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### **Alaska Fish & (and) Wildlife Federation & (and) Outdoor Council, Inc. v. Dunkel: The Alaskan Natives' Right to Migratory Bird Subsistence Hunting - Fact or Fiction**

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# *Alaska Fish & Wildlife Federation & Outdoor Council, Inc. v. Dunkle*: The Alaskan Natives' Right to Migratory Bird Subsistence Hunting—Fact or Fiction?

*A treaty, . . . , is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.—Mr. Justice Miller*<sup>1</sup>

## I. INTRODUCTION

Concern for the protection of migratory birds prompted Congress to enact the Migratory Bird Treaty Act in 1918, giving effect to a convention signed by the United States and Great Britain.<sup>2</sup> Three more conventions have followed and Congress has amended the original Migratory Bird Treaty Act to reflect all three.<sup>3</sup> This action by Congress has produced an effective piece of legislation to govern the hunting and preservation of migratory birds throughout the United States.

However, problems may occur when the terms of the conventions, which Congress incorporated into United States law, differ in reference to certain subjects. One such topic of concern is the subsistence hunting of migratory birds by Alaskan natives. This disparity of language in the four conventions was the source of conflict in *Alaska Fish & Wildlife Federation & Outdoor Council, Inc. v. Dunkle*.<sup>4</sup> The issue involved concerned the ability of the Alaskan natives to hunt migratory birds for subsistence purposes.

This Note analyzes the status of the migratory bird treaties as the "supreme law of the land" in the United States. After describing the conflict which exists between several of the treaties concerning Alas-

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1. *Edye v. Robertson* (The Head Money Cases), 112 U.S. 580, 598-99 (1884).

2. Migratory Bird Treaty Act, ch.128, § 2, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703-712 (1982)).

3. *Id.* See *infra* notes 53-55.

4. 829 F.2d 933 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988).

kan native subsistence hunting, this Note explores why the Alaskan District Court and the Ninth Circuit Court used statutory analyses of U.S. domestic law to side-step the main issue in the case, namely, the operation of the migratory bird treaties in the United States today. Finally, this Note questions how well the Ninth Circuit Court's decision upholds the original conservationist intent of the treaties, and how far it will go in promoting the protection of migratory birds in Alaska.

## II. STATUTORY HISTORY OF ALASKAN NATIVES' SUBSISTENCE HUNTING RIGHTS

In 1902, Congress passed the first effective federal game law for Alaska, which prohibited the wanton destruction of game, nests, and eggs.<sup>5</sup> In addition, the law prohibited the killing of game birds outside of the established seasons and set bag limits on the number of birds that could be taken.<sup>6</sup> One objective of this 1902 Act was to end the slaughter of game by natives in Alaska, since the slaughter was not for food but rather for the price which could be obtained for the hides of game.<sup>7</sup> The 1902 Act stated that nothing in the Act shall "prevent the killing of any game animal or bird for food or clothing by native Indians or Eskimos or by miners, explorers, or travelers on a journey when in need of food . . . ."<sup>8</sup> Despite the presence of this statute, the slaughter of game for profit continued.<sup>9</sup> Consequently, Congress amended the Act in 1908 to modify the established seasons and to set up a licensing system to fund enforcement of the Act.<sup>10</sup> The exemption in the 1902 Act for people hunting for food and personal clothing was retained with only minor changes.<sup>11</sup>

In 1913, Congress enacted legislation that directly regulated migratory birds.<sup>12</sup> The 1913 Migratory Bird Act declared:

All wild geese, wild swans, brant, wild ducks . . . and all other migratory game and insectivorous birds which . . . do not remain permanently the entire year within the borders of any State or Ter-

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5. Act of June 7, 1902, ch. 1037, 32 Stat. 327 (1902).

6. *Id.*

7. H.R. REP. NO. 951, 57th Cong., 1st Sess. 3 (1902).

8. Act of June 7, 1902, ch. 1037, 32 Stat. 327 (1902).

9. S. REP. NO. 597, 60th Cong., 1st Sess. 1 (1908).

10. Act of May 11, 1908, ch. 162, 35 Stat. 102 (1908).

11. The 1908 Act reads in relevant part: "Nothing in this Act shall . . . prevent the killing of any game animal or bird for food or clothing at any time by natives, or by miners or explorers, when in need of food . . . ." *Id.*

12. Migratory Bird Act of March 4, 1913, ch. 145, 37 Stat. 847 (repealed 1918).

ritory, [are] . . . within the custody and protection of the Government of the United States and [they] shall not be destroyed or taken contrary to regulations . . . .<sup>13</sup>

A number of states challenged this federal act as being an impermissible regulation of an activity exclusively within the states' jurisdiction.<sup>14</sup> In *United States v. Shauver*<sup>15</sup> and *United States v. McCullagh*,<sup>16</sup> federal district courts declared the 1913 Act unconstitutional because it was a measure which extended Congress' power beyond its constitutional boundaries.<sup>17</sup> The government appealed these decisions, and the Supreme Court heard argument on the issue.<sup>18</sup> In the meantime, Secretary of State Lansing, invoking the Treaty power under the Constitution,<sup>19</sup> negotiated a treaty with Great Britain on behalf of Canada for the protection of birds migrating between the countries.<sup>20</sup> Congress drafted legislation to execute the terms of the United States-Canada Convention, and on July 3, 1918, President Wilson signed the Migratory Bird Treaty Act ("MBTA") into law.<sup>21</sup> As a result of this legislation, the Supreme Court dismissed the case as moot.<sup>22</sup> One year later, the Court upheld the constitutionality of the MBTA as a valid exercise of Congress' treaty-making power in *Missouri v. Holland*.<sup>23</sup>

The MBTA authorized the Secretary of Agriculture to issue regulations giving the statute effect.<sup>24</sup> Within one month of the MBTA's enactment, the Secretary of Agriculture, through Presidential procla-

13. *Id.*

14. See *infra* notes 15-18 and accompanying text.

15. 214 F. 154 (E.D. Ark. 1914), *appeal dismissed*, 248 U.S. 594 (1919).

16. 221 F. 288 (D. Kan. 1915).

17. *Id.* at 296. *United States v. Shauver*, 214 F. 154, 160 (E.D. Ark. 1914).

18. *United States v. Shauver*, 248 U.S. 594 (1919).

19. U.S. CONST. art. II, § 2, cl. 2.

20. See Convention for the Protection of Migratory Birds, August 16, 1916, United States-Great Britain (on behalf of Canada), 39 Stat. 1702, T.S. No. 628 [hereinafter United States-Canada Convention].

21. See 1918 Migratory Bird Treaty Act, 40 Stat. 755 (codified as amended at 16 U.S.C. §§ 703-712 (1982)).

22. *United States v. Shauver*, 248 U.S. 594 (1919).

23. 252 U.S. 416 (1920).

It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found.

*Id.* at 433.

24. Act of July 3, 1918, ch. 128, § 3, 40 Stat. 755.

mation,<sup>25</sup> adopted regulations determining "when, to what extent, . . . and by what means"<sup>26</sup> migratory birds could be hunted.<sup>27</sup> Regulation 4 expressly provided a limited open season in Alaska for the hunting of waterfowl.<sup>28</sup> Regulation 5 set bag limits on the number of waterfowl that a person could take in one day.<sup>29</sup> In addition, the Secretary adopted a regulation modeled after the Alaska native exception in the United States-Canada Convention which allowed the taking of certain migratory nongame birds in Alaska.<sup>30</sup> Specifically, the regulation provided that, "[i]n Alaska, Eskimos and Indians may take for the use of themselves and their immediate families, in any manner and at any time, and possess and transport auks, auklets, guillemots, murres, and puffins and their eggs for food, and their skins for clothing."<sup>31</sup>

These first regulations, adopted pursuant to the MBTA, were periodically revised.<sup>32</sup> None of these revisions exempted Alaska from the September 1 to December 15 open season for hunting migratory waterfowl.<sup>33</sup> For subsistence hunting, the Alaskan natives were only allowed to take certain migratory nongame birds.<sup>34</sup>

By an Act of January 13, 1925, Congress again enacted a game law for Alaska.<sup>35</sup> Section 8 of the 1925 Alaska Game Law ("1925 AGL") made it unlawful for any person "to take, possess, transport, sell, offer to sell, purchase, or offer to purchase any game animal, land fur-bearing animal, wild bird, or any parts thereof, or any nest or egg of any such bird,"<sup>36</sup> except as permitted by the Law itself or by regulations issued pursuant to the Law.<sup>37</sup> Section 10 of the Law author-

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25. *Id.* Section 3 of the MBTA provided that regulations became effective when approved by the President. Thus, from 1918 to 1950, MBTA regulations were issued by Presidential proclamation. In 1951, the President empowered the Secretary of the Interior, who by then exercised the Secretary of Agriculture's authority under the MBTA, to promulgate regulations without prior approval, ratification, or other action of the President. Exec. Order No. 10250 (1951), *reprinted in* 16 Fed. Reg. 5385 (1951).

26. Act of July 3, 1918, ch. 128, § 3, 40 Stat. 755.

27. Proclamation of July 31, 1918, 40 Stat. 1812.

28. *Id.* at 1813-15.

29. *Id.* at 1815.

30. *Id.*, Regulation 7 at 1816.

31. *Id.*

32. *See, e.g.*, Proclamation of May 17, 1921, 42 Stat. 2240; Proclamation of March 8, 1922, 42 Stat. 2265; Proclamation of June 11, 1923, 43 Stat. 1915-16; Proclamation of July 2, 1924, 43 Stat. 1961-62; Proclamation of June 22, 1925, 44 Stat. 2579-80.

33. *See supra* note 32.

34. *See supra* note 32.

35. Alaska Game Law of 1925, ch. 75, 43 Stat. 739 (1925).

36. *Id.* § 8, at 743.

37. *Id.*

ized the Secretary of Agriculture to adopt regulations determining "when, to what extent, if at all, and by what means game animals, land fur-bearing animals, game birds, nongame birds, and nests or eggs of birds may be taken, possessed, transported, bought, or sold . . . ."38

Section 10 and the 1925 AGL also contained limiting provisions.<sup>39</sup> First, it provided that no regulation adopted pursuant to the Act shall "prohibit any Indian or Eskimo, prospector, or traveler to take animals or birds during the close season when he is in absolute need of food and other food is not available,"<sup>40</sup> except where the Secretary "shall determine that the supply of such species of animals or birds is in danger of extermination . . . ."41 Second, it prohibited any regulation from "contraven[ing] any of the provisions of the Migratory Bird Treaty Act and regulations."<sup>42</sup>

The first regulations issued under the 1925 AGL recognized the continuing authority of the MBTA.<sup>43</sup> But these regulations contained a much broader exception for the subsistence hunting of migratory birds by the natives than the MBTA or the United States-Canada Convention allowed.<sup>44</sup> Regulation 8 provided:

*An Indian, Eskimo, or half-breed who has not severed his tribal relations by adopting a civilized mode of living or by exercising the right of franchise and an explorer, prospector, or traveler may take animals or birds in any part of the Territory at any time for food when in absolute need of food and other food is not available, but he shall not ship or sell any animal, or bird, or part thereof, so taken.*<sup>45</sup>

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38. *Id.* § 10, at 743.

39. *Id.* at 744.

40. Alaska Game Law of 1925, 43 Stat. at 744.

41. *Id.*

42. *Id.*

43. Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933, 944 n.9 (9th Cir. 1987), cert. denied, 108 S. Ct. 1290 (1988). These regulations provided:

The Alaska game law (act of January 1925) and the regulations thereunder supersede all previous Federal laws and regulations for the protection of game animals, land fur-bearing animals, and birds in the Territory, *except the migratory-bird treaty Act of July 3, 1918* (40 Stat. 755), the Lacey Act of May 25, 1900, as amended (31 Stat. 87-88; 35 Stat. 1137), and the law protecting animals and birds on Federal refuges (42 Stat. 98), and the regulations thereunder.

*Id.*, n.9 (emphasis added). See U.S. Dept. of Agriculture, Bureau of Biological Survey, Alaska Game Law and Regulations and Federal Laws Relating to Game and Birds in the Territory, issued May, 1925.

44. *Dunkle*, 829 F.2d at 944 n.8 (emphasis added).

45. *Id.* Brief for the Director, United States Fish and Wildlife Service, Appellee at 12,

Nineteen years later, in 1944, this regulation was amended to exclude migratory birds from this subsistence exception.<sup>46</sup> Some form of this regulation remained in effect until 1960, when it and other federal regulations implementing the 1925 AGL were deleted from the Code of Federal Regulations as having been "superseded by operation of the Alaska Statehood Act<sup>47</sup> . . . as amended."<sup>48</sup>

From 1959 to 1975, recognizing that some Alaskan native populations were dependent on hunting migratory birds for subsistence purposes, the Fish and Wildlife Service did not consistently enforce the MBTA with regard to Spring subsistence hunting.<sup>49</sup> In 1975, the Fish and Wildlife Service articulated the Watson Policy, which was an administrative policy regarding the prosecution of Alaskan natives hunting migratory birds out of season.<sup>50</sup> It stated that "where there is a demonstrable need for the taking of migratory bird resources for subsistence purposes, the U.S. Fish and Wildlife Service will not recommend prosecution in Federal court for a violation of the Migratory Bird Treaty Act during the statutory closed period."<sup>51</sup> Since 1980, the Fish and Wildlife Service has conducted surveys to monitor the subsistence harvesting by the natives in order to protect against a population decline in any of the migratory bird species.<sup>52</sup>

### III. MIGRATORY BIRD TREATIES

Additional treaties addressing the protection of migratory birds followed the 1916 United States-Canada Convention. The United

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Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933 (9th Cir. 1987) (No. 86-3657) (emphasis added).

46. 9 Fed. Reg. 5270, 5271 (May 17, 1944). The 1944 regulation read:

*Taking animals, birds, and game fishes in emergencies.* An Indian or Eskimo, or an explorer, prospector or traveler, may take animals, *birds except migratory birds*, or game fishes in any part of the Territory at any time for food when in need thereof and other sufficient food is not available, but he shall not transport or sell any animal, bird, game fish, or part thereof so taken, and an Indian or Eskimo also may take, possess, and transport, at any time, auks, auklets, guillemots, murre, and puffins and their eggs for food, and their skins for clothing for his own use and that of his immediate family.

*Id.* (emphasis added).

47. Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339, *as amended*, 73 Stat. 141.

48. 25 Fed. Reg. 7681 (Aug. 12, 1960).

49. Brief for the Director, United States Fish and Wildlife Service, Appellee at 13, Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933 (9th Cir. 1987) (No. 86-3657).

50. *Id.*

51. *Id.*

52. *Id.* at 14.

States entered into agreements with Mexico in 1936,<sup>53</sup> with Japan in 1972,<sup>54</sup> and with the Soviet Union in 1976.<sup>55</sup> Although the later treaties differ in particulars, they are closely patterned after the 1916 United States-Canada Convention.

For the purpose of "saving from indiscriminate slaughter and . . . insuring the preservation of such migratory birds as are either useful to man or are harmless,"<sup>56</sup> the United States and the United Kingdom of Great Britain contracted to regulate the taking of three separate groups of migratory birds. Article I of the United States-Canada Convention enumerates by common scientific Family name the migratory game birds, the migratory insectivorous birds and other migratory nongame birds which would be protected under the treaty.<sup>57</sup> For each group, a "close season" is established by Article II, during which "no hunting shall be done except for scientific or propagating purposes under permits."<sup>58</sup> In addition, a year-round close season is established for both migratory insectivorous and migratory nongame birds, except that certain types of migratory nongame birds may be taken by Eskimos and Indians for food and clothing.<sup>59</sup> The treaty sets the close season for migratory game birds between March 10 and September 1,<sup>60</sup> and further restricts the hunting season to three and one-half months.<sup>61</sup> Article V further prohibits the taking of nests or eggs of migratory birds, except for scientific or propagating purposes.<sup>62</sup> Finally, Article VII allows for the killing of any migratory birds which "under extraordinary conditions, may become seriously injurious to

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53. Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, United States-Mexico, 50 Stat. 1311 (1936), T.S. No. 912 [hereinafter United States-Mexico Convention]. This convention was amended in 1972 by adding a list of protected species not included in the original agreement. See Exchange of Notes at Mexico and Tlatelolco, 23 U.S.T. 260, T.I.A.S. No. 7302.

54. Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Mar. 4, 1972, United States-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990 (1972) [hereinafter United States-Japan Convention].

55. Convention Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, United States-USSR, 29 U.S.T. 4647, T.I.A.S. No. 9073 (1978) [hereinafter United States-USSR Convention].

56. United States-Canada Convention, *supra* note 20, at preamble.

57. *Id.* art. I.

58. *Id.* art. II.

59. *Id.* art. II, § 3.

60. *Id.* art. II, § 1. For Atlantic coast shorebirds, a special close season between February 1 and August 15 is prescribed.

61. United States-Canada Convention, *supra* note 20, art. II, § 1.

62. *Id.* art. V.



the agricultural or other interests in any particular community."<sup>63</sup>

In 1936, the United States and Mexico concluded the "Convention between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals."<sup>64</sup> The purpose motivating the agreement was to "protect birds denominated as migratory . . . by means of adequate methods which will permit, in so far as the respective . . . parties may see fit, the utilization of said birds rationally for purposes of sport, food, commerce and industry."<sup>65</sup> This treaty limits the length of the hunting season for migratory birds to a maximum of four months, and requires the hunter to have a permit.<sup>66</sup> The treaty also calls for the establishment of refuge zones for the birds,<sup>67</sup> and prohibits hunting from aircraft.<sup>68</sup> Similar to the United States-Canada Convention, the Mexican treaty not only allows the taking of migratory birds for scientific and propagating purposes, but also includes an exception for museums.<sup>69</sup> While the Canada Convention allows the killing of migratory birds when they become "seriously injurious to the agricultural or other interests,"<sup>70</sup> the Mexico Convention only allows this killing "when [the birds] become injurious to agriculture and constitute plagues."<sup>71</sup> Un-

63. *Id.* art. VII.

64. United States-Mexico Convention, *supra* note 53.

65. *Id.* art. I.

66. *Id.* art. II(C).

The Mexican Convention is quite inartfully drafted insofar as the establishment of close seasons is concerned. Article II(A) provides generally for their establishment, but does not specify their length; Article II(C) then limits the permissible hunting period to no more than four months in each year; Article II(D) prescribes a close season of from March 10 to September 1 for wild ducks; and Article II(E) prescribes a year round close season for 'migratory insectivorous birds.' The ambiguity arises from Article IV, however, which lumps all migratory birds into only two categories: migratory game birds and migratory nongame birds. If the latter grouping was intended to include any birds other than 'migratory insectivorous birds,' then the Convention fails to indicate what close or open seasons are to apply to such other birds. The matter was further confused when, by exchange of notes on March 20, 1972, the governments of Mexico and the United States supplemented the 1936 Treaty by agreeing to a lengthy list of additional birds to be protected. These birds are described as 'additions . . . to the list of birds set forth in Article IV,' without specifying whether the same are to be considered 'migratory game birds' or 'migratory nongame birds.' By administrative regulation, however, they are all treated as nongame birds, and, therefore, protected from hunting. See 50 C.F.R. § 10.13 (1975).

M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 70-71, n.12 (1983) [hereinafter BEAN].

67. United States-Mexico Convention, *supra* note 53, art. II(B).

68. *Id.* art. II(F).

69. *Id.* art. II(A).

70. United States-Canada Convention, *supra* note 20, art. VII.

71. United States-Mexico Convention, *supra* note 53, art. II(E).

like the Canada Convention, the Mexico Convention creates no hunting exception for the Indians.

In 1972, the United States and Japan concluded the "Convention between the United States and Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment."<sup>72</sup> Its purpose being much broader in scope than the previous conventions, this treaty sought to protect "a natural resource of great value for recreational, aesthetic, scientific, and economic purposes."<sup>73</sup> Thus, it extends protection to species and subspecies of birds which migrate between or are common to both countries.<sup>74</sup> While it does not delineate any definite hunting seasons, the Japan Convention requires that the hunting seasons established by the contracting parties be set "so as to avoid [the migratory birds'] principal nesting seasons and to maintain their populations in optimum numbers."<sup>75</sup> In addition, the treaty directs both Japan and the United States to establish "sanctuaries and other facilities for the protection or management of migratory birds."<sup>76</sup> The Japan Convention also creates exceptions for scientific, educational, or propagative purposes,<sup>77</sup> for "the purpose of protecting persons and property,"<sup>78</sup> and for taking by "Eskimos, Indians, and indigenous peoples of the Trust Territory of the Pacific Islands for their own food and clothing."<sup>79</sup>

In 1978, the United States ratified a treaty concerning the conservation of migratory birds with the Union of Soviet Socialist Republics.<sup>80</sup> Its terms are similar to the United States-Japan Convention with a few variations. It states that the establishment of hunting seasons "shall be determined by the competent authority of each Contracting Party"<sup>81</sup> and shall be set "so as to provide for the preservation and maintenance of stocks of migratory birds."<sup>82</sup> The USSR treaty requires the contracting parties to identify areas of

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72. United States-Japan Convention, *supra* note 54.

73. *Id.* at preamble.

74. *Id.* art. II(1).

75. *Id.* art. III(2).

76. *Id.* art. III(3).

77. United States-Japan Convention, *supra* note 54, art. III(1)(a).

78. *Id.* art. III(1)(b).

79. *Id.* art. III(1)(e).

80. United States-USSR Convention, *supra* note 55.

81. *Id.* art. II(2). The term "competent authority" is defined as "a national scientific or management agency authorized by the Contracting Party to implement the activities under this Convention." *Id.* art. I(2).

82. *Id.* art. II(2).

“breeding, wintering, feeding, and moulting”<sup>83</sup> and to designate them as “Migratory Bird Habitat[s]”<sup>84</sup> which would receive special protection. The exceptions to the general prohibition against taking of migratory birds are the same as those in the Japan Convention except for a slight variation in the language of the Indian hunting exception. In accord with the contracting party’s laws, decrees or regulations the “indigenous inhabitants of the Chukchi and Koryaksk national regions, the Commander Islands and the State of Alaska [may take migratory birds] for their own nutritional and other essential needs (as determined by the competent authority of the relevant Contracting Party).”<sup>85</sup> However, this taking is restricted to those seasons set by the competent authority of each contracting party.<sup>86</sup>

#### IV. THE MIGRATORY BIRD TREATY ACT

Drafted in response to the United States-Canada Convention, the MBTA reads very much the same today as it did in 1918. With the ratifications of the subsequent migratory bird conventions, Congress made only technical amendments to the MBTA, which merely added appropriate references to each later treaty.<sup>87</sup> Even though the conventions’ terms differ, the broad and general language of the MBTA has operated to give effect to each one. Section 703 provides, in pertinent part:

Unless and except as permitted by regulations . . . it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, . . . possess, offer for sale, sell, . . . purchase, . . . ship, export, import, . . . transport or cause to be transported, . . . any migratory bird, any part, nest, or eggs of any such bird, or any product, . . . of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain, . . . the United States and the United Mexican States, . . . and the United States and the Government of Japan . . .<sup>88</sup>

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83. *Id.* art. IV(2)(c).

84. *Id.*

85. United States-USSR Convention, *supra* note 55, art. II(1)(c).

86. *Id.* art. II(2). See *supra* notes 81-82 and accompanying text.

87. Act of June 20, 1936, ch. 634, § 3, 49 Stat. 1556 (United States-Mexico Convention); Act of June 1, 1974, Pub. L. No. 93-300, § 1, 88 Stat. 190 (United States-Japan Convention). Reference to the United States-USSR Convention is found in § 712 of the MBTA. This section was not part of the original statute, but was added when Congress passed the 1978 Fish and Wildlife Improvement Act. See *infra* notes 100-104 and accompanying text.

88. 16 U.S.C. § 703 (1982).

The Secretary of the Interior<sup>89</sup> is authorized in section 704 to issue regulations regarding the taking of migratory birds "subject to the provisions and in order to carry out the purposes of the conventions."<sup>90</sup> In addition, the Secretary is directed to give "due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds."<sup>91</sup>

The remaining eight sections of the MBTA supplement and give effect to these two primary sections. For example, section 705 makes it illegal to transport, ship, or carry any bird to any state or territory if it was taken contrary to the laws of any state, territory, district or province.<sup>92</sup> Supplementing the enforcement powers of the employees of the Department of the Interior, section 706 allows the employees to arrest without a warrant persons who violate the MBTA within their presence or view.<sup>93</sup> These employees may also execute search and arrest warrants.<sup>94</sup>

Section 707 imposes criminal penalties for violations of the conventions, the MBTA or the regulations implemented under it.<sup>95</sup> If the violation does not involve the selling of migratory birds, it is a misdemeanor punishable by a fine of not more than \$500, or imprisonment for not more than six months, or both.<sup>96</sup> Section 707(b) also provides that one who violates the MBTA with the intent to sell the illegally obtained bird "shall be guilty of a felony and . . . be fined not more than \$2,000 or imprisoned not more than two years, or both."<sup>97</sup>

Additionally, section 708 allows states to make or enforce laws or regulations which give greater protection to migratory birds, as long as they are not inconsistent with the conventions or the MBTA.<sup>98</sup> Section 711 allows the breeding and sale of migratory birds in certain circumstances in order to increase the food supply. For

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89. The authority of the Secretary of Agriculture under the Act was transferred to the Secretary of the Interior in 1939 pursuant to Reorganization Plan No. II, § 4(f), 4 Fed. Reg. 2731, 53 Stat. 1433.

90. 16 U.S.C. § 704 (1982).

91. *Id.*

92. *Id.* § 705. The term "province" refers to "any Province of the Dominion of Canada." *Id.* This section is not limited to migratory birds. *Bogle v. White*, 61 F.2d 930, 931 (5th Cir. 1932), *cert. denied*, 289 U.S. 737 (1933).

93. 16 U.S.C. § 706 (1982).

94. *Id.*

95. *Id.* § 707(a).

96. *Id.*

97. *Id.* § 707(b).

98. *Id.* § 708.

example, section 711 allows the breeding of migratory game birds on farms and, if done under proper regulations, permits the sale of these birds.<sup>99</sup>

It is interesting to note that the only reference to the newest treaty with the Soviet Union, besides the generic term "conventions,"<sup>100</sup> is in section 712,<sup>101</sup> which was added when the MBTA was amended by the 1978 Fish and Wildlife Improvement Act.<sup>102</sup> This section authorizes the Secretary of the Interior, in accordance with the several migratory bird treaties with Canada, Japan, Mexico and the USSR,

to issue such regulations as may be necessary to assure that the taking of migratory birds . . . by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs, as determined by the Secretary of the Interior, during seasons established so as to provide for the preservation and maintenance of stocks of migratory birds.<sup>103</sup>

Section 712 further authorizes the Secretary to issue regulations "as may be necessary" to implement the provisions of the four treaties.<sup>104</sup>

In order to implement the provisions of the MBTA, the Secretary has issued two types of federal regulations. One commentator has described them as follows:

The first is of a general and continuing nature, and governs such subjects as hunting methods, tagging and identification requirements, scientific and other permit requirements, and other similar matters . . . . The second type fixes season lengths, shooting hours, bag limits and so forth, and is revised annually on the basis of bird population data, and the recommendations of affected states, "Flyway Councils," and various advisory committees . . . . The end-product of these formalized proceedings is the promulgation of so-called "framework regulations" which offer individual states a range of choices regarding season lengths, shooting hours, bag limits and so forth. Individual states select from among the choices offered in the framework regulations, and their selections are then

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99. *Id.* § 711. See *United States v. Conners*, 606 F.2d 269, 272 (10th Cir. 1979) (Migratory Bird Treaty Act applies only to mallard ducks which are "wild" and not to those which have been "captive-reared.").

100. This term is found in 16 U.S.C. §§ 704, 707(a), 708, and 709(a).

101. *Id.* § 712.

102. Pub. L. No. 95-616, § 3(h)(2), (3), 92 Stat. 3112, 1978 U.S. CODE CONG. & ADMIN. NEWS 7641.

103. 16 U.S.C. § 712 (1982).

104. *Id.*

published as final federal regulations.<sup>105</sup>

The federal government maintains a published list of migratory birds entitled to protection which includes almost all native North American birds.<sup>106</sup> These regulations, revised annually, have operated since 1918 to regulate the hunting of migratory birds in order to preserve them as viable species.

## V. FACTS OF THE CASE

Conservationist concern over the decline in migratory bird populations in Alaska sparked action by several regulatory groups. In 1984, the United States Fish and Wildlife Service ("Fish and Wildlife Service"), the Alaska Department of Fish and Game ("ADF&G"), and the California Department of Fish and Game joined with the Alaskan natives through the Association of Village Council Presidents<sup>107</sup> to set up a cooperative plan to reduce the subsistence hunting of three kinds of migratory birds.<sup>108</sup> This plan, known as the Hooper Bay Agreement, became effective during the 1984 hunting season. The plan prohibited sport hunting of cackling Canadian geese and imposed a 50% reduction in the hunting of white-fronted geese and black brants.<sup>109</sup> The plan also restricted but did not entirely prohibit subsistence hunting.<sup>110</sup> In 1985, this plan was replaced by the Yukon-Kuskokwim Goose Management Plan.<sup>111</sup> The new plan not only continued the hunting restrictions in the first plan but also restricted all hunting of the emperor goose.<sup>112</sup>

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105. BEAN, *supra* note 66, at 76, n.33.

106. 50 C.F.R. § 10.13 (1988).

107. Brief for Director, United States Fish and Wildlife Service, Appellee at 14-15, Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933 (9th Cir. 1987)(No. 86-3657), *cert. denied*, 108 S. Ct. 1290 (1988). The Association of Village Council Presidents is a nonprofit corporation "organized under the laws of the State of Alaska to promote and protect the physical, economic, and social well-being of the approximate 16,000 Yup'ik Eskimo people who reside throughout the Yukon-Kuskokwim delta . . . ." The Yukon-Kuskokwim Delta is the major nesting range for the four species at issue in this case. *Id.* at 15, n.11.

108. Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933, 936 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988).

109. Brief for Director, United States Fish and Wildlife Service, Appellee at 15, Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933 (9th Cir. 1987) (No. 86-3657), *cert. denied*, 108 S. Ct. 1290 (1988).

110. *Dunkle*, 829 F.2d at 936.

111. Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Jantzen, 13 Indian L. Rep. (Am. Indian Law. Training Program) 3023, 3023 (D. Alaska 1986).

112. *Id.*

Before the 1984 nesting season began, the Alaska Fish and Wildlife Conservation Fund and the Alaska Fish and Wildlife Federation and Outdoor Council ("Conservation Fund") filed suit against the Fish and Wildlife Service and the ADF&G.<sup>113</sup> The Conservation Fund alleged that the Fish and Wildlife Service's entrance into the Hooper Bay Agreement effectively and illegally allowed Alaskan natives to hunt during the close season.<sup>114</sup> It maintained that this allowance was contrary to the Migratory Bird Treaty Act, which Congress enacted in 1918 to give effect to a convention between the United States and Great Britain protecting migratory birds.<sup>115</sup> To remedy this problem, the Conservation Fund sought to enjoin the Fish and Wildlife Service from allowing Alaska natives to hunt migratory birds during the 1984 close season.<sup>116</sup>

Shortly thereafter, the Alaska Federation of Natives, the Association of Village Council Presidents, and the State of Alaska through its State Representative Tony Vaska ("Intervenors") intervened by filing a cross-claim against the Fish and Wildlife Service.<sup>117</sup> The cross-claim alleged that the MBTA did not govern the subsistence hunting of migratory game birds, but rather that the 1925 Alaska Game Law<sup>118</sup> had superseded the MBTA making it the authority over all subsistence hunting in the state of Alaska.<sup>119</sup> The Intervenors maintained that, until the Secretary of the Interior adopts regulations pursuant to the 1978 Fish and Wildlife Improvement Act,<sup>120</sup> the Alaskan natives are authorized by Congress through the 1925 AGL to hunt migratory birds for subsistence purposes.<sup>121</sup> The district court denied

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113. Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933, 936 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988).

114. *Id.*

115. United States-Canada Convention, *supra* note 20.

116. *Dunkle*, 829 F.2d at 936.

117. *Id.* at 934, 936.

118. Alaska Game Law, Pub. L. No. 320, 43 Stat. 739 (1925).

119. *Dunkle*, 829 F.2d at 936.

120. Fish and Wildlife Improvement Act of 1978, Pub. L. No. 95-616 § 3(h)(2), (3), 92 Stat. 3112 (1978) (codified as amended at 16 U.S.C. § 712 (1982)).

121. Alaska Game Law, Pub. L. No. 320, 43 Stat. 739 (1925). The relevant section reads in part:

[N]or, except as herein provided, shall [any regulation] prohibit any Indian or Eskimo, prospector, or traveler to take animals or birds during the close season when he is in absolute need of food and other food is not available, . . . but the Secretary by regulation may prohibit such native Indians or Eskimos, prospectors, or travelers from taking any species of animals or birds for food during the close season in any section of the Territory within which he shall determine that the supply of such species of animals or birds is in danger of extermination: nor shall any such regula-

the Conservation Fund's request for a preliminary injunction.<sup>122</sup> All parties sought summary judgment.<sup>123</sup>

VI. REASONING OF THE COURTS

A. District Court Decision

In January 1986, the court granted summary judgment for the Intervenors.<sup>124</sup> The court accepted the Intervenors argument that Congress had authorized Alaska natives to harvest migratory game birds under the 1925 AGL during all seasons.<sup>125</sup> The court found that a subsistence exception in the statute effectively repealed the MBTA as it applied to restriction of subsistence hunting by Alaskan natives.<sup>126</sup> In construing the ambiguous language, the court looked to Congressional intent to determine that the 1925 AGL expressly and impliedly repealed the MBTA as it applied to Alaska.<sup>127</sup>

Section 8 of the 1925 AGL outlaws the taking of all game, including migratory birds, unless taken pursuant to exceptions in the Act and its implementing regulations.<sup>128</sup> Section 10 authorizes the Secretary to issue regulations, but restricts the content and scope of those regulations.<sup>129</sup> Two conflicting restrictions in this section were

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tion contravene any of the provisions of the migratory bird treaty Act and regulations.

*Id.* § 10, at 744.

122. *Dunkle*, 829 F.2d at 936.

123. *Id.*

124. *Id.*

125. Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Jantzen, 13 Indian L. Rep. (Am. Indian Law. Training Program) 3023, 3026 (D. Alaska 1986).

126. *Id.*

127. *Id.* at 3025.

128. Alaska Game Law of 1925, ch. 75, 43 Stat. 739, 743 (1925). The relevant part of section 8 reads as follows:

That, *unless and except as permitted by this Act or by regulations made pursuant to this Act*, it shall be unlawful for any person to take, possess, transport, sell, offer to sell, purchase, or offer to purchase any game animal, land fur-bearing animal, wild bird, or any parts thereof, or any nest or egg of any such bird . . . : *Provided*, [t]hat nothing in this Act shall be construed to prevent the collection or exportation of animals, birds, parts thereof, or nests or eggs of birds for scientific purposes, or of live animals, birds, or eggs of birds, for propagation or exhibition purposes, under a permit issued by the Secretary of Agriculture and under such regulations as he may prescribe . . . .

*Id.* (emphasis added).

129. *Id.* at 743-44. The relevant language of section 10 is as follows:

That the Secretary of Agriculture, upon consultation with or recommendation from the [Alaska Game] Commission, is hereby authorized and directed from time to time to determine when, to what extent, if at all, and by what means . . . game birds, nongame birds, and nests or eggs of birds may be taken, possessed, transported,



reviewed by the court. One says that no regulation shall "prohibit any Indian or Eskimo, prospector or traveler to take animals or birds during the close season when he is in absolute need of food and other food is not available."<sup>130</sup> The other states "nor shall any such regulation contravene any of the provisions of the Migratory Bird Treaty Act and regulations."<sup>131</sup>

The *Jantzen* court defined the issue as "whether the 'emergency taking' clause must be read as an exception to the MBTA, *i.e.*, the MBTA applies except for emergency taking, or whether the MBTA excludes migratory birds from an emergency taking exception."<sup>132</sup> To ascertain Congress' intent, the court looked at the structure of the Act itself. First, the court found that Congress intended the 1925 AGL to replace the MBTA as the authority under which regulations are issued for Alaska.<sup>133</sup> It said "Section 8, . . . makes all taking of birds illegal, 'except as permitted by *this Act* or by regulations made pursuant to *this Act*.'"<sup>134</sup>

The court found section 10 of the 1925 AGL to be further evidence that Congress intended for all new Alaskan migratory bird regulations to conform to the Act rather than the MBTA.<sup>135</sup> Section 10 of the Act authorizes the Secretary to issue regulations regarding the taking of migratory birds.<sup>136</sup> The court even found the last phrase of the section stating ". . . nor shall any such regulation contravene any of the provisions of the Migratory Bird Treaty Act and regula-

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caught, or sold, and to adopt suitable regulations permitting and governing the same in accordance with such determinations . . . .

[But] *no such regulation . . . except as herein provided, shall prohibit any Indian or Eskimo, prospector, or traveler to take animals or birds during the close season when he is in absolute need of food and other food is not available*, but the shipment or sale of any animals or birds or parts thereof so taken shall not be permitted, except that the hides of the animal so taken may be sold within the Territory, but the Secretary by regulation may prohibit such native Indians or Eskimos, prospectors, or travelers from taking any species of animals or birds for food during the close season in any section of the Territory within which he shall determine that the supply of such species of animals or birds is in danger of extermination; *nor shall any such regulation contravene any of the provisions of the Migratory Bird Treaty Act and regulations.*

*Id.* (emphasis added).

130. *Id.* at 744.

131. *Id.*

132. Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Jantzen, 13 Indian L. Rep. (Am. Indian Law. Training Program) 3023, 3025 (D. Alaska 1986).

133. *Id.*

134. *Id.* See 1925 Alaska Game Law, 43 Stat. 739, 743 (emphasis added).

135. *Jantzen*, 13 Indian L. Rep. at 3025.

136. See Alaska Game Law, 43 Stat. 739, 743-44.

tions,"<sup>137</sup> to be evidence of Congress' intent that the 1925 AGL, rather than the MBTA, should authorize regulations.<sup>138</sup> The court reasoned that if Congress wanted regulations to be made under the MBTA, then Congress would not have included this provision in the Act.<sup>139</sup>

In addition, the court found that section 16 of the 1925 AGL further evidenced its conclusion that migratory bird regulations were to be made under the Act rather than the MBTA.<sup>140</sup> The court noted that when the 1925 Act was made, the MBTA regulated the taking of migratory birds in Alaska.<sup>141</sup> The court reasoned that if Congress had wanted the MBTA to remain effective, it would not have repealed it through section 16 of the Act.<sup>142</sup>

Observing that the 1925 AGL incorporated the MBTA by reference,<sup>143</sup> the court's next consideration was "whether the 1925 Act repealed the MBTA as it applied to Alaska in any manner."<sup>144</sup> Based on standard statutory construction, such a repeal could be either express or implied.<sup>145</sup> In the instant action, the court found both. First, the court found that section 16 of the Act *expressly* repealed the MBTA in its application to Alaska.<sup>146</sup> The Act effectively repealed existing laws that regulated migratory birds, including the MBTA. However, since the MBTA was incorporated into the 1925 Act through section 10, the court determined that the MBTA applied to Alaska to the extent that it was consistent with the provisions of the 1925 AGL.<sup>147</sup>

137. *Id.*

138. Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Jantzen, 13 Indian L. Rep. (Am. Indian Law. Training Program) 3023, 3025 (D. Alaska 1986).

139. *Id.*

140. *Id.* Section 16 is as follows:

That the provisions of existing laws relating to the protection of game and fur-bearing animals, *birds, and nests and eggs of birds* in the Territory shall remain in full force and effect until expiration of ninety days from the date of publication of regulations of the Secretary of Agriculture adopted pursuant to the provisions of this Act.

Alaska Game Law of 1925, ch. 75, 43 Stat. 739, 747 (1925) (emphasis added).

141. *Jantzen*, 13 Indian L. Rep. at 3025.

142. *Id.*

143. According to the last provision of section 10 in the 1925 Act, any regulation under the 1925 Act was to be consistent with the MBTA. See 1925 Alaska Game Law, 43 Stat. at 743-44.

144. Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Jantzen, 13 Indian L. Rep. (Am. Indian Law. Training Program) 3023, 3025 (D. Alaska 1986).

145. 1A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 23.07 (Sands 4th ed. 1985 rev.).

146. *Jantzen*, 13 Indian L. Rep. at 3025.

147. *Id.*

Second, the court found that the 1925 Act *impliedly* repealed the MBTA in its application to Alaska, at least with respect to the 1925 Act's conflicting subsistence exception.<sup>148</sup> Citing Chief Justice Hughes' opinion in *United States v. Borden Co.*,<sup>149</sup> the court followed the view that

[i]t is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal "must be clear and manifest." It is not sufficient, as was said by Mr. Justice Story in *Wood v. United States*, "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." There must be "a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy."<sup>150</sup>

The court determined, therefore, that if a particular local law conflicts with an earlier general law of nationwide application, the special or local law will supersede the general law to the extent that they conflict.<sup>151</sup> Examining the conflicting clauses in section 10 of the 1925 AGL, the court decided that the weight of a number of factors was dispositive of Congress' intent that the Act's emergency need exception took precedence over the MBTA clause.<sup>152</sup> First, the plain language of the emergency need exception did not distinguish between different types of birds, whereas elsewhere in the 1925 Act, Congress did differentiate.<sup>153</sup> According to the court, this showed that the exception was intended to include all birds.<sup>154</sup>

Second, the court found that the 1925 AGL emergency need exception's statement that "[no regulation] . . . shall prohibit any Indian or Eskimo to take . . . birds during the close season when he is in absolute need of food . . ." directly authorized natives to hunt for subsistence purposes, regardless of whether Congress implemented other regulations allowing such hunting.<sup>155</sup> The court construed the

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148. *Id.*

149. 308 U.S. 188, 198-99 (1939).

150. *Id.* (citations omitted).

151. *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Jantzen*, 13 Indian L. Rep. (Am. Indian Law. Training Program) 3023, 3026 (D. Alaska 1986).

152. *Id.*

153. *See, e.g.*, §§ 2, 10 of 1925 Alaska Game Law, 43 Stat. 739, 743-44.

154. *Jantzen*, 13 Indian L. Rep. at 3026.

155. *Id.*

MBTA clause as applying only to *regulations* issued under the 1925 Act.<sup>156</sup> Therefore, the court presumed that the MBTA was not meant to apply to subsistence hunting by Alaskan natives for emergency purposes which could occur without issued regulations.<sup>157</sup>

Additionally, the court considered the Department of Agriculture's subsequent interpretation of the 1925 Act,<sup>158</sup> as well as interpretations of the Act based on principles of statutory interpretation<sup>159</sup> and logic.<sup>160</sup> Considering these factors, the court determined that the 1925 Act impliedly repealed the MBTA, at least to the extent that it was inconsistent with the 1925 Act.<sup>161</sup>

The court also noted that Congress reenacted the 1925 AGL in 1943.<sup>162</sup> Congress did not amend the subsistence exception at this time, and consequently the court found that "Congress' failure to clarify the statute's language demonstrate[d] its acceptance of that regulatory interpretation and must be seen as a ratification of the regulation."<sup>163</sup>

As to the plaintiff's allegations,<sup>164</sup> the court determined that since the "Fish and Wildlife Service cannot enforce the MBTA against bona fide subsistence users in the delta, [then] its promises [in the Hooper Bay Agreement and the Goose Management Plan] to refrain from doing so under certain conditions are irrelevant."<sup>165</sup>

156. *Id.*

157. *Id.*

158. *Id.* The Department of Agriculture issued regulations pursuant to the Act in May 1925 which included an emergency exception to the MBTA. Regulation 8 provided this absolute exception, stating,

[a]n Indian, Eskimo, or half-breed who has not severed his tribal relations by adopting a civilized mode of living or by exercising the right of franchise and an explorer, prospector, or traveler may take animals or birds in any part of the Territory at any time for food when in absolute need of food and other food is not available, but he shall not ship or sell any animal or bird or part thereof so taken.

*Id.* (quoting U.S. Dept. of Agriculture, Bureau of Biological Surveys, Alaska Game Law and Regulations and Federal Laws Relating to Game and Birds in the Territory, issued May 1925).

159. Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Jantzen, 13 Indian L. Rep. (Am. Indian Law. Training Program) 3023, 3026 (D. Alaska 1986). The court reasoned that ambiguities in a statute intended to benefit Alaskan natives should be construed in favor of the natives. Also, the more specific, locally-oriented emergency clause is presumed to supersede the more general MBTA clause. *Id.* See, e.g., Morton v. Mancari, 417 U.S. 540, 550-51 (1974).

160. *Jantzen*, 13 Indian L. Rep. at 3026. The court determined that it was reasonable to assume that Congress intended all types of food be available to those trying to avoid starvation.

161. *Id.*

162. *Id.* at n.9.

163. *Id.*

164. See *supra* notes 113-116 and accompanying text.

165. *Jantzen*, 13 Indian L. Rep. at 3028.

Therefore, the court declared the Conservation Fund's claim against the Fish and Wildlife Service moot because the 1925 AGL permits subsistence hunting of migratory birds for nutritional needs.<sup>166</sup>

### B. Appellate Court Decision

In the Ninth Circuit Court, the Conservation Fund sought a declaratory judgment that the Hooper Bay Agreement and the 1985 Goose Management Plan contravened the MBTA because they permitted subsistence hunting of migratory birds.<sup>167</sup> The Conservation Fund argued that the district court was wrong in its decision that the 1925 AGL superseded the MBTA with respect to subsistence hunting.<sup>168</sup> The appellate court reversed the decision of the district court upholding the validity of the MBTA and remanded to the district court for a determination of whether the two management plans contravened the MBTA.<sup>169</sup>

The Ninth Circuit Court considered whether the MBTA allowed close season subsistence hunting.<sup>170</sup> Noting that the 1978 Fish and Wildlife Improvement Act amended the MBTA to include a direct reference to subsistence hunting by Alaskan natives, the court examined the legislative history<sup>171</sup> behind the 1978 Act to discern the guidelines governing the adoption of subsistence hunting regulations.<sup>172</sup> The court concluded that "regulations permitting close season subsistence hunting may not be adopted if they are contrary to any of the treaties."<sup>173</sup>

In its analysis, the court decided that Congress favored some subsistence hunting by the Alaskan natives.<sup>174</sup> This conclusion followed from the Senate Report which stated that "the subsistence provisions of the three earlier treaties lack the administrative flexibility necessary to deal with the issue in a responsible manner. In contrast

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166. *Id.* The court did not address whether the Secretary had authority to issue regulations under the Fish and Wildlife Improvement Act of 1978. Instead it declared that it could not hear the issue because no case or controversy existed on this issue. *Id.* at 3027.

167. *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 937 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988).

168. *Id.* at 936-37.

169. *Id.* at 945.

170. *Id.* at 940.

171. S. REP. NO. 1175, 95th Cong., 2d Sess. 6, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7641 [hereinafter SENATE REPORT].

172. *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 940 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988).

173. *Id.*

174. *Id.* at 940-41.

to these earlier inadequacies, the USSR Convention contains the most modern and workable language on subsistence and avoids the errors of the past."<sup>175</sup> The court thought the legislative history demonstrated Congress' view that regulations permitting subsistence hunting could be adopted only if the treaties with Canada, Mexico and Japan were amended.<sup>176</sup> For example, Senator Gravel, speaking before the Senate in favor of the Fish and Wildlife Improvement Act, made it clear that "as soon as these other treaties can be amended by our negotiators and ratified, we can at least put to rest one of the most longstanding, volatile issues facing rural Alaskan users of migratory birds."<sup>177</sup> The court noted that Congress approved the 1978 amendment in anticipation of treaty modifications that were then under negotiation by the Executive branch.<sup>178</sup> Since at the time of the Ninth Circuit Court's decision the treaty amendments had yet to be made, the court adopted the view that "the Secretary of the Interior is authorized to issue regulations permitting subsistence hunting, but only to the extent that the regulations are in accord with all four treaties."<sup>179</sup>

Recognizing that the United States-Canada Convention's terms are the most restrictive with regard to Alaskan subsistence hunting, the court said that regulations issued by the Secretary of the Interior pursuant to section 712 of the MBTA<sup>180</sup> must conform to those restrictions.<sup>181</sup> Therefore, regulations could allow up to three and one-half months for subsistence hunting between September 1 and March 10 of each year.<sup>182</sup> However, the MBTA would not permit subsis-

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175. SENATE REPORT, *supra* note 171.

176. *Dunkle*, 829 F.2d at 941.

177. SENATE REPORT, *supra* note 171.

178. *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 941 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988).

179. *Id.*

180. 16 U.S.C. § 712(1) (1982). The relevant provision provides:

In accordance with the various migratory bird treaties and conventions with Canada, Japan, Mexico, and the Union of Soviet Socialist Republics (USSR), the Secretary of the Interior is authorized to issue such regulations as may be necessary to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs, as determined by the Secretary of the Interior, during seasons established so as to provide for the preservation and maintenance of stocks of migratory birds.

*Id.*

181. *Dunkle*, 829 F.2d at 941.

182. *Id.*

tence hunting outside this open season.<sup>183</sup>

The court then addressed the district court's statutory analysis upon which it had concluded that the 1925 AGL repealed the MBTA insofar as it applied to subsistence hunting in Alaska.<sup>184</sup> The court said that when interpreting a statute, the court will "look first to the statutory language and then to the legislative history if the statutory language is unclear."<sup>185</sup> Realizing that the two clauses in section 10 of the 1925 AGL<sup>186</sup> conflicted, the court stated that "one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless."<sup>187</sup>

The court noted that one possible interpretation could give meaning to both clauses. This interpretation would read the subsistence hunting provision as allowing subsistence hunting of all animals and non-migratory birds.<sup>188</sup> If this interpretation were followed, the MBTA would govern emergency subsistence hunting.<sup>189</sup> Since the MBTA allows subsistence hunting of some migratory nongame birds, this interpretation gives effect to both seemingly contradictory clauses in section 10 of the 1925 AGL.<sup>190</sup> The court decided that even if the legislative history of the 1925 AGL did not explain the inconsistency between the two clauses in section 10, the articulated policies<sup>191</sup> of the 1925 AGL were satisfied by this interpretation.<sup>192</sup>

The court went on to analyze the issue of whether section 16 effected a repeal of the MBTA as it applied to Alaska. It decided that section 16 could not be interpreted to mean that the MBTA was repealed since section 8 stated, "no regulation shall contravene the pro-

183. Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933, 942 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988).

184. *Id.*

185. *Id.* at 943 (quoting Blum v. Stenson, 465 U.S. 886, 896 (1984)).

186. See *supra* notes 129-142 and accompanying text.

187. Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933, 943 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988) (quoting Shields v. United States, 698 F.2d 987, 989 (9th Cir.), *cert. denied*, 464 U.S. 816 (1983)).

188. Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933, 943 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988).

189. *Id.*

190. *Id.*

191. *Id.* See generally H.R. REP. NO. 993, 68th Cong., 1st Sess. (1924); S. REP. NO. 480, 68th Cong., 1st Sess. (1924). These policies included flexibility in meeting local needs and conservation of the area's natural resources.

192. Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933, 943 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988).

visions of the MBTA."<sup>193</sup> Thus, the court concluded, the plain language of the 1925 AGL suggests that the MBTA applies to Alaska and was not repealed by section 16.<sup>194</sup>

Next, the court examined the Department of Agriculture's interpretation of the subsistence hunting allowance in the 1925 AGL when it issued regulations under both the 1925 AGL and the MBTA.<sup>195</sup> The court found evidence of the agency's contemporaneous interpretation in the regulations issued by the Bureau of Biological Survey four months after the 1925 AGL was passed.<sup>196</sup> For example, Regulation 8 allowed the hunting of animals and birds by Indians and Eskimos if they were in absolute need of food and no other food was available.<sup>197</sup> Additionally, an introductory statement to the regulations stated that the 1925 AGL did not supersede the MBTA.<sup>198</sup> The court concluded that these regulations demonstrated the Department of Agriculture's intent to allow emergency subsistence hunting while abiding by the restrictions of the MBTA.<sup>199</sup>

Finally, the court found that subsequent administrative interpretation supported the view that the 1925 AGL did not supersede the MBTA.<sup>200</sup> Three factors supported this view that the MBTA alone governed subsistence hunting of migratory birds. First, the regulations issued under the MBTA after the passage of the 1925 AGL have continued to govern the hunting of migratory birds in Alaska.<sup>201</sup> The regulations did not change to incorporate the 1925 AGL.<sup>202</sup>

Second, the Secretary of the Interior revised Regulation 8 in 1944 to clarify that the emergency subsistence exception did not apply to the migratory game birds which were governed by the MBTA.<sup>203</sup> Although courts generally give less deference to later interpretations, the court deemed this to be a clarification of the original interpreta-

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193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 944.

197. *See supra* note 45 and accompanying text.

198. *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 944 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988).

199. *Id.*

200. *Id.*

201. *Id.* *See, e.g.*, 50 C.F.R. § 20.102 (1988).

202. *See* Presidential Proclamation of June 22, 1925, 44 Stat. 2579-81, *amending* Presidential Proclamation of July 31, 1918, 40 Stat. 1812-18.

203. *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 944 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988).



tion rather than a changed interpretation.<sup>204</sup> Thus, the court followed the Secretary of the Interior's revision.

Third, the court found that both Congress and the agency believed that the Alaska Statehood Act repealed the 1925 AGL.<sup>205</sup> The agency continued issuing regulations pursuant to the MBTA with the belief that it governed subsistence hunting of migratory game birds in Alaska.<sup>206</sup> For these reasons, the court concluded that the MBTA, and not the 1925 AGL, governed the hunting of migratory birds in Alaska.

The Ninth Circuit Court remanded the case to the district court for a determination as to whether the Hooper Bay Agreement and the 1985 Goose Management Plan violated the MBTA.<sup>207</sup> The United States Supreme Court denied certiorari when the government appealed.<sup>208</sup>

## VII. ANALYSIS

Article VI, clause 2 of the United States Constitution states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

As a result, treaties between the United States and other countries rank equally with federal laws and other treaties. A treaty may even preempt a prior federal law if there is an irreconcilable conflict between them.<sup>209</sup> However, treaties do not automatically supersede inconsistent U.S. laws unless the treaty provisions are self-executing.

All four migratory bird treaties are similar in their hunting prohibitions, but only the Japanese<sup>210</sup> and USSR Conventions<sup>211</sup> create exceptions for subsistence hunting by Alaskan natives. Since the MBTA requires the Secretary of the Interior to issue regulations that

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204. *Id.* at 945.

205. *Id.*

206. *Id.*

207. *Id.* at 935.

208. 108 S. Ct. 1290 (1988).

209. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

210. United States-Japan Convention, *supra* note 54, art. III(1)(e).

211. United States-USSR Convention, *supra* note 55, art. II(1)(c).

comply with all four treaties,<sup>212</sup> Alaskan natives are not allowed to hunt migratory birds for subsistence purposes because the Canada Convention does not permit it.

If these treaties are self-executing, then a subsequent conflicting treaty would supersede an older treaty. Clearly, the Alaskan hunting exception in the 1916 Canada Convention conflicts with the later exceptions found in the 1972 Japan Convention and the 1978 USSR Convention. Further, analysis of the self-executing nature of these treaties shows that the Alaskan natives might have the right to hunt based on the language of the later two treaties.

#### A. *Migratory Bird Treaties: Are They Self-Executing?*

Chief Justice Marshall, in *Foster v. Neilson*,<sup>213</sup> articulated a principle of law considered authoritative by almost every case dealing with the self-execution of a treaty. He stated:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.<sup>214</sup>

Therefore, courts have held that treaties written to include contract terms or that use the word "shall" to connote future actions by the parties cannot be self-executing.<sup>215</sup> The *Foster* Court interpreted language that grants of land "shall be ratified and confirmed to the persons in possession" as requiring action by the legislature to give

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212. 16 U.S.C. § 712 (Supp. 1982). *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 941 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988).

213. 27 U.S. (2 Pet.) 253, 314 (1829).

214. *Id.*

215. Comment, *The Migratory Bird Treaty: Another Feather In The Environmentalist's Cap*, 19 S.D.L. REV. 307, 312 (1974) [hereinafter Comment].

these grants effect.<sup>216</sup> In *Robertson v. General Electric Co.*,<sup>217</sup> the court held that the Treaty of Versailles was not self-executing because it stated that priority rights for filing patents "shall be extended by each of the high contracting parties in favour of all nationals of the other high contracting parties."<sup>218</sup>

However, Leslie Henry, a legal commentator, has pointed out that treaties are, by their very nature, contracts, and that "shall" is a common treaty word.<sup>219</sup> Therefore, one might argue, blind adherence to Chief Justice Marshall's statement would deny all treaties their status of "supreme law of the land." Henry suggests that a treaty provision reading like a statute should be self-executing.<sup>220</sup> He further suggests that the subject matter of the treaty often shows the drafters' intent regarding its self-execution.<sup>221</sup> The drafters will often consider how the legislatures have treated prior treaties when creating similar pacts.<sup>222</sup>

One could argue that the 1916 Migratory Bird Convention is partially self-executing.<sup>223</sup> Although Article VIII of the Canada Convention, stating that "[t]he High Contracting Powers agree themselves to take, or propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present Convention,"<sup>224</sup> seemingly suggests the treaty is executory in nature, several factors combine to suggest otherwise.

First, the treaty language referring to domestic legislation only occurs in connection with exceptions to the treaty's general prohibition on the taking of migratory birds.<sup>225</sup> Article II, establishing close

216. *Foster*, 27 U.S. at 314.

217. 32 F.2d 495 (4th Cir. 1929), *cert. denied*, 280 U.S. 571 (1929).

218. *Id.* at 496.

219. Henry, *When Is A Treaty Self-Executing?*, 27 MICH. L. REV. 776, 778 (1929) [hereinafter Henry].

220. *Id.* at 780.

221. *Id.* See, e.g., *Aerovias Interamericanas De Panama S.A. v. Board of County Comm'rs*, 197 F. Supp. 230, 246 (S.D. Fla. 1961), *rev'd*, 307 F.2d 802 (5th Cir. 1962), *cert. denied*, 371 U.S. 961 (1963), *reh'g denied*, 372 U.S. 932 (1963) (treaties requiring appropriation to provide for designated spending of funds are considered to be not self-executing, but treaties giving nationals of one country rights within the United States are generally held to be self-executing); *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880) (a treaty allowing foreign nationals to inherit real estate, sell it and withdraw the proceeds free from discriminatory taxation is self-executing).

222. Henry, *supra* note 219, at 780.

223. See Comment, *supra* note 215, at 314-16. The text accompanying notes 224-229 is a summary of this argument.

224. United States-Canada Convention, *supra* note 20, at 1704.

225. Comment, *supra* note 215, at 314.

seasons for migratory birds, allows for a three and one-half month open season "as the High Contracting Powers may severally deem appropriate and define by law or regulation."<sup>226</sup> Article IV proposes to protect the wood duck and the eider duck either by a five year close season, refuges or "by such other regulations as may be deemed appropriate."<sup>227</sup> Regarding the taking of nests and eggs of migratory birds, Article V provides a taking exception "for scientific or propagating purposes under such laws or regulations as the High Contracting Powers may severally deem appropriate."<sup>228</sup> Additionally, Article VII allows the killing of protected birds when they become harmful to agricultural or other community interests. However, killing is only permitted if done pursuant to a permit "issued by the proper authorities of the High Contracting Powers under suitable regulations prescribed therefore by them respectively."<sup>229</sup>

Therefore, it can be argued that the convention drafters intended that only the exceptions would require legislation to implement them.<sup>230</sup> Courts have held that certain portions of a treaty can be executory while other provisions of the same treaty are self-executing.<sup>231</sup>

Moreover, the contracting parties could have implemented the exceptions with legislation *or* regulation. The language in Articles II and V states that the contracting powers may define the scope of the respective exception by law or regulation.<sup>232</sup> Further, the language in Articles IV and VII refers exclusively to implementing regulations.<sup>233</sup> Since the use of the disjunctive "or" indicates that the contracting parties had two distinct means to implement the exceptions, it is arguable that Congress' enactment of the MBTA simply designated the Secretary of Agriculture as the proper authority to issue the implementing regulations,<sup>234</sup> and established a penalty for treaty violations.<sup>235</sup> This theory is supported by the remarks of Congressman

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226. United States-Canada Convention, *supra* note 20, at 1703.

227. *Id.* at 1704.

228. *Id.*

229. *Id.*

230. Comment, *supra* note 215, at 314.

231. *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 738 (1943) (Stone, C.J. concurring); *Indemnity Ins. Co. of North America v. Pan American Airways, Inc.*, 58 F. Supp. 338, 340 (S.D.N.Y. 1944); *Sei Fujii v. State*, 38 Cal. 2d 718, 722, 242 P.2d 617, 621 (1952).

232. See text accompanying notes 226 and 228.

233. See text accompanying notes 227 and 229.

234. 16 U.S.C. § 704 (1982).

235. *Id.* § 707.

Temple which were made during the Congressional debate over the MBTA. He said:

The treaty for the protection of migratory birds does undoubtedly require legislative provision to preserve the national faith. The treaty has gone into effect and is a part of the supreme law of the land, but there is as yet no penalty for the violation of this law and Congress has not as yet empowered the proper authorities to issue the regulations provided for in Article VII of the treaty.<sup>236</sup>

That the Secretary is the head of an *executive* administrative agency supports the premise that the implementing power was taken completely out of the legislative realm.

Another method for determining whether a treaty was intended to be self-executing is to examine the circumstances under which it was made.<sup>237</sup> For example, in 1913 Congress enacted a law that directly regulated migratory birds, but this law was struck down by several federal district courts as unconstitutional.<sup>238</sup> Then Congress entered the treaty with Great Britain, effectively using its constitutionally granted Treaty power as a vehicle to enact otherwise unconstitutional legislation. Even though Congress, arguably, did not have to enact the MBTA, except for those reasons already stated, it chose to do so in order to guarantee that the federal government, rather than the states, would have the authority to regulate migratory birds. Therefore, the fact that laws were implemented does not mean the laws were required to give the treaty effect.

Congressional debate over the MBTA is inconclusive as to how our representatives interpreted the treaty.<sup>239</sup> But the State Department, in a later interpretation, said:

Whether or not a given treaty or convention is 'self-executing' depends upon the intention of the parties to the treaty . . . . Most often . . . the treaty instrument itself is silent on the point and a judgment as to the intention of the parties has to be made on the basis of an examination of the document itself and the circumstances surrounding its negotiation. Thus, if the obligations of the instrument are broadly phrased, i.e., countries pledge themselves to 'promote human rights,' as in the United Nations Charter, it will

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236. 56 CONG. REC. 7368 (1918).

237. Henry, *supra* note 219, at 777.

238. See *supra* notes 12-17 and accompanying text.

239. 56 CONG. REC. 7361-68 (1918). The remarks of Congressman Stedman tend to show the treaty was executory, while Congressman Temple's comments support the opposite view.

almost certainly be judged that the instrument is not intended to be self-executing . . . .

On the other hand, where the obligation is in more concrete terms, it may be found in the 'self-executing' category, i.e., the Migratory Birds Convention with Canada . . . .<sup>240</sup>

This statement is particularly probative since it was issued by the political department under whose authority the treaty was drafted. Courts give much weight to such constructions.<sup>241</sup>

The argument that the 1916 Canada Convention is self-executing could extend to the three subsequent migratory bird treaties. Since treaty makers tend to follow the lead of prior drafters of a similar treaty,<sup>242</sup> it is very probable that the three subsequent treaties are also self-executing.

### B. Last Act of the Sovereign

Since the Supremacy Clause of the U.S. Constitution makes no distinction between treaties and congressional acts, they have equal force as national law.<sup>243</sup> Therefore, "where the provisions of a treaty conflict with a federal statute or with the terms of a later treaty, the treaty or statute last enacted prevails over the earlier one."<sup>244</sup>

Applying the argument from the previous section, the migratory bird treaties have the force of national law under the Supremacy Clause of the U.S. Constitution. Further, examination of the treaties' language shows that a conflict exists with regard to the subsistence hunting exceptions.<sup>245</sup> The 1916 United States-Canada Convention states:

The close season on other migratory nongame birds shall continue throughout the year, except that Eskimos and Indians may take at any season auks, auklets, guillemots, murrees and puffins, and their

240. Stanley C. Metzger, Ass't Legal Advisor for Economic Affairs to Office of Business Practices (Goldblatt), Office of Economic Affairs, Department of State, memorandum, "Dr. Bogsch's question on 'self-executing treaties.'" January 31, 1951, MS Dept. of State, file 3000/1-3151 as cited in Guilbert, *Wilderness Preservation II: Bringing the Convention Into Court*, 3 ENVIR. L. REP. 50044, 50047-48, n.39 (1973).

241. *Aerovias Interamericanas De Panama S.A. v. Board of County Comm'rs*, 197 F. Supp. 230, 247 (S.D. Fla. 1961). See also *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921); *Charleton v. Kelly*, 229 U.S. 447, 468 (1913); *Argento v. Horn*, 241 F.2d 258, 263 (6th Cir. 1957).

242. Henry, *supra* note 219, at 780.

243. *Whitney v. Robertson*, 124 U.S. 190 (1888).

244. See *supra* note 145.

245. The United States-Mexico Convention, *supra* note 53, makes no reference to subsistence hunting so it will not be discussed with regard to this issue.

eggs, for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.<sup>246</sup>

The birds designated in the exception are all categorized as migratory *nongame* birds by the treaty.<sup>247</sup> In designating the close season for the hunting of migratory game birds, the treaty allows "Indians . . . [to] take at any time scoters for food but not for sale."<sup>248</sup> The treaty drafters specifically enumerated the Indians' rights regarding the taking of migratory game and nongame birds. This specificity clearly shows they had addressed the issue and did not want to extend the privilege to other migratory birds. Therefore, the Alaskan natives are prohibited by the Canada Convention from hunting during the close season the migratory game birds designated in the Hooper Bay Agreement and the Goose Management Plan.<sup>249</sup>

The 1972 United States-Japan Convention allows for the "[t]aking [of migratory birds] by Eskimos, Indians, and indigenous peoples of the Trust Territory of the Pacific Islands for their own food and clothing."<sup>250</sup> This exception seems to permit close season subsistence hunting by Alaskan natives of any migratory bird. However, this exception is limited by other language in the treaty.

The taking of migratory birds by the Alaskan natives "may be permitted in accordance with the laws *and* regulations of the respective Contracting Parties."<sup>251</sup> This statement suggests that any subsistence taking must be conducted in accordance with the United States' laws existing at the time the treaty was signed, as well as those laws enacted after the treaty was ratified. If the 1916 Canada Convention was viewed as existing U.S. law with respect to subsistence hunting of migratory birds, the exception in the Japan Convention would only allow the Alaskan natives to hunt scoters, and the migratory nongame birds delineated by the Canada Convention.

The Japan Convention's grant of the broad right to hunt migratory birds for subsistence purposes seems to conflict with the limited right granted by the Canada Convention. Despite this conflict, a court may deem the two treaties to be consistent. In order to avoid an implied repeal of a prior act, courts will interpret a statute or treaty so

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246. United States-Canada Convention, *supra* note 20, at 1703, art. II(3).

247. *Id.* at 1703, art. I(3).

248. *Id.* at 1703, art. II(1).

249. *Id.* at 1702, art. I(1)(a).

250. United States-Japan Convention, *supra* note 54, art. III(1)(e).

251. *Id.* art. III(1) (emphasis added).

as to eliminate any direct inconsistency with the prior act.<sup>252</sup> By interpreting the Japan Convention's subsistence exception as applying only to those migratory birds named in the Canada Convention, a court could declare these two exceptions consistent.

The 1978 United States-USSR Convention provides an exception [f]or the taking of migratory birds and the collection of their eggs by the indigenous inhabitants of the Chukchi and Koryaksk national regions, the Commander Islands and the State of Alaska for their own nutritional and other essential needs (as determined by the competent authority of the relevant [sic] Contracting Party) during seasons established in accordance with Paragraph 2 of this Article[.]”<sup>253</sup>

This exception “may be made on the basis of laws, decrees *or* regulations of the respective Contracting Parties.”<sup>254</sup> This clause indicates that Alaskan natives can hunt migratory birds for subsistence purposes if regulations are issued to allow such hunting. One could argue that a court would interpret this clause as requiring that the hunting comply with the *laws* of the U.S., in order to avoid a conflict with the previous treaties.<sup>255</sup> However, several considerations detract from this argument.

First, the USSR treaty states that “the seasons during which the indigenous inhabitants . . . may take such birds and collect their eggs for their own nutritional and other essential needs . . . , shall be determined by the competent authority of each Contracting Party respectively.”<sup>256</sup> The term “competent authority” is defined as “a national scientific or management agency authorized by the Contracting Party to implement the activities under this Convention.”<sup>257</sup> Congress has delegated the regulatory authority to the Secretary of the Interior and to those agencies working within the Department of the Interior.<sup>258</sup> Therefore, the “competent authority” is not a legislative body, but rather an administrative body that issues regulations pursuant to the President's approval.<sup>259</sup>

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252. N. SINGER, *supra* note 145, § 23.10. See *Preston v. Heckler*, 734 F.2d 1359, 1368 (9th Cir. 1984).

253. United States-USSR Convention, *supra* note 55, art. II(1)(c).

254. *Id.* art. II(1) (emphasis added).

255. N. SINGER, *supra* note 145.

256. United States-USSR Convention, *supra* note 55, art. II(2).

257. *Id.* art. I(2).

258. 16 U.S.C. § 704 (1982).

259. *Id.*



Second, the USSR Convention gives the Secretary more power to regulate subsistence hunting than the Canada Convention. For example, section 704 of the MBTA mandates that the regulations issued by the Secretary be "compatible with the terms of the conventions."<sup>260</sup> The appellate court interpreted this section as requiring the regulations to comply with both the USSR Convention and the more restrictive Canada Convention.<sup>261</sup> Under this reading, the Secretary could only allow Alaskan natives to hunt scoters and certain migratory nongame birds. However, the USSR Convention requires the Secretary to establish subsistence hunting seasons so as to "provide for the preservation and maintenance of stocks of migratory birds."<sup>262</sup> Additionally, it requires the Secretary to determine the indigenous inhabitants' "nutritional and other essential needs."<sup>263</sup> These mandates conflict with the Canada Convention's absolute grant of the right to "take [scoters] at *any time*,"<sup>264</sup> and the right "to take at *any season* auks, auklets, guillemots, murre and puffins."<sup>265</sup> While the Alaskan natives do not need regulatory authorization to hunt scoters and the named migratory nongame birds, regulations are required under the USSR Convention to allow them to hunt for subsistence purposes. The reasonable explanation for this distinction is that the USSR Convention is expanding the right of subsistence hunting to all migratory birds, subject to the Secretary's limiting regulations.

As demonstrated, a conflict exists between the USSR Convention's terms and the Canada Convention's absolute prohibition on the close season hunting of migratory game birds.

When a subsequent enactment covering a field of operation coexistent with a prior [law] cannot by any reasonable construction be given effect while the prior law remains in existence because of irreconcilable conflict between the two acts, the latest legislative expression prevails, and the prior law yields to the extent of the conflict.<sup>266</sup>

Clearly, the Secretary cannot issue regulations pursuant to both the USSR and Canada Conventions. Therefore, the later treaty, the

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260. *Id.*

261. Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933, 941 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988).

262. United States-USSR Convention, *supra* note 55, art. II(2).

263. *Id.*

264. United States-Canada Convention, *supra* note 20, at 1703, art. II(1) (emphasis added).

265. *Id.* at 1703, art. II(3) (emphasis added).

266. See N. SINGER, *supra* note 145.

USSR Convention, repeals the Canada Convention with respect to the inconsistency.

As applied to the facts of this case, the USSR Convention's mandate to the Secretary to set seasons so as to "provide for the preservation and maintenance of stocks of migratory birds," is fulfilled in the Hooper Bay Agreement and Goose Management Plan. The Fish and Wildlife Service, an agency under the authority of the Department of the Interior, entered these agreements to prevent the decline of migratory bird populations. Therefore, the agency violated neither the terms of the MBTA nor the terms of the migratory bird treaties.

Even assuming the treaties are not self-executing, Congress incorporated their terms into the MBTA after each was ratified, making them the supreme law of the land. By ratifying the USSR Convention, Congress attempted to incorporate an inconsistent rule of law into the MBTA. Thus, to the extent that it conflicted with any prior treaty, the USSR Convention repealed the prior act with regard to that inconsistency.

### C. *The Court's Approach*

The Ninth Circuit Court, like the district court, ignored the treaties' conflicting terms in its analysis. The Ninth Circuit Court simply concluded that the regulations issued by the Secretary of the Interior had to comply with the most restrictive of the four treaties.<sup>267</sup> It then deferred to its statutory analysis dealing with the 1925 Alaska Game Law. Attempting to avoid interfering with a treaty, the Ninth Circuit dealt with the more familiar domestic legislation emanating from Congress, namely, the MBTA and the 1925 AGL.

The Ninth Circuit's approach is erroneous for two reasons. First, it destroys any right the Alaskan natives had to hunt for subsistence purposes under section 712 of the MBTA.<sup>268</sup> This section of the MBTA lies dormant until Congress takes action to amend the language of the Canada Convention. The Canada Convention prohibits any hunting of migratory game birds, while giving the Alaskan natives an absolute right to hunt those few migratory bird species that are delineated in its exceptions. Since the court interpreted section 712 to provide the same right, it has rendered this section of the MBTA superfluous. When interpreting a statute, a court should re-

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267. *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 941 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988).

268. 16 U.S.C. § 712 (1982).

frain from interpreting it so as to render the act, or a portion of it, meaningless.<sup>269</sup>

Second, the Ninth Circuit ignored the status of these migratory bird treaties as the supreme law of the land, whether through their self-executing nature or the enactment of the MBTA. Its analysis erroneously renders the subsistence hunting exceptions of the Japan and USSR Conventions completely ineffective as United States law.

One explanation for the appellate court's decision is that Congress created the problem by incorporating four conflicting treaties into one United States statute. The court attempted to unintrusively interpret the problem in order to maintain the status quo. Under the court's ruling, if Alaskan natives want the subsistence rights available under the USSR treaty, they must pressure Congress to remedy the situation. One option is already available to Congress. It involves a protocol to amend the 1916 Canada Convention to allow for Alaskan subsistence hunting; a protocol that both Canada and the United States have signed.<sup>270</sup> While no action has been taken yet, the Senate might be inclined to ratify it because of the Ninth Circuit's decision.

#### VIII. CONCLUSION

As argued in this Note, the migratory bird treaties are the supreme law of the land. They have as much force as the Alaska Game Law or any congressional act. The Ninth Circuit Court should have recognized their importance and analyzed their terms more closely. Obviously, a conflict exists between the subsistence provisions in the Canada Convention and USSR Convention. As a result, the later treaty impliedly repealed the earlier one, giving the Secretary of the Interior greater flexibility in dealing with the subsistence needs of the Alaskan natives.

Interestingly, the Conservation Fund cannot force the Secretary to prosecute violators of the MBTA. However, when the Fish and Wildlife Service wants to take measures to protect migratory birds, it is not allowed to enter into agreements, such as the Hooper Bay Agreement and the Goose Management Plan. It is this author's argument that the Secretary does have the authority to allow Alaskan natives the right to hunt for subsistence purposes, based on the language

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269. *Shields v. United States*, 698 F.2d 987, 989 (9th Cir. 1983), *cert. denied*, 464 U.S. 816 (1983).

270. Protocol Amending the 1916 Convention with Canada for the Protection of Migratory Birds (Jan. 30, 1979), S. DOC. EXEC. W, 96th Cong., 2d Sess. (1980).

of the migratory bird treaties to which the MBTA gives effect. Now, it is up to Congress to amend the 1916 treaty to give effect to the available subsistence rights under the USSR Convention.

*Carrie E. Phelan\**

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