

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOHN STURGEON, :

4 Petitioner : No. 14-1209

5 v. :

6 BERT FROST, IN HIS OFFICIAL :

7 CAPACITY AS ALASKA REGIONAL :

8 DIRECTOR OF THE NATIONAL :

9 PARK SERVICE, ET AL. :

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11 Washington, D.C.

12 Wednesday, January 20, 2016

13

14 The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States

16 at 11:19 a.m.

17 APPEARANCES:

18 MATTHEW T. FINDLEY, ESQ., Anchorage, Alaska; on behalf

19 of Petitioner.

20 RUTH BOTSTEIN, ESQ., Assistant Attorney General,

21 Anchorage, Alaska; for Alaska, as amicus curiae,

22 supporting Petitioner.

23 RACHEL P. KOVNER, ESQ., Assistant to the Solicitor

24 General, Department of Justice, Washington, D.C.; on

25 behalf of Respondents.

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1 P R O C E E D I N G S

2 (11:19 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 14-1209, Sturgeon v. Frost.

5 Mr. Findley.

6 ORAL ARGUMENT OF MATTHEW T. FINDLEY

7 ON BEHALF OF THE PETITIONER

8 MR. FINDLEY: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 ANILCA was the result of a grand bargain.
11 Congress enacted ANILCA to finally resolve land
12 ownership in Alaska, a process that began with the
13 Statehood Act and continued with the Native Claims
14 Settlement Act, both statutes that granted land to the
15 State and native corporations to further economic
16 development and self-sufficiency for Alaska and its
17 people.

18 ANILCA very carefully balanced conservation
19 with those important goals.

20 JUSTICE KAGAN: Mr. -- Mr. Findley, can I
21 ask two quick clarifying questions just so I understand
22 what's at issue here?

23 Your argument applies to the navigable
24 rivers generally; is that right? In other words, to the
25 navigable rivers running through the federally owned

1 land as well as to those running through the inholdings?

2 MR. FINDLEY: If a navigable river is
3 surrounded by the outer boundaries of the park, yes,
4 that's covered by Section 103(c).

5 JUSTICE KAGAN: And is there any information
6 in the record about whether your client actually was
7 running his boat on the portions which were -- are
8 within the federally owned parts, or instead it's the
9 inholdings?

10 Is that what you called them?

11 MR. FINDLEY: That is one word for it.

12 JUSTICE KAGAN: Yes.

13 MR. FINDLEY: He was within the shore. On
14 either side of where his hovercraft was stopped was
15 Federal public land.

16 JUSTICE KAGAN: Was Federal --

17 MR. FINDLEY: Yes.

18 JUSTICE KAGAN: Was Federal public land?

19 MR. FINDLEY: Yes, exactly.

20 JUSTICE KAGAN: Okay. Thank you.

21 MR. FINDLEY: Oh, sure.

22 JUSTICE KENNEDY: Just, again, a preliminary
23 question.

24 MR. FINDLEY: Sure.

25 JUSTICE KENNEDY: Is it conceded by all or

1 is it not that this is navigable -- that these are
2 navigable waters?

3 MR. FINDLEY: Yes. And the Ninth Circuit
4 issued decision in 2001 called Alaska v. United States
5 by Judge Kleinfeld which adjudicated the Nation River
6 navigable.

7 JUSTICE KENNEDY: And that's not contested
8 here?

9 MR. FINDLEY: No, it is not contested here.

10 JUSTICE SOTOMAYOR: So you're claiming a
11 right not merely to use the hovercraft in the nonpublic
12 lands. You're claiming that there's no residual right
13 to control navigable waters in the Federal lands area?

14 MR. FINDLEY: What Mr. Sturgeon is
15 arguing -- we've been very specific about that -- is
16 that the Park Service does not have authority to issue
17 its Park Management Regulations to cover State navigable
18 waters that run through these ANILCA parks.

19 JUSTICE SOTOMAYOR: So what do you do about
20 the ANILCA provision that says that boating and other
21 water activities within public lands, within Federal
22 public lands can be regulated?

23 MR. FINDLEY: Yes. And those apply to all
24 kinds of waters that are not navigable. Those apply to
25 Federal waters and those --

1 JUSTICE SOTOMAYOR: That's not what it says.
2 It says any waters in the jurisdiction of the United
3 States.

4 MR. FINDLEY: It doesn't say navigable
5 waters. And there is --

6 JUSTICE SOTOMAYOR: Well, it could apply to
7 both, is what I'm saying. What says it excludes
8 navigable waters?

9 MR. FINDLEY: You turn back to the
10 definition of public lands in the statute, which makes
11 clear for anything to be public lands, the United States
12 must hold title.

13 And there really is no dispute. The United
14 States does not hold title to the submerged lands or the
15 navigable waters. So those navigable waters, they
16 aren't public lands.

17 Section 103(c) makes crystal clear they're
18 not part of the park and they are not subject to
19 regulations solely enacted to manage our claim.

20 CHIEF JUSTICE ROBERTS: I wasn't sure, but
21 I -- I thought maybe they were suggesting that the
22 navigational servitude and its reserved rights were --
23 were title.

24 MR. FINDLEY: They are not title interests.
25 They are both nonpossessory use rights. Even the Ninth

1 Circuit made crystal clear that the navigationable
2 servitude is not something the United States owns. And
3 the Submerged Lands Act itself disavows an actual title
4 of proprietary interest pursuant to the navigational
5 servitude. Reserved water rights, it had the same
6 answer: They're a nonpossessory use right.

7 JUSTICE SCALIA: So it -- it -- it may well
8 be, you think, that the Federal government would have
9 authority to do this in the exercise of its navigational
10 servitude even though it doesn't have authority to do
11 it, as you assert, under the Park Service?

12 MR. FINDLEY: Our objection is to the Park
13 Service asserting its regulation on these navigable
14 waters. Our position is Congress expressly denied this
15 authority to the Park Service in 103(c).

16 JUSTICE SCALIA: Okay. Do -- do we have to
17 resolve the further question? Whether if the Park
18 Service can't do it somebody else can do it?

19 MR. FINDLEY: You don't have to resolve that
20 further question. I mean, ANILCA makes crystal clear
21 that Federal government is not bereft of authority over
22 navigable waters. The EPA has authority, Corps of
23 Engineer has authority.

24 The specific issue here was you -- you had
25 pockets of land that were about to be surrounded by

1 these new ANILCA CSUs. Those included State navigable
2 waters, and that included over 40 percent of the native
3 corporation land selections under the Native Corporation
4 Settlement Act.

5 The concern was whoa, if you're about to
6 surround us with these parks, we don't want to be part
7 of the parks and we don't want to be subject to park
8 regulation. The idea was if you weren't part of the
9 park, you weren't subject to park regulation the day
10 before ANILCA was enacted, and that status quo carries
11 through after ANILCA was enacted.

12 JUSTICE KENNEDY: Suppose you have a
13 regulation or a statute that's applicable to all United
14 States parks. Is it applicable here?

15 MR. FINDLEY: If it's a regulation that the
16 Park Service --

17 JUSTICE KENNEDY: No, let's say -- let's say
18 first it's a statute, suppose a Federal statute. So you
19 need a permit for a fire in a Federal park. Applicable
20 or -- or -- or not?

21 MR. FINDLEY: You have to look at whether
22 this is a regulation that was solely enacted to manage
23 park land. The hovercraft regulation we have here, it's
24 crystal clear. That's exactly that type of regulation
25 where the Park Service made a judgment call about what

1 it believed was appropriate or not appropriate to occur
2 on public land.

3 If the Park Service -- this is a Park
4 Service regulation issued under the Organic Act and you
5 read this code of Federal regulations and the Park
6 Service is saying, we want fires here on public lands;
7 we want fires here not on public lands. That's the type
8 of regulation Section 103(c) is talking about.

9 If the EPA says, look, we're concerned about
10 Clean Air Act emissions from fire smoke and we are going
11 to issue a generally applicable regulation across the
12 United States on when you can burn wood and when you
13 can't, that is not the type of regulation that
14 Section 103(c) reaches.

15 JUSTICE ALITO: What was the basis for the
16 Ninth Circuit's decision? Was it limited to navigable
17 waters?

18 MR. FINDLEY: The Ninth Circuit did not
19 reach the unnavigable waters issues at all.

20 JUSTICE ALITO: What was the basis for the
21 decision?

22 MR. FINDLEY: The Ninth Circuit took a very
23 strained, improper reading of the statute and looked at
24 Section 103(c) and said, well, it only applies to
25 Alaska-specific regulations. And it was a reading that

1 reads the statute out of context. It's contrary to the
2 text and leads to an incredibly absurd result that,
3 frankly, no -- there's evidence Congress thought this is
4 what was going to happen was that these islands of
5 non-Federal land that were excluded from the parks,
6 under the Ninth Circuit's ruling, they cannot take
7 advantage of all of the rules in Alaska that Congress
8 specifically loosened for Alaska parks. You can camp in
9 Alaska parks. You can hunt. You can fish. You can use
10 snow machines. You can fly. The list goes on and on.
11 Right?

12 Under the Ninth Circuit ruling, those
13 relaxed rules, they don't apply to the non-Federal land.
14 Instead, that non-Federal land is subject to the more
15 restrictive nationwide rules that were not promulgated
16 to be tailored to Alaska. And that simply makes no
17 sense.

18 JUSTICE SOTOMAYOR: Your reading on a
19 practical basis with respect to the navigable waters
20 makes almost no sense to me.

21 I'm looking at a map attached to the
22 petition of the State of Alaska. It's attached to the
23 end of the brief. And it seems like these national
24 parks are spread along the coast of Alaska in a
25 haphazard way, meaning the national parks have

1 jurisdiction over a small strip along the coast of
2 Alaska.

3 Presumably you're not arguing that this
4 agreement controls the U.S. servitude of navigable
5 waters around those strips.

6 MR. FINDLEY: We're not claiming that
7 Section 103(c) trumps the navigable -- navigational
8 servitude. What we're claiming is ANILCA makes crystal
9 clear for submerged lands and navigable waters owned by
10 the State, they aren't public lands; they aren't part of
11 the park.

12 JUSTICE SOTOMAYOR: So you're saying that
13 the U.S. can't control the navigable servitude in any
14 part of that coast.

15 MR. FINDLEY: No. The United States can.

16 JUSTICE SOTOMAYOR: Can.

17 MR. FINDLEY: The Park Service hasn't been
18 delegated that authority. It was expressly denied that
19 authority by Section 103(c).

20 JUSTICE SOTOMAYOR: And so what do you take
21 the words in -- in 103(c) to mean, the boating
22 exception, when it says "in the jurisdiction of the
23 United States"? "Waters in the jurisdiction"?

24 You don't think navigable waters are within
25 the jurisdiction of the United States in Federal lands?

1 MR. FINDLEY: That's within the regulation
2 that the Park Service promulgated nationwide, saying
3 we're going in -- the hovercraft is one of many
4 regulations that they assert to apply within the
5 jurisdiction of the Park Service.

6 Section 103(c), which is the -- which is the
7 specific park-enabling statute, denied the Park Service
8 jurisdiction over nonpublic land which includes these
9 navigable waters.

10 CHIEF JUSTICE ROBERTS: So if the -- as it
11 often does elsewhere, if the Army Corps of Engineers
12 have issues with respect to things that the State is
13 doing on the navigable waters or, you know, other people
14 are building a -- a -- a damn or a fish -- I forget what
15 they are called -- the Corps of Engineers can come in
16 and say, you can't do that.

17 MR. FINDLEY: Exactly. Under whatever its
18 authorities are. I mean -- and that's exactly what
19 ANILCA was meant to remain unaffected by the law was
20 those generally applicable rights that --

21 JUSTICE SCALIA: Let's -- and EPA might --
22 might be able to prohibit boating, no?

23 MR. FINDLEY: Whether the EPA --

24 JUSTICE SCALIA: Or environmental --

25 MR. FINDLEY: -- can prohibit boating, that

1 may be an extension of their authority. But certainly.
2 It's -- Coast Guard has authority, EPA, Corps of
3 Engineers. There's a laundry list of Federal agencies
4 that have plenty of authority here.

5 The question is the Park Service can't throw
6 its hat in the ring and in addition apply its park
7 regulations on top of everything else.

8 JUSTICE BREYER: But it says in the
9 regulation -- look at the regulation. It says, "The
10 Hovercraft Regulation applies to waters subject to the
11 jurisdiction of the United States." This is water
12 subject to the jurisdiction. "Within the boundaries of
13 the National Park Service" -- that's the tougher part --
14 "including navigable waters." That doesn't help us.

15 So the question, I would think, would be is
16 this portion of the river within the boundaries of the
17 National Park Service? Am I right so far?

18 MR. FINDLEY: It is within the outer
19 boundaries of the park. It is not part of the park
20 pursuant to --

21 JUSTICE BREYER: Well, now, you look at what
22 they say about that, and you get, when they're defining
23 the Yukon-Charley River's National Preserve, it says
24 that that national preserve -- which is the whole thing,
25 which includes the section of the river that we're

1 talking about -- contains public lands. It doesn't say
2 it's identical with the public lands.

3 And then in another place it says, "Only
4 those lands within the portion which are public lands
5 shall be deemed to be included a portion of such unit,"
6 not that they make up the whole of such unit.

7 At least we --

8 JUSTICE SCALIA: What are -- what are you
9 quoting from? I'm --

10 JUSTICE BREYER: I'm quoting from
11 regulations which are 54 U.S.C. -- I don't know.
12 I'll -- I'll have to show you later, because I'm
13 quoting --

14 (Laughter.)

15 JUSTICE BREYER: We're going to get into
16 numbers, and I -- I just thought this case is too
17 complicated to ask anything, but you've tempted me.

18 (Laughter.)

19 JUSTICE BREYER: And so -- so you see --
20 have you got in your mind what I just quoted?

21 MR. FINDLEY: Yes.

22 JUSTICE BREYER: And then once you have
23 that, you have this regulation applying to this portion
24 of the river.

25 So now we look to the statute to see if

1 anything there takes away what the regulations seem to
2 give. And the only part of the statute -- though it's
3 an important part -- that supports you is the second
4 sentence. But as I read that second sentence, it says
5 that, "The regulations that apply solely to public lands
6 within such units," you see, "are the ones that don't
7 apply to the private land up in Yukon-Charley.

8 But I've just read you a regulation, which,
9 on my reading of it, is the Hovercraft Regulation, and
10 does not apply solely to public lands within National
11 Park Service units, either in Alaska or anywhere else.
12 And therefore, the statute doesn't stop it.

13 Now, that's -- that's -- and I want to -- I
14 don't know if I can do this orally; I just tried to,
15 which is to put the argument against you as best I
16 could, and I want to hear the reply.

17 MR. FINDLEY: Yes, Your Honor. Thank you.
18 And you know, this is -- and the government makes the
19 same argument in its briefing here.

20 JUSTICE BREYER: Yes.

21 MR. FINDLEY: And -- and this is a dispute
22 that's why -- it's what has brought us together here
23 today.

24 JUSTICE BREYER: Uh-huh.

25 MR. FINDLEY: But prior to 1996, the Park

1 Service did not apply this regulation to navigable
2 waters. That was a change they made in 1996, and that's
3 in 36 C.F.R. 1.2(b) where they say now we're going to
4 apply this to navigable waters without regard to
5 ownership of the submerged lands. And that is what
6 Mr. Sturgeon is objecting to.

7 The whole point was 103(c) says --

8 JUSTICE KAGAN: Well, Mr. Findley, I mean --

9 MR. FINDLEY: -- you can't do that.

10 JUSTICE KAGAN: -- whether or not that's
11 true, agencies can change their mind about things. And
12 I think that the question that Justice Breyer is putting
13 to you is this question about what this provision means:
14 "Shall be subject to the regulations applicable solely
15 to public lands."

16 I mean, "solely" is a very purposive word,
17 you know? I mean, Congress drops lots of words, but you
18 put "solely" in a sentence when you mean "solely." And
19 this does not apply solely to public lands.

20 MR. FINDLEY: Because the regulation never
21 should have been allowed to reach out to the public
22 land. That is our objection here. The Hovercraft
23 Regulation, as promulgated in 1983, was a regulation
24 promulgated solely to manage park land.

25 What 103(c) says, it was a permanent barrier

1 to take in that regulation and extending it out to
2 nonpublic land. The fact that they did it in 1996, and
3 the fact that they've gotten away with it for over 20
4 years, does not suddenly make the regulation --

5 JUSTICE KENNEDY: I -- I don't understand
6 why the statute that Justice Breyer is focusing on, that
7 part of the statute. Applies just to park regulations
8 and not to something from the EPA or the Federal
9 Aeronautics Administration. Federal Aeronautics
10 Administration says you can't have a smoke stack more
11 than 800 feet high.

12 Why -- why doesn't that apply?

13 MR. FINDLEY: Because that would not be a
14 regulation solely enacted to manage park land. You ask
15 about the word "solely." The reason that it's there, if
16 you were to take a --

17 JUSTICE KENNEDY: But it -- it -- it -- but
18 it -- it talks about regulations applicable solely to
19 public lands. But is -- is -- is that all Forest
20 Service regulations? Are you saying that that's a --
21 the same as Forest Service regulations? Is that what
22 you're saying?

23 MR. FINDLEY: Forest Service regulations are
24 also solely enacted to manage those public lands.

25 To answer your question, if you take the

1 word "solely" out of the statute, you've inadvertently
2 created a statute which says none of these private lands
3 within the ANILCA parks are subject to any regulations
4 applicable to public lands.

5 Now surely, Congress is not trying to exempt
6 these lands from Clean Water Act, Clean Air Act --

7 JUSTICE KAGAN: Maybe --

8 MR. FINDLEY: That's what the word "solely"
9 is there to do.

10 JUSTICE KAGAN: I guess maybe -- maybe you
11 can explain that to me. But it seems to me that if you
12 took it out of the statute, what you would have was to
13 something that says no private lands shall be subject to
14 the regulations applicable to public lands. And that's
15 what you should want.

16 If -- if it had said that, no private lands
17 shall be subject to the regulations applicable to public
18 lands, you wouldn't be here. You would have won your
19 case already. But it doesn't say that. It says, "No
20 private lands shall be subject to the regulations
21 applicable solely" -- exclusively, only -- "to public
22 lands."

23 MR. FINDLEY: Right. And again, though,
24 however, you take out the word "solely," not only, I
25 suppose, will Mr. Sturgeon win, but you have a lot of

1 in-holding owners that would be happy to know they're
2 not subject to the Clean Water Act, the Clean Air Act,
3 the Voting Rights Act, or anything else. I mean, that's
4 what that word is there to do. If there's any doubt
5 about that, then I think the 1979 Senate report makes
6 that --

7 JUSTICE KAGAN: So you're saying that the
8 word "solely" distinguishes between statutes like the
9 Clean Air Act and park land statutes?

10 MR. FINDLEY: Yes. Absolutely. That's
11 what's there to draw that line in the sand.

12 JUSTICE KAGAN: Because I understand why
13 Congress might have wanted to distinguish between, like,
14 the Clean Air Act and park statutes. But putting the
15 word "solely" in, I got to say, does not do that for me.

16 MR. FINDLEY: It may not have been the
17 perfect way for Congress to go about and do it, but
18 that's --

19 JUSTICE KAGAN: Well, tell me the imperfect
20 way.

21 MR. FINDLEY: Well, "solely."

22 (Laughter.)

23 JUSTICE KAGAN: Well, no. How does that do
24 that? No, seriously. How does that distinguish between
25 two different kinds of generally-applicable statutes,

1 one generally applicable in applying to park lands and
2 not park lands, and another generally applicable in the
3 sense of applying to both public and private lands
4 within parks.

5 MR. FINDLEY: Read that sentence in context
6 with both the first sentence of Section 103(c) and the
7 third sentence, and then read it in context with the
8 purpose of the statute.

9 The first sentence says these lands are not
10 part of the park.

11 The second sentence is doing its best to
12 make clear these lands won't be regulated as though they
13 were.

14 And the third sentence makes clear that if
15 the Federal government -- or the Park Service, excuse
16 me -- wants to regulate these lands, wants them to be
17 part of the park, they have to go out and acquire them.
18 There wouldn't be any purpose for that third sentence if
19 the Federal government -- or, excuse me -- the Park
20 Service already had authority of those nonpublic lands.

21 And if you take a step back and you look at
22 the overall purpose of the statute -- and again 101(d)
23 of the statute makes clear that this is a balancing
24 statute. This is not just a conservation statute. So
25 right in context, that's that -- what that line "solely"

1 is trying to draw on -- draw on.

2 Again, I would direct you to, if -- if
3 there's any doubt, look at the 1979 Senate report, makes
4 crystal clear about what regulations were meant to be
5 affected by this and which were not.

6 If there are -- aren't any further
7 questions, I'd like to reserve the remainder of my time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 MR. FINDLEY: Thank you.

10 CHIEF JUSTICE ROBERTS: Miss Botstein.

11 ORAL ARGUMENT OF RUTH BOTSTEIN,

12 AS AMICUS CURIAE FOR ALASKA,

13 SUPPORTING THE PETITIONER

14 MS. BOTSTEIN: Thank you, Mr. Chief Justice,
15 and may it please the Court:

16 This case is about honoring Congress's
17 mandate to protect Alaska's sovereignty in the face of
18 the Park Service's rapidly-expanding interpretation of
19 its own jurisdiction under ANILCA.

20 Congress provided in ANILCA that Alaska
21 would lose over 100 million acres of land. But at the
22 same time, Congress provided concrete protection against
23 further encroachments on the lands and waters that
24 Alaska did retain. This Court should reject the Park
25 Service's attempt to redefine the Federal/State balance

1 that Congress chose.

2 We know from ANILCA that Congress intended
3 to provide unique management rules for Alaska, and there
4 are good reasons for that. This was the continuation in
5 a trilogy of legislation that began with the Alaska
6 Statehood Act and the Alaska Native Claims Settlement
7 Act, and this piece of legislation furthered the goals
8 of those predecessors.

9 One purpose of the statute was to provide
10 adequate opportunity for the satisfaction of the
11 economic and social needs of the State of Alaska and its
12 people. And Congress explicitly balanced that goal with
13 conservation goals and the goals of completing the land
14 selections within the States. And that means that the
15 National Park Service's authority in other States or in
16 other parks are not the baseline here. The starting
17 point is the power that Congress gave to the National
18 Park Service and other Land Management agencies in
19 regulating ANILCA parks.

20 And what Congress did in Section 103(c) was
21 to set aside the inholdings of the State, private, and
22 native corporation lands that might be surrounded by the
23 parks, but should not be regulated as though they were
24 in fact part of the parks.

25 CHIEF JUSTICE ROBERTS: By "inholdings," you

1 include the submerged lands that were conveyed to the
2 State upon statehood?

3 MS. BOTSTEIN: We do, Your Honor. The
4 submerged lands and the waters that accompany them.

5 CHIEF JUSTICE ROBERTS: Right. Now, is
6 there any basis for distinguishing the submerged lands
7 from the -- I don't know what to call it -- from the
8 land land that are in the other inholdings or do you
9 understand the government's argument to be that they are
10 treated the same?

11 MS. BOTSTEIN: I understand the Park
12 Service's argument to be that the -- the submerged --
13 the waters and the submerged lands have somehow become
14 public lands. I mean, I understand their argument here
15 to say, well, Section 103(c) doesn't apply to the waters
16 because those are, in fact, not Alaska's waters. But
17 that is completely wrong, Your Honor.

18 This Court's cases have held that control
19 over lands and waters is an unmistakable and central
20 part of a State sovereignty.

21 JUSTICE GINSBURG: What does that do to
22 Federal right to control, whether it's titled or not,
23 all navigable waters?

24 MS. BOTSTEIN: Congress possesses a right to
25 control the navigational servitude, and that's not an

1 issue here. Congress hasn't given that and ANILCA
2 doesn't delegate the authorization to control navigation
3 to the Park Service as part of Park Service regulation.
4 And I think even the Park Service isn't asserting that
5 it has. So that right --

6 JUSTICE SOTOMAYOR: Repeat what you said. I
7 didn't quite hear it or understand it. I'm sorry. Say
8 it again.

9 MS. BOTSTEIN: Your Honor, Congress has the
10 power to control navigation in these waters through
11 exercise of the navigational servitude. Congress hasn't
12 given that power to the National Park Service. And I
13 don't even believe they are asserting that it has. So
14 that's not what's at issue here.

15 Neither has -- does --

16 JUSTICE KENNEDY: Well, suppose there were a
17 Coast Guard regulation that -- applicable to all
18 throughout the United States. Could that be applied to
19 this river?

20 MS. BOTSTEIN: Yes, Your Honor. The Coast
21 Guard has that power --

22 JUSTICE KENNEDY: Well, why is the -- so
23 you're -- you're just saying that the Park Service lacks
24 authority to promulgate this regulation quite without
25 regard to this statute, which doesn't help me very much.

1 MS. BOTSTEIN: No, Your Honor. We're saying
2 this statute, the enabling legislation of the parks,
3 sets the ground rules for what authority the National
4 Park Service has.

5 JUSTICE SOTOMAYOR: So you're not -- I'm
6 sorry. You're not saying that the Coast Guard couldn't
7 come in and say no hovercrafts around the Alaskan coast.

8 MS. BOTSTEIN: The Coast Guard could enact
9 regulations to regulate navigation in the water. The
10 River and Harbors Act gives the Coast Guard that
11 explicit delegation.

12 JUSTICE SOTOMAYOR: How about if they wanted
13 to say, in this alcove, the Coast Guard, not the Park
14 Service, says you can't have hovercrafts, that would be
15 okay?

16 MS. BOTSTEIN: Yes, Your Honor. The Coast
17 Guard could do it. We're not --

18 JUSTICE KAGAN: If I understand what you're
19 saying, you're saying with respect to a river that's
20 smack in the middle of federally owned lands, okay, a
21 river that's in the middle of federally owned lands,
22 what cannot happen is that the EPA can't come in and say
23 there's some terrible pollution in this river, and we
24 need to address it. That would be off limits?

25 MS. BOTSTEIN: No, Your Honor. What -- a

1 couple of things there. I mean, first, the -- the
2 waters go with the submerged lands. If the submerged
3 lands pass to the State of Alaska, then there are some
4 lands that are going to be State owned together with the
5 water column itself. And what Section 103(c) places
6 limits on is the Park Service's ability to regulate that
7 in the same fashion it wants to regulate the rest --

8 JUSTICE BREYER: Why? I mean --

9 MS. BOTSTEIN: The EPA is separate.

10 JUSTICE KAGAN: The Coast Guard can do it.
11 The EPA can do. It's only the Park Service that can't
12 do it?

13 MS. BOTSTEIN: Or another Land Management
14 agency that is regulating -- is attempting to regulate
15 the lands and waters that are not part of the park as
16 though they were part of the park. We're not saying
17 these are some islands of lawlessness. We're saying
18 that the Park Service is not the policeman here, because
19 it is Congress that needs to give an agency power to
20 regulate --

21 JUSTICE KAGAN: And I guess part of my
22 question about this is, I look at that map, you know,
23 and that map of this area has all this green land, which
24 green represents real Federal park land, and there's a
25 river that runs through it. And -- and you're saying

1 that that river that runs through the park land, and
2 nobody can do anything on -- or the Feds can't do
3 anything on? I mean, this isn't the inholdings. I
4 mean, I can understand the argument with respect to the
5 inholdings and the rivers that are running through the
6 inholdings. But this is the rivers that are running
7 through the park land.

8 Now, it seems to me a very strange thing
9 that Congress would have created Federal lands in a
10 Federal park land but said that the Federal Park Service
11 can't have anything to do with the rivers. The rivers
12 are like an important part of the park, aren't they?

13 MS. BOTSTEIN: The rivers are an important
14 part of the park, but the control over the rivers is
15 Alaska's, is Alaska's by sovereign right. And the clear
16 statement cases of the Court make clear that Congress
17 does not lightly or vaguely take that power away from a
18 State that --

19 JUSTICE KENNEDY: But that's not true as to
20 navigable waters. The Federal government can regulate
21 navigable waters.

22 MS. BOTSTEIN: It can, but it has not done
23 so in this case. ANILCA does not talk about navigable
24 waters. It does not talk about the Commerce Clause to
25 regulate navigation. It is about the Land Management

1 agency's ability to regulate parks. And our position is
2 that the park -- the park management can't encompass
3 State waters and lands.

4 And there are good reasons that Congress
5 made that choice. Alaska's waters are used in ways that
6 are different from the lower 48 in, for example, the
7 Yukon Flats National Wildlife Refuge, there are three
8 villages of less than one hundred people that are
9 hundreds of miles from any road. And this is common in
10 Alaska. So these rivers are the way that you would
11 travel to get medical care or groceries or obtain school
12 books for your children. And Alaska's ability to make
13 choices about what sort of conduct is permissible on the
14 rivers furthers its ability to provide economic and
15 self-sufficiency for its people, which was one of
16 Congress's primary goals in passing this legislation.

17 The idea that the creation of a park somehow
18 transforms Alaska's waters into Federal waters, Alaska
19 lands into Federal lands without a clear statement would
20 dramatically change Alaska's sovereign ability to
21 control its property in a way that this Court never has
22 sanctioned and should not do so now.

23 JUSTICE BREYER: As I read it -- as I read
24 it, it's complicated, but in a sense it's simple.
25 Yosemite has some private land within it and a lot of

1 public. You know, there's some houses in Yosemite owned
2 by private people. There are interior regs that apply
3 to all of Yosemite, such as certain fireplace regs.
4 There are some that only apply to the park but not the
5 private people. What this statute says is the latter.
6 Doesn't deprive -- apply to that land that you gave to
7 Alaska. That's what the statute says.

8 And what the reg says is that our hovercraft
9 reg applies to everything within Yosemite, if this were
10 Yosemite. This navigable waters, whether the land
11 around it is owned by James Jones, the private person,
12 or whether it's owned -- whether it's part of Yosemite
13 Park. That's what it seemed to say to me.

14 Now, there are two problems with what I just
15 read. One is the third sentence and the word "unit."
16 And the second problem is the NPS, the National Park
17 Service, is it really all of Yosemite, you know, with
18 that private thing or is it just the public part?

19 Now, that's at least a sorry. I shouldn't
20 have got into it. It's too complicated. Skip the
21 question.

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: Why don't you
24 take -- the -- the rest of us are interested in your
25 answer to Justice Breyer.

1 MS. BOTSTEIN: Thank you, Mr. Chief Justice.
2 I don't actually think it's all that complicated, Your
3 Honor. Analytically, the Court would first look to the
4 enabling legislation that creates a specific park. In
5 the case of Yosemite, there's actually a clear
6 congressional indication that says the Park Service has
7 sole and exclusive jurisdiction over park lands.

8 That's not what we have here. Here we would
9 look to ANILCA and specifically the limitations in
10 Section 103(c), which tell the Park Service, in fact,
11 you cannot manage State and private lands as though they
12 were public lands.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 MS. BOTSTEIN: Thank you, Your Honor.

15 CHIEF JUSTICE ROBERTS: Ms. Kovner.

16 ORAL ARGUMENT OF RACHEL P. KOVNER

17 ON BEHALF OF THE RESPONDENTS

18 MS. KOVNER: Mr. Chief Justice, and may it
19 please the Court:

20 When Congress created new park units in
21 Alaska for the express purpose of protecting their
22 waters, their free-flowing rivers and their fish, it
23 didn't simultaneously strip the Park Service of
24 preexisting authorities to achieve those goals by
25 regulating navigable waters. And I think it might make

1 sense just to clarify our argument to first explain what
2 those preexisting authorities are and why they let the
3 Park Service --

4 JUSTICE ALITO: Well, before you get to
5 that, could we begin with what the Ninth Circuit
6 decided?

7 You're entitled to defend the judgment on
8 any ground that you like, but -- that was presented
9 below, but the only issue we have to -- we have to reach
10 is the correctness of the Ninth Circuit's decision.

11 Now, I understand what the Ninth Circuit to
12 have held, to be this, that the hovercraft rule is not
13 barred by the second sentence of Section 103(c) of
14 ANILCA, because the hovercraft rule does not apply only
15 in Alaska, because it applies throughout the country.

16 Is that -- that's a correct understanding of
17 what they held?

18 MS. KOVNER: I actually think they were
19 saying two things. I think you're right that they were
20 saying that hovercraft rule isn't covered by the second
21 sentence. But I think they say this rule is out for two
22 reasons: One is that conservation-specific unit, and
23 the other is -- and I direct you to 24a and 26a -- they
24 talk about whether the regulation is generally
25 applicable or not. And I take that to mean, essentially

1 whether it applies only on public lands, in which case
2 it's out, or whether it's the very limited class of
3 rules that the Park Service is allowed to write in the
4 way that Justice Breyer alludes to, to apply to both
5 public and private lands.

6 And so if I could just explain the Park
7 Service's --

8 JUSTICE ALITO: Well, no. I want to -- I
9 understand the -- the holding -- and I -- I stand ready
10 to be corrected -- to be what I stated: That the
11 hovercraft rule is not barred because it isn't
12 Alaska-specific.

13 And, I mean, you filed a 58-page brief and,
14 as I read it, you didn't get to the reason that the
15 Ninth Circuit based its decision on until page 49, and
16 you devoted exactly a paragraph to it.

17 And why don't you concede that it's wrong?
18 It's a ridiculous interpretation, is it not?

19 (Laughter.)

20 MS. KOVNER: We think we have two much
21 stronger arguments than that, and we focused on those.
22 And if I could go to the --

23 JUSTICE SOTOMAYOR: If it's wrong. And --
24 and -- and walk it through, their argument, and tell me
25 why they are wrong.

1 I think they start with that Federal lands,
2 as defined under the statute, are only lands that the
3 U.S. has title to.

4 Do you take -- do you disagree with that?
5 And if so, why?

6 MS. KOVNER: We think public lands are
7 slightly more expansive than that. Public --

8 JUSTICE SOTOMAYOR: How? Read the
9 statute --

10 MS. KOVNER: Sure.

11 JUSTICE SOTOMAYOR: -- and -- and -- and
12 tell me how --

13 MS. KOVNER: Yes.

14 JUSTICE SOTOMAYOR: -- in the statute --

15 MS. KOVNER: Yes.

16 JUSTICE SOTOMAYOR: -- you can read it more
17 broadly.

18 MS. KOVNER: Sure. So the -- in the
19 definition --

20 JUSTICE SOTOMAYOR: I'm going -- I'm in the
21 definition section.

22 MS. KOVNER: Yes. So we're on 3a of our
23 appendix, and it defines public lands to mean lands
24 situated in Alaska, which are Federal lands. So we're
25 going to look to the Federal lands. And Federal lands

1 means lands which the title is held by the United
2 States.

3 And then "lands" is defined -- and this is
4 the critical portion for us. "Lands" is defined to
5 include not just lands and waters, but also interests
6 therein.

7 And what we get from that, Your Honor, is
8 that public lands includes interests in water that the
9 United States holds title to.

10 CHIEF JUSTICE ROBERTS: Well, in other
11 words, the interests aren't the title. This is
12 subsidiary. It's -- it's water that the U.S. holds
13 title to and interests in that water, even though they
14 are not reflected in the title?

15 MS. KOVNER: We agree the U.S. has to hold
16 title to the interest. It has to be a property --

17 CHIEF JUSTICE ROBERTS: It has to hold title
18 to the interest.

19 MS. KOVNER: That's right, Your Honor.

20 CHIEF JUSTICE ROBERTS: Well, that's where I
21 kind of stumbled in your argument, because you're not
22 claiming title to the submerged land. It's clear that's
23 in the State --

24 MS. KOVNER: That's right.

25 CHIEF JUSTICE ROBERTS: -- right?

1 You're -- you -- you rely on the reserved
2 water right.

3 Is that ever expressed as "title," as
4 opposed to a -- the words -- "usufructuary right"?

5 MS. KOVNER: Usufructuary right is a
6 property interest, so it is something you can hold title
7 to. And one place you see that is in the Mohawk
8 Power --

9 JUSTICE SCALIA: Yes, but holding title to
10 that is different from holding title to the water.

11 MS. KOVNER: That's right.

12 JUSTICE SCALIA: And you're -- you're
13 telling us that the river, that the government holds
14 title to the river. It doesn't. It has usufructuary
15 rights in the river.

16 MS. KOVNER: No. We're saying, as -- as
17 Your Honor articulated it correctly, that the United
18 States holds title to an interest in the water.

19 JUSTICE SCALIA: That's different from
20 holding title to the water.

21 MS. KOVNER: I agree. And the question is,
22 if we hold title to an interest in the water, how broad
23 is that interest, and what does it let us regulate.

24 And the interest has been defined by
25 regulation. And -- and consistent with the statements

1 of what this land is being reserved for, it's an
2 interest that we hold over the entirety of the water.
3 And that permits us to regulate the water.

4 And I think one way you know that --

5 CHIEF JUSTICE ROBERTS: Well, it's just a --
6 I'm sorry to pause -- pause there.

7 I understood with reserve water doctrine is
8 usually, you know, we need water to do this, so we
9 get -- we have a reserve right to 40 percent of the
10 water, or the initial flow, or whatever. I've never
11 thought of it as a basis for general regulatory
12 authority.

13 MS. KOVNER: So I think that move is made by
14 ANILCA, the statute. It's ANILCA-specific, because
15 ANILCA says if you hold title to an interest, like a
16 reserved water right interest, then that is a public
17 land, and it can be regulated as public lands.

18 And if -- if there's questions --

19 JUSTICE SOTOMAYOR: I'm with you so far.
20 That gets you to regulating the waters in Federal --
21 in -- in -- in Federal units, because the U.S. under
22 ANILCA only controls lands within the conservation units
23 that are public lands.

24 MS. KOVNER: Yes.

25 JUSTICE SOTOMAYOR: In the United States.

1 MS. KOVNER: Right. We only have authority
2 to regulate the lands in which we have reserved water
3 rights, and those are only waters within the park's
4 units.

5 And, Your Honor --

6 JUSTICE SOTOMAYOR: So -- and does the
7 no-hovercraft rule apply to the nonpublic lands? Is
8 that the position you're taking, that you have the right
9 to regulate that as well?

10 MS. KOVNER: No. The hovercraft rule only
11 applies on public lands, and so it doesn't apply on
12 inholdings.

13 JUSTICE BREYER: Then -- then -- then I'm
14 completely wrong. Then what the right -- then -- then I
15 was totally wrong. I -- I thought that the argument was
16 that -- just to go to my Yosemite analogy --

17 MS. KOVNER: Yes.

18 JUSTICE BREYER: -- that the hovercraft rule
19 was like a rule that applies to all of Yosemite, say a
20 campfire rule that applies even to John Jones's house.

21 MS. KOVNER: So it's written to apply in two
22 places.

23 JUSTICE BREYER: I mean, it could be the
24 navigable waters. It wouldn't be John Jones's
25 fireplace.

1 But if that -- if that's your argument, I
2 was wrong.

3 MS. KOVNER: No. Your -- Your Honor, it's
4 written to apply in two places. The first is on
5 Federally-owned lands, and the second is on -- on
6 navigable waters.

7 JUSTICE BREYER: I thought the navigable
8 waters are not. They're on John Jones's property. But
9 you still have the authority to regulate them, because
10 the regulation that does it is not a regulation that
11 applies solely to public lands.

12 MS. KOVNER: That's right. And Your Honor,
13 so it's like --

14 JUSTICE BREYER: Is that right? Because you
15 just seemed to say the opposite a minute ago.

16 MS. KOVNER: No. So the -- the way that the
17 regulations are written as -- it's 1.2, and it -- it
18 says they apply in two places: Federally-Owned lands,
19 and also on navigable waters that are within the parks.

20 JUSTICE BREYER: Now, navigable waters that
21 are within the boundaries of the National Park Service.

22 MS. KOVNER: That's right. That's right.

23 JUSTICE BREYER: That's like John Jones's
24 house in Yosemite.

25 MS. KOVNER: That's right.

1 JUSTICE BREYER: The fireplace reg applies
2 to him, even though his is a private house, because it's
3 within the boundary of Yosemite.

4 MS. KOVNER: Yes.

5 JUSTICE BREYER: Am I right or not?

6 MS. KOVNER: Well, I think the -- the
7 difficulty is, Your Honor, we think that the navigable
8 waters are not like John Jones's house. We think
9 they're Federal lands.

10 But if Your Honor is to assume --

11 JUSTICE BREYER: Either way, you say you
12 win. Either they are Federal lands and this is part of
13 a reg that applies to Federal lands; or they are not
14 Federal lands, in which case this reg applies to both
15 nonfederal and -- I mean nonpublic lands and public
16 lands. So it's not within the second sentence.

17 Is that your argument?

18 MS. KOVNER: That is right. And so if we
19 could talk about what that sentence means, even
20 assuming --

21 CHIEF JUSTICE ROBERTS: Well, but if that's
22 right, I mean, it -- it -- it's right because the
23 question is do these things apply solely to public
24 lands. And you say, well, the second sentence doesn't
25 matter because we say they don't apply solely to public

1 lands.

2 That's not a very significant protection for
3 the inholders.

4 MS. KOVNER: I -- I think it is. And the
5 reason is that we have very limited authority to
6 regulate things that are inholdings. And in particular,
7 we are acting here pursuant to an express grant of
8 authority to regulate waters within the parks. In
9 19- --

10 JUSTICE ALITO: Well, you -- you want to
11 talk about waters, and -- and after this question I
12 won't say anything more on this, but is the Ninth
13 Circuit's holding limited to waters? The -- the State
14 of Alaska on page 20 and 21 of their brief cite a notice
15 in the Federal Register by the Park Service in which
16 they defend the regulation of nonfederal oil and gas
17 activities on the basis of Sturgeon, on the ground that
18 Section 103(c) of ANILCA applies only to Alaska-specific
19 regulations. And since these are not Alaska-specific,
20 those -- those regulations apply.

21 So they understand it to apply to something
22 more than just navigable waters.

23 MS. KOVNER: That's right. So I think the
24 long-standing interpretation for 20 years, so that in a
25 notice and comment regulation of what this provision

1 means, is that it only limits rules that are written
2 solely to apply to public lands.

3 And as to what the Park Service can do when
4 it --

5 JUSTICE ALITO: It's solely to apply to
6 Alaska --

7 JUSTICE BREYER: That's the whole --

8 JUSTICE KENNEDY: -- within such unit?

9 MS. KOVNER: We just --

10 JUSTICE ALITO: Solely to apply to nonpublic
11 units to lands in Alaska.

12 MS. KOVNER: That -- if that's how Your
13 Honor understands the Ninth Circuit's ruling.

14 The regulation, the 20-year regulation I'm
15 alluding to, says if it's a rule that applies to both
16 public and private lands, then it's not covered by this
17 provision.

18 And just to be clear, we have very limited
19 authority to regulate private lands. So it's not a
20 plenary -- this -- this provision doesn't grant us the
21 ability to regulate privately held --

22 JUSTICE SCALIA: Let's -- let's talk about
23 your authority. I don't even get to the second
24 sentence. I just get to the first sentence. The
25 authority of the Park Service comes from the statute

1 which authorizes the Secretary of Interior to, quote,
2 "prescribe such regulations necessary or proper for the
3 use and management of system units, including those
4 concerning boating and other activities. Only here the
5 CSU's are park system units."

6 That's 13.013(c). As a result, non-Federal
7 holdings unambiguously fall outside the scope of the
8 Secretary's authority because of the first sentence.
9 "Only those lands within the boundaries of any
10 conservation system unit which are public lands as such
11 term is defined in this Act shall be deemed to be
12 included as a portion of such unit."

13 If it's not within the unit, it's not within
14 the basic authority of the Park Service to issue
15 regulations, period.

16 So you -- you have to show that -- I think
17 the Federal government holds title to the water. I
18 don't think you can show. Nobody holds title to the
19 water.

20 MS. KOVNER: So if I could walk through that
21 authority that Your Honor is discussing and show why it
22 allows us to enact the regulation here. I agree, Your
23 Honor, that the authority under (a) is general authority
24 to prescribe only those rules that are necessary for the
25 protection of the system units, meaning the parks. And

1 I agree that this is outside of that. And as a result
2 our authority to prescribe rules for this land is very
3 limited.

4 JUSTICE SOTOMAYOR: Why? You're -- you're
5 conceding that the waters are outside of that?

6 MS. KOVNER: I'm conceding -- well, we
7 haven't -- our first argument, Your Honor, is that no,
8 these are public lands. But if -- I think Justice
9 Scalia's premise is what is our authority to regulate if
10 they are not public lands. Okay?

11 And I want to focus on provision (b), okay,
12 and just the language of provision (b). It has always
13 been understood to allow us to regulate waters that are
14 within the boundaries of the parks regardless of who
15 owns them. And who owns them is always going to be the
16 State under Petitioner's theory no matter where we are.

17 And just to focus on the language of it,
18 it's a very specific express grant of authority to
19 regulate waters within parks. It says we can -- the
20 Park Service can enact rules, quote, "concerning boating
21 and other activities, not just on but also relating to
22 waters that are located within" --

23 JUSTICE BREYER: I read that first sentence.
24 It's very interesting, because the tone of voice is the
25 only way I can deal with this case. Watch. Imagine we

1 have a valley that's a public land, and that valley
2 traverses the boundary of the unit. Some of it's inside
3 and some of it's outside.

4 Now, only those lands within the boundaries
5 of any conservation system which are public -- within
6 the boundaries of any conservation system which are
7 public lands shall be deemed to be included as a portion
8 of the unit.

9 So the only part of that valley that it's a
10 portion of the unit is that part of the valley that's
11 within the boundary of the unit. The part that's
12 outside the boundary of the unit is not part of the
13 unit.

14 MS. KOVNER: Yes. So --

15 JUSTICE BREYER: Is that what it -- I
16 thought it must mean something like that. If it doesn't
17 mean something like that, it means what Justice Scalia
18 says. And then they're -- Joe Jones' house, the Indian
19 reservation, none of it is part of the unit. But that
20 can't be what it means, can it?

21 MS. KOVNER: So I think the --

22 JUSTICE BREYER: Do you see what I -- are
23 you following it?

24 MS. KOVNER: I think -- I think I am
25 following. The statutes that Congress has enacted draw

1 a distinction between land that is within the boundaries
2 of the unit, which includes private lands, and lands --

3 JUSTICE BREYER: If it makes clear -- if it
4 makes clear that private lands like Joe Jones' house are
5 a part of the unit?

6 MS. KOVNER: I think they're within the
7 boundaries of the unit, not part of the unit.

8 JUSTICE BREYER: Within the boundaries of
9 it. Ah, so distinction between being part of the unit
10 and being within the boundaries of the unit.

11 MS. KOVNER: Just -- so this -- this grant
12 of authority in (b) has always been -- yes.

13 JUSTICE SCALIA: You say this grant of
14 authority in (b). You're quoting from the
15 regulations --

16 MS. KOVNER: No.

17 JUSTICE SCALIA: -- right from the statute.

18 MS. KOVNER: No.

19 JUSTICE SCALIA: What are you quoting from?

20 MS. KOVNER: From -- so on 7a of our
21 appendix, it's a statute. It's a statute that was
22 enacted in 1976, and it expressly grants the Park
23 Service the authority to enact rules concerning boating
24 and other activities on or relating to waters.

25 JUSTICE SOTOMAYOR: Can you tell me whether

1 that statute violates this statute?

2 MS. KOVNER: I think that's -- I think it's
3 whether this provision prohibits the Park Service from
4 exercising that authority or whether --

5 CHIEF JUSTICE ROBERTS: I'm sorry. Go
6 ahead.

7 MS. KOVNER: Yes. And so to answer that, I
8 think we look at the text and what does the text do.
9 And the text says you can't apply on lands that were
10 conveyed to the State or to private parties those rules
11 that are applicable solely to public lands within
12 conservation system units. And so it's not --

13 JUSTICE SCALIA: 7a? You're saying it's on
14 page 7a?

15 MS. KOVNER: Yes.

16 JUSTICE SCALIA: That's 54 U.S.C. 107 --
17 100751. It's a regulation. It's not --

18 MS. KOVNER: No. I'm sorry. It is -- it is
19 a statute. It's the Act of 1976. I understand that the
20 numbering is -- it's an unusually high --

21 JUSTICE SCALIA: It's not the numbering.
22 It's -- it says regulations -- oh, I see.

23 (Laughter.)

24 MS. KOVNER: It's about the authority to
25 enact --

1 JUSTICE SCALIA: The statute is addressing
2 regulations.

3 MS. KOVNER: Yes.

4 JUSTICE SCALIA: That's the subtitle in the
5 statute.

6 MS. KOVNER: Yes. And so just -- I think
7 Justice Kennedy was making this -- this distinction.
8 And I think it's exactly the right distinction. Is --
9 is this authority one that gives the Park Service the
10 ability to regulate lands whether they are public or
11 private?

12 And if you look at the text, it does. And
13 as a result, this is not a regulation -- if you think
14 that waters within the parks are private lands, this is
15 not the kind of regulation that's carved out by the
16 text. Just giving meaning to the word solely, that has
17 to be correct.

18 And if you also look to other provisions of
19 the statute, it confirms it in two ways, if I could just
20 focuses on two of them.

21 The first is, if you look at the management
22 plan of the statute of ANILCA, it expressly contemplates
23 that the Park Service is going to be able to regulate
24 private lands under some circumstances. And it does
25 that by saying, you need your management plan to

1 describe the activities that are occurring on private
2 lands and to describe any methods you're going to use --
3 the methods you're going to use to control those
4 activities, including, quote, "issuance or enforcement
5 of regulations."

6 And just the other thing I think --

7 JUSTICE KAGAN: And if I'm looking at the
8 right section, I mean, I would have thought that that
9 was key to your argument, because it says in these
10 management plans what you need is a -- is a "description
11 of privately owned areas which are within such unit."
12 So it's clearly contemplating that there are these
13 private areas that are within the unit.

14 And then as you say, it goes on and says we
15 want in these plans some idea of what regulations are
16 going to be applying on those private lands within the
17 unit.

18 MS. KOVNER: That's right, Your Honor. And
19 if I could just focus on the one other part of the
20 statute that confirms that this reading is correct, that
21 the Park Service isn't being stripped of its preexisting
22 authority to regulate rivers. It's if you look at the
23 other provisions of the statute that very clearly
24 confirm the Park Service is going to have the authority
25 to regulate rivers. And let me just give two examples

1 of those.

2 The first is, when Congress is setting aside
3 land for parks -- and let me use the park here as an
4 example -- it states it's -- its purposes. So it says
5 "We are creating here the Yukon-Charley Rivers Preserve.
6 And our purposes are to ensure the protection of,"
7 quote, "the entire Yukon-Charley basin, including the
8 lakes and the streams. So that provision confirms that
9 Congress is contemplating by setting aside this land as
10 parks, we're going to have this preexisting authority to
11 regulate waters within the parks still in place.

12 And just one other example of these
13 provisions is the Wild and Scenic River Act provisions
14 that are in the statute. And Congress sets aside as a
15 special type of conservation system unit wild and scenic
16 rivers. These are entirely composed of rivers. And
17 says, Park Service, you are supposed to protect those
18 pursuant to your Organic Act authority in these wild and
19 scenic water provisions.

20 The Petitioner's view would --

21 CHIEF JUSTICE ROBERTS: What does -- you --
22 on page 24, and I think you have mentioned this several
23 times, so -- you talk about this isn't a problem because
24 your authority is circumscribed and you have the
25 inholdings are -- have substantial protections against

1 Park Service regulation. What -- what are those
2 protections?

3 MS. KOVNER: Yes. So I want to make clear,
4 our authority is very narrow, and we can only regulate
5 where there is some statute that authorizes us to
6 regulate inholdings and --

7 CHIEF JUSTICE ROBERTS: Do you -- do you
8 think the statute that authorizes you to regulate is the
9 one that says "the Secretary shall prescribe such
10 regulations as the Secretary considers necessary or
11 proper"? Would you --

12 MS. KOVNER: We're principally relying on
13 the one right below that, (b).

14 CHIEF JUSTICE ROBERTS: Well, but do you
15 rely on that one? Because if you rely on that one, I
16 don't see that it provides any protections at all.

17 MS. KOVNER: So let me tell you how -- how
18 that first one has been interpreted and why it does
19 provide protections. So that first provision has been
20 interpreted to allow the Secretary to regulate private
21 lands when doing so is necessary for the protection of
22 the system units.

23 And so, for example, if the Park Service
24 regulates some activity on private lands that is going
25 to cause danger or harm to the system units that's --

1 that adjoins them, that's the only circumstance in which
2 authority to regulate --

3 CHIEF JUSTICE ROBERTS: So danger -- danger
4 or harm, is that what it's limited to? Or could it be
5 limited to scenic, environmental, noise impacts?

6 MS. KOVNER: We think it's clear that the
7 Park Service can't simply treat inholdings as though
8 they were public lands. And the only case in which the
9 Park Service has tried to use its authority to regulate
10 inholdings under that provision is this case where there
11 is going to be some kind of harm to the actual public
12 lands that befalls the park's units. But --

13 JUSTICE KENNEDY: But is that true even if
14 it's a -- the regulation is nation -- applicable
15 nationwide?

16 MS. KOVNER: We think that nationwide, yes,
17 the Park Service's authority to regulate inholdings is
18 quite limited.

19 JUSTICE KENNEDY: So -- so if -- because if
20 that's true, then I don't know what -- then you disagree
21 with the Ninth Circuit on the meaning that it gave --
22 gives to the "solely" phrase?

23 MS. KOVNER: I think that we think -- and
24 we've said for 20 years in a regulation that's entitled
25 the Chevron difference that what the "solely" phrase

1 does is it carves out the rules that are applicable
2 solely to public lands. And because our authority is so
3 limited, that's most rules. It's only under very narrow
4 circumstances that we can write rules that apply to both
5 public and private lands.

6 CHIEF JUSTICE ROBERTS: No, but your
7 authority is not limited if you get Chevron deference.
8 If you get Chevron deference on determining what you
9 think is necessary or proper, the idea that that's a
10 substantial circumscription of your authority doesn't
11 seem to me to be a valid one.

12 MS. KOVNER: I don't think so. I mean,
13 there's a -- it's been a very long-standing limitation
14 on how this has been construed that we're not going
15 beyond the kinds of regulations I've described to
16 pervasive regulation. There might be, if we tried to
17 interpret our authority under this section more broadly,
18 there might be a clear statement problem then, but
19 there's certainly no clear statement problem --

20 JUSTICE SCALIA: More broadly? Interpret
21 necessary or proper -- necessary or proper to mean
22 necessary or proper? You think it's beyond belief that
23 you're going to do that?

24 MS. KOVNER: I -- I do. And when the
25 history is there to prove it, it's been interpreted

1 quite narrowly, and I think the Court would --

2 JUSTICE SOTOMAYOR: Some might argue that
3 your proposed regulations on oil contravene the intent
4 of this provision.

5 So assuming we do, how do you deal with
6 that? Assuming some people do. I don't -- I don't know
7 that --

8 MS. KOVNER: Yes. I -- I think Your Honor
9 is right, that some people might say that that's not an
10 appropriate regulation, and they will be able to
11 challenge it nationwide as not an appropriate exercise
12 of our authority.

13 But what's never been disputed in this case
14 is that, in general, under the 1976 Act, this very
15 specific authorization of the Park Service to regulate
16 waters within units, we have the authority to regulate
17 waters in units --

18 JUSTICE BREYER: What --

19 JUSTICE ALITO: What can you do about why
20 this provision that you -- you reproduce on 7a gets
21 around the first section of 103(c)? This -- that
22 provision allows regulation of waters within Service
23 units, but the first section, as I read it, says that
24 nonpublic land within the boundaries of -- of a CSU is
25 not part of the CSU.

1 MS. KOVNER: Yes. So I think the statutory
2 authorization is actually slightly broader. And just to
3 read the language, it's concerning boating or other
4 activities on or relating to waters located within
5 system units. And that's always been understood to
6 allow the regulation of all the waters in system units,
7 regardless of their ownership. And I think it makes
8 sense, because you can't regulate or protect a river
9 piecemeal, stretch by stretch.

10 If Congress -- when Congress set aside these
11 rivers and said the Park Service is going to be able to
12 protect the entire river and stream and basin,
13 protecting the rivers and streams and basins that are
14 Federal property is going to require setting a rule for
15 the whole river, and enforcing the rule on the whole --

16 JUSTICE SCALIA: 100751 is a general
17 statute; it applies everywhere, right?

18 MS. KOVNER: Yeah.

19 JUSTICE SCALIA: And -- and 3101,
20 Section 103 is specific to Alaska, isn't it?

21 MS. KOVNER: Yes.

22 JUSTICE SCALIA: Isn't there a general rule
23 that the specific governs the general?

24 MS. KOVNER: Yes. And I think then --

25 JUSTICE SCALIA: So this general provision

1 is limited by what Congress has said about Alaska. And
2 that sentence says, "Only those lines within the
3 boundaries of any CSU which are public lands shall be
4 deemed to be included as a portion of such unit."

5 MS. KOVNER: Yes.

6 JUSTICE SCALIA: And if you read that back
7 into 100751, it seems to me the Park Service doesn't
8 have jurisdiction.

9 MS. KOVNER: No. So we agree, Your Honor,
10 that the specific governs the general, and so the Court
11 has to give effect to that first sentence. And what
12 that first sentence says is they can't be treated --
13 they are not part of the unit.

14 So then we look to the Park Service's
15 authorities and we say, does the Park Service's
16 authority depend on this water being part of the unit?
17 And the answer is no. If you look at (b), it's an
18 authorization to impose rules concerning boating and --
19 and other activities on or relating to waters located
20 within.

21 JUSTICE KENNEDY: Go --

22 JUSTICE BREYER: The regulation itself says,
23 it says water -- "Hovercraft regulation applies to,
24 quote, 'waters subject to the jurisdiction of the
25 United States within the boundaries of the National Park

1 Service.'" "

2 MS. KOVNER: Yes.

3 JUSTICE BREYER: And then the National Park
4 Service somewhere has a definition that equates it with
5 the unit. The National Park Service is defined
6 identically to system units. That's at 54 U.S.C. 100102
7 and 100501.

8 So if we -- Justice Scalia's point is this
9 seems to take the private land, the in-holdings, and say
10 they're not part of the unit; only the public lands are
11 part of the unit --

12 MS. KOVNER: That's --

13 JUSTICE BREYER: -- and then the Hovercraft
14 Regulation applies only to the unit.

15 MS. KOVNER: No, Your Honor.

16 JUSTICE BREYER: And that's -- that -- isn't
17 that the point? Yes. That's --

18 MS. KOVNER: No --

19 JUSTICE BREYER: -- the point.

20 MS. KOVNER: No, your Honor.

21 JUSTICE BREYER: What's the response to
22 that?

23 MS. KOVNER: So I think Your Honor's
24 suggesting that the regulations themselves say they
25 don't apply --

1 JUSTICE BREYER: Yes.

2 MS. KOVNER: -- unless it's part of a unit.

3 JUSTICE BREYER: Exactly.

4 MS. KOVNER: And I think that's not correct.

5 There's this distinction between what's within the
6 boundaries of the park and what is park lands. And
7 Your -- Your Honor, this is established in Section 103,
8 among other places, where it talks about whether land is
9 within the boundaries of the system unit --

10 JUSTICE BREYER: Ah.

11 MS. KOVNER: -- versus being within the
12 park.

13 JUSTICE BREYER: So you're saying it applies
14 within -- it is within the boundaries of the unit,
15 although the unit consists of just the public land. Who
16 drafted this? This is --

17 (Laughter.)

18 MS. KOVNER: And to be clear, there's never
19 been any -- to be clear, there's never been any dispute
20 that the regulations are written to apply to these
21 lands. The only question in this case is whether
22 Section 103 strips that authority.

23 And Your Honor, I would just ask the Court
24 again --

25 JUSTICE SOTOMAYOR: Well, the specific would

1 overcome the general. So if Congress passed a new
2 statute, it could limit or expand 103 as it chose,
3 correct?

4 MS. KOVNER: Yes. And Your Honor, just --
5 if I could leave the Court with -- I mean, in
6 interpreting Section 103, this provision that talks
7 about rules solely applicable to public lands, and
8 whether that removes the Park Service's preexisting
9 authority to regulate waters in the parks, I would just
10 ask the Court to look to all the other provisions of the
11 statute that clearly contemplate -- of ANILCA, the
12 statute -- that clearly contemplate the Park Service is
13 going to retain the authority to protect park's waters.

14 JUSTICE ALITO: Let's say that part of a
15 river is within a CSU. And do you read this statute to
16 mean that the --the Park Service could regulate boating
17 500 miles downstream from that part of the -- on that
18 river, because it's relating to waters that are within
19 the CSU?

20 MS. KOVNER: The Park Service has -- has
21 consistently understood its authority to be regulating
22 the park's -- within the park's boundaries. It's never
23 sought to enact a regulation outside of the park's
24 boundaries. But this 1976 provision has uniformly been
25 understood to confer on the Park Service --

1 JUSTICE BREYER: Are you satisfied with this
2 holding -- imaginary -- but the Ninth Circuit's wrong.

3 Two, the second sentence does not bar this
4 regulation.

5 Three, there are other possible arguments;
6 we send it back for reconsideration as to whether those
7 arguments are good or bad.

8 MS. KOVNER: I'm -- I'm not sure I
9 understand the second sentence of the whole -- so --

10 JUSTICE BREYER: They -- they -- we're
11 saying that the second sentence, which is what they're
12 talking about primarily in the briefs, the second
13 sentence of (c) --

14 MS. KOVNER: Yes.

15 JUSTICE BREYER: -- "no lands which,"
16 et cetera, you're right about that.

17 MS. KOVNER: Right.

18 JUSTICE BREYER: You're right about -- I
19 mean I imagine --

20 MS. KOVNER: Yes.

21 JUSTICE BREYER: Then as to this first
22 sentence, which I -- I don't think I focused on,
23 particularly, we say go back and argue that.

24 MS. KOVNER: Your Honor, this case could be
25 sent back to address both that and to address the

1 question of what is public lands, which is a question
2 that wasn't addressed below. And we think it would be
3 sufficient to say the second sentence doesn't -- the
4 text clearly indicates the second sentence doesn't
5 prohibit the application of those rules that are validly
6 written to apply to both public and private lands within
7 the parks.

8 This regulation is a rule that's been
9 written to apply, regardless of who owns the lands in
10 the parks. It's an exercise of our narrow authority --

11 JUSTICE SOTOMAYOR: No. That's you winning.
12 (Laughter.)

13 I think Justice Alito has been asking you
14 this question from the beginning.

15 MS. KOVNER: Yes.

16 JUSTICE SOTOMAYOR: What do you think the
17 Ninth Circuit meant? And do you agree with its
18 interpretation? As he pointed out --

19 MS. KOVNER: Yes.

20 JUSTICE SOTOMAYOR: -- you spent 49 pages of
21 your brief arguing other things --

22 MS. KOVNER: Yes.

23 JUSTICE SOTOMAYOR: -- putting you to the
24 test.

25 MS. KOVNER: Yes.

1 JUSTICE SOTOMAYOR: All right. So what do
2 you think it held?

3 MS. KOVNER: So we think there are -- we
4 have two stronger arguments, but we think part of what
5 the Ninth Circuit said was the second sentence only
6 limits rules that are specific to conservation system
7 units. And "conservation system units" is defined in
8 the statute to be parks units in Alaska.

9 And we think, yes, the plain text of this
10 regulation only limits those kinds of rules. We don't
11 think the Court needs to reach that --

12 JUSTICE SOTOMAYOR: Do you think the Ninth
13 Circuit was right?

14 MS. KOVNER: Yes.

15 JUSTICE ALITO: So if there's a rule that
16 applies to conservation -- it applies to Alaska, and it
17 applies to the National Mall, that would be that you
18 can't have a Hovercraft in Alaska or in the tidal basin.
19 Under the Ninth Circuit's -- the Ninth Circuit's
20 rationale, that would be 107 -- 103 -- 103(c) wouldn't
21 buy that.

22 MS. KOVNER: I don't think there's any
23 dispute that's what the plain text says. And the reason
24 I don't think that's ridiculous or irrational,
25 Your Honor, is because when ANILCA was enacted, there

1 was a very well-settled regulatory regime that didn't
2 subject private lands to any kind of plenary authority.
3 So Congress had every reason to -- may I just finish my
4 sentence?

5 Congress had every reason to expect that
6 would remain the rule, nationwide. And what it was
7 concerned about was that the Park Service would deviate
8 from that approach in Alaska when these new lands were
9 added.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. Findley, you have two minutes remaining.

12 REBUTTAL ARGUMENT OF MATTHEW T. FINDLEY

13 ON BEHALF OF THE PETITIONER

14 JUSTICE KENNEDY: Just in the two minutes,
15 can you address the very last point the Solicitor
16 General made, please?

17 MR. FINDLEY: Yes. And that's -- it's
18 simply backwards to what 103(c) was supposed to do.

19 Let's take Joe Jones' house, and let's think
20 about it differently. Let's think about this as a
21 native corporation's land allotment.

22 You have 40 percent of their land allotment
23 that they were given under Native Claim Settlement Act,
24 land that was given to them in exchange for
25 extinguishing their entire claim for aboriginal land

1 rights. It's there for economic development.

2 It's about to be surrounded by these ANILCA
3 parks. It's worth taking a step back. What does 1 --
4 Section 103(c) doing? It is saying before ANILCA was
5 passed, you're not part of the park and you're not
6 subject to Park Service regulation. The day after
7 ANILCA was part -- excuse me. The day after ANILCA is
8 passed, you're still not part of the park and you're
9 still not subject to Park Service regulation.

10 The government's position here, they keep
11 saying their authority is limited, and Mr. Chief Justice
12 hit the nail on the head. They're relying on the
13 Organic Act which allows them to enact any regulations
14 they feel necessary at any time.

15 They've already done that with the 9(b) oil
16 and gas regulations, seeking to apply those to
17 non-Federal land within Alaska. And the hits are going
18 to keep on coming unless this Court stops this
19 interpretation and goes back to what 103(c) was meant to
20 do, which was to prevent the Park Service from taking
21 these lands that aren't owned by the government and
22 regulating them as though they are part of the park.

23 And the second point want -- I -- I want to
24 make -- I imagine about 45 seconds at this point:
25 There's a lot of discussion about whether ANILCA covers

1 navigable waters or not. The clear statement rule
2 covers that question. And in that circumstance, it's a
3 question of is anything in the statute clearly saying we
4 are taking away State authority over navigable waters?

5 You will not find the term navigable waters
6 in the statute once.

7 Let's contrast this to other park-enabling
8 legislation. This is for Olympic National Park, and
9 you'll find this at 16 U.S.C. 251(n). And here's what
10 it says: "The boundary of Olympic National Park
11 Washington is" -- if I may just finish the quote -- "is
12 hereby revised to" -- "is hereby revised to include
13 within the park all submerged lands and waters of Lake
14 Ozette, Washington, and the Ozette River, Washington."

15 There's your clear statement.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Case is submitted.

19 (Whereupon, at 12:21 p.m., the case in the
20 above-entitled matter was submitted.)

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