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Conoco Inc. v. United States: A Narrowing Of The Sovereign Acts Doctrine

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CONOCO INC. V. UNITED STATES: A NARROWING OF THE SOVEREIGN ACTS DOCTRINE?

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I. INTRODUCTION

In *Conoco Inc. v. United States,*[1] the United States Court of Federal Claims held that the federal government breached oil and gas lease contracts it entered into for the offshore areas of North Carolina by taking actions as required by the Outer Banks Protection Act of 1990 (OBPA).[2] In an attempt to shield itself from liability for this breach of oil lease contracts, the federal government unsuccessfully attempted to use the sovereign acts doctrine.[3] This Note will present the legal background of the *Conoco* case and will discuss the sovereign acts doctrine as it relates to the court's eventual holding. Lastly, this Note will argue that there is

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1. 35 Fed. Cl. 309 (1996).

2. 33 U.S.C. § 2753 (1994).

3. This doctrine accounts for the two separate roles the government may act in; that of the sovereign and that of the private contractor. Horowitz v. United States, 267 U.S. 458 (1925). This doctrine eases the tension between these dual capacities of the government, establishes the supremacy of the federal government when acting in its sovereign role, and ultimately represents a method of risk allocation. Ronald G. Morgan, *Identifying Protected Government Acts under the Sovereign Acts Doctrine: a Question of Acts and Actors*, 22 PUB. CONT. L.J. 223, 224 (1993). The government will not incur any liability beyond that of what a private party would face if contracts change because of a corresponding change in the law. However, the government will be liable for any contractual breach that is the result of legislation enacted for the specific purpose of changing one of the terms of a particular contract. The General Accounting Office has described the doctrine's purposes as: "first, that the government cannot contract away its sovereignty or duty to take acts in the interest of the public, and second, that the contractor should not be in a better position . . . because his contract is with the government rather than with a private party." *Id.* at 229 (citing U.S. General Accounting Office, Office of the General Counsel, Government Contract Principles (3d ed.1980)). *See infra* Part II.B.

a fundamental problem in the manner in which the *Conoco* court applied the sovereign acts doctrine apart from whether or not it would shield the federal government in this case.

Conoco contributes a body of case law that provides a functional definition of the sovereign acts doctrine, and continues a trend towards narrowing the definition of an act that is considered "public and general in nature." This definition of an act that is "public and general in nature" directly impacts environmental protection and legislation. Although the OBPA was enacted with the specific intent to protect the offshore area of North Carolina from severe environmental damage,[4] the court found that the OBPA was not intended to promote the public interest. Instead, the court found that the act's sole effect was to obstruct performance of a specific governmental contract. For this reason, the court held that the government was liable for significant damages.

Through the judicial analysis in this case, the court takes a narrow and severe view toward the overall purpose of environmental legislation. Along with a series of recent decisions,[5] the *Conoco* court's definition of an act with public and general applicability can be seen as part of a judicial movement towards narrowing the definition of a sovereign act.

II. THE LEGAL BACKGROUND OF *CONOCO*

A. The Statutory Framework

In 1953, Congress passed the Outer Continental Shelf Lands Act (OCSLA)[6] to promote oil and gas lease sales. In enacting OCSLA, Congress intended to exercise both the proprietary powers of a landowner and the police powers of a legislature in regulating leases of publicly owned resources.[7] The 1978 amendments of OCSLA authorized, for OCS lands, "expeditious and orderly development, subject to environmental safeguards."[8]

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4. 33 U.S.C. § 2753.
5. *See infra* notes 12, 17, 21, 24, and 31.
6. 43 U.S.C. §§ 1331-1356 (1994).
7. *Id.* § 1334(a).
8. The amendments also established the procedural criteria for the Secretary of the Interior (Secretary) to follow in granting the offshore leases. *Id.* § 204, 92 Stat. at 636 (codified as amended at 43 U.S.C. § 1334 (1994)). In these procedures, the Secretary was granted narrow authority to cancel leases upon a finding of a threat of environmental harm.

Congress responded to North Carolina's particular environmental concerns by enacting the OPBA in 1990, which was included in the Oil Pollution Act.[9] The OBPA, without amending the OCSLA,[10] expressly prohibited the Department of the Interior (DOI) from approving any plans of exploration (POEs) or in any way permitting exploration or development in North Carolina offshore outer continental shelf (OCS) regions until, at the earliest, October 1, 1991.[11]

B. Case Law Background of the Sovereign Acts Doctrine

The sovereign acts doctrine has long been used as a defense to governmental liability for breach of contract in the courts of the United States. The following cases all involve an assertion of the doctrine and were relied upon for the judicial decision in *Conoco.*

In *Jones v. United States,*[12] an action was brought by two civil engineers to recover damages from a contract they made with the Commissioner of Indian Affairs for a survey of land districts described in

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Id. §§ 204, 208, 92 Stat. at 636-637, 661 (codified as amended at 43 U.S.C. §§ 1334(a), 1351(h) (1994)). These canceled leases had a remedy in the establishment of a statutory compensation formula. *Id.* § 204, 92 Stat. at 637-638 (codified as amended at 43 U.S.C. § 1334(a)(2)(C) (1994)).

9. 33 U.S.C. §§ 2701-2761 (1994).

10. Through the Outer Continental Shelf Lands Act the federal government asserts exclusive jurisdiction over mineral resources over the Outer Continental Shelf. 43 U.S.C. § 1332 (1994).

11. In 33 U.S.C. § 2753, Congress spelled out its specific reasons for enacting OBPA. The language of this section provides in part that:

> (1) [T]he Outer Banks of North Carolina is an area of exceptional environmental fragility and beauty;
>
> (2) the annual economic benefits of commercial and recreational fishing activities to North Carolina, which could be adversely affected by oil or gas development offshore the State's coast, exceeds $1,000,000,000;
>
> (3) the major industry in coastal North Carolina is tourism, which is subject to potentially significant disruption by offshore oil or gas development;
>
> (4) the physical oceanographic characteristics of the area offshore North Carolina . . . are not well understood . . . ;
>
> (5) diverse and abundant fisheries resources occur . . . offshore North Carolina . . . ;
>
> (6) the environmental impact statements prepared for Outer Continental Shelf lease sales . . . contain insufficient and outdated environmental information . . . .

33 U.S.C. § 2753(b) (1994).

12. 1 Ct. Cl. 383 (1865).

treaties between the United States and several Indian tribes. While the services required by the contract were fully performed and the price contracted for was fully paid, the plaintiffs sued for additional compensation for costs incurred as a result of a government troop withdrawal contrary to the terms of the Indian treaties.

The Court of Claims held that "[w]hatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons."[13] The court found that in this case the United States was appearing only in its contractor capacity and thus should be seen as would any other private defendant. The court fashioned the primary standard that "[w]herever the public and private acts of the government seem to commingle, a citizen or corporate body must by supposition be substituted in its place, and then the question must be determined whether the action will lie against the supposed defendant."[14] Through this substitution test, the court sought to make the frequently misapprehended distinction between the public acts and the private contracts of the government so broad and distinct that the two could not be confused.[15] The federal government, when acting in a contracting capacity, cannot be held liable directly or indirectly for the public acts of the United States as a sovereign.[16]

In *Horowitz v. United States,*[17] the Court further refined the doctrine set forth in *Jones.* This case involved an action to recover damages caused by a governmental delay in silk delivery, which allegedly constituted a breach of contract by the Ordinance Department of the United States government.[18] Apparently after the contract for shipment was made, the federal government, through the U.S. Railroad Administration, placed an embargo on silk by freight.[19] The Supreme Court, relying on *Jones v. United States,* held that the United States, when sued as a contractor, cannot be held liable for an obstruction to performance of the

13. *Id.* at 384.
14. *Id.* at 385.
15. *Id.*
16. *Id.*
17. 267 U.S. 458 (1925).
18. *Id.* at 459-60.
19. *Id.* at 460. The price of silk subsequently declined greatly and Horowitz was forced to take a loss of over $10,000. *Id.*

contract which results from a sovereign act which is public and general.[20] Thus, the Court expanded the doctrine by looking at the governmental act in question to see if it was of public and general utility.

This judicial inquiry of whether an act has public and general utility was also the ultimate factor in the outcome of *Sun Oil Co. v. United States*.[21] *Sun Oil* involved an action by three oil companies to recover damages and/or just compensation for the delay and the denial of permits to establish and operate offshore oil platforms as allowed by relevant lease terms and OCSLA.[22] For the breach of contract claim brought before it, the court held that denying an application to build a second platform was unjustified on the merits. Although the federal government argued that the sovereign acts doctrine allowed the government to escape liability for breach, the court held otherwise, declaring that the actions taken by the Secretary were "not actions of public and general applicability, but were actions directed principally and primarily at plaintiffs' contractual right to install a platform . . . and to extract oil and gas therefrom. The doctrine of sovereign immunity does not insulate defendant from liability in such instances."[23]

In *Sun Oil Co.* and in *Everett Plywood Corp. v. United States*,[24] the court found the government's defenses lacking after applying this public and general test. In *Everett*, a governmental timber contract was reformulated after it was forecasted to cause environmental damage. After reviewing the facts, the *Everett* court found "it is obvious that the act in question was neither public nor general—the government unilaterally terminated one contract after deciding continued performance would have been unwise."[25] Here, as in *Sun Oil Co.*, the government's arguments

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20. *Id.* at 461. The court again followed the reasoning of *Jones:* "Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons." *Id.* (quoting Jones v. United States, 1 Ct. Cl. at 384). Because the court in this instance found that the embargo on silk by rail was an act public and general in nature, the government was held not liable for the resulting breach of contract. *Id.* at 461.

21. 572 F.2d 786 (1978).

22. *Id.* at 792-93. This case arose in California and followed the 1969 Union Oil platform blowout off the coast of Santa Barbara and the subsequent review and reconsideration of federal leases and leasing procedures. *Id.* at 797-98. This case also occurred prior to the passage of the Oil Pollution Act of 1990.

23. *Id.* at 817.

24. 651 F.2d 723 (Ct. Cl. 1981).

25. *Id.* at 731-32.

based upon the doctrines of frustration,[26] or sovereign acts, would not cancel the contract without liability for breach.[27]

In *Hughes Communication Galaxy, Inc., v. United States,*[28] the court added an additional inquiry into the use of the sovereign acts doctrine. The court would now look at the contract in question in order to determine if there was any governmental surrender of sovereignty in an unmistakable manner that would preclude the government from asserting the sovereign acts defense.

This important case involved a contract between Hughes Communication Galaxy (Hughes) and the National Aeronautics and Space Administration (NASA). In its contract, NASA agreed to use its best efforts to launch Hughes' satellites through the use of the Space Shuttle according to the "United States policy governing launch assistance approved by the President of the United States on August 6, 1982."[29] When the Space Shuttle Challenger explosion occurred, it prompted the President to issue an order stating that NASA would no longer launch commercial spacecraft.[30] Because of this new policy, several of Hughes' spacecraft were not able to be carried by the Space Shuttle. Hughes subsequently brought

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26. This doctrine is used to excuse performance where performance still remains possible, but the value of the performance to at least one of the parties and the basic reason for entering into the contract for both parties has been destroyed by an unforeseen and supervening event. *Id.* at 728.

27. It is also important to note the discussion in *Everett Plywood* on the distinction between an act that is "public and general in nature" and one that is not. The court remarks, "[i]t would have been an entirely different case if Congress had passed a law immediately prohibiting all cutting in all public forests, but this unilateral termination does not constitute a sovereign act that excuses the government from breach damages." *Id.* at 732. In this manner, the court attempts to give guidance to potential plaintiffs, the government, and other courts as to what makes an act "public and general."

28. 998 F.2d 953 (Fed. Cir. 1993).

29. President Reagan issued this policy, entitled "Space Assistance and Cooperation Policy." It stated:

> With respect to the priority and scheduling for launching foreign payloads at U.S. launch sites, such launchings will be dealt with on the same basis as U.S. launchings. Each launching will be treated in terms of its own requirements and as an individual case. Once a payload is scheduled for launch, the launching agency will use its best effort to meet the scheduling commitments. Should events arise which require rescheduling, the U.S. will consult with all affected users in an attempt to meet the needs of users in an equitable manner.

Id. at 956 (footnote omitted). The unique contract contained a cut-off date after which NASA's obligations would expire whether or not the satellites were still unlaunched. *Id.*

30. *Id.*

an action for damages against the federal government after NASA informed it that its satellites would not be launched due to this Presidential revision of Space Shuttle payload policy.

The court found that the clause in the launch services agreement shifted the financial responsibility to the government for any changes in launches and launch priority resulting from a policy change or revision. The defense of the sovereign acts doctrine could not be used by the government to escape liability in this instance, because here the court determined that any future use of the doctrine was surrendered in the language of the contract in unmistakable terms[31] that required that the government provide launch scheduling in accordance with the August 6, 1982 Presidential decree.[32]

In *United States v. Winstar,* the Supreme Court combined the reasoning behind *Jones, Horowitz,* and *Hughes* to apply both the public and general test to the act in question and to add the second consideration of whether there was any surrender of the defense by the government in the contract terms. Additionally, the Court looked at a new factor, governmental self-interest, when it decided whether the act was public and general.

During the savings and loan crisis in the 1980s, the Federal Home Loan Bank Board encouraged healthy thrifts and outside investors to take over ailing thrifts by allowing them to designate the excess of the purchase price over the fair market value of identifiable assets as supervisory goodwill and to count such goodwill toward the capital reserve requirements imposed by federal regulations. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) subsequently disallowed this practice.[33] Three thrifts sued for breach of contract.[34]

The Court in *Winstar* stated that the sovereign acts defense could not prevail because the facts of the case did not warrant its application.[35] In

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31. The unmistakability doctrine is a special rule dealing with government contracts which holds that "surrenders of sovereign authority must appear in unmistakable terms." United States v. Winstar Corp., 116 S. Ct. 2432, 2479 (1996) (Rehnquist, J., dissenting).

32. Hughes Communication Galaxy, Inc. v. United States, 998 F.2d at 958.

33. 12 U.S.C § 1464(t)(1)(A).

34. These thrifts included Glendale Federal Bank, Federal Savings Bank, the Winstar Corporation, and The Statesman Group. United States v. Winstar, 116 S. Ct. at 2447.

35. Again, the Supreme Court reiterated the *Horowitz* and the *Jones* tests and stated that:

> The sovereign acts doctrine thus balances the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign

the Court's view, FIRREA was not an act that was "public or general." The Court noted that even if FIRREA was found to be "public and general," the legal impossibility defense could not be applied to protect the United States from liability. The Court reasoned that because the object of the doctrine is to place the government as contractor on the same footing as that of a private contractor, the government, like any other contractor, "must show that the passage of the statute rendering its performance impossible was an event contrary to the basic assumptions on which the parties agreed, and must ultimately show that the language or circumstances do not indicate that the Government should be liable in any case."[36] The Court found that the government had not met these conditions because some changes in the regulatory structure of thrifts was foreseeable and probable.[37] As the Court stated:

> Finally, any governmental contract that not only deals with regulatory change but allocates the risk of its occurrence will, by definition, fail the further condition of a successful impossibility defense, for it will indeed indicate that the parties' agreement was not meant to be rendered nugatory by a change in the regulatory law.[38]

The sovereign acts doctrine was looked at from a new angle in *Winstar*. Under this new approach, the defense would not hold up if there was a judicial determination of the statute being "tainted by a governmental

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act is properly attributable to the government as contractor. If the answer is no, the government's defense to liability depends on the answer to the further question, whether that act would otherwise release the Government from liability under ordinary principles of contract law.

Id. at 2465.

36. *Id.* at 2469.

37. *Id.* at 2470. The Supreme Court, in a relevant footnote, offered an alternate position to reviewing courts. It is this alternate position that is relied on in *Conoco*. This principle states that a court may hold that a governmental action was not "public and general" under *Horowitz* if its primary purpose or effect was to avoid the Government's contractual commitments. However, the Supreme Court realized the difficulty that would result from applying this test due to the required judicial determination of relative intent. *Id.* at 2467 n.46. The Court in *Winstar* holds that the government will not be liable as long as the impact on a governmental contract is "merely incidental to the accomplishment of a broader governmental objective." *Id.* at 2466.

38. *Id.* at 2471.

object of self-relief" rather than being "regulatory legislation that is relatively free of government self-interest."[39]

III. *CONOCO INC. V. UNITED STATES*

A. Background

In August 1981, August 1982, and September 1983, the government of the United States conducted lease sales for fifty-three tracts off the coast of North Carolina.[40] This lease sale was conducted pursuant to OCSLA, which specifically authorizes the Secretary to sell leases for oil and gas exploration within the Outer Continental Shelf (OCS).[41] Conoco, along with other plaintiffs,[42] paid more than $354,000,000 for these leases and more than $8,000,000 in annual rentals. In order to allow these lands to be leased, Conoco and the Secretary had to follow numerous procedural requirements mandated by OCSLA.[43]

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39. *Id.* at 2465.

40. Over the past forty-two years, more than one hundred leases for oil and gas exploration have been issued pursuant to the OCSLA regime. Over $55 billion has been paid to the United States government for such leases. Conoco Inc. v. United States, 35 Fed. Cl. 309, 316 (1996).

41. The OCS is the submerged land beneath navigable waters on the Continental Shelf beginning seaward of the coastal waters of states. Coastal states have jurisdiction over the waters and the submerged land out to within three miles of their coasts. The OCS extends beyond this three miles. 43 U.S.C. §§ 1301(a), (b), 1331(a) 1994.

42. Nine other oil companies filed suit as third-party plaintiffs. These third-party plaintiffs included: Amerada Hess Corporation, Chevron USA Inc., Marathon Oil Company, Mobil Exploration & Producing U.S. Inc., Murphy Exploration & Production Company, Murphy Oil USA, Inc., OXY USA Inc., Pennzoil Exploration & Production Company, and Shell Offshore Inc. On October 28, 1995, eight more companies filed motions to intervene. The court granted the motion to allow Amoco Production Company, Mobil Oil Corporation, Mobil Exploration & Producing North America Inc., Mobil Exploration & Producing Southeast Inc., Shell Frontier Oil & Gas Inc., Shell Western E & P Inc., Texaco Exploration and Production, Texaco Inc., and Union Oil Company of California to become intervenors in the case. Conoco Inc. v. United States, 35 Fed. Cl. at 315.

43. 43 U.S.C. § 1331 (1994). Under the OCSLA system a competitive bidding system is used to sell leases. *Id.* § 1337. This system is a complicated process involving the Secretary and many other agencies. The Secretary must establish a five-year plan for each leasing program that contains a schedule of lease sales that reflects the 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." *Id.* § 1334(a). The DOI issues the OCS leases on standard, non-negotiable lease forms that it prepares. The United States of America is the "lessor" and the "lease area" is generally a three-square mile tract. Terms

Before exploiting or exploring under OCSLA, a lessee must obtain approval by the DOI and any other involved state or federal agencies. If the lessee wants to pursue oil and gas development and production, it must have a subsequent development and a production plan approved by the Secretary.[44]

In this instance, Conoco successfully bid on tract regions off the coast of North Carolina and entered into a contractual lease agreement[45] with the federal government.[46] Along with twenty owners of North Carolina leases, Conoco proposed to drill one exploratory well about forty-five miles east of Cape Hatteras. During this time period, increasing objections mounted against the proposed exploratory drilling and the North Carolina leases in general. In August 1990, due to an environmental outcry, Congress passed the OBPA. This legislation was part of the more comprehensive Oil Pollution Act, and in the North Carolina region, specifically prohibited the DOI from approving any POEs or other exploration, production, or development of the Outer Continental Shelf offshore until October 1, 1991.[47]

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of the lease range from five to ten years and are extendible as long as drilling is actually taking place. Periodic lease payments and cash bonuses are required from all OCS lessees. *Id.* § 1337.

44. Conoco Inc. v. United States, 35 Fed. Cl. at 317.

45. Section Two of the lease listed the rights of the Lessee:

> The Lessor hereby grants and leases to the Lessee the exclusive right and privilege to drill for, develop, and produce oil and gas resources .... These rights include:
>
> (a) the nonexclusive right to conduct within the leased area geological and geophysical explorations in accordance with applicable regulations;
>
> (b) the nonexclusive right to drill water wells within the leased area . . . ; and
>
> (c) the right to construct or erect and to maintain within the leased area artificial islands, installations, and other devices permanently or temporarily attached to the seabed ....

Id. at 317-18.

46. The lease entered into was not adjacent to any other offshore areas of production. *Id.* at 316.

47. The passage of the OBPA came immediately before the submission to the Secretary of a POE for the exploratory well. *Id.* at 318. All operations under Conoco's North Carolina leases were suspended. Exploration activity would only be allowed to resume after the Secretary certified to Congress that he had adequate information to carry out OCSLA responsibilities in approving POEs. The OBPA provides, in part, that the Secretary shall not conduct any new lease sales, issue any new leases, approve any exploration plans, approve any development and production plans, approve any applications for a permit to drill, or permit any drilling for oil or gas under the OCSLA on any OCS lands offshore of North Carolina. 42 U.S.C. §§ 1331-1356 (1994).

B. Arguments Presented on Appeal

Plaintiff Conoco's arguments, in essence, stated that the passage of OBPA materially breached a binding contract, made it impossible for them to take advantage of their offshore leases, and interfered with the Secretary's ability to perform his contractual duties under the OCS leases.[48] Conoco argued that while the OBPA did not expressly repeal OCSLA (the statute under which the leases were granted) it did make performance of the contracts impossible.[49] According to Conoco, the express terms of the OCSLA leases, and the circumstances under which they were made, contractually forced the United States to fairly consider and expeditiously act upon Conoco's POEs as well as any other subsequent plans for development. Therefore, Conoco asserted that the government's failure to at least give fair consideration to their POE was a material breach of contract.[50] Conoco further maintained that the United States, through passage of the OBPA, had deliberately prevented Conoco from receiving any benefit from their leases.

In the alternative, Conoco argued that the passage of OBPA frustrated their performance of the lease because the principal purpose of the lease, oil exploitation, was delayed.[51] Therefore, the contracts should be nullified and restitution should be granted. Lastly, Conoco stated that both of the defenses raised by the government, the sovereign acts doctrine and the unmistakability doctrines, had no merit.[52]

The United States contended that the OCS leases never granted Conoco absolute rights to explore and develop the lease areas. The government countered that the lease sale is merely one stage in the OCS administrative process which is separate from the federal permitting stage to develop or explore. Conoco knew, when purchasing the leases, that they might never be able to exploit them because no guarantee was ever given in the OCS lease that such exploitation would be permitted.[53] The

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48. Conoco filed suit against the federal government alleging that the passage of OBPA materially breached the leasing contracts, frustrated performance thereof, rendered such performance impracticable, or constituted a taking in violation of the Fifth Amendment of the United States Constitution. Conoco Inc. v. United States, 35 Fed. Cl. at 319.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 320.

government asserted that the plaintiffs were aware that the environmental impacts associated with their proposed development had to be carefully studied and that their permits could be denied because of numerous environmental requirements.[54] Further, the leases clearly state that they are subject to OCSLA, and all other applicable statutes and regulations. Therefore, Conoco's defined rights and expectancies, as set out by the lease agreement, were extremely limited and all government actions, such as the subsequent enactment of OBPA, were contemplated by the lease agreements.[55]

The government further argued that it did not breach the lease contracts by suspending the leases because suspension is incorporated into the lease agreement. Merely suspending the leases did not bar exploration and development, but only imposed additional DOI requirements before it could approve a drilling permit.[56] Finally, the government stated that the delay in exploration was not solely attributable to the OBPA but was also the result of Conoco's inability to obtain compliance with North Carolina's Coastal Area Management Act.[57]

In the event of a finding of breach, the government asserted that the sovereign acts doctrine and the doctrine of unmistakability were a shield from liability in this case.[58] The government maintained that because the OBPA was "public and general in nature" and because the government did not contractually waive its sovereign immunity in the lease terms, the government is not liable for breach.

C. The Court's Opinion

The Court of Federal Claims found in favor of plaintiff Conoco, holding that the OBPA legislation was not considered when making the lease contracts, that compliance with OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation, and that the government, at the very least, was contractually obligated to timely and fairly consider Conoco's POEs. Any suspension of the North Carolina leases did not occur pursuant to the OCSLA and its regulations.

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54. *Id.*
55. *Id.*
56. *Id.*
57. N.C. Gen. Stat. §§ 113A-100 to 134.4 (1996).
58. Conoco Inc. v. United States, 35 Fed. Cl. at 320.

In addition, the court held that the government could not escape liability under the sovereign acts doctrine.

The court first ascertained the exact meaning of the relevant lease terms to see if there was a breach. In doing so, the court agreed with Conoco's interpretation of the leases.[59] The court found that the plain meaning interpretation of the clause referring to "all other applicable statutes and regulations" makes no mention of future or subsequent legislation which might affect parties' rights and procedures.[60] More importantly, the court found that at the time of execution of the leases neither side envisioned the passage of OBPA.[61] The court held that the lease contracts could not be read to allow the government, through passage of the OBPA, to so drastically interfere with and narrow the lessees' bargained-for rights of exploitation.

While the lease agreements do not specifically state the parties' obligations regarding the exploration plans under the OCSLA, exploration may only be conducted in compliance with approved plans of exploration. Thus, Conoco is obligated to prepare and submit exploration plans. The court found a corresponding reciprocal obligation on the part the government to timely and fairly consider the POEs properly submitted before it.[62] The passage of the OBPA imposed severe new conditions upon the DOI's obligation to approve such POEs; conditions not contemplated by the parties at the time of lease execution.[63] Further, the court held that the suspensions were not done according to the lease terms because they did not point to any environmental threats, risks of harm to life or the environment, or any other justifications found in the OCSLA regulations.[64] Thus, they were neither agreed to by Conoco nor incorpor-

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59. *Id.* at 324.

60. *Id.* at 322. A forward-looking reading of these provisions would also be inconsistent with the underlying purpose of the lease which is to promote the discovery of new hydrocarbon resources. *Id.* at 323.

61. *Id.*

62. *Id.* at 327.

63. *Id.* at 328.

64. *Id.* "The leases contain a provision relating to suspending the leases, according to which '[t]he Lessor may suspend or cancel this lease pursuant to Section 5 of the [OCSLA] and compensation shall be paid when provided by the Act.'" *Id.* Because the court found that the leases were only subject to statutes then-existing, the extent to which the suspensions were proper depends on whether they were made as required by OCSLA and its regulations. Here, the court found that the suspensions were not of the type contemplated by the OCSLA because they were open-ended, indefinite bars, and that the suspension notices sent to plaintiffs were not invoked pursuant to any justification set forth

ated into the bargain at the time of lease formation.[65] The government's assertion that the leases were suspended to conduct further environmental studies, was found to be unpersuasive.[66]

After finding a breach by the government, the court ruled that the sovereign acts doctrine did not shield the government from liability. The court distinguished between two types of governmental action; government action as sovereign versus government action as contractor. Relying on *Sun Oil,* the court stated that "governmental acts that directly or intentionally, as opposed to incidentally, impede specific contracts rather than promote the public interest are not sovereign acts within the meaning of the defense. A fortiori, a governmental act whose effect was specifically designed to obstruct performance is not a sovereign act."[67]

The court further proposed the broad theory that the government, through its assertion of the sovereign acts doctrine, was arguing that all laws affecting the environment should be considered sovereign acts immune from liability. The court addressed this proposition by stating: "It is not true, however, that all of the governments' actions taken to protect the environment are sovereign acts."[68]

In the end, the court found that while the OBPA may have been developed to address environmental concerns, it was not an act of public and general applicability. At most, it was found that the act affected the public welfare incidentally.[69] The court thus denied the government's motion for summary judgment and granted third party plaintiffs' cross-motion for partial summary judgment on the breach of contract claims.[70]

IV. DISCUSSION

The court was correct in its determination and reliance on the aforementioned case law to hold that the United States government materially breached the OCS lease contracts with Conoco. However, the

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in the regulations of OCSLA. *Id.* at 328-29.

65. *Id.* at 329.

66. *Id.*

67. *Id.* at 335.

68. *Id.* at 336.

69. The court went on to state that the OBPA "was 'principally and primarily' enacted to restrict the SOI's ability to act on plaintiffs' POEs. . . . It was specifically enacted to delay indefinitely plaintiffs' exploration of the OCS offshore North Carolina." *Id.*

70. Damages to be awarded were to be decided at a formal status conference. Conoco Inc. v. United States, 35 Fed. Cl. at 337.

court improperly relied on the case law to show that the doctrine of sovereign acts does not apply in this case. As feared in *Jones*, the court here engaged in a muddled sovereign acts analysis.[71] A close look at the cited cases in the *Conoco* opinion shows that judicial reliance upon them is unpersuasive. In *Jones, Horowitz,* and *Sun Oil*, the courts specifically mandated a broad definition of the term "public and general in nature" and gave significant judicial deference to the reasoning behind the Executive and Legislative actions.

In addition, under the relevant case law, the court should have applied two fundamental tests to the passage of OBPA and the government's subsequent assertion of the sovereign acts doctrine. The first test is whether the government is acting in its contracting role. The second test is whether the act in question will release the government from liability under ordinary principles of contract law.[72]

In the *Conoco* case, the government was acting in its contractor role as a result of its contractual relationship with oil companies for OCS oil exploration. Yet, as an additional part of this inquiry, the court must further inquire into the nature of the act. Was the act in question "public and general in nature?" This is a decisive issue in the case, and here the court narrows the application of the sovereign acts doctrine through its restrictive definition of the phrase "public and general."

As a result of this narrow judicial inquiry, the OBPA, with its dedication to the preservation of the offshore resources and environmental benefits of the North Carolina coast, was found by the court to not be public and general in nature. The court looked at the effect of the statute in a narrow perspective, focusing primarily on the effect to Conoco. Even though the preservation of the North Carolina offshore environment is beneficial to fishery resources, the tourism industry, and to regional and migratory populations of marine mammals, the court held that the OBPA was not broad or general enough. By narrowly focusing on the monetary effect to the contractor bringing suit, and not on the broad purpose of the legislation, the *Conoco* court overlooked the long-term, nationwide, environmental and economic implications of this important act.[73] In so doing, the court determined that the primary effect and purpose of OBPA

71. Jones v. United States, 1 Ct. Cl. 383, 385 (1865).
72. United States v. Winstar, 116 S. Ct. 2432, 2465 (1996).
73. Conoco Inc. v. United States, 35 Fed. Cl. at 335-36.

was to specifically avoid the government's contractual lease commitments.[74]

In finding no public and general act, the court overlooked the subtle, yet significant, wide-ranging public benefits of the OBPA. A reduction in the environmental stresses associated with oil exploration in this one area would promote a corresponding net benefit to the marine resources of the Mid-Atlantic region, and possibly to the entire nation. Living marine resources have no boundaries and thus the positive benefits of the OBPA are not limited to the immediate locality of North Carolina. By looking narrowly at the specific region highlighted in the OBPA, the court neglected to take into account the over-arching benefit that this legislation has, and was intended to have, for the whole of marine living resources.

This judicial intent analysis imposes severe limitations on the usage of the sovereign acts doctrine. It has invited, and will continue to promote, judicial speculation. The Supreme Court has described this analysis as difficult to do.[75] Additionally, it limits the judicial deference traditionally paid to the other branches of the government in applications of this defense.[76] Furthermore, the court in *Conoco* made this determination of congressional intent without engaging in a detailed or thorough analysis of the OBPA or its legislative history.[77] By judging the intent of OBPA by its contractual effects, the court entered onto dangerous ground because the court's ultimate conclusion could easily have been the product of a result-oriented analysis.

In *Conoco*, the elements of the court's analysis were correct, but they were applied in the wrong sequence. After finding that there was a breach of contract, the court should have then applied the initial test of the sovereign acts doctrine. If the passage of the OBPA passed this test, then the court should have looked to see if the act would release the government from liability under ordinary principles of contract law as developed in *Winstar*.[78]

Instead, the court reversed the order of this test by first looking at the lease terms and determining whether the OBPA was foreseeable. In doing so, the court determined that no future legislation on oil exploration was

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74. *Id.* at 336.

75. United States v. Winstar, 116 S. Ct. at 2467 n.46.

76. *See supra* notes 12 and 21 and accompanying text.

77. *See* Act of August 3, 1990 , Pub. L. No. 101-380, 1990 U.S.C.C.A.N. (104 Stat.) 839.

78. United States v. Winstar, 116 S. Ct. at 2469.

foreseeable by either party. In this manner, the court limited the way in which the doctrine was applied. If the court's analysis had proceeded with a test of the doctrine first, followed by an analysis of contract principles, the court might have realized that such a restrictive view of the term "public and general in nature" was unnecessary.

This decision sets dangerous precedent for environmental statutes enacted to remedy environmental harm. The potential costs of paying damages for contract breaches arising from subsequent environmental legislation must now be factored into proposed regulatory reform. Furthermore, the approach of *Conoco* suggests that courts may look only to the effect of legislation on contracts in a sovereign acts doctrine analysis without giving due consideration to the broad intent of Congress.

V. CONCLUSION

The Court erred in its analysis in *Conoco*. It did not look carefully enough at the subsequent statute in question to determine the exact legislative intent. In neglecting this congressional intent analysis, the court had an easy time construing the phrase "public and general in nature" narrowly, and thereby continued the judicial trend toward a restrictive application of the sovereign acts doctrine.

The court still could have decided that the government was liable in *Conoco*. Yet, the opinion would be of much greater weight if the analysis was done in a different manner. The Outer Banks Protection Act was subsequently repealed on April 26 and May 2, 1996.[79] While it is claimed that this statute was repealed because the mandate it called for had been fulfilled,[80] some could argue that the holding in this case compelled Congress to take such action.

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79. 33 U.S.C. § 2753 (1996).
80. H.R. Rep. No. 104-173, at 46 (1995).