
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-Plaintiffs-Appellants.

BRIEF OF APPELLEES

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

Chief Circuit Judge Sidney R. Thomas, Presiding

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INTRODUCTION

Mary Ann Murray and Lige M. Murray (hereafter, the “Murrays”) request that the Court follow the reasoning of Judge Susan Watters in her decision in Murray v. Billings Garfield Land Company, 187 F.Supp.3d 1203 (D.Mont. 2016) (hereafter, “*Murray I*”) and answer the question certified by the Ninth Circuit by holding that fossils are not “minerals” under Montana law.

Until the Ninth Circuit panel reversed Judge Watters in Murray v. BEJ Minerals, LLC, 908 F.3d 437 (9th Cir. 2018) (hereafter, “*Murray II*”), no court, legislature, administrative agency, paleontological scientist, legal treatise, scientific treatise, dictionary, or scholarly or popular publication had ever held, found, ruled, or determined that any vertebrate or invertebrate fossil was classified as a “mineral” for any purpose. Applying the law of Montana, dinosaur fossils cannot be classified as “minerals” within the ordinary, popular and legal meaning of the term when used in a broad reservation of a subsurface mineral interest.

To classify “fossils” as “minerals” creates a confusing distinction between fossils found on private land versus fossils found on public land. It also creates an impractical, expensive, case-by-case method for determining which fossils are “rare and valuable minerals” or “common and worthless non-mineral fossils.” Furthermore, creating such a distinction puts at risk the title ownership of many

important specimens and fossil collections in the hands of natural history museums, paleontologists, evolutionary biologists, and even private citizens across the country.

The Appellants want this Court to ignore “common and worthless non-mineral fossils” when it addresses the certified question and only address the fossils found on the Murrays’ property (hereafter, the “Murray Fossils”). The Appellants also want the Court to ignore the will of the people of Montana as reflected in 2019 Montana Laws Ch. 136 (H.B. 229) (effective April 16, 2019) which passed both houses of the Montana Legislature unanimously in a rare display of bipartisanship to show the common understanding in Montana that fossils are not considered minerals. The Murrays ask the Court not to put on the blinders requested by the Appellants but, instead, address the certified question as presented in light of the recent law passed by the people of Montana.

STATEMENT OF THE ISSUE

The Murrays agree with the statement of the issue as presented by the Ninth Circuit. The Murrays disagree with the restatement of the issue presented by the Appellants who attempt to limit the issue to only the Murray Fossils rather than the broader category of all dinosaur fossils.

STATEMENT OF THE CASE

The Murrays agree with the Appellants’ general description of the procedural history of this lawsuit.

STATEMENT OF THE RELEVANT FACTS

As set forth in this Court’s Order of June 4, 2019, the Murrays understand that the certified issue is to be addressed using only the facts set forth in Ninth Circuit Court’s certification of the question. See e.g. BNSF Ry. Co. v. Feit, 2012 MT 147, ¶ 7, 365 Mont. 359, 281 P.3d 225 (the Court refused to reformulate the question or consider facts outside those in the certification of the question). The Appellants, however, have deviated from the facts set forth in the certification of the question, and have stated facts from not only the Montana District Court’s opinion in *Murray I* and the Ninth Circuit panel decision in *Murray II*¹ but also facts outside those two decisions.² The Murrays disagree with Appellants’ approach and, especially, the

¹ There is a legal issue as to whether the Ninth Circuit panel decision in *Murray II* should be considered by the Court at all because the Ninth Circuit determined that it was not to be cited as precedent. See Murray v. BEJ Minerals, LLC, 920 F.3d 583 (9th Cir. 2019). The Murrays assert that reliance on *Murray II* for any proposition, factual or legal, is inappropriate.

² After stating that the facts of this case should come exclusively from the Federal Court opinions, the Appellants drop footnotes in their brief providing factual background on the Appellants not set forth either in the Federal Court opinions or elsewhere in the record. The Murrays assert that some of these additional facts are not only irrelevant to the issue to be decided by the Court, and should be stricken, but are also misstated. For example, Appellants try to paint themselves as Montanans when the undisputed fact is that the Appellants in this case are legal entities with their principal places of business outside of Montana. See Murray Appendix, Ex. A (other exhibits attached thereto omitted). Not only are the Appellants foreign entities, but all of their individual owners, including Bo and Jerry Severson, reside outside Montana. Id. In fact Appellants removed this case from State Court to Federal Court—by asserting diversity jurisdiction based on the fact that all of them and their owners were out of state residents. Id.

last sentence from Appellants' Statement of Relevant Facts. If the Court is going to consider facts outside the certification of the question, then the Court should consider other portions of the factual record that are undisputed.

If the Court is willing to consider facts outside those set forth in the Certification Order, especially Appellants' rendition set forth in pages 5-8 of their brief, it should also consider the undisputed fact that not all dinosaur fossils are rare and valuable. See Murray I at 1207 (record citation omitted). As noted by the Federal District Court, "[f]ragments of fossils that have little or no value are sometimes referred to as "chunkosaur" or "junkasaur.'" Id. (record citation omitted). This fact is important because the Appellants have consistently tried to create an illegitimate and unworkable legal distinction between "rare and valuable fossils" which they consider minerals and "common and worthless fossils" which they assert do not qualify as minerals. Appellants' proposed distinction is also the basis upon which Appellants want the Court to consider only the Murray Fossils in any decision

Another fact asserted by Bo and Jerry Severson is that they did not become aware of the existence of any dinosaur fossils until, at the earliest, October 2008. To the contrary, the Murrays first mentioned the discovery of dinosaur fossils to the Seversons in a Christmas letter in 2006. See Murray App., Ex. B. The issue as to when or how the Appellants became aware of the existence of the fossils is not before the Court. Consequently, the Murrays request that the Court ignore these facts outside the record.

rather than the broader category of all dinosaur fossils (as the Ninth Circuit has framed the issue).

The Appellants make the statement at page 7 of their Opening Brief that “the parties do not dispute that the Montana Fossils *are* minerals in a scientific sense....” See *Murray II* at 442. This statement, however, is misleading and ignores the fact that all bones, whether fossilized or not, are made of minerals as discussed by the Federal District Court in its opinion:

The Murrays’ experts largely agree with the fossilization process described by Rogers, but they differ on the conclusion that francolite is a mineral compound. Expert Peter Larson opined that “francolite has not been recognized as a distinct, valid mineral species since 2008.” Larson stated that the fossils are composed of the mineral hydroxylapatite. As mentioned above, hydroxylapatite is not unique to fossils, as it is found in the bones of living vertebrates. Larson compared the x-ray diffraction patterns of the Murray T. Rex and a modern bison bone, and he concluded that the samples contained identical patterns of hydroxylapatite. Larson opined that the fossil “has not been replaced by minerals in any way, shape, or form. It is hydroxylapatite just as when it was alive.” Larson does not consider minerals that fill voids in the bone to be part of the fossil.

See *Murray I* at 1206-1207 (record citations, including internal citations, omitted; emphasis supplied. As noted by the Federal District Court, dinosaur fossils are actually made of the same minerals as living bone, and the minerals that fill the voids in the bones are not actually part of the fossil. Thus, dinosaur fossils are not “minerals” in the ordinary, common, and legal sense of the term. They are actually bones which are made up of minerals, in the same way that topsoil and plants are made of minerals. As further noted by the Federal District Court:

dinosaur fossils are the remains of once-living vertebrates. The fossils' properties are not what make them valuable. Fossils are not subject to further refinement before becoming economically exploitable. Instead, the fossils are valuable because of their very existence. Dinosaur bones are not economically valuable to be processed into fuel or materials or manufactured into jewelry. Further, dinosaur fossils are not mined in the traditional sense, but rather discovered by happenstance.

See Murray I at 1212 (record citation omitted). If this Court were to determine that fossil bones are part of the mineral estate, then the logical extension of that determination would be that ancient, or even modern, human skeletons found in burial sites around the State could be considered part of the mineral estate.³

The Appellants wrap up the fact section of their brief by stating what they believe are the essential relevant facts to resolve the certified question. The Murrays disagree with the Appellants' limited list of "essential" facts and assert that, if the Court is going to look outside the facts set forth in the Certification Order, only the following facts are necessary for the Court to consider:

- The parties' Mineral Deed makes no statement about reserving to the Appellants the fossils from the Property;
- The Murray Fossils are bones which are the remains of once living vertebrates;

³ For example, the skeleton of an approximately 12,600 year old Clovis child found in western Montana would be part of the mineral estate following the logic of the Appellants. See <http://www.cbsnews.com/news/12000-year-old-baby-dna-unlocks-clues-to-earliest-americans/>. Many Native American groups, and others, would strongly disagree.

- All bones are made of minerals;
- The Murray Fossils as well as “junksaur” fossils are composed of the same minerals;
- Fossils, unlike mineral substances, are not milled, concentrated, or refined; and,
- Not all fossils are rare, valuable, or exceptional.

STANDARD OF REVIEW

The Appellants’ statement of the standard of review is correct although the Murrays do believe there are “agreed facts” in this matter, but only those facts that the Ninth Circuit has provided this Court as part of its Certification Order.

SUMMARY OF ARGUMENT

The Court should answer the issue presented by the Ninth Circuit in the negative because dinosaur fossils do not constitute “minerals” for the purpose of a mineral reservation according to the legal precedent of Montana. Judge Watters got the issue right in *Murray I* when she granted the Murrays summary judgment on this issue.

The Appellants want to reformulate the issue to address only the Murray Fossils rather than the actual question presented by the Ninth Circuit as to whether all dinosaur fossils are to be considered minerals. This Court has never held that a certain subset of specimens or materials like the Murray Fossils, viewed in isolation,

can constitute minerals when the larger set of specimens or materials to which the subset belongs cannot. To the contrary, this Court has rejected requests to call something a mineral even though it may be rare and valuable in certain limited situations. See e.g. Caldwell v. Sabo, 2013 MT 240, 371 Mont. 328, 308 P.3d 81 (“Although it is not considered a mineral, scoria is valuable in road construction—particularly roads used for oil and gas exploration.”) (citation omitted); Hart v. Craig, 2009 MT 283, 352 Mont. 209, 216 P.3d 197 (sandstone suited for commercial sale as rip-rap and landscaping was not a mineral in deed's general mineral reservation).⁴

The lack of any authority, whether be it legislative, administrative, scientific, or otherwise to support a determination that fossils are minerals should resolve the certified question. No court, prior to *Murray II*, had held that fossils are minerals. Moreover, no other legislature, administrative agency, or paleontological scientist had ever held, found, ruled, or determined that any vertebrate or invertebrate fossil was classified as a mineral for any purpose, particularly the reservation of a mineral estate. Further, no legal treatise, scientific treatise, dictionary, or scholarly or popular publication specifically classifies “fossils” as “minerals” for any purpose. The panel in *Murray II*, using confusing logic and negative inferences, determined out of whole

⁴ The Court may want to note that the trial judge in the Hart case was the same person who decided *Murray I*, that is, Judge Watters.

cloth that the Murray Fossils were minerals. The panel simply got it wrong as the Ninth Circuit determined when it vacated the decision in its *en banc* ruling.

Applying the law of Montana, especially in light of the recent law passed unanimously by the Montana Legislature that shows the intent of the people with respect to this issue, “dinosaur fossils” cannot be classified as “minerals” within the ordinary, popular, and legal meaning of the term especially when used in a broad reservation of a subsurface mineral interest.

ARGUMENT

I. The Interpretation of Conveyance Documents.

As noted by the Appellants in their opening brief, deeds are interpreted like contracts. See § 82–4–303(9), Mont. Code Ann.; Hudson v. Irwin, 2018 MT 8, ¶ 15, 390 Mont. 138, 408 P.3d 1283 (citations omitted). The construction and interpretation of a contract is a question of law for the court. Schwend v. Schwend, 1999 MT 194, ¶ 36, 295 Mont. 384, 983 P.2d 988 (citation omitted). Courts interpret the language of a contract according to its plain, ordinary meaning. Id., ¶ 39 (citation omitted). Courts look only to the contract’s plain language and do not “insert what has been omitted or . . . omit what has been inserted.” See §1-4-101, M.C.A. Courts may not “presume contracting parties intended to insert in a written contract a provision other or different from that which the plain language used would indicate. . . .” Union Electric Co. v. Lovell Livestock Co., 54 P.2d 112, 115 (Mont. 1936)

(citation omitted). Moreover, courts do not rewrite language simply because one party wishes it were different. Pearson v. Virginia City Ranches Assoc., 2000 MT 12, ¶ 25, 298 Mont. 52, 993 P.2d 688 (citation omitted). “[I]t is beyond [a court’s] power to make agreements for parties or amend those which the parties themselves have made.” State Bank of Darby v. Pew, 195 P. 852, 857 (Mont. 1921) (citation omitted). A court must enforce a valid contract notwithstanding harshness of provisions therein. Union Central Life Ins. Co. v. Audet, 21 P.2d 53, 55 (Mont. 1933) (citations omitted).

Applying the foregoing rules of contract construction and interpretation to the instant case, the term “dinosaur fossils” should not be included in the contract between the parties. To do so is to re-write the contract and insert something that is not written into the document in the first place. If the Appellants had intended that dinosaur fossils be included in the conveyance, then they could have (and should have) placed it in their mineral reservation the same way they inserted words like “coal” or “fossil fuels” into their reservation. Moreover, using the plain, ordinary meaning of the word “mineral” in the interpretation of the contract, as more fully discussed below, the contract cannot be construed to include “dinosaur fossils” within it.

II. Dinosaur Fossils Do Not Meet the Test for What Constitutes a Mineral Under any Legal Authority or Common Understanding.

a. The Appellants Misstate the *Farley* Analysis and Related Cases.

Although Appellants start out their legal analysis of Montana mineral law by citing Farley v. Booth Bros. Land and Livestock Co., 270 Mont. 1, 890 P.2d 377 (1995), their perfunctory discussion of that case misstates the actual legal analysis the Court went through in determining that scoria was not a mineral under Montana law. More importantly, the Appellants' statement of what constitutes the two-part test adopted in Farley for determining whether something is a "mineral" is wrong. The Court did not adopt the test stated by Appellants, and they provide no citation to the actual case in support of their conclusory statement.

What the Court did in Farley was begin its analysis with a discussion of the following statutory definition:

"Mineral" means any ore, rock, or substance, other than oil, gas, bentonite, clay, coal, sand, gravel, phosphate rock, or uranium, 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.

Id., 270 Mont. at 5, 890 P.2d at 379 quoting § 82-4-303(9), Mont. Code Ann. (now § 82-4-303(16), Mont. Code Ann.). The Court also looked at another statutory definition which defined "minerals" to mean "bentonite, clay, scoria, phosphate rock, sand, or gravel." Farley at id. (emphasis supplied) quoting § 82-4-403(6),

Mont. Code Ann. (which has since been amended to change the definition from “minerals” to “materials”). After looking at these different statutory definitions, the Court stated that while scoria was clearly included in one definition of “mineral” it was unclear whether it fit into another definition of the same term. Farley at id. (citations omitted). The Court then stated that “this apparent inconsistency can be clarified by recognizing that the definition of “mineral” can differ according to the context in which it is used.” Id., 270 Mont. at 5-6, 890 P.2d at 379.

Since there were conflicting statutory definitions which specifically included scoria as a mineral, on one hand, and may have excluded it, on the other hand, the Court decided to look to the case law of other jurisdictions since the issue was one of first impression. Farley, 270 Mont. at 6, 890 P.2d at 379-380. It is the case law from other jurisdictions that actually uses the “rare and exceptional” or “rare and valuable” language discussed by the Appellants. The Court in Farley did not specifically adopt any test using the “rare and exceptional” or “rare and valuable” language, rather, the “rare and exceptional” or “rare and valuable” language from other cases was only discussed by the Court. Id., 270 Mont. at 6-7, 890 P.2d at 380 (citations omitted). Furthermore, while the Court noted that scoria was used in constructing roadways that did “not elevate scoria to the status of a compound which is rare and exceptional in character and therefore, a mineral.” Id. at 270 Mont. at 7, 890 P.2d at 380 (citation and internal quotation marks omitted).

The Appellants go on to state in their opening brief that this Court applied the same test from Farley in the more recent case of Hart, *supra*. That statement is not accurate because, while the Court did refer to Farley in the Hart decision, the analysis is not exactly the same. In Hart, the Court glossed over the first part of the Farley analysis, that is, whether there was any statutory definition of “mineral” that included sandstone within it. Instead, the Court appears to have assumed that sandstone, being a sedimentary rock, could be considered a mineral since Mont. Code Ann. § 82–4–303(16) includes the word “rock” within the definition of “mineral.”⁵

Relying on Farley, the Court in Hart went beyond the statutory definition of mineral to determine that the sandstone was not a mineral as commonly understood. Hart at ¶ 7. In doing so, the Court stated specifically that sandstone was “not rare or exceptional *simply because it can be sold commercially.*” Id. at ¶ 7 (emphasis added). The same holds true in the instant case with respect to dinosaur fossils,

⁵ There is also legal authority from jurisdictions other than Montana that defines sandstone as a mineral. See e.g. PAPCO, Inc. v. U.S., 814 F.Supp.2d 477 (W.D.Pa. 2011) (sandstone a mineral within mineral reservation); Kalberer v. Grassham, 138 S.W.2d 940, 944 (Ky.App.1940) (explaining that “the language used in the conveyance, viewed in light of the circumstances surrounding the parties, [impelled the court] to the conclusion that the [sandstone] quarry in question was included in the conveyance as a mineral”); In re Forestry Reservation Commission, 28 Pa.C.C. 145, 12 Pa. D. 420, 1903 WL 2604 (Pa. Atty. Gen. 1903) (sandstone constituted a mineral whether lying loose on the surface or requiring excavation). In contrast, there are no cases that say dinosaur fossils are minerals.

generally. As an undisputed fact, not all dinosaur fossils are rare, exceptional, or commercially saleable; worthless dinosaur fossils are sometimes referred to as “chunkosaur” or “junkasaur.” See *Murray I* at 1207 (record citation omitted). Thus, even if the Court were to skip over most of the *Farley* analysis and apply only the “rare or exceptional” aspect of the *Hart* decision as the test for whether something is a mineral, dinosaur fossils would fail the test.

The analysis that this Court undertook in *Farley* and *Hart* is consistent with what the Texas Supreme Court did in *Heinatz v. Allen*, 217 S.W.2d 994, 997 (Tex. 1949). In that case, the parties provided the Supreme Court of Texas several scientific reference books in which limestone (the substance at issue) was referred to as a “mineral.” *Id.*, 217 S.W.2d at 996-997. The Court also noted that there were a number of cases discussing limestone as a mineral. *Id.*, 217 S.W.2d at 998. In contrast, Appellants have not referenced, and cannot find, any book, treatise, statute, or other authoritative work, that includes the word “fossil” within the definition of “mineral” in either the common parlance or technical sense.⁶

The Court in *Heinatz* also pointed out that if one were to look only at the scientific or technical definitions of minerals, those definitions are so broad to

⁶ Appellants make the statement on page 14 of their opening brief that *Farley*, *Hart*, and *Heinatz* never cite “dictionary” definitions for the term “mineral” in their decisions. This is true, but misleading. The Court in *Farley* reviewed statutory definitions of the term “mineral” and the *Heinatz* Court refers to statutory, case law, and legal treatise definitions in its opinion.

include soil within them. Id., 217 S.W.2d at 997. Rejecting such technical or scientific definitions, the Court went back to the ordinary and natural meaning of mineral rights. Id. It is in this context, after rejecting the technical and scientific definitions of minerals, that the Court looked at substances such as sand, gravel, and limestone to determine whether they could be minerals within the ordinary and natural meaning of the word. Id. The Court decided that such substances could not be considered minerals “unless they are rare and exceptional in character or possess a peculiar property giving them special value, as for example sand that is valuable for making glass and limestone of such quality that it may profitably be manufactured into cement. Such 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. (citations omitted).

Another important aspect of the Heinatz decision bears consideration in the instant case. In Heinatz, the court noted that “[a]nother reason supports the conclusion that the words ‘the mineral rights’ used in the will were not intended to include the right to the limestone. It is that the limestone is recoverable only by quarrying or the open pit method which destroys the surface for agricultural and grazing purposes.” Id., 217 S.W.2d at 998. The same is true in the instant matter, since the only way to find fossils is to follow surface fragments and scrape away the

surface. As such, one of the reasons stated by Heinatz for not including “fossils” within the “mineral” definition applies here.

Ultimately, the Court in Heinatz began its discussion of the rare and exceptional character test only after finding that limestone was included within the definition of “mineral” in either the common parlance or technical sense by citing other works that said as much. In the present case, the Appellants cannot meet the first part of the test which is to find some authoritative source from Montana that would lead one to believe that “fossils” are includable in a definition of “mineral” in either the common parlance or even technical sense.

There is a question as to whether Heinatz is still good law, especially regarding the “rare and exceptional” or “special value” *dicta* from that case. In Atwood v. Rodman, 355 S.W.2d 206 (Tex.Ct.App. 1962), the Court rejected this *dicta* from Heinatz and stating as follows:

To hold that usage controls would make for hopeless confusion, because if limestone is ... highly useful and valuable in building and construction, then there would be an inevitable conflict between those who claim that it is a mineral and want to use it for cement, and those who claim that it is rock used for construction.... For these reasons we do not think usage, which here is used to mean subsequent development to the dates of the instruments, can or does change the intent of the grantors and grantees.

Atwood at 215. Thereafter, the Court of Appeals in Kentucky decided not to follow Heinatz, since Texas itself had disavowed the case. Florman v. MEBCO Ltd. Partnership, 207 S.W.3d 593, 603 (Ky.Ct.App. 2006).

Reviewing the Farley decision in its entirety, the Appellants' statement of what constitutes the two-part test in Farley is erroneous. Instead, the test in Farley can be boiled down to the following: (1) the Court looks to see whether the substance or item at issue specifically has been defined as a "mineral" under applicable Montana statute; and, (2) if the substance or item specifically has been defined as a "mineral" in a statute, but there is still some doubt as to whether it fits the common parlance for the matter at issue (e.g. a mineral deed), the Court looks to other authority, include the case law of other jurisdictions to help answer the question, and also applies the rare and exceptional test to further resolve any doubts.

Applying this analysis set forth in Farley, dinosaur fossils do not even pass the first part of the test because they do not fit into any definition of "mineral" set forth under Montana statutory law. Thus, there is no reason to jump to the last test, the "rare and exceptional" test, as requested by the Appellants.

b. Dinosaur Fossils Are Not Specifically Defined as "Minerals."

Beginning with the statutory definition of "mineral" found at Section 82-4-303(16), Mont. Code Ann., set forth above, it is clear that dinosaur fossils do not fall within its dictates because they are not used "for the purpose of milling, concentration, refinement, smelting, manufacturing, or other subsequent use or processing or for stockpiling for future use, refinement, or smelting." Id. Under

Title 70, of the Montana Code, which refers to property, generally, the term “mineral” is defined to mean:

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; stream and other geothermal resource; or any other substance defined as a mineral by the law of this state.

See Mont. Code Ann. § 70-9-802(9). This definition may be the most applicable definition to the instant matter because the subject matter of the instant case is property and, therefore, Title 70 applies. Looking at the language of this statute, it is clear that dinosaur fossils are not specifically mentioned. So, unless dinosaur fossils fall into the last clause of the statute, they are not a “mineral” as defined in Title 70.

The only other statutory definition for “mineral” can be found under Title 15, Chapter 38 of the Montana Code relating to taxation, generally, and mineral production taxes, specifically. See Section 15-38-103(3), Mont. Code. Ann. That definition defines “minerals” 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.” Id. Dinosaur fossils do not fall into this definition, even the very broad last clause of the statute because not all dinosaur fossils are merchantable products (i.e. “chunkosaur” or “junkasaur”).

In considering these statutes, the Court should follow the generally recognized rules of statutory construction and interpretation, that is, to not insert what has been omitted. See Mont. Code Ann. § 1-2-101. Under Montana law the maxim of statutory construction *expressio unius est exclusio alterius* (the inclusion of one excludes others) applies and a court does not read into a statute to prohibit from including that which is not included. Westmoreland Resources Inc. v. Department of Revenue, 2014 MT 212, ¶ 12, 376 Mont. 180, 330 P.3d 1188 (citation omitted). This maxim should be applied in the instant case.

Other definitions from Montana law to consider in this context which differentiate fossils from minerals include the term “paleontological remains” which are defined as “fossilized plants and animals of a geological nature found upon or beneath the earth or under water which are rare and critical to scientific research.” See Mont.Admin.R. 36.2.802(8). The term “general recreational use” under Mont.Admin.R. 36.25.145(11) differentiates between fossils and minerals when it states as follows:

- (a) collection, disturbance, alteration, or removal of archeological, historical, or paleontological sites or specimens (e.g., fossils, dinosaur bones, arrowheads, old buildings, including siding) (which requires an antiquities permit pursuant to 22-3-432, Mont. Code Ann.);
- (b) mineral exploration, development, or mining (which requires a lease or license pursuant to Title 77, chapter 3, Mont. Code Ann.);
- (c) collection of valuable rocks or minerals (which requires a lease or license pursuant to Title 77, chapter 3, Mont. Code Ann.)....

Likewise, Mont. Code. Ann. Section 22-3-107 differentiates between “fossils” and “minerals” when it says that the trustees of the Montana Historical Society have the power “to collect and preserve such natural history objects as fossils, plants, minerals, and animals...” *Id.* at (13).

Applying the foregoing statutes, the ordinary and natural meaning of the term “minerals” has never been defined by either the Montana Legislature or any of the State’s administrative bodies to include within its definition any type of fossil and, especially, dinosaur fossils. The Appellants have not provided any statutory or regulatory authority that explicitly and specifically includes fossils within the definition of “minerals” under Montana law.

Dictionary definitions can be helpful to courts “in determining the common and ordinary understanding of a contract term.” *Murray I* at 1210 citing Dollar Plus Stores, Inc. v. R-Montana Associates, L.P., 350 Mont. 476, 209 P.3d 216, 219 (2009); Ravalli Cty. v. Erickson, 320 Mont. 31, 85 P.3d 772, 774 (2004). In *Murray I*, Judge Watters went to discuss various dictionary definitions as follows:

The relevant dictionary definitions of “mineral” typically include an inorganic element or compound mined for economic purposes. See Webster’s Third New International Dictionary 1437 (Philip Babcock Gove ed. 1981) (defining “mineral,” in part, as “a solid homogenous crystalline chemical element or compound (as diamond or quartz) that results from inorganic processes of nature and that has a characteristic crystal structure and chemical composition or range of compositions; any of various naturally occurring homogenous or apparently homogenous and usu[ally] but not necessarily solid substances...obtained for man’s use usu[ally] from the ground”); New Oxford American Dictionary 1113 (Angus Stevenson & Christine Lindberg eds., 3rd

ed. 2010) (“a solid inorganic substance of natural occurrence; substance obtained by mining”); and The American Heritage Dictionary 1120-21 (Joseph Pickett ed., 5th ed. 2011) (“A naturally occurring, homogenous inorganic solid substance having a definite chemical composition and characteristic crystalline structure, color, and hardness; Any of the various natural substances, as: a. An element, such as gold or silver. b. An organic derivative, such as coal or petroleum. c. A substance, such as stone, sand, salt, or coal, that is extracted or obtained from the ground or water and used in economic activities”). Finally, the latest edition of Black’s Law Dictionary defines “mineral” as:

1. Any natural inorganic matter that has a definite chemical composition and specific physical properties that give it value <most minerals are crystalline solids>.
2. A subsurface material that is explored for, mined, and exploited for its useful properties and commercial value.
3. Any natural material that is defined as a mineral by statute or caselaw.

Black’s Law Dictionary 1145 (Bryan Garner ed., 10th ed. 2014).

See Murray I at 1210.

The determination that the term “minerals” under Montana law should not include “dinosaur fossils” is consistent with Federal law. For example, the Paleontological Resources Preservation Act, 16 U.S.C.A. § 470aaa, *et seq.*, includes “fossilized remains, traces, or imprints of organisms, preserved in or on the earth’s crust, that are of paleontological interest and that provide information about the history of life on earth...” in the definition of “paleontological resource.” See 16 U.S.C.A. § 470aaa(4); 36 C.F.R. § 291.5. As further noted in the Federal laws, the term “paleontological resources” do not include mineral resources, such as “coal, oil, natural gas, and other economic minerals that are subject to the existing mining

and mineral laws....” See 36 C.F.R. § 291.9(d); see also 43 U.S.C.A. § 1785 (removing the “Fossil Forest” from mining and mineral leasing and developing a management plan for the excavation and collection of fossils); 43 C.F.R. § 423.2 (differentiating within the definition of “natural resources” the terms “minerals” and “fossils”).

As the foregoing should make clear, no Montana or Federal statutory or regulatory definition includes dinosaur fossils within the meaning of “mineral” in any context. Therefore, the Appellants have not met the first test of Farley and, on this basis alone, Montana law excludes dinosaur fossils from being considered minerals.

c. No Court has Held that Dinosaur Fossils are Includable in the Mineral Estate.

Assuming, *arguendo*, that there is any doubt as to whether dinosaur fossils might fall into the statutory or regulatory definitions of “minerals” as discussed above, for purposes of the first part of the Farley test, it is clear that there is no case or administrative law authority from anywhere in the country that has held that dinosaur fossils are to be included in the mineral estate. To the contrary, the Department of the Interior in the matter of Earl Douglass, 44 Pub. Lands Dec. 325, 1915 WL 1202 (1915), stated that “Fossil remains of dinosaurs and other prehistoric animals are not mineral within the meaning of the United States mining laws, and lands containing such remains are not subject to entry under such laws.” Id.; see

also Hunterfly Realty Corp. v. State of New York, 346 N.Y.S.2d 455 (N.Y.Ct.Cl. 1973) (mastodon fossils not considered minerals). Appellants have cited no case that holds to the contrary.

The Appellants do cite two cases from Pennsylvania that state, in *dicta*, that fossils are minerals, but a closer look at those two cases shows that the Appellants' reliance on them is misplaced. With respect to Highland v. Com., 161 A.2d 390 (Pa. 1960), the reference to fossils in that case was made in *dicta* since the issue was whether the deeds conveyed natural gas. Id. at 393. As part of its analysis, the Court noted that it had created, some 87 years before, a very broad and general definition of "minerals" which embraced "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." Id. at 398 citing Griffin v. Fellows, 81 ½ Pa. 114, 124, 1873 WL 11950 (1873). In essence, the extremely broad definition cited from the Griffin case of 1873 stated that everything below the surface of the earth was a mineral—a very scientifically suspect and unworkable definition. Looking further, at the original Griffin case, it is clear that the Court in that case was also referring to fossils in *dicta* when it discussed a mining lease. Id. at 1873 WL 11950*9 (citations omitted). Rather than holding that fossils were minerals, the court in Griffin was only parroting the language from two earlier sources. Id. (citations omitted). In neither the Highland nor the Griffin cases was the actual issue

of whether fossils were properly classified as minerals squarely before the respective courts.

d. The Court Should Not Apply Only One Aspect of the *Farley* Test Solely to the Murray Fossils.

The Appellants coyly try to turn this case into a question of whether the Murray Fossils, standing alone, are “rare and exceptional” using those isolated terms from the Farley, Hart, and Heinatz cases. The Court should not fall for this ruse.

The Appellants also make the bare faced assertion that this “rare and exceptional” test can be applied to a particular and specific item (e.g. the Hope Diamond rather than all diamonds, which are always considered minerals, even if ground into powder). This statement is not accurate and none of the cases mentioned by Appellants have applied the “rare and exceptional” test to one specific item or even a small group of items. While Farley did mention, in *dicta*, that the test could be applied to a subset of materials it never stated that the test would be applied to one particular item, like the Murray Fossils, standing in isolation. Moreover, in both Farley and Hart, the Court rejected the argument that a subset of materials would be deemed minerals in those particular instances. In Farley, the Court held that a sub-type of scoria used in constructing roads did not make it a mineral for purposes of a general mineral reservation. Id., 270 Mont. at 5–8, 890 P.2d at 379–81. In Hart, the Court rejected the argument that a sub-type of sandstone suitable for rip-rap and

landscaping could be classified as a “mineral” in a deed's general mineral reservation. Id. at ¶¶ 4-8.

Appellants cite both Heinatz and Holland v. Dolese Co., 540 P.2d 549 (Ok. 1975), for the proposition that a subset of materials can be considered minerals if they meet the rare and exceptional test. Neither of those cases, however, actually held that the subset of materials at issue in those cases would be considered minerals. Heinatz at 997-1000; Holland at 551-552. The case of Holland refers back to the earlier Oklahoma case of Mack Oil Co. v. Laurence, 389 P.2d 955 (Ok. 1964), which established the “true test” for determining whether exceptional substances are to be considered as minerals in a particular case. Id. at 961 (citation omitted). The determination under this true test “must turn upon what the word denoting the substance ordinarily is understood to mean in the meaning and intention (vernacular) of the particular industry, the commercial world and the landowners themselves at the time of the conveyance.” Id. (citation omitted). Applying the true test, in the instant matter, there is nothing in any documentation of the industry, the commercial world, or the parties themselves that would lead any court to determine that fossils are includable in the mineral estate.

The Appellants cite no case where a court has actually applied the “rare and exceptional” test to find that a specific item or even a subset of substances are to be considered minerals when the broader category of substances does not fit the test.

Counsel for the Murrays has done extensive research and has not found any case from anywhere in the country that has applied the “rare and exceptional” test to either an isolated item or a subset of substances and held that the mineral moniker applied. Therefore, if the Court determines that the Murray Fossils are to be considered minerals, apart from dinosaur fossils as a group, solely based on the “rare and exceptional” test, it will be the only court in the country to apply the test in that manner.

Implicitly acknowledging that they have no specific case law authority that has applied the “rare and exceptional test” in cases like this one, the Appellants try to buttress their argument by discussing Federal law. The Court should not be persuaded because the Appellants misapply 30 U.S.C. § 611 which is known as the Common Varieties Act. That statute specifically states that “sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood” will be considered minerals and then carves out an exception for those that have “distinct and special value.” See 30 U.S.C. § 611. That is a different legal construct from the instant matter, and is entirely different from the test in Farley, as discussed above. Thus, the cases that arise under the Federal statute are limited in their applicability to the language of 30 U.S.C. § 611.

The purpose of the Common Varieties Act was to curb the abuses of the General Mining Act, 30 U.S.C. §§ 22-47. See Ryan, James L., *Sand Wars: Mineral*

Reservation Policies Lead the Supreme Court to Determine Whether Sand is a Valuable Mineral in the Nevada Desert, 37 Loy. U. Chi. L.J. 213, 227 (Fall 2005) (footnote omitted). Specifically, the purpose behind the Common Varieties Act was as follows:

The reason we have done that is because sand, gravel, pumice and pumicite are really building materials and are not the type of material contemplated to be handled under the mining laws, and that is precisely where we have had so much abuse of the mining laws, because people can go out and file mining claims on sand, stone, pumice, and pumicite taking in recreational sites and even taking in valuable stands of commercial timber in the national forests and on the public domain.

Id. at n. 115 quoting 101 Cong. Rec. H7454 (daily ed. June 20, 1955) (statement of Rep. Engle); see U.S. v. Locke, 471 U.S. 84 n.2, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985). Thus, the Act has no application in the present matter because it was intended to differentiate building materials from mined materials. Fossils are neither and, as discussed above, Federal law makes it clear that they are not within the mining laws.

The cases that the Appellants cite regarding the Common Varieties Act are also not on point. None of those cases discuss fossils. Furthermore, there is a fundamental difference between minerals, used either for mining or building, and fossils. Also, fossils are not included in any of the definitions of “minerals” under Title 30 of the United States Code. See 30 U.S.C.A. §§ 21a, 1291. Other portions of the United States Code and related regulations specifically exclude fossils from

the definition. Thus, the Appellants' argument concerning the Common Varieties Act is not well taken.

Appellants' reliance on Farrell v. Sayre, 270 P.2d 190 (Colo. 1984), in this context is misplaced. The case of Farrell involved a specific grant of sand and gravel. Id. at 370. Thus, the Court had no problem holding that the owner of the surface rights, "as grantor, had no intention of reserving to himself that which he had granted, namely, the sand and gravel surface of the land." Id. at 373. The instant case is entirely different—there has been no grant of the fossil rights to the Appellants.

The citation of Moser v. U.S. Steel Corp., 676 S.W.2d 99 (Tex. 1984), by Appellants serves them no better. First, the case did not rely on the "rare and exceptional" test put forward by Appellants. Second, the passage quoted by the Appellants from the case is taken out of context. The quoted passage comes from an earlier Texas decision from 1971. Id. at 102 citing Acker v. Guinn, 464 S.W.2d 348, 352 (Tex.1971). The Court in Moser actually limited the holding of Acker and, instead, held that "a severance of minerals in an oil, gas and other minerals clause includes all substances *within the ordinary and natural meaning of that word*, whether their presence or value is known at the time of severance. Moser at 102 (citations omitted; emphasis supplied). Using the ordinary and natural meaning of the word "minerals" the Court determined that uranium was included. Id. at 102.

After making that determination, the Court went on to consider to what extent the mineral rights holder could use the surface estate. Id. at 102-103. The case does not stand for the proposition, espoused by the Appellants, that all valuable substances belong to the mineral owner regardless of whether they are specifically granted or reserved.

III. Appellants Do Not Apply *Farley* to the Certified Facts.

Beginning on page 20 of their brief, Appellants claim to be applying the certified facts to the issue presented by the Ninth Circuit and the law of Montana. The Appellants are wrong on all accounts. First, the certified question accepted by this Court refers to all “dinosaur fossils” and not just the Murray Fossils. Appellants’ entire argument is based upon this Court restating the certified question to refer to the Murray Fossils only. The Court should not do so, and the Appellants have given no valid reason for doing so. See e.g. BNSF Ry. Co. v. Feit, 2012 MT 147, ¶ 7, 365 Mont. 359, 281 P.3d 225 (the Court refused to reformulate the question or consider facts outside those in the certification of the question).

The Appellants also go beyond the facts set forth in the Certification Order in presenting their case to the Court. Again, this is improper. BNSF at id. As set forth in the Certification Order, Murray v. BEJ Minerals, LLC, 924 F.3d 1070 (9th Cir. 2019), the actual facts presented to this Court by the Ninth Circuit are limited to the following:

Mary Ann and Lige Murray live on a farm and ranch in Garfield County, Montana. As is common in Montana, the Murray property mineral estate has been severed from the surface estate. The Murrays own the surface estate and a minority interest in the mineral estate. The remaining mineral rights are currently owned by non-Montana entities, BEJ Minerals, LLC and RTWF, LLC.

The parties' mineral deed provides that the Murrays and these entities own, as tenants in common, "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[.]" 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." At the time the parties executed the purchase agreement and mineral deed in 2005, "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."

Shortly thereafter, in Fall 2005, the Murrays discovered a "spike cluster" fossil on the property, but did not consider this discovery significant. Several valuable fossil discoveries have followed. These discoveries 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. According to BEJ and RTWF, the Murrays first notified the other mineral titleholders of the fossil discoveries in 2008. BEJ and RTWF asserted an ownership interest based on their status as mineral titleholder in 2013.

Id. at 1072-1073 (internal citations omitted). The facts set forth on page 20 of the Appellants' brief do not actually appear above with exception that the fossil discoveries are valuable. Id. at 1072. Instead, the Appellants refer to *Murray II* for their other facts. These facts from *Murray II* are actually not set forth within the Certification Order and, therefore, should not be considered by the Court, especially

since the Ninth Circuit determined that *Murray II* was not to be cited as precedent. See Murray v. BEJ Minerals, LLC, 920 F.3d 583 (9th Cir. 2019). If, however, the Court is going to consider facts outside the certification of the question, then the Court should consider other portions of the factual record that are undisputed. The Murrays have set forth those undisputed facts above but restate them here for the Court's convenience:

- The parties' Mineral Deed makes no statement about reserving to the Appellants the fossils from the Property (Certification Order, 924 F.3d at 1072);
- The Murray Fossils are bones which are the remains of once living vertebrates (Certification Order, 924 F.3d at 1081);
- All bones are made of minerals (Certification Order, 924 F.3d at 1076-1077);
- The Murray Fossils as well as "junksaur" fossils are composed of the same minerals (Certification Order, 924 F.3d at 1081);
- Fossils are not mined, processed, or refined (Certification Order, 924 F.3d at 1081); and,
- Not all fossils are rare, valuable, or exceptional (Certification Order, 924 F.3d at 1077, 1081).

The established legal standard in Montana is based on Farley, discussed above, and is restated here as follows: (1) the Court looks to see whether the substance or item at issue specifically has been defined as a "mineral" under applicable Montana statute; and, (2) if the substance or item specifically has been

defined as a “mineral” in a statute, but there is still some doubt as to whether it fits the common parlance for the matter at issue (e.g. a mineral deed), the Court looks to other legal authority, include the case law of other jurisdictions to help answer the question, and also applies the rare and exceptional test to further resolve any doubts.

The Appellants apparently concede that, unless the certified question is restated to refer only to the Murray Fossils, then they lose the case because they admit on page 21 of their opening brief that not “all or even most dinosaur fossils are “minerals.”” The Murrays agree with that concession but also assert that even under a reformulation of the certified question, the Appellants lose because they do not meet the first prong of the mineral test. Moreover, the Appellants do not even meet the second prong of the test because there is no authority that holds that fossils are minerals within the common understanding of the term.

Appellants make a red herring argument concerning the Hope Diamond which is not analogous to the instant case. The case of Kentucky Diamond Mining & Developing Co. v. Kentucky Transvaal Diamond Co., 132 S.W. 397 (Ky.Ct.App. 1910), stated that all diamonds are minerals. Id. at 398. Thus, the Hope Diamond is a mineral because it is a diamond. The Hope Diamond is not a mineral because, as Appellants argue, it is rare and exceptional. Its rarity and exceptional value have nothing to do with whether it is a mineral. Instead, it is a mineral because, as the Court determined, “a diamond is a mineral.” Id.

The Appellants then proceed to make the curious argument that, if the Hope Diamond were ground into powder, its mineral composition would not change but its value would be destroyed. Grinding a diamond into dust, however, does not mean it ceases to be a “mineral” and at least one case holds that “diamond powder” is a mineral. Swiss Mfrs. Ass'n, Inc. v. U.S., 39 Cust.Ct. 227, 240, 1957 WL 9571*12 (U.S.Cust.Ct. 1957). To the contrary, Appellants provide no legal authority that holds that any diamond (whether ground into powder, or not) ceases to be a mineral because its value has been lost.

The Appellants further argue that fossils should be considered minerals just like oil and gas are commonly understood as minerals. Oil and gas, however, are defined specifically by statute in Title 70, relating to property, as minerals. See Mont. Code Ann. § 70-9-802(9). Fossils are not. Also, oil and gas have long been popularly considered minerals, and have traditionally been specifically listed in mineral reservations (like the one at issue). See e.g. Stokes v. Tutvet, 134 Mont. 250, 328 P.2d 1096 (1958) (discussing oil and gas as mineral interests generally); Mid-Northern Oil Co. v. Walker, 211 P. 353, 356 (Mont. 1922) citing Burke v. Southern Pacific R. Co., 234 U. S. 669, 676, 34 Sup. Ct. 907, 910, 58 L. Ed. 1527 (“Petroleum has long been popularly regarded as a mineral oil. As its derivation indicates, the word means ‘rock oil,’ an oily substance so named because found naturally oozing from crevices in rocks.”); Ohio Oil Co. v. State of Indiana, 177 U.S.

190, 20 S.Ct. 576, 44 L.Ed. 729 (1900) (discussing generally the characteristics of gas as a mineral). Unlike oil and gas, the Appellants seek to have the Court determine that fossils, at least the Murray Fossils, are minerals even though fossils have never been popularly or commonly regarded as such, and were not specifically included in the Appellants' mineral reservation.

The Appellants further argue that whether something is a "mineral" for legal purposes has nothing to do with whether it has organic or inorganic origins. Historically, that may be correct but the statement is misleading. The fact that courts or legislatures in the past have inartfully included items in the definition of "mineral" should not lead this Court to do the same, especially when fossils have never been popularly or commonly regarded as a "mineral."

The Appellants refer to Sierra Club v. Louisiana Dept. of Wildlife & Fisheries, 519 So.2d 836 (La.Ct.App. 1988), in support of this argument, but that case actually supports the Murrays. In Sierra Club, the issue was whether Louisiana "must follow public bidding procedures before it grants a party the right to take fossil clam and oyster shell deposits from State owned water bottoms." Id. at 837. The Court looked at certain statutes and determined that shell beds are part of Louisiana's mineral rights because Louisiana statutory law specifically stated they were included. Id. at 840 (footnote omitted). Montana statutory law does not specifically include fossils within mineral rights. The Murrays ask the Court to read Montana statutory law (as

well as Federal law) in *pari materia* with the common law to hold that dinosaur fossils are not part of the mineral estate.

The Louisiana case also makes clear that the fossils at issue were used for commercial purposes, “especially as a building material for roads and levees.” Sierra Club at 837. Thus, they are not used for “paleontological” purposes like the dinosaur fossils at issue in this case.

IV. The Court Should Consider Montana’s New Statute (HB 229).

The Appellants want the Court to ignore the will of the people of Montana as reflected in 2019 Montana Laws Ch. 136 (H.B. 229) (effective April 16, 2019) which passed both houses of the Montana Legislature unanimously in a rare display of bipartisanship. While the Murrays agree that the new law does not control this case directly, the Murrays do ask the Court to consider the new law as a statement by the people of Montana that they do not now, and never have, considered fossils to be part of the mineral estate for any purposes. The passage of this law is probably the best indication of the common understanding that mineral interests in Montana do not include fossils.

As part of their argument, the Appellants make the argument that the statute of limitations on any transaction would be two years for trespass under Mont. Code. Ann. § 27-2-207. If that is the case, then Appellants are admitting that their action in this matter is time-barred since the certified facts state that they knew about the

fossils no later than 2008 yet did not assert ownership until 2013. Thus, by their own admission, their claim to the Murray Fossils is invalid.

V. The Court Should Not Disregard the Concerns of the *Amici*.

The Appellants try to downplay the concerns of the *amici* that were raised in the Ninth Circuit. Those briefs are attached as Exhibits C and D in the Murrays' Appendix. The Appellants' arguments, however, ignore the importance of the Court's decision nationwide. The issue presented to the Court is one of first impression in the country. It will be cited as legal authority in other courts in other jurisdictions. It will likely be cited in treatises and other secondary sources. Its impact will not be limited to Montana private property owners going forward but landowners around the nation. As the *amici* point out, the importance of getting this decision right for their constituencies cannot be over-emphasized.

VI. The Court Should Consider Consistency With Federal Law.

The Appellants also want to ignore the importance of construing the term "mineral" consistent with Federal law. As set forth above, Federal law specifically excludes fossils from mineral interests. In other situations, this Court has tried to interpret Montana law consistent with Federal law. See e.g. Anderson v. ReconTrust Company, N.A., 2017 MT 313, 390 Mont. 12, 407 P.3d 692 (consumer protection); BNSF Ry. Co. v. Feit, 2012 MT 147, 365 Mont. 359, 281 P.3d 225 (discrimination laws); Timm v. Montana Dept. of Public Health and Human Services, 2008 MT 126,

343 Mont. 11, 184 P.3d 994 (Medicaid administration); State v. Reavley, 2003 MT 298, 318 Mont. 150, 79 P.3d 270 (right to counsel). Likewise, the Court should consider consistency with Federal law in making its determination in this case.

VII. The Court Should Avoid the Distinction Between Mineral and Non-Mineral Fossils for Policy Reasons.

The Appellants acknowledge that not all fossils will be considered minerals but only those “rare and valuable fossils.” On the other hand, “common and worthless fossils” will not be considered minerals. For policy reasons, this distinction is unworkable in the case of fossils.

If only rare and valuable fossils are considered “minerals” then title uncertainty and increased litigation would result. In each and every situation, the Court would have to determine whether fossils are “rare and valuable” or “common and worthless” for purposes of inclusion or exclusion from the mineral estate. Moreover, it may not be known until many years after removal from the land whether a fossil is “rare and valuable.” See e.g. <https://www.wivb.com/news/local-news/buffalo-museum-of-science-prepares-to-display-egg-stremely-rare-fossil-discovered-in-collection/> (rare bird egg found in museum collection); <https://www.geek.com/news/rare-bird-fossil-discovered-in-museum-storage-1760863/> (rare bird fossil discovered in museum storage); <http://www.denverpost.com/2007/10/30/rare-fossil-found-inside-pa-museum/> (ancient fossilized footprints found in museum collection). If the Appellants’

position was adopted, ownership litigation over the rarity and value of each fossil found on private property would proliferate. Of course, in such situations, the statute of limitations may not run until the discovery is made that a fossil is rare and valuable. See Section 27–2–102(3), MCA; Johnston v. Centennial Log Homes & Furnishings, Inc., 2013 MT 179, ¶ 28, 370 Mont. 529, 305 P.3d 781 (citation omitted).

If a museum determines later that the fossils they have acquired are “rare and valuable” and, therefore, minerals under the Appellants’ definition, the museum would have to determine who owned the mineral rights at the time it was found and track down those owners in order to acquire their rights to the fossils. Only a definition of “minerals” that excludes fossils will accomplish the goal of title certainty.

CONCLUSION

For all the foregoing reasons, the Murrays respectfully request that the Court answer the certified question in the negative.

DATED this 31st day of July, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellant Procedure, I certify that this Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double-spaced, and the word count calculated by Microsoft Office Word 2013, is 9,817 words, including all text, excluding table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 31st day of July, 2019.

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