NO. A09-1889

State of Minnesota
In Court of Appeals

R. James Swenson,

Appellant,

v.

Mark Holsten, in his official capacity as Commissioner of the Minnesota Department of Natural Resources; Thomas Provost, individually and as a Minnesota Department of Natural Resources Law Enforcement Supervisor; and Cary Shoutz, individually and as a Minnesota Department of Natural Resources Conservation Officer,

Respondents.

APPELLANT R. JAMES SWENSON'S BRIEF, ADDENDUM AND APPENDIX

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STATEMENT OF THE ISSUES

I. Did the lower court improperly hold that the remains of wild animals that die of natural causes on private property are owned by the State of Minnesota?

The lower court held that there was no provision of the game and fish laws allowing an individual to own the remains of wild animals found on private property, regardless of whether they expired naturally, or by the hands of man.

Apposite legal authorities:

- *State v. Mitchell*, 290 N.W. 222 (Minn. 1940)
- *State v. Rodman*, 59 N. W. 1098 (Minn. 1884)
- *Waldo v. Gould*, 206 N.W. 46 (Minn. 1925)
- Minn. Stat. § 97A.535

II. Did the lower court improperly hold that Appellant could have obtained a license or permit to possess, transport, dress and mount the remains of the subject bear, but that he failed to follow the proper procedures for doing so?

The lower court held that Appellant failed to cite any Minnesota law or rule that would permit him to possess, transport, dress and mount the remains of a protected wild animal, even though none exists.

Apposite legal authorities:

- *State v. Mitchell*, 290 N.W. 222 (Minn. 1940)
- *State v. Rodman*, 59 N. W. 1098 (Minn. 1884)
- *Waldo v. Gould*, 206 N.W. 46 (Minn. 1925)
- Minn. Stat. § 97A.535

III. Did the lower court improperly determine that Appellant was adequately put on notice of the required "form of prior approval to possess or transport protected animals via a license or other proper authorization" when such animal is found dead on private property apparently of natural causes?

The lower court held that it would appear to be necessary that the State require some form of prior approval process to possess or transport protected animals via a license or other proper authorization, but failed to identify any statute, rule or regulation setting forth that process.

Apposite legal authorities:

- *State v. Mitchell*, 290 N.W. 222 (Minn. 1940)
- *State v. Rodman*, 59 N. W. 1098 (Minn. 1884)
- *Waldo v. Gould*, 206 N.W. 46 (Minn. 1925)
- Minn. Stat. § 97A..535

IV. Did the lower court improperly hold that Appellant was not deprived, under color of state law, of the substantive due process rights afforded to him by the United States Constitution?

The lower court failed to address this issue, but by implication Appellant was so deprived.

Apposite legal authorities:

Not applicable.

V. Did the lower court improperly hold that Appellant was not deprived, under color of state law, of the procedural due process rights afforded to him by the United States Constitution?

The lower court failed to address this issue, but by implication Appellant was so deprived.

Apposite legal authorities:

Not applicable.

VI. Did the lower court's holding deprive Appellant of property without fair compensation as required under the Fifth Amendment of the United States Constitution?

The lower court failed to address this issue, but by implication Appellant was so deprived.

Apposite legal authorities:

Not applicable.

STATEMENT OF THE CASE

"The pearl at the bottom of the sea belongs to no one, but the diver who enters the water and brings it to light has property in the gem."

~ U.S. Supreme Court Justice Stephen Johnson Field,
Geer v. Connecticut, 161 U.S. 519 (1896)

Appellant R. James Swenson and Respondents agree Minnesota's Game and Fish Laws are intended to protect the wild animals for the benefit and enjoyment of all Minnesotans. As a passionate outdoorsman, Appellant embodies and embraces Minnesota's constitutional wildlife provision:

> Hunting and fishing and the taking of game and fish are a valued part of our heritage that shall be forever preserved for the people and shall be managed by law and regulation for the public good.

MINN. CONST. art. XIII, § 12. Appellant, however, challenges Respondents' ability to summarily confiscate property when no game is taken and the protection of wild animals is not accomplished.

In the case of wild animals, defined as "all ***living*** creatures,"[1] Minnesota's Game and Fish Laws vest the Department of Natural Resources ("DNR") with the power to regulate killing and taking, and through police power authority, subsequent possession and transportation. But because the dead bear Appellant discovered was not killed or taken, the DNR's seizure and summary confiscation was improper. Indeed, unless first killed or taken, no provision of Minnesota's Game and Fish Laws grants the State

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[1] Minn. Stat. § 97A.015, subd. 55, defines "wild animals" as "all living creatures, not human, wild by nature, endowed with sensation and power of voluntary motion, and includes mammals, birds, fish, amphibians, reptiles, crustaceans, and mollusks." This is perhaps the clearest expression of the scope of the State's power to regulate game and fish. It does ***not*** say dead animals or carcasses of dead animals.

property rights or regulatory authority over wild animal remains. The Minnesota Legislature simply did not contemplate a provision concerning wild animals that expire naturally because, understandably, it is not rationally related to their protection.

Further, while the ownership of animals *ferea naturea*[2] undisputedly resides in the State, remains of animals that expire naturally fall outside the State's ownership as sovereign. Indeed, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, ***or to the people***." U.S. CONST. amend, X. All apposite authority in this matter requires killing or taking as a prerequisite to State property rights and regulatory authority over protected wild animals. When animals expire naturally, their remains, like any other un-owned property, belong to their finder.

Based on this understanding, on January 11, 2009, Appellant commenced an action in Crow Wing County District Court against the DNR and two DNR officers for unlawfully depriving him of his personal property and due process. Specifically, Appellant seeks return of the bear remains he found on his private property. In his Complaint, Appellant alleged the following causes of action:

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

Count I: Declaratory Relief

Count II: Conversion

Count III: Replevin

Count IV: Violation of Substantive Due Process under 42 U.S.C. § 1983

Count V: Violation of Procedural Due Process under 42 U.S.C. § 1983

Count VI: Unlawful Taking under the Fifth Amendment

The lower court disagreed with Appellant's interpretation of the Game and Fish laws, Minnesota case law, and the United States Constitution by granting Respondent's motion to dismiss on the pleadings. Instead, the lower court simply held Appellant did not properly obtain an ownership interest in the bear remains under Minnesota's Game and Fish laws. The lower court's opinion failed altogether to address the arguments raised in Appellant's brief in opposition to dismissal, chiefly that the game and fish laws do not apply to wild animals that expire of natural causes, as opposed to wild animals that are taken or killed. The lower court also failed to meaningfully discuss whether the State had indeed regulated in the area of wild animal remains by providing a process for licensing and/or tagging, which Respondents allege was required of Appellant.

This appeal is rooted in Appellant's constitutionally protected rights. According to Appellant, in its sovereign capacity, the State owns as trustee all wild animals *ferea naturea*. Thus, it may control their taking and subsequent possession and transportation. But when that animal dies of natural causes, it is no longer *ferea naturea* and the State's ownership as trustee ceases. At that moment, "the diver who enters the water and brings it to light has property in the gem." And, if the State seeks to regulate the remains of

animals that expire naturally, it has failed to do so. Thus, by overlooking Appellant's constitutional protection of property rights and due process, the lower court erred by dismissing his claims in this matter. Put simply, the lower court failed to recognize that when Appellant first happened upon the bear remains, that they were not owned by anyone, including the State.

STATEMENT OF FACTS

1. Appellant R. James Swenson is a 60-year-old Minnesota resident who resides on his farm in Fifty Lakes, Minnesota. Appellant's farm is roughly 600 acres and includes fields, wooded areas, prairie, and a small lake and stream. He only farms a small part of it. Since he was a boy, Appellant has loved the outdoors and wildlife. He began hunting and fishing before he could ride a bike. And every year since he can remember, Appellant has purchased a hunting license for deer. Deer hunting is his true passion.

2. Although Appellant lives on a farm, he is not a farmer in the traditional sense. Appellant plants crops that support wildlife and leaves them in the ground for wintertime. He has done this over the past 10 years. He also maintains deer feeders in the harsh winter months so the deer do not starve. He does all this because he loves deer and deer hunting. Like anyone, Appellant hates to see deer suffer, especially when he can help by providing them with habitat and food.

3. Every year when Appellant buys his hunting license, he gets the DNR pamphlet that contains Minnesota's hunting rules and regulations. (APP-85.) He reads these rules carefully to ensure he is hunting in accordance with the law. (*Id.*) He also

takes note of changes to the rules, which the DNR often highlights to help hunters understand what is required of them. (*Id.*) In his lifetime of deer hunting, Appellant has never been charged with, or convicted of, any violations of the Game and Fish Laws or any other DNR rules or regulations. (*Id.*) He follows the laws and rules of hunting because he respects the deer and his privilege to hunt them. (*Id.* at 85-86.)

4. Appellant earns his living as a business owner. He owns a trucking company, a cold-storage warehouse, and various other businesses operated out of St. Cloud, Minnesota. He is an active and respected member of the St. Cloud business community.

5. Appellant has two sons who deer hunt with him each fall. Every year Appellant invites several close friends and relatives to deer hunt on his farm. Over the years, they have shared many wonderful hunting experiences together in the true heritage of Minnesota's hunting tradition.

6. On or about November 1, 2007, Appellant discovered the remains of an exceptionally large American Black Bear decomposing in the woods on his farm. (APP-85.)

7. After informing a local taxidermist named Tracy Jones of his find, Jones collected the bear remains from Appellant's farm with the mutual understanding that Jones would return the skull and hide as a fully mounted display. (APP-86.)

8. On or about April 7, 2008, Appellant contacted Jones to inquire about the progress of his mount. (APP-58.) Appellant asked whether Jones was required to contact

the DNR in order to mount the bear remains, and if so, whether the DNR was contacted. (*Id.*)

9. On April 14, 2008, after learning that Jones had not contacted the DNR, Appellant, through his attorney, contacted Respondent Provost by telephone to report the find. (APP-58.)

10. The following day, on April 15, 2008, Respondent Shoutz seized the bear skull and hide belonging to Appellant from Jones Taxidermy in Emily, Minnesota. (APP-59.)

11. In a letter dated May 27, 2008, Respondent Shoutz informed Appellant that "[b]ecause [Appellant] illegally possessed a black bear in violation of Game Statute 97A.501 the bear hide and skull have been confiscated and are now the property of the State of MN, DNR." (APP-56.)

12. Appellant was issued a Warning of Violation (No. 292362) for "Illegal Possession" under Minn. Stat. § 97A.501(1). (APP-56.)

13. Despite several attempts to negotiate with Respondents Shoutz and Provost for return of his property, the skull and hide are still in Respondents' possession. (APP-58-59, 61-63, 65-66,67-68.)

14. Appellant read Minnesota's Game and Fish Laws and did not find any laws or rules that required him to report his discovery. (APP-86.) Appellant also did not find any requirement, in either the Game and Fish Laws or in the Commissioner's Rules, to tag or register the subject bear. (*Id.*) Accordingly, Appellant did not have any notice

what to do because there was no law, rule, regulation, or statute discussing what Respondents claim was required. (*Id.*) When Appellant did contact Respondents to report the bear remains, it was done voluntarily and by his own initiation. (*Id.*)

15. Appellant wants the bear remains he found to display in his home. (APP-63.) The bear's skull and hide are beautiful, and they are uniquely special to his farm because that is where the bear died. (*Id.*) Its remains are a part of the farm. (*Id.*)

16. Appellant was not privy to Jones's failure to keep proper taxidermy records, nor did he consent to such an omission. (APP-86.) To the contrary, Appellant instructed Jones to observe any requirements attendant to mounting the subject bear's skull and tanning its hide. (*Id.* at 58.) He also believed that Jones, as a professional taxidermist, had indeed acquired any necessary paperwork for mounting the subject bear remains. (*Id.*)

17. Respondent Shoutz never interviewed Appellant about how he came to discovery the decomposing bear carcass at any time before or after the bear's remains were seized. (APP-86.) Appellant was the first person to find the bear's remains and he could have explained to Respondent Shoutz the condition of the bear when he found it, where it was found, and other pertinent information that would help in an investigation into whether the bear indeed expired naturally, or whether it was killed or taken by someone and came to rest on Appellant's property. Respondent Shoutz also could have asked Appellant if there were any suspicious marks on the decomposing remains of the bear's body, and whether Appellant had any information about the possibility the bear might not have expired naturally. (*Id.*)

18. Finally, the DNR seized the subject bear remains after Appellant clearly and proactively informed Respondent Provost that he found the bear dead and that he reasonably believed it had expired naturally. (APP-58-59.) When Appellant contacted the DNR, he offered to allow the DNR to inspect the bear remains and interview him about where he found it and its condition. (*Id.*) Instead, Respondent Shoutz conducted an unannounced raid and seizure. (*Id.*) This, according to Appellant, was part of a continuing pattern of hostility toward him by Respondent Shoutz that had gone on for several years.

ARGUMENT

I. STANDARD OF REVIEW.

"Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Anderson v. Dep't of Natural Res.*, 693 N.W.2d 181, 186 (Minn. 2005). On appeal from summary judgment, this Court considers whether the district court erred in applying the law and must view the evidence in the light most favorable to Appellant. *Id.*; *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

A *de novo* standard of review is also applied by this Court to constitutional issues. *See, e.g., Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 413 (Minn. 2007) (*de novo* review applied to constitutional questions involving application of law to undisputed

facts); *Fedziuk v. Comm'r of Pub. Safety*, 696 N.W.2d 340, 344 (Minn. 2005); *Zellman ex rel. M.Z. v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220 (Minn. Ct. App. 1999) (reviewing procedural due process afforded to a party on a de novo basis), *review denied* (Minn. July 28, 1999).

II. APPELLANT BECAME THE OWNER OF THE BEAR SKULL AND HIDE HE FOUND ON HIS PRIVATE PROPERTY WHEN HE REDUCED IT TO HIS POSSESSION.

This case presents a matter of first impression. No reported Minnesota case addresses the ownership rights of decomposing animal remains unless they were first taken or killed. In fact, Appellant has located no reported case in any jurisdiction discussing this precise issue. None were cited by Respondents at the lower court. Thus, in order to determine the property rights involved in this case, a review of property concepts is appropriate.

Respondents' conduct was unlawful because it violated Appellant's right to private property. The seminal case of ownership by capture is *Pierson v. Post*, which is still found in many law school casebooks. 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805). Under *Pierson v. Post*, when wild animals are on a private estate, the owner of the estate, if pursuing or attempting to apprehend *ferae naturae* is likely to be deemed the rightful possessor to the title of the animal. *Id.* More recently, courts have come to recognize a state's sovereign authority over wild animals *ferae naturae*. *See e.g., Waldo v. Gould*, 206 N.W. 46 (Minn. 1925). But a state's sovereign authority over wild animals *ferae naturae* does not abrogate the common law of property, "acknowledged by all states 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." *Geer v. Connecticut*, 161 U.S. 519, 539-40 (1896) (Field, J., dissenting) (overruled on other grounds and adopting Field's dissent). Accordingly, as the default common law rule, property belongs to the individual who reduces it to control and use, unless made unlawful by statute.

Minnesota adheres to the property right tenants expressed in *Pierson* and *Geer*, particularly in the case of animals on private property. In *State v. Mitchell*, 290 N.W. 222 (Minn. 1940), 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 a 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 a prendre*. This is true although wild life is a subject of ownership only when reduced to possession."

Mitchell, 290 N.W. at 224. Against this backdrop, the State's sovereign authority over wild animals *ferae naturae* finds its limit.

A. The Game and Fish Laws Only Apply When an Animal is Taken.

Minnesota's Game and Fish Laws' definition of "taking" requires an overt act which 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.

See Minn. Stat. § 97A.015, subd. 47. Notably, "taking" does not include finding an animal that expired naturally.[3] 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."

One of the first cases interpreting Minnesota's Game and Fish Laws was *State v. Rodman*, 59 N. W. 1098 (Minn. 1884). *Rodman* involved three defendants charged with "possession, more than five days after the end of the open season, [of] parts of the flesh and meat of deer, contrary to the provisions" of the 1893 Game and Fish Laws. *Id.* at 1098. The defendants in *Rodman* lawfully killed the deer during open season, but challenged the State's "power to make it an offense to have in possession birds, animals, or fish, during the closed season." *Id.* The thrust of the defendants' challenge was that the State had no proprietary right in wild animals *ferea naturea*, and could acquire none by mere legislation. *Id.* at 1099. The Minnesota Supreme Court rejected this argument. *Id.* According to Justice Collins:

> 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.

Id. This decree forms the basis of Minnesota's current Game and Fish Laws, including the specific provisions cited by Respondents before the lower court (*i.e.*, Minn. Stat. §§ 97A.025 and 97A.501 (2008)). *See also State v. Poole*, 100 N.W. 647 (Minn. 1904) (also

[3] Because the definition of "taking" includes "killing," Appellant will use these terms interchangeably in his arguments.

cited by the State for this general proposition). Appellant takes no issue with the State's sovereign role as trustee of wild animals *ferea naturea.* This is, as they say, the law of the land.

Because the three defendants in *Rodman* killed the deer in question, however, the Court's opinion does not address the precise issue presented here by Appellant: who owns the decomposing remains of wild animals that were not taken or killed, but rather reduced to possession by an individual only after the animal expired naturally? For this, the *Rodman* case is instructive on the ***limits of State power***. According to the Court, the State may adopt reasonable regulations "not only to the time and manner in which such game may be ***taken and killed***, but also imposing limitations upon the right of property in such game ***after*** it has been reduced to possession." *Rodman*, 59 N. W. at 1099 (emphasis added).

> Such limitations deprive no person of his property, because he who ***takes or kills*** game had no previous right of property in it, and ***when he acquires such a right by reducing it to possession, he does so subject to the conditions and limitations*** as the legislature has seen fit to impose.

Id. (emphasis added). This language confirms Appellant's interpretation of the Game and Fish Laws. Specifically, the DNR's sovereign ownership is triggered only ***after*** a wild animal is taken or killed—only then may an individual become subject to State-imposed conditions and limitations, including regulating possession and transportation of wild animals.

At the lower court, Respondents cited *Waldo v. Gould* in support of their argument that individuals may obtain no rights in wild animals unless permitted by the game and

fish laws. According to the Court in *Waldo*, however, "no property rights exist in wild animals in this state except as permitted by" the Game and Fish Laws, and "[t]hat the Legislature may thus limit and restrict rights in wild animals permitted in this state, whether they are ***taken*** here or elsewhere." *Waldo*, 206 N.W. at 48. Thus, in a commerce clause case involving transportation of wild animals across state lines, *Waldo* only confirms that ***taking or killing is the prerequisite*** to any legislative limitations and restrictions. *Waldo* does not support Respondents' argument that animals that expire naturally are owned by the State, but rather belies that conclusion.

A plain reading of the current Game and Fish Laws reflects the fundamental limitation on State power at issue in this appeal. Minnesota Statutes section 97A.535 is titled "Possession and Transportation of Deer, Bear, Elk, and Moose." Respondents allege Appellant violated the Game and Fish Laws because the disputed bear remains were not tagged and registered as required under this section. According to subdivision 1(a), 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.

Minn. Stat. § 97A.535(1)(a). The express prerequisite that the animal is "taken" is reflected throughout section 97A.535. Subdivision 1, parts (b), (c) and (e), and subdivision 2(a) refer to "***at the site of the kill.***" Likewise, under subdivision 5, "[t]he hides of deer, bear, elk, and moose, and the claws of bear ***legally taken*** and with the tags

that are required by this section, may be bought, sold, and transported at any time." In every section of the Game and Fish Laws related to possession and transportation, taking is either an express or implied prerequisite for the State's regulation. Accordingly, under the specific provision Appellant is alleged to have violated—Possession and Transportation of Deer, Bear, Elk, and Moose—it cannot be applied to him, by its express terms, because Appellant did not "take" the subject bear. Minn. Stat. § 97A.535, subd. 1(a); 97A.015, subd. 47 (defining "taking"). Thus, Respondents' purported exercise of authority over bear remains at issue in this lawsuit was unlawful.

Appellant's primary challenge to Respondents' conduct does not require this Court to overrule long-standing precedent, or to hold that the Minnesota Game and Fish Laws are unconstitutional. Rather, Appellant asks this Court to examine the foundation for State sovereign ownership of wild animals *ferea naturea* and the constitutional limits on that power. Upon such examination the Court should conclude, like the Court in *Rodman*, that State ownership as trustee applies only after an animal is taken or killed:

> In short, the object to be attained is the preservation from extinction or undue depletion of game; and the legislature may pass any reasonable laws to effect that end, even to the extent of restricting the use of, or right of property in, the game ***after it is taken or killed.*** All so-called game laws proceed upon that principal, and their constitutionality has rarely, if ever, been successfully assailed.

Rodman, 59 N. W. at 1099.

The issues raised by Appellant in this appeal must be viewed under this narrow framework. *See Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 327-28 (Minn. 2004) (holding that statutes in derogation of the common law are strictly

construed, and that legislation will not be interpreted to supplant, impair, or restrict equity's normal function as an aid to complete justice). *See also Shaw Acquisition Co. v. Bank of Elk River*, 639 N.W.2d 873, 877 (Minn. 2002); *Bloom v. Am. Express Co.*, 23 N.W.2d 570, 573 (Minn. 1946). *See also* 73 Am. Jur. 2d Statutes § 191 (2001) ("[I]t is not presumed that the legislature intended to abrogate or modify a rule of the common law on the subject any further than that which is expressly declared or clearly indicated."). Because "taking" is a prerequisite to control under the Game and Fish Laws, they do not apply to the decomposing bear remains discovered by Appellant.

B. Because Protection Was Not at Issue After Appellant's Bear Expired Naturally, the State Does Not Own Its Remains.

The DNR serves a vital role in Minnesota. Without its wildlife and habitat management, our lakes, rivers, prairies and forests would be at risk. These protection and conservation functions form the sole basis for State sovereign ownership of wild animals *ferea naturea*. *See Waldo*, 206 N.W. at 46; *Rodman*, 59 N.W. at 1098. This interpretation is underscored by MINN. CONST. art. XIII, § 12 as well as the prefatory language of the Game and Fish Laws themselves. Outside of these functions, the DNR has no power to take property from individuals without due process or just compensation.

When an animal expires naturally, the State has preformed its job of protecting that animal. It is axiomic, therefore, that because all living things expire naturally, their protection is only at issue with an unnatural death *i.e.*, when man interferes by taking or killing wild animals. Indeed, as explained above, the Game and Fish Laws only apply to

the taking and killing of ***living*** wild animals, and to subsequent regulation of possession and transportation after they are taken or killed.

In the case of the American Black Bear, regulation of hunting seasons, methods of taking, and other associated activities, including taxidermy, are rationally related to protection. Protection is not, however, implicated when a bear expires naturally—certainly the State does not contend it can make bears immortal by regulating their possession and transportation after death. Regardless, bears in Minnesota require very little protection. According to the DNR website, "[t]here are roughly 30,000 black bears in Minnesota. Sport hunting helps keep the bear population from getting too large." *See* DNR website, "Black Bear: Nature Snapshots from Minnesota DNR," at http://www.dnr.state.mn.us/snapshots/mammals/blackbear.html (last visited July 8, 2009). If this is true, and there are truly 30,000 black bears roaming the state, and their population is controlled through hunting, there is no rationale for regulation of bears that expire from natural causes. Even if there were, however, ownership is not reserved to the State because it has no rational relation to preservation from extinction or undue depletion. To the contrary, America Black Bears in Minnesota are not in danger of extinction, and there is nothing undue about a natural death.

The landmark U.S. Supreme Court case of *Geer v. Connecticut*, 161 U.S. 519 (1896) cites *Rodham* for the proposition that State sovereign ownership of wild animals *ferea naturea* confers authority to regulate their subsequent possession and transportation. *Geer* involved a challenge to Connecticut's game and fish laws governing the transportation of wild animal pelts across state lines as contrary to interstate

commerce. In its analysis, the Court describes both the extent and the limitation of State authority to regulate wild animals:

> While the fundamental principles upon which the common property in game rest have undergone no change, the development of free institutions had led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, ***and not as a prerogative for the advantage of the government as distinct from the people***, or for the benefit of private individuals as distinguished from the public good.

Id. at 529 (emphasis added). Thus, to the extent the State owns wild animals *ferea naturea*, its exercise of this power must be held in check.

Geer was overruled in 1979 by the U.S. Supreme Court in *Hughes v. Oklahoma*, 441 U.S. 322 (1979). Writing for the Court, Justice Brennan cited Justice Field's dissent in *Geer* when he held that Oklahoma's law preventing shipments of lawfully taken minnows across state lines impermissibly restricted interstate commerce. In his opinion, Justice Brennan further narrowed the constitutional limitations on state game and fish laws. 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.***

Hughes, 441 U.S. at 335 (emphasis added). Indeed, the Supreme Court "long has recognized that the ownership language of *Geer* and 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." *Id.* at 341-42. "Admittedly, a State does not 'own' the wild creatures within its borders in any conventional sense of the word." *Id.* at 341 (citations omitted). Accordingly, in its sovereign capacity, the State may exercise police power "unless the regulation . . . allocates access in a manner that violates the Fourteenth Amendment." *Id.* at 342 (citations omitted). Here, Appellant's claims arise under the rights guaranteed to him through the Fourteenth Amendment. Specifically, when Appellant reduced the disputed bear remains to his possession he became their lawful owner. Respondents' subsequent summary confiscation without any notice or opportunity to be heard in an adjudicative proceeding unlawfully deprived Appellant of his personal property and was conducted in violation of Appellant's due process rights.

III. THE STATE HAS FAILED, UNDER ITS POLICE POWER AUTHORITY, TO REGULATE POSSESSION AND TRANSPORTATION OF ANIMALS THAT EXPIRE NATURALLY.

"Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform government whenever required by the public good." MINN. CONST. art. I, § 1. Minnesota courts "presume[] that statutes are consistent with the common law, and if a statute abrogates the common law, the abrogation must be by express wording or necessary implication." *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000); *see also Bloom v. Am. Express Co.*, 23 N.W.2d 570, 573 (Minn. 1946) (stating that statutes in derogation of the common law must be strictly construed). Thus, this Court cannot interpret the Game and Fish Laws to create new powers and authority in the State that the Legislature did not intend, and which do not exist at common law. If the DNR is

interested in regulation of animals that expire naturally, then it should amend the Game and Fish Laws accordingly under its police power authority expressly rather than by vague implication through interpretation.

A. No Law, Rule or Regulation Controls the Disposition of Animals that Expire Naturally Discovered by Private Property Owners.

The Court in *Waldo v. Gould*, declared that "the [Game and Fish Laws were] enacted as a police measure to protect and preserve useful or valuable wild animals for the benefit of the public. [They are] to be construed as a whole in light of the obvious purpose intended to be accomplished, and so as to harmonize and give effect to all [their] parts if reasonably possible." *Waldo*, 206 N.W. at 48. The Court should reject any invitation to interpret the "obvious purpose intended" as expanding State sovereignty beyond protection and preservation. Such an interpretation is unconstitutionally void-for-vagueness. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (holding the void-for-vagueness doctrine requires "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement").

At the lower court, Respondents failed to cite a single provision of Minnesota Statutes Chapters 97A, 97B, and 97C (the Game and Fish Laws) that controls the disposition of animals unless they are fist taken or killed. Indeed, the only statute that ostensibly falls outside of the defined scope of killing or taking deals with road-kill deer. *See* Minn. Stat. § 97A.502 (entitled "Deer Killed by Motor Vehicles"). When a person hits a deer, the State employs the road authority to remove the animal's carcass and

record its death for statistical purposes. *Id.* No provision of the Game and Fish Laws, however, controls the possession and transportation of animal that expire naturally. The Legislature is silent on this issue. Only a strained reading of the Game and Fish Laws supports the opposite conclusion.

The Minnesota Legislature has ceded rulemaking authority to the DNR Commissioner, Respondent Mark Holsten. In his capacity as Commissioner, Respondent Holsten is required to provide notice of any rulemaking. *See* Minn. Stat. § 97A.045, subd. 9. Further, Respondent Holsten is required to prepare summary of the hunting and fishing laws and rules and deliver a sufficient supply to county auditors to furnish one copy to each person obtaining a hunting, fishing, or trapping license. *See* Minn. Stat. § 97.051, subd. 2(a). The rules prescribed by the Commissioner, including his summary of the hunting and fishing laws, have the force and effect of the law. *Id.* at subd. 4. Respondents have failed, however, to cite a single provision of these rules (Minn. Admin. R. Ch.'s 3230 and 3232), which expressly controls the disposition of animals by private individuals unless they are first taken or killed. Again, even a liberal reading of these rules does not support Respondents' arguments. Under the narrow construction required here, the rules are inadequate.

Respondents' contention that Appellant could have obtained a possession permit under the Game and Fish Laws demonstrates their erroneous interpretation. According to Respondents, "[h]ad [Appellant] simply applied for a possession permit, or even alerted DNR to his discovery before taking the actions he allegedly took, DNR could have ruled out concerns that the bear had been poached and issued a license or possession permit."

(APP-15.) On remand for trial, Appellant will testify that he could not locate any provision of Minnesota's Game and Fish laws requiring him to acquire a tag or register the subject bear—the laws are absolutely silent for individual property owners who find decomposing animals that have expired naturally. Appellant had no way of knowing what to do because no law, rule, regulation, or statute explains what Respondents now claim was required of Appellant.[4]

Deer antlers, as "parts" of wild animals, are an example where Respondents have adequately prescribed a valid exercise police power. The DNR touts antler hunting on its website in an article titled: "Seeking Woodland Crowns: After Deer Shed Their Antlers, Some Hunters Seek the Lost Crowns." (*See* APP-73-75.) According to the article, shed hunters collect the antlers to "make art and crafts," or just as "objects of natural beauty." (*Id.*) Under Minn. Stat. § 97B.22, this practice is expressly authorized. Specifically, the statute allows a person to find and keep naturally shed antlers without a license. *See* Minn. Stat. § 97B.22(a).

Practically speaking, this is no different than finding and keeping the skull of a dead bear. Both antler sheds and bear remains exist in the woods as a result of the natural cycle of life. In the case of antler sheds, the statute prevents a person from placing, setting or arranging "equipment in a manner that is likely to artificially pull, sever, or otherwise cause antlers of live deer, moose, elk, or caribou to be shed or removed." *See*

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[4] By making this argument, Appellant is not claiming ignorance of the law. Rather, he states affirmatively that there is no law or rule governing the facts of his case. Furthermore, short of relying on his local DNR conservation officer to interpret the Game and Fish Laws for him, Appellant had no way of knowing his rights or any limitations on them.

Minn. Stat. § 97B.22(a). If the Legislature was inclined to regulate the collection of dead bear remains, it could easily have passed a similar law. Likewise, in his rulemaking capacity, Respondent Holsten could prescribe regulations requiring people to report a dead animal discovered in the woods. Doing so would aid the DNR in an investigation to rule out illegal activity.

In absence of any such provisions prohibiting the collection of bear remains after the animal has expired of natural causes, however, the DNR's seizure and confiscation of Appellant's private property was improper, unlawful and a violation of his constitutional rights.

B. Individual Private Property Right Do Not Undermine the Prevention of Poaching.

People engaged in poaching know it is illegal. Here, however, Appellant did not know he may have been violating a law, and indeed there is no clear law providing notice these acts are prohibited. At the lower court, Respondents argued a broad interpretation of the Game and Fish Laws is necessary to prevent poaching. According to Respondents, if Appellant is correct, poachers could simply claim that illegally acquired game expired naturally. Respondents contend that unless the DNR possess the authority to regulate possession and transportation of wild game under ***all*** circumstances, it will be impossible to distinguish a discovery like Appellant's from an illegal killing or taking, *i.e.*, evidence of the illegal taking would be spoliated.

The court in *Rodman* shared the concern expressed by Respondents, but which is not at issue in this case:

> Game is usually found in secluded places, away from habitations of men, with no one to witness the killing but the hunter himself. The game would have no earmarks to show whether it was taken or killed in the open or closed season, and hence conviction under this statute would ordinarily be impossible, and the law would become practically a dead letter. In these days of cold-storage warehouses, the mere lapse of time after the expiration of the open season would furnish little aid in an effort to prove that the game had been taken or killed out of season.

Rodman, 59 N.W. at 1099.

However, the solution to widespread poaching cannot be accomplished through an erroneous application of the Game and Fish Laws as they currently exist. Rather, the State may, under its police power authority, enact reasonable regulations which do not impair individual property rights. *See Hughes*, 441 U.S. at 342 (holding that game and fish laws may not impair rights afforded to individuals through the Fourteenth Amendment). For unknown reasons, Respondents have failed to take this simple step.

Proscribing clear laws and rules will encourage self-reporting and allow for meaningful investigation, not stifle it. At the lower court, Respondents argued that Appellant could have let the bear remains rot in the woods and simply not reported the find. Wanton waste like this is contrary to the letter and spirit of the Game and Fish Laws. *See* Minn. Stat. § 97A.031 ("Unless expressly allowed, a person may not wantonly waste or destroy a usable part of a protected wild animal."). But when people who find animal remains fear prosecution under Game and Fish Laws, or unnecessary harassment including charges of criminal conduct, this is what likely will happen. In this case, the magnificent specimen Appellant found would have been lost forever. As a

solution, the Legislature or DNR should adequately inform Minnesotans of their rights and responsibilities related to wild animals that expire naturally, and how to properly report them.

Another example that encourages non-reporting is Respondents' view that wild animal remains unequivocally belong to the State regardless of the animal expired naturally or was taken. When an individual discovers a naturally deceased animal on his private property that possesses intrinsic or pecuniary value, he may reasonably want to keep it. According to the Boone & Crockett Club, an organization that collects and reports records of trophy wildlife, the world record black bear skull was "picked up" in Utah in 1975. (*See* APP-76-77.) The world record is 23 10/16 inches wide and is now owned by Cabela's, Inc. (*Id.*) In this case, Appellant wants the bear remains he found to display in his home. But if the Game and Fish Laws do not inform individuals how they can accomplish this, all that is left is to contact the DNR and rely on a conservation officer's whim—as Respondents' assert—to issue a possession permit. The problem with that scenario is that a DNR conservation officer could just as easily decide not to issue a possession permit. Thus, particularly in cases where the remains are valuable or special, or where there is mistrust of the DNR's motives, individuals will not be inclined to report wild animals they find. Reasonable people under these circumstances may likely choose not to report a trophy discovery if the local DNR conservation officer is just going to take it from them. In this case, Respondents took the bear remains from Appellant and registered its skull with the Boone & Crockett Club as a Minnesota DNR trophy, without giving any attribution to Appellant. (*See* APP-78.)

Under both examples set forth above, the DNR's true concern of widespread poaching is exacerbated, not relieved. If the DNR is truly concerned with preventing poaching, its best tool for achieving that goal is cooperation from the public. Cooperation begins with a clear statement of the laws and rules. Furthermore, education about common situations like finding dead animals should be made available on the DNR website. This allows both the public and conservation officers to understand the laws and reliably predict the results in various circumstances that are likely to occur.

C. If The Game And Fish Laws are Intended to Cover Animals That Expire Naturally, They Are Unconstitutional On their Face.

The void-for-vagueness doctrine requires that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). *See also Baggett v. Bullitt*, 377 U.S. 360, 367 (1964) (defining void for vagueness); *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985) (discussing void for vagueness doctrine). A defendant may not successfully challenge a statute as unconstitutionally vague if the statute clearly applies to the defendant's alleged conduct. *State v. Grube*, 531 N.W.2d 484, 490 (Minn. 1995) (quotation omitted). Here, the Game and Fish Laws do not clearly apply to the remains of bears that expire naturally, nor do they inform the finder of his rights, and responsibilities and possible punishment with respect to the remains.

A statute is void for vagueness if it "defines an act in a manner that encourages arbitrary and discriminatory enforcement," or the law is so indefinite that reasonable

people "must guess at its meaning." *Humenansky v. Minn. Bd. of Med. Exam'rs*, 525 N.W.2d 559, 564 (Minn. App. 1994) (citations omitted), *review denied* (Minn. Feb. 14, 1995). Due process standards of indefiniteness require that persons of common intelligence not be left to guess at the meaning of a law, nor differ as to its application. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127 (1925); *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985). Appellant asserts that this Court must apply the rule of statutory construction requiring courts to avoid, if possible, interpreting statutes in a manner that renders them unconstitutional. *See* Minn. Stat. § 645.17(3) (1994). Further, Appellant notes that if, as here, a court is confronted by two differing possible constructions of a statute, the court must adopt the option which upholds the constitutionality of the statute. *State on Behalf of Forslund v. Bronson*, 305 N.W.2d 748, 751 (Minn. 1981).

In *Giaccio v. Pennsylvania*, the U.S. Supreme Court stated that a law fails to meet due process requirements if it "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." 382 U.S. 399, 402-03 (1966). But due process requirements are satisfied "by specifying standards of conduct in terms that have acquired meaning involving reasonably definite standards either according to the common law or by long and general usage." *State v. Bolsinger*, 21 N.W.2d 480, 489 (Minn. 1946) *rev'd. on other grounds*, *State v. Engle*, 743 N.W.2d 592, 594 (Minn. 2008). Thus, to the extent Respondents assert the Game and Fish Laws or the rules prescribed by the DNR Commissioner apply to animals that expire naturally—as opposed to animals that are killed or taken—Appellant challenges the

Game and Fish Laws only as Respondents seek to have them interpreted and applied.[5] The Game and Fish Laws are facially valid, but Respondents' contorted interpretation and application would make them unconstitutional. The clear language does ***not*** include animals that expire naturally. Respondents read that into the Game and Fish Laws unnecessarily. Thus, this Court does not need to construe the Game and Fish Laws, they are clear on their face that ownership and regulation does not attach to wild animals *ferea naturea* unless they are taken or killed.

IV. APPELLANT HAD NO NOTICE AND OPPORTUNITY TO BE HEARD.

The valid exercise of police power must be accomplished through clear regulation, not on *ad hoc* decisions by field officers. *Pembauer v. City of Cincinnati*, 475 U.S. 469, 499 (1986). Minnesota law governing dead and decomposing animals is unclear. Other states specifically address this issue and provide proper notice to avoid violating due process. Minnesota should provide a clear statement of the law as do these other states.

The Wisconsin Legislature has provided adequate notice of the laws related to dead animals whether killed or discovered dead from natural causes. Under Wisconsin

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[5] At the lower court, Appellant also challenged the Game and Fish Laws' to the extent they impose strict criminal liability for possession of wild animals. Due process requires a criminal statute must (a) define the criminal offense with sufficient definitiveness that ordinary people can understand what conduct is prohibited, and (b) establish adequate guidelines to govern law enforcement. *State v. Poole*, 489 N.W.2d 537, 541 (Minn. Ct. App. 1992), *aff'd*, 499 N.W.2d 31 (Minn. 1993). Although it isn't true in all States, the general rule is that *strict liability* can only be used for crimes that do not carry the possibility of imprisonment. *State v. Guminga*, 395 N.W.2d 344 (Minn. 1986) (holding vicarious liability imposed on employers whose employees served alcohol to minors violates substantive due process provision of Minnesota Constitution). In Minnesota, possession of a wild animal without a tag may be punished as a gross misdemeanor. *See* Minn. Stat. § 97A.331, subd. 4. Thus, under Respondents' interpretation of the Game and Fish Laws, absent any *mens rea*, an individual could be imprisoned for possessing the remains of an animal that expired naturally. For this reason, the Game and Fish Laws should be interpreted so as not to render them unconstitutional, but instead in the way suggested by Appellant. *See* Minn. Stat. § 645.17, subd. 3. ("the legislature does not intend to violate the Constitution of the United States or of this state").

Statutes section 29.011(2), "[t]he legal title to a wild animal ***or carcass***, taken or reduced to possession in violation of this chapter, remains in the state." Carcass is defined as "the dead body of a wild animal." *See* Wis. Stat. § 29.001(18) (emphasis added). By this language, Wisconsin has effectively exercised its police power over the carcass of a wild animal regardless of the manner of its death. The statute is a clear, unambiguous pronouncement of Wisconsin's police power authority. In contrast, the Minnesota Game and Fish Laws only apply to animals that are killed or taken. Because of this, in Minnesota there is no notice of any State power to regulate animals that expire naturally.

As another example of adequate notice of the laws and rules, Manitoba has a very simple form people can fill out if they find a dead animal. (*See* APP-79.) The form is issued by Manitoba Conservation and is entitled "Application for Dead Wild Animal Possession Permit." (*Id.*) To fill-out the form, an individual who finds a dead animal simply provides their personal information, checks a box indicating the known or suspected cause of death, and checks another box describing their intended use. (*Id.*) The intended use options include: personal, scientific, educational, ceremonial/religious. (*Id.*)

Despite Respondents' assertion that one exists, there is no so-called possession permit in Minnesota for animals that are found dead. A quick look at the permits page of the DNR website confirms this. (*See* APP-80.) There are DNR permits for many common activities, including:

- Wildlife rehabilitation permits;
- Muzzleloader scope permits;
- Hunt from a standing vehicle permits;
- Take big game and/or turkey with a crossbow permits;
- Special permits for hunters with disabilities using snowmobiles; and
- Special permits for hunters with disabilities using recreational motor vehicles;

(*Id.*) But there is no permit listed, like the Manitoba Conservation permit, for keeping animals that ordinary individuals find dead of natural causes. The only so-called possession permit in Minnesota is for hunters. They attach it to the animal at the site of the kill, as required by statute. *See* Minn. Stat. § 97A.535. If Respondents suggest borrowing the hunting license and tag permit process for the distinctly different situation Appellant encountered, Appellant clearly had no notice of the requirements Respondents now assert he failed to obey. At the very least, whether the State or DNR has a possession permit process applicable to animals that are not taken or killed was an issue of material fact which should have prevented the lower court from dismissing this matter.

There are no barriers to providing a clear and unambiguous statement of the law that will provide proper notice and respect individual's due process and property rights. The Commissioner of the DNR has plenary authority to issue rules under the Game and Fish Laws. These rules are issued in pamphlets to everyone who purchases a license. Appellant and other hunters review these regulation pamphlets every year. Because the obstacles are so *de minimus*, there is no excuse for the Commissioner failing to clarify the law and publish it in a manner calculated to reach all hunters. For those who do not hunt or fish, the Commissioner could put this information on the DNR's website with the other types of permits.

V. BECAUSE APPELLANT POSSESSES A PROPERTY RIGHT IN THE SUBJECT BEAR REMAINS, SUMMARY FORFEITURE UNDER THE GAME AND FISH LAWS WAS INAPPROPRIATE.

As it relates to forfeiture of the bear skull and hide, Appellant does not challenge the constitutionality the Game and Fish Laws summary confiscation statute on its face. If animal remains are subject to the State's sovereign power because they were taken or killed, then the State may validly exercise its regulatory police power authority over that property. Minnesota Statutes section 97A.221, subd. 3 governs the procedure for confiscation of seized property. It reads:

> The enforcement officer must hold the seized property. The property held may be confiscated when:
>
> (1) the person from whom the property was seized is convicted, the conviction is not under appeal, and the time period for appeal of the conviction has expired; or
>
> (2) the property seized is contraband consisting of a wild animal, wild rice, or other aquatic vegetation.

See § 97A.221, subd. 3. In essence, the State grants a limited ownership right over animals that are taken or killed as authorized by the Game and Fish Laws. It may revoke or suspend that right if the animal is subsequently possessed in violation of the Game and Fish Laws. But this section does not apply unless there was a taking or killing.

Appellant's challenge to the summary confiscation statute is different. Appellant challenges this statute as it was applied to him. Specifically, Appellant acquired his property rights in the bear remains outside the scope of the Game and Fish Laws. His right to ownership, therefore, is not limited or qualified in any way. It is not subject to valid seizure and confiscation under § 97A.221, subd. 3. This is because the State,

having not asserted its police power authority to regulate the possession and transportation of animals that expire naturally, cannot regulate Applellant's property interest in the same way it regulates animals that were taken or killed *i.e.*, the State's sovereign power of protection is not triggered. Thus, because summary confiscation under § 97A.221, subd. 3 does not apply to Appellant's property right in the subject bear remains, forfeiture proceedings must occur outside the Game and Fish Laws.

Minnesota statutes section 609.531 governs civil forfeiture. Under this section "an action for forfeiture is a civil *in rem* action and is independent of any criminal prosecution." *Id.* at subd. 6(a). At the lower court, Respondents argued that the unpublished case of *Kottam v. Minn. Dep't of Natural Res.*, 2008 WL 4977414 (Minn. Ct. App. Nov. 25, 2008) places a burden on Appellant to demonstrate lawful acquisition of the bear skull and hide under the Game and Fish Laws in order to defeat a civil forfeiture. This contention is flawed for two reasons. First, the Game and Fish Laws do not apply to Appellant's discovery because his bear was not taken, and because no protection interest is served by its regulation. Second, Appellant was not convicted of any Game and Fish Law violations.

Further, in *Kottom* the Court of Appeals recognized that § 97A.221, subd. 3 of the Game and Fish Laws applies in the same way as Minnesota's civil forfeiture statute. *See Kottam,* 2008 WL 4977414 at * 3, n. 3. Thus, as in an administrative or judicial forfeiture, the agency seizing the property must give "notice to all persons known to have an ownership or possessory interest in the property, informing them that they may demand judicial review of the forfeiture." *Blanche v. 1995 Pontiac Grand Prix*, 599

N.W.2d 161, 165 (Minn. 1999) (citing Minn. Stat. 609.5314, subd. 2). "[D]ue process requires notice to owners before forfeiture." *Id.* at 166. Under Minn. Stat. § 609.531, subd. 1(e), the civil forfeiture statute applies to the "Department of Natural Resources Division of Enforcement." In this case, however, the DNR did not provide the requisite notice to Appellant, and has not afforded Appellant the opportunity to be heard as part of any judicial review. These failures are a further violation of his rights under the Constitution and applicable laws. *See* 42 U.S.C. § 1983.

Further, at the lower court, Respondents argued that taxidermist Tracy Jones' guilty plea to Game and Fish violations rendered the bear remains contraband. Minnesota recognizes an innocent owner defense "available to a claimant who proves the he was not 'privy to the use or intended use' of property to facilitate [a crime], or that 'the unlawful use or intended use of the property otherwise occurred with[out] the owner's knowledge or consent." *See Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 520 (Minn. 2007). *See also Laase v. 2007 Chevrolet Tahoe*, 755 N.W.2d 23, 26 (Minn. Ct. App. 2008) (extending the innocent owner defense to joint owners of property). Here, Jones plead guilty to charges for failure to keep proper records of the names and addresses of the person from whom a wild animal was obtained, along with serial numbers of licenses, tags, or permits required to be attached to the animal as allegedly required under Minnesota Statutes § 97A.425, subd. 2.[6] As alleged in his Complaint, Appellant was not privy to Jones's failure to keep records, nor did he consent.

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[6] Appellant also challenges Jones' guilty plea to the extent Jones was required to possess any licenses, tags, or permits. As discussed *supra*, the disputed bear remains were not subject to these requirements because no law or rule requires licenses, tags, or permits unless the animal was taken or killed.

To the contrary, Appellant instructed Jones to observe any requirements attendant to mounting the subject bear's skull and tanning its hide.

In *Riley v. 1987 Station Wagon*, the Minnesota Supreme Court acknowledged "that civil forfeiture is disfavored because it is quasi-penal in nature, and accordingly, it must be strictly construed against the prosecuting agency." 650 N.W.2d 441, 443 (Minn. 2002). Thus, in accordance with his due process rights afforded under the Fourteenth Amendment, Appellant must be allowed to assert his innocent owner defense in a civil forfeiture proceeding. The lower court erred by depriving Appellant of this right.

VI. APPELLANT ADEQUATELY PLED HIS § 1983 CLAIMS AGAINST RESPONDENTS SHOUTZ AND PROVOST.

Appellant pled sufficient facts to demonstrate Respondents' liability under § 1983. The sole basis for dismissal of those claims by the lower court was that Appellant had never obtained any ownership right in the remains of the bear. Thus, if this Court holds that Appellant may have a right in the bear remains at issue in this lawsuit, the case should be remanded with instructions that Appellant may proceed with his claims under 42 U.S.C § 1983.

CONCLUSION

This case implores this Court to draw a bright line distinguishing individual rights from impermissible state regulation. In doing so, Appellant challenges the lower court's approval of Respondents' broad interpretation of the Game and Fish Laws as an over-extension of DNR police power authority. Further, to the extent the DNR may proscribe ownership outside of its sovereign power, it has failed to do so here. Simply put, until the

DNR informs people what to do when they find a dead animal that was not taken or killed, it cannot constitutionally deprive an individual of ownership or exercise regulatory authority over that personal property without notice and opportunity to be heard. Accordingly, Appellant respectfully requests that this Court reverse the lower court by holding that Appellant may obtain an interest in dead and decompsing wild animal remains on his property that were not taken or killed, but instead died of natural causes.

Respectfully submitted,

Dated: December 7, 2009

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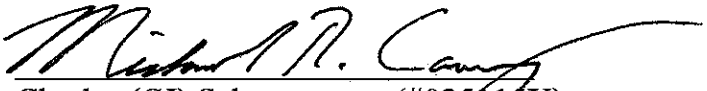
CERTIFICATE OF COMPLIANCE

I hereby certify this Appellants' Brief was prepared using Microsoft Word, in Times Roman font, 13 point, and according to the word processing system's word count, is no more than 10,002 words, exclusive of the cover page, table of contents, table of authorities, signature block and appendix, and complies with the typeface requirements of Minn.R.Civ.App.P. 132.01.

Respectfully submitted,

Dated: December 7, 2009

BOWMAN AND BROOKE LLP



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