

HB

506

# STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

## DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

OFFICE OF THE COMMISSIONER

POUCH D - JUNEAU 99811

April 26, 1977

Honorable Al Osterback  
Chairman  
House Resources Committee  
Pouch V  
Juneau, Alaska 99811

Dear Mr. Chairman:

Thank you for your letter of April 13 requesting our comments on House Bill 459 which would establish the position of Subsistence Economist within this department.

We support this bill and believe the establishment of this position would increase our ability to respond to Native issues and problems. It would also add expertise to aid in formulating basic State policy decisions.

We would appreciate the opportunity to testify on this bill when it is scheduled for committee action. A Fiscal Note has been submitted indicating a \$52.3 expenditure for FY '78. If we can provide additional information, we would be pleased to respond.

Yours truly,

  
H. Phillip Hubbard  
Commissioner



# Alaska State Legislature

## House

JUNEAU ALASKA May 4, 1977

Memo to: Sally

From: Ruth

George Utermohle, of Legislative Affairs, Research, has looked over HB 506, at our request, to find any possible problem areas in the bill.

Briefly, his comments are:

Most of the bill is the same as previous law. Exceptions are:  
page 1, Line 10, after "meeting" through line 13, after "sooner", is new.

page 2, Line 11, after "requested," through line 29, "made", is new.

page 3, Line 4 through line 16 is new.

According to Utermohle, the bill is a good way to handle some of the subsistence law problems.

Suggested changes in the new sections are:

page 2, Line 15, add "and report" after "investigation"

page 2, Line 19 through 21--this may not be possible since the information may not be available except in areas where harvest tickets are necessary. Even then the game involved may not have adequate records.

Page 3, Line 13, "biomass"-----this is a scientific term and would include all plant life, animal life, and any other parts of an ecosystem. The term should probably be replaced with another phrase, such as "biomass of the species under consideration" or something similar.

Suggested changes in existing language, to tie up currently existing problem areas:

Page 1, Line 10. include after "or"---"at a special meeting held after"----

Page 1, Line 16 and 17 (1)

There are currently problems in coordination between the Department of Fish and Game and the Department of Public Safety regarding regulations--the enforcement division doesn't see the regs until after they're adopted, and can't forstall problems until after they're created.



# Alaska State Legislature

## House

JUNEAU ALASKA May 4, HB 506

pg. 2

Suggested change is to add after "e idence:"---"or recommendation of Division of Fish and Wildlife Protection"

Page 3, Line 24 and 25, add similar wording as above.

Regarding the term "subsistence hunting" it is stressed that everyone is now a subsistence hunter, except trophy hunters. Where subsistence hunting is contrasted with recreational hunting, there is no definition of recreational hunting--so the phrase using the contrast actually means nothing.

Another problem area could be that departmental staff are not listed among the ones able to call a meeting. Also, the bill doesn't clarify what "area of the public" the 100 or 25 people are from, as mentioned on page 1 Line 19 through 22.

Other than that, Utermohle says it is a "good" bill. Possibly either a sponsor substitute or a committee substitute would be easier than amendments.

Thanks.

Hope this helped,

RA

TO: The Honorable Rep. Osterbach, Chairman, and members  
of the House Resources Committee

FROM: Peggy Berck, Alaska Legal Services Corporation

RE: H.B. 506

DATED: May 4, 1977

1. Introduction The clients of Alaska Legal Services corporation are strongly in support of H.B. 506. Although I shall be unable to attend the Resources Committee hearing scheduled for May 5, 1977, in order to present oral testimony on this bill, I have drafted the following written comments. My absence should not be construed as a reflection of any disinterest on behalf of my clients with respect to this bill. I shall be in Chicago on that date in order to present testimony before the U.S. House Subcommittee relative to the impact of D-2 legislation now under consideration upon the subsistence activities of rural Alaskans. Should there be additional opportunity for testimony on this bill, I shall be available any time after May 8, 1977.

2. Summary H.B. 506 would essentially accomplish three things. First, the Bill would permit the declaration of a subsistence hunting unit within 120 days of either; the receipt of a petition, or, a majority vote of the active local advisory committees, calling for the establishment of a subsistence area.

Second, the Bill would mandate the Department of Fish and Game to provide the petitioners or the advisory committee with information they can use to determine for themselves whether a subsistence zone is needed. At the hearing, the petitioners or advisory committees would have the opportunity to present this information in the posture most suited to their position and to dispute the information that the Board would most likely base its determination upon.

Third, the Bill sets forth certain standards upon which the Board must make its determination. These standards would preclude the Board from making decisions in an arbitrary or capricious manner and, furthermore, would provide some means to challenge a decision if not based on those designated standards.

3. Why this Legislaton is Needed Current law provides that the Board of Game may delcare a subsistence zone only once

a year at their annual meeting. H.B. 506 would allow the proponents to raise the issue at any time. This is necessary since the issue may become critical at a time other than that set for the annual meeting.

4. The subsections (Section 1 (c)(2) - (4) requiring the Department to investigate and submit a factual report to the proponents provides the proponents with an opportunity to present their case upon biological evidence rather than merely upon their personal observations. Thus the amendments require the Board to provide information that currently they do not ordinarily have to provide.

This requirement is needed in order to allow the proponents more input into the determination, by giving them the information necessary to present their case and to question the Board of Game's determination.

This information is to be given to the proponents at least 45 days prior to the determination by the Board of Game as the time for the public hearing.

Additionally, Section 1(c) (1) would require that one department game biologist responsible for that particular unit and two members of the Board of Game attend the public hearing. This is needed so that responsible and informed persons might be able to answer the questions of the people living in the area to be affected. Furthermore, it is essential that the Board of Game have personal, first hand knowledge of what is happening in a particular area requesting subsistence regulations.

5. The subsections (Section 4, subsections (f) (1) - (4)) setting forth the standards upon which the Board must make its determinations are necessary in order to prevent an improper delegation of the legislative function which licenses the fact finder to create its own standards in each case. Without reasonably clear standards there exists an invitation to arbitrary and capricious determination.

6. The Board of Game is reluctant to use this statute for various reasons; such as, that they do not want to establish any precedents and that they can accomplish the same result without creating subsistence zones. This attitude does not follow the intent of the legislature which is to create areas of hunting which are to be used primarily by the subsistence user. The effect of the H.B. 506 would require the Board to take a serious look at each proposal for a subsistence zone.

cc: Rep. Nels Anderson

HB 506      An Act relating to subsistence hunting.

Nels Anderson, the sponsor testified in favor of the bill

1 IN THE HOUSE

BY ANDERSON

2 HOUSE BILL NO. 506

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to subsistence hunting."

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 \* Section 1. AS 16.05.257 is repealed and re-enacted to read:

9 Sec. 16.05.257. SUBSISTENCE HUNTING REGULATIONS. (a) The Board  
10 of Game, at its regularly scheduled annual meeting, ~~or within 120 days~~ *at a special meeting held*  
11 ~~from~~ *after* the vote conducted under (2) of this subsection, or within 120 days  
12 ~~from~~ *after receipt* the ~~date~~ a petition ~~is~~ submitted under (3) or (4) of this subsec-  
13 tion, whichever comes sooner, may adopt regulations providing for subsis-  
14 tence hunting in a game management unit or subunit or a portion of a  
15 unit or subunit upon

- 16 (1) recommendation of the department, based on biological  
17 evidence; *OR RECOMMENDATION OF DIV. OF FISH & WILDLIFE*  
18 (2) the majority vote of the active local advisory committee *S*  
19 for that game management unit or subunit;  
20 (3) the written petition of not less than 100 interested  
21 residents of that game management unit or subunit; or  
22 (4) the written petition of not less than 25 interested resi-  
23 dents of an area which is requested for establishment as a subsistence  
24 area within a game management unit or subunit.

25 (b) The regulations may include but are not limited to the  
26 following:

- 27 (1) the establishment of subsistence hunting areas;  
28 (2) the regulation of transportation methods and means to  
29 protect subsistence hunting within subsistence hunting areas, including

1 the prohibition or limitation of pack animals and mechanized vehicles and  
2 aircraft, other than watercraft or wheeled vehicles operating on a road  
3 maintained by public funds;

4 (3) the establishment of open and closed seasons and areas to  
5 protect subsistence hunting;

6 (4) the limitation of hunting to only one sex of the animal.

7 (c) At least 45 days before the determination made in (a) and (b)  
8 of this section the department shall,

9 (1) after reasonable notice, hold public hearings, at least  
10 one of which must be at or in close proximity to the area for which a  
11 subsistence area is requested, with at least one department game biolo-  
12 gist responsible for the unit or subunit in which the subsistence area  
13 is located and two members of the Board of Game in attendance at these  
14 hearings;

15 (2) make an adequate biological investigation, <sup>of report</sup> including  
16 but not limited to the carrying capacity of the species under considera-  
17 tion, the concentration of other species, and competition among species  
18 which are found in the unit or subunit under consideration;

19 (3) make an adequate report of the numbers of the species that  
20 are being harvested and who is harvesting them, including but not limited  
21 to residents, nonresidents, subsistence hunters and recreational hunters;

22 (4) make the reports submitted under (2) - (3) of this sub-  
23 section available to the advisory committees voting under (a)(2) of this  
24 section or to the persons who petitioned under (a)(3) or (4) of this  
25 section.

26 (d) Comments to the reports submitted under (c)(2) - (3) of this  
27 section may be submitted to the Board of Game at least 10 days before a  
28 determination to adopt regulations under (a) and (b) of this section is  
29 made.

1 (e) A petition submitted under (a)(3) or (4) of this section shall  
2 contain a complete description of the area requested as a subsistence  
3 area, a specification of the species within the area considered necessary  
4 for subsistence use, and a statement as to why a subsistence area is  
5 being requested, including but not limited to the availability of the  
6 species for subsistence harvest and the competition between subsistence  
7 and nonsubsistence users.

8 (f) Subject to (g) of this section, the determination by the Board  
9 of Game to provide for subsistence hunting shall be based on the fol-  
10 lowing:

- 11 (1) the past and present dependence of the area for subsis-  
12 tence use of the species;
- 13 (2) the extent of the biomass in the area;
- 14 (3) the population trends of the species in the area; and  
15 (4) whether the population is able to support nonsubsistence  
16 harvest.

17 (g) No subsistence area may be created under this section if the  
18 Board of Game determines that biological evidence indicates that the  
19 creation of such an area is likely to adversely affect a resource in that  
20 it would fall below the level of sustained yield determined to be  
21 adequate.

22 (h) The Board of Game at any time may review and change the boun-  
23 daries of a subsistence area upon

- 24 (1) the recommendation of the department, based on biological  
25 evidence; *Recommendations of the Dir. of Fish & Wildlife Protection*  
26 (2) the written petition of not less than 25 interested resi-  
27 dents of that area; or  
28 (3) the majority vote of the active local advisory committees  
29 for that area.

1 (i) The department shall submit a report to the legislature during  
2 the first 10 days of each <sup>(REGULAR)</sup> legislative session beginning after January 1,  
3 1977. The report shall include, but is not limited to, a listing of the  
4 specific subsistence areas established or modified during the preceding  
5 year and the species subject to subsistence use within those areas.

6 (j) In this section

7 (1) "subsistence hunting" means the taking of game animals by  
8 a state resident for food or clothing for personal or immediate family  
9 use;

10 (2) "subsistence hunting area" means an area designated by  
11 the board as primarily important for subsistence use and in which it is  
12 unlikely that subsistence needs will be met if recreational hunting,  
13 including hunting for trophy purposes, is permitted or if certain methods  
14 and means are continued.

15 [ DEFINE RECREATIONAL HUNTING AS OPPOSED TO  
16 SUBSISTENCE HUNTING ]  
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HB 506

TANANA VALLEY SPORTSMEN'S )  
ASSOCIATION, INC., and )  
MARK A. WARTES, )

Plaintiffs, )

vs. )

THE STATE OF ALASKA, )

Defendant. )

O P I N I O N

No. 75-1958

The declining population of the Western Arctic caribou herd brought about a meeting of the Alaska Board of Game in Fairbanks commencing September 20, 1976. The testimony documented the decrease of caribou, and game biologist Jim Davis testified, without contradiction, that, "Biologically, and considering the caribou population exclusively, it would be desirable to have zero human utilization." Minutes, Public Hearing, p. 13. Presumably this means that it would be best for the caribou herd if no caribou were killed by people.

Apparently the Game Board showed more concern with what it considered to be the needs of the people of the western Arctic than with the declining caribou population, since the final decision was to allow the taking of 3,000 bulls. Only hunters issued permits are allowed to take caribou. The 3,000 permits are to be distributed on the basis of a quota system with a set number to be distributed by department personnel in each village in the western Arctic.

September 1976 read as follows:

"(17) the taking of caribou in Units 23, 24, 26A and 26B shall be by permit only and such permits shall be issued by department agents in designated villages. Quotas of permits for each village and persons living outside of villages shall be based on the recommendation of village councils and corporations on the basis of population, need, availability of other food sources

and employment, and other facts which may assist in meeting the minimum sustenance needs."

It is clear that the intent of the original emergency regulation was to restrict the issuing of permits to members of native corporations and that the only reason for issuing any permits was the Board's finding that the people of the regions in question need caribou. No facts are set forth to show why the Game Board decided the caribou were needed to maintain minimum sustenance needs.

A permanent regulation became effective on December 29, 1976. The permanent regulation set forth the number of permits to be issued by department personnel from each village. As the State points out in its brief at page 2:

" . . . the change in wording from the emergency regulation to the permanent regulation had nothing to do with the criteria by which permits were to be issued to individual applicants. A close reading shows that the deleted phrases indicated the method by which the total number of permits were to be allocated to issuing agents in different parts of the affected areas. The deletion was made because the next section of the regulations actually made this allocation, so the deleted phrases were totally unnecessary. The specific allocations were made by the Board using the criteria specified, namely minimum sustenance needs, thus underlining the Board's directive to the Department that need be a criteria for issuance of individual permits." State's Opposition Memorandum, p. 2.

made in permit issuance are between sports hunters and true sustenance or 'need' hunters". State's Opposition Memorandum, p. 3.

The State justifies this differentiation between "sports" hunters and "need" hunters as follows:

" . . . this distinction is no more invalid than is a graduated income tax or Aid to Dependent Children -- all cases in which public resources are allocated in such a manner as to avoid undue hardship on those truly in need. Thus 'need' is a perfectly proper and legal basis on which to allocate preferences among users of this resource." State's Opposition Memorandum, p. 3, 4.

The crux of the controversy is clear: Does the Game Board have the authority to allocate the resource, i.e., caribou, on the basis of the "needs" of some of the people to the exclusion of the rest at a time when any "human exploitation" of the caribou is unwise from a game management standpoint?

It is clear to the Court that the actions of the Board violate the following provisions of the Constitution of the State of Alaska:

"The legislature shall provide for the utilization, development and conservation of all natural resources belonging to the State . . . for the maximum benefit of its people." Alaska Constitution, Article VIII, §2.

"Whenever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." Alaska Constitution, Article VIII, §3.

"Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses." Alaska Constitution, Article VIII, §4.

"Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation." Alaska Constitution, Article VIII, §17.

Based upon the testimony of Jim Davis and the recommendation of the Department staff, no caribou should be killed by people. Allowing the harvesting of 3,000 bulls because of an alleged need is certainly not conserving caribou for the maximum benefit of all the people of Alaska. No convincing argument can be made that the animals are being reserved to the people for common use or that they are being utilized on the sustained yield principle. It also seems clear that the designation of permits for hunting caribou to those claiming to need them is regulating the resource unequally.

There is no question that the Game Board has the authority to limit the taking of fish and game for the purpose of preserving the resource. This does not mean that the Board has the authority to distribute the resource to a certain designated category of persons (i.e., "the needy") while specifically ignoring uncontradicted testimony that no caribou should be killed by people.

The State argues that AS 16.05.257 allows the Game Board to designate who may take certain animals on the basis of need. This statute was adopted in 1975 and amended in 1976. It allows the Board of Game to adopt regulations providing for subsistence hunting in a game management unit. AS 16.05.257(h)(1) defines "subsistence hunting" as the taking of game animals by a state resident for food or clothing for personal or immediate family use. There is no qualification that the "subsistence hunter" "need" the game animal.

AS 16.05.257 cannot be read to allow the Game Board to establish a subsistence hunting game management unit allowing the taking of animals from a depleted herd when the uncontradicted biological evidence militates against further depletion.


Additionally, even if the Game Board had the authority to designate who could hunt or how many permits could issue on the basis of need, proper guidelines and regulations would have to be established to determine need. The Game Board did not publish or adopt any guidelines or regulations telling why 3,000 permits were issued or explaining reasons for the allotment of a certain number of permits to a certain village or town area.

In summary, the Court finds that the Board of Game has violated the applicable Constitutional requirements set forth herein. It cannot justify its actions by relying on AS 16.05.257, and it has failed to adopt or publish standards and guidelines for the allotment of a certain number of permits to a certain area.

Plaintiff's Motion for Summary Judgment is GRANTED. Defendant is restrained from enforcing that emergency regulation pertaining to the taking of caribou as adopted in September of 1976 and amended in December of 1976.

An Order will enter accordingly.

DATED at Fairbanks, Alaska, this 6 day of April, 1977.

  
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JAMES R. BLAIR  
Superior Court Judge