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# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. No. 85-1239 & 85-1406

TITLE AMOCO PRODUCTION COMPANY, ET AL., Petitioners V. VILLAGE OF GAMBELL, ALASKA, ET AL.; and
DONALD P. HODEL, SECRETARY OF INTERIOR, ET AL., Petitioners V. VILLAGE OF GAMBELL, ET AL.

PLACE Washington, D. C.

DATE January 12, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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AMOCO PRODUCTION COMPANY, ET AL., :

Petitioners, :

V. : No. 85-1239

VILLAGE OF GAMBELL, ALASKA, :

ET AL.; :

and :

DONALD P. HODEL, SECRETARY OF :

INTERIOR, ET AL., :

Petitioners, :

V. : No. 85-1406

VILLAGE OF GAMBELL, ET AL. :

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Washington, D.C.

Monday, January 12, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 o'clock a.m.



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E. EDWARD BRUCE, ESQ., Washington, D.C.; on behalf of the petitioners in No. 85-1239.

DONALD S. COOPER, ESQ., Anchorage, Alaska; on behalf of the respondents.

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PROCEEDINGS

CHIEF JUSTICE REHNQUIST: We will hear arguments first this morning in No. 85-1239, Amoco Production Company versus Village of Gambell, and No. 85-1406, Donald Hodel versus Village of Gambell.

Mr. Habicht, you may proceed whenever you are ready.

ORAL ARGUMENT OF F. HENRY HABICHT, II, ESQ.,
ON BEHALF OF THE PETITIONER IN NO. 85-1239

MR. HABICHT: Mr. Chief Justice, and may it please the Court, this case concerns the Ninth Circuit's entry of a preliminary injunction against oil and gas exploration activities in two areas of the outer continental shelf lying between 25 and 350 miles from the coast of Alaska.

The Ninth Circuit reversed the District Court's denial of a preliminary injunction here. The Court of Appeals did not overrule the express District Court findings of no irreparable harm, and that the balance of harms counseled against entry of a preliminary injunction.

Rather, the Ninth Circuit ruled that these findings did not, in the words of the Court, "excuse the District Court's duty to enter an injunction." Based upon the Ninth Circuit rule that absent unusual

circumstances an injunction must issue when the Court finds a procedural violation of an environmental or a conservation statute.

The environmental statute said to be violated here is Section 810 of the Alaska National Interest Lands Conservation Act, or ANILCA, which provides for a consideration of impacts on subsistence activities in certain federal decisions concerning the use of public lands.

The Ninth Circuit ruled that even though the Secretary of Interior had analyzed subsistence impacts at length in the environmental impact statement for these lease sales, Section 810 of ANILCA, which by its terms applies to public lands in Alaska, requires the Secretary separately to comply with that provision before leasing outer continental shelf tracts lying as much as 350 miles offshore.

Today we will argue two points developed in our briefs. First, that the Ninth Circuit rule automatically requiring injunctions for certain statutory violations is without basis. Second, that in ANILCA Congress never intended the terms "public lands in Alaska" to govern activities on the outer continental shelf.

QUESTION: Mr. Habicht, are you going to at

some time in your argument get to the geographical location of these lands?

MR. HABICHT: These lands -- I would be happy to, Mr. Chief Justice. These lands are located in the Bering Sea southwest of Nome, Alaska. The Norton Basin area, which is Sale 57, lies about 25 miles from the coast. The Navarin Basin, which is the area covered by Sale 83 in this case, lies as much as 350 miles from the coast of Alaska. It is due west, at the western end of the Bering Sea, lying adjacent to the border with the Soviet Union.

Even assuming that Section 810 applies to these leased sales, the Ninth Circuit requirement of a preliminary injunction here is flatly contrary to this Court's decision in Weinberger versus Romaro Barcelo, which we submit is controlling. This Court in Weinberger thoroughly reviewed the history and the principles of equity jurisprudence, and said clearly that while violations of the law will not be ignored, the extraordinary remedy of an injunction requires a particularized inquiry into the circumstances of each case, including at a minimum a finding of irreparable harm.

The Ninth Circuit rejected the Weinberger inquiry here and the District Court's express findings

in favor of a generalized rule that a procedural violation of an environmental statute alone can warrant injunctive relief. This notion of a duty to enter an injunction without findings of irreparable harm on its face conflicts with the decision of this Court in Weinberger. And there are no alternative grounds for sustaining the Ninth Circuit decision here.

Given the teaching of Weinberger and a host of other decisions of this Court concerning equity jurisprudence, the District Court's findings here can only be reversed on one of two grounds. First, that it was an abuse of discretion which is the traditional standard of review of a denial of a preliminary injunction. Or, second, that Congress removed, clearly removed the District Court's discretion, in this case in ANILCA by specifically requiring injunctive relief in all cases without regard to the circumstances.

First, there can be no finding of an abuse of discretion on this record. The Ninth Circuit did not overrule the express findings of the District Court concerning irreparable harm or balance of harms. It simply ruled that these findings were irrelevant. Second, the Ninth Circuit said that Weinberger was inapplicable and therefore did not attempt to determine as Weinberger dictates whether in Section 810 Congress

specifically intended to curtail District Court discretion.

Here there is no express language that has been cited nor legislative history to support that proposition. In fact, in the Senate report to ANILCA which served as the conference report, cited in our brief at Page 23, the report says that a proposed action may proceed even in the face of findings of potential harm to subsistence resources.

This kind of language hardly meets this Court's requirement of either express intent, express statements, or a necessary and inescapable inference that Congress intended to withdraw traditional equitable discretion from the District Court.

This language and the context of Section 810 is strikingly similar to that of the Clean Water Act reviewed by this Court in Weinberger. The Clean Water Act also in quite mandatory terms prohibited the discharge of pollutants without a permit. The Court in Weinberger ruled that an injunction was not required based upon findings of no irreparable harm to water quality in that case and that the compliance proposals were fully consistent with the goals of the Clean Water Act. This is precisely such a case.

Respondents have argued that TVA versus Hill

requires a different result here. But in fact this Court in TVA versus Hill engaged in precisely the sort of inquiry outlined in Weinberger. The Court expressly found that there would be -- that a critical habitat of the snail guider, an endangered species in that case, would be destroyed by the closing of the Teleco Dam.

Secondly, the Court ruled at Page 193 of 437 United States Reports, that the finding that the very object of the substantive protections of the Endangered Species Act was going to be extirpated in the words of the Court, didn't necessarily dictate the remedy.

The Court then engaged in an inquiry into the legislative history of the Endangered Species Act and other evidence of Congressional intent to find that Congress explicitly, beyond doubt in the words of the Court, struck the balance in that case in favor of saving this endangered species which was in fact going to be extirpated.

Here, as we have already noted, the District Court found that there would be no harm from exploration activities to subsistence resources in the outer continental shelf off Alaska.

Finally, the factual and statutory context here demonstrates why it is important to examine all the elements in the traditional preliminary injunction

test. The fact, for example, the fact that this action is proceeding under the Outer Continental Shelf Lands Act Amendments of 1978 is not irrelevant. First of all, the Outer Continental Shelf Lands Act Amendments bear on the determination of the public interest in an equitable proceeding.

As this Court recognized in Secretary of Interior versus California, Congress intended to promote the expedited exploration of the resources of the Outer Continental Shelf Lands Act, the United States Outer Continental Shelf of which two-thirds lies offshore Alaska.

Second, the Outer Continental Shelf Lands Act bears directly on the remedial calculus here, because as this Court also recognized in Secretary of Interior versus California, Congress explicitly segmented the Outer Continental Shelf Lands Act process into discrete stages so that information about resources on the Outer Continental Shelf could be developed without undue risk to environmental or human resources.

Congress made clear that development may never occur on the Outer Continental Shelf without a separate approval and separate environmental analysis before any development plans are approved. Therefore this structure is indeed directly relevant to determining the

necessity and the appropriate scope of an equitable remedy in this case.

The Outer Continental Shelf Lands Act is not dispositive with regard to the public interest. The proper relief in a given case is going to depend on the nature of the harm and the facts and the circumstances before the District Court. Here, as we have noted, subsistence evaluations were made by the Secretary both before the lease sales and then under Section 810 after each of the lease sales here.

The District Court expressly found no harm to subsistence resources from the exploration stage, and also noted that production and development could not occur until there would be further environmental review and further approvals, and also noted that under the Outer Continental Shelf Lands Act the Secretary of the Interior has the authority to shape and control the outer continental shelf leasing process, including cancelling leases if significant harm to the environment or social harm is presented.

Given all of these circumstances and the ample protection for subsistence here the goals, the statutory goals of Congress in Section 810 of ANILCA can be met without shutting down the lease sales.

Turning to the second point, turning to the

second major area of the Ninth Circuit --

QUESTION: May I ask you a question as you make your transition? Which question do you think we should address first. You decided to address the remedy issue first. Do you think that is the appropriate question for us to address first?

MR. HABICHT: In our view, Justice Stevens, both the scope and the applicability of Section 810 to this sale and the Ninth Circuit preliminary injunction rule both should be addressed by the Court. They are both --

QUESTION: But if you win on one there is no need to address the other. Do you want us to just give you an advisory opinion on one of the two?

MR. HABICHT: Well, in Kleppe versus Sierra Club we had similar circumstances. In that case there was an allegation of a NEPA violation with regard to Interior's coal leasing program, and there was also an issue of the propriety of the D.C. Circuit's preliminary injunction there. In that case the Court found in favor of the Secretary on the NEPA issue and then proceeded to note that the preliminary injunction in any event, even if NEPA had applied in those circumstances, would have been inappropriate. So we think it is not -- it is not an advisory opinion in the sense that both issues are

currently live. They have been fully briefed before the Court.

QUESTION: But is it not true that if you win on one you have won the lawsuit? We don't have to address the other.

MR. HABICHT: It is true, Justice Stevens. If we win --

QUESTION: If we decide we only need to address one, which do think we should address? Do you have a preference? You argued the preliminary injunction one first. Is that because you think it is your strongest argument, or you think logically it comes first?

MR. HABICHT: The preliminary injunction argument has the broadest significance. It is a rule that has been well ingrained in Ninth Circuit jurisprudence and has led to in our view a number of inappropriate preliminary injunctions without equitable findings.

I would say that in this case, Justice Stevens, the 810 issue would dispose of the entire case whereas the preliminary injunction issue would require further proceedings to determine the applicability of ANILCA, so the 810 issue is the one that would dispose of the case --

QUESTION: You will take either.

MR. HABICHT: -- and that we would urge on the Court.

QUESTION: But you will take either.

(General laughter.)

MR. HABICHT: We will certainly take either, and we would urge the Court to reach both because it is so seldom that a preliminary injunction issue comes before this Court. It has, as it were, a short shelf life.

QUESTION: Well, if we address the preliminary injunction issue first in reverse, there are going to be further proceedings.

MR. HABICHT: If you address only the preliminary injunction issue there would be further proceedings. That's correct.

QUESTION: Well, but we shouldn't be ordering further proceedings needlessly if 810 doesn't reach this at all.

MR. HABICHT: I agree. I wouldn't urge the Court not to reach an issue which we think is appropriately before the Court that would dispose of the entire case, and the 810 issue would indeed dispose of the entire case. Again, though, as the Court did in Kleppe v. Sierra Club, a ruling on the very concretely

presented preliminary injunction issue is extremely important as well to a number of activities in the Ninth Circuit.

QUESTION: Is it clear that the 810 issue would dispose of the entire case? What about the point that the native rights were preserved in the -- which the Ninth Circuit never had to reach because of the way it came out on the 810 issue? What do we do with that issue?

MR. HABICHT: Well, the issue of whether aboriginal title remains on the outer continental shelf is in our view, Justice Scalia, not before the Court.

QUESTION: I understand that. It is not before this Court, but it was before the Ninth Circuit, and the Ninth Circuit disposed of it in a way that hinged, it seems to me, upon its disposition of the 810 issue. Shouldn't these challengers have the right before some Court to have that issue disposed of and not simply assumed one way or the other?

QUESTION: There was no cross-petition, was there?

QUESTION: There is a cross-petition.

MR. HABICHT: There was a cross-petition.

QUESTION: There is a cross-petition on that very issue?

MR. HABICHT: On that very issue, and it is still pending before the Court, so if this Court were to deny the cross-petition, that would dispose in our view of the aboriginal title issue. It hasn't been -- the petition hasn't been granted, so it is not currently before the Court.

QUESTION: It would dispose of it, but would it dispose of it fairly? Has the point ever been considered by the Ninth Circuit by any Court?

MR. HABICHT: The point has been considered in the Inupiat Community case, I believe, about three years ago in which this Court denied certiorari.

QUESTION: Yes, but not in this case.

MR. HABICHT: It was considered by the Ninth Circuit in Gamble, the decision in Gamble I, and the Ninth Circuit held that there was no longer any aboriginal title in the outer continental shelf. That was an explicit holding of the Ninth Circuit in Gamble I, and that is the subject of the cross-petition which is still pending before the Court.

QUESTION: Why would our denial of cert -- that wouldn't constitute a ruling on the merits of the issue, would it?

MR. HABICHT: No, it wouldn't constitute a ruling on the merits but having a definitive Ninth

Circuit ruling on the subject, and the Ninth Circuit had also ruled previously in the Inupiat case in which this Court denied cert, so in our view the issue has been squarely presented on at least two occasions to the Ninth Circuit, and the Ninth Circuit has rejected the contention.

QUESTION: But what you are really saying is, I suppose, if we deny cert and it remains open in the Ninth Circuit they presumably will follow their precedence in the earlier cases. That's the way.

MR. HABICHT: We presume that the Ninth Circuit precedent would be followed in the Ninth Circuit.

QUESTION: Right.

MR. HABICHT: Briefly, with regard to the Section 810 issue which we again believe is dispositive it is clear the legislative evidence is compelling that Congress never intended silently to extend the term "public lands" 350 miles off-shore. The express language of the statute is dispositive in our view. Title 8 and Section 810 of ANILCA apply only to public lands, a defined term used throughout ANILCA and other land selection and withdrawal statutes such as the Alaska Statehood Act, the Native Claims Settlement Act, and a number of other federal land statutes.

QUESTION: Mr. Habicht, has the outer continental shelf lands been interpreted to be lands in Alaska under the Alaskan Native Claims Act?

MR. HABICHT: No, Justice O'Connor, the Outer Continental Shelf Lands Act strictly applies to land outside the three-mile boundary, and those lands have never been termed public lands in any court or Congress.

QUESTION: Have they been held to be lands in Alaska under the Native Claims Act?

MR. HABICHT: Section 4(b) of the Native Claims Act extinguishes all claims to lands in Alaska both on-shore and off-shore, including submerged lands, so the Outer Continental Shelf Lands Act has never been termed public lands, but the extinguishment provisions of 4(b) of the Native Claims Settlement Act have been held to extend offshore. But the statutes are entirely different. In fact, we are aware of no statute which has ever been held in which the term "public lands" has ever been held to include the outer continental shelf.

QUESTION: Isn't it quite one thing for a Court, specifically the Ninth Circuit, to hold that the Native Claims Settlement Act applies -- does not apply or covers -- well, the Ninth Circuit is assuming that the coverage of the two statutes are identical. Isn't

that correct? And you want us to disagree with the Ninth Circuit as to one but affirm the Ninth Circuit's position as to the other?

MR. HABICHT: Well, the coverage of the Native Claims -- we are asking you to find that the term "public lands," which was not used in Section 4(b) of the Native Claims Settlement Act --

QUESTION: That's right.

MR. HABICHT: -- only applies on shore, which it has been found to apply for over 100 years in public land law and public land jurisprudence.

QUESTION: But had the Ninth Circuit known that you were going to interpret the Native Claims -- that we are going to interpret the Native Claims Settlement Act in that fashion -- or, excuse me, ANILCA in the fashion you are urging us to interpret it, it might have interpreted the Native Claims Settlement Act in a different fashion. Isn't that correct?

It viewed the two as going pari passu, didn't it? And you want us to affirm -- or to reverse them on one-half of that equivalency, but just let their decision stand on the other half without giving them a chance to consider whether given the fact that we now say the two don't necessarily go together, they should come out the same way.

MR. HABICHT: Justice Scalia, in our view the scope of Section 4(b) of the Native Claims Settlement Act, and I would note that the rest of the Native Claims Settlement Act refers only to the selection of public lands in Alaska, in our view, the scope of Section 4(b) is not relevant to what Congress intended in ANILCA.

This Court is being asked to determine what Congress intended in ANILCA when it used the term "public lands" to define the scope of that entire statute, both the land provisions, which were 90 percent of the statute, and the subsistence provisions. Now, in our view, because in ANILCA the Court -- the Congress talked about -- defined public lands as lands situated in Alaska and lands to which the United States hold title. Clearly the OCS is not situated in Alaska, and clearly the United States, based on 40 years of careful activity by this Court and Congress not to assert title to the OCS does not -- the term public lands could not extend to the outer continental shelf.

QUESTION: That may well be true. I am not disputing that on the merits. What I am suggesting is this. Is it fair to the Ninth Circuit or to the litigants if the Ninth Circuit based its decision concerning the scope of the Claims Settlement Act upon an assumption of equivalency of coverage between that

and ANILCA? Can we eliminate that presumption and yet not give the Ninth Circuit a chance to reconsider what its position on the Native Claims Settlement Act is?

MR. HABICHT: Respectfully, Justice Scalia, I think that you can. The Ninth Circuit -- we are saying that the ANILCA Congress was thinking of Section 4(b) when it enacted Section 810, and I think looking at the legislative history of ANILCA refutes that.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Habicht.

We will hear now from you, Mr. Bruce.

ORAL ARGUMENT OF E. EDWARD BRUCE, ESQ.,
ON BEHALF OF THE PETITIONERS IN NO. 85-1239

MR. BRUCE: Mr. Chief Justice, and may it please the Court, I will devote my remarks exclusively to the question of ANILCA's application to the OCS, and in doing so I think will address the concerns of Justice Scalia and Justice O'Connor regarding the reconciliation of these two statutes.

It is important to understand ANILCA's role in the entire scheme of things within Alaska land legislation. There are three key Acts, the Statehood Act of 1958, the 1971 Claims Settlement Act, and then ANILCA. All three use the term "public lands." In all

three it is absolutely clear that that term pertains exclusively to lands within Alaska and cannot extend to the OCS.

The Statehood Act gave Alaska the right to select about 100 million acres of public lands in Alaska. It has always been recognized that those lands selected by the states had to be exclusively on shore lands. The '71 Claims Settlement Act dealt with complications that arose in the course of Alaska's selection of its lands arising from native claims and arising from conservationist concerns to preserve certain federal lands and parks and the like.

That was done in Section 17(d)(2) of the Claims Settlement Act. That Act directed the United States to withdraw 80 million acres of public land. It also gave the state and the natives a right to select from the public lands lands in satisfaction of the state's Statehood Act rights and lands in satisfaction of the native claims rights.

Again, it is perfectly clear that public lands there did not extend to the OCS. ANILCA completed that process. It put about 120 million acres of public lands, again, lands within the state, in parks, refuges, and the like. It did that in Titles 2 through 7. It is perfectly clear those public lands are lands within the

state. It is also clear that whenever that phrase was used in other provisions of the statute it pertained exclusively to lands within the state.

For example, Section 906 of the statute, which is 43 USC 1635(b), extends the state's land selection rights to public lands for an additional ten years, and it also gives the state of Alaska 75,000 acres of additional lands, again, public lands. Perfectly clear these public lands are lands within the state, not the OCS. Title 8, the subsistence provision, uses the same term "public lands." The subsistence protection of the statute pertains exclusively to public lands. The legislative history was very clear that what the natives wanted was extension of subsistence protection, not just to those 120 million acres of lands within parks and refuges but also to all remaining public lands in Alaska, on shore lands, not the OCS.

The specific definition formulated by Congress regarding the meaning of public lands reinforces the natural conclusions that one draws when one understands ANILCA's role in the legislative process. Public lands are lands situated in Alaska. They are lands to which the United States asserts title. The OCS qualifies under neither score.

Now, the respondent's entire argument really

in this case is that because under Section 4(b) of the Claims Settlement Act their claims to lands on the OCS were extinguished, then the subsistence provisions should read in pari materia. They, too, they say, should be extended to the OCS. That argument misunderstands and overlooks obvious and decisive dissimilarities between the two statutes.

First, the Native Claims Settlement Act when it extinguished lands did not limit its application to public lands. It extinguished the native claims to all lands, whether state-owned, federally owned, or privately held. The term "public lands" is not used in Section 4(b).

Second, that statute was specifically written -- by that statute I mean Section 4(b) of the Claims Settlement Act, specifically included submerged lands underneath all water areas, both inland and offshore, and that specific reference in the statute was in response to testimony offered to Congress during the Claims Settlement Act which said we should extinguish offshore claims as well as onshore claims.

ANILCA, by sharp contrast, has nothing in it whatever on its face or in its legislative history that suggests in any way that it should extend to the OCS. There is no need or no point in remanding this case to

the Ninth Circuit for further consideration in the light of this Court's proper construction of Section 810.

This Court can in this case render a construction of Section 810 of ANILCA that makes it perfectly clear that while it extends only to lands in Alaska, as the statute indicates, there is every reason to believe the other statute might extend elsewhere.

QUESTION: You think we don't have to reach that point, whether it extends elsewhere?

MR. BRUCE: I don't think you have to reach that point. No, Your Honor.

QUESTION: I mean, it is sort of hard to base or decision here on that point when there is a cross-petition pending without granting that cross-petition, just decide the issue without granting the cross-petition.

MR. BRUCE: What we ask you to do is decide the proper construction of Section 810 and then ask the Court in due consideration of a pending cross-petition to take that into account as it decides to dispose of that cross-petition in an appropriate way.

Let me turn very briefly, and I would like to save a couple of minutes for rebuttal, if I can, to the nontextual arguments that the petitioner, or, excuse me, the respondents advance. They say that this was Indian

law and should be liberally construed in their favor, the subsistence provision of ANILCA.

Well, it is Indian law in a sense, but it is Indian law in a special sense. Section 810 is only one section in a massive statute that uses the same term, "public lands," throughout. You can't adopt an expansive construction of it for Title 8 and wreak havoc throughout the rest of the statute by a principle of resolving ambiguities in favor of native Americans.

Secondly, that principle only takes you so far. It cannot take you to the point of overlooking the plain language and clear legislative history of the statute as you would have to do to adopt their reading of the statute here.

Finally, they argue that ANILCA is a general subsistence protection measure, and it should be liberally construed to protect them. It is not a general subsistence protection measure. It is a very special statute. It is limited to the disposition of federal public lands in Alaska, and that is all it applies to.

There are other statutes that protect subsistence on the OCS as elsewhere. NEPA protects. The Endangered Species Act protects. All those statutes were complied with in this case. No one has argued to

the contrary in this Court. So the general subsistence protection is provided elsewhere, not in ANILCA.

We will rest on the arguments that we have regarding the Ninth Circuit's two other mistakes pertaining to ANILCA by virtue of what we have said in our briefs, because if the Court agrees with us on the basic question of ANILCA's application to the OCS it need not reach those questions.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bruce. We will hear now from you, Mr. Cooper.

ORAL ARGUMENT OF DONALD S. COOPER, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. COOPER: Mr. Chief Justice, and may it please the Court, the facts which give rise to this case concern the use of ice areas which lie off the coast of Alaska by Alaskan natives. Obviously, in most areas of the world, you know, water is water and land is land. Because of the arctic conditions Alaskan natives have traditionally ranged far out in the ice areas off the coast to do their hunting and fishing. They have set up camps on the ice. They have built roads on the ice and engaged in those kinds of activities.

Because we have these unusual or somewhat unusual circumstances it sort of gives rise to what you

have identified at least preliminarily here as a basic issue in the case, and that is whether various statutes which can affect the hunting and fishing rights of Alaskan natives in fact apply to these ice areas lying off the coast of Alaska.

The first statute is the Alaska Native Claims Settlement Act, and that statute was passed in 1971. It was passed for the purpose of extinguishing native claims to the interior regions of Alaska.

After oil was discovered in Alaska the oil industry needed to extinguish native claims so that they could build a pipeline through basically the interior areas of Alaska and then into the water ice-free ports so that they could then transport the oil to the lower 48.

The focus of the Claims Settlement Act, it was always considered to be a land claims settlement. The outer continental shelf is not mentioned in that statute, and really, given the history and the context it is unsurprising that that wasn't didn't come up, since the issue really was, they needed to extinguish the claims in the interior so that they could build the pipeline into the port of Valdez.

As a consequence, as you look at the Claims Settlement Act, it does not seem to affect the outer

continental shelf. The statute uses the terms "public lands," and that is now at 16 USC 3102, and that defines public lands as all federal lands and interests therein located in Alaska. Just from the plain language it would not seem that the Claims Settlement Act was intended to apply to areas lying outside the territorial boundaries of the state. It simply says in Alaska.

That plain language is also buttressed by the legislative history of the Claims Settlement Act, and the legislative history indicates constant references both in committee reports and by testimony that says that this Claims Act is supposed to apply to the lands comprising the state of Alaska. There are some references that say specifically that this Act applies to 375 million acres of land in Alaska, and 375 million acres are the interior land areas, the offshore areas, and the submerged lands in Alaska. It does not include the outer continental shelf.

QUESTION: Mr. Cooper, we don't really have this issue before us, do we? I mean, we are still thinking about whether we want to decide this issue that you are arguing right now.

MR. COOPER: Well, I think you do have it before you in this sense. This case is here on an appeal not from a final judgment but from the grant of a

preliminary injunction. If this Court were to construe the Conservation Act and the Claims Settlement Act and find that the plain language suggested that neither applied to the outer continental shelf, then remanded to the Court of Appeals, obviously the Court of Appeals, following the remand, would be free to reconsider its decision concerning the extinguishment of aboriginal title.

QUESTION: We shouldn't decide that neither applies when we haven't agreed to hear argument on whether one of them applies. We have just agreed to hear argument on the other.

MR. COOPER: Well, alternatively, what we would suggest is that if that -- what I would say is that all the arguments concerning the geographic scope of the Claims Settlement Act have already been presented to the Court in this case.

The oil companies and the government have argued that they have relied heavily on the Claims Settlement Act as suggesting that their position that the Acts are totally different, and we have relied on it heavily to show that the Acts have to be construed consistently, and I am not -- if you did grant the cross-petition and entertain arguments I don't think that those arguments would differ from what you already

have before you.

And given that the case is here on a request for certiorari from a grant of preliminary injunction, the Court of Appeals would be free to go back and to reconsider its decision with respect to the geographic application of the Claims Settlement Act.

When we get to the Conservation Act, I mean, the Conservation Act was passed about ten years after the Claims Settlement Act, and it has a somewhat different purpose.

It is -- what happened was, of course, that as part of the agreement which produced the Claims Settlement Act Congress chose not to place statutory protections for subsistence hunting and fishing rights in the Claims Settlement Act, but it did tell Alaska natives that it would protect those uses by directing Interior to take all measures necessary to protect them. And in fact, in the final committee report which dropped out the subsistence protections there was an explicit direction both to the Secretary and to the state of Alaska that they should act to protect these uses.

The protections for subsistence hunting and fishing did materialize. When Congress came back in 1980 and passed the Conservation Act it first included a

small section which would have protected the subsistence hunting and fishing rights on the conservation units, the (d)(2) lands which were created by the bill. Alaska natives came back and said that is not sufficient.

I mean, what has happened is, you have extinguished aboriginal title to land and interests in Alaska, and we basically want these statutory protections to be congruent with those, with that extinguishment. And the Alaska natives' proposal went directly to the Claims Settlement Act. The Conservation Act in their proposed definition uses the term "public lands," and it defines public lands as federal lands, waters, and interests therein situated in Alaska, so the term "public lands" in the Claims Settlement Act is defined as federal lands and interests therein located in Alaska. The term in the Conservation Act is federal lands, waters, and interests therein situated in Alaska, and I suggest to you that other than the fact that in the Conservation Act you add the term "waters" and it is located instead of situated, I mean, those terms are identical in the two statutes.

Interior basically urges this Court to accept its position, which is, those two phrases should be construed totally inconsistently. When they get to the Claims Settlement Act, they suggest that it is

ambiguous, that the term "in Alaska," that if you say "in Alaska, including submerged lands," which of course would have referred to the oil port facilities which are, which the pipeline runs through submerged lands of the Port of Valdiz, that you should construe that broadly.

You should construe the term "in Alaska" as extending out to the outer continental shelf, and then when they get to the Conservation Act they want this Court to take the totally opposite viewpoint. They want to have that construed as narrowly as possible. They say that the term "in Alaska" is clear and unambiguous, and that it doesn't include the outer continental shelf.

Our position in this case has been that you actually can't do that, that obviously the two statutes are historically intertwined, that they are very linked, and that whatever construction that you want to give to one you really have to give to the other, and there really isn't any room given the close fit between the statutes to engage in this inconsistent interpretation.

We have pointed out that the legislative history also supports that. Once again, it just -- Section 810 of the Conservation Act comes virtually word for word from a draft of the Claims Settlement Act. It

was one of the provisions that was removed from the Claims Settlement Act in 1970 and it appears again almost virtually word for word in the Conservation Act. And again, to reemphasize, that the definition of public lands in the two statutes are virtually identical, again, with the Conservation Act, if anything, having a slightly broader application because it includes waters.

Just for a second, I would like to talk about what the policy ramifications of a consistent construction between the statutes would be.

In the briefs and so forth I think Interior has suggested that applying both statutes to the outer continental shelf would result in Section 810 applying to OCS leasing and that somehow that would be a horrible result which would somehow compromise the nation's interest in developing its oil resources, and it's a somewhat odd argument in that the vast majority of oil which has come from Alaska has come from onshore oil development.

I don't know precisely what the figures are, but my guess would be 80 or 90 percent of the oil produced which has come from Alaska has been from onshore development.

And so it wouldn't seem that it would be such a terrible compromise or somehow endanger the national

interest to apply the protections of the Conservation Act which obviously Congress intended to apply to onshore development and which everyone in this case concedes apply to onshore development to development on the outer continental shelf.

Certainly OCS leasing is more risky in the sense that is poses more dangers, and to this point in time it has also not produced nearly as much oil as the onshore development.

Alternatively, if neither statute applies, there doesn't seem to be or there wouldn't seem to be a tremendous compromise of the national interest in oil development in that case either. Obviously, if the Claims Settlement Act does not apply to the outer continental shelf, our position is that we have aboriginal hunting and fishing rights in that area and that we have aboriginal title to those lands.

Now, those claims would in all probability preclude oil and gas leasing. Obviously, the Conservation Act in Section 810 doesn't preclude oil and gas leasing. It merely requires that that leasing be somewhat affected by the specific provisions of Section 810. Recognizing aboriginal title would in fact preclude oil leasing but the preclusion would occur in a much smaller geographic area.

QUESTION: That is the point on which the Ninth Circuit has held against you in a different case. Is that right?

MR. COOPER: No, Your Honor, it held -- the application of the Claims Settlement Act?

QUESTION: No, about the aboriginal title.

MR. COOPER: Well, Your Honor, the complaint in this case also raised that precise issue. The complaint, our first cause of action in this case was aboriginal title, and our second cause of action said if we don't have aboriginal title because of your position that has been extinguished by the Claims Settlement Act, then we want the protections of the Conservation Act.

What you are talking about is the Inupiat Community case. That case was filed approximately two years before our case, but when we got to the Court of Appeals the cases were consolidated, and in the opinion in the Inupiat Community case with respect to the discussion of whether the Claims Settlement Act applies to the outer continental shelf simply references the opinion in this case.

QUESTION: Well, did the Ninth Circuit in this case pass on your claim of aboriginal title?

MR. COOPER: What it did is that it assumed that our claim for aboriginal title was valid unless it

had been extinguished by the Claims Settlement Act. It then held that the Claims Settlement Act extinguished -- basically the Claims Settlement Act applied to the outer continental shelf and had extinguished our aboriginal title in that area.

Then it proceeded to find that the Conservation Act essentially was congruent and also applied.

QUESTION: You filed a petition on that, didn't you?

MR. COOPER: Yes, we did file a cross-petition.

QUESTION: So it is still here.

MR. COOPER: Yes, it is still before this Court.

QUESTION: So it is not before us in this case.

MR. COOPER: Well, I think I have answered Justice Scalia's question the same way, is that this case is here from a grant of a preliminary injunction, and of course on the remand, depending what this Court said in its opinion, the Ninth Circuit could go back and reconsider its decision with respect to the aboriginal title claim, as long as we would raise it.

QUESTION: That is on your petition for cert

without granting it?

MR. COOPER: Well, in a sense that would be true, but only because --

QUESTION: You mean we could do that?

MR. COOPER: Yes, you could, but again, only because we're here on a preliminary injunction rather than from a final order. You know, alternatively, although this Court has not done it routinely, it has occasionally, of course, issued writs of certiorari just on the basis of the petition, so obviously it has the power to pass on that issue if it would so choose to.

QUESTION: Mr. Cooper, when the Ninth Circuit originally decided that issue --

MR. COOPER: Yes.

QUESTION: -- in the case several years ago --

MR. COOPER: Yes.

QUESTION: -- was that issue tied to the issue that is before us today?

MR. COOPER: Absolutely.

QUESTION: ANILCA?

MR. COOPER: Absolutely, Your Honor. Our argument about the two statutes has been consistent from the day that we filed the case. We have actually never argued that the term "in Alaska" --

QUESTION: Well, now, wait. Your argument

about the two statutes, now, the Ninth Circuit doesn't agree with your argument as to how the two statutes fit together, does it? I mean --

MR. COOPER: Yes, it does.

QUESTION: Well, the Ninth Circuit says that they are coextensive.

MR. COOPER: That's right, Your Honor.

QUESTION: You say that they are not coextensive. You say --

MR. COOPER: No, Your Honor, that is the government's position. Our position is that the term "in Alaska" in both statutes means exactly the same geographic area, and that either both statutes apply or neither statute applies.

QUESTION: Then who is before us arguing for the more narrow interpretation of the Claims Settlement Act? Nobody.

MR. COOPER: We are arguing for -- what our position is is that what we have said consistently is that we are indifferent as to whether the statutes are construed narrowly or broadly. We are arguing for a consistent interpretation. If the government wants to argue for a broad application of the term "in Alaska," we are happy with that. If they want to argue for a narrow interpretation of the term "in Alaska," we are

happy with that.

QUESTION: When the Ninth Circuit in the case two years ago held that the Claims Settlement Act had a broad interpretation, did it have before it at the same time ANILCA?

MR. COOPER: Yes, it did.

QUESTION: And said at that same time that that also had a broad interpretation?

MR. COOPER: Exactly. And it construed the two statutes together, and that was our argument. We have never in this case actively argued for one interpretation or the other. We have essentially said, you can construe these two statutes broadly. You can construe them narrowly. We don't care. What our position is, though, that they have to be construed consistently. And that was our argument to the Court of Appeals, and that is what they had before it.

You know, our position was, is that the Court of Appeals stretched in the Claims Settlement Act to find that the term "in Alaska" included the outer continental shelf. We have been really hesitant to attack that opinion. One of the questions that the Court had when we argued the Gamble I case is, they put the question to me and said, well, if neither statute applies, if the Claims Settlement Act doesn't apply to

the outer continental shelf, and let's assume that you have aboriginal title in that area, and now it is also true that the Conservation Act applies within the territorial waters of the state of Alaska so you have these comprehensive statutory protections which include, by the way, an absolute priority for hunting and fishing rights, and one of the questions they had, they said, well, how does that work given that the fish and wildlife freely migrate from areas outside the state of Alaska to areas inside the state of Alaska?

I mean, a lot of the most valuable resources, of course, are things like salmon or arctic char, which essentially spawn in fresh water and then go to sea for several years and come back, and they said, well, you know, how would you expect Interior to be able to construe these two totally different schemes? We have aboriginal title outside the three miles, and you have the statutory protections inside, and how do you fit those two together?

That seemed to be a great concern to them. Our position has been that their decision really can't be criticized insofar as it did construe those same terms in the two statutes consistently.

QUESTION: Mr. Cooper, there is one significant difference, it seems to me, that you haven't

addressed, and that is that in ANILCA the statute defines public lands, and it defines -- it uses the term "federal lands" and goes on and defines federal lands as lands the title to which is in the United States. And I suppose you concede that the United States does not have title to the outer continental shelf lands?

MR. COOPER: Well, Your Honor, what we have --

QUESTION: Do you concede that?

MR. COOPER: Well, Your Honor, what we concede is that for purposes of international law and technical interpretations of international law, that the United States does not claim title to the outer continental shelf.

QUESTION: And in the Claims Settlement Act I guess the Act doesn't speak in terms of title in the United States, does it? I mean, that is a difference in the Acts.

MR. COOPER: There is a difference Your Honor, but it is not a difference which appears to be particularly significant, particularly in this case. The reason for that is essentially twofold, and one is that we have cited several statutes to the Court where the United States, where Congress has essentially enacted statutes which explicitly provide that the outer continental shelf -- actually, what they do is, they use

the term "federal lands" and then they say "federal lands but not including," and federal lands they defined as lands to which the United States holds title, but then they go on to say, "and this does not include federal lands on the outer continental shelf."

And we have given the Court -- we have cited two cases which have seemed to suggest that in a practical sense that Congress often treats the outer continental shelf as though in fact it does have title to that area, although obviously in international arenas and for formal purposes it would not.

The second thing that I think is also fairly persuasive here is that we are not -- for purposes of this case we don't have to show that Section 810 applies, that, in other words, the United States holds title to the outer continental shelf. All we have to show is that they are leasing an interest to which they hold title, and title merely denotes the ability to sell, and we have pointed out that the United States does assert that it holds -- that it does have the authority to sell leasehold interests to the mineral resources of the outer continental shelf.

So, our point is, for purposes of this case it is not even really necessary to decide that Congress decided that it held title.

QUESTION: But since Congress knows so much about the continental shelf, did it mention it in any three of these statutes?

MR. COOPER: Well, actually, the only -- there is a -- there is a --

QUESTION: You spent quite a bit of time saying how they were well aware of it. So they were aware of the continental shelf when they were debating this point, weren't they?

MR. COOPER: Well --

QUESTION: Did they mention it?

MR. COOPER: Well, they did. I just wanted to say real briefly -- well, the Claims Settlement Act mentioned it briefly, and it is not important here, but for your question, in Section 1001, which is Title 10 of the Conservation Act, what it says is that Title 10 is supposed to apply to all federal lands which -- obviously the same definition that Title 8 applies to, and then it says "other than those federal lands on the outer continental shelf."

So that in Title 10, Section 1001, there is a very specific reference to the outer continental shelf, and the reference is made for the purposes of ensuring that the ordinary definition which applies to Title 8 does not ensure that Title 19 applies to the outer

continental shelf.

QUESTION: That doesn't necessarily follow. They could very well have said this includes or does not include, couldn't they?

MR. COOPER: Well, if they, if -- I mean, as a matter --

QUESTION: They knew how to say it.

MR. COOPER: Well, as a matter of logic if the term --

QUESTION: I am not talking about logic. I am talking about fact.

MR. COOPER: Well, if federal lands applies, includes within its definition the outer continental shelf, then obviously there is no reason to say that this title applies to federal lands and the outer continental shelf. You would only want to add --

QUESTION: Every time it says public lands it does not include the continental shelf, except the way you have put it.

MR. COOPER: That is correct. The only mention is in the section that I have just cited to you.

QUESTION: Mr. Cooper, are you going to get to the question of the propriety of the injunction in this case, or are you going to leave that to your brief?

MR. COOPER: No, Your Honor, I will turn to that now.

Our position on the injunction is that, just to start off, that there are some substantial violations of Section 810. Section 810 has two sentences. The District Court and the Court of Appeals found violations of the first sentence --

QUESTION: The government, of course, says that the Ninth Circuit really paid no attention to our opinion in Romulo Barcello.

MR. COOPER: That's correct.

QUESTION: Yet I notice the Ninth Circuit opinion simply treats that, our opinion Romulo-Barcello, in a footnote. Do you think the Ninth Circuit adequately dealt with our opinion in Romulo-Barcello?

MR. COOPER: Your Honor, without getting into my personal feelings about the way the Court of Appeals wrote its decision, what I would say is that I think its decision is fully consistent with Romero-Barcello, and by that what I say is that it seemed to me, and of course you would have a much better idea than I would, that Romero-Barcello says -- it relies on TVA v. Hill and it says what has to happen is that analytically we have to look at the statute to see whether an injunction is an appropriate remedy.

In TVA v. Hill, given the statutory language and so forth that an injunction was the appropriate remedy, and then it looked at the Clean Water Act, and under the Clean Water Act the normal violation, the normal remedy for a violation of the Clean Water Act would essentially be an order which the Environmental Protection Agency would obtain which would require compliance at a future date.

And this Court's decision in Romaro Barcello basically says, well, if that is the normal remedy for a violation of the Clean Water Act, then surely that should be -- the Court should have that remedy available for a violation of the Clean Water Act by the government, so we think that if you apply that framework, which is to actually look at the language of Section 810, Section 810 sets out with some specificity the timing that certain studies and that certain findings and hearings and so forth have to be made.

It requires that some of the things be done before the decision to lease is made. In the second sentence it says that other things have to be done before the lease is issued -- excuse me. It says, effected, but in the leasing context that would be issued.

And our position is is that given that

statutory language, that if the Interior has failed to follow that, that obviously the only way to remedy that would be a preliminary injunction. Interestingly, we were not the ones in the Court of Appeals who argued for an injunction. What our position was was that since it was impossible to comply, since Congress had obviously determined that the timing of compliance was extremely important, our position was that it was extremely important, that our proper remedy was an order voiding the sale.

The government and the oil companies came back and they said, oh, no, the proper remedy is not to void the sale. It is to issue, to enjoin activity until such time as Interior complies with the statute. So in some senses we are in a little bit of an odd -- then we went back on the remand and we sent it to the District Court and we said, look, your remand order says, decide whether to void the sale or whether to enjoin further exploration and development until Interior complies, and pending that decision, we think you should issue a preliminary injunction.

Of course, now we are here defending the issuance of the preliminary injunction, but that was not the remedy that we requested.

QUESTION: And the District Court refused to

issue it, and the Court of Appeals said it ought to have issued it.

MR. COOPER: That's correct.

QUESTION: Mr. Cooper, before you sit down, I wanted to get one thing clear on this question of whether we can reach the Claims Settlement Act or not, whether it is before us and so forth. Mr. Bruce said that as far as he was concerned it seemed to him that all the issues relating to the scope of the Claims Settlement Act have been argued here as extensively as they would be argued in any case. Are you satisfied to the same effect?

MR. COOPER: I think that is very true, Your Honor. I think that the arguments about the geographic scope of the Claims Settlement Act have been presented as fully as they would in a separate case, yes.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cooper.

Do petitioners have anything more? You have two minutes left. Mr. Bruce.

ORAL ARGUMENT OF E. EDWARD BRUCE, ESQ.,
ON BEHALF OF THE PETITIONER IN NO. 85-1239 - REBUTTAL

MR. BRUCE: Yes, I would like first to respond to Justice Scalia's comment. I have not said that the

Settlement Act issues have been fully briefed at this point in this Court. We have not briefed them at all. We haven't briefed them because they are not in the case.

Secondly, I reiterate that there is a dispositive difference in the scope of these two statutes. The Claims Settlement Act extinguishment provisions are not limited to public lands, and further that the Claims Settlement Act was written very explicitly to pertain to submerged lands underneath water areas both inland and offshore. The subsistence provisions of ANILCA were not so limited.

Counsel made reference to Section 1001's exclusion --

QUESTION: May I ask you on that last point, to what extent does the record or the legislative history show that the offshore goes beyond three miles? You are talking about Section 4(b), I think, now.

MR. BRUCE: Yes.

QUESTION: But can't that be read, if you interpret "in Alaska" narrowly as just referring to the immediate area immediately offshore?

MR. BRUCE: Your Honor, this is covered fully in the Gamble I opinion at Page 577, Volume 746 of Fed 2nd where Mr. John Pickering, then a spokesperson for a

group interested in the Claims Settlement Act, made the point very explicitly that this would extend to the outer continental shelf. The Ninth Circuit understood that. There is really no ambiguity.

QUESTION: You think that is perfectly clear from Mr. Pickering's presentation.

MR. BRUCE: Perfectly clear.

QUESTION: All right, I will look at it again.

MR. BRUCE: I guess finally I would note that counsel says there would be no great disruption if the Claims Settlement Act were extended to the OCS. Well, in fact, of course, there have been over $4 billion worth of leases that have been purchased over time in connection with offshore oil and gas activities in Alaska. That would be disrupted both by such an application of that statute and by the application of ANILCA, for that matter, to this area.

ANILCA is clear that it does not apply to the OCS. This Court should so hold. It is also clear that the Ninth Circuit totally disregarded this Court's opinion in Weinberger versus Romaro Barcello and this Court should so hold so as to cure that or remove that so-called Ninth Circuit rule that ignores that precedent.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bruce. The case is submitted.

(Whereupon, at 11:01 o'clock a.m., the case in the above-entitled matter was submitted.)

# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-1239 - AMOCO PRODUCTION COMPANY, ET AL., Petitioners V. VILLAGE OF GAMBELL, ALASKA, ET AL.; and

#85-1406 - DONALD P. HODEL, SECRETARY OF INTERIOR, ET AL., Petitioners V. VILLAGE OF GAMBELL, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)