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Does the National Forest Service Have Authority to Grant Rights-of-Way under the Mineral Leasing Act through National Forest Lands Traversed by the Appalachian Trails

Robert Abrams

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CASE AT A GLANCE

Atlantic Coast Pipeline, LLC, proposed construction of a natural gas pipeline stretching from West Virginia to North Carolina. The route approved by the Federal Energy Regulatory Commission included a section running across National Forest System land, including the point at which the pipeline would cross the Appalachian National Scenic Trail (ANST). After initial objections, the U.S. Forest Service reversed course and issued the needed right-of-way across National Forest System lands. Environmental groups objected and a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit unanimously held that the Forest Service had acted arbitrarily and capriciously thereby violating both the National Forest Management Act and the National Environmental Policy Act. The Fourth Circuit vacated the grant of the right-of-way. Additionally, that court ruled that the Forest Service lacked authority under the Mineral Leasing Act to issue a right-of-way for a pipeline crossing the ANST. Only this last ruling is the subject of Supreme Court review.

U.S. Forest Service v. Cowpasture River Association
Docket No. 18-1584

Atlantic Coast Pipeline, LLC v. Cowpasture River Association
Docket No. 18-1587

Argument Date: February 24, 2020
From: The Fourth Circuit

by Robert "Bo" Abrams
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ISSUES

1. Are those portions of the Appalachian National Scenic Trail (ANST), which is administered by the National Park Service (NPS), situated on lands managed by the Forest Service subject to the same restrictions forbidding pipeline rights-of-way as lands directly managed by the NPS?

2. Does the restriction in the Mineral Leasing Act that forbids use of national park lands for pipelines apply to federal lands within units of the National Forest System over which the ANST passes?

FACTS

Atlantic Coast Pipeline, LLC, proposed construction of a 604.5-mile, 42-inch diameter pipeline to transmit natural gas from West Virginia to North Carolina. The Atlantic Coast Pipeline (ACP) route approved by the Federal Energy Regulatory Commission (FERC) would have the pipeline traverse 21 miles of federal land situated in parts of the George Washington National Forest (GWNF) and the Monongahela National Forest (MNF). The project included clearing a 125-foot right-of-way (75 feet in wetlands) through those national forests, digging a trench for the pipeline, and blasting and flattening ridgelines. In some areas the pipeline would tunnel beneath the land surface. Of particular concern in this case, the ACP would cross under the Appalachian Trail at a location in the GWNF.

As the licensing agency principally involved with the ACP, FERC was required by the National Environmental Policy Act to prepare an Environmental Impact Statement (EIS), describing the likely environmental impacts. In preparing its Draft EIS in April 2015, FERC obtained scoping comments from the Forest Service in which the Forest Service called for FERC to analyze alternative routes that did not cross Forest Service land and noted the Forest Service policy that restricts special uses (such as a pipeline) to projects that "cannot reasonably be accommodated on non-National Forest System lands." The Forest Service further commented raising an array of environmental concerns including landslides, slope failures, sedimentation, and impacts to groundwater, soils, and threatened and endangered species. Later in 2015, ACP filed a formal application for the pipeline with FERC and applied to the Forest Service for a Special Use Permit for the 21-mile right-of-way.

As 2016 progressed, ACP's proposed construction plan for the pipeline through the national forest areas was shared with the

Forest Service. In response, the Forest Service indicated a need for more details in order to be able to judge whether the ACP plans would be consistent with the standards imposed by the GWNF and MNF forest management plans. Even after the presidential election in November 2016, the Forest Service was still calling on ACP for information that would allow the Forest Service to assess the potential environmental damage and conformity with the forest plans.

In December 2016, however, the dynamic apparently began to shift. ACP circulated its timeline for FERC and Forest Service Reviews, which called for fast-tracking approvals that would have the Forest Service give its final approval by September 2017, followed by forest plan amendments by October of that year. Together with FERC actions on the EIS, the approvals would have allowed the pipeline to be in service by 2019. Through the early months of 2017, the Forest Service continued to assert in comments on the Draft EIS that its conclusions were premature due to incomplete information on environmental effects on Forest Service resources and understatement and inapposite analysis of the impact on sensitive species. By May 2017, the Forest Service began to change course. This culminated in a final Record of Decision in November 2017 supporting the Special Use Permit, which was issued in January 2018 despite a November 2017 updated biologic evaluation that found a likely loss of viability for three Regional Forester Sensitive Species. As noted by the Fourth Circuit, such a result is in direct contravention of Forest Service rules: "Per [Forest Service Manual] 2670.32, activities or decisions on National Forest System lands 'must not result in a loss of species viability or create significant trends towards federal listing.' " (911 F.3d at 159–160.) The Fourth Circuit was clearly cognizant of and skeptical of the Forest Service change of position. The court stated:

> A thorough review of the record leads to the necessary conclusion that the Forest Service abdicated its responsibility to preserve national forest resources. This conclusion is particularly informed by the Forest Service's serious environmental concerns that were suddenly, and mysteriously, assuaged in time to meet a private pipeline company's deadlines. (911 F.3d at 183.)

Shortly after the Special Use Permit was issued, Cowpasture River Preservation Association and other environmental groups sought review of the final Forest Service action in the court of appeals under the Administrative Procedure Act and the Natural Gas Act. The court found it had jurisdiction. As noted above, the court ruled that the issuance of the Special Use Permit in several particulars violated the National Forest Management Act and the National Environmental Policy Act. It also ruled that the Forest Service was without authority to issue the Special Use Permit under the Mineral Lands Act and the National Scenic Trails Act. The Supreme Court granted *certiorari* only in relation to that last ruling, a ruling that is independent of the *bona fides* of the Forest Service administrative performance.

CASE ANALYSIS

Determining the extent of Forest Service's authority in this case involves nuanced statutory interpretation. All parties accept that the Mineral Leasing Act (MLA), which allows the federal government to grant pipeline rights-of-way across federal lands does not permit such grants across national park lands. As relevant here, under the MLA, "Rights-of-way through any Federal lands may be granted by the Secretary of the Interior or appropriate agency head for pipeline purposes…." As defined by the MLA, however, "Federal lands" means "all lands owned by the United States *except lands in the National Park System*." 30 U.S.C. § 185(b)(1) (emphasis supplied). The federal land at issue for which a pipeline right-of-way is being sought in this case is managed by the Forest Service, not the National Park Service. The pipeline plan calls for it to cross the Appalachian Trail, which is administered by the National Park Service, raising the possibility that the MLA limitation on pipeline rights-of-way might apply in this case.

The legislation authorizing the ANST places responsibility for it under the Secretary of Interior, which houses the National Park Service rather than the Department of Agriculture which houses the U.S. Forest Service. As stated in 16 U.S.C. § 1244(a)(1), "The Appalachian Trail shall be administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture." Further complicating the statutory briar patch is another section of the National Trails System Act (NTSA), 16 U.S.C. § 1248(a), which states:

> 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.

The NTSA language is susceptible to competing interpretations. On one hand, as petitioners (including the Forest Service) argue, emphasizing the explicit mention of the Secretary of Agriculture (hence the Forest Service) and laws applicable to the "national forest system," only rules applicable to Forest Service lands apply. Importantly, for the administrative law questions relating to deference to the lead agency in statutory interpretation, the Forest Service in one of its briefs concedes that it is not the lead agency for the purposes of the NSTA, and, hence, its view of the NSTA is not entitled to judicial deference.

On the other hand, as the Fourth Circuit viewed the matter, the MLA exclusion of National Park Service lands from the definition of "Federal lands" for which pipeline permits can be granted ends the inquiry because the ANST is a unit of the Park Service, thereby prohibiting the grant of the right-of-way. Taking its argument further, the Fourth Circuit, relying on the statutory language of 16 U.S.C. § 1246(a), found a clearly expressed congressional allocation that distinguished administration of the ANST that was assigned to the Secretary of Interior (hence the Park Service) from the management of the lands across which it passes, which here would be the Secretary of Agriculture and the Forest Service. Thus, the Fourth Circuit ruled that under the MLA the "appropriate agency head" is the National Park Service, which administers the entire ANST, not the Forest Service. As a separate matter, it also can be argued that without regard to the agency managing the particular land in question, the Section 1248 language reproduced

above requires that agency to act in "accordance with the laws applicable to the national park system *and* the national forest system." (Emphasis added.) That reading would require the Forest Service to follow both its own statutory requirements and those of the National Park Service.

SIGNIFICANCE

As a legal matter, 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. The resolution of the issue will have very little doctrinal significance. It will apply only when lands "in the National Park System" are lands administered by federal agencies other than the National Park Service and a pipeline right-of-way traversing those lands is sought under the MLA. 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 charged with managing the land in question. Importantly, if the Court sustains the Fourth Circuit ruling and Congress is unhappy with the result, Congress can amend the statutes involved, either generally or on a case-by-case basis. This latter result is not without precedent. For example, Congress granted an exemption from a different MLA limitation for the Trans-Alaska Pipeline several decades ago.

As a practical matter, the issue has rather plain and fairly extensive consequences. The ANST is 2,200 miles in length and, in much of its length, the lands are owned by the federal government as parts of the National Forest System. If all federal lands over which the ANST passes are deemed to be "in the National Park System," then it will be impossible to obtain a right-of-way for a pipeline across the ANST except on lands not controlled by the federal government. At a minimum, the need to avoid federal land crossings of the ANST will almost certainly increase significantly the cost of a pipeline due to the need to condemn private land or obtain permits to cross state lands. Resorting to condemnation is likely to engender public opposition to the pipeline project, further increasing the difficulty of constructing those pipelines.

The economic costs of an affirmance are, according to the petitioners, quite high. Atlantic Coast Pipeline estimated the direct economic costs of denying the right-of-way as "$2.7 billion in economic activity and $4.2 million in tax revenue annually during construction." The pipeline would be capable of carrying up to 1.5 billion cubic feet of natural gas per day. Although somewhat speculative, ACP asserts that equivalent "costs" would attach to other projects that might have to be foregone if crossing the ANST with a pipeline is made more difficult or impractical. Perhaps overplaying the parade of horribles, the petitioners even raised the possibility of the catastrophic dislocations that might follow if all existing rights-of-way traversing the ANST on federal lands had to be decommissioned. The point remains, however, that the real-world impact of an affirmance of the Fourth Circuit will have a significant impact on future movement of oil, gas, and other forms of pipeline transmission activities that must cross the ANST.

In terms of the impact on hikers' ANST experience, the eventual result of this project should be modest. The plan for the pipeline has it passing 700 feet beneath the surface in the portion of the George Washington National Forest that is crossed by 0.1 miles of the ANST. The disruption of hiking would arise during the construction phases and as potential ancillary environmental damage to the forest areas adjacent to the ANST to the extent those areas are used at times by those hiking the trail. Although it is not before the Supreme Court, the potential for harm to environmental values in the affected national forests was viewed by the Fourth Circuit as significant. The bulk of the decision below focused on the failure of the Forest Service to address adequately the environmental impacts of the project, holding the Forest Service decisions to be so poorly supported as to be arbitrary and capricious and, thus, violate requirements of both the National Environmental Policy Act and the National Forest Management Act and the implementing regulations of those statutes.

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ATTORNEYS FOR THE PARTIES

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For Respondents Cowpasture River Association, et al. (Michael K. Kellogg, 202.326.7900)

AMICUS BRIEFS

In Support of Petitioners Atlantic Coast Pipeline, LLC and United States Forest Service

State of West Virginia and 17 Other States (Lindsay S. See, 304.558.2021)

Representative Jeff Duncan and 61 Other Members of the United States House of Representatives (E. Travis Ramey, 205.251.3000)

Mountain Valley Pipeline (Murray D. Feldman, 208.342.5000)

National Association of Manufacturers (John C. Cruden, 202.789.6000)

Forest Resource Council, et al. (Lawson E. Fite, 503.222.9505)

Journeymen and Apprentice Plumbers, Pipefitters, et al. (Ellen O. Boardman, 202.362.0041)

In Support of Neither Party

Appalachian Trail Conservancy (Keith Bradley, 303.830.1776)

Richard J. Pierce Jr. (Richard J. Pierce Jr., 703.304.1623)