

**ALASKA STATE LEGISLATURE**  
**SENATE RESOURCES STANDING COMMITTEE**

April 7, 2003

3:31 p.m.

**MEMBERS PRESENT**

Senator Thomas Wagoner, Vice Chair  
Senator Fred Dyson  
Senator Ralph Seekins  
Senator Ben Stevens  
Senator Kim Elton  
Senator Georgianna Lincoln

**MEMBERS ABSENT**

Senator Scott Ogan, Chair

**COMMITTEE CALENDAR**

SENATE BILL NO. 97

"An Act relating to public interest litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."

MOVED SB 97 OUT OF COMMITTEE

CONFIRMATION HEARING: Kevin Duffy, Commissioner, Alaska Department of Fish and Game

**PREVIOUS ACTION**

SB 97 - See Resources minutes dated 3/28/03.

**WITNESS REGISTER**

Al Sundquist  
3384 Mt. Vernon Ct.  
Anchorage, AK 99503

**POSITION STATEMENT:** Opposed to SB 97

Janel Wright  
Disability Law Center  
3330 Arctic Blvd. #103  
Anchorage, AK 99503

**POSITION STATEMENT:** Opposed to SB 97

June Pinnell-Stephens  
3140 Roden Lane

Fairbanks, AK 99709

**POSITION STATEMENT:** Opposed to SB 97

Craig Tillery  
Assistant Attorney General  
Department of Law  
1031 W 4th Ave.  
Anchorage, AK 99501

**POSITION STATEMENT:** Explained the changes to the proposed committee substitute to SB 97

Ken Jacobus  
509 W Third  
Anchorage, AK 99501

**POSITION STATEMENT:** Opposed to the proposed committee substitute to SB 97

Al Burch  
PO Box 884  
Kodiak, AK 99615

**POSITION STATEMENT:** Supports the confirmation of Mr. Duffy as ADF&G commissioner

Chris Garcia  
PO Box 203  
Kenai, AK 99611

**POSITION STATEMENT:** Opposed to Mr. Duffy's appointment as commissioner of ADF&G

Janet Clucas  
72880 Sterling Hwy  
Clam Gulch, AK 99568

**POSITION STATEMENT:** Does not support Mr. Duffy's appointment if he has been involved in the decline of the set net fishery.

Lynn Levensgood  
1008 16th Ave. Suite 200  
Fairbanks, AK 99701

**POSITION STATEMENT:** Opposed to Mr. Duffy's confirmation.

Ken Duckett  
United Southeast Alaska Gillnetters  
No address provided

**POSITION STATEMENT:** Supports Mr. Duffy's confirmation.

Jerry McCune  
United Fishermen of Alaska

211 4th Street, Suite 110  
Juneau, Alaska 99801-1172  
**POSITION STATEMENT:** Supports SB 97

**ACTION NARRATIVE**

**TAPE 03-24, SIDE A**  
Number 0001

**VICE-CHAIR TOM WAGONER** called the Senate Resources Standing Committee meeting to order at 3:31 p.m. Senators Dyson, Seekins, Elton, Lincoln and Wagoner were present. The committee took up SB 97.

#SB 97

**SB 97-ATTY FEES: PUBLIC INTEREST LITIGANTS**

VICE-CHAIR WAGONER told members that a committee substitute (CS) for SB 97, labeled Version D, had been prepared that is no longer specific to natural resource related litigation. He said he plans to move this bill to the Senate Judiciary Committee and asked participants to limit their testimony to 2 or 3 minutes.

SENATOR SEEKINS moved to adopt Version D of SB 97 as the working document of the committee.

SENATOR ELTON objected for the purpose of hearing public testimony.

VICE-CHAIR WAGONER took public testimony.

MR. AL SUNDQUIST spoke in opposition to SB 97. He told members that laws of questionable constitutionality must be challenged in the public interest. Public interest litigation provides the most effective way to defend Alaskan's constitutional rights against encroachments by state or local governments. SB 97 would jeopardize the ability of individuals to hold legislators accountable for misjudgments or misconduct. He asked committee members to reject SB 97.

MS. JANEL WRIGHT, legal director for the Disability Law Center, stated opposition to SB 97 for the following reasons. The public interest litigant rule protects the public's ability to challenge state decisions on matters of broad public interest without the financial hardship of paying the state's attorney fees if that litigation is unsuccessful. SB 97 eliminates this protection by prohibiting courts from taking into consideration

the public interest nature of a case when the court determines whether to award attorney's fees to the prevailing party. A very important component of the Disability Law Center's ability to advocate on behalf of Alaskans with disabilities is judicious pursuit of state court remedies. Eliminating public interest litigant status will effectively eliminate the opportunity of individuals with disabilities to access the judicial branch of their government to enforce their rights.

MS. WRIGHT pointed out that individuals with disabilities have the highest unemployment rate nationwide and, as a group, have the highest number living in poverty. If faced with the prospect of liability for the defense attorney's fees, individuals with disabilities will be unable to protect their rights in the court. The public interest litigant exception does not foster frivolous lawsuits. The Alaska Supreme Court has clearly stated that anyone bringing a frivolous lawsuit exposes both the attorney and the client to defense attorney's fees.

MS. JUNE PINNELL-STEPHENS stated opposition to SB 97 because when the government makes a mistake, an individual should not have to pony up the money to go to court to have it corrected. Only by gathering together as organizations can most individuals hope to take on that sort of action.

MR. CRAIG TILLERY, Assistant Attorney General, Department of Law (DOL), offered to answer questions.

SENATOR DYSON asked Mr. Tillery to explain the changes in Version D and how those changes will clarify that the bill no longer pertains only to resource related litigation.

MR. TILLERY told members that Version D is substantially different from the original bill. The original version was focused on particular decisions by particular agencies. Version D takes a different approach and completely abrogates public interest litigant fees except in those instances where the legislature may choose to amend by statute. For example, currently, full attorneys fees are provided by statute for consumer protection cases.

SENATOR DYSON said his impression is that this bill is aimed at stopping frivolous lawsuits that impede resource development through the use of court injunctions. If those lawsuits are filed for illegitimate reasons, the plaintiff would pay the cost of the litigation. He asked if Version D broadens the scope to the extent it will have a dampening effect on someone in the

disability community who challenges a government action for valid reasons but loses the case.

MR. TILLERY told members the original bill was broadened because of concern about an equal protection challenge. DOL felt the original bill would pass constitutional muster, however the argument would be more difficult than if the scope of the bill was broadened. In addition, the original version of the bill started "writing in what is excepted and it becomes very difficult to apply."

Regarding the effect on an individual bringing a disability lawsuit in the public interest, MR. TILLERY said Version D would require the individual to decide the likelihood of prevailing on the merits of the case before filing. If the legislature believes people should be able to bring a specific type of lawsuit, the legislature could make that judgment by making exceptions in statute. This bill puts that decision squarely back in the hands of the legislature by eliminating the court system's broad-brush approach.

VICE-CHAIR WAGONER announced that Senator Ben Stevens was present.

SENATOR SEEKINS asked how many states have adopted a rule similar to Rule 82.

MR. TILLERY said that very few, if any, have a similar rule. He said the federal system does not have one either. The U.S. Supreme Court stated it is not the province of the court system to make those judgments; public interest litigant status should be determined by a congressional or legislative decision.

MR. TILLERY said some other state legislatures might grant attorneys' fees in specific instances, for example for consumer protection or anti-trust cases. Nevertheless, as a general rule, those decisions are not in the court's purview.

SENATOR SEEKINS asked if the legislature passes this bill as it exists today [Version D], it could exempt certain types of cases through another piece of legislation.

MR. TILLERY said that is correct.

SENATOR ELTON said during the subcommittee discussion, his understanding was that no court rule would have to be eliminated because public interest litigant status is an exception to a

court rule. However, he learned that a 1993 Supreme Court Order, No. 11-18, established a court rule that will be abrogated by this legislation.

MR. TILLERY said it is DOL's view that the court created that rule through judicial exception. To remove the court's ability to apply that exception via this legislation would not abrogate a court rule but simply require the court to apply the original rule.

SENATOR ELTON asked Mr. Tillery if he is familiar with the 1993 Supreme Court Order No. 11-18.

MR. TILLERY said he did not have a copy of it.

SENATOR ELTON said it would be helpful to understand why an exception is not a de facto court rule.

MR. TILLERY offered to get back to Senator Elton with an answer to that question.

SENATOR LINCOLN asked the amount of general fund dollars spent in 2002 on public interest litigation.

MR. TILLERY said from FY 93 through FY 03, the state spent \$4.5 million.

SENATOR LINCOLN asked how much of the \$4.5 million was spent on state resource agency cases.

MR. TILLERY said he would have to get back to Senator Lincoln with an answer to that question.

**3:50 p.m.**

MR. KEN JACOBUS, an attorney in private practice and for the Republican Party, said his comments to the committee were on his own behalf. He said he had no problem with the original bill because it was designed to address a specific area of concern to the Governor: protection of natural resources and economic development. Although he prefers other solutions, he could support the original bill. However, he is opposed to broadening the bill to include all public interest litigant cases. He reminded members that when the government loses a public interest litigant case, there is nothing wrong with requiring the government to compensate for its wrongdoing. He pointed out that a number of Republicans would not be in the legislature

were it not for the redistricting case, which was public interest litigation. Also, a number of legislators could not have collected campaign contributions but for the Singleton case, which allowed unlimited soft money contributions, again, public interest litigation. He said if a voter wants to challenge an election for a good reason, this bill would require the individual voter to pay attorney's fees to the state if he or she loses the case. He doubts anyone would have challenged the Lindauer candidacy if that were the case.

MR. JACOBUS said he disagrees with Mr. Tillery's statement that Alaska Civil Rule 82 has a catch-all provision that says the courts may vary attorney's fees if the equities of the case so direct. The court can take any factor into account to determine the inequities of the case. If the court is no longer able to consider certain factors, that is the limitation on the catch-all provision of Rule 82. He advised that he has no problem with the legislature protecting natural resource cases. However, to take away the rights of public interest litigation across the board is inappropriate because of the numerous unintended consequences. He asked members not to enact the committee substitute [Version D].

SENATOR ELTON noted the purpose section of Version D cites increased litigation, arguments made with little merit, difficulties in compromising claims, and significant cost to the state and private citizens as reasons to eliminate public interest litigant status. He said when he read that, his immediate thought was that it may save the state money, but it creates a difficult standard for Alaskan citizens to meet. He asked Mr. Jacobus if that is the focus of his testimony.

MR. JACOBUS said some of the statements in the purpose section are not really true. A person is unlikely to bring an argument with little merit because if one loses a public interest case, he or she does not get reimbursed for attorney's fees. He agrees that the public interest litigant doctrine leads to increased litigation, but it does not encourage frivolous litigation. He said it does not increase difficulty in compromising claims and, although it may cost the state more money, that cost is for wrongs that need to be redressed.

SENATOR ELTON maintained his objection to adopting Version D as the working draft before the committee. He said he has concerns with the original bill, but those problems are magnified in the committee substitute. He felt Mr. Jacobus's testimony was compelling. He stated his belief that the only way many Alaska

citizens feel able to challenge an overreaching state bureaucracy is through this rule.

SENATOR BEN STEVENS asked how many of the testifiers are public interest litigant attorneys. He questioned whether the testifiers today are attorneys whose fees are paid by public interest litigants.

SENATOR DYSON indicated he takes significant exception to Senator Stevens' statement if it was an indictment of Mr. Jacobus's testimony or integrity.

SENATOR BEN STEVENS said he was just making the point that the committee needs to take that into consideration.

VICE-CHAIR WAGONER announced a brief at-ease.

SENATOR SEEKINS withdrew his motion to adopt Version D as the working draft before the committee. He then moved to pass SB 97 from committee with individual recommendations.

SENATOR ELTON objected.

SENATOR LINCOLN told members she will be voting against the motion. She said the cost of most of the cases has been small so for the legislature to tell Alaskans they have to give much thought to paying their own attorney fees for a public interest case is wrong. She noted she just received a letter from the Alaska Village Council Presidents who said they were involved in three public interest litigant cases, the Kasillie (ph) case and challenges to state agency decisions about fish and wildlife management. They are very concerned this legislation will deter the common person from filing a lawsuit against a state agency thereby allowing some bad public decisions to be made.

VICE-CHAIR WAGONER said he would be supporting the bill because he has seen, at times, the unfairness of the public interest litigant doctrine.

The motion to move SB 97 from committee carried with Senators Seekins, Dyson, Stevens and Wagoner in favor, and Senators Elton and Lincoln opposed.

VICE-CHAIR WAGONER announced the bill would move to the Senate Judiciary Committee with its appropriate fiscal notes.

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4:07 p.m.

CONFIRMATION HEARING - KEVIN DUFFY, ADFG

MR. KEVIN DUFFY, Commissioner-designee of the Alaska Department of Fish and Game (ADF&G), told members in his previous roles as deputy commissioner and deputy director of the Division of Commercial Fisheries he has had a chance to meet with most of the committee members. He prides himself as having an open door policy and will maintain that policy as the commissioner. He has been employed at ADF&G for 21 years. He is proud of ADF&G's professional staff. ADF&G has a reputation for sound management that has been earned in both national and international forums that others are envious of. He is under no illusions about the challenges of the position of commissioner of ADF&G. He recognizes the controversies associated with the decisions he will make. He noted that Alaskans are very connected to the resources and are comfortable expressing their opinions about the use and management of those resources. He welcomes the public's input to the department and to the Boards of Game and Fisheries. He told members he is committed to using sound science and biology when making resource management decisions.

VICE-CHAIR WAGONER announced he would first take testimony from a person with time constraints and would then open the hearing to questions from committee members.

MR. AL BURCH, a resident of Alaska since 1953 and a resident of Kodiak for 38 years, stated support for Mr. Duffy's appointment. He has commercially fished during his entire adult life. He has worked with Mr. Duffy for a number of years on the North Pacific Fisheries Management Council and appreciates Mr. Duffy's approach to the fisheries. He believes the key words in Mr. Duffy's testimony were "good science." Mr. Duffy will bring Alaska into the 21st Century of fisheries management and will enable Alaska's coastal communities to survive with the development of a groundfish industry.

VICE-CHAIR WAGONER entertained questions from committee members.

SENATOR LINCOLN asked Mr. Duffy about his voting record as a member of the North Pacific Fisheries Management Council (NPFMC), on a policy which requires crab fishermen to sell their catch to processors who own processor shares and on the IFQ program for halibut sport charter vessels. She also asked his view of the Division of Habitat transfer from ADF&G to the

Department of Natural Resources (DNR) and how that can result in more efficiency with fewer people to issue permits.

MR. DUFFY said he supported the concept of processor shares in the crab rationalization program before the NPFMC. NPFMC spent almost four years trying to design the future of the crab program in the Bering Sea and Aleutian Islands. Congress instructed NPFMC to look at the impacts of a rationalization program on communities, harvesters and processors. NPFMC established a committee of industry representatives from a broad spectrum of interests that worked for about two years to identify a series of alternatives by which the Bering Sea crab fishery could be rationalized. NPFMC, under his lead, established a three-part program that included:

- IFQs to individual fishermen at 100 percent, based on particular years selected for catch history.
- Processor shares at 90 percent to processors with a history of processing crab in the Bering Sea and Aleutian Islands based on a specific number of years.
- Impacts to coastal communities. The Council was clear in its record about rationalizing the Bering Sea crab fishery. That fishery is comprised of large vessels, a lot of non-resident participation and a lot of stranded capital on the processing side.

NPFMC was very clear that the program should not be used as a model or set a precedent for other fisheries under consideration for rationalization, the next being the Gulf of Alaska groundfish fishery. He repeated that he did support processor shares in that particular fishery and that a number of caveats were included to protect the interests of IFQ holders, or harvesters. The processors are awarded 90 percent of their historical [catch] and the harvesters have 100 percent IFQs so it is not true that an individual fisherman is required to work with a particular processor. The concept of 90-10 also created A and B shares. B shares can be sold to anyone. When this program was designed, it was incumbent upon NPFMC to find a program that was fair to all participants in the Bering Sea program.

TAPE 03-24, SIDE B

MR. DUFFY said that decision was made in June of 2002 but the processor share aspect will require congressional approval. He pointed out this program took almost four years to develop and was approved by a vote of 11 to zero.

MR. DUFFY said, in response to Senator Lincoln's second question, he voted against the halibut charter IFQ program in the fall of 2001 for a number of reasons. He explained that NPFMC had decided to restrict that industry with a guideline harvest level prior to his involvement. It decided the guideline harvest level for the charter halibut fishery could grow up to 125 percent of its historic percentage. If the level hit 125 percent, the fishery would be ratcheted down. The charter halibut program was set up for Southcentral and Southeast Alaska. As a new NPFMC member, he reviewed the record. The discussion centered on how the halibut charter industry was exploding and needed to be controlled. It appeared to him that the halibut charter industry was growing by leaps and bounds. His conclusion was that a guideline harvest level program was the correct way to manage that fishery over the long term.

MR. DUFFY pointed out the halibut charter IFQ program goes one step further and awards individual fishing quotas to charter operators. He did not feel that was a necessary regulation in the NPFMC process. Others felt differently. He noted that IFQ programs for recreational fisheries are a significant national public policy issue. He said he believes it will work but did not believe it was necessary at the time.

Regarding Senator Lincoln's third question, MR. DUFFY said when the decision was made to transfer Title 16 permitting responsibilities from ADF&G to DNR, he worked with the division directors to create a structure to continue to protect fish and wildlife habitats in the state. That structure retains certain permitting functions within DNR and certain permitting functions at ADF&G. Title 16 permitting functions were moved to DNR but other habitat related activities were retained at ADF&G. When he and others undertook this permit streamlining effort, their goal was to design a system with a number of trained professional habitat biologists in DNR to maintain an effective and efficient permitting system that would have some crossover ability to consult with ADF&G. That system required a lot of analysis by a lot of people. The habitat division had multiple funding sources with multiple duties associated with each funding source. To unravel that structure, the group tried to identify the amount of money and time these individuals spent on Title 16 habitat permitting. The net result of that analysis is what was proposed in EO 107.

VICE-CHAIR WAGONER pointed out that four of Mr. Duffy's predecessors testified against EO 107 and time will prove who is right. He said he is willing to support the Governor's proposal

but does not understand why EO 107 places the ultimate authority with the deputy commissioner of DNR and the state forester. He interprets that to mean that decisions cannot be appealed to the commissioner. Any decision will have to be appealed in court. He asked why the proposal was structured that way.

MR. DUFFY said his understanding is that putting the decision making authority at the deputy commissioner level will not actually erode any of the DNR commissioner's responsibility because the commissioner will be held accountable.

SENATOR SEEKINS asked how many people will be transferred from the habitat division to DNR under this proposal.

MR. DUFFY answered about 35 or 36, of which 29 are professional biologists and the others are administrative positions.

SENATOR SEEKINS asked if that is the number of positions or actual employees.

MR. DUFFY said the collective bargaining process binds ADF&G to inform the ADF&G employees who could be adversely affected. Under the collective bargaining system, some employees have "bumping" rights.

SENATOR SEEKINS said one of his concerns is game management. He asked Mr. Duffy what he envisions the relationship to be between the Board of Game and ADF&G.

MR. DUFFY replied the relationship is one in which ADF&G provides scientific and biological expertise to the Board of Game to use when making allocation decisions. ADF&G acts in an advisory role to the Board of Game. In addition, the ADF&G commissioner and the Board of Game have a collaborative relationship. When the Board of Game makes certain decisions, the commissioner is statutorily required to make a finding. He sees the relationship as one in which ADF&G acts as support staff to the board and, once decisions are made - one being the Board of Game recommendation on Unit 19D East for the predator control program - ADF&G provides the regulatory structure to implement those decisions. In certain situations, the commissioner must also make a finding based on recommendations made by the Board of Game.

SENATOR SEEKINS asked, "Recommendations from the Game Board - to whom?"

MR. DUFFY corrected himself and said "Direction."

SENATOR SEEKINS noted that a number of years ago the Board of Game determined that the [game] populations were collapsing in Unit 13 and authorized a predator control program. He asked why ADF&G has not carried that out.

MR. DUFFY said he cannot give a detailed answer because he was not directly involved in game management issues during that time. He said in the recent past, the Board of Game gave ADF&G a set of directions on Unit 13. ADF&G initiated an informed consent process. Over the next year ADF&G will gather public input and try to bring affected constituents up to speed on the issues to come to a set of conclusions to move forward on an effective predator control program in Unit 13. He anticipates that he will make a decision next spring on the predator control program.

SENATOR SEEKINS asked where the requirement for that process exists in statute.

MR. DUFFY said he cannot specifically point to the statute that gives him that authority.

SENATOR SEEKINS said he does not think Mr. Duffy will find it. He said the Board of Game's statutory process authorizes the use of predator control programs. However, no statute says after the Board of Game has decided a problem exists, ADF&G should go through the survey process and instigate a stakeholder process when ADF&G biologists have already advised the Board that the problem exists. He said although Mr. Duffy supports the survey concept and spending \$56,400 on it, the public process already occurred through testimony to the Board of Game. He asked what it is in this non-statutory process Mr. Duffy supports.

MR. DUFFY said the statutes he operates under as commissioner give him some fairly broad powers, duties and authorities. Although he cannot point to the specific statute, he has some latitude in programs that ADF&G moves forward with.

SENATOR SEEKINS said he would like to know where that specific authority lies in statute since the public input process authority lies with the Board.

MR. DUFFY said Senator Seekins is correct in that the public process authority lies with the Board of Game. However, through experience in game management, ADF&G has found that providing an

informed consent process often allows an opportunity to move forward on controversial programs and [devise a sustainable solution]. One of his goals in initiating this one-year process is to design a program that would be consistent with the Board of Game's directive and to move forward with a sustainable program for Unit 13.

SENATOR SEEKINS said the legislature has vested authority with the Board of Game but, in effect, the commissioner can veto the Board's decision to implement an active management program in a district by initiating another public process and not submitting findings.

MR. DUFFY said he cannot "veto" Board of Game decisions. He believes he has some latitude once the Board of Game provides direction to make a finding. He has some discretion within those findings. He acknowledged that Senator Seekins does not support the approach that ADF&G has initiated but he argued that this approach may provide a long-term sustainable predator control program that may be much more effective in the end.

VICE-CHAIR WAGONER said he gets the feeling that no one in ADF&G wants to do predator control because they are afraid of the threats of tourism and other boycotts. He indicated that predator control programs have worked in the past.

MR. DUFFY said staff within the Division of Wildlife Conservation focus on the best scientific information available on which to base decisions. Within that confine, he believes a number of professionals in ADF&G strongly support predator control programs. He personally supports them. He pointed out that ADF&G is administering such a program in Unit 19D East in McGrath right now.

SENATOR LINCOLN noted McGrath is in her district and said this issue has been ongoing through at least three administrations. The issue boils down to implementing a real predator control program using airplanes. She said during Governor Murkowski's campaign, he talked about making a decision based on science, not emotion. Most people in the McGrath area were enthused that someone was going to take the predator control issue forward. Very few moose are left for human consumption in that area and McGrath residents depend upon it for their subsistence lifestyle. She then read Mr. Duffy's recent quote in the Fairbanks News Miner: "When predator control is implemented, techniques must be chosen based on effectiveness and efficiency." She said having been raised in Rampart and living

there now, she knows that wolves are very hard to trap. She has seen wolves kill moose just to show their cubs how to do it. They do not always eat them.

SENATOR LINCOLN said she has a real problem with having to come back to this table to talk about predator control every year. She expressed frustration that Mr. Duffy again suggested that ADF&G can send local people out to trap wolves. That has not and will not work because the wolf population has increased so much. She said she was hoping [this administration] might "bite the bullet" and do something effective but she now sees ADF&G backing away to take more public input. She said public input has been solicited on this issue for at least eight years. She assured Mr. Duffy that ADF&G will hear nothing new yet that process will take one more year. She maintained that the people who live in that area depend on moose for food and cannot afford to wait one more year.

SENATOR LINCOLN said the Board of Game clearly reaffirmed the previous board's position that human consumptive use is the preferred use of moose and that predator control in the McGrath area is necessary to help restore the abundance of the moose population to provide for human harvest. In addition, the board recognized local concerns and endorsed an experimental predator management program in Unit 19D East. She said this problem has already been documented and the decision was based upon science and, although the decision has been controversial, she is concerned about food for people who live in that area.

SENATOR ELTON asked Mr. Duffy if the Board of Game recommended that a predator control program be implemented in Unit 13 that involved helicopters and biologists, and the Governor did not support that idea, who Mr. Duffy would listen to.

MR. DUFFY asked to first respond to Senator Lincoln's comment. He said she quoted some of the decisions made by the Board of Game on Unit 19D. ADF&G chose an approach for Unit 19D whereby department employees would fly the McGrath experimental management area in fixed wing aircraft and relay information on the presence or absence of wolves. ADF&G would then use local residents to participate in the predator control program.

SENATOR LINCOLN responded, "That does not work. It's already been tried."

SENATOR ELTON said the same issues arise in fisheries.

MR. DUFFY said in terms of his accountability as commissioner of ADF&G, he is accountable to all of the citizens of the state and ultimately his job is to protect, maintain and enhance the fish and wildlife resources in the state. He said he faces a dynamic tension when it comes to predator control programs. When he makes a finding, he consults with the Governor's Office and collectively they decide which program to go forward with. He said he is responsive to both parties, the Board of Game and the Governor. He wants to do everything he can to support the Board of Game's decision-making authority and to implement the programs it suggests. He also believes it is not a perfect fit. In making the findings he also makes determinations based on his direct boss, the Governor. He said he wants to be clear that he will be working with the Governor on these decisions and, in doing so, he will do everything he can to support the Board of Game.

**4:53 p.m.**

VICE-CHAIR WAGONER said he understands the position Mr. Duffy is in, but it seems the Governor has said in past speeches that the resources of this state will be managed on biological principles. Mr. Duffy's staff has supported predator control based on biological principles for years. He asked how Mr. Duffy and the Governor couldn't take the advice of ADF&G staff that are being paid to make such recommendations. He stated:

I think we got politicized at the top again and I'm not so sure - the legislature anyway - is willing to sit here and watch one more study go by. With that study and the timing you've given us, I believe that's two seasons and two more litters of pups per pack and not only are we going to be out of control, we're going to be out of touch if that happens.

SENATOR DYSON said his sense is that the legislature will vote to confirm Mr. Duffy and he appreciates the fact Mr. Duffy is caught in the crossfire. He hopes Mr. Duffy can convey the sense of this committee to the Governor: that biologists, the Board of Game, local residents, and common sense strongly support getting on with it. He said the delays are very frustrating and most legislators do not believe they are justified. He commented that most people who are offended by the predator control program would not vote for the Governor anyway.

SENATOR SEEKINS said he was pleased with Mr. Duffy's opening statement in which he said his management style would be based

on sound science and biology. He said when he reviewed the survey [on predator control] sent out by ADF&G, it did not ask anything about biological management. It asked how people felt about predator control. In a letter of explanation, ADF&G regional managers said it is important to know how people feel about using short-term contraceptives to control the grizzly bear population. He asked Mr. Duffy to explain how that human dimension equates to biological management.

MR. DUFFY said he will take Senator Seekins' concern about the survey to his staff but he is not moving off of his position that he supports decision-making based on the best biological science at the game board level and internally at ADF&G.

SENATOR SEEKINS referred to an ADF&G chart that shows the moose population in Unit 13 has decreased from 27,000 to 8,000 from 1988 to 2001. He asked if that decrease represents a biological emergency.

MR. DUFFY said it certainly represents a serious biological concern. He would have to consult with the appropriate manager at ADF&G before drawing that conclusion.

SENATOR SEEKINS said if that trend continues, the moose population will be wiped out and that area is very close to one of the largest metropolitan communities in the state. He said he believes this is a sociological problem in that people are not being given a reasonable opportunity to harvest.

VICE-CHAIR WAGONER took public testimony.

MR. CHRIS GARCIA said, from a commercial fishing perspective, he believes the higher-level staff at ADF&G have given the commercial fishing industry a very bad time over the last 20 years. For example, in the Kenai, the 2 percent aquaculture tax equals \$187,594,500, which was circulated in the local economy. By 1990, that amount was knocked down to just under \$10 million. In his opinion, continuing on the current course will kill off the whole peninsula. He recommended the legislature not confirm Mr. Duffy as the commissioner of ADF&G.

MS. JANET CLUKAS, representing 16 set net fishing families in the Ninilchik area, said those families used to make a viable income from set netting, however over the last few years they have been lucky to earn \$2,000 per year. She said if Mr. Duffy has been involved in that decline of income for set net fishermen, she cannot endorse him for the position of

commissioner. She maintained the fishery was doing well under the old management plan until the Knowles Administration took over.

MR. LYNN LEVENGOOD, representing the Alaska Wildlife Conservation Association, said the Association's only goal is a return of the abundance of wildlife. The Association has been shocked by the acting commissioner's actions regarding interfacing with the Board of Game. When the Board asked him to confirm that ADF&G biologists said that predation was causing severe prey declines in Unit 19D, rather than providing the board with the finding it asked for, he provided a document saying ADF&G would fly over the area and tell the local people there are predators out there. Mr. Levengood said that Mr. Duffy is proud of implementing a public opinion survey about people's feelings, while the charts provided by ADF&G show that an emergency exists in Unit 13 and that families will go hungry. He said that is not managing by biology. He urged members not to confirm Mr. Duffy.

MR. KEN DUCKETT, Executive Director of the United Southeast Alaska Gillnetters' Association, stated support for Mr. Duffy's confirmation. He said he had the opportunity to work with Mr. Duffy on an allocation task force set up by the Board of Fish.

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MR. DUCKETT said that allocation matters between different gear groups are difficult. They worked together on that process for about three years and, without Mr. Duffy's participation, he is sure those endeavors would not have been successful. He said to lay the problems of the fisheries on Mr. Duffy because he happened to be involved in the last administration is not fair. He asked members to give Mr. Duffy a chance as he will do a good job as commissioner.

VICE-CHAIR WAGONER informed participants that although the committee hearing was noticed as a confirmation hearing, Mr. Duffy will stand for confirmation in front of the full body, not this committee. The committee will forward his name on to the full panel.

MR. JERRY McCUNE, Executive Director of United Fishermen of Alaska (UFA), stated strong support for Mr. Duffy's confirmation. UFA believes Mr. Duffy will bring ADF&G together and get things working in favor of everyone in the state.

SENATOR SEEKINS asked Mr. Duffy how the upper level structure of ADF&G will change and what new positions will be added.

MR. DUFFY said his deputy commissioner positions are not filled as of yet. The current organization of the department has a commissioner, two deputy commissioners, a special assistant for the Pacific Salmon Treaty, a special assistant that is federally funded and a legislative liaison. The structure he is looking at implementing would have a commissioner, two deputy commissioners for fisheries and a chief wildlife scientist. He said depending on his confirmation, and the level of expertise of the selected deputy commissioners, he may or may not need to bring in someone with scientific expertise. The Governor would like to see the level of scientific expertise ratcheted up, which Mr. Duffy supports.

SENATOR SEEKINS asked if the directors report directly to the commissioner.

MR. DUFFY said the division directors do not report to the deputy commissioner. They discuss issues on a daily basis but they report to the commissioner.

SENATOR SEEKINS asked if the directors are required to be degreed scientists.

MR. DUFFY said yes; all current division directors have biological credentials. Scientific expertise resides within the divisions.

SENATOR LINCOLN mentioned that Senator Ted Stevens recently challenged the Alaska House and Senate to resolve the subsistence issue. She asked Mr. Duffy's position on a constitutional amendment for a rural subsistence priority in Alaska and what he intends to do in his role as commissioner to get the issue resolved.

MR. DUFFY said he supports the Governor's perspective, that being to adopt a constitutional amendment for a rural priority and to make some modifications to ANILCA.

SENATOR LINCOLN referred to a letter the Alaska Village Council Presidents (AVCP) wrote to the commissioner dated March 18 and noted the commissioner responded that the [plan for the habitat division] transition for permitting functions is moving forward. She read from the commissioner's response, "I do not believe a formal process to gather public input about the changes

undertaken is needed." She said she listened to Mr. Duffy say ADF&G feels it is necessary to get more public input on the predator control issue, which is the opposite of what he emphasized to the AVCP. In his response he also said, "And I believe our mandate to achieve greater profitability in Alaska's resource extraction industry is clear." She asked Mr. Duffy to explain what he meant by that last statement and how he will combine that with his role as commissioner of ADF&G.

MR. DUFFY told Senator Lincoln that letter was drafted for the Governor's signature but in the flurry of letters associated with EO 107, he inadvertently signed that letter himself. He said the letter talks about "my plan" but he is a commissioner who works for the governor who has a plan. He apologized for his error. He said regarding the public input comments, at the time the letter was drafted, both the House and Senate were holding hearings on EO 107. His conclusion, given the short timeframe of an executive order, was that an appropriate public input process relevant to EO 107 was being undertaken by the legislature. He said the public weighed in significantly on that issue.

SENATOR LINCOLN commented that the letter was written on the Commissioner's letterhead, not the Governor's.

VICE-CHAIR WAGONER said he distributed to members and Mr. Duffy copies of a letter he received from a constituent. He then asked Mr. Duffy what he tends to do to correct the type of mistakes addressed in the letter and what he would do to assure those mistakes do not occur in the future.

MR. DUFFY said he wants to reinforce within ADF&G the need to provide the most biologically defensible and scientifically credible information to both of the boards. He will hold people accountable through the chain of command for major mistakes that are made. He explained that within the Board of Fisheries process, proposals are combined by subject matter; committees of 1, 2 or 3 board members are then formed. Committees hold meetings with members of the public to discuss potential solutions to the issues. Senator Wagoner's constituent argued that inadequate time was provided to the public to respond to a committee report and that some of the information provided to the committee was incorrect and may have had implications.

In response to the constituent's complaint, MR. DUFFY said the Board sets deadlines for public review of committee reports and requires meetings to be held within the original dates. The Board attempts to make completed committee reports available to

the public as soon as possible for review prior to deliberation before the full Board. There is a time crunch but the committee tries to get the report written as soon as possible. Regarding the criticism that 12 ADF&G employees were involved with a committee, he explained that only board members are members of the committee. ADF&G staff attends only to provide technical advice, and often only two or three staff attend meetings. The fact that 12 employees listened to the issue might have meant that particular issue was of interest to them.

Regarding the incorrect information in the committee report, MR. DUFFY said that was an unfortunate mistake and, due to the tight time constraint, ADF&G actually provided percentages for male salmon instead of females. However, board members were made aware of the incorrect data prior to deliberations.

VICE-CHAIR WAGONER said his point was the time crunch needs to be examined because the state cannot afford to make mistakes on a critical fishery.

MR. DUFFY concurred and said he will do everything within his power to make sure ADF&G is providing the best information available at the time.

SENATOR ELTON asked Mr. Duffy whether the Governor's Office was informed of the particular employees who may not be retained in the transfer of the habitat division or whether the Governor's Office provided ADF&G with names prior to notification of non-retention.

MR. DUFFY said the short answer is no [names were discussed].

SENATOR ELTON asked Mr. Duffy whether he will delegate his seat on the North Pacific Fisheries Management Council or whether he will serve.

MR. DUFFY said he will serve. He believes Alaska needs to emphasize the need to restructure and revitalize its salmon industry. If he can maintain his council seat, a deputy commissioner will be freed up to put greater emphasis on the commercial salmon industry.

SENATOR ELTON said that from Mr. Duffy's description of his restructuring of the Commissioner's Office, he thinks the first criterion for the second in charge should be someone with strong management skills since Mr. Duffy plans to keep his seat on NPFMC.

VICE-CHAIR WAGONER said candidates with both strong scientific and management skills are available.

SENATOR ELTON said his point was that strong scientific skills should not be the threshold issue.

SENATOR SEEKINS thought most commissioners filled the seat on NPFMC in the past.

MR. DUFFY said that changed, depending on the commissioner. He said the previous deputy commissioner sat on NPFMC. In response to Senator Elton's comment, he said when he talked about a revised structure in the Commissioner's Office, he talked about two deputy commissioners - one to focus on fisheries issues, the other to focus on wildlife issues. Depending on the nature of the skill set of the people hired, those people may or may not have very strong scientific credentials. He may instead choose to hire someone with strong administrative skills and a long term working relationship with the legislature. If that is the case, he may bring in an additional person with scientific expertise.

SENATOR ELTON said that idea scares him because given the budget cut scenario of 90 and 95 percent of general fund dollars, the only component with general fund dollars will be the Division of Commercial Fish. Therefore, Mr. Duffy will be shifting general fund dollars from that division to the commissioner's office.

VICE-CHAIR WAGONER asked Mr. Duffy if he believes the state has the processing capacity to handle its current run of salmon or whether it will need to allow the Russians to come into Alaska waters to purchase salmon.

MR. DUFFY said based on ADF&G's capacity survey of the domestic processors, Alaska has adequate domestic processing capacity to handle the anticipated salmon return in 2003.

SENATOR LINCOLN asked Mr. Duffy to describe his background in wildlife issues and how much time he expects to spend at NPFMC meetings each year.

MR. DUFFY said his background in wildlife issues is not his strong suit, which is why he believes it is incumbent upon him to rely on the expertise in the division and to hire someone with expertise. In terms of time spent on the Council, he said

the Council meets four times per year; each meeting lasts one week.

VICE-CHAIR WAGONER asked Mr. Duffy if he supports SB 70.

MR. DUFFY said he believes the attorney general's office has participated in the hearings on SB 70. They see it as a clarification of the commissioner's authority. If that is what it does, he supports it with the caveat that he would be leery of it if it puts him in a situation where he would constantly be second guessing Board of Fish allocation decisions relative to salmon. He said he would like the opportunity to consult with the attorney general's office before giving a more definitive answer.

VICE-CHAIR WAGONER asked Mr. Duffy to get back to him with an answer.

SENATOR SEEKINS said he understands that Mr. Duffy was not personally involved in some of the decisions made in the management or mismanagement of game by ADF&G over the last several years. However, many of his constituents feel strongly that ADF&G is the department of "watch them and count them," which is not management. They feel the upper levels of the department support a philosophy of watching and keeping records. He said these people, both urban and rural, want to put food on the table for their families. He said that humans harvest less than 3 percent of the annual harvestable surplus of ungulates; the rest go to predators. He said the precipitous decline in the reproductive base is the result of predation, not of human hunting. To see that this Administration advocates further study rather than biological management is shocking. He said his constituents want to know what Mr. Duffy plans to do within ADF&G's structure to fix that.

MR. DUFFY said during the first three months of the new administration, there has been a move in a positive direction relative to predator control programs. It may not be what everyone wanted, but it is moving in a direction that is responsive to the public. As commissioner, he wants to have a strong working relationship with the game board.

VICE-CHAIR WAGONER asked Mr. Duffy what is the single most important factor in managing the state's fisheries resources.

MR. DUFFY answered scientific and biological credibility of the information provided to the Board of Fisheries by which it makes allocation decisions.

There being no further questions, SENATOR DYSON moved to forward the name of Mr. Duffy to the full body for consideration for confirmation, with the understanding that a vote in favor does not indicate support for or objection to Mr. Duffy's confirmation.

With no objection, VICE-CHAIR WAGONER announced the motion carried. He then adjourned the meeting at 5:45 p.m.