NU-WEST INDUSTRIES, INC.

192 IBLA 143                Decided January 18, 2018
NU-WEST INDUSTRIES, INC.

IBLA 2016-181, et al. \hspace{1cm} Decided January 18, 2018

Appeals from Bureau of Land Management decisions responding to a lessee’s objections to readjustments to the lessee’s phosphate lease terms and conditions. IDI-011775, IDI-014664, IDI-011877, IDI-013215, IDI-015939A, IDI-0678, IDI-015940, IDI-015035.

Appeals consolidated; set aside and remanded in part; affirmed in part.

1. Phosphate Leases and Permits: Leases

BLM issues phosphate leases under the Mineral Leasing Act, which provides that lands containing phosphate deposits “shall be leased under such terms and conditions as are herein specified.” Phosphate leases are issued for an initial 20-year term. At the end of each 20-year period, BLM has broad authority to reasonably readjust a phosphate lease under the MLA, unless otherwise provided by law.

2. Phosphate Lease and Permits: Leases

A phosphate lease readjustment term requiring the lessee to broadly indemnify and hold harmless the United States from any and all claims arising out of the lessee’s activities and operations under the lease is not reasonable under the Mineral Leasing Act when the language of the term imposes strict liability on the lessee under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), even where BLM states its intent to interpret that term in a way that does not establish a condition of no fault for the United States.
3. **Phosphate Leases and Permits: Leases**

   A phosphate lease readjustment term under which the lessee is responsible for response costs relating to the lessee’s activities on the leased area, including costs and damages accruing to the United States related to such activities, does not violate CERCLA because it does not shift liability, and constitutes a reasonable lease readjustment under the Mineral Leasing Act.

4. **Phosphate Leases and Permits: Leases**

   A phosphate lease readjustment term that requires the lessee to take various measures deemed necessary by BLM to ensure that lease operations minimize risk of environmental harm to the public lands and its resources does not violate the delegation of the President’s CERCLA authority related to enforcement orders for “imminent and substantial endangerment” requiring abatement.

**APPEARANCES:** Zach C. Miller, Esq., and Tim Canon, Esq., Denver, Colorado, for Nu-West Industries, Inc.; Scott W. Hulbert, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, Boise, Idaho, for the Bureau of Land Management.

**OPINION BY ADMINISTRATIVE JUDGE SOSIN**

Nu-West Industries, Inc. (Nu-West), appeals from an April 27, 2016, decision of the Idaho State Office, Bureau of Land Management (BLM), rejecting Nu-West’s objections to certain readjustments to the terms and conditions of Federal phosphate lease IDI-011775. We granted BLM’s motion for expedited consideration of Nu-West’s appeal because a ruling in this appeal will assist BLM in resolving identical pending objections in approximately 16 other phosphate lease readjustment cases.¹

Nu-West has also appealed from six additional decisions issued by BLM rejecting Nu-West’s objections to identical readjustments to the terms and conditions of its other phosphate leases. Nu-West has filed appeals of the following BLM decisions:

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¹ Order Granting Motion to Expedite Review (Sept. 20, 2016).
1. BLM decision issued on April 27, 2016, rejecting Nu-West’s objections to readjustments for Lease IDI-014664 (Docketed as IBLA 2016-201);

2. BLM decision issued on April 27, 2016, rejecting Nu-West’s objections to readjustments for Leases IDI-011877 & IDI-013215 (Docketed as IBLA 2016-202);

3. BLM decision issued on June 10, 2016, rejecting Nu-West’s objections to readjustments for Lease IDI-015939A (Docketed as IBLA 2016-231);

4. BLM decision issued on March 20, 2017, rejecting Nu-West’s objections to readjustments for Lease IDI-0678 (Docketed as IBLA 2017-180);

5. BLM decision issued on March 20, 2017, rejecting Nu-West’s objections to readjustments for Lease IDI-015940 (Docketed as IBLA 2017-181); and

6. BLM decision issued on March 20, 2017, rejecting Nu-West’s objections to readjustments for Lease IDI-015035 (Docketed as IBLA 2017-182).

Because the facts and legal issues in each of these appeals are similar — Nu-West challenges the same readjusted language in each of its appeals — we consolidate IBLA 2016-181 with IBLA 2016-201, 2016-202, 2016-231, 2017-180, 2017-181, and 2017-182 for final disposition. For ease of understanding, unless otherwise stated, specific facts, such as dates, and citations to pleadings, refer to those in the record for IBLA 2016-181.

**SUMMARY**

BLM issues phosphate leases under the Mineral Leasing Act (MLA) for an initial 20-year term. At the end of each 20-year period, BLM has broad authority to prescribe reasonable readjustment of the terms and conditions of a phosphate lease, unless otherwise provided by law. Here, BLM proposed various readjustments to phosphate leases held by Nu-West, and rejected Nu-West’s objections to those readjustments between 5 and 11 years after Nu-West filed its objections.

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2 43 C.F.R. § 4.404.
Because nothing in the MLA, BLM's implementing regulations, or the Administrative Procedure Act (APA) requires BLM to respond to a lessee's objections to lease readjustments within any particular time frame, we reject Nu-West's argument that BLM's delay in issuing its decisions violates the law. Moreover, the section of the APA instructing courts to compel agency action unreasonably delayed does not apply to this Board.

We next address Nu-West's allegations that the lease readjustments at issue are impermissible because they impose strict liability on Nu-West in violation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Under CERCLA's express waiver of sovereign immunity, the United States is liable in the same manner as any non-governmental entity as an owner and operator of a facility at which hazardous substances are disposed. As a consequence, BLM is prohibited under CERCLA from shifting its liability to another liable party. One of the lease readjustments at issue is a broad indemnification clause that this Board has previously held to be "unacceptable and flawed." Although BLM has continued to use this language and interpret it so as not to impose strict liability on its lessees, we now find that the dichotomy between the language and BLM's intent necessitates that we set aside and remand to BLM its decisions to include this broad indemnification clause in its readjusted leases. But we uphold BLM's decisions with respect to the other readjusted terms since we find none improperly shifts liability under CERCLA or is otherwise inconsistent with CERCLA's requirements.

BACKGROUND

A. BLM's Authority to Reasonably Readjust Phosphate Lease Terms and Conditions

[1] BLM issues phosphate leases under the MLA, which provides that lands containing phosphate deposits "shall be leased under such terms and conditions as are herein specified."3 Phosphate leases are issued for an initial 20-year term.4 At the end of each 20-year period, BLM has broad authority to readjust a phosphate lease under the MLA: The bureau may prescribe "reasonable readjustment of the terms and conditions [of a phosphate lease] . . . unless otherwise provided by law . . . ."5

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4 Id.
5 Id.; see J.R. Simplot Co., 173 IBLA 129, 133 (2007); Gulf Oil Corp., 91 IBLA 93, 97-99 (1986); Sunoco Energy Development Co., 84 IBLA 131, 133 (1984); Coastal States Energy Co., 81 IBLA 171, 174 (1984), stipulated dismissal,
B. BLM’s Proposed Readjustments to Nu-West’s Phosphate Lease
IDI-011775 and Nu-West’s Objections

Effective August 1, 1965, BLM issued Phosphate Lease, whose current lease number is IDI-011775, to the original lessee, FMC Corporation. Lease IDI-011775 consists of 560 acres of private surface and Federal minerals in southeast Idaho. Under Section 3(e) of the Lease, the Department of the Interior reserved the right to “reasonably readjust” the terms and conditions of the Lease at the end of the 20th year, and thereafter at the end of each succeeding 20-year period. In August 1986, BLM readjusted the Lease for the first time.

FMC subsequently assigned the Lease to Astaris Productions, LLC. On August 11, 2003, BLM issued to Astaris a Notice of Intent to Readjust the Lease. On November 18, 2004, BLM approved the assignment of 100% of Astarisis’s record title interest in the Lease to Nu-West.

On July 18, 2005, BLM sent to Nu-West a Notice of Readjusted Lease, which included a Notice to Phosphate Lessee, with proposed readjusted lease terms. BLM gave Nu-West 60 days from receipt of the Notice to object to the lease readjustments. Nu-West timely objected to the proposed readjustments.

In the April 27, 2016, decision now on appeal, BLM rejected each of Nu-West’s objections. In decisions issued on April 27, 2016, June 10, 2016, and March 20, 2017, BLM similarly rejected each of Nu-West’s objections to the readjustments proposed for Nu-West’s other phosphate leases at issue in this consolidated appeal.
C. The Lease Readjustments at Issue

In each of its appeals, Nu-West objected to the following readjusted terms of the phosphate leases:

1. Section 6 (Damages to Property and Conduct of Operations), paragraph 3, sentences 2 & 3

Lessee shall take reasonable measures deemed necessary by lessor to accomplish the intent of this lease term. Such measures may include, but are not limited to, modification to proposed siting or design of facilities, timing of operations, and specification of interim and final reclamation procedures.

2. 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.

3. Section 14 (Special Stipulations)

(a) 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.

(b) 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.

4. Notice to Phosphate Lessee, paragraphs 10 & 11

¶10. As part of any mine plan submitted for approval, the lessee will be required to provide details outlining the procedures for disposing of solid and other wastes generated from all activities conducted within the lease. All waste disposal must be in accordance with established laws and regulatory requirements.

¶11. Selenium and other toxic substances may require special treatment, handling, or mitigation measures that are not currently standard mining practices in the southeast Idaho phosphate field. Mining and reclamation plans submitted need to address these concerns so that environmental effects can be analyzed in the appropriate [National Environmental Policy Act] documents.

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DISCUSSION

A. Standard of Review and Burden of Proof

As noted above, BLM has broad authority to readjust phosphate leases issued under the MLA.16 This Board has stated that, in a lease readjustment, "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."17 Thus, under the MLA, any readjustment must comport with the law and be reasonable.18 As we have explained, BLM must exercise its authority to readjust a lease in compliance "with the requirements of law and standards of reasonableness" such that a lease does not contain provisions that "are unacceptable because they are arbitrary, capricious, or an abuse of discretion."19 It is therefore an appellant's burden to demonstrate that the readjusted terms it challenges "are unreasonable or are otherwise arbitrary, capricious, or an abuse of discretion."20

B. Nu-West's Arguments on Appeal

On appeal, Nu-West argues that each of BLM's decisions rejecting Nu-West's objections to its Lease readjustments violates the APA because of the delay between Nu-West's objections and BLM's decision.21 Nu-West also argues that each of BLM's decisions violates CERCLA22 in numerous respects.

We turn first to Nu-West's argument about delay.

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16 J.R. Simplot Co., 173 IBLA at 133; Gulf Oil Corp., 91 IBLA at 97-99; Sunoco Energy Development Co., 84 IBLA at 133; Coastal States Energy Co., 81 IBLA at 174.
17 Coastal States Energy Co., 81 IBLA at 174.
18 See J.R. Simplot Co., 173 IBLA at 134.
19 Sunoco Energy Development Co., 84 IBLA at 133; see Cominco American Inc., 26 IBLA 329, 338 (1976) ("We still must determine whether the proposed conditions [of a readjusted phosphate lease] are reasonable.").
20 J.R. Simplot Co., 173 IBLA at 134.
C. BLM’s Delay in Issuing its Decision Does Not Violate the APA

Nu-West complains of the 11-year delay between the company’s objections to its readjusted Lease, and BLM’s decision rejecting those objections, in the case of Lease IDI-011775, and delays ranging from 5 to 10 years in its other appeals. Nu-West argues that these delays violate the APA and render BLM’s decisions unlawful.\(^{23}\) Nu-West argues that under the APA, agencies have a duty to decide issues presented to them within a reasonable time, and reviewing courts are obligated to “compel agency action unlawfully withheld or unreasonably delayed.”\(^{24}\) Citing an unpublished decision in which the U.S. District Court for the District of Columbia held that BLM’s suspension of a mineral lease for over 29 years constituted “unreasonable delay” under the APA,\(^{25}\) Nu-West states that BLM’s 11-year delay in issuing its decision is also in violation of the APA “and has not been and cannot be justified.”\(^{26}\) Nu-West further contends that the delay has been prejudicial to it because “many knowledgeable employees and representatives of Nu-West at the time it filed its objections in 2005 are no longer with the company . . . .”\(^{27}\) Nu-West makes similar arguments with respect to BLM’s other decisions.\(^{28}\)

But neither the MLA nor BLM’s implementing regulations require BLM to respond to a lessee’s objections to lease readjustments within any particular time frame. While the regulations impose a 60-day time period in which a lessee must object to proposed lease readjustments, they do not specify a time for when BLM must respond to any objections, stating only that BLM “will issue a decision in response.”\(^{29}\) BLM’s delay in issuing its decision did not violate the law applicable to phosphate lease readjustments.

In addition, Nu-West’s reliance on the APA is misplaced. Nu-West cites to the APA’s provision requiring Federal courts to “compel agency action unlawfully withheld or unreasonably delayed,”\(^{30}\) but because BLM issued its decision for Lease IDI-011775 on April 27, 2016, and decisions for the other leases on June 10, 2016, and March 20, 2017, there are no decisions left for either this Board or a court to

\(^{23}\) Notice of Appeal and Statement of Reasons, IBLA 2016-181 (SOR) at 5-6.
\(^{24}\) Id. at 5 (citing 5 U.S.C. § 555(b) (2012) and quoting 5 U.S.C. § 706(1) (2012)).
\(^{26}\) SOR at 5.
\(^{27}\) Id. at 6.
\(^{28}\) SOR IBLA 2016-201 at 5-6; SOR IBLA 2016-202 at 5-6; SOR 2016-231 at 6-7; SOR IBLA 2017-180 at 6-7; SOR IBLA 2017-181 at 6-7; SOR IBLA 2017-18 at 6-7.
\(^{29}\) 43 C.F.R. § 3511.26(a).
compel. Furthermore, this provision of the APA applies to Federal courts, not to administrative tribunals like the Board.\textsuperscript{31}

Accordingly, we reject Nu-West’s argument that this Board “strike BLM’s Decision[s] as untimely and unlawful under the APA.”\textsuperscript{32}

\textbf{D. Nu-West’s CERCLA Arguments}

At the heart of Nu-West’s appeals is its argument that through the Lease readjustments, BLM has unilaterally imposed strict liability on the company for the impacts of all operations under its phosphate Lease, in violation of CERCLA.\textsuperscript{33}

Nu-West asserts that each of the Lease adjustments runs afoul of CERCLA’s express waiver of sovereign immunity in Section 120(a), which makes the United States liable under Section 107(e) of the statute as an owner and operator of a facility at which hazardous substances were disposed, in the same manner as any non-governmental entity.\textsuperscript{34} Nu-West asserts that BLM’s readjustments to its phosphate Leases are an “attempt to improperly use the unilateral nature of the lease readjustment process to evade the potential CERCLA liability purposely created by the Section 120 provisions.”\textsuperscript{35}

More specifically, Nu-West’s primary argument is that the readjusted language in Sections 12 (Indemnification) and 14(a) (Allocation of Response Costs and Natural Resources Damages) improperly imposes strict liability on Nu-West in violation of CERCLA.\textsuperscript{36} Nu-West further argues that the readjusted language in Section 14(a) also violates Nu-West’s right to contribution under CERCLA.\textsuperscript{37} Nu-West also argues that other readjusted terms of the Lease – several sentences in Sections 6 (Damages to Property and Conduct of Operations), Section 14(b)...

\textsuperscript{32} SOR at 6.
\textsuperscript{33} 42 U.S.C. §§ 9601-9675 (2012); United States v. Bestfoods, 524 U.S. 51, 55 (1998) (“CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites.”) (quoting Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994)).
\textsuperscript{34} See 42 U.S.C. §§ 9607(a) (2012) (liability extends to, among others, “the owner and operator” of a facility and to “any person who ... arranged” for the transport or disposal or treatment of hazardous substances), 9620(a)(1) (2012) (United States’ waiver of sovereign immunity).
\textsuperscript{35} SOR at 17.
\textsuperscript{36} Id. at 6-13.
\textsuperscript{37} Id. at 18-19 (citing 42 U.S.C. § 9613(h) (2012)).
(Environmental Assessment Upon Application for Relinquishment), and paragraphs 10 and 11 of the Notice to Phosphate Lessee – violate CERCLA because they constitute enforcement actions that require concurrence by the U.S. Environmental Protection Agency (EPA).38

We address these arguments below.

1. The Indemnification Clause in Section 12 Is Unreasonable Because Its Language Does Not Comport with BLM’s Intent

Nu-West argues that Section 12 of the readjusted Leases, the indemnification clause, is unlawful under CERCLA because it imposes strict liability on Nu-West, and this Board has already ruled that this exact clause is unreasonable.39

Nu-West is correct that we have previously addressed this same indemnification clause in other cases involving challenges to BLM phosphate lease readjustments. In J.R. Simplot Company, we concluded that this same clause was “unacceptable and flawed” because it would not be reasonable “for BLM to be held harmless for its mistakes or for [the lessee] to be held liable to BLM for claims over which it has or had no control, culpability, or responsibility.”40 We therefore held that “BLM cannot impose strict or no-fault liability under Section 12 . . . .”41 But in J.R. Simplot Company, we did not strike the offending language. Instead, we held that “BLM must either interpret and apply [that language] consistent with [the Board’s] decision or revise that provision.”42

In response to the Board’s decision in J.R. Simplot Company, BLM issued Instruction Memorandum No. 2008-096, specifying that BLM will not “use an indemnification provision that was, or will be, added to a solid mineral lease in a lease readjustment to impose liability on the lessee for damages caused by the BLM’s actions” and that BLM’s policy “is not to treat the indemnification provision as a ‘strict liability’ provision.”43 In the IM, BLM explained that, consistent with

40 J.R. Simplot Co., 173 IBLA at 137.
41 Id.
42 Id.
43 IM No. 2008-096, Interpretation of “general indemnification” provision proposed for inclusion during lease readjustment for solid mineral leases following the
the Board's ruling, BLM would not interpret and apply the indemnification provision "so as to require the lessee to hold the BLM harmless for damages caused by the BLM's actions. The indemnification provision should not be interpreted or applied to hold solid mineral lessees liable for claims over which the lessees have or had no control, culpability, or responsibility."\(^{44}\)

In reliance on the Board's ruling in *J.R. Simplot Company* and its IM, BLM has continued to include the language of Section 12 in readjusted phosphate leases, but is interpreting that language so as not to impose strict liability on lessees. This is what BLM did in the decisions now on appeal: BLM included Section 12 as a readjusted term of Nu-West's phosphate leases, and, in rejecting Nu-West's objection to that readjusted term, BLM explained that it was acting consistent with the *J.R. Simplot Company* decision and the IM.\(^{45}\) BLM therefore argues on appeal that its approach should be upheld, stating:

> By developing this policy [referring to the IM], BLM is complying with the IBLA's mandate with respect to the scope of the coverage of Section 12. When answering an objection to Section 12 that alleges it imposes strict liability, BLM memorializes this policy by attaching the IM to the decision. As a result of IBLA's decision in *J.R. Simplot Company*, therefore, Section 12 remains a general indemnity provision, appropriate for inclusion in readjusted leases.\(^{46}\)

While we continue to agree with our determination in *J.R. Simplot Company* that the plain language of Section 12 "may well impose strict or no fault liability" upon a lessee in violation of CERCLA, we find that circumstances now dictate a different resolution. As we noted above, we granted expedited review of this matter because, in addition to the appeals consolidated for purposes of this decision, BLM currently has before it numerous other objections to its inclusion of Section 12 in other readjusted phosphate leases. If the Board were to follow its approach in *J.R. Simplot Company*, and uphold BLM's use of Section 12 in this appeal based on BLM's intent to interpret Section 12 so as not to improperly impose strict liability upon Nu-West, we can see no end to the cycle of objections and appeals that is now occurring. In other words, BLM will continue to include Section 12 in readjusted phosphate leases, lessees will continue to object, BLM will continue to reject those objections based on our previous ruling in *J.R. Simplot Company* and Bureau policy, and lessees will continue to appeal those decisions to the Board. At the time of our

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\(^{44}\) Id. at 2.

\(^{45}\) Decision at 5.

\(^{46}\) Answer at 10.
decision in *J.R. Simplot Company*, we could not have predicted the proliferation of objections and potential appeals that has occurred and that has placed significant burdens on the administrative adjudicatory process. The gap between the language in Section 12 (imposing strict liability) and BLM's interpretation and application of that language (not imposing strict liability) has created unnecessary confusion and a resulting burden on BLM, its lessees, and this Board.

[2] We conclude, therefore, that the better course at this time is to act consistent with the Board's previous case law addressing lease readjustments challenged as improperly imposing strict liability. In *Coastal States Energy Company*, for example, a coal lessee objected to an indemnification clause in its readjusted lease almost identical to the clause objected to by Nu-West. On appeal before the Board, BLM argued that it did not intend for the clause to impose strict liability. But we held that we could not "ignore the obvious dichotomy between BLM's declared intention and the specific language used," and required BLM to revise the clause to comport with the bureau's intention. Similarly, in *Ark Land Company*, BLM again argued that this same indemnification clause was "not intended to establish a condition of no fault for the United States Government," and the Board again set aside BLM's decision to include such broad indemnification language because of "the obvious dichotomy between BLM's declared intention and the specific language used."~

Guided by these decisions, and by the persistent appeals that have resulted from BLM's insertion of Section 12 into readjusted phosphate leases, we find that there is a dichotomy between the language of Section 12 and BLM's intent in applying that language in Nu-West's readjusted Leases. Rather than leave this language intact, as we did in *J.R. Simplot Company*, we think the better course now is to strike Section 12 as unreasonable because it does not comport with BLM's intent. In order to resolve this dichotomy and the resulting confusion and proliferation of objections and appeals, we set aside and remand to BLM its decisions to include readjusted Section 12 in Nu-West's phosphate Leases.

*2. The Cost Allocation Provision in Section 14(a) Does Not Improperly Impose Strict Liability on Nu-West*

We turn now to Nu-West's first objection to Section 14(a) of its readjusted Leases. Section 14(a) allocates the costs of remediating hazardous substances under CERCLA, as well as certain substances exempt from CERCLA, i.e.,

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47 81 IBLA 171.
48 Id. at 178.
50 Id. at 163 (quoting *Coastal States Energy Co.*, 81 IBLA at 178).
petroleum and oil. It provides that Nu-West will pay for or reimburse the United States for all response costs related to the release of hazardous and other substances from activities undertaken by Nu-West on its Leases, including “costs and damages accruing to the United States relating to such activities.”

Nu-West asserts Section 14(a) improperly imposes strict liability on the company and relieves BLM of its liability under CERCLA. According to Nu-West, the cost allocation provision is an improper attempt to contractually place the entire financial burden for any environmental response actions relating to the leased lands on Nu-West, regardless of fault or statutory liability.

In support of its argument, Nu-West first states that BLM’s imposition of Section 14(a) in its readjusted Leases is inconsistent with an Idaho District Court decision involving other Nu-West phosphate leases within the same watershed as the leases now at issue. In that case — Nu-West Mining, Inc. v. United States — Nu-West sued BLM under CERCLA, seeking to hold the Government liable for the costs of clean-up of selenium contamination at four phosphate mine sites leased to, and operated by, Nu-West. The District Court ruled in Nu-West’s favor. It explained that Section 120(a) of CERCLA contains an express waiver of the sovereign immunity of the United States, and therefore, because the United States qualified as an owner, arranger, and operator of the waste disposal sites, it was liable for the costs of remediating the selenium contamination.

Nu-West states that the Idaho District Court decision “confirmed that the U.S. can incur CERCLA liability as a result of its ownership and its activities directing operations at a federal phosphate lease site in its capacity as lessor.” Nu-West then claims that the Lease readjustments it challenges here improperly ignore BLM’s own liability under CERCLA. Nu-West argues that Section 14(a) of the readjusted Leases “improperly attempts to override the Court’s ruling in the

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51 SOR at 12.
52 Id.
54 Id. at 1089 (“CERCLA’s waiver provision – at 42 U.S.C. § 9620(a)(1) – . . . contain[s] an unambiguous waiver of the sovereign immunity of the Government.”), 1091 (“[T]he Government has waived its sovereign immunity to the full extent of its liability as an operator.”).
55 SOR at 6.
56 Id. at 7.
Nu-West CERCLA case by purporting to provide that any action or inaction by BLM or the U.S., no matter how damaging or egregious, does not change Nu-West's obligations to pay all costs and do whatever the U.S. orders.”

We agree that the Idaho District Court held that because of the waiver of sovereign immunity contained in CERCLA, the United States is liable under that statute as an owner, arranger, and operator of the waste disposal sites at issue in that case. BLM does not dispute this. But the Idaho District Court's decision in Nu-West does not dictate that the cost allocation provision in Section 14(a) of the readjusted leases violates CERCLA. This is because Section 14(a) does not alter or reduce the United States' liability under CERCLA. It deals only with how costs related to activities under the leases will be allocated among potentially responsible parties (PRPs) - i.e., Nu-West and the United States. And while CERCLA prohibits shifting liability between and among liable parties, it expressly contemplates, in Section 107(e)(1), agreements under which such parties can "insure, hold harmless, or indemnify a party to such agreement from any liability under this section." Federal courts have upheld CERCLA cost allocation agreements as permissible for shifting financial loss, while having no effect on a party's ultimate CERCLA liability.

57 Id.  

58 See J.R. Simplot Co., 173 IBLA at 139 (“The scope of this waiver [of sovereign immunity] is co-extensive with CERCLA’s substantive liability standards.”).  

59 Answer at 7 (“The BLM does not dispute the Nu-West holdings.”).  


61 See, e.g., PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 613 (7th Cir. 1998) (“Both companies, as respectively the owner of the polluted site and the former owner who polluted it, are liable under CERCLA . . . . Parties are free, however, to allocate such expenses between themselves by contract.”); Hatco Corp. v. W.R. Grace & Co., 59 F.3d 400, 404 (3rd Cir. 1995) (“Although . . . private [indemnification] agreements cannot nullify a party’s underlying CERCLA liability, they are effective to shift the ultimate financial loss.”); Beazer East, Inc. v. Mead Corp., 34 F.3d 206, 215 (3rd Cir. 1995) (“How [PRPs] apportion their CERCLA liability among themselves does not affect the primary duty they owe the United States to clean up the poisons left to befoul the site both used.”); United States v. Hardage, 985 F.2d 1427, 1433 (10th Cir. 1993) (“The plain meaning of this language is that, although responsible parties may not altogether transfer their CERCLA liability, they have the right to obtain indemnification for that liability.”); Marden Corp. v. C.D.G. Music, 804 F.2d 1454, 1459 (9th Cir. 1986) (“Contractual arrangements apportioning CERCLA liabilities . . . cannot alter or excuse the underlying liability, but can only change who ultimately pays that liability.”).
The Board addressed language identical to that in Section 14(a) in \textit{J.R. Simplot Company}, where we concluded that this cost allocation language "does not shift liability but imposes an obligation on [the lessee] to indemnify the Government for certain costs."\footnote{\textit{J.R. Simplot Co.}, 173 IBLA at 140.} We found that the scope of the cost allocation clause was narrower than the broad indemnification clause we found to be flawed since it limited allocated costs "to those arising out of 'activities undertaken by the lessee,' as determined by 'records on file with BLM.'"\footnote{Id. at 141.} Further, we considered BLM's role as protector of public lands entrusted to its care and concluded that there was no error in BLM requiring the lessee to reimburse the Government for its costs in responding to releases arising out of the lessee's activities on its Federal lease.\footnote{Id.} We therefore found that the provision was permitted under CERCLA and reasonable to include in the readjusted lease.\footnote{Id.} We see no reason here to deviate from our analysis and conclusion in that case.

Nu-West also cites to a Tenth Circuit Court of Appeals decision, \textit{Coastal States Energy Co. v. Hodel},\footnote{816 F.2d 502 (10th Cir. 1987).} in support of its position that Section 14's cost allocation provision violates the United States' waiver of sovereign immunity under CERCLA.\footnote{SOR at 20-21.} But that case is not on point, and we find it readily distinguishable from the present appeal.

In \textit{Hodel}, BLM readjusted a lessee's coal lease, increasing the royalty rate from 15 cents per ton of coal mined to 8\% of the value of the coal. BLM based the readjusted royalty rate on a new regulation, which provided that a lease "shall require payment of a royalty rate of not less than 8 per centum . . . except that an authorized officer may determine a lesser amount, but in no case less than 5 percent if conditions warrant."\footnote{816 F.2d at 506 (quoting 43 C.F.R. § 3473.3-2(a)(3) (1979)).} BLM's position was that, under the regulation, it had no choice but to impose a royalty rate of 8\% in the readjusted lease. The Tenth Circuit ruled against BLM, holding that the imposition of an 8\% royalty rate in the readjusted lease was unreasonable because it ignored the regulation's language allowing for a royalty rate of less than 8\% "if conditions warrant."\footnote{Id. at 507.}
Nu-West asserts that, just like in *Hodel*, where the royalty regulation precluded BLM from imposing a mandatory readjusted royalty rate of 8%, CERCLA precludes BLM from shifting its own liability under that statute to Nu-West through the cost allocation provision in Section 14(a).\(^70\) Nu-West states: “As the Tenth Circuit Court of Appeals made clear in *Hodel*, once a matter dealt with in an MLA lease is addressed in a specific fashion in some statute, regulation, or case law, that law acts to limit Interior’s readjustment authority under the MLA.”\(^71\) But in *Hodel*, the regulation at issue specified that the royalty rate could be less than 8%, and therefore a lower rate was specifically authorized. And while CERCLA’s waiver of sovereign immunity means that the United States is liable under that statute and cannot shift its liability onto others, cost allocation among liable parties is specifically authorized.

Moreover, Nu-West’s characterization of Section 14(a) is overbroad. Nu-West’s assertion that Section 14(a) makes it liable for paying the costs of *all* environmental response actions relating to the leased lands is based on the first sentence of that section.\(^72\) But Nu-West does not account for the second sentence of Section 14(a), which specifies that the requirement that the lessee reimburse the United States applies to “response costs and natural resource damages based upon, arising out of, or in any way relating to, activities undertaken by the lessee... on the leased area... and includes but is not limited to, costs and damages accruing to the United States related to such activities.” We stated in *Simplot* that this sentence “limits costs subject to allocation to those arising out of ‘activities undertaken by the lessee.’”\(^73\) Thus, Section 14(a) is more limited than claimed by Nu-West, and we reject its arguments to the contrary.

Finally, Nu-West argues that we must read Section 14(a), not as the type of cost-sharing agreement permissible under Section 107(e) of CERCLA, but rather as a unilateral imposition of terms and conditions.\(^74\) We disagree.

Section 107(e) states first that any indemnification, hold harmless, or similar agreement cannot transfer liability from one party to another. It then states that “[n]othing in this subsection shall bar” any such agreement among PRPs.\(^75\) Section 107(e) affirms that each PRP is liable under the statute and cannot divest itself of

\(^70\) SOR at 21.
\(^71\) *Id.*
\(^72\) *Id.* at 12-13.
\(^73\) *J.R. Simplot Co.*, 173 IBLA at 141.
\(^74\) SOR at 13-14; Reply at 5 (stating that the cost allocation provisions “clearly are not an arms-length ‘agreement’ of the sort authorized by CERCLA”).
\(^75\) 42 U.S.C. § 9607(e)(1) and (2) (2012).
this liability, but allows agreements under which PRPs share costs associated with clean-up.\textsuperscript{76} Section 107(e) does not, however, preclude cost-sharing as a condition of a lease for Federal mineral resources. Indeed, Nu-West’s phosphate leases, which are contracts between BLM, as the lessor, and Nu-West, as the lessee, constitute agreements such as contemplated by Section 107(e).\textsuperscript{77} As we have stated in the past, once a lessee holds a Federal mineral resource lease, it has only one right when BLM proposes readjusted terms to that lease: the right to accept or reject continuation of its lease under such reasonable terms as the Secretary deems proper.\textsuperscript{78} Stated another way, “[i]f appellant chooses to receive the benefits of leasing federal land, it must also assume the burdens,” and if it “is dissatisfied with the new conditions of the readjusted lease, it is not without recourse since by the terms of the agreement appellant is entitled to ‘surrender this lease’ . . . .”\textsuperscript{79} The fact that Nu-West does not wish to allocate response costs in the way proposed by BLM’s readjusted Section 14(a) does not make Section 14(a) improper under CERCLA or unreasonable under the MLA. Nu-West is free to reject or accept the lease as it deems appropriate.

We therefore reject Nu-West’s argument that the cost allocation provision in Section 14(a) violates CERCLA, and we reaffirm our conclusion in \textit{J.R. Simplot Company} that the provision is a reasonable lease readjustment under the MLA.

3. \textit{The Cost Allocation Provision in Section 14(a) Does Not Violate Nu-West’s Right to Contribution Under CERCLA}

Nu-West’s second objection to Section 14(a) of the readjusted Lease is that it violates Nu-West’s right to seek contribution under Section 113(f) of CERCLA.\textsuperscript{80} That section of CERCLA provides, in relevant part, that “[a]ny person may seek contribution from any other person who is liable or potentially liable under

\textsuperscript{76} See, e.g., Peoples Gas Light & Coke Co. v. Beazer East, Inc., 802 F.3d 876, 880 (7th Cir. 2015); Coy/Superior Team v. BNFL, Inc., 174 Fed. Appx. 901, 908 (6th Cir. 2006).


\textsuperscript{78} Coastal States Energy Co., 81 IBLA at 174.

\textsuperscript{79} \textit{Cominco American, Inc.}, 26 IBLA 329, 339 (1976).

\textsuperscript{80} 42 U.S.C. § 9613(f) (2012).
Nu-West states that because Section 14(a) requires it to pay the response costs on the leased area resulting from activities undertaken by Nu-West, including costs and damages accruing to the United States relating to such activities, the provision “improperly destroys any right of Nu-West to contribution from the United States itself.”

Nu-West is correct that in Section 14(a) of the readjusted leases BLM has limited Nu-West’s right to seek contribution from the United States for response costs relating to Nu-West’s activities on its Lease. In fact, all cost allocation agreements necessarily limit the party who is allocated costs from seeking contribution from the other party to the agreement. We already found that such agreements are permissible under CERCLA and the MLA. And there is nothing in CERCLA, either in Section 113 or elsewhere, that provides that the right to contribution is absolute and cannot be limited under any circumstances. Nu-West’s argument that Section 14(a) also runs afoul of its right to contribution is unavailing, and Nu-West cites to no other authority in support of its theory that Section 113(f) bars a lease readjustment that allocates CERCLA costs between the United States and its lessee. We therefore conclude that Section 14(a) does not violate CERCLA and constitutes a reasonable lease readjustment under the MLA.

4. The Lease Readjustments Do Not Violate the Delegation of the President’s Authority Under Section 106(a) of CERCLA

Nu-West next argues that the Lease readjustments concerning clean-up of the leased property – Sections 6 and 14(b), and paragraphs 10 and 11 of the Notice to Phosphate Lessee – violate the delegation of the President’s CERCLA Section 106(a) authority. We note that in its SORs for appeals IBLA 2016-231, IBLA 2017-180, IBLA 2017-181, and IBLA 2017-182, Nu-West concludes by asking the Board to strike or reverse BLM’s decisions with respect to “Notice to Phosphate Lessee: paragraphs 9 and 11 in their entirety.” But in the body of these SORs, Nu-West challenges paragraphs 10 and 11, just as it does in its other appeals.

81 Id.; see United States v. Atlantic Research Corp., 551 U.S. 128, 138 (2007) (“Section 113(f) explicitly grants PRPs a right to contribution. Contribution is defined as the ‘tortfeasor’s right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault.’”).
82 SOR at 18.
83 SOR at 14-15; Reply at 6.
84 See SOR IBLA 2016-231 at 14, 16; SOR 2017-180 at 15, 17; SOR IBLA 2017-181 at 15, 17; SOR IBLA 2017-182 at 15, 17.
Under Section 106(a) of CERCLA, Congress granted authority to the President to abate imminent and substantial endangerments, including the authority to issue unilateral administrative orders requiring a PRP to carry out response actions at a facility. In a 1987 Executive Order, the President delegated his authority under Section 106(a) to the U.S. Environmental Protection Agency (EPA) (and in some circumstances, the U.S. Coast Guard). Then, in 1996, in another Executive Order, the President revised this delegation of authority to provide that "the functions vested in the President by section[] 106(a) . . . of [CERCLA] are delegated to the Secretary of the Interior [and certain other agencies] to be exercised only with the concurrence of [EPA] . . . "

Nu-West states that several terms in its readjusted Lease "sidestep" the requirement for BLM to obtain EPA's concurrence for enforcement actions. For example, Section 6 directs that the lessee "shall take reasonable measures deemed necessary by the lessor," including "modification to proposed siting design of facilities, timing of operations, and specification of interim and final reclamation procedures." Paragraph 10 of the Notice provides that as part of any mine plan submitted for approval, the lessee "will be required to provide details outlining the procedures for disposing of solid and other wastes generated from all activities conducted within the lease." Paragraph 11 of the Notice provides that mining and reclamation plans submitted by the lessee must address "special treatment, handling, or mitigation measures" for selenium and other toxic substances that may be required and "are not currently standard mining practices in the southeast Idaho phosphate field." And Section 14(b) requires Nu-West to conduct, at its expense, a Phase II Environmental Site Assessment prior to lease relinquishment that documents existing site conditions. Nu-West argues that if BLM is permitted to include these terms in its readjusted Lease, BLM will never need to issue any enforcement orders under section 106 of CERCLA "because it will simply exercise its contractual authority" under the Lease.

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85 42 U.S.C. § 9606(a) (2012); see, e.g., City of Rialto v. West Coast Loading Corp., 581 F.3d 865, 869-70 (9th Cir. 2009).
88 SOR at 14: id. at 15 ("Each of these provisions is aimed at allowing the agency, without any oversight or restraint, to unilaterally compel the sort of response actions that clearly fall within the ambit of Section 106(a) of CERCLA.").
89 Id. at 15.
But enforcement orders issued under the authority of Section 106(a) are in response to “imminent and substantial endangerment” that requires immediate action to abate such danger or threat, and the lease readjustments challenged by Nu-West do not constitute such enforcement orders. Rather, the lease readjustments are an exercise of BLM’s authority under FLPMA and the MLA and its implementing regulations to require its lessees to conduct operations so as to minimize risk of environmental harm to the public lands and its resources.

More specifically, the Lease readjustments reflect BLM’s obligation under its regulations to “promote orderly and efficient” mining that “will avoid, minimize or correct damage to the environment . . .” and its responsibility to regulate mining and approve operating plans after appropriate environmental analysis. The lease readjustments also reflect Nu-West’s obligation as a lessee under the regulations “to take such action as may be needed to avoid, minimize, or repair” environmental harms, including hazardous conditions, pollution, damage to vegetation, injury to or destruction of fish or wildlife or their habitat, and damage to recreation, scenic, historical and ecological values of the lands. In addition, the lease readjustments reiterate the requirement that Nu-West submit to BLM a mining plan that protects non-mineral resources, and a reclamation plan that addresses the reclamation of the surface of the lands affected by its mining operations. And with respect to the requirement in Section 14(b) that Nu-West prepare an Environmental Site Assessment prior to lease relinquishment, such requirement is consistent with a lessee’s duty under the regulations to “show, to BLM’s satisfaction,” that relinquishment will not impair the public interest.

Because the lease readjustments challenged by Nu-West implement and are consistent with BLM’s authority under FLPMA and the MLA and applicable regulations, and do not constitute or “sidestep” the process required by CERCLA to issue an enforcement order under section 106(a), we find that they are reasonable. We therefore reject Nu-West’s arguments to the contrary.

43 U.S.C. § 1732(b) (2012) (“In managing the public lands, the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”): 43 C.F.R. Part 3590.
43 C.F.R. §§ 3590.0-1, 3590.1, 3590.2(a).
Id. § 3591.1(b).
Id. §§ 3592.1(a), 3592.1(c)(8)(iii) (requiring a mining plan to describe, among other things, the measures “to prevent or control fire, soil erosion, subsidence, pollution of surface and ground water, pollution of air, damage to fish or wildlife or other natural resources and hazards to public health and safety . . .”).
Id. § 3514.11.
Nu-West further argues, however, that Section 14(b) “traps” Nu-West in its readjusted leases because although the company can relinquish a phosphate lease that contains objectionable provisions, BLM “has made clear in other contexts [that] it intends to prevent lessees” from doing so. In support of this statement, Nu-West cites to what appears to be a Board decision from 2008, “P4 Production LLC Decision,” at 2 (IBLA February 15, 2008), but has not provided a copy of the decision or its docket or file number. Regardless of how BLM may have handled a lease relinquishment in another instance, however, BLM is bound by its regulations, which provide a process for lease relinquishment—specifically a lessee must show to BLM’s satisfaction that relinquishment will not impair the public interest. And if BLM approves lease relinquishment, the regulations provide that the lessee must “pay all accrued rentals and royalties, and perform any reclamation of the leased lands that BLM may require.” These regulations were in effect at the time Nu-West acquired its leases, and Nu-West was therefore on notice of these regulatory requirements.

**CONCLUSION**

Under CERCLA’s express waiver of sovereign immunity, the United States is prohibited from shifting its liability to another PRP. Consistent with our holding in *J.R. Simplot Company*, BLM has continued to include Section 12 in readjusted leases and stated its intent to interpret that language so as not to impose strict liability upon its lessees. But we now set aside and remand BLM’s decisions to include Section 12 in the readjusted leases in light of the proliferation of objections and appeals, which has placed significant burdens on the administrative adjudicatory process, and in recognition of dichotomy between the language in Section 12 and BLM’s interpretation and application of that language. But we uphold BLM’s decisions with respect to the other readjusted terms since we find none improperly shifts liability under CERCLA or is otherwise inconsistent with CERCLA’s requirements or BLM’s authority under the MLA and FLPMA.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, we set aside and remand BLM’s decisions to the

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96 SOR at 13.
97 Id.
98 43 C.F.R. § 3514.11.
99 Id.
100 Id. § 4.1.
extent they include Section 12 in Nu-West’s readjusted Leases, and affirm BLM’s decisions with respect to all other aspects of the decisions challenged by Nu-West.

/s/
Amy B. Sosin
Administrative Judge

I concur:

/s/
James F. Roberts
Deputy Chief Administrative Judge