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Federal Cases

SCOTUS Rejects National Park Service's Attempt to Regulate River in Alaskan Preserve

Alaskan hunter John Sturgeon navigated his amphibious hovercraft in search of moose along the Nation River in the Yukon-Charley Rivers National Preserve when park rangers stopped him, asserting a National Park Service regulation that prohibited hovercrafts on rivers within any federal preserve or park. Mooseless, Sturgeon retreated from the preserve. Soon after, he sued the Park Service, arguing the federal prohibition did not apply on the state-owned Nation River and seeking an injunction to allow him to resume using his hovercraft on his accustomed hunting route. The State of Alaska intervened in support of Sturgeon.

The dispute centered on whether Section 103 of the Alaska National Interest Lands Conservation Act creates an "Alaska-specific exception to the National Park Service's general authority over boating and related activities in federally managed preservation areas." This question arises out of Alaska's unique system of "inholdings": more than 18 million acres of state, Native, and private land located within the boundaries of the numerous national parks, monuments, and preserves (termed "conservation system units"), including the Yukon-Charley, set aside by ANILCA. Traditionally, the Park Service has broad authority under its Organic Act to administer both lands and waters within the boundaries of its national conservation units – in particular, the power to issue regulations concerning "boating and other activities on or relating to water located within" these areas.

ANILCA, however, prescribes a slightly different regulatory scheme. Under ANILCA Section 103(c),

> [o]nly those lands within the boundaries of any conservation system unit which are public lands . . . 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.

"Land," as defined in the Act, means "lands, waters, and interests therein." "Public lands" in turn means "lands" (including waters and interests therein) "the title to which is in the United States" – *except* for lands selected for future transfer to the State or Native Corporations.

Sturgeon argued that Section 103 prohibits the Park Service from regulating "non-public" land, including state-owned rivers like the Nation. The Park Service asserted that, regardless of Section 103, it has authority to regulate such non-public land under a theory of reserved water rights – that when the federal government created the Yukon-Charley, it "reserved the water within the boundaries of the conservation system unit to achieve the government's conservation goals." Those reserved water rights, in not only the Nation River but all other navigable waters in Alaska's conservation system units, therefore constituted an "interest" sufficient to deem the river as a whole a "public land" under ANILCA.

The courts denied Sturgeon relief until 2016 when the case made its way to the U.S. Supreme Court. As recounted in the April 2016 *RELU Digest*, in March 2016, the high Court vacated the Ninth Circuit's dismissal of Sturgeon's suit, remanding and punting back to the lower court two questions. First, does the Nation River qualify as "public land" for purposes of ANILCA? And second, if the Nation River is not "public land," does the Park Service have authority to regulate Sturgeon's activities on the portion of the river in the Yukon-Charley? The Ninth Circuit reached only the first question, answering that the Nation River was in fact a "public land" under Section 103, thereby granting the Park Service authority to ground Sturgeon's hovercraft.

The Supreme Court again granted cert, and, on March 26, 2019, reversed the Ninth Circuit's conclusion. The Court's unanimous opinion, penned by Justice Kagan, focused on the definition of "public lands." That term includes "(almost all) 'lands, waters, and interests therein' the 'title to which is in the United States.'" The Court rejected the Park Service's reserved water rights argument, invoking the Alaska Supreme Court's interpretation in *Totemoff v. State*, another ANILCA case that established "reserved water rights are not the type of property interests to which title can be held"; rather, "the term 'title' applies to 'fee ownership of property' and (sometimes) to 'possessory interests' in property like those granted by a lease." But, the Court explained, even if Congress had intended ANILCA's "interest therein" language to include reserved water rights, the Nation River would not become "public land" in the way the Park Service urged. In such a case, the "public land" at issue would consist only of the federal government's specific reserved "interest" in the river – that is, the ability to take or maintain the amount of water necessary to fulfil the purpose of the initial reservation. That right, said the Court, would support only a Park Service regulation preventing the "depletion or diversion" of waters in the river; not a rule prohibiting hovercraft, which merely "moves above" the water.

Thus, the Court arrived at the second question, not reached by the Ninth Circuit: whether there existed any other grounds on which the Park Service could regulate the Nation River, if not a "public land." Here, the primary debate surrounded the meaning of "solely" in Section 103's second sentence. The Park Service argued that the sentence functions to exempt non-public lands from only "one particular class of Park Service regulations," those that apply solely to public lands. In other words, if a Park Service regulation on its face applies "solely" to public lands, then the regulation would not apply to a park's non-public lands. If instead the regulation covers public and non-public lands alike, then the regulation can indeed govern both. The Court scorned this strained construction as a truism, essentially stating that rules applying only to public lands apply only to public lands and that rules applying to both public and non-public lands apply to both. Finally, the Court rejected the Park Service's "last plea" for "some kind of special rule" based on the navigability of Alaska's waters, holding that ANILCA "does not readily allow the decoupling of navigable waters from other non-federally owned areas in Alaskan national parks for regulatory (or, indeed, any other) purpose."

The Court left the Park Service with some consolation, however, reminding that the Service wields "multiple tools to 'protect' rivers in Alaskan national parks" under ANILCA. It may regulate the public lands flanking rivers.

It may enter into "cooperative agreements" with the State to preserve the rivers themselves. It may similarly propose that state or other jurisdictional federal agencies undertake needed regulatory action on those rivers. And, "if all else fails," it may buy from Alaska the submerged lands of navigable waters and administer them as public lands. A concurrence from Justices Sotomayor and Ginsburg continues in this flow, acknowledging, too, that Congress left two other "avenues for the Service to achieve ANILCA's purposes": (1) the power under the Necessary and Proper Clause of the Constitution "over navigable rivers that run through Alaska's parks when that power is necessary to protect America's parklands" and (2) the power to regulate those Alaskan rivers designated as Wild and Scenic.

The ripples of *Sturgeon II* may not travel far beyond Alaska. The Court throughout its opinion premised and conditioned its holdings on Alaska's specific and largely idiosyncratic historical and legal development. Indeed, the Court acknowledged that had "Sturgeon lived in any other State, his suit would not have a prayer of success." Still, even in the lower 48, the case provides valuable insight into the Court's current leanings on principles of federalism, federal lands, reserved water rights doctrine, and statutory construction generally. Less clear, however, is whether Sturgeon, fresh off a win at the Supreme Court, has since been as victorious with the elusive moose.

Sturgeon v. Frost, 587 U.S. ____ (Mar. 26, 2019).

Ariel Stavitsky

Oregon Cases

For Your Consideration . . .

From the first day of 1L Contracts, the term "consideration" takes on significance to all lawyers. For regulatory lawyers the word features added meaning, in that we daily ask government agencies to consider evidence that we present in pursuit of permit approval. In *Citizens for Responsible Development in The Dalles v. Wal-Mart*, the court of appeals addressed that meaning.

As context, the process of obtaining permits centers on the applicable criteria. Setting aside for the moment the considerable lawyer time devoted to *how* they apply, the threshold question is always *whether* a given provision of law constitutes a criterion applicable to approval or denial.

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