No. 14-

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

SUE MASICA, IN HER OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WILLIAM S. CONSOVOY
THOMAS R. MCCARTHY
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PLLC
3033 Wilson Boulevard
Suite 700
Arlington, VA 22201

DOUGLAS POPE
POPE & KATCHER
421 West First Avenue
Suite 220
Anchorage, AK 99501

MATTHEW T. FINDLEY
Counsel of Record
EVA R. GARDNER
ASHBURN & MASON, P.C.
1227 West Ninth Avenue
Suite 200
Anchorage, AK 99501
(907) 276-4331
mtf@anchorlaw.com

Date: March 31, 2015

Attorneys for Petitioner

258813

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether Section 103(c) of the Alaska National Interest Lands Conservation Act of 1980 prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private Alaska land physically located within the boundaries of the National Park System.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is John Sturgeon.

Respondents are Sue Masica, in her official capacity as Alaska Regional Director of the National Park Service; Greg Dudgeon; Andee Sears; Sally Jewell, Secretary of the Interior; Jonathan Jarvis, in his official capacity as Director of the National Park Service; the National Park Service; and the United States Department of the Interior.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Sturgeon submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 768 F.3d 1066 and is reproduced in the Appendix ("App.") at 3a-34a. The Ninth Circuit's order denying rehearing en banc is unreported and is reproduced at App. 1a-2a. The opinion of the United States District Court for the District of Alaska is unreported and is reproduced at App. 35a-58a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its decision on October 6, 2014. App. 5a. A timely petition for rehearing en banc was denied on December 16, 2014. App.1a. On February 20, 2015, Justice Kennedy extended the time to file this petition for writ of certiorari to March 31, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(a).

STATUTORY PROVISION INVOLVED

Section 103(c) of the Alaska National Interest Lands Conservation Act of 1980 provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act)

> shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

INTRODUCTION

The State of Alaska contains over 150 million acres of federally managed national parks, preserves, and monuments. The act responsible for creating the majority of this parkland, the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 3101 *et seq.*, carefully and explicitly provided that non-federal land and water physically located within these parks that is owned by the State of Alaska, Alaska Native Corporations, and private citizens would not be included within the National Park System and, as a result, would not be subject to the myriad federal rules and regulations enacted to manage the National Park System.

In 1996, however, the National Park Service ("NPS") abandoned its longstanding interpretation of ANILCA and declared that it had all along possessed full regulatory authority over non-federal land and waters within national

parks and preserves in Alaska. It was that about-face that led to this case. NPS bans hovercraft in all national parks, and that regulation has been extended to state navigable waters within the Yukon-Charley Preserve based on this revised interpretation of ANILCA. While operating a small personal hovercraft on the Nation River to access moose hunting grounds upriver from the Yukon-Charley, Mr. Sturgeon was informed by armed NPS officials (and again later by their regional supervisor) that he would be subject to federal criminal citation if he continued to use his state-licensed hovercraft within the Yukon-Charley Preserve. Mr. Sturgeon thereafter filed this suit in federal district court challenging NPS's interpretation of Section 103(c) of ANILCA, and its extension of the hovercraft ban to non-federal land, under the Administrative Procedure Act. The district court granted summary judgment to NPS and the Ninth Circuit affirmed.

The decision below warrants this Court's review. The Ninth Circuit has granted NPS plenary authority to regulate State, Native Corporation, and private lands within Alaska's national parks and preserves as though these lands were in fact part of these parks. That decision has significant social and economic ramifications that will reverberate throughout the State of Alaska. Not only does it deprive petitioner of a liberty interest and the State of Alaska of sovereign control over its land, it destroys rights granted to Alaska Natives under the Alaska Native Claims Settlement Act ("ANCSA"). Alaska Natives depend on this land for economic support, which will be denied to them by NPS regulations that destroy its economic value and deny to these landowners the right to make productive use of their property. In one fell swoop, then, the Ninth Circuit has nullified not one—but *two*—important federal

statutes over which it has exclusive review and in turn opened 19 million acres of non-federal Alaska land to invasive federal regulation.

The Ninth Circuit's decision also is unsustainable on the merits. Section 103(c) unambiguously provides that NPS may exercise regulatory control only over "public lands" in Alaska, which the law defines to exclude State, Native Corporation, and private lands (even if the non-public land is located within the physical boundaries of the National Park System). The Ninth Circuit's decision read this limitation on NPS authority out of existence, holding that Section 103(c) protects non-public Alaska land only from application of Alaska-specific NPS regulations (as opposed to nationwide regulations like the hovercraft rule). But not only does this interpretation betray the statute's text, structure, and history, it is utterly illogical as it denies to these non-public lands the benefit of Alaska-specific NPS regulations that relax nationwide restrictions on hunting, camping, and motorized access. A Ninth Circuit opinion interpreting a statute designed to insulate millions of acres of non-federal Alaskan wilderness from NPS management to somehow impose a more restrictive regulatory regime on this land than NPS imposes even on Alaska national park land warrants this Court's attention. The petition should be granted.

STATEMENT OF THE CASE

A. The State of Alaska's Land Allocation

The State of Alaska covers 570,374 square miles, or roughly one-fifth of the total land area of the contiguous United States. From north to south, Alaska measures

1,420 miles, approximately the distance between Denver, Colorado and Mexico City, Mexico, and from east to west it measures nearly 2,400 miles, approximately the distance from Savannah, Georgia to Santa Barbara, California. While Alaska is the largest of the fifty states, it supports a total population of only 710,231 people and most of its acreage is inaccessible by road. Indeed, Alaska's average population density is only 1.2 persons per square mile. If Manhattan had the same population density as the state of Alaska, 28 people would live there. Allocating land and resources in this vast landscape, and ensuring the economic viability of its people, has been an issue of vital importance since Alaska joined the Union in 1959.

Allowing the new State of Alaska to control its land and resources was a central compact of statehood. In the Alaska Statehood Act, Congress granted approximately 103,350,000 acres of land to the new State of Alaska (or 28 percent of its overall area), and required that any further conveyance of this land must reserve mineral and other rights to the State. *See* Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339. The purpose of this grant was to ensure Alaska's economic viability.

However, statehood did not resolve Native Alaskan land claims. In 1971, Congress passed the Alaska Native Claims Settlement Act ("ANCSA") in response to the "immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims[.]" 43 U.S.C. § 1601(a). ANCSA created 13 Regional Corporations and 220 Village Corporations, and prescribed a three-step regime involving the withdrawal, selection, and conveyance of roughly 22 million acres of federal land within the State

of Alaska. ANCSA conveyed the land to the Village Corporations and patented the subsurface estate to Regional Corporations. The Regional Corporations also received the right to select an additional 16 million acres (of both surface and subsurface estates) from federal land. *See Chugach Natives v. Doyon, Ltd.*, 588 F.2d 723, 724 (9th Cir. 1979). Congress intended for the Native Corporations to use the transfers of lands and assets for economic development benefiting the Native peoples of Alaska. *See* 43 U.S.C. § 1607; *City of Saint Paul, Alaska v. Evans*, 344 F.3d 1029, 1031 (9th Cir. 2003).

ANCSA also addressed land allocation between the State of Alaska and the United States. Under ANCSA, the Secretary of Interior was directed to withdraw up to 80 million acres of federal land from availability for Native Corporation selection to protect national interest lands for "public use and enjoyment." 43 U.S.C. § 1616(d)(2). This process was never completed because the Secretary's withdrawals never received Congressional approval.[1] The Carter Administration later stepped in and ordered a series of land withdrawals, claiming authority under the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-1784, and the Antiquities Act of 1906, 16 U.S.C. §§ 431-433. By 1980, the Executive Branch had withdrawn over 100 million acres of federal land. *See* Proclamation No. 4611, 43 Fed. Reg. 57009 (1978) (Admiralty Island National Monument); Public Land Order 5653, 43 Fed. Reg. 59756 (1978); Public Land Orders 5696-5711, 45 Fed. Reg. 9562 (1980).

1. ANCSA provided that Congress had five years to act on the Secretary's recommendations and without Congressional action, the withdrawals would expire. 43 U.S.C. § 1616(d)(2)(D).

B. The Alaska National Interest Lands Conservation Act of 1980

The Alaska National Interest Lands Conservation Act of 1980 ("ANILCA") was a direct legislative response to the Executive Branch's unilateral withdrawal of millions of acres of federal lands for conservation purposes. "Congress became aware of the need for a legislative means of maintaining the proper balance between the designation of national conservation areas and the necessary disposition of public lands for more intensive private use." *City of Angoon v. Marsh*, 749 F.2d 1413, 1415-16 (9th Cir. 1984). The congressional goal, in other words, was "to preserve unrivaled scenic and geological values associated with natural landscapes" and "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." 16 U.S.C. § 3101(b)-(c). Congress thus designed ANILCA to provide "sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provide[] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." *Id.* § 3101(d).

ANILCA affected 104.3 million acres of land in Alaska; the statute expanded the national park system in Alaska by over 43 million acres, creating ten new national parks, and increased the territory of three existing parks. Congress designated this land as the "conservation system unit" or "CSU."[2] As part of this national park expansion,

2. "The term 'conservation system unit' means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National

ANILCA established the Yukon-Charley Preserve as a CSU in east-central Alaska, west of the village of Eagle. *See id.* § 410hh(10).

Essential to ANILCA's compromise was Congress's assurance that the millions of acres of land previously set aside for the economic and social needs of the Alaskan people would not be subject to federal regulatory control and management. This concern was quite real given that much of this land surrounded or was located within the physical boundaries of CSUs.

Section 103(c) of ANILCA addressed the concern:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter." 16 U.S.C. § 3102(4).

"The term 'land' means lands, waters, and interests therein." *Id.* § 3102(1). "The term 'Federal land' means lands the title to which is in the United States after December 2, 1980." *Id.* § 3102(2). "The term 'public lands' means land situated in Alaska which, after December 2, 1980, are Federal lands, except—(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law; (B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and (C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act." *Id.* § 3102(3).

Section 103(c)'s purpose was apparent from the inception of the legislative process. The provision began as an amendment "to make clear beyond any doubt that any State, Native, or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands, which, in fact, are part of the unit." 125 Cong. Rec. H3240 (May 15, 1979). The Senate Report explained that "[t]hose private lands, and those public lands owned by the State of Alaska … are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands." S. Rep. No. 96-413 at 303 (November 14, 1979).

Arizona Congressman Morris Udall, ANILCA's primary sponsor in the House of Representatives, further explained that:

> this bill… is a direct out-growth of the Alaska Native Claims Settlement Act of 1971.... Thus, it is important to recall the relationship between the conservation system units … and the lands which the Native peoples of Alaska have received and will receive pursuant to the Alaska Native Claims Settlement Act in return for the extinguishment of their claims based on aboriginal title. We recognize that there are certain lands which have been selected by Native Corporations and which are within the exterior boundaries of some of the conservation system units …. I want to make clear that inclusion of these Native lands within the boundaries of conservation system units is not intended to affect any rights which the Corporations may have under this act, the Alaska Native Claims Settlement Act, or any other law, or to restrict use of such lands by the owning Corporations nor to subject the Native lands to regulations applicable to the public lands within the specific conservation system unit.

125 Cong. Rec. 9905 (May 4, 1979).

Senator Ted Stevens of Alaska agreed:

> The fact that Native lands lie within the boundaries of conservation system units is not intended to affect any rights which the

> corporations have under this act, the Alaska Native Claims Settlement Act, or any other law. It is not our intent, by the inclusion of Native lands within the exterior boundaries of conservation system units, to imply that such inclusion is a revocation of land selections validly filed pursuant to any provision of the Alaska Native Claims Settlement Act. The Native organizations have been given repeated assurances that including their lands within conservation units will not affect the implementation of the Native Claims Settlement Act. We intend to have these assurances translated into practice by the administrative agencies.

126 Cong. Rec. 21882 (1980).

Section 103(c) was added to the final version of ANILCA through a concurrent resolution. *See* H. Cong. Res. 452, 96th Cong. (Nov. 21, 1980). The resolution, which contained Section 103(c)'s text, was added to the statute in order to firmly establish "that only public lands (and not State or private lands) are to be subject to the conservation unit regulations applying to public lands." 126 Cong. Rec. 30495, 30496 (1980).

C. ANILCA's Regulatory History

For sixteen years following ANILCA's enactment, NPS interpreted Section 103(c) to deny it the authority to regulate State of Alaska, Native Corporation, and private lands within the physical boundaries of CSUs as if they are part of the National Park System. In 1981, NPS

issued regulations to "provide interim guidance on public uses of National Park System units in Alaska, including units established by the Alaska National Interest Lands Conservation Act." 46 Fed. Reg. 31836 (June 17, 1981). The section-by-section preamble explained that:

> Sections 103(c) and 906(o) of ANILCA generally restrict the applicability of National Park Service regulations to federally-owned lands within park area boundaries. Consistent with the statute and the explanatory legislative history … § 13.2(e) restricts the applicability of these regulations to 'federally owned' lands (defined to mean all land interests held by the Federal government including unconveyed Native selections) within park boundaries …. These regulations would not apply to activities occurring on State lands. Similarly, these regulations would not apply to activities occurring on Native or any other non-federally owned land interests located within park area boundaries.

Id. at 31843. NPS further explained that the Alaska-specific regulations found in 36 C.F.R. Part 13 "would not apply to activities occurring on Native or any other non-federally owned land interests located inside park area boundaries." *Id*.

As promulgated in 1983, then, 36 C.F.R. § 1.2(b) provided that:

> The regulations contained in Parts 1 through 7 of this chapter are not applicable on privately

> owned lands and waters (including Indian lands and waters owned individually or tribally) within the boundaries of a park area, except as may be provided by regulations relating specifically to privately owned lands and waters under the legislative jurisdiction of the United States.

48 Fed. Reg. 30252 (June 30, 1983).

36 C.F.R. § 1.4 defined "legislative jurisdiction" to mean "lands and waters under the exclusive or concurrent jurisdiction of the United States." NPS further explained that the regulation was "intended to also include state inholdings that are under the legislative jurisdiction of the United States." 48 Fed. Reg. at 30261.

Confusion nonetheless persisted as to the regulatory status of State-owned lands and the meaning of the phrase "legislative jurisdiction of the United States." In 1987, NPS resolved the confusion by revising Section 1.2(b). As revised, the regulation provided:

> Except for regulations containing provisions that are specifically applicable, regardless of land ownership, on lands and waters within a park area that are under the legislative jurisdiction of the United States, the regulations contained in Parts 1 through 5 and Part 7 of this chapter do not apply on non-federally owned lands and waters or on Indian lands and waters owned individually or tribally within the boundaries of a park area.

52 Fed. Reg. 35238 (Sept. 18, 1987). NPS cleared up the issue as to State-owned lands by broadening Section 1.2 to cover all "non-federally owned lands and waters or on Indian lands and waters." As to the meaning of "the legislative jurisdiction of the United States," NPS clarified that "when applied to non-federal lands, [it] means lands and waters over which the State has ceded some or all of its legislative authority to the United States." 52 Fed. Reg. 35238 (Sept. 17, 1987).

NPS reversed course in 1996, extending all of its regulations to non-federal lands in Alaska. To accomplish this objective, NPS issued 36 C.F.R. § 1.2(a)(3), which provides that NPS regulations apply to "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters … *without regard to the ownership of submerged lands, tidelands, or lowlands*." 61 Fed. Reg. 35133 (July 5, 1996) (emphasis added). NPS revised 36 C.F.R. § 1.2(b) to provide that the "regulations contained in parts 1 through 5, part 7, and part 13 of this chapter do not apply on non-federally owned lands and waters or Indian tribal trust lands located within National Park System boundaries, *except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters*." *Id.* (emphasis added). Among the NPS regulations made applicable to State-owned lands is 36 C.F.R. § 2.17(e), which bans the use of hovercraft within NPS boundaries.

D. Factual Background

John Sturgeon has held a resident hunting license in Alaska for the past 40 years and, from 1971 until this

controversy, annually hunted moose on the Yukon River downstream from Eagle, Alaska, and its tributary, the Nation River. App. 8a. The Nation River has been adjudicated to be navigable. *See Alaska v. United States*, 201 F.3d 1154 (9th Cir. 2000). Thus, title to the bed of the Nation River vested in Alaska under the Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958); accordingly, its waters and submerged lands are not "public land" for purposes of ANILCA. App. 55a. Further, the Submerged Lands Act of 1953 grants the State of Alaska the authority to manage, use, and administer these submerged lands, the natural resources in them, and the navigable waters that flow over them. *See* 43 U.S.C. § 1311(a).

In 1990, in order to access all of the waters of the Nation River, including those waters of the Nation River upriver from the Yukon-Charley boundary, Mr. Sturgeon purchased a small personal hovercraft and licensed it with the State of Alaska as a watercraft. App. 8a. From 1990 through 2007, Mr. Sturgeon used the hovercraft to access moose hunting grounds on the Yukon River downstream from Eagle to the confluence of the Nation and Yukon Rivers, and on the Nation River thirty-five to forty miles upriver from the Yukon-Charley boundary. App. 8a. Operation of hovercraft on the Nation River is permissible under Alaska law.

In September of 2007, during his annual moose-hunting trip, Mr. Sturgeon entered the Nation River from the Yukon River for the purpose of taking the hovercraft upriver to hunt "moose meadows" and other stretches of the Nation River beyond the Yukon-Charley boundary. App. 8a. Approximately two miles upriver, while stopped on a gravel bar located below mean high water to engage

in some repairs, Mr. Sturgeon was approached by three armed NPS law enforcement employees. App. 8a. The NPS employees told Mr. Sturgeon it was a federal crime for him to operate the hovercraft within the boundaries of the Yukon-Charley. App. 8a. When Mr. Sturgeon advised the NPS employees that the hovercraft was being operated on a State-owned navigable river and thus the NPS water regulations did not apply, the NPS employees advised him that he was incorrect. App. 8a. Mr. Sturgeon complied with the NPS employees' directive to remove his hovercraft from within the boundaries of the Yukon-Charley App. 8a.

After returning from this hunt, Mr. Sturgeon had phone conversations and met with NPS Special Agent Andee Sears in Anchorage, Alaska. App. 9a. Ms. Sears agreed that the State of Alaska owned the submerged land within the banks of the Yukon and Nation Rivers, but reaffirmed NPS's position that use of a hovercraft within the boundaries of the Yukon-Charley is a federal crime, even on navigable waters or on submerged land between the banks of navigable rivers, and warned Mr. Sturgeon that he would be criminally cited if he ever again operated the hovercraft within the Yukon-Charley. App. 9a. As a result of these warnings by NPS officials and employees, Mr. Sturgeon has not used his hovercraft within the boundaries of the Yukon-Charley in subsequent hunting seasons; as a result, he has not been able to hunt areas of the Nation River and the Yukon River he had previously accessed on a regular basis with the use of his hovercraft. App. 9a.[3]

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3. In October 2010, Mr. Sturgeon, by and through counsel, sent a letter to then Secretary of the Interior Ken Salazar,

E. Proceedings Below

On September 14, 2011, Mr. Sturgeon filed a complaint in the U.S. District Court for the District of Alaska to, among other things, enjoin application of 36 C.F.R. § 1.2(a)(3) and 36 C.F.R. § 2.17(e) on various grounds under the APA. The State of Alaska intervened and joined in the challenge to these NPS regulations. The district court granted summary judgment to the NPS as to all claims. App. 35a-58a. Mr. Sturgeon and the State both timely appealed.

The Ninth Circuit affirmed, holding that ANILCA did not prohibit the NPS from asserting authority over non-public lands within CSUs pursuant to regulations of general applicability. To the Ninth Circuit, Section 103(c)'s restriction on NPS's power to impose on non-public land "regulations applicable solely to public lands within such units" was limited to Alaska-specific regulations. App. 25a-28a. ANILCA, which was passed in 1980, therefore did not supersede the general authority that Congress, in 1976, vested in the Secretary of Interior to "'[p]romulgate and enforce regulations concerning boating and other

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petitioning him to engage in rulemaking to repeal or amend NPS regulations so that the NPS would no longer assert the authority to restrict access on navigable waters located within the boundaries of park areas in Alaska. Mr. Sturgeon never received a response to this letter. App. 49a. Faced with this lack of response, on June 26, 2011 he wrote a letter to the NPS Alaska District Regional Chief Ranger, copying Ms. Sears, in which he requested written confirmation that he would be cited if he attempted to operate his hovercraft within the Yukon-Charley in the areas he had traditionally hunted. Mr. Sturgeon also never received a response to this letter. App 49a.

activities on or relating to waters located with areas of the National Park System, including waters subject to the jurisdiction of the United States.'" App. 31a (quoting 16 U.S.C. § 1a-2(h)).[4] The Ninth Circuit concluded that because the "hovercraft ban ... applies to all federal owned lands and waters administered by NPS nationwide"—and not only on federal lands within Alaska—it may be enforced on Alaskan land owned by the State, Native Corporations, and individuals. App. 26a.[5]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c). The decision below has significant social and economic ramifications for the people of Alaska. It implicates not only Alaska's sovereignty and Mr. Sturgeon's liberty, but Alaskan Natives' dependence on access to the State's natural resources for economic sustainability. The Ninth Circuit's decision jeopardizes all of these interests in contravention of Section 103(c) of ANILCA, which squarely prohibits NPS from regulating non-federal Alaska land as if it were part of the National Park System.

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4. 16 U.S.C. § 1a-2(h) was repealed and recodified by Pub. L. 113-287, Dec. 19, 2014, 128 Stat. 3272. *See* 54 U.S.C. § 100751.

5. The Ninth Circuit rejected the government's argument that Mr. Sturgeon lacked standing. App. 10a-14a. But the court agreed with the government that the State lacked standing and instructed the district court to dismiss its complaint. App. 14a-20a.

I. The Petition Raises A Question of Exceptional Importance To The State of Alaska, Native Corporations, and Private Citizens.

Because no circuit split is possible on this issue, the key consideration for purposes of certiorari is whether the petition raises an important federal question. It is difficult to conceive of an issue of greater importance to the people of Alaska than the one presented here. This case concerns the regulatory disposition of more than 19 million acres of Alaskan land. Perhaps more than any other State, Alaska depends on the beneficial use of its land for "economic and social well-being." *Trustees for Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987). Yet if the Ninth Circuit's decision is upheld, the ability of Alaskans to productively use their natural resources will be subject to the plenary control of NPS, which prefers to use the Alaska wilderness strictly for conservation purposes. As a result, it is likely that the developmental potential of this land will be unrealized. The economic ramifications of the Ninth Circuit's decision for the people of Alaska is a compelling basis for reviewing this petition. *See, e.g.*, *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 267 (2009).

Because the decision's economic impact will fall most harshly on Native Corporations, which own approximately 18 million acres of the non-public land at issue, the need for further review is all the more urgent. Congress passed ANCSA in 1971 to resolve the "aboriginal land claims." 43 U.S.C. § 1601(a). Under ANCSA, roughly 40 million acres of land were conveyed to Alaska Native regional and village corporations to "assist them in achieving financial independence and self-sufficiency." *City of Angoon*, 749 F.2d at 1414. "Congress contemplated that

land granted under ANCSA would be put primarily to three uses—village expansion, subsistence, and capital for economic development. Of these potential uses, Congress clearly expected economic development would be the most significant." *Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991, 996 (9th Cir. 1994) (citations omitted). Congress thus extinguished aboriginal claims in exchange for land, on the understanding that Alaska Natives "would be able to develop that land and to realize that potential." *Id.* at 997. Under the Ninth Circuit's ruling, however, Native Corporations will be foreclosed from developing roughly 30 percent of the land that Congress conveyed to them to address "the real economic and social needs of Natives." 43 U.S.C. § 1601(b).

But the importance of this case extends far beyond the practical harms resulting from the Ninth Circuit's view of ANILCA. These non-public lands, including the specific territory at issue in this case, do *not* belong to the federal government. *See supra* at 14-15. "After a State enters the Union, title to the land is governed by state law. The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce." *Montana v. United States*, 450 U.S. 544, 551 (1981). Alaska thus owns the "shores of navigable waters, and the soils under them." *John v. United States*, 720 F.3d 1214, 1224 (9th Cir. 2013). NPS's assertion of regulatory authority therefore impairs Alaska's sovereign right to manage and direct the use of these non-federal lands. The significant federalism concerns created by the Ninth Circuit's decision warrant this Court's attention. *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) ("[T]he federal structure serves to

grant and delimit the prerogatives and responsibilities of the States and the National Government vis-a-vis one another. The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.").

The basis for the State of Alaska's intervention in this dispute illustrates the point. The State sought to collect specimens from the bed of the Alagnak River in connection with fisheries research. App. 9a-10a. Although the riverbed is indisputably State-owned submerged land, NPS restricted the State's ability to access it, asserting that the Alagnak's location within the Katami National Park subjected it to NPS regulation. App 9a-10a. The State was therefore barred from accessing the riverbed until it applied for a permit, obtained approval, and granted ownership of the resulting samples to NPS. App. 15a. The State should not have to seek permission from the federal government to conduct environmental studies on its own land.

Indeed, the Ninth Circuit's reading of ANILCA to grant NPS control over non-federal lands raises a difficult constitutional question. Congress's Article I authority to wrest supervision and control of these lands from Alaska would need to derive from the Commerce Clause or the Property Clause. But neither provides the sweeping power NPS asserts here. Both require a showing that activities on State-owned water sufficiently impact NPS controlled land so as to justify extra-territorial regulation. *See, e.g.*, *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979); *State of Minnesota by Alexander v. Block*, 660 F.2d 1240, 1249 (8th Cir. 1981). Thus, while this authority allows NPS to enforce specific targeted regulations on non-federal

lands to protect federal lands, *see Lindsey*, 595 F.2d at 6, it is not blanket authorization for the NPS to enforce the entirety of its regulations on non-federal lands, especially when NPS seeks to infringe on state sovereignty and regulate state-owned lands.

These important constitutional issues are not just a means to resolving a turf war between NPS and the State of Alaska. "Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power … Federalism secures the freedom of the individual." *Bond*, 131 S. Ct. at 2364 (citations and quotations omitted). "The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2677 (2012) (joint dissent). This case shows just how true that is.

As noted above, Mr. Sturgeon has held a resident hunting license in Alaska for the past 40 years and has used a small personal hovercraft, which he licensed with the State of Alaska, to access moose hunting grounds on the Yukon River since 1990. App. 8a. Yet, in 2007, he was approached by armed NPS officials who told him it was illegal to use the hovercraft. App. 8a. Petitioner was later informed that he would be subject to federal prosecution if he ever attempted to use the hovercraft again. App. 9a. It is difficult to conceive of a more severe threat to individual liberty than being threatened with criminal citation. NPS should not be permitted to threaten Mr. Sturgeon with criminal penalties for using a state-approved hovercraft for a state-approved purpose on non-federal land.

Unlike other instances, the significant practical and structural concerns raised by this case are not the result of Congress's desire to press the boundaries of its Article I authority. Congress has not demanded federal regulatory control over millions of acres of Alaskan land. It is instead NPS's assertion of expansive authority under a federal law specifically designed to curb its power, *see infra* at 23-30, and the Ninth Circuit's decision to accept that contorted interpretation that has led to this confrontation. This case epitomizes the concern that "[t]he administrative state wields vast power and touches almost every aspect of daily life…. It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878-79 (2013) (Roberts, C.J., dissenting) (citations and quotation omitted). The administrative state's assertion of power over all manner of "economic, social, and political" activity, *id*. at 1878, is troublesome enough when it comes with the imprimatur of Congress. This Court's attention is certainly required where, as here, it does not.

II. The Ninth Circuit's Interpretation of Section 103(c) of ANILCA Is Unsustainable Under This Court's Decisions.

The question presented asks whether Section 103(c) of ANILCA prohibits NPS from managing and regulating Alaskan and Native Corporation non-federal lands located within the National Park System as if they were part of the National Park System. Contrary to the Ninth Circuit's ruling, the statute unambiguously denies this authority to NPS. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency,

must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Because the intent behind Section 103(c) is clear, the ruling conflicts with this Court's prior decisions and should be reversed.

Section 103(c) states that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in the Act) shall be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c). Under the statute, "public lands" means "land situated in Alaska which, after December 2, 1980, are Federal lands" and excludes from its ambit lands belonging to the "State of Alaska," "a Native Corporation," or "lands referred to in Section 19(b) of the Alaska Native Claims Settlement Act." *Id.* § 3102(3). Accordingly, "[n]o lands, which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units." *Id.* § 3103(c). "If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly." *Id.*

The law is straightforward. Under Section 103(c), State, Native Corporation, and private land within the boundaries of the ANILCA conservation system units are not part of these units and may not be managed as though they are. Each sentence of Section 103(c) clarifies, in different ways, that State, Native Corporation, and private land is not to be managed or otherwise treated as part of a CSU. Section 103(c) thus removes these lands from the

reach of the vast array of federal regulations promulgated to manage public lands, such as the hovercraft regulation at issue here, and forecloses the ability of NPS and other federal agencies to exert authority beyond public lands in Alaska. Accordingly, any NPS regulation that attempts to manage non-federal land in Alaska as if it is public land is not in accordance with law.

This interpretation follows not only from the law's plain meaning, it vindicates Congress's purpose. *See, e.g.*, *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 300 (1988). ANILCA's dramatic expansion of federal park acreage raised serious concerns that it would sacrifice the needs of Alaskans who live off this land. *See supra* at 7-11. Section 103(c) struck a balance. It "provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). The statute accomplished this objective by "[s]pecifying that only public lands (and not State or private lands) are to be subject to the conservation unit regulations applying to public lands." H. Cong. Res. 452, 96th Cong. (Nov. 21, 1980); *see also* S. Rep. No. 96-413 at 303 (Nov. 14, 1979) ("Those private lands, and those public lands, owned by the State of Alaska … are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands."). The whole point was to "make clear beyond any doubt that any State, Native, or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and

are not subject to regulations which are applied to public lands, which, in fact, are part of the unit." 125 Cong. Rec. H3240 (May 15, 1979). The inclusion of Section 103(c) in the final version of ANILCA reflected a deliberate choice by Congress to preserve State management and limit NPS authority over these lands.

That is why, until 1996, NPS correctly interpreted Section 103(c) just as Petitioner does here. *See supra* at 11-14. In 1981, NPS explained that its "regulations would not apply to activities occurring on Native or any other non-federally owned land interests located inside park area boundaries." 46 Fed. Reg. 31843 (June 17, 1981). Further, in 1987, NPS reaffirmed that: "Except for regulations containing provisions that are specifically applicable, regardless of land ownership, on lands and waters within a park area that are under the legislative jurisdiction of the United States, the regulations contained in Parts 1 through 5 and Part 7 of this chapter do not apply on non-federally owned lands and waters or on Indian lands and waters owned individually or tribally within the boundaries of a park area." 52 Fed. Reg. 35238 (Sept. 18, 1987). That is, NPS interpreted Section 103(c) faithful to its terms by limiting NPS's regulatory authority to public lands in Alaska.

The Ninth Circuit nevertheless rejected this reading based on a crabbed interpretation of Section 103(c). App. 25a-28a. In the Ninth Circuit's view, the limitation on NPS authority to impose "regulations applicable solely to public lands within such units" applies only to Alaska-specific NPS regulations. App. 25a-26a. According to the Ninth Circuit, NPS was thus free to ban hovercrafts on non-federal Alaskan lands under its general authority to

"[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System," 16 U.S.C. § 1a-2(h), so long as the ban was applied "to all federal-owned lands and waters administered by NPS nationwide" and not just to Alaska public lands. App. 25-26a. This interpretation of Section 103(c) is unsustainable.

Although its reasoning is far from clear, the Ninth Circuit appears to derive its Alaska-specific interpretation of Section 103(c) from its determination that "[t]he plain text of § 103(c) only exempts nonfederal land from 'regulations applicable *solely* to public lands within [CSUs].'" App. 25a (emphasis in original). The Ninth Circuit believed that this language limited Section 103(c) to "*CSU-specific regulations*." App. 25a (emphasis in original). But the Ninth Circuit drew the line in the wrong place. ANILCA does not distinguish between regulations applying nationwide and those applying only "within such units" in Alaska. The law distinguishes between NPS's authority to manage "public lands within such units" and its lack of authority to manage non-public (*i.e.*, non-federal) lands *within such units*. That point is made clear by the preceding sentence: "Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c). The Ninth Circuit committed the cardinal error of reading the phrase "within such units" in "isolation" instead of "the context in which it is used." *Deal v. United States,* 508 U.S. 129, 132 (1993).

The Ninth Circuit sought to draw additional support from Section 103(c)'s use of the word "solely," since

nationwide NPS regulations are not "solely" applicable to federal lands in Alaska. App. 25a. The Ninth Circuit claimed that only this interpretation could reconcile the statutory text with Congress's statement that "'[f]ederal laws and regulations of general applicability to both private and public lands' are 'unaffected,' and 'would be applicable to private or non-federal public land holdings within [CSUs].'" App. 27a-28a (quoting S. Rep. 96-413, at 303 (1979)). But the Ninth Circuit's textual analysis again missed the mark.

Congress inserted "solely" into Section 103(c) to avoid inadvertently nullifying *all* federal statutes and regulations applicable to non-federal lands in Alaska. That is, Congress was careful to ensure that ANILCA did not exempt non-federal lands in Alaska from laws such as the Clean Air Act and the Clean Water Act. These are the federal laws of "general applicability" (and not the run-of-the-mill NPS management regulations) that were to be "unaffected" by ANILCA:

> Federal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act, the Water Pollution Control Act, U.S. Army Corps of Engineers wetland regulations and other Federal statutes of general applicability would be applicable to private or non-Federal public land in holdings within conservations [sic] system units, and to such lands adjacent to conservation system units, and thus are unaffected by the passage of the bill.

S. Rep. 96-413, at 303 (1979). Had the Ninth Circuit not selectively quoted from the Senate Report, this would have been clear.

But even if there were some support for the Ninth Circuit's Alaska-specific version of Section 103(c), which there is not, the statute should be interpreted to avoid a "nonsensical result" if the text will allow it. *Paroline v. United States*, 134 S. Ct. 1710, 1729 (2014). As explained above, the Ninth Circuit's reading exempts non-federal lands from NPS's Alaska-specific regulations, but not from NPS's nationwide regulations. Under that reading, then, non-federal land could not benefit when NPS exempts Alaska national parks from a more restrictive nationwide rule. By the Ninth Circuit's reasoning, the non-public land would remain subject to the more restrictive nationwide regulation. If NPS decided to exempt Alaska public lands from the hovercraft regulations, the non-federal lands (*i.e.*, State, private, and Native-owned) would, paradoxically, still be subject to the ban.

This is not some wild hypothetical. There are many NPS regulations that make allowances for Alaska public lands that are not applicable to the rest of the National Park System. For example, NPS has granted Alaska parks more liberal hunting, trapping, and motorized access rules because of the unique terrain. *See, e.g.*, 36 C.F.R. §§ 13.25, 13.30, 13.45, 13.182. It is nonsensical to interpret Section 103(c) to force non-federal land in Alaska to abide by the more restrictive nationwide rule instead of benefiting from the less restrictive Alaska-specific rule. Yet that is where the Ninth Circuit's ruling leads. The better interpretation of Section 103(c) is one that, as Congress clearly intended, leaves day-to-day management of these non-federal lands

to their owners: the State of Alaska, Native Corporations, and private individuals.

At base, the Ninth Circuit's interpretation violates the "text, structure, and purpose" of ANILCA. *Maracich v. Spears*, 133 S. Ct. 2191, 2196 (2013). Section 103(c) was enacted to enforce the law's bargain that those lands not transferred to the federal government would be subject to state and local management. *See supra* at 5-11. Under the Ninth Circuit's reasoning, however, the promise is illusory. If the decision below is allowed to stand, NPS could easily circumvent any limitation on its day-to-day management authority merely by regulating on a nationwide basis. There is no basis for interpreting Section 103(c) to defeat ANILCA's objective of preserving state authority, private property rights, and Native Alaskan land rights within the new federal park lands it created. Certainly not when there is a strong textual basis for interpreting the law to achieve that unambiguous congressional purpose.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

William S. Consovoy
Thomas R. McCarthy
J. Michael Connolly
Consovoy Mccarthy PLLC
3033 Wilson Boulevard
Suite 700
Arlington, VA 22201

Douglas Pope
Pope & Katcher
421 West First Avenue
Suite 220
Anchorage, AK 99501

Matthew T. Findley
Counsel of Record
Eva R. Gardner
Ashburn & Mason, P.C.
1227 West Ninth Avenue
Suite 200
Anchorage, AK 99501
(907) 276-4331
mtf@anchorlaw.com

Attorneys for Petitioner

Date: March 31, 2015

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 16, 2014

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-36165

JOHN STURGEON,

Plaintiff-Appellant,

STATE OF ALASKA,

Plaintiff-Intervenor,

v.

SUE MASICA, in her official capacity as Alaska Regional Director of the National Park Service; GREG DUDGEON; ANDEE SEARS; SALLY JEWELL, Secretary of the Interior; JONATHAN JARVIS, in his official capacity as Director of the National Park Service; THE NATIONAL PARK SERVICE; THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

D.C. No. 3:11-cv-00183-HRH
District of Alaska,
Anchorage

Appendix A

ORDER

Before: FARRIS, D.W. NELSON, and NGUYEN, Circuit Judges.

Judge Farris, Nelson, and Nguyen have voted to deny the petitions for panel rehearing filed by Plaintiff-Appellant John Sturgeon and Plaintiff-Intervenor State of Alaska. Judge Nguyen has voted to deny the petitions for rehearing *en banc* filed by Sturgeon and the State of Alaska, and Judges Farris and Nelson so recommend.

The full court has been advised of the petitions, and no judge of the court has requested a vote on the petitions for rehearing *en banc*. Fed. R. App. P. 35.

The petitions for rehearing and rehearing *en banc* are DENIED.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 6, 2014

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-36165

D.C. No. 3:11-cv-00183-HRH

JOHN STURGEON,

Plaintiff-Appellant,

STATE OF ALASKA,

Plaintiff-Intervenor,

v.

SUE MASICA, in her official capacity as Alaska Regional Director of the National Park Service; GREG DUDGEON; ANDEE SEARS; SALLY JEWELL, Secretary of the Interior; JONATHAN JARVIS, in his official capacity as Director of the National Park Service; THE NATIONAL PARK SERVICE; THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

Appendix B

No. 13-36166

D.C. No. 3:11-cv-00183-HRH

STATE OF ALASKA,

Intervenor-Plaintiff-Appellant,

and

JOHN STURGEON,

Plaintiff,

v.

SUE MASICA, in her official capacity as Alaska Regional Director of the National Park Service; GREG DUDGEON; ANDEE SEARS; SALLY JEWELL, Secretary of the Interior; JONATHAN JARVIS, in his official capacity as Director of the National Park Service; THE NATIONAL PARK SERVICE; THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, Senior District Judge, Presiding

August 12, 2014, Argued and Submitted,
Anchorage, Alaska

Appendix B

October 6, 2014, Filed

Before: Jerome Farris, Dorothy W. Nelson, and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Nguyen

SUMMARY[*]

Standing / National Park Service

The panel affirmed the district court's summary judgment in favor of federal appellees, and vacated the judgment against intervenor/appellant State of Alaska, due to its lack of standing, in an action brought by John Sturgeon challenging the National Park Service's enforcement of a regulation banning the operation of hovercrafts on the Nation River.

Tha National Park Service ("NPS") ban prevented Sturgeon from using his personal hovercraft on his moose hunting trips on the Nation River, part of which falls within the Yukon-Charley Rivers National Preserve. The State of Alaska intervened, challenging NPS's authority to require its researchers to obtain a permit before engaging in studies of chum and sockeye salmon on the Alagnak River, part of which falls within the boundaries of the Katmai National Park and Preserve.

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[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Appendix B

The panel held that Sturgeon established Article III standing. The panel also held that the federal appellees waived their prudential standing arguments. The panel further held that the State of Alaska lacked standing to challenge the NPS regulations. The panel vacated the district court's judgment as to Alaska, and remanded with instructions that Alaska's case be dismissed for lack of jurisdiction.

The panel rejected Sturgeon's contention that § 103(c) of the Alaska National Interest Lands Conservation Act precluded NPS from regulating activities on state-owned lands and navigable waters that fell within the boundaries of National Park System units in Alaska. The panel held that Sturgeon's interpretation of § 103(c) was foreclosed by the plain text of the statute. The panel held that even assuming that the waters of and lands beneath the Nation River had been "conveyed to the State" for purposes of the Alaska National Interest Lands Conservation Act § 103(c), NPS's hovercraft ban was not a regulation that applied solely to public lands within conservation system units in Alaska; and given its general applicability, the regulation could be enforced on both public and nonpublic lands alike within conservation system units.

The panel also rejected Sturgeon's arguments that the Secretary of the Interior exceeded her statutory authority in promulgating the regulation at issue, and that her action raised serious constitutional concerns.

Appendix B

OPINION

NGUYEN, Circuit Judge:

John Sturgeon ("Sturgeon") challenges the National Park Service's ("NPS") enforcement of a regulation banning the operation of hovercrafts on the Nation River, part of which falls within the Yukon-Charley Rivers National Preserve. The ban prevented Sturgeon from using his personal hovercraft on his moose hunting trips on the Nation River. The State of Alaska intervened, challenging NPS's authority to require its researchers to obtain a permit before engaging in studies of chum and sockeye salmon on the Alagnak River, part of which falls within the boundaries of the Katmai National Park and Preserve.

Sturgeon and Alaska present the same legal argument: § 103(c) of the Alaska National Interest Lands Conservation Act ("ANILCA") precludes NPS from regulating activities on state-owned lands and navigable waters that fall within the boundaries of National Park System units in Alaska. The district court granted summary judgment in favor of the federal appellees. Because we find that Sturgeon's interpretation of § 103(c) is foreclosed by the plain text of the statute, we affirm as to Sturgeon. We hold that Alaska lacks standing to bring this challenge, and thus vacate and remand with instructions that Alaska's case be dismissed.

Appendix B

I.

The facts are straightforward and largely undisputed. Since 1971, Sturgeon has hunted moose on an annual basis on the Nation River.[1] The lower six miles of the Nation River lie within the Yukon-Charley Rivers National Preserve ("Yukon-Charley"), which is a unit of the National Park System. In 1990, Sturgeon purchased a small, personal hovercraft, which he used on his hunting excursions. In September 2007, while repairing his hovercraft on a gravel bar adjoining the river, Sturgeon was approached by three NPS law enforcement employees. They informed him that NPS regulations prohibited the operation of hovercrafts within the Yukon-Charley and issued him a verbal warning. Sturgeon protested that the NPS regulations were inapplicable because he was operating his hovercraft on a state-owned navigable river. Sturgeon contacted his attorney via satellite phone, who in turn contacted Andee Sears, a Regional Law Enforcement Specialist with NPS. Sears told Sturgeon's attorney that the hovercraft must be removed from the Yukon-Charley. Sturgeon complied.

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1. The Nation River is a tributary of the Yukon River. While Sturgeon's complaint also mentions his hunting excursions on the Yukon River, part of which also falls within the Yukon-Charley Rivers National Preserve, he failed to raise a separate claim for the Yukon River. Thus, the district court found that only the applicability of the regulation to the Nation River was before the court. *Sturgeon v. Masica*, No. 3:11-CV-0183-HRH, 2013 U.S. Dist. LEXIS 157078, 2013 WL 5888230, at *6 (D. Alaska Oct. 30, 2013). Sturgeon does not challenge that finding on appeal.

Later, Sturgeon followed up with Sears over the phone and met with him in Anchorage. Sears advised Sturgeon that even though Alaska might own the submerged land beneath the river, the hovercraft ban was nonetheless in force within the boundaries of the Yukon-Charley. Sears warned Sturgeon that he risked criminal liability if he operated his hovercraft within the Yukon-Charley. In response to these warnings, Sturgeon refrained from using his hovercraft during the 2008 to 2010 moose hunting seasons and has not been able to hunt on the portions of the Nation River that fall within the boundaries of the Yukon-Charley.

Although Sturgeon sent a letter to then-Secretary of the Interior, Ken Salazar, petitioning for repeal or amendment of the NPS regulations restricting his access to navigable waters located within national park boundaries, he did not receive a response. He then sued in federal district court, seeking an order declaring that NPS's regulations violated ANILCA, as applied to him on state-owned lands and waters, and enjoining the federal defendants from enforcing these regulations.

Alaska intervened, raising the same argument that the application and enforcement of NPS regulations on state-owned lands and waters violated ANILCA. Specifically, Alaska challenged NPS regulations that required employees of the Alaska Department of Fish and Game to obtain a scientific research and collecting permit before engaging in genetic sampling of chum and sockeye salmon on the Alagnak River. These regulations purportedly harmed Alaska "in the form of increased

staff time and expense in complying with NPS procedures and in the form of delays in implementing the project." Alaska further argued that NPS's actions both interfered with its sovereign right to manage and regulate its lands and waters and chilled its citizens' ability to enjoy the rights and benefits flowing from its management of state resources.

On summary judgment, the district court ruled in favor of the federal appellees. *Sturgeon v. Masica*, No. 3:11-CV-0183-HRH, 2013 U.S. Dist. LEXIS 157078, 2013 WL 5888230, at *9 (D. Alaska Oct. 30, 2013). The district court found that Sturgeon's and Alaska's interpretation of ANILCA § 103(c) lacks support in the plain language of the statute. 2013 U.S. Dist. LEXIS 157078, [WL] at *8-*9. This appeal followed.

II.

We review questions of law resolved on summary judgment de novo, and the district court's factual findings for clear error. *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 976 (9th Cir. 2012).

III.

As an initial matter, the federal appellees contend that we lack jurisdiction over this appeal because Sturgeon and Alaska have failed to establish standing. Even though the federal appellees did not present these arguments to the district court below, they may nonetheless do so for the first time on appeal. The constitutional requirements for

standing under Article III are jurisdictional, cannot be waived by any party, and may be considered sua sponte. *City of Los Angeles v. Cnty. of Kern*, 581 F.3d 841, 845 (9th Cir. 2009). The oft-repeated "irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "First, the plaintiff must have suffered an 'injury in fact,'" which is both concrete and particularized, as well as actual or imminent. *Id.* "Second, there must be a causal connection between the injury and the conduct complained of," meaning that the injury must be "fairly traceable to the challenged action of the defendant." *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (quotation mark and alterations omitted)). Third, it must be likely that a favorable decision would redress the injury identified. *Id.* at 561.

Apart from these constitutional concerns, "there exists a body of 'judicially self-imposed limits on the exercise of federal jurisdiction'" that forms the prudential standing doctrine. *Cnty. of Kern*, 581 F.3d at 845 (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)); *see also Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 289-90, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008). Because these considerations are nonconstitutional in nature, they may be deemed waived if not previously raised before the district court. *Cnty. of Kern*, 581 F.3d at 845.

Appendix B

A.

We find that Sturgeon has established standing. The federal appellees argue that Sturgeon has failed to show probable or imminent enforcement of the NPS regulations to meet the first requirement of an injury-in-fact. The federal appellees' view, however, cannot be reconciled with the Supreme Court's recent decision in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014), where the Court emphasized that *threatened* enforcement actions may suffice to create Article III injuries. "When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Id.* at 2342. Thus, "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Id.* (quoting *Babbitt v. Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)).

Sturgeon has satisfied the injury-in-fact requirement. He has alleged an intention to use his hovercraft, and has contacted both NPS and the Department of the Interior regarding the applicability and enforcement of the regulation to his hovercraft use. Sturgeon's inability to use his hovercraft for moose-hunting purposes arguably implicates his right under the Privileges or Immunities Clause of the Fourteenth Amendment "to use the navigable waters of the United States, however they may penetrate the territory of the several States."

The Slaughter-House Cases, 83 U.S. 36, 79, 21 L. Ed. 394 (1872); *see also Courtney v. Goltz*, 736 F.3d 1152, 1160 (9th Cir. 2013) (interpreting the Privileges or Immunities Clause to encompass "a right to *navigate* the navigable waters of the United States"). Sturgeon thus alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest." *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt*, 442 U.S. at 298).

Further, there is no dispute that his intended conduct is proscribed by NPS regulation. *See* 36 C.F.R. § 2.17(e) (stating that "[t]he operation or use of hovercraft is prohibited" within NPS-administered lands and waters, which include the Yukon-Charley). Finally, "there exists a credible threat of prosecution thereunder." *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt*, 442 U.S. at 298). The federal appellees concede that Sturgeon received a verbal warning not to use the hovercraft, that Special Agent Sears told Sturgeon's lawyer that Sturgeon "should remove the hovercraft from the preserve," and that Sears later indicated that Sturgeon "[might] be subject to criminal liability if he operated a hovercraft in the preserve."[2] These facts are sufficient to show a credible threat of enforcement against Sturgeon.

Next, the federal appellees argue that any injury-in-fact identified by Sturgeon is not "fairly traceable" to actions of NPS. We disagree. The regulation was promulgated by NPS and enforcement has been

2. Indeed, if Sturgeon violated NPS's hovercraft ban, he would risk incurring a fine and imprisonment for up to six months. *See* 36 C.F.R. § 1.3(a).

threatened by NPS employees. Therefore, Sturgeon's injuries are "fairly traceable" to actions of NPS. Finally, a favorable decision would redress Sturgeon's identified injury-in-fact, and the federal appellees do not contend otherwise.

In addition to contending that Sturgeon lacks Article III standing, the federal appellees argue that prudential considerations of ripeness and adverseness militate against a finding of standing. However, the federal appellees failed to raise these arguments before the district court. We thus find them waived, as prudential standing arguments "can be deemed waived if not raised in the district court" due to their nonconstitutional nature.[3] *Cnty. of Kern*, 581 F.3d at 845 (quoting *Bd. of Natural Res. v. Brown*, 992 F.2d 937, 946 (9th Cir. 1993)) (internal quotation marks omitted).

B.

The State of Alaska, on the other hand, lacks standing. Alaska offers three bases to support its standing: (1) harm "in the form of increased staff time and expense" in obtaining and complying with the terms of a scientific research and collecting permit; (2) injuries to Alaska's sovereign right to control its lands and waters; and (3) the Secretary of the Interior's denial of its petition for

3. Moreover, it may be that the "Article III standing and ripeness issues in this case 'boil down to the same question'"—namely, whether a sufficient injury-in-fact exists to render the case ripe. *Susan B. Anthony List*, 134 S. Ct. at 2341 n.5 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)).

administrative proceedings that would repeal or amend the regulations at issue. We address each of the proffered bases in turn.

With regard to Alaska's chum and sockeye salmon study, the increased burdens to Alaska as a result of NPS's permit requirement clearly constitute injuries-in-fact. It is undisputed that NPS employees informed Alaska's Department of Fish and Game ("DFG") that a scientific research and collecting permit was required before it engaged in the study. The scientific research and collecting permit that DFG actually obtained and the General Conditions and Park Specific Guidance that accompanied it—all of which are part of the record—demonstrate that DFG was forced to comply with numerous obligations and limitations under the terms of the permit. To name just a few, DFG was not allowed to destroy research specimens without NPS's prior authorization, was obligated to catalogue collected specimens into NPS's Interior Collections Management System and label such specimens with NPS accession and catalog numbers, and was required to submit an Investigator's Annual Report and copies of other final reports and publications resulting from the study within a year of publication. The record thus amply supports Alaska's allegation of harm in the form of increased staff time and expense.

But while Alaska may have suffered cognizable injuries, a favorable ruling would not redress these injuries. Alaska's complaint sought a declaration that the NPS regulations were invalid and void as applied to state-owned lands and waters and an injunction barring future

enforcement of the regulations on state-owned lands and waters. Such relief would not remedy injuries relating to DFG's chum and sockeye salmon study in 2010, which have already been incurred and suffered. At oral argument, Alaska represented that DFG's chum and sockeye salmon study is complete, and the record offers no indication that related studies or efforts are pending or forthcoming. In the absence of evidence showing how the requested relief would redress its identified injuries, Alaska may not rely on activities relating to the 2010 study of chum and sockeye salmon to establish standing. *Cf. Lujan*, 504 U.S. at 564 ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." (alteration in original) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)) (internal quotation marks omitted).

The second basis proffered by Alaska presents a closer question. Alaska argues that the NPS regulations violate its "sovereign[]" and "proprietary interests" in its lands and waters, and interfere with its "authority and ability to manage its property in accordance with the Alaska Constitution and state law." States certainly possess sovereign and proprietary interests that may be pursued via litigation. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601-02, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982); *see also, Pennsylvania v. New Jersey*, 426 U.S. 660, 665, 96 S. Ct. 2333, 49 L. Ed. 2d 124 (1976) ("It has . . . become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated . . . ."). However, we conclude

that Alaska's arguments are unavailing for purposes of establishing standing under the circumstances of this case.

To begin with, Alaska failed to meet the requirement that its purported injuries be "actual or imminent." *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)) (internal quotation mark omitted). Because Alaska did not identify any actual conflict between NPS's regulations and its own statutes and regulations, we are left with only a vague idea of how exactly NPS's permitting requirement infringes on the state's sovereign and proprietary interests in its lands and waters, or how the requirement interferes with the state's control over and management of those lands and waters. In the absence of such a conflict, Alaska's purported injuries are too "conjectural or hypothetical" to constitute injuries-in-fact. *Id.* (quoting *Whitmore*, 495 U.S. at 155) (internal quotation marks omitted).

Alaska has cited no case that finds standing based simply on purported violations of a state's sovereign rights. Rather, evidence of actual injury is still required. For example, in *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007), the Supreme Court found that Massachusetts had standing to challenge the EPA's denial of a rulemaking petition requesting regulation of greenhouse gas emissions under the Clean Air Act. *Id.* at 510-11, 526. The Court noted that the state was due "special solicitude in [the] standing analysis" based on two factors: (1) Massachusetts sought to vindicate a procedural right, which eliminated the need under Article

III to demonstrate redressability and immediacy, and (2) Massachusetts's status as a "sovereign State." *Id.* at 517-20; *see also Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1144-45 (9th Cir. 2013) (distinguishing *Massachusetts v. EPA*). Even in light of this special solicitude, however, the Court specifically found that "[b]ecause the Commonwealth 'own[ed] a substantial portion of the state's coastal property,' it ha[d] alleged a particularized injury in its capacity as a landowner" due to rising global sea levels. *Massachusetts*, 549 U.S. at 522 (citation omitted).

Similarly, in *Oregon v. Legal Services Corp.*, 552 F.3d 965 (9th Cir. 2009), Oregon contended that a private, nonprofit corporation established by the United States to provide federal funds to local legal assistance programs "thwart[ed] [its] efforts at policy making with regards to Oregon's Legal Service Program." *Id.* at 973. We rejected Oregon's claim because "there [was] no dispute over Oregon's ability to regulate its legal services program, and no claim that Oregon's laws ha[d] been invalidated as a result of the [corporation's] restrictions." *Id.* Because Oregon was able "to regulate its legal service programs as it desire[d]," there was thus "no judicially cognizable injury." *Id.* at 974.

Finally, *Nevada v. Burford*, 918 F.2d 854 (9th Cir. 1990), is also illustrative. Nevada challenged the Bureau of Land Management's decision to grant a right-of-way over state-owned land to the Department of Energy. *Id.* at 855. Because Nevada's complaint was "silent as to how [the Bureau's] alleged violations . . . resulted in injury to Nevada," in the absence of demonstrated injury, its claim

"'constitute[d] a generalized grievance that the [Bureau] [was] not acting in . . . accordance' with federal laws" and was thus "insufficient to demonstrate standing." *Id.* at 856-57 (first, third, and fourth alterations added, second alteration in original) (quoting *Nevada v. Burford*, 708 F. Supp. 289, 295 (D. Nev. 1989)). *See also Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 883 (9th Cir. 2001) (finding no injury-in-fact where twenty Native American tribes challenged a Master Settlement Agreement between Philip Morris, Inc. and forty-six states, five territories, and the District of Columbia because the tribes identified no tribal regulations or contracts that would be affected by the Agreement).

Similarly, here, Alaska's claims regarding its sovereign and proprietary interests lack grounding in a demonstrated injury. While Alaska alleges that NPS regulations "have directly interfered with Alaska's ability as a sovereign to manage and regulate its land and waters," Alaska identifies no conflict between NPS regulations and its own state statutes and regulations.[4]

4. Alaska also alleges that the NPS regulations have had "a chilling effect" on Alaskans' use and enjoyment of state-owned lands and waters. But "a state does not have standing 'to protect her citizens from the operation of federal statutes.'" *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 971 (9th Cir. 2009) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007)). And "the State must articulate an interest apart from the interests of particular private parties." *Id.* (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982)) (internal quotation mark omitted). Alaska has failed to do so.

Any injury to Alaska's sovereign and proprietary interest is pure conjecture and thus insufficient to establish standing.

The third and final basis upon which Alaska relies to establish standing is the Secretary of the Interior's denial of its petition for new administrative proceedings. A plaintiff possesses standing to enforce procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Lujan*, 504 U.S. at 573 n.8. As discussed above, Alaska fails to identify any "threatened concrete interest." Alaska cannot rely on the Secretary's denial of its petition because "[p]articipation in agency proceedings is alone insufficient to satisfy judicial standing requirements." *Gettman v. Drug Enforcement Admin.*, 290 F.3d 430, 433, 351 U.S. App. D.C. 344 (D.C. Cir. 2002) (quoting *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 27, 349 U.S. App. D.C. 347 (D.C. Cir. 2002)) (internal quotation marks omitted). Alaska's "right to petition the agency does not in turn 'automatic[ally]' confer Article III standing when that right is deprived." *Id.* (alteration in original) (quoting Pet'rs' Br.).

Therefore, we hold that Alaska has failed to establish standing to challenge the NPS regulations. We vacate the district court's judgment as to Alaska and remand with instructions that Alaska's case be dismissed for lack of jurisdiction.

Appendix B

IV.

We now turn to the merits of Sturgeon's challenge. Sturgeon contends that § 103(c) of ANILCA bars the application and enforcement of NPS's hovercraft ban on the Nation River,[5] which he contends is state-owned land. According to Sturgeon, the plain text of the statute, its legislative history, and our decision in *City of Angoon v. Marsh*, 749 F.2d 1413 (9th Cir. 1984), support his view. Before explaining why we find Sturgeon's contentions unpersuasive, we offer a bit of background.

A.

ANILCA, enacted in 1980, offered new "protection[s] for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provide[d] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). Summarized succinctly, "ANILCA is generally concerned with the designation, disposition, and management of land for environmental preservation purposes." *Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1165 (9th Cir. 2008). To this end, Congress "set aside approximately 105 million acres

5. Many of Sturgeon's arguments resemble a facial challenge to NPS's general regulatory authority over nonfederal land within conservation system units. However, the district court's finding that Sturgeon had pleaded an as-applied challenge, *Sturgeon*, 2013 U.S. Dist. LEXIS 157078, 2013 WL 5888230, at *1, is not contested on appeal, and we therefore limit our consideration to the regulation as applied to Sturgeon.

of federal land in Alaska for protection of natural resource values by permanent federal ownership and management." *Nat'l Audubon Soc'y v. Hodel*, 606 F. Supp. 825, 827-28 (D. Alaska 1984). Portions of those lands were used to expand existing units of the National Park System and create new units, which were to be administered by the Secretary of the Interior. 16 U.S.C. § 410hh; *id.* § 410hh-1. Such units included national parks, preserves, and monuments. See 16 U.S.C. § 410hh; *id.* § 410hh-1. ANILCA refers to units of the National Park System situated in Alaska as "conservation system unit[s]" ("CSUs"). 16 U.S.C. § 3102(4).

Not all lands that lie within the boundaries of a CSU are owned by the federal government. Where possible, Congress drew unit boundaries "to include whole ecosystems and to follow natural features," and was thus cognizant of the fact that state, Native, or private-owned land could fall within the boundaries of CSUs. *Marsh*, 749 F.2d at 1417 (quoting 125 Cong. Rec. 9905 (1979)). The presence of both federal-owned and nonfederal-owned land lying within CSUs led Congress to clarify two things: first, what land would actually comprise the CSUs, and second, more generally, how land falling within a CSU's boundaries—whether federally owned or not—could be regulated. *See id.* (discussing the House version of ANILCA and the "Tsongas substitute" in the Senate).

Such clarification came in ANILCA § 103(c). The full text of that subsection reads as follows:

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> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

Section 103(c) thus contains three separate instructions regarding the composition and regulation of CSUs. First, only "public lands" lying within the boundaries of a CSU are "deemed to be included as a portion of such unit." *Id.* Under ANILCA, "public lands" are "[f]ederal lands" (including "lands, waters, and interests therein") in which the United States holds title after December 2, 1980. *Id.* § 3102(1)-(3). The first sentence of § 103(c) makes clear that the boundaries of CSUs "do[] not in any way change the status of that State, native, or private land" lying within those boundaries. 125 Cong. Rec. 11158 (1979).

The second sentence of § 103(c) declares that state, Native, and private-owned land shall not be subject to

"regulations applicable solely to public lands within such units." 16 U.S.C. § 3103(c). Accordingly, under § 103(c)'s plain text, only public land lying within a CSU's boundaries may be subjected to *CSU-specific regulations*—nonfederal land is expressly made exempt from such regulations. As the 1979 Senate Report on ANILCA makes clear, nonfederal land would not be "subject to the management regulations which may be adopted to manage and administer any national [CSU] *which is adjacent to, or surrounds, the private or non-federal public lands*." S. Rep. No. 96-413, at 303 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5247 (emphasis added). Importantly for purposes of this case, in contrast to CSU-specific regulations, "[f]ederal laws and regulations of general applicability to both private and public lands" are "unaffected," and "would be applicable to private or non-federal public land holdings within [CSUs]." *Id.*

Finally, § 103(c)'s third sentence provides that the Secretary of the Interior may acquire nonfederal land lying within a CSU's boundaries; such land would then "become part of the unit" and may "be administered accordingly." 16 U.S.C. § 3103(c). Once acquired, what was previously nonfederal land would no longer be free from "regulations applicable solely to public lands within [CSUs]." *Id.; see also* 126 Cong. Rec. 21882 (1980) (noting that "if the [Native-]corporations ever decide to dispose of their property, [it] could become part of the [CSU]").

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B.

With this background in mind, we easily resolve Sturgeon's appeal. Sturgeon argues that the plain language of ANILCA § 103(c) removes nonfederal lands from the reach of federal regulations promulgated to manage public lands. Thus, his argument goes, NPS may not enforce the hovercraft ban on the lower portion of the Nation River that falls within the Yukon-Charley because the water and submerged land of that river is owned by the state of Alaska.

While we agree with Sturgeon that § 103(c) is unambiguous, we find that it unambiguously forecloses his interpretation. The plain text of s§ 103(c) only exempts nonfederal land from "regulations applicable *solely* to public lands within [CSUs]." 16 U.S.C. § 3103(c) (emphasis added). The regulation at issue, banning hovercraft use in the Yukon-Charley, is not so limited.

In 1976, Congress vested the Secretary of the Interior with the authority to "[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States." 16 U.S.C. § 1a-2(h). Pursuant to this grant of authority, the Secretary promulgated a number of regulations to "provide for the proper use, management, government, and protection of persons, property, and natural and cultural resources within areas under the jurisdiction of the National Park Service." 36 C.F.R. § 1.1(a). Within the chapter of the Code of Federal Regulations

containing those regulations, parts 1 through 5 "apply to all persons entering, using, visiting, or otherwise within" federally owned lands and waters administered by NPS and "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters." 36 C.F.R. § 1.2(a)(1), (3). The hovercraft ban is located within part 2 of that chapter. *See* 36 C.F.R. § 2.17(e).

In short, then, the hovercraft ban is not one that "appli[es] solely to public lands within [CSUs]" in Alaska. 16 U.S.C. § 3103(c). Rather, this regulation applies to all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national parks. Thus, even assuming (without deciding) that the waters of and lands beneath the Nation River have been "conveyed to the State" for purposes of § 103(c), that subsection does not preclude the application and enforcement of the NPS regulation at issue. Because of its general applicability, the regulation may be enforced on both public and nonpublic lands alike within CSUs. Though Sturgeon might prefer a more robust regulatory exemption, we "must presume that a legislature says in a statute what it means and means in a statute what it says." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461-62, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)).[6]

6. Because we resolve this case based on the plain text of the statute, we need not address whether our decisions in *John v. United States (Katie John III)*, 720 F.3d 1214 (9th Cir. 2013), *John v. United States (Katie John II)*, 247 F.3d 1032 (9th Cir. 2001) (en

C.

Sturgeon acknowledges that § 103(c)'s language exempts nonfederal lands from regulations applicable "solely" to public lands, but argues that overreliance on the word "solely" leads to a result contrary to the express legislative purpose of restricting federal authority over nonfederal land within CSUs. "When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 n. 29, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978); *see also Balen v. Holland Am. Line Inc.*, 583 F.3d 647, 653 (9th Cir. 2009) (quoting *North Dakota v. United States*, 460 U.S. 300, 312, 103 S. Ct. 1095, 75 L. Ed. 2d 77 (1983)) (internal quotation mark omitted) (stating that when statutory language is clear, its "language must ordinarily be regarded as conclusive"). But even if we consider the legislative history of ANILCA, we find no support for Sturgeon's claim. Rather, the legislative records from the House and Senate contain numerous statements supporting the plain language of the statute. The sponsor of § 103(c) in the House offered the view that his amendment "restate[d] and ma[de] clear" that nonfederal lands within CSUs would not be "subject to regulations which are applied to public lands which, in fact, are part of the unit." 125 Cong. Rec. 11158 (1979). The primary sponsor of ANILCA in the House declared that nonfederal land would not be constrained by "regulations applicable

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banc) (per curiam), or *State of Alaska v. Babbitt (Katie John I)*, 72 F.3d 698 (9th Cir. 1995) supply an alternative basis for affirming the district court.

to the public lands within the specific conservation system unit." 125 Cong. Rec. 9905 (1979). The House Concurrent Resolution that added § 103(c) to ANILCA specified that "only public lands (and not State or private lands) are to be subject to the [CSU] regulations applying to public lands." 126 Cong. Rec. 30498 (1980). Finally, the Senate Report notes that § 103(c) would exempt nonfederal land from "regulations which may be adopted to manage and administer any [CSU] which is adjacent to, or surrounds, the private or non-Federal public lands." S. Rep. No. 96-413, at 303 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5247.[7] Rather than help Sturgeon, the legislative history confirms that ANILCA § 103(c) did not purport to exempt nonfederal lands within CSUs from generally applicable federal laws and regulations like the hovercraft ban.

D.

Next, Sturgeon argues that our decision in *City of Angoon v. Marsh*, 749 F.2d 1413 (9th Cir. 1984), supports his interpretation. Sturgeon's reliance on *Marsh*, however, is misplaced. *Marsh* involved the interaction between

7. Sturgeon also claims that until 1996, NPS did not purport to have regulatory authority over state-owned lands and waters within CSUs, but in July 1996, NPS reversed course. Even if so, NPS's current view comports with the text of the statute, and to the extent Sturgeon believes that NPS's purported change in position militates against deference, "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the Chevron framework." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

two subsections of ANILCA § 503. The first, § 503(b), established the Admiralty Island National Monument, which was composed of 921,000 acres "of public lands." *Id.* at 1416 (emphasis omitted) (quoting ANILCA, Pub. L. No. 96-487, § 503(b), 94 Stat. 2371 (1980)). The second, § 503(d), stated that "[w]ithin the Monument[], the Secretary shall not permit the sale of [sic] harvesting of timber." *Id.*

Reading these two subsections in conjunction, we held that the district court erred in finding that "all lands within the boundaries of a National Forest System Monument"—including private lands—"come within the harvesting prohibition of section 503(d)." *Id.* (emphasis omitted). We pointed out that under § 503(b), the Admiralty Island National Monument, "by definition, consists solely of public or federally owned lands." *Id.* Thus, § 503(d)'s use of the phrase "[w]ithin the Monument" was inapplicable "to *private lands* which are within the boundaries of a national forest conservation system unit." *Id.* (emphasis added and omitted).

Marsh clearly is inapposite to the present dispute. First, *Marsh*'s discussion of § 103(c) is largely dicta because that subsection was inapplicable to the timber harvesting ban at issue. While ANILCA § 103(c) refers to "regulations applicable solely to public lands within such units," § 503(d) imposes a statutory prohibition against timber harvesting. At most, *Marsh* drew inferences from § 103(c) for the purpose of determining the reach of § 503(d). *See id.* at 1418 (noting that the court examined sections 102, 103(c), 503(d), and 506(c) "harmoniously" to determine Congressional intent regarding the ban

on timber harvesting). Second, *Marsh* offers little guidance in Sturgeon's case because, if promulgated as a regulation, § 503(d)'s ban on timber harvesting would fall under § 103(c)'s exception to the application of regulations applying solely to public lands, while NPS's hovercraft ban does not. Section 503(d) specifically refers to activities taking place "[w]ithin the Monument[]," and thus only limits conduct taking place on public lands within a specific CSU. For that reason, if promulgated as an agency regulation, its harvesting ban would qualify as a "regulation[] applicable solely to public lands within [CSUs]," and would be unenforceable on state, Native, or private-owned land under ANILCA § 103(c). As we noted above, NPS's hovercraft ban is not so constrained, and it applies to federally owned lands and waters administered by NPS nationwide, as well as navigable waters within national parks.

V.

We reject two additional arguments asserted by Sturgeon, that the Secretary of the Interior exceeded her statutory authority in promulgating the regulation at issue and that her action raises serious constitutional concerns.

A.

The 1976 Park Service Administration and Improvement Act ("1976 Act") grants the Secretary of the Interior broad authority over boating and water-related activities within the National Park System. That authorization provides as follows:

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> [T]he Secretary of the Interior is authorized . . . [to] [p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States: *Provided*, That any regulations adopted pursuant to this subsection shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States.

16 U.S.C. § 1a-2(h). Sturgeon contends that the latter portion of this subsection restricts the Secretary's regulatory power and does not permit her to regulate any and all activities on waters within national parks.

However, the plain text of the 1976 Act merely requires that any regulations promulgated by the Secretary *complement*, and not *derogate*, Coast Guard authority over waters subject to federal jurisdiction. It does not, as Sturgeon argues, limit the Secretary's regulatory authority to that enjoyed by the Coast Guard. The Oxford English Dictionary defines "complement" to mean "to supply what is wanting," 3 *Oxford English Dictionary* 610 (2d ed. 1989), and "derogate" to mean to "diminish," *id.* at 504. Thus, under the 1976 Act, the Secretary may regulate boating and other water-related activities taking place within the National Park System and its navigable

waters so long as those regulations supplement and do not diminish the Coast Guard's authority.[8]

Indeed, the legislative history of the 1976 Act makes this clear. The concern regarding the regulatory authority of the Coast Guard was first raised by the Secretary of the Interior in a letter to the House Committee on Interior and Insular Affairs.[9] H.R. Rep. No. 94-1569, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4290, 4299. The Secretary noted that the Coast Guard possessed existing authority to "promulgate and enforce regulations for the promotion of *safety of life and property on* . . . waters subject to the jurisdiction of the United States." *Id.* (alteration in original) (emphasis added) (quoting 14 U.S.C. § 2(3)). Because many waters within the National Park System were navigable, the Secretary noted that his agency would "exercise authority concurrent with the Coast Guard in

8. Moreover, ANILCA § 1319 provides that "[n]othing in [the statute] shall be construed as . . . superseding, modifying, or repealing, except as specifically set forth in this Act, existing laws applicable to the various Federal agencies which are authorized to . . . *exercise licensing or regulatory functions in relation thereto.*" 16 U.S.C. § 3207 (emphasis added).

9. The Secretary of Transportation also submitted a letter to the House Committee "strongly object[ing]" to the fact that the bill as drafted "would authorize the Secretary of the Interior to promulgate and enforce boating regulations which relate to construction, performance, and equipment standards"—responsibility for which had been previously delegated to "the Secretary of the department in which the Coast Guard is operating." H.R. Rep. No. 94-1569, at 24 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4290, 4310.

many instances," and thus recommended an amendment clarifying that the bill's grant of regulatory authority would "not diminish the Coast Guard's authority under existing law to regulate boat design and safety." *Id*. The remainder of the bill would still, however, grant her the authority "to regulate *recreational, commercial and other uses and activities* relating to all waters of the National Park System." *Id*. (emphasis added).

The statute reflects just such a clarifying amendment. *See* 16 U.S.C. § 1a-2(h). Thus, both the plain text and the legislative history of the 1976 Act make clear that Sturgeon's argument that the Secretary of the Interior exceeded her statutory authority is without merit.

B.

Finally, Sturgeon contends that the Secretary's exercise of her regulatory authority under the 1976 Act implicates "serious constitutional concerns." Specifically, he raises the specter of potential violations of the Property and Commerce Clauses, though without offering any specifics as to how or why the NPS regulations contravene those clauses. We therefore decline to invalidate NPS's hovercraft ban on constitutional grounds because "[w]hatever the extent of the State's proprietary interest in [its] river[s], the pre-eminent authority to regulate the flow of navigable waters resides with the Federal Government." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6, 102 S. Ct. 1096, 71 L. Ed. 2d 188 (1982); *see also Alaska v. United States*, 545 U.S. 75, 116-17, 125 S. Ct. 2137, 162 L. Ed. 2d 57 (2005)

(Scalia, J., concurring in part and dissenting in part) ("If title to submerged lands passed to Alaska, the Federal Government would still retain significant authority to regulate activities in the waters of Glacier Bay by virtue of its dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power.").

VI.

We hold that even assuming that the waters of and lands beneath the Nation River have been "conveyed to the State" for purposes of ANILCA § 103(c), NPS's hovercraft ban is not a regulation that applies solely to public lands within CSUs in Alaska. Therefore, as to Sturgeon, we affirm the district court's grant of summary judgment in favor of the federal appellees. Because Alaska cannot establish standing on this record, we vacate the district court's judgment as to Alaska and remand with instructions that Alaska's action be dismissed for lack of subject matter jurisdiction.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

APPENDIX C — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, FILED OCTOBER 30, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOHN STURGEON,

Plaintiff,

and

STATE OF ALASKA,

Plaintiff-Intervenor,

vs.

SUE MASICA, *et al.*,

Defendants.

No. 3:11-cv-0183-HRH

DECISION

I. Procedural History.

In this action brought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-06, plaintiff John Sturgeon and plaintiff-intervenor the State of Alaska bring "as applied" challenges to National Park Service ("NPS") regulations. Sturgeon and the State have timely filed their

opening summary judgment briefs,[1] to which defendants have responded.[2] Sturgeon and the State timely filed their reply briefs[3] and defendants[4] have timely filed their surreply[5] as contemplated by the court's scheduling order.[6] Oral argument has been heard.

On September 14, 2011, Sturgeon commenced this action. In Count I of his complaint, he seeks a declaration that the application of NPS regulations on lands belonging to the State of Alaska that are within NPS conservation system units created or expanded by the Alaska Native Lands Conservation Act (herein "ANILCA") are void as applied to him.[7] In Count II of his complaint, Sturgeon seeks a declaration that "any regulations purporting to authorize the NPS to enforce regulations which are solely applicable to public lands within conservation units on lands owned by the State of Alaska, including navigable waters, within NPS conservation units created or

1. Docket Nos. 77 & 81.

2. Docket No. 84.

3. Docket Nos. 97 & 98.

4. Defendants are Sue Masica, Greg Dudgeon, Andee Sears, Jonathan Jarvis, the National Park Service, Sally Jewel, and the United States Department of the Interior.

5. Docket No. 101.

6. Docket No. 74 at 2.

7. Complaint for Declaratory Judgment and Injunctive Relief at 14-15, ¶ 46, Docket No. 1.

expanded by ANILCA are void."[8] In Count III, Sturgeon requests an order enjoining defendants "from interfering with [his] operation of his hovercraft on state-owned navigable waters within the Yukon-Charley" Rivers National Preserve (herein "Yukon-Charley").[9] In Count IV, he requests an order enjoining defendants "from enforcing NPS regulations, which are solely applicable to public lands within federal conservation system units, on lands belonging to the State of Alaska, including navigable waters, within the boundaries of NPS conservation units in Alaska that were created or expanded by ANILCA."[10]

In its second amended complaint in intervention,[11] the State asserted four claims for relief. The State's first claim for relief was a facial challenge to the regulations in question.[12] In its second claim for relief, the State seeks a declaration that the application and enforcement of 36 C. F. R § 1.2(a)(3) and § 13.2 violates § 103(c) of ANILCA.[13] In its third claim for relief, the State seeks a declaration that the Secretary's denial of the State's petition for rule-making was arbitrary and capricious.[14] In its fourth claim for relief, the State seeks injunctive relief prohibiting the

8. Id. at 16, ¶ 51.

9. Id. at 17, ¶ 55.

10. Id. at 18-19, ¶ 60.

11. Docket No. 45.

12. Id. at 15, ¶¶ 56-57.

13. Id. at 15, ¶¶ 58-59.

14. Id. at 15, ¶¶ 60-63.

application and enforcement of the regulations in question on State-owned lands and waters.[15]

By order of September 19, 2012,[16] the court rejected the State's first claim for relief which was a facial challenge to the NPS regulations at issue here because that claim was time-barred. Defendants now contend that both Sturgeon and the State are in fact bringing facial challenges in the guise of an "as-applied" challenge. Sturgeon and the State have pled as-applied challenges. The facts upon which Sturgeon and the State rely demonstrate application of NPS regulations to the respective activities of Sturgeon and the State. The court will address the as-applied claims.

In their briefing to the court, the State and defendants briefly discuss whether or not the State is challenging 36 C. F. R. § 13.2.[17] The court finds no evidence in the record that the defendants applied 36 C. F. R. § 13.2 to the State. As discussed hereinafter, the principal issue here is the applicability of 36 C. F. R. § 1.2 (which regulation addresses the applicability of Title 36, Part 2, as well as 36 C. F. R. Part 13 regulations) to the conduct of Sturgeon and the State.

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15. Id. at 15, ¶¶ 64-65.

16. Docket No. 53.

17. 36 C. F. R. § 13.2 addresses the applicability and scope of the Part 13 regulations which have application to NPS units in Alaska.

Appendix C

II. Statutory/Regulatory Background.

A. Alaska Native Claims Settlement Act.

In 1971, Congress enacted the Alaska Native Claims Settlement Act ("ANCSA") for purposes of addressing and resolving outstanding aboriginal claims of Native Alaskans which began to accrue in 1867 when the United States purchased Russian-America (Alaska). In addition to a monetary settlement and the conveyance of some 40 million acres of land to be divided amongst 220 Native villages and 12 regional corporations, ANCSA created the joint Federal-State Land Use Planning Commission for Alaska[18] and, by § 17(d)(2)(A), made provision for the withdrawal from public domain 80 million acres of unreserved public lands in Alaska for potential addition to or creation of new units of the national parks, forests, wildlife refuges, and wild and scenic river systems.[19]

B. Alaska National Interest Lands Conservation Act.

Based upon the work of the Commission, Congress in 1980 enacted ANILCA. In furtherance of the ANCSA § 17(d)(2)(A) withdrawals, Title II of ANILCA makes provision for the creation of or additions to the NPS. Section 201 established new "units of the National Park

18. 43 U.S.C. § 1616. For convenience, we refer in the text of this discussion to ANCSA and ANILCA sections by statutory number, with parallel United States Code sections in a footnote.

19. 43 U.S.C. § 1616(d)(2)(A).

System [which] shall be administered by the Secretary under the laws governing the administration of such lands and under the provisions of this Act[.]"[20]Included as a new area was Yukon-Charley, "containing approximately one million seven hundred and thirteen thousand acres of public lands, as generally depicted on map numbered YUCH-90, 008[.]" § 201(10).[21] Section 201(10) expressly sets forth the purposes for this withdrawal, one of which was the maintenance of the environmental integrity of the Charley River Basin in its undeveloped, natural condition.

Section 202 of ANILCA[22] adds to existing NPS units.[23] Included by § 202(2)[24] is an addition to the Katmai National Monument[25] of 1, 037, 000 acres of public land, to be known as Katmai National Preserve ["Katmai"]. Katmai is to be administered to protect habitat, including fish populations, and to protect scenic geological, cultural, and recreational features. § 202(2).[26]

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20. 16 U.S.C. § 410hh.

21. 16 U.S.C. § 410hh(10).

22. 16 U.S.C. § 410hh-1.

23. 16 U.S.C. § 410hh-1.

24. 16 U.S.C. § 410hh-1(2).

25. Renamed Katmai National Park by § 202(2).

26. 16 U.S.C. § 410hh-1(2).

Included in Yukon-Charley are the lower reaches of the Nation River. Included in Katmai is the Alagnak River.[27]

For purposes of the implementation of ANILCA, that act contains definitions which are critical to understanding the act. The key terms are "land," "federal land," and, most important of all, "public lands." "Land" means "lands, waters, and interests therein." § 102(1).[28] "Federal land" means "lands the title to which is in the United States" after the date of enactment of ANILCA. § 102(2).[29] "Public lands" means "land situated in Alaska which, "after the date of enactment of ANILCA are Federal lands, except:

> land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska of the State under any other provision of Federal Law.

§ 102(3)(A).[30] Finally, "conservation system unit" is defined to include the various NPS units addressed by ANILCA. § 102(4).[31] Yukon-Charley and Katmai are conservation system units for purposes of ANILCA.

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27. The Alagnak River is also designated by § 601(25) as a wild and scenic river within the NPS. 16 U.S.C. § 1274(a)(25).

28. 16 U.S.C. § 3102(1).

29. 16 U.S.C. § 3102(2).

30. 16 U.S.C. § 3102(3)(A).

31. 16 U.S.C. § 3102(4).

Collapsing the foregoing definitions for ease of discussion of the circumstances in this case, "public lands" are waters or interests in waters in Alaska owned by the United States in 1980. Excluded from public lands are interests in land and/or water confirmed or granted to the State of Alaska under any federal law.

Somewhat buried in the "maps" section of ANILCA is § 103(c)[32] which is at the heart of this litigation:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

C. National Park Service Administration Improvement Act and Regulations.

In order to facilitate the administration of the national park system, the Secretary of the

32. 16 U.S.C. § 3103(c).

> Interior is authorized, under such terms and conditions as he may deem advisable, to carry out the following activities:
>
> . . . .
>
> Promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States: Provided, That any regulations adopted pursuant to this subsection shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States.

16 U.S.C. § 1a-2(h).

Relying upon and in furtherance of the above act, the Secretary of the Interior had adopted by 1997 the following general provision of Title 36 of the Code of Federal Regulations for areas administered by the NPS. Section 1.2[33] provides as follows:

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33. The parties have discussed at length the history of 36 C. F. R. § 1.2. Because this 1997 regulation is clear and unambiguous, and because the court has before it only as-applied challenges to the NPS regulations, there is no need to delve into the development of § 1.2. It is the interplay between § 1.2 and ANILCA § 103(c) which is critical to a disposition of this case.

Appendix C

Applicability and scope.

(a) The regulations contained in this chapter apply to all persons entering, using, visiting, or otherwise within:

(1) The boundaries of federally owned land sand waters administered by the National Park Service;

. . . .

(3) Waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and without regard to the ownership of submerged lands, tidelands, or low-lands;

. . . .

(5) Other lands and waters over which the United States holds a less-than-fee interest, to the extent necessary to fulfill the purpose of the National Park Service administered interest and compatible with the nonfederal interest.

(b) The regulations contained in parts 1 through 5, part 7, and part 13 of this chapter

> do not apply on non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.

36 C. F. R. § 1.2(a), (b).

Summarizing the foregoing, subsections (a)(1) through (5) of § 1.2 apply to everyone going within the boundaries of all NPS administered lands in the United States. Navigable waters within the boundaries of such lands are subject to regulation, irrespective of ownership of submerged lands.[34]

The Secretary of the Interior has also promulgated 36 C. F. R. Part 13, containing regulations applicable to the NPS units in Alaska. Section 13.2(a) provides:

> The regulations contained in part 13 are prescribed for the proper use and management of park areas in Alaska and supplement the general regulations of this chapter. The general regulations contained in this chapter are applicable except as modified by part 13.

36 C. F. R. § 13.2(a). With respect to park areas, § 13.2(b) provides:

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34. For reasons explained hereinafter, the provisions of § 1.2(a)(5) do not come into play in this case.

Appendix C

> Subparts A through F contain regulations applicable to park areas. Such regulations amend in part the general regulations contained in this chapter. The regulations in subparts A through F govern use and management, including subsistence activities, within the park areas, except as modified by special park regulations in subparts H through V.

36 C. F. R. § 13.2(b).

In furtherance of his/her general administrative duties, the Secretary of the Interior has promulgated specific regulations which pertain to entries within the boundaries of NPS administered lands using hovercraft or helicopters. Title 36, Code of Federal Regulations, § 2.17(e), provides that "[t]he operation or use of hovercraft is prohibited." Section 2.17(a)(3) provides that the following is prohibited:

> Delivering or retrieving a person or object by parachute, helicopter, or other airborne means, except in emergencies involving public safety or serious property loss, or pursuant to the terms and conditions of a permit.

36 C. F. R. § 2.17(a)(3).

Part 2 regulations, including § 2.17(a)(3) and (e), are expressly subject to § 1.2(a), as provided by § 1.2(b). Part 13 regulations are also subject to § 1.2(a), as provided by § 1.2(b), except to the extent that Part 13 regulations

modify or amend the general regulations. Sturgeon and the State have not pointed to, and the court does not perceive there to be any amendment of the subparts A through F, Alaska-specific regulations with respect to park areas.[35] Therefore, the regulations specific to the use of helicopters and hovercraft have application within the boundaries of Yukon-Charley and Katmai, including the navigable waters of those NPS administered areas, **unless** Sturgeon and the State are correct in arguing that 36 C. F. R. § 1.2 (and therefore§§ 2.17(a)(3) and (e) and Part 13 as well) does not apply within the boundaries of Yukon-Charley and Katmai because of the provisions of ANILCA § 103(c).[36]

III. Factual Background.

Sturgeon's complaint and the State's second amended complaint in intervention focus upon their respective use of the Nation River and the Alagnak River. The lower reaches of the Nation River are within the boundaries of Yukon-Charley. The upper reaches of the Alagnak River are within the boundaries of Katmai. Both Yukon-Charley and Katmai are national parks created or expanded by ANILCA §§ 201 and 202. The Nation River arises in the

35. There are, in subparts H and O, special regulations applicable to the Alagnak River as a wild river and to Katmai National Park and reserve. The Alagnak regulation has to do with bear viewing. 36 C. F. R. § 13.550. The subpart O regulations contain general provisions with respect to fishing, wildlife viewing, firearms, and the use of Lake Camp and Brooks Camp Developed Area. 36 C. F. R. §§ 13.1202-1242.

36. 16 U.S.C. § 3103(c).

Ogilvie Mountains of Yukon Territory, Canada, near the U. S. border, and flows in a southerly direction into Alaska and then into the northeastern quadrant of Yukon-Charley where it ultimately joins the Yukon River. The Alagnak River arises in the Aleutian Range south of Lake Iliamna and flows in a westerly direction through Katmai National Preserve. The Alagnak empties into Kvichak Bay, then into Bristol Bay.

It is undisputed that those portions of the Nation and Alagnak Rivers which are the subject of this litigation are within a conservation system unit as defined by § 102(4) and that both rivers have been determined to be navigable. Because the Nation and Alagnak Rivers are navigable, the State holds title to the lands under the navigable waters in trust for the people of Alaska, "that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." Ill. Cent. R. Co. v. State of Ill., 146 U.S. 387, 452, 13 S. Ct. 110, 36 L. Ed. 1018 (1892); Alaska v. United States, 545 U. S. 75, 78-79, 125 S. Ct. 2137, 162 L. Ed. 2d 57 (2005).[37]

Sturgeon alleges that while he was on a moose hunting trip in 2007, the NPS informed him that he could not use

37. "The common-law public trust doctrine has been incorporated into the constitution and statutes of Alaska." State, Dep't of Natural Resources v. Alaska Riverways, Inc., 232 P. 3d 1203, 1211 (Alaska 2010). "The people of the state have a constitutional right to free access to and use of the navigable or public water of the state" and "[t]he state has full power and control of all of the navigable or public water of the state, both meandered and unmeandered[.]" AS § 38. 05. 126(a), (b).

his small personal hovercraft on the Nation River within the boundaries of the Yukon-Charley. Sturgeon alleges that upon returning from his hunting trip, he had phone conversations and met with Andee Sears, a special agent for the NPS, who "reaffirmed the NPS's position that use of a hovercraft within the boundaries of the Yukon-Charley is a crime . . . and warned plaintiff that he would be criminally cited if he ever again operated the hovercraft within the Yukon-Charley".[38] In October 2010, Sturgeon petitioned the NPS "to engage in rule-making to repeal or amend NPS regulations so that the NPS would no longer assert the authority to restrict access on navigable waters located within the boundaries of park areas in Alaska."[39] Sturgeon received no response to his petition.[40] On July 26, 2011, Sturgeon sent a letter to the regional chief ranger of the Alaska district of the NPS, requesting that the chief ranger "confirm in writing whether I will be able to launch in the Yukon or the lower reaches of the Nation with my hovercraft so I can access that part of the Nation upriver from the Yukon-Charley boundary."[41] Sturgeon received no response to this letter.[42]

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38. Complaint for Declaratory Judgment and Injunctive Relief at 11, ¶ 36, Docket No. 1.

39. Id. at 12, ¶ 40; see also, Exhibit A, Complaint for Declaratory Judgment and Injunctive Relief, Docket No. 1.

40. Id. at 13.

41. Exhibit B at 2, Complaint for Declaratory Judgment and Injunctive Relief, Docket No. 1.

42. Complaint for Declaratory Judgment and Injunctive Relief at 13, ¶ 41, Docket No. 1.

In 2010, the Alaska Department of Fish and Game was required to apply to defendants for a scientific research and collecting permit to conduct genetic sampling on chum salmon in the Alagnak River.[43] "Access to State lands was to be by helicopter. . . ."[44]

On September 30, 2010, the State petitioned the Secretary of the Interior to repeal or amend § 1.2(a)(3) to make it in applicable to Alaska, with a corresponding repeal of the revisions to 36 C. F. R. § 13.2.[45] The petition was denied on January 13, 2012.[46]

IV. Jurisdiction.

The parties disagree as to whether Sturgeon and the State have standing to bring their as-applied regulatory claims with respect to the Kobuk and Yukon Rivers.[47] Sturgeon mentions the Yukon River in his complaint, but he has not asserted any separate claim based upon the Yukon River; and the NPS regulations that Sturgeon is challenging were applied to him with respect to his use of

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43. Second Amended Complaint in Intervention [etc.] at 12, ¶ 2b, Docket No. 45.

44. Id. at 13.

45. Id. at 11, ¶ 44.

46. Id. at 11, ¶ 46.

47. Defendants concede that this court has jurisdiction over Sturgeon's claims based on the Nation River and the State's claims based on the Alagnak River. Defendants' Sur-Reply on Motions for Summary Judgment at 4, Docket No. 101.

a hover-craft on the Nation River within Yukon-Charley. Similarly, the State never pled any factual allegations relating to its access to the Kobuk National Park. The court therefore concludes that it is defendants' application of 36 C. F. R. § 1.2 and the related Part 2 regulations to Sturgeon and the State with respect to their operations on the Nation and Alagnak Rivers which is before the court. Claims as to the Kobuk and Yukon Rivers have not been put before the court.

V. Standard of Review.

"Summary judgment is a suitable vehicle for resolution of a challenge to agency action under the Administrative Procedure Act. . . ." Western Watersheds Project v. Salazar, 766 F. Supp. 2d 1095, 1104 (D. Mont. 2011) (citing Nw. Motorcycle Ass'n v. United States Dep't of Agric., 18 F. 3d 1468, 1471-72 (9th Cir. 1994)). "However, unlike the typical civil summary judgment resolution, the [c]ourt does not make findings of fact or determine the existence of genuine issues of material fact." Id. "The [c]ourt must instead review the Administrative Record that was before the federal agency at the time it made its decision to determine whether the record supports the agency's decision. . . ." Id.

"'Because this case involves an administrative agency's construction of a statute that it administers, [the court's] analysis is governed by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694. . . .'" Rodriguez v. Smith, 541 F.3d 1180, 1183 (9th Cir. 2008) (quoting Mujahid v.

Daniels, 413 F.3d 991, 997 (9th Cir. 2005)). "Under the Chevron framework" the court "must 'first determine[] if Congress has directly spoken to the precise question at issue, in such a way that the intent of Congress is clear.'" Id. at 1184 (quoting Mujahid, 413 F. 3d at 997). "'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Id. (quoting Chevron, 467 U. S. at 842-43). "'[I]f the statute is silent or ambiguous with respect to the specific issue,' the court moves to step two of the Chevron inquiry, and considers 'whether the agency's answer is based on a permissible construction of the statute.'" Blandino-Medina v. Holder, 712 F. 3d 1338, 1343 (9th Cir. 2013) (quoting Chevron, 467 U. S. at 843).

VI. Discussion.

Sturgeon and the State argue that the NPS general regulations may not be applied to them because of § 103(c) of ANILCA.[48] They point out that 36 C. F. R. § 1.2 purports to grant the NPS regulatory authority over state-owned navigable waters within the boundaries of Yukon-Charley and Katmai. They contend that § 103(c) of ANILCA forbids the NPS from exercising its regulatory authority over state-owned navigable waters within park boundaries in Alaska.

48. 16 U. S. C § 3103(c).

Appendix C

The first sentence of § 103(c) provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act)shall be deemed to be included as a portion of such unit.[49]

It is clear beyond any room for discussion that the river beds and waters of the Alagnak and Nation Rivers are lands within the boundaries of Yukon-Charley and Katmai, both of which are ANILCA conservation system units. The first sentence of § 103(c) provides that only "public lands" are part of the respective conservation units (Yukon-Charley and Katmai). The State's submerged lands — the beds of the Nation River and the Alagnak River — are owned by the State, not the United States. The river beds are not included in — are not part of — conservation units Yukon-Charley or Katmai.

The State's submerged lands — the beds of the Nation River and the Alagnak River — are not the only interests to be addressed. For purposes of ANILCA, "land" means land or water or interests in them. The State owns "the natural resources within such lands and waters." 43 U.S.C. § 1311(a). The United States is entitled to regulate and improve navigation on navigable waters in furtherance of commerce. United States v. 32.42 Acres of Land in San Diego County, 683 F.3d 1030, 1037 (9th Cir. 2012). However, the federal government's rights as

49. 16 U. S. C § 3103(c).

regards navigation is not an interest inland for purposes of ANILCA. Alaska v. Babbitt, 72 F. 3d 698, 702-03 (9th Cir. 1995) ("Katie John I").[50] The Katie John I decision stands for the further proposition that the United States may have reserved water rights with respect to navigable waters within ANILCA conservation units; and where such reserved water rights exist, the United States does own public land for purposes of ANILCA. Id. at 703-04. The State claims to "own" the waters of the Nation and Alagnak Rivers. Defendants contend that the United States owns reserved water rights in the Nation and Alagnak Rivers, thereby making the rivers "public lands" for purposes of ANILCA.

Each of the United States and the State have correlative rights with respect to navigable waters. But we need not decide here which if any of the correlative rights with respect to the navigable waters (as distinguished from submerged lands) of the Nation and Alagnak Rivers are owned by the State or the United States, or whether such interests are or are not public land. The principal issue in this case is whether or not 36 C. F. R. § 1.2(a) (and therefore also § 2.17 and Part 13) applies to the respective operations of Sturgeon and the State within the boundaries of Yukon-Charley and Katmai. The first sentence of § 103(c) does not address that issue.

The second sentence of § 103(c) does address the application of Title 36 regulations. It reads:

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50. Katie John I "remains controlling law" despite Katie John II. John v. United States, 720 F.3d 1214, 1226 (9th Cir. 2013).

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> No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within suchunits.[51]

The parties disagree as to whether the beds of the Nation and Alagnak Rivers, and such other rights as the State may own, were "conveyed to the State." The river beds were not transferred to the State by means of a deed or patent such as the federal government routinely uses in transferring selected lands from public domain to the State. Here, there is no evidence of a conveyance of river beds to the State. However, § 102(3)(A) of ANILCA expressly provides that "lands which have been confirmed to . . . or granted to the Territory of Alaska or the State under any other provision of Federal law" are excluded from "public lands."[52] The State acquired title to the beds of the Nation and Alagnak Rivers under the Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), and the Submerged Lands Act, 43 U.S.C. §§ 1311-15. Because of the State ownership of the river beds, those river beds are not "public lands" for purposes of ANILCA. § 102(3).[53] However, the fact that the beds of the Nation and Alagnak Rivers are not public lands does not answer the question: "Does 36 C. F. R. § 1.2 and the underlying specific regulations of 36 C. F. R. Part 2 or Part 13 nevertheless

51. 16 U.S.C. § 3103(c).

52. 16 U. S. C. § 3102(3)(A).

53. 16 U.S.C. § 3102(3).

have application to the activities of Sturgeon and the State within the boundaries of Yukon-Charley and Katmai?" On its face, § 1.2 has application to them because, on the facts of this case, both Sturgeon and the State entered and carried on activities "within. . . [t]he boundaries of federally owned lands and waters administered by the National Park Service. . . ." 36 C. F. R. § 1.2(a). Again, subsection (a) is applicable by the terms of 36 C. F. R. § 1.2(b), and application of § 1.2(a) does not depend upon ANILCA or the State's rights as to navigable waters.

Assuming for the sake of discussion that the beds of the Nation and Alagnak Rivers which the State owns by virtue of the Submerged Lands Act are deemed to have been "conveyed" to the State for purposes of § 103(c) of ANILCA,[54] the second sentence of § 103(c) is dispositive in this case. The regulations which § 103(c) excludes from application to State lands are those "regulations applicable solely to public lands within such units."[55] Title 36, C. F. R. § 1.2, and Part II of Title 36 (including § 2.17)were enacted by the Department of the Interior pursuant to its general authority to adopt regulations for all NPS administered lands and waters. None of those regulations was adopted "solely" to address entry upon or use of various equipment on public lands within ANILCA-created conservation units such as Yukon-Charley and Katmai.

There are regulations contained within Title 36 which have been adopted and are "applicable solely to public

54. 16 U.S.C. § 3103(c).

55. 16 U.S.C. § 3103(c).

lands within [ANILCA units]." 36 C. F. R. § 103(c).[56] Part 13 of Title 36 contains the regulations which are applicable to NPS units in Alaska, including Yukon-Charley and Katmai. The Part 13 regulations "supplement the general regulations. . . ." 36 C. F. R. § 13.2(a). Part 13 regulations might "modify" or "amend" general regulations applicable to park areas. 36 C. F. R. § 13.2(a) and (b). But Part 13 regulations have not altered or amended the helicopter or hovercraft regulations of § 2.17.

It is arguable that Part 13 regulations do not apply to state-owned submerged lands within Yukon-Charley and Katmai because of § 103(c).[57] But the regulations which expressly proscribe the use of hovercraft and helicopters within the boundaries of NPS administered lands are contained in Part 2 of Title 36, not Part 13. The regulations contained in Part 2, and in particular §§ 2.17(e) and 2.17(a)(3) are not regulations applicable solely to public lands within conservation system units. They are regulations of general application across the entirety of the NPS.

The foregoing disposes of Sturgeon's and the State's claims based upon NPS regulations. There remains the State's third claim for relief by which the State seeks review of the defendants' denial of its petition for rule-making. The State did not present any argument with respect to its third claim in its opening brief. Defendants contend that the claim has been abandoned. The State

56. 16 U.S.C. § 3103(c).

57. 16 U.S.C. § 3103(c).

contends that it addressed this claim because, if the challenged regulations are invalid, then it was arbitrary and capricious of the defendants to deny the State's petition for rule-making. Inasmuch as defendants have prevailed with respect to the application of 36 C. F. R. § 1.2, it follows that the denial of the State's petition for rule-making was not arbitrary or capricious.

VII. Conclusion

The court concludes that 36 C. F. R. § 1.2(a), §§ 2.17(e) and 2.17(a)(3) were properly applied to the respective operations of Sturgeon and the State.

Sturgeon's complaint[58] is dismissed with prejudice. Intervenor the State of Alaska's second amended complaint[59] is dismissed with prejudice. The clerk of court shall enter judgment accordingly.

DATED at Anchorage, Alaska, this 30th day of October, 2013.

/s/ H. Russel Holland
United States District Judge

58. Docket No. 1.

59. Docket No. 45.