UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT
C.A. NO. 25-09876

CLINCHCO, INCORPORATED
AND THE STATE OF BLACKROCK — **APPELLANTS**

VS.

EMMA JAMES, JOSE GARCIA,
AND VICTORIA GARCIA — **APPELLEES**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF BLACKROCK
HON. KYLE FORD

BRIEF FOR APPELLEES

Respectfully submitted,

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Team #7
Lead Counsel for Appellees

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The 1922 deed did not convey the right to mine crexactium. The term "mineral," as used in the deed, is ambiguous as to scope and does not include crexactium. Furthermore, the general legal and commercial usage of the term "mineral" at the time the deed was executed did not encompass crexactium. Additionally, the crexactium in the GOB piles was not "in or under" the property, therefore the right to mine the crexactium could not have been conveyed by the deed. Any mineral estate that may have existed in the GOB piles at the time of the original transfer has since been abandoned.

On the matter of Executive Order 15678, which declared a national emergency with respect to rare earth elements, that Executive Order is reviewable by this court. Review of that Executive Order reveals that the NEA is an improper delegation of the authority to declare emergencies and violates the nondelegation doctrine. Additionally, the Executive Order also violates the major questions doctrine.

In turn, OSMRE improperly relied on the emergency declaration when it issued the ATP without conducting a full environmental review under NEPA or engaging in formal consultation under the ESA. Importantly, the Court is not required to defer to OSMRE's determination regarding the emergency declaration. Independent review of NEPA and the ESA reveals that the Executive Order declaring an emergency does not meet the definition of an "emergency" under either statute, meaning alternate expedited procedures were not authorized in this scenario. Therefore, OSMRE acted without authority when it circumvented the statutory processes contained within NEPA and the ESA, and its actions should be reversed.

ARGUMENT

I. The 1922 deed did not convey the right to mine for crexactium.

A. The term "mineral," as used in the 1922 deed, is ambiguous as to scope.

The term "mineral," as used in the 1922 deed between the Stones and Garland Coal and Timber Company ("Garland Coal"), is an ambiguous term as to the scope of the mineral rights conveyed.

The 1922 deed chiefly conveyed to Garland Coal "[a]ll the coal, mineral and mineral products, all the iron and iron ores, and all stone in and under" various properties in Lowland County, Blackrock.[1] Garland Coal subsequently mined the various properties and recovered coal for well over five decades.[2] During this time, Garland Coal piled its mining refuse onto the surface of Appellees' various properties.[3] These refuse piles are now colloquially referred to as Garbage of Bituminous or GOB Piles and have become major environmental hazards, leaching pollutants and intermittently catching fire.[4] The GOB piles that currently reside on Appellees' properties are massive in scale, with the largest weighing nearly half a million pounds and sitting 100 feet deep.[5]

After Garland Coal ceased mining for coal in the 1980's, it struggled financially.[6] This struggle culminated in 1995, when the company filed for bankruptcy.[7] During this financially tumultuous time, however, Garland Coal never turned to its GOB piles as a source of revenue. Instead, Garland Coal claimed on its balance sheets that the 1922 deed, and by extension the GOB

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[1] TR at 6.
[2] *Id.*
[3] *Id.*
[4] TR at 4, 7.
[5] TR at 6.
[6] *See* TR at 7.
[7] *Id.*

piles contained on the deed's properties, had no present value.[8] And when Garland Coal executed a deed to its bankruptcy successor, Fortune Holding Company ("Fortune"), the only reference to the GOB piles came in a catchall provision transferring to Fortune "whatever" mineral rights remained in the properties in Blackrock.[9]

In 2005, Fortune sold the mineral estate conveyed by the 1922 deed to ClinchCo, Incorporated ("ClinchCo").[10] ClinchCo bought these rights, by its own admission, "on the hope that" the rights would "eventually yield valuable [rare earth elements] and critical minerals."[11] ClinchCo's hopes proved to be well-founded. Though the exact timing is unclear, a practical application for crexactium in battery development was discovered in the early 2000's.[12] Since that discovery, crexactium has become an essential component of the global energy space, with China extracting and processing the bulk of global crexactium.[13] Amid rising concerns over crexactium availability in the United States,[14] ClinchCo at last saw the possibility of profiting from its crexactium stores. In 2024, Blackrock applied to the Abandoned Mines Program ("AML") program for a grant "to engage ClinchCo to mine several GOB [p]iles" within the state, including the GOB piles on Appellees' properties.[15] The AML application emphasized both the rare earth elements contained within the GOB piles and the remediation efforts that would follow the GOB pile mining.[16] Just a few months after submitting the application, Blackrock's request was granted, and the Appellees subsequently initiated an action for summary judgment in the U.S. District Court

[8] *Id.*
[9] *Id.* (quoting the 1995 deed).
[10] *Id.*
[11] *Id.*
[12] TR at 4.
[13] *Id.*
[14] *See* TR at 5.
[15] TR at 7.
[16] *Id.*

for the Western District of Blackrock, citing the need for the Office of Surface Mining and Reclamation and Enforcement ("OSMRE") to reconsider the application's approval and conduct a meaningful environmental review of the proposed project.[17]

When the parties' intentions animating a deed are unclear, then courts must look to the general legal and commercial usage of the language employed by the deed.[18] The U.S. District Court in this matter determined, without any in-depth explanation, that the 1922 deed's usage of the term "mineral" was an unambiguous term and so did not apply the "general legal and commercial usage" test employed by courts analyzing ambiguous deed terms.[19] A closer examination of the deed and the case law, however, reveals that the court erred in this matter. The 1922 deed's usage of the term "mineral" is an ambiguous term.

The U.S. District Court held that "crexactium, as a solid inorganic substance of natural occurrence" fits "*any* dictionary definition of 'mineral.'"[20] And if crexactium must be considered a mineral by any definition, the court reasoned, then such rights must be conveyed by a deed purporting to convey the rights to "[a]ll . . . mineral and mineral products . . . in and under" a property.[21] This logic is sound on its surface. But while "[d]ictionary . . . definitions" of such concepts "superficially" provide "the merit of simplicity,"[22] a reliance on dictionary definitions obscures the complexity of these mineral rights cases.

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[17] TR at 8.
[18] *See Petro-Hunt, L.L.C. v. Tank*, 4 N.W.3d 526, 532 (N.D. 2024); *Border Res, LLC v. Ir. Oil & Gas, Co.*, 869 N.W.2d 758, 763 (N.D. 2015); *EnerVest Operating, Inc. v. Sebastian Mining, LLC*, 676 F.3d 1144, 1147 (8th Cir. 2012).
[19] TR at 9.
[20] *Id.* (emphasis added).
[21] *See* TR at 6, 9.
[22] *Poulos v. LBR Holdings, LLC*, 238 W.Va. 89, 98 (W.Va. 2016).

Indeed, the U.S. District Court seemed to acknowledge this complexity by citing an array of mineral rights cases dealing with the complicated issue of whether rights to coalbed methane ("CBM"), a once undesirable mining byproduct turned valuable energy source, should be conveyed by deeds including a conveyance of the terms "coal," "gas," or "mineral."[23] The problem of deed construction illustrated in the CBM cases is highly analogous to the current crexactium conundrum. But instead of delving into an issue which has perplexed courts and legal thinkers for decades,[24] the Court simply waved the issue away. The Court held that the case law demonstrates no consensus on the issue, and as such, the Court provided no reason beyond the dictionary that the "the term 'minerals' . . . unambiguously includes crexactium."[25] But this very lack of consensus is good reason to consider the term "minerals" to be ambiguous. In discussing the issue of CBM, legal scholars have variously remarked that "the instruments of conveyance [do] not explicitly" cover such an issue,[26] that the issue is ultimately a "question of policy,"[27] and that the myriad of "conflicting legal principles" relating to the issue "do not point toward any [single] solution[] as necessarily or even probably correct."[28] This lack of clarity, coupled with the issue's complexity, illustrates perfectly the need for a more reasoned, case-by-case approach to deed construction in complex mineral rights cases. This is a realm in which reasonable minds have long differed—and drastically. While bright-line rules "easily applied is a desirable path[,]"[29] such simplicity often fails to fairly resolve complex claims. This is especially true where "the application of a declared

[23] TR at 9.
[24] *See Poulos*, 328 W.Va. at 95-98 (describing the development of these mineral rights issues, including various perspectives).
[25] TR at 9.
[26] *Poulos*, 238 W.Va. at 96.
[27] *Id.* at 97.
[28] *Id.* at 97-98.
[29] *Id.* at 98.

simple rule operates retrospectively"[30] and the potential for prejudice is therefore high. The U.S. District Court in this case sought to apply a new "simple rule" for crexactium to a deed created over a century ago. The energy sector of the U.S. in 1922 exists as an entirely separate world from that of 2024, when the court made its decision. The law in this realm, too, has seen much development. These changes, and the retrospective nature of the court's decision, merit a deeper analysis.

Moreover, there is no extra-deed context between Garland Coal and Appellees to assist the court in determining the meaning of the term "mineral." In *EnerVest Operating, LLC v. Sebastian Mining, LLC*, for example, the Eighth Circuit Court of Appeals used a variety of deeds executed between the parties to better glean the meaning of the language employed in each deed.[31] Because a restrictive deed existed in that case, the court determined that a mineral deed employing more general language was necessarily conveying a broader range of mineral rights than the deed's more restrictive counterpart.[32] Here, however, the 1922 deed is all the context the parties have. And this deed is not particularly clear. For instance, the deed does relevantly convey "[a]ll . . . mineral and mineral products . . . in and under" the properties in question.[33] But by its plain language, the deed also draws a distinction between a "mineral" and "iron and iron ore."[34] Given the U.S. District Court's dictionary definition of "mineral"—that is, "a solid inorganic substance of natural occurrence"[35]—"iron and iron ore" should *be* a "mineral." The deed's division of these concepts seems to suggest that a more specialized or nuanced version of the term "mineral" was intended. Otherwise, the 1922 deed contains a superfluous clause—a queer claim, indeed, given the deed's

[30] *Id.*
[31] *EnerVest Operating, LLC v. Sebastian Mining, LLC*, 676 F.3d 1144, 1147 (8th Cir. 2012).
[32] *Id.*
[33] TR at 6, n. 6.
[34] *See id.*
[35] TR at 9.

otherwise competent and complex clauses. In such a case, a mere dictionary definition is not enough to determine the meaning of the term in question. The term, unmoored from any other context, becomes wholly ambiguous.

B. The general legal and commercial usage of "mineral" at the time the deed was executed did not encompass crexactium.

Because the term "mineral," as used in the 1922 deed, is ambiguous, courts must look to the general legal and commercial usage of the term at the time the deed was executed to determine if crexactium can be considered a "mineral."[36] In 1922, such general legal and commercial usage would not have included crexactium in the term "mineral."

First, as discussed above, the 1922 deed itself seems to construe "mineral" in a specialized manner. In the wider context of the deed and of the import of mineral rights broadly, it is likely that this specialized meaning is grounded in economics. Everything else that the deed conveys is a resource meant to be extracted for profit—from coal to timber.[37] And a chief reason, if not the sole reason, mineral rights are generally transferred is economic development.[38] In a general legal and commercial context, then, it makes sense to construe the term "mineral" as being "a solid inorganic substance of natural occurrence" with economic value.[39]

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[36] *See Petro-Hunt, L.L.C. v. Tank*, 4 N.W.3d 526, 532 (N.D. 2024); *Border Res, LLC v. Ir. Oil & Gas, Co.*, 869 N.W.2d 758, 763 (N.D. 2015); *EnerVest Operating, Inc. v. Sebastian Mining, LLC*, 676 F.3d 1144, 1147 (8th Cir. 2012).

[37] TR at 6, n. 6.

[38] *See* TR at 7 (describing Garland Coal's listing and sale of the mineral rights and ClinchCo's desire to profit from the rare earth elements inside the GOB piles).

[39] TR at 9; *see also Poulos v. LBR Holdings, LLC*, 238 W.Va. 89, 101-04 (W.Va. 2016) (focusing on the economic value of CBM at the time a deed was executed).

Second, crexactium had no known use at the time the deed was executed.[40] It was brittle, all but impossible to mine, and received no known practical application until the early 2000's.[41] As such, at the time the deed was executed, crexactium had little, if any, economic value. The mere fact that crexactium became immensely valuable decades later cannot save Appellants here. There was simply no way the general legal and commercial use of the specialized term "mineral" in 1922 could have been intended to include a rare earth element with no use and no value at the time.

C. The crexactium in the GOB piles was not "in [or] under" the properties.

Even if crexactium can be considered a "mineral" under the 1922 deed, Appellants still have no claim to the crexactium in the GOB piles because the piles are not located "in [or] under" the Appellees' properties.

Throughout the course of its mining activities, Garland Coal removed copious amounts of earth and mining refuse and placed it into large piles on the surface of Appellees' properties.[42] These GOB piles have now sat on the surface of Appellees' properties for at least four decades—and perhaps much longer than that—becoming covered with dirt and plant material.[43]

The 1922 deed relevantly conveys the rights to "[a]ll . . . mineral and mineral products . . . in and under" the properties in question.[44] Under a plain reading of the deed, the GOB piles are obviously excluded from this conveyance. A mineral on the surface of the earth can in no instance be construed to be "in [or] under" the earth. The U.S. District Court, however, rejected this

[40] *See* TR at 4.
[41] TR at 4-5.
[42] TR at 6-7.
[43] *Id.*
[44] TR at 6, n. 6.

argument as a "hypertechnical reading" of the deed.[45] According to the court, the mere removal of a mineral from under the earth to the surface does not serve to defeat the remover's right to that mineral.[46] There is some truth to this assertion. Assuredly, the Appellees would lose if they were to claim that Garland Coal lost its rights to the coal it mined the moment the coal exited the earth. But that is not the situation before the court.

Instead, Appellees challenge a new type of mining on their properties, incongruent with their surface estates[47] and not contemplated by the original 1922 conveyance. *Skivolocki v. E. Ohio Gas Co.* is instructive. In that case, the Ohio Supreme Court construed a deed conveying the coal "in and under" a property as totally precluding the practice of strip mining.[48] The location modifier in the deed prescribed, according to the court, a type of "min[ing], dig[ging], excavat[ing], and remov[ing]" of coal "by the usual method at that time known and accepted" in the region.[49] And by prescribing certain conduct, the deed necessarily proscribed conduct inconsistent with the estates therein and the common practices at that time and in that locality.[50] At the time the deed in that case was executed, strip mining had yet to be widely employed.[51] Moreover, the property owners affected by the mining owned the surface estates upon the land where the strip mining would occur.[52] Therefore, "[b]ecause strip mining is totally incompatible with the enjoyment of a surface estate," and because strip mining did not exist when the coal rights were conveyed, the court concluded that the deed could not have been intended to allow strip mining.[53]

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[45] TR at 9.
[46] *Id.*
[47] TR at 6.
[48] *Skivolocki v. E. Ohio Gas Co.*, 38 Ohio St. 2d 244, 245, 251 (Ohio 1974).
[49] *Id.* at 251.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*

Here, although the GOB pile mining is not "strip mining" as the term is commonly understood, GOB pile mining and strip mining are highly analogous. Like strip mining, GOB pile mining primarily impacts the surface of the earth, instead of chiefly involving an excavation below the surface. And as with strip mining, GOB pile mining has significant implications for the enjoyment of Appellees' surface estates. Mining the GOB piles will require disturbing large swaths of Appellees' properties, including removing vegetative growth.[54] And in disturbing these piles, Appellants threaten to create a fire hazard and release heavy metals into Appellees' properties and the surrounding land and waterways.[55] Due to the fire hazard involved, GOB pile mining may indeed be *riskier* than strip mining—an activity already deemed by a state supreme court to be "totally inconsistent" with the Appellees' surface estates.[56]

Moreover, GOB pile mining did not exist at the time the 1922 deed was executed. And when "the deed relied upon was executed prior to the time [a] mining technique[]" became "widely employed[,]" there is a strong presumption against construing the deed to allow for that mining technique.[57] At the time the deed in this case was executed, crexactium had no known use.[58] Its brittle nature made it difficult to mine, and as such, crexactium in Blackrock prior to the early 2000's simply ended up in GOB piles with the rest of the mining refuse.[59] In the early 2000's, a practical application for crexactium in battery development was discovered.[60] But this discovery did not occur until nearly eight decades after the 1922 deed was executed, and no one even attempted full-scale GOB pile mining in Blackrock until two decades after that discovery.[61] The

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[54] TR at 7.
[55] *See id.*
[56] *Skivolocki*, 38 Ohio St. 2d at 251.
[57] *Id.*
[58] *See* TR at 4.
[59] *See id.* at 4-5.
[60] *Id.* at 4.
[61] *See id.* at 4, 7-8.

near-century in between the 1922 deed and the development of GOB pile mining techniques therefore places a strong presumption against construing the deed to allow for GOB pile mining. As such, the 1922 deed could not have contemplated GOB pile mining, in the same way that the *Skivolocki* deed could not have contemplated strip mining. The Appellants, then, have no claim to the minerals contained in the GOB piles, as they are not "in [or] under" Appellees' properties.

II. Any mineral estate that still existed in the GOB piles at the time of transfer has since been abandoned.

Even if the court holds that the 1922 deed conveyed the right to mine for crexactium, Appellants remain out of luck, because the mineral estate in the GOB piles was abandoned.

Under Blackrock law, "[a] mineral estate is abandoned if it has not been used for a period of twenty years or more."[62] If a mineral estate is deemed abandoned, then the title to the estate vests in the "owner of the surface estate in the land in, or under, which the mineral interest is located[.]"[63] However, Blackrock law does not define the term "used" in this statute.[64] As such, the U.S. District Court turned to the case law of various states to determine what factors those courts have looked to in determining whether a mineral estate has been abandoned.[65] Those factors primarily hinge on (1) the lack of production or activity related to the mineral rights and (2) the intent of the owner to abandon the mineral estate.[66] A mineral estate owner may, inter alia, maintain an interest in the estate by "leasing or conveying the minerals, recording a mortgage, or engaging in pooling or utilization agreements[.]"[67]

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[62] B.R.S. 32-1 (2016).
[63] *Id.*
[64] *See id.*; TR at 10.
[65] *Id.*
[66] *Id.*
[67] *Id.*

In this case, Garland Coal did not engage in any mining activity on Appellees' properties for a period of twenty-four years.[68] Garland Coal stopped mining entirely on these properties in 1981. [69] After it ceased mining, Garland Coal subsequently denied responsibility for environmental issues associated with the GOB piles left on Appellees' properties and did nothing with the mineral estate until it entered bankruptcy proceedings.[70] From the period of 1983 to 1995, Garland Coal only listed the mineral estate as an asset of "no present value" on its internal reports.[71] And even after Garland Coal entered bankruptcy proceedings in 1995, it did not identify the mineral estate in any bankruptcy filings, nor were Appellees notified of these proceedings and filings.[72] As such, as far as public notice and perception are concerned, Garland Coal was not engaged with the mineral estate in any capacity after 1981.

In 1996, Garland Coal did execute a deed to Fortune with a catchall provision transferring "whatever" mineral rights remained in its deeds throughout western Blackrock.[73] This catchall provision, however, made no claim that any such mineral estate existed, and as mentioned above, no mineral estate was ever reported during Garland Coal's bankruptcy proceedings. On the record, it is unclear whether Fortune ever attempted to ascertain the existence of a mineral estate in Appellees' properties. What is clear is that the next action was the sale of the deeds to ClinchCo in 2005[74]—a full twenty-four years after Garland Coal had ceased mining the mineral estate.[75] If

[68] *See* TR at 6, 10.
[69] TR at 6.
[70] TR at 7.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *See* TR at 6, 10.

Garland Coal and Fortune did nothing to preserve the mineral estate during this time, then Blackrock law is clear: the mineral estate was abandoned.

On these facts, there can be no doubt that the mineral estate was abandoned. Garland Coal, Fortune, and ClinchCo essentially want to have their cake and eat it, too: they want to claim a mineral estate without doing anything to preserve the estate and without claiming any liability for the environmental hazards of the estate. There is fundamental injustice in this construction of Blackrock law. In drafting B.R.S. 32-1, it is undoubtable that the Blackrock legislature intended, at least in part, to require the owners of mineral estates to be easily ascertainable. Indeed, other courts interpretating similar provisions in their state law have said as much. In South Dakota, for example, the South Dakota Supreme Court cited in favor of a very similar law, "The purpose of the . . . act was . . . to promote the development of mineral interests by reducing the difficulty in locating the owners of severed mineral interests[.]"[76] With this goal in mind, it is difficult to see how Garland Coal and Fortune have complied with the spirit of B.R.S. 32-1. At no point did either entity inform the Appellees of the alleged transfers of the mineral estate, nor did either entity perform any public action relating to the mineral estate after 1981. To the contrary, when Garland Coal was asked to assist with a fire raging at a GOB pile, it refused. And when it had the opportunity to publicly proclaim its right to the mineral estate during bankruptcy proceedings, it failed to do so. For all intents and purposes, the Appellees could rightly assume that the mineral estate had been utterly abandoned and that they had been saddled with the fallout of the GOB piles.

[76] *Holsti v. Kimber*, 2014 SD 21, ¶12 (S.D. 2014) (citing *Oberlin v. Wolverine Gas & Oil Co.*, 181 Mich.App. 506, 511 (Mich.Ct.App. 1989)).

Moreover, the catchall deed executed during bankruptcy was not enough to preserve the mineral estate. This deed—executed in private, with no notice given to the Appellees—did nothing to "reduc[e] the difficulty in locating the owner[] of" the mineral estate.[77] Functionally, nothing regarding the mineral estate had publicly changed. The deed executed between Fortune and ClinchCo is more availing, but by then, it was too late to act to preserve the estate under B.R.S. 32-1. The mineral estate was abandoned in 2001 and transferred, without further action, to Appellees.

III. Executive Order 15678 declaring a national emergency with respect to rare earth elements is reviewable by the Court.

A. The emergency declaration is reviewable.

Executive Order 15678, which declared a national emergency with respect to rare earth elements, is reviewable by the Court. The political question doctrine does not preclude this Court's review of the Executive Order because the source of the president's power being challenged is statutory, not constitutional.

The political question doctrine is a principle of judicial restraint that, when applicable, prevents federal courts from deciding constitutional issues that are more appropriate for either the legislative or executive branch to resolve.[78] In *Baker v. Carr*, the Court clarified that the doctrine's application is narrow and prudential, arising only from specific criteria, including "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it."[79]

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[77] *Id.*
[78] *Baker v. Carr*, 369 U.S. 186 (1962).
[79] *Id*. at 217.

Although the Court held in *Center for Biological Diversity v. Trump* that determining whether a national emergency exists is a "quintessential political question," which the President has authority to determine without affording any "judicially discoverable and manageable standards" to help courts review such determinations, that case is not controlling here.[80]

In this case, the source of the President's power being challenged is statutory, not constitutional. As the Court established in *Newsom v. Trump*, the political question doctrine "has not been available in statutory cases" because the "nonjusticiability of a political question is primarily a function of the separation of powers."[81] This is because applying the political question doctrine in a statutory case would "systematically favor" the President over Congress by functionally ignoring any limitations placed on the President by Congress.[82] If the political question doctrine leans systematically towards one branch of government in this way, then it threatens the very separation of powers that it was intended to protect.

There is only one exception when a statutory-based claim may trigger political question concerns, and it does not apply here. In *Zivotofsky v. Clinton*, the Court reasoned that when they are being asked to supplant a foreign policy decision of the political branches, the political question doctrine may still bar statutory claims.[83] This exception plainly does not apply here. Although the President cited concerns regarding the United States' place in the global crexactium market as justification for the Executive Order, the Court today is not being asked to substitute their judgment in that regard for that of the executive branch. Instead, the Court is

[80] *Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 31-32 (D.D.C. 2020).
[81] *Newsom v. Trump*, 141 F.4th 1032, 1045 (9th Cir. 2025).
[82] *Id*. at 14, *citing El-Shifa Pharm Co. v. United States*, 607 F.3d 836, 857 (D.C. Cir. 2010).
[83] *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012).

simply being asked to determine whether there is statutory authority for declaring an emergency and exercising extra-statutory powers in the first place.

It cannot be argued that the source or authority to declare an emergency with respect to rare earth elements comes from anywhere within the constitution. There is no express nor implied grant of such authority from the constitution itself. Despite the language in the Executive Order declaring that it was issued "under the Constitution and laws of the United States," this rote language does nothing to change the fact that there is simply no provision within the constitution granting this authority. The authority is strictly statutory under the NEA. Therefore, the political question doctrine does not block judicial review.

B. The NEA is an improper delegation of the authority to declare emergencies and runs afoul of the nondelegation doctrine.

Because the NEA's grant of authority is overly vague and broad, the statute violates the nondelegation doctrine. The nondelegation doctrine is designed to prevent Congress from transferring its legislative power to another branch of government.[84] Of particular relevance to the current case is language from *A.L.A. Schechter Poultry Corp. v. United States*, where the Court wrote that "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."[85]

In order for Congress to delegate legislative authority to the President, it must provide some "discernable standard" under which the delegated authority may be exercised.[86] The NEA, however, lacks any discernible standards whatsoever. An examination of the NEA reveals that

[84] *Gundy v. U.S.*, 588 U.S. 128, 132 (2019).
[85] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-38 (1935).
[86] *Gundy*, 588 U.S. 128 at 149 (Alito, concurring).

Congress has effectively delegated to the President the power to determine which laws his administration must follow, without placing any discernable standards around the exercise of that delegated authority. Absent those discernable standards, the NEA violates the nondelegation doctrine.

Notably, the NEA fails to outline any definition of "emergency." By not including a definition, Congress is functionally allowing the President to define this term, which is central to the grant of legislative authority within the NEA. Because the President can define the term himself, the NEA goes farther than lacking any "discernable standards," it actually allows the President to set the standards for the exercise of his delegated authority himself. This clearly runs afoul of the nondelegation doctrine, rendering the NEA unconstitutional.

C. Executive Order 15678 violates the major questions doctrine.

In addition to the NEA violating the nondelegation doctrine, Executive Order 15678 itself violates the major questions doctrine. Accordingly, the Executive Order should be struck down.

While the nondelegation doctrine looks to whether a federal statute (in this case, the NEA) is unconstitutional, the major questions doctrine examines whether an executive action is proper, not the underlying law.[87] The major questions doctrine holds that, if an agency action impacts matters of vast economic or political significance, the agency's authority to so act must be clearly stated within the delegating statute.[88]

Although most cases decided along the grounds of the major questions doctrine deal with agency action, the doctrine can be applied to presidential actions equally. In *Louisiana v. Biden*,

[87] *See generally Biden v. Nebraska*, 600 U.S. 477 (2023).
[88] *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014).

the Fifth Circuit Court of Appeals decided that the major questions doctrine did extend to presidential actions.[89] The Fifth Circuit reasoned that the Supreme Court has never expressly limited the major questions doctrine to delegations to agencies rather than to the president.[90] Because Article II of the Constitution "makes a single President responsible for the actions of the Executive Branch," the court stated that "delegations to the President and delegations to an agency should be treated the same under the major questions doctrine."[91]

Given that the major questions doctrine can be applied to Executive Order 15678, that doctrine prohibits the action. The Executive Order impacts areas of vast economic and political significance. Rare earth elements make up a large portion of the United States' economy. This is especially true of crexactium. Currently, the United States imports all of the crexactium it uses. A shift towards production over importing will have massive economic and political ramifications. It should fall to Congress, not to the President acting alone, to decide what the nation's policy regarding rare earth elements (crexactium in particular) ought to be.

IV. OSMRE improperly relied on the emergency declaration when it issued the ATP without conducting a full environmental review under NEPA or engaging in formal consultations under the ESA.

A. This court is not required to defer to OSMRE's determination regarding the emergency declaration.

Before examining the emergency declaration, it is worth establishing that OSMRE's determination that the emergency declaration justified their issuance of an Authorization to Proceed ("ATP") without conducting a full environmental review under the National Environmental Policy Act ("NEPA") or formal consultations under the Endangered Species Act

[89] *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022).
[90] *Id*. at 1031 n.40.
[91] *Id*.

("ESA") should not be afforded deference by this court. Importantly, the Court is not being asked to determine whether the factual basis underlying the declaration of an emergency is sufficient for an emergency to be declared. Instead, the Court is being asked to review only whether the emergency declared is of the type to trigger the emergency shortcuts in NEPA or the ESA. What OSMRE was tasked with determining was the latter, which is reviewable by this Court under typical APA standards.[92]

The Court may review the legality of actions taken under emergency declarations even when that declaration is valid, or when the emergency declaration itself is not reviewable. For example, in *Biden v. Nebraska*, the Court reviewed the suspension of student loan repayment obligations even though that suspension was made under the validly declared COVID emergency.[93] Similarly, in *Trump v. Hawaii*, the Court reviewed multiple executive actions regarding a travel ban while simultaneously upholding the emergency declaration at issue.[94]

As such, while the President may be afforded some deference for declaring an emergency, it is for this Court—and this Court alone—to decide whether that declaration in turn allows OSMRE to invoke the emergency procedures contained within NEPA and the ESA. In fact, the Ninth Circuit Court of Appeals held just this in *State v. Su* when it wrote "final agency actions, even if implementing an executive order, are subject to judicial review under the APA."[95]

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[92] *See generally Loper Bright Enters. v. Raimondo*, 603 U.S. 369, (2024).
[93] *Nebraska*, 600 U.S. 477.
[94] *Trump v. Hawaii*, 585 U.S. 667 (2018); see also *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019) (reviewing executive actions regarding the southern border wall even though the initial declaration of an emergency was a political question).
[95] *State v. Su*, 121 F.4th 1, 14 (9th Cir. 2024).

Given that OSMRE's determination regarding the applicability of the emergency provisions of NEPA and the ESA was an agency decision, the analysis turns to *Loper Bright*. Under the *Loper Bright* framework, this Court should not afford any deference to OSMRE's decision regarding the emergency provisions of NEPA and the ESA, but should instead undergo its own judicial determination of the issue.[96]

B. Alternate arrangements due to the emergency are not authorized under NEPA.

Because Executive Order 15678 only articulates economic concerns as reasoning for the declaration of an emergency, OSMRE is not permitted to circumvent the environmental review process outlined in NEPA. Simply put, the Executive Order is insufficient to trigger the emergency provisions of NEPA, meaning OSMRE acted without proper authority when they issued the ATP without complying with the environmental review process described in NEPA.

NEPA itself does not define what precisely constitutes an "emergency" for purposes of determining when its emergency provisions may be triggered. At this present moment, there are no Council of Environmental Quality ("CEQ") regulations in effect that shed light on this subject either. However, the Department of Interior ("DOI") has promulgated regulations instructing agencies on how to comply with NEPA, to which OSMRE is bound. These regulations are what allow OSMRE and other agencies to take emergency actions without full and complete NEPA compliance.[97] Under these regulations, the authority to take emergency action does not exist unless "the Responsible Official determines that an emergency exists that makes it necessary to take urgently needed actions before preparing a NEPA analysis and documentation."[98]

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[96] *Loper Bright Enters.*, 603 U.S. 369.
[97] 43 C.F.R. §46.150.
[98] *Id*.

These DOI regulations do not define an emergency specifically. That being said, they do speak broadly about "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."[99] Clearly, the DOI intended for an emergency to be a situation in which there was a genuine threat to human life. Notably absent from this discussion, however, is any economic justification for declaring an emergency. Although economic concerns may be enough for the President to declare an emergency through an Executive Order, any action declared on economic grounds would be insufficient to trigger the emergency provisions of NEPA under these regulations.

Although these regulations fail to give an exact definition of an "emergency," speaking instead in broad terms, OSMRE regulations actually do define the term specifically. These regulations state the following:

> Emergency means 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.[100]

Again, these more specific regulations only talk about emergencies in the context of threats to human life and wellbeing. It is clear from this definition that OSMRE itself does not evaluate economic concerns when determining when an "emergency" is sufficient to justify forgoing the usual procedure of NEPA. OSMRE is therefore not authorized to take emergency actions and avoid full compliance with NEPA unless the emergency which has been declared is one which poses a danger to human life. Executive Order 15678, which speaks of economic

[99] 43 C.F.R. §46.150(a).
[100] 30 C.F.R. §700.5.

concerns for declaring an emergency, does not allow OSMRE to avoid the codified NEPA review process.

C. Alternate arrangements due to the emergency are not authorized under the ESA.

Once again, because Executive Order 15678 only articulates economic concerns as reasoning for the declaration of an emergency, OSMRE is not permitted to circumvent the formal consultation requirements in the ESA. Although the U.S. Fish and Wildlife Service ("U.S. FWS") does not define exactly what the term "emergency" means, the organization does recognize that there are some emergencies in which the usual formal consultations under the ESA can be done away with. On the subject, the U.S. FWS instructs:

> Where emergency circumstances mandate the need to consult in an expedited manner, consultation may be conducted informally through alternative procedures that the Director determines to be consistent with the requirements of sections 7(a)-(d) of the Act. This provision applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc.[101]

Echoing this language, the FWS Handbook states that a qualifying emergency under the ESA is "a situation involving an act of God, disasters, casualties, national defense or security emergencies, etc., and includes response activities that must be taken to prevent imminent loss of human life or property."[102]

Clearly, the term "emergency" within the ESA, much like was the case in NEPA, was only intended to include instances in which there is a threat to human life. Although these guidelines from FWS do include an "etc.," it is unlikely that this was intended to include

[101] 50 C.F.R. §402.05.
[102] FWS Handbook, 8.1.

emergencies that are motivated solely by economic concerns. All the other listed examples relate to emergencies that present a threat to human safety, with no mention of economic considerations appearing in the guidelines whatsoever. Furthermore, the passage from the FWS Handbook makes clear that an emergency, even of the type included in the "etc." rather than being explicitly listed out, is only an event in which "response activities that must be taken to prevent imminent loss of human life or property" are being carried out.[103] There is no contention in this case that there are any response activities being taken to prevent loss of human life or property in relation to the declared rare earth element emergency.

Looking to the courts for further clarification, multiple circuits around the nation have ruled on cases that provide some guidance on what kinds of situations qualify as "emergencies" under 50 C.F.R. §402.05. From these cases, a situation can be considered an "emergency" if it meets the following criteria: (1) there is an element of surprise and unexpectedness; (2) there is a need to consult in an expedited manner or, put another way, action is necessary immediately and before proper formal consultations can be conducted; and (3) the situation itself poses a risk to human life or property.[104]

No matter how the issue is spun, it is apparent that a shortage of domestic supplies of rare earth elements is not within the meaning of "emergency" in the ESA. That being the case, OSMRE was without authority to bypass the formal consultation requirement of the ESA in this scenario. OSMRE's invocation of emergency powers under the ESA to avoid statutory

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[103] *Id*.
[104] *See Defs. of Wildlife v. United States Army Corps of Eng'rs*, No. 1:20CV142-LG-RPM, 2022 WL 18456141 (S.D. Miss. Nov. 22, 2022); *Friends of Merrymeeting Bay v. U.S. Dep't of Com.*, 810 F. Supp. 2d 320 (D. Me. 2011); *Washington Toxics Coal. v. U.S. Dep't of Interior, Fish & Wildlife Serv.*, 457 F. Supp. 2d 1158 (W.D. Wash. 2006); *Forest Serv. Emps. for Env't Ethics v. U.S. Forest Serv.*, 397 F. Supp. 2d 1241 (D. Mont. 2005).

requirements was improper and without justification, rendering their actions unlawful. As such, OSMRE's actions must be reversed.

CONCLUSION

ClinchCo has no legal claim to the crexactium. The 1922 deed did not convey the right to mine crexactium. The term "mineral" as used in the deed is ambiguous as to scope and does not include crexactium. To resolve this ambiguity, an examination of the general legal and commercial usage of the term "mineral" at the time the deed was executed is appropriate. This analysis reveals that the term "mineral," as it was understood at the time the deed was executed, did not encompass crexactium.

Related to this matter, the crexactium in the GOB piles was not "in or under" the property Therefore, the right to mine the crexactium could not have been conveyed by the deed to begin with. Even assuming some mineral estate that could have existed in the GOB piles at the time of the original transfer, any estate therein has since been abandoned due to ClinchCo's prolonged inaction in relation to the GOB piles.

Moving to Executive Order 15678, which declared a national emergency with respect to rare earth elements, it is first important to establish that the Executive Order is reviewable by this court. Review of that Executive Order reveals that the NEA is an improper delegation of the authority to declare emergencies as it violates the nondelegation doctrine. Additionally, the Executive Order also violates the major questions doctrine.

Regardless of the status of the Executive Order, however, OSMRE improperly relied on the emergency declaration when it issued the ATP without conducting a full environmental review under NEPA or engaging in formal consultation under the ESA. Importantly, the Court is not

required to defer to OSMRE's determination regarding the emergency declaration. Independent review of NEPA and the ESA reveal that the Executive Order declaring an emergency does not meet the definition of an "emergency" under either statute, meaning alternate expedited procedures were not authorized in this scenario. Therefore, OSMRE acted without authority when it circumvented the statutory processes contained within NEPA and the ESA and its actions should be reversed.