



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

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M-37049

Memorandum

To: Director, Bureau of Land Management

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

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

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

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

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

Background

Statutory Authority for Issuance of the Leases

The leases are located in northern Minnesota on acquired Weeks Act¹ lands, as well as lands reserved from the public domain, that are managed as part of the National Forest System by the Forest Service. The Secretary's authority, as delegated to the BLM, for mineral disposition on the acquired lands is found in section 402 of Reorganization Plan No. 3 of 1946,² and 16 U.S.C. § 520, which governs mineral disposition on Weeks Act lands. The Secretary's authority, as delegated to the BLM, for mineral disposition on reserved National Forest System lands in Minnesota is 16 U.S.C. § 508b. Under these provisions, leasing for hardrock mineral development is allowed only if the Secretary of Agriculture has consented to the issuance of the lease.³

Negotiation and Issuance of the 1966 Leases

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

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

Term – INCO sought a 50-year term to increase certainty for its investors while the BLM wanted a maximum 20-year primary term;⁵

Royalty rates – the Department wanted higher royalty rates than INCO was willing to agree to pay;⁶ and

Production assurances – the BLM sought assurance that INCO would begin production during the lease term.⁷

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

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

³ *See id.*; 16 U.S.C. § 508(b).

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰ 43 C.F.R. § 3221.4(f) (1966).

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

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

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

Activity during the Primary Term of the 1966 Leases

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

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

¹¹ See § 2(c) of the 1966 leases.

¹² *Id.*

¹³ Section 14 of the 1966 leases.

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

¹⁵ *Id.* at 3.

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

The 1989 Lease Renewals

INCO timely filed its first lease renewal application on May 14, 1986.¹⁶ After receiving legal advice from the Office of the Solicitor confirming that the lease could be renewed despite the lack of production,¹⁷ the BLM requested the consent of the Forest Service, and the Forest Service agreed to the renewals, finding the terms and conditions of the original leases to be “adequate to prevent or mitigate unacceptable impacts and that no additional conditions need to be added prior to their renewal provided that none of the terms and conditions related to [Forest Service surface] authority are diminished in any manner.”¹⁸

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

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

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

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

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

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

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

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

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

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

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

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

²² *Id.* at 2.

²³ *Id.*

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

²⁵ 1989 lease renewal forms, at 2–3.

²⁶ *Id.* at 1.

The 2004 Lease Renewals

American Copper timely applied for a second renewal of the leases on March 15, 1999.²⁷ The Forest Service consented to the renewals, finding the terms and conditions to be sufficient.²⁸ The BLM issued its decision granting the lease renewals on November 12, 2003, and directed American Copper to sign the enclosed Preference Right Lease forms and return them to the BLM office within 30 days.²⁹ As lease forms, the BLM again provided Standard Form 3520-7 (December 1984), with identical typed-in provisions to those of the 1989 leases, and again attached the 1966 leases in full.³⁰ The leases were renewed with an effective date of January 1, 2004.

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

The 2012 Renewal Application and Issuance of M-37036

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

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

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

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

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

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

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

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

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

After receiving the M-Opinion, the BLM requested the Forest Service’s consent determination on the lease renewals.³⁵ After taking public comment on the question, the Forest Service submitted a letter to the BLM Director on December 14, 2016, stating it did not consent to renewal of the leases.³⁶ As a result of the Forest Service’s denial of consent, the BLM issued a decision denying renewal of the leases on December 15, 2016.³⁷

Analysis

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

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

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

³³ *Id.* at 13.

³⁴ *Id.* at 2.

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

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

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

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

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

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

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

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

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

³⁹ M-37036 at 6.

⁴⁰ *Id.*

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

⁴² *Id.* at 6.

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

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

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

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

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

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

The lack of an integration clause in the 2004 leases is particularly important given the parties' interpretation of the identically worded 1989 leases that the Department has consistently acknowledged as incorporating the 1966 lease terms in their entirety.⁵¹ The use of the identical form in 2004 without explanation and without an integration clause at the very least creates an ambiguity as to whether the parties intended the 2004 leases to be treated the same as the 1989 leases or completely differently as interpreted by M-37036.⁵²

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

Sec. 14. Special Stipulations --

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

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

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

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

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

⁵¹ See M-37036 at 6.

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

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

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

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

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

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

⁵³ 2004 Leases at § 14.

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

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

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

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

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

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

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

The forms the BLM transmitted for signature were Standard Forms 3520-7 (December 1984), with the original 1966 leases attached and incorporated by reference into the standard forms through two special stipulations included as section 14 of the forms (the same form and special stipulations that would be used in the 2004 renewals). In sum, the 1989 leases, although using Standard Form 3520-7, renewed the 1966 leases without alteration of the operative terms. This fact was acknowledged in M-37036.⁶¹

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

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

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

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

⁶¹ M-37036 at 6, 12.

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

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

The BLM issued its decision granting the lease renewals on November 12, 2003, changing neither the terms of the lease renewals nor the conditions and stipulations, and provided the same standard form for signature as the BLM provided to the lessee in 1989.⁶⁴ The BLM did not indicate any change to the contracts in its decision, and the course of dealings between the parties had established the common basis of understanding that the 1966 lease terms were to remain in effect.⁶⁵

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

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

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

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

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

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

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

The 1966 Lease Terms Provide for a Third Right of Renewal

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

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

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

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

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

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

⁶⁸ 1966 leases § 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁰ M-37036 at 9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁵ M-37036 at 12–13.

⁷⁶ 176 IBLA 1 (2008).

⁷⁷ *Id.* at 5.

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

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

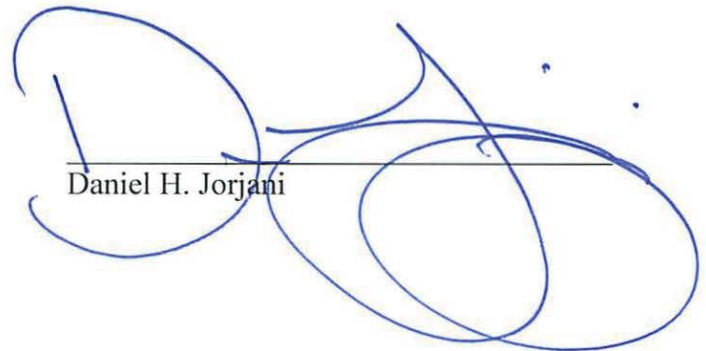
⁸⁰ Memorandum from BLM Assistant District Manager for Solid Minerals, Rolla, Vincent Vogt, to the State Director, Eastern States Office, “Recommendations for Lease Renewals, International Nickel Corporation Hardrock Mineral Leases MNES-1352 and MNES-1353” (Oct. 14, 1988) at 2.

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

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

Conclusion

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



Daniel H. Jorjani

⁸¹ M-37036 at 11.