

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN STURGEON, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 17-949  
 )  
BERT FROST, IN HIS OFFICIAL )  
 )  
CAPACITY AS ALASKA REGIONAL )  
 )  
DIRECTOR OF THE NATIONAL PARK )  
 )  
SERVICE, ET AL., )  
 )  
 Respondents. )  
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Pages: 1 through 71  
Place: Washington, D.C.  
Date: November 5, 2018

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P R O C E E D I N G S

(10:05 a.m.)

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

Mr. Findley.

ORAL ARGUMENT OF MATTHEW T. FINDLEY  
ON BEHALF OF THE PETITIONER

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

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

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

Section 103(c) of the statute preserved the status of these non-public lands and waters by excluding them from ANILCA's 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 -- duty to manage these parks  
17      for the purpose of maintaining the Kobuk River,  
18      the 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 it's 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 JUSTICE SOTOMAYOR: All right. So --

19 MR. FINDLEY: -- statehood.

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

25 MR. FINDLEY: It cannot do that work

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

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

15 JUSTICE SOTOMAYOR: Does it make any  
16 --

17 MR. FINDLEY: -- that protects the  
18 river.

19 JUSTICE SOTOMAYOR: -- difference that  
20 a park is designated as a wild and scenic  
21 river?

22 MR. FINDLEY: No, it does not, Your  
23 Honor. The Wild and Scenic Rivers Act was even  
24 specifically amended by ANILCA to make sure it  
25 wasn't covering state land that goes into the

1 site of the river, and the Wild and Scenic  
2 Rivers Act itself recognizes state ownership of  
3 submerged lands. In the Wild and Scenic Rivers  
4 Act, there's nothing about those designations  
5 that undoes the central compromise that was  
6 through 103(c).

7 JUSTICE SOTOMAYOR: That's a quite  
8 extreme --

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

15 MR. FINDLEY: The federal government  
16 may. The Park Service may not. That was a  
17 power that was not delegated to the Park  
18 Service. An example that even the Park Service  
19 brings up in its brief is the Yukon-Kuskokwim  
20 Wildlife Refuge. So there's a very specific  
21 provision directing that the Park Service may  
22 not impede access to these rivers.  
23 Particularly in that area of Alaska where there  
24 are no roads, the Yukon and the Kuskokwim River  
25 are the arteries of commerce that's helpful to

1 get to and from villages. That's how they go  
2 to vote. That's how to buy groceries.

3 And the specific mandate in ANILCA is  
4 we are about to surround these highways with  
5 these federal lands, we're going to put them in  
6 a conservation system unit, that's great, but  
7 please do not block access to the highway. And  
8 that's the point of exempting the rivers.

9 CHIEF JUSTICE ROBERTS: So an agency  
10 like EPA is -- is fully empowered to regulate  
11 the waters?

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

19 JUSTICE KAGAN: What does that do --

20 MR. FINDLEY: -- the ANILCA parks.

21 JUSTICE KAGAN: -- to your federalism  
22 argument? Because, at various times in your  
23 brief, you press federalism concerns. But I'm  
24 wondering, if those concerns have a lot of  
25 weight, if what you're really saying is not

1 this agency but that agency?

2 MR. FINDLEY: When it comes to  
3 interpreting the Organic Act, against Section  
4 103(c), those aren't necessarily implicated,  
5 although, as this Court recognized in the first  
6 decision, the state's power over its navigable  
7 waters does raise significant issues of state  
8 sovereignty. And any time this Court addresses  
9 a case of navigable waters, the refrain rings  
10 throughout these cases that the state's  
11 ownership of the submerged lands and control  
12 and ownership of the resources within it is a  
13 hallmark of state -- state sovereignty and a  
14 hallmark of federalism.

15 Where the clear statement rule comes  
16 into play is the Park Service's fallback  
17 argument here, which is, well, if you look at  
18 reserve water rights, this can turn these into  
19 public lands and actually make these part of  
20 the park.

21 And there's nothing in ANILCA that's a  
22 clear statement saying we are going to take the  
23 state's submerged lands, make them public  
24 lands, and actually include them in the parks.

25 When we were here last time, we talked

1 about when that happens, the enabling statute  
2 is very clear. And the statute that added Lake  
3 Ozette to the Olympic National Park actually  
4 specifically said we are adding the submerged  
5 lands to the park, so --

6 CHIEF JUSTICE ROBERTS: So you just --  
7 it -- it -- you just don't like the Park  
8 Service. The Coast Guard is fine with you, the  
9 Army Corps of Engineers is fine with you, the  
10 EPA is fine. But not the Park Service?

11 MR. FINDLEY: It's not that we don't  
12 like the Park Service, as it -- it's that layer  
13 of regulation --

14 (Laughter.)

15 MR. FINDLEY: -- that was not supposed  
16 to apply on top. Yes, Mr. Chief Justice,  
17 that's exactly right.

18 JUSTICE ALITO: Which sentence of  
19 Section 3103(c) do you think wins this case for  
20 you?

21 MR. FINDLEY: The second -- second  
22 sentence does the most work, but the second  
23 sentence needs to be read in conjunction with  
24 all three sentences and in conjunction with the  
25 context of the statute.

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

6 MR. FINDLEY: Thank you. So you --  
7 you -- the first sentence of 103(c) has just  
8 told you that any non-public land, whether it's  
9 state land, submerged -- submerged lands,  
10 waters, native corporation, or private land, it  
11 is not going to be part of the park.

12 JUSTICE ALITO: It's not a portion of  
13 the park?

14 MR. FINDLEY: It's not a portion of  
15 the park. It may be surrounded by the outer  
16 boundaries --

17 JUSTICE ALITO: Yeah, and -- and --

18 MR. FINDLEY: -- but it's not part of  
19 the unit.

20 JUSTICE ALITO: Yeah, and -- and, you  
21 know, whether something can be within a unit  
22 but not be a portion of the unit is kind of a  
23 nice question. I don't think there's a -- a  
24 slam-dunk answer to that one way or the other.  
25 Would you agree?

1           MR. FINDLEY: I -- I would agree, but  
2 the Court doesn't need to reach that issue. To  
3 the second sentence, it then says no lands  
4 which on or before December 2, 1980, have been  
5 conveyed to the state, native corporation, or  
6 private person. Again, shorthand, non-public  
7 lands.

8           JUSTICE ALITO: Right.

9           MR. FINDLEY: They shall not be  
10 subject to regulations applicable solely to  
11 public lands within the units. And what that  
12 is telling you is not only are they not part of  
13 the unit, they may not be regulated as though  
14 they were.

15           And that's the function of the word  
16 "solely," is to distinguish between park  
17 management regulations and the regulations Mr.  
18 Chief Justice was talking about, Coast Guard,  
19 EPA and --

20           JUSTICE KAGAN: Well, how does it do  
21 --

22           JUSTICE ALITO: All right. When --

23           JUSTICE KAGAN: -- that? I'm sorry.

24           JUSTICE ALITO: If I can just ask one  
25 more question related to this. I understand

1 that lands is defined by ANILCA to include  
2 inter -- water and waters and interests  
3 therein, but the second sentence after  
4 referring to lands then refers to a conveyance,  
5 which I take it means the transfer of title.

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

8 MR. FINDLEY: The -- there are two --  
9 two parts to that. First of all, the submerged  
10 lands were conveyed to Alaska. The Submerged  
11 Lands Act was specifically included within the  
12 --

13 JUSTICE ALITO: Right.

14 MR. FINDLEY: -- Statehood Act.

15 In terms of having title to water,  
16 this Court has, in U.S. v. California, and PPL  
17 Montana, certainly suggested with very strong  
18 language that, with -- with the Submerged Lands  
19 Act, with title to the submerged lands, and  
20 with ownership and control of all the resources  
21 within there, that is effectively title to the  
22 waters.

23 JUSTICE ALITO: No, I mean as to the  
24 public lands.

25 MR. FINDLEY: Right.

1 JUSTICE ALITO: So public lands are  
2 defined -- I mean, lands are defined the same  
3 way. They include water. Public means, I take  
4 it, title in the United States, but the United  
5 States does not have title to navigable waters,  
6 is that right?

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

9 JUSTICE KAGAN: Could I ask you to go  
10 back --

11 JUSTICE SOTOMAYOR: The state doesn't  
12 -- I'm sorry.

13 JUSTICE KAGAN: -- to the --

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

15 JUSTICE KAGAN: Okay, could I ask you  
16 to go back to the applicable -- regulations  
17 applicable solely to public lands? And you  
18 suggested that that language is what  
19 distinguishes Park Service regulations from,  
20 let's say, EPA regulations.

21 But, when I read that language,  
22 "regulations applicable solely to public  
23 lands," it seems to be making a distinction  
24 between regulations that apply solely,  
25 exclusively to public lands and those that

1 apply more broadly to both public and private  
2 lands.

3 That seems to be the distinction this  
4 makes on its face. So I guess I don't quite  
5 get how -- how you make it into something  
6 different.

7 MR. FINDLEY: Yes. And Mr. Sturgeon's  
8 position, as with the state, is that "solely"  
9 distinguishes between the generally applicable  
10 regulations that we talked to Mr. Chief Justice  
11 about, Coast Guard, EPA, and so on, and park  
12 management regulations.

13 If you were to take the word "solely"  
14 out of the statute, you would have  
15 inadvertently exempted these lands from a  
16 myriad of other federal regulation that applied  
17 before ANILCA and that was certainly intended  
18 to apply -- apply after ANILCA.

19 If you look, I mean, the Park Service  
20 in its argument about Section 103(c) and  
21 argument --

22 JUSTICE KAGAN: But -- but --

23 MR. FINDLEY: Go ahead.

24 JUSTICE KAGAN: -- but -- but I guess  
25 solely to public lands, is like if you take out

1 the -- if you take out the word "solely," this  
2 -- this is saying solely to public lands as  
3 compared to what, as compared to -- to public  
4 lands and something else, meaning non-public  
5 lands. And that seems to be the distinction  
6 it's drawing: solely to public lands, or to  
7 public lands and something else, non-public  
8 lands.

9 MR. FINDLEY: The sentence needs to  
10 have meaning beyond articulating what is  
11 already true. If a regulation is promulgated  
12 only to apply to public lands, it already only  
13 applies to public lands. That second sentence  
14 has to have meaning.

15 And if it doesn't prohibit the Park  
16 Service from issuing the exact regulation at  
17 issue here, which is a regulation designed to  
18 touch both public and non-public land, that  
19 sentence actually doesn't prohibit anything.  
20 It needs to have prohibitive effect.

21 If you want to understand its  
22 prohibitive effect, you look at this came into  
23 the statute, it was not a last-minute technical  
24 addition. It was introduced in the House by  
25 Representative Seiberling a year and a half

1 before ANILCA was passed, and he specifically  
2 said the fact that these non-public lands were  
3 within the units drawn on the map does not  
4 change the status of that state native for  
5 private land.

6 And that goes back to, if we're about  
7 to surround these lands with the parks, they  
8 were already subject to a rich matrix of  
9 federal regulations before ANILCA. You are not  
10 going to subject them to any new array of  
11 federal regulation merely because of them being  
12 surrounded by the park.

13 JUSTICE KAGAN: I -- I understand what  
14 -- I think it's a good point, the point you  
15 make about, look, if it were public lands  
16 versus public and non-public lands, this would  
17 not be doing very much.

18 But I -- I guess what I want to know  
19 from you is, like, why pick this language to  
20 convey what you want to convey? I mean, how do  
21 I have to manipulate this language to get it to  
22 mean what you want it to mean?

23 MR. FINDLEY: I can't answer why  
24 Congress chose those specific words.

25 JUSTICE KAGAN: But, I mean, like

1 what -- what -- what could you do to this  
2 language to make it more like what you're  
3 suggesting it means? Because I look at this  
4 language, it just doesn't say -- it's just not  
5 anywhere close to what you're saying it means.

6 MR. FINDLEY: I mean, we believe the  
7 --

8 JUSTICE KAGAN: But maybe I'm wrong  
9 about that. I really am trying -- I'm  
10 struggling with this.

11 MR. FINDLEY: If the language weren't  
12 read in context with all three sentences, and  
13 read in context with the statute, the meaning  
14 becomes clearer. And perhaps in hindsight they  
15 could have written something about applicable  
16 solely to land, you know, solely land  
17 management power, but what your -- the "solely"  
18 is drawing that distinction of the regulations  
19 that only could come into play after the  
20 passage of ANILCA. And it's important to keep  
21 in mind that, without provisions like  
22 Section 103(c), there is no ANILCA. There are  
23 no ANILCA parks.

24 And the -- the large debate, it took  
25 two years to pass the statute, there were

1 issues relating to the Native Claims Settlement  
2 Act, there were issues related to the Statehood  
3 Act, and it was a very large debate, that this  
4 Court recognized in Amoco, of what lands will  
5 go into a conservation system unit and be  
6 subject to much more rigorous conservation  
7 regulations and which lands will not go into  
8 these things.

9 CHIEF JUSTICE ROBERTS: Did the -- the  
10 Park Service had no -- no regulatory authority  
11 over these areas prior to ANILCA or --

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

13 JUSTICE BREYER: Well, I mean, that  
14 seems the question to me, that -- that the Park  
15 Service has a reg, imagine, that says no  
16 bonfires in Yellowstone, within the boundaries  
17 of Yellowstone. There are some private  
18 enclaves within Yellowstone, but they mean no  
19 boundaries -- forget it. I want you to reserve  
20 your time. I'd rather you reserved your time.  
21 I'll ask them.

22 MR. FINDLEY: Oh, okay. Thank you.  
23 If there are no other questions, I will reserve  
24 my time.

25 (Laughter.)

1 MR. FINDLEY: Thank you.

2 CHIEF JUSTICE ROBERTS: Good -- good  
3 choice. Thank you, counsel.

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: Ms. Botstein.

6 ORAL ARGUMENT OF RUTH BOTSTEIN FOR ALASKA,  
7 AS AMICUS CURIAE SUPPORTING THE PETITIONER

8 MS. BOTSTEIN: Mr. Chief Justice, and  
9 may it please the Court:

10 Understanding ANILCA requires  
11 understanding remote Alaska. In most of the  
12 state, a vast wilderness that is more than  
13 twice the size of Texas, our rivers are our  
14 only roads. When Congress surrounded many of  
15 these crucial state waterways with federal park  
16 areas, it consciously chose not to take away  
17 state control over these crucial rivers.

18 Instead, Congress left them under  
19 state control as part of its commitment to  
20 providing adequate opportunity for satisfaction  
21 of the economic and social needs of the State  
22 of Alaska and its people.

23 This Court should reject the Park  
24 Service's continuing attempts to commandeer  
25 control of Alaska's navigable waters, because

1 that is not what Congress intended.

2 CHIEF JUSTICE ROBERTS: Well,  
3 "commandeer" is strong language, but what --  
4 what do you say for the -- the Park Service's  
5 argument that, with respect to their reserved  
6 water rights and so on, that you would be  
7 creating a checkerboard sort of situation where  
8 the Park Service has authority with respect to  
9 some areas but not others along -- along the  
10 river?

11 MS. BOTSTEIN: It is true that both  
12 within these park areas there are areas of  
13 mixed jurisdiction. Congress absolutely knew  
14 that because it created islands of private and  
15 native corporation land that were beyond the  
16 reach of park management regulation and,  
17 similarly, with the waters.

18 And that's consistent with the default  
19 way that water management is done. I mean, PPL  
20 Montana mandates a segment-by-segment  
21 navigability analysis. So, even along large  
22 waters, there is a mixed jurisdiction. That --

23 CHIEF JUSTICE ROBERTS: But what  
24 authority would you say that the Park Service  
25 has? I mean, you're asserting authority with

1 respect to the river. The Park Service in,  
2 apart from inholdings, has authority with  
3 respect to the land.

4 How do you resolve conflicts that are  
5 inevitably going to arise?

6 MS. BOTSTEIN: What Congress did was  
7 mandated cooperative management as a primary  
8 management tool in these parks, so -- and --  
9 and this gets back to the first question from  
10 the Court. Justice Sotomayor asked how can the  
11 Park Service fulfill its statutory mission if  
12 it doesn't have title to all the lands and the  
13 waters.

14 What Congress said is you work  
15 together and create a management plan for each  
16 area, identify areas of concern on public and  
17 non-public land, and work with landowners and  
18 the State of Alaska to try to cooperatively  
19 resolve those conflicts because Congress knew  
20 it wasn't giving sole and exclusive  
21 jurisdiction to the federal government.

22 If there's any doubt about that, Your  
23 Honor --

24 JUSTICE SOTOMAYOR: I don't think  
25 you've answered my question. How is the

1 government, the federal government, supposed to  
2 fulfill its statutory duties? There are many  
3 rivers here that they're given explicit  
4 obligations.

5 Your basically saying 103(c) trumps  
6 that doesn't make much sense to me. If a  
7 statute tells the government do this and at the  
8 same time reserves some rights to the state,  
9 doesn't the federal government's obligation to  
10 do this, the explicit obligation to deal with  
11 certain rivers in a particular way, trump any  
12 other exemption that you might have?

13 MS. BOTSTEIN: No, Your Honor, because  
14 the statutory mission is limited to regulation  
15 on the public lands, on the federal lands.

16 Congress reserved state lands,  
17 non-public lands to Alaska, private landowners,  
18 or native corporations. Another --

19 JUSTICE SOTOMAYOR: I -- I'm sorry --

20 MS. BOTSTEIN: -- way to think --

21 JUSTICE SOTOMAYOR: -- just that's not  
22 true. Many of these rivers are specifically  
23 named in the statute.

24 MS. BOTSTEIN: Yes.

25 JUSTICE SOTOMAYOR: And your position

1 or your co-counsel's position is that all of  
2 these rivers belong to the state?

3 MS. BOTSTEIN: The navigable rivers  
4 that were state -- that were not federal owner  
5 -- in ownership that passed to the state under  
6 the Submerged Lands Act, yes.

7 JUSTICE SOTOMAYOR: Well, we have a  
8 problem with whether you can own navigable  
9 waters, but that's a different issue.

10 MS. BOTSTEIN: What Congress did, Your  
11 Honor, was said -- you know, when Congress  
12 names the rivers as part of a watershed, in  
13 part what it's saying is, on the public lands,  
14 your statutory mission is to regulate in a way  
15 that protects these watersheds, protects access  
16 to the watersheds, protects the watersheds,  
17 but, at the same time, it is the state that has  
18 jurisdiction over the water themselves.

19 And if there's any doubt about this,  
20 if you look through Title 16, when Congress  
21 created different national parks, it used  
22 vastly different jurisdictional language.

23 When Congress created Yellowstone,  
24 which Justice Breyer mentioned, this is what it  
25 said: The Yellowstone National Park, as its

1 boundaries now are defined or as they may  
2 hereinafter be defined or extended, shall be  
3 under the sole and exclusive jurisdiction of  
4 the United States.

5 That's a very clear statement that  
6 says we drew a circle and everything within it  
7 is federal; the Park Service can manage it. It  
8 does violence to Congress's differing intent to  
9 interpret Section 103(c) to mean the same as  
10 what -- sole and exclusive federal  
11 jurisdiction.

12 And Congress had very good reasons for  
13 giving Alaska more sovereign power, reserving  
14 more sovereign power to Alaska than it did to  
15 Wyoming, because this statute is not a pure  
16 conservation statute. This is also a statute  
17 that fulfills the promises made to Alaska at  
18 statehood and in the Native Claims Settlement  
19 Act about local control and self-sufficiency  
20 designed by Alaskans.

21 JUSTICE SOTOMAYOR: I'm having a hard  
22 time accepting your position in this case with  
23 your position that the Katie John decisions  
24 should be retained. I don't know how we can  
25 give different meaning to public lands in two

1 provisions of the same Act.

2 MS. BOTSTEIN: Your Honor, giving  
3 effect to Congress's intent in ANILCA does --  
4 may require preserving the rural subsistence  
5 priority in Title 8 of the legislation, even if  
6 it does require a different statutory  
7 definition.

8 Now no party has challenged the  
9 current federal subsistence management --  
10 subsistence regulations. The briefing  
11 certainly reflects this is an issue of great  
12 concern to the people of Alaska and its rural  
13 residents. And the Court should not upset  
14 those settled expectations of Alaskans today.

15 A different definition in these titles  
16 does reflect Congress's very different intent  
17 in Title 8. Title 8 could have been its own  
18 statute. It has its own statement of purpose.  
19 It has its own -- it is the only place in this  
20 extensive law where Congress specifically  
21 exercised its commerce power.

22 And it has a federal takeover  
23 provision that says Congress was so concerned  
24 that there be an -- an -- an enforceable  
25 subsistence priority that it gave explicitly

1 the federal government the right to regulate  
2 that if the state could not, which is how it  
3 played out.

4 So we don't think the Court needs to  
5 resolve this issue today, but we do ask that  
6 the Court leave some space open for those to be  
7 differently interpreted in --

8 JUSTICE SOTOMAYOR: One could --

9 MS. BOTSTEIN: -- accordance with  
10 Congress's intent.

11 JUSTICE SOTOMAYOR: -- if one defines  
12 them the same, but not in accordance with your  
13 views, but in accordance with the government's  
14 current view, and the Katie law decisions  
15 view --

16 MS. BOTSTEIN: The statute --

17 JUSTICE SOTOMAYOR: -- then you don't  
18 win here.

19 MS. BOTSTEIN: The statute does  
20 contain one definition. We've cited to the  
21 Court in our brief cases that do suggest, in  
22 these long complicated statutes, we do look to  
23 Congress's intent in the context of the  
24 statute, and that can mean that a term does  
25 have different meaning in different sections

1 when that is what Congress --

2 JUSTICE SOTOMAYOR: So --

3 MS. BOTSTEIN: -- intended.

4 JUSTICE SOTOMAYOR: -- why isn't an --  
5 all of the references to the government's  
6 control of rivers in this Act a similar  
7 statement of purpose?

8 MS. BOTSTEIN: Because those need to  
9 be read in the context of 103(c), which doesn't  
10 say the federal government can come in and  
11 regulate these rivers if we don't --

12 JUSTICE SOTOMAYOR: Or regulate --

13 MS. BOTSTEIN: -- compel and ask them  
14 to do that.

15 JUSTICE SOTOMAYOR: -- subsistence  
16 living, but you're arguing that the purpose of  
17 the statute is reflected in its structure and  
18 words. And the structure and words here are  
19 giving the government defined statutory duties  
20 for any number of rivers within this compound.

21 So it -- I don't see the difference in  
22 the logic.

23 MS. BOTSTEIN: Your Honor, the  
24 statutory duties that the Park Service is  
25 given, is delegated to regulate for

1 non-subsistence purposes, is limited by Section  
2 103(c) and --

3 JUSTICE KAVANAUGH: You agree --

4 MS. BOTSTEIN: -- that is a meaningful  
5 restriction.

6 JUSTICE KAVANAUGH: You agree with the  
7 Katie John decisions, correct?

8 MS. BOTSTEIN: We are not challenging  
9 the federal subsistence management regulations  
10 --

11 JUSTICE KAVANAUGH: Do you -- do you  
12 --

13 MS. BOTSTEIN: -- that were mentioned.

14 JUSTICE KAVANAUGH: Does the State of  
15 Alaska agree with those decisions?

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

22 And, certainly, Congress had good  
23 reasons for treating Alaska differently than  
24 other states in the main body of the statute  
25 because this comes back to the Congress's

1 special solicitude for Alaska and its  
2 uniqueness, which are concerns this Court spoke  
3 about in its 2016 opinion.

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

10 And these are exactly the reasons that  
11 states were given -- if -- if I may finish my  
12 sentence, Your Honor?

13 CHIEF JUSTICE ROBERTS: Sure.

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

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Mr. Kneedler.

22 ORAL ARGUMENT OF EDWIN S. KNEEDLER

23 ON BEHALF OF THE RESPONDENTS

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

1 I'd like to identify at the outset two  
2 statutes that have not been discussed which we  
3 think are very important to understand the  
4 provisions of ANILCA at issue here.

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

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

19 So the question here is whether that  
20 was somehow abrogated when it comes to Alaska.  
21 And I think the answer to that question is in  
22 another provision that --

23 JUSTICE GORSUCH: Mr. Kneedler --

24 MR. KNEEDLER: -- is not mentioned.

25 JUSTICE GORSUCH: -- before we get to

1 the abrogation question --

2 MR. KNEEDLER: Yes.

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

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

18 But that's not what the statute says.  
19 It says that the -- it may prescribe  
20 regulations concerning boating or other  
21 activities that themselves relate to water in  
22 system units.

23 So I would think that the government  
24 would have to prove some nexus between boating  
25 or the other activities and the water within

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

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

10 JUSTICE GORSUCH: No. I'm -- I'm  
11 asking whether --

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

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

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

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

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

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

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

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

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

13 JUSTICE GORSUCH: Okay.

14 MR. KNEEDLER: It may be --

15 JUSTICE GORSUCH: If I don't buy that  
16 argument, then do you have anything 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 --

18 JUSTICE GORSUCH: Let alone seen.

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

6 JUSTICE BREYER: I got that one.

7 MR. KNEEDLER: -- which --

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

11 But -- but is there another one?

12 MR. KNEEDLER: No, Justice, if I could  
13 just finish --

14 JUSTICE BREYER: I'm not --

15 MR. KNEEDLER: -- my point.

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

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

1 the fact that the waters, the navigable waters,  
2 were not conveyed to the state, and, therefore,  
3 the Secretary's regulatory authority over such  
4 waters is not -- is not --

5 JUSTICE SOTOMAYOR: Can --

6 JUSTICE ALITO: Who has title to --

7 MR. KNEEDLER: -- affected at all by  
8 the --

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

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

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

1 the Park Service lands themselves, the -- the  
2 -- the usual Park Service lands. It wanted  
3 them to be set apart.

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

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

15 JUSTICE GORSUCH: But, Mr. Kneedler --

16 MR. KNEEDLER: -- of navigable waters  
17 --

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

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

1 JUSTICE GORSUCH: Right. But  
2 everything relates. All waterways are  
3 connected. And you say it's not just the  
4 waterway but anything related to the waterway  
5 that you own or that you claim to have land on  
6 besides --

7 MR. KNEEDLER: Well, it --

8 JUSTICE GORSUCH: -- so where is the  
9 limit?

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

16 JUSTICE GORSUCH: So it's plenary --  
17 it's plenary then, right?

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

1 regulate the waters --

2 CHIEF JUSTICE ROBERTS: Well, but --

3 MR. KNEEDLER: -- themselves.

4 CHIEF JUSTICE ROBERTS: -- that's --  
5 the --

6 MR. KNEEDLER: The Clean Water Act,  
7 for example.

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

14 MR. KNEEDLER: Well, Congress  
15 regulates, again, outside of parks, regulates  
16 extensively navigable waters for dredging and  
17 filling, for --

18 CHIEF JUSTICE ROBERTS: It regulates  
19 navigable waters. The question --

20 MR. KNEEDLER: -- the Clean Water Act,  
21 for pollution.

22 CHIEF JUSTICE ROBERTS: No, no, all  
23 sorts of things. And that's, as the state  
24 reads it and the private party, that's what the  
25 "solely" is for. They agree that the Clean

1 Water Act applies. They agree that the  
2 navigational servitude applies. I think they  
3 agree that the reserved water rights apply.

4 They -- what they don't agree is that  
5 that is a lever that gives you authority to do  
6 this sort of day-to-day regulation, such as,  
7 you know, the hovercraft traffic.

8 MR. KNEEDLER: Well, the --

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

13 (Laughter.)

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

22 The fact that the Secretary is -- is  
23 permitted to regulate boating only subject --  
24 only reasonably means that he can regulate  
25 boating, means the National Park Service can

1 regulate boating --

2 JUSTICE SOTOMAYOR: So am I to --

3 MR. KNEEDLER: -- on -- on waters  
4 within the park.

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

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

20 The uplands are very --

21 JUSTICE SOTOMAYOR: So you're --

22 MR. KNEEDLER: -- different.

23 JUSTICE SOTOMAYOR: -- basically  
24 saying, whatever the regulations were under the  
25 Organic Act or even under this Act, and

1 charging you with taking care of certain parks,  
2 that the navigable waters are part of that  
3 charge?

4 MR. KNEEDLER: Yes. And the uplands  
5 are different, and that's really what drove  
6 103(c), was to make sure that these land  
7 selections were not going to be subject to the  
8 general regulations of the Park Service.

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

25 CHIEF JUSTICE ROBERTS: So your --

1 MR. KNEEDLER: The Park Service --

2 CHIEF JUSTICE ROBERTS: You think --

3 MR. KNEEDLER: -- has not done more  
4 than that.

5 CHIEF JUSTICE ROBERTS: So -- so you  
6 think the state's argument works with respect  
7 to solid land, land land?

8 MR. KNEEDLER: Well --

9 CHIEF JUSTICE ROBERTS: It's --

10 MR. KNEEDLER: -- there is --

11 CHIEF JUSTICE ROBERTS: It's only  
12 because you don't think that water is included  
13 in public lands that their argument doesn't  
14 work?

15 MR. KNEEDLER: No, their -- well,  
16 it's because --

17 CHIEF JUSTICE ROBERTS: It's only  
18 because it is water?

19 MR. KNEEDLER: Water -- water was not  
20 conveyed to the state. That's the first  
21 argument.

22 The second argument is, if you have a  
23 regulation that, in the case -- examples I  
24 mentioned, regulations issued pursuant to  
25 statutory directive to apply to both public and

1 non-public lands within the national park, that  
2 comes within the reference they are not  
3 regulations applicable solely to --

4 CHIEF JUSTICE ROBERTS: But that's --

5 MR. KNEEDLER: -- public lands and --

6 CHIEF JUSTICE ROBERTS: -- that's the  
7 -- that's one of your arguments that causes me  
8 concern, because you're saying that if the  
9 regulation applies to the -- the private or  
10 state land, then it is not a regulation solely  
11 applicable to public land and, therefore, it's  
12 not covered.

13 But the -- the sentence is obviously  
14 designed to protect the state, the natives, and  
15 the private landholders against the federal  
16 government or the Park Service to whatever  
17 extent we can debate. But to say that all the  
18 Park Service has to do to get around it is say,  
19 oh, and this applies to the inholdings, that  
20 can't be right.

21 MR. KNEEDLER: Well, I'm -- I'm not  
22 saying -- I'm not -- in fact, I would disclaim  
23 the proposition that the Park Service could  
24 treat them as -- as -- as -- the same way it  
25 treats regular Park Service lands. It cannot

1 do that. And the only examples where it has  
2 issued regulations that go beyond that are  
3 pursuant to specific statutory directive, of  
4 which the 1976 Act regulating waters is one.  
5 Now that's --

6 JUSTICE KAGAN: But, if --

7 MR. KNEEDLER: Now that's --

8 JUST KAGAN: -- I understand your  
9 view, Mr. Kneedler, what you're saying this  
10 means is that non-public lands shall not be  
11 subject to regulations that are applicable only  
12 to public lands.

13 And you don't need a statute to tell  
14 you that. Of course, non-public lands aren't  
15 subject to regulations applicable solely to  
16 public lands. If that's what the statute was  
17 saying, who would need a statute?

18 MR. KNEEDLER: Well, I -- I think the  
19 purpose of the statute -- and, again, I think  
20 this comes through in the legislative history  
21 that -- that is cited on the other side -- the  
22 native groups were concerned, and as was the  
23 state, that because large tracts of land that  
24 they had selected were going to be included  
25 within the -- in the -- within the outer

1 boundaries, that they were not going to be --  
2 that they would be treated just like -- they  
3 wanted assurance that they wouldn't be treated  
4 just like Park Service.

5           And that's what this did. It's  
6 important to recognize that this is subsection  
7 (c) of a section that deals with maps. It  
8 isn't -- it -- it doesn't -- you would think if  
9 there was some major substantive change -- work  
10 that this was supposed to do aside from the  
11 substantive regulations, it would appear  
12 elsewhere.

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

14           JUSTICE KAGAN: But just on the face  
15 of things, Mr. Kneedler, if -- if the Park  
16 Service issues a regulation and the regulation  
17 says this applies only to public lands within a  
18 park, right, and you're not a public land  
19 within a park, you're a private land within a  
20 park, what kind of assurance do you need?

21           It's like you know that you're not a  
22 public land, so it doesn't matter that you're  
23 in the park. You don't need a special statute  
24 to tell you that, do you? You only need a  
25 special statute if the special statute exempts

1 you from something that would otherwise apply  
2 to you.

3 MR. KNEEDLER: With all respect, I  
4 don't think that's correct. I think that the  
5 -- I think that there was a lot of debate about  
6 -- about different versions of the statute.  
7 And I -- and I think if you -- if you recall,  
8 as I said, this was in a section dealing with  
9 maps, and the statute required that the -- that  
10 the -- that the lot -- the boundaries -- that  
11 maps be published identifying what the parks  
12 were.

13 Those maps might have -- and -- and,  
14 in fact, I think did -- just outline the outer  
15 boundaries. And so subsection (c) says, well,  
16 yeah, that -- that may be the boundaries of  
17 what was designated, but we want to be clear  
18 that it's only -- it's only the public lands  
19 that will be deemed to be portions --

20 CHIEF JUSTICE ROBERTS: But you're not  
21 taking --

22 JUSTICE BREYER: Though I think there  
23 are --

24 JUSTICE ALITO: Can I ask a question  
25 about --

1           CHIEF JUSTICE ROBERTS: -- adequate  
2 account of -- of the third sentence. I mean,  
3 you're trying to minimize it by saying it's  
4 maps. The third sentence has to illuminate the  
5 first two. And what it says is, if a state, a  
6 native corporation, or an owner wants to convey  
7 lands to the Secretary, it can.

8           In other words, if you -- the -- the  
9 -- the Secretary, feels that you need to have  
10 authority over areas that you don't, it tells  
11 you in -- in the third sentence how to do it:  
12 get the state or the native corporation to  
13 convey it to you.

14           That would be an odd sentence to  
15 include if this were not -- if this were a -- a  
16 -- a protection you could write around just by  
17 saying, oh, and, by the way, this applies to  
18 the -- the inholders.

19           MR. KNEEDLER: No, I -- I don't think  
20 so at all. I mean, I think -- I think this  
21 provision was in there because if the -- if you  
22 had native or state selected lands or native  
23 lands, the corporation -- the native  
24 corporation, they were -- if they decided to  
25 sell their land, this just says that the Park

1 Service could purchase it.

2 JUSTICE ALITO: If you claim that --

3 JUSTICE BREYER: Can I go back to this  
4 question because this is obviously the question  
5 that's bothering some of us, okay?

6 And it seems to me you sort of  
7 answered it both ways. You're not -- I -- I  
8 started out thinking that if a reg applies to  
9 Mr. Smith's inholding in Yosemite because it  
10 applies to all of Yosemite, that that is solely  
11 public lands.

12 Why? Because if the only things that  
13 count as a reg for public lands -- we've said  
14 this three times -- are -- are those regs that  
15 say they don't apply to Smith's inholding, you  
16 don't need this statute, okay? That's the  
17 basic thing.

18 Now some of what you said seems to  
19 agree with that and some of it does not. But  
20 what I took your basic arguments to be, one,  
21 that water, unlike Mr. Smith's cabin, is close  
22 enough to public lands that it's out of this  
23 thing.

24 Two, even if it isn't, there are other  
25 statutes that give specific authority to the

1 government to regulate the water. And one of  
2 them might be general. One of them might be  
3 the ones you just started off your argument  
4 with. One of them might be -- I don't know.  
5 There are two or three on that.

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

10 MR. KNEEDLER: No, I -- I think  
11 it's --

12 (Laughter.)

13 MR. KNEEDLER: -- I think it's  
14 basically correct, but there is the category of  
15 regulations that are not applicable solely to  
16 public lands because -- because they have been  
17 made applicable to inholdings within the Park  
18 Service.

19 Whether or not that's valid in any  
20 particular case is a different matter, but  
21 there are three, as I mentioned, that were done  
22 pursuant to statutory authorization, and those,  
23 I think, must be valid because Congress has  
24 authorized them.

25 CHIEF JUSTICE ROBERTS: Counsel, I

1 think --

2 MR. KNEEDLER: But that is not really  
3 involved here. Here, we're only talking about  
4 --

5 CHIEF JUSTICE ROBERTS: Counsel --

6 MR. KNEEDLER: Waters which were not  
7 --

8 CHIEF JUSTICE ROBERTS: -- Justice  
9 Alito has been trying to ask a question.

10 MR. KNEEDLER: I'm sorry.

11 (Laughter.)

12 JUSTICE ALITO: Thank you, Chief  
13 Justice.

14 I just wanted to ask you a question  
15 about implied reserved water rights. In the  
16 cases where we have dealt with that, the  
17 government has been asked to show in detail the  
18 purpose of the reservation and the volume of  
19 water that's necessary to achieve that purpose.

20 Do you have to make any kind of  
21 showing like that here?

22 MR. KNEEDLER: Well, in the 1999  
23 regulations that Congress allowed to go into  
24 effect, the -- the Park Service by rule  
25 identified the Park Service units or the areas

1 added or expanded by ANILCA in which there were  
2 reserved water rights. And when you look at  
3 the purposes for which these units were  
4 established, it's clear that water was a  
5 central purpose of them.

6 In fact, the one we have here is the  
7 Yukon-Charley Rivers National Preserve, and it  
8 -- and it specifically defines as one of the  
9 purposes to preserve the entire Charley river  
10 basin, including streams and lakes.

11 So that -- that clearly identifies the  
12 protection of the integrity of those waters and  
13 the -- and the -- the scenic values associated  
14 with them. That's why we have national parks.  
15 That's why we have this national preserve.

16 So I -- I think it's clear that water  
17 is reserved for the purposes of these  
18 reservations, every one of which either refers  
19 to specific bodies of water or to aquatic  
20 activities, such as fishing --

21 JUSTICE ALITO: So what has been --

22 MR. KNEEDLER: -- or boating or  
23 access.

24 JUSTICE ALITO: -- reserved -- what  
25 has been reserved here is plenary authority for

1 the federal government --

2 MR. KNEEDLER: No.

3 JUSTICE ALITO: -- to regulate the  
4 navigable waters?

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

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

20 JUSTICE ALITO: Well, no I wasn't --

21 MR. KNEEDLER: -- reserved water  
22 rights.

23 JUSTICE ALITO: -- asking about the  
24 geographical limits of it. I'm asking about  
25 the regulatory limits.

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

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

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

19           If I could go back to the --

20           JUSTICE ALITO: Well, could I just --

21           MR. KNEEDLER: -- Chief Justice's  
22 question.

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

1 that was asked of counsel for Alaska.

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

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

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

20 If I could just finish the answer  
21 about sentence 3 of -- of 103 -- 103(c). One  
22 of the -- one of the things the Park Service  
23 could never do is grant access to private  
24 lands. The Park Service not only regulates  
25 things that you can't do in national parks but

1 things that they have to allow, like access,  
2 camping, picnicking.

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

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

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

25 JUSTICE KAVANAUGH: But there's

1 nothing --

2 MR. KNEEDLER: -- the river.

3 JUSTICE KAVANAUGH: -- that says that  
4 the Park Service has plenary authority over all  
5 the navigable rivers within the conservation  
6 system unit, nor is there any indication by any  
7 member of Congress of such a authority?

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

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

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

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

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

1 Park Service's general authority, which  
2 includes the 1976 Act.

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

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

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

1 the rivers, even though title in the submerged  
2 lands is in the state?

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

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

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

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

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

1 different about Alaska is the importance of the  
2 federal government having control over the  
3 navigable waters that are the centerpiece of  
4 the parks.

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

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

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

22           CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24           Five minutes, Mr. Findley.

25

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 --

21 JUSTICE SOTOMAYOR: The -- the problem  
22 is --

23 MR. FINDLEY: -- is not part of the  
24 unit.

25 JUSTICE SOTOMAYOR: -- you don't have

1 title to the water. I mean, you suggest that  
2 there are some cases who say effectively it is,  
3 but effectively is different than is.

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

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

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

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

23 MR. FINDLEY: What matters here is  
24 that the United States does not have title to  
25 those waters and does not have title to the

1 submerged lands. Once that's the case, they  
2 aren't public lands. They aren't part of these  
3 units. And the Park Service may not use its  
4 Organic Act authority to reach out and regulate  
5 them.

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

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

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

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

24           Activities on or relating to water  
25 could very easily be read as activities taking

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

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

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

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

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

21           CHIEF JUSTICE ROBERTS: Thank you,  
22           counsel. The case is submitted.

23           (Whereupon, at 11:06 a.m., the case  
24           was submitted.)

25

## Official

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