



PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY

962 Wayne Ave • Suite 610 • Silver Spring, MD 20910

Via email to [BLM ES Lands@blm.gov](mailto:BLM_ES_Lands@blm.gov); Gina.Owens@usda.gov; ccummins@usda.gov

F. David Radford
Deputy State Director of Geospatial Services
BLM Eastern States Office
5275 Leesburg Pike
Falls Church, VA 22041

Gina Owens
Regional Forester
USDA Forest Service
626 East Wisconsin Ave.
Milwaukee, WI 53202

Constance Cummins
Forest Supervisor
USDA Forest Service
Superior National Forest
8901 Grand Place
Duluth, MN 55808-1122

RE: Scope of environmental review for Application for Withdrawal and Segregation of Federal Lands; Cook, Lake, and Saint Louis Counties, Minnesota

January 19, 2022

Dear Mr. Radford:

Public Employees for Environmental Responsibility (PEER) is a nonprofit organization that assists federal, state, and local public employees in fighting for the ethical management of natural resources, strong environmental laws and policies, and accountability and transparency in government actions. PEER respectfully submits these comments on the Bureau of Land Management's (BLM) and U.S. Forest Service's (USFS) (collectively "the agencies") "Application for Withdrawal and Segregation of Federal Lands; Cook, Lake, and Saint Louis Counties, Minnesota"¹ (withdrawal). Specifically, PEER submits comments on the scope of environmental

¹ U.S. Land Management Bureau, Notice of Application for Withdrawal and Segregation of Federal Lands; Cook, Lake, and Saint Louis Counties, Minnesota, 86 Fed. Reg. 58,299 (Oct. 21, 2021), <https://www.federalregister.gov/documents/2021/10/21/2021-22958/notice-of-application-for-withdrawal-and-segregation-of-federal-lands-cook-lake-and-saint-louis> [hereinafter "BLM withdrawal"].

review under the National Environmental Policy Act (NEPA) and other law that binds the agencies' decision making.

I. Background

PEER first and foremost urges the agencies to heed and consider the warnings of past public employees, who have raised numerous scientific and economic issues that are relevant to the scoping of the NEPA review of this withdrawal. In May of 2019 a group of retired USFS employees with a combined experience of 988 years at the agency wrote to the heads of the U.S. Department of Agriculture and U.S. Interior Department to express concerns regarding the permitting of sulfide-ore copper mining in the Rainy River Drainage Basin.² The letter is attached in its entirety,³ but in summary it raised important issues, including:

- Existing information on Acid Mine Drainage (AMD) by hardrock mines around the world demonstrates that the sulfide-bearing overburden from these mines would produce sulfuric acid, and leach harmful amounts of heavy metals into public waters.
- The threat of pollution would require “continuous management and perpetual water treatment,” and even with that in place there is no way to prevent water pollution impacts over the indefinite period that mine waste would have to be managed in a particularly vulnerable region.
- There is no need for this ore to be mined because:
 - “nearly all [past mined copper] is still in circulation because copper’s recycling rate is higher than that of any other engineering metal.”⁴ And
 - “simple common sense tells us that with upwards of 75% of all known copper deposits still available for development, there are surely more ecologically-suited places to meet the demand for copper than directly upstream from millions of acres of water-rich wilderness.”
- Pollution will flow through U.S. public waterways in pristine protected areas, and will pollute waters across the border into Canada. “The highly complex and interconnected surface and subsurface waters of the Rainy River Watershed provide an immediate and irremediable transport mechanism for toxic material to move through the [Boundary Waters Canoe Area Wilderness (BWCAW)], Voyageurs National Park, and Quetico Provincial Park.”⁵

In addition to joining the letter, Brenda Halter, the retired Forest Supervisor for Superior National Forest, has written about how the near-total failure rate of copper mines (either releasing pollution in catastrophic events like a tailings dam failure or through slow leaks that nonetheless poison resources) demonstrates that there are no existing practices or technologies that appear to be able to prevent failure during “the construction, operation or the extremely long-term

² See Dan Kraker, *Retired Forest Service officials raise concerns about Twin Metals*, MPR NEWS, May 3, 2019,

<https://www.mprnews.org/story/2019/05/03/retired-forest-service-officials-raise-concerns-about-twin-metals>.

³ See Attachment A.

⁴ *Id.* (quoting the Copper Development Association, Inc. (2019))

⁵ *Id.*

reclamation phase of these mines.”⁶ While recognizing the “multiple-use mission of national forests” she argued that allowing a mine in this area would cost the entire BWCAW, continuing:

Once the mine fails, there is simply no way to contain it without sacrificing the wilderness and the long-term economic sustainability that it supports. All of the science and all of our experience tell us that in this extremely valuable, water-rich and highly interconnected place, you simply cannot have both.⁷

Any mining in the watershed has also been opposed by Tom Tidwell, who served as the Chief of USFS from 2009 to 2017.⁸ He argued, “Our nation needs metals, but there are enough places to get those metals without forever damaging precious lands and waters like the Boundary Waters Wilderness.”⁹ All of the above concerns and facts brought to light by former senior USFS employees should be considered as important areas of investigation within the environmental review process.

II. Legal Scope

While the agencies are taking this action under the Federal Land Policy and Management Act and are required to produce an adequate environmental review under NEPA, there are several treaties that further restrict agency action to only those that sufficiently protect living resources and boundary waters. While BLM is correct in following 43 C.F.R. part 2300’s standards in preparing a record for the Secretary of the Interior’s ultimate decision, the agencies are also bound by existing treaty law covering the relevant lands and waters. Thus, it is important that the scope of NEPA review include sufficient findings to allow the Secretary to make an informed decision that abides by limits set by these treaties.

1. 1854 Treaty with the Chippewa

The Federal Register notice for this withdrawal explains “The purpose of the proposed withdrawal is also to prevent the effects of climate change on precipitation regimes and protect the health, traditional cultural values, and subsistence-based lifestyle of the Tribes, which rely on resources in the region such as wild rice that are particularly susceptible to adverse impacts associated with mining.”¹⁰ Treaties that have been in place for more than a hundred years that are binding on the agencies of the U.S. government make this protection of Tribal resources mandatory.

⁶ Brenda Halter, *We must stop the political do-over on the Twin Metals mine*, STAR TRIBUNE, Jan. 29, 2019, <http://www.startribune.com/we-must-stop-the-political-do-over-on-the-twin-metals-mine/505050332/>

⁷ *Id.*

⁸ See Tom Tidwell, *Let’s prevent irreparable harm to an irreplaceable wilderness area*, THE HILL, Jan. 17, 2020, <https://thehill.com/opinion/energy-environment/478716-lets-prevent-irreparable-harm-to-an-irreplaceable-wilderness-area>

⁹ *Id.*

¹⁰ 86 Fed. Reg. at 58,300, <https://www.federalregister.gov/d/2021-22958/p-8>.

As USFS explained in its Record of Decision on a 2004 Environmental Impact Statement to accompany the Land Resource Management Plan for the forest: “The Superior National Forest is entirely within the territory ceded in the Treaty of 1854, in which the Lake Superior Chippewa retained the rights to hunt and gather.”¹¹ At the time the Regional Forester acknowledged not only the need to protect tribal members’ uses and culture, but also the obligation to fully support treaty rights under the 1854 treaty.¹² These rights have been affirmed both by federal courts and by formal agreements between tribes and state and federal governmental units.¹³

Moreover, in addition to reserved rights to hunt and fish, the Ojibwe have reserved the right to harvest wild rice under numerous treaties.¹⁴ In the agreement with Minnesota to establish the 1854 treaty’s standards, tribes included “fishing, hunting, trapping, and wild rice gathering” within the usufructuary rights that tribal members retain inside the treaty boundary.¹⁵ The inter-tribal 1854 Treaty Authority now works to preserve, protect, and enhance wild rice ecosystems within the ceded territory covered by the treaty.¹⁶

Mining inside the 1854 ceded territory is likely to damage and in some cases eliminate the resources that the treaty requires the agencies to protect. Elevated levels of toxic metals in waterways caused by mining can be deadly to moose and other ruminant animals.¹⁷ Increased

¹¹ U.S. Department of Agriculture, Forest Service, Superior National Forest Record of Decision: Final Environmental Impact Statement, To accompany the Land and Resource Management Plan at 19 (July 2004), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsm91_048973.pdf.

¹² *Id.*

¹³ See DOUGLAS P. THOMPSON, 1854 TREATY AUTHORITY, THE RIGHT TO HUNT AND FISH THEREIN: UNDERSTANDING CHIPPEWA TREATY RIGHTS IN MINNESOTA’S 1854 CEDED TERRITORY at 15-19 (2020), <https://www.1854treatyauthority.org/images/ToHuntandFish.updated2020.pdf> (discussing the federal court confirmation of treaty rights to hunt, fish, and gather under the 1837 Chippewa Treaty and the 1854 treaty, further supported by a 1988 agreement between the relevant Ojibwe tribes and the state of Minnesota) [hereinafter “THE RIGHT TO HUNT AND FISH THEREIN”].

¹⁴ This is most clearly stated in the 1837 Chippewa Treaty that explicitly names wild rice, but based on canons of interpretation it is not possible to read the 1854 treaty as not reserving this right – therefore wild rice access is also a reserved right within the area covered by the withdrawal. See Treaty With the Chippewa, 1837, 7 Stat. 536, (July 29, 1837), available at <https://glifwc.org/TreatyRights/TreatyChippewa07291837Web.pdf> (“ARTICLE 5. The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States.”); see also THE RIGHT TO HUNT AND FISH THEREIN, *supra* note 12, at 5 (summarizing canons of treaty construction established by U.S. Supreme Court).

¹⁵ THE RIGHT TO HUNT AND FISH THEREIN, *supra* note 12, at 18.

¹⁶ 1854 Treaty Authority, Wild Rice, <https://www.1854treatyauthority.org/wild-rice/wild-rice.html> (last visited Jan.18, 2022).

¹⁷ MWH, Draft Minntac Water Inventory Reduction Environmental Impact Statement at 5-128 (Sept. 2004), <https://www.pca.state.mn.us/sites/default/files/minntac-deis.pdf> (describing molybdenosis toxicity to ruminants such as moose caused by mining-related water pollution in northern Minnesota).

mercury levels in waterways makes fish toxic to humans and wildlife such as bald eagles.¹⁸ Increased sulfate and sulfide in waterways harms the propagation of wild rice and, even where it is not extirpated, reduces abundance to a level that is not sufficient for traditional harvest.¹⁹ The importance of wild rice to tribal cultures and public health is well established,²⁰ and the agencies must acknowledge in their NEPA analyses any impacts to the resource that would hinder protected treaty rights.

2. 1909 Boundary Waters Treaty

It is beyond question that, as Chief Tidwell wrote in 2020, pollution from this mining district would travel “downstream to Voyageurs National Park in the U.S. and to Quetico Provincial Park in Ontario.”²¹ As quoted above, this was also established by the group of retired USFS employees in their May 2019 letter. Consistently, the Federal Register notice for the withdrawal states:

Congress designated the BWCAW and established the [Boundary Waters Canoe Area Wilderness Mining Protection Area (MPA)] to protect and preserve the ecological richness of the lakes, waterways, and forested wilderness along the Canadian border. The protection of the Rainy River Watershed would help the preservation of the BWCAW and MPA, as well as Canada’s Quetico Provincial Park, which are all interconnected through the unique hydrology in the region.²²

All waters from this mining district would not only flow into protected parks of the United States, they would also clearly continue flowing into boundary waters between this nation and Canada.

In 1909 the United States entered into a treaty with the British crown to protect and manage boundary waters along the border. The Boundary Waters Treaty,²³ now between the U.S. and Canada, requires the agencies to perform a NEPA analysis that accounts for *any* pollution that would flow into boundary waters from a mining district in the withdrawal area—if such pollution is predicted it must be prevented. This is because the treaty states: “It is further agreed

¹⁸ *Id.* at 5-127

¹⁹ MINNESOTA TRIBAL WILD RICE TASK FORCE, 2018 TRIBAL WILD RICE TASK FORCE REPORT at 26-27 (Dec. 15, 2018), <https://www.mnchippewatribe.org/pdf/TWRTF.Report.2018.pdf> (discussing mining-caused sulfate pollution and its impacts to wild rice abundance in studied lakes), *id.* at 31-32 (discussing abundance reductions over time).

²⁰ Fond du Lac Band of Lake Superior Chippewa, Health Impact Assessment, Expanding the Narrative of Tribal Health: The Effects of Wild Rice Water Quality Rule Changes on Tribal Health, <http://www.fdlrez.com/RM/downloads/WQSHIA.pdf> [hereinafter “Wild Rice HIA”].

²¹ Tom Tidwell, *Local View: Industrial mining must be kept away from the Boundary Waters*, DULUTH NEWS TRIBUNE, Nov. 3, 2018, <http://www.duluthnewstribune.com/opinion/columns/4524156-local-view-industrial-mining-mustbe-kept-away-boundary-waters> (describing potential pollution flowing downriver from the Twin Metals project in the Rainy River watershed).

²² 86 Fed. Reg. at 58,300, <https://www.federalregister.gov/d/2021-22958/p-21>.

²³ The Boundary Waters Treaty of 1909, 36 Stat. 2448 (Jan. 11, 1909), <https://ijc.org/sites/default/files/2018-07/Boundary%20Waters%20Treaty%20of%201909.pdf>

that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.”²⁴ While this clause has been interpreted in the past to support the anti-pollution efforts of the International Joint Commission (IJC) that oversees the Boundary Waters Treaty,²⁵ the clause is in no way limited to the IJC, and the treaty appears to be self-executing and binding on all agencies of the federal government.²⁶ Indeed, agencies such as the Department of Interior have made incorporating Boundary Waters Treaty pollution standards into agency decision making a “guiding principle” where the treaty is implicated.²⁷ If mining in this area cannot avoid pollution of boundary waters that harms health or property then it must be forbidden pursuant to the withdrawal.

Importantly, the Boundary Waters Treaty sets a substantive environmental standard—preventing pollution that could harm health or property—that defines the scope of NEPA review. Even if the treaty were not self-executing and were not directly binding on the agencies, nonetheless it is the agencies’ duty to read domestic law consistent with a treaty unless Congress has clearly commanded otherwise.²⁸ Much to the contrary, NEPA commands the agencies to broadly assess environmental impacts such as those covered by the Boundary Waters Treaty.²⁹ As a result, the scope of NEPA review must provide the Secretary with information on whether

²⁴ *Id.* Art. IV.

²⁵ See International Joint Commission, Water Quality, <https://ijc.org/en/what/water-quality> (last visited Jan. 18, 2022).

²⁶ The treaty was established in 1909, fully 99 years before the U.S. Supreme Court established a standard for whether treaties are “self-executing” or whether they need implementing legislation to have any effect in U.S. law. See *Medellin v. Texas*, 552 U.S. 491 (2008). Regardless of the fact that the Boundary Waters Treaty was not declared “self-executing” at the time it was enacted, it has never required implementing legislation to be in force and is acknowledged by federal courts as applicable law. See generally Senate Committee on Foreign Relations, Report to accompany Treaty Doc. 114–13B, Treaty Between the Government of the United States of America and the Government of the Republic of Kiribati on the Delimitation of Maritime Boundaries, Signed at Majuro on September 6, 2013, Exec. Rept. 115–3 at 3, 4 (115th Congress, 2d Session), <https://congress.gov/115/crpt/erpt3/CRPT-115erpt3.pdf> (finding that a treaty that does not require any implementing legislation is “self-executing”).

²⁷ *Government of Province of Manitoba v. Norton*, 398 F. Supp. 2d 41, 61 (D.D.C. 2005).

²⁸ *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (stating the doctrine as “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”); see also Justin Hughes, *The Charming Betsy Canon, American Legal Doctrine, and the Global Rule of Law*, 53 *Vanderbilt J. of Transnational L.* 1147 (2020), https://b6840033-54a4-44a7-acca-23e4b7815763.usrfiles.com/ugd/b68400_2cd95a9af38340b981159df2aee7cdc6.pdf (discussing the *Charming Betsy* canon and how it interacts with *Chevron* deference in federal courts, and is not displaced by *Chevron* unless Congress expressed a clear intent to do so).

²⁹ See generally, 42 USC § 4321 (stating NEPA’s purpose “to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man[, and] to enrich the understanding of the ecological systems and natural resources important to the Nation”); 42 USC § 4331(b) (commanding the entire federal government to protect the environment for future generations using “Federal plans, functions, programs, and resources”).

any pollution from a mining district could enter boundary waters, and violate the Boundary Waters Treaty by harming public health or property in connected Canadian waters.

Due to the centuries of pollution that is likely to leach from any such mining district, this legal standard requires the NEPA review to fully assess the pollution dangers posed by mining far into the future when pollution will accumulate and do harm—not limiting assessment of pollution impacts within an abbreviated twenty-year timeline. Since mining pollution will infiltrate drinking water and harm the abundance of natural resources used for food, it is important for the agency to acknowledge all of the public health impacts of reduced quality and quantity of natural resources.³⁰ These impacts are likely to violate the standard set by the Boundary Waters Treaty, meaning that the withdrawal is consistent with the agencies’ duties under treaty law.

III. Factual Scope

Beyond the issues raised by public employees, referenced above and further explained in the attached letter, there are broad economic costs to allowing a mining district in an area that is currently known for pristine wilderness. Additionally, consistent with points made by former senior USFS employees, it is imperative that any NEPA analysis of the withdrawal fully analyze the other available sources of metals that may be exploited from the withdrawal area.

1. Scope of regional economic analysis

Analyses of the economic impacts to northern Minnesota of hard rock mining balancing the benefits of mining against tourism or recreation are insufficient to capture the extent of reasonably predictable impacts to the region. The potential economic impact of mining should more accurately be weighed against the bulk of all existing regional economic activity from current residents and visitors. Many people within the withdrawal region rely on surface water for drinking, and highly value the amenities associated with their clean environment, so it is unsurprising that local research indicates that the most affluent residents of the region may simply leave if a mining district is allowed to proceed. Former head of USFS Tom Tidwell explained: “An industrial mining district in the Boundary Waters watershed would forever change the landscape, undercut the wilderness character of the Boundary Waters, and continuously produce pollution that would flow directly into the Wilderness.”³¹ This would lead to depopulation that would harm the local economy and tax base.

This important distinction was made by research begun by *The Timberjay* newspaper and further expanded by researchers who looked beyond seasonal employment figures at issues such as property taxes and relative spending power. Drawing on “census data, county records, election results, and findings from a 2014 survey of residents in the townships surrounding Ely,” *The Timberjay*’s Marshall Helmberger concluded that even ignoring tourism impacts “it is reasonable to assume that the opening of a mine could lead to the initial loss of anywhere from \$22.9 million

³⁰ See, e.g., Wild Rice HIA, *supra* note 19, (discussing the public health impacts on Indigenous communities that result from water quality rules impacting wild rice).

³¹ See Tom Tidwell, *Let’s prevent irreparable harm to an irreplaceable wilderness area*, THE HILL, Jan. 17, 2020, <https://thehill.com/opinion/energy-environment/478716-lets-prevent-irreparable-harm-to-an-irreplaceable-wilderness-area>.

to \$28.6 million in local income, a figure that would likely increase over time.”³² This analysis also noted that the economic damage could be far worse if large environmental impacts worsened public perception of environmental degradation of the area.³³

While mining pollution, and therefore economic damage, is likely to continue to impact the region for centuries (and should be assessed over their full timeline), even on a short 20-year timeline the negative impacts to the regional economy are likely to be stark. Research shows that “mining disamenities” lead to property value losses from AMD can be 12.2% of a home’s value, and over a large region such pollution can add up to hundreds of millions of dollars of property values (and property taxes) lost.³⁴ Even if there was a temporary boom in economic activity when a mine opened, the bust that followed is likely to be far longer and deeper than any realized economic benefit to the region.³⁵ A mining district could halt in-migration of new residents seeking access to pristine areas, and could also lead to out-migration of existing residents who seek cleaner environmental conditions elsewhere.³⁶ One analysis of proposed mining in the withdrawal area estimated that while \$288 million would be lost in visitor spending, that is also accompanied by a loss of \$509 million in lost property values.³⁷ Any analysis of impacts on the human environment of the withdrawal must acknowledge the full economic costs of alternatives where mining is allowed to proceed.

2. Alternative sources of metals

While nickel, cobalt, copper and other metals are valuable to society, it is utterly unreasonable to destroy a priceless shared public lands resource for a fungible commodity that is much more readily available by mining landfills or higher-grade ore deposits than can be found in the withdrawal area. Based on the criticisms and commentary by the former USFS employees the alternatives analyzed must also include a robust analysis of other sources of the metals that may be obtained from deposits inside the withdrawal area.

The analysis must include comparisons of how much of the metals could be obtained by other sources under the “no action” alternative, either from other mines or improved recycling rates in future years. While individual companies developing claims within the withdrawal area only

³² Marshall Helmberger, *Ely’s golden goose*, THE TIMBERJAY, Aug. 2, 2017, <https://www.timberjay.com/stories/elys-golden-goose,13540>.

³³ *Id.*

³⁴ Letter from Dr. James H. Stock and Jacob T. Bradt to Connie Cummins, Superior National Forest Supervisor, RE: U.S. Forest Service (USFS) Environmental Assessment (EA) on Proposed 20-year Mineral Leasing Withdrawal in Superior National Forest, Aug. 6, 2018, at 11, https://scholar.harvard.edu/files/stock/files/snf_withdrawal_ea_stock_and_bradt_aug6_2018.pdf [hereinafter “Stock and Bradt letter”].

³⁵ James H. Stock & Jacob T. Bradt, *Analysis of proposed 20-year mineral leasing withdrawal in Superior National Forest*, 174 *Ecological Economics* 106,663 (2020), <https://scholar.harvard.edu/files/stock/files/1-s2.0-s0921800919309954-main.pdf>.

³⁶ *Id.*; Stock and Bradt letter, *supra* note 33, at 11-12.

³⁷ Key-Log Economics, *Boundary Waters of Minnesota: Sulfide Ore Copper & Nickel Mining Could Undo Region’s Amenity-Based Development*, <http://www.keylogeconomics.com/boundarywatersmining.html> (last visited Jan. 18, 2022).

value the project they can develop, it is the agencies' duty in this withdrawal NEPA analysis to consider all reasonable alternative sources for minerals, both those available now and those that will become available during the lifetime of the mineral withdrawal. The environmental review should also anticipate and factor in improvements in recycling practices and technologies that are likely to displace mining in the coming decades – for example, the looming industry of electric vehicle battery recyclers who will obtain cobalt and nickel from old vehicles without any mining impacts.

IV. Conclusion

PEER would like to thank the agencies for this opportunity to comment on the scope of NEPA review necessary for the proposed withdrawal. PEER respectfully requests that the review include adequate analysis of –

1. Water pollution impacts that, as past USFS employees have repeatedly pointed out, would be permanent, significant, and which would require perpetual management.
2. Each alternative's likely impacts on usufructuary rights retained under the 1854 treaty, and the severity of impacts to relevant natural resources like game, fish, and wild rice, sufficient to determine which alternatives violate treaty rights.
3. Each alternative's likely pollution impacts on boundary waters relevant to the standard set in the Boundary Waters Treaty, sufficient to determine which alternatives would violate the prohibition on polluting set out in the treaty.
4. The full and long-term economic impacts a mining district would have on migration of population, regional spending power, property values, and local tax base.
5. The overall availability of fungible metal resources from other mining prospects, recycling, or simply the global commodities market.

As an organization founded by and for public employees who protect America's natural resources, we wholeheartedly encourage the USFS to listen to its retirees and to its own conscience when scoping this withdrawal and hope for its speedy completion.

Hudson B. Kingston
Litigation and Policy Attorney
Public Employees for Environmental Responsibility (PEER)
962 Wayne Ave., Suite 610, Silver Spring, MD 20910
Tel: (202) 265-7337
hkingston@peer.org