The Atlantic Coast Pipeline and the Pipeline Pipe Dream

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For the Atlantic Coast Pipeline, a roughly six-hundred-mile natural gas pipeline stretching from West Virginia to North Carolina, a right-of-way to intersect the Appalachian Trail was essential. Although the proposed pipeline crossed below the trail by about six-hundred feet, it would require clearing of trees and plants along its length, drilling through a mountain, and constructing three compressor stations. Throughout the project's history, community and environmental groups opposed its construction. One coalition challenged different aspects of the pipeline permitting process under federal law and won a favorable U.S. Court of Appeals for the Fourth Circuit verdict. But the Supreme Court reversed an aspect of the Fourth Circuit's decision, holding that the U.S. Forest Service has the authority to grant a right-of-way on land crossed by the Appalachian Trail. However, even a Supreme Court win was not enough to save the project: the Atlantic Coast Pipeline was canceled shortly after it received a favorable decision from the nation's highest court.

The showdown between Atlantic Coast Pipeline and the Appalachian Trail exemplifies the tension between escalating U.S. oil and gas development and protecting spaces for recreational, scientific, cultural, and aesthetic uses. This Note argues the legislative and executive history behind the National Trails System Act of 1968 supports the protection of trails on federal lands, and the plain language of a statutory trio reserves to Congress the ability to grant oil and gas pipeline rights-of-way across national trails in the National Park System, such as the Appalachian Trail. In addition, this Note suggests an alternative framework for granting oil and gas pipeline rights-of-ways across national trails both in and outside the National Park System. Given that national trails were created to offer an escape from development and industry, oil and

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gas pipeline rights-of-way should only be granted across national trails on federal lands if no prudent and feasible alternative exists. By limiting oil and gas pipeline development on national trails, such trails may be preserved for future users, untrammeled and undisturbed, as escapes.

INTRODUCTION

"I speak for the trees, for the trees have no tongues." – Dr. Seuss.[1]

In September 2019, eighteen-year-old Kaylin Brown completed a thru-hike of the 2,192-mile[2] Appalachian Trail.[3] She took a break in August to attend her high school graduation.[4] Jonathan Bradley completed the last section of the trail in September, after thirteen years of hiking segments in one- to two-week increments.[5]

Also in September and October 2019: a group of blinded veterans hiked a portion of the trail.[6] A recent college graduate and Dancing with the Stars of Darlington County contestant completed a thru-hike.[7] A couple got engaged on Mount Katahdin after a five-month thru-hike, and the groom-to-be noted his bride unknowingly carried her engagement ring when they switched backpacks.[8] These stories are just a sampling of hiker and recreational user experiences with the Appalachian Trail over a two-month period. In just one week, hikers anointed with "trail names" such as Plume, Black Widow, Washbucket, Jabez, Lifesaver, Puma, Pizza Steve, Noodle, and more completed thru-hikes of the trail.[9]

At the time these hikers summited Katahdin, following in the footsteps of decades of recreationalists to come before, the future of the Appalachian National Scenic Trail ("Appalachian Trail") unfolded in the chambers of One

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1. DR. SEUSS, THE LORAX 23 (Random House, 1971), quoted by the U.S. Court of Appeals for the Fourth Circuit in Cowpasture River Preservation Ass'n v. Forest Service, 911 F.3d 150, 183 (4th Cir. 2018) (noting "[w]e trust the United States Forest Service to 'speak for the trees, for the trees have no tongues'").

2. Authorities disagree about the exact length of the Appalachian Trail, but it is typically estimated to be between 2,100 and 2,200 miles long. *Compare* APPALACHIAN TRAIL CONSERVANCY: THRU-HIKING, https://www.appalachiantrail.org/home/explore-the-trail/thru-hiking (last visited Oct. 20, 2019) (2,190 miles), *with* APPALACHIAN: FOOTPATH FOR THE PEOPLE, https://www.nps.gov/appa/index.htm (last visited Oct. 20, 2019) (2,180-plus miles).

3. Meg Robbins, *Winslow teen hikes 2,192-mile Appalachian Trail – and graduated high school in the process*, MORNING SENTINEL (Sept. 29, 2019), https://www.centralmaine.com/2019/09/29/winslow-teen-hikes-2192-mile-appalachian-trail-and-graduates-high-school-in-the-process/. A "thru-hike" refers to the completion of a trail from start to finish.

4. *See id.*

5. Bill Poteat, *Freightliner employee finishes Appalachian Trail 13 years after starting*, GASTON GAZETTE (Oct. 4, 2019), https://www.gastongazette.com/news/20191004/freightliner-employee-finishes-appalachian-trail-13-years-after-starting.

6. Robbi Pounds, *Blinded Vets Hike Section of Appalachian Trail*, GRAHAM STAR (Oct. 4, 2019), https://www.grahamstar.com/local-regional-news/blinded-vets-hike-section-appalachian-trail.

7. Ardie Arvidson, *Special memories Hartsville's Noah Stanley hikes Appalachian Trail*, HARTSVILLE MESSENGER (Sept. 29, 2019), https://www.scnow.com/messenger/news/article_826a9b38-e2d5-11e9-903f-6356c57d9bd5.html.

8. Chelsea Church, *Virginia couple hikes entire Appalachian Trail and gets engaged*, WHSV (Sept. 8, 2019), https://www.nbc12.com/2019/09/08/virginia-couple-hikes-entire-appalachian-trail-gets-engaged/.

9. Rachel Skonecki, *Congrats to These 2019 Appalachian Trail Thru-Hikers September 26 – October 2*, THE TREK (Oct. 2, 2019) https://thetrek.co/appalachian-trail/congrats-2019-appalachian-trail-thru-hikers-september-26-october-2/.

First Street Northeast in Washington, D.C. On October 4, 2019, the U.S. Supreme Court granted certiorari[10] to review a reversal of a right-of-way granted across the Appalachian Trail to an oil and gas pipeline. Ultimately, the Court would side with the pipeline, not the trail. And yet, even a win in the nation's highest court was not enough to save the pipeline project.

On July 5, 2020, after almost six years and $3.4 billion,[11] the Atlantic Coast Pipeline perished, before ever delivering a cubic foot of natural gas.[12] The proposed pipeline project was to stretch approximately 600 miles from West Virginia to North Carolina and carry 1.5 billion cubic feet of natural gas daily, adding to an upward trend in U.S. production of natural gas and the thousands of miles of crisscrossing veins of domestic fossil fuel infrastructure.[13] But along those 600 miles, the project repeatedly ran into local, state, and national opposition.[14] More than a few such clashes resulted in litigation.[15] Opponents successfully challenged federal and state permits from many angles, overturning an air permit for a compressor station due to insufficient environmental justice and health analyses,[16] securing remand of a federal biological assessment,[17] vacating a species take statement and related right-of-way permit,[18] prevailing over the U.S. Forest Service ("Forest Service") regarding an arbitrary and

10. Order Granting Certiorari, Cowpasture River Pres. Ass'n v. U.S. Forest Serv., 140 S. Ct. 36 (2019) (Mem.).

11. Erin Cox & Gregory S. Schneider, *Energy Companies Abandon Long-Delayed Atlantic Coast Pipeline*, WASH. POST (July 5, 2020), https://www.washingtonpost.com/local/virginia-politics/atlantic-coast-pipeline-canceled/2020/07/05/da1c0f40-bef5-11ea-b178-bb7b05b94af1_story.html; *see generally* FERC Online eLibrary, Atlantic Coast Pipeline Project Application, Docket No. CP15-554-000 (Sept. 18, 2015) (providing the complete application of the Atlantic Coast Pipeline as filed with FERC).

12. *See* Press Release, Dominion Energy, Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline (July 5, 2020), https://news.dominionenergy.com/2020-07-05-Dominion-Energy-and-Duke-Energy-Cancel-the-Atlantic-Coast-Pipeline.

13. Lyndsey Gilpin, *Pipe Dream A Pipeline Runs Through It*, GRIST (Dec. 3, 2019), https://grist.org/justice/tracing-the-path-of-dominion-energys-atlantic-coast-natural-gas-pipeline/. *See* U.S. Energy Info. Admin., *Monthly Crude Oil and Natural Gas Production* (Oct. 30, 2020), https://www.eia.gov/petroleum/production/#ng-tab (showing increasing volume of U.S. natural gas production between 2010 and the first quarter of 2020, followed by a drop in the second and third quarters of 2020 possibly due to the COVID-19 pandemic).

14. *See* Sarah Vogelsong, *What Sank the Atlantic Coast Pipeline? It Wasn't Just Environmentalism*, VA. MERCURY (July 8, 2020), https://www.virginiamercury.com/2020/07/08/what-sank-the-atlantic-coast-pipeline-it-wasnt-just-environmentalism/ (noting the large-scale multipronged community and national organizational efforts against the Atlantic Coast Pipeline); *see also* Press Release, Al Gore, Joint Statement by Former Vice President Al Gore and Bishop William Barber II on the Decision to Cancel the Atlantic Coast Pipeline Project (July 5, 2020), https://algore.com/news/joint-statement-by-former-vice-president-al-gore-and-bishop-william-barber-ii-on-the-decision-to-cancel-the-atlantic-coast-pipeline-project (noting the "project represented a dangerous web of injustice—the injustice of race, the injustice of ecological devastation, the injustice of poverty").

15. *See* Dominion Energy, Inc., Quarterly Report (Form 10-Q) (May 5, 2020).

16. Friends of Buckingham v. State Air Pollution Control Bd., 947 F.3d 68, 93 (4th Cir. 2020).

17. Defs. of Wildlife v. U.S. Dep't of the Interior, 931 F.3d 339, 365–66 (4th Cir. 2019).

18. Sierra Club v. U.S. Dep't of the Interior, 899 F.3d 260, 295 (4th Cir. 2018).

capricious environmental impact statement,[19] revealing a failure of proper analysis under forest management laws,[20] and more.[21]

Of all the issues activists, community groups, national environmental organizations, and others raised, one lone dispute ended up in the Supreme Court. There, before the nation's highest court, the pipeline won.[22] And yet even that victory was insufficient to buttress the project: Less than three weeks later, Dominion Energy and Duke Energy, the companies behind the pipeline, pulled the plug.[23]

The Atlantic Coast Pipeline project is not alone in its failure. The day after the project shuttered, its oil-bearing brothers suffered blows in the federal courts. A district court ordered the operational Dakota Access Pipeline to shut down and empty,[24] and the Supreme Court denied a request for continued construction of the Keystone XL pipeline.[25] As of this writing, the Mountain Valley Pipeline, a 303-mile neighbor to the Atlantic Coast Pipeline project, is facing various delays and legal challenges.[26]

These recent defeats raise questions about the long-term viability of oil and gas pipelines and underscore the need for rethinking pipeline pathways and other long-range energy infrastructure projects moving forward. Each section of the Atlantic Coast Pipeline project crossed a distinct landscape, presenting any number of different social justice, environmental, logistical, and practical considerations.

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19. Cowpasture River Pres. Ass'n v. Forest Serv., 911 F 3d 150, 179 (4th Cir. 2018).

20. *See id.* at 169.

21. *See* Dominion Energy, Inc., *supra* note 15 (noting that "these challenges allege[] non-compliance on the part of federal and state permitting authorities and adverse ecological consequences . . . [s]ince December 2018, notable developments in these challenges include a stay . . . and . . . vacatur of the biological opinion and incidental take statement[,] . . . [court] decisions vacating the permits to cross certain federal forests and the air permit for a compressor station at Buckingham, Virginia[,] . . . [a] remand to Army Corps of Engineers of Atlantic Coast Pipeline's Huntington District 404 verification and the . . . remand to the National Park Service of Atlantic Coast Pipeline's Blue Ridge Parkway right-of-way").

22. U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1850 (2020) (holding that U.S. Forest Service has the authority to issue a permit for a right-of-way intersecting with the Appalachian Trail, and reversing the lower court).

23. *Compare id.* at 1837 (noting the decision date as June 15, 2020), *with* Press Release, *supra* note 12 (noting the publication date as July 5, 2020).

24. Cheyenne River Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-1534 (JEB), 2020 WL 3634426, at *10–11 (D.D.C. July 6, 2020).

25. Army Corps of Eng'rs v. N. Plains Res. Council, No. 19A-1053, 2020 WL 3637662 (July 6, 2020) (order granting stay in part).

26. The Fourth Circuit entered a temporary stay of construction of the Mountain Valley Pipeline on October 16, 2020. *See* Sierra Club v. U.S. Army Corps of Eng'rs, No. 20-2039 (4th Cir. 2020). Less than two weeks later, a coalition of environmental organizations petitioned the Fourth Circuit to consider the U.S. Fish and Wildlife Service's ("FWS") biological opinion and incidental take statement for two endangered species potentially impacted by the pipeline. *See* Joint Petition for Review, Appalachian Voices v. U.S. Dep't of Interior (4th Cir. Oct. 27, 2020).

The Atlantic Coast Pipeline was to stretch from the Marcellus Shale region in West Virginia to North Carolina.[27] The project required drilling a mile-long hole through a mountain,[28] clear-cutting a 125-foot right-of-way for most of the pipeline's path through forests,[29] blasting mountain ridgetops, and more.[30] Each of those steps represents a choice made by project proponents. This Note focuses on one such choice along the Atlantic Coast Pipeline's 600-mile length: the choice to intersect the Appalachian Trail on federal land. This Note suggests future long-distance energy projects should consider whether a "feasible and prudent" alternative to such crossings exist. Although such a standard is discussed here in specific application to lands in the National Park System and intersecting national trails, in abstract such an inquiry could assist in diverting future projects from other potentially disruptive routes. The likely answer to questions of whether "feasible and prudent" alternatives existed to contested portions of the Atlantic Coast Pipeline is "yes".[31]

As proposed, the Atlantic Coast Pipeline faced a barrier sprawling more than 2,000 miles: the Appalachian Trail, the first designated national trail under the National Trails System Act.[32] Pipeline proponents took the fight over agency ability to grant a right-of-way under the Appalachian Trail to the Supreme Court and won.[33] In *U.S. Forest Service v. Cowpasture River Preservation Association*, the Court held the Forest Service could grant a right-of-way for the Atlantic Coast Pipeline under the Appalachian Trail, reversing the U.S. Court of Appeals for the Fourth Circuit's denial of such authority.[34]

The Atlantic Coast Pipeline threatened not just the width of the Appalachian Trail as a footpath: the direct and indirect effects of the pipeline winning its right-of-way negatively impacted the realm of the trail.[35] For myriad hikers, the trail's

27. Gilpin, *supra* note 13.

28. Brief in Opposition for Respondents at 5, U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837 (2020) (Nos. 18-1584 and 18-1587) [hereinafter *Brief in Opposition*].

29. *See id.*

30. *See id.*

31. *See, e.g.*, Jonathan Mingle, *How Overreach by Trump Administration Derailed Big Pipeline Projects*, YALE ENV'T 360 (July 15, 2020), https://e360.yale.edu/features/how-overreach-by-trump-administration-derailed-big-pipeline-projects (discussing pressure to speed up review of the Atlantic Coast Pipeline, and the issues created by such expedited review); Emily Brown, *Pipeline Architects with Project Since Inception Work Through Obstacles, Criticism*, NEWS & ADVANCE (Dec. 27, 2017), https://newsadvance.com/nelson_county_times/news/pipeline-architects-with-project-since-inception-work-through-obstacles-criticism/article_baf944e0-0682-586d-82e2-794af0cbddce.html (noting the planning of the initial route for the Atlantic Coast Pipeline took Dominion Energy engineers one week to complete).

32. H.R. REP. NO. 1631, at 2 (1968).

33. *See generally* Petition for a Writ of Certiorari at I, U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837 (2020) (presenting the question of "[w]hether the Forest Service has authority to grant rights-of-way under the Mineral Leasing Act through lands traversed by the Appalachian Trail within national forests").

34. U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1850 (2020).

35. Although this Note focuses on the impacts of the Atlantic Pipeline on the Appalachian Trail and the statutory and historical context for limiting such pipeline development, the proposed pipeline path would have greatly impacted communities along its 600-mile length. Oil and gas pipeline development

surroundings—the forests, rivers, mountains, and creeks the trail runs through—are just as important as the four-foot-wide trail itself. The Appalachian Trail is not merely a footpath; the environments through which the trail winds create the experience of the trail. Without its landscape, the Appalachian Trail is just a trail, just a "beaten track alone."[36] Thus, the Appalachian Trail was an ideal place from which to make a stand against pipeline development on federal lands.[37] The Appalachian Trail inspired the National Trails System Act,[38] and the trail's communal, executive, and statutory history and evidence establish a natural and scenic stewardship legacy that should be continued.

This Note argues that in order to preserve the recreational essence of national trails such as the Appalachian Trail, oil and gas pipelines rights-of-way across such trails on federal land should be granted only in rare circumstances. The construction and long-term effects of such pipelines disrupt and destroy the natural and aesthetic qualities of such spaces.[39] The Appalachian Trail should be considered a unit of the National Park System ("Park System"),[40] and thus plain language of operative statutes should be interpreted to protect the trail from oil and gas pipeline rights-of-way on federal land. For national trails designated as

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can disproportionately impact low-income and minority communities, and it raises severe environmental justice concerns. *See* Elizabeth Ouzts, *Critics Highlight Atlantic Coast Pipeline's Environmental Justice Impact*, ENERGY NEWS NETWORK (Dec. 1, 2017), https://energynews.us/2017/12/01/southeast/critics-highlight-atlantic-coast-pipelines-environmental-justice-impact/; Press Release, Nat. Res. Def. Council, Legal Brief: FERC's Flaws Endanger Communities of Color in Atlantic Coast Pipeline Path (Apr. 15, 2019), https://www.nrdc.org/media/2019/190415; Elizabeth Allen, *The Environmental Justice Implications of the Atlantic Coast Pipeline*, DUKE NICHOLAS SCH. ENV'T (Apr. 5, 2019), https://blogs.nicholas.duke.edu/env212/the-environmental-justice-implications-of-the-atlantic-coast-pipeline/. For a detailed discussion on the different views of community stakeholders along the Atlantic Pipeline's path, see Gilpin, *supra* note 13.

36. Brief of Amicus Curiae The Appalachian Trail Conservancy in Support of None of the Parties at 5, *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837 (2020) (Nos. 18-1584, 18-1587) [hereinafter *ATC Amici Brief*].

37. *See* Eric Lipton & Hiroko Tabuchi, *Driven by Trump Policy Changes, Fracking Booms on Public Lands*, N.Y. TIMES (Oct. 27, 2018), https://www.nytimes.com/2018/10/27/climate/trump-fracking-drilling-oil-gas.html (describing the Trump administration's auction of millions of acres of drilling rights to oil and gas developers); *see also* Scott Horsley, *Energy Boom That Trump Celebrates Began Years Before He Took Office*, NAT'L PUB. RADIO (Aug. 13, 2019), https://www.npr.org/2019/08/13/750528826/energy-boom-that-trump-celebrates-began-years-before-he-took-office (stating that the United States became the world's biggest crude oil producer in 2018, and that the Trump administration is supportive of the energy industry).

38. *See, e.g.*, LYNDON B. JOHNSON, PRESERVING OUR NATURAL HERITAGE, H.R. DOC. NO. 387 (Feb. 23, 1966) (noting President Lyndon B. Johnson's recommendation "to extend Federal support to the *Appalachian Trail*, and to encourage the development of hiking trails accessible to the people throughout the country. I am submitting legislation to foster the development by Federal, State, and local agencies of a *nationwide system of trails*")(emphasis added).

39. *See* ERM, *Visual Impact Assessment for Pipeline Segments in Monongahela and George Washington National Forests, and National Park Service Lands, Including the Appalachian National Scenic Trail and Seneca State Forest* 19 (Jan. 2017), https://atlanticcoastpipeline.com/filings/5/revised-via-report-pt1.pdf (prepared for Atlantic Coast Pipeline LLC).

40. *Compare* 54 U.S.C. § 100102(6) (2018), *with* 54 U.S.C. § 100501 (2018) (noting that the former defines a "unit" as "one of the areas described in" the latter, which includes "any area of land and water *administered* by the Secretary") (emphasis added).

units of the Park System, only Congress has the authority to grant pipeline rights-of-way across federal land, as consistent with the text of the Mineral Leasing Act of 1920, the National Trails System Act of 1968, and the National Park Service Organic Act of 1916. The Appalachian Trail has and should continue to be considered such a unit of the Park System.[41]

The Supreme Court, however, excised the Appalachian Trail from the land over which it runs, relying on two other statutes not discussed by the lower court.[42] The Court held the trail is an easement, and as an easement, the National Park Service ("NPS") merely has power over the establishment and administration of the trail, while the Forest Service retains jurisdiction over the land.[43] This holding ignores the motivation behind the creation and conception of the Appalachian Trail and the comprehensive National Trails System as outdoor spaces offering recreational and natural respites from industrialized, developed life. As Justice Sotomayor noted in her dissent, "the Court does not disclose how the Park Service could administer the Trail without administering the land that forms it."[44]

In keeping with the spirit of national trails, this Note proposes trails in *and* outside the Park System should be protected under a "feasible and prudent" alternative standard. A rich congressional, administrative, and executive history led to the creation of national trails as a recreational system to be preserved for future generations, and such origins should be honored moving forward. National trails inside the Park System administered by the NPS and trails outside the Park System administered by other agencies, such as the Forest Service or U.S. Bureau of Land Management ("BLM"), should be protected from oil and gas pipeline crossings on federal land. Trails outside the Park System include: the Pacific Crest National Scenic Trail ("Pacific Crest Trail"), stretching from Mexico to Canada across the western United States; the Lewis and Clark National Historic Trail, originating in Missouri and terminating at the Pacific Ocean; and the Trail of Tears National Historic Trail, crisscrossing across eight states.[45] National trails offer a way for people today to walk paths retracing both celebratory and devastating moments in U.S. history. Such trails are valuable to cultural, historical, and recreational pursuits. Thus, this Note argues administering agencies should only grant pipeline rights-of-way across such trails if there exists

41. NPS, F7.2 DRAFT, FOUNDATION DOCUMENT: APPALACHIAN NATIONAL SCENIC TRAIL 5 (2014).

42. *See* U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1845–56 (2020) (holding that the Appalachian "Trail is an easement"); *compare U.S. Forest Serv.*, 140 S. Ct. at 1842–43, 1847–48, *with* Cowpasture River Pres. Ass'n v. Forest Serv., 911 F.3d 150, 150–83 (4th Cir. 2018) (noting the absence of discussion of the Weeks Act of Wild and Scenic Rivers Act in the latter).

43. *U.S. Forest Serv.*, 140 S. Ct. at 1845–46.

44. *Id.* at 1856 (Sotomayor, J., dissenting) (reasoning as well that "the Court [does not] explain how the Trail could be a unit of the Park System if it is not land").

45. NPS, *National Trails System Map* (2010), https://www.nps.gov/subjects/nationaltrailssystem/upload/National-Trails-map.pdf.

no other "feasible and prudent" alternative.[46] If no such alternative exists, "all possible planning to minimize harm" to the trail should be done.

By requiring congressional approval of rights-of-way across federal lands and holding agencies to a "feasible and prudent" alternative standard, the portions of national trails on federal lands can be preserved as spaces for recreation and enjoyment and vulnerable species can benefit from less development through habitat. Importantly, this approach does not foreclose all pipeline rights-of-way on national trails. Rather, it limits development to state and privately-owned lands except in cases where Congress approves a right-of-way or the administering agency determines there is not a more prudent passage. Thus, at least portions of national trails may be protected.

In Part I, this Note analyzes legislative and executive history and evidence behind the creation of the National Trails System, statutes, and cases to show the intent behind the relevant legal mechanisms is to protect the Appalachian Trail. Part II discusses the operative statutory trio governing the recent controversy, which is discussed in Part III. Part IV proposes a solution aligned with the Appalachian Trail Conservancy's own policy regarding pipeline trail crossings.

I. THE LEGISLATIVE AND EXECUTIVE EVIDENCE, STATUTES, AND CASES AGAINST WHICH THE ATLANTIC PIPELINE CUT

As the first national trail established under the National Trails System Act ("Trails Act"),[47] the history surrounding the Appalachian Trail is well documented. Three sources make clear national trails, and the Appalachian Trail specifically, are intended to be preserved as national resources. First, the initial proposal for an Appalachian Trail outlines a regional planning project dedicated to camping and recreation. Second, through legislation, Congress supported continuing the tradition of community groups and volunteer efforts to protect and foster the trail. Finally, the legislative evidence, as shown through the conference committee report surrounding the enactment of the Trails Act, clearly establishes Congress' purpose in erecting a National Trails System was to preserve a nationwide system of footpaths for outdoor recreation separate from industrial and mechanized growth. The very backbone of the Appalachian Trail and the Trails Act supports a system that limits oil and gas pipeline rights-of-way across such trails.

A. The Appalachian Trail: A Proposal

Today's Appalachian Trail grew out of a proposal by "planner, forester, and idiosyncratic social reformer Benton MacKaye . . . ."[48] One of the first graduates

46. *Infra see* discussion in Part IV.B.

47. H.R. REP. NO. 1631, *supra* note 32.

48. Garrett Dash Nelson, *An Appalachian Trail A Project in Regional Planning*, PLACES J. (2019), https://placesjournal.org/article/an-appalachian-trail-a-project-in-regional-planning/.

of Harvard University's forestry program and an early employee of the newly minted U.S. Forest Service,[49] MacKaye laid the path for the current 2,000-plus-mile incarnation of the Appalachian Trail in a relatively concise six-page 1921 article.[50]

MacKaye proposed the Appalachian Trail as "[a] project in regional planning" to develop a "continuous belt of under-developed lands" along the Appalachian Mountains.[51] He lamented the lack of access to nature enjoyed by the U.S. populace and the need for economic development and job creation.[52] MacKaye envisioned the Appalachian Trail as a communal project which would create an accessible path for recreation. For MacKaye, the trail would serve many purposes: a link among different communities and socioeconomic classes, an exercise in regional planning and development, a job creator, and finally, an eastern American playground for camping and recreation. He noted, "[t]he ability to cope with nature directly—unshielded by the weakening wall of civilization—is one of the admitted needs of modern times."[53] The Appalachian Trail, as MacKaye envisioned, would answer that need.

Support grew for the Appalachian Trail over the next decade.[54] MacKaye and trail proponents unveiled specific plans for the monumental hiking path in 1925 at the Appalachian Trail Conference.[55] Admiralty lawyer Myron H. Avery, a founder of the Potomac Appalachian Trail Club, was elected to the first of seven consecutive terms as the conference's chair in 1937.[56] Avery and MacKaye did not always agree on the same physical or symbolic path for the trail: Avery was willing to accommodate a scenic highway through Shenandoah National Park, while MacKaye "thought it a betrayal of founding principles . . . ."[57] Despite fracturing among its early stewards, the Appalachian Trail was officially completed as a continuous trail on August 14, 1937.[58] Although

49. *See id.*

50. *See* Benton MacKaye, *An Appalachian Trail A Project in Regional Planning*, 9 J. AM. INST. ARCHITECTS 325, 328 (1921) (proposing a footpath linking communal shelter camps, groups, and food and farm camps). Bill Bryson notes in his memoir of walking the Appalachian Trail that in 1921 "to say that MacKaye's life at this point was not going well would be to engage in careless understatement," and that MacKaye had been "let go" from jobs at Harvard and the Forest Service. BILL BRYSON, A WALK IN THE WOODS 27 (Broadway Books, 1998).

51. MacKaye, *supra* note 50, at 325–26.

52. *See id.* at 326 (noting the "[e]xtensive national playgrounds" in the American west, "in the Yosemite, the Yellowstone," and the lack of such escapes in the American east). MacKaye also proposed the construction of shelter camps and the community groups to grow alongside them, as well as food and farm camps to be developed along the trail. *See id.* at 328.

53. *Id.* at 325.

54. *See* APPALACHIAN TRAIL CONSERVANCY: HISTORY, https://appalachiantrail.org/our-work/about-us/atc-history/ (last visited July 31, 2020).

55. *See id.*

56. *See id.*

57. *See id.*; BRYSON, *supra* note 50, at 29.

58. BRYSON, *supra* note 50, at 29; FOUNDATION DOCUMENT, *supra* note 41, at 5; *see also* BUREAU OF OUTDOOR RECREATION, TRAILS FOR AMERICA: REPORT ON THE NATIONWIDE TRAILS STUDY 32–33 (1966).

maintenance of the trail lapsed during World War II,[59] administration and management of the trail were formalized in 1968 with the Trails Act.

B. A Legacy of Community, Volunteerism, and Cooperative Management

Congress intended the Appalachian Trail to be a through line of collaboration and volunteerism, connecting communities from Georgia to Maine. Legislative evidence surrounding the amendments to the Trails Act notes that "volunteer efforts by interested trail users themselves, working in concert with various levels of government, have been highly effective in expanding trail recreation opportunities at low cost."[60] The Trails Act was specifically amended in 1983 to "further encourag[e] and assist[] volunteer citizen involvement in the advancement of the Nation's trail development program."[61] A purpose of the Trails Act was to foster volunteer involvement, and Congress took steps to limit liability facing such volunteers.[62]

The communal and volunteer spirit surrounding the Appalachian Trail, and national trails in general, is not merely supported by legislative text and persuasive agency opinions. Congress enacted volunteerism as part of the Trails Act.[63] The Trails Act authorizes the Secretaries of Interior and Agriculture, "and the head of any Federal agency administering Federal lands . . . to encourage volunteers and volunteer organizations to plan, develop, maintain, and manage, where appropriate, trails throughout the Nation."[64] In addition, the Trails Act authorizes the secretaries and agency heads to allow volunteers to use federal "facilities, equipment, tools, and technical assistance . . . ."[65] The scope of volunteer work encouraged by the act includes planning, development, operating programs, maintaining, and managing current portions of national trails and trails which could become part of the National Trails System.[66]

Today, the Appalachian Trail exemplifies communal maintenance and the volunteer ethos. Much in the spirit of MacKaye's "job for 40,000 souls[,]"[67] the Appalachian Trail, although a unit of the Park System, is managed through a cooperative management system.[68] As NPS, the agency administering the Park

59. EARL V. SHAFFER, WALKING WITH SPRING 1 (1983). Earl V. Shaffer is the first person known to thru-hike the Appalachian Trail, and he wrote *Walking with Spring* after the first of his ultimately three thru-hikes of the trail. *See id.* at back cover.

60. H.R. REP. NO. 98-28, at 2 (1983).

61. *Id.* at 1; *see* Act of Mar. 28, 1983, Pub. L. No. 98-11, § 202(2), 97 Stat. 42, 42 (codified as amended at 16 U.S.C. § 1241(c) (2018)).

62. *See id.* at 3, 6 (noting congressional support for including volunteers and volunteer organizations in the maintenance of the Appalachian Trail).

63. National Trails System Act of 1968, 16 U.S.C. § 1250(a)(1)–(c) (2018).

64. *Id.* § 1250(a)(1).

65. *Id.* § 1250(c).

66. *Id.* § 1250(b)(1)–(2).

67. MacKaye, *supra* note 50, at 330.

68. FOUNDATION DOCUMENT, *supra* note 41, at 9; *see generally* NPS & APPALACHIAN TRAIL CONSERVANCY, AGREEMENT NO. P14AC00659, COOPERATIVE MANAGEMENT OF THE APPALACHIAN

System, notes, "[l]ocal partnerships are the basic building blocks of this intricate system spanning 14 states, 8 national forests, 6 national park units . . . and many other areas."[69] In 2013, "approximately 6,000 volunteers contributed nearly 250,000 volunteer hours," an estimated contribution of more than $5 million.[70]

Under the cooperative management model, numerous federal agencies including NPS and the Forest Service cooperate with state agencies and non-profit organizations such as the Appalachian Trail Conservancy,[71] as well as thirty-one volunteer clubs, to jointly manage the Appalachian Trail.[72] This cooperative management model has successfully fostered decades of responsible stewardship of the Appalachian Trail. While the Appalachian Trail is ultimately "administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture[,]"[73] day-to-day and foot-by-foot management has encouraged a collective ownership of the 2,000-mile footpath.

Given the number of caretakers authorized to maintain the Appalachian Trail under the cooperative management model, vesting Congress with the authority to grant pipeline rights-of-way across the trail simplifies the process on federal lands. Instead of parsing through complicated management structures and risking upsetting different cooperating agencies, non-profit organizations, and community groups, a pipeline developer can go to one place for a right-of-way across the trail: Congress. Consistent with the plain language of relevant statutes, requiring a congressional grant simplifies the process and ultimately protects portions of the trail on all federal lands.

NPS itself states "[t]he Trail is one of the greatest testaments to volunteerism in the nation. Volunteers are the soul of the Trail . . . ."[74] Where possible, such a testament to community and collaboration should be fostered and protected, not run through with clear-cuts and pipeline rights-of-way.

C. A Clear Mandate from the Executive and Congress

Since its inception, Congress intended the National Trails System, and the Appalachian Trail specifically, to be a protected space. With the nation's recreational pursuits top of mind, the Trails Act enjoyed broad bipartisan

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NATIONAL SCENIC TRAIL (2014) (outlining cooperative management of the Appalachian Trail between the NPS and the Appalachian Trail Conservancy).

69. FOUNDATION DOCUMENT, *supra* note 41, at 6 (going on to include "2 national wildlife refuges, 24 wilderness areas, 8 national natural landmarks, 3 national historic landmarks, approximately 60 state protected areas, 88 counties, 164 townships and municipalities" among the areas spanned by the Appalachian Trail).

70. *Id.*

71. The Appalachian Trail Conference was rebranded as the Appalachian Trail Conservancy in 2005. *See* APPALACHIAN TRAIL CONSERVANCY: HISTORY, *supra* note 54.

72. FOUNDATION DOCUMENT, *supra* note 41, at 54.

73. National Trails System Act of 1968, 16 U.S.C. § 1244(a)(1) (2018).

74. FOUNDATION DOCUMENT, *supra* note 41, at 5.

support.[75] But Congress was not acting alone. The Trails Act was born in an environment strongly supportive of conservation and the protection of natural and wild spaces.[76]

President Lyndon B. Johnson oversaw a vast and dynamic body of legislation and policy, oft celebrated and criticized, domestic and international,[77] including conservation efforts.[78] Johnson gave two influential speeches in the years prior to the enactment of the Trails Act: "A Message on Natural Beauty of Our Country" during his 1965 State of the Union address, and "Programs for Controlling Pollution and Preserving Our Natural and Historical Heritage" in the following State of the Union.[79]

In "A Message on Natural Beauty," Johnson lamented the dwindling outdoor and recreational opportunities in the United States and cautioned against the dangers of modern technology.[80] Johnson noted:

> For centuries Americans have drawn strength and inspiration from the beauty of our country. It would be a *neglectful generation* indeed, indifferent alike to the judgment of history and the command of principle, *which failed to preserve* and extend such a heritage for its descendants . . . .
>
> The increasing tempo of urbanization and growth is already depriving many Americans from the right to live in decent surroundings. More of our people are crowding into cities and being *cut off* from nature . . . . A modern highway may wipe out the equivalent of a 50-acre park with every mile. And people

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75. *See, e.g.*, *The Appalachian Trail Hearing on S. 622 Before the Sub. Comm. on Parks and Recreation of the Comm. on Interior and Insular Affairs*, 89th Cong. 6–14 (1965) (noting statements from Democrats and Republicans supporting a national trails system). The Trails System Act passed through the House of Representatives with a bipartisan vote of 165 Republicans and 213 Democrats supporting. *CQ House Votes 136 Through 141*, *in* 1968 CQ ALMANAC, 62 (1968), *available at* https://library.cqpress.com/cqalmanac/toc.php?mode=cqalmanac-appendix&level=3&values=Floor+Votes+Tables%7E1968 (follow "1968 House Floor Votes 136-141" hyperlink).

76. Throughout this Note I reference the "natural" or "wild" qualities of the Appalachian Trail, and the need for protecting such characteristics. As discussed by J.B. MacKinnon in *The Once and Future World*, much of the "nature" and "wilderness" in the world has already been altered and remade by humans. *See* J.B. MACKINNON, THE ONCE AND FUTURE WORLD 10–11 (2013) (citing George Perkins Marsh's *Man and Nature* in a discussion of the illusions of nature and the different baselines for wilderness many bring to the outdoors). Even the creation and maintenance of the Appalachian Trail impacts the spaces through which the trail runs. However, I use terms such as "natural" and "wild" in arguing for stopping pipeline projects across the Appalachian Trail as a reference to the existing developed-undeveloped baseline. Even if the "nature" through which the Appalachian Trail runs is one heavily altered by human activity and development, it is still worthy of protecting for future users.

77. *See generally* IRVING BERNSTEIN, GUNS OR BUTTER: THE PRESIDENCY OF LYNDON JOHNSON (Oxford University Press, 1996) (providing an overview of President Jonson's legacy, including the Voting Rights Act, immigration, pollution, conservation, highway beautification, Vietnam, and more).

78. *See id.* at 261–306, 298 (discussing in general different conservation-oriented initiatives undertaken by President Johnson's administration, and First Lady Claudia Alta "Lady Bird" Johnson's influence on the conservation movement during President Johnson's tenure).

79. *Compare* A Message on Natural Beauty of Our Country, State of the Union, H.R. DOC. NO. 78 (Feb. 8, 1965), *with* H.R. DOC. NO. 387, *supra* note 38 (both discussing conservation-minded goals).

80. A Message on Natural Beauty, *supra* note 79, at 1–2 (noting "the storm of modern change is threatening to blight and diminish in a few decades what has been cherished and protected for generations").

> move out from the city to get closer to nature only to find that nature has moved farther from them.[81]

Johnson called for a new version of conservation, and specifically for "an abundance of trails for walking, cycling, and horseback riding, in and close to our cities."[82] The inspiration for such an abundance of trails? "[T]he great Appalachian Trail . . . ."[83]

Johnson's soaring conservation rhetoric in 1965 and 1966 was followed by the congressional enactment of the National Trails System Act in 1968.[84] The administrative and legislative evidence is strongly supportive, as was President Johnson, of a conservationist and protectionist approach to national trails, particularly the Appalachian Trail.

For an example of administrative support for the protection of natural scenic trails, the influential 1966 report from the then-named U.S. Bureau of Outdoor Recreation ("Bureau") spoke for the "crisis in outdoor recreation" and the "surging demand for opportunities to enjoy outdoor activities."[85] The Bureau recommended trails as "a major opportunity to satisfy the demand for outdoor recreation."[86] The report touched on the spirit of adventure in the hearts of all Americans, and how long-distance trails offer opportunities to "travel[] through regions of outstanding scenic, historic, and recreation interest."[87]

Notably, the Bureau recommended in 1966 the organizational hierarchy for trail administration present today. The report noted that "[i]t is logical for the Secretary of the Interior to have primary . . . responsibility for the Appalachian Trail and the Potomac Heritage Trail" and for the Secretary of Agriculture to have primary responsibility for western trails such as the Pacific Crest Trail, because a large proportion of the western trails "lie within or adjacent to the National Forest."[88] Since 1966, the Secretary of Interior, or her delegate, has held administration of the Appalachian Trail.

Leading up to the enactment of the Trails Act, senators spoke of the rarity, importance, and value of the Appalachian Trail:

> If the Appalachian Trail is to be here for our children and grandchildren to enjoy then it is necessary that the vital interest of all the American people in

81. *Id.* at 1 (emphasis added).

82. *Id.* at 7.

83. *Id.*

84. *See* National Trails System Act of 1968, 16 U.S.C. § 1242 (2018) (establishing a national system of trails).

85. TRAILS FOR AMERICA, *supra* note 58, at 19. The 1966 report drew from an earlier 1962 Outdoor Recreation Resource Review Commission study. *See generally* OUTDOOR RECREATION RES. REVIEW COMM'N, R21, THE FUTURE OF OUTDOOR RECREATION IN METROPOLITAN REGIONS OF THE UNITED STATES, (1962) (discussing the important of outdoor recreation in the United States and the importance of trails for different recreation uses).

86. TRAILS FOR AMERICA, *supra* note 58, at 19.

87. *Id.* at 24.

88. *Id.* at 25.

> the preservation of this *priceless resource* be shown by congressional action.[89]
>
> One of our *most valuable recreational resources*, the Appalachian Trail, is in need of Federal protection to keep it from being destroyed by manmade encroachments . . . . Fortunately, it is still possible to get away from civilization and automobiles to walk through the woods and mountains. The Appalachian Trail offers one of these *rare* opportunities.[90]
>
> With this bill we have a chance to take preventive measures to protect the *natural beauty* of the Appalachian Trail from the encroachment of our expanding population before it occurs.[91]

The senator from Virginia at the time, where the recent controversy over the Appalachian Trail took place, spoke of preserving the trail: "The trail itself is a *rare recreational asset because it is preserving* at least a narrow strip of *land in the natural state* in which our forefathers found it. The trail passes through eight national forests and two national parks."[92]

A senate report from 1968 noted trails would become ever more important to American recreational needs.[93] The legislature saw many positives to trails as recreational assets: there are few trails, the trails are dispersed, and trails are beneficial to all types of exercise including "walking, hiking, horseback riding, and cycling."[94] The initial Trails Act bill provided for four trails: the Appalachian Trail, the Continental Divide Trail, the Pacific Crest Trail, and the Potomac Heritage Trail.[95]

Critics of legislative history argue that little can be gleaned about legislative intent from such committee reports or hearings as quoted above, in part because the legislature, as an entity composed of hundreds of legislators, cannot have any singular intent.[96] Such critics argue a single statement from a former senator of Virginia sheds little light on the intent of Congress as a whole. But successful legislation is a majoritarian process, and under a legislative decision theory of statutory interpretation, legislative history can provide "*evidence* of legislative *decisions*."[97] Some legislative evidence is more indicative of the majoritarian

89. *Hearing on S. 622, supra* note 75, at 7 (statement by Sen. Gaylord Nelson, Wisc.) (emphasis added).

90. *Id.* at 11 (statement by Sen. Joseph S. Clark, Pa.) (emphasis added).

91. *Id.* at 12 (statement by Sen. Claiborne Pell, R.I.) (emphasis added).

92. *Id.* at 10 (statement by Sen. A. Willis Robertson, Va.) (emphasis added).

93. *See* S. Rep. No. 1233, at 1–2 (1968).

94. *Id.*

95. *See id.* at 4.

96. Antonin Scalia, Lecture at Princeton University: Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws (Mar. 8-9, 1995), *in* TANNER LECTURES ON HUMAN VALUES, at 106 (stating "assuming, contrary to all reality, that the search for 'legislative intent' is a search for something that exists, that something is not likely to be found in the archives of legislative history"); *see also* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (arguing that a singular legislative intent is a "transparent and absurd fiction").

97. VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 64, 66 (Harv. U. Press, 2016).

legislative process than other evidence. For example, the last stage in the legislative process before a future piece of law is sent to the executive's desk is the conference committee report. The conference committee report comes at the end of the legislative process, and is jointly-issued text with "reports of the textual resolution of issues in conflict between House and Senate . . . ."[98]

The conference committee report for the Trails Act provides clear textual evidence that the Secretary of the Interior administers the Appalachian Trail, and that any right-of-way "over, under, across, or along" a national scenic trail must be "in accordance with the laws applicable to national park and forest lands."[99] The conference committee report for the Trails Act indicates a clear separation of the roles of the Secretaries of the Interior and Agriculture, with the former having administrative authority over the Appalachian Trail.[100] Notably, the conference committee report for the Trails Act speaks *directly* to the issue of "easements and rights-of-way upon, over, under, across, or along any components of the national trails system . . . ."[101] The evidence is clear: such easements or rights-of-way "must be related to the purposes of th[e] act."[102] The purpose of the Trails Act, as stated in the law's accompanying "statement of policy":

> In order to provide for the ever-increasing outdoor recreation needs of an expanding population *and in order to promote the preservation* of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation, trails should be established.[103]

The prediction that trails and surrounding natural areas would become important has proven true. As recently as 2016, areas adjacent to the Appalachian Trail have been protected by executive action for their cultural, scientific, and historic interest. In August 2016, President Barack Obama created, by presidential proclamation, the Katahdin Woods and Waters National Monument.[104] Obama declared the Katahdin Woods and Waters "a significant piece of this extraordinary natural and cultural landscape[,]" noting that the Appalachian Trail's northern terminus, Mount Katahdin, is located in those very woods and waters.[105] As Obama stated, the legacy of the Katahdin Woods stretches back centuries: President Theodore Roosevelt summitted Mount Katahdin on an 1879 Maine trip.[106]

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98. *See id.* at 80.
99. H.R. REP. NO. 1891, at 11 (1968) (Conf. Rep.).
100. *Id.* at 10.
101. *Id.* at 11.
102. *Id.*
103. National Trails System Act of 1968, 16 U.S.C. §1241(a) (2018) (emphasis added).
104. *See, e.g.*, Proclamation No. 9476, 81 Fed. Reg. 59,121, 59,121 (Aug. 29, 2016) (Establishment of the Katahdin Woods and Waters National Monument).
105. *Id.*
106. *See id.* at 59,122.

Agency action today on the Appalachian Trail and any other national trail operates against a clear backdrop of executive and legislative evidentiary materials emphasizing the importance of preserving such trails in a pristine and natural state. In reconciling versions of the Trails Act, the conference committee spoke clearly to the issues of administration of the Appalachian Trail and conditioning any easement or rights-of-way "over, under, across, or along any components of the national trails system in accordance with the laws applicable to the national park and forest lands."[107] The protection of national trails, with the Appalachian Trail as the original model, was viewed as paramount to the overall health of Americans. Together with the legacy of community and intention of the Appalachian Trail's first stewards, the executive and legislative evidence of the Trails Act strongly suggest limiting adverse construction and development across the trail.

II. THE STATUTORY TRIO'S PLAIN LANGUAGE SUPPORTS PROTECTING THE APPALACHIAN TRAIL

The natural and scenic essence of the Appalachian Trail should be protected by more than just legislative and executive evidence: The plain language of a statutory trio safeguards such trails. This statutory trio was the one raised by the U.S. Court of Appeals for the Fourth Circuit and the dissenting opinion in the Supreme Court.[108]

A plain reading of these three statutes appears to vest in Congress the power to grant a right-of-way over the Appalachian Trail and other national trails in the Park System. The plain language of the Mineral Leasing Act, the National Trails System Act, and the National Park Service Organic Act creates a system reserving the right to Congress to grant oil and gas pipeline rights-of-way across the Appalachian Trail. The Acts: (1) prohibit any entity other than Congress from granting oil and gas pipelines rights-of-way through the Park System; (2) vest administrative authority over the Appalachian Trail with the Secretary of the Interior; and (3) include in the Park System all lands administered by NPS into "one National Park System."[109] Thus, only Congress can grant a right-of-way across the Appalachian Trail to an oil and gas pipeline. These statutes all support the protection of the trail from ill-advised right-of-way grants to oil and gas pipelines.

107. H.R. REP. NO. 1891, *supra* note 99, at 11.

108. *Compare* U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1852 (2020) (Sotomayor, J., dissenting) (noting "[t]hree interlocking statutes foreclose" the majority's analysis in reference to the Mineral Leasing Act, the Park Service Organic Act, and the National Trails System Act of 1968), *with* Cowpasture River Pres. Ass'n v. Forest Serv., 911 F.3d 150, 179–83 (4th Cir. 2018) (analyzing the Forest Service's authority under the Mineral Leasing Act).

109. H.R. REP. NO. 91-1265, at 10 (1970).

Plain language, or plain meaning, is a pillar of statutory interpretation.[110] Some critique plain language statutory interpretation as reductive and "simple-minded[,]"[111] but the Supreme Court itself continues to use plain language in parsing legislative action.[112] The majority opinion in *U.S. Forest Service* relies on "the plain language of the Trails Act" read "in light of basic property law principles."[113] Plain language interpretation guides courts in determining the meaning of a statute, and requires that a court look first to statutory "language, giving the words used their ordinary meaning."[114] While "the task is frequently more easily said than done,"[115] attempting to interpret statutes according to plain meaning is a fine place to start when grappling with a statute, because ordinary meaning provides "an obvious point of agreement in circumstances in which disagreement is too costly."[116]

Here, where the natural and scenic spirit of the Appalachian Trail is at stake, Congress' intent in protecting the Park System is clear from the operative statutory triptych: the Mineral Leasing Act, the National Trails System Act, and the National Park Service Organic Act. This Part addresses the plain language meaning of each of these Acts in turn.

A. Mineral Leasing Act of 1920

The Mineral Leasing Act (MLA) is one of the primary statutes governing mining, oil and gas extraction, and transport. As amended in 1973, the statute is Congress' "definitive statement on gas pipeline rights-of-way across federal property."[117] Under the MLA, "[r]ights-of-way through any Federal lands may be granted by the Secretary of the Interior or appropriate agency head for pipeline

110. *See, e.g.*, LEARNED HAND, HOW FAR IS A JUDGE FREE IN RENDERING A DECISION? (1935), *reprinted in* L. HAND, THE SPIRIT OF LIBERTY 108 (Irving Dillard ed., 3d ed., Alfred A. Knopf, 1960) (reasoning that "[w]hen a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks is right. *Let him beware*, *however*, *or he will usurp the office of government*") (emphasis added). Learned Hand also noted the judges are torn between two forces: plain language and congressional intent. *See id.* at 106 (stating that a judge "cannot go beyond what has been said, *because he is bound to enforce existing commands and only those*; on the other hand, he cannot support that what has been said should clearly frustrate or leave unexecuted its own purpose") (emphasis added).

111. Arthur W. Murphy, *Old Maxims Never Die The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COL. L. REV. 1299, 1317 (1975).

112. *See* Moskal v. U.S., 498 U.S. 103, 108 (1990) (stating "[i]n determining the scope of a statute, we look first to its language, . . . giving the 'words used' their 'ordinary meaning' . . .") (citations and internal quotations omitted); *see also* Artis v. District of Columbia, 138 S. Ct. 594, 603 (2018) (quoting *Moskal*).

113. *U.S. Forest Service*, 140 S. Ct. at 1846.

114. *Artis*, 138 S. Ct. at 603.

115. Murphy, *supra* note 111, at 1299.

116. David A. Strauss, *Why Plain Meaning?*, 72 NORTE DAME L. REV. 1565, 1565 (1997).

117. *Brief in Opposition*, *supra* note 28, at 4; H.R. REP. NO. 93-624, at 21 (1973) (Conf. Com.) (stating that "the Mineral Leasing Act of 1920 . . . is the principal authority for granting oil and gas pipeline rights-of-way across public lands").

purposes for the transportation of oil, natural gas," and other minerals.[118] However, MLA section 185(b)(1) states that "'Federal lands' means all lands owned by the United States *except* lands in the National Park System . . . ."[119] Usually the Secretary of Interior or appropriate agency head could grant a right-of-way, but, under the MLA the "Secretary of the Interior or appropriate agency head" *cannot* grant an oil or gas pipeline a right-of-way in the Park System: only Congress has such authority.[120]

The MLA, therefore, sets up the foundation for reserving to Congress the right to grant oil and gas pipelines rights-of-way across the Park System. Notably, the 1973 amendments to the MLA took into account "developments in coal gasification and liquification, oil shale, and tar sands."[121] Congress also explicitly exempted lands in "the National Park System, the Outer Continental Shelf, and Indian lands" from administrative authority to grant rights-of-way.[122] At a House and Senate conference on disagreeing votes regarding the 1973 amendments, the conferees adopted the Senate's approach of excluding such lands while declining to exclude two previously excluded categories: the National Wildlife Refuge System and the National Wilderness Preservation System.[123] Consistent with the "feasible and prudent" approach detailed later in this Note, the conferees noted that "rights-of-way through reserved areas *may not be granted if they would be inconsistent with the purposes of the reservation*."[124] Even though the majority in *U.S. Forest Service* read the MLA in light of two other, seemingly unrelated statutes,[125] the approach noted by conferees supports the application of a "feasible and prudent" approach to trails in the National Park System moving forward.

B. National Trails System Act of 1968

Operating against the backdrop of the MLA is the National Trails System Act. The Trails Act created a system of national scenic and historic trails, and Congress notably reserved the power to grant oil and gas pipeline rights-of-way to itself in the MLA 1973 amendments *after* the enactment of the Trails Act.[126] The Trails Act, in addition to emphasizing the importance of the natural and scenic nature of national trails, and specifically the Appalachian Trail, also

118. Mineral Leasing Act of 1920, 30 U.S.C. § 185(a)–(b)(1) (2018).
119. *Id.* § 185(b)(1) (emphasis added).
120. *See id.*
121. H.R. REP. NO. 93-624, *supra* note 117, at 21.
122. *Id.*
123. *See id.*
124. *See id.* at 21–22 (emphasis added).
125. *See* U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1842–43, 1847–48 (2020).
126. *See* Act of Nov. 16, 1973, Pub. L. No. 93-153, § 28(b)(1), 87 STAT. 576, 577 (codified as amended at 30 U.S.C. § 185(b)(1) (2018)).

divided administration of national trails among different agencies.[127] It is that division of administration which differentiates the Appalachian Trail as a unit of the Park System from other trails which are not similarly included.

The Trails Act explicitly states "[t]he Appalachian Trail *shall be administered* primarily as a footpath *by the Secretary of the Interior*, in consultation with the Secretary of Agriculture."[128] Thus, the Act vested administrative authority over the Appalachian Trail with the Secretary of Interior, who delegated authority to the NPS.[129] Following the Supreme Court's decision, the Secretary of Agriculture and the Forest Service through delegated power, have the ability to grant rights-of-way on Forest Services lands over which the trail runs.[130]

In addition to a plain language reading of the Trails Act, administrative agencies themselves agree that the Appalachian Trail is a unit of the Park System. In its final environmental impact statement (EIS), the Federal Energy Regulatory Commission (FERC) noted, "the NPS is . . . the lead federal agency for the administration of the entire [Appalachian Trail]; and the [Appalachian Trail] is a 'unit' of the national park system."[131] The Forest Service later proposed to adopt FERC's Impact Statement.[132]

Taken together, the plain language of the Trails Act and the Forest Service's own concession that the Appalachian Trail is a unit of the Park System support the NPS' administration of the trail.[133]

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127. *See* National Trails System Act of 1968, 16 U.S.C. § 1244(a)(1) (2018); *see also* TRAILS FOR AMERICA, *supra* note 58, at 25.

128. § 1244(a)(1).

129. *See* National Wild and Scenic Rivers System and National Trails System: Responsibility for Planning and Operation of Programs and Projects, 34 Fed. Reg. 14,337, 14,337 (Sept. 12, 1969) (delegating administrative authority of the Appalachian Trail to the Bureau of Outdoor Recreation, which would later fold into the NPS).

130. *U.S. Forest Serv.*, 140 S. Ct. at 1850.

131. FED. ENERGY REGULATORY COMM'N, DOCKET NOS. CP15-554-000, CP15-554-001, CP15-555-000, CP15-556-000, ATLANTIC COAST PIPELINE AND SUPPLY HEADER PROJECT FINAL ENVIRONMENTAL IMPACT STATEMENT VOL. I, 4-476 (2017); *see also* Atlantic Coast Pipeline, LLC, Dominion Energy Transmission, Inc., Piedmont Natural Gas Company, Inc.; Notice of Availability of the Final Environmental Impact Statement for the Proposed Atlantic Coast Pipeline and Supply Header Project, 82 Fed. Reg. 35,192, 35,192 (Jul. 28, 2017) (providing notice that FERC's final environmental impact statement for the Atlantic Coast Pipeline is available). FERC prepared the environmental impact statement, as required by the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4332 (2018), because FERC reviews applications for the construction and operation of interstate natural gas pipelines under its Natural Gas Act authority. *See* Natural Gas Act of 1938, 15 U.S.C. §§ 717b-1(a), 717*o* (2018) (outlining FERC's National Environmental Policy Act of 1969 responsibilities and administrative powers). FERC is the independent entity charged with the regulation of natural gas pipelines under the Natural Gas Act. Natural Gas Act of 1938, 15 U.S.C. § 717 (2018) (granting power to the Federal Power Commission. The Federal Power Commission's functions would later transfer to FERC. *See* 42 U.S.C. § 7172(a) (2018)).

132. U.S. DEP'T OF AGRIC., RECORD OF DECISION: ATLANTIC COAST PIPELINE PROJECT SPECIAL USE PERMIT/LAND RESOURCE MANAGEMENT PLAN AMENDMENTS, 3, 7 (2017) (stating "[w]e have adopted the environmental analysis conducted by FERC").

133. *See* Cowpasture River Pres. Ass'n v. Forest Serv., 911 F.3d 150, 179 (4th Cir. 2018).

C. National Park Service Organic Act of 1916

Finally, the Trails Act and MLA should also be read in *pari materia* with the National Park Service Organic Act ("Park Service Act"), which provides that the purpose of NPS is to conserve the natural scenery of Park System units. The "fundamental purpose" of Park System units, which include the Appalachian Trail, "is to conserve the scenery, natural and historic objects, and wild life . . . and to provide for the[ir] enjoyment . . . in such manner and by such means *as will leave them unimpaired* for the enjoyment of future generations."[134] The Appalachian Trail is a unit of NPS: Congress incorporated all areas administered by NPS into "one National Park System" in 1970.[135]

By reading the Trails Act and MLA in light of the Park Service Act, it is clear that the purpose of the Appalachian Trail is to provide an unimpaired natural landscape for the American people. Increased pipeline development is directly in conflict with the plain language and purpose of the statutes governing the trail. To be "unimpaired" as required by the Park Service Act, the Appalachian Trail should be protected from encroaching development under a "feasible and prudent" alternative standard, from the hundreds of miles of clear cuts and years of construction that accompany oil and gas pipeline development.[136]

III. THE PIPELINE VERSUS THE VERY FIRST TRAIL

The Atlantic Pipeline project and the Appalachian Trail exemplify the tension between preserving national trails stretching hundreds and even thousands of miles, and increasing oil and gas development. As technologies for oil and gas extraction continue to develop, new gas resources are discovered. But getting the gas to consumers requires transportation, and for natural gas, pipelines are highly effective. Challenges faced by the Atlantic Pipeline and the project's ultimate cancellation raise serious questions about the long-term viability of such projects, especially considering increased competition from other energy sources.

134. National Park Service Organic Act of 1916, 54 U.S.C. § 100101(a) (2018).

135. H.R. REP. NO. 91-1265, *supra* note 109.

136. The climate change impacts of oil and gas pipeline development on national trails are outside the scope of this Note. However, it is well documented that oil and gas pipeline development contributes to climate change. *See* Oliver Milman, *Study Finds North American Drilling Boom is Threatening Efforts to Slow Climate Change*, MOTHER JONES (Apr. 26, 2019), https://www.motherjones.com/environment/2019/04/study-finds-north-american-drilling-boom-is-threatening-efforts-to-slow-climate-change/. While this Note argues that the physical intrusion of a right-of-way through national trails and surrounding areas injures such trails' natural and scenic qualities, the direct and indirect climate change impacts of increased oil and gas pipeline development also degrade trails' natural and scenic character.

A. From Shale to Consumer

The Marcellus Shale and Point Pleasant-Utica Shale formations in the Appalachian Basin contain an estimated 214 trillion cubic feet of potentially recoverable natural gas.[137] These formations stretch across six states, and as technology advances, estimates of the potential natural gas and oil bound up in the shale fluctuates.[138]

Until recently, shale formations were considered impenetrable to oil and gas development.[139] Shale rock deposits hold shale gas, either freely trapped in rock pores and fissures or absorbed into the rock surfaces.[140] Traditionally, shale gas was viewed as an "impractical or uneconomic" source of fuel.[141] Only in the twenty-first century has "[t]he combination of horizontal drilling and hydraulic fracturing enable[d] the extraction of huge quantities of natural gas from impermeable shale formations."[142] The horizontal drilling and hydraulic fracturing ("fracking") boom has "transformed the US energy landscape" and revived declining U.S. natural gas output.[143]

Shale rock oil and gas development, and in particular the Marcellus Shale formation, gained a powerful ally in the past decade: President Donald J. Trump. In October 2019, Trump lauded the potential "Marcellus Shale country" held for both states and employees and lamented the reticence of some in allowing fracking and pipeline development.[144] These statements follow Trump's overall American "energy dominance"[145] and "energy independence"[146] agenda.

Once oil or gas is extracted from the Marcellus Shale and Utica formations, it needs a way to get to consumers. And what works well for transport? Pipelines.

B. The Controversy Before the Courts

The Atlantic Coast Pipeline ("Atlantic Pipeline") was proposed as a 604.5-mile, forty-two-inch diameter pipeline originating in the Marcellus Shale

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137. *See* U.S. GEOLOGICAL SURVEY ("USGS"), USGS ESTIMATES 214 TRILLION CUBIC FEET OF NATURAL GAS IN APPALACHIAN BASIN FORMATIONS (2019).

138. *See id.* (stating increasing estimates); *but see* Qiang Wang et al., *Natural Gas from Shale Formation – The Evolution, Evidences and Challenges of Shale Gas Revolution in United States*, 30 RENEWABLE & SUSTAINABLE ENERGY REVS. 1, 5 (2014) (noting a decrease).

139. *See* Wang et al., *supra* note 138, at 2.

140. *See id.* at 3.

141. *Id.* at 2.

142. *Id.*

143. *Id.*

144. *See* President Donald Trump, Remarks at 9th Annual Shale Insight Conference (Oct. 23, 2019) (noting the importance of the Marcellus Shale region and disapproving of New York's disallowing of pipelines and fracking).

145. THE WHITE HOUSE, PRESIDENT DONALD J. TRUMP IS UNLEASHING AMERICAN ENERGY DOMINANCE (2019) (summarizing different actions contributing to "[t]he golden era of American energy").

146. Exec. Order No. 13783: Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093, 16,093 (Mar. 31, 2017).

formation in West Virginia.[147] From West Virginia, the proposed pipeline traveled southeast through Virginia, passing through more than a dozen counties before hitting the Virginia-North Carolina border and continuing southwest through North Carolina.[148] The proposed pipeline ended in North Carolina's Robeson County and included an extension branching off near the Virginia-North Carolina border and running east through the state to Chesapeake, Virginia.[149] Pipeline developer Atlantic Coast Pipeline, LLC ("Atlantic") expected the project to generate 17,000 temporary construction jobs and 2,200 long-term jobs.[150]

The Atlantic Pipeline is vastly different than the first natural gas pipeline to stretch across any part of the United States. In 1892, a 120-mile pipeline reached from Indiana to Chicago, making long-distance natural gas transmission possible for the first time.[151] As proposed, the Atlantic Pipeline was five times as long as that 1892 pipeline and would carry product from a source unimaginable in the nineteenth century: shale rock.[152]

But like all other pipelines, the Atlantic Pipeline project required permission from different agencies before construction could begin. It is one of those permissions Atlantic obtained that set up the Supreme Court showdown between the 600-mile pipeline and the very first national trail.

Although the Atlantic Pipeline wound its way to the Supreme Court and prevailed in June 2020,[153] the project officially entered the administrative process just over five years earlier in September 2015, when Atlantic filed its formal pipeline application with FERC.[154] Shortly thereafter, Atlantic applied for a special-use permit from the Forest Service to construct and operate the pipeline in the Monongahela National Forest ("Monongahela") and the George Washington National Forest ("George Washington").[155]

In order to build an interstate gas or oil pipeline in the United States, a company like Atlantic needs certain permits and permissions from different local, state, and federal agencies. For the Atlantic Pipeline, the controversial

147. *See* Cowpasture River Pres. Ass'n v. Forest Serv., 911 F.3d 150, 155 (4th Cir. 2018); *see also* Atlantic Coast Pipeline, *Project Overview Map* (Nov. 2018), https://perma.cc/NXY9-DB8E; *see also* Elizabeth Ouzts, *In North Carolina, Novel Legal Maneuver Deployed Against Atlantic Coast Pipeline*, ENERGY NEWS NETWORK (Aug. 21, 2019), https://energynews.us/2019/08/21/southeast/in-north-carolina-novel-legal-maneuver-deployed-against-atlantic-coast-pipeline/.

148. *See* Atlantic Coast Pipeline, *supra* note 147.

149. *See id.*

150. *Id.*

151. CHARLES M. HAAR & DANIEL W. FESSLER, THE WRONG SIDE OF THE TRACKS 143 (Simon & Schuster 1986). Hydraulic fracturing consists of drilling a well into the ground, and pumping a fracturing fluid into the well until the surrounding earth fractures and allows trapped oil and gas to escape. *See* Wang et al , *supra* note 138, at 3.

152. *See* Wang et al., *supra* note 138, at 2 (noting that shale gas only became economically and technologically feasible to develop in the twenty-first century).

153. U.S. Forest Serv. v. Cowpasture River Preservation Ass'n, 140 S. Ct. 1837, 1850 (2020).

154. Cowpasture River Pres. Ass'n v. Forest Serv., 911 F.3d 150, 155 (4th Cir. 2018); *see generally* Atlantic Coast Pipeline Project Application, *supra* note 11.

155. *See Cowpasture*, 911 F.3d at 155.

permissions which led to the Supreme Court were federal permits and decisions made by the Forest Service.[156] Atlantic needed the Forest Service's approval because the pipeline's proposed route crossed twenty-one miles of national forest land—approximately sixteen miles in the George Washington and five miles in the Monongahela—before intersecting with the Appalachian Trail in the George Washington.[157]

The Forest Service grants such permits consistent with its overall national forest planning regulations.[158] In November 2017, the Forest Service granted the Atlantic Pipeline a right-of-way across the Appalachian Trail.[159] In February 2018, a coalition of conservation and environmental groups headed by the Cowpasture River Preservation Association filed a challenge to the right-of-way, in addition to aspects of the Forest Service's National Forest Management Act ("NFMA") and National Environmental Policy Act ("NEPA") procedures.[160]

But the Forest Service was not the only agency involved in the leadup to the Appalachian Trail-pipeline dispute. Because the Atlantic project also fell under FERC's jurisdiction as an interstate oil and natural gas pipeline,[161] the Forest Service worked with FERC in reviewing and commenting on FERC's EIS for the pipeline project.[162] Notably, the EIS issued by FERC "explicitly stated that the [Atlantic Pipeline] was routed on national forest lands in order to *avoid* the need for congressional approval for the pipeline to cross the [Appalachian Trail] . . . ."[163] The agencies were thus aware prior to the grant of a right-of-way across the Appalachian Trail that pipelines needed congressional approval in the Park System. The EIS stated:

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156. *Id.* (vacating and remanding the Forest Service's grant of a special use permit and Record of Decision); *see also* National Forest Management Act, 16 U.S.C. § 1604 (2018); *see also* National Trails System Act of 1968, 16 U.S.C. § 1244(a)(1) (2018).

157. *See Cowpasture*, 911 F.3d at 155.

158. *See* National Forest System Land Management Planning, 78 Fed. Reg. 23,491, 23,491 (Apr. 19, 2013) (codified at 36 C.F.R. § 219).

159. RECORD OF DECISION: ATLANTIC COAST PIPELINE PROJECT, *supra* note 132, at 50 (approving the right-of-way and stating that the special use permit for the Atlantic Pipeline is "compliant with the [Trails Act]").

160. Petitioners' Opening Brief at 1–2, 8, 15–17, Cowpasture River Pres. Ass'n v. Forest Serv., 911 F.3d 150, 155 (4th Cir. 2018) (No. 18-1144). In addition to the pipeline right-of-way issue across the Appalachian Trail, the conservation coalition raised issues regarding the Forest Service's National Forest Management Act (NFMA) and FERC's National Environmental Policy Act (NEPA) procedures. *See id.* at 15–17. The Fourth Circuit ultimately held against the Forest Service on both issues. *See Cowpasture*, 911 F.3d at 166, 179 (holding as arbitrary and capricious the Forest Service's decision that amendments to the George Washington and Monongahela forest plans would not have substantial adverse effects on the forests because the Forest Service went to "striking, and inexplicable" lengths to avoid applying the 2012 Planning Rule's substantive requirements, and that FERC's EIS was insufficient because it failed to consider alternative off-forest routes and did not take a "hard look" at landslide, erosion, and water quality risks in violation of NEPA). A deeper dive into the NFMA and NEPA issues identified by the Fourth Circuit is beyond the scope of this Note.

161. Natural Gas Act of 1938, 15 U.S.C. § 717 (2018).

162. *See Cowpasture*, 911 F.3d at 155–56.

163. *Id.* at 156 (emphasis added).

> [a] *significant factor in siting [the Atlantic Pipeline]* was the location at which the pipeline would cross the [Appalachian Trail]. In the general project area, the Appalachian Trail is located on lands managed by either the NPS or [Forest Service]. The NPS has indicated *that it does not have the authority to authorize a pipeline crossing* of the [Appalachian Trail] on its lands. Instead, legislation proposed by Congress and signed into law by the President would be necessary to allow the NPS the authority to review, analyze, and approve a pipeline crossing of the [Appalachian Trail] on its lands.[164]

The agencies' point of view differs from the plain language of the MLA, Trails Act, and Park Service Act statutory trio in concluding that the Forest Service *does* have jurisdiction to grant a right-of-way across the Appalachian Trail on national forest lands.[165] The Forest Service argued that it may grant a right-of-way across the Appalachian Trail within national forests, because "the Park Service is responsible for administering the Appalachian Trail as a footpath, while the Forest Service retains jurisdiction and authority over the *lands* within national forests traversed by the footpath."[166] Likewise, Atlantic argued that the Forest Service "generally has the authority to grant rights-of-way for pipelines over Forest Service land" under the MLA.[167] The Forest Service relied on the distinction between a "trail" and the "land" over which the trail rests, a distinction the Supreme Court's majority agreed with.[168] For the Forest Service, the trail is severable from the land, and therefore the Park Service can manage the trail while the Forest Service manages the land.[169] The argument of course ignored the existence of the Appalachian Trail beyond the dirt users traverse and excises the physical trail from the natural splendor that draws recreationalists to the realm of the trail.

The U.S. Court of Appeals for the Fourth Circuit disagreed with both the Forest Service and Atlantic. The court reasoned that the Appalachian Trail is a unit of the Park System, and therefore the Secretary of Agriculture, the Forest Service through delegated authority, or anyone else cannot grant a pipeline a right-of-way across the trail.[170] The court held that under the language of the MLA, as read with the Trails Act and the Park Service Act, *only* Congress may approve pipeline access over units of the Park System.[171]

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164. FERC EIS, *supra* note 131, at 3-18–19.

165. *See id.*; *see also* Brief for Federal Petitioners at 19–24, U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1845 (2020) (Nos. 18-1584, 18-1587) [hereinafter *Brief for Federal Petitioners*].

166. *Petition for Certiorari*, *supra* note 33, at 13–14 (emphasis added).

167. Petition for Writ of Certiorari at 10, Atlantic Coast Pipeline, LLC v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1845 (2020) (No. 18-1587, *consolidated with* No. 18-1584) [hereinafter *Atlantic Petition*].

168. U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1845 (2020) (noting the grant of the Appalachian Trail is "an easement across the land, not jurisdiction over the land itself").

169. *See Brief for Federal Petitioners*, *supra* note 165, at 25.

170. *See* Cowpasture River Pres. Ass'n v. Forest Serv., 911 F.3d 150, 181 (4th Cir. 2018).

171. *See id.*

In holding for the conservation coalition, the Fourth Circuit rejected the Forest Service's argument that the Trails Act provides for the administration of national trails by distinguishing between overall administration of the *trail* and administration of underlying *lands*.[172] The Forest Service relied on section 1248(a) of the Trails Act, which states "[t]he Secretary of the Interior or the Secretary of Agriculture as the case may be, *may grant* . . . rights-of-way upon, over, under, across, or along any component of the national trails system in accordance with the laws applicable to the national park system and the national forest system . . . ."[173] The court reasoned that the Trails Act "does not distinguish between . . . levels of administration of the trail . . . rather, . . . the Act is clear that the Secretary of the Interior *administers* the entire [Appalachian Trail], with . . . the Forest Service . . . *manag[ing]* trail components under their jurisdiction."[174]

Although the Fourth Circuit also remanded to the Forest Service issues under NFMA and NEPA,[175] the Forest Service and Atlantic only petitioned the Supreme Court for review on one issue: the Forest Service's authority, or lack thereof according to the Fourth Circuit, to grant a right-of-way across the Appalachian Trail.[176] Atlantic argued that the Fourth Circuit's decision "converts [the] Trail . . . into a 2,200-mile Park-Service Barrier separating critical natural resources from consumers along the East Coast . . . ."[177] The U.S. Solicitor General, on behalf of the Forest Service, reasserted its argument, stating that under the Trails Act and the MLA, the Forest Service retains jurisdiction over all lands in the national forest including the land over which the Appalachian Trail lies.[178]

Both Atlantic and the Solicitor General voiced concern about the threat the Fourth Circuit's holding poses to oil and gas development. The Solicitor General contended the court's ruling:

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172. *See id.* at 180.

173. National Trails System Act of 1968, 16 U.S.C. § 1248(a) (2018) (emphasis added).

174. *Cowpasture*, 911 F.3d at 180 (relying on Section 1246(a) of the Trails Act, which states, "The Secretary charged with the overall *administration* of a trail pursuant to section 1244(a) of this title shall, in *administering and managing* the trail, consult with the heads of all other affected State and Federal agencies. Nothing 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." National Trails System Act of 1968, 16 U.S.C. § 1248(a) (2012)).

175. The NEPA issue identified by the Fourth Circuit is a classic example of agency acquiescence to an insufficient analysis. *See* Sierra Club, Inc. v. U.S. Forest Serv., 897 F.3d 582, 595 (4th Cir. 2018). Under NEPA, an agency is required to analyze alternatives to proposed projects. 40 C.F.R. § 1505.2(b) (2010). The Fourth Circuit noted that "no such analysis is apparent anywhere in the record, and most tellingly, neither the Forest Service nor Atlantic even attempt to identify evidence to demonstrate that FERC did anything to address the Forest Service's concerns about off-forest alternative routes." *See Cowpasture*, 911 F.3d at 172–73.

176. *See Petition for Certiorari*, *supra* note 33, at (I); *see also Atlantic Petition*, *supra* note 167, at i–ii. In its grant of review, the Supreme Court combined the Atlantic and Forest Service dockets.

177. *Atlantic Petition*, *supra* note 167, at 2.

178. *See Petition for Certiorari*, *supra* note 33, at 13–14.

> threatens to hamper the development of energy infrastructure in the eastern United States . . .[and] casts doubt on the Forest Service's previously unquestioned authority to grant permits and other types of land use authorizations for power lines, communications sites, water facilities, and roads that cross the Appalachian Trail within national forests.[179]

The Trump Administration routinely viewed threats to oil and gas pipelines as threats to the American energy industry in general. After Dominion Energy and Duke Energy announced the end of the Atlantic Pipeline project, the U.S. Secretary of Energy Dan Brouillette placed blamed on "[t]he well-funded, obstructionist environmental lobby [which] successfully killed the Atlantic Coast Pipeline."[180]

The argument that the Fourth Circuit's reasoning borders on the absurd and cannot possibly be what Congress intended with the MLA, Trails Act, and Park Service Act, ignores the fact that this statutory trio forecloses *only* oil and gas pipeline development, and then only if Congress declines to approve the pipeline. The parade of horribles the Solicitor General cited—cancelled powerlines, communications sites, and more—are not affected by the MLA's plain language.[181] Moreover, the absurd result Atlantic, the Forest Service, and the Solicitor General feared is out of touch with the legislative intent behind the MLA, Trails Act, and Park Service Act. The absurdity doctrine reasons that if statutory interpretation results in "an outcome so contrary to perceived social values that Congress could not have 'intended' it," the outcome should be rejected.[182] Here, the precise terms of the text merely serve to protect the natural and scenic essence of the Appalachian Trail from the encroachment of a pipeline project otherwise plagued by improper administrative procedure.

In the Supreme Court, the controversy between the pipeline and the very first trail narrowed to a single question: on whose land does the Appalachian Trail lie?[183] The majority reasons the Forest Service entered into a right-of-way agreement with the NPS for the portion of the Appalachian Trail within national forests, and rights-of-ways are a type of easement which do not transfer land

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179. *Id.* at 14.

180. Press Release, U.S. Dep't of Energy, Secretary Brouillette Issues Statement on Atlantic Coast Pipeline (July 5, 2020), https://www.energy.gov/articles/secretary-brouillette-issues-statement-atlantic-coast-pipeline.

181. *See* Mineral Leasing Act of 1920, 30 U.S.C. § 185(a) (2018).

182. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

183. *Compare* U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1844 (2020) (stating "[t]he question before us, then, becomes whether these lands within the forest have been removed from the Forest Service's jurisdiction and placed under the Park Service's control because the Trail crosses them"), *with* 140 S. Ct. at 1850 (Sotomayor, J. dissenting) (noting "[t]he majority's complicated discussion … masks the simple (and only) dispute here. Is the Appalachian National Scenic Trail "lan[d] in the National Park System"?); *See also* Natasha Geiling, *Whose Land is this Land?*, SIERRA (Feb. 26, 2020), https://www.sierraclub.org/sierra/whose-land-atlantic-coast-pipeline-appalachian-trail-supreme-court-dominion-energy-duke-energy (discussing the question of Forest Service or NPS authority over the portion of the Appalachian Trail intersected by the Atlantic Pipeline project).

from the Forest Service to the NPS.[184] The Court notes "[a]lthough the Federal Government owns all the land involved . . . the same general principles" of private property law apply.[185] Thus, under the majority's reasoning, the NPS' jurisdiction over the contested portion of the trail is a mere right-of-way and therefore the trail cannot be "land" in the Park System.

Ultimately, the majority's opinion ignores statutory history and legislative evidence and relies on separate statutes[186] to limit the NPS' interest to that of an easement, despite statutory text stating the NPS "administers" the trail.[187] As noted by the dissent, the majority's rationale is particularly weak in its utilization of private property concepts for lands held by the federal government.[188] But even under the majority's framework, the categorization of the Appalachian Trail as an easement does not neuter the NPS' authority.

An "easement" under the Third Restatement of Property is "a nonpossessory right to enter and use land in possession of another *and obligates the possessor not to interfere with the uses authorized by the easement*."[189] Because the Trails Act states that the Secretary of Interior administers the Appalachian Trail, it is unclear how an interagency grant from the Forest Service to the NPS can claw back administrative authority granted to the Secretary of Interior by Congress. Even under the framework of an easement, it is unclear by the majority's reasoning how Forest Service's grant of a right-of-way to the NPS for the Appalachian Trail through national forests would at the same time limit an act of Congress that previously granted administration of the Appalachian Trail to the Secretary of Interior. The majority states the "plain language of the Trails Act and the agreement between the agencies did not divest the Forest Service of jurisdiction."[190] But in doing so, the majority does not engage with the three operative statutes and as the dissent notes, reaches an outcome "inconsistent with the language of three statutes, longstanding agency practice, and common sense."[191]

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184. *U.S. Forest Serv.*, 140 S. Ct. at 1844.

185. *Id.* at 1845.

186. *Id.* at 1847, 1850 (comparing the Trails Act to the Wild and Scenic Rivers Act and reasoning the "Trails Act must be read against the backdrop of the Weeks Act").

187. H.R. REP. NO. 1891, *supra* note 99, at 10; *see also* National Trails System Act of 1968, 16 U.S.C. § 1244(a)(1) (2018).

188. *U.S. Forest Serv.*, 140 S. Ct. at 1856 (Sotomayor, J., dissenting) (noting "because the Government owns all the lands at issue, it makes little sense to ask whether the Government granted itself an easement over its own land under state-law principles. Between agencies of the Federal Government, federal statutory commands, not private-law analogies, govern.").

189. *Restatement (Third) of Property (Servitudes)* § 1 2 (2000) (emphasis added).

190. *U.S. Forest Serv.*, 140 S. Ct. at 1846.

191. *Id.* at 1861 (Sotomayor, J., dissenting). The majority opinion is plagued in other places by an apparent lack of common sense. At one point, the majority notes that "Respondents' entire theory depends on an administrative action about which the statutes at issue are completed silent: the Department of the Interior's voluntary decision to assign responsibility over a given trail to the National Park Service rather than to the Bureau of Land Management." *Id.* at 1848. Rather than revealing some conspiracy or irrational decision making by the Secretary of Interior, such a statement ignores the practical: Founded in 1946, BLM largely manages lands in the western United States, whereas the Appalachian Trail is located in the

The divorce of the Appalachian Trail from the land over which the trail crosses and the trail's environment ultimately permits the Court to choose a pipeline over the trail. In doing so, the Court reverses decades of collaboration, protection, and the long-term efforts of many stakeholders.[192]

C. The Potential Threats of the Atlantic Pipeline to the Appalachian Trail

The threatened impacts of the Atlantic Pipeline right-of-way across the Appalachian Trail were likely different than most imagine. What the impacts are *not* is a forty-two-inch diameter pipe crossing the trail at any single point. Instead, the pipeline as proposed was to be buried approximately 600 feet beneath the trail.[193] However, burying the pipeline required drilling a mile-long, 3.5-foot diameter hole through a mountain and "more than a year of around-the-clock operations with heavy construction equipment operating continuously."[194]

In addition to the direct effects of the pipeline on the Appalachian Trail, indirect construction impacts would diminish the natural and wild qualities of the trail and its surroundings. In addition to drilling through a mountain, Atlantic would have clear-cut—fell and remove all trees and brush[195]—a 125-foot right-of-way for most of the pipeline's crossing through the George Washington and Monongahela National Forests.[196] That is approximately twenty-one miles by 125 feet of cleared forest.[197] According to Atlantic's own visual impact assessment, that clear-cut corridor would be visible from at least eight different points along the Appalachian Trail.[198] For at least one of the eight different

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eastern United States. BLM's concentration in the western United States has continued from founding to today. The U.S. Grazing Service (with jurisdiction over 142 million in 10 western states between 1935 and 1951), the General Land Office (consisting largely of undisposed public domain in the rural western United States), and the Oregon & California Revested Lands Administration were combined to form BLM. *See* Public Lands Foundation, *America's Public Lands origin, history, future* 9–10 (2014), https://publicland.org/wp-content/uploads/2016/08/150359_Public_Lands_Document_web.pdf. As discussed in a 2020 Congressional Research Service report, "more than 99%" of BLM lands "are heavily concentrated . . . in 11 contiguous western states and Alaska." Carol Hardy Vincent et al., Cong. Research Serv., R42346, *Federal Land Ownership Overview and Data* 4 (2020).

192. Although this Note focuses on the narrow portion of the Atlantic Pipeline's path that intersected the Appalachian Trail, the pipeline was met with challenges along its 600-plus-mile length. As discussed by Nick Martin in an article for *The New Republic*, the *Cowpasture* case should be considered in context of how such pipeline projects "target[] communities of color, tribal nations, and rural towns with pinpoint precision." Nick Martin, *The Atlantic Coast Pipeline Project is About People, Not Precedent*, THE NEW REPUBLIC (June 15, 2020), https://newrepublic.com/article/158179/atlantic-coast-pipeline-battle-people-not-precedent.

193. *See Petition for Certiorari*, *supra* note 33, at 10.

194. *Brief in Opposition*, *supra* note 28, at 5.

195. NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 303 (Christine A. Klein et al., eds., 4th ed., Wolters Kluwer 2018) (stating "[c]lear-cutting is a term used to describe a number of even-age silvicultural practices in which all the trees in the designated area are removed or killed").

196. *See Brief in Opposition*, *supra* note 28, at 5; *See generally* ERM, *supra* note 39 (outlining the impact of the Atlantic Pipeline in Monongahela and George Washington National Forests).

197. *See id.*

198. *See* ERM, *supra* note 39, at 19.

viewpoints, Atlantic's visual impact assessment noted that "[v]iews of the [pipeline] corridor . . . would likely be inconsistent with NPS management objectives, given the proximity to the viewer . . . and the corridor's contrast with the surrounding forest."[199] Atlantic proposed to plant shrubs to mitigate such impacts on the trail.[200]

Atlantic would have also blasted mountain ridgetops "down by as much as 20 feet" to facilitate the pipeline.[201] Combined, the clear-cut, construction, drilling, and blasting would have amounted to an encroachment on the Appalachian Trail, and a violation of the congressional intent in designating the trail as the first national trail. As President Johnson said, "[i]t would be a neglectful generation indeed . . . which failed to preserve and extend such a heritage for its descendants."[202] Here, at the intersection of the Appalachian Trail and the Atlantic Pipeline, was an opportunity to preserve the integrity of a narrow footpath. But even a missed opportunity can be learned from.

As it turns out, the Atlantic Pipeline was not the only natural gas pipeline seeking to cross the Appalachian Trail. The Mountain Valley Pipeline ("Mountain Valley"), a proposed 303-mile natural gas pipeline stretching from the same Marcellus Shale region in West Virginia before terminating in southern Virginia, is also fighting for a right-of-way across the Appalachian Trail.[203] Mountain Valley, like the Atlantic Pipeline, was granted a right-of-way across the Appalachian Trail by a federal agency. Mountain Valley's right-of-way followed Atlantic Pipeline's right-of-way by a little more than a month,[204] and the two pipelines are progressing in tandem through the courts.[205] While the fight over the Appalachian Trail right-of-way was not raised in challenges to Mountain Valley,[206] the Fourth Circuit's decision regarding the Atlantic Pipeline right-of-way affected Mountain Valley. After the court's decision, Mountain Valley suspended its plans to drill a borehole under the Appalachian Trail.[207] As stated

199. *Id.* at 105.

200. *See id.*

201. *See Brief in Opposition*, *supra* note 28, at 5.

202. A Message on Natural Beauty, *supra* note 79, at 1.

203. Brief of Amicus Curiae Mountain Valley Pipeline, LLC Supporting Petitioners at 1, U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837 (2020) (Nos. 18-1584, 18-1587).

204. *Compare* Press Release, U.S. Dep't of Agric., USDA Forest Service Issues Final Decision to Permit the Atlantic Coast Pipeline Route on National Forests in West Virginia and Virginia (Nov. 17, 2017), https://www.fs.usda.gov/detail/gwj/news-events/?cid=fseprd564451, *with* U.S. BUREAU OF LAND MGMT., VAES-058143, WVES-058142, RECORD OF DECISION: MOUNTAIN VALLEY PIPELINE PROJECT DECISION TO GRANT RIGHTS OF WAY AND TEMPORARY USE PERMITS (2017).

205. Mountain Valley has also suffered legal blows. In an annual report filed with the Securities Exchange Commission in February 2019, Mountain Valley's parent company disclosed to investors that it "received a letter from the U.S. Attorney's Office for the Western District of Virginia stating that it and the EPA are investigating potential criminal and/or civil violations of the Clean Water Act and other federal statutes as they relate to the construction of the MVP." EQM Midstream Partners, LP, Annual Report 52–53 (Form 10-K) (Feb. 14, 2019). The joint venture controlling Mountain Valley also received a grand jury subpoena the same month. *Id.*

206. *Mountain Valley Amici*, *supra* note 203, at 3.

207. *See id.*

in an amici brief filed with the Supreme Court on behalf of the Forest Service, "the Court's decision [regarding the Atlantic Pipeline] will directly affect Mountain Valley."[208] As of writing, opponents of the Mountain Valley Pipeline were hopeful that the project would follow in the path of the shuttered Atlantic Pipeline.[209]

The fact that two natural gas pipelines were or are seeking rights-of-way across the Appalachian Trail on federal lands highlights the importance of protecting the trail, and similar national trails, today. As oil and gas extraction technologies continue to improve, more pipeline capacity will be needed to bring such resources to market. The Appalachian Trail should not be the only barrier between reason and runaway oil and gas development, and decades of land protections should not be undone because of pressure from the oil and gas industry.

IV. NATIONAL TRAILS SHOULD BE PROTECTED FROM OIL AND GAS PIPELINE RIGHTS-OF-WAY

National trails wind across the whole of the United States.[210] In the continental United States, the Appalachian Trail and the Pacific Crest Trail meander near the eastern and western seaboards, respectively. The Lewis and Clark Trail stretches from the Midwest to the Pacific; the Mormon Pioneer National Historic Trail runs through the center of the country. From the U.S.-Mexico border, the Arizona National Scenic Trail, the Continental Divide National Scenic Trail, and the Juan Bautista de Anza National Historic Trail reach north, west, and east. In Alaska, the Iditarod National Historic Trail bridges the Gulf of Alaska and the Bering Sea. In Hawai'i, the Ala Kahakai National Historic Trail rings the Big Island.[211] Of all these trails, only three are administered by NPS: the Appalachian Trail, the Natchez Trace National Scenic Trail, and the Potomac Heritage National Scenic Trail.[212]

The three Park System trails and all other national trails should be protected because these trails are valuable to the nation's recreational, wilderness, cultural, and spiritual interests. However, in order to maintain consistency with current agency administration of these trails, I suggest requiring a "feasible and prudent alternative" system for granting oil and gas pipeline rights-of-way across such trails.[213] The administering agency of each trail should decline to grant a right-

208. *See id.*

209. Laurence Hammack, *Mountain Valley Pipeline's Uphill Climb' Gets a Little Easier*, ROANOKE TIMES (July 7, 2020), https://roanoke.com/business/mountain-valley-pipelines-uphill-climb-gets-a-little-easier/article_6b032142-60f0-5125-bb15-67ce5626c2aa.html (providing arguments against and in support of the pipeline project's viability after the Atlantic Pipeline project's cancellation). As noted above, *supra* note 26, Mountain Valley is being challenged from other angles.

210. NATIONAL TRAILS SYSTEM MAP, *supra* note 45.

211. *See id.*

212. *See* National Park Service, *National Park System*, https://www.nps.gov/aboutus/national-park-system.htm (last visited Aug. 2, 2020).

213. *Infra* Part IV.B.

of-way over a national trail *on federal land* if a feasible and prudent alternative exists. If no such alternative exists, the agency should require mitigation.

Finally, and importantly, this approach will not impede responsible and needed energy development in the United States. For trails both within and outside the Park System, oil and gas pipeline rights-of-way are not foreclosed across national trails on federal land. Likewise, long-range energy projects in general will not be foreclosed. And a right-of-way across a national trail on state- or privately owned land need not go through this system. This ensures national trails on federal land are protected from imprudent and unneeded oil and gas pipeline development and preserved for future recreationalists, scientists, naturalists, and young explorers. Development will thus be directed and concentrated in certain areas, maintaining some portions of the trails. To some extent, this system already exists on the Appalachian Trail. There are more than fifty pipeline rights-of-way across the Appalachian Trail, either on state and private lands or on federal lands as crossings that pre-existed the Trails Act.[214] What is remarkable about the Atlantic Pipeline is that it was the first pipeline since the enactment of the Trails Act to request and be granted a right-of-way across the trail on federal lands. After more than fifty years, the Appalachian Trail should continue to be protected.

A. Only Congress Should Have the Authority to Grant Oil and Gas Pipeline Rights-of-Way across Units of the Park System, Including across the Appalachian Trail

Restricting the authority to grant rights-of-way across the Appalachian Trail is consistent with the executive and legislative intent behind NPS and the National Trails System, as well as Benton MacKaye's proposal, the communal history of trail management, and the plain language of the MLA, Trails Act, and Park Service Act. As discussed above in Parts I.A and II.A of this Note, the Appalachian Trail is the first national trail established under the Trails Act,[215] and the well-documented history surrounding the Appalachian Trail supports protecting the natural and scenic qualities of the trail on federal land.

The type of development proposed by Atlantic—a multi-hundred-mile oil and gas pipeline—is contrary to the legislative, executive, and communal intent behind the Appalachian Trail. Notably, in NPS's own Foundation Document for the trail, the service itself identified "infrastructure development within the corridor" including "*pipelines*, powerlines, roads" as a "threat" to the Appalachian Trail.[216] Such development should not be considered lightly, and

214. *See* Letter from Austin D.J. Gerken, Program Dir., S. Envtl. Law Ctr., to Kathleen Atkinson & Ken Arney, Reg'l Foresters, U.S. Forest Serv. (Jun. 24, 2019), at 3, *available at* https://perma.cc/Y36S-6GM5.

215. H.R. REP. NO. 1631, *supra* note 32.

216. FOUNDATION DOCUMENT, *supra* note 41, at 11, 24 (reasoning that "[t]he eastern seaboard continues to grow, as does development and the desire for power and connectivity, resulting in more

here, only Congress could grant Atlantic's desired right-of-way. While that may seem a high hurdle, the threshold is set to preserve the trail, not to facilitate oil and gas pipeline development.

B. Outside the Park System, Agencies Should Only Grant Rights-of-Way to Oil and Gas Pipelines if No Feasible or Prudent Alternative Exists

The Fourth Circuit correctly interpreted the MLA, Trails Act, and Park Service Act as the statutory trio relates to the Appalachian Trail. However, the policy of limiting pipelines over national scenic and historic trails should be encouraged in general to preserve the natural, scenic, and aesthetic nature of these trails.

I propose a right-of-way authorization scheme similar to one discussed by the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe* to approve federal funds for highway development through public parks.[217] In *Overton Park*, the Supreme Court held as arbitrary and capricious a decision of the Secretary of Transportation to allow development of a highway through a public park under the Department of Transportation Act of 1966 and the Federal-Aid Highway Act of 1968.[218] Read together, the two statutes prohibit the Secretary:

> from authorizing the use of federal funds to finance the construction of highways through public parks if a *'feasible and prudent'* alternative route exists. If no such route is available, the statutes allow him to approve construction through parks only if there has been *'all possible planning to minimize harm'* to the park.[219]

A parallel approach should be required by Congress of agencies such as the Forest Service, or by agencies through their own regulations, in granting rights-of-way across national and scenic historic trails. If the NPS or another agency administers a national scenic or historic trail, a right-of-way should only be granted if no "feasible and prudent alternative route exists." In the case where no feasible and prudent alternative exists, then the right-of-way may be granted as conditioned by requiring "all possible planning to minimize harm" to the trail. This system would better protect the natural and scenic essence of national trails from encroaching oil and gas development.

In the case of the Appalachian Trail, many other alternative routes existed for the Atlantic Pipeline: The route in controversy was simply the route preferred by the oil and gas development company.[220] Agencies should only disturb the

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infrastructure—wind turbines, powerlines, pipelines, and wider roads. These trends create major impacts on Trail viewsheds, soundscapes, ecological systems, and cultural resources").

217. *See* 401 U.S. 402, 402 (1971).

218. *See id.* at 404–05.

219. *Id.* at 405 (emphasis added).

220. Petitioner's Opening Brief, *supra* note 160 at 17 (stating "[i]n the Forest Service's own words, the 'real reason' for rejecting off-forest alternatives was Atlantic's determination to route its 600-mile pipeline through a narrow 1.3-mile segment of the [Appalachian Trail] where it crosses the [George Washington National Forest]").

natural and untrammeled essence of national trails with pipeline development if there are not sufficient alternative routes. Thus, under an *Overton Park* system, pipelines will only be granted rights-of-way over the Appalachian or Pacific Crest Trails if no "feasible and prudent alternative route exists" and the grant is conditioned by requiring minimal harm.

Importantly, the *Overton Park* system will not greatly disturb the current federal land management hierarchy and administrative process. The Forest Service will retain management authority of trails it currently oversees. Functionally, this system will not change day-to-day management and administration of such trails. Additionally, a feasible and prudent alternative analysis could dovetail with the alternatives analysis required in the NEPA process.[221]

Within the "feasible and prudent" standard is an implicit suggestion of some sort of cost-benefit analysis. As the Supreme Court noted in *Overton Park*, it is almost always cheaper to go through a park than through developed land:

> It is obvious that in most cases, considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible.[222]

But, as the Court reasoned, the overarching statutory scheme indicated a congressional intent to protect parks:

> [T]he *very existence of . . . statutes* indicates that protection of parkland was to be given *paramount importance*. The few green havens . . .were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. *If the statutes are to have any meaning*, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.[223]

The Court's reasoning implies that in a cost-benefit analysis, it will *always* be economically cheaper to construct through parklands. Because parks often lack residential or commercial development, it is less disruptive for a community to build through a park. However, the Court noted that because statutes exist to protect parkland, the consideration in such an analysis is not purely economic.

Here, as in *Overton Park*, a statutory scheme indicates that Congress meant to protect national trails. Thus, if the Trails Act is to have any meaning, the Forest

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221. *See* National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C), (C)(iii) (2018) (requiring an agency to include a statement regarding "alternatives to the proposed [agency] action" in every recommendation or report on proposals for legislation and "major Federal actions significantly affecting the quality of the human environment"). Although FERC likely would prepare the EIS for an oil and gas pipeline, as it did for the Atlantic Pipeline, the cooperating land agency could analyze the alternatives in the statement under the feasible and prudent standard, or consider possible other alternatives in a supplemental environmental impact statement or assessment.

222. *Overton Park*, 401 U.S. at 411–12.

223. *Id.* at 412–13 (emphasis added).

Service "cannot approve the destruction" of trails "unless [the agency] finds that alternative routes present unique problems."[224]

While proponents of oil and gas development may argue imposing an additional development standard on top of existing requirements such as those imposed by NFMA and NEPA is particularly burdensome, the standard does not foreclose development, as cases following *Overton Park* indicate.[225] Rather, the standard simply requires that approving agencies consider whether feasible and prudent alternatives exist. In doing so, the agencies will ideally incorporate additional information into the internal agency decision-making process, as well as provide information for the public and outside interest groups.

C. This Proposed System Will Not Foreclose Pipeline Crossings on National Trails

What this system for granting oil and gas pipelines rights-of-way across national trails on federal lands *does not do* is prohibit pipeline crossing on national trails.[226] Rather, the system merely serves to protect and preserve the portions of the trails that are on federal lands, and encourage federal agencies and Congress to consider the impacts such development could have on the trails' natural and scenic qualities, consistent with the spirit of the trails and enabling legislation, and the history surrounding community efforts to foster these trails.

Oil and gas pipeline crossings are still possible over trails on state, private, and federal lands. On the Appalachian Trail, there are fifty-five such existing crossings on state- and privately owned land, and on federal land that preexisted the Trails Act.[227] These fifty-five crossings are concentrated in thirty-four locations.[228] Of those thirty-four locations, fifteen are on parcels owned by state or private landowners and nineteen are on parcels owned by NPS.[229] The crossings on NPS parcels "predate federal ownership or the creation of the Appalachian Trail."[230]

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224. *See id.*

225. *See* Block House Mun. Util. Dist. v. City of Leander, 291 S.W 3d 537, 540 (Tex. App. 2009) (applying the feasible and prudent standard in a state law context and upholding a city's determination "that there is no feasible and prudent alternative to the use or taking of parkland"); *see also* Nat. Res. Def. Council, Inc. v. FAA, 564 F.3d 549, 551, 566 (2d Cir. 2009) (using the "feasible and prudent" alternative in *Overton Park* as analogous to Federal Aviation Administration's approvals under the Airport and Airway Improvement Act); *see also* Conservation All. of St. Lucie Cty., Inc. v. U.S. Dep't of Transp., 847 F.3d 1309, 1320, 1327 (11th Cir. 2017) (affirming the Federal Highway Administration's selection of a bridge and highway project alternative under the *Overton Park* analysis).

226. Some energy industry analysts raised the specter of the Appalachian Trail being turned into a "Great Wall" by the Fourth Circuit's reasoning in *Cowpasture*. *See* Noah Sachs, *Can the Appalachian Trail Block a Natural Gas Pipeline?*, AM. PROSPECT (Aug. 14, 2019), https://prospect.org/power/can-appalachian-trail-block-natural-gas-pipeline/.

227. *See* Letter from Austin D.J. Gerken, *supra* note 214.

228. *See id.* The Southern Environmental Law Center is one of the respondents' attorneys in *Cowpasture*. *See Brief in Opposition*, *supra* note 28, at 14–15.

229. *See* Letter from Austin D.J. Gerken, *supra* note 214.

230. *Id.*

The Atlantic Pipeline is not merely the first crossing on federal lands since the enactment of the Trails Act. It would also have been the first pipeline to cross the trail on land owned by the Forest Service, either pre- or post-Trails Act.[231] In order to maintain the existing natural and scenic nature of the trail, agencies such as the Forest Service and NPS, in addition to Congress, should restrict new pipeline crossings and impacts to lands with existing crossings. This strategy of focused development will maintain the natural and scenic aspects of certain lands, fulfilling the historical, legislative, and executive purpose of a national trails system.

D. The Proposal Is Consistent with Existing Guidelines for the Oil and Gas Pipeline Development on the Appalachian Trail

Although application of the "feasible and prudent" standard detailed in *Overton Park* may be novel as applied to oil and gas pipeline development across all national trails, it is consistent with the Appalachian Trail Conservancy's ("Conservancy's") own policy regarding pipeline crossings of the Appalachian Trail.[232] The Conservancy filed an amicus brief with the Supreme Court in *U.S. Forest Service*, in support of no party.[233] In its brief, the Conservancy stressed the importance of the cooperative management of the Appalachian Trail and of preserving and protecting the "realm" of the trail, which includes the surrounding forest, mountains, rivers, and more.[234] At the same time, the Conservancy noted that "given the location and length of the Trail, it is not always possible simply to foreclose any development or alternative use of land near the Trail."[235] Given the reality of continued and likely increasing construction of highways, pipelines, and more, the Conservancy adopted a pipeline policy in 2015.[236]

The Appalachian Trail Conservancy's pipeline policy provides eight guidelines for pipeline development across the Appalachian Trail. Because a pipeline affects not just the trail itself, but also the surrounding natural environment, the Conservancy notes that "a pipeline or other infrastructure that invades the natural environment of the Trail Corridor can do significant damage to the Trail even if it never intersects the Trail's path."[237] The first three guidelines should be familiar:

> To be acceptable, a pipeline should, first, be "the only *prudent and feasible alternative* to meet an overriding public need." . . .
>
> [T]he pipeline should cross the Trail "at a point already subject to significant impact," such as an existing infrastructure crossing . . .

231. *See id.*

232. Appalachian Trail Conservancy, *ATC Policy on Pipeline Crossing of the Appalachian Trail*, 1–3 (2015), https://perma.cc/UKM8-MT82.

233. *ATC Amici Brief*, *supra* note 36, at 1.

234. *See id.* at 5.

235. *Id.* at 32.

236. *See id.* at 32–33.

237. *Id.* at 33.

[T]he pipeline should use best practices to minimize its impact.[238]

In addition, the Conservancy's policy states: pipelines must avoid areas "especially unsuitable for infrastructure crossings"; pipeline plans should address maintenance and operations; authorizations should minimize methane leaks and acknowledge that the pipeline owner and operator have an affirmative duty to protect the environment and Trail; and finally, "pipeline authorizations should include mitigation for any loss of 'the natural, cultural, scenic, and recreational values' of the Appalachian Trail."[239]

The first three guidelines of the Appalachian Trail Conservancy's policy track the structure inspired by the *Overton Park* "feasible and prudent" alternatives and "all possible planning to minimize harm" standards. As emphasized by the Conservancy, such guidelines are in place to ensure the realms united by the Appalachian Trail are preserved and conserved for present and future users.[240] Finally, such a "feasible and prudent" standard tracks with the legislative evidence provided by the conference committee report accompanying the 1968 Trails Act establishing the Appalachian Trail. As such, any easements or rights-of-way "over, under, across, or along any component of the national trails system"[241] must follow the policy and purposes of the Trails Act.

CONCLUSION

In June 2020, around the same time the Supreme Court announced its decision in *U.S. Forest Service* and a pandemic wound its way around the globe, the Appalachian Trail continued to draw hikers. However, Andrew Underwood's experience thru-hiking the Appalachian Trail was a bit different from the trials of Brown, Bradley, and the numerous hikers completing thru-hikes in the fall of 2019. Underwood completed his thru-hike in 2020, when the bulk of the trail was closed due to COVID-19.[242] His is a story marked by evading authority, sleeping in shuttered shelters, trespass, and privilege.[243] But his timing is remarkable: the day Underwood summitted Maine's Mount Katahdin, June 17, came just a day after the bulk of the trail reopened for hiking and two days after the Supreme Court announced its decision in *U.S. Forest Service*.[244]

In 1921, Benton MacKaye wrote "[t]he skyline along the top of the main divides and ridges of the Appalachians would overlook a mighty part of the

238. *Id.* at 33–34 (emphasis added).
239. *Id.* at 34–35.
240. *See id.* at 35.
241. H.R. REP. NO. 1891, *supra* note 99, at 11.
242. Grayson Haver Currin, *The Thru-Hikers who Finished the AT During the Pandemic*, OUTSIDE (July 1, 2020), https://www.outsideonline.com/2415299/appalachian-trail-thru-hikers-2020-coronavirus.
243. *See id.*
244. *Compare id. with* Appalachian Trail Conservancy, *June 16, 2020 Update on A.T. Closures and Conditions* (June 16, 2020), https://appalachiantrail.org/official-blog/june-16-update-at-closures/, *and* U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1837 (2020).

nation's activities."[245] Perhaps almost a century ago, just a year after the MLA was enacted, one of the fathers of the Appalachian Trail knew what was to come: the nation's trails would become ever less natural, less of an escape into nature and more footpaths from which to watch industry snake across the United States. On the other hand, MacKaye noted that the trail could be "a sanctuary and a refuge from the scramble of every-day worldly commercial life. It is in essence a retreat from profit."[246] It might be simply that MacKaye foresaw the tensions that would play out across the trail: that of industry, and the desire to protect natural spaces.

Then, as now, federal agencies should preserve and conserve natural oases on federal lands. If such spaces are continually wound through with development and the direct and indirect effects of an increasingly industrialized world, there eventually will be no such spaces left.

One lesson from the Atlantic Coast Pipeline project's persistence and ultimate end is that each inch of a hundreds-mile long pipeline crosses a different environment, a unique mix of natural and manmade landscapes, a distinct potential pressure point. Each intersection requires a careful and holistic consideration. Many portions cry out for great care: an air compressor in a residential town, a stretch of pipeline along a slope even federal agencies are skeptical can support it, a portion of the very first national trail. This Note suggests a framework for considering the impact and viability of future crossings of lands in the Park System, one such pressure point. But each crossing, each imposition of an infrastructure project on a preexisting landscape, should require such care. At each point, project proponents should ask if this is the most prudent and feasible path, and can best practices be put in place to minimize impacts. In doing so, stakeholders may better be able to balance priorities between long-term energy interests and environmental and community concerns.

245. MacKaye, *supra* note 50, at 326.
246. *Id.* at 329.