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. :

10 - - - - - - - - - - - - - - - - - - x

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 the 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 navigable servitude
2 is not something the United States owns. And the
3 Submerged Lands Act itself disavows an actual title of
4 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,
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 read
5 this code of Federal regulations and the Park Service is
6 saying, we want fires here on public lands; we want
7 fires here not on public lands. That's the type of
8 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 Ninth
16 Circuit's decision? Was it limited to navigable waters?
17 MR. FINDLEY: The Ninth Circuit did not
18 reach unnavigable waters issues at all.
19 JUSTICE ALITO: What was the basis for the
20 decision?
21 MR. FINDLEY: The Ninth Circuit took a very
22 strained, improper reading of the statute and looked at
23 Section 103(c) and said, well, it only applies to
24 Alaska-specific regulations. And it was a reading that
25 reads the statute out of context. It's contrary to the

1 text and leads to an incredibly absurd result that,
2 frankly, no -- there's evidence Congress thought this is
3 what was going to happen was that these islands of
4 non-Federal land that were excluded from the parks,
5 under the Ninth Circuit's ruling, they cannot take
6 advantage of all of the rules in Alaska that Congress
7 specifically loosened for Alaska parks. You can camp in
8 Alaska parks. You can hunt. You can fish. You can use
9 snow machines. You can fly. The list goes on and on.
10 Right?
11 Under the Ninth Circuit ruling, those
12 relaxed rules, they don't apply to the non-Federal land.
13 Instead, that non-Federal land is subject to the more
14 restrictive nationwide rules that were not promulgated
15 to be tailored to Alaska. And that simply makes no
16 sense.
17 JUSTICE SOTOMAYOR: Your reading on a
18 practical basis with respect to the navigable waters
19 makes almost no sense to me.
20 I'm looking at a map attached to the
21 petition of the State of Alaska. It's attached to the
22 end of the brief. And it seems like these national
23 parks are spread along the coast of Alaska in a
24 haphazard way, meaning the national parks have
25 jurisdiction over a small strip along the coast of

1 Alaska.

2 Presumably you're not arguing that this

3 agreement controls the U.S. servitude of navigable

4 waters around those strips.

5 MR. FINDLEY: We're not claiming that

6 Section 103(c) trumps the navigable -- navigational

7 servitude. What we're claiming is ANILCA makes crystal

8 clear for submerged lands and navigable waters owned by

9 the State, they aren't public lands; they aren't part of

10 the park.

11 JUSTICE SOTOMAYOR: So you're saying that

12 the U.S. can't control the navigable servitude in any

13 part of that coast.

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

15 JUSTICE SOTOMAYOR: Can.

16 MR. FINDLEY: The Park Service hasn't been

17 delegated that authority. It was expressly denied that

18 authority by Section 103(c).

19 JUSTICE SOTOMAYOR: And so what do you take

20 the words in -- in 103(c) to mean, the boating

21 exception, when it says "in the jurisdiction of the

22 United States"? "Waters in the jurisdiction"?

23 You don't think navigable waters are within

24 the jurisdiction of the United States in Federal lands?

25 MR. FINDLEY: That's within the regulation

1 that the Park Service promulgated nationwide, saying
2 we're going in -- the hovercraft is one of many
3 regulations that they assert to apply within the
4 jurisdiction of the Park Service.
5 Section 103(c), which is the -- which is the
6 specific park-enabling statute, denied the Park Service
7 jurisdiction over nonpublic land which includes these
8 navigable waters.
9 CHIEF JUSTICE ROBERTS: So if the -- as it
10 often does elsewhere, if the Army Corps of Engineers
11 have issues with respect to things that the State is
12 doing on the navigable waters or, you know, other people
13 are building a -- a -- a damn or a fish -- I forget what
14 they are called -- the Corps of Engineers can come in
15 and say, you can't do that.
16 MR. FINDLEY: Exactly. Under whatever its
17 authorities are. I mean -- and that's exactly what
18 ANILCA was meant to remain unaffected by the law was
19 those generally applicable rights that --
20 JUSTICE SCALIA: Let's -- and EPA might --
21 might be able to prohibit boating, no?
22 MR. FINDLEY: Whether the EPA --
23 JUSTICE SCALIA: Or environmental --
24 MR. FINDLEY: -- can prohibit boating, that
25 may be an extension of their authority. But certainly.

1 It's -- Coast Guard has authority, EPA, Corps of
2 Engineers. There's a laundry list of Federal agencies
3 that have plenty of authority here.
4 The question is the Park Service can't throw
5 its hat in the ring and in addition apply its park
6 regulations on top of everything else.
7 JUSTICE BREYER: But it says in the
8 regulation -- look at the regulation. It says, "The
9 Hovercraft Regulation applies to waters subject to the
10 jurisdiction of the United States." This is water
11 subject to the jurisdiction. "Within the boundaries of
12 the National Park Service" -- that's the tougher part --
13 "including navigable waters." That doesn't help us.
14 So the question, I would think, would be is
15 this portion of the river within the boundaries of the
16 National Park Service? Am I right so far?
17 MR. FINDLEY: It is within the outer
18 boundaries of the park. It is not part of the park
19 pursuant to --
20 JUSTICE BREYER: Well, now, you look at what
21 they say about that, and you get, when they're defining
22 the Yukon-Charley River's National Preserve, it says
23 that that national preserve -- which is the whole thing,
24 which includes the section of the river that we're
25 talking about -- contains public lands. It doesn't say

1 it's identical with the public lands.

2 And then in another place it says, "Only

3 those lands within the portion which are public lands

4 shall be deemed to be included a portion of such unit,"

5 not that they make up the whole of such unit.

6 At least we --

7 JUSTICE SCALIA: What are -- what are you

8 quoting from? I'm --

9 JUSTICE BREYER: I'm quoting from

10 regulations which are 54 U.S.C. -- I don't know.

11 I'll -- I'll have to show you later, because I'm

12 quoting --

13 (Laughter.)

14 JUSTICE BREYER: We're going to get into

15 numbers, and I -- I just thought this case is too

16 complicated to ask anything, but you've tempted me.

17 (Laughter.)

18 JUSTICE BREYER: And so -- so you see --

19 have you got in your mind what I just quoted?

20 MR. FINDLEY: Yes.

21 JUSTICE BREYER: And then once you have

22 that, you have this regulation applying to this portion

23 of the river.

24 So now we look to the statute to see if

25 anything there takes away what the regulations seem to

1 give. And the only part of the statute -- though it's
2 an important part -- that supports you is the second
3 sentence. But as I read that second sentence, it says
4 that, "The regulations that apply solely to public lands
5 within such units," you see, "are the ones that don't
6 apply to the private land up in Yukon-Charley.
7 But I've just read you a regulation, which,
8 on my reading of it, is the Hovercraft Regulation, and
9 does not apply solely to public lands within National
10 Park Service units, either in Alaska or anywhere else.
11 And therefore, the statute doesn't stop it.
12 Now, that's -- that's -- and I want to -- I
13 don't know if I can do this orally; I just tried to,
14 which is to put the argument against you as best I
15 could, and I want to hear the reply.
16 MR. FINDLEY: Yes, Your Honor. Thank you.
17 And you know, this is -- and the government makes the
18 same argument in its briefing here.
19 JUSTICE BREYER: Yes.
20 MR. FINDLEY: And -- and this is a dispute
21 that's why -- it's what has brought us here together
22 today.
23 JUSTICE BREYER: Uh-huh.
24 MR. FINDLEY: But prior to 1996, the Park
25 Service did not apply this regulation to navigable

1 waters. That was a change they made in 1996, and that's
2 in 36 C.F.R. 1.2(b) where they say now we're going to
3 apply this to navigable waters without regard to
4 ownership of submerged lands. And that is what
5 Mr. Sturgeon is objecting to.
6 The whole point was 103(c) says --
7 JUSTICE KAGAN: Well, Mr. Findley, I mean --
8 MR. FINDLEY: -- you can't do that.
9 JUSTICE KAGAN: -- whether or not that's
10 true, agencies can change their mind about things. And
11 I think that the question that Justice Breyer is putting
12 to you is this question about what this provision means:
13 "Shall be subject to the regulations applicable solely
14 to public lands."
15 I mean, "solely" is a very purposive word,
16 you know? I mean, Congress drops lots of words, but you
17 put "solely" in a sentence when you mean "solely." And
18 this does not apply solely to public lands.
19 MR. FINDLEY: Because the regulation never
20 should have been allowed to reach out to the public
21 land. That is our objection here. The Hovercraft
22 Regulation, as promulgated in 1983, was a regulation
23 promulgated solely to manage park land.
24 What 103(c) says, it was a permanent barrier
25 to take in that regulation and extending it out to

1 nonpublic land. The fact that they did it in 1996, and
2 the fact that they've gotten away with it for over 20
3 years, does not suddenly make the regulation --
4 JUSTICE KENNEDY: I -- I don't understand
5 why the statute that Justice Breyer is focusing on, that
6 part of the statute. Applies just to park regulations
7 and not to something from the EPA or the Federal
8 Aeronautics Admission. Federal Aeronautics
9 Administration says you can't have a smoke stack more
10 than 800 feet high.
11 Why -- why doesn't that apply?
12 MR. FINDLEY: Because that would not be a
13 regulation solely enacted to manage park land. You ask
14 about the word "solely." The reason that it's there, if
15 you were to take a --
16 JUSTICE KENNEDY: But it -- it -- it -- but
17 it -- it talks about regulations applicable solely to
18 public lands. But is -- is -- is that all Forest
19 Service regulations? Are you saying that that's a --
20 the same as Forest Service regulations? Is that what
21 you're saying?
22 MR. FINDLEY: Forest Service regulations are
23 also solely enacted to manage those public lands.
24 To answer your question, if you take the
25 word "solely" out of the statute, you've inadvertently

1 created a statute which says none of these private lands
2 within the ANILCA parks are subject to any regulations
3 applicable to public lands.
4 Now surely, Congress is not trying to exempt
5 these lands from Clean Water Act, Clean Air Act --
6 JUSTICE KAGAN: Maybe --
7 MR. FINDLEY: That's what the word "solely"
8 is there to do.
9 JUSTICE KAGAN: I guess maybe -- maybe you
10 can explain that to me. But it seems to me that if you
11 took it out of the statute, what you would have was to
12 something that says no private lands shall be subject to
13 the regulations applicable to public lands. And that's
14 what you should want.
15 If -- if it had said that, no private lands
16 shall be subject to the regulations applicable to public
17 lands, you wouldn't be here. You would have won your
18 case already. But it doesn't say that. It says, "No
19 private lands shall be subject to the regulations
20 applicable solely" -- exclusively, only -- "to public
21 lands."
22 MR. FINDLEY: Right. And again, though,
23 however, you take out the word "solely," not only, I
24 suppose, will Mr. Sturgeon win, but you have a lot of
25 in-holding owners that would be happy to know they're

1 not subject to the Clean Water Act, the Clean Air Act,
2 the Voting Rights Act, or anything else. I mean, that's
3 what that word is there to do. If there's any doubt
4 about that, then I think the 1979 Senate report makes
5 that --
6 JUSTICE KAGAN: So you're saying that the
7 word "solely" distinguishes between statutes like the
8 Clean Air Act and park land statutes?
9 MR. FINDLEY: Yes. Absolutely. That's
10 what's there to draw that line in the sand.
11 JUSTICE KAGAN: Because I understand why
12 Congress might have wanted to distinguish between, like,
13 the Clean Air Act and park statutes. But putting the
14 word "solely" in, I got to say, does not do that for me.
15 MR. FINDLEY: It may not have been the
16 perfect way for Congress to go about and do it, but
17 that's --
18 JUSTICE KAGAN: Well, tell me the imperfect
19 way.
20 MR. FINDLEY: Well, "solely."
21 (Laughter.)
22 JUSTICE KAGAN: Well, no. How does that do
23 that? No, seriously. How does that distinguish between
24 two different kinds of generally-applicable statutes,
25 one generally applicable in applying to park lands and

1 not park lands, and another generally applicable in the
2 sense of applying to both public and private lands
3 within parks.
4 MR. FINDLEY: Read that sentence in context
5 with both the first sentence of Section 103(c) and the
6 third sentence, and then read it in context with the
7 purpose of the statute.
8 The first sentence says these lands are not
9 part of the park.
10 The second sentence is doing its best to
11 make clear these lands won't be regulated as though they
12 were.
13 And the third sentence makes clear that if
14 the Federal government -- or the Park Service, excuse
15 me -- wants to regulate these lands, wants them to be
16 part of the park, they have to go out and acquire them.
17 There wouldn't be any purpose for that third sentence if
18 the Federal government -- or, excuse me -- the Park
19 Service already had authority of those nonpublic lands.
20 And if you take a step back and you look at
21 the overall purpose of the statute -- and again 101(d)
22 of the statute makes clear that this is a balancing
23 statute. This is not just a conservation statute. So
24 right in context, that's that -- what that line "solely"
25 is trying to draw on -- draw on.

1 Again, I would direct you to, if -- if
2 there's any doubt, look at the 1979 Senate report, makes
3 crystal clear about what regulations were meant to be
4 affected by this and which were not.
5 If there are -- aren't any further
6 questions, I'd like to reserve the remainder of my time.
7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 MR. FINDLEY: Thank you.
9 CHIEF JUSTICE ROBERTS: Miss Botstein.
10 ORAL ARGUMENT OF RUTH BOTSTEIN,
11 AS AMICUS CURIAE FOR ALASKA,
12 SUPPORTING THE PETITIONER
13 MS. BOTSTEIN: Thank you, Mr. Chief Justice,
14 and may it please the Court:
15 This case is about honoring Congress's
16 mandate to protect Alaska's sovereignty in the face of
17 the Park Service's rapidly-expanding interpretation of
18 its own jurisdiction under ANILCA.
19 Congress provided in ANILCA that Alaska
20 would lose over 100 million acres of land. But at the
21 same time, Congress provided concrete protection against
22 further encroachments on the lands and waters that
23 Alaska did retain. This Court should reject the Park
24 Service's attempt to redefine the Federal/State balance
25 that Congress chose.

1 We know from ANILCA that Congress intended
2 to provide unique management rules for Alaska, and there
3 are good reasons for that. This was the continuation
4 and a trilogy of legislation that began with the Alaska
5 Statehood Act and the Alaska Native Claims Settlement
6 Act, and this piece of legislation furthered the goals
7 of those predecessors.
8 One purpose of the statute was to provide
9 adequate opportunity for the satisfaction of the
10 economic and social needs of the State of Alaska and its
11 people. And Congress explicitly balanced that goal with
12 conservation goals and the goals of completing the land
13 selections within the States. And that means that the
14 National Park Service's authority in other States or in
15 other parks are not the baseline here. The starting
16 point is the power that Congress gave to the National
17 Park Service and other Land Management agencies in
18 regulating ANILCA parks.
19 And what Congress did in Section 103(c) was
20 to set aside the inholdings of the State, private, and
21 native corporation lands that might be surrounded by the
22 parks, but should not be regulated as though they were
23 in fact part of the parks.
24 CHIEF JUSTICE ROBERTS: By "inholdings," you
25 include the submerged lands that were conveyed to the

1 State upon statehood?

2 MS. BOTSTEIN: We do, Your Honor. The

3 submerged lands and the waters that accompany them.

4 CHIEF JUSTICE ROBERTS: Right. Now, is

5 there any basis for distinguishing the submerged lands

6 from the -- I don't know what to call it -- the land

7 that are in the other inholdings or do you understand

8 the government's argument to be that they are treated

9 the same?

10 MS. BOTSTEIN: I understand the Park

11 Service's argument to be that the -- the submerged --

12 the waters and the submerged lands have somehow become

13 public lands. I mean, I understand their argument here

14 to say, well, Section 103(c) doesn't apply to the waters

15 because those are, in fact, not Alaska's waters. But

16 that is completely wrong, Your Honor.

17 This Court's cases have held that control

18 over lands and waters is an unmistakable and central

19 part of a State sovereignty.

20 JUSTICE GINSBURG: What does that do to

21 Federal right to control, whether it's titled or not,

22 all navigable waters?

23 MS. BOTSTEIN: Congress possesses a right to

24 control the navigational servitude, and that's not an

25 issue here. Congress hasn't given that and mostly

1 doesn't delegate the authorization to control navigation
2 to the Park Service as part of Park Service regulation.
3 And I think even the Park Service isn't asserting that
4 it has. So that right --
5 JUSTICE SOTOMAYOR: Repeat what you said. I
6 didn't quite hear it or understand it. I'm sorry. Say
7 it again.
8 MS. BOTSTEIN: Your Honor, Congress has the
9 power to control navigation in these waters through
10 exercise of the navigational servitude. Congress hasn't
11 given that power to the National Park Service. And I
12 don't even believe they are asserting that it has. So
13 that's not what's at issue here.
14 Neither has -- does --
15 JUSTICE KENNEDY: Well, suppose there were a
16 Coast Guard regulation that -- applicable to all
17 throughout the United States. Could that be applied to
18 this river?
19 MS. BOTSTEIN: Yes, Your Honor. The Coast
20 Guard has that power --
21 JUSTICE KENNEDY: Well, why is the -- so
22 you're -- you're just saying that the Park Service lacks
23 authority to promulgate this regulation quite without
24 regard to this statute, which doesn't help me very much.
25 MS. BOTSTEIN: No, Your Honor. We're saying

1 this statute, the enabling legislation of the parks,
2 sets the ground rules for what authority the National
3 Park Service has.
4 JUSTICE SOTOMAYOR: So you're not -- I'm
5 sorry. You're not saying that the Coast Guard couldn't
6 come in and say no hovercrafts around the Alaskan coast.
7 MS. BOTSTEIN: The Coast Guard could enact
8 regulations to regulate navigation in the water. The
9 River and Harbors Act gives the Coast Guard that
10 explicit delegation.
11 JUSTICE SOTOMAYOR: How about if they wanted
12 to say, in this alcove, the Coast Guard, not the Park
13 Service, says you can't have hovercrafts, that would be
14 okay?
15 MS. BOTSTEIN: Yes, Your Honor. The Coast
16 Guard could do it. We're not --
17 JUSTICE KAGAN: If I understand what you're
18 saying, you're saying with respect to a river that's
19 smack in the middle of federally owned lands, okay, a
20 river that's in the middle of federally owned lands,
21 what cannot happen is that the EPA can't come in and say
22 there's some terrible pollution in this river, and we
23 need to address it. That would be off limits?
24 MS. BOTSTEIN: No, Your Honor. What -- a
25 couple of things there. I mean, first, the -- the

1 waters go with the submerged lands. If the submerged
2 lands pass to the State of Alaska, then there are some
3 lands that are going to be State owned together with the
4 water column itself. And what Section 103(c) places
5 limits on is the Park Service's ability to regulate that
6 in the same fashion it wants to regulate the rest --
7 JUSTICE BREYER: Why? I mean --
8 MS. BOTSTEIN: The EPA is separate.
9 JUSTICE KAGAN: The Coast Guard can do it.
10 The EPA can do. It's only the Park Service that can't
11 do it?
12 MS. BOTSTEIN: Or another Land Management
13 agency that is regulating -- is attempting to regulate
14 the lands and waters that are not part of the park as
15 though they were part of the park. We're not saying
16 these aren't some islands of lawlessness. We're saying
17 that the Park Service is not the policeman here, because
18 it is Congress that needs to give an agency power to
19 regulate --
20 JUSTICE KAGAN: And I guess part of my
21 question about this is, I look at that map, you know,
22 and that map of this area has all this green land, which
23 green represents real Federal park land, and there's a
24 river that runs through it. And -- and you're saying
25 that that river that runs through the park land, and

1 nobody can do anything on -- or the Feds can't do
2 anything on? I mean, this isn't the inholdings. I
3 mean, I can understand the argument with respect to the
4 inholdings and the rivers that are running through the
5 inholdings. But this is the rivers that are running
6 through the park land.
7 Now, it seems to me a very strange thing
8 that Congress would have created Federal lands in a
9 Federal park land but said that the Federal Park Service
10 can't have anything to do with the rivers. The rivers
11 are like an important part of the park, aren't they?
12 MS. BOTSTEIN: The rivers are an important
13 part of the park, but the control over the rivers is
14 Alaska's, is Alaska's by sovereign right. And the clear
15 statement cases of the Court make clear that Congress
16 does not lightly or vaguely take that power away from a
17 State that --
18 JUSTICE KENNEDY: But that's not true as to
19 navigable waters. The Federal government can regulate
20 navigable waters.
21 MS. BOTSTEIN: It can, but it has not done
22 so in this case. ANILCA does not talk about navigable
23 waters. It does not talk about the Commerce Clause to
24 regulate navigation. It is about the Land Management
25 agency's ability to regulate parks. And our position is

1 that the park -- the park management can't encompass
2 State waters and lands.
3 And there are good reasons that Congress
4 made that choice. Alaska's waters are used in ways that
5 are different from the lower 48 in, for example, the
6 Yukon Flats National Wildlife Refuge, there are three
7 villages of less than one hundred people that are
8 hundreds of miles from any road. And this is common in
9 Alaska. So these rivers are the way that you would
10 travel to get medical care or groceries or obtain school
11 books for your children. And Alaska's ability to make
12 choices about what sort of conduct is permissible on the
13 rivers furthers its ability to provide economic and
14 self-sufficiency for its people, which was one of
15 Congress's primary goals in passing this legislation.
16 The idea that the creation of a park somehow
17 transforms Alaska's waters into Federal waters, Alaska
18 lands into Federal lands without a clear statement would
19 dramatically change Alaska's sovereign ability to
20 control its property in a way that this Court never has
21 sanctioned and should not do so now.
22 JUSTICE BREYER: As I read it -- as I read
23 it, it's complicated, but in a sense it's simple.
24 Yosemite has some private land within it and a lot of
25 public. You know, there's some houses in Yosemite owned

1 by private people. There are interior regs that apply
2 to all of Yosemite, such as certain fireplace regs.
3 There are some that only apply to the park but not the
4 private people. What this statute says is the latter.
5 Doesn't deprive -- apply to that land that you gave to
6 Alaska. That's what the statute says.
7 And what the reg says is that our hovercraft
8 reg applies to everything within Yosemite, if this were
9 Yosemite. This navigable waters, whether the land
10 around it is owned by James Jones, the private person,
11 or whether it's owned -- whether it's part of Yosemite
12 Park. That's what it seemed to say to me.
13 Now, there are two problems with what I just
14 read. One is the third sentence and the word "unit."
15 And the second problem is the NPS, the National Park
16 Service, is it really all of Yosemite, you know, with
17 that private thing or is it just the public part?
18 Now, that's at least a sorry. I shouldn't
19 have got into it. It's too complicated. Skip the
20 question.
21 (Laughter.)
22 CHIEF JUSTICE ROBERTS: The -- the rest of
23 us are interested in your answer to Justice Breyer.
24 MS. BOTSTEIN: Thank you, Mr. Chief Justice.
25 I don't actually think it's all that complicated, Your

1 Honor. Analytically, the Court would first look to the
2 enabling legislation that creates a specific park. In
3 the case of Yosemite, there's actually a clear
4 congressional indication that says the Park Service has
5 sole and exclusive jurisdiction over park lands.
6 That's not what we have here. Here we would
7 look to ANILCA and specifically the limitations in
8 Section 103(c), which tell the Park Service, in fact,
9 you cannot manage State and private lands as though they
10 were public lands.
11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 MS. BOTSTEIN: Thank you, Your Honor.
13 CHIEF JUSTICE ROBERTS: Ms. Kovner.
14 ORAL ARGUMENT OF RACHEL P. KOVNER
15 ON BEHALF OF THE RESPONDENTS
16 MS. KOVNER: Mr. Chief Justice, and may it
17 please the Court:
18 When Congress created new park units in
19 Alaska for the express purpose of protecting their
20 waters, their free-flowing rivers and their fish, it
21 didn't simultaneously strip the Park Service of
22 preexisting authorities to achieve those goals by
23 regulating navigable waters. And I think it might make
24 sense just to clarify our argument to first explain what
25 those preexisting authorities are and why they let the

1 Park Service --

2 JUSTICE ALITO: Well, before you get to

3 that, could we begin with what the Ninth Circuit

4 decided?

5 You're entitled to defend the judgment on

6 any ground that you like, but -- that was presented

7 below, but the only issue we have to -- we have to reach

8 is the correctness of the Ninth Circuit's decision.

9 Now, I understand what the Ninth Circuit to

10 have held, to be this, that the hovercraft rule is not

11 barred by the second sentence of Section 103(c) of

12 ANILCA, because the hovercraft rule does not apply only

13 in Alaska, because it applies throughout the country.

14 Is that -- that's a correct understanding of

15 what they held?

16 MS. KOVNER: I actually think they were

17 saying two things. I think you're right that they were

18 saying the hovercraft rule isn't covered by the second

19 sentence. But I think they say this rule is out for two

20 reasons: One is that conservation-specific unit, and

21 the other is -- and I direct you to 24a and 26a -- they

22 talk about whether the regulation is generally

23 applicable or not. And I take that to mean, essentially

24 whether it applies only on public lands, in which case

25 it's out, or whether it's the very limited class of

1 rules that the Park Service is allowed to write in the
2 way that Justice Breyer alludes to, to apply to both
3 public and private lands.
4 And so if I could just explain the Park
5 Service's --
6 JUSTICE ALITO: Well, no. I want to -- I
7 understand the -- the holding -- and I -- I stand ready
8 to be corrected -- to be what I stated: That the
9 hovercraft rule is not barred because it isn't
10 Alaska-specific.
11 And, I mean, you filed a 58-page brief and,
12 as I read it, you didn't get to the reason that the
13 Ninth Circuit based its decision on until page 49, and
14 you devoted exactly a paragraph to it.
15 And why don't you concede that it's wrong?
16 It's a ridiculous interpretation, is it not?
17 (Laughter.)
18 MS. KOVNER: We think we have two much
19 stronger arguments than that, and we focused on those.
20 And if I could go to the --
21 JUSTICE SOTOMAYOR: It's wrong. And --
22 and -- and walk it through, their argument, and tell me
23 why they are wrong.
24 I think they start with that Federal lands,
25 as defined under the statute, are only lands that the

1 U.S. has title to.

2 Do you take -- do you disagree with that?

3 And if so, why?

4 MS. KOVNER: We think public lands are

5 slightly more expansive than that. Public --

6 JUSTICE SOTOMAYOR: How? Read the

7 statute --

8 MS. KOVNER: Sure.

9 JUSTICE SOTOMAYOR: -- and -- and -- and

10 tell me how --

11 MS. KOVNER: Yes.

12 JUSTICE SOTOMAYOR: -- in the statute --

13 MS. KOVNER: Yes.

14 JUSTICE SOTOMAYOR: -- you can read it more

15 broadly.

16 MS. KOVNER: Sure. So the -- in the

17 definition --

18 JUSTICE SOTOMAYOR: I'm going -- I'm in the

19 definition section.

20 MS. KOVNER: Yes. So we're on 3a of our

21 appendix, and it defines public lands to mean lands

22 situated in Alaska, which are Federal lands. So we're

23 going to look to the Federal lands. And Federal lands

24 means lands which the title is held by the United

25 States.

1 And then "lands" is defined -- and this is
2 the critical portion for us. "Lands" is defined to
3 include not just lands and waters, but also interests
4 therein.
5 And what we get from that, Your Honor, is
6 that public lands includes interests in water that the
7 United States holds title to.
8 CHIEF JUSTICE ROBERTS: Well, in other
9 words, the interests aren't the title. This is
10 subsidiary. It's -- it's water that the U.S. holds
11 title to and interests in that water, even though they
12 are not reflected in the title?
13 MS. KOVNER: We agree the U.S. has to hold
14 title to the interest. It has to be a property --
15 CHIEF JUSTICE ROBERTS: It has to hold title
16 to the interest.
17 MS. KOVNER: That's right, Your Honor.
18 CHIEF JUSTICE ROBERTS: Well, that's where I
19 kind of stumbled in your argument, because you're not
20 claiming title to the submerged land. It's clear that's
21 in the State --
22 MS. KOVNER: That's right.
23 CHIEF JUSTICE ROBERTS: -- right?
24 You're -- you -- you rely on the reserved
25 water right.

1 Is that ever expressed as "title," as
2 opposed to a -- the words -- "usufructuary right"?
3 MS. KOVNER: Usufructuary right is a
4 property interest, so it is something you can hold title
5 to. And one place you see that is in the Mohawk
6 Power --
7 JUSTICE SCALIA: Yes, but holding title to
8 that is different from holding title to the water.
9 MS. KOVNER: That's right.
10 JUSTICE SCALIA: And you're -- you're
11 telling us that the river, that the government holds
12 title to the river. It doesn't. It has usufructuary
13 rights in the river.
14 MS. KOVNER: No. We're saying, as -- as
15 Your Honor articulated it correctly, that the United
16 States holds title to an interest in the water.
17 JUSTICE SCALIA: That's different from
18 holding title to the water.
19 MS. KOVNER: I agree. And the question is,
20 if we hold title to an interest in the water, how broad
21 is that interest, and what does it let us regulate.
22 And the interest has been defined by
23 regulation. And -- and consistent with the statements
24 of what this land is being reserved for, it's an
25 interest that we hold over the entirety of the water.

1 And that permits us to regulate the water.
2 And I think one way you know that --
3 CHIEF JUSTICE ROBERTS: Well, it's just a --
4 I'm sorry to pause -- pause there.
5 I understood with reserve water doctrine is
6 usually, you know, we need water to do this, so we
7 get -- we have a reserve right to 40 percent of the
8 water, or the initial flow, or whatever. I've never
9 thought of it as a basis for general regulatory
10 authority.
11 MS. KOVNER: So I think that move is made by
12 ANILCA, the statute. It's ANILCA-specific, because
13 ANILCA says if you hold title to an interest, like a
14 reserved water right interest, then that is a public
15 land, and it can be regulated as public lands.
16 And if -- if there's questions --
17 JUSTICE SOTOMAYOR: I'm with you so far.
18 That gets you to regulating the waters in Federal --
19 in -- in -- in Federal units, because the U.S. under
20 ANILCA only controls lands within the conservation units
21 that are public lands.
22 MS. KOVNER: Yes.
23 JUSTICE SOTOMAYOR: In the United States.
24 MS. KOVNER: Right. We only have authority
25 to regulate the lands in which we have reserved water

1 rights, and those are only waters within the park's
2 units.
3 And, Your Honor --
4 JUSTICE SOTOMAYOR: So -- and does the
5 no-hovercraft rule apply to the nonpublic lands? Is
6 that the position you're taking, that you have the right
7 to regulate that as well?
8 MS. KOVNER: No. The hovercraft rule only
9 applies on public lands, and so it doesn't apply on
10 inholdings.
11 JUSTICE BREYER: Then -- then -- then I'm
12 completely wrong. Then what the right -- then -- then I
13 was totally wrong. I -- I thought that the argument was
14 that -- just to go to my Yosemite analogy --
15 MS. KOVNER: Yes.
16 JUSTICE BREYER: -- that the hovercraft rule
17 was like a rule that applies to all of Yosemite, say a
18 campfire rule that applies even to John Jones's house.
19 MS. KOVNER: So it's written to apply in two
20 places.
21 JUSTICE BREYER: I mean, it could be the
22 navigable waters. It wouldn't be John Jones's
23 fireplace.
24 But if that -- if that's your argument, I
25 was wrong.

1 MS. KOVNER: No. Your -- Your Honor, it's
2 written to apply in two places. The first is on
3 Federally-owned lands, and the second is on -- on
4 navigable waters.
5 JUSTICE BREYER: I thought the navigable
6 waters are not. They're on John Jones's property. But
7 you still have the authority to regulate them, because
8 the regulation that does it is not a regulation that
9 applies solely to public lands.
10 MS. KOVNER: That's right. And Your Honor,
11 so it's like --
12 JUSTICE BREYER: Is that right? Because you
13 just seemed to say the opposite a minute ago.
14 MS. KOVNER: No. So the -- the way that the
15 regulations are written as -- it's 1.2, and it -- it
16 says they apply in two places: Federally-Owned lands,
17 and also on navigable waters that are within the parks.
18 JUSTICE BREYER: Now, navigable waters that
19 are within the boundaries of the National Park Service.
20 MS. KOVNER: That's right. That's right.
21 JUSTICE BREYER: That's like John Jones's
22 house in Yosemite.
23 MS. KOVNER: That's right.
24 JUSTICE BREYER: The fireplace reg applies
25 to him, even though his is a private house, because it's

1 within the boundary of Yosemite.

2 MS. KOVNER: Yes.

3 JUSTICE BREYER: Am I right or not?

4 MS. KOVNER: Well, I think the -- the

5 difficulty is, Your Honor, we think that the navigable

6 waters are not like John Jones's house. We think

7 they're Federal lands.

8 But if Your Honor is to assume --

9 JUSTICE BREYER: Either way, you say you

10 win. Either they are Federal lands and this is part of

11 a reg that applies to Federal lands; or they are not

12 Federal lands, in which case this reg applies to both

13 nonfederal and -- I mean nonpublic lands and public

14 lands. So it's not within the second sentence.

15 Is that your argument?

16 MS. KOVNER: That is right. And so if we

17 could talk about what that sentence means, even

18 assuming --

19 CHIEF JUSTICE ROBERTS: Well, but if that's

20 right, I mean, it -- it -- it's right because the

21 question is do these things apply solely to public

22 lands. And you say, well, the second sentence doesn't

23 matter because we say they don't apply solely to public

24 lands.

25 That's not a very significant protection for

1 the inholders.

2 MS. KOVNER: I -- I think it is. And the

3 reason is that we have very limited authority to

4 regulate things that are inholdings. And in particular,

5 we are acting here pursuant to an express grant of

6 authority to regulate waters within the parks. In

7 19- --

8 JUSTICE ALITO: Well, you -- you want to

9 talk about waters, and -- and after this question I

10 won't say anything more on this, but is the Ninth

11 Circuit's holding limited to waters? The -- the State

12 of Alaska on page 20 and 21 of their brief cite a notice

13 in the Federal Register by the Park Service in which

14 they defend the regulation of nonfederal oil and gas

15 activities on the basis of Sturgeon, on the ground that

16 Section 103(c) of ANILCA applies only to Alaska-specific

17 regulations. And since these are not Alaska-specific,

18 those -- those regulations apply.

19 So they understand it to apply to something

20 more than just navigable waters.

21 MS. KOVNER: That's right. So I think the

22 long-standing interpretation for 20 years, so that in a

23 notice and comment regulation of what this provision

24 means, is that it only limits rules that are written

25 solely to apply to public lands.

1 And as to what the Park Service can do when
2 it --
3 JUSTICE ALITO: It's solely to apply to
4 Alaska --
5 JUSTICE BREYER: That's the whole --
6 JUSTICE ALITO: -- within such unit?
7 MS. KOVNER: We just --
8 JUSTICE ALITO: Solely to apply to nonpublic
9 units to lands in Alaska.
10 MS. KOVNER: That -- if that's how Your
11 Honor understands the Ninth Circuit's ruling.
12 The regulation, the 20-year regulation I'm
13 alluding to, says if it's a rule that applies to both
14 public and private lands, then it's not covered by this
15 provision.
16 And just to be clear, we have very limited
17 authority to regulate private lands. So it's not a
18 plenary -- this -- this provision doesn't grant us the
19 ability to regulate privately held --
20 JUSTICE SCALIA: Let's -- let's talk about
21 your authority. I don't even get to the second
22 sentence. I just get to the first sans sentence. The
23 authority of the Park Service comes from the statute
24 which authorizes the Secretary of Interior to, quote,
25 "prescribe such regulations necessary or proper for the

1 use and management of system units, including those
2 concerning boating and other activities. Only here the
3 CSU's are park system units."
4 That's 13.013(c). As a result, non-Federal
5 holdings unambiguously fall outside the scope of the
6 Secretary's authority because of the first sentence.
7 "Only those lands within the boundaries of any
8 conservation system unit which are public lands as such
9 term is defined in this Act shall be deemed to be
10 included as a portion of such unit."
11 If it's not within the unit, it's not within
12 the basic authority of the Park Service to issue
13 regulations, period.
14 So you -- you have to show that -- I think
15 the Federal government holds title to the water. I
16 don't think you can show. Nobody holds title to the
17 water.
18 MS. KOVNER: So if I could walk through that
19 authority that Your Honor is discussing and show why it
20 allows us to enact the regulation here. I agree, Your
21 Honor, the authority under (a) is general authority to
22 prescribe only those rules that are necessary for the
23 protection of the system units, meaning the parks. And
24 I agree that this is outside of that. And as a result
25 our authority to prescribe rules for this land is very

1 limited.

2 JUSTICE SOTOMAYOR: Why? You're -- you're

3 conceding that the waters are outside of that?

4 MS. KOVNER: I'm conceding -- well, we

5 haven't -- our first argument, Your Honor, is that no,

6 these are public lands. But if -- I think Justice

7 Scalia's premise is what is our authority to regulate if

8 they are not public lands. Okay?

9 And I want to focus on provision (b), okay,

10 and just the language of provision (b). It has always

11 been understood to allow us to regulate waters that are

12 within the boundaries of the parks regardless of who

13 owns them. And who owns them is always going to be the

14 State under Petitioner's theory no matter where we are.

15 And just to focus on the language of it,

16 it's a very specific express grant of authority to

17 regulate waters within parks. It says we can -- the

18 Park Service can enact rules, quote, "concerning boating

19 and other activities, not just on but also relating to

20 waters that are located within" --

21 JUSTICE BREYER: I read that first sentence.

22 It's very interesting, because the tone of voice is the

23 only way I can deal with this case. Watch. Imagine we

24 have a valley that's a public land, and that valley

25 traverses the boundary of the unit. Some of it's inside

1 and some of it's outside.

2 Now, only those lands within the boundaries

3 of any conservation system which are public -- within

4 the boundaries of any conservation system which are

5 public lands shall be deemed to be included as a portion

6 of the unit.

7 So the only part of that valley that it's a

8 portion of the unit is that part of the valley that's

9 within the boundary of the unit. The part that's

10 outside the boundary of the unit is not part of the

11 unit.

12 MS. KOVNER: Yes. So --

13 JUSTICE BREYER: Is that what it -- I

14 thought it must mean something like that. If it doesn't

15 mean something like that, it means what Justice Scalia

16 says. And then they're -- Joe Jones' house, the Indian

17 reservation, none of it is part of the unit. But that

18 can't be what it means, can it?

19 MS. KOVNER: So I think the --

20 JUSTICE BREYER: Do you see what I -- are

21 you following it?

22 MS. KOVNER: I think -- I think I am

23 following. The statutes that Congress has enacted draw

24 a distinction between land that is within the boundaries

25 of the unit, which includes private lands, and lands --

1 JUSTICE BREYER: If it makes clear -- if it
2 makes clear that private lands like Joe Jones' house are
3 a part of the unit?
4 MS. KOVNER: I think they're within the
5 boundaries of the unit, not part of the unit.
6 JUSTICE BREYER: Within the boundaries of
7 it. Ah, so distinction between being part of the unit
8 and being within the boundaries of the unit.
9 MS. KOVNER: Just -- so this -- this
10 authority, indeed, has always been -- yes.
11 JUSTICE SCALIA: You say this grant of
12 authority in (b). You're quoting from the
13 regulations --
14 MS. KOVNER: No.
15 JUSTICE SCALIA: -- right from the statute.
16 MS. KOVNER: No.
17 JUSTICE SCALIA: What are you quoting from?
18 MS. KOVNER: From -- so on 7a of our
19 appendix, it's a statute. It's a statute that was
20 enacted in 1976, and it expressly grants the Park
21 Service the authority to enact rules concerning boating
22 and other activities on or relating to waters.
23 JUSTICE SOTOMAYOR: Can you tell me whether
24 that statute violates this statute?
25 MS. KOVNER: I think that's -- I think it's

1 whether this provision prohibits the Park Service from
2 exercising that authority or whether --
3 CHIEF JUSTICE ROBERTS: I'm sorry. Go
4 ahead.
5 MS. KOVNER: Yes. And so to answer that, I
6 think we look at the text and what does the text do.
7 And the text says you can't apply on lands that were
8 conveyed to the State or to private parties those rules
9 that are applicable solely to public lands within
10 conservation system units. And so it's not --
11 JUSTICE SCALIA: 7a? You're saying it's on
12 page 7a?
13 MS. KOVNER: Yes.
14 JUSTICE SCALIA: That's 54 U.S.C. 107 --
15 100751. It's a regulation. It's not --
16 MS. KOVNER: No. I'm sorry. It is -- it is
17 a statute. It's the Act of 1976. I understand that the
18 numbering is -- it's an unusually high --
19 JUSTICE SCALIA: It's not the numbering.
20 It's -- it says regulations -- oh, I see.
21 (Laughter.)
22 MS. KOVNER: It's about the authority to
23 enact --
24 JUSTICE SCALIA: The statute is addressing
25 regulations.

1 MS. KOVNER: Yes.

2 JUSTICE SCALIA: That's the subtitle in the

3 statute.

4 MS. KOVNER: Yes. And so just -- I think

5 Justice Kennedy was making this -- this distinction.

6 And I think it's exactly the right distinction. Is --

7 is this authority one that gives the Park Service the

8 ability to regulate lands whether they are public or

9 private?

10 And if you look at the text, it does. And

11 as a result, this is not a regulation -- if you think

12 that waters within the parks are private lands, this is

13 not the kind of regulation that's carved out by the

14 text. Just giving meaning to the word solely, that has

15 to be correct.

16 And if you also look to other provisions of

17 the statute, it confirms it in two ways, if I could just

18 focuses on two of them.

19 The first is, if you look at the management

20 plan of the statute of ANILCA, it expressly contemplates

21 that the Park Service is going to be able to regulate

22 private lands under some circumstances. And it does

23 that by saying, you need your management plan to

24 describe the activities that are occurring on private

25 lands and to describe any methods you're going to use --

1 the methods you're going to use to control those
2 activities, including, quote, "issuance or enforcement
3 of regulations."
4 And just the other thing I think --
5 JUSTICE KAGAN: And if I'm looking at the
6 right section, I mean, I would have thought that that
7 was key to your argument, because it says in these
8 management plans what you need is a -- is a "description
9 of privately owned areas which are within such unit."
10 So it's clearly contemplating that there are these
11 private areas that are within the unit.
12 And then as you say, it goes on and says we
13 want in these plans some idea of what regulations are
14 going to be applying on those private lands within the
15 unit.
16 MS. KOVNER: That's right, Your Honor. And
17 if I could just focus on the one other part of the
18 statute that confirms that this reading is correct, that
19 the Park Service isn't being stripped of its preexisting
20 authority to regulate rivers. It's if you look at the
21 other provisions of the statute that very clearly
22 confirm the Park Service is going to have the authority
23 to regulate rivers. And let me just give two examples
24 of those.
25 The first is, when Congress is setting aside

1 land for parks -- and let me use the park here as an
2 example -- it states it's -- its purposes. So it says
3 "We are creating here the Yukon-Charley Rivers Preserve.
4 And our purposes are to ensure the protection of,"
5 quote, "the entire Yukon-Charley basin, including the
6 lakes and the streams. So that reading confirms that
7 Congress is contemplating by setting aside this land as
8 parks, we're going to have this preexisting authority to
9 regulate waters within the parks still in place.
10 And just one other example of these
11 provisions is the Wild and Scenic Water Act provisions
12 that are in the statute. And Congress sets aside as a
13 special type of conservation system unit wild and scenic
14 rivers. These are entirely composed of rivers. And
15 says, Park Service, you are supposed to protect those
16 pursuant to your Organic Act authority in these wild and
17 scenic water provisions.
18 The speaker's view would --
19 CHIEF JUSTICE ROBERTS: What does -- you --
20 on page 24, and I think you have mentioned this several
21 times, so -- you talk about this isn't a problem because
22 your authority is circumscribed and you have the
23 inholdings are -- have substantial protections against
24 Park Service regulation. What -- what are those
25 protections?

1 MS. KOVNER: Yes. So I want to make clear,
2 our authority is very narrow, and we can only regulate
3 where there is some statute that authorizes us to
4 regulate inholdings and --
5 CHIEF JUSTICE ROBERTS: Do you -- do you
6 think the statute that authorizes you to regulate is the
7 one that says "the Secretary shall prescribe such
8 regulations as the Secretary considers necessary or
9 proper"? Would you --
10 MS. KOVNER: We're principally relying on
11 the one right below that, (b).
12 CHIEF JUSTICE ROBERTS: Well, but do you
13 rely on that one? Because if you rely on that one, I
14 don't see that it provides any protections at all.
15 MS. KOVNER: So let me tell you how -- how
16 that first one interpreted and why it does provide
17 protections. So that first provision has been
18 interpreted to allow the Secretary to regulate private
19 lands when doing so is necessary for the protection of
20 the system units.
21 And so, for example, if the Park Service
22 regulates some activity on private lands that is going
23 to cause danger or harm to the system units that's --
24 that adjoins them, that's the only circumstance in which
25 authority to regulate --

1 CHIEF JUSTICE ROBERTS: So danger -- danger
2 or harm, is that what it's limited to? Or could it be
3 limited to scenic, environmental, noise impacts?
4 MS. KOVNER: We think it's clear that the
5 Park Service can't simply treat inholdings as though
6 they were public lands. And the only case in which the
7 Park Service has tried to use its authority to regulate
8 inholdings under that provision is this case where there
9 is going to be some kind of harm to the actual public
10 lands that befalls the park's units. But --
11 JUSTICE KENNEDY: But is that true even if
12 it's a -- the regulation is nation -- applicable
13 nationwide?
14 MS. KOVNER: We think that nationwide, yes,
15 the Park Service's authority to regulate inholdings is
16 quite limited.
17 JUSTICE KENNEDY: So -- so if -- because if
18 that's true, then I don't know what -- then you disagree
19 with the Ninth Circuit on the meaning that it gave --
20 gives to the "solely" phrase?
21 MS. KOVNER: I think that we think -- and
22 we've said for 20 years in a regulation that's entitled
23 the Chevron difference that what the "solely" phrase
24 does is it carves out the rules that are applicable
25 solely to public lands. And because our authority is so

1 limited, that's most rules. It's only under very narrow
2 circumstances that we can write rules that apply to both
3 public and private lands.
4 CHIEF JUSTICE ROBERTS: No, but your
5 authority is not limited if you get Chevron deference.
6 If you get Chevron deference on determining what you
7 think is necessary or proper, the idea that that's a
8 substantial circumscription of your authority doesn't
9 seem to me to be a valid one.
10 MS. KOVNER: I don't think so. I mean,
11 there's a -- it's been a very long-standing limitation
12 on how this has been construed that we're not going
13 beyond the kinds of regulations I've described to
14 pervasive regulation. There might be, if we tried to
15 interpret our authority under this section more broadly,
16 there might be a clear statement problem then, but
17 there's certainly no clear statement problem --
18 JUSTICE SCALIA: More broadly? Interpret
19 necessary or proper -- necessary or proper to mean
20 necessary or proper? You think it's beyond belief that
21 you're going to do that?
22 MS. KOVNER: I -- I do. And when the
23 history is there to prove it, it's been interpreted
24 quite narrowly, and I think the Court would --
25 JUSTICE SOTOMAYOR: Some might argue that

1 your proposed regulations on oil contravene the intent
2 of this provision.
3 So assuming we do, how do you deal with
4 that? Assuming some people do. I don't -- I don't know
5 that --
6 MS. KOVNER: Yes. I -- I think Your Honor
7 is right, that some people might say that that's not an
8 appropriate regulation, and they will be able to
9 challenge it nationwide as not an appropriate exercise
10 of our authority.
11 But what's never been disputed in this case
12 is that, in general, under the 1976 Act, this very
13 specific authorization of the Park Service to regulate
14 waters within units, we have the authority to regulate
15 waters in units --
16 JUSTICE BREYER: What --
17 JUSTICE ALITO: What can you do about why
18 this provision that you -- you reproduce on 7a gets
19 around the first section of 103(c)? This -- that
20 provision allows regulation of waters within Service
21 units, but the first section, as I read it, says that
22 nonpublic land within the boundaries of -- of a CSU is
23 not part of the CSU.
24 MS. KOVNER: Yes. So I think the statutory
25 authorization is actually slightly broader. And just to

1 read the language, it's concerning boating or other
2 activities on or relating to waters located within
3 system units. And that's always been understood to
4 allow the regulation of all the waters in system units,
5 regardless of their ownership. And I think it makes
6 sense, because you can't regulate or protect a river
7 piecemeal, stretch by stretch.
8 If Congress -- when Congress set aside these
9 rivers and said the Park Service is going to be able to
10 protect the entire river and stream and basin,
11 protecting the rivers and streams and basins that are
12 Federal property is going to require setting a rule for
13 the whole river, and enforcing the rule on the whole --
14 JUSTICE SCALIA: 100751 is a general
15 statute; it applies everywhere, right?
16 MS. KOVNER: Yeah.
17 JUSTICE SCALIA: And -- and Section 3101,
18 Section 103 is specific to Alaska, isn't it?
19 MS. KOVNER: Yes.
20 JUSTICE SCALIA: Isn't there a general rule
21 that the specific governs the general?
22 MS. KOVNER: Yes. And I think then --
23 JUSTICE SCALIA: So this general provision
24 is limited by what Congress has said about Alaska. And
25 that sentence says, "Only those lines within the

1 boundaries of any CSU which are public lands shall be
2 deemed to be included as a portion of such unit."
3 MS. KOVNER: Yes.
4 JUSTICE SCALIA: And if you read that back
5 into 100751, it seems to me the Park Service doesn't
6 have jurisdiction.
7 MS. KOVNER: No. So we agree, Your Honor,
8 that the specific governs the general, and so the Court
9 has to give effect to that first sentence. And what
10 that first sentence says is they can't be treated --
11 they are not part of the unit.
12 So then we look to the Park Service's
13 authorities and we say, does the Park Service's
14 authority depend on this water being part of the unit?
15 And the answer is no. If you look at (b), it's an
16 authorization to impose rules concerning boating and --
17 and other activities on or relating to waters located
18 within.
19 JUSTICE KENNEDY: Go --
20 JUSTICE BREYER: The regulation itself says,
21 it says water -- "Hovercraft regulation applies to,
22 quote, 'waters subject to the jurisdiction of the
23 United States within the boundaries of the National Park
24 Service.'"
25 MS. KOVNER: Yes.

1 JUSTICE BREYER: And then the National Park
2 Service somewhere has a definition that equates it with
3 the unit. The National Park Service is defined
4 identically to system units. That's at 54 U.S.C. 100102
5 and 100501.
6 So if we -- Justice Scalia's point is this
7 seems to take the private land, the in-holdings, and say
8 they're not part of the unit; only the public lands are
9 part of the unit --
10 MS. KOVNER: That's --
11 JUSTICE BREYER: -- and then the Hovercraft
12 Regulation applies only to the unit.
13 MS. KOVNER: No, Your Honor.
14 JUSTICE BREYER: And that's -- that -- isn't
15 that the point? Yes. That's --
16 MS. KOVNER: No --
17 JUSTICE BREYER: -- the point.
18 MS. KOVNER: No, your Honor.
19 JUSTICE BREYER: What's the response to
20 that?
21 MS. KOVNER: So I think Your Honor's
22 suggesting that the regulations themselves say they
23 don't apply --
24 JUSTICE BREYER: Yes.
25 MS. KOVNER: -- unless it's part of a unit.

1 JUSTICE BREYER: Exactly.

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

3 There's this distinction between what's within the

4 boundaries of the park and what is park lands. And

5 Your -- Your Honor, this is established in Section 103,

6 among other places, where it talks about whether land is

7 within the boundaries of the system unit --

8 JUSTICE BREYER: Ah.

9 MS. KOVNER: -- versus being within the

10 park.

11 JUSTICE BREYER: So you're saying it applies

12 within -- it is within the boundaries of the unit,

13 although the unit consists of just the public land. Who

14 drafted this? This is --

15 (Laughter.)

16 MS. KOVNER: And to be clear, there's never

17 been any -- to be clear, there's never been any dispute

18 that the regulations are written to apply to these

19 lands. The only question in this case is whether

20 Section 103 strips that authority.

21 And Your Honor, I would just ask the Court

22 again --

23 JUSTICE SOTOMAYOR: Well, the specific would

24 overcome the general. So if Congress passed a new

25 statute, it could limit or expand 103 as it chose,

1 correct?

2 MS. KOVNER: Yes. And Your Honor, just --

3 if I could leave the Court with -- I mean, in

4 interpreting Section 103, this provision that talks

5 about rules solely applicable to public lands, and

6 whether that removes the Park Service's preexisting

7 authority to regulate waters in the parks, I would just

8 ask the Court to look to all the other provisions of the

9 statute that clearly contemplate -- of ANILCA, the

10 statute -- that clearly contemplate the Park Service is

11 going to retain the authority to protect park's waters.

12 JUSTICE ALITO: Let's say that part of a

13 river is within a CSU. And do you read this statute to

14 mean that the --the Park Service could regulate boating

15 500 miles downstream from that part of the -- on that

16 river, because it's relating to waters that are within

17 the CSU?

18 MS. KOVNER: The Park Service has -- has

19 consistently understood its authority to be regulating

20 the park's -- within the park's boundaries. It's never

21 sought to enact a regulation outside of the park's

22 boundaries. But this 1976 provision has uniformly been

23 understood to confer on the Park Service --

24 JUSTICE BREYER: Are you satisfied with this

25 holding -- imaginary -- but the Ninth Circuit's wrong.

1 Two, the second sentence does not bar this
2 regulation.
3 Three, there are other possible arguments;
4 we send it back for reconsideration as to whether those
5 arguments are good or bad.
6 MS. KOVNER: I'm -- I'm not sure I
7 understand the second sentence of the whole -- so --
8 JUSTICE BREYER: They -- they -- we're
9 saying that the second sentence, which is what they're
10 talking about primarily in the briefs, the second
11 sentence of (c) --
12 MS. KOVNER: Yes.
13 JUSTICE BREYER: -- "no lands which,"
14 et cetera, you're right about that.
15 MS. KOVNER: Right.
16 JUSTICE BREYER: You're right about -- I
17 mean I imagine --
18 MS. KOVNER: Yes.
19 JUSTICE BREYER: Then as to this first
20 sentence, which I -- I don't think I focused on,
21 particularly, we say go back and argue that.
22 MS. KOVNER: Your Honor, this case could be
23 sent back to address both that and to address the
24 question of what is public lands, which is a question
25 that wasn't addressed below. And we think it would be

1 sufficient to say the second sentence doesn't -- the
2 text clearly indicates the second sentence doesn't
3 prohibit the application of those rules that are validly
4 written to apply to both public and private lands within
5 the parks.
6 This regulation is a rule that's been
7 written to apply, regardless of who owns the lands in
8 the parks. It's an exercise of our narrow authority --
9 JUSTICE SOTOMAYOR: No. That's you winning.
10 (Laughter.)
11 I think Justice Alito has been asking you
12 this question from the beginning.
13 MS. KOVNER: Yes.
14 JUSTICE SOTOMAYOR: What do you think the
15 Ninth Circuit meant? And do you agree with its
16 interpretation? As he pointed out --
17 MS. KOVNER: Yes.
18 JUSTICE SOTOMAYOR: -- you spent 49 pages of
19 your brief arguing other things --
20 MS. KOVNER: Yes.
21 JUSTICE SOTOMAYOR: -- putting you to the
22 test.
23 MS. KOVNER: Yes.
24 JUSTICE SOTOMAYOR: All right. So what do
25 you think it held?

1 MS. KOVNER: So we think there are -- we
2 have two stronger arguments, but we think part of what
3 the Ninth Circuit said was the second sentence only
4 limits rules that are specific to conservation system
5 units. And "conservation system units" is defined in
6 the statute to be parks units in Alaska.
7 And we think, yes, the plain text of this
8 regulation only limits those kinds of rules. We don't
9 think the Court needs to reach that --
10 JUSTICE SOTOMAYOR: Do you think the Ninth
11 Circuit was right?
12 MS. KOVNER: Yes.
13 JUSTICE ALITO: So if there's a rule that
14 applies to conservation -- it applies to Alaska, and it
15 applies to the National Mall, that would be that you
16 can't have a Hovercraft in Alaska or in the title basin.
17 Under the Ninth Circuit's -- the Ninth Circuit's
18 rationale, that would be 107 -- 103 -- 103(c) wouldn't
19 buy that.
20 MS. KOVNER: I don't think there's any
21 dispute that's what the plain text says. And the reason
22 I don't think that's ridiculous or irrational,
23 Your Honor, is because when ANILCA was enacted, there
24 was a very well-settled regulatory regime that didn't
25 subject private lands to any kind of plenary authority.

1 So Congress had every reason to -- may I just finish my
2 sentence?
3 Congress had every reason to expect that
4 would remain the rule, nationwide. And what it was
5 concerned about was that the Park Service would deviate
6 from that approach in Alaska when these new lands were
7 added.
8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Findley, you have two minutes remaining.
10 REBUTTAL ARGUMENT OF MATTHEW T. FINDLEY
11 ON BEHALF OF THE PETITIONER
12 JUSTICE KENNEDY: Just in the two minutes,
13 can you address the very last point the Solicitor
14 General made?
15 MR. FINDLEY: Yes. And that's -- it's
16 simply backwards to what 103(c) was supposed to do.
17 Let's take Joe Jones' house, and let's think
18 about it differently. Let's think about this as a
19 native corporation's land allotment.
20 You have 40 percent of their land allotment
21 that they were given under Native Claim Settlement Act,
22 land that was given to them in exchange for
23 extinguishing their entire claim for aboriginal land
24 rights. It's there for economic development.
25 It's about to be surrounded by the ANILCA

1 parks. It's worth taking a step back. What does 1 --
2 Section 103(c) doing? It is saying before ANILCA was
3 passed, you're not part of the park and you're not
4 subject to Park Service regulation. The day after
5 ANILCA was part -- excuse me. The day after ANILCA is
6 passed, you're still not part of the park and you're
7 still not subject to Park Service regulation.
8 The government's position here, they keep
9 saying their authority is limited, and Mr. Chief Justice
10 hit the nail on the head. They're relying on the
11 Organic Act which allows them to enact any regulations
12 they feel necessary at any time.
13 They've already done that with the 9(b) oil
14 and gas regulations, seeking to apply those to
15 non-Federal land within Alaska. And the hits are going
16 to keep on coming unless this Court stops this
17 interpretation and goes back to what 103(c) was meant to
18 do, which was to prevent the Park Service from taking
19 these lands that aren't owned by the government and
20 regulating them as though they are part of the park.
21 And the second point want -- I -- I want to
22 make -- I imagine about 45 seconds at this point:
23 There's a lot of discussion about whether ANILCA covers
24 navigable waters or not. The clear statement rule
25 covers that question. And in that circumstance, it's a

1 question of is anything in the statute clearly saying we
2 are taking away State authority over navigable waters?
3 You will not find the term navigable waters
4 in the statute once.
5 Let's contrast this to other park-enabling
6 legislation. This is for Olympic National Park, and
7 you'll find this at 16 U.S.C. 251(n). And here's what
8 it says: "The boundary of Olympic National Park
9 Washington is" -- if I may just finish the quote -- "is
10 hereby revised to" -- "is hereby revised to include
11 within the park all submerged lands and waters of Lake
12 Ozette, Washington, and the Ozette River, Washington."
13 There's your clear statement.
14 Thank you.
15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 Case is submitted.
17 (Whereupon, at 12:21 p.m., the case in the
18 above-entitled matter was submitted.)
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