

STURGEON v. FROST: A LIMITED HOLDING REVEALS AN ENVIRONMENTALLY HESITANT POST-SCALIA COURT

MICHAEL O'LOUGHLIN*

Abstract: The first environmental case before the United States Supreme Court after the death of Justice Antonin Scalia, *Sturgeon v. Frost*, involved the National Park Service's authority to regulate hovercraft use over a segment of river running through lands under its authority pursuant to the Alaska National Interest Lands Conservation Act. The plaintiff sought to show that the State held title to navigable waters within the State, and that, therefore, the National Park Service did not have authority to enforce its regulation. The parties invoked precedent and argued for textual analysis of the at-issue statute, but the United States Court of Appeals for the Ninth Circuit forged its own interpretation of the statute to find for the National Park Service. On review, the United States Supreme Court invalidated the Ninth Circuit's holding as incongruous with the context of the statute. However, despite a sufficient record, the Court did not articulate the correct interpretation, suggesting a Court hesitant to risk plurality.

INTRODUCTION

Alaska is a unique place.¹ It houses more than half of the United States' national parks, the tallest mountain on the continent, and an abundance of natural resources.² The state's extensive land mass, unique resources, traditional population, and odd dispersal of federal, state, private, and Native Corporation managed lands invite unique legislation.³ One such piece of legislation stood at issue in *Sturgeon v. Frost* (*Sturgeon II*), in which an Alaskan moose hunter sued the National Park Service ("NPS") to

* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2016–2017.

¹ See *Sturgeon v. Frost* (*Sturgeon II*), 136 S. Ct. 1061, 1070–71 (2016).

² Deborah Williams, *ANILCA: A Different Legal Framework for Managing the Extraordinary National Park Units of the Last Frontier*, 74 DENV. U.L. REV. 859, 859 (1997) (published in a symposium issue on the National Park System).

³ See *Sturgeon II*, 136 S. Ct. at 1066. The fact that Alaska is noncontiguous to the other states adds further constitutional questions to federal regulation, particularly to regulations passed under the Commerce Clause. See U.S. CONST. art. I, § 8. cl. 3; *Alaska v. Babbitt*, 72 F.3d 698, 706–07 (9th Cir. 1995) (Hall, J., dissenting); *infra* notes 56–62 and accompanying text. The phrase "Native Corporations" refers to legal property owning entities comprised of native Alaskans established after the dissolution of the aboriginal land claims in 1971. See *infra* note 54 and accompanying text.

avoid future prosecution under a national regulation banning the use of hovercrafts over certain waters.⁴

Rather than challenge the regulation or the Secretary of the Interior's authority to promulgate it, the hunter challenged the NPS's authority over what he claimed were state lands within a federal conservation system unit managed by the NPS.⁵ This focused the case on interpreting the legislation that created the conservation lands in Alaska and authorized the NPS to regulate them.⁶ Generally, courts feel comfortable interpreting statutes, and they have adopted an increasingly systematic approach to the process.⁷ Textualism in particular, as championed by the late-Justice Antonin Scalia following his appointment to the United States Supreme Court in 1986, has given courts a structured mechanism for interpreting statutes.⁸ Usually, when confronted with an issue of statutory interpretation, a reviewing court will first analyze the individual statutory terms at issue, expand the analysis to the surrounding text, then to the legislation as a whole, and finally look to legislative history as necessary.⁹

In *Sturgeon II*, argued shortly before and decided shortly after Justice Scalia's passing, the United States Supreme Court took a different approach.¹⁰ The Court's decision barely addressed the statute's text and did not approach the legislative history.¹¹ Instead, the context created by Alaska's

⁴ 136 S. Ct. at 1067.

⁵ *Id.* at 1068.

⁶ *Id.*

⁷ See *infra* notes 8–9.

⁸ See Antonin Scalia, Assoc. Justice, United States Supreme Court, Common-Law Courts in a Civil-System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, Address at Princeton University (March 8–9, 1995), in THE TANNER LECTURES ON HUMAN VALUES 100 (1995), http://tannerlectures.utah.edu/_documents/a-to-z/s/scalia97.pdf [<https://perma.cc/RZ8K-JSSR>]; see, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2489–96 (2015) (systematically interpreting the Affordable Care Act); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388–91 (2000) (Scalia, J., concurring) (advocating for focus on statutory text by repeating the phrase “[i]t is perfectly obvious on the face of this statute”); *Biography of Associate Justice Antonin Scalia*, SUPREME COURT OF THE UNITED STATES (Mar. 24, 2017), <https://www.supremecourt.gov/about/biographyScalia.aspx> [<https://perma.cc/N22P-M7UN>].

⁹ See *King*, 135 S. Ct. at 2489–96 (starting with a textual analysis and then expanding to legislative intent); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 89–91 (2007) (starting with textual analysis and then expanding to legislative intent); see also *Zuni*, 550 U.S. at 106 (Stevens, J., concurring) (suggesting that to resort to legislative history would help elucidate Congress's intent).

¹⁰ See *Sturgeon II*, 136 S. Ct. at 1061; *infra* notes 72–84 and accompanying text. Justice Scalia passed away on February 13, 2016. *Biography of Associate Justice Antonin Scalia*, *supra* note 8.

¹¹ See *Sturgeon II*, 136 S. Ct. at 1070–71. Congress plainly acknowledged the value of Alaska's natural resources in its statement of purpose for the at-issue statute. See Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101(a) (2012) (“In order to preserve . . . certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values . . .”).

distinct history and natural features controlled the reasoning of the Court.¹² This approach allowed the Court to produce a holding so limited in scope that it secured unanimous support from the Court's eight remaining justices, both liberal and conservative.¹³

I. FACTS AND PROCEDURAL HISTORY

In September 2007 John Sturgeon, a moose hunter, stopped within the Yukon-Charley National Preserve (“Yukon-Charley”) to make repairs to his hovercraft along the banks of the Nation River.¹⁴ Sturgeon began hunting in an area beyond the Yukon-Charley decades earlier and purchased his hovercraft—a fan driven vehicle—in 1990 to help reach the remote hunting ground.¹⁵ While on the bank, three NPS law enforcement employees approached him and told him that a federal regulation prohibited hovercraft use over that portion of the Nation River.¹⁶ Initially, he protested, arguing that the river was state land and outside their jurisdiction.¹⁷ He complied with the verbal warning, however, after contacting his lawyer via satellite phone.¹⁸ Sturgeon subsequently missed the next several hunting seasons in continued compliance.¹⁹

Hoping to ward off future prosecution, he filed suit in the United States District Court for the District of Alaska.²⁰ Sturgeon sought relief in two forms.²¹ First, he sought a declaration from the court that the hovercraft ban on the Nation River violated § 103(c) of the Alaska National Interest Lands Conservation Act (“ANILCA”); and second, he sought to enjoin further enforcement of NPS regulations on navigable waters belonging to the State.²² Alaska intervened on his behalf, seeking similar relief against the NPS, in part based on injury allegedly caused by an NPS permitting pro-

¹² See *Sturgeon II*, 136 S. Ct. at 1072 (describing Alaska as “the exception, not the rule”).

¹³ See *id.* at 1071–72; Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 45, 40, 98 (2008); Hannah Fairfield & Adam Liptak, *A More Nuanced Breakdown of the Supreme Court*, N.Y. TIMES: THE UPSHOT (June 26, 2014), http://www.nytimes.com/2014/06/27/upshot/a-more-nuanced-breakdown-of-the-supreme-court.html?_r=0 [https://perma.cc/997M-BTTV].

¹⁴ *Sturgeon v. Masica (Sturgeon I)*, 768 F.3d 1066, 1070 (9th Cir. 2014), *vacated sub nom. Sturgeon v. Frost*, 136 S. Ct. 1061 (2016).

¹⁵ *Sturgeon v. Frost (Sturgeon II)*, 136 S. Ct. 1061, 1064 (2016); *Sturgeon I*, 768 F.3d at 1070.

¹⁶ *Sturgeon II*, 136 S. Ct. at 1066–67; see Aircraft and Air Delivery, 36 C.F.R. § 2.17(e) (2016).

¹⁷ *Sturgeon II*, 136 S. Ct. at 1067.

¹⁸ *Sturgeon I*, 768 F.3d at 1070.

¹⁹ *Id.*

²⁰ *Sturgeon II*, 136 S. Ct. at 1067; Complaint at 1, *Sturgeon v. Masica*, No. 3:11-cv-00183-
HRH, 2013 U.S. Dist. LEXIS 157078 (D. Alaska Oct. 30, 2013).

²¹ *Sturgeon II*, 136 S. Ct. at 1067.

²² 16 U.S.C. § 3103(c) (2012); *Sturgeon II*, 136 S. Ct. at 1067; Complaint, *supra* note 20, at 20.

gram that inhibited its ability to take genetic samples of salmon in the Alagnak River.²³

Sturgeon argued that because the waters of the Nation River are navigable, the river belongs to the State, and therefore is not public land and not part of the Yukon-Charley.²⁴ He further asserted that, because the river is not part of the preserve, the NPS does not have authority to regulate it.²⁵ The NPS in response ceded that the river qualifies as navigable waters, but raised alternative arguments to justify its exertion of authority.²⁶ First, it asserted that the Nation River is part of the Yukon-Charley because the reserved waters rights doctrine gives the United States title over such appurtenant waters.²⁷ Hence, the river qualifies as public lands over which it has authority to regulate.²⁸ Second, the NPS argued that § 103(c) of ANILCA only prohibits enforcing regulations that are applicable solely to public lands on nonpublic lands in Alaska.²⁹ The hovercraft ban lacks such a public-only designation, so the NPS reasoned that it does not fall into the Alaska-specific exception, and the agency retains authority to enforce the regulation within the bounds of the conservation system unit.³⁰

The District Court granted summary judgment for the NPS, and Sturgeon and Alaska appealed.³¹ The United States Court of Appeals for the Ninth Circuit decided that Alaska lacked standing to continue the suit, but on Sturgeon's substantive claims found for the NPS.³² The court did not

²³ *Sturgeon II*, 136 S. Ct. at 1067 (describing Alaska's intervention in the case); *Sturgeon I*, 768 F.3d at 1069 (describing Alaska's allegations that the scientific research and collecting permit required by the National Park Service ("NPS") increased staff time and expenses and disrupted its sovereignty over state lands and waters). Alaska's position here parrots its position in other ANILCA cases, claiming sovereignty over and opposing federal regulation of navigable waters within the state. See *John v. United States (John II)*, 720 F.3d 1214, 1223 (9th Cir. 2013); *John v. United States (John I)*, 247 F.3d 1032, 1033 (9th Cir. 2001); *Alaska v. Babbitt*, 72 F.3d 698, 701 (9th Cir. 1995).

²⁴ *Sturgeon II*, 136 S. Ct. at 1068–69.

²⁵ *Id.* at 1069. The term public lands refers to lands owned by the federal government. See *infra* notes 27–28 and accompanying text.

²⁶ *Sturgeon II*, 136 S. Ct. at 1069; Answer at 4, *Sturgeon v. Masica*, No. 3:11-cv-00183-HRH (D. Alaska, Oct. 30, 2013), 2013 WL 5888230; see also Brief for Respondents at 21, *Sturgeon v. Frost*, 136 S. Ct. 106 (2016) (No. 14-1209) (ceding the navigability of the Nation River).

²⁷ *Sturgeon II*, 136 S. Ct. at 1069; see *infra* note 68 and accompanying text (discussing the reserved water rights doctrine). Appurtenant waters are those attached to notable bodies of water. *Appurtenant*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²⁸ *Sturgeon II*, 136 S. Ct. at 1069. This argument stems from the holdings of earlier Alaska National Interest Lands Conservation Act ("ANILCA") cases considering whether certain navigable waters qualify as public lands and thus invoke ANILCA's rural subsistence hunting and fishing priority. See *John II*, 720 F.3d at 1245; *John I*, 247 F.3d at 1033; *Babbitt*, 72 F.3d at 704.

²⁹ *Sturgeon II*, 136 S. Ct. at 1069.

³⁰ *Id.*

³¹ *Id.* at 1067.

³² *Sturgeon I*, 768 F.3d at 1081.

base its judgment on either of the § 103(c) interpretations proposed by the NPS.³³ Instead, the court utilized an alternate interpretation based on its own disjunctive reading of the statute.³⁴ The court reasoned that § 103(c) did create an exception of sorts into which state lands within federal conservation system units could fall, but that this exception only protects non-public lands from enforcement of NPS regulations meant specifically for public lands in Alaska.³⁵

The Ninth Circuit focused on the phrase “solely to public lands” when asserting its interpretation of the statute.³⁶ Rather than reading it as refining the preceding clause—that only public lands are part of the conservation system units—the Ninth Circuit read the phrase as independent from the other clauses of the section and as unambiguously creating an exception for certain types of regulations.³⁷ The court then relied on one particular canon of statutory interpretation in reaching its decision: a court should accept unambiguous terms as conclusive.³⁸ Even though the court deemed the text of § 103(c) unambiguous, it proceeded to look to legislative history for supplementary validation, stopping shy of looking to case precedent for tertiary support.³⁹

Unlike the NPS’s alternative argument, this interpretation added the criteria that the federal regulation must specifically target Alaska.⁴⁰ Under this reasoning, the hovercraft ban fell outside the exception because it was enforceable nationwide.⁴¹ As a result, the NPS could enforce the hovercraft ban throughout Alaskan conservation system units on both public and non-public lands.⁴² Sturgeon subsequently petitioned for and was granted certiorari by the United States Supreme Court.⁴³ Oral arguments took place on January 20, 2016, before all nine members of the Court.⁴⁴ Justice Scalia

³³ See *Sturgeon II*, 136 S. Ct. at 1069; *Sturgeon I*, 768 F.3d at 1077–79.

³⁴ See *Sturgeon II*, 136 S. Ct. at 1069–70; *Sturgeon I*, 768 F.3d at 1077; see *infra* notes 36–40 and accompanying text.

³⁵ *Sturgeon II*, 136 S. Ct. at 1069–70; *Sturgeon I*, 768 F.3d at 1077.

³⁶ See *Sturgeon I*, 768 F.3d at 1077.

³⁷ See *id.*

³⁸ *Id.*; see *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 n.29 (1978) (explaining that courts should accept the unambiguous terms of statutory text).

³⁹ See *Sturgeon I*, 768 F.3d at 1077–78.

⁴⁰ See *Sturgeon II*, 136 S. Ct. at 1069–70; *Sturgeon I*, 768 F.3d at 1077–78.

⁴¹ *Sturgeon II*, 136 S. Ct. at 1070.

⁴² *Id.*

⁴³ *Id.* at 1067.

⁴⁴ Transcript of Oral Argument at 1, *Sturgeon v. Frost* 136 S. Ct. 106 (2016) (No. 14-1209). At oral argument, the Court did probe the issues that it opted not to decide in its opinion, including relevant statutory and regulatory texts, title to the Nation River, and the regulatory authority of the NPS. See *id.* Several members of the Court found it generally odd that NPS could regulate the entire Yukon-Charley preserve but not the river running through it. See *id.* For example, Justice Elena Kagan said, “it seems to me a very strange thing that Congress would have created Federal

passed away a few weeks later on February 13.⁴⁵ On March 22, the remaining eight members of the Court issued their decision.⁴⁶

II. LEGAL BACKGROUND

A. *The Alaska National Interest Lands Conservation Act*

The issue at the heart of *Sturgeon v. Frost*, whether the National Park Service (“NPS”) has authority to enforce its hovercraft ban on the Nation River as it runs through the Yukon-Charley, involves interpretation of the Alaska National Interest Lands Conservation Act (“ANILCA”) § 103(c).⁴⁷ *Sturgeon’s* claims do not question the validity of the hovercraft ban or the Secretary of the Interior’s authority to promulgate that regulation.⁴⁸ Beyond this case, courts have not yet interpreted this particular subsection of ANILCA, nor have they interpreted comparable language in parallel statutes applicable to other states, leaving this question to the United States Supreme Court.⁴⁹

From the time the U.S. purchased Alaska in 1867 until considerations of statehood began in the 1950s, ninety-eight percent of the 365 million acre territory belonged to the federal government.⁵⁰ In creating the State of Alaska, the 1958 Alaska Statehood Act resolved this issue by permitting Alaska to select 103 million acres of that federal land for state ownership.⁵¹ Upon becoming a state, Alaska also gained ownership of all lands under navigable waters in accordance with the Submerged Lands Act of 1953 and the equal footing doctrine.⁵² Nevertheless, ongoing land disputes with Alas-

lands in a Federal park land but said that the Federal Park Service can’t have anything to do with the rivers. The rivers are like an important part of the park, aren’t they?” *Id.* at 27. Several others focused their questions on the text and the exception it creates, “[L]et’s talk about your authority . . . I just get to the first sentence. . . . If it’s not within the unit, it’s not within the basic authority of the Park Service to issue regulations, period.” *Id.* at 41–42.

⁴⁵ *Biography of Associate Justice Antonin Scalia*, *supra* note 8.

⁴⁶ *Sturgeon II*, 136 S. Ct. at 1061.

⁴⁷ See *Sturgeon v. Frost (Sturgeon II)*, 136 S. Ct. 1061, 1068 (2016).

⁴⁸ 36 C.F.R. § 2.17(e) (2016) (banning hovercrafts); see *Sturgeon II*, 136 S. Ct. at 1067; Complaint, *supra* note 20, at 14–18.

⁴⁹ See *Sturgeon II*, 136 S. Ct. at 1068, 71. The acreage of the national park system in Alaska and the odd way in which it took shape set the Alaskan system apart in terms of management and jurisdiction from the relatively uniform park system across the rest of the nation. Williams, *supra* note 2, at 859–60.

⁵⁰ *Sturgeon II*, 136 S. Ct. at 1064–65. The Supreme Court indicated that the unique historical conditions from which ANILCA emerged weigh heavily on its proper interpretation. *Id.* at 1064–66, 1071; see 16 U.S.C. §§ 3101–3233 (2012).

⁵¹ Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958); *Sturgeon II*, 136 S. Ct. at 1065; *Sturgeon v. Masica (Sturgeon I)*, 768 F.3d 1066, 1070 (9th Cir. 2014), *vacated sub nom. Sturgeon v. Frost*, 136 S. Ct. 1061 (2016).

⁵² See U.S. CONST. art. IV § 3, cl. 1; Submerged Lands Act, 43 U.S.C. § 1311 (2012); *infra* note 69 and accompanying text (describing the equal footing doctrine). Alaskan natural resource

kan Natives forced the land management system to evolve.⁵³ The 1971 Alaska Native Claims Settlement Act extinguished all aboriginal land claims, but it permitted the Alaskan Natives to organize into Native Corporations and then select and manage forty million acres of the remaining federal land through those corporations.⁵⁴ This still left almost two hundred million acres under federal control.⁵⁵

Congress passed ANILCA in 1980 after an attempt by President Carter to designate fifty-six million acres of Alaskan federal land for preservation as national monuments.⁵⁶ ANILCA rescinded President Carter's designations and set aside 104 million acres for preservation purposes, placing the preserved lands into conservation system units defined along natural features of the land.⁵⁷ Because the conservation system units have natural rather than political boundaries, more than eighteen million acres of state, Native Corporation, and private lands fall within them, creating the subject of litigation in *Sturgeon I* and *II*.⁵⁸

As with most national preserves, ANILCA gives regulatory authority over the preserved lands to the NPS.⁵⁹ But, unlike most resource-preservation statutes, it creates a management regime tailored to the particular physical and societal circumstances of the region.⁶⁰ Foremost, it bars the NPS from prohibiting certain activities of particular importance to Alaskan culture, such as subsistence hunting.⁶¹ It also allows sport hunting on some preserve lands, and, in acknowledgment of the remote nature of much of the region, contains an entire title devoted to promoting access to the preserve system.⁶² Section 103(c) further limits the NPS's authority stating that only public lands are part of the conservation system units and that federal regu-

policy aims to make these resources "available for maximum use consistent with the public interest." ALASKA CONST. art. VIII, § 1.

⁵³ See *Sturgeon II*, 136 S. Ct. at 1065.

⁵⁴ Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1629(h) (2012); *Sturgeon II*, 136 S. Ct. at 1065.

⁵⁵ See *Sturgeon II*, 136 S. Ct. at 1065. The remaining federal lands still exceed the total land area of the second largest state, Texas. See Gregory McNamee, DeWitt Redick, & Ralph Wooster, *Texas*, ENCYCLOPEDIA BRITANNICA (May 22, 2015), <https://www.britannica.com/place/Texas-state> [<https://perma.cc/7ZK3-32PT>].

⁵⁶ 16 U.S.C. §§ 3101–3233 (2012); *Sturgeon II*, 136 S. Ct. at 1066–67.

⁵⁷ 16 U.S.C. § 3101(a); *Sturgeon II*, 136 S. Ct. at 1066.

⁵⁸ *Sturgeon II*, 136 S. Ct. at 1066.

⁵⁹ See 16 U.S.C. §§ 3102–3103; *Sturgeon II*, 136 S. Ct. at 1067.

⁶⁰ See 16 U.S.C. § 3101; *Sturgeon II*, 136 S. Ct. at 1066, 1070; Williams, *supra* note 2, at 859–60.

⁶¹ *Sturgeon II*, 136 S. Ct. at 1066; see 16 U.S.C. § 3103(c); Williams, *supra* note 2, at 860.

⁶² See 16 U.S.C. §§ 3161–3173 (2012); *Sturgeon II*, 136 S. Ct. at 1066; Williams, *supra* note 2, at 860, 863.

lations are only applicable to public lands.⁶³ In addition, § 103(c) provides for a means to convey nonpublic lands back to federal control.⁶⁴

B. Regulatory Authority over Navigable Waters

Behind ANILCA, several constitutional doctrines of federalism govern state and federal authority over navigable waters.⁶⁵ Most applicable to these facts are the equal footing doctrine and the reserved water rights doctrine.⁶⁶ The equal footing doctrine guarantees that states joining the union enter with the same rights as the original thirteen, which includes title to lands submerged under navigable bodies of water, such as the Nation River.⁶⁷ The reserved water rights doctrine, contrarily, gives the federal government authority to regulate waters proximate to but otherwise beyond its jurisdiction as the effective regulation of lands and waters within its jurisdiction makes necessary.⁶⁸

Other cases interpreting ANILCA have based their holdings on the jurisdictional framework that these doctrines outline.⁶⁹ *Alaska v. Babbitt* and its progeny, for example, each arose from tripartite conflict between the state, the federal government, and Native Alaskans over the subsistence fishing rights granted by ANILCA.⁷⁰ In these cases, the state raised its jurisdictional control over submerged lands, but the court, acknowledging the reserved water rights doctrine, resolved the matter in favor of enforcing ANILCA.⁷¹

III. ANALYSIS

In *Sturgeon v. Frost*, the United States Supreme Court analyzed undisputed facts and four proposed interpretations of § 103(c) of the Alaska National Interest Lands Conservation Act (“ANILCA”).⁷² The Court’s holding, however, displays curious restraint.⁷³ Ultimately, the holding reduces to a rather simple statement that neither addresses all of the proposed interpreta-

⁶³ 16 U.S.C. § 3103(c).

⁶⁴ *See id.*

⁶⁵ Charles F. Wilkins, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 439 (1989).

⁶⁶ *See infra* notes 104–117, and accompanying text.

⁶⁷ *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 486 (1988); *Equal Footing Doctrine*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁶⁸ *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

⁶⁹ *See infra* notes 74–75 and accompanying text.

⁷⁰ *John v. United States (John II)*, 720 F.3d 1214, 1223 (9th Cir. 2013); *John v. United States (John I)*, 247 F.3d 1032, 1033 (9th Cir. 2001); *Alaska v. Babbitt*, 72 F.3d 698, 701 (9th Cir. 1995).

⁷¹ *Sturgeon II*, 136 S. Ct. at 1072; *John II*, 720 F.3d at 1226; *John I*, 247 F.3d at 1033; *Babbitt*, 72 F.3d at 704.

⁷² *See* 16 U.S.C. § 3103(c); *Sturgeon v. Frost (Sturgeon II)*, 136 S. Ct. at 1066, 67, 68–70.

⁷³ *See Sturgeon II*, 136 S. Ct. at 1072; *see infra* notes 85–89 and accompanying text.

tions nor applies the facts.⁷⁴ The Court reviewed the interpretation asserted by the United States Court of Appeals for the Ninth Circuit in light of Alaska's unique land use regime and natural resources, declared it inconsistent with the text and context of the statute, and then declined to go further.⁷⁵ The Court did so despite having the resources necessary to declare the correct interpretation of § 103(c) and speak to the Nation River's status as public land.⁷⁶ Interestingly, this display of judicial restraint may actually stem from considerations beyond mere respect for the lower courts, namely, the timing of the case and composition of the Court.⁷⁷

The Court unanimously saw the interpretation given by Ninth Circuit Court of Appeals as reaching absurd results when viewed in context ANILCA's enactment.⁷⁸ The Ninth Circuit's interpretation drew a line between regulations written specifically for Alaska and those written for national application, allowing the National Park Service ("NPS") to enforce those regulations not written specifically for Alaska in the same way as it would throughout the rest of its jurisdiction.⁷⁹ In other words, the Ninth Circuit held that the NPS could not enforce Alaska-specific regulations on nonpublic lands within the State but could enforce national regulations, such as the hovercraft ban, on those same lands.⁸⁰

Chief Justice Roberts makes clear that this limited and detracted recognition of Alaska's uniqueness falls short of what ANILCA requires.⁸¹ Viewing ANILCA as a collective act, understanding ANILCA as a descendant of the Alaska Statehood Act and the Alaska Native Claims Settlement Act, and appreciating that its drafters accounted for the abundance, uniqueness, and remoteness of the State's natural resources; ANILCA reasonably creates a distinct preservation system.⁸² Section 103(c) further tries to distinguish the public and nonpublic lands within the State.⁸³ The Court recognized that the Ninth Circuit's interpretation only allows the NPS to acknowledge the excep-

⁷⁴ See *Sturgeon II*, 136 S. Ct. at 1070.

⁷⁵ See *id.* The opinion only discusses the text minimally. See *id.* at 1071.

⁷⁶ See *id.* at 1067–69; see *infra* notes 86–120 and accompanying text.

⁷⁷ See *Sturgeon II*, 136 S. Ct. at 1061; Katherine Vaccaro, *Split Supreme Court Raises EPA Regulation Questions; Environmental Law*, LEGAL INTELLIGENCER (July 6, 2016), <http://www.thelegalintelligencer.com/id=1202761904433/Split-Supreme-Court-Raises-EPA-Regulation-Questions?slreturn=20160826114950> [https://perma.cc/4SSB-SHMY]; see *infra* notes 123–133 and accompanying text.

⁷⁸ See *Sturgeon II*, 136 S. Ct. at 1070.

⁷⁹ *Id.* at 1069–70; *Sturgeon v. Masica (Sturgeon I)*, 768 F.3d 1066, 1077–78 (2014), *vacated sub nom.* *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016).

⁸⁰ See *Sturgeon II*, 136 S. Ct. at 1070; *Sturgeon I*, 768 F.3d at 1077.

⁸¹ *Sturgeon II*, 136 S. Ct. at 1070.

⁸² *Id.* at 1065–66; Williams, *supra* note 2, at 867.

⁸³ See 16 U.S.C. § 3103(c) (2012); *Sturgeon II*, 136 S. Ct. at 1067–68.

tional character of Alaska through promulgation of Alaska-specific regulations, not through tailoring its enforcement practices.⁸⁴

The Court was correct in invalidating the interpretation of § 103(c) put forth by the Ninth Circuit, but it could have issued a more comprehensive judgment.⁸⁵ Foremost, it did not actually state a definitive interpretation of the statute.⁸⁶ Further, to leave no confusion as to the extent of the holding, Chief Justice Roberts proceeded to limit it explicitly.⁸⁷ He wrote that the Court did not decide whether the Nation River qualified as public land, and that it did not decide whether the NPS had authority to enforce its regulations on the Nation River.⁸⁸ Summarily speaking, the Court failed to decide any of the questions or address any of the proposed resolutions raised by the parties to the case.⁸⁹

The Court could have stated the correct interpretation of § 103(c).⁹⁰ Armed with the statutory text, references to legislative history on the record, and even an understanding of the context surrounding ANICLA's enactment, the Court had all of the information necessary to dictate the proper reading of the statute.⁹¹ The Court actually utilized most of these resources in reaching its limited holding, but it stopped short of giving comprehensive guidance on how to read the statute.⁹²

⁸⁴ See *Sturgeon II*, 136 S. Ct. at 1071.

⁸⁵ See 16 U.S.C. § 3103(c). Compare *Sturgeon II*, 136 S. Ct. at 1072 (expressly limiting its holding), with *Util. Air Reg. Group v. Env'tl. Prot. Agency*, 134 S. Ct. 2427, 2449 (2014) (reaching a comprehensive holding regarding an agency's authority through a largely textual analysis). In *Utility Air Regulatory Group v. Environmental Protection Agency*, the Court reviewed a prior decision that discussed the Environmental Protection Agency's scope of authority as it pertains to the Clean Air Act, discussed the applicability of that precedent, and then performed a largely textual statutory analysis to decide each issue before the Court. 134 S. Ct. at 2439–41, 2442–49; see *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 498, 529 (2009) (determining that greenhouse gases are air pollutants within the EPA's jurisdiction). Similarly, in *Sturgeon v. Frost*, the Court had precedent that was not exactly on point, but related in a similar way to a different section of ANILCA, as well as full access to the text to perform a thorough textual analysis of the statute. See *Sturgeon II*, 136 S. Ct. at 1070–71; *infra* notes 90–120 and accompanying text.

⁸⁶ See *Sturgeon II*, 136 S. Ct. at 1071.

⁸⁷ See *id.* at 1072.

⁸⁸ See *id.*

⁸⁹ See *id.* at 1071–72; Complaint, *supra* note 20, at 19–20; Answer, *supra* note 26, at 11; Brief for Respondents, *supra* note 26, at 2; Transcript of Oral Argument, *supra* note 44, at 3–64. In reviewing the Ninth Circuit's judgment, Chief Justice Roberts relied on a single case as precedent. *Sturgeon II*, 136 S. Ct. at 1070. He cited *Roberts v. Sea-land Services, Inc.*, an employment case involving the Longshore and Harbor Worker's Compensation Act, to support the simple proposition that courts should consider context when interpreting statutes. *Sturgeon II*, 136 S. Ct. at 1070 (quoting 566 U.S. 93, 101 (2012) (“Statutory language cannot be construed in a vacuum”).

⁹⁰ 16 U.S.C. § 3103(c); see *Sturgeon II*, 136 S. Ct. at 1071 (opting not to definitively interpret § 103 of ANILCA); *Sturgeon I*, 768 F.3d at 1077–78 (opting to interpret § 103 of ANICLA).

⁹¹ See 16 U.S.C. § 3103(c); *Sturgeon II*, 136 S. Ct. 1070–71; *Sturgeon I*, 768 F.3d at 1077–78.

⁹² See *Sturgeon II*, 136 S. Ct. at 1070–71.

Moreover, Chief Justice Roberts' manner of dismissing the lower court's interpretation implies that he believes a particular interpretation is correct, specifically that § 103(c) makes nonpublic lands within Alaskan conservation system units an exception to NPS's authority and that the aim and scope of the rulemaking does not limit this exception.⁹³ The opinion highlights that ANILCA aims to treat conservation system units in Alaska differently than those elsewhere, that a further distinction lies between treatment of public and nonpublic lands within those units, and that limiting this differential treatment to those regulations purposed specifically for Alaska falls short of ANILCA's demands.⁹⁴

Based on this view, an interpretation limiting the exception to those regulations expressly purposed for public lands, as advocated for by the NPS, would probably not fare much better than the reading of § 103(c) offered by the Ninth Circuit.⁹⁵ Thus, the Court would probably favor the interpretation presented by the petitioner—that NPS cannot enforce its regulations on nonpublic lands—over that of the NPS.⁹⁶ The Court, nevertheless, fails to say so explicitly.⁹⁷ Instead, it avoids the declaration and shifts this responsibility back to the Circuit Court.⁹⁸

The Supreme Court also could have considered whether the Nation River qualifies as public land which would have allowed it to apply the facts of the case to § 103.⁹⁹ Because the Ninth Circuit's interpretation made answering this question unnecessary, that court did not hold on the matter, and correspondingly the Supreme Court could avoid the issue.¹⁰⁰ The parties in their briefs, however, did raise the question, and, again, the Court had the necessary record and precedent at least to narrow the issue.¹⁰¹

The facts acquiesced by both parties and case precedent suggest that the Court could have narrowed the questions on remand, first, to whether the Nation River qualifies as waters appurtenant to the public land within the Yukon-Charley and, second, whether its regulation is necessary to the

⁹³ See 16 U.S.C. § 3103(c); *Sturgeon II*, 136 S. Ct. at 1071.

⁹⁴ *Id.*

⁹⁵ See *id.*; Brief for Respondents, *supra* note 26, at 48.

⁹⁶ See *Sturgeon II*, 136 S. Ct. at 1071.

⁹⁷ See *id.*

⁹⁸ *Id.* at 1071–72. Rather than consider the parties' arguments itself, the Court simply vacated the Ninth Circuit's judgment and remanded for the circuit court to reconsider the arguments. *Id.* at 1072. Compare *Sturgeon II*, 136 S. Ct. at 1072 (vacating judgment), with *Michigan v. Env'tl. Prot. Agency*, 135 S. Ct. 2699, 2712 (2015) (reversing and remanding for further proceedings consistent with the opinion), and *Util. Air Reg. Group*, 134 S. Ct. at 2449 (entering judgment).

⁹⁹ See *Sturgeon II*, 136 S. Ct. at 1072.

¹⁰⁰ See *Sturgeon I*, 768 F.3d at 1077–78; STEVEN CHILDRESS & MARTHA DAVIES, FEDERAL STANDARDS OF REVIEW § 1.03 (4th ed. 2015) (discussing the scope of appellate review).

¹⁰¹ See *Sturgeon II*, 136 S. Ct. at 1069; Brief for Petitioner at 35, *Sturgeon v. Frost*, 136 S. Ct. 106 (2016) (No. 14-1209); Brief for Respondents at, *supra* note 26, at 2, 25–26.

preservation efforts of the NPS for that land.¹⁰² Both parties ceded the navigability of the Nation River.¹⁰³ Sturgeon proposed that, in accordance with the equal footing doctrine and Submerged Lands Act, this made it property of the State.¹⁰⁴ Under this theory, if the Nation River is navigable, title to its submerged lands passed to Alaska upon statehood.¹⁰⁵ Applying the interpretation of § 103(c) implied by the Court, such state lands qualify as nonpublic lands and fall outside NPS authority.¹⁰⁶ The NPS, though, proposed that, in that scenario, the reserved water rights doctrine pulls that section of the Nation River back into its jurisdiction.¹⁰⁷ Based on this argument, if the disputed section of river attaches to public lands under NPS authority and successful preservation of the Yukon-Charley necessitates its regulation, then it becomes public land also under its authority.¹⁰⁸

The Court has well-established precedent to guide its review of both the equal footing doctrine and the reserved water rights doctrine.¹⁰⁹ The Ninth Circuit has even utilized the reserved water doctrine to decide whether ANILCA applies to other segments of river.¹¹⁰ In *Alaska v. Babbitt*, Alaskan Natives and the State challenged regulations promulgated by the Secretary of the Interior regarding the qualification of navigable waters as public lands for ANILCA's subsistence fishing provision.¹¹¹ The Natives maintained that ANILCA allowed subsistence fishing in all navigable waters because all navigable waters qualify as public lands.¹¹² The State, on the other hand, insisted that no navigable waters qualify as public lands.¹¹³ The federal agencies, for their part, maintained that only those navigable waters brought under its jurisdiction by the reserved water rights doctrine qualify as public.¹¹⁴

¹⁰² See *Sturgeon II*, 136 S. Ct. at 1069; Brief for Petitioner, *supra* note 101, at 35; Brief for Respondents, *supra* note 26, at 2, 25–26.

¹⁰³ Answer, *supra* note 26, at 4.

¹⁰⁴ 43 U.S.C. § 1311 (2012); *Sturgeon II*, 136 S. Ct. at 1068; see *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 486 (1988) (describing the equal footing doctrine); Brief for Petitioner, *supra* note 101, at 33, 34 (presenting Sturgeon's position).

¹⁰⁵ See *Sturgeon II*, 136 S. Ct. at 1068; Brief for Petitioner, *supra* note 101, at 34–35.

¹⁰⁶ See 16 U.S.C. § 3103(c) (2012); *Sturgeon II*, 136 S. Ct. at 1068.

¹⁰⁷ *Sturgeon II*, 136 S. Ct. at 1069; Brief for Respondents, *supra* note 26, at 29.

¹⁰⁸ *Sturgeon II*, 136 S. Ct. at 1069; Brief for Respondents, *supra* note 26, at 31.

¹⁰⁹ See, e.g., *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590 (2012) (applying the equal footing doctrine); *Phillips Petroleum Co.*, 484 U.S. at 486 (applying the equal footing doctrine); *United States v. New Mexico*, 438 U.S. 696, 700 (1978) (applying the reserved water rights doctrine); *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (applying the reserved water rights doctrine); *Shively v. Bowlby*, 152 U.S. 1, 9 (1894) (applying the equal footing doctrine).

¹¹⁰ See *John v. United States (John II)*, 720 F.3d 1214, 1223 (9th Cir. 2013); *John v. United States (John I)*, 247 F.3d 1032, 1033 (9th Cir. 2001); *Alaska v. Babbitt*, 72 F.3d 698, 701 (9th Cir. 1995).

¹¹¹ 72 F.3d at 701.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

In the end, the Ninth Circuit concluded that the federal agencies' position represented the best interpretation.¹¹⁵ It has since upheld this interpretation in two subsequent cases.¹¹⁶ The position raised by the NPS in *Sturgeon II* stems directly from this line of precedent.¹¹⁷

Unless the Supreme Court expected the Ninth Circuit to reverse its position on this point, it could have referred to this line of cases to find that the Nation River may qualify as public land and thus places the Yukon-Charley within NPS authority.¹¹⁸ This position, coupled with an actual interpretation of § 103(c), would have left concrete questions for review on remand.¹¹⁹ Instead, despite having the tools to shape a comprehensive holding, the Court in effect told the lower court to try again.¹²⁰ A more thorough review of the statutory terms, the text surrounding § 103(c), and the statutory structure, would most likely have still invalidated the Ninth Circuit's interpretation.¹²¹ Had the Court explicitly adopted the interpretation that Chief Justice Roberts's opinion seems to favor, however, it may have resulted in a plurality judgment, which would have left the Ninth Circuit's judgment intact—an option that the Court unanimously opposed.¹²²

While only the justices themselves could say with certainty, the timing of the oral arguments, Justice Scalia's untimely death, and the Court's decision lends some light to the impetus behind the narrow holding proffered by the Court.¹²³ The even composition of the Court, split between liberal and conservative justices, at the time of the decision made a plurality a genuine possibility had the Court chosen to issue a broader opinion.¹²⁴ Unfortunately, an eight-justice court lacks the capacity to absorb disharmony of a nine-justice court.¹²⁵ Since the last of the current members of the Court took their seats, the Court has decided several environmental cases of note, many of which have demonstrated a recognizable philosophical divide within the Court, particularly in cases involving the extent of regulatory authority.¹²⁶ A

¹¹⁵ *Id.* at 704.

¹¹⁶ See *John II*, 720 F.3d at 1226; *John I*, 247 F.3d at 1033.

¹¹⁷ See *Sturgeon II*, 136 S. Ct. at 1069; Brief for Respondents, *supra* note 26, at 30.

¹¹⁸ See *Sturgeon II*, 136 S. Ct. at 1072; *John II*, 720 F.3d at 1226; *John I*, 247 F.3d at 1033; *Babbitt*, 72 F.3d at 704.

¹¹⁹ See 16 U.S.C. § 3103(c) (2012); *Sturgeon II*, 136 S. Ct. at 1071–72.

¹²⁰ See *Sturgeon II*, 136 S. Ct. at 1072; *supra* notes 90–119 and accompanying text. The Court had the statutory text, legislative history, and analogous case law available. See *Sturgeon II*, 136 S. Ct. at 1072; *supra* notes 90–119 and accompanying text.

¹²¹ See 16 U.S.C. § 3103(c); *Sturgeon II*, 136 S. Ct. at 1070–71.

¹²² See *Sturgeon II*, 136 S. Ct. at 1071, 72.

¹²³ See *id.*; 1072; Transcript of Oral Argument at 1, *supra* note 44.

¹²⁴ See *Sturgeon II*, 136 S. Ct. at 1072; see *infra* note 126 and accompanying text.

¹²⁵ See Epstein & Jacobi *supra* note 13, at 45, 40, 98.

¹²⁶ See *Michigan v. Env'tl. Prot. Agency*, 135 S. Ct. at 2712, 2726 (reaching a 5–4 decision, with Kagan, Ginsburg, Breyer, and Sotomayor, JJ. dissenting); *Util. Air Reg. Group*, 134 S. Ct. at 2449 (reaching a 5–4 decision with Breyer, Ginsburg, Sotomayor, and Kagan, J.J. concurring in

review of the *Sturgeon II* oral argument transcript shows similar disagreement brewing between members of the Court in late January.¹²⁷

Some philosophical discord makes sense when one considers the possible implications of a more comprehensive holding.¹²⁸ The massive acreage of preserve lands within Alaska means that the Court's interpretation automatically influences a large swath of the National Park System, even though ANILCA only applies to a single state.¹²⁹ Further, because the case involves the relationship between state and federal governments and a preservation system tailored to the unique character of the State, the decision could implicate both federalism and the future of adaptive land use management.¹³⁰

As the Court proceeds with eight members and an apparent ideological split, safe holdings such as the one demonstrated in *Sturgeon II* may occur with greater frequency.¹³¹ Correspondingly, potentially landscape-shifting pronouncements may stall, particularly in divisive fields such as many of the areas lumped under the title of environmental law.¹³² With the future composition of the Court uncertain and the sitting Court apparently hesitant to extend its holdings to the point of plurality division, the future of environmental law hangs in limbo.¹³³

part and dissenting in part); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013) (reaching a 5–4 decision, with Kagan, Ginsburg, Breyer, and Sotomayor, JJ. dissenting).

¹²⁷ See Transcript of Oral Argument, *supra* note 44, at 3–64. For example, Justice Sotomayor questioned Sturgeon's assertion that ANILCA did not apply to navigable waters within the state. *Id.* at 6 ("What says [ANILCA] excludes navigable waters?"). Justice Breyer, likewise, critiqued the statutory basis of Sturgeon's position. *Id.* at 15 (Justice Breyer stating "I've just read you a regulation, which . . . does not apply solely to public lands within National Park Service units, either in Alaska or anywhere else. And therefore, the statute doesn't stop it."). On the other side, Justice Alito questioned the NPS's choice to read the second provision of § 103(c) apart from the first. *Id.* at 53 ("What can you do about [the second] provision that . . . gets around the first section of 103(c)?"). Chief Justice Roberts, for his part, noted NPS's alternative argument. *Id.* at 36 ("I've never thought of [the reserved water rights doctrine] as a basis for general regulatory authority."). The transcript also shows Justice Scalia playing a particularly active role throughout the arguments. See *id.*

¹²⁸ See *Sturgeon II*, 136 S. Ct. at 1072; Transcript of Oral Argument, *supra* note 44, 3–64.

¹²⁹ See *Sturgeon II*, 136 S. Ct. at 1066; Williams, *supra* note 2, at 859.

¹³⁰ See *Sturgeon II*, 136 S. Ct. at 1066; Williams, *supra* note 2, at 860.

¹³¹ See *Fairfield & Liptak* *supra* note 13; Vaccaro, *supra* note 77. A unanimous Court also decided the only other environmental case argued since *Sturgeon*, though that case raised a procedural question. *U.S. Army Corps of Eng'rs. v. Hawkes Co.*, 136 S. Ct. 1807, 1811 (2016) (deciding whether jurisdictional determinations qualify as final agency action).

¹³² See Vaccaro, *supra* note 77.

¹³³ See *Sturgeon II*, 136 S. Ct. at 1072; *Supreme Court: Obama: Concerns about Trump Mean Nominee Should Advance*, ENV'T. & ENERGY DAILY (May 17, 2016), <http://www.eenews.net/eedaily/stories/1060037352> [<https://perma.cc/5LR5-EZ3W>]; *Supreme Court: Ginsburg Urges Senate to 'Wake Up,' Consider Garland*, GREENWIRE (Sept. 8, 2016), <http://www.eenews.net/greenwire/stories/1060042495> [<https://perma.cc/8WUB-TPWH>].

CONCLUSION

The first environmental decision following the passing of Justice Scalia, *Sturgeon v. Frost*, presented the United States Supreme Court with an interesting fact pattern involving hovercraft use in the remote expanses of Alaska, and an issue of state/federal relations that it could resolve through simple statutory interpretation. While the piece of legislation in question, § 103(c) of Alaska National Interest Lands Conservation Act (“ANILCA”), applies to a single state, the expanse of preserved lands governed by that statute means that any relevant decision would affect a significant portion of the United States’ protected lands.

With undisputed facts and several proposed interpretations before it, the Court had the option to stabilize regulatory authority over that region. But, it chose not to. Instead, it chose to limit its holding, invalidate the United States Court of Appeals for the Ninth Circuit’s interpretation of the statute as disagreeing with the unique history and natural resources of the State as recognized by ANILCA, and shift the burden of statutory interpretation back to the lower court. Whether the political makeup of an eight-person court and a potential split decision or the plain proximity to Justice Scalia’s passing affected the decision will remain a mystery. If this apparent hesitancy to issue full decisions on potentially divisive matters continues, however, the progress of environmental law will wait in the unknown until the stability of the political branches improves.

