

# Committee on Natural Resources

Rob Bishop Chairman  
Mark-Up Memorandum

April 13, 2018

To: All Natural Resources Committee Members

From: Majority Committee Staff – Chris Esparza and Steven Parr  
Subcommittee on Federal Lands (x6-7736)

Mark-Up: **H.R. 4069 (Rep. Don Young)**, 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.  
**April 18, 2018, at 10:15 AM; 1324 Longworth House Office Building**

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## Summary of the Bill

H.R. 4069, introduced by Representative Don Young (R-AK-At Large), would amend the Migratory Bird Treaty Act to clarify the treatment of authentic Alaska Native articles of handicraft containing nonedible migratory bird parts.

## Cosponsors

None.

## Background

In 1916, the United States and Great Britain (for Canada) signed the Convention for the Protection of Migratory Birds.<sup>1</sup> 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, 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<sup>2</sup>, Japan in 1972<sup>3</sup>, and Russia in 1976<sup>4</sup>. Congress implemented the provisions of the original treaty with the enactment of the Migratory Bird Treaty Act of 1918.<sup>5</sup>

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

<sup>2</sup> 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>.

<sup>3</sup> 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>.

There are over 900 avian species protected by the Migratory Bird Treaty Act.<sup>6</sup> 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 Japan<sup>7</sup> and Russia<sup>8</sup> recognized the legitimate subsistence needs of indigenous people, the 1916 and 1936 treaties with Canada<sup>9</sup> and Mexico<sup>10</sup> 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.<sup>11</sup> 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<sup>12</sup>, and the Protocol between the United States and Mexico signed on May 5, 1997. 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 Canada<sup>13</sup> and Mexico<sup>14</sup>.

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<sup>4</sup> 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>.

<sup>5</sup> 16 U.S.C. §§703-712.

<sup>6</sup> 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>.

<sup>7</sup>Ibid 3.

<sup>8</sup> Ibid 4.

<sup>9</sup> 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>.

<sup>10</sup> Ibid 2.

<sup>11</sup> Ibid 9.

<sup>12</sup> Ibid 7.

<sup>13</sup> Ibid 7.

<sup>14</sup> <sup>14</sup> 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>.

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.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup> This rule enabled Alaska Natives to sell authentic Native articles of handicraft or clothing that contain inedible byproducts from migratory birds that were taken for food during the Alaska migratory bird subsistence-harvest season. A senate companion, S. 1941, was introduced by Senator Dan Sullivan (R-AK). A similar bill was passed out of the House in the 113<sup>th</sup> Congress and was introduced in the 114<sup>th</sup>.

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.

### **Cost**

A Congressional Budget Office cost estimate has not yet been completed for this bill.

### **Administration Position**

The Administration's position is currently unknown.

### **Effect on Current Law (Ramseyer)**

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<sup>15</sup> 50 CFR 92.6

<sup>16</sup> 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/>.

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

<sup>18</sup> 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>.