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U.S. Supreme Court's *Cowpasture* Decision: Implications for Federal Lands in Idaho

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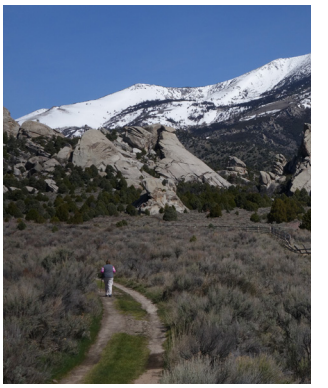
On the Cover



The California National Historic Trail, part of the National Trails System, runs through the City of Rocks National Reserve in southeastern Idaho. The U.S. Supreme Court's decision last year in *Cowpasture River Preservation Association v. U.S. Forest Service* addressed the National Trails System Act with implications for the administration and agency jurisdiction of National Trails System segments traversing federal land areas in Idaho [as discussed in this issue's Featured Article]. Photo credit: Murray Feldman.

Featured Article

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Nez Perce (Nee-Me-Poo) National Historic Trail along the Salmon River at Skookumchuck Creek recreation site, Idaho. Photo credit: Murray Feldman.

Cowpastures in the Supreme Court: Implications for Idaho's Federal Lands

Murray D. Feldman[1]

In *U.S. Forest Service v. Cowpasture River Preservation Association*,[2] the United States Supreme Court upheld the U.S. Forest Service's grant of a natural gas pipeline right-of-way beneath the Appalachian National Scenic Trail within a national forest in Virginia. In its most recent federal public lands decision, the Court relied on general property law principles and application of the implicated statutory language.

The Court rejected the respondent conservation groups' and Fourth Circuit's reasoning that the lands traversed by the Trail became part of the National Park System and were therefore excepted from the definition of "Federal lands" under the Mineral Leasing Act (MLA). That Act authorizes the Forest Service to grant a natural gas pipeline right-of-way over "Federal lands" for which it has jurisdiction.[3]

Although the decision arose in the context of the famed Appalachian Trail footpath running some 2,220 miles from Georgia to Maine, *Cowpasture* also has implications for the management of Idaho's extensive federal lands. There are six National Trails System components in Idaho, as well as many other overlay designations on Idaho's federal lands.

Idaho also has instances of multi-agency jurisdictional management of federal land units, such as the City of Rocks National Reserve (a National Park System unit operated by the State of Idaho Department of Parks and Recreation under a long-term cooperative agreement)[4] and Craters of the Moon National Monument and Preserve (with National Park Service management of a portion of the Monument and all of the Preserve, and Bureau of Land Management (BLM) administration of another part of the Monument).[5] Those and other multi-agency jurisdictional arrangements in Idaho may be affected or clarified by the Supreme Court's handling of analogous agency jurisdiction issues in *Cowpasture*.

This article first discusses the background of the *Cowpasture* decision and the statutory landscape of the federal lands jurisdiction at issue. Next, it reviews the Supreme Court's approach and analysis in *Cowpasture*, and then concludes with a discussion of the decision's implications for federal public lands management generally and the implications for Idaho's federal lands.

Background

In *Cowpasture*, petitioner Atlantic Coast Pipeline (ACP) sought to build and operate a 604-mile natural gas pipeline

from West Virginia to North Carolina. The pipeline's route would cross 16 miles of the George Washington National Forest, including a 0.1-mile segment some 600 feet beneath the Appalachian Trail. The National Park Service is responsible for the overall administration of and coordination for the Trail, which traverses federal, state, and private lands. In 2018, the Forest Service issued ACP a special-use permit and MLA right-of-way for the pipeline.

> *"Under general property principles, an easement does not dispossess an original owner of its property interest in the underlying estate."*

Respondent Cowpasture River Preservation Association and other conservation organizations challenged the Forest Service's decision in the Fourth Circuit Court of Appeals under the Natural Gas Act. That Act provides original jurisdiction in the federal courts of appeals to review federal permits and approvals for pipelines, such as ACP's, that are within the Federal Energy Regulatory Commission's jurisdiction.[6] The Fourth Circuit set aside the pipeline right-of-way, holding that the Trail, even where it traversed the national forest, was land in the National Park System, and therefore the Forest Service lacked MLA authority to issue a right-of-way beneath the Trail.

Departing from the circuit court's approach, the Supreme Court considered the Park Service's property interest in the Trail across the national forest as an easement. Under general property principles, an easement does not dispossess an original owner of its property interest in the underlying estate. Therefore, the Court determined, despite the Forest Service's separate Trail-easement grant to the Park Service pursuant to the National Trails System Act (Trails Act), the Forest Service retained "ownership over *the land itself*" and had authority to grant the MLA pipeline right-of-way.[7]

The case thus involved the intersection of several federal public lands laws—the Weeks Act, National Park System Organic Act, National Trails System Act (Trails Act), and MLA—and Congress' plenary Property Clause constitutional authority to choose which Executive Branch department would have administrative jurisdiction over certain portions of the federal public lands. The basic federal public lands statutory framework at issue in *Cowpasture* is set out in the following.

The roots of the National Forest System in the eastern United States trace to the 1911 Weeks Act. That Act authorized the federal acquisition of private forest lands there to be "permanently reserved, held and administered" by the Secretary of Agriculture "as national forest lands."[8] Previously, in 1891, Congress authorized the President to "set apart and reserve . . . public land bearing forests . . . as public reservations."[9]

In the national forest Organic Administration Act of 1897, Congress provided that "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber."[10] From their inception, the national forests, administered by the Secretary of Agriculture following the 1905 Forest Transfer Act, were to be managed for "multiple use," diverse, public purposes including commercial activities such as timber harvest, mining, grazing, and energy development.[11]

In contrast to the National Forest System, Congress established the National Park System within the Department of the Interior to preserve, not develop, federal lands and resources. The Park Service's preservation mission is very different from the Forest Service's utilitarian mission.[12] In 1916, Congress provided that the "fundamental purposes of the said parks, monuments, and reservations . . . is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same . . . unimpaired for the enjoyment of future generations."[13]

Park lands are to be preserved and, where possible, enjoyed. Under the Park Service organic legislation, the areas in the National Park System "shall include any area of land and water administered by the Secretary [of the Interior], acting through the [Park Service] Director, for park, monument, historic, recreational, or other purposes."[14]

The 1968 National Trails System Act designated the Appalachian Trail as a National Scenic Trail to "be administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture."[15] It authorized creation of a National Trails System comprised of National Historic Trails, National Recreation Trails, and National Scenic Trails.[16]

In the Trails Act, Congress did not change the jurisdictional status of the lands over which the trails cross. The Act did not "transfer among Federal agencies any management responsibilities established under any other law for federally administered lands" traversed by a designated trail.[17] As Professor Fairfax explained in 1974, in what turned out to be a prescient view that the Court would adopt in *Cowpasture*, "[i]rrespective of which Secretary has overall responsibility for a trail [under the Trails Act], the Secretary of the Interior is in charge when a trail crosses Park or Bureau of Land Management lands and the Secretary of Agriculture is responsible for management when a trail crosses Forest Service land."[18]

The Appalachian Trail originally was conceived by private individuals and hiking clubs in the 1920s.[19] The Forest Ser-

Lochsa River Wild and Scenic River Corridor at Wilderness Gateway, Nez Perce-Clearwater National Forests, Idaho, near the Lewis and Clark and Nez Perce (Nee-Me-Poo) National Historic Trails. Photo credit: Murray Feldman.

vice and the Park Service dedicated significant effort to trail building under various Depression-era public works programs, completing the Trail in 1937.[20] Today, the Trail passes through 14 states and eight national forests (that, together, host 1,015 miles, or 47 percent of the trail); six national parks; two national wildlife refuges; and 67 state-owned land areas.[21] Roughly half of the Trail remains on nonfederal lands.

Despite the federal land managers' important roles, most responsibility for Trail management remained with the local clubs that took responsibility for construction and maintenance of local Trail segments.[22] After World War II, and throughout the 1950s and 1960s, discord and lack of coordination among the many different trail clubs, private landowners, and various agencies regarding the footpath revealed the need for a central entity to perform a unifying, coordinating role, especially with respect to government acquisition and protection of private lands.[23] The hiking advocates' efforts culminated with the 1968 passage of the Trails Act.

The MLA authorizes the "Secretary of the Interior or appropriate agency head" to grant rights-of-way through any federal lands "for pipeline purposes for the transportation of oil [and] natural gas." "Federal lands" means "all lands owned by the United States *except* lands in the National Park System."[24]

The Supreme Court's *Cowpasture* decision

The 7-2 majority opinion, by Justice Thomas, framed the Court's task as focus-ing on "the distinction between the *land* that the Trail traverses and the Trail it-self, because the lands (not the Trail) are the object of the relevant statute."[25] After reciting the pertinent MLA provisions, the Court's inquiry became "whether the *lands* within the forest have been removed from the Forest Service's jurisdiction and placed under the Park Service's control be-cause the Trail crosses them. If no trans-fer of jurisdiction has occurred, then the lands remain National Forest land, *i.e.*, 'Federal lands' subject to the grant of a pipeline right-of-way."[26]

Key to the Court's analysis was the Trails Act's language providing that the Forest Service entered into "right-of-way" agreements of its own with the National Park Service for the segments of the Ap-palachian Trail that traversed national forest land, and that such right-of-way agreements did not convert those "Federal lands" into lands within the National Park System.[27]

The majority opinion's analysis focused on three main points: general private property law principles as applied to sorting out the questions of overlapping agency jurisdiction; the effect, if any, of the Trails Act's use of the terms "administration" and "management" to describe the agencies' roles; and the policy argument against presuming a silent transfer of agency jurisdiction under the Trails Act.

First, the Court relied on general private property law principles concerning easements and rights-of-way. It began with the principle that a right-of-way is a type of easement granting "a nonowner a limited privilege to use the lands of another."[28] Such easements grant only "nonpossessory rights of use limited to the purposes specified in the easement agreement."[29] An easement does not dispossess the original owner of its property interest in the estate over which the easement is granted, so that both "a possessor and easement holder can simultaneously utilize the same parcel of land."[30] Thus, "as would be the case with private or state property owners, a right-of-way between two [federal] agencies grants only an easement across the land, not jurisdiction over the land itself."[31]

The Court acknowledged that while "the Federal Government owns all lands involved here," the same general principles of private property law apply.[32] Thus, "read in light of basic property law principles, the plain language of the Trails Act and the agreement between the two agencies did not divest the Forest Service of jurisdiction over the lands that the Trail crosses."[33] The Forest Service's right-of-way grant to the Park Service for the Trail gave the Park Service "an easement for the specified and limited purpose of establishing and administering the trail, but the land itself remained under" Forest Service jurisdiction.[34]

Second, the dissenting opinion (written by Justice Sotomayor and joined by Justice Kagan) cited the distinction between "administration" and "management" in the Trails Act, similar to the Fourth Circuit's approach. The dissent argued that the Park Service "administers" the Trail, while the Forest Service "manages" the national forest lands traversed by the Trail, and that therefore under the

definitional terms of the Park Service Organic Act, the Trail was a unit of the National Park System and excepted from the MLA definition of "Federal lands."[35] The majority rejected this approach, reasoning that the "Park Service does not administer the 'land' crossed by the Trail. It administers the *Trail* as an easement—an easement that is separate from the underlying land."[36]

Third, the *Cowpasture* majority pointed out that "Congress has used unequivocal and direct language in multiple statutes when it wished to transfer land from one agency to another, just as one would expect if a property owner conveyed land in fee simple to another private property owner."[37] For instance, in the Wild and Scenic Rivers Act, enacted the same day in 1968 as the Trails Act, Congress specified that "[a]ny component of the national wild and scenic rivers system that is administered by the Secretary of the Interior through the National Park Service shall become a part of the national park system."[38] Thus, the fact that "Congress chose to speak in terms of rights-of-way in the Trails Act, rather than in terms of land transfers, reinforces the conclusion that the Park Service has a limited role over only the Trail, not the lands that the Trail crosses."[39]

Overall, the Court stated that the "entire Trails Act must be read against the backdrop of the Weeks Act, which states that land acquired for the National Forest System—including the George Washington National Forest—'shall be permanently reserved, held, and administered as national forest lands.'"[40] Treating the Trail across national forest land as part of the National Park System would alter, by silent implication from the Secretary of the Interior's delegation of Trail administration responsibility to the Park Service, these plain congressional directives, contrary to congressional intent. Therefore, the Court held that "the Trails Act did not transfer jurisdiction of the lands crossed by the Trail from the Forest Service to the Department of the Interior" or the National Park Service, and the Forest Service retained the authority to issue the special-use permit for the pipeline to cross the Trail.[41]

The Court's decision focused on the Forest Service's authority to issue the challenged pipeline right-of-way beneath the Trail, not on whether that authorization was correct under any standard that might be applicable. In a footnote, the Court recognized that "[o]bjections that a pipeline interferes with rights of use enjoyed by the National Park Service would present a different issue."[42] But, the *Cowpasture* facts "d[id] not present anything resembling such a scenario."

Among other things, the pipeline Trail crossing would have workstations located on private land, some 1,400 feet and 3,400 feet distant from the Trail; ACP would use a drilling method that did not require any land clearing or digging on the Trail's surface; entry and exit points for the underground Trail boring would not be visible from the Trail; and no detour would be required for Trail users.[43] Accordingly, the Court reversed the court of appeals' judgment and remanded the case for further proceedings.

Implications for Federal Lands Management in Idaho

The *Cowpasture* decision upholds the Court's approach from 110 years ago that "it is not for the courts to say how" the nation's public lands "shall be administered. That is for Congress to determine."[44] The *Cowpasture* decision thus respects the jurisdictional boundaries between different federal land management agency regimes as established by Congress. What Congress specifies in designating legislation will be honored by the federal courts and not presumed to be changed by Executive Branch administrative delegation or classification.

Next, *Cowpasture* provides an example of how the overlay approach of federal land management and designation versus the enclave approach may be applied on the ground. The Appalachian Trail is an overlay of a particular use—a recreational footpath—on national forest land that is coordinated with and connected to the same use of other federal, state, and private lands under the National Scenic Trail designation. But that coordinated Trail use does not change the legal status of the land or dispossess the Forest Service of its jurisdiction.

By contrast, the respondents and the dissent advocated for an enclave theory whereby the Trails Act would have placed jurisdiction over the entire Trail corridor with the National Park Service. Under the enclave theory, every interest has its own space on the federal lands, often achieved at great expense or effort in terms of legislation, political capital, or court decisions.

"The crucial question under enclave management is where the national park boundary is drawn, or whether land shall be in a park or national forest. But once the battle is over and the line drawn, the negative imperative of such parcelization comes into play. What you have not won for your categorical enclave is not mandated to be managed for your purposes."[45]

Designated federal wilderness or national park areas are examples of enclave management, whereas the National Trail System designations on existing state, federal, and private lands are examples of overlay management. In general, as overlay management provides more flexibility for the accommodation of multiple stakeholder interests, that approach may be more likely to lead to a broader consensus on public land management.

Thus, to the extent that *Cowpasture* upholds the Trails Act's overlay approach, it may signal the Court's support for implementing similar approaches on the public lands. This, in turn, may bode well for the continued application and innovation of collaborative and cooperative approaches in Idaho and elsewhere, including for example the Owyhee Initiative and collaborative forest management processes.[46]

The Owyhee Initiative was a collaborative effort, sanctioned by Senator Mike Crapo, to bring together diverse parties—including ranchers, environmental interests, Native Americans, recreationists, the U.S. Air Force, and others—to address livestock grazing, wilderness, wild and scenic rivers, and other uses on and above BLM public lands in southwestern Idaho's Owyhee County.

The resulting consensus agreement was incorporated into legislation passed as part of the 2009 Omnibus Public Land Management Act that, among other things, designated almost 517,000 acres in six wilderness areas and 316 miles of wild and scenic rivers in 16 segments in the Owyhee Canyonlands.[47] Under the

Idaho Forest Restoration Partnership, locally based groups bring together a range of extractive industry, community, and environmental and conservation interests to try to resolve conflicting land-use emphases and activities on Idaho's public forests, including the Nez-Perce Clearwater National Forest through the Clearwater Basin Collaborative's efforts.

Also within Idaho are portions of six National Trails System components.[48] Considering the number and extent of these segments, *Cowpasture* highlights the potential reach and role of the Trails Act in Idaho. While these Trails Act designations do not displace the underlying management jurisdiction over the federal lands traversed by the trails, or state or private lands for that matter, the effect of the designations may still need to be considered in agency management decisions.[49] The *Cowpasture* approach is consistent with prior applications of these principles in Idaho.

For instance, in the *Access Fund* City of Rocks case, the Idaho federal district court upheld the Park Service's authority to consider potential impacts on the context and visitor experience of the California National Historic Trail in the agency's implementation of a climbing ban on certain rock formations in the City of Rocks National Reserve.[50] In the *Idaho Rivers United* Highway 12 corridor case, the district court held that the Forest Service retained jurisdiction and management duties following its grant of a highway right-of-way, within the Clearwater and Lochsa Rivers Wild and Scenic River Corridor, to the Idaho Department of Transportation for Highway 12.[51]

Both of these cases illustrate, as does *Cowpasture*, the potential effect of Trails Act or other overlay designations on land management decisions in Idaho and the retained jurisdiction of the federal agency for public lands traversed by a National Trails System segment.

Conclusion

In *Cowpasture*, the Supreme Court upheld the primacy of Congress' allocation of agency jurisdiction on the public lands, the application of general property law principles to federal lands rights-of-way, and the use of the overlay management approach found in several federal lands statutes and likely to continue in future legislative and administrative applications for public land decision-making.

These legacies of *Cowpasture* are likely greater than any practical effect on the ACP project that was before the Court. Ironically, that project was cancelled just weeks after the Court's decision, owing—the company said—to the difficulties in obtaining other future permits and approvals for the pipeline, even though the Court had determined that the Forest Service had jurisdiction to issue the special-use permit to cross beneath the Appalachian Trail.[52]

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Endnotes

1. The positions, opinions, and conclusions in this paper are solely the author's and do not reflect the position of any client or organizational affiliation of the author.

2. 140 S. Ct. 1837 (2020).

3. *Id.* at 1844; *see also* 30 U.S.C. §185.

4. U.S. Dep't of the Interior, Nat'l Pak Serv., *City of Rocks Nat'l Reserve General Mgnt. Plan and Env't Assessment* 1 (June 2020), https://www.nps.gov/crmo/learn/management/index.htm.

5. *See* https://www.nps.gov/crmo/learn/management/index.htm.

6. 15 U.S.C. § 717r(d)(1).

7. 140 S. Ct. at 1844 (emphasis by Court).

8. 16 U.S.C. § 521; *see also* Harold K. Steen, *The U.S. Forest Service: A History* 122–129 (1976).

9. Forest Reserve Act of 1891, ch. 561, § 24, 26 Stat. 1103 (codified at 16 U.S.C. § 471 (repealed 1976)).

10. Organic Administration Act of 1987, ch. 2, § 1, 30 Stat. 34 (codified at 16 U.S.C. § 475); *see* Forest Serv., U.S. Dep't of Agric., *George Washington National Forest: A History* 11, 15 (1993), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3832787.pdf.

11. *See, e.g., United States v. New Mexico*, 438 U.S. 696, 706–09 & n.18 (1978); *United States v. Grimaud*, 220 U.S. 506, 515 (1911); Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§528–531.

12. *See, e.g.*, Joseph L. Sax, *Mountains Without Handrails, Reflections on the National Parks* 5–9 (1980).

13. Nat'l Park Serv. Organic Act of 1916, ch. 408, § 1, 39 Stat. 535 (codified as amended at 54 U.S.C. § 100101).

14. 54 U.S.C. § 100501.

15. 16 U.S.C. § 1244(a)(1).

16. *Id.* § 1242(a).

17. *Id.* § 1246(a)(1)(A).

18. Sally K. Fairfax, *Federal-State Cooperation in Outdoor Recreation Policy Formation: The Case of the Appalachian Trail 58* (1974) (Ph.D. dissertation, Duke University).

19. *See* Nat'l Park Serv., U.S. Dep't of the Interior, *Trails for America: Report on the Nationwide Trail Study* 32–33 (1966), https://www.nps.gov/noco/learn/management/upload/trails-for-america-1966.pdf.

20. Fairfax, note 18 at 26–27; *see also* Cong. Research Serv., R43868, *The National Trails System: A Brief Overview* 6–7 (2015).

21. Nat'l Parks Conservation Ass'n, Appalachian National Scenic Trail: A Special Report 1 (March 2010), https://www.nps.gov/appa/learn/management/upload/AT-report-web.pdf.

22. *See generally* Appalachian Trail Conservancy, *The Appalachian Trail: Celebrating America's Hiking Trail* 15–38 (2012).

23. *See, e.g.,* Fairfax, note 18 at 31–33.

24. 30 U.S.C. § 185(a), (b) (emphasis added).

25. 140 S. Ct. at 1844.

26. *Id.*

27. *Id.*(citing, *inter alia*, 16 U.S.C. § 1246(a)(2)).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1845.

33. *Id.* at 1846.

34. *Id.*

35. *Id.* at 1847; *see also* note 14 and accompanying text.

36. 140 S. Ct. at 1847.

37. *Id.*

38. 16 U.S.C. § 1281(c); *see* 140 S. Ct. at 1847.

39. 140 S. Ct. at 1847.

40. *Id.* at 1850 (citing and quoting 16 U.S.C. §521); *see also* 16 U.S.C. §1246(a)(1)(A).

41. 140 S. Ct. at 1850.

42. *Id.* at 1847, 1850.

43. *Id.* at 1850 n.7.

44. *Light v. United States*, 220 U.S. 523, 536–37 (1911).

45. Joseph L. Sax, *Proposals for Public Land Reform: Sorting Out the Good, the Bad and the Indifferent*, 3 Hastings W.-Nw. J. Env't L. & Pol'y 187, 189 (1996); *see id.* at 192.

46. *See, e.g.,* Steve Steubner, *The Owyhee Initiative collaborative: An Idaho success story,* (Idaho Falls) Post Register, Oct. 30, 2019; http://clearwaterbasin-collaborative.org/ (Clearwater Basin Collaborative for Nez Perce-Clearwater National Forests).

47. *See* https://www.blm.gov/programs/national-conservation-lands/idaho.

48. The California National Historic Trail, Oregon National Historic Trail, Lewis and Clark National Historic Trail, Continental Divide National Scenic Trail, Nez Perce (Nee-Me-Poo) National Historic Trail, and Pacific Northwest National Scenic Trail. The first three are administered by the Secretary of the Interior; the Secretary of Agriculture administers the latter three. *See* 16 U.S.C. §1244(a).

49. *See Cowpasture,* 140 S. Ct. at 1850 n.7.

50. *Access Fund v. Dep't of the Interior*, No. CV 98-0445-E-BLW (D. Idaho Aug. 4, 2000).

51. *Idaho Rivers United v. U.S. Forest Service*, No. 1:11-CV-95-BLW, 2013 WL 474851, at *6–9 (D. Idaho Feb. 7, 2013).

52. https://news.dominionenergy.com/2020-07-05-Dominion-Energy-and-Duke-Energy-Cancel-the-Atlantic-Coast-Pipeline.