IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VOYAGEUR OUTWARD BOUND SCHOOL *et al.*, *Plaintiffs*, v. UNITED STATES *et al.*, *Defendants*, and TWIN METALS MINNESOTA LLC *et al.*, *Defendant-Intervenors*.	Case No. 1:18-cv-01463-TNM
THE WILDERNESS SOCIETY *et al*., *Plaintiffs*, v. RYAN ZINKE *et al.*, *Defendants*, and TWIN METALS MINNESOTA LLC *et al.*, *Defendant-Intervenors*.	Case No. 1:18-cv-01497-TNM
FRIENDS OF THE BOUNDARY WATERS WILDERNESS, *Plaintiff*, v. BUREAU OF LAND MANAGEMENT *et al.*, *Defendants*, and TWIN METALS MINNESOTA LLC *et al.*, *Defendant-Intervenors*.	Case No. 1:18-cv-01499-TNM

PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

At issue in this case is the reinstatement of two mineral leases on the edge of the Boundary Waters Canoe Area Wilderness ("Boundary Waters Wilderness") in the Superior National Forest, a 1.1-million-acre wilderness area in Northern Minnesota that has been federally protected for nearly 100 years. The area's interconnected network of lakes, wetlands, rivers, and streams contains some of the cleanest water in America, and offers unmatched fishing, hunting, and year-round recreational and economic opportunities.

On December 15, 2016, in a final agency action approved by the Deputy Secretary for the Department of Interior, the Bureau of Land Management rejected intervenor Twin Metals Minnesota's application to renew the leases (the "2016 Denial"). The Bureau's decision was based on a thorough legal opinion of the Solicitor of the Department of the Interior (the "First M-Opinion"), which concluded that the leases' unambiguous terms gave the Bureau discretion to decide whether or not to renew the leases. Consistent with the statutory scheme and the government's prior practice, the Bureau asked the U.S. Forest Service, which is responsible for the surface resources, if it consented to renewal. The U.S. Forest Service did not consent due to significant risks to the Boundary Waters Wilderness and water quality. Based on this lack of consent, the Bureau declined to renew the leases. As a result of this final agency action, Twin Metals' leases expired.

More than a year later, on May 2, 2018, the Principal Deputy Solicitor issued a new opinion (the "Second M-Opinion") that purported to reverse the First M-Opinion. This opinion concluded that the Bureau lacked discretion over renewal of the leases and was required to renew them. Based on the Second M-Opinion, the Bureau then purported to reinstate the leases that had expired as a result of the Bureau's final action more than a year earlier (the "2018 Reversal").

This case challenges the unlawful 2018 Reversal and the Second M-Opinion that serves as its basis.

The 2018 Reversal exceeds the Bureau's authority. There is no statute or regulation that gives the Bureau authority to reinstate expired mineral leases. Although the 2018 Reversal states the Bureau's previous final decision was based on a legal error, there is no error in the 2016 Denial or the First M-Opinion, let alone any error within the narrow category of clerical mistakes and inadvertent failures to consider relevant factors courts have authorized agencies to correct absent explicit statutory authority. Moreover, the decision is arbitrary and contrary to law because it is based on the Second M-Opinion, which ignores the unambiguous renewal term in the current leases; fails to apply an important rule of construction for government contracts; and in resorting to parol evidence fails to address facts that contradict its conclusion.

By unlawfully and arbitrarily disavowing its discretion to deny Twin Metals' renewal application, the Bureau short-circuited statutory obligations Congress imposed on both the Bureau and the Forest Service to protect the public interest and the valuable surface resources of the Boundary Waters Wilderness and the Superior National Forest. The Forest Service concluded in its non-consent decision that renewing the leases is inconsistent with these statutory obligations. The Bureau now ignores that determination, issued per the statutory scheme, and incorrectly treats the Forest Service's decision as "not legally operative."

For all these reasons, the Plaintiffs ask the Court to vacate the 2018 Reversal and the Second M-Opinion on which it is based.

LEGAL FRAMEWORK

The leased land at issue in this case is in the Superior National Forest in Minnesota, within the watershed of and partially abutting the Boundary Waters Wilderness. BLM-000387;

See BLM-000678 (map showing the Boundary Waters Wilderness in dark green and the leases in bright red). Of the leased land, over 90% is land withdrawn by the United States from the public domain for the federal government, and the remainder is land acquired by the United States under the Weeks Act. BLM-000393–94.

The Secretary of Agriculture, acting through the Forest Service, is responsible for managing the resources of the Superior National Forest and the Boundary Waters Wilderness. The Secretary of Agriculture must manage Superior National Forest land so as to preserve its productivity, provide for diverse plant and animal communities, and prevent serious adverse effects to water quality and fish habitat. *See* 16 U.S.C. § 1604(g)(3). In particular, the Secretary has an affirmative obligation to preserve the wilderness character and values of the Boundary Waters Wilderness. *See* Boundary Waters Canoe Area Wilderness Act, Pub. L. 95-495, 92 Stat 1649, § 4(a) (1978); 16 U.S.C. § 1133(b).

The General Mining Act of 1872, which governs hardrock mining and mineral leasing in most of the country, does not apply in Minnesota. *See* 30 U.S.C. § 48. The Bureau may only authorize hardrock mineral development in the Superior National Forest with the Forest Service's consent, under statutes specific to the category of land involved. For Superior National Forest land withdrawn from the public domain, which is over 90% of the leased land, the governing statute provides:

> [T]he Secretary of the Interior is authorized, under general regulations to be prescribed by him and upon such terms and for specified periods or otherwise as he may deem to be for the best interests of the United States, to permit the prospecting for and the development and utilization of [mineral resources on withdrawn lands in Minnesota national forests]: *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.

16 U.S.C. § 508b (emphasis in original). On land the United States acquired under the Weeks Act, which is less than 10% of the leased land, the Secretary of Agriculture is authorized to permit prospecting and development of mineral resources. 16 U.S.C. § 520. Section 402 of Reorganization Plan No. 3 of 1946 transfers these Weeks Act functions from the Secretary of Agriculture to the Secretary of Interior, and provides, similar to the statute governing withdrawn lands:

> [M]ineral development on such lands 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.

5 U.S.C. App 1 (Reorganization Plan No. 3 of 1946, § 402). The Bureau's general regulations for mineral leasing at 43 C.F.R. part 3500 also address hardrock mineral leasing under 16 U.S.C. § 508b and Section 402 of Reorganization Plan No. 3 of 1946. *See* 43 C.F.R. §§ 3503.13(a)(1), (c). They state that such hardrock mineral permits and leases are "[s]ubject to the consent of the surface managing agency." *Id.* § 3503.13.

FACTUAL BACKGROUND

I. IN 1966, THE BUREAU ISSUED TWO 20-YEAR MINERAL LEASES IN THE SUPERIOR NATIONAL FOREST, WITHIN THE WATERSHED OF AND IN PART ADJACENT TO THE FEDERALLY PROTECTED BOUNDARY WATERS WILDERNESS.

The Bureau issued hardrock leases MNES 1352 and MNES 1353 in June 1966, conveying to the International Nickel Company (INCO) an exclusive right to mine for copper, nickel, and associated minerals for a 20-year primary term.[1] BLM-003603–04 (section 1).

[1] The two leases are virtually identical to each other except as to the land described, both in 1966 and as renewed. *See* BLM-003603–14; BLM-003615–25; BLM-002753–56; BLM-002757–63; BLM-002553–57; BLM-002558–62. Therefore, for simplicity, this brief will cite to only one of the two leases.

In negotiating the leases, INCO initially demanded a 50-year term. BLM-003794–95; BLM-003811–12; BLM-003797. The Bureau rejected that proposal because it would allow INCO to delay production for 49 years. BLM-003794; BLM-003740; BLM-003796. The agency wanted to ensure that INCO would put the leases to productive use in a timely manner, and viewed it as "customary for lessees to obtain production prior to the 5th, 10th, or 15th lease years." BLM-003794; *see also* BLM-003685; BLM-003802–03. Instead of 50-year leases, the Bureau offered the leases for 20 years and incorporated special incentives to induce mineral production within that 20-year primary term.[2] The Bureau wanted "the best possible assurance that the company would begin productive operations during the primary term." BLM-003758. Among the incentives was a right to renew for an additional 30 years (through three 10-year renewals)—essentially, converting the 20-year leases to INCO's desired 50-year term—which INCO could obtain *only* by starting production during the primary 20-year term:

> . . . the Lessee shall have the right to three successive ten-year renewals of this lease with any readjustment in the royalties [limited as specified] 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.

[2] The 1966 leases provide for more favorable royalty rates if the lessee sinks an underground exploration shaft quickly, and establish a higher-than-usual minimum royalty rate, which is the amount the lessee pays the Bureau when there is no production. BLM-002811–12; BLM-003604 (section 2(c)); BLM-003613 (section 14).

BLM-003610 (section (5)).[3] Unless production started within the primary 20-year term, renewal would be discretionary.[4] Bureau staff confirmed this point, observing that the Secretary of Interior has a "right not to renew in the absence of production." BLM-003789. Similarly, a June 14, 1966 Department of Interior news release explained that the leases "grant mining rights to the company for 20 years, renewable for 30 years at 10-year intervals *if the property is brought into production within the initial 20-year term*." BLM-003630 (emphasis added).

As noted above, the leased land is in the Superior National Forest, within the watershed of and in part abutting the Boundary Waters Wilderness. *See supra* pp. 2–4. The Boundary Waters Wilderness is an undeveloped expanse of protected federal land located in the northern third of the Superior National Forest in Minnesota, extending along the international boundary with Canada. It is comprised of sub-boreal forest interspersed with more than 2,000 pristine, interconnected lakes, and is rich in recreational and scientific research opportunities, cultural resources, fish, wildlife, and high-quality fresh water. *See* BLM-000387–90. It is one of the most visited areas in the entire National Wilderness Preservation System. *See* BLM-000390. The Superior National Forest, of which the Boundary Waters Wilderness is a part, contains 20 percent of all the fresh water in the entire National Forest System. *See* BLM-004795. Water from the leased land flows directly into the Boundary Waters. BLM-004806.

[3] Section 1 of the leases also addresses renewal, granting "a right in the Lessee to renew … 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*" (emphasis added). As the emphasized language makes clear, any right to renew under Section 1 is conditioned by other provisions of the lease, including the production requirement of Section 5.

[4] The leases allow the Bureau to grant an "extension" of the time to commence production and trigger entitlement to renewal. The leases make clear that extension is distinct from renewal. There is no indication the Bureau granted an extension at any point in the history of these leases.

As far back as 1926, the Department of Agriculture recognized the value of preserving the primitive character that can still be seen today in the Boundary Waters Wilderness. *See* BLM-000389. Recognizing that the area was threatened by the encroachment of human activity and development, Congress determined that the Boundary Waters Wilderness should be one of the first federally designated wilderness areas established by the Wilderness Act of 1964, 16 U.S.C. §§ 1131–1136. *See* BLM-000389.

After the Bureau issued the 1966 leases, Congress passed additional legislation to protect the Boundary Waters Wilderness and the National Forest System, as well as our foundational modern environmental and public land laws. In 1978, Congress passed the Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92 Stat. 1649 (1978), which provided clear direction that the natural values of the Boundary Waters Wilderness were to be protected, including from the environmental impacts of mine development. *See* BLM-000389. Congress also passed the National Environmental Policy Act (1969), key amendments to the Clean Air Act (1970), the Clean Water Act (1972), Endangered Species Act (1973), Federal Land Policy and Management Act (1976), and National Forest Management Act (1976). These laws added procedural protections and mandatory environmental considerations to federal decisions affecting public lands such as the Superior National Forest. The National Forest Management Act, for example, directed the Secretary of Agriculture to manage the National Forests in ways that would protect their productivity, provide for diverse plant and animal life, and prevent serious damage to water quality. *See* 16 U.S.C. § 1604(g)(3).

II. THE BUREAU RENEWED THE LEASES TWICE, BUT REJECTED A THIRD RENEWAL IN 2016 BECAUSE THE FOREST SERVICE FOUND THAT A MINE WOULD THREATEN EXTREME DAMAGE TO THE BOUNDARY WATERS WILDERNESS.

Neither INCO nor its successors have ever commenced production on the leases. *See* BLM-000062. The Bureau nevertheless exercised its discretion to renew the leases for two ten-year periods in 1989 and 2004. BLM-002753–56; BLM-002553–57.[5]

Near the end of the initial 20-year term in the mid-1980s, the Bureau's district office questioned whether it was even "*possible* to grant lease renewals for these leases when the leases never have been in production." BLM-005457 (emphasis added). Far from believing the mining company had a right to renewal, the Bureau was not sure renewal was even possible absent production. The Associate Solicitor addressed this question in a legal opinion, concluding that the leases and regulations did not prohibit renewal in the absence of production. BLM-003664. After receiving this advice, the Bureau granted INCO a discretionary 10-year renewal.

During the 1989 renewal process, the Bureau changed most of the terms and conditions in the 1966 leases to the more modern terms and conditions in the agency's standard lease form developed in 1984. BLM-003603–14; BLM-002753–56. The 1989 leases provided only a "preferential right in the lessee to renew." BLM-002753. By longstanding Bureau practice, this means that the lessee has no entitlement to renewal, but does have the right to be *preferred* against other potential lessees *if* the Bureau chooses to renew the lease. *See* BLM-000766. The Bureau had no need to incorporate the 1966 leases' conditional right to three ten-year renewals from section 5, because INCO's option to trigger that right lapsed when there was no production

[5] The lessee filed timely renewal applications, but the applications took years to process. *See* BLM-000760–61. Leases remain in effect while applications to renew are pending, even if they would otherwise expire sooner. *See* BLM-001486.

during the primary 20-year term and that triggering period was never extended. *See* BLM-003610 (section (5)). In 2004, the Bureau issued another discretionary renewal for the leases on terms virtually identical to the 1989 leases. BLM-002753–56; BLM-002553–57.

Consistent with an understanding by both the Bureau and the Forest Service that renewal was discretionary, and in accordance with the governing statutes, the Bureau obtained the Forest Service's consent before granting the 1989 and 2004 renewals. The Bureau expressly asked the Forest Service to "[p]lease advise whether you have any objections to the requested renewals." BLM-005447. The Forest Service confirmed in similarly express language that it "consent[ed] to the renewal of the above-noted leases for a 10-year period." BLM-002848; *see also* BLM-002831; BLM-002582 ("The Forest Service has no objection to the renewal of the above preference right leases.").

In 2012, the lessee (a successor to INCO) applied to renew the leases a third time. BLM-001881. The Bureau sought advice from the Solicitor of the Interior as to whether the agency had discretion to grant or deny the application. BLM-000760. Twin Metals, which became owner of the leases in 2013, *see* BLM-001584–87 (assigning leases to Franconia Minerals); BLM-001905 (stating that Twin Metals wholly owns Franconia Minerals), submitted legal arguments to the Solicitor making its case that the Bureau did not have discretion to deny renewal. BLM-001290–95; BLM-001038. Plaintiff Northeastern Minnesotans for Wilderness submitted legal arguments explaining that the Bureau did have discretion to deny renewal. BLM-001168–74.

On March 8, 2016, the Solicitor issued an opinion (the "First M-Opinion"), concluding that the Bureau had discretion to grant or deny Twin Metals' application. BLM-000760–74. The First M-Opinion determined that the language of the 2004 leases must be given effect. BLM-000764–66. Specifically, because the 2004 leases provide only a "preferential right in the lessee

to renew," the First M-Opinion found that in accordance with the Bureau's longstanding application of that term, the lessee was not guaranteed renewal. BLM-000764. Further, the First M-Opinion found that even if the language of the 2004 leases could be overlooked and the terms of the 1966 leases controlled (as Twin Metals argued, BLM-001043–44), the 1966 leases themselves did not guarantee renewal in the absence of production. BLM-000767–72.

In light of the First M-Opinion, and in accordance with the statutory scheme, the Bureau asked whether the Forest Service consented to renewal. BLM-000735–36. After soliciting public input and holding two public listening sessions, the Forest Service denied consent on December 14, 2016. BLM-004811–12; BLM-004795. The Forest Service set out its basis for denying consent in a 21-page letter with a seven-page bibliography. BLM-004795–822. The Forest Service summarized the irreplaceable value of the Boundary Waters and the extreme risks a mine would pose. The agency determined that the risks of acid mine drainage, habitat degradation, and habitat fragmentation posed by a mine are too great, and that allowing mining on the leases would be inconsistent with the Forest Service's obligations under the Boundary Waters Canoe Area Wilderness Act. BLM-004814–15.

On December 15, 2016, the Bureau rejected Twin Metals' application to renew the leases (the "2016 Denial"), citing the Forest Service's denial of consent.[6] BLM-000345–48. The 2016 Denial was signed by the Bureau's State Director for the Eastern States Office and was approved by the Deputy Secretary for the Department of Interior, rendering it Interior's final decision and

[6] Twin Metals filed a lawsuit challenging the validity of the First M-Opinion, *see* BLM-000055, later amending its complaint to challenge the 2016 Denial as well. *See* Pls.' Mot. to File Suppl. and Amended Complaint, *Franconia Minerals (US) LLC v. U.S.*, No. 0:16-cv-03042-SRN-LIN (D. Minn. Jan. 3, 2017). Twin Metals voluntarily dismissed both challenges on December 22, 2017, the same day the Principal Deputy Solicitor reversed the First M-Opinion. *See* Pls.' Notice of Voluntary Dismissal Without Prejudice, *Franconia Minerals (US) LLC v. U.S.*, No. 0:16-cv-03042-SRN-LIN (D. Minn. Dec. 22, 2017).

foreclosing administrative appeal. BLM-000347–48. The leases expired upon Twin Metals' receipt of the 2016 Denial. BLM-000347. Neither Twin Metals nor any of its predecessors has ever developed a mine or started commercial production on the leases. BLM-000345–46.

III. ONE AND A HALF YEARS LATER, THE BUREAU REVERSED COURSE AND PURPORTED TO REINSTATE THE EXPIRED LEASES.

On May 2, 2018, nearly seventeen months after the leases expired, the Bureau purported to reinstate the 2004 leases and Twin Metals' 2012 renewal application (the 2018 Reversal). BLM-000001–03. The Bureau's decision relies on a December 22, 2017, legal opinion issued by the Principal Deputy Solicitor in the absence of a confirmed Solicitor (the Second M-Opinion). BLM-000001–03. The Second M-Opinion purportedly reversed the First M-Opinion and found that the Bureau lacked discretion to deny a third renewal of the leases. BLM-000055.

Based on the same record considered in preparing the First M-Opinion, the Second M-Opinion determined the First M-Opinion "erred." BLM-000055. The Second M-Opinion ignored the "preferential right . . . to renew" term of the 2004 leases entirely and adopted Twin Metals' argument that it is appropriate to look beyond the language of the 2004 leases for evidence of the parties' intent. *See* BLM-000063 n.41 ("We do not address in this replacement opinion the meaning of the 2004 lease renewal language . . . ."). According to the Second M-Opinion, this extrinsic evidence reveals that the parties wanted the actual language of the 2004 leases to be ignored, leaving the language of the 1966 leases to govern. *See* BLM-000062. The opinion further concluded the 1966 leases entitled Twin Metals to unlimited renewals, even though the lessee had not begun production during the primary 20-year term (or at any time since). BLM-000068 ("[T]he 1966 leases provide the lessee with a non-discretionary right of renewal for successive ten-year periods, as long as the lessee complies with the lease terms."); BLM-000073. The Second M-Opinion did not cite any information not before the Solicitor when she issued the

First M-Opinion. Its conclusions were based on the same arguments that Twin Metals had made previously and that the Solicitor had considered but rejected in the First M-Opinion. *Compare* BLM-001039–42 *with* BLM-000760–72.

Relying on the Second M-Opinion, the Bureau found that its previous request for Forest Service consent to renew the leases was "based on the legal error that the United States had discretion to decide whether to renew the leases." BLM-000002. As a result, the Bureau stated that the Forest Service's December 2016 non-consent determination is "not legally operative." BLM-000002. Accordingly, the Bureau disregarded the Forest Service's lack of consent in determining that Twin Metals has an absolute right to renew the leases. *See* BLM-000002.

Plaintiffs filed three lawsuits in June 2018 challenging the 2018 Reversal and the Second M-Opinion. These cases were consolidated in case no. 1:18-cv-01463-TNM on July 25, 2018.

PLAINTIFFS' STANDING

Plaintiffs have standing because they, their members, and/or their customers use the Superior National Forest and Boundary Waters Wilderness in the vicinity of the leases. These uses depend on keeping the areas free of pollution and industrial mining activity. In addition, the conservation group plaintiffs have standing because their members would have standing to bring this case in their own right, the interests at stake in the case are germane to the groups' organizational purposes, and the lawsuit does not require the participation of individual members. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 181 (2000).

Voyageur Outward Bound School (VOBS) is a nonprofit organization that provides leadership and experiential outdoor education to a wide range of people through outdoor and wilderness expeditions in the Boundary Waters and the Superior National Forest. Ex. 22 ¶¶ 2–5,

8–11. VOBS brings more than 600 people into the Boundary Waters each year for instruction in canoeing, backpacking, hiking, dog-sledding, skiing, orienteering, and camping. *Id.* ¶ 8, 11.

Piragis Northwoods Company, Ely Outfitting Company & Boundary Waters Guide Service, Wenonah Canoe, Northstar Canoe, Sawbill Canoe Outfitters, Hungry Jack Outfitters, Women's Wilderness Discovery, and River Point Resort and Outfitting Company are businesses that offer their customers outdoor adventure outfitting, guiding, and equipment. A significant portion of these businesses' revenue is generated by public use of the Boundary Waters and/or Superior National Forest for fishing, canoeing, hiking, hunting, birdwatching, wilderness skill-building, and other activities dependent on clean air and water, abundant fish and wildlife, and a natural, aesthetically pleasing setting free of discordant industrial development. Ex. 28 ¶¶ 4, 9; Ex. 41 ¶¶ 2–4; Ex. 7 ¶ 10, 14; Ex. 4 ¶¶ 5–7; Ex. 35 ¶¶ 4–10; Ex. 34 ¶¶ 6–8; Ex. 3 ¶¶ 6–10; Ex. 20 ¶¶ 4–6.

Northeastern Minnesotans for Wilderness, the Friends of the Boundary Waters Wilderness, The Wilderness Society, the Izaak Walton League of America, and the Center for Biological Diversity are conservation groups, each with a mission that encompasses protecting and preserving the wilderness value of the Boundary Waters Wilderness and the Superior National Forest, including the waters, lands, wildlife, plant, and aquatic resources of these areas. *See, e.g.*, Ex. 30 ¶ 8; Ex. 18 ¶¶ 16–17; Ex. 9 ¶¶ 4–10; Ex. 21¶¶ 1–6; Ex. 12 ¶¶ 3–4, 8, 11. Members of these plaintiff groups reside near, visit, or otherwise use and enjoy the Boundary Waters, the Superior National Forest, and the areas around the Twin Metals leases for various purposes, including canoeing, wildlife viewing, birdwatching, hunting, fishing, gathering wild rice, photography, educational purposes, scientific study, and/or aesthetic and spiritual enjoyment. *See e.g.*, Exs.1–2, 5–6, 8–17, 19, 23–26, 20, 30–33, 36–37, 39, 40.

Plaintiffs and their members are harmed by the 2018 Reversal because it canceled Twin Metals' prior obligation to remove all equipment from the leases and reclaim old drill sites, and allowed Twin Metals to resume activity on the leases in anticipation of a potential mine, including hydrogeological drilling and associated road construction. *See* BLM-000347. This activity has resulted in the restriction of public access, increased noise, traffic, construction, and the presence of industrial equipment on these public lands. *See e.g* ., Ex. 25 ¶¶ 9–10; Ex. 9 ¶ 16; Ex. 6 ¶ 14; Ex. 20 ¶¶ 26, 30–31; Ex. 31 at ¶13. These effects reduce and degrade opportunities for plaintiffs, their customers,[7] and/or their members to use and otherwise enjoy the Boundary Waters, the Superior National Forest, and surrounding areas for residential, recreational, educational, and scientific study purposes, and also result in degradation of the public's perception of public land near the leases as a suitable destination for outdoor activity. *See e.g.*, Ex. 16 ¶ 13 ("[B]ecause of Twin Metal's activities along Spruce Road, I have avoided these entry points [into the Boundary Waters Wilderness]."); Ex. 37 ¶ 14; Ex. 2 ¶¶ 7, 12; Ex. 8 ¶¶ 7–15; Ex. 15 ¶¶ 8, 12–17; Ex. 17 ¶¶ 13–19, 21, 31–35; Ex. 23 ¶ 16–18; Ex. 25,¶ 14; Ex. 29 ¶¶ 18–23, 31; Ex. 31 ¶¶ 11, 16; Ex. 32 ¶¶ 7, 9, 11, 14; Ex. 39 ¶¶ 10–11, 18; Ex. 6 ¶¶ 11, 13, 14, 17; Ex. 4 ¶ 8–9; Ex. 30 ¶¶ 20, 24; Ex. 20 ¶¶ 13–31, Ex. 24 ¶ 11–13; Ex. 37 ¶ 14.

Plaintiffs' members who own property near the leased land are harmed by the 2018 Reversal because the perception that a mine will be built nearby is depressing their property values. *See e.g.*, Ex. 31 ¶ 16; Ex. 16 ¶ 5; Ex. 2 ¶¶ 8–9; Ex. 17 ¶¶ 19–21; Ex. 23 ¶ 22–24; Ex. 24 ¶ 14; Ex. 20 ¶ 32. In addition, River Point Resort is harmed by the 2018 Reversal because its owners invested in upgrades to the business in reliance on the Bureau's decision denying renewal

[7] For the business plaintiffs, reduced and degraded opportunities for their clients to enjoy the area near the leases translate into lost business opportunities and therefore economic harm.

in December 2016—an investment they would not have made but for that final decision. Ex. 20 ¶ 32.

The harms to the plaintiffs and their members are a direct result of defendants' actions, and would be redressed by a favorable decision of this Court setting aside defendants' unlawful actions. *See Friends of the Earth*, 528 U.S. at 180–84. These harms will increase in magnitude if mine development occurs on the leases. Ex. 25 ¶¶ 11–12; Ex. 31 ¶ 16–17; Ex. 2 ¶ 9, 12; Ex. 15 ¶ 15, 17; Ex. 17 ¶ 16, 18–19, 31–32; Ex. 24 ¶¶ 11–13; Ex. 29 ¶ 28–29; Ex. 37 ¶ 16; Ex. 20 ¶¶ 31, 33; Ex. 36 ¶ 14–15; Ex. 30 ¶ 24; Ex. 34 ¶¶ 27–29.

LEGAL STANDARD FOR SUMMARY JUDGMENT

In Administrative Procedure Act (APA) cases, summary judgment is the procedural vehicle "for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Sierra Club v. Mainella*, 459 F.Supp.2d 76, 90 (D.D.C. 2006). The APA requires the Court to set aside agency action that is arbitrary or capricious, exceeds the agency's authority or limitations under a statute, does not follow procedure required by law, or is otherwise not in accordance with law. 5 U.S.C. §§ 706(2)(A), (C); *see also, e.g.*, *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 449 (D.C. Cir. 2012). The Court is empowered to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. 706. In assessing the legality of agency action, the focus is on the explanation provided by the agency. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2867 (1983). The court may not, post-hoc, substitute its rationale for one provided by the agency. *Id*. (If the explanation provided in the agency action is insufficient, the "reviewing court should not attempt itself to make up for such

deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.").

ARGUMENT

The 2018 Reversal must be vacated because the Bureau lacks authority to reinstate the expired leases. There is no express authority for reinstatement, and an agency's inherent authority to correct errors does not apply where, as here, there was no ministerial error or inadvertent failure to consider relevant factors in the prior decision. Further, the reasonable timeframe for correcting a purported error had long passed.

Vacatur is also required because the 2018 Reversal is arbitrary, capricious, and contrary to law. Its sole stated rationale is the Second M-Opinion's interpretation of the leases, which suffers from at least three fatal flaws. First, the Second M-Opinion fails to apply the contractual terms of the 2004 leases, which unambiguously make renewal discretionary. Instead, the opinion improperly relies on parol evidence to contradict that unambiguous contractual term.

Second, the unmistakability doctrine applicable to government contracts precludes an interpretation that reads the leases as surrendering the Bureau's discretion; such a surrender must be "clear and unmistakable," and cannot be ambiguous. The leases contain no such surrender, clear or otherwise.

Third, even if extrinsic evidence is considered, that evidence shows that the parties intended the 1966 leases to preserve the Bureau's discretion to deny renewal in the absence of production during the 20-year primary term. Under the 1966 leases, INCO would be entitled to renewal only if it commenced production within the first 20 years. Thus, when the leases were renewed in 1989 after INCO failed to commence production, INCO agreed to receive only a

"preferential right . . . to renew"—*i.e.*, the right to be preferred over other potential lessees if the agency, in its discretion, chooses to renew the leases.

I. THE BUREAU LACKED AUTHORITY TO ISSUE THE 2018 REVERSAL.

The Bureau had no authority to take the actions encompassed by the 2018 Reversal. It identified no express authority allowing it to reinstate the expired leases, and no such authority exists. The decision thus can only be upheld if it falls within the limited scope of the Bureau's implied authority (sometimes called "inherent authority") to correct ministerial errors or remedy inadvertent failures to consider relevant issues in final decisions. *Int'l Paper Co. v. F.E.R.C.*, 737 F.2d 1159, 1163–66 (D.C. Cir. 1984). However, that implied authority is inapplicable here because the Bureau has not identified any ministerial error or inadvertent failure to consider relevant issues in the 2016 Denial or First M-Opinion. Moreover, Federal Defendants were motivated by a policy change that should have been implemented through the normal regulatory process for issuing new leases.

The Bureau's purported error correction also occurred far too late. The D.C. Circuit has mandated that absent unusual circumstances there is a "short and reasonable time period" of "weeks, not years" for an agency to correct mistakes. *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977) (quoting *Gratehouse v. United States*, 512 F.2d 1104, 1109 (Cl. Ct. 1975)). In this case, the 2018 Reversal came a year and a half after the 2016 Denial.

Loosening the existing limits on an agency's implied authority to correct errors in otherwise final decisions would erode the longstanding definition of final agency action as a decision by which "rights or obligations have been determined" or from which "legal consequences will flow." *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). It would give officials carte blanche power to reverse their

predecessors' long-settled final decisions outside the bounds of ordinary statutory and regulatory processes, "[l]ike the sword suspended by a hair above the courtier Damocles . . . fostering great uncertainty in the business community" and the community at large.[8] *Am. Methyl Corp. v. E.P.A.*, 749 F.2d 826, 840 (D.C. Cir. 1984). Although new executive branch officials may change policies on leasing, they must do so through legally mandated procedures. Here, those procedures would require issuance of new leases—not reinstatement of expired leases under the pretext of correcting an error.

A. The Bureau Has No Express Authority to Reverse Final Decisions Denying Lease Renewal, Reinstate Expired Leases, or Reinstate Rejected Renewal Applications.

Administrative agencies have only those powers expressly granted to them by Congress or included by necessary implication from a Congressional grant. *See Civil Aeronautics Board v. Delta Air Lines, Inc*., 367 U.S. 316, 322 (1961); *Peters v. Hobby*, 349 U.S. 331, 345 (1955); *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) ("[A]s we have made clear, it is 'axiomatic' that 'administrative agencies may act only pursuant to authority delegated to them by Congress.'" (quoting *Verizon v. F.C.C.*, 740 F.3d 623, 632 (D.C. Cir. 2014))); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 125 (2000). There are no statutes or regulations that expressly authorize the Bureau to take any of the actions encompassed by the 2018 Reversal.

The relevant authorities here are 16 U.S.C. §§ 508b and 520, 5 U.S.C. App 1 (Reorganization Plan No. 3 of 1946, § 402), and implementing regulations such as 43 C.F.R. part 3500. This framework is the sole authority for the Bureau, acting on behalf of Interior, to issue

[8] Several plaintiffs in this case are businesses harmed by the 2018 Reversal. *See supra* pp. 12–15.

leases in the Superior National Forest. *See supra* pp. 2–4. Neither the statutes nor the implementing regulations include provisions for reversing a final decision denying lease renewal, reinstating an expired lease, or reinstating a rejected renewal application. Nor does the Bureau's organic act, the Federal Land Policy and Management Act, authorize these actions or contain any general provision authorizing the reversal of final decisions. 43 U.S.C. §§ 1701–1787.

B. The Bureau Cannot Rely on Its Implied Authority Because It Did Not Identify Any Inadvertent Errors in the Prior Decision.

An agency's implied authority to correct mistakes by revising prior final decisions outside of an administrative appeal process is limited to ministerial errors or inadvertent failures to consider relevant issues. *See Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 144–45 (1958) (holding that the Interstate Commerce Commission's (ICC) general enabling act authorizes the correction of inadvertent ministerial errors in a manner similar to Federal Rule of Civil Procedure 60(a), which allows correction of "clerical mistakes" and "errors . . . arising from oversight or omission"); *United States v. Seatrain Lines*, 329 U.S. 424, 429 (1947) (rejecting ICC's attempt to rely on the implied power to correct mistakes where the so-called mistake was not inadvertent); *Hirschey v. F.E.R.C.*, 701 F.2d 215, 218–19 (D.C. Cir. 1983) (holding the Federal Energy Regulatory Commission (FERC) had no authority to revoke an exemption granted automatically by virtue of agency inaction because that inaction did not amount to ministerial error); *Int'l Paper Co.*, 737 F.2d at 1164 (same). This case plainly does not involve a ministerial or clerical error, nor does it involve an inadvertent failure to consider relevant issues.

Moreover, an agency's implied authority to correct its mistakes does not encompass changes to previous decisions based on shifting governmental policies. *Am. Trucking Ass'ns*, 358

U.S. at 146 ("the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies"). That, however, is precisely what occurred here: the Bureau's correction of a purported error was merely a pretext for a policy change that should have been implemented through the normal leasing process.

1. There is no clerical error or inadvertent oversight or omission in the First M-Opinion.

The Bureau's implied authority to correct mistakes does not support the 2018 Reversal because neither the 2018 Reversal nor the Second M-Opinion identifies any clerical errors or inadvertent oversights in the First M-Opinion or the 2016 Denial. This plainly is not a case of a clerical or ministerial error, so the only question is whether the First M-Opinion inadvertently overlooked some important consideration. It did not.

Although the Second M-Opinion comes to different conclusions than the First M-Opinion, it does not identify any issues or arguments that were not already considered (and rejected) in the First M-Opinion. In fact, the Second M-Opinion's analysis and conclusions are the very same arguments Twin Metals submitted in 2016 and that the Solicitor considered when crafting the First M-Opinion. *See, e.g.*, BLM-000765, 000769–71 (discussing and rejecting arguments in memorandum to Solicitor from Twin Metals produced at BLM-001038–52) ; BLM-000608 (rejecting a July 1, 2016, request by Twin Metals to reconsider the First M-Opinion, adding "I have read your two letters and carefully considered the points you made therein."). The Second M-Opinion does not identify any new arguments, missing information, or controlling legal authority that the First M-Opinion overlooked. *See generally* BLM-000055–73.

The only alleged errors are the Solicitor's deliberate conclusions in the First M-Opinion. Those conclusions were not inadvertent in any sense of the word, and are vastly different from the patently inadvertent oversights and omissions that courts in this circuit have seen as a valid basis for invoking an agency's implied authority to correct errors. *See Howard Sober, Inc. v. I. C. C.*, 628 F.2d 36, 41 (D.C. Cir. 1980) (holding the ICC could rely on implied authority to correct a certificate so that it included restrictions already expressly imposed by the ICC's prior order); *Mazaleski*, 562 F.2d at 719–21 (recognizing the Public Health Service's inherent authority to correct what was "merely an oversight"); *Ranbaxy Labs., Ltd v. Burwell*, 82 F. Supp. 3d 159, 190 (D.D.C. 2015) (upholding implied authority to correct a mistake that occurred in "bluntly, a rushed and ill-considered process" characterized by miscommunication that "led to the erroneous issuance of tentative approval . . . *despite* the existence of a clear policy against such issuance") (emphasis in the original).

Unlike these cases, there is no evidence here that, at the time of the First M-Opinion, the Solicitor omitted or overlooked relevant considerations or intended something different from the action she actually took. Where the record is devoid of such evidence, the D.C. Circuit has held there is no inherent authority to make a correction. *See Hirschey*, 701 F.2d at 220 (concluding the mere "assertion" that an error was inadvertent insufficient to invoke inherent authority); *Int'l Paper Co.*, 737 F.2d at 1164 (rejecting claim of inherent authority where there was "no record support" for FERC's assertion that it intended something different). In short, this was not an appropriate case for the exercise of an agency's inherent authority to correct its mistakes.

2. The record shows that the Second M-Opinion implemented a policy change under the pretext of correcting an error.

Because there was no inadvertent clerical error or oversight to correct, the Bureau cannot rely on any inherent authority, and the Court need look no further to reverse the Bureau decision. There is, however, an additional reason implied authority cannot apply: Federal Defendants were substantially motivated by a change in policy, which courts have held is an invalid use of implied authority. *Am. Trucking Ass'ns*, 358 U.S. at 146 ("Of course, the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies."); *Consol. Rail Corp. v. Surface Transp. Bd.*, 93 F.3d 793, 801 (D.C. Cir. 1996); *Coteau Properties Co. v. Department of Interior*, 53 F.3d 1466, 1478 (8th Cir. 1995). "The Administrative Procedure Act requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process.'" *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring).

Rather than correcting some unidentified ministerial error or inadvertent omission, the record shows that the 2018 Reversal was motivated by a policy change. In 2016, Twin Metals sued the agency to challenge the First M-Opinion and 2016 Denial. *See* Complaint, *Franconia Minerals (US) LLC v. U.S.*, No. 0:16-cv-03042-SRN-LIN (D. Minn. Sept. 12, 2016). A new administration took office in January 2017, and Ryan Zinke was confirmed as Secretary of the Interior on March 1, 2017. Within two months, Twin Metals and its parent company Antofagasta plc, a large Chilean mining company, requested meetings with Secretary Zinke. *See* BLM-005546–47; BLM-005545.

In its request, Twin Metals urged Secretary Zinke to "direct [the Bureau] to renew the leases" not only because of an alleged legal error but because of the prior administration's

"incorrect policy judgments." BLM-005546–47. By the end of 2017, Interior replaced the First M-Opinion with the Second M-Opinion, which adopted the exact arguments the company had previously made and the Solicitor had rejected. *See* BLM-000055–73; BLM-001038–52; BLM-000765, 000769–71 (rejecting Twin Metals' arguments in First M-Opinion); BLM-000608 (stating the Solicitor considered Twin Metals' arguments in the First M-Opinion). These events show the Second M-Opinion and 2018 Reversal were driven in significant part by a change in policy.

An administration of course can change its policies, and many statutes and regulations give agencies the express authority to reconsider prior final actions.[9] However, the Bureau did not rely on express reconsideration authority here, and it may not implement a policy change under the guise of correcting a purported legal error. A policy decision by the Bureau to allow Twin Metals to mine adjacent to the Boundary Waters Wilderness must be implemented through established regulatory processes. Because Twin Metals' leases were not renewed and expired during the previous administration, new leases can be issued only through the leasing process.

3. Invoking inherent authority for the 2018 Reversal would circumvent the statutory and regulatory scheme.

Courts also have found inherent correction authority inapplicable when it would bypass an agency's existing statutory or regulatory processes. *See, e.g., Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 87 (D.C. Cir. 2014) (Kavanaugh, J.) (rejecting an agency's attempt to "short-circuit or end-run the carefully prescribed statutory . . . process"); *Am. Methyl Corp.*, 749 F.2d at 835 ("when Congress has provided a mechanism capable of rectifying mistaken actions, . . . it is not

[9] *See, e.g.*, 43 C.F.R. § 4.403(b) (Department of Interior regulations outlining the criteria for the Interior Board of Land Appeals to reconsider a final agency action); 7 C.F.R. § 1.146 (2005) (reconsideration procedures for adjudications by the Department of Agriculture).

reasonable to infer authority to reconsider agency action"); *Douglas Timber Operators, Inc. v. Salazar*, 774 F. Supp. 2d 245, 258–59 (D.D.C. 2011) (holding that the Secretary of the Interior the Secretary "lacked inherent authority to withdraw" a final agency action "without following the procedures required under the [Federal Land Policy and Management Act]"). The regulatory scheme in 43 C.F.R. Part 3500, which governs the leases, gives the Bureau a means to implement a policy shift even in areas where existing leases have expired—namely, via the procedure for issuing new leases. *See* 43 C.F.R. § 3507. Interior's attempt to reinstate the expired leases short-circuits the leasing process, which would require Twin Metals or another lessee to, among other things, pay updated rental rates, renegotiate royalty payments, and potentially obtain new prospecting permits (the latter of which are considered on a first-come, first-served basis).[10] Of critical importance here, 43 C.F.R. § 3507.19(b) requires the Bureau to determine whether the project's environmental impacts make mining an undesirable use of the lands in question, while 43 C.F.R. § 3507.19(c), 16 U.S.C. § 508b, and Reorganization Plan No. 3 of 1946, § 402 require the Bureau to obtain the Forest Service's consent. Allowing the Bureau to skirt these procedures undercuts and short-circuits the Bureau's own regulatory scheme, which the Bureau has no inherent authority to do. *Ivy Sports Med*, 767 F.3d at 87.

C. Too Much Time Has Passed for Interior and the Bureau to Correct an Alleged Mistake in Agency Decision-making.

An agency's inherent authority to correct errors is also limited in time. "[A]bsent unusual circumstances, *the time period would be measured in weeks, not years*." *Mazaleski*, 562 F.2d at

[10] *See, e.g.*, 43 C.F.R. § 3504.15 (new rental rates), 43 C.F.R. § 3504.22 (new negotiations of royalty payments), and 43 C.F.R. § 3505.25 (new prospecting permit queue positions).

720 (emphasis added). The time for Interior to exercise any inherent authority to correct alleged mistakes passed long before the 2018 Reversal.

Where inherent authority is available, it must be exercised promptly to encourage better agency decision-making in the first instance and to protect the public interest in regulatory finality. *See Am. Methyl Corp.*, 749 F.2d at 839–40; *Hirschey*, 701 F.2d at 220 ("There is a strong interest in repose under any regime of legal rules."). The D.C. Circuit has underscored this limit, explaining that agencies correcting their mistakes must act within a "short and reasonable time." *Mazaleski*, 562 F.2d at 720. "What is a short and reasonable time period will vary with each case, but absent unusual circumstances, *the time period would be measured in weeks, not years*." *Id.* (emphasis added); *see also Gubisch v. Brady*, No. CIV. A. 88-2031, 1989 WL 44083, at *10 (D.D.C. Apr. 20, 1989) (holding that unexplained delays of 11 months and 16 months did not meet the Circuit's "short and reasonable" standard).[11] As then-Judge Kavanaugh observed, D.C. Circuit precedent requires any "inherent authority to revisit their prior decisions [to be exercised] in a timely fashion." *Ivy Sports Med.*, 767 F.3d at 86 (citations omitted).

Here, the delay between the initial decision and reconsideration is longer than a year no matter how it is measured. The 2018 Reversal was issued on May 2, 2018, BLM-000001–03, while the First M-Opinion on which the 2016 Denial was based was issued on March 8, 2016, BLM-000760–74. Thus, the Bureau purported to correct a legal error 26 months after the allegedly erroneous opinion was announced. Even if the time is measured from the 2016 Denial, the 2018 Reversal occurred almost a year and a half after that decision. BLM-000345–86; BLM-000001–03.

[11] *See also Cabo Distrib. Co. v. Brady*, 821 F. Supp. 601, 613 (N.D. Cal. 1992) (applying the "weeks, not years" standard to reject reconsideration after a three-year delay).

These time periods are far longer than the D.C. Circuit's prescribed "short and reasonable" timeframe of "weeks, not years." *Mazaleski*, 562 F.2d at 720; *see also Gubisch*, 1989 WL 44083, at *10 ("Once the reasonable time period has expired . . . the agency has lost its opportunity to correct previous errors and its decision becomes final."). Nor are there any unusual circumstances present to justify delay. By any measure, far too much time passed before the 2018 Reversal for the agency to rely on inherent authority to correct its own purportedly erroneous decision.

II. THE 2018 REVERSAL IS CONTRARY TO LAW BECAUSE IT IS BASED ON AN INTERPRETATION OF THE 2004 LEASES THAT IGNORES THEIR UNAMBIGUOUS RENEWAL TERMS AND MISAPPLIES PAROL EVIDENCE.

Even if the Bureau had authority to issue the 2018 Reversal, that decision is arbitrary and contrary to law because it is based on the Second M-Opinion, which misinterprets the leases and extrinsic evidence. The First M-Opinion correctly determined that the Bureau has discretion to decide not to renew Twin Metals' 2004 leases based on the well-established meaning of their renewal term.[12] That term conveys a "preferential right in the lessee to renew," which is a right to be preferred over others but only if the Bureau decides to continue leasing the land.

The Second M-Opinion reached a different conclusion by disregarding the renewal term in the 2004 leases. BLM-000063 ("We do not address in this replacement opinion the meaning of the 2004 lease renewal language because, as explained later, the parties intended the renewal terms of the 1966 leases to remain operative."). This flips contract law on its head, using extrinsic evidence to bypass an unambiguous lease term rather than starting with the language of the leases themselves. The Second M-Opinion also fails to acknowledge, let alone apply, the

[12] For completeness, the First M-Opinion also considered the 1966 lease renewal terms. It concluded that "even if the 1966 lease terms are in effect, they do not prohibit the BLM from exercising its discretion to decide whether to renew the leases." BLM-000767.

unmistakability doctrine, which dictates that the government is not deemed to surrender sovereign authority (such as its authority over public lands) by contract unless the surrender is clear and unmistakable. *W. Fuels-Utah, Inc. v. Lujan*, 895 F.2d 780, 789 (D.C. Cir. 1990).

Even if it were permissible to resort to extrinsic evidence, that evidence confirms that the government was under no obligation to renew the leases in the absence of mineral production within the initial 20-year term of the 1966 leases. For all of these reasons, the Second M-Opinion was incorrect to conclude that Twin Metals is entitled to renewal. As the Second M-Opinion was the sole basis for the Bureau's 2018 Reversal and misinterprets the leases, both the 2018 Reversal and Second M-Opinion are arbitrary and contrary to law and must be vacated.

A. The 2004 Leases Convey Only a "Preferential Right to Renew," and Therefore Are Renewable Only at the Discretion of the Bureau.

The renewal term in the 2004 leases, which provides a "preferential right in the lessee to renew," is a well-established term of art used by the Bureau. The Department of Interior has consistently applied this language as conveying only a right to be preferred against other potential lessees *if* the government chooses to renew, not an absolute right to renew. The Second M-Opinion did not dispute the meaning of this term or argue that it is ambiguous, deciding instead that it could be ignored. But unambiguous contractual terms cannot be ignored: "Contract interpretation begins with the language of the written agreement." *Coast Fed. Bank, FSB v.*

United States, 323 F.3d 1035, 1038 (Fed. Cir. 2006) (en banc).[13] Unless another intention is manifested, the "generally prevailing meaning" of the contract terms is applied, such that "technical terms and words of art are given their technical meaning when used in a transaction within their technical field." Restatement (Second) of Contracts §§ 202(3)(a)-(b) (1981).[14] The well-established meaning of the 2004 leases' renewal term thus is controlling.

The renewal term in the 2004 leases is found in Part I, within the section titled "LEASE RIGHTS GRANTED."[15] BLM-002553. Part I shows that there are two options the Bureau can select to indicate the renewal term. The first, which the Bureau selected in the leases here, is the renewal term for "Sodium, Sulphur, [and] Hardrock" leases. This renewal term provides a:

> 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.

BLM-002553; BLM-002558. The second option, for "Potassium, Phosphate, and Gilsonite" leases, provides that the term is "for so long thereafter as lessee complies with the terms and conditions of this lease. . . ."

---

[13] Fundamental tenets of contract interpretation such as this one apply with equal force to contracts with the government. *Red Lake Band of Chippewa Indians v. United States Dep't of Interior*, 624 F. Supp. 2d 1, 12 (D.D.C. 2009) ("Courts [] apply the federal common law of contracts to the interpretation of contracts with the federal government.") (citing *Wright v. Foreign Serv. Grievance Bd.*, 503 F. Supp. 2d 163, 180 (D.D.C. 2007)); *Mobil Oil Expl. & Producing Serv., Inc. v. United States*, 530 U.S. 604, 607–08 (2000) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996))). "A lease, of course, is a contract." *Griffin & Griffin Expl., LLC v. United States*, 116 Fed. Cl. 163, 171 (Cl. Ct. 2014) (citing *Prudential Ins. Co. v. United States*, 801 F.2d 1295, 1296 (Fed. Cir. 1986)).

[14] "[C]ourts should look to the Restatement (Second) of Contracts when analyzing questions of federal common law." *Deutsche Bank Nat'l Tr. Co. v. FDIC*, 109 F. Supp. 3d 179, 197 (D.D.C. 2015) (citing *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 94, 348 U.S. App. D.C. 309 (D.C. Cir. 2001); *Bowden v. United States*, 106 F.3d 433, 439 (D.C. Cir. 1997)).

[15] The renewal term in the 2004 leases is part of the Bureau's standard form mineral leases. BLM-002553 (indicating that the lease is Form 3520-7 (December 1984)).

The Bureau established these two types of leases based on the applicable leasing statutes. Under the governing statutes, phosphate,[16] potassium,[17] and gilsonite[18] leases have an indeterminate duration, subject to readjustment of lease terms every 20 years. BLM-005464–65 (Interior Solicitor's Opinion, Sodium Lease Renewals, 89 Interior Dec. 173 (1982)) (considering the text and legislative history of the Mineral Lands Leasing Act (MLLA) of 1920 as making the term of phosphate leases indeterminate, as well as the 1948 amendments, which made potassium lease terms indeterminate). In contrast, the statute governing sodium leases states that these "shall be for a period of twenty years, with preferential right in the lessee to renew for successive periods of ten years. . . ." BLM-005466 (considering the statutory renewal term for sodium leases in 30 U.S.C. § 262).[19] The statutes governing the hardrock leases at issue do not specify the duration or renewal terms of such leases. *See* 16 U.S.C. §§ 508b, 520; 5 U.S.C. App 1 (Reorganization Plan No. 3 of 1946, § 402). The standard form on which the 2004 leases appears shows, however, that the Bureau chose to treat hardrock leases like sodium leases for those

[16] 30 U.S.C. § 212 ("[Phosphate] Leases shall be for a term of twenty years and so long thereafter as the lessee complies with the terms and conditions of the lease and upon the further condition that at the end of each twenty-year period succeeding the date of the lease such reasonable readjustment of the terms and conditions thereof may be made therein as may be prescribed by the Secretary of the Interior unless otherwise provided by law at the expiration of such periods.").

[17] 40 Stat. 297 § 2 ("[Potassium] Leases shall be for indeterminate periods, upon condition that at the end of each twenty-year period succeeding the date of any lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods.").

[18] 30 U.S.C. § 241(a)(3) ("Leases may be for indeterminate periods, upon such conditions as may be imposed by the Secretary of the Interior, including covenants relative to methods of mining, prevention of waste, and productive development.").

[19] "Leases under this section shall be for a period of twenty years, with preferential right in the lessee to renew for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior unless otherwise provided by law at the expiration of such period." 30 U.S.C. § 262.

purposes: limited in duration, with only a preferential right in the lessee to renew. *See* BLM-002553.

The meaning of the term "preferential right . . . to renew" has been established since at least 1982. That year, the Solicitor of the Interior concluded that "Congress knew of, and intended that there be, a difference between indeterminate leases subject to readjustment and 20-year leases with a preference right of renewal." BLM-005465. An "indeterminate" lease remains valid as long as the lessee complies with its terms. BLM-005465. In contrast, a determinate-length lease with a preferential right to renewal lapses at the end of a specified term unless the lessee applies for and is granted a renewal lease. BLM-005465. Renewal of a determinate-length lease also is not guaranteed: the "preferential right to renewal" gives the lessee only "the legal right to be preferred against other parties should the Secretary, in the proper exercise of his discretion, decide to continue leasing." BLM-005466–67. This "preferential right" makes these leases distinct from leases granted pursuant to statutes that use mandatory renewal language. BLM-005465–67 (contrasting the recognized distinction between "indeterminate leases subject to readjustment" and "20-year leases with a preference right of renewal").

As the First M-Opinion explained, "[t]here 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." BLM-000766. The "longstanding and well establishing meaning" is as described in the 1982 Solicitor's Opinion: "[t]his 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."

BLM-000764–65 (quoting *Gen. Chem. (Soda Ash) Partners*, 176 IBLA 1, 3 (2008) (citing "Sodium Lease Renewals," 89 Interior Board of Land Appeals 173, 178 (1982) (produced at BLM-005463–73)).[20] Applying this meaning, the First M-Opinion readily concluded the Bureau had discretion to renew or not renew the leases. BLM-000764.

In contrast, the Second M-Opinion did *not* apply the well-understood meaning of "preferential right . . . to renew." BLM-000067–68 n.67. Nor did the Second M-Opinion find this term ambiguous. Remarkably, the Second M-Opinion did not address the term "preferential right . . . to renew" at all. BLM-000067–68 n.67. In this way, the Second M-Opinion failed to begin the contract interpretation "with the language of the written agreement." *Coast Fed. Bank*, 323 F.3d at 1040.

The Second M-Opinion's interpretation in effect eliminates the word "preferential" from the 2004 leases. By finding that Twin Metals has an indefinite right to renewal, the Second M-Opinion converts the "preferential right to renew" into an indeterminate term, contrary to the leases' plain language and 30 years of Interior precedent applying that distinction. The Second M-Opinion's failure to apply the proper meaning of the term "preferential right"—or indeed give it any meaning at all—renders its interpretation of the contract invalid. *Fort Sumter Tours, Inc. v. Babbitt*, 202 F.3d 349, 358 (D.C. Cir. 2000); *see also* Restatement (Second) of Contracts § 203(a) (1981) ("an interpretation which gives a reasonable, lawful, and effective meaning to all

[20] The First M-Opinion also considered Twin Metals' arguments about the language of the 1966 leases and concluded that "the language of section 5 [of the 1966 leases] does not give the lessee a non-discretionary right to three successive renewals. Rather, production is 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." BLM-000769. This correct conclusion is discussed in detail in Section II.D.1 below.

the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect").

By signing the 2004 leases, Twin Metals' predecessor agreed to a lease of 10-year determinate length with a "preferential right in the lessee to renew." BLM-002558; BLM-002562. The 2004 leases do not contain any renewal term other than the "preferential right in the lessee to renew." As a result, the government had the discretion to terminate the 2004 leases at the end of the primary 10-year term.

B. The Second M-Opinion Erred in Considering Parol Evidence that Contravenes the "Preferential Right" to Renew.

To reach its conclusion that the Bureau lacks discretion to deny lease renewal, the Second M-Opinion relies on evidence external to the 2004 leases. BLM-000063–73; BLM-000065. That resort to extrinsic evidence runs afoul of the parol evidence rule, which bars the use of extrinsic evidence to contradict an unambiguous contract term. *See Coast Fed. Bank,* 323 F.3d at 1040. As described above, the renewal term "preferential right . . . to renew" is an unambiguous term of art. The interpretation of the leases should have stopped there. Instead, the Second M-Opinion bypasses the renewal term completely, arguing that extrinsic evidence of the parties' intent is necessary because the 2004 leases are not fully integrated and because there is an ambiguity in a different section of the 2004 leases. Even if these rationales were correct, which they are not, none of them justifies the use of extrinsic evidence to contradict the leases' unambiguous renewal term.

The Second M-Opinion argues that the absence of an "integration clause" stating that the leases represent the full expression of the parties' agreement suggests the leases are not fully integrated, warranting a full examination of the extrinsic evidence. BLM-000064. A written

agreement is fully integrated if it is "adopted by the parties as a complete and exclusive statement of the terms of the agreement." Restatement (Second) of Contracts § 210 (2nd 1981). In contrast, a partially integrated contract is one that reflects the agreement of the parties only "with respect to the matters stated therein." *Ryan v. BuckleySandler, LLP*, 69 F. Supp. 3d 140, 145 (D.D.C. 2014). As the First M-Opinion found, the 2004 leases are fully integrated, "contain all necessary lease terms and are duly signed by the lessee and lessor." BLM-000765. But even if the 2004 leases were only partially integrated, extrinsic evidence still may not be used to import a term that would conflict with or contravene one of their written terms. *Piedmont Resolution, L.L.C. v. Johnston, Rivlin & Foley*, 999 F. Supp. 34, 50 (D.D.C. 1998) (where an agreement is only partially integrated, extrinsic evidence may be considered to add "consistent additional terms" (quoting Restatement (Second) of Contracts § 210 cmt. a)).[21] Yet that is precisely what the Second M-Opinion did, using extrinsic evidence to reach a conclusion directly contrary to the leases' "preferential right to renew" term.

The Second M-Opinion also concludes that it is appropriate to rely on extrinsic evidence to interpret the 2004 leases because the degree to which the 2004 leases incorporate the 1966 leases is ambiguous. *See generally* BLM-000062–73. This is incorrect. There is no ambiguity as to the portions of the 1966 leases that are incorporated into the 2004 leases. Part II, Section 14

[21] *See also Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (explaining that the parol evidence rule bars a party from interpreting a contract with extrinsic evidence that conflicts with the language of the contract); *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1434 (Fed. Cir. 1996) (explaining that partially integrated contracts allow for the introduction of extrinsic evidence only to supplement a contract with additional terms *consistent with* the plain language of the contract) (emphasis added); 6 *Corbin on Contracts* § 25.9 (2018) (quoting *Williston, The Law on Contracts* § 639 (1920) and discussing that the "general rule is clear that a parol agreement which is in terms contradictory of the express words of a contemporaneous or subsequent written contract, properly construed, necessarily is ineffectual and evidence of it inadmissible"); Restatement (Second) of Contracts §§ 215–16.

("Special Stipulations") of the 2004 leases identifies two and only two portions of the 1966 agreements that are incorporated by reference:

> Sec. 14 SPECIAL STIPULATIONS –
>
> * The terms and conditions of the production royalties remains [sic] as stated in the attached original lease agreement.
>
> ** The minimum annual production and minimum royalty is $10.00 per acre or a fraction thereof as stated in the attached original lease agreement.

BLM-002556; *see also* BLM-002561. Both of these special stipulations are limited to terms about "royalties"—not a right of renewal. Yet the Second M-Opinion puzzlingly concludes that, despite their express limitation to royalty terms, the effect of the stipulations is to incorporate the terms and conditions of the 1966 leases *in their entirety*—including renewal terms. BLM-000067 ("the same terms and conditions as the original 1966 leases … remain operative in the 2004 renewal"). That reading is not tenable, let alone persuasive. If the drafters of the 2004 leases had intended to incorporate all the terms and conditions of the 1966 leases, they would have said so. Instead, they expressly limited the incorporating stipulations to terms concerning one topic: royalties.

Moreover, even if there were some ambiguity about *which* royalty terms were incorporated (there is not), that still could not support an interpretation that incorporates matters unrelated to royalties, including an alleged right of renewal. Where a specific term of a contract is found ambiguous, extrinsic evidence may be considered only as to that term. *See Shell Oil Co. v. United States*, 751 F.3d 1282, 1295 (Fed. Cir. 2014) ("The Government has not established ambiguity in the *relevant* provision, in the absence of which it is improper to rely on extrinsic evidence." (emphasis added)). Specifically, the Second M-Opinion argues that the first Special Stipulation is ambiguous. BLM-000065. Even assuming there were some ambiguity in the first

Special Stipulation, extrinsic evidence could be used only to interpret that stipulation or the corresponding section of the 2004 leases, which is Part II, Section 2(a), governing "PRODUCTION ROYALTIES." BLM-002555–56; *see also* BLM-002560–61. Extrinsic evidence is not available to interpret the "preferential right" in Part I of the 2004 leases, which is titled "LEASE RIGHTS GRANTED."

In sum, the Second M-Opinion found ambiguity where none existed, relied on that purported ambiguity in one portion of the leases to resort to extrinsic evidence to interpret a different portion of the leases, and used that extrinsic evidence to contradict the leases' clear terms. Each and every one those steps is antithetical to ordinary canons of contract interpretation. The Second M-Opinion thus was contrary to law, and the 2018 Reversal should be vacated.

C. The Unmistakability Doctrine Compels an Interpretation that Preserves the Bureau's Discretion to Deny Renewal.

The 2004 leases unambiguously preserve the Bureau's right to deny renewal. However, even if the renewal term in the 2004 leases were ambiguous, the unmistakability doctrine would preclude the Second M-Opinion's interpretation. According to the unmistakability doctrine, the leases must be interpreted to preserve the Bureau's discretion not to renew unless they surrender that discretion unmistakably. Neither the 2004 leases nor the 1966 leases (if they were relevant) provide an unmistakable nondiscretionary right to renewal.

The unmistakability doctrine is an additional rule of construction that applies when interpreting contracts with the government. *See Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 618 (D.C. Cir. 1992), *abrogated in part on other grounds as recognized in Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 620 (D.C. Cir. 2017). It provides that contracts with the government "should be construed, if possible, to avoid foreclosing

exercise of sovereign authority." *W. Fuels-Utah*, 895 F.2d at 789 (quoting *Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52–53 (1986)). The doctrine recognizes that "the whole community is interested in retaining sovereign power undiminished" and "has a right to insist, that its abandonment ought not to be presumed." *Transohio Sav. Bank*, 967 F.2d at 618 (quoting *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 560 (1830)) (alterations omitted). The principle applies "most forcefully in cases involving the government's regulatory power," as opposed to those pertaining to the government's financial obligations. *Id.* at 619.

The unmistakability doctrine governs the lease interpretation issues in this case. Congress has plenary power to manage and dispose of federal lands. U.S. Const. art. IV, § 3, cl. 2. Congress has delegated some of that power to the Bureau and the Forest Service. The agencies may disallow, or authorize and regulate, mineral development in the Superior National Forest. 16 U.S.C. §§ 508b, 520; 5 U.S.C. App 1 (Reorganization Plan No. 3 of 1946, § 402). The agencies must consider the environmental effects of major federal actions before taking those actions, and must protect the Superior National Forest and the wilderness values of the Boundary Waters Wilderness. 42 U.S.C. § 4332(2)(C); 16 U.S.C. § 1133(b) (an agency that manages wilderness such as the Boundary Waters "shall be responsible for preserving the wilderness character of the area"); Pub. L. No. 95–495, 92 Stat 1649, § 2(4) (1978) (listing one of Congress' goals of the Boundary Waters Canoe Area Wilderness Act of 1978 as "minimiz[ing] to the maximum extent possible, the environmental impacts associated with mineral development affecting" the Boundary Waters); 16 U.S.C. § 1604(g)(3); 43 U.S.C. § 1701(a)(8).

Agency implementation of these laws governing the Superior National Forest and the Boundary Waters Wilderness is an exercise of sovereign authority. The laws serve public and general purposes. *See, e.g.*, *Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 522 (Fed.

Cir. 2011) (holding that agency action requiring compliance with the Endangered Species Act is a sovereign act); *Atlas Corp. v. United States*, 895 F.2d 745, 754 (Fed. Cir. 1990) (holding that a statute enacted to control uranium mill waste and implementing regulations are sovereign acts). Moreover, as regulatory powers not directed toward managing the government's financial obligations, the unmistakability doctrine protects these aspects of sovereignty "most forcefully." *See Transohio Sav. Bank*, 967 F.2d at 619.

The unmistakability doctrine is a particularly important guide when interpreting the leases here, because Congress has already dictated that its authority must be exercised by the agencies in ways that conflict with the Second M-Opinion. *See W. Fuels-Utah*, 895 F.2d at 789 ("[T]he crucial point is that some of the constructions would immunize the leases from the sovereign power of the United States to change its laws."). Under the Boundary Waters Canoe Area Wilderness Act, Congress charged the Forest Service with "protect[ing] the special qualities of the [Boundary Waters] as a natural forest-lakeland wilderness ecosystem of major esthetic, cultural, scientific, recreational and educational value to the Nation." Pub. L. No. 95–495, 92 Stat 1649, § 1; *see also* 16 U.S.C. § 1133(b). The Forest Service exercised this regulatory authority and determined that renewing the leases would be inconsistent with its obligations to protect the Boundary Waters. *See* BLM-000407.

The Second M-Opinion's interpretation of the leases would constrain the agencies' ability to exercise these delegated sovereign powers by eliminating the option to disallow renewal. Therefore, that interpretation is permissible only if the leases surrender the Bureau's discretion in unmistakable terms. Neither the Second M-Opinion nor 2018 Reversal addresses the unmistakability doctrine. As discussed *supra* pp. 27–32, the 2004 leases' "preferential right" language plainly preserves the agencies' authority to deny renewal. But even if the Court finds

some ambiguity in the leases, the unmistakability doctrine compels an interpretation that preserves the agency's authority to deny renewal.

D. Even If It Were Appropriate to Consider Extrinsic Evidence, that Evidence Demonstrates that Renewal Is at the Bureau's Discretion.

Because the "preferential right . . . to renew" term of the leases is unambiguous (as described above), nothing in the past 67 years of parol evidence can be used to contradict it. *See supra* pp. 27–32. Even if the term were ambiguous, however, the unmistakability doctrine likely precludes consideration of parol evidence. That is because D.C. Circuit decisions applying the unmistakability doctrine suggest that the language of the contract *itself* has to be unmistakable, without considering parol evidence. *See Transohio Sav. Bank*, 967 F.2d at 619 (acknowledging that under Supreme Court precedent the "power of sovereignty" will not be "held by this court to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken" quoting *Jefferson Branch Bank v. Skelly*, 66 U.S. 436, 446 (1861))); *W. Fuels-Utah*, 895 F.2d at 789 (construing contract not to surrender sovereign authority based on language of the contract alone). The four-justice plurality in *United States v. Winstar Corporation* likewise described the unmistakability doctrine in terms indicating it turns on a contract's language alone. *See* 518 U.S. 839, 878 (1996) ("[A] contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an Act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power."). To the extent the issue is unresolved, however, the parol evidence itself must meet the unmistakability standard. Far from showing that the Bureau unmistakably surrendered its discretion to deny renewal, the parol evidence only further demonstrates that the leases preserved that discretion.

The evidence shows that the 1966 leases incentivized early production by providing three mandatory renewals as a reward for production if it occurred during the initial 20-year term, but otherwise granted no mandatory right to renew. The Bureau's contemporaneous statements show that it believed it had discretion not to renew the leases absent production during the initial term. There is no evidence that the parties understood the 1966 leases any differently.

When the Bureau renewed the leases in 1989 (after the time for INCO to trigger the mandatory renewal incentive had lapsed without any production), the 1989 leases included only a preferential right to renew, as they expressly stated. This was consistent with the historical language of the 1966 leases, which provided no nondiscretionary right to renewal absent production within the primary 20-year term of those leases. However, even if the Second M-Opinion were correct that the 1966 leases granted a right to renew without production, the 1989 and 2004 leases qualified that right as a preferential right.

1. The extrinsic evidence from the 1960s confirms that the 1966 leases did not guarantee renewal unless the lessee started production during the primary 20-year term.

Even if the Second M-Opinion were correct that the renewal terms of the 1966 leases should be applied in place of the 2004 renewal terms, the 1966 terms leave renewal at the Bureau's discretion in the absence of the timely production that the Bureau had hoped to incentivize. Section 5 of the 1966 leases specifies the only conditions under which the lessee was guaranteed 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 law at the time of the expiration of any such period, and to readjust other terms and conditions of the lease, including the revision 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.

BLM-003610 (emphasis added). This language grants three mandatory renewals on favorable terms "unless" the lessee fails to begin production during the initial 20-year term. If production comes too late, there is no nondiscretionary right to renew.

The Second M-Opinion's alternative interpretation—*i.e.*, that the leases provide a right to renew for unlimited 10-year periods regardless of production, as well as a separate right to three 10-year renewals on the same terms and conditions if production begins on time—is incorrect. That argument relies primarily on section 1 of the leases, titled "Rights of the Lessee," which provides that the leases are "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*." BLM-003603–04 (emphasis added); *see* BLM-000068–69.

The Second M-Opinion maintains that section 1 grants the lessee the right to renewal, while section 5 addresses the Bureau's separate right to make readjustments upon renewal. BLM-000068. Not so, as the context shows. Section 1 is a general summary of the rights granted to the lessee. BLM-003603–04. By its own terms, section 1 is subject to the more specific provisions of the leases, including section 5, which governs "Renewal Terms" and conditions the right to renew on timely production. BLM-003604; BLM-003610. This same pattern applies to other rights granted in section 1, such as the right to mine and the right to construct facilities for mining. BLM-003603–04. They are not separate rights unencumbered by the leases' limitations on when, where, and how to mine and construct facilities. *See, e.g.*, BLM-003609 (requiring

approval of construction); BLM-003610–11 (restricting mining methods). The rights outlined in section 1 are qualified rights, subject to the detailed terms in the other "provisions of this lease." BLM-0003604.

The Second M-Opinion also maintains that the word "unless" in section 5 of the 1966 leases modifies only the clause "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," rather than all of the text after the words "provided, however . . . ." *See* BLM-000069–70. According to this reading, section 5 grants an unconditional right to three 10-year renewals, and the only thing conditioned on mineral production is the right to the same terms and conditions. However, there is no textual basis, such as a comma, to indicate a separation between "the right to three successive ten-year renewals of this lease" and "with any readjustment . . . limited . . . ." BLM-003610. These clauses flow uninterrupted from the words "provided, however" to the word "unless," indicating that "unless" modifies both. *Id.*

Finally, the Second M-Opinion asserts that the 1966 leases contain an unqualified right to unlimited renewal because section 1 specifies that the rights granted are "in accordance with regulation 43 C.F.R. § 3221.4(f) and the provisions of this lease." BLM-000068. Section 3221.4(f) described how lease terms would be established and stated in part "[t]he lessee will be granted a right of renewal for successive periods, not exceeding 10 years each . . . ." 43 C.F.R. § 3221.4(f) (1966). Far from requiring an unlimited and unqualified right of renewal, however, section 3221.4(f) provided "[t]he terms and conditions of the lease, including the royalty rates, will be established on an individual case basis" and renewal will be "under such reasonable terms and conditions as the Secretary of the Interior may prescribe." Section 1 of the 1966 leases, likewise, points the reader to "the provisions of this lease" to interpret the rights granted. BLM-

003604. Consistent with 43 C.F.R. § 3221.4(f), section 5 of the 1966 leases provides a right to renewal conditioned on timely production. Section 5, which provides the more specific conditions for renewal, must govern the interpretation of the general, introductory language in section 1. *See Gandal v. Telemundo Grp., Inc.*, 23 F.3d 539, 546 (D.C. Cir. 1994) ("The specific provision, therefore, supersedes the language of the general clause."). Thus, the 1966 leases granted a non-discretionary right to renewal for three periods of 10 years only if the lessee began production on time.

Evidence contemporaneous with the issuance of the 1966 leases confirms this interpretation. During negotiations, the Bureau repeatedly rejected the idea of 50-year leases. BLM-003794–95; BLM-003796; BLM-003740. The Bureau was concerned that 50-year leases would allow the lessee to delay production for 49 years. BLM-003794; *see* BLM-003758.[22] INCO eventually agreed to 20-year leases, BLM-003793, even representing to the agencies that "development drilling will start soon after the leases are issued" and that production could begin in ten years or less. BLM-003802. After extensive negotiation on this point, there is nothing in the record to suggest the Bureau nevertheless bound itself to grant unlimited renewals. To the contrary, the Bureau understood that INCO's right to renew was conditioned on production.

Indeed, the agency rejected a proposed clause in an otherwise nearly identical draft of section 5 because it would have "impose[d] a pre-condition on the Secretary's right not to renew in the absence of production." BLM-003789 (section (5)). The Bureau thus believed that, without the rejected term, section 5 preserved its discretion not to renew.

[22] Indeed, more than 50 years have passed since 1966, the full duration originally contemplated (and rejected) for the leases, and still no production has occurred.

Consistent with this evidence, the agency described the leases to the public in a contemporaneous press release as "renewable for 30 years at 10-year intervals if the property is brought into production within the initial 20-year term." BLM-003630. The Second M-Opinion fails to address these statements by the Bureau about its authority to deny renewal. There is no contemporaneous evidence that the Bureau or INCO interpreted the leases as granting a right to renew absent production.[23]

In short, to the extent they are even relevant, both the 1966 leases themselves and other contemporaneous extrinsic evidence confirm that the leases did not guarantee renewal if there was no mineral production during the initial 20-year term.

2. Extrinsic evidence from the 1980s further confirms that the leases did not guarantee renewal without production.

[23] Even though there is no contemporaneous evidence showing that INCO believed the 1966 leases granted a perpetual right to renew, the Second M-Opinion asserts that Twin Metals has "consistently" maintained that the 1966 leases supplant the 1989 and 2004 leases and that the company has a right to nondiscretionary renewals. BLM-000062. That assertion is not consistent with the record. An October 2014 technical report commissioned by Duluth Metals—then the majority owner of the Twin Metals Minnesota Project—acknowledged that the Bureau has discretion to deny renewal of "any preference right lease":

> A preference right lease includes the right to develop and construct a mine under the terms thereof, but additional permits are required before work can commence. Subject to applicable laws and regulations, *BLM has discretion as to whether to issue or renew any prospecting permit and any preference right lease*, as well as discretion with respect to the terms and conditions to be included in any such prospecting permits and preference right leases. Issuance and renewal of prospecting permits and preference right leases also are subject to review by the United Sates Forest Service (USFS) under applicable federal law.

BLM-004919 (emphasis added). The technical report was prepared under a Canadian securities law, National Instrument 43-101, designed to protect investors, and thus presumably represents the lessee's candid view of its renewal rights. *See* BLM-004823.

Toward the end of the primary term in the mid-1980s, the Bureau sought advice from the Solicitor's office as to whether it was "possible to grant lease renewals for these leases when the leases have never been in production." BLM-003664. The Associate Solicitor responded in April 1986 not that renewal was compulsory, but that the leases "*may* be extended, even though production has not occurred, for a period not exceeding 10 years." BLM-003664 (emphasis added). Thus, the agency interpreted the leases to give the Bureau discretion over renewal. This extrinsic evidence surrounding the renewal in the 1980s further undermines the Second M-Opinion's view that the parties intended the 1966 leases to grant unlimited renewals regardless of production.

The Second M-Opinion dismisses the 1986 opinion as exhibiting faulty reasoning. BLM-000071–72. But the very fact that the Bureau asked whether renewal was even possible demonstrates that it did not interpret the leases as conveying an unqualified right to renew. That the resulting opinion did not say renewal is mandatory shows that the Solicitor's office did not interpret the leases that way either. The 1986 opinion is thus a key piece of extrinsic evidence contradicting the Second M-Opinion's conclusion that the 1966 leases unambiguously grant a perpetual right to renewal. *See* BLM-000068.

Even the extrinsic evidence the Second M-Opinion itself cites from the 1980s does not support its interpretation of the 1966 leases. The Second M-Opinion quotes a Bureau memo from 1985, which stated that the minimum royalty is the "only diligence requirement" for timely development in the leases. BLM-000072 (quoting BLM-005456). But the same memo recommended asking the Solicitor whether renewal was even possible in the absence of production, underscoring that the Bureau did not view the leases as granting the right to unlimited renewals without production. BLM-0054557. Similarly, the Second M-Opinion cites a

1988 Bureau memo that rejected a recommendation to require the lessees to start production within the renewal term on pain of lease termination, citing the leases' high minimum royalty provisions as an adequate incentive. BLM-000072; BLM-002811–12; BLM-002882–83. However, providing that the leases will *terminate* absent production is harsher than simply preserving the Bureau's discretion to deny renewal, and rejecting that harsher condition does not imply that the Bureau surrendered its discretion to deny renewals. The oblique characterizations of the leases' production incentives in these two memos do not contradict, and are ultimately less informative than, the evidence from the 1960s and 1980s directly pertaining to the Bureau's understanding of the 1966 leases' renewal terms.

3. The extrinsic evidence also shows the Bureau preserved its renewal discretion in 1989 and 2004.

When the Bureau renewed the leases in 1989, the agency made even clearer that they confer no right to nondiscretionary renewal. Because INCO failed to begin production during the initial term, *see* BLM-002878, there was no need to preserve the conditional production-based right to renew from the 1966 leases. Instead, by incorporating the 1966 royalty provisions, the Bureau made the 1989 leases consistent with the 1966 leases in every significant respect that was still pertinent. *See* BLM-002755 (section (14)). Even if the 1966 leases provided an unlimited right to renewal without production (they did not), the 1989 and 2004 leases unambiguously give the Bureau the discretion to deny renewal. As explained *supra* pp. 27–32, that conclusion is plain on the face of the leases. The extrinsic evidence further confirms that the parties intended the terms of the renewal leases as written to govern.

Consistent with the language of the 1989 leases, which incorporate a limited set of terms from the 1966 leases, the Bureau and the lessee intended to preserve some of the 1966 terms and

conditions. This does not mean, however, that the 1966 terms supplant and nullify *all* of the 1989 terms, as the Second M-Opinion wrongly concludes. *See* BLM-000065. Rather, the evidence shows the Bureau and INCO retained only the 1966 royalty terms that were essential to the original agreement.

The Bureau first sent renewal leases to INCO in September 1988 but then withdrew them "because the new lease forms . . . will alter the terms and conditions of the original leases." BLM-002808. This withdrawal followed an internal memo recommending that "[b]ecause of the highly negotiated terms and conditions of these two leases, which contain many references to the requirements to be applied during lease renewal periods, I recommend that these leases be renewed under the existing terms and conditions and in their present form, i.e., not on the new lease form." BLM-002812. Despite this recommendation, the Bureau ultimately *did* use the Bureau's standard Form 3520-7 for the 1989 and 2004 renewals. *See* BLM-002753; BLM-002553. To address the concern about preserving the leases' original terms, the Bureau included two special stipulations that replace the standard "production royalty" and "minimum annual production and minimum royalty" clauses with the corresponding terms and conditions from the 1966 Leases. BLM-002754 (showing section (2)(a) and (b) marked with asterisks); BLM-002755 (incorporating provisions of the 1966 Leases in place of section (2)(a) and (b) with corresponding asterisks). In transmitting the final 1989 leases for signature, the Bureau wrote that the agencies had "agreed to the renewal of the enclosed Preference Right Leases MNES 1352 and MNES 1353 under the existing terms and conditions of the original leases." BLM-002780.

The Second M-Opinion infers from these events that, notwithstanding the 1989 leases' express incorporation of only the royalty terms and conditions of the 1966 leases, the parties

actually "renewed the 1966 leases without alteration of the operative terms." BLM-000066. In fact, the course of events in 1988 and 1989 confirms that the "existing terms and conditions" the Bureau was concerned about preserving were just the royalty provisions expressly carried over in the 1989 leases. *See* BLM-002755. This is because INCO had exercised an option in section 14 of the 1966 leases that allowed it to lock in a more favorable royalty schedule on renewal. *See* BLM-002811. This meant that, as Bureau staff recognized in a memo discussing the terms of renewal, the agency had *no choice* but to incorporate the royalty provisions from the 1966 leases in 1989. *Id.*

Incorporating only the royalty provisions was also consistent with the fact that they were the most carefully considered and highly negotiated terms leading up to issuance of the 1966 leases, with even Congressional representatives weighing in. BLM-003793; BLM-003774–75; BLM-003759; BLM-003756; BLM-003750–55; BLM-003747–48; BLM-003745–46; BLM-003744 (Bureau memo noting "difficulties encountered in arriving at a mutually acceptable royalty rate" and describing "the royalty problem" as "the principal obstacle" to issuing the leases); BLM-003732; BLM-003726–29; BLM-003700–01 (U.S. Geological Survey, Department of the Interior, advising the Bureau not to reduce royalty rates as requested by INCO); BLM-003698; BLM-003686–87 (Bureau memo prepared for Congressman Blatnik February 28, 1966, summarizing negotiations as "stymied on the royalty question"); BLM-003643. The parties argued over just "a few cents per ton." BLM-003736. The "gross value" used as the basis for royalties was also unique, allowing for the cost of producing the low-grade ore on the site. *See* BLM-003604 (section (2)(b)); BLM-003698 ("Ordinarily, we would not allow two-thirds for the cost of manufacture"); BLM-004338 ("The costs of mining . . . no doubt will remain high.").

In contrast, there is no evidence that the Bureau's discretion not to renew the leases was a contested issue in the negotiations. Although INCO originally sought a 50-year lease, the company ultimately agreed to a 20-year lease and then shifted its focus to royalties. *See* BLM-003793. Therefore, unlike the royalty rates guaranteed by section 14 of the 1966 leases, the Bureau not only had a right to update the renewal terms to conform to Bureau standards, it could do so without altering the parties' agreement. Because the non-discretionary right to renew expired after the lessee failed to begin production during the initial 20-year term, that term was no longer an operative part of the parties' agreement. Indeed, if anything, the desire to preserve the key terms from the 1966 leases coupled with the unambiguous selection of a discretionary "preferential right to renew" in the 1989 leases confirms that even if the 1966 leases had included an indefinite, non-discretionary right to renew, that term was *not* seen as something that survived and needed to be preserved in the 1989 leases. Consistent with both the parol evidence and the 1989 leases the parties executed, the royalty provisions from the 1966 leases were the only significant "existing terms and conditions" that the parties intended should supersede the 1989 terms.

Moreover, the Second M-Opinion's view that all terms of the 1966 leases remain operative is demonstrably incorrect. Several provisions of the 1966 leases are flatly inconsistent with those in the 1989 and 2004 leases. For example, the 1989 and 2004 leases require only a $5,000 bond, whereas the 1966 leases require $10,000. BLM-002754 (section (4)); BLM-003606 (section (2)(g)). The 1989 and 2004 leases provide that equipment and structures not removed by the lessee within 180 days of lease termination become property of the lessor, whereas the 1966 leases allow one year for removal. BLM-002755 (section (9)); BLM-003611 (section (9)). As with the "preferential right to renew," the Second M-Opinion's reasoning would nullify these

express terms of the 1989 and 2004 leases in favor of the conflicting 1966 terms. That result, however, is contrary to the widely recognized prohibition on using extrinsic evidence to contradict a contract's unambiguous terms. *See supra* pp. 32–35.

In sum, the 1966 leases did not guarantee any renewal absent production within the primary 20-year term and the Bureau's contemporaneous statements reflected that understanding. The Bureau later asked whether it was even possible to renew the leases absent production, and the Solicitor did not respond that renewal was mandatory. Furthermore, in 1989 the parties changed the renewal term to the version that still appears in the 2004 leases, which, as explained *supra* pp. 27–32, unambiguously preserves the Bureau's discretion. Far from showing that the Bureau unmistakably surrendered its discretion not to renew, this parol evidence demonstrates the agency retained that discretion as the First M-Opinion concluded.

III. BECAUSE THE 2018 REVERSAL IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW, THE PROPER REMEDY IS VACATUR.

Vacatur is the ordinary remedy for unlawful agency action under the APA. *Nat'l Mining Ass'n v. United States Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *Petroleum Commc'ns., Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (citing *Am. Tel. & Tel. Co. v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992) ("Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion," the court "must undo [the agency's] action."); *Crowley's Yacht Yard, Inc. v. Pena*, 863 F. Supp. 18, 22 (D.C.C. 1994) (citing *Nat'l Treasury Emp't Union v. Horner*, 854 F.2d 490, 499 (D.C. Cir. 1988) (further citations removed)). The decision to vacate arbitrary agency action or remand without vacatur depends on whether (1) the agency's action is so deficient as to raise serious doubts whether the agency can adequately justify its decision at all; and (2) vacatur would be seriously disruptive. *Humane Soc'y of United States v. Zinke*, 865 F.3d 585, 614 (D.C. Cir. 2017).

Here, both factors support vacating the 2018 Reversal and Second M-Opinion. Given the nature and extent of the deficiencies in these decisions, there is no way for the agencies to justify them on remand. As described above, the Bureau had no authority to issue the 2018 Reversal. Furthermore, the 2018 Reversal is arbitrary, capricious, and contrary to law because its sole basis is the Second M-Opinion. The Second M-Opinion, in turn, is arbitrary, capricious, and contrary to law because it ignores the unambiguous renewal terms of the 2004 leases, misuses parol evidence, fails to apply the unmistakability doctrine, and misinterprets the 1966 leases and parol evidence. These are "shortcomings that go to the heart of" the 2018 Reversal and Second M-Opinion—the conclusion that the Bureau has no discretion to deny renewal. *Id*. Remand would be unproductive, because there is no way for the government to remedy the shortcomings in these decisions and still arrive at the same course of action. Under these conditions, vacatur is appropriate. *Id*. at 614–15.

Vacatur also would not have disruptive consequences. If the Court vacates the 2018 Reversal and Second M-Opinion, then Twin Metals' leases would once again be expired. This would simply restore the circumstances that obtained immediately prior to the government's unlawful action. *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110–11 (D.C. Cir. 2014) ("This is not a case in which the egg has been scrambled, and it is too late to reverse course." (quotation omitted)).

CONCLUSION

For the foregoing reasons, plaintiffs request that the Court vacate and set aside the 2018 Reversal and Second M-Opinion as arbitrary, capricious, and contrary to law, and, with respect to the 2018 Reversal, in excess of the Bureau's authority.

Respectfully submitted this 16th day of April, 2019,

s/ Erin Whalen

s/ Eric P. Jorgensen

Erin Whalen (admitted *pro hac vice*)
Eric P. Jorgensen (DC Bar No. 88897)
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
T: 907.586.2751
E: ewhalen@rearthjustice.org
E: ejorgensen@earthjustice.org

Janette K. Brimmer (admitted *pro hac vice*)
EARTHJUSTICE
705 Second Avenue, Suite 203
Seattle, WA 98104
T: 206.343.1029
E: jbrimmer@earthjustice.org

Attorneys for Plaintiffs The Wilderness Society, Izaak Walton League of America, and Center for Biological Diversity in Case No. 1:18-cv-01496-TNM

s/ Dustin C. Elliott

Joseph Alexander Ward (DC Bar No. 463927)
Dustin C. Elliott (DC Bar No. 1032601)
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006-1888
Telephone: 202.887.1500

Thomas B. Heffelfinger (admitted *pro hac vice*)
Amy S. Conners (admitted *pro hac vice*)
BEST & FLANAGAN LLP
60 South Sixth Street
Suite 2700
Minneapolis, MN 55402
Telephone: 612.339.7121

Attorneys for Plaintiffs Voyageur Outward Bound School, Piragis Northwoods Company, Inc., Ely Outfitting Company & Boundary Waters Guide Service, Wenonah Canoe Inc., Northstar Canoe, Sawbill Canoe Outfitters, Inc., Hungary Jack Outfitters, Women's Wilderness Discovery, River Point Resort and Outfitting Company, and Northeastern Minnesotans for Wilderness in Case No. 1:18-cv-01463-TNM

s/ Ari B. Lukoff

Richard B. Allyn (MN # 0001338) (admitted *pro hac vice*)
Stephen P. Safranski (MN #0331326) (admitted *pro hac vice*)
Ari B. Lukoff (MN #0390025) (admitted *pro hac vice*)
ROBINS KAPLAN LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
Tel.: (612)349-8500
Fax: (612)339-4181
RAllyn@robinskaplan.com
SSafranski@robinskaplan.com
ALukoff@robinskaplan.com

s/ Meegan F. Hollywood

Meegan F. Hollywood (Dist. D.C. Bar No. NY0206)
ROBINS KAPLAN LLP
399 Park Avenue
Suite 3600
New York, NY 10022
Tel.: (212)980-7400
Fax: (212)980-7499
MHollywood@robinskaplan.com

Attorneys for Plaintiff Friends of the Boundary Waters Wilderness in Case No. 1:18-cv-01499-TNM

TABLE OF DECLARATIONS

Exhibit No.	Description
1	Declaration of Collette Adkins
2	Declaration of Carla Arneson
3	Declaration of Peta Claire Barrett
4	Declaration of Ted Bell
5	Declaration of Kimberly M. Blaeser, Phd.
6	Declaration of Gail Bollis
7	Declaration of Michael Cichanowski
8	Declaration of Jonathan Engel
9	Declaration of Alison Flint
10	Declaration of Amy Freeman
11	Declaration of David Freeman
12	Declaration of David Noah Greenwald
13	Declaration of Jeffrey A. Goldstein, M.D.
14	Declaration of Joseph Goldstein
15	Declaration of Deborah Huskins
16	Declaration of John Ipsen
17	Declaration of Stephen J. Jay, M.D.
18	Declaration of Christopher Knopf
19	Declaration of James S. Koschak
20	Declaration of Steven L. Koschak
21	Declaration of Scott Kovarovics