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MIGRATORY BIRD TREATY REFORM ACT OF 2004

AUGUST 25, 2004.—Ordered to be printed

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Mr. INHOFE, from the Committee on Environment and Public Works, submitted the following

REPORT

[To accompany S. 2547]

[Including cost estimate of the Congressional Budget Office]

The Committee on Environment and Public Works, to which was referred a bill (S. 2547) to amend the Migratory Bird Treaty Act to exclude non-native migratory bird species from the application of that Act, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

GENERAL STATEMENT AND BACKGROUND

In 1916, the United States and Great Britain (for Canada) signed a treaty known as the Convention for the Protection of Migratory Birds. The fundamental goal of this agreement was to establish a framework for the protection and conservation of migratory birds, or birds that seasonally migrate between the member nations. Under the treaty, unless and except as permitted by regulations, it is unlawful at any time to “pursue, hunt, take, capture, kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, export, import any migratory bird, any part, nest, or egg of such bird . . . included in the terms of the Convention between the United States and Great Britain for the protection of migratory birds”. Since the original convention with Great Britain, the United States has signed similar conventions with Japan, Mexico and the Russian Federation.

In 1918, Congress passed the Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*) to implement the first Convention for the Protection of Migratory Birds. This Act became the domestic law implementing all of the International Migratory Bird Conventions and it committed the United States to the protection and management of migratory birds. In addition, the Act gave the U.S. Fish and Wildlife Service the authority to develop regulations on the harvest or taking of migratory game birds.

The conventions with Japan and Russia clearly list individual *species* of birds that are protected. By contrast, the conventions with Canada and Mexico introduce some confusion by merely listing protected *families* of birds: the conventions do not expressly state whether they apply to all species within the designated families or just to those species that are native to the territory of the parties. Under the Convention for the Protection of Migratory Birds, the term “migratory bird” includes a number of families of birds such as Anatidae, Gruidae, Rallidae, Limicolae, and Columbidae. Specifically, covered native species include brants, coots, cormorants, crows, gallinules, geese, gulls, mourning doves, rails, robins, snipes, swans, white-winged doves, whooping cranes, wild pigeons, wild species of ducks, and woodcocks. This is, however, not a complete list of protected bird species.

The Migratory Bird Treaty Act does not define “migratory” and includes as specifically protected, on the one hand, many native species that are not migratory (e.g., blue jays and crows) while, on the other hand, it leaves unprotected certain nongame species, such as quail, grouse, and turkey, that do not migrate. Also, the Migratory Bird Treaty Act does not specifically make a distinction between native and exotic species, although the U.S. Fish and Wildlife Service has always interpreted the Act as applying to native species only. Species considered “exotic” have been intentionally introduced or have voluntarily moved into North America from other continents. Examples of exotic bird management challenges include the mute swan, house sparrow, European starling, rock dove (pigeon), and the Muscovy duck. It is unclear how the Act should be interpreted to treat these species.

In the last 30 years, more than 360 non-native bird species have been recorded in an unrestrained wild state in the United States due to human intervention. Of this total, 94 are species that belong to families listed in conventions with Canada or Mexico. Although most introduced species never become established in the wild, 16 of the species that belong to listed families are known to have established self-sustaining populations. While most of these species have rather restricted ranges, the mute swan, rock pigeon, English starlings, and Eurasian collared-dove are more broadly distributed across the continental United States. These non-native birds, like other alien species, compete with native birds, damage other natural resources, and impose economic costs. The introduction of non-native birds is a growing problem, with additional species being detected annually.

In a case involving the application of the Migratory Bird Treaty Act to mute swans (*Hill v. Norton*), the D.C. Circuit Court decided that the convention with Canada did not make a distinction between native and non-native members of the listed families. Ac-

ording to the court, the reference in the convention to the swan family meant that the convention applied to mute swans. This line of reasoning could ultimately result in the Federal government being required to afford protection to other non-native species, such as the rock pigeon, Eurasian collared-dove, and other established species that belong to treaty *families*. Like the mute swan, many of these invasive species are causing harm to the natural and economic resources of the United States. To the extent that such species are afforded protection under the Act (and the treaties that it implements), State and Federal authorities would face considerable obstacles in their efforts to reduce or eradicate the populations of such species currently in the United States.

In 2000, the Congress passed the Neotropical Migratory Bird Conservation Act. The Act provides grants to countries in Latin America and the Caribbean, and the United States for the conservation of birds that winter south of the border and summer in North America. The law creates a competitive grants program to be administered by the Secretary of the Interior, through the Director of the U.S. Fish and Wildlife Service. The law encourages habitat protection, education, researching, monitoring, and capacity building to provide for the long-term protection of neotropical migratory birds.

OBJECTIVES OF THE LEGISLATION

Title I of S. 2547 clarifies that the Migratory Bird Treaty Act's prohibition on taking, killing, or possessing migratory birds applies only to native migratory bird species whose occurrence in the United States results from natural biological or ecological conditions. The legislation also excludes from coverage under the Migratory Bird Treaty Act bird species occurring as the result of human-assisted introduction unless the species: (1) was native to the United States and extant in 1918; (2) became extinct throughout its range thereafter; and (3) was reintroduced as part of a Federal program. The proposed change is also consistent with Executive Order 13112 (Invasive Species), which directs the Federal government to "prevent the introduction of invasive species and provide for their control and to minimize the economic, ecological, and human health impacts that invasive species cause."

Title II of S. 2547 authorizes a total of \$35 million for the Neotropical Migratory Bird Conservation Fund for fiscal years 2005 through 2008. The Fund supports a matching grants program under the U.S. Fish and Wildlife Service to fund projects that promote the conservation of birds that migrate beyond the borders of the United States. At least 75 percent of the funds must be spent for projects outside of the United States and the non-Federal match is lowered from 3:1 to 1:1 to allow greater participation. Projects in the United States and Caribbean have traditionally been eligible for these grants. The Migratory Bird Treaty Reform Act would extend the program to projects in Canada as well any fiscal year where amounts appropriated for the program exceed \$10 million. There is also an increase from \$80,000 to \$150,000 for administrative expenses.

Title II will assist in addressing persistent threats to neotropical migratory birds during their breeding and migration in North

America as well as their migration and over-wintering in Latin America and the Caribbean.

SECTION-BY-SECTION ANALYSIS

TITLE I - EXCLUSION OF NON-NATIVE SPECIES FROM MIGRATORY BIRD TREATY ACT

Sec. 101. Short Title

This section provides that this Act may be cited as the “Migratory Bird Treaty Reform Act of 2004.”

Sec. 102. Exclusion of Non-Native Species from Application of Certain Prohibitions Under Migratory Bird Treaty Act.

This section amends section 2 of the Migratory Bird Treaty Act clarifying that the Migratory Bird Treaty Act’s prohibition on taking, killing, or possessing migratory birds applies only to native migratory bird species whose occurrence in the United States results from natural biological or ecological conditions. This section also excludes from coverage under the Migratory Bird Treaty Act bird species occurring as the result of human-assisted introduction unless the species: (1) was native to the United States and extant in 1918; (2) became extinct throughout its range thereafter; and (3) was reintroduced as part of a Federal program.

Sec. 103. Publication of List.

This section asks the Secretary of Interior to publish in the Federal Register no later than 90 days after enactment a list of all non-native, human-introduced bird species to which the Migratory Bird Treaty Act does not apply. This section asks the Secretary to provide adequate time for public comment before the list is published.

TITLE II - CONSERVATION OF NEOTROPICAL MIGRATORY BIRDS

Sec. 201. Short Title

This section provides that this Act may also be cited as the “Neotropical Migratory Bird Conservation Improvement Act of 2004.”

Sec. 202. Amendments to Neotropical Migratory Bird Conservation Act.

This section authorizes \$5 million each for fiscal years 2005 and 2006; \$10 million for fiscal year 2007; and \$15 million for fiscal year 2008 for the Neotropical Migratory Bird Conservation Fund. The Fund supports a matching grants program under the U.S. Fish and Wildlife Service to fund projects that promote the conservation of birds that migrate beyond the borders of the United States. At least 75 percent of the funds must be spent outside of the United States and the non-Federal match is 1 to 1. Projects in the United States and Caribbean have traditionally been eligible for these grants. This section would extend the program to projects in Canada as well in any fiscal year where amounts appropriated for the program exceed \$10 million. There is a slight increase to \$150,000 for administrative expenses.

LEGISLATIVE HISTORY

On June 18, 2004, Senator George Voinovich introduced S. 2547, which was cosponsored by Senator Michael Crapo. The bill was referred to the Senate Committee on Environment and Public Works. A full committee business meeting was held on June 23, 2004, and the committee ordered S. 2547 to be reported to the full Senate.

HEARINGS

There were no hearings held on S. 2547 during the 108th Congress.

ROLLCALL VOTES

The Committee on Environment and Public Works met to consider S. 2547 on June 23, 2004. The committee voted favorably to report S. 2547 by voice vote without amendments.

REGULATORY IMPACT STATEMENT

In compliance with section 11(b) of rule XXVI of the Standing Rules of the Senate, the committee makes evaluation of the regulatory impact of the reported bill.

The bill does not create any additional regulatory burdens, nor will it cause any adverse impact on the personal privacy of individuals.

MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act of 1995 (Public Law 104-4), the committee finds that S. 2547 would not impose Federal intergovernmental unfunded mandates on State, local, or tribal governments.

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Control Act requires that a statement of the cost of the reported bill, prepared by the Congressional Budget Office, be included in the report. That statement follows:

 CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 2547 Migratory Bird Treaty Reform Act of 2004, as ordered reported by the Senate Committee on Environment and Public Works on June 23, 2004.

Summary

S. 2547 would amend the Migratory Bird Treaty Act to clarify that only species that are native to the United States are protected under that act, which governs the conservation of migratory birds. Title II of the bill would reauthorize funding for projects carried out under the Neotropical Migratory Bird Conservation Act through fiscal year 2008. (The current authorization to fund this program expires after fiscal year 2005.) The Secretary of the Inte-

rior uses this funding primarily to help finance research and conservation programs in North and South America.

Assuming appropriation of the authorized amounts, CBO estimates that implementing title II would cost \$30 million over the 2006-2009 period. We estimate that enacting title I would have no significant effect on the Federal budget. Enacting the legislation would not affect direct spending or revenues. S. 2547 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on State, local, or tribal governments.

Estimated Cost to the Federal Government

The estimated budgetary impact of S. 2547 is shown in the following table. For this estimate, CBO assumes that the entire amounts authorized by the bill will be appropriated for each fiscal year. Outlay estimates are based on recent spending patterns for conservation programs. The cost of this legislation falls within budget function 300 (natural resources and environment).

By Fiscal Year, in Millions of Dollars

	2004	2005	2006	2007	2008	2009
SPENDING SUBJECT TO APPROPRIATION						
Spending Under Current Law for Neotropical Bird Conservation Programs:						
Authorization Level ¹	4	5	0	0	0	0
Estimated Outlays	4	5	1	0	0	0
Proposed Changes:						
Authorization Level	0	0	5	10	15	0
Estimated Outlays	0	0	4	7	10	9
Spending Under S. 2547 for Neotropical Bird Conservation Programs:						
Authorization Level ¹	4	5	5	10	15	0
Estimated Outlays	4	5	5	7	10	9

¹The 2004 level is the amount appropriated for that year for neotropical migratory bird conservation. The 2005 level is the amount authorized under current law.

Intergovernmental and Private-Sector Impact

S. 2547 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on State, local, or tribal governments.

Previous CBO Estimate

On May 27, 2004, CBO transmitted a cost estimate for H.R. 4114, the Migratory Bird Treaty Reform Act of 2004, as ordered reported by the House Committee on Resources on May 5, 2004. H.R. 4114 and S. 2547 are very similar, and the estimated costs of the two pieces of legislation are identical.

Estimate Prepared By: Federal Costs: Deborah Reis; Impact on State, Local, and Tribal Governments: Marjorie Miller; Impact on the Private Sector: Karen Raupp.

Estimate Approved By: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

[Chapter 128, Approved July 3, 1918, 40 Stat. 703]

MIGRATORY BIRD TREATY ACT

CHAP. 128.—An Act to give effect to the conventions between the United States and other nations for the protection of migratory birds, birds in danger of extinction, game mammals, and their environment.

* * * * *

SEC. 2. [That unless and except as permitted](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, transportation, 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 section applies only to migratory bird species that are native to the United States the occurrence of which in the United States is entirely the result of natural biological or ecological conditions.*

(2) *TREATMENT OF INTRODUCED SPECIES.*—*For purposes of paragraph (1)—*

(A) *a bird species shall not be treated as native to the United States if the species occurs in the United States solely as a result of intentional or unintentional human-assisted introduction; and*

(B) *a migratory bird species shall be treated as native to the United States if—*

(i) *the species was native to the United States and extant in 1918;*

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

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

* * * * *

NEOTROPICAL MIGRATORY BIRD CONSERVATION ACT

An Act to require the Secretary of the Interior to establish a program to provide assistance in the conservation of neotropical migratory birds

SECTION 1. SHORT TITLE.

This Act may be cited as the “Neotropical Migratory Bird Conservation Act”.

SEC. 2. FINDINGS.

Congress finds that—

(1) of the nearly 800 bird species known to occur in the United States, approximately 500 migrate among countries, and the large majority of those species, the neotropical migrants, winter in Latin America and the Caribbean, *but breed in Canada and the United States;*

* * * * *

SEC. 4. DEFINITIONS.

In this Act:

[(1) Account.—The term “Account” means the Neotropical Migratory Bird Conservation Account established by section 9(a).]

(1) *CARIBBEAN.*—The term “Caribbean” includes Puerto Rico and the United States Virgin Islands.

(2) Conservation.—The term “conservation” means the use of methods and procedures necessary to bring a species of neotropical migratory bird to the point at which there are sufficient populations in the wild to ensure the long-term viability of the species, including—

- (A) protection and management of neotropical migratory bird populations;
- (B) maintenance, management, protection, and restoration of neotropical migratory bird habitat;
- (C) research and monitoring;
- (D) law enforcement; and
- (E) community outreach and education.

(3) *FUND.*—The term “Fund” means the Neotropical Migratory Bird Conservation Fund established by section 9(a).

[(3)](4) Secretary.—The term “Secretary” means the Secretary of the Interior.

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SEC. 5. FINANCIAL ASSISTANCE.

(a) * * *

* * * * *

(e) Cost Sharing.—

(1) Federal share.—The Federal share of the cost of each project shall be not greater than [25 percent]50 percent.

(2) Non-federal share.—

(A) Source.—The non-Federal share required to be paid for a project shall not be derived from any Federal grant program.

[(B) Form of payment.—

[(i) Projects in the united states.—The non- Federal share required to be paid for a project carried out in the United States shall be paid in cash.]

[(ii) Projects in foreign countries.—The non- Federal share required to be paid for a project carried out in a foreign country may be paid in cash or in kind.]

(B) FORM OF PAYMENT.—

(i) PROJECTS IN THE UNITED STATES AND CANADA.—*The non-Federal share required to be paid for a project carried out in the United States or Canada shall be paid in cash.*

(ii) PROJECTS IN LATIN AMERICA AND THE CARIBBEAN.—*The non-Federal share required to be paid for a project carried out in Latin America or the Caribbean may be paid in cash or in kind.*

* * * * *

SEC. 8. REPORT TO CONGRESS.

Not later than [October 1, 2002] *1 year after the date of enactment of the Neotropical Migratory Bird Conservation Improvement Act of 2004*, the Secretary shall submit to Congress a report on the results and effectiveness of the program carried out under [this Act, including recommendations] *this Act that includes—*

- (1) *recommendations concerning how the Act might be improved and whether the program should be continued[.]; and*
- (2) *a description of the activities of the advisory group convened under section 7(b).*

[SEC. 9. NEOTROPICAL MIGRATORY BIRD CONSERVATION ACCOUNT.

[(a) Establishment.—There is established in the Multinational Species Conservation Fund of the Treasury a separate account to be known as the “Neotropical Migratory Bird Conservation Account”, which shall consist of amounts deposited into the Account by the Secretary of the Treasury under subsection (b).]

[(b) Deposits Into the Account.—The Secretary of the Treasury shall deposit into the Account—

- [(1) all amounts received by the Secretary in the form of donations under subsection (d); and
- [(2) other amounts appropriated to the Account.]

SEC. 9. NEOTROPICAL MIGRATORY BIRD CONSERVATION FUND.

(a) ESTABLISHMENT.—*There is established in the Treasury a separate account to be known as the ‘Neotropical Migratory Bird Conservation Fund’, which shall consist of amounts deposited in the Fund by the Secretary of the Treasury under subsection (b).*

(b) DEPOSITS IN THE FUND.—*The Secretary of the Treasury shall deposit into the Fund—*

- (1) *all amounts received by the Secretary in the form of donations under subsection (d); and*
- (2) *other amounts appropriated to the Fund.*

(c) Use.—

- (1) In general.—Subject to paragraph (2), the Secretary may use amounts in the Account, without further Act of appropriation, to carry out this Act.

(2) Administrative expenses.—Of amounts in the Account available for each fiscal year, the Secretary may expend not more than 3 percent or up to ~~【\$80,000】~~*\$150,000*, whichever is greater, to pay the administrative expenses necessary to carry out this Act.

(d) Acceptance and Use of Donations.—The Secretary may accept and use donations to carry out this Act. Amounts received by the Secretary in the form of donations shall be transferred to the Secretary of the Treasury for deposit into the ~~【Account】~~*Fund*.

SEC. 10. AUTHORIZATION OF APPROPRIATIONS.

(a) *IN GENERAL.*—*There are authorized to be appropriated to the Fund to carry out this Act—*

(1) \$5,000,000 for each of fiscal years 2005 and 2006;

(2) \$10,000,000 for fiscal year 2007; and

(3) \$15,000,000 for fiscal year 2008.

(b) *AVAILABILITY.*—*Amounts made available under this section shall remain available until expended.*

(c) *ALLOCATION.*—*Of amounts made available under this section for a fiscal year, not less than 75 percent shall be expended for projects carried out outside the United States.*

(d) *LIMITATION ON EXPENDITURES FOR PROJECTS IN CANADA.*—*Amounts made available under this section for a fiscal year shall not be used for any project in Canada unless the amount available to carry out this Act for that fiscal year is greater than \$10,000,000.*

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