

**ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE**

March 1, 2021

3:31 p.m.

MEMBERS PRESENT

Senator Joshua Revak, Chair (teleconference)

Senator Peter Micciche, Vice Chair

Senator Click Bishop

Senator Gary Stevens

Senator Jesse Kiehl

Senator Scott Kawasaki

MEMBERS ABSENT

Senator Natasha von Imhof

OTHER LEGISLATORS PRESENT

Senator Tom Begich

COMMITTEE CALENDAR

PRESENTATION: DESIGNATING ENDANGERED SPECIES IN ALASKA: A
CAUTIONARY NOTE

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

DOUG VINCENT-LANG, Commissioner
Alaska Department of Fish and Game
Juneau, Alaska

POSITION STATEMENT: Delivered a presentation on designating
endangered species in Alaska.

ACTION NARRATIVE

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VICE CHAIR PETER MICCICHE called the Senate Resources Standing Committee meeting to order at 3:31 p.m. Present at the call to order was Senators Kawasaki, Stevens, Kiehl, Chair Revak (via teleconference), and Vice-Chair Micciche.

**PRESENTATION: Designating Endangered Species in Alaska:
A Cautionary Note**

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VICE CHAIR MICCICHE announced the committee would hear a presentation from Commissioner Vincent-Lang on designating endangered species in Alaska.

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DOUG VINCENT-LANG, Commissioner, Alaska Department of Fish and Game, Juneau, Alaska, reviewed the following outline of the presentation on designating endangered species in Alaska:

1. Definition of the ESA
2. State of Alaska position
3. ESA process
4. Alaska ESA examples
5. Issues with current implementation
6. Current status of ESA listings in Alaska
7. Consultation process issues
8. Legal considerations

COMMISSIONER VINCENT-LANG discussed the history and purpose of the Endangered Species Act (ESA). He paraphrased slide 3 that read as follows:

The ESA

- Adopted under President Nixon in 1973
- **Purpose:**
 - to protect critically imperiled species from extinction
 - to recover species to the point where legal protections are not needed
- **Effect:** Puts species and the habitats they occupy that the federal government determines to be critically imperiled under federal control and adopts a comprehensive federal regulatory oversight program.

COMMISSIONER VINCENT-LANG emphasized that the state supports listing species that are critically imperiled and at-risk of immediate extinction. However, the state is concerned about what constitutes "critically imperiled" and how much federal oversight is necessary to "recover" a species.

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COMMISSIONER VINCENT-LANG stated agreement with listing the North Pacific right whale as endangered. He said there is no question that this species needs protection, and the state is committed to work with the federal government until protection is no longer needed.

COMMISSIONER VINCENT-LANG stated he disagreed with the ESA ringed seal listing. He paraphrased slide 6 that read as follows:

Disagreement

Ringed Seals

- The state disagrees with the listing of this species as threatened.
- This species currently numbers in the millions worldwide.
- By their own analysis NOAA found there will be no population level impacts to this species in the next 50 years.
- However, this species was listed based solely on climatic modeling results that show something might happen in the next 100 years that warrants its listing today.
- As a result of its listing this species is granted the same protections as the right whale and NOAA recently proposed a designation of critical habitat for this species that is about the size of Texas.

We disagree with the listing of this species and are fighting in court to reverse it.

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VICE CHAIR MICCICHE announced Senator Bishop joined the committee meeting.

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COMMISSIONER VINCENT-LANG continued the slide presentation. He reviewed the ESA process that starts with a public petition or is initiated by an agency when people are concerned about the extinction of a species. After the petition, the agency has 90 days to determine whether further analysis is necessary to come to a listing decision. He said the state's experience is that the findings could take up to a couple of years. This is followed by a 12-month status review and a proposed decision that goes out for public review. Thereafter, the agency makes a final decision on whether to list the species.

COMMISSIONER VINCENT-LANG explained that if the species is listed, the next steps are to designate the critical habitat and establish a recovery team and develop recovery objectives. As the species does or does not recover, it is reclassified. He defined each category. Up-listing is the reclassification of a species from threatened to endangered; down-listing is the reclassification of a species from endangered to threatened; and de-listing removes a species from the list.

COMMISSIONER VINCENT-LANG highlighted the following four species to explain the ESA listing process in greater detail:

Alaska ESA Examples

Aleutian Canada Goose
Polar Bear
Steller Sea Lion
Beluga Whales in Cook Inlet

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COMMISSIONER VINCENT-LANG stated that the Aleutian Canada goose was listed as endangered in 1967 and a recovery plan was adopted in 1974. Predation by introduced foxes was identified as the primary threat and once they were removed, the species began to recover. He underscored it is optional for the agency to define critical habitat, and it was not done in this case, because habitat was not a limiting factor. The species was reclassified to threatened status in 1990 and de-listed as recovered in 2001.

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SENATOR BISHOP asked who introduced the foxes.

COMMISSIONER VINCENT-LANG answered he did not know and directed attention to the ESA listing process for the Steller sea lion. He explained that the eastern and western stock of this species was listed as threatened in 1990. The National Marine Fisheries

Service (NMFS) established critical habitat in 1993 after a determination that fish were an important prey-base for Steller sea lions so the habitat for the prey-base needed protection. He noted that the western stock of the species, which occupies the area from Prince William Sound to the Aleutians, was up-listed to endangered status in 1997. The eastern stock, which occupies Prince William Sound down through Southeast Alaska, remained in threatened status.

COMMISSIONER VINCENT-LANG explained that the federal government prepared a fishery biological opinion (BiOp) as part of a consultation process and fishing was restricted in 1998. A recovery plan was adopted in 1992 and revised in 2008 when recovery objectives were established. These were to grow the stock throughout the range three percent per year for 30 years and to eliminate any threats. He highlighted that the estimated cost to achieve the objectives was \$430 million. The current status is that the eastern stock remains threatened, and the western stock remains endangered.

COMMISSIONER VINCENT-LANG said this was an interesting case. The state did not fight the listing and the establishment of critical habitat. Rather, it used federal and matching state general fund dollars to collect data on the Steller sea lion. The state's data was used in court to challenge the federal BiOp, which unnecessarily restricted fishing in Alaska. The collected data demonstrated federal science was wrong. The judge agreed and overturned the BiOp; the rewritten BiOp resulted in fewer Alaska fishery restrictions. He emphasized that good, state-collected data was crucial to Alaska's success, because the courts were deferential to federal data.

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SENATOR KAWASAKI asked about the process to disagree, challenge, or appeal a federal decision.

COMMISSIONER VINCENT-LANG responded every step in the ESA process can be litigated by both the State of Alaska and by non-governmental organization (NGO) communities watching the federal process. To challenge, the state has two options. It can litigate a listing or designation of critical habitat, or use state science to battle decisions. In this case, state data, collected with federal dollars, proved federal science was not the best available. Fortunately, a federal judge agreed and eased fishery restrictions.

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SENATOR STEVENS questioned why the Steller sea lion was divided into eastern and western stocks.

COMMISSIONER VINCENT-LANG answered the Steller sea lion was originally listed as an entire stock. Eventually, through genetic information, the stocks were separated. The federal government allowed different listing criteria for each species. The eastern stock met its recovery objectives, so it was down-listed. Whereas, the western stock was not meeting its recovery objectives, so it remained listed as endangered. This resulted in differential fishery restrictions in the Western stock verses the Eastern stock.

SENATOR STEVENS commented that this added an aspect of complexity. Other species could be treated the same way; healthy in one area and endangered in another.

COMMISSIONER VINCENT-LANG said ringed seals were counted as a whole, without demographic separation. The worldwide population numbers in the millions. Even though the United States ESA determined the worldwide population was at risk, the recovery and critical habitat plan jurisdiction was limited to U.S. waters.

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CHAIR REVAK referred to the NOAA analysis that found there will be no ringed seal population impacts within the next 50 years. He said some people have speculated that the federal government was motivated to list this species to skirt promises made to Alaskans under ANILCA and other federal laws. He requested feedback on this speculation.

COMMISSIONER VINCENT-LANG said the State of Alaska disagrees with the ringed seal listing, because fifty years is well beyond what is foreseeable. He posited that species most at-risk, such as the North Pacific right whale, should be prioritized. Ringed seals do not merit the same level of resources, in terms of extinction prevention. In essence, the listing gave both species equal levels of protection.

He said the net effect of the Endangered Species Act was to remove the listed species and its habitat from state management. Some people believed the underpinning of this was to bring some species and their habitat under federal control.

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CHAIR REVAK asked how the ringed seal listing affects Alaskans.

COMMISSIONER VINCENT-LANG answered that as soon as a species is listed, direct and incidental taking is prohibited. A federal permit is required for any activity that directly or indirectly takes a ringed seal. In addition, anything that potentially adversely modifies or jeopardizes the habitat, would now be under federal permit, especially if it occurs on federal land. Suddenly, an area the size of Texas is subject to a jeopardy and adverse modification fine.

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SENATOR KIEHL referred to the ESA examples, three marine mammals and a migratory bird, described earlier. He asked for confirmation that these species are not subject to much state management.

COMMISSIONER VINCENT-LANG answered that is correct. Until now, listed species have primarily been limited to marine mammals. He predicted this strategy would soon be used on non-marine mammals.

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VICE CHAIR MICCICHE asked if polar bears were listed, because modeling determined the population could be in danger in the future.

COMMISSIONER VINCENT-LANG responded polar bears are next. He paraphrased slides 12 and 13 that read as follows:

Polar Bear

- Environmental groups petitioned USFWS to list polar bears as endangered due to climate change impacts
- May 2008, USFWS listed polar bears as threatened based on:
 - climate change will result in a decline of sea ice habitats
 - lost habitat will threaten currently healthy populations with extinction over the next 50-100 years

He said the State of Alaska opposed this listing, took it to court and lost. The judge ruled it was at the discretion of the U.S. Fish and Wildlife Service (USFWS) to define foreseeable future, and to determine the statistical validity of the definition. As a result of the polar bear listing, Alaska has a:

- Section 4d Rule
 - Defines the scope of the Section 7 consultation process
- Critical Habitat
 - Designated over state objection over 200,000 square miles as critical habitat
- Recovery Plan
 - Developed a recovery/conservation plan that set recovery objectives to OSY numbers

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COMMISSIONER VINCENT-LANG related that polar bears are not only listed under the ESA, but also under the Marine Mammal Protection Act (MMPA), which means the recovery objective changed from "action required to prevent extinction" to the much higher "optimal sustainable yield (OSY)" numbers. He emphasized that in Alaska, the two subpopulations of polar bear are not at immediate risk of extinction. The Chukchi population is healthy and robust and the southern Beaufort Sea population, which has declined in numbers, has stabilized as a result of changing habitat.

He related that the USFWS listed the worldwide population of polar bears as at-risk of extinction. However, the agency did not list the 19 subpopulations identified in the Marine Mammal Protection Act as either threatened or endangered, yet recovery objectives were set for each of the subpopulations. He said a lot of "messes" resulted because of how a species was listed worldwide versus how the recovery was managed in a subpopulation.

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SENATOR BISHOP asked if the USFWS was collaring, tracking, and monitoring polar bears.

COMMISSIONER VINCENT-LANG offered his understanding the agency had adopted non-handling methods to estimate populations, in lieu of collaring, to avoid harassment of the bears. He contrasted the non-handling methods used on polar bears with the hands-on research methods used on California condors, which is also a listed species. Not only were California condors collared, but they were also captured annually to test lead levels. He said ADF&G believes listed species need to be studied.

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SENATOR STEVENS brought up the issue of climate change and described it as "out of our control." He questioned how the state can be required to maintain a species if climate change causes it to relocate.

COMMISSIONER VINCENT-LANG responded climate change was one of the most interesting aspects of the polar bear listing. Even though it was identified as the primary threat, the USFWS said little could be done with respect to climate change. Instead, the USFWS focused on management of other existing threats, which were considered inconsequential at the time of listing.

COMMISSIONER VINCENT-LANG reviewed the impacts on ANWR and the North Slope that resulted from the polar bear listing. He said oil and gas operations were not causal components in the listing, but oil and gas activities were impacted due to incidental intake regulations, both in ANWR and on the North Slope. The listing is also affecting traditional uses of polar bears by Alaska Natives, and it has started to affect interest in Alaska as a place to do business. He maintained challenged permits create uncertainty as to whether oil wells will be allowed to operate.

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SENATOR KAWASAKI read AS 16.20.190(a) regarding what the commissioner of fish and game must consider when determining endangered species. He asked if ADF&G considers this statute to render the determination as opposed to what USFWS has done.

COMMISSIONER VINCENT-LANG answered although state statute does not define the word "foreseeable," it was considered. He said ADF&G could not conclude polar bears were at-risk of extinction in the foreseeable future.

SENATOR KAWASAKI asked if he was referring to polar bears in the state, not internationally.

COMMISSIONER VINCENT-LANG answered right.

SENATOR KAWASAKI said he wanted to see both a healthy polar bear population and continued drilling. There are pros and cons to both, but he did not like to hear that polar bears may, in fact, become extinct in Alaska. He continued to say:

Senator Stevens is right, we are not going to get away from the climate changing, some things we can do, and some things are beyond our control.

COMMISSIONER VINCENT-LANG offered his belief that the state agrees that the polar bear population should be monitored to ensure it does not become extinct. However, the entire weight of a federal and state regulatory process should not be utilized when, under USFWS estimates, the risk of extinction hovers in the 1 percent to 3 percent range.

COMMISSIONER VINCENT-LANG said in the next couple of years, population estimates would be available in the Beaufort. At that time, it will be clear whether the northern Beaufort and Chukchi populations have increased. He suspected that this would indicate southern populations had moved north.

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SENATOR BISHOP asked how long the polar bear had been on the planet and suggested 10,000 years.

COMMISSIONER VINCENT-LANG said yes, something like that.

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VICE CHAIR MICCICHE brought up listed birds that migrate to Alaska. He asked how listings attributable to declining populations and habitat in other regions of the world, but not attributable to conditions in Alaska, are handled.

COMMISSIONER VINCENT-LANG answered the worldwide population would be evaluated. If the population is determined to be threatened or endangered, critical habitat along migration routes would be identified. The species would then be listed as threatened or endangered in Alaska, and the habitat designated as critical to prevent extinction of the species.

VICE CHAIR MICCICHE asked, if the South American habitat was decimated but the habitat in Alaska was secure, would the state have any control or would it suffer the same consequences.

COMMISSIONER VINCENT-LANG answered this was exactly the case with yellow-billed loons. Although they migrated, nested, and fledged in Alaska, the primary threat to the yellow-billed loon was in the South China Sea. Alaska was disconnected from the limiting factor, but the migratory routes and nesting grounds in Alaska would probably be designated as protected.

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SENATOR BISHOP asked if there were any documented cases of interbreeding between polar bears and grizzly bears in the Interior.

COMMISSIONER VINCENT-LANG answered yes, it occurred.

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COMMISSIONER VINCENT-LANG discussed beluga whales in Cook Inlet. Slides 16-17 read as follows.

Beluga Whales in Cook Inlet

- Beluga whales over-harvested in early to mid-1990s
- In 1998, NMFS initiated a status review to list beluga whales in Cook Inlet as endangered
- In 2000, NMFS determined the whales are not in danger of extinction and chooses to not list under ESA
- NMFS instead lists the whales as depleted under the MMPA
- In October 2008 NMFS listed beluga whales as endangered based on:
 - population was not increasing as fast as expected after harvest was regulated
 - the population had a greater than 1% chance of going extinct within 100 years
- Critical habitat has been established in Cook Inlet
- A recovery plan has been developed that sets the recovery goal to OSY levels
- We are now seeing a wide variety of lawsuits impacting oil and gas operations as a result of the listing
 - The state is engaged as an intervenor.
- NMFS has stated its intent to examine fisheries impacts on these whales with an eye towards restricting fisheries

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VICE CHAIR MICCICHE asked if MMPA was the acronym for the Marine Mammal Protection Act.

COMMISSIONER VINCENT-LANG said yes.

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SENATOR BISHOP cited a national news article published two days prior, "Energy Company to Breed Endangered California Condors to Replace Birds Killed by Turbine Blades." A green energy company, a California environmentalist, and the USFWS worked together to raise California Condors in captivity. He suggested the possibility of oil and gas companies breeding belugas in captivity, for release in Cook Inlet, as a new paradigm to alleviate the problem.

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COMMISSIONER VINCENT-LANG answered that beluga whales are genetically one population across the state. Prior to the MMPA overharvesting regulation, which occurred twenty-five years ago, Bristol Bay and Cook Inlet belugas intermixed in Shelikof Strait.

COMMISSIONER VINCENT-LANG said the MMPA harvesting regulations resulted in larger orca populations that created a barrier in Shelikof Strait which segregated the Bristol Bay belugas from the Cook Inlet belugas. The larger orca population also forced belugas into a narrower habitat range in the upper part of Cook Inlet, whereas belugas used to occupy the entire inlet. He said the state did not challenge the listing in court and instead put sonobuoys in Cook Inlet to collect science. Belugas were not heard in the middle and lower parts of Cook Inlet, but there were a lot of killer whale sounds. He said NMFS looked at beluga whales in Cook Inlet but did not look at the geographically isolated pod of 12-13 belugas that occupied the Yakutat area. NMFS chose to focus on the Cook Inlet population without considering other populations.

COMMISSIONER VINCENT-LANG surmised that the smaller beluga population in Cook Inlet was unable to grow to 1500 (the OSY number), because the habitat range was constrained by killer whales. He stated this would not change unless something was done about killer whales in Cook Inlet.

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SENATOR KIEHL brought up recovery numbers and noted that the federal and state goals matched. The goal was not just to conserve and protect, but to restore and propagate. He asked Commissioner Vincent-Lang how he interpreted the instructions in statute to be different from the federal government with ESA.

COMMISSIONER VINCENT-LANG answered it was unnecessary to grow numbers back to historic levels under the state Act. He said the population needed to be recovered sufficiently to prevent

extinction. To ensure good diversity in the population, the right genetic number of belugas in Cook Inlet was 500.

He stated resources should be used on species most critically at-risk in the immediate future, rather than potentially threatened in the future. He said he fundamentally took issue with the fact that resources could be thrown at a species that had a 1 percent chance of extinction over the next 100 years; the threshold is too low.

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SENATOR STEVENS commented that it was a fascinating fact that orcas have interrupted interbreeding between Bristol Bay and Cook Inlet belugas. He asked if it was possible to control the population of killer whales.

COMMISSIONER VINCENT-LANG responded it was not possible under the Marine Mammal Protection Act.

SENATOR STEVENS asked if the orca population doubled or tripled, could their numbers be controlled.

COMMISSIONER VINCENT-LANG was aware of one instance when the federal government allowed a listed species to be controlled to protect another species at greater risk of extinction. In the Columbia River, Steller sea lions consumed endangered salmon and steelhead trout. The determination was that some of the Steller sea lions could be taken to ensure salmon and steelhead trout were protected.

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VICE CHAIR MICCICHE asked if there was a threshold under ESA to manage predatory species.

COMMISSIONER VINCENT-LANG answered that it is discretionary within the federal agencies. There is not a specific standard.

VICE CHAIR MICCICHE asked, if the problem were in the archipelago of Kodiak, if it could be worked from that angle. He then withdrew the question.

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COMMISSIONER VINCENT-LANG chronicled the issues the state sees with the implementation of the ESA. He briefly touched on the issue of appropriate parameters when modeling populations under consideration for listing, slide 18:

- How far into the future can population trends be reasonably predicted -
10 years, 50 years, 100 years, 300 years?
- What is a reasonable level of extinction risk -
1%, 10%, 20%, 25%?

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VICE CHAIR MICCICHE asked how the threshold was defined in the ESA.

COMMISSIONER VINCENT-LANG answered federal agencies had the discretion to define foreseeable and the discretion to define the level of acceptable risk.

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COMMISSIONER VINCENT-LANG reviewed the questions about climate related listings, recovery objectives, and critical habitat on slides 19-21:

For climate related listings:

- Is it possible to save all species in their historic ranges when the ecosystems are changing due to climate change?
- Assuming climate is changing ecosystems, how should critical habitat be established and defined?
- How would recovery objectives be written, especially for species at currently healthy levels but are projected to decline?
- Should a species be listed even if the cause (climate change) cannot reasonably be addressed by the ESA?
- What could not be listed due to climate change?

For recovery objectives:

- Are recovery objectives set too high?
- Can threats be completely removed?
- Can population targets be reached and sustained?
- MMPA and ESA have different criteria for de-listing. Should ESA recovery standards be the same as those for de-listing under MMPA?

For critical habitat:

- What is truly critical?
- Are excessive designations necessary?
- What is considered [de minimis] impact?

COMMISSIONER VINCENT-LANG displayed the map on slide 22 of the current or proposed critical habitat in Alaska. He noted almost the entirety of Alaska's coastline is designated as critical habitat for one species or another. He pointed out that this map differs considerably from the East Coast map for whales. Rather than designating the entire eastern coastline as critical habitat for whales, very discrete areas that are important for feeding and migration were designated as critical habitat, but not the entire range. He said Alaska is being singled-out for a differential application of critical habitat.

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COMMISSIONER VINCENT-LANG pointed out that it is easier to list a species than to de-list a species. He paraphrased the following points on slide 23:

- About 2,000 plants and animals are currently listed as threatened or endangered under ESA
- An additional 300+ species are being considered for listing
- To delist, the agency must determine that:
 - a species must be no longer in danger of becoming extinct
 - threats facing it have been eliminated and are monitored
- Since inception, only 46 species de-listed, of which only 20 have been recovered (~1%)

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VICE CHAIR MICCICHE asked how the MMPA and the ESA work when they conflict with "no diminishment" under ANILCA.

COMMISSIONER VINCENT-LANG answered the federal government argued the Endangered Species Act and the Marine Mammal Protection Act supersede ANILCA through the Commerce Clause.

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CHAIR REVAK asked if ADF&G was prepared to have a conversation with the federal government regarding the excessive critical habitat designations up and down Alaska's coastline. He also asked what the state needed to do better research.

COMMISSIONER VINCENT-LANG answered ADF&G has been developing a record of both the ringed seal and the humpback whale to determine which occupied areas are critically important habitat to those species.

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VICE CHAIR MICCICHE mentioned that Alaska did not challenge its rights under ANILCA and asked if it had created a precedent since states without agreements, such as ANILCA, had fared far better than Alaska. He also asked about the possibility of litigating previous critical habitat listings.

COMMISSIONER VINCENT-LANG answered that the state was poised to have that discussion about ringed seals and humpback whales. He said an administrative record is being compiled to show Alaska has been treated differently.

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CHAIR REVAK asked if ADFG had a division specifically focused on marine mammals and suggested that if not, would it be beneficial.

COMMISSIONER VINCENT-LANG answered that a section in the Division of Wildlife Conservation is dedicated to marine mammals. The governor's proposed budget had \$4 million earmarked to collect marine mammal science that will hopefully be used to better inform decisions of the USFWS. The state learned that backed by science, it could challenge decisions in federal court. Without sound science, it was limited by the discretionary decisions of federal agencies.

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VICE CHAIR MICCICHE asked Senator Revak if he was satisfied with the commissioner's answer.

CHAIR REVAK responded that it is imperative the State of Alaska be on top of the science.

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SENATOR BISHOP stated support for an adequately funded division to argue the state's case in federal court.

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COMMISSIONER VINCENT-LANG noted the ringed seal decision was not challenged. Instead, five years was spent to collect ringed seal demographics, health data, body condition and other data. Not a

single impact to ringed seals was evidenced. Rather than challenge the listing, a request to de-list was submitted.

He said the federal government recently denied the de-listing petition, arguing that despite the current health of the population, there was a 1 percent probability the species might be impacted in the next 100 years.

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VICE CHAIR MICCICHE referred to the Columbia River predator control program executed on the Steller sea lion. He asked if state or federal science was used to make the decision.

COMMISSIONER VINCENT-LANG answered he thought it was a combination.

VICE CHAIR MICCICHE requested more information, specifically, whether the program resulted from a federal and state partnership. If so, he said it would support standing up a division in Alaska to work with the federal government on similar issues, like the beluga - orca issue in Cook Inlet.

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COMMISSIONER VINCENT-LANG displayed the current status of endangered and threatened species listed in Alaska on slides 24-25.

Current Status of Listings
In Alaska

ESA:
Endangered Species

- Short-tailed albatross - USFWS
- Eskimo curlew - USFWS (presumed extinct)
- Aleutian shield fern - USFWS
-
- Steller sea lion (western stock) - NMFS
- Bowhead whale - NMFS
- Fin whale - NMFS
- Cook Inlet beluga whale - NMFS
- Humpback whale (Western NP DPS) - NMFS
- Other rare species: North Pacific right whale, Blue whale, Sei whale, Sperm whale, and the Leatherback sea turtle - NMFS

ESA:
Threatened Species

- Spectacled eider - USFWS
- Steller's eider (AK breeding pop) - USFWS
- Polar bear - USFWS
- Northern sea otter, southwest Alaska DPS - USFWS
- Steller sea lion, eastern pop. - NMFS
- Green, loggerhead and olive ridley sea turtles - NMFS
- Wood bison (less the E/NS population) - USFWS
- Mexican DPS humpback whale - NMFS

COMMISSIONER VINCENT-LANG recounted the process to obtain a nonessential and experimental population designation and the reason it was requested for the wood bison.

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SENATOR KAWASAKI asked about the current status of the herd.

COMMISSIONER VINCENT-LANG said the population is slowly growing.

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SENATOR KIEHL asked him to describe department prevention activities that helped species currently under consideration, to recover and prevent further decline.

COMMISSIONER VINCENT-LANG displayed slide 26 and the roster of species currently under consideration for ESA listing to answer the question.

He said that the department allowed the harvest of the Alexander Archipelago wolf to get out of hand for a year, but they learned from that misstep. They put timely reporting in place so seasons could be shut down to avoid overharvest and actively watched the population and how it interacted with the management regime.

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SENATOR KIEHL noted that some of these species are harvested, some are not, but they are all contemplated under the Alaska Endangered Species Act.

COMMISSIONER VINCENT-LANG agreed and referenced the USFWS listed Pacific walrus and Kittlitz's murrelet to respond. He advised that as long as the department continues to receive federal grants, it would closely monitor the Pacific walrus population.

If it appears at-risk of extinction within the next twenty years, the department will work with the federal government to list that species.

He said the risk of extinction for the Kittlitz's murrelet is not very high over the next 100 years. The department has worked closely with the statewide wildlife grant programs to assess populations and genetic variation across the state. The state's science probably influenced the USFWS to refrain from immediately listing the species and instead provide close monitoring over the next several years. He noted that through the Exxon Valdez oil spill, the department gave \$250,000 to study the Kittlitz's murrelet, so a more informed decision could be made.

[4:40:27 PM](#)

VICE CHAIR MICCICHE announced 20 minutes until adjournment.

COMMISSIONER VINCENT-LANG acknowledged the time warning and continued to review the species currently under consideration for ESA listing. He stated that the Lynn Canal herring is actively studied. He noted that the [NMFS] listing was proposed by an opponent of a nearby Lynn Canal mine, not out of concern that the Lynn Canal population would go extinct.

COMMISSIONER VINCENT-LANG mentioned that Suckley's bumblebee is listed by USFWS and said he had no idea how to estimate the bumblebee population in the state, but he needed to figure out where they are on the landscape.

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COMMISSIONER VINCENT-LANG reviewed the highly migratory species outside Alaska that are ESA listed by NMFS, all of which affect Alaska's fisheries. The list on slide 27 was as follows:

- Southern resident killer whales- NMFS
- Mexican humpback whales- NMFS
- Puget Sound Chinook salmon- NMFS
- Snake River Fall Chinook- NMFS
- Willamette River Chinook- NMFS
- Lower Columbia Fall Chinook- NMFS

COMMISSIONER VINCENT-LANG said he did not believe that harvesting up to 200,000 king salmon in Southeast Alaska affects the reproduction of killer whales in Puget Sound, Washington as much as the water quality in the sound itself, but the

management of Alaska's fishery is tremendously affected, nonetheless. The same situation applies to Mexican humpback whales. The reproductive health of the species is likely affected by what is happening off the Mexican coastline, but if Alaska waters are designated critical habitat, cruise ship travel could be affected. Similarly, Southeast Alaska treaty fisheries are affected by the Snake River fall Chinook salmon.

COMMISSIONER VINCENT-LANG discussed slide 28 and the sections of the Endangered Species Act that become relevant when a species is listed. The slide read as follows:

- Section 9: Prohibits the "take" of a listed species. Under Section 3 take includes "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect or attempt to engage in any such conduct".
- Section 7: For projects that have a federal "nexus", federal agencies need to consult with NMFS or USFWS on any project that may affect a listed species or its critical habitat.
 - Biological assessment ("likelihood to effect" decision)
 - BiOp (with "JAM" finding and resultant incidental take statement and minimization measures).
- Section 10: For projects that have "incidental take" but no federal nexus.
 - Habitat Conservation Plans (HCP) to minimize and mitigate impact of incidental take
 - Incidental take permits w/ approved HCP

COMMISSIONER VINCENT-LANG expressed concern that the definition of "take" is modeled because it is not clear which of the activities in Section 3 is affecting the animal's behavior. Similarly, modeled results are used for polar bear incidental take requirements (ITRs) because documented cases on the North Slope are no longer verifiable. The current thinking is that flying a survey at a low-level has a five percent chance of "taking" a polar bear denning under the ice. ADF&G is not seeing these carcasses and is increasingly worried about estimating "take" on a model versus what is actually happening.

COMMISSIONER VINCENT-LANG directed attention to the map on slide 29 of the range of listed or candidate species. He highlighted how much of Alaska is within the range of a listed species.

COMMISSIONER VINCENT-LANG briefly reviewed the consultation process issues outlined on slide 30. It read as follows:

As more species are listed the more likely:

- minimization & mitigation efforts will conflict
- recovery objectives will conflict
- critical habitat needs will conflict
- climate impacts will be considered

COMMISSIONER VINCENT-LANG discussed the following legal considerations listed on slide 31:

- All agency decisions are subject to citizen litigation, from listing decisions to critical habitat designations, to [jeopardy and adverse modification (JAM)] authorizations.
- This has the real potential to slow resource development projects, and place decisions in the hands of judges.

He stated his preference was to place decisions regarding recovery in the hands of biologists.

COMMISSIONER VINCENT-LANG summarized that the Steller sea lion mitigation measures and polar bear incidental take requirements are clear evidence that listing will affect resource development in Alaska. He highlighted ADF&G's position that listing decisions and implementation should be based on reasonable time frames for population projections; reasonable recovery objectives and goals; and reasonable establishment of critical habitat.

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COMMISSIONER VINCENT-LANG concluded the presentation highlighting the current state strategy to address ESA listings. He paraphrased the list on slides 33-34 that read as follow:

- Challenge unwarranted or unjustified listing decisions (e.g., polar bear)
- Intervene in court cases in which the state has an interest (e.g., ribbon seal)

- Initiate down- or de-listing petitions for recovered species (e.g., Eastern DPS of SSL)
- Conduct research on at-risk or listed species to improve knowledge (e.g., Section 6 funds)
- Help Alaskans navigate thru the ESA processes
- Governor's budget includes a capital request for ADF&G to fund data collection and engage in legal challenges.
- Governor's budget also includes an increment for the Department of Law to engage in legal challenges of unwarranted actions.

[4:48:33 PM](#)

VICE CHAIR MICCICHE announced a few minutes remained for questions.

[4:48:42 PM](#)

SENATOR KAWASAKI asked if the State of Alaska had determined any species to be endangered that USFWS or NOAA had not.

COMMISSIONER VINCENT-LANG answered that the state supports listing the North Pacific right whale and many whale species as threatened. The primary threat to these whale species has been overharvesting. Because this was primarily due to overharvesting, he did not believe the critical habitat designation was needed. He noted that since the International Whaling Commission was created, that risk has been mitigated and many of the populations have grown. He said the issue with the Aleutian Canada goose was similar. Critical habitat was not designated because the primary threat was predation.

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VICE CHAIR MICCICHE interjected to ask whether the question was answered.

[4:50:38 PM](#)

SENATOR KAWASAKI rephrased the question and asked if the state had determined a species to be endangered under the four areas of concern and the federal government did not agree.

COMMISSIONER VINCENT-LANG apologized for the confusion and answered no.

[4:50:55 PM](#)

SENATOR STEVENS asked if a regime change might affect the Endangered Species Act.

COMMISSIONER VINCENT-LANG answered that the state would probably monitor species affected by natural population changes, but not list them. He noted that the issue might be treated differently by the federal government.

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VICE CHAIR MICCICHE asked if the Aleutian shield fern was the only plant listed under the ESA in Alaska.

COMMISSIONER VINCENT-LANG answered that is correct.

VICE CHAIR MICCICHE asked if yellow cedar was listed.

COMMISSIONER VINCENT-LANG answered no.

[4:53:17 PM](#)

VICE CHAIR MICCICHE thanked Commissioner Vincent-Lang. He stated it is not only the Resources Committee's responsibility to protect natural resources, but also to defend the right to extract, produce, and harvest resources for sustenance and economic survival as guaranteed under the Alaska Statehood Act and ANILCA.

[4:54:06 PM](#)

There being no further business to come before the committee, Vice Chair Micciche adjourned the Senate Resources Standing Committee meeting at 4:54 p.m.