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The Justices' Latest Take On Regulation Of Alaska's Parks

By **Sam Daughety** (April 5, 2019, 4:30 PM EDT)

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"Alaska is often the exception, not the rule." So said Chief Justice John Roberts for a unanimous U.S. Supreme Court three terms ago in exploring the unique contours of the Alaska National Interest Lands Conservation Act, a 1980 federal law withdrawing over 100 million acres of land in Alaska for preservation purposes, and John Sturgeon's challenge to the National Park Service's interpretation of the statute.[1]

That 2016 decision in Sturgeon v. Frost largely ducked the central question posed by Sturgeon, namely, whether ANILCA authorizes the Park Service to regulate his use of a hovercraft on a river flowing through federally managed preservation areas within the lands set aside under the act. The court revisited Sturgeon's challenge again last week, and Justice Elena Kagan, writing this time on behalf of her again-unanimous colleagues, made sure to repeat Sturgeon I's pronouncement concerning Alaska's "exceptional" nature not once, but four times[2] before answering this central question "no."

Due to Sturgeon's exceptional form of transportation, Sturgeon I and II seem destined to become known as the "Alaska hovercraft cases." This is a shame, because that moniker obscures the broader implications that these cases have for the subsistence fishing rights of thousands of Alaska Natives, federal regulation within the remainder of Alaska parkland, and federal reserved water rights more generally.

Unlike most other congressional withdrawals of federal land, ANILCA followed "topographic and natural features" in creating the geographic boundary lines of the conservation system units making up the parks — in the process creating 18 million acres of state, local and Native-owned "inholdings" within these boundaries.[3] This unusual delineation was due to the state's "confusing patchwork of ownership," the product of "prior cessions of property to the State and Alaska Natives."[4] In order to satisfy concerns that these inholdings wouldn't be treated the same as federally owned property, Section 103(c) of ANILCA provided a series of exceptionally dense constraints. Justice Kagan acknowledged that this section "may require some re-reading" but that the court would "quote it … first in one block; then provide some definitions; then go over it again a bit more slowly":

> 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 [the date of ANILCA's passage], 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.

The act further defines "lands" as "lands, waters, and interests therein," and "public lands" to

mean "lands" (including waters and interests therein) "the title to which is in the United States" (except for certain federal lands selected for transfer to the state or Native corporations).[5]

The Park Service advanced three principal arguments in favor of its regulatory authority.

First, it contended that "public lands" used in Section 103(c) includes "waters" flowing through conservation system units — in this case, the National River in the Yukon-Charley Preserve — thus permitting regulation of these waters as part of the park.

Second, it contended that nonpublic lands and waters are subject to Park Service regulation because Section 103(c)'s second sentence restricting regulatory authority "exempts those non-public lands from only one particular class of Park Service regulations–to wit, rules applicable solely to public lands."[6]

Finally, it claimed that ANILCA, read as a whole, must allow it to regulate navigable waters such as the National River.

With characteristically crisp writing, Justice Kagan rejected all three arguments.

To include the National River within ANILCA's definition of "public lands," she explained, would mean expanding the concept of federal "title" in a "less customary and more capacious sense" than Congress intended.[7] "[R]unning waters cannot be owned–whether by the government or a private party."[8] Instead, the federal government's "interests" in the River are "usufructuary," or "usage rights," which under the reserved water rights doctrine include the right "to take or maintain the specific 'amount of water'–and 'no more'–required to 'fulfill the purpose of'" the reserved land.[9] Such a right would support "a regulation preventing the depletion or diversion of waters in the River," but not the regulation of a hovercraft "wafting along the River's surface…"[10]

As to the Park Service's claim to regulate nonpublic lands and waters, the court allowed that "[i]f Sturgeon lived in any other State, his suit would not have a prayer of success." Indeed, the Park Service's Organic Act explicitly provides it with authority to regulate areas located within a national park's boundaries "without any 'regard to … ownership.'"[11]

But according to the court, reading Section 103(c) as a whole, in combination with the unique "topographical" construction of the conservation system unit boundaries, prevented the application of such a standard in Alaska. The first sentence "deems" land within a conservation system unit to part of that unit only if it is "public land." "Geographic inholdings thus become regulatory outholdings, impervious to the Service's ordinary authority."[12] The third sentence then "provides a kind of escape hatch" by allowing the Park Service to acquire other land, which then "become[s] part of the [system] unit."[13] Under this reading, Section 103(c)'s second sentence means that "the Park Service's regulations should apply 'solely' to public lands (and not to state, Native, or private ones)."[14]

The court grudgingly admitted that the Park Service's reading of the word "solely" was "grammatically possible" but "'ultimately inconsistent' with the 'text and context of the statute.'"[15] Curiously, though, the court explicitly avoided undertaking a Chevron deference analysis in reaching this conclusion, explaining in a footnote that "[b]ecause we see … no ambiguity as to Section 103(c)'s meaning, we cannot give deference to the Park Service's contrary construction."[16] This is, of course, the same provision that the court earlier felt the need to "go over … a bit more slowly" because it would "require some re-reading."[17]

Ordinarily, the open recognition of such convoluted legislative draftsmanship would warrant the acknowledgement of ambiguity, if only to dispense with the agency's interpretation as "unreasonable" at Chevron step two.[18] And Justice Kagan, writing for a unanimous court, clearly found the Park Service's interpretation to be an unreasonable one. Perhaps the court here sought to avoid muddying the waters in advance of another big administrative deference case due up this term, Kaiser v. Wilkie.[19] Or perhaps all of the justices agreed on this particular reading of the statute, notwithstanding the "grammatically possible" contrary reading that the National Park Service adopted and that the court below found was "consistent with Congressional intent."[20] Given such an uncommon accord on the court as to a statute's meaning, why bring a

controversial doctrine into the mix?

In support of its third and final argument — that ANILCA provides it authority to regulate "navigable waters" such as the National River — the Park Service pointed to the statute's statements of purpose, which repeatedly refers to the "protection" and "preservation" of rivers.[21] But, according to the court, this argument fails because the statute defines "lands" as "waters (including navigable waters)" as well.[22] Since ANILCA precludes regulation of "public lands," and since "we must read ANILCA as treating identically solid ground and flowing water," then the Park Service could not rely on the statute for such regulatory authority.

But questions concerning the extent of federal authority within ANILCA parklands remain. In a concurrence, Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, pointed to the Organic Act as potentially providing Park Service regulatory authority over non-"public lands" "as an adjunct to its authority over the parks themselves … when that power is necessary to protect Alaska's parkland."[23] Yet another source of authority might include the Wild and Scenic Rivers Act, which provides specific preservation authority over particular rivers.[24] However, both justices recognized that the court's opinion "creates uncertainty concerning the extent of Service authority over navigable waters in Alaska's parks," and urged Congress to clarify the scope of Park Service authority.[25]

In another footnote, the court consciously sidestepped a different provision in ANILCA, and one that has been the subject of decades of controversy. ANILCA's Title VIII prioritizes subsistence use fishing and hunting on public lands.[26] Fishing rights in particular are of "vital importance to Indians in Alaska,"[27] and while Title VIII sets out a preference in terms of "rural Alaska residents," the "priority for 'subsistence users' was based in large part on Congress's desire to protect the traditional Alaska Native way of life."[28]

In a series of decisions construing the preference (commonly known as the Katie John trilogy), the U.S. Court of Appeals for the Ninth Circuit found that "public lands" as used in Title VIII include navigable waters "in which the United States has an interest by virtue of the reserved water rights doctrine," and repeatedly upheld federal regulations promulgated to implement this interpretation and protect subsistence fishing within ANILCA's conservation system units.

Agreeing with several amici, the court noted that Title VIII was not at issue in Sturgeon's suit, and that it therefore "would not disturb the Ninth Circuit's holdings that the Park Service may regulate subsistence fishing on navigable waters."[29] As other amici pointed out, however, it may be difficult to "distinguish the scope of 'public lands' for Title VIII, on the one hand, and the rest of ANILCA, on the other" without "undermin[ing] the foundation on which the Katie John rulings stand."[30]

Answers to these weighty questions are for another day. In the meantime, the court having dispensed with the Park Service's arguments (albeit not without spilling a good deal of ink in doing so), John Sturgeon may once again waft on down the river in his hovercraft.

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[1] Sturgeon v. Frost , 136 S. Ct. 1061, 1071 (2016), citing 94 Stat. 2371, 16 § U.S.C. 3101 et seq.

[2] Slip op. 2, 11, 16, and 29.

[3] Id. at 7.

[4] Id. The "cessions of property" to Alaska Natives is more properly thought of in the reverse. Through the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 et seq., Congress settled most claims to aboriginal title in Alaska. See Slip op. 5. In return, Alaska Natives received fee title to millions of acres of land, to be controlled by Native-owned corporations.

[5] Id. at 9-10, citing § 3102(1), (2), and (3).

[6] Slip op. 20, internal quotations omitted, emphasis in original.

[7] Id. at 14.

[8] Id. at 12.

[9] Id., quoting Cappaert v. United States, 426 U.S. 128, 141 (1976). More than a hundred years ago, the Court similarly found that the reservation of land for an Indian tribe impliedly reserved water necessary to fulfil the purposes of the reservation. Winters v. United States, 207 U.S. 464, 576 (1908).

[10] Id. at 15.

[11] Id. at 16, quoting 36 C.F.R. §§2.17(e), 1.2(a)(3).

[12] Id. at 19.

[13] Id. at 20, brackets in original.

[14] Id. at 23.

[15] Id., quoting Sturgeon I, 136 S.Ct. at 1070.

[16] Id. at 16 n.3, citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1986) ("If the intent of Congress is clear, that is the end of the matter").

[17] Id. at 9.

[18] See National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 US 967, 986 (2005).

[19] No. 18-15.

[20] Sturgeon v. Frost, 872 F.3d 927, 935 (9th Cir. 2017).

[21] Slip op. 26, quoting 16 U.S.C. §§3101(b) and 410hh-1(1).

[22] Id. at 27.

[23] Opinion of Sotomayor, J., Slip op. 8.

[24] Id at 11; see 16 U.S.C. § 1271 et seq.

[25] Id. at 12.

[26] See 16 U.S.C. § 3111(1)

[27] Organized Village of Kake v. Eagan, 369 U.S. 60, 66 (1962).

[28] Cohen's Handbook of Federal Indian Law, § 4.07[3][c][ii][A] (2012 ed.), quoting 16 U.S.C. §§ 3113 and 3111(4).

[29] Slip op. 15 n. 2.

[30] Brief of Amici Curiae Alaska Native Subsistence Users in Support of Respondents at 23.