

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN STURGEON, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 17-949  
 )  
 ) BERT FROST, IN HIS OFFICIAL )  
 )  
 ) CAPACITY AS ALASKA REGIONAL )  
 )  
 ) DIRECTOR OF THE NATIONAL PARK )  
 )  
 ) SERVICE, ET AL., )  
 )  
 ) Respondents. )  
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Pages: 1 through 69

Place: Washington, D.C.

Date: November 5, 2018

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2       - - - - -  
3       JOHN STURGEON,   )  
4                                 Petitioner,                                     )  
5                                     v.   ) No. 17-949  
6       BERT FROST, IN HIS OFFICIAL                                     )  
7       CAPACITY AS ALASKA REGIONAL                                     )  
8       DIRECTOR OF THE NATIONAL PARK                                     )  
9       SERVICE, ET AL.,   )  
10                                 Respondents.                                     )  
11       - - - - -

Washington, D.C.

Monday, November 5, 2018

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15                         The above-entitled matter came on for  
16       oral argument before the Supreme Court of the  
17       United States at 10:05 a.m.

18  
19       APPEARANCES:

20  
21       MATTHEW T. FINDLEY, ESQ., Anchorage, Alaska; on  
22                 behalf of the Petitioner.  
23       RUTH BOTSTEIN, Assistant Attorney General,  
24                 Anchorage, Alaska; for Alaska, as amicus  
25                 curiae, supporting the Petitioner.

1 APPEARANCES: (Continued)

2

3 EDWIN S. KNEEDLER, Deputy Solicitor General,

4 Department of Justice, Washington, D.C.; on

5 behalf of the Respondents.

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

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 17-949,  
5 Sturgeon versus Frost.

6 Mr. Findley.

7 ORAL ARGUMENT OF MATTHEW T. FINDLEY

8 ON BEHALF OF THE PETITIONER

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

11 Mr. Sturgeon is asking that this Court  
12 restore the balance that Congress struck when  
13 enacting ANILCA. ANILCA is unique and  
14 represents a series of bargains and  
15 compromises.

16 A centerpiece of this balancing was  
17 ensuring that the over 18 million acres of  
18 non-public lands and waters about to be  
19 surrounded by the new ANILCA parks and  
20 preserves would not be subject to a new array  
21 of federal regulation.

22 Section 103(c) of the statute  
23 preserved the status of these non-public lands  
24 and waters by excluding them from ANILCA's  
25 parks and preserves and specifically exempting

1       them from park management regulation.

2                   JUSTICE SOTOMAYOR: I'm sorry, but  
3 ANILCA in many places puts statutory duties on  
4 the government, on the Park Service. So, for  
5 example, the statute expands the Glacier Bay  
6 National Monument. It says that the monument  
7 shall be managed for the following purposes  
8 among others, to protect a segment of the Alsek  
9 River fish and wildlife habitats and migration  
10 routes and a portion of the Fairweather Range.

11                   Or take another example. ANILCA  
12 creates the Kobuk Valley National Park, which  
13 it says shall be managed for the following  
14 purposes: among others, to keep it in an  
15 undeveloped state. So the agency has a  
16 statutory duty to manage these parks for the  
17 purpose of maintaining the Kobuk River, the  
18 Alsek River, and other rivers.

19                   If the Park Service can't do what you  
20 say, any regulation on these rivers, how can  
21 the secretary fulfill the statutory duties and  
22 -- under ANILCA, unless it's under its organic  
23 powers?

24                   MR. FINDLEY: ANILCA, as this Court  
25 recognized in the first decision, specifically

1 invoked the Organic Act and said these parks  
2 shall be managed in accord with the Organic Act  
3 and in accord with the provisions of ANILCA.  
4 And this Court recognized that ANILCA carries  
5 many provisions specifically modifying the Park  
6 Service's Organic Act authority, Section 103(c)  
7 being one of them.

8 To your question, how can the Park  
9 Service fulfill its duties: In understanding  
10 ANILCA and so understanding the debate about  
11 ANILCA, it was very important what land went  
12 into conservation system units, but it was  
13 equally important what land did not get  
14 included within conservation system units.

15 ANILCA was not just a park enabling  
16 statute. As this Court recognized in Amoco  
17 when it was -- first addressed ANILCA, it was  
18 resolving multiple land use disputes within  
19 Alaska.

20 JUSTICE SOTOMAYOR: You haven't  
21 answered my question.

22 Under your theory, the state manages  
23 all navigable waters between federal lands or  
24 between state lands. And I mean not waters but  
25 lands --

1 MR. FINDLEY: Yes.

2 JUSTICE SOTOMAYOR: -- in terms of the  
3 territorial lands.

4 How does the Park Service engage in  
5 its statutory obligations if it can't do what  
6 you say?

7 MR. FINDLEY: The Park Service, for  
8 all those purposes, it can regulate submerged  
9 lands and waters where title did not pass to  
10 the state at statehood. It can manage public  
11 waters. It can manage any non-navigable  
12 waters.

13 JUSTICE SOTOMAYOR: There's no public  
14 waters. Under your theory, all the waters  
15 belong to the state.

16 MR. FINDLEY: Only navigable waters  
17 where title to the submerged lands passed at  
18 statehood.

19 JUSTICE SOTOMAYOR: All right. So  
20 what you're saying is that a good portion of  
21 the Act with all of the preservations of the  
22 rivers that the Act imposes upon the Park  
23 Service, it cannot do any of that work?

24 MR. FINDLEY: It cannot do that work  
25 on any of the specific navigable waters, but it



1 can protect the watershed. The Yukon-Charley  
2 is a very good example of that. The  
3 Yukon-Charley -- again, think of the balancing  
4 of ANILCA that this Court recognized -- some of  
5 its conservation purposes is equally important  
6 to balance the economic needs of the State of  
7 Alaska.

8 The Yukon-Charley met goal number one  
9 by putting 1.7 million acres of land into the  
10 preserve to protect lakes, streams, and  
11 watershed. And you protect the river by  
12 regulating those 1.7 million acres of public  
13 lands that's regulated under the watershed that  
14 protects the river.

15 JUSTICE SOTOMAYOR: Does it make any  
16 difference that a park is designated as a wild  
17 and scenic river?

18 MR. FINDLEY: No, it does not, Your  
19 Honor. The Wild and Scenic Rivers Act was even  
20 specifically amended by ANILCA to make sure it  
21 wasn't covering state land that goes into the  
22 site of the river, and the Wild and Scenic  
23 Rivers Act itself recognizes state ownership of  
24 submerged lands. In the Wild and Scenic Rivers  
25 Act, there's nothing about those designations

1 that undoes the central compromise that was  
2 through 103(c).

3 JUSTICE SOTOMAYOR: That's a quite  
4 extreme --

5 JUSTICE KAGAN: And you don't think it  
6 makes any difference if there are public lands  
7 on both sides of a river? In other words, both  
8 banks of a river are public lands, but still  
9 the federal government cannot regulate the  
10 river running through those lands?

11 MR. FINDLEY: The federal government  
12 may. The Park Service may not. That was a  
13 power that was not delegated to the Park  
14 Service. An example that even the Park Service  
15 brings up in its brief is the Yukon-Kuskokwim  
16 Wildlife Refuge. So there's a very specific  
17 provision directing that the Park Service may  
18 not impede access to these rivers.

19 Particularly in that area of Alaska where there  
20 are no roads, the Yukon and the Kuskokwim River  
21 are the arteries of commerce that's helpful to  
22 get to and from villages. That's how they go  
23 to vote. That's how to buy groceries.

24 And the specific mandate in ANILCA is  
25 we are about to surround these highways with

1 these federal lands, we're going to put them in  
2 a conservation system unit, that's great, but  
3 please do not block access to the highway. And  
4 that's the point of exempting the rivers.

5 CHIEF JUSTICE ROBERTS: So an agency  
6 like EPA is -- is fully empowered to regulate  
7 the waters?

8 MR. FINDLEY: Yes, Your Honor, that's  
9 exactly right. The EPA, the Coast Guard, any  
10 other federal, criminal -- all of these still  
11 apply. It's just simply that extra layer of  
12 Park Service regulation that was not supposed  
13 to apply once these lands and waters were  
14 surrounded by the ANILCA parks.

15 JUSTICE KAGAN: What does that do to  
16 your federalism argument? Because, at various  
17 times in your brief, you press federalism  
18 concerns. But I'm wondering, if those concerns  
19 have a lot of weight, if what you're really  
20 saying is not this agency but that agency?

21 MR. FINDLEY: When it comes to  
22 interpreting the Organic Act, against Section  
23 103(c), those aren't necessarily implicated,  
24 although, as this Court recognized in the first  
25 decision, the state's power over its navigable

1 waters does raise significant issues of state  
2 sovereign. And any time this Court addresses a  
3 case of navigable waters, the refrain rings  
4 throughout these cases that the state's  
5 ownership of the submerged lands and control  
6 and ownership of the resources within it is a  
7 hallmark of state -- state sovereignty and a  
8 hallmark of federalism.

9 Where the clear statement rule comes  
10 into play is the Park Service's fallback  
11 argument here, which is while, if you look at  
12 reserve water rights, this can turn these into  
13 public lands and actually make these part of  
14 the park.

15 And there's nothing in ANILCA that's a  
16 clear statement saying we are going to take the  
17 state's submerged lands, make them public  
18 lands, and actually include them in the parks.

19 When we were here last time, we talked  
20 about when that happens, the enabling statute  
21 is very clear. And the statute that added Lake  
22 Ozette to the Olympic National Park actually  
23 specifically said we are adding the submerged  
24 lands to the park, so --

25 CHIEF JUSTICE ROBERTS: So you just --

1 it -- it -- you just don't like the Park  
2 Service. The Coast Guard is fine with you, the  
3 Army Corps of Engineers is fine with you, the  
4 EPA is fine. But not the Park Service?

5 MR. FINDLEY: It's not that we don't  
6 like the Park Service, as it -- it's that layer  
7 of regulation --

8 (Laughter.)

9 MR. FINDLEY: -- that was not supposed  
10 to apply on top. Yes, Mr. Chief Justice,  
11 that's exactly right.

12 JUSTICE ALITO: Which sentence of  
13 Section 3103(c) do you think wins this case for  
14 you?

15 MR. FINDLEY: The second sentence does  
16 the most work, but the second sentence needs to  
17 be read in conjunction with all three sentences  
18 and in conjunction with the context of the  
19 statute.

20 JUSTICE ALITO: All right. I've  
21 burned up an awful lot of gray cells trying to  
22 put together the pieces of this statute. Could  
23 you just take me through the second sentence  
24 and explain why that wins the case for you?

25 MR. FINDLEY: Thank you. So you --

1 the first sentence of 103(c) has just told you  
2 that any non-public land, whether it's state  
3 land, submerged -- submerged lands of waters,  
4 native corporation, or private land, it is not  
5 going to be a part of the park.

6 JUSTICE ALITO: It's not a portion of  
7 the park?

8 MR. FINDLEY: It's not a portion of  
9 the park. It may be surrounded by the outer  
10 boundaries, but it's not part of the unit.

11 JUSTICE ALITO: Yeah, and -- and, you  
12 know, whether something can be within a unit  
13 but not be a portion of the unit is kind of a  
14 nice question. I don't think there's a -- a  
15 slam-dunk answer to that one way or the other.  
16 Would you agree?

17 MR. FINDLEY: I -- I would agree, but  
18 the Court doesn't need to reach that issue. To  
19 the second sentence, it then says no lands  
20 which on or before December 2, 1980, have been  
21 conveyed to the state, native corporation, or  
22 private person. Again, shorthand, non-public  
23 lands.

24 JUSTICE ALITO: Right.

25 MR. FINDLEY: They shall not be

1 subject to regulations applicable solely to  
2 public lands within the units. And what that  
3 is telling you is not only they're not part of  
4 the unit, they may not be regulated as though  
5 they were.

6 And that's the function of the word  
7 "solely," is to distinguish between park  
8 management regulations and the regulations Mr.  
9 Chief Justice was talking about, Coast Guard,  
10 EPA and --

11 JUSTICE KAGAN: Well, how does it do  
12 that?

13 JUSTICE ALITO: All right. When --

14 JUSTICE KAGAN: I'm sorry.

15 JUSTICE ALITO: If I can just ask one  
16 more question related to this. I understand  
17 that lands is defined by ANILCA to include  
18 water and waters and interests therein, but the  
19 second sentence after referring to lands then  
20 refers to a conveyance, which I take it means  
21 the transfer of title.

22 And nobody really has title to  
23 navigable waters. So what do we do with that?

24 MR. FINDLEY: The -- there are two  
25 parts to that. First of all, the submerged

1 lands were conveyed to Alaska. The Submerged  
2 Lands Act was specifically included within the  
3 Statehood Act.

4 JUSTICE ALITO: Right.

5 MR. FINDLEY: In terms of having title  
6 to water, this Court has, in U.S. v.  
7 California, and PPL Montana, certainly  
8 suggested with very strong language that, with  
9 the Submerged Lands Act, with title to the  
10 submerged lands, and with ownership and control  
11 of all the resources within there, that is  
12 effectively title to the waters.

13 JUSTICE ALITO: No, I mean as to the  
14 public lands. So public lands are defined -- I  
15 mean, lands are defined the same way. They  
16 include water. Public means, I take it, title  
17 in the United States, but the United States  
18 does not have title to navigable waters, is  
19 that right?

20 MR. FINDLEY: That is definitely  
21 right. And they don't claim so here.

22 JUSTICE KAGAN: Could I ask you to go  
23 back to the --

24 JUSTICE SOTOMAYOR: The state doesn't  
25 have title --



1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: Could I ask you to go  
3 back to the applicable -- regulations  
4 applicable solely to public lands? And you  
5 suggested that that language is what  
6 distinguishes Park Service regulations from,  
7 let's say, EPA regulations.

8 But, when I read that language,  
9 regulations applicable solely to public lands,  
10 it seems to be making a distinction between  
11 regulations that apply solely, exclusively to  
12 public lands and those that apply more broadly  
13 to both public and private lands.

14 That seems to be the distinction this  
15 makes on its face. So I guess I don't quite  
16 get how -- how you make it into something  
17 different.

18 MR. FINDLEY: Yes. And Mr. Sturgeon's  
19 position, as with the state, is that "solely"  
20 distinguishes between the generally applicable  
21 regulations that we talked to Mr. Chief Justice  
22 about, Coast Guard, EPA, and so on, and park  
23 management regulations.

24 If you were to take the word "solely"  
25 out of the statute, you would have

1 inadvertently exempted these lands from a  
2 myriad of other federal regulation that applied  
3 before ANILCA and that was certainly intended  
4 to apply -- apply after ANILCA.

5 If you look, I mean, the Park Service  
6 in its argument about Section 103(c) and  
7 argument --

8 JUSTICE KAGAN: But -- but -- but --

9 MR. FINDLEY: Go ahead.

10 JUSTICE KAGAN: But I guess solely to  
11 public lands, is like if you take out the -- if  
12 you take out the word "solely," this -- this is  
13 saying solely to public lands as compared to  
14 what, as compared to -- to public lands and  
15 something else, meaning non-public lands. And  
16 that seems to be the distinction it's drawing,  
17 solely to public lands, or to public lands and  
18 something else, non-public lands.

19 MR. FINDLEY: The sentence needs to  
20 have meaning beyond articulating what is  
21 already true. If a regulation is promulgated  
22 only to apply to public lands, it already only  
23 applies to public lands. That second sentence  
24 has to have meaning.

25 And if it doesn't prohibit the Park

1 Service from issuing the exact regulation at  
2 issue here, which is a regulation designed to  
3 touch both public and non-public land, that  
4 sentence actually doesn't prohibit anything.  
5 It needs to have prohibitive effect.

6 If you want to understand its  
7 prohibitive effect, you look at this came into  
8 the statute, it was not a last-minute technical  
9 addition. It was introduced in the House by  
10 Representative Seiberling a year and a half  
11 before ANILCA was passed, and he specifically  
12 said the fact that these non-public lands were  
13 within the units drawn on the map does not  
14 change the status of that state native for  
15 private land.

16 And that goes back to, if we're about  
17 to surround these lands with the parks, they  
18 were already subject to a rich matrix of  
19 federal regulations before ANILCA. You are not  
20 going to subject them to any new array of  
21 federal regulation merely because of them being  
22 surrounded by the park.

23 JUSTICE KAGAN: I -- I understand what  
24 -- I think it's a good point, the point you  
25 make about, look, if it were public lands

1 versus public and non-public lands, this would  
2 not be doing very much.

3 But I guess what I want to know from  
4 you is like, why pick this language to convey  
5 what you want to convey? I mean, how do I have  
6 to manipulate this language to get it to mean  
7 what you want it to mean?

8 MR. FINDLEY: I can't answer why  
9 Congress chose those specific words.

10 JUSTICE KAGAN: But, I mean, what --  
11 what -- what could you do to this language to  
12 make it more like what you're suggesting it  
13 means? Because I look at this language, it  
14 just doesn't say -- it's just not anywhere  
15 close to what you're saying it means.

16 MR. FINDLEY: I mean, we believe the  
17 --

18 JUSTICE KAGAN: But maybe I'm wrong  
19 about that. I really am trying -- I'm  
20 struggling with this.

21 MR. FINDLEY: If the language weren't  
22 read in context with all three sentences, and  
23 read in context with the statute, the meaning  
24 becomes clearer. And perhaps in hindsight they  
25 could have written something about applicable

1 solely to land, you know, solely land  
2 management power, but what your -- the "solely"  
3 is drawing that distinction of the regulations  
4 that only could come into play after the  
5 passage of ANILCA. And it's important to keep  
6 in mind that, without provisions like  
7 Section 103(c), there is no ANILCA. There are  
8 no ANILCA parks.

9           And the -- the large debate, it took  
10 two years to pass the statute, there were  
11 issues relating to the Native Claims Settlement  
12 Act, there were issues related to the Statehood  
13 Act, and it was a very large debate, that this  
14 Court recognized in Amoco, of what lands will  
15 go into a conservation system unit and be  
16 subject to much more rigorous conservation  
17 regulations and which lands will not go into  
18 these things.

19           CHIEF JUSTICE ROBERTS: Did the -- the  
20 Park Service had no -- no regulatory authority  
21 over these areas prior to ANILCA or --

22           MR. FINDLEY: None. That's correct.

23           JUSTICE BREYER: Well, I mean, that  
24 seems the question to me, that -- that the Park  
25 Service has a reg, I imagine, that says no

1 bonfires in Yellowstone, within the boundaries  
2 of Yellowstone. There are some private  
3 enclaves within Yellowstone, but they mean no  
4 boundaries -- forget it. I want you to reserve  
5 your time. I'd rather you reserved your time.  
6 I'll ask them.

7 MR. FINDLEY: Oh, okay. Thank you.  
8 If there are no other questions, I will reserve  
9 my time.

10 (Laughter.)

11 MR. FINDLEY: Thank you.

12 CHIEF JUSTICE ROBERTS: Good -- good  
13 choice. Thank you, counsel.

14 (Laughter.)

15 CHIEF JUSTICE ROBERTS: Ms. Botstein.

16 ORAL ARGUMENT OF RUTH BOTSTEIN FOR ALASKA,  
17 AS AMICUS CURIAE SUPPORTING THE PETITIONER

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

20 Understanding ANILCA requires  
21 understanding remote Alaska, in most of the  
22 state a vast wilderness that is more than twice  
23 the size of Texas. Our rivers are our only  
24 roads. When Congress surrounded many of these  
25 crucial state waterways with federal park

1 areas, it consciously chose not to take away  
2 state control over these crucial rivers.

3 Instead, Congress left them under  
4 state control as part of its commitment to  
5 providing adequate opportunity for satisfaction  
6 of the economic and social needs of the State  
7 of Alaska and its people.

8 This Court should reject the Park  
9 Service's continuing attempts to commandeer  
10 control of Alaska's navigable waters, because  
11 that is not what Congress intended.

12 CHIEF JUSTICE ROBERTS: Well,  
13 "commandeer" is strong language, but what --  
14 what do you say for the -- the Park Service's  
15 argument that, with respect to their reserved  
16 water rights and so on, that you would be  
17 creating a checkerboard sort of situation where  
18 the Park Service has authority with respect to  
19 some areas but not others along -- along the  
20 river?

21 MS. BOTSTEIN: It is true that within  
22 these park areas there are areas of mixed  
23 jurisdiction. Congress absolutely knew that  
24 because it created islands of private and  
25 native corporation land that were beyond the

1 reach of park management regulation and,  
2 similarly, with the waters.

3 And that's consistent with the default  
4 way that water management is done. I mean, PPL  
5 Montana mandates a segment-by-segment  
6 navigability analysis. So, even along large  
7 waters, there is a mixed jurisdiction. That --

8 CHIEF JUSTICE ROBERTS: But what  
9 authority would you say that the Park Service  
10 has? I mean, you're asserting authority with  
11 respect to the river. The Park Service in,  
12 apart from inholdings, has authority with  
13 respect to the land.

14 How do you resolve conflicts that are  
15 inevitably going to arise?

16 MS. BOTSTEIN: What Congress did was  
17 mandated cooperative management as a primary  
18 management tool in these parks. So -- and this  
19 gets back to the first question from the Court.  
20 Justice Sotomayor asked how can the Park  
21 Service fulfill its statutory mission if it  
22 doesn't have title to all the lands in the  
23 waters.

24 What Congress said is you work  
25 together and create a management plan for each



1 area, identify areas of concern on public and  
2 non-public land, and work with landowners and  
3 the State of Alaska to try to cooperatively  
4 resolve those conflicts because Congress knew  
5 it wasn't giving sole and exclusive  
6 jurisdiction to the federal government.

7 If there's any doubt about that, Your  
8 Honor --

9 JUSTICE SOTOMAYOR: I don't think  
10 you've answered my question. How is the  
11 government, the federal government, supposed to  
12 fulfill its statutory duties? There are many  
13 rivers here that they're given explicit  
14 obligations.

15 Your basically saying 103(c) trumps  
16 that doesn't make much sense to me. If a  
17 statute tells the government do this and at the  
18 same time reserves some rights to the state,  
19 doesn't the federal government's obligation to  
20 do this, the explicit obligation to deal with  
21 certain rivers in a particular way, trump any  
22 other exemption that you might have?

23 MS. BOTSTEIN: No, Your Honor, because  
24 the statutory mission is limited to regulation  
25 on the public lands, on the federal lands.

1 Congress reserved state lands,  
2 non-public lands to Alaska, private landowners,  
3 or native corporations. Another way to  
4 think --

5 JUSTICE SOTOMAYOR: I -- I'm sorry,  
6 just that's not true. Many of these rivers are  
7 specifically named in the statute.

8 MS. BOTSTEIN: Yes.

9 JUSTICE SOTOMAYOR: And your position  
10 or your co-counsel's position is that all of  
11 these rivers belong to the state?

12 MS. BOTSTEIN: The navigable rivers  
13 that were state -- that were not federal owner  
14 -- in ownership that passed to the state under  
15 the Submerged Lands Act, yes.

16 JUSTICE SOTOMAYOR: Well, we have a  
17 problem with whether you can own navigable  
18 waters, but that's a different issue.

19 MS. BOTSTEIN: What Congress did, Your  
20 Honor, was said -- you know, when Congress  
21 names the rivers as part of a watershed, in  
22 part what it's saying is, on the public lands,  
23 your statutory mission is to regulate in a way  
24 that protects these watersheds, protects access  
25 to the watersheds, protects the watersheds,

1 but, at the same time, it is the state that has  
2 jurisdiction over the water themselves.

3 And if there's any doubt about this,  
4 if you look through Title 16, when Congress  
5 created different national parks, it used  
6 vastly different jurisdictional language.

7 When Congress created Yellowstone,  
8 which Justice Breyer mentioned, this is what it  
9 said: The Yellowstone National Park, as its  
10 boundaries now are defined or as they may  
11 hereinafter be defined or extended, shall be  
12 under the sole and exclusive jurisdiction of  
13 the United States.

14 That's a very clear statement that  
15 says we drew a circle and everything within it  
16 is federal; the Park Service can manage it. It  
17 does violence to Congress's differing intent to  
18 interpret Section 103(c) to mean the same as  
19 what -- sole and exclusive federal  
20 jurisdiction.

21 And Congress had very good reasons for  
22 giving Alaska more sovereign power, reserving  
23 more sovereign power to Alaska than it did to  
24 Wyoming, because this statute is not a pure  
25 conservation statute. This is also a statute

1 that fulfills the promises made to Alaska at  
2 statehood and in the Native Claims Settlement  
3 Act about local control and self-sufficiency  
4 designed by Alaskans.

5 JUSTICE SOTOMAYOR: I'm having a hard  
6 time accepting your position in this case with  
7 your position that the Katie John decisions  
8 should be retained. I don't know how we can  
9 give different meaning to public lands in two  
10 provisions of the same Act.

11 MS. BOTSTEIN: Your Honor, giving  
12 effect to Congress's intent in ANILCA does --  
13 may require preserving the rural subsistence  
14 priority in Title 8 of the legislation, even if  
15 it does require a different statutory  
16 definition.

17 Now no party has challenged the  
18 current federal subsistence management --  
19 subsistence regulations. The briefing  
20 certainly reflects this is an issue of great  
21 concern to the people of Alaska and its rural  
22 residents. And the Court should not upset  
23 those settled expectations of Alaskans today.

24 A different definition in these titles  
25 does reflect Congress's very different intent

1 in Title 8. Title 8 could have been its own  
2 statute. It has its own statement of purpose.  
3 It has its own -- it is the only place in this  
4 extensive law where Congress specifically  
5 exercised its commerce power.

6 And it has a federal takeover  
7 provision that says Congress was so concerned  
8 that there be an -- an enforceable subsistence  
9 priority that it gave explicitly the federal  
10 government the right to regulate that, if the  
11 state could not, which is how it played out.

12 So we don't think the Court needs to  
13 resolve this issue today, but we do ask that  
14 the Court leave some space open for those to be  
15 differently interpreted --

16 JUSTICE SOTOMAYOR: One could --

17 MS. BOTSTEIN: -- in accordance with  
18 Congress's intent.

19 JUSTICE SOTOMAYOR: -- if one defines  
20 them the same, but not in accordance with your  
21 views, but in accordance with the government's  
22 current view, and the Katie law decisions  
23 view --

24 MS. BOTSTEIN: The statute --

25 JUSTICE SOTOMAYOR: -- then you don't

1 win here.

2 MS. BOTSTEIN: The statute does  
3 contain one definition. We've cited to the  
4 Court, in our brief, cases that do suggest in  
5 these long complicated statutes, we do look to  
6 Congress's intent in the context of the  
7 statute, and that can mean that a term does  
8 have different meaning in different sections  
9 when that is what Congress intended.

10 JUSTICE SOTOMAYOR: So why isn't an --  
11 all of the references to the government's  
12 control of rivers in this Act a similar  
13 statement of purpose?

14 MS. BOTSTEIN: Because those need to  
15 be read in the context of 103(c), which doesn't  
16 say the federal government can come in and  
17 regulate these rivers if we don't compel and  
18 ask them to do that.

19 JUSTICE SOTOMAYOR: Or regulate  
20 subsistence living, but you're arguing that the  
21 purpose of the statute is reflected in its  
22 structure and words. And the structure and  
23 words here are giving the government defined  
24 statutory duties for any number of rivers  
25 within this compound.

1           So it -- I don't see the difference in  
2 the logic.

3           MS. BOTSTEIN: Your Honor, the  
4 statutory duties that the Park Service is  
5 given, is delegated to regulate for  
6 non-subsistence purposes, is limited by Section  
7 103(c) --

8           JUSTICE KAVANAUGH: You agree --

9           MS. BOTSTEIN: -- and that is a  
10 meaningful restriction.

11          JUSTICE KAVANAUGH: You agree with the  
12 Katie John decisions, correct?

13          MS. BOTSTEIN: We are not challenging  
14 the federal subsistence management regulations  
15 that were mentioned.

16          JUSTICE KAVANAUGH: Do you -- do you  
17 -- does the State of Alaska agree with those  
18 decisions?

19          MS. BOTSTEIN: Your Honor, the  
20 reasoning of those decisions may be appropriate  
21 to -- for the limited purpose of effectuating  
22 Title 8 but should not be expanded to change  
23 the federal reserved water rights doctrine  
24 throughout the circuit for all purposes.

25                 And, certainly, Congress had good

1 reasons for treating Alaska differently than  
2 other states in the main body of the statute  
3 because this comes back to the Congress's  
4 special solicitude for Alaska and its  
5 uniqueness, which are concerns this Court spoke  
6 about in its 2016 opinion.

7 This is not a situation where we're  
8 talking about tourists who might be disturbing  
9 a wilderness area. This is a situation where  
10 people are living and working along these  
11 rivers and using them for transportation, for  
12 commerce, for fishing.

13 And these are exactly the reasons that  
14 states were given -- if -- if I may finish my  
15 sentence, Your Honor?

16 CHIEF JUSTICE ROBERTS: Sure.

17 MS. BOTSTEIN: These are exactly the  
18 reasons that states were given control of their  
19 submerged lands under the Submerged Lands Act.  
20 And Congress wanted to effectuate those  
21 purposes in this statute. Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Mr. Kneedler.

25



1 ORAL ARGUMENT OF EDWIN S. KNEEDLER  
2 ON BEHALF OF THE RESPONDENTS

3 MR. KNEEDLER: Mr. Chief Justice --  
4 excuse me -- and may it please the Court:

5 I'd like to identify at the outset two  
6 statutes that have not been discussed which we  
7 think are very important to understand the  
8 provisions of ANILCA at issue here.

9 The first is a general statute enacted  
10 in 1976 and added to the Park Service's general  
11 authorities, which is reproduced in our -- in  
12 our brief at page 8a. And it says the  
13 Secretary, under such terms and conditions, et  
14 cetera, will have the authority to issue  
15 regulations concerning boating and other  
16 activities on or relating to water located  
17 within system units.

18 That is a general authority contrary  
19 to Petitioner's argument that specifically  
20 delegates to the Park Service, along with the  
21 Coast Guard, power to regulate navigable waters  
22 in the national park system.

23 So the question here is whether that  
24 was somehow abrogated when it comes to Alaska.  
25 And I think the answer to that question is in

1 another provision that -- that is not  
2 mentioned.

3 JUSTICE GORSUCH: Mr. Kneedler, before  
4 we get to the abrogation question --

5 MR. KNEEDLER: Yes.

6 JUSTICE GORSUCH: -- I'd just like to  
7 understand your argument on the terms of -- of  
8 the '76 Act itself a little bit better. It  
9 says the Secretary may prescribe regulations  
10 concerning boating and other activities on or  
11 relating to water within system units. And I'm  
12 paraphrasing, but I think that's about it.

13 And I'd understand your argument  
14 better, I think, if the -- if the statute read  
15 that the Secretary could regulate water in or  
16 relating to system units, so not just water  
17 within system units but also water outside  
18 system units, like the water here that might  
19 have some downstream effect, say.

20 But that's not what the statute says.  
21 It says that the -- it may prescribe  
22 regulations concerning boating or other  
23 activities that themselves relate to water in  
24 system units. So I would think that the  
25 government would have to prove some nexus

1 between boating or the other activities and the  
2 water within the government's system units.

3 And I just didn't see that story told  
4 here, how Mr. Sturgeon's hovercraft would in  
5 some way impact water within the system units,  
6 meaning public -- public lands, public waters.

7 MR. KNEEDLER: Okay. So if -- if I  
8 could answer that, the -- that, I think, does  
9 go to the abrogation question. This is a  
10 general statute that applies within --

11 JUSTICE GORSUCH: No. I'm -- I'm  
12 asking whether -- whether you even --

13 MR. KNEEDLER: Yeah. No, no, I'm --

14 JUSTICE GORSUCH: -- you even qualify  
15 under this statute before we get to abrogation.

16 MR. KNEEDLER: Yes. Well, I think  
17 under -- they are within -- they are located  
18 within the outer boundaries of --

19 JUSTICE GORSUCH: Within the outer  
20 boundaries but -- but not necessarily from --  
21 we know from ANILCA, within the unit itself.

22 MR. KNEEDLER: Well, that goes  
23 directly to the --

24 JUSTICE GORSUCH: Okay. But assume  
25 for the -- for the moment that I'm -- I'm --

1 I'm persuaded that it's not within the unit,  
2 okay, and that you have to rely on relating to  
3 the unit. All right?

4 What's your argument then? Do you  
5 have one?

6 MR. KNEEDLER: Well, non-navigable  
7 waters -- I mean, first of all, we're talking  
8 in -- in this instance about a river that runs  
9 through federal lands on both sides. And it's  
10 -- it's been determined to be navigable, but it  
11 is -- it is within the federal -- the federal  
12 bounds. It may be --

13 JUSTICE GORSUCH: Okay. If I don't  
14 buy that argument, then do you have anything  
15 left?

16 MR. KNEEDLER: Well, it would -- it  
17 would affect the non-navigable waters within  
18 the area. There could be stretches of the  
19 river that would be non-navigable under this  
20 Court's decision in PPL.

21 JUSTICE GORSUCH: That's not -- I  
22 guess that doesn't help me either. I'm  
23 wondering whether you have any argument that  
24 the use of the hovercraft outside the system  
25 units, boating activity outside the system unit

1 -- premise me -- work on that premise -- would  
2 have any effect on the water within the system  
3 unit?

4 MR. KNEEDLER: Well, it -- it has --  
5 it has -- a hovercraft could have, they're very  
6 loud, they're unsightly, and I don't -- I don't  
7 read this to say that the effect has to be on  
8 the water.

9 The purpose of giving the regulation,  
10 regulatory authority to the Park Service is to  
11 enable -- to fulfill the purposes of the park  
12 as a whole, not just the waters.

13 JUSTICE GORSUCH: Do we know from the  
14 record that the hovercraft could be heard  
15 within the system unit itself?

16 MR. KNEEDLER: Well, there were --

17 JUSTICE GORSUCH: Let alone seen.

18 MR. KNEEDLER: -- there were federal  
19 lands on -- on both sides of the -- of the --  
20 of the water. So -- so as -- when operating, I  
21 think it could surely be --

22 JUSTICE GORSUCH: Okay.

23 MR. KNEEDLER: -- be heard on the  
24 lands.

25 But if I could go to the second

1 statutory provision I wanted -- wanted to cite,  
2 this is in 410hh-2 that we cite in our brief,  
3 again, against the backdrop of the 1976  
4 statute, it says "the Secretary shall  
5 administer the lands, waters, and interests  
6 therein added to existing areas or established  
7 by the foregoing sections of ANILCA" -- the one  
8 that lists the parks -- "in accordance with the  
9 Organic Act as amended and supplemented." In  
10 other words, in accordance with the general  
11 authorities, which includes the 1976 Act.

12 This provision, far from abrogating  
13 the Secretary's authority, confirms that with  
14 respect to the waters that were added to the --  
15 to the parks, to the park system --

16 JUSTICE BREYER: Okay. I've got --

17 MR. KNEEDLER: -- the Secretary can  
18 invoke the 1976 Act.

19 JUSTICE BREYER: So your point here,  
20 which we'll hear something about probably on  
21 rebuttal, is that there's some other statutes  
22 here that, whatever it says in 103(c), give  
23 direct authority to the Secretary to do this.  
24 I see where you're driving at.

25 But I'd like to go back to 103(c)

1 because the question that Justice Kagan asked  
2 was a question that was in my mind too, and it  
3 is to do with the word "solely."

4           And either they -- he can answer this  
5 on rebuttal too if he wants. Imagine something  
6 like Yellowstone, not perfectly, but it's a  
7 square and it is mostly -- it's federal, but  
8 there are a few houses belonging to Smith and  
9 Jones that are private, and the -- pass a  
10 statute, a reg, and the reg says: Oh, no  
11 bonfires within the boundaries of the park,  
12 which means Smith can't do it either.

13           Now is that a reg that is a reg solely  
14 relating to lands to which the U.S. has title?  
15 Well, I can -- the argument that it couldn't  
16 possibly be for the purposes of this statute is  
17 you wouldn't need -- you wouldn't need sentence  
18 2 at all if that were the case. You just  
19 wouldn't need it, period, because it wouldn't  
20 apply to the river regardless because it says  
21 it wouldn't. Okay?

22           So sentence 2 must have some purpose.  
23 And, therefore, when the national park system  
24 has a reg which says "applies within the  
25 boundaries of a national park," that is a rule

1 that relates only to public lands. And if it  
2 doesn't -- see, without that, this is  
3 meaningless, and so it must mean that, and so  
4 it must be that that kind of thing is what you  
5 can't do to enclaves within public lands in  
6 this area. And the river is such an enclave  
7 because it is not a piece of property to which  
8 the United States has title.

9 Now that, I think, is their argument.  
10 I've had a hard time grasping the arguments in  
11 this case, but I think that that is their  
12 argument.

13 If I am right, what's the answer to  
14 it, if there is one?

15 MR. KNEEDLER: There are a number of  
16 answers to that, and there -- there are several  
17 respects in which 103(c), the second sentence,  
18 is inapplicable.

19 Perhaps the most basic is the fact  
20 that 103(c), that second sentence, refers to --  
21 excuse me -- refers to no lands which have been  
22 conveyed to a state.

23 The -- the Submerged Lands Act  
24 conveyed to the state only submerged lands and  
25 interests in waters. It did not convey the



1 waters themselves.

2           And so that -- so the second sentence  
3 of 103(c) does not affect the Park Service's  
4 regulation of navigable waters, which --

5           JUSTICE BREYER: I got that one. Is  
6 there another one? Because that one, I don't  
7 know if water is stuff you could convey and I  
8 don't know art.

9           But -- but is there another one?

10          MR. KNEEDLER: No, Justice, if I could  
11 just finish my point.

12          JUSTICE BREYER: I'm not --

13          MR. KNEEDLER: No, that -- that's --  
14 that's critical to the point I was making  
15 before, that the 1976 Act is one of general  
16 applicability, specifically giving the  
17 Secretary the authority to regulate waters,  
18 including navigable waters.

19               And the other statute I mentioned  
20 specifically says that the Secretary may  
21 regulate the waters added to these park units  
22 according to the general authorities, which  
23 includes the '76 Act, and that ties directly to  
24 the fact that the waters, the navigable waters,  
25 were not conveyed to the state, and, therefore,

1 the Secretary's regulatory authority over such  
2 waters is not -- is not affected at all by the  
3 --

4 JUSTICE SOTOMAYOR: Can --

5 JUSTICE ALITO: Who has title to --

6 JUSTICE SOTOMAYOR: Can I ask the  
7 question in reverse? What can't you do? Under  
8 your reading of this statute, what sorts of  
9 regulations can't you pass?

10 Because, if you can identify a  
11 permissible and impermissible, you're giving  
12 meaning to this. If you don't, you're  
13 basically saying there's no meaning.

14 MR. KNEEDLER: And I -- I think it may  
15 be useful to distinguish two different types of  
16 -- of non -- of -- of land not owned by the  
17 United States. The one where the inholdings,  
18 so the issue here was -- that was different  
19 about Alaska was that, within the outer  
20 boundaries, there were lands selected by the  
21 state or selected by native corporations, and  
22 Congress did not want them to be administered  
23 just like the Park Service lands themselves,  
24 the -- the usual Park Service lands. It wanted  
25 them to be set apart.

1           The other category -- and that is --  
2           that is what the legislative history that the  
3           other side refers to was all about, was  
4           preserving the ability of the native  
5           corporations to use the large tracts of land  
6           that they had selected. It was not about  
7           navigable waters. That's the other category of  
8           -- at issue here.

9           And, again, the state only owns the  
10          bed. It's -- it's -- it's an established  
11          principle --

12                 JUSTICE GORSUCH: But, Mr. Kneedler --

13                 MR. KNEEDLER: -- of navigable waters  
14          --

15                 JUSTICE GORSUCH: -- I haven't yet  
16          heard an answer to Justice Sotomayor's question  
17          when it comes to water. Does the government  
18          claim plenary authority over all waterways in  
19          Alaska?

20                 MR. KNEEDLER: No. We're only --  
21          we're only talking here about waterways,  
22          navigable waterways within national parks.

23                 JUSTICE GORSUCH: Right. But  
24          everything relates. All waterways are  
25          connected. And you say it's not just the

1 waterway but anything related to the waterway  
2 that you own or that you claim to have land on  
3 besides --

4 MR. KNEEDLER: Well, it --

5 JUSTICE GORSUCH: -- so where is the  
6 limit?

7 MR. KNEEDLER: It's -- it's well --  
8 it's well established under -- under the  
9 navigational servitude and -- and, in fact, the  
10 Submerged Lands Act preserves to Congress the  
11 ability to regulate in the interest of  
12 commerce.

13 JUSTICE GORSUCH: So it's plenary --  
14 it's plenary then, right?

15 MR. KNEEDLER: I -- I -- I -- it's --  
16 it's pretty close to plenary, but this Court  
17 has recognized that there is -- but the  
18 Secretary hasn't exercised it to that degree,  
19 but -- but the -- this Court has recognized in  
20 cases involving navigable water that the fact  
21 that the state owns the submerged lands does  
22 not interfere with Congress's ability to  
23 regulate the waters themselves.

24 CHIEF JUSTICE ROBERTS: Well, but  
25 that's -- the --

1                   MR. KNEEDLER: The Clean Water Act,  
2 for example.

3                   CHIEF JUSTICE ROBERTS: The  
4 navigational servitude, I mean, that's really  
5 about if Alaska decided to, you know, build a  
6 bridge across the river and things like that.  
7 I don't know that it reaches as far to justify  
8 any type of regulation on -- on the water.

9                   MR. KNEEDLER: Well, Congress  
10 regulates, again, outside of parks, regulates  
11 extensively navigable waters for dredging and  
12 filling, for --

13                   CHIEF JUSTICE ROBERTS: It regulates  
14 navigable waters. The question --

15                   MR. KNEEDLER: The Clean Water Act for  
16 pollution.

17                   CHIEF JUSTICE ROBERTS: No, no, all  
18 sorts of things. And that's, as the state  
19 reads it and the private party, that's what the  
20 "solely" is for. They agree that the Clean  
21 Water Act applies. They agree that the  
22 navigational servitude applies. I think they  
23 agree that the reserved water rights apply.

24                   They -- what they don't agree is that  
25 that is a lever that gives you authority to do

1 this sort of day-to-day regulation, such as,  
2 you know, the hovercraft traffic.

3 MR. KNEEDLER: Well, the --

4 CHIEF JUSTICE ROBERTS: And while --  
5 while you may think a hovercraft is unsightly,  
6 I mean, if you're trying to get from point A to  
7 point B, it's pretty beautiful.

8 (Laughter.)

9 MR. KNEEDLER: Well, there are --  
10 there are -- there are a number of instances  
11 within the Act in which Congress has  
12 specifically required the Secretary to  
13 accommodate, to take into account what's  
14 different about Alaska, by requiring them to  
15 accommodate methods of transportation like air.  
16 We mentioned boating.

17 The fact that the Secretary is -- is  
18 permitted to regulate boating only subject --  
19 only reasonably means that he can regulate  
20 boating, means the National Park Service can  
21 regulate boating --

22 JUSTICE SOTOMAYOR: So am I to --

23 MR. KNEEDLER: -- on -- on waters  
24 within the park.

25 JUSTICE SOTOMAYOR: Can I summarize

1     what I think you said?  Are you saying that  
2     103(c) basically, because of the navigational  
3     servitude, the other regulations you've pointed  
4     to, doesn't permit the government to regulate  
5     activities on the territorial lands or -- or on  
6     the submerged lands, but it does give it  
7     basically plenary authority over navigable  
8     waters?

9             MR. KNEEDLER:  I -- I hesitate to say  
10     plenary.  I think it gives it -- it preserves  
11     for the -- through the Park Service whatever  
12     the scope of authority that -- that Congress  
13     would have or the federal government has over  
14     navigable waters.

15             The uplands are very different --

16             JUSTICE SOTOMAYOR:  So you're  
17     basically saying, whatever the regulations were  
18     under the Organic Act or even under this Act,  
19     and charging you with taking care of certain  
20     parks, that the navigable waters are part of  
21     that charge?

22             MR. KNEEDLER:  Yes.  The uplands are  
23     different, and that's really what drove 103(c),  
24     was to make sure that these land selections  
25     were not going to be subject to the general

1 regulations of the Park Service.

2 And, in fact, that's been exactly  
3 true. There -- there are -- there are really  
4 only three sets of regulations that the Park  
5 Service has applied in -- outside of federally  
6 owned lands. One is the regulation of  
7 navigable waters pursuant to an express  
8 statutory authorization in the '76 Act. The  
9 other two have to do with the regulation of  
10 solid waste pursuant to a specific statutory  
11 directive to regulate within the boundaries of  
12 national park units, just like this statute  
13 talks about within system units. And the other  
14 is mining in areas of the national park system,  
15 which the Park Service has applied regulations  
16 there. All three pursuant to specific  
17 statutory directives.

18 CHIEF JUSTICE ROBERTS: So your -- you  
19 think --

20 MR. KNEEDLER: The Park Service has  
21 not done more than that.

22 CHIEF JUSTICE ROBERTS: So -- so you  
23 think the state's argument works with respect  
24 to solid land, land land?

25 MR. KNEEDLER: Well, there is --



1 CHIEF JUSTICE ROBERTS: It's -- it's  
2 only because you don't think that water is  
3 included in public lands that their argument  
4 doesn't work?

5 MR. KNEEDLER: No, their -- well,  
6 it's because --

7 CHIEF JUSTICE ROBERTS: It's only  
8 because it is water?

9 MR. KNEEDLER: Water -- water was not  
10 conveyed to the state. That's the first  
11 argument.

12 The second argument is, if you have a  
13 regulation that, in the case -- examples I  
14 mentioned, regulations issued pursuant to  
15 statutory directive to apply to both public and  
16 non-public lands within the national park, that  
17 comes within the reference they are not  
18 regulations applicable solely to public lands  
19 and --

20 CHIEF JUSTICE ROBERTS: But that's --  
21 that's the -- that's one of your arguments that  
22 causes me concern, because you're saying that  
23 if the regulation applies to the -- the private  
24 or state land, then it is not a regulation  
25 solely applicable to public land and therefore

1 it's not covered.

2 But the -- the sentence is obviously  
3 designed to protect the state, the natives, and  
4 the private landholders against the federal  
5 government or the Park Service to whatever  
6 extent we can debate. But to say that all the  
7 Park Service has to do to get around it is say,  
8 oh, and this applies to the inholdings, that  
9 can't be right.

10 MR. KNEEDLER: Well, I'm not saying --  
11 I'm not -- in fact, I would disclaim the  
12 proposition that the Park Service could treat  
13 them as -- as -- as -- the same way it treats  
14 regular Park Service lands. It cannot do that.  
15 And the only examples where it has issued  
16 regulations that go beyond that are pursuant to  
17 specific statutory directive, of which the 1976  
18 Act regulating waters is one. Now that's --

19 JUSTICE KAGAN: But, if I understand  
20 your view, Mr. Kneedler, what you're saying  
21 this means is that non-public lands shall not  
22 be subject to regulations that are applicable  
23 only to public lands.

24 And you don't need a statute to tell  
25 you that. Of course, non-public lands aren't

1 subject to regulations applicable solely to  
2 public lands. If that's what the statute was  
3 saying, who would need a statute?

4 MR. KNEEDLER: Well, I -- I think the  
5 purpose of the statute -- and, again, I think  
6 this comes through in the legislative history  
7 that -- that is cited on the other side -- the  
8 native groups were concerned, and as was the  
9 state, that because large tracts of land that  
10 they had selected were going to be included  
11 within the -- in the -- within the outer  
12 boundaries, that they were not going to be --  
13 that they would be treated just like -- they  
14 wanted assurance that they wouldn't be treated  
15 just like Park Service.

16 And that's what this did. It's  
17 important to recognize that this is subsection  
18 (c) of a section that deals with maps. It  
19 isn't -- it doesn't -- you would think if there  
20 was some major substantive change -- work that  
21 this was supposed to do aside from the  
22 substantive regulations, it would appear  
23 elsewhere.

24 And there may be -- I think it --

25 JUSTICE KAGAN: But just on the face

1 of things, Mr. Kneedler, if -- if the Park  
2 Service issues a regulation and the regulation  
3 says this applies only to public lands within a  
4 park, right, and you're not a public land  
5 within a park, you're a private land within a  
6 park, what kind of assurance do you need?

7 It's like you know that you're not a  
8 public land, so it doesn't matter that you're  
9 in the park. You don't need a special statute  
10 to tell you that, do you? You only need a  
11 special statute if the special statute exempts  
12 you from something that would otherwise apply  
13 to you.

14 MR. KNEEDLER: With all respect, I  
15 don't think that's correct. I think that -- I  
16 think that there was a lot of debate about --  
17 about different versions of this statute. And  
18 I -- and I think if you -- if you recall, as I  
19 said, this was in a section dealing with maps,  
20 and the statute required that the -- that the  
21 -- that the lot -- the boundaries -- that maps  
22 be published identifying what the parks were.

23 Those maps might have -- and -- and,  
24 in fact, I think did -- just outline the outer  
25 boundaries. And so subsection (c) says, well,

1     yeah, that -- that may be the boundaries of  
2     what was designated, but we want to be clear  
3     that it's only -- it's only the public lands  
4     that will be deemed to be portions --

5             CHIEF JUSTICE ROBERTS:  But you're not  
6     taking --

7             JUSTICE BREYER:  Though I think there  
8     are --

9             JUSTICE ALITO:  Can I ask a question  
10    about --

11            CHIEF JUSTICE ROBERTS:  -- adequate  
12    account of -- of the third sentence.  I mean,  
13    you're trying to minimize it by saying it's  
14    maps.  The third sentence has to illuminate the  
15    first two.  And what it says is, if a state, a  
16    native corporation, or an owner wants to convey  
17    lands to the Secretary, it can.

18            In other words, if you -- the -- the  
19    Secretary, feels that you need to have  
20    authority over areas that you don't, it tells  
21    you in -- in the third sentence how to do it:  
22    Get the state or the native corporation to  
23    convey it to you.

24            That would be an odd sentence to  
25    include if this were not -- if this were a -- a

1 -- a protection you could write around just by  
2 saying, oh, and, by the way, this applies to  
3 the -- the inholders.

4 MR. KNEEDLER: No, I -- I don't think  
5 so at all. I mean, I think -- I think this  
6 provision was in there because if the -- if you  
7 had native or state selected lands or native  
8 land, the corporation -- the native  
9 corporation, they were -- if they decided to  
10 sell their land, this just says that the Park  
11 Service could purchase it.

12 JUSTICE BREYER: If you -- let me go  
13 back to this question because this is obviously  
14 the question that's bothering some of us, okay?

15 And it seems to me you sort of  
16 answered it both ways. You're not -- I -- I  
17 started out thinking that if a reg applies to  
18 Mr. Smith's inholding in Yosemite because it  
19 applies to all of Yosemite, that that is solely  
20 public lands.

21 Why? Because if the only things that  
22 counts as a reg for public lands are -- we've  
23 said this three times -- are -- are those regs  
24 that say they don't apply to Smith's inholding,  
25 you don't need this statute, okay? That's the

1 basic thing.

2 Now some of what you said seems to  
3 agree with that and some of it does not. But  
4 what I took your basic arguments to be, one,  
5 that water, unlike Mr. Smith's cabin, is close  
6 enough to public lands that it's out of this  
7 thing.

8 Two, even if it isn't, there are other  
9 statutes that give specific authority to the  
10 government to regulate the water. And one of  
11 them might be general. One of them might be  
12 the ones you just started off your argument  
13 with. One of them might be -- I don't know.  
14 There are two or three on that.

15 Now I think I've got this very helpful  
16 argument right at least to what you're arguing.  
17 And is there something else, or do I have it so  
18 wrong it's hardly worth answering?

19 MR. KNEEDLER: No, I -- I think  
20 it's --

21 (Laughter.)

22 MR. KNEEDLER: -- I think it's  
23 basically correct, but there is the category of  
24 regulations that are not applicable solely to  
25 public lands because -- because they have been

1 made applicable to inholdings within the Park  
2 Service.

3 Whether or not that's valid in any  
4 particular case is a different matter, but  
5 there are three, as I mentioned, that were done  
6 pursuant to statutory authorization, and those,  
7 I think, must be valid because Congress has  
8 authorized them.

9 CHIEF JUSTICE ROBERTS: Counsel, I  
10 think --

11 MR. KNEEDLER: But that is not really  
12 involved here. Here, we're only talking about  
13 waters which were not --

14 CHIEF JUSTICE ROBERTS: Counsel,  
15 Justice Alito has been trying to ask a  
16 question.

17 MR. KNEEDLER: I'm sorry.

18 (Laughter.)

19 JUSTICE ALITO: Thank you, Chief  
20 Justice.

21 I just wanted to ask you a question  
22 about implied reserved water rights. In the  
23 cases where we have dealt with that, the  
24 government has been asked to show in detail the  
25 purpose of the reservation and the volume of



1 water that's necessary to achieve that purpose.

2 Do you have to make any kind of  
3 showing like that here?

4 MR. KNEEDLER: Well, in the 1999  
5 regulations that Congress allowed to go into  
6 effect, the -- the Park Service by rule  
7 identified the Park Service units or the areas  
8 added or expanded by ANILCA in which there were  
9 reserved water rights. And when you look at  
10 the purposes for which these units were  
11 established, it's clear that water was a  
12 central purpose of them.

13 In fact, the one we have here is the  
14 Yukon-Charley Rivers National Preserve, and it  
15 -- and it specifically defines as one of the  
16 purposes to preserve the entire Charley river  
17 basin, including streams and lakes.

18 So that -- that clearly identifies the  
19 protection of the integrity of those waters and  
20 the -- and the -- the scenic values associated  
21 with them. That's why we have national parks.  
22 That's why we have this national preserve.

23 So I -- I think it's clear that water  
24 is reserved for the purposes of these  
25 reservations, every one of which either refers

1 to specific bodies of water or to aquatic  
2 activities, such as fishing or boating or  
3 access.

4 JUSTICE ALITO: So what has been  
5 reserved -- what has been reserved here is  
6 plenary authority for the federal government --

7 MR. KNEEDLER: No.

8 JUSTICE ALITO: -- to regulate the  
9 navigable waters?

10 MR. KNEEDLER: The -- the -- the --  
11 the -- the -- the extent of the -- of the --  
12 and -- and the -- the Ninth Circuit's opinion  
13 in Katie John III makes this clear, the extent  
14 or even, frankly, the existence at a particular  
15 location of a reserved water right has not been  
16 decided.

17 If -- if there's an adjudication down  
18 the road that the reserved water right does not  
19 extend to some stretch or another area, that  
20 could be resolved, but what the -- what the  
21 Interior Department had to do in light of the  
22 Katie John decisions was to identify the areas  
23 that for the time being in its view were  
24 subject to reserved water rights.

25 JUSTICE ALITO: Well, no, I wasn't

1 asking about the geographical limits of it.

2 I'm asking about the regulatory limits.

3 As to water for which there is a  
4 reserved right, the federal government, the  
5 Park Service can do -- can regulate completely,  
6 as it -- is that right?

7 MR. KNEEDLER: I -- I wouldn't -- I --  
8 I -- I think within the national park system it  
9 overlaps with the 1976 statute that I -- that I  
10 mentioned, which I -- I think directly -- you  
11 don't have to go through the reserved water  
12 rights approach to get there -- within national  
13 parks, the -- the Katie John's subsistence use  
14 could have been satisfied by relying on the  
15 1976 Act and not relying on reserved water  
16 rights.

17 And all we have here are navigable  
18 waters within national parks. But, no, I --  
19 the extent of what regulatory power might be  
20 triggered would be different.

21 If I could go back to the Chief  
22 Justice's question.

23 JUSTICE ALITO: Well, could I just  
24 slip in one more question since you referred to  
25 Katie -- to Katie John, and I'll ask you the

1 same question that was asked of counsel for  
2 Alaska.

3 If we were to rule against you here,  
4 would that necessarily mean that the Katie John  
5 decision was incorrect?

6 MR. KNEEDLER: I -- I would certainly  
7 hope not, but -- but, I mean, I think  
8 Petitioners have a different -- Petitioner and  
9 the state have a difficult argument because the  
10 Katie John and the regulations implementing it,  
11 once the Congress specifically allowed to go  
12 into effect with full acknowledge that Katie  
13 John was out there, it turns on the definition  
14 of public lands, which is a term that runs  
15 throughout the Act, which is, we think, a good  
16 reason why -- why it should be upheld.

17 At the very least, Katie John  
18 demonstrates the importance of federal  
19 regulation of waters within these areas, in  
20 that instance for -- for subsistence uses. If  
21 I could just finish the answer about sentence 3  
22 of -- of 103 -- 103(c).

23 One of the -- one of the things the  
24 Park Service could never do is grant access to  
25 private lands. The Park Service not only

1 regulates things that you can't do in national  
2 parks but things that they have to allow, like  
3 access, camping, picnicking.

4 Well, obviously, the Park Service  
5 cannot allow people to have private -- have  
6 access to the private inholdings. So one of  
7 the reasons why the Park Service might want to  
8 acquire the adjacent lands or the inholdings  
9 would be for the purpose of allowing public  
10 access to those areas.

11 But I also want to underscore that  
12 there are so many provisions of ANILCA that  
13 specifically refer to water and, in fact, the  
14 regulation of water. One of the ones I  
15 mentioned, 3170(a), specifically allows the  
16 Park Service to regulate boating in -- in these  
17 areas.

18 That picks up on the 1976 Act, the  
19 general application that is made specific here  
20 by allowing regulation of boating. There's  
21 3121(b) which requires access for subsistence  
22 unit -- units -- uses. There's the Wild and  
23 Scenic Rivers Act, which the whole purpose of  
24 designating a river within these national parks  
25 is to preserve the river.

1 JUSTICE KAVANAUGH: But there's  
2 nothing that says that the Park Service has  
3 plenary authority over all the navigable rivers  
4 within the conservation system unit, nor is  
5 there any indication by any member of Congress  
6 of such a authority?

7 MR. KNEEDLER: Well, I mean, putting  
8 to one side whatever we might mean by plenary,  
9 the 1976 Act specifically gives the parks --

10 JUSTICE KAVANAUGH: But this would  
11 have been a --

12 MR. KNEEDLER: -- authority over  
13 water.

14 JUSTICE KAVANAUGH: Sorry to  
15 interrupt. This would have been a huge deal  
16 for the people of Alaska and the  
17 representatives from Alaska to accept full or  
18 close to full Park Service authority over all  
19 the navigable rivers, yet --

20 MR. KNEEDLER: I -- I -- to the  
21 contrary. I -- I -- I see no indication in  
22 that, and this 1410hh2 that I mentioned  
23 specifically says that the waters added to  
24 these areas are subject to regulation under the  
25 Park Service's general authority, which

1 includes the 1976 Act.

2 I think the extraordinary thing would  
3 be to say that -- that the federal government  
4 through the Park Service did not have the  
5 authority to regulate navigable waters, not  
6 just any navigable waters but navigable waters  
7 in park areas set aside for the very purpose,  
8 often express purpose of preserving the values  
9 of the rivers and lakes and streams that were  
10 in their midst.

11 The -- this -- this -- this is a very  
12 water-centric statute. And I think it would  
13 turn it upside down to say that Congress of all  
14 things was incapable of regulating the  
15 navigable waters within -- within the park  
16 system.

17 CHIEF JUSTICE ROBERTS: Well, but, I  
18 mean, the waters are very important to Alaskan  
19 way of life in the way they aren't elsewhere.  
20 And I -- I guess the argument on the other  
21 side, it would be pretty extraordinary if you  
22 go to the trouble to say you only can regulate  
23 lands with respect to which you have title, and  
24 you say from that you get the authority over  
25 the rivers, even though title in the submerged

1 lands is in the state?

2 MR. KNEEDLER: Well, our argument  
3 doesn't depend on the title question or -- or  
4 control over navigable waters. But the title  
5 question is involved in -- if -- if -- on the  
6 -- on the -- on the Katie John rationale.

7 But, on the points you mentioned,  
8 ANILCA itself embodies the compromise or the --  
9 or the balance of the competing values.

10 In most parks, you can't hunt.  
11 Hunting is permitted in national preserves,  
12 including this one. In -- in most places, you  
13 can't have airplane use. Well, here, you are  
14 allowed to have airplane use.

15 There's specific provisions for access  
16 to inholdings, something that you don't  
17 normally have in other national parks, but,  
18 because there were inholdings, there are  
19 provisions for that. There's provisions for --  
20 for boating and other access to subsistence  
21 uses.

22 The very things that make Alaska  
23 different are accommodated in this statute.  
24 But one of the things that -- that is not  
25 different about Alaska is the importance of the



1 federal government having control over the  
2 navigable waters that are the centerpiece of  
3 the parks.

4           What is different about Alaska is the  
5 large tracts of inholdings, which is really  
6 what the focus of 103(c) was. And in that  
7 situation and only in very limited  
8 circumstances has the Park Service ever applied  
9 regulations that go beyond simply the public  
10 lands to -- to embrace the broader -- the  
11 broader system of -- of -- of lands.

12           And, again, this is the Yukon-Charley  
13 River's national monument. It would be -- or  
14 national preserve. It would be extraordinary  
15 to conclude that the Park Service, without some  
16 express statement to that effect in the -- in  
17 the statute, could not regulate it.

18           And, as I say, this statute giving it  
19 the authority to regulate waters is -- is  
20 explicit on that point.

21           CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23           Five minutes, Mr. Findley.

24  
25

1 REBUTTAL ARGUMENT OF MATTHEW T. FINDLEY

2 ON BEHALF OF THE PETITIONER

3 MR. FINDLEY: Yes, thank you. Counsel  
4 several times cited the provision of ANILCA  
5 saying these parks and preserves shall be  
6 governed in accord to the Organic Act. Counsel  
7 forgot to finish the provision of the statute  
8 that says "and as amended or modified by  
9 ANILCA."

10 So every time they refer to the  
11 Organic Act they have to read it together with  
12 ANILCA. And you have to read it with Section  
13 103(c), at the very front of the statute, it's  
14 a linchpin, and it's foundational. And what  
15 it's designed to do is say, if the federal  
16 government doesn't have title, it's not public  
17 land, it's not part of the park, and it's there  
18 to prevent the Park Service from using its  
19 Organic Act authority to regulate  
20 extraterritorially to land that is not part of  
21 the unit.

22 JUSTICE SOTOMAYOR: The problem is you  
23 don't have title to the water. I mean, you  
24 suggest that there are some cases who say  
25 effectively it is, but effectively is different

1 than is.

2 Navigable waters are navigable waters.  
3 We rarely think of them as someone having title  
4 to them, but we do think of them as having  
5 interest in them. And if there's two  
6 interests, the federal government's and the  
7 state's, don't they win?

8 Because, if they have an interest,  
9 they have a public interest that by statute is  
10 being directed. I mean, there are 26 rivers  
11 designated as wild and scenic rivers here.

12 There are all sorts of -- I've  
13 mentioned this repeatedly -- all sorts of  
14 statutory obligations that the government's  
15 being given under this particular Act to  
16 preserve these waterways in a particular way.

17 So I -- I don't understand. If you  
18 don't have title, does this -- at least with  
19 respect to navigable waters, do you have any  
20 claim whatsoever?

21 MR. FINDLEY: What matters here is  
22 that the United States does not have title to  
23 those waters and does not have title to the  
24 submerged lands. Once that's the case, they  
25 aren't public lands. They aren't part of these

1 units. And the Park Service may not use its  
2 Organic Act authority to reach out and regulate  
3 them.

4 You asked the Park Service early on a  
5 very foundational question: What does 103(c)  
6 prohibit in your view? And 20 minutes later  
7 there was no answer from the Park Service.

8 The reality is, in their view, any  
9 time they feel it is necessary or appropriate  
10 to regulate outside the boundaries of public  
11 lands, they feel they can do that.

12 Now they feel, well, we haven't done  
13 it that often, but this is exactly what Section  
14 103(c) was designed to prevent. They are  
15 looking at 751(b) -- go ahead. Sorry, I  
16 thought I heard a question come in.

17 They are looking at 751(b) and they  
18 are relying on that phrase, "activities on or  
19 related to water," to justify regulating water  
20 that is not part of the unit and there's no  
21 limiting principle to that.

22 Activities on or relating to water  
23 could very easily be read as activities taking  
24 place on native corporation land within the  
25 unit. All of that is extraterritorial regulation.

1 That is what Section 103(c) was specifically  
2 designed to prevent, so every time the Park  
3 Service wanted to promulgate a regulation to  
4 reach out to a non-public land that is not part  
5 of the unit, the State of Alaska, a native  
6 corporation or a private party did not have to  
7 go petition the court and say: Please don't do  
8 this. That was the central deal of ANILCA.

9 And the waters were as crucial to that  
10 as a native corporation land and the other  
11 inholdings. As my friend from the state made  
12 very clear, and for the State of Alaska, the  
13 rivers are the roads. And while the Act  
14 constantly references rivers and waters, you  
15 need to give effect to both dual balancing that  
16 the Congress was doing.

17 By adding over 100 million acres of  
18 land, public land to these units, you are  
19 achieving significant protection of the waters,  
20 and you are also protecting all waters where  
21 the -- where the state does not own the  
22 submerged lands. So regulation of those public  
23 lands, indeed, protects the waters.

24 What we are talking about here is the  
25 state's authority to retain primary control

1 over the use of its rivers that run by the  
2 parks and are surrounded by the parks. The  
3 federal government, of course, retains control  
4 of the rivers. As we've talked about, the  
5 Clean Air Act applies, Coast Guard regulations  
6 apply, federal criminal law applies. These  
7 rivers are already significantly protected.

8 I mean, the hovercraft rule, to come  
9 back to what brought us here today, why is that  
10 rule there? It's not there to protect the  
11 quality of the river. It's there because of  
12 sound and it's there because the Park Service  
13 wants to restrict access to remote areas of the  
14 parks, while the State of Alaska has a very  
15 different view about access to the remote areas  
16 of the state. And that's a judgment call that  
17 ANILCA should leave to the State of Alaska.  
18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel. The case is submitted.

21 (Whereupon, at 11:06 a.m., the case  
22 was submitted.)

23  
24  
25

Official - Subject to Final Review

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