United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Washington, D.C. 20240
http://www.blm.gov

November 29, 2019

In Reply Refer To:
1278-FOIA (640)
FOIA# 2019-00938
1:19-CV-01857

Austin R. Evers
American Oversight
1030 15th Street NW, Suite B255
Washington, DC 20005

Dear Mr. Evers:

This letter is an interim response to your Freedom of Information Act (FOIA) requests, dated March 5, 2019 and April 23, 2019 and assigned tracking numbers 2019-00938 and 2019-00952. In your letter, you asked for the following:

All records reflecting communications (including email messages, email attachments, calendar invitations or entries, and any handwritten or typed notes from meetings) between the custodians listed below and the following individuals and entities:

a. Any employee or representative of Antofagasta PLC, including anyone with an email address ending in antofagasta.co.uk;
b. Andronico Luksic, and anyone acting on his behalf such as a chief of staff, scheduler, or assistant;
c. Ivan Arriagada, and anyone acting on his behalf such as a chief of staff, scheduler, or assistant;
d. Any employee or representative of Twin Metals Minnesota (TMM), including anyone with an email address ending in twin-metals.com;
e. Robert Lehman (including but not limited to the email address rob.lehman@wilmerhale.com); and/or
f. Timothy Martin (including but not limited to the email address timothy.martin@wilmerhale.com).

All communications (including email messages, email attachments, calendar invitations or entries, and any handwritten or typed notes from meetings) between the custodians listed below and the following individuals and entities, regarding the mining leases of Twin Metals in Minnesota:

a. Representative Tom Emmer, and anyone acting on his behalf or serving on his

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staff, including but not limited to Christopher Maneval (Christopher.Maneval@mail.house.gov), David Fitzsimmons (David.fitzsimmons@mail.house.gov), Alyssa Anderson (alyssa.anderson@mail.house.gov), Landon Zinda (landon.zinda@mail.house.gov), and Catherine Lenz (Catherine.lenz@mail.house.gov).

b. Representative Paul Gosar, and anyone acting on his behalf or serving on his staff, including but not limited to Thomas Van Flein (tom.vanflein@mail.house.gov), Leslie Foti (leslie.foti@mail.house.gov), Rory Burke (rory.burke@mail.house.gov), and Jeff Small (jeff.small@mail.house.gov).

We are providing via email a PDF file consisting of 67 pages, which is being released in its entirety. Of these, 1 page is being partially withheld. We reasonably foresee that disclosure would harm an interest protected by one or more of the nine exemptions to the FOIA's general rule of disclosure.

Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency." 5 U.S.C. § 552 (b) (5); see Nat'l Labor Relations Bd. v. Sears Roebuck & Co., 421 U.S. 132, 149 (1975). Exemption 5 therefore incorporates the privileges that protect materials from discovery in litigation, including the deliberative process, attorney work-product, attorney-client, and commercial information privileges.

The Federal Rule of Civil Procedure 26(c) (7), which provides that "for good cause shown…a trade secret or other confidential research, development or commercial information" is protected from discovery. This qualified privilege is available "at least to the extent that this information is generated by the Government itself in the process leading up to the awarding of a contract.

Keiosha Alexander, Bureau of Land Management (BLM) FOIA Officer, is responsible for this release. Briana Collier, Attorney Advisor in the Office of the Solicitor, was consulted.

If you have any questions regarding this request, please contact Sheriff Oladepo, BLM WO FOIA Specialist, at (202) 912-7650 or via email at BLM_WO_FOIA@blm.gov.

Sincerely,

KEIOSHA ALEXANDER

Digitally signed by KEIOSHA ALEXANDER
Date: 2019.11.29 12:26:37 -05'00'

For Ryan Witt, Acting Chief
Division of Intergovernmental and External Affairs

From: Bob McFarlin
To: mleveret@blm.gov; kbenedetto@blm.gov
Subject: Further Information
Date: Wednesday, January 24, 2018 6:42:24 PM
Attachments: Mining_MN_Spruce_Rd_Letter.doc
USFS_SpruceRd_BulkSite_Tech_Memo_4-20-11.pdf

Hi Kathy and Mitch,

I hope this e-mail finds you both well. I came across some notes from our meeting last month and realized I did not send you promised information regarding the Spruce Road bulk sample site just north of the Twin Metals project location. You may recall our brief conversation about ongoing claims made by anti-mining activists that the Spruce Road site is a definitive example of acid mine drainage caused by mining waste material, and that those activists frequently market a photo of the site (cropped for effect) as evidence of their claims. I mentioned that the USFS did a chemical analysis of the area in 2011 and found the AMD claims unfounded. To be precise, the USFS stated in a letter, *"…contributions from the seep are insignificant relative to the ambient or naturally occurring loadings in Filson Creek and the seep is not having any measurable negative impact to the watershed."* Despite the USFS findings, the claims by activists of harmful AMD persist. I promised to provide you with the USFS analysis and the subject photo. Attached you will find the USFS technical memo, a letter from the USFS to the MiningMinnesota trade association, and the photo that is frequently used by anti-mining activists for erroneous effect. I apologize for not sending this information more promptly. Thanks and take care.

Bob McFarlin
Government Affairs Advisor
Twin Metals Minnesota
380 St. Peter St., Suite 705
St. Paul, MN 55102
612-655-2099 (c)

www.Twin-Metals.com

From: Bob McFarlin
Sent: Tuesday, December 19, 2017 12:08 PM
To: 'mleveret@blm.gov' <mleveret@blm.gov>; 'kbenedetto@blm.gov' <kbenedetto@blm.gov>
Cc: Anne Williamson <awilliamson@twin-metals.com>
Subject: Thank you & Further Information

Dear Kathy and Mitch:

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Thank you for meeting with Anne Williamson and me last week in D.C. We greatly appreciate your time and consideration. As follow-up to a couple of issues we discussed I have attached the following two documents:

1. The recent letter sent by Encampment Minerals to the Minnesota Dept. of Natural Resources relinquishing rights to 23 state minerals leases, citing as cause the US Forest Service/BLM land withdrawal proposal. Encampment's letter represents a loss of potential jobs in the region – immediate and future – and a loss of potential school trust fund revenues.
2. A letter Twin Metals sent to the Minnesota House Mining and Outdoor Recreation Committee in Feb. 2015 following a hearing on mining issues. Please note item #5. Twin Metals has used this information and reference frequently in responding to stakeholder and media questions about Acid Rock Drainage, as well as deliberate misinformation.

Also, I have pasted below an e-mail correspondence that was broadly distributed to stakeholders earlier this year referencing updated project data released by Twin Metals. Please also note the highlighted bullet on the potential for acid generation. This reference is also in our website material at: http://www.twin-metals.com/about-the-project/project-facts/. Thank you again for your time.

(Stakeholder e-mail distributed May 25, 2017)
Dear :

Twin Metals Minnesota has made significant progress over the past few years in furthering the conceptual design of its developing underground mine project. Twin Metals has released updated technical and economic information that captures this progress and sets the foundation for ongoing public reference and discussion about the project. I am writing to make you aware of this information and to guide you to further details.

As you know, the Twin Metals project is located approximately nine miles southeast of Ely and 11 miles northeast of Babbitt. The project site is located outside the boundaries and state and federal buffer zones of the Boundary Waters Canoe Area, in an area where mining is both allowed and encouraged by state and federal law.

Key updated technical and economic aspects of the preliminary project design include:

- Twin Metal's current preliminary project design is more efficient and compact than mine designs previously studied, greatly minimizing surface impacts.
- The Twin Metals project is being designed to process approximately 20,000 tons of mineralized ore per day from a single identified mineral deposit, the Maturi Deposit. Previous project designs were based on processing 50,000 tons per day.

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- The current project design would create an estimated 650 direct mining jobs and more than 1,300 indirect spinoff jobs in a variety of industries throughout Northeast Minnesota, serving generations of Minnesotans.
- The project's three year construction phase will generate several million labor hours for construction trades and other professions.
- More than $1.2 billion will be invested in further design and project construction.
- Approximately half of the tailings material from mine operations will be stored as permanent backfill in the underground mine. The remaining tailings material will be stored in a modern, lined surface storage facility. In its future formal mine plan proposal, Twin Metals intends to propose the tailings storage facility next to an existing mine southwest of Babbitt.
- Scientific testing has confirmed that the tailings material from mine operations will be non-acid generating.

The engineering, technical, environmental and economic work on the project will continue as Twin Metals works toward its goal of submitting in approximately two years a formal mine project proposal to state and federal agencies for extensive environmental review. However, the future of the Twin Metals project is dependent on successful resolution of the company's federal mineral lease issues and the proposed withdrawal of federal lands in Northeast Minnesota from future mineral exploration and development. Twin Metals is continuing to pursue legal remedies to secure renewal of its federal mineral leases, and the company is joining Northeast Minnesota citizens, businesses, local governments and others to strongly oppose the withdrawal of federal lands in the region. Please contact me if you would like additional information on these critical issues.

I have attached an updated fact sheet about the Twin Metals project. I also encourage you to visit the Twin Metals website – http://www.twin-metals.com/about-the-project/project-facts/ – for more details on the updated preliminary project information.

Twin Metals is excited to move forward in the ongoing development of its underground mine proposal. The Twin Metals project offers the region a great opportunity for long-term, environmentally safe job creation and economic growth. Thank you for your continued interest and support.

Bob McFarlin
Government Affairs Advisor
Twin Metals Minnesota
380 St. Peter St., Suite 705
St. Paul, MN 55102
612-655-2099 (c)

www.Twin-Metals.com

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From:	Benedetto, Kathleen
To:	Dawn Pagenkopf
Subject:	Fwd: [EXTERNAL] Meeting on July 24?
Date:	Saturday, July 14, 2018 2:33:42 PM

Dawn Here is another scheduling request. Thanks KB

---------- Forwarded message ----------
From: **Bob McFarlin** <bmcfarlin@twin-metals.com>
Date: Thu, Jul 12, 2018 at 11:21 AM
Subject: [EXTERNAL] Meeting on July 24?
To: "kbenedetto@blm.gov" <kbenedetto@blm.gov>

Hi Kathy,

I will be in D.C. on Tuesday, July 24 with my Twin Metals colleague Anne Williamson (Environment VP). Wondering if you have some time that day for a brief visit. We would like to provide you a brief update on project issues and activities. Thanks for your consideration. We may also be available late afternoon on the 23rd, if that works better on your end.

Bob McFarlin

Government Affairs Advisor

Twin Metals Minnesota

380 St. Peter St., Suite 705

St. Paul, MN 55102

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www.Twin-Metals.com

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Kathleen Benedetto
Senior Adviser
Bureau of Land Management
Room 5648, MIB
1849 C Street NW
Washington, DC 20240
Direct: (202) 208-5934
Cell: (202) 336-9318

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From: Benedetto, Kathleen
To: Linda Thurn; Yolando Mack-Thompson
Subject: Fwd: Good to talk with you yesterday
Date: Tuesday, March 21, 2017 9:47:38 AM

Another meeting request.

---------- Forwarded message ----------
From: **Martin, Timothy** <Timothy.Martin@wilmerhale.com>
Date: Tue, Mar 21, 2017 at 9:34 AM
Subject: RE: Good to talk with you yesterday
To: "kathleen_benedetto@ios.doi.gov" <kathleen_benedetto@ios.doi.gov>

Hi Kathy,

Thank you for all your hard work on this issue. I had a great conversation with Melissa last week and I was hopeful you might have time for a brief meeting this week?

Happy to work around your schedule.

Thanks for the consideration.

Best,

Tim

From: Lehman, Rob
Sent: Monday, March 20, 2017 4:22 PM
To: Dansel, Brian - OSEC, Washington, DC <Brian.Dansel@osec.usda.gov>
Cc: kathleen_benedetto@ios.doi.gov; melissa_simpson@ios.doi.gov; Martin, Timothy <Timothy.Martin@wilmerhale.com>
Subject: RE: Good to talk with you yesterday

Brian,

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Thank you again for your time last week to discuss the challenges facing Twin Metals and miners in Northern Minnesota. We look forward to working with you, Kathy and Melissa on more constructive policies where protection of our natural resources can exist with common-sense economic activities.

Please don't hesitate if we can provide additional information or answer any questions.

Rob

Rob Lehman | WilmerHale
Senior Public Policy Advisor
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Washington, DC 20006 USA
+1 202 663 6907 (t)
+1 202 663 6363 (f)
rob.lehman@wilmerhale.com

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From: Dansel, Brian - OSEC, Washington, DC [mailto:Brian.Dansel@osec.usda.gov]
Sent: Thursday, March 16, 2017 12:39 PM
To: Lehman, Rob <Rob.Lehman@wilmerhale.com>
Cc: kathleen_benedetto@ios.doi.gov; melissa_simpson@ios.doi.gov
Subject: Re: Good to talk with you yesterday

Rob, I sent you, Kathleen and Melissa an introductory email but I must have entered your email address incorrectly. Rob--Kathleen and Melissa are over at DOI. Melissa and Kathleen---Rob will be helpful in getting to a conducive answer of the Twin Metals issue in Minnesota. Please let me know if I can do anything to further the discussion.

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Brian Dansel

Natural Resources and Environment

USDA

(202) 450-9074

Sent from my iPhone

On Mar 16, 2017, at 9:31 AM, Lehman, Rob <Rob.Lehman@wilmerhale.com> wrote:

> Brian,
>
> Thank you again for your time and counsel. It's refreshing to know that we will have individuals in the senior levels of government that understand the importance of mining to rural communities. We are looking forward to touching base with colleagues at DOI when possible.
>
> Thank you again.
>
> Rob

Rob Lehman | WilmerHale
Senior Public Policy Advisor
1875 Pennsylvania Avenue NW
Washington, DC 20006 USA
+1 202 663 6907 (t)
+1 202 663 6363 (f)
rob.lehman@wilmerhale.com

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--
Kathleen Benedetto
Special Assistant to the Secretary
Department of the Interior
Bureau of Land Management
(202) 208-5934

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From:	Benedetto, Kathleen
To:	Linda Thurn
Subject:	Fwd: Meeting Next Week?
Date:	Tuesday, April 11, 2017 10:30:34 AM

Can you set this up? Thanks KB

---------- Forwarded message ----------
From: **Bob McFarlin** <bmcfarlin@twin-metals.com>
Date: Tue, Apr 11, 2017 at 9:50 AM
Subject: Meeting Next Week?
To: "Kathleen_Benedetto@ios.doi.gov" <Kathleen_Benedetto@ios.doi.gov>

Dear Kathy,

Would you be available to meet with me next week - later in the afternoon next Tuesday, any time Wednesday up to 1:30 pm., or Wednesday after 3:30 pm? I will be in DC for a short visit. Thanks.

Bob McFarlin

Government Affairs Advisor

Twin Metals Minnesota

380 St. Peter St., Suite 705

St. Paul, MN 55102

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www.Twin-Metals.com

--
Kathleen Benedetto

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Special Assistant to the Secretary
Department of the Interior
Bureau of Land Management
(202) 208-5934

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From:	Sklar, Ryan
To:	Katusak, Justin
Subject:	Fwd: Provisional Reclamation Plan
Date:	Wednesday, July 26, 2017 12:24:47 PM
Attachments:	ATT00001.htm Provisional Reclamation Plan 1352_1353.pdf

---

Justin,

Here's the June 2 letter from TM to Dean.

Ryan
---------- Forwarded message ----------
From: **Collier, Briana** <briana.collier@sol.doi.gov>
Date: Fri, Jun 2, 2017 at 4:49 PM
Subject: Fwd: Provisional Reclamation Plan
To: Karen Hawbecker <karen.hawbecker@sol.doi.gov>, Richard McNeer <richard.mcneer@sol.doi.gov>
Cc: Roy Fuller <roy.fuller@sol.doi.gov>, Ryan Sklar <ryan.sklar@sol.doi.gov>

Karen, Richard: Attached is Twin Metals' newly sent "provisional reclamation proposal." I will send this to DOJ for their awareness, and I will catch Roy and Ryan up on how we are helping to advise BLM ESO on this issue and the BLM ESO's response. Thank you. -Briana

Briana Collier
Attorney-Adviser, Division of Mineral Resources
U.S. Department of the Interior, Office of the Solicitor
1849 C Street NW, Washington, D.C. 20240
Office: (202) 208-4853

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---------- Forwarded message ----------
From: **Karen Mouritsen** <kmourits@blm.gov>
Date: Fri, Jun 2, 2017 at 1:56 PM
Subject: Fwd: Provisional Reclamation Plan
To: Briana Collier <briana.collier@sol.doi.gov>, Joshua Hanson <joshua.hanson@sol.doi.gov>

Karen Mouritsen
State Director
Bureau of Land Management,
Eastern States Office

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Cell 202-329-2030

Sent from my iPhone

Begin forwarded message:

From: Ian Duckworth <IDuckworth@twin-metals.com>
To: "Gettinger, Dean" <dgettinger@blm.gov>
Cc: "Mouritsen, Karen" <kmourits@blm.gov>
Subject: Re: Provisional Reclamation Plan

Dean:

Please find attached a letter and plan pertaining to approval of provisional reclamation for preference right leases MNES 01352 and 01353.

Do not hesitate to call if you have any questions concerning this proposal, otherwise I look forward to your response.

Regards,

Ian Duckworth

Ian Duckworth, PhD, PE

Senior Project Director

Twin Metals Minnesota, LLC

380 St Peter Street, Suite 705

Saint Paul, Minnesota 55102

Office: +1 (651) 842-6832

Cell: +1 (612) 750-5745

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Ryan Sklar
Attorney-Advisor
Office of the Solicitor
U.S. Department of the Interior
202-208-3039

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From: Benedetto, Kathleen
To: Linda Thurn
Subject: Fwd: Twin Metals Letter
Date: Monday, June 12, 2017 6:23:59 PM

---------- Forwarded message ----------
From: **Bob McFarlin** <bmcfarlin@twin-metals.com>
Date: Mon, Jun 12, 2017 at 6:22 PM
Subject: RE: Twin Metals Letter
To: "Benedetto, Kathleen" <kathleen_benedetto@ios.doi.gov>

Thanks. 4:00 p.m. would work great.

Bob McFarlin

Government Affairs Advisor

Twin Metals Minnesota

380 St. Peter St., Suite 705

St. Paul, MN 55102

612-655-2099 (c)

www.Twin-Metals.com

From: Benedetto, Kathleen [mailto:kathleen_benedetto@ios.doi.gov]
Sent: Monday, June 12, 2017 5:22 PM
To: Bob McFarlin <bmcfarlin@twin-metals.com>; Linda Thurn <lthurn@blm.gov>
Subject: Re: Twin Metals Letter

I'm going to be on the hill Friday Morning. I could do a 4:00 pm. I've copied Linda Thurn on this email, she can help figure out a time. KB

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On Mon, Jun 12, 2017 at 4:14 PM, Bob McFarlin <bmcfarlin@twin-metals.com> wrote:

> Hi Kathy,
>
> Would you have a few minutes for a meeting this Friday? I would like to discuss the new upcoming USFS-BLM public hearings in Minnesota, Twin Metals' new project information and other updates. I will be in DC Wed. afternoon through Friday.
>
> Bob McFarlin
>
> Government Affairs Advisor
>
> Twin Metals Minnesota
>
> 380 St. Peter St., Suite 705
>
> St. Paul, MN 55102
>
> 612-655-2099 (c)
>
> www.Twin-Metals.com

From: Bob McFarlin
Sent: Wednesday, June 07, 2017 12:40 PM
To: 'Benedetto, Kathleen' <kathleen_benedetto@ios.doi.gov>
Subject: RE: Twin Metals Letter

> Hi Kathy,
>
> Just left you a voice mail.
>
> Bob McFarlin

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Government Affairs Advisor

Twin Metals Minnesota

380 St. Peter St., Suite 705

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From: Bob McFarlin
Sent: Friday, June 02, 2017 8:45 AM
To: 'Benedetto, Kathleen' <kathleen_benedetto@ios.doi.gov>
Subject: Twin Metals Letter

Hi Kathy,

You may already be aware of the attached letter sent this week from Twin Metals to Dept. of Interior Secretary Zinke and Dept. of Agriculture Secretary Perdue. The letter outlines Twin Metals' position that the withdrawal of federal lands in northeast Minnesota from future mining exploration and development as proposed by the U.S. Forest Service (USFS) and the Bureau of Land Management (BLM) is illegal, and requests that the withdrawal proposal be rescinded by USFS or rejected by BLM. Twin Metals will also address the illegality of the withdrawal proposal and other issues in our formal comments to the USFS prior to the conclusion of the current public comment period in August. Thanks.

Bob McFarlin

Government Affairs Advisor

Twin Metals Minnesota

380 St. Peter St., Suite 705

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--

Kathleen Benedetto

Special Assistant to the Secretary

Department of the Interior

Bureau of Land Management

(202) 208-5934

--
Kathleen Benedetto
Special Assistant to the Secretary
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From:	Finch, Kimberly
To:	Timothy Spisak; John Kalish; Mitchell Leverette; Bradford Purdy
Cc:	Adam Merrill; Alfred Elser; Grange, Stuart; Jill Ralston; Patrick Wilkinson; Meagan Gins
Subject:	For WO-300/ESO Review: Rep. Emmer"s discussion draft "H.R.___" mineral leasing in Minnesota
Date:	Tuesday, September 26, 2017 5:17:39 PM
Attachments:	H.R. __RepEmmerMN-TwinMetals_DiscussionDraftANALYSIS_091917.docx emmer_024_xml_2.pdf hearing_memo_--_leg_hrg_on_discussion_draft_rep._emmer_07.27.17_2.pdf

Tim/John/Mitch,

DOI requested BLM to review a draft bill from Rep. Emmer (R-MN-6) amending mineral leasing on USFS lands in Minnesota, and requiring an act of Congress to establish national monuments and to withdraw lands from mineral and geothermal leasing laws on USFS lands in the State of Minnesota. Attached and pasted below for your surname is our proposed response.

We worked with WO-320 staff and ESO to develop the content of this review. Attached is an updated draft incorporating additional feedback. Thanks to program and ESO staff for the assistance!

Attached:

- Draft BLM Review
- Rep. Emmer's Discussion Draft H.R.___
- Rep. Emmer's July 25 hearing memo on the discussion draft describing intent

DOI Technical Assistance Request
BLM Review

H.R. ____ To require congressional approval of any mineral withdrawal or monument designation involving the National Forest System lands in the State of Minnesota, to provide for the renewal of certain mineral leases in such lands, and for other purposes.
Rep. Emmer (R-MN-6)

Rep. Emmer (R-MN-6) requested that the Department of the Interior (DOI) provide technical assistance on draft bill (H.R. ___) relating to mineral leasing on all National Forest System (USFS) lands in the State of Minnesota.

The discussion draft changes renewal and suspension of operations terms for all future mineral leases, and provides the Secretary of the Interior (Secretary) with the authority to amend and renew two specific mineral leases (MNES-01352 and MNES-01353 / Twin Metals Minnesota, LLC (TMM)), under new terms and authorities. Under the draft, the Secretary would only need to consult with the Secretary of Agriculture rather than seek his/her consent for mineral leasing in Minnesota. The Secretary could not suspend a lease due to a lessee's inability to develop the

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minerals under their lease(s), and the TMM and all future leases would be indeterminate preference right leases (i.e. automatic lease renewals) in Minnesota.

Additionally, under the draft, only Congress could designate national monuments in Minnesota, and the draft prohibits Antiquities Act national monument designations on USFS lands in Minnesota. It also states that only Congress may approve mineral withdrawals on USFS lands in Minnesota, rather than the Secretary authorizing withdrawals. The proposed legislation does not apply to prospecting or developing minerals in the Boundary Waters Canoe Area Wilderness.

BLM Technical Input

The Bureau of Land Management believes that the discussion draft, as written, would accomplish the goals of the sponsor and has no recommended edits.

Kimberly Finch
Legislative Affairs
Bureau of Land Management
Email: kfinch@blm.gov
Office: 202-912-7430
Cell: 385-249-0699

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Subcommittee on Energy and Mineral Resources
Paul Gosar, Chairman
Hearing Memorandum

July 25, 2017

To: All Subcommittee on Energy and Mineral Resource Subcommittee Members

From: Majority Committee Staff, Chris Esparza (x5-9297)
Subcommittee on Energy and Mineral Resources

Hearing: **Discussion Draft on H.R. ___ (Rep. Tom Emmer)**, To require congressional approval of any mineral withdrawal or monument designation involving the National Forest System lands in the State of Minnesota, to provide for the renewal of certain mineral leases in such lands, and for other purposes.
July 27, 2017 at 10:00 AM; 1324 Longworth HOB

Summary of the Bill

The bill would require congressional approval to withdraw any minerals on National Forest System (NFS) lands in the State of Minnesota from disposition under U.S. mineral and geothermal leasing laws. The bill further requires congressional approval for the establishment of national monuments on NFS lands in the State of Minnesota. Finally, the bill clarifies the lease terms for all mineral leases within the exterior boundaries of NFS lands in the State of Minnesota.

Invited Witnesses

Panel I

The Honorable Tom Emmer
Member of Congress
Minnesota's 6th Congressional District

Panel II

Ms. Nancy Norr
Director, Regional Development
Minnesota Power, an ALLETE Company

Professor Drew Shindell
Nicholas Professor of Earth Sciences
Nicholas School of the Environment, Duke University

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Background

The Twin Metals Minnesota Project is a prospective underground copper, nickel, platinum, palladium, gold and silver mine operation.[1] The world-class Maturi mineral deposit is located near the cities of Ely, and Babbitt, Minnesota in the Superior National Forest. Project proponents seek to submit a formal mine plan proposal and formally begin detailed environmental reviews required by state and federal laws. Before this can occur, a pending court case between the federal government and the project owners will need to be resolved to determine the status of the project owner's mineral rights.[2]

The Twin Metals project is expected to extract 20,000 tons of mineralized ore per day from which marketable concentrates are produced.[3] This project is expected to create 650 direct and 1,300 indirect jobs.[4] In 2015 the average wage for a mining job in Minnesota was $78,635, while the average wage in Minnesota was $53,938.[5] If approved, the project will generate significant tax and royalty revenues for Minnesota.

The Twin Metals project would consist of an underground operation and a tailings storage facility.[6] The mined out workings of the mine would serve as permanent storage for waste rock and tailings. This would minimize surface storage of these byproducts. Sufficient underground space would be created to contain 100% of the produced waste rock and 50% of the processed tailings. The other 50% will be deposited in a surface tailings storage facility.[7] This facility is expected to be located at an existing mine near Babbitt, Minnesota.

Unlike most mineral operations on federal lands, which are governed by the Mining Law of 1872 (30 U.S.C.), the Weeks Act (16 U.S.C. 521a), which deals with acquired lands and minerals, controls the Twin Metals Project.[8] Leases of acquired minerals on federal land for mineral exploration and extraction are not indefinite agreements and periodically need to be renewed on 20-year increments. The two leases for the mineral deposit in question began in 1966 and were renewed both in 1989 and 2004.[9] These leases have been transferred several times, most recently by Antofagasta, a Chilean mining corporation. Upon acquisition, Antofagasta took a renewed interest in exploratory and design activities, spending more than $400 million in developing the Twin Metals.[10]

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[1] Twin Metals Minnesota, About the Project, http://www.twin-metals.com/about-the-project/.
[2] Steve Karnowski, Feds seek to dismiss Twin Metals mineral rights lawsuit, StarTribune, June 6, 2017, http://www.startribune.com/feds-seeks-to-dismiss-twin-metals-mineral-rights-lawsuit/426796791/.
[3] Twin Metals Minnesota, Project Facts, http://www.twin-metals.com/about-the-project/project-facts/.
[4] *id.*
[5] *id.*
[6] *id.*
[7] *id.*
[8] Complaint, *Franconia Minerals v. U.S. Dep't of the Interior*, Filed Sept. 12, 2016 (Dist. MN).
[9] *id.*
[10] Twin Metals Minnesota, *supra*, note 3.

AMERICAN OVERSIGHT

However, the previous administration denied Antofagasta's recent application to renew its leases, premising the denial on an opinion (M-Opinion) by then-Interior Solicitor Hilary Tompkins that concluded that BLM had discretion to deny renewal of Twin Metals' leases.[11] On September 12, 2016, Twin Metals Minnesota filed a lawsuit in Federal Court in Minnesota to challenge the M-Opinion, and to affirm and protect its long-standing mineral rights in the Iron Range region of Northeast Minnesota.[12]

On December 14, 2016, the Forest Service denied consent for the renewal of Twin Metals' leases and the following day, the BLM denied the renewal of the leases.[13] Shortly thereafter, at the end of the Obama administration, the U.S. Forest Service and the U.S. Bureau of Land Management (BLM) made proposals to withdraw 235,000 acres from mineral exploration and mining development.[14] The leases were within the boundaries of the withdrawal. The Forest Service is now conducting an extensive environmental review of the impacts of the proposed withdrawal to consider a 20-year withdrawal of the lands.

Section – by – Section

Section 1. Condition on Mineral Withdrawal of National Forest System Lands in Minnesota.

This section prohibits the withdrawal of minerals within NFS lands in the State of Minnesota from disposition without congressional approval.

Section 2. Condition on Monument Designation on National Forest System Lands in Minnesota.

This section prohibits the establishment of national monuments on NFS lands in the State of Minnesota without congressional approval.

Section 3. Clarifying the Nature of Mineral Rights on Forest System Lands in Minnesota.

This section clarifies that all mineral leases issued within NFS lands in the State of Minnesota are indeterminate right leases subject to automatic renewal if certain requirements are met.

This section outlines specific instances when the Secretary of Interior may suspend operations under a lease.

[11] U.S. Department of the Interior Solicitor Hilary Tompkins, M-37036: Twin Metals Minnesota Application to Renew Preference Rights Leases, https://www.doi.gov/sites/doi.gov/files/uploads/m-37036.pdf.
[12] *Franconia Minerals v. U.S. Dep't of the Interior , supra* note 8.
[13] U.S. Forest Service, Twin Metals Lease Renewal, https://www.fs.usda.gov/detail/superior/landmanagement/resourcemanagement/?cid=fseprd507250.
[14] *id.*

AMERICAN OVERSIGHT

This section authorizes the Secretary of Interior to issue permits for the use of surface lands, not included in the lease, for purposes connected with exploration and development of deposits.

This section clarifies the applicability of this legislation's lease terms to leases in effect, leases not yet in effect, and recently non-renewed hard rock mineral leases for the Superior National Forest in Minnesota.

Finally, this section clarifies this legislation should not be construed to permit prospecting for development and utilization of mineral resources within the Boundary Waters Canoe Area Wilderness or Mine Protection Area.

Administration Position

Unknown at this time.

Cost

CBO has not scored the legislation.

Effect on Current Law (Ramseyer)

Showing Current Law as amended by the Discussion Draft for a bill to require congressional approval of any mineral withdrawal or monument designation involving the national Forest System lands in the State of Minnesota, to provide for the renewal of certain mineral leases in such lands, and for other purposes
[text to be added highlighted in yellow]

Section 320301 of title 54, United States Code

320301. National monuments

(a) Presidential Declaration.-The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.

(b) Reservation of Land.-The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

(c) Relinquishment to Federal Government.-When an object is situated on a parcel covered by a bona fide unperfected claim or held in private ownership, the parcel, or so much of the parcel as may be necessary for the proper care and management of the object, may be relinquished to the Federal Government and the Secretary may accept the relinquishment of the parcel on behalf of the Federal Government.

(d) Limitation on Extension or Establishment of National Monuments in Wyoming.-No extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress.

AMERICAN OVERSIGHT

(e) LIMITATION ON EXTENSION OR ESTABLISHMENT OF A NATIONAL MONUMENTS[sic] IN MINNESOTA.—No extension or establishment of national monuments on National Forest System lands in the State of Minnesota may be undertaken except by express authorization of Congress.

AMERICAN OVERSIGHT

From:	Maritza (Andrea) Reilly
To:	Mitchell Leverette; Barbara Eggers; Sabry Hanna; Mary (Kathy) Gunderman; Nicole Virella; Dean Gettinger; Richard McNeer; Roy Fuller; fpiccoli@blm.gov; Karen Hawbecker; Beverly Winston; Stephen Mahoney; Elena Fink; Briana Collier
Subject:	FW: Twin Metals from Public Lands News
Date:	Friday, June 29, 2018 2:00:22 PM

Superior National Forest, Minnesota: On Jan. 5, 2017, under the Obama administration the Forest Service segregated a 234,328-acre area in the Superior National Forest to allow time to consider a mining project and/or to authorize a 20-year withdrawal.

The Twin Metals Mining Project would allow Twin Metals Minnesota to mine for copper, nickel, platinum, palladium, gold and silver on two leases near the Boundary Waters Canoe Area of Superior National Forest. Just before the Obama administration left office it cancelled the two leases on Dec. 14, 2016. A month later the Obama administration executed the segregation/withdrawal.

Said the caucus, "The University of Minnesota-Duluth estimates the creation of 12,000 construction jobs and 5,000 long-term mining jobs if mining projects already being pursued in Duluth Complex are allowed to move forward."

President Trump is on board. He told a political rally in Duluth, Minn., June 20 that he will roll back an attempt by the Obama administration to block the Twin Metals project in the Boundary Waters Canoe Area of the Superior forest.

On May 2 BLM took an initial action in favor of the project, reinstating two mineral leases totaling 4,800 acres that the company held to mine copper, nickel, platinum, palladium, gold and silver.

Now Trump is implying the withdrawal proposal would be canceled. According to the *Minneapolis Star Tribune,* he said, "America's rich natural resources, of which your state has a lot, were put under lock and key (by the Obama administration.)" But, he added, "It is going to happen, I will tell you."

Rep. Tom Emmer (R-Minn.) praised the president. "I am hopeful that the steps needed to ensure a full reversal of the former administration's harmful actions are taken soon, specifically ending the withdrawal proposal that has now dragged on for 18 months, to dramatically revitalize local communities and their economies," he said.

But sportsmen in the area and environmentalists disagree and they filed lawsuits against the reinstallation of the two leases. Led by Voyageur Outward Bound School, the recreation businesses said of their June 21 suit, "Plaintiffs are business owners and users of the Wilderness and Superior National Forest. Their businesses and other uses of the Wilderness depend on the BWCAW remaining in its undiminished, pure state, and on the Superior National Forest remaining a welcoming place for tourists and recreational users."

On June 25 an alliance of environmental groups including the Izaak Walton League filed a similar lawsuit.

The sportsmen's lawsuit is available at:
https://www.savetheboundarywaters.org/sites/default/files/attachments/finalnmw_-

AMERICAN OVERSIGHT

From:	Katusak, Justin
To:	Ryan Sklar; Briana Collier
Subject:	Fwd: For ESO/320 Review (COB 10/16): Rep. Emmer"s introduced bill technical review H.R. 3905, TMM
Date:	Wednesday, October 18, 2017 2:57:52 PM
Attachments:	BILLS-115hr3905ih.pdf RepEmmerMNMinerals_legislationCompare100617.docx H.R.__RepEmmerMN-TwinMetals_HR3905ANALYSIS_101217_toProgramsStates.docx hearing_memo_--_leg_hrg_on_discussion_draft_rep._emmer_07.27.17_2.pdf

Hi Ryan, Briana,

I don't know if this has already been shared with you, but in case not, please see attached Rep. Emmer's introduced bill regarding the TMM leases. It was just based along to Eastern States, but we have until the end of the day to comment. I am reviewing now.

Please let me know if you have the opportunity to review.

Thanks,
Justin

---------- Forwarded message ----------
From: **Elser, Lesley** <laelser@blm.gov>
Date: Wed, Oct 18, 2017 at 2:51 PM
Subject: Fwd: For ESO/320 Review (COB 10/16): Rep. Emmer's introduced bill technical review H.R. 3905, TMM
To: Justin Katusak <jkatusak@blm.gov>

Lesley Elser

External Affairs, Eastern States

20 M Street SE

Washington, D.C. 20003-3503

Desk: (202) 912-7711

Email: laelser@blm.gov

---------- Forwarded message ----------
From: **Finch, Kimberly** <kfinch@blm.gov>
Date: Wed, Oct 18, 2017 at 1:05 PM
Subject: Fwd: For ESO/320 Review (COB 10/16): Rep. Emmer's introduced bill technical review H.R. 3905, TMM
To: laelser@blm.gov

AMERICAN OVERSIGHT

Hi Lesley,

Below are the email and documents that I'm waiting on ESO review. I have also attached a hearing memo which expresses what the congressman hopes to do and references the pending court case. Thank you!

Kimberly Finch
Legislative Affairs
Bureau of Land Management
Email: kfinch@blm.gov
Office: 202-912-7430
Cell: 385-249-0699

Adam,

Rep. Emmer notes in his hearing memo that there is a pending court case on the TMM leases. Can you verify/provide background on this. Wouldn't a pending court case impede BLM from immediately issuing the leases if the bill was enacted?

"Before this can occur, a pending court case between the federal government and the project owners will need to be resolved to determine the status of the project owner's mineral rights."

---------- Forwarded message ----------
From: **Finch, Kimberly** <kfinch@blm.gov>
Date: Thu, Oct 12, 2017 at 12:40 PM
Subject: For ESO/320 Review (COB 10/16): Rep. Emmer's introduced bill technical review H.R. 3905, TMM
To: Alfred Elser <aelser@blm.gov>, "Grange, Stuart" <sgrange@blm.gov>, Mitchell Leverette <mleveret@blm.gov>, Bradford Purdy <bpurdy@blm.gov>
Cc: Meagan Gins <mgins@blm.gov>, Jill Ralston <jralston@blm.gov>, Patrick Wilkinson <p2wilkin@blm.gov>, Andrea Nelson <anelson@blm.gov>

Hi ESO/WO-320,

Thanks again for all your time and attention regarding Rep. Emmer's draft bill for mineral leasing in MN. On Oct. 2, Emmer introduced a new version of the bill (H.R. 3905), and OCL asked us to finalize our review on the introduced version, and not the discussion draft. I asked DOI-SOL to review the draft bill and our previously cleared analysis. SOL flagged a few conflicts in the legislation, which you will see in the tech review section.

Pasted below and attached is a new draft summary/analysis. Please review in track changes by **COB 10/16**. I asked WO-210 for their input on the new NEPA section, and they stated that there are no mandated timelines associated with an EA; however, you may be aware of other regulations or other requirements (e.g. litigation) impeding the issuance of an EA for TMM in 30 days.

This is not a request for a proposed position statement(s) at this time; however, a legislative referral will be forthcoming, with an extended deadline.

Attached:

- Draft BLM analysis of H.R. 3905

AMERICAN OVERSIGHT

- H.R. 3905 as introduced
- Comparison doc between draft bill and HR 3905

DOI Technical Assistance Request
BLM Review
H.R. 3905, Minnesota's Economic Rights in the Superior National Forest Act
Rep. Emmer (R-MN-6)

Rep. Emmer (R-MN-6) requested that the Department of the Interior (DOI) provide technical assistance on a draft bill regarding mineral leasing, mineral withdrawals, and national monuments on National Forest System (USFS) lands in the State of Minnesota. On Oct. 2, 2017, Rep. Emmer introduced H.R. 3905, Minnesota's Economic Rights in the Superior National Forest Act, with new language. The following is a technical review of the introduced bill, H.R. 3905.

H.R. 3905 Summary

H.R. 3905 changes renewal and suspension of operations terms for all current and future mineral leases. Under H.R. 3905, all mineral leases in Minnesota, and specifically the MNES-01352 and MNES-01353 leases (Twin Metals Minnesota, LLC (TMM)), would be indeterminate preference right leases for terms of 20 years, subject to 10-year renewal periods, with certain adjustments allowed by the Secretary of the Interior (Secretary) and/or Secretary of Agriculture. The Secretary could only suspend mineral leases on USFS lands in Minnesota if the lessee(s) were operating at a loss due to market conditions, or if strikes interrupted operations. All leases would be subject to NEPA, and the BLM would be required to complete the environmental assessment for the TMM leases, no later than 30 days after the enactment of the act.

In addition to changing mineral leasing, the bill would amend the Antiquities Act for USFS lands in Minnesota to require Congressional authorization of national monument designations. Under H.R. 3905, all current and future mineral withdrawals on USFS lands in Minnesota would require congressional approval, rather than Secretarial approval. Finally, the proposed legislation does not apply to prospecting or developing minerals in the Boundary Waters Canoe Area Wilderness.

BLM Technical Review

The Bureau of Land Management (BLM) believes that the discussion draft, as written, would accomplish many of the sponsor's goals, but has a few suggestions for consideration.

We believe the sponsor seeks to change the U.S. Forest Service's (USFS) authority to consent to mineral leasing in Minnesota. As written, we believe that Section 4 would not accomplish the sponsor's goal of requiring consultation only, over consent. If the sponsor's intent is to

AMERICAN OVERSIGHT

minimize USFS involvement from consent to consultation, the existing statues (the Act of June 30, 1950 (16 USC 508b), and section 402 of Reorganization Plan No. 3 of 1946 (5 U.S.C. App.)) authorizing consent would still likely be in conflict with H.R. 3905, because the bill has not amended those statutes.

If enacted, H.R. 3805 would require the DOI to update regulations regarding indeterminate leases and preference right leases in order to conform with the bill.

Section 4 would be inconsistent with BLM's regulations regarding indeterminate leases. Under 43 CFR Part 3500, indeterminate leases are not subject to renewal. H.R. 3905 creates indeterminate leases that are subject to renewal. A renewal implies that a lessee would have to submit an application for renewal; whereas, an indeterminate lease continues indefinitely subject to periodic readjustments. For reference, under 43 CFR 3514.25(a) "hardrock mineral leases expire at the end of the lease term."

Under current regulations, the BLM only issues preference right leases to holders of prospecting permits if the permittees discover a valuable mineral deposit. Known mineral deposits are subject to competitive leasing.

Kimberly Finch
Legislative Affairs
Bureau of Land Management
Email: kfinch@blm.gov
Office: 202-912-7430
Cell: 385-249-0699

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Justin Katusak
Acting Senior Litigation Specialist
Office of the Director
Bureau of Land Management
Desk: (202) 208-4695
Cell: (202) 365-6050

AMERICAN OVERSIGHT

I

115TH CONGRESS
1ST SESSION

H. R. 3905

To require congressional approval of any mineral withdrawal or monument designation involving the National Forest System lands in the State of Minnesota, to provide for the renewal of certain mineral leases in such lands, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 2, 2017

Mr. EMMER (for himself, Mr. PETERSON, and Mr. LEWIS of Minnesota) introduced the following bill; which was referred to the Committee on Natural Resources

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A BILL

To require congressional approval of any mineral withdrawal or monument designation involving the National Forest System lands in the State of Minnesota, to provide for the renewal of certain mineral leases in such lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Minnesota's Economic Rights in the Superior National Forest Act''.

AMERICAN OVERSIGHT

SEC. 2. CONDITION ON MINERAL WITHDRAWAL OF NATIONAL FOREST SYSTEM LANDS IN MINNESOTA.

Minerals within the National Forest System lands in the State of Minnesota shall not be subject to withdrawal from disposition under United States mineral and geothermal leasing law unless the withdrawal is specifically approved by an Act of Congress enacted after the date of the enactment of this Act.

SEC. 3. CONDITION ON MONUMENT DESIGNATION ON NATIONAL FOREST SYSTEM LANDS IN MINNESOTA.

Section 320301 of title 54, United States Code, is amended by adding at the end the following new subsection:

''(e) LIMITATION ON EXTENSION OR ESTABLISHMENT OF A NATIONAL MONUMENT IN MINNESOTA.—No extension or establishment of national monuments on National Forest System lands in the State of Minnesota may be undertaken except by express authorization of Congress.''.

SEC. 4. CLARIFYING THE NATURE OF MINERAL RIGHTS ON FOREST SYSTEM LANDS IN MINNESOTA.

(a) MINERAL LEASES ISSUED WITHIN FOREST SYSTEM LANDS IN MINNESOTA.—

AMERICAN OVERSIGHT

DOI-19-0291, 19-0538-E-000032

(1) IN GENERAL.—All mineral leases issued within the exterior boundaries of National Forest System lands in the State of Minnesota under the authority of the Act of June 30, 1950 (16 U.S.C. 508b), or section 402 of Reorganization Plan No. 3 of 1946 (5 U.S.C. App.), are indeterminate preference right leases that—

(A) shall be issued for an initial 20-year period; and

(B) as provided in paragraph (2), shall be renewable after the period described in subparagraph (A) for 10-year renewal periods.

(2) REQUIREMENTS FOR RENEWAL.—A lease shall be renewed under paragraph (1)(B)—

(A) if the lessee has complied with the terms and conditions of the lease during the preceding lease period; and

(B) on the condition that, at the end of each ten-year renewal period, such reasonable readjustment of the terms and conditions of the lease may be prescribed by the Secretary of the Interior, in consultation with the Secretary of Agriculture, for the purpose of—

(i) encouraging production; or

AMERICAN OVERSIGHT

DOI-19-0291, 19-0538-E-000033

(ii) addressing changing conditions within the lease area.

(b) SUSPENSION OF OPERATIONS.—The Secretary of the Interior may suspend operations under a lease described in subsection (a) when—

(1) the lease can only be operated at a loss due to market conditions; or

(2) operations are interrupted by strikes.

(c) PERMITS FOR USE OF SURFACE LANDS.—With respect to lands subject to a lease pursuant to subsection (a), the Secretary of the Interior, in consultation with the Secretary of Agriculture, may issue permits for the use of surface lands not included in the lease for purposes connected with, and reasonably necessary to, the exploration, development, and use of the deposits covered by the lease.

(d) APPLICABILITY TO MINERAL LEASES.—This section shall apply with respect to all mineral leases described in subsection (a), including—

(1) leases that on the date of the enactment of this section are not in effect; and

(2) the hard rock mineral leases for the Superior National Forest in Minnesota identified as MNES–01352 and MNES–01353.

(e) APPLICABILITY OF NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.—The National Environmental Pol-

AMERICAN OVERSIGHT

DOI-19-0291, 19-0538-E-000034

icy Act of 1969 (42 U.S.C. 4331 et seq.) shall apply with respect to a mineral lease described in subsection (a). In the case of the renewal of the existing hard rock mineral leases referred to in subsection (d)(2), the Bureau of Land Management shall complete the pending environmental assessment no later than 30 days after the date of the enactment of this Act.

(f) EXCLUSION OF BOUNDARY WATERS CANOE AREA WILDERNESS.—Nothing in this section may be construed as permitting the prospecting for development and utilization of mineral resources within the Boundary Waters Canoe Area Wilderness or Mine Protection Area.

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AMERICAN OVERSIGHT

DOI-19-0291, 19-0538-E-000035

Subcommittee on Energy and Mineral Resources
Paul Gosar, Chairman
Hearing Memorandum

July 25, 2017

To: All Subcommittee on Energy and Mineral Resource Subcommittee Members

From: Majority Committee Staff, Chris Esparza (x5-9297)
Subcommittee on Energy and Mineral Resources

Hearing: **Discussion Draft on H.R. ___ (Rep. Tom Emmer)**, To require congressional approval of any mineral withdrawal or monument designation involving the National Forest System lands in the State of Minnesota, to provide for the renewal of certain mineral leases in such lands, and for other purposes.
July 27, 2017 at 10:00 AM; 1324 Longworth HOB

Summary of the Bill

The bill would require congressional approval to withdraw any minerals on National Forest System (NFS) lands in the State of Minnesota from disposition under U.S. mineral and geothermal leasing laws. The bill further requires congressional approval for the establishment of national monuments on NFS lands in the State of Minnesota. Finally, the bill clarifies the lease terms for all mineral leases within the exterior boundaries of NFS lands in the State of Minnesota.

Invited Witnesses

Panel I

The Honorable Tom Emmer
Member of Congress
Minnesota's 6th Congressional District

Panel II

Ms. Nancy Norr
Director, Regional Development
Minnesota Power, an ALLETE Company

Professor Drew Shindell
Nicholas Professor of Earth Sciences
Nicholas School of the Environment, Duke University

AMERICAN OVERSIGHT

Background

The Twin Metals Minnesota Project is a prospective underground copper, nickel, platinum, palladium, gold and silver mine operation.[1] The world-class Maturi mineral deposit is located near the cities of Ely, and Babbitt, Minnesota in the Superior National Forest. Project proponents seek to submit a formal mine plan proposal and formally begin detailed environmental reviews required by state and federal laws. Before this can occur, a pending court case between the federal government and the project owners will need to be resolved to determine the status of the project owner's mineral rights.[2]

The Twin Metals project is expected to extract 20,000 tons of mineralized ore per day from which marketable concentrates are produced.[3] This project is expected to create 650 direct and 1,300 indirect jobs.[4] In 2015 the average wage for a mining job in Minnesota was $78,635, while the average wage in Minnesota was $53,938.[5] If approved, the project will generate significant tax and royalty revenues for Minnesota.

The Twin Metals project would consist of an underground operation and a tailings storage facility.[6] The mined out workings of the mine would serve as permanent storage for waste rock and tailings. This would minimize surface storage of these byproducts. Sufficient underground space would be created to contain 100% of the produced waste rock and 50% of the processed tailings. The other 50% will be deposited in a surface tailings storage facility.[7] This facility is expected to be located at an existing mine near Babbitt, Minnesota.

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[1] Twin Metals Minnesota, About the Project, http://www.twin-metals.com/about-the-project/.
[2] Steve Karnowski, Feds seek to dismiss Twin Metals mineral rights lawsuit, StarTribune, June 6, 2017, http://www.startribune.com/feds-seeks-to-dismiss-twin-metals-mineral-rights-lawsuit/426796791/.
[3] Twin Metals Minnesota, Project Facts, http://www.twin-metals.com/about-the-project/project-facts/.
[4] *id.*
[5] *id.*
[6] *id.*
[7] *id.*
[8] Complaint, *Franconia Minerals v. U.S. Dep't of the Interior*, Filed Sept. 12, 2016 (Dist. MN).
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[10] Twin Metals Minnesota, *supra*, note 3.

AMERICAN OVERSIGHT

However, the previous administration denied Antofagasta's recent application to renew its leases, premising the denial on an opinion (M-Opinion) by then-Interior Solicitor Hilary Tompkins that concluded that BLM had discretion to deny renewal of Twin Metals' leases.[11] On September 12, 2016, Twin Metals Minnesota filed a lawsuit in Federal Court in Minnesota to challenge the M-Opinion, and to affirm and protect its long-standing mineral rights in the Iron Range region of Northeast Minnesota.[12]

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This section prohibits the establishment of national monuments on NFS lands in the State of Minnesota without congressional approval.

Section 3. Clarifying the Nature of Mineral Rights on Forest System Lands in Minnesota.

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This section outlines specific instances when the Secretary of Interior may suspend operations under a lease.

[11] U.S. Department of the Interior Solicitor Hilary Tompkins, M-37036: Twin Metals Minnesota Application to Renew Preference Rights Leases, https://www.doi.gov/sites/doi.gov/files/uploads/m-37036.pdf.
[12] *Franconia Minerals v. U.S. Dep't of the Interior , supra* note 8.
[13] U.S. Forest Service, Twin Metals Lease Renewal, https://www.fs.usda.gov/detail/superior/landmanagement/resourcemanagement/?cid=fseprd507250.
[14] *id.*

AMERICAN OVERSIGHT

This section authorizes the Secretary of Interior to issue permits for the use of surface lands, not included in the lease, for purposes connected with exploration and development of deposits.

This section clarifies the applicability of this legislation's lease terms to leases in effect, leases not yet in effect, and recently non-renewed hard rock mineral leases for the Superior National Forest in Minnesota.

Finally, this section clarifies this legislation should not be construed to permit prospecting for development and utilization of mineral resources within the Boundary Waters Canoe Area Wilderness or Mine Protection Area.

Administration Position

Unknown at this time.

Cost

CBO has not scored the legislation.

Effect on Current Law (Ramseyer)

Showing Current Law as amended by the Discussion Draft for a bill to require congressional approval of any mineral withdrawal or monument designation involving the national Forest System lands in the State of Minnesota, to provide for the renewal of certain mineral leases in such lands, and for other purposes
[text to be added highlighted in yellow]

Section 320301 of title 54, United States Code

320301. National monuments

(a) Presidential Declaration.-The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.

(b) Reservation of Land.-The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

(c) Relinquishment to Federal Government.-When an object is situated on a parcel covered by a bona fide unperfected claim or held in private ownership, the parcel, or so much of the parcel as may be necessary for the proper care and management of the object, may be relinquished to the Federal Government and the Secretary may accept the relinquishment of the parcel on behalf of the Federal Government.

(d) Limitation on Extension or Establishment of National Monuments in Wyoming.-No extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress.

AMERICAN OVERSIGHT

(e) LIMITATION ON EXTENSION OR ESTABLISHMENT OF A NATIONAL MONUMENTS[sic] IN MINNESOTA.—No extension or establishment of national monuments on National Forest System lands in the State of Minnesota may be undertaken except by express authorization of Congress.

AMERICAN OVERSIGHT

From:	Leverette, Mitchell
To:	Fink, Elena; Fuhs, Gregory
Subject:	Fwd: Updated Twin Metals materials
Date:	Tuesday, December 26, 2017 11:38:25 AM
Attachments:	2017.12.22 Twin Metals - BLM if asked statement_final.docx M 37049 Reversal of M 37036 Twin Metals Minnesota Application to Renew Preference Right Leases 122217.pdf TMM_notifications_12.22.17_final.docx Twin Metals - Talking points and Q&A_12.22.17.docx

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Elena,

FYI

Mitchell Leverette
Acting State Director
Eastern States
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202-912-7702 (w)
202-431-2262 (c)

---------- Forwarded message ----------
From: **Winston, Beverly** <bwinston@blm.gov>
Date: Fri, Dec 22, 2017 at 3:22 PM
Subject: Updated Twin Metals materials
To: Mitchell Leverette <mleveret@blm.gov>, Dean Gettinger <dgettinger@blm.gov>, Kimberly Finch <kfinch@blm.gov>
Cc: Jeff Krauss <jkrauss@blm.gov>, Patrick Wilkinson <p2wilkin@blm.gov>, Jill Ralston <jralston@blm.gov>, Justin Katusak <jkatusak@blm.gov>, "Ross, Paul" <paul_ross@ios.doi.gov>

Everyone,
Here is the updated notification schedule, the final if-asked statement, a pdf of the opinion, the TPs and Qs&As. For those doing outreach The tempo picked up, so you can do your outreach when you see the opinion posted here: SOL web page here (even if the schedule said to do it in advance).
Heads up Dean and Mitch, your schedules changed the most.
Thanks for patience.
Bev

--

Bev Winston
Bureau of Land Management | Communications
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AMERICAN OVERSIGHT

Reversal of Twin Metals Opinion, M-37036

BLM PRESS STATEMENT (IF ASKED):

Today, the United States Department of the Interior's Office of the Solicitor issued a new legal opinion concluding that Twin Metals Minnesota has a non-discretionary right to a third renewal of its two hardrock mining leases, located in the Superior National Forest in northern Minnesota. The new M-Opinion (Memorandum Opinion) M-37049 reverses and replaces a prior opinion on the topic which was issued in March 2016.

Under the new legal opinion, the Bureau of Land Management (BLM) will work together with the surface management agency, USDA Forest Service, to reconsider a 2016 decision in which the BLM denied Twin Metals' pending lease renewal application. The agencies will conduct the appropriate environmental analysis under the National Environmental Policy Act (NEPA) to make a final agency decision on the application and to identify appropriate terms and conditions for surface protection.

The M-Opinion is available at this link: https://www.doi.gov/solicitor/opinions.

CONTACT: BLM Public Affairs at BLM_PRESS@blm.gov

AMERICAN OVERSIGHT

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

DEC 22 2017

M-37049

Memorandum

To: Director, Bureau of Land Management

From: Principal Deputy Solicitor Exercising the Authority of the Solicitor Pursuant to Secretarial Order 3345

Subject: Reversal of M-37036, "Twin Metals Minnesota Application to Renew Preference Right Leases (MNES-01352 and MNES-01353)"

On October 21, 2012, Twin Metals Minnesota (Twin Metals) filed an application with the Bureau of Land Management (BLM) to renew hardrock mineral leases MNES-01352 and MNES-01353 located within the Superior National Forest in Northeastern Minnesota. On March 8, 2016, the former Solicitor issued an M-Opinion entitled, "Twin Metals Minnesota Application to Renew Preference Right Leases (MNES-01352 and MNES-01353)" (M-37036), concluding that the BLM had discretion to either grant or deny Twin Metals' pending application to renew the two hardrock mineral leases. Twin Metals filed suit on September 12, 2016, challenging the M-Opinion.

After the United States Department of Agriculture Forest Service (Forest Service) withheld its consent to renew the leases, the BLM cancelled the leases in December 2016. In response to the decision not to renew their leases, Twin Metals asked for reconsideration of M-37036. After further review of the relevant documents and underlying legal framework, we believe that M-37036 erred in concluding that BLM has discretion to grant or deny Twin Metals' lease renewal application. Accordingly, this Memorandum withdraws and replaces M-37036.

For the reasons set forth below, the terms of the original leases issued to Twin Metals' predecessor-in-interest in 1966 remain the operative provisions governing lease renewal. The original 1966 leases provide Twin Metals with a non-discretionary right to a third renewal, subject to readjusted terms and conditions as allowed by the 1966 leases. Accordingly, while the United States maintains discretion to impose reasonable new terms and conditions in the lease renewal agreements, the BLM does not have the discretion to deny the renewal application.

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DOI-19-0291, 19-0538-E-000043

Background

Statutory Authority for Issuance of the Leases

The leases are located in northern Minnesota on acquired Weeks Act[1] lands, as well as lands reserved from the public domain, that are managed as part of the National Forest System by the Forest Service. The Secretary's authority, as delegated to the BLM, for mineral disposition on the acquired lands is found in section 402 of Reorganization Plan No. 3 of 1946,[2] and 16 U.S.C. § 520, which governs mineral disposition on Weeks Act lands. The Secretary's authority, as delegated to the BLM, for mineral disposition on reserved National Forest System lands in Minnesota is 16 U.S.C. § 508b. Under these provisions, leasing for hardrock mineral development is allowed only if the Secretary of Agriculture has consented to the issuance of the lease.[3]

Negotiation and Issuance of the 1966 Leases

The history of the original lease negotiations and the subsequent renewals is an important factor in determining the intent of the parties with respect to the right of renewal. The history began in 1952 when Twin Metals' predecessor-in-interest, the International Nickel Company, Inc. (INCO), followed successful prospecting activity by approaching the Department of the Interior (Department) regarding applying for hardrock mineral leases.

The two parties began negotiating potential terms in 1953, and INCO originally sought a 50-year lease from the Department.[4] The lease negotiations did not end for over ten years, in part because the parties disagreed on three major issues:

> Term – INCO sought a 50-year term to increase certainty for its investors while the BLM wanted a maximum 20-year primary term;[5]
>
> Royalty rates – the Department wanted higher royalty rates than INCO was willing to agree to pay;[6] and
>
> Production assurances – the BLM sought assurance that INCO would begin production during the lease term.[7]

---

[1] Pub. L. No. 61-436, § 6, 36 Stat. 961, 962 (1911) (codified as amended at 16 U.S.C. § 515).

[2] 60 Stat. 1097, 1099-1100, Section 402 (May 16, 1946).

[3] *See id.*; 16 U.S.C. § 508(b).

[4] Memorandum from United States Geological Survey (USGS) Chief, Conservation Division to file, "Nickel Leasing" (Aug. 13, 1953).

[5] Memorandum from P.W. Guild, BLM Chief, Branch of Ferrous Metals to file, "Meeting in Congressman Blatnik's office re Cu-Ni deposits in Minnesota" (July 9, 1965).

[6] Memorandum from USGS Chief, Conservation Division to USGS Associate Director, "Proposed preference right lease to International Nickel Company, Inc." (Oct. 29, 1965).

[7] Memorandum from BLM Director to DOI Assistant Secretary, Mineral Resources, "Proposed Preference Right Leases to International Nickel Company, Inc." (Oct. 5, 1965).

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After several years of exchanging drafts of potential lease terms, the parties reached a compromise agreement on these issues:

- INCO agreed to accept the 20-year primary term;
- The BLM agreed to accept a lower yet escalating minimum royalty rate; and
- The BLM received some production assurances in the form of adjustable royalty rates on future production that would fluctuate depending on how soon the lessee began producing.[8]

As a result of these and other compromises, the original MNES-01352 and MNES-01353 leases awarded to INCO on June 1, 1966, were unique, borrowing terms from, but not utilizing, the BLM's Standard Lease Form in place at the time.

The royalty and renewal provisions were particularly distinctive. The first section of the leases provides the lessee with the exclusive right to mine on the leasehold for a primary term of 20 years and the right to renewals at 10-year intervals after the primary term:

> Rights of Lessee. In consideration of the rents and royalties to be paid and conditions and covenants to be observed as herein set forth the Lessor grants to the Lessee . . . the exclusive right to mine, remove, and dispose of all the copper and/or nickel minerals and associated minerals . . . in, upon, or under [the described lands] . . . together with the right to construct and maintain thereon such structures and other facilities as may be necessary or convenient for the mining, preparation, and removal of said minerals, for a period of twenty (20) years *with a right in the Lessee to renew the same for successive periods of ten (10) years each in accordance with regulation 43 CFR § 3221.4(f) and the provisions of this lease*.[9]

The regulation referenced in the renewal clause provides in pertinent part that the "lessee will be granted a right of renewal for successive periods, not exceeding 10 years each, under such reasonable terms and conditions as the Secretary of the Interior may prescribe."[10]

Section 2 of the leases then sets forth most of the lessee's obligations, covering rental and royalty payments, bonding, inspection, payment of taxes, and non-discrimination provisions, among other things. Of importance for Twin Metals to hold the leases without production, section 2(c) provides for minimum royalty payments in lieu of production. Those provisions state that, beginning after the tenth year of the primary term, the lessee is required to mine a quantity of minerals such that the royalties would be equal to $5 per annum per acre for the primary term and $10 per annum per

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[8] *See* Memorandum from USGS Assistant Chief, Conservation Division, to file, "Phone call from Julian Feiss re meeting with International Nickel" (Aug. 18, 1965); Memorandum from USGS Director to the Secretary of the Interior, "Congressman John A. Blatnik may telephone the Secretary" (Jan. 10, 1966) (discussing the parties' differing positions on royalty rates and recommending a "performance clause" be added as a "'reentry' clause for royalty adjustment that might be introduced permitting reevaluation and lowering of the royalty rates if justified after some operating experience").

[9] Section 1(a) of Lease (emphasis added).

[10] 43 C.F.R. § 3221.4(f) (1966).

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DOI-19-0291, 19-0538-E-000045

acre during each renewal or, in lieu of that production, pay royalties equal to the minimum royalty.[11] Section 2(c) also allows the lessor in its discretion to waive, reduce or suspend the minimum royalty payment for reasonable periods of time in the interest of conservation.[12] Pursuant to this section, INCO and its successors have paid over $1.4 million dollars in royalties to the government.

Section 5, entitled "Renewal Terms," is also unique by describing in detail BLM's rights to readjust royalty rates and other terms upon renewal. As more fully discussed in the analysis section below, section 5 creates a production incentive for the lessee by providing BLM with only limited readjustment rights if the lessee was producing by the end of the initial 20-year term. On the other hand, if the lessee was not producing before the initial term ended (and if BLM had not extended the period for commencement of production), then BLM would have the right, starting with the first renewal, to readjust terms and conditions without these limitations.

Finally, section 14, entitled "Royalty Adjustment," is unique by providing another production incentive. It requires lowering the royalty rate in the second ten years of the primary lease term and in the first three renewals if the lessee sinks a shaft or otherwise commences commercial development within five years of obtaining all the necessary permits and authorizations.[13]

Activity during the Primary Term of the 1966 Leases

INCO fulfilled the royalty rate reduction provisions of section 14 by sinking a 1,100 foot mine shaft on lands leased under MNES-01352 in 1967 to obtain bulk sampling. But no production occurred under the leases during the 20-year primary term. Under the terms of section 2(c) of the 1966 leases, INCO's minimum royalty payments became due beginning with the 1976-1977 lease year. The BLM granted INCO's requests for waivers of the minimum royalty payments for a five-year period, from June 1, 1976, through May 31, 1981, because the State of Minnesota was conducting environmental studies of the proposed mining operations during that time period, which prevented INCO from proceeding with development of the leases.[14] INCO again requested a waiver of minimum royalty payments for the five-year period between June 1, 1981, and May 31, 1986, citing copper and nickel prices too low to allow for development. The BLM denied this second request, reasoning in part that the royalty payment was the only diligence requirement in the leases:

> The provision for minimum royalty in lieu of production requirements was a lease term arrived at through pre-lease negotiations between the Bureau and INCO. The intention of the minimum royalty is to spur development of the resource and, in effect, is the only diligence requirement contained in the subject leases. Waiver of minimum royalty removes all incentive for the timely development of the leases.[15]

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[11] *See* § 2(c) of the 1966 leases.

[12] *Id.*

[13] Section 14 of the 1966 leases.

[14] Memorandum from BLM Associate District Manager, Milwaukee, to the State Director, Eastern States Office, "Recommendation Regarding an Application for Minimum Royalty Waiver Submitted by INCO Alloys International, Inc." (Aug. 28, 1985), at 2.

[15] *Id.* at 3.

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Beginning in 1985, after the BLM denied the waiver request, INCO started submitting minimum royalty payments as required by the leases.

The 1989 Lease Renewals

INCO timely filed its first lease renewal application on May 14, 1986.[16] After receiving legal advice from the Office of the Solicitor confirming that the lease could be renewed despite the lack of production,[17] the BLM requested the consent of the Forest Service, and the Forest Service agreed to the renewals, finding the terms and conditions of the original leases to be "adequate to prevent or mitigate unacceptable impacts and that no additional conditions need to be added prior to their renewal provided that none of the terms and conditions related to [Forest Service surface] authority are diminished in any manner."[18]

After then receiving the recommendations of the BLM Assistant District Manager in Milwaukee, the BLM issued a decision renewing the leases on September 12, 1988, and enclosed a new lease form for INCO's signature.[19] The new lease would have altered several terms and conditions of the leases, including raising the base royalty rate to 5% and lowering the minimum royalty payment to $3 per acre per year.

Before the new lease was signed, the BLM took the unusual step of withdrawing the leasing decision "because the new lease forms submitted for signature will alter the terms and conditions of the original leases."[20] The withdrawal of the decision was made after an internal reassessment of the renewal form against the original lease terms. An internal BLM memorandum explained that the minimum royalty rate should not be lowered to $3 per acre as the then-current regulations

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[16] The regulations at 43 C.F.R. § 3522.1-1 (1985) state that renewal applications "must be filed in the appropriate land office within 90 days prior to the expiration of the lease term." The "within 90 days" language in this regulatory provision allows lease renewal applications to be filed at any time before the expiration of the lease term. The lessee filed an application for extension of the term of the leases on May 14, 1986—30 days before the end of the primary twenty-year term on June 14, 1986, which was "within 90 days" of the lease expiration. Consequently, the renewal application was timely filed.

[17] Memorandum from Associate Solicitor, Energy and Resources, to Deputy State Director, Mineral Resources, Eastern States Office, BLM, "Application for Minimum Royalty Waiver Submitted by INCO Alloys International, Incorporated for Leases ES 01352 and ES 01353" (Apr. 2, 1986).

[18] Decision of United States Department of Agriculture (USDA), Forest Service, Superior National Forest Supervisor, Clay Beal, "Finding of Categorical Exclusion, Conditions of Extending Bureau of Land Management Leases" (Feb. 6, 1987). The Regional Forester subsequently affirmed the agency's consent to the 1989 lease renewals. Decision of United States Department of Agriculture (USDA), Forest Service, Eastern Region, Regional Forester, Floyd J. Marita, "BLM Preference Right Leases, ES 01352 and ES 01353 Inco Alloys International, Inc. – (Superior NF – MN) (June 19, 1987).

[19] Memorandum from BLM Assistant District Manager for Energy and Minerals, Milwaukee to State Director, Eastern States Office, "Recommendations for Lease Renewals, International Nickel Corporation Leases ES-1352 and ES-1353" (July 9, 1986); Decision by Bureau of Land Management Deputy State Director for Mineral Resources, Eastern States Office to INCO Alloys International, Inc., "Preference Right Leases Renewed, Lease Forms Transmitted for Signature" (Sept. 12, 1988).

[20] Decision by BLM Deputy State Director for Mineral Resources, Eastern States Office to INCO Alloys International, Inc., "Decision Vacated" (Oct. 27, 1988).

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directed, but should be set at the $10 per acre rate outlined in the 1966 leases, as "[t]his high minimum royalty payment was agreed to through intensive negotiations and is intended to serve as the 'production incentive' or 'diligent development' provision in the leases, and should not be changed."[21] Likewise, with such a production incentive, the memorandum stated that it would be "inappropriate" to impose an additional production requirement on the lessee in the lease renewal, especially "when no other hardrock leases in our District contain such a requirement."[22] The memorandum concludes, "Because of the highly negotiated terms and conditions of these two leases, which contain many references to requirements to be applied during lease renewal periods, I recommend that these leases be renewed under the existing terms and conditions and in their present form, i.e., not on the new lease form."[23] Based on this recommendation, the BLM withdrew its initial leasing decision as noted above.

A few months later, the BLM granted INCO's renewal application in a new decision. This decision expressly stated that the renewal was on the same terms and conditions of the original leases: "The Forest Service and the Bureau of Land Management have agreed to the renewal of the enclosed Preference Right Leases MNES 1352 and MNES 1353 under the existing terms and conditions of the original lease. Enclosed are lease renewal forms transmitted for your signature and return to this office."[24]

The forms the BLM transmitted for signature were the Standard Form 3520-7 (December 1984), with some terms written in and other terms referencing the 1966 leases, which were attached in full to the standard forms. On the standard forms, the BLM typed in single and double asterisks next to section 2 (a) and (b), and included text later in section 14, entitled "Special Stipulations," that corresponded to the single and double asterisks. These provisions stated that the "terms and conditions of the production royalties remains [sic] as stated in the attached original lease agreement," and that "[t]he minimum annual production and minimum royalty is $10.00 per acre or a fraction thereof as stated in the attached original lease agreement."[25] The forms also contain a standard renewal provision stating that the lease is effective "for a period of ten years . . . with preferential right in the lessee to renew for successive periods of ten years under such terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the expiration of any period."[26]

During this time period, INCO filed to assign its interests in the leases to American Copper and Nickel Company, Inc. ("American Copper") in May 1988. The BLM granted the assignments, effective January 1, 1991. Although exploration work continued, neither INCO nor American Copper began production on the leases during the first renewal period.

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[21] Memorandum from BLM Assistant District Manager for Solid Minerals, Rolla, Vincent Vogt, to the State Director, Eastern States Office, "Recommendations for Lease Renewals, International Nickel Corporation Hardrock Mineral Leases MNES-1352 and MNES-1353" (Oct. 14, 1988) at 1.

[22] *Id.* at 2.

[23] *Id.*

[24] Decision by BLM Deputy State Director for Mineral Resources, Eastern States Office to INCO Alloys International, Inc., "Preference Right Leases Renewed, Lease Forms Transmitted for Signature" (Apr. 25, 1989).

[25] 1989 lease renewal forms, at 2–3.

[26] *Id.* at 1.

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The 2004 Lease Renewals

American Copper timely applied for a second renewal of the leases on March 15, 1999.[27] The Forest Service consented to the renewals, finding the terms and conditions to be sufficient.[28] The BLM issued its decision granting the lease renewals on November 12, 2003, and directed American Copper to sign the enclosed Preference Right Lease forms and return them to the BLM office within 30 days.[29] As lease forms, the BLM again provided Standard Form 3520-7 (December 1984), with identical typed-in provisions to those of the 1989 leases, and again attached the 1966 leases in full.[30] The leases were renewed with an effective date of January 1, 2004.

On April 7, 2004, American Copper filed to assign its interests in the leases to Beaver Bay Joint Venture. The BLM approved the assignment on March 30, 2005, to be effective April 1, 2005. Although exploration work continued, neither American Copper nor Beaver Bay Joint Venture began production on the leases during the second renewal period.

The 2012 Renewal Application and Issuance of M-37036

On October 21, 2012, Beaver Bay Joint Venture timely filed for a third renewal of the leases.[31] Through BLM-approved assignments and transfers, Franconia Minerals (US) LLC (Franconia) later became the current leaseholder of MNES-1352 and MNES-1353. Franconia is a wholly-owned subsidiary of Twin Metals.

In processing the 2012 application for renewal, the BLM identified the need for a legal opinion to determine whether it had discretion to grant or deny the lease renewal. The Solicitor issued M-Opinion 37036 on March 8, 2016, in response to the request.[32] In M-37036, the Solicitor disagreed with Twin Metals' assertion that the original lease terms governed and provided a perpetual right to renew the leases every ten years. The M-Opinion found that the more recent 2004 lease terms governed renewal, and while the "2004 lease terms give the lessee preference over other potential lessees to lease the lands in question, they do not entitle the lessee to non-

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[27] The lessee applied for a second renewal on March 15, 1999, which was 109 days before the end of the first lease renewal on July 1, 1999. The 1999 regulations instruct lessees to "[f]ile an application [for renewal] at least 90 days before the lease term expires." 43 C.F.R. § 3511.27 (1999). Consequently, the 1999 renewal applications were timely filed.

[28] Decision of the USDA Forest Service, Regional Forester, Randy Moore, to BLM State Director, Eastern States Office, "Renewal of Preference Right Leases MNES 1352 and MNES 1353" (July 18, 2003).

[29] Decision of BLM Chief of Use Authorization, Division of Resources Planning, Use and Protection, to American Copper and Nickel Co., "Additional Requirements to be Met" (Nov. 12, 2003).

[30] *See* 2004 lease renewal forms, at 2–3.

[31] The 2012 renewal application was submitted 438 days before the end of the second renewal on January 1, 2014. The filing requirements in the current regulations are the same as those in the 1999 regulations. *Id.* (2014). Consequently, the 2012 application was timely filed.

[32] *Twin Metals Minnesota Application to Renew Preference Right Leases (MNES-01352 and MNES-01353)*, M-37036 (Mar. 8, 2016).

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discretionary renewal of the leases."[33] The M-Opinion also concluded that even if the terms of the 1966 leases governed, they did not provide a non-discretionary right to renewal. Instead, M-37036 found that "[u]nder the original 1966 lease terms . . . the lessee was required to commence production within the twenty-year primary term to qualify for three renewals of right."[34] Because no production has occurred, the M-Opinion concluded that no right to renewal existed: "Twin Metals Minnesota does not have a non-discretionary right to renewal, but rather the BLM has discretion to grant or deny the pending renewal application."

After receiving the M-Opinion, the BLM requested the Forest Service's consent determination on the lease renewals.[35] After taking public comment on the question, the Forest Service submitted a letter to the BLM Director on December 14, 2016, stating it did not consent to renewal of the leases.[36] As a result of the Forest Service's denial of consent, the BLM issued a decision denying renewal of the leases on December 15, 2016.[37]

Analysis

Twin Metals has consistently asserted that the renewal provisions of its 1966 leases govern and provide a right of renewal every ten years as long as it complies with the terms of the leases. In contrast, M-37036 concluded that Twin Metal's renewal rights were governed by the terms of the 2004 lease forms, and that those terms were unambiguous and provided Twin Metals only with the right to be considered for a renewal at the discretion of the Forest Service and the BLM. In addition, M-37036 asserted that even if the terms of the 1966 leases governed, Twin Metals still would not be entitled to a non-discretionary right of renewal because it did not begin production within its extended primary term.

As discussed below, Twin Metals is entitled to a third renewal. First, the renewal terms of the 2004 lease form do not govern. The form is ambiguous, and the intent of the parties to keep operative the terms of the 1966 leases becomes clear once the BLM's decision files are examined.[38] M-37036 also misconstrues the terms of the 1966 leases. They do in fact provide for a third, non-discretionary right to renewal without regard to whether production has begun. Accordingly, Twin Metals has the right to renewed leases, subject to the imposition of reasonable new terms and conditions as allowed by the 1966 leases.

In the sections below, we first discuss why the 1966 renewal terms govern, and then discuss the meaning of those terms.

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[33] *Id.* at 13.

[34] *Id.* at 2.

[35] Letter from Karen Mouritsen, State Director, BLM Eastern States Office, to Kathleen Atkinson, Regional Forester, Eastern Region, Forest Service (June 3, 2016).

[36] Letter from Thomas L. Tidwell, Chief, Forest Service, to Neil Kornze, Director, BLM (Dec. 14, 2016).

[37] Decision by BLM State Director, Eastern States Office, Karen Mouritsen, to Twin Metals Minnesota Chief Operating Office, Ian Duckworth, "Lease Renewal Application Rejected" (Dec. 15, 2016).

[38] M-37036 did not examine this extrinsic evidence because of its underlying premise that the 2004 lease forms were unambiguous.

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Twin Metals' Renewal Application is Governed by the Renewal Terms of the 1966 Leases

M-37036 concluded that the renewal rights of Twin Metals are governed by the terms of BLM standard form 3520-7 (Dec. 1984) rather than the terms of the 1966 leases. To reach this conclusion, M-37036 found that the 2004 lease forms "are each complete, integrated documents that contain all necessary lease terms and are duly signed by the lessee and lessor."[39] The M-Opinion states that the lease forms only incorporate two portions of the 1966 leases through section 14 of the 2004 lease form, and that "[n]either of these imported provisions includes the lease renewal provisions of the 1966 leases."[40] Consequently, according to M-37036, since the time that the 2004 lease form was executed, "the renewal provisions of the 1966 leases have no longer applied and the only renewal terms are those described in the 2004 leases . . . ."[41]

M-37036 treats the 1989 lease renewal, which was identical to the one issued in 2004, very differently. The M-Opinion finds that "the 1989 renewal was effectively a ten-year extension of the 1966 lease terms . . . ."[42] In other words, M-37036 recognized that the 1989 form incorporated all the provisions of the 1966 leases, including the renewal terms, while opining that the identically worded form in 2004 did not.[43]

M-37036 misapprehends the meaning and effect of the 2004 lease forms. As discussed below, the 2004 lease terms are ambiguous as to the extent to which the provisions of the 1966 leases are incorporated. Properly analyzed, examining both the text of the leases and the intent of the parties as expressed during negotiations, the renewal provisions found in the 1966 leases remain operative, and provide the non-discretionary right to a third renewal.

The normal principles of contract construction lead to the foregoing conclusion.[44] When construing a contract, we must first examine the plain meaning of its express terms.[45] The task is to determine the intent of the parties at the time they contracted, as evidenced by the contract itself.[46] If the terms are clear and unambiguous, the provisions must be given their plain meaning

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[39] M-37036 at 6.

[40] *Id.*

[41] *Id.* M-37036 then opined that the renewal language used in the 2004 lease form made the renewal discretionary, stating that the "Department has consistently interpreted this provision as not entitling the lessee to an automatic right of renewal . . . ." *Id.* at 5. We do not address in this replacement opinion the meaning of the 2004 lease renewal language because, as explained later, the parties intended the renewal terms of the 1966 leases to remain operative.

[42] *Id.* at 6.

[43] As discussed below, *see* footnote 62 and accompanying text, M-37036 attempts to distinguish the two situations by finding that the 1989 renewal differs "because the BLM's discretion was limited in 1989 but not in 2004." *Id.* at 6. We discuss below that the discretion did not vary between the two renewals and, even if BLM had differing discretion, it intended the 2004 renewal to maintain the terms of the original 1966 leases, just as the 1989 renewal had done.

[44] The normal rules of contract construction govern the interpretation of agreements between the government and a private party. *Thoman v. Bureau of Land Mgmt. (on recon.)*, 155 IBLA 266, 267 (2001) (citing *Anthony v. United States*, 987 F.2d 670, 673 (10th Cir. 1993)); *Press Machinery Corp. v. Smith R.P.M. Corp.*, 727 F.2d 781, 784 (8th Cir. 1984)).

[45] *Textron Def. Sys. v. Widnall*, 143 F.3d 1465, 1468 (Fed. Cir. 1998).

[46] *Greco v. Dep't of Army*, 852 F.2d 558, 560 (Fed. Cir. 1988).

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and extrinsic evidence is inadmissible to interpret them.[47] However, where contract terms are unclear or ambiguous, an examination of extrinsic evidence is appropriate to properly interpret the contract in accordance with the parties' intent.[48]

Applying these principles, it is evident that the 2004 leases are ambiguous and extrinsic evidence must be examined to determine the intent of the parties. Rather than being "complete, integrated documents," the leases attach without full explanation the entirety of the 1966 leases and do not include an integration clause that states that the 2004 lease forms are the complete expression of the parties' agreement.[49] These facts alone warrant an examination of extrinsic evidence to determine the intent of the parties.[50]

The lack of an integration clause in the 2004 leases is particularly important given the parties' interpretation of the identically worded1989 leases that the Department has consistently acknowledged as incorporating the 1966 lease terms in their entirety.[51] The use of the identical form in 2004 without explanation and without an integration clause at the very least creates an ambiguity as to whether the parties intended the 2004 leases to be treated the same as the 1989 leases or completely differently as interpreted by M-37036.[52]

Even absent that ambiguity, the text of section 14 in the 2004 leases is ambiguous. Section 14 contains two special stipulations that incorporate the 1966 leases:

> Sec. 14. Special Stipulations --
>
> * The terms and conditions of the production royalties remains [sic] as stated in the attached original lease agreement.

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[47] *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996).

[48] *BP Amoco Chem. Co. v. Flint Hills Res., LLC*, 600 F. Supp. 2d 976, 981 (N.D. Ill. 2009); *see also* 5-24 Corbin on Contracts § 24.7. Terms may be ambiguous where the language is susceptible to more than one meaning, where the language is unclear or vague, or where the language can reasonably be construed differently by those who have examined the language in the context of the contract as a whole. *Thoman*, 155 IBLA at 267 (2001) (citing *WH Smith Hotel Services v. Wendy's Int'l, Inc.*, 25 F.3d 422, 427 (7th Cir. 1994) ("Contractual language will be deemed ambiguous only when it is reasonably susceptible to different constructions.")); *Collins v. Harrison-Bode*, 303 F.3d 429, 433 (2d Cir. 2002) ("Contract language is ambiguous if it is 'capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement.'").

[49] "Integration clauses, also known as merger clauses, are contract provisions that generally state that the agreement as written constitutes the entire agreement between the parties and supersedes any prior representations." *Jacobson v. Hofgard*, 168 F. Supp. 3d 187, 201 (D.D.C. 2016) (citing 6 Peter Linzer, Corbin on Contracts § 25.8[A] (Joseph M. Perillo ed., 2010) at 68).

[50] *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 295 (2d Cir. 1999) ("When a contract lacks an express integration clause [courts] *must* 'determine whether the parties intended their agreement to be an integrated contract by reading the writing in light of the surrounding circumstances.'") (emphasis added); *see also, e.g., McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1434 (Fed. Cir. 1996) ("extrinsic evidence is 'especially pertinent ... where ... the writing itself contains no recitals or other evidence testifying to its intended completeness and finality'").

[51] *See* M-37036 at 6.

[52] The historical interpretation given to a contract by the parties is strong evidence of its meaning. *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1150 (D.C. Cir. 1983).

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** The minimum annual production and minimum royalty is $10.00 per acre or a fraction thereof as stated in the attached original lease agreement.[53]

The first quoted stipulation is ambiguous because it does not precisely state which sections of the 1966 lease are being incorporated. Instead it provides that the "terms and conditions of the production royalties" remain as stated in the original 1966 leases. Those terms and conditions are interspersed throughout the 1966 leases, and are addressed in section 2 (setting the initial rate and minimum royalty payments, among other things), section 5 (setting out the authority and limitations on adjusting royalty rates at renewals), and section 14 (setting out additional limitations on royalty adjustments).

By not specifying which of these sections were incorporated and how, the 2004 lease form is ambiguous. Were only the provisions of section 2 intended to be incorporated? Or were the provisions of sections 5 and 14 also to be included? M-37036 assumed the former. Despite section 5 addressing the adjustment of royalties and other terms during renewals, M-37036 assumed that section 5 of the 1966 leases was not incorporated and had no bearing in analyzing the 2004 leases.[54] It addressed the meaning of section 5 solely as an alternative argument. Yet this assumption is unwarranted because the "terms and conditions" of the production royalties are not fully addressed without sections 5 and 14, so they should be incorporated in some fashion. Precisely how they should be incorporated is also ambiguous given that the royalty and other adjustment provisions of section 5 are intertwined with the renewal provisions of section 1 of the 1966 leases.[55]

In short, the meaning of the 2004 leases is ambiguous.[56] Given this ambiguity, extrinsic evidence beyond the "four corners" of the document may be considered to ascertain the intent of the contracting parties.[57] Examining the decision files of the BLM resolves the ambiguity. The record shows that the BLM renewed the leases in 1989 under the same terms as the 1966 leases, and did so again in 2004.

The circumstances surrounding the 1989 renewal provide important context for understanding the 2004 renewal. The decision file for the 1989 renewal conclusively establishes that the BLM intended to renew the leases in 1989 on the same terms as the original 1966 leases. The BLM initially issued a decision document in September of 1988 that would have renewed the leases on different terms from the original 1966 leases, but the BLM quickly reassessed the matter and

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[53] 2004 Leases at § 14.

[54] *See* M-37036 at 6 ("Neither of these imported provisions includes the lease renewal provisions of the 1966 leases."); *id.* at 7 (" * * * there is no conflicting renewal provision [to the one in the 2004 lease form] referenced elsewhere in the 2004 leases").

[55] The interrelationship is seen directly in the text of section 5, which refers to the "successive" renewals that are provided by section 1 of the 1966 leases.

[56] Given the already described ambiguity that is inherent in the 2004 lease forms, this opinion does not address whether there are other potential ambiguities in those forms.

[57] *See, e.g., Daewoo Eng'g & Constr. Co. v. United States*, 557 F.3d 1332, 1337 (Fed. Cir. 2009) ("Where the meaning of a written instrument is unclear, courts look to extrinsic evidence to resolve the question.").

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formally vacated its decision "because the new lease forms submitted for signature will alter the terms and conditions of the original leases."[58]

The unusual act of BLM vacating its initial renewal decision was based, in part, on a recommendation memorandum from the Assistant District Manager for Solid Minerals. The memorandum concluded that "[b]ecause of the highly negotiated terms and conditions of these two leases, which contain many references to requirements to be applied during lease renewal periods, I recommend that these leases be renewed under the existing terms and conditions and in their present form, i.e., not on the new lease form."[59]

A few months after vacating its initial decision, the BLM issued a revised decision renewing the leases under the same terms as the original leases. The BLM's decision stated unambiguously that it intended to renew the leases with the same terms and conditions as the original leases: "The Forest Service and the Bureau of Land Management have agreed to the renewal of the enclosed Preference Right Leases MNES 1352 and MNES 1353 *under the existing terms and conditions of the original leases.* Enclosed are lease renewal forms transmitted for your signature and return to this office."[60]

The forms the BLM transmitted for signature were Standard Forms 3520-7 (December 1984), with the original 1966 leases attached and incorporated by reference into the standard forms through two special stipulations included as section 14 of the forms (the same form and special stipulations that would be used in the 2004 renewals). In sum, the 1989 leases, although using Standard Form 3520-7, renewed the 1966 leases without alteration of the operative terms. This fact was acknowledged in M-37036.[61]

When the 2004 renewal was made, there is no statement or other indication in the files that the BLM or the company intended to change any of the terms of the 1989 leases. To the contrary, the record shows that the leases were expected to be renewed on the same terms. Before granting the 2004 lease renewals, the BLM's Division of Solid Minerals stated by internal memorandum that "[w]e have no objection to Preference Right Leases MNES-1352 and MNES-1353 being renewed for ten years, as stipulated within the lease language."[62] The BLM official making this recommendation was the same official who recommended renewing the leases in 1989 on the same terms as the 1966 leases. His reference to the "lease language" therefore was informed by his knowledge of the 1989 leases and refers to the terms of the governing 1966 leases. Later, the

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[58] Decision by BLM Deputy State Director for Mineral Resources, Eastern States Office to INCO Alloys International, Inc., "Decision Vacated" (Oct. 27, 1988).

[59] Memorandum from BLM Assistant District Manager for Solid Minerals, Rolla, Vincent Vogt, to the State Director, Eastern States Office, "Recommendations for Lease Renewals, International Nickel Corporation Hardrock Mineral Leases MNES-1352 and MNES-1353" (Oct. 14, 1988).

[60] Decision by BLM Deputy State Director for Mineral Resources, Eastern States Office to INCO Alloys International, Inc., "Preference Right Leases Renewed, Lease Forms Transmitted for Signature" (Apr. 25, 1989) (emphasis added).

[61] M-37036 at 6, 12.

[62] Memorandum from BLM Assistant Field Manager for Solid Minerals, Rolla, Vincent Vogt, to State Director, Eastern States Office, "Renewal of Preference Right Leases MNES-1352 and MNES-1353" (Apr. 12, 1999).

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Forest Service also stated that it had no objection to the renewal, as "[t]he terms, conditions and stipulations have been reviewed, and it has been determined that they are sufficient to protect the resources of the United States."[63]

The BLM issued its decision granting the lease renewals on November 12, 2003, changing neither the terms of the lease renewals nor the conditions and stipulations, and provided the same standard form for signature as the BLM provided to the lessee in 1989.[64] The BLM did not indicate any change to the contracts in its decision, and the course of dealings between the parties had established the common basis of understanding that the 1966 lease terms were to remain in effect.[65]

While M-37036 attempted to distinguish between the 1989 and 2004 renewals to explain how two identically worded leases could have drastically different meanings, the attempt fails. As noted earlier, M-37036 concludes that the two renewals differ "because the BLM's discretion was limited in 1989 but not in 2004."[66] But even if that were true, it does not follow that BLM intended to exercise its discretion by drastically altering the meaning of the same lease forms in 2004 (without mentioning the fact to the lessee or even in its own internal files). As discussed above, there is simply no evidence that either the BLM or the Forest Service intended in the 2004 renewal to deviate from the terms previously in effect in the 1989 renewal (i.e., the terms of the original 1966 leases). The 2004 renewal could, and did, as discussed above, renew the leases under the same terms as in 1989, thereby retaining the renewal terms of the 1966 leases.

In sum, we have found no documents or other evidence that indicate in any way that the 2004 renewals were to be on altered terms or conditions from the 1989 leases. Because the 1989 leases renewed the leases under the same terms and conditions as the original 1966 leases, those terms remain operative in the 2004 renewal and, as discussed below, entitle Twin Metals to a third renewal.[67]

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[63] Decision of the USDA Forest Service, Regional Forester, Randy Moore, to BLM State Director, Eastern States Office, "Renewal of Preference Right Leases MNES 1352 and MNES 1353" (July 18, 2003).

[64] Decision of BLM Chief of Use Authorization, Division of Resources Planning, Use and Protection, to American Copper and Nickel Co., "Additional Requirements to be Met" (Nov. 12, 2003).

[65] The courts have recognized that the parties' own construction of an ambiguous written instrument is important when determining its meaning. *See DDB Techs., L.L.C. v. MLB Advanced Media, L.P.*, 517 F.3d 1284, 1292 (Fed. Cir. 2008); 11 Richard A. Lord, *Williston on Contracts* § 32:14 (4th ed. 1999) ("[T]he parties' own practical interpretation of the contract--how they actually acted, thereby giving meaning to their contract during the course of performing it--can be an important aid to the court.").

[66] M-37036 at 6. The M-Opinion reasons that the 1989 renewal, unlike the 2004 renewal, had to be on the same terms as the original 1966 leases because it served as an extension of time for commencement of production as authorized by the second sentence of section 5 of the 1966 leases. M-37036 at 6. That provision states that a renewal made while the extension is in effect must be "without readjustment except of royalties payable . . . ." 1966 Lease, § 5 (second sentence). Accordingly, to comply with the dictates of section 5 of the 1966 Leases, the M-Opinion concludes that the 1989 renewal had to be on the same terms as the 1966 leases. The M-Opinion concludes that the 2004 renewal, in contrast, did not have to be on the same terms because it could not and did not provide an extension. It is important to note that nothing on the face of the 1989 lease form states that it serves as an extension, and there is no evidence in the BLM's decision files that the lessee sought an extension or that BLM granted one.

[67] Because the parties intended for the renewal terms of the 1966 leases to remain operative, there is no need to address the meaning of the renewal provision used in the 2004 standard form, which provides for a "preferential

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The 1966 Lease Terms Provide for a Third Right of Renewal

The renewal terms of the 1966 leases are not ambiguous in providing Twin Metals with a non-discretionary right to a third renewal, subject to the United States' right to impose reasonable new terms and conditions. Section 1 of the 1966 leases sets out the overall renewal rights, and it provides "a right in the Lessee to renew the same for successive periods of ten (10) years each in accordance with regulation 43 C.F.R. § 3221.4(f) and the provisions of this lease."[68] The referenced regulation is similarly unambiguous in providing a right to successive renewals, in relevant part providing lessees with:

> [A] right of renewal for successive periods, not exceeding 10 years each, under such reasonable terms and conditions as the Secretary of the Interior may prescribe, including the revision of or imposition of stipulations for the protection of the surface of the land as may be required by the agency having jurisdiction thereof.[69]

Thus, section 1 of the 1966 leases, by its own terms and by reference to section 3221.4(f) of the regulations, establishes that the lessee has a right of renewal for successive ten-year periods, and that the renewals are subject to the provisions of the lease, including provisions regarding subsequent terms and conditions. No other provision of the leases negates this right of renewal. Accordingly, the 1966 leases provide the lessee with a non-discretionary right of renewal for successive ten-year periods, as long as the lessee complies with the lease terms.

M-37036 reached a different conclusion by finding that section 5 of the leases conditioned the lessee's right of renewal upon the lessee having begun production by the end of the primary term. But the text of section 5 does not support this interpretation. Instead, section 5 merely provides terms that govern the extent to which the leases are subject to readjustment at the time of renewal; it does not abrogate the non-discretionary right of renewal provided by section 1. The text of section 5 provides:

> Renewal Terms. The Lessor shall have the right to reasonably readjust and fix royalties payable hereunder at the end of the primary term of this lease and thereafter at the end of each successive renewal thereof unless otherwise provided by the law at the time of the

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right in the lessee to renew for successive periods of 10 years under such terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the expiration of any period."

[68] 1966 leases § 1.

[69] 43 C.F.R. § 3221.4(f) (1966). M-37036 suggests that the last sentence of section 3221.4(f) supports its conclusion that production is a condition of renewal. M-37036 at 11–12. The last sentence of section 3221.4(f) states: "An application for renewal of the lease must be filed in a manner similar to that prescribed for extension of a [prospecting] permit in § 3221.3(a)." M-37036 reasons from this language that because section 3221.3(a) required a person seeking an extension of a prospecting permit to show that he has "diligently performed prospecting activities," section 3221.4(f) must analogously require a person who is filing for renewal of a lease to make "a showing of diligence in performing … production." M-37036 at 11. M-37036 provided no administrative or judicial precedent to support this interpretation, and it fails upon closer examination. Section 3221.4(f) incorporated section 3221.3(a) only to the extent it dealt with the "manner" of filing (§ 3221.3(a) required filing an application in triplicate and with a filing fee within 90 days of the permit expiration); it does not incorporate the substantive criteria under which a prospecting permit extension is adjudicated. It thus provides no support for the conclusion that a production requirement is a condition of renewal.

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> expiration of any such period, and to readjust other terms and conditions of the lease, including the revision of or imposition of stipulations for the protection of the surface of the land as may be required by the agency having jurisdiction thereover; provided, however, that the Lessee shall have the right to three successive ten-year renewals of this lease with any readjustment in the royalties payable hereunder limited to that hereinafter provided and with no readjustment of any of the other terms and conditions of this lease unless at the end of the primary term of this lease the Lessee shall not have begun production, either hereunder or under the companion lease granted to the Lessee this day. The Secretary of the Interior may grant extensions of time for commencement of production in the interest of conservation or upon a satisfactory showing by the Lessee that the lease cannot be successfully operated at a profit or for other reasons, and the Lessee shall be entitled to renewal as herein provided without readjustment except of royalties payable hereunder if at the end of the primary or renewal period such an extension shall be in effect, but the Lessee shall not be entitled to subsequent such renewals unless it shall have begun production within the extended time. If the Lessee shall be entitled to renewal without readjustment except of royalties payable hereunder, the Secretary of the Interior may in his discretion increase the royalty rate prescribed in subsection (b) of Section 2 up to, but not exceeding (i) 5% during the first ten-year renewal period, (ii) 6% during the second ten-year renewal period, and (iii) 7% during the third ten-year renewal period. The extent of readjustment of royalty, if any to be made under this section shall be determined prior to the commencement of the renewal period.

Rather than conditioning the right of renewal upon production as M-37036 argues, section 5 sets forth the degree to which the BLM may readjust the terms, conditions, and royalty rates during lease renewals, and creates an incentive for early production by limiting BLM's discretion during the first three lease renewals if production has begun.

The first sentence in section 5 has engendered the most commentary, but its meaning is evident from the text. Parsed out, the initial clause grants the BLM two rights:

> 1. The right to reasonably readjust and fix royalties at the end of the primary term of the lease and at the end of each successive renewal thereof unless otherwise provided by the law at the time of the expiration of any such period; and
>
> 2. The right to readjust other terms and conditions of the lease, including the revision of or imposition of stipulations for the protection of the surface of the land as may be required by the agency having jurisdiction thereover.

These rights are subject to one condition set out in the proviso clause. The proviso provides an incentive to production by restricting the BLM's right to adjust the terms of the leases during the first three renewals if production has begun during the primary term:

> That the Lessee has the right to three successive ten-year renewals of the lease with any readjustment in the royalties payable limited to that provided in the 1966 lease and with no readjustment of any of the other terms and conditions of this lease unless at the end of the

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> primary term of this lease the Lessee shall not have begun production, either hereunder or under the companion lease granted to the Lessee this day.

Under the terms of this proviso, the consequence of a failure to begin production within the primary term is not the loss of the right to renew, as M-37036 asserted, but the loss of the right to a renewal with extremely limited readjustments.

Despite the plain wording of this proviso, M-37036 attempted to argue that the "unless" clause at the end of the sentence "qualifies the very right to renew."[70] According to that M-Opinion, this "proper" meaning was demonstrated by deleting text from the provision:

> [T]he proper meaning of the proviso is clear when the last clause is placed next to the provision it actually qualifies: "[T]he Lessee shall have the right to three successive ten-year renewals of this lease … unless at the end of the primary term of this lease the Lessee shall not have begun production, either hereunder or under the companion lease granted to the Lessee this day."[71]

Under this interpretation, the final "unless" phrase in the proviso imposes a production requirement that negates *sub silentio* the renewal rights provided in section 1 of the leases.

This interpretation is not correct. Deleting the text from the proviso does not clarify its meaning, it simply (and not surprisingly) changes the meaning. The deleted text works with the "unless" phrase to form one restrictive modifier that states how the right to three successive renewals will be limited if production has begun. In other words, the "unless" phrase does not qualify the right to renewal but is part and parcel of the restrictive modifier describing precisely how the BLM's readjustment rights were to be limited if production had begun. Deleting the text thus changes, rather than clarifies, the meaning of the proviso.

Moreover, the interpretation suggested by M-37036 does not account for the fact that the entire sentence is a proviso to the first clause. The first clause describes the BLM's readjustment authority at renewal and evinces no intention to circumscribe the renewal rights set out in section 1 of the leases or create a production condition on renewal. The proviso is properly interpreted as qualifying this clause,[72] but the interpretation suggested by M-37036 elevates the proviso into a separate, standalone provision that creates a production condition, which negates the section 1 renewal rights. Such an interpretation is not warranted by the text or placement of the proviso.

The remaining two sentences of section 5 reinforce that the right to renew is not impacted by section 5, but merely the amount of readjustments that can be made with a renewal. The second sentence has three clauses. The first clause gives the Secretary of the Interior broad discretion to grant extensions of time for commencement of production in the interest of conservation, upon a showing that the lease cannot be operated for a profit, or "for other reasons." The second clause makes clear that a consequence of granting an extension is that the lessee will continue to enjoy the

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[70] M-37036 at 9.

[71] *Id.* (alteration and ellipsis in original).

[72] *See, e.g.*, *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) ("[A] limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows.").

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favorable limitations on lease readjustments if renewal occurs while the extension is in effect: "the Lessee shall be entitled to renewal as herein provided without readjustment except of royalties payable."

The third clause provides that "the Lessee shall not be entitled to subsequent *such* renewals unless it shall have begun production within the extended time" (emphasis added). The phrase "such renewals" refers back to the preceding clause, which references renewals without readjustment of the terms and conditions.[73] In other words, the second sentence of section 5 takes as a given the right to renew the lease; it is only the terms and conditions of a renewal that are affected by the authorized extension of time for commencement of production.

Finally, the third sentence of section 5 is straightforward. It provides a schedule for the rate readjustments when the lessee is entitled to renewal without readjustment except of royalties. It limits rate readjustments to:

- 5% during the first ten-year renewal period;
- 6% during the second ten-year renewal period; and
- 7% during the third ten-year renewal period.

As reflected by this analysis of section 5, its provisions set out the right of BLM to readjust royalty rates and lease terms and conditions at the time of renewal, but creates a production incentive for the lessee by providing BLM with only limited readjustment rights if the lessee begins production by the end of the primary term (or by the end of an extension if one is granted). The commencement of production is thus a condition precedent to limiting BLM's readjustment rights, but it is not a condition precedent to the right to a renewal.

M-37036 attempts to support its interpretation that section 5 imposes a production condition on renewal with a number of subsidiary arguments. The M-Opinion argues, for example, that its position is longstanding and supported by a 1986 memorandum from an Associate Solicitor.[74] While that 1986 Opinion answered the narrow renewal question before it correctly, finding that BLM could renew the leases in the absence of production, its reasoning is faulty and was not even relied upon in M-37036. More specifically, the 1986 Opinion improperly focused only on the second sentence of section 5, without reference to section 1 of the lease or even the other sentences of section 5. It summarily concluded that the final clause of the second sentence (which states that "the lessee shall not be entitled to subsequent such renewals unless it shall have begun production within the extended time") precludes *all* subsequent renewals. As discussed above, that is an

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[73] M-37036 asserts that the last clause of the second sentence supports its interpretation, apparently viewing the phrase "shall not be entitled to subsequent such renewals" as effectively meaning "shall not be entitled to any renewals." The M-Opinion's construction does not square with the actual wording of the clause.

[74] M-37036 at 12 (citing Memorandum from Associate Solicitor, Energy and Resources, signed by Kenneth G. Lee, Assistant Solicitor, Branch of Eastern Resources, to Deputy State Director, Mineral Resources, Eastern States Office, BLM, "Application for Minimum Royalty Waiver Submitted by INCO Alloys International, Incorporated for Leases ES 01352 and ES 01353" (Apr. 2, 1986) (1986 Opinion)).

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improper reading that ignores what the clause is qualifying and gives no meaning to the phase "such renewals," instead transforming it into "all renewals." Moreover, the BLM appropriately did not follow the advice given in the 1986 Opinion when it renewed the leases for a second time in 2004. The 1986 Opinion thus provides no support for concluding that production is a precondition to the right to renew.

M-37036 also argues that the lease requirement to pay minimum royalties in lieu of production does not negate the precondition of production for mandatory renewals.[75] While it is certainly true that BLM could impose both requirements, the very case cited in the M-Opinion shows that when BLM intends to impose a production requirement, it will do so explicitly. In *General Chemicals (Soda Ash) Partners*,[76] the BLM had imposed a minimum royalty payment in a sodium lease but also included an express production precondition for renewal, stating that "[t]he authorized officer will reject an application for renewal of this lease if, at the end of the lease's current term, sodium is not being produced."[77] *General Chemicals* underscores that the BLM will explicitly include a production precondition when it so intends.[78] There is no such provision in the leases at issue.

Moreover, the historical record of the 1966 lease implementation shows that production was not made a condition of renewal. For example, as stated in the background section above, the BLM denied INCO's requested waiver of minimum royalty payments precisely because there was no production requirement in the lease:

> The provision for minimum royalty in lieu of production requirements was a lease term arrived at through pre-lease negotiations between the Bureau and INCO. The intention of the minimum royalty is to spur development of the resource and, in effect, is the only diligence requirement contained in the subject leases. Waiver of minimum royalty removes all incentive for the timely development of the leases.[79]

Later, when processing the 1989 renewal application, the BLM wrote in an internal memorandum that it would be "inappropriate" to impose a production requirement upon the lessee in the lease renewal, especially "when no other hardrock leases in our District contain such a requirement."[80]

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[75] M-37036 at 12–13.

[76] 176 IBLA 1 (2008).

[77] *Id.* at 5.

[78] M-37036 suggests that *General Chemicals* supports its position because the Board in that case found that the payment of minimum royalties did not satisfy the lease's production requirement. M37036 at 13 (citing *General Chemicals*, 176 IBLA. at 9.). Given that the lease in *General Chemicals* included an express production requirement, while the leases at issue do not, the case is clearly distinguishable and actually supports the conclusion reached here that no production requirement is imposed by the leases.

[79] Memorandum from BLM Associate District Manager, Milwaukee to the State Director, Eastern States Office, "Recommendation Regarding an Application for Minimum Royalty Waiver Submitted by INCO Alloys International, Inc." (Aug. 28, 1985), at 2.

[80] Memorandum from BLM Assistant District Manager for Solid Minerals, Rolla, Vincent Vogt, to the State Director, Eastern States Office, "Recommendations for Lease Renewals, International Nickel Corporation Hardrock Mineral Leases MNES-1352 and MNES-1353" (Oct. 14, 1988) at 2.

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Finally, M-37036 makes in essence a public policy argument that a lease without a production precondition would allow for speculative holding of mineral rights in contravention of Congress's intent to encourage mineral development and "provide a fair return to the American taxpayer."[81] But the leases here do provide incentives for production by imposing minimum royalty payments and authorizing greater revisions of the royalty rates and other terms when there has been no production. The American public has received over $1.4 million dollars in royalty payments, and Twin Metals has asserted that it has spent over $400 million in exploration activity. The public policy concern is unfounded in this instance.

In summary, neither the terms of the 1966 leases, the course of conduct of the parties over the last 50 years, nor public policy suggest that a production precondition is required.

Conclusion

M-37036 improperly interpreted the leases at issue and is withdrawn. As discussed above, the terms of the original leases issued to Twin Metals' predecessor-in-interest in 1966 remain operative in the 2004 lease renewal. The original 1966 leases provide Twin Metals with a non-discretionary right to a third renewal, subject to the United States' right to impose reasonable terms and conditions as authorized by the 1966 leases. Accordingly, the BLM does not have the discretion to deny the renewal application.

Daniel H. Jorjani

[81] M-37036 at 11.

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UPDATED DRAFT Outreach Plan on New M-Opinion: Dec. 22, 2017						
Timing	**Responsible**	**Affiliation**	**Group**	**Contact**	**Contact Info**	**Type of Contact**
At time of announcement	Mitch Leverette (ES Director)	MN State Government	Governor Mark Dayton	Mark Dayton	(651) 201-3400 (main number)	Phone Call Also, Dean is to contact the Department of Natural Resources (see below) and ask that they ensure the Governor's Office is made aware)
1 hour prior	Mitch Leverette (ES Director)	Applicant	Twin Metals Minnesota	Bob McFarland (Gov Affairs)	bmcfarlin@win-metals.com	Phone call; 612-655-2099
1 hour prior	DOI OCL/Amanda Kaster	Congressional DC	Rep. Rick Nolan (D-MN8)	Rick Nolan	(202) 225-6211	Phone Call
1 hour prior	DOI OCL/Amanda Kaster	Congressional DC	Rep. Betty McCollum (D-MN4)	Rep. McCollum	(202) 225-6631	Phone Call
1 hour prior	DOI OCL/Amanda Kaster	Congressional DC	Sen. Amy Klobuchar (D-MN)	Sen. Klobuchar	(202) 224-3244	Phone Call
1 hour prior	DOI OCL/Amanda Kaster	Congressional DC	Sen. Al Franken (D-MN)	Sen. Franken	(202) 224-5641	Phone Call
1 hour prior	DOI OCL/Amanda Kaster	Congressional DC	Rep. Keith Ellison (D-MN5)	Kari Moe (Chief of Staff)	(202) 225-4755	Phone call
1 hour prior	DOI OCL/Amanda Kaster	Congressional DC	Rep. Tom Emmer (MN-06)	Landon Zinda (Dep Leg Director)	202-225-2331	Phone call
1 hour prior	BLM Leg. Affairs/Kim Finch	US Forest Service	Legislative Affairs (hardrock minerals)	Scott Vandegrift	202-205-1011	Phone call
1 hour prior	Dean Gettinger District Manger	MN State Government	MN Department of Natural Resources	Commissioner Tom Landwehr	(651) 296-6157 commissioner.dnr@state.mn.us	Phone Call
At time of announcement	Northeastern States DO	Tribe	Fon-du-Lac Reservation	April McCormick Grand Portage	aprilmm@grandportage.com	Email

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				Lands Manager		
At Time of announcement	Northeastern States DO	Tribe	Bois Forte Band of Chippewa	Kevin Leecy (Tribal Chair)	kevin.leecy@boisforte-nsn.gov	Email
At time of announcement	Northeastern States DO	Tribe	Grand Portage Band of Chippewa	Tim Krohn Fond du Lac Land Information Manager	timothykrohn@fdlrez.com	Email
At time of announcement	Dean Gettinger (Northeastern States DM)	Local Government	City of Ely	Mayor Chuck Novak	mayorchucknovak@ely mn .us	Phone Call & Email

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New M-Opinion, M-___, Reverses M-37036 Regarding Twin Metals' Renewal Rights for Preference Right Leases Within the Superior National Forest, Minnesota

TALKING POINTS

- The new Solicitor's opinion concludes that Twin Metals Minnesota is entitled to a non-discretionary third renewal of two leases for hardrock minerals, including the critical minerals cobalt and platinum, in Superior National Forest in Northern Minnesota

- This reverses a 2016 Obama Administration legal opinion that incorrectly concluded renewal was discretionary
    - The Obama Administration then denied renewal

- This opinion affirms that the government means what it says when it enters into contracts
    - The BLM renewed these leases in 1989, assuring Twin Metal's predecessor-in-interest that all the terms were the same as under its original 1966 lease
    - It then used the same form to renew the leases again in 2004
    - The Obama Administration concluded that the exact same words agreed to by the exact same parties meant something different in 2004 than in 1989

- The effect of this opinion is to clear the way BLM to reconsider its decision regarding Twin Metal's lease renewal application

BACKGROUND

- The Solicitor's Office performs the legal work for the Department of the Interior and its bureaus, including the Bureau of Land Management (BLM).
- The BLM's multiple-use mission is to sustain the health and productivity of the public lands for the use and enjoyment of present and future generations, which is accomplished by managing the public lands for a diverse set of uses, including extractive uses, such as mining, as well as conservation and recreation.
- An M-Opinion is a formal legal opinion of the Solicitor that is binding on all Departmental offices and may only be modified or overruled by the Solicitor, the Deputy Secretary or Secretary. (209 DM 3)
- The new M-Opinion, M-___, finds that the analysis of a prior M-Opinion, M-37036 issued by a former Solicitor on March 8, 2016, is incorrect, and reverses and replaces M-37036.
- M-___ concludes that the two leases that Twin Metals has from the United States granted them a non-discretionary right to a third renewal and, therefore, the BLM did not have the discretion to deny Twin Metals' lease renewal application in December 2016.
- M-___ is not a final agency action and is not a decision on Twin Metals' lease renewal application. It is a legal opinion issued by the Solicitor's Office that clarifies the right of renewal granted to the lessees. The BLM is bound by the opinion, and will take further action on the lease decisions.

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- The BLM and the Forest Service, which is the surface management agency, will now move forward to review their December 2016 decisions according to the M-Opinion's advice. They will then reconsider Twin Metals' 2012 lease renewal application, including the appropriate environmental analysis under the National Environmental Policy Act (NEPA), to identify appropriate terms and conditions for surface protection and to make a final agency decision on the application.

Q & A

Q: Is this M-Opinion a leasing decision?
A: No, the M-Opinion is not a leasing decision. It is a legal opinion issued by the Solicitor that provides legal advice to the BLM on whether a prior opinion, M-37036, was correct in concluding that the agency had the discretion to deny the pending Twin Metals Minnesota lease renewal application. Although the legal principles in the M-Opinion are binding on the BLM, it does not by itself reinstate the canceled leases, nor grant the renewal application.

Q: Why doesn't the BLM have discretion to grant or deny the renewal of the mining leases?
A: The M-Opinion explains that, contrary to the conclusion of the M-37036 opinion, the right to a third lease renewal provided for in the original 1966 leases remains in effect. That right entitles the lessee to a non-discretionary third lease renewal. The BLM did not have the discretion to deny the renewal because of the nature of the rights that the United States conferred to lessee in the leases.

Q: How is the Forest Service involved in this issue?
A: The leases are located within the Superior National Forest, which is managed by the Forest Service. The BLM manages the mineral leasing and mineral development for lands within the Superior National Forest. The Forest Service manages the surface that overlays the Federal minerals under lease. The Forest Service plays a key role in BLM's mineral leasing decisions because, as an expression of its consent authority, the Forest Service provides terms and conditions for surface protections that are included in the leases and lease renewals.

Q: But the Forest Service already denied its consent for the lease renewals based on the potential of mining to harm the watershed. Isn't the question of the lessee's right to renew moot because the Forest Service does not consent?
A: Because the BLM's prior request for the Forest Service to consent was based on the legal error that the United States had discretion to grant or deny the lease renewals, the Forest Service's December 2016 non-consent determination is no longer considered a valid determination. The BLM and the Forest Service will work together on the next steps in

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reviewing the December 2016 decisions and processing Twin Metals' lease renewal application anew.

Q: What are the next steps that the BLM (and the Forest Service) will take?
A: The BLM and the Forest Service will first review their prior decisions of December 2016, according to the legal principles in M-___. The agencies will then process Twin Metals' lease renewal application, and in doing so the agencies will work together to conduct appropriate environmental review before making any final agency decision.

(b) (5) [redacted]

Q: When will the BLM make its decision on the lease renewal?
A: The timing of a BLM decision on the Twin Metals lease renewal application will depend on a number of factors, which will include coordinating with the Forest Service and conducting the necessary reviews and analysis to fully inform the decision-makers.

Q: Has the mining company begun production on the leased lands and, if not, what has it done so far on the leased lands?
A: Neither Twin Metals Minnesota nor its predecessors in interest have begun production on the leased lands. They have engaged in exploratory drilling and have sunk a mine shaft on the leased lands at issue.

Q: Twin Metals Mining and its predecessors have now held these leases for 50 years without producing any minerals. Is it fair to allow them to tie up the land for a longer time period?
A: Hard rock mining of a deposit of copper and nickel, such as the deposit in Minnesota, requires a very large commitment of time and resources by a mining company. The United States granted the lessees a 20-year lease with the rights to renew to allow adequate time for the exploration and development of these resources. The companies holding the leases have made investments in permitting, mineral exploration, and planning for development on the leased lands. They have also paid the United States a minimum royalty amount each year for many years, providing the public a return on the mineral leases even though they are not in production and are not paying production royalties.

Q: Why did the BLM grant these mining leases on the boundary of such an environmentally sensitive Wilderness Area to begin with?

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A: The leases were issued in accordance with the law in 1966, and conferred valuable rights. Barring the current segregation of lands in the area, as discussed below, mining may be considered within the Superior National Forest, subject to specific withdrawals by Congress and the discretion of Federal land management agencies. Congress designated the Boundary Waters Canoe Area as part of the National Wilderness Preservation System in the 1964 Wilderness Act, and in 1978, expanded the acreage of the Wilderness Area in the Boundary Waters Canoe Area Wilderness Act. These leases are within an area that was open to mining at the time of lease issuance. The area is currently segregated from new mining actions for two years, subject to valid existing rights, while the Secretary considers a withdrawal application from the Forest Service.

Q: What does the Forest Service's Forest Plan say about mining in this area?
A: The Forest Service Land and Resource Management Plan for the Superior National Forest, issued in July 2004, allows for consideration of mining on the National Forest System lands, except for within the wilderness and the Boundary Waters Canoe Area Mining Protection Area. It also sets forth the Desired Condition that exploration, development, and production of mineral resources are conducted in an environmentally sound manner.

Q: Twin Metals Minnesota applied to renew its leases in 2012 – why did it take BLM so long to act?

A: The Twin Metals application for renewal of these two leases presented a number of unique and challenging legal and policy questions. While the Department of the Interior Solicitor was examining the legal question that led to the prior M-Opinion, the BLM had been working with Federal partners to explore the outstanding policy questions in order to be able to move forward with a decision-making process once the legal question was resolved. Previous lease renewal applications for these leases in 1989 and 2004 took 2-4 years to get to a final decision. In the interim, Twin Metals was able to continue on-the-ground activities under the terms of the 2004 leases until the December 2016 decision. After the December 2016 decision, the BLM allowed Twin Metals to continue its well-monitoring activities, as they related to reclamation.

Q: How do I make my views known to the BLM and the Forest Service about the lease renewals?
A: The BLM will provide a notice of the availability of the environmental review that the agencies prepare for the lease renewal decision, allowing for public review.

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