

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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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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 sovereignty. And any time this Court addresses
3 a 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, well, 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, waters,
4 native corporation, or private land, it is not
5 going to be 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 are they 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
10 lands," it seems to be making a distinction
11 between regulations that apply solely,
12 exclusively to public lands and those that
13 apply more broadly to both public and private
14 lands.

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

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

25 If you were to take the word "solely"

1 out of the statute, you would have
2 inadvertently exempted these lands from a
3 myriad of other federal regulation that applied
4 before ANILCA and that was certainly intended
5 to apply -- apply after ANILCA.

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

9 JUSTICE KAGAN: But -- but -- but --

10 MR. FINDLEY: Go ahead.

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

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

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

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

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

24 JUSTICE KAGAN: I -- I understand what
25 -- I think it's a good point, the point you

1 make about, look, if it were public lands
2 versus public and non-public lands, this would
3 not be doing very much.

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

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

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

17 MR. FINDLEY: I mean, we believe the
18 --

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

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

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

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

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

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

24 JUSTICE BREYER: Well, I mean, that
25 seems the question to me, that -- that the Park

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

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

11 (Laughter.)

12 MR. FINDLEY: Thank you.

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

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: Ms. Botstein.

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

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

21 Understanding ANILCA requires
22 understanding remote Alaska. In most of the
23 state, a vast wilderness that is more than
24 twice the size of Texas, our rivers are our
25 only roads. When Congress surrounded many of

1 these crucial state waterways with federal park
2 areas, it consciously chose not to take away
3 state control over these crucial rivers.

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

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

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

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

1 native corporation land that were beyond the
2 reach of park management regulation and,
3 similarly, with the waters.

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

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

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

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

25 What Congress said is you work

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

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

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

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

24 MS. BOTSTEIN: No, Your Honor, because
25 the statutory mission is limited to regulation

1 on the public lands, on the federal lands.

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

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

9 MS. BOTSTEIN: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 A different definition in these titles

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

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

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

17 JUSTICE SOTOMAYOR: One could --

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

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

25 MS. BOTSTEIN: The statute --

1 JUSTICE SOTOMAYOR: -- then you don't
2 win here.

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

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

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

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

1 within this compound.

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

4 MS. BOTSTEIN: Your Honor, the
5 statutory duties that the Park Service is
6 given, is delegated to regulate for
7 non-subsistence purposes, is limited by Section
8 103(c) --

9 JUSTICE KAVANAUGH: You agree --

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

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

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

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

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

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

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

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

17 CHIEF JUSTICE ROBERTS: Sure.

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

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Kneedler.

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.

25 So I would think that the government

1 would have to prove some nexus between boating
2 or the other activities and the water within
3 the government's system units. And I just
4 didn't see that story told here, how Mr.
5 Sturgeon's hovercraft would in some way impact
6 water within the system units, meaning public
7 -- public lands, public waters.

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

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

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

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

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

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

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

25 JUSTICE GORSUCH: Okay. But assume

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

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

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

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

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

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

1 units, boating activity outside the system unit
2 -- premise me -- work on that premise -- would
3 have any effect on the water within the system
4 unit?

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

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

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

17 MR. KNEEDLER: Well, there were --

18 JUSTICE GORSUCH: Let alone seen.

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

23 JUSTICE GORSUCH: Okay.

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

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

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

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

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

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

1 But I'd like to go back to 103(c)
2 because the question that Justice Kagan asked
3 was a question that was in my mind too, and it
4 is to do with the word "solely."

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

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

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

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

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

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

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

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

24 The -- the Submerged Lands Act
25 conveyed to the state only submerged lands and

1 interests in waters. It did not convey the
2 waters themselves.

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

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

10 But -- but is there another one?

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

13 JUSTICE BREYER: I'm not --

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

20 And the other statute I mentioned
21 specifically says that the Secretary may
22 regulate the waters added to these park units
23 according to the general authorities, which
24 includes the '76 Act, and that ties directly to
25 the fact that the waters, the navigable waters,

1 were not conveyed to the state, and, therefore,
2 the Secretary's regulatory authority over such
3 waters is not -- is not affected at all by the
4 --

5 JUSTICE SOTOMAYOR: Can --

6 JUSTICE ALITO: Who has title to --

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

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

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

1 set apart.

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

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

13 JUSTICE GORSUCH: But, Mr. Kneedler --

14 MR. KNEEDLER: -- of navigable waters
15 --

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

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

24 JUSTICE GORSUCH: Right. But
25 everything relates. All waterways are

1 connected. And you say it's not just the
2 waterway but anything related to the waterway
3 that you own or that you claim to have land on
4 besides --

5 MR. KNEEDLER: Well, it --

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, but

1 that's -- the --

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

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

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

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

16 MR. KNEEDLER: -- the Clean Water Act,
17 for pollution.

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

25 They -- what they don't agree is that

1 that is a lever that gives you authority to do
2 this sort of day-to-day regulation, such as,
3 you know, the hovercraft traffic.

4 MR. KNEEDLER: Well, the --

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

9 (Laughter.)

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

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

23 JUSTICE SOTOMAYOR: So am I to --

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

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

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

16 The uplands are very different --

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

23 MR. KNEEDLER: Yes. The uplands are
24 different, and that's really what drove 103(c),
25 was to make sure that these land selections

1 were not going to be subject to the general
2 regulations of the Park Service.

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

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

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

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

1 MR. KNEEDLER: Well, there is --

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

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

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

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

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

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

1 solely applicable to public land and,
2 therefore, it's not covered.

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

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

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

25 And you don't need a statute to tell

1 you that. Of course, non-public lands aren't
2 subject to regulations applicable solely to
3 public lands. If that's what the statute was
4 saying, who would need a statute?

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

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

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

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

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

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

25 Those maps might have -- and -- and,

1 in fact, I think did -- just outline the outer
2 boundaries. And so subsection (c) says, well,
3 yeah, that -- that may be the boundaries of
4 what was designated, but we want to be clear
5 that it's only -- it's only the public lands
6 that will be deemed to be portions --

7 CHIEF JUSTICE ROBERTS: But you're not
8 taking --

9 JUSTICE BREYER: Though I think there
10 are --

11 JUSTICE ALITO: Can I ask a question
12 about --

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

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

1 That would be an odd sentence to
2 include if this were not -- if this were a -- a
3 -- a protection you could write around just by
4 saying, oh, and, by the way, this applies to
5 the -- the inholders.

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

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

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

23 Why? Because if the only things that
24 count as a reg for public lands -- we've said
25 this three times -- are -- are those regs that

1 say they don't apply to Smith's inholding, you
2 don't need this statute, okay? That's the
3 basic thing.

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

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

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

21 MR. KNEEDLER: No, I -- I think
22 it's --

23 (Laughter.)

24 MR. KNEEDLER: -- I think it's
25 basically correct, but there is the category of

1 regulations that are not applicable solely to
2 public lands because -- because they have been
3 made applicable to inholdings within the Park
4 Service.

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

11 CHIEF JUSTICE ROBERTS: Counsel, I
12 think --

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

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

19 MR. KNEEDLER: I'm sorry.

20 (Laughter.)

21 JUSTICE ALITO: Thank you, Chief
22 Justice.

23 I just wanted to ask you a question
24 about implied reserved water rights. In the
25 cases where we have dealt with that, the

1 government has been asked to show in detail the
2 purpose of the reservation and the volume of
3 water that's necessary to achieve that purpose.

4 Do you have to make any kind of
5 showing like that here?

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

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

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

25 So I -- I think it's clear that water

1 is reserved for the purposes of these
2 reservations, every one of which either refers
3 to specific bodies of water or to aquatic
4 activities, such as fishing or boating or
5 access.

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

9 MR. KNEEDLER: No.

10 JUSTICE ALITO: -- to regulate the
11 navigable waters?

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

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

1 subject to reserved water rights.

2 JUSTICE ALITO: Well, no, I wasn't
3 asking about the geographical limits of it.
4 I'm asking about the regulatory limits.

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

9 MR. KNEEDLER: I -- I wouldn't -- I --
10 I -- I think within the national park system it
11 overlaps with the 1976 statute that I -- that I
12 mentioned, which I -- I think directly -- you
13 don't have to go through the reserved water
14 rights approach to get there -- within national
15 parks, the -- the -- Katie John's subsistence
16 use could have been satisfied by relying on the
17 1976 Act and not relying on reserved water
18 rights.

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

23 If I could go back to the Chief
24 Justice's question.

25 JUSTICE ALITO: Well, could I just

1 slip in one more question since you referred to
2 Katie -- to Katie John, and I'll ask you the
3 same question that was asked of counsel for
4 Alaska.

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

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

19 At the very least, Katie John
20 demonstrates the importance of federal
21 regulation of waters within these areas, in
22 that instance for -- for subsistence uses.

23 If I could just finish the answer
24 about sentence 3 of -- of 103 -- 103(c). One
25 of the -- one of the things the Park Service

1 could never do is grant access to private
2 lands. The Park Service not only regulates
3 things that you can't do in national parks but
4 things that they have to allow, like access,
5 camping, picnicking.

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

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

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

1 designating a river within these national parks
2 is to preserve the river.

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

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

12 JUSTICE KAVANAUGH: But this would
13 have been a --

14 MR. KNEEDLER: -- authority over
15 water.

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

22 MR. KNEEDLER: I -- I -- to the
23 contrary. I -- I -- I see no indication in
24 that, and this 1410hh-2 that I mentioned
25 specifically says that the waters added to

1 these areas are subject to regulation under the
2 Park Service's general authority, which
3 includes the 1976 Act.

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

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

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

1 you say from that you get the authority over
2 the rivers, even though title in the submerged
3 lands is in the state?

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

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

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

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

24 The very things that make Alaska
25 different are accommodated in this statute.

1 But one of the things that -- that is not
2 different about Alaska is the importance of the
3 federal government having control over the
4 navigable waters that are the centerpiece of
5 the parks.

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Five minutes, Mr. Findley.

1 REBUTTAL ARGUMENT OF MATTHEW T. FINDLEY
2 ON BEHALF OF THE PETITIONER

3 MR. FINDLEY: Yes, thank you.

4 Counsel several times cited the
5 provision of ANILCA, saying these parks and
6 preserves shall be governed in accord to the
7 Organic Act. Counsel forgot to finish the
8 provision of the statute that says "and as
9 amended or modified by 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 is not part of the park, and it's
18 there to prevent the Park Service from using
19 its 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,
10 is 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 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 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're also protecting all waters where the
21 -- where the state does not own the submerged
22 lands. So regulation of those public lands,
23 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

1	accord ^[3] 6:2,3 65:6 accordance ^[5] 28:18,21,22 37:9, 11 according ^[1] 40:23 account ^[2] 45:14 52:14 achieve ^[1] 56:3 achieving ^[1] 68:19 acknowledge ^[1] 59:14 acquire ^[1] 60:10 acres ^[4] 4:17 8:9,12 68:17 across ^[1] 44:7 Act ^[48] 6:1,2,6 7:21,22 8:19,23,25 10:22 15:2,3,9 20:13,14 25:16 27: 4,11 29:13 31:20 33:8 37:10,12, 19 39:24 40:16,24 43:11 44:2,16, 22 45:12 46:19,19 47:9 49:19 58: 17 59:17 60:20,25 61:11 62:3 65: 7,11,19 66:15 67:2 68:13 69:5 activities ^[9] 32:16 33:10,23 34:2 46:6 57:4 67:18,22,23 activity ^[1] 36:1 actually ^[4] 11:13,18,22 18:5 added ^[7] 11:21 32:10 37:7,15 40: 22 56:10 61:25 adding ^[2] 11:23 68:17 addition ^[1] 18:10 addressed ^[1] 6:17 addresses ^[1] 11:2 adequate ^[2] 22:6 52:13 adjacent ^[1] 60:10 adjudication ^[1] 57:19 administer ^[1] 37:6 administered ^[1] 41:23 affect ^[2] 35:18 40:4 affected ^[1] 41:3 agency ^[4] 5:15 10:5,20,20 agree ^[10] 13:16,17 30:9,12,18 44: 21,22,24,25 54:5 ahead ^[2] 17:10 67:15 air ^[2] 45:16 69:5 airplane ^[2] 63:15,16 AL ^[1] 1:9 ALASKA ^[36] 1:7,21,24,24 3:7 6: 19 8:7 9:19 15:1 21:17,22 22:8 24: 4 25:3 26:23,24 27:2,22 30:18 31: 2,5 32:24 41:20 42:20 44:6 45:15 59:4 61:18,19 63:24 64:2,6 68:5, 12 69:14,17 Alaska's ^[1] 22:11 Alaskan ^[1] 62:20 Alaskans ^[2] 27:5,24 ALITO ^[17] 12:12,20 13:6,11,24 14: 13,15 15:4,13 41:6 52:11 55:17, 21 57:6,10 58:2,25 allow ^[2] 60:4,7 allowed ^[3] 56:7 59:13 63:16 allowing ^[2] 60:11,22 allows ^[1] 60:17 alone ^[1] 36:18 already ^[4] 17:22,23 18:19 69:7 Alek ^[2] 5:8,18 although ^[1] 10:24 amended ^[3] 8:20 37:10 65:9 amicus ^[3] 1:24 3:7 21:18	Amoco ^[2] 6:16 20:15 among ^[2] 5:8,14 analysis ^[1] 23:7 Anchorage ^[2] 1:21,24 ANILCA ^[40] 4:13,13,19 5:3,11,22, 24 6:3,4,10,11,15,17 8:4,20 9:24 10:14 11:15 14:17 17:4,5 18:12, 20 20:6,8,9,22 21:21 27:13 32:8 34:22 37:8 56:10 60:14 63:10 65: 5,9,12 68:8 69:17 ANILCA's ^[1] 4:24 another ^[6] 5:11 25:4 33:1 40:7,10 57:21 answer ^[9] 13:15 19:9 32:25 34:9 38:5 39:14 42:17 59:23 67:7 answered ^[3] 6:21 24:11 53:18 answering ^[1] 54:20 answers ^[1] 39:17 apart ^[2] 23:13 42:1 appear ^[1] 50:23 APPEARANCES ^[2] 1:19 2:1 applicability ^[1] 40:17 applicable ^[12] 14:1 16:3,4,9,21 20:1 48:19 49:1,23 50:2 55:1,3 application ^[1] 60:21 applied ^[4] 17:3 47:6,16 64:10 applies ^[13] 17:24 34:11 38:25 44: 22,23 48:24 49:9 51:4 53:4,19,21 69:5,6 apply ^[14] 10:11,13 12:10 16:11,13 17:5,5,23 38:21 44:24 48:16 51: 13 54:1 69:6 approach ^[1] 58:14 appropriate ^[2] 30:21 67:9 aquatic ^[1] 57:3 area ^[6] 9:19 24:2 31:10 35:19 39: 7 57:21 areas ^[18] 20:22 22:2,20,23,23 24: 2 37:7 47:15 52:22 56:9 57:24 59: 21 60:12,19 62:1,9 69:13,15 aren't ^[5] 10:23 50:1 62:21 66:25, 25 arguing ^[2] 29:21 54:18 argument ^[33] 1:16 3:2,5,9,12 4:4, 7 10:16 11:11 17:7,8 21:17 22:16 32:1,19 33:7,13 35:5,15,24 38:16 39:10,13 47:24 48:4,12,13 54:14, 18 59:11 62:22 63:4 65:1 arguments ^[3] 39:11 48:22 54:6 arise ^[1] 23:16 Army ^[1] 12:3 around ^[2] 49:8 53:3 array ^[2] 4:20 18:21 art ^[1] 40:9 arteries ^[1] 9:21 articulating ^[1] 17:21 aside ^[2] 50:22 62:9 asserting ^[1] 23:11 Assistant ^[1] 1:23 associated ^[1] 56:22 assume ^[1] 34:25 assurance ^[2] 50:15 51:7 attempts ^[1] 22:10 Attorney ^[1] 1:23	authorities ^[3] 32:11 37:12 40:23 authority ^[31] 6:6 20:21 22:19 23: 10,11,13 32:14,18 36:11 37:14,24 40:18 41:2 42:19 45:1 46:8,13 52: 22 54:11 57:8 61:5,8,14,20 62:2,7 63:1 64:21 65:19 67:2 68:25 authorization ^[2] 47:9 55:8 authorized ^[1] 55:10 away ^[1] 22:2 awful ^[1] 12:21
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