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If A Bear Dies in the Woods...

If you find a dead bear in the woods—or a deer, or a moose for that matter—who does it belong to? The answer depends. However, after Swenson v. Holsten, 783 N.W.2d 580 (Minn. Ct. App. 2010),[1] Minnesotans now have some additional guidance about where private property rights end and the state's interests begin.

Most people are familiar with the old adage of "finders keepers," which, as it turns out, has support in the law. A modern example of "finders keepers" is the case of the giant black bear found by Mr. Swenson on his farm in Fifty Lakes, Minnesota. This case also raises interesting issues related to the rights of property owners outside the context of deceased wild animals. Who owns buried treasure? Who owns dinosaur fossils? Who owns the carcass of a roadkill deer along the shoulder of a state highway? The law underlying *Swenson v. Holsten* provides guidance on property rights involving the more unusual property ownership situations in Minnesota.

In November 2007, Swenson discovered the decaying remains of an exceptionally large dead American black bear in the woods on his farm. Swenson turned the bear's remains over to a taxidermist with the mutual understanding that the taxidermist would return the skull and hide as a fully mounted display.

Several months later, Swenson contacted the taxidermist to inquire about the progress of his mount. Swenson asked whether the taxidermist was required to contact the Department of Natural Resources (DNR) in order to mount the bear's remains, and if so, whether the DNR had been contacted.

After learning the taxidermist had not contacted the DNR, Swenson, himself, then reported finding the remains of the bear on his private property. The following day a DNR conservation officer seized the bear skull and hide from the taxidermist. The DNR refused to return this property to Swenson despite repeated requests. Eventually, Swenson initiated litigation in order to obtain possession of the bear's remains.

Prior to *Swenson v. Holsten*, no Minnesota case had addressed the ownership rights to a decomposing animal that had not first been taken or killed. No surprise there. The seminal case of ownership by capture is *Pierson v. Post*, which is still found in many law school casebooks.[2] Under *Pierson v. Post*, decided in 1805 by the New York Supreme Court, the owner of private property pursuing or attempting to apprehend wild animals is likely to be deemed the rightful possessor of the wild animals found on his property.

More recently, though, courts have come to recognize a state's sovereign authority over wild animals that roam freely.[3] But a state's sovereign authority over *ferae naturae*[4] does not abrogate the common law of property, "acknowledged by all states

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in Christendom," that when "a subject, animate or inanimate, which otherwise could not be brought under the control or use of man, is reduced to such control or use by his individual labor or skill, a right of property is acquired in it."[5] Accordingly, as the default common law rule, property belongs to the individual who reduces it to control and use, unless made unlawful by statute (i.e., a modified form of "finders keepers").

Minnesota follows the common law property right tenants expressed in cases from other jurisdictions, particularly in cases involving wild animals on private property. In *State v. Mitchell*, the Minnesota Supreme Court addressed the property rights of landowners over wild animals:

> While it is true that wild life is not part of the soil as many common forms of *profits à prendre* are, yet the right to hunt and take game appertains to the land and is a profit flowing from the ownership. It is an incorporeal right allied so closely to the fee...that it is justifiably regarded as a *profit à prendre*. This is true although wild life is a subject of ownership only when reduced to possession.[6]

Against this backdrop, state sovereign authority over wild animals finds its limit.

Minnsota's game and fish laws define "taking" as an overt act that causes the death of a wild animal:

> "Taking" means pursuing, shooting, killing, capturing, trapping, snaring, angling, spearing, or netting wild animals, or placing, setting, drawing, or using a net, trap, or other device to take wild animals. Taking includes attempting to take wild animals, and assisting another person in taking wild animals.[7]

Notably, "taking" does not include finding an animal that expired naturally. The statutory canon of interpretation, *expressio unius est exclusio alterius*, confirms this reasonable reading of the statute's clear and unambiguous meaning: animals that die of natural causes are not "taken." Indeed, a plain reading of the current game and fish laws reflects the fundamental limitation on state power at issue in *Swenson v. Holsten*.

In this case, the DNR alleged Swenson violated Minnesota's game and fish laws because the disputed bear remains were not tagged and registered as required under Minn. Stat. § 97A.535. Under the game and fish laws, however, tags and registration are only required for a bear *taken* in the state:

> A person may not possess or transport deer, bear, elk, or moose *taken in the state* unless a tag is attached to the carcass in a manner prescribed by the commissioner. The commissioner must prescribe the type of tag that has the license number of the owner, the year of its issue, and other information prescribed by the commissioner.[8]

The prerequisite that an animal is "taken" is reflected throughout the game and fish laws of Minnesota. In every section related to possession and transportation, "taking" is either an express or implied prerequisite for the state's regulation.

The prerequisite that an animal is "taken" is reflected throughout the game and fish laws of Minnesota. In every section related to possession and transportation, "taking" is either an express or implied prerequisite for the state's regulation. Significantly, "taking" is a critical element that cannot be satisfied when a bear (or other animal) has died of natural causes. According to the Court of Appeals in the *Swenson v. Holsten* case, the state's purported exercise of authority over Swenson's disputed bear remains rests entirely on whether the bear died of natural causes.

One of the first cases interpreting Minnesota's game and fish laws was *State v. Rodman*.[9] *Rodman* involved three defendants charged with violation of the 1983 game and fish laws as the result of their possession of the flesh and meat of deer more than five days after the end of the open season. The defendants in *Rodman*, who lawfully killed the deer during open season, challenged the state's "power to make it an offense to have in possession birds, animals, or fish, during the closed season." The thrust of the defendants' challenge was that the state had no proprietary right in wild animals and could acquire none by mere legislation. The Minnesota Supreme Court rejected this argument, writing:

> We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor, but in its sovereign

> capacity as the representative, and for the benefit, of all its people in common.

This decree forms the basis of Minnesota's current game and fish laws.

In 1979, the U.S. Supreme Court narrowed the constitutional limitations on state game and fish laws in *Hughes v. Oklahoma*.[10] Writing for the Court, Justice William J. Brennan Jr. held that Oklahoma's law preventing shipments of lawfully taken minnows across state lines impermissibly restricted interstate commerce. Justice Brennan wrote:

> Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution. In more recent years...the Court has recognized that *the State's interest in regulating and controlling those things they claim to "own" is by no means absolute.*[11]

Indeed, the Supreme Court has long recognized that the "ownership language" in previous similar cases is simply a shorthand way of describing a state's substantial interest in preserving and regulating the exploitation of the fish and game within a state's boundaries. "Admittedly, a State does not 'own' the wild creatures within its borders in any conventional sense of the word."[12] Accordingly, in its sovereign capacity, a state may exercise police power "unless the regulation...allocates access in a manner that violates the 14th Amendment"[13]

Although the Court of Appeals in *Swenson v. Holsten* did not reach its decision based upon the constitutional issues at stake, ultimately Minnesotans' property rights in chattel are protected by the 14th Amendment as it is applied to the states. Accordingly, as a matter of due process, if you reduce property to your possession, you must be given notice and opportunity to be heard before you can be deprived of that property. Notice can take the form of statutes and rules, such as Minnesota's game and fish laws. You must also be compensated if your property is taken from you for a public purpose. In either case, however, the old adage of "finders keepers" may apply. So before you surrender the buried treasure in your backyard to the state, or the trophy buck that darts in front of your car, read the statutes and rules carefully. Like Swenson, you may be entitled to keep your treasure.

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[1] The authors represented the plaintiff, Mr. Swenson, in this case.

[2] Pierson v. Post, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805).

[3] Waldo v. Gould, 206 N.W. 46 (Minn. 1925).

[4] *Ferae naturae* means animals which are wild, untamed, and undomesticated. *See* Black's Law Dictionary 653 (8th ed. 2004).

[5] Geer v. Connecticut, 161 U.S. 519, 539-40 (1896) (Field, J., dissenting), *overruled on other grounds*, Hughes v. Oklahoma, 441 U.S. 322 (1979) (adopting Field's dissent).

[6] State v. Mitchell, 290 N.W. 222, 224 (Minn. 1940).

[7] Minn. Stat. § 97A.015, subd. 47.

[8] Minn. Stat. § 97A.535(1)(a).

[9] State v. Rodman, 59 N.W. 1098 (Minn. 1894).

[10] Hughes v. Oklahoma, 441 U.S. 322 (1979).

[11] *Id.* at 335.

[12] *Id.* at 341-42.

[13] *Id.* at 342.