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PREVIEW; Murray v. BEJ Minerals: *Digging Up the Truth on Whether the Possessory Right of Dinosaur Fossils Lie with a Parcel's Mineral Interest or Surface Interest*

Kylar Clifton

Candidate for J.D. 2021, Alexander Blewett III School of Law at the University of Montana

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PREVIEW; Murray v. BEJ Minerals: *Digging Up the Truth on Whether the Possessory Right of Dinosaur Fossils Lie with a Parcel's Mineral Interest or Surface Interest.*

Kylar Clifton*

The Montana Supreme Court will hear oral argument in this matter on Thursday, November 7, 2019, at 9:30 a.m., in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana. Eric B. Wolff will likely appear on behalf of the Appellants. Harlan B. Krogh will likely appear on behalf of the Appellees.

I. INTRODUCTION

The Ninth Circuit Court of Appeals granted rehearing *en banc* in *Murray v. BEJ Minerals, LLC*, to determine whether dinosaur fossils are part of the surface or mineral estate under Montana law.¹ Finding state law determinative and no controlling precedent, the Ninth Circuit certified the question to the Montana Supreme Court. This question asks the Court to determine: Whether, under Montana law, dinosaur fossils constitute “minerals” for the purpose of a mineral reservation?

This question presents the Court with the issue of determining whether dinosaur fossils are “minerals” for the purpose of a mineral reservations in a deed between private parties in Montana. During the 2019 Legislative Session, the Montana State Legislature passed legislation establishing that fossils are not “minerals” for the purpose of a mineral rights reservation.² Here, however, the Court has the opportunity to articulate a test that will affect not only the dinosaurs fossils in this matter, but also principles of contract interpretation and the relationship between the judiciary and the legislature.

II. FACTUAL AND PROCEDURAL BACKGROUND

George Severson previously owned a farm and ranch property including both the surface and mineral estate (“the Ranch”) located in Garfield County, Montana. George Severson has leased the Ranch to Mary Ann and Lige Murray (collectively the “Murrays”) since 1983.³ From approximately 1991 until 2005, George Severson transferred portions of his property interest to his two sons, Jerry and Robert (collectively the “Seversons”). The property interest still retained by the Seversons has been transferred to BEJ Minerals, LLC, and RTWF, LLC.⁴ In 2005, after of the surface and mineral estates were severed, George

* Kylar Clifton, Candidate for J.D. 2021, Alexander Blewett III School of Law at the University of Montana.

¹ 920 F.3d 583 (9th Cir. 2019) (en banc).

² H.B. 229, 66th Gen. Assemb., 1st Reg. Sess. (Mont. 2019) (codified as MONT. CODE ANN. § 1-4-112).

³ *Murray v. Billings Garfield Land Co.*, 187 F. Supp. 3d 1203, 1204 (D. Mont. 2016).

⁴ *Id.* at 1205.

Severson sold the remainder of his interest to the Murrays.⁵ Until 2005, the Seversons and the Murrays jointly owned and operated the Ranch.⁶ Subsequently, the Seversons sold their entire surface estate rights and one-third of their mineral estate rights to the Murrays.⁷ The mineral deed executed and recorded by both parties during the sale stated that both parties would remain tenants in common to “all right title and interest in and to all of the oil, gas, hydrocarbons, and minerals in, on and under, and that may be produced” from the Ranch.⁸ At the time the parties executed the sale of the surface estate, neither the Seversons nor the Murrays suspected dinosaur fossils existed on the Ranch.⁹

After the severance and conveyance of the mineral and surface estates, the Murrays discovered several valuable dinosaur fossils (collectively the “Fossils”) on the Ranch.¹⁰ One of the discoveries included a pair of interlocked dinosaurs nicknamed “the Dueling Dinosaurs.”¹¹ The Dueling Dinosaurs were appraised to have a market value of seven to nine million dollars.¹² Additionally, the fossilized remains of a *Tyrannosaurus rex* was discovered in 2013 and the Murrays have already sold this theropod to a Dutch museum for millions of dollars with the proceeds held in escrow pending the resolution of this litigation.¹³ The Murrays claim that they first notified the Seversons of the initial discoveries in 2008¹⁴, however, this fact is disputed.

The Murrays filed a complaint in the Sixteenth Judicial District Court of Montana seeking a declaratory judgment that they are the rightful owners of the Fossils under Montana law because fossils are part of the surface estate.¹⁵ The Seversons removed the case to federal court on the basis of diversity and counterclaimed that the Fossils were part of the mineral estate.¹⁶ The Seversons assert that the Fossils are “minerals” under Montana law, and, as such, they are entitled to part of the proceeds from the sale of the Fossils.¹⁷

The United States District Court for the District of Montana, Billings Division, presided over the case and held that dinosaur fossils are not “minerals” for the purposes of a mineral reservation under Montana law.¹⁸ The Seversons appealed the judgement to the Ninth Circuit.¹⁹ A majority of a three judge panel of the Ninth Circuit reversed the decision in favor of the Seversons, holding that the dinosaur fossils

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1073 (9th Cir. 2019).

¹⁵ *Id.*

¹⁶ *Murray*, 187 F. Supp. 3d at 1207.

¹⁷ *Murray*, 924 F.3d at 1073.

¹⁸ *Murray*, 187 F. Supp. 3d at 1212.

¹⁹ *Murray*, 924 F.3d at 1073.

are “minerals.”²⁰ However, this holding by the Ninth Circuit panel is non-precedential.²¹ The Murrays requested a rehearing *en banc*.²² A majority vote of the active non-recused judges of the Ninth Circuit granted the request for an *en banc* hearing²³ and stayed proceedings pending a determination by the Court whether the Fossils are part of the surface or mineral estate for the purposes of a mineral reservation under Montana law.²⁴

The Court accepted the certified question on June 4, 2019.²⁵ In accordance with the Montana Rules of Appellate Procedure, the Court may reformulate the question pending full consideration of the issue.²⁶ Here, the Court may take this opportunity to articulate whether or not fossils should be part of the mineral or surface estate of a property regardless of what the Montana State Legislature determined last session, or the Court may choose to focus on the contractual agreement between the two parties and leave the legislative determination untouched.

III. SUMMARY OF ARGUMENTS

A. Appellants' Arguments

The Seversons contend that the Ninth Circuit was correct in determining that the Fossils discovered on the Ranch are categorized as “minerals.”²⁷ The Seversons assert that due to the value and rareness of the Fossils, the Court should determine that the Fossils are “minerals” and order that the proceeds from the sale of the Fossils be split according to the division of mineral rights under the deed executed by the parties.²⁸ The Seversons assert that the Court should follow the test announced in *Farley v. Booth Brothers Land and Livestock Company*²⁹, and refined in *Hart v. Craig*³⁰, to determine that the Fossils are “minerals” for the purpose of a mineral reservation.

In *Farley*, the Court noted that the term “mineral” has been difficult for the courts to define and the statutory definitions available are inconsistent.³¹ The Court held that for a naturally occurring substance to be considered a “mineral” for the purpose of a mineral reservation the substance must have a particular property giving it special value beyond being used for roadbuilding.³²

²⁰ Murray v. BEJ Minerals, LLC, 908 F.3d 437, 448 (9th Cir. 2019).

²¹ Murray v. BEJ Minerals, LLC, 920 F.3d 583 (9th Cir. 2019).

²² *Id.*

²³ *Id.*

²⁴ Murray, 924 F.3d at 1074.

²⁵ Murray v. BEJ Minerals, LLC, 2019 WL 2383604 at *1 (Mont. June 4, 2019) (No. 16-5506).

²⁶ Mont. R. App. P. 15(6)(a)(iii).

²⁷ Brief of Appellants, *Murray v. BEJ Minerals, LLC*, 2019 WL 4238239 at *1–2 (Mont. July 2, 2019) (No. OP 19-0304).

²⁸ *Id.*

²⁹ 890 P.2d 377 (Mont. 1995).

³⁰ 216 P.3d 197 (Mont. 2009).

³¹ *Farley*, 890 P.2d at 379–381.

³² *Id.* at 380.

The Court adopted this test from the Texas Supreme Court decision in *Heinatz v. Allen*.³³ In *Heinatz*, the Texas Supreme Court was tasked with determining if limestone was part of the surface or mineral estate for a parcel of land.³⁴ The *Heinatz*, decision held that materials which are only of use in road building are not considered minerals.³⁵ The Texas Supreme Court held in *Heinatz* that “substances such as sand, gravel and limestone are not minerals within the ordinary and natural meaning of the word unless they are rare and exceptional in character or possess a peculiar property giving them special value.”³⁶ While this language may suggest, as the Seversons desire, that substances with rare and exceptional value are minerals, the Texas Supreme Court then goes on to highlight the production value of substances when they are used to “mak[e] glass” or “manufactured into cement.”³⁷ The Texas Supreme Court stated that because the limestone was not rare or exceptional in value and was closely related to the soil it could not be considered part of the mineral estate and was, therefore, part of the surface estate.³⁸

In *Farley*, the Court determined that even though scoria was used to construct roadways that does not make it valuable and exceptional in character and therefore is not a mineral.³⁹ In *Hart*, the Court extended their holding in *Farley* to a dispute over whether sandstone was a part of a conveyed mineral reservation.⁴⁰ The Court relied upon *Heinatz* and ruled that substances such as sandstone are not considered a “mineral” unless they are: (1) rare and exceptional in character; or (2) possess a peculiar property giving them special value.⁴¹ The Court emphasized in *Hart* that sandstone is not considered rare or exceptional simply because it can be sold commercially.⁴²

Here, the Seversons urge the Court to focus solely on the Fossils at issue here, which would provide the most equitable result.⁴³ The Seversons ask the Court to adopt the same interpretation that they did in *Farley* and *Hart* which provides a substance is a mineral if it: (1) is comprised of mineral substances; and (2) is rare and exceptional in character or it has a peculiar property giving it special value.⁴⁴ The Seversons contend that because the Fossils are rare and valuable, they should be categorized as minerals,” and therefore should be part of the mineral estate.⁴⁵ The Seversons assert that in *Farley* and subsequently in *Hart*, the Court did not rely on the statutory definitions of the term “minerals” and determined that the definitions were of little significance

³³ 217 S.W.2d 994 (Tex. 1949).

³⁴ *Id.* at 998.

³⁵ *Id.* at 997.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Hart v. Craig*, 216 P.3d 197, 198 (Mont. 2009).

⁴¹ *Id.* at 211.

⁴² *Id.*

⁴³ Appellant Br., *supra* note 27, at *21–22.

⁴⁴ *Id.* at *12.

⁴⁵ *Id.* at *20.

due to the multitude of ways the word mineral can and has been defined.⁴⁶

B. Appellees' Arguments

The Murrays, contend that the Court should adopt the ruling of the district court and conclude that the Fossils are part of the surface estate of the Ranch.⁴⁷ The Murrays argue that if the Court were to conclude that fossils are indeed part of the mineral estate relying on the *Farley* test, then other courts will be burdened by having to conduct a case-by-case analysis to determine whether fossils disputed in future litigation are rare and valuable.⁴⁸ Further, the Murrays dispute the holding in *Farley* and contend that it did not develop a test that allows for a substance to be classified as a mineral if it is exceptionally rare and valuable.⁴⁹ The Murrays contend that in *Farley* the Court first looked to the statutory definitions of the term “mineral” and then assessed whether the substance in dispute was of exceptional character.⁵⁰ The Murrays contend that the rare and valuable test articulated in *Farley* only applies if the substance in dispute is not contemplated in the statutory definition of the term mineral.⁵¹ Since fossils are not defined in any statutory definition of the term mineral, the Court cannot move on to the rare and valuable analysis of *Farley*.⁵²

Additionally, the Murrays ask the Court to heed the will of the Montana State Legislature which, while this litigation was pending, adopted a new provision to the Montana Code providing that fossils are not minerals.⁵³ The Murrays additionally argue that since the contract in which the mineral and surface estates were conveyed did not explicitly contemplate fossils the Court should not construe the mineral reservation to include fossils.⁵⁴

IV. ANALYSIS

Defining what constitutes a mineral has not been extensively addressed under Montana law, and whether a fossil is a “mineral” has never been specifically addressed by the Court. The limited Montana case law available, *Farley* and *Hart*, which attempted to develop a test for the lower courts to apply in classifying minerals were discussed at length by both parties. The statutory definitions of the word “mineral” under Montana law are contradictory and misleading when employed out of context such as with the question currently before the Court.⁵⁵ The Court even acknowledged the contradictory nature of the term in *Farley*

⁴⁶ *Farley v. Booth Brothers Land and Livestock Co.*, 890 P.2d 377, 379 (Mont. 1995).

⁴⁷ Brief of Appellees, *Murrays v. BEJ Minerals, LLC*, 2019 WL 4238240 at *1–3 (Mont. July 31, 2019) (No. OP 19-0304).

⁴⁸ *Id.* at *2.

⁴⁹ *Id.* at *12.

⁵⁰ *Id.* at *11–12.

⁵¹ *Id.* at *17.

⁵² *Id.*

⁵³ *Id.* at *3.

⁵⁴ *Id.* at *10–12.

⁵⁵ *Id.* at *12.

and pointed out that under Title 82, Chapter 4 gravel is a “mineral” in one provision and not a “mineral” in another.⁵⁶

The term “mineral” is discussed in three different provisions of the Montana Code Annotated. In Title 82, Minerals, Oil, and Gas, minerals include any:

ore, rock, or substance, other than oil, gas, bentonite, clay, coal, sand, gravel, peat, soil materials, or uranium, that is taken from below the surface or from the surface of the earth for the purpose of milling, concentration, refinement, smelting, manufacturing, or other subsequent use or processing or for stockpiling for future use, refinement, or smelting.⁵⁷

This definition provides little guidance to the question presented because fossils are not used in milling, concentration, refinement, smelting or any other defined form of processing.

Additionally, under Title 70, Property, mineral means “gas; oil; coal; other gaseous, liquid, and solid hydrocarbons; oil shale; cement material; sand and gravel; road material; building stone; chemical raw material; gemstone; fissionable and nonfissionable ores; colloidal and other clay; steam and other geothermal resource.”⁵⁸ Just as in Title 82 this definition does not include any reference to fossils or any text that would necessarily encompass fossils.

Finally, in Title 15, Taxation, mineral is defined as “any precious stones or gems, gold, silver, copper, coal, lead, petroleum, natural gas, oil, uranium, talc, vermiculite, limestone, or other nonrenewable merchantable products extracted from the surface or subsurface of the state of Montana.”⁵⁹ This provision specifically distinguishes precious substances that have value as minerals, but does not include any reference to fossils. The Court has found little value in statutory interpretations of a mineral and in *Farley* it stated that “the definition of ‘mineral’ can differ according to the context in which it is used.”⁶⁰ Here, the Court should follow their decision in *Farley* and not rely on statutory definitions to resolve this matter.⁶¹

While an equitable solution would include the Fossils in the mineral estate of the Ranch, since both parties have a portion of the mineral rights, the Court may choose to allow the will of the Montana State Legislature to dictate the outcome of this matter. In 2019, the Montana State Legislature passed House Bill 229, which specifically states that fossils are not minerals and are part of the surface estate of land.⁶² Section 8 of House Bill 229 states that the act and its provisions within

⁵⁶ *Farley v. Booth Brothers Land and Livestock Co.*, 890 P.2d 377, 379 (Mont. 1995).

⁵⁷ MONT. CODE ANN. § 82-4-303 (2019).

⁵⁸ *Id.* § 70-9-802.

⁵⁹ *Id.* § 15-38-103.

⁶⁰ *Farley*, 890 P.2d at 379.

⁶¹ *Id.*

⁶² H.B. 229, 66th Gen. Assemb., 1st Reg. Sess. (Mont. 2019).

apply retroactively to instruments that sever the mineral estate from the surface estate of a parcel of property.⁶³ However, Section 5, carved out this matter from its application. Section 5 states that H.B. 229 does not affect proceedings that began before its passage.⁶⁴ Since H.B. 229 cannot dictate the outcome of this matter by virtue of its passage, the Murrays request that the Court at least consider the message communicated by its passage.⁶⁵ This request, however, would obscure the separation of powers afforded to both the judicial and legislative branches in Montana. While H.B. 229, will determine the outcome of future fossil disputes, the Court has the authority to determine the fate of the Fossils discovered on the Ranch.

Since current statutory definitions and the newly enacted statute do not conclusively resolve the issue here, the Court will likely look to its prior holdings in *Farley* and *Hart*. In *Farley*, the Court determined that scoria could not easily be included in the statutory definition of “mineral” under Title 82.⁶⁶ In its holding, the Court discussed how scoria is used for building roadways and the gains value after being processed.⁶⁷ Even though its rare and exceptional value was asserted by one of the parties in *Farley*, the Court did not rest its holding on that assertion.⁶⁸ Instead, the Court only noted that scoria is only useful for building and road-making purposes and therefore is not a mineral.⁶⁹ This denotation is particularly important to the dispute between the Murrays and the Seversons because the Court in *Farley* focused its analysis on the production and processing potential of scoria not on its intrinsic value.

The only other instance where the Court addressed the definition of a mineral was in *Hart*. In *Hart*, the Court briefly addressed the intrinsic value of the material in question and concluded that sandstone was not exceptionally rare or valuable.⁷⁰ In *Hart*, the Court again turned to *Heinatz* in assessing whether sandstone constitutes a mineral with regards to a mineral rights reservation.⁷¹ The Court concluded that sandstone is not rare and has no exceptional value when used for landscaping purposes.⁷² As with *Farley*, the Court here focused on the production and processing value of the material in question and did not discuss its stand-alone intrinsic value. Accordingly, in this matter the Court is faced with a new issue that may fall outside the scope of *Farley* and *Hart*.

Although the precise issue presented here has not previously been considered, the Court should extend the well-reasoned logic of *Farley* and *Hart* to resolve this case. First, the Court should look to see if the

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Appellee Br., *supra* note 47, at *35.

⁶⁶ *Farley*, 890 P.2d at 379.

⁶⁷ *Id.* at 380.

⁶⁸ *Farley*, 890 P.2d at 380 (quoting *Holland v. Dolese Co.*, 540 P.2d 549, 550–51 (Okla. 1975)).

⁶⁹ *Id.*

⁷⁰ *Hart v. Craig*, 216 P.3d 197, 198 (Mont. 2009).

⁷¹ *Id.*

⁷² *Id.*

Fossils are rare and exceptional in character. If the Court finds that the Fossils are rare and exceptional in character than they should be considered part of the mineral estate. However, if the Court does not find them to be rare and exceptional in character the Court should then see if they possess any peculiar property giving them special value for a production or processing purpose. Here, the Court should not have to go beyond the first part of the test. The Fossils discovered on the Ranch are not useful for road construction or other production purposes, but they are still rare and exceptional on their own as evidenced by their market value. The Court is likely to rule in contradiction of Montana Code Annotated § 1-4-112 in this matter and find that the Fossils in question here are “minerals” because they are rare and exceptional in character.

V. CONCLUSION

Despite all prior case law discussing the processing value of various mineral substances, the Court will likely look to its established precedent and determine that the Fossils on the Ranch are part of the mineral estate. While this ruling will not impact other future fossil discoveries due to subsequent legislative enactments, it will have significant monetary effects on the Murrays and the Seversons. The Court will likely hold that the Fossils are rare and exceptional in character because they are distinguishable from the materials discussed in *Farley* and *Hart* and therefore should be categorized as minerals.