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# ONE J

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THAT T-REX IS MINE! A NOTE ON THE  
MONTANA SUPREME COURT DECISION  
*MURRAY v. BEJ MINERALS, LLC*

BRYCE HAYDEN\*

*I. Background*

What is a mineral? Normally, when minerals come up in conversation, the average person conjures up colorful rock formations bought at a gift or pawn shop. Maybe someone in biology would consider minerals to be a product of the food a person eats for nutritional benefit. However, many landowners are familiar with mineral interests. These interests generally include the right to egress and ingress the property and extract oil and natural gas resources. Generally, all considerations are taken into account when drafting and negotiating parting the estate's surface and mineral rights, but what happens when an unanticipated substance appears and does not fall in the purview or consideration of that deed? What happens when sandstone is found and taken from the land? Who would get to benefit from that resource? The Montana Supreme Court addressed these differing understandings in *Murray v. BEJ Minerals, LLC*.<sup>1</sup> The case presented a legal duel for one of the best *Tyrannosaurus-Rex* fossils ever

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1. *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070 (9th Cir. 2019), *certifying questions to* 2020 MT 131, 400 Mont. 135, 464 P.3d 80.

found as well as an encapsulated duel between a *Ceratopsian* and *Teropod* that made national headlines.<sup>2</sup>

As exploration and extraction of minerals of land increased, many questions on the ownership of these resources came into question. Even in the twenty-first century, states struggle to allocate resources to the appropriate owner if they are different and uphold the mineral deed's interpretation to encompass or exclude the resource. The Montana Supreme Court has currently set forth a decision impacting Montana's resource ownership questions and a decision that could have implications in other states. The question was whether valuable dinosaur bones belong to a surface right owner or the mineral right owner. The court created a three-factor test that considers the language of minerals in the deed, consideration of its rarity and value, and how the substance relates and affects the surface.<sup>3</sup> However, the majority overlooked many considerations of precedent on the issue and granted the valuable resources to the wrong person.

This note will present the precedent that led towards the *Murray* decisions. It will then explain the underlying facts and procedure to reach the Montana Supreme Court. Further, it will go into detail about the majority opinion as well as the dissenting opinion. The article then will proceed to explain why Montana and other states should consider the fact comparisons of the dissent more persuasive than the majority, with a narrowly decided case such as *Murray* has presented with incredibly high stakes.

## II. Previous Law and Precedent

### A. Moving from Texas to Montana: Foundational case in mineral determination: *Heinatz v. Allen*<sup>4</sup>

*Heinatz* is a case the Montana Supreme Court relies on and is the basis for the Montana precedent. Land in Travis and Williamson counties in Texas was owned in whole by the petitioner's mother.<sup>5</sup> The mother conveyed the mineral rights to the defendant and surface rights to the

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2. *Will the Public Ever Get to See the "Dueling Dinosaurs"?* SMITHSONIAN MAGAZINE (July/August 2017), <https://www.smithsonianmag.com/science-nature/public-ever-see-dueling-dinosaurs-180963676/>.

3. *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070 (9th Cir. 2019), *certifying questions to* 2020 MT 131, 400 Mont. 135, 464 P.3d 80.

4. *Heinatz v. Allen*, 147 Tex. 512, 217 S.W.2d 994 (1949).

5. *Id.* at 995.

petitioner.<sup>6</sup> The defendants then started extracting limestone commercially.<sup>7</sup> Petitioners claimed damages from the extraction of limestone on land in which they owned only the mineral rights.<sup>8</sup> The court had to determine how limestone in Texas "relat[es] to the surface of the land, its use and value, and the method and effect of its removal."<sup>9</sup> The opinion focused on how the stripped or quarried limestone impacted the land.<sup>10</sup> Another comparison is that limestone is related to gravel or even caliche, which is deposited similarly to limestone.<sup>11</sup> Using inferences from an assortment of cases, Texas Supreme Court distinguished sand from other minerals using special value or rarity, and using it for building purposes does not render it as valuable.<sup>12</sup>

Additionally, there was a question about the limestone's extraction and how it can affect the value of the land and the surface. Using the Kentucky case *Rudd v. Hayden*, the court concluded that the interpretation of what constituted a mineral hinged on additional words such as cement to add limestone and other minerals into the word's original meaning.<sup>13</sup> The Texas Supreme Court concluded and reinforced the notion that limestone is just a building material similar to sand and has no rare or exceptional value.<sup>14</sup>

*B. Montana's First Impression: Farley v. Booth Brothers Land & Livestock Co.*

The decision in *Farley v. Booth Brothers Land & Livestock Co.* incorporated *Heinatz* and its reasoning into Montana's precedent.<sup>15</sup> The defendant owned a ranch subject to multiple agreements from the Western Energy Company to use the surface of the land for mining purposes.<sup>16</sup> A plaintiff filed a complaint claiming Western's usage of the surface.<sup>17</sup> The issue at hand was whether scoria taken from the land should count as a

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6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 996.

10. *Id.*

11. *Id.* at 996-97.

12. *Id.* at 997.

13. *Id.*

14. *Id.* at 1000.

15. 270 Mont. 1, 890 P.2d 377 (1995).

16. *Id.* at 378.

17. *Id.* at 379.

mineral or subject to the surface.<sup>18</sup> At the time the case was decided, a legally defined mineral included:

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 of processing or for stockpiling for future use, refinement, or smelting.<sup>19</sup>

A contention that arises later is that the definition of "mineral" can change due to the context and separate sentences. The court used *Hovden v. Lind* to exemplify that when a substance is not exceptionally rare and valuable, then it does not qualify as a mineral.<sup>20</sup> The court also relied on a similar case from Oklahoma, which held that normal substances become minerals if "they are rare and exceptional in character or possess a peculiar property giving them special value."<sup>21</sup> For example, scoria was listed as ordinary by its use in roadmaking, making it not a mineral. Interestingly, the court could not determine scoria's alternative use because the lower court failed to raise the issue, but the court recognized it could change its determination.<sup>22</sup> The court then created its precedent for Montana heavily relying on the determination of the rarity or special use of the substance in question. The precedent is:

substances such as sand, gravel and *limestone* are not minerals within the ordinary and natural meaning of the word unless they are rare and exceptional in character or possess a peculiar property giving them special value, 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.*<sup>23</sup>

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18. *Id.*

19. *Id.* (citing MONT. CODE ANN. § 82-4-303).

20. *Id.* at 380 (citing *Hovden v. Lind*, 301 N.W.2d, 374 (N.D. 1981)).

21. *Id.* at 380 (citing *Holland v. Dolese Co.*, 540 P.2d 549 (Okla. 1975)).

22. *Id.* at 380-381.

23. *Id.* at 380 (1995) (quoting *Holland*, 540 P.2d at 550-551) (emphasis in original).

*C. Prior Use of the Test: Hart v. Craig*

In this dispute, the appellee purchased the land from the appellant in the late 1980s, with the appellant reserving the mineral rights.<sup>24</sup> The deed listed normal minerals and additional other minerals in the land.<sup>25</sup> Appellee began taking and selling sandstone off of the land. The appellant brought suit claiming that sandstone is a mineral and therefore was part of the reservation in the conveyance.<sup>26</sup> In addressing this question of gravel, the Montana Supreme Court followed *Farley* by ruling that the substance must be rare and exceptional or used for a specific purpose, such as being refined or processed.<sup>27</sup> The court deemed sandstone as ordinary and not of high value because of its use in making everyday items like cement and glass.<sup>28</sup>

*III. Statement of the Case**A. General Facts*

Rancher George Severson of Garfield County, Montana, owned the estate at issue, which is operated as a ranch.<sup>29</sup> The land was leased in 1983 by Mary Ann and Lige Murray (Murrays), who then created a partnership with Severson to ranch the property.<sup>30</sup> In 2005, the mineral and surface estate was conveyed and separated.<sup>31</sup> A purchase agreement conveyed the Murrays to own the entire surface estate and a minority interest in the mineral estate.<sup>32</sup> The direct language of the mineral deed is as follows:

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] . . . together with the right, if any, to ingress and egress at all times for the purpose of mining, drilling, exploring, operating, and developing said lands for oil, gas, hydrocarbons, and minerals, and storing, handling, transporting, and marketing the same therefrom with the rights to

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24. *Hart v. Craig*, 2009 MT 283, 352 Mont. 209, 216 P.3d 197.

25. *Id.* at 197.

26. *Id.* at 198

27. *Id.*

28. *Id.*

29. *Murray v. BEJ Minerals, LLC*, 464 P.3d 80, 81.

30. *Id.*

31. *Id.*

32. *Id.*

remove from said lands all of the Grantor's property and improvements.<sup>33</sup>

From the available facts, three critical circumstances existed at the time of the conveyance. The first is that neither party had a suspicion that the ranch possessed the fossils.<sup>34</sup> Second, no party considered the fossils and their effect after the 2005 transfer of the mineral rights.<sup>35</sup> Lastly, there was no specific intent about who would be entitled to ownership of the fossils.<sup>36</sup> The parties conceded they were of high value and rarity.<sup>37</sup> The majority mineral estate split ownership into thirds between Robert Severson, BEJ Minerals, LLC, and RTWF LLC, which then were combined to represent BEJ as a group.<sup>38</sup> From 2006 to 2013, the Murrays found the fossilized remains of a *Ceratopsian* and *Teropod* fighting, a *Triceratops* foot and skull, and a nearly complete *Tyrannosaurus rex*.<sup>39</sup> The fossils' were held in escrow, while their value ranged into the millions of dollars.

#### *B. Procedural Posture*

For the sake of clarity, the Montana Supreme Court referred to these separate proceedings as *Murray I* and *Murray II*. The initial suit and movement for summary judgment served as *Murray I*.<sup>40</sup> Litigation started in 2013 when BEJ filed for an ownership interest in the fossils as the mineral owner.<sup>41</sup> In the Montana Sixteenth Judicial District Court, the Murrays sought a declaratory judgment that they own the fossils as the surface right owners.<sup>42</sup> The case was removed to federal court based on diversity jurisdiction; as a result, BEJ sought a declaratory judgment for ownership of the minerals, and in anticipation, requested records of the fossils and their accountings.<sup>43</sup>

Both parties moved for summary judgment and requested the court to decide ownership of the fossils.<sup>44</sup> The district court reasoned the applicable

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33. *Id.* at 81-82 (bracketing and omission in original).

34. *Id.* at 82.

35. *Id.*

36. *Id.*

37. *Id.* at 82.

38. *Id.*

39. *Id.*

40. *Id.* at 81.

41. *Murray v. Billings Garfield Land Co. (Murray I)*, 187 F.Supp.3d 1203, 1207 (2016).

42. *Id.*

43. *Id.*

44. *Id.*

test to use is *Farley*, but does not set a precedent from the rule in *Heinatz*.<sup>45</sup> In *Farley*, the court's interpretation used the plain language of the word mineral and claimed the case at hand was similar to the sandstone to the fossils found on the property; therefore, the Murrays, as surface right owners, kept ownership of the fossils.<sup>46</sup>

On appeal, the Ninth Circuit reversed *Murray I*, which then led to its opinion becoming *Murray II*.<sup>47</sup> The Ninth Circuit held despite inconsistencies in the statutory definitions, the statute indicated the fossils were, in fact, minerals.<sup>48</sup> The opinion uses the concession of its monetary value to satisfy that prong of the analysis on rarity and value.<sup>49</sup> The Ninth Circuit then *en banc* certified the question to the Montana Supreme Court to determine the issue under state law, given *Murray I* and *Murray II* for the fact and procedural background.<sup>50</sup>

#### IV. Majority Opinion's Analysis

The Montana Supreme Court first evaluated the standard of review, which was abnormal since it was a certifying question from the Ninth Circuit. When issuing the certifying question, the Montana Supreme Court received the following certifying question "an interpretation of the law as applied to the agreed facts underlying the action."<sup>51</sup> With this standard, the majority addressed the issue provided by the Ninth Circuit, "Whether, under Montana law, dinosaur fossils constitute 'minerals' for a mineral reservation."<sup>52</sup> The first notion of disagreement stemmed from the interpretation of the issue from the Ninth Circuit. The majority formulated the opinion to serve as a benchmark for future decisions by creating clear precedent on the basis that was the intent of the certifying question by the Ninth Circuit.<sup>53</sup>

The Montana Supreme Court majority first laid out the case law but faced conflicting problems of the precedents set in both *Farley* and *Hart*. The Montana Supreme Court wrestled with whether *Heinatz* was binding

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45. *Id.* at 1208.

46. *Id.* at 1209.

47. *Id.*

48. *Murray v. BEJ Minerals, LLC, (Murray II)*, 908 F.3d 437, 444 (2018).

49. *Id.* at 447.

50. *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1074 (2019).

51. *Id.* at 83 (quoting *State Farm Fire & Cas. Co. v. Bush Hog, LLC*, 2009 MT 349, ¶ 4, 353 Mont. 173, 219 P. 3d 1249).

52. *Id.*

53. *Id.*



on the court, which the lower courts had previously established that the general principles of the case were adopted.<sup>54</sup> The court moved to use *Heinatz* but doubled back to prioritizing the ordinary and natural meaning of the word and the parties' intent otherwise.<sup>55</sup> The court then used language from *Murray I* and *Heinatz* to reshape precedent and make a new rule that encompasses prior case law.<sup>56</sup> First, the court highlights in *Murray I*, "the focus of the test articulated by *Heinatz* does not turn on whether the substance is 'rare and exceptional in character.'"<sup>57</sup> The court built upon this to determine that a potential mineral's rarity and value is only one factor of the analysis.<sup>58</sup> Second, the court claimed from *Murray I*, stating that "a material's inclusion in the scientific definition of 'mineral' is not determinative."<sup>59</sup> Additionally, there must no showing of an intention to use in the conveying instrument the scientific definition.<sup>60</sup> The court added from *Heinatz* a factor that is determined by the substance's effect on the surface.<sup>61</sup>

The new test effectively created by the Montana Supreme Court has three factors that contribute to the designation. The first factor is how the language of the word "mineral" is used in the deed itself.<sup>62</sup> The second factor pertains to the substance's rarity and value as a critical consideration, but the court minimized it to a not directly decisive factor.<sup>63</sup> Lastly, the court looked at the substance's relation to and effect on the surface in its third factor.<sup>64</sup> This last factor is buried in *Heinatz* as a consideration but does not carry much weight in *Farley* and *Hart*. The court also added principals from *Murray I* to help come to the decisions on these factors. The first is the doubling down that rarity and exceptional in character are only an equal factor minimized in the case.<sup>65</sup> The court also mentioned that

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54. *Id.*

55. *Id.* at 84.

56. *Id.*

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

58. *Id.* at 84.

59. *Id.* (quoting *Murray v. Billings Garfield Land Co.*, 187 F.Supp.3d 1203 (D. Mont. 2016). *See also* *Heinatz v. Allen*, 217 S.W.2d 994, 997 (1949).

60. *See, Murray I*, 187 F. Supp. 3d at 1210; *See also Heinatz*, 217 S.W.2d at 997.

61. *Murray v. BEJ Minerals, LLC*, 464 P.3d 80, 84.

62. *Id.*

63. *Id.*

64. *Id.*

65. *See, Murray v. BEJ Minerals, LLC*, 464 P.3d 80, 84.

scientific definitions of “mineral” were not determinative unless determined to be so in the parties' intent and the conveying instrument.<sup>66</sup>

*A. The Majority's Determination of the Language of "Mineral" as Used in a Mineral Deed*

The Montana Supreme Court acknowledged that the prior litigation yielded a problem of interpreting and defining "mineral."<sup>67</sup> The court moved to look at "mineral" from the context of an entire sentence rather than just the word itself. The context of minerals in the deed is as follows: "oil, gas, hydrocarbons, and minerals in, on and under, and that may be produced from the [property]."<sup>68</sup> These combined with the rights of "mining, drilling, exploring, operating, and developing said lands for oil, gas, hydrocarbons, and minerals"<sup>69</sup> In also determining "mineral" in this context was the concept of deeds and contracts being interpreted in the same manner.<sup>70</sup>

Indicating the implications of contract law, the court interpreted the deed at the time of contraction to affect the parties' mutual assent. Additionally, as required by Montana Statute, when a contract or a deed is reduced to writing if possible, the court addressed the writing alone to solve any ambiguity.<sup>71</sup> However, because the prior courts of *Murray I* and *Murray II* moved the interpretation outside the document's four corners, the Montana Supreme Court also elected to do so.<sup>72</sup> *Farley's* notion of outside resources, where the court used two different definitions of "mineral" under Montana statutes to determine if scoria meets the definition.<sup>73</sup> The court also noted it was relying on common sense to determine the intentions in the mineral deed.<sup>74</sup>

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66. *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1074 (9th Cir. 2019), 464 P.3d 80, 84.

67. *Id.* at 85.

68. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. d (Am. Law Inst. 1971)).

69. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. d (Am. Law Inst. 1971)).

70. *Id.* at 85.

71. Mont. Code Ann. § 28-3-303 (West).

72. *Murray v. BEJ Minerals, LLC*, 464 P.3d 80, 86.

73. *Id.*

74. *Id.* at 86 (citing *First United Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 869 (4th Cir. 1989)).

The majority opinion first relied on the interpretation principles noted in *Carbon County v. Union Reserve Coal Co.*<sup>75</sup> In *Carbon County*, the parties conveyed "all coal and coal rights."<sup>76</sup> In that case, the Montana Supreme Court had to determine if the conveyance included coal seam methane gas.<sup>77</sup> After declaring that coal and coal seam methane gas were two different terms, the court then reasoned *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) applies commonly in Montana.<sup>78</sup> The majority then claimed *Carbon County* was analogous to *Murray* because fossils are excluded in the list of "oil, gas, [and] hydrocarbons."<sup>79</sup> Fossils failed to meet the general grant of minerals because fossils were excluded from the language.<sup>80</sup> Furthermore, the court noted that fossils were not given specific intent or consideration in the meaning of "mineral."<sup>81</sup>

To further the point that mineral and fossils are exclusive terms, the majority opinion cited multiple statutory definitions found in Montana. These statutes range in the area the area of law, which the majority points to Montana's rigorous interpretations as a sign that fossils have never been contemplated as a mineral. The first statute was the definition for "Metal Mine Reclamation" and lists many substances and their purposes without mentioning fossils.<sup>82</sup> Second, the Uniform Unclaimed Property Act defined minerals with a list including gas, oil, sand and gravel, road material, or other substances.<sup>83</sup> Lastly, the majority cites broad tax codes requiring the taxes owed on minerals, which omits fossils.<sup>84</sup> The majority also cited that the *Murray's* did not use the tax code as further evidence.<sup>85</sup>

The majority then proceeded to assess the reference of "fossil" under Montana laws. The term fossil was is in a different title than mineral, under Title 22: "Libraries, Art, and Antiques."<sup>86</sup> This refers to the preservation of

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75. *Carbon Cty. v. Union Reserve Coal Co.*, 271 Mont. 459, 898 P.2d 680, 681-682 (1995).

76. *Id.* (citing *Carbon Cty. v. Union Reserve Coal Co.*, 271 Mont. 459, 898 P.2d 680, 681-682 (1995)).

77. *Id.* (citing *Carbon Cty.*, 898 P.2d at 681-82).

78. *Id.* (citing *Carbon Cty.*, 898 P.2d at 681-82).

79. *Id.* at 86-87 (citing *Carbon Cty.*, 898 P.2d at 684).

80. *Id.* at 87.

81. *Id.*

82. *Id.* (quoting MONT CODE ANN. § 82-4-303(16)).

83. *Murray*, 464 P.3d 80, 87 (citing MONT CODE ANN. § 70-9-802(9)).

84. *Murray*, 464 P.3d 80, 87.

85. *Id.* at 88.

86. *Murray*, 464 P.3d 80, 88 (citing MONT. CODE ANN. § 22-3-107).

fossils and other minerals.<sup>87</sup> The majority also mentioned the statutory reference to the official Montana state fossil in Title 1: "General Laws and Definitions."<sup>88</sup> Even extending outside of statutory interpretations, the majority examined the Montana Department of Natural Resources and Conversation's use of fossil. The use of "fossil" by the department is in regard to paleontological remains and it uses the same listing format as those indicating it is expressive and not inclusive of other considerations of "minerals."<sup>89</sup> A further expansion is provided in an excerpt from a 1915 letter from a paleologist to the Commissioner of the General Land Office.<sup>90</sup>

After analyzing both sides of "mineral" and "fossil," the majority explained the relevance pertaining to the case at hand. The statutory interpretations and use of those statutes' words lend a heavy hand to their applications' context clues.<sup>91</sup> All of the mentioned statutes with the words were available and constituted a portion of relation to the deed.<sup>92</sup> The majority categorizes this as "overwhelming authority" that the terms are exclusive.<sup>93</sup> The deed is restricted to its apparent objects in which the parties intended to contract.<sup>94</sup> The court further stated that this translates to an intention for fossils not to be a part of the minerals conveyed.<sup>95</sup> The majority decided to extend that fossils are under the broad reservation of minerals in the conveyance.<sup>96</sup> The parties could have inserted these considerations and failed to do so, rendering the consideration outside the purview of their intent.<sup>97</sup> With these considerations, the factor weighs towards Murray.

#### *B. Rarity and the price tag of the mineral composition*

In the second factor, the court ascertained whether the mineral was rare and valuable, narrowly only encompassing mineral composition.<sup>98</sup> The difference is subtle but would impact the decision of the factor

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87. *Murray*, 464 P.3d 80, 88.

88. *Murray*, 464 P.3d 80, 88. (citing MONT. CODE ANN. § 22-3-107).

89. *Id.* at 88.

90. *Id.* at 89.

91. *Id.* at 90.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 91 (citing *Farley*, 270 Mont. at 7-8, 890 P.2d at 380; *Hart*, ¶¶ 6-7; *Heinatz*, 217 S.W.2d at 997).

significantly. The alternative would be that parties need only prove how valuable and rare the mineral is from a general perspective because fossils are not found everywhere and command attention and likely would meet this factor handsomely.<sup>99</sup> The majority declared that to be a unilateral decision. It would "neglect to thoroughly examine for the ordinary and natural meaning of mineral by failing to account for the use of the substance, its relation to the surface, and its method of removal."<sup>100</sup>

The main reasoning for its actual narrowing of the rule into the contents and uses stems from the *Heinatz* opinion, which states, "In our opinion substances . . . are not mineral 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."<sup>101</sup> The majority stated that it goes against the ordinary and accepted meaning of "mineral" if aspects like usefulness or the content of the mineral render it valuable for refinement and economic exploration.<sup>102</sup> However, *Heinatz* is merely persuasive, but the court claims this notion is reinforced in *Farley* and *Hart*.<sup>103</sup> When determining sandstone, in *Hart*, the court claimed that "this rock is not very special, nor is it exceptionally rare and valuable. It does not have to be changed, refined or processed to be used commercially."<sup>104</sup> The court drew the comparison from sandstone to fossils because they do not go through refinement or processing.

The majority attempted to draw a line in the literal meaning of rare and valuable fossils, but these and others are not rare and valuable in precedent terms. If the only question asked was in a literal sense of the words "rare" and "valuable," it would be certain that most fossils would qualify. Fossils are rare partly due to fossils' exclusivity since they are evidence of organisms from years ago in a preserved space. These fossils also help bring understanding to the times before humanity and paint a picture of a world with different organisms. The court recognized these considerations but distinguished the meanings of rare and valuable. The majority relied on the *Murray I* district court opinion, which stated that not all dinosaur fossils are considered rare and valuable.<sup>105</sup> As a result, the fossils do not meet the

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99. *Id.*

100. *Id.* at 90-91.

101. *Id.* at 91 (citing *Heinatz*, 217 S.W.2d at 997).

102. *Id.*

103. *Id.*

104. *Id.* (quoting *Hart*, ¶ 5) (emphasis omitted).

105. *Murray*, 464 P.3d 80, 91 (citing *Murray I*, 187 F. Supp. 3d at 1207).

rare and valuable standard because of their mineral properties.<sup>106</sup> The majority then pulls from the dissenting opinion in *Murray II*, stating, "value turns on characteristics other than mineral composition, such as the completeness of specimen, the species of dinosaur, and how well the fossil is persevered."<sup>107</sup> Another distinction is that fossils are not sourced and extracted as oil or gas but found by luck and are not valuable because of their mineral properties.<sup>108</sup> On the contrary, the fossils are only valuable because they are historic.<sup>109</sup> The majority concludes since the fossil is not rare and valuable due to its usefulness and composition, it is not under the ordinary and natural meaning of the word used in the general mineral deed.<sup>110</sup>

### C. How Fossils Relate and Effect the Surface

The court used *Heinatz* as a comparison to help distinguish if these "fossils" were "minerals" and how they relate to the surface estate. Another consideration the Montana Supreme Court implemented was also how the "mineral" effects the surface in its extraction. Part of the *Heinatz* analysis revolves around whether limestone was related to the surface and its effect on the surface.<sup>111</sup> The Texas Supreme Court held that limestone was related to the surface because it is "found exposed on the surface" and, in addition, is generally found on all land at "varying and usually shallow depths."<sup>112</sup> In the case of limestone, it is "sometimes found on the top of the surface and removed by quarrying after scraping off the overlying caliche [sic] or other top soil."<sup>113</sup> With this combined, the Texas Supreme Court concluded that because limestone is exposed near the top of the surface, and so it is part of the soil itself, it should be considered a part of the surface estate.<sup>114</sup>

Concerning how limestone affects the surface, it is destroyed by quarrying the land.<sup>115</sup> Quarrying found in *Heinatz* is a process of stripping back land to excavate the limestone, diminishing the agricultural value of an additional five acres for every acre stripped.<sup>116</sup> The Texas Supreme

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106. *Id.*

107. *Id.* (citing *Murray II*, 908 F.3d at 450 (Murguia, J., dissenting)).

108. *Id.*

109. *Id.*

110. *Id.* at 92.

111. *Id.*

112. *Heinatz v. Allen*, 147 Tex. 512, 217 S.W.2d 994, 997 (1949).

113. *Id.*

114. *Id.*

115. *Id.* at 996.

116. *Id.*

Court held that this destructive manner of excavation was not indicative of being a part of the surface estate but was helpful in its determination towards that conclusion.<sup>117</sup>

The Montana Supreme Court moved that the non-binding Texas Supreme Court's analysis of limestone is analogous to fossils related to the soil. As with limestone sometimes being exposed on the surface, fossils can be found by surveying the land by driving or walking to look for a sign of a fossil sticking out.<sup>118</sup> Like limestone, the Montana Supreme Court found that the soil's natural events and erosion could unearth and make fossils visible from the surface.<sup>119</sup> Therefore, because it is so close to the surface, the fossils, in this case, bear a strong relation to the surface estate rather than the mineral estate.<sup>120</sup>

The Montana Supreme Court also found that the extraction of fossils is very hard on the surface and affects it significantly, similar to the limestone in *Heinatz*.<sup>121</sup> Because the extraction is done prudently, and it generally creates interferences with the use of the surface.<sup>122</sup> *Heinatz* used the effect on the surface to help distinguish limestone as a part of the surface estate, which helped lead the Montana Supreme Court to find the same conclusion. The majority opinion did recognize that a panel in *Murray II* viewed "the quantity, quality, or type of substances present underneath the land may be unknown."<sup>123</sup> Additionally, the Montana Supreme Court acknowledged the panel in *Murray II* stated that "the purpose of retaining or acquiring a mineral estate is to extract something valuable from that land."<sup>124</sup> However, the Montana Court did disagree with the second premise due to the surface estate's effect and that the unknown value proposed does not outweigh this effect.<sup>125</sup> The court also acknowledged that the surface right owners also acquired that interest to find value and should not be pushed aside by someone different who owned the mineral rights.<sup>126</sup>

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117. *Id.* at 998.

118. *Murray v. BEJ Minerals, LLC*, 464 P.3d 80, 92.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* (quoting *Murray II*, 908 F.3d at 447).

124. *Id.* (quoting *Murray II*, 908 F.3d at 447).

125. *Id.*

126. *Id.*

### V. The Concurring Opinion

Justice Laurie McKinnon agreed with the majority's holding but wrote separately to distinguish a tool that could have saved the court from hassling with the dictionary and statutory terms. To reinforce the approach, Justice McKinnon displayed the disparities using both dictionary and statutory terms using the finding in *Murray I* and *Murray II*. In Justice McKinnon's example, *Murray I* held that these definitions "largely 'focus[ed] the mining of hard substances or oil and gas that are primarily extracted for future refinement and economic purposes.'"<sup>127</sup> This determination led the court in *Murray I* to find that fossils are not a part of the mineral estate because of *Heinatz* and the guidance of disregarding the word mineral's technical term.<sup>128</sup> Subsequently, the court in *Murray II* "methodically distinguished each statutory, dictionary, and regulatory definition considered significant to the court in *Murray I*."<sup>129</sup>

To further promote that dictionaries are inferior forms of analysis, Justice McKinnon provides that courts misuse dictionaries. Justice McKinnon provides that in *Murray II*, a definition by *Murray I* was secondary and provided no foundation for that assertion.<sup>130</sup> A court could conclude that a dictionary meaning across various sources could provide a different meaning and does not provide a proper conclusion.<sup>131</sup> Finally, before introducing their solution, Justice McKinnon explained that different periods of definitions only provide for the meaning during that time that does not expand to encompass an ordinary meaning. This is illustrated by *Murray II* that used BLACK'S LAW DICTIONARY and conflated that source to be a common usage of "mineral."<sup>132</sup>

In the concurring opinion, Justice McKinnon suggested implementing "[a]n electronic corpus containing a vast collection of written and spoken English."<sup>133</sup> An electronic corpus is a database that generates the most common words that are paired around four words or fewer within a mineral from a vast amount of text.<sup>134</sup> These paired words are "collocates" and, if used with minerals, can assess the word's attested meaning.<sup>135</sup>

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127. *Id.* at 93 (quoting *Murray I*, 187 F. Supp. 3d at 1211).

128. *Id.* at 93.

129. *Id.* at 93 (citing *Murray II*, 908 F. 3d at 445, 446 n. 9).

130. *Id.* at 94.

131. *Id.*

132. *Id.*

133. *Id.* at 95.

134. *Id.*

135. *Id.* (quoting *Rasabout*, 356 P.3d at 1281).



Using "mineral" as the tested word for an electronic corpus, the most relevant nouns found were "resource," "oil," and "deposit."<sup>136</sup> In the case of verbs found near "mineral" using an electronic corpus was "extract" and "mine."<sup>137</sup> The noun "fossil" was found sixty-nine times compared to the other listed nouns, which received over 200 results. Since the verbs and nouns conform closer to *Murray I* characterization of the ordinary meaning, the concurrence was persuaded with the majority's finding.<sup>138</sup> Because mineral is not found with fossil and cannot be attributed to that definition, it could not be a part of the mineral estate.

#### *VI. The Dissenting Opinion*

The dissenting opinion, written by Justice Ingrid Gustafson, criticized the majority in the same order as its analysis; therefore, it moved from the certifying question and then through each factor. The first divergence was the interpretation of the certifying question by the majority opinion. Justice Gustafson interpreted the certifying question as being narrower and a fact-specific inquiry compared to the broad overarching analysis that Justice Laurie McKinnon applied in the majority opinion.<sup>139</sup> The dissent cited that this was a fact-specific situation due to precedent such as *Farley* and *Hart* being fact-intensive opinions.<sup>140</sup> Therefore the dissent phrased the certifying question as follows, "[w]hether, under Montana law, these dinosaur fossils constitute 'minerals' for the purpose of a mineral reservation."<sup>141</sup>

Justice Gustafson favored the two-prong approach by Montana precedent of *Farley* that created the first prong regarding whether the substance comprised of minerals and secondly whether the substance is rare and exception or possession a peculiar property giving it value.<sup>142</sup> The two facts that weighed in BEJ's favor in the analysis of this test would be the parties did not dispute the mineral composition being 100% of the fossils found and the undisputed fact they were monetarily valuable.<sup>143</sup> Instead, the

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136. *Id.* at 95.

137. *Id.* at 95-96.

138. *Id.* at 96. (The *Murray I* characterization of plain and ordinary was "the common understanding of 'mineral' includes the mining of a hard compound or oil and gas for refinement and economic exploration." *Murray I*, 187 F. Supp. 3d at 1212).

139. *Id.* at 96.

140. *Id.*

141. *Id.* (The only difference between the proposed certifying questions would be the changing of "these" to denote a fact specific inquiry in the dissents proposition).

142. *Id.* at 97.

143. *Id.*

dissent criticized the long search of statutes for determining "mineral" in its first prong by pointing out inconsistencies in its analysis. The first was the use of MCA § 82-4-303(16) that defines a mineral as "any ore, rock, or substance . . . that is taken from below the surface or from the surface of the earth for . . . other subsequent use."<sup>144</sup> The fossils met this definition that the majority cited by being taken from the surface and used subsequently for scientific research and exhibits.<sup>145</sup> Another relevant statute cited by the dissent is MCA § 15-38-103(3) that defined "mineral" to be products that are "nonrenewable merchantable products extracted from the surface or subsurface of the state of Montana."<sup>146</sup> Fossils are not renewable and are very sought-after products that, in this case, were extracted from the state of Montana and, according to the dissent, met the definition of the statute.<sup>147</sup>

The dissent pointed out that a scientific determination would have been a better alternative to struggling through statutes that purport many different meanings.<sup>148</sup> The alternative proposed is to shift through statutes and discredit the parties for not expressly indicating dinosaurs' fossils in the mineral deed.<sup>149</sup> In this case, it was agreed upon that neither party had even a fleeting thought about fossils being a portion retained or conveyed.<sup>150</sup> The dissent deemed the majority "whittles its meaning in the deed down to nothingness by finding the failure to affirmatively, and prospectively, list a substance which is 100% composed of minerals in a mineral reservation somehow means that a substance is now a mineral."<sup>151</sup>

According to Justice Gustafson, the majority created an entirely new test that stripped away the original test under *Hart* and *Farley*.<sup>152</sup> The dissent pointed out that *Heinatz* and its language being "to the rare and exceptional qualities of the substance, not its mineral composition."<sup>153</sup> The dissent points out the disparities in this logic by an analogous example of diamonds and fossils.<sup>154</sup> Diamonds are made of carbon atoms, which are an abundant element that is not rare.<sup>155</sup> According to the majority's new test, diamonds

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144. *Id.* (quoting MONT. CODE ANN. § 82-4-303(16)).

145. *Id.* at 98.

146. *Id.* (quoting MONT. CODE ANN. § 15-38-103(3)).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 99.

153. *Id.*

154. *Id.* at 99.

155. *Id.*

are not rare and valuable because they are composed of carbon, which was abundant. Fossils would fall under the same logic as they are composed of "hydroxyapatite and/or francolite, which are not necessarily rare and valuable on their own."<sup>156</sup>

The last substantive point the dissent made is its criticism of what the opinion called "grafting on a third prong."<sup>157</sup> The dissent recognized that the substance's relation to the surface was mentioned in *Heinatz* but never adopted in the controlling precedent of *Hart* and *Farley*, which only provided for the two-prong test. Furthermore, Judge Gustafson and the dissent suggested the need itself to the indicated relation of the surface that is required in the analysis by the language. "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] (emphasis added)."<sup>158</sup> By that language, the deed demonstrated the parties contemplated the existence of minerals on the surface and did not need to be examined by the court.<sup>159</sup>

#### *VII. Argument in Support of the Dissenting Opinion*

Justice Gustafson indicated a problem that will soon arise from the opinion by stating, "[T]he Court today has upended this simple and clear guidance. To reach such a result, the Court crafts an new, convoluted, and opaque three-factor test that will spawn more questions than it answers."<sup>160</sup> The narrow scope of the problem of finding fossils in Montana specifically is now alleviated due to the Montana Legislature in 2019 passing legislation that allocated fossils under the surface estate unless clearly and expressly conveyed in the mineral deed.<sup>161</sup> While it is now statutorily provided in Montana, that does not alleviate what the majorities new test may do in the future for other states in which a similar scenario happens with either fossils or a "mineral" that has not been determined yet. For example, suppose a state were to have little case law in the area of mineral determination. In that case, the *Murray* decisions could lead to this outcome, which has circumvented the precedent available through *Hart* and *Farley* as well as a foundational case as *Heinatz*. Because the majority opinion's persuasive implications are a dual threat to the analysis of not just fossils but other

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156. *Id.*

157. *Id.*

158. *Id.* at 99-100.

159. *Id.* at 100.

160. *Id.*

161. MONT. CODE ANN. § 1-4-112 (formally H.B. 223 referenced in the opinion).

undetermined minerals on where they belong among the surface or mineral estate, it is important to criticize the lack of clarity and disregard for precedent the majority demonstrated.

The majority and dissent are split on the certifying question's scope, transforming the inquiry from a more fact-specific inquiry or a broad inquiry.<sup>162</sup> The dissent provided that the certifying question should be interpreted narrowly.<sup>163</sup> Under Montana law, the Montana Supreme Court may reformulate the question upon receiving the certifying question.<sup>164</sup> The majority's broad inquiry argument is stymied because the Montana legislature already answered the broad question, which leaves a fact intensive inquiry suggested by the dissent.<sup>165</sup> The main determination in light of MCA § 1-4-112 only leaves the implications, in this case, to follow precedent and use a fact-specific inquiry.

Following *Farley* and *Hart's* precedent, the analysis scientifically is analogous, which both were found to be minerals, but absent a rare and exceptional character. Scoria, in the case of *Farley*, was found to have 100% mineral composition.<sup>166</sup> As well as in *Hart*, the composition of sandstone was 100%.<sup>167</sup> It should have a greater weight ordinarily that fossils are composed of 100% minerals, such as hydroxylapatite and/or francolite, in the majority opinion.<sup>168</sup> Regardless, there is a flaw and uncertainty of looking at the dictionary and statutory definitions.<sup>169</sup> Even more evident is the concurring opinion, written by Justice McKinnon, suggesting the use of an electronic corpus that has clear flaws.<sup>170</sup> MCA § 82-4-303(16) provides a clear example of disagreement.<sup>171</sup> The Murrays proposed this statute as a reinforcement, but the dissent counters that it does meet that being a substance made of minerals, taken from the surface for use in exhibits. The majority rebutted this proposition that fossils' mineral properties do not make them valuable compared to the properties of oil and gas that makes them valuable. However, the second prong in *Farley* that was clear in *Heinatz* there is a portion to evaluate value and use. The

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162. *Murray*, 464 P.3d 80, 83.

163. *Id.* at 97.

164. M. R. App. P. 15(6)(a)(iii).

165. *Murray*, 464 P.3d 80, 96.

166. *Id.* at 97 (citing *Farley*, 270 Mont. at 7-8).

167. *Id.* (citing *Hart v. Craig*, 352 Mont. 209 ¶ 6).

168. *Id.* at 98.

169. See *Murray v. BEJ Minerals, LLC*, 908 F.3d 437, 442 (9th Cir. 2018).

170. *Id.* *Murray*, 464 P.3d 80, 95.

171. *Id.* at 98.

analogy used is diamonds not being valuable because the properties of diamonds are carbon, which is abundant.<sup>172</sup> It is hard to reconcile that diamonds are not valuable.

The dissent is persuasive in this fact because it clearly demonstrates that statutes vary in context and change the meaning of what constitutes a "mineral."<sup>173</sup> The capability to determine the composition of a substance can be distinguished as a mineral that should take a more significant portion in the ordinary and natural meaning of a mineral. The dissent phrases this distinction as, "[T]he Court should accept the undisputed fact that these fossils are scientifically minerals, recognize that the definition of mineral can differ according to the context in which it is used, and move on to the second part of *Farley* test." It is hard to reconcile that because the distinction was not contemplated in the mineral deed, the ordinary meaning of minerals and a fossil that had a composition of 100% minerals would not be in that substance bearing clear statute.

The majority cites the following for their argument that the composition of a mineral is what is determined as rare and valuable, "In our opinion substances . . . are not minerals within the ordinary and natural meaning of the word unless they are rare and exceptional character or possess a peculiar peripety giving them special value."<sup>174</sup> The court claimed this speaks to the resourcefulness demonstrated in *Hart* because sandstone does not have to be changed to be used commercially.<sup>175</sup> The dissent continues a functional analysis of a diamond, rare and valuable outside of its composition of carbon. There is no indication in *Heinatz* that mineral composition is what must be valued monetarily or rare. The explicit language speaks to the substance.<sup>176</sup> The substance is not to be confused with composition but to be the fossil itself or, in the dissent's analogy, the diamond itself.

The dissent correctly points out that this expanded reading of *Heinatz* to include an effect on the surface factor is not seen in *Hart* and *Farley's* precedent cases. This prong also creates doubt and uncertainty for the future. Therefore, because it is a factor in the analysis, there must be thorough discussion and building of case law to establish the depths of the surface estate and mineral estate, and there they split.<sup>177</sup> Another dimension to the factor on if the depth is an issue or is it the destruction that the

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172. *Id.* at 99.

173. *See Farley*, 270 Mont. at 6.

174. *Murray v. BEJ Minerals, LLC*, 464 P.3d 80, 91.

175. *Id.* (citing *Hart v. Craig*, 352 Mont. 209 ¶ 5).

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

177. *See Murray*, 464 P.3d 80, 100.

extraction causes that is the determination?<sup>178</sup> This determination was not a consideration in Montana and now confuses an opinion that was decided to bring clarity. With all three factors being established, it is clear that the dissent follows precedent instead of creating a new grafted factored list to determine minerals in Montana.

### *VIII. Conclusion*

Statutorily it is now a non-issue that fossils are a part of the surface estate and decided in favor of the Murray's. However, an issue will soon arise in other states where fossils or other minerals are found. Courts could incline to use the line of *Murray* cases to be persuasive in subsequent outcomes. However, the dissenting opinion should be the most persuasive as it provides the necessary interpretation consistent in *Heinatz*, *Farley*, and *Hart* that would have made this analysis logical and linear. Because it correctly follows precedent and disproves every point, and creates a new test to stray away from precedent, it is the sound and logical opinion that should have prevailed.

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178. *Murray*, 464 P.3d 80, 100.