United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

M-37072 January 25, 2022

Memorandum

To: Secretary

From: Principal Deputy Solicitor

Subject: Authority to Cancel Improperly Renewed Twin Metals Mineral Leases and Withdrawal of M-37049, "Reversal of M-37036, 'Twin Metals Minnesota Application to Renew Preference Right Leases (MNES-01352 and MNES-01353)'"

In May 2019, the Assistant Secretary for Land and Minerals Management improperly granted the renewal of mining company Twin Metals Minnesota's (Twin Metals') two hardrock mineral leases, MNES-01352 and MNES-01353, located in northeastern Minnesota within the Superior National Forest, adjacent to the Boundary Waters Canoe Area Wilderness. The Bureau of Land Management (BLM) previously denied the renewal of these two leases in December of 2016, based on the U.S. Forest Service's (Forest Service's) determination that it did not consent to the renewals, under its statutory consent authority. The BLM's December 2016 decision denying renewal of the leases caused the leases to expire. However, in 2017, the Solicitor's Office reversed a prior M-Opinion, thereby changing its interpretation of the lease terms. Following the 2017 M-Opinion, the Assistant Secretary informed the Forest Service that the BLM would rescind its December 2016 decision denying renewal of the leases and reinstate both the leases and lease renewal application. Further, the then Assistant Secretary informed the Forest Service that its non-consent determination would no longer be treated as a valid determination. The Assistant Secretary then requested that the Forest Service consult with the BLM and provide its input on stipulations to include in the lease renewals for the protection of the surface lands, to be analyzed in an Environmental Assessment (EA) under the National Environmental Policy Act (NEPA). The BLM then rescinded its prior 2016 decision denying renewal of the leases, reinstated the leases, and reinstated the lease renewal application to make the application once again pending.

After this chain of events, the BLM prepared the EA regarding the lease renewal application. The EA analysis was limited in scope, and did not include a no-renewal, no-action alternative. In May 2019, the then Assistant Secretary, Land and Minerals Management, granted renewal of the leases. The BLM did not request nor obtain the Forest Service's consent before issuing the lease renewals. The renewals were made with new, customized lease terms designed specifically for Twin Metals and that departed from and altered the BLM's standard lease form and terms.

I have concluded that the 2019 lease renewals violated BLM regulations in at least two ways: (1) by customizing lease terms specifically for Twin Metals and departing from the standard lease form established in regulations, in ways not permitted by the regulation; and (2) by ignoring the

preferential right to renew provision in the standard lease form and the scheme of discretionary renewal provided for in the regulations. The alterations of the standard lease terms in the renewal of Twin Metals' leases contravened the Department of the Interior's (Department's) regulations for the leasing of federal solid minerals in Minnesota. Furthermore, after comparing the language of the BLM's standard solid mineral lease form to the customized lease renewals granted to Twin Metals in 2019, I am advising the Secretary that, because BLM's standard lease forms and standardized lease terms are crafted to implement relevant regulatory provisions, which in turn implement the relevant statutory authorities, the Department may not insert terms that conflict with the regulations into a standard lease form, even if the form allows for limited customization. In addition, the Department may not change the standard lease terms in a manner that conflicts with existing regulations without first completing the appropriate administrative process. If BLM or the Department finds that contemplated changes to the terms of the standard lease form conflict with current regulations, it must: (1) ensure that the contemplated new lease terms are consistent with the Department's statutory authority, and then (2) promulgate an appropriate revision of the regulations in accordance with the Administrative Procedure Act (APA) to eliminate the conflict between the contemplated new lease terms and the current regulations. In making any such amendments to the regulations and standard lease terms, I advise the Secretary that the change to the lease terms must be applied consistently to all lessees to avoid giving individual lessees special treatment.

In addition to these regulatory violations, I advise that the Department may not diminish or bypass the Forest Service's statutory consent authority over federal solid mineral leasing decisions in Minnesota, including with respect to lease renewal decisions. Lastly, due to the discretionary nature of lease renewal decisions in Minnesota, the NEPA analysis that informs such lease renewal decisions must include a no-renewal, no-action alternative.

In light of these considerations, I find that the Twin Metals lease renewals were improperly issued and are subject to cancelation under 43 C.F.R. § 3514.30. The cancelation of the 2019 lease renewals would not revive any prior versions of the leases or any prior pending lease renewal applications.[1] I am also withdrawing the Jorjani M-Opinion, M-37049, which is flawed and spurred the improper renewal decisions.

Background

Statutory and regulatory authorities

Congress authorized the Secretary of the Interior to lease federal minerals in Minnesota under the Act of June 30, 1950 (codified at 16 U.S.C. § 508b), the Weeks Act mineral leasing statute (1917) (codified at 16 U.S.C. § 520), and section 402 of Reorganization Plan No. 3 of 1946, 5

[1] On September 20, 2021, the Forest Service submitted an application to withdraw lands in the Rainy River watershed within the Superior National Forest from the operation of the mineral and geothermal leasing laws, subject to valid existing rights. The BLM issued a Federal Register notice of its receipt of the application on October 21, 2021, which by law effected a segregation of the lands. 86 Fed. Reg. 58,299 (Oct. 21, 2021). In light of this segregation, the BLM denied the pending discretionary prospecting permit applications and lease applications in the withdrawal area. While the current withdrawal application and segregation do not affect any permits or leases in the withdrawal area that may constitute valid existing rights, the Department's withdrawal regulations provide that, with respect to any upcoming discretionary decisions that may arise on such permits and leases, such as at their extension or renewal dates, those discretionary applications "shall be denied." 43 C.F.R. § 2310.2(d).

U.S.C. appendix, 60 Stat. 1097, 1099–1100. These statutes limit the Secretary's authority by stating that the minerals cannot be developed or used except with the consent of the Secretary of Agriculture.[2] The Department of Agriculture has delegated its consent authority to the Forest Service, which is also the surface managing agency on the lands subject to the Twin Metals' leases within the Superior National Forest.

The Department regulations on the BLM's "Leasing of Solid Minerals Other than Coal and Oil Shale," at 43 C.F.R. Part 3500, which implement these statutory authorities, recognize the Forest Service's consent authority.[3] The current version of the BLM's Part 3500 regulations cited in this memorandum have been in place since 1999.

The BLM's Part 3500 regulations state that hardrock mineral leases are issued for an initial term "not to exceed 20 years," and that such leases "can be renewed for 10 years at the end of the initial term and for following 10 year periods." 43 C.F.R. § 3511.15(f). The regulations also state that hardrock leases expire on the later of either the end of the lease term or on "the date BLM rejected" the lessee's renewal application. *Id.* § 3514.25(a). The regulations at section 3511.25(b) state the question, "What is meant by lease readjustment and lease renewal?" and the answer regarding lease renewal is:

> If you have a lease that requires renewal, . . . [y]ou must apply for a renewal of the lease at least 90 days before the initial term ends in order to extend the lease for an additional term. If you do not renew the lease, it expires and the lands become available for re-leasing. BLM may change some of your lease terms when we renew a lease.

Relatedly, the regulations answer the question, "Are there standard terms and conditions which apply to all leases?" by stating "Yes. BLM will issue your lease on a standard form which will contain several terms and conditions. We will add your rental rate, royalty obligations and any special stipulations to this lease form." *Id*. § 3511.12. The regulations also state that "BLM may cancel your lease administratively if we issued it in violation of any law or regulation. In such a case, we may consider issuing an amended lease, if appropriate." *Id*. § 3514.30(b).

The Department's regulations on BLM public administrative procedures at 43 C.F.R. Part 1800 further state that "[t]he United States is not bound or estopped by the acts of its officers or agents

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[2] For the relevant statutory language on the Agriculture Department's consent authority, *see infra* Analysis, Part B.

[3] *See e.g.,* 43 C.F.R. §§ 3503.13(a) and (c) ("Subject to the consent of the surface managing agency, you may obtain hardrock mineral permits and leases only in the following areas: (a) Lands identified in Reorganization Plan No. 3 of 1946, for which jurisdiction for mineral leasing was transferred to the Secretary of the Interior. These include lands originally acquired under the following acts: (1) 16 U.S.C. 520 (Weeks Act); . . . (c) Public Domain Lands within the National Forests in Minnesota (16 U.S.C. 508 (b)) . . . ."); 3503.20(a) and (b) ("§ 3503.20 What if another Federal agency manages the lands I am interested in? (a) *Public domain lands*. BLM will issue a permit or lease for public domain lands where the surface is administered by another Federal agency only after consulting with the surface management agency. Some laws applicable to public domain lands require us to obtain the consent of the surface management agency before we issue a lease or permit. (b) *Acquired lands*. For all lands not subject to paragraph (a) of this section where the surface is managed by another Federal agency, we must have written consent from the surface management agency before we issue permits or leases. The surface management agency may request further information about surface disturbance and reclamation before granting its consent."); 3507.19(c) ("We will also reject your [lease] application if the surface managing agency does not consent to the lease."); and 3509.41 ("We will only grant fractional interest permits or leases with the consent of the surface managing agency.").

when they enter into an arrangement or agreement to do or cause to be done what the law does not sanction or permit," and that "[r]eliance upon information or opinion of any officer, agent or employee or on records maintained by land offices cannot operate to vest any right not authorized by law." *Id*. § 1810.3(b) and (c).[4]

BLM's Standard Lease Form 3520-7

The BLM uses standard lease form 3520-7 for the issuance of new leases and for the renewal of existing leases for solid minerals other than coal or oil shale, which are addressed in the 43 C.F.R. Part 3500 regulations.[5] The standard form 3520-7 is keyed to the Part 3500 regulations, with certain lease terms keyed to specific minerals. For example, the form contains a lease renewal section that is applicable to sodium, sulphur, and hardrock mineral leases, and a lease readjustment section that is applicable to potassium, phosphate, and gilsonite leases.[6] Form 3520-7 provides that the renewal of a sodium, sulphur, or hardrock mineral lease is effective for a certain number of years, to be designated by the BLM in conformance with its regulations,[7] "with preferential right in the lessee to renew for successive periods of ____ 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."[8] Form 3520-7 also states that "this lease is issued pursuant and subject to the terms and provisions of . . . the regulations and general mining orders of the Secretary of the Interior in force on the date this lease issued."[9]

BLM's 2016 denial of Twin Metals' lease renewal application

On October 21, 2012, Twin Metals filed an application with the BLM to renew for the third time its two hardrock mineral leases, MNES-01352 and MNES-01353, originally issued in 1966. The BLM had most recently issued renewals of Twin Metals' leases in 2004. The BLM issued the 2004 renewals on the standard forms 3520-7. On those standard forms, BLM incorporated the original 1966 royalty terms in two special stipulations, and then attached the 1966 leases to the standard forms.[10]

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[4] "It is well settled that the Secretary has the authority to cancel any oil and gas lease issued contrary to law or regulation because of the inadvertence of his subordinates." *High Plains Petroleum Corp*., 125 IBLA 24, 26 (1992) (citing *Boesche v. Udall*, 373 U.S. 472 (1963) (confirming that the Secretary's "general powers of management over the public lands" give him "authority to cancel [a] lease administratively for invalidity at its inception."); *Clayton W. Williams, Jr*., 103 IBLA 192, 202, 95 Interior Dec. 102, 107 (1988)). Furthermore, "where an officer of BLM acts beyond the scope of his authority in issuing an oil and gas lease, such action is incapable of binding the Department and any lease so issued is 'voidable.'" *Id.* (citing *Beverly M. Harris*, 78 IBLA 251 (1984); *U.S. v. Alexander*, 41 IBLA 1 (1979), *aff'd*, *Alexander v. Andrus*, No. 79-603-B (D.N.M. July 7, 1980); *Nola Grace Ptasynski* (*on court remand*), 28 IBLA 256 (1976), *aff'd*, *Ptasynski v. Hathaway*, Civ. No. 75-282-M (D.N.M. May 5, 1977).

[5] Standard form 3520-7 contains a checkbox for the BLM to fill out to indicate whether the particular form is being issued as a "Lease" or a "Lease Renewal." BLM Standard Lease Form 3520-7, Part I, https://www.blm.gov/sites/blm.gov/files/uploads/Services_National-Operations-Center_Eforms_Fluid-and-Solid-Minerals_3520-007.pdf. When issued as a lease renewal, the standard form becomes the new lease instrument, superseding the prior instrument.

[6] BLM Standard Lease Form 3520-7, Part I; *see also* 43 C.F.R. § 3511.15.

[7] *See* 43 C.F.R. § 3511.15.

[8] BLM Standard Lease Form 3520-7, Part I.

[9] *Id.* at Section 1.

[10] *See* 2004 lease forms, sec. 14 ("*The terms and conditions of the production royalties remains as stated in the attached original lease agreement. **The minimum annual production and minimum royalty is $10.00 per acre or a fraction thereof as stated in the attached original lease agreement.").

While processing the application, the BLM requested legal advice from the Office of the Solicitor regarding whether the BLM had discretion to grant or deny the lease renewal application. In response, the Solicitor issued an M-Opinion on March 8, 2016, 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. The Solicitor based her conclusion upon the finding that the company's two leases, as they were most recently renewed in 2004 on BLM's standard lease form 3520-7, contained the standard renewal terms that, on their face, governed the pending third renewal.[11] The Solicitor concluded that, under those terms, the leases granted to the lessee only a preference over other potential lessees to lease the lands in question and did not entitle the lessee to a non-discretionary renewal.

Following the issuance of M-Opinion M-37036, the BLM requested Forest Service consent to renew the leases in the Superior National Forest, as required by the relevant statutory authorities.[12] The Forest Service responded to the BLM on December 14, 2016, issuing a non-consent determination.[13] On December 15, 2016, the BLM, lacking authority to renew the leases without the Forest Service's consent, denied Twin Metals' lease renewal application, causing the two leases to expire.[14]

BLM's 2018 rescission of its lease renewal denial

After a change of administration, the Principal Deputy Solicitor, exercising the authority of the Solicitor, reviewed M-37036 and issued a new M-Opinion on December 22, 2017, entitled, "Reversal of M-37036, 'Twin Metals Minnesota Application to Renew Preference Right Leases (MNES-01352 and MNES-01353)'" (M-37049 or the Jorjani Opinion), which withdrew and replaced the 2016 M-Opinion. The 2017 Jorjani M-Opinion found that the 2016 opinion had misinterpreted the leases and concluded that the BLM did not have discretion to deny Twin Metals' lease renewal application. The Principal Deputy Solicitor based his conclusion on the finding that the 2004 leases were ambiguous, and that, therefore, extrinsic evidence should be considered to identify the operable terms of the lease based on the intent of the parties. The Principal Deputy Solicitor also found that the extrinsic evidence showed that the parties intended for the original 1966 lease terms—and not the terms in the standard lease form—to govern Twin Metals' rights to the pending renewal.[15] Finally, he interpreted the 1966 lease terms to provide Twin Metals with a non-discretionary right to a third renewal.

On February 16, 2018, based on the conclusion of M-37049[16] that Twin Metals had a non-discretionary right to a third renewal, the then Assistant Secretary issued a letter to the Forest Service, alerting the Forest Service that BLM intended to rescind its December 15, 2016,

[11] Memorandum Opinion, M-37036, "Twin Metals Minnesota Application to Renew Preference Right Leases (MNES-01352 and MNES-01353)" Mar. 8, 2016, at 13.
[12] Letter from BLM State Dir., Eastern States Off., Karen Mouritsen, to Forest Serv. Reg'l Forester, Kathleen Atkinson (June 3, 2016).
[13] Letter from Thomas L. Tidwell, Chief, Forest Serv., to Neil Kornze, Dir., BLM (Dec. 14, 2016).
[14] Decision by BLM State Dir., Eastern States Off., Karen Mouritsen, to Twin Metals Minnesota Chief Operating Officer, Ian Duckworth, "Lease Renewal Application Rejected" (Dec. 15, 2016).
[15] M-37049, at 8.
[16] M-Opinions are binding on Department bureaus. 209 DM 3.2(A)(11).

decision denying the renewals. The Assistant Secretary stated in the letter that, because the BLM's prior request for a Forest Service consent determination "was based on legal error that the United States had discretion whether to renew the leases, we will no longer treat the Forest Service's December 2016 non-consent determination as a valid determination."[17] In place of a consent determination, the Assistant Secretary requested that the Forest Service supply the BLM with "any appropriate surface protection stipulations to be incorporated into the terms of the third lease renewal, subject to environmental review in accordance with the National Environmental Policy Act."[18] On May 2, 2018, the BLM rescinded its December 15, 2016, decision denying the renewals, reinstated the expired leases that had been issued in 2004, and reinstated as pending the application to renew the two leases.[19]

BLM's narrowly scoped EA and 2019 renewal of the leases with customized terms

On October 17, 2018, the Forest Service provided the BLM with stipulations "designed to protect surface and water resources in the two lease areas" upon renewal.[20] The BLM prepared an EA in regards to the lease renewal application, analyzing potential environmental impacts related to the Forest Service's proposed stipulations.[21] The EA analysis compared the renewal of the leases with the changed surface use stipulations to the renewal of the leases without the changed terms. However, because the M-37049 opinion concluded that the lessee held a non-discretionary right of renewal, the BLM did not include a no-renewal, no-action alternative in its EA analysis.[22] Instead, the BLM limited the scope of its EA analysis to review only the renewal with the changed stipulations, as the Proposed Alternative, in comparison with a renewal with no changes to the terms of the prior leases, as its No-Action Alternative.[23]

In May 2019, following completion of that NEPA analysis, the BLM's State Director, Eastern States Office, signed the Decision Record for the Environmental Assessment, and then the Assistant Secretary concurred and issued the leases. In doing so, the then Assistant Secretary granted renewals of the Twin Metals leases on lease forms with customized lease terms that deviated from those set forth in the standard lease form, including a non-standard renewal term, in a manner that conflicted with the existing regulations. The BLM changed the standard lease term on renewal from granting a "preferential right in the lessee to renew . . . 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 such period" to granting a "right in the lessee to renew . . . under

[17] Letter from Joseph Balash, Dep't of the Interior Assistant Sec'y for Land and Minerals Mgmt., to Tony Tooke, U.S. Forest Serv. Chief (Feb. 16, 2018).
[18] *Id*.
[19] Decision of BLM Acting State Dir., Eastern States Off., Mitchell Leverette, to Twin Metals Minnesota, "Rescission of December 15, 2016, Lease Renewal Application Rejection, Reinstatement of Mineral Leases MNES 01352 & MNES 01353 as Issued in 2004, Reinstatement of Twin Metal's [sic] 2012 Lease Renewal Application" (May 2, 2018) (concurred in by Joseph Balash, Dep't of the Interior Assistant Sec'y for Land and Minerals Mgmt.).
[20] Letter from Mary Beth Borst, Acting Reg'l Forester, Eastern Region, Forest Serv., to Karen Mouritsen, BLM State Dir., Eastern States Off. (Oct. 17, 2018).
[21] U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., NORTHEASTERN STATES DIST. OFF., ENVIRONMENTAL ASSESSMENT, "ADDITION OF TERMS AND CONDITIONS FOR RENEWAL OF HARDROCK LEASES, MNES-001352 AND MNES-001353" (2019), https://eplanning.blm.gov/public_projects/nepa/98730/172784/209929/EA_LeaseRenewal_MNES01352-01353_FINAL.pdf.
[22] *See id.* at 5-8, 14, 88.
[23] *Id.*

such terms and conditions as may be prescribed by the Secretary of the Interior, including those conditions described in special stipulations in Section 14 below, unless otherwise provided by law at the expiration of any such period."[24]

Although this change contravened the relevant statutes and regulations in place at the time, the Department did not first ensure that the changes aligned with the Department's statutory authority, nor did it revise its regulations in accordance with the APA to eliminate the conflict before issuing the leases. Moreover, the BLM left in place the standard lease term that made the 2019 lease renewals "subject to the . . . regulations and general mining orders of the Secretary of the Interior in force on the date this lease renewal issued."[25]

Analysis

The 2019 lease renewals were improperly issued in conflict with the relevant legal authorities.

The then Assistant Secretary issued Twin Metals' 2019 lease renewals in violation of multiple legal authorities. First, in attempting to follow the conclusions of M-37049, the BLM altered the renewal term in the standard lease form 3520-7, in violation of BLM's 43 C.F.R. Part 3500 regulations, and the Assistant Secretary issued the lease renewals with those altered terms. Second, the Assistant Secretary disregarded the Forest Service's consent authority, which is provided for by the relevant mineral leasing statutes. And third, in making the lease renewal decision, the BLM and Assistant Secretary relied upon a NEPA analysis that was inappropriately narrow in scope and that improperly failed to consider a no-renewal, no-action alternative. As noted above, the Department's regulations state that "[t]he United States is not bound or estopped by the acts of its officers or agents when they enter into an arrangement or agreement to or cause to be done what the law does not sanction or permit," and that "[r]eliance upon information or opinion of any officer, agent or employee or on records maintained by land offices cannot operate to vest any right not authorized by law." 43 C.F.R. § 1810.3(b) and (c). The BLM's relevant mineral leasing regulations also state that "BLM may cancel your lease administratively if we issued it in violation of any law or regulation." 43 C.F.R. § 3514.30(b).

The Interior Board of Land Appeals and courts have confirmed that the BLM may cancel leases issued in violation of legal authorities. *See, e.g.*, *High Plains Petroleum Corp.*, 125 IBLA 24 (1992) (finding that BLM properly canceled an oil and gas lease where it was issued in violation of the regulatory requirement in the land management plan); *Grynberg v. Kempthorne*, 2008 WL 2445564, at *4 (D. Colo. June 16, 2008) (finding that BLM properly canceled a lease where the applicable statute required the surface managing agency to give consent to lease but consent had not been requested); *Bob Marshall All. v. Lujan*, 804 F. Supp. 1292 (D. Mont. 1992) (where the BLM issued oil and gas leases without analyzing a no-action alternative, the court found cancelation to be the only remedy that would effectively ensure NEPA's goal of guaranteeing, to the fullest extent possible, that agencies study, develop, and describe alternatives, including the no-action alternative). Because the Assistant Secretary issued the Twin Metals lease renewals in violation of the applicable regulations and other legal authorities, and because the United States

[24] *See* 2019 lease renewal forms, Part I, at 1. The special stipulations at section 14 condition renewal of the leases upon the satisfaction of diligence requirements. *See* 2019 lease renewal forms, Sec. 14(b), at 4.
[25] *Id.* at Sec. 1, at 1.

is not bound by such an action that the legal authorities do not permit, the BLM has the authority to cancel the lease renewals.

A. The 2019 lease renewals issued on customized forms were not in accordance with the Department's regulations, or its standard lease form and terms.

The then Assistant Secretary issued Twin Metals' 2019 lease renewals on customized forms that altered the standard lease terms in a manner that violated Department regulations. Under the relevant regulations, the BLM's standard lease form, and BLM precedent interpreting its standard lease form, the renewal term in the 2019 leases could only have granted the lessee a "preferential right" to renew. The preferential right does not entitle the lessee to a right of renewal as against the Secretary.[26] But the BLM and the Assistant Secretary removed the provision for a "preferential right in the lessee to renew" in the standard lease term to grant Twin Metals instead a special "right" to another renewal, conditioned only upon the new diligence requirements inserted into the special stipulations of the leases. This alteration violated the regulations in two ways. First, by modifying the standard terms in the standard lease form, the 2019 lease renewals violated the regulation governing the use of the standard lease form. Second, the renewals violated the scheme of discretionary renewals provided for in the regulations that allows for the lease to provide the lessee with a preferential right to renew, but not a right of renewal.

The Record of Decision that the BLM prepared following the lease renewal EA provided an explanation for the changes made to the standard lease terms:

> In December 2017, the United States Department of the Interior's Office of the Solicitor issued a legal opinion (M-37049) concluding that, while the United States maintains discretion to impose reasonable new or readjusted terms, conditions, and stipulations in the lease agreements, TMM has a non-discretionary right to a third renewal. This is because the renewal terms of the 1966 leases, including those pertaining to renewal, were carried forward in the renewed leases in both 1989 and 2004 and remain operative today. Because the lessee has a right to a renewal of these leases for the third term, the BLM does not have the discretion to deny the renewal application.
> . . .
> *The BLM prepared these lease renewal documents utilizing the BLM Standard Form 3520-7 (August 2016) as a basis to modernize the standard lease terms. The BLM then edited the standard form at various places to better fit its needs in this individual case*, and both the BLM and the Forest Service included customized stipulations in Section 14.

(emphasis added). Thus, the BLM and the Assistant Secretary not only sought to grant a renewal for a third term in the 2019 leases, but also made changes to the standard lease terms regarding the next potential renewal in an attempt to implement the Jorjani M-Opinion.[27]

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[26] *See infra* Analysis Section A(1) and note 42.

[27] Although the U.S. District Court for the District of Columbia found the Jorjani Opinion's interpretation of the leases to be "reasonable" *in Voyageur Outward Bound School v. United States*, the United States did not raise, and

In fact, the 2004 leases did not allow for this expansion of the renewal rights in the 2019 leases. The 2004 leases state expressly in Part I, Section 1 that they are "issued pursuant and subject to . . . the regulations . . . *in force on the date this lease issued*." (emphasis added). Therefore, even if the 1966 leases did provide for a non-discretionary right of renewal for a third renewal, and that right of renewal provision was found to have been incorporated into the 2004 leases, it could not have negated or supplanted the application of the laws and regulations that were in force in 2004, including the regulations that state that BLM will issue leases on a standard form (which contains a preferential right of renewal provision), the regulations that provide for a scheme of discretionary renewals, and the laws and regulations that make leasing contingent on obtaining Forest Service consent.

Moreover, the 2004 leases state expressly in Part I that they are "effective Jan. 1 2004, for a period of 10 years, with a preferential right in the lessee to renew for successive periods of 10 years under the terms and conditions as may be prescribed by the Secretary of the Interior, *unless otherwise provided by law at the expiration of any period*." (emphasis added). When the prior lease term for the 2004 renewal ended, the regulations that applied to BLM's consideration of Twin Metals' lease renewal application were those in force, at the earliest, in 2014, or at the latest in 2019. Either way, the regulations continued to provide for the use of the standard form (which contains a provision for a preferential right of renewal) and a scheme of discretionary renewals, and required the BLM to obtain Forest Service consent.[28] Therefore, at the time BLM was considering the lease renewal application, the BLM had an obligation to use the standard lease form and exercise discretion, in conjunction with seeking the consent of the Forest Service, to determine whether it was appropriate to grant the lease renewal application. The 2019 lease renewals were issued without recognizing that regulatory discretion and in a manner that improperly modified the standard lease form.[29]

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the court did not consider, the issues raised in this opinion. 444 F. Supp. 3d 182, 200 (D.D.C. 2020). The *Voyageur* briefs and case concerned which parts of the original lease may or may not have been incorporated into the 2004 renewals, whereas in this Opinion the Solicitor is analyzing what law applies to those contracts. The legal errors underlying the 2019 renewals that are discussed in this opinion—namely the improper modification of standard lease terms, the lack of Forest Service consent, and the failure to analyze a no-action/no-renewal alternative under NEPA—are independent from the Jorjani Opinion. And notably, the District Court reviewed the Jorjani Opinion under the APA's "arbitrary and capricious" standard of review, which did not involve a determinative decision on the rights within the lease contracts or on what law applied. *Id.* at 201 ("Recall that the Court is reviewing under the arbitrary and capricious standard. It 'need not decide what result [it] would reach if faced with the necessity of construing de novo these Delphic contractual provisions.'") (quoting *W. Union Tel. Co. v. FCC*, 541 F.2d 346, 352 (3d Cir. 1976)). The reasoned explanation in this opinion demonstrates why the 2019 leases were issued improperly under the applicable laws and regulations in effect when they were renewed.

[28] The initial lease term spanned June 1, 1966, to June 30, 1989. The first renewal term spanned from July 1, 1989 to December 31, 2003. The second renewal spanned from January 1, 2004, to the BLM's rejection of Twin Metals' lease renewal application on December 15, 2016, and then from the BLM's reinstatement of the leases on May 2, 2018 to the day before the effective date of the third renewals—May 31, 2019. The third renewal purported to become effective June 1, 2019. The regulations in force during the terms provided for in the second and purported third renewal provided for the use of the standard form.

[29] The Jorjani Opinion's reading of the 1966 and 2004 leases disregarded the regulatory provisions that applied to the BLM's consideration of the lease renewal applications, including the need to use the standard lease form, the regulatory scheme of discretionary renewals, as well the consent authority that the relevant statutes provide for the Forest Service to either consent or deny consent to lease renewals. As the Jorjani Opinion's interpretation of the leases conflicts with applicable laws and regulations, the alteration of the renewal terms in 2019 to implement the Jorjani Opinion also conflicts with the same legal authorities. Because the Jorjani Opinion conflicts with applicable laws and regulations, I am rescinding that Opinion.

1. The 2019 lease renewals violated the existing regulations by modifying a standard term and condition in the standard lease form.

The applicable regulations provide that there are "standard terms and conditions which apply to all leases," that "BLM will issue your lease on a standard form" containing those standard terms and conditions, and that any lease-specific rental rates, royalty obligations, and special stipulations will be added to the standard lease form. 43 C.F.R. § 3511.12. In short, that regulation requires issuance of a lease on a standard lease form that includes standard terms and conditions. Under the plain terms of that regulation, while BLM can *add* lease-specific rental rates, royalty obligations, and special stipulations, it must otherwise use the standard lease form language.[30]

The 2019 renewals did not use the requisite standard lease form language. The standard lease form plainly provides only for a preferential right of renewal, not a non-discretionary right. Specifically, it states that the renewal of a sodium, sulphur, or hardrock mineral lease is effective for a certain number of years, to be designated by the BLM in conformance with its regulations,[31] "with *preferential right* in the lessee to renew for successive periods of ____ 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."[32] This "preferential right to renew" language has for decades been consistently interpreted by the Department as "not *entitl[ing]* the lessee to renewal of the lease but 'giv[ing] 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 preferential right to renew for sodium, sulphur, and hardrock mineral leases stands in contrast to the "indeterminate" lease term of potassium and phosphate leases, which automatically extends beyond the initial term "for so long thereafter as [the] lessee complies with the terms and conditions of this lease which are subject to readjustment at the end of each ___ year period [usually 20 years], unless otherwise provided by law," as stated on the same standard lease form. BLM Standard Lease Form 3520-7, Section I; *see also* 43 C.F.R. § 3511.15.

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[30] Because BLM's standard lease form and standardized lease terms are crafted to implement relevant regulatory provisions, which in turn implement the relevant statutory authorities, the BLM may not, as occurred with the 2019 renewals, change the standard terms in a manner that conflicts with existing regulations without going through the appropriate administrative process. To modify standard terms and conditions of the standard lease form, BLM should first determine whether the new lease terms would conflict with either the current regulations or with the Department's statutory authority. If the modified lease terms would conflict with the applicable statutory authority, as is the case with the 2019 leases in providing for a right of renewal in conflict with the Forest Service's consent authority, BLM cannot modify the standard terms and conditions. If they would not conflict with either the statutory authority or regulations, BLM could modify the standard terms and conditions in the standard lease form for all lessees going forward. If, however, the modified lease terms would not conflict with the statutory authority but would conflict with the regulations, BLM should go through the APA rulemaking process to make any necessary changes to the regulations before modifying the standard terms and conditions in the standard lease form. In making any such amendments to the regulations and standard lease terms, the change to the lease terms should be applied consistently to avoid giving any particular lessee special treatment.

[31] *See* 43 C.F.R. § 3511.15.

[32] BLM Standard Lease Form 3520-7, Part I (emphasis added).

The 2019 renewals improperly changed that standard term to provide for an automatic right of renewal, if newly developed and customized diligence requirements were met, rather than the preferential right provided in the standard lease form. The lease term on renewal in the standard form, which grants a "preferential right" to renewal rather than a non-discretionary right to renewal, is one of the standard terms and conditions that applies to all leases. It is not a rental rate or a royalty obligation, and it is not a special stipulation, which the agencies typically employ to address surface use restrictions.[33] Based on the Department's regulations and the standard lease form, it is not a term that BLM could change upon renewal without going through the statutory determination and regulatory process described above.[34]

2. The regulations do not permit a non-discretionary right of renewal.

Moreover, the Department's regulations for the leasing of solid minerals other than coal and oil shale also substantively prohibit a non-discretionary right of renewal. Those regulations provide that hardrock mineral lease renewals are decisions within the agencies' discretion to grant or deny. The regulations state that hardrock leases "*can* be renewed for 10 years at the end of the initial term and for following 10 year periods," not that they must be renewed. 43 C.F.R. § 3511.15(f) (emphasis added). A hardrock lessee must apply for a renewal of the lease or the lease expires and the lands become available for re-leasing. *Id.* § 3511.25(b). Furthermore, the Part 3500 regulations state that hardrock leases, like sodium, sulphur, and asphalt leases, expire on the later of either the end of the lease term or on "the date that BLM *reject[s]*" the lessee's renewal application. *Id*. § 3514.25(a) (emphasis added). The regulations would not provide for the possibility of BLM rejecting a lessee's renewal application if the decision to grant a lease renewal was not a discretionary decision.

The standard lease form 3520-7 makes the lease or lease renewal "subject to the . . . regulations and general mining orders of the Secretary of the Interior in force on the date this lease renewal issued." And the standard lease form 3520-7's standard term on renewal for hardrock mineral leases, conveying only a preferential right, comports with the BLM's applicable regulations at 43 C.F.R. Part 3500, while a "right" of renewal, albeit conditioned upon satisfaction of a diligence requirement, does not.[35]

Nothing in the Part 3500 regulations supports the argument that a lessee would be entitled to a renewal as of right, or that renewal terms that contradict the relevant statutes or regulations could

[33] Rental rates differ for the various mineral commodities and are calculated by how many acres any given lease covers. *See* chart at 43 C.F.R. § 3504.15 for rental rates for each mineral. Royalty obligations and special stipulations may vary from lease to lease. A royalty schedule and special stipulations are often customized for a specific lease, depending on an assessment of fair market value for royalty rates and an assessment by the surface managing agency and the BLM of the stipulations necessary for the protection of the surface lands at issue, and those customized terms are then appended to the standard lease form. *See, e.g.*, BLM Standard Lease Form 3520-7, Part II, Sec. 2. (a) "Production Royalties. – Lessee must pay lessor a production royalty in accordance with the attached schedule."

[34] *See supra* n. 30.

[35] As stated above, the special stipulations at section 14 of Twin Metals' 2019 lease renewals condition the next renewal of the leases upon the satisfaction of diligence requirements, but also state that, if the lessee meets the newly developed diligence requirements, "the lessor will renew the lease" and the Forest Service "will provide consent to a renewal." *See* 2019 MNES-01352 lease renewal form, Sec. 14(b) and (i)(8), at 4, 8. These special stipulations at section 14 do not provide for BLM discretion regarding the renewal decision. *See also* letter from Randy Moore, Chief, Forest Serv., to Tracy Stone-Manning, Dir., BLM (Jan. 24, 2022).

be appended to the standard lease form and be considered effective. A renewal as of right would contravene the BLM's discretionary authority under the existing regulations to reject a hardrock lease renewal application. The regulations do not recognize any potential non-discretionary right of renewal on the part of the lessee for this type of lease or lease renewal. Including a renewal as of right in a standard lease form would also contravene the Forest Service's statutory consent authority for leasing decisions on the lands at issue here.

B. The Forest Service's statutory consent authority for leasing decisions was ignored.

In renewing the two leases in 2019, the then Assistant Secretary also violated the applicable statutes and regulations by bypassing and disregarding the Forest Service's consent authority over leasing decisions. Twin Metals' leases MNES 1352 and MNES 1353 include both public domain and acquired lands. Congress provided the BLM with the authority to lease minerals on public domain lands reserved for Forest Service purposes and on acquired lands in Minnesota under separate statutes. For reserved public domain lands administered by the United States Forest Service in Minnesota, under the Act of June 30, 1950, codified at 16 U.S.C. § 508b, the BLM has authority, delegated from the Secretary of the Interior, "to permit the prospecting for and the development and utilization" of hardrock mineral resources. However, the statute provides that the "development and utilization of such mineral deposits shall not be permitted by the [BLM] except with the consent of the Secretary of Agriculture," which has been delegated to the Forest Service. *Id*. This statute plainly requires the BLM to obtain Forest Service consent before allowing "development and utilization" of hardrock mineral resources on National Forest System lands reserved from the public domain in Minnesota.[36]

For hardrock mineral leasing on acquired lands, section 402 of Reorganization Plan No. 3 of 1946, transferred the jurisdiction for mineral leasing on lands acquired by the United States under the Weeks Act[37] and a number of other statutory authorities[38] from the Secretary of Agriculture to the Secretary of the Interior. This transfer of authority was subject to the condition that "mineral development on such lands shall be authorized by the Secretary of the Interior only when he is advised by the Secretary of Agriculture that such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified by the Secretary of Agriculture in order to protect such purposes." Reorganization Plan No. 3 of 1946, § 402, 5 U.S.C. appendix, 60 Stat. 1097, 1099–1100.

[36] Under this statute, consent is required before any lease renewal, whether a lease provides for discretionary renewal or a renewal as of right. Therefore, Forest Service consent was required before Twin Metals' leases were renewed in 2019, even if Twin Metals had some form of contractual "right of renewal" that carried forward from their original leases.

[37] Congress provided for the disposition of mineral resources on lands acquired under the authority of the Weeks Act in 16 U.S.C. § 520, which allowed the Secretary of Agriculture "to permit the prospecting, development, and utilization" of minerals on lands acquired under that Act. The three statutes, 16 U.S.C. § 508b, 16 U.S.C. § 520, and section 402 of the Reorganization Plan, apply here because the leases involve both public domain and acquired lands.

[38] Other statutes providing authority to dispose of minerals from acquired lands include the National Industrial Recovery Act (40 U.S.C. §§ 401, 403a and 408), the 1935 Emergency Relief Appropriation Act (48 Stat. 115 and 118), the Act of August 24, 1935 (49 Stat. 750 and 781), the Act of July 22, 1937 (the Bankhead Jones Act) (7 U.S.C. §§ 1011(c) and 1018). *See also* 43 C.F.R. § 3503.13.

These statutory provisions do not expressly define the permitting and leasing decisions to which the Forest Service's consent authority attaches. The statutory language states that consent is required before "development and utilization" of mineral resources is "permitted," or before "mineral development" is "authorized," and this language stands for the principle that the BLM cannot authorize *any* mineral development without Forest Service consent. The agencies have interpreted the Forest Service's statutory consent authority over mineral development in Minnesota to attach to both hardrock mineral permitting and leasing decisions. As noted above, the BLM's implementing regulations at 43 C.F.R. Part 3500 state that "hardrock mineral permits and leases" are available in certain areas, including the federal lands in Minnesota, "[s]ubject to the consent of the surface managing agency," that "[s]ome laws applicable to public domain lands require us to obtain the consent of the surface management agency before we issue a lease or permit," and that for acquired lands, the BLM "must have written consent from the surface management agency before we issue permits or leases."[39] The Interior Board of Land Appeals has also long viewed the statutorily-based consent of the Forest Service as a requirement before the BLM may act.[40]

As BLM's action of granting a lease renewal application constitutes a permission or authorization for mineral development (subject to compliance with the terms of the renewed lease), surface management consent from the Forest Service is required as a condition precedent, as it is when a lease is initially issued. Hence, it is necessary to construe the BLM regulatory provisions, which require surface management agency consent, as being applicable in the context of a lease renewal and not just the initial lease issuance.

The agencies have interpreted the consent authority to attach at lease renewal as it does at the original lease issuance, due to the development rights each decision grants through the standard form 3520-7 lease instrument[41] and the discretion provided for in the relevant regulations for BLM to deny the renewal decision, as well as due to the Department's longstanding interpretation of the discretionary nature of the preferential right to renew that the BLM's standard form 3520-7 grants to the lessee.[42] Thus, the BLM's longstanding practice for leasing

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[39] 43 C.F.R. §§ 3503.13, 3503.20.

[40] *E.g.*, *Equity Au, Inc.*, 134 IBLA 319 (Jan. 19, 1996) (commenting on section 402 of Reorganization Plan No. 3 of 1946, "Congress sought to reserve in the Secretary of Agriculture, as the administrator of the surface estate, the authority to ban mineral development of such lands where it would interfere with the purposes for which the land was originally acquired or control such development in order to protect those purposes"); *Ozark-Mahoning Co.*, 17 IBLA 228 (Sept. 17, 1974) ("Mineral development may be permitted by the Secretary of the Interior, however, only with the consent of the Secretary of Agriculture, and subject to such conditions as he may prescribe to protect the purposes for which the lands were acquired or are being administered"); and *Graymont (Mi) LLC*, 190 IBLA 113 (May 1, 2017) ("Without the Forest Service's consent, BLM has no authority to approve a prospecting permit for those lands and must deny the permit application").

[41] The BLM's standard lease form 3520-7 provides the lessee with "the exclusive right and privilege to explore for, drill for, mine, extract, remove, beneficiate, concentrate, or otherwise process and dispose of the [identified mineral] deposits . . . [on the leased lands] . . . , together with the right to construct such works, buildings, plants, structures, equipment and appliances and the right to use such on-lease rights-of-way which may be necessary and convenient in the exercise of the rights and privileges granted, subject to the conditions herein provided." BLM Standard Lease Form 3520-7, Part I, Sec. 2.

[42] As stated above, the "preferential right to renew" language in the standard form 3520-7 has for decades been consistently interpreted by the Department as "not *entitl[ing]* the lessee to renewal of the lease but 'giv[ing] 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)).

in Minnesota has been to request the Forest Service's consent to approve lease renewal applications, as well as to request that the Forest Service provide any surface protection stipulations they would like included should the lease renewal be granted. The agencies coordinated on the two prior lease renewal requests for the 1989 and 2004 leases to allow the Forest Service to exercise its required consent authority due to the development permission or authorization to be gained by the renewal of the leases.

Yet, as discussed above, the BLM renewed the leases in 2019 without allowing for the full exercise of the consent of the Forest Service.[43] This appears to have occurred as a consequence of the Jorjani M-Opinion, even though that opinion did not directly address the Forest Service's consent authority.[44] Although the Forest Service, on December 14, 2016, issued a non-consent determination, denying its consent to the Twin Metals lease renewal, that non-consent was ignored when, on February 16, 2018, the Assistant Secretary issued a letter to the Forest Service, improperly advising the Forest Service that, because its prior request for a Forest Service consent determination "was based on legal error that the United States had discretion whether to renew the leases, we will no longer treat the Forest Service's December 2016 non-consent determination as a valid determination."[45]

In *Grynberg v. Kempthorne*, the U.S. District Court for the District of Colorado affirmed a decision of the IBLA that the BLM's cancelation of a lease was proper where the lease was issued without the BLM first obtaining Forest Service consent, as required by the relevant statute, the Mineral Leasing Act for Acquired Lands (MLAAL).[46] The IBLA found that the lease issued to the plaintiff "was not lawfully issued because it did not comply with the MLAAL," and that under the relevant Departmental oil and gas leasing regulations, "an improperly issued lease is subject to cancelation."[47] Here, the issuance of Twin Metals' lease renewals similarly did not comply with the relevant statutes for mineral leasing in Minnesota. It was improper for the Assistant Secretary to ignore the Forest Service's 2016 non-consent determination and to fail to provide the Forest Service with an opportunity to consent or withhold consent for renewal of the leases before issuing them in 2019. And similarly, here, the BLM may administratively cancel a lease if it is "issued [] in violation of any law or regulation." 43 C.F.R. § 3514.30(b).

C. In light of the discretionary nature of the renewal decision, NEPA required analysis of the environmental consequences of renewing the leases as compared to not doing so.

In addition, the BLM's EA concerning the lease renewal application failed to adequately evaluate the difference in environmental consequences between renewing and not renewing the

[43] The Jorjani Opinion addressed the consent issue only briefly as background and did not address consent as a factor relevant to its analysis.
[44] As already explained, the statutory consent role inures to the Secretary of Agriculture, so it would be inappropriate for this office to render a legal interpretation that limits the exercise of that statutory authority.
[45] Letter from Joseph Balash, Dep't of the Interior Assistant Sec'y for Land and Minerals Mgmt., to Tony Tooke, U.S. Forest Serv. Chief (Feb. 16, 2018).
[46] 2008 WL 2445564, at *1 (D. Colo. June 16, 2008) (affirming Celeste C. Grynberg, 169 IBLA 178, 182–83 (June 22, 2006)).
[47] *Celeste C. Grynberg*, 169 IBLA 178, 182–83 (June 22, 2006) (citing to BLM's oil and gas regulations at 43 C.F.R. § 3108.3 (d)).

leases, which is a fundamental deficiency. Because NEPA requires agencies to identify and consider the environmental consequences of a proposed action, agencies typically account for this difference in their description of the affected environment, which generally includes description of trends, or their description of a "no action alternative" (or both). In the case of environmental impact statements (EISs), under NEPA's implementing regulations, agencies must evaluate reasonable alternatives in their NEPA analysis, "includ[ing] the alternative of no action" and "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits." 40 C.F.R. § 1502.14(b), (d) (1978).[48] Although the Council on Environmental Quality (CEQ) regulations relating to EAs do not explicitly require articulation and analysis of a "no action alternative," CEQ has interpreted the regulations generally to require some consideration in an EA of what might happen absent agency action; CEQ guidance provides that an agency developing an EA "may contrast the impacts of the proposed action and alternatives with the current condition and expected future condition in the absence of the project. This constitutes consideration of a no-action alternative as well as demonstrating the need for the project."[49]

Because the Forest Service has the discretion to deny its consent for lease renewal under its statutory consent authority, and therefore the BLM must have the discretion not to renew the lease, each lease renewal in the Superior National Forest should properly be viewed as a new decision of whether to grant the lessee a lease and an irreversible and irretrievable commitment of resources.[50] Therefore, the alternative of not renewing the lease was the reasonable alternative of no action and should have been analyzed in the BLM's 2018 lease renewal EA.[51] At a minimum, the EA should have included a description of what was likely to occur should the BLM not renew the leases. Such analysis can appear in a description of the "Affected Environment" or "environmental baseline" section of an environmental document. Regardless of how styled, where agencies have failed to consider the environmental implications of the absence of the proposed action, such as by analyzing a no-lease, no-action alternative, or providing an "environmental baseline" to which the environmental consequences of the proposed action can be compared, courts have found this to violate NEPA's "mandate requiring informed and meaningful consideration of alternatives to leasing [], including the no-leasing option." *Bob*

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[48] The BLM issued its EA for Twin Metals' lease renewals in May of 2019, before the Council on Environmental Quality issued its revised NEPA regulations in September of 2020, and so, relied upon the former 1978 version of the regulations.

[49] COUNCIL ON ENV'T QUALITY, MEMORANDUM TO FEDERAL NEPA CONTACTS: EMERGENCY ACTIONS AND NEPA (2005); *see also*, COUNCIL ON ENV'T QUALITY, MEMORANDUM TO SECRETARY OF AGRICULTURE AND SECRETARY OF THE INTERIOR: GUIDANCE FOR ENVIRONMENTAL ASSESSMENTS OF FOREST HEALTH PROJECTS (2002).

[50] Once the discretionary nature of the Twin Metals lease renewal decision is taken into account, the question also arises as to whether an EA would provide a sufficient level of analysis under NEPA. Because the lease renewals would be viewed as a "go/no go" leasing decision, and the leases would also allow surface disturbance, the renewal decision would also likely be considered to be an irreversible commitment of resources, for which an EIS might be required, if no other EIS had yet been prepared. *See Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988); *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999); *Sierra Club v. Peterson*, 717 F.2d 1409, 1414–15 (D.C. Cir. 1983); *Fisheries Survival Fund v. Jewell*, No. 16-CV-2409 (TSC), 2018 WL 4705795, at *7 (D.D.C. Sept. 30, 2018).

[51] *See* COUNCIL ON ENV'T QUALITY, NEPA FORTY MOST ASKED QUESTIONS, QUESTION 3 ON THE "NO-ACTION ALTERNATIVE" ("There are two distinct interpretations of 'no action' that must be considered, depending on the nature of the proposal being evaluated . . . The second interpretation of 'no action' is illustrated in instances involving federal decisions on proposals for projects. 'No action' in such cases would mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative activity to go forward.").

Marshall Alliance v. Lujan, 804 F. Supp. 1292, 1297 (D. Mont. 1992). "NEPA therefore requires that alternatives—including the no-leasing option—be given full and meaningful consideration." *Id.* at 1294, n. 7. Moreover, "by definition, the no-leasing option is no longer viable once the leases have been issued; it must be considered before any action is taken or the statutory mandate becomes ineffective." *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229 n.4 (9th Cir.1988). Under this reasoning, courts have found that "[c]ancellation of the leases is the only remedy which will effectively ensure the goal envisioned by NEPA, particularly 42 U.S.C. § 4332(2)(E) (1982), by guaranteeing, to the fullest extent possible, that the defendant agencies have studied, developed and described alternatives, including the no-action alternative." *Bob Marshall Alliance v. Lujan*, 804 F. Supp. 1292, 1297 (D. Mont. 1992).

The BLM's EA did not include a no-renewal, no-action alternative, and did not properly describe the environmental baseline associated. Therefore, the EA on which the Assistant Secretary relied to issue the lease renewals was insufficient.

Conclusion

Based on the language of BLM's standard solid mineral lease form and the provisions of the Department's minerals regulations that the standard lease form reflects, I find that, as a general matter, the standardized terms may not be replaced by customized terms that conflict with the standard lease form and the applicable regulations. In order to introduce terms into the standard lease that conflict with existing regulations, BLM must first ensure that the changes align with the Department's statutory authority and, if so, it must then revise the applicable regulations in accordance with the APA to eliminate the conflict before amending the standard lease form.

In trying to implement the implications of the legal conclusions in the Jorjani M-Opinion, the BLM and the Assistant Secretary violated the Department's regulations in altering the renewal term of the standard form in the renewal of Twin Metals' leases in 2019. The Assistant Secretary and the BLM also ignored the Forest Service's 2016 non-consent decision in violation of 16 U.S.C. § 508b and section 402 of Reorganization Plan No. 3 of 1946, and the BLM prepared an inadequate NEPA analysis of the renewal decision. In light of these considerations, I advise the Secretary that Twin Metals leases MNES-01352 and MNES-01353 were improperly renewed and are subject to cancelation under 43 C.F.R. § 3514.30.

For reasons described herein, this opinion rescinds and replaces the Jorjani M-Opinion.

ANN BLEDSOE DOWNES

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