Nos. 18-1584 & 18-1587

In The Supreme Court of the United States

UNITED STATES FOREST SERVICE, ET AL.,

Petitioners,

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION, ET AL.,

Respondents.

ATLANTIC COAST PIPELINE, LLC,

Petitioner,

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR AMICUS CURIAE NISKANEN CENTER IN SUPPORT OF RESPONDENTS

DAVID BOOKBINDER
NISKANEN CENTER
820 First Street, NE
Suite 675
Washington, DC 20002
301-751-0611
dbookbinder@niskanencenter.org

Counsel for Amicus Curiae Niskanen Center

January 17, 2020

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICUS CURIAE

The Niskanen Center is a nonprofit, nonpartisan public policy think tank which advocates free market solutions to promote growth and economic liberty.[1] Central to Niskanen Center's purpose is the principle of securing Americans' rights to their property. It is a fundamental matter of justice that government should forcibly take private property only as a measure of last resort, when truly for public use, and must compensate the property owners sufficiently to render them indifferent to the taking.

As a result, Niskanen frequently participates in cases and FERC administrative proceedings where natural gas pipeline developers are relying on eminent domain to seize landowners' property. These include two other pending cases involving Petitioner Atlantic Coast Pipeline (ACP): Niskanen represents landowners in *Atlantic Coast Pipeline v. Federal Energy Regulatory Commission*, D.C. Cir. No. 18-1224, the challenge to FERC's Certificate of Public Convenience and Necessity for the pipeline, and is suing FERC under the Freedom of Information Act (*Niskanen Center v. FERC*, D.D.C. No. 1:19-cv-00125) for refusing to disclose

[1] Under this Court's Rule 37.2(a), Niskanen has received consent from all parties to submit this brief. Under Rule 37.6, Niskanen affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than Niskanen, or its counsel, made a monetary contribution to its preparation or submission.

information concerning the adequacy of notice provided to landowners whose property ACP is trying to take.

Other current interstate natural gas pipelines on Niskanen's docket include the PennEast pipeline (*Delaware Riverkeeper Network v. FERC*, D.C. Cir. No. 18-1128 and *In re PennEast Pipeline Company*, 938 F.3d 96 (3rd Cir. 2019)), the Atlantic Sunrise Pipeline (*Allegheny Defense Project v. FERC*, D.C. Cir. No. 17-1098), and the Pacific Connector Pipeline (FERC Docket No. CP17-494-000).[2]

Niskanen's interest in this case is limited to the issue of the impact of the Fourth Circuit's decision on the rights of private landowners whose property the Appalachian National Scenic Trail (the "Trail") crosses. The relevant part of the decision addressed only the question of which federal agency Congress chose to administer federal lands underneath the Trail, and did not say a word about the private lands crossed by the Trail. Nevertheless, ACP erroneously claims that the decision necessarily will have far-reaching adverse consequences for private (and State) landowners on the Trail, and then argues that these

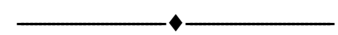
---

[2] Niskanen has also submitted amicus briefs in two oil pipeline eminent domain cases which arise under state law: *Puntenney v. Iowa Utilities Board*, 928 N.W.2d 829 (Iowa 2019) (concerning the Dakota Access Pipeline), and *Bayou Bridge Pipeline v. 38.00 Acres, More or Less*, Louisiana Third Circuit Court of Appeal, No. 2019 CA 00565.

consequences are one reason why this Court should reverse the decision below.

In reality, nothing in the Fourth Circuit's decision can be read to affect private (or State) lands in any way, let alone "effect a massive land transfer, as it would convert all lands through which the Trail passes—including the hundreds of miles of state and private lands—into Park System lands." Brief for Petitioner Atlantic Coast Pipeline, LLC (ACP Br.) at 19. Nor is it "a massive uncompensated transfer of property rights" and it did not divest "all of those non-federal property owners . . . of property rights, including the right to withhold or grant a right-of-way and to be compensated for the latter." *Id*. at 41.

Putting aside ACP's hyperbolic fear-mongering about how the Fourth Circuit has erected a "2,200 mile-barrier to pipeline development" (repeated no fewer than eight times, in one form or another, in its brief), nothing in the decision below or in its underlying rationale can be read to affect the property rights of private landowners on the Appalachian Trail, and this argument provides no basis for reversing the Fourth Circuit.[3]



[3] ACP, which is busy forcibly acquiring hundreds of properties belonging to private landowners along its route, does not appear to see the irony of its sudden concern for private property rights.

STATEMENT OF THE CASE

The Mineral Leasing Act, 30 U.S.C. 185(a) provides that "[r]ights-of-way through any Federal lands may be granted by the Secretary of the Interior or appropriate agency head for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels", and section 185(b) defines "federal lands" as "all lands owned by the United States" with certain exclusions, one of which is "lands in the National Park System."

Because "lands in the National Park System" is an exclusion from "lands owned by the United States", the relevant portion of section 185(b) is best understood as "lands *owned by the United States* in the National Park System." Understanding that this exclusion from authority to grant fossil fuel pipeline rights-of-way concerns *only* lands in the National Park System that are owned by the United States is critical, because ACP's argument is based on eliding the difference between such Federal lands and private lands, both of which may be "in" the National Park System.

The question before the Fourth Circuit and now this Court is simply whether the federal lands *underneath* the Appalachian Trail ("the subsurface estate") are, for purposes of the Mineral Leasing Act, "lands owned by the United States in the National Park System."

The subsurface estate of the land that ACP wants to build on was originally managed by the Forest Service as national forest land, and thus was not "in the

National Park System." But when, in the 1968 National Trails System Act, Congress designated the Appalachian Trail as a National Scenic Trail and gave the Secretary of the Interior administrative authority over the Trail, the question for national forest land crossed by the Trail is whether Congress intended (1) transfer administration of the subsurface estate to the Park Service along with responsibility for the Trail itself, (2) keep the subsurface estate management in the hands of the Forest Service, or (3) divide subsurface management responsibility between the agencies.

The decision below did no more than determine the relative management responsibilities of two federal agencies over the federal subsurface estate, and no matter which (or both) agencies are responsible for the subsurface estate on national forest lands, the outcome does not transfer to the federal government or otherwise affect the ownership of the subsurface estate on private lands that the Trail crosses.

SUMMARY OF ARGUMENT

The land ACP wishes to cross is owned by the federal government and is located in the George Washington National Forest. The Mineral Leasing Act allows the appropriate agency head to grant natural gas pipelines rights-of-way across "Federal lands" (30 U.S.C. 185(a)), and defines "Federal lands" as "all lands owned by the United States except lands in the National Park System." 30 U.S.C. 185(b)(1). Thus the question the

Fourth Circuit decided was, by definition, not "what are lands in the National Park System", but what are "lands owned by the United States in the National Park System."

The Fourth Circuit began with the Park Service's organic statute, which provides that the National Park System "shall include any area of land and water administered by the Secretary [of the Interior] acting through the Director [of the National Park Service], for park, monument, historic, parkway, recreational, or other purposes" (54 U.S.C. 100501). And when Congress provided in the National Trails System Act ("NTSA") that the Appalachian Trail "shall be administered primarily as a footpath by the Secretary of the Interior" (16 U.S.C. 1244(a)(1)), the Trail thus became part of the National Park System. And, indeed, the court noted that no party disputed that the Trail was part of the Park System. *Cowpasture River Preservation Assn. v. Forest Service*, 911 F.3d 150, 179 (4th Cir. 2019). Therefore, if the Appalachian Trail was part of the National Park System, then federal lands that the Trail crossed were, by definition, "federal lands in the National Park System", even if the Forest Service still managed "land underlying components of the [Trail]." *Id.* at 181.

Neither the NTSA nor the Fourth Circuit's decision altered *the ownership* of the federal subsurface estate. Before the decision it was owned by the United States, and after the decision it was owned by the United States; at most, the decision affected only whether, for the limited purpose of granting oil and gas pipeline rights-of-way under the Mineral Leasing Act,

the federal subsurface estate was managed by the Park Service as being "in" the National Park System, or managed by the Forest Service as part of the George Washington National Forest.

In order to substantiate its claim that the Fourth Circuit "erected a 2,200-mile barrier" to pipelines, ACP argues that if the Park Service's NTSA authority "to administer" the Trail puts the federal subsurface land "in" the National Park System, then by doing so the Fourth Circuit (or Congress) thereby transferred ownership of that subsurface estate from the Forest Service to the Park Service. And if the Park Service's authority to administer the Trail thus gave it ownership of the federal subsurface estate, then that same administrative authority must have also transferred the private subsurface estate to the Park Service as well. The basis for this bizarre argument is, predictably, equally bizarre, that agency administrative authority is the equivalent of ownership: "When it comes to federal lands and which federal agency controls them, concepts of ownership and jurisdiction are largely interchangeable." ACP Br. at 22 n.2. Thus changing agencies means changing ownership. But, as described below, changing agency jurisdiction over the federal subsurface estate has no effect on the federal government's ownership, and likewise did not work a change in the ownership of any private or state lands.

ARGUMENT

ACP's argument that reading the NTSA's grant of administrative authority over the Trail to the Park Service means that the NTSA thereby transferred ownership of non-federal lands makes no sense, for three reasons. First and foremost, neither the Park Service nor the Forest Service own the land they manage, and no matter what the effect of the National Trails System Act or the decision below, it concerns only *the management of federal land owned by the United States*. Whether the federal subsurface estate is managed by either, by both, or by a combination of the Architect of the Capitol, the Department of Housing and Urban Development, and the General Services Administration, it would not alter in the slightest the fact that it is owed by the United States.

ACP's argument necessarily ignores the fundamental facts that the United States owns all federal lands and that the agencies merely manage it on the government's behalf. But according to ACP, "When it comes to federal lands and which federal agency controls them, concepts of ownership and jurisdiction are largely interchangeable." ACP Br. at 22, n.2.

ACP's theory that "agency jurisdiction" and "ownership" are synonymous is based on its assumption that whoever exercises control over property therefore owns it. In ACP's words, "the kind of jurisdiction that matters here is jurisdiction to exercise the incidents of ownership—or what might simply be called ownership in the context of non-governmental parties." *Id*. In

other words, the Park Service's jurisdiction over National Park lands means that the Park Service owns those lands, the Forest Service's jurisdiction over national forest lands means that the Forest Service owns those, the Fish & Wildlife Service's jurisdiction over federal wildlife refuges means that FWS owns those refuges, etc.

This is a truly novel legal doctrine, to be sure: by carrying out an owner's instruction as to how to exercise "an incident of ownership", an agent (or agency) thereby becomes the owner of the property. To put it baldly, ACP cites no authority for a proposition that upends centuries of established property (and agency) law.

ACP's legerdemain equating jurisdiction with ownership then allows it to assert that by conferring administrative authority on the Park Service and making the Trail part of the National Park System, the NTSA transferred ownership of the federal subsurface estate from the Forest Service to the Park Service. And because the NTSA conferred this administrative authority on the Park Service for the entire Trail, then all of the private lands underneath the Trail subsurface estate are now "in" the National Park System, and thus are owned by the Park Service.

At this point ACP's logic breaks down yet again, by assuming that if the private subsurface estate is "in" the National Park System, then the Park Service must own it. But even assuming the NTSA acted to put private subsurface estates "in the National Park

System", that does not mean that the federal government owns them. There is plenty of private property "in" the National Park System; as the Forest Service notes, "[p]rivately owned lands known as inholdings can exist within the exterior boundaries of National Forests and National Parks." Federal Pet. Br. at 10, n.4. "The term 'inholding' means any right, title, or interest, held by a non-Federal entity, in or to a tract of land that lies within the boundary of a federally designated area" (43 U.S.C. 2302(4)), and "federally designated area" includes "a unit of the National Park System" (43 U.S.C. 2302(2)(b)). Because Congress has made it clear that private lands can (and do) exist "within" the National Park System, even if the NTSA did operate to put private subsurface estates "in" the National Park System, it cannot be read to automatically transfer their ownership to the United States.

In short, by recognizing that the NTSA put the federal subsurface estate into the National Park System along with the Trail itself, the Fourth Circuit's reading of the NTSA did not change ownership of any of that estate. And even if the decision below can also be read to put private subsurface estates into the National Park System, that alone would be of no consequence as to who owns that estate, or at least no consequence that either ACP or the Federal Petitioners have pointed out.

Finally, Petitioners note that the National Trails System Act provides that the Park Service and other Federal agencies shall enter into agreements concerning the management of National Trails if they cross

other agencies. 16 U.S.C. 1246(a)(2). Specifically, "[t]oday, roughly 1,000 miles of the Trail's 2,200 miles pass through national forest lands pursuant to rights-of-way agreements with the Forest Service." ACP Br. at 7. But Petitioners never discuss what, if anything, those agreements have to say as to which agency is in charge of the land underneath the Trail that passes through national forest lands, beyond stating, without citation, that "these agreements leave ownership and jurisdiction over these Forest Service lands unaffected—*i.e.* they remain with the Forest Service." ACP Br. at 7. It is hard to imagine that these two agencies, which each manage tens of millions of acres of land, did not ever consider the issue; the fact that Petitioners have chosen not to disclose the contents of those agreements raises the question as to whether they show that the agencies did consider this issue, and in fact resolved it in favor of the Park Service.

Attached as Appendix A is one such document ("Memorandum of Agreement for the Management of the Appalachian National Scenic Trail"). Executed by the Park Service and the Forest Service in January 1993, it deals with lands "acquired for the Appalachian Trail by the National Park Service [which] are adjacent to or in proximity to National Forests, and these federally-owned lands would be more efficiently managed by the Forest Service than the National Park Service." *Id*. p. 2. These tracts, and any other tracts that the Park Service acquires in certain designated Trail segments, would be managed by the Forest Service, "for the protection and enhancement of the

Appalachian Trail and also in accordance with this Agreement." *Id*. p. 2.

Critically, the Agreement provided that the Park Service would reserve certain responsibilities (*id*. p. 2), among which was *the responsibility for "[a]ny future authorization of oil or gas pipeline crossings*." *Id.* p. 3. It hardly seems likely that in the more than 50 years of agreements between the Park Service and the Forest Service for management of 1,000 miles of the Trail that this would be the only example of an explicit agreement as to who had authority over oil and gas pipeline crossings. What can be learned from this Agreement is that at least for some lands purchased by the Park Service and then transferred to Forest Service management, the agencies agreed that the Park Service would have jurisdiction over oil and gas pipelines in the subsurface estate.[4] If there, then where else did they agree that this issue was subject to Park Service jurisdiction? Unfortunately, the Federal Petitioners have not presented any of those agreements to the Fourth Circuit or this Court.

[4] The fact that the Park Service had jurisdiction over "any future authorization of oil or gas pipeline crossings" does not imply that the Park Service believed it had discretion to grant any such requests for authorization. In this case the Park Service, while reserving for itself pipeline right-of-way decisions, interpreted the NTSA and the Mineral Leasing Act to preclude it from granting a right-of-way for ACP's pipeline.

CONCLUSION

For the reasons given herein, nothing in the decision below mandates that Park Service jurisdiction over federal subsurface estates underneath the Appalachian Trail necessarily means that the federal government has taken ownership of, or in any other way affected private ownership of, subsurface estates under the Appalachian Trail.

Respectfully submitted,

DAVID BOOKBINDER
NISKANEN CENTER
820 First Street, NE
Suite 675
Washington, DC 20002
301-751-0611
dbookbinder@niskanencenter.org