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The Docket: 'Dueling Dinosaurs' Ends With Fifth-Round Split Decision

July 28, 2020

The Docket is a monthly TitleNews Online feature provided by ALTA's Title Counsel Committee which reviews significant court rulings and other legal developments and explains the relevance to the title insurance industry.

Lance Pomerantz, a New York-based sole practitioner who provides expert testimony, litigation consulting and strategic advice in land title disputes, reviews a recent Montana case that determined whether dinosaur fossils are part of the surface estate or the mineral estate. He can be reached at **lance@landtitlelaw.com**.

Citation: *Murray v. BEJ Minerals,* 2020 MT 131 (May 20, 2020).

Facts: In 2006, the Murrays discovered an extremely rare and highly valuable trove of dinosaur fossils on their ranch, including a complete *T. rex* skeleton and a specimen of two dinosaurs who appear to have been locked in combat when they died approximately 65 million years ago ("the Dueling Dinosaurs"). BEJ Minerals owned an interest in the subsurface mineral rights and asserted partial ownership of the fossils, claiming they were "minerals" under the terms of the mineral deed. The action was initially filed in state court, then removed to federal court under diversity jurisdiction. The federal district court found for the Murrays (the undisputed owners of the surface estate) on summary judgment (*Murray v. Billings Garfield Land Co.,* 187 F. Supp. 3d 1203 (2016)), a 9th Circuit panel reversed in a 2-1 decision over a vociferous dissent (*Murray v. BEJ Minerals, LLC*, 908 F. 3d 437 (9th Cir., 2018)), the *en banc* 9th Circuit granted rehearing (*Murray v. BEJ Minerals, LLC,* 920 F. 3d 583 (9th Cir., 2019) and, upon rehearing, certified the following question to the Montana Supreme Court (*Murray v. BEJ Minerals, LLC,* 924 F.3d 1070 (9th Cir., 2019)):

Whether, under Montana law, dinosaur fossils constitute "minerals" for the purpose of a mineral reservation.

Following determination of the certified question, the 9th Circuit entered an order finally disposing of the federal court action (*Murray v. BEJ Minerals, LLC,* No. 16-35506 (9th Cir., June 17, 2020)), but this review will focus on the Montana Supreme Court case.

Holding: The Montana Supreme Court split 4-3 in holding that, under Montana law, dinosaur fossils do not constitute "minerals" for the purpose of a mineral reservation. The majority held "the best method for determining whether a substance fits within the ordinary and natural meaning of "mineral" is to use contextual cues, e.g., an analysis of the term as used in the instrument; whether the material's mineral content makes it rare and valuable; and the material's relation to, and the effect of removal on, the surface" and embarked on a lengthy analysis of each of those elements.

In contrast, the dissent "reframed" the question as: "[w]hether, under Montana law, ***these*** dinosaur fossils constitute 'minerals' for the purpose of a mineral reservation?" [emphasis supplied]. Using that formulation, the dissent felt that existing Montana precedent required the opposite result than that reached by the majority. One aspect of the case that all the courts seemed to take for granted was the status of fossils as "real property," rather than chattels.

Relevance to the Title Industry: While this case was pending, the Montana legislature declared by statute that fossils are not "minerals," *see* MCA §§ 1-4-111, 1-4-112 and 82-1-501 (2019). Other state laws on fossils, paleontology and geology vary tremendously in scope and detail, while federal law pertaining to fossil collection and ownership on federal lands is subject to a bewildering maze of statutes, regulations and overlapping agency jurisdiction. Given the divisive nature of the issue (as seen by the multiple close splits), it is unclear how much influence *Murray* will have on similar cases in other jurisdictions. Unless the applicable background principles of law are so well established as to entirely eliminate the risk, title insurers would be well advised to consider adding one or more "fossil exceptions" to new policies tailored to those jurisdictions where such issues are likely to arise.

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