
Articles

Congress Resurrects a Native Harvest and Creates Potential for Conflict in Migratory Bird Management

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ABSTRACT

In 2014 Congress passed the Huna Tlingit Traditional Gull Egg Use Act. The Act reestablishes a native gull egg harvest that had been eliminated in the 1960s. The new statute, however, does not reference the Migratory Bird Treaty Act or the migratory bird treaties, and the new statute contains several provisions that conflict with one or the other of those documents. Statutes that conflict with earlier treaties without explicitly abrogating them have been found to be unenforceable in court. Therefore, this new statute may find itself subject to challenge. Additionally, because the new harvest has been established outside of existing migratory bird management frameworks, there exists the possibility of management conflict, user confusion, and gull population mismanagement.

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I. INTRODUCTION

In 2014 Congress passed the Huna Tlingit Traditional Gull Egg Use Act¹ (“Gull Egg Act”), permitting an Alaska native group, specifically members of the Hoonah Indian Association, to collect Glaucous-winged gull (*Larus glaucescens*) eggs from Glacier Bay National Park. The purpose of the statute was to right the perceived wrong that occurred in the 1960s when the Hoonah (or Huna tribal people) were excluded from harvesting within the Park, which had been part of their historical subsistence grounds. The narrow statute references the Alaska National Interest Lands Conservation Act (“ANILCA”),² the most recent establishment legislation for the Park, but does not reference the Migratory Bird Treaty Act (“MBTA”).³ Glaucous-winged gulls are a species protected by the MBTA,⁴ and before the passage of the Gull Egg Act, it was uniformly understood that all harvest decisions had to be made by the U.S. Fish and Wildlife Service (“FWS”), the agency tasked with administering that statute, and under the auspices of the MBTA. After the passage of the Gull Egg Act, this appears to no longer be the case, creating the likelihood of different management regulations for the same species of bird depending on where the bird happens to nest (inside versus outside Glacier Bay National Park).

Section II of this Article presents the Hoonah’s historical relationship with Glacier Bay National Park and the gull egg harvest as well as the evolution, elimination, and reconsideration of the harvest throughout National Park Service (“NPS”) management. Section III describes the MBTA, the treaties on which it is based, and the development of the subsistence exemption to the prohibitions of the MBTA. Section IV describes the egg-laying biology of glaucous-winged gulls, the traditional ecological knowledge of the gull egg harvest, and the NPS’s current approach to harvest management. Section V depicts the differences between the MBTA and the Gull Egg Act management strategies and describes the point of potential conflict between the two. Section VI explains the potential conflicts between the Gull Egg Act and the migratory bird treaties and presents the fractured state of the law regarding conflicts between treaties and later enacted statutes. Finally, Section VII

1. Huna Tlingit Traditional Gull Egg Use Act, Pub. L. No. 113-142, 128 Stat. 1749 (July 25, 2014).

2. 16 U.S.C. §§ 3101–3233 (2012).

3. 16 U.S.C. §§ 703 *et seq.* (2012).

4. List of Migratory Birds, 50 C.F.R. § 10.13 (2016).

cautions against ignoring pre-existing treaties and laws when crafting new interrelated statutes.

II. HISTORY OF THE HOONAH, THE PARK, AND THE HARVEST

Glacier Bay National Park is located in southeast Alaska, bounded by Icy Strait, the Gulf of Alaska, and the Canadian border. The Huna Tlingit, the local indigenous peoples inhabiting the modern village of Hoonah, say they have occupied lands in and around Glacier Bay National Park since “time immemorial.”⁵ The modern day Huna people maintain an intimately detailed traditional ecological knowledge of subsistence resources in and around the Park, and consider Glacier Bay to be their “breadbasket” or “icebox” for harvesting seals, gull eggs, and berries.⁶

On February 26, 1925, President Calvin Coolidge created Glacier Bay National Monument using his Executive Proclamation authority under the Antiquities Act.⁷ The proclamation neither recognized nor extinguished native claims and traditional native subsistence practices continued unmonitored and largely undocumented.⁸ The Huna Tlingit maintained subsistence harvest practices for many years after the creation of the monument, including regular harvest of gull eggs, a key cul-

5. Daniel Monteith, *Ethics, Management, And Research In Glacier Bay, Alaska Ethics, Management, and Research in Glacier Bay, Alaska*, 8 TEACHING ETHICS 67, 67 (2007). Monteith’s claim may be substantiated by archeological evidence. Among the oldest archeological sites in southeast Alaska are the “Groundhog Bay 2” sites near Glacier Bay, carbon dated at 9220 ± 180 yr B.P. These sites provide evidence that people have occupied these areas for centuries. R.E. Ackerman, *Ground Hog Bay, Site 2*, in AMERICAN BEGINNINGS: THE PREHISTORY AND PALAEOECOLOGY OF BERINGIA 413–423 (1996). Recent studies combining ethnology, archeology and geology have uncovered promising evidence that strongly corroborate the traditional narratives of residence in Glacier Bay. See ARON CROWELL et al., THE HOONAH TLINGIT CULTURAL LANDSCAPE IN GLACIER BAY NATIONAL PARK AND PRESERVE: AN ARCHEOLOGICAL AND GEOLOGICAL STUDY (2013).

6. Robert Bosworth, *Consistency and Change in Subsistence Use at Glacier Bay, Alaska*, in PROCEEDINGS OF THE SECOND GLACIER BAY SCIENCE SYMPOSIUM 101–07 (1988); WALTER GOLDSCHMIDT & THEODORE HAAS, HAA AANI- OUR LAND: TLINGIT AND HAIDA LAND RIGHTS AND USE (1998).

7. Proclamation No. 1733, 43 Stat. 1988 (Feb. 26, 1925).

8. T.R. Catton, *Glacier Bay National Monument, the Tlingit, and the artifice of wilderness*, 11 N. REV. 56, 60-62 (1993).

tural food.⁹ A 1945 Bureau of Indian Affairs (“BIA”) subsistence survey states that the Village of Hoonah harvested 800 dozen eggs in that year.¹⁰ Many of these were likely from Glacier Bay, which contained the largest sheltered-water gull colonies in the region.¹¹

The NPS did not allocate any resources to the new monument to enforce NPS regulations, and prohibitions against hunting and trapping were entirely unenforced until April 1939,¹² when the monument’s acreage was doubled under President Roosevelt.¹³ This second Executive Proclamation suddenly raised awareness and concern as to the extent of traditional uses within the monument. The BIA and the NPS met later in 1939 and forged an agreement to allow “normal use” by the Tlingit for hunting, trapping, and gull egg collecting. These traditional harvests were only to be permitted “until a definite wildlife policy [could] be determined,”¹⁴ a state that continued fitfully as the agreements between the NPS and BIA were made, lapsed, and remade through the 1950s and 1960s. The NPS restricted egg harvest for the last time in the 1960s, citing the MBTA and NPS regulations.¹⁵

In 1980 the passage of ANILCA re-designated Glacier Bay National Monument into Glacier Bay National Park¹⁶ and expanded its borders to

9. *Tlingit & Haida Indians of Alaska v. United States*, 177 F. Supp. 452, 468 (Ct. Cl. 1959).

10. THEODORE CATTON, *LAND REBORN: A HISTORY OF ADMINISTRATION AND VISITOR USE IN GLACIER BAY NATIONAL PARK AND PRESERVE* chap. VI (1995) http://www.nps.gov/parkhistory/online_books/glba/adhi/.

11. It is likely that the number of eggs cited as having been harvested included a wide range of common nesting species, including, but not limited to, glaucous-winged gulls, black oystercatcher, mew gulls, kittiwakes, arctic terns, and more. For a complete list of egg-laying species documented as having been traditionally harvested see EUGENE HUNN ET AL., *NAT’L PARKS SERV., A STUDY OF TRADITIONAL USE OF BIRDS’ EGGS BY THE HUNA TLINGIT* 56–57 (2002), http://www.cfr.washington.edu/research.cesu/reports/j9w88050018_tech_report.pdf. Goldshmidt and Haas documented the traditional harvest of gull eggs from the Islands of Glacier Bay. See GOLDSCHMIDT & HAAS, *supra* note 6.

12. CATTON, *supra* note 10, at 13, 102.

13. Proclamation No. 2330, 53 Stat. 2533 (Apr. 18, 1939).

14. CATTON, *supra* note 10, at 103.

15. See HUNN ET AL., *supra* note 11, at 38; see also, NATIONAL PARK SERVICE, *FINAL LEGISLATIVE ENVIRONMENTAL IMPACT STATEMENT: HARVEST OF GLAUCOUS-WINGED GULL EGGS BY HUNA TLINGIT IN GLACIER BAY NATIONAL PARK* 3–23 (2010) [hereinafter *FINAL LEGISLATIVE ENVIRONMENTAL IMPACT STATEMENT*], <http://parkplanning.nps.gov/document.cfm?parkID=12&projectID=16968&documentID=34176>.

16. Alaska National Interest Lands Conservation Act § 22203, Pub. L. No. 96-487, 94 Stat. 2371 (codified as amended at 16 U.S.C. §§ 3101–3222 (2012)).

encompass nearly 3.3 million acres. ANILCA allows subsistence access to newly created federal lands in Alaska where such uses are specifically permitted. ANILCA does not specifically permit any subsistence uses within the “old” pre-ANILCA boundaries of Glacier Bay National Park. Management in this original part of the unit is similar to park management elsewhere in the nation where hunting and other consumptive uses are typically forbidden.¹⁷

However, despite this legal prohibition against subsistence harvests inside Glacier Bay National Park, there have been ongoing efforts by the Huna and the NPS to reunite the Huna with their traditional practices. The Hoonah Indian Association and the NPS signed a Memorandum of Understanding in 1995.¹⁸ In 1997, the NPS sponsored a workshop on Traditional Ecological Knowledge of Glacier Bay, involving Hoonah tribal officials and elders.¹⁹ The Huna prioritized legal access to harvesting gull eggs, and the NPS and Hoonah formed a working group, outlining a step-by-step process to move toward this goal.²⁰ In 2000, Congress passed a law authorizing and funding an environmental impact statement process to evaluate the possibility of legalizing an egg harvest.²¹ A biological study of the nesting islands in Glacier Bay²² and an ethnographic study of the traditional ecological knowledge of egg harvest²³ were conducted, and the results went into a Legislative Environmental Impact Statement (“LEIS”).²⁴ The alternative of the LEIS, which included a “two-harvest” model at several nesting islands within the bay, was incor-

17. 16 U.S.C. § 410hh-2 (2012); Subsistence hunting is explicitly not authorized in Glacier Bay, Katmai, a portion of Denali, and the Klondike Gold Rush and Sitka Historical National Parks. *Id.*; 16 U.S.C. § 410 hh-1. The Secretary has the authority to prohibit subsistence activities for several reasons, including to assure the continued viability of a fish or wildlife population. 16 U.S.C. § 3126(b) (2012).

18. Memorandum of Understanding Between Hoonah Indian Association and Department of the Interior- National Park Service, Hoonah Indian Ass’n-Nat’l Park Serv., Sept. 30, 1995 (on file with author).

19. HUNN ET AL., *supra* note 11, at xiv.

20. *Id.*

21. Glacier Bay National Park Resource Management Act of 2000, 16 U.S.C. § 410hh-4 (2012).

22. Stephani G. Zador, Reproductive and Physiological Consequences of Egg Predation for Glaucous-winged Gulls (2001) (unpublished Master's thesis, University of Washington, Seattle) (on file with author); STEPHANI G. ZADOR & JOHN F. PIATT, SIMULATING THE EFFECTS OF PREDATION AND EGG-HARVEST AT A GULL COLONY: FINAL REPORT TO GLACIER BAY NATIONAL PARK (2002), http://alaska.usgs.gov/science/biology/seabirds_foragefish/products/reports/GWGU_Egg_Harvest_Model.pdf.

23. HUNN ET AL., *supra* note 11.

24. FINAL LEGISLATIVE ENVIRONMENTAL IMPACT STATEMENT, *supra* note 15.

porated into bills introduced to Congress from 2011 to 2014. One of these bills was finally passed and signed by President Obama in July 2014.²⁵

III. THE MBTA AND THE SUBSISTENCE EXEMPTION

The MBTA implements four bilateral migratory bird protection treaties between the United States and Canada, Mexico, Japan, and Russia, respectively. The MBTA provides the FWS with authority to regulate hunting and to enforce closed seasons for protected birds. Over 800 bird species are protected by the MBTA, which comprehensively implements the terms of all four of the treaties,²⁶ though specific terms and requirements differ treaty to treaty. The statute prohibits the “take” of migratory birds, unless the take is authorized by regulations under the statute.²⁷ The term “take” is understood as applying to both intentional and unintentional taking, since the language of the statute states that taking is unlawful “at any time, by any means or in any manner.”²⁸

As originally passed, the MBTA did not provide any protection for Native Alaskan subsistence. In 1987, the Ninth Circuit in *Alaska Fish and Wildlife Federation and Outdoor Council v. Dunkle*²⁹ found that the MBTA cannot include exemptions for native subsistence hunting in the closed season because not all of the treaties permitted such exemptions.³⁰ In that case, Native Alaskans in the Yukon-Kuskokwim Delta region in southwest Alaska persisted in their traditional harvests of migratory birds, though that harvest took place during the closed season under the migratory bird treaties. The FWS made no effort to enforce the MBTA against these groups and in 1975 even adopted a formal policy “stating that subsistence hunting in Alaska during the closed season would not be

25. Huna Tlingit Traditional Gull Egg Use Act, Pub. L. No. 113–142, 128 Stat. 1749 (July 25, 2014).

26. Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-712 (2012); *See also* 50 C.F.R. § 10.13 (2013) (the full list of migratory bird species protected by the MBTA).

27. *Id.* § 703.

28. *Id.* § 703(a).

29. *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933 (9th Cir. 1987).

30. *Id.* at 945; *see* MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 83–84 (3d ed. 1997), for a more complete discussion of the case and its consequences.

punished.”³¹ In 1984, however, concerned with bird population levels, the FWS entered into a cooperative agreement with native groups to reduce hunting of certain species.³² The FWS was sued for allowing hunts in the closed season in violation of the MBTA and the treaties. The court stated that “regulations permitting closed season subsistence hunting may not be adopted if they are contrary to any of the treaties.”³³ Since the treaties with Mexico and Canada did not, at that time, contain language permitting such harvests, they substantially limited the government’s ability to allow subsistence harvests to continue.³⁴

This result presented a problem for traditional native subsistence users in Alaska. The open seasons provided by the treaties and the statute do not typically coincide with the presence of birds in the arctic,³⁵ yet migratory birds have traditionally composed an important element of Native Alaskan diets.³⁶ In 1995, the United States and Canada signed the Canada Protocol, amending the migratory bird treaty between them, which recognizes the history of native subsistence reliance on migratory birds in the arctic, as well as the Canadian government’s responsibility under the Canadian Constitution, its treaties with native peoples, and its statutes to protect the aboriginal right to “exploit natural resources.”³⁷ The Canada Protocol creates an explicit exemption for “indigenous inhabitants” of Alaska and Canada to take migratory birds and their eggs during the closed season.³⁸

The migratory bird treaty with Mexico was similarly amended through a protocol to reflect this exception for “indigenous inhabitants” in Alaska to take migratory birds during the closed seasons. The treaties with the Soviet Union and Japan were originally written to include an exception for indigenous inhabitants in Alaska, so no amendments were needed. However, only the Canada Protocol defines the term “indigenous inhabitants of Alaska” and that rather broad definition states that the term

31. *Dunkle*, 829 F.2d at 935.

32. *Id.* at 936.

33. *Id.* at 940.

34. *Id.* at 945.

35. See DAVID CASE & DAVID VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 264 (2d ed. 2002).

36. Establishment of Management Bodies in Alaska To Develop Recommendations Related to the Spring/Summer Subsistence Harvest of Migratory Birds, 65 Fed. Reg. 16,405 (Mar. 28, 2000); see CASE & VOLUCK, *supra* note 35, at 264, for a description of migratory game birds’ role in native Alaskan subsistence diet.

37. Protocol Amending the 1916 Convention For the Protection of Migratory Birds, U.S.-Can., Dec. 14, 1995, U.S.-Can., 1995 U.S.T. LEXIS 225, at 5–6.

38. *Id.* at 7, 15.

is "understood for the purposes of the Protocol as meaning Alaska Natives and permanent resident nonnatives with legitimate subsistence hunting needs living in designated subsistence hunting areas."³⁹ The Canada Protocol recognizes that the Japan Convention, which limits access to native subsistence hunts to those of aboriginal descent,⁴⁰ conflicts with the expansive definition of the term "indigenous inhabitant," implying that the more restrictive definition will have to govern.⁴¹ It is not clear why the same recognition was not made for the treaty with the Soviet Union, which was already in place at the time of the signing of the Canada Protocol (the protocol amending the treaty with Mexico was not signed until 1997, but also does not contain this expansive definition of "indigenous inhabitant"). However, when the Senate ratified the Canada and Mexico Protocol amendments, the Senate "confirmed its understanding at ratification that an eligible indigenous inhabitant is a permanent resident of a village within a subsistence harvest area, regardless of race."⁴²

Subsistence harvest is further limited by language in the Japan Convention which requires that hunting seasons be set "so as to avoid . . . principal nesting seasons and to maintain . . . optimum numbers."⁴³ Any subsistence harvest must be consistent with this limiting language which may "allow only for limited taking of eggs."⁴⁴ However, this limitation of the Japan Convention, while it ought to affect the subsistence harvest under regular MBTA authority, does not apply to the harvest created by the Gull Egg Act. The Convention states:

1. Exceptions to the prohibition of taking may be permitted . . . in the following cases:
. . . .

39. *Id.* at 8.

40. The exception is for "Taking by Eskimos, Indians, and indigenous peoples of the Trust Territory of the Pacific Islands for their own food and clothing." Protection of Birds and Their Environment, U.S.-Japan, art. III (1)(e), Sept. 19, 1974, U.S.-Japan, 25 U.S.T. 3329 [hereinafter Protection of Birds and Their Environment].

41. Protocol Amending the 1916 Convention for the Protection of Migratory Birds, *supra* note 37, 1995 U.S.T. LEXIS 225, at 12.

42. Establishment of Management Bodies in Alaska To Develop Recommendations Related to the Spring/Summer Subsistence Harvest of Migratory Birds, 65 Fed. Reg. 16,405 at 16,405.

43. Protection of Birds and Their Environment, *supra* note 40, 25 U.S.T. 3329, at art. III (2); *See also* CASE & VOLUCK, *supra* note 35, at 266.

44. Message from the President of the United States Transmitting a Protocol Between the U.S. and Can. Amending the 1916 Convention for the Protection of Migratory Birds in Can. and the U.S., Aug. 2, 1996, S. TREATY DOC. NO. 104-28 at viii, ix (1996).

(c) During open hunting seasons established in accordance with paragraph 2 of this Article;

. . . .

(e) Taking by Eskimos, Indians . . . for their own food and clothing.
2. Open seasons for hunting migratory birds may be decided by each Contracting Party respectively. Such hunting seasons shall be set so as to avoid their principal nesting seasons and to maintain their populations in optimum numbers.⁴⁵

Because the Japan Convention contains significantly limiting language as to who may be eligible for subsistence harvests, namely only Eskimos and Indians, (a much narrower definition of “indigenous” than is found in the Canada Convention) the United States instead relies on the permissive language that “Open seasons for hunting migratory birds may be decided by each Contracting Party respectively” in order to permit the subsistence harvests. But the United States also recognizes that this interpretation “may allow for only limited taking of eggs,”⁴⁶ since the open hunting season is explicitly limited by the requirement “to avoid their principal nesting seasons and to maintain their populations in optimum numbers.” The Gull Egg Act, however, creates a subsistence hunt that is only open to Indians (thereby fitting within the native harvest exemption language of that Convention), and the Japan Convention exception for taking by Eskimos and Indians contains no corresponding limited language as to avoiding nesting seasons. There are many subsistence egg harvests⁴⁷ under the MBTA, however, that seem to be of questionable legality.

The second major change made by the Canada Protocol is the requirement that each country establish a management body to develop recommendations for the management of these hunts.⁴⁸ According to the Canada Protocol this management body must include:

Native, Federal, and State of Alaska representatives as equals, and will develop recommendations for, among other things: seasons and bag limits; law enforcement policies; population and harvest monitoring Creation of these management bodies is intended to provide more effective conservation of migratory birds in designated subsist-

45. Protection of Birds and Their Environment, *supra* note 40 at art. III (1), (2), 25 U.S.T. 3329, art. III (1 & 2).

46. Message from the President of the United States Transmitting a Protocol Between the U.S. and Canada Amending the 1916 Convention for the Protection of Migratory Birds in Canada and the U.S. *supra* note 44, at viii, ix.

47. Migratory Bird Subsistence Harvest in Alaska, 50 C.F.R. § 92.31 (2015).

48. Protocol Amending the 1916 Convention For the Protection of Migratory Birds, *supra* note 37, at 15.

ence harvest areas without diminishing the ultimate authority and responsibility of DOI/FWS.⁴⁹

Accordingly, the Alaska Migratory Bird Co-Management Council was established and has since developed management recommendations that it submits to the FWS and the Migratory Flyway Councils.⁵⁰ The Co-Management Council is made up of representatives from the State of Alaska, the FWS, and seven to twelve native representatives representing the twelve regions of Alaska.⁵¹ Once the FWS makes a final determination about the management decisions, it creates final regulations reflecting those decisions.

As part of this process, the Co-Management Council made recommendations to the FWS regarding glaucous-winged gull egg harvests in southeast Alaska in areas outside of Glacier Bay National Park. Since Glacier Bay National Park has historically been closed to all manner of wildlife harvests, the FWS regulations explicitly do not apply to any areas within the Park.⁵² The final regulations approved by the FWS create an open season of May 15 to June 30 to collect glaucous-winged gull eggs, in specified locations, for all people residing in the communities of Hoonah, Craig, Hydaburg, and Yakutat.⁵³ This process abides by the treaty requirements that "native inhabitants" be understood fairly broadly to include nonnative inhabitants of villages in designated subsistence areas and that subsistence harvest rules be informed by a body with substantial native representation—the Migratory Bird Co-Management Council.

49. *Id.* at 15-16.

50. Establishment of Management Bodies in Alaska To Develop Recommendations Related to the Spring/Summer Subsistence Harvest of Migratory Birds, 65 Fed. Reg. 16,405, 16,405.

51. *Id.* at 16,406, 16,408.

52. U.S. Fish and Wildlife Service, *2014 Alaska Subsistence Spring/Summer Migratory Bird Harvest Regulations* 3 (2014), http://www.fws.gov/alaska/ambcc/Regs%20-%2004%20pages/14%20Regs%20Book-3-14-14_web.pdf.

53. *Id.* at 14.

IV. GULL BIOLOGY AND NPS HARVEST MANAGEMENT

Glaucous-winged gulls are a common species⁵⁴ along the west coast of North America, ranging from the Alaska Peninsula to Washington State. The bird has a long lifespan, low adult mortality rate, and typically nests in island colonies. They are synchronized colonial nesters, tending to build nests in close proximity, laying eggs within a short time frame so as to minimize predation through colonial defense. The glaucous-winged gulls typically produce clutches of three large eggs in mid to late May. Glaucous-winged gulls are indeterminate layers, meaning they are able to replace entire lost clutches, even after onset of incubation.⁵⁵ Glaucous-winged gulls will continue laying to replace individual lost eggs, reaching an average clutch size of three through a process called “protracted” laying. If gulls have not begun incubating, having reached a clutch size of three, then each lost egg is replaced roughly every two days. Glaucous-winged gulls raise a single brood, but destruction of their clutch during incubation from predation or natural disaster may result in re-laying.⁵⁶ It takes approximately twelve days to re-lay a full clutch after incubation has started,⁵⁷ as opposed to the two-day delay associated with re-laying before incubation onset. Therefore, traditional egg harvest practices likely targeted eggs early in the nesting season, prior to incubation, allowing for the gulls to quickly relay their clutches post-harvest.⁵⁸

A successful harvest depends upon knowing the date or range when these synchronized layers begin producing eggs⁵⁹ in order to harvest early enough to maximize protracted laying and minimize delay in laying due to onset of incubation. Harvest timing is a critical component to a successful harvest. Hunn describes a study of traditional ecological knowledge of egg-harvest strategy where the majority of respondents

54. The IUCN Red List of Threatened Species categorizes *Larus glaucescens* as a “species of least concern”—its lowest ranking of conservation priority. International Union for Conservation of Nature and Natural Resources, *Larus Glaucescens*, THE IUCN RED LIST OF THREATENED SPECIES, <http://www.iucnredlist.org/details/22694334/0>.

55. Zador, *supra* note 22.

56. HUNN ET AL., *supra* note 11, at 106.

57. Sheri Ickes, Jerrold Belant, & Richard Dolbeer, *Nest disturbance techniques to control nesting by gulls*, 26(2) WILDLIFE SOC’Y BULL., 269–273 (1998).

58. HUNN ET AL., *supra* note 11, at 106.

59. Stephani G. Zador, John F. Piatt, & Andre Punt, *Balancing Predation and Egg Harvest in a Colonial Seabird: A Simulation Model*, 195 ECOLOGICAL MODELING 318 (2006).

preferred to harvest only from incomplete nests in order to induce continued laying, avoiding harvesting from completed nests with a higher risk of incubation onset.⁶⁰ The NPS has been collecting baseline data on the nesting gull colonies in Glacier Bay since 2012⁶¹ in order to understand glaucous-winged gulls nesting phenology.⁶² A final harvest plan will be developed by the Hoonah Indian Association and the NPS.⁶³ The harvest approach chosen through the LEIS is a “two-harvest” model, meaning there will be an early harvest “on or before the [fifth] day following onset” of laying and a second harvest within nine days of the first.⁶⁴

The NPS conducted the first egg harvest under the Gull Egg Act in late May of 2015 in the form of an “experimental” harvest (general harvest regulations are not yet promulgated and the more specific harvest has not been finalized).⁶⁵ This harvest allowed traditional harvesting to resume, despite the lack of promulgated regulations. It furthered NPS-Hoonah collaboration, allowing the NPS to test different adaptive harvest management strategies, compare chick/fledgling numbers to previous years, test for differences between harvested and post-harvested nests against set aside control areas, in order to investigate egg size differences, egg laying phenology, and numbers of eggs per nest and per colony.⁶⁶

After a forty-year exclusion from practicing this traditional and customary harvest, and after nearly two decades of effort by the NPS and Hoonah Indian Association, the Huna may soon be able to reengage in

60. HUNN ET AL., *supra* note 11, at 106.

61. Tania Lewis & Mary Beth Moss, *Glaucous-winged Gull Monitoring and Egg Harvest in Glacier Bay, Alaska*, 14 ALASKA PARK SCI., no. 2, 18 (2015).

62. Phenology is “the study of periodic biological events . . . such as the lifetime pattern in an organism of growth, development and reproduction in relation to the seasons.” MICHAEL BEGON, ET AL., *ECOLOGY: INDIVIDUALS, POPULATIONS AND COMMUNITIES* 858 (2d. ed. 1990).

63. FINAL LEGISLATIVE ENVIRONMENTAL IMPACT STATEMENT, *supra* note 15.

64. NAT’L PARK SERV., RECORD OF DECISION- HARVEST OF GLAUCOUS-WINGED GULL EGGS BY HUNA TLINGIT IN GLACIER BAY NATIONAL PARK AND PRESERVE LEGISLATIVE ENVIRONMENTAL IMPACT STATEMENT 2 (2010), <http://parkplanning.nps.gov/document.cfm?parkID=12&projectID=16968&documentID=36593>.

65. National Park Service, 2015 Scientific Research and Collecting Permit: Glaucous-winged Gull Monitoring in Glacier Bay, Alaska, Permit # GLBA-2015-SCI-0004 (2015) (on file with author); *See also*, Tania Lewis, 2015 Application for Scientific Research and Collecting Permit: Glaucous-winged Gull Monitoring in Glacier Bay, Alaska (on file with author).

66. NAT’L PARK SERV., *supra* note 64; Lewis & Moss, *supra* note 61.

this practice. General harvest regulations and a detailed harvest plan are currently being developed by the NPS and the Huna. However, at the date of this writing, the NPS has yet to announce a formal estimate for their completion.⁶⁷ Because the final regulations will be based on these local studies, with input only required from the Hoonah and the NPS, it is possible that the final harvest dates chosen will not mirror the harvest dates set by the FWS under their MBTA authority for glaucous-winged gull egg collection outside of the Park.

V. CONFLICT WITH MBTA AND EXISTING HARVEST REGULATIONS

In order to completely understand the sources of potential conflict present in the current situation, it is necessary to explain the process and factors used by the FWS and the Alaska Migratory Bird Co-Management Council in establishing their gull egg harvest rules under the MBTA as a point of contrast with the NPS process described above. The FWS does not conduct research to determine annual variability in the onset of laying and does not base its harvest management on nesting phenology. Neither the FWS nor the Alaska Department of Fish and Game have conducted research documenting harvest levels in Southeast Alaska since 2004,⁶⁸ nor is baseline biological research conducted to understand the influence of egg harvests upon regional gull populations.⁶⁹ FWS regulations allow for the harvest of gull eggs between May 15 and June 30, and the FWS approach can be described as largely “hands-off,” entrusting the management of nesting gulls to the harvesters themselves, while the NPS approach is much more prescriptive. The NPS will only allow for two harvests,⁷⁰ and NPS egg harvest timing is entirely dependent upon the date of onset, when the first gull lays the first egg in a colony. NPS biologists will determine the date of onset, and the first harvest of the season

67. Phillip Hooge, *Glacier Bay Gull Egg Legislation Signed into Law*, NATIONAL PARK SERVICE (July 31, 2014), <http://www.nps.gov/glba/learn/news/glacier-bay-gull-egg-legislation-signed-into-law.htm>.

68. LILIANA NAVES AND & NICOLE BRAEM, ALASKA SUBSISTENCE HARVEST OF BIRDS AND EGGS, 2012, ALASKA MIGRATORY BIRD CO-MANAGEMENT COUNCIL, TECHNICAL PAPER No. 397 (2014), <http://www.fws.gov/alaska/ambcc/ambcc/Harvest/TP397.pdf>.

69. Telephone interview with Donna Dewhurst, FWS AMBCC Coordinator (August 15, 2015).

70. NAT'L PARK SERV., *supra* note 64, at 2.

will be “on or before the [fifth] day following onset.”⁷¹ The second harvest will be conducted within nine days of the first.⁷²

While it may be unlikely that glaucous-winged gulls will begin to lay prior to May 15 in Glacier Bay, it is not impossible. With global climate change likely influencing the nesting system, it is possible that gull nesting phenology may shift in unpredictable ways. If NPS biologists were to discover onset by May 9, the first harvest would take place by May 14. This would put the NPS harvest at odds with existing FWS regulations, which are promulgated annually, well in advance of harvest.

The potential for conflict, between the seasons the NPS is likely to establish and the existing seasons the FWS has established, is obvious. The language of the Gull Egg Act indicates that the NPS has specific management authority for this harvest. And since the Gull Egg Act never references the MBTA, we must assume that the intention is for that management authority to exist outside of the MBTA and separate from the FWS’s traditional management authority in this area as well as the Co-Management Councils’ traditional advisory role. With different participants and different management criteria and goals, the management outcomes are likely to be different as well. While there are no legal conflicts, a new management conflict will likely be created; glaucous-winged gull egg harvests will be organized and managed differently inside and outside of Glacier Bay National Park. This may have biological implications for the species and may be confusing for the user groups since it is likely that the Huna will continue to collect gull eggs both inside and outside of the Park. However, having different harvest regulations in different places for the same species is not unusual in Alaska. Both the federal and state governments maintain their own sets of harvest regulations that apply depending on where and when the harvesting is taking place and who is doing the harvesting.⁷³ Therefore, perhaps this

71. *Id.*

72. *Id.* This two-harvest structure is presumably designed to synchronize early and late laying gulls and to provide for a larger number of “fresh” eggs to be available for harvesters.

73. *Compare* ALASKA DEP’T OF FISH AND GAME, 2015-2016 ALASKA HUNTING REGULATIONS, <http://www.adfg.alaska.gov/static/regulations/wildliferegulations/pdfs/general.pdf>, with U.S. DEP’T OF INTERIOR FEDERAL SUBSISTENCE MANAGEMENT PROGRAM, SUBSISTENCE MANAGEMENT REGULATIONS FOR THE HARVEST OF WILDLIFE ON FEDERAL PUBLIC LANDS IN ALASKA (Effective July 1, 2012- June 30, 2014), <http://www.doi.gov/subsistence/regulation/wildlife/upload/Book.pdf>.

single unusual harvest will not have significant impacts either for the wildlife or human populations.

VI. CONFLICTS WITH MIGRATORY BIRD CONVENTIONS

There are two instances where the new statute conflicts, or may be interpreted to conflict, with at least two of the bilateral Migratory Bird Conventions. The first conflicting issue is who is entitled to participate in the subsistence harvest, and second, who must be involved in the decision-making process surrounding the subsistence harvest? *Dunkle* states that any regulation of migratory birds must agree with the most restrictive convention in the case of conflicts.⁷⁴ Yet, that is not necessarily how the conventions have always been implemented. Furthermore, the Gull Egg Act does not officially recognize the conventions and does not meet all of the various requirements laid out by them. It is additionally useful to recognize that glaucous-winged gulls are specifically protected by each of the four treaties, since the glaucous-winged gulls are present in each of the relevant five countries.⁷⁵

A. Law Regarding Conflict between Treaties and Later Passed Statutes

In 2006 the Court of Appeals for the District of Columbia decided *Fund for Animals v. Kempthorne*.⁷⁶ In that case, the court reviewed a challenge to the FWS's determination that mute swans are not protected by the MBTA, and therefore, are potentially subject to the eradication

74. *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 941 (9th Cir. 1987).

75. Convention Between the United States and Great Britain [on behalf of Canada] for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702 (T.S. No. 628); Convention Between the United States and Mexico for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311 (T.S. No. 912); Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, U.S.-Japan, Mar. 4, 1972, 25 U.S.T. 3329 (T.I.A.S. No. 7990); Convention Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, U.S.-Union of Soviet Socialist Republics, Nov. 19, 1976, 20 U.S.T. 4647 (T.I.A.S. No. 9073).

76. *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872 (D.C. Cir. 2006).

program proposed by the State of Maryland.⁷⁷ The case turned on whether or not the MBTA applies to nonnative birds. The treaties do not refer to native versus nonnative birds, but instead, list groups of birds to be protected, including “swans.”⁷⁸ In 2004, Congress passed the Migratory Bird Treaty Reform Act,⁷⁹ which limits the application of the MBTA to native birds.⁸⁰ The Act included the language “It is the sense of Congress that the language of this section is consistent with the intent and language of the 4 bilateral treaties implemented by this section.”⁸¹ The D.C. Court of Appeals, however, found that the unambiguous language of the statute clearly conflicted with the language and intent of the treaties⁸² regardless of Congress’ statement to the contrary, but because Congress’ intent to exclude nonnative birds from MBTA protection in the new statute was clear and of more recent vintage, it must be given effect.⁸³

However, in three other influential cases the same court disagrees with the *Fund for Animals* rationale. In *Roeder et al. v. Islamic Republic of Iran* (“*Roeder I*”),⁸⁴ Americans held as hostages in Iran in 1979 attempted to sue Iran for damages.⁸⁵ The Algiers Accord, the bilateral agreement between the United States and Iran that secured the release of the hostages, prohibited lawsuits arising from the hostage-taking.⁸⁶ However, the plaintiffs relied on a statute passed in 1996, which waives sovereign immunity and creates causes of action for Americans harmed by state-sponsored acts of terrorism.⁸⁷ The court held that since the later passed statute did not explicitly abrogate the Algiers Accord, the requirements of that agreement remained undisturbed.⁸⁸ *Roeder I* was followed by *Roeder II*,⁸⁹ in which plaintiffs attempted to raise the same claims by relying on a second statute passed in 2008.⁹⁰ However, this

77. *Id.* at 874-75.

78. *Id.* at 874.

79. 118 Stat. 2809, 16 U.S.C. § 703 (Dec. 8, 2004).

80. 16 U.S.C. § 703(b).

81. Pub. L. No. 108-447, § 143(d), 118 Stat. 2809 (Dec. 8, 2004).

82. *Fund for Animals, Inc.*, 472 F.3d at 877.

83. *Id.* at 878-79.

84. *Roeder et al. v. Islamic Republic of Iran (Roeder I)*, 333 F.3d 228 (D.C. Cir. 2003).

85. *Id.* at 230.

86. *Id.* at 231.

87. *Id.* at 230.

88. *Id.* at 237-38.

89. *Roeder et al. v. Islamic Republic of Iran (Roeder II)*, 646 F.3d 56 (D.C. Cir. 2011).

90. *Id.* at 58.

second statute also failed to explicitly abrogate the Algiers Accord and so, did not pass the court's test.⁹¹

In *Owner-Operator Independent Drivers Ass'n, Inc. v. United States Dep't of Transp.* (“*Independent Drivers*”),⁹² Independent Drivers, a trade association representing U.S.-licensed commercial drivers, challenged the decision of the Federal Motor Carrier Administration to exempt Canadian and Mexican commercial motor vehicle operators from medical certification requirements applied to U.S.-licensed drivers under a new statute.⁹³ The exemption is based on agreements between Mexico, Canada, and the United States for reciprocal licensing of cross-border commercial drivers. The trade association argued that the new statute—the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users—overlays additional medical certification requirements on top of any pre-existing commercial licensing requirements.⁹⁴ This would have conflicted with the international agreements, which were intended to give full recognition to the foreign licensing programs. However, the court again reasoned that “absent some clear and overt indication from Congress, we will not construe a statute to abrogate existing international agreements even when the statute’s text is not itself ambiguous.”⁹⁵ Here, as in *Roeder I* and *Roeder II*, the relevant statute did not explicitly abrogate the earlier international agreements, and so, the requirements of those agreements remain in force.

The position of the D.C. Circuit Court of Appeals expressed in these cases is that in order to abrogate an earlier treaty, a later statute must explicitly express Congress’ intent to do so. The “requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.”⁹⁶ Both the *Roeder* cases and the *Independent Drivers* case, like the Gull Egg Act example, concern “textually clear statute[s] with no express reference—or any other indication of its intended application—to conflicting international agreements.”⁹⁷ And as the *Independent Drivers* court

91. *Id.* at 59, 62.

92. *Owner-Operator Independent Drivers Ass'n, Inc. v. United States Dep't of Transp.* et al., 724 F.3d 230 (D.C. Cir. 2013).

93. *Id.* at 232.

94. *Id.* at 234.

95. *Id.* at 234; *See also Roeder I*, 333 F.3d 228 at 238; *Roeder II*, 646 F.3d 56 at 61.

96. *Roeder II*, 646 F.3d at 61 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991)).

97. *Owner Operator Independent Drivers Ass'n Inc.*, 724 F.3d at 234.

recognizes, there is a presumption that new statutes do not automatically abrogate existing treaties.⁹⁸

This position directly conflicts with the court's reasoning in *Fund for Animals*. The *Independent Drivers* court justifies ignoring *Fund for Animals* for two reasons: 1) *Fund for Animals* conflicts with both *Roeder I* and *II*, which bracket that case chronologically, and also conflicts with past Supreme Court practice, making *Fund for Animals* an anomaly, rather than controlling precedent; and 2) while the statute at issue in *Fund for Animals* does not explicitly abrogate the treaties in question, it does directly reference them, thus satisfying the court that the treaties were directly considered by Congress in the course of enacting the conflicting statute.⁹⁹ In *Roeder*, *Independent Drivers*, and the Gull Egg Act cases however, the statute in question make no reference whatsoever to the relevant treaties and therefore, could not be considered to have abrogated them, even where the statutory language is clear.

B. Who Can Hunt?

The Gull Egg Act is explicit that the subsistence regulations to be promulgated are open only to “members of the Hoonah Indian Association.”¹⁰⁰ This significantly limits those eligible to participate in this harvest to members of a single indigenous group, rather than the broader “permanent resident of a village within a subsistence harvest area, regardless of race”¹⁰¹ that the treaties have been understood to allow. This certainly conflicts with Congress' express understanding of the treaties' reference to “indigenous inhabitant” as applying to all rural residents in Alaska living in villages in subsistence harvest areas.¹⁰² Yet, we have already discussed how that interpretation by Congress is not supported by the language of all of the treaties. The Gull Egg Act's narrow interpretation of “indigenous” seems to comport with the most stringent versions of the treaty language but does not comport with Congress' stated inter-

98. *Id.*

99. *Id.* at 237.

100. Gull Egg Act §2(a), Pub. L. No. 113-142, 128 Stat. 1749 (July 25, 2014).

101. Establishment of Management Bodies in Alaska to Develop Recommendations Related to the Spring/Summer Subsistence Harvest of Migratory Birds, 65 Fed. Reg. 16,405,16,405 (Mar. 28, 2000).

102. CASE & VOLUCK, *supra* note 35, at 264–265 n.44.

pretation of the treaties.¹⁰³ This confuses the analysis of the new statute, but there are two possible outcomes. First, we could assume that even if the treaties do permit the more expansive interpretation (which is not obvious), there is no reason to assume that a more limited implementation is not permissible under the treaties. Second, we could argue in the alternative that the more expansive definition is the only interpretation that is permissible since it is the interpretation that the Senate chose upon ratification. This may leave the new statute open to challenge.

C. Who Must be Involved in the Decision-making?

The new statute also seems to conflict with the Canada Protocol requirement that native harvest decisions be made by native, federal, and state representatives. Through the Co-Management Council, the State of Alaska is currently actively involved in native harvest decisions under regular MBTA authority.¹⁰⁴ The Gull Egg Act, however, requires only that federal and native groups be involved in the process. State representatives are not given a place at these negotiations, contrary to the Canada Protocol's language.

The Canada Protocol states that broad involvement is necessary in order to "provide more effective conservation of migratory birds."¹⁰⁵ Federal, state, and native groups are involved in harvest management and migratory bird data collection, and each group is impacted by the actions of the other groups. If input from one of these groups is excluded from the process, then important information may be overlooked. The State of Alaska plays an important role in subsistence harvest data collection. The absence of state input into egg harvest management may limit the ability of the NPS to consider the effects of this harvest on a larger regional scale for this wide-ranging species.¹⁰⁶ This discrepancy over who is enti-

103. Establishment of Management Bodies in Alaska to Develop Recommendations Related to the Spring/Summer Subsistence Harvest of Migratory Birds, 65 Fed. Reg. at 16,405.

104. See the Alaska Migratory Bird Co-management Council's contact page for Council members which includes contact information for State Department of Fish and Game representatives, Alaska Migratory Bird Co-management Council (2015) http://www.fws.gov/alaska/ambcc/About%20Us_files/AMBCC%20Members%20Data%20Web%20-%20April%202015.pdf.

105. Protocol Amending the 1916 Convention For the Protection of Migratory Birds, *supra* note 37 at 15–16.

106. This egg harvest is one small part of the larger gull nesting ecological system, the NPS can only "manage" within its borders, but these species move across borders,

tled to provide input in the decision-making process may also leave the new statute vulnerable to challenges.

VII. CONCLUSION

The Hoonah have been excluded from an important cultural and subsistence resource for decades. In an attempt to correct that problem, Congress passed a statute that fails to recognize other implicated laws and treaties. The result may well be confusion for the user-group and inadvertent mismanagement of a wildlife population. It is possible that the Co-Management Council will simply decide to adopt Glacier Bay National Park's harvest rules, but they certainly are not under any obligation to do so. Similarly, the Park is not obligated to adopt the Co-Management Council's rules or even consult with the council. The Migratory Bird Co-Management Council Coordinator, Donna Dewhurst, has expressed interest in trying to reconcile the two sets of regulations in an attempt to create greater consistency for hunters,¹⁰⁷ and Tania Lewis, Wildlife Biologist at Glacier Bay National Park, has corroborated that the two agencies have discussed the possibility of the FWS altering the timing of its hunt based on data provided by the NPS studies.¹⁰⁸ However, it remains to be seen whether those efforts are successful and whether there are similar attempts to do so in future years.

The confused interpretation and implementation history of the MBTA and the various migratory bird treaties make the interpretations and implementation of the Gull Egg Act complicated as well. It is not clear which statute, the MBTA or the Gull Egg Act, contains the more accurate interpretation of who is entitled to subsistence hunt in the closed season under the treaties. On the issue of who must be involved in the decision-making process, the new statute contradicts the treaties without actually abrogating the treaties and may be susceptible to legal challenge in accordance with the reasoning in the *Roeder* and *Independent Drivers*

and are influenced by exogenous system variables, both biological and social. F. STUART CHAPIN, et al., PRINCIPLES OF ECOSYSTEM STEWARDSHIP: RESILIENCE-BASED NATURAL RESOURCE MANAGEMENT IN A CHANGING WORLD 6–7 (F. Stuart Chapin, III, et al. eds., 2009).

107. Telephone Interview with Donna Dewhurst, U.S. Fish and Wildlife Service Biologist and U.S. Fish and Wildlife Service Alaska Migratory Bird Co-Management Council Coordinator (Jan. 28, 2015).

108. Telephone Interview with Tania Lewis, Wildlife Biologist for Glacier Bay National Park (Sept. 14, 2015).

cases. The NPS could resolve the difficulty by simply bringing the state into the decision-making process.

It is possible that this single, unique harvest, with its two sets of management strategies and collection rules, will not have significant impacts, for either the wildlife or human populations involved. However there are many tribes in Alaska, many of which may be separated from traditional hunts and hunting grounds for various reasons.¹⁰⁹ If Congress were to habitually create harvests with the potential to increase regulatory confusion and conflict, then it is possible that future outcomes will be less benign.

109. For instance, the Hoonah traditionally hunted seals in the waters of Glacier Bay National Park as well, but have not been permitted to do so 1972. *See* CATTON, *supra* note 10, at chap. x.