pending the outcome of the U.S. Supreme Court case.

SELC, on behalf of Friends of Buckingham, also challenged the Virginia Air Pollution Control Board’s decision to approve the pipeline Buckingham County compressor station.

Joining SELC in the lawsuit, filed with the Fourth Circuit, was the Chesapeake Bay Foundation.

The Court vacated the Air Board’s permit for the ACP on the grounds that the board did not consider a cleaner and quieter alternative to the compressor station; and the board inadequately considered the impact the project would have on Union Hill.

The 600-mile pipeline would originate in West Virginia, travel through Highland and Bath counties in Virginia with a lateral extending to Chesapeake, then continue south into eastern North Carolina, ending in Robeson County.

Two additional, shorter laterals would connect to Dominion Energy power stations in Brunswick and Greenville counties.