

**SB**

**19**

# HOUSE COMMITTEE REPORT

(7)  
Date Referred to Committee: April 18, 1997

FURTHER REFERRALS:

Date of Committee Action: 4/23/97

The JUDICIARY Committee considered:

SB 19 am

SENATE BILL NO. 19 am

REPEAL FED ENFORCEMENT DUTIES/F&G COMSNR

“An Act relating to enforcement of federal laws relating to fish and game; and repealing the power and duty of the commissioner of fish and game to assist in the enforcement of federal laws relating to fish and game.”

recommends it be replaced with the following committee substitute \_\_\_\_\_  the same title  
 a new title

additional referral to \_\_\_\_\_ Committee  
 attached amendment(s)

ADOPTS: \_\_\_\_\_ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) \_\_\_\_\_

APPROVES PREVIOUS: (Dept/Date) \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

zero fiscal note(s) \_\_\_\_\_

zero fiscal note(s) PLIB. SAFETY F&G

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>[Signature]</i> CROFT				✓
<i>Brian S. Porter</i> PORTER	✓			
<i>[Signature]</i> GREEN			✓	
<i>[Signature]</i> JAMES	✓			
<i>[Signature]</i> BUNDE			✓	
<i>[Signature]</i> BERKOWITZ			✓	

CHAIR'S SIGNATURE \_\_\_\_\_

FISCAL NOTE

No. 1

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO: . Version: SB 19

(S) Publish Date: 2/6/97

Revision Date: \_\_\_\_\_ Dept. Affected: Public Safety  
 Title: An Act relating to the Commissioner of Fish BRU: Fish and Wildlife Protection  
Game Component: Detachments  
 Sponsor: Senator Sharp  
 Requestor: S. RES COMPONENT SERIAL NO. 0490

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
---------	-----	-----	-----	-----	-----	-----

CHANGE IN REVENUES ( ) Revenue Code	-0-	-0-	-0-	-0-	-0-	-0-
--	-----	-----	-----	-----	-----	-----

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 97) impact: \$ -0-

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)  
 This Bill will not impact this Department's programs or budget.

Prepared By: Lt. Joel L. Hard Phone: 269-5409  
 Division: Fish and Wildlife Protection Date: January 31, 1997  
 Approved by Commissioner: Deel Smith Date: 1/31/97  
 Agency: Ronald L. Otte, Department of Public Safety

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE  
 For further distribution information call the Governor's Legislative Office

04/21/97

**AMENDMENT**

OFFERED IN THE HOUSE

BY: Representative Berkowitz

TO: House CS for Senate Bill 19 (RES)

Page 1, line

Following "is", delete "repealed"

Insert: "amended to read:

**(1) to assist the United States Fish and Wildlife Service in the enforcement of federal laws and regulations pertaining to fish and game in a manner consistent with state policy, law, and regulation;"**

AS 16.10.070 — community, Annette 901 (Alaska 1961), bounds, 369 U.S. 45, 32).

t of wounded game 05.

3.

ned

aid Acts

rant  
ipment

is the principal  
ner shall be a  
, management,  
§ 4 art I ch 94

ch. 14, SLA 1996  
is section made by  
tments made on or

land remanded on  
t. 552, 7 L. Ed. 2d

Fisheries Entry  
54).

ll  
division heads,  
necessary for the

l aquatic plant  
ng of the state;

(3) have necessary power to accomplish the foregoing including, but not limited to, the power to delegate authority to subordinate officers and employees of the department. (§ 4 art I ch 94 SLA 1959; am § 1 ch 110 SLA 1970)

**Opinions of attorney general.** — The commissioner of fish and game has the power to adopt procedural rules to implement AS 16.05.870 and to establish by regulation the standards under which permits will be issued under AS 16.05.870. March 4, 1982 Op. Att'y Gen.

Under existing statutory and regulatory provisions the progeny of birds held in captivity under a collecting permit from the Department of Fish and Game do not automatically become the property of the permittee; they remain subject to the same ownership interest the state retains in the adults, unless the permit and applicable regulations specify otherwise. Oct. 20, 1987 Op. Att'y Gen.

It is well within the authorities of the Board of Game under AS 16.05.255(a) and the Department of Fish and Game under this section to determine by regulation the point at which certain animals are deemed feral and subject to whatever game regulations the board may wish to adopt. A board or departmental regulation defining "feral animal" would be applicable statewide regardless of land ownership. July 30, 1987 Op. Att'y Gen.

In light of the commissioner's statutory charge to "manage, protect, maintain, improve, and extend the fish . . . resources of the state," emergency orders can be issued to protect sustained yield, based on conservation concerns. Aug. 1, 1990 Op. Att'y Gen.

**NOTES TO DECISIONS**

**Veto power.** — The Commissioner of the Department of Fish and Game does not have the authority to effectively veto a decision of the Board of Fisheries.

Peninsula Mktg. Ass'n v. Rosier, 890 P.2d 567 (Alaska 1995).

*Sec. 16.05.030. Status of commissioner. [Repealed, § 40 ch 206 SLA 1975.]*

**Sec. 16.05.040. Compensation of commissioner.** The commissioner is entitled to the compensation fixed by law and, subject to appropriate state travel regulations, is entitled to reimbursement for actual and necessary traveling and other expenses incurred in the discharge of official duties. (§ 5 art I ch 94 SLA 1959)

**Sec. 16.05.050. Powers and duties of commissioner.** The commissioner has, but not by way of limitation, the following powers and duties:

- (1) to assist the United States Fish and Wildlife Service in the enforcement of federal laws and regulations pertaining to fish and game;
- (2) through the appropriate state agency and under the provisions of AS 36.30 (State Procurement Code), to acquire by gift, purchase, or lease, or other lawful means, land, buildings, water, rights-of-way, or other necessary or proper real or personal property when the acquisition is in the interest of furthering an objective or purpose of the department and the state;
- (3) under the provisions of AS 36.30, to design and construct hatcheries, pipelines, rearing ponds, fishways, and other projects beneficial for the fish and game resources of the state;
- (4) to accept money from any person under conditions requiring the use of the money for specific purposes in the furtherance of the protection, rehabilitation, propagation, preservation, or investigation of the fish and game resources of the state or in settlement of claims for damages to fish or game resources;
- (5) to collect, classify, and disseminate statistics, data and information that, in the commissioner's discretion, will tend to promote the purposes of this title except AS 16.51 and AS 16.52;
- (6) to take, capture, propagate, transport, buy, sell, or exchange fish or game or eggs for propagating, scientific, public safety, or stocking purposes;
- (7) under the provisions of AS 36.30, to provide public facilities where necessary or proper to facilitate the taking of fish or game, and to enter into cooperative agreements with any person to effect them;
- (8) to exercise administrative, budgeting, and fiscal powers;
- (9) under the provisions of AS 36.30, to construct, operate, supervise, and maintain vessels used by the department;

# STATE OF ALASKA

TONY KNOWLES, GOVERNOR

## DEPARTMENT OF PUBLIC SAFETY

OFFICE OF THE COMMISSIONER

P.O. BOX 111200  
JUNEAU, ALASKA 99811-1200  
PHONE: (907) 465-4322  
FAX: (907) 465-4362

April 8, 1997

The Honorable Bert Sharp  
Alaska State Senate  
Alaska Capitol, Room 516  
Juneau, AK 99801-1182

Dear Senator Sharp:

I am very concerned about the impact of Senate Bill 19 on the ability of the Division of Fish & Wildlife Protection (FWP) to cooperate and work with federal agencies in protecting Alaska's fish and game resources. During a phone conversation with Deputy Commissioner Smith earlier this session you indicated the legislation was not intended to effect FWP in their enforcement activities. However, it appears from the bill's current language that it may well have an effect on FWP officers in the performance of their enforcement duties.

I have enclosed a letter from the Attorney General which sets out the legal issues the Department of Law feels will be issues if the legislation becomes law. While I cannot comment with any degree of authority on the legal issues, I do see operational problems for FWP personnel.

Currently FWP troopers are "cross designated" and can enforce federal wildlife laws. It appears that under the current wording of the proposed legislation they may be precluded from taking any enforcement action on federal violations. Even if their involvement was limited to the gathering of evidence the defendants would most certainly make an effort to prevent the introduction of the evidence based on the language in SB 19 if it becomes law.

Additionally, "cross designation" works both ways and federal officers are not likely to provide assistance to the state officers since the state officers do not provide reciprocal assistance to them.

I see the above examples as potentially detrimental to the fish and games resources of the State of Alaska. Therefore, I urge you to craft language that will not tie the hands of the FWP troopers who work daily to ensure that Alaskans can enjoy and utilize the fish and wildlife bounty of this great state.

Sincerely,



Ronald L. Otte  
Commissioner

# STATE OF ALASKA

TONY KNOWLES, GOVERNOR

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300  
JUNEAU, ALASKA 99811-0300  
PHONE: (907) 465-3600  
FAX: (907) 465-2075

April 8, 1997

Representative Bill Hudson, Co-Chair  
Representative Scott Ogan, Co-Chair  
and members  
House Resources Committee  
Alaska State Legislature, State Capitol

Dear Representatives Hudson, Ogan,  
and members of the House Resources Committee:

The present version of Senate Bill 19 prohibits a state employee from assisting with the enforcement of federal fish and game laws that are "in conflict with" Alaska fish and game laws. The Department of Law has the following concerns about implementing that bill if it becomes law.

I believe the principal purpose of the bill is to prevent the state from assisting with implementation of the federal subsistence law, Title VIII of ANILCA. That law, following the *McDowell* decision, differs from the present state law, AS 16.05.258, regarding who is eligible for the subsistence priority.

The term "in conflict with," however, could be applied outside of the subsistence context. That is because the term is inherently vague. Courts have given it various meanings.

A common interpretation is that there is "conflict" between two laws when one law allows an activity that the other law prohibits, and vice versa. *Cozart v. Carran*, 11 N.E.2d 245 (Ohio 1937); *Otto v. Wearty*, 27 N.E. 2d 190, 192 (Ohio App. 8 Dist., 1940); *City of Columbus v. Glascock*, 189 N.E.2d 889, 891 (Ohio App. 1962); *Village of Struthers v. Sokol*, 140 N.E. 519, 521 (Ohio 1923); *City of Portland v. Jackson*, 826 P.2d 37, 43 (Or.App. 1992). Thus, laws that are different but are "compatible as a whole" are not in conflict. *Id.* Similarly, "in conflict with" does not necessarily mean different from. *In re Robertson*, 20 F.Supp. 270, 273 (N.D.Tex. 1936). For two laws to be "in conflict", it is not necessary that they are directly opposite, but rather that they are incompatible such that both could not apply in a given situation. *Spencer v. State*, 520 N.E.2d 106, 109 (Ind.App. 1 Dist. 1988).<sup>1</sup>

---

<sup>1</sup> Ironically, under that interpretation, the federal and state subsistence laws may not be "in conflict." Since ANILCA applies only to "public lands" and AS 16.05.258 applies elsewhere, there is no instance where they would legally overlap, that is, "apply in a given situation."

The courts themselves are in conflict over the meaning of the term. In one opinion, laws that punished the same act were "in conflict." *People v. Zook*, 197 P.2d 851, 852 (Cal. App. 1948). In another opinion, laws that identically defined and prohibited an act, and even imposed different penalties, were not "in conflict." *Cincinnati v. Thompson*, 643 N.E.2d 1157, 1172 (Ohio App. 1994).

Besides legal ambiguity, there are practical situations where the bill's impact is unclear. Presently, state fish and wildlife protection officers are "cross deputized" to enforce federal wildlife laws. The present bill would likely prevent a state officer from arresting, reporting, or even collecting evidence of violations of federal subsistence laws. In that event, the officer may have to formally revoke any oath he or she has taken to uphold and enforce federal law. If a state official were inadvertently or indirectly involved in gathering any particular evidence, the defendant could ask the court to prohibit that evidence from being introduced at trial. It could handicap the entire prosecution of the crime. *See Wallace v. State*, Op. No. 1514 (Alaska App., Feb. 28, 1997).

In addition to the federal subsistence law, Alaska fish and wildlife protection officers are called on to assist the enforcement and prosecution of other federal wildlife laws, such as the Marine Mammal Protection Act ("MMPA"), the Endangered Species Act ("ESA"), the Magnuson Act ("MFCMA"), and the Migratory Bird Treaty Act. Except for the ESA (See AS 16.20.180-.210), there are no Alaska equivalents to those laws, and therefore, no direct conflict between federal and state enactments. There are, however, disagreements about how the federal laws are being implemented. For example, Alaska has objected to proposed listings under the ESA and to federal management actions inside state waters under the MFCMA.

There are also instances where the courts have concluded that federal laws have preempted state laws in certain areas. For example, Alaska laws regulating certain activities on the Walrus Island State Game Sanctuary are preempted by the MMPA. *State v. Arnariak*, 893 P.2d 1273 (Alaska 1995). The only effective way for state managers of the Sanctuary to protect the walrus population is through that federal law. It is uncertain whether those situations -- where the state differs with certain steps taken to implement federal law or where the federal law has displaced state law - would be interpreted as "conflicts" under this bill.

Cross deputization works both ways. If the state stops assisting with the enforcement of federal wildlife laws, officers of the National Marine Fisheries Service (NMFS), the Fish and Wildlife Service, and the Bureau of Land Management would have little incentive to enforce Alaska wildlife laws.

It is important to realize that combined enforcement actions have been very successful. For example, in 1992 an effort involving U.S. Coast Guard vessels and aircraft, NMFS agents, and state officers documented illegal bottom trawling in state waters. Joint teams boarded and inspected approximately fifty vessels, and in the end, thirteen vessels were convicted. The state recovered more than six million dollars in criminal and civil fines. Illegal trawling has not been

Rep. Bill Hudson, Co-Chair  
Rep. Scott Ogan, Co-Chair

April 8, 1997  
Page 3

detected since.

If federal cooperation is withdrawn in response to this bill, the Department of Public Safety does not have resources to fill the gap. As a result, fewer overall violations of Alaska fish and game law would be detected and prosecuted.

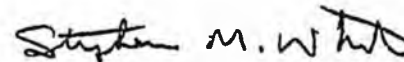
It is not clear whether the bill governs more than law enforcement. Presently, state officials exchange information with federal subsistence counterparts, and they comment on proposals to the Federal Subsistence Board. They also desire to participate in a joint committee that reviews technical information in proposals to the Federal Subsistence Board. If those activities are prohibited, Alaska may miss opportunities to positively affect federal subsistence decisions.

I offer these comments hoping that the intent for Senate Bill 19 will be clarified as the bill is being considered by the House Resources Committee.

Sincerely,

BRUCE M. BOTELHO  
ATTORNEY GENERAL

By:



Stephen M. White  
Assistant Attorney General

cc: Senator Bert Sharp  
Commissioner Ron Otte  
Colonel John Glass  
Pat Pourciot  
Deborah Behr  
Chrystal Smith

SMW:lt

0-LS0173\VE  
Utermohle  
4/15/97

HOUSE CS FOR SENATE BILL NO. 19(RES)  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTIETH LEGISLATURE - FIRST SESSION

BY THE HOUSE RESOURCES COMMITTEE

Offered:  
Referred:

Sponsor(s): SENATORS SHARP, Taylor, Donley

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to enforcement of federal laws relating to fish and game; and  
2 repealing the power and duty of the commissioner of fish and game to assist  
3 in the enforcement of federal laws relating to fish and game."

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

5 \*Section 1. AS 16.05.050(1) is repealed.