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Louisiana v. Biden: The Fallacy of Congressionally Mandated Oil and Gas Drilling in the Outer Continental Shelf

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Louisiana v. Biden: The Fallacy of Congressionally Mandated Oil and Gas Drilling in the Outer Continental Shelf

Garrett Bergthold[*]

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I. INTRODUCTION

During his presidential campaign, Joe Biden vowed to end new oil and gas drilling on public lands and in federal waters.[1] "No more drilling on federal lands, no more drilling, including offshore," President Biden said during a debate on March 15, 2020.[2] "No ability for the oil industry to continue to drill, period."[3] Shortly after taking office, President Biden sought to make good on his campaign commitment by signing Executive Order 14008 (EO 14008).[4]

EO 14008 directed Executive Branch departments and agencies to take various actions to limit climate change.[5] Section 208 of EO 14008 ordered the Secretary of the Interior (Secretary) to "pause new oil and natural gas leases on public lands or in offshore waters."[6] Section 208 required that the pause remain in effect pending a review of the federal government's oil and gas leasing program.[7] In response, agencies in the Department of the Interior (Interior) stopped issuing new onshore and offshore oil and gas leases, though existing leases were unaffected.[8]

The federal government's oil and gas leasing program features two components.[9] First, the Bureau of Ocean Energy Management (BOEM) administers leases in the Outer Continental Shelf (OCS).[10] The OCS comprises approximately 2.3 billion acres of underwater land claimed by the federal government.[11] Secondly, the Bureau of Land Management (BLM) oversees leases

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[1] *9 Key Elements of Joe Biden's Plan for a Clean Energy Revolution*, JOE BIDEN CAMPAIGN, https://joebiden.com/9-key-elements-of-joe-bidens-plan-for-a-clean-energy-revolution/# (content cited is no longer available online) (last visited Apr. 22, 2023) (on file with the *University of the Pacific Law Review*).

[2] Joe Biden, Democratic Presidential Candidate, Democratic Candidates Debate in Washington D.C. (Mar. 15, 2020) (transcript available at The American Presidency Project at U.C. Santa Barbara).

[3] *Id.*

[4] *See* Exec. Order No. 14008, 86 Fed. Reg. 7619, 7619–33 (Feb. 1, 2021) (naming the order "Tackling the Climate Crisis at Home and Abroad").

[5] *Id.* at 7622.

[6] *Id.* at 7624–25; *see also* U.S. DEP'T OF THE INTERIOR, REPORT ON THE FEDERAL OIL AND GAS LEASING PROGRAM 3 (Nov. 2021) (stating the Secretary of the Interior possesses responsibility over public lands and offshore waters under federal jurisdiction); *Mineral Lease*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a mineral lease as "[a] lease in which the lessee has the right to explore for and extract oil, gas, or other minerals"); *Federal Waters*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining federal waters as "[t]erritorial waters under the jurisdiction of the United States"); *Natural Gas Explained,* U.S. ENERGY INFO. ADMIN, https://www.eia.gov/energyexplained/natural-gas/ (last visited May 27, 2023) (on file with the *University of the Pacific Law Review*) (defining natural gas as "a fossil fuel energy source" comprising methane and several other compounds).

[7] Exec. Order No. 14008, 86 Fed. Reg. 7619, 7624–25 (Feb. 1, 2021) (requiring that the comprehensive review evaluate "potential climate and other impacts associated with oil and gas activities," among other goals).

[8] CONG. RSCH. SERV., IF11909, OFFSHORE OIL AND GAS: LEASING "PAUSE," FEDERAL LEASING REVIEW, AND CURRENT ISSUES 1 (Apr. 29, 2022) (stating that issuance of new oil and gas lease sales halted following EO 14008, while exploration and development permits related to existing leases were unaffected).

[9] U.S. DEP'T OF THE INTERIOR, *supra* note 6, at 3–5.

[10] CONG. RSCH. SERV., R44504, FIVE-YEAR OFFSHORE OIL AND GAS LEASING PROGRAM: HISTORY AND BACKGROUND 1 (2022).

[11] U.S. DEP'T OF THE INTERIOR, *supra* note 6, at 5, 15 (defining the OCS as submerged lands beginning three nautical miles offshore of the United States, though it begins nine nautical miles off the coasts of Florida and Texas).

of federal onshore lands and federally owned subsurface mineral rights.[12] The Outer Continental Shelf Lands Act (OCSLA) governs oil and gas leasing decisions in the OCS, while the Mineral Leasing Act (MLA) regulates onshore leasing.[13]

EO 14008 sowed confusion and uncertainty within the oil and gas industry.[14] Businesses and states that rely on fossil fuel extraction questioned the legality of the pause.[15] Litigation ensued, including one notable lawsuit brought by thirteen states.[16] The states alleged President Biden, in issuing the pause, exceeded his authority under the MLA and OCSLA.[17] The states also challenged the legality of actions of the agency officials who carried out the pause under the Administrative Procedure Act (APA).[18]

In *Louisiana v. Biden*, the United States District Court for the Western District of Louisiana preliminarily enjoined the Biden administration from enforcing the pause nationwide (*Louisiana I*).[19] The government appealed and announced it would resume selling leases.[20] The Fifth Circuit of Appeals vacated the injunction.[21] The panel concluded that the district court failed to adequately define "pause" and remanded the case for clarification.[22] On remand, the court held President Biden exceeded the authority delegated by Congress to the Executive Branch in violation of the MLA and OCSLA (*Louisiana II*).[23] Additionally, the court held the agency actions violated the APA.[24] The district court permanently enjoined President Biden and his agencies from implementing the pause within the plaintiff states.[25]

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[12] *Id.* at 4 (stating the BLM oversees the sale of oil and gas leases pertaining to approximately 245 million acres of land located onshore and 700 million acres of subsurface federal minerals); *see also Subsurface Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a subsurface interest as a right to minerals or water located underground, beneath a property, held by either a property owner or a third party); U.S. GOV'T ACCOUNTABILITY OFF., FEDERAL LAND MANAGEMENT: KEY DIFFERENCES AND STAKEHOLDER VIEWS OF THE FEDERAL VIEWS OF THE FEDERAL SYSTEMS USED TO MANAGE HARDROCK MINING 1–2 (July 2021) (stating federally owned subsurface minerals include those that exist under private lands or federal lands administered by agencies other than the BLM).

[13] Louisiana v. Biden, 622 F. Supp. 3d 267, 277, 280 (W.D. La. 2022).

[14] Melissa A. Hornbein, *The Federal Oil and Gas Program Under the Biden Administration: "Comprehensive Review" or the Same Old Song?*, 2022 FOUND. FOR NAT. RES. & ENERGY L. 6B, 6B-1.

[15] *Id.*

[16] Louisiana, 622 F. Supp. 3d at 284.

[17] Complaint at 49–50, Louisiana v. Biden, 622 F. Supp. 3d 267 (W.D. La. 2022) (Case No. 2:21-CV-00778).

[18] *Id.* at 43–47 (detailing eight causes of action brought under Section 706 of the APA).

[19] Louisiana v. Biden, 543 F. Supp. 3d 388, 418–19 (W.D. La. 2021).

[20] Press Release, U.S. Dep't of the Interior, Interior Department Files Court Brief Outlining Next Steps in Leasing Program (Aug. 24, 2021), https://www.doi.gov/pressreleases/interior-department-files-court-brief-outlining-next-steps-leasing-program (on file with the *University of the Pacific Law Review*).

[21] Louisiana v. Biden, 45 F.4th 841, 846 (5th Cir. 2022).

[22] *Id*. at 845–46.

[23] Louisiana v. Biden, 622 F. Supp. 3d 267, 283–84, 289–90 (W.D. La. 2022) (clarifying the "pause" meant "stop" prior to holding Biden exceeded his authority under the MLA and OCSLA).

[24] *Id*. at 295–96.

[25] *Compare* Louisiana v. Biden, 543 F. Supp. 3d 388, 418–19 (W.D. La. 2021) (issuing a nationwide preliminary injunction against the pause), *with* Louisiana, 622 F. Supp. at 298–99 (issuing a permanent injunction against the pause only within the thirteen plaintiff states).

While offshore drilling poses environmental dangers inherent to the extraction process itself, those dangers do not end once the product reaches shore.[26] Fossil fuels, including oil and natural gas extracted offshore, are subsequently burned to generate electricity, power transportation, and contribute to industrial processes.[27] Burning fossil fuels produces carbon dioxide, a greenhouse gas.[28] Greenhouse gas molecules trap heat in the atmosphere, resulting in global warming.[29] Increased warming causes the sea level to rise, extreme weather events, biodiversity loss, and species extinction.[30]

Notwithstanding the holding in *Louisiana II*, OSCLA permits the Executive Branch to limit the quantity of fossil fuels extracted offshore for the purpose of combatting climate change.[31] The Executive Branch can accomplish this task through two pathways.[32] First, it can scale down the quantity of oil and gas extracted through existing leases.[33] Second, the Executive Branch can cease the issuance of new offshore drilling leases in the OCS.[34]

Part II explains the modern offshore leasing framework under OCSLA.[35] Part III analyzes the *Louisiana v. Biden* line of cases, culminating with a discussion of *Louisiana II* and the extent of its applicability to future legal disputes.[36] Part IV argues that limiting the quantity of fossil fuels extracted from the OCS constitutes sound climate policy.[37] Part V describes the broad authority the President and Secretary of Energy possess to throttle the quantity of oil and gas extracted by active leaseholders.[38] Part VI explains how the Secretary can stop issuing new offshore leases while still adhering to OCSLA.[39] Part VI concludes by arguing the Secretary possesses a duty to future generations to limit drilling in the OCS to reduce the threat of climate change.[40]

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[26] DEFS. OF WILDLIFE, OUTER CONTINENTAL SHELF DRILLING 1–2, https://defenders.org/sites/default/files/publications/impacts_of_outer_continental_shelf_drilling.pdf (last visited May 27, 2023) (on file with the *University of the Pacific Law Review*).

[27] *Burning of Fossil Fuels*, UNIV. OF CAL. MUSEUM OF PALEONTOLOGY, https://ugc.berkeley.edu/background-content/burning-of-fossil-fuels/ (last visited May 27, 2023) (on file with the *University of the Pacific Law Review*).

[28] *Id*.

[29] *Id*.

[30] *Id*.

[31] *Infra* Parts V and VI.

[32] *Infra* Parts V and VI.

[33] *Infra* Part V.

[34] *Infra* Part VI.

[35] *Infra* Part II.

[36] *Infra* Part III.

[37] *Infra* Part IV.

[38] *Infra* Part V.

[39] *Infra* Part VI.

[40] *Infra* Part VI.

II. The Outer Continental Shelf Lands Act Leasing Framework

Lands submerged off the coast of the United States are rich with oil and natural gas.[41] The means to extract those resources existed as early as the late 1890s.[42] State and federal governments historically wrestled for control of offshore resources.[43] States regulated offshore oil and gas extraction beginning in the 1930s; meanwhile, President Harry Truman declared offshore lands under federal jurisdiction in 1945.[44]

United States Supreme Court decisions ultimately upheld federal control of submerged lands.[45] In 1953, Congress passed the Submerged Lands Act (SLA) in response to those judicial decisions.[46] The SLA granted coastal states title to the natural resources in the submerged lands that extend three miles from their coastlines.[47] OCSLA followed later that year; it declared federal control over submerged lands lying beyond the three-mile coastal zone granted to the states under the SLA.[48] OCSLA authorized the Secretary to lease submerged lands under federal jurisdiction for mineral development.[49]

A disastrous oil spill in Santa Barbara in 1969 sparked resistance to offshore drilling by coastal states and environmentalists.[50] Congress reacted by passing statutes aimed at protecting the environment, culminating in amendments to OCSLA in 1978.[51] Congress intended that the amendments strike a balance between two competing goals: environmental protection and national energy self-sufficiency.[52] The amendments declared that the OCS constituted a "vital national resource reserve held by the Federal Government for the public."[53] They also said that the OCS "should be made available for expeditious and orderly development."[54] The amendments further held that development should be "subject to environmental safeguards, in a manner which is consistent with maintenance of competition and other national needs."[55] Congress did not rank these goals, or state that one goal should be held above the others.[56] However, the

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[41] U.S. DEP'T OF THE INTERIOR, *supra* note 6, at 5.

[42] Gordon L. James, *The Outer Continental Shelf Lands Act Amendments of 1978: Balancing Energy Needs with Environmental Concerns?*, 40 LA. L. REV. 177, 178 (1979) (explaining that early offshore drilling existed primarily in shallow waters near shore due to the limitations of early drilling technology).

[43] *Id.*

[44] *Id.*

[45] United States v. California, 332 U.S. 19, 41 (1947); United States v. Texas, 339 U.S. 707, 720 (1950); United States v. Louisiana, 339 U.S. 699, 706 (1950).

[46] James, *supra* note 42, at 178.

[47] 43 U.S.C. §§ 1311(a), 1312.

[48] *Id.* § 1331(a)(1)–(2) (defining terms found throughout the Outer Continental Shelf Lands Act, or "OCSLA").

[49] *Id.* § 1334(a). *See generally id.* § 1331(b) (stating the term "Secretary" refers to the Secretary of the Interior).

[50] James, *supra* note 42, at 181 ("Americans realized that our modern industrialized society has been causing a gradual deterioration in the environment.").

[51] *Id.* at 187.

[52] *Id.* (describing the polices as "seemingly incompatible").

[53] 43 U.S.C. § 1332(3).

[54] *Id.*

[55] *Id.*

[56] *See id.* (stating the various policies of OCLSA without any of the polices priority treatment compared to the others).

Eastern District of Louisiana in *ENSCO Offshore Co. v. Salazar* concluded OCSLA includes an "overriding policy of expeditious development."[57]

The amendments also codified a four-step process for developing offshore wells: pre-leasing, leasing, exploration, and development and production.[58] The pre-leasing stage comprises the preparation of periodic five-year oil and gas leasing programs, a process that typically takes two to three years to complete.[59] A five-year leasing program must consider the "national energy needs" required in the five years that would follow its approval.[60] BOEM must consider the potential impact of oil and gas leases on "other resource values of the [OCS] and the marine, coastal, and human environments."[61] In determining the timing and location of leases, BOEM must balance three concerns.[62] These include "the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone."[63]

Next, lessees must submit exploration plans prior to exploring for fossil fuels.[64] BOEM must approve or deny exploration plans within thirty days.[65] BOEM may require lessees secure permits before drilling exploratory wells under an approved plan.[66] Lastly, once an exploratory well yields oil or gas of commercial quantities, leaseholders must submit development and production plans for BOEM's approval prior to extraction.[67]

The Secretary retains broad authority over leases even after they are issued.[68] The Secretary "may at any time" promulgate regulations that "provide for the prevention of waste and conservation of the natural resources of the [OCS]."[69] The Ninth District Court of Appeals in *Gulf Oil Corp. v. Morton* interpreted the phrase "natural resources" found in OCSLA to include "marine animal and plant life," not just oil and gas.[70] The court held the Secretary's suspension of leases for environmental purposes in response to the Santa Barbara oil spill fell within his duty to conserve natural resources in the OCS.[71]

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[57] ENSCO Offshore Co. v. Salazar, 781 F. Supp. 2d 332, 339 (E.D. La. 2011) (holding the Secretary must process drilling permit applications submitted by active leaseholders within thirty days to comport with OCSLA's "overriding policy of expeditious development"). *But see* 43 U.S.C. § 1332(3) (omitting the word "overriding" in the statute).

[58] Sec'y of the Interior v. California, 464 U.S. 312, 337 (1984).

[59] 43 U.S.C. § 1344(a) (requiring the Secretary to specify the "size, timing, and location of leasing activity which he determines will best meet national energy needs" for five years); CONG. RSCH. SERV., *supra* note 10, at 1.

[60] 43 U.S.C. § 1344(a).

[61] *Id.* § 1344(a)(1).

[62] *Id.* § 1344(a)(3).

[63] *Id.*

[64] *Id.* § 1340(c)(1); *id.* § 1331(k) (defining "exploration" to mean the "process of searching for minerals").

[65] *Id.* § 1340(c)(1).

[66] *Id.* § 1340(d).

[67] *Id.* § 1351(a)(1).

[68] *Id.* § 1334(a).

[69] *Id.*

[70] Gulf Oil Corp. v. Morton, 493 F.2d 141, 145 (9th Cir. 1973) (concluding the Secretary reasonably interpreted the term "natural resources" in OCSLA to hold the same meaning as that term's meaning in the SLA); 43 U.S.C. § 1301(e) ("'[N]atural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life…").

[71] Gulf Oil Corp., 493 F.2d at 145.

But even the Secretary's broad stewardship responsibilities over the natural resources of the OCS do not allow the federal government to change the terms of a lease after its been issued.[72] In *Mobil Oil Exploration & Producing Southwest, Inc. v. United States*, the United States Supreme Court clarified the federal government's contractual obligations to OCSLA leaseholders.[73] The court held a federal statute that extended the time that the Secretary must approve exploration plans violated the material terms of a lease, constituting a substantial breach of that lease.[74]

The Secretary must also take care to not over-regulate active leases to the point of violating the Takings Clause of the Fifth Amendment of the United States Constitution.[75] The Ninth District Court of Appeals in *Union Oil Co. v. Morton* took up the issue of takings in the context of OCSLA.[76] It held that an indefinite suspension could constitute a taking requiring a payment of just compensation.[77] The court noted Congress did not delegate the power to "take" offshore leases to the Executive Branch.[78] However, modern landmark takings cases and their associated tests, not *Union Oil Co. v. Morton*, would guide any future OCSLA-related takings inquiries.[79]

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[72] *See* Mobil Oil Expl. & Producing Sw., Inc. v. United States, 530 U.S. 604, 624 (2000) (concluding a federal statute prevented the federal government from honoring its contractual obligations to OCSLA leaseholders). *See generally* CTR. FOR BIOLOGICAL DIVERSITY ET AL., PETITION TO REDUCE THE RATE OF OIL AND GAS PRODUCTION ON PUBLIC LANDS AND WATERS TO NEAR ZERO BY 2035, at 21–22 (2022) (arguing that phasing out offshore oil and gas drilling in the OCS by 2035 would not constitute a breach of contract to be suffered by an active leaseholder).

[73] Mobil Oil Expl., 530 U.S. at 608, 624.

[74] *Id.* at 621.

[75] Union Oil Co. of Cal. v. Morton, 512 F.2d 743, 750 (9th Cir. 1975); U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). *See generally* CTR. FOR BIOLOGICAL DIVERSITY, *supra* note 72, at 22–25 (arguing that phasing out offshore oil and gas drilling in the OCS by 2035 would not cause active leaseholders to suffer a taking of private property).

[76] Union Oil Co., 512 F.2d at 746, 750 (stating the case centered around lease suspensions following the Santa Barbara oil spill).

[77] *Id*. at 750–51 (remanding the case to the lower court to determine whether the plaintiff suffered an indefinite lease suspension).

[78] *See id.* ("But without congressional authorization, the Secretary or the executive branch in general has no intrinsic powers of condemnation.").

[79] *Compare* JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 40.04 (5th ed. 2023) (marking the 1978 decision in *Penn Cent. Transp. Co. v. City of N.Y.*, and cases that followed, as comprising the modern era of regulatory takings jurisprudence), *with* Union Oil Co., 512 F.2d at 752 (remanding the case to the district court in 1975).

III. *LOUISIANA V. BIDEN*: A LIMITED CHECK ON EXECUTIVE DISCRETION

Section 208 of EO 14008 directed the Secretary to "pause new oil and natural gas leases on public lands or in offshore waters."[80] Section 208 required that the pause continue pending a review of the government's oil and gas leasing program.[81] Agencies immediately stopped selling new onshore and offshore leases.[82] The 2017–2022 Five Year Leasing Program (2017–2022 Program), which included eleven offshore lease sales, remained in effect when the president signed EO 14008.[83]

Thirteen states sued the federal government in the United States District Court for the Western District of Louisiana in *Louisiana v. Biden*.[84] The states' allegations concerned onshore leasing under the MLA and offshore leasing in the OCS under OCSLA.[85] The states challenged the scope of President Biden's authority, contending neither the MLA nor OCSLA authorized the pause.[86] The states additionally challenged the procedures that President Biden's agencies employed in carrying out the pause under the APA.[87]

In *Louisiana I*, the court concluded the states made the requisite showing to warrant the issuance of a nationwide preliminary injunction.[88] The federal government appealed, and the Fifth Circuit Court of Appeals reversed.[89] It held the lower court's order lacked specificity.[90] The court concluded the term "pause" was insufficiently defined and remanded for clarification.[91]

On remand, the court in *Louisiana II* handed down a final disposition in the case pursuant to dualling motions for summary judgement.[92] The court first held the pause exceeded the authority delegated to President Biden by Congress in violation of the MLA and OCSLA.[93] Regarding OCSLA, the court reasoned that

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[80] Exec. Order No. 14008, 86 Fed. Reg. 7619, 7624–25, 7632 (Feb. 1, 2021) (signing Executive Order 14008, or "EO 14008," on January 27, 2021). *See generally* 43 U.S.C. § 1331(b) (stating the term "Secretary" refers to the Secretary of the Interior).

[81] Exec. Order No. 14008, 86 Fed. Reg. 7619, 7624–25 (Feb. 1, 2021); *see also* U.S. DEP'T OF THE INTERIOR, *supra* note 6, at 3 (declaring that the report constitutes the review of the government's oil and gas leasing program ordered under EO 14008).

[82] CONG. RSCH. SERV., *supra* note 8, at 1.

[83] Memorandum from the Sec'y of the U.S. Dep't of the Interior, Record of Decision and Approval of the 2017–2022 Outer Continental Shelf Oil and Gas Leasing Program 3 (Jan. 17, 2017) (on file with the *University of the Pacific Law Review*); CONG. RSCH. SERV., R44692, FIVE-YEAR OFFSHORE OIL AND GAS LEASING PROGRAM: STATUS AND ISSUES IN BRIEF 1 (Aug. 10, 2022) (stating that the 2017–2022 Program expired on June 30, 2022).

[84] Complaint at 4, Louisiana v. Biden, 622 F. Supp. 3d 267 (W.D. La. 2022) (Case No. 2:21-CV-00778).

[85] *Id.* at 14, 32 (stating the Mineral Leasing Act, or "MLA," guides onshore leasing and the Outer Continental Shelf Lands Act, or "OCSLA," concerns offshore leasing in the Outer Continental Shelf, or "OCS").

[86] *Id.* at 49–50.

[87] *Id.* at 43–48 (including eight causes of action under the Administrative Procedure Act, or "APA").

[88] Louisiana v. Biden, 543 F. Supp. 3d 388, 418–19 (W.D. La. 2021).

[89] *Id.*, *vacated and remanded*, 45 F.4th 841, 846 (5th Cir. 2022) (imposing a preliminary injunction on the pause ordered by Section 208 that the Fifth Circuit struck down due to a technical error); Louisiana v. Biden, 622 F. Supp. 3d 267, 298–99 (W.D. La. 2022) (permanently enjoining the pause).

[90] Louisiana, 45 F.4th at 846 (stating that a preliminary injunction issued by a district court must "state its terms specifically and describe in reasonable detail the conduct restrained or required").

[91] *Id.* at 845–46.

[92] Louisiana, 622 F. Supp. 3d at 276.

[93] *Id*. at 283–84, 289–90 (clarifying first that "pause" meant "stop" prior to holding Biden exceeded his authority under the MLA and OCSLA).

by pausing leases proposed in the 2017–2022 Program, the pause constituted a "'significant' revision" of that program.[94] However, the court reasoned, OCSLA only permits the Secretary to make "insignificant" changes; any "significant" revisions must go through the "the same manner the plan was originally developed."[95] OCLSA's four-step process begins with the preparation of a five-year leasing program.[96] Thus, by ordering the stoppage of lease sales without restarting the five-year leasing program creation process, President Biden acted contrary to congressional commands contained within OCSLA.[97]

The court then reviewed the agency actions that carried out the pause under the APA.[98] Regarding OCLSA, the court first held that BOEM lacked discretion under the statute "to stop the lease process for eligible lands."[99] The court reasoned that because the 2017–2022 Program included scheduled, yet unsold, leases, BOEM was responsible for holding those lease sales.[100] The court cited *ENSCO v. Offshore Co. Salazar* (*ENSCO*), which itself cited OCSLA, in declaring OCSLA requires the Secretary to make the OCS "available for expeditious development."[101] Next, the court held that the agencies acted contrary to law by stopping lease sales in violation of both the MLA and OCSLA.[102] Regarding OCSLA, the court reasoned that the 2017–2022 Program remained in effect at the time President Biden ordered the pause, and that the program "requires eligible leases to be sold."[103] Finally, the court held the agencies acted arbitrarily and capriciously and that they failed to provide notice comment.[104] The court issued a permanent injunction enjoining enforcement of the pause in the thirteen plaintiff states.[105]

Generally, decisions made by federal district courts are not binding authority on other district courts.[106] A district court confronted with an issue of federal law must only abide by decisions made by the relevant Court of Appeals circuit in which it sits and the United States Supreme Court.[107] The mandatory effectiveness of *Louisiana II* is thus confined to the thirteen plaintiff states, and it

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[94] *Id.* at 288–89.

[95] *Id.*

[96] *Id*. at 277, 288–89.

[97] *Id.* at 288–89.

[98] *Id.* at 292–93 (concluding the actions constituted "final agency actions" that were reviewable under the APA); 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

[99] Louisiana, 622 F. Supp. 3d at 293–94 (concluding the applicable agency actions were reviewable under the APA because they were not committed to agency discretion by law).

[100] *Id.* at 277, 293 (indicating the Bureau of Ocean Energy Management, or "BOEM," regulates offshore oil and gas leasing in federal waters).

[101] *Id.* at 293; ENSCO Offshore Co. v. Salazar, 781 F. Supp. 2d 332, 339 (E.D. La. 2011) (asserting OCSLA includes an "overriding policy of expeditious development"); 43 U.S.C. § 1332(3) (stating the OCS "should be made available for expeditious and orderly development").

[102] Louisiana, 622 F. Supp. 3d at 294.

[103] *Id.*

[104] *Id.* at 294–96.

[105] *Id*. at 298–99.

[106] H.R. *ex rel.* Reuter v. Medtronic, Inc., 996 F. Supp. 2d 671, 678 n.5 (S.D. Ohio 2014). *But see Imperative Authority*, BLACK'S LAW DICTIONARY (11th ed. 2019) (stating imperative authority is "[a]bsolutely binding on a court.").

[107] H.R. *ex rel.* Reuter, 996 F. Supp. 2d at 678 n.5.

is only in those states that the pause envisioned by Section 208 can be enforced.[108] However, other federal courts could rely on *Louisiana II* as persuasive authority.[109]

IV. LIMITING THE SUPPLY OF OIL AND GAS EXTRACTED OFFSHORE COULD HELP CURB CLIMATE CHANGE

The Intergovernmental Panel on Climate Change (IPCC) reports Earth can still avoid catastrophically rising temperatures if drastic reductions in carbon dioxide and other greenhouse gas emissions occur soon.[110] In 2016, the United States joined the Paris Agreement in which the signatory nations pledged to reduce global greenhouse gas emissions to substantially limit global warming.[111] The nations agreed to limit warming to 2 degrees Celsius above pre-industrial levels, with the ultimate goal of limiting the increase to 1.5 degrees Celsius.[112] Recent science shows that achieving the goals of the Paris Agreement depends on accomplishing a rapid phase-out of fossil fuel usage.[113] Such a tactic seems reasonable given the continued production of fossil fuels comprises an illogical method of "simultaneously trying to reduce their use."[114]

The United States should complement its pre-existing climate change mitigation strategy by reducing the quantity of fossil fuels extracted offshore.[115] Given approximately 16% of United States' oil production originates from the OCS, limiting the quantity of oil extracted from the OCS can plausibly decrease the quantity of burned fossil fuels overall.[116] A reduction in burned fossil fuels in the OCS would result in reduced quantities of carbon dioxide released into the atmosphere, combatting global warming and resulting climate change.[117] This would in turn help the United States satisfy its Paris Agreement commitment.[118]

Generally, policies that aim to reduce greenhouse gas emissions to curb climate change are classified as either demand-side or supply-side policies.[119] Demand-side policies strive to reduce fossil fuel consumption, while supply-side

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[108] *See id.* (clarifying the difference between binding authority and persuasive authority); Louisiana v. Biden, 622 F. Supp. 3d 267, 298–99 (W.D. La. 2022).

[109] *Persuasive Authority*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Authority that carries some weight but is not binding on a court, often from a court in a different jurisdiction.").

[110] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SIXTH ASSESSMENT REPORT WORKING GROUP 1 SUMMARY FOR POLICYMAKERS 27 (Aug. 2021).

[111] Kristen Eichensehr*, Biden Administration Reengages with International Institutions and Agreements*, 115 AM. J. INT'L L. 323, 324 (2021) (stating President Biden re-entered the Paris Agreement in January 2021 following President Trump's November 2020 withdrawal from the agreement).

[112] *The Paris Agreement*, UNITED NATIONS, https://www.un.org/en/climatechange/paris-agreement (last visited June 6, 2023) (on file with the *University of the Pacific Law Review*).

[113] PETER ERICKSON & MICHAEL LAZARUS, STOCKHOLM ENV'T INST., HOW WOULD PHASING OUT U.S. FEDERAL LEASES FOR FOSSIL FUEL EXTRACTION AFFECT CO2 EMISSIONS AND 2°C GOALS? 9 (2016).

[114] *Id.*

[115] BRIAN C. PREST, RESS. FOR THE FUTURE, PARTNERS, NOT RIVALS: THE POWER OF PARALLEL SUPPLY-SIDE AND DEMAND-SIDE CLIMATE POLICY 1–2 (Apr. 2022) (recommending that supply-side and demand-side climate policies be implemented in tandem to reduce the negative effects of each in isolation).

[116] U.S. DEP'T OF THE INTERIOR, *supra* note 6, at 5 (stating oil and natural gas extracted from the Outer Continental Shelf, or "OCS," constituted 16% of oil production and 3% of natural gas production in the United States in fiscal year 2020).

[117] UNIV. OF CAL. MUSEUM OF PALEONTOLOGY, *supra* note 27.

[118] UNITED NATIONS, *supra* note 112.

[119] PREST, *supra* note 115, at 1.

policies work to directly reduce quantities of extracted fossil fuels.[120] Demand-side polices include fuel economy standards, taxation of carbon at the point of emission, and subsidies for electric vehicles.[121] Supply-side policies include ending fossil fuel subsidies, taxation of carbon at the point of extraction, and—relevant here—limiting the supply of fossil fuels by targeting extraction operations.[122]

Climate policy in recent decades has been mostly limited to demand-side solutions.[123] The focus on demand-side policies stems, in part, from complaints that supply-side policies cause carbon leakage.[124] Carbon leakage occurs when a reduction in fossil fuel production and emissions in one region is offset by increased production and emissions in another region.[125] However, both supply-side and demand-side policies, when employed alone, cause leakage.[126] Supply-side policies cause leakage by increasing the cost of fossil fuels, incentivizing producers elsewhere to increase production to compete in the targeted markets.[127] Demand-side policies cause leakage by reducing the cost of fossil fuels in one area, making it cheaper for consumers to burn them in other areas.[128] Research suggests jurisdictions should implement supply-side and demand-side policies together to mitigate the negative effects of either deployed alone.[129] Deploying both together can cause "reduced supply [to be] offset by reduced demand, muting or even eliminating the effect on global prices and hence the leakage problem."[130]

The United States has historically relied on demand-side policies to fight climate change.[131] For instance, the Obama administration did little to reduce fossil fuel production, but instead relied on demand-side polices including power plant regulations and fuel economy standards.[132] Future administrations should contemplate the implications of new research regarding the ineffectiveness of demand-side policies alone in reducing global carbon dioxide emissions.[133] Reducing rates of fossil fuel production in the OCS to lessen the overall supply of fossil fuels could complement demand-side policies already being implemented in the United States.[134] Such a policy could help the United States meet its Paris Agreement commitments, which in turn, could stave off the disastrous effects of climate change.[135]

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[120] *Id.*
[121] *Id.* at 4.
[122] *Id.*
[123] *Id.* at 1.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.* at 2.
[128] *Id*. at 1.
[129] *See, e.g.*, *id.* at 2; FERGUS GREEN & RICHARD DENNISS, CUTTING WITH BOTH ARMS OF THE SCISSORS: THE ECONOMIC AND POLITICAL CASE FOR RESTRICTIVE SUPPLY-SIDE CLIMATE POLICIES 3 (Mar. 12, 2018).
[130] PREST, *supra* note 115, at 2.
[131] *Id.* at 1.
[132] *Id.*
[133] *Id.* at 2.
[134] *See* PREST, *supra* note 115, at 1–2 (discussing historic trends of demand-side climate polices in the United States).
[135] *See* UNITED NATIONS, *supra* note 112.

V. THE EXECUTIVE BRANCH CAN REDUCE THE QUANTITY OF FOSSIL FUELS EXTRACTED BY ACTIVE LEASEHOLDERS

No lessee secures a lease to extract a pre-determined quantity of oil or gas from the OCS.[136] Instead, the President or the Secretary of Energy set "rates of production" depending on the circumstances.[137] The President or the Secretary of Energy thus possess discretion to reduce quantities of oil and gas that active leaseholders can extract from the OCS.[138] Reducing the quantity of oil and gas collected by active lessees in the OCS constitutes an effective supply-side tool for combatting climate change.[139] Section A analyzes the discretion of the President and Secretary of Energy.[140] Section B explains why throttling production rates would not result in a taking in violation of the United States Constitution.[141] Section C concludes by arguing that throttling rates of production would not constitute a breach of contract.[142]

A. The Executive Branch Possesses Broad Authority to Throttle Rates of Production

Section 5(g)(1) of OCSLA states lessees must extract oil or gas at rates according to "any rule or order issued by the President."[143] If the President fails to set production rates, Section 5(g)(2) requires that the Secretary of Energy promulgate regulations setting rates.[144] Subsection 1 details the President's authority.[145] Subsection 2 analyzes the role of the Secretary of Energy.[146]

1.Interpreting Presidential Authority to Throttle Rates of Production

Section 5(g)(1) states lessees must extract oil or gas at rates set according to "any rule or order issued by the President."[147] The extent of authority afforded to the President by Congress under Section 5(g)(1) first rests in the meaning of the phrase "any rule or order."[148] Courts seeking to interpret a word contained in a statute first look to the statute itself for a definition.[149] Absent a statutory definition,

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[136] 43 U.S.C. § 1334(g)(1)–(2).

[137] *Id.* (stating that the Secretary of Energy may only set rates of production under the Outer Continental Shelf Lands Act, or "OCSLA," if the President does not).

[138] *Id.*

[139] *See* ERICKSON & LAZARUS, *supra* note 113, at 11 (suggesting a reduction in quantities of extracted fossil fuels from federal lands can help the United States assist in the achievement of the 2-degrees-Celsius goal of the Paris Agreement).

[140] *Infra* Section V.A.

[141] *Infra* Section V.B.

[142] *Infra* Section V.C.

[143] 43 U.S.C. § 1334(g)(1).

[144] *Id.* at § 1334(g)(2).

[145] *Infra* Subsection V.A.1.

[146] *Infra* Subsection V.A.2.

[147] 43 U.S.C. § 1334(g)(1).

[148] *Id.*

[149] Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995) (looking first at the language of the statute in question to define a term when engaging in statutory interpretation).

courts will give a word its ordinary meaning, typically by referencing dictionaries.[150] OCSLA does not define the terms "any," "rule," or "order."[151] One dictionary defines the adjective *any* as a person or thing that "is not particular or specific."[152] The word *rule* refers to an authoritative standard to guide conduct in a situation.[153] The word *order* constitutes a command, direction, or instruction.[154] Taking the phrase as whole, "any rule or order" refers to any number of unspecified authoritative decisions.[155] A broad reading of the phrase "any rule or order" points toward the President possessing vast discretion to set the quantity of extractable oil and gas.[156] By abstaining from placing bounds on permissible rules or orders, OCSLA in effect permits the President to comply with Section 5(g)(1) by issuing a seemingly endless number of rules or orders.[157]

The range of choices available to the President under Section 5(g)(1) next turns on what activities constitute applicable rules or orders.[158] Two examples of permissible rules or orders the President can deploy include executive orders and national emergency declarations.[159] First, an executive order would constitute both a rule and order under the plain meanings of those terms.[160] An executive order—issued by the President—constitutes an order intended to direct "the actions of executive agencies or government officials."[161] An executive order encapsulates a rule by "mandating or guiding conduct" and an order by constituting a "command,

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[150] *Id.* (stating that courts give a word its ordinary meaning if undefined in the statute); Mohamad v. Palestinian Auth., 566 U.S. 449, 454 (2012) (using dictionary definitions first when attempting to discern the ordinary meaning of a word that is not defined within the statute in question).

[151] *See* 43 U.S.C. § 1334(g)(1) (declining to define the phrase "any rule or order" or the individual words contained within that phrase); *id.* § 1331 (omitting definitions of the words "any," "rule," or "order" from the definition section of OCSLA).

[152] *Any*, BRITANNICA, https://www.britannica.com/dictionary/any (last visited June 8, 2023) (on file with the *University of the Pacific Law Review*) (defining "any" as a person or thing that "is not particular or specific").

[153] *Rule*, BLACK'S LAW DICTIONARY (11th ed. 1969) ("Generally, an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation.").

[154] *Order*, BLACK'S LAW DICTIONARY (11th ed. 1969) ("A command, direction, instruction.").

[155] *Any*, BRITANNICA, https://www.britannica.com/dictionary/any (last visited June 8, 2023) (on file with the *University of the Pacific Law Review*); *Rule*, BLACK'S LAW DICTIONARY (11th ed. 1969); *Order*, BLACK'S LAW DICTIONARY (11th ed. 1969).

[156] *Compare* 43 U.S.C. § 1334(g)(1) (allowing for the President to issue "*any* rule or order" in setting extractable gas and oil quantities), *with Any*, BRITANNICA, https://www.britannica.com/dictionary/any (last visited June 8, 2023) (on file with the *University of the Pacific Law Review*) (defining "any" as a person or thing that "is not particular or specific"); *and Rule*, BLACK'S LAW DICTIONARY (11th ed. 1969) ("Generally, an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation."), *and Order*, BLACK'S LAW DICTIONARY (11th ed. 1969) ("A command, direction, instruction.").

[157] *See* 43 U.S.C. § 1334(g)(1) (allowing for the President to issue "any rule or order" in setting extractable gas and oil quantities); *Any*, BRITANNICA, https://www.britannica.com/dictionary/any (last visited June 8, 2023) (on file with the *University of the Pacific Law Review*); Gibson v. Agric. Life Ins. Co., 282 Mich. 282, 288–89 (1937) (referencing an instance where the Michigan Supreme Court determined that the use of "any" in regards to any contracts meant "all" agency contracts).

[158] 43 U.S.C. § 1334(g)(1).

[159] *See* CTR. FOR BIOLOGICAL DIVERSITY, *supra* note 72, at 4, 19 (recommending that the President either declare a national emergency or issue an executive order to phase down offshore drilling under Section 5(g)(1)).

[160] *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *Executive Order*, BLACK'S LAW DICTIONARY (11th ed. 1969) (stating an executive order intends to direct the actions of executive agencies); *Rule*, BLACK'S LAW DICTIONARY (11th ed. 1969); *Order*, BLACK'S LAW DICTIONARY (11th ed. 1969).

[161] *Executive Order*, BLACK'S LAW DICTIONARY (11th ed. 1969).

direction, [or] instruction."[162] Thus, OCSLA plausibly allows for the President to issue any executive order prior to decreasing the quantities of extractable gas or oil under Section 5(g)(1).[163] Second, the President may declare a national emergency pursuant to the National Emergencies Act to conform with Section 5(g)(1).[164] A national emergency declaration constitutes a rule or order according to the plain meanings of those terms.[165] A national emergency declaration permits the President to mandate or guide the conduct of Executive agencies or departments by implementing commands, directions, or instructions, constituting a rule and order.[166] Thus, the President could direct BOEM to carry out an ordered reduction in extractable oil or gas by active OCSLA leaseholders through the authority of a national emergency declaration.[167]

The pressing state of human-caused climate change presents various opportunities to premise any rule or order to curb its effects.[168] First, the President could declare climate change a national emergency and set rates based on that declaration alone.[169] Climate change continues to unleash global climate extremes worldwide, and the United States is no exception.[170] Second, the United States vowed to do its part to combat climate change by reducing greenhouse gas emissions when it entered into the Paris Agreement.[171] Therefore, any rule or order issued by the President could serve as a mechanism for the United States to fulfil its international commitments.[172] Notably, however, the Paris Agreement stems from the United Nations Framework Convention on Climate Change (UNFCCC),

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[162] *Id.*; *Rule*, BLACK'S LAW DICTIONARY (11th ed. 1969); *Order*, BLACK'S LAW DICTIONARY (11th ed. 1969).

[163] *See* 43 U.S.C. § 1334(g)(1) (allowing for the President to issue "any rule or order" in setting extractable gas and oil quantities issued under OCSLA); *Any*, BRITANNICA, https://www.britannica.com/dictionary/any (last visited Mar. 5, 2023) (on file with the *University of the Pacific Law Review*); *Rule*, BLACK'S LAW DICTIONARY (11th ed. 1969); *Order*, BLACK'S LAW DICTIONARY (11th ed. 1969).

[164] *See* 43 U.S.C. § 1334(g)(1) (allowing for the President to issue "any rule or order" in setting extractable gas and oil quantities); 50 U.S.C. § 1621(a) (authorizing the President to declare a national emergency); *National Emergency*, BLACK'S LAW DICTIONARY (11th ed. 1969) ("A state of national crisis or a situation requiring immediate and extraordinary national action.").

[165] 50 U.S.C. § 1621(a); *Rule*, BLACK'S LAW DICTIONARY (11th ed. 1969); *Order*, BLACK'S LAW DICTIONARY (11th ed. 1969).

[166] 50 U.S.C. § 1621(a); *Rule*, BLACK'S LAW DICTIONARY (11th ed. 1969); *Order*, BLACK'S LAW DICTIONARY (11th ed. 1969).

[167] Louisiana v. Biden, 622 F. Supp. 3d 267, 277 (W.D. La. 2022) (indicating the Bureau of Ocean Energy Management, or "BOEM," regulates offshore oil and gas leasing in the Outer Continental Shelf, or "OCS"); 43 U.S.C. § 1334(g)(1); 50 U.S.C. § 1621(a); *Rule*, BLACK'S LAW DICTIONARY (11th ed. 1969); *Order*, BLACK'S LAW DICTIONARY (11th ed. 1969).

[168] 43 U.S.C. § 1334(g)(1); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 110, at 8 ("Human-induced climate change is already affecting many weather and climate extremes in every region across the globe.").

[169] *See* 50 U.S.C. § 1621(a) (authorizing the President to declare a national emergency); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 110, at 8 ("Evidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones, and, in particular, their attribution to human influence, has strengthened [in recent years].").

[170] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 110, at 8.

[171] CONG. RSCH. SERV., IF11746, UNITED STATES REJOINS THE PARIS AGREEMENT ON CLIMATE CHANGE: OPTIONS FOR CONGRESS 1 (2021) (stating the United States entered in 2016 the Paris Agreement, which Trump left during his presidency, which Biden subsequently reentered during his term).

[172] *See id.* (stating that President Biden rejoined, on behalf of the United States, the Paris Agreement on January 20, 2021).

a treaty which the United States ratified in 1992.[173] The Paris Agreement itself does not constitute a treaty.[174] The Paris Agreement equates to an executive agreement that contains no legal obligations outside of those mandated by UNFCCC.[175] Notwithstanding the Paris Agreement's lack of legal obligations, movements by the United States to accomplish its goals should still be celebrated as sound climate policy.[176] In doing so, the United States could inspire other nations to follow suit; climate change threatens all nations, constituting a global problem that requires collective action.[177]

The President could also comply with Section 5(g)(1) by issuing a rule or order aimed at avoiding the environmental destruction associated with offshore drilling.[178] Offshore fossil fuel extraction generally comprises a multi-pronged environmental threat.[179] For example, the extraction process damages the ocean floor and disrupts populations of floor-dwelling creatures that are important to the rest of the food chain.[180] Additionally, spills and leaks are inevitable, even with proper safeguards in place; these spills and leaks devastate plant and animal life.[181] The text of OCSLA, as interpreted in *Gulf Oil Corp. v. Morton*, supports the ability of the Executive Branch to promulgate regulations to protect offshore natural resources.[182]

2. Interpreting the Authority of the Secretary of Energy to Throttle Rates of Production

If the President fails to set production rates, Section 5(g)(2) requires that the Secretary of Energy promulgate regulations setting rates.[183] While the President enjoys seemingly open-ended discretion in setting production rates under OCSLA, the Secretary of Energy must abide by a substantive requirement that favors fossil fuel extraction.[184] This indicates the President would be the ideal

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[173] *Id*. *See generally* Eichensehr*, supra* note 111, at 324 (stating that President Biden re-entered the Paris Agreement in January 2021 following President Trump's withdrawal from the agreement that became effective in November 2020).

[174] CONG. RSCH. SERV., *supra* note 171, at 1.

[175] *Id*.

[176] *Id*.; ERICKSON & LAZARUS, *supra* note 113, at 30.

[177] ERICKSON & LAZARUS, *supra* note 113, at 30 (highlighting the ability of the United States to influence the actions of other countries changes to its offshore leasing policy); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 110, at 8.

[178] 43 U.S.C. § 1334(g)(1).

[179] DEFS. OF WILDLIFE, *supra* note 26, at 1–2.

[180] *Id.* at 1.

[181] *Id.*

[182] *See* 43 U.S.C. § 1334(a) (declaring that the Secretary of the Interior may promulgate regulations to protect natural resources in the OCS); Gulf Oil Corp. v. Morton, 493 F.2d 141, 145 (9th Cir. 1973) (concluding the Secretary reasonably interpreted the term "natural resources" in OCSLA to hold the same meaning as that term's meaning in the SLA); 43 U.S.C. § 1301(e) ("'[N]atural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life…").

[183] 43 U.S.C. § 1334(g)(2).

[184] *Compare id.* § 1334(g)(1) (omitting any substantive checks on the President's authority to set rates of production), *with id.* § 1334(g)(2) (requiring the Secretary of Energy to set rates of production as to "assure the

individual to reduce rates of production under Section 5(g) as to avoid legal challenges to the Secretary of Energy's authority.[185] The Secretary of Energy's authority is further complicated by the fact that Section 5(g)(2) has yet to be interpreted by the courts.[186] Yet, despite the substantive requirement, the Secretary of Energy still possesses some discretion under OCSLA that she can use to drastically throttle rates of production in the event the President does not.[187]

Section 5(g)(2) states that the Secretary of Energy in setting rates of production must take into account a lessee's ability to produce oil and gas "at the maximum rate that can be sustained without reducing the ultimate recovery of oil and gas, or both"[188] Any extraction operations that occur as a result of the Secretary's promulgation of rates of production must occur "under sound engineering and economic principles."[189] A reasonable reading of Section 5(g)(2) indicates that the Secretary of Energy must justify any rates of production she sets based on a substantive preference for ensuring the extractability of fossil fuels.[190]

But OCSLA vests the Secretary of Energy with some discretion.[191] In achieving the objectives contained in Section 5(g)(2), the Secretary of Energy "may permit the lessee to vary such rates if [she] finds that such variance is necessary."[192] Congress did not define "necessary" in the statute.[193] Absent a statutory definition, courts attach to words their ordinary meaning.[194] The ordinary meaning of necessary is when something is "needed for some purpose or reason."[195]

Section 5(g)(2) does not shed light on the "purpose or reason" that would serve as the catalyst for the Secretary of Energy setting production rates.[196] A basic cannon of statutory interpretation is the "mere surplusage" principle.[197] The principle requires that courts "give effect, if possible, to every clause and word of

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maximum rate of production which may be sustained without loss of ultimate recovery of oil or gas, or both, under sound engineering and economic principles, and which is safe for the duration of the activity covered by the approved plan").

[185] *Compare id.* § 1334(g)(1) (omitting any substantive checks on the President's authority to set rates of production), *with id.* § 1334(g)(2) (including a substantive check that the Secretary of Energy must abide by in favor of the extraction of fossil fuels).

[186] *Id.* § 1334(g)(2).

[187] *See id.* (allowing the Secretary of Energy to "permit the lessee to vary such rates if [she] finds that such variance is necessary").

[188] *Id.*

[189] *Id.*

[190] *See id.* (requiring the Secretary of Energy to consider the "maximum rate that can be sustained without reducing the ultimate recovery of oil and gas, or both" in setting rates of production).

[191] *Id.*

[192] *Id.*

[193] *Id.* (refraining from defining necessary); *id.* § 1331 (omitting a definition of the word "necessary" from the definition section of OCSLA).

[194] Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995) (stating that courts give a word its ordinary meaning if undefined in the statute); Mohamad v. Palestinian Auth., 566 U.S. 449, 457 (2012) (using dictionary definitions to discern the ordinary meaning of a word).

[195] *Necessary*, BLACK'S LAW DICTIONARY (11th ed. 1969).

[196] 43 U.S.C. § 1334(g)(2) (refraining from explaining the conditions in which the Secretary of Energy's throttling of extractable oil and gas would be necessary).

[197] CONG. RSCH. SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 14 (Sept. 24, 2014).

a statute."[198] In doing so, courts seek to avoid "any construction which implies that the legislature was ignorant of the meaning it employed."[199]

Here, Congress plausibly wrote Section 5(g)(2) to vest the Secretary of Energy with sufficiently broad authority to throttle rates of production in order to combat climate change.[200] By abstaining from defining the word "necessary," Congress intended to vest the Secretary of Energy with broad authority to determine the necessity of any throttling of oil and gas quantities.[201] The Secretary could thus declare keeping fossil fuels in the ground is necessary to combat climate change and order active leaseholders to reduce their production amounts accordingly.[202]

B. Throttling Production Rates Would Not Constitute a Taking of Private Property

The power of the United States to take private property "requires no constitutional recognition" but is instead "an attribute of sovereignty."[203] The Fifth Amendment limits that power by requiring that the federal government take private property for public use subject to a payment of just compensation.[204] A leasehold interest in oil and gas conveys a property interest.[205] When the government "takes" a leaseholder's property, that leaseholder is entitled to just compensation.[206] If a regulation goes "too far," it can effectuate a taking.[207] Such regulatory takings are distinguishable from classic takings, the latter of which typically involve the government's physical appropriation of private property.[208]

OCSLA vests the President and Secretary of Energy with broad discretion to throttle the rates of production of current OCS leaseholders.[209] However, that power is circumscribed by the Fifth Amendment's Takings Clause.[210] Furthermore, Congress curtailed that power by abstaining from delegating to the Executive Branch the power to take a leasehold interest sold pursuant to OCSLA, even with just compensation.[211] While Congress—which possesses eminent

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[198] Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).

[199] *Id.*

[200] *See* 43 U.S.C. § 1334(g)(2) (refraining from explaining the conditions in which the Secretary of Energy's throttling of extractable oil and gas would be necessary); Montclair, 107 U.S. at 152 (explaining that Congress' choice of words in writing statutes should be given effect).

[201] *See* 43 U.S.C. § 1334(g)(2) (refraining from defining necessary).

[202] Bill McKibben, *Why We Need to Keep 80% of Fossil Fuels in the Ground*, 350.ORG (Feb. 16, 2016), https://350.org/why-we-need-to-keep-80-percent-of-fossil-fuels-in-the-ground/ (on file with the *University of the Pacific Law Review*).

[203] Boom Co. v. Patterson, 98 U.S. 403, 406 (1878).

[204] *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[205] Union Oil Co. of Cal. v. Morton, 512 F.2d 743, 747 (9th Cir. 1975).

[206] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[207] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

[208] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.").

[209] *See* 43 U.S.C. § 1334(g)(1)–(2) (broadly empowering the President or Secretary of Energy to determine the rates of production).

[210] U.S. CONST. amend. V.

[211] Union Oil Co. of Cal. v. Morton, 512 F.2d 743, 751 (9th Cir. 1975).

domain power—typically delegates its power to effectuate condemnations to Executive Branch agencies, it has not delegated the power to take OCSLA leases.[212] Thus, the Executive Branch must exercise caution not to over-regulate active leases to the point of effectuating a taking for which it does not have the authority to orchestrate.[213]

Relevant OCSLA-related takings jurisprudence is limited, but includes the 1975 decision *Union Oil Company of California v. Morton* (*Union Oil Company*).[214] In *Union Oil Company*, the Ninth Circuit Court of Appeals held that an indefinite lease suspension could constitute a taking under the Fifth Amendment.[215] However, the Ninth Circuit decided *Union Oil Company* five years before the United States Supreme Court decided *Penn Central*, and nineteen years before *Lucas v. South Carolina Coastal Council* (*Lucas*).[216] *Penn Central* and *Lucas* would guide a modern court in determining whether a forced decrease in rates of production would amount to a regulatory taking.[217]

Courts typically determine whether a government regulation of property rights constitutes a taking by employing the multifactor balancing test from *Penn Central*.[218] *Penn Central* requires a fact-specific inquiry.[219] However, *Lucas* carved out a categorical exception that does not require a fact-specific inquiry when a regulation "denies all economically beneficial or productive use of land."[220] Though takings claims that rely on *Lucas* rarely succeed, plaintiffs are more likely to succeed under *Lucas* compared to *Penn Central*.[221]

A suit, claiming that a decrease of rates by the President or Secretary of Energy effectuates a categorical regulatory taking under *Lucas*, would fail.[222] A categorical regulatory taking first requires that a regulation deprive a property

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[212] *See* CONG. RSCH. SERV., RS22884, DELEGATION OF THE FEDERAL POWER OF EMINENT DOMAIN TO NONFEDERAL ENTITIES 1 (May 20, 2008) ("Congress routinely delegates eminent domain power to executive branch agencies, for their use in carrying out federal programs that require the acquisition of property interests."); Union Oil Co., 512 F.2d at 751.

[213] *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); Union Oil Co., 512 F.2d at 751.

[214] *See* Union Oil Co., 512 F.2d at 750–51 (analyzing an indefinite suspension of a leasing for a taking).

[215] *Id.* at 750–52 (vacating the district court's decision and remanding the case to the district court to determine whether a taking occurred).

[216] *Compare* SPRANKLING, *supra* note 79, at § 40.04 (marking the 1978 decision in *Penn Cent. Transp. Co. v. City of N.Y.*, and cases that followed, as comprising the modern era of regulatory takings jurisprudence), *with* Union Oil Co., 512 F.2d at 752 (remanding the case to the district court in 1975).

[217] 43 U.S.C. § 1334(g)(1)–(2); SPRANKLING, *supra* note 79, at § 40.04.

[218] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005); SPRANKLING, *supra* note 79, at § 40.04 (clarifying that the current categorical exceptions include the tests from *Lucas*, the *Nollan/Dolan* exactions inquiry, and the physical appropriation test from *Cedar Point Nursery v. Hassid*).

[219] Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978).

[220] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015, 1029 (1992).

[221] *See* Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, IOWA L. REV. 1847, 1849–50 (2017) (finding that courts found a categorical regulatory taking in twenty-seven out of 1,700 cases filed in state and federal courts over a twenty-five-year period, amounting to a 1.6% win-loss rate); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 330–31 (2007) (stating plaintiffs are more likely to win if a court analyzes a case under *Lucas* compared to *Penn Central*).

[222] *See* 43 U.S.C. § 1334(g)(1)–(2) (vesting the President or Secretary of Energy with the authority to throttle rates of production for active leaseholders); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1013 (1992).

owner of "all economically beneficial or productive use of land."[223] In *Lucas*, the trial court determined that a state statute that barred the plaintiff from building permanent habitable structures on his two beachfront parcels rendered those parcels "valueless."[224]

Lucas would be distinguishable from throttling rates of production because such a move would retain value through the continued capacity to extract at least some quantity of oil and gas.[225] This would probably still be the case even if rates of production were decreased drastically.[226] In *Palazzolo v. Rhode Island*, the Supreme Court held a state wetlands regulation that resulted in a property suffering a loss of most of its value did not satisfy the *Lucas* standard.[227] A court could likewise find even an overwhelming decrease in rates of production would not constitute a categorical regulatory taking.[228] However, Executive Branch agencies must not completely bar leaseholders from extracting oil and gas.[229] Doing so would leave the property interest, in the words of the *Lucas* court, "economically idle."[230] Economic idleness would make the government vulnerable to a successful claim under *Lucas* as the property interest would be deprived of "all economically beneficial or productive use of land."[231]

Even if a leaseholder showed that a reduction in extractable oil or gas denied "all economically beneficial or productive use" of their OCSLA lease, the inquiry would continue.[232] Such a showing would merely create a presumption that a taking occurred, but the federal government could justify its regulation under an exception contained within *Lucas*.[233] The exception shifts the burden to the government to prove that "background principles of the State's law of property and nuisance" justify the regulation.[234] Applicable "background principles" generally include state nuisance and property law but can also include regulations based on federal law.[235] This exception exists because "the government cannot 'take' a right which the property owner does not possess" in the first place.[236] Because OCSLA leases exist in federal waters and are granted under a federal statute, the federal

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223 Lucas, 505 U.S. at 1015.

224 *Id.* at 1019.

225 *See id.* (quoting the trial court that determined the plaintiff's parcels were valueless due to the statute); 43 U.S.C. § 1334(g)(1)–(2) (specifying that the President or Secretary of Energy set rates of production).

226 Lucas, 505 U.S. at 1019 n.8 ("It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full.").

227 Palazzolo v. Rhode Island, 533 U.S. 606, 613–14, 630–31 (2001) (noting the government "may not evade the duty to compensate on the premise that the landowner is left with a token interest").

228 *See id.* (stating a developer who planned to build a sprawling private beach club on twenty acres did not suffer a taking because he could still build a single house).

229 43 U.S.C. § 1334(g)(1)–(2).

230 Lucas, 505 U.S. at 1019.

231 *Id.* at 1015, 1019.

232 *Id.* at 1029–31.

233 SPRANKLING, *supra* note 79, at § 40.06.

234 *Id.* at 1029–31.

235 SPRANKLING, *supra* note 79, at § 40.06 (stating the scope of the exception remains unclear regarding, among other things, what types of law are to be considered).

236 Lucas, 505 U.S. at 1027 ("[W]e think [the government] may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."; Jill Dickey Protos, *Lucas v. South Carolina Coastal Council: A Tremor on the Regulatory Taking Richter Scale*, 43 CASE W. RES. L. REV. 669, 677 (1993).

government would plausibly be required to justify any challenged regulation under federal law.[237]

It is unlikely the government could utilize the *Lucas* exception; the government should thus be weary of rendering active leases "economically idle" as to avoid a finding of a categorical regulatory taking.[238] Environmental groups contend fossil fuel extraction constitutes a nuisance because of its negative effects on climate change, public health, and the environment.[239] The groups' arguments are not without merit, from a factual standpoint.[240] For one, the effects of climate change, including the resulting surge in extreme weather events, do interfere with the use and enjoyment of private property.[241] However, from a legal standpoint, nuisance claims based on federal common law in the context of greenhouse emissions represent a losing argument.[242] In *American Electric Power Company v. Connecticut*, the United States Supreme Court held the Clean Air Act (CAA) displaced federal common-law nuisance claims targeting greenhouse gas emissions.[243] The Court reasoned that the CAA delegated to the Environmental Protection Agency the authority to regulate greenhouse gas emissions, not the judiciary.[244] Thus, it is through the CAA's statutory framework that plaintiffs must seek redress concerning greenhouse gas emissions.[245]

Given future plaintiffs fail the *Lucas* standard, they would then be left with the three-prong, fact-intensive inquiry from *Penn Central*.[246] The first factor concerns the economic impact of the governmental impact on the property owner.[247] In discerning the impact of a reduction of extractable oil and gas on a leaseholder, most courts would focus on the lease's remaining economic use.[248] Courts would look for a substantial decrease in the lease's remaining economic use.[249] In *Penn Central*, the court held that a New York law did not effectuate a

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[237] Lucas, 505 U.S. at 1029–31; SPRANKLING, *supra* note 79, at § 40.06 (noting that the *Lucas* exception extends also to regulations arising under federal law).

[238] Lucas, 505 U.S. at 1015, 1019, 1029–31.

[239] CTR. FOR BIOLOGICAL DIVERSITY, *supra* note 72, at 25 (arguing oil and gas extraction in the OCS constitutes a nuisance); see also *Nuisance*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A condition, activity, or situation…that interferes with the use or enjoyment of property.").

[240] *See* UNIV. OF CAL. MUSEUM OF PALEONTOLOGY, *supra* note 27 (detailing the relationship between burning fossil fuels and climate change).

[241] *Id.*; *Nuisance*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[242] *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 415, 424–25 (2011) (holding the Clean Air Act displaced federal common-law nuisance claims); John C. Dernbach & Patrick Dernbach, *Judicial Remedies for Climate Disruption*, 53 Env't L. Rep. 10574, 10586 ("There is no remedy for federal common-law claims based on [greenhouse gas] emissions [after] *American Electric Power Co. v. Connecticut*….").

[243] Am. Elec. Power Co., 564 U.S. at 415, 424–25.

[244] *Id.* at (clarifying the CAA still provides plaintiffs a means of civil enforcement through the courts if regulators fail to enforce emissions limits against regulated sources).

[245] *Id.* at 425.

[246] *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005) (clarifying that takings inquiries regularly fall under the *Penn Central* balancing test unless governed by a categorical exception); SPRANKLING, *supra* note 79, at § 40.04 (clarifying that the current categorical exceptions include the tests from *Lucas*, the *Nollan/Dolan* exactions inquiry, and the physical appropriation test from *Cedar Point Nursery v. Hassid*).

[247] Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978).

[248] Meltz, *supra* note 221, at 334 (stating *Penn Central* stated no preference between focusing on remaining market value or remaining economic use, but that most courts look at remaining economic use).

[249] *Id.* at 334 (indicating that courts would look for an economic impact that is "very substantial, or arguably severe").

severe economic impact on the owner.[250] The court reasoned that the property owner could still secure return on its investment by operating the terminal, despite no longer being allowed to rent out the air space.[251] Likewise, decreasing rates of production would allow leaseholders to extract at least some oil and gas.[252] The economic impact would be noticeable, but not severe enough.[253]

The second prong explores the plaintiffs' reasonable "investment-backed expectations."[254] Here, a plaintiff could not prove that they possessed an expectation at the time they signed their lease regarding certain lease quantities.[255] OCLSA puts leaseholders on notice that the President or Secretary of Energy set rates of production, not the individual lessees.[256] Thus, a leaseholder's only plausible expectation is that they will be able to extract *some* oil and gas, but not a specified amount.[257]

Third, a court would look at the "character of the government action."[258] *Penn Central* states generally that an action involving a physical invasion of property is more likely to be deemed a taking compared to a regulatory action.[259] Relevant here, a physical invasion affecting OCSLA leaseholders could involve some sort of barricade physically stopping lessees from utilizing their leases.[260] Given an act throttling rates of production does not involve the physical invasion of property, it is unlikely the third prong would be met.[261] In sum, an order by the President or Secretary of Energy requiring that active leaseholders extract minimal quantities of oil and gas would not constitute a taking under *Lucas* or *Penn Central*.[262]

C. Minimizing Rates of Production Would Not Constitute a Breach of Contract

The laws that govern contracts between private parties apply equally to the United States when it decides to contract with private parties.[263] Thus, OCSLA leaseholders can sue the federal government for breach of contract if the President

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250 Penn Cent., 438 U.S. at 134–35.
251 *Id.*
252 *See id.* (explaining that the plaintiffs did not suffer a taking because of their remaining ability to extract economic benefit from the building itself, despite being barred from profiting off the air space).
253 *Id.*
254 *Id.* at 124.
255 *See* 43 U.S.C. § 1334(g)(1)–(2) (specifying that the President or Secretary of Energy set rates of production).
256 *Id.*
257 *See id.* (specifying that the President or Secretary of Energy set rates of production).
258 Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978).
259 *Id.*
260 *See id.* (declaring that an action involving a physical invasion of property is more likely to be deemed a taking).
261 *Id.*
262 *See* 43 U.S.C. § 1334(g)(1)–(2) (stating the President or Secretary of Energy set rates of production); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (declaring a taking will be found if a government regulation deprives a property owner of "all economically beneficial or productive use of land"); Penn Cent., 438 U.S. at 124 (setting forth a three-prong inquiry for suspected regulatory takings).
263 United States v. Winstar Corp., 518 U.S. 839, 895 (1996).

or the Secretary of Energy directs them to reduce their rates of production.[264] Such a claim would probably fall short because OCSLA gives the Executive Branch broad discretion in determining the amount of oil or gas lessees may extract.[265] The plain language contained in Section 5 puts leaseholders on notice of the federal government's discretion, as does the language found in BOEM's official leasing form.[266] A breach of contract claim would also fail because a forced reduction in extracted oil and gas is distinguishable from the facts in *Mobil Oil Exploration*, a primary case on point regarding OCSLA leases and breaches of contract.[267]

OCSLA grants the President and Secretary of Energy broad authority to curb the amount of oil or gas lessees may extract.[268] This language, found in Section 5, has existed since 1978, meaning leaseholders have had decades to digest the implications of such discretionary authority.[269] In addition, an offshore lease form (Form 2005) that BOEM uses to officialize an offshore lease does not include explicit language about specified quantities.[270] If a leaseholder alleges breach of contract following an ordered production decrease, the leaseholder must point to some promise that the federal government made regarding rates of production.[271] Form 2005 makes no such promise, but instead, it advises lessees that their lease is "subject to [OCSLA]" and other specified authorities.[272] Form 2005 further cautions lessees that new statutes, regulations, or amendments to pre-existing statutes may "increase or decrease the Lessee's obligations under the lease."[273] Form 2005 therefore informs lessees that their obligations under their respective leases are always in flux, meaning they should remain ever vigilant about future changes.[274] This language is found on page 1, section 1 of Form 2005, signifying that readers would not need to read far to find it.[275]

Form 2005 also makes an important caveat.[276] It reassures lessees that they must only comply with new statutes and regulations, or amendments to pre-existing statutes, if changes do not "explicitly conflict with an express provision

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264 *See Breach of Contract*, BLACK'S LAW DICTIONARY (11th ed. 1969) (defining breach of contract as a "[v]iolation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance.").

265 43 U.S.C. § 1334(g)(1)–(2).

266 *Id.*; BUREAU OF OCEAN ENERGY MGMT., FORM BOEM-2005, at 1 (Feb. 2017), https://www.boem.gov/sites/default/files/about-boem/Procurement-Business-Opportunities/BOEM-OCS-Operation-Forms/BOEM-2005.pdf (on file with the *University of the Pacific Law Review*).

267 *Compare* Mobil Oil Expl. & Producing Sw., Inc. v. United States, 530 U.S. 604, 624 (2000) (concluding a federal statute prevented the federal government from honoring its contractual obligations to OCSLA leaseholders), *with* 43 U.S.C. § 1334(g)(1)–(2) (informing prospective leaseholders of the broad authority held by the President and Secretary of Energy to set production rates).

268 43 U.S.C. § 1334(g)(1)–(2).

269 Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 204, 92 Stat. 629 (1978) (adding 43 U.S.C. § 1334(g)(1)–(2) to OCSLA).

270 *See* BUREAU OF OCEAN ENERGY MGMT., *supra* note 266, at 1–7 (abstaining from specifying explicit information related to rates of production); BUREAU OF OCEAN ENERGY MGMT., GULF OF MEXICO OUTER CONTINENTAL SHELF OIL AND GAS LEASE SALE 259, FINAL NOTICE OF SALE 10 (last visited Apr. 23, 2023) (declaring that BOEM uses Form 2005 to "convey leases resulting" from lease sales).

271 *Breach of Contract*, BLACK'S LAW DICTIONARY (11th ed. 1969).

272 BUREAU OF OCEAN ENERGY MGMT., *supra* note 266, at 1–7.

273 *Id.*

274 *Id.* at 1.

275 *Id.*

276 *Id.*

of [the] lease."[277] By throttling the rates of production, the President or Secretary of Energy would not be infringing on an express provision found in Form 2005.[278] Form 2005 does not make promises it cannot keep.[279] Instead, it directs lessees to the text of OCSLA, where, in Section 5, Congress codified the broad bounds of executive discretion concerning rates of production.[280]

Throttling production rates is also distinguishable from the facts in *Mobil Oil Exploration*.[281] Two oil companies purchased offshore leases from the federal government in 1981; however, in 1990, Congress passed the Outer Banks Protection Act (Act).[282] Among other things, the Act required that the Secretary wait at least thirteen months before approving new offshore exploration plans.[283] OCSLA, in contrast, requires that Interior approve a submitted exploration plan that adheres to OCSLA "within thirty days."[284] Plaintiffs submitted their exploration plans, which Interior said fully complied with OCSLA.[285] However, citing the Act, the Secretary refused to approve the exploration plans and suspended the leases.[286] The Court held the Secretary's adherence to the thirteen-month delay included in the Act violated material terms in the lease contracts, constituting a substantial breach.[287]

Mobil Oil Exploration would not apply to an ordered reduction in extracted oil and gas by Executive Branch.[288] That is because an ordered reduction would not constitute a new requirement that the Government sought to impose on a leaseholder after the contract had been signed.[289] *Mobil Oil Exploration* involved a new federal statute that in essence directed the Secretary to violate OCSLA without amending OCSLA.[290]

Meanwhile, Form 2005 instructs lessees that their contracts—which do not contain specified rates of production—are subject to OCSLA.[291] OCSLA, using plain language, informs lessees, absent any qualifiers, that the President has the ultimate authority to set rates of production for OCSLA leases.[292] It then goes on to specify that if the President does not exercise that authority, the Secretary of Energy can.[293] Form 2005 informs leaseholders that they must adhere to future OCSLA amendments, unless those amendments deviate from a term specified in

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277 *Id.*

278 *Id.* at 1–7.

279 *Id.*

280 *See* 43 U.S.C. § 1334(g)(1)–(2) (stating the President or Secretary of Energy set production rates); BUREAU OF OCEAN ENERGY MGMT., *supra* note 266, at 1–7 (omitting specific promises related to rates of production).

281 Mobil Oil Expl. & Producing Sw., Inc. v. United States, 530 U.S. 604, 611–12 (2000).

282 *Id.*

283 *Id*. *See generally* 43 U.S.C. § 1331(b) (stating the term "Secretary" refers to the Secretary of the Interior).

284 43 U.S.C. § 1340(c)(1).

285 Mobil Oil Expl., 530 U.S. at 612.

286 *Id* at 612–13.

287 *Id*. at 621.

288 *See id.* at 616 ("Without some such contractual provision limiting the Government's power to impose new and different requirements, the companies would have spent $156 million to buy next to nothing.").

289 *Id*.

290 *Id*. at 624.

291 BUREAU OF OCEAN ENERGY MGMT., *supra* note 266, at 1–7.

292 43 U.S.C. § 1334(g)(1).

293 *Id*. § 1334(g)(2).

the lease contract.[294] Thus, Form 2005 additionally supports the conclusion that throttling production rates would not equal an unforeseen hurdle for any lessee due to its consistency with OCSLA.[295]

VI. The Outer Continental Shelf Lands Act Allows the Secretary to Eliminate New Lease Sales

OCSLA vests the Secretary with sufficient discretion to eliminate the issuance of new leases through the five-year leasing plan process.[296] Section A focuses on the text of OCSLA in concluding that five-year programs must not include new leases.[297] Section B concludes by analogizing the Secretary's responsibilities under OCSLA with her responsibilities under other statutes.[298]

A. New Lease Sales Are Not Required in Five-Year Plans

OCSLA requires the Secretary to periodically prepare schedules of proposed oil and gas leases.[299] Resulting schedules must aim to "best meet [the] national energy needs for the five years following its approval or reapproval."[300] Thus, when the previous five-year 2017 to 2022 Program expired on June 30, 2022, the Secretary fell out-of-step with the requirements of OCSLA.[301] In almost all previous programs, federal officials finalized a new program by the time the previous one expired, allowing for a smooth transition between programs.[302]

On July 1, 2022, the Secretary released a proposed program set to span 2023 to 2028.[303] The proposal included a possibility of as many as eleven and as little as zero new leases.[304] President Biden then signed the Inflation Reduction Act (IRA) on August 12, 2022.[305] The White House touted it as "the most significant action Congress has taken on clean energy and climate change in the nation's history."[306] However, the IRA included a compromise friendly to the oil and gas industry that that could impact five-year leasing program decisions for the immediate future.[307] Relevant here, the Secretary must offer at least 60 million

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294 Bureau of Ocean Energy Mgmt., *supra* note 266, at 1.

295 *Id*. at 1–7; 43 U.S.C. § 1334(g)(1)–(2).

296 *See id.* § 1344(a) (tasking the Secretary with broad authority to prepare Outer Continental Shelf Lands Act, or "OCSLA," leasing programs that "he determines will best meet national energy needs"). *See generally* 43 U.S.C. § 1331(b) (stating the term "Secretary" refers to the Secretary of the Interior).

297 *Infra* Section V.A.

298 *Infra* Section V.B.

299 *See* 43 U.S.C. § 1344(a) (the Secretary "shall prepare and periodically revise" five-year leasing programs).

300 *Id*.

301 Cong. Rsch. Serv., *supra* note 83, at 1.

302 *Id.* at 4.

303 *Id.* at 1.

304 *Id.*

305 Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (2022); *Inflation Reduction Act Guidebook*, White House, https://www.whitehouse.gov/cleanenergy/inflation-reduction-act-guidebook/ (last visited April 15, 2024) (on file with the *University of the Pacific Law Review*).

306 White House, *supra* note 305.

307 *What the Inflation Reduction Act Means for Climate*, Earthjustice (Aug. 16, 2022), https://earthjustice.org/brief/2022/what-the-inflation-reduction-act-means-for-climate (on file with the

offshore acres for oil and gas leasing within the year preceding the issuance of any offshore wind development leases.[308] The provision in essence ties the fates of offshore clean energy projects with continued fossil fuel extraction.[309] The provision is not permanent; it sunsets ten years from August 16, 2022.[310] The Secretary approved the 2024–2029 Five Year Leasing Program (2024–2029 Program) on December 14, 2023.[311] The 2024–2029 Program includes three potential lease sales, all in the Gulf of Mexico.[312]

Notable here, the IRA does not require that five-year leasing programs contain proposed lease sales.[313] In fact, the IRA doesn't even require that the Secretary sell offshore lease sales to producers as a condition of issuing offshore wind energy permits.[314] It only requires that lease sales be *offered* for sale.[315] Further, the IRA's requirement that the Secretary offer oil and gas leases for sale as a condition precedent of issuing wind development permits is not permanent.[316] Any incentive the Secretary had for including lease sales in the 2024-2029 Program based on the IRA will thus not exist in perpetuity.[317] For these reasons, the Secretary may propose future five-year oil and gas leasing programs absent any proposed lease sales notwithstanding the IRA.[318]

While OCSLA requires the promulgation of regular lease schedules, OCSLA is less clear about whether lease schedules must contain proposed leases.[319] Stakeholders have different opinions about whether OCSLA requires that five-year programs include at least some proposed leases.[320] Some point to Section 18 of OCSLA that requires that "[t]he leasing program shall consist of a schedule of proposed lease sales."[321] Other stakeholders indicate that a proposal comprising zero leases would not conform with OCSLA.[322] The ordinary meaning of "shall" refers to the expression of something required, insinuating that new lease sales are

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University of the Pacific Law Review); *see also* CONG. RSCH. SERV., IF11980, OFFSHORE WIND PROVISIONS IN THE INFLATION REDUCTION ACT 1 (Sept. 29, 2022) (stating the IRA's requirement that oil and gas lease sale offerings precede the granting of any wind energy permits may affect decisionmaking concerning subsequent five-year programs).

[308] Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 50265, 136 Stat. 1818 (2022) (creating 43 U.S.C. § 3006); 43 U.S.C. § 3006(b)(2).

[309] 43 U.S.C. § 3006(b)(2).

[310] *Id.* § 3006(b).

[311] Memorandum from the Sec'y of the U.S. Dep't of the Interior, Record of Decision and Approval of the 2024–2029 Outer Continental Shelf Oil and Gas Leasing Program 13 (Dec. 14, 2023) (on file with the *University of the Pacific Law Review*);

[312] U.S. DEP'T OF THE INTERIOR & BUREAU OF OCEAN ENERGY MGMT., 2024–2029 OUTER CONTINENTAL SHELF OIL AND GAS LEASING PROPOSED FINAL PROGRAM 3 (Sept. 2023).

[313] *See* 43 U.S.C. § 3006(b)(2) (abstaining from mandating that five-year oil and gas programs include proposed lease sales).

[314] *Id.*

[315] *Id.*

[316] 43 U.S.C. § 3006(b).

[317] *See id.* § 3006(b), (b)(2) (leveraging the holding of oil and gas lease sales a condition precedent of issuing permits for wind development in the OCS).

[318] *See supra* notes 313–317 and accompanying text.

[319] *See id.* § 1344(a) (refraining from specifying whether periodic programs must provide for new lease sales).

[320] CONG. RSCH. SERV., *supra* note 83, at 6.

[321] *Id.* at 6; 43 U.S.C. § 1344(a).

[322] CONG. RSCH. SERV., *supra* note 83, at 6; 43 U.S.C. § 1344(a).

required.[323] Others disagree.[324] Either way, no previous five-year program has included zero proposed leases, meaning the legal question remains untested.[325]

If indeed OCSLA requires that BOEM include lease sales in every five-year lease plan, such a requirement would run afoul of a central purpose of the 1978 amendments.[326] Following the disastrous Santa Barbara oil spill, Congress vested the Executive Branch with discretion to balance energy and environmental concerns in promulgating lease schedules.[327] Though one author described the priorities as "seemingly incompatible," congressional intent that the balance occurs is clear.[328] Mandating the inclusion of lease sales in every five-year proposal would not comprise a balance between two equally important goals, but a preference for one over another.[329] Had Congress intended for extraction concerns to trump environmental concerns, it would have specified so in OCSLA.[330] However, Congress did not specify this.[331] Instead, Congress declared that the OCS constitutes a "vital national resource" that "should be made available for expeditious and orderly development, subject to environmental safeguards."[332] Further, Congress said that environmentally conscious development of the OCS should exist in a "manner which is consistent with the maintenance of competition and other national needs."[333] The introduction of "other national needs" into the balance suggests that Congress intended the calculus surrounding OCS drilling to change over time.[334]

The courts in *ENSCO* and *Louisiana II* erroneously focused only on the clause in Section 3 referencing the OCS being "made available to expeditious and orderly development."[335] The court in *ENSCO* went so far as to claim that OCSLA had an "overriding policy of expeditious development."[336] However, OCSLA does

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[323] *See Shall*, BLACK'S LAW DICTIONARY (11th ed. 1969) ("Has a duty to; more broadly, is required to.").

[324] *See, e.g.*, EARTHJUSTICE & EVERGREEN ACTION, MEETING THE MOMENT: HOW PRESIDENT BIDEN CAN ALIGN THE FEDERAL FOSSIL FUEL PROGRAM TO DELIVER ON CLIMATE AND PUT PEOPLE OVER PROFITS 16 (June 2022) ("[D]ecisions to offer OCS leases are driven by an assessment of what would 'best meet national energy needs,' and must be consistent with environmental protection, [among other values].").

[325] CONG. RSCH. SERV., *supra* note 83, at 6.

[326] *See* 43 U.S.C. § 1332(3) (stating that "expeditious and orderly development" of the OCS must be "subject to environmental safeguards," among other goals).

[327] *See* James, *supra* note 42, at 187 (citing the findings, purposes, and policies of the 1978 amendments in concluding that Congress intended to strike a balance between oil and gas drilling in the OCS and protection of the coastal environment).

[328] *Compare id.* (stating the 1978 amendments included "seemingly incompatible policies"), *with* 43 U.S.C. § 1332(3) (declaring that the "expeditious and orderly development" of the OCS must be "subject to environmental safeguards").

[329] *See* 43 U.S.C. § 1332(3) (stating that "expeditious and orderly development" of the OCS must be "subject to environmental safeguards," among other goals).

[330] *See id.* (omitting a ranking of congressional policy goals).

[331] *Id.*

[332] *Id.*

[333] *Id.*

[334] *Id.*

[335] *Compare id.* (stating that the "expeditious and orderly development" of the OCS must be subject to other policy goals), *with* ENSCO Offshore Co. v. Salazar, 781 F. Supp. 2d 332, 339 (E.D. La. 2011) (finding a 30-day deadline for the Secretary to decide whether a pending drill permit failed to comport with OCSLA's "overriding policy of expeditious development"), *and* Louisiana v. Biden, 622 F.Supp.3d 267, 293 (W.D. La. 2022) ("The OSCLA directs the Secretary of the DOI to make the [OCS] available for expeditious development.").

[336] ENSCO Offshore Co. v. Salazar, 781 F. Supp. 2d 332, 339 (E.D. La. 2011).

not state that environmental or "other national concerns" constitute inferior goals compared to oil and gas.[337] The text of Section 3 of OCSLA and its legislative history support the conclusion that the Secretary must balance several goals in preparing lease schedules.[338] Thus, the need for "environmental safeguards" to achieve "other national needs," collectively enshrined in a policy against climate change, may outweigh the need for extracting fossil fuels.[339] Such a determination would support the Secretary's decision to finalize a five-year lease program comprising zero new lease sales.[340]

However, even if *ENSCO* and *Louisiana II* correctly interpretated OCSLA's "expeditious and orderly development" language, the facts of those cases are distinguishable from ending new leases.[341] *ENSCO* involved permit applications and, more specifically, questions surrounding whether the Secretary had to act on permit applications within a specified time.[342] Meanwhile, *Louisiana II*, centered on an executive order that compelled executive agencies to stop selling new leases under an active five-year leasing program.[343] Regarding *Louisiana II*, the omission of new leases in a five-year program is distinguishable from the pause envisioned under Section 208 and in keeping with the court's holding.[344] Omitting new leases would coincide with the court's call to avoid making "significant changes" in an active five-year program without restarting the five-year lease creation process.[345] Instead, omitting leases during the five-year creation process follows the four-step leasing process created by Congress and endorsed by the Western District of Louisiana in *Louisiana II*.[346]

Lastly, five-year programs must take into account what the Secretary determines will "best meet national energy needs."[347] OCSLA provides no further instruction on how the Secretary should calculate those needs.[348] The absence of such a process implies Congress intended the Secretary to make the ultimate decision regarding what constitutes "national energy needs."[349] Policy goals inculcated within the IRA would support the Secretary of Energy's conclusion that

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[337] 43 U.S.C. § 1332(3).

[338] *See id.* (stating that "expeditious and orderly development" of the OCS must be "subject to environmental safeguards," among other goals); James, *supra* note 42, 187 (citing the findings, purposes, and policies of the 1978 amendments in concluding that Congress intended to strike a balance between oil and gas drilling in the OCS and protection of the coastal environment).

[339] *See* 43 U.S.C § 1332(3) (inferring that goals related to "environmental safeguards" and "other national needs" may outweigh the need for "expeditious and orderly development" of the OCS).

[340] *Compare id.* (stating that "expeditious and orderly development" of the OCS must be "subject to environmental safeguards," among other goals), *with id.* § 1344(a) (detailing the Secretary's responsibility for preparing periodic five-year lease programs).

[341] *Id.* § 1332(3); *see also* ENSCO Offshore Co. v. Salazar, 781 F. Supp. 2d 332, 334 (E.D. La. 2011) (concerning lease suspensions related to active holders); Louisiana v. Biden, 622 F.Supp.3d 267, 277 (W.D. La 2022) (arising amid a final five-year lease program that included proposed new leases).

[342] ENSCO Offshore Co., 781 F. Supp. 2d at 334.

[343] *Id.* at 338.

[344] Louisiana, 622 F.Supp.3d at 275.

[345] *Id.* at 288–89.

[346] *Id.* at 277.

[347] 43 U.S.C. § 1344(a).

[348] *See id.* (foregoing further discussion related to how the Secretary should work to satisfy the national energy needs through OCSLA).

[349] *See id.* (inferring that the Secretary should use her discretion to analyze the national energy needs).

"national energy needs" involve alternative energies such as wind not only fossil fuels.[350] The IRA incentivized a variety of renewable energy programs for the purpose of "building a clean energy economy."[351] Renewable energy programs will help achieve the United States' Paris Agreement pledge to reduce greenhouse gas emissions to combat climate change.[352] Public policy thus supports a determination that renewable energy, not fossil fuels, should satisfy the "national energy needs."[353]

B. Federal Law Vests the Secretary With Broad Authority to Protect Areas for Present and Future Generations

OCSLA authorizes the Secretary to balance sometimes conflicting objectives in overseeing offshore oil and gas drilling in the OCS.[354] These objectives include the need for "expeditious and orderly development," along with a mandate that development be "subject to environmental safeguards," among other goals.[355] OCSLA refrains from describing the weight that each of its goals should be afforded; however, other federal statutes suggest that environmental protection is paramount.[356] These other federal statutes support the argument that the Secretary can issue a five-year program containing no proposed offshore leases.[357] A contrary conclusion would mean Congress afforded robust protections for present and future generations concerning some lands under the Secretary's purview but not others.[358]

The National Environmental Policy Act (NEPA) directly circumscribes the Secretary's responsibilities to create five-year programs under OCSLA.[359] NEPA ensures draft proposed five-year programs undergo robust environmental review.[360] Environmental review under NEPA may result in the narrowing of a

[350] *See* Press Release, White House, By the Numbers: The Inflation Reduction Act (Aug. 15, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/15/by-the-numbers-the-inflation-reduction-act/ (on file with the *University of the Pacific Law Review*) (discussing tax credits, consumer rebates, and other programs for clean energy-powered homes and vehicles).

[351] *Id.*

[352] UNITED NATIONS, *supra* note 112.

[353] *See* 43 U.S.C. § 1344(a) (inferring that the Secretary should use her discretion to analyze the national energy needs).

[354] *Id.* § 1332(3); *see also* James, *supra* note 42, at 187 (stating the 1978 amendments included "seemingly incompatible policies").

[355] *Id.*

[356] *See, e.g.*, *id.* § 1702(c) (codifying a requirement that federal officials consider the needs of present and future generations when overseeing lands that fall under the Federal Land Policy and Management Act).

[357] *See id.* § 1344(a) (describing the Secretary's authority to promulgate five-year programs amid limited congressionally mandated criteria).

[358] *See* U.S. DEP'T OF THE INTERIOR, *supra* note 6, at 3 (stating the Secretary of the Interior possesses responsibility over public lands and offshore waters under federal jurisdiction). *See generally* CTR. FOR BIOLOGICAL DIVERSITY, *supra* note 72, at 17–18 (arguing that various federal statutes suggest that the Department of the Interior possesses a general charge to safeguard the public interest in which it should employ to reduce offshore drilling).

[359] 42 U.S.C. § 4335 ("The policies and goals set forth [in NEPA] are supplementary to those set forth in existing authorizations of Federal agencies."); Union Oil Co. of Cal. v. Morton, 512 F.2d 743, 749 (1975) ("NEPA's goals supplement the original goals of [OCSLA].").

[360] CONG. RSCH. SERV., *supra* note 83, at 1.

final leasing program due to environmental concerns.[361] In *Union Oil Company*, the Ninth Circuit reasoned that NEPA authorizes the Secretary to "reconcile the objectives of both statutes with an eye toward preserving the environmental quality of the [OCS]."[362] The Secretary could thus utilize NEPA to ensure five-year programs include zero offshore leases to better "encourage productive and enjoyable harmony between [people] and [their] environment."[363]

Unlike NEPA, the following federal statutes do not play a direct role in the Secretary's oversight of the OCS.[364] However, they do provide persuasive authority that her responsibilities stretch beyond making the OCS available for oil and gas development.[365] First, the Federal Land Policy and Management Act (FLPMA) is the primary law through which the Secretary manages about 250 million acres of public lands in the United States.[366] The Act requires the Secretary to manage public lands under the principles of multiple use and sustained yield.[367] The FLPMA's definition of "multiple uses" requires that federal officials ensure lands and resources are utilized to "best meet the present and future needs of the American people."[368] Interpreting OCSLA to require that the Secretary ensure oil and gas drilling occurs through the promulgation of five-year programs featuring leases would run afoul of her responsibilities under the FLPMA.[369] Research shows climate change creates drier conditions, which in turn cause more active fire seasons.[370] Active fire seasons increase the probability of forest fires, which, if ignited, tear through public lands.[371] Thus, the Secretary fails to satisfy the FLPMA statutory command to provide for "multiple uses" by allowing OCS drilling, which extracts the raw materials that exacerbate climate change.[372]

Meanwhile, the National Park System Organic Act (NPSOA) created the National Park Service (NPS).[373] The NPSOA also guides the Secretary on balancing the usage of National Park System lands with her obligation to protect those lands from damage.[374] To administer the act, the Secretary must "conserve

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[361] *Id.*

[362] Union Oil Co., 512 F.2d at 749.

[363] *See* 42 U.S.C. § 4321 (describing the congressional policy behind NEPA).

[364] *See id.* § 4335 ("The policies and goals set forth [in NEPA] are supplementary to those set forth in existing authorizations of Federal agencies.").

[365] *See, e.g.*, 43 U.S.C. § 1702(c) (charging executive officials with carrying out the Federal Land Policy and Management Act with the needs of present and future generations in mind).

[366] *Bureau of Land Management*, PUB. LANDS FOUND., https://publicland.org/about/blm-flpma/ (last visited Dec. 18, 2022) (on file with the *University of the Pacific Law Review*).

[367] 43 U.S.C. § 1701(a)(7).

[368] *Id.* § 1702(c).

[369] *See id.* (declaring it to be congressional policy that federal officials consider the needs of present and future generations when overseeing lands that fall under the FLPMA).

[370] *Wildfire Climate Connection*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://www.noaa.gov/noaa-wildfire/wildfire-climate-connection (last visited Dec. 1, 2022) (on file with the *University of the Pacific Law Review*).

[371] *Id.*

[372] UNIV. OF CAL. MUSEUM OF PALEONTOLOGY, *supra* note 27; *see also* 43 U.S.C. § 1702(c) (requiring the Secretary to prove for multiple uses when overseeing FLPMA lands).

[373] *NPS Organic Act*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/ocl/nps-organic-act (last visited Dec. 18, 2022) (on file with the *University of the Pacific Law Review*).

[374] *Id.*

the scenery, natural and historical objects, and wildlife."[375] The Secretary's conservation tactics must leave NPSOA lands "unimpaired for the enjoyment of future generations."[376] Climate change is increasing forest fire, sea-level change, warming, and impacts on wildlife in the nation's national parks.[377] Like the FLPMA, the NPSOA likewise requires that the Secretary protect public lands for future generations.[378] The NPSOA's "multiple uses" regime requires the NPS to balance the need for public usage of public lands with the broader goal of protecting those lands for future generations.[379] Mandating fossil fuel extraction from the OCS—one area under the Secretary's purview —would exacerbate climate-change created hardships in national parks, which also fall under her purview.[380] The two goals are irreconcilable, lending credence to the argument that OCSLA additionally creates a "multiple uses" regime whereby the Secretary has discretion to balance multiple goals.[381]

The National Historic Preservation Act (NHPA) seeks to preserve the nation's historic structures.[382] The NHPA establishes it as a federal policy to "foster conditions under which our modern society and our historic property can exist in productive harmony."[383] The NHPA seeks to achieve the required harmony to "fulfill the social, economic, and other requirements of present and future generations."[384] Extreme weather events fueled by climate change can destroy historic structures.[385] Requiring fossil fuel extraction in the OCS would conflict with the Secretary's duty to protect historic structures for "present and future generations."[386]

Congress enacted the Coastal Zone Management Act (CZMA) amid economic and population booms on the nation's coasts in the 1970s.[387] The CZMA exists to preserve and, if necessary, restore coastal areas "for this and succeeding generations."[388] Offshore oil drilling wreaks havoc on the coastal zone.[389] Drilling

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[375] 54 U.S.C. § 100101(a).

[376] *Id.*

[377] *Climate Change: Effects in Parks*, NAT'L PARK SERV., https://www.nps.gov/subjects/climatechange/effectsinparks.htm (last visited Apr. 23, 2023) (on file with the *University of the Pacific Law Review*).

[378] *Compare* 43 U.S.C. § 1702(c) (defining "multiple uses" to include working for the betterment of current and future generations), *with* 54 U.S.C. § 100101(a) (likewise tasking federal officials with preserving NPS lands to "leave them unimpaired for the enjoyment of future generations").

[379] 54 U.S.C. § 100101(a).

[380] *See id.* (delegating to the Secretary the responsibility over ensuring NPS lands are left unimpaired for future generations).

[381] *Id.*

[382] *Id.* § 300101(2).

[383] *Id.* § 300101(1).

[384] *Id.*

[385] *See* NAT'L OCEANIC & ATMOSPHERIC ADMIN., *supra* note 370 (detailing the relationship between climate change and wildfire).

[386] *See* 54 U.S.C. § 300101(1) (detailing the Secretary's responsibility to preserve historic structures for future generations).

[387] *Coastal Zone Management Act of 1972*, BUREAU OF OCEAN ENERGY MGMT., https://www.boem.gov/sites/default/files/documents//The%20Coastal%20Zone%20Management%20Act%20of%201972.pdf (last visited Dec. 18, 2022) (on file with the *University of the Pacific Law Review*).

[388] 16 U.S.C. § 1452(1).

[389] NAT'L RES. DEF. COUNCIL, PROTECTING OUR OCEAN AND COASTAL ECONOMIES: AVOIDING UNNECESSARY RISKS FROM OFFSHORE DRILLING 2–3 (2009).

in the OCS thus directly interferes with the Secretary's mission to protect the nation's coastal zone for present and future generations under the CZMA.[390]

Coastal zone destruction occurs due to both the drilling process and the climate change-fueling impacts that stem from the collected fossil fuels.[391] Environmental effects on the coastal zone begin far before oil is collected.[392] Seismic surveys utilized to estimate the size of an oil or gas reserve involve thousands of high-decibel explosives.[393] The blasts kill fish eggs and larvae, and affect the hearing of fish, making them vulnerable to predators.[394] The blasts also disrupt migratory patterns and can cause whale beaching incidents.[395] The oil drilling, transportation, and onshore refining processes contribute to air pollution, affecting the coastal zone.[396] Any oil spills associated with OCS drilling ravages wetlands, beaches, and wildlife.[397] The environmental destruction caused by offshore drilling directly interferes with future generations' use and enjoyment of coastal areas.[398] The destruction impacts fish stock, water quality for swimming, the quantity of birds to watch, and general beauty of the coastal zone.[399]

Meanwhile, the end products of the OCS drilling process directly contribute to global warming, which also negatively impacts national coastal zones.[400] Global warming causes the global mean sea level to rise via two primary processes.[401] First, glaciers and ice continue to melt worldwide, adding water to the ocean.[402] Second, the ocean's volume is expanding as the water temperature increases.[403] Sea level rise causes shoreline erosion and threatens coastal infrastructure, including roads, homes, and landfills.[404] Future generations depend on access to these critical pieces of infrastructure, and sea-level rise due to global warming threatens this access.[405] Future generations are slated to inherit real property or parcels of land in coastal zones, all of which are under threat due to sea level rise.[406] The environmental side effects of offshore drilling, coupled with the

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[390] *See* 16 U.S.C. § 1452(1) (detailing congressional policy related to the preservation of the coastal zone for present and future generations).

[391] NAT'L RES. DEF. COUNCIL, *supra* note 389, at 2–3; *Burning of Fossil Fuels*, UNIV. OF CAL. MUSEUM OF PALEONTOLOGY, *supra* note 27.

[392] NAT'L RES. DEF. COUNCIL, *supra* note 389, at 3.

[393] *Id.*

[394] *Id.*

[395] *Id.*

[396] *Offshore Oil Drilling*, CHESAPEAKE BAY FOUND., https://www.cbf.org/issues/offshore-drilling/index.html (last visited Oct. 30, 2022) (on file with the *University of the Pacific Law Review*).

[397] *Id.*

[398] *See* NAT'L RES. DEF. COUNCIL, *supra* note 389, at 2–3 (detailing the effects of offshore oil drilling on the coastal zone, including long-term effects).

[399] *Id.*; CHESAPEAKE BAY FOUND., *supra* note 396.

[400] UNIV. OF CAL. MUSEUM OF PALEONTOLOGY, *supra* note 27.

[401] Rebecca Lindsey, *Climate Change: Global Sea Level*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Apr. 19, 2022), https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level (on file with the *University of the Pacific Law Review*).

[402] *Id.*

[403] *Id.*

[404] *Id.*

[405] *See id.* (listing critical infrastructure under threat by climate change).

[406] *See id.* (stating nearly 30% of the United States population lives in highly populated coastal zones where sea level rise continues to cause erosion, flooding, and other hazards).

climate-change related impacts caused by the end product, threaten to upend the protective mission of the CZMA.[407]

VII. CONCLUSION

Climate scientists agree that humans must immediately phase out fossil fuel usage to curtail enough greenhouse gas emissions to limit global warming to two degrees Celsius.[408] In signing the Paris Agreement in 2016, the United States obligated itself to do its part to reduce greenhouse gas emissions to achieve the two-degree Celsius goal.[409] Given 16% of all United States' oil production originates from the OCS, limiting the quantity of OCS-derived oil presents a plausible pathway for decreasing the quantity of burned fossil fuels.[410] This reduces the quantity of released carbon dioxide, minimizing the United States' effects on climate change.[411] While such a "supply-side" tool is not the end-all solution to the climate crisis, it is, nonetheless, a mechanism that the federal government can undertake unilaterally that will work toward accomplishing its Paris Agreement promises.[412]

In all, the Executive Branch possesses various tools to limit the quantity of climate change-causing fossil fuels collected in the OCS.[413] First, the President or the Secretary of Energy can throttle production rates for current leases without effectuating a taking or breach of contract, reducing the quantity of fossil fuels extracted in the OCS.[414] Additionally, the Secretary can use her broad discretion over the five-year leasing program process to stop the issuing of new leases.[415] Some contend that OCSLA *requires* the Secretary to sell oil and gas leases in the OCS.[416] This is not the case.[417] OCSLA affords the Secretary with broad discretion to balance environmental, mineral, and "other" concerns regarding her duties over

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[407] *See* 16 U.S.C. § 1452(1) (detailing congressional policy related to the preservation of the coastal zone for present and future generations).

[408] ERICKSON & LAZARUS, *supra* note 113, at 9.

[409] Eichensehr*, supra* note 111, at 324.

[410] U.S. DEP'T OF THE INTERIOR, *supra* note 6, at 5 (stating oil and natural gas extracted from the Outer Continental Shelf, or "OCS," constituted 16% of oil production and 3% of natural gas production in the United States in fiscal year 2020).

[411] *See* UNIV. OF CAL. MUSEUM OF PALEONTOLOGY, *supra* note 27 (inferring that a reduction in emissions of human-caused carbon dioxide in the United States would result in less carbon dioxide accumulating in the atmosphere).

[412] ERICKSON & LAZARUS, *supra* note 113, at 9.

[413] *See* 43 U.S.C. § 1334(g)(1)–(2) (vesting the President and Secretary of Energy with responsibility over setting rates of production depending on the circumstances pursuant to the Outer Continental Shelf Lands Act, or "OCSLA"); *id.* § 1344(a) (delegating to the Secretary of the Interior the responsibility to prepare five-year lease programs).

[414] *See id.* § 1334(g)(1)–(2) (vesting the President and Secretary of Energy with responsibility over setting rates of production).

[415] CONG. RSCH. SERV., *supra* note 10, at 1.

[416] *Id.*; *see also* 43 U.S.C. § 1344(a) (stating lease programs "shall consist of a schedule of proposed lease sales").

[417] *See, e.g.*, EARTHJUSTICE & EVERGREEN ACTION, *supra* note 324, at 16 ("[D]ecisions to offer OCS leases are driven by an assessment of what would 'best meet national energy needs,' and must be consistent with environmental protection, [among other values].").

the OCS, which includes five-year leasing programs [418] The Secretary may rightfully determine to not include proposed leases in a periodic program.[419] None of the aforementioned solutions will offend the Eastern District of Louisiana's holding in *Louisiana II*, which dealt with specific facts related to a pre-existing five-year leasing program.[420]

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[418] *See* 43 U.S.C. § 1332(3) (stating that "expeditious and orderly development" of the OCS must be "subject to environmental safeguards," among other goals). *See generally* 43 U.S.C. § 1331(b) (stating the term "Secretary" refers to the Secretary of the Interior).

[419] *See id.* § 1344(a) (delegating to the Secretary of the Interior the responsibility to prepare five-year lease programs).

[420] Louisiana v. Biden, 622 F. Supp. 3d 267, 277 (W.D. La. 2022).

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