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Marathon Oil Co. v. United States: The Rising Costs Of Domestic Oil Production

M. Jean McDevitt
University of Maine School of Law

MARATHON OIL CO. V. UNITED STATES: THE RISING COSTS OF DOMESTIC OIL PRODUCTION

*M. Jean McDevitt**

I. INTRODUCTION

The Outer Continental Shelf Lands Act of 1953 (OCSLA)[1] was enacted by Congress to establish exclusive federal jurisdiction over submerged lands on the continental shelf beyond three miles from the coastline.[2] Pursuant to the OCSLA, the Secretary of the Interior is authorized to sell oil and gas leases on outer continental shelf (OCS) lands through a competitive bidding process.[3] The Act was amended in 1978 to provide for the "expeditious and orderly development, subject to environmental safeguards," of resources on the OCS "consistent with the maintenance of competition and other national needs."[4] Lessees must seek approvals from various federal and state agencies before each stage of exploration, development, and production.[5] Considerable controversy can develop between the lessee and the federal and state governments.

In one recent decision, *Marathon Oil Co. v. United States*,[6] the United States Court of Appeals for the Federal Circuit held that the government's refusal to issue oil and gas exploration permits for the OCS to the lessee did not constitute a material breach of a lease.[7] As a result, lessees were not entitled to restitution of over $156 million in up-front contract bonuses.[8]

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* University of Maine School of Law, Class of 2001.

1. Outer Continental Shelf Lands Act, 43 U.S.C.A. §§ 1331–1356 (West 1986 & Supp. 1999).

2. *See* 43 U.S.C.A. §§ 1301, 1331(a) (West 1986 & Supp. 1999).

3. *See id.* § 1337(a).

4. *Id.* § 1332(3).

5. *See id.* § 1340(c).

6. Marathon Oil Co. v. United States, 177 F.3d 1331 (Fed. Cir. 1999), *cert. granted*, 120 S. Ct. 494 (U.S. Nov. 15, 1999) (No. 99-253).

7. The Federal Circuit reversed a decision from the United States Court of Federal Claims, Conoco Inc. v. United States, 35 Fed. Cl. 309 (1996). *See* Marathon Oil Co. v. United States, 35 Fed. Cl. 309, 316 (1996).

8. *See* Marathon Oil Co. v. United States, 177 F.3d at 1333.

In ruling that the government had not breached the lease, the court upheld a means by which the federal government may withdraw federal rights based on state objections without returning the federal consideration.[9] Moreover, the legislative policy behind the OCSLA has been undermined as OCS development under the current law will neither be "expeditious" nor "orderly" as long as the federal government does not have to operate under rules of fair dealing.

Viewing the OCSLA from an equitable perspective leads to the conclusion that the process is flawed and should be changed. This Note argues that lessees do not engage in a fair process when conflicting legislation exists and judicial determinations are unable to take this into account in decision making. This Note suggests that the structure of the OCSLA provides the answer in that more discussion should be centered upon the lease sales rather than allowing state objections to effectively destroy an exploration project post-sale.

II. LEGAL BACKGROUND

A. Select Statutes Concerning Oil and Gas Leases

Passage of the OCSLA was part of a larger congressional action, including the passage of the Submerged Lands Act of 1953, to clarify the federal and state jurisdictional problems.[10] Although the Submerged Lands Act generally established state jurisdiction up to three geographical miles from the coastline, including exclusive rights to the resources within, and established federal jurisdiction beyond three miles, the Act failed to comment on the resource rights within the federal OCS lands.[11] Resolution of these rights was a major goal for the subsequently passed OCSLA. In addition to defining federal jurisdiction of the OCS as lands beyond the three mile state jurisdiction, including the subsoil and seabed,[12] the OCSLA provides for OCS resource management and leasing of tracts for oil, gas and other mineral exploration and development, as administered by the Secretary of the Interior.[13]

Congress declared its policy in asserting authority over the resources of the OCS:[14] "[V]ital national resource[s] . . . held by the Federal Government

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9. *See id.* at 1342 (Newman, Circuit Judge, dissenting).

10. *See* JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW 386–388 (1999).

11. *See id.* Based on historic reasoning, the boundaries of Florida, on the Gulf of Mexico side, and Texas were extended three marine leagues, approximately 10.5 miles, from their coastlines. *See id.* at 374.

12. *See* 43 U.S.C.A. § 1332(1) (West 1986 & Supp. 1999).

13. *See id.* § 1334(a).

14. *See id.* § 1332.

for the public . . . should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs."[15] Congress recognized that OCS exploration, development, and production would have a substantial impact on the coastal states.[16] Congress maintained that such states would be allowed assistance in protecting their coastal zones from such an impact.[17] Moreover, such states would be entitled to participate in the policy and planning decisions made by the federal government in relation to exploration, development, and production of OCS resources.[18] State participation would be subject to the national interest.[19]

OCSLA authorization for the Secretary of the Interior to sell oil and gas leases includes the formulation of a five-year oil and gas leasing program that details a schedule of proposed lease sales, indicating the size, timing, and location of leasing activity.[20] The Secretary of the Interior prior to a lease sale, must consider an intense study of industry interest and environmental concerns.[21] Once a lease sale program is finalized, competitive bids are received and leases are issued to the successful bidders.[22] OCS leases are issued by the Department of the Interior on standard, non-negotiable lease forms.[23] OCS lessees may be required to pay large cash bonuses in addition to periodic lease payments for the rights to submit plans of exploration.[24]

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15. *Id.* § 1332(3). "National needs" are generally thought to mean national security interests. In light of Middle Eastern control of oil production and numerous oil tanker spills, national security should be a serious element in determining when and where oil production is sound policy.

16. *See id.* § 1332(4).

17. *See id.* § 1332(4)(A).

18. *See* 43 U.S.C.A. § 1332(4)(C).

19. *See id.*

20. *See id.* § 1344. The leasing schedule strives to recognize a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone. *See id.* § 1344(a).

21. *See id.* §§ 1344(c) & (f), 1346(a). The Secretary must publish a call for information in the Federal Register regarding public interest and environmental concerns related to the proposed sale. The Secretary must study the environmental concerns and draft an environmental impact statement (EIS). After issuing the draft EIS, hearings are held and comments taken, culminating in the approval or rejection of a final EIS. If the Secretary decides to proceed with the sale, a proposed Notice of Sale is published in the Federal Register. Following this entire process, the Secretary must formally consult with the governors of affected states regarding the proposed Notice of Sale. The Secretary may then decide whether to finally proceed with the sale. *See id.* §§ 1334(c) & (f), 1346(a), 1337(a)(8).

22. *See id.* § 1337(a).

23. *See* Conoco Inc. v. United States, 35 Fed. Cl. 309, 316 (1996).

24. *See* 43 U.S.C.A. § 1337(a)(1). A successful bidder in effect gains few "rights" as

At each stage of the oil and gas lease process—exploration, development, and production—the lessee must submit plans to the Secretary of the Interior[25] as well as any necessary permit applications.[26] The Secretary must either approve or request modifications of the plan within thirty days of its submission.[27] If the lessee's exploration plans indicate effects to the land or water use in the coastal zone of a state with a Coastal Zone Management Act (CZMA) program, then the lessee must certify that the plan and permits are consistent with the state's CZMA program.[28] If the state does not concur with the CZMA certification, then the Secretary of the Interior may not approve such activities unless the Secretary of the Commerce overrides the state's decision.[29]

The Coastal Zone Management Act of 1972 (CZMA)[30] was enacted by Congress to provide federal funding for states to develop and administer coastal programs according to federal guidelines.[31] The CZMA established a national policy to preserve, protect, develop, and restore or enhance the coastal zone resources.[32] Under the CZMA, any federal agency activity or federally sponsored activity affecting the coastal zone must be consistent with the state-created and federally approved management plan.[33] Due to

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a lessee. Essentially the lessee acquires only a priority position in submitting plans to conduct exploration, development, and production; rejection of such plans results in no further exploration. *See* Secretary of the Interior v. California, 464 U.S. 312, 339 (1984).

25. *See* 43 U.S.C.A. § 1340(c)(1).

26. The lessee is required to apply for a number of federal permits depending on the proposed activities. An example relevant to the subject case is the National Pollutant Discharge Elimination System (NPDES) permit obtained from the Environmental Protection Agency. An NPDES permit is required if an activity includes discharge of pollutants into the ocean. *See* 33 U.S.C.A. §§ 1311(a), 1342(a) (West 1986 & Supp. 1999).

27. *See* 43 U.S.C.A. § 1340(c)(1). Section 1340(c)(1) also provides that the Secretary must disapprove any plan that would unavoidably cause serious harm to fish and aquatic life, property, minerals (in areas leased or not leased), the national security or defense, or to the marine, coastal, or human environment. *See id.* §§ 1340(c)(1), 1334(a)(2)(A)(i) (listing reasons for cancellation of a lease or permit). If the Secretary disapproves a plan under the preceding reasons, he may cancel the lease and the lessee would be entitled to compensation. *See id.* § 1340(c)(1).

28. *See id.* § 1340(c)(2). The section provides that, "[t]he Secretary shall not grant any license or permit for any activity described in detail in an exploration plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program . . . unless the State concurs . . . ." *Id.*

29. *See id.* To override the state, the Secretary of the Commerce must find that the lessee's activities are consistent with the CZMA or are necessary in the interest of national security. *See* Coastal Zone Management Act, 16 U.S.C.A. § 1456(c)(3)(B)(iii) (West 1985 & Supp. 1999).

30. Coastal Zone Management Act, 16 U.S.C.A. §§ 1451–1465 (West 1985 & Supp. 1999).

31. *See* KALO ET AL., *supra* note 10, at 202.

32. *See* 16 U.S.C.A. § 1452.

33. *See id.* §§ 1456(c)(1)–(2).

the consistency requirement, no federal licenses or permits may be issued until either the state has approved a plan of exploration or the Secretary has overridden a state denial.[34]

The Outer Banks Protection Act (OBPA)[35] was enacted by Congress as part of the Oil Pollution Act of 1990 (OPA),[36] a comprehensive oil spill legislation package.[37] The OBPA directly impacted the OCSLA by expressly prohibiting the Secretary of the Interior from approving any plans of exploration or otherwise permitting exploration, production, or development of the OCS lands off of North Carolina until at least October 1, 1991.[38] Congress repealed the OBPA in 1996.[39]

The mandates of the preceding legislation require that the federal and state governments and private lessees work together; however, the goals of the legislation may be at cross-purpose with the goals of the interested parties, resulting in significant litigation.

B. Court Decisions Involving OCSLA Determinations

A number of federal cases have been litigated concerning various provisions of the OCSLA relevant to the subject case. In *Secretary of the*

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34. *See id.* § 1456(c)(3)(B). The CZMA expressly establishes the procedure for approval of the plans of exploration and permits that are required under the OCSLA for oil and gas leases. The cross-reference between the two statutes indicates that Congress intended significant coordination and cooperation between state and federal agencies regarding the development of OCS oil and gas tracts. *See id.* § 1456(c)(B)(iii); *supra* text accompanying note 29.

35. Outer Banks Protection Act, 33 U.S.C. § 2753 (1994) (repealed 1996).

36. Oil Pollution Act of 1990, 33 U.S.C.A. §§2701–2761 (West. Supp. 1999).

37. The OBPA was passed in large part due to the successful legislative efforts of North Carolina Congressman Walter Jones. Enactment of the OBPA was in direct response to oil and gas lease tracts off of the North Carolina coast. *See* Conoco Inc. v. United States, 35 Fed. Cl. 309, 318 (1996).

38. *See* 33 U.S.C.A. § 2753(c)(1) (repealed 1996). The prohibitions as stated by Congress are as follows:

> The Secretary of the Interior shall not—
> (A) conduct a lease sale;
> (B) issue any new leases;
> (C) approve any exploration plan;
> (D) approve any development and production plan;
> (E) approve any application for permit to drill; or
> (F) permit any drilling, for oil or gas under the Outer Continental Shelf Lands Act,
> on any lands of the Outer Continental Shelf offshore North Carolina.

Id. In addition to the moratorium on exploration and development, the OBPA also created the Environmental Sciences Review Panel to study the impact of proposed North Carolina OCS development. *See id.* § 2753(c)(3)(A) (repealed 1996).

39. *See id.* § 2753 (repealed 1996).

Interior v. California,[40] the Secretary appealed a lower court decision to enjoin the Secretary from proceeding with oil and gas lease sales off of the coast of California.[41] The plaintiffs argued that the sales were activities directly affecting the coastal zone thereby requiring a consistency certification under the CZMA.[42] In reversing the injunction, the Supreme Court held in part that the purchase of a lease entails no right to proceed with full exploration, development, or production; the lessee acquires only a priority over other interested parties in submitting plans to conduct those activities on the leased tract.[43] Moreover, the Court observed that states with federally approved CZMA programs have considerable authority to veto exploration, production, and development plans that are inconsistent with the state's program.[44]

In *Sun Oil Co. v. United States*,[45] the plaintiffs sought damages after claiming that the delay of the Secretary of the Interior in approving a permit to install a drilling platform constituted a breach of the lease contract.[46] The Secretary's consideration of the application followed an oil blowout from a lease tract operated by a third party.[47] All drilling and production

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40. Secretary of the Interior v. California, 464 U.S. 312 (1984).

41. *See id.* at 320.

42. *See id.* at 319. California argued that a lease sale sets in motion a chain of events that culminates in oil and gas development, directly affecting the coastal zone. *See id.*

43. *See id.* at 337. The Court found a significant difference between the lease sale and actual exploration, development, and production of the tract. In essence, the Court stated that stricter requirements are in effect later in the development process, which is when adverse environmental effects are most likely to occur. *See id.* at 341.

44. *See id.* The Court's statements are relevant because they identify the limited "property" rights that the lessee's acquire upon purchase of an oil and gas lease. A lease issued under the OCSLA does not convey title in the land, nor does it convey an unencumbered estate in the oil and gas. *See* Union Oil Co. v. Morton, 512 F.2d 743, 747 (9th Cir. 1975). Although an oil and gas lease does convey interests enforceable against the government, such interests lack many of the characteristics of private property. Because the resources of the OCS belong to all people of the nation, Congress has established safeguards to ensure that the benefits of exploitation are extended to all, not just the private lease holder. *See id.* As a result of both statutory safeguards and other regulations, "successful" lessees have significant barriers to overcome before actual production may begin and lessees are not guaranteed that they will ever realize production on their tracts.

45. Sun Oil Co. v. United States, 572 F.2d 786 (Ct. Cl. 1978).

46. *See id.* at 793. Plaintiff's breach of lease theory is based on the general proposition that, "neither party to the contract will do anything to prevent performance thereof by the other party or that will hinder or delay him in its performance." *Id.* at 801 (quoting Wah Chang Corp. v. United States, 282 F.2d 728, 733 (Ct. Cl. 1960)).

47. *See* Sun Oil Co. v. United States, 572 F.2d at 797. The blowout occurred at a platform operated by Union Oil Company in California's Santa Barbara Channel. The massive oil spill polluted the Channel and adjacent coastline, killing birds, fish and other marine organisms, damaged beaches and shore front property and restricted fishing and recreational activities in the Santa Barbara area. *See id.*

operations on federal lease tracts in that area were temporarily suspended.[48] As a result of the delay, the plaintiffs suspended the construction of their platform.[49] The court found that the Secretary's delay in permit approval was irrelevant because it was not the primary cause of delay; rather, the plaintiff's own decision to halt construction of the platform was the immediate cause.[50]

III. *MARATHON OIL CO. V. UNITED STATES*

A. Facts

The questions presented in *Marathon Oil Co. v. United States*[51] concentrate on the denial by the Secretary of the Interior of the permits necessary for Marathon to engage in oil exploration, and the effect of the Outer Banks Protection Act, which was enacted subsequent to the parties entering the lease contract.[52] The leases were purchased in 1981 by Marathon Oil Company, Mobil Oil Exploration and Producing Southeast, Inc., and Amerada Hess Corporation.[53] Each company purchased one-third undivided interests in five OCS lease tracts off the coast of North Carolina; each paid more than $78 million to the Government in up-front cash bonuses.[54] The lessees joined into a single entity known as the Manteo Unit.[55]

The Manteo Unit drafted a plan of exploration (POE) proposing to drill one exploratory well about forty-five miles east of Cape Hatteras.[56] Following objections to the POE by the state of North Carolina in 1989, the State, the Department of the Interior (DOI), and the Manteo Unit entered into a Memorandum of Understanding that required a special environmental

48. *See id.* The blowout resulted in a series of investigations, reviews of existing procedures, and reconsiderations of the federal leasing program in that area. The Interior Department's primary concern following the incident was ensuring that future operations would not result in similar environmental disasters. *See id.*

49. *See id.* at 799.

50. *See id.* at 807. In addition, the court emphasized the obligations the Secretary faced in response to the oil spill. The Secretary was required to proceed with extreme care in approving the installation of another drilling platform in the Santa Barbara Channel. The Secretary's deliberately cautious approval was reasonable. *See id.* at 808.

51. Marathon Oil Co. v. United States, 177 F.3d 1331 (Fed. Cir. 1999), *cert. granted*, 120 S. Ct. 494 (U.S. Nov. 15, 1999) (No. 99-253).

52. *See id.* at 1333.

53. *See id.* at 1334.

54. *See id.* In addition to the up-front cash bonuses, each company paid approximately $264,000 in annual rentals during the ten-year primary term. *See id.*

55. *See id.*

56. *See id.*

review before the Secretary would act on the POE.[57] The environmental review determined that the POE would not result in any significant environmental impacts and the DOI considered the POE to be "approvable in all respects."[58] However, in 1990, North Carolina also objected to the CZMA certification of the Manteo Unit's application to the Environmental Protection Agency for a National Pollutant Discharge Elimination System (NPDES) permit.[59]

Before any further action was taken on the POE or requested permits, Congress passed the OBPA, placing a temporary moratorium on exploration and development of the North Carolina OCS.[60] Pursuant to the OBPA, the DOI suspended all leases offshore of North Carolina, terminating both the operations and the obligation to pay rental fees on the leases.[61] Despite the legislation, the Manteo Unit submitted its final POE to drill the exploratory well.[62] North Carolina formally objected to the Manteo Unit's certification that the POE would comply with the state's CZMA program.[63] The Manteo Unit appealed North Carolina's CZMA objections to the Secretary of Commerce.[64] The Secretary of Commerce found that the POE and the discharge of wastes under the NPDES permit were neither consistent with North Carolina's CZMA program nor of such interest to national security that an override was clearly necessary.[65] In October of 1992, Marathon Oil Company and Mobil Oil Exploration and Producing Southeast, Inc. ("Marathon"), intervened as third party plaintiffs in a breach of contract action between the United States and Conoco Inc.[66] over OCS leases off the coasts of Alaska, Florida, and North Carolina.[67]

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57. *See id.* at 1334.

58. *Id.* at 1335.

59. *See id.* The NPDES permit was required because the POE included planned discharge of wastes into the ocean. *See* Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1311(a), 1342(a) (West 1986 & Supp. 1999). Under the CZMA, state concurrence of the NPDES permit is required before it may be granted. *See* 16 U.S.C.A. § 1456(c)(3)(A) (West 1985 & Supp. 1999).

60. *See* Marathon Oil Co. v. United States, 177 F.3d at 1335; 33 U.S.C.A. § 2753(c)(1); *supra* notes 37–38 and accompanying text.

61. *See* Marathon Oil Co. v. United States, 177 F.3d at 1335.

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. *See* Conoco Inc. v. United States, 35 Fed. Cl. 309, 314–15 (1996).

67. *See* Marathon Oil Co. v. United States, 177 F.3d at 1336. All the OCS lessees reached settlements with the government, however, Marathon Oil Company and Mobil Oil Exploration and Producing Southeast, Inc. reserved the right to all claims regarding the OBPA's effect on the OCS leases off the North Carolina coast. *See id.*

B. Court of Federal Claims Ruling

The United States Court of Federal Claims granted Marathon's cross-motion for partial summary judgment on their claim of breach of contract.[68] Marathon was subsequently awarded restitution of the up-front cash bonuses amounting to over $156 million.[69] The court made a number of findings.[70] First, the court found that the OBPA should not have applied to the contract because it was not considered as a basis of the bargain.[71] The lease provided that it would be subject to all other applicable statutes and regulations including all subsequent regulations issued pursuant to the OCSLA statute.[72] No mention of future statutes was made.[73] Neither of the parties had anticipated the OBPA or similar legislation at the making of the contract.[74] Second, the court found that the Secretary had a duty under the terms of the contract to act on the lessee's POE within thirty days of submission.[75] Because the OBPA legislatively barred the Secretary from acting on the POE, the government had to be in breach of the contract.[76] Finally, in response to the government's argument that the Secretary had properly suspended the contract, thereby eliminating all obligations for both parties, the court found that the Secretary had no right to suspend the contract pursuant to the OBPA.[77]

C. On Appeal

The United States Court of Appeals for the Federal Circuit reversed, holding that although the leases were not subject to the OBPA, the government's decision not to approve the exploration of the OCS site did

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68. *See* Conoco Inc. v. United States, 35 Fed. Cl. at 337. The court denied defendant's motions for summary judgment. *See id.*

69. *See* Marathon Oil Co. v. United States, 177 F.3d at 1333.

70. *See* Conoco Inc. v. United States, 35 Fed. Cl. at 322–31.

71. *See id.* at 322–23.

72. *See id.*

73. *See id.*

74. *See id.* at 323. The court found that the OBPA evaded the spirit of the bargain by compelling interference with and failure to cooperate with the parties' performance. *See id.* at 324.

75. *See id.* at 327.

76. *See id.* at 328.

77. *See id.* at 330; 43 U.S.C.A. § 1340(c)(1); *supra* text accompanying note 27. The suspension notice that the government sent to the lessees stated that the suspension was necessary to comply with the OBPA; the government later claimed that the suspension was necessary to conduct additional environmental studies. *See* Conoco Inc. v. United States, 35 Fed. Cl. at 329. The court viewed this as an improper attempt to justify the suspension retroactively. *See id.*

not constitute a material breach of the lease.[78] The court held that neither party had breached the lease and Marathon was not entitled to a return of its up-front cash bonuses.[79] The court summarily dismissed the importance of the OBPA by concurring with the lower court that the terms of the lease did not provide for the application of subsequently enacted legislation.[80] The court instead focused on Marathon's obligations under the contract.[81]

The court found that the importance of the OBPA was essentially moot because Marathon had failed to meets its obligations in terms of satisfying North Carolina's regulations and certifications.[82] Marathon had been unable to provide the necessary state concurrence to its certification of CZMA compliance.[83] Satisfaction of applicable statutes and regulations was a prerequisite to obtaining the necessary permits and licenses.[84] As long as Marathon failed to meet the certification requirements, the Secretary of the Interior was not able to issue the permits, regardless of the applicability of the OBPA.[85]

Marathon argued that the Secretary of Commerce had declined to override North Carolina's CZMA objections based on the enactment of the OBPA.[86] The court refused to consider that issue because it was not before the court on appeal.[87] Marathon also argued that, in the event that the lease was subject to state CZMA consistency objections, the Government should have canceled the lease and provided restitution.[88] The court found no basis for such compensation in the OCSLA.[89] The court concluded that Marathon

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78. *See* Marathon Oil Co. v. United States, 177 F.3d 1331, 1340 (Fed. Cir. 1999). The court's duty was to determine whether the lower court's judgment was correct as a matter of law.

79. *See id.*

80. *See id.* at 1337.

81. *See id.* at 1337–39.

82. *See id.* at 1338.

83. *See id.* The court identified North Carolina's objection as the lessee's "failure to provide data and information necessary to allow the State to conduct a proper consistency review of the proposal on its merits." *Id.* at 1339. The court noted that the objection to the POE CZMA consistency certification was also for inadequate information. *See id.* at 1339.

84. *See id.*; Secretary of the Interior v. California, 464 U.S. 312, 341 (1984); *supra* text accompanying note 44.

85. *See* Marathon Oil v. United States, 177 F.3d at 1339; 43 U.S.C.A. § 1340(c)(2); *supra* text accompanying note 28.

86. *See* Marathon Oil v. United States, 177 F.3d at 1339.

87. *See id.* Marathon filed an action challenging the Secretary of Commerce's decision. *See* Mobil Oil Exploration v. Brown, 920 F. Supp. 1, 1–2 (D.D.C. 1996). The district court remanded back to the Secretary of Commerce to determine whether certain studies performed by the Department of the Interior should have been allowed to enter the administrative record after it was closed but prior to his decision. *See id.* at 3.

88. *See* Marathon Oil Co. v. United States, 177 F.3d at 1339.

89. *See id.* The OCSLA's cancellation provisions identify harm to the marine, coastal, or human environment as grounds for cancellation and subsequent compensation. *See* 43

had risked a large amount of up-front money on a lease tract without knowing its value.[90] The court characterized Marathon's financial loss as no different in principle than if weather conditions, equipment failures, or financial problems had contributed to its inability to explore the tract.[91] The court found that Marathon's inability to explore the tract was not attributable to the government and, therefore, Marathon was not entitled to any refund of the consideration paid for the lease.[92]

IV. Discussion

The holding of the court in *Marathon Oil* is a proper interpretation of the facts and adheres to the plain language of the OCSLA. The holding recognizes that the OBPA and its mandated moratorium should not have effectuated a result on the government's contract with Marathon's POE.[93] In holding that the Secretary satisfied his obligations under the contract and the OCSLA, and that Marathon's inability to get consistency certification was the true deficiency, the court failed to recognize the interplay between the OCSLA and the CZMA and ignored the legislative intent of the OCSLA. The court's holding allows a violation of the legislative intent of the OCSLA and its entire leasing program.

The OCSLA's congressional policy recognizes the OCS as a "vital resource" held for the public that should be made available for "expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs."[94] As a result of North Carolina's objections, this resource was not developed under the contracted-for lease. North Carolina's objections are understandable; its perspective is possibly shared by every other state as

U.S.C.A. §§ 1334(a)(2), 1340(c)(1). The court's finding that it was Marathon's own failure in complying with its obligations eliminates applicability of the OCSLA cancellation provisions.

90. *See* Marathon Oil Co. v. United States, 177 F.3d at 1340.

91. *See id.*

92. *See id.* The dissenting opinion found Marathon's loss to be fully attributable to the government. *See id.* at 1341. The dissent characterized the issue as a "change of government policy after the exploration rights had been sold and paid for." *Id.* Stating that the Government had violated its obligation by failing to timely and fairly consider the POE, the dissent perceived the issue as a lack of fair dealing and found that the Government had prohibited performance of the contract. *See id.*; *supra* text accompanying note 74.

93. In actuality, however, the OBPA was at least partly responsible for Marathon's inability to secure the necessary permits. The Department of the Interior had already indicated its tendency toward approving the POE. *See* Marathon Oil Co. v. United States, 177 F.3d at 1335; *supra* text accompanying note 58.

94. 43 U.S.C.A. § 1332(3) (West 1986 & Supp. 1999); *supra* text accompanying note 15.

well. The potential negative effects of an oil drilling platform are conceivable for any coastal state.[95] Despite these objections, the OCS resources still belong to the national public and development is a necessary reality of that ownership.

State governments should be engaged in the process of OCS resource development. However, this engagement should not be merely in the form of a veto power. Instead, state and federal governments and lessees should be working together to encourage the use of better equipment and to improve the technology in both resource development and pollution containment and clean up. It would be far more productive to encourage businesses to increase technology to make oil extraction cleaner and safer rather than preventing them from developing domestic resources.

The interplay of the CZMA and OCSLA requires that the parties work together in order to have a successful leasing program. In studying the facts of this case, it seems appropriate to consider where the communication broke down. Did Marathon simply think it could ignore the consistency requirement? Or were North Carolina's objections not explicitly clear? It seems unimaginable that Marathon would have gambled a vast sum of money and a huge production opportunity on the incompleteness of a few documents.

The role of the Secretary of the Interior should be carefully scrutinized as well. The Secretary is obligated to invite and consider studies and hear from various interests, including state governments, prior to approving a lease sale program.[96] The Secretary of the Interior should be encouraged to consider a state's objections more seriously at the beginning of the lease sale program design. The primary parties should be engaged in a collective agreement that ignores no interest but also balances the benefits of the OCS resources. State objections that are consistently present throughout the lease-sale program should be analyzed and decisive action to either halt the lease sales or continue with exploration should be made before lessees are engaged.

The United States Supreme Court has recognized that as the stages of lease exploration, development, and production advance, the scrutiny of environmental safety is heightened.[97] Environmental safeguards require that exploration, production, and development be well controlled. In the present case, however, concrete environmental issues were not the

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95. However, "not in my backyard" is never a good answer, be it for toxic waste dumps or oil platforms.

96. *See* 43 U.S.C.A. § 1344(c)(1); *supra* text accompanying notes 20–21.

97. *See* Secretary of the Interior v. California, 464 U.S. 312, 337 (1984); *supra* text accompanying notes 40–44.

problem.[98] Rather, the conflicting interests of the fishing, tourism, and oil industries were at issue.[99]

A marked difference exists between the suspension in the present case and suspensions that have occurred in the past.[100] Numerous cases have been litigated concerning lease rights when companies have been prevented from pursuing their exploration, production, and development because of an environmental disaster.[101] For example, as a result of the 1969 oil blowout in the Santa Barbara Channel off the California coast, Congress was certainly justified in exercising its police powers by suspending operations. In the present case, however, no specific risk of environmental harm existed, and the POE and permit applications were submitted. The environmental status of the area had not changed from the time when the lease sale program was developed and when Marathon attempted to explore the tract. Despite Marathon's inability to obtain North Carolina's CZMA consistency certification, the company did not violate any rules.[102] With the exception of the Santa Barbara incident, all major domestic oil spills have occurred as a result of tanker accidents.[103] The environmental risks associated with OCS development are substantially less than the risks with oil tanker passage.[104]

The business and monetary risks involved with OCS development, however, are substantial. *Marathon Oil* is indicative of the huge risk that companies take when investing in domestic oil production. Marathon paid large cash bonuses on the expectation that the lease tracts contained substantial oil reserves and could be made productive. Although a federal buyback program is inherently impossible because of the term of years of lease sales and the federal finance structure, alternative bidding systems exist that would greatly improve the OCSLA leasing program.[105] Under an alternative bidding system, the lessee would be able to put down a smaller

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98. Numerous environmental reviews were carried out by the Secretary of the Interior, Marathon, and independent studies at the request of North Carolina. All of the reviews came back favorably as to proceeding with the exploration. *See* Marathon Oil Co. v. United States, 177 F.3d 1331 (Fed. Cir. 1999), *cert. granted*, 120 S. Ct. 494 (U.S. Nov 15, 1999) (No. 99–253); *supra* text accompanying notes 57–58.

99. The ever-present realm of politics was also at issue in the present case. *See* Conoco Inc. v. United States, 35 Fed. Cl. 309, 318 (1996).

100. *See* Sun Oil Co. v. United States, 592 F.2d 786, 797 (Ct. Cl. 1978); *supra* text accompanying notes 45–50.

101. *See, e.g.*, Sun Oil Co. v. United States, 572 F.2d 786 (Ct. Cl. 1978); Union Oil Co. v. Morton, 512 F.2d 743 (9th Cir. 1975).

102. *See* 43 U.S.C.A. § 1334(a)(2) (West 1986 & Supp. 1999).

103. *See* KALO ET AL., *supra* note 10, at 386.

104. *See id.*

105. *See* James C. Cox et al., *OCS Leasing and Auctions: Incentives and the Performance of Alternative Bidding Institutions*, 2 SUP. CT. ECON. REV. 43, 51–54 (1983).

cash payment, so there would be less at risk in the event of a lease suspension or termination without compensation.[106] Alternative bidding systems would lessen the impact of cancellation by decreasing the bonus amounts paid during the bidding process and increasing the rental payments as the lease tract becomes productive.[107]

Because of fiscal benefits, the federal government is unable to abstain from involvement in OCS oil and gas development. Financial gains from drilling, lease sales, royalties, bonuses, and rents constitute the third largest non-tax source of revenue for the federal government.[108] OCS litigation results in additional financial pressure as timely litigation results in little more than mere delays and some modification of OCS plans. As in the present cases, Congress may withdraw highly sensitive areas from lease plans but this also results in a lengthy and expensive litigation process.

V. CONCLUSION

In upholding the contract between Marathon and the Government, the *Marathon Oil* holding illustrates the adverse positions held by the federal and state governments and OCSLA lessees. This Note agrees that the United States Court of Appeals for the Federal Circuit adhered to the plain language of the OCSLA and the contract; however, legislative policy and the leasing program have suffered as a result. The lease sale program should be restructured to provide for more initial discussion prior to lease sales, and the lessees should not be required to put such vast sums of money into up-front cash bonuses. The leasing program should further consider and use alternative bidding systems as a means of encouraging domestic oil production while maintaining environmental safeguards.

Relief may exist for Marathon Oil Company and other lessees similarly situated. The United States Supreme Court recently granted the petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit.[109]

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106. *See id.*

107. *See id.*

108. *See* KALO ET AL., *supra* note 10, at 386.

109. *See* Marathon Oil Co. v. United States, 177 F.3d 1331 (Fed. Cir. 1999), *cert. granted*, 120 S.Ct. 494 (U.S. Nov. 15, 1999) (No. 99-253).