No. 14-1209

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

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

PETITIONER'S OPENING BRIEF

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

MICHAEL H. PARK
CONSOVOY MCCARTHY PARK PLLC
Three Columbus Circle
15th Floor
New York, NY 10019

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

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

Attorneys for Petitioner

Date: November 16, 2015

261990

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 Bert Frost, in his official capacity as Alaska Regional Director of the National Park Service; Greg Dudgeon, in his official capacity as Superintendent of the Yukon-Charley Rivers National Preserve; Andee Sears, in her official capacity as a Special Agent for the National Park Service; Sally Jewell, in her official capacity as 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.

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

STATUTES AND CONSTITUTIONAL PROVISIONS

Page

REGULATIONS

Page

OTHER AUTHORITIES

Cited Authorities

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 to the Petition ("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 issued its decision on October 6, 2014. App. 3a. A timely petition for rehearing en banc was denied on December 16, 2014. App. 1a. The petition for a writ of certiorari was timely filed on March 31, 2015, and granted on October 1, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

A. The Allocation of Lands to the State of Alaska and Alaska Natives

Upon entering the Union in 1959, Alaska received the largest land grant in the history of the United States. The Alaska Statehood Act of 1958 ("Statehood Act")

authorized Alaska to select up to 102,550,000 acres—an area the size of California—from the public lands of the United States "which [we]re vacant, unappropriated, and unreserved at the time of their selection." Pub. L. 85-508, § 6(b), 72 Stat. 339, 340 (1958). This unprecedented grant was driven by "fear that the territory was economically immature" and that its small, dispersed population "would be unable to support a state government." *Trustees for Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987). The land grant would act "as an endowment which would yield the income that Alaska needed to meet the costs of statehood" and thus "ensure the economic and social well-being of the new state." *Id.* at 335-36.

The Statehood Act also made the Submerged Lands Act of 1953, which grants "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States," 43 U.S.C. § 1311(a), "applicable to the State of Alaska" such that Alaska "shall have the same rights as do existing States thereunder," Pub. L. 85-508, § 6(m), 72 Stat. 343. Alaska therefore "holds title to the beds of navigable waters 'in trust for the people of the State 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.'" *Dep't of Natural Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1211 (Alaska 2010) (quoting *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 452 (1892)).

In the decade following its admission to the Union, Alaska began selecting lands from the public domain in accordance with its rights under the Statehood Act. But land disputes quickly arose when the State attempted

to select lands over which Alaska Natives had asserted aboriginal title. Because the Statehood Act had not extinguished their claims, Alaska Natives contended that the State had no legal right to their land. As a result, the Secretary of the Interior temporarily suspended transfer of unreserved public lands to Alaska. *See* Public Land Order 4582, 34 Fed. Reg. 1,025 (Jan. 23, 1969).

In 1971, Congress passed the Alaska Native Claims Settlement Act ("ANCSA") to resolve these disputes. Pub. L. 92-903, 85 Stat. 688 (1971). Congress designed ANCSA to settle Alaska Natives' claims of aboriginal title "rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property." 43 U.S.C. § 1601(b). At the same time, Congress was intent on doing so "without establishing any permanent racially defined institutions, rights, privileges, or obligations" or "creating a reservation system or lengthy wardship or trusteeship." *Id.* In short, Congress sought to "end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy." *Alaska v. Native Vill. of Venetie Tribal Gov.*, 522 U.S. 520, 523-24 (1998).

To that end, Congress extinguished the aboriginal land claims of Alaska Natives, appropriated $962.5 million to fund various Native regional and village corporations, and granted these corporations the right to select approximately 40 million acres of land. *See* 43 U.S.C. §§ 1603(b), 1605, 1607, 1610-15. "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 Res.*, 39 F.3d 991, 996 (9th Cir. 1994) (internal citation omitted). Indeed, Congress recognized that development of the land would allow Alaska Natives to "achiev[e] financial independence and self-sufficiency." *City of Angoon v. Marsh*, 749 F.2d 1413, 1414 (9th Cir. 1984).

B. The Alaska National Interest Lands Conservation Act of 1980

In addition to resolving the land claims of Native Alaskans, ANCSA directed the Secretary of the Interior to set aside up to 80 million acres of unreserved federal land "which the Secretary deems are suitable for addition to or creation as units of the National Park System[]." 43 U.S.C. § 1616(d)(2). The Secretary's subsequent withdrawals, however, never received congressional approval. *See id.* § 1616(d)(2)(D) (providing that the withdrawals would expire unless Congress approved them within five years). The Carter Administration (claiming authority under the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784, and the Antiquities Act of 1906, 16 U.S.C. §§ 431-433) then started withdrawing land on an *ad hoc* basis. By 1980, the Carter Administration had unilaterally withdrawn over 100 million acres of federal land. *See* Proclamation No. 4611, 43 Fed. Reg. 57,009 (Dec. 5, 1978); Public Land Order 5653, 43 Fed. Reg. 59,756 (Dec. 21, 1978); Public Land Orders 5696-5711, 45 Fed. Reg. 9,562 (Feb. 12, 1980). Alaska, which was still in the process of making its land selections under the Statehood Act, was "outraged by President Carter's expansive use of the Antiquities Act," and the "public outcry against this massive land 'lock-up' was significant." Richard M.

Johannsen, *Public Land Withdrawal Policy and the Antiquities Act*, 56 Wash. L. Rev. 439, 455 (1981).

In response, Congress enacted the Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. 96-487, 94 Stat. 2371 (1980). ANILCA rescinded the Carter Administration's land withdrawals, *see* 16 U.S.C. § 3209, and made any future federal withdrawals in Alaska of more than 5,000 acres subject to congressional approval, *see id.* § 3213(a). Congress thus developed its own policies to finally "complete the allocation of federal lands in the State of Alaska." *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 549 (1987). In doing so, Congress sought to balance two objectives: protecting "the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska" and, as it had done with the Alaska Statehood Act and ANCSA, ensuring "the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d).

ANILCA placed more than 100 million acres into conservation system units ("CSUs") in Alaska, expanding the National Park System by over 43 million acres and creating numerous new National Monuments and Wildlife Refuges. 16 U.S.C. §§ 431, 410hh, 668dd, 460mm, 539, 1274(a), 1132.[1] The Yukon-Charley Rivers National Preserve ("Yukon-Charley") is one of these CSUs.

1. ANILCA defined a CSU as "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 Forest Monument." 16 U.S.C. § 3102(4). That definition included "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." *Id.*

Congress identified the Yukon-Charley as "containing approximately one million seven hundred and thirteen thousand acres of public lands, as generally depicted on map numbered YUCH-90,008, and dated October 1978." 16 U.S.C. § 410hh(10). ANILCA established the Yukon-Charley as a "unit[] of the National Park System … [to] be administered by the Secretary under the laws governing the administration of such lands and under the provisions of this Act." *Id.* § 410hh.

Because Congress sought to include an entire ecosystem within a given CSU, each one encompassed a massive amount of land—not all of which belonged to the federal government. ANILCA delineated new CSU boundaries that encompassed roughly 28 percent of all land in Alaska. Native Corporations and the State owned much of the nonfederal land contained within these CSUs. As of this year, Native Corporations alone own approximately 18 million acres within CSUs, which amount to approximately 40 percent of their total ANCSA land selections. *See* Brief of Ahtna, Inc. et al. as Amici Curiae Supporting Petitioner at 5 & Ex. 1 (Apr. 29, 2015).

The disposition of these nonfederal lands within the new or expanded CSUs received significant congressional attention. There was no question as to Congress's intent: State, Native Corporation, and private lands were not "public lands," were not part of any CSU, and would not be subject to federal regulation as if they were part of a CSU. As the Senate committee charged with drafting responsibility explained, "[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 (1979). Rather, only "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 wetlands regulations, and other Federal statutes and regulations of general applicability would be applicable to private or non-Federal public land inholdings within conservations system units." *Id.* These generally-applicable statutes and regulations thus were "unaffected by the passage of this bill." *Id.*

Congress was especially concerned that ANILCA not disturb the land rights granted to Alaska Natives under ANCSA. Applying federal conservation regulations to Native Corporation lands would imperil ANCSA's goal of ensuring financial independence and self-sufficiency for Alaska Natives. As Arizona Congressman Morris Udall, one of ANILCA's primary sponsors, put it: ANILCA was a "direct out-growth of [ANCSA]," and, as a consequence, it was "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 [ANCSA] in return for the extinguishment of their claims based on aboriginal title." 125 Cong. Rec. 9,905 (1979) (statement of Rep. Udall).

Congressman Udall explained that ANILCA was to have no effect on these lands:

> 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, [ANCSA], 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.

Id.; *see also* 126 Cong. Rec. 21,882 (1980) (statement of Sen. Stevens) ("The fact that Native lands lie within the boundaries of conservation system units is not intended to affect any rights which the [Native] corporations have under this act, [ANCSA], or any other law…. The Native organizations have been given repeated assurances that including their lands within conservation units will not affect the implementation of [ANCSA]."); 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling) (recognizing that nothing in ANILCA "alters in any way the ability of the State or Natives to do what it will with … lands" within the boundaries of CSUs).

Congress understood, though, that it should do more than make its intent known in legislative documents and floor statements. It thus added Section 103(c), which states:

> 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).[2]

Congress added Section 103(c) 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. 11,158 (1979) (statement of Rep. Seiberling). Only an express statutory prohibition would guarantee that some "sharp lawyer" would not use "catch words" to circumvent Congress's intention that "the fact that [land] is within the boundaries drawn on the map for that conservation unit does not in

2. This provision was originally located in Section 810(c) of H.R. 3651, the "Udall-Anderson" bill that eventually became ANILCA. *See* H.R. 39, 96th Cong. (1979). After the House version of ANILCA passed, 125 Cong. Rec. 11,458-59 (1979), it was replaced with the Senate's version, which did not include Section 810(c), 126 Cong. Rec. 21,891 (1980); H.R. 39, 96th Cong. (1980). This provision was included in the final version of ANILCA through a concurrent resolution that reinstated the original Section 810(c) amendment language to its new location at Section 103(c). 126 Cong. Rec. 30,495-500 (1980); *see* H.R. Con. Res. 452, 96th Cong. (1980).

any way change the status of that State, native or private land or make it subject to any of the laws or regulations that pertain to U.S. public lands." *Id*. In sum, Congress added Section 103(c) to 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. 30,498 (1980) (statement of Rep. Udall).

C. Regulatory History

In the wake of ANILCA's passage, NPS adopted regulations to govern "public uses of National Park System units in Alaska, including units established by [ANILCA]." National Park System Units in Alaska, 46 Fed. Reg. 31,836, 31,836 (June 17, 1981). These NPS regulations addressed, *inter alia*, public access, camping and picnicking, carrying of firearms, and preservation of natural features. *See id.* at 31,854-64 (citing 36 C.F.R. Part 13). These Alaska-specific regulations complemented NPS's nationwide regulations and, in some cases, superseded "otherwise applicable regulatory provisions of 36 CFR Parts 1-9," which NPS found "generally inappropriate in the unique Alaska setting." *Id.* at 31,836.

NPS recognized "Sections 103(c) and 906(o) of ANILCA generally restrict the applicability of [NPS] regulations to federally-owned lands within park area boundaries." *Id*. at 31,843.[3] "Consistent with the statute

3. Section 906(o) provides, in relevant part, that "any land withdrawn pursuant to [ANCSA] and within the boundaries of any [CSU] … shall be added to such unit and administered accordingly" unless it is conveyed to a Native Corporation or the State; and that "[u]ntil conveyed, all Federal lands within the boundaries of a [CSU] … shall be administered in accordance with the laws applicable to such unit." 43 U.S.C. § 1635(o)(1)-(2).

and the explanatory legislative history," then, NPS "restrict[ed] the applicability of these regulations to 'federally owned' lands … within park area boundaries." *Id.* (citing 126 Cong. Rec. 11,115 (1980) and 126 Cong. Rec. 15,130-31 (1980)). In other words, NPS made clear that "[t]hese 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 inside park area boundaries." *Id.*

Two years later, NPS engaged in a "comprehensive review of [its] general regulations" applicable nationwide in an effort to "simplify" them and "ease the burden of [its] regulations on the public." General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30,252, 30,252 (June 30, 1983). Under the National Park Service Organic Act, the Secretary of the Interior had the authority to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Services," 16 U.S.C. § 3, and 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," *id.* § 1a-2(h).[4] Acting under those authorities, NPS revised many of its general regulations governing public use and recreational activities in areas it administers. 48 Fed. Reg. at 30,252. As part of this overhaul, NPS

4. 16 U.S.C. § 3 and 16 U.S.C. § 1a-2(h) were later repealed and recodified by the Act of Dec. 19, 2014, Pub. L. 113-287, § 7, 128 Stat. 3094, 3273 (2014). *See* 54 U.S.C. § 100751.

prohibited "[t]he operation or use of hovercraft" in park areas. *Id.* at 30,286 (quoting 36 C.F.R. § 2.17(e)).

At the same time, NPS sought to clarify the extent of its jurisdiction over nonfederal lands. *See id.* at 30,260-61. In an amended version of 36 C.F.R. § 1.2(b), NPS announced that "[t]he regulations contained in Parts 1 through 7 of this chapter are not applicable on privately owned lands and water (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." *Id.* at 30,275. "Legislative jurisdiction," in turn, was defined as "lands and waters under the exclusive or concurrent jurisdiction of the United States." *Id.* at 30,276 (quoting 36 C.F.R. § 1.4).

In 1988, NPS revised Section 1.2(b) to confirm that the ban on federal regulation in the absence of legislative jurisdiction extended to all "non-federally owned lands and waters" and not just "privately owned lands and water." Applicability of Regulations to Non-Federal Lands and Waters Under U.S. Legislative Jurisdiction, 52 Fed. Reg. 35,238, 35,239 (Sept. 18, 1987).

NPS abruptly reversed course in 1996. Referencing its inability to prosecute an individual who had taken a seal from Alaskan waters for a ceremonial potlatch,[5] the

5. In that case, *United States v. Brown*, 36 F.3d 1103 (9th Cir. 1994), the United States ceased prosecution and sought dismissal because it recognized that it neither "own[ed] the submerged land" nor had "legislative jurisdiction" over such lands. *See* Brief of the United States at 5-6, *United States v. Brown*, No. 94-30019, 1994 WL 16122537 (9th Cir. May 17, 1994).

agency purported to clarify "the applicability of those NPS regulations that apply in all National Park System areas to waters subject to federal jurisdiction located within park boundaries, including navigable waters." General Regulations for Areas Administered by the National Park Service and National Park System Units in Alaska, 61 Fed. Reg. 35,133, 35,133 (July 5, 1996). Abandoning its earlier view, NPS announced "that NPS regulations otherwise applicable within the boundaries of a National Park System unit apply on and within waters subject to the jurisdiction of the United States located within that unit, including navigable waters and areas within their ordinary reach … irrespective of ownership of submerged lands, tidelands or lowlands, and jurisdictional status." *Id.* at 35,136 (quoting 36 C.F.R. § 1.2(a)(3)).

NPS therefore claimed power to enforce both its general regulations, which included the ban on hovercraft in 36 C.F.R. § 2.17(e), and its Alaska-specific regulations in 36 C.F.R. Part 13 over all State-owned navigable waters within the boundaries of the CSUs that ANILCA created or expanded. NPS rejected comments that Section 103(c) of ANILCA "should be interpreted as superseding NPS authority to regulate [non-federal] waters within park boundaries." *Id.* at 35,135. According to NPS, Section 103(c) "was characterized by Congress as a minor technical provision" and interpreting it to allow NPS regulation of nonfederal navigable waters within CSUs would be "consistent with [ANILCA's] underlying protective purposes." *Id.*

D. Factual Background

Petitioner John Sturgeon is a lifelong Alaskan. Prior to this dispute, he had hunted moose annually since 1971 on the Yukon River downstream from Eagle, Alaska, and its tributary, the Nation River. App. 8a. In 1990, in order to access waters of the Nation River inaccessible by other watercraft, Mr. Sturgeon purchased a small personal hovercraft and registered it with the State of Alaska. App. 8a. A hovercraft is a motorized vessel that utilizes a low-pressure air cushion produced by downward-directed fans. *See* Alaska Admin. Code tit. 11, §§ 20.990(7), (18). A hovercraft can travel over water and exposed gravel bars, which are common in Alaska. Alaska law permits the use of hovercraft on State-owned lands and waters.

From 1990 through 2007, Mr. Sturgeon used his hovercraft to access moose-hunting grounds on the Nation River, including those waters of the Nation River upriver from the Yukon-Charley boundary. App. 8a. Because the Nation River is navigable, Alaska holds title to its submerged lands. *See Alaska v. United States*, 201 F.3d 1154 (9th Cir. 2000).

In September 2007, during his annual moose-hunting trip, Mr. Sturgeon entered the Nation River from the Yukon River on his hovercraft. Approximately two miles upriver, Mr. Sturgeon stopped on a gravel bar located below the river's mean high-water mark to make repairs. Shortly thereafter, three armed NPS rangers approached him. App. 8a. The NPS rangers told Mr. Sturgeon that he was committing a federal crime by operating his State-registered hovercraft within the Yukon-Charley. App. 8a. Mr. Sturgeon explained to the NPS rangers that he

was operating his hovercraft on a State-owned navigable river. App. 8a. The NPS rangers said that Mr. Sturgeon was incorrect and insisted that he remove the hovercraft from the Yukon-Charley. App. 8a.

Mr. Sturgeon later met with NPS Special Agent Sears in Anchorage, Alaska, to discuss NPS's threat of criminal citation. App. 9a. Special Agent Sears acknowledged that the State of Alaska owned the submerged lands within the banks of the Yukon and Nation Rivers, but reaffirmed NPS's position that it would be a federal crime for Mr. Sturgeon to use his hovercraft on navigable waters within CSUs. App. 9a. She warned Mr. Sturgeon that NPS would criminally charge him if he again operated his hovercraft within the Yukon-Charley. App. 9a. Because of these warnings, Mr. Sturgeon did not use his hovercraft within the Yukon-Charley in subsequent hunting seasons. He thus was unable to hunt areas of the Nation River that he had previously accessed with his hovercraft. App. 9a.

In October 2010, Mr. Sturgeon sent a letter to then-Secretary of the Interior Ken Salazar, requesting that he initiate a rulemaking to repeal or amend NPS regulations so that NPS could no longer restrict access on State navigable waters located within the boundaries of CSUs. App. 9a. He received no response. On June 26, 2011, Mr. Sturgeon wrote to the NPS Alaska District Regional Chief Ranger, copying Special Agent Sears, requesting written confirmation that he would be cited if he again operated his hovercraft within the remote regions of the Yukon-Charley. D. Ct. Doc. No. 1-2, at 1-2 (Sept. 14, 2011). He received no response.

E. Proceedings Below

On September 14, 2011, Mr. Sturgeon filed a complaint against Sue Masica—the Alaska Regional Director of NPS at the time—and additional federal defendants in the U.S. District Court for the District of Alaska under the Administrative Procedure Act. The complaint sought, among other things, a declaratory judgment that ANILCA prohibits NPS from enforcing its regulations, including its ban on hovercraft in 36 C.F.R. *§* 2.17(e), on nonfederal lands in Alaska. Mr. Sturgeon also sought to enjoin the defendants from interfering with the operation of his hovercraft on navigable waters within the Yukon-Charley. The State of Alaska intervened to join the challenge.[6]

The district court granted summary judgment to the defendants. App. 35a-58a. The court recognized that the State had acquired title to the bed of the Nation River under the Statehood Act and the Submerged Lands Act. App. 55a. Nevertheless, the district court held that NPS could ban hovercraft on these waters because, in its view, Section 103(c) prohibited application of only Alaska-specific regulations. App. 56a. Because NPS's nationwide regulations, including the ban on hovercraft, "were enacted by the Department of the Interior pursuant to its general authority to adopt regulations for all NPS administered lands and waters," they were not "adopted 'solely' to address entry upon or use of various equipment on public lands within ANILCA-created conservation units such as Yukon-Charley." App. 56a.

---

6. On appeal, NPS claimed that the State had no standing to bring its action. The Ninth Circuit agreed and ordered the district court to dismiss the State's complaint. App. 14a-20a.

The Ninth Circuit affirmed. Like the district court, the Ninth Circuit concluded that ANILCA did not prevent NPS from imposing its generally applicable regulations on nonfederal lands within CSUs. ANILCA's limitation on NPS authority to impose "regulations applicable solely to public lands within such units" applied only to Alaska-specific regulations. App. 25a-26a. In the court's view, ANILCA did not supersede the general authority that Congress, in 1976, vested in the Secretary of the Interior to "'[p]romulgate and enforce regulations concerning boating and other 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. 25a (quoting 16 U.S.C. § la-2(h)). The Ninth Circuit concluded, therefore, 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.

On October 1, 2015, this Court granted Mr. Sturgeon's petition for certiorari.

SUMMARY OF ARGUMENT

This case involves a straightforward question of statutory interpretation. ANILCA mandates that any nonfederal land within its CSU boundaries is not included in the CSUs and is exempt from regulations enacted to manage the CSUs.

Specifically, in Section 103(c), Congress provided that only "public lands" within the boundaries of CSUs "shall be deemed to be included as a portion of such

unit," and that no lands owned by "the State, [a] Native Corporation, or [a] private party shall be subject to the regulations applicable solely to public lands within such units." 16 U.S.C. § 3103(c). Congress further stated that to "become part of the unit and [be] administered accordingly," nonfederal land must first be conveyed to the United States. *Id.*

ANILCA defines "public lands" to mean "land situated in Alaska which, after December 2, 1980, are Federal lands," *id.* § 3102(3), and "federal lands" to mean "lands the title to which is in the United States after December 2, 1980," *id.* § 3102(2). Lands belonging to Alaska and Native Corporations are expressly excluded from the definition of "public lands." *Id.* § 3102(3).

There is no dispute that Alaska's navigable waters are not "public lands." Through the Statehood Act, Alaska received "title to and ownership of the lands beneath navigable waters within [its] boundaries." 43 U.S.C. § 1311(a). The Submerged Lands Act establishes that this title includes control of the waters and resources above. *See infra* at 33-35. Because Alaska's navigable waters are not "public lands," NPS may not regulate them pursuant to its general authority to manage national parks. Section 103(c) of ANILCA, a specific statutory provision, is controlling. For Mr. Sturgeon, that means that NPS had no authority to threaten him with a criminal citation for using his hovercraft on the Nation River, a State-owned navigable river in Alaska.

The Ninth Circuit found otherwise by distorting the plain meaning of Section 103(c). Focusing on the word "solely," the Ninth Circuit read Section 103(c) to mean that

nonfederal land within CSUs was exempt from only "*CSU-specific regulations*." App. 24a (emphasis in original).

But nothing in ANILCA suggests a distinction between NPS regulations applicable nationwide and those applicable only in Alaska CSUs. Instead, Section 103(c) distinguishes between NPS's authority to manage "public lands within such units" and its lack of authority to manage nonpublic (*i.e.*, nonfederal) lands within such units. Had Congress intended otherwise, it would not have expressly required that these lands be conveyed to NPS before they could be administered as part of the National Park System. Congress used the word "solely" to ensure that nonfederal lands in Alaska CSUs remained subject to laws applicable to both public and private lands (such as the Clean Air Act and Clean Water Act).

ANILCA's legislative history confirms this plain reading. Congress passed ANILCA to provide for the conservation of Alaskan lands while also preserving the unique interests of the State and Native Corporations in their respective lands. In the Statehood Act, Congress provided the State of Alaska with a historic land grant to ensure the economic prosperity of its people. And in ANCSA, Congress provided significant funds and land grants to Alaska Natives so they could achieve financial independence and self-sufficiency. In light of the economic purposes of these acts, Congress wanted to ensure that ANILCA did not undermine these objectives by saddling State and Native Corporation lands with burdensome federal regulations. Congress thus passed Section 103(c) 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. 11,158 (1979) (statement of Rep. Seiberling).

Even if ANILCA were ambiguous, which it is not, NPS's construction of Section 103(c) would be unreasonable and entitled to no deference. Under NPS's interpretation, the agency could easily evade Section 103(c)'s limitation on federal control simply by promulgating a nationwide regulation applicable to nonpublic lands. Paradoxically, this interpretation would mean that should this new regulation be more restrictive than NPS's Alaska-specific rules, public lands within CSUs would continue to receive the benefit of the relaxed Alaska-specific regulations, but nonpublic lands would not. This nonsensical outcome squarely contradicts ANILCA, which repeatedly recognizes the unique nature of Alaskan lands.

Finally, NPS's alternative arguments based on navigable waters are not before the Court and cannot salvage the agency's regulations in any event. NPS may argue that submerged lands were never "conveyed" to the State of Alaska. But the transfer of title from the United States to Alaska under the Statehood and Submerged Lands Acts is a "conveyance" under any commonly understood definition of the term. Nor are Alaskan navigable waters "public lands," as NPS may argue. It is settled law that the State's ownership of submerged lands includes control of the waters flowing above them.

In short, because the State's navigable waters are not "public lands," ANILCA makes clear that NPS may not regulate them as though they were part of a CSU. NPS thus had no power to threaten Mr. Sturgeon with

a criminal citation for using his hovercraft on the Nation River. This Court should reverse the Ninth Circuit's decision.

ARGUMENT

I. ANILCA Prohibits NPS from Regulating Nonfederal Lands Within Alaska CSUs as Though They Were Part of the National Park System.

This Court reviews a federal agency's construction of a statute that it administers under the framework set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9. "Only if 'Congress has not directly addressed the precise question at issue' should a court consider 'whether the agency's answer is based on a permissible construction of the statute.'" *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 107 (2007) (Kennedy, J., concurring) (quoting *Chevron*, 467 U.S. at 843).

NPS's construction of Section 103(c) cannot survive *Chevron* review. First, Congress spoke directly and clearly by specifying in ANILCA that nonfederal lands within a CSU are not part of the CSU and not subject to regulation as though they were. As a consequence, NPS's enforcement of 36 C.F.R. § 1.2(a)(3) exceeded its statutory authority. Second, the legislative history confirms that Congress intended for Section 103(c) to prevent NPS from regulating nonpublic land in Alaska CSUs as though they were part of the National Park System. Third, even

if there were any ambiguity, NPS's interpretation of Section 103(c) would still be unreasonable and depend on an impermissible construction of ANILCA.

A. Section 103(c) of ANILCA limits NPS's general regulatory control to "public lands" within Alaska CSUs.

The question presented here is whether Section 103(c) of ANILCA limits NPS's general authority to regulate nonfederal lands located within Alaska CSUs.[7] As explained below, it plainly does.

The Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). The text of Section 103(c) is straightforward. It 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

7. NPS's regulatory authority derives from two statutory sources, neither of which permits application of the hovercraft regulation to nonpublic lands within Alaska CSUs. First, the Secretary of the Interior may "prescribe such regulations as the Secretary considers necessary or proper for the use and management of System units." 54 U.S.C. § 100751(a). Second, the Secretary may "prescribe regulations under subsection (a) concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States." *Id.* § 100751(b). But it is "familiar law that a specific statute controls over a general one." *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961).

> 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).

The Court need look no further than the provision's first sentence to resolve this dispute. State, Alaska Native, and private property holdings located within CSUs are not "public lands" as ANILCA defines that term. The preceding statutory section, Section 102, defines "lands" to mean "land, waters, and interests therein." 16 U.S.C. § 3102(1). And it defines "public lands" to mean "land situated in Alaska which, after December 2, 1980, are Federal lands," excluding from its ambit lands belonging to the "State of Alaska," "a Native Corporation," or "lands referred to in Section 19(b) of [ANCSA]." *Id.* § 3102(3). Because the navigable waterway at issue is not public land as ANILCA defines that term, it is not "a portion" of the CSU within which it is located. In other words, the State-owned river upon which Mr. Sturgeon was using his hovercraft is not part of the National Park System. NPS may not manage it as though it were.

Congress wisely understood that the nonpublic status of these lands might not prevent NPS from trying to

regulate them. Section 103(c)'s second sentence therefore provides that nonpublic lands shall not be "subject to the regulations applicable solely to public lands within such units." In other words, regulations (including NPS boating regulations) that apply to the federal portions of CSUs do not, and cannot, apply to State, Native Corporation, and private lands within CSU boundaries.

Lastly, Section 103(c)'s third sentence sets forth the only way such nonpublic land may become subject to NPS management. As the statute explains, "the State, a Native Corporation, or other owner" must "convey" the land, which "the Secretary may acquire … in accordance with applicable law." Only after the nonpublic land is conveyed to the United States "shall [it] become part of the unit, and be administered accordingly."

When read together, Sections 102 and 103(c) evince a clear intent to protect State, Native Corporation, and private land from being managed as part of the National Park System. Every statutory reference to nonfederal land is phrased in protective or exclusionary terms. Such land is excluded from the definition of "public lands" in Section 102(3); it is excluded from the CSUs in the first sentence of Section 103(c); it is fenced off from NPS regulation in the second sentence of Section 103(c); and Section 103(c)'s third sentence ensures that it may be administered by NPS only after it has been conveyed to the federal government.

Section 103(c) has a mirror image in Section 906(o), which confirms its plain meaning. Section 906(o)(1), located in ANILCA's chapter addressing ANCSA and the Statehood Act, provides that ANCSA land withdrawals

are included in a CSU "and administered accordingly" unless they were conveyed to a Native Corporation prior to ANILCA's enactment, or unless they are subsequently conveyed to the State. 43 U.S.C. § 1635(o)(1). Section 906(o)(2) then provides that "Federal lands within the boundaries of a conservation system unit … shall be administered in accordance with the laws applicable to such unit" only "until conveyed" out of federal ownership. *Id*. § 1635(o)(2). Like Section 103(c), Section 906(o) clearly distinguishes between management of federal and nonfederal lands. Federal lands are part of the CSU "and administered accordingly," while nonfederal lands within CSU boundaries are not deemed to be included in the CSU and are not so administered.[8] Thus, ANILCA draws a sharp distinction between federal lands, which are subject to NPS management, and nonfederal lands, which are not.

Indeed, it was not until Mr. Sturgeon initiated this litigation that NPS made the argument, which the Ninth Circuit accepted, that Section 103(c) exempts "nonfederal land" within Alaska CSUs only from Alaska "*CSU-specific regulations*." App. 24a. According to the Ninth Circuit, the phrase "regulations applicable solely to public lands within such units" distinguishes between Alaska-specific NPS regulations and nationwide NPS regulations. App. 23a-24a. The Ninth Circuit thus upheld the extension of

8. Section 907(a) likewise makes clear that nonpublic lands within CSUs are exempt from NPS regulations applying to public lands. That provision states that nonpublic land becomes subject to federal management only if the owner agrees in writing. 43 U.S.C. § 1636(a). By implication, no agreement would be necessary if these nonpublic lands were already subject to federal management regulations.

NPS's hovercraft ban to State-owned land because it is not one that "appli[es] solely to public lands within [CSUs]" in Alaska. 16 U.S.C. § 3103(c). This regulation "applies to all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national parks." App. 26a.

The Ninth Circuit's construction of Section 103(c) is untenable. The statute does not distinguish between NPS regulations applicable nationwide and those applicable in Alaska CSUs. As explained above, it distinguishes between NPS's authority to manage "public lands within such units" and its lack of authority to manage nonpublic (*i.e.*, nonfederal) lands within such units. That is the point of Section 103(c)'s first sentence: nonfederal lands are not "deemed to be included as a portion of such unit" even if they are physically located "within the boundaries of any conservation system unit." And that is plainly the context in which Section 103(c)'s second sentence uses the phrase "within such units." *See Deal v. United States*, 508 U.S. 129, 132 (1993) ("[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.").

Nor does the word "solely" limit the application of Section 103(c). The provision does not employ "solely" to distinguish nationwide NPS regulations from Alaska CSU-specific regulations. It distinguishes federal regulations applicable to both public and private lands—such as those enforcing the Clean Air Act and Clean Water Act—from regulations "applicable solely to public lands"—such as NPS regulations restricting boating and other activities. *See infra* at 29. Put differently, "solely" emphasizes that nonfederal lands within CSU boundaries, although

physically inside CSUs, are not subject to regulations (like the hovercraft ban challenged here) that apply only to public lands. There is no textual support for the Ninth Circuit's conclusion that "solely" modifies "within such units" instead of "public lands"—the phrase immediately following it in Section 103(c).

In sum, Section 103(c) plainly expresses Congress's intent. It provides that only "public lands" are part of CSUs; that NPS may not exert regulatory control over State, Native Corporation, and private lands located within those CSUs; and that those lands may be administered as part of the National Park System only if they are later conveyed to the federal government. Because there is no other permissible interpretation, "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,* 467 U.S. at 842-43.[9]

9. It bears noting that ANILCA's CSUs are not delineated in the statute by reference to legal descriptions. Rather, Section 103, entitled "Maps," establishes which lands are—and which lands are not—included in ANILCA's new or expanded CSUs. 16 U.S.C. § 3103. Accordingly, NPS's claim that Section 103(c) is "a minor technical provision," 61 Fed. Reg. at 35,135, and that Congress would not have "buried" a provision this important in "the 'maps' section of ANILCA," Brief in Opposition 18 (quoting App. 42a), misses the mark. Section 103(c) is in the maps section because it is part of an enactment that was redrawing maps to create millions of acres of CSUs. The maps section was the "natural place to locate" a provision setting forth the regulatory regime that would apply to the territory being allocated in those maps. *Nken v. Holder*, 556 U.S. 418, 431 (2009).

B. Congress intended for Section 103(c) to prevent NPS from regulating nonpublic lands in Alaska CSUs as though they were part of the National Park System.

"Given the straightforward statutory command" of Section 103(c), "there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997). But there can be no serious dispute that the statute's "legislative history confirms what [its] language … compels." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 205 (1991). Congress's objective in inserting Section 103(c) into ANILCA was to ensure that nonfederal lands newly surrounded by or adjacent to CSUs would not be subject to NPS oversight and regulation.

Section 103(c)'s House sponsor introduced it 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. 11,158 (1979) (statement of Rep. Seiberling); *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 legislative record is replete with evidence confirming Section 103(c)'s specific purpose. *See supra* at 5-10. Congress passed it to make explicit "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. 30,498 (1980) (statement of Rep. Udall).

Accordingly, the Ninth Circuit erred in stating that "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." App. 28a. In fact, that is the provision's main purpose. As Section 103(c) made clear, "the fact that [land] is within the boundaries drawn on the map for that conservation unit does not in any way change the status of that State, native, or private land or make it subject to any of the laws or regulations that pertain to U.S. public lands, so that those inholdings are clearly not controlled by any of the public land laws of the United States." 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling).

The legislative history also undermines the Ninth Circuit's contorted interpretation of "solely." As is evident from the provision's text, the function of "solely" in Section 103(c) is to ensure that "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 [are] applicable to private or non-Federal public land in holdings within [CSUs], and to such lands adjacent to [CSUs], and thus are unaffected by the passage of the bill." S. Rep. No. 96-413, at 303 (1979). In contrast, there is no indication from ANILCA's legislative history that Congress used "solely" to signal a distinction between Alaska CSU-specific and nationwide NPS regulations.

In its rulemaking, NPS further claimed that its revised construction of Section 103(c) was "consistent with [ANILCA's] underlying protective purposes: to protect objects of ecological, cultural, geological, historical, prehistorical, and scientific interest." 61 Fed. Reg. at 35,135. To be sure, conservation of Alaska's natural resources was one of ANILCA's purposes. *See* 16 U.S.C. § 3101(b).

But that was not Congress's only purpose. ANILCA also "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). For example, ANILCA protects mining operations, *see* 16 U.S.C. § 3170; promotes oil and gas development, *see id.* § 3142; and supports the Alaska timber industry, *see id.* § 539d. NPS ignores the "balance" the law struck. *Id.* § 3101(d). ANILCA's massive expansion of the National Park System achieved Congress's conservationist goal, and its restriction on NPS authority to regulate nonfederal lands achieved its parallel interest in safeguarding Alaska's social and economic welfare. Petitioner's construction of Section 103(c) is faithful to Congress's careful balancing of both goals. NPS's is not.

C. NPS's construction of Section 103(c) is unreasonable.

Even if Section 103(c) were ambiguous, which it is not, the hovercraft ban still would not be "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. NPS's construction of Section 103(c) is at odds with the provision's restrictive design. The parties may disagree over whether Section 103(c), by its terms,

restricts NPS's authority broadly or narrowly; but they agree that the point of enacting this provision was to restrict NPS authority. Yet under NPS's construction, *any* statutory limitation on its authority is easily evaded. All NPS would need to do is promulgate a new regulation making a previously Alaska-specific rule applicable to nonpublic lands nationwide and the rule would no longer be "applicable solely" to public lands. An interpretation of Section 103(c) that renders its restriction on NPS's authority "pointless" is not reasonable. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001).

In opposing certiorari, NPS argued that this concern is purely hypothetical unless "NPS dramatically shifts its regulatory approach" and, therefore, "enforcement of NPS rules on navigable waters within park boundaries will not make NPS's rules applicable on privately held, state-held, or Native-held inholdings." Brief in Opposition 21-22. But just last month, NPS published a notice of proposed rulemaking that would eliminate an Alaska-specific exemption from certain nationwide oil and gas rules, making the rules enforceable on State, Native Corporation, and private inholdings. *See* General Provisions and Non-Federal Oil and Gas Rights, 80 Fed. Reg. 65,572, 65,573 (Oct. 26, 2015). Notably, the rulemaking explained "that because these regulations are generally applicable to NPS units nationwide and to non-federal interests in those units, they are not 'applicable solely to public lands within [units established under ANILCA],' and thus are not affected by section 103(c) of ANILCA." *Id.* (quoting *Sturgeon v. Masica*, 768 F.3d 1066, 1077-78 (9th Cir. 2014)). Accordingly, there is no need to debate whether NPS will use its newly found power to impose nationwide regulations on nonpublic land in Alaska CSUs. It has already promised to do so.

An interpretation of Section 103(c) that leads to a "nonsensical result" is likewise unreasonable. *Paroline v. United States*, 134 S. Ct. 1710, 1729 (2014). Because of the uniqueness of Alaska's wilderness, numerous Alaska-specific rules differ from the nationwide rules governing the National Park System. Alaska's national parks, for example, have special camping, hunting, fishing, trapping, commercial activity, and motorized access rules. *See* 36 C.F.R. § 13.25 (camping); *id.* § 13.30 (weapons, traps, and nets); *id.* § 13.40 (commercial fishing); *id.* § 13.176 (commercial use of cabins); *id.* § 13.182 (construction of temporary facilities); *id.* § 13.1316 (commercial passenger transport). According to NPS's interpretation of Section 103(c), however, nonpublic lands located in Alaska CSUs would never receive the benefit of these more relaxed, Alaska-specific regulations (because they can never apply to nonpublic land). Rather, these nonpublic lands would have to comply with the nationwide rules that NPS itself determined were not appropriately sensitive to Alaska's circumstances.

The text of Section 103(c) cannot require that if NPS enacted an Alaska-specific rule permitting hovercraft, then State, Alaska Native, and private lands within those parks would, paradoxically, remain subject to the more restrictive nationwide rule. That is the epitome of an unreasonable construction of a federal statute. But it would be the inevitable consequence of adopting NPS's and the Ninth Circuit's interpretation of Section 103(c).

II. NPS's Alternative Arguments Are Beyond the Question Presented and Provide No Basis for Affirming the Judgment Below.

Both the district court and the Ninth Circuit decided this case based on their reading of Section 103(c). The question presented to this Court is thus limited to that issue. At the certiorari stage, however, NPS raised alternative arguments in an effort to sustain the extension of its hovercraft ban to nonpublic lands. But there are good reasons why the lower courts bypassed these arguments in favor of an anti-textual construction of Section 103(c). As explained below, they are all untenable.

A. Submerged lands were "conveyed" to the State of Alaska.

NPS argued below that Section 103(c) does not apply to submerged lands and navigable waters because they were not "conveyed" to the State, but instead became State land by operation of law. *See* App. 55a-56a Therefore, NPS asserted, such lands and waters could be administered as part of a CSU under Section 103(c), even though they were not "public lands." *Id*. The Ninth Circuit "assum[ed] (without deciding) that the waters of and land beneath the Nation River were 'conveyed to the State' for purposes of Section 103(c)." App. 26a. This assumption was correct.

The Alaska Statehood Act expressly incorporated the Submerged Lands Act of 1953. Pub. L. 85-508, § 6(m), 72 Stat. 339, 343 (1958). "By applying the Submerged Lands Act to Alaska through the Alaska Statehood Act, Congress granted the State title to submerged lands." *United States v. Alaska*, 521 U.S. 1, 7-8 (1997). This grant

of title to submerged lands at statehood is universally described as a transfer of an interest in property from the United States to the newly sovereign state. *See Idaho v. United States*, 533 U.S. 263, 272 (2001) ("[T]he default rule is that title to land under navigable waters passes from the United States to a newly admitted state."); *Alaska v. Ahtna*, 891 F.2d 1401, 1404 (9th Cir. 1989) (considering ownership of the lower thirty miles of the Gulkana River and noting that, "[i]f navigable, title to the submerged lands passed to Alaska at statehood").

A transfer of title to submerged lands from the United States to Alaska is a "conveyance" under any commonly understood definition of the term. Black's Law Dictionary defines "conveyance" as "[t]he voluntary transfer of a right or of property," and "convey" as "[t]o transfer or deliver (something, such as a right or property) to another, esp. by deed or other writing; esp., to perform an act that is intended to create one or more property interests, regardless of whether the act is actually effective to create those interests." Black's Law Dictionary (10th ed. 2014). Neither definition excludes transfers by operation of law. *Accord Tyonek Native Corp. v. Sec'y of the Interior*, 836 F.2d 1237, 1241 n.5 (9th Cir. 1988) (referencing "lands conveyed under the Alaska Statehood Act").

Consistent with these principles, the Alaska Supreme Court has described the transfer of submerged lands to the states at statehood as a "conveyance." *James v. State*, 950 P.2d 1130, 1138 (Alaska 1997) ("We conclude that the tidelands and lands underlying the coastal waters of the Tongass were conveyed to the State of Alaska at statehood under the equal footing doctrine and the Submerged Lands Act."). Section 103(c)'s exemption for "lands …

conveyed to the State" thus applies to submerged lands and navigable waters.

B. State navigable waters are not "public lands."

1. Ownership of submerged lands includes control of the waters flowing above them.

NPS asserted below that navigable waters could be "public lands" under ANILCA because Alaska does not "own" water, only its submerged lands. Resp. C.A. Br. 38-40. But this novel theory has no merit because the definition of "lands" in Section 102(1) of ANILCA includes "waters." 16 U.S.C. § 3102(1). Thus, under ANILCA, submerged lands include the waters above them. NPS's regulations similarly make no distinction between ownership of "submerged lands" and ownership of "waters." *See* 36 C.F.R. §§ 34.4, 9.37, & 9.38 (purporting to regulate "federally owned or controlled lands and waters"); 36 C.F.R. § 13.1406 (regulating "state-owned lands and waters").

Furthermore, there is no legal support for distinguishing between submerged lands and the waters above. The Submerged Lands Act makes clear that it inseparably grants ownership of submerged lands *and* the right to manage and regulate the resources in the waters above:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and

> waters, and *(2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established and vested in and assigned to the respective States.*

43 U.S.C. § 1311(a) (emphasis added).

The Submerged Lands Act thus grants to the States "title to and ownership of [] submerged lands *and waters*," including "the right and power to manage, administer, lease, develop, and use them." *United States v. California*, 436 U.S. 32, 40 (1978) (emphasis added) (citation and quotation omitted); *see also Totemoff v. State*, 905 P.2d 954, 964 (Alaska 1995) ("The Submerged Lands Act thus gives Alaska ownership of, title to, and management power over the following: lands beneath the navigable waters of Alaska, *the navigable waters themselves*, and fish and other marine life located in Alaska's navigable waters." (emphasis added) (footnotes omitted)).

Permitting federal regulation of navigable waterways independent of state ownership of the submerged lands beneath would also subvert the public trust doctrine. As a sovereign state, Alaska holds title to lands under navigable waters in trust for the people of Alaska, so "that they may enjoy the navigation of the waters, carry commerce over them, and have the liberty of fishing therein." *Illinois Cent.*, 146 U.S. at 453.[10] Accordingly, "title to the lands

10. Alaska's constitution and law unequivocally recognize the rights of all Alaskans to use and access water for purposes

under the navigable waters … necessarily carries with it control over the waters above them." *Id.* at 452. NPS's assertion that waters flowing over submerged lands may constitute federal "public lands" under ANILCA cannot be reconciled with this principle. There is no authority for divorcing control of State-owned submerged lands "from the waters above them."

NPS's argument also overlooks the fact that "public lands" in ANILCA are defined not by what Alaska owns, but by what the United States owns. ANILCA provides that "public lands" are "lands the title to which is in the United States." 16 U.S.C. §§ 3102(1)-(3). NPS has at no point demonstrated or even argued that the United States holds "title" to the waters flowing over Alaska's submerged lands. For good reason: the notion of federal "title" to water is incompatible with Alaska's undisputed ownership of submerged lands and control of the waters flowing above. 43 U.S.C. § 1311(a)(1).

Finally, ANILCA itself bars NPS's efforts to usurp Alaska's traditional control over navigable waters flowing over its submerged lands. Section 1319 makes clear that ANILCA does not "expand or diminish[] Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control." 16 U.S.C.

---

consistent with the public trust. *See, e.g.*, Alaska Const. art. VIII, § 3 ("Whether occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."); Alaska Stat. § 38.05.126(a) ("The people of the state have a constitutional right to free access to and use of the navigable or public water of the state."); Alaska Stat. § 38.05.126(b) ("[T]he state holds and controls all navigable or public water in trust for the use of the people of the state.").

§ 3207(2). It also provides that the statute does not affect "in any way any law governing appropriation or use of, or Federal right to, water on lands within the State of Alaska." *Id.* § 3207(1); *see also id.* § 3202. In this way, ANILCA preserves federal rights to *use* Alaskan waters while expressly refraining from attempting to alter the preexisting balance between state and federal *control* over those waters.

2. No federal reserved water rights for subsistence justify NPS extending its jurisdiction to state submerged lands and navigable waters.

Alternatively, NPS claimed below that it had the authority under the Ninth Circuit's "*Katie John*" decisions to regulate Alaskan navigable waters as "public lands" because the United States had reserved water rights in waters flowing through Alaska CSUs to further the conservation purposes behind ANILCA. Resp. C.A. Br. 12-13, 36-38; *see Alaska v. Babbitt*, 72 F.3d 698, 704 (9th Cir. 1995) ("*Katie John I*"); *Katie John v. United States*, 720 F.3d 1214, 1245 (9th Cir. 2013) ("*Katie John II*"). These decisions, however, held that waters with associated federal reserved water rights were "public lands" only for the limited purpose of giving effect to ANILCA's subsistence provisions in Title VIII. *See Katie John I*, 72 F.3d at 702 n.9; *Katie John II*, 720 F.3d at 1245. Any reserved water rights held by the government related to subsistence provide no authority for NPS, or any other agency, to regulate beyond subsistence issues. *See Cappaert v. United States*, 426 U.S. 128, 141 (1976) ("The implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.").

The NPS hovercraft prohibition at issue here was adopted for reasons wholly unrelated to subsistence. It is part of NPS's regulations promulgated under its general authorities, not any category of federal subsistence regulations promulgated under Title VIII of ANILCA. And on its face, it does not purport to manage allocation of, or access to, subsistence resources.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the decision of the Ninth Circuit.

Respectfully submitted,

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

Michael H. Park
Consovoy McCarthy Park PLLC
Three Columbus Circle
15th Floor
New York, NY 10019

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

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

Attorneys for Petitioner

Date: November 16, 2015

APPENDIX

APPENDIX A — 16 U.S.C. § 3103

16 U.S.C. § 3103

§ 3103. Maps

(a) Filing and availability for inspection; discrepancies; coastal areas

The boundary maps described in this Act shall be on file and available for public inspection in the office of the Secretary or the Secretary of Agriculture with regard to the National Forest System. In the event of discrepancies between the acreages specified in this Act and those depicted on such maps, the maps shall be controlling, but the boundaries of areas added to the National Park, Wildlife Refuge and National Forest Systems shall, in coastal areas not extend seaward beyond the mean high tide line to include lands owned by the State of Alaska unless the State shall have concurred in such boundary extension and such extension is accomplished under the notice and reporting requirements of this Act.

(b) Changes in land management status; publication in Federal Register; filing; clerical errors; boundary features and adjustments

As soon as practicable after December 2, 1980, a map and legal description of each change in land management status effected by this Act, including the National Wilderness Preservation System, shall be published in the Federal Register and filed with the Speaker of the House of Representatives and the President of the Senate,

and each such description shall have the same force and effect as if included in this Act: *Provided, however*, That correction of clerical and typographical errors in each such legal description and map may be made. Each such map and legal description shall be on file and available for public inspection in the office of the Secretary. Whenever possible boundaries shall follow hydrographic divides or embrace other topographic or natural features. Following reasonable notice in writing to the Congress of his intention to do so the Secretary and the Secretary of Agriculture may make minor adjustments in the boundaries of the areas added to or established by this Act as units of National Park, Wildlife Refuge, Wild and Scenic Rivers, National Wilderness Preservation, and National Forest Systems and as national conservation areas and national recreation areas. For the purposes of this subsection, a minor boundary adjustment shall not increase or decrease the amount of land within any such area by more than 23,000 acres.

(c) Lands included within unit; acquisition of land by Secretary

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.

APPENDIX B — 36 C.F.R. § 1.2

36 C.F.R. § 1.2

§ 1.2 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 lands and waters administered by the National Park Service;

(2) The boundaries of lands and waters administered by the National Park Service for public-use purposes pursuant to the terms of a written instrument;

(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 lowlands;

(4) Lands and waters in the environs of the District of Columbia, policed with the approval or concurrence of the head of the agency having jurisdiction or control over such reservations, pursuant to the provisions of the Act of March 17, 1948 (62 Stat. 81);

(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.

(c) The regulations contained in part 7 and part 13 of this chapter are special regulations prescribed for specific park areas. Those regulations may amend, modify, relax or make more stringent the regulations contained in parts 1 through 5 and part 12 of this chapter.

(d) The regulations contained in parts 2 through 5, part 7, and part 13 of this section shall not be construed to prohibit administrative activities conducted by the National Park Service, or its agents, in accordance with approved general management and resource management plans, or in emergency operations involving threats to life, property, or park resources.

(e) The regulations in this chapter are intended to treat a mobility-impaired person using a manual or motorized wheelchair as a pedestrian, and are not intended to restrict the activities of such a person beyond the degree that the activities of a pedestrian are restricted by the same regulations.

APPENDIX C — 36 C.F.R. § 2.17

36 C.F.R. § 2.17

§ 2.17 Aircraft and air delivery.

(a) The following are prohibited:

(1) Operating or using aircraft on lands or waters other than at locations designated pursuant to special regulations.

(2) Where a water surface is designated pursuant to paragraph (a)(1) of this section, operating or using aircraft under power on the water within 500 feet of locations designated as swimming beaches, boat docks, piers, or ramps, except as otherwise designated.

(3) 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.

(b) The provisions of this section, other than paragraph (c) of this section, shall not be applicable to official business of the Federal government, or emergency rescues in accordance with the directions of the superintendent, or to landings due to circumstances beyond the control of the operator.

(c)(1) Except as provided in paragraph (c)(3) of this section, the owners of a downed aircraft shall remove the

aircraft and all component parts thereof in accordance with procedures established by the superintendent. In establishing removal procedures, the superintendent is authorized to: (i) Establish a reasonable date by which aircraft removal operations must be complete; (ii) determine times and means of access to and from the downed aircraft; and (iii) specify the manner or method of removal.

(2) Failure to comply with procedures and conditions established under paragraph (c)(1) of this section is prohibited.

(3) The superintendent may waive the requirements of paragraph (c)(1) of this section or prohibit the removal of downed aircraft, upon a determination that: (i) The removal of downed aircraft would constitute an unacceptable risk to human life; (ii) the removal of a downed aircraft would result in extensive resource damage; or (iii) the removal of a downed aircraft is impracticable or impossible.

(d) The use of aircraft shall be in accordance with regulations of the Federal Aviation Administration. Such regulations are adopted as a part of these regulations.

(e) The operation or use of hovercraft is prohibited.

(f) Violation of the terms and conditions of a permit issued in accordance with this section is prohibited and may result in the suspension or revocation of the permit.