



**INVESTIGATIVE REPORT**  
**Ombudsman Complaint A2008-0041**  
**April 22, 2010**

**Public Report**

*Edited and redacted to remove information made confidential by Alaska Statute and to protect the privacy interests of those citizens involved.*

A moose hunter contacted the Office of the Ombudsman in January 2008 because of his concerns about a decision by the Department of Law's Office of the Special Prosecutions and Appeals.

The hunter, who will be referred to in this report as the Complainant, filed an ombudsman complaint alleging that the Special Prosecutor failed to properly perform the duty of prosecuting two men for the offense of illegally assisting in the taking of a bull moose the same day one of them flew in a private aircraft in violation of 5 AAC 92.085(8):

***5 AAC 92.085. Unlawful methods of taking big game; exceptions***

The following methods and means of taking big game are prohibited in addition to the prohibitions in AAC 92.080:

(8) a person who has been airborne may not take or assist in taking a big game animal until after 3:00 a.m. following the day in which the flying occurred;

The Complainant specifically alleged that Special Prosecutor Andrew Peterson abused his prosecutorial discretion by dismissing charges against two hunters that the complainant said violated the "same-day airborne" regulation. The Complainant further alleged that the decision to dismiss the charges against the two defendants was motivated by the Juneau District Attorney's friendship with one of the defendants.

The ombudsman opened a complaint with the following allegation, written to conform with AS 24.55.150, which authorizes the ombudsman to investigate complaints about administrative acts of state agencies:

***Abuse of discretion: The Attorney General's office did not prosecute a hunter involved in the illegal taking of a moose because of a personal friendship with the hunter.***

Assistant Ombudsman Jennifer Christensen investigated the complaint with the assistance of Assistant Ombudsman Beth Leibowitz and forwarded her report to the ombudsman.

## BACKGROUND

The Complainant said he was hunting on September 17, 2006, when he saw an airplane that he believed was attempting to flush a moose out of a wooded area. He called the Alaska Department of Public Safety Division of Wildlife Troopers (AWT) on a satellite phone to report a violation of hunting regulations. The call was logged at approximately 7:30 p.m. on September 17, 2006.

The Complainant told the Alaska Wildlife Trooper dispatcher that he witnessed a yellow Supercub aircraft repeatedly marking the location of a moose for a hunter on the ground. The Complainant estimated he was one-half mile away from the plane when he saw what happened.

In response to the Complainant's report, Wildlife Trooper Todd Machacek conducted an investigation into his allegations the next day and subsequently filed criminal complaints against the Pilot, and the Hunter who was hunting on the ground. Trooper Machacek charged the two with violations of 5 AAC 92.085. (The names of the pilot and hunter have been removed to protect the privacy interests of the citizens involved. The pilot will be referred to as the Pilot and the hunter as the Hunter.)

Normally charges originating in Haines are handled by the Juneau District Attorney's office which was headed at the time by District Attorney Douglas Gardner. Mr. Gardner referred the charges against the Pilot and the Hunter to the Office of the Special Prosecutor on September 28, 2006. Mr. Gardner declined to handle these two cases because he knew both of the defendants personally. He also declined to refer the cases to any assistant district attorney in his office because they worked under his direct supervision. Mr. Gardner notified Alaska Wildlife Trooper Sergeant Steven Hall from the Juneau AWT post of his decision in a September 28, 2006 letter. Mr. Gardner suggested that then-Special Prosecutor Roger Rom assist the Troopers with these complaints. Mr. Rom later transferred to a different position in the Attorney General's office and Special Prosecutor Andrew Peterson took over both cases in January or February of 2007.

The Complainant stated that he contacted Mr. Peterson in the fall of 2007 to discuss his concerns that Mr. Peterson was mishandling these two cases. The Complainant also spoke with Assistant Attorney General Lance Nelson (Mr. Peterson's direct supervisor) and Deputy Attorney General Richard Svobodny to express his dissatisfaction with Mr. Peterson's performance in the cases. He was not satisfied with the responses he received from Messrs. Peterson, Nelson or Svobodny.

He also contacted the then-Acting Director of the Board of Game, Doug Larson, as well as Game Board members Ben Grussendorf and Ron Somerville.<sup>1</sup> He stated that all three men expressed concern that dismissing the cases would dramatically and negatively affect Alaska's ability to enforce the same-day airborne law in the future. He said Mr. Somerville told him that he had discussed the Complainant's concerns with law enforcement personnel, Mr. Nelson, and Mr. Peterson. The Complainant also stated that Mr. Somerville told him that despite Game Board members' concerns these cases would

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<sup>1</sup> Mr. Grussendorf is a former member of the Alaska House of Representatives and former Speaker of the Alaska House. He remains a Board of Game member. Mr. Somerville was Deputy Commissioner of the Department of Fish and Game during Governor Walter Hickle's second term as governor. He was later appointed to the Board of Game. His term on the Board expired in March 2008 and then-Governor Sarah Palin did not re-appoint him to the Board. He worked for and with ADF&G for 24 years.

be dropped. According to the Complainant, state prosecutors told Mr. Somerville that favoritism played no role in this decision.

On December 7, 2007, Special Prosecutor Peterson dismissed the charges against both defendants. Because the Complainant was dissatisfied with Mr. Peterson's decision to dismiss these two cases, he filed a complaint with the ombudsman on January 8, 2008.

### **OMBUDSMAN'S FINDING OF RECORD**

For reasons more fully articulated in the body of this report, the ombudsman did not find sufficient evidence that Mr. Peterson dismissed the charges against the two defendants because of an improper motive or that Mr. Peterson abused his prosecutorial discretion in doing so. He has articulated a reasonable basis for his decision.

### **INVESTIGATION**

#### Ombudsman Standards

In terms of ombudsman administrative standards, the Complainant's complaint alleged an abuse of discretion by the special prosecutor. The Office of the Ombudsman's Policies and Procedures Manual at 4040(7) discusses and defines Abuse of Discretion:

For ombudsman purposes, disposition of an investigation of a complaint alleging "abuse of discretion" requires, first a determination that the agency could exercise discretion in the matter that was before it, and second, a determination that, in the exercise of its judgment, the agency:

- (A) did not proceed according to law;
- (B) based its decision on an erroneous choice of standards or principles;
- (C) based its decision on considerations not supported by evidence;
- (D) based its decision on considerations that were not relevant; or
- (E) made a decision that was clearly contrary to the reasonable inferences or deductions to be made from the evidence.

Ms. Christensen interviewed the following persons:

- The Complainant,
- Special Prosecutor Andrew Peterson
- District Attorney Doug Gardner
- Deputy Attorney General Rick Svobodny
- AWT Colonel Gary Folger
- AWT Major Steve Bear
- AWT Captain Burke Waldron
- AWT Trooper Todd Machacek
- Former Board of Game Member Ron Somerville
- ADF&G Program Coordinator Suzan Bowen
- ADF&G Board of Game Executive Director Kristie Tibbles.

Ms. Christensen also reviewed the history of 5 AAC 92.085, the "same day airborne" regulation, and the AWT investigation report.

#### **District Attorney Doug Gardner**

Mr. Gardner said that he first learned of the case when AWT Sgt. Steve Hall called him to discuss the charges. He said he immediately realized that he knew the Pilot socially

and told Sgt. Hall that he couldn't prosecute the case. He said he knew that the defendant would want to discuss the court case during social events and that would cause problems. Mr. Gardner said he also became professionally acquainted with the Hunter's son several years ago.

He said he determined his Juneau staff couldn't handle the case because of his conflict. He considered moving the case to Sitka but prosecutors there were in the midst of a significant case. He looked to Ketchikan but decided against moving the Haines case further south. Instead he sent it to the special prosecutor in Anchorage.

He said he wrote a conflict memo explaining why he could not prosecute the case on the day he learned about it from Sgt. Hall. Mr. Gardner said that the special prosecutor specializes in this type of case, so it made sense from a workload perspective. Although Gardner's office handles "90 percent" of the fish and game cases in Southeast rather than referring them to the special prosecutor, this case could have been a "time sink" and might have been an appropriate referral for that reason alone, aside from the conflict of interest.

Mr. Gardner also said that Jack Schmidt in the Juneau office usually handles fish and game cases but he had been tied up for two weeks on a bear-shooting case and Mr. Gardner wanted to make him available for basic criminal cases.

Mr. Gardner said that he may have had incidental contact with Mr. Peterson during his career but he is "not one of the AAGs" that he knows. He said does not recall ever speaking to Mr. Peterson about this case.

#### **Special Prosecutor Andrew Peterson**

Mr. Peterson took over the special prosecutor's position in January or February 2007 after his predecessor, Roger Rom, moved to another office. Mr. Peterson stated that it was not uncommon for cases like this to get referred to him because he had experience prosecuting wildlife enforcement issues. He said that cases of this nature come to his office either directly from wildlife troopers after the initial investigation is done and charges are filed, or from local district attorney's office asking him to handle the case because of the issues involved.

He does not remember how these two cases first came to the special prosecutor's office. He recalled that he became involved once the investigation was finished and the indictments were filed in March 2007.

Mr. Peterson told the ombudsman investigator that until she contacted him, he was unaware that Mr. Gardner was the person in the District Attorney's office who knew the defendants and declared the conflict. He said he does not remember ever speaking to Mr. Gardner about either of these cases. He said that the only time he recalls ever meeting Mr. Gardner was at a staff meeting.

Special Prosecutor Peterson cited three reasons for why he decided to not prosecute this case:

- Conflicting witness testimony;
- Discrepancy in the timeline between when the Pilot flew his plane and when the moose was shot and killed; and
- Difficulty in proving that the aircraft was connected with spotting the moose by the Hunter later in the afternoon, several hours after the Pilot flew the plane.

Mr. Peterson also disputes many of the statements that the Complainant attributed to him during their Fall 2007 telephone conversation, which he set forth in his December, 2007 letter to the ombudsman. The Complainant's letter said Mr. Peterson gave him seven reasons for not prosecuting these cases. Those seven reasons are listed below in boldface type. The investigator discussed the seven reasons with Mr. Peterson and his responses follow.

**1. The Pilot is an elderly man with no known prior convictions, so it would be unfair to prosecute him.**

Mr. Peterson denies making this statement. He said that one of the factors in his decision was whether the Pilot had a history of multiple violations or convictions. He acknowledges that he may have stated that the Pilot was in his 70s and a long-time Alaska resident, but he denies that he did not prosecute him simply because he was elderly. His focus was on the Pilot's lack of game violations.

**2. The Complainant's statements conflicted with statements of another hunter who was a mile away from the incident and who did not witness it.**

Mr. Peterson said that the Complainant reported seeing the Pilot's plane climbing and diving, throttling, either in an act of hunting an animal or trying to drive an animal out of the woods. Mr. Peterson stated that a father and a son were in the same area at the time the Pilot was flying his plane. The father and son reported seeing the Pilot circling but did not see the plane climbing and diving. The other witness wrote to the Federal Aviation Administration that the Supercub was circling 500 yards from his location, which was consistent with the information the witness also provided to AWT. The Complainant alleged to the AWT and the ombudsman that the plane was circling at low altitude within one-half mile of his location. The Complainant also alleged that the father and son were a full mile from the location. The Complainant also wrote a letter to AWT in 2006 stating that he was a half mile from the location. According to a conversion chart, one-half mile is equal to 880 yards; 500 yards equal .28 miles. Assuming both witnesses are accurate in their estimate of their distance from the plane, the father and son would actually have been closer to the scene than the Complainant. Mr. Peterson said that while there was nothing to suggest that the Complainant's testimony was false, the statements conflicted and he had to take this into consideration when determining how a jury would view the witness testimony.

**3. The moose was wounded so it would be unfair to prosecute the Pilot because the state could confiscate his airplane. The decision to prosecute or not was totally his decision.**

Mr. Peterson denied saying this to the complainant. He said that it was discretionary to the judge whether to confiscate the plane. Given the facts of these two cases he does not think the court would have taken the plane. However, he said that this was not a factor in his decision not to prosecute.

He acknowledged that it was his decision not to prosecute, and he likely did say this to the Complainant. He also stated that although this decision was ultimately his, he consulted with his supervisors and AWT management for their opinions before dropping the charges.

Mr. Peterson also stated that the evidence suggested that the Pilot was looking for a wounded moose, as opposed to an uninjured animal, at the time he flew the plane.

- 4. Another hunter in the past had requested and received permission from the Alaska Wildlife Troopers to locate a wounded animal by air, thereby setting a precedent which would prevent the State from winning this case.**

Mr. Peterson denies stating that he could not prosecute because of precedent. He stated that there have been cases in the past where a trooper was contacted by commercial guides and, under special conditions, granted the guides permission to fly to locate a wounded bear. He did say he was concerned that if the issue of the troopers granting permission in the past was raised and he lost at trial, a precedent could be set and the law weakened so anyone could use this as an excuse to fly while hunting.

- 5. In the past Mr. Peterson prosecuted another hunter for shooting a bear the same day he was airborne and Mr. Peterson felt badly about it because the hunter did not actually spot the bear from the airplane. However, Mr. Peterson prosecuted him anyway.**

Mr. Peterson denied that he failed to prosecute the Pilot or the Hunter because of his decisions in any prior cases he had prosecuted.

- 6. If the Pilot had been involved in a commercial operation such as guiding or transporting game Mr. Peterson would have prosecuted him, but because the defendant was not a commercial operator, he does not deserve to be prosecuted.**

Mr. Peterson denies making this statement. According to Mr. Peterson, Alaska Administrative Code governing commercial guides says that guides must do everything they can to harvest a wounded animal. This wasn't a guided action but if it was, this is what they have to do. He said that the state can charge a guide under a guide statute, which has stricter penalties than those imposed on an average citizen. He said that it would have been more difficult, not easier, to prosecute had the Pilot been a licensed guide, but he also said that this was not a factor in his decision.

- 7. The Pilot's admission of guilt was that he only used the airplane to track the moose, not to spot it.**

The Complainant asserted that Mr. Peterson said that the Pilot admitted that he used the airplane to track the wounded moose after it had already been shot by the Hunter earlier that day.

Mr. Peterson said the Pilot did not admit that he flew the airplane to spot a live, uninjured moose. Mr. Peterson stated that an element of proof was missing to show that the Hunter was somehow complicit in using information he received from the Pilot to find the moose. Mr. Peterson said he could not prove that the Pilot advised the Hunter where the moose was. The Hunter said that he did not ask the Pilot to look for the moose in his airplane and the Pilot told the Hunter he did not see the moose.

Mr. Peterson believed these statements to be true because of the timelines in this incident. According to Mr. Peterson's investigation the Hunter said he went out in the morning with his son, and each shot moose in the morning. The son's moose died, but the father's wounded moose got away from him. The father searched the area but couldn't find it. This was around 10 a.m. Mr. Peterson said there were a number of witnesses to the fact that the father did shoot a moose and there was no suggestion of foul play. Mr. Peterson said:

It was perfectly legal up to this point. (The Hunter) then returned to camp and told (Pilot) he shot a moose, but it got away and he couldn't find it. (The Pilot) flew around looking to see if he could find the wounded moose.

If the (father's) moose was dead, (there was) no same-day airborne issue; if it's not dead, the argument could be made that it was a same-day airborne act. . . . No one would testify against the two defendants that they were out looking for a perfectly alive animal. [The Pilot] flew around looking for a wounded animal then he flew back. This is true from the testimony of all involved. I believed it to be true because [the Hunter] and his son about 3:30-4 o'clock took their four-wheeler and went back to scene where the son had killed and butchered his moose. Witness testimony confirms this.

At this location the other wounded moose pops up and they shoot it. If they were out looking for perfectly healthy moose they wouldn't have spent an hour cleaning the other moose. All evidence suggested that (the Pilot) was looking for a wounded moose and up pops a wounded moose.

Given facts of case and simply looking to harvest a wounded animal, there is nothing in statute that authorizes them to fly; yes, I agree. The argument could be made that flying for a wounded animal should also be prohibited -- clearly in his mind at that point the defendants had a wounded animal.

Mr. Peterson said he talked with his supervisor about the case and the possibility of obtaining a conviction. Based on the evidence they had they decided not to proceed. He also discussed pros and cons of prosecuting with AWT Capt. Waldron and Major Bear. The prosecutor said the decision was ultimately his but with difficult cases he often seeks the input of others so he's not way off base. He said he and the AWT brass agreed that this probably was not the appropriate case to proceed on for a conviction.

It could have turned out to be a scenario that a different Trooper contacted this guy (and) might have warned (him) not to look for wounded animal like this. No one wants to see a moose go to waste. Having a wounded moose is not a huge safety concern, but it is an issue. The only (person) disappointed in his decision was [the Complainant]. Trooper Machacek understood his decision but preferred to move ahead with the case and understood why he didn't.

Finally, Mr. Peterson pointed out that the Hunter and his son were penalized in connection with the hunt. According to Mr. Peterson, both were convicted for bringing antlers out of the field before all of the meat was removed in violation of hunting regulations. When Troopers arrived at the hunting camp they determined

that most of the meat had been moved to the hunting camp but one set of antlers had been delivered to ADF&G. Taking antlers to Fish and Game is required by permit but regulations require that all meat be removed from the kill site first. The Hunter and his son pleaded to a violation, were fined \$500, and had to forfeit the antlers.

### **Alaska Wildlife Troopers**

#### **Trooper Todd Machacek**

Trooper Machacek was the charging officer in this case. He said that the Haines area has had problems with hunters thumbing their noses at hunting regulations for years. The Complainant, he said, has taken a stand and “stuck his neck out” against hunting violations and has drawn a lot of heat for his position.

The trooper said that he has found The Complainant to be a reliable source of information and thought that prosecutors should give his account more credence than the other witnesses who were farther from the scene.

He said Special Prosecutor Peterson was concerned that this incident might set precedent and jeopardize the integrity of the “same-day flight” regulation. The trooper said enforcement of the same-day airborne violation is inconsistent:

Sometimes people get warnings; other times citations for the same conduct---this happens all the time but it’s not a good reason not to prosecute.

He said that the main issue Mr. Peterson discussed with him was that the two witnesses’ stories didn't match. The Trooper said the Complainant was 300 feet from the area – the length of a football field - while the other witnesses were one mile away. The Complainant saw the plane diving while the other witness did not. The trooper said the prosecutor should have relied more on the complainant who was closer and probably had a better view of the incident.

According to Trooper Machacek’s notes, the Hunter said that he wounded the moose at 10:30 a.m. on September 17, 2006; at approx 1-2 p.m., the Pilot flew the plane for approximately 20 minutes, could not find the moose, and returned to the hunt site. The Hunter said that the moose was located at approximately 4 p.m. that day about 150 yards from where he originally wounded or shot the moose earlier that morning. The Trooper apparently never interviewed the Pilot.

The Trooper’s notes indicate that the Complainant said that he witnessed the Pilot’s plane in the air circling for approximately an hour at approximately 3 p.m. on September 17, 2006. The Complainant told the Trooper that he heard one rifle shot near where the plane last circled at approximately 6 p.m. the same day. Trooper Machacek recalled that the Complainant called Trooper dispatch approximately 60 to 90 minutes after witnessing these events on September 17, 2006, or at approximately 6:30-7:00 p.m.

According to the written information the Complainant provided to the ombudsman and to the AWT investigation report, Trooper Machacek did not inspect the site until September 21, 2006, four days after the hunt. The Complainant said that the Troopers asked him to guide them to the hunt site while he was a passenger in a plane. The Trooper completed this flight inspection at approximately 10:30-11:30 a.m. on September 21, 2006. The Complainant indicated that several magpies were observed working two kill locations and that he recalled seeing a yellow rope suspended between the trees. The Complainant said that he did not personally observe any gut pile from the air, but there were several



scavengers in the area that could have consumed the site. The Complainant said that swampy terrain prevented the troopers from landing the aircraft near the kill site. Without an ATV to use, troopers apparently were unable to cross the terrain on foot to inspect the kill location.

Trooper Machacek confirmed the Complainant's version of these events. He further added that although he was unable to conduct a ground inspection of the kill site, he did go to the Pilot and the Hunter's camp site approximately 1-2 miles from the kill site to speak to them about this incident.

According to Trooper Machacek, the Pilot and the Hunter had already butchered and processed the moose and had already flown it out of the campsite by the time he arrived. Because of this, he was unable to inspect the meat to determine how many times the animal had been shot or to examine the carcass for any bullet wounds. However, he did note that he found a fresh bullet hole in the antlers. He asserts that while this may have stunned the animal, it would not have been enough to mortally wound it. Although without being able to inspect the meat or carcass, he could not verify if there was another shot to its body that could have done so.

Trooper Machacek confirmed that because it was difficult to find the kill site on foot, he was unable to find a blood trail. A blood trail would clearly indicate the point where the Hunter asserted he first shot the animal, versus the point where the animal was ultimately shot and killed. This information could support the Hunters' claim that the animal was already wounded at the time that they later located it and shot it the second time. However, as Trooper Machacek pointed out to the investigator, the law does not make an exception for violating the law on this basis. It is not a legal defense.

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The ombudsman investigator interviewed AWT officers Colonel Gary Folger, Major Steve Bear, and Captain Burke Waldron. They said they supported Mr. Peterson's decision and had consulted with him at length prior to dismissal of the charges. They all agreed that it was a difficult case to prove, and they did not find anything improper in Mr. Peterson's decision to dismiss the charges.

#### **AWT Colonel Gary Folger**

Colonel Folger said more than 25 years ago he gave permission to another hunter to use a plane to track a wounded animal. He said that in 1982 or 1983 he received a call from a bow hunter who had wounded a moose on the last day of the season. The moose ran from the site and the hunter searched for it unsuccessfully. The hunter went out the next day after the season had closed, and looked for part of the day up until noon but he could not locate the moose. The hunter called him to seek authorization to use the airplane to find the moose. Col. Folger approved the request to prevent the moose from being wasted. The hunter located the moose. He returned to the moose's location to butcher it and found it was still alive. He then killed the moose with a knife.

Col. Folger said that was the only time in his career he authorized use of an airplane to locate a wounded moose. He also discussed the crime of wanton waste and the fact that hunters sometimes wound animals that then get away. He said that wanton waste of an animal is a serious crime. A hunter's legitimate belief that the animal is wounded is the reasoning behind granting permission to fly and locate the animal.

Decisions are based on more than an individual case, said Col. Folger. They don't want a same-day airborne case to be prosecuted for a very light sentence. The regulation is meant to deter same-day spotting/hunting, and he believes it should be used against defendants who deserve heavier sentences. He said that all indications in this case were that the defendants did not even find the moose from the aircraft. The case evidence showed that the Pilot was unable to locate the moose from the air. He said that close to two hours after the Pilot had landed the Hunter found the wounded moose after helping his son dress out the moose that the son had shot in the morning.

Col. Folger told the investigator he does not believe Mr. Peterson abused his discretion by dropping the charges nor does he believe the friendship between Mr. Gardner and the defendants motivated Mr. Peterson.

### **AWT Captain Burke Waldron**

Captain Waldron stated that he and Major Steve Bear supported Mr. Peterson's decision to not prosecute because they believed they were unable to prove the charges against the defendants beyond a reasonable doubt, the standard of proof in criminal trials. He said that they discussed the difficulty of getting a conviction. Their major concern was the timeline: How long had it been between the time that the plane flew and the time the moose was killed? He recalled that the defendant flew the airplane in the morning, and then several hours passed before they killed the animal. Mr. Peterson told Captain Waldron that he couldn't prove that the airplane had direct impact or connection in killing the animal because too much time had passed.

Captain Waldron said he was comfortable with the decision to not prosecute and he didn't believe Mr. Peterson did anything improper in making that decision. He commented that, "Just because there is probable cause to [file criminal charges], doesn't mean that a case is winnable at trial."

Captain Waldron said that the three discussed the issue of AWT giving other hunters permission to fly to locate a wounded animal and were concerned that this issue would be brought up at trial. They believed it would be difficult to prove that the defendants were in the wrong when there was evidence that in other cases Troopers have granted permission to people to fly to find a wounded animal.

### **AWT Major Steve Bear**

Major Steve Bear said that Mr. Peterson did not make the decision to drop the charges alone. "We all struggled with the decision."

Major Bear also mentioned that Colonel Folger had given a hunter permission to fly to locate a wounded animal in the past. He said that the agency's past practice was to allow this and the evidence in this case seemed clear that the hunters were trying to find a wounded animal. He also recalls that there was a timeline problem but he did not recall the specifics of this aspect of the conversation. He said that the decision to dismiss charges did not come easily but he doesn't believe the intent of the law is to prosecute these types of defendants.

Major Bear said that the law is clear that there are no exceptions made for the same-day airborne law to hunt a wounded animal versus one that wasn't wounded. He said the law's intent is to prevent people from spotting healthy game from the air, then locating, landing and killing it. He said that each case must be assessed on its face. He did not disagree that a violation of the law occurred, and that the law doesn't give exemptions for

this. However, he said AWT and the DA did not want to take this case to trial. He also recalled that discrepancies in witness statements were a factor in the decision not to prosecute.

A lot of things are going into play. The intent of the regulation is to stop people from finding a live animal, not to stop them from finding a wounded animal. Don't want to set the precedent. We were more willing to say, it's not legal but it's not a charge to hang our hats on.

He said he understands that Trooper Machacek was upset about the decision to not prosecute but he said that is not uncommon for any law enforcement officers; they put a lot of hard work into investigations, and it is very frustrating to them whenever charges get dismissed. However, as management they have to make these tough decisions.

### **Former Board of Game Member Ron Somerville**

The investigator also spoke with then-Board of Game member Ron Somerville who said he had discussed the issue with the Attorney General, AWT, and other Board members because of concerns about enforcement of hunting regulations in the Haines area.

He said his "general sense is that the AG's thought it was complex enough to go either way. It was their judgment. I didn't see any evidence that the DA was pulling shenanigans. The Trooper seemed to agree that it was a very complicated case."

Mr. Somerville discussed the intent of the "same day airborne" regulation. He said the regulation prohibits taking animals on the same day the hunter has been airborne. "If the animal was wounded already then it is 'taken' arguably, and a hunter can get in the plane to locate it." He said he believes the policy needs to be rewritten or taken back to the Board of Game to address inconsistency in application.

He also pointed out that it can be difficult for Troopers to prove when an animal is shot in relation to the plane flying. That was an issue in this case he recalled. He said the defendant contended the moose was wounded before flight took place, but, he asked, how can you prove that? That was another reason why this case was complicated and led to there being insufficient evidence to prosecute.

He said he was involved with the development of this regulation.

It's been a long-standing issue. In 60s and 70s there was severe abuses of Fish and Game regulations . . . Flying, taking and shooting wild game. The intent was to try to make it harder illegally taking brown bears. The same-day airborne regulation was adopted to try to correct this.

He said the wounded animal exception has been discussed with F&G management for as long as he can remember.

The 'reg' says you can't take the animal, period. No exception, but exceptions are always being made.

### **History and Intent of Regulation**

Susan Bowen, program coordinator for ADF&G Division of Wildlife Conservation said she had never heard that the intent of the same day airborne regulation was to not prosecute defendants who hunted same day airborne to locate a wounded animal.

Technically, (the regulation) has been around longer than I have been here. The reasoning behind it is fairly clear. Not to spot an animal because it gives the

hunter an advantage, (That's) exactly the reason it has been allowed under predator control situations. I always thought this was one (regulation) that the Troopers enforced with zero tolerance. Must have been good reasons for them not to prosecute I would assume though. I've never heard this particular excuse.

She said that to her knowledge the department has never expressed this position. "It's the first time I've ever heard of it. Sounds a little fishy. (There are) two or three regs they (AWT) enforce as much as they can. Same day airborne; Wanton waste is another. I've heard of very few cases that weren't prosecuted."

The investigator asked if Fish and Game had a database that tracked how many people have been charged and prosecuted with violating this regulation. Ms. Bowen referred the investigator to the troopers. However, she added, "Game Board members have occasionally asked for a summary of different types of citations the AWT has issued but this seems to be difficult for them to give us these results."

She referred the investigator to Board of Game Executive Director Kristie Tibbles who discussed research the investigator might conduct to learn more about the intent of the regulation.

The investigator researched the enactment history of the same-day airborne regulation and learned that the majority of history had to do with public anger about aerial hunting of wolves. She found a brief mention of either pro or con same-day airborne testimony, but this was from the general public comments or in local advisory area committee minutes. The historical records contained nothing to indicate that the regulation wasn't enacted to prosecute people looking for wounded animals though.

The investigator also found Jan. 2, 2008 written testimony from Dave Lorrington of the Wildlife Troopers opposing proposed changes to the game regulations<sup>2</sup> that would allow for same day airborne for the taking of black bear. His opposition stated it would provide "one more layer of defense by giving (hunters) the excuse of hunting black bear at a bait station." The Troopers' position was that an illegal hunter could use this excuse when attempting to fly the same day for big game like moose, etc.

In the same document, Mr. Lorrington opposed amending the regulation to allow the use of lights in the field to recover wounded big game animals. Mr. Lorrington states "Allowing artificial lights in the field during a hunting season will allow the excuse "I am tracking a wounded big game animal" to be used for any illegal spotlighting activity that might be occurring."

## **ANALYSIS AND FINDING OF RECORD**

AS 24.55.150 authorizes the ombudsman to investigate administrative acts that the ombudsman has reason to believe might be contrary to law; unreasonable; unfair; oppressive; arbitrary; capricious; an abuse of discretion; or unnecessarily discriminatory, even though in accordance with law; based on a mistake of fact, based on improper or irrelevant grounds, unsupported by an adequate statement of reasons; performed in an inefficient or discourteous manner; or otherwise erroneous. "The ombudsman may investigate to find an appropriate remedy."

Under 21 AAC 20.210 the ombudsman evaluates evidence relating to a complaint against a state agency to determine whether criticism of the agency's actions is valid, and then

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<sup>2</sup> 5 AAC 92.080 Proposal #43 and 52.

makes a finding that the complaint is *justified, partially justified, not supported, or indeterminate*. A complaint is *justified* “if, on the basis of the evidence obtained during investigation, the ombudsman determines that the complainant’s criticism of the administrative act is valid.” Conversely, a complaint is *not supported* if the evidence shows that the administrative act was appropriate. If the ombudsman finds both that a complaint is justified and that the complainant’s action or inaction materially affected the agency’s action, the complaint may be found *partially justified*. A complaint is *indeterminate* if the evidence is insufficient “to determine conclusively” whether criticism of the administrative act is valid.

The standard used to evaluate all Ombudsman complaints is **the preponderance of the evidence**. If the preponderance of the evidence indicates that the administrative act took place and the complainant's criticism of it is valid, the allegation should be found justified.

*Abuse of discretion: The Attorney General's office did not prosecute a hunter involved in the illegal taking of a moose because of a personal friendship with the hunter.*

**AS 44.23.020. Duties; and powers; waiver of immunity.**

(a) The attorney general is the legal advisor of the governor and other state officers.

(b) The attorney general shall

...

**(4) prosecute all cases involving violation of state law, and file informations and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution;**

\* \* \* \*

The attorney general has broad discretion to decide how litigation involving the state will be handled. This authority is derived from Alaska Statute 44.23.020 and an Alaska Supreme Court decision, Public Defender Agency v. Superior Court, 534 P.2d 947 (Alaska 1975).

The Ombudsman’s Office will not substitute its judgment for that of the state’s attorneys. Disagreeing with a prosecutor’s decision is not enough to challenge it. People often disagree in good faith on the conclusions to be drawn when laws are applied to evidence. Historically, the ombudsman will only review such decisions if there is evidence of impropriety, serious flaws in the decision-making process, or evidence that the decision is completely unsupportable.

However, because the complainant alleged a violation of ethical standards by Mr. Peterson in his decision to dismiss charges, a complaint that is taken very seriously by the ombudsman, we agreed to look into the matter further.

The Complainant contended that Mr. Peterson’s decision to dismiss the charges was motivated by a personal friendship another attorney has with one of the two hunters.

Mr. Gardner stated that he referred the case to the Special Prosecutor’s office because he had a personal conflict and felt that it would be inappropriate for any of his subordinates to handle the cases given that he directly supervised them. He referred the cases to the Special Prosecutor for further handling. This was appropriate under these circumstances.

Mr. Peterson said he didn't know the Pilot, had barely met Mr. Gardner, was unaware that Mr. Gardner had declared the conflict until the ombudsman told him, and had never discussed the case with Mr. Gardner.

The Complainant has presented no evidence nor has the ombudsman found anything to suggest that Mr. Peterson knows the hunters or is close enough to Mr. Gardner that he would alter his professional opinion in a criminal case for him.

Any conflict caused by Mr. Gardner's friendship with the defendants was cured when he transferred the case to the Office of Special Prosecutions to be evaluated and handled by a stranger to him and the defendants. Mr. Peterson has denied - and the ombudsman found nothing to refute his denial - that he and Mr. Gardner knew each other or conspired to let the defendant off. Nor did Mr. Somerville who was sympathetic to the Complainant's case find any "shenanigans" on the part of the DA.

Finally, the Complainant alleged that the transfer to Office of Special Prosecutions and Appeals "carries a very strong connotation of 'expecting a favor' and automatically tainted the case."

The ombudsman disagrees. The Office of Special Prosecutions was established to handle, among other things, fish and game prosecutions, and prosecutions that involve some sort of conflict. This case fits the criteria perfectly.

It would have been a clear conflict for Mr. Gardner to have kept this case on his caseload when he was a friend of one defendant and acquaintance of another. If he dismissed the charges he could have been accused of deferring to his friend. If he instead prosecuted with poor evidence, he could have been accused of leaning too far the other way to avoid the appearance of bias which would have been just as unfair to the defendants. He also recognized that his staff would also have a conflict if he assigned the prosecution to one of his subordinates who could perceive pressure to act one way or another.

This was a no-win situation for Mr. Gardner and his office and he moved the case to the office established to handle such cases. The ombudsman finds that his decision was entirely reasonable and proper.

That leaves the question of Mr. Peterson's decision to not prosecute the charges.

Mr. Peterson said he dismissed the charge because the case was weakened by:

- **Conflicting witness testimony.** One witness said the plane was diving into the area near the moose as if to flush the moose. Another nearby witness did not see the plane diving. The conflict was exacerbated by discrepancies in the estimated distance of the witnesses to the plane.
- **Discrepancy in the timeline** between when the Pilot flew his plane and when the moose was shot and wounded. The defendants stated that they were searching for a moose that one of them had wounded before the Pilot went airborne, not for a healthy moose.
- **Difficulty in proving that the aircraft was connected with spotting the moose** by the Hunter later in the afternoon, several hours after the Pilot flew the plane. The men said they did not communicate about the location of the moose and, in fact, never found the moose while he was flying.

Finally, Mr. Peterson stated that he consulted with the three top Alaska Wildlife Troopers officers who concurred with his decision. Ombudsman interviews with the three

confirmed their consensus. Trooper Machacek clearly didn't agree with the decision and he suggested that a jury decide the case. None of his three supervisors were happy to dismiss a case but they didn't want to lose a weak case.

Ombudsman investigators also discussed the issue with former Board of Game member Ron Somerville who pointed out the problems that this regulation presents to enforcement officers. The law, as written, states that hunters cannot use an aircraft to *spot* game and then *take* the game on the same day airborne. The intent of the "same day airborne" regulation is to prohibit hunters from locating then shooting animals on the same day the hunter is airborne.

However, Mr. Somerville pointed out, "If the animal was wounded already then it is 'taken' arguably, and a hunter can get in the plane to locate it," he said. He said he believes the policy needs to be rewritten or taken back to the Board of Game to address inconsistency in application.

He also pointed out that it can be difficult for Troopers to prove when an animal is shot in relation to the plane flying. He said the defendant contended the moose was wounded before flight took place, but, he asked, how can you prove that? This further complicated the case and led to there being insufficient evidence to prosecute.

\* \* \*

When considering an abuse of discretion allegation, the ombudsman must first determine that the subject of the allegation has discretion to make a decision. Mr. Peterson clearly had discretion to proceed or not proceed with prosecution of these charges after he evaluated the evidence.

In order to find that the decision was an abuse of discretion the ombudsman must determine that Mr. Peterson:

- (A) did not proceed according to law;
- (B) based his decision on an erroneous choice of standards or principles;
- (C) based his decision on considerations not supported by evidence;
- (D) based his decision on considerations that were not relevant; or
- (E) made a decision that was clearly contrary to the reasonable inferences or deductions to be made from the evidence.

Part of a prosecutor's job is to evaluate evidence to determine if a case is appropriate to take to trial. In many cases a crime has been committed but the proof to convict a suspect is lacking. Mr. Peterson did not violate the law when he evaluated the evidence in light of the regulation.

In this case, there is a great amount of contradictory "he said, she said" testimony. The complainant saw the plane diving and the other witness did not. There is a question about the distance between the complainant and the other witness and the plane. The complainant quoted Mr. Peterson making several statements which Mr. Peterson denied saying, or said the Complainant misconstrued them. No physical evidence supported either side.

Mr. Peterson's reasons for dismissing the charges were relevant considerations: conflicting witness testimony, confusion about timing of the flight, the apparent lack of communication between hunters. While some prosecutors might take a swing at this set of facts, Mr. Peterson, in his professional judgment and after consultation with others

with long experience in prosecutions and enforcement of game violations, doubted he could prove the case beyond a reasonable doubt.

The ombudsman could not find that Mr. Peterson abused his discretion in this decision.

Accordingly the ombudsman finds this allegation to be **unsupported** by the facts uncovered in this investigation.

Because the ombudsman found this allegation to be unsupported by the facts, no formal recommendations are called for.

However, during the ombudsman investigator's interviews with Fish and Game staff, Board of Game members, the troopers and the Department of Law, it was clear that the issue of enforcement of this particular regulation is an ongoing concern for both the Department of Fish and Game and the Alaska Wildlife Troopers.

Testimony and evidence suggests that the Board of Game should consider meeting with the Troopers and Department of Law to revisit and clarify the intent of the same-day airborne regulation. The Ombudsman suggests that the three groups meet to discuss this troubling problem and will provide a copy this investigative report to the Board of Game.

**Public Report**