

# The Recorder

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## Supreme Court considers pipeline appeal

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Flanked by representatives from environmental groups including the Sierra Club and Highlanders for Responsible Development, Southern Environmental Law Center attorney D.J. Gerken, far left, addressed a crowd on the steps of the U.S. Supreme Court Monday. The court debated whether the U.S. Forest Service has authority to grant a permit for a proposed pipeline to cross the Appalachian Trail. “This pipeline has other routes available to it, but the pipeline developers refuse to consider them, insisting, demanding, that they be allowed to cross on our public lands instead,” he said. “The Appalachian Trail is a national treasure ... Congress gave it special protection from pipeline development on federal land.” (Recorder photos by Anne Adams)

WASHINGTON, D.C. — The senior most justice lobbed the first question.

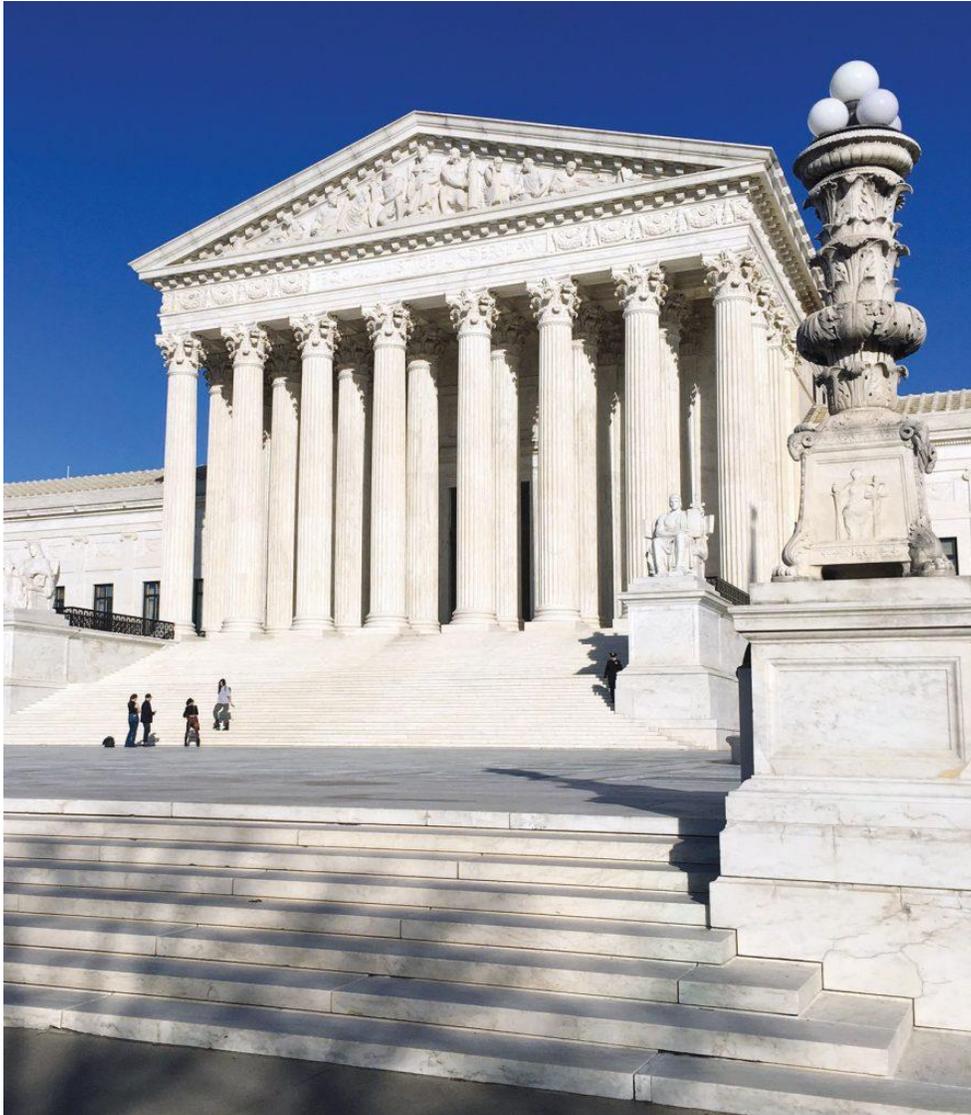
“Isn’t this case going back for consideration of the environmental consequences?” Justice Ruth Bader Ginsburg asked. “Since those reviews go on, will the Mineral Leasing Act question be moot?”

Monday morning, the U.S. Supreme Court heard an appeal in U.S. Forest Service v. Cowpasture River Preservation Association over a narrow legal question with regard to which federal agency has the authority to grant a permit for the proposed Atlantic Coast Pipeline to cross the Appalachian Trail near Waynesboro.

It followed court challenges going back two years that made their way through the U.S. Fourth Circuit Court (see sidebar, page 4).

The attorney arguing for the USFS, Anthony Yang, agreed with Ginsburg that could be possible. “That issue could change to make this issue no longer necessary,” he said.

But he stressed the need for the court to make a determination on this point. “If the trail cannot be crossed,” he said, “then this whole enterprise is done. We’re done. They’d have to start over.”



The U.S. Supreme Court was in session Monday to hear oral arguments by attorneys for the U.S. Forest Service, Atlantic Coast Pipeline LLC, and environmental groups represented by Michael Kellogg. The USFS and ACP were provided 15 minutes each to make their legal points and answer questions from the justices; Kellogg was given 30 minutes to do the same on behalf of the Cowpasture River Preservation Association and other environmental groups that had challenged the USFS special permit for the ACP to cross the Appalachian Trail.

Ginsburg pressed on. “Then, no one doubts the trail is in the National Park System?”

The trail is administered by the NPS, Yang said, but not the land.

This set in motion a series of questions and debate on what the trail is, and whether it’s considered “land.”

Yang, assistant to the Solicitor General in the Department of Justice, said in his opening statement that while the NPS administers the trail, the ultimate care of the land where the trail sits is managed by the USFS. If the court were to decide the trail is “land” under the NPS, then it would put “vast amounts” of land into the park system, including places where the trail crosses like towns, bridges, and some 600 roads.

Ginsburg pointed to a brief prepared by the ACP respondents, noting they agree the trail is in the National Park System. “So how is the trail not land?” she asked.



The side of the U.S. Supreme Court building was empty Sunday evening, but by early Monday morning, lines began to form around the perimeter of the building, which faces the U.S. Capitol. The courtroom accommodated fewer than 50 citizens who waited for hours to gain entry to the proceedings. Most of those who traveled to Washington to hear oral arguments were forced to wait outside to learn what the justices had to say. (Recorder photo by Anne Adams)

“Our view is that the trail is not land,” Yang said.

Justice Helena Kagan weighed in on the difficulties of separating the trail from the land, saying when one walks or bikes on the trail, they're on land. "You're saying the trail is distinct from the land that is the trail, but no one makes this distinction in real life," she said.

Kagan told Yang she found the USFS and ACP briefs on the subject, while well written, "strange to read because you can't say what you mean, which is that the trail is a piece of land ... you are wrapped up in these strange locutions about the trail traversing land ... imagining something that goes on top of (the land) somehow," she said.

She pointed to Yang's argument that if a tree fell on the trail, it would be USFS personnel called to remove it, not National Park Service staff. On the Appalachian Trail, Kagan said, it's the park service that regulates the trail's uses. "The land is the trail," she said, and the director of the park service is in charge of regulating that land, including how regulations are implemented.

Justice Sonia Sotomayor wanted to know why two federal agencies cannot have simultaneous management. Under the Mineral Leasing Act, she noted, there is a whole chapter devoted to when two agencies manage land.

"Wouldn't the Trails Act supersede the forest service's permission?" she asked.

"The answer is no," Yang said, wrapping up his allotted 15 minutes to make his oral arguments.

Attorney Paul Clement, arguing on behalf of Atlantic Coast Pipeline LLC, argued the National Trails Act draws a distinction between the trail and the land it crosses. "The trail can even be moved," he said. He pointed to the National Rivers Act, passed by Congress the same day as the Trails Act, and said there would be "untenable consequences" to finding in favor of the CRPA's challenge, moving thousands of acres of land under the National Park Service.

Justice Stephen Breyer was keen to debate whether the land under the trail was also considered to fall under the National Park Service. He asked about how the pipeline would be tunneled under the trail, and Clement explained it would start and end on either side on private land, and be situated about 600 feet under the surface of the trail and about 800 feet under the Blue Ridge Parkway.

Justice Samuel Alito took up this point. "So, the trail is on top of the earth, and the pipeline will be 600 feet below; why can't we just say the trail is only on the surface?"

He said when he thinks of a trail, he thinks of something that lies on top of the earth, but a pipeline 600 feet below doesn't seem like a trail. Instead of having to figure out how to distinguish a trail from land it's on, "Why can't we just say the trail is on the surface and something 600 feet below the surface is not the trail?"

He noted that would pretty much determine the case in favor of ACP.

"I'm sure my clients would be happy to win on that point," Yang said, but again insisted there were broader consequences involved for situations where it's important to determine which agency controls the federal land where the trail crosses. "It is pretty far underground, but as for practical matters, there are other issues," Yang said.

For example, he pointed to multiple uses for national forest land, such as when maple tree producers tap sugar trees in New Hampshire, and they do so with forest service permission.

“That’s not quite the question,” Breyer said. “The question is, what harm would it do to separate the trail from the land beneath it?” Why, he wondered, should the court decide this case when it would have all kinds of consequences? Sotomayor agreed there were problems with definitions involved. “Does the Act give the park service the right to grant easements on top and below the trail?”

Clement noted when a right of way is granted across land, that does not affect subsurface rights.

Kagan came back to the statute. “Here’s the argument that you can’t separate the two,” she said. “The Mineral Leasing Act gives the authority for rights of way to the Secretary of the Interior (which oversees the National Park Service). That has the authority over the surface, and the subsurface is given to the person in charge of the surface.”

Clement disagreed, saying the forest service isn’t necessarily in a subsidiary position when the two federal agencies have jurisdiction. “It asks which agency has the authority,” he said, adding, “Congress isn’t crazy. It had no delusions of including the lands of the National Park Service (that way) ... there’s a difference in the implications of the theories.”

He said there are several provisions of the National Trails System Act that make a distinction between the trail and the land without which there could be “untenable consequences” that would end up creating a barrier to all pipeline development in the East.

But Ginsburg reiterated her previous point. “You said the trail is in the National Park Service. How do you respond to that line?”

“I say you keep reading,” Clement responded. “It is in the National Park Service ... but that doesn’t make all lands traversed by the trail, all the other lands, subjected to the service’s authority.”

Alito interjected. “The trail is administered in full by the National Park Service,” he said.

“In full, but really meaning in land,” Clement said. “I don’t think it’s as metaphysical as you think,” he said, again noting the trail is maintained day to day by the forest service, “The park service and the forest service haven’t had any problem with this for 50 years.”

“Does the National Park Service have an office here in Washington?” Alito said. “And isn’t that administered by the park service?”

“Yes, but not everything is administered by the park service,” Clement said.

### **Environmental groups respond**

Following oral arguments from the forest service and ACP, attorney Michael Kellogg, arguing on behalf of the CRPA and other environmental groups, had 30 minutes to provide his arguments.

The Appalachian Trail, he said, falls under the Secretary of Interior, National Park Service, as granted by statute. The NPS has authority upon the trail for rights of way that go over, under, across, or along any components of it. “Under counts,” he said. “The MLA talks about jurisdiction, the one who administers the surface, and Congress made it clear with the Trails Act that the Appalachian Trail shall be under the Secretary of the Interior.” Congress also made it clear under the General Authorities Act, he said, that all NPS land is part of the park system, whether it’s land, water, buildings, or monuments. “The MLA makes it absolutely clear,” he said, “that it referred to all federal lands, except those in the National Park System.”

Chief Justice John Roberts asked about the nature of easements and property rights.

Kellogg said rights of way are passages across land, and the Trails Act repeatedly mentions this.

Alito asked, “What property rights does the National Park Service have ... Any property rights over private land?”

Kellogg note the regulations specifically exclude private property arrangements, and only refer to federal lands. The land for the Appalachian Trail, he said, considers its acreage and its length.

“Who regulates its use?” Kagan asked.

Kellogg explained the National Park Service has authority over its use, but can delegate maintenance to other federal agencies.

“Suppose there was a regulation that said no snowmobiles were allowed?” Kagan continued.

“The National Park Service has the authority over those regulations,” Kellogg responded.

Sotomayor said, “The trail runs through towns (like Selma). Can the National Park Service regulate use in that area, downtown Selma?”

“No,” Kellogg said, pointing out again that regulatory authority in question is about federal land, not private or state-owned property.

Justice Neil Gorsuch pressed, and Kellogg reiterated, “The park service has no regulatory power on the national historic trail for private or state lands.”

Breyer provided an example of a state park where Native American remains might be buried, and asked whether a private group could get permission to access them.

“They can do it,” Kellogg said, again noting the NPS has control only over federal where the trail crosses.

“So it’s more like an easement,” Breyer said, “and private individuals or states have the right to use the land as they wish. But if you go down 1,000 feet, then maybe they can do it too, but only if the National Park Service agrees?”

Gorsuch made the point than in the East, the National Park Service administers trails, but in the West, it's the national forest service. "While you might thwart this pipeline here, you'd open it up for pipelines in the west," he said.

"I don't think that's going to happen," Kellogg said.

"That's what I thought you'd say," Breyer replied.

Justice Brett Kavanaugh pointed out the confusion about which agency has authority, and the enormous consequences of upholding the environmentalists' position. "You'd expect to see clearer language from Congress," he said, "if we're getting all those consequences."

But, Kellogg noted, the word "administered" is used in every Act from Congress, as applied to regulatory authority, and in this case, he said, the federal government owns the land.

"Couldn't congress reassign authority?" Gorsuch asked.

Kellogg pointed out that when Congress established authority, it specifically kept the Appalachian Trail and a couple of others separate.

Breyer came back to the subsurface point. "If the land belongs to the federal government, does that mean to the center of the earth? Is that your position with the trails, too?"

Kellogg affirmed that point.

Roberts expressed concern about future development. "It really creates an impermeable barrier," he said, for bringing natural gas pipelines to the East where they are needed more.

"That's absolutely incorrect, your honor," Kellogg replied, noting some 55 pipelines already cross the trail over private or state property, and 19 pipelines cross on federal land by permanent easement before the trail was designated. This question, he said, only applies to where pipelines are proposed to cross on federal land, and no such pipelines have been authorized to cross the trail under the Mineral Leasing Act since the trail was established.

Kagan wanted to know the effect of joint jurisdiction of the two federal entities. "If it's joint, isn't it true that the Secretary of the Interior has control over the right of way?"

"Yes," Kellogg said. "The secretary administers the land."

"If it's everything the park service administers, that means it can stop the pipelines across the country," Sotomayor added. "You haven't articulated this."

"Any reason why Congress would single out the Appalachian Trail?" Alito asked.

"Because insofar as it is on federal land, where the most beautiful parts of the trail are found through national forest," Kellogg said, "Congress drew a bright line."

“There may be good environmental reasons not to authorize this pipeline,” Alito said, “but do you have anything more than just ‘gotcha’ arguments? Is this what Congress intended?”

Yang came back to the podium and wrapped up his conclusions making the point that Congress gave administrative authority to the park service, but did not intend for all park lands to be governed by the Secretary of the Interior.

Sotomayor interrupted, pointing out that “management” and “administration” have different meanings.

“Management includes management of the land,” Yang said. “If (the USFS) has no authority of the land, then management is transferred.”

Following the hour’s arguments, environmental groups held a press conference on the steps of the Supreme Court building, explaining there are numerous other challenges to the pipeline proposal (see sidebar, above).

The court is not expected to render its decision until late spring or early summer.