



United States Department of the Interior

OFFICE OF THE SOLICITOR

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Memorandum

To: Director, Bureau of Land Management

From: Solicitor

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

The Bureau of Land Management (BLM) has asked whether it has the discretion to grant or deny Twin Metals Minnesota's pending application for renewal of two hardrock preference right leases in northern Minnesota.¹ I conclude that Twin Metals Minnesota does not have a non-discretionary right to renewal, but rather the BLM has discretion to grant or deny the pending renewal application.

Background

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

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

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

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

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

³ See 1966 leases §§ 1(a), 5.

⁴ The regulations at 43 C.F.R. § 3522.1-1 (1985) state that renewal applications "must be filed in the appropriate land office within 90 days prior to the expiration of the lease term." The lessee filed an application for extension of the term of the leases on May 14, 1986—30 days before the end of the primary twenty-year term on June 14, 1986, which was "within 90 days" of the lease expiration. Consequently, the renewal application was timely filed.

ten years.⁵ TMM timely applied for a second renewal on March 15, 1999. The BLM renewed the leases on January 1, 2004.⁶ The 2004 leases state that they are for a period of ten years, “with preferential right in the lessee to renew for successive periods of 10 years under such terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the expiration of any period.” On October 21, 2012, TMM timely applied to renew the leases once more.⁷ TMM has been conducting exploration activities on the leaseholds based on the 2004 leases while the BLM considers TMM’s 2012 renewal application.

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

Although there has been no production, the operator held the leases under production waivers for five years and then through payment of minimum royalties in lieu of production payments for the rest of the time, consistent with the provisions of the 1966 leases that were incorporated by reference in the 2004 leases. Those provisions stated that, beginning after the tenth year of the primary term, the lessee is required to mine a quantity of minerals such that the royalties would be equal to \$5 per annum per acre for the primary term and \$10 per annum per acre during each renewal or, in lieu of that production, pay royalties equal to the minimum royalty. *See* 1966 leases § 2(c) (incorporated into section 14 of the 2004 leases). Section 2(c) of the 1966 leases allowed the lessor to waive, reduce, or suspend the minimum royalty payment for reasonable periods of time in the interest of conservation or when such action does not adversely affect the interest of the United States in accordance with 43 C.F.R. § 3222.6-2. *Id.*

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

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

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

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

⁸ Section 5 of the 1966 leases contains definite conditions for allowing such an extension, i.e., in the interest of conservation or upon a satisfactory showing by the lessee that the lease cannot be successfully operated at a profit or for other reasons.

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

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

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

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

Relevant Lease Provisions

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

Part I. Lease Rights Granted:

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

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

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

¹¹ See *infra* p. 12.

Nickel Company, 922 19th Street, Golden, Colorado, 80401, hereinafter called lessee, is effective Jan-1 2004, for a period of 10 years, *Sodium, Sulphur, Hardrock* – with preferential right in the lessee to renew for successive periods of 10 years under such terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the expiration of any period.

Part I, Section 2:

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

Part II, Section 14. Special Stipulations:

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

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

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

The three relevant provisions in the 1966 leases are:

Introductory clause:

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

Section 1(a):

Rights of Lessee. In consideration of the rents and royalties to be paid and conditions and covenants to be observed as herein set forth the Lessor grants to the Lessee, subject to all privileges and uses heretofore duly authorized and prior valid claims, the exclusive right to mine, remove, and dispose of all the copper and/or nickel minerals and associated minerals . . . in, upon, or under [the described lands] . . . together with the right to construct and maintain thereon such structures and other facilities as may be necessary or convenient for the mining, preparation, and removal of said minerals, for a period of twenty (20) years with a right in the Lessee to renew the same for successive

periods of ten (10) years each in accordance with regulation 43 C.F.R. § 3221.4(f) and the provisions of this lease.

Section 5:

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

Analysis

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

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

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

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

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

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

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

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

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

Finally, even if the 1966 lease renewal terms were in effect, they do not prohibit the BLM from exercising its discretion to decide whether to renew the leases. Section 1(a) of the 1966 leases granted to the lessee “the exclusive right to mine, remove, and dispose of all the copper and/or nickel minerals and associated minerals” It also provided that renewal of the leases beyond the primary term is subject to 43 C.F.R. § 3221.4(f) (1966) and the provisions of the lease. Section 3221.4(f) provides that the lessee “will be granted a right of renewal for successive periods, not exceeding 10 years each, under such reasonable terms and conditions as the Secretary of the Interior may prescribe, including the revision of or imposition of stipulations for the protection of the surface of the land as may be required by the agency having jurisdiction thereover.” Based on this regulation, the BLM included a conditional renewal provision in section 5 of the 1966 leases.

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

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

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

to a further renewal when production¹⁴ has not begun at the end of the first renewal-extension period.

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

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

provided, however, that the Lessee shall have the right to three successive ten-year renewals of this lease with any readjustment in royalties payable hereunder limited to that hereinafter provided and with no readjustment of any of the other terms and conditions of the lease **unless at the end of the primary term of this lease the Lessee shall not have begun production, either hereunder or under the companion lease granted to the Lessee this day.**

This highlighted clause, which begins with "unless," qualifies the very right to renew and not merely, as the company has asserted, the phrase describing the level of discretion the BLM has to readjust the other terms and conditions of the leases upon renewal. In other words, the proper meaning of the proviso is clear when the last clause is placed next to the provision it actually qualifies: "[T]he Lessee shall have the right to three successive ten-year renewals of this lease . . . unless at the end of the primary term of this lease the Lessee shall not have begun production, either hereunder or under the companion lease granted to the Lessee this day."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁷ See Memorandum from Associate Solicitor, Energy and Resources, signed by Kenneth G. Lee, Assistant Solicitor, Branch of Eastern Resources, to Deputy State Director, Mineral Resources, Eastern States Office, Bureau of Land Management, "Application for Minimum Royalty Waiver Submitted by INCO Alloys International, Incorporated for Leases ES 01352 and ES 01353" (Apr. 2, 1986) (Attached).

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

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

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

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

Conclusion

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


Hilary C. Tompkins

Attachment



United States Department of the Interior

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

BLM.ER.0335

APR - 2 1986

Memorandum

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

From: Associate Solicitor, Energy and Resources

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

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

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

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

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

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

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

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

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

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



Kenneth G. Lee
Assistant Solicitor
Branch of Eastern Resources

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