United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Eastern States Office
20 M Street, SE Suite 950
Washington, DC 20003
http://www.es.blm.gov

DEC 15 2016

In Reply Refer
To:
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MNES 01352, MNES 01353

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DECISION

Mr. Ian Duckworth, Chief Operating Officer Twin Metals Minnesota 380 St. Peter Street, Suite 705 St. Paul, MN 55102	: : : : :	Leasing of Hardrock Minerals Serial Number MNES 01352 Serial Number MNES 01353

Lease Renewal Application Rejected

On December 14, 2016, the United States Forest Service (U.S. Forest Service or USFS) submitted a letter to the Bureau of Land Management (BLM) stating it did not consent to renewal of Preference Right Leases MNES 01352 and MNES 01353. As a result, with the approval of the Deputy Secretary, I hereby reject the application for renewal of these leases. The reasons for my decision to reject the lease renewals are set forth below.

Background

The Department of the Interior (DOI) Bureau of Land Management (BLM) Eastern States Office completed its review of the application for renewal of Preference Right Leases MNES 01352 and MNES 01353, located within the Superior National Forest in Northern Minnesota, submitted by Twin Metals Minnesota (TMM), a subsidiary of Franconia Minerals (US) LLC, on October 21, 2012. The application for renewal was submitted timely as the leases were scheduled to expire on January 1, 2014. The USFS is the surface management agency for the lands where these two leases are located, and BLM has jurisdiction over the mineral rights.

The TMM's predecessor in interest obtained the two original preference right leases that were issued in 1966 for a primary term of 20 years. The BLM issued two renewals, with U.S. Forest Service concurrence, in 1989 and 2004. Those leases allowed for the mining of copper, nickel,

and associated minerals, but to date, TMM has not begun mineral production on either of the leases.

The leases are located on the South Kawishiwi River on Superior NF lands south of the Boundary Waters Canoe Area (BWCA) Wilderness on acquired Weeks Act lands, as well as National Forest System lands reserved from the public domain and managed by USFS. These lands are not open to the operation of the Mining Law of 1872. Rather, the Secretary of the Interior's (Secretary) authority, delegated to BLM, for mineral disposition on the acquired lands is in section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099-1100, and 16 U.S.C. § 520, which governs mineral disposition on Weeks Act lands. The Secretary's authority, delegated to BLM, for mineral disposition on reserved National Forest System lands in Minnesota is found in 16 U.S.C. § 508b. For acquired lands, these authorities provide that "mineral development on such lands shall be authorized by the Secretary only when he is advised by the Secretary of Agriculture that such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified by the Secretary of Agriculture in order to protect such purposes." Section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099-1100. For public domain lands, the authorities provide that "the development and utilization of such mineral deposits shall not be permitted by the Secretary of the Interior except with the consent of the Secretary of Agriculture." 16 U.S.C. § 508b.

Since submission of the application for renewal of these Preference Right Leases, BLM has consulted with the DOI Office of the Solicitor and the Department of Agriculture, U.S. Forest Service, about this application.

In processing the application, BLM identified the need for a legal opinion to determine whether TMM has a non-discretionary right to renew the two preference right leases. The DOI Office of the Solicitor (Solicitor) examined the issue. On March 8, 2016, the Solicitor issued Memorandum Opinion 37036 (M-Opinion) (Enclosure 1) determining that the lessee does not have a non-discretionary right to a third 10-year renewal and, therefore, that BLM has discretion to decide whether to grant or deny the application. The M-Opinion also noted that, even if the original 1966 lease terms apply, the renewal provision gives BLM discretion regarding whether to renew the leases and requires renewal as a matter of right only if the lessee has already begun production, which is not the case here. Therefore, BLM has discretion to grant or deny these leases and, in accordance with the relevant statutes identified above and BLM regulations at 43 C.F.R. §§ 3503.13, 3503.20, BLM must have written consent from the surface management agency to issue any permits or leases.

U.S. Forest Service Consent Decision

On June 3, 2016, BLM issued a letter to USFS requesting a written decision on whether the Agency consents or does not consent to renewal of the leases (Enclosure 2). The USFS in turn issued a media release on June 13, 2016, announcing a 30-day period for public input. The USFS held two listening sessions: one in Duluth, Minnesota, on July 12, 2016, and a second session in Ely, Minnesota, on July 19, 2016.

On December 14, 2016, the U.S. Forest Service issued a letter stating it did not consent to the renewal of MNES 01352 and MNES 01353 (Enclosure 3). In its decision, USFS determined that these leases were inconsistent with the Agency's affirmative duty to protect and maintain the values in the BWCA Wilderness, embodied by the directive in the 2004 Superior National Forest Plan to manage the BWCA Wilderness in such a manner that "perpetuates and protects its unique natural ecosystems, provides an enduring wilderness resource for future generations, and provides opportunities for a primitive and unconfined recreation experience." In considering this renewal application, the Agency identified grave concerns that the development of the copper sulfide-ore mining in the Rainy River Watershed, in particular the MNES 01352 and 01353 mineral leases, risks seriously impairing the ecosystem health of the wilderness area, and with it, poses unacceptable risks to the wildlife, recreational uses, tribal hunting, fishing, and usufructuary rights, and tourism industry that depend on the pristine nature of the BWCA Wilderness.

Conclusion

As stated above, in accordance with section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099-1100, 16 U.S.C. § 520, 16 U.S.C. § 508b, and BLM regulations in 43 C.F.R. Subpart 3503, BLM must have written consent from the surface management agency before it may issue the leases on both public domain and acquired lands. In this instance, because USFS did not consent, BLM cannot grant your application for renewal of leases MNES 01352 and MNES 01353 and hereby rejects the lease renewal application.

Final Agency Action

It is my decision to reject your application to renew Twin Metals Leases MNES 01352 and MNES 01353 based on USFS's decision on December 14, 2016, not to consent. The lease expires upon receipt of this notice. 43 C.F.R. § 3514.25. We are providing you 30 days to remove equipment from the lease and remediate existing boreholes. If more time is needed, please contact the BLM Northeastern States District Manager to arrange for additional time for equipment removal and remediation.

Karen E. Mouritsen
State Director
Eastern States Office, BLM

Final Agency Action

I hereby approve the decision rejecting the application to renew Twin Metals Leases MNES 01352 and MNES 01353. My approval of this decision constitutes the final decision of the Department of the Interior and, in accordance with the regulations at 43 C.F.R. § 4.410(a)(3), is not subject to appeal under departmental regulations at 43 C.F.R. Part 4.

Approved by:

Michael L. Connor
Deputy Secretary
Department of the Interior

Enclosures
1 – Memorandum Opinion 37036, dated March 8, 2016.
2 – Letter from BLM ES-State Director to U.S. Forest Service Regional Director, dated June 3, 2016
3 – Forest Service letter

cc: BLM Northeastern States District Office
Regional Forester, USFS Region 9
Case Files
ES-930 Reading Files

Enclosure 1

United States Department of the Interior

OFFICE OF THE SOLICITOR
1849 C STREET N.W.
WASHINGTON, DC 20240

M-37036

MAR - 8 2016

Memorandum

To: Director, Bureau of Land Management

From: Solicitor

Subject: Twin Metals Minnesota Application to Renew Preference Right Leases (MNES-01352 and MNES-01353)

The Bureau of Land Management (BLM) has asked whether it has the discretion to grant or deny Twin Metals Minnesota's pending application for renewal of two hardrock preference right leases in northern Minnesota.[1] I conclude that 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.

Background

On October 21, 2012, Twin Metals Minnesota (TMM) submitted an application to renew two preference right leases (MNES-01352 and MNES-01353) for lands that are located near the southern boundary of the Boundary Waters Canoe Area Wilderness in northern Minnesota.[2]

The two leases at issue are located on acquired Weeks Act lands, as well as National Forest System lands reserved from the public domain and managed by the United States Forest Service. The Secretary's authority, delegated to the BLM, for mineral disposition on the acquired lands is in section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099-1100, and 16 U.S.C. § 520, which governs mineral disposition on Weeks Act lands. The Secretary's authority, delegated to the BLM, for mineral disposition on reserved National Forest System lands in Minnesota is in 16 U.S.C. § 508b.

The BLM originally awarded the leases on June 1, 1966, for a primary term of twenty years, with the possibility of three ten-year renewals.[3] On May 14, 1986, the lessee timely applied for a renewal.[4] After receiving legal advice from the Office of the Solicitor that the lease terms allowed for a renewal, the BLM granted a renewal of the leases on July 1, 1989, for a period of

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[1] This memorandum does not address issues related to National Environmental Policy Act compliance or any other legal issues surrounding these leases.

[2] The Chippewa in Minnesota have hunting, fishing, and other usufructuary rights in the northeast portion of the state of Minnesota under the 1854 Treaty of LaPointe. Treaty with the Chippewa, 10 Stat. 1109 (1854).

[3] *See* 1966 leases §§ 1(a), 5.

[4] 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 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.

ten years.[5] TMM timely applied for a second renewal on March 15, 1999. The BLM renewed the leases on January 1, 2004.[6] The 2004 leases state that they are for a period of ten years, "with preferential 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." On October 21, 2012, TMM timely applied to renew the leases once more.[7] TMM has been conducting exploration activities on the leaseholds based on the 2004 leases while the BLM considers TMM's 2012 renewal application.

Under the original 1966 lease terms, as discussed more fully below, the lessee was required to commence production within the twenty-year primary term to qualify for three renewals of right. The leases provided that if there was no production at the end of the primary term, the leases would end unless the Secretary granted a lease renewal to extend the time to commence production.[8]

Although there has been no production, the operator held the leases under production waivers for five years and then through payment of minimum royalties in lieu of production payments for the rest of the time, consistent with the provisions of the 1966 leases that were incorporated by reference in the 2004 leases. Those provisions stated 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 acre during each renewal or, in lieu of that production, pay royalties equal to the minimum royalty. *See* 1966 leases § 2(c) (incorporated into section 14 of the 2004 leases). Section 2(c) of the 1966 leases allowed the lessor to waive, reduce, or suspend the minimum royalty payment for reasonable periods of time in the interest of conservation or when such action does not adversely affect the interest of the United States in accordance with 43 C.F.R. § 3222.6-2. *Id.*

According to the BLM's records, the BLM relied on section 2(c) of the 1966 leases to grant individual waivers of production and minimum royalties for each of the first five lease years after the tenth year of the leases, beginning on June 1, 1976, and ending May 31, 1981, while the State of Minnesota was conducting environmental studies on the proposed mining operations,

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[5] The three-year time period between the date on which the lessee filed for the first ten-year lease renewal and the date on which the lease renewal was approved appears to have been due to BLM's consideration of the lessee's minimum royalty waiver request, coordination efforts between the United State Forest Service and the BLM regarding the Forest Service approval for the renewals, and the BLM's consideration regarding the terms of the lease renewal.

[6] The lessee's application for a second renewal on March 15, 1999 was 109 days before the end of the first lease renewal on July 1, 1999. The regulations in force in 1999 state that "[a]n application for lease renewal shall be filed at least 90 days prior to the expiration of the lease term." 43 C.F.R. § 3528.1 (1998). Consequently, the 1999 renewal application was timely filed. The time period between the lessee's filing of the second renewal application in March 1999 and the BLM's approval of the lease renewal in January 2004 appears to have been due to coordination efforts between the United States Forest Service and the BLM, as well as the BLM's internal review process.

[7] The 2012 renewal application was submitted 438 days before the end of the second renewal on January 1, 2014. The timing requirements for filing a renewal application in the current regulations are the same as those in the regulations that were in force in 1999. *Id.* § 3511.27 (2015). Consequently, the 2012 application was timely filed.

[8] Section 5 of the 1966 leases contains definite conditions for allowing such an extension, i.e., 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.

which prevented INCO Alloys International, Inc. (TMM's predecessor in interest at the time of BLM's waiver decision), from developing the leases.[9]

The BLM records show that INCO filed another production and minimum royalty waiver request on June 26, 1985, for the period of July 1, 1981, to June 30, 1986. In response, the BLM issued a decision on January 28, 1987, finding that Minnesota had completed its environmental studies in 1979 and that INCO had not filed any mining applications or royalty waiver applications since 1981. The decision stated that "there is no evidence that INCO International is diligently working towards the development of these leases." Based on the BLM's conclusion that INCO had not met the obligations of the leases, the agency denied the production and royalty waiver request. The decision also notified the lessee that all delinquent payments were due before the BLM could process the first lease renewals at that time.[10] Although the BLM's records show that INCO failed to timely pay the annual rentals and minimum royalties in lieu of production for the lease years from June 1, 1981, to May 31, 1985 (a four-year period), once INCO received notice from the BLM about the delinquency, INCO paid the fees for all four years. Consequently, the royalty payment records of the Office of Natural Resources Revenue (ONRR) show that TMM and its predecessors paid the minimum royalties in lieu of production for each of the delinquent years—1981 to 1985. The ONRR records also show that TMM paid the minimum royalty in lieu of production payments from 1986 to the present.

In preparing to respond to the 1985 royalty waiver request, the BLM sought legal advice from the Solicitor's Office, which led to a 1986 legal memorandum regarding the use of one of the three renewals identified in section 5 of the 1966 leases to extend the time to commence production. This 1986 Associate Solicitor's Opinion is discussed below in this memorandum.[11]

As to the rental payments, the regulations in effect before 1986 provided that the "rental paid for any year shall be credited against any royalties for that year." 43 C.F.R. § 3503.3-1(b)(5) (1985). Beginning in 1999, the regulations have provided that the Minerals Management Service (now ONRR) "will credit your lease rental for any year against the first production royalties or minimum royalties . . . as the royalties accrue under the lease during that year." *Id.* § 3504.16(e) (2014). The ONRR records show that TMM has paid the rentals and those payments have been recouped for payment of a portion of the minimum royalty payments.

Relevant Lease Provisions

Three provisions in the 2004 leases are pertinent to whether TMM has a non-discretionary right to renewal:

Part I. Lease Rights Granted:

> This Lease Renewal entered into by and between the United States of America, through the Bureau of Land Management, hereinafter called lessor, and American Copper &

[9] These annual waivers, beginning in June 1976 and ending in May 1981, served to waive the production and minimum royalty requirements of the leases for that time period. The notification letters that BLM sent to the lessee for each of these waivers state that a waiver of production and minimum royalty requirements is granted and do not state that the lease term is being extended for the period of the suspension.

[10] As noted above, the lessee applied for its first lease renewal in May 1986. Under the 1966 lease terms, the twenty-year primary term was due to expire in June 1986.

[11] *See infra* p. 12.

Nickel Company, 922 19th Street, Golden, Colorado, 80401, hereinafter called lessee, is effective Jan-1 2004, for a period of 10 years, *Sodium, Sulphur, Hardrock* – with preferential 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.

Part I, Section 2:

Lessor, in consideration of any bonuses, rents, and royalties to be paid, and the conditions and covenants to be observed as herein set forth, hereby grants and leases to lessee the exclusive right and privilege to explore for, drill for, mine, extract, remove, beneficiate, concentrate, or otherwise process and dispose of the copper deposits nickel & associated minerals hereinafter referred to as "leased deposits," in, upon, or under the following described lands: . . . .

Part II, Section 14. Special Stipulations:

* The terms and conditions of the production royalties remains as stated in the attached original lease agreement [referring to the 1966 lease].

** The minimum annual production and minimum royalty is $10.00 per acre or a fraction thereof as stated in the attached original lease agreement [referring to the 1966 lease].

Because the provisions of the 2004 leases govern for the reasons set forth below, the renewal provisions of the 1966 leases are not applicable. Nevertheless, to provide a comprehensive analysis, the renewal provisions of the 1966 leases are discussed in the analysis that follows.

The three relevant provisions in the 1966 leases are:

Introductory clause:

This lease entered into . . . between the United States of America, as Lessor, through the Bureau of Land Management, and [TMM's predecessor], as Lessee, pursuant to the authority set out in, and subject to, Section 402 of the President's Reorganization Plan No. 3 of 1946, 60 Stat. 1099, and the Act of June 30, 1950, 64 Stat. 311, and to all regulations of the Secretary of the Interior now in force when not inconsistent with any of the provisions herein.

Section 1(a):

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, subject to all privileges and uses heretofore duly authorized and prior valid claims, 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 C.F.R. § 3221.4(f) and the provisions of this lease.

Section 5:

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 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.

Analysis

The renewal rights of TMM are governed by the applicable provisions of leases MNES 01352 and MNES 01353. At this time, the 2004 renewal leases are in effect, and they use the BLM's standard renewal language that has been in place since the 1980s. In particular, the 2004 lease renewal terms grant the "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." The Department has consistently interpreted this provision as not entitling the lessee to an automatic right of renewal: "This *preferential* right of renewal does not *entitle* the lessee to renewal of the lease but 'gives the renewal lease applicant the legal right to be preferred against other parties, should the Secretary, in the exercise of his discretion, decide to continue leasing.'" *Gen. Chem. (Soda Ash) Partners*, 176 IBLA 1, 3 (2008) (emphasis in original) (quoting *Sodium Lease Renewals*, M-36943, 89 Interior Dec. 173, 178 (1982) (1982 Solicitor's Opinion)). The Interior Board of Land Appeals (IBLA) noted further that the "Secretary may exercise his discretionary authority in renewing a lease in the same manner as in issuing an initial lease." *Id.*

In reaching this conclusion, I have carefully considered TMM's contention that the terms of the 1966 leases govern and require the BLM to renew the leases for a third ten-year term. As discussed below, I have concluded that the terms of the 2004 leases govern and that, in any event, the renewal provisions of the 1966 leases give the BLM discretion regarding whether to renew the leases.

The 2004 leases are each complete, integrated documents that contain all necessary lease terms and are duly signed by the lessee and lessor. The degree to which the original 1966 leases continue in effect are specifically described in the 2004 leases, with two special stipulations that incorporate by reference only two provisions from the 1966 leases. 2004 leases § 14. The first stipulation states that the "terms and conditions of the production royalties remains as stated in the attached original lease agreement." The second states that the "minimum annual production and minimum royalty is $10.00 per acre or fraction thereof as stated in the attached original lease agreement." Neither of these imported provisions includes the lease renewal provisions of the 1966 leases. Consequently, since at least the time that the BLM and the lessee signed the 2004 lease renewals, the renewal provisions of the 1966 leases have no longer applied and the only renewal terms are those described in the 2004 leases, as quoted in the previous paragraph. Based on that well understood and unambiguous renewal language, the BLM has the same discretionary authority in considering whether to renew the 2004 leases as it had in issuing the initial 1966 leases.

In a recent memorandum to me from TMM's legal counsel,[12] TMM asks the BLM to ignore the plain renewal terms of the 2004 leases and instead apply the renewal provisions of the 1966 leases. TMM relies on extrinsic evidence, placing heavy reliance on the circumstances leading up to the earlier 1989 renewal, which TMM asserts provide evidence that the BLM intended to simply renew the leases under the exact same terms of the 1966 leases. TMM further asserts that the 2004 renewal, because it was executed using the same forms, must also have intended to renew the 1966 leases without any change in terms.

As explained below in the discussion of the 1966 lease terms, the 1989 and 2004 renewals differ from each other because the BLM's discretion was limited in 1989 but not in 2004. In particular, the 1989 renewal served as a one-time extension of time for commencement of production, as authorized under section 5 of the 1966 leases. But section 5 also states that if an extension is granted, the renewal must be on unaltered terms (other than royalty). Accordingly, under section 5 of the 1966 leases, the 1989 renewal was effectively a ten-year extension of the 1966 lease terms, and the use of standard renewal forms in 1989 could have no effect other than to extend the leases for ten years to allow for commencement of production. But because no production commenced during that extension, TMM was not entitled to any subsequent production extensions or renewals under the 1966 lease terms, so the BLM had discretion in 2004 over both whether to renew and the terms of any such renewal. The executed renewal in 2004 therefore has operative effect, and the plain language of the 2004 leases actually executed by the parties must be given effect. There is nothing in the duly executed 2004 leases that states that the 1966 terms somehow govern over the terms expressly set out in the 2004 leases.

[12] Memorandum from I. Daniel Colton, Partner, Dorsey & Whitney LLP, received under a cover letter dated January 26, 2016, to me from Kevin L. Baker, Director, Legal Affairs, Twin Metals Minnesota, LLC.

TMM's reliance on extrinsic evidence to attempt to negate the 2004 lease terms does not comply with the law of contracts. In the absence of ambiguity in the relevant lease provision, it is improper to rely on extrinsic evidence. *See Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1040 (Fed. Cir. 2006) (en banc) ("If the provisions are clear and unambiguous, they must be given their plain and ordinary meaning, and we may not resort to extrinsic evidence to interpret them." (internal quotation marks and citation omitted)); *see also Shell Oil Co. v. United States*, 751 F.3d 1282, 1295 (Fed. Cir. 2014) (improper for government to rely on extrinsic evidence when contract provision is unambiguous); *Thoman v. Bureau of Land Mgmt. (on recon.)*, 155 IBLA 266, 267 (2001) ("If the contract language is clear and unambiguous, the terms of the agreement are given plain meaning and the intent of the parties and the interpretation of the agreement will be determined from the four corners of the document alone." (internal citations omitted)). Under this objective law of contracts, the subjective intent of the parties is not relevant unless there is fraud, duress, or mutual mistake, none of which is alleged by TMM. *See Armenian Assembly of Am., Inc. v. Cafesjian*, 758 F.3d 265, 278 (D.C. Cir. 2014) ("[T]he 'objective' law of contracts . . . generally means that 'the written language embodying the terms of an agreement will govern the rights and liabilities of the parties, [regardless] of the intent of the parties at the time they entered into the contract, unless the written language is not susceptible of a clear and definite undertaking, or unless there is fraud, duress, or mutual mistake." (alteration in original) (citations omitted)).

In this case, there is nothing ambiguous with the renewal provision contained in the 2004 leases: there is no conflicting renewal provision referenced elsewhere in the 2004 leases and the provision has a longstanding and well established meaning. While TMM has asserted that the "preferential right" to renew is ambiguous because it is susceptible of more than one meaning, that argument is without merit.[13] TMM misinterprets the 1982 Solicitor's Opinion, which held that the preference right to renew "gives the renewal lease applicant the legal right to be preferred against other parties should the Secretary, in the proper exercise of his discretion, decide to continue leasing." 1982 Solicitor's Opinion, 89 Interior Dec. at 178. In reaching this conclusion, the Solicitor included a discussion of the meaning of "preference right leases." That discussion focused on the rights gained in the *initial* leasing decision, and distinguished between "entitlement" leases, which are leases to which an applicant is by statute entitled to receive if it meets statutory criteria, and true "preference right leases," which are issued only if the Secretary decides to lease. *See id.* Based on this discussion, TMM asserts it is ambiguous whether its leases are entitlement leases or preference right leases. Even if this distinction altered renewal rights, which is an issue that does not need to be addressed for purposes of this memorandum, there is no ambiguity in this case. Neither of the statutory authorities under which the leases are issued—section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099-1100, and 16 U.S.C. § 508b—creates an entitlement to a lease or otherwise mandates the issuance of leases. To the contrary, both authorities expressly condition leasing on surface owner consent (in this instance the discretion of the Forest Service) and thus are discretionary. In short, there is no ambiguity, and the renewal provisions in the 2004 leases provide the BLM with discretion to decide whether to renew the leases.

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[13] A lease is not ambiguous merely because the parties disagree on the correct interpretation. *Thoman*, 155 IBLA at 267 (citing *Pollock v. Fed. Deposit Ins. Corp.*, 17 F.3d 798, 803 (5th Cir. 1994); *Stichting Mayflower Recreational Fonds v. Newpark Res., Inc.*, 917 F.2d 1239, 1247 (10th Cir. 1990)).

Finally, even if the 1966 lease renewal terms were in effect, they do not prohibit the BLM from exercising its discretion to decide whether to renew the leases. Section 1(a) of the 1966 leases granted to the lessee "the exclusive right to mine, remove, and dispose of all the copper and/or nickel minerals and associated minerals . . . ." It also provided that renewal of the leases beyond the primary term is subject to 43 C.F.R. § 3221.4(f) (1966) and the provisions of the lease. Section 3221.4(f) provides 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, 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." Based on this regulation, the BLM included a conditional renewal provision in section 5 of the 1966 leases.

Section 5 of the 1966 leases describes both the conditions with which the lessee must comply to establish a right to renew the lease and the limitations on revisions to the lease terms when the lessee does have a right to renewal:

> 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 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.

1966 leases § 5 (emphases added). As explained more fully below, since at least 1986, the Solicitor's Office has interpreted section 5 to mean that, even if the Secretary can and does, as a matter of discretion, renew the lease to extend the time to commence production, there is no right

to a further renewal when production[14] has not begun at the end of the first renewal-extension period.

The opening segment of the first sentence of section 5 describes the BLM's right to readjust the royalties and other terms and conditions at the renewal stage. This provision means that, as a general rule, if renewing the lease, the BLM is allowed to readjust not only the lease royalties but also other terms and conditions at the renewal stage, including stipulations to protect the surface.

The second segment of the first sentence following the semi-colon (highlighted in **bold** above) is a proviso that allows for three successive ten-year renewals, but conditions the lessee's right to those renewals on the lessee beginning production before the end of the primary term of the lease. The key conditioning language is at the end of the first sentence, as highlighted below:

> provided, however, that the Lessee shall have the right to three successive ten-year renewals of this lease with any readjustment in royalties payable hereunder limited to that hereinafter provided and with no readjustment of any of the other terms and conditions of the 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.**

This highlighted clause, which begins with "unless," qualifies the very right to renew and not merely, as the company has asserted, the phrase describing the level of discretion the BLM has to readjust the other terms and conditions of the leases upon renewal. In other words, the 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."

This conclusion is evident by the construction of the proviso. The two readjustment limitations are tied together and modify the "right to three successive ten-year renewals" language. The use of the conjunctive "and" between the two readjustment phrases ("with any readjustment in royalties payable hereunder limited to that hereinafter provided **and** with no readjustment of any of the other terms and conditions of the lease") ties them together as a single modifier to the right-to-renew language. Accordingly, the production requirement set out as the last clause of the proviso cannot merely qualify the readjustment phrases, as contended by TMM, but must apply to the overall right of renewal. In this way the proviso makes any non-discretionary renewal contingent on the lessee meeting the production requirement first, and then the conditions of that renewal regarding royalties and lease terms are specified in the readjustment phrases.

This conclusion is further reinforced by the second sentence of section 5 (the portion of section 5 <u>underlined</u> above). That sentence has three clauses. The first clause provides that the BLM has

[14] None of the Department's solid minerals leasing regulations—including those in force at the time of the 1986 Solicitor's Opinion, those promulgated immediately thereafter, and those currently in force—expressly define the term "production." However, the rights granted in section 1 of the 1966 leases are described as mining, removing, and disposing of the copper and/or nickel minerals and associated minerals in, upon, or under the leased lands. These activities may be viewed to reasonably describe production.

the discretion to grant the lessee an extension beyond the primary term to begin production, if doing so would be in the interest of conservation or the lessee cannot operate the lease at a profit or for other reasons. The second clause states that, if an extension is granted, the lessee is entitled to a renewal in which the only revision allowed is to the royalties provision. These two clauses allow the lessee to use the first renewal as an extension time period to begin production. The third and final clause of the sentence, however, limits this right to a renewal if there is no production by the end of the extension: "but the Lessee shall not be entitled to subsequent such renewals unless it shall have begun production within the extended time." This final clause reinforces the preceding sentence's condition precedent that there must be production before the lessee has a "right" to subsequent renewals. The second sentence therefore again makes production a precondition for any right to renew and disallows the lessee from obtaining a "right" to a renewal if no production has occurred during the primary term or an extension that the Secretary may grant for commencement of production.

The third sentence of section 5 (the portion of section 5 in *italics* above) describes the degree to which the BLM may readjust the royalty if the lessee is entitled to a "limited adjustment" lease renewal under the first sentence, i.e., the Lessee is "entitled to renewal without readjustment except of royalties payable hereunder . . . ." But without production, there would be no such entitlement.

Taken as a whole, the language of section 5 does not give the lessee a non-discretionary right to three successive renewals. Rather, production is the condition precedent for the lessee to obtain any lease renewals of right. There is no right of renewal if there has been no production before the end of the primary term or at the end of any renewal that the BLM grants to extend the time for the lessee to commence production. The fact that the lease terms expressly state that subsequent renewals of right are not available if no production occurs during any extension the BLM may grant for commencement of production reiterates the linkage between renewals of right and production. It would be incongruent to link only the benefit of unchanged lease terms to production, while leaving the lease renewal and royalty readjustment terms unaffected by a lack of production. Such arbitrary line drawing would create little incentive for the lessee to develop the minerals, which is the entire purpose for these mineral leases. In contrast, when production is a condition precedent for lease renewals, the lease renewal provision effectively serves as a minimal due diligence provision for the lessee.[15]

TMM asserts a different interpretation though. TMM reads the proviso of the first sentence of section 5 to grant the lessee a non-discretionary right of renewal, with such right of renewal limited only to royalty readjustment and with no readjustment of any other lease terms. TMM also reads the production requirement in the provision—"unless at the end of the primary term of

[15] We note that section 14 of the 1966 leases does not change this conclusion. Section 14 sets forth the royalty rates that would apply in the second ten years of the primary lease term and in the first, second, and third ten-year renewal periods, if the lessee were to sink a shaft for underground exploration or development or otherwise begin commercial development within five years of obtaining the rights and authorizations for construction, operation and maintenance of the leased premises. According to TMM, in 1967, its predecessor in interest, INCO, sunk an 1100-foot shaft for exploration and development on lease MNES 01352. TMM asserts that section 14 contractually entitles it to these royalty rates during each of three renewal periods. However, nothing in section 14 provides for a non-discretionary right of renewal. Rather, section 14 merely describes the royalty rate that would apply during the first three ten-year renewals. It does not grant those renewals and does not state that sinking an exploration or development shaft entitles the lessee to those renewals.

this lease the Lessee shall not have begun production"—to modify only the readjustment limitation language, not the right to renewal language. Under TMM's interpretation of the provision, if the lessee begins production within the primary term, the BLM may make only limited royalty adjustments, as provided in the leases, and no adjustments to any other lease terms. If, on the other hand, the lessee fails to begin production within the primary term, according to TMM, the lack of production negates only the readjustment limitations in the provision, and the BLM would be able to impose greater royalty readjustments and readjust other terms and conditions of the leases upon renewal. In other words, under the company's reading, a right to three successive ten-year renewals begins immediately following the primary terms regardless of whether production has occurred, and section 5 only affects the parameters for the BLM's readjustment of the lease terms in those non-discretionary three renewals.

In addition to being unsupported by the terms of the proviso as described above, TMM's interpretation would allow it to hold the leases without any need to produce minerals in paying quantities for at least fifty years, and longer in this instance given the time to process the lease renewals. This interpretation not only conflicts with the plain wording of the 1966 lease terms but also is contrary to the very intent of the applicable statutory framework under which the Secretary may authorize mineral development with an expectation of revenues, not speculative land holdings. *See* Reorganization Plan No. 3 of 1946 § 402, 60 Stat. 1097, 1099-1100; 16 U.S.C. § 520. Interpreting the leases to allow for three non-discretionary renewals covering a thirty-year time span without the occurrence of the very underlying activity for which the leases are issued in the first place would defeat the purpose of entering into the lease. Such an interpretation would allow for the speculative holding of mineral rights, which is contrary to Congress's intent to encourage productive mineral development while also providing a fair return to the American taxpayer.

Our interpretation that section 5 requires the lessee to begin production to obtain the benefit of any non-discretionary right of renewal is not only mandated by the lease terms, but is consistent with the regulation regarding renewal applications cited in the lease. Section 1(a) of the 1966 leases requires the renewals to be in accordance with 43 C.F.R. § 3221.4(f) (1966), which in turn requires that renewal applications "must be filed in a manner similar to that prescribed for extension of a prospecting permit in § 3221.3(a)." Under 43 C.F.R. § 3221.3(a), a prospector must show that he or she has "diligently performed prospecting activities" to support an application for an extension of a prospecting permit.[16] Allowing for the difference between a prospecting permit application and a lease renewal application, § 3221.3(a) requires that the lease renewal application include a showing of diligence in performing the lease activities (rather than the prospecting activities), which are reasonably viewed, consistent with the rights granted in section 1 of the lease terms, as mining, removing, and disposing of the copper and/or nickel minerals and associated minerals—i.e., production. Consequently, by stating that any renewals must be "in accordance with 43 C.F.R. § 3221.4(f)," the lease terms again identified production as the baseline for obtaining a renewal of right. Based on the lease terms as a whole, and because there has been no production during the primary term or the succeeding extensions through lease renewals that the BLM has granted, TMM has not satisfied the condition precedent

[16] Under 43 C.F.R. § 3221.3(a) (1966), in addition to making a show of diligence, the applicant must file an application in triplicate within ninety days before the expiration date of the lease term and must pay a filing fee.

for obtaining a renewal of right and, therefore, the BLM has discretion to make a decision regarding whether to renew the leases even if the 1966 renewal terms were in effect.

In addition, the Solicitor's Office has already concluded that the BLM is not required to renew the 1966 leases as a matter of right if there has been no production. In 1986, the Associate Solicitor for the Division of Energy and Resources sent a memorandum to the Deputy State Director for the BLM Eastern States Office responding to three questions from the Deputy State Director.[17] The first question was whether it was possible to grant lease renewals (for the same leases that are at issue here) when the leases had never been in production. In response, the Associate Solicitor examined the terms of the lease to determine whether or not lack of production precludes extending the lease term. The Associate Solicitor then relied on the second sentence of section 5 (the portion of section 5 underlined above) to conclude that, while the leases may be extended for a period not exceeding ten years even though production has not occurred, if production does not occur during the period of extension, "no further extensions will be allowed in accordance with the terms of the lease." Consistent with this legal advice and the provisions of section 5 of the 1966 leases, the BLM granted a ten-year extension by renewing these two leases in 1989.

As noted above, the BLM also renewed the leases for a second ten-year period in 2004. Because no production had occurred by that time, the BLM's decision to renew the leases in 2004 was discretionary. The BLM's decision to renew the leases in 2004 does not impede the BLM from again exercising discretion regarding the lessee's application for a third renewal of the leases, particularly where this office has previously concluded that the agency need not allow additional pre-production renewals.[18]

It should be noted that the lessee's payment of minimum royalties in lieu of production does not alter the foregoing analysis.[19] The payment of minimum royalties is certainly one incentive to produce that was imposed by the 1966 leases, but that incentive worked in tandem with the one created by the leases' production precondition for mandatory renewals. The second incentive

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[17] *See* 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, Bureau of Land Management, "Application for Minimum Royalty Waiver Submitted by INCO Alloys International, Incorporated for Leases ES 01352 and ES 01353" (Apr. 2, 1986) (Attached).

[18] TMM has made no showing in its pending renewal application under 43 C.F.R. § 3221.4(f) (1966) that would entitle it to a third and final renewal under section 5 of the 1966 leases. TMM has never begun production. TMM's predecessor, INCO, sunk a development shaft and conducted bulk sampling, but neither of those actions qualifies as beginning production. Without any showing of diligence in mining, removing, or disposing of the copper, nickel, and associated minerals, and without beginning production, TMM is not entitled to any further non-discretionary ten-year renewals. TMM has also asserted that the Department of the Interior is prohibited by 30 U.S.C. § 184(h)(2), as well as the Department's regulations at 43 C.F.R. § 3514.40 (2015), from "cancelling" TMM's interest in the leases at issue as TMM is a bona fide purchaser. But the cancellation regulations have no applicability where, as here, the decision is whether to renew a lease. Were BLM to exercise its discretion to deny the lease renewal application, it would not be cancelling the leases, as contemplated by 30 U.S.C. § 184(h)(2) and 43 C.F.R. § 3514.40, but rather would be allowing leases that have been in existence for fifty years without production to terminate by their own terms.

[19] The original leases do not mention minimum royalties as a way to fulfill the production requirement. And section 2(b) of TMM's 2004 leases merely provides that "[a]t the request of the lessee, made prior to initiation of the lease year, the authorized officer may allow in writing the payment of a $3.00 per acre or fraction thereof minimum royalty in lieu of production for any particular lease year."

expired when no production occurred by the end of the extension period granted by the 1989 renewal. While the 2004 renewal leases retain the minimum royalties payment incentive, that fact has no impact on the renewal provision of the 2004 leases. Of course, for the leases to continue in effect during the renewal period, the lessee was required to continue to meet its obligation to pay royalties in lieu of production. However, that payment was and is not equivalent to production and does not somehow entitle the lessee to obtain a lease renewal of right; instead, it merely keeps the leases from terminating during the extension time period the BLM has granted through a lease renewal.

The fact that the payment of royalties in lieu of production cannot be the basis for establishing the right to renew, and cannot be a *de facto* means of extending a lease in perpetuity, is also clear from IBLA case law. In *General Chemical (Soda Ash) Partners*, the IBLA held that minimum royalties in lieu of production have "nothing to do with whether the Secretary, in looking at production from the mine of which the lease is a part at the end of the current lease term, will renew the lease for an additional term." 176 IBLA at 9. The Board further held, "Moreover, '[t]he Secretary has the authority to encourage production and development of federally leased sodium resources *both through minimum development and production requirements and minimum royalties* imposed on each lease." *Id.* (emphasis in original) (quoting 1982 Solicitor's Opinion, 89 Interior Dec. at 185). The leases here use precisely both mechanisms to encourage production, albeit not successfully in this instance.

Conclusion

For the foregoing reasons, the lessee has not established a non-discretionary right to a third ten-year renewal. Under the governing 2004 lease terms, the BLM has the same discretion regarding whether to renew the lease for a third time as it had in determining whether to grant the initial lease. While the 2004 lease terms give the lessee a preference over other potential lessees to lease the lands in question, they do not entitle the lessee to non-discretionary renewal of the leases.

Hilary C. Tompkins

Attachment

United States Department of the Interior

OFFICE OF THE SOLICITOR
350 South Pickett Street
ALEXANDRIA, VIRGINIA 22304

BLM.ER.0335

APR - 2 1986

Memorandum

To: Deputy State Director, Mineral Resources (970)
Eastern States Office, Bureau of Land Management

From: Associate Solicitor, Energy and Resources

Subject: Application for Minimum Royalty Waiver Submitted by INCO Alloys International, Incorporated for Leases ES 01352 and ES 01353

You have requested a legal opinion addressing three questions raised in a memorandum from the Milwaukee District Office. The answers along with these questions are set forth below.

Question No. 1: "Is it possible to grant lease renewals for these leases when the leases have never been in production? The lease documents and the regulations are not clear on this point. This question will surely be asked by INCO since the initial 20 year lease term expires on May 31, 1986."

A lease for hardrock minerals may be issued for a period not exceeding 20 years. The primary term on the subject leases was for a 20 year period. The lease shall be subject to a preferential right to renew for a term not to exceed 10 years at the end of the initial term and each succeeding term thereafter, upon such terms and conditions as may be incorporated in each lease or prescribed in the general regulations issued by the Secretary. 43 C.F.R. 3520.2-1(a)(2). The Secretary of the Interior has promulgated no regulations that require production as a prerequisite to the extension of such leases. Accordingly, we must look to the terms of the lease to determine whether or not lack of production precludes extending the lease term. Section 5 of the lease states that, "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 . . . but the lessee shall not be entitled to subsequent such renewals unless it shall have begun production within the extended time." Therefore, according to the terms of the lease, such lease may be extended even though production has not occurred, for a period not exceeding 10 years. If production does not occur during the period of extension, no further extensions will be allowed in accordance with the terms of the lease.

Question No. 2: "INCO has been given waivers of minimum royalty payments for 5 years due to condition beyond its control (i.e.,

environmental analysis), and is now asking for a waiver based on additional conditions beyond its control (i.e., low copper and nickel prices). Has BLM set a binding precedence [sic] by granting the original waivers?"

INCO's failure to pay minimum royalties as set forth in section 2(c) of the lease, constitutes a breach of the covenants and conditions contained in the lease agreement. In section 6(b) of the lease, the United States reserved the right to waive any breach of the covenants and conditions contained therein but any such waiver shall extend only to the particular breach so waived and shall not limit the rights of the lessor with respect to any future breach. Therefore, waiver of a prior breach of the minimum royalty payments, does not obligate the Bureau to grant any subsequent waivers.

Question No. 3: Section 2(c) of the lease states, "Lessee [sic] may . . . waive . . . minimum royalty payments for reasonable periods of time . . . ." Waivers were given for the first 5 years they were due, which is one-fourth of the initial lease term. Would granting of further waivers be conceived to extend beyond a "reasonable period?"

Section 2(c) states that, "Lessor may in its discretion, waive, reduce, or suspend the minimum royalty payment for reasonable periods of time in the interest of conservation or when such action does not adversely affect the interest of the United States. . . ." Whether or not the waiver period is "reasonable" must be determined by an examination of the purpose for which such discretion was exercised. Obviously if the reason for such waiver was due to a condition that only existed for 3 years, then a waiver of minimum royalty for a 10 year period would probably be deemed unreasonable. We suggest that the information submitted by the lessee be examined and considered in its entirety in order to determine what is reasonable given the facts set forth in that information. In addition, the reasonable period of time is to be viewed in the context of the "interest of conservation" and the "interest of the United States."

If you should have any further questions relating to this matter, please contact Barry Crowell at 274-0204.

Kenneth G. Lee
Assistant Solicitor
Branch of Eastern Resources

Attachment

Enclosure 2

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Eastern States
20 M Street, SE Suite 950
Washington, DC 20003
http://www.es.blm.gov

JUN 0 3 2016

Ms. Kathleen Atkinson
Regional Forester
626 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Dear Ms. Atkinson:

As you know, the Bureau of Land Management (BLM) has been considering an application by Twin Metals Minnesota (TMM) to renew its two existing mining leases (MNES 1352 and MNES 1353). The USDA Forest Service is the surface management agency for the lands where these two leases are located, and the BLM has jurisdiction over the mineral rights. The BLM has previously issued two renewals of the leases, with USDA Forest Service consent, in 1989 and 2004. The leases allow for the mining of copper, nickel, and associated minerals; but to date, the lessee has not begun mineral production on either of the leases.

In processing the pending application, the BLM identified the need for a legal opinion to determine whether TMM has a non-discretionary right to renew the two leases. The Department of the Interior's Office of the Solicitor examined the issue and determined that TMM does not have a right to the automatic renewal of the leases; rather, the government has discretion to decide whether to grant or deny the application for renewal. This determination was formalized in a Memorandum Opinion issued by the Solicitor of the United States Department of the Interior on March 8, 2016 (M-37036), a copy of which I have attached for your information.

In light of the legal determination that the government has discretion in granting or denying the TMM lease renewal application, in accordance with 43 CFR 3503.20, 16 U.S.C. 508b, Section 402 of Reorganization Plan Number 3 of 1946, 60 Stat. 1097, 1099, and 16 U.S.C 520, the BLM requests that the USDA Forest Service provide, in writing, a decision on whether it consents or does not consent to renewal of the leases. As you know, this information from the surface management agency is necessary before the BLM takes additional action on the application.

We appreciate your continued partnership in this process and in managing the public lands inNorthern Minnesota. If you need additional information, please contact me at (202) 912-7701.

Sincerely,

Karen Mouritsen
State Director
BLM Eastern States

Attachment

cc: Ms. Brenda Halter, Forest Supervisor, Superior National Forest
Mr. Richard Periman, Deputy Forest Supervisor, Superior National Forest

Enclosure 3

United States Department of Agriculture
Forest Service
Washington Office
201 14th Street, SW
Washington, DC 20250

File Code: 2670
Date: DEC 14 2016

Neil Kornze
Director
Bureau of Land Management
1849 C. Street NW, Rm. 5665
Washington, DC 20240

Dear Director Kornze:

On June 3, 2016, the Bureau of Land Management (BLM) requested the Forest Service (FS) provide a decision on whether it consents to renewal of two leases currently held by Twin Metals Minnesota (TMM) for lands within the Superior National Forest (SNF) in northern Minnesota. These two Preference Right leases, MNES-01352 and MNES-01353, lie directly adjacent to and within three miles of the Boundary Waters Canoe Area Wilderness (BWCAW), respectively. The FS has considered the environmental conditions, nature and uses of the BWCAW by the public and tribes, economic benefits of mineral development and wilderness recreation, potential environmental consequences of mineral development on the leases, public opinion, rarity of copper-nickel sulfide ore mining in this region, and current laws and policy to inform the agency's decision.

Based on this analysis, I find unacceptable the inherent potential risk that development of a regionally-untested copper-nickel sulfide ore mine within the same watershed as the BWCAW might cause serious and irreplaceable harm to this unique, iconic, and irreplaceable wilderness area. Therefore, the FS does not consent to renewal of Preference Right leases MNES-01352 and MNES-01353. A summary of the basis for my decision follows.

The BWCAW Is an Irreplaceable Resource

The 1.1 million acre the BWCAW is located in the northern third of the SNF in Minnesota, extending nearly 200 miles along the international boundary with Canada. It is the only large-scale protected sub-boreal forest in the lower 48 United States. The SNF holds 20 percent of the National Forest System's fresh water supply. These healthy forests with extremely high water quality also provide a host of watershed benefits, such as purifying water, sustaining surface water and ground water flow, maintaining fish habitats, controlling erosion, and stabilizing streambanks.

In addition to the existing high quality of the waters, the dramatic hydrogeology and interconnectedness of BWCAW's forests, lakes, streams, and wetlands make the region unique and susceptible to degradation. The BWCAW includes nearly 2,000 pristine lakes ranging in size from 10 acres to 10,000 acres, and more than 1,200 miles of canoe routes.

With Voyageurs National Park and Quetico Provincial Park, BWCAW is part of an international network of conserved land and wilderness. Quetico Provincial Park, located in Ontario, Canada,

lies within the same Rainy River watershed as the BWCAW. Quetico Provincial Park is an iconic wilderness class park, world renowned as a destination for backcountry canoeing with over 2,000 lakes and over one million acres of remote water-based wilderness. Together, Quetico and BWCAW form a core wilderness area of over two million acres.

Located northwest of the BWCAW, Voyageurs National Park was established by Congress in 1971 to preserve and interpret fur trade history and the importance of canoe travel routes in northern Minnesota. The park is at the southern edge of the boreal forest, and lies within the same Rainy River watershed as the BWCAW. It features spectacular canoeing and boating routes along with hiking trails exploring portage routes used by American Indians, early fur traders, and gold miners. Approximately 240,000 people visit Voyageurs National Park every year.

Just south of the BWCAW the Laurentian Divide separates three river systems: one flowing north to Hudson Bay; the Laurentian system flowing eastward towards the Atlantic through the Great Lakes, and the Mississippi system, flowing south to the Gulf of Mexico. TMM's two leases subject to FS decision are located in the Rainy River Watershed, which drains into the BWCAW, Quetico Provincial Park and Voyageurs National Park. There are four HUC (Hydrologic Unit Code) -10 sub-watersheds in the area of the leases and potential project site—Birch Lake, Stony River, Isabella River and Kawishiwi River. Surface water flows north and west from Birch Lake and the Kawishiwi River watershed through Kawishiwi River and several lakes into BWCAW. Water from the Stony River and the Isabella River watersheds flows into the Birch Lake watershed.

The BWCAW's Natural Environment

The SNF provides abundant and diverse habitat for thousands of breeding, wintering, and migratory species of terrestrial and aquatic wildlife, including over 100 species of migratory breeding birds in a zone with North America's greatest diversity of songbirds and forest-dependent warblers. The SNF also has one of the largest populations of gray wolves outside of Alaska, common loons, and moose. It has popular game species such as walleye, trout, deer, ruffed grouse, fisher, and beaver; and numerous rare species such as great gray owl, black-backed woodpecker, ram's-head ladyslipper and other orchids, and lake sturgeon. The SNF also has a great diversity and abundance of species common to the boreal forest biome, including three-toed woodpecker, boreal owl, boreal chickadee, lynx, moose, and grizzled skipper butterfly. All these species provide a wide array of crucial ecological, social and economic benefits and uses - from big game hunting and fishing to wildlife watching and research.

The BWCAW is also home to three threatened or endangered species: Canada lynx, northern long-eared bat, and gray wolf. Over the decades the BWCAW has been protected, it has provided refugia for species under stress or with declining populations, such as moose. In the face of climate change, the BWCAW may be critical to the continued existence of these species within Minnesota.

Cultural Resources and Treaty Rights Associated with the BWCAW

The BWCAW region has been home to Native Americans for millennia. The Minnesota Chippewa Tribe and three associated Bands – the Grand Portage Band, the Fond du Lac Band,

and the Bois Forte Band -- retain hunting, fishing, and other usufructuary rights throughout the entire northeast portion of the State of Minnesota under the 1854 Treaty of LaPointe. In the Ceded Territory all Bands have a legal interest in protecting natural resources, and the FS shares in federal trust responsibility to maintain treaty resources. Many resident Ojibwe, who ceded lands that became the BWCAW, continue to visit ancestral sites and traditional gathering and fishing locations within the wilderness. Tribes rely on natural resources like fish, wildlife and wild plants such as wild rice for subsistence and to support them spiritually, culturally, medicinally, and economically.

The northern border of the BWCAW is situated along a winding, 120-mile canoe route known locally as the Border Route, or Voyageurs Highway. This historic canoe route, bordered on the north by Ontario's Quetico Provincial Park, on the east by Grand Portage National Monument, and on the west by Voyageurs National Park, was utilized extensively by pre-contact Native Americans, European fur traders, and tribal groups such as the Dakota, Cree, and Ojibwe.

There are approximately 1,500 cultural resource sites identified on National Forest System (NFS) lands within the BWCAW. Many more cultural resources are believed to exist within the wilderness; as of 2015 only about 3 percent of the landscape has been intensively surveyed. Cultural resource sites include historic Ojibwe village sites, French and British period fur trade sites dating from 1730-1830, Woodland period village sites (2,000-500 years old) situated on wild rice lakes, Native American pictograph panel sites, Archaic period (8,000-3,000 years old) sites with copper tools, and large Paleoindian quarry sites such as those recently discovered on Knife Lake where Native Americans shaped stone tools up to 10,000 years ago.

Wilderness Designation

The irreplaceable natural qualities of the BWCAW were recognized nearly a century ago in 1926 when the Department of Agriculture first set aside the area to preserve its primitive character. The Wilderness Act of 1964 officially designated land inside today's BWCAW as part of the National Wilderness Preservation System. The Boundary Waters Canoe Area Wilderness Act of 1978 expanded the wilderness area to 1,090,000 acres. The 1978 Act also established a separate Boundary Waters Canoe Area Mining Protection Area (MPA) to protect existing natural values and high standards of environmental quality from the adverse impacts associated with mineral development. Sec. 9, Pub. L. 95-495, 92 Stat. 1649, 1655 (1978). Congress provided very clear direction regarding the purposes of the BWCAW and MPA:

(1) provide for the protection and management of the fish and wildlife of the wilderness so as to enhance public enjoyment and appreciation of the unique biotic resources of the region,

(2) protect and enhance the natural values and environmental quality of the lakes, streams, shorelines and associated forest areas of the wilderness,

(3) maintain high water quality in such areas,

(4) minimize to the maximum extent possible, the environmental impacts associated with mineral development affecting such areas.... Sec. 2, Pub. L. 95-495, 92 Stat. 1649 (1978).

The BWCAW Act bans authorization of federal mineral development within the BWCAW and MPA. However, the BWCAW Act does not govern federal mineral development on other NFS lands. Instead, the authorities governing federal mineral development on SNF lands outside the BWCAW and MPA are 16 U.S.C. § 508b and Section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099-1100. A decision withholding FS consent to the lease renewals is fully consistent with this statutory framework.

World Renowned Research Laboratory

Because of its unique quality and character, the BWCAW is a living laboratory supporting dozens of research projects each year. Scientists of all disciplines rely on scarce areas like the BWCAW to support scientific inquiry and serve as control areas in the study of water quality, climate change effects, and natural ecological processes. The BWCAW is internationally known as a laboratory for ground-breaking research on forest fires, landscape patterns, biodiversity, wildlife, soils, nutrient cycles, other ecosystem processes, lakes, climate change, and recreational use of wilderness. This body of work is widely cited by scientists around the world. As an example, Miron Hinselman's work on forest fires in BWCAW, published during the 1970s-1990s, has been cited in more than 1,700 published studies. More recent BWCAW-related studies by Frelich and Reich have already been cited in 1,300 studies in 70 peer-reviewed science journals published in 20 countries on 4 continents. New results from BWCAW research are regularly presented at prestigious international meetings on scientific study.

Recreation Values of the BWCAW

The BWCAW is one of the most visited areas in the entire National Wilderness Preservation System, and the System's only large lake-land wilderness. It provides an experience unique within the continental United States. The BWCAW's thousands of lakes and hundreds of miles of streams comprise about 190,000 acres (20 percent) of the BWCAW's surface area and provide for long distance travel by watercraft. The opportunity to pursue and experience expansive solitude, challenge and personal immersion in nature are integral to the BWCAW experience. Winter BWCAW visitors enjoy opportunities for skiing, dog-sledding, camping and ice fishing. Fishing is one of the most popular BWCAW activities throughout the year due to the range of species found in its waters, including smallmouth bass, northern pike, walleye, and lake trout.

Social and Economic Environment

TMM's leases are located near Ely, in St. Louis and Lake Counties. The population of St. Louis County is concentrated in and around the City of Duluth, approximately 100 miles south of the lease area. The Iron Range communities of Ely, Hibbing, and Virginia are smaller secondary population centers. The 2010 U.S. Census shows area population has declined by nearly 10 percent since 1980, while Minnesota's population as a whole has increased by more than 30 percent. At least some of this population decline may be attributable to a loss of iron industry jobs. The Fond du Lac, Grand Portage, and Bois Forte reservations are exceptions to the regional trend - populations there have increased since 1990.

The median income of area communities is significantly lower than that of the State as a whole. It is also the case that the median income of the area's secondary population centers is generally

lower than that of St. Louis County as a whole. In some of these communities, such as Ely and Tower, the median household income is slightly more than half of the state median. In many individual communities, poverty rates are as high as or higher than statewide (with the exceptions of the secondary population centers of Hoyt Lakes, Soudan, and Tower).

Mining employment in St. Louis County declined from more than 12,000 jobs in 1980 to approximately 3,000 jobs in 2009. However, since mining employment can vary greatly from one year to the next, this decline does not represent a steady reduction. Mining-related employment is volatile and fluctuates due to changes in the market price of commodities being extracted. During the same time period, service-related employment (which includes the North American Industry Classification System categories for professional services, management, health care, education, arts/entertainment, and accommodation/food) in the study area has increased substantially, mirroring broader state and national trends.

Tourism is rooted in the region's unique recreation opportunities such as the BWCAW, and is broadly dependent on hunting, fishing, boating, sightseeing, and wilderness experiences provided by the region's high-quality natural environment. Industries associated with tourism (arts, entertainment, recreation, accommodation, and food services) account for nearly 13 percent of all employment in St. Louis County. The landscape and recreational opportunities attracts retirees and new residents.

Fishing in Minnesota lakes and rivers generates $2.8 billion in direct annual expenditures and contributes more than $640 million a year in tax revenues to the treasuries of the state and federal governments. The BWCAW itself has provided millions of visitors with a unique water-based recreation experience and provided an economic driver to local communities and the state of Minnesota. Leases MNES-01352 and MNES-01353 are surrounded by 29 resorts, outfitters, campgrounds and hundreds of homes and cabins. Similarly, Voyageurs National Park and Quetico Provincial Park both support vibrant tourism industries.

In 2015, 150,000 people visited the BWCAW. Economic benefits generated from recreation in the BWCAW average approximately $44.5 million annually. Continued economic returns rely on sustaining BWCAW's natural resource quality and wilderness character.

The FS's Role with Respect to Hardrock Mineral Leases

TMM's two leases include a mixture of NFS lands reserved from the public domain and acquired NFS lands, with the vast majority being reserved lands. 16 U.S.C. § 508b applies to reserved NFS lands and provides in pertinent part:

"the Secretary of the Interior is authorized … to permit the prospecting for and the development and utilization of [hard rock] mineral resources: provided, that the development and utilization of such mineral deposits shall not be permitted by the Secretary of the Interior except with the consent of the Secretary of Agriculture."

Section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099, applies to acquired NFS lands and provides in pertinent part:

"The functions of the Secretary of Agriculture and the Department of Agriculture with respect to the uses of mineral deposits in certain lands pursuant to … 16 U.S.C. § 520 … are hereby transferred to the Secretary of the Interior and shall be performed by him or … by such officers and agencies of the Department of the Interior as he may designate: Provided, That mineral development on [lands acquired pursuant to the Weeks Act] shall be authorized by the Secretary of the Interior only when he is advised by the Secretary of Agriculture that such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified by the Secretary of Agriculture in order to protect such purposes."

In pertinent part, 16 U.S.C. § 520 provides:

The Secretary of Agriculture is authorized, under general regulations to be prescribed by him, to permit the prospecting, development, and utilization of the mineral resources of the lands acquired under the Act of March first, nineteen hundred and eleven, known as the Weeks law, upon such terms and for specified periods or otherwise, as he may deem to be for the best interests of the United States….

Under the Weeks Act, 16 U.S.C. § 515, the Secretary of Agriculture is authorized to purchase lands for the purposes of "the regulation of the flow of navigable streams or … the production of timber."

The Department of the Interior adopted regulations providing for disposal of mineral resources pursuant to 16 U.S.C. § 508b and Section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099, by means of a leasing system governed by 43 C.F.R. part 3500. 43 C.F.R. § 3501.1(b)(1) & (3). The Department of the Interior's regulations provide that BLM's issuance of leases for hard rock minerals, including deposits of copper, nickel and associated minerals, on lands administered by another surface managing agency is "[s]ubject to the consent of the surface managing agency," 43 C.F.R. § 3503.13(a) & (c), which in the case of NFS lands is the United States Department of Agriculture, Forest Service. 16 U.S.C. § 1609(a). Specifically, 43 C.F.R. § 3503.13(a) relates to lands acquired under the Weeks Act while 43 C.F.R. § 3503.13(c) relates to the reserved lands.

On March 8, 2016, Department of Interior Solicitor Hilary Tompkins issued memorandum M-37036 (M-Opinion) in response to a BLM request asking "whether it has the discretion to grant or deny Twin Metals Minnesota's pending application for renewal of two hardrock preference right leases in northern Minnesota." The M-Opinion advises the BLM determining that, "Neither of the statutory authorities under which [MNES-01352 and MNES-01353] are issued–section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099-1100, and 16 U.S.C. § 508b–creates an entitlement to a lease or otherwise mandates the issuance of leases" and "[t]o the contrary, both authorities expressly condition leasing on surface owner consent (in this instance the Forest Service) and thus are discretionary." Therefore, on June 3, 2016, the BLM advised the Forest Service:

"[i]n light of the legal determination that the government has discretion in granting or denying the TMM lease renewal application, in accordance with 43 CFR 3503.20, 16 U.S.C. 508b, Section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099, and 16 USC 520, the

BLM requests that the USDA Forest Service provide, in writing, a decision on whether it consents or does not consent to the renewal of the leases."

Irrespective of the M-Opinion, the FS's consent to any hardrock lease renewal is mandated by 16 U.S.C. § 508b and Section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099. Pursuant to 16 U.S.C. § 508b, the Secretary of Agriculture's right to consent to "the development and utilization of [hardrock] mineral resources" is coextensive with the Secretary of the Interior's authority to permit "the development and utilization of [hardrock] mineral resources." The fact that the Secretary of the Interior has implemented the authority 16 U.S.C. § 508b confers to permit "the development and utilization of [hardrock] mineral resources" by means of a regulatory scheme containing a number of decision points simply means that the Secretary of Agriculture's statutory consent authority with respect to hardrock mineral development and utilization – authority expressed in terms identical to the Department of Interior's authority – similarly extends to the same universe of decision points providing those decisions have the potential to affect NFS surface resources.

Whereas pursuant to Section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099, the Secretary of the Interior's authority per 16 U.S.C. § 520 "to permit the … development … of the [hardrock] mineral resources of the lands acquired under … the Weeks law…" is contingent upon the Secretary of Agriculture's determination that "such development will not interfere with the primary purposes for which the land was acquired…." It is well established that mineral "development" is authorized by a lease, whether it is one issued in the first instance or a subsequent renewal. Indeed, the M-Opinion explicitly recognizes that "the entire purpose" of a mineral lease is "for the lessee to develop the minerals…." Another M-Opinion finds that since the 1970s hardrock prospecting permits for NFS lands, which are the precursor for the issuance of hardrock mineral leases including MNES-01352 and MNES-01353, have uniformly included the condition that "no mineral development of any type is authorized hereby." M-36993, Options Regarding Applications for Hardrock Mineral Prospecting Permits on Acquired Lands Near a Unit of the National Park System (1998 WL 35152797 (April 16, 1998)). *Missouri Coalition for the Environment*, 124 IBLA 211, 217 (1992) ("mineral development … may only be authorized upon issuance of a [hardrock] lease*); John A. Nejedly Contra Costa Youth Association, 80 IBLA 14, 26 (1984)* (concurring opinion) (development under a hardrock lease "is a logically foreseen result of successful prospecting"). So again, the fact that the Secretary of the Interior has implemented the authority Section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099, confers to permit the development of hardrock mineral resources on lands acquired pursuant to the Weeks Act by means of a regulatory scheme containing a number of decision points simply means that the Secretary of Agriculture's consent authority with respect to hardrock mineral development – authority expressed in terms identical to Interior's authority – similarly extends to the same universe of decision points providing those decisions have the potential to affect NFS surface resources.

Of course, under Section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099, the Secretary of Agriculture cannot block mineral development absent a finding that "such development will … interfere with the primary purposes for which the land was acquired…." Here, since the small percentage of acquired lands subject to TMM's two leases were purchased in accordance with the Weeks Act, those primary purposes were "the regulation of the flow of navigable streams or … the production of timber." As discussed below, TMM hopes to construct

and operate an underground mine on its two leases – not a strip mine. At this juncture the FS consequently cannot definitively say that the mineral development which TMM hopes to conduct on its leases will interfere with those purposes. Uncertainty about this question is of little import, however, since the lands subject to TMM's leases are an admixture of lands reserved from the public domain and acquired lands with the reserved lands being in excess of 90% of the acreage included in both leases. Further, there is no reason to believe that TMM's mineral development exclusively could be confined to the acquired lands. The FS's conclusion that the agency should exercise the absolute discretion that 16 U.S.C. § 508b confers upon it to withhold consent to the renewal of TMM's leases insofar as the reserved lands are concerned accordingly has preclusive effect with respect to the lands acquired pursuant to the Weeks Act.

The Role of Forest Plans

The FS develops land and resource management plans to provide a framework that protects renewable surface resources. This framework balances both economic and environmental considerations to provide for multiple uses and sustained yield of NFS renewable surface resources.

The 2004 SNF Plan at D-MN-1 states: "Exploration and development of mineral and mineral material resources is allowed on NFS land, except for federally owned minerals in designated wilderness and the Mining Protection Area." The Plan also provides that the FS will manage the BWCAW in a manner that perpetuates and protects its unique natural ecosystems, provides an enduring wilderness resource for future generations, and provides opportunities for a primitive and unconfined recreation experience.

Although forest plans provide a framework, they do "not authorize projects or activities or commit the Forest Service to take action" (36 C.F.R. § 219.2(b)(2)). Instead, forest plans provide broad management guidance and ensure all program elements and legal requirements are considered prior to critical project level decisions, such as a decision to authorize timber harvesting, grazing or mining operations. As the Supreme Court has determined, forest plans:

"…do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations. Thus, for example, the Plan does not give anyone a legal right to cut trees, nor does it abolish anyone's legal authority to object to trees being cut. *Ohio Forestry Ass'n. v. Sierra Club*, 523 U.S. 726, 733 (1998)."

Following Forest Plan approval, proposals are evaluated on a case-by-case basis. Proposals inconsistent with Plan direction may not be authorized (16 U.S.C. §1604(i)). However, a proposal might reveal the need to amend plan direction that would otherwise stand as an impediment to a proposal. Yet a proposal's consistency with applicable Plan standards and guidelines is not an assurance that the proposal will be authorized. The FS retains discretionary judgment concerning overall multiple use, sustained yield management of NFS lands. Further, denial of a proposal consistent with applicable Plan standards and guidelines does not require alteration of the applicable direction.

The SNF Plan does not prohibit mineral development within the management area where TMM's leases are located. But the FS is not bound to approve TMM's application for renewal of its leases either. Neither the statute nor regulations governing forest plans mandate the approval of proposals consistent with a Forest plan. Moreover, as discussed above, pursuant to the express terms of 16 U.S.C. § 508b and Section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099, the FS retains discretion to withhold consent to TMM's lease renewals given the leases' purpose is mineral development, as recognized by the M-Opinion. Specifically, the FS denial of consent to TMM's lease renewals is warranted for the reasons set out in the M-Opinion and also because the bar in both 16 U.S.C. § 508b and Section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099, against mineral development absent the consent of the Secretary of Agriculture applies with equal force to the initial issuance of the lease and any renewal of that lease. Accordingly, the FS may consider any potential negative environmental impacts that might flow from mineral development on those leases and their effect on future national forest conditions.

National Environmental Policy Act (NEPA) Applicability

NEPA ensures federal agencies take into account significant environmental matters in their decision making, and that they disclose to the public that the agency has considered environmental concerns. An environmental impact statement (EIS) must be prepared when an agency proposes to undertake a major federal action that may significantly affect the quality of the human environment. In summary, NEPA tasks agencies to assess changes in the physical environment caused by the action it proposes to authorize.

Council on Environmental Quality (CEQ) regulations implementing NEPA are clear that a proposal "exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." 40 C.F.R. § 1508.23. This provision is reinforced by CEQ's instruction that major federal actions "includes actions with effects...." 40 C.F.R. § 1508.18. FS NEPA regulations establish a four part test for determining when NEPA obligations arise, including whether "[t]he Forest Service has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated...." 36 C.F.R. § 220.4(a)(1). Thus, when the FS declines to authorize a private application, the mere contemplation of that application does not constitute a federal proposal and the FS is not required to conduct an environmental analysis under NEPA.

As it is my determination not to consent to issuance of lease renewals based on the application before the agency at this time, preparation of an environmental analysis is not required. As further explained below, no significant environmental effects will occur as a result of the agency's no-consent determination.

This outcome is entirely in keeping with NEPA and its implementing regulations. Situations like this pose the unusual question of whether NEPA requires consideration of environmental effects of federal actions that foreclose development or use of natural resources. NEPA does not require a federal agency to consider effects arising from an action it has declined to allow third parties to undertake when that does not represent change in the physical environment caused by the federal

action itself. In other words, only federal actions with significant environmental effects trigger NEPA's detailed statement requirement. Actions which do nothing to alter the natural physical environment and maintain the environmental status quo are not subject to NEPA.

The FS routinely prescreens non-mineral, special use authorization applications and agency regulations direct that non-conforming uses do not need to receive further evaluation and processing. See 36 C.F.R. § 251.54(e) (2). The FS does not have regulations governing consideration of discretionary mineral leasing applications, but agency practice is consistent.

As recently as 2014, Regional Forester Atkinson rejected a request for consent to a prospecting permit on the Hiawatha National Forest without preparing a NEPA document. Diverting scarce budgetary resources to prepare NEPA documents for proposals that will not move forward trivializes NEPA and diminishes its utility in providing useful environmental analysis for actions that the agency accepts and actively evaluates for approval.

In these circumstances, the Court of Appeals' Eighth Circuit holding that a FS decision to refrain from using herbicides as a method of vegetation control is not a "proposal or action to which NEPA can apply" pertains. *Minnesota Pesticide Information and Educ., Inc. v. Espy*, 29 F.3d 442, 443 (8th Cir. 1994).

NFS Land Management Perspectives

Half of a century has passed since TMM's leases were issued in 1966. The original leases were issued prior to statutes such as the National Historic Preservation Act of 1966, National Environmental Policy Act of 1969, Clean Water Act of 1972, Endangered Species Act of 1973, National Forest Management Act of 1976, and Boundary Waters Canoe Area Wilderness Act of 1978. Without these laws in place the environmental consequences of potential "commercial development [of the nickel and copper deposit] by a large-scale mining operation" originally envisioned by BLM in 1956 on what are now TMM's leases received markedly less consideration in comparison with current requirements. Given changes in policy and information availability, it is not unreasonable to anticipate a higher level of interest and concern regarding these consequences than when TMM's leases were originally issued, as demonstrated in the examples to follow.

In 1991 the Minnesota Department of Natural Resources recognized the value of the BWCAW for its scenic beauty and solitude by establishing a State Mineral Management Corridor. In light of surface water flow and recreational uses, no surface disturbance or state leases may be offered in the Corridor. The State Mineral Management Corridor overlaps with federal lease MNES-1353.

The federal relationship with Native American tribes has also evolved significantly over the 50 years since the TMM leases were issued. The FS has a legal obligation to acknowledge rights of Tribes and tribal members, including off-reservation rights to hunt, fish, gather and continue cultural and spiritual practices. Such recognition did not occur until the late 1970s when Indians began to assert their rights to off-reservation resources in federal court, including those rights to fish and gather wild rice. (E.g.: *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 653 F. Supp. 1420 (W.D. Wis. 1987) (LCO III), *Lac Courte Orelles Band of Lake*

Superior Chippewa Indians v. State of Wis., 668 F. Supp. 1233 (W.D. Wis. 1987) (LCO IV)). No documentation suggests that consultation occurred or treaty rights were considered in the 1966 decision to grant the two leases.

Finally, since the last renewal of TMM's leases in 2004, we have gained experience with copper sulfide ore mining in different parts of the country. It is clear that these types of mines pose substantial risk of failure and environmental mitigation and remediation technologies are limited, and often ineffective, as discussed later in this letter. Awareness of the environmental effects of mining, specifically those from copper-nickel mining, has increased since 2004. While economic values are important to area communities and the nation, preserving Wilderness Areas and their associated qualities also have national and local support and precedent.

Evaluation of the Present Lease Application

In light of the M-Opinion's legal conclusion that TMM does not have the right to automatic renewal of its leases MNES-01352 and MNES-01353, on March 8, 2016 the BLM notified TMM that the agency would review the company's lease renewal application using the same criteria that are employed in deciding whether to grant initial hardrock mineral leases. The BLM's letter also specified that as part of its consideration of TMM's lease renewal application, the BLM would ask the FS whether it consents to the leases' renewal. In response to the BLM's June 3, 2016 letter making that request of the FS, the agency began considering whether to consent to the renewal of TMM's leases based upon the agency's recognition that it has full discretion to consent or withhold consent to the renewal of TMM's two leases.

As noted above, CEQ and FS NEPA regulations make clear that an application must be accepted by the agency as a proposal before NEPA obligations are triggered. At this time, the FS will not consent to lease renewal based on the submitted application and therefore does not have a goal that it is actively pursuing to authorize such activities. For this reason, no NEPA analysis is required.

Acid Mine Drainage

Bedrock geochemistry in northeastern Minnesota plays a large role in the low buffering capacity of the lakes and streams in the region. Both the Minnesota Pollution Control Agency and the Environmental Protection Agency (EPA) have identified the surface waters of northeastern Minnesota as sensitive to changes in pH, acid deposition, and acid runoff. Unlike surface waters bounded by carbonate bedrock, or relatively thick carbonate rich glacial till where neutralization of acid runoff occurs through dissolution of limestone and exsolution of carbon dioxide from water, the waters of northeastern Minnesota are largely underlain by igneous and metamorphic bedrock with thin overlying soils and surficial deposits with little acid neutralization capacity.

A risk of mining development is acid mine drainage (AMD). AMD generally occurs when sulfide minerals present in ore bodies and rock overburden are exposed to air and water. The exposure to air (oxidation) and water (hydrolysis) creates sulfuric acid, which subsequently increases water pH and leaches harmful metals such as copper, zinc, lead, cadmium, iron and nickel. FS data indicates between 20,000 and 50,000 mines currently generate acid on lands managed by the agency. Negative impacts from these mines affect 8,000 to 16,000 km of

streams. While AMD can originate naturally from the ore body itself, its likelihood is dramatically increased by the generation of any mining product (stockpiles, overburden, and tailings) exposed to air and water, and can continue for decades.

Hardrock mines in sulfide bearing mineralization are known worldwide for producing AMD that requires continuous management and perpetual water treatment. Production of AMD is prevalent in all mining operation elements: construction, waste rock, tailings, and mine structures such as pits and underground workings. Acid drainage is one of the most significant potential environmental impacts at hardrock mine sites.

Water from a mine site could potentially enter streams and lakes through wastewater treatment plant discharges, uncollected runoff and leakage, concentrate spills, pipeline spills, truck accidents, spillway releases, tailings dam failures, water collection and treatment operation failures, and post-closure failures. All carry some risk to the environment. The magnitude and setting of a failure would drive the significance of the environmental risk and its potential impact.

The AMD increases lake and stream acidity, with potential risks to aquatic life including sport fisheries. A decline in water quality and aquatic species would have a negative effect on recreational visitors to the BWCAW. For example, the USGS estimated that in 2010 approximately 3,000 miles of Pennsylvania streams degraded by acid mine drainage led to approximately $67 million in lost sport fishing revenue each year.

Mining accidents are inherently unpredictable and can result from geotechnical failures or human error. Other circumstances that can affect the likelihood of mining failures or discharges include changing metals markets, financial crises, political events, and climate change. In addition, climatic trends affecting the frequency and magnitude of storm events and seasonal temperatures could lead to unpredicted environmental changes in vegetative composition, water quality and quantity, and wildlife habitat making the environment more susceptible to damage resulting from mining operations.

There is a direct flow of water from the lands subject to TMM's leases to the BWCAW. Specifically, the leases are located within the South Kawishiwi River Watershed and the Birch Lake Watershed which both are catchments of the Rainy River Watershed. Water flows from the lands embraced by the northern lease into the South Kawishiwi River which in turn flows into Birch Lake. Water from the lands embraced by the southern lease also flows into Birch Lake and Birch Lake empties into the main Kawishiwi River and then into the BWCAW.

TMM's leases overlay the Duluth Complex known for nickel-copper-platinum group element ore deposits. Due to the inherent sulfide chemistry of this ore type, mining facilities and byproducts can produce significant amounts of acid. Consistent with the footprint and infrastructure of similar mines, as well as publically available preliminary information from TMM about this specific site, TMM's potential project area could include underground mine(s) producing mainly copper and nickel, plus smaller amounts of other metals. TMM's project would require a concentrator facility (potentially 1-2 miles west of the mine(s)), a tailing storage facility (potentially 13 miles southwest of concentrator), and connecting utility corridors. The utility corridors would include roads, rail lines, power transmission lines, natural gas pipelines, tailing

and concentrate pipelines, and water pipelines. TMM's Pre-Feasibility Study also reveals that its project would involve four delineated ore bodies – Maturi, Maturi Southwest, Birch Lake, and Spruce Road – all of which are north and east of the Laurentian Divide and thus in the watershed draining towards BWCAW.

TMM's mining operations are expected to dispose of some waste rock and tailings underground. Other waste rock and tailings would be disposed of using surface facilities. All of the waste rock and tailings derived from the sulfide ore bodies on the leases would have a high likelihood of oxidizing and becoming sources of AMD. TMM's Technical Report on Pre-Feasibility Study shows that TMM's subsurface mining operations would occur north of the Divide and present BWCAW contamination risks. That is also true of TMM's ore processing concentrator facilities. But TMM's Technical Report on Pre-Feasibility Study shows that TMM's tailings disposal facilities potentially would be south of Laurentian Divide in the Superior Watershed, which drains away from the BWCAW.

There are limitations in understanding the full contours of the mineral operations that ultimately might occur on TMM's leases, including the location of important features such as its tailings disposal facilities. The pre-feasibility study is an economic feasibility analysis, not TMM's final proposal to mine the hardrock mineral deposits. But pursuant to the terms of both 16 U.S.C. § 508b and Section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099-1100, the FS's consent is required for hardrock mineral development and the purpose of any lease, whether it is one issued in the first instance or a subsequent renewal, is mineral development. Indeed, the M-Opinion explicitly recognizes that "the entire purpose" of a mineral lease is "for the lessee to develop the minerals…." Another M-Opinion reports that since the 1970s hardrock prospecting permits for NFS lands, which are the precursor for the issuance of Preference Right hardrock mineral leases including MNES-01352 and MNES-01353, have been issued subject to the condition that "no mineral development of any type is authorized hereby." M-36993, Options Regarding Applications for Hardrock Mineral Prospecting Permits on Acquired Lands Near A Unit Of The National Park System (1998 WL 35152797 (April 16, 1998)). *See also John A. Nejedly Contra Costa Youth Association*, 80 IBLA 14, 26 (1984) (concurring opinion) (development under a preference right lease "is a logically foreseen result of successful prospecting").

Another factor relevant to assessing the likelihood of AMD if TMM develops a mine on the lands subject to the two leases it seeks to renew is that the waters in the Rainy River watershed flow largely through bedrock fractures with limited carbonate rock surface area. Therefore the watershed has low capacity to buffer AMD.

In sum, given the hydrology and hydrogeology of this area, the likelihood of these ore bodies being exposed to water is very high, and given these particular ore bodies' composition, resulting drainage from the mine workings and mining wastes are likely to be highly acidic.

Lessons from Similar Copper Sulfide Mines

Contamination from mining operations can also occur instantaneously via catastrophic failure of the type that occurred in 2014 at the Mount Polley Mine in British Columbia, Canada and at other copper mines. A review of water quality impacts from 14 operating U.S. copper sulfide

mines found: 100% of the mines experienced pipeline spills or accidental releases; 13 of 14 mines' water collection and treatment systems failed to control contaminated mine seepage resulting in significant water quality impacts; tailings spills occurred at 9 operations; and a partial failure of tailing impoundments occurred at 4 mines. The inherent risks of mining hardrock mineral deposits on the lands leased to TMM set a high bar for potential mineral development within this watershed due to potentially severe consequences for the BWCAW resulting from such failures. Because of the hydrology and hydrogeology of this particular area, should contamination occur, it could cover a very broad region.

Recent reviews of similar mining proposals in Minnesota and Alaska highlight inherent risks of metal mining to natural resources, and provide examples of risks associated with long term effectiveness of planned containment strategies. In Minnesota, the Final Environmental Impact Statement for nearby NorthMet Mining Project and Land Exchange recognizes that no matter the depth of analysis and planned containment strategies there remain uncertainties associated with mine development, operation and long-term water and waste rock treatment.

Similarly, the EPA, in a Proposal Determination Pursuant to Section 404(c) of the Clean Water Act for the Pebble Mine in Alaska, warns that, "There is also real uncertainty as to whether severe accidents or failures, such as a complete wastewater treatment plant failure or a tailings dam failure, could be adequately prevented over a management horizon of centuries, or even in perpetuity, particularly in such a geographically remote area subject to climate extremes. If such events were to occur, they would have profound ecological ramifications." While the ramifications of these risks are possibly greater in the case of the Pebble Mine, due to its location, the BWCAW shares many similarities in terms of hydrogeology, extreme weather and remoteness.

Unique Attributes of Copper Sulfide Ore Mining in the BWCAW Region

Many operating copper mines in the United States are situated in the arid southwest or other drier areas of the Nation. Northern Minnesota has an established history of taconite mining - indeed, the region to the west of the lease sites is known as the "Iron Range." However, taconite is an iron-bearing oxide ore. Mining of the copper-nickel sulfide ore found on TMM's leases is untested in Northern Minnesota. This lack of experience with copper-nickel sulfide ore mines in environments with the complex hydrogeology of northern Minnesota complicates assessment of the consequences of mining operations on TMM's leases, which could occur if those leases are renewed.

Another variable in assessing the consequences of these operations is climate change. In Minnesota, mean annual temperatures are expected to continue rising and precipitation is expected to increase, along with the size and magnitude of weather events. An increase in precipitation and water supply in association with significant events could exacerbate the likelihood of AMD and water resource contamination. The projected changes in climate and associated impacts and vulnerabilities would have important implications for economically important timber species, forest dependent wildlife and plants, recreation, and long-range planning. The combined impacts of contaminants from mineral development and climate change could impact the ecosystem resilience of the BWCAW and the Superior National Forest outside of the wilderness.

The NorthMet Mining Project and Land Exchange, the first copper-nickel mine proposed in Minnesota, has similar concerns regarding AMD, climate change, and water quality. These concerns were addressed in NorthMet's final EIS through engineering, permitting, and monitoring requirements. Significantly, the NorthMet project is located in an area either previously disturbed and/or surrounded by brown-field taconite open pit mines and waste piles in the Laurentian Watershed, which drains away from the BWCAW. In contrast, TMM's leases are in close proximity to the BWCAW and within its high quality watershed resource of outstanding value. The inherent and legislated wilderness values and untrammeled qualities of the BWCAW contrast with the extensively disturbed surroundings of NorthMet's location. Additionally, if there is any potential for NorthMet's copper-nickel mining project to affect the BWCAW and MPA, this potential would be far less than that associated with any copper-nickel mining operations TMM might ultimately conduct.

If TMM ultimately conducts mining operations on lands subject to its two leases and they result in AMD, metal leaching, and water contamination, very few of the available containment and remediation strategies would be compatible with maintaining the BWCAW's quality and character. Available containment and remediation strategies such as sediment basins, water diversions, or construction and long-term operation of water treatment plants have the potential to deleteriously affect the BWCAW. Of particular concern, given the location of TMM's leases, is the effectiveness of available methods to counteract AMD in the case of seepage, spills, or facility failures. Water is the basic transport medium for contaminants. Consequently, all measures aimed at controlling AMD generation and migration involve controlling water flow. To reduce the generation and release of AMD, the infiltration of meteoric water (rain and snow) can be retarded through the use of sealing layers and the installation of under-drains, respectively. Diversion of contaminated water most commonly requires installation of ditches or sedimentation ponds. But even with the use of these measures successful long-term isolation of intercepted contaminated groundwater is, at best, very difficult to achieve.

Moreover, even if available remediation techniques to handle contaminated water, such as flushing, containment and evaporation, discharge through wetlands, neutralization and precipitation, desalination, water treatment plant construction and operation, utilization of ditches or sedimentation ponds, and installation of cut-off walls, trenches or wells, are effective, very few, if any, of them are compatible with maintaining the quality and character of BWCAW and MPA, as required by the Boundary Water Canoe Area Wilderness Act. Given the TMM's leases' proximity to the BWCAW's boundary (adjacent to in one case and less than 3 miles distant in the other) and the direct transport route of surface water from Birch Lake and the Kawishiwi River, it is reasonable to expect direct effects of any mining operations on those leases to the BWCAW and MPA.

Potential Impacts to Water, Fish, and Wildlife

As noted above, the potential for environmental harm is inherent to copper-nickel and other sulfide-bearing ore mining operations. This potential exists during all phases of mine development, mineral extraction and processing, and long-term mine closure and remediation. Expected environmental harm could encompass damage to both surface and ground water resources, including changes in water quantity, quality, and flow direction, contamination with acid and leached metals resulting from AMD and tailings disposal facility failures, and more. It

is also well established that this environmental damage can adversely affect fish populations and aquatic ecosystems directly and by indirect effects on food supplies and habitat. Recognizing this potential harm, the second edition Rainy-Lake of the Woods State of the Basin Report (2014) recommends scientifically examining the effect of new mining proposals on water quality in the Rainy River Watershed.

TMM's leaseholds lie within the Rainy River's Birch Lake Sub-Watershed (HUC 10) which the SNF has identified as a priority watershed per the FS's Watershed Condition Framework. The Framework is a comprehensive approach for: 1) evaluating the condition of watersheds, 2) strategically implementing integrated restoration, and 3) tracking and monitoring outcome based program accomplishments. According to the Watershed Restoration Action Plan for Birch Lake the watershed is currently functioning at risk, based on fair ratings for aquatic biotic condition, water quality condition, aquatic habitat condition, soil condition, and fire effects/fire regime condition. The Action Plan recognizes that further development in the watershed has the potential to move the watershed from its suboptimal level of functioning at risk to the worst level of impaired functioning.

As noted previously, the BWCAW and SNF are home to dozens of sensitive species. Three species, the Canada Lynx, gray wolf and northern long-eared bat, are listed as threatened. Crucially, the BWCAW and SNF are considered critical habitat for the threatened Canada Lynx, which requires spruce-fir boreal forest with dense understory. Canada Lynx cover large areas, traveling extensively throughout the year, meaning that development and habitat fragmentation can affect the viability of lynx populations.

The threatened northern long-eared bat lives in both Lake and St. Louis County, where TMM's leases are located. The northern long-eared bat spends its winter hibernating in caves. In summer it roosts in both live and dead trees, as well as caves. Northern long-eared bat populations are under significant stress from White-nose Syndrome, which has caused drastic declines in bat populations across the country. Increased impacts to their habitat could exacerbate population decline.

The gray wolf population in the western Great Lakes, including the BWCAW, was re-listed as threatened in 2014 by the Fish and Wildlife Service. Gray wolves also cover large areas to hunt, so wolf populations can be impacted by development and habitat fragmentation. Other animals benefit from wolves living in northern Minnesota as carcasses wolves leave behind feed many other animals.

Northern Minnesota is one of the few places in the continental U.S. where visitors can see moose. However, the state's iconic moose population continues to decline – decreasing by approximately 60 percent in the last decade, according to Minnesota's State Department of Natural Resources. Given this population decline, the U.S. Fish and Wildlife Service (FWS) initiated a status review for the U.S. population of northwestern moose (i.e., those in Michigan and Minnesota). The status review was initiated as a result of a positive 90-day finding on a petition to list moose under the Endangered Species Act. FWS determined information in the petition provided substantial scientific or commercial information indicating that species listing may be warranted.

Moose often gather around ponds, lake shores, bogs and streams where they feed on aquatic vegetation. They are under stress from climatic change, likely due to a greatly increased number of ticks brought about by warmer summers. Therefore they are ever more dependent on the extensive, high quality habitat available in the BWCAW. Additional development, such as mining activity and associated road building, in the vicinity of the BWCAW could lead to habitat fragmentation that may further stress the moose population. While contamination of BWCAW waters by acid and leached metals could lead to habitat degradation that would also add to the moose population's stress.

The potential impacts of mining activities also could affect other species dependent upon forested areas through habitat fragmentation, increased dispersal of invasive plant and animal species, and alterations to wildlife migration and residence patterns.

Social and Economic Considerations

The State of Minnesota has primary responsibility under the Clean Water Act of 1972 to protect the water quality of the BWCAW and identifies the wilderness area as an "outstanding resource value water" under Minnesota Rules (Minn. R. 7050.0180). That section also provides that "[n]o person may cause or allow a new or expanded discharge of any sewage, industrial waste, or other waste to waters within the Boundary Waters Canoe Area Wilderness."

On March 6, 2016, Minnesota Governor Mark Dayton sent, and publicly released, a letter to TMM stating that he had directed the State's Department of Natural Resources "not to authorize or enter into any new state access or lease agreements for mining operations on those state lands" near the BWCAW. The Governor stated he has grave concerns about the use of state surface lands for mining near the BWCAW:

"[M]y concern is for the inherent risks associated with any mining operation in close proximity to the BWCAW and … about the State of Minnesota's actively promoting advancement of such operations by permitting access to state lands."

"As you know the BWCAW is a crown jewel in Minnesota and a national treasure. It is the most visited wilderness in the eastern US, and a magnificently unique assemblage of forest and waterbodies, an extraordinary legacy of wilderness adventure, and the home to iconic species like moose and wolves. I have an obligation to ensure it is not diminished in any way. Its uniqueness and fragility require that we exercise special care when we evaluate significant land use changes in the area, and I am unwilling to take risks with that Minnesota environmental icon."

As a partner in managing and conserving natural resources within the State of Minnesota, the FS takes Governor Dayton's statements seriously. The FS shares many of the Governor's concerns. These shared concerns also support the decision to withhold consent to renewal of leases MNES-01352 and MNES-0153.

The FS was aware of negative public sentiment regarding other mineral related projects on nearby SNF lands and many people's concern about the possible renewal of leases MNES-01352 and MNES-01353. Consequently, on June 13, 2016 the FS announced it would provide a 30-day public input period commencing June 20, 2016 and including a listening session on July 13,

2016 to better understand public views about renewal of TMM's two leases. A second listening session on July 19, 2016 was subsequently announced.

Individuals and organizations expressed passionate views both in support of and opposition to renewing the leases during the input period and listening sessions. In addition, TMM submitted comments for the record during the public input period. Overall the FS received over 30,000 separate communications is response to the listening sessions. In total, this input provided FS decision makers the fullest possible understanding of public views and concerns regarding the proposed lease renewals.

Local sentiment is similarly mixed regarding the desirability of TMM developing a mine on the lands subject to its two leases. Northeastern Minnesota has a long history of mining, and much of the local economy along the Iron Range remains dependent on iron mining. Ely, Virginia, and other local communities, have a long-standing social identity associated with mining. During the two listening sessions, elected officials, union representatives, and miners expressed their concerns regarding the future of these communities, mining-associated tax revenues that support schools and local services, and high-paying jobs for future generations. These mining proponents often cited the potential economic benefits of mining, should TMM develop a mine on its leases. They also stated that young people and families are leaving the area due to a depressed local economy. Mining proponents also referred to the need for strategic metals for American industry and national defense, including their use in sustainable technologies such as wind turbines and hybrid cars.

Those who oppose TMM's development of a mine on the lands subject to its two leases emphasize the copper-nickel mining industry's history of causing serious environmental harm, the potential mine's proximity to the BWCAW, the interconnected hydrology of the leased lands and the BWCAW, and the probable negative impacts to water quality, quantity and aquatic ecosystems downstream from any mine TMM establishes. These mining opponents often stated that mining has created a boom-bust economy that only now has stabilized with the creation of sustainable recreation-based jobs reliant on an unspoiled environment. They also raised concerns about the probable negative impacts any TMM mine would have on the quality of individuals' future recreational experiences in the BWCAW, maintenance of the BWCAW's wilderness character, and preservation of the BWCAW for future generations.

In its Technical Report on Pre-Feasibility Study, TMM estimates the company's initial capital investment for mine construction will be $2.77 billion while over the projected 30-year life of the mine its total capital investment will be $5.41 billion. TMM also estimates the potential economic contributions of mining the copper-nickel deposits underlying its two leases could include the need for close to 12 million labor hours during the estimated three-year mine construction period and approximately 850 full-time jobs when the mine becomes operational.

Based on accepted multipliers of direct and indirect economic contribution, TMM's mining operations predicated upon its two leases might generate approximately 1,700-1,900 additional indirect jobs in the region's economy.

Conversely, across the country, counties with designated wilderness areas are associated with rapid population growth, greater employment, and enhanced personal income growth, relative to

counties lacking wilderness areas. This is attributable to the increasing mobility of service jobs, and many entrepreneurs' preference to locate their businesses in areas offering a high quality of life. Specifically, up to 150,000 visitors visit the BWCAW annually. Economic benefits generated by BWCAW-related recreation have been estimated at approximately $44.5 million annually. The wilderness recreation-based tourism and any derivative economic return is dependent upon preserving the BWCAW's natural quality and wilderness character.

With passage of the Boundary Waters Canoe Area Wilderness Act in 1978, the business model of industries and communities associated with the BWCAW shifted. Timber production was halted. Many resorts located within the wilderness were bought out by the federal government and others received financial assistance to shift to a wilderness based business model. Gateway communities such as Ely, Tofte and Grand Marais have also shifted to wilderness based economics. While the transition has been long and often difficult these communities are now highly dependent on revenue generated by the BWCAW for economic sustainability. Potential unforeseen impacts to natural resources and water quality within the BWCAW would likely result in substantial economic impacts to established local businesses and communities now dependent upon a wilderness based business model.

On April 15, 2015, Congresswoman Betty McCollum (D-MN) introduced the National Park and Wilderness Waters Protection Act (H.R. 1796). The Act would withdraw all federal lands in the Rainy River Watershed from the mining laws, the mineral leasing laws, and the laws governing the disposal of mineral materials, subject to valid existing rights. The Act also would impose additional restrictions on the issuance of any lease or permit for mineral related activities. In a February 2, 2016, letter to the Secretaries of Agriculture and the Interior and the Director of CEQ, Congresswoman McCollum urged them "to immediately take action to protect two of America's natural treasures – the BWCAW and Voyageurs National Park." Specifically, Congresswoman McCollum requested the denial of TMM's requested lease renewals and administrative withdrawal of the Rainy River watershed.

Former Vice President—and former Minnesota Senator—Walter Mondale also has advocated that the Department of the Interior deny the renewal of TMM's leases and withdraw all federal minerals in the BWCAW's watershed. On April 1, 2016, he wrote that "Arizona has its Grand Canyon, Wyoming its Yellowstone, California, its Yosemite. These wonders come to mind unbidden as images of a place when those states are named. The Boundary Waters is such an image for Minnesota." Vice President Mondale goes on to say:

"Vice President Hubert Humphrey and I were deeply committed to protection of the Boundary Waters and its precious waters. Although we were mindful of the need for jobs, we knew that it was important to protect the magnificence of the Boundary Waters. The Twin Metals mining proposal lacks this balance. That means that today I join Minnesota's Gov. Mark Dayton and urge the federal land management agencies to continue the work of nearly 100 years and to ensure that the Boundary Waters wilderness remains the place it is today."

Then in a July 1, 2016 letter characterizing the BWCWA as pristine and irreplaceable wilderness, Vice President Mondale warned that the kind of heavy-metal mining that TMM proposes:

"…is in a destructive class all its own. Enormous amounts of unusable waste rock containing sulfides are left behind on the surface. A byproduct of this kind of mining is sulfuric acid, which often finds its way into nearby waterways. Similar mines around the country have already poisoned lakes and thousands of miles of streams. The consequence of acid mine drainage polluting the pristine Boundary Waters would be catastrophic. It is a risk we simply can't take."

Conclusion

The FS understands the important economic and national security benefits provided by mineral extraction and supports mining as a legitimate activity on NFS lands. However, mining is not appropriate on all places within the NFS or on every acre of NFS lands. When evaluating whether to consent to issuance of an initial lease or the lease's renewal, the FS may consider the unique ecological and cultural attributes of all NFS lands that might be adversely affected by mineral development on the leasehold along with the social and economic consequences that could flow from both a decision to consent and to withhold consent. The FS also has an affirmative responsibility to protect and maintain the character and quality of the BWCAW and MPA for present and future generations. Sec. 2, Pub. L. 95-495, 92 Stat. 1649 (1978). Thus the agency may weigh the possible benefits of TMM's potential mineral development against the possible harm TMM's potential mineral development might do to the BWCAW's uniquely valuable landscape.

TMM's potential mineral development on its two leaseholds might contribute markedly to employment and economic growth in St. Louis County, Lake County, and nearby areas. Copper-nickel mining conducted by TMM also would furnish metals important to U.S. industries and modern technology. Deposits of copper are relatively abundant in the United States and many operating copper mines in the United States are situated in arid or drier areas of the Nation where their potential for environmental harm may be reduced. The United States Geological Survey reported that as of 2015 there was only one operating nickel mine in the United States but nonetheless nickel was in oversupply and three other U.S. mining projects that would supply nickel were in development.

The BWCAW contributes to the cultural and economic sustainability of communities within the State of Minnesota, the Nation and beyond and to the ecological sustainability of unique landscapes and rare species dependent upon those landscapes that are valued within the State of Minnesota, the Nation and beyond. The BWCAW is irreplaceable, but likely irreparable in the event of its significant degradation.

Based on information provided by TMM to date (e.g., its Technical Pre-Feasibility Report), existing science, and examination of similar proposals, there is no reason to doubt that the mining operations TMM hopes to eventually conduct could result in AMD and concomitant metal leaching both during and after mineral development given the sought after copper-nickel ore is sulfidic. This fact is very significant given TMM's two leases are adjacent or proximate to the BWCAW and within the same watershed as the wilderness. It might be possible for TMM to develop a mine which employs mitigation and containment strategies that reduce the mine's potential to cause AMD and leached metals that could harm the wilderness. However, at the very least it is equally possible that available water treatment technologies would be unable to prevent the spread of any AMD and leached metals in the watershed. Further, there appears to be even

less likelihood that any contamination of the BWCAW resulting from TMM's mining operations could later be remediated, especially not in a manner compatible with the BWCAW's wilderness character. Moreover, any degree of contamination of the BWCAW by AMD and leached metals has the potential to seriously degrade the wilderness area's character and quality. Thus, even if the probability that TMM's mining operations might generate and release of AMD and leached metals was very low, which the FS does not believe to be the case, the environmental harm to the BWCAW that could result from any contamination of the area with AMD and leached metals might be extreme. Failing to prevent such damage also is contrary to Congress' determination that it is necessary to "protect the special qualities of the [BWCAW] as a natural forest-lakeland wilderness ecosystem of major esthetic, cultural, scientific, recreational and educational value to the Nation." Sec. 1, Pub. L. 95-495, 92 Stat. 1649 (1978).

Balancing what are primarily economic benefits of the mining operations that TMM hopes to conduct in connection with the renewal of its two leases against even a remote possibility of damaging the BWCAW—a unique ecosystem that Minnesota elected officials have fittingly called irreplaceable and a national treasure—makes it clear that it is incumbent upon the FS to withhold consent to the renewal of TMM's leases MNES-01352 and MNES-01353.

This decision withholding consent to the renewal of TMM's leases is subject to discretionary review by the Under Secretary for Natural Resources and Environment pursuant to 36 C.F.R. § 214.7(b), but not appeal pursuant to 36 C.F.R. part 214 (36 C.F.R. § 214.7(a)(2)). No additional information may be considered by the Under Secretary for Natural Resources and Environment in connection with the discretionary review of this decision (36 C.F.R. § 214.19(b) & (e)).

Sincerely,

Thomas L. Tidwell

THOMAS L. TIDWELL
Chief