Nos. 99-244 and 99-253

IN THE
Supreme Court of the United States

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

MARATHON OIL COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF PETITIONER MARATHON OIL COMPANY

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December 30, 1999

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the United States, after having accepted consideration from a government contractor, is required to return that consideration (*i.e.*, pay restitution) when subsequent government action bars the United States from performing its contractual obligations.

PARTIES TO PROCEEDING BELOW AND RULE 29.6 STATEMENT

In addition to petitioner, Mobil Oil Exploration & Producing Southeast, Inc., was a plaintiff-appellee below. The following parties were plaintiffs, but not appellees, below:

Conoco, Inc.,
Amerada Hess Corporation,
Chevron USA, Inc.,
Murphy Exploration & Production Co.,
Murphy Oil USA, Inc.,
OXY USA, Inc.,
Pennzoil Exploration & Production Co., and
Shell Offshore, Inc.

Pursuant to Rule 29.6, Marathon Oil Company states that its parent company is USX Corporation. The following are subsidiaries of Marathon Oil Company that are not wholly owned:

Arctic LNG Transportation Company,
Colonial Pipeline Company,
Eagle Sun Company Limited,
Explorer Pipeline Company,
Kenai LNG Corporation,
Marathon Ashland Petroleum LLC,
Odyssey Pipeline L.L.C.,
Oil Insurance Limited,
Polar LNG Shipping Corporation,
Poseidon Oil Pipeline Company, L.L.C.,
West Shore Pipe Line Company, and
Wolverine Pipe Line Company.

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OPINIONS BELOW

The superseding opinion of the Court of Federal Claims (Pet. App. 45a-99a)[1] granting petitioners' motion for partial summary judgment as to liability is reported at 35 Fed. Cl. 309. The judgments of the Court of Federal Claims in favor of petitioners (J.A. 339-40) are unreported. The original opinion of the United States Court

[1] Citations of "Pet. App." refer to the appendices to the petition filed in No. 99-253.

of Appeals for the Federal Circuit (Pet. App. 25a-43a) reversing the judgment of the Court of Federal Claims was entered on October 15, 1998, and is reported at 158 F.3d 1253. The court of appeals granted panel rehearing and entered a revised order and opinion (Pet. App. 1a-24a) on May 13, 1999, which is reported at 177 F.3d 1331.

JURISDICTION

The court of appeals entered its original decision on October 15, 1998. On November 25, 1998, petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc*. The court granted panel rehearing and entered a revised judgment on May 13, 1999. Petitioners timely filed petitions for writs of certiorari on August 10 (No. 99-244) and August 11, 1999 (No. 99-253), which this Court granted on November 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are (1) the Outer Continental Shelf Lands Act of 1953, ch. 345, 67 Stat. 462 (codified as amended at 43 U.S.C. § 1331 *et seq.*), (2) the Outer Banks Protection Act, Pub. L. No. 101-380, § 6003. 104 Stat. 484, 555-58 (1990), and (3) the Coastal Zone Management Act, 16 U.S.C. § 1456, which are reproduced in pertinent part at Pet. App. 100a-158a, 159a-165a, and 166a-173a, respectively.

STATEMENT OF THE CASE

This case is a contract dispute between petitioners Marathon Oil Co. ("Marathon") and Mobil Oil Exploration and Producing Southeast, Inc. ("Mobil") and the United States. In 1981, petitioners each paid the United States more than $78 million for interests in oil and gas

leases that gave them "the exclusive right and privilege to drill for, develop, and produce oil and gas resources" on five tracts off the coast of North Carolina. Pet. App. 175a (§ 2) (sample lease). In exchange, the United States contractually obligated itself to timely and fairly consider petitioners' requests for its approval of plans and applications necessary for them to explore and develop their lease tracts. In 1990, the United States enacted the Outer Banks Protection Act ("OBPA"), Pub. L. No. 101-380, § 6003, 104 Stat. 484, 555-58 (1990), which, the Court of Federal Claims found, not only repudiated the government's obligations under petitioners' leases, but also "compelled governmental breach by non-performance." Pet. App. 76a. The court of appeals did not address these findings, but nevertheless denied petitioners' claim for restitution of the money they had paid. The court of appeals reasoned that, even though the OBPA had barred the United States from performing its contractual obligations, the statute was not the "operative cause," *id.* at 4a, of the contract's failure. *Id.* at 14a-15a. The question presented for resolution by this Court is whether the United States, after having bargained for and received consideration from a government contractor, is required to pay restitution when its own acts subsequently bar it from performing its contractual obligations.

1. *Petitioners' Outer Continental Shelf Lands Act Leases.*

The Outer Continental Shelf Lands Act of 1953 ("OCSLA"), ch. 345, 67 Stat. 462 (codified as amended at 43 U.S.C. § 1331 *et seq.*), establishes federal jurisdiction over the seabed and subsoil of the continental shelf lying more than three miles from the coast of the United States ("OCS lands"). See 43 U.S.C. § 1333(a). The OCSLA further authorizes the Secretary of the Interior ("the Secretary") to sell leases to private parties to explore for and develop oil and gas deposits on those lands.

See *id.* § 1337. Those leases "entitle the lessee to explore, develop, and produce the oil and gas contained within the lease area," subject only to the lessee's compliance with the OCSLA and regulations promulgated thereunder. *Id.* § 1337(b)(4).

Under the OCSLA, leases for tracts of OCS land are sold by the Department of the Interior ("DOI") through a competitive bidding process. See *id.* § 1337(a)(1). The winning bidders in this process are required to pay large, up-front, cash "bonuses" as well as annual lease payments for their leases and—if production is ever achieved—royalites on any oil or gas produced. See *Watt* v. *Energy Action Educ. Found.*, 454 U.S. 151, 168-69 (1981) (upholding DOI's up-front, cash "bonus" system). Since OCSLA's enactment in 1953, over 19,000 OCS leases have been sold and successful bidders have paid more than $60.7 billion in "bonuses" to the United States for the right to explore their tracts and develop any oil and gas deposits they find. See Minerals Management Serv., U.S. Dep't of the Interior, *Mineral Revenues 1998*, at 51 (1999).

In August 1981, petitioners Marathon and Mobil, along with Amerada Hess Corporation,[2] each purchased one-third undivided interests in oil and gas leases for five OCS tracts off the coast of North Carolina. See Pet. App. 6a-7a. Under these leases, petitioners acquired "the exclusive right and privilege to drill for, develop, and produce oil and gas resources, except helium gas" on their OCS tracts. *Id.* at 175a (§ 2). In exchange, petitioners each paid more than $78 million to the United States in up-front, cash "bonuses." *Id.* at 7a. Subsequently, petitioners each

[2] Amerada Hess Corporation settled its claims against the government in 1996, before the Court of Federal Claims entered judgment in this case, *see* Pet. App. 9a-10a, and was not a party to the proceedings before the court of appeals.

paid more than $264,000 in total rental payments to the United States during the leases' ten-year primary term. *Id.* at 7a.

Each of the lease agreements between petitioners and the United States was a non-negotiable, standard-form contract prepared by the DOI. See Pet. App. 174a-192a. Section 1 of each lease expressly provided that it was issued "pursuant to" and "subject to" the OCSLA, see *id.* at 175a, and thereby incorporated the provisions of OCSLA by reference. As the Court of Federal Claims found (and the court of appeals did not dispute), by entering into these leases, the United States contractually obligated itself to comply with the requirements of the OCSLA. See *id.* at 76a. In particular, the government assumed the contractual duty to "timely and fairly consider—not necessarily approve, but at least promptly consider—" the plans and permit applications necessary for petitioners to explore and develop their OCS lease tracts. *Id.*[3] "Otherwise," the court concluded, "the bargain between the [United States] and [petitioners] would be illusory and would permit [the government's] unilateral forfeiture of [petitioners'] lease bonuses with impunity." *Id.* at 57a; *accord id.* at 76a.

[3] The leases also reiterated the pre-existing requirement of the OCSLA that, in exploring and developing their OCS tracts, the lessees "comply with all regulations and orders relating to exploration, development, and production." Pet. App. 178a (§ 10). Under the OCSLA, exploration, development, and production may be conducted only pursuant to plans approved by the DOI. *See* 43 U.S.C. § 1340(b), (c)(1) (exploration); *id.* § 1351(b) (development and production). As the Court of Federal Claims found, by requiring petitioners to comply with the OCSLA and regulations promulgated thereunder, the leases imposed on the United States the "necessary reciprocal obligation" also to comply with the OCSLA when acting on petitioners plans. *See* Pet. App. 76a.

2. *The Outer Continental Shelf Lands Act Regulatory Scheme.*

When a lease tract is not adjacent to known deposits of oil or gas, the first step in developing an OCS lease is the preparation and submission to the Secretary of a plan of exploration ("POE"). See 43 U.S.C. § 1340(b), (c)(1). A POE must set forth, in detail, a schedule of planned exploration activities, a description of the equipment to be used, the location of each exploratory well to be drilled, and other pertinent information. See *id.* § 1340(c)(3). Following submission of a POE, the Secretary is required to determine whether the POE is "consistent" with the OCSLA and the regulations promulgated thereunder. *Id.* § 1340(c)(1). The Secretary may require modifications of a POE to achieve such "consistency," and upon determining that the POE is "consistent" with the OCSLA, the Secretary "*shall*" approve the POE. *Id.* (emphasis added).[4]

The OCSLA places a strict time limit for action by the Secretary with respect to a POE that is "consistent" with the OCSLA. Under the Act's express terms, "[t]he Secretary *shall* approve such plan, as submitted or modified, within *thirty days* of its submission," *id.* (emphases added), unless (A) the proposed exploratory activities would probably cause serious harm or damage to life (including fish and other aquatic life), national security, property, mineral deposits, or the environment *and* (B) the proposed activities "cannot be modified to avoid" such harm or damage, *id.* (incorporating by reference 43 U.S.C. § 1334 (a)(2)(A)(i)). If the Secretary disapproves a POE that is "consistent" with the OCSLA under the foregoing provision, he may cancel the lease, entitling the lessee to compensation. *Id.* § 1340(c)(1).

[4] If a lessee's planned exploratory activities will involve the discharge of any wastes into the ocean, the lessee must also obtain a National Pollutant Discharge Elimination System ("NPDES") permit from the Environmental Protection Agency ("EPA"). *See* 33 U.S.C. §§ 1311(a), 1342(a).

After a POE is approved, the next step in the process is for the lessee to obtain the necessary permits to begin exploratory drilling. *Id.* § 1340(d). Under the OCSLA, in order to obtain a federal drilling permit, a lessee whose activities will affect land or water uses in the coastal zone of a State with a federally approved coastal zone management program must, under the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(B) ("CZMA") certify that its proposed activities are consistent with the State's program. See 43 U.S.C. § 1340(c)(2). The Secretary may not issue a drilling permit unless the State concurs with the lessee's certification, CZMA § 1456 (c)(3)(B)(i), or is presumed to concur with that certification, *id.* § 1456(c)(3)(B)(ii), or the State's objection is overriden by the Secretary of Commerce, *id.* § 1456 (c)(3)(B)(iii). See 43 U.S.C. § 1340(c)(2).

A lessee's failure to obtain a State's CZMA concurrence is *not* a ground under the OCSLA for withholding approval of an otherwise approvable POE. Although the OCSLA expressly prohibits the Secretary from granting a drilling permit or permitting exploratory activity without a State's CZMA concurrence (or a federal override of its objection), it does *not* restrain him from taking the first step—approving a POE that complies with the OCSLA—even in the face of a State's CZMA objection. See *id.* § 1340(c)(1). Indeed, during the relevant period, the DOI's own regulations made clear that a State's CZMA objection was not a barrier to approving a POE that complied with the OCSLA. See 30 C.F.R. § 250.33(i) (1993).

If a lessee's initial exploration of its tract proves successful, it may (and usually will) pursue additional exploratory activities by preparing and submitting additional POEs. Finally, in order to extract any oil or gas found, the lessee must prepare and submit a development and

production plan ("POD"). See 43 U.S.C. § 1351(a)(1). Like a POE, a POD must describe the work to be performed, the facilities to be used, the environmental safeguards to be followed, and set forth other pertinent information. See *id.* § 1351(c). *Unlike* a POE, however, a POD may not, under the OCSLA's express terms, be approved unless a State concurs or is presumed to concur in the lessee's CZMA certification, or its objection is overridden by the Secretary of Commerce. See *id.* § 1351(d), (h)(1)(B).

3. *Petitioners' Initial Efforts To Explore Their Lease Tracts.*

In 1989, petitioners, the co-lessee of their OCS tracts, and the owners of other adjacent OCS leases organized their tracts into a single exploration unit (the "Manteo Unit") and proposed to drill a single exploratory well approximately 45 miles east of Cape Hatteras.[5] After the State of North Carolina raised initial environmental objections to the plan, Mobil (the operator of the Manteo Unit) entered into a memorandum of understanding with the DOI and the State on July 14, 1989. See J.A. 79-85. In this memorandum, Mobil agreed to produce a draft POE for the DOI's and the State's review and to delay submitting a final POE until after the DOI had completed a special environmental report assessing the environmental impacts of the proposed exploration of the Manteo Unit. See Pet. App. 7a.

On June 1, 1990, the DOI issued a three-volume, 2000-page special environmental report. Based on this report, which one DOI official agreed was "the most extensive and intensive environmental examination that has ever

[5] Four of petitioners' five OCS tracts were included in the Manteo Unit. *See* J.A. 79. The fifth—Lease Block No. 220—was not.

been afforded an exploration well in the OCS program," J.A. 179, the DOI determined that the proposed exploration of the Manteo Unit would not result in any significant environmental impacts—either offshore or to the North Carolina coastal zone—and that the Manteo Unit's POE was consistent with the OCSLA and "approvable in all respects." Pet. App. 194a.

4. *The Outer Banks Protection Act.*

On August 18, 1990—before Mobil was able to submit the Manteo Unit's final POE to the Secretary—the United States enacted the Outer Banks Protection Act ("OBPA") as part of the comprehensive Oil Pollution Act of 1990. See Pub. L. No. 101-380, § 6003, 104 Stat. at 555-58. This Act—without amending the OCSLA—expressly prohibited the United States from fulfilling its contractual obligations under petitioners' North Carolina OCS leases. By its terms, the OBPA imposed an open-ended "moratorium," Pet. App. 7a, on the approval of any exploration or development of North Carolina OCS lands:

> PROHIBITION.—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.

OBPA § 6003(c)(1). This moratorium was to extend for not less than 13 months, until October 1, 1991, and thereafter until the 45th day of continuous congressional session after the Secretary submitted a written report to Congress certifying that the information acquired during new "ecological and socioeconomic studies, additional oceanographic studies, . . . and other additional environmental studies" which the OBPA required the Secretary to undertake, *id.* § 6003(d), was sufficient to enable him to carry out his responsibilities under the OCSLA, *id.* § 6003(c)(3)(A). The OBPA further mandated that the Secretary's report could be made only after he had considered the findings and recommendations of an Environmental Sciences Review Panel ("Review Panel"), which the OBPA created. *Id.* § 6003(c)(3)(A)(ii).

The OBPA's purpose is apparent both on its face and from its history. In 1988 and 1989, Congress enacted similar "moratoria" by prohibiting the DOI from expending any funds to approve any exploration of OCS tracts offshore of both Florida and Alaska. See Pub. L. No. 100-446, § 110, 102 Stat. 1774, 1801 (1988) (Florida); Pub. L. No. 101-121, § 111, 103 Stat. 701, 720 (1989) (North Aleutian Basin).[6] In June 1990, in response to environmental concerns raised by several States, President Bush instructed the DOI to cancel planned auctions of OCS leases offshore of California and Florida, to "[b]egin cancellation of *existing* leases off Florida," and to explore a "joint federal-state buy-back" of the Florida OCS leases. J.A. 99-100.

[6] Like the OBPA, the Florida and Alaska moratoria prompted the affected lessees to file contract actions against the United States. Before those claims were resolved, however, the government settled and paid nine of the Florida and Alaska lessees approximately $175 million—more than 100 percent of the bonuses and rental payments they had paid—in exchange for the cancellation of their leases. *See* Fed. Cir. App. 973-80.

The State of North Carolina, and members of its congressional delegation, strenuously protested the omission of OCS tracts off its coast from these bans on exploration. In July 1990, Representative Jones of North Carolina introduced what would become the OBPA as an amendment to the Oil Pollution Act of 1990. Representative Jones candidly explained the purpose of the OBPA. "[I]n his offshore moratoria proposal, the President has forgotten about North Carolina. Well, I have not." 136 Cong. Rec. 22,275 (1990).[7]

The OBPA's text confirms that it was directed solely toward barring petitioners' proposed exploration of the Manteo Unit. In its findings, the OBPA specifically referred to petitioner Mobil, the operator of the Manteo Unit, and stated that the 2000-page environmental report that DOI had prepared pursuant to the July 1989 memorandum of understanding "ha[d] not allayed concerns about the adequacy of the environmental information available." OBPA § 6003(b)(7). See also H.R. Conf. Rep. No. 101-653, at 161 (1990) ("[T]he [OBPA] essentially addresses the proposal by Mobil Oil Corporation and seven partners to drill an exploratory well about 40 miles off Cape Hatteras.").

5. *Application Of The OBPA.*

On August 20, 1990—two days after the enactment of the OBPA—Mobil, on behalf of the Manteo Unit, sub-

[7] Representative Rose of North Carolina expressed similar views:

> Governor Martin [of North Carolina] . . . was horrified when the President stopped offshore drilling off the coast of . . . Florida and left North Carolina out. And so he . . . wrote to Mr. Jones, and Mr. Jones did exactly what [Governor Martin] asked him to do, he put [the OBPA] in the legislation.

136 Cong. Rec. 22,277 (1990). *See also id.* at 22,278 (Rep. Young) (describing OBPA as a "moratorium"); *id.* at 22,279 (Rep. Lagomarsino) (same).

mitted its final POE to drill a single exploratory well on the North Carolina OCS lands leased by the Unit.[8] On September 28, 1990—30 days after the DOI deemed Mobil's submission to have been complete—the DOI found that the Manteo Unit's POE complied with all DOI regulations and would have no significant impact on the environment. The DOI reported to the Governor of North Carolina that:

> The [Manteo Unit] Plan, together with its supporting information, is deemed to be approvable in all respects. The Outer Banks Protection Act (OBPA) of 1990, however, prohibits the approval of any Exploration Plan at this time. Under Section 11 of the Outer Continental Shelf Lands Act [43 U.S.C. § 1337(c)], we are required to approve an Exploration Plan unless it is inconsistent with applicable law or because it would result in serious harm to the environment. Because we have found that [the Manteo Unit's] Plan fully complies with the law and will have only negligible effect on the environment, we are not authorized to disapprove the Plan or require its modification as you suggest.
>
> However, because we are currently prohibited from approving it, the Plan will remain on file until the requirements of the OBPA are met. Our determinations concerning this Plan will be reevaluated at that time.

Pet. App. 194a. Thus, although the DOI found the Manteo Unit's POE was "approvable in all respects," the Secretary nonetheless withheld his approval specifically in order to comply with the OBPA. Indeed, the government has conceded in this litigation that the Secretary would have approved the POE absent the OBPA. See U.S. Fed. Cir. Br. 39.

In response to the OBPA, the DOI also suspended petitioners' OCS leases—including the one that was not part of the Manteo Unit—as of August 18, 1990, the OBPA's effective date. The DOI cited as authority for its action a regulation that permitted the DOI to order operations on an OCS lease tract to be halted when "[t]he suspension is necessary to comply with judicial decrees prohibiting production or any other operation or activity, or the permitting of those activities, effective the date set by the court for that prohibition," 30 C.F.R. § 250.10(b)(7) (1993). See J.A. 129-31; see also *id.* at 133.[9]

As implicitly recognized in the DOI's suspension order, the OBPA's ban was not limited to the specific exploratory activities proposed in the Manteo Unit's pending POE. By its terms, the OBPA prohibited the Secretary

[8] On April 17, 1990, Mobil submitted a NPDES permit application to the EPA, along with the required certification that its proposed exploratory activities were consistent with North Carolina's CZMA plan. *See* CZMA § 1456(c)(3)(A). North Carolina objected to that certification on July 16, 1990, *see* J.A. 106-07, thereby barring the EPA from issuing the NPDES permit absent override of the objection by the Secretary of Commerce, *see* CZMA § 1456(c)(3)(A). The Manteo Unit promptly appealed in order to obtain such an override. The State's objection to the Manteo Unit's NPDES permit, however, would not have barred exploratory drilling because petitioners could have adopted a "no discharge" approach in which any wastes would have been barged to shore. *See* J.A. 331.

[9] DOI lifted this suspension only with respect to petitioners' Manteo Unit tracts on June 8, 1992, *see* J.A. 165-67, after the Secretary had certified that he had sufficient information to perform his responsibilities under the OCSLA with respect to the Manteo Unit's POE. Because the Secretary had stated that he would nonetheless not act on the POE or permit any drilling until additional studies recommended by the OBPA's Review Panel were completed, *see infra* at 15, Mobil requested that the suspension be reinstated. *See* J.A. 168-69; *id.* at 170-71. DOI granted Mobil's request, *see id.* at 173, and the suspension remained in effect until November 9, 1994, after studies were completed and the Secretary of Commerce had denied the Manteo Unit's appeals of North Carolina's CZMA objections. *See id.* at 337.

from approving *any* POE, permitting *any* drilling, or approving *any* POD for any North Carolina OCS tract, even if a lessee's application complied in every respect with the OCSLA and was *supported* (rather than opposed) by the State. See OBPA § 6003(c)(1). In short, as the Court of Federal Claims found, see Pet. App. 74a-84a, the OBPA foreclosed the government from performing any of the acts necessary for petitioners to pursue the rights they had purchased to explore and develop their North Carolina OCS tracts.

On November 19, 1990—even though the DOI had concluded two months earlier that the Manteo Unit's planned exploratory activities complied in all respects with the OCSLA and would not have any significant impact on the environment—the State of North Carolina objected to the Manteo Unit's certification that its POE was consistent with the States' CZMA program. See J.A. 141-48. Echoing the findings set forth in the legislation that its Governor had asked Representative Rose to introduce, see OBPA § 6003(b)(4)-(8), North Carolina's objection was based principally on its assertion that, even though the DOI had completed a 2000-page special environmental report just six months earlier, the available information was insufficient to assess the impact on the North Carolina coastal zone. See J.A. 142. The Manteo Unit lessees promptly appealed the State's CZMA objection to the Secretary of Commerce. See *infra* at 15 n.10.

In January 1992—almost a year after the deadline set by the OBPA—the Review Panel established by the Act belatedly submitted its report to the Secretary of the Interior. After reviewing this report, the Secretary certified to Congress on April 2, 1992, that "sufficient information presently exists to allow me to exercise my responsibilities under the OCSLA . . . and consider approval of the

exploration activities currently proposed to take place offshore North Carolina (*i.e.*, the first Manteo exploratory well) . . . ." Pet. App. 202a. Although the Secretary's certification arguably should have lifted the OBPA's "moratorium" with respect to the Manteo Unit's pending POE on the 45th day of continuous Congressional session following its submission, see OBPA § 6003(c)(3)(A), the Secretary nevertheless stated that he would not approve the POE or permit the drilling of the single proposed exploratory well until the completion of two studies that had been recommended by the Review Panel. See Pet. App. 202a. These studies were completed in July 1994, nearly two years after this litigation was commenced. The Secretary, however, ultimately never approved—or disapproved—the Manteo Unit's POE.[10]

By its express terms, the OBPA's "moratorium" applied to all activities required for petitioners to pursue exploration or development of their North Carolina OCS tracts from the OBPA's enactment in 1990 until its repeal in 1996, see Pub. L. No. 104-134, § 109, 110 Stat. 1321, 1321-177 (1996)—almost four years after petitioners filed this suit. The sole OBPA certification the Secretary ever made to Congress extended *only* to the single exploratory well proposed in the Manteo Unit's POE, which the Secretary nonetheless declined to approve. In fact, the Secretary specifically advised Congress in April 1992 that further studies would be required for him to make the

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10 On September 2, 1994, the Secretary of Commerce declined to override North Carolina's CZMA objections to the Manteo Unit's POE and its NPDES permit application. *See* J.A. 196-260; *id.* at 261-336. The Secretary of Commerce's decision was based in large part on the OBPA's finding, and the opinion of the Review Panel that it created, that the available information was insufficient to assess the likely environmental and socioeconomic effects of the single exploratory well proposed in the Manteo Unit's POE. *See id.* at 247 (citing the OBPA); *see also id.* at 224, 227 n.35, 232-33, 239, 244 (citing Review Panel's report).

OBPA certification for additional (or different) wells, POEs, and PODs, and that those studies "w[ould] not begin in earnest prior to reviewing the initial exploration drilling" proposed in the Manteo Unit's POE. Pet. App. 202a. Accordingly, even if the Manteo Unit's POE had been approved and its single exploratory well allowed to proceed, the OBPA continued—even *after* the Secretary's April 1992 certification—as a bar to (i) all other exploratory plans (such as ones for drilling additional wells to determine the boundaires of any deposits found by the first well), (ii) different exploratory activities, and (iii) the ultimate production and development of any oil or gas deposits found, both for the Manteo Unit and petitioners' one non-Manteo tract.

6. ***Proceedings Below.***

In October 1992, Marathon and Mobil, along with the owners of other leases for North Carolina OCS tracts, joined a lawsuit filed by Conoco Inc. against the United States for breach of the leases it had entered into for, *inter alia*, OCS tracts off the coast of North Carolina. In that suit, petitioners contended that the enactment and enforcement of the OBPA had materially breached their OCS leases by preventing the Secretary from performing his contractual duties. As the Court of Federal Claims explained, petitioners "d[id] not claim that [the government's] failure to approve [their] POEs and grant the necessary permits breached [its] lease contracts, but only that [the government's] failure at least to fairly consider their plans was a material breach." Pet. App. 57a. Accordingly, petitioners sought restitution of the up-front, cash "bonuses" they had paid, as well as their annual lease payments.

On April 1, 1996, the Court of Federal Claims granted partial summary judgment for petitioners as to liability,

holding that the United States' "failure [to carry out its contractual obligations], under the restrictions adopted pursuant to the OBPA, was a material breach of the leases." Pet. App. 84a. The court began by rejecting the United States' principal claim that the text of the leases—which made them subject to the OCSLA, "regulations . . . in existence upon the effective date of th[ese] lease[s,] . . . and *all other applicable statutes and regulations*," *id.* at 175a (§ 1) (emphasis added)—made petitioners' contractual rights expressly subject to all future statutes enacted by the United States, including one, such as the OBPA, which was both unforeseeable and effectively extinguished petitioners' rights. See *id.* at 68a-69a. As the court concluded, "the lease contracts here at issue cannot be construed to allow for such drastic unilateral interference by the government, through passage of highly restrictive legislation, the OBPA, with the lessees' bargained for rights of exploration." *Id.* at 67a.

The court next held that the United States' enactment and implementation of the OBPA constituted a "total breach" of its lease contract with petitioner:

> [U]nder the lease agreements, defendant was contractually obligated to consider facially compliant POEs promptly and fairly. Any contrary interpretation would render the bargain illusory and subject to unilateral forfeiture. Clearly, the OBPA imposed severe, burdensome, new conditions upon the DOI's obligation under OCSLA to approve POEs offshore North Carolina, which were not contemplated by the parties when the leases were executed. Therefore, the court also finds that compliance with the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to "total breach."

Pet. App. 76a.[11] On July 24, 1997, the Court of Federal Claims awarded Marathon Oil and Mobil restitution of the up-front, cash "bonuses" they had paid for their North Carolina OCS leases and entered judgment for Marathon Oil in the amount of $78,242,368.59 and for Mobil for $78,257,565.00. J.A. 339-40.

On October 15, 1998, a divided panel of the Federal Circuit reversed. Judge Plager, who was joined by Judge Schall, wrote the majority opinion. Judge Newman dissented. Petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc*. Thereafter, five members of the court of appeals, including Judge Schall, recused themselves. Judge Schall was replaced by Judge Rader. On May 13, 1999, without hearing re-argument, the newly-constituted panel issued a revised opinion again reversing the judgment of the Court of Federal Claims, again by a divided vote.

The majority opinion, again authored by Judge Plager, first agreed with the Court of Federal Claims that petitioners' OCS leases were not, by their terms, subject to modification by subsequent legislation such as the OBPA. See Pet. App. 12a. The court of appeals rejected the lower court's conclusion that the government's OBPA-compelled breach of petitioners' leases entitled them to restitution, however, because, in its view, the OBPA was

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[11] Relying on *Winstar Corp.* v. *United States*, 64 F.3d 1531 (Fed. Cir. 1995) (*en banc*), the court also rejected the government's arguments that it was immune from liability under the sovereign acts and unmistakability doctrines, finding that the OBPA "was not an act of public, general applicability," Pet. App. 96a, but was instead "narrowly tailored to target the specific contracts and sought to abate the accompanying rights here at issue," *id.* at 91a. The Federal Circuit's opinion in *Winstar* was later affirmed by this Court in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), after which the government abandoned its sovereign acts and unmistakability arguments in this case.

not the "operative cause," *id.* at 4a, for the DOI's failure to approve the Manteo Unit's POE:

> Whatever restraints on secretarial actions were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the POE's CZMA consistency certification or the override provided by law.
>
> . . . .
>
> [E]ven if the Secretary had felt constrained in acting on the application by the provisions of the OBPA, the law is clear that, had he been free to act, he could not have issued any permits for exploration so long as North Carolina's objections remained in force.

Id. at 14a-15a. Although the majority acknowledged that petitioners' rights to explore and develop their OCS tracts had been frustrated, it denied petitioners restitution of the up-front "bonuses" they had paid on the ground that there was

> no principled distinction between a lessee whose hopes for large rewards from such a lease are frustrated by a failure to obtain the necessary permits for exploration, and those of a lessee whose hopes are drowned by impossible weather, equipment failures, financial setbacks, or any number of other circumstances beyond the lessee's control. In either case, the lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to explore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease.

Id. at 18a.

Judge Newman dissented. In Judge Newman's view, petitioners and the government had entered into a contract under which petitioners had purchased an entitlement to

explore their tracts, which was later eliminated by the enactment of the OBPA. Pet. App. 20a. As Judge Newman explained:

> When one party to a contract prevents the other party from achieving the benefit for which it paid, the party who prevents the performance can not retain the consideration it accepted for the performance. . . . [Petitioners] do[] not challenge the government's change of policy; nor do[] [they] seek damages, or specific performance, or other interesting things. [They] just want[] [their] money back.

Id. at 19a-20a. The post-contract events that made it impossible for the government to perform its promise to " 'timely and fairly consider' exploration plans that were properly submitted," *id.* at 21a, "were all outside the control of Marathon," *id.* at 22a. Applying both "hornbook law," *id.*, and a "wealth of precedent," *id.* at 23a, Judge Newman concluded that the "withdrawal of [petitioners'] federal right," *id.*, required "return of the federal consideration," *id.* As Judge Newman explained, any other result would relieve the government of its duty to "deal fairly and legally with its contracting partners." *Id.* at 21a.

SUMMARY OF ARGUMENT

1. In this case, the United States entered into contracts in which, in exchange for the more than $156 million that petitioners paid, the United States bound itself to adhere to the time frames and substantive standards set forth in the OCSLA when acting on petitioners' requests for its approval of plans and applications necessary for them to explore and develop their OCS lease tracts. Thereafter, the United States enacted the OBPA, which by its express terms prohibited the government from performing *any* of the duties it had undertaken under petitioners' leases for an indefinite period. Having thus repudiated its contractual obligations and made its own performance impossible, the United States was in total breach, entitling petitioners to restitution.

A. The enactment of the OBPA placed the United States in total breach of petitioners' leases. First, the OBPA constituted a categorical repudiation of the duties the government had undertaken. Although the government had contractually obligated itself to timely and fairly consider plans and applications petitioners submitted, the OBPA categorically barred it from doing so and announced the United States' unequivocal intention not to perform the duties it had assumed under its contracts with petitioners for at least 13 months and perhaps forever. Moreover, the OBPA was a repudiation of petitioners' leases even if it is viewed not as having disabled the government completely from performing its contractual obligations, but instead as merely having imposed additional conditions on the Secretary's performance of the government's pre-existing obligations. It is hornbook law that a party may not unilaterally impose new and more onerous conditions on its performance under a contract without repudiating and placing itself in breach. See *Restatement (Second) of Contracts* § 250 cmt. b (1981). By enacting the OBPA, the United States purported to condition its performance on the additional requirements embodied in the Act and thereby placed itself in breach.

Finally, in addition to constituting an unequivocal repudiation of all of the government's obligations under petitioners' leases, the OBPA also caused the government's performance to fall specifically short of what the contract demanded in the only instance in which its performance was actually called for. Under the parties' bargain, the Secretary of the Interior was obliged to approve a POE that complied with the OCSLA within 30 days of its submission. When petitioners submitted such a POE—which

the DOI found to be "approvable in all respects"—the Secretary withheld his approval specifically in order to comply with the OBPA and thereby defaulted on the government's duties under petitioners' contracts.

2. The government's contention that the OBPA's repudiation of all of the performance the government was obligated to provide under petitioners' leases, coupled with the actual nonperformance it compelled, did not constitute a "material breach" defies credulity. A material breach is one which deprives the injured party of the performance that that party expected from the parties' agreed-upon exchange of performances. In this case, the government's enactment of the OBPA compelled the government to withhold performance of all of the duties it had undertaken in exchange for petitioners' payments and thereby deprived them of the performance for which they had bargained.

3. The United States' alternative suggestion that it is not in breach because it withdrew its repudiation by repealing the OBPA in 1996 disregards settled contract rules. The power to retract a repudiation ends when the injured party brings a suit to enforce the contract. Petitioners in this case filed suit nearly four years before the OBPA was repealed. The repeal simply came too late to nullify the government's breach. See 4 Arthur Linton Corbin, *Corbin on Contracts* § 980, at 930-31 (1951).

B. It is well established that restitution is available as an alternative remedy when the defendant has repudiated his duties under a contract or otherwise committed a total breach. See, *e.g.*, *Restatement (Second) of Contracts* § 373(1). Indeed, the alternative remedy of restitution is available following repudiation, even where expectation damages would not be or could not be proved. See, *e.g.*, *id.* § 373(1) & cmt. a. The court of appeals ignored this well-established principle of contract law, and instead

fashioned a heretofore unknown "harmless error" exception to the ordinary principles of restitution. Its holding—that the "OBPA essentially had no effect," Pet. App. 14a, because petitioners never would have been allowed to drill and produce oil and gas off the North Carolina coast—is fatally flawed both legally and factually.

There is no "harmless error" exception to an innocent party's right to restitution. Where, as here, a defendant has placed itself in total breach, a plaintiff need not have been able to have performed his own obligations and or to have satisfied any conditions precedent to the defendant's performance in order to obtain restitution. Although a plaintiff seeking *expectation damages* must prove that, but for the defendant's breach, he would have performed his own obligations and received the benefits of his contract, it is black-letter law that a plaintiff seeking *restitution* need not.

In addition, the court of appeals' decision was also based on a fundamental misapprehension of the facts in this case. As a factual matter, the OBPA did "have an effect." Indeed, by the government's own admission, it caused the United States to fail to perform its contractual duty to approve a POE that was "approvable in all respects," Pet. App. 194a. Moreover, it also made it impossible for petitioners to pursue any other exploration or development activities.

II. Even if the OBPA did not place the government in total breach, petitioners are nonetheless entitled to restitution under the doctrine of supervening impracticability. Whatever else the OBPA accomplished, it certainly made it impossible for the government to fulfill its responsibilities under petitioners' leases. Even assuming *arguendo* that government's repudiation of its contracts with petitioners could be excused under the doctrine of impractica-

bility, even the United States "is not privileged to keep something for nothing, and restitution is an available remedy against [it]," 5 Arthur Linton Corbin, *Corbin on Contracts* § 1102, at 549 (1964). Here, the government proposes to keep more than $156 million for nothing. Not surprisingly, normal principles of contract law—and common sense—do not permit a private party to behave this way, and under *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), and its predecessors, neither may the United States.

ARGUMENT

Three years ago, this Court reaffirmed the long-standing principle that " '[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.' " *United States* v. *Winstar Corp.*, 518 U.S. 839, 895 (1996) (plurality opinion) (quoting *Lynch* v. *United States*, 292 U.S. 571, 579 (1934)). See also *id.* at 912 (Breyer, J., concurring) (same). *Accord Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 369 (1943) ("The United States does business on business terms.") (quoting *United States* v. *National Exch. Bank*, 270 U.S. 527, 534 (1926)); *Perry* v. *United States*, 294 U.S. 330, 352 (1935) ("When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference . . . except that the United States cannot be sued without its consent.") (citation omitted); *United States* v. *Bostwick*, 94 U.S. 53, 66 (1876) (same); *Cooke* v. *United States*, 91 U.S. 389, 398 (1875) (same). Indeed, as this Court has noted, adherence to the general rules of contract law is essential to preserving "the Government's capacity as a reliable, straightforward contractor." *Winstar*, 518 U.S. at 886 (plurality opinion).

One fundamental principle of the " 'law applicable to contracts between private individuals,' " *id.* at 895 (plurality opinion), is that a party whose performance is made impossible either by its own acts, see, *e.g.*, *Ankeny* v. *Clark*, 148 U.S. 345, 353 (1893), or by supervening impracticability "is not privileged to keep something for nothing, and restitution is an available remedy against [it]," 5 Arthur Linton Corbin, *Corbin on Contracts* § 1102, at 549 (1964). In particular, where, as here, a defendant repudiates its contractual obligations or commits a material breach, the plaintiff is entitled to restitution. See, *e.g.*, *Restatement (Second) of Contracts* § 373(1) (1981). Under these principles, petitioners were entitled to get back the money they had paid to the government, and the court of appeals' decision denying them restitution should be reversed.

I. THE ENACTMENT OF THE OBPA REPUDIATED AND TOTALLY BREACHED PETITIONERS' OCS LEASES, ENTITLING THEM TO RESTITUTION.

A. Enactment Of The OBPA Repudiated, And Placed The United States In Total Breach Of, Its Lease Agreements With Petitioners.

1. The government's enactment of the OBPA placed it in breach of its lease contracts with petitioners. As the Court of Federal Claims concluded, see Pet. App. 76a, and the Federal Circuit did not dispute, see *id.* at 12a-13a, the OBPA anticipatorily repudiated the government's obligations under petitioners' leases and also compelled the government not to perform when its performance with respect to the Manteo Unit's POE was required under the contract. It was thus in "total breach." See, *e.g.*, *Restatement (Second) of Contracts* § 243(2) (1981) ("total breach" includes "a breach by non-performance accompanied or followed by a repudiation"); *Dobler* v. *Malloy*, 190 N.W.2d 46, 52 (N.D. 1971); *Gold Mining & Water*

Co. v. *Swinerton*, 142 P.2d 22, 27 (Cal. 1943); *Sagamore Corp.* v. *Willcutt*, 180 A. 464, 465 (Conn. 1935).

a. The OBPA constituted an express and unequivocal repudiation by the government of its obligations under petitioners' leases. It has long been settled that "a positive statement to the promisee indicating that [the promisor] will not or cannot substantially perform his contractual duties" is a repudiation. See, *e.g.*, *Gold Mining & Water*, 142 P.2d at 27. *Accord Restatement (Second) of Contracts* § 250(a); II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.21, at 475 (1990); 11 Walter H.E. Jaeger, *Williston on Contracts* § 1312, at 109 (3d ed. 1968); John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 12.4, at 480-81 (1998). Similarly, "a voluntary affirmative act which renders the obligor unable or apparently unable to perform" is also a repudiation of a contract. *Restatement (Second) of Contracts* § 250(b). *Accord Roehm* v. *Horst*, 178 U.S. 1, 8 (1900) ("It is not disputed that if one party to a contract has . . . disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract, although the time for his performance has not arrived."); *id.* at 18 (same); *Ankeny* v. *Clark*, 148 U.S. 345, 353 (1893).

This Court recently reaffirmed that where, as here, the government, through post-contract legislation, makes performance of its contractual obligations impossible, it repudiates, and places itself in total breach of, its contract. See *United States* v. *Winstar Corp.*, 518 U.S. 839, 870 (1996) (plurality opinion); *id.* at 918 (Breyer, J., concurring); *id.* at 919 (Scalia, J., concurring in judgment). In *Winstar*, the United States had entered into contracts in which it specifically promised to permit certain thrifts to treat goodwill as capital for up to 40 years in exchange for their acquiring and assuming the liabilities of other, failing thrifts. See *id.* at 867-68 (plurality opinion). Thereafter, the government enacted legislation and

adopted implementing regulations prohibiting those thrifts from treating goodwill as capital. See *id.* at 868-69 (plurality opinion). This Court held that, because Congress had made it impossible for the government to perform its ongoing obligations under the contracts, it had repudiated those contracts and was in total breach. See *id.* at 870 (plurality opinion); *id.* at 918 (Breyer, J., concurring); *id.* at 919 (Scalia, J., concurring in judgment). See also *Far West Fed. Bank* v. *Office of Thrift Supervision—Director*, 119 F.3d 1358, 1364-65 (9th Cir. 1997) (same).

In this case, the United States also expressly repudiated its ongoing contractual obligations. By entering into petitioners' leases, the government contractually obligated ttself to comply with the requirements of the OCSLA in exchange for the consideration petitioners paid. Section 1 of each lease expressly provided that it was issued "pursuant to" and "subject to" the OCSLA, see Pet. App. 175a, and thereby incorporated the provisions of OCSLA by reference and made them part of the contract. See, *e.g.*, 4 Walter H.E. Jaeger, *Williston on Contracts* § 581, at 135 (3d ed. 1961) (incorporated terms are part of the contract itself); *The Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 78-79 (1870). By executing petitioners' leases, the government assumed the contractual duty to "timely and fairly consider—not necessarily approve, but at least consider—exploration plans properly submitted," Pet. App. 76a, and otherwise to adhere to the time lines and substantive standards set forth in the OCSLA when acting on petitioners' requests for its approval of plans and applications necessary for them to explore and develop their lease tracts. "Otherwise," the court concludued, "the bargain between the [United States] and [petitioners] would be illusory and would permit [the government's] unilateral forfeiture of [petitioners'] lease bonuses with impunity." *Id.* at 57a; *accord id.* at 76a.

Nonetheless, by its express terms, the OBPA renounced the governments' promise to adhere to the OCSLA's regulatory scheme and, in fact, flatly prohibited it from doing so. As the court of appeals found, the OBPA imposed an indefinite and unconditional "moratorium," Pet. App. 7a, on the government's performance of all of its obligations under petitioners' leases. Although petitioners' leases obligated the government to "timely and fairly consider" plans and applications petitioners submitted, by its express terms, the OBPA completely barred the government from:

> . . .
>
> (C) approv[ing] *any* exploration plan;
>
> (D) approv[ing] *any* development and production plan;
>
> (E) approv[ing] *any* application for permit to drill; or
>
> (F) permit[ing] *any* drilling
>
> . . . .

OBPA § 6003(c)(1) (emphases added). Thus, although the government was, under petitioners' leases, required to approve any POE that was consistent with the requirements of the OCSLA within 30 days of submission, see 43 U.S.C. § 1340(c)(1), the OBPA prohibited the Secretary from approving any POE, even one that complied with the requirements of the OCSLA in every respect, until the OBPA's "moratorium" was lifted. See OBPA § 6003(c)(3)(A). It likewise prohibited the Secretary from performing any of the other actions—*e.g.*, approving drilling permits and PODs that complied with the OCSLA, see *id.* § 6003(c)(1)(D)-(F)—which the government's lease contracts with petitioners obligated him to do. This prohibition on Secretarial action was not limited to the Manteo Unit's POE, but extended throughout the life of the OBPA to *every* POE, drilling permit application, or POD that petitioners might have submitted, either for the

Manteo Unit or for their non-Manteo tract. In short, the OBPA was a classic repudiation: the government "disabled [it]self from performing [its contract] by [its] own act." *Ankeny*, 148 U.S. at 353.

The OBPA's repudiation of petitioners' leases was hardly fleeting. By the OBPA's express terms, its prohibition on the government's performance was to extend for at least 13 months, until October 1, 1991, and thereafter potentially in perpetuity—*i.e.*, until the Secretary completed new "ecological and socioeconomic studies, additional oceanographic studies, . . . and other additional environmental studies" OBPA § 6003(d), and certified to Congress that the information acquired in those studies was sufficient for him to perform his pre-existing duties under the OCSLA and petitioners' leases, *id.* § 6003(c). In fact, the OBPA's moratorium was not ultimately lifted until nearly six years later, on April 26, 1996—after petitioners had filed suit and after the Court of Federal Claims had granted them partial summary judgment—when the OBPA was finally repealed. See Pub. L. No. 104-134, § 109, 110 Stat. 1321, 1321-177 (1996).[12]

b. The OBPA also constituted a repudiation of petitioners' leases even if it is viewed not as disabling the government completely from performing its contractual obligations, but instead—as the court of appeals sug-

[12] The OBPA's moratorium arguably should have been lifted solely with respect to the Manteo Unit's POE on the 45th day of continuous Congressional session after the Secretary's April 2, 1992, certification to Congress. *See supra* at 14-15. However, in that certification, the Secretary stated that he would nevertheless not approve the Manteo Unti's POE or permit the drilling of the single proposed exploratory well until the completion of two studies that had been recommended by the OBPA's Review Panel. *See* Pet. App. 202a. Those studies were not completed until July 1994, nearly two years after this litigation was commenced. *See supra* at 15.

gested, see Pet. App. 15a-16a—as merely imposing additional conditions on the Secretary's performance of the government's pre-existing obligations. "If one who is bound to perform a contract annexes an unwarranted condition to his offer of performance, there is, in effect, a refusal to perform." *Loop Bldg. Co.* v. *De Coo*, 275 P. 881, 885 (Cal. Dist. Ct. App. 1929). *Accord Restatement (Second) of Contracts* § 250 cmt. b ("language that under a fair reading 'amounts to a statement of intention not to perform except on conditions which go beyond the contract' constitutes a repudiation" (quoting U.C.C. § 2-610 cmt. 2)); 4 Arthur Linton Corbin, *Corbin on Contracts* § 973, at 910-11 (1951) (same). See also *Placid Oil Co.* v. *Humphrey*, 244 F.2d 184, 188-89 (5th Cir. 1957) (lessor's imposition of burdensome new conditions on oil lessee constituted repudiation of lease contract); *United States* v. *Western Cas. and Sur. Co.*, 498 F.2d 335, 339 (9th Cir. 1974) (imposition of new and onerous conditions and delay on plaintiff constitutes breach by repudiation); *VanHaaren* v. *State Farm Mut. Auto. Ins. Co.*, 989 F.2d 1, 6 (1st Cir. 1993); *REA Express, Inc.* v. *Interway Corp.*, 538 F.2d 953, 955 (2d Cir. 1976).

By its terms, the OBPA unilaterally "imposed severe, burdensome, new conditions" on the Secretary's performance of his duties under petitioners' leases "which were not contemplated by the parties when the leases were executed." Pet. App. 76a. For example, under the parties' contract, which expressly incorporated the OCSLA, see *id.* at 175a. (§ 1), the government was required to approve any POE that was consistent with the requirements of the OCSLA within *30 days* of submission, see 43 U.S.C. § 1340(c)(1). After the enactment of OBPA, the Secretary was prohibited from approving a POE, even one that was otherwise "approvable in all respects," for at least *13 months* and thereafter until the new studies

the OBPA required him to undertake were completed and he made the required certification to Congress. See OBPA § 6003(c)(3)(A). The OBPA likewise supplanted the statutory and regulatory scheme that the parties had incorporated when they entered into the lease contracts by prohibiting the Secretary from approving any drilling permit application or POD until the OBPA's new conditions for his performance were met, even if North Carolina enthusiastically supported petitioners' proposed activities, or filed a CZMA objection that was overriden by the Secretary of Commerce.

c. In addition to repudiating all subsequent government performance, the OBPA caused an actual "breach by non-performance," Pet. App. 76a, in September 1990 by compelling the Secretary to fail to perform his contractual duty timely to approve the Manteo Unit's POE. As the DOI itself found, the Manteo Unit's POE "fully complie[d] with the law," *id.* at 194a, and was "approvable in all respects," *id.* Indeed, the DOI found that, because the POE fully complied with the requirements of the OCSLA and "w[ould] have only negligible effect on the environment," it could neither disapprove the POE nor require its modification, as the Governor of North Carolina had requested. *Id.* Nonetheless, in order to comply with the newly-enacted OBPA, the Secretary withheld approval of the pending POE, *id.*, thereby breaching the government's contractual obligation to "timely and fairly consider . . . exploration plans properly submitted" to it, *id.* at 76a, and to approve them if they complied with the OCSLA, which the Manteo Unit's POE did.

2. The government has argued that neither the OBPA's repudiation of the government's obligations under petitioners' leases nor the Secretary's OBPA-compelled failure to approve the Manteo Unit's POE in September 1990 was a "material breach" because "at all times, petitioners

were disabled from proceeding with their proposed plan of exploration because North Carolina independently objected to the CZMA certification," Cert. Opp. 13. This argument erroneously collapses the question of whether the OBPA repudiated or otherwise materially breached the government's obligations and placed it in total breach, see *supra* at 25-31, into the question of what remedies (particularly expectation damages) are available against it as a consequence of that breach in light of North Carolina's subsequent CZMA objection and the Secretary of Commerce's even later refusal to override that objection, see *infra* at 36-42. First, there can be no question that there was a breach. "When performance of a duty under a contract is due any non-performance is a breach." *Restatement (Second) of Contracts* § 235(2). *Accord* II Farnsworth, *supra*, § 8.8, at 397. Likewise, there is a breach by repudiation where a defendant states " 'that he will not or cannot substantially perform his contractual duties.' " 11 Jaeger, *supra*, § 1312, at 109 (quoting *Gold Mining & Water Co.* v. *Swinerton*, 142 P.2d 22, 27 (Cal. 1943)). In August 1990, the OBPA repudiated the government's obligations under petitioners' leases by imposing an indefinite moratorium on the entirety of the government's performance of its contractual obligations, see OBPA § 6003(c)(1)(C)-(F), which was not lifted until the OBPA was repealed. It also compelled the government not to perform when its performance with respect to the Manteo Unit's POE was required under petitioners' leases in September 1990. The government was thus in breach.

Second, and more importantly, the government's argument that it did not commit a material breach simply misconstrues the law and the nature of the contracts between the parties in this case. A breach is "material" when it "deprive[s] the injured party of the benefit that party expected from the exchange." II Farnsworth, *supra*, § 8.16,

at 443; *id.* at 442 n.2 (material means "more than just a little"). *Accord Link* v. *Department of Treasury*, 51 F.3d 1577, 1583 (Fed. Cir. 1995) (material breach committed when plaintiff was "deprived of the full benefit . . . for which he had bargained"); *Restatement (Second) of Contracts* § 241(a). Thus, a breach is material if, by that breach, the defendant refused to or failed to render the performance that it agreed to "exchange" for plaintiff's performance. *Id.* § 241 cmt. b; *id.* § 243(1) & cmt. a. Such a breach "amount[s] to the nonoccurrence of a constructive condition of exchange," II Farnsworth, *supra*, § 8.16, at 442, which relieves the non-breaching party of any duty to continue to perform its own obligations. *Id. Accord* 4 Corbin, *supra*, § 946, at 809; *Restatement (Second) of Contracts* §§ 237, 238. Similarly, "[i]n order to create a right of restitution, all that is necessary is that the plaintiff shall have rendered part of the performance that was the *agreed exchange* for the performance promised by the defendant." 5 Arthur Linton Corbin, *Corbin on Contracts*, § 1107, at 575 (1964) (emphasis added).

By entering into the leases at issue in this case, petitioners obligated themselves to pay up-front, cash "bonuses" of more than $156 million, make annual rental payments, and—if production ever commenced—pay royalties on the oil and gas they extracted. See Pet. App. 174a, 176a-178a (§§ 4-7). In exchange for petitioners' payments, the government promised to adhere to the OCSLA's terms and, in particular, to "timely and fairly consider" the plans and applications necessary for petitioners to explore and developed their lease tracts. See *supra* at 27. Indeed, without assuming that "necessary reciprocal obligation," Pet. App. 76a, the government would have provided no consideration at all and the bargain it entered into with petitioners would have been com-

pletely illusory. See *id.* See also 1 R. Lord, *Williston on Contracts* § 1:2, at 11 (4th ed. 1990); *Winstar*, 518 U.S. at 921 (Scalia, J., concurring in judgment).

The critical question in determining whether the government's enactment of the OBPA placed it in "material breach"—either by repudiation alone or by repudiation coupled with actual nonperformance—is whether the Act directed the government to withhold the performance for which petitioners had paid. The answer is that it clearly did. Under petitioners' leases, the only performance that the government promised was to timely and fairly consider petitioners' plans and applications. At a minimum, as the Court of Claims found (and the court of appeals did not disagree) "the OBPA imposed severe, burdensome, new conditions" upon the government's performance of that promise, see Pet. App. 76a, that—*by design*, see *supra* at 10-11—deprived petitioners of the benefits for which they had bargained. See also Pet. App. 67a (enactment of the OBPA constituted "drastic unilateral interference by the government . . . with lessees' bargained for rights"). The enactment of OBPA was thus a material breach.

Finally, "[t]he doctrine of material breach is simply the converse of the doctrine of substantial performance." II Farnsworth, *supra*, § 8.16, at 442. If the government were correct in its argument that the enactment of the OBPA was not a repudiation or "material" breach of petitioners' leases, it follows that the government was, throughout the life of the OBPA, in substantial compliance with its duties under the leases. See *id.* Substantial performance is performance that is " 'almost complete.' " *Id.* § 8.16, at 442 n.2. But the OBPA directed that the government could render *no* performance for at least 13 months, and perhaps in perpetuity—not "almost complete" performance. If the government's breach had not been

material, petitioners would have been obligated to continue to make the annual rental payments required under the leases, even while the OBPA's "moratorium" on the government's performance of its obligations remained in full force. See *id.* § 8.15, at 436; *id.* § 8.16, at 442 (other party may suspend its performance only if breach is material). However, not even the government has embraced this absurd (but necessary) implication of its argument that the OBPA did not place it in material breach. In fact, one month after the OBPA's enactment, even the DOI—citing the OBPA's "specific prohibit[ion]" on its approval of "any" POE, drilling permit, or "any drilling," see J.A. 129—acknowledged that petitioners' leases (and petitioners' duty to make rental payments) were suspended. See *supra* at 13.[13]

3. The government also has suggested that the enactment of the OBPA did not breach petitioners' leases because it was subsequently repealed and the moratorium on the government's performance of its obligations lifted, leaving petitioners free to exercise their rights under their leases and the OCSLA. See Cert. Op. 13-14. This argument is manifestly incorrect.

> One who has committed an anticipatory breach by a manifestation of an intention not to perform his contract has power to nullify its effect as a breach by notifying the promisee that he has changed his wrongful intention and will perform the contract. This power of retraction will cease to exist as soon as the promisee has materially changed his position

[13] In addition, a defendant's bad faith makes it more likely that a breach is material. *See Restatement (Second) of Contracts* § 241(e) (1981); *id.* § 243 cmt. e. As the former Assistant Secretary of the Interior for Lands and Minerals testified, the OBPA was both a breach of petitioners' leases and an act of bad faith by the government, *see* J.A. 187.

> in reliance on the repudiation. *The bringing of a suit by the promisee for the anticipatory breach is one sort of reliance making retraction impossible.*

4 Corbin, *supra*, § 980, at 930-31 (emphasis added) (footnotes omitted). See also *Restatement (Second) of Contracts* § 256 & cmt. c; 11 Jaeger, *supra*, § 1335, at 182-83. Petitioners filed this suit against the government on October 28, 1992. See Pet. App. 46a. And the Court of Federal Claims entered partial summary judgment as to liability in their favor on April 1, 1996. See *id.* at 45a. The OBPA was not repealed until nearly a month later, on April 26, 1996. See Pub. L. No. 104-134, § 109, 110 Stat. at 1321-177. Thus, the OBPA's repeal simply came too late to retract or nullify the government's legislative repudiation of its contractual obligations under the leases six years earlier. See *Restatement (Second) of Contracts* § 256 cmt. c (filing of lawsuit extinguishes party's ability to retract its repudiation of contract); *Lake Erie Distribs., Inc.* v. *Martlet Importing Co.*, 634 N.Y.S.2d 599, 601 (N.Y. App. Div. 1995); *United States* v. *Seacoast Gas Co.*, 204 F.2d 709, 711 (5th Cir. 1953).[14]

B. The Government's Repudiation And Total Breach Of Petitioners' Leases Entitled Petitioners To Restitution.

1. One of the fundamental principles of "'the law applicable to contracts between private individuals,'"

[14] Moreover, as indicated by its legislative history, "[t]he [1996] repeal . . . [wa]s not intended to excuse the United States from . . . liabilit[y], if any, it has incurred to date nor otherwise affect pending litigation." 141 Cong. Rec. H9443 (daily ed. Sept. 21, 1995). *Cf.* 1 U.S.C. § 109 ("The repeal of any statute shall not have the effect to release or extinguish any . . . liability under such statute, unless the repealing Act shall so expressly provide.")

Winstar, 518 U.S. at 895 (plurality opinion), is that "on a breach by non-performance that gives rise to claim for damages for total breach *or on a repudiation*, the injured party is entitled to restitution for any benefit he has conferred on the other party . . . ." *Restatement (Second) of Contracts* § 373(1) (emphasis added). *Accord Ankeny*, 148 U.S. at 353 (same); *Lee* v. *Foote*, 481 A.2d 484, 485-86 & nn.3, 6 (D.C. 1984) (same; collecting cases). Indeed, the alternative remedy of restitution is available following repudiation, even where expectation damages would not be or could not be proved:

> If a repudiation is recognized as a breach of contract, the injured party is given the alternative remedy of restitution on the same conditions as in other cases of total breach. It makes no difference whether the repudiation was anticipatory or was accompanied by a breach by non-performance of a promise. Indeed, it appears that even courts that do not like to recognize an anticipatory repudiation as a breach for which an action for damages will lie are willing to maintain an immediate action for restitution of the consideration paid.

4 Corbin, *supra*, § 979, at 928-29. See also *Restatement (Second) of Contracts* § 373 cmt. a ("Restitution is available on repudiation by the other party, even in those exceptional situations in which no claim for damages for total breach arises as a result of repudiation alone."). Similarly, it is well-established that the restitution is available even where the amount of restitution exceeds the provable amount of expectation damages. See, *e.g.*, *Nash* v. *Towne*, 72 U.S. (5 Wall.) 689, 702 (1866); *United States* v. *Algernon Blair, Inc.*, 479 F.2d 638, 641 (4th Cir. 1973); *Restatement (Second) of Contracts* § 373, cmts. b, d & illus. 1, 16; III E. Allan Farnsworth, *Farns-*

worth on Contracts § 12.20, at 325-26 (2d ed. 1998).[15] As one leading treatise states, a contrary result "would be a shocking decision." I George E. Palmer, *The Law of Restitution* § 4.3, at 381-83 (1978). And this principle has been recognized to apply with equal force in government contract cases. See, *e.g.*, *Acme Process Equip. Co.* v. *United States*, 347 F.2d 509, 528 (Ct. Cl. 1965) ("The applicability of restitution as an alternative remedy for breach [of contract] is . . . well-established in both the federal and state courts."), *rev'd on other grounds*, 385 U.S. 138 (1966); *Petrofsky* v. *United States*, 488 F.2d 1394, 1405 (Ct. Cl. 1973) (same).[16]

2. The court of appeals ignored this well-established principle of contract law, and instead fashioned a heretofore unknown "harmless error" exception to the ordinary principles of restitution. Focusing exclusively on the government's "actual breach" of withholding timely approval of the Manteo Unit's POE (rather than petitioners' broader claims for the government's repudiation of all of its duties), the court held that even though the OBPA had made it impossible for the government to perform its obligations under petitioners' lease contracts, petitioners

[15] The sole exception to the general rule that a defendant's breach or repudiation of a contract entitles the plaintiff to restitution is where the palintiff has fully performed his obligations and the only performance due by the defendant is the payment of a sum certain. *See Restatement (Second) of Contracts* § 373(2) & cmt. b; 5 Arthur Linton Corbin, *Corbin on Contracts* § 1110, at 587 (1964). That is not the case here, where the performance due from the government was timely and fair consideration of petitioners' plans and applications.

[16] In accord with hornbook law, *see, e.g., Restatement (Second) of Contracts* §§ 344(c), 373(1), the government conceded below that if restitution applies, each party "must 'restore' to the other the value of any benefit received from the other party's performance," U.S. Fed. Cir. Br. 42, and that, under this standard, the government benefited by over $156 million from petitioners' performance, *id.* at 43.

were nonetheless not entitled to restitution of the money they had paid because the OBPA was not the "operative cause," Pet. App. 4a, for the government's failure to approve the POE:

> Whatever restraints on secretarial actions were imposed by the OBPA *essentially had no* effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the POE's CZMA consistency certification or the override provided by law.
>
> . . . .
>
> Lessees have not established that their inability to obtain secretarial approval of the POE and to undertake exploratory activity was caused by the moratorium rather than by the fact that they were unable to provide the necessary state concurrence to their certification of CZMA compliance. And even if the Secretary had felt constrained in acting on the application by the provisions of the OBPA, the law is clear that, had he been free to act, he could not have issued any permits for exploration so long as North Carolina's objections remained in force.

Id. at 14a-15a (emphasis added). Although North Carolina's CZMA objection might have been relevant if petitioners had sought expectation damages based on lost profits or the market value of the lost oil and gas, it is utterly *irrelevant* as a matter of law to their claim for restitution.

a. The court of appeals' decision below contradicted hornbook law that, where a defendant has placed himself in total breach, either by a repudiation or through a total failure to perform, a plaintiff need not have been able to have performed his own obligations and or to have satisfied any conditions precedent to the repudiator's performance in order to obtain restitution.

> A repudiation or other total breach by one party enables the other to get a judgment for damages or for restitution without performing acts that would otherwise have been conditions precedent. It is no longer necessary for the plaintiff to perform or to tender performance. This is true whether the repudiation is in express words or is by an act that makes performance by the repudiator apparently impossible or very improbable.

4 Corbin, *supra*, § 977, at 920-22 (footnote omitted). *Accord* 12 Walter H. E. Jaeger, *Williston on Contracts* § 1454, at 3 (3d ed. 1970); *Restatement (Second) of Contracts* § 253(2) (repudiation "discharges the other party's remaining duties to render performance"). See also *Livi Steel, Inc.* v. *Bank One, Youngstown, N.A.*, 584 N.E.2d 1267, 1269-70 (Ohio Ct. App. 1989) (same).

Indeed, restitution is available following a repudiation or other total breach even if the injured party not only failed to "perform[] acts which would otherwise have been conditions precedent," but also in fact *could not* have performed those acts.

> A contract . . . may be rescinded, and the purchase moneys paid in advance may be recovered, on the failure of the seller to perform, even though the purchaser could not have performed. *In an action to rescind and recover payments made on account of the purchase price*[,] *it is enough to show a breach by the seller.*

Weintraub v. *Rungmar Realty Corp.*, 231 N.Y.S.2d 241, 244 (N.Y. Sup. Ct. 1962) (emphasis added); see also *id.* (purchaser entitled to restitution of down payment where seller was in breach, even though buyer could not have performed his obligation to pay balance of purchase price at closing). *Accord Bertrand* v. *Jones*, 156 A.2d 161, 167-69 (N.J. Super. 1959) (same); *Bu-Vi-Bar Petroleum*

Corp. v. *Krow*, 40 F.2d 488, 491 (10th Cir. 1930) (plaintiff is "excused from the necessity of performing or being ready to perform" upon defendant's repudiation); *Bigler* v. *Morgan*, 77 N.Y. 312, 318-19 (N.Y. 1879). See also 4 Corbin, *supra*, § 978, at 928. In short, where a defendant has repudiated his duties under a contract or otherwise committed a total breach, a plaintiff need not have been able to perform his end of the bargain, let alone actually have satisfied any "conditions precedent" to the repudiating party's obligations, in order to obtain restitution.[17]

In this case, the OBPA categorically repudiated the government's promises to "timely and fairly consider" plans and applications (including the Manteo Unit's POE) that petitioners submitted, and the OBPA also compelled the Secretary to commit an "actual breach" by withholding timely approval of the Manteo Unit's POE. The United States, having repudiated and made its own performance of its contractual obligations impossible, thus was in "total breach." See *supra* at 25-31. Even if the court of appeals had been correct that peti-

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[17] Indeed, even when the plaintiff is in breach and thus has not fulfilled a condition for the defendant's performance, he may nonetheless obtain restitution of any benefit conferred on the repudiating defendant. *See Restatement (Second) of Contracts* § 374; 12 Walter H.E. Jaeger, *Williston on Contracts* § 1454, at 3-5 (3d ed. 1970). The rule is, of course, different if expectation damages (rather than an award of restitution) are sought. *See, e.g., Weintraub* v. *Rungmar Realty Corp.*, 231 N.Y.S.2d 241, 244 (N.Y. Sup. Ct. 1962). "In an action for breach by an unconditional repudiation it is still a condition precedent to plaintiff's right to a *judgment for damages* that he should have the ability to perform all such conditions." 4 Arthur Linton Corbin, *Corbin on Contracts* § 978, at 924 (1951) (emphasis added). *See also id.* § 978, at 928 ("If the plaintiff could not have performed in any case, he will not be given damages for the defendant's failure to perform . . . ."); *Alabama Football, Inc.* v. *Greenwood*, 452 F. Supp. 1191, 1196 (W.D. Pa. 1978) (same).

tioners had failed to satisfy "a prerequisite to obtaining the necessary permits and licenses," Pet. App. 15a—but see *infra* at 43-45—petitioners were nonetheless entitled to restitution (as opposed to other forms of relief which they did not seek). See, *e.g.*, *Alabama Football, Inc.* v. *Greenwood*, 452 F. Supp. 1191, 1196 (W.D. Pa. 1978) (awarding restitution even though damages not available); *Weintraub*, 231 N.Y.S.2d at 244 (same.) The result required here was restitution by the government, not "the federal government's confiscation of Marathon's payment[s]." Pet. App. 20a-21a (Newman, J., dissenting).

b. The court of appeals' fundamental error in this case appears to stem from its misplaced reliance on *Sun Oil Co.* v. *United States*, 572 F.2d 786 (Ct. Cl. 1978), which it cited as the sole authority for the "harmless error" exception it grafted onto the ordinary rules governing restitution. See Pet. App. 15a. *Sun Oil* is, however, simply inapposite. In that case, three OCSLA lessees sought *damages* resulting from the government's alleged delay in approving a POD and other permit applications which they had submitted. See *Sun Oil*, 572 F.2d at 793.[18] They did *not* seek restitution based on the government's asserted breach; indeed, after the DOI's allegedly tardy approval of their POD and drilling platform permit, they continued to pursue their rights under the lease, installed the drilling platform, and eventually commenced production. See *id.* at 799-800. The Court of Claims rejected the plaintiffs' claim for delay damages first on the ground that no breach of their lease had occurred be-

[18] Delay damages are a form of expectation damages which compensate for additional costs incurred or revenues lost by reason of the delay. *See* 5 John C. McBride & Thomas J. Touey, *Government Contracts* § 37A.10, at 37A-1 (1998); *Bates & Rogers Constr. Corp.* v. *Greeley & Hansen*, 486 N.E.2d 902, 904-05 (Ill. 1985).

cause the delays were both justified and permitted under the OCSLA. See *id.* at 804. The court also concluded that the *Sun Oil* plaintiffs could not recover delay damages because the construction of their platform was not completed until after the government had approved their POD and permit. See *id.* at 806. This alternative holding—that "any delay in plan and permit approval [was] of little or no significance since such a delay would not delay the ultimate completion of the project," *id.*—is manifestly relevant to a plaintiff's claim for expectation damages. See *supra* at 41 n.17. It, however, has no application whatsoever where, as here, the plaintiffs' claim is strictly for restitution based on the government's repudiation and total breach of its contract.

c. The decision below is also based on a fundamental misapprehension of the facts in this case. As a factual matter, North Carolina's CZMA objection to the Manteo Unit's POE was not—and could not have been—the reason for the Secretary of the Interior's failure to perform his contractual duty to "timely and fairly consider" the Manteo Unit's POE and to approve it if it complied with the OCSLA. Petitioners submitted their POE for the Manteo Unit, which included only four of their five North Carolina OCS tracts, on August 20, 1990. On September 28, 1990—30 days after the submission was deemed complete, see Pet. App. 193a—the DOI reported that, even though the POE was "approvable in all respects," *id.* at 194a, the Secretary was withholding approval *in order to comply with the OBPA*.

> The [Manteo Unit] Plan, together with its supporting information, is deemed to be approvable in all respects. *The Outer Banks Protection Act (OBPA) of 1990, however, prohibits the approval of any Exploration Plan at this time.* Under Section 11(c) of the Outer Continental Shelf Lands Act, we are re-

> quired to approve an Exploration Plan unless it is inconsistent with applicable law or because it would result in serious harm to the environment. Because we have found that [the Manteo Unit's] Plan fully complies with the law and will have only negligible effect on the environment, we are not authorized to disapprove the Plan or require its modification as you suggest.

Id. (emphasis added). By its own admission, the reason for the government's refusal to perform its obligations under petitioners' lease contracts and the OCCLA was the need to comply with the OBPA, *not* North Carolina's CZMA objection. See also J.A. 180. Indeed, the government *conceded* below that, absent the OBPA, the Secretary would have approved the Manteo Unit's POE within the 30-day period set out in the OCSLA. See U.S. Fed. Cir. Br. 39. The court of appeals' *post hoc* attempt to attribute the government's OBPA-compelled breach of petitioners' lease contracts to a cause that was *not* the one that the federal government cited when it acted must accordingly be rejected. Cf. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (courts "must judge the propriety of [the agency's] action solely by the grounds invoked by the agency"); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962) (same).

Indeed, it would have been *impossible* for North Carolina's CZMA objection to have been the cause of the Secretary's refusal to approve the Manteo Unit's POE in September 1990—*i.e.*, within the 30-day period in which the Secretary is required to approve a POE that meets the requirements of the OCSLA, 43 U.S.C. § 1340(c)(1). North Carolina did not file its CZMA objection to the Manteo Unit's POE until November 19, 1990, see J.A. 141, nearly *two months* after the date that DOI would,

by its own admission, have been required to approve—and would have approved—the POE, but for the OBPA.

Finally, the decision below also blurred the different requirements imposed by the OCSLA at each stage of exploration and development of an OCS lease tract. A lessee's failure to obtain a State's CZMA concurrence is *not* a ground under the OCSLA for withholding approval of an otherwise approvable *POE*. Although the OCSLA expressly prohibits the Secretary from granting a drilling permit or approving a *POD* without a State's CZMA concurrence, it does *not* restrain him from taking the first step—approving a POE that complies with the OCSLA—even in the face of a State's CZMA objection. Compare 43 U.S.C. § 1340(c)(1) (Secretary "shall" approve a POE that is consistent with the OCSLA) with *id.* § 1340(c)(2) (Secretary shall not grant any license or permit for activity described in a POE unless State concurs under the CZMA), and *id.* § 1351(h)(1)(B) (same for a POD). Indeed, during the relevant period, the DOI's own regulations made clear that unlike an application for a drilling permit, a POE complying with the OCSLA was approvable notwithstanding a State's CZMA objection. Compare 30 C.F.R. § 250.33(i) (1993) (POE) with *id.* § 250.33(p) (1993) (drilling permit application).

3. The court of appeals also fundamentally erred by treating petitioners' claim for restitution as being based solely on the Secretary's refusal to act on the single POE that was submitted for the Manteo Unit rather than on the OBPA's wholesale repudiation of *all* of the government's obligations under petitioners' leases. As explained above, the OBPA not only prohibited the Secretary from carrying out his duties under petitioners' leases with respect to the Manteo Unit's POE, but also anticipatorily repudiated the government's contractual obligations as to every other POE, drilling permit application, and POD

that petitioners were entitled to submit. See *supra* at 25-31. The statement of the court of appeals that "the OBPA essentially had no effect" required bald *speculation* that North Carolina would have raised a CZMA objection to *every* plan that petitioners might have proposed, whether it involved the Manteo Unit or their one non-Manteo tract, and that the Secretary of Commerce would have sustained each objection.

Moreover, even if this guess were correct, it is *irrelevant* to whether the OBPA repudiated petitioners' leases and placed the United States in total breach and thus as to whether *restitution* (rather than an award of expectation damages) is available in this case. See *supra* at 39-42. "[R]estitution at law is not limited to situations in which the damages remedy is regarded as inadequate," I Palmer, *supra*, § 4.7, at 427, or is unavailable, see, *e.g.*, *Weintraub*, 231 N.Y.S.2d at 244. Where expectation damages are uncertain or difficlt to ascertain, however, the commentators agree that denying restitution on that basis would be an especially "serious injustice," 5 Corbin, *supra*, § 1110, at 590. *Accord Restatement of Contracts* § 350 cmt. b (1932); I Palmer, *supra*, § 4.1, at 368; *id.* § 4.7, at 428. See also *Acme*, 347 F.2d at 530 n.29 (restitution available even where expectation damages are "too speculative"). Here, the government's repudiation and breach made expectation damages difficult to ascertain because it is difficult to know how, absent the OBPA, North Carolina or the Secretary of Commerce would have treated CZMA issues raised in a modified Manteo Unit POE or different POEs, drilling permit applications, or PODs; how petitioners would have sought to satisfy any reasonable concerns; or whether (and how much) oil or gas ultimately would have been discovered. It is axiomatic, however, that a defendant who has repudiated or otherwise totally breached a contract should not be "permitted to escape under cover of a demand for nonexistent certainty." *Palmer* v. *Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 560-61 (1941). See also *Locke* v. *United States*, 283 F.2d 521, 524 (Ct. Cl. 1960) ("The defendant who has wrongfully broken a contract should not be permitted to reap advantage from his own wrong by insisting on proof which by reason of his breach is unobtainable."). It was clear legal error by the court below effectively to limit petitioners to expectation damages remedies that the government's breach made unprovable.

II. EVEN IF THE OBPA DID NOT PLACE THE GOVERNMENT IN BREACH, PETITIONERS ARE INDEPENDENTLY ENTITLED TO RESTITUTION UNDER THE DOCTRINE OF SUPERVENING IMPRACTICABILITY.

As explained above, the enactment of the OBPA legislatively repudiated the government's obligations under petitioners' leases and made it impossible for the government to uphold its end of the bargain with petitioners. See *supra* at 25-31. Under this Court's decision in *Winstar*, the United States thus repudiated its contract and was in total breach. See *United States* v. *Winstar Corp.*, 518 U.S. 839, 870 (1996) (plurality opinion); *id.* at 918 (Breyer, J., concurring); *id.* at 919 (Scalia, J., concurring in judgment). However, even if the government's enactment of the OBPA is viewed not as having breached petitioners' leases, but instead as a supervening governmental action which made the government's performance of its own obligations impracticable, petitioners are nonetheless entitled to restitution.

It is hornbook law that when a party's performance of its obligations under a contract is made impracticable or impossible by supervening events for which it is not responsible, such as post-contract legislation, that party is

excused from performing. See, *e.g., Restatement (Second) of Contracts* § 261 (1981) ("Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged . . . ."); *id.* § 264 (Governmental regulation or order that makes performance impracticable "is an event the non-occurrence of which was a basic assumption on which the contract was made.").

However, it is equally well established that "a party who is excused from performance by supervening impossibility is not privileged to keep something for nothing, and restitution is an available remedy against him." 5 Arthur Linton Corbin, *Corbin on Contracts* § 1102, at 549 (1964). *Accord Restatement (Second) of Contracts* § 377 & cmt. a (party entitled to restitution when other party's performance excused by supervening impossibility); *Restatement of Restitution* § 108(c) (1937) (same); 18 Walter H.E. Jaeger, *Williston on Contracts* § 1972, at 224-27 (3d ed. 1978) (same). Thus, when one party's performance of a contract becomes impracticable or impossible, rescission of the contract and restitution of any consideration provided to it is an appropriate remedy. See, *e.g., Winstar Corp.* v. *United States*, 994 F.2d 797, 818-19 (Fed. Cir. 1993) (Newman, J., dissenting), *rev'd on reh'g*, 64 F.3d 1531 (Fed. Cir. 1995) (*en banc*), *aff'd*, 518 U.S. 839 (1996); *Bishop Trust Co. Ltd.* v. *Kamokila Dev. Corp.*, 555 P.2d 1193, 1196 (Haw. 1976); *Aerojet-General Corp.* v. *Askew*, 453 F.2d 819, 831 (5th Cir. 1971).[19]

[19] Following this Court's decision in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), the government abandoned its argument that it was immune from liability under the sovereign acts doctrine. Even if the doctrine applied, however, it would merely "relieve[] the Government as contractor from the traditional blanket rule that a contracting party may not obtain discharge if its own act rendered performance impossible" and "place the Government as contractor on par with a private contractor in the same circumstances." *Id.* at 904 (plurality opinion). As this Court made clear in *Winstar*, under the " 'law applicable to contracts between private individuals,' " *id.* at 895 (plurality opinion), when the government asserts a sovereign acts defense, the rules governing impracticability nonetheless apply. *See id.* at 904-10 (plurality opinion). As the text above explains, when a party's performance becomes impracticable, those rules require restitution.

In this case, the OBPA expressly prohibited the Secretary, for an indefinite period, from performing *any* of his duties under petitioners' leases and required him not to approve the Manteo Unit's POE within the time period prescribed by the OCSLA and incorporated into the leases by reference. Even if the OBPA did not breach petitioners' leases—which it most certainly did—it at the very least rendered it impracticable or impossible for the government to perform its duties under those leases. In that circumstance, although the government would be excused from performance and thus would not be liable for expectation damages, petitioners would nonetheless be entitled to restitution of the $156 million they had paid. In short, whether the OBPA repudiated the government's contracts with petitioners, or merely made its performance impracticable, it was not entitled to "keep something for nothing." 5 Corbin, *supra*, § 1102, at 549.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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December 30, 1999

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