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Montana

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I. INTRODUCTION

In 2019, Montana produced nearly twenty-three million barrels of crude oil, up slightly from its 2018 production,[1] and 48.5 million cubic feet of natural gas.[2] Through mid-2020, both crude oil and natural gas production declined by more than 25% when compared to the same period in 2012.[3]

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1. *Crude Oil Production,* U.S. ENERGY INFO. ADMIN., https://www.eia.gov/dnav/pet/pet_crd_crpdn_adc_mbbl_a.htm [https://perma.cc/TE2B-ZXBB**].**

2. *Montana Natural Gas Withdrawals,* U.S. ENERGY INFO. ADMIN., https://www.eia.gov/dnav/ng/hist/n9010mt2a.htm [https://perma.cc/768H-SFLV].

3. *See Montana Field Production of Crude Oil*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPMT2&f=M [https://perma.cc/JYT8-EBNK] (displaying the annual crude oil production and the decrease in crude oil production through June 2020); *See U.S. natural gas production (gross withdrawals)*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/petroleum/production/#ng-tab [https://perma.cc/N9ZU-M3LV] (follow: tab option on the screen to "Montana") (indicating the decrease in natural gas production).

II. MONTANA SUPREME COURT

The Montana Supreme Court only decided one oil and gas case in the last year—*Murray v. BEJ Minerals, LLC*. However, it was relatively significant because it clarified the test used in Montana to determine what is included in a grant or reservation of "other minerals."

A. *Background*

Beginning in 2005, Mary Ann and Lige Murray discovered several unique dinosaur fossils on their ranch in eastern Montana. The fossils included the remains of two dinosaurs locked in combat, a nearly complete Tyrannosaurus rex, and several intact Triceratops parts. Each fossil has significant scientific and financial value.

The Murrays own all of the surface estate on their property but only a minority interest in the mineral estate. The mineral estate was split from the surface estate in a mineral deed that stated, "[a]ll right title and interest in and to all of the oil, gas, hydrocarbons, and minerals in, on and under, and that many be produced from [the described property] . . . ."[4] Two entities, including BEJ Minerals, LLC ("BEJ"), ultimately owned the majority of the mineral interest. A dispute arose when the Murrays notified the other mineral interest owners of the fossil finds, as they were required to do under the terms of the purchase contract for their ranch. BEJ claimed the fossils fell within the definition of "minerals" under the terms of the deed and were not part of the Murrays' surface estate interest. (BEJ did not dispute that the Murrays owned a minority share of the mineral interest.) The Murrays disagreed and filed suit in Montana state district court seeking a declaratory judgment that the fossils were part of the surface estate.

The Murrays' filing started a long procedural journey for the dispute. BEJ removed the case to federal court based on diversity. The federal district court ruled that the dinosaur fossils were part of the surface estate.[5] BEJ appealed, and the Ninth Circuit Court of Appeals reversed, finding that fossils were not part of the surface estate. [6] The

4. Murray v. BEJ Minerals, LLC, 464 P.3d 80, 81 (Mont. 2020).

5. Murray v. Billings Garfield Land Co., 187 F. Supp. 3d 1203 (D. Mont. 2016), *rev'd and remanded sub nom.* Murray v. BEJ Minerals, LLC, 908 F.3d 437 (9th Cir. 2018), *on reh'g en banc*, 924 F.3d 1070 (9th Cir. 2019), *certifying question to*, 2020 MT 131, 400 Mont. 135, 464 P.3d 80.

6. Murray v. BEJ Minerals, 908 F.3d 437, 447–48 (9th Cir. 2018), *on reh'g en banc*, 924 F.3d 1070 (9th Cir. 2019), *certifying question to*, 464 P.3d 80.

Murrays asked for *en banc* review, which the Ninth Circuit granted.[7] As reported in the update last year, due to important public policy ramifications for Montana,[8] the Ninth Circuit then certified to the Montana Supreme Court the question of whether dinosaur fossils fall within the scope of the term "minerals" when used in a mineral reservation. In *Murray v. BEJ Minerals, LLC*, the Montana Supreme Court held they do not.

The Montana Supreme Court articulated and applied a three-factor test to provide the necessary "contextual cues" as to whether "a substance fits within the ordinary and natural meaning of 'mineral.'"[9] First, the Court examined the scope of the term "minerals" as used in the deed and whether dinosaur fossils fit within the term. Next, the Court evaluated whether the mineral composition of the material makes it rare and valuable. Finally, the Court looked to the relationship to and effect on the surface when the material is removed. This three-factor test had not previously been used in Montana to evaluate the term "mineral" in a deed or reservation.[10]

B. *Majority Opinion*

The Court spent the majority of its analysis on the first factor, seeking to determine the mutual intent of the parties when they drafted the deed as is required by Montana statute.[11] The Court applied this factor in a general sense because there was no indication in the factual record that the parties specifically contemplated ownership of dinosaur fossils when they drafted the mineral deed.[12] The Court noted that the materials specifically mentioned in the deed (oil, gas, and hydrocarbons) typically are "mined for further refinement and economic exploitation" while fossils are not.[13] The Court then surveyed several Montana statutes that define the term "mineral" for various permitting and reclamation purposes. Although these definitions refer to various examples, none mention fossils. The Court

7. Murray v. BEJ Minerals, LLC, 920 F.3d 583, 584 (9th Cir. 2019) (order granting en banc).
8. Murray v. BEJ Minerals, LLC, 924 F.3d 1070, 1071–72 (9th Cir. 2019) (en banc).
9. *Murray*, 464 P.3d at 84.
10. *Id.*
11. *Id.* at 84–90; MONT. CODE ANN. § 28-3-301 (2019).
12. *Murray*, 464 P.3d at 87.
13. *Id.*

then identified several instances in Montana statutes where fossils are mentioned but only in a non-economic sense.[14]

The Court also visited its decision in *Carbon County v. Union Reserve Coal Co*., where it held that coal seam gas was not within the scope of the terms "coal and coal rights" when used in an instrument.[15] The Court noted with approval that under *Carbon County* and the maxim *expression unius est exclusion alterius*,[16] the grant of specific minerals (i.e. coal and coal rights) does not imply the grant of all minerals.[17] Based upon all these interpretive tools, the Court concluded that in the context of a "general mineral reservation deed," the "language identifying 'mineral' would not ordinarily and naturally include fossils."[18]

Even though it arguably could have finished its analysis with its conclusion that fossils are not minerals in this type of deed, the Court proceeded to its second factor. The Court found that the "rarity and value of dinosaur fossils" is "not a circumstance of their mineral composition and consequent usefulness for refinement and economic exploitation."[19] This factor therefore supported the conclusion that fossils are not minerals. As precedent, the Court looked to two Montana cases, where it previously ruled that substances that are "minerals" in a scientific sense are not minerals for purposes of a general reference in an instrument, primarily because they are too common. The first involved the use of scoria for roadbuilding material.[20] The second involved sandstone that did not have to be "changed, refined, or processed to be used commercially."[21] Both cases in turn relied on the Texas Supreme Court's decision in *Heinatz v. Allen*[22]—a 1949 case holding that limestone ordinarily is not a mineral. In *Heinatz*, the Texas Supreme Court reasoned 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

14. *Id.*
15. Carbon Cty. v. Union Reserve Coal Co., 898 P.2d 680, 688 (Mont. 1995).
16. As defined by the Court, "the expression of one thing is the exclusion of another," *Id.* 271 Mont. at 466, 898 P.2d at 684.
17. *Murray*, 464 P.3d at 86.
18. *Id.* at 90.
19. *Id.* at 92.
20. Farley v. Booth Bros. Land & Livestock Co., 890 P.2d 377, 378–79 (Mont. 1995).
21. Hart v. Craig, 216 P.3d 197, 198 (Mont. 2009).
22. Heinatz v. Allen, 217 S.W.2d 994, 995 (Tex. 1949).

> 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 profitable be manufactured into cement.[23]

In applying this factor, the *Murray* Court did not focus on the "character" or "particular property" of dinosaur fossils but instead on whether the material has a composition that can be usefully refined and exploited economically. The Court concluded fossils do not, and therefore they are not rare and exceptional.

The *Murray* Court's final factor looked to how dinosaur fossils relate to the surface of the land and the "method and effect" of removing them.[24] The Court concluded that because fossils are "excavated" from the ground and not "mined," they are similar to the limestone at issue in *Heinatz*. Therefore, the Court weighed against interpreting the fossils to be "minerals" within the scope of the deed.[25]

C. *Dissenting Opinion*

Three justices dissented. They concluded that because dinosaur fossils met the scientific definition of "mineral," all that is left is a determination of whether the fossils have rare and exceptional qualities. The dissent then argued that the focus should be on these particular fossils, not fossils in general. Because it is "abundantly clear these fossils are rare, exceptional, and valuable," the dissent concluded that Montana law dictates that they must be "minerals" as that term was used in the deed.[26] The dissent strongly disagreed with the majority's addition of the surface destruction factor, arguing it lacked any precedential basis.[27]

D. *Analysis*

Based on the first factor, the Court gave a well-reasoned analysis of why dinosaur fossils do not fall within the accepted use of the term "minerals." The *Murray* Court thoroughly reviewed Montana statutes, case law, and regulatory interpretations to ultimately conclude the term "minerals" when used in a deed "would not ordinarily and

23. *Id.* at 997.
24. *Murray,* 464 P.3d at 92.
25. *Id.* at 92.
26. *Id.* at 99.
27. *Id.*

naturally include fossils."[28] At that point, the Court could have ended its inquiry because if fossils are not "minerals" as commonly understood, there was no reason to conduct an inquiry into whether the fossils are "rare and valuable" or can be collected without disturbing the surface. The Court's analysis of the second and third factors arguably raises more question than it answers.

Ending the inquiry at fossils not being minerals arguably would not conflict with Montana precedent. If the scoria and sandstone at issue in the prior Montana cases were filtered through the Court's "ordinary and natural" usage analysis, they both would technically be minerals, which then justifies the additional inquiry of whether either had some particular property that differentiated them from other scoria, sandstone, or common materials. The Texas Supreme Court followed this approach in *Heinatz* when it concluded that limestone could be a "mineral" under an instrument in some instances but was not in that particular case because it had no use other than as common building material.[29]

The prior Montana cases and the Texas court in *Heinatz* indicate that the analysis moves to the "rare and valuable" step after a finding that a material is a mineral but is more like soil or construction material, thereby justifying further inquiry.[30] Additionally and somewhat analogously, under the Surface Resources Act, the United States recognizes uncommon varieties of certain minerals when the mineral deposit has some property giving it "distinct and special value."[31]

Unfortunately, the Montana Court strays from these cases by its focus on what can be refined and economically exploited from the mineral composition of the material. The Court seems to have tried to make the test fit the facts, which inadvertently could cause some materials to not be minerals when they otherwise would be under the *Heinatz* line of cases. The Court cited no case where the "rare and valuable" or some similar test had been applied to fossils, and it does

28. *Id.* at 90.

29. Heinatz v. Allen, 217 S.W.2d 994, 997 (Tex. 1949).

30. *See, e.g.*, Miller Land & Mineral Co. v. State Highway Com'n of Wyo., 757 P.2d 1001 (Wyo. 1988) (gravel not part of mineral estate); Holland v. Dolese Co., 540 P.2d 549 (Okla. 1975) (limestone); Kinney v. Keith, 128 P.3d 297 (Colo. App. 2005) (sand and gravel); George E. Reeves, *The Meaning of the Word Minerals*, 54 N.D. L. REV. 419 (1977).

31. 30 U.S.C. § 611 (2012); *see, e.g.*, Pitkin Iron Corp. v. Kempthorne, 554 F. Supp. 2d 1208, 1208 (D. Colo. 2008); Alyeska Pipeline Serv. Co. v. Anderson, 629 P.2d 512, 512 (Alaska 1981); McClarty v. Sec'y of Interior, 408 F.2d 907, 907 (9th Cir. 1969) (outlining 5-factor test).

not appear to have been necessary for the Court to do so here, especially in light of its conclusion under the first factor.

The third factor identified by the Court is probably the most problematic. The Court identified no prior Montana court that relied on the effect of surface extraction but instead only cited Texas law as applied in *Heinatz* as precedent. However, the Court failed to recognize that Texas law has evolved significantly since 1949 when *Heinatz* was decided. Specifically, in *Moser v. United States Steel Corp*,[32] the Texas Supreme Court rejected surface destruction as a factor in determining whether a substance is a "mineral" for purposes of a grant or reservation. Instead, the Court held that uranium, which may require surface destruction to extract, still may be a mineral.

The Montana Supreme Court could have easily relied on *Moser* for its decision and reached the same result, while at the same time simplifying Montana law going forward.[33] In *Moser*, the Texas Court looked to the "ordinary and natural meaning" of the term "mineral" rather than either a surface destruction test or what was known about the value of a mineral at the time of its severance.[34] This is similar to the analysis used by the Montana Court in its evaluation of the first factor. In other words, while uranium is commonly understood to be a mineral, dinosaur fossils are not. No party cited any case from Montana or any other jurisdiction where dinosaur fossils fall within a generic reference to "minerals" in an instrument.

Ultimately, the inclusion of the surface destruction factor may lead Montana down a road of fewer substances being within the scope of the term "mineral." For instance, if a rare mineral was discovered close to the surface of property, the Court's analysis suggests it may not be a "mineral" reserved or granted by an instrument, even if the material is commonly understood as a mineral and is rare and valuable if its extraction destroys the surface.

The surface destruction factor also leads to potential confusion because it forces a fine distinction between the "surface estate" and the "surface of the land." Montana recognizes that the surface estate may include aspects of property, such as pore space thousands of feet below the physical surface of the land.[35] Essentially, the surface estate

32. Moser v. U.S. Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984).

33. The Montana Supreme Court previously has cited *Moser* with approval in a decision holding that pore space is part of the surface estate, not the mineral estate. Burlington Res. Oil & Gas Co., LP v. Lang & Sons, Inc., 259 P.3d 766, 770 (Mont. 2011).

34. *Moser*, 676 S.W.2d at 102.

35. *Burlington*, 259 P.3d at 770.

is everything that is not part of the mineral estate. If destruction of the surface estate is a component of determining whether something is part of the surface estate, it would potentially lead to a circular analysis. The Montana Supreme Court potentially raised this concern by incorrectly equating the terms "surface of the land" and "surface estate" in its analysis.[36]

In a narrow sense, the *Murray* decision puts to rest the question in Montana of whether dinosaur fossils are minerals. If these fossils fail to meet the mineral test, it is difficult to imagine how any others ever could. Moreover, the Montana Legislature has, at least prospectively, removed any ambiguity by legislating that fossils are not minerals unless specifically mentioned in a deed.[37] However, by expanding the rare and valuable factor beyond its traditional use as a test for widespread mineral materials, and by adding a surface destruction factor that has fallen out of favor in other states, the Court may have unnecessarily added some uncertainty when determining the scope of a grant or reservation of "minerals," which ultimately may make title examination in Montana less certain.

III. FEDERAL DISTRICT COURT OF MONTANA

A. *Wildearth Guardians v. United States Bureau of Land Management*

Wildearth Guardians ("Wildearth") challenged the United States Bureau of Land Management's ("BLM") decision to issue 287 oil and gas leases covering 145,063 acres of land in Montana. Wildearth contended that the BLM's decision to issue the leases in late 2017 and early 2018 violated various requirements of the National Environmental Policy Act ("NEPA"). A Montana federal district court agreed and vacated the leases.[38]

NEPA requires that federal agencies comply with several procedural obligations before making decisions that may significantly affect the quality of the human environment.[39] One of these

36. *E.g.*, Murray v. BEJ Minerals, LLC, 464 P.3d 80, 92 (Mont. 2020) (references to "land surface" and "surface estate").

37. MONT. CODE ANN. § 1–4–112 (2019) ("When used in any instrument, unless the clear and express terms of the instrument provide otherwise, the term "minerals" does not include fossils").

38. Wildearth Guardians v. U.S. Bureau of Land Mgmt., 2020 WL 2104760, at *13 (D. Mont. May 1, 2020).

39. 42 U.S.C. § 4332(C) (2012).

obligations requires agencies to take a "hard look" at potential environmental impacts. The BLM oil and gas leasing process is a set of decisions subject to NEPA. The plaintiffs in this case asserted that BLM failed to meet its NEPA obligations when it sold leases in several planning areas in Montana.

The court identified several NEPA violations. First, the court looked to several alleged impacts to groundwater from drilling and fracking. Specifically, the plaintiffs alleged that the BLM failed to analyze the role shallow fracturing and surface casing depth would play in spills and the potential effects to groundwater. The court found no direct response to these complaints. Second, the court also found that the BLM failed to comply with its obligation to evaluate reasonable alternatives because it did not consider a measure to protect "all usable groundwater zones."[40] The plaintiffs suggested that this alternative was reasonable because it could be included in a lease stipulation or notice requiring groundwater testing prior to drilling. The court found the BLM's proposed no surface occupancy alternative did not respond to this concern.

Next, the court found that the BLM failed to meet its obligation to consider "cumulative impacts" because it did not look at the cumulative impacts to climate from the multiple lease sales. The court recognized that individual leases may have a negligible impact on climate, but "if BLM ever hopes to determine the true impact of its projects on climate change, it can only do so by looking at projects in combination with each other."[41] Lastly, the court concluded that because the BLM prepared deficient environmental assessments, its findings of no significant impact were also deficient.[42] Based on these violations, the court held that the standard in the Ninth Circuit required it to vacate the leases as part of the remand to the bureau.[43]

B. *Montana Wildlife Federation v. Bernhardt*

In a decision issued shortly after *Wildearth Guardians*, the same Montana federal district court judge ruled that an instructional memorandum issued by the BLM in 2018 violated the Federal Land Policy and Management Act ("FLPMA") and therefore provided grounds to invalidate a number of oil and gas lease sales.[44] The

40. *Wildearth Guardians*, 2020 WL 2104760, at *6.
41. *Id.* at *11.
42. *Id.* at *13.
43. *Id.*
44. Mont. Wildlife Fed'n v. Bernhardt, No. CV-18-69-GF-BMM, 2020 WL

FLPMA establishes the framework under which the BLM manages public lands within its jurisdiction. The statute requires that public land management protect "the quality of scientific, scenic, historical, ecological," and other environmental attributes.[45] BLM complies with this mandate by developing and implementing Resource Management Plans to guide its decisionmaking.[46] BLM also oversees the competitive oil and gas leasing process on federal public lands.[47]

As part of these authorities, the BLM has undertaken a multi-state planning effort to protect sage grouse due to concerns regarding the impacts of it being listed as an endangered species. The BLM designated areas of sage grouse habitat to be protected and directed its field offices to give habitat protection priority in the oil and gas leasing process. In 2016, the BLM issued an instruction memorandum to implement this policy.

Following the change in administration, the BLM issued a revised instruction memorandum. The revised memorandum stated that the BLM no longer needed to prioritize sage grouse habitat in leasing decisions. The BLM then sold oil and gas leases based upon the revised memorandum. The plaintiffs challenged these decisions as violations of FLPMA and other statutes. The court found that the revised memorandum violated the BLM's own sage grouse policy. The court then found that the lease sales also violated FLMPA because they were based upon an invalid memorandum. The court then vacated the lease sales.

C. *WBI Energy Transmission, Inc. v. Subsurface Easements for the Storage of Natural Gas*

A Montana federal district court judge adopted the findings and recommendations of the United States magistrate judge as to three motions for summary judgment regarding condemnation of surface estate interests necessary to operate a natural gas storage field in southeastern Montana.[48] The Baker Storage Field operated as a natural gas storage field in southeastern Montana since the 1940s. After the Montana Supreme Court ruled that the surface estate, not the mineral

2615631, at *9–10 (D. Mont. May 22, 2020).

45. 43 U.S.C. § 1701(a)(8) (1982).

46. 43 U.S.C. § 1712 (1982).

47. 43 C.F.R. § 3120.3 (2019).

48. *See* WBI Energy Transmission, Inc. v. Subsurface Easements for the Storage of Nat. Gas in the Judith River Subterranean Geologic Formation, No. CV 18-88-BLG-SPW, 2020 WL 4582025 (D. Mont. Aug. 10, 2020).

estate, owns the pore space, the project operator, WBI Energy Transmission, Inc. ("WBI"), had to negotiate leases with the various surface owners within the storage field.

As reported in the last update, WBI filed a condemnation action in federal district court under the Natural Gas Act for those properties where it could not successfully negotiate leases.[49] The defendants counterclaimed based on trespass and other legal theories. The counterclaims were dismissed as precluded under Federal Rule of Civil Procedure 71.1—the procedural rule governing condemnation cases.[50] In subsequent rulings, the magistrate judge found that the surface owners failed to produce an expert witness to testify as to the market value of the interests condemned. The federal district court agreed and awarded a nominal amount of $1.00 to each defendant.

IV. LEGISLATION

The Montana legislature meets for its regular session biannually in odd numbered years.[51] The legislature did not meet in 2020.

49. WBI Energy Transmission, Inc. v. Subsurface Easements for Storage of Nat. Gas in Judith River Subterranean Geological Formation, No. CV 18-88-BLG-SPW-TJC, 2019 WL 3470742, at *2 (D. Mont. July 8, 2019).

50. Fed. R. Civ. P. 71.1.

51. MONT. CONST. art. V, § 6.