

TO AMEND THE MIGRATORY BIRD TREATY ACT TO CLARIFY THE TREATMENT OF AUTHENTIC ALASKA NATIVE ARTICLES OF HANDICRAFT CONTAINING NONEDIBLE MIGRATORY BIRD PARTS, AND FOR OTHER PURPOSES

MAY 15, 2018.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BISHOP of Utah, from the Committee on Natural Resources, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 4069]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 4069) to amend the Migratory Bird Treaty Act to clarify the treatment of authentic Alaska Native articles of handicraft containing nonedible migratory bird parts, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 4069 is to amend the Migratory Bird Treaty Act to clarify the treatment of authentic Alaska Native articles of handicraft containing nonedible migratory bird parts.

BACKGROUND AND NEED FOR LEGISLATION

In 1916, the United States and Great Britain (for Canada) signed the Convention for the Protection of Migratory Birds.¹ The goal of this agreement was to establish an international framework for the protection and conservation of migratory birds.

The agreement also established the federal government's authority to manage migratory birds. Under the Migratory Bird Treaty,

¹Protection of Migratory Birds Treaty, Library of Congress <https://www.loc.gov/law/help/us-treaties/bevans/b-gb-ust000012-0375.pdf>.

unless permitted by regulation, it is unlawful at any time to pursue, hunt, take, capture, kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, export, or import any migratory bird, any part, nest, or egg of such bird protected under the Convention. Migratory bird treaties were also implemented with Mexico in 1936,² Japan in 1972,³ and Russia in 1976.⁴ Congress implemented the provisions of the original treaty with the enactment of the Migratory Bird Treaty Act of 1918.⁵

There are over 900 avian species protected by the Migratory Bird Treaty Act.⁶ Under the treaty, the term migratory bird includes all wild species of crows, ducks, falcons, geese, hawks, snipes, woodcocks, mourning doves, and white-winged doves. The Fish and Wildlife Service (FWS) regulates most aspects of the taking, possession, transportation, sale, purchase, barter, export, and import of migratory birds. The FWS has promulgated regulations containing restrictions on the taking of migratory birds, including what species can be hunted, the length of hunting seasons, bag limits, and the use of live decoys or other techniques to hunt migratory birds.

While the bilateral treaties with Japan⁷ and Russia⁸ recognized the legitimate subsistence needs of indigenous people, the 1916 and 1936 treaties with Canada⁹ and Mexico¹⁰ did not. As a result, federal courts have prevented the implementation of any subsistence rights, holding that the Migratory Bird Treaty Act requires the federal government to follow the most restrictive provisions of any of the four international agreements.

Under the 1916 Convention with Canada there is a closed season from March 10 to September 1 during which no hunting is permitted except in extremely limited circumstances.¹¹ The 1936 Convention with Mexico established a similar closed season for ducks. In Alaska, migratory birds have left large areas of northern, western and interior regions of the State by mid-September and in these areas, they generally do not return before March 10. Consequently, much of the traditional harvest of migratory birds, which has occurred for thousands of years in rural Alaska, has occurred during the closed portion of the year.

An effort to update the international treaties was initiated in the 1970s and culminated with the signing of the Protocol between the United States and Canada on December 14, 1995,¹² and the Protocol between the United States and Mexico signed on May 5, 1997.

² U.S. Fish and Wildlife Service, Mexico-United States Convention for the Protection of Migratory Birds and Game Mammals <https://www.fws.gov/migratorybirds/pdf/Treaties-Legislation/Treaty-Mexico.pdf>.

³ U.S. Fish and Wildlife Service, 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 <https://www.fws.gov/le/pdf/MigBirdTreatyJapan.pdf>.

⁴ U.S. Fish and Wildlife Service, Convention of Migratory Birds and their Environment, Between the United States of American and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds <https://www.fws.gov/le/pdf/MigBirdTreatyRussia.pdf>.

⁵ 16 U.S.C. §§ 703–712.

⁶ U.S. Fish and Wildlife Service, Migratory Bird Treaty Act Protect Species <https://www.fws.gov/birds/management/managed-species/migratory-bird-treaty-act-protected-species.php>.

⁷ *Ibid* 3.

⁸ *Ibid* 4.

⁹ U.S. Fish and Wildlife Service, Protocol Amending the 1916 Convention for the Protection of Migratory Birds, Canada <https://www.fws.gov/le/pdf/MigBirdTreatyCanada.pdf>.

¹⁰ *Ibid* 2.

¹¹ *Ibid* 9.

¹² *Ibid* 7.

The fundamental goal of these Protocols was to allow aboriginal and indigenous peoples to legally hunt protected migratory birds for subsistence and traditional uses in Alaska and Canada. On October 23, 1997, the United States Senate approved the Protocols amending the Migratory Bird treaties with Canada¹³ and Mexico.¹⁴

Regrettably, when implementing the treaty language, Congress failed to clarify that non-edible parts of the harvest migratory bird could be sold in commercial products. FWS followed by promulgating regulations prohibiting the sale or purchase of migratory bird parts, including feathers and parts of birds taken for subsistence.¹⁵ As a result, in 2012, a native Alaskan carver was fined \$2,000 for violating the Migratory Bird Treaty Act for using feathers in his handicraft products.¹⁶

In 2012, the Alaska Federation of Natives adopted a resolution urging the State of Alaska and FWS to revise its existing regulations to allow Alaskan natives to sell traditional handicrafts containing feathers or parts of migratory birds.¹⁷ The Alaskan Federation of Natives, Sealaska Heritage Institute, and the Alaska Migratory Bird Co-Management Council all support this legislative fix.

On August 23, 2017, a FWS final rule went into effect which amended the permanent migratory bird subsistence-harvest regulations in Alaska.¹⁸ This rule enabled Alaska Natives to sell authentic Native articles of handicraft or clothing that contain inedible by-products from migratory birds that were taken for food during the Alaska migratory bird subsistence-harvest season.

H.R. 4069 would amend the Migratory Bird Treaty Act to exempt certain Alaskan Native articles from the prohibitions on the sale of items containing nonedible migratory bird parts. The bill defines the term Alaskan Native to include a member of any Indian tribe that is based in the State of Alaska. It stipulates that authentic Alaskan native articles of handicrafts include beading, carving, drawing, lacing, painting, sewing, stitching and weaving or any combination thereof. Finally, the exemption will not apply to any handicraft containing any part of a migratory bird that was taken in a wasteful manner.

COMMITTEE ACTION

H.R. 4069 was introduced on October 12, 2017, by Congressman Don Young (R-AK). The bill was referred to the Committee on Natural Resources, and within the Committee to the Subcommittee on Federal Lands. On April 18, 2018, the Natural Resources Committee met to consider the bill. The Subcommittee was discharged by unanimous consent. No amendments were offered and the bill

¹³ Ibid 7.

¹⁴ 14 U.S. Fish and Wildlife Service, Protocol Amending the 1916 Convention for the Protection of Migratory Birds, Mexico <https://www.congress.gov/105/cdoc/tdoc26/CDOC-105tdoc26.pdf>.

¹⁵ 50 CFR 92.6

¹⁶ Anchorage Daily News, Alaska Native artist told selling feathered art violates law, Mike Duncan, September 29, 2012 <https://www.adn.com/our-alaska/article/alaska-native-artist-told-selling-feathered-art-violates-laws/2012/10/16/>.

¹⁷ Alaska Federation of Natives, 2012 Annual Convention Resolutions <http://www.nativefederation.org/wp-content/uploads/2012/10/2012-afn-convention-resolutions.pdf>.

¹⁸ Federal Register, Migratory Bird Subsistence Harvest in Alaska; Use of Inedible Bird Parts in Authentic Alaska Native Handicrafts for Sale, A rule by the U.S. Fish and Wildlife Service, August 24, 2017. <https://www.federalregister.gov/documents/2017/07/24/2017-15465/migratory-bird-subsistence-harvest-in-alaska-use-of-inedible-bird-parts-in-authentic-alaska-native>.

was ordered favorably reported to the House of Representatives by unanimous consent.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

COMPLIANCE WITH HOUSE RULE XIII AND CONGRESSIONAL BUDGET ACT

1. Cost of Legislation and the Congressional Budget Act. With respect to the requirements of clause 3(c)(2) and (3) of rule XIII of the Rules of the House of Representatives and sections 308(a) and 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for the bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 9, 2018.

Hon. ROB BISHOP,
*Chairman, Committee on Natural Resources,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4069, a bill to amend the Migratory Bird Treaty Act to clarify the treatment of authentic Alaska Native articles of handicraft containing nonedible migratory bird parts, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Jeff LaFave.

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 4069—A bill to amend the Migratory Bird Treaty Act to clarify the treatment of authentic Alaska Native articles of handicraft containing nonedible migratory bird parts, and for other purposes

H.R. 4069 would amend the Migratory Bird Treaty Act to allow Alaska Natives to make and sell traditional handicrafts such as masks, jewelry, clothing, and hunting equipment that are made from parts of migratory birds, particularly feathers. CBO estimates that implementing the bill would have no significant effect on the federal budget.

Enacting H.R. 4069 could reduce revenues and associated direct spending from civil and criminal penalties; therefore, pay-as-you-go procedures apply. However, CBO estimates that any such effects would be negligible.

CBO estimates that enacting H.R. 4069 would not increase net direct spending or significantly increase on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

H.R. 4069 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Jeff LaFave. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

2. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to amend the Migratory Bird Treaty Act to clarify the treatment of authentic Alaska Native articles of handicraft containing nonedible migratory bird parts.

EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains no unfunded mandates.

COMPLIANCE WITH H. RES. 5

Directed Rule Making. This bill does not contain any directed rule makings.

Duplication of Existing Programs. This bill does not establish or reauthorize a program of the federal government known to be duplicative of another program. Such program was not included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139 or identified in the most recent Catalog of Federal Domestic Assistance published pursuant to the Federal Program Information Act (Public Law 95-220, as amended by Public Law 98-169) as relating to other programs.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in *italic* and existing law in which no change is proposed is shown in roman):

MIGRATORY BIRD TREATY ACT

* * * * *

SEC. 2. (a) IN GENERAL.—Unless and except as permitted by regulations made as hereinafter provided, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, trans-

portation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, 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 for the protection of migratory birds concluded August 16, 1916, the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972, and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.

(b) LIMITATION ON APPLICATION TO INTRODUCED SPECIES.—

(1) IN GENERAL.—This Act applies only to migratory bird species that are native to the United States or its territories.

(2) NATIVE TO THE UNITED STATES DEFINED.—

(A) IN GENERAL.—Subject to subparagraph (B), in this subsection the term “native to the United States or its territories” means occurring in the United States or its territories as the result of natural biological or ecological processes.

(B) TREATMENT OF INTRODUCED SPECIES.—For purposes of paragraph (1), a migratory bird species that occurs in the United States or its territories solely as a result of intentional or unintentional human-assisted introduction shall not be considered native to the United States or its territories unless—

(i) it was native to the United States or its territories and extant in 1918;

(ii) it was extirpated after 1918 throughout its range in the United States and its territories; and

(iii) after such extirpation, it was reintroduced in the United States or its territories as a part of a program carried out by a Federal agency.

(c) CLARIFICATION FOR AUTHENTIC ALASKA NATIVE ARTICLES OF HANDICRAFT.—

(1) DEFINITIONS.—*In this subsection:*

(A) ALASKA NATIVE.—*The term “Alaska Native” means a member of any Indian tribe (as defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304)) that is based in the State of Alaska.*

(B) AUTHENTIC ALASKA NATIVE ARTICLE OF HANDICRAFT.—

(i) IN GENERAL.—*The term “authentic Alaska Native article of handicraft” means any item that is—*

(I) composed, wholly or in a significant respect, of natural materials; and

(II) produced, decorated, or fashioned by hand in significant part—

(aa) by an Alaska Native;

(bb) in the exercise of traditional Alaska Native handicrafts; and

(cc) without the use of any mass copying device.

(ii) INCLUSIONS.—The term “authentic Alaska Native article of handicraft” includes—

(I) any weaving, carving, stitching, sewing, lacing, beading, drawing, or painting that meets the criteria described in clause (i); and

(II) any item, including clothing, described in subclause (I) that combines the techniques described in that subclause.

(2) CLARIFICATION FOR CERTAIN AUTHENTIC ALASKA NATIVE ARTICLES OF HANDICRAFT.—Subject to paragraph (3) and notwithstanding any other provision of this Act, nothing in this Act prohibits the possession, offering for sale, sale, offering to barter, barter, offering to purchase, purchase, delivery for shipment, shipment, causing to be shipped or delivered for transportation, transport, causing to be transported, carrying, causing to be carried, or receiving for shipment, transportation, or carriage of any authentic Alaska Native article of handicraft on the basis that the authentic Alaska Native article of handicraft contains a nonedible migratory bird part.

(3) LIMITATION.—This subsection does not apply to an authentic Alaska Native article of handicraft containing a part of a migratory bird that was taken in a wasteful manner.

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ADDITIONAL VIEWS

H.R. 4069 would amend the Migratory Bird Treaty Act (MBTA) and change the treatment of authentic Alaska Native articles of handicraft under several treaties pertaining to migratory birds. The MBTA implements treaties between the United States and Canada, Mexico, Japan, and Russia for the protection of migratory birds. These treaties prohibit the taking, possession, import, export, transportation, sale, or trade of any migratory bird, or its parts, nests or eggs. H.R. 4069 would exempt any authentic Alaskan Native article of handicraft or clothing that contains a nonedible migratory bird part from this provision if the bird was taken in a wasteful manner.

In July 2017, the United States Fish and Wildlife Service (FWS) released a final rule to allow Alaska Natives to sell authentic handicrafts that contain inedible byproducts from 27 species of migratory birds taken during the spring and summer Alaska migratory bird subsistence-harvest season. The rule does not allow for additional hunting and gives the FWS the authority to remove a species from the list if its population begins to decline. The rule was developed under an intense and thorough co-management process with the Alaska Department of Fish and Game and Alaska Native representatives to ensure that the United States remained in compliance with the treaties.

Unlike the FWS final rule, H.R. 4069 circumvents treaty obligations of the United States to include all species. It also does not include seasonal hunting restrictions or provide the backstop that allows the FWS to remove a species if its population declines. At markup, Representative Don Young offered to work with Ranking Member Raúl M. Grijalva to address some of these concerns. We hope to work with our colleagues to ensure that this bill codifies the existing FWS rule while addressing the concerns of Alaska Natives.

RAÚL M. GRIJALVA,
*Ranking Member, House
Committee on Natural Re-
sources.*

JARED HUFFMAN.

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