

## A Brief Overview of What's Happening

Very briefly (see Background, below, for more information), the December 22, 2017 Memorandum Opinion by the Deputy Solicitor for the Department of the Interior reverses a Memorandum Opinion issued in March 2016 by the DOI Solicitor (the Interior Department's top lawyer). The M-Opinions address the issue of whether two federal minerals leases held by Twin Metals (owned by Antofagasta) were automatically renewable or renewable at the discretion of the BLM. The 2016 Opinion said that renewal was discretionary because the two leases were preference rights leases with discretionary renewal language. The 2017 Opinion said that the preference rights leases were ambiguous and therefore one needed to look at all the facts to determine the parties' intent. It concluded that Twin Metals is entitled to an automatic renewal of its leases, and therefore the Forest Service's withholding of consent to a renewal is not valid. We anticipate that the BLM will reinstate the expired mineral leases and move forward to consider renewals of the two leases.

If the Twin Metals leases are renewed, the company may proceed to develop its mining plans and submit them for additional environmental review for operating permits. Review for operating permits is narrow and does not include consideration of whether sulfide-ore copper mining is appropriate for national forest lands in the watershed of the Boundary Waters. And it is likely to be wrong. A peer-review study of how mines have actually performed relative to modeling for water quality for modern hard rock mines has shown that such modeling - and projections - are wrong roughly 9 out of 10 times for mines located near waters. For sulfide-ore copper mines, 100% have polluted water. This is why a decision on location is critical. Mines pollute - a problem not solved with moderate mines, and especially a problem in a water-intensive ecosystem.

We intend to challenge the December 22, 2017 decision in court.

Popular questions:

**1) The Twin Metals mine still needs to go through a lengthy permitting process, right? Are both federal and state agencies involved? If so, which are the major agencies?**

We're not yet close to that point, and we will challenge the new M-Opinion's legality, but potentially, yes. The key thing to understand is that if the federal agencies succeed in reinstating and renewing the two leases, then by their terms those leases would give Twin Metals/Antofagasta the *right* to build a mine – even if the federal mineral withdrawal goes through in the meantime.

That is why the new M-Opinion should be seen as an attempt to do an end-run around the environmental review already underway on the proposed withdrawal of federal minerals from the federal mining program. The M-Opinion is how the administration is trying to lock-in TMM/Antofagasta's right to mine before the current environmental review is completed. The administration knows that the current environmental review will show that the watershed of the Boundary Waters is the wrong place to allow sulfide-ore copper mining.

If the new M-Opinion is not tossed out by a court and this attempt to resuscitate and renew the leases is not blocked, then decisions on mine permitting likely would be made by the Minnesota Department of Natural Resources, the Army Corps of Engineers, and the EPA.

**2) My understanding is that parts of the lease are surrounded by state-owned land and Dayton is blocking (or will block) access through those state-owned parcels. Is that true, or just speculation?**

See the attached map, showing the lands covered by the two leases (#1352 and #1353). Yes, Dayton said the company could not cross or otherwise use state lands. He opposes sulfide-ore copper mining in the watershed of the Boundary Waters. Governor Dayton made clear his position in a letter to the company, and he directed the state DNR not to allow use or crossing of state lands by the mining company.

**3) About the reversal ... was the decision to allow the Twin Metals to retain its leases. But the rest of the 235k acres that the Obama administration blocked from future mining activity is still being blocked, right? In other words, the decision opened the door only for the Twin Metals leases, not other future leases in the area?**

The effect of the Dec. 22, 2017 M-Opinion was to resuscitate TMM's expired leases. They have yet to be renewed, though we expect the BLM to move to do so soon.

The proposed 20-year federal mineral withdrawal covering 234,328 acres of federal lands in the watershed of the Boundary Waters is still in-process and environmental review is underway. Likewise, the 2-year segregation to allow environmental review to be completed on the proposal is still in place. We are almost halfway through the 2-year segregation, during which time no new mineral leases or new exploration permits may be issued. Correct, the new M-Opinion applies only to the two leases held by TMM. Those are the only two federal mineral leases ever granted in the watershed of the Boundary Waters.

**Background:**

The laws governing the leasing of federal minerals beneath Minnesota's national forest lands (Section 402 of Reorganization Plan No. 3 of 1946 addresses acquired lands; the Act of June 30, 1950 addresses public domain lands) require consent of the Forest Service on any proposed mineral leasing on both public domain and acquired lands. Congress has given the Forest Service the power to consent or withhold consent to mining when it comes to mining on National Forest System lands in Minnesota. This is appropriate, considering the vast amount of high-quality lakes, rivers, streams, wetlands, and groundwater.

In October, 2012, when Twin Metals applied for a third 10-year renewal of the two leases and claimed an automatic right to the third renewal, the BLM asked the Department of Interior Solicitor's Office (the DOI Solicitor is the Interior Department's top lawyer) whether Twin Metals was automatically entitled to a third lease renewal, or whether instead it was up to the discretion of the federal agencies. On March 8th, 2016, the Solicitor issued its determination in a substantial document called a Memorandum Opinion.

The 2016 Solicitor's M-Opinion concluded that mining company Twin Metals Minnesota had no legal right to a third renewal of the expired mineral leases, but rather that whether or not to renew the expired leases is a decision within the discretion of Secretary of the Interior and its Bureau of Land Management – and because the BLM had discretion, the USFS as surface land manager had to be asked whether it would consent to a lease renewal. The 2016 M-Opinion explains, painstakingly, that under the terms of the original leases the lessee (now Twin Metals) is entitled to three successive 10-year renewals of the leases unless at the end of the original 20-year lease the lessee had not begun production (i.e., mining). The leases allow the Secretary of Interior to grant a single 10-year extension of time for the commencement of production, but the lessee is not entitled to any subsequent lease renewals unless production begins during the extended time.

Production under the two federal mineral leases (the only two federal mineral leases in the watershed of the Boundary Waters) has never begun – neither during the 20-year primary term, nor during the first lease renewal term. In addition, the Secretary of Interior did not grant an extension of time for beyond the primary lease term for commencement of production. As a result, the Solicitor determined in its 2016 M-Opinion, Twin Metals had no legal right to an automatic third renewal of the expired leases.

That left the decision of whether to renew the expired leases up to the discretion of the BLM and USFS. The BLM asked the USFS in June, 2016 whether it would consent or not to renewal of the two leases.

Between early June, 2016 and mid-December, 2016, the Forest Service received public comment and hosted listening sessions during a 30-day public input period, and carefully considered the public input and factual and scientific evidence received, and announced that it declined to consent to renewal of the two leases. The next day, the BLM informed Twin Metals/Antofagasta that its application for

renewal of the expired leases was denied. That decision meant the mineral leases were terminated, and ceased to exist.

Regarding the mineral withdrawal:

At the same time, the USDA-Forest Service and DOI-Bureau of Land Management announced that they would start the process to withdraw federal minerals in the Boundary Waters watershed from the federal mineral leasing program for a period of two decades. The Forest Service submitted its formal application for renewal, and notice of the withdrawal application was published in the Federal Register, which had the effect of starting the clock on a 2-year segregation to allow the Forest Service time for preparation of an EIS on the proposed withdrawal. The Forest Service opened the EIS process by asking for public comments on the proper scope of the withdrawal proposal EIS. More than 125,000 people submitted scoping comments online or in writing. The federal agencies also hosted three public comment meetings, which were attended more than 3,000 people. Those who spoke in favor of the mineral withdrawal outnumbered those who opposed it by 2:1.

During the 2-year segregation, no new mineral leases and no new mineral exploration permits may be granted. When the EIS is complete, the Secretary of the Interior will make a decision on whether to order or deny the proposed 20-year withdrawal. Federal law (the Federal Land Policy Management Act, or FLPMA) makes clear that anytime a withdrawal is ordered, it takes effect subject to "valid existing rights." A valid existing right includes a current mineral lease, but it also includes a mineral lease that is being considered for renewal and later is in fact renewed. It does not include a lease that has been canceled.

On December 22, 2017, roughly one year into the 2-year segregation, the Deputy Solicitor of the DOI issued a new M-Opinion, which by its terms reverses the M-Opinion issued in March 2016 by the DOI Solicitor (the Interior Department's top lawyer). Both the M Opinions address the issue of whether two federal minerals leases held by Twin Metals (owned by Antofagasta) were automatically renewable or renewable at the discretion of the BLM. The 2016 Opinion said that renewal was discretionary because the two leases were preference rights leases with discretionary renewal language. The 2017 Opinion said that the preference rights leases were ambiguous and therefore one needed to look at all the facts to determine the parties' intent. It concluded that Twin Metals is entitled to an automatic renewal of its leases, i.e., that the BLM did not have discretion and therefore the Forest Service's withholding of its consent to a renewal was invalid.

The effect of the new M-Opinion, from the perspective of the two leases, is to resuscitate them. DOI and Twin Metals/Antofagasta would argue that means that even if the requested mineral withdrawal is ordered later by the Secretary of Interior, Twin Metals' two leases would be considered "valid existing rights," giving Twin Metals/Antofagasta the right to mine despite the withdrawal. We anticipate that the BLM will announce the reinstatement of the expired mineral leases and move forward to consider renewals of the two leases.