

# The Recorder

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## From 4th Circuit to Supreme Court: A case history

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WASHINGTON, D.C. — It's taken two years.

The case of U.S. Forest Service v. Cowpasture River Preservation Association was first filed in the Fourth Circuit Court of Appeals, and had two reviews before it was appealed to the U.S. Supreme Court in Washington, D.C.

Here's a look at the history and significance of the case.

### **What's the project?**

Atlantic Coast Pipeline LLC (consisting now of principal owners Dominion Energy and Duke Energy) proposes to build a 600-mile natural gas pipeline to carry gas from Marcellus shale in West Virginia, through Virginia to North Carolina.

It would cross 21 miles of federal property in parts of two national forests — the George Washington and the Monongahela.

And, it is proposed to cross the Appalachian Trail at Reed's Gap, near Waynesboro. **How did the forest service handle the proposal?**

In 2015, the Federal Energy Regulatory Commission sought input from the USFS about the project. At the time, the forest service told FERC that alternative routes should be found because pipelines didn't fit the mission of forest plans or policies. The USFS also had myriad environmental concerns. Later that year, Dominion applied for a special use permit to cross the forests anyway, and the USFS requested much more information about the plans. Then Dominion not only sought permission to cross the forest, but also fast-tracked approval to do that. The USFS kept insisting on more information.

## **What brought the legal challenge?**

By mid-2017, the USFS seemed to change its mind, and supported a special use permit that would make way for the pipeline; it issued one in January 2018 despite its admission there would be a negative impact to sensitive species and habitat, in direct conflict with its own rules that say activities on USFS lands may not result in a loss of species. At this point, the Cowpasture River Preservation Association and other environmental groups sued in the Fourth Circuit Court of Appeals to challenge that permit.

## **How did the court respond?**

The Fourth Circuit Court twice agreed with the environmental groups, saying the USFS had abdicated its responsibility to preserve forest resources. It said in its ruling at the time that the USFS had “serious environmental concerns that were suddenly, and mysteriously, assuaged in time to meet a private pipeline company’s deadlines.” It concluded that in issuing the special use permit, the USFS violated the National Forest Management Act and the National Environmental Policy Act. It also said the USFS did not have the authority to issue the permit under the Mineral Leasing Act and the National Scenic Trails Act to allow the pipeline to cross the Appalachian Trail.

## **What did ACP do next?**

The pipeline owners had one recourse at this point — an appeal to the U.S. Supreme Court. There was no guarantee the court would hear their appeal, but the court agreed to do that just before the end of 2019, and oral arguments were scheduled for this month.

## **What did the Supreme Court agree to hear?**

The Supreme Court limited the question before the justices to only whether the USFS had authority to permit the pipeline to cross the Appalachian Trail under the Mineral Leasing and National Scenic Trails acts. It did not take up issues related to environmental concerns.

## **What’s the heart of the matter?**

As outlined in a court summary by Robert Abrams, professor of law at Florida A&M University College, determining the extent of the USFS authority in this case involves nuanced statutory interpretation. While parties on both sides agree the Mineral Leasing Act allows the federal government to permit pipeline rights of way on federal land, but does not permit them on national park service land. While the land involved is national forest property, the plan calls for the pipeline to cross the Appalachian Trail, which is administered by the National Park Service.

## **Why is it complicated?**

The statutory language involved doesn’t make this easy, which is why the court’s interpretation is important.

The legislation authorizing the Appalachian Trail makes the Secretary of the Interior responsible for it, not the Department of Agriculture, which oversees the USFS. It says, “The Appalachian Trail shall be administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture.”

But then, under the National Trails System Act, it says, “The Secretary of the Interior or the Secretary of Agriculture, as the case may be, may grant easements and rights of way upon, over, under, across, or along any component of the national trails system in accordance with the laws applicable to the national park system and the national forest system, respectively, provided that any conditions contained in such easements and rights of way shall be related to the policy and purposes of this chapter.”

So, as Professor Abrams noted, the language in the Trails Act “is susceptible to competing interpretations.”

On the one hand, emphasizing the explicit mention of the Secretary of Agriculture (USFS) and laws that apply to the national forests, only rules that apply to the national forests are considered, and in one of its briefs, the USFS “concedes that it is not the lead agency” for the Trails Act, and doesn’t have jurisdiction over the trail.

On the other hand, the Mineral Leasing Act excludes national park service land from the definition of “federal lands” where pipeline permits can be granted.

### **What did the lower court rule?**

Because it was clear the MLA does not apply to park service land, the Fourth Circuit concluded that Congress clearly distinguished the Appalachian Trail’s administration — as assigned to the park service — from the “management” of the land where it traverses.

So, the court said that under the MLA, the “appropriate agency head” is the park service, not the forest service. Separately, as Abrams pointed out, it can also be argued that statutory language requires action “in accordance with the laws applicable to the national park system *and* the national forest system. “That reading would require the forest service to follow both its own statutory requirements and those of the National Park Service.”

### **Why does it matter?**

Abrams noted, “The issue before the Supreme Court involves a discrete and somewhat narrow matter of statutory interpretation that arises at the intersection of several statutes governing the administration of federal lands.”

Also, resolving the matter will have “very little doctrinal significance” because it applies only when national park system lands that are administered by federal agencies other than the park service, *and* a pipeline right of way through those lands are sought under the Mineral Leasing Act.

He said, “If the Fourth Circuit decision is affirmed, those pipelines cannot be permitted; if the Fourth Circuit is reversed on that point” such pipelines can be permitted by the federal agency managing the property; in this case that would be the forest service.

He emphasized that if the court upholds the Fourth Circuit ruling, Congress can amend the statutes, and that’s not without precedent. “Congress granted an exemption from a different MLA limitation for the Trans-Alaska Pipeline several decades ago,” he noted.

### **What happens if the Supreme Court upholds the Fourth Circuit ruling in favor of environmentalist groups?**

If the justices agree with the lower court that the USFS cannot issue a permit for the pipeline to cross the trail, Dominion would have to re-route the pipeline to cross the trail elsewhere, on private or state-owned land. Proponents of the project say this would be expensive to fix, perhaps cost-prohibitive for its shareholders.

### **What if the Supreme Court overrules the Fourth Circuit?**

If the justices overturn the lower court’s decision in favor of the ACP, the USFS can re-issue a permit to cross.

However, the USFS must still address the Fourth Circuit’s other concerns about environmental issues and harm to sensitive species; otherwise, a new permit would likely again be challenged in court.