



Twin Metals files suit to seek lease renewal

Company claims renewal of two federal leases is mandatory

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Twin Metals has filed a lawsuit seeking to maintain federal mineral leases in the Superior National Forest. The company has spent millions on test drilling and other work as it seeks to advance its copper-nickel mine proposal near Ely.

REGIONAL— A lawsuit filed Monday by Twin Metals Minnesota has reopened the debate about the company's rights to renew two federal mineral leases on the Superior National Forest that are critical to the company's plans to open a copper-nickel mine near Ely.

In their legal brief and other documents submitted in federal District Court in Minneapolis this week, Twin Metals seeks to invalidate a recent opinion by Department of the Interior Solicitor Hilary Tompkins, who determined earlier this year that the Bureau of Land Management has the discretion to approve or deny renewal of the mineral leases which date back to 1966.

The solicitor's opinion was a body blow to Twin Metal's project and the company promised at the time to defend what they argue is a legal right to renewal of the leases. Twin Metals calls the solicitor's opinion "inconsistent with federal law, the terms of Twin Metals' leases, and the federal government's established precedent in supporting and renewing the leases over five decades."

The opinion has also cast a cloud of uncertainty over Twin Metals' future, according to Ian Duckworth, Chief Operating Officer of Twin Metals. "Affirming the validity of Twin Metals'

federal mineral leases would eliminate that uncertainty and facilitate responsible project development activities moving forward,” Duckworth said.

Twin Metals officials argue that the original leases came with non-discretionary rights to three, successive 10-year renewals. Twin Metals filed the pending lease renewal application in mid-2013. Twin Metals argues that it has invested more than \$400 million to date in acquisition, exploration, technical, environmental, and other project development activities, all while relying on the federal government’s repeated affirmation of the validity of the mineral leases.

In a press statement issued on Monday, Twin Metals officials allege that the change of position on the leases “appears to be motivated by political pressure and unsupported allegations about potential impacts of future mining development in the region.”

But Twin Metals’ allegation of political influence belie a longstanding concern about the right of renewal of the two mineral leases going back at least to the Reagan administration. That’s true, in part, because of the terms of the longstanding lease, which required commercial production beginning by the end of the original 20-year lease period. Indeed, that provision led BLM officials under the Reagan administration to question whether the International Nickel Company, or INCO, could even be granted a renewal of their two leases in the mid-1980s since the company never opened an operating mine during the term of the original lease.

Attorneys for Twin Metals argue that the original lease contains no production requirement, instead granting the right for up to three ten-year renewals regardless of whether a commercial mine is actually operating, which would presumably allow one more ten-year extension.

But that opinion misinterprets the terms of the lease, according to more than one legal counsel at the Department of the Interior. A 1986 opinion by Kenneth Lee, then associate solicitor at the department, determined that while the department could issue a ten-year renewal on the original lease, any subsequent renewals were dependent on the start of commercial production. “If production does not occur during the period of extension, no further extensions will be allowed in accordance with the terms of the lease,” wrote Lee.

Current Solicitor Hilary Tompkins cites key language from the 1966 lease in her 2016 opinion, which does appear to allow for three lease extensions, that is “unless at the end of the primary term of this lease the Lessee shall not have begun production...” Tompkins said both the language and the effects are clear— the right of non-discretionary renewal of the leases hinged on the start of production decades ago.

That established yet another quandary for BLM officials in 2004, when Franconia Minerals applied for second renewal of the lease. Rather than grant a renewal, notes Tompkins in her opinion, the BLM essentially issued a new lease in 2004, with a term of ten years and entirely discretionary terms for renewal. That new lease “expressly condition leasing on surface owner consent (in this instance, the discretion of the Forest Service) and thus are discretionary,” writes Tompkins. “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.”

Tompkins, in short, argues that whether looked at under the terms of the 1966 lease, or the new 2004 lease, the effect is the same—the BLM has discretion over whether to renew. And under the terms of the 2004 lease, the Forest Service, as the surface owner, has the right to block renewal. Forest Service officials, earlier this year, indicated they were “deeply concerned” about the potential impact of the Twin Metals mining proposal, given its proximity to the Boundary Waters Canoe Area Wilderness and concerns about potential water pollution and other effects within a major wilderness watershed. The Forest Service is expected to release a decision on the lease renewals later this year.

Environmental opponents of the mine proposal quickly dismissed Twin Metals’ legal claim. “It is a longstanding fact that renewals of the Twin Metals federal mining leases are discretionary,” said Becky Rom, National Chair of the Campaign to Save the Boundary Waters. “The Bureau of Land Management’s authority to renew or deny renewal based on science and proximity to the Boundary Waters Canoe Area Wilderness is absolutely clear.”

Indeed, Twin Metals appeared to acknowledge in internal documents from 2014, that its federal mineral leases were not guaranteed. The company’s pre-feasibility study, issued in 2014, states: “Under the BLM regulations, the initial term for preference right leases may not exceed 20 years, with the possibility of successive 10-year renewals.” Twin Metals 2014 study continues, stating: “Subject to applicable laws and regulations, BLM has discretion as to whether to issue or renew any prospecting permit and any preference right lease, as well as discretion with respect to the terms and conditions to be included in any such prospecting permits and preference right leases.”

Twin Metals spokesperson Bob McFarlin acknowledged the language in the 2014 report, but said its meaning isn’t as certain as it appears. “The key phrase in this statement is the first phrase, ‘Subject to applicable laws and regulations...’” said McFarlin. “It is Twin Metals’ legal position that, in the case of Twin Metals’ federal leases, the ‘applicable laws and regulations’ are clear in establishing that the BLM does NOT have discretion on the question of renewal, that the leases must be renewed and BLM’s “discretion” is constrained to limited review and alteration of certain lease terms.”

McFarlin acknowledges that the Forest Service has a role in the lease renewal decision, but said the agency’s role is limited to review only and doesn’t include the power to consent or deny the renewal of the leases.

Rom said Twin Metals isn’t being accurate. “It’s a bogus case,” she said. “I don’t think it will get very far.”

Twin Metals is being represented by Dorsey & Whitney, of Minneapolis, and Wilmer Cutler Pickering Hale and Dorr, of Washington D.C. and Denver, Colo.