

Calender No. 718

115TH CONGRESS }
2d Session }

SENATE

{ REPORT
115-415 }

ALLOWING ALASKA TO IMPROVE VITAL OP-
PORTUNITIES IN THE RURAL ECONOMY
ACT

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION

ON

S. 1965
together with
SUPPLEMENTAL VIEWS



DECEMBER 5, 2018.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

89-010

WASHINGTON : 2018

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

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ALLOWING ALASKA TO IMPROVE VITAL OPPORTUNITIES IN THE RURAL ECONOMY ACT

DECEMBER 5, 2018.—Ordered to be printed

Mr. THUNE, from the Committee on Commerce, Science, and
Transportation, submitted the following

R E P O R T

[To accompany S. 1965]

[Including cost estimate of the Congressional Budget Office]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1965) to amend the Marine Mammal Protection Act of 1972 to protect the cultural practices and livelihoods of producers of Alaska Native handicrafts and traditional mammoth ivory products, and for other purposes, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

The purpose of S. 1965 is to amend the Marine Mammal Protection Act of 1972 (MMPA)¹ to do the following: clearly define traditional and authentic native handicrafts and clothing; explicitly state that these items may be sold in interstate commerce; and prohibit States from prohibiting the possession or sale of certain Alaska Native-produced ivory handicrafts that are legal under Federal law.

BACKGROUND AND NEEDS

Under the MMPA, any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean, described as Alaska Natives, may legally produce

¹ 16 U.S.C. §1361 et seq.

and sell traditional handicrafts from marine mammal parts.² These parts include walrus ivory and whale baleen (also known as whalebone). Alaska Natives also produce and sell raw ivory of extinct woolly mammoths, as well as handicrafts made from mammoth ivory. Walruses are not listed as endangered under the Endangered Species Act (ESA), but only Alaska Natives may harvest them and carve their ivory. Once carved and sold, anyone may resell or export Alaska Native art made of walrus ivory. Alternatively, bowhead whales, the most common source of baleen for Alaska Native crafts, are listed as endangered under the ESA, and bowhead baleen may be sold by Alaska Natives and be transported out of Alaska, but may not be subsequently resold or exported. Mammoth and mastodon ivory is generally unregulated as these species are extinct and not protected by Federal wildlife laws.

The sale of arts and crafts produced by Alaska Natives from legally and sustainably harvested marine mammal parts, especially in subsistence economies, provides critical financial benefits to Alaska Native villages that otherwise lack economic opportunities.³ In July 2016, the Fish and Wildlife Service (FWS) enacted a near-total ban on commercial trade in African elephant ivory, which does not affect ivory from marine species.⁴ A number of States, including New York,⁵ New Jersey,⁶ California,⁷ Hawaii,⁸ Oregon,⁹ and Washington,¹⁰ have broad laws prohibiting the sale or possession of ivory and do not specifically exempt mammoth ivory or items legally produced by Alaska Natives. While Federal law already preempts State law, public misunderstanding of State laws that broadly prohibit ivory and ivory products, in addition to FWS regulations on elephant ivory, has created a perception that marine mammal and mammoth ivory handicrafts produced by Alaska Natives are illegal. As a result of public confusion, Alaska Native artisans have experienced reduced demand for their artwork.¹¹

SUMMARY OF PROVISIONS

If enacted, S. 1965, the Allowing Alaska IVORY Act would amend the MMPA to do the following: clearly define traditional and authentic native handicrafts and clothing; explicitly state that these items may be sold in interstate commerce; and prohibit States from prohibiting the possession or sale of certain Alaska Native-produced ivory handicrafts that are legal under Federal law.

² 16 U.S.C. §1371(b).

³ U.S. Senate Committee on Environment and Public Works, Subcommittee on Fisheries, Water, and Wildlife. Field Hearing on Examining the Impacts of the Federal African Elephant Ivory Ban and Related State Laws, October 20, 2016. 114th Cong. 2nd Sess. Washington: GPO, 2016 (statement of Rosita Worl, president, Sealaska Heritage, Inc.).

⁴ U.S. Fish and Wildlife Service, "Endangered and Threatened Wildlife and Plants; Revision of the Section 4(d) Rule for the African Elephant (*Loxodonta africana*)," 81 Federal Register 36387, July 6, 2016.

⁵ New York Consolidated Laws, Environmental Conservation Law §11-0535-A.

⁶ New Jersey Status Annotated §23:2A-13.3(c)-(f).

⁷ California's Fish and Wildlife Code, §2022.

⁸ Hawaii Revised Statutes §183D-66.

⁹ Oregon Revised Statutes §49022.

¹⁰ Revised Code of Washington §77.15.135.

¹¹ National Public Radio, "Ivory Ban Hurts Alaska Natives Who Legally Carve Walrus Tusks," November 24, 2016 (<https://www.npr.org/2016/11/24/503036303/ivory-ban-hurts-native-alaskans-who-legally-carve-walrus-tusks>) (accessed July 25, 2018).

LEGISLATIVE HISTORY

S. 1965 was introduced on October 17, 2017, by Senator Sullivan (for himself and Senator Murkowski) and was referred to the Committee on Commerce, Science, and Transportation of the Senate. On September 5, 2018, the Committee met in open Executive Session and by voice vote ordered S. 1965 to be reported favorably with an amendment (in the nature of a substitute).

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

S. 1965—Allowing Alaska IVORY Act

S. 1965 would amend the Marine Mammal Protection Act of 1972 to prohibit any state or locality from banning the importation, sale, barter, or possession of an authentic native handicraft article of mammoth, mastodon, or walrus ivory or marine mammal bones that have been produced by an Alaska Native. Authentic native articles are defined by the bill as items composed of natural materials produced or fashioned through traditional native handicraft procedures.

Because S. 1965 would not change federal policy related to the sale of marine mammal bones, CBO estimates that implementing the bill would not affect the federal budget.

CBO estimates that enacting S. 1965 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting S. 1965 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

S. 1965 would preempt state and local laws governing the possession, trade, or sale of handicrafts or clothing produced by certain Alaska Natives using animal ivory or bone. That preemption would be a mandate as defined in the Unfunded Mandates Reform Act (UMRA). Although the bill would limit the application of state and local laws, it would impose no duty on state or local governments that would result in additional spending.

S. 1965 contains no private-sector mandates as defined by UMRA.

The CBO staff contacts for this estimate are Robert Reese (for federal costs) and Rachel Austin (for mandates). The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

S. 1965, as reported, would not create any new programs or impose any new regulatory requirements. Therefore, it would not subject any individuals or businesses to new regulations.

ECONOMIC IMPACT

Enactment of this legislation is not expected to have a negative impact on the Nation's economy and will provide positive impacts to rural Alaska Native communities.

PRIVACY

The reported bill is not expected to impact the personal privacy of individuals.

PAPERWORK

S. 1965 would not create increases in paperwork burdens if enacted.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title.

This section would provide that the bill may be cited as the "Allowing Alaska to Improve Vital Opportunities in the Rural Economy Act," or the "Allowing Alaska IVORY Act."

Section 2. Alaska Native handicrafts.

This section would restructure section 101(b) of the MMPA¹² to clearly define traditional and authentic native handicrafts and clothing and to explicitly state that authentic native articles of handicrafts and clothing may be sold in interstate commerce. This section also would prohibit States from prohibiting the importation, sale, trade, or possession of mammoth, mastodon, or walrus ivory or marine mammal bones, teeth, or baleen produced as a native handicraft.

SUPPLEMENTAL VIEWS OF SENATOR NELSON

The Allowing Alaska IVORY Act would restate the authority of Alaska Natives to sell handicrafts made from legally acquired marine mammal parts under the MMPA and ESA. This bill would also amend the MMPA to allow exemptions for the sale of Alaska Native-carved handicrafts made of mastodon and mammoth ivory. Carving and selling mammoth and mastodon ivory is already legal for Alaska Natives and non-Natives since mammoths and mastodons are extinct, and hence not covered by the MMPA or ESA. Since the commerce in marine mammal, mammoth, and mastodon

¹² 16 U.S.C. §1371(b).

ivory is already legal, further legislating of existing authorities is unnecessary. If enacted, this bill would be the first time the MMPA—the United States’ only marine mammal protective bill—covered non-marine mammal species. There are concerns from environmentalists that amending the MMPA in this way could weaken protections for marine mammals and create legal precedent for other non-marine mammal exemptions to be added in the future.

There are also concerns from wildlife protection groups about the potential unintended consequences of this bill to the global and domestic efforts to curb the illegal trade of elephant ivory. While the international trade in elephant ivory has been banned since 1990, global demand for ivory remains. Smugglers attempt to sell elephant ivory by claiming it is legal mammoth ivory, both of which look nearly identical to the untrained eye. It is also difficult to differentiate walrus, mammoth, and mastodon ivory. Enforcement of illegal ivory trade remains challenging because there is currently no instant, easy, and inexpensive test to differentiate these ivories.¹³

Due to concerns for the illegal elephant ivory trade, some States have passed bans that prohibit some combination of walrus, mammoth, and mastodon ivory and marine mammal parts in intrastate commerce. The Allowing Alaska IVORY Act would preempt these State laws. However, all of the existing State laws (except for New York’s¹⁴) exempt federally authorized products from their ivory prohibitions, thus allowing for continued intrastate commerce in Alaska Native-carved walrus, mammoth, and mastodon ivory and marine mammal parts.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in *italic*, existing law in which no change is proposed is shown in roman):

MARINE MAMMAL PROTECTION ACT OF 1972

[16 U.S.C. 1361 et seq.]

SEC. 101. MORATORIUM ON TAKING AND IMPORTING MARINE MAMMALS AND MARINE MAMMAL PRODUCTS.

[16 U.S.C. 1371]

(a) * * *

[(b) EXEMPTIONS FOR ALASKAN NATIVES.—Except as]

(b) **APPLICATION TO CERTAIN ALASKA NATIVES.**—(1) **DEFINITIONS.**—*In this subsection:*

(A) **AUTHENTIC NATIVE ARTICLE OF HANDICRAFTS AND CLOTHING.**—*The term “authentic native article of handicrafts and clothing” means an item composed wholly or in some significant respect of natural materials that is produced, decorated, or fashioned in the exercise of traditional*

¹³ Vigne, Lucy and Martin, Esmond. “China Faces a Conservation Challenge: The Expanding Elephant and Mammoth Ivory Trade in Beijing and Shanghai.” 2014. (http://saveetheelephants.org/wp-content/uploads/2014/12/2014_ChinaConservationChallenge.pdf)

¹⁴ New York State Law S. 7890. (<https://legislation.nysenate.gov/pdf/bills/2013/S7890>)

native handicrafts without the use of a pantograph, multiple carvers, or any other mass copying device.

(B) TRADITIONAL NATIVE HANDICRAFTS.—The term “traditional native handicrafts” includes weaving, carving, stitching, sewing, lacing, beading, drawing, and painting.

(2) APPLICATION.—Except as provided in section 109, the provisions of this Act shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking—

[(1) is for subsistence purposes; or]

[(2) is done] (A)(i) is for subsistence purposes; or

(ii) is done for purposes of creating and selling authentic native articles of handicrafts [and clothing: Provided, That only authentic native articles of handicrafts and clothing may be sold in interstate commerce: And provided further, That any edible portion of marine mammals may be sold in native villages and towns in Alaska or for native consumption. For the purposes of this subsection, the term “authentic native articles of handicrafts and clothing” means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing, and painting] and clothing; and

[(3)](B) in each case, is not accomplished in a wasteful manner.]

[Notwithstanding the preceding provisions of this subsection, when]

(3) LIMITATIONS.—Notwithstanding paragraph (2), if, under this Act, the Secretary determines any species or stock of marine mammal subject to taking by Indians, Aleuts, or Eskimos to be depleted, he may prescribe regulations upon the taking of such marine mammals by any Indian, Aleut, or Eskimo described in this subsection. Such regulations may be established with reference to species or stocks, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the purposes of this Act. Such regulations shall be prescribed after notice and hearing required by section 103 of this title and shall be removed as soon as the Secretary determines that the need for their imposition has disappeared. In promulgating any regulation or making any assessment pursuant to a hearing or proceeding under this subsection or section 117(b)(2), or in making any determination of depletion under this subsection or finding regarding unmitigable adverse impacts under subsection (a)(5) that affects stocks or persons to which this subsection applies, the Secretary shall be responsible for demonstrating that such regulation, assessment, determination, or finding is supported by substantial evidence on the basis of the record as a whole. The preceding sentence

shall only be applicable in an action brought by one or more Alaska Native organizations representing persons to which this subsection applies.

(4) *SPECIAL RULES.*—

(A) *INTERSTATE COMMERCE.*—*Only authentic native articles of handicrafts and clothing may be sold in interstate commerce.*

(B) *EDIBLE PORTIONS OF MARINE MAMMALS.*—*Any edible portion of a marine mammal may be sold in a native village or town in Alaska or for native consumption.*

(5) *PROHIBITIONS.*—*No State or political subdivision thereof shall prohibit the importation, sale, offer for sale, transfer, trade, barter, possession or possession with the intent to sell, transfer, trade, or barter of mammoth, mastodon, or walrus ivory, marine mammal bones, teeth, or baleen produced under this title by an Indian, Aleut, or Eskimo as an authentic native article of handicrafts and clothing.*

(c) *TAKING IN DEFENSE OF SELF OR OTHERS.*—It shall not be a violation of this Act to take a marine mammal if such taking is imminently necessary in self-defense or to save the life of a person in immediate danger, and such taking is reported to the Secretary within 48 hours. The Secretary may seize and dispose of any carcass.

(d) *GOOD SAMARITAN EXEMPTION.*—It shall not be a violation of this Act to take a marine mammal if—

(1) such taking is imminently necessary to avoid serious injury, additional injury, or death to a marine mammal entangled in fishing gear or debris;

(2) reasonable care is taken to ensure the safe release of the marine mammal, taking into consideration the equipment, expertise, and conditions at hand;

(3) reasonable care is exercised to prevent any further injury to the marine mammal; and

(4) such taking is reported to the Secretary within 48 hours.

(e) *ACT NOT TO APPLY TO INCIDENTAL TAKINGS BY UNITED STATES CITIZENS EMPLOYED ON FOREIGN VESSELS OUTSIDE THE UNITED STATES EEZ.*—The provisions of this Act shall not apply to a citizen of the United States who incidentally takes any marine mammal during fishing operations outside the United States exclusive economic zone (as defined in section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802)) when employed on a foreign fishing vessel of a harvesting nation which is in compliance with the International Dolphin Conservation Program.

(f) *EXEMPTION OF ACTIONS NECESSARY FOR NATIONAL DEFENSE.*—

(1) The Secretary of Defense, after conferring with the Secretary of Commerce, the Secretary of the Interior, or both, as appropriate, may exempt any action or category of actions undertaken by the Department of Defense or its components from compliance with any requirement of this Act, if the Secretary determines that it is necessary for national defense.

(2) An exemption granted under this subsection—

(A) subject to subparagraph (B), shall be effective for a period specified by the Secretary of Defense; and

(B) shall not be effective for more than 2 years.

(3)(A) The Secretary of Defense may issue additional exemptions under this subsection for the same action or category of actions, after—

(i) conferring with the Secretary of Commerce, the Secretary of the Interior, or both as appropriate; and

(ii) making a new determination that the additional exemption is necessary for national defense.

(B) Each additional exemption under this paragraph shall be effective for a period specified by the Secretary of Defense, of not more than 2 years.

(4) Not later than 30 days after issuing an exemption under paragraph (1) or an additional exemption under paragraph (3), the Secretary of Defense shall submit to the Committee on Armed Services of the House of Representatives and the Committee on Armed Services of the Senate notice describing the exemption and the reasons therefor. The notice may be provided in classified form if the Secretary of Defense determines that use of the classified form is necessary for reasons of national security.