CA 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 and Cross-Appeal from the District Court for the Western District of Blackrock,
Dist. Ct.
Judge Laura Greene

BRIEF FOR APPELLEES AND CROSS-APPELLANTS

Team No. 4
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September 5, 2025

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OTHER AUTHORITIES

Andrew T. Hyman, *Executive Orders in Court*, 124 Yale L.J. 2026 (2015).....22

Emergency, *Black's Law Dictionary* (2nd ed. 1910). 25

Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. Chi. L. Rev. 1743

(2019). 22, 23, 25

Phillip J. Cooper, By Order of the President: The Use and Abuse of Executive Direct Action (Lawrence, University Press of Kansas, 2002). 22

U.S. Dep't of the Interior, *Departmental Manual, Part 516: National Environmental Policy Act of 1969* (2025) 26

U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act*, 8.1 (1998).....29

JURISDICTIONAL STATEMENTS

The district court had jurisdiction over this action under 28 U.S.C. § 1331 and §1367(a). The court entered judgment on August 9, 2025, and the parties filed timely appeals. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the 1922 Deed conveying "all the coal, mineral and mineral products, all the iron and iron ores, and all stone in and under [the tract]" conveyed the right to the rare earth element crexactium found in coal waste piles on the surface—an unknown substance not contemplated by the parties in 1922;
2. Whether ClinchCo or its predecessors abandoned any claim to the crexactium in the coal waste piles by treating those piles as worthless refuse and leaving them on the land for decades, such that the surface owners, Plaintiffs, now hold the exclusive right to any minerals therein;
3. Whether Executive Order 15678—which declared a national emergency over rare earth element supply and expedited the administration of domestic mining projects—is subject to judicial review, and if so, under what standard;
4. Whether the Office of Surface Mining Reclamation and Enforcement's issuance of the Authorization to Proceed for mining, without preparing a National Environmental Policy Act Environmental Impact Statement, or engaging in a formal Endangered Species Act consultation, violated federal law through improper reliance on the Executive Order's emergency declaration.

STATEMENT OF THE CASE

Emma James, Jose Garcia, and Victoria Garcia, brought this case in opposition to ClinchCo's claim to coal waste piles on Plaintiffs' land and the State of Blackrock's blind reliance on that claim. The incorrect assumption of ownership expedited approval to the Office of Surface Mining Reclamation and Enforcement's ("OSMRE") $4.4 million grant and issuance of an Authorization to Proceed ("ATP") in mining for the rare earth element ("REE") crexactium on the surface of Plaintiffs' properties.

The REE is found in coal waste piles, referred to as Garbage of Bituminous ("GOB") piles, resulting from coal mining in the Blackrock area from at least the mid-1920s to 1981. R. at 6. Significantly beyond coal mining activities ceasing, these hazardous piles remain on the surface of Plaintiffs' properties. R. at 6. ClinchCo and its predecessors rejected ownership when informed by the Plaintiffs of repeated incidents in which the GOB piles created environmental and safety hazards. R. at 7. ClinchCo's interest in ownership of these piles was only reinvigorated following the President's issuance of Executive Order 15678 ("EO 15678") in August of 2024. EO 15678 declared a national emergency due to a "domestic shortage" created by China's temporary export restrictions of several REEs, including crexactium. R. at 5.

The Order encouraged federal agencies to "find emergency powers" to expedite the application process for Abandoned Mine Land ("AML") grants, increasing mining of REEs domestically. R. at 5. Further, the EO directs agencies to hasten the search by utilizing "the emergency procedures" of the Clean Water Act, the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), and the National Historic Preservation Act. R. at 5.

In response to the EO, Blackrock negligently enabled ClinchCo to begin remediation of the GOB piles located on Plaintiffs' properties without verifying ownership. R. at 7. ClinchCo, via their mineral estate conveyed in the 1922 Deed, claims ownership of the GOB piles on the surface of the Plaintiffs' land containing crexactium. R. at 6. ClinchCo purchased the mineral estate of Plaintiffs' lands, along with others in Blackrock, in 2005 from Fortune Holding Company, which was the bankruptcy successor to Garland Coal and Timber Company, the original owners of the mineral estate. R. at 7. Garland, Fortune Holding, and ClinchCo have not interacted with the GOB piles since 1981. R. at 6–7. Garland, in addition to refusing to help with the piles' hazards, did not identify as owners of crexactium or the GOB piles when filing for bankruptcy in 1995. R. at 7. They did, however, list the 1922 Deed as a right executed to Fortune Holding Company in 1996. R. at 7. Further, when Fortune Holding Company sold its' regional estates to ClinchCo, the mineral estate described in the 1922 Deed was listed. R. at 7. Plaintiffs received no notice of these transfers and retain their claim on ownership. R. at 7.

Blackrock and ClinchCo's application was approved by OSMRE, awarding $4.4 million of AML funding. R. at 7. Further, OSMRE granted the project alternative procedures for both NEPA and ESA consultations in reliance on the emergency declaration. R. at 7–8. Accordingly, OSMRE released only a four-page "Environmental Assessment" conforming to the Department of Interior's ("DOI") recommended, alternative NEPA requirements. R. at 7. In conjunction with the U.S. Fish & Wildlife Service ("FWS"), OSMRE determined that ClinchCo must "take all commercially feasible steps to minimize harm to the Cole Salamander population and habitat," appeasing the emergency ESA requirements. R. at 8.

In addition to ownership concerns, Plaintiffs sought administrative remedies to have OSMRE reconsider the project and require full environmental review; this was rejected. R. at 8.

Plaintiffs then then brought forth this action. R. at 8. Patrial summary judgement was granted by the District Court for the Western District of Blackrock to the Defendants regarding the ownership of the GOB piles, which Plaintiffs have appealed. R. at 1. Patrial summary judgement was granted to the Plaintiffs regarding the lack of environmental analyses under the EO, which Defendants have appealed. R. at 1.

SUMMARY OF THE ARGUMENT

This case turns on a simple principle: financial gain. ClinchCo, wielding an improper emergency declaration, vies for Plaintiffs' property for no reason other than monetary benefit. Similarly, the issuance of EO 15678 encourages an increase in domestic REE profits at the risk of irrevocable environmental harm. Following the emergency declaration, ClinchCo sought previously abandoned mineral estates to exploit for profit. Funded by agencies improperly relying on an unlimited executive declaration, ClinchCo was enabled to skip crucial environmental reviews. This Court should affirm the lower court's holding for an environmental analysis but remand the issue of ownership of the GOB piles.

Contrary to ClinchCo's claims, the 1922 Deed of the mineral estate did not convey the future right to mine for unknown REEs in the GOB piles. According to the construction of ejusdem generis, general language in mineral estates can only be read to include similar minerals as are explicitly stated. Under the deed, crexactium does not fall under the language of the conveyance according to the contemporaneous intent of the parties. Further, byproducts of mineral extraction belong to surface owners when extraction destroys the surface. Here, the abandonment of the waste piles caused immense property damage, preventing the mineral estate owners from staking claim to the crexactium byproduct.

Even if the deed had transferred ownership of the REEs from the Plaintiffs, ClinchCo and its predecessors have clearly abandoned the mineral estate. According to the State of Blackrock's definition directly, in which mineral estates are abandoned after twenty years of non-use, the GOB piles were abandoned. In parallel, the piles were abandoned according to the common law definition. ClinchCo and its predecessors demonstrated both intent to, and actual abandonment of, the waste piles through non-use and disclaim of the properties. Once the possibility of profit was reintroduced, ClinchCo pounced on the opportunity to claim what had already been abandoned.

Mirroring ClinchCo's monetary motivations regarding REEs, the President issued EO 15678, declaring a national emergency without a valid emergency concern. As a statutory based order, without foreign policy considerations, the EO is not precluded by the political question doctrine and is therefore reviewable by the Court. However, the EO does violate the major questions doctrine: the President exercised vast power without clear Congressional authority.

Further, as there is no intelligible principle in the National Emergency Act ("NEA") to guide EOs, the statute violates the nondelegation doctrine. In reviewing the President's actions, this Court should be influenced by the Administrative Procedures Act's ("APA") arbitrary and capricious standard. While the APA only regulates agency actions, this Court should defer to its standard in executive matters to ensure separation of powers. Application of an arbitrary and capricious standard illustrates that EO 15678's "emergency" falls outside of all formal definitions of the word, therefore violating the standard and rendering it invalid.

When OSMRE did not prepare an EIS, nor engage in formal ESA consultations, its actions violated the agency-applicable APA. Without an emergency according to definitions provided by the agencies' alternative arrangement guidelines, EO 15678 does not authorize

abbreviated consultations under NEPA or the ESA. Allowing the EO to stand effectively prioritizes bolstering the economy over ensuring lasting environmental safety.

ARGUMENTS AND AUTHORITIES

I. The 1922 Deed did not convey the right to mine for unknown rare earth elements in coal waste piles left on the tract's surface decades ago.

Crexactium, found in coal waste piles on the surface of Plaintiffs' land, is an REE "essential for efficient EVs and renewable energy storage." R. at 4. Prior to being mined, REEs are encompassed in land as immovable, intangible objects—mere pieces of real property—that are valueless as minerals until mined. Such REEs left in piles as byproduct from coal mining are formerly deemed worthless by mining companies. R. at 6; *see also Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 876 (1999) (illuminating that at the time of early coal mining acts, methane gas was viewed as a "dangerous waste product," not part of the coal's value). The byproduct of mining—the GOB waste piles—leaves messes, hazards, and liability for the owners of the surface rights, with no repercussions to owners of mineral estates. R. at 4. Unsurprisingly, Plaintiffs have been saddled with the destruction of their properties for years, due to the REE deposits left on the surface by ClinchCo and its predecessors. R. at 6. The company's noninterest in these coal waste piles disappeared the minute crexactium was revealed as monetarily beneficial while Plaintiffs suffered surface property damage for decades. R. at 6.

A. The language of the 1922 Deed does not consider or transfer uncontemplated and unknown REEs; therefore, the Deed cannot transfer crexactium.

Typically, land deeds outline the specific property transferred, including tracts, mineral rights, and fixtures of the land. The 1922 Deed clearly outlined exactly what was to be transferred. R. at 6. The Deed references "[a]ll the coal, mineral and mineral products, all the

iron and iron ores, and all stone in and under the hereinafter described tract of land," but neither REEs nor any other new minerals discovered as profitable in the future are specifically mentioned. R. at 6. Courts have long held that when a deed lists certain minerals and then uses a general catch-all term, the general language must be read to include only things of the same kind as those specifically listed, under the rule of *ejusdem generis*. *See e.g.*, *Highland v. Commonwealth*, 161 A.2d 390, 400 (1960) (holding that general references to "minerals" did not extend to oil and gas absent specific mention); *see also Kinney v. Keith*, 128 P.3d 297, 306–07 (Colo. App. 2005) (applying ejusdem generis to hold that a grant of "all oil, gas and other minerals" did not include sand and gravel, which were not of the same kind as the enumerated substances). Thus, if a mineral is not of the same kind as those enumerated, and was not contemplated or mentioned in writing, it cannot be deemed transferred.

Courts have articulated a similar limitation through the *Moss* test, which focuses on the knowledge and intent of the parties at the time of the deed. In *Energy Development Corp. v. Moss*, the West Virginia Supreme Court held that courts must ask whether the parties could have contemplated the disputed substance at the time the conveyance was executed. 591 S.E.2d 135, 143 (W. Va. 2003). If the substance was not known or recognized as valuable, it is not included unless the deed expressly provides otherwise. *Id.* Applying this reasoning, the court concluded that coalbed methane—then considered a dangerous waste byproduct—was not conveyed by a reservation of "oil and gas." *Id.* at 144. The U.S. Supreme Court reached the same conclusion in *Amoco Production Co. v. Southern Ute Tribe*, holding that a grant of "coal" did not include coalbed methane because the parties to the early 20th-century deed never contemplated coalbed methane as part of the conveyance. 526 U.S. 865, 873–74 (1999). Together, *Moss* and *Amoco* reinforce the logic of ejusdem generis: absent express language, deeds do not encompass

minerals unknown or without recognized value at the time of execution. Accordingly, the 1922 Deed's reference to "coal, minerals and mineral products" cannot reasonably be extended to encompass REEs that were unknown and without commercial value when the deed was made. R. at 6.

In *U.S. Steel Corp. v. Hoge*, the Pennsylvania Supreme Court concluded that a reservation of "coal" did not include coalbed methane, since the substance was not within the contemplation of the parties at the time of the deed. 468 A.2d 1380, 1383–84 (Pa. 1983). The court's reasoning reflects the principle of ejusdem generis, limiting general mineral terms to substances of the same kind as those specifically listed. *See id.* Likewise, under the *Moss* test, courts ask whether the parties could have contemplated the disputed substance when the deed was executed; if not, it is excluded unless expressly conveyed. *Moss*, 591 S.E.2d at 142–44. Applying both doctrines, the 1922 Deed's reference to "coal, minerals and mineral products" cannot be read to encompass crexactium. The REE cannot be classified within the Deed's mineral category and therefore was not conveyed, because crexactium was unknown and without recognized value in 1922.

The language of conveyance or reservation is critical in determining ownership, and when ambiguity exists courts may consider extrinsic evidence to discern intent. *See Cronkhite v. Falkenstein*, 352 P.2d 396, 399 (Okla. 1960) (applying ejusdem generis and allowing extrinsic evidence to interpret ambiguous mineral deed). For instance, in *Hudson & Collins v. McGuire*, the court noted that ambiguous language in a deed may permit the introduction of evidence to show that the parties intended to limit the meaning of "minerals" to substances ordinarily mined and smelted for commercial purposes. 223 S.W. 1101, 1102 (Ky. 1920); *see e.g., McAuley v. Brooker*, 101 N.E.3d 1118, 1122 (Ohio App. 7th Dist. 2017). Similarly, the 1922 Deed used broad and ambiguous language, thus should permit extrinsic evidence to determine intent. Based

on the understanding of "minerals" at the time of writing, the 1922 Deed intended to transfer only substances that were ordinarily mined and smelted for commercial purposes. R. at 6; *Hudson & Collins*, 223 S.W. at 1102. Only "'coal, minerals and mineral products … in and under' the grantors' property" were contemplated in that document. R. at 9. The language specifically omits any byproducts, minerals left on top of the surface, REEs, and crexactium. Using the Supreme Court of Kentucky's understanding of transfer under a deed, the Court should agree with the Plaintiffs.

Many courts, including the Supreme Court of Louisiana in *Huie Hodge Lumber Co. v. Railroad Lands Co.,* have addressed the interpretation of the term "minerals." 91 So. 676, 677–78 (La. 1922). The court held that a reservation of "iron, coal, and other minerals" did not include oil and gas. *Id.* at 678. The court reasoned that the phraseology indicated only solid minerals were contemplated, and the rule of ejusdem generis required the term "other minerals" to be construed as including only minerals similar to iron and coal. *Id.*

Even if the 1922 Deed's language is deemed ambiguous, the canon of ejusdem generis limits 'minerals' to substances of the same type as those specifically listed—coal, iron, and stone. *See Central Nat. Res., Inc. v. Davis Operating Co.*, 201 P.3d 680, 684–86 (Kan. 2009). Nothing in the deed or the surrounding context suggests the parties contemplated REEs, much less crexactium. The absence of such intent confirms that the 1922 Deed did not convey rights to REEs in waste piles. In *Skivolocki v. East Ohio Gas Co.*, the Ohio Supreme Court held that a conveyance of coal "in and under" the land did not extend to methods of extraction that would effectively destroy the surface estate. 313 N.E.2d 374, 378–79 (Ohio 1974). Similarly, here, the waste piles have caused lasting damage to Plaintiffs' properties through smoldering, burning, and contamination. Allowing further extraction of crexactium would only increase the destruction of

the surface estate. Guided by the reasoning in *Skivolocki*, the 1922 Deed cannot be read to transfer rights to crexactium, because its recovery would irreparably harm the surface and the Deed contains no explicit language granting such rights. *Id.*

B. Mining efforts that destroy land inherently entitle the surface owners to byproducts of the mineral extraction.

When mineral and surface estates are severed, the mineral estate owner typically retains ownership of the minerals and their byproducts, provided the extraction does not unreasonably harm the surface estate. *See Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971); *Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971); *Skivolocki*, 313 N.E.2d at 378–79. For example, in *Groves v. Terrace Mining Co*., the court explained that severance of surface and mineral rights creates separate estates, and the mineral estate owner reserves the right to extract minerals and associated byproducts unless otherwise restricted by the conveyance. 340 S.W.2d 708, 710 (Mo. 1960). Similarly, *Reed v. Wylie* reaffirmed the principle that mineral estate owners generally retain ownership of minerals unless the extraction "method [] would [substantially] destroy…the surface [estate]." 554 S.W.2d 169, 172 (Tex. 1977). Both cases mirror ClinchCo's treatment of the Plaintiffs; here, it is not the extraction that has destroyed Plaintiffs' properties, but rather the desertion of minerals on the surface of the estates. Again, this is restricted by the conveyance based on the idea that extrinsic evidence is allowed .

The method of extraction plays a critical role in determining ownership of byproducts. In *Acker v. Guinn*, the Texas Supreme Court established that substances requiring extraction methods that consume or deplete the surface estate are not considered minerals under a general reservation of mineral rights. 464 S.W.2d 348, 352 (Tex. 1971). This rule protects surface owners from substantial destruction of their estate and grants them ownership of such substances. *Reed*,

554 S.W.2d at 172. The court should employ this postulation; the substantial destruction of their estate should grant Plaintiffs ownership of the GOB piles on their property.

Surface owners retain ownership of non-mineral components of the land, including geological structures and subsurface mass, unless explicitly conveyed to the mineral estate owner. In *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, the Texas Supreme Court clarified that surface owners own all non-mineral molecules of the land, even if the subsurface contains recoverable minerals. 520 S.W.3d 39, 48–49 (Tex. 2017); *see also XTO Energy Inc. v. Goodwin,* 584 S.W.3d 481, 487 (Tex. 2017) (emphasizing that surface owners retain ownership of geological structures, unless the conveyance specifies otherwise). The abandoned structures of byproduct containing the REE therefore would belong to the Plaintiffs.

Ownership of mineral byproducts is determined by the severance of estates, the method of extraction, and the language of the conveyance or reservation. Here, the estates were severed; ClinchCo discarded the coal waste as abandoned material, and the 1922 Deed contains no language conveying byproducts. Under these circumstances, the law leaves no doubt: Plaintiffs, as the surface estate owners, hold rightful title to the GOB piles and the crexactium within them. *See Fidelity-Philadelphia Tr. Co. v. Lehigh Valley Coal Co.*, 143 A. 474, 477 (1928) (holding that culm piles deposited on the surface were treated as valueless waste and ownership vested in surface owner); *Gilberton Coal Co. v. Schuster*, 169 A.2d 44, 47 (1961) (citing coal refuse left on surface is personal property that may be abandoned); *Amoco Prod. Co.* 526 U.S. at 878 (finding coalbed methane historically viewed as a worthless and dangerous waste product, not contemplated as part of mineral conveyances).

II. Even if the 1922 Deed did transfer the REE, ClinchCo and/or its predecessors have abandoned any mineral estate they held with respect to the GOB piles.

To abandon property, it must first qualify as personal property, and the owner must also demonstrate the requisite intent to relinquish all rights in it. *See Universal Mins., Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 103 (3d Cir. 1981); *see also Wheelock v. Heath*, 272 N.W.2d 768, 771 (Neb. 1978). Real property interests are not typically subject to abandonment, but personal property, such as waste piles, can be abandoned. *See Duncan v. Mason*, 39 S.W.2d 1006, 1009 (Ky. Ct. App. 1931); *Freeport Gas Coal Tr. v. Harrison Cnty. Coal Res., Inc.*, 662 F. Supp. 3d 594, 604 (N.D.W. Va. 2023) (distinguishing nonuse from intent to abandon).

A. Under B.R.S. § 32–1, ClinchCo and/or its predecessors abandoned the crexactium.

ClinchCo and its predecessors have demonstrated clear abandonment of the coal waste piles under both Blackrock's statutory definition and property common law. R. at 6–7; *see also Browning v. Cavanaugh*, 300 S.W.2d 580, 582 (Ky. 1957) (recognizing abandonment of mineral interests requires clear intent and conduct inconsistent with continued ownership). Under Blackrock's statute, B.R.S. § 32–1,

> A mineral interest is abandoned if it has not been used for a period of twenty years or more. Title to an abandoned mineral interest vests in the owner of the surface estate in the land in, or under, which the mineral interest is located on the date of abandonment.

R. at 10. This provision requires no action or use of the mineral interest for two decades before the interest automatically reverts to the surface owner. R. at 10. Importantly, as several courts have recognized when interpreting similar dormant mineral statutes, the mere transfer of title or paper ownership does not constitute "use." *See Texaco, Inc. v. Short*, 454 U.S. 516, 530–31 (1982) (explaining that dormant mineral statutes require affirmative acts such as production,

leasing, or recording to preserve interests); *Hosti v. Kimbler*, 845 N.W.2d 923, 928 (S.D. 2014) (holding that transfers of title alone do not prevent abandonment under a dormant mineral act); *Freeport Gas Coal Tr.,* 662 F. Supp. 3d at 604 (same). The lower court's interpretation, which treated the transfer of ownership alone as sufficient to preserve the interest, contradicts the intent and structure of such statutes across multiple jurisdictions. R. at 10.

For over twenty years, ClinchCo and its predecessors did nothing with the waste piles—no mining, no maintenance, no development—and expressly disclaimed responsibility when pressed by local authorities. R. at 6–7. Such prolonged inaction and disclaimers establish abandonment under both statutory and common law. *See Texaco*, 454 U.S. at 530–31 (holding dormant mineral statutes require affirmative acts to preserve interests); *Hosti*, 845 N.W.2d at 928 (finding title transfers alone insufficient to prevent abandonment); *Universal Mins.,* 669 F.2d at 103 (inferring intent from long inaction and disclaimers).

B. Under the common law definition, ClinchCo and/or its predecessors abandoned the crexactium.

Real property is defined as "land which is immovable but also that which is affixed to the land, that which is incidental or appurtenant to the land, and that which is immovable by law." *Strobel v. Nw. G. F. Mut. Ins. Co.*, 152 N.W.2d 794, 796 (N.D. 1967). "[R]eal estate includes land, minerals and quarries in and under the land, and improvements." *Mitchell v. Espinosa*, 243 P.2d 412, 416 (1952). This aligns with the well-established definition of real property. For example, the mineral estate owned by ClinchCo is realty.

Items that are not affixed to the land are generally classified as personal property. *See Teaff v. Hewitt*, 1 Ohio St. 511, 530–31 (1853) (distinguishing between fixtures attached to realty and movable personal property). Personal property is broadly defined as tangible or intangible

property that is not considered real property. *Sprinkler Warehouse, Inc. v. Systematic Rain, Inc.*, 880 N.W.2d 16, 21 (Minn. 2016).

Realty can become personal property in certain circumstances. In the context of mineral law, it is well established: a mineral, "while in the earth [] is part of the realty." *Kelly v. Ohio Oil Co.*, 49 N.E. 399, 401 (Ohio 1897). However, once a mineral is extracted or severed through mining, it immediately becomes personal property. *Miller v. Carr*, 188 So. 103, 106 (Fla. 1939). Thus, unmined minerals are part of real estate, while mined minerals are classified as personal property. *Id.*

The crexactium found on Plaintiffs' land qualifies as personal property because it is no longer affixed to the land. R. at 6; *Strobel*, 152 N.W.2d at 796. In *Forbes v. Gracey*, the Court reasoned that "the moment [] ore becomes detached from the soil in which it is embedded, it becomes personal property," belonging to the miner who extracted it, free of any claim by the land's title owner. 94 U.S. 762, 765 (1876). Thus, extracted minerals are treated like any other personal property. *Id.* When ClinchCo or its predecessors removed the coal, any waste or byproduct from the ground became personal property, separate from the underlying realty. This distinction between real and personal property is crucial because it dictates the specific rights associated with the property—including the possibility of abandonment. *See Universal Mins.,* 669 F.2d at 103 (recognizing abandonment applies to personal property but not to real property interests).

According to property law, ownership of personal property carries a recognized "bundle of rights," including the rights to possess, use, enjoy, control, exclude others, transfer, dispose of, and even destroy the property. *See Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Holmes, J., dissenting) (describing property as a set of legally protected rights); *Kaiser Aetna v.*

United States, 444 U.S. 164, 179 (1979) (identifying "the right to exclude" as one of the most fundamental property rights). Within that bundle, lies the right to abandon—an attribute of personal property ownership that does not extend to real property interests. *See Duncan v. Mason*, 39 S.W.2d 1006, 1009 (Ky. Ct. App. 1931) (noting that fee simple mineral estates cannot be abandoned by mere nonuse); *Freeport Gas Coal Tr.*, 662 F. Supp. at 604 (distinguishing abandonment of personal property from nonuse of real property rights).

At common law, abandonment is defined as "the voluntary relinquishment thereof by its owner or holder, with the intention of terminating his ownership, possession, and control, and without vesting ownership in any other person." *Davis v. Odell*, 729 P.2d 1117, 1124 (1987). Abandonment requires both (1) the intent to abandon and (2) an act effectuating the relinquishment of ownership and control. *See Universal Mins.,* 669 F.2d at 103 (holding that an intent to abandon mineral byproducts can be inferred from long inaction and disclaimers); *Wheelock*, 272 N.W.2d at 771 (finding both intent and conduct must be shown); *Browning*, 300 S.W.2d at 582 (same).

The Supreme Court of North Carolina defines abandonment as "the giving up of a thing absolutely…including both the intention to relinquish all claim and the external act by which this intention is executed." *State v. West*, 235 S.E.2d 150, 156–57 (N.C. 1977). ClinchCo and its predecessors have repeatedly demonstrated this intent to abandon through both inaction and express disclaimers, satisfying the legal requirements of abandonment. R. at 7.

First, ClinchCo left the remnants of coal containing valuable REEs sitting on the land for decades without maintaining, relocating, or asserting control. R. at 7. Such prolonged inaction demonstrates both the intent to abandon, and the relinquishment required under *West* and *Davis. West*, 235 S.E.2d at 156–57; *Davis*, 744 P.2d at 1123. Only once the material acquired

commercial value did ClinchCo suddenly claim ownership—conduct that contradicts its prior behavior and confirms abandonment. R. at 6.

Second, ClinchCo's disclaimers when the GOB piles became hazardous liabilities provide additional evidence of abandonment. R. at 7. When fires broke out on Plaintiffs' properties, ClinchCo's predecessor, Garland, expressly denied ownership, distancing itself from responsibility. R. at 7. Courts recognize that abandonment may be inferred from such words and actions. *See City of St. Paul v. Vaughn*, 237 N.W.2d 365, 345 (Minn. 1976) ("Abandonment is primarily a question of intent…inferred from words spoken, acts done, and other objective facts."). ClinchCo's later reversal, asserting ownership only when the piles became profitable, underscores its prior abandonment. R. at 6.

Third, surface waste is not encompassed within subsurface mineral rights, which apply only to minerals "in and under" the land. *See Norken Corp. v. McGahan*, 823 P.2d 622, 627 (Alaska 1991). By depositing the waste piles on the surface and failing to exercise dominion over them, ClinchCo converted them into personal property subject to abandonment. R. at 6.

Finally, courts addressing coal waste specifically have treated such piles as abandoned under similar circumstances. In *Callaghan v. Eastern Associated Coal Corp.*, the West Virginia Supreme Court recognized that coal refuse may be deemed abandoned where the owner demonstrates prolonged inactivity, disclaims responsibility, or refuses to manage hazards. 351 S.E.2d 605, 610 (W. Va. 1986). ClinchCo's documented inactivity and express disclaimers mirror those factors and compel the same conclusion. R. at 6–7.

Moreover, courts consistently hold that the mere passage of time combined with the absence of possessory acts can be strong evidence of intent to abandon. In *Universal Minerals, Inc. v. C.A. Hughes & Co.*, the court emphasized that abandonment is established through "a lack

of production or activity related to the mineral rights and the intent to abandon," which may be inferred from the surrounding circumstances, including long neglect or failure to claim the property. 669 F.2d at 103. Similarly, ClinchCo's decades-long failure to move, secure, or assert ownership over the waste material, combined with its refusal to take financial responsibility for the hazards it created, reinforces the inference of abandonment.

Additionally, when a party disclaims responsibility for property, especially in the face of liability, courts often consider that disownment as strong evidence of abandonment. In *Duncan v. Mason*, the Kentucky Court of Appeals confirmed that abandonment may be inferred from both nonuse and surrounding conduct reflecting an intent to relinquish rights. 39 S.W.2d 1006, 1009 (Ky. App. 1931). ClinchCo's predecessor, Garland, repeatedly disclaimed responsibility for the GOB piles—refusing to remediate environmental hazards and declining to address dangerous fires—thereby affirming its lack of ownership intent. R. at 7.

It is also well-established that ownership cannot be reasserted retroactively after an act of abandonment. Once property is relinquished with the requisite intent, it ceases to belong to the prior owner. In *Wheelock v. Heath*, the Nebraska Supreme Court confirmed that abandonment is final: once mineral rights have been deemed abandoned, "title vests in the surface owner" and the prior owner cannot later reclaim them, 272 N.W.2d at 771. ClinchCo's current attempt to reclaim ownership of the waste piles—after decades of disclaimers and nonuse—is irreconcilable with this principle and must be rejected.

Any rights under a mineral deed do not extend to surface waste unless expressly stated. *See Skivolocki*, 313 N.E.2d at 378–79 (limiting mineral rights to substances "in and under" the land and excluding surface deposits). Courts have consistently held that the surface and mineral estates are distinct, and surface materials remain with the surface owner absent clear language to

the contrary. *See id* (confirming surface owner retains rights to surface materials where deed conveyed only subsurface minerals). Because ClinchCo deposited the waste on the surface, disclaimed responsibility for decades, and only reasserted ownership when REEs became valuable, its present claim is legally unfounded.

Accordingly, under both the Blackrock statute and common law principles of abandonment, title to the GOB piles—and the crexactium they contain—properly rests with Plaintiffs.

III. Executive Order 15678 declaring a national emergency with respect to rare earth elements is reviewable by this court under an arbitrary and capricious standard.

EO 15678 declared a national emergency regarding a domestic storage of REEs after China temporarily limited its export of REEs in response to western countries' alleged preferential treatment to domestic companies in the summer of 2024. R. at 5. In the spring of 2025, the limit was renewed after a U.S. proposal to place tariffs on Chinese imports. R. at 5. The order directed federal agencies to "find emergency powers" for the purpose of promoting exploration for REEs, referencing the Clean Water Act, NEPA, ESA, and the National Historic Preservation Act. R. at 5.

EO 15678 should be reviewed using an arbitrary and capricious standard, which is still deferential, but requires a reasonable decision-making process. Administrative Procedures Act, 5 U.S.C. § 706(2)(A). While previously the standard used was a very deferential standard, this Court should adopt a standard similar to the holding in *Loper Bright Enterprises v. Raimondo*, regarding agency actions. 603 U.S. 369, 371 (2024) (removing deference for all questions of law); *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191, 1199 (D. Mass. 1986)(ruling that judicial review of presidential discretionary actions is limited). Under an arbitrary and capricious

review, this EO was improperly issued and therefore OSMRE's reliance on it violated the APA. 5 U.S.C. § 706.

A. As a statutory based order, Executive Order 15678 is not precluded by the political question doctrine, but it does violate the major questions doctrine due to its vast effects while relying on an unspecified statute.

The political question doctrine does not preclude review of EO 15678 because presidential authority to issue an EO arises statutorily rather than from the Constitution, and the EO does not require this Court to resolve any foreign policy issues.

The political question doctrine bars the judicial branch from deciding questions better suited for review by the legislative or executive branches of the government, serving as "a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). Typically, the doctrine bars review only when there is an issue arising under the Constitution or, when arising under a statute, if judicial review would require a court to make a foreign policy decision. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195-96 (2012). *Baker* explains that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. at 211; *see Zivotofsky*, 566 U.S. at 196–97 (holding that the Court may review a case where plaintiff requested to list Isreal as his birthplace on his passport, without requiring the judiciary to address Israel's status as a country).

EOs based on statutory interpretation do not generally evoke a political question issue because interpretation of a statute's language and constitutionality is a common judicial exercise. *Id.* at 196. Further, the President would be improperly favored and the separation of powers undermined, if this court applies the political question doctrine to cases involving statutory claims. *See El-Shifa Pharm. Inds. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010).

EO 15678 was issued "under the laws of the Constitution and laws of the United States…" but the Defendants do not dispute that the President's power here does not stem from an express or inherent constitutional authority. R. at 5, 11–12. Supposedly, the NEA alongside the four statutes referenced in the EO authorizes the President to declare a national emergency. *See generally Zivotofsky*, 566 U.S. at 189; R. at 5. Here, despite the statutory allowance to the President to grant the EO, and the reference to Chinese exports, the foreign policy exception still is not evoked. R. at 11. The judiciary is not "being asked to supplant a foreign policy decision," it is solely being asked if the President has authority to declare a national emergency. R. at 11. This case, therefore, is reviewable by this Court.

With the political question doctrine not barring review, this Court will find that the EO violates the major questions doctrine, making it unconstitutional. The major questions doctrine applies when an agency, here the President, exercises powers of vast economic and political significance without clear Congressional authority. *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014). Objectively, the doctrine seeks to invalidate an action, not the statute under which it was executed. *See generally Biden v. Nebraska*, 600 U.S. 477 (2023).

Circuits are split on whether the major questions doctrine applies to presidential actions; some courts limit the application of the doctrine to agencies, while others apply it to executive orders directing agency actions. R. at 13; *Compare Mayes v. Biden*, 67 F.4th 921, 933–34 (9th Cir. 2023) *with Commonwealth v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023).

Here, the doctrine should apply because the President effectively functioned as an agency when he declared an "emergency" inconsistent with the definitions of the word as found in his statutory references.

The EO itself violated the major questions doctrine because of the sweeping effect the emergency powers will have on the economy. The NEA states that the President can declare a national emergency, but agencies' exercise of emergency powers must be specified in a statute. 50 U.S.C. § 1631. EO 15678 did not cite clear statutory authority. Instead, it merely directed agencies to "find emergency powers," even though the statutes cited provide no authority based on the facts at issue. R. at 5. Without a specific delegation of power, the EO is a blanket grant of authority that allows agencies to bypass their own statutory framework.

By bypassing integral regulatory steps, this EO will create an influx of AML disbursements and accelerate REE mining, producing vast political and economic consequences. Such significant ramifications require reliance on clear statutory or Congressional authority. *Indus. Union Dep't, AFL–CIO v. Am. Petroleum Inst*., 448 U.S. 607, 684 (1980) (Rehnquist, J., concurring) (explaining Congress must provide explicit authority granting language when there are potential extensive economic repercussions). Because this authority has not been provided, the EO violated the major questions doctrine and is bypassing Congress.

B. The vague authority to declare emergencies under the National Emergency Act cannot support the sweeping powers claimed in Executive Order 15678, and without an intelligible principle, the statute violates the nondelegation doctrine.

The NEA provides no meaningful definition of an "emergency," granting the President standardless discretion that cannot support the unlimited powers in EO 15678. 50 U.S.C. § 1621 *et. seq*. In the modern context, political checks are insufficient, and this Court should review this case under an arbitrary and capricious standard, similar to the APA's guidelines on agencies.

The lower court's opinion stated that Congress intended to provide broad discretion through the NEA, however, that was not the purpose of the statute. R. at 12. Rather, the NEA was

passed to suppress previous misuse of "emergency" declarations, often issued without any legal basis. *El Paso Cnty., Tex. v. Trump*, 982 F.3d 332, 370 (5th Cir. 2020) (Dennis, J., dissenting) (citing S. Rep. No. 93–1170, at 2 (1974)). Despite the purpose, the NEA remains too vague and requires oversight from the judiciary to ensure lawful EOs. The President is only required to publish the declaration in the Federal Register and to notify Congress. 50 U.S.C. § 1621(a). While Congress is required to review the declaration within six months, there is no requirement to modify, resolve, or terminate the EO. *Id.* § 1622(c–d). As a result, modern EOs generally mirror the EOs passed prior to the NEA; they are based on unfounded reasoning and often without actual emergencies, undermining the NEA's original purpose. *See generally* Andrew T. Hyman, *Executive Orders in Court*, 124 Yale L.J. 2026 (2015). Without oversight by the judiciary, the NEA runs rampant and will continue to be abused. *See generally* Phillip J. Cooper, By Order of the President: The Use and Abuse of Executive Direct Action (Lawrence, University Press of Kansas, 2002).

Historically, courts reviewed the validity of EOs indirectly, following agency implementation of emergency powers from EO emergency declarations. Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. Chi. L. Rev. 1743, 1746 (2019). The standard of review is the APA's arbitrary and capricious standard, because courts were addressing agency actions. 5 U.S.C. § 706(2)(A), *see generally Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). Emergency declarations have immediate and sweeping effects, far greater than any single agency action could incite. Currently, political remedies such as Presidential reelection, function as checks on improper use of emergency declarations. Manheim, *supra* at 1798. However, the current production rate of emergency orders defeats the effectiveness of a political check; no longer do political repercussions suffice. *Id.* By implementing judicial checks on

executive orders prior to agency actions, any damage or unnecessary spending will be prevented. *Id.* at 1748.

Though APA review does not formally apply to the President, this Court should draw on its principles when deciding the standard of review for EOs because of the exponential increase of presidential discretionary actions. *Franklin*, 505 U.S. at 796. The APA requires courts to "decide all relevant questions of law" and set aside action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Applying this standard of review to EOs would ensure emergency declarations are founded in fact. To review EOs any differently would be placing emergency declarations at a lower standard than agency rulemaking.

Recent case law confirms the need for judicial oversight in interpretation of vague statutory terms. *Loper Bright* established the modern shift, holding that agencies no longer have discretionary review over ambiguous statutes. 603 U.S. 369, 412–13 (2024). The NEA's lack of definition of an "emergency" contains the same ambiguity challenged in *Loper Bright*. *Id.* If the court does not defer to an agency regarding an ambiguous standard, it should not defer to the President either.

Other courts have recognized the danger of unchecked executive powers through EOs. The dissent of *El Paso County, Texas v. Trump* warned that the "misuse of emergency powers" to circumvent congressional limits "flies in the face" of separation of powers, and the discretion allowed in EOs shields the President from judicial review. 982 F.3d at 374. The same concern is present here—while Congress has not denied REE development, the authority to do so should be legislative. The Constitution rejects unbounded executive authority, but through EOs Presidential power is limitless.

The NEA's silence on what constitutes an "emergency" transforms the statute into a blank check for presidential discretion. Guided by *Loper Bright* and the APA standards, this Court should hold that vague statutory grants like the NEA demand judicial review. *See generally* 603 U.S. 369; 5 U.S.C. § 706. Only by applying an arbitrary and capricious standard can this Court prevent an unchecked executive and preserve the separation of powers.

Even beyond its vagueness, the NEA violates the nondelegation doctrine by providing no "intelligible principle" for emergency declarations beyond the President's "unfettered discretion." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (explaining that an intelligible principle validates a delegation of power). The statutes cited in the EO, likewise, fail to provide a definition of emergency consistent with the facts in this case, leaving the President without any statutory standards to justify the EO.

The case at hand mirrors the statutes at issue in *Panama Refining Co. v. Ryan* and *A.L.A. Schechter Poultry Corp. v. United States*. In *Panama Refining*, the Court invalidated a statute providing President Roosevelt unrestricted discretion to stabilize the economy through regulation of petroleum transportation because is provided no other guidance. 293 U.S. 388, 431 (1935). Similarly, the NEA authorizes the President to declare emergencies, but there is no prerequisite to meet the emergency requirements of the act he is referencing. This provides no discernable standard. In *Schechter Poultry*, the Court struck down a statute allowing the President to decide the industry's definition of "fair competition" without any meaningful standards. 295 U.S. 495, 537–38 (1935). Because EO 15678 urged agencies to simply "find" emergency powers, the EO presents the same flaw and suggests an ability to reach outside the statutory provisions. R. at 5.

Although no statute has been struck down by the nondelegation doctrine in over 90 years, this Court should not dismiss the doctrine's validity. The NEA—by failing to provide a standard

or intelligible principle—enables the President to use discretion with no consequences. Such unfettered discretion violates the separation of powers. Accordingly, this Court should hold that the NEA violates the nondelegation doctrine and is thus unconstitutional.

C. Declaring a national emergency with Executive Order 15678 was arbitrary and capricious, therefore, this Court should declare the emergency order invalid.

The emergency order was not within the discretion of the President because it fell outside the arbitrary and capricious standard. 5 U.S.C. § 706(2)(A). Due to the recent influx of emergency declarations, political remedies such as the threat of no reelection are no longer sufficient to deter overreaching actions by the President. Manheim, *supra* at 1748. Although historically executive decisions have been reviewed under an extremely discretionary standard, this court should adopt a standard mirroring the APA to hold the executive branch accountable for overreaching EOs.

Applying that standard here, no true emergency, in accordance with any statutes relied upon by the EO, or in accordance with Black Law's Dictionary, exists. *Emergency*, *Black's Law Dictionary* (2nd ed. 1910). The term is defined as a "situation requiring immediate attention and remedial action. Involves injury, loss of life, damage to the property, or catastrophic interference with the normal activities. A sudden, unexpected, or impending situation." *Id.* The absence of evidence supporting an actual emergency is abundant, as China's temporary limit to the import of REEs does not constitute anything requiring immediate action or a catastrophic interference with normal activities. *Id.* Therefore, the EO was not within the President's discretion, and was not reasonable.

IV. Even if this court decides Executive Order 15678 is neither reviewable nor incorrect, the Office of Surface Mining Reclamation and Enforcement should have prepared a proper Environmental Impact Statement and conducted formal consultations.

In a non-emergency situation, to receive an award from the AML fund, a state is required to apply to the Secretary of the Interior through its state program. *See* 30 U.S.C. § 1231 *et. seq*. Then the secretary evaluates the application and instructs other agencies to conduct the necessary environmental reviews. *Id.* As AML funds are provided via federal grants, which are considered "major federal actions," an Environmental Assessment ("EA") will be conducted under NEPA. U.S. Dep't of the Interior, *Departmental Manual, Part 516: National Environmental Policy Act of 1969* (2025) (directing reliance on 40 CFR § 1501 (2024) until new agency guidelines are finalized). After the EA is conducted, OSMRE will release either a Finding of No Significant Impact ("FONSI") detailing the impacts and why they are not significant, or an Environmental Impact Statement ("EIS") if significant impacts are found. *Id.*

Due to the effect mining GOB piles would have on the endangered Cole Salamander species and habitat, the FWS was notified and required to effectuate an ESA consultation. 50 C.F.R. § 402.14. This must happen in conjunction with the already established NEPA requirements 40 C.F.R. § 1501.2(b)(2) (2024). If there is a way to mitigate the harm to the species, the findings from the ESA consultation will be published with the EIS. *Id.* at § 1503.2 (requiring comments from all possibly affected agencies, ensuring publication together). If the ESA consultation finds no mitigation possibilities, then OSMRE will not be able to provide the AML grant to the party in compliance with the ESA. 50 C.F.R. § 402.14(h)(2). By not providing these essential checks, the endangered salamander population and the residents in Blackrock are at risk.

A. The Office of Surface Mining Reclamation and Enforcement's decision to authorize alternative arrangements is reviewable by this Court.

This Court may review OSMRE's decision to bypass the environmental review and consultations because agency actions made in reliance of an EO are subject to the APA standards of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(A)(2). After *Loper Bright*, courts no longer defer to an agency's interpretation of an ambiguous law. 603 U.S. at 371. Instead, courts conduct statutory review and then make their decision. *Id.*

Courts have made it clear that even agency actions in reliance on an EO are reviewable. Emergencies do not suspend the APA guidelines barring arbitrary, capricious, discretion abusing, or not in accordance with law actions. 5 U.S.C. § 706(A)(2); *see Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019) (reviewing actions regarding building a border wall without setting the EO aside); *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, 539 F. Supp. 3d 29 (D.D.C. 2021) (holding that the agency exceeded statutory abilities despite reliance on an EO); *Biden v. Nebraska*, 600 U.S. 477 (2023) (reviewing the decision to suspend student loans in reliance on an EO); *Trump v. Hawaii*, 585 U.S. 667 (2018) (upholding an emergency declaration while still reviewing agency actions); R. at 15. Accordingly, this Court's focus should be whether the emergency declaration properly triggered the use of emergency provisions and whether OSMRE's reliance on the EO was "arbitrary, capricious, an abuse of discretion or not otherwise in accordance with the law." 5 U.S.C. § 706(A)(2).

B. The Office of Surface Mining Reclamation and Enforcement violated the National Environmental Protection Act because the emergency in Executive Order 15678 does not authorize alternative arrangements.

The situation detailed by the President in his emergency declaration does not meet the standard of 'emergency' required to authorize NEPA's alternative arrangements. Historically, the Council of Environmental Quality ("CEQ") regulations governed emergencies brought under NEPA because NEPA itself contains no definition of "emergency." *Iowa v. Council of Env't Quality*, 765 F.Supp.3d 859, 884 (D.N.D. 2025). Following the holding in *Iowa v. CEQ*, the agency's authority was doubted, and it withdrew its emergency regulation from the Code of Federal Regulations. *Id.* The CEQ directed agencies to rely on their own emergency procedures, here those of the DOI. *Id.*; 40 C.F.R. § 1506.11 (2024).

According to the DOI, "[t]he 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." 43 C.F.R. § 46.150(a). Further, OSMRE's regulations define emergency as "a sudden danger or impairment that presents a high probability of substantial physical harm to the health, safety, or general welfare of people *before* the danger can be abated under normal program operation procedures." 30 C.F.R. § 700.5 (emphasis added). This language limits emergencies to when immediate action is necessary in protection of life, property or critical resources, not a market-driven fluctuation in REE prices after a temporary restriction of resources.

Rising prices due to a temporary restriction on imports of REEs may be politically significant but are not the "sudden danger" to life or property that both the DOI and OSMRE define. 43 C.F.R. § 46.150(a); 30 C.F.R. § 700.5. While appellants may argue that reducing

reliance on China's REE supply is a valid public policy reason, public policy cannot override the statutory and regulatory limits of the emergency provisions. Accepting this argument would invalidate NEPA's narrow emergency exception and cause the environmental review requirement to be meaningless. The president's declaration does not meet emergency standards, therefore, OSMRE relied incorrectly on the EO to bypass NEPA.

C. The Office of Surface Mining Reclamation and Enforcement violated the Endangered Species Act because the emergency in Executive Order 15678 does not authorize alternative arrangements.

The ESA does not outline a definition for an "emergency," but the FWS provides a detailed definition. The agency allows for alternative procedures only in the case of emergency circumstances, described as, "acts of God, disasters, casualties, national defense or security emergencies, etc.." 50 C.F.R. § 402.05(a). Further, the FWS Handbook explains that emergencies include situations which require "response activities that must be taken to prevent imminent loss of human life or property" and specifically excludes predictable events. U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act*, 8.1 (1998).

This Court has not addressed what constitutes an emergency under the FWS definition, but due the ambiguity of the definition, the construction of ejusdem generis is applicable in these circumstances. 50 C.F.R. § 402.05(a). Other circuits have interpreted "emergency" narrowly, stating that an emergency is present if, under 50 C.F.R. § 402.05(a), some or all of the following criteria are present: (1) there is an element of surprise and unexpectedness; (2) there is a need to consult in an expedited manner, meaning action is necessary before proper formal consultations

could be conducted; and (3) the situation poses a risk to human life or property. R. at 16 (citing *Friends of Merrymeeting Bay v. United States DOC*, 810 F. Supp. 2d 320 (D. Me. 2011); *Washington Toxics Coal. v. United States DOI*, 457 F. Supp. 2d 1158, 1194 (W.D. Wash. 2006); *Forest Ser. Emps. For Env't Ethics v. U.S. Forest Serv.*, 397 F. Supp. 2d 1241, 1256–57 (D. Mont. 2005)). None of these elements are present.

As China's export restrictions are now repetitive and predictable, and a lack of REEs provide no risk to life or property, it was not proper for the FWS to rely on the EO. Accordingly, OSMRE must conduct a full ESA consultation.

CONCLUSION

For the foregoing reasons, Appellees/Cross-Appellants Emma James, Jose Garcia and Victoria Garcia respectfully request that this Court: (1) REVERSE the District Court for the Western District of Blackrock's determination that ClinchCo and the State of Blackrock have the right to mine crexactium from the GOB piles on Plaintiffs' land, and instead hold that Plaintiffs are the rightful owners of those minerals, the 1922 Deed not having conveyed them, or any such rights having been abandoned; (2) REVERSE the district court's decision that Executive Order 15678 can only be reviewed under a very deferential standard, and instead apply an arbitrary and capricious standard, which would invalidate the emergency order; and (3) AFFIRM the district court's decision requiring OSMRE conduct a full NEPA environmental review and formal ESA consultation before any Authorization to Proceed with the project, and affirm the invalidation of the ATP unless and until such compliance is achieved.