

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

February 10, 2016

3:31 p.m.

**MEMBERS PRESENT**

Senator Cathy Giessel, Chair  
Senator Mia Costello, Vice Chair  
Senator John Coghill  
Senator Peter Micciche  
Senator Bert Stedman  
Senator Bill Stoltze  
Senator Bill Wielechowski

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

OVERVIEW: STATE OF ALASKA AND ENDANGERED SPECIES ACT LISTINGS

- HEARD

**PREVIOUS COMMITTEE ACTION**

No previous action to record

**WITNESS REGISTER**

COMMISSIONER SAM COTTEN

Alaska Department of Fish and Game (ADF&G)

Juneau, Alaska

**POSITION STATEMENT:** Commented on the Endangered Species Act (ESA) listings in Alaska.

BRUCE DALE, Director

Division of Wildlife Conservation

Alaska Department of Fish and Game (ADF&G)

Juneau, Alaska

**POSITION STATEMENT:** Commented on the Endangered Species Act (ESA) listings in Alaska.

ATTORNEY GENERAL CRAIG RICHARDS

Department of Law (DOL)

Juneau, Alaska

**POSITION STATEMENT:** Commented on the Endangered Species Act (ESA) listings in Alaska.

BRAD MEYEN, Sr. Assistant Attorney General  
Resources Section  
Department of Law (DOL)  
Anchorage, Alaska

**POSITION STATEMENT:** Commented on the Endangered Species Act (ESA) listings in Alaska.

#### **ACTION NARRATIVE**

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**CHAIR CATHY GIESSEL** called the Senate Resources Standing Committee meeting to order at 3:31 p.m. Present at the call to order were Senators Stoltze, Costello, Micciche, Coghill and Chair Giessel.

#### **Overview: State of Alaska and Endangered Species Act Listings**

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CHAIR GIESSEL announced the overview of the Endangered Species Act (ESA).

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COMMISSIONER SAM COTTEN, Alaska Department of Fish and Game (ADF&G), Juneau, Alaska, said the ADF&G provides scientific expertise on most ESA issues. The department has experts on fish, marine mammals, game, and non-game species, and they like to think that they have a good reputation. They work closely with a lot of other organizations, nationally and internationally, and have often been recognized as valuable contributors on these issues.

In addition to its scientific staff, he said the department has experts on the ESA. That ESA work was recently consolidated with the Wildlife Diversity Program and turned into the Threatened Endangered and Diversity Program. This change enabled the department to maintain its ESA capacity with fewer financial resources.

COMMISSIONER COTTEN said the ADF&G collaborates closely on ESA issues with the Department of Natural Resources (DNR) and the Department of Law (DOL). ESA staff from ADF&G and DOL communicate on a daily basis and are participating in three initiatives to reform the ESA where necessary, so it can be

implemented in a way that better meets the interests of the State of Alaska.

ATTORNEY GENERAL CRAIG RICHARDS, Department of Law (DOL), Juneau, Alaska, said he wanted to briefly address what DOL does in relation to the ESA and tell them how his program works and why he thinks it is a particular success.

SENATOR STEDMAN joined the committee.

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ATTORNEY GENERAL RICHARDS said the DOL does several things in relation to ESA challenges: listings and critical habitat designations, in particular with federal action. The department actually challenges the federal government in lawsuits if Alaska disagrees with ESA listings in the State or Alaska or in its surrounding territorial waters. Additionally, the department sometimes intervenes to support ESA determinations in rule makings and other areas where the state agrees with the feds instead of environmental groups who want more stringent action.

ATTORNEY GENERAL RICHARDS said the DOL also assists ADF&G in a number of different areas including reviewing proposed rules and developing a coordinated and cohesive strategy to ultimately win in the rule making process to the extent they can and to litigate if necessary. They also monitor nationwide issues evolving with ESA and try to develop alliances both internally and with industry partners on different ESA issues like marine mammals. He also develops alliances nationwide with other state attorney generals' offices, because although Alaska is unique in terms of the marine mammal issues, it is not unique in the sense that other states often share some of our frustrations in how ESA listings are being used to close down development over large tracts of land.

He said the DOL had successfully used outside counsel for ESA listings, but a couple of years ago the decision was made to try to develop that competency in-house as much as possible, both to save money and to develop the internal institutional knowledge needed to handle these cases, and to be a little more proactive on a long-term basis. He said that Mr. Meyen and a few other attorneys are critical to that effort and have done an amazing job of putting together a litigation and ESA push-back mechanism for a relatively low cost where they have seen "some resounding successes."

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BRUCE DALE, Director, Division of Wildlife Conservation, Alaska Department of Fish and Game (ADF&G), Juneau, Alaska, took over the presentation and said a staff of approximately eight are in the Threatened and Endangered and Diversity Species Program and many more are in the Marine Mammals Program. It is comprised of people with ESA expertise, people who do work on pre-listed species, and scientific experts. This staffing array has provided additional capacity and capability to the entire department with fewer resources.

The goals of this program, which is housed in the Division of Wildlife Conservation, are to provide stewardship for Alaska's wildlife, to conduct and provide relevant and sound science, to protect the state, including its economy, from unwarranted ESA regulations and impacts, to maintain the state's management authority, and to build on the excellent work of previous administrations.

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Their strategy is to take strong positions to protect the state and fulfill its mandates. The division participates fully pre-listing to post de-listing. The program coordinates with the entire ADF&G, the DOL, DNR, and the legislature. Substantial scientific expertise is one of their biggest tools. They work with their partners to avoid listings and minimize impacts; they defend good decisions and strategically challenge bad decisions. Another big part of their program is to address ESA shortcomings through the initiatives that Commissioner Cotten mentioned.

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MR. DALE provided some definitions:

-Threatened: likely to become endangered within the foreseeable future.

-Endangered: an official view of both Fish and Wildlife Services (FWS) and National Marine Fisheries Services (NMFS), (the two federal agencies that implement the ESA), that a species is in natural danger of extinction.

CHAIR GIESSEL asked for a definition of "foreseeable future."

MR. DALE replied that there are different viewpoints. Climate change listings look far into the foreseeable future and use an overabundance of critical assumptions. FWS and NMFS need clearer guidance, especially on climate change listings, on what reasonable standards for the foreseeable future are. Otherwise measures are adopted that are impossible to implement meaningful

conservation, because the timeline is just too far out and the future is too uncertain.

He said it's also inappropriate to use the ESA as a tool to implement carbon reductions and to effect climate change policies, although climate-based listings are likely to increase. The wolverine and northern bog lemming, which have been listed in the Lower 48, are two examples of those policies. Everyone knows that these petitions are going to become more common if the FWS continues to list species based on those rationale.

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MR. DALE said that FWS has listed 3 endangered and 5 threatened species. The NMFS has 14 endangered and 16 threatened listings, but importantly only three of those have critical habitat in Alaska. Candidate species (found warranted in a 90 day finding) are: the Iliamna fresh water seal, the Pacific walrus (precluded, which means that decision will be delayed for some time), the northern bog lemming, and yellow cedar. The western bumble bee is a newly petitioned species and while it is doing well in Alaska, it is doing poorly in the Lower 48.

The humpback whale is proposed to be delisted. The 12-month finding for the Southeast wolves in which the FWS concluded that the Prince of Wales (POW) wolves do not qualify as a distinct population segment came just at the end of last year. Anticipating a response from the petitioners, the program is coordinating a response with the DOL.

MR. DALE said actions have been taken over the last two years to demonstrate that "take" can be managed sustainably. This has entailed bringing issues to the Board of Game and implementing a conservative management strategy - if it can't be demonstrated that human-caused mortality can be regulated, the state becomes more vulnerable to petitions and listings. Ongoing research continues to fill knowledge gaps and staff continues to evaluate FWS decisions and status reviews to find out where the weaknesses are and then apply whatever tools are needed: research or further work on ESA reform.

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SENATOR WIELECHOWSKI joined the committee.

CHAIR GIESSEL asked for a description of ADF&G's scientific expertise.

MR. DALE answered that seven biologists work primarily on pre-listing species, or where they anticipate a species might be petitioned, because there isn't much information on that species. "A little bit of information can go a long way at preventing those listings," he said. A few scientists in regular regions partly work on this work with an ESA specialist with an advanced degree in biology and a degree in law work on ESA issues when it's about game species. The program coordinator oversees those staff and he is the one who directs and coordinates between some of the scientific expertise for issues like marine mammals, which typically would have 30 scientists.

CHAIR GIESSEL asked if they are proactively collecting baseline data.

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MR. DALE answered yes, very much so. He explained that when they heard the northern bog lemming was going to be petitioned, they immediately did as much research as possible, because once the petition reaches the FWS they have 90 days to determine whether or not to consider it as a candidate species for listing.

SENATOR STOLTZE asked who does the petitioning.

MR. DALE answered that it's sometimes easy to determine which species are going to pop up for possible petitioning, because there is very little information on them, and they are in areas that certain groups would not like to see an industry expand or be successful.

SENATOR STOLTZE asked who is involved in the litigation and if there is a common theme.

MR. DALE answered the Center for Environmental Diversity is probably the most prolific, but there is a list of environmental groups that actively petition.

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SENATOR STOLTZE requested a short list of the ones that pop up all the time.

SENATOR COGHILL said he wanted a general list and that it would be interesting to find out who discovered the northern bog lemming.

MR.DALE replied the Center for Biological Diversity and Greenpeace and similar organizations are major players. It varies regionally from very small groups to national and international organizations.

SENATOR WIELECHOWSKI asked him to include a list of the organizations that are being successful or frivolous.

COMMISSIONER COTTEN added that often litigation is not involved, but the petition to list is.

SENATOR STOLTZE asked if the state has ever stopped a closed door settlement from happening by having a seat at the table. He pointed out that in the past, the state has interjected its presence in either lawsuits or contesting petitions.

COMMISSIONER COTTEN responded that part of the goal is to make sure these things don't get listed, so the department is at the table and participating with the DOL in comments and offering its scientific evidence as to why they shouldn't, in some cases, be listed before litigation.

SENATOR MICCICHE asked Mr. Dale if he was saying that these groups that serially petition species might shop for a species that no one knows a lot about, or one that is hard to research, in order to stop projects like the Keystone Pipeline.

MR. DALE answered yes and that the 90-day finding is a low bar. If they can get something that doesn't have much information across that low bar, then the stakes go up quite a bit in terms of the research that is needed. Often there isn't time during the 12-month finding period to actually conduct field research. So, hopping over that low bar is a very important step.

Petitioning species that don't have much scientific information in areas where some groups would like to provide some protections is a good strategy. When FWS and NMFS get a petition, they have 90 days to make a decision, and all they can do is use the information on hand in their files and the information that is provided in the petition. So, one of the ESA reforms that they (the Association of Fish and Wildlife Agencies, the ESA Joint Task Force, the Federal State Joint Task Force, and the new Western Governors Association Initiative) are encouraging FWS to do is require the petitioner to provide the affected state or states with the petition 30 days before the clock starts ticking on the 90 days at the federal level. That allows the states to assemble any information that is relative

to the petition and put it in the FWS or federal agencies' drawer so that information can be used in evaluating the 90-day petition. However, this is being fought very strongly.

He said a companion part to ESA reform is to not allow multiple petitions, because several years ago the state got one petition with over 30 species of coral. The corals have little niches in life and not that much is known about them. So, it's pretty challenging for states to come up with that much information that quickly.

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SENATOR COSTELLO said that critters - northern bog lemmings, for instance - don't stop at political borders and asked if these efforts are multinational or if Canada is dealing with the same issues. What is the relationship between their efforts and ours? If something that comes off the list in the U.S., does it go on the list in Canada?

MR. DALE answered that the department works with its Canadian counterpart and the northern bog lemming is a bigger problem there. However, several states also have northern bog lemmings, so this will be a larger effort. In response, Alaska submitted extensive comments, but many of those other states did not. That isn't a good idea, because the more comments one can get in early, the more those comments can be considered. Some people didn't take this seriously because they have just a little sliver of land, but now that it's past the low bar of the 90-day finding, they are reaching out to the Canadian counterparts to understand the research that they have done on this species and finding out what can be done to provide research. This one may not be acted on right away, so there may be some time do some research in Alaska and portions of Canada to understand the species better. The status review is not expected until after 2020.

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MR. DALE said the polar bear is listed as threatened and a draft recovery plan is in place. This listing was also the first ESA climate change recovery plan. One of the ways that state, industry and NGOs can be involved is by participating in these recovery plans so that they can be designed in a way that both industry can continue in whatever ways possible and meaningful conservation can occur. In this instance, "take" as it relates to industry is identified as not a primary threat. So the take-home is that an ESA listing like this has little conservation benefit for polar bears, but under the recovery plan, activities

such as Native harvests and industry exploration and development in polar bear habitat are going to be allowed to continue.

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CHAIR GIESSEL asked if the polar bear listing was based on a 100-year projection of their population.

MR. DALE answered yes and that was especially problematic in terms of critical habitat because one can't predict what a habitat will look like in 100 years. Therefore, the DOL got it successfully vacated in court.

He said that Alaska will participate in a round table work session in the Western Governors Association April meeting that will include industry. The association plans to provide the Wyoming governor's initiative on ESA reform to its Resources Committee that will make recommendations that will be taken to Congress.

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COMMISSIONER COTTEN related that Mr. Dale generated interest in this issue at the Resource Development Council meeting on the part of some industry participants who said they intend to participate in the conference.

MR. DALE added as a result of that interaction with the Resource Development Council they have some really good people from different industries lined up who are very excited about this. They are also working with various groups to come up with a representative from the fishing industry.

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SENATOR STOLTZE said the PEW Charitable Trust has been very active along with other national organizations on working ESAs in other states. Many of them have a stated goal of not having commercial fisheries, because they are not sustainable.

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MR. DALE responded that the department takes its constitutional mandate to manage on a sustained yield basis very seriously. Their efforts to demonstrate that is the best defense against groups arguing essentially that those activities are not sustainable, and information gained through research is the only thing that can level that playing field.

SENATOR STOLTZE said it wasn't until the Mat-Su delegation put money into the budget that the department acknowledged Cook

Inlet wasn't identified for a genetic identification study and then subsequently undertook that study, because the Kenai Peninsula commercial fishing industry didn't want it. That concerns him a little bit, because he has some constituents who have said they would have a good case to use the ESA to promote their fair share on the Kenai Peninsula watershed. He does not think that is the best approach and he asked Commissioner Cotten if he had any suggestions on how to prevent forcing groups, out of frustration, to go to the last straw of filing ESAs.

COMMISSIONER COTTEN asked if he is referring to the biggest genetic study the state has undertaken in the last decade, the Western Alaska Sustainable Salmon Identification Project (WASSIP), which specifically left out Cook Inlet, because it was designed around identifying western Alaska fish stocks. The study didn't get too specific about Cook Inlet, Southeast or even Kodiak fish, because it wasn't what the question was at the time.

He explained that the department has learned a lot about genetics in the mean-time using a lot of new methods and information about identifying salmon species, in particular. He wouldn't oppose additional genetic studies, but that one cost \$6 to \$8 million - that cost is another factor in this fiscal environment.

SENATOR STOLTZE said specific appropriations were put in to address the Cook Inlet stocks and they got a lot of resistance from other user groups. Overall, the concern is that the ESA is being used in Alaska out of frustration and bad motivations by groups like the PEW Charitable Trust and Oceana. He asked if listings surrounding fishing was a concern, because he didn't see any slides on the issue.

COMMISSIONER COTTEN responded that it certainly is a concern, and the department has had a lot of experience with the ESA. The Steller sea lion is one that had a pretty good ending. It was delisted, because Alaska successfully challenged some of the assumptions used for designating critical habitat areas. As a result, the feds reconstituted an evaluation of important critical habitat areas. He thought that meant that they would reduce the number of critical habitat areas, but in fact that is not what it does: it allows them to reconsider all critical habitat in Alaska. However, they have backed up a little bit on that effort recently as a result of some of the state's challenges. But it does seem to be never ending. Fishing is often impacted by ESA listings.

SENATOR STOLTZE proposed a hypothetical scenario of frustration resulting from no action in the legislature and lack of success in the courts leading to a filing of an ESA on Kasilof Chinooks, and asked what uncertainty that could throw into the process.

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COMMISSIONER COTTEN responded that someone wanting to petition to list the Kasilof Chinook salmon would have to go through the same process that any other ESA petition would "enjoy." The department would participate fully at that point. It has a lot of expertise on a lot of salmon stocks, and staff would certainly dig deep if a proposal like that ever came up to make sure they are prepared. However, he didn't see that as a different process.

MR. DALE agreed and said the department has a lot of evidence that would show that a fishery could be managed on a sustained yield basis, and it has evidence and information on genetics that would clearly show whether one group is a distinct population segment.

He explained that like with the Prince of Wales wolf, different fish stocks can be detected as genetically different, but that is not all that determines whether it is a subspecies or not, or whether it should be listed or not. The FWS asks what unique characteristics of a population would be lost with its extinction and that is the reason why the Prince of Wales wolf wasn't declared a distinct population segment.

MR. DALE continued that the department works with Alaska Native groups on harvest of polar bear subpopulations that are shared with Canada and Russia. Many of the circumpolar species are managed under a treaty, and in this case there is a treaty and a shared quota between Alaska and Russia. He said the U.S. delegation recently went to Russia for that meeting, and the department wrote some strong letters siding with the North Slope Borough and Native Corporation asking the FWS not to implement the quota, because the other side doesn't have legal seasons or bag limits and no meaningful reporting of the harvest. So, an unfair burden would be placed on Alaska Natives without any meaningful conservation on the other side.

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He said the humpback whale is a proposed partial delisting that the State of Alaska and Hawaii actually began. It's a situation where the entire humpback whale species was listed way back in

the early days. Through the work of a large variety of people, 14 different stocks were identified, and the Hawaii/Alaska segment didn't look like it needed to be listed. That final ruling is expected soon. The state will be involved in a post-delisting monitoring plan.

MR. DALE reported that yellow cedar is another climate change listing petition and it has a positive 90-day finding. The petitioners really overstated the decline and there is inconsistent evidence for a climate change link. He, working with DNR foresters, has submitted extensive comments on this. The status review won't happen right away.

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SENATOR STEDMAN said the yellow cedar petition relates to the previous question about data mining issues where people select a species to throw on the table to block development. Most of the yellow cedar die-off happened in Southeast in the 1880s and 1890s. "They've been dead for a long time," but the impression the public gets is of recent industrialization. He asked if this petition will affect any state land in Southeast if it prevails.

MR. DALE said he couldn't speak to the distribution of yellow cedar relative to state land, but he can state that where it is distributed on state land, those restrictions on activities would apply - to private lands, as well - should this species become listed.

SENATOR STEDMAN said that yellow cedar is a valuable tree that is used as insect repellent and takes 100 years to decay. He said it is valuable as an export, and ESAs are just a mechanism to continually try to shut down the Tongass Forest. He hoped the state would take a very aggressive position on fighting this type of activity.

SENATOR MICCICHE asked what proportion of plant species versus animal species have there been attempts at listing.

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BRAD MEYEN, Sr. Assistant Attorney General, Resources Section, Department of Law (DOL), Anchorage, Alaska, replied that the Aleutian shield fern is the only listed plant species for Alaska. The yellow cedar is the first plant species that has been proposed for listing after that.

MR. DALE followed up that he was thinking of the question in terms of nationally, because Hawaii has the unfortunate

distinction of being the clear winner in the total number of listed species category and most of those are plants. The picture is probably much different nationally.

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MR. DALE said the beluga whale in Cook Inlet has been listed as endangered and has a draft recovery plan in place. He has serious problems with this plan, because there is no viable path to down-list or delist, even if research clearly shows that the whales are no longer in danger of extinction. This is because there are historical numbers for only a very short time period. The population could very well increase modestly or become very stable in its current size and no longer be in danger of extinction, but that could not be proved. This is a very serious problem in recovery plans and a very important step for states to pay attention to when they are being developed. The only way to change that equation at this point is to know more about the whales in the Cook Inlet. That applies to both the critical habitat and population dynamics. As more becomes known about these whales, it's possible that some critical habitats will be found to not be, in fact, critical.

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MR. DALE said the status review of the Pacific walrus is on the radar and that decision will be made by September 2017 and a decision is expected on the listing of the Lake Iliamna harbor seal in the next few months. The western bumble bee petition is being reviewed, and it ranges across much of Alaska. So, the department is actively busy looking into these species as much as possible from all aspects.

He said Alaska was asked to participate in the Western Governors Association ESA Initiative, and he is working heavily on that content with two other coastal states with whom Alaska shares unique ESA characteristics. The Association of Fish and Wildlife Agencies has a standing Threatened and Endangered Species Policy Committee, and the states provide direct and strong unified recommendations to the FWS and the NMFS in that forum. The Joint State-Federal ESA Task Force is another initiative that has 10 states including Alaska. He wants to maintain Alaska's seat, because other states consider Alaska a leader in this field and he wants to maintain that role going into the future.

CHAIR GIESSEL asked if bumble bees are honeybees.

MR. DALE said he didn't know that answer, but he would provide that information for her.

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MR. DALE said the department wants to increase the state's role and standing in addressing ESA shortcomings through these initiatives and discussion with Alaska's delegation as Congress intended. Improving the listing and critical habitat designation processes and addressing climate change issues, like defining "foreseeable future" appropriately, is very important and until that is done, climate-based petitions will continue.

CHAIR GIESSEL asked what the chances are for delisting sea otters, because the committee had heard a lot about their destructive activities toward shellfish.

MR. DALE answered that the sea otter issue is more under the Marine Mammal Protection Act than the ESA.

SENATOR STEDMAN noted that sea otters are a problem, particularly in Southeast and the state needs to keep the feds' feet to the fire in updating their reports, as they are supposed to do, and allow the citizens of Alaska who are legally qualified hunters to be able to get their limit.

He also commented that Southeast has been going up and down with the ice ages and a lot of the yellow cedar range is most likely under water now due to changing ice levels. He recognized that some coastal village sites that used to be at water level are 300 feet above high tide now, and some of the ones that are at water level, like Sitka, did not used to be a shore front community.

SENATOR STEDMAN said it's hard to live in a national forest and be viewed as an invasive species by the feds while some of these groups just use the courts to try to shut down the industrial base. He invited people to swing by his office in Room 30 to see his charts of Southeast Alaska's industrialization, salmon canneries, fish traps, and mines 100 years ago.

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SENATOR MICCICHE said in all of their enlightenment, the feds don't realize that there is an interplay between the ESA and the Marine Mammal Protection Act. Sea otter die offs are happening in Kachemak Bay because they were protected in the first place and the population consequently became unsustainable. He worries that the Steller sea lion will be in the same situation. He wondered about the potential for fraud or abuse from using the ESA law for self-serving reasons and thought there should be

some penalty for abusing something that should be an honorable act.

MR. DALE responded that was a very good point and it was a subject of considerable discussion at the first two Western Governors Association meetings. That is the value of bringing in all kinds of recreational users as well as industry to the discussion.

SENATOR MICCICHE suggested a public outreach program that exposes what happens to the hundreds of millions of dollars that people send these environmental groups. Donors think they are saving a furry little critter and have no idea of the real objectives.

COMMISSIONER COTTEN commented that they are all familiar with the situation in Kachemak Bay where ADF&G was not allowed to manage sea otters on a sustained yield basis. Tanner crab, Dungeness crab, and King crab populations are all suffering as a result. If sea otters could be managed, that would then allow ADF&G to manage other species more intelligently.

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MR. DALE said money spent on research to avoid unwarranted listings and critical habitat designations is well worthwhile. Research enables the state to drive good decisions and limit unnecessary ESA regulations. It prevented the listing of Kittlitz's Murrelets, thus avoiding potential cruise ship regulations and barriers to that industry. Partnering with industry, research helped prevent listing of the yellow billed loon, which commonly nests in oil and gas areas, and helped determine that little brown bats nest in twos and threes in Canada and Alaska, and not in huge groups like elsewhere leading to the spread of the very lethal white nose syndrome, the cause of many needless petitions in Canada.

SENATOR MICCICHE said he was the local mayor at the time the beluga whale was listed and asked if there is something in the ESA that recognizes that our planet has moved many species along before the invention of the internal combustion engine or industry, because it moved beyond nature's usefulness.

MR. DALE said that was a good question to segue to Mr. Meyen for the rest of the talk, because nothing in the act separates natural extinctions from potentially human-caused ones. In fact, if something is inevitable because of natural processes, it's

still subject to the same law as something that was clearly or allegedly affected by humans in some way.

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MR. MEYEN responded that the ESA can actually be used to list healthy species and that is sometimes what happens. In the two cases they have talked about the listing was based on a projected decline in models going out 100 years.

MR. MEYEN said the Aleutian shield fern is the only listed plant species currently in Alaska and there are efforts to list the yellow cedar, but he is working closely with ADF&G and DNR to address its uniqueness. He said he would work with ADF&G on compiling a list of groups that bring these petitions forward.

MR. MEYEN said the ESA litigation on listing of polar bears left the question of whether it was appropriate for the FWS to designate over 187,000 square miles of land and water as critical habitat, which became effective in 2011. As soon as the six day notice expired, the State of Alaska filed suit in March, 2011, to challenge that designation for among other reasons the lack of defining certain primary constituent elements, which are biological and physical traits of certain types of land that are necessary for the conservation of the species. For example, the FWS designated a boundary area of five miles inland to cover denning habitat while 98 percent of that area does not have the necessary requirements to support denning.

Another factor is that when any state makes comments about either the listing of a species or the designation of critical habitat, the federal agency responsible for that species is to provide specific and direct comments back to the state, but the federal government did not do that properly. As part of the litigation, the U.S. District Court in Alaska agreed with the primary constituent elements issue and other factors in the case and overturned the polar bear critical habitat designation in Alaska, vacating it in January 2013. So, for the past three years there has been no critical habitat effective for the Alaska polar bear.

The FWS along with the environmental groups that have petitioned for listing the polar bear, principally the Center for Biological Diversity, then appealed to the Ninth Circuit. The briefing of that appeal has been completed and the case was argued before the justices when they were in Alaska in August 2015. All the writings and pleadings are done and they are just waiting for the final decision to be rendered.

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MR. MEYEN said there are two primary points of challenge: when a species is listed and the designation of critical habitat. The bearded seal (managed by the NMFS) was listed in 2012. In that instance, the state - along with the oil and gas industry, the North Slope Borough along with other North Slope interests - filed individual lawsuits. All three of them were managed together and all the briefings coordinated. In July 2014 the judge vacated the listing of the bearded seal for among other reasons, not responding directly to the state's criticisms of the listing under Sec. 4(i) of the ESA and not giving the full explanation of why the FWS did not accept the state's comments, and instead proceeded to list the species in any event. Another factor was using a 100-year projection model for the sea ice regime to predict that a species, which numbers in the hundreds of thousands today, would become in danger of extinction 100 years in the future. The court thought that was a little bit too far in the distance to be reasonably foreseeable.

When the listing was vacated in July 2014, the NMFS and the environmental groups that had done the petition (the Center for Biological Diversity) appealed to the Ninth Circuit. This case was fully briefed by the state and filed in November 2015. All that remains is the final brief by the federal government and that is due on March 18, 2016.

MR. MEYEN said the next case is the ringed seal that is very similar to the bearded seals. It was originally listed in 2012, but the decision was to address these species (bearded seal and Prince of Wales wolf) separately. The State of Alaska and others - the Alaska Oil and Gas Association (AOGA), the American Petroleum Institute, and a coalition of North Slope interests including the North Slope Borough - filed their independent actions to challenge the listing and the three actions were consolidated for purposes of briefing and hearing. All the briefings were completed in November 2015 and the court has not set a hearing yet. It is the same judge that handled the bearded seal case, and a hearing was not held in that case either. Again, the DOL is in the situation of waiting for a decision. That is the extent of open litigation where the State of Alaska is a party.

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MR. MEYEN said the decision was made to not list the Alexander Archipelago wolf in Southeast and they are waiting to see if the environmental organizations will attempt to challenge it. If

that is the case and the DOL determines that the decision was appropriately made by the FWS, then the department would consider intervening on behalf of the federal government to support their decision.

MR. MEYEN explained that the state has not always been adverse to the federal government on listing issues. It has intervened and/or filed amicus briefs on behalf of their positions in the past. One example from several years ago is the decision to not list the ribbon seal. In that case, the DOL intervened and filed amicus briefs on behalf of the NMFS. The decision was upheld and the ribbon seal is not listed in Alaska waters at this time.

SENATOR STOLTZE asked if he thought the ESA is the number-one threat to development in Alaska.

ATTORNEY GENERAL RICHARDS said his great concern is if large critical habitat designations occur, on the North Slope for instance, that they would pose a very serious economic threat to the state's economic base.

SENATOR STOLTZE observed that the ESA is applied using the theory of global warming. With the polar bear the hypothetical is that its habitat will be destroyed in the future.

ATTORNEY GENERAL RICHARDS said this is one area where the state has to play the long game. Just from a lawyer's perspective, when the state enters into these cases it's incredibly important to inform the record, to do the research and analysis so that years down the road there is an informed record to win on a scientific basis and not just on legal challenges. Maintaining alignment within the administration and with Native and industry groups is really important, because the state has to have five to ten year visions, if not longer, of how to keep these repeated challenges from shutting down development.

SENATOR STOLTZE closed by acknowledging his appreciation of the legal team on this issue.

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SENATOR MICCICHE said when the National Oceanic and Atmospheric Administration's (NOAA) priority actions for 2016-2020 was released, it lead in by saying that, "Eight species were identified by the National Marine Fisheries Service as among the most at risk of extinction," and the Cook Inlet beluga whale is on that list.

MR. DALE said he hadn't read that report.

COMMISSIONER COTTEN said he had seen it, and in fact, the beluga whale is an interesting animal in a lot of different ways. But it isn't just a matter of evolution of the planet and the ice age withdrawal that caused a reduction in their population in Cook Inlet. The U.S. government allowed a hunt for several years that never should have happened and that did reduce the numbers.

He said there is some discussion about what might have been the average population over a period of years, and while there is some conjecture around that number, now it's in the neighborhood of about 300-350 animals, and the determination was made that that number was not sustainable. The other half of that problem is that no one has been able to identify why they haven't recovered. That is why the recovery plan was filled with so much research to make it rebound.

SENATOR MICCICHE said stakeholders in the original meetings with NOAA and NMFS were forbidden from talking about the subsistence hunt that resulted in the decimation of belugas on the west side of Cook Inlet. The first page of the first report said that subsistence hunting would be disregarded as a cause. It was very frustrating.

SENATOR COSTELLO asked Attorney General Richards if the state's current budget situation would diminish the department's ability to be engaged in this effort.

ATTORNEY GENERAL RICHARDS replied that he didn't think so. The department has had excess funds for ESA litigation for a number of years that was not needed and prior to his coming into office, a few attorney generals had focused on developing the internal capacity to handle these large cases, and they have been very strategic about the way they do it. They are litigating as much as they need to, and it is being done leanly and successfully.

CHAIR GIESSEL thanked everyone and echoed what Senator Stoltze said about due diligence on this issue.

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CHAIR GIESSEL adjourned the Senate Resources Standing Committee meeting at 5:04 p.m.