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NOTE: This disposition is nonprecedential.



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Interior Board of Land Appeals
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IBLA 2014-230)	IDI-002400
)	
J.R. SIMPLOT CO.)	Phosphate Lease Readjustment
)	
)	Reversed

ORDER

J.R. Simplot Company (Simplot) appeals from a June 24, 2014, decision issued by the Branch Chief for Lands, Minerals, and Water Rights of the Idaho State Office, Bureau of Land Management (BLM), that rejected Simplot’s objections to a provision added to section 14(a) of its readjusted phosphate lease (IDI-002400) (lease). Because we conclude that the provision at issue is inconsistent with applicable law, we reverse BLM’s June 2014, decision and strike the proposed language from the readjusted lease.

Background

Phosphate leases are issued under the Mineral Leasing Act of 1920 (MLA), which provides the Secretary of the Interior with authority to lease “phosphate deposits of the United States, and lands containing such deposits.”¹ Under the MLA, lands containing phosphate deposits “shall be leased under such terms and conditions as are herein specified.”²

The MLA includes express authority to readjust phosphate lease terms and conditions:

Leases shall be for a term of twenty years and so long thereafter as the lessee complies with the terms and conditions of the lease and upon the

¹ 30 U.S.C. § 211(a) (2012).

² *Id.*; see also *id.* §§ 181, 182, 184(c).

further condition that at the end of each twenty-year period succeeding the date of the lease such reasonable readjustment of the terms and conditions thereof may be made therein as may be prescribed by the Secretary of the Interior unless otherwise provided by law at the expiration of such periods.³

Consistent with this authority, section 3(e) of Simplot's lease, effective August 1, 1953, expressly reserved:

The right reasonably to readjust and fix the royalties payable hereunder and other terms and conditions, including [the] amount of minimum annual production, at the end of 20 years from the date hereof, and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period, but in case the lessee be dissatisfied with the rate of royalty or other terms and conditions so fixed, he shall be entitled to surrender this lease in the manner and under the conditions provided in sections 4 and 5 hereof.⁴

On August 3, 2011, BLM sent a notice to Simplot informing the company that its lease would be readjusted, effective August 1, 2013, and that readjusted terms and conditions would be sent by that date.⁵ On July 17, 2013, BLM issued to Simplot a "Notice of Readjusted Lease," proposing several adjustments to the terms of Simplot's lease. The proposed adjustment relevant to this appeal was a sentence added to section 14(a) of the lease, "Special Stipulation Section 14(a), Allocation of Response Costs and Natural Resources Damages." The new language in section 14(a) states:

Lessee also waives any and all claims that any actions proposed or required by lessor in exercising its authority to regulate lessee's activities on or after the effective date of this lease readjustment were negligent, unless lessee appeals lessor's decision in accordance with 43 C.F.R. Part 4 prior to implementing the action, and IBLA rules in favor of the lessee.⁶

BLM provided Simplot 60 days to object to the proposed readjustment. By letter dated September 13, 2013, Simplot objected to the proposed language.

³ *Id.* § 212.

⁴ Lease form 002400, Aug. 1962.

⁵ See BLM's Notice of Intent to Readjust.

⁶ Readjusted Lease 02400 at 5.

BLM issued the decision now on appeal on June 24, 2014, declining to withdraw the new language in section 14(a).⁷ BLM explained that the primary purpose of the sentence added to section 14(a) was to provide Simplot incentive “to analyze and address potential flaws with the mine plan before mining, and also address any potential concerns raised by the agencies that review and approve such plans,” especially since the impacts of mining “may not occur or be discovered for many years.”⁸ BLM asserted that section 14(a), including the added provision, pertained only to Simplot’s activities and all response costs and natural resource damages that related to those activities, stating: “[i]t is appropriate, and permissible under the Mineral Leasing Act, that the miner bear the costs if its mining causes contamination.”⁹

On July 23, 2014, Simplot timely filed its notice of appeal and statement of reasons (NOA/SOR). BLM filed its Answer on August 25, 2014, and Simplot filed a Reply on September 10, 2014. On October 30, 2015, we granted BLM’s motion to expedite consideration of the appeal, based on BLM’s representation that the agency “is now considering objections from 12 other phosphate lessees regarding the same liability provision that is currently at issue in this appeal.”¹⁰

Analysis

The issue before the Board is whether the challenged language BLM proposes to add to section 14(a) of Simplot’s readjusted phosphate lease is allowable under applicable law.

It is not clear what BLM intends by the new language in section 14(a). However, based on the title of section 14(a), “Allocation of Response Costs and Natural Resources Damages,” and the pleadings filed by BLM and Simplot, which focus on cleaning up contamination caused by phosphate mining, we infer that the provision is intended to address liability under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹¹ Yet neither

⁷ See Decision at 2-5.

⁸ *Id.* at 5.

⁹ *Id.*

¹⁰ Order, IBLA 2014-230, dated Oct. 30, 2015.

¹¹ 42 U.S.C. § 9607 (2012). In CERCLA, Congress provided a mechanism for cleaning up hazardous waste sites and imposed the costs of such cleanup on those responsible for the contamination. See *Burlington Northern & Santa Fe Ry. v. United States*, 556 U.S. 599, 602 (2007).

BLM nor Simplot specifically identifies the proposed language in section 14(a) as relating to liability under CERCLA.

In its Answer, BLM states that the primary purpose for the proposed language in section 14(a) is to ensure that Simplot properly assumes responsibility for its activities, and to provide Simplot additional incentive to “fully raise an issue . . . and allow BLM to correct a ‘bad decision’ that could lead to contamination,” especially since the impacts of mining may not occur or be discovered for many years.¹² BLM stated: “[T]he provision prevents a stale record for challenge to a decision that was appropriate when made, but did not turn out well.”¹³ BLM, however, points only to the broad authority granted to the Secretary of the Interior under the MLA as supporting its proposed language: “The MLA provides that BLM may include lease terms in phosphate leases that safeguard the public welfare.”¹⁴

Simplot similarly is vague in its objections to the proposed language in section 14(a), stating that the language requires it to “bear the risk and expense of BLM’s negligence” and is “unfair and not supported by law.”¹⁵ Simplot primarily argues that the proposed language constitutes a type of broad indemnification or strict liability clause struck down by this Board in 2007 in another appeal brought by Simplot.¹⁶ In that case, we held that BLM could not, in a readjusted phosphate lease, require that the lessee “shall indemnify and hold harmless the United States from any and all claims arising out of the lessee’s activities and operations under this lease.”¹⁷ We set aside this provision because it explicitly imposed “strict liability” on the lessee, stating that “a readjusted lease term which imposes strict liability is ‘unacceptable’ and ‘flawed.’”¹⁸

Liability under CERCLA is governed by section 107, which imposes strict, joint, and several liability on four identified groups, collectively known as “potentially responsible parties” (PRPs).¹⁹ Congress amended the statute in 1986 to waive

¹² Answer at 4-5.

¹³ *Id.* at 5.

¹⁴ *Id.* at 3-4, 6 (citing 30 U.S.C. §§ 198, 211 (2012)).

¹⁵ NOA/SOR at 2.

¹⁶ *J.R. Simplot*, 173 IBLA 129 (2007) (*Simplot I*); see NOA/SOR at 2, 3.

¹⁷ *Simplot I*, 173 IBLA at 132.

¹⁸ *Id.* at 136 (quoting *Sunoco Energy Development Co.*, 84 IBLA 131, 137 (1984)).

¹⁹ 42 U.S.C. § 9607(a) (2012); *Simplot I*, 173 IBLA at 139 (citing *Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007); *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 184 (2nd Cir. 2003), *cert. denied*, 540 U.S. 1103 (2004); *Carson Harbor Village*,

(continued ...)

Federal sovereign immunity and make the United States liable to the same extent as any nongovernmental entity.²⁰ CERCLA prohibits shifting liability between and among PRPs, but expressly allows one PRP to be held harmless or indemnified by another PRP:

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.²¹

Because CERCLA prohibits a PRP from shifting its liability onto another PRP, we must first look at the proposed language in section 14(a) to determine if it would result in BLM impermissibly shifting its liability under CERCLA to Simplot. We conclude that it would not. The plain language of BLM's proposed addition to section 14(a) of Simplot's readjusted phosphate lease would limit Simplot's ability to assert a claim of "negligence" against BLM. The language would not, however, change or shift any party's ultimate liability under CERCLA. Moreover, on its own, the proposed language is consistent with section 107(d)(1) of CERCLA, which provides that "liability for costs or damages as the result of negligence" are not precluded.²² Section 107(d)(1), however, means simply that the United States can be sued to recover damages on the ground that it was negligent. It does not mean that the United States can insulate itself from its liability as a PRP. Our analysis does not end here, however.

It is important to understand that a claim against the United States in negligence is separate from a claim under CERCLA. While it is possible that the same set of facts could give rise to both a claim for response costs under CERCLA and a claim for negligence, negligence actions against the United States are governed exclusively by the Federal Tort Claims Act (FTCA).²³ The FTCA establishes a limited waiver of sovereign immunity and provides generally that "[t]he United States shall

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Ltd. v. Unocal Corp., 270 F.3d 863, 870-71 (9th Cir. 2001), *cert. denied*, 535 U.S. 971 (2002)).

²⁰ 42 U.S.C. § 9620(a)(1) (2012).

²¹ *Id.* § 9607(e)(1).

²² *Id.* § 9607(d)(1).

²³ 28 U.S.C. §§ 2671-2680 (2012).

be liable [in tort] . . . in the same manner and to the same extent as a private individual under like circumstances.”²⁴ Significantly, the FTCA includes an exemption for agency discretionary functions. Under this “discretionary function” exemption, negligence claims against the government are prohibited when the claim is “based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function”²⁵

In *United States v. Gaubert*, the Supreme Court established that a government employee’s allegedly negligent act or omission falls within the discretionary function exception (and thus bars jurisdiction over the case) if it involves an element of judgment or choice and is “grounded in the social, economic, or political goals of the statute and regulations” being implemented.²⁶ This means that government employees exercising a discretionary function or duty cannot be sued for negligence based on that act.²⁷

Unless specific action by BLM is dictated by the Mineral Leasing Act or BLM’s implementing regulations, the actions BLM takes to administer a phosphate lease in accordance with these authorities are discretionary functions protected by the doctrine of sovereign immunity. We are hard-pressed to imagine a circumstance in which a BLM decision administering Simplot’s lease would fall outside of the discretionary function exemption of the FTCA – *i.e.*, where BLM violated a federal statute, regulation, or policy. Furthermore, it does not appear that section 14(a) is intended to address actions that would fall outside of the discretionary function exemption. BLM, in its Answer, explains that the intent of the proposed additional language is to “prevent[] a stale record for challenge to a decision *that was appropriate when made*, but did not turn out well.”²⁸ The inclusion of the proposed language in section 14(a) of the readjusted phosphate lease is therefore puzzling, since we can see no avenue for a lessee to bring a suit in negligence against the United States for the government’s discretionary decisions in administering its lease. It therefore appears that BLM is unnecessarily attempting to protect itself from legal action – a negligence claim – that, by law, would be prohibited.

²⁴ *Id.* § 2674; *see also* 28 U.S.C. § 1346(b)(1) (2012).

²⁵ 28 U.S.C. § 2680(a) (2012).

²⁶ 499 U.S. 315, 322-23 (1991).

²⁷ *See Elder v. United States*, 312 F.3d 1172, 1177 (10th Cir. 2002) (discretionary function exemption does not apply if a federal employee “violated a federal statute, regulation, or policy that is both ‘specific and mandatory.’”).

²⁸ Answer at 5 (emphasis added).

Both parties argue that our decision in *Simplot I* should guide our decision here. In that case, at issue were several provisions in a readjusted phosphate lease. One provision was an indemnification provision that provided that the lessee “shall indemnify and hold harmless the United States from any and all claims arising out of the lessee’s activities and operations under this lease.”²⁹ As noted above, we set aside this provision because it explicitly imposed “strict liability” on the lessee.³⁰ The other provision at issue was a stipulation under which the lessee agreed to reimburse the United States for all costs resulting from any release or threat of release of hazardous substances, pollutants, contaminants, petroleum, or oil on or from the lease area that arose from activities undertaken by the lessee.³¹ We held that this stipulation was reasonable because it was limited in scope and did not shift liability.³²

Simplot argues that the proposed additional language at issue in this case is a type of broad indemnification or strict liability clause struck down in *Simplot I*.³³ BLM argues that the language at issue in this case is more like the “more narrowly drawn provision” we upheld in *Simplot I*.³⁴ Neither party is correct. First, as we have already stated, the proposed language in section 14(a) does not shift liability; it therefore does not operate in a manner similar to the clause we struck down in *Simplot I*. Moreover, because the proposed language in section 14(a) is about negligence, it is not comparable to the narrowly drawn cost allocation provision we upheld in *Simplot I*.

In further support of its argument that the additional language in section 14(a) is unlawful, *Simplot* points to *Nu-West Mining, Inc., v. United States*.³⁵ In that case, Nu-West, a phosphate mining company, sued the Forest Service under CERCLA to recover costs for cleaning up selenium contamination caused by Nu-West’s mining activities. The district court held that the Forest Service was liable under CERCLA’s broad waiver of sovereign immunity.³⁶ *Simplot* is seemingly concerned that the proposed additional language in section 14(a) is an attempt by BLM to extricate itself from liability under CERCLA. As we have already stated, however, the proposed language in section 14(a) would not shift liability under CERCLA and relates, instead, to “negligence,” which is governed by the FTCA. Moreover, BLM appears to agree

²⁹ *Simplot I*, 173 IBLA at 132.

³⁰ *Id.* at 136.

³¹ *Id.* at 132-33.

³² *Id.* at 140-41.

³³ NOA/SOR at 2, 3.

³⁴ Answer at 8.

³⁵ 768 F. Supp. 2d 1082 (D. Idaho, 2011).

³⁶ *Id.* at 1089, 1091.

that *Nu-West Mining, Inc. v. United States* is not relevant to our analysis, stating “[t]he court in *Nu-West* did not have the issue of negligence before it.”³⁷ In any event, to the extent BLM intends to insert into the lease a provision that would exempt it from CERCLA liability, such provision would be contrary to CERCLA and unenforceable.

Regardless, comparisons to *Simplot I* and *Nu-West* serve no useful purpose since the FTCA’s discretionary function exemption would prohibit Simplot from bringing a claim against BLM in negligence for BLM’s discretionary decisions administering Simplot’s lease. We therefore find that the proposed additional language in section 14(a) is unnecessary and inconsistent with governing law.

We note that even if we were to find the proposed additional language in section 14(a) of the readjusted lease generally consistent with the law, we would strike the language requiring Simplot to challenge BLM “proposed” actions, in addition to “required” actions; “proposed” decisions are not appealable decisions, and thus cannot be challenged in accordance with 43 C.F.R. Part 4.

Conclusion

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board reverses BLM’s decision and strikes the proposed language from section 14(a) of the readjusted lease.

_____/s/
Amy B. Sosin
Administrative Judge

I concur:

_____/s/
Christina S. Kalavritinos
Administrative Judge

³⁷ Answer at 5.