

ARTICLE

CFIUS Forces Chinese Government-Backed Firm to Divest Interest in Canadian Mining Company With U.S. Operations

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On June 18, 2013, Canada-based Lincoln Mining Corporation (Lincoln) announced that following a review by the U.S. Committee on Foreign Investment in the United States (CFIUS), Procon Mining and Tunnelling, Ltd., along with its affiliate, the Chinese state-owned enterprise (SOE) China National Machinery Industry Corporation (collectively with Procon Mining and Tunnelling, Ltd., "Procon"), will divest its entire investment in Lincoln within 120 days. [1] Although details regarding the nature of CFIUS' national security concerns will not be released, it is apparent that the proximity of Lincoln's properties to U.S. military bases was a significant factor.

Although a Canadian company, Lincoln's core mining operations are in Nevada and California. Lincoln's Bell Mountain and Pine Grove properties are near the Fallon Naval Air Station in Nevada, where the TOPGUN flight training school is located, while the Oro Cruz property is in California, near the Marine Corps Air Station Yuma. In September and November 2012, Procon acquired controlling shares of Lincoln. Yet, the parties filed their CFIUS notice on April 1, 2013, after the transaction had closed.

Less than two months after notifying CFIUS, the companies have agreed to unwind the transaction and provide CFIUS with advance notice of the intended purchaser(s) of Procon's shares and debenture, as well as the structure of the proposed sale, both of which will be subject to CFIUS approval. Moreover, until the divestment is complete, all access to Lincoln's properties at Bell Mountain, Pine Grove and Oro Cruz will be subject to prior authorization from the U.S. government.

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Notably, this appears to be the third time that CFIUS has rejected attempts by Chinese investors to acquire interests in mining companies in Nevada near the Fallon Naval Air Station. First, in 2009, CFIUS rejected China-based Northwest Non Ferrous International Investment Company Ltd.'s attempt to acquire interest in Firstgold Corporation (Firstgold). According to a leaked memorandum from Firstgold's legal counsel that was published in *The New York Times*, the proximity of certain of Firstgold's properties to the military base raised "serious, significant, and consequential national security" concerns that could not be overcome. [2]

Then, in 2012, CFIUS initiated a review of a 2010 acquisition by Hong Kong-based Far East Golden Resources Investment Limited (FEGRI) of shares in Nevada Gold Holdings, Inc. (Nevada Gold). In the course of its review, CFIUS proposed certain measures to mitigate risks to U.S. national security posed by the proximity of certain Nevada Gold properties to the Fallon Naval Air Station. Rather than accept the burdensome mitigation measures, both parties agreed to unwind the transaction, with FEGRI, along with its ultimate controlling entity, divesting all interests in Nevada Gold.

The most salient lesson to be learned from the Lincoln acquisition, and the others noted above, is that parties to transactions involving foreign entities must carefully consider the national security issues raised by the proximity of the business being acquired to U.S. defense and critical infrastructure facilities. Further, parties, particularly SOEs or those affiliated with SOEs, should always notify CFIUS prior to closing transactions that have national security implications or risk CFIUS discovery and possible burdensome mitigation or divestment. Finally, CFIUS has the authority to review any acquisition of control of a U.S. business by a foreign entity, regardless of the home country of the foreign entity or the extent of its foreign operations.

[1] See Lincoln Mining Corp. Press Release (June 18, 2013), *available at* http://lincolnmining.com/news/index.php?&content_id=255.

[2] A copy of the legal memorandum is available on *The New York Times* website at <http://graphics8.nytimes.com/packages/images/nytint/docs/memo-regarding-the-sale-of-firstgold-corp/original.pdf>.