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Argument preview: Can a hovercraft navigate the shoals of Yukon-Charley?

"Alaska is different." So said Chief Justice John Roberts when the U.S. Supreme Court last took up this case two years ago in *Sturgeon v. Frost* (*Sturgeon I*). When the court hears a second oral argument in *Sturgeon v. Frost* (*Sturgeon II*) next Monday, it will once again consider whether a form of transportation unknown to most people outside of Alaska – a hovercraft (an amphibious vehicle that glides over land and water) – can be used in the Yukon-Charley Rivers National Preserve conservation system unit (CSU). Why, you may ask, would the court bother (twice) with such an arcane and seemingly inconsequential set of issues involving a place that most of us will never even visit, much less on a hovercraft?

The relatively narrow question presented in *Sturgeon II* is whether the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3103(c), withdrew the National Park Service's authority to regulate activities on navigable waters located within units of the National Park System in Alaska.

At stake more broadly may be the federal government's authority to enforce regulations that restrict activities on navigable waters above riverbeds owned by a state. It is well settled that the Army Corps of Engineers, the Coast Guard, and even the U.S. Environmental Protection Agency have this power, which flows from specific delegations from Congress. But where does the Park Service fall in this cast of federal characters?

The backstory begins with the admission of Alaska to the Union in 1959. As Alaska's attorney argued in *Sturgeon I,* the "legislative compromise that gave birth to the state [and] extinguished native claims of title to land ... created a complicated tapestry of federal, state, native, and private land."

One piece of that compromise, ANILCA, is at the heart of the legal dispute. In that statute, Congress attempted to balance twin goals of protecting "the national interest in the scenic, natural, cultural and environmental values on the public lands" with providing "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." Specifically, Section 3103(c) of ANILCA both grants and limits the Park Service's authority within the boundaries of CSUs:

> 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.

ANILCA defines "land" broadly as "lands, waters, and interests therein." But what it means to "be subject to the regulations applicable solely to public lands within such units" is more discrete. And vexing.

Enter John Sturgeon, whose saga began in 2007, when park rangers prevented him from traveling by hovercraft on a stretch of the Nation River within Yukon-Charley to access moose-hunting grounds located upstream from the preserve. Sturgeon exited the preserve under protest, and then sued the Park Service, alleging that the Nation River belongs to Alaska and that the Park Service has no authority to regulate it. Alaska weighed in as an intervenor in his support. From the get-go, both the state and Sturgeon have tried to cast this as a case about heavy-handed federal overreach.

Like other CSUs, Yukon-Charley is a checkerboard of lands held by federal, state, Native Corporation and private interests. Three years before ANILCA's enactment, President Jimmy Carter reserved Yukon-Charley "for the protection of ... historical, archeological, biological, [and] geological ... phenomena," including habitat for "wild populations of Dall sheep, moose, bear, wolf, and other large mammals." He also "reserved all water necessary to the proper care and management of those objects protected by [Yukon-Charley] and for [Yukon-Charley's] proper administration."

When ANILCA was passed, Congress followed suit, stating that Yukon-Charley "shall be managed for the following purposes, among others":

> To maintain the environmental integrity of the entire Charley River basin, including streams, lakes and other natural features, in its undeveloped natural condition for public benefit and scientific study; to protect habitat for, and populations of, fish and wildlife, including but not limited to the peregrine falcons ... , moose, Dall sheep, grizzly bears, and wolves.

Let's pause and put on our wide-angle lens for a moment. In 1976, Congress enacted legislation granting the Secretary of the Interior, acting through the Director of the National Park Service, authority to regulate conduct "on or relating to" waters within the entire National Park System, including

As the federal government notes in its brief:

> There is no dispute that, in the National Park System in every State other than Alaska, [the 1976] authorization fully supports sanitation and noise standards for boats and other vessels, rules concerning pollution and sanitation, constraints on introduction and removal of fish, plants, and wildlife, and, as relevant here, a bar on "operation or use of hovercraft" on navigable waters, as well as on the non-navigable waters on federally owned lands (citations omitted).

It follows, then, that even if "navigable waters" are not "public lands" for purposes of ANILCA Section 103(c), the Park Service's authority to regulate navigable waters under the 1976 act would remain intact. The amicus brief of over two dozen law professors steeped in water law, public lands and constitutional law put it succinctly: "Any other reading of section 103(c) would wreak havoc, not only in Alaska but nationwide."

Moreover, far from upsetting the apple cart, Section 103(c) was intended to reflect "minor revisions" to the bill that became ANILCA. As the U.S. explains, these:

> were "technical" and "non-controversial," and would not "change any of the major features of" the statute. No Member of Congress suggested that the provision would rescind the Park Service's authority to regulate conduct on all the navigable waterways flowing through the National Park System in Alaska. On the contrary, Members of Congress repeatedly indicated that they understood ANILCA would allow the Park Service to protect the rivers within the National Park System in Alaska (citations omitted).

In short, Congress does not "hide elephants" (or moose) "in mouseholes," in Alaska or elsewhere.

So far, so good. But, as the Supreme Court observed in *Sturgeon I*, in addition to stating that CSUs "shall be administered … under the laws governing the administration of [National Park Service] lands," ANILCA also "specified that the Park Service could not prohibit on those lands certain activities of particular importance to Alaskans." For example, Park Service regulations prohibit hunting and snowmobiling in park units nationwide, whereas ANILCA permits "the use of snowmachines … for travel to and from villages and homesites," and "the taking of … wildlife for sport purposes and subsistence uses." More to the point for purposes of this case, Park Service regulations ban hovercraft within "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System … without regard to the ownership of submerged lands, tidelands, or lowlands." By contrast, Alaska permits hovercraft on its waterways.

In *Sturgeon I*, the U.S. Court of Appeals for the 9th Circuit found that, because the hovercraft regulation "applies to all federal-owned lands and waters administered by [the Park Service] nationwide, as well as all navigable waters lying within national parks," the regulation does not apply "solely" within CSUs in Alaska within the meaning of Section 103(c). The court therefore concluded that the Park Service has authority to enforce its hovercraft ban on the Nation River, without addressing whether the river is "public land" for purposes of ANILCA.

The Supreme Court granted certiorari, and held that the 9th Circuit's interpretation was inconsistent with ANILCA. The court noted, "ANILCA repeatedly recognizes that Alaska is different, and ANILCA itself accordingly carves out numerous Alaska-specific exceptions to the Park Service's general authority over federally managed preservation areas. Those Alaska-specific provisions reflect the simple truth that Alaska is often the exception, not the rule."

According to the Supreme Court, Section 103(c) clearly draws a distinction between "public" and "non-public" lands within the boundaries of CSUs. Yet *Sturgeon I* left many issues decidedly unclear and even downright murky. The court did not decide whether the Nation River, as a navigable water, qualifies as "public land" for purposes of ANILCA, nor did it determine whether the Park Service has authority under the 1976 legislation to regulate activities on the Nation River even if the river is not "public land." Neither did the court resolve whether the Park Service has authority under Section 103(c) over both "public" and "non-public" lands within the boundaries of CSUs, to the extent a regulation is written to apply to both types of land – i.e., the regulation is not applicable "solely" to public lands within the CSU. The court remanded the case for the lower courts to grapple with these issues.

When it came back for its second bite at the apple in *Sturgeon II*, a unanimous panel of the 9th Circuit went down an interesting side-channel. The panel held that, because the Nation River was situated within the boundaries of a federal reservation, a federal reserved water right existed, and that "ANILCA's definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." Accordingly, "the United States ha[d] an interest in such waters for the primary purposes of the reservations." The court held that the regulation therefore applied to "public land," so ANILCA did not prevent the application of the hovercraft ban on the river within Yukon-Charley. In an unusual twist, Judge Jacqueline Nguyen, who wrote the majority opinion, also concurred. Her concurring opinion, joined by Judge Dorothy Nelson, stated that she would have upheld the Park Service's application of the hovercraft rule to the river based on the federal navigational servitude under the commerce clause, rather than on the reserved-water-rights theory, if the court had not been bound by its own precedent. Nguyen's concurrence may be prescient – the Supreme Court has issued less than a dozen reserved-water-rights cases since it announced the doctrine in 1908 in *Winters v. United States*, and it seems unlikely to paddle down that stream in *Sturgeon II*. (It recently denied certiorari in a blockbuster of a case that applied the doctrine to groundwater, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*.)

The law professors' amicus brief notes that, "[r]egardless of any regulatory or proprietary interests that Alaska may possess in the waterways that flow through the Alaska conservation lands, … the Park Service must have authority to regulate water-based activities on the 'tens of thousands of miles' of navigable waters that run through Alaska conservation lands, because such activities may severely compromise the values and resources for which Congress designated those lands." To hold otherwise, they maintain, "would place the public domain of the United States completely at the mercy of state legislation," a proposition rejected in 1897 in *Camfield v. United States*.

Like *Camfield,* this case implicates Congress' property clause power over public lands and resources. The Supreme Court has never found that Congress exceeded its authority to protect public lands from external threats, and has upheld a plethora of laws to that effect, such as those prohibiting persons from erecting fences that enclose public lands, in *Camfield*, lighting unattended fires near public lands, in 1927's *United States v. Alford*, and capturing

Even if the justices sidestep the constitutional issues, *Sturgeon II* will shed light on how the Roberts court views federal power over public lands and waters, not just in Alaska, but throughout the country.

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