May 3, 2013

Stephen Mahoney
US Department of the Interior
Office of the Solicitor
Three Parkway Center
Suite 385
Pittsburgh, Pennsylvania 15220

Dear Mr. Mahoney,

Attached please find the memoranda, included as Attachments 1 and 2, respectively, addressing the level of National Environmental Policy Act ("NEPA") analysis appropriate for the request for renewal of Twin Metals Minnesota's existing federal mineral leases and the preference right lease application submitted by Twin Metals Minnesota. We appreciate the opportunity to provide these memoranda to you and we would appreciate the opportunity to respond at any questions that arise as you review these memoranda. We greatly appreciate your attention to this matter and look forward to hearing your thoughts.

Sincerely,

Dan Colton

General Counsel and Vice President of Regulatory and Legal Affairs
Twin Metals Minnesota

Cc:

Dr. John G. Lyon, PhD, State Director, Eastern States Office, Bureau of Land Management
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ATTACHMENT 1

BUREAU OF LAND MANAGEMENT'S CATEGORICAL EXCLUSION FOR MINERAL LEASE RENEWALS APPLIES TO RENEWAL OF EXISTING FEDERAL MINERAL LEASES HELD BY TWIN METALS MINNESOTA

On October 16, 2012, Twin Metals Minnesota ("Twin Metals") applied for the third as-of-right, ten-year renewal period afforded under the terms of its existing Bureau of Land Management ("BLM") Leases MNES 1352 ("Maturi Lease") and MNES 1353 ("Spruce Road Lease") (herein referred to as the "Leases," and as requested the "Lease Renewals"). In compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., BLM and the United States Forest Service should apply a categorical exclusion ("CX") to the Lease Renewals. This approach is supported by Twin Metals' contractual right to the Lease Renewals; consistency with agency action taken with respect to previous lease renewals; the extensive analyses of environmental impacts in the area covered by the Leases; existing BLM regulations and guidance; and relevant case law.

A. Leases and Previous Lease Renewals

BLM, with Forest Service consent, initially issued the Leases in 1966 for a term of twenty years, including an express right to three successive ten-year renewals. See Sections 1(a), 5. Consistent with the original grant and the terms of the Leases, BLM and the Forest Service have twice before issued renewals for the Leases. Because the agencies determined at the time of issuance of the Leases that the leaseholder would be entitled to a minimum of three lease renewals (upon request), the agencies have no discretion to deny the requested Lease Renewals.

In 1986, Twin Metals' predecessor sought the first renewal. In approving the first renewal, the agencies used a categorical exclusion and found that no significant impacts would result requiring any additional NEPA analysis. Approximately ten years later, Twin Metals' predecessor sought its second renewal of the Leases. Again, the agencies found no impacts warranting further NEPA analysis, determined that existing lease terms were adequate for protecting surface resources, and approved the renewal. The agencies noted that proposed exploration and other activities on the Leases cannot occur without prior approval and specific NEPA review for individual plans. Based on the terms of the Leases, no significant environmental impacts have occurred (and no significant environmental impacts could occur without additional NEPA) during the terms of the Leases.

Consistent with this precedent for the Leases and current BLM NEPA standards related to lease renewals for solid minerals, the lease renewal decision is properly subject to an expressly applicable CX. Furthermore, no "extraordinary circumstances" exist with respect to Twin Metals' third renewal application that would prevent use of that CX and thus result in disparate treatment under NEPA than for the prior renewals.

B. Use of a Categorical Exclusion is Appropriate

Pursuant to regulations promulgated by the Council on Environmental Quality ("CEQ"), federal agencies typically establish certain categories of actions "which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect" for NEPA purposes. 40 C.F.R. § 1508.4. CEQ and federal agencies refer to these insignificant actions as being categorically excluded from more detailed NEPA review. If an action is covered by a CX, the agency is not required to prepare an Environmental Assessment ("EA") or an

Environmental Impact Statement ("EIS"). *Id.* Agencies promulgate CXs based on agency experience and after public notice and comment. 40 C.F.R. § 1507.3.

Consistent with the CEQ regulations, BLM has established a categorical exclusion for the renewal of mineral leases ("Mineral Lease CX"). Specifically, BLM categorically excludes from more detailed NEPA review "[a]pproval of mineral lease readjustments, *renewals*, and transfers including assignments and subleases" (emphasis added). 516 Departmental Manual (DM) 11.9, F.2; see also BLM NEPA Handbook H-1790-1 at App. 4 (same). The Lease Renewals fall squarely within this Mineral Lease CX. Application of the Mineral Lease CX here satisfies NEPA.

Agency determinations to date regarding the Leases support use of the Mineral Lease CX. With respect to the 1987 and 1999 applications for renewal, the Forest Service and BLM both concluded that renewal of the Leases would not result in environmental impacts that warranted further NEPA analysis. Specifically, in 1987, the Forest Service found "that the terms and conditions of Bureau of Land Management (BLM) leases ES 01352 and ES 01353 are adequate to prevent or mitigate unacceptable impacts and [] no additional conditions need to be added prior to their renewal ...." BLM's and Forest Service's prior decisions and conclusions regarding environmental impacts (or lack thereof) considered the history of mineral development on the parcel:

> [t]hese [Maturi and Spruce Road] leases have been in effect for 20 years .... During this time the area has been extensively explored, hundreds of test holes have been drilled, both surface and underground bulk samples have been taken, and a large scale open pit mining operation proposed and evaluated. At no time were the terms and conditions of the leases found to be inadequate.

This history[1] did not alter BLM and Forest Service determinations that no impacts requiring NEPA analysis would result from renewal of the Leases because of the adequacy of the terms and conditions in the Leases. Twin Metals does not propose any material revisions to the above-referenced terms and conditions in the Leases, and such terms and conditions will continue to adequately ensure that no significant environmental impacts will occur.

Utilization of the Mineral Lease CX for the Lease Renewals is also supported by agency practice for renewals of similar solid mineral leases issued under the same BLM regulatory regime. In February 2012, BLM renewed a 2,187-acre preference right sodium lease with this CX.[2] BLM has also applied the Mineral Lease CX when renewing leases with modified terms. See, e.g., Grand Junction CAM Lease Renewal (adding a stipulation requiring development of mitigation plans for

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[1] The agencies expressly acknowledge in prior lease renewal documentation that the existence of exploration drilling and bulk sampling activities does not preclude the application of a CX. This is important precedent. As Twin Metals recently discussed with BLM and the Forest Service, Twin Metals proposes to undertake drilling and bulk sample projects on the Maturi Lease in the 2013-2014 timeframe. The proposed drilling and bulk sample projects will be evaluated for compliance with NEPA and any required NEPA analysis will be conducted by BLM and the Forest Service. Just as the pending drilling and bulk sample work did not counsel against application of a CX for prior lease renewals, so too does the proposed drilling and bulk sample work not counsel against application of the Mineral Lease CX. In fact, the bulk sample site (the INCO shaft) referenced by the Forest Service in its 1987 categorical exclusion determination is the bulk-sample location that Twin Metals has recently proposed to BLM and the Forest Service.

[2] Shell Frontier Preference Right Sodium Lease Renewal, DOI-BLM-CO-110-2012-0028-CX.

many animals). These examples, coupled with the renewal rights and satisfactory terms in the existing Leases, warrant similar application of the Mineral Lease CX here.

The agencies may confidently rely upon the duly promulgated and controlling Mineral Lease CX. As noted by the Fourth Circuit, "the more specific examples of categorical exclusions listed in the regulations" should govern the agency's decision as to whether a project is properly considered not to have significant environmental impacts and appropriate for categorical exclusion status. City of Alexandria v. Fed. Highway Admin., 756 F.2d 1014, 1019 (4th Cir. 1985). In establishing the Mineral Lease CX, BLM went through the formal notice and comment process. 65 Fed. Reg. 52212, 52231 (Aug. 28, 2000). Thus, courts will properly treat the Mineral Lease CX as an agency rule. See Citizens' Committee to Save Our Canyons v. U.S. Forest Service, 297 F.3d 1012, 1023 n.8 (10th Cir. 2002); Rhodes v. Johnson, 153 F.3d 785, 788 (7th Cir. 1998). As such, in the event of a third-party challenge, application of the Mineral Lease CX to the Lease Renewals would be granted "controlling weight unless plainly erroneous or inconsistent with the terms used in the regulation." Alaska Center For Environment v. U.S. Forest Service, 189 F.3d 851, 859 (9th Cir. 1999); Back Country Horsemen of America v. Johanns, 424 F.Supp.2d 89, 99 (D.D.C. 2006) (same). The Lease Renewals conform precisely to the terms of the regulation.

BLM's establishment of a categorical exclusion for mineral lease renewals also conforms to the well-supported principle that an agency does not authorize significant environmental impacts under NEPA when it reauthorizes an existing grant (and thus the activities authorized by that grant). See 65 Fed. Reg. at 52231 (adopting Mineral Lease CX). In Citizens' Committee to Save Our Canyons v. U.S. Forest Service, the Tenth Circuit upheld this principle during its review of a Forest Service CX for the "[s]ale or exchange of land or interest in land and resources where resulting land uses remain essentially the same." 297 F.3d at 1023-24; see also 36 C.F.R. § 220.6(d)(7). The court upheld the Forest Service's application of the categorical exclusion because transferring the land to a ski resort "would not alter its essential use or character." 297 F.3d at 1024. For the same reasons articulated by the Tenth Circuit and implicitly acknowledged by BLM through its adoption of the Mineral Lease CX, the Lease Renewals will not alter the essential use or character of the already-leased lands covered by the existing Maturi and Spruce Road Leases and therefore will not result in significant environmental impacts.

For all of the reasons discussed above, the Lease Renewals fall squarely within the Mineral Lease CX. Further, and as discussed in greater detail in Section C below, no extraordinary circumstances exist justifying more detailed NEPA review for the Lease Renewals.

C. No "Extraordinary Circumstances" Exist

CEQ regulations provide that in certain limited circumstances—i.e., "extraordinary circumstances" in which a normally excluded action may have a significant environmental effect—application of an established categorical exclusion may not be appropriate. See 40 C.F.R. § 1508.4. However, as the very name connotes, such circumstances must be extraordinary. The straightforward renewals of the Leases as required by the Leases themselves—leases which the agencies have twice before renewed without detailed NEPA review—present no such circumstances.

BLM identifies twelve extraordinary circumstances in which it will not apply categorical exclusions, which mirror the Departmental regulations. See 43 C.F.R. § 46.215(b); 516 DM 2,

Appendix 2. None of the extraordinary circumstances applies here. For greater clarity, we specifically address two of those extraordinary circumstances relevant here.

First, BLM may decline to apply a CX if a proposed action may have "significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers...." 43 C.F.R. § 46.215(b). However, the mere presence of unique nearby natural resources, such as the Boundary Waters Canoe Area Wilderness ("BWCAW") near the Twin Metals project, does not automatically create an "extraordinary circumstance" that triggers more extensive NEPA analysis. Department of the Interior regulations, the BLM Handbook, and Forest Service regulations all make clear that the threat of *significant impacts* to such a resource must occur for such an extraordinary circumstance exception to apply. See 516 DM 2, Appendix 2 at 2.2; BLM NEPA Handbook H-1790-1 at App. 5. And this extraordinary circumstance exception, by its very terms, requires "significant impacts" on the articulated natural resources. 43 C.F.R. § 46.215(b). Similarly, though the Forest Service considers the presence of wilderness areas in evaluating the presence of "extraordinary circumstances," the Forest Service acknowledges that the

> mere presence of one or more of these resource conditions does not preclude the use of a categorical exclusion (CE). It is the existence of a cause-effect relationship between a proposed action and the potential effect on these resource conditions, and if such a relationship exists, the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.

36 C.F.R. § 220.6(b)(2). In fact, the Forest Service changed its regulations to clarify that the mere presence of such resources does not demonstrate that extraordinary circumstances exist. See Clarification of Extraordinary Circumstances for Categories of Actions Excluded From Documentation in an Environmental Assessment or an Environmental Impact Statement, 67 Fed. Reg. 54622, 54627 (Aug. 23, 2002).

Federal courts have confirmed that an agency may use a CX even in the vicinity of sensitive resources provided those resources are not significantly impacted by the proposed action. In Southwest Center for Biological Diversity v. U.S. Forest Service, the Ninth Circuit held that an agency may invoke a CX even if endangered or threatened species are present (a resource condition included in the agency's extraordinary circumstances criteria), as long as the project will not negatively impact the species. 100 F.3d 1443, 1450 (9th Cir. 1996). Similarly, an agency's reliance on a CX was affirmed even though the project area included a municipal watershed (another resource condition commonly included in extraordinary circumstance criteria). See Krichbaum v. U.S. Forest Serv., 17 F. Supp. 2d 549, 558 (W.D. Va. 1998). In another example, a court upheld the use of a CX even though it was "undisputed that three of the extraordinary circumstances listed in the handbook exist[ed] in the [project area], namely steep slopes, endangered species, and a watershed," because there was "no evidence that the [project] will potentially have a significant impact on those three conditions." Utah Envtl. Cong. v. U.S. Forest Serv., No. 2:01-CV-00390B, 2001 WL 34036256, *5 (D. Utah June 19, 2001). Thus, the mere presence of a resource area, such as the BWCAW, in the general vicinity of the relevant area does not constitute an extraordinary circumstance preventing use of an identified categorical exclusion.

In fact, BLM and the Forest Service have twice before concluded that the proximity of the Maturi and Spruce Road Leases to the BWCAW did not justify additional NEPA analysis when renewing the Leases. The BWCAW boundaries have not expanded toward the Twin Metals' leased properties since the agencies applied a categorical exclusion to those two prior lease renewals. Thus, the mere presence of the BWCAW does not present an extraordinary circumstance that precludes use of the Mineral Lease CX.

Second, under BLM's extraordinary circumstances criteria, BLM may decline to apply a CX when an action may have a direct relationship to other actions with individually insignificant but cumulatively significant effects. For the same reasons articulated above, this factor requires not just cumulative impacts, but "cumulatively significant environmental effects." 43 C.F.R. § 46.215(f) (emphasis added). In other words, the mere presence of other similar projects nearby does not disqualify a project from a CX. See, e.g., Utah Envtl. Cong. v. Bosworth, 370 F.Supp.2d 1157, 1164 (D. Utah 2005) (rejecting argument that a CX was improper because of other adjacent projects); Cascadia Wildlands Project v. Anthony, Civ. No. 08-6198-HO, 2008 WL 3200693, *3 (D. Or. Aug. 5, 2008) (upholding two separate CXs for two simultaneous timber projects where "there is some overlap"). Moreover, the potential for significant impacts to resources described in the extraordinary circumstances criteria, including significant cumulative impacts, should be demonstrated before a project is disqualified for application of a CX. See Utah Envtl. Cong. v. Bosworth, 443 F.3d 732, 742 (10th Cir. 2006) (the CX regulation "plainly requires that an action first may produce a significant effect before a federal agency engages in further analysis"). Here, there is no evidence that the Lease Renewals either will create significant impacts themselves or result in cumulatively significant impacts.

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D. Other Reasons a CX Applies

Lease Renewal will not alter any impacts to the leased lands. The activities that will occur on the Leases in the third renewal period are substantially the same as the field activities undertaken by Twin Metals' predecessors in the periods before the first two Lease Renewals were issued without additional NEPA analysis. Specifically, the work that Twin Metals will undertake includes exploration drilling, infill or definitional drilling for financing purposes, and a bulk sample project. Again, as noted above, these are the exact same types of activities that BLM and the Forest Service expressly described as not warranting additional NEPA analysis for renewal of the leases. *See*, *supra*, at footnote 1 and accompanying text. Forest Service and BLM rightfully understood that before approval, any activities on the leases would be evaluated for compliance with NEPA. That has not changed and Twin Metals understands that additional NEPA analysis will be required for many of the activities it may propose, particularly on the Maturi Lease.

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Additionally, at the time that Twin Metals develops and submits its MPO, that MPO will be governed by the significant mitigation stipulations included in the Maturi and Spruce Road Leases and other conditions previously developed by BLM and the Forest Service (e.g., conditions developed during the NEPA analysis of prospecting in the Superior National Forest). Together, the past NEPA analyses of activities on Maturi Lease, the agencies' conclusions with respect to the prior lease renewals, and the ability of the agencies to condition activities on the Leases once renewed demonstrate that issuance of the Lease Renewals will not have significant effects that preclude use of the Mineral Lease CX.

That Twin Metals may propose a Mine Plan of Operations during the period of the third Lease Renewals does not warrant a different conclusion. Specifically, one of the important terms and conditions of the Leases requires that any mine plan of operations ("MPO") submitted by Twin Metals must undergo extensive evaluation, including a detailed review under NEPA, before any on-the ground mining impacts can occur. In this way, the existing Lease terms, that BLM and the Forest Service previously found adequate, ensure protection of the environment. Moreover, nothing in the various NEPA analyses conducted within the Superior National Forest since the last lease renewal indicates that any additional terms and conditions are necessary, at the lease stage, to protect the environment.

Finally, use of the Mineral Lease CX is not precluded simply because development may occur during the renewal period. BLM choose not to craft the Mineral Lease CX to apply only to lease renewals where development of the lease was not imminent or anticipated during the renewal period. As a result, use of the Mineral Lease CX is not limited to situations in which mineral development will not occur during the lease renewal period. In fact, BLM and the Forest Service have consistently understood during issuance of the original Maturi and Spruce Road Leases, and the subsequent lease renewals, that mineral development and related activities would occur on those leases. Such anticipated activities did not affect BLM's and the Forest Service's conclusion that no additional NEPA analysis was warranted. The same result holds here.

To be clear, though Twin Metals has submitted, in connection with its pending preference right lease application, a conceptual mine plan, the conceptual mine is not a proposal for mining. The conceptual mine plan was developed for a very specific regulatory purpose and does not constitute Twin Metals' proposal for a mine. Twin Metals anticipates that any future plan for mineral development will differ (perhaps significantly) from the information provided in the conceptual mine plan and Twin Metals' development of a fully analyzed and viable proposed MPO will take substantial time and resources. Moreover, prior to undertaking any mining, that MPO must undergo extensive evaluation, including an EIS under federal and state laws. Thus, at this time no concrete proposal for mineral development exists and no such proposal is anticipated for at least several years, if at all.

In sum, renewals of leases contemplate that activities will take place during the renewal period. In promulgating the Mineral Lease CX to apply to lease renewals, BLM determined that such renewals of existing leases do not trigger significant impacts warranting further NEPA review. Here, the Mineral Lease CX applies and no extraordinary circumstances warrant its rejection.

E. The Mitigation Measures in the Maturi and Spruce Road Leases and the Right of BLM and the Forest Service to Condition Activities Further Support Use of the Mineral Lease CX

As noted above, the Maturi and Spruce Road Leases contain measures that further protect the covered lands and the BWCAW, and limit any potential impacts. These measures include requiring Forest Service and BLM approval of all lease activities, and allowing the Forest Service and BLM to impose additional conditions on those activities. <u>See</u> Lease 1352 Section 3(a), 3(c). The Maturi and Spruce Road Leases also limit open-pit mining. <u>See</u> Lease 1352 Section 7. As they have done in the past, both BLM and the Forest Service will conduct appropriate levels of NEPA for all activities that Twin Metals proposes on the leased properties, including exploration drilling, further definitional drilling for financing purposes, and bulk sampling activities. The appropriate time to

evaluate environmental impacts and relevant mitigation measures is at the time such site-specific proposals are submitted—not at the Lease Renewal stage.

Any mitigation measures developed during the NEPA reviews applied to specific field activities proposed by Twin Metals will further decrease any minor potential impacts to the BWCAW. The presence of these measures may be considered during BLM's evaluation of the application of a CX. In fact, courts agree that an agency may rely upon mitigation measures to ensure that no extraordinary circumstances exist and apply a CX in conjunction with those mitigation measures. In Alliance for the Wild Rockies v. Tidwell, the Ninth Circuit upheld the Forest Service's conclusion that the logging project's potential impact on the northern goshawk did not constitute an extraordinary circumstance by finding that the mitigation measures implemented by the Forest Service limited any effect that the logging might have on the northern goshawk nest identified in the project area. 385 Fed. Appx. 732, 734 (9th Cir. 2010). Similarly, in Florida Keys Citizens Coalition v. U.S. Army Corps of Engineers, the court upheld a CX based upon the significant mitigation measures incorporated into the project and prior related environmental reviews. See 374 F. Supp. 2d 1116, 1143 (S.D. Fla. 2005). Finally, the Ninth Circuit has rejected the argument that the presence of conditions and mitigation measures on a permit indicates that the impacts of the permit are not minor and therefore do not qualify for a CX. Alaska Ctr. for the Env't, 189 F.3d at 859-60.

F. Conclusion

The Lease Renewals fall squarely within the existing BLM CX for mineral lease renewals. No extraordinary circumstances preclude application of the CX. Consequently, the agencies should employ this CX to satisfy NEPA for the Lease Renewals.[3]

[3] The analysis contained herein was prepared by legal counsel to Twin Metals Minnesota including Beveridge & Diamond PC, Hogan Lovells US LP, and Leonard Street and Deinard.

ATTACHMENT 2

AN ENVIRONMENTAL ASSESSMENT IS ADEQUATE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT TO SUPPORT ISSUANCE OF TWIN METALS MINNESOTA'S PREFERENCE RIGHT LEASE

Twin Metals Minnesota ("Twin Metals") recently submitted its Preference Right Lease Application ("PRLA") for lands subject to prospecting permits MNES 50652 and MNES 50846 (collectively the "Permit Lands") held by Twin Metals. Twin Metals has engaged the Bureau of Land Management ("BLM") and the United States Forest Service ("Forest Service") in a dialogue regarding the appropriate level of analysis under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., for approval of the PRLA to ensure full NEPA compliance, alleviate stakeholder uncertainty, and facilitate prompt lease issuance. Such lease issuance will assist in providing Twin Metals the mineral tenure necessary to support its continued substantial investment in mineral development. As discussed, BLM and the Forest Service should evaluate the PRLA through an Environmental Assessment ("EA") with a full opportunity for public review and comment. This EA approach fully satisfies NEPA because the decision to issue the preference right lease does not significantly impact the environment. The adequacy of an EA is supported by several factors including (1) the limited scope of the lease issuance decision under the specialized legal regime applicable to leasing of public domain hardrock minerals; (2) multiple recently completed environmental analyses in the area covered by the PRLA; (3) the speculative nature of the impacts to the Permit Lands from mining; and (4) the lack of significant impacts to the Permit Lands even under the current conceptual mine plan submitted with the PRLA. By contrast, preparation of an Environmental Impact Statement ("EIS") for this PRLA would be both unnecessary and unproductive at this juncture.

A. Preparation of an EA for the Twin Metals PRLA is Well Within Proper Agency Discretion

A federal agency's application of NEPA is governed by a "'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decision making process." Dep't of Transp. v. Public Citizen, 541 U.S. 752, 767 (2004) (citing Marsh v. Or. Natural Res. Council, 490 U.S. 360, 373-374 (1989)). Federal agencies typically conduct an EA, rather than an EIS, when "the agency takes a 'hard look' and determines that the proposed action has no 'significant' environmental impacts." Heartwood, Inc. v. U.S. Forest Serv., 380 F.3d 428, 431 (8th Cir. 2004); see also 40 C.F.R §§ 1501.4(b)-(c), 1508.9(a), 1508.13. Because issuance of the preference right lease to Twin Metals will not result in any significant environmental impacts as communicated in prior discussions and further supported below, under the rule of reason, an EA is adequate for BLM and the Forest Service to support the preference right lease issuance decision.

B. An EA is Consistent with the Distinct Legal Framework Governing Twin Metals' PRLA

Twin Metals' PRLA for public domain hardrock minerals underlying the Permit Lands presents a different and more limited type of leasing decision for BLM and the Forest Service than for other minerals and for acquired lands. In the more common federal oil and gas competitive and non-competitive leasing context, the Secretary of the Interior has complete discretion whether to proceed with leasing and typically is deciding for the first time whether an area should be subject to mineral development. However, in implementing Congress' specific development authorization at 16 U.S.C. § 508b, BLM chose instead to place leasing of public domain hardrock minerals in the Superior National Forest under its "preference right" leasing regulations at 43 C.F.R. Part 3500.

Under that system, the agencies are not writing on a blank slate. Rather, under the applicable regulatory scheme, BLM and the Forest Service have previously authorized the issuance of prospecting permits. These prospecting permits anticipate that the holder—here Twin Metals—will invest considerable funds and effort to demonstrate the presence of a "valuable mineral deposit" and in return be granted a lease rewarding[1] those efforts by conferring mineral tenure. BLM and the Forest Service's past authorization of the Prospecting Permits and Twin Metals' subsequent demonstration of a valuable mineral deposit in its PRLA should substantially reduce the scope of the preference right lease issuance decision, and thereby support the sufficiency of an EA.

In light of the agencies' past decisions on the two Prospecting Permits, the agencies' decisions on Twin Metals' PRLA take on less "significance" for NEPA purposes than leasing of other minerals such as oil and gas, and more recently coal. In stark contrast to preference right leasing for public domain hardrock minerals, the legal system for competitively or noncompetitively leasing oil, gas, and coal renders leasing decisions entirely within the discretion of the Interior Department. See 30 U.S.C. §§ 226, 201(a)(1); McTiernan v. Franklin, 508 F.2d 885, 887 (10th Cir. 1975) ("The Mineral Leasing Act gives the Secretary discretionary power to accept or reject oil and gas lease offers."). Thus, for oil and gas, at the leasing stage, BLM must consider both whether to lease (tenure) and the form of the lease (terms and stipulations). For this reason, some courts have found oil and gas leasing decisions to be "significant," thus warranting an EIS. However, the oil and gas leasing regime and associated case law do not control here. For Twin Metals' PRLA, the agencies have already issued the two Prospecting Permits, determined that this area should not be excluded from hardrock mineral development, and encouraged Twin Metals to expend immense resources to locate a previously unknown valuable deposit of hardrock minerals.[2] As in Natural Resources Defense Council, Inc. v. Berklund, based on these past actions and the regulatory scheme governing these minerals, the material issue for NEPA analysis thus should be not whether to issue a lease at all, but rather what terms and stipulations may need to be placed on the lease at the time of issuance. 458 F. Supp. 925, 937 (D.D.C. 1978) (limiting the context of the preference right leasing NEPA analysis to the terms and stipulations of the lease), aff'd, 609 F.2d 553, 558 (D.C. Cir. 1979). In Twin Metals' circumstances, the remaining decisions are not significant for NEPA purposes, and the preference right leasing analysis may, and should, be undertaken in an EA.

C. Significant Environmental Impacts Will Not Result From Issuance of the Preference Right Lease

BLM and the Forest Service's primary task in reviewing Twin Metals' PRLA will be to evaluate the types of terms and environmental protections that will be incorporated into the preference right lease. The terms and environmental protections will work in conjunction with any

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[1] This system is intended, as Congress has stated, to "reward" the prospector who finds valuable minerals with a "preferential right to a lease" for those minerals. H.R. No. 398, 66th Cong. 1st Sess. 12 (1919). The mineral tenure created through the preference right leasing process is also akin to the tenure created and maintained on valid unpatented claims under the Mining Law of 1872, 30 U.S.C. § 21, et seq., which governed the public domain hardrock minerals in the Superior National Forest before they were withdrawn and subsequently reinstituted by Congress. Public domain minerals in the Superior National Forest are subject to the same preference right leasing regulatory scheme as public domain solid leasable minerals under the Mineral Leasing Act of 1920.

[2] In the typical federal oil and gas leasing context, a lessee first obtains its mineral lease rights and then makes its large investment in exploration and development. It would defy logic and fairness to suggest that after a hardrock mineral prospecting permittee obtains its prospecting permits and expends hundreds of millions of dollars to demonstrate the existence of a valuable mineral deposit, the federal government could arbitrarily deny that permittee the right to develop those minerals at all.

conditions required pursuant to later NEPA reviews conducted for subsequent site-specific approvals of individual proposed activities or a detailed Mine Plan of Operations ("MPO") approved pursuant to the preference right lease. In crafting such terms and environmental protections, the agencies again are not working from a blank slate. BLM and the Forest Service have substantial information available to them regarding the potential impacts resulting from mineral development in the area covered by the preference right lease. In fact, the agencies have analyzed this geographic area multiple times and found no special protections are warranted and have found no basis for prohibiting mineral development in the area covered by the preference right lease. BLM and the Forest Service also have deemed acceptable Twin Metals' exploration activities on its Permit Lands and its existing Federal Lease MNES-01352, activities which parallel the only currently reasonably foreseeable activities that Twin Metals will conduct on the issued preference right lease. Site-specific impacts to the preference right lease lands from mining are not reasonably foreseeable for purposes of NEPA because such impacts are entirely speculative at this time. That said, even the conceptual plan for mining required solely for Twin Metals' PRLA anticipates only minimal impacts on Permit Lands. Finally, before any specific activities or mining occurs, the agencies will have the opportunity to conduct separate and meaningful NEPA reviews and impose reasonable conditions in the context of concrete proposals, including a comprehensive EIS for an MPO when prepared and proposed. At this early PRLA stage, an EA is all that NEPA requires.

1. An EIS is Not a Prerequisite for a Preference Right Lease

BLM and the Forest Service can assess in an EA those very limited surface impacts identified in the PRLA that are reasonably foreseeable once BLM issues the preference right lease. An EA for Twin Metals' PRLA is consistent with the NEPA analysis of preference right leasing in Berklund. After holding that the Department of the Interior could not deny a lease altogether on environmental grounds after a prospecting permittee had found a valuable mineral deposit, Berklund held that evaluation of proposed lease terms and stipulations for the lease is subject to NEPA review. 458 F. Supp. at 928-29. Specifically, Berklund called for a "detailed and informed analysis of the environmental costs [to] be prepared and available prior to the issuance of the lease." Id. at 939. Yet, Berklund did not hold that an EIS is inexorably required to complete this NEPA review. Consistent with NEPA, the court there merely presupposed that an EIS was required for a "major federal action significantly affecting the environment." Id. at 928-29, 931, 937 n.20; see also 42 U.S.C. § 4332(2)(C). While an EIS was deemed warranted in Berklund, the situation there was different from Twin Metals' PRLA in that there was no prior analysis of the suitability of the lease areas for mineral development and the court was concerned about the potential presence of unstudied significant impacts. See Berklund, 458 F. Supp. at 932, 932 n.13. By contrast, and as more thoroughly described below, BLM and the Forest Service have determined, through a number of planning processes and NEPA analyses, that mineral development is compatible with and appropriate in this portion of the Superior National Forest. Thus, here, the agencies can conduct a NEPA analysis (through an EA) that focuses on the potential lease performance standards, alternative methods for meeting those standards, and estimated costs of compliance. See id. at 938. This is all that Berklund (and NEPA) require.

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2. **BLM and the Forest Service Previously Have Determined That Mineral Development Is Compatible With the Permit Lands in the Superior National Forest**

BLM and the Forest Service have extensively evaluated the Superior National Forest, and specifically the area around the Permit Lands, for its resources and the compatibility of those resources with both mineral exploration and mining activities. Such prior efforts took place before and after issuance of the two Prospecting Permits in 2006. Prior efforts include the 1986 and 2004 Forest Plans and accompanying NEPA analyses, the 2007 Kawishiwi EA for exploratory drilling, and the May 2012 Federal Hardrock Mineral Prospecting Permit EIS for the Superior National Forest. Based on all of these prior analyses, the Forest Service has identified throughout the Superior National Forest those areas that are, and that are not, suitable for mining and has designated unsuitable areas as either Research Natural Areas or Unique Biological Areas, excluding them from mineral development. None of the Permit Lands is designated as Research Natural Areas or Unique Biological Areas. In fact, the entire Permit Lands area is designated as either a General Forest Management Area or a Recreation Use in a Scenic Landscape Management Area. The Forest Service allows mining in each of those areas, and continues to apply the general precept that mining is a Forest-Wide Desired Condition to be encouraged. See 2004 Forest Plan at 2-9; 1986 Forest Plan at 3-50. The Forest Service's determinations regarding mining are also consistent with Congress' directives to allow mining in the Superior National Forest and the Forest Service's own policies regarding mineral development. See, e.g., 16 U.S.C. § 508b; FSM 2822.03 ("The Forest Service considers mineral exploration and development to be important parts of its management program."). These prior analyses and the agencies' resulting determinations that mining is appropriate in the area covered by the PRLA further support use of an EA at the leasing stage here.

3. **Post-Lease Activities Most Likely to be Proposed on the Permit Lands Mirror Actions Already Approved or Under EA Review, and Present Only Minimal Impacts**

The terms of the preference right lease will authorize Twin Metals to conduct certain activities prior to approval and implementation of the MPO, namely continued exploratory and infill drilling and baseline environmental studies ("Interim Lease Activities"). These Interim Lease Activities will be the only activities with surface-disturbing impacts authorized by the issuance of the preference right lease. Twin Metals supports analysis of the impacts from those Interim Lease Activities in the NEPA analysis associated with the PRLA. The well-understood and insignificant nature of these activities, consistent with prior studies and approvals, further warrant an EA for the PRLA.

The Interim Lease Activities that Twin Metals will undertake on the preference right lease, and before an MPO is submitted, are substantially the same as the field activities undertaken to date by Twin Metals and its predecessors (namely, exploratory drilling) that the BLM and Forest Service analyzed in previous NEPA analyses and found to be minimal. Importantly, the prior NEPA analyses, and the stipulations developed as part of those NEPA analyses, demonstrate that no significant impacts will result from these kinds of activities. See Prospecting Permit PEIS Forest Service Record of Decision at 4 (May 2012); Prospecting Permit PEIS BLM Record of Decision at 2 (Sept. 2012); Kawishiwi Forest Service Record of Decision at 1-2 (Nov. 2007). As a result, these same activities should not be expected to cause significant impacts sufficient to trigger an EIS for the PRLA. Rather, BLM and the Forest Service should tier to or incorporate by reference those prior NEPA analyses into the NEPA for the PRLA. To the extent that Interim Lease Activities have not

been previously analyzed, they can be analyzed in an EA (like Twin Metals' planned hydrogeologic study currently being considered by the Forest Service). Twin Metals also will comply with any applicable stipulations in the preference right lease for the Interim Lease Activities. As a result, no significant environmental impacts will result from the Interim Lease Activities and correspondingly no significant environmental impacts will result from issuance of a preference right lease.

By issuing a preference right lease, BLM (and the Forest Service in its role) will not specifically authorize any surface disturbance or change in the physical environment associated with speculative future activities or mining. Additional NEPA analysis by the pertinent federal agencies will be required for other activities Twin Metals may propose on the preference right lease that are not approved at the time of lease issuance. Specifically, Twin Metals will not be authorized to mine the preference right lease until it obtains federal approval of its MPO; that approval will require an extensive EIS.

4. Potential Impacts to the Permit Lands from Mining Do Not Warrant an EIS

Here, as discussed above, the primary decision for BLM and the Forest Service is to determine any lease terms and stipulations to address the limited scope of potential impacts to the Permit Lands from a potential future mining operation. This present decision does *not* encompass approval of any mine or broader mining impacts beyond the Permit Lands. Addition of such extraneous or speculative considerations to the NEPA analysis defeats rather than furthers the goals of NEPA. Instead, the basic purpose of NEPA review is to inform agencies and the public of environmental impacts of the relevant decision before it is made. See 40 C.F.R. § 1500.1. As such, it is essential that the NEPA analysis focus on the actual decision presently before the agencies—issuing a preference right lease for the Permit Lands.

The NEPA process fundamentally depends on accurate, high-quality analysis of issues most pertinent to the action in question, rather than "amassing needless detail" or "generat[ing] paperwork." 40 C.F.R. § 1500.1. Consistently, agencies are not required to speculate in NEPA documents beyond reasonably foreseeable consequences. Reasonable foreseeability does not include "highly speculative harms" that "distort[ ] the decision making process" by emphasizing consequences beyond those of "greatest concern to the public and of greatest relevance to the agency's decision." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 355-56 (1989); City of Dallas, Tex. v. Hall, 562 F.3d 712, 719 (5th Cir. 2009). Rather, the NEPA process is intended to identify potential impacts of an actual proposal and to develop alternatives to avoid those impacts or measures to mitigate them. See Kleppe v. Sierra Club, 427 U.S. 390, 406 (1976) ("the contemplation of a project and the accompanying study thereof do not necessarily result in a proposal for major federal action..."). Even under oil and gas leasing cases, not controlling in a preference right leasing context, site-specific analysis can be properly "made at later permitting stages when the sites, and hence more site specific effects, are identifiable." Northern Alaska Environmental Center v. Kempthorne, 457 F.3d 969, 977 (9th Cir. 2006); cf. New Mexico ex rel. Richardson v. BLM, 565 F.3d 683, 718-19 (10th Cir. 2009) (site-specific EIS for oil and gas lease is appropriate where applicant "has concrete plans to build approximately 30 wells on the BRU Parcel and those it already leases, and it has obtained the necessary permits for a gas pipeline connecting these wells to a larger pipeline in Texas"); see also Park County Resource Council, Inc. v. U.S. Dept. of Agriculture, 817 F.2d 609, 623 (10th Cir. 1987) (overruled in part on other grounds).

An EIS here would run afoul of these NEPA principles. Compelling an EIS would ask the agencies and Twin Metals to effectively undertake guesswork, since the information available about

the potential for impacts to the Permit Lands from mining is highly speculative and uncertain. Though Twin Metals has conducted sufficient exploration on the Permit Lands (and other project lands) to confirm the presence of a valuable mineral deposit, Twin Metals continues to conduct infill drilling, engineering evaluations, and other detailed studies necessary before Twin Metals can develop a reasonable and viable plan for any mineral development, and thus determine the specific impacts to any particular lands from mining. Twin Metals anticipates completing its prefeasibility study ("PFS"), which is a preliminary step in evaluating whether to engage in mine planning and design, no earlier than 2014. If Twin Metals determines to proceed with mine planning after completion of the PFS, Twin Metals will undergo years of mine design. Thus, at this time and for the foreseeable future, the impacts to the Permit Lands from mining are speculative and indiscernible.

The existence of a "conceptual" mine plan does not indicate otherwise. Twin Metals developed the conceptual mine plan in its PRLA solely to meet the requirements of BLM's preference right lease process. See 43 C.F.R. § 3507.17(c)(2). Importantly, Twin Metals' conceptual mine plan was developed for the sole purpose of providing estimates to comply with BLM's rules regarding demonstration of a valuable mineral deposit; it does not provide a definitive roadmap to Twin Metals' potential mine development and thus offers no foundation for a meaningful EIS analysis of impacts to the Permit Lands from mining. See 43 C.F.R. §§ 3507.11 (a), 3507(c)(2). The valuable mineral deposit determination is a highly technical process in which BLM evaluates the following: core or test holes; maps; logs of strata penetrated; in-hole surveys or other logs produced; other information about the extent and character of the deposit; information about anticipated mining, processing methods, costs, and the kind and extent of necessary surface disturbance; location information; reclamation plans; and whether there is a reasonable prospect of success in developing a profitable mine. See 43 C.F.R. §§ 3507.18, 3593.1. As part of its economic analysis, BLM makes assumptions about environmental controls/reclamation and associated costs *only* to ensure that the inclusion of such costs does not preclude the generation of a profit. See 43 C.F.R. § 3507.18; Berklund, 458 F.Supp. at 938-939. BLM employs overly conservative assumptions into its analysis of environmental factors, environmental controls, and reclamation, rather than tailoring specific controls to particular project details or balancing costs and benefits. Thus, in creating the conceptual mine plan, Twin Metals has adopted overly conservative environmental assumptions and assessed a practicable option for siting its facilities.

Consistent with BLM regulations, the PRLA's conceptual mine plan indicates the types of impacts that could occur only under one scenario, and does so in only a limited and conservative manner as those PRLA regulations require. Any future MPO submitted by Twin Metals may differ significantly from the conceptual mine plan—and BLM's regulations do not prohibit or discourage such changes from the conceptual mine plan to the MPO. Presently, information is lacking and unobtainable regarding any mine's potential design, size, location, and a multitude of other features required to assess potential impacts from mining on the Permit Lands. Twin Metals' development of a fully analyzed and viable proposal for mining will take substantial time and resources. In short, because development of the mine described in Twin Metals' conceptual mine plan (a plan developed solely for purposes of satisfying the PRLA requirements) is highly speculative, BLM and the Forest Service cannot, and should not, seek to use the conceptual mine plan to attempt to predict site-specific impacts to the Permit Lands—and NEPA does not require such use. Such impacts are not reasonably foreseeable at this point in time and any such efforts would result in meritless speculation rather than informing the decision-making process and advancing the goals of NEPA.

To the extent that BLM and the Forest Service fail to acknowledge the limited purposes for which Twin Metals developed the conceptual mine plan in its PRLA, that conceptual plan forecasts

only insignificant, speculative mining impacts to the surface of the Permit Lands supporting use of an EA. The conceptual mine plan anticipates only marginal impacts to the Permit Lands from any future mine because Twin Metals anticipates proposing an underground mine that maximizes avoidance of surface impacts to the Permit Lands, as well as other areas within the Superior National Forest. Even under the conceptual mine plan's overly conservative environmental assumptions for practicable placement of associated facilities, any mine is expected to cause little if any disturbance to the Permit Lands, the only area under consideration in the PRLA. Indeed, elements on the Permit Lands, while completely speculative at this point, include only minimal vents, roads, and other necessary infrastructure. Therefore, even if the conceptual mine plan was considered beyond the proper context of the valuable mineral deposit, the anticipated lack of surface impacts on the Permit Lands supports an EA for the PRLA.

D. BLM and the Forest Service Have Conducted EAs for Mineral Leases

BLM and the Forest Service have repeatedly used EAs to analyze the impacts of mineral leases, including under the same preference right leasing regime that governs here—i.e., the 43 C.F.R. Part 3500 regulations. See Attachment A. For instance, in 2011, BLM's Fillmore (Utah) Field Office used an EA to analyze the impacts of leasing 125,762 acres for potash and potassium mining. See Sevier Lake Competitive Potash Leasing Proposal EA (2011). Further, BLM's Rock Springs (Wyoming) Field Office used an EA to consider the impacts of leasing 9,894 acres for trona (a particular kind of sodium). See EA for Sodium Leasing in the Green River Basin of Southwestern Wyoming (July 1995). BLM has also used EAs to consider the impacts of leasing coal. See Environmental Assessment for Ten Mile Rim, Sweetwater County, Wyoming Coal Lease (2004); Environmental Assessment for Wadge Seam, Sage Creek (Apr. 2012). The Forest Service has done the same. See Environmental Assessment for Bledsoe Coal Lease KYES-53865, Leslie County, KY (Oct. 2012). BLM and the Forest Service, likewise, should conduct an EA to analyze the environmental impacts associated with issuance of the preference right lease to Twin Metals for the Permit Lands.

E. An EIS Would be Unnecessary, Counter-Productive, and Unhelpful to the PRLA Analysis

Preparation of an EIS for the PRLA is unnecessary. In fact, an EIS would produce adverse consequences without providing additional meaningful information for the PRLA decision relative to an EA. An EIS for the PRLA would create significant inefficiencies, wasting both Twin Metals and agency resources. Agency costs would be further compounded through gross misallocation of resources, diverting agency staff from more immediate matters in order to devote attention to an EIS for the PRLA that is unnecessary because it would yield no further valuable information for the BLM and the Forest Service beyond what an EA would provide. Further, an EIS would confuse the public as to the purpose of the conceptual mine plan and the current status of Twin Metals' development and planning process. Based on those misperceptions of the PRLA decision, the administrative record would become unduly complicated and burdened with obsolete analysis and public comments and responses ultimately having no bearing on an actual future mine proposal. Corresponding time delays also create the risk of overlapping EIS analyses that contain inconsistent assumptions and data. In light of these concerns, the agencies' valuable resources should be reserved until submission of the proposed MPO when the agencies can examine in detail site-specific impacts and alternatives for an actually proposed mine.

F. Conclusion

The applicable preference right leasing process and NEPA law demonstrate that BLM and the Forest Service may rely on an EA to evaluate the PRLA and issue a lease to Twin Metals for the Permit Lands. BLM and the Forest Service will best serve their decision-making processes and the goals of NEPA by appropriately deferring extensive, site-specific analysis of speculative mining impacts until the point in time when such impacts will be known—i.e., during review of the MPO. BLM and the Forest Service can evaluate all appropriate impacts from issuance of the preference right lease, as well as any proposed terms and protective stipulations, in an EA. Utilizing an EA will prevent a gross misallocation of resources, fully inform the decision-makers, and avoid confusing the public, while protecting the environment.[3]

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[3] The analysis contained herein was prepared by legal counsel to Twin Metals Minnesota including Beveridge & Diamond PC, Hogan Lovells US LP, Leonard Street and Deinard.

Attachment A

Recent Federal Mineral Leasing NEPA Analyses

Mineral	Title	Location	Likely Future Action	Agencies	Date	Acreage	EA/EIS	Outcome
Potash	**Sevier Lake Competitive Potash Leasing Proposal**	Utah, Fillmore Field Office	New mine.	BLM	2011	125,762 acres	EA	FONSI issued in 2011.
Sodium (Trona)	**Sodium Leasing in the Green River Basin of Southwestern Wyoming**	Wyoming, Green River Basin, Rock Springs Field Office	New trona mines.	BLM	1996	9,894 acres	EA	FONSI issued in 1996.
Coal	**Ten Mile Rim**	Sweetwater County, Southern Wyoming	Expansion of existing underground mine.	BLM	2004	2,224 acres	EA	Final EA and FONSI issued in 2004.
Coal	**Wadge Seam, Sage Creek**	Routt County, Western Colorado	Expansion of existing underground mine.	BLM	2012	400 acres	EA	Competitive coal lease sale held in July 2012.
Coal	**Bledsoe Coal Lease 053865**	Daniel Boone National Forest, Eastern Kentucky	Expansion of existing underground mines.	USFS/ BLM	2012	174 acres	EA	EA issued in October 2012.