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Argument analysis: Yukon-Charley continues to commandeer gray cells

Alaska hunter John Sturgeon is asking the Supreme Court to slam the door on the National Park Service's ability to apply its nationwide hovercraft ban to the Nation River within the Yukon-Charley Rivers National Preserve. Sturgeon's attorney, Matthew Findley, told the justices during oral argument yesterday that the Alaska National Interest Lands Conservation Act prevents the Park Service — but not other federal agencies — from exercising authority over waters in park units in Alaska.

This is the second time the justices have had to wrestle with a section of ANILCA entitled "maps," situated within a title that specifies Congress' purposes, provides definitions and addresses boundary maps and land management status. Section 103(c) — a veritable Rubik's Cube of legislative drafting — provides that lands conveyed to the state, native corporations or private parties are not subject to "regulations applicable solely to public lands" within Alaska conservation system units. According to Findley, this provision immunizes 18 million acres of nonpublic lands and waters from what he calls "extraterritorial" regulation by the Park Service.

Mere seconds into the argument, Justice Sonia Sotomayor lobbed the first question Findley's way: "ANILCA in many places puts statutory duties on the government. ... If the Park Service can't do what you say, any regulation on these rivers, how can the secretary fulfill the statutory duties?" Findley replied that the service could fulfill its duties by recognizing that "ANILCA was not just a park enabling statute," but instead was designed to resolve "multiple land use disputes within the state of Alaska."

Not satisfied, Sotomayor expressed concern that the Park Service can't protect rivers – many of which are specifically named by Congress in the provisions that created Yukon-Charley and other preserves in Alaska – if it can't regulate activities on those rivers. Findley stated that it was enough to preserve the federally owned public lands surrounding the rivers, which in turn would protect the watersheds, but that the state-owned submerged lands underlying the navigable rivers, and the waters flowing through those rivers, were off limits.

Justice Elena Kagan jumped into the fray. She pushed Findley: "You don't think it makes any difference if ... both banks of a river are public lands, but still the federal government cannot regulate the river running through those lands?"

"The federal government may; the Park Service may not," Findley asserted. "That was a power that was not delegated to the Park Service."

Chief Justice John Roberts was perplexed by that response. "So an agency like [the Environmental Protection Agency] is — is fully empowered to regulate the waters?" Roberts asked.

Findley replied, "Yes, Your Honor, that's exactly right. The EPA, the Coast Guard, any other federal, criminal — all of these still apply. It's just simply that extra layer of Park Service regulation that was not supposed to apply once these lands and waters were surrounded by the ANILCA parks."

At this point, Justice Samuel Alito was ready for a deep dive into statutory interpretation. He asked Findley point blank, "Which sentence of Section [103(c)] do you think wins this case for you?"

Findley replied, "The second sentence does the most work, but the second sentence needs to be read in conjunction with all three sentences and in conjunction with the context of the statute." To which Alito quipped, "I've burned up an awful lot of gray cells trying to put together the pieces of this statute."

Findley's belief that the second sentence made state-owned submerged lands "not a portion of the park," prompted Alito to remark that "whether something can be within a unit but not be a portion of the unit is kind of a nice question."

Findley offered that "the function of the word 'solely' is to distinguish between park management regulations and the regulations Mr. Chief Justice was talking about," namely, Coast Guard and EPA regulations.

Alito took one more crack at it: "I understand that lands is defined by ANILCA to include water and waters and interests therein, but the second sentence after referring to lands refers to a conveyance, which I take it means the transfer of title." He added that "nobody really has title to navigable waters" – including the United States, casting doubt on whether the navigable waters could be considered "public lands." If not, it follows that the hovercraft ban is not a regulation applicable solely to public lands within the conservation unit and thus the ban would be allowed under Section 103(c).

land and water within park units in Alaska.

Alaska's Assistant Attorney General Ruth Botstein, arguing as a "friend of the court" in support of Sturgeon, said, "Understanding ANILCA requires understanding remote Alaska," adding that Alaskans live along rivers and that, when it comes to transportation, "Our rivers are our only roads." This theme picked up on a riff started by Findley: "That's how they go to vote. That's how to buy groceries." According to Botstein, the Supreme Court should reject the Park Service's "continuing attempts to commandeer control of Alaska's navigable waters."

Roberts immediately remarked that "'commandeer' is strong language." Yet Roberts seemed sympathetic to the unique importance of traveling by waterways in Alaska, and got a few chuckles when he remarked that, although the government "may think the hovercraft is unsightly, ... if you're trying to get from point A to point B, it's pretty beautiful."

The nation's most iconic national park, Yellowstone, was brought up on several occasions as a reference point. Justice Stephen Breyer wondered whether a ban on bonfires within the boundaries of Yellowstone National Park meant no bonfires on private inholdings within Yellowstone, too, but then withdrew the question.

For Botstein, Yellowstone provided a nice contrast to Alaska's preserves. "[W]hen Congress created different national parks, it used vastly different jurisdictional language," said Botstein. "When Congress created Yellowstone, which Justice Breyer mentioned, this is what it said: The Yellowstone National Park, as its boundaries now are defined or as they may hereinafter be defined or extended, shall be under the sole and exclusive jurisdiction of the United States." She argued that any interpretation of Section 103(c) that would give "sole and exclusive federal jurisdiction" to the Park Service does "violence to Congress's differing intent" in ANILCA.

Deputy Solicitor General Edwin Kneedler agreed that the Park Service does not have carte blanche over nonpublic lands in Alaska or elsewhere, but argued that the Park Service can regulate under ANILCA as well as under general authorities spelled out in other statutes.

Justice Brett Kavanaugh expressed skepticism that Congress could have intended to give the Park Service "plenary authority over all the navigable rivers." Although Kneedler refused to characterize it as "plenary," he stuck to his position that the Park Service had authority to manage navigable waters within park units to preserve the value of rivers and streams within them. Pointing to a 1976 statute that grants authority to regulate boating throughout the National Park System, Kneedler said that it would turn ANILCA — "a very water-centric statute" — "upside down" if the Park Service could not regulate rivers within the boundaries of conservation units.

On one point, Kneedler and Findley came close to agreement. Findley equated the Nation River to an inholding, which would be off limits to Park Service rules. Kneedler didn't go that far, but he conceded that the Park Service could not grant access to someone's private inholding for subsistence uses, which are specifically prioritized in ANILCA, or for other purposes unless it acquired the inholding.

Findley's rebuttal clothed the issue in federalism, emphasizing "the state's authority to retain primary control over the use of its rivers." He acknowledged that the United States has control, through the Coast Guard and the EPA, over the "quality of the river," but under the special provisions of ANILCA, he said, the Park Service does not.

Given the statutory ambiguities, readers may wonder why the Park Service's reading of ANILCA and its own enabling acts would not be entitled to deference from the Supreme Court under *Chevron v. Natural Resources Defense Council*, which requires a court to defer to an agency's reasonable interpretation of an ambiguous statute that the agency administers. Curiously, *Chevron* wasn't mentioned, not even once, not even by the government's lawyer (though it does appear in a footnote of the government's brief). That may be an indication of things to come, with the government being unwilling to put the *Chevron* doctrine on display for fear that the court will chip away at it – or overturn it altogether.

As for the fate of the hovercraft users on the Nation River, that too is unclear. Reading the tea leaves is dangerous, but the justices' questioning suggests that Sotomayor and Kagan will side with the Park Service while Roberts and possibly Alito and Kavanaugh will be inclined to rule for Sturgeon, leaving four votes up for grabs.

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