

PIPELINES AND PUBLIC LANDS: NATIONAL TRAILS
SYSTEM INFRASTRUCTURE POST U.S. FOREST SERVICE
V. COWPASTURE RIVER PRESERVATION ASSOCIATION

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“It is also vandalism wantonly to destroy or to permit the destruction of what is beautiful in nature, whether it be a cliff, a forest, or a species of mammal or bird. Here in the United States we turn our rivers and streams into sewers and dumping-grounds, we pollute the air, we destroy forests, and exterminate fishes, birds and mammals - not to speak of vulgarizing charming landscapes with hideous advertisements. But at last it looks as if our people are awakening.”¹

“Now there is a considerable body of opinion in favor of our keeping for our children’s children, as a priceless heritage, all the delicate beauty and all the burly majesty of the mightier forms of wildlife. Surely our people do not understand, even yet, the rich heritage that is theirs!”²

“The whole point of the experience [on the Appalachian Trail] is to remove yourself so thoroughly from the conveniences of everyday life that the most ordinary things—processed cheese, a can of pop gorgeously beaded with condensation—fill you with wonder and gratitude. It is an intoxicating experience to taste Coca-Cola as if for the first time and to be conveyed to the very brink of orgasm by white bread.”³

INTRODUCTION

Before there were roads, and before there were railways, America had trails. Harkening back to the pioneering spirit of Lewis and Clark as they set forth on the Oregon Trail, this country began with its wagon trains, horse paths, and foot trails. These organic pathways set routes for trade and migration before the trail concept transitioned to primarily recreational functions. Pathways were surveyed and carved within the landscape through

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¹ Theodore Roosevelt, *Our Vanishing Wildlife*, OUTLOOK MAG., at 160 (Jan. 25, 1913), <https://hdl.handle.net/2027/uc1.32106019606547> [<https://perma.cc/8PWZ-GCEY>].

² Theodore Roosevelt, *Wilderness Reserves; the Yellowstone Park*, in OUTDOOR PASTIMES OF AN AMERICAN HUNTER 264 (1906).

³ BILL BRYSON, *A WALK IN THE WOODS: REDISCOVERING AMERICA ON THE APPALACHIAN TRAIL* 55 (1997).

experience, grit, and the American spirit. They were here long before the electrical lines and the oil pipelines, and they will be here long after that infrastructure decays.

Today, the National Trails System must contend with the most heavily built environment the world has ever known. The modern foot trail is at a crossroads with the infrastructure needed to maintain not just the tourist economy that the public lands support, but the changing needs of an ever growing, industrialized society with the potential to overwhelm the trails. The public lands over which the trails cross do not exist in pristine vacuums. Rather, they are snapshots of a utopian, naturalistic ideal from an earlier America, either crisscrossing or deftly evading an industrialized world. They are a barrier to and a retreat from modern society. Each step on our nation's trails carries the legacy of John Muir, Henry David Thoreau, President Theodore Roosevelt, and even Bill Bryson. The burden on public lands makes us wonder how much erosion our trails can withstand before they lose their place in the wild.

Wilderness is undergoing a metamorphosis, and *U.S. Forest Service v. Cowpasture River Preservation Association* carves the path. The recent Supreme Court opinion permits pipeline construction along the National Trails System on Federal lands outside of the National Parks⁴ and causes one to wonder: can a trail running alongside an oil pipeline maintain that “transformative magic?”⁵ The *Cowpasture* dispute drives home the difference between private construction on public land and public construction on public land. Thus, a critical legal analysis of this holding must include a discussion of the current state of infrastructure in the National Park System, and how different thinking about public land management and administration (key terms as we will see from the *Cowpasture* opinion) fails to foster the twin goals of preservation and sustainability.

First, this article will introduce the history of the Atlantic Coast Pipeline – the project giving rise to the *Cowpasture* dispute. Next, this article will discuss the role of the National Trails System along with the differences between the National Park Service (NPS) and National Forest Service (NFS). After reviewing the differences between the two institutions, this article identifies various ecological, biological, and anthropogenic considerations for legal realism with an emphasis on physical space. Finally, this article will review the *Cowpasture* opinion considering Justice Clarence Thomas’

⁴ *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837 (2020).

⁵ Allie Ghaman, *Why America's National Scenic Trails Matter More Than Ever*, NAT'L GEOGRAPHIC (Jul. 9, 2020), <https://www.nationalgeographic.com/travel/features/why-national-scenic-trails-matter-more-than-ever/> [<https://perma.cc/WT2Z-2RYF>].

textualist approach to judicial analysis and how these conclusions conflict with congressional intent. This discussion of the Court's methodology will address land ownership and the distinction between administration and management.

I. THE ATLANTIC COAST PIPELINE PROJECT

In early 2015, Atlantic Coast Pipeline, LLC (Atlantic) and Dominion Energy sought to construct an approximately 604-mile natural gas pipeline from West Virginia to North Carolina.⁶ The pipeline was slated to distribute “1.5 billion cubic feet of natural gas per day from the gas-rich Marcellus Shale of West Virginia to southern North Carolina,”⁷ or 1.5 million dekatherms.⁸ The Atlantic Pipeline's “proposed route traversed 16 miles of land”⁹ within the George Washington and Jefferson National Forest,¹⁰ located in Virginia, West Virginia, and Kentucky (and is the subject of Atlantic's right-of-way request). Atlantic (via Dominion, its joint-venture partner) requested a permit from the NFS for the construction of a 0.1-mile segment of pipe to pass approximately 600 feet (180 meters) below the Appalachian Scenic Trail (AT) with entrance and exit points approximately 1,400 and 3,400 feet away from the path, respectively.¹¹

The NFS initially rejected the application due to a high potential for slope failures, contamination of local aquifers, wetland destruction, and habitat

⁶ *Cowpasture*, 140 S. Ct. at 1841.

⁷ Heather Hansman, *The Supreme Court Approved More Drilling Under the AT*, OUTSIDE (Jun. 25, 2020), <https://www.outsideonline.com/outdoor-adventure/environment/dominion-energy-appalachian-trail-drilling-supreme-court-decision/> [<https://perma.cc/3GW T-Q4FA>]; see also Scott Carpenter, *‘Desperate’ to Get Natural Gas Out of Appalachia, Pipeline Builders Face Long Battle Even After Supreme Court Victory*, FORBES (Jun. 18, 2020), <https://www.forbes.com/sites/scottcarpenter/2020/06/18/desperate-to-get-natural-gas-out-of-appalachia-pipeline-builders-face-long-battle-even-after-supreme-court-victory/> [<https://perma.cc/Y3A9-627T>].

⁸ “[A] therm is 100,000 Btu, which is roughly equivalent to 100 cubic feet of natural gas; a dekatherm is the equivalent of about one thousand cubic feet (Mcf).” *The Basics of Underground Natural Gas Storage*, U.S. ENERGY INFO. ADMIN. (Nov. 16, 2015), <https://www.eia.gov/naturalgas/storage/basics/> [<https://perma.cc/T5R2-B24W>].

⁹ *Cowpasture*, 140 S. Ct. at 1841.

¹⁰ The Shenandoah National Forest, established by Proclamation No. 1448, 40 Stat. 1779 (May 16, 1918), was renamed to the George Washington National Forest by Exec. Order No. 5867 (Jun. 28, 1932). The Jefferson National Forest was established by Proclamation No. 2165, 49 Stat. 3506 (Apr. 21, 1936). See U.S. DEP'T OF AGRIC., FOREST SERV., ESTABLISHMENT AND MODIFICATION OF NATIONAL FOREST BOUNDARIES AND NATIONAL GRASSLANDS: A CHRONOLOGICAL RECORD (2012).

¹¹ *Cowpasture*, 140 S. Ct. at 1842.

deterioration,¹² including sensitive habitat for endangered species such as the Northern Long-Eared Bat.¹³ This rejection was not unusual. Indeed, the NFS had not issued a pipeline crossing the AT in a National Forest for the AT's existence.¹⁴ Proponents of the Atlantic Coast Pipeline assert that the AT represents a de facto two-thousand-mile 'Great Wall' along the Eastern seaboard.¹⁵ They suggest that it is unrealistic and unreasonable to treat the AT as an immutable barrier for all construction and development, and penetrations through this metaphorical wall must be permitted else the AT represents too great a hindrance to economic growth and energy distribution.¹⁶

As late as October 2016, the NFS requested alternative routes from Atlantic for review.¹⁷ Then, in 2017, all the concern over the potential risks and irreversible damage to the National Forests simply vanished. A critical legal analysis¹⁸ recognizes societal influences outside of the law, such as political ideology. And so, it is worth noting that this abrupt change in agency attitude coincides with a change in the executive branch¹⁹ and, subsequently, a change in agency leadership. The Senate confirmed then-President Donald Trump's nominee for Secretary of Agriculture to the Forest

¹² J. Weston Phippen, *The Forest Service Is the Energy Industry's New Pal*, OUTSIDE (Dec. 21, 2018), <https://www.outsideonline.com/2378161/forest-service-energy-industrys-new-pal> [https://perma.cc/AP3D-HDDM].

¹³ *Id.*

¹⁴ Brief in Opposition for Respondents at 14, U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837 (2020) (Nos. 18-1584 and 18-1587).

¹⁵ Petition for Writ of Certiorari at 31, U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837 (2020) (No. 18-1587).

¹⁶ See Reply Brief for Petitioner at 7, U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837 (2020) (Nos. 18-1584 & 18-1587) ("Respondents fail to confront the fact that, under their reading, the Forest Service would have the power to grant a right-of-way under Forest Service land all the way up to the theoretical barrier imposed by the footpath 700 feet above."); *id.* at 9 ("There is thus simply no escaping that the logic of respondents' own arguments would treat the entirety of the Trail as a regulatory barrier to pipelines and construe the Trails Act as taking right-of-way authority not just from the Forest Service but from myriad States and private owners.").

¹⁷ Brief for the States of Vermont, Connecticut, Delaware, Hawai'i, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, and the District of Columbia as Amici Curiae Supporting Respondents, U.S. Forest Serv., et al., v. Cowpasture River Pres. Ass'n, et al., 140 S. Ct. 1837 (2020) (Nos. 18-1584 and 18-1587). (Nos. 18-1584 and 18-1587).

¹⁸ Critical Legal Studies "argue that interpretation of the law is subjective, and they emphasize the role of power and political ideology more strongly than most of the realists." Phoebe C. Ellsworth, *Legal Reasoning*, in CAMBRIDGE HANDBOOK OF THINKING & REASONING 685, 695 (Keith J. Holyoak & Robert G. Morrison Jr. eds., Cambridge Univ. Press 2005).

¹⁹ Phippen, *supra* note 12.

Service, Sonny Perdue, on April 24, 2017.²⁰ Perdue then appointed Tony Tooke as Forest Chief on August 22, 2017.²¹ Less than three months later, the NFS issued a final record of decision (ROD) authorizing the use of lands in the National Forest pursuant to the Mineral Leasing Act (“MLA” or “Leasing Act”).²²

Under the MLA, a landowning Federal agency may issue rights-of-way for pipeline construction.²³ However, there is an exception within the Leasing Act that excludes National Park lands from the right-of-way issuing power;²⁴ the Park Service, rather than the NFS, oversees and administers the AT. Despite this exception, the NFS granted Atlantic a right-of-way for construction across a section of the AT²⁵ and issued a special use authorization (SUA) on January 23, 2018, to allow the project to cross the AT in the George Washington and Jefferson National Forest.²⁶

²⁰ Bartholomew D. Sullivan, *Sonny Perdue is Confirmed by the Senate as the Next Agriculture Secretary*, USA TODAY (Apr. 24, 2017), <https://www.usatoday.com/story/news/politics/2017/04/24/sonny-perdue-confirmed-senate-next-agriculture-secretary/100851620/> [<https://perma.cc/37LG-9ZW5>].

²¹ *Trump Administration Names New Forest Service Chief*, FOREST SERV. EMPS. FOR ENV’T ETHICS (Aug. 22, 2017), <https://www.fseee.org/2017/08/22/trump-administration-names-new-forest-service-chief/> [<https://perma.cc/9RJ5-8FUM>]

²² U.S. DEP’T OF AGRIC., FOREST SERV., RECORD OF DECISION FOR THE ATLANTIC COAST PIPELINE PROJECT SPECIAL USE PERMITS/LAND AND RESOURCE MANAGEMENT PLAN AMENDMENTS, (Nov. 2017) [hereinafter ATLANTIC PIPELINE RECORD OF DECISION], https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd564397.pdf [<https://perma.cc/9FD8-MSLG>]; see also *USDA Forest Service Issues Final Decision to Permit the Atlantic Coast Pipeline Route on National Forests in West Virginia and Virginia*, U.S. DEP’T OF AGRIC., FOREST SERV. (Nov. 17, 2017), <https://www.fs.usda.gov/detail/gwj/news-events/?cid=fseprd564451> [<https://perma.cc/FXM6-9TS6>].

²³ Mineral Leasing Act, 30 U.S.C. § 185(a) (1920) (“Rights-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 to any applicant possessing the qualifications provided in section 181 of this title in accordance with the provisions of this section.”).

²⁴ *Id.* at § 185(b)(1) (“For the purposes of this section ‘Federal lands’ means all lands owned by the United States except lands in the National Park System”).

²⁵ See ATLANTIC PIPELINE RECORD OF DECISION, *supra* note 22; see also Erin Burch, *Challenging the Pipeline*, ALL. FOR SHENANDOAH VALLEY (Jul. 1, 2019), <https://shenandoahalliance.org/challenging-the-pipeline/> [<https://perma.cc/T33L-ZWDE>].

²⁶ *Court Vacates Key Permit for Pipeline*, THE RECORDER 8 (Dec. 13, 2018), https://www.abralliance.org/wp-content/uploads/2018/12/Court-vacates-key-permit-for-pipeline-Recorder_20181213.pdf [<https://perma.cc/T3SS-T2MK>] (“USFS issued its final decision Nov. 17, 2017; it issued the Special Use Permit and granted the right of way across the Appalachian Trail on Jan. 23, 2018.”).

When this decision was challenged in the Fourth Circuit,²⁷ the court agreed with *Cowpasture* and vacated the special use permit because (1) the Trails System is part of the National Park System;²⁸ (2) the Secretary of the Interior granted authority for administering the National Park System to the NPS, not the NFS;²⁹ (3) the MLA excluded the National Park System³⁰ from its right-of-way granting authority,³¹ and in turn, the AT; and (4) by this exclusion and allocation of authority, the Leasing Act excluded the AT from the Forest Service's power to grant rights-of-way over NFS land.³² Thus arose the question put before the Supreme Court: *Which federal agency has the authority to grant rights-of-way on public lands to private entities?*

II. NATIONAL TRAILS SYSTEM

The National Parks Service (NPS) administers the Trails System that consists of thousands of trails in a diverse and expansive network of intertwined physical (read: natural) and legal (read: human) systems.³³ This background is helpful for appreciating the network of land, the variety of interests in play and the administrative framework that governs the parks. These trails cross a variety of land interests, including land within the National Forests, and one such intersection is the focal point of the *Cowpasture* dispute. The rules for trail designation and the contours of land acquisition and access are relevant for understanding the property rules applied in the Supreme Court's holding. This section will explore the Trails System, its history, the types of trails that make up this network of land, and the system's integration into various land-owning mechanisms with emphasis on the Park System and the National Forests.

The Appalachian Trail (AT), a footpath formed in the 1920s and 1930s³⁴ that predates the Trails System itself, is the benchmark for other trails to follow and serves as an effective case study for this discussion. The AT was the singular vision of Benton MacKaye, an early twentieth century landscape architect,³⁵ and the result of years of dedication from admiralty attorney

²⁷ *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 155 (4th Cir. 2018).

²⁸ 16 USC § 1244(a)(1).

²⁹ 34 Fed. Reg. 14337.

³⁰ Mineral Leasing Act, 30 U.S.C. § 181(b)(1) (1920).

³¹ *Id.* § 185.

³² *Cowpasture*, 911 F.3d at 155.

³³ MARK K. DESANTIS & SANDRA L. JOHNSON, CONG. RSCH. SERV., R43868, THE NATIONAL TRAILS SYSTEM: A BRIEF OVERVIEW (Feb. 20, 2020) (citing 16 U.S.C. § 1246).

³⁴ *Id.* (citing *About the Trail: History*, APPALACHIAN TRAIL CONSERVANCY (available at <https://appalachiantrail.org/our-work/about-us/atc-history> [<https://perma.cc/7XVM-V3F3>])).

³⁵ See NAT'L PARKS CONSERVATION ASS'N, APPALACHIAN NATIONAL SCENIC TRAIL: A SPECIAL REPORT 3 (Mar. 2010), <https://www.nps.gov/appa/learn/management/upload/AT->

Myron Avery.³⁶ In 1923, routes through Harriman and Bear Mountain State Parks in New York formed the first AT sections. Through the Appalachian Trail Conservancy (ATC),³⁷ thousands of volunteers under Avery's guidance built out the AT over the ensuing two decades from its northernmost tip at Mount Katahdin in Maine to its southernmost at Springer Mountain in Georgia. That work included surveying the route, clearing paths, and installing signage. In the 1940s, the Civilian Conservation Corps (CCC) built much of the associated infrastructure, including rock walls, steps, lean-tos, cabins, shelters, and fire towers.³⁸ Present-day trail management responsibilities are divided between the ATC and the NPS.³⁹

A. *The National Trails System Act*

McKaye and Avery's vision of a network of pastoral trails for future generations persisted. At the behest of President Lyndon B. Johnson,⁴⁰ the 120th Congress passed the National Trails System Act ("Trails Act"), 16 U.S.C. §§ 1241-1251, and established the Appalachian Trail and the Pacific Crest Trail—the first ever codification of a trails system. The establishment of the National Trails System in 1968⁴¹ included four types of trails: (1) national scenic trails (NST), which highlight physiographic regions⁴² of the United States; (2) national historic trails (NHT), which highlight routes of historic significance; (3) national recreation trails (NRT), which provide

report-web.pdf [<https://perma.cc/2W8V-G6XE>].

³⁶ *Id.*

³⁷ *Id.* ("The ATC and its affiliated clubs provide about \$3 million annually in contributed volunteer services to the trail.")

³⁸ *Id.*

³⁹ The roles and responsibilities of the ATC and the NPS's Appalachian Trail Park Office (ATPO) have been outlined within a memorandum of understanding that dates back to 1984 and that has been renewed periodically. The ATC is responsible for day-to-day management of the Appalachian Trail, coordination of 30 independent trail-maintaining clubs, financial management and fundraising for the trail, maintenance of the trail and its associated structures, and stewardship of the lands through which it passes. The ATPO retains primary responsibility for federal land acquisition, boundary surveys, issuance of special use permits (i.e., permission required for uses ranging from hang gliding to conducting natural resource research on federal land), law enforcement, environmental compliance, and overall administration of more than 85,000 acres of federally acquired Appalachian Trail lands.

Id. at 4.

⁴⁰ See DESANTIS & JOHNSON, *supra* note 33, at 2.

⁴¹ National Trails System Act of 1968, Pub. L. No. 90-543, 82 Stat. 919.

⁴² 16 U.S.C. § 1242(a)(2).

outdoor recreation to urban areas; and (4) connecting side trails, which provide access to and among the three other trail types.⁴³

Acts of Congress establish new trails under the Trails Act,⁴⁴ with consideration for location, type, and funding. The Trails System's purpose extends beyond buoying the paradoxical pleasures attendant to trekking across terrain that is both suffocatingly brutal and yet divinely serene. In addition to the persistent madness of hiking uphill (and it is somehow always uphill)⁴⁵ for recreation, the National Trails System shall "promote the preservation of . . . open-air, outdoor areas and historic resources of the [United States]."⁴⁶

The AT was designated a NST on October 2, 1968, to coincide with the original passing of the Trails Act.⁴⁷ Congress formed two other trails that year, both also designated as NSTs—the Pacific Crest Trail (PCT) and the Ice Age Trail (IAT).⁴⁸ To date, there are eleven NSTs and nineteen NHTs.⁴⁹ There are also approximately 1,300 NRTs designated by the Secretaries of the Interior and Agriculture.⁵⁰ The NFS administers five of the eleven NSTs,⁵¹ the NPS administers the other six.⁵²

The Trails System's routes are not fixed. There are three processes available for expanding the Trails System:⁵³ (1) adding sections to existing trails; (2) forming new trails under existing categories; and (3) by Federal consideration of entirely new trail classifications.⁵⁴ Under the first category,

⁴³ DESANTIS & JOHNSON, *supra* note 33, at 1.

⁴⁴ *Id.*

⁴⁵ "What the hell happened to down!?" A WALK IN THE WOODS (Broad Green 2015).

⁴⁶ 16 U.S.C. § 12412(a) (emphasis added).

⁴⁷ DESANTIS & JOHNSON, *supra* note 33, at 2.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ U.S. DEPT. OF AGRIC., NATIONAL SCENIC AND HISTORIC TRAILS PROGRAM (2014), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3855600.pdf [<https://perma.cc/38N8-W28Y>] (Arizona National Scenic Trail (AZT), Continental Divide National Scenic Trail (CDT), Florida National Scenic Trail (FNST), Pacific Crest National Scenic Trail (PCT), Pacific Northwest National Scenic Trail (PNT)).

⁵² *National Scenic Trails*, NAT'L PARK SERV., <https://www.nps.gov/subjects/national-trailssystem/national-scenic-trails.htm> [<https://perma.cc/QJV2-6R9L>] (Potomac Heritage Trail, North Country Trail, New England Trail, Natchez Trace Trail, Ice Age Trail, Appalachian Trail).

⁵³ "The purpose of this Act is to provide the means for . . . prescribing the methods by which, and standards according to which, additional components may be added to the system." National Trail System Act, 16 U.S.C. § 1241(b).

⁵⁴ "Congress establishes new trails within the system; directs the Administration to study

the White House added 1,645 miles of trails to the existing Trails System between 2018 and 2020.⁵⁵

There are several recent examples of the second category. The Department of the Interior designated the Mohave National Water Trail in 2020.⁵⁶ Also, Public Law 116-111 provides for the ‘study’ of a new Emancipation National Historic Trail to follow a migration route used in the 19th century by newly freed slaves extending from Galveston, TX to Freedmen’s Town and Emancipation Park in Houston, TX.⁵⁷ Furthermore, Congress continues to authorize new trails through the use of railroad rights-of-way easements for rail-to-trail conversions.⁵⁸ Rails-to-trails conversions are designations of inactive rail corridors on private land⁵⁹ to expand public access to trails and to preserve rail corridors for future use⁶⁰ under the “Rails-to-Trails” Amendment, 16 U.S.C. § 1247(d). States have followed the model

potential new trails; determines the level of agency funding for trail management; and considers whether new trail categories (such as “national discovery trails”) should be included in the system, among other roles.” DESANTIS & JOHNSON, *supra* note 33, at 2.

⁵⁵ *Trump Administration Adds 1,275 Miles to the National Trail System*, U.S. DEP’T OF INTERIOR, <https://www.doi.gov/pressreleases/trump-administration-adds-1275-miles-national-trail-system> [https://perma.cc/PK2Y-W22A].

⁵⁶ *Mohave National Water Trail*, NAT’L PARK SERV., <https://www.nps.gov/lake/planyourvisit/mohave-water-trail.htm> [https://perma.cc/9S54-BHHM].

⁵⁷ Emancipation National Historic Trail Study Act of 2020, Pub. L. 116-111, 134 Stat. 8 (codified as amended at 42 U.S.C. § 1244(c)(47)).

⁵⁸ “Requires certain Federal officials to encourage the establishment of national trails using the provisions of the Railroad Revitalization and Regulatory Reform Act of 1976. Provides that the interim use of a railroad right-of-way for trail use shall not constitute an abandonment of the use of the right-of-way for railroad purposes.” 16 U.S.C § 1247(d).

⁵⁹ The controversy over “rails-to-trails” programs is that when a government agency converts land previously allocated to a railroad easement (“rail”) to a public use (i.e., a “trail”), that conversion amounts to a taking) under the Fifth Amendment’s Takings Clause: “nor shall private property be taken for public use, without just compensation.” *See, e.g., Schneider v. United States*, 197 F.R.D. 397 (D. Neb. 2000) (finding that the government’s Notice of Interim Trail Use ((NITU) concerning a section of the Union Pacific Railroad Company near Papillon, Nebraska *did* amount to a taking; *see also* *Hash v. United States*, 403 F.3d 1308, 1311 (Fed. Cir. 2005) (concerning the application of the “rails-to-trails” program to an 83.1 mile stretch of the Pacific and Idaho Northern Railroad Co. rail line “by ‘banking’ the rights-of-way for possible future reactivation; the Trails Act authorizes interim use of the rights-of-way as recreational trails.”),

⁶⁰ *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 17-18 (1990) (“First, Congress intended to ‘encourage the development of additional trails’ and to ‘assist recreation[al] users by providing opportunities for trail use on an interim basis’ Second, Congress intended ‘to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use.”) (internal citation omitted).

with the Tunnel Hill State Trail⁶¹ in Illinois and the Jacksonville-Baldwin Rail Trail⁶² in Florida, for example.

Under the third type of Trails System expansion, Congress is reviewing a new classification of trails dubbed “National Discovery Trails.”⁶³ National Discovery Trails are defined as “extended, continuous, interstate trails so located as to provide for outstanding outdoor recreation and travel and to connect representative examples of America’s trails and communities,”⁶⁴ and would be the fifth category of trail (after NST, NRT, NHT and connecting/side trails). The American Discovery Trail⁶⁵ is the first trail proposed of this potential National Discovery Trail category to go before Congress⁶⁶ and, if formed, would be the first of its kind.

B. Land Ownership and Trail Designation

The Trails System does not exist as its own entity. Trails such as the AT are instead part of the National Park System by operation of the Trails Act.⁶⁷ Even then, though closely entwined with the National Park System, the trails are not merely self-contained footpaths inside the National Parks. Indeed, many paths extend well beyond the National Parks such that the trails are

⁶¹ See *Tunnel Hill State Trail*, ILL. DEP’T NAT. RES., <https://www2.illinois.gov/dnr/Parks/Pages/TunnelHill.aspx> [<https://perma.cc/P94U-ST8E>].

⁶² See *Jacksonville Baldwin State Trail*, JAXPARKS, <https://www.coj.net/departments/parks-and-recreation/recreation-and-community-programming/parks/jacksonville-baldwin-rail-trail.aspx> [<https://perma.cc/MZ97-EN9D>].

⁶³ National Discovery Trails Act, H.R. 726, 116th Cong. § 2 (2019) (“(5) National discovery trails, established under section 5, which— (A) shall be extended, continuous, interstate trails so located as to provide for outstanding outdoor recreation and travel and to connect representative examples of America’s trails and communities;(B) should provide for the conservation and enjoyment of significant natural, cultural, and historic resources associated with each trail and should be so located as to represent metropolitan, urban, rural, and back country regions of the Nation; (C) may be designated on Federal lands and, with the consent of the owner thereof, on any non-Federal lands; and “(D) shall not be construed to modify, enlarge, or diminish any authority of the Federal, State, or local governments to regulate any use of land as provided for by law or regulation.”).

⁶⁴ *Id.* § 2(a)(5)(A).

⁶⁵ *Id.* § 2(b).

⁶⁶ AM. DISCOVERY TRAIL, <https://discoverytrail.org/> [<https://perma.cc/X6DS-K5N7>] (“The American Discovery Trail is a new breed of national trail — part city, part small town, part forest, part mountains, part desert — all in one trail. Its 6,800+ miles of continuous, multi-use trail stretches from Cape Henlopen State Park, Delaware, to Pt. Reyes National Seashore, California. It reaches across America, linking community to community in the first coast to coast, non-motorized trail. The ADT provides trail users the opportunity to journey into the heart of all that is uniquely American — its culture, heritage, landscape and spirit.”).

⁶⁷ “The Appalachian Trail shall be administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture.” 16 U.S.C. § 1244.

closely intertwined with the surrounding land and landowners.⁶⁸ The overarching organizing and coordinating authority over a trail has the authority to enter cooperative agreements with other entities to develop a cohesive trails system. A given trail, such as the AT, may pass through both federal and non-federal lands to form a single, complete system that achieves its goals.⁶⁹

State and local authorities may acquire land or form cooperative agreements with private landowners by donation, direct purchase through donated or appropriated funds, property exchange, or condemnation.⁷⁰ These authorities are required to attempt these processes before the federal government is authorized to intervene.⁷¹ NRTs have further limitations in that they must fall within set administrative boundaries to further their mission to service urban areas.⁷² Particularly for long distance trails, such as the AT, the result is a complicated network of: (1) federal land held by different agencies; (2) state and local entities acquiring trail lands; and (3) negotiated rights-of-way through private lands.⁷³ The AT's unique length, history, and position along the eastern United States means that the AT typifies all of these circumstances.

⁶⁸ “National Recreation Trails (NRTs) are on federal, state, or private lands that are in, or reasonably accessible to, urban areas.” DESANTIS & JOHNSON, *supra* note 33, at 2. “The Appalachian National Scenic Trail is a footpath and corridor of land under the overall administration of the NPS. However, more than 60% of the A.T. passes through lands owned and managed by the U.S. Forest Service and many other federal, state, and local agencies.” *Permits, Fees and Regulations*, APPALACHIAN TRAIL CONSERVANCY, <https://appalachiantrail.org/explore/hike-the-a-t/thru-hiking/permits-regulations/> [<https://perma.cc/X3F2-8KET>]. And “[i]n some places, state governments have taken the lead to assemble trail corridors. Where private lands are involved, nonprofit land trusts have in some cases obtained scenic easements on those lands.” *National Trails System*, U.S. DEP’T INTERIOR, OFFICE CONG. & LEGIS. AFFS. (July 26, 2005), <https://www.doi.gov/ocl/national-trails-system> [<https://perma.cc/NB6Z-C2CR>].

⁶⁹ “The trail follows the spine of the Appalachian Mountains, passing through 14 states and six national parks, eight national forests (which contain 1,015 miles, or 47 percent of the trail), two national wildlife refuges, 67 state-owned land areas (e.g., game lands, forests, or parks), and more than a dozen local municipal watershed properties.” NAT’L PARKS CONSERVATION ASS’N, *supra* note 36.

⁷⁰ 16 U.S.C. § 1246(f)-(g); *see also* DESANTIS & JOHNSON, *supra* note 33.

⁷¹ *Id.* § 1246(d)-(e) (flush text (2)).

⁷² *Id.* § 2(d).

⁷³ “With about one-half of Appalachian Trail lands within its borders, the U.S. Forest Service is also a major manager of the myriad other public agencies—including national parks, national forests, the Tennessee Valley Authority, state parks, state game commissions, state forests, state highway departments, county parks, town parks, and water reservoir authorities—administer portions of the trail corridor.” NAT’L PARKS CONSERVATION ASS’N, *supra* note 35, at 4.

The AT corridor consists of a roughly 1,000-foot wide path.⁷⁴ Across the Appalachian Trail's full length, this amounts to more than 250,000 acres.⁷⁵ Of this stretch, the Park Service has acquired 111,485 acres, the Forest Service owns 56,457 acres, and various state agencies together own 19,493 acres.⁷⁶ Private land ownership represents the balance of the AT corridor (over 62,000 acres or 24.8% of the corridor).⁷⁷ While this acreage is not insubstantial, it does not represent a proportionate length of the Trail; only roughly ten miles of the Trail are not held by a government agency.⁷⁸ Further, these ten miles are host to only about 150 properties.⁷⁹

In the pursuit of preservation, the Trails System supports significant physical interests. The AT is a significant cultural,⁸⁰ historical,⁸¹ and biological resource. The trail is at risk from invasive species,⁸² degradation of air quality,⁸³ threats to water quality,⁸⁴ and ecological impacts from plant and animal poaching.⁸⁵ As Bill Bryson reminds us, even the seemingly immeasurable forests along the AT are not so eternal. The American Chestnut, a towering behemoth of a tree measuring nearly 100 feet tall, once dominated the landscape; now, the species is endangered.⁸⁶ Where the AT

⁷⁴ *Id.* at 1.

⁷⁵ *Id.*

⁷⁶ *Id.* at 5.

⁷⁷ *Id.* at 8 (The National Park Service considers absolute public ownership of the Trail a priority goal, and one within reach).

⁷⁸ *Id.* (“Of the more than 2,100 miles of the A.T., just over 10 miles are not owned by NPS, the Forest Service, or one of the states or municipalities through which the trail passes. Only about 150 properties remain to be acquired on the trail in order to reach the goal.”).

⁷⁹ *Id.*

⁸⁰ *Id.* at 17.

⁸¹ *Id.* at 20.

⁸² *Id.* at 10 (“[I]nvasive non-native species trail wide are multiflora rose (*Rosa multiflora*) and garlic mustard (*Alliaria petiolata*), followed by Japanese honeysuckle (*Lonicera japonica*), Japanese stilt grass (*Microstegium vimineum*), tree of heaven (*Ailanthus altissima*), and crown vetch (*Securigera varia*).”)

⁸³ *Id.* at 13 (“Air quality threats along the Appalachian Trail fall into three main categories: wet and dry acid deposition, ground-level ozone, and visibility reductions due to haze and particulates”).

⁸⁴ *Id.* at 14 (The four primary threats to water quality: “climate change; wet and dry deposition of nitrate, sulfate, and heavy metals; excess nutrients; and erosion”).

⁸⁵ *Id.* at 18 (“Poachers have particularly focused on wild ginseng (*Panax quinquefolius*)... Ornamental plant species that are also targeted by poachers include lady slipper orchids (subfamily *Cypripedioideae*), kidney-leaved twayblade (*Listera smallii*), dwarf violet iris (*Iris verna*), and trillium (*Trillium* spp.). Gray’s lily (*Lilium grayi*)... is also poached. Animals that are known to be illegally harvested along the trail include timber rattlesnakes (*Crotalus horridus*), white-tailed deer (*Odocoileus virginianus*), and black bears (*Ursus americanus*)”).

⁸⁶ BRYSON, *supra* note 3.

might have once been a walk among Chestnut giants, we might be so lucky as to spot a younger, less prominent shoot on the trails.

III. NATIONAL PARK AND FOREST SYSTEMS

In common parlance, the National Forests and the National Parks are functionally the same thing for ordinary recreational uses (hiking, camping, picnics, and the like), and distinct in name only.⁸⁷ It may be that they have different titles because of some accident of American governmental bureaucracy. Or it may be that they are separate because National Forests only include technical forests, while National Parks can include a wider array of ecosystems such as swamps, marshlands, mountain ranges, grassy plains, etc. (including but not limited to ‘forests’). These theories, while reasonable guesses, are ultimately wrong—there is a greater purpose to the statutory designation of these two distinct systems.

The character of the National Forest System and the National Park System are fundamentally different, if ostensibly aligned to maintain a degree of ‘green’ space. Despite being ‘sister’ institutions, the programmatic objectives of the Forest System and the Park System are, as a matter of fact, inapposite to each other.⁸⁸ The National Parks are designed to maintain an untouched, pristine image of the American wilderness.⁸⁹ Meanwhile, the National Forests provide for sustainable development of America’s natural and renewable resources (i.e., trees, lumber).⁹⁰ This is a distinction between the two agencies that the Court’s opinion (from either the majority or the dissent) does not address in any great detail, but clarifies how the *Cowpasture* dispute came to pass.

The Parks System and the Forest System are two federal institutions with seemingly compatible and aspirational objectives but prove to have divergent

⁸⁷ *National Park vs. State Park: Understanding the Difference*, VA. WESLEYAN UNIV., ENV’T STUD. (Jul. 18, 2018), <https://online.vwu.edu/news/environmental-studies/national-park-vs-state-park/> [<https://perma.cc/MEK5-FRVX>] (“Despite the connection many people feel to America’s national parks and forests, visitors may not be aware of the difference between the national park, state park, and national forest systems.”).

⁸⁸ *America’s Public Lands Explained*, U.S. DEPT. INTERIOR (Jun. 13, 2016), <https://doi.gov/blog/americas-public-lands-explained> [<https://perma.cc/TW5H-5AA2>].

⁸⁹ “[T]he fundamental purposes of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same.” Organic Administration Act of 1897, 16 U.S.C. §§ 473-482.

⁹⁰ National Forest Management Act of 2005, 16 U.S.C. § 1600; *see also* KATIE HOOVER & ANNE A. RIDDLE, CONG. RSCH. SERV., R43872, NATIONAL FOREST SYSTEM MANAGEMENT: OVERVIEW, APPROPRIATIONS, AND ISSUES FOR CONGRESS 8 (Sept. 5, 2019).

methods yielding incompatible results. This discussion follows the Department of the Interior's approach and refers to the lands in both institutions as general 'public' lands.⁹¹

Though separate entities, the National Parks and National Forests have an often closely intertwined existence. They share similar management and administrative responsibilities, and sometimes these responsibilities exist over land adjacent to each other. For example, the very first National Forest was the 6,580,920-acre Yellowstone Park Timber and Land Reserve,⁹² adjacent to Yellowstone National Park. And in the *Cowpasture* case alone, we see that the National Trails System Act contemplates that "units" of the Trails System will cross National Forests.⁹³

A. National Forest System

The National Forests formed out of the Organic Act.⁹⁴ The Organic Act in its original passage also enabled timber production while simultaneously protecting watersheds – a foundational component for the National Forests.⁹⁵ To that end, the Organic Act provides that "no national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."⁹⁶

The Atlantic Pipeline would cross the George Washington and Jefferson National Forest.⁹⁷ Incidentally, it would also cross a 0.1-mile segment of the AT.⁹⁸ This transect is almost inevitable: the AT alone crosses eight National Forests for approximately 1,000 total miles.⁹⁹ Per the Forest Service, "[t]he

⁹¹ *America's Public Lands Explained*, *supra* note 88.

⁹² Forest Reserve Act of 1891, P. L. No. 51-561, 26 Stat. 1095.

⁹³ "The Secretary responsible for the administration of any segment of any component of the National Trails System (as determined in a manner consistent with subsection (a)(1) of this section) may also utilize authorities related to units of the national park system or the national forest system, as the case may be, in carrying out his administrative responsibilities for such component." National Trail System Act, 16 U.S.C. § 1246(i).

⁹⁴ Organic Administration Act of 1897, 16 U.S.C. §§ 473-482.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ "Petitioner . . . seeks to construct a natural-gas pipeline across the George Washington National Forest. The proposed route traverses 21 miles of national forests and requires crossing 57 rivers, streams, and lakes within those forests." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1852 (2020) (Sotomayor, J., dissenting).

⁹⁸ *Id.* at 1842.

⁹⁹ NAT'L PARK SERVICE, APPALACHIAN NATIONAL SCENIC TRAIL: 2015 BUSINESS PLAN 18 (2015), https://www.nps.gov/appa/getinvolved/upload/APP_2015_Business_Plan_page_

administering agency is responsible for administration of the entire length of each NSHT as one unit. The managing agency is the agency, landowner, or interest with the authority and/or responsibility for decision making for lands under its jurisdiction.”¹⁰⁰ The Organic Act injects the debated term, “unit,”¹⁰¹ – the source of doubt over what constitutes “land” within the NPS.

This article does not represent the first instance a writer observed a conflation of National Parks and National Forests in common parlance and then endeavored to clarify the differences between the two institutions.¹⁰² The very topic was raised in an article published in 1997 in connection with Denver Law Review’s Symposium on the National Park System.¹⁰³ Indeed, the Department of the Interior¹⁰⁴ and the NPS¹⁰⁵ posted articles in an effort to resolve precisely this question: *Is there a difference?*

A National Forest’s purpose is to provide for “the long-term benefit for present and future generations.”¹⁰⁶ The NFS manages the National Forests by designation from the U.S. Department of Agriculture.¹⁰⁷ Currently, the Forest System consists of 193 million acres: 155 National Forests, twenty National Grasslands, and one National Tallgrass Prairie.¹⁰⁸ From inception, the forests were set aside to “improve and protect the forest within the reservation, or

version.pdf [https://perma.cc/DZC8-VKLM].

¹⁰⁰ ATLANTIC PIPELINE RECORD OF DECISION, *supra* note 22.

¹⁰¹ The statute uses the broader ‘unit’ because the NPS consists of more than just land. The NPS also includes areas of and water, along with various manufactured structures such as monuments, roads, and historic structures. However, this clarification requires an inquiry into Congressional intent and should be avoided under textualist principles.

¹⁰² See, for example, Hannah Featherman, *What Are the Differences Between National Parks and National Forests?*, NAT’L FOREST FOUND. (Mar. 12, 2013), <https://www.nationalforests.org/blog/what-are-the-differences-between-national-parks-and-national-forests> [https://perma.cc/WX36-5PTD]; see also, Jason Barnette, *The Differences Between National Parks and National Forests*, ROAD TRIPS & COFFEE (Jul. 15, 2020), <https://www.roadtripsandcoffee.com/differences-between-national-parks-national-forests> [https://perma.cc/RU38-H96Z].

¹⁰³ See Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625 (1997).

¹⁰⁴ *America’s Public Lands Explained*, *supra* note 88 (defining protected area subcategories as National Wildlife Refuges, National Conservation Areas, National Monuments, Wildernesses, National Historic Sites, National Memorials, National Battlefields, National Recreation Areas, Wild and Scenic Rivers, National Seashores, National Lakeshores and National Trails).

¹⁰⁵ *National Park or National Forest?*, NAT’L PARK SERV. (Aug. 6, 2015), <https://www.nps.gov/grsm/planyourvisit/np-versus-nf.htm> [https://perma.cc/V668-8AXT].

¹⁰⁶ 16 U.S.C. § 1609 (2018).

¹⁰⁷ *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1842 (2020).

¹⁰⁸ Featherman, *supra* note 102.

for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States,”¹⁰⁹ with goals set by the Multiple-Use Sustained-Yield Management Act of 1960.¹¹⁰

Together, this means providing for sustained yields across multiple uses.¹¹¹ “Multiple uses” implies a wide array of permissible activities, from protecting fish and wildlife habitats, providing for outdoor recreation, supporting rangelands for livestock, providing a sustainable supply of timber, protecting watershed health, managing various land designations (such as wilderness areas and national trails), allowing other uses and, notably, enabling mineral and energy development.¹¹² Energy development includes both non-renewable¹¹³ and renewable¹¹⁴ sources. Approximately 3.5 million acres of Forest System land are leased to oil, gas, coal, and geothermal operations.¹¹⁵ Though permitted, the NFS has not approved any solar projects on Forest System land.¹¹⁶

The National Forests are managed as outlets for sustainable economic activity from renewable resources.¹¹⁷ Indeed, their very purpose is “assuring that the [United States] maintains a natural resource conservation posture that will meet the requirements of our people in perpetuity.”¹¹⁸ For example, limitations on timber withdrawals are set to “a quantity which can be removed from such forest annually in perpetuity on a sustained-yield basis.”¹¹⁹ To achieve its objectives, the National Forests are designed to “improve and protect the forest, to secure favorable watershed conditions, and to furnish a continuous supply of timber for the use of citizens of the United States . . . [and] ecological restoration and protection, research and product development, fire hazard reduction, and the maintenance of healthy forests.”¹²⁰

¹⁰⁹ Organic Administration Act of 1897, 16 U.S.C. § 475 (2021).

¹¹⁰ 16 U.S.C. § 528, Pub. L. No. 86-517, 74 Stat. 215.

¹¹¹ HOOVER & RIDDLE, *supra* note 90, at 4.

¹¹² *Id.* at 7-13.

¹¹³ *Id.* at 8 (citing U.S. DEP’T AGRIC., FOREST SERV., FY 2020 BUDGET JUSTIFICATION 73 (Mar. 2019) [<https://perma.cc/88CG-KCRJ>]).

¹¹⁴ See NAT’L RENEWABLE ENERGY LAB., ASSESSING THE POTENTIAL FOR RENEWABLE ENERGY ON NATIONAL FOREST SYSTEM LANDS (Jan. 2005).

¹¹⁵ HOOVER & RIDDLE, *supra* note 90, at 8 (citing U.S. DEP’T AGRIC., FOREST SERVICE, FY 2020 BUDGET JUSTIFICATION 73 (Mar. 2019) [<https://perma.cc/88CG-KCRJ>]).

¹¹⁶ *Id.* at 9.

¹¹⁷ National Forest Management Act of 2005, 16 U.S.C. § 1600(6)

¹¹⁸ 16 U.S.C. § 1600

¹¹⁹ National Forest Management Act of 2005, 16 U.S.C. § 1611(a)

¹²⁰ *About Us*, U.S. DEP’T AGRIC., U.S. FOREST SERV., <https://www.fs.fed.us/forest>

Sustainable development is a trait of the National Forests that is inexplicably lost in the extant discourse. The difference between the NPS and the NFS is not addressed in the *Cowpasture* opinion, briefs, or publications on the case. At most, the NFS is regarded as a villain, a Benedict Arnold to environmentalists.¹²¹ Among the Forest Service's harshest critics was the Fourth Circuit.¹²² But the situation is not so simple. An oil pipeline right-of-way is well within the Forest Service's bailiwick, if only the high threshold in place for such authorization was met,¹²³ such as conformance to soil, water, and wildlife standards,¹²⁴ a review of alternative routes,¹²⁵ and an analysis of environmental consequences.¹²⁶

B. Forest System Land Acquisition

As with any Federal agency, there are many different aspects of the NFS's responsibilities, ranging from the scope in which the agency operates to the nature of its funding sources¹²⁷ to the types of ecosystems it supports,¹²⁸ and to the various remedial projects it pursues (such as hazardous fuel management¹²⁹ for wildfire mitigation). But there is one area in particular which warrants discussion to fully understand *Cowpasture*—land acquisition.¹³⁰ In its earlier incarnations, the Forest Service expanded by

management/aboutus/ [https://perma.cc/3XS8-5ZW9].

¹²¹ See Forest Service Decision on Atlantic Coast Pipeline Puts National Forests at Risk, S. ENV'T L. CTR. (Nov. 17, 2017), <https://www.southernenvironment.org/news/forest-service-decision-on-atlantic-coast-pipeline-puts-national-forests-at/> [https://perma.cc/26TK-XWZ3]. The article notes that the NFS approved the project "despite [the Forest Service's] many unanswered requests."

¹²² "We trust the United States Forest Service to "speak for the trees, for the trees have no tongues." Dr. Seuss, *The Lorax* (1971). A thorough review of the record leads to the necessary conclusion that the Forest Service abdicated its responsibility to preserve national forest resources." *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 183 (4th Cir. 2018).

¹²³ See Robert "Bo" Abrams, *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?*, FLA. A&M U. COLL. L. SCHOLARLY COMMONS 4 (2020).

¹²⁴ Brief in Opposition for Respondents at 9, *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837 (2020) (Nos. 18-1584 and 18-1587).

¹²⁵ *Id.* at 9.

¹²⁶ *Id.*

¹²⁷ *Budget & Performance*, U.S. DEP'T AGRIC., U.S. FOREST SERV., <https://www.fs.usda.gov/about-agency/budget-performance> [https://perma.cc/8K88-76B3].

¹²⁸ 2012 Planning Rule for the National Forest System, 36 C.F.R. § 219.

¹²⁹ See Nicole M. Vaillant & Elizabeth D. Reinhardt, *An Evaluation of the Forest Service Hazardous Fuels Treatment Program—Are We Treating Enough to Promote Resiliency or Reduce Hazard?*, 115 J. FORESTRY 300 (Jul. 2017).

¹³⁰ Weeks Act in 1911, Pub. L. 61-435, 36 Stat. 961; see 16 U.S.C. §§ 516-517.

operation of the Office of the President,¹³¹ but today, designation of new National Forests requires an act of Congress.¹³² The Forest System is analogous to the NPS in this regard; only an act of Congress can establish a new National Park or create a new National Trail.¹³³

The Secretary of Agriculture has the authority to manage the National Forests. This authority includes acquisition of new lands,¹³⁴ typically adjacent land or inholdings, to support the agency's directives to regulate watersheds and support timber production. Inholdings are "lands (primarily private) within the designated boundaries of the national forests (and other NFS units) that are not administered by the [Forest Service] land already contained within a National Forest."¹³⁵ The Secretary of Agriculture may also acquire submarginal lands pursuant to the Bankhead-Jones Farm Tenant Act of 1937.¹³⁶ In conjunction with the Weeks Act,¹³⁷ the Secretary of Agriculture can expand an existing National Forest but cannot create new ones.

With the power to purchase land comes the power to sell land.¹³⁸ This generally means disposing of land that is either "no longer needed for a federal purpose or that might be chiefly valuable for another purpose . . . such as agriculture or mining."¹³⁹ The Secretary of Agriculture may also dispose of land to relieve encroachments,¹⁴⁰ for educational purposes,¹⁴¹ or by Congressional directive.¹⁴² A distinction between resource extraction and resource transfer (such as via pipeline) is instructive to understand *Cowpasture* and how certain land management activities support National Forest purposes.

¹³¹ Federal Land Policy and Management Act of 1976, Act of October 21, 1976 (P.L. 94-579, 43 U.S.C. §§1701 et seq.).

¹³² HOOVER & RIDDLE, *supra* note 90, at 6.

¹³³ National Trail System Act, 16 U.S.C. § 1241(5)(a).

¹³⁴ HOOVER & RIDDLE, *supra* note 90, at 16-17.

¹³⁵ *Id.* at 2 ("Inholdings sometimes pose difficulties for FS land management, because the agency does not regulate their development and use, which may be incompatible with desired uses of the federal lands, and constraints on access across inholdings may limit access to some federal lands.").

¹³⁶ Bankhead-Jones Farm Tenant Act of 1937, 7 U.S.C. §1010; *see id.* (acquisition of "submarginal lands and lands not suitable for cultivation").

¹³⁷ Act of March 1, 1911 (P.L. 61-435 as amended, 16 U.S.C. § 480).

¹³⁸ *Sale of Forest Service Lands*, U.S. FOREST SERV., LANDS & REALTY MGMT., <https://www.fs.fed.us/land/staff/disposal.shtml> [<https://perma.cc/ULV2-Z4P9>].

¹³⁹ HOOVER & RIDDLE, *supra* note 90, at 23.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

Ordinary energy development under the Forest Service’s purview includes extraction and distribution from National Forests. This category includes the authority to issue permits to extract resources from National Forest lands. The Mineral Lands Leasing Act of 1920 granted the specific authority to issue permits for oil, natural gas and coal exploration in National Forests.¹⁴³ This power is used extensively on the order of 5.6 million acres¹⁴⁴ allocated to permitted exploration and an estimated 4,200 wells.¹⁴⁵ However, the latter’s condition is the subject of *Cowpasture*, and one that requires a special use authorization (SUA).¹⁴⁶ SUAs provide third parties with access to NFS lands for various purposes, such as a “rights-of-way (ROW) for the use and occupancy of NFS lands”¹⁴⁷ for “distribution of liquids, gases (with specified exceptions), and solid materials.”¹⁴⁸

There are key differences between National Parks and National Forests—differences that are relevant for a discussion of pipeline construction. First and foremost is that while National Parks are focused on preserving an untouched wilderness,¹⁴⁹ the National Forests are authorized for sustainable “productivity” uses, which might include timber, recreation, grazing, wildlife, and fishing.¹⁵⁰ The National Forests allow for industrial economic activities from renewable resources,¹⁵¹ while the National Parks do not.

IV. INFRASTRUCTURE ON THE NATIONAL TRAILS SYSTEM

Both the NPS and NFS control a significant portion of the National Trails System. They are sister agencies to the extent both manage American public lands, but they do so with different objectives: the NPS for preservation¹⁵² and the NFS for sustainable development.¹⁵³ These differing objectives lead to inconsistent rules over analogous space. And these inconsistencies

¹⁴³ Mineral Leasing Act, 30 U.S.C. § 181 (1920).

¹⁴⁴ HOOVER & RIDDLE, *supra* note 90, at 11.

¹⁴⁵ *Id.*

¹⁴⁶ “Systems and related facilities for generation, transmission, and distribution of electric energy, except that the applicant, in addition to obtaining a Forest Service special use authorization, shall also comply with all applicable requirements of the Federal Energy Regulatory Commission under the Federal Power Act of 1935, as amended, 49 Stat. 838 (16 U.S.C. 791a, *et seq.*)” 36 C.F.R. § 251.53(I)(4).

¹⁴⁷ HOOVER & RIDDLE, *supra* note 90, at 13 (citing the Federal Land Policy and Management Act of 1976 43 U.S.C. § 1761, *et seq.* (codified at 36 C.F.R. § 251 Subpart B)).

¹⁴⁸ *Id.*

¹⁴⁹ National Trail System Act, 16 U.S.C. § 1241(2)(a).

¹⁵⁰ *See* HOOVER & RIDDLE, *supra* note 90, at 11.

¹⁵¹ Forest and Rangeland Renewable Resources Planning Act of 1976, 16 U.S.C. § 36.

¹⁵² 16 U.S.C. § 12412(a)

¹⁵³ National Forest Management Act of 2005, 16 U.S.C. § 1600

naturally lead to clashes over adjacent land and then lawsuits to address utilities that would potentially touch land managed by both agencies. Case in point: the proposed Atlantic pipeline in *Cowpasture* would pass through the Washington and Jefferson National Forest¹⁵⁴ before passing under the Appalachian Trail¹⁵⁵ – a unit of the National Park System.

The first subsection will bring attention to infrastructure in the parks. There is an active billion-dollar backlog in maintenance for infrastructure that supports park activities.¹⁵⁶ This includes infrastructure that supports either immediate activities in the parks (e.g., hiking) or access to the parks (e.g., roads). The first subsection will outline some of the economic benefits that flow from a healthy park system in terms of jobs and dollars.¹⁵⁷ It will also highlight some of the ongoing Congressional efforts to curb deterioration, address future needs, and provide improvements to the National Parks and Trails System infrastructure.¹⁵⁸

The second subsection will address another type of infrastructure class that promotes non-NPS uses in NPS space, including the Trails System. This subsection will turn to the infrastructure within America’s public lands that does *not* support park activities, but rather activities external to the parks. This category takes the form of energy transport infrastructure such as transmission towers, transmission lines, and pipelines. This category was considered in *Cowpasture*.

The proposed Atlantic Pipeline would classify as infrastructure on the AT in Parks Developed Areas.¹⁵⁹ In the interest of providing a complete, critical legal analysis of the physical conditions that underpin the *Cowpasture* dispute, this paper will present an overview of infrastructure along the Trails System. To fully understand the controversy, we must look at the state of infrastructure along the Trails System. This discussion includes the types of structures found along the Trails System. It will assess their relative

¹⁵⁴ U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837 (2020).

¹⁵⁵ *Id.*

¹⁵⁶ AM. SOC. CIVIL ENG'RS, REPORT CARD FOR AM.'S INFRASTRUCTURE: PUBLIC PARKS 91 (2021) [<https://perma.cc/B38X-8F55>].

¹⁵⁷ *See id.*

¹⁵⁸ *Id.* at 91-94.

¹⁵⁹ “Most of these facilities are not related to the Trail . . . Park developed areas that contain utility lines (which include electric powerlines, oil and natural gas pipelines, water lines, sewer lines, and linear communication facilities).” NAT’L PARK SERVICE, APPALACHIAN NATIONAL SCENIC TRAIL RESOURCE MANAGEMENT PLAN, at III-7 (Sept. 2008) [<https://perma.cc/RV7W-8JRQ>].

frequency and impact to determine whether such structures are either commonplace or a quirky anomaly on the AT.

This paper categorizes the Trails System infrastructure into two bundles:¹⁶⁰ (1) parks operations-related infrastructure in Backcountry Recreation Areas¹⁶¹ necessarily on park land; and (2) non-parks-related infrastructure in Park Developed Areas.¹⁶² This framework provides a baseline for understanding and organizing the impacts and needs of different projects with respect to fulfilling a park's purpose (or one external to public lands).

Both project types impact the scenic qualities attributed to isolated trail pathways and to more frequented roadways. While structures like visitor centers, lean-tos, ramps, steps, signs, and bridges altogether enable and augment the user experience, non-parks related infrastructure has the potential to negatively impact the hiking experience—and so is the more contentious classification for the purposes of *Cowpasture*. National Park infrastructure is closely intertwined with the Trails System. The two systems share both physical space (to the extent the trails necessarily snake to some degree through National Parks; the AT alone passes through six National Parks¹⁶³) and administrative/managerial resources (to the extent the NPS is the designated administrator for the majority of the Trails System).¹⁶⁴

¹⁶⁰ A third classification of management area (Agricultural Area) is used primarily for agricultural purposes and is not discussed at length here. For further information, see *id.*

¹⁶¹ "This area includes all Appalachian Trail Park Office lands that contribute to providing a backcountry recreation experience Approximately 96% of Appalachian Trail Park Office lands fall into this category." *Id.*

¹⁶² *Id.*

¹⁶³ NAT'L PARKS CONSERVATION ASS'N, *supra* note 35, at 1.

¹⁶⁴ "The National Park Service administers 21; the Bureau of Land Management administers one; and the National Park Service and Bureau of Land Management jointly administer two. The U.S. Forest Service administers six." *National Trails System Act Legislation*, NAT'L PARK SERVICE, <https://www.nps.gov/subjects/nationaltrailssystem/national-trails-system-act-legislation.htm> [<https://perma.cc/DQB6-YXBA>].

A. *National Parks Infrastructure*

The country's most astounding natural features should be accessible to all. There is an American promise of an egalitarian¹⁶⁵ and accessible¹⁶⁶ character to these spaces, within reason. The Appalachian Trail, due in large part to its geographic position in the United States, "provides solitude, quiet, and a wilderness-like experience that is accessible to millions of residents on the Eastern Seaboard."¹⁶⁷ But the parks are not living up to their promise. Instead, visitors face areas that are "untenable"¹⁶⁸ for any ordinary use. This condition is symptomatic of societal disregard¹⁶⁹ for public lands to the point of disrepair.¹⁷⁰

Infrastructure in the National Parks and along the Trails System is degrading.¹⁷¹ For those who make frequent use of these resources, the degradation has become so constant for so long that the decrepit and crumbling conditions have become a tragic element of a park's fallen charms.¹⁷² It is representative of a new status quo and indicative of a natural history that is little more than a forgotten afterthought for most of society.

¹⁶⁵ "National parks are inherently egalitarian in their ideal: They belong to all of us. The nation and all its citizens, not just wealthy landowners, hold title to more than 400 places that represent our beauty, our culture, our history and diversity, our failures and successes." See Mackenzie Warren, *Our National Parks Must Tell the Whole Story*, USA TODAY (Jun. 7, 2017), <https://www.usatoday.com/story/news/nation/2017/06/08/our-national-parks-must-tell-whole-story/379687001/> [<https://perma.cc/HLE6-GZFE>].

¹⁶⁶ A key initiative for the National Parks Service in its #RecreateResponsibly program is to "[b]e an active part of making our nation's parks and public lands safe and welcoming for all identities and abilities." *Plan Your Visit*, NAT'L PARK SERVICE, <https://www.nps.gov/planyourvisit/recreate-responsibly.htm> [<https://perma.cc/Q8Q6-NG6H>].

¹⁶⁷ NAT'L PARKS CONSERVATION ASS'N, *supra* note 35.

¹⁶⁸ J. Weston Phippen, *The Terrible State of Our National Parks - in Photos*, OUTSIDE ONLINE (Jul. 5, 2018), <https://www.outsideonline.com/2322611/national-parks-repair-maintenance-backlog-photos> [<https://perma.cc/HD4F-6UPQ>].

¹⁶⁹ "The few bright spots are unfortunately significantly outweighed by the deliberate disregard for the future of our public lands." *The Undoing of our Public Lands and National Parks*, NAT'L PARKS CONSERVATION ASS'N (Jan. 21, 2021), <https://www.npca.org/articles/2171-the-undoing-of-our-public-lands-and-national-parks> [<https://perma.cc/J7TY-KFEK>].

¹⁷⁰ See AM. SOC. CIVIL ENG'RS, *supra* note 156.

¹⁷¹ See *id.*

¹⁷² The National Parks' popularity creates a corresponding need to manage human waste. The volume created has been called an "open sewer" and a "stinking problem." See Charlotte Simmonds et al., *Crisis in Our National Parks: How Tourists are Loving Nature to Death*, THE GUARDIAN (Nov. 20, 2018), <https://www.theguardian.com/environment/2018/nov/20/national-parks-america-overcrowding-crisis-tourism-visitation-solutions> [<https://perma.cc/R2RZ-TJCE>].

The result is an experience of traversing crumbling roadways, akin to wandering among Roman ruins or Incan stonework.

The Park Service maintains more than “75,000 constructed assets,”¹⁷³ including many shared by the Trails System. There are “260 overnight shelters, 400 parking areas, 1,200 miles of NPS-managed boundary, 200 maintained landscapes,” and other assets on and along the AT.¹⁷⁴ The NPS manages the funds allocated to providing maintenance and capital improvements to the infrastructure in the parks and along the trails,¹⁷⁵ but is struggling in this task.¹⁷⁶

The NPS struggles due to the current funding scenario and a backlog of deferred maintenance that is only increasing over time.¹⁷⁷ The 2021 Infrastructure Report Card gave the Public Parks a D+ grade.¹⁷⁸ The National Park System faces a \$12 billion backlog in deferred maintenance projects and capital improvements, including \$5.77 billion allocated to “wastewater and drinking water systems, dams, utility systems, and other non-surface transportation projects.”¹⁷⁹ This backlog increased by 9% over the past decade.¹⁸⁰ Approximately half of the backlog comes from needed repairs to the existing transportation infrastructure,¹⁸¹ specifically roads, bridges, tunnels, and parking.

The backlog includes maintenance and repairs to roughly 17,000 miles of trails in the National Parks.¹⁸² The Forest System bears a similar burden. The Forest System Trails Stewardship Act finds that there is a backlog in \$314 million in trail maintenance¹⁸³ and a \$210 million backlog in annual

¹⁷³ AM. SOC. CIVIL ENG'RS, *supra* note 156.

¹⁷⁴ NAT'L PARK SERVICE, *supra* note 99, at 18.

¹⁷⁵ See AM. SOC. CIVIL ENG'RS, *supra* note 156.

¹⁷⁶ “Meanwhile, limited space in urban areas is causing local governments, utilities, and nonprofits to be more creative by building parks projects that provide mutually beneficial functions, such as public access spaces that also serve as flood control.” *Id.* at 91.

¹⁷⁷ “Over the past decade, deteriorating facilities, an increased number of assets, and resource constraints resulted in a 9% growth in the deferred maintenance backlog.” *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ There is “\$11.92 billion of deferred maintenance, including \$6.15 billion in bridges, tunnels, and paved parking areas and roadways, and \$5.77 billion in wastewater and drinking water systems, dams, utility systems, and other non-surface transportation projects.” *Id.*

¹⁸² David L. Bernhardt, U.S. Secretary of the Interior, *In Case You Missed It: Constructive Collaboration: Improving Infrastructure at Our National Parks*, WASH. TIMES (Nov. 21, 2019) <https://www.doi.gov/pressreleases/case-you-missed-it-constructive-collaboration-improving-infrastructure-our-national> [<https://perma.cc/T8WV-93NX>]

¹⁸³ National Forest System Trails Stewardship Act.. Pub. L. No. 114-245, 130 Stat. 990

maintenance, capital improvements and operations.¹⁸⁴ “As of 2018, 193,138 miles of trails on federal lands have an estimated \$886 million maintenance backlog.”¹⁸⁵ These conditions are unfortunate because there are real economic benefits to the country’s parks and trails system in terms of interest measured in visitors and in jobs translating to both employment and dollars generated. The NPS’s 419 parks attracted 327 million visitors¹⁸⁶ in 2019 and 237 million visitors in 2020 (an annual decrease during the height of the COVID-19 pandemic) while State Parks attracted 807 million visitors¹⁸⁷ in 2017. Golden Gate National Recreation Area, Blue Ridge Parkway and the Great Smoky Mountains National Park alone welcomed approximately 40.6 million visitors in 2020.¹⁸⁸

This apparent interest in America’s public lands is significant in terms of dollar value. Economic benefits accrue directly to the parks and the ‘gateway communities’ that lie within sixty miles of the parks.¹⁸⁹ In 2017, the National Parks generated \$887 billion supporting 7.6 million jobs.¹⁹⁰ The National Park System generated more than 300 million visitors per year in 2018, supporting \$40 billion in direct economic impact and 329,000 non-Parks jobs (hotels, restaurants, transportation, and recreation).¹⁹¹ That number increased in 2019 to 340,500 jobs.¹⁹²

Reports also indicate that “[i]nvesting in the maintenance of our national parks will likely create more than 110,000 infrastructure jobs.”¹⁹³ In addition

(identifying 15 priority areas for improvement).

¹⁸⁴ *Id.*

¹⁸⁵ *Addressing the Maintenance Backlog on Public Lands*, AM. HIKING SOC., <https://americanhiking.org/advocacy/addressing-the-maintenance-backlog-on-public-lands/> [<https://perma.cc/LBY6-8W8D>].

¹⁸⁶ *National Park Visitation Tops 327 Million in 2019*, NAT’L PARK SERVICE (Feb. 27, 2020), <https://www.nps.gov/orgs/1207/2019-visitation-numbers.htm> [<https://perma.cc/L9C8-F6AA>].

¹⁸⁷ *Id.*

¹⁸⁸ *National Parks Hosted 237 Million Visitors in 2020*, NAT’L PARK SERVICE (Feb. 25, 2021), <https://www.nps.gov/orgs/1207/02-25-21-national-parks-hosted-237-million-visitors-in-2020.htm> [<https://perma.cc/63B2-UKS6>].

¹⁸⁹ AM. SOC. CIVIL ENG’RS, *supra* note 156.

¹⁹⁰ *Id.*

¹⁹¹ Bernhardt, *supra* note 182.

¹⁹² AM. SOC. CIVIL ENG’RS, *supra* note 156.

¹⁹³ David LaBarre, *Repairing our National Parks and the Implications of the Great American Outdoors Act*, WAKE FOREST L. REV. BLOG (Sept. 29, 2020), <http://wakeforestlawreview.com/2020/09/repairing-our-national-parks-and-the-implications-of-the-great-american-outdoors-act/> [<https://perma.cc/SPY9-VHN4>] (citing CADMUS GRP., *Restoring Parks, Creating Jobs: How Infrastructure Restoration in the National Park System Can Create or Support Jobs* (Nov. 2018),

to the direct economic impact and jobs benefits, the parks help sustain the value of urban and semi-urban spaces.¹⁹⁴ Public lands provide natural processing for combined sewer overflows (CSOs),¹⁹⁵ increase property values by proximity,¹⁹⁶ insulate drinking water from pollution,¹⁹⁷ provide natural buffers from floods,¹⁹⁸ and support biodiversity maintaining habitat for wild flora and fauna.¹⁹⁹

Ordinary funding for park maintenance comes from mandatory allocations²⁰⁰ and fees²⁰¹ and discretionary appropriations.²⁰² The contributions of both fall short of what is needed, and Congress is taking note. Beginning in 2021, the Great American Outdoors Act will inject “as much as \$9.5 billion toward a National Park System backlog in deferred maintenance,”²⁰³ from “unobligated federal mineral revenues”²⁰⁴ and is set aside for capital improvements. Non-transportation projects could include remodeled buildings, water systems, expanded parking, revamped campgrounds and employee housing, with an emphasis on addressing the maintenance backlog.²⁰⁵ Funding through the Great America Outdoor Act will alleviate much of the maintenance backlog and programmatic struggles the National Parks face to fulfill its mission.

The Great America Outdoors Act notwithstanding, the administrative and funding scheme results in a shortfall in funding requirements for infrastructure supporting recreational uses in the National Park System. Meanwhile, *Cowpasture* expands park access for infrastructure along the Trails System to support non-recreational activities (purposes which run afoul of the NPS’s mission to preserve American outdoor public spaces). While National Park infrastructure is undergoing a period of contraction and deterioration, non-parks infrastructure is undergoing a period of expansion.

PEW-Jobs-Analysis_07122019.pdf [<https://perma.cc/TSS3-ZR43>]).

¹⁹⁴ AM. SOC. CIVIL ENG’RS, *supra* note 156, at 95.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 93.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Timothy Puko, *From Yellowstone to Yosemite, National Parks to Get Long-Awaited Overhaul*, WALL ST. J. (Aug. 4, 2020), www.wsj.com/articles/from-yellowstone-to-yosemite-national-parks-to-get-long-awaited-overhaul-11596533401 [perma.cc/Y9WU-XW8V].

²⁰⁴ AM. SOC. CIVIL ENG’RS, *supra* note 156.

²⁰⁵ *Great America Outdoors Act*, NAT’L PARKS SERVICE, <https://www.nps.gov/subjects/legal/great-american-outdoors-act.htm> [<https://perma.cc/BB2Q-3ZX5>].

*B. Non-Parks Infrastructure on Park Developed Areas
Along the Trails System*

There is a significant infrastructure presence in the National Parks, with dozens of utility crossings intersecting the AT. The non-parks related infrastructure in the parks is already quite extensive and expanding.²⁰⁶ This discussion of non-parks infrastructure take a more granular look at infrastructure that does not support park activities along the Trails System in Park Developed Areas,²⁰⁷ projects with purposes that are external to the Trails System and the National Parks. That means energy transport infrastructure in the form of utility crossings.²⁰⁸ It also means water and sewer lines.²⁰⁹ Non-parks infrastructure in Park Developed Areas impact viewsheds, soundscapes, ecological systems and cultural resources²¹⁰ along the AT, and this category of infrastructure in the parks was the focal point of *Cowpasture*.²¹¹

Argonne National Laboratory conducted a census of infrastructure crossings on Federal lands in the Trails System in the form of utility crossings.²¹² This paper will mirror the breakdown found in that study. These fall under three categories of utility crossings: (1) electrical transmission lines; (2) electrical transmission towers; and (3) oil and gas pipelines.²¹³ Utility crossings and their impact are measured in terms of: (1) actual

²⁰⁶ See *supra* Section IV(A).

²⁰⁷ “Park developed areas that contain utility lines (which include electric powerlines, oil and natural gas pipelines, water lines, sewer lines, and linear communication facilities) are depicted with a 100’ right-of-way (50’ either side of centerline).” NAT’L PARK SERVICE, *supra* note 159, at III-7.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ NAT’L PARK SERVICE, FOUNDATION DOCUMENT: APPALACHIAN NATIONAL SCENIC TRAIL 11 (Dec. 2014) (“Reacting proactively to external threats associated with development, power infrastructure, and industrial operations. The Trail is within a day’s drive of two-thirds of the population of the United States. The eastern seaboard continues to grow, as does development and the desire for power and connectivity, resulting in more infrastructure—wind turbines, powerlines, pipelines, and wider roads. These trends create major impacts on Trail viewsheds, soundscapes, ecological systems, and cultural resources. The geographic position and length and width of the Trail make it especially vulnerable to fragmentation and degradation from development. For example, in many areas, the Trail’s protected corridor is less than 1,000 feet.”) [<https://perma.cc/3KX7-BGUS>].

²¹¹ U.S. Forest Serv. v. Cowpasture River Pres. Ass’n, 140 S. Ct. 1837 (2020).

²¹² JAMES A. KUIPER ET AL., ARGONNE NAT’L LAB., ELECTRICITY TRANSMISSION, PIPELINES AND NATIONAL TRAILS (Mar. 25, 2014).

²¹³ *Id.*

crossings with trails; (2) line proximity to trails; and (3) the frequency of the crossings per unit of trail distance.²¹⁴

Electric transmission lines and oil pipelines have different statutes that govern their installation. The Energy Policy Act of 2005²¹⁵ requires the designation of “energy corridors” on federal lands for the purposes of providing oil, gas, and hydrogen pipelines and for electrical transmission lines. These corridor designations are subject to environmental reviews,²¹⁶ such as scenic impacts relevant to the Trails System. Meanwhile, one act expressly authorizes electric line installations through National Parks, in addition to telecommunication lines and water utilities.²¹⁷

There are 1,328 national trail crossings with high-voltage transmission lines in addition to 168 planned crossings.²¹⁸ In some instances, single trails have hundreds of intersections, while others have at least ten.²¹⁹ On the AT alone, there are “700 road crossings, 190-plus major power line or pipeline crossings, and over 30 railroad crossings.”²²⁰ Per the 2014 report from Argonne National Laboratory, there are 116,500 miles of existing transmission lines.²²¹ There are also 24,800 miles of planned high-level transmission lines.²²²

There are numerous points where these lines intersect with the Trails System. However, there is also a degree of error built into Argonne National Laboratory’s survey that translates to uncertainty with respect to the actual impact on the Trails System. Specifically, “the position of fully 77% of these transmission lines cannot be verified to within 1 mile of their mapped locations . . . [and only] about 7% of the lines are mapped to a level (within

²¹⁴ See *id.*, at 41.

²¹⁵ Energy Policy Act of 1992, 42 U.S.C. § 13201

²¹⁶ Energy Policy Act of 1992, 42 U.S.C. § 13201 Subsection 368(2).

²¹⁷ See 54 U.S.C. § 100902 (Rights of way for public utilities and power and communication facilities).

²¹⁸ KUIPER ET AL., *supra* note 40, at 41.

²¹⁹ “Trails with large numbers of existing crossings include the North Country NST (207), the Potomac Heritage NHT (250), the Trail of Tears NHT (158), and the Washington-Rochambeau Revolutionary Route NHT (130). Eight of the trails have at least 10 planned crossings, including the Appalachian NHT (12), the El Camino Real de Los Tejas NHT (16), the Mormon Pioneer NHT (11), the North Country NHT (11), the Potomac Heritage NHT (27), the Star-Spangled Banner NHT (12), the Trail of Tears NHT (26), and the Washington-Rochambeau Revolutionary Route NHT (14).” *Id.*

²²⁰ NAT’L PARK SERVICE, *supra* note 99, at 28.

²²¹ KUIPER ET AL., *supra* note 40, at 33.

²²² *Id.*

165 feet) that would allow specific planned trail crossing locations to be accurately determined.”²²³

Further affecting the potential impact is the relative frequency with which crossings occur—it is not enough to simply observe a transmission line to gauge its impact. The problem is compounded when those observations continually repeat. This is notable in the congested Northeast corridor where “the Washington-Rochambeau Revolutionary Route NHT, the New England NST, and the Potomac Heritage NHT each average less than 10 miles between existing transmission line crossings.”²²⁴

A specific fraction of these crossings is located on federal land. As of 2014, there were 101 existing electrical transmission lines intersecting with the Trails System *on federal land*, in addition to twenty proposed intersections.²²⁵ Separate from actual crossings, 9,999 miles of existing lines and 1,234 miles of planned electric transmission lines are within 2.5 miles of a national trail, with even greater numbers lying within 7.5 miles of national trails.²²⁶

Connecting the miles of transmission lines are transmission towers. Unlike the pipeline discussed in the *Cowpasture* case, transmission lines are above-ground. The character of the transmission tower’s scenic intrusion depends on the type of tower, its proximity to a trail path and the surrounding environmental conditions.²²⁷ The three primary types of transmission towers are: (1) lattice; (2) H-Frame; and (3) Monopole.²²⁸ Five hundred-kV lattice transmission towers are observed to be visible up to the naked eye at distances up to ten miles in Western states.²²⁹ These observable distances decrease in the Midwestern and Eastern state due to high humidity and air pollution.²³⁰ Nonetheless, the visual impact is exacerbated by the swaths of cleared land needed to make way for the towers via rights-of-way and the possibility that the towers can extend above the tree-line.²³¹

²²³ *Id.* at 32.

²²⁴ *Id.* at 42.

²²⁵ *Id.* at 41.

²²⁶ *Id.*

²²⁷ *See generally id.*

²²⁸ *Id.* at 6.

²²⁹ *Id.*

²³⁰ “Visibility distances are likely shorter in the Midwestern and eastern states because of higher average humidity and poorer average air quality.” *Id.*

²³¹ “Visible access roads and cleared ROWs in forested landscapes can greatly increase the visibility of transmission facilities. At long distances, a cleared ROW may be visible even though the towers are not.” *Id.*

An analysis about transmission tower visual impacts in the United States' western landscapes gauged the distance and conditions where towers were visible and eventually occupied the visual attention.²³² In its report, the Argonne National Laboratory, under the Department of Energy's management, recommended that "the limit of visibility for casual observers be used as a minimum distance for visual impact assessments,"²³³ a distance of approximately 3.5 miles from a tower to a trail, and greater when factoring in land to be cleared for the infrastructure.²³⁴

In addition to electrical transmission, the public lands support oil and gas pipelines on Federal, State and private lands.²³⁵ The NPS is empowered to issue rights-of-way for various infrastructure uses, including power and water, but specifically excludes pipelines.²³⁶ Keeping in mind that each additional encroachment drives the parks farther from the naturalistic ideal the parks were supposed to encapsulate, it is appropriate that there is one gatekeeper to appropriately balance those intrusions on park lands while furthering non-parks infrastructure.

The Atlantic Pipeline would potentially cross the AT along a 0.1-mile segment (meaning it would mirror the AT's path for approximately a tenth of a mile, and not merely cross it for the perhaps six-foot width of the AT). Before anyone dismisses the benign value of a 0.1-mile pipe segment, the impact is substantial.²³⁷

The proposed pipeline is not an innocuous transect of pipe running beneath the AT. Rather, it is an imposing and intrusive crossing.²³⁸ The Atlantic Pipeline would cross the AT no less than thirty-four times.²³⁹ The project entails a route that "traverses 21 miles of national forests and requires

²³² *Id.* at 24.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *See id.*

²³⁶ 54 U.S.C. § 100902.

²³⁷ The plan calls for "clearing trees and other vegetation from a 125-foot right of way . . . through the national forests, digging a trench to bury the pipeline, and blasting and flattening ridgelines in mountainous terrains." Construction noise will affect Appalachian Trail use 24 hours a day. Atlantic's machinery (including the artificial lights required to work all night) will dim the stars visible from the Trail. As relevant here, at one stretch the pipeline would cross the Trail.

U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837 (2020) (Sotomayor, J., dissenting) (internal citations omitted).

²³⁸ *Id.*

²³⁹ Hansman, *supra* note 7.

crossing 57 rivers, streams, and lakes within those forests.”²⁴⁰ This proposed path also brings with it excavation and demolition such that immediate construction activities would also affect the AT from boring operations resulting in noise and “night-sky impacts.”²⁴¹

A 0.1-mile of pipe is not merely 0.1 miles of pipe drilled underground. Like electric transmission lines, a pipeline requires clearing large swaths of land.²⁴² The Cornell Legal Information Institute notes that the pipeline would necessitate “clearing trees in a 125-foot right-of-way through the national forests [and] blasting mountain ridgelines to flatten the terrain.”²⁴³

The current infrastructure is worth mentioning since existing easements allow for new pipeline construction without any supplemental permitting under the Leasing Act.²⁴⁴ In one such case, a Transco pipeline crossed the AT on Pennsylvania game lands.²⁴⁵ In another example, East Tennessee Natural Gas Company’s Patriot Project crossed the AT within an existing easement, so new authorization under MLA was not needed.²⁴⁶ There are “55 existing oil and gas pipelines across the AT, at 34 locations (pipelines are often co-located). Of these thirty-four crossing locations, fifteen are within parcels owned by state or private landowners.”²⁴⁷ The remaining nineteen cross federal land.²⁴⁸

The 2014 report from Argonne National Laboratory identifies two planned crude oil pipelines and nine natural gas pipelines in the Energy Policy Act of 1992 § 368(b) states (east of MT, WY, CO and NM), excluding the Gulf of Mexico.²⁴⁹ During design and throughout the course of litigation, the Atlantic Pipeline falls under this type of ‘planned’ category, but it is no

²⁴⁰ *Cowpasture*, 140 S. Ct. at 1851 (Sotomayor, J., dissenting).

²⁴¹ Petition for Writ of Certiorari at 9, *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837 (Nos. 18-1584 and 18-1587).

²⁴² As noted, the Atlantic Pipeline would require “clearing trees and other vegetation from a 125-foot right of way (reduced to 75 feet in wetlands) through the national forests.” *Cowpasture*, 140 S. Ct. at 1837 (J. Sotomayor, dissenting).

²⁴³ Hansman, *supra* note 7.

²⁴⁴ “Because the federal government took ownership subject to pre-existing pipeline easements, no new authorizations under the MLA were required.” Brief in Opposition for Respondents at 15, *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837 (2020) (Nos. 18-1584 and 18-1587).

²⁴⁵ *Id.* (citing Penn. State Game Comm’n, *Right-of-Way Agreement Adds Acreage to Game Lands* (July 19, 2016) <http://bit.ly/PGCROWpress> [<https://perma.cc/DMV7-6QE6>]).

²⁴⁶ *Id.* at 17.

²⁴⁷ *Id.* at 14-15.

²⁴⁸ *Id.*

²⁴⁹ KUIPER ET AL., *supra* note 40, at 37 fig.5.6; see Energy Policy Act of 1992, *supra* note 216.

longer either “planned” or “existing” due to the project’s cancellation.²⁵⁰ Relevant for the purposes of the *Cowpasture* discussion are planned installations such as the PennEast pipeline the Federal Energy Regulatory Commission (FERC) approved to cross the AT in 2017.²⁵¹ A second notable example of the planned pipeline category is the TransCanada Keystone Pipeline, a planned 36-inch pipeline across South Dakota, Nebraska, Oklahoma and Texas,²⁵² since canceled by President Joe Biden.²⁵³

C. Summary

Though closely related in common parlance (to the extent both agencies maintain American public lands), the NPS and the NFS are separate institutions with different programmatic guidelines. The former emphasizes conservation while the latter emphasizes sustainable development. Both are valid objectives but are necessarily achieved with different processes. More to the point, the Forest Service enables development of domestic energy capacity while the Parks Service does not. There are two categories of infrastructure in the parks: parks use oriented and non-parks use oriented. Infrastructure for parks use is significant in scope but deteriorating. Infrastructure for purposes external to American public lands comes with significant impacts to the user experience, including visual impacts and harm to natural systems, including degradation of sensitive ecosystems.

This section examined the type of infrastructure raised in *Cowpasture*, an oil pipeline crossing a National Trail, which is not uncommon: there are thirty-four trail crossings of oil and gas pipelines along the AT on private, state, and federal lands. But even if such crossings are not unheard of, their impact is still very real, and their mere existence does not grandfather in a right to construct additional crossings. With this understanding of the Parks Service and the Forest Service, and the frequency of finding existing utility

²⁵⁰ Adam Forester Griffin, *Post-Decision Review: United States Forest Service v. Cowpasture River Preservation Association*, FEDERALIST SOC’Y (Jun. 7, 2020), <https://fedsoc.org/commentary/fedsoc-blog/post-decision-review-united-states-forest-service-v-cowpasture-river-preservation-association> [<https://perma.cc/78P3-GAU8>].

²⁵¹*Id.* at 16.

²⁵² KUIPER ET AL., *supra* note 40, at 37 fig.5.6.

²⁵³ Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021); *see also* Ankit Ajmera, *Developer Officially Cancels Keystone XL Pipeline Project Blocked by Biden*, REUTERS (Jun. 10, 2021), <https://www.reuters.com/business/energy/tc-energy-terminates-keystone-xl-pipeline-project-2021-06-09/> [<https://perma.cc/3RZK-44WW>]; *see also* Matthew Brown, *Keystone Pipeline Canceled After Biden Administration Blocks Permit*, L.A. TIMES (Jun. 9, 2021), <https://www.latimes.com/world-nation/story/2021-06-09/keystone-pipeline-canceled-after-biden-administration-blocks-permit> [<https://perma.cc/KW9R-RZXE>].

crossings over land held by both institutions, we turn to a discussion of the *Cowpasture* opinion.

V. COWPASTURE: CONGRESSIONAL INTENT

The previous sections first provided an overview of the historical and legislative history underlying the National Trails System, and then inquired into the state of infrastructure in the National Parks with an emphasis on the types and frequency of energy infrastructure on the National Trail System on Federal Lands. The article highlighted the different purposes between the National Parks and the National Forests—preservation versus sustainable development.²⁵⁴ That difference in purpose proved to be an enabling mechanism for the right-of-way that the NFS issued and became central to the *Cowpasture* dispute. The article then noted the marked disrepair of infrastructure in the National Parks that fulfill those Parks' purpose while conversely observing the relative frequency with which energy infrastructure is observed along the Trails Systems.

The following section will apply the observations from the prior two sections to the *Cowpasture* opinion by asking whether Justice Thomas's textualist approach is consistent with the Leasing Act's Congressional intent. To do so, this section first sets forth Congressional intent by reference to legislative history.

It is evident from the exclusionary language that Congress intended to support pro-environmental initiatives which, as noted in the Trails Act, were to "provide for maximum outdoor recreation potential and for the conservation and enjoyment" of "nationally significant scenic, historic, natural, or cultural qualities."²⁵⁵ The Congressional record includes strict prohibitions against intrusions on the National Park System. A Conference Committee authorizing the amendments indicated that the Leasing Act "is not intended to grant rights-of-way through the National Park System."²⁵⁶ The Conference Committee subsequently confirmed the three exclusions carved out of the Leasing Act: "the National Park System, the Outer Continental Shelf, and Indian lands."²⁵⁷

Furthermore, the Leasing Act itself provides additional requirements to meet environmental protection and that where a "new project which *may* have a significant impact on the environment, shall require the applicant to submit

²⁵⁴ *Supra* Section III.

²⁵⁵ 16 U.S.C. § 1242

²⁵⁶ S. Rep. No. 93-207, at 29 (1973).

²⁵⁷ H.R. Conf. Rep. No. 93-264, at 21 (1973).

a plan of construction, operation and rehabilitation for such right-of-way permit.”²⁵⁸ This is an indication that Congress intended the Leasing Act to act in conjunction with other statutes as part of a conversation-oriented land management scheme. The Leasing Act contains an explicit exclusion of the National Park System, and that exclusion is supported by the legislative history. Despite the seemingly apparent consideration of preservation via the Trails System when passing the Leasing Act, the Supreme Court erred in favor of energy infrastructure development.

The Supreme Court reversed the Fourth Circuit’s decision and determined that the Forest Service *could* grant rights-of-way across the AT in the Washington-Jefferson National Forest.²⁵⁹ Justice Thomas turned to classic property law in his textual analysis to generate a formalistic opinion.²⁶⁰ His opinion sets forth that (1) there is a common law difference between an easement and ownership; (2) the Court requires explicit statutory language transferring land between agencies, and without explicit language, the Forest Service’s ownership over Federal lands for the purposes of issuing rights-of-way is unaltered by the Act’s exclusion of the National Park System; (3) the Trails Act contains language limiting its purpose to trail administration only; and (4) the dissent’s logic is contrary to Congress’s intent.

The opinion is not without public criticism, and the result is a form of politicized governance that ignores congressional intent (acceptable under textualist approaches) as *Cowpasture* nonetheless deviates from normative positions set forth in statutory language and regulatory history.²⁶¹ Though the Court is true to Justice Thomas’ textualist reasoning, the result lays bare a degree of politics involved with the decision-making process; the NFS grants of the right-of-way permit arose out of a shift in priorities due to new appointees in NFS leadership by the Trump administration.²⁶² The situation

²⁵⁸ 30 U.S.C. § 185(h)(2)

²⁵⁹ U.S. Forest Serv. v. Cowpasture River Pres. Ass’n, 140 S. Ct. 1837, 1841 (2020).

²⁶⁰ Indeed, Justice Thomas elects to view the matter “in light of basic property law principles.” *Id.* at 1846.

²⁶¹ The Fourth Circuit points out that “[n]otwithstanding the Forest Service’s statements of purpose and need in the [Record of Decision], in its briefing and at oral argument the Forest Service attempted to recharacterize the purpose of the amendments as ‘to relax thirteen planning standards just enough to ‘authorize [Atlantic] to use and occupy [National Forest System] lands for the [ACP] Project’ consistent with the forest plans.’” *Cowpasture River Pres. Ass’n v. Forest Serv.*, 911 F.3d 150, 163 (4th Cir. 2018).

²⁶² Mark Hand, *Trump Appointees Approve Two Major Pipelines to Transport Fracked Gas*, THINKPROGRESS (Oct. 16, 2017), <https://archive.thinkprogress.org/ferc-commissioner-dissents-33ed185fed9d/> [<https://perma.cc/TBL5-9623>] (“President Donald Trump’s two appointees to the Federal Energy Regulatory Commission (FERC) voted late Friday to

becomes about the sidestepping and politicization of the process instead of authority over the permit application and (disregard of) the review process.

Commentators note that Justice Thomas's opinion bulldozes environmental protections in favor of deregulation and expanded power to political appointees.²⁶³ The politics involved are not lost on those outside the federal government: "Dominion has clearly benefited from an administration that's keen to give energy companies anything they want without regard for what the rule says," says DJ Gerken, Program Director of the Southern Environmental Law Center, who argued the case.²⁶⁴ The federal government owns the land and empowers one agency or another (in this case, the NFS) to grant certain land benefits (i.e., easements) to private entities, but without the finicky and expensive burdens of legal ownership. A private actor thus benefits from the land but does not have to pay the landowner compensation for the land beyond permit fees.

The exclusionary language is less an overexpansion of the NPS' authority and more an explicit limitation on the powers available to other agencies by the Mineral Leasing Act. By declining to 'expand' the National Park Service's ability to administer lands under its control, the Supreme Court 'expands' the ability for other agencies to encroach on those same National Park lands (in this case, via the Forest Service).²⁶⁵ There is a point, however, that was not considered by Congress in 1970 – the changing character of land ownership.

The passage of the Leasing Act faced a land-holding scheme which was, if anything, more complex than that observed today. A 1970 memorandum details that "significant portions of the Appalachian National Scenic Trail traverse lands under the separate administrative jurisdictions of the Park Service and the Forest Service."²⁶⁶ The Petitioners noted that, in 1966 (seven years before the Leasing Act's amendment), 43% of the Trail crossed private land while 23% crossed State Land and only 34% crossed Federal Land, with 507 miles in National Forests and 172 miles in National Parks. As noted

approve both the Atlantic Coast Pipeline and the Mountain Valley Pipeline").

²⁶³ Hansman, *supra* note 7.

²⁶⁴ *Id.*

²⁶⁵ This reasoning potentially opens the National Parks to appointees in other agencies acting through the Mineral Leasing Act – appointees who may not see conservation as a mandate. The National Parks System would then be vulnerable to any justified encroachment on public lands. The Federal Government may limit uses which may harm the Trails System's integrity with one hand, and then with the other, issue rights-of-way which enable damaging energy infrastructure development.

²⁶⁶ U.S. DEP'T OF AGRIC., *Forest Service Manual* 1531.32a (effective June 1, 1990) (reproducing the 1970 memorandum of agreement) [<https://perma.cc/QF6N-HCXC>].

above, these ratios have shifted in the ensuing decades where only ten miles of the Trail is not held by a government agency,²⁶⁷ and these ten miles are concentrated in approximately 150 properties.²⁶⁸ In other words, there were more routes available for energy infrastructure on state and private land in 1970 than there are today.

The shifting land ownership scenario raises one of the Petitioners' chief arguments against a rigid application of the Leasing Act's exception: "The lower [Fourth Circuit] court's ruling would essentially create a barrier along a large portion of the East Coast to moving hydrocarbons from where they are produced to where they are used. This consequence could not have been intended by Congress in enacting the Trail[s] Act."²⁶⁹ Although the exception's purpose serves as a strict prohibition against energy transport infrastructure, the conditions under which that purpose was derived have shifted.

In short, although there are explicit protections for certain categories of Federal lands against encroachments by energy transport infrastructure, and detailed descriptions of permissible uses on those lands, there is also a record which relates a dynamic shift in land ownership – one with previously extensive holdings among the States and private landowners to one which is predominately Federal.

During that transition, a condition arose where infrastructure that does not support public lands became a common occurrence, even along the Trails System,²⁷⁰ hence ostensibly acceptable from a legal realist analysis. While a strict application of the Leasing Act's exception may be preferred in environmental circles, it does not necessarily make sense given the state of land ownership at the time of passage and the societal need for energy transport infrastructure – provided the Forest Service conducts an adequate review process. It fell to the Supreme Court, through *Cowpasture*, whether the Leasing Act's exceptions still controlled. The result suggests that jurists should be careful to avoid projecting National Park values onto the Forest Service's when analyzing infrastructure projects. In other words, courts

²⁶⁷ "Of the more than 2,100 miles of the A.T., just over 10 miles are not owned by NPS, the Forest Service, or one of the states or municipalities through which the trail passes. Only about 150 properties remain to be acquired on the trail in order to reach the goal." NAT'L PARKS CONSERVATION ASS'N, *supra* note 35.

²⁶⁸ *Id.*

²⁶⁹ Kurt Repanshek, *Supreme Court Says Gas Pipeline Can Cross Appalachian Trail*, NAT'L PARKS TRAVELER (Jun. 15, 2020), www.nationalparkstraveler.org/2020/06/update-supreme-court-says-gas-pipeline-can-cross-appalachian-trail [<https://perma.cc/U4J7-VBKP>].

²⁷⁰ *See supra* Section III.

should avoid applying standards for conservation and preservation to a program which fosters sustainable development.

CONCLUSION

The National Park System and the Forest System manage similar ecosystems but fulfill different purposes; the NPS strives for conservation and preservation²⁷¹ while the NFS pursues a program of sustainable development.²⁷² While both are in line with the ‘green’ initiative, they are nonetheless different. The *Cowpasture* dispute is a direct result of that difference. It gives us a Supreme Court opinion which enables construction over the Trails System on any Federal Land outside the National Parks.²⁷³

Under *Cowpasture*, the Leasing Act excludes “land” in the National Parks from the power to issue permits for rights-of-way, but not the Trails System.²⁷⁴ With this scenario, what is the path forward? In a choice between conservation and sustainable development, where does Congress lie? One resolution is obvious – resolve this legislative gap by an act of Congress. In the *Cowpasture* opinion, the Supreme Court itself hints at a solution and proposed carving out the land by an explicit transfer of jurisdiction.²⁷⁵

From a normative position in favor of preservation, Congress *should* amend the Leasing Act to explicitly exclude land administered under the Trails System from the permitting powers, and explicitly reserve the permitting power to the agency “administering” that land (or the delegated agency, as the case may be – here, the Park Service), in the interest of preserving those corridors. Such an amendment would both close an apparent loophole in the statutory scheme and boost the ability of the Park Service to develop and administer a cohesive land management scheme that supports the Trails System’s ideals and purposes.

Moreover, there is a need for a defined, cooperative, and coordinated land management program²⁷⁶ across multiple agencies that sets forth roles,

²⁷¹ National Trail System Act, 16 U.S.C. § 1241(2)(a)

²⁷² National Forest Management Act of 2005, 16 U.S.C. § 1600.

²⁷³ U.S. Forest Serv. v. Cowpasture River Pres. Ass’n, 140 S. Ct. 1837 (2020).

²⁷⁴ *Id.*

²⁷⁵ *See id.* at 3 (“Congress has used unequivocal and direct language in multiple statutes when it wished to transfer land from one agency to another, just as one would expect if a property owner conveyed land in fee simple to another private property owner.”).

²⁷⁶ The National Forest Management Act in 1976 builds on the Forest Reserve Act of 1891 and provides for generation of management plans over the Forest System. Meanwhile, the Secretary of the Interior’s administrative powers over the AT include a trail’s protection, management, development, and administration. 16 U.S.C. § 1246(i).

responsibilities, and powers for a cohesive system with twin goals of preservation and sustainable development. This requires coordination between career bureaucrats and political appointees in different agencies.²⁷⁷ It also requires consideration of financial commitments involved with different infrastructure classes.²⁷⁸ Congress should encourage the agencies involved to develop and issue a formal joint memorandum setting forth the terms of engagement in a suitable land management program as provided in the Trails Act.²⁷⁹

Cowpasture will have consequences beyond the immediate case and a non-existent pipeline. There are at least two pending cases which sought briefs on the potential impact of the *Cowpasture* opinion: Atlantic Coast Pipeline LLC v. FERC and Delaware Riverkeeping Network v. FERC.²⁸⁰ Dominion Energy and Duke Energy announced on June 5, 2020, that they cancelled development of the Atlantic Coast pipeline due to “ongoing delays and increasing cost uncertainty.”²⁸¹ Indeed, pipeline construction is a complicated endeavor which must comply with more than just the Mineral Leasing Act. Nonetheless, the *Cowpasture* opinion paves the way for non-parks infrastructure on the Trails System, even if the Atlantic Pipeline is not among them.

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²⁷⁷ The Trails Act anticipates the need for cooperation among different agencies and indeed limits its own authority by the following: “[n]othing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System.” *Id.* at § 1246(a)(1)(A).

²⁷⁸ See *supra* Section III.

²⁷⁹ The Secretary charged with the overall administration of any trail pursuant to section 1244(a) of this title may transfer management of any specified trail segment of such trail to the other appropriate Secretary pursuant to a joint memorandum of agreement containing such terms and conditions as the Secretaries consider most appropriate to accomplish the purposes of this chapter. During any period in which management responsibilities for any trail segment are transferred under such an agreement, the management of any such segment shall be subject to the laws, rules, and regulations of the Secretary provided with the management authority under the agreement, except to such extent as the agreement may otherwise expressly provide.

National Trail System Act, 16 U.S.C. § 1246(a)(1)(B)

²⁸⁰ Monique Watson et al., *Appalachian Trail Ruling May Speed Other Pipeline Cases*, LAW360 (Jun. 24, 2020), <https://www.steptoe.com/en/news-publications/appalachian-trail-ruling-may-speed-other-pipeline-cases.html> [<https://perma.cc/D4XV-V2CZ>].

²⁸¹ Adam Forester Griffin, *supra* note 250.