

## WHAT IS MINED IS NO LONGER OURS: MINING LAWS IN SUPERIOR NATIONAL FOREST

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*Created in 1909, Superior National Forest spans more than three million acres of wilderness in northeastern Minnesota. Within the Forest's borders lie countless waterways, lakes, and cultural sites, as well as three endangered species and many unique ecosystems. Yet, recent mineral extraction proposals located within the Forest have called into question the legality of mining operations on these protected lands. Federal mining laws typically provide primary guidance on such issues. But these generally applicable federal laws have little influence on most of the lands within the Forest. Ownership of the land within the Forest is split amongst the federal government, the State of Minnesota, and private individuals. Federal mining laws also created exceptions for Superior National Forest, making federally owned lands within it outside of the purview of such laws. As the State faces new issues of mineral ownership, leasing, and extraction, the differences in applicable law are essential to recognize and comprehend. Without an understanding of the mining laws at play in Superior National Forest, no legal claims by mining companies, individuals, the State, the federal government, or concerned parties will be successful.*

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## I. INTRODUCTION

Endless waterways stretch out to the horizon line, bordered by wetland grasses, tall jack pines, and black spruces. The water itself is anything but still—the buzz of insects above, punctuated by the haunting calls of loons and the sudden splash of a walleye’s tail. A canoe carves through the water quietly, the gentle dip of each paddle propelling the craft forward. This place is wilderness; a swath of more than three million acres supporting a vibrant freshwater ecosystem in the northeast corner of Minnesota.

Superior National Forest (the Forest) is a point of pride for many Minnesotans, a place where one can leave behind the worries of a busy life and enter a pristine patchwork of rivers, streams, lakes, and forests. The Forest was created by the federal government for the purpose of public enjoyment in 1909,<sup>1</sup> but the land within its borders remains a complicated mix of federal, state, and private land. The complexity of ownership and rights to access and use only increases when applying federal and state mining laws to each type of land.

A suite of federal mining laws applies to a majority of federally owned and managed lands throughout the United States. Yet Minnesota is unique. These generally applicable federal mining laws have little influence on a majority of land within the Forest. There is even less federal control over the Boundary Waters Canoe Area Wilderness (BWCAW) and private inholdings.<sup>2</sup> As the State faces new issues of mineral ownership, leasing, and extraction, the differences in applicable law are essential to recognize and understand. Without an understanding of the mining laws at play in Superior National Forest, no claims by mining companies, individuals, the State, the federal government, or concerned parties will be successful.

Part II of this note will provide a background on the history of mining within the U.S. and Minnesota and include a discussion of land ownership by each entity. Part III of this Note contains the legal analysis of three key elements of federal mining laws—the General Mining Law of 1872, the Mineral Leasing Act of 1920, and the agencies administering these federal laws. Part III will then discuss the applicability of these federal laws to different types of land within the Forest. Part III will also consider the application of state mining laws to state lands found within Superior National Forest. Finally, Part III will conclude by addressing a recent development in mining law in Minnesota—the lease renewal at issue in *Friends of the Boundary Waters v. BLM*.

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1. *History of the BWCAW*, U.S. FOREST SERV., <https://www.fs.usda.gov/detail/superior/specialplaces/?cid=stelprdb5127455> (last visited Oct. 21, 2019).

2. *Id.* (describing the BWCAW as a subset of land within Superior National Forest, which is regulated under a different set of statutes).

## II. BACKGROUND

### A. *History of Mining in the United States*

Mining has an extensive history in the United States, developing before the country's independence.<sup>3</sup> As early as 1803, the federal government recognized the economic advantages of minerals when Thomas Jefferson sent Lewis and Clark out on their famous expedition west.<sup>4</sup> When gold was first discovered in the California countryside, the value of minerals became even more apparent.<sup>5</sup> Lying beneath millions of acres of land were untold riches in the form of precious metals, minerals, and fuel.<sup>6</sup> Oil and gas have become key energy minerals at the focus of the national drive to mine.<sup>7</sup> Essential to the discussion of mining in the U.S. is the dissemination of property rights between the federal government, the state governments, and private actors.

#### 1. Land Ownership

The federal government obtained all real property in the U.S. through purchase, treaties, cessions, or the forcible removal of Native American populations.<sup>8</sup> The lands obtained by the federal government can be broadly classified into three categories: public domain lands, acquired lands, and reserved or withdrawn lands.<sup>9</sup> Public domain lands are lands owned by the federal government and managed primarily by the Bureau of Land Management (BLM), under the Department of the Interior (DOI).<sup>10</sup> Public domain lands are generally subject to all public land laws—including mining laws—of the U.S.<sup>11</sup> Acquired lands are those lands obtained by the federal government through purchase, condemnation, or gift.<sup>12</sup> In general, the public lands laws do not apply to acquired lands.<sup>13</sup>

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3. See GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 473 (7th ed. 2014) (describing history of mining in the U.S.).

4. *Id.*

5. *Id.*

6. *Id.*

7. Press Release, Bureau of Econ. Analysis, Gross Domestic Product by Industry: Second Quarter 2018 (Nov. 1, 2018).

8. COGGINS ET AL., *supra* note 3, at 46–47.

9. 1 ROCKY MOUNTAIN MINERAL LAW FOUND., *AMERICAN LAW OF MINING* § 3.02[1] (2nd ed. 1991).

10. TERRY S. MALEY, *HANDBOOK OF MINERAL LAW* 37 (2nd ed., rev. 1979).

11. 1 ROCKY MOUNTAIN MINERAL LAW FOUND., *supra* note 9, at § 3.02[3].

12. *Id.* § 3.02[5].

13. *Id.*

Reserved and withdrawn lands are similar to acquired lands in that their status often places them outside the purview of the federal public land laws.<sup>14</sup> Reserved lands are those lands set aside by the federal government for specific purposes, such as a wildlife refuge or recreation area.<sup>15</sup> These lands are typically not subject to disposition under the public land laws.<sup>16</sup> Withdrawn lands are lands that have been removed from “settlement, sale, location, or entry” under the typical federal laws that would apply, such as the General Mining Law or the Timber and Stone Act.<sup>17</sup> Thus, depending on the means of attainment by the federal government, different public lands will be subject to different laws of management and disposition.

Additional consideration must be given to state- and privately-owned lands. Though the federal government originally held title to these lands in the states outside of the original thirteen colonies, it granted states and individuals parcels of land through the administration of laws enacted to encourage development and settlement of the West.<sup>18</sup> Acts impacting ownership included the Homestead Act of 1862, the Taylor Grazing Act of 1934, and individual railroad grants.<sup>19</sup> Under these acts, the federal government generally only granted lands not believed to hold minerals (lands nonmineral in character) to states and individuals.<sup>20</sup> Yet, at the time, knowing with complete certainty whether valuable minerals lay underneath the disposed land was impossible.<sup>21</sup> To combat this uncertainty, the government chose in some instances to reserve any mineral rights discovered in the future.<sup>22</sup> In other cases, the government allowed the grantee to keep any potential minerals.<sup>23</sup> When the government chose the former course of action, it created the severance of lands—the split ownership of mineral and surface rights—or the “split estate.”<sup>24</sup> One entity, usually the federal government, held the rights to the mineral interest in the land, while another—a private party or the state—held the rights to the rest of the land, or the surface estate.<sup>25</sup>

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14. *Id.* § 3.02[6].

15. *Id.*

16. *Id.*

17. *Id.* § 3.02[6] n. 20; *Withdrawals*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/lands-and-realty/land-tenure/withdrawals> (last visited Sept. 28, 2019).

18. MINN. DEP’T OF NAT. RES., PUBLIC LAND AND MINERAL OWNERSHIP IN MINNESOTA: A GUIDE FOR TEACHERS 10 (rev. 2016).

19. *Id.* at 11–12; TERRY S. MALEY, MINERAL LAW 148, 182, 204–05 (6th ed. 1996).

20. MALEY, *supra* note 10, at 63.

21. *See generally id.* (describing the means of determining whether lands were mineral or nonmineral in character).

22. *Id.* at 62.

23. *Id.* at 63.

24. *Id.* at 62.

25. *Id.*

The federal government's acquisition and subsequent disposal to multiple different entities was an amalgamation of varying property rights and mineral access.<sup>26</sup> Some lands are owned outright by the federal government with no split estate and, therefore, no underlying interest in the mineral deposits exists underneath the surface lands.<sup>27</sup> The federal government retains surface ownership of other lands while knowingly granting or leasing the mineral rights to a non-federal entity.<sup>28</sup> Alternatively, a non-federal entity may own the surface rights to a parcel of land, but not the underlying mineral rights, if the federal government has reserved those rights for itself.<sup>29</sup> Finally, in some instances, a non-federal entity may have a claim over both the surface and mineral rights on the parcel of land.<sup>30</sup>

## 2. Mining in the United States

Mining has been recognized as a lucrative means of land use since before the establishment of the U.S. as an independent nation.<sup>31</sup> The charters of the American colonies authorized grants of mineral lands to those who discovered them, though these rights were subject to perpetual reservation by the Crown for future use.<sup>32</sup> After obtaining independence, the U.S. continued the tradition of reserving a portion of mineral rights on public lands for the federal government and enacted the Land Ordinance of 1785.<sup>33</sup> In 1803, Thomas Jefferson explicitly instructed Lewis and Clark to note "mineral productions of every kind; but more particularly metals, limestone, pit coal & saltpetre," on their expedition westward.<sup>34</sup> The California Gold Rush in 1849 further solidified the importance of mineral access as an ownership right in the U.S.<sup>35</sup> Most recently, coal, oil, and gas—all classified as extractable minerals—have grown increasingly important as sources of energy within the U.S.<sup>36</sup>

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26. *Id.* at 37–44.

27. *Id.* at 62.

28. *Id.*

29. *Id.*

30. *Id.*

31. JOHN D. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* 9 (1987).

32. *Id.*

33. *Id.*; Robert W. Swenson, *Legal Aspects of Mineral Resources Exploitation*, in *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 701–02 (Joseph Cellini ed., 1979) (noting the Land Ordinance of 1785 expired after the Continental Congress dissolved).

34. Letter from Thomas Jefferson, President, U.S., to Meriwether Lewis, Captain, U.S. 1st Infantry (June 20, 1803).

35. COGGINS ET AL., *supra* note 3, at 473.

36. See Press Release, Bureau of Econ. Analysis, *supra* note 7 (finding that mining activities have contributed between 300 and 400 billion dollars to the annual U.S. economy in the past ten years alone).

The patchwork quality of a majority of the lands within the U.S. has created a complicated framework for the management and regulation of mining. Depending on the property rights and limitations of a given parcel of land, an individual may have one of three types of rights: (1) the right to mine with little interference from the state or federal government; (2) mineral leasing rights; or (3) no recognized right to mine at all. To understand how federal and state mining laws impact mining claims in Superior National Forest, it is essential to first examine the history of land ownership within the Forest's boundaries.

### *B. History of Superior National Forest*

#### 1. Land Ownership

The land that is now Superior National Forest was first “owned” by Native American tribes (including the Ojibwe), England, and France.<sup>37</sup> The U.S. federal government obtained the land within the state of Minnesota through the Treaty of Paris, the Louisiana Purchase, and individual “agreements” with tribal nations.<sup>38</sup> Federal public lands in Minnesota therefore fit under both the classification of public domain lands and acquired lands.

After Congress granted Minnesota statehood, it agreed to give the State three million acres of land.<sup>39</sup> Of those lands granted by the federal government, parcels 16 and 36 in each township were reserved for use to support the public school system.<sup>40</sup> An additional 72 parcels were reserved for the use and support of public universities.<sup>41</sup> A portion of lands were also given to individuals via the Homestead Act, to railroad companies via railroad grants, and reserved for tribal nations via individual agreements.<sup>42</sup> Generally, the system of disposal of lands in Minnesota followed federal policy nationally.<sup>43</sup> That is, if the land granted by the federal government was believed to be nonmineral in character, the land was disposed of to the state

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37. MINN. DEP'T OF NAT. RES., *supra* note 18, at 5–6; *The Ojibwe People*, MINN. HISTORICAL SOC'Y, <https://www.mnhs.org/fortsnelling/learn/native-americans/ojibwe-people> (last visited Dec. 28, 2019).

38. MINN. DEP'T OF NAT. RES., *supra* note 18, at 5–7.

39. Act of Feb. 26, 1857, ch. 60, 11 Stat. 166 (1857) (authorizing the People of the Territory of Minnesota statehood).

40. MINN. DEP'T OF NAT. RES., *supra* note 18, at 13.

41. *Id.* (noting that an additional 94,439 acres was granted to establish agricultural and mechanic arts colleges by the Morrill Act of 1862).

42. *Id.* at 10–13.

43. MALEY, *supra* note 10, at 63.

or individuals.<sup>44</sup> Depending on the language of the grant or sale, any future minerals discovered may have been included in the grant or may have been reserved for ownership by the federal government.<sup>45</sup> The result was a patchwork of ownership with varying claims to mineral deposits in the State.<sup>46</sup>

Starting in the early 1900s, after much of the land within the State had been acquired and disposed, one enterprising Minnesotan, General Christopher C. Andrews, promoted the conservation of substantial tracts of land in Northeastern Minnesota.<sup>47</sup> He succeeded in convincing the federal government to withdraw nearly 500,000 acres of land from further settlement and development.<sup>48</sup> Two more withdrawals followed in 1905 and 1908 before President Roosevelt finally announced the establishment of Superior National Forest in 1909.<sup>49</sup> Between 1909 and 1950, the federal government continued to purchase and acquire land and expand the borders of Superior National Forest.<sup>50</sup> The final boundaries of the National Forest included nearly three million acres of wilderness, managed by the federal government for multiple uses.<sup>51</sup> Much of Superior National Forest can therefore be classified as withdrawn public land. Yet some lands within the borders of Superior National Forest remain in private ownership, state ownership, or have been dedicated to the public-school system for use.<sup>52</sup>

## 2. Mining in Minnesota

Minnesota is no stranger to the mining industry. Mining has occurred in northern Minnesota since the discovery there of iron ore by George Stuntz in 1865.<sup>53</sup> Throughout the 19th and 20th centuries, iron ore was the dominant

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44. *Id.* at 62–63.

45. *Id.*

46. MINN. DEP'T OF NAT. RES., *supra* note 18, at 10.

47. *History of the BWCAW*, *supra* note 1.

48. *Id.*

49. *Id.*

50. *Id.*

51. *About the Forest*, U.S. FOREST SERV., <https://www.fs.usda.gov/main/superior/about-forest> (last visited Nov. 7, 2019).

52. See U.S. FOREST SERV., SUPERIOR NATIONAL FOREST MANAGEMENT AREAS (June 2004) (showing the general outline of areas within the forest owned and managed by the federal government in color and those owned by private individuals or companies in white); *School Trust Lands- Maps*, MINN. DEP'T OF NAT. RES., [https://www.dnr.state.mn.us/aboutdnr/school\\_land/map.html](https://www.dnr.state.mn.us/aboutdnr/school_land/map.html) (last visited Nov. 27, 2019) (directing to maps showing school trust lands).

53. *A Timeline of Minnesota's Iron Range* (May 2006), <http://news.minnesota.publicradio.org/features/2006/05/rangetimeline/index.shtml>.

mineral sought in Minnesotan mining operations.<sup>54</sup> The mining operations followed a “boom and bust” cycle during this time before facing a dramatic decline in the early 1980s.<sup>55</sup> Despite this, Minnesota remains the largest producer of iron ore and taconite (a low-grade iron ore<sup>56</sup>) in the U.S.<sup>57</sup> In addition to iron ore, Minnesota has mining operations for silica sand, granite, limestone, kaolin clay, peat, and crushed stone.<sup>58</sup> The Minnesota Department of Natural Resources also lists potential mineral sources for copper/nickel, manganese, sulfur, and titanium, though no mining operations for these minerals have begun.<sup>59</sup>

### III. LEGAL ANALYSIS

Given the history of ownership and its effect on applicable public land laws, the regulatory scheme of mining on public lands can be difficult to piece together. The confusion is especially apparent within Superior National Forest, where federal lands fall into each of the three categories of ownership (public land, acquired land, and reserved or withdrawn land), and state and private interests are interspersed throughout those federal lands. Three of the major federal mining laws applicable to public lands are discussed below. A discussion of the exceptions to and nuances of these laws as applied to Minnesota follows.

#### A. Federal Mining Laws

A number of federal laws cover the mining activities on U.S. lands. These include, but are not limited to, regulations of extraction techniques, working environments and workplace safety, taxation, and environmental impacts.<sup>60</sup> Two federal laws, the General Mining Act of 1872 and the Mineral Leasing Act of 1920, as well as the role of administrative agencies, will be the focus of this Note for their general applicability to a majority of federal public lands where mining may take place.

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54. *Id.*; see generally THOMAS MICHAEL POWER, THE ECONOMIC ROLE OF METAL MINING IN MINNESOTA: PAST, PRESENT, AND FUTURE 3 (2007) (describing the historical economic impact of iron ore mining in Minnesota).

55. *A Timeline of Minnesota's Iron Range*, *supra* note 53.

56. *Taconite*, MINN. DEP'T OF NAT. RES., <https://www.dnr.state.mn.us/education/geology/digging/taconite.html> (last visited Nov. 8, 2019).

57. *Mining in Minnesota*, MINN. DEP'T OF NAT. RES., <https://www.dnr.state.mn.us/education/geology/digging/mining.html> (last visited Nov. 7, 2019).

58. *Id.*

59. MINN. DEP'T OF NAT. RES., MINERAL INDUSTRIES OF MINNESOTA (1998), [https://images.dnr.state.mn.us/education\\_safety/education/geology/digging/minmap.gif](https://images.dnr.state.mn.us/education_safety/education/geology/digging/minmap.gif).

60. NAT'L RES. COUNCIL, HARDROCK MINING ON FEDERAL LANDS 45, 47, 53 (1999).

## 1. General Mining Act of 1872

Prior to the passage of the General Mining Act, the federal government generally regulated mining on a case-by-case basis and by resort to custom.<sup>61</sup> The general rule was to dispose of public land for revenue, settlement, or conservation.<sup>62</sup> After a number of failed attempts at regulating mineral claims and the Gold Rush of the 1840s and 50s, the federal government introduced a policy of free mining in 1866.<sup>63</sup> While the 1866 Mining Law created an initial framework for mining claims, the federal government chose to enact a complete version in the General Mining Act of 1872.<sup>64</sup> The essential language of the Act establishes the policy that:

[A]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such. . . .<sup>65</sup>

Since 1872, the General Mining Act has provided any U.S. citizen the broad authority to discover and then obtain a claim to any valuable mineral deposits on the public lands of the U.S.<sup>66</sup> It is important to note that the claim allowed under the General Mining Act is not necessarily for the land itself, but for the minerals located within the parcel. Though individuals can obtain title to the land on which the minerals were located (patent their claim), it is not required to hold a valid mineral claim in the U.S.<sup>67</sup> Those with unpatented claims would still have *pedis possessio* rights to the surface lands against adverse claimants or the general public.<sup>68</sup>

Further sections of the Act stipulate the means by which an individual can and should go about obtaining a claim to a valuable mineral deposit. Generally, the Act requires the completion of a three-step process to obtain a valid claim.<sup>69</sup> First, the individual must discover the mineral deposit on

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61. MALEY, *supra* note 10, at 2, 203–04.

62. Swenson, *supra* note 33, at 707.

63. *Id.*

64. 1 ROCKY MOUNTAIN MINERAL LAW FOUND., *supra* note 9, § 4.11[1].

65. General Mining Act, 30 U.S.C. § 22 (2018).

66. *Id.*

67. COGGINS ET AL., *supra* note 3, at 510–11.

68. MALEY, *supra* note 10, at 203–04.

69. COGGINS ET AL., *supra* note 3, at 486–87.

recognized federal public property.<sup>70</sup> Second, the mineral deposit must be “located” by the individual posting notice at or near the site to successfully exclude claims by others. Finally, the claimant must develop the deposit so that they can adequately assess the “character and extent” of the deposit.<sup>71</sup> An individual may successfully obtain a claim to the mineral deposit only when all three requirements are met.<sup>72</sup> Again, a claim under the General Mining Act only applies to the mineral deposit itself, not the surrounding land. Thus, a successful claimant owns only the rights to mineral extraction, while the federal government retains the title to the surrounding land.<sup>73</sup> However, an individual could obtain further ownership rights by patenting their claim and completing an application with the federal government.<sup>74</sup> In doing so, the individual received fee simple title over the lands.<sup>75</sup>

While the General Mining Act is specific in its description of the means for acquisition, it fails to define the term “all valuable mineral deposits.”<sup>76</sup> In the years since its enactment, the courts and Congress have interpreted and amended the law to bridge this gap. In general, a material is a mineral if it is (1) “recognized by the standard authorities as a mineral” and (2) has commercial value.<sup>77</sup> Minerals considered locatable under the General Mining Act include both metalliferous minerals<sup>78</sup> and nonmetalliferous minerals such as marble, mica, kaolin, and umber.<sup>79</sup> Other mineral deposits, such as sand, gravel, peat, oil, and salt were excluded from the language of the General Mining Act via specific statutes and therefore cannot be acquired under the Act.<sup>80</sup>

Despite the broad language used in the Act, the law applies to a narrow set of circumstances. First, the mineral deposit must be only of the kinds described above.<sup>81</sup> Second, the deposit must be located on federal lands open to development—that is, not acquired public lands or lands withdrawn by the

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70. *Id.*

71. *Id.*

72. *Id.*

73. *See id.* at 511 (discussing unpatented versus patented claims).

74. *See id.* at 510-11 (discussing patented claims).

75. *Id.* at 510.

76. General Mining Act, 30 U.S.C. § 22 (2018); 1 ROCKY MOUNTAIN MINERAL LAW FOUND., *supra* note 9, § 4.11[2].

77. 1 ROCKY MOUNTAIN MINERAL LAW FOUND., *supra* note 9, § 8.01[2].

78. *Id.* § 8.01[3] n.20 (“[A] metalliferous mineral is one which is valuable for the production of the metal which is extracted from the material.”).

79. *Id.* § 8.01[3].

80. *E.g., compare* An Act to provide for the Disposal of Materials on the Public Lands of the United States, Pub. L. No. 291, 61 Stat. 681 (1947) *with* Surface Resources Act, Pub. L. No. 167, 69 Stat. 367 (1955) (amending earlier act to remove “common varieties” of sand, stone, gravel, pumice, pumicite, cinders, and clay from location).

81. 1 ROCKY MOUNTAIN MINERAL LAW FOUND., *supra* note 9, § 8.01[4][a][i].

government from mining uses.<sup>82</sup> Third, the claimants must successfully stake their claim to the exclusion of others.<sup>83</sup> Claims under the Act are also limited in that they apply only to the minerals themselves, not necessarily the surrounding lands.<sup>84</sup>

## 2. Mineral Lands Leasing Act of 1920

The Mineral Lands Leasing Act of 1920 was enacted to address the access to mineral lands not open for development under the General Mining Act.<sup>85</sup> While the General Mining Act had instilled a policy of free mining, that sentiment rapidly waned.<sup>86</sup> Congress enacted legislation between 1872 and 1920 in an attempt to reserve mineral rights while still encouraging westward settlement, but the efforts were too widespread and specific to be of much national significance.<sup>87</sup> The Mineral Lands Leasing Act sought to consolidate these expansive interests in minerals reserved by the federal government into one system of leasing.<sup>88</sup>

The language of the Act provides that “coal, phosphate, sodium, oil, oil shale or gas [deposits], and lands containing such deposits owned by the United States, including those in national forests . . . and those in national parks . . . shall be subject to disposition in the form and manner provided by this Act . . . .”<sup>89</sup> The “form and manner” provided by the Act is leasing.<sup>90</sup> The terms of each lease are decided by the Secretary of the Interior, who also has the authority to grant and deny leases.<sup>91</sup> Though each type of mineral listed receives its own special consideration within the Act and its subsequent amendments, each is too specific to explain in detail here.<sup>92</sup>

The Leasing Act is significantly different from the General Mining Act in two ways. While the General Mining Act allows for self-initiated claims, the Leasing Act places the authority for granting a lease in the hands of the Secretary of the Interior.<sup>93</sup> The Leasing Act also only gives ownership to the minerals removed, not the entire fee connected to those deposits.<sup>94</sup> While the

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82. *Id.* § 6.01.

83. *Id.* § 6.04[1].

84. COGGINS ET AL., *supra* note 3, at 511.

85. 1 ROCKY MOUNTAIN MINERAL LAW FOUND., *supra* note 9, § 4.15.

86. LESHY, *supra* note 31, at 4344.

87. *Id.*

88. 1 ROCKY MOUNTAIN MINERAL LAW FOUND., *supra* note 9, § 4.15.

89. Mineral Leasing Act of 1920, 30 U.S.C. § 181 (2018).

90. *Id.*

91. 1 ROCKY MOUNTAIN MINERAL LAW FOUND., *supra* note 9, § 4.15.

92. *See generally* 30 U.S.C. §§ 181–263 (detailing item-specific considerations for each mineral resource encompassed by the Act).

93. 1 ROCKY MOUNTAIN MINERAL LAW FOUND., *supra* note 9, § 4.16.

94. *Id.*

General Mining Act does not automatically grant a successful claimant the title to the lands holding the mineral deposits, claims under that law can be patented to grant rights to the land surrounding the mineral deposits.<sup>95</sup> In other words, the General Mining Act allows individuals to obtain ownership of both the minerals and the lands on which they are found, while the Leasing Act allows only the ownership of the minerals themselves.<sup>96</sup> This shift in mining policy was largely due to the concerns that the federal government was granting away its rights to potentially valuable mineral deposits.<sup>97</sup>

### *B. Federal Administration of Mining Laws on Federal Lands*

Today, the federal government maintains ownership of nearly 640 million acres of land and subsurface mineral rights within the U.S.<sup>98</sup> Such an extensive expanse of property cannot be managed by the federal government alone, or even by any one branch or agency. For this reason, the federal government has enacted enabling legislation for a number of agencies to regulate and manage mining on federal lands. The most prominent of these agencies are the BLM and the U.S. Forest Service.<sup>99</sup>

#### 1. BLM Management of Mining Laws on Federal Lands

The BLM manages 248.3 million acres of federally owned lands in the U.S., approximately 39 percent of all the land held by the federal government.<sup>100</sup> The BLM's management authority includes both surface and subsurface resources of these federally held lands.<sup>101</sup> The Federal Land Policy and Management Act (FLPMA) grants the power of regulation and enforcement of those lands to the BLM.<sup>102</sup> FLPMA instructs the BLM to

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95. COGGINS ET AL., *supra* note 3, at 510–11. However, the federal government placed a moratorium on new patent applications in 1994. *Id.* at 510.

96. 1 ROCKY MOUNTAIN MINERAL LAW FOUND., *supra* note 9, § 4.15.

97. *See id.* § 4.12 (explaining the sentiment in the 1970s around federal reservation of public lands); SAMUEL HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 at 89–90 (1959, reprt. 1968).

98. CAROL H. VINCENT ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2017).

99. MALEY, *supra* note 10, at 31–32 (showing additional agencies with mining authority include the Bureau of Indian Affairs (BIA), the Office of Surface Mining Reclamation and Enforcement (OSM), the National Park Service, and the U.S. Geological Survey); *Mining Sector Information* <https://www.epa.gov/smartsectors/mining-sector-information> (last updated Nov. 19, 2018) (highlighting other agencies with authority to regulate the mining industry including the EPA, the Mine Safety and Health Administration (MSHA), and the Nuclear Regulatory Commission (NRC)).

100. VINCENT, *supra* note 98, at 1.

101. 5 ROCKY MOUNTAIN MINERAL LAW FOUND., AMERICAN LAW OF MINING § 185.02[3] (2nd ed. 1991).

102. 43 U.S.C. § 1701(a)(5) (2018).

retain the character of the public lands unless their use would benefit the national interest.<sup>103</sup> The statute defines this balancing act as “multiple use.”<sup>104</sup> Among the factors the BLM should consider when determining appropriate multiple uses of public lands are:

[T]he long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return of the greatest unit output.<sup>105</sup>

Thus, FLMPA requires the BLM to consider many factors when administering the mining laws on public lands. The BLM cannot grant leases or title to mineral lands for purely economic reasons, nor can it deny such permits and ownership based solely on the environmental impact mining operations may have on the land in question.<sup>106</sup> However, under FLMPA, the BLM can overcome these restrictions if doing so would be in the nation’s best interest to meet present and future needs.<sup>107</sup>

## 2. Forest Service Management of Mining Laws on Federal Lands

The U.S. Forest Service (the Service) manages a smaller portion of federal land than the BLM—approximately 192.9 acres.<sup>108</sup> The Service also differs from the BLM in that the Service manages only the surface resources of national forest system lands.<sup>109</sup> Created in 1897, the Service was originally charged with managing the National Forest lands in order to protect the forest and the waterflows therein and to ensure the continuous production of timber.<sup>110</sup> In 1960, however, Congress passed the Multiple and Sustained

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103. *Id.* § 1701(a)(1).

104. *Id.* §§ 1701(a)(7), 1702(c).

105. *Id.* § 1702(c).

106. *Id.*

107. *Id.* § 1701(a)(1).

108. VINCENT, *supra* note 98, at 1.

109. 5 ROCKY MOUNTAIN MINERAL LAW FOUND., *supra* note 101, § 185.05.

110. 16 U.S.C. § 475 (2018).

Yield Act (MUSYA), which shifted the Service's management policy to one of "multiple use."<sup>111</sup> Such a management strategy was enacted to:

[P]romote the stability of forest industries, of employment, of communities, and of taxable forest wealth, through continuous supplies of timber; in order to provide for a continuous and ample supply of forest products; and in order to secure the benefits of forest in maintenance of water supply, regulation of stream flow, prevention of soil erosion, amelioration of climate, and preservation of wildlife.<sup>112</sup>

MUSYA requires the Service to conduct a careful balancing act between the extraction of necessary forest products and the preservation of essential forest features, such as water flow and wildlife populations. Such considerations may at times conflict, as when an endangered species resides in an area of forestland which is rich in timber.<sup>113</sup> Thus, where the Service manages surficial aspects of mineral deposits, all of the considerations listed in MUSYA are at play, resulting in a varied system of mineral acquisition based on the balancing of multiple and sustained yields of the forest.<sup>114</sup>

In traditional public land states, the General Mining Act and the Mineral Leasing Act of 1920 are the controlling regulations for mineral activity.<sup>115</sup> The BLM manages both the surface and subsurface rights of some of those public lands in accordance with FLPMA.<sup>116</sup> The Service manages only the surface rights of lands within the National Forest system according to MUSYA.<sup>117</sup> While both the BLM and the Service manage their respective lands according to a "multiple use" model, each agency obtains its authority to do so from separate statutes.<sup>118</sup> Yet, Minnesota is not a traditional public land state. Minnesota's Superior National Forest has an exceptional variety of ownership types, applicable laws, and administering agencies managing the three million acres of forested land.

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111. *Id.* § 529.

112. *Id.* § 583.

113. *See generally* Babbitt v. Sweet Home Chapter of Cmty. for a Great Or., 515 U.S. 687, 707 (1995) (finding that the Secretary of the Interior had the authority to determine the meaning of "harm" within the ESA's "take" provision).

114. 16 U.S.C. § 583(a).

115. COGGINS ET AL., *supra* note 3, at 98–100.

116. 5 ROCKY MOUNTAIN MINERAL LAW FOUND., *supra* note 101, § 185.02; 43 U.S.C. § 1701(a)(5) (2018).

117. 5 ROCKY MOUNTAIN MINERAL LAW FOUND., *supra* note 101, § 185.05; 16 U.S.C. § 583(a).

118. 43 U.S.C. § 1701(a)(5); 16 U.S.C. § 583.

*C. Application of Federal Mining Laws to Federal Lands in  
Minnesota*

Minnesota's history has created a patchwork of ownership within the state, but especially within Superior National Forest. This diversity of ownership has resulted in an equally diverse set of laws relating to the regulation of mining within the Forest. However, it is not feasible to discuss the applicability of every federal mining law and its exception to the federal lands in Minnesota in this Note. Therefore, only the applicability of the General Mining Act and the Mineral Lands Leasing Act will be discussed below.

1. Inapplicability of the General Mining Act of 1872 and the Mineral  
Lands Leasing Act of 1920

From the beginning of the nation's attempt to manage mining, it was clear that Minnesota would be different. In 1873, just one year after the passage of the General Mining Act, Congress passed legislation that explicitly exempted all federal mineral lands in Minnesota from the General Mining Act.<sup>119</sup> Instead, Congress allowed for the sale of mineral lands in Minnesota in a manner equal to that of all other public lands.<sup>120</sup> Thus, from 1857 onwards, federally owned public lands within Minnesota were free and open for discovery and purchase by any U.S. citizen, and not restricted by the means of attainment outlined in the General Mining Act.<sup>121</sup>

By the late 1800s, the government was grappling with the early conservation movement.<sup>122</sup> In 1891, Congress passed the Forest Reserve Act, authorizing the President to establish National Forests via Presidential Proclamation.<sup>123</sup> Six years later, Congress passed the Organic Administration Act of 1897, which clarified the management and administration of National Forests in the U.S.<sup>124</sup> The Act allowed for three purposes of reserving land under the National Forest System: to protect the forest, secure "favorable conditions for water flows," and to ensure a continuous supply of timber.<sup>125</sup> Yet the Act also recognized the importance of minerals, stating that "it is not the purpose or intent of these provisions . . . to authorize the inclusion therein

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119. 30 U.S.C. § 48 (2018).

120. *Id.*

121. *Id.*

122. 1 ROCKY MOUNTAIN MINERAL LAW FOUND., *supra* note 9, § 4.12.

123. *Id.*

124. MALEY, *supra* note 10, at 95.

125. 16 U.S.C. § 475.

of lands more valuable for the mineral therein . . . .”<sup>126</sup> From the start of the National Forest System, Congress was cognizant of the potential presence of valuable minerals beneath the land they were attempting to reserve and sought to retain their availability for extraction.<sup>127</sup>

It is into this political climate that Superior National Forest was born. Prior to establishment as a National Forest, the land was held in federal ownership.<sup>128</sup> Within and amongst those forestlands were some private and state claims, such as the public school lands in each township.<sup>129</sup> With President Roosevelt’s proclamation in 1909, the Forest was incorporated into the Forest System, which recognized as a basic tenet the importance of maintaining access to mineral rights beneath federal lands in Minnesota.<sup>130</sup> What the Proclamation created was a National Forest, “reserved from settlement or entry and set apart as a public reservation, for the use and benefit of the people . . . .”<sup>131</sup> However, the Proclamation also recognized existing rights, stating that the withdrawal remained subject to previously appropriated lands.<sup>132</sup> Because the Proclamation did not explicitly speak to the nature of mineral rights within the newly recognized National Forest, the existing rulings remained in full force.<sup>133</sup> Thus, mining in the original one million acres of Superior National Forest remained free and open to the public.<sup>134</sup>

In 1950, Congress decided to clarify the applicability of the general mining laws to federally owned lands in Northern Minnesota.<sup>135</sup> The Act of 1950 specifically permitted the “prospecting, development, mining, removal, and utilization of the mineral resources within the national forests in Minnesota . . . .”<sup>136</sup> The Act also recognized and reaffirmed the original 1873 rule removing those lands from the purview of the general mining and leasing laws.<sup>137</sup> Lands obtained through withdrawal or reservation were “not subject

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126. *Id.*

127. MALEY, *supra* note 10, at 63, 95 (“Vacant unappropriated public lands within the National Forest System are generally open to entry under the mining and mineral leasing laws.”).

128. MINN. DEP’T OF NAT. RES., *supra* note 18, at 16–17.

129. *Id.* at 17.

130. 16 U.S.C. § 475.

131. Proclamation No. 848, 35 Stat. 2223 (Feb. 13, 1909).

132. *Id.*

133. COGGINS ET AL., *supra* note 3, at 480.

134. See 30 U.S.C. § 48 (exempting mineral lands in Minnesota, Wisconsin, and Michigan from most extraction-restricting statutes); Proclamation No. 848, 35 Stat. 2223 (Feb. 13, 1909) (identifying existing mining rights lands within original Forest land are not affected by appropriations).

135. Act of June 30, 1950, ch. 430, 64 Stat. 311 (codified in amended at 16 U.S.C. § 508b (2018)).

136. *Id.*

137. *Id.*

to development or utilization under the mining laws of the United States or the mineral leasing laws . . . .”<sup>138</sup>

Because much of the federally owned land in Superior National Forest was included under the foregoing Acts, a majority of the land remains outside the purview of the General Mining Act of 1872 and the Mineral Lands Leasing Act. However, untangling the applicability of the general mining laws and their exceptions is only half of the picture. It is also essential to consider the agencies that have authority over the administration of those laws.

#### *D. Federal Management of Superior National Forest and the BWCWA*

Minnesota is similar to other public lands states in that the BLM and the Forest Service manage a majority of its public lands.<sup>139</sup> Two important executive and legislative documents provide exceptions to the general delegation of administrative authority between the two agencies. The Reorganization Plan of 1946 and the Act of 1950 both restructure the administrative authority of the agencies over federal land in Minnesota.

##### 1. Reorganization of Administrative Authority

President Truman introduced Reorganization Plan No. 3 of 1946 pursuant to the Reorganization Act of 1945 to “increase the efficiency of the operations of the Government.”<sup>140</sup> Of specific importance to Superior National Forest is Part IV: the reorganization of the Department of the Interior’s duties.<sup>141</sup> Under the Reorganization Plan, the Secretary of Agriculture’s authority to oversee the “uses of mineral deposits” on certain federal lands was transferred to the Secretary of the Interior.<sup>142</sup> While a portion of the lands in Superior National Forest were already under the purview of the Secretary of the Interior, a portion remained under the authority of the Department of Agriculture (USDA).<sup>143</sup> Thus, the Reorganization Plan consolidated control of the federal lands with mining

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138. *Id.*

139. VINCENT, *supra* note 98, at 8–9. (noting that, in Minnesota, BLM and the Forest Service manage 2,845,898 acres of the 3,495,893 acres of total federal land within the state).

140. Reorganization Plan No. 3 of 1946, 60 Stat. 1099; Reorganization Act of 1945, 50 Stat. 613 (enabling statute for the reorganization plan).

141. Reorganization Plan No. 3 of 1946, 60 Stat. 1099.

142. *Id.* (limiting the reorganization plan to lands obtained by the federal government via the Weeks Act, the National Industrial Recovery Act, the Emergency Relief Appropriation Act, the 1935 Agricultural Adjustment Act Amendment, and the authority of the Secretary of Agriculture).

143. *Id.*

interests into one agency—the Department of the Interior.<sup>144</sup> However, the Reorganization Plan left a piece of administrative power in the hands of the Secretary of Agriculture. The Secretary of the Interior may only authorize the mineral development of land “when he [or she] 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.”<sup>145</sup> Therefore, the power of the Secretary of the Interior to manage and regulate mineral lands is limited, if only in writing, by the consent of the Secretary of Agriculture.

Four years after the enactment of the Reorganization Plan, Congress enacted 16 U.S.C. § 508b.<sup>146</sup> In addition to exempting any withdrawn or reserved land in Minnesota from the mining laws and mineral leasing laws of the U.S., the statute also granted authority over those lands to the Secretary of the Interior.<sup>147</sup> Specifically, the statute provides the Secretary with the power to “permit the prospecting for and the development and utilization of such mineral resources . . . .”<sup>148</sup> However, as with the Reorganization Plan, the Secretary of the Interior’s power is constrained by the statute as well.<sup>149</sup> The Secretary of the Interior may not develop and utilize the mineral lands without the consent of the Secretary of Agriculture.<sup>150</sup> Together, Reorganization Plan No. 3 of 1946 and 16 U.S.C. § 508b ensure that federally owned land in Minnesota, either withdrawn or acquired under a handful of additional acts, is regulated by the Secretary of the Interior with the consent of the Secretary of Agriculture.<sup>151</sup> The impacts of these delegations of administrative authority are discussed below for the two largest parcels of federally owned land in the Northeast corner of Minnesota—Superior National Forest and the Boundary Waters Canoe Area Wilderness.

## 2. Administration of Mining Laws in Superior National Forest

The Secretary of the Interior oversees mining in Superior National Forest with the consent of the Secretary of Agriculture, per Reorganization Plan No. 3 and 16 U.S.C. § 508b.<sup>152</sup> The Department of Interior is therefore

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144. *Id.*

145. *Id.*

146. 16 U.S.C. § 508b (2018).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*; Reorganization Plan No. 3 of 1946, 60 Stat. 1099.

152. 16 U.S.C. § 508b; Reorganization Plan No. 3 of 1946, 60 Stat. 1099.

responsible for ensuring that any mineral activities undertaken in the Forest comply with MUSYA, and to some extent, the Forest Service Organic Act and the Superior National Forest Management Plan. As discussed, the Organic Act and MUSYA require the Service to manage any National Forest via a multiple-use system. What this means for Minnesota is that, depending on the Secretary of the Interior's balancing of the extraction of forest products versus conservation of the Forest, any given plot of federal land may be used for economic purposes, preserved, or some combination of the two.<sup>153</sup> But this general principle becomes more nuanced when considering the additional Forest Management Plan tailored to the specific resources and ecosystems found within Superior National Forest.

Established in 2004, the Superior National Forest Management Plan provides an extensive description of the goals of the Service in managing the Forest.<sup>154</sup> Included in its Forest-wide goals are: (1) the promotion of ecosystem health and conservation; (2) the protection, and where applicable, the restoration of soil, air, and water resources; (3) the management of biologically diverse ecosystems to provide for a variety of life; (4) the use of forest products in an environmentally acceptable manner; (5) the provision of forest settings and natural resources that "enhance social and economic benefits at local, regional, and national levels"; (6) the management of sustainable ecosystems to provide for a variety of uses, values, products, and services for present and future generations; and (7) the management of the forest in a way that enhances social and economic benefits for both individuals and communities.<sup>155</sup> The Management Plan also provides goals specific to the natural resources found within Superior National Forest, including minerals.

The Forest Management Plan provides two "desired conditions" for the Forest regarding mining. First, the Plan explicitly allows for the "[e]xploration and development of mineral and mineral material resources . . . on National Forest System Land . . ."<sup>156</sup> The only exceptions to this goal are federally owned lands within the BWCAW and the Mining Protected Area (MPA).<sup>157</sup> The second goal of the Forest Management Plan is to ensure that such exploration, development, and production of minerals is "conducted in an environmentally sound manner so that they may contribute to economic growth and national defense."<sup>158</sup> Mining that does occur within

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153. *Id.*

154. U.S. FOREST SERV., SUPERIOR NATIONAL FOREST MANAGEMENT PLAN 2-5 (2004).

155. *Id.*

156. *Id.* at 2-9.

157. *Id.*

158. *Id.*

Superior National Forest is subsequently limited by the language of the Forest Plan only in terms of the quantity of material removed. If more than 5,000 cubic yards of minerals are extracted per year, the entity extracting the minerals must also have an approved development and reclamation plan.<sup>159</sup> Despite trying to ensure the “environmentally sound” extraction and production of minerals, the fact remains that Superior National Forest is open to mining with little in the way of statutory restrictions.

There are many discretionary restrictions that may apply once a mineral claim or mineral lease is obtained from the government. At that time, it is up to the discretion of the Secretary of the Interior to permit prospecting, extraction, and use of the mineral resource.<sup>160</sup> The parameters of these permits and leases are left primarily to the Secretary of the Interior to determine (with the consent of the Secretary of Agriculture), though he or she must follow the basic mission of the department.<sup>161</sup> The current mission statement of the Department of Interior is to “conserve[] and manage[] the Nation’s natural resources and cultural heritage for the benefit and enjoyment of the American people . . . .”<sup>162</sup> Yet the focus of each Secretary’s tenure varies and can contradict the overall mission of the Department of Interior. For example, under previous Secretary Ryan Zinke, the Department of Interior had as one of its main “visions” for 2018–2022 the promotion of “energy dominance and critical minerals development.”<sup>163</sup> The overall result is that mining in Superior National Forest on federally owned lands is not subject to the general mining and leasing laws, but rather subject to the discretion of the Secretary of Interior.<sup>164</sup>

### 3. Federal Management of BWCAW

As hinted at in the Superior National Forest Management Plan, the BWCAW has a different set of regulations relating to mining within its boundaries. Established in 1978, though withdrawn in small portions over the history of the Superior National Forest, the BWCAW is roughly one million acres of federally recognized Wilderness.<sup>165</sup> Under the Wilderness Act of 1964, lands classified as Wilderness between the enactment of the Act and December 31, 1983 are subject to the mineral leasing and mining laws.<sup>166</sup>

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159. *Id.*

160. 16 U.S.C. § 508b (2018).

161. *Id.*

162. *About*, U.S. DEP’T OF INTERIOR, <https://www.doi.gov/whoweare> (last visited Nov 15, 2019).

163. U.S. DEP’T OF INTERIOR, STRATEGIC PLAN FOR FISCAL YEARS 2018-2022 3.

164. 16 U.S.C. § 508b.

165. MINN. DEP’T OF NAT. RES., *supra* note 18, at 18–19.

166. 16 U.S.C. § 1133(d)(3).

However, the BWCAW was explicitly exempt from these generally applicable provisions in the Wilderness Act. The Wilderness Act specifically maintained the authority of three key Acts—the Shipstead-Nolon Act, the Thye-Blatnik Act, and the Humphrey-Thye-Blatnik-Andersen Act.<sup>167</sup> Together, these Acts established that the lands acquired under the Acts were subject to existing mining regulations in Minnesota and were to be administered by the Secretary of Agriculture.<sup>168</sup> As such, the lands were not subject to the General Mining Act or the Mineral Lands Leasing Act, but instead, were either free and open to claims via a purchasing system or reserved by the government.

Mining in the BWCAW is also subject to restrictions outlined in the Wilderness’s enacting statute.<sup>169</sup> In 1978, Congress established the BWCAW as a designated Wilderness Area, which included a section of 222,000 acres set aside as a “mining protection area.”<sup>170</sup> Mineral deposits in this area were subject to the administration of the applicable mineral laws by the Secretary of Agriculture.<sup>171</sup> The purpose of establishing these protected areas was to

(1) provide for the protection and management of the fish and wildlife of the wilderness . . . ; (2) protect and enhance the natural values and environmental quality of the lakes, streams, shorelines and associated forest areas . . . ; (3) maintain high water quality in such areas; (4) minimize to the maximum extent possible, the environmental impacts associated with mineral development affecting such areas; (5) prevent further road and commercial development . . . and; (6) provide for the orderly and equitable transition from motorized recreational uses to nonmotorized recreational uses . . . .<sup>172</sup>

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167. *Id.*

168. Shipstead-Nolon Act, 46 Stat. 1020 (1930) (codified at 16 U.S.C. § 577–577b (2018)) (withdrawing public lands in northern Minnesota for the purpose of “conserving the natural beauty of shorelines for recreational use . . . .”); Thye-Blatnik Act, 62 Stat. 568 (1948) (codified at 16 U.S.C. § 577c–h (2018)) (identifying additional lands in northern Minnesota to be protected in accordance with the Shipstead-Nolon Act); Humphrey-Thye-Batnik-Andresen Act, 70 Stat. 326 (1956) (codified at 16 U.S.C. § 577d–1 (2018)) (identifying additional lands in northern Minnesota subject to the Shipstead-Nolon Act).

169. *See* 16 U.S.C. § 1133(a) (stating that the purpose of the Wilderness Act is “within and supplemental to the purposes for which national forests . . . are established and administered . . . .”); Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92 Stat. 1649 (1978).

170. Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-49, § 11, 92 Stat. 1649, 1655 (1978).

171. *Id.* §§ 3, 4, 92 Stat. at 1649–50.

172. *Id.* § 2, 92 Stat. at 1649.

In order to accomplish these goals, Congress stipulated that “no permit, lease, or other authorization may be issued” for the exploration or mining of minerals within the BWCAW and the Mining Protection Area, if such exploration and mining would affect navigable waters, or if the use of the land for mining or exploration would “impair the wilderness qualities” of the area.<sup>173</sup> Yet, the statute also created two exceptions to this rule. First, exploration and mining may take place “pursuant to a national emergency” as declared by the President.<sup>174</sup> Second, the Secretary of Agriculture may allow a permit, lease, or other authorization to mine if the individual or company seeking to mine submits a plan detailing the means of extraction and restoration, has posted bond for performance, and obtained all necessary permits and licenses.<sup>175</sup> The contradictory nature of the second exception throws into question whether mining may occur in the BWCAW. Per the Act, mining is prohibited in general but allowed in a specific set of circumstances.<sup>176</sup> Again, the determination is left up to the administering agency—the Secretary of Agriculture.<sup>177</sup>

Federal mining laws are complex in themselves but become even less intelligible when applied to federal lands within Superior National Forest. Not only are there explicit exceptions to the laws themselves, but the management of the lands within the Forest are also delegated differently from other public lands and unartfully split between two powerful land management agencies. One theme appears consistent through all the confusion: the federal lands in Superior National Forest are generally open to mining, though the final decision on the sale or lease of the mineral rights will always lie with the agency charged with administering those laws. Mining in Superior National Forest, then, lies in the hands of both the Secretary of the Interior and the Secretary of Agriculture. But their power only extends to the lands over which the federal government has sole ownership. A number of parcels in Superior National Forest remain under state and private ownership, requiring adequate consideration of the laws relevant to each.

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173. *Id.* § 11(a)(3), 92 Stat. at 1655.

174. *Id.* § 11, 92 Stat. at 1655.

175. *Id.* § 11(b)(1), 92 Stat. at 1655–56.

176. *Id.* § 11, 92 Stat. at 1655–56.

177. *Id.* §§ 4(a), 11(b), 92 Stat. at 1650, 1655–57.

*E. State Mining Laws on State Lands in Minnesota*

The State of Minnesota currently owns the rights to 5.6 million acres of land within the state.<sup>178</sup> Counties manage an additional 2.8 million acres of land the State owns.<sup>179</sup> Of those, 1.55 million acres have been reserved from certain uses as State Forests, Parks, and other entities.<sup>180</sup> The Minnesota legislature enacted a suite of laws with general applicability to regulate the acquisition, disposal, taxation, and management of mineral deposits and their corresponding mining activities.<sup>181</sup> Because these laws can be as complex as their federal counterparts, this Note only considers those related to the rights of access to mineral deposits.

## 1. State Laws

The State of Minnesota has established a general policy of mineral reservation in the disposition of state land.<sup>182</sup> Accordingly, mineral deposits on state-owned lands are restricted to leasing activities only.<sup>183</sup> The prevailing authority for the leasing of mineral deposits located on state-owned land is Minnesota Statute 93.25. The Statute allows the issuance of leases “to prospect for, mine, and remove minerals other than iron ore upon any lands owned by the state . . . .”<sup>184</sup> The statute is sufficiently broad to include all mineral ores besides iron, on “trust fund lands, lands forfeited for nonpayment of taxes[,] . . . lands otherwise acquired, and the beds of any waters belonging to the state.”<sup>185</sup> Thus, all state-owned lands in Minnesota have the potential to be leased for mineral prospecting, mining, and extraction. As with its federal counterparts, however, the Minnesota leasing statute leaves the final decision to grant leases with the head of a state agency.<sup>186</sup>

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178. MINN. DEP’T OF NAT. RES., PUBLIC LANDS SUMMARY 1 (2019).

179. *Id.*

180. MINN. DEP’T OF NAT. RES., *supra* note 18, at 25

181. MINN. DEP’T OF NAT. RES., MINNESOTA’S MINING LAWS 1 (2016).

182. *Id.* at 3.

183. *Id.* at 2.

184. MINN. STAT. § 93.25 (2019).

185. *Id.*

186. *Id.*

## 2. State Administration of the Mining Laws

In Minnesota, all mineral leases are issued by the Commissioner of the Minnesota Department of Natural Resources.<sup>187</sup> No individual may mine without the Commissioner issuing them a permit.<sup>188</sup> The Commissioner requires the permit applicant to include in their application:

- (1) a proposed plan for the reclamation or restoration of any mining areas affected by the mining operations . . .
- (2) a certificate issued by an insurance company authorized to do business in the United States . . .
- (3) an application fee . . . and
- (5) a copy of the applicant's advertisement of the ownership, location, and boundaries of the proposed mining area . . . .<sup>189</sup>

Then, the Commissioner has 120 days to review the petition, after which he or she may grant the permit, with or without modifications or conditions, or deny the permit.<sup>190</sup> The Commissioner also sets the terms of the permit as deemed necessary “for the completion of the mining operation, including reclamation or restoration.”<sup>191</sup> As with the corresponding federal agencies administering federal law in Minnesota, the Commissioner acts as the final decision-maker for the management of mineral leasing in the state.

### *F. Private Ownership*

Though the federal government has placed a moratorium on the practice of patenting mineral claims, some parcels within the boundaries of Superior National Forest remain in control of private individuals with mineral patents. Because of this, it is necessary to conclude the discussion of the application of federal and state laws to mining in Minnesota with an aside about private rights. The General Mining Act of 1872 granted individuals the “exclusive right of possession and enjoyment of all surface included within the lines of their locations . . . .”<sup>192</sup> While a patented claim provided for the exclusive use of the minerals on the located deposit against a third party, including the federal government, the property rights accompanying the patent were not

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187. *Id.*; see also MINN. STAT. § 93.0015 (2019) (explaining that the Commissioner of Natural Resources is the chair of the Mineral Coordinating Committee).

188. MINN. STAT. § 93.25.

189. MINN. STAT. § 93.481, subd. 1 (2019).

190. *Id.* at subd. 2.

191. *Id.* at subd. 3.

192. 30 U.S.C. § 26 (2018).

limitless.<sup>193</sup> In fact, the property rights granted with a patent were limited to “the rights of possession and enjoyment of the minerals as well as the surface ground,” so long as the patentholder abided by the requirements outlined in the General Mining Act (discovery, acquisition, and payment).<sup>194</sup> In addition, once patented, a claim became private property (containing only the property rights mentioned above), subject to laws of the state in which the claim was located.<sup>195</sup> Even in instances where a private individual has patented a mineral claim, the rights of possession and extraction are not limitless and remain regulated by federal and state government.

### *G. Current Mining Issues in Minnesota*

Legal analysis of federal and state mining laws and their application to Superior National Forest would be incomplete without a discussion of some of the prominent issues surrounding the topic today. It is these issues that take the theoretical discussion out of the sphere of academia and into the real world for application and resolution. Two proposed actions in Superior National Forest have recently captured the attention of environmentalists across the U.S.<sup>196</sup> The first is the renewal of two mineral leases on lands within Superior National Forest and adjacent to the BWCAW.<sup>197</sup> The second is the Service’s request for a withdrawal of 234,328 acres from mineral and geothermal leasing.<sup>198</sup> In each instance, the government’s actions hinge on the determination of ownership of surface and mineral rights administration of relevant mineral laws.

#### 1. Friends of the Boundary Waters v. BLM

Twin Metals Minnesota (Twin Metals), a subsidiary of Antofagasta, PLC, a Chilean copper-mining company, seeks to renew two mining leases on land adjacent to the BWCAW and within Superior National Forest.<sup>199</sup>

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193. COGGINS ET AL., *supra* note 3, at 512.

194. 1 ROCKY MOUNTAIN MINERAL LAW FOUND., *supra* note 9, § 30.04.

195. COGGINS ET AL., *supra* note 3, at 511.

196. Ari Natter & Jennifer Jacobs, *Trump Vows to Open Minnesota’s Superior National Forest to Mines* (June 21, 2018), <http://www.bloomberg.com/news/articles/2019-6-21/trump-vows-to-open-minnesota-s-superior-national-forest-to-mines>.

197. *Twin Metals Lease Renewal*, U.S. FOREST SERV., <https://www.fs.usda.gov/detail/superior/landmanagement/resourcemanagement/?cid=fseprd507250> (last visited Nov 15, 2019).

198. APPLICATION FOR WITHDRAWAL, U.S. FOREST SERV. (January 12, 2017), [https://www.fs.usda.gov/nfs/11558/www/nepa/105871\\_FSPLT3\\_3924868.pdf](https://www.fs.usda.gov/nfs/11558/www/nepa/105871_FSPLT3_3924868.pdf).

199. *Who We Are*, TWIN METALS MINN., LLC, <http://www.twin-metals.com/who-we-are/> (last visited Nov. 6, 2019); *About the Project*, TWIN METALS MINN., LLC, <http://www.twin-metals.com/about-the-project/> (last visited Dec. 19, 2019).

These proposed renewals lie at the top of the Rainy River watershed, which flows down into more than one million acres of wilderness within Superior National Forest and the BWCAW.<sup>200</sup> Twin Metals has held these leases since 1966 but has yet to build any mining operations.<sup>201</sup> In 2012, Twin Metals applied for lease renewal and indicated their intent to begin building mining operations on those sites.<sup>202</sup> The BLM rejected Twin Metals' renewal in 2016 based on memoranda from the Solicitor for the Department of the Interior and the Chief of the Forest Service.<sup>203</sup> Yet one year later, and after the change in administration, BLM revived the inquiry into Twin Metals' lease renewal and reversed their earlier decision, granting Twin Metals their renewal.<sup>204</sup> At issue is whether BLM has the authority to reconsider a lease-renewal application which has already been rejected.<sup>205</sup>

In 1966, the International Nickel Company, Inc. (INCO), Twin Metals' predecessor-in-interest, received two mineral leases.<sup>206</sup> Each lease had an initial term of 20 years to be followed by no more than three ten-year lease renewals.<sup>207</sup> BLM granted two renewals in 1989 and 2004.<sup>208</sup> In 2012, Twin Metals applied for its third lease renewal with BLM.<sup>209</sup> Before making its final decision, the BLM sought the legal opinion of the Solicitor of the Department of the Interior.<sup>210</sup> In her memorandum, Solicitor Hilary Tompkins found that the BLM was not required to renew Twin Metals' lease a third and final time.<sup>211</sup> According to Tompkins, the language of the 2004 lease renewal governed, meaning that there was no automatic right of renewal.<sup>212</sup> Instead, the 2004 lease terms gave Twin Metals "the legal right to be preferred against other parties, should the Secretary . . . decide to continue leasing."<sup>213</sup>

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200. See Compl. *Friends of the Boundary Waters v. Bureau of Land Mgmt.*, ¶¶ 43, 47, No. 1:18-cv-01499 (D.D.C. filed June 25, 2018).

201. *Id.* ¶¶ 67, 69–70.

202. *Id.* ¶ 53.

203. *Id.* ¶ 2.

204. *Id.* ¶ 3.

205. *Id.*

206. *Id.* ¶ 55; see also BUREAU OF LAND MGMT., INT'L NICKEL CO., INC. MINERAL LEASE 01352 (1966) (lease issued); BUREAU OF LAND MGMT., INT'L NICKEL CO., INC., MINERAL LEASE 01353 (1966) (lease issued).

207. Compl., *supra* note 200, ¶ 67.

208. *Id.* ¶¶ 71–72.

209. *Id.* ¶¶ 74–75.

210. *Id.* ¶¶ 76–77.

211. Memorandum from Hilary C. Tompkins, Solicitor, Dep't of the Interior to Dir., Bureau of Land Mgmt. 1 (Mar. 8, 2016) (M-37036) [hereinafter Memorandum].

212. *Id.* at 5.

213. *Id.* (quotations omitted).

BLM also sought consent to renew Twin Metals's lease from the Service.<sup>214</sup> The Chief of the Service, Thomas Tidwell, responded with a clear denial of consent to renew the leases.<sup>215</sup> The memorandum was specifically concerned with the "serious and irreplaceable harm" copper-nickel mining could have on the BWCAW's "unique, iconic, and irreplaceable wilderness . . ."<sup>216</sup> Based on the feedback from both the Solicitor for the Department of the Interior and the Chief of the Forest Service, BLM denied Twin Metals's request for lease renewal on December 15, 2016.<sup>217</sup>

A year later, the Principal Deputy Solicitor of the Department of the Interior, Daniel Jorjani, wrote a memorandum concerning BLM's ability to renew Twin Metals's lease for a third time.<sup>218</sup> This memorandum stated that the 2016 memorandum was incorrect in its understanding of the original 1966 leases.<sup>219</sup> Not only did the language of the 1966 lease govern the ability for BLM to deny the 2004 renewal, it also guaranteed a non-discretionary right to lease renewal.<sup>220</sup> BLM relied on the new memorandum to reinstate Twin Metals's leases.<sup>221</sup> In doing so, the agency explicitly told the Forest Service that its previous non-consent determination was "not legally operative."<sup>222</sup>

In light of these contradictory orders, the Friends of the Boundary Waters, a non-profit dedicated to the protection and restoration of the BWCAW, brought a claim against the BLM and the Department of the Interior.<sup>223</sup> Friends of the Boundary Waters claimed that BLM was in violation of the Administrative Procedure Act (APA) and the Declaratory Judgment Act.<sup>224</sup> The group argued that BLM violated the APA because its decision to renew the leases was arbitrary, capricious, and contrary to law.<sup>225</sup> In addition, the complaint alleged that BLM's decision to renew was also a violation of the Declaratory Judgment Act because the government does not have the authority to revisit a final agency decision made 16 months prior.<sup>226</sup>

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214. Compl., *supra* note 200, ¶ 83 ("BLM made this request to the USFS because the USFS is the agency with supervisory jurisdiction over surface rights and surface management of the lands that are the subject of the leases.").

215. U.S. Forest Serv., Opinion Letter on Renewal of Two Leases Within Superior National Forest 1 (Dec. 14, 2016).

216. *Id.* at 1.

217. Compl., *supra* note 200, ¶ 96.

218. Memorandum from Daniel H. Jorjani, Principal Deputy Solicitor, Dep't of the Interior to Dir., Bureau of Land Mgmt. 1 (Dec. 22, 2017) (M-37049).

219. *Id.*

220. *Id.* at 8.

221. Compl., *supra* note 200, ¶¶ 105–109.

222. *Id.*

223. *Id.* ¶¶ 1, 9.

224. *Id.* ¶ 1.

225. *Id.* ¶ 4.

226. *Id.* ¶¶ 1, 4.

The case was consolidated in July 2018 under *Voyageur Outward Bound School v. United States*, which is currently pending in the U.S. District Court for the District of Columbia.<sup>227</sup>

One of the primary concerns of the Friends of the Boundary Waters and like-minded groups is the potential damage copper-nickel-sulfide mining may cause to the environment.<sup>228</sup> Sulfide mining typically entails extracting the desired minerals—here, copper—from the surrounding rock.<sup>229</sup> The minerals sought often appear in small quantities compared to the rocks they are found within, resulting in a substantial amount of waste materials after the extraction process.<sup>230</sup> Refining the obtained ores after extraction creates further waste material.<sup>231</sup> Two common problems resulting from this process are oxidization of waste rock and tailings and emissions of sulphur dioxide.<sup>232</sup> Oxidation of the waste materials creates the potential for acid leaching.<sup>233</sup> The leached material will contain the remaining minerals—here, iron and sulfuric acid, which may enter the ground or surface water systems nearby.<sup>234</sup> The fear with the proposed mines in Superior National Forest is that any acid leaching from waste rocks could potentially spread through the highly connected waterways in the watershed and contaminate all three million acres of protected forest.<sup>235</sup> These environmental concerns lead to the Service’s application for withdrawal of over 200,000 acres from mineral and geothermal leasing in northern Minnesota.<sup>236</sup>

## 2. Rainy River Watershed Withdrawal

On January 12, 2017, the Service submitted an application for withdrawal of 234, 328 acres in Superior National Forest from mineral and geothermal leasing to the BLM.<sup>237</sup> As stated, the purpose of the withdrawal is to “protect National Forest System Lands (and waters) located in the Rainy River Watershed, the BWCAW, and the MPA from the adverse environmental impacts arising from exploration and development of fully

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227. *Id.* at 1; *Voyageur Outward Bound School v. United States*, No. 1:18-cv-01463, 2018 WL 3091073 (D. D.C. June 21, 2018).

228. Compl., *supra* note 200, ¶ 10.

229. EARLE A. RIPLEY ET AL., ENVIRONMENTAL EFFECTS OF MINING 145 (1996).

230. *Id.*

231. *Id.*

232. *Id.* at 145–46.

233. *Id.* at 146.

234. *Id.*

235. APPLICATION FOR WITHDRAWAL, *supra* note 198, at 2–3.

236. *Id.* at 1.

237. *Northern Minnesota Federal Withdrawal*, U.S. FOREST SERV., <https://www.fs.usda.gov/project/?project=50938> (last visited Dec. 19, 2019).

Federally-owned minerals conducted pursuant to the mineral leasing laws.”<sup>238</sup> The application requested the maximum term limit—20 years—and also asked the BLM to allow for a two-year segregation period during which the notice of withdrawal would be published in the Federal Register and would receive public comment.<sup>239</sup> BLM originally granted the Forest Service’s request for a segregation period of up to two years in their published notice of the withdrawal application.<sup>240</sup> However, in early September 2018, the Department of Agriculture cancelled the Service’s withdrawal application several months short of the two-year deadline.<sup>241</sup> The decision, while disappointing to many in favor of protecting the ecosystems in Superior National Forest, is unsurprising given the structure of the federal administration of mining laws on federal lands. In most instances, decisions regarding the sale or leasing of mineral deposits and surface lands lie in the hands of the heads of the agencies. Thus, the Department of Agriculture’s decision to cancel its own request for withdrawal, while apparently contradictory, is likely well within the scope of what the agency can do with regard to federal land and the administration of federal mining laws.

At this time, the outcomes of each action are uncertain. Though the current administration cancelled the withdrawal, it could be renewed under future administrations. The Friends of the Boundary Waters case is far from over, and it is unclear whether the court will find the plaintiffs’ APA claims persuasive against the tried-and-true reliance on agency discretion. Hopefully, whatever the outcome of these individual actions, the Superior National Forest’s future will remain bright.

#### CONCLUSION

Superior National Forest encompasses over three million acres of wilderness in the Minnesota Northwoods.<sup>242</sup> It is home to three endangered species, miles of interconnected waterways, and several cultural heritage sites.<sup>243</sup> Yet it is the minerals beneath these lands and waterways that have proved to be one of the largest influences on the Forest. Federal mining law,

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238. APPLICATION FOR WITHDRAWAL, *supra* note 198, at 3.

239. *Id.* at 5.

240. Notice of Application for Withdrawal, 82 Fed. Reg. 6,639 (Jan. 19, 2017).

241. Press Release, U.S. Dep’t of Agric., USDA Removes Roadblock to Mineral Exploration in Rainy River Watershed (Sept. 6, 2018).

242. *About the Forest*, *supra* note 51.

243. *Wildlife of the Superior National Forest*, U.S. FOREST SERV., [https://www.fs.usda.gov/detail/superior/about-forest/?cid=fsm91\\_049837](https://www.fs.usda.gov/detail/superior/about-forest/?cid=fsm91_049837) (last visited Nov. 8, 2019); *Introduction*, U.S. FOREST SERV., [https://www.fs.usda.gov/detail/superior/landmanagement/resourcemanagement/?cid=fsm91\\_049826](https://www.fs.usda.gov/detail/superior/landmanagement/resourcemanagement/?cid=fsm91_049826) (last visited Dec. 19, 2019).

while complex in its own right, becomes nearly inscrutable when applied to the federally owned lands in Minnesota. Adding state- and privately owned lands into the mix creates even greater confusion over who owns what land, to what degree, and for what purpose. However, understanding the relationships between and among these laws and actors is critical. Issues over mineral access are at the forefront of Minnesota politics, with a pending case challenging the renewal of a previously rejected mineral lease and the cancelled application for withdrawal of federal lands from mineral leasing. The outcome of each action, while uncertain, will without doubt be based on the understanding and interpretation of the interplay between federal, state, and individual mineral rights, federal and state mining laws, and the administration of those laws by federal and state agencies. Untangling the web of ownership, access, and management is essential for the successful litigation of issues like those facing Minnesota today.