No. 16-35506

In the United States Court of Appeals
For The Ninth Circuit

MARY ANN MURRAY and LIGE M. MURRAY,
Plaintiffs-Counter-Defendants-Appellees,
v.
BEJ MINERALS, LLC and RTWF, LLC,
Defendants-Counter-Plaintiffs-Appellants.

Appeal from United States District Court for the District of Montana,
Billings Division
Civil Case No. CV-14-00106
The Honorable Susan P. Watters, U.S. District Court Judge, Presiding

UNITED PROPERTY OWNERS OF MONTANA (UPOM) AMICUS BRIEF IN SUPPORT OF PLAINTIFFS-COUNTER-DEFENDANTS-APPELLEES MARY ANN MURRAY AND LIGE M. MURRAY'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae United Property Owners of Montana (UPOM) is the leading private property rights organization in the State of Montana. It is headquartered in Helena, Montana, and herewith discloses that it has no parent corporation and it issues no stock.

Dated December 31, 2018

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURAIE[1]

Amicus Curiae, UPOM is the largest grassroots organization dedicated to protecting the expectations and rights of private property owners across the State of Montana. It has hundreds of members owning collectively more than 1 million acres of deeded private land in Montana. Amicus is dedicating to preserving ranching and use of the surface estate for agriculture as a way of life in Montana.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case of first impression pits the rights of commercial extraction companies holding title under a general mineral deed against the rights and expectations of Montana ranchers owning the surface estate in fee title.

The Panel's split 2-1 decision turns a century of Montana conveyancing practice and custom on its head, unjustly expanding the mineral estate to include fossils at the uncompenstated expense of the fee owners (surface estate) of the surface estate.

[1] Federal Rules of Appellate Procedure 29 (a)(2). Amicus affirms that no counsel for a party authored this brief in whole or part. Amicus affirms that no person other than Amicus or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. Federal Rules of Appellate Procedure 29 (a)(4)(e).

In addition, the Panel's decision has broad, statewide implications for all Montana landowners. In this context, Amicus is very concerned that the Panel's decision amounts to what U.S. Supreme Court Associate Justices Scalia and Thomas have referred to as a judicial takings, e.g., a court decision that confiscates long established property rights without compensation. *See e.g., Stop the Beach Renourishment v. Fla. Dept. of Envtl Prot*., 130 S. Ct. 2592 (2010). Such concern is particularly warranted in instances when the split mineral estate is owned by the state or federal government, which is commonplace across Montana.

The Panel's erroneous legal analysis and potentially unconstitutional holding can be avoided now by *en banc* rehearing with correct application of Montana law or, alternatively, the Court *en banc* applying a narrower legal analysis impacting only these parties, e.g., applying a well-settled contract interpretation rule requiring ambiguities in contracts and deeds relating to real property to be resolved against the drafter. (Here, the extraction companies' predecessor, Severson, drafted the general mineral deed now at issue.) Finally, in addition, or in the alternative to the foregoing, all of these dire consequences could be avoided if the instant relief sought is granted or this legal question is certified for resolution by the Montana Supreme Court.

The Panel's 2-1 decision is the first instance in the history of Montana in which any institution has tried to define the term "minerals" resulting from geologic processes to include *ferae naturae* and their biological remains.

Since territorial times, Montana law has recognized the fee owner's (surface estate) right to control who may take wild animals found on private property. The law governing the taking of live wild animals, *ferae naturae,* has been followed in practice and custom with respect to biological remains. Pursuant to this custom and practice, fee owners of the surface estate have granted rights and privileges in the biological remains of wildlife, including prehistoric biological remains now known as fossils. Amicus believes that literally untold tens of thousands of fossils have been disposed of by the fee owners of private surface interests across Montana. Unfortunately, the Panel's 2-1 decision is an outlier standing against the tide of custom and practice, if not the law itself.

The custom and practice perhaps reflects the undisputed right of the surface owner to control access and possession of *ferae naturae,* whether living or dead, as well as generally well-settled federal law governing this issue upon federal public lands. As early as 1915, the US Department of the Interior made clear that mineral rights are exclusive of any right to enter upon the surface estate and explore for or extract the biological remains referred to as fossils.

En banc review is required to prevent a judicial taking in this case, to avoid the clear error the Panel committed in applying Montana law, and to maintain the rights and expectations of Montana landowners. In the alternative, or both, this is precisely the type of case that warrants this Court certifying the legal question at issue for resolution by the forum state. The forum state is Montana, the "treasure state," whose history is rich for not only the discovery and preservation of biological remains known as fossils but also for the discovery, extraction and refining of minerals, which result from geologic processes distinct from the biologic processes impacting old animal bones. Accordingly, the Montana Supreme Court is uniquely situated to resolve the legal question presented here over the meaning of the term "mineral" in an instrument containing a general grant of minerals.

ARGUMENT

I. The Panel Decision Raises an Issue of Exceptional Importance by Imposing Uncertainty on Private Property owners of the State of Montana.

A. By Reversing A Widely Accepted Understanding of Surface Property Rights, the Panel Decision Subjects Property Transfers to Uncertainty Regarding the Relative Rights in a Split Estate.

For more than a century the fee owner (surface estate) has controlled the disposition of wild animal bones and other biological specimens situated on private land.

Not a single instance exists in Montana history – until this Panel's 2-1 decision – when an owner of any interest in private land other than the fee owner has even claimed, let alone succeeded in acquiring a right in or to proceeds from fossils.

This point cannot be underscored enough: there is no case law, no agency determination, no scholarly treatise nor any other academic paper in Montana, including any known publication by either the Montana School of Law at the University of Montana in Missoula, or the Montana School of Mines in Butte, asserting that the term "minerals" in a general mineral grant includes fossils or any other biological remains of wildlife *ferae naturae.*

At the same time, it cannot be questioned that literally untold tens of thousands of fossils have been transferred, sold and otherwise controlled and disposed of by owners of the fee title (surface estate), without regard to the separate and distinct interests of the owners of the mineral estate. This is well settled custom and practice across Montana, without a single outlier, until the Panel's 2-1 decision.

Two legal theories have driven this result. First, Montana fee owners as a matter of law control who can access private land and take wild animals *ferae naturae*. It easily follows that the death of such creatures causes no change in the legal status of who controls their remains, no matter how old, nor what biological

processes may occur in the interim. The biological remains of the wild creatures at issue here are now deemed by science to be "fossils," through the biological processes mutually exclusive from the geological processes that generate "minerals." There is no logical reason to cut off the fee title (surface estate) owner's right to control disposition of biological specimens derived from wildlife *ferae naturae*.

The second reason for this century's old, uniform practice and custom lies in the development of federal law, which clearly distinguishes fossils from minerals. This occurred in the context of a determination of whether fossil remains of dinosaurs were minerals, making those lands subject to the requirements of a mining claim in order to recover fossils. In Decisions Related to State Lands, Earl Douglass, the Secretary of the Interior applied a test for determining the whether a substance is a mineral.

a. Whether the substance is recognized as mineral according to its chemical composition according to standard authorities. The opinion found that fossils were not recognized as a mineral by standard authorities.

b. Whether the substance is classified as a mineral in trade or commerce. Fossils are not so classified as a mineral in trade or commerce.

c. Whether the substance has economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts. Fossils do not possess this economic value.

In a landmark case in Montana, the Montana Supreme Court defined land as all encompassing:

> "Land," says Blackstone, "in its legal signification has an indefinite extent, upwards as well as downwards; whoever owns the land possesses all the space upwards to an indefinite extent; such is the maxim of the law." Cooley's Blackstone, Book II, 18; vol. 1, 445; Kent's Com. 401.

Herrin v. Sutherland, 74 Mont. 587, 241 P. 328, 332 (1925).

In that same case the court recognized the comparable right of ownership to that which exists on the surface and early statutes addressed the ownership of wild animals upon the land: 16 Section 6665, R. C. 1921, declares:

> "Animals wild by nature are the subjects of ownership, while living, only when on the land of the person claiming them, or when tamed, or taken or held in the possession, or disabled and immediately pursued."

Herrin, 241 P. at 333 (1925).

It follows that the remains of wild animals would likewise be controlled by the fee owner of the land (surface estate). And, indeed, the century's old custom and practice in Montana follows this fundamental rule of law. For example, with respect to the searching, collection and sale of biological remains such as antlers and wild animal skulls and other bones, including those that could be classified as fossils by the biologic processes they've incurred, the fee owner of the land

(surface owner) owns and controls those attributes of the land, not the owners of the mineral estate.

Despite this historic context, the Panel has adopted a new and erroneous legal analysis that upends the well established custom and practice recognizing the fee owner's (surface estate) control of biological remains (fossils) situated within the owners' lands. The decision has statewide impact on all landowners, including the members of Amicus UPOM.

This Panel's 2-1 decision marks the end of the relative certainty of Montana's century-old custom and practice vis-à-vis the competing rights of ranchers owning fee title to land (surface estate) and mineral extraction companies owning minerals by operation of general mineral grants, like the grant in this case. Uncertainty now reigns as between the fee owner (surface estate) and the mineral estate owner.

In addition, fee owners (surface estate) are potentially exposed to legal liability from both the federal government and the State of Montana, which both own mineral interests in private fee title lands. It is generally illegal to collect or sell biological specimens, like fossils, from public land absent permitting by the government under one or more agencies.

In addition to the foregoing, the Montana School of Mines has since 1963 published a survey of the minerals found in Montana. At no time has the School of

Mines classified fossils as minerals. Moreover, to the extent these biological specimens contain some substances known as minerals – those minerals are not recognized under Montana's survey.

One does not have to go far to make a better analysis – to acknowledge the types of minerals that are common in each area of the state with some acceptance of the disruption that will occur to the use of the surface estate. Mineral and Water Resources of Montana, not only lists every mineral found in Montana, the publication tracks the extraction and development of each mineral, the type of geological structure likely to produce each mineral, and the likely disruption to the surface estate. Mineral and Water Resources of Montana does not define a dinosaur fossil as a mineral. The expectation of landowners can be pretty clearly identified based on science and personal knowledge of the area.

With this unprecedented decision the Amicus felt strongly enough about this misapprehension of law, that it has requested a bill be introduced in the next Montana Legislative session that specifically excludes fossils from designation as a mineral. A copy of the bill is attached.

B. The Panel Decision Could Inadvertently Subject a Significant—and Arbitrary—Subset of Montana Fossils to Federal Regulation

Originally, public domain land was made available for claim by individuals as either mineral or non-mineral land.

> . . . title to the entire land was disposed of on the basis of the classification. . . .With respect to land deemed mineral in character, the mining laws provided incentives for the discovery and exploitation of minerals, but the land could not be disposed of under the major land-grant statutes.

Watt v. W. Nuclear, Inc., 462 U.S. 36, 47–48 (1983). Because the United States had a large stake in the development of mineral resources, the land grant statutes eliminated the classification of the land as mineral or non-mineral and instead the United States reserved all mineral rights to land granted for homestead or other surface uses. *Id.* at 50. This ensured that the surface and subsurface resources of each parcel of land could be used to its greatest value.

As a result, much of the land used in ranching was granted to homesteaders with mineral rights reserved by the United States. If fossils were discovered and removed landowners are subject to allegations that they have removed minerals without the authority of the government.

The opening paragraph of the 2-1 opinion of the three judge panel describes in fairy tale fashion the story of a duel between two dinosaurs, 66 million years ago, as the basis for this litigation. This case is important to the property owners of Montana to preserve the strong economic and cultural history of mineral extraction and to protect the private property rights of Montanans with split estate ownership. Resolution of this case does not require an examination of dictionary definitions of minerals and fossils. It requires an examination of Montana's history of mineral

extraction and the scientific, cultural and legal descriptions of the State's minerals and the legal principles that attach to the nature of the ownership.

Montana is a renowned mineral extraction estate. Against that background not a single case has ever found that fossils belong to the mineral estate.

II. The Extraordinary Consequences of the Panel's Error Result From A Misapplication of Scientific Principles and Montana Law

A. The Panel's Definition of "Mineral" Ignores the Legal Authority that exists to Preclude a Finding that a Fossil is a Mineral.

The opinion in this case examines the term "mineral" in the reservation of a mineral right in its "ordinary and popular sense unless the parties use the words in a technical sense or unless the parties give a special meaning to them by usage." *Murray v. BEJ Minerals, LLC*, 908 F.3d 437, 442 (9th Cir. 2018). The opinion then reviews dictionary definitions to determine the ordinary meaning of a word, concluding that the ordinary dictionary definition does not **exclude** dinosaur fossils as a mineral so it must include fossils. The parties do not agree that fossils fall within the scientific definition of minerals. The parties do agree on which minerals are contained in these fossils. A scientific definition of minerals is more likely to be identified in scientific publications. A legal definition of minerals is more likely to be identified in statutes or case law. Instead the opinion cites Webster's:

> under the *Webster's* definition, the Montana Fossils are clearly "naturally occurring homogeneous ... solid substances ... obtained for man's use." *Webster's* 1437. Although it could be argued that dinosaur fossils are

> unlike oil, gas, coal, and other substances traditionally thought of as minerals because they are not used as fuel, neither are many of the other substances specifically listed in the *Webster's* definition, such as salt, sand, and gravel.[2]

Other courts have considered these same or similar substances to determine whether they are minerals, without relying upon Webster's. It should be noted that the District Court opinion relied upon those cases from state and federal courts, holding that sand, gravel and scoria were not minerals:

> The Court favorably quoted a North Dakota case which held that "materials like gravel, clay and scoria are not ordinarily classified as minerals because they are not exceptionally rare and valuable." *Id.* at 380 (quoting *Hovden v. Lind*, 301 N.W.2d 374, 378 (N.D.1981)). The Court also favorably quoted an Oklahoma case which held "that substances such as sand, gravel and limestone are not minerals within the ordinary and natural meaning of the word unless they are rare and exceptional in character or possess a peculiar property giving them special value." *Farley*, 890 P.2d at 380

Murray v. Billings Garfield Land Co., 187 F. Supp. 3d 1203, 1208 (D. Mont. 2016), *rev'd and remanded sub nom. Murray v. BEJ Minerals, LLC*, 908 F.3d 437 (9th Cir. 2018)

The Federal District Court judge, Hon. Susan Watters, in her capacity as a state district court judge was upheld by the Montana Supreme Court in her analysis of whether sandstone is a mineral:

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[2] Dictionary definitions of the term, minerals has long been discouraged. ". . . the word "minerals" is "used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case." *Northern Pacific R. Co. v. Soderberg,* 188 U.S. 526, 530, 23 S. Ct. 365, 367, 47 L. Ed. 575 (1903).

> In this case, we are dealing with a general mineral reservation containing the word "mineral" but not stating that sandstone is a mineral that is reserved. Thus, our task is to analyze whether the sandstone in question falls within the category of "minerals" in the reservation.

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

These clear statements of law that define certain substances as a mineral and others as not, also support the request that this case be certified to the Montana Supreme Court for a determination of whether fossils are minerals. The disregard of legal precedent of the Panel decision requires *en banc* review to rely upon recognized legal authority for the definition of a mineral.

B. The Panel Decision Ignores The Body of Scientific Knowledge Regarding the Minerals that Exist in Montana and a Means to Measure Their Value

Noted engineer and surveyor, A. E. Weissenborn, U.S. Geological Survey, summarized the significance of minerals to Montana in the introduction to Mineral and Water Resources of Montana:

> Montana is known as the Treasure State because of the richness and variety of its mineral resources, and the State's economy from its beginning has been closely tied to its mineral wealth. It was the discovery of gold that in the 1860's brought the first permanent settlers to what is now the State of Montana, and it was the copper mines of Butte that in the early 1880's brought the railroads to Montana, thus facilitating the settlement of the country. . . . Montana mineral production has made important contributions to both the local and the national economy . . . Strategic and critical metals and minerals from the State's mines have contributed significantly to the national security at times when these were urgently needed.

There are extensive scientific studies that recognize the minerals found in the state of Montana. The seminal study and subsequent publication of the identification of minerals located in Montana is "Mineral and Water Resources of Montana," Montana Bureau of Mines and Geology, Special Publication No. 28, May, 1963[3]. This analysis qualifies as "standard authority" on the characterization of the nearly forty minerals found in Montana. None of them are associated in any way with the minerals present in fossils. For example, the expert witnesses in this case described the minerals present in the fossils of the dueling dinosaurs as hydroxylapatite and/or francolite. Neither of these minerals is even listed as a mineral found in the state of Montana.

CONCLUSION

If this intrusion into the surface estate is allowed then the dire warnings of the Supreme Court in 1983 will become the law of the land.

> . . . "the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom." (*Citation omitted)* While it may be necessary that a substance be inorganic to qualify as a mineral . . . it cannot be sufficient. If all lands were considered "minerals" . . . **the owner of the surface estate would be left with nothing**.

Watt v. W. Nuclear, Inc., 462 U.S. 36, 42–43, 103 S. Ct. 2218, 2222–23, 76 L. Ed. 2d 400 (1983)

[3] This study is no longer in print but it was updated and published digitally in 2003 at http://www.mbmg.mtech.edu/sp28/intro.htm.

The ruling in this case opens the floodgates. Expanding the definition of minerals to include fossils because fossils are made up of minerals and are potentially valuable, intrudes into the ownership of surface rights wherever in Montana there is a split estate. It questions the validity of the custom and practice that recognized that the owner of the surface estate also owned the animals that roamed their property, even after death. For all of those homesteads whose mineral rights were reserved by the federal government, it introduces a new level of regulation over the surface estates of Montana landowners.

The Court must grant *en banc* review to correct this error. In the alternative, the Court could certify this question to the Montana Supreme Court where there is adequate precedent to exclude fossils from the identification as a mineral.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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This brief contains 3548 **words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature: s/ Colleen M. Dowdall **Date:** December 31, 2018

CERTIFICATE OF FILING AND SERVICE

I hereby certify I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on December 31, 2018. All participants in the case are registered CM/ECF users and so will be served by the CM/ECF system, which constitutes service pursuant to Federal Rule of Appellate Procedure 25(c)(2) and Ninth Circuit Rule 25-5.

Date: December 31, 2018

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