

































































































































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.)

21

22

23

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25



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