



J.R. SIMPLOT CO.

173 IBLA 129

Decided: November 30, 2007



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

J.R. SIMPLOT CO.

IBLA 2006-45

Decided: November 30, 2007

Appeal of a decision by the State Director of the Idaho State Office, Bureau of Land Management, overruling objections to a readjusted phosphate lease and revising one stipulation related to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. IDI-012890

Affirmed in part; reversed in part.

1. Mineral Leasing Act: Generally--Mineral Leasing Act:  
Environment--Phosphate Leases and Permits: Generally

In challenging a provision of a readjusted phosphate lease under the Mineral Leasing Act of 1920, the burden is upon the appellant to demonstrate that the challenged provisions are unreasonable or otherwise arbitrary, capricious, or an abuse of discretion.

2. Mineral Leasing Act: Generally--Mineral Leasing Act:  
Environment--Phosphate Leases and Permits: Generally

The Department has broad authority to change and add reasonable provisions to a readjusted lease issued under the Mineral Leasing Act of 1920 and is not limited to readjusting economic terms and conditions only.

3. Mineral Leasing Act: Generally--Phosphate Leases and Permits:  
Generally

Where a readjusted lease term imposes strict or no-fault liability on a lessee, without regard to its culpability and responsibility or the Department's fault, culpability, or responsibility, such a readjusted lease term is unreasonable under the Mineral Leasing Act of 1920. Where a BLM decision determines that strict or no-fault liability can be imposed through the lease readjustment process, it is properly reversed.

4. Mineral Leasing Act: Generally--Mineral Leasing Act:  
Environment--Phosphate Leases and Permits: Generally

The Department may include a provision in a readjusted lease under the Mineral Leasing Act of 1920 requiring the lessee to indemnify the Department for costs arising out of the lessee's activities on that lease.

APPEARANCES: Albert P. Barker, Esq., Boise, Idaho, for the J.R. Simplot Company; Stephanie A. Balzarini, Office of the Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

The J.R. Simplot Company (Simplot) has appealed an October 21, 2005, decision (Decision) by the State Director, Idaho State Office, Bureau of Land Management (BLM), overruling its objections to readjusted phosphate lease IDI-012890 under which it conducts operations at the Smoky Canyon Mine within the Caribou-Targhee National Forest in southeastern Idaho. Simplot's petition for a stay pending our review of the Decision and BLM's request for expedited consideration were granted by orders dated December 8, 2005, and January 24, 2007, respectively.

*BACKGROUND*

Phosphate leases are issued under the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §§ 181-287 (2000). The MLA provides that lands containing phosphate deposits "shall be leased under such terms and conditions as are herein specified." 30 U.S.C. § 211(a) (2000); *see* 30 U.S.C. §§ 181, 182, 184(c) (2000). Significant to the instant appeal, 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 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.

30 U.S.C. § 212 (2000). Consistent with the MLA, section 3(d) of Simplot's lease, effective October 1, 1962, 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 . . . .*

Lease form 4-1110, December 1958 (emphasis added).

The present case originates with a December 20, 2000, notice informing Simplot that BLM intended to readjust its lease, effective October 1, 2002.<sup>1</sup> By decision dated August 29, 2002, BLM issued to Simplot a “Notice of Readjusted Lease,” which included its readjusted lease, and a “Notice to Phosphate Lessee.” Simplot objected to the readjusted lease by letter dated October 29, 2002 (Letter of Objection). BLM responded by notifying Simplot that the readjusted lease was in effect, but the effectiveness of two provisions would be stayed while it evaluated Simplot’s objections. Almost 2 years later and after consultation with the U.S. Department of Agriculture, BLM prepared a revision to Paragraph 12 of the Stipulation for Lands Under Jurisdiction of Department of Agriculture which was incorporated by reference and made a part of the readjusted lease (Stipulation 12), one of the provisions to which Simplot objects. BLM met with Simplot and other phosphate lessees to discuss that revised stipulation on November 23, 2004; Simplot joined in written comments to BLM’s proposed revision on January 12, 2005 (Joint Comment Letter). The Decision responded not only to those comments, but also to other issues raised in Simplot’s Letter of Objection.

On appeal, Simplot challenges Section 12, Section 13,<sup>2</sup> and Stipulation 12 of its readjusted lease. For ease of analysis and understanding, we restate each separately below:

<sup>1</sup> BLM first attempted to readjust this 1962 lease in 1984, but subsequently waived that readjustment. *Cf. Noranda Exploration, Inc.*, 71 IBLA 9, 11 (1983) (notice of readjustment must be timely and occur prior to the end of the lease’s 20-year term).

<sup>2</sup> BLM asserts that “Section 13 is not at issue in this appeal, and will not be addressed.” Response at 4. BLM appears to have overlooked Simplot’s renewal on appeal of its objection to that provision. *See* SOR at 7 n.1.

**Section 12:** INDEMNIFICATION - 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.

**Section 13:** SPECIAL STATUTES - This lease is subject to the Federal Water Pollution Control Act, the Clean Air Act, the Comprehensive Environmental Response, Compensation and Liability Act [(CERCLA)], the Resource Conservation and Recovery Act [(RCRA)], and to all other applicable laws pertaining to exploration activities, mining operations, reclamation, response and restoration. [Citations omitted.]

**Stipulation 12**, as revised and incorporated into Simplot's readjusted lease, states:

Allocation of Response Costs and Natural Resource Damages.

The lessee agrees that it will pay for and/or reimburse the United States for all costs, including but not limited to response costs, and all natural resource damages, resulting from any release or the threat of a release of hazardous substances, pollutants, contaminants, petroleum, or oil on or from the leased area. This paragraph applies to all response costs and natural resource damages based upon, arising out of, or in any way relating to, activities undertaken by the lessee, its agents, employees, contractors, successors or assigns, on the leased area on or after the effective date of this Lease Readjustment, and includes but is not limited to, costs and damages accruing to the United States relating to such activities. Provided, however, that nothing herein shall be deemed to be a waiver of the United States' right to assert and recover any response costs and natural resource damages from lessee or any other potentially responsible persons or entities, for any release or the threat of a release of hazardous substances, pollutants, contaminants, petroleum, or oil occurring, caused by or arising out of the activities of the lessee, its agents, employees, contractors, successors or assigns, prior to the date of this Lease Readjustment. Records on file with the BLM, including the Annual Operation maps submitted by the lessee, will be used to identify the activities to which this paragraph applies. Provided, however, that the lessee's agreement to pay all such costs shall not affect the lessee's rights to seek contribution for those costs from entities other than the United States; and that the lessee does not waive its right to assert that costs incurred by the

United States are inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. Part 300. Terms and phrases used in this paragraph shall carry the same meaning as set forth by 42 U.S.C. § 9601, to the extent they are defined therein.

Environmental Assessment Upon Application For Relinquishment. At the time application is made for the relinquishment of all or a portion of the leased area, the lessee shall provide to the Authorized Officer, at lessee's expense, a Phase II, American Society for Testing and Materials (ASTM) Environmental Site Assessment (E1903-97; 2002 or latest version), or an equivalent report (as determined by the Authorized Officer), documenting existing site conditions. Prior to the submission of the Phase II Environmental Site Assessment, the lessee shall provide a proposed work plan, including a schedule, for such Site Assessment to the Authorized Officer. Upon approval of the work plan by the Authorized Officer the lessee shall complete the Site Assessment. To the extent the Authorized Officer determines that further investigation of existing site conditions is necessary prior to relinquishment acceptance, the lessee shall be responsible for such further assessment.

#### ANALYSIS

[1] As an initial matter, the Board agrees with BLM that the Department has broad authority to change and add provisions to a readjusted lease issued under the MLA. See *Coastal States Energy Co. v. Hodel*, 816 F.2d 502, 505 (10th Cir. 1987); *Rosebud Coal Sales Co., Inc. v. Andrus*, 667 F.2d 949, 951 (10th Cir. 1982); *Gulf Oil Corp.*, 91 IBLA 93, 97-99 (1986); *Consolidation Coal Co.*, 86 IBLA 60, 63-64 (1985), *appeal dismissed per stipulation Consolidation Coal Co. v. Hodel*, Civ. No. 85-361-BLG-JFB (D. Mont. Mar. 25, 1989). We have repeatedly held that this broad authority to readjust a lease must be exercised "in accordance with the proper administration of the lands" and that a lease readjustment is "subject to administrative review to insure that the terms of the adjusted leases comply with the requirements of law and standards of reasonableness; that is, that they do not contain provisions which are unacceptable because they are arbitrary, capricious, or an abuse of discretion." *Sunoco Energy Development Co.*, 84 IBLA 131, 133 (1984) (*Sunoco*), *citing Coastal States Energy Co.*, 70 IBLA 386, 391 (1983), *aff'd*, *Coastal States Energy Co. v. Watt*, 629 F. Supp. 9 (D. Utah 1985), *aff'd*, 816 F.2d 502 (10th Cir. 1987) (*Coastal I*); *see also Mid-Continent Coal & Coke*, 83 IBLA 56, 59 (1984), and cases cited. Although BLM's authority to readjust a coal lease is not qualified under the MLA, 30 U.S.C.

§ 207(a) (2000), its authority to readjust a phosphate lease is expressly limited by the Act and Simplot's phosphate lease, quoted in full above, to a "reasonable" readjustment and a right "reasonably" to readjust that lease. *See Cominco American Inc.*, 26 IBLA 329, 338 (1976) ("[w]e still must determine whether the proposed conditions [of a readjusted phosphate lease] are reasonable"); *see generally James M. Chudnow*, 67 IBLA 360, 362 (1982) (lease terms must "reflect a reasonable means to accomplish a proper Departmental purpose"). Accordingly, the standard to be applied in this case is whether the provisions of Simplot's readjusted phosphate lease are "reasonable," and framed in terms of the parties' burdens, whether Simplot has demonstrated that the provisions it challenges are unreasonable or are otherwise arbitrary, capricious, or an abuse of discretion.

[2] Simplot argues that Section 12 and Stipulation 12 exceed BLM's authority under section 10(a) of the MLA, 30 U.S.C. § 212(a) (2000), and section 3(d) of its lease, contending that they should be read in context as limiting lease readjustment only to economic terms and conditions. SOR at 12-14. While section 10(a) of the MLA and Simplot's lease focus largely on royalties and other economic terms, their lease readjustment provisions, quoted in full above, do not reflect the gloss suggested by Simplot's parsing of words or characterization of their context. We rejected similar arguments in *Coastal States Energy Co.*, 81 IBLA 171, 174 (1984), *appeal dismissed per stipulation Coastal States Energy Co. v. Hodel*, Civ. No. 85-C-665-S (D. Utah Mar. 2, 1988) (*Coastal II*), and *Coastal States Energy Co.*, 94 IBLA 352 (1986), *appeal dismissed per stipulation Coastal States Energy Co. v. Hodel*, Civ. No. 87-C-0293-A (D. Utah Sept. 12, 1989) (*Coastal III*), and so reject Simplot's arguments here. Simply stated, we are unpersuaded that a phosphate lease readjustment can address only royalties and other economic terms and conditions of that lease.

Having dispensed with the preliminaries, we proceed to the main event-- Simplot's several challenges to the reasonableness of including Section 12, Section 13, and Stipulation 12 in its readjusted lease.

### **Section 12**

Simplot claims Section 12 must be set aside because it imposes strict liability. In responding to Simplot's earlier objection that BLM was attempting to impose strict liability through the lease readjustment process, the State Director determined that BLM was not precluded from imposing strict liability through that process and then rejected Simplot's objection to Stipulation 12. Decision at 7-8; *see discussion infra*. Simplot asserts on appeal that BLM is also attempting to impose strict liability under Section 12 of its readjusted phosphate lease. SOR at 1, 4-5, 11-12, 15-19, *citing*

*Coastal II*, *Sunoco*, and *Coastal III*; see Letter of Objection at 3.<sup>3</sup> Rather than eschewing an intent to hold Simplot strictly liable under Section 12, BLM responds that this provision is a general indemnification clause<sup>4</sup> and, in any event, BLM is not precluded from imposing strict liability through the lease readjustment process. Response at 12, 14-15.

We begin with what we have said concerning strict liability and the lease readjustment process. In *Coastal I*, we affirmed BLM's use of readjusted lease section 26, Lessee's Liability to Lessor, which could be read as imposing strict liability, because BLM did not intend that section "to establish a condition of no fault for the United States Government" and because BLM acknowledged that "lessee liability would be limited to equitable or legal remedies." 70 IBLA at 395. We reviewed that same section 26<sup>5</sup> in *Coastal II*, but set it aside and remanded it to "comport with the

<sup>3</sup> BLM contends Simplot is precluded from challenging Section 12 because it did not identify that provision in its objections to the State Director. Response at 11-12. Simplot counters that its challenge is predicated upon BLM's lack of authority unilaterally to impose strict liability through a lease modification, an issue clearly raised in its earlier objections. Reply at 2 n.1. Given Simplot's broad challenge to BLM's authority to unilaterally impose strict liability through the lease readjustment process, we are unpersuaded that a challenge to Section 12 is precluded by Simplot's failure to specifically and separately identify that provision in its Letter of Objection.

<sup>4</sup> BLM asserts that language identical to Section 12 was approved in *Order, Anchor Coal Co., Inc. (On Reconsideration)*, IBLA 87-9, dated Oct. 17, 1988, and that this order overruled *Coastal III*, 94 IBLA at 361. Response at 12. Simplot correctly replies that *Anchor Coal* is not controlling precedent because it is an unpublished order. 5 U.S.C. § 552(a)(2) (2000); *Southern Utah Wilderness Alliance*, 163 IBLA 142, 158 n.12 (2004), citing *Kentucky Resources Council*, 137 IBLA 345, 351 n.5 (1997).

<sup>5</sup> The lessee liability section there at issue provided that:

(a) The lessee shall be liable to the United States for any damage suffered by the United States in any way arising from or connected with the lessee's activities and operations under this lease, except where damage is caused by employees of the United States acting within the scope of their authority.

(b) The lessee shall indemnify and hold harmless the United States from any and all claims arising from or connected with the lessee's activities and operations under this lease.

(c) In any case where liability without fault is imposed on the lessee pursuant to this section, and the damages involved were caused by the action of a third party, the rules of subrogation shall apply in accordance with the law of the jurisdiction where the damages occurred.

*Coastal II*, 81 IBLA at 178. Consistent with our express direction and BLM's intent

(continued...)

intention stated,” noting that “the Board cannot ignore the obvious dichotomy between BLM [disclaiming any intent to impose liability without fault] and the specific language used.” 81 IBLA at 178; *accord Ark Land Co.*, 86 IBLA 153, 163 (1985), *aff’d*, *Ark Land Co. v. Hodel*, Civ. No. 85-313 (D. Wyo. Oct. 1, 1987). In *Sunoco*, we determined that a virtually identical section established an “unacceptable . . . no-fault liability standard for the lessee” and then set that “flawed” section aside and directed BLM to eliminate language which provided that “liability without fault may be imposed upon the lessee.” 84 IBLA at 137-38. *Coastal III* involved four leases, three of which included a general indemnification provision which is identical to Section 12 of Simplot’s readjusted lease. 94 IBLA at 361. Since that provision could subject Coastal to strict liability, we set it aside and remanded these three leases to BLM “to make this provision comport with its intent,” as had been done in both *Sunoco* and *Coastal II*. *Id.*

It is clear from the foregoing that this Board has questioned the appropriateness of imposing strict or no-fault liability on lessees through the lease readjustment process and that our concerns were repeatedly assuaged by BLM’s disclaiming any intent to impose such liability on those lessees. *See Coastal I*, 70 IBLA at 395; *Coastal II*, 81 IBLA at 178; *Sunoco*, 84 IBLA at 138; and *Coastal III*, 94 IBLA at 361. Where ambiguity previously prevailed and a dichotomy existed between the words used and intent expressed by BLM, certainty is now provided--Section 12 is expressly intended by BLM to impose strict or no-fault liability on Simplot.<sup>6</sup> We agree with BLM that the clarity of its intent to impose strict liability causes this case to be distinguishable from our prior precedents which focused on conforming the words used to BLM’s intent of *not* imposing strict liability on its lessees. For the reasons outlined below, however, we echo the view expressed in *Sunoco* that a readjusted lease term which imposes strict liability is “unacceptable” and “flawed.” 84 IBLA at 137.

Simplot recognizes that strict liability can be accepted by a potential lessee under a new lease, but argues that such a provision cannot be imposed upon a lessee

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<sup>5</sup> (...continued)

not to impose strict or no-fault liability on a lessee through lease readjustment, the third part of this section was deleted on remand. *See Coastal States Energy Co.*, 105 IBLA 64, 67 (1988) (*Coastal IV*).

<sup>6</sup> It is for this reason we find our order in *Anchor Coal (On Reconsideration)* to be less than helpful to a proper resolution of this case. *See* n.4. The reasoning of that order returned the issue to where it had been after *Coastal I* (but before *Coastal II*): a liability provision is reasonable and acceptable provided there is no intent to impose strict liability on a lessee and such lessee is exposed only to liability for legal and equitable remedies. Here, however, a very different issue is presented.

through a unilateral lease readjustment 40 years after that lease was first issued. SOR at 19 n.5, 22. We have held that BLM may readjust lease terms abrogating existing contractual rights and that “a lessee has only one existing right: the right to accept or reject the continuation of [its] lease beyond a 20-year period under such reasonable terms as the Secretary deems proper.” *Coastal II*, 81 IBLA at 174. The issue here presented is whether it is “reasonable” for BLM to impose strict liability through the lease readjustment process in the face of a lessee’s objection and unwillingness to accept potentially unlimited liability for the acts or omissions of BLM and without regard to any legal or equitable liability Simplot may have to BLM or others.

A general indemnity clause is interpreted strictly against its proponent but may result in strict liability where that intent is clear to the parties. 41 Am. Jur. 2d, Indemnity §§ 7, 10, 13, 14. Where such clarity is provided, the terms of a general indemnity or hold harmless provision will be given effect such that the lessor/indemnitee will be held harmless for its expenses and attorneys’ fees in defending against a covered claim, as well as any expenditures necessary to resolve that claim (e.g., damages). *Id.* at §§ 29, 30. A claim need not be based on any direct or indirect liability of the lessee/indemnitor to the claimant and can be predicated solely upon the lessor’s acts and omissions, including its negligence, so long as it is a covered claim. *Id.* at §§ 18, 19. Section 12 of Simplot’s readjusted lease identifies a covered claim as any claim “arising out of the lessee’s activities and operations under this lease” and requires Simplot to hold the United States harmless “from any and all claims.”

[3] Absent a contrary intent being expressed by BLM in response to Simplot’s strict liability concerns under Section 12, this section may well impose strict or no fault liability upon Simplot. *See Coastal III*, 94 IBLA at 361. We simply do not believe it would be reasonable for BLM to be held harmless for its mistakes or for Simplot to be held liable to BLM for claims over which it has or had no control, culpability, or responsibility. Accordingly, we hold that BLM cannot impose strict or no-fault liability under Section 12 of Simplot’s readjusted phosphate lease, reverse the State Director to the extent he determined generally that BLM can impose strict liability through the lease readjustment process, Decision at 7, and note that BLM must either interpret and apply Section 12 consistent with this decision or revise that provision.

### **Section 13**

Simplot objected to Section 13 because its references to CERCLA and RCRA were “unnecessary” and “troubling.” Letter of Objection at 7. It claimed that RCRA is not meaningful because the “Bevill Amendment” excludes wastes generated from the extraction and beneficiation of minerals from regulation as hazardous wastes. *Id.* The State Director overruled this objection:

The lease would be subject to CERCLA and RCRA without a specific reference to them in this section of the lease. Nevertheless, BLM believes that these two laws should be included for the purpose of expressly setting forth statutory requirements that are, by experience, particularly relevant to mining activities. While the Bevill Amendment does exempt wastes resulting from the extraction and beneficiation of ore (40 C.F.R. § 261.4(b)(7)) [<sup>7</sup>], Simplot's facilities include a shop area which likely generates RCRA wastes from the servicing of Simplot's mining equipment.

Decision at 14. Because BLM does not claim that Section 13 makes Simplot subject to any of the statutes listed in that section, it is informational only. While we agree with Simplot that the references to CERCLA and RCRA are unnecessary, as is this entire section, we perceive no harm to Simplot by including this informational Section 13 in its readjusted lease. Accordingly, we find it is neither unreasonable, arbitrary, capricious, nor an abuse of discretion to identify "special statutes" of concern to BLM and, therefore, affirm the Decision's overruling of Simplot's objection to Section 13.

### **Stipulation 12**

Simplot presented a variety of objections to Stipulation 12. Most fundamentally, it objected to what it perceives to be the imposition of strict liability and an alteration of the financial responsibility system established under CERCLA. Letter of Objection at 3-4; Joint Comment Letter at 1-3. Simplot reasserts these claims on appeal and contends that the stipulation violates 42 U.S.C. § 9607(e)(1) (2000), and is contrary to Congressional intent in waiving Federal sovereign immunity, 42 U.S.C. § 9620 (2000). SOR at 8 n.2, 20-22. The Government counters that Stipulation 12 merely allocates costs, does not and "is not intended to impose or

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<sup>7</sup> More precisely, CERCLA excludes from the definition of a "hazardous substance" any hazardous waste identified under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-87 (2000), the regulation of which has been suspended by Congress. 42 U.S.C. § 6901(14)(c) (2000). The Bevill Amendment exempts "[s]olid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore" until the completion of studies. 42 U.S.C. § 6921(b)(3)(A)(ii) (2000).

shift liability for environmental damages to the company,”<sup>8</sup> and is not only consistent with 42 U.S.C. § 9607(e)(1) (2000), but also in the public interest for the proper administration of public lands. Response at 14, 16; *see* Decision at 5-7, 8, 10.

It must be noted at the outset that CERCLA is an exceedingly complex piece of legislation. *See Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 859, 883 (9th Cir. 2001), *cert. denied*, 535 U.S. 971 (2002) (“neither a logician nor a grammarian will find comfort in the world of CERCLA”). For the purpose of reviewing Stipulation 12, the critical feature of CERCLA is that section 107(a), 42 U.S.C. § 9607(a) (2000), imposes strict, joint, and several liability on four identified groups, collectively known as “potentially responsible parties” (PRPs). *Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coating 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, Ltd. v. Unocal Corp.*, 270 F.3d at 870-71. Congress amended CERCLA in 1980<sup>9</sup> to waive Federal sovereign immunity by providing that:

Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under sections 9606 and 9607 of this title.

42 U.S.C. § 9620(a)(1) (2000). *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 10 (1989). The scope of this waiver is co-extensive with CERCLA’s substantive liability standards. *See United States v. Shell Oil Co.*, 294 F.3d at 1053; *East Bay Municipal Utility District v. United States Department of Commerce*, 142 F.3d 479, 481 (D.C. Cir. 1998); *FMC Corp. v. United States Department of Commerce*, 29 F.3d 833, 838-42 (3rd Cir. 1994). In simple terms, this waiver of sovereign immunity makes a Federal entity liable under section 107(a) if it was the owner or operator of a facility, arranged for the disposal or treatment of hazardous substances, or accepted hazardous waste for treatment or disposal. *See* 42 U.S.C. § 9601(9), (14), (20), (21) (2000).

<sup>8</sup> This expression of BLM intent is to be juxtaposed with the broad, strict liability standard espoused in and expressed by BLM with respect to Section 12. *See* discussion *supra*.

<sup>9</sup> An earlier version had been included as § 107(g) of CERCLA. Pub. L. No. 96-510, 94 Stat. 2767, 2783 (1980).

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 from any liability under this section.

42 U.S.C. § 9607(e)(1) (2000); *see Harley-Davidson v. Minstar, Inc.*, 41 F.3d 341 (7th Cir. 1994), *cert. denied*, 514 U.S. 1036 (1995). By its terms, Stipulation 12 does not shift liability but imposes an obligation on Simplot to indemnify the Government for certain costs. As explained by the Government, this provision does not address costs attributable to BLM's potential liability as a CERCLA operator, arranger, or acceptor of hazardous substances or wastes. Rather, this stipulation is limited to allocating costs between itself as a potentially responsible owner/lessor of the land and Simplot as a potentially responsible operator/lessee of that same land.

A fair reading of Stipulation 12, as further clarified by the Government, leads to the conclusion that this provision is permitted under CERCLA. We are unpersuaded that BLM's reliance upon 42 U.S.C. § 9607(e)(1) (2000) is contrary to Congressional intent in waiving sovereign immunity. Simplot has cited no legislative history or provided any other support for suggesting that Congress intended to preclude the Federal agencies from entering into hold harmless or indemnification agreements, as may be entered into by other PRPs. To the contrary, this waiver of sovereign immunity expressly states that the Federal Government "shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity." 42 U.S.C. § 9620(a)(1) (2000). We, therefore, reject appellant's claims that Stipulation 12 is inconsistent with or contrary to CERCLA<sup>10</sup> and proceed to consider whether Stipulation 12 is unreasonable, arbitrary, capricious, or an abuse of discretion.

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<sup>10</sup> Simplot separately objected to Stipulation 12 because it could adversely affect Simplot's right to seek contribution from others under CERCLA to the extent the costs incurred by the Government and indemnified by Simplot are inconsistent with the National Contingency Plan (NCP). Letter of Objection at 4-5. The revised stipulation addressed these concerns by adding that "the lessee does not waive its right to assert that costs incurred by the United States are inconsistent with the [NCP]." Although Simplot "reserved" these objections for future briefing, SOR at 8 n.2, no such briefing has been provided.

[4] To the extent Stipulation 12 allocates CERCLA costs between PRPs, as permitted by 42 U.S.C. § 9607(e)(1) (2000), we find it was reasonable to include it in Simplot's readjusted phosphate lease. Stipulation 12 is not limited to costs arising out of the release of CERCLA hazardous substances, but includes costs "resulting from any release or threatened release of . . . pollutants, contaminants, petroleum, or oil on or from the leased area." The stipulation goes on and limits costs subject to allocation to those arising out of "activities undertaken by the lessee," as determined by "records on file with BLM." Because these provisions render the scope of Stipulation 12 to be far more limited than Section 12, Stipulation 12 avoids the difficulties presented by that section's broad language and BLM's intent that it impose strict, no-fault liability on Simplot. *See* discussion *supra*. As the protector of the public lands entrusted to its care and "in accordance with the proper administration of the lands," we find no error in BLM requiring Simplot to reimburse the Government for its costs in responding to releases arising out of Simplot's activities on its Federal lease, as determined by BLM records (including Simplot's Annual Operation maps). *See Sunoco*, 84 IBLA at 133; *cf. Cominco American Inc.*, 26 IBLA 329, 338-39 (1976). We, therefore, reject Simplot's claim that Stipulation 12 is unreasonable, arbitrary, capricious, or an abuse of discretion and affirm BLM's decision that this stipulation was properly included in Simplot's readjusted lease.<sup>11</sup>

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<sup>11</sup> Simplot separately objected to the second paragraph of Stipulation 12 because it would present a problem if a relinquished lease had never been mined. Joint Comment Letter at 3-4. BLM rejected language proposed by Simplot, but it added a new sentence at the end of that paragraph which states:

If there has been no ground disturbing activity on the lease area proposed for relinquishment, the lessee may provide the BLM Authorized Officer with an ASTM Phase I Environmental Site Assessment, ASTM Practice E 1527 (2000 or most recent edition) or an equivalent report (as determined by the BLM Authorized officer), with a request that the BLM Authorized Officer waive the requirement for a Phase II Environmental Site Assessment.

Decision at 13, 17. Simplot notes this addition, SOR at 10-11, but has apparently abandoned its objections because no argument is here presented which challenges this new sentence or any aspect of that paragraph.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR § 4.1, the October 21, 2005, decision of the State Director of the Idaho State Office is set aside with respect to Section 12 but affirmed as to Section 13 and Stipulation 12 of Simplot's readjusted lease.

\_\_\_\_\_/s/\_\_\_\_\_  
James K. Jackson  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Roberts  
Administrative Judge