

# Supreme Court Visits Appalachian Trail to Address Pipeline Permitting Dispute

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A proposed interstate natural gas pipeline in the mid-Atlantic is one step closer to reality after obtaining one of the federal permits needed for construction and operation, thanks to a decision last week from the U.S. Supreme Court. In *U.S. Forest Service v. Cowpasture River Preservation Association*, the Court tackled a complex web of federal legislation and regulations that ultimately boiled down to a simple question: who has the authority to issue a permit for an infrastructure project to cross the Appalachian National Scenic Trail (Appalachian Trail or Trail)? The Court **found** that the U.S. Forest Service (FS) had acted properly when it issued a special use permit for the construction and operation of a subsurface pipeline segment passing under the Trail. The Court reversed a **decision** by the U.S. Court of Appeals for the Fourth Circuit, which had held that the FS lacked statutory authority to issue the permit.

The decision involves the **Atlantic Coast Pipeline**—a proposed **604 mile** natural gas pipeline that would run from West Virginia through Virginia to Robeson County, NC, near the South Carolina border. The developers obtained their **Certificate of Public Convenience and Necessity** from the Federal Energy Regulatory Commission (FERC) in 2017 for the overall project. However, as is often the case, the pipeline’s developers also needed authorizations from other federal and state agencies for various segments and characteristics of the project. Among these was **permission** to construct and operate a segment of the pipeline that runs approximately 600 feet below the Appalachian Trail that is within the George Washington National Forest. The litigation focused on how and from whom to obtain permission for construction and operation of that segment of the Atlantic Coast Pipeline project. In order to discern the answer, the courts had to evaluate a morass of public land use statutes. The Fourth Circuit **determined** that the Trail was part of the National Park System. As a result, the court held that the FS lacks authority to grant the right-of-way because the **relevant text** of the Mineral Leasing Act of 1920 (MLA) explicitly excludes “lands of the National Park System” from the definition of “federal lands” through which FS may grant a right-of-way.

The Supreme Court disagreed, and reversed the lower court. In a 7-2 opinion authored by Justice Thomas, the Court evaluated what it **referred to** as “the interaction of multiple federal laws.” The Court first evaluated the **Weeks Act of 1911**, which provides for acquisition of lands to form the National Forest System under the administration of FS pursuant to **delegated** authority from the Secretary of Agriculture. Exercising its Weeks Act authority, FS **established** the George Washington National Forest in 1932. Congress later established the Appalachian Trail through the passage of the **National Trails System Act**

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(Trails Act) in 1968. That statute **dictates** that the Appalachian Trail is to be “administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture.” The act also **empowers** the Secretary of the Interior to establish the location and width of the trails via “rights-of-way” agreements with federal, state, and local agencies, as well as private landowners. The Secretary of the Interior has **delegated authority** over trails to either the National Park Service or the Bureau of Land Management. The National Park Service administers the Appalachian Trail.

With this framework in mind, the Supreme Court turned to the MLA, which FS relied on to grant the Atlantic Coast Pipeline a right-of-way to cross under the Appalachian Trail. The MLA **provides** that, among other things, “[r]ights-of-way through any Federal lands may be granted by the Secretary of the Interior or appropriate agency head for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom.” However, the **statutory language** explicitly excludes “lands in the National Park System” from the definition of “Federal lands,” meaning that the MLA does not authorize agency heads to grant pipeline rights-of-way across such lands. The FS relied on the authority granted by this section of the act in authorizing Atlantic Coast Pipeline’s right-of-way underneath the Appalachian Trail.

The Supreme Court **focused** “on the distinction between the *lands* that the Trail traverses and the Trail itself, because the lands (not the Trail) are the object of the relevant statutes” (emphasis in original). The Court **noted** that there was no dispute regarding FS jurisdiction over the lands within the George Washington National Forest at the center of the dispute. The question for the Court, therefore, was whether the lands associated with the Trail were still subject to FS jurisdiction. If so, the FS had the authority to issue a right-of-way permit under the MLA. If, however, the designation of the Trail under the Trails Act and the Secretary of the Interior’s delegation of administrative authority over the Trail to the National Park Service rendered the Trail “land[] in the National Park System,” a right-of-way could not be granted under the MLA.

The Court **held** that the Trails Act did not transfer jurisdiction over the land in which the Appalachian Trail is located. **According** to the Court, the Trails Act directed the Secretary of the Interior to enter into “right-of-way agreements,” not land transfers, and that these right-of-way agreements do not convert the underlying lands to “lands within the National Park System.” The decision **explored** the legal nature of rights-of-way and easements, pointing out that these designations generally “grant a non-owner a limited privilege to ‘use the lands of another’” but that “the grantor of the easement retains ownership over *the land itself*.” The Court acknowledged that the circumstances were somewhat different in this case, where the federal government was the owner of both the George Washington National Forest and the Appalachian Trail that runs through it, but **determined** that “the same general principles apply” with respect to different federal agencies. The Court **interpreted** the Trails Act’s reference to the granted land interests as “rights-of-way” as a deliberate choice by the legislature to limit the nature of the property rights. The Court **noted** that “[t]he fact that Congress chose to speak in terms of rights-of-way in the Trails Act, rather than in terms of land transfers, reinforces the conclusion that the Park Service has a limited role over only the Trail, not the lands that the Trail crosses.” As a result, the Court **concluded** that the authorization did not make the land in question part of the “National Park System” in which issuance of pipeline rights-of-way is not authorized under the MLA, but rather “Federal lands” under the jurisdiction of the FS across which a right-of-way could be granted under the MLA.

The dissent, written by Justice Sotomayor and joined by Justice Kagan, **found** the analogy to easements and rights-of-way across private lands “unconvincing,” noting that such property rights are generally granted by one landowner to another, while in this case the federal government owns all of the relevant property interests. The dissent argued that the Trail included land, not merely an easement, and **asked** “how the Park Service could administer the Trail without administering the land that forms it.”

As a result of this decision, the permit issued by the FS to Atlantic Coast Pipeline for crossing underneath the Appalachian Trail is **valid**. Legislators who oppose the pipeline could halt its progress through new

legislation. In addition, Congress could amend the statutory framework for authorizing crossings of the Appalachian Trail and other properties administered by the National Park Service or other aspects of the interstate pipeline permitting process.

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