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## PREVIEW—Murray v. BEJ Minerals, LLC: Finding a Home for Fossils

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**PREVIEW—Murray v. BEJ Minerals, LLC:  
*Finding a Home for Fossils***

**Layne Ryerson\***

The Montana Supreme Court will hear oral arguments in this matter on Thursday, November 7, 2019 at 9:30 AM in the courtroom of the Montana Supreme Court, Joseph P. Mazurek Building, Helena, Montana. The Honorable Olivia Rieger will hear the case in place of Justice Jim Rice, who recused himself. Eric B. Wolff is expected to argue for the Appellants. Harlan B. Krogh is expected to argue for the Appellees.

**I. INTRODUCTION**

This case presents a unique property law issue at the center of a long-running dispute over the ownership of multiple valuable dinosaur fossils. As surface estate owners, Appellees claim sole ownership of the fossils, while Appellants argue the fossils belong to the mineral estate. After a series of appeals, the United States Court of Appeals for the Ninth Circuit has certified to the Montana Supreme Court the question of “[w]hether, under Montana law, dinosaur fossils constitute ‘minerals’ for the purpose of a mineral reservation?”<sup>1</sup>

**II. FACTUAL AND PROCEDURAL BACKGROUND**

In 2005, Jerry and Robert Severson sold the surface rights and one-third of the mineral estate of their Garfield County ranch to Lige and Mary Ann Murray (the “Murrays”). The Seversons and Murrays owned the remaining two-thirds of the mineral estate as tenants-in-common.<sup>2</sup> The mineral deed stated that the parties would share “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].”<sup>3</sup> At the time of the sale, neither party knew of or suspected the presence of dinosaur fossils on the ranch.<sup>4</sup>

Shortly after the sale, an amateur paleontologist discovered several valuable fossils on the ranch, including a nearly-intact *Tyrannosaurus rex* skeleton, as well as the “Dueling Dinosaurs,” a two-part fossil containing a 22-foot-long *theropod* and a 28-foot-long

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1. Murray v. BEJ Minerals, LLC, 924 F.3d 1070 (9th Cir. 2019) [hereinafter Certification Order].

2. Murray v. Billings Garfield Land Co., 187 F. Supp. 3d 1203, 1205 (D. Mont. 2016) [hereinafter Murray I].

3. *Id.* (citing Dep. Mary Ann Murray 30:3–31:8, Doc. 48-4 at 5–6 (2016)).

4. *Id.*

*ceratopsian* locked in combat.<sup>5</sup> Experts considered the fossils (collectively the “Montana Fossils”) highly valuable, with the *Tyrannosaurus rex* skeleton fetching several million dollars from a Dutch museum.<sup>6</sup>

In 2014, the Murrays filed suit in Montana state court, seeking a declaratory judgment that Jerry and Robert Seversons and their assignees, BEJ Minerals, LLC and RTWF, LLC (collectively the “Seversons”), had no interest in the Montana Fossils because they belonged to the owner of the surface estate.<sup>7</sup> The Seversons removed the case to federal court based on diversity and counterclaimed, seeking reimbursement for the ownership and sale of the Montana Fossils, which they argued were part of the mineral estate.<sup>8</sup>

The federal district court granted summary judgment for the Murrays, determining that the Montana Fossils did not fall within the “ordinary and natural meaning” of the word “mineral” as used in the deed.<sup>9</sup> The district court noted that the fossils were not mined in a traditional sense but rather discovered by good fortune.<sup>10</sup> Moreover, the fossils were deemed valuable based on specimen, preservation, and species, rather than their mineral composition.<sup>11</sup> Finally, unlike minerals, the fossils did not require further refinement to become valuable; their value stemmed exclusively from their discovery.<sup>12</sup>

The Seversons appealed, and a three-judge panel of the Ninth Circuit reversed.<sup>13</sup> The Ninth Circuit determined that Montana had adopted the test used by the Texas Supreme Court in *Heintz v. Allen*;<sup>14</sup> therefore, substances which are both composed of minerals and deemed rare and exceptional belong to the mineral estate.<sup>15</sup> Because the Montana Fossils were technically composed of minerals and considered rare and exceptional, the Ninth Circuit found they belonged to the mineral estate owners.<sup>16</sup> In response to the Ninth Circuit’s holding, the Montana Legislature unanimously passed House Bill 229, a bill clarifying that fossils belong to the owner of the surface estate.<sup>17</sup>

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5. *Id.* at 1205–06 (citing Dep. Peter Larson 131:10, Doc. 48-4 at 141 (2016)).

6. *Murray I*, 187 F. Supp. 3d at 1205–07; *Murray v. BEJ Minerals, LLC*, 908 F.3d 437, 441 (9th Cir. 2018) [hereinafter *Murray II*].

7. *Murray I*, 187 F. Supp. 3d at 1207.

8. *Id.* at 1212.

9. *Id.*

10. *Id.* at 1207.

11. *Id.*

12. *Id.*

13. *Murray II*, 908 F.3d at 448.

14. 217 S.W.2d 994 (Tex. 1949).

15. *Murray II*, 908 F. 3d at 447.

16. *Id.*

17. H.B. 229, 66th Leg. (Mont. 2019) (codified at Mont. Code Ann. §§ 1–4–112, 82–1–501 (2019)).

The Murrays petitioned for rehearing en banc, which the Ninth Circuit granted.<sup>18</sup> The Ninth Circuit then certified to the Montana Supreme Court the question of “whether, under Montana law, dinosaur fossils constitute ‘minerals’ for the purpose of a mineral reservation.”<sup>19</sup> The Court accepted the question but reserved the option to reformulate pending full consideration of the issue.<sup>20</sup>

### III. SUMMARY OF ARGUMENTS

#### A. Appellants’ Arguments

The Seversons argue three main points. First, that the Court has adopted the *Heinatz* test and should apply it on a case-by-case basis.<sup>21</sup> Second, the passing of H.B. 229 has no bearing on the case and the Court should not take it consideration.<sup>22</sup> Third, the Murrays’ public policy arguments against the inclusion of fossils in the mineral estate lack merit.<sup>23</sup>

##### 1. *Heinatz* Test

The Seversons argue that the Court has already adopted the *Heinatz* test and applied it on numerous occasions to determine whether a substance qualifies as a mineral for the purposes of a mineral estate.<sup>24</sup> Under the test, if a substance both qualifies as a mineral in the natural and ordinary sense of the word and is deemed rare and exceptional, it belongs to the mineral estate.<sup>25</sup> When applying the test, however, the Seversons urge the Court to focus on the “rare and exceptional” criteria, rather than the “natural and ordinary” meaning, to determine mineral classification.<sup>26</sup> The Seversons argue that the Court has never relied on dictionary or statutory definitions to determine if a substance is a mineral.<sup>27</sup>

Next, the Seversons rely on the facts from the Ninth Circuit’s certification order to show that the Montana Fossils qualify as minerals under the *Heinatz* test.<sup>28</sup> According to the order, the Montana Fossils are both mineral in composition, as well as rare and valuable.<sup>29</sup> The Seversons dismiss the contention that the Montana Fossils were once composed of

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

19. Certification Order, 924 F.3d 1070, 1074 (9th Cir. 2019).

20. *Murray v. BEJ Minerals, LLC*, 2019 WL 2383604, at \*1 (Mont. June 4, 2019).

21. Appellants’ Br. at 9, July 7, 2019, No. OP 19-0304; Appellants’ Reply Br. at 4, Aug. 14, 2019, No. OP 19-0304

22. Appellants’ Br. at 22–24.

23. *Id.* at 24–27.

24. *Id.* at 9.

25. *Id.*

26. *Id.* at 14–15.

27. *Id.*

28. *Id.*

29. *Id.* (citing Certification Order, 924 F.3d at 1074).

organic matter, noting that substances like gas and oil, which are commonly considered part of the mineral estate, also derive from living organisms.<sup>30</sup> Additionally, the Seversons deflect concerns that the *Heinatz* test would apply to other types of bones.<sup>31</sup> While fossils are completely mineral in composition, bones merely contain minerals.<sup>32</sup>

The Seversons point to previous cases where the Court utilized the *Heinatz* test. In *Farley v. Booth Brothers Land and Livestock Company*, the Court applied the *Heinatz* test to scoria.<sup>33</sup> The Court determined that scoria was neither rare nor valuable, even though it could be sold commercially.<sup>34</sup> Next, in *Hart v. Craig*, the Court determined that sandstone's use in road construction did not make it rare and exceptional for the sake of the test.<sup>35</sup> The Seversons assert that these decisions show the *Heinatz* test is established precedent in Montana and should be applied to the Montana Fossils.<sup>36</sup>

Further, the Seversons argue that the *Heinatz* test appropriately makes determinations on a case-by-case basis.<sup>37</sup> A "sweeping categorical" test, meanwhile, would incorrectly place value on certain minerals despite their low quantity or difficult accessibility.<sup>38</sup> The Seversons argue that a case-by-case methodology will not be overly burdensome and point to federal mining laws which also determine ownership on a situational basis.<sup>39</sup> According to the Seversons, the *Heinatz* test also provides "predictability" because it recognizes that the purpose of a mineral estate is to convey all valuable mineral substances to the mineral owner.<sup>40</sup> If parties wish to create an agreement outside this framework, they can contract accordingly.<sup>41</sup> Therefore, the Seversons urge the Court to observe *stare decisis* and continue applying the *Heinatz* test to determine what constitutes a mineral.<sup>42</sup>

Additionally, the Seversons suggest the Court reformulate the certified question as allowed under the Ninth Circuit's certification order.<sup>43</sup> The Seversons argue the Court cannot properly answer the question posed because dinosaur fossils in general do not meet or fail the *Heinatz* test.<sup>44</sup> Accordingly, the Seversons maintain that the proper

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30. Appellants' Reply Br. at 21.

31. *Id.*

32. *Id.* at 6.

33. 890 P.2d at 378.

34. Appellants' Br. at 9 (citing *Farley v. Booth Bros. Land & Livestock Co.*, 890 P.2d 377, 380 (Mont. 1995)).

35. *Id.* (citing *Hart v. Craig*, 216 P.3d 197 (Mont. 2009)).

36. *Id.*

37. *Id.*

38. *Id.* at 17.

39. *Id.*

40. *Id.* at 19.

41. *Id.*

42. *Id.* at 20.

43. *Id.* at 4 (citing Certification Order, 924 F.3d at 1074).

44. *Id.* at 3.

analysis of a fossil’s mineral or non-mineral designation must be specific to the particular fossil.<sup>45</sup>

## 2. Montana’s Legislative Fix

Shortly after the Ninth Circuit’s decision, Montana enacted legislation to “clarify [that] dinosaur bones and fossils are part of surface estate.”<sup>46</sup> The Seversons note that while the statute applies retroactively, it does not apply to pending litigation; therefore, it should have no bearing on the Court’s decision.<sup>47</sup> Moreover, the Seversons argue that the statute says nothing about the parties’ original intended allocation of the mineral estate nor their use of the word “mineral.”<sup>48</sup>

## 3. Policy Concerns

Finally, the Seversons contend that the public policy arguments presented by the Murrays and their amici are unfounded and undermined by the new statute.<sup>49</sup> One major concern raised by the opposition involved the impact to museum ownership of fossils.<sup>50</sup> The Seversons argued that this perceived problem could only occur under a specific five-part series of events that, to date, has never been an issue.<sup>51</sup> Additionally, Montana’s two-year statute of limitations would also greatly mitigate such concerns.<sup>52</sup>

Second, the Seversons claim that recognizing valuable fossils as minerals would not hamper paleontological research.<sup>53</sup> The Seversons compare fossil exploration to that of oil and gas, which is not impeded by the need to acquire permission from both mineral and surface estate owners.<sup>54</sup> Finally, the Seversons counter the argument that the “rare and exceptional” distinction is unworkable.<sup>55</sup> They point to *Farley*, where the Court used the distinction to show that sand and limestone could either pass or fail the *Heinatz* test depending on their specific qualities.<sup>56</sup> Accordingly, the Seversons submit that dinosaur fossils should be treated no differently than fossil fuels for the sake of ownership.<sup>57</sup>

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45. *Id.* at 4.

46. Mont. Code Ann. § 1–4–112 (2019).

47. Appellants’ Reply Br. at 16.

48. *Id.*

49. Appellants’ Br., at 24.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 25.

54. *Id.*

55. *Id.* at 26.

56. *Id.* (citing *Farley*, 890 P.2d at 381).

57. *Id.*

### B. Appellees' Argument

The Murrays respond with three main points. First, the Court must not view the certified question as applying specifically to the Montana Fossils, and thus should deem all fossils as non-mineral.<sup>58</sup> Second, the Court should consider H.B. 229 as indicative of what Montanans consider to qualify as minerals, and rule accordingly.<sup>59</sup> Third, including fossils in the mineral estate would have dangerous public policy ramifications.<sup>60</sup>

#### 1. *Heinatz* Test

The Murrays first question Montana's adoption of the *Heinatz* test. They argue the Seversons misstated relevant Montana mineral law by asserting that the *Farley* Court adopted the *Heinatz test*.<sup>61</sup> Instead, they argue the *Farley* Court began by looking at the statutory classification of scoria, and only looked to other jurisdictions because of inconsistent statutory definitions.<sup>62</sup> Furthermore, the Murray's assert that the *Farley* Court merely mentioned the "rare and exceptional test," but did not apply it.<sup>63</sup> Additionally, the Murrays state that since deeds are interpreted like contracts, the Court should look solely at the four corners of the document.<sup>64</sup> Therefore, dinosaur fossils should not be included, since they are not expressly mentioned in the mineral deed.<sup>65</sup>

To the extent Montana has adopted the *Heinatz* test, the Murrays alternatively argue that it requires the substance to have been "specifically . . . defined as a 'mineral' under applicable Montana statute."<sup>66</sup> If doubt remains whether the material is considered a "mineral," the Murrays argue that the Court should apply the "rare and exceptional test."<sup>67</sup> Because fossils have never been considered a mineral in any common parlance or technical sense, the Murrays contend the Court should not advance to the rare and exceptional analysis.<sup>68</sup>

The Murrays also point to an additional factor mentioned in *Heinatz*: the impact of mineral excavation on the surrounding landscape.<sup>69</sup> Much like the limestone at issue in *Heinatz*, fossil discovery requires the excavator to follow fragments and scrape away the surface of the land.<sup>70</sup>

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58. Appellees' Br. at 9, July 31, 2019, No. OP 19-0304.

59. *Id.* at 2.

60. *Id.*

61. *Id.* at 9 (citing *Farley*, 890 P.2d at 380).

62. *Id.* at 9.

63. *Id.* at 24.

64. *Id.* (citing Mont. Code Ann. § 82-4-303(9) (2019)).

65. *Id.* at 10.

66. *Id.*

67. *Id.* at 17.

68. *Id.* at 14.

69. *Id.* at 15 (citing *Heinatz v. Allen*, 217 S.W.2d 994, 1000 (Tex. 1949)).

70. *Id.*

Therefore, the Murrays urge the Court to consider the significant impact of fossil extraction on the surface estate.<sup>71</sup>

Next, the Murrays disagree that the “rare and exceptional test” can apply to a specific object within a class of substances.<sup>72</sup> They state that the test cannot operate in isolation; therefore, the Court must look at all fossils when making a decision.<sup>73</sup> Further, they state that no court has ever looked at an individual substance or subset and determined that it met the rare and exceptional test.<sup>74</sup>

The Murrays then propose a “true test” for determining if substances qualify as minerals.<sup>75</sup> This test looks at what “mineral” is understood to mean in the vernacular of the resource extraction industry, commercial world, and specific landowners.<sup>76</sup> The Montana Fossils would fail under such a test, since fossils have never been understood by the resource extraction industry, commercial world, or landowners to constitute minerals.<sup>77</sup>

Finally, the Murrays critique the Seversons’ representation of the Ninth Circuit’s certification order.<sup>78</sup> The certified question asks if fossils, in general, are part of the mineral estate.<sup>79</sup> This contradicts the Seversons’ argument that the Montana Fossils deserve a focused analysis. Accordingly, the Murrays argue that the Court’s analysis should apply to all dinosaur fossils, regardless of their value.<sup>80</sup>

## 2. Montana’s Legislative Fix

While the Murrays concede that H.B. 229 has no bearing on the case, they note the unanimous support for the legislation indicates the will of the Montana people.<sup>81</sup> Further, the Murrays argue widespread support for the law demonstrates that Montanans have never considered dinosaur fossils part of the mineral estate.<sup>82</sup>

## 3. Impact on Precedent

Lastly, the Murrays urge the Court to observe the potential public policy impacts of their ruling.<sup>83</sup> While the Court’s decision will not impact

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71. *Id.* at 15–16.

72. *Id.* at 24–25.

73. *Id.* at 25.

74. *Id.*

75. *Id.* (citing *Mack Oil Co. v. Laurence*, 389 P.2d 955 (Okla. 1964) (holding that sub-surface water was not intended to be conveyed under the transfer of the mineral estate)).

76. *Id.*

77. *Id.*

78. *Id.* at 30–31.

79. *Id.* (citing Certification Order, 924 F.3d at 1074)..

80. *Id.*

81. *Id.* at 35.

82. *Id.*

83. *Id.*

Montana law, it may be followed by other states without legislation addressing dinosaur fossils and mineral rights.<sup>84</sup> Furthermore, the Murrays note the impracticality of the rare and exceptional test, stating that many fossils require significant excavation before their value can be determined.<sup>85</sup> Accordingly, it would be impractical to create a distinction between mineral and non-mineral fossils.<sup>86</sup>

#### IV. ANALYSIS

The Court will likely apply the natural and ordinary test to determine that dinosaur fossils are not minerals for the sake of a mineral estate. The parties do not contest that fossils are composed of Francolite and that Francolite is properly classified as a mineral.<sup>87</sup> But the mere presence of minerals in a substance does not satisfy the natural and ordinary test; otherwise all dirt and water would qualify as a mineral. Montana law expressly permits the use of statutory and dictionary definitions to determine the ordinary meaning of a contract term.<sup>88</sup> Therefore, the Court will likely consider these definitions of the term “mineral” to determine if fossils qualify for the sake of the Severson mineral estate. The result of such consideration will yield that no Montana or federal statutory definition includes dinosaur fossils within the meaning of “mineral” in any context.<sup>89</sup>

Moreover, there is a critical distinction between this situation and *Farley*. In *Farley*, the Court first looked at the statutory classification of scoria and, finding that it was expressly included in one definition of mineral and ambiguous in another, the Court chose to continue to the rare and exceptional analysis.<sup>90</sup> Here, the Court will likely view the absence of statutory and dictionary definitions of “fossils” as evidence that fossils fall outside the natural and ordinary meaning of the term mineral.

If the Court determines that fossils are minerals in a natural and ordinary sense, they will likely grant the Seversons’ request to reformulate the certified question.<sup>91</sup> The “rare and exceptional” language from *Heinatz* requires that the Court look at a specific object within a category of substances. Despite the Murrays’ argument that the test should apply categorically to all fossils, prior cases demonstrate a clear intent for non-categorical application. *Heinatz* held that in order for common substances like limestone and sand to become valuable they must contain unique attributes, such as a conducive composition for making glass or cement.<sup>92</sup>

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84. *Id.*

85. *Id.*

86. *Id.* at 37–38.

87. Appellants’ Br. at 7.

88. Appellees’ Br. at 20–21 (citing *Ravalli County v. Erickson*, 85 P.3d 772, 774 (Mont. 2004)).

89. *Murray I*, 187 F. Supp. 3d at 1205.

90. *Farley*, 890 P.2d at 379.

91. Appellants’ Reply Br. at 4.

92. *Heinatz*, 217 S.W.2d at 997.

Further, the *Farley* Court held that sand is typically not rare or exceptional but can qualify if it is valuable for making glass.<sup>93</sup> The majority opinion from *Murray II* clarified that the *Farley* Court obviously intended for the *Heinatz* test to be applied non-categorically, and for the outcome to be dependent on the rare and valuable nature of the particular substance.<sup>94</sup> If the Court chooses to apply the *Heinatz* test non-categorically, specifically focusing on the Montana Fossils, there is no question that they would satisfy the rare and exceptional requirement. Therefore, if the Court determines that fossils are minerals in a natural and ordinary sense, it will likely reformulate the certified question and rule in favor of the Seversons.

The Court will also likely consider the public policy concerns raised by the parties. Despite the Seversons' claim to the contrary, fossil exploration differs vastly from that of oil and gas.<sup>95</sup> Clayton Phipps, the amateur paleontologist who initially discovered the Montana Fossils, admits that finding fossils is unscientific and mostly a matter of luck.<sup>96</sup> Fossil discovery primarily involves "walking, riding, or driving around to see if there are any bones lying around or sticking out of the ground."<sup>97</sup> Given Montana's heightened sense of privacy, unfettered exploration would be problematic. Unrestrained exploration could run counter to the property rights recognized by Montana, particularly the implied covenant of quiet enjoyment.

The Court may also consider the potential disruption that could occur from a fossil dig. The *Heinatz* Court excluded limestone from the mineral estate primarily due to impacts from the extraction process.<sup>98</sup> Like limestone strip mining, fossil excavations can include many individuals and encompass hundreds of acres. Such disruptions would interfere with farmers and ranchers who depend on their land for their livelihood. While surface estate owners would be entitled to compensation under Montana statute, many Montana landowners would likely find that this type of lifestyle interference cannot be satisfied by monetary damages.

## V. CONCLUSION

Given the existing case precedent and public policy ramifications, the Court will likely conclude that the Montana Fossils properly belong to the Murrays. While the holding of this case may not impact Montana law regarding fossil ownership, it may establish useful jurisprudence for surrounding states that have not yet passed an applicable statute. However, the Court's decision will nonetheless greatly impact the two families who stand to gain considerable wealth or be left with nothing.

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93. *Farley*, 890 P.2d at 380.

94. *Murray II*, 908 F.3d at 447 (citing *Farley*, 890 P.2d at 380).

95. Appellants' Br. at 26.

96. *Murray I*, 187 F. Supp. 3d at 1207.

97. *Id.*

98. *Heinatz*, 217 S.W.2d at 997.