IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 19-0304

MARY ANN MURRAY and LIGE M. MURRAY,

Plaintiffs/Counter-Defendants/Appellees

v.

BEJ MINERALS, LLC and RTWF LLC,

Defendants/Counter-Claimants/Appellants.

BRIEF OF APPELLANTS

ON A QUESTION CERTIFIED TO THIS COURT BY THE UNTIED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, CAUSE NO. 16-35506

Chief Circuit Judge Sidney R. Thomas, Presiding

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This proceeding arises from a certified question from the U.S. Court of Appeals for the Ninth Circuit about whether dinosaur fossils are "minerals" for the purpose of a mineral reservation in a Montana deed between private parties. The Ninth Circuit has formulated that question in broad legal terms, and this Court accepted that question. But the best way to answer the question is with respect to the particular fossils at issue in this case.

The fossils at issue are like the Hope Diamond of dinosaur fossils. They include a complete T-Rex that has already been sold for several million dollars and two dinosaurs locked in combat (the "Dueling Dinosaurs") that have been valued at $6 million. It is undisputed that these fossils are "rare" and very "valuable." It is also undisputed that, as a technical matter, the fossils are "minerals." Under this Court's settled test for determining "mineral" status, the fact that these fossils are technically minerals and also rare and valuable makes them "minerals" as a legal matter. *See Hart v. Craig*, 352 Mont. 209, 211, 216 P.3d 197, 198 (2009); *Farley v. Booth Bros. Land & Livestock Co.*, 270 Mont. 1, 6-7, 890 P.2d 377, 380 (1995).

For some reason, that straightforward application of this Court's case law has prompted resistance, at times bordering on panic. Perhaps some view it as an affront to eastern Montana ranchers who own the surface estate; others have tried to suggest that it presents a threat to the collections of prominent natural history museums. No evidence or case law supports those reactions, but those panicked views prompted the Montana legislature to enact new default rules that will apply to all Montana dinosaur fossils going forward, 2019 Montana Laws Ch. 136 (H.B. 229) (effective April 16, 2019), and the concern over museums may have affected the Ninth Circuit's decision to certify the question.

There has never been any cause for alarm. The best resolution of this case should focus on the dinosaur fossils in this case and the deed in this case. Bo Severson (who owns BEJ Minerals, LLC) and Jerry Severson (who owns RTWF LLC) (together, the "Seversons") owned half the surface estate and all of the mineral estate at issue in this case until 2005. In 2005 the Seversons sold their half of the surface estate and divided the mineral estate. The Murrays had been leasing the surface estate for decades and became owners of the entire surface estate in 2005. The Murrays also got a portion of the mineral estate in 2005. If the panicked reaction prevails (as the Murrays would prefer), then the Murrays get everything. If this Court concludes that these especially rare and valuable fossils satisfy the test for a "mineral" under *Hart* and *Farley*—which they plainly do—then the proceeds will be shared. That outcome follows this Court's established case law; it is the fairest outcome between the parties because it splits the proceeds and vindicates the fact that the Seversons reserved partial ownership of rare and valuable mineral substances; and it puts the exaggerated non-legal reactions in their proper place.

The Seversons respectfully request that this Court answer the certified question by holding that the particular dinosaur fossils in this case are, under the settled standards of this Court's cases, "minerals" under Montana law. Other fossils will be governed by the new statute, and for any cases that require the older rules, those cases will depend on the particular fossils at issue. Here, with the Hope Diamond of fossils, the fossils are sufficiently rare and valuable that they qualify as "minerals." And that is the fair, sensible outcome in this case.

ISSUE PRESENTED FOR REVIEW

The question formulated by the Ninth Circuit and accepted by this Court is: whether, under Montana law, dinosaur fossils constitute "minerals" for the

purpose of a mineral reservation? As noted above, the Seversons believe that question should be reformulated to only address the dinosaur fossils in this case, which are rare and extremely valuable, and other cases—if any ever arise—should likewise be judged on their particular facts.

STATEMENT OF THE CASE

This case began in 2014 when the Murrays brought suit in Montana state court seeking a declaration that they owned, in their entirety, the rights to several multi-million-dollar dinosaur fossils that the Murrays had extracted from land in Garfield County previously owned by the Seversons until 2005. The Seversons removed the case to federal court on the basis of diversity, and also counterclaimed that the fossils were sufficiently rare and valuable that they were "minerals" under Montana law, and that the Seversons were entitled to a portion of the proceeds as holders of reserved mineral rights. The federal district court ruled in favor of the Murrays. *Murray v. Billings Garfield Land Co., et al.*, 187 F. Supp. 3d 1203 (D. Mont. 2016) ("*Murray I*"). A panel of the Ninth Circuit reversed and ruled in favor of the Seversons. *Murray v. BEJ Minerals, LLC, et al.*, 908 F.3d 437 (9th Cir. 2018) ("*Murray II*").

The Murrays petitioned for rehearing *en banc*, which included amicus briefs by some natural history museums and property owners in support of the Murrays. On April 4, 2019, the Ninth Circuit granted rehearing *en banc* but did not set a hearing date. *See Murray v. BEJ Minerals, LLC, et al.*, 920 F.3d 583 (9th Cir. 2019). The Ninth Circuit then certified the following question to this Court:

> Whether, under Montana law, dinosaur fossils constitute "minerals" for the purpose of a mineral reservation.

See Murray v. BEJ Minerals, et al., 924 F.3d 1070, 1073-74 (9th Cir. 2019) (the "Certification Order").

The Murrays and their allies also lobbied the Montana legislature to change the law. On April 16, 2019, the Governor signed a new bill (H.B. 229) declaring that "[w]hen used in any instrument, unless clear and express terms of the instrument provide otherwise, the term 'mineral' does not include fossils." Certification Order, 924 F.3d at 1073, and text of H.B. 229 § 2(1) (as enacted, 2019 Montana Laws Ch. 136 (H.B. 229)). For ease of reference, a copy of the enacted statute is included in the Appendix to this brief. The statute expressly does not apply to pending cases like this one. 2019 Montana Laws Ch. 136 (H.B. 229) § 5.

On June 4, 2019, this Court issued an order accepting the certified question, while reserving the option to reformulate the question pending full consideration of the issue. *Murray v. BEJ Minerals, LLC, et al.*, OP 19-0304, 2019 WL 2383604, at *1 (Mont. June 4, 2019).

STATEMENT OF RELEVANT FACTS

As required by Mont. R. App. P. 15(6), the Ninth Circuit's Certification Order provides the relevant facts of the case and a summary of the procedural history. *See* Certification Order, 924 F.3d at 1072-73. The Certification Order includes an Appendix with copies of the Montana District Court's opinion (*Murray I*) and the Ninth Circuit panel decision (*Murray II*), both of which contain descriptions of the undisputed facts relevant to this dispute. Certification Order, 924 F.3d at 1075-1093 (for ease of reference, a copy of the Certification Order, *Murray I* and *Murray II* are included in the Appendix to this brief). The Seversons' understanding is that those sources make up the exclusive domain of relevant facts for this Court to answer the certified question.

A. The property in Garfield County that the Seversons sold to the Murrays, reserving mineral rights.

The Property at issue in this action is a privately-owned parcel of ranch land in Garfield County, in which the mineral estate was severed from the surface estate. Certification Order, 924 F.3d at 1072. Until 2005, Bo and Jerry Severson owned most of the Property. In June 2005, they sold all of their surface ownership rights in the Property and a portion of their mineral rights to Lige and Mary Ann Murray, who had lived on the property and operated the ranch under a lease for more than 20 years. *Id.* at 1072 & 1084. After the 2005 sale, the Murrays owned all of the surface estate and a minority interest in the mineral estate, while the majority of the mineral rights were held by the Seversons. *Id.* at 1072.[1]

The parties' mineral deed from the June 2005 transaction (the "Mineral Deed") provides that the Murrays and the Seversons own, as tenants in common,

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[1] Some of the reaction to this case has perhaps been affected by an incorrect (and legally improper) assumption that the companies owned by the Seversons—BEJ Minerals LLC and RTWF LLC—are somehow foreign to Montana. For example, The Montana Lawyer ran an article about this case and described it, purportedly based on "court documents," as the Murrays versus "out of state corporations," in reference to the Seversons' LLCs. *See* https://www.montanabar.org/news/457981/An-epic-prehistoric-battle-going-to-Montana-Supreme-Court-.htm.

The Severson family has been in Montana for five generations. Bo and Jerry Severson grew up in Baker, where their mom was a schoolteacher, and graduated from high school in Miles City. Their father bought the Garfield County property in 1962, and Bo and Jerry worked on it growing up. Both boys went to MSU, and they have endowed a scholarship there to their father. Their mother lived out her days in Billings, and her obituary ran in the Billings Gazette. https://billingsgazette.com/lifestyles/announcements/obituaries/marjorie-reaugh-seibert-severson/article_096ff19a-108f-5c22-8345-8ba49e602452.html. Bo and Jerry first became aware of the existence of the Dueling Dinosaur fossils when they brought their mom out to the ranch for a visit for her 96th birthday in October 2008 and saw the fossil being excavated. Bo and Jerry first became aware of the existence of the T. Rex fossil when they visited the ranch in 2013 to scatter their mom's ashes.

"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 lands[.]" Certification Order, 924 F.3d at 1072. The purchase agreement accompanying the Mineral Deed obligated all the parties "to inform all of the other Parties of any material event which may [affect] the mineral interests and [to] share all communications and contracts with all other Parties." *Id.*

It is undisputed that when the parties executed the purchase agreement and mineral deed, "none of the parties or their agents had ever considered whether the Mineral Estate as defined in the 2005 Mineral Deed included fossils, and none of the parties or their agents had or expressed any specific intent about who would be entitled to ownership of any fossils found on the Subject Property." *Id.*

B. The multi-million-dollar fossils that the Murrays discovered after the sale.

After the 2005 sale, the Murrays found and excavated several rare and extremely valuable dinosaur fossils on the Property. These include the complete fossilized remains of a *Tyrannosaurus rex*, the fossilized remains of two dinosaurs locked in combat (the "Dueling Dinosaurs"), a large *Triceratops* skull, and a *Triceratops* foot (collectively, the "Montana Fossils"). Certification Order, 924 F.3d at 1072.

The parties agree, and it is undisputed, that the Montana Fossils are rare and extremely valuable. *Id.* at 1084. The Dueling Dinosaurs have been valued at six million dollars, and the parties have stipulated that they are worth several million dollars. *Id.* The Murrays sold the *Tyrannosaurus rex* to a Dutch museum in 2014 for several million dollars, with a portion of the proceeds held in escrow pending the outcome of this litigation. *Id.* The Murrays sold the Triceratops foot for $20,000 and have offered to sell the skull for $200,000 to $250,000. *Id.*

It is also undisputed that the Montana Fossils are "minerals" as a scientific matter. "In this case . . . the parties do not dispute that the Montana Fossils *are* minerals in a scientific sense, as they are composed entirely of the minerals hydroxylapatite and/or francolite." Certification Order, 924 F.3d at 1085 (emphasis in original). "[T]he parties' experts dispute whether the x-ray diffraction test results indicate that the Montana Fossils are composed of the mineral hydroxylapatite, or whether the Montana Fossils instead contain the mineral francolite . . .. The parties do not dispute, however, that the Montana Fossils are entirely composed of one or both of these two mineral substances." *Id.* at 1085 & n.6.

According to the Seversons, the Murrays first notified them of the fossil discoveries in 2008. Certification Order, 924 F.3d at 1072. In 2013, the Seversons asserted an ownership interest in the Montana Fossils based on their ownership share of any "minerals in, on and under" the Property, as stated in the parties' 2005 Mineral Deed. *Id.* at 1072-73.

C. Litigation commenced by the Murrays, eventually leading to certification to this Court, and a new statute.

On May 22, 2014, the Murrays filed a complaint for a declaratory judgment that the term "minerals" in the parties' Mineral Deed does not include rare and valuable fossils, and as a result the Montana Fossils are part of the Property's surface estate, which they own. Certification Order, 924 F.3d at 1073. The Seversons filed a counterclaim for a determination that the Montana Fossils are "minerals" under the Mineral Deed and Montana case law, and also for an accounting detailing all fossils found, expenses incurred, profits gained, and contracts formed regarding any valuable fossils found on the Property. *Id.*

As recounted above, the Seversons removed the case to federal court, eventually leading to the Ninth Circuit panel decision in favor of the Seversons, and then the Ninth Circuit's certification of the question at issue. In addition, the Montana Legislature responded to the litigation and sought "to enact into law a presumptive understanding that fossils are not minerals and that fossils belong to the surface estate, unless conveyed by a clear and express grant." 2019 Montana Laws Ch. 136 (H.B. 229) § 1(1).

In summary, the essential relevant facts to resolve this certified question (all of which are undisputed) are:

- The parties' 2005 Mineral Deed determines ownership of all "minerals in, on and under, and that may be produced from the [Property]," which is privately owned;
- At the time they signed the Mineral Deed, none of the parties or their agents had ever considered whether the term "minerals" in the deed included fossils, or who would be entitled to ownership of any fossils that might be found on the Property;
- The Montana Fossils were later found on or under the Property;
- The Montana Fossils are composed entirely of mineral substances;
- The Montana Fossils are rare and extremely valuable, with the Dueling Dinosaurs and the T-Rex each being worth several million dollars, and
- The Mineral Deed is a contract governed by Montana law.

STANDARD OF REVIEW

This proceeding is governed by Rule of Appellate Procedure 15, which permits this Court to "answer a question of law certified to it by a court of the United States" where "[t]he answer may be determinative of an issue in pending litigation in the certifying court." Mont. R. App. P. 15(3). "Accordingly, as a

question of law, [this Court's] review of a certified question is 'purely an interpretation of the law as applied to the agreed facts underlying the action.'" *Bassett v. Lamantia*, 391 Mont. 309, 313, 417 P.3d 299, 304 (2018) (quoting *N. Pac. Ins. Co. v. Stucky*, 377 Mont. 25, 388 P.3d 56 (2014)). Further, the interpretation of a deed conveying an interest in real property is governed by the rules of contract interpretation, and the interpretation of a contract is a question of law. *Mary J. Baker Revocable Trust v. Cenex Harvest States, Coops., Inc.*, 38 Mont. 41, 50, 164 P.3d 851, 857 (2007) (citing Mont. Code Ann. § 70-1-513).

SUMMARY OF ARGUMENT

The status of these multi-million-dollar fossils as "minerals" under Montana law should have been straightforward because this Court's case law is clear, and clearly applicable. In *Farley v. Booth Bros. Land & Livestock Co.*, 270 Mont. 1, 890 P.2d 377 (1995), and *Hart v. Craig*, 352 Mont. 209, 216 P.3d 197 (2009), this Court borrowed and adopted the legal test of the Texas Supreme Court in *Heinatz v. Allen*, 217 S.W.2d 994 (Tex. 1949). Materials that are within "the scientific or technical definition of the word minerals" will be treated as "minerals" for legal purposes if they are "rare and exceptional in character or possess a peculiar property giving them special value." *Heinatz*, 217 S.W.2d at 996-97. *See Farley*, 270 Mont. 6-7, 890 P.2d at 380; *Hart*, 352 Mont. at 211, 216 P.3d at 198. The dinosaur fossils here ace that test. They are scientifically "minerals," and they are very rare and valuable. They are not the equivalent of "scoria" or ordinary sandstone. They are like rare gems. They are the Hope Diamond of fossils. Applying this Court's test to the undisputed facts, the fossils here are "minerals." And frankly, the fossils should be treated as the Montana state treasure that they are.

But something about that conclusion has made some people balk and even panic, and it has led to the certified question and a new Montana statute. Yet while there has been a lot of rhetoric, there has never been any serious *evidence* or reasoning based on *case law* that awarding the Seversons their share of the proceeds would actually affect any fossils in a museum or overturn any actual, legitimate legal understanding. Those concerns have been scare tactics. Regardless, the new statute will control things going forward.

The right outcome here is that the Murrays should not get all of the proceeds. The Seversons reserved rights to "minerals" under Montana law, and Montana law treats rare and valuable mineral substances as legal "minerals." These fossils—which are mineral substances—are too rare and valuable not to be "minerals," and the fair outcome is that the proceeds should be shared under the tenants-in-common mineral rights. In the future, parties transacting land in eastern Montana or anywhere else in the State will have the new statute as a framework and can allocate rights to fossils as they see fit. But the appropriate resolution here is that these parties should share the proceeds of this windfall treasure. In this case, for these parties, these very rare and valuable fossils qualify as "minerals."

ARGUMENT

"Don't we need to follow . . . **Hart** *stands for the methodology that you use, that is,* **Farley** *lays out the test,* **Hart** *applies it, and the next one that comes along, we know what to do."*

–Judge Eduardo C. Robreno, during Ninth Circuit oral argument in *Murray v. BEJ Minerals, LLC, et al.*, at 31:08.

* * *

The 2005 Mineral Deed that gave rise to this action was a contract between two private parties governed by Montana law. It conveyed "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 Property. The interpretation of a deed is a question of state law governed by general contract construction principles. *See* Mont. Code Ann. § 70-1-513; *Mary J. Baker Revocable Trust*, 38 Mont. at 50, 164 P.3d at 857. "The main object in construing a deed is to ascertain the intention of the parties from the language used and to effectuate such intention where not inconsistent with any rule of law." *Henningsen v. Stromberg*, 124 Mont. 185, 191, 221 P.2d 438, 442 (Mont. 1950). There is no evidence—whether in the deed or elsewhere—that the parties intended to restrict the scope of what would otherwise be considered a "mineral" under applicable Montana law. And there is no dispute that the phrase "all . . . minerals" in the deed means exactly what it says—any and all substances on the property that fall within Montana's legal definition of "minerals." The interpretation of that term is determined by Montana case law.

I. This Court has a clear test that a "mineral" substance is a "mineral" for legal purposes if it is "rare and exceptional" or has "special value."

This case is not the first time Montana courts have been required to decide whether a particular disputed item or material is considered a "mineral" for legal

purposes under a deed. In 1995, this Court adopted an appropriate legal methodology for resolving such disputes in *Farley v. Booth Bros. Land & Livestock*, 270 Mont. 1, 890 P.2d 377 (1995). In that case, this Court held that when the mineral estate has been severed from the surface estate, a material belongs to the mineral estate if it satisfies a two-part test. First, it must be composed of mineral substances, and, second, it must be rare and exceptional or possess a peculiar property giving it special value.

In 2009, this Court re-affirmed and followed *Farley*, and it applied the same legal test to a different set of factual circumstances and a different kind of disputed mineral substance. *See Hart v. Craig*, 352 Mont. 209, 216 P.3d 197 (2009). The methodology adopted in *Farley* remains the correct legal test for defining what is a "mineral" under Montana law for legal purposes, and there should be no dispute that it applies here.

A. *Farley*—choosing a "mineral" test and applying it to determine that "scoria" was not a "mineral."

In *Farley*, the substance at issue was scoria—a type of rock used in road construction. This Court noted that the definition of the term "mineral" "has been the source of considerable confusion in mineral law litigation nationwide," 270 Mont. at 5, 890 P.2d at 379, so it sought to clarify the issue under Montana law by adopting a consistent legal standard.

This Court first reviewed definitions of "mineral" in several different Montana statutes, but found those definitions unhelpful and did not rely on them since they were "not necessarily consistent" and were limited by their terms to a specific statutory context. *Farley*, 270 Mont. at 5, 890 P.2d at 379. To the extent the Murrays attempt to make arguments from statutory definitions, that portion of *Farley* should be remembered.

This Court then surveyed decisions from other jurisdictions that had addressed the issue, noting wide adoption of the "rare and exceptional" test, which was first announced by the Texas Supreme Court in *Heinatz v. Allen*, 217 S.W.2d 994 (Tex. 1949). *See Farley*, 270 Mont, at 6-7, 890 P.2d at 380. *Farley* adopted the *Heinatz* test, holding that for purposes of property ownership, deposits composed of mineral substances "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." *Id.* (quoting *Holland v. Dolese Co.*, 540 P.2d 549, 550 (Okla. 1975), in turn quoting *Heinatz*, 217 S.W.2d at 997).[2]

Farley noted that determining what is "rare and exceptional" or has "special value" may depend on how the material is used. *Farley*, 270 Mont. at 6-8, 890 P.2d at 380-81. Observing that scoria "is used in road construction," this Court explained that "'[s]uch substances, when they are useful only for building and road-making purposes, are not regarded as minerals in the ordinary and generally accepted meaning of the word.'" *Id.* 270 Mont. at 6-8, 890 P.2d at 380-81 (quoting *Holland*, 540 P.2d at 550-51, in turn quoting *Heinatz*, 217 S.W.2d at 997). It concluded that "[t]he use of scoria in constructing roadways does not

[2] At least ten other States have adopted the same legal test. *See, e.g.*, *Holland v. Dolese Co.*, 540 P.2d 549, 550 (Okla. 1975); *Heinatz*, 217 S.W.2d at 997; *Heineman* v. *Terra Enter., LLC*, 817 F. Supp. 2d 1049, 1059 (E.D. Tenn. 2011); *Miller Land & Mineral Co.* v. *State Highway Comm'n of Wyo.*, 757 P.2d 1001, 1004 (Wyo. 1988); *Payne* v. *Hoover, Inc.*, 486 So. 2d 426, 428 (Ala. 1986); *Hovden* v. *Lind*, 301 N.W.2d 374, 378 (N.D. 1981); *S. Title Ins. Co.* v. *Oller*, 595 S.W.2d 681, 683 (Ark. 1980); *State ex rel. State Highway Comm'n* v. *Trujillo*, 487 P.2d 122, 124 (N.M. 1971); *Elkhorn City Land Co.* v. *Elkhorn City*, 459 S.W.2d 762, 765 (Ky. Ct. App. 1970); *Farrell* v. *Sayre*, 270 P.2d 190, 192-93 (Colo. 1954).

elevate scoria to the status of a compound which is 'rare and exceptional in character' and therefore, a 'mineral.'" *Id.* 270 Mont. at 7, 890 P.2d at 380.[3]

B. *Hart*—reaffirming the test in *Farley* and concluding that an ordinary sandstone deposit was not a "mineral."

This Court reaffirmed the *Farley* test in *Hart v. Craig*, 352 Mont. 209, 216 P.3d 197 (2009). *Hart* considered whether a general mineral reservation in a property deed included a deposit of sandstone that was being quarried and sold to be used "for rip-rap and landscaping." *Id.*, 352 Mont. at 210, 216 P.3d at 198. *Hart* followed *Farley*, acknowledging that the controlling legal standard in Montana is the "rare and exceptional" test. *Id.*, 352 Mont. at 211, 216 P.2d at 198. Focusing on the specific uses for which the sandstone was intended, the Court noted that the material "tends to be somewhat harder than typical sandstone" and "also tends to fracture into blocks," making it "suited for landscaping and rip-rap." *Id.*, 352 Mont. at 210, 216 P.3d at 198. But because "[u]sing sandstone for landscaping and rip-rap is analogous to using ordinary rock for road making and building purposes," this Court concluded that "this rock is not very special, nor is it exceptionally rare and valuable," and that it was therefore not a mineral for legal purposes. *Id.*, 352 Mont. at 211, 216 P.2d at 198.

C. This Court has not turned to dictionary definitions or statutory definitions that do not apply to deeds.

Significantly, *Farley* and *Hart* (and also the Texas Supreme Court in the *Heinatz* case, that they both rely on) never cited dictionary definitions of the term

[3] Notably, although it is sometimes referred to in shorthand as the "rare and exceptional" test, the legal standard adopted by the Court in *Farley* is disjunctive, finding that substances are minerals for legal purposes if they are *either* "rare and exceptional in character *or* possess a peculiar property giving them special value." *Farley*, 270 Mont. at 6, 890 P.2d at 380 *(*quoting *Holland*, 540 P.2d at 550) (emphasis added). Thus, even a substance or item that is not "rare and exceptional" can still be considered a mineral if it has some "peculiar property" that gives it "special value."

"mineral." That is not surprising because, as the United States Supreme Court long ago acknowledged in the context of a property rights dispute, "[t]he word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case." *N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 530 (1903). Indeed, some definitions of the term mineral expressly include fossils. *See Highland* v. *Commonwealth*, 161 A.2d 390, 398 (Pa. 1960) ("The term 'minerals' embraces everything not of the mere surface, which is used for agricultural purposes; the granite of the mountain as well as metallic ores and fossils, are comprehended within it.") (quoting *Griffin* v. *Fellows*, 81 1/2 Pa. 114, 124 (1873)).

This Court has also not turned to statutory definitions that are not aimed at deeds. Both Wyoming and California have likewise rejected statutory definitions that have nothing to do with deeds between private parties. *See, e.g.*, *Miller Land & Mineral Co.* v. *State Highway Comm'n*, 757 P.2d 1001, 1003 (Wyo. 1988) (rejecting the argument that a Wyoming statute including gravel in the definition of mineral for reclamation purposes has any bearing on the interpretation of a private deed transferring "all minerals", and instead analyzing the issue under the rare and exceptional test); *Bambauer* v. *Menjoulet*, 29 Cal. Rptr. 874, 876-77 (Ct. App. 1963) (rejecting reliance on state statute including gravel as a mineral in all mineral deposits reserved to the state because "[w]e do not believe that it was ever intended that [this statute] should be given such application to documents of conveyance between private citizens").

The guidance from *Farley* and *Hart* is clear: whether a particular item or substance is deemed a "mineral" under Montana law is determined by applying the "rare and exceptional" test—not by parsing dictionary definitions or statutory definitions.

D. The test applied in *Farley* and *Hart* is a good, workable test that should not be abandoned in the case of fossils.

Determining "mineral" status can sometimes be difficult. Not every rare and valuable object found in the ground can reasonably be described as a mineral—truffles and tulip bulbs, for example, do not qualify. Although the court in *Farley* did not expressly discuss it, the *Heinatz* test addresses that consideration by requiring the court to make an initial determination that the substance is within "the scientific or technical definition of the word minerals." 217 S.W.2d at 996. The *Heinatz* court made that determination before it discussed the "rare and exceptional" question, explaining that "[i]t has been pointed out in several decisions that the scientific or technical definition of minerals is so broad as to embrace not only metallic minerals, oil, gas, stone, sand, gravel and many other substances, but even the soil itself." *Id.* at 997.

The *Heinatz* court properly recognized, however, that the technical definition cannot be the entirety of the analysis. Instead, it explained that the analysis must progress to a second step by asking whether the substance is also "rare and exceptional" or has special value. *Id.* In *Farley* and *Hart*, this Court had no need to discuss the first component of the test because the materials at issue—scoria and sandstone, *i.e.*, rocks—were plainly "minerals" in a technical sense. Instead, the Court proceeded to the second step by asking whether the materials "are rare and exceptional in character or possess a peculiar property giving them special value." *Farley*, 270 Mont. at 6, 890 P.2d at 380; *Hart*, 352 Mont. at 211, 216 P.3d at 198. Having chosen to "appl[y] the reasoning from" *Heinatz* in construing mineral reservations, Montana applies both parts of the test in a case such as this. *Hart*, 352 Mont. at 211, 216 P.3d at 198.

In its full application, *Farley* and *Hart* provide a settled, reliable framework for any case where there is a dispute about whether or not any

particular deposit or item found on or under a split estate in Montana is a "mineral" for legal ownership purposes. The court need only determine: (1) is the disputed item or deposit composed of mineral substances, in a technical sense? (2) Judging from its use or other value, is the disputed item "rare and exceptional" or does it have special value? If the answer to both questions is yes, then the disputed item or deposit is a "mineral" for legal ownership purposes under Montana law.

It should also be emphasized that the "rare and exceptional" test is applied on a case-by-case basis and its outcome always depends upon an analysis of the particular item or deposit in dispute, not on sweeping categorical determinations. This Court has appropriately rejected an "all or nothing" approach to determining whether a *class* of objects consists of minerals. *Farley* explained that one deposit of a particular mineral substance may be valuable enough based on its potential uses to be deemed a "mineral" for legal purposes, even though different deposits of that same mineral substance do not share the same value, and therefore would not be deemed "minerals" in a legal sense. *Farley* offered "sand that is valuable for making glass and limestone of such quality that it may profitably be manufactured into cement" as examples of substances that would be sufficiently "rare and exceptional" or would have "special value" to make them minerals for legal purposes. *See Farley*, 270 Mont. at 6, 890 P.2d at 380 (quoting *Holland*, 217 S.W.2d at 997). *See also Heinatz*, 217 S.W.2d at 997; *Holland*, 540 P.2d at 550. It follows that most other deposits of sand and limestone that are not of high enough quality to make into glass or cement are not rare and exceptional, and therefore not minerals.

Indeed, it is not surprising that the status of a material as a "mineral" would turn on the characteristics and uses of the specific deposit at issue. Courts have

applied a similarly focused analysis when determining the validity of mining claims. Federal mining statutes provide that a party cannot assert ownership of a mineral claim on federal land for any "deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders." 30 U.S.C. § 611. That exclusion, however, does not apply to "deposits of such materials which are valuable because the deposit has some property giving it distinct and special value." *Id.* Although this federal statute does not govern private deed transactions governed by state law and has no direct application here, the cases applying it demonstrate that courts can and do routinely make determinations about mineral ownership on a case-by-case basis that turn on whether each particular mineral deposit's characteristics and commercial uses show some distinct and special value, rather than using a categorical "all or nothing" approach. For example, although Coconino sandstone is typically classified as a "common" building stone not subject to federal mining claims (*see Rawls* v. *United States*, 566 F.2d 1373, 1375 (9th Cir. 1978)), one particular deposit of Coconino sandstone that had "sharp bands of contrasting colors" crossing the rock at unique angles was found to have "distinct and special value" as decorative stone. *United States* v. *Chartrand*, 11 I.B.L.A. 194, 201, 204 (Interior Bd. of Land Appeals 1973); *accord Copar Pumice Co., Inc.* v. *Tidwell*, 603 F.3d 780, 795 (10th Cir. 2010) (holding that a deposit of common pumice stone can be deemed an uncommon variety with distinct and special value if it has specialized use in the garment finishing industry as a stonewashing agent).

Other decisions recognize that a particular deposit of otherwise ordinary minerals may have distinct and special value deriving entirely from its ornamental or aesthetic characteristics. *See United States* v. *United Mining Corp.*, 142 I.B.L.A. 339, 367 (Interior Bd. of Land Appeals 1998) (finding that common

basalt boulders formed by erosion and water flow into decorative rock sculptures had distinct and special value); *United States* v. *Bolinder*, 28 I.B.L.A. 187, 203 (Interior Bd. of Land Appeals 1976) (finding that certain geodes "have unique properties which give them a special and distinct value"). Under *Farley*, those principles are equally applicable here.

Finally, the *Farley* "rare and exceptional" test balances competing policy considerations and avoids construing mineral rights either unduly broadly or unduly narrowly. If satisfying "the scientific definition of minerals" were all that were necessary for a substance to be considered a "mineral," then "even the soil itself" would be included in a grant of a mineral estate. *Heinatz*, 217 S.W.2d at 997. But if the holder of the mineral rights could remove the soil, then the grant of surface rights would be a nullity. *See, e.g.*, *Farrell* v. *Sayre*, 270 P.2d 190, 192 (Colo. 1954). The "rare and exceptional" test provides predictability because it establishes that "the general intent of parties executing a mineral deed or lease is presumed to be an intent to sever the mineral and surface estates, convey *all* valuable substances to the mineral owner regardless of whether their presence or value was known at the time of conveyance, and to preserve the uses incident to each estate." *Moser* v. *U.S. Steel Corp.*, 676 S.W.2d 99, 102 (Tex. 1984) (emphasis added). And since it is relatively easy to determine whether a material is rare and exceptional or possesses special value, the test reduces the need for litigating difficult definitional questions. If the parties wish to adopt a narrower definition, they are always free to specify one in the deed. If they do not, then the "rare and exceptional" rule provides the clear, easy-to-apply default rule that applies to any disputed item or substance.

The *Farley-Hart-Heinatz* test is a good, workable test for answering what are otherwise difficult questions about "mineral" status. And it is appropriately

sensitive to the dramatic difference in value that might exist for substances that technically are not very different in their molecular composition, such as exotic patterned sandstone versus ordinary sandstone, but that deserve different treatment under the law. There is no reason to reject the continued application of the *Farley-Hart-Heinatz* test. As this Court has emphasized:

> "Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." . . . "It is of fundamental importance to the rule of law."

State v. Kirkbride, 343 Mont. 409, 412, 185 P.3d 340, 343 (2008) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) and *State v. Gatts*, 279 Mont. 42, 51, 928 P.2d 114, 119 (1996)).

The *Farley, Hart, Heinatz* test should apply here.

II. Applying *Farley, Hart,* and *Heinatz* to the undisputed facts here leads to only one conclusion: these multi-million-dollar fossils are "minerals."

"[A]s a question of law, [this Court's] review of a certified question is 'purely an interpretation of the law as applied to the agreed facts underlying the action.'" *Bassett*, 391 Mont. at 313, 417 P.3d at 304. The facts necessary for deciding the certified question are set out in the Certification Order. *See* Mont. R. App. P. 15(6). Most importantly, it is undisputed that:

- the Montana Fossils are composed entirely of mineral substances (Certification Order, 924 F.3d at 1085 & n.6), and
- the Montana Fossils are rare and extremely valuable. (Certification Order, 924 F.3d at 1072, 1084).

Applying the established legal standard under Montana law (the "rare and exceptional" test from *Farley*, *Hart*, and *Heinatz*) to those undisputed facts leads to the conclusion that the Montana Fossils are "minerals."

That is *not* a conclusion that *all* or even most dinosaur fossils are "minerals." Many dinosaur fossils may be of such marginal value or interest that they will not qualify under this test. But that conclusion is irrelevant to the status of dinosaur fossils that *are* very rare, exceptional, and valuable, like the Montana Fossils in this case.

Many mineral deposits derive their rarity and exceptional value from their unique form, state of preservation or beauty rather than only from their molecular makeup. The Hope Diamond, for example, is unquestionably a mineral. *See Ky. Diamond Mining & Developing Co. v. Ky. Transvaal Diamond Co.*, 132 S.W. 397, 398 (Ky. Ct. App. 1910) ("It is conceded that a diamond is a mineral."); *accord Harvey v. Mo. Pac. R. Co.*, 207 P. 761, 762 (Kan. 1922). But the Hope Diamond's exceptional value is rooted almost entirely in its rare and unique form, displayed as a popular exhibit in a museum; if it were ground into powder, its mineral composition would not change at all, yet its value would be destroyed. The same is true of a unique and valuable dinosaur fossil.

It should also be of no moment that the fossils were not always "minerals" in a scientific or technical sense. Obviously, dinosaur fossils were once the bones of living creatures millions of years ago (before becoming fossilized into mineral form). But Montana has long recognized that oil and gas are commonly understood as minerals for legal ownership, even though oil and gas likewise derived from the remains of living organisms millions of years ago that have undergone chemical and geological changes. Even limestone is partly biological in origin, being composed of skeletal fragments of marine organisms, but that

does not mean that it cannot be a mineral (indeed, the *Farley* opinion itself states that limestone can be a mineral for legal purposes if it is of high enough quality to be used in making cement, *see* 270 Mont. at 6, 890 P.2d at 380).

This demonstrates that whether something is a "mineral" for legal purposes has nothing to do with its organic or inorganic origins. *See Rice Oil Co. v. Toole Cty.*, 86 Mont. 427, 428, 284 P. 145, 146 (Mont. 1930) (stating that under Montana law "[o]il is a mineral"); *Sierra Club* v. *La. Dept. of Wildlife & Fisheries*, 519 So. 2d 836, 841 (La. Ct. App. 1988) (holding that fossilized oyster and clam beds were "minerals" under a provision of the state constitution that required public bidding for any leases of "minerals or mineral rights" owned by the state). Oil, gas and coal—like dinosaur fossils—all originally derive from organic sources that were preserved underground for millions of years. And oil, gas, and coal all contain organic compounds. If the dinosaur or plant remains that have been preserved in the form of economically valuable oil, gas, or coal are minerals, then dinosaur or plant remains that were instead preserved in the form of fully mineralized fossils that are worth millions of dollars should also be considered "minerals." There is no reason to treat million-dollar fossils any differently from fossil fuels.

Applying *Farley*, *Hart*, and *Heinatz*, the fossils in this case easily qualify as "minerals."

III. The new statute (HB 229) does not change the "mineral" status determination in this case.

As noted in the Certification Order, on April 16, 2019, primarily in response to this litigation, the Legislature adopted a new statute declaring that "[w]hen used in any instrument, unless clear and express terms of the instrument provide otherwise, the term 'mineral' does not include fossils." Certification

Order, 924 F.3d at 1073, and text of H.B. 229 § 2(1) (as enacted, 2019 Montana Laws Ch. 136 (H.B. 229)). The statute also states that its purpose "is to enact into law a presumptive understanding that fossils are not minerals and that fossils belong to the surface estate, unless conveyed by a clear and express grant." 2019 Montana Laws Ch. 136 (H.B. 229) § 1(1).

By its terms, the new statute does not apply to the parties and fossils involved in this dispute because this dispute was already pending in court when the statute became effective (*see id.* §5). But the new statute does purport to change the presumptive rule under Montana law on the very issue that is addressed in the certified question, and it purports to apply retroactively. 2019 Montana Laws Ch. 136 (H.B. 229) § 8.

Because only rare and exceptionally valuable fossils would ever qualify for "mineral" status under *Farley*, *Hart*, and *Heinatz*, it is doubtful that even retroactive application of the new statute is likely to result in a genuine change in the "mineral" status of fossils in any particular case. Such occurrences would be rare, because only "rare" fossils could conceivably give rise to them (this fossil case is, after all, the first one of its kind ever litigated in Montana or anywhere else). And any such occurrences would be rarer still because any old transaction in fossils that might be cause for concern under the new statute would almost certainly be outside the statute of limitations for a trespass, which is two years. Mont. Code Ann. § 27-2-207. Thus, if a museum purchased fossils from a surface owner five years ago, and a mineral owner decided to challenge that transaction and also claim that the new statute took away property rights, the statute of limitations on the trespass would have already run, and the mineral owner could not claim that the new statute deprived him or her of anything.

The new statute unquestionably provides clear default rules going forward, and possibly retroactively if the rare case should ever arise. But it is indisputable that the new statute has no application to the fossils in this case, and their status as "minerals" is answered under this Court's settled case law.

IV. The panic over simply following *Farley* and *Hart* is completely unjustified.

The Murrays and the two groups that filed amicus briefs in the Ninth Circuit have raised a litany of supposed public policy concerns that they claim require the rejection of the *Farley/Hart* "rare and exceptional" test when it comes to fossils, and this Court is very likely to hear those same points. The assertions are largely unfounded in fact, overblown in importance, and they've now been totally obviated by the new Montana statute.

First, the Murrays and the amici suggest that any decision recognizing dinosaur fossils as minerals will dramatically affect the ownership of existing fossil collections in museums. But this purported concern is unfounded. Museum fossils could be affected only if (1) they were removed from private land; (2) the land was located in Montana; (3) the land was subject to a severance of surface rights and mineral rights; (4) the party that collected the fossils had the permission of the owner of the surface estate but not the owner of the mineral estate; and (5) the fossils were sufficiently rare and valuable to qualify as "minerals." There has never in this case been any attempt to actually demonstrate that museums hold any fossils of note meeting those criteria. There have simply been naked accusations that ruling against the Murrays would threaten natural history museums. As already noted, the entire argument should be rejected as baseless because Montana law imposes a two-year statute of limitations on trespass claims involving real or personal property. Mont. Code Ann. § 27-2-207.

So, to the extent that any claims might possibly exist based on disputed ownership of museum fossils, the statute of limitations would eliminate almost all of them.

Second, while the Murrays' amici assert that recognizing valuable fossils as minerals will pose practical obstacles to future paleontological research, experience demonstrates otherwise. There is no question that oil, gas, and metal ores are minerals, and yet commercial prospecting for them regularly takes place despite the need to secure permission from both mineral rights owners and surface estate owners. Mineral deeds are recorded in the same way as deeds to the surface estate, so the identification of mineral and surface property owners in connection with the discovery of any valuable fossils will not require any extraordinary investigative resources.

Third, the Murrays and their amici have noted that federal mining laws generally do not treat fossils as minerals and have suggested that Montana law governing private property should follow the same approach as federal policy governing publicly-owned federal land. But the federal policy for federal land should not apply between private parties, and the purposes behind the federal policy are not relevant at all. As the proprietor of public lands, the federal government can and does allow people to enter federal land and mine. *See* generally 30 U.S.C. § 21a (describing the federal policy of encouraging development of mineral resources). That the federal government allows certain mineral claims on public land, but retains ownership of fossils, says nothing about how a private deed should be construed under Montana state law. In articulating the state's common law, Montana courts are not required to follow statutes and regulations applied by federal agencies on public lands in different contexts and for different purposes, and it is not uncommon for states to take a different view

of what constitutes a "mineral" for property law purposes than does federal law governing federal land.[4]

Fourth, the Murrays have objected that applying the "rare and exceptional" test to fossils would create an unworkable distinction between rare and valuable fossils (which are minerals) and common and worthless fossils (which are not minerals). But that objection is answered by *Farley* itself, in which this Court noted that some deposits of sand and limestone might be "minerals," while others are not. Further, any decision by this Court will not create a new distinction between "rare and valuable" substances and "common and worthless" substances under Montana law—*Farley* did that already more than 20 years ago. Under *Farley*, even if some other dinosaur fossils are worthless, that is irrelevant to the status of the Montana Fossils at issue in this case, which are composed entirely of mineral substances, and are indisputably rare and extremely valuable.

Further, the reason why any particular mineral deposit is recognized as having special economic value (whether a deposit of oil that can be sold to power an automobile, a beautiful gem deposit that can be sold for decorative jewelry, or a dinosaur fossil deposit that can be sold as a popular museum attraction) is irrelevant. Under Montana law, if an item is a mineral substance, and it is also rare, exceptional, or valuable, then for ownership purposes it is a "mineral" and part of the mineral estate. And when parties reserve a "mineral" estate, that is precisely what they are reserving: ownership of any mineral substance that turns

[4] *Compare Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 56-57 (1983) (holding that gravel is a mineral under federal law) with *Salzseider v. Brunsdale*, 94 N.W. 2d 502, 504 (N.D. 1959) (holding that gravel is not a mineral under state law); *and compare Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 880 (1999) (holding that owner of federal coal rights does not have rights to coalbed methane), *with Cimarron Oil Corp. v. Howard Energy Corp.*, 909 N.E.2d 1115, 1116 (Ind. Ct. App. 2009) (holding that coal rights lessee had exclusive right to the coalbed methane under state law).

out to be rare and valuable, whatever that might be. Some type of rock that is worthless today could turn out to be necessary for cold fusion or the latest craze in jewelry and thereby become a legal "mineral." Reserving the "mineral" rights is reserving rights with respect to precisely that sort of windfall contingency, and the Severson reserved those rights. The Court should hold that rare and valuable dinosaur fossils are subject to the same legal rule and should be treated no differently for ownership purposes than fossil fuels.

Finally, whatever persuasive force the Murray's policy arguments had with the federal district court or the Ninth Circuit, that force is gone. The new statute sets the rules going forward. There is no reason for this Court to distort a perfectly good test in *Farley* to avoid how it applies to these fossils because new rules for fossils going forward have now been set by the Legislature.

CONCLUSION

The Severson respectfully request that the Court narrow the certified question from the Ninth Circuit to only answer with respect to the very rare and valuable dinosaur fossils in this case. The fossils in this case satisfy the test for "minerals" under this Court's case law; other fossils may not. Other cases—if they ever arise, which is unlikely—should be judged on their individual facts. That is the right outcome under this Court's case law, and it is the fair outcome between these parties.

DATED this 2nd day of July, 2019.

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CERTIFICATE OF SERVICE

I, Stephanie M. Regenold, do hereby state that on this date, I served a true and correct copy of the foregoing document upon the individuals listed below, via the following means:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), M.R. App. P., I hereby certify that this principal brief is printed with a proportionately spaced Times New Roman typeface of 14 points; that it is double-spaced except for footnotes and quoted and indented material; and that the word count is 8,417 words, excluding the table of contents, table of authorities, certificate of service and certificate of compliance.

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