Civil Action No. 25-09876

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

ClinchCo, Incorporated and the State of Blackrock

Appellants and Cross-Appellees,

v.

Emma James, Jose Garcia, and Victoria Garcia

Appellees and Cross-Appellants.

On Appeal from the United States District Court for the Western District of Blackrock

Opening Brief for the Appellant and Cross-Appellee

Team Number Two

Counsel for Appellant and Cross-Appellee

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JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1331, the District Court for the Western District of Blackrock had jurisdiction of the case docketed as No. 2024-212. The district court's federal question was based on alleged violations of the National Emergencies Act, 50 U.S.C. §§ 1621(a), 1622, 1631, the Administrative Procedure Act, 5 U.S.C. §§ 701, 706(A)(2). The district court had supplemental jurisdiction of state law claims pursuant to 28 U.S.C. § 1367.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The final order being appealed from was issued July 15, 2025, and disposed of all issues. The notice of appeal was timely filed. Fed. R. App. P. 4(a). Accordingly, this appeal is properly before the United States Court of Appeals for the 12th Circuit.

STATEMENT OF THE ISSUES PRESENTED

1. Whether a deed conferring ownership of minerals lying in and under a tract of land and waiving the mineral estate owner's liability or responsibility for removing mining byproducts that have been removed to the surface conveyed ownership of the elements within those byproducts.
2. Whether mineral rights are abandoned under B.R.S. 32–1 when previous owners have not conducted mining activities within the statutory period but have acknowledged continued ownership of the rights and conveyed those mineral rights to others.
3. Whether a court can review a Presidential declaration of a national emergency when Congress has explicitly given the power to declare a national emergency to the President, and the national emergency implicates foreign policy.

4. Whether an agency can rely on a national emergency to circumvent the National Environmental Policy Act or the Endangered Species act when relevant regulations allow for agencies to circumvent those statutes during emergencies.

STATEMENT OF THE CASE

I. Factual Summary

Since the 1800s, coal mining has been an economic cornerstone of western Blackrock. R. at 4. Over time, mining activities gradually ceased, but coal waste piles, known as "Garbage of Bituminous" or "GOB piles," were left behind. R. at 4. Over 200 GOB piles remain in the area, and they create environmental and safety hazards, including the degradation of Blackrock's waterways through acid mine drainage and the leaching of pollutants. R. at 4. Additionally, the GOB piles are unstable and a fire risk, which creates a public danger. R. at 4.

Crexactium is a rare earth element ("REE") that is essential in the production of batteries used for electric vehicles and renewable energy storage. R. at 4-5. It was first discovered under a coal seam in 1875. R. at 4. The U.S. currently imports all its crexactium, and China is the world's primary exporter of REEs such as crexactium, making up 85-88% of the United States' crexactium imports. R. at 4. In the spring of 2025, China announced that it would be limiting exports of crexactium for the second time since the summer of 2024. R. at 5. An academic study published in 1952 hypothesized that REEs can be mined from GOB files, and modeling shows that commercially recoverable amounts of crexactium may exist in GOB piles in Lowland County. R. at 5. According to the study, mining the GOB piles for crexactium could lead to short-term environmental consequences including destabilizing the piles and facilitating runoff. R. at 5.

In response to China's limitation of REE exports, "under the Constitution and laws of the United States, including 3 U.S.C. § 301 and 50 U.S.C. § 1621 *et seq.*" the President issued

Executive Order 15678 ("Order"), which declared an emergency with respect to "certain Rare Earth Elements." R. at 5. The rationale for the Order is that the U.S. "risks falling behind other nations (especially China) in crucial economic sectors relating to renewable and low carbon energy, undermining strategic and foreign policy objectives." R. at 5. The Order directs agencies to "find emergency powers" to explore possible methods of producing REEs. R. at 5.

Appellees Emma James, Jose Garcia, and Victor Garcia own the surface rights to two parcels with GOB piles. R. at 6. Josh and Iyana Stone owned the parcels before 1930. R. at 6. On May 16, 1922, the Stones conveyed "[a]ll the coal, mineral and mineral products, all the iron and iron ores, and all stone in and under" the two parcels to Garland Coal and Timber Company ("Garland") via a deed drafted by Garland. R. at 6. The full text of the deed conveying the mineral estate to Garland ("the 1922 Deed") contains the following language:

> All the coal, mineral and mineral products, all the iron and iron ores, and all stone in and under the hereinafter described tract of land, and such of the standing timber as may be necessary for mining purposes, and the exclusive right of way for any and all roads that are now or may hereafter be located on the property hereinafter described either by said party of the second part, except as hereinafter provided, his heirs successors and assigns or any other person or corporation under the authority of said party of the second part his heirs successors and assigns upon the hereafter described tract of land, together to enter upon said tract of land and use and operate the same and the surface thereof free from further costs or damage in all or any manner that may deemed necessary or convenient for mining preparing for market and removing therefrom or otherwise utilizing all or any of the said coal or minerals or the coal or minerals and the manufacture of the same and shipping the said articles and products above named; without liability for injury to the surface of said land or to any thing thereon or thereunder by reason of the mining,manufacture or removal of said coal minerals, etc. for all which the party of the second part his heirs successors and assigns is hereby released from liability as well as to remove the products now owned or hereafter acquired by the said party of the second part of his heirs successors and assigns in the free and full exercise and the enjoyment of the rights and privileges herein granted. It is understood and agreed that the free right of ingress and egress in, on, over, under and through said lands hereinafter described is also hereby sold and granted to the said party of the second part his heirs successors and assigns.

R. at 6. Garland mined for coal pursuant to the 1922 Deed for roughly sixty years, but it never mined any product other than coal and never attempted to harvest any surface materials. R. at 6. The GOB piles on these parcels were a result of Garland's coal mining activities. R. at 6. Garland stopped mining the parcels in 1981 and stopped mining the region entirely in 1983. R. at 6.

The GOB piles on the parcels have occasionally caught fire, and Garland cited language from the 1922 Deed in 1922 and 1923 to deny responsibility for remediating the GOB piles and deny responsibility to manage a burning GOB pile. R. at 7. From 1983 to 1995 Garland listed the two parcels as assets with "no present value" on its balance sheets R. at 7. In 1995, Garland filed for bankruptcy and did not identify the parcels or the GOB piles in any of the filings. R. at 7. In 1996, Garland executed a deed to Fortune Holding Company ("Fortune"), its bankruptcy successor, that included "whatever rights remain in the following inactive coal and/or mineral estates in . . . western Blackrock by virtue of the following recorded deeds[,]" and the 1922 Deed was listed among them. R. at 7.

In 2005, Fortune sold most of its mineral estate holdings to Appellant ClinchCo, Incorporated ("ClinchCo"), a Canadian company that extracts REEs from industrial waste, including crexactium from GOB piles. R. at 6-7. ClinchCo has been mining GOB piles in western Blackrock since the late-1990s. R. at 6. ClinchCo plans to remediate GOB piles after they are mined to mitigate the environmental consequences. R. at 5. In 2016, the Blackrock General Assembly enacted B.R.S. 32–1, which declares a mineral interest abandoned and vested in the owner of the surface estate if the interest "has not been used for a period of twenty years or more." R. at 10. Since 2018, the state of Blackrock has annually listed its identified legacy GOB piles in the Office of Surface Mining Reclamation and Enforcement's ("OSMRE") Abandoned Mine Land

Inventory System, eMLIS. R. at 7. The GOB piles on the parcels were added in 2021, and Appellees were informed of the listing. R. at 7.

In July 2024, Blackrock applied for a $4.4 million grant from OSMRE's Abandoned Mine Land ("AML") program to engage ClinchCo to mine GOB piles in western Blackrock for REEs and then remediate them. R. at 7. Two of the largest GOB piles are on Appellees' lands. R. at 7. In August 2024, shortly after the Order was issued, OSMRE notified Blackrock and ClinchCo that their application for AML funding was approved. R. at 7.

Blackrock subsequently requested that the project be covered by alternative arrangements for National Environmental Policy Act ("NEPA") and informal Endangered Species Act ("ESA") consultations. R. at 8. OSMRE granted the request. R. at 8. OSMRE received public comments on the project, including from Appellees. R. at 8. Concerns included the project's impact on water quality, surface disturbances to Appellees' property, and ClinchCo's ownership of the REEs in the GOB piles. R. at 8. On September 12, 2024, OSMRE notified the U.S. Fish & Wildlife Service ("U.S. FWS") of the project and plans to use informal consultation procedures because of the national emergency. R. at 8. OSMRE and U.S. FWS participated in two zoom calls and exchanged a memo detailing mitigation measures, including to "take all commercially feasible steps to minimize harm to the Cole Salamander population and habitat[,]" and monitoring the salamander populations and water quality in the area. R. at 8.

OSMRE released a four-page Environmental Assessment ("EA") on September 24 that explained the purpose and need for the project, the socio-economic benefits of the project, the alternative GOB pile mediation proposals that never came to fruition, the environmental mitigation measures ClinchCo would take, and the environmental benefits of removing the GOB piles. R. at 8. OSMRE and ClinchCo submitted final detailed project plans on September 27, 2024, and

OSMRE published its EA and a finding of no significant impact (FONSI) on October 8. R. at 8. That same day, OSMRE announced its decision to award Blackrock the grant and issued the ATP. R. at 8.

II. Procedural History

Following OSMRE's announcement on October 8, 2024, Appellees and Cross-Appellants filed a Petition to Review OSMRE's issuance of an Authorization to Proceed pursuant to the Administrative Procedure Act ("APA"). R. at 3, 8. ClinchCo and the State of Blackrock sued to intervene, and OSMRE declined to defend the action while it was still pending. R. at 3.

Appellees first alleged that ClinchCo was not the rightful owner of the REEs within the GOB piles. R. at 3. They claimed that the 1922 Deed conferring ClinchCo its mineral estate did not include crexactium as a mineral that was intended by the original parties to be conferred. R. at 3, 8–9. Appellees alternatively argued that the estate had been abandoned by the application of B.R.S. 32-1, as mining had not been conducted within the statutory period. R. at 10. The suit also alleged that OSMRE's issuance of the ATP was improper, as it relied on an Executive Order ("EO") that violated the APA. R. at 11. ClinchCo and the State of Blackrock refuted this challenge, arguing that the EO could not be reviewed by the district court due to the political question doctrine. R. at 11. ClinchCo, Blackrock, and OSMRE moved for summary judgment on all of Appellees' claims, and Appellees responded by cross-moving for summary judgment. R. at 3.

The district court granted partial summary judgment to both parties. R. at 3. It held that the mineral estate conveyed by the 1922 Deed included the right to the crexactium within the GOB piles, as the piles had been removed by the original grantee to the surface in the exercise of their mineral rights and that the term "minerals" in the deed unambiguously included crexactium. R. at 9. The court further held that the mineral estate had not been abandoned via B.R.S. 32-1, as

ClinchCo's predecessors' actions constituted "use" of the estate under the statute. R. at 10. The district court determined it could review the EO, further holding that the NEA was a proper delegation of authority supporting the declaration of an emergency, that it did not violate the major questions doctrine, and that it was within the President's discretion to issue. R at 11–14. Finally, the court held that OSMRE's decision not to prepare an EIS or conduct a formal consultation as required by NEPA and ESA was not justified via the emergency powers. R. at 14.

The parties timely filed appeals seeking to reverse the decision of the district court. R. at 1. The 12th Circuit issued an order on August 9, 2025, outlining the issues to be argued and briefed on appeal. R. at 1–2.

SUMMARY OF THE ARGUMENT

As to Issue I, the 1922 Deed clearly confers all mineral rights to ClinchCo and its predecessors, which would include crexactium per the plain definition of the term "mineral." It is improper to consider extraneous factors regarding the definition of the term "mineral" beyond the plain language of the 1922 Deed, as the term mineral is not ambiguous; however, the deed's language restricting rights to those "in and under" the tract is ambiguous and merits consideration of extrinsic evidence of the parties' intent, as the 1922 Deed broadly waives liability for surface damage and contemplated this damage in the removal of coal minerals acquired by the holder of the mineral estate.

As to Issue II, neither ClinchCo nor its predecessors have abandoned their mineral interests. There must be evidence of the legislature's intent for a law to be applied retroactively, and such evidence is not reflected in the record. Even if the Blackrock's law designating mineral interests as abandoned were intended to be applied retroactively, the law would not apply here under the jurisprudence and statutory schemes of other states' laws with respect to abandonment. As

ClinchCo and its predecessors have not demonstrated an intent to abandon their mineral interests, and they have engaged in activities that are recognized in another state's very similar statute to constitute use of its mineral rights, it has not abandoned its mineral interests.

As to Issue III, the President's declaration of the REE shortage as a national emergency is not reviewable by this Court. The question of whether the REE shortage qualifies as a national emergency is a nonjusticiable political question for two reasons. First, because the REE shortage invokes foreign policy, an issue expressly delegated by the Constitution to the Executive and Legislative Branches, the first *Baker* formulation for nonjusticiable political questions is met. Second, because there is no way to judicially discover or manage whether an REE shortage constitutes a national emergency, the second *Baker* formulation for nonjusticiable political questions is met. Thus, this Court cannot review the emergency declaration. Additionally, this Court cannot rely on *Loper-Bright*, the nondelegation doctrine, or the major questions doctrine to review the Declaration because the President is not an agency.

As to Issue IV, the district court was correct in finding that it can review agency actions pursuant to a nonreviewable national emergency; however, OSMRE's decision not to prepare an EIS under NEPA was pursuant with the law because DOI's emergency regulation allows relevant agencies to circumvent NEPA compliance in emergencies. As long as the responsible official documents in writing that an emergency exists and describes the actions taken, an agency can avoid having to prepare a full EIS. OSMRE did just that through consultations with the U.S. FWS, so it was proper for OSMRE not to prepare an EIS under NEPA. Similarly, OSMRE's decision not to participate in ESA consultations was in accordance with the law because U.S. FWS's emergency regulation allows relevant agencies to circumvent ESA consultations during certain emergencies including those that implicate national security, except for planned or routine events.

The REE shortage invokes foreign policy, and national security is also implicated. Approving a grant to a mining company due to a national REE shortage is neither a planned nor routine event. Thus, it was proper for OSMRE not to engage in formal ESA consultations.

STANDARD OF REVIEW

"Summary judgment is appropriate where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *National Enterprises, Inc. v. Smith*, 114 F.3d 561, 563 (6th Cir. 1997) (quoting Fed. R. Civ. P. 56(c)); *see Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). This Court reviews district court findings of fact for clear error and conclusions of law de novo. *Smith*, 114 F.3d at 563. The issues presented in this matter are conclusions of law, so they are reviewed de novo. *See id.*; R. at 2.

ARGUMENT

I. THE 1922 DEED UNAMBIGUOUSLY CONVEYED THE RIGHT TO MINE FOR ALL MINERALS, INCLUDING CREXACTIUM, WHILE THE LANGUAGE GRANTING MINERAL RIGHTS "IN AND UNDER" THE TRACT INCLUDES THE MINERALS IN THE GOB PILES, IN LIGHT OF EXTERNAL EVIDENCE.

The 1922 Deed acquired by ClinchCo's predecessors conveyed the mineral rights to the crexactium within the GOB piles, as the 1922 Deed's language unambiguously included this rare earth element, and ClinchCo therefore retains these rights. *See Petro-Hunt, L.L.C. v. Tank*, 4 N.W.3d 526, 532 (N.D., 2024); R. at 6. When an assignment of interests "is memorialized in a clear and unambiguous writing, a court should not look to extrinsic evidence to ascertain intent." *Petro-Hunt, L.L.C.*, 4 N.W.3d at 532 (quoting *Golden v. SM Energy Co.*, 826 N.W.2d 610, 615 (N.D. 2013)). Further, "the question as to whether a contract is ambiguous is a question of law to be determined by the court." *Energy Development Corp. v. Moss*, 591 S.E.2d 135, 143 (W. Va.

2003) (quoting *Berkeley County Pub. Serv. Dist. v. Vitro Corp.*, 162 S.E.2d 189, 200 (W. Va. 1968)).

A. <u>The Term "Minerals" as Employed in the 1922 Deed is not Ambiguous, as its Plain Definition is Ascertainable and Describes Crexactium.</u>

The 1922 Deed's use of the term "minerals" includes crexactium, and the language of the conveyance does not contain ambiguities that support judicial consideration of extrinsic evidence of the parties' intent. When interpreting the language of a conveyance, the "best guide to interpretation of terms used in any instrument is the ordinary meaning of the words themselves, in their own context." *Entervest Operating, LLC v. Sebastian Mining, LLC*, 676 F.3d 1144, 1146 (8th Cir. 2012) (quoting *Pollock v. McAlester Fuel Co.*, 223 S.W.2d 813, 814 (Ark. 1949)). As correctly recognized by the court below, crexactium meets any definition of "mineral," as it is "a solid inorganic substance of natural occurrence." R. at 9. The deed itself places no restraint on what is classified as a mineral. R. at 6. Further, minerals naturally occurring in coal like crexactium appear to have been contemplated by the original parties, as evidenced by the use of the term "coal minerals" at a later point in the deed. R. at 6. Finally, while extrinsic evidence should not be considered in the absence of ambiguity in the deed's language, crexactium has been a mineral known to be associated with coal since 1875, and it would therefore have been a "mineral" at the time the 1922 Deed was signed. *Entervest Operating, LLC*, 676 F.3d at 1146; R. at 6. Thus, the deed's plain language unambiguously included crexactium in its conveyance of the mineral estate.

B. <u>The Language Designating the Mineral Rights as extending "in and under" the Tract includes the Crexactium in Light of the 1922 Deed's Language Disclaiming Liability for Surface Damage and the Removal of the GOB Piles to the Surface.</u>

The 1922 Deed's language describing the mineral lying "in and under" the tract also includes the GOB piles on the surface, as evidenced by the original parties' agreement to broadly waive damage to the surface. R. at 4, 6. When federal courts exercise supplemental jurisdiction

over state law claims like the interpretation of a deed, they are "bound to apply the law of the forum state to the same extent as if it were exercising its diversity jurisdiction." *Menuskin v. Williams*, 145 F.3d 755, 761 (6th Cir. 1998). Further, when there is no guidance from a state's supreme court with respect to an issue, the federal court must "anticipate how that court would rule," considering intermediate appellate courts' decisions and other persuasive data that could indicate the likely decision of the state's supreme court. *Safeco Ins. Co. of America v. CPA Plastics Group, Ltd.*, 625 F. Supp. 2d 508, 517 (E.D. Mich. 2008). Absent indication that there are any relevant decisions from Blackrock's courts or the Twelfth Circuit, the state court decisions of similarly situated states may be persuasive to this Court. *Id.* Under Pennsylvania law, when the express intent of the parties with respect to the manner of mining is not readily ascertainable from the plain text of the conveyance, "then all attending circumstances existing at the time of the execution of the instrument should be considered to aid in determining the apparent object of the parties." *Stewart v. Chernicky*, 266 A.2d 259, 263 (Pa. 1970).

In *Stewart v. Chernicky*, the Supreme Court of Pennsylvania determined that a deed was ambiguous with respect to whether it permitted strip mining or only deep mining, as there was "no express intent of the parties . . . concerning the means by which the coal was to be mined, neither strip mining nor deep mining being specifically mentioned." *Id.* As the deed later contained provisions suggesting that mineshafts would require ventilation, which would only be applicable to deep mining operations, the court held that the deed reflected no intent of the parties to include strip mining of the tract. *Id.*

Although the 1922 Deed contains language limiting the mineral estate to those minerals "in and under" the tract, like in *Stewart*, the express intent of the parties is not readily ascertainable from the deed with respect to the minerals comprising the GOB piles, as the deed lacks language

directly describing whether they are part of the mineral estate. R. at 6; 266 A.2d at 264–65. Whereas the deed in *Stewart* contained language indicating that the intent of the parties was to limit the extraction of coal to deep mining techniques, the language of the 1922 Deed's waiver of liability for any injury to the surface of the land indicates that the parties contemplated an expansive exploitation of the land in which debris would be moved to the surface. 266 A.2d at 264–65; R. at 6. Specifically, the deed's expansive language permitting the owner of the mineral estate to "use and operate the . . . surface thereof free from" liability for using, manufacturing, removing, or "otherwise utilizing all or any of the coal or minerals" suggests that creation and use of the GOB piles were within the contemplation of the parties to the deed. R. at 6. This is further supported by the deed's waiver of any duty to remove "products now owned or hereinafter acquired by the" owner of the mineral estate. R. at 6. This language indicates that the original parties to the deed expected some products of the mining operations to be removed and placed on the surface, for which the mineral estate would still exercise ownership but disclaim liability. R.at 6. Thus, this Court should resolve the ambiguity regarding whether the 1922 Deed permits the mining of the GOB piles at the surface in favor of the mineral estate holder's right to mine the minerals within them.

II. NEITHER CLINCHCO NOR ITS PREDECESSORS HAVE ABANDONED THEIR MINERAL ESTATE IN THE GOB PILES' CREXACTIUM, AS B.R.S. 32-1 DOES NOT APPLY RETROACTIVELY, AND CLINCHCO'S PREDECESSORS USED THE ESTATE BY THE STANDARDS OF SIMILARLY SITUATED STATES.

Neither ClinchCo nor its predecessors abandoned their mineral estate in the crexactium located within the GOB piles, as there is no indication that the legislature intended for B.R.S. 32-1 to apply retroactively. *See Wheelock v. Heath*, 272 N.W.2d 768 (Neb. 1978); R. at 10. When federal courts interpret a state statute through its supplemental jurisdiction over an issue, and there are no decisions on point from the state's highest court, federal courts can "predict how the highest

court would decide an issue by looking to other reliable indicators of state law, including the decisions of other state courts." *Hunter v. Page Cnty., Iowa*, 102 F.4th 853, 866 (8th Cir. 2024). Further, per the standards of similarly situated states, ClinchCo and its predecessors have not demonstrated the required intent to abandon the minerals within the GOB piles. *See Freeport Gas Coal Trust v. Harrison Cnty. Coal Resources, Inc.*, 662 F.Supp.3d 594, 604–05 (N. D. W. Va., 2023) (holding that both a physical abandonment and intent to abandon are required to effect an abandonment of one's mineral estate).

A. **Blackrock's Law Determining the Abandonment of Mineral Interests Should not have Started Tolling Until 2016, as There is no Evidence that the Legislature Intended for the Law to Apply Retroactively.**

Blackrock's 2016 law determining the abandonment of mineral interests has not tolled twenty years, as the plain language of the law does not specify that the law applies retroactively, and there are no factors demonstrating that this was the intent of the legislature. When a new law is promulgated that would affect one's substantive rights, the law presumptively applies "only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed." *Wheelock*, 272 N.W.2d at 771. Numerous states have echoed this principle in their jurisprudence, including Nebraska, North Dakota, and West Virginia. *See id.*; *Johnson v. Taliaferro,* 793 N.W.2d 804, 807–08 (N.D. 2011) (recognizing that one's mineral interests cannot be deprived through retroactive application of law without clear legislative intent in North Dakota); *Cabot Oil & Gas Corp. v. Huffman*, 705 S.E.2d 806, 815 (W. Va. 2010) ("Absent a direct expression of such intent by the Legislature, we are constrained to apply the law in effect at the time of the deed's execution.").

In *Wheelock*, the Supreme Court of Nebraska considered whether a statute that set forth a series of conditions that would trigger the abandonment of mineral rights could apply retroactively. *Id.* at 770–71. The law at issue deemed mineral interests to be abandoned when no mining

activities, transactions, or recording of interests occurred after a period of twenty-three years. *Id.* at 770. The court looked to the intent of the Nebraska legislature to determine whether the law and its tolling period could apply retroactively. *Id.* As the law contained language providing procedural guidelines for actions filed within two years of the law's passage and contemplated that these challenges could be brought in that time, the Supreme Court of Nebraska held that there was a sufficient showing of legislative intent for the law to toll and apply retroactively. *Id.* at 771.

B.R.S. 32-1 declares a mineral interest abandoned if it is not used for a period of twenty years. R. at 10. The law directly affects the substantive property interests of ClinchCo's mineral rights, as its application would divest ClinchCo of its property interests and hand them to the owners of the surface estate. R. at 10. Unlike the law at issue in *Wheelock*, there is no indication that the Blackrock legislature intended for B.R.S. 32-1 to apply retroactively. R. at 10; *see* 272 N.W.2d at 771. As B.R.S. 32-1 was enacted in 2016, the tolling of the twenty-year-period should not have begun until that year, leaving ClinchCo with several years before the statute could operate to deem its mineral interests abandoned. R. at 10. Accordingly, this Court should hold that the law is inapplicable in this case, absent evidence that the Blackrock legislature intended for the twenty-year-period to toll retroactively.

B. Even if B.R.S. 32-1 Applied and Tolled Retroactively, ClinchCo and its Predecessors Have not Abandoned the Mineral Estate with Respect to Other States' Jurisprudence and Statutory Regimes.

Even if B.R.S. 32-1 applied and tolled retroactively, ClinchCo and its Predecessors have not abandoned their mineral estate with respect to other states' laws, as they have demonstrated no intent to abandon the estate and taken actions that would constitute use. *See* R. at 10. While the term "use" within B.R.S. 32-1 lacks accompanying language to define the meaning of the term with respect to its statutory application, other states' standards for abandonment can provide clarity. *See* R. at 10; *Wheelock*, 272 N.W.2d at 770–71. Several states, including Nebraska,

Pennsylvania, and Kentucky, apply a standard that requires both a physical "relinquishment of possession" of the mineral estate as well as "the intention to abandon it." *Wheelock*, 272 N.W.2d at 771 (applying the common law standard in Nebraska); *see also Universal Mins., Inc. v. C. A. Hughes & Co.*, 669 F.2d 98, 103 (3d Cir. 1981) (applying the common law standard in Pennsylvania); *Elk Horn Coal Corp. v. Allen*, 324 S.W.2d 829, 830 (Ky. 1959) (recognizing that in Kentucky, "there must be a showing of actual acts of relinquishment, accompanied with the intention to abandon."). Further, South Dakota's statutory regime, which similarly designates mineral rights abandoned after a period of disuse, defines the use of mineral interests to include an expansive list of actions that do not require engagement in actual mining activities. *Holsti v. Kimber*, 845 N.W.2d 923, 928–29 (S.D. 2014).

i. *Neither ClinchCo nor its Predecessors have Manifested Intent to Abandon the Mineral Estate by Other States' Jurisprudence.*

By the standards of other similarly situated states, neither ClinchCo nor its predecessors have demonstrated intent to abandon the mineral estate. Intent to abandon a mineral interest "may and indeed often must be inferred from acts." *Universal Mins., Inc.*, 669 F.2d at 103 (quoting Llewellyn v. Philadelphia & Reading Coal & Iron Co., 162 A. 429, 430 (Pa. 1932)). Further, merely being absent and refraining from activity on a property does not constitute an intent to abandon, "although conduct of that kind may continue unexplained for such length of time as not to be consistent with any other hypothesis." *Wheelock*, 272 N.W.2d at 771.

In *Universal Minerals, Inc. v. C. A. Hughes & Co.*, the United States Court of Appeals for the Third Circuit considered whether a company's actions compelled a finding that it had expressed intent to abandon its mineral interests. 669 F.2d at 104–05. There, the holder of mineral rights terminated its deep mining operation, "razed its buildings and cleaning plant and removed its railroad tracks and its generation station." *Id.* at 104. The holder of mineral rights then allowed

refuse piles from its mining operations to burn extensively, making no effort to prevent or stop the burning. *Id.* When it later prepared a list of all its assets for a proposed bulk sale, the rights holder did not list or refer to the piles, despite having sold minerals from one of its piles on several occasions in unadvertised transactions. *Id.* The Third Circuit Court of Appeals held that these factors did not compel a finding that the mineral rights holder had manifested intent to abandon the rights to the pile. *Id.*

Applying effectively the same standard, the United States District Court for the Northern District of West Virginia held that an intent to abandon mineral rights was evident where a lessee of mineral rights failed to commence mining operations in an extended period of time after acquiring the rights. *Freeport Gas Coal Trust*, 662 F. Supp. 3d at 604–05. There, a lease was acquired that required the payment of a royalty for coal mined from the estate. *Id.* at 604. In addition to failing to commence any mining operations, the lessee also failed to physically occupy the leased premises for fifty-six years, and they refused to provide the lessor of the mineral rights a plan for mining despite the lessor's requests. *Id.*

ClinchCo and its predecessors have more to show for their intent than the rights holders in these cases. *See* R. at 7. Whereas the rights holder in *Universal Minerals, Inc.* failed to identify its mineral estate as an asset and was held not to have intended to abandon its rights, ClinchCo's predecessor Garland identified the mineral estate as an asset on its balance sheets from 1983 to 1995 and referred to its mineral holdings in an executed deed to its bankruptcy successor. 669 F.2d at 104–05; R. at 7. Though Garland left GOB piles and stopped its mining activities in 1981, similar actions taken by the rights holder in *Universal Minerals, Inc.* were held not to compel a finding of their intent to abandon. 669 F.2d at 104–05; R. at 6. Further, unlike the lessee in *Freeport Gas Coal Trust*, ClinchCo's predecessors actually entered the land and engaged in mining operations

without a half-century's delay. 662 F. Supp. 3d at 604–05. Thus, no intent to abandon the mineral rights to the GOB piles has been manifested in this case.

ii. ClinchCo and its Predecessors have Engaged in Activities that Would Constitute "Use" Under South Dakota's Similar Statutory Scheme.

In addition to lacking a manifestation of intent to abandon the mineral estate, ClinchCo and its predecessors have engaged in activities that would constitute "use" under a similar statutory regime. Under South Dakota's statutes, "a mineral interest will be deemed abandoned if it is 'unused' for twenty-three years" unless the holder of the mineral interest engages in certain statutorily recognized actions. *Holsti*, 845 N.W.2d at 928. In South Dakota, actual mining activities are not necessary to constitute use of a mineral interest. *Id.* As applied by the Supreme Court of South Dakota, a mineral interest will be considered "used" if a conveyance, lease, mortgage, assignment, or other transfer of interest occurs. *Id.*

Per South Dakota's definition of the term, ClinchCo's predecessors' transactions and recognition of the mineral estate as an asset would constitute "use" to prevent abandonment. *Id.*; R. at 7, 10. Assuming B.R.S. 32–1 can toll and apply retroactively, Garland's execution of a deed to its successor in bankruptcy in 1996, Fortune Holding Company, would have prevented a statutory determination of abandonment until 2016, as the executed deed incorporated the remaining mineral interests codified in the 1922 Deed. R. at 7, 10; *Holsti*, 845 N.W.2d at 928–29. While still within this grace period from abandonment, Fortune Holding Company conveyed the 1922 Deed and its included mineral interests to ClinchCo in 2005, adding another twenty years to its period during which abandonment would not occur by operation of statute. R. at 7, 10. Finally, as ClinchCo demonstrated its clear intent to mine the GOB piles at issue via its application with OSMRE while still within the twenty–year period following its last "use," this Court should hold that ClinchCo's mineral rights have not been abandoned under B.R.S. 32–1. R. at 7, 8, 10.

III. NATIONAL EMERGENCIES ARE NONJUSTICIABLE POLITICAL QUESTIONS THAT THIS COURT DOES NOT HAVE THE POWER TO REVIEW.

The district court erred in finding that the Order was reviewable because it is barred from reviewing the Order under the political question doctrine, and neither *Loper Bright Enterprises v. Raimondo* nor the Major Questions Doctrine apply to presidential actions themselves. *See* 603 U.S. 369, 410-11 (2024). Article III courts cannot hear political questions, as political questions are non-justiciable. *Baker v. Carr*, 369 U.S. 186, 210 (1962). Further, the APA allows for judicial review of "final agency action," and the President is not an agency, so presidential actions are not reviewable "final agency actions." *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Dalton v. Specter*, 511 U.S. 462, 470 (1994). Accordingly, because both *Loper Bright* and the major questions doctrine apply to agency actions, the Presidential action of declaring a national emergency is not reviewable under either of those standards. *See* 603 U.S. 369 at 410-11; *West Virginia v. Environmental Protection Agency*, 597 U.S. 697, 732 (2022).

A. <u>Judicial review of the Order is barred by the political question doctrine.</u>

Courts have consistently found that presidential declarations of national emergencies are nonjusticiable political questions. *See, e.g.*, *United States v. Amirnazmi*, 645 F.3d 564, 581 (3rd Cir. 2011) ("[F]ederal courts have historically declined to review the essentially political questions surrounding the declaration or continuance of a national emergency" (citation omitted)); *United States v. Yashida Int'l, Inc.*, 526 F.2d 560, 579 (C.C.P.A. 1975) (courts will not "review the judgment of a President that a national emergency exists").

In *Baker*, the Supreme Court held that if a case presents a political question, Article III courts cannot hear that portion of the case. 369 U.S. at 210. The Court then outlined six formulations that constitute political questions. *Id.* at 217. A question need meet only one of the formulations to be considered a political question. *Id.* The first *Baker* formulation states that a

political question exists when there is a "textually demonstrable constitutional commitment of [an] issue to a coordinate political department[.]" *Id.* The second *Baker* formulation states that a political question exists when the question has "a lack of judicially discoverable and manageable standards for resolving it[.]" *Id.*

In *Center for Biological Diversity v. Trump*, the District Court for the District of Columbia found that whether a national emergency existed at the southern border of the United States was a nonjusticiable political question. 435 F.Supp.3d 11, 33 (D.D.C. 2020). In addition to citing previous decisions from other courts exemplifying that national emergencies are nonjusticiable political questions, the court also analyzed the first two *Baker* formulations. *Id.* at 31. The court found that the first *Baker* formulation was met because "the declaration of a national emergency raises questions about national security or foreign policy[,] [a]nd matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention, since the Constitution commits those issues to the Executive and Legislative Branches." *Id.* (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)). In analyzing the second *Baker* formulation, the court looked to the text of 50 U.S.C. § 1621 which simply states "during the period of a national emergency . . . the President is authorized to declare such national emergency." *Id.* at 32. The court then emphasized that nothing in the text of § 1621 guides how the President should make the decision of whether something is a national emergency. *Id.* Thus, the court found that because "whether a crisis reaches the point of a national emergency is inherently a subjective and fact-intensive inquiry[,]" it could not determine whether a national emergency existed at the southern border. *Id.* at 32-33 (citing *Al-Tamimi v. Adelson*, 916 F.3d 1, 11-12 (D.C. Cir. 2019)).

Here, the district court found that the political question doctrine is not implicated because the court is not being asked to supplant a foreign policy decision. R. at 11. But the President issued

the Order and declared a national emergency as a direct result of a "domestic shortage" of REEs because China limited its REE exports. R. at 11. The Order explained that if the domestic shortage continued, it could undermine "strategic and foreign policy objectives." R. at 11. The national emergency, as explained in the Order, raises questions about foreign policy—issues the Constitution commits to the Executive and Legislative Branches. R. at 11; *see CBD*, 435 F.Supp.3d at 31. The first *Baker* formulation is met here. *See Baker*, 369 U.S. at 217; *CBD*, 435 F.Supp.3d at 33.

In addition to the first *Baker* formulation, the second *Baker* formulation is also met here, and only one formulation is needed to invoke the political question doctrine. *See Baker*, 369 U.S. at 217. The President used § 1621 to declare the national emergency here just as the President did to declare the national emergency in *CBD*. *See* 435 F.Supp.3d at 32. Section 1621 is silent as to how the President should make a decision as to whether there is a national emergency. *See id.* Like the court in *CBD*, this Court would be making a subjective, fact-intensive inquiry that is committed by statute to the President, not the courts. *See id.* at 32-33.

Further, even if this Court were to hold that the Order and emergency declaration does not raise questions about foreign policy, the district court's assumption that national emergencies can only be political questions in the foreign policy context is misguided. Although *CBP*'s analysis of the first *Baker* formulation relies heavily on a foreign policy nexus, analysis of the second *Baker* formulation does not. *See id.* at 31-33. Historically, Presidents have declared national emergencies under § 1621 for domestic policy reasons. *See* Proclamation No. 7924, 70 Fed. Reg. 54227 (Sept. 8, 2005) (responding to a national emergency caused by Hurricane Katrina); Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020) (responding to a national emergency caused by the Covid-19 pandemic). For Proclamation 9994, the Supreme Court analyzed agency actions that

followed the Proclamation, but neither the Supreme Court nor any other court examined the merits of the national emergency. *See generally Biden v. Nebraska*, 600 U.S. 477 (2023). Accordingly, whether a domestic REE shortage is a national emergency is a nonjusticiable political question, and this Court does not have the power to review it. *See Baker*, 369 U.S. at 210.

B. **Presidential actions are not subject to judicial review under either *Loper Bright* or the major questions doctrine.**

This Court also does not have the power to review the Order through the lens of any of the administrative law principles outlined in the district court Opinion. Administrative law principles such as the *Loper Bright* holding, the major questions doctrine, and the nondelegation doctrine apply to agency actions, not presidential actions. *Franklin*, 705 U.S. at 796; *Dalton*, 511 U.S. at 470. The district court was correct in finding that the nondelegation doctrine is not applicable here because it is outdated and has been functionally replaced by other, more recent Supreme Court decisions. R. at 13.

In *Franklin*, the Supreme Court held that the Administrative Procedure Act ("APA") provides for judicial review of "final agency action where there is other adequate remedy in a court." 705 U.S. at 796 (quoting 5 U.S.C. § 704). Because the President is not an agency, the Court held that Presidential actions cannot be reviewed under the APA. *Id.*

In *Loper Bright*, the Supreme Court held that *Chevron* deference was not in accord with the APA and ultimately overruled *Chevron*. 603 U.S. at 410-11. In *West Virginia*, the Supreme Court invoked the major questions doctrine in the context of EPA actions—agency actions. 597 U.S. at 732. Unlike in *Loper Bright*, the Court did not invoke the APA by name in the *West Virginia* opinion. *Id.* But the Ninth Circuit Court of Appeals case *Mayes v. Biden* provides guidance indicating that the major questions doctrine does not apply to presidential actions. 67 F.4th 921, 932-33 (9th Cir. 2023). The case dealt with President Biden's vaccine mandates in the wake of the

Covid-19 pandemic, and the Ninth Circuit subsequently vacated the opinion upon President Biden's withdrawal of the vaccine mandates. *Mayes v. Biden*, 89 F.4th 1186, 1188 (9th Cir. 2023) *vacating as moot* 67 F.4th 921 (9th Cir. 2023). However, the judicial holdings of the case are still persuasive to this Court. Citing prior Supreme Court cases invoking the major questions doctrine, the court held that the Supreme Court requires an express statement of Congress meant to subject the President's actions to additional scrutiny. 67 F.4th at 934. There is not an APA-adjacent statute that applies to Presidential actions. *Id.* As the Ninth Circuit recognized, "[i]f we were to determine that the Major Questions Doctrine prevents the President from exercising lawfully delegated power, we would be rewriting the Constitution's Faithfully Executed Clause in a way never contemplated by the Framers." *Id.* at 933.

The President declared the REE shortage a national emergency in accordance with 50 U.S.C. § 1621, a power granted to the President by Congress. R. at 12. Any actions the President takes in accordance with § 1621 are Presidential actions, not agency actions. *See Franklin*, 705 U.S. at 796. Thus, administrative law principles in the APA context do not apply to presidential actions. *See Loper Bright*, 603 U.S. at 410-11; *Mayes*, 67 F.4th at 933-34. While the actions agencies undertake pursuant to a national emergency are reviewable by this Court, the President's declaration of a national emergency is not. *See Franklin*, 705 U.S. at 796.

IV. OSMRE'S DECISION NOT TO PREPARE AN EIS OR ENGAGE IN FORMAL ESA CONSULTATION WAS IN ACCORDANCE WITH THE LAW.

The district court erred in finding that OSMRE's decision not to prepare an EIS or engage in formal ESA consultation was not in accordance with the law. The district court was correct in finding that it can review actions taken during an emergency declaration even though the emergency declaration itself is not reviewable. R. at 15; *see, e.g.*, *Biden*, 600 U.S. at 506-07. Similarly, courts can review agency actions pursuant to a national emergency under *Loper Bright*.

603 U.S. 369 (2024). However, OSMRE's actions were in accordance with relevant DOI and U.S. FWS provisions. *See* 43 C.F.R. § 46.150; 50 C.F.R. § 402.05.

A. OSMRE acted in accordance with 43 C.F.R. § 46.150.

DOI's regulation 43 C.F.R. § 46.150 allows a "Responsible Official" at an agency to take actions before preparing a NEPA analysis and environmental impact statement in the event of an emergency. The Responsible Official must "take into account the probable environmental consequences of these actions and mitigate foreseeable adverse environmental effects to the extent practical," and the Official must "document in writing the determination that an emergency exists and describe the responsive action(s) taken." § 46.150(a)-(b). Section 46.150(a) specifies that the Responsible Official may "take those actions necessary to control the immediate impacts of the emergency that are urgently needed to mitigate harm to life, property, or important natural, cultural, or historic resources." If an agency proposes actions that go "beyond those actions necessary to control the immediate impacts of the emergency[,]" "the Responsible Official must consult with the Office of Environmental Policy and Compliance about alternative arrangements for such additional responsive actions." § 46.150(a), (c).

In *Friends of Animals v. Bureau of Land Management*, an environmental group sued the Bureau of Land Management ("BLM") for removing wild horses from an area to preserve the area's vegetation after a fire. No. 2:16–cv–1670–SI, 2018 WL 1612836, at *4 (D. Ore. Apr. 2, 2018). Before the removal, BLM prepared an EA and received and reviewed public comments. *Id.* BLM then determined issued a FONSI. *Id.* The court then determined that BLM went beyond what was necessary to control the immediate impacts of the fire and did not consult with the Office of Environmental Policy and Compliance ("OEPC") or any other entity about "alternative arrangements" as required by § 46.150(c). *Id.* at *8-9. Ultimately, the court found that because

BLM did not consult with OEPC, it would have to comply with NEPA outside of the emergency context. *Id.* at *9-10.

The district court here concludes that DOI's emergency NEPA provision is not implicated because OSMRE regulations "suggest" that such shortcuts are only available when an emergency "presents a high probability of substantial physical harm to the health, safety, or general welfare of people. . . ." R. at 16; 30 C.F.R. § 1506.11. While this language would be relevant in the context of OSMRE's internal policies related to surface mining reclamation, this lawsuit involves a challenge to OSMRE's policies in the context of NEPA and § 46.150. R. at 15-16. NEPA itself does not speak to emergency situations, but as detailed above, § 46.150 does. R. at 16.

Like BLM, OSMRE received public comment on its decision to circumvent NEPA even though § 46.150 did not require it to do so. R. at 8; *see Friends of Animals*, 2018 WL 1612836, at *4. OSMRE's consultations with the U.S. FWS discussing its grant to ClinchCo's potential implications on water quality and the Cole Salamander population via two zoom calls and a memo fulfill the requirements of §§ 46.150(a)-(b). R. at 8. After these discussions, OSMRE released its EA and FONSI in accordance with § 46.150. R. at 8. However, unlike BLM, it is unlikely that OSMRE's grant to ClinchCo goes beyond the actions necessary to control the REE shortage. *See Friends of Animals*, 2018 WL 1612836, at *8-9. While the Record does not go into much detail on the foreign policy or domestic implications of the REE shortage, there are still foreign and domestic implications of such a shortage, and it was improper for the district court to rely on a regulation guiding internal OSMRE policies with regard to surface mine reclamation to make a finding on NEPA compliance.

But even if this Court were to find that OSMRE's actions went beyond the actions necessary to control the REE shortage, OSMRE still acted in accordance with § 46.150. Unlike

Friends of Animals, where BLM made no efforts to engage in any consultations regarding the environmental impacts of its emergency actions, OSMRE has consulted with U.S. FWS. R. at 8; *see id.* The Record is unclear as to whether OSMRE consulted with DOI's OEPC prior to consulting with U.S. FWS, but it still consulted with another agency to identify and subsequently troubleshoot any environmental impacts the grant would have.

B. <u>OSMRE acted in accordance with 50 C.F.R § 402.05.</u>

U.S. FWS's regulation 50 C.F.R § 402.05 allows agencies to circumvent formal ESA consultations in certain emergency situations. R. at 16. Specifically, the provision "applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc." 50 C.F.R § 402.05(a). This is a rarely litigated provision, as evidenced by there being only twelve district court opinions as of March 20, 2025, that cite the provision. Accordingly, there is a limited amount of caselaw providing guidance for what constitutes an "emergency" under § 402.05.

In *Washington Toxics Coalition v. United States Department of the Interior, Fish and Wildlife Service*, the District Court for the Western District of Washington found that the use of pesticides to control pest outbreaks was not an "emergency" because it was a planned, routine event. 457 F.Supp.2d 1158, 1195-96 (W.D. Wash. 2006). Other courts have similarly found that certain events did not constitute emergencies because they were expected or routine events. *See, e.g.*, *Defenders of Wildlife v. United States Army Corps of Engineers*, No. 1:20CV142-LG-RPM, 2022 WL 18456141, at *7 (S.D. Miss. Nov. 22, 2022) (finding that the opening of a flood control spillway was not an emergency because it was a routine event).

In *WildEarth Guardians v. United States Forest Service*, the District Court for the District of Arizona entered an order based on a Stipulation of the parties that allowed the U.S. Forest Service ("USFS") to use § 402.05 to remove certain trees. No. CV–10–385–TUC–DCB, 2012 WL

10738432, at *1-2 (D. Ariz.). The rationale was that if the trees in question were not removed, it could cause damage to power lines which could "result in outages to the electric system and/or pose a significant threat to the public safety[.]" *Id.* at *1.

Here, the REE shortage has both domestic and foreign policy implications, which places this emergency squarely within the "national defense or security emergencies, etc." language of § 402.05. R. at 11. Unlike the use of pesticides in *Washington Toxics* or the opening of a flood control spillway in *Defenders of Wildlife*, both planned, expected, or routine events, approving a grant to a mining company in the wake of an REE shortage is not a planned, expected, or routine event. *See* 457 F.Supp.2d at 1195-96; 2022 WL 18456141, at *7. The REE shortage is more like the tree situation in *WildEarth*, and, like the tree situation in *WildEarth*, complications with the electric system can and likely will result from an REE shortage. *See* 2012 WL 10738432, at *1-2. The implications here are likely more drastic as an REE shortage can add complications to the entire United States energy industry, not just one power grid. *See id.*

CONCLUSION

For the foregoing reasons, the State of Blackrock, ClinchCo, and OSMRE respectfully ask that this Court AFFIRM the district court's findings regarding the 1922 Deed and the applicability of B.R.S. 32–1, REVERSE the district court's findings that it can review the merits of the National Emergency and that OSMRE did not comply with NEPA or ESA, and REMAND for further proceedings consistent with this ruling.