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

PLAINTIFFS-COUNTER-DEFENDANTS-APPELLEES MARY ANN MURRAY AND LIGE M. MURRAY'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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INTRODUCTION

Plaintiffs-Counter-Defendants-Appellees Mary Ann Murray and Lige M. Murray (the "Murrays") respectfully petition for rehearing and rehearing *en banc* to review the panel's decision in this case, which creates new law by holding that fossils are "minerals" under Montana law. Murray v. BEJ Minerals, LLC, *et al*., 9th Cir. Ct. of Appeals, Cause No. 16-35506 (Doc. 35).[1]

This case is of exceptional importance not only to the Murrays and other ranchers in the state of Montana and other Western states, but to all natural history museums with fossil collections, all paleontologists and evolutionary biologists (whether university, government, commercial or amateur) across the country. Until now, no court, legislature, administrative agency, or paleontological scientist has ever held, found, ruled, or determined that any vertebrate or invertebrate fossil was classified as a mineral for any purpose. Moreover, to the knowledge of the Murrays, no legal treatise, scientific treatise, dictionary, or scholarly or popular publication has specifically classified "fossils" as "minerals" for any purpose. Despite the dearth of any authority to support its decision, the panel came to the conclusion that "fossils" are "minerals" within the ordinary, natural, and popular meaning of the term when used in a broad reservation of a subsurface mineral interest.

[1] For ease of reference going forward, Murray will cite to the published Westlaw opinion at Murray v. BEJ Minerals, LLC, 908 F.3d 437 (9th Cir. 2018) rather than the docket number or slip opinion.

The panel's decision is inconsistent with federal and Montana law. The panel also misconstrues existing Texas case law, and creates a confusing distinction between fossils found on private land versus fossils found on public land. This decision creates an impractical, expensive, case-by-case method for determining which fossils are "rare and valuable minerals" or "common and worthless non-mineral fossils".

FACTUAL AND PROCEDURAL BACKGROUND

The Murrays, owners of a ranch in eastern Montana (the "Murray Ranch") and the holders of the surface rights, filed a declaratory judgment action in state court (Appellants' Excerpts of Record (hereafter, "E.R.") 447-455)) against BEJ Minerals, LLC and RTWF, LLC (out of state entities set up by the Severson family which previously owned the Murray Ranch-collectively, the "Appellants"). The Appellants, who own certain mineral rights, made a claim to fossils found on the Murray Ranch as part of their Counterclaims. (E.R. 392).

After the parties filed cross-motions for summary judgment, the District Court issued an Order granting the Murrays' Motion and denying Appellants' Motion. (E.R. 1).[2] The District Court held that fossils are not "minerals" under Montana law

[2] Again, for ease of reference, Murray will refer to the District Court's published Westlaw opinion, Murray v. Billings Garfield Land Company, 187 F.Supp.3d 1203 (D.Mont. 2016), rather than the docket or E.R. number.

for the purposes of interpreting a general reservation of all minerals as part of a real estate conveyance and, therefore, are owned by the Murrays. Judgment was entered and the Appellants appealed to this Court.

In a two to one decision, the panel reversed the District Court and determined that "fossils" (at least the fossils at issue in this case) are "minerals" for purposes of the general reservation of minerals in the real estate conveyance. United States District Court Judge Eduardo Robreno, of the Eastern District of Pennsylvania, sitting by designation, wrote the majority's opinion. Ninth Circuit Judge Mary Murguia, in her dissent, voiced her disagreement with the majority's decision since "fossils" do not fall within the ordinary and natural meaning of the word "mineral." Murray, 908 F.3d at 448-450. She agreed with the District Court that fossils are not "primarily extracted for future refinement and economic purposes…." Id. at 449-450. She concluded that the District Court's analysis that fossils were not minerals was correct. Id. at 450.

The Murrays request that the Court rehear the case to address those aspects of the District Court's decision not addressed by the panel and determine, as Judge Murguia did, that the District Court's decision was correct. A rehearing or rehearing *en banc* is appropriate to address the flaws in the panel's decision more fully discussed below. The District Court's original opinion should be affirmed.

ARGUMENT AND AUTHORITIES

a. Fossils are not Minerals in any Legal, Scientific or Popular Sense.

The panel's decision purports to interpret the term "mineral" in its ordinary, natural, and popular meaning but the decision fails to cite any legal, scientific, or popular authority that specifically makes that point. Certainly, if it were popularly accepted that landowners, governmental authorities, judges, and scientists considered fossils to be minerals, there would be statutes, case law, as well as legal and scientific journals and treatises so stating. The panel's decision cites no such body of legal, scientific, or popular work and it ignores the references which affirmatively state that fossils are *not* minerals.

In Earl Douglass, 44 Pub. Lands Dec. 325, 1915 WL 1202 (1915, the Department of Interior said clearly:

> Fossil remains of dinosaurs and other prehistoric animals are not mineral (sic) within the meaning of the United States mining laws, and lands containing such remains are not subject to entry under such laws.

Id. at **1-2; see also, Hunterfly Realty Corp. v. State of New York, 346 N.Y.S.2d 455 (N.Y.Ct.Cl. 1973) (mastodon fossils not considered minerals).

How the panel arrives at the opposite conclusion is through an internally inconsistent and sometimes contradictory alchemy of science and legal definitions.

b. The Legal Definition of "Mineral" has Nothing to do with "Science".

The panel begins its analysis by noting that Montana law requires words in a contract to be interpreted in their "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, 442 (citation omitted). Then the panel deviates from interpreting the word "mineral" in its "ordinary and popular sense" and goes through an unprecedented scientific and legal analysis to fit the word "fossils" (or at least potentially expensive fossils) into the definition of "mineral." Rather than considering the "ordinary and popular" usage of the word, the panel actually ends up applying a special "scientific" meaning to "mineral," using it in a "technical sense," in violation of Montana Supreme Court precedent. See e.g. Hart v. Craig, 216 P.3d 197 (Mont. 2009); Farley v. Booth Bros. Land and Livestock Co., 890 P.2d 377 (1995).

It is clear from the panel's decision that no current dictionary definition (including Webster's or Black's) includes the word "fossils" within the meaning of "mineral." Murray, 442-443 (citations omitted). Without same, the panel ultimately relies on its subjective interpretation of parts of the extremely broad definitions of the term "mineral" found in Webster's Dictionary. Webster's definition provides the following laundry list of "minerals":

> ore, coal, asbestos, asphalt, borax, clay, fuller's earth, pigments, precious stones, rock phosphate, salt, soapstone, sulfur, building stone, cement rock, peat, sand, gravel, slate, salts extracted from river, lake, and ocean waters, petroleum, water, natural gas, air, and gases extracted from the air)….

Murray, 442-443 (citation omitted). There is no mention of fossils in this definition. Moreover, in the Webster's "mineral" laundry list, there are numerous substances called minerals which are clearly *not* minerals in the scientific sense (e.g., coal, asphalt, building stone, peat, lake and ocean waters, water, petroleum, natural gas, air, and gasses extracted from air).

Finding no actual current dictionary definition that specifically includes fossils within the definition of mineral, the panel makes the sweeping assertion that "the Montana Fossils clearly fall within these dictionary definitions…." (emphasis supplied). Murray, 442. To the contrary, it is clear from the actual language of everything cited by the panel that the opposite is true: dinosaur fossils do not "clearly" fall within any dictionary definition of the term "mineral".[3]

[3] Despite the fact that Black's Law Dictionary actually *deleted* the word "fossils" from the definition of "mineral" after 1991, the panel nonetheless cites to its abandoned definition as the basis for its decision. Murray at 444 (citation omitted). If the Court were interpreting a statute, the rules of statutory construction or interpretation would require the Court to determine that the deletion of the word "fossils" from the definition of "mineral" was intentional and done for effect. See e.g. Carter v. U.S., 530 U.S. 255, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (deletion of word from statute was more than a stylistic change).

Obviously there can be no "common understanding" that "fossils" are "minerals" when none of the dictionaries--standard, scientific or legal define fossils as minerals.

c. There is No Statutory Definition of "Mineral" that Specifically Includes "Fossils".

The panel finds that "the majority of the statutes and regulations the Murrays cite do encompass fossils in their definition of "minerals," and those definitions that exclude fossils are limited to particular statutory schemes that are not relevant here." Murray, 445-446 (footnote omitted; emphasis supplied). This finding is incorrect. No statutes or regulations actually and specifically include "fossils" within the definition of "mineral." Contrary to established statutory construction and interpretation, the panel reads into the statutes and regulations cited both by the District Court and the Murrays words that are not specifically there.

When Montana law defines "minerals" in rather lengthy terms, it mentions oil and gas, coal and other hydrocarbons (none of which are scientifically considered minerals), but does not include the word "fossils":

> "Mineral" means gas; oil, coal; other gaseous liquid, and solid hydrocarbons; oil shale; cement material; sand and gravel; road material; building stone; chemical raw material; gemstone; fissionable and non fissionable ores; colloidal and other clay; stream and other geothermal resource; or any other substance defined as a mineral by the law of this state.

See Mont. Code Ann. § 70-9-802(9).

In the construction and interpretation of a statute, a judge does not insert what has been omitted or omit what has been inserted. See Mont. Code Ann. § 1-2-101; see also In re Western States Wholesale Natural Gas Antitrust Litigation, 715 F.3d 716 (9th Cir. 2013) ("In interpreting a state statute, a federal court applies the relevant state's rules of statutory construction."). Under both Montana and Federal law the maxim of statutory construction *expressio unius est exclusio alterius* (the inclusion of one excludes others) applies and a court does not read into a statute to prohibit from including that which is not included. Westmoreland Resources Inc. v. Department of Revenue, 2014 MT 212, ¶ 12, 376 Mont. 180, 330 P.3d 1188 (citation omitted); see also Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (interpreting Rule 9(b), F.R.Civ.P.). This maxim should have been applied by the panel.

d. Fossils Are Not Minerals

For more than 100 years, the Federal government has maintained that fossils were not minerals. See e.g. Earl Douglass, 44 Pub. Lands Dec. 325, 1915 WL 1202 (1915) (the Department of Interior stated that "[f]ossil remains of dinosaurs and other prehistoric animals are not mineral"); 43 U.S.C.A. § 1785 (removing the "Fossil Forest" from mining and mineral leasing and developing a management plan for the excavation and collection of fossils); 16 U.S.C.A. § 470aaa (Congress, specifically regulated the collection of fossils separate from all laws regarding

minerals and mining.), 36 C.F.R. § 291.9(d) ("paleontological resources" do not include mineral resources, such as "coal, oil, natural gas, and other economic minerals that are subject to the existing mining and mineral laws….").

Montana law is totally consistent with Federal law and also differentiates between fossils and minerals when it states as follows:

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

See Mont. Admin. R. 36.25.145(11). Likewise, MCA 22-3-107 differentiates between "fossils" and "minerals" when it says that the trustees of the Montana Historical Society have the power "to collect and preserve such natural history objects as fossils, plants, minerals, and animals…." Id., (13).

If the panel was looking for the ordinary, natural, and popular meaning of the term "mineral" it should have found it in these legal authorities. Also, if the panel was seeking to provide consistency in the law, it not only failed to do so but it accomplished exactly the opposite. The panel's decision has put the law regarding minerals on private land at odds with the law on federal and Montana

public land. The law should be consistently applied across all lands regardless of ownership.

e. The Panel Misapplied the *Farley* Case.

The panel cites Farley, *supra*, in adopting the Appellants' rationale that "a substance which is technically a mineral in the scientific sense is also a mineral within the meaning of a real property agreement if it is rare and exceptional in character or possesses a peculiar property giving it special value." Murray, 445. As discussed more fully below, the panel glosses over the actual science of fossils to find that they are minerals, disregards the "ordinary, natural, and popular meaning" of the term "mineral" and decides to give special meaning to "mineral" and uses the term in a technical sense, as if a dinosaur's chemical composition controlled its legal classification. In Farley the court did the opposite, by returning to the "ordinary, natural and popular" standard.

The Court in Farley started off with a statutory definition of "minerals" that already included scoria (the substance at issue) within its definition. Farley at 890 P.2d at 379 quoting § 82–4–403(6), MCA (subsequently, this statute was amended to change "minerals" to "materials"). In contrast, there is no statute in the instant case that specifically contains "fossils" within the definition of "mineral."

The Court in Farley also had a case from North Dakota that discussed whether scoria was a mineral. Farley, 890 P.2d at 380 (citation omitted). Here

there is no case law from any jurisdiction that stands for the proposition that the "fossils" at issue are within the definition of "mineral."

It was only after the Court in Farley determined that there was some question, based upon statutory and case law authority, as to whether scoria was a mineral in the "ordinary, natural, and popular meaning" of the term that it proceeded with the discussion of whether it was rare and exceptional in character. Farley, 890 P.2d at 380-381. The same is true here—the panel should have first determined whether there was any basis to determine that fossils fit within the ordinary, natural and common meaning of the term "mineral" by citing to some statute, case law, treatise, or even common publication before making the jump into the rare and exceptional portion of the test. The panel could not do so, because there is no such reference.[4]

f. The *Hart* and *Heinatz* Cases Both Support the Murray's Position on Montana Law

Based upon its reading of Hart v. Craig, *supra*, the panel concluded that the Montana Supreme Court would adopt the test for determining what constitutes a mineral as set forth in the Texas Supreme Court case of Heinatz v. Allen, 217

[4] Clearly Farley and all related cases which discuss how some minerals could be classified as rare and exceptional do not apply that test after the excavation or sale of the proposed minerals at issue, but cite such examples to indicate that a proponent of including minerals outside of "the ordinary, natural, and popular meaning" should list the "new" minerals in the list of mostly hydrocarbons (not minerals) in the standard general reservations of "mineral" rights.

S.W.2d 994 (Tex. 1949). Murray, 446 (footnote omitted). This conclusion was reached by the panel despite the coincidence that the Montana State District Court Judge who rendered the underlying decision in Hart is Judge Susan Watters, who is now the Federal District Court Judge who authored the underlying opinion in this action. See Hart at id.

In Hart, the Montana Supreme Court was considering whether a general mineral reservation (similar to the one in the instant case) that did not contain the word "sandstone" nonetheless included it within its definition. Id. 216 P.3d at 198.[5] Citing both Heinatz, *supra*, and Farley, *supra* (sometimes referred to as the "Heinatz/Farley Test"), the Montana Supreme Court determined that the sandstone was not a mineral as commonly understood and also stated specifically that sandstone was "not rare or exceptional *simply because it can be sold commercially.*" Hart, 216 P.3d at 198 (emphasis added). Yet in the instant case the panel concludes that "the Montana Fossils are being "used" for economic or commercial purposes…." Murray, 443. So was the sandstone in Hart and the limestone in Heinatz. Being used for economic or commercial purposes does not make a fossil a "mineral" under the law. In addition, having the properties of

[5] Prior to this decision, of course, there were cases and other authorities that said sandstone was a mineral. See e.g. In re Forestry Reservation Commission, 28 Pa.C.C. 145, 12 Pa. D. 420, 1903 WL 2604 (Pa. Atty. Gen. 1903) (sandstone constituted a mineral whether lying loose on the surface or requiring excavation).

being "rare or exceptional" has no bearing on whether the fossils at issue belong to the ranch owner or the sub-surface estate.[6]

In Heinatz, the parties provided to the Supreme Court of Texas several scientific reference books in which limestone (the substance at issue in that case) was referred to as a "mineral." Id., 217 S.W.2d at 996-997. The Court also noted that there were a number of cases discussing limestone as a mineral. Id., 217 S.W.2d at 998. In contrast, Appellants have not referenced, and cannot find, books, treatises, case law, statutes, dictionaries, or anything else authoritative, that includes the word "fossil" within the definition of "mineral" in either the common parlance or technical sense.

The Heinatz Court also noted that "[a]nother reason supports the conclusion that the words 'the mineral rights' used in the will were not intended to include the right to the limestone. It is that the limestone is recoverable only by quarrying or the open pit method which destroys the surface for agricultural and grazing purposes." Id., 217 S.W.2d at 998. The same is true in the instant matter, since the only way to find fossils is to follow surface fragments and scrape away the surface.

[6] Either would be faced with hiring professional paleontologists to carefully excavate and prepare the fragile bones, and invest in transportation, mounting, marketing, etc., before the dinosaur can reach a museum, the only logical ultimate home for a dinosaur. The surface owner is the only party in a position to find surface clues that a dinosaur, or more likely a part thereof, has begun the fatal process of "weathering out."

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

Ultimately, the Court in Heinatz began its discussion of the rare or exceptional character test after finding that limestone was included within the definition of "mineral" in either the common parlance or technical sense by citing other works that said as much. In the present case, the panel misses the first step which is to find that anyone other than Appellants believe that "fossils" are includable in a definition of "mineral." Before the ruling of this Court, no authoritative source has ever argued that fossils are minerals in the legal, technical, scientific, or common meaning of the term.

g. Describing Fossils as Minerals in a Technical Sense Ignores the Nuances in the District Court's Opinion as well as the Opinion of the Parties' Experts.

The panel starts off with the premise that "the parties do not dispute that the Montana Fossils *are* minerals in a scientific sense…." Murray, 442. The panel then uses this statement, which it apparently deems as an admission of sorts, to determine that the fossils automatically fit into certain definitions based on chemical composition. Id. (citations omitted). In doing so, the panel ignores the nuances regarding the composition of fossils described in the District Court's opinion:

> The Murrays' experts largely agree with the fossilization process described by Rogers, but they differ on the conclusion that francolite is a mineral

> compound. Expert Peter Larson opined that "francolite has not been recognized as a distinct, valid mineral species since 2008." (*Peter Larson Rebuttal Ex. Report* at 1, Doc. 55-6 at 6.) Larson stated that the fossils are composed of the mineral hydroxylapatite. (*Peter Larson Depo.* 223:12-14, Doc. 48-4 at 156.) As mentioned above, hyrdoxylapatite is not unique to fossils, as it is found in the bones of living vertebrates. Larson compared the x-ray diffraction patterns of the Murray T. Rex and a modern bison bone, and he concluded that the samples contained identical patterns of hydroxylapatite. (Id., 219:17-221:17, Doc. 48-4 at 219-221.) Larson opined that the fossil "has not been replaced by minerals in any way, shape, or form. It is hydroxylapatite just as when it was alive." (Id., 224:15-18, Doc. 55-3 at 7.) Larson does not consider minerals that fill voids in the bone to be part of the fossil. (Id.)

Murray v. Billings Garfield Land Company, at 187 F.Supp.3d at 1206-1207. It is the last two sentences which warrant special attention. To lump fossils into a group of minerals ignores the nuanced statement that fossils are actually bone made of minerals, and the minerals that fill the void in the bones are not actually part of the fossil. Put another way, fossils are not "minerals" in the ordinary and common sense. They are actually bones which are made up of minerals, in the same way that topsoil is made up of minerals. Taking the panel's finding to its logical conclusion, ancient, or even modern, human skeletons could be considered part of the mineral estate.[7]

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

The District Court decision correctly recognized that the fossilization process for bone and other organic material distinguishes fossils from being classified as minerals in their ordinary and natural meaning.[8] Murray, 187 F. Supp. 3d at 1210. The panel should recognize this distinction as well.

h. The Panel Creates an Unworkable Distinction Between Types of Fossils.

This ruling sets the Montana Fossils off into a class of minerals by themselves, to be appraised by way of litigation. By not addressing the important distinction between various classes of fossils, the opinion has created an unworkable distinction between "rare and valuable mineral fossils" and "common and worthless non-mineral fossils" and provides no legal guidance for the future as to which fossils are to be treated for ownership purposes as minerals. See Supplemental Excerpts of Record (Doc. 18) at 14-16 (and exhibits thereto).

CONCLUSION

For the reasons stated above, the Murrays respectfully request that the Court grant its petition for rehearing *en banc* and reverse the Panel's decision. Alternatively, if the Panel is concerned about imposing its own policy considerations

[8] Certainly the ordinary, natural, and popular definition of Arlington National Cemetery is not "a huge field of calcium-hydroxyapatite."

and analysis on the Montana Supreme Court, it can certify the question to the Montana Supreme Court for its determination.

DATED this 20th day of December, 2018.

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Certificate of Compliance Pursuant to F.R.A.P. 32(a)(7)(C) and Circuit Rule 32-1

I certify that pursuant to Fed.R.ER.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **Petition for Rehearing and Rehearing *En Banc*** is proportionately spaced, has a typeface of 14 points or more and contains 3,888 words.

DATED this 20th day of December, 2018.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing **Petition for Rehearing and Rehearing *En Banc*** was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system on the 20th day of December, 2018. Participants in this case who are registered CM/ECF users will be served by the Appellate CM/ECF system.

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On Appeal from the United States District Court
for the District of Montana

APPELLANTS' RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Appellants BEJ Minerals, LLC and RTWF LLC both state that they have no parent corporation, and no publicly traded corporation owns 10% or more of their stock.

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INTRODUCTION

The issue in this case is whether valuable dinosaur fossils excavated from a privately owned ranch in Montana are considered minerals under Montana law and are therefore part of the mineral estate rather than the surface estate. The panel's resolution of that issue was correct; it involves the law of only one state; and it does not warrant review by the en banc Court. *Murray* v. *BEJ Minerals, LLC*, 908 F.3d 437 (9th Cir. 2018).

As the panel recognized, this case is governed by the Montana Supreme Court's decision in *Farley* v. *Booth Bros. Land & Livestock Co.*, 890 P.2d 377 (Mont. 1995), which establishes a test under which materials that are minerals in a technical and scientific sense will be treated as minerals in a legal sense if they are "rare and exceptional in character or possess a peculiar property giving them special value," *id.* at 380 (internal quotation marks omitted). The fossils in this case satisfy that test because it is undisputed that they are technically mineral—that is, that they are composed of inorganic, rock-like mineral substances—and that they are "rare and exceptional," having "special value."

In attempting to resist that conclusion, the Murrays repeat the same question-begging arguments that they presented to the panel. They assert, repeatedly, that fossils are not minerals. They then present a variety of arguments based on that flawed premise. In their view, the *Farley* test applies only to materials that are already determined to be minerals on the basis of some other test derived from unrelated statutes or "ordinary meaning." But this case is governed by the common law, not by statutes, and the Montana Supreme Court has expressly rejected reliance on statutory definitions of the word "mineral" in construing a mineral deed. As to ordinary meaning, the *Farley* test *is* the test for identifying the ordinary meaning of "mineral" under Montana law. Because the panel correctly applied that test, the petition should be denied.

ARGUMENT

A. This case does not satisfy the criteria of Federal Rule of Appellate Procedure 35

The Murrays make little effort to argue that this case meets the criteria for rehearing en banc set out in Federal Rule of Appellate Procedure 35, and it plainly does not. The panel's decision does not create a conflict with any decision of this Court or any other federal court of appeals, and the Murrays do not claim that "en banc consideration is

necessary to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1).

The Murrays suggest (Pet. 1) that "[t]his case is of exceptional importance" because it will affect "ranchers in the state of Montana and other Western states" as well as museums and paleontologists "across the country." That suggestion suffers from at least three flaws.

First, the Murrays overlook that the issue here is one of Montana law, and that this case is in federal court only because the parties happen to be of diverse citizenship. The panel's decision does not purport to apply to any "other Western states"—only Montana. Even if the decision were incorrect—and, as we explain below, it was not—the case would not have exceptional importance because the Montana courts will not be bound by the panel's decision if the issue ever arises in state-court litigation. Any error in the panel's decision can therefore be corrected by the Montana courts. And of course, if the Montana Legislature disapproves of the policy consequences of treating fossils as minerals, it too has the ability to change the law prospectively.

Second, the supposed "exceptional importance" of the issue is belied by the reality that it has never before been litigated, in Montana or

any other state. The Murrays have been unable to identify any other case between the end of the Cretaceous period and the present in which any court has considered whether a dinosaur fossil is a mineral under Montana law, or any other state's law. The en banc Court should not devote its limited resources to examining an issue that has never arisen before and that might not arise again for many years.

Third, the Murrays' suggestion that the panel's decision will affect the existing fossil collections of museums is unfounded. Museum fossils could be affected only if (1) they were removed from private land; (2) the land was located in Montana; (3) the land was subject to a severance of surface rights and mineral rights; and (4) the party that collected the fossils had the permission of the owner of the surface estate but not the owner of the mineral estate. Neither the Murrays nor their *amici* provide evidence of the number of such fossils in museums—or indeed, that *any* such fossils are currently held in museums. In any event, Montana law imposes a two-year statute of limitations on trespass claims involving real or personal property. Mont. Code § 27-2-207. To the extent that any claims might otherwise exist based on museum fossils, the statute of limitations would eliminate almost all of them. Although the statute

of limitations was cited in the merits briefing, neither the Murrays nor their *amici* offer any response to it.

While the Murrays' *amici* assert that the panel's decision will pose "practical obstacles to future paleontological research" (Paleontological Soc'y *Amicus* Br. 14), experience demonstrates otherwise. There is no question that oil, gas, and metal ores are minerals, and yet commercial prospecting for them regularly takes place despite the need "to secure permission from both mineral rights owners *and* surface estate owners" (*id.*). Mineral deeds are recorded in the same way as deeds to the surface estate, so however the issue in this case is resolved, the identification of property owners will not require extraordinary investigative resources.

B. The panel's decision was well-reasoned and correct

The Murrays devote most of their petition to arguing that the panel's decision was incorrect on the merits, but their arguments simply repeat points made in their briefs that were already addressed and rejected by the panel.

1. The Murrays assert (Pet. 5) that "no current dictionary definition . . . includes the word 'fossils' within the meaning of 'mineral,'" and (Pet. 7) that "[n]o statutes or regulations actually and specifically

include 'fossils' within the definition of 'mineral.'" Neither of those assertions is correct. The panel cited several dictionary definitions of "mineral" that include fossils, *Murray*, 908 F.3d at 442, and it also explained that "[c]ontrary to the Murrays' assertions, the majority of the statutes and regulations the Murrays cite *do* encompass fossils in their definition of 'minerals,'" *id.* at 445. More to the point, neither dictionaries nor other statutes are relevant here. The Montana Supreme Court in *Farley* never cited any dictionary definitions of the term "mineral," no doubt because that court, like the United States Supreme Court, recognized that "[t]he word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case." *N. Pac. Ry. Co.* v. *Soderberg*, 188 U.S. 526, 530 (1903). And in *Farley*, the Montana Supreme Court also chose not to consult statutory definitions in construing the term "mineral" in a mineral deed. As the court explained, statutory "definitions of the term 'mineral' are not necessarily consistent" because "the definition of 'mineral' can differ according to the context in which it is used." 890 P.2d at 379; *see id.* ("[T]he term 'mineral,' has varying definitions in different contexts."). In construing deeds, Montana law defines "mineral" by

reference to the common-law test of *Farley*, not by reference to dictionaries or statutes.

2. The Murrays also note that federal mining laws generally do not treat fossils as minerals. Pet. 8-9; *see also* Paleontological Soc'y *Amicus* Br. 15-17 (discussing the Paleontological Resources Preservation Act, 16 U.S.C. § 470aaa *et seq.*, which governs the management of "paleontological resources on Federal land," 16 U.S.C. § 470aaa-1). That is irrelevant here. As a proprietor of public lands, the federal government has authority to determine the conditions under which it will allow private parties to enter those lands and make claims upon them. *See generally* 30 U.S.C. § 21a (describing the federal policy of encouraging development of mineral resources). That it has chosen to allow parties to establish claims to other kinds of minerals, but not to fossils, says nothing about how a private deed should be construed under state law. In articulating the state's common law, Montana courts are not required to follow statutes and regulations applied by federal agencies on public lands in different contexts and for different purposes.

3. The Murrays have little to say about *Farley*, which, as the panel correctly recognized, describes the test applied by Montana courts in

determining the scope of a mineral deed. The Murrays argue (Pet. 11) that before applying *Farley*, "the panel should have first determined whether there was any basis to determine that fossils fit within the ordinary, natural and common meaning of the term 'mineral.'" But the *Farley* test *is* the Montana Supreme Court's test for the definition of the meaning of "mineral" in a private deed. Restricting the application of *Farley* to materials that satisfy some other, undefined test has no basis in Montana law and would cast doubt on the status of all materials to which *Farley* would otherwise apply.

In any event, the panel did examine the ordinary meaning of "mineral," and it determined that the fossils at issue "clearly fall within" that meaning. *Murray*, 908 F.3d at 442. The Murrays have not explained how else the ordinary meaning of the word "mineral" might be determined, nor have they shown that fossils do not fall within that meaning. And as the panel explained, the Murrays conceded that fossils "fit within the scientific definition of minerals." *Id.* at 443.

The Murrays object (Pet. 16) that the panel's decision "created an unworkable distinction between 'rare and valuable mineral fossils' and 'common and worthless non-mineral fossils,'" but that objection is

answered by *Farley* itself, in which the Montana Supreme Court noted that some deposits of sand and limestone might be minerals while others are not. Specifically, the court recognized that sand and limestone deposits are normally suited only for road building purposes and therefore will not be considered "minerals," but it identified "sand that is valuable for making glass and limestone of such quality that it may profitably be manufactured into cement" as examples of substances that would be sufficiently "rare and exceptional" or would have "special value" to make them minerals for legal purposes. 890 P.2d at 380 (quoting *Holland* v. *Dolese Co.*, 540 P.2d 549, 550-51 (Okla. 1975), in turn quoting *Heinatz* v. *Allen*, 217 S.W.2d 994, 997 (Tex. 1949)). The panel's decision did not create the distinction between "rare and valuable" substances and "common and worthless" substances under Montana law—the Montana Supreme Court did so more than 20 years ago in *Farley*. Under *Farley*, even if some other dinosaur fossils are worthless, that is irrelevant to the status of these dinosaur fossils, which are "indisputably valuable." E.R. 21.

The analysis set out in *Farley* also answers the Murrays' objection (Pet. 13) that "the only way to find fossils is to follow surface fragments

and scrape away at the surface." Under *Farley*, even materials like sand and limestone—which can be exploited only through surface-disturbing excavation—can be treated as minerals if they have "special value." 890 P.2d at 380. And in any event, the Murrays have identified no evidence in the record supporting their assertion that fossil excavation "destroys the surface for agricultural and grazing purposes." *Heinatz*, 217 S.W.2d at 998.

4. Finally, the Murrays' *amici* emphasize that fossils originated from a biological process, a fact that, they say, means that fossils cannot be minerals. *See* Paleontological Soc'y *Amicus* Br. 17-21. But oil, gas, and coal are commonly understood to be minerals, even though they all originally derive from biologically produced organic materials that were preserved underground for millions of years. *See Rice Oil Co.* v. *Toole Cty.*, 284 P. 145, 146 (Mont. 1930) (stating that under Montana law "[o]il is a mineral"); *see also Sierra Club* v. *La. Dept. of Wildlife & Fisheries*, 519 So. 2d 836, 841 (La. Ct. App. 1988) (holding that fossilized oyster and clam beds were "minerals" under a provision of the state constitution that required public bidding for any leases of "minerals or mineral rights" owned by the state). Indeed, even limestone is partly biological

in origin, being composed of skeletal fragments of marine organisms, but that does not mean that it cannot be a mineral. As explained in the definition offered by the Murrays' *amici*, a "product can be accepted as a mineral" as long as "geological processes *were involved* in the genesis of the compound." Paleontological Soc'y *Amicus* Br. 19 (quoting E.H. Nickel, *The Definition of a Mineral*, 33 Canadian Mineralogist 689, 689-90 (1995)) (emphasis added). If dinosaur or plant remains that have been preserved in the form of economically valuable oil, gas, or coal are minerals, then dinosaur or plant remains that were instead preserved in the form of fully mineralized fossils that are worth millions of dollars should also be considered "minerals." There is no reason to treat fossils any differently from fossil fuels.

C. There is no reason to certify this case to the Montana Supreme Court

Some of the Murrays' *amici* invite the Court to certify this case to the Montana Supreme Court. Paleontological Soc'y *Amicus* Br. 23-25. The Court should decline the invitation.

The Murrays did not seek certification in the district court, and after prevailing there, they did not seek certification on appeal—even as an alternative form of relief. This Court has explained that it

"strongly disfavor[s] a party that prevailed below requesting certification for the first time after it becomes apparent at oral argument that it is not likely to prevail in federal court." *Hinojos* v. *Kohl's Corp.*, 718 F.3d 1098, 1109 (9th Cir. 2013). Certification should be even more disfavored after the party has already lost on appeal, and especially so when certification is requested not by the party but only by an *amicus*.

CONCLUSION

The petition for rehearing and rehearing en banc should be denied.

Respectfully submitted.

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January 25, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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