KEEPING IT *ALL* IN THE GROUND?

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Federal public lands are a major source for fossil fuel extraction in the United States—extraction that contributes to greenhouse gas emissions. Extraction occurs through the leasing of federal lands to private companies for development. Activists have called for ending new fossil fuel leasing as part of a "Keep It in the Ground" movement. We analyze the legal possibilities for more radical action—the termination of existing fossil fuel leases. We identify the possibility for both congressional action to terminate leases, as well as executive power to terminate leases even without additional legislation. We find strong legal arguments for executive power to breach these leases, albeit with the possibility that compensation to leaseholders might be required. We find it unlikely that courts would order specific performance by the federal government as a remedy for any breach; remedies would likely be limited to monetary damages. We conclude with a brief analysis of the policy consequences of terminating existing leases—such an approach would be an aggressive version of supply-side efforts to address greenhouse gas emissions, and its utility will vary depending on the fossil fuel.

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INTRODUCTION

Environmental advocates have called for the reduction or termination of all future leasing of federal lands for fossil fuel production, including coal, oil, and natural gas. This "Leave It in the Ground" movement argues that fossil fuels extracted from federal lands represent a substantial proportion of total U.S. greenhouse gas emissions; that reduction of those emissions is an essential component of U.S. efforts to meet its share of global greenhouse gas reductions to reduce future climate change; and that the President and the federal land management agencies have the legal authority to terminate future leasing under existing law.[1] Activists have petitioned the President to use his executive authority to limit or eliminate future leasing.[2] They have also undertaken litigation challenging federal fossil-fuel leases for failing to comply with environmental review requirements under the National Environmental Policy Act ("NEPA").[3]

In 2016, the Department of the Interior ("DOI"), which includes the Bureau of Land Management ("BLM") and the Bureau of Ocean Energy Management ("BOEM")—the agencies that are primarily in charge of leasing federal lands for fossil fuel production onshore and offshore, respectively—paused leasing of additional federal lands for coal production to conduct an environmental review of the federal leasing program, including an examination of its climate change impacts.[4]

But the arrival of the Trump Administration marked a decided shift in federal policy regarding energy, fossil fuels, and federal lands. Soon after taking office, President Trump issued an executive order promoting energy resource

1. *See* MICHAEL SAUL ET AL., CTR. FOR BIOLOGICAL DIVERSITY, GROUNDED: THE PRESIDENT'S POWER TO FIGHT CLIMATE CHANGE, PROTECT PUBLIC LANDS BY KEEPING PUBLICLY OWNED FOSSIL FUELS IN THE GROUND 3–4 (2015), https://www.biologicaldiversity.org/campaigns/keep_it_in_the_ground/pdfs/Grounded.pdf.

2. *See, e.g.*, MICHAEL SAUL ET AL., CTR. FOR BIOLOGICAL DIVERSITY, BEFORE THE PRESIDENT OF THE UNITED STATES: PETITION TO END FEDERAL OFFSHORE OIL AND GAS LEASING OF THE UNITED STATES OUTER CONTINENTAL SHELF TO ADDRESS CLIMATE CHANGE 2 (2016), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2016/20160329_docket-na_petition.pdf.

3. *See, e.g.*, Mont. Wildlife Fed'n v. Bernhardt, No. CV-18-69-GF-BMM, 2020 WL 2615631, at *12 (D. Mont. May 22, 2020), *appeal dismissed*, No. 20-35609, 2020 WL 6194597 (9th Cir. Oct. 16, 2020); WildEarth Guardians v. Zinke, 368 F. Supp. 3d 41, 51 (D.D.C. 2019).

4. *See* U.S. DEP'T OF THE INTERIOR, ORDER NO. 3338, DISCRETIONARY PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT TO MODERNIZE THE FEDERAL COAL PROGRAM 8–10 (2016).

development on federal lands and directing the DOI to review and rescind Obama-era rules on federal fossil fuel leasing.[5] He issued an executive order promoting federal offshore oil and gas development and directing the DOI to accelerate leasing processes.[6] In 2017, Secretary Zinke issued an order withdrawing the coal-lease moratorium and halting the programmatic environmental review.[7] Later that year, the Interior Secretary ordered BLM to accelerate federal onshore oil and gas leasing; that order spurred BLM to issue field guidance tightening lease review timelines.[8]

Beginning in 2017, the Trump Administration opened millions of acres of federal onshore and offshore lands to oil and gas leasing.[9] Environmental groups have challenged many of these new leases, in some cases winning court-ordered pauses of leases in sensitive areas (including partial overturning of BLM's new field

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5. *See* Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

6. *See* Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (Apr. 28, 2017).

7. *See* U.S. DEP'T OF THE INTERIOR, ORDER NO. 3348, CONCERNING THE FEDERAL COAL MORATORIUM 1–2 (2017). Environmental groups challenged the order, seeking review of the agency's action under NEPA. A federal district court held that the DOI was required to prepare an environmental assessment of the withdrawal order, which the DOI completed in early 2020. *See* Citizens for Clean Energy v. U.S. Dep't of the Interior, 384 F. Supp. 3d 1264, 1281–82 (D. Mont. 2019) (requiring DOI to prepare an environmental assessment under NEPA). The court approved the assessment on procedural grounds, Citizens for Clean Energy v. U.S. Dep't of the Interior, No. CV-17-30-GF-BMM, 2020 WL 2615527, at *9 (D. Mont. May 22, 2020) (approving DOI's environmental assessment as a remedy for the procedural NEPA violation), although it may still be subject to litigation of its substantive findings. *See* BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, DOI-BLM-WO-WO2100-2019-0001-EA, LIFTING THE PAUSE ON THE ISSUANCE OF NEW FEDERAL COAL LEASES FOR THERMAL (STEAM) COAL FINAL ENVIRONMENTAL ASSESSMENT 3 (2019).

8. *See* U.S. DEP'T OF THE INTERIOR, ORDER NO. 3354, SUPPORTING AND IMPROVING THE FEDERAL ONSHORE OIL AND GAS LEASING PROGRAM AND FEDERAL SOLID MINERAL LEASING PROGRAM 1–2 (2017); BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, IM 2018-034, UPDATING OIL AND GAS LEASING REFORM—LAND USE PLANNING AND LEASE PARCEL REVIEWS (2018).

9. *See Oil and Gas Statistics*, U.S. DEP'T OF THE INTERIOR: BUREAU OF LAND MGMT., tbl.4, https://www.blm.gov/programs-energy-and-minerals-oil-and-gas-oil-and-gas-statistics (last updated Oct. 1, 2019) (containing data on historic leasing by state through 2019); U.S. DEP'T OF THE INTERIOR, U.S. PUBLIC LAND STATISTICS 2019, at 86–93 tbl.3-13 (2020), https://www.blm.gov/sites/blm.gov/files/PublicLandStatistics2019.pdf (totaling competitive oil, gas, and geothermal leasing for 2019).

guidance).[10] But in February 2020, the DOI celebrated a record of over one billion barrels of oil produced from federal leases in 2019.[11]

While the "Leave It in the Ground" movement has to date primarily focused on termination of future fossil fuel leasing of federal lands, millions of acres are already subject to existing leases that allow private companies to extract coal, oil, and natural gas—a situation exacerbated by the Trump Administration, but predating it. While the quantity of fossil fuels on leased lands is dwarfed by the amount that remains on unleased lands,[12] existing leases contribute a significant portion of U.S. fossil-fuel production and greenhouse gas emissions. In 2017, active onshore and offshore leases produced 2.2 million barrels of crude oil per day (nearly 24% of total U.S. production), 4,328 billion cubic feet of natural gas per year (13% of total U.S. production), and 333 million short tons of coal (43% of total U.S. production).[13] In 2014, the direct and indirect emissions from the fossil fuels extracted from federal lands produced the equivalent of 1,279 million metric tons of carbon dioxide, an average of 23% of total U.S. greenhouse gas emissions from 2005–2014.[14] This is a large portion of U.S. greenhouse gas emissions; full exploitation of the fossil fuels from these existing leases could make it impossible

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10. *See, e.g.*, W. Watersheds Project v. Zinke, 441 F. Supp. 3d 1042, 1049 (D. Idaho 2020) (vacating at-issue provisions of BLM IM 2018-034 and setting aside certain leases in sage grouse habitat areas); WildEarth Guardians v. U.S. Bureau of Land Mgmt., 457 F. Supp. 3d 880, 897 (D. Mont. 2020) (setting aside certain leases for failure to adequately review groundwater impacts); Complaint for Injunctive and Declaratory Relief at 2, Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., No. 4:19-cv-07155 (N.D. Cal. Oct. 30, 2019), https://www.biologicaldiversity.org/programs/public_lands/energy/dirty_energy_development/oil_and_gas/pdfs/California-Central-Coast-Lease-Sales-Complaint.pdf.

11. *See* Press Release, U.S. Dep't of the Interior, Oil Production from the Department of the Interior Managed Leases Surpasses 1 Billion Barrels for the First Time in History Under the Trump Administration (Feb. 11, 2020), https://www.doi.gov/pressreleases/oil-production-department-interior-managed-leases-surpasses-1-billion-barrels-first.

12. *See* DUSTIN MULVANEY ET AL., ECOSHIFT CONSULTING, THE POTENTIAL GREENHOUSE GAS EMISSIONS FROM U.S. FEDERAL FOSSIL FUELS 3–5 (2015), http://www.ecoshiftconsulting.com/wp-content/uploads/Potential-Greenhouse-Gas-Emissions-U-S-Federal-Fossil-Fuels.pdf (finding that 91% of the potential greenhouse gas emissions from fossil fuels on federal lands is in energy resources that have not yet been leased).

13. For the oil and gas data, see CONG. RESEARCH SERV., R42432, U.S. CRUDE OIL AND NATURAL GAS PRODUCTION IN FEDERAL AND NONFEDERAL AREA 3 tbl.1, 5 tbl.3 (2018). For the coal data, see *Production*, U.S. DEP'T OF THE INTERIOR: NAT. RESOURCES REVENUE DATA, https://revenuedata.doi.gov/?tab=tab-production (last visited July 10, 2020) and U.S. ENERGY INFO. ADMIN., ANNUAL COAL REPORT 2018, at xi (2019).

14. *See* MATTHEW D. MERRILL ET AL., U.S. GEOLOGICAL SURVEY, DEP'T OF THE INTERIOR, SCIENTIFIC INVESTIGATIONS REPORT 2018-5131, FEDERAL LANDS GREENHOUSE GAS EMISSIONS AND SEQUESTRATION IN THE UNITED STATES: ESTIMATES FOR 2005–2014, at 8 tbl.2 (2018), https://pubs.usgs.gov/sir/2018/5131/sir20185131.pdf.

for the United States to meet its commitments to reduce greenhouse gas emissions sufficient to restrict climate change to less than 2° Celsius warming.[15]

There is significant uncertainty associated with these estimates and projections. However, it is clear that fossil-fuel production on federal lands contributes significantly to total U.S. greenhouse gas emissions; and if even roughly accurate, these statistics raise the question of whether termination of existing fossil-fuel leases on federal lands might be necessary to achieve target U.S. reductions in greenhouse gas emissions. Answering that question requires determining whether, and to what extent, the federal government has the legal authority to terminate existing fossil-fuel leases. The remainder of this Article focuses on that discrete question.

We begin by analyzing the ability of Congress to pass legislation to terminate existing fossil-fuel leases and what (if any) compensation might then be owed to leaseholders. We then turn to the more difficult question of whether, under existing law, the President and the DOI could terminate existing offshore and onshore fossil-fuel leases.[16] We also examine what remedies might be available to leaseholders to seek judicial review or court-ordered compensation for administrative actions to terminate leases. We conclude by briefly identifying the questions that must be addressed to determine whether—even if there is legal authority to terminate leases—such termination is a wise policy choice.

We emphasize at the outset that in pursuing this analysis, we are not necessarily advocating for the immediate shutdown of all fossil-fuel-leasing activity on federal lands—as we discuss in Part VI, we believe there are difficult policy questions to resolve about the timing and sequencing of any federal restriction of fossil-fuel activity. We also want to emphasize that our focus on the termination of existing leases is intended to be a complementary step to existing analyses of the

15. *See* Peter Erickson & Michael Lazarus, *How Would Phasing out U.S. Federal Leases for Fossil Fuel Extraction Affect CO_2 Emissions and 2ºC Goals?* 13–14 figs.3 & 4 (Stockholm Env't Inst., Working Paper No. 2016-02, 2016) (showing that continued production from existing leases through 2040 would prevent the United States from meeting emission reduction targets required to keep climate change below 2ºC warming); DUSTIN MULVANEY ET AL., ECOSHIFT CONSULTING, OVER-LEASED: HOW PRODUCTION HORIZONS OF ALREADY LEASED FEDERAL FOSSIL FUELS OUTLAST GLOBAL CARBON BUDGETS 1–2 (2016) (finding that "currently leased fossil fuels for all fuel types will last significantly beyond the thresholds for both 1.5ºC and 2ºC of global warming"); *see also* MULVANEY ET AL., *supra* note 12, at 3–5 (finding that total emissions from full production of all of the leased federal fossil fuel resources would total between 30 to 43 gigatons of carbon dioxide).

16. We focus on the legal question of the extent to which Congress, the President, or the BLM could fully terminate leases. We do not examine the extent to which the terms of those existing leases could be adjusted (e.g., through increasing royalty rates, adding more protective standards for drilling, requiring higher reclamation bonds, completely denying applications for permits to drill, or suspensions) in ways that could reduce fossil-fuel production. However, it seems likely that agency power to adjust lease terms would track closely (or even be greater than) agency power to completely terminate leases.

ability of the federal government to end future leasing[17] and that we do not see termination of existing leases as a substitute for ending future leasing.

I. A BRIEF OVERVIEW OF FEDERAL LEASING LAW

As background, we provide for readers a brief sketch of how federal fossil-fuel leasing works. The federal government owns the subsurface rights to extract fossil fuels on much (though not all) of the federally owned lands in the United States. It also owns the subsurface mineral rights beneath a substantial amount of private land, primarily in the West, and beneath the submerged land of the outer continental shelf, which generally extends beyond 3 nautical miles offshore.[18]

Since 1920, the federal government has generally used a leasing system to allow private entities to extract oil, gas, and coal from these onshore properties. The initial act authorizing such leasing was the Mineral Leasing Act ("MLA") of 1920; the law has been repeatedly amended since.[19] The primary agency implementing the leasing program for federal onshore lands and subsurface mineral rights is the BLM. The BLM generally relies on nominations or applications by private parties to identify parcels to be put up for lease sales or auctions.[20] Decisions whether to lease a particular parcel of land are generally understood to fall within the discretion of the BLM.[21] The BLM must exercise that discretion consistent with its authorities and responsibilities under its organic act (the Federal Land Policy and Management Act ("FLPMA")), and the BLM's existing land-management plans for the lands where it has primary management authority over the surface.[22] Where another federal agency (e.g., the U.S. Forest Service) has primary management authority over the surface (e.g., a National Forest), the BLM generally consults with that agency about whether leasing a particular parcel of land can occur, and in some circumstances, the surface managing agency has veto power over whether leasing can occur.[23] Issuance of leases must generally comply with the environmental review requirements of NEPA and with other federal environmental laws such as the Endangered Species Act ("ESA").[24]

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17. *See generally* Thomas R. Delehanty, *Executive Authority to Keep It in the Ground: An Administrative End to Oil and Gas Leasing on Federal Land*, 35 UCLA J. ENVTL. L. & POL'Y 145 (2017); John D. Leshy, Comment, *Interior's Authority to Curb Fossil Fuel Leasing*, 49 ENVTL. L. REP. 10631 (2019).

18. Most state waters extend to 3 nautical miles offshore. 43 U.S.C. § 1312. The two exceptions are the state waters of Texas and the Gulf Coast of Florida, which extend to 9 nautical miles offshore. *See* U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 70–71 (2004). One nautical mile is equal to approximately 1.15 statute miles.

19. CHRISTINE KLEIN ET AL., NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 469–71 (4th ed. 2018).

20. *Expression of Interest*, U.S. DEP'T OF THE INTERIOR: BUREAU OF LAND MGMT., https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/parcel-nominations (last visited Mar. 7, 2021).

21. *See* KLEIN ET AL., *supra* note 19, at 478 n.1.

22. *See* 43 U.S.C. § 1732(a) (requiring management by BLM to be consistent with land management plans).

23. *See* KLEIN ET AL., *supra* note 19, at 470–71, 480; 30 U.S.C. § 226(g)–(h).

24. *See, e.g.*, Conner v. Burford, 848 F.2d 1441, 1451–53 (9th Cir. 1988).

Successful purchasers of these lease rights, in return for upfront or annual payments of money to the government, have a mineral lease to extract oil, gas, or coal from the relevant federal lands or subsurface mineral rights.[25] Leases usually have a primary term of ten years and are generally extended indefinitely as long as production under the lease continues.[26] The term of the lease might be suspended by the BLM either on its own initiative or at the request of the lessee, particularly if the BLM has suspended the lessee's ability to produce or develop on the lease.[27] Leases do not necessarily grant the lessee the right to disturb the surface in order to extract the resource; for instance, for oil and gas leases, the lease holder generally must file an application for a permit to drill ("APD") with the BLM.[28] Additional NEPA, ESA, and other environmental-compliance requirements might apply in the review and approval of the APD.

Offshore leasing follows a similar structure, but under a different statute—the Outer Continental Shelf Leasing Act ("OCSLA"). In 1953, Congress passed the Submerged Lands Act, which granted states control of coastal waters out to 3 (or, in some cases, 9) nautical miles from shore.[29] That same year, Congress passed OCSLA, establishing a framework for leasing federal offshore submerged lands for mineral development and vesting oversight authority in the Secretary of the Interior.[30] Within the DOI, offshore oil and gas operations are overseen by the Bureau of Ocean Energy Management ("BOEM"), the Bureau of Safety and Environmental Enforcement ("BSEE"), and the Office of Natural Resources Revenue ("ONRR"). These offices oversee a multi-phase leasing process that begins with the development of a five-year oil and gas leasing program that outlines eligible lease sites and establishes a lease-sales schedule. Leases are generally five to ten years in duration and then are typically extended so long as the well is producing.

Similar to onshore leases, the purchase of an offshore lease does not guarantee a right to produce. Lessees must obtain approval of their exploration plans for any geological, geophysical, and other exploratory activities, and then lessees must also obtain approval for their development and production plans before they can commence operations. The lease automatically expires if a development and production plan is not submitted within the initial lease term. Originally, OCSLA only allowed for lease cancellation in the event of wrongdoing on the part of the lessee, such as fraud, misrepresentation, or failure to comply with a provision of the Act, subsequent regulations, or the lease itself. In 1978, however, a series of substantial amendments expanded the cancellation authority to include environmental protection.[31] Today, a lease may be canceled for a variety of reasons,

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25. *See* KLEIN ET AL., *supra* note 19, at 470.
26. 30 U.S.C. § 226(e).
27. *Id.* §§ 209, 226(i); 43 C.F.R. § 3103.4-4 (2019). Suspension allows the lease term to continue beyond its original termination date even if production has not occurred. 43 C.F.R. § 3103.4-4(b).
28. 43 C.F.R. § 3162.3-1.
29. Submerged Lands Act of 1953, 43 U.S.C. §§ 1301–1303, 1311–1315.
30. Outer Continental Shelf Leasing Act of 1953, 43 U.S.C. §§ 1331–1356b.
31. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 204, 92 Stat. 630, 637.

including if, among other things, the continued lessee activity would "probably cause" harm or damage to the marine, coastal, or human environment.[32]

II. CONGRESSIONAL POWER TO TERMINATE LEASES

There is no question that Congress would have power under the Property Clause to enact legislation to terminate all existing oil, gas, and coal leases on the public lands.[33] As the Supreme Court has noted, Congress's power under the Clause is one "without limitations."[34] The main legal question is the extent to which the federal government would owe compensation to the former lessees, either for breach of contract or for a claim under the Takings Clause, meaning that the government had taken private property rights.[35] Either claim would be brought in the Court of Federal Claims pursuant to the Tucker Act.[36]

In general, fossil-fuel leases create not only a contract right but also a property right (in terms of giving the lessee the right to access the mineral resources on the land).[37] Moreover, there is Supreme Court precedent for the proposition that government contract rights can be understood as property rights protected by the Takings Clause.[38] Nonetheless, courts have a strong preference to treat claims that the government has interfered with contractual provisions as breach-of-contract claims,[39] at least where the government is a party to the contract and where any property rights at issue were created by the relevant contractual provisions.[40] Both

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32. *See* 43 U.S.C. § 1334(a)(2)(A)(i).

33. *See* U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

34. *See* Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (internal quotation marks omitted) (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940)); *see also* Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 2 (2001).

35. If the leases could be terminated by the government without compensation in any case, then there is no valid contract-breach or takings claim. We discuss those issues *infra* Part V.

36. *See infra* Part V.

37. *See, e.g.*, Sun Oil Co. v. United States, 572 F.2d 786, 818 (Ct. Cl. 1978) ("As a general proposition, a leasehold interest is property, the taking of which entitles the leaseholder to just compensation for the value thereof." (citing Lemmons v. United States, 496 F.2d 864, 873 (Ct. Cl. 1974)). For a discussion of the nature of that property right, see *infra* note 102.

38. *See* Lynch v. United States, 292 U.S. 571, 579 (1934) ("Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." (citing United States v. Cent. Pac. R.R. Co., 118 U.S. 235, 238 (1886); United States v. N. Pac. Ry. Co. 256 U.S. 51, 64, 67 (1921))). *But see* Pro-Eco, Inc. v. Bd. of Comm'rs, 57 F.3d 505, 510 n.2 (7th Cir. 1995) (concluding that *Lynch* has been overruled by subsequent Supreme Court caselaw to "the extent that it flatly holds that contracts are property that the government may not take without compensation").

39. Stockton E. Water Dist. v. United States, 583 F.3d 1344, 1368 (Fed. Cir. 2009) (noting preference of deciding "cases on non-constitutional grounds when that is available").

40. *See, e.g.*, Barlow & Haun, Inc. v. United States, 87 Fed. Cl. 428, 438–39 (2009) ("Ordinarily, the Government's interference with contractual rights arising under a

conditions appear to be satisfied here, as the leases are contracts with the government and any property rights would have been created by the leases themselves.

There are two plausible, closely related defenses the government might raise with respect to claims that legislation terminating the leases would be a breach of contract. First, the sovereign-acts defense holds that an act by the government as sovereign (as opposed to the government as contracting entity) that is sufficiently public generally bars liability for any alleged breach of contract.[41] The Supreme Court has described this doctrine as necessary to balance "the Government's need for freedom to legislate with its obligation to honor its contracts."[42]

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contract with the Government will give rise to a breach of contract action, rather than a taking claim," unless the property rights have not been "solely created by the terms of the contract."); Franconia Assocs. v. United States, 61 Fed. Cl. 718, 737–38 (2004) ("[C]ourts have readily concluded that passage of legislation targeting the government's obligations under preexisting contracts does not effectuate a taking."); *Sun Oil Co.*, 572 F.2d at 818 ("[T]he concept of a taking as a compensable claim theory has limited application to the relative rights of party litigants when those rights have been voluntarily created by contract. In such instances, interference with such contractual rights generally gives rise to a breach claim not a taking claim." (citation omitted)); *see also* Kevin R. Garden, *Fifth Amendment Takings of Rights Arising from Agreements with the Federal Government*, 29 PUB. CONT. L.J. 187, 201–05 (2000).

Courts have made clear that the takings and contracts claims are alternative remedies, such that a plaintiff could only recover under one of the two. *Stockton E. Water Dist.*, 583 F.3d at 1368; *Sun Oil Co.*, 572 F.2d at 817–18; *see also* Castle v. United States, 301 F.3d 1328, 1342 (Fed. Cir. 2002) (holding that where private party retained remedies to address breach of contract by government, takings claims based on breach of contract were not viable); *Franconia Assocs.*, 61 Fed. Cl. at 739–40 (same). In choosing the alternative remedy, lessees might lean towards a breach of contract claim. While takings claims allow for the award of pre-judgment interest, contract claims would not, absent a waiver of sovereign immunity. *Id.* at 739 n.32. In general, the damages under a contract remedy will be higher because they can allow for "reasonable and consequential damages resulting from the breach" as opposed to simply "just compensation." Garden, *supra*, at 205. For space reasons, we do not provide a detailed analysis of the probability of success of a takings claim based on congressional cancellation of fossil-fuel leases. Relevant would be the extent to which the lessee would not have a property right to conduct fossil-fuel-extraction activity under the lease based on "background principles" of property or nuisance law. *See generally* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). Courts would also have to determine whether to analyze the takings claim under the per se rule of *Lucas* that a complete wipeout of a property's economically viable use constitutes a taking or the multi-factor balancing test for takings liability laid out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124–29 (1978).

41. Horowitz v. United States, 267 U.S. 458, 461 (1925) ("[T]he United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." (citing Deming v. United States, 1 Ct. Cl. 190, 191 (1865); Jones v. United States, 1 Ct. Cl. 383, 384 (1865); Wilson v. United States, 11 Ct. Cl. 513, 520 (1875))).

42. United States v. Winstar Corp., 518 U.S. 839, 896 (1996) (plurality opinion). While the Souter opinion in *Winstar* only received the votes of three or four justices (depending on the section), the Federal Circuit has treated the opinion as laying out the

However, the sovereign-acts defense is inapplicable "where the governmental action is specifically directed at nullifying contract rights" owed by the government,[43] as opposed to being "merely incidental to the accomplishment of a broader governmental objective."[44] The courts look at the generality of the government act that terminated liability; for instance, a government action that has identical effects on a wide range of private contracts as well as government contracts will be more likely to be found to be a sovereign act, while a government act that only releases the government from liability under its own contracts will be less likely to be found to be a sovereign act.[45] Likewise, if the impact of the government action is disproportionately felt by government contractors, as opposed to private contractors, then the generality of the action is less.[46] In addition, courts look to the act's purpose; if it was intended to release the government from particular governmental contracts, as opposed to having a separate public purpose, then the sovereign act defense is less likely to apply.[47]

In the case of Congress terminating existing fossil-fuel leases on federal lands, it seems more likely than not that the courts would conclude that the sovereign-acts defense would not apply—though there is some uncertainty about that conclusion. On the one hand, the termination would only apply to federal fossil-fuel leases and would not affect similar leases on private lands in the United States.[48] Similarly, the impact of cancellation would be felt only by lessees on public lands. On the other hand, there is a plausible public goal behind such cancellation, besides simply trying to reduce government liabilities or responsibilities under a contract—

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governing principles for the sovereign-acts doctrine. Conner Bros. Constr. Co. v. Geren, 550 F.3d 1368, 1374 (Fed. Cir. 2008).

43. *Geren*, 550 F.3d at 1374 (citing City Line Joint Venture v. United States, 503 F.3d 1319, 1323 (Fed. Cir. 2007); Centex Corp. v. United States, 395 F.3d 1283, 1308 (Fed. Cir. 2005)).

44. *Winstar*, 518 U.S. at 898 (citing O'Neill v. United States, 231 Ct. Cl. 823, 826 (1982)); *see also* Ronald G. Morgan, *Identifying Protected Government Acts Under the Sovereign Acts Doctrine: A Question of Acts and Actors*, 22 PUB. CONT. L.J. 223, 237–47 (1992) (government action that targets particular contractual obligations is not protected under the sovereign-acts doctrine).

45. *See Geren*, 550 F.3d at 1375 (looking to "whether the governmental action applies exclusively to the contractor or more broadly to include other parties not in a contractual relationship with the government"); Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569, 1575–76 (Fed. Cir. 1997) (same); *see also Winstar*, 518 U.S. at 899 (noting these polar opposites); Joshua I. Schwartz, *Assembling* Winstar*: Triumph of the Ideal of Congruence in Government Contracts Law?*, 26 PUB. CONT. L.J. 481, 555 (1997).

46. *See Winstar*, 518 U.S. at 895–96; *see also Yankee Atomic Elec. Co.*, 112 F.3d at 1575–76 (noting the fact that new tax did not just fall on government contractors weighed in favor of application of sovereign-acts doctrine).

47. *See Geren*, 550 F.3d at 1374–75 (looking "to the extent to which the governmental action was directed to relieving the government of its contractual obligations"); Centex Corp. v. United States, 395 F.3d 1283, 1305–06 (Fed. Cir. 2005); *Yankee Atomic Elec. Co.*, 112 F.3d at 1575–76; *see also* Morgan, *supra* note 44, at 267–70.

48. Note that if the congressional termination of federal fossil-fuel leases was part of a broader program ending fossil-fuel extraction in the United States, then the sovereign-acts doctrine would be more likely to apply.

the goal of reducing greenhouse gas emissions.[49] Given that similar government actions to adjust the terms of federal offshore oil and gas leases have been held by the courts to not be sovereign acts,[50] primarily because of their focus on governmental contracts, it seems likely that courts would similarly conclude that termination of fossil-fuel leases would also not be sovereign acts.[51]

The second possible defense for the government is the unmistakability doctrine, a principle of contract interpretation that holds that, absent specific, clear language in the contract to the contrary, the government will not be presumed to have bargained away its sovereign powers.[52] However, if the government is not exercising its sovereign powers, then the doctrine would not be relevant.[53] Thus, a plurality of the Supreme Court in *United States v. Winstar Corp.* held that damages payments for breach of contract will not ordinarily raise concerns about the government having bargained away its sovereign powers, and therefore, will be permitted.[54] Lower courts have interpreted the unmistakability doctrine as not

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49. *See Geren*, 550 F.3d at 1376 (noting that even a government action that interferes with a single government contract may be insulated under the sovereign-acts doctrine so "long as the effect on the contractor's contract rights is incidental to a broader governmental objective").

50. *See, e.g.*, Conoco Inc. v. United States, 35 Fed. Cl. 309, 335 (1996) (holding that denials of drilling permits by government constituted breach of contract under offshore oil and gas leases and were not covered by sovereign-acts doctrine), *rev'd sub nom.* Marathon Oil Co. v. United States, 177 F.3d 1331 (Fed. Cir. 1999), *rev'd sub nom.* Mobil Oil Expl. & Producing Se., Inc. v. United States, 530 U.S. 604 (2000); *see also* Sun Oil Co. v. United States, 572 F.2d 786, 817 (1978).

51. Even if the government action is sufficiently public and general, the government must also establish a common-law contractual-impossibility defense. *Winstar*, 518 U.S. at 904. "[T]he nonoccurrence of the act in question must have been a basic assumption of the contract, and the government must not have assumed the risk that such an act would occur." *Geren*, 550 F.3d at 1379 (citing *Winstar*, 518 U.S. at 905; Seaboard Lumber Co. v. United States, 308 F.3d 1283, 1294 (Fed. Cir. 2002)). The termination of fossil-fuel contracts in order to reduce greenhouse gas emissions might well have been an act that the parties to federal oil and gas leases would have assumed would not have occurred when the leases were entered into, especially if they were more than a few years old. Whether the government assumed the risk of any change in government policy with respect to greenhouse gases is, in essence, a question of whether the terms of the lease cover those issues, one we cover *infra* Parts III & IV.

It is also possible that if the government successfully asserted the sovereign-acts defense for breach of contract liability that a lessee might then be able to make a claim against the government for compensation under the Takings Clause. *See* Garden, *supra* note 40, at 202; *see also* Franconia Assocs. v. United States, 61 Fed. Cl. 718, 737–39 (2004) (noting that where government is simply alleged to have breached a contract, there is no exercise of public authority that can justify a takings claim).

52. *See Winstar*, 518 U.S. at 871–72 (quoting Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 52 (1986)).

53. *See* Centex Corp. v. United States, 395 F.3d 1283, 1307 (Fed. Cir. 2005) ("A prerequisite for invoking the unmistakability doctrine is that a sovereign act must be implicated."); Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569, 1576, 1579 (Fed. Cir. 1997) (same).

54. *See Winstar*, 518 U.S. at 883–84. We discuss the relevant measure of damages *infra* Part V.

applying where the government action is not general enough to qualify under the sovereign-acts doctrine.[55] Thus, the unmistakability doctrine probably does not provide the government any additional protection that the sovereign-acts doctrine would not provide.[56]

III. ONSHORE LEASING

There are two main plausible arguments for the power of the executive branch to end, cancel, or forfeit onshore oil and gas leases without affirmative congressional action:[57] first, an argument that the relevant statutes preserve or recognize inherent discretionary power by the President or the BLM to terminate leases or to breach government contracts; and second, an argument that the standard oil and gas leases allow for termination of leases because of the negative environmental impacts of the greenhouse gas emissions from fossil-fuel combustion. The first argument is more debatable, but it would likely require the agencies to compensate the leaseholders, as it would involve the government breaching the lease. The second argument is less debatable and would likely not require compensation of the lease holders for the termination of their interests.

A. Inherent Discretionary Authority to Terminate Leases

The MLA has specific provisions that identify ways in which existing leases can be terminated. Leases may be forfeited if they were issued in violation of

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55. *See, e.g.*, *Franconia Assocs.*, 61 Fed. Cl. at 734 (stating that the unmistakability doctrine does not apply "where Congress, rather than exercising its sovereign powers, targets its preexisting contractual obligations" (citing Gen. Dynamics Corp. v. United States, 47 Fed. Cl. 514 (2000); Coast-to-Coast Fin. Corp. v. United States, 45 Fed. Cl. 796, 802 (2000))); *see also* Schwartz, *supra* note 45, at 556 (making this point in the context of analyzing *Winstar*).

56. If the relevant leases are interpreted by courts to provide a promise by the government that the lessees would not be subject to additional regulatory burdens, the unmistakability doctrine might not bar the payment of damages. *See Winstar*, 518 U.S. at 871 (holding that interpreting government contracts as providing a promise to pay damages if additional regulatory burdens are placed on the contracting party is consistent with the unmistakability doctrine). We later discuss the specific terms of the standard oil and gas and coal leases and the extent to which they allow the imposition of additional regulatory requirements *infra* Part III.

57. A note on terminology, which will become important as we do our analysis. We use "terminate" a lease as a generic term to refer to cutting a lease term short, whether or not compensation is owed to the lessee. "Ending" or "breaching" a lease refers to the government breaching its obligations under the contract, triggering a reciprocal obligation by the government to pay contract damages to the lessee. "Forfeiture" of a lease means that the lease is ended without any compensation to the lessee, often because the lessee has violated the terms of the lease or because the lease was void ab initio. *See, e.g.*, *Commission of Waste as Ground for Forfeiture of Lease*, 3 A.L.R. 672 (2020); *Forfeiture*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining forfeiture as "[t]he divestiture of property without compensation"). Cancellation of a lease has ambiguous meaning and can refer to termination of a lease because of a breach by the lessee (potentially also triggering damages owed by the lessee), or it can refer to termination of a lease by the government, triggering compensation owed by the government to the lessee (as in the OCSLA context). *See infra* Part IV and note 164. We use "cancellation" where the courts or agencies have done so, but we note its varying meaning where relevant.

limits on the total acreage that any one lessee can hold. In this case, forfeiture requires judicial action by the federal government.[58] Leases may also be forfeited if the lessee fails to comply with the lease terms, the provisions of the MLA, or the regulations issued under the Act and in effect at the time of the lease.[59] In these cases, forfeiture can happen through administrative action by the agency unless the lease "contains a well capable of production of oil or gas in paying quantities" or is part of a broader cooperative or unit plan which contains a well capable of production, in which case forfeiture can only occur through judicial action.[60]

The question is whether these are the only grounds for lease termination.[61] On the one hand, there is caselaw that states that an "agency literally has no power to act . . . unless and until Congress confers power upon it."[62] These arguments may have particular purchase in the context of the Property Clause, which grants Congress authority to "dispose of and make all needful Rules and Regulations" with respect to federal property.[63] Moreover, the nature of Article IV (of which the Property Clause is a part) as focused on the relationships between states (horizontal federalism) rather than on the powers and limits of the federal government (vertical federalism) would lean in favor of congressional primacy here.[64]

On the other hand, there is a significant body of caselaw holding that land-management agencies have substantial discretion to act within the scope of the authorities given to them by Congress to effectively manage the public lands.[65] That

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58. *See* 30 U.S.C. § 184(h)(1); *see also id.* § 184(k) (similar provision for unlawful ownership of lease interests through a trust).

59. *Id.* § 188(a).

60. *See id.* § 188(b). Automatic cancellation can occur for failure to make rental payments. *Id.*

61. The relevant legislative history of the MLA provides very little insight on this question. *See* Neil F. Stull, *The Authority of the Secretary of the Interior to Cancel Noncompetitive Oil and Gas Leases by Administrative Action*, 5 ROCKY MTN. MIN. L. INST. 1, 12 (1960). During the original enactment of the statute in 1919–1920, individual members of Congress (including members of the committees that reviewed the Act) stated that they believed that the agency could only cancel leases through judicial action. *See* 58 CONG. REC. 4168 (1919); 58 CONG. REC. 7604 (1919). Perhaps most relevant is a congressional refusal in 1960 to alter the relevant language in § 184(h) to either authorize or prohibit the agency's claimed administrative forfeiture or cancellation powers. The relevant congressional reports indicate that the choice was made to let the courts resolve the question. WAYNE N. ASPINALL, AMENDING THE MINERAL LEASING ACT OF FEBRUARY 25, 1920, H.R. REP. NO. 86-1401, at 7, 15 (1960). A few years later, in *Boesche v. Udall*, discussed below, the Supreme Court held that the Secretary does have administrative power to cancel a lease. 373 U.S. 472, 485 (1963).

62. *See* La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986). Also relevant is the caselaw interpreting the OCSLA provisions to limit agency power to cancel leases to those specifically authorized in the statute. *See* cases cited *infra* note 96. While those cases are interpreting the OCSLA, given the similarity of the statutory language and the subject matter, we do think they may be helpful in understanding the MLA as well.

63. U.S. CONST. art. IV, § 3, cl. 2.

64. *See* Eric Biber, *The Property Clause, Article IV, and Constitutional Structure*, 71 EMORY L.J. (forthcoming 2022) (on file with author).

65. *See, e.g.*, United States *ex rel.* McLennan v. Wilbur, 283 U.S. 414, 418–19 (1931) (upholding agency decision to refuse to issue oil and gas leases on a national basis in

caselaw draws on the need for executive discretion to undertake the day-to-day operations and management of the government, including property management, at least where Congress has not spoken to the specific question.[66]

Perhaps the most famous (and infamous) of those cases is *United States v. Midwest Oil Co.* Alarmed at the rapid depletion of oil and gas reserves on federal lands under existing mining law, President Taft in 1909 issued a proclamation withdrawing millions of acres of land in Wyoming and California from disposal under the mining laws in order to allow Congress time to enact legislation to properly manage oil and gas extraction from the federal lands.[67] There was concededly no statutory authorization for the President's withdrawal, but the Supreme Court noted that prior Presidents had issued many similar "withdrawal" orders over the years, exempting federal lands from sale or disposal to private parties under some or all of the many relevant federal public-land statutes, and that Congress had never intervened.[68] Accordingly, because Congress had "uniformly and repeatedly acquiesced in the practice" of executive withdrawal, the Court held that the President's action was appropriate.[69]

However, the *Midwest Oil* precedent is of limited utility for our analysis for a number of reasons. First, in enacting FLPMA in 1976, Congress explicitly disavowed the case and statutorily restricted the President's ability to unilaterally withdraw lands from the scope of the public-lands laws like the MLA.[70] Thus, any

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part because of "consideration of [the Secretary's] general powers over the public lands as guardian of the people"); Williams v. United States, 138 U.S. 514, 524 (1891) ("[I]n the administration of such large and varied interests as are intrusted to the land department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and therefore that the secretary of the interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice."); Knight v. United Land Ass'n, 142 U.S. 161, 177–78 (1891) ("[T]he secretary of the interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States."); Silver State Land, LLC v. Schneider, 843 F.3d 982, 989 (D.C. Cir. 2016) (identifying the Secretary of the Interior's "plenary authority" in managing the public lands); Hannifin v. Morton, 444 F.2d 200, 202 (10th Cir. 1971) ("Quite apart from the statutory grants of authority, the Secretary has general powers over the public lands as guardian of the people." (internal quotation marks and citation omitted)). For a scholarly discussion of the important role that executive power over public lands management plays in broader constitutional understandings of executive power, see generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2291–92 (2001).

66. *See* Biber, *supra* note 64.

67. United States v. Midwest Oil Co., 236 U.S. 459, 467–69 (1915). The Mineral Leasing Act of 1920 was Congress's (belated) response to Taft's request for legislation.

68. *Id.* at 469–71.

69. *Id.* at 471.

70. *See* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (repealing "the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (U.S. v. Midwest Oil Co., 236 U.S. 459)"); 43 U.S.C. § 1714(c)(1) (restricting BLM withdrawal authority and requiring notification to Congress of withdrawals of 5,000 acres or more); *id.* § 1701(a)(4) (noting congressional policy in FLPMA that "Congress exercise its constitutional authority

claims about inherent executive withdrawal power as a matter of statutory interpretation are gone.[71]

Second, and more importantly for our purposes, termination of a lease is not a "withdrawal." As defined in FLPMA, a "withdrawal" is:

> withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program.[72]

But termination of a lease does not "withhold[]" the leased area from future leasing under the MLA or from disposal under any other public-land law. Termination of a lease is termination of an existing use, rather than a prohibition on future uses.[73] Thus, FLPMA's elimination of an inherent executive withdrawal power would not apply to cancellation of a lease.[74]

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to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action"); *see also* H.R. REP. NO. 94-1163, at 29 (1976) (House committee report stating that the bill would "repeal" the executive authority recognized under *Midwest Oil*); Charles F. Wheatley, Jr., *Withdrawals Under the Federal Land Policy Management Act of 1976*, 21 ARIZ. L. REV. 311, 317–19 (1979).

71. The President has at times made arguments that there is inherent constitutional authority for the executive branch to take actions with respect to the public lands. *See* 1 CHARLES F. WHEATLEY, JR., PUB. LAND LAW REVIEW COMM'N, STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS 134–45 (1969) (summarizing historic arguments by the Executive). The Court in *Midwest Oil* explicitly refused to rule on the question. 236 U.S. at 469. We do not explore this question further, as we believe that the statutory-based and lease-based arguments for cancellation power are more plausible. For more thorough discussion of the possibility of inherent presidential power in this context, see generally Biber, *supra* note 64.

72. 43 U.S.C. § 1702(j). The House committee indicated that in crafting this definition, it intended to "preserve its traditional meanings." H.R. REP. NO. 94-1163, at 5 (1976). The Public Land Law Review Commission was a review commission tasked by Congress with proposing an overhaul of federal public-land laws; its work was the basis for FLPMA, and it used a similar definition. PUB. LAND LAW REVIEW COMM'N, ONE-THIRD OF THE NATION'S LAND 42 n.1 (1970); *see also* 3 WHEATLEY, *supra* note 71, at A-1 to A-2 app. A (showing that a report that provided background information on withdrawals for the Commission used similar definition of withdrawal).

73. *Cf.* Silver State Land, LLC v. Schneider, 843 F.3d 982, 991 (D.C. Cir. 2016) (distinguishing cancellation of the sale of land from the withdrawal of land from availability for sale). This understanding of the meaning of the term withdrawal is buttressed by how FLPMA treats withdrawals. BLM's withdrawal power under FLPMA is limited to a maximum term of 20 years, after which the withdrawal must terminate or be renewed. 43 U.S.C. § 1714(c)(1); *id.* § 1714(f) (extension of renewals); *see also id.* § 1714(d) (allowing withdrawals of less than 5,000 acres to be made without reporting to Congress but also with time limits).

74. It is possible that termination of leases might be a "management decision . . . that excludes (that is, totally eliminates) one or more major uses [of the public lands] for two or more years with respect to a tract of land of one hundred thousand acres or

The Supreme Court identified a similar residual power for the Secretary of the Interior to terminate leases under the MLA in at least some circumstances in *Boesche v. Udall*.[75] The Secretary has long argued that she has had the power to terminate through administrative proceedings leases that were improperly issued, even though the MLA does not give the agency any explicit authority to cancel leases on those grounds or through administrative proceedings.[76] The Court noted that the land-management statutes "vest[] the Secretary with general managerial powers over the public lands,"[77] that the courts had found that the Secretary had similar powers to administratively correct errors in a wide range of public land contexts,[78] and that without this "traditional administrative authority," the agency would be unable to address improperly issued leases.[79] Buttressing the Court's conclusion was that the relevant statutory provisions only spoke to post-lease violations of lease terms and that the MLA was "intended to expand, not contract, the Secretary's control over the mineral lands of the United States," and therefore, it would be "surprising to find in the Act . . . a restriction on the Secretary's power to cancel leases issued through administrative error."[80]

Of course, *Boesche* could be read to exclude administrative termination of leases for post-lease violations outside the provisions of the MLA because the Act does have specific provisions for termination in that context, as the Court noted.[81]

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more." 43 U.S.C. § 1712(e)(2). Such actions must be reported to Congress. *Id.* Again, however, the trigger of mandatory reporting to Congress is defined by the prospective impact of the management act to exclude an action from the public lands for two or more years. Termination of a lease affects present uses, but not future uses, and in theory at least the agency could immediately release the lands covered by the lease.

75. 373 U.S. 472, 473 (1963).

76. *Id.* at 475–76; *see* Stull, *supra* note 61, at 5 (noting that the agency has used this authority "several thousand" times). The agency has codified its claimed authority to administratively cancel leases that were improperly issued. 43 C.F.R. § 3108.3(d) (2019).

77. *Boesche*, 373 U.S. at 476.

78. *Id.* at 476–77.

79. *Id.* at 478–79.

80. *Id.* at 481–82. For subsequent caselaw broadly applying *Boesche*, see Winkler v. Andrus, 614 F.2d 707, 711 (10th Cir. 1980) ("The Secretary has broad authority to cancel oil and gas leases for violations of the Mineral Leasing Act and regulations thereunder, as well as for administrative errors committed before the lease was issued."); Nat. Res. Def. Council, Inc. v. Hughes, 454 F. Supp. 148, 154 (D.D.C. 1978) (noting power of agency under *Boesche* in holding that agency can refuse to issue coal leases).

81. *See Boesche*, 373 U.S. at 485 ("We hold only that the Secretary has the power to correct administrative errors of the sort involved here . . . ."); *cf.* Douglas Timber Operators, Inc. v. Salazar, 774 F. Supp. 2d 245, 257–58 (D.D.C. 2011) (rejecting the BLM's argument based on *Boesche* that it had inherent authority to administratively change a land-use plan because FLPMA has specific provisions that allow for revision of the plan). For post-*Boesche* caselaw that can be read to limit the Secretary's authority to terminate leases, see Belville Mining Co. v. United States, 999 F.2d 989, 998–99 (6th Cir. 1993) (stating that agencies cannot rely simply on a change in policy to retroactively change prior decisions); Naartex Consulting Corp. v. Watt, 722 F.2d 779, 795 (D.C. Cir. 1983) (stating that agencies cannot administratively cancel a producing lease under the MLA); Texas Oil & Gas Corp. v. Watt, 683 F.2d 427, 431–34 (D.C. Cir. 1982) (ordering canceled lease to be restored because agency

On the other hand, the Act never explicitly prohibits termination of leases beyond the relevant provisions of the MLA,[82] indicating that the "traditional administrative

made an error of law when it canceled lease); Utah Int'l, Inc. v. Andrus, 488 F. Supp. 976, 986 (D. Colo. 1980) (requiring issuance of coal lease by agency to plaintiff because plaintiff had complied with regulatory requirements for issuance of lease, and stating that *Boesche* does not apply to agency's "ability to apply changes in policy determinations already made"); and Clayton W. Williams, Jr. Exxon Corp., 103 IBLA 192, 202 (1988) (Interior Department administrative appeal holding that cancellation can occur "only under certain circumstances"). At least *Belville* can be reconciled with agency authority to terminate existing leases outside the explicit restrictions of the MLA. *Belville* can be understood as recognizing agency discretion to terminate leases but allowing for review of that discretion to see if it is arbitrary and capricious.

Further support for limiting the inherent power of the agency to terminate existing leases might be found in the purposes of the MLA, which one court has characterized as "promot[ing] the orderly development of the oil and gas deposits in the publicly owned lands of the United States through private enterprise." Harvey v. Udall, 384 F.2d 883, 885 (10th Cir. 1967) (internal quotations and citation omitted); *see also* Conway v. Watt, 717 F.2d 512, 514 (10th Cir. 1983) (stating that the purpose behind the MLA was the "development of the nation as a whole"); Cal. Co. v. Udall, 296 F.2d 384, 388 (D.C. Cir. 1961) ("The Act was intended to promote wise development of these natural resources and to obtain for the public a reasonable financial return on assets that 'belong' to the public."); Wyoming v. U.S. Dep't of the Interior, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *7, *12 (D. Wyo. June 21, 2016) (striking down the BLM rule restricting fracking activities on public lands in part because of conclusion that the MLA does not authorize general environmental regulation), *vacated sub nom.* Wyoming v. Zinke, 871 F.3d 1133 (10th Cir. 2017); Mountain States Legal Found. v. Andrus, 499 F. Supp. 383, 392 (D. Wyo. 1980) ("The Secretary of the Interior must administer the [MLA] so as to provide some incentive for, and to promote the development of oil and gas deposits . . . ."). Preventing easy termination of existing leases would protect the investments and reasonable expectations of lessees, encouraging more development. On the other hand, if termination is paired with compensation, then termination should not have a significant, negative deterrent effect on development. In addition, there are good arguments that subsequent amendments to the MLA, as well as the enactment of later environmental statutes, such as NEPA, have expanded the purposes of the MLA to include environmental protection. *See, e.g.*, Park Cty. Res. Council, Inc. v. U.S. Dep't of Agric., 817 F.2d 609, 620–21 (10th Cir. 1987) (discussing how policy goals of NEPA and the MLA reflect "the hybrid goal for this nation . . . to encourage the development of domestic oil and gas production while at the same time ensuring that such development is undertaken with an eye toward environmental concerns"), *overruled on other grounds by* Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970, 973 (10th Cir. 1992); Validity of Regulations Relating to Oil and Gas Leases on Wildlife Refuges, Game Range and Coordination Lands, 65 Interior Dec. 305, 308–09 (1958) (Interior Solicitor's Opinion) (stating that the agency does not need to "effectuate so single mindedly the policies of the Mineral Leasing Acts, that thereby you equally were required to ignore the congressional objectives" of other laws, and concluding that Interior Department has authority to withdraw lands in wildlife refuges from leasing under the MLA); Charles L. Kaiser & Scott W. Hardt, *Surface-Use Regulation of Federal Oil and Gas Leases: Exploring the Limit of Administrative Discretion*, 38 ROCKY MTN. MIN. L. INST. § 19.01, § 19.04[2][c][i] (1992) (noting that both the broad agency discretion under the MLA plus subsequent environmental laws may undermine any arguments that restricting oil and gas development defeats the purpose of the MLA).

82. The most relevant provision of the Act states that "any lease . . . *may* be forfeited and canceled" through a judicial proceeding for relevant violations. 30 U.S.C.

authority" that the agency has always held was retained, absent express congressional divestment of that power.[83]

Inherent presidential authority to terminate leases under the MLA can also be grounded in general executive discretion to terminate government contracts. In the context of military procurement contracts where Congress has given the

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§ 188(a) (emphasis added). It never explicitly prohibits alternative methods of termination, particularly for other grounds besides those listed in the relevant provision.

83. *See id.* § 189 (authorizing the Secretary of the Interior "to do any and all things necessary to carry out and accomplish the purposes of this chapter"); *see also* Arch Mineral Corp. v. Lujan, 911 F.2d 408, 415 (10th Cir. 1990) (describing this as "a broad grant of authority"); Hannifin v. Morton, 444 F.2d 200, 202 (10th Cir. 1971) (stating that the MLA "should be broadly construed in order for the Secretary to properly carry out his proprietary function on behalf of the government and its citizens"); Kaiser & Hardt, *supra* note 81, § 19.03[1] (stating that this "broad MLA language includes the power to impose conditions on oil and gas activities found necessary or advisable to protect the environment"); Michael D. Axline, *Private Rights to Public Oil and Gas*, 19 IDAHO L. REV. 505, 548–49 (1983) (arguing that agency discretion includes the ability to prevent drilling on leases to protect the environment, especially since the agency has discretion not to lease in the first place); James B. Martin, Comment, *The Interrelationships of the Mineral Lands Leasing Act, the Wilderness Act, and the Endangered Species Act: A Conflict in Search of a Resolution*, 12 ENVTL. L. 363, 372 n.60 (1982) (listing cases identifying broad agency power). For an early agency interpretation of the MLA consistent with this theory, see Interpretation of the Mineral Leasing Act of February 25, 1920 (41 Stat. 347), as Amended, 56 Interior Dec. 174, 183 (1937) ("[E]xistence of implied authority is precluded only if the omission is ascribable to a deliberate intention on the part of the Congress to deprive the Secretary of any authority . . . ."). For examples of BLM claiming implied authority to act under the MLA, see *Hannifin*, 444 F.2d at 202 (upholding agency imposition of rental fee based on implied MLA authority) and 43 C.F.R. § 3100.0-3(d) (2019) (implied authority to lease lands otherwise unavailable to lease in order to prevent drainage).

The FLPMA requires the BLM to:

> insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, after notice and hearing, of such instrument upon a final administrative finding of a violation of any term or condition of the instrument, including . . . terms and conditions requiring compliance with regulations under Acts applicable to the public lands and compliance with applicable State or Federal air or water quality standard or implementation plan.

43 U.S.C. § 1732(c). We do not see this provision as implicitly repealing any inherent agency discretion to cancel leases (if such discretion already exists under the MLA). First, the FLPMA states that "[n]othing in this Act shall be deemed to repeal any existing law by implication." Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 701(f), 90 Stat. 2743, 2786. Second, this provision can be seen as requiring the BLM to proactively insert provisions in leases and similar permits that allow for termination without compensation; as noted *infra*, we think that any inherent BLM authority to terminate oil and gas leases likely contains a compensation requirement. The limited legislative history of this provision does not indicate it was intended to constrain any prior agency authority. *See* John A. Carver, Jr., *Federal Land Policy and Management Act of 1976: Fruition or Frustration*, 54 DENV. L.J. 387, 401 (1977) (noting that the FLPMA provision was based on Public Land Law Review Commission recommendations); PUB. LAND LAW REVIEW COMM'N, *supra* note 72, at 81–82 (proposing recommendations).

President broad authority, the Supreme Court in *United States v. Corliss Steam-Engine Co.* stated that:

> the discharge of the duty devolving upon the [Secretary of the Navy] necessarily requires him to enter into numerous contracts for the public service; and the power to suspend work contracted for, whether in the construction, armament, or equipment of vessels of war, when from any cause the public interest requires such suspension, must necessarily rest with him.[84]

Based on this inherent power, the Court held that the federal government was required to honor a settlement agreement between the Secretary of the Navy and a naval contractor, where the federal government canceled an existing shipbuilding contract in return for a payment of a lump sum of money and transfer of the unfinished ship to the federal government.[85] This was true even though Congress subsequently sought to reject the settlement agreement through an appropriations bill and even though there were not sufficient appropriated funds to pay the full lump sum immediately.[86] *Corliss Steam-Engine* can be understood as part of a broader context of executive discretion in management of day-to-day government operations, such as contracts, where Congress has not specifically spoken to the matter. That discretion can be the basis for executive power, even in the context of the Property Clause where Congress has greater primacy vis-à-vis the Executive.[87]

As the Court did in the *Corliss Steam-Engine* case, Congress has granted broad authority under the MLA to the Secretary of the Interior to manage the leasing program. In both situations, management of leasing is management of contracts and management of day-to-day operations of government activity.[88] Accordingly, unless Congress specifically provides to the contrary,[89] broad discretion as to how to manage contracts (including leases) under the program in order to respond to changed circumstances would remain with the Secretary.[90] Indeed, the authority that

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84. United States v. Corliss Steam-Engine Co., 91 U.S. 321, 322 (1875); *see also* Peter L. Dounis & Frederick W. Forman, *Historical Significance of Termination of Contracts for the Convenience of the Government*, 14 FED. B.J. 191, 195 (1954) ("The Corliss case . . . established the right of the Government to terminate contracts."); Lawrence Lerner, *Tying Together Termination for Convenience in Government Contracts*, 7 PEPP. L. REV. 711, 712–13 (1980) (stating that in *Corliss*, "the Supreme Court held that the capacity to contract necessarily included the capacity to administer contracts and also the capacity to breach them, when to do so would serve the public interest").

85. *Corliss*, 91 U.S. at 321–22.

86. *See* Corliss Steam-Engine Co. v. United States, 10 Ct. Cl. 494, 495–501 (1874), *aff'd*, 91 U.S. 321 (1875).

87. *See* Biber, *supra* note 64.

88. *See id.*

89. *Corliss*, 91 U.S. at 322 ("The power of the President in such cases is, of course, limited by the legislation of Congress.")

90. *Id.* at 323 ("[I]t would be of serious detriment to the public service if the power of the head of the Navy Department did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors.")

the Secretary would have under *Corliss Steam-Engine* would be significantly different from that which is explicitly given to the Secretary under the terms of the MLA to forfeit or cancel leases. If the Secretary exercised her authority under *Corliss Steam-Engine*, she would be ending or breaching the lease contracts—triggering an obligation to pay compensation to the lessees for breach of contract (but not specific performance, as we discuss *infra* Part V). On the other hand, forfeiture under the MLA provisions might well allow the Secretary to terminate leases without paying any compensation to the lessees. Forfeiture in the context of oil and gas leasing specifically and property more generally is usually understood to involve termination of a property or lease right without any compensation. As for cancellation, under the MLA provision cancellation can occur where the lease is either void ab initio (implying no compensation is owed to the lessee) or where the lessee breaches lease terms (as discussed *infra* Part V)—in those situations, no compensation might be owed to the lessee as well, or the lessee might even owe damages to the government. Thus, the structure of procedural rules and carefully cabined discretion for the agency in the context of forfeiture or cancellation make sense to protect a lessee against the possibility that they might be left without any compensation from the government.[91] In contrast, if the government breached the lease, compensation would be owed.[92]

Modern federal regulations for contracts to procure goods and services for the government draw on the *Corliss* case by generally requiring all procurement contracts to include a "termination for convenience" clause, which allows the government to terminate contracts at will, in return for limited damages for "recovery of costs incurred, profit on completed work, and termination proposal preparation costs," but "recovery of anticipatory profits is precluded," such that "the government is insulated from paying breach damages in situations where a private party would have to pay them." Joseph J. Petrillo & William E. Conner, *From* Torncello *to* Krygoski*: 25 Years of the Government's Termination for Convenience Power*, 7 FED. CIR. B.J. 337, 341 (1997); *see also* Torncello v. United States, 681 F.2d 756, 763–66 (Ct. Cl. 1982) (discussing the clause); G.L. Christian & Assocs. v. United States, 312 F.2d 418, 426–27 (Ct. Cl. 1963) (stating that termination for convenience is incorporated into all federal contracts covered by the federal acquisition regulations, even if not explicitly included in the contract, because it represents a "deeply ingrained strand of public procurement policy"); FAR 49.501–.503 (2021) (requiring inclusion of clause); Ralph C. Nash, *Terminations for Convenience: When Are They Improper?*, 26 NASH & CIBINIC REP. ¶ 52 (2012) (describing limits on when government can invoke doctrine); Marc A. Pederson, *Rethinking the Termination for Convenience Clause in Federal Contracts*, 31 PUB. CONT. L.J. 83, 88 (2001) (noting doctrine is not limited to military contracts in time of war). However, these regulations would not apply to leases under the MLA, since those leases do not involve the procurement of goods or services for the government. *See* 41 U.S.C. § 1122. Moreover, we do not believe that the limited damages available for a termination for convenience should apply to canceled MLA leases.

91. Indeed, there is evidence in the legislative history that Congress was concerned about the possibility that leases would be forfeited, and the judicial procedures were intended to protect lessees against the consequences of forfeiture. *See* 58 CONG. REC. 7604 (1919) (stating that requiring judicial process for canceling lease was "in recognition that the law abhors a forfeiture, and there must be a showing made in court before the forfeiture can be secured").

92. *See infra* Part V.

If such residual, traditional administrative authority still exists under the MLA for the agency to terminate leases beyond those conditions specified under the Act, we believe courts are more likely to uphold agency action in this context if lessees are compensated.[93] It is also possible that a court is more likely to uphold that authority if the authority is exercised consistent with the procedural requirements identified by Congress where Congress has explicitly authorized forfeiture or cancellation—e.g., for leases with wells capable of production, the agency would act through a judicial proceeding to cancel; nonproducing wells might be canceled administratively. On the other hand, some of the language in the caselaw indicates that the broad, residual administrative power of the agency to terminate leases and take administrative actions with respect to the public lands extends very far indeed, given the broad statutory authorization given by Congress to the Secretary of the Interior to manage the public lands.[94] In addition, where the government can rely on claims that the original issuance of the lease was illegal or outside the agency's authority—e.g., because of violations of NEPA, the ESA, the National Historic Preservation Act, or other statutes—then the agency can point to prior precedent where it has canceled similar leases through administrative proceedings.[95]

The caselaw that would cut most strongly against this theory of inherent agency authority to cancel oil and gas leases is a series of cases from the Ninth Circuit in response to the infamous Santa Barbara Oil Spill of 1969. After the spill, the Secretary of the Interior responded to the disaster and subsequent public outcry by placing holds on various drilling operations by offshore oil and gas lessees. Some of those lessees sued, arguing that the agency's delays conflicted with the lease and

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93. If the government did breach the leases, the lessees would have the opportunity to obtain full contract damages through litigation in the Court of Federal Claims. *See infra* Part V.

We note that there is a history of federal agencies—such as the BLM and Department of Defense—using compensation to buy out existing interests of private parties on federal lands that are withdrawn or converted to other federal uses, even though the MLA does not explicitly authorize such compensation. *See* 43 C.F.R. § 2310.3-5(a) (2019) (requiring withdrawal applicant to compensate holder of any lease "lawfully terminated or revoked" after the withdrawal for all authorized improvements); 2 WHEATLEY, *supra* note 71, at 320–25, 330–38. The Public Land Law Review Commission similarly recommended that any terminations of leases of public land should ensure lessees are "equitably compensated for the resulting losses." PUB. LAND LAW REVIEW COMM'N, *supra* note 72, at 4.

94. *See* Silver State Land, LLC v. Schneider, 843 F.3d 982, 989–90 (D.C. Cir. 2016) (noting Congressional grant of authority to Secretary of the Interior to undertake "all executive duties appertaining to the surveying and sale of the public lands" and stating this delegation gives the Secretary "plenary authority" to manage the public lands (citing 43 U.S.C. § 2)).

95. *See, e.g.*, Solenex LLC v. Bernhardt, 962 F.3d 520, 525–26 (D.C. Cir. 2020) (describing administrative cancellation of lease on grounds that original issuance was in violation of NEPA and other laws); Griffin & Griffin Expl. v. United States, 116 Fed. Cl. 163, 167 (2014) (describing administrative cancellation of lease that had been issued on same land that was already leased to another lessee); Grynberg v. Kempthorne, No. 06–cv–01878–WYD–MJW, 2008 WL 2445564, at *3 (D. Colo. June 16, 2008) (describing administrative cancellation of lease for failure to obtain approval of Forest Service at time of leasing); *see also* 43 C.F.R. § 3108.3(d) (2019).

exceeded the Secretary's legal authority. In reviewing whether a suspension of a number of the leases was legally supportable, the Ninth Circuit stated that the agency did not have the power to condemn the property rights in the leases by implication, and that without explicit congressional authority, the agency could not terminate the leases.[96] While the leases were issued under a different statutory scheme for offshore oil and gas leasing that has since been amended,[97] the reasoning would seem to apply equally to arguments about implicit agency authority to cancel onshore leases.[98]

However, these cases focus on whether the agency has the power to "take" property through Fifth Amendment condemnation. Since leases both create a property right and are a contract, government cancellation of leases can also be understood as a breach of contract, making the government liable for ordinary damages through litigation. At least one court has distinguished the Santa Barbara line of cases on the grounds that they focus only on whether an agency can cause a taking, concluding that instead an agency might have the power to breach a lease contract, providing the lessee with a remedy in damages.[99] In other words, courts might be more likely to find that the agency can breach a contract than take property.

Further supporting arguments about executive power to cancel leases under the MLA is the broad discretion of the Executive in implementing the law, combined

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96. Union Oil Co. of Cal. v. Morton, 512 F.2d 743, 750 (9th Cir. 1975) ("Congress clearly did not intend to grant leases so tenuous in nature that the Secretary could terminate them, in whole or in part, at will."); *id.* at 751 ("A suspension for which the fifth amendment would require compensation is therefore unauthorized and beyond the Secretary's power."); *see also* Gulf Oil Corp. v. Morton, 493 F.2d 141, 148 (9th Cir. 1973) (upholding a short-term suspension of leases in the Santa Barbara area until Congress can decide whether to take further legislative steps, but stating that "[i]t is arguable that at some point, if Congress does not act, there must be an end to the matter" and that once Congress refused to take legislative steps, the suspension must end); Pauley Petrol. Inc. v. United States, 591 F.2d 1308, 1326–27 (Ct. Cl. 1979) (in denying claims by Santa Barbara offshore oil and gas lessees that delays in drilling permit issuance warranted compensation, stating that the relevant statute "contains no authority for the Secretary to take property by completely and indefinitely halting all drilling").

97. In 1978, Congress overhauled the offshore leasing system. *See infra* Part IV.

98. For scholarly commentary making a similar argument, see generally Martin, *supra* note 83 (arguing that agency, after a lease is issued, can only use police power authority to restrict existing leases beyond whatever power the government has under the lease).

99. Sun Oil Co. v. United States, 572 F.2d 786, 814–19 (Ct. Cl. 1978) (holding that Santa Barbara offshore oil and gas lessees could recover damages for denial of permits to develop lease, but that damages would only be based on contract remedies, not on takings, since agencies did not have authority to take property). This distinction would be consistent with the distinction discussed in Part II, *supra*, between sovereign acts by the government—for which no compensation for breach of contract is owed, but for which compensation under the Takings Clause might be owed—and ordinary breach of contract by the government, which allows for contract damages but generally not takings claims.

As discussed below, this caselaw probably informed Congress's decision in the 1978 OCSLA amendments to explicitly grant the Secretary of the Interior the authority to cancel leases in return for compensation. *See infra* note 179. However, for the reasons we discuss there, we do not think that Congress's decision in 1978 to explicitly grant cancellation with compensation authority to the Secretary necessarily means that no such authority implicitly rests with the Secretary under the MLA.

with the limited property and contract rights held by lessees. The Act requires the Executive to include in lease terms provisions "for the protection of the interests of the United States . . . and for the safeguarding of the public welfare."[100] This language gives the Executive broad powers to determine what is appropriate for effective implementation of the statute, including protection of important environmental resources.[101] On the other hand, the Supreme Court has noted the limited nature of the property rights in a lease under the MLA.[102]

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100. 30 U.S.C. § 187.

101. *See* United States v. Ohio Oil Co., 163 F.2d 633, 639–40 (10th Cir. 1947) (upholding agency power to restructure royalty provisions in oil and gas leases because of broad power under the Act and the Secretary's role of "safeguarding the public interest"); Getty Oil Co. v. Clark, 614 F. Supp. 904, 915–16 (D. Wyo. 1985) (concluding that enactment of statutes such as NEPA gives agency broad discretion to rely on environmental grounds in suspending leases under MLA); BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, IB 2007-119, EXISTING SURFACE MANAGEMENT AUTHORITY FOR OIL AND GAS LEASES att. at 1 (2007) (stating that the MLA "authorizes the Secretary to require environmental protection determined necessary or needful"); Kaiser & Hardt, *supra* note 81, § 19.03[1] (stating that broad MLA language granting agency discretion includes the power to impose conditions on oil and gas activities found necessary or advisable to protect the environment"); Michael D. Axline, *supra* note 83, at 536–38, 548–49 (arguing that BLM and the Forest Service can, under the MLA, require the imposition of lease terms that protect the environment); Validity of Regulations Relating to Oil and Gas Leases on Wildlife Refuges, Game Range and Coordination Lands, 65 Interior Dec. 305, 308–10 (1958) (concluding that Interior Department can impose conditions on leases in wildlife refuges to protect the refuges). For a broader discussion of executive-power discretion to manage property in the context of Article IV and the Property Clause, see generally Biber, *supra* note 64.

102. Boesche v. Udall, 373 U.S. 472, 477–78 (1963) ("Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary. . . . In short, a mineral lease does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals."); *see also* Udall v. Tallman, 380 U.S. 1, 19 (1965) ("An oil and gas lease does not vest title to the lands in the lessee."); Abbott v. BP Expl. & Prod. Inc., 781 F. Supp. 2d 453, 463–64 (S.D. Tex. 2011); BUREAU OF LAND MGMT., *supra* note 101, at 1 (citing the language in *Boesche*); Kaiser & Hardt, *supra* note 81, § 19.03[4]. *But see* Mafrige v. United States, 893 F. Supp. 691, 698 (S.D. Tex. 1995) (noting limited nature of property right in an oil and gas lease, but holding it was enough of a property right to support a lawsuit under the Quiet Title Act), *aff'd per curiam*, 189 F.3d 466 (5th Cir. 1999). Based on the limited nature of the lessee's property right and ongoing supervision of that right by the federal government as lessor, we are skeptical of arguments, based on nineteenth-century judicial decisions interpreting public-lands disposal statutes, where courts prohibited agencies from canceling property interests issued by the federal government to private parties once title had passed to private ownership. *See, e.g.*, *Tallman*, 380 U.S. at 19–20 (holding that disposition only covered transfer of title to land, and therefore does not cover mineral leasing because it is not a transfer of title); Moore v. Robbins, 96 U.S. 530 (1877); United States v. Stone, 69 U.S. 525 (1864).

An independent source for BLM to cancel leases might be found in FLPMA.[103] FLPMA requires BLM to "take any action necessary to prevent unnecessary or undue degradation of the [public] lands."[104] While the meaning of the "unnecessary or undue degradation" ("UUD") standard has been subject to great debate ever since the enactment of FLPMA, the only judicial opinion interpreting the provision held that UUD included "substantial and irreparable harm" of the public lands.[105] BLM could plausibly conclude that the combustion of fossil fuels extracted from the public lands was contributing to climate change that was causing "unnecessary or undue degradation" of the public lands, and that therefore the BLM was required to cancel existing leases. While FLPMA does require that all agency actions pursuant to the Act "shall be subject to valid existing rights," both the agency's interpretation of that term and the relevant legislative history indicate that this provision was limited to rights predating the enactment of FLPMA in 1976.[106]

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103. While the Public Land Law Review Commission called for Congress to restrict the ability of land management agencies to unilaterally change mineral lease terms—in response to what it called the "considerable authority [of agencies] through regulation and practice to modify operating conditions unilaterally"—Congress did not impose any such changes in FLPMA. PUB. LAND LAW REVIEW COMM'N, *supra* note 72, at 133.

104. 43 U.S.C. § 1732(b).

105. *See* Mineral Policy Ctr. v. Norton, 292 F. Supp. 2d 30, 35 (D.D.C. 2003).

106. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 701(h), 90 Stat. 2743, 2786; *see* Sierra Club v. Hodel, 848 F.2d 1068, 1078, 1081, 1083 (10th Cir. 1988) (valid existing rights savings clause protects right-of-way established before FLPMA but does not allow for its expansion in scope beyond what was already granted), *overruled on other grounds by* Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970, 973 (10th Cir. 1992); Colorado Envtl. Coal. v. Bureau of Land Mgmt., 932 F. Supp. 1247, 1249 (D. Colo. 1996) (valid existing rights apply to pre-FLPMA rights); Colo. Open Space Council, 73 IBLA 226, 229–30 (1983); Interpretation of Section 603 of the Federal Land Policy and Management Act of 1976—Bureau of Land Management (BLM) Wilderness Study, 86 Interior Dec. 89, 113–14 (1979) (agency interpretation of valid existing rights restriction as only applying to pre-FLPMA rights, because post-FLPMA rights would be subject to FLPMA regulatory provisions in any case); 122 CONG. REC. 4052 (1976) (Senators proposing separate "valid existing rights" proviso for provisions repealing prior public lands disposal statutes in order to emphasize the rights obtained before FLPMA's enactment would be protected); S. COMM. ON ENERGY AND NAT. RES., 94TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, at 1727–32 (Comm. Print 1978) (floor debate during Senate enactment of predecessor of FLPMA, with relevant savings clause language, indicating that limits on Secretary's power to affect "valid existing rights" would protect rights in existence prior to FLPMA); Kaiser & Hardt, *supra* note 81, § 19.04[2][b] (stating that this provision prevents BLM from "restrict[ing] surface activities on oil and gas leases issued before [the enactment of FLPMA] to the point that the lessee's rights under its lease to explore for and develop oil and gas are impaired"). *But see* Barlow & Haun, Inc. v. United States, 118 Fed. Cl. 597, 609 (2014) (noting that "without detailed analysis," BLM rejected option of canceling leases because it was required to protect "valid existing rights"), *aff'd*, 805 F.3d 1049 (Fed. Cir. 2015); Pamela A. Roy & Craig R. Carver, *Section 603 of the Federal Land Policy and Management Act: An Analysis of the BLM's Wilderness Study Process*, 21 ARIZ. L. REV. 373, 389–91 (1979) (arguing for broad interpretation of the savings clause). The distinction between pre- and post-FLPMA rights for purposes of the savings clause makes sense because any rights obtained post-FLPMA (including leases) would

To summarize, under the MLA we believe there is a good argument that the agency has the inherent authority to terminate leases while paying full contract damages to the lessees.[107] That power in part draws on the Secretary of the Interior's powers to implement the public-lands laws; on the Supreme Court's recognition of the power of the executive branch to manage government contracts; and on the distinction between forfeiting or canceling leases without necessarily paying compensation (which must follow the explicit MLA provisions) and terminating leases while paying full compensation. We also emphasize that this argument is not a slam-dunk—there are strong counterarguments in the legislative history, the caselaw, and the structure of the MLA.

B. Authority to Cancel Leases Pursuant to the Lease Terms

Looking at the relevant statutes, regulations, and standard lease terms,[108] the agency likely has authority to cancel leases because of climate change impacts. Because cancellation would be pursuant to the terms of the lease, no compensation to lessees would be owed.[109] We begin with an assessment of oil and gas leases and then review coal leases.

1. Oil and Gas Leases

Under the MLA, lessees must comply with "any of the provisions of [the MLA], of the lease, or of the general regulations promulgated under [the MLA] and in force at the date of the lease."[110] The implementing regulations also state that a lessee's rights under a lease are subject to:

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necessarily have been limited by the power of the government to regulate pursuant to the UUD provision and other FLPMA provisions. *See* Interpretation of Section 603 of the Federal Land Policy and Management Act of 1976—Bureau of Land Management (BLM) Wilderness Study, 86 Interior Dec. 89, 113–14 (1979) (noting this argument in the context of separate FLPMA requirement that BLM not impair potential wilderness areas).

Another argument against allowing FLPMA UUD authority to justify cancellation of existing leases is that FLPMA, as noted above, was not intended to "repeal any existing law by implication." FLPMA, § 701(f), 90 Stat. at 2786. However, this provision might be understood as a grant of additional authority and responsibility to the agency, rather than repealing any provision of the MLA.

107. We emphasize that Congress through statute could eliminate this authority, but no such explicit prohibition on the agency's ability to breach leases exists in the MLA.

108. For leases, we draw on the most recent standard lease terms used by BLM for oil and gas and coal leases. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, FORM 3100-11, OFFER TO LEASE AND LEASE FOR OIL AND GAS (2008); *see also* 43 C.F.R. § 3101.1-1 (2019) (requiring leases to be issued "only on the standard form approved by the Director"). Of course, lease terms may have changed over the years, and older leases may be issued under prior statutory or regulatory authority that sets different standards for cancellation. Accordingly, our assessment only applies to a subset (although likely a substantial subset) of existing leases.

109. In this Section, we follow the statute and regulations and use "cancellation" to mean "forfeiture," or termination of a lease because of violation of the lease terms, such that compensation to the lessee is not owed. *See supra* note 51.

110. 30 U.S.C. § 188(a). Violations of these terms allow the Secretary to cancel or forfeit the lease, although judicial proceedings are required for leases that include "a well

> stipulations attached to the lease; restrictions deriving from specific, nondiscretionary statutes; and such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed. To the extent consistent with lease rights granted, such reasonable measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures.[111]

Of the three main restrictions in the regulations, only "reasonable measures . . . to minimize adverse impacts to other resource values, land uses[,] or users" must be "consistent with lease rights granted."[112] Stipulations attached to the lease would obviously be consistent with the lease rights in any case. Accordingly, "restrictions deriving from specific, nondiscretionary statutes" would warrant restriction or presumably even cancellation of the lease even if they have not been formally incorporated into the lease.[113] The standard form oil and gas lease contains similar language:

> Rights granted are subject to applicable laws, the terms, conditions, and attached stipulations of this lease, the Secretary of the Interior's regulations and formal orders in effect as of lease issuance, and to regulations and formal orders hereafter promulgated when not inconsistent with lease rights granted or specific provisions of this lease.[114]

The three categories in the regulations appear to be replicated in the lease terms: "applicable laws" is at least as broad as the regulation's language of "restrictions deriving from specific, nondiscretionary statutes."[115] Both the lease and

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capable of production" or that are part of a unit plan or communization agreement that has "a well capable of production." *Id.* § 188(a)–(b).

111. 43 C.F.R. § 3101.1-2.

112. *See id.* This plausibly means that these reasonable measures cannot make exploitation of the resource infeasible.

113. *See id.*

114. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, FORM 3100-11, OFFER TO LEASE AND LEASE FOR OIL AND GAS (2008).

115. *See* 43 C.F.R. § 3101.1-2; BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, FORM 3100-11, OFFER TO LEASE AND LEASE FOR OIL AND GAS (2008). To the extent that the regulatory language is narrower than the lease terms, an assessment of the language that is most favorable to the lessee would only track the regulatory language. We apply such an assessment in our analysis.

Neither the lease form nor the regulations explicitly state whether statutes that were enacted subsequent to the lease issuance serve as restrictions on lessee rights. We believe the better argument is that subsequently enacted statutes would restrict lessee rights. First, both the regulations and the lease terms differentiate between current and future regulatory restrictions, but not between current and future statutory restrictions. In contrast, where the Supreme Court has held that offshore oil and gas lease terms do not incorporate subsequently enacted statutes, the Court relied on lease language that both indicated that subsequently promulgated regulations issued pursuant to OCSLA and related statutes would not restrict the regulations recognize that lease stipulations constrain lessee rights. And subsequent regulations and formal orders can only constrain lessee rights when they are “not inconsistent” with lease provisions.[116]

Two “specific, nondiscretionary statutes” are plausible candidates for restricting or prohibiting fossil-fuel production on oil and gas leases: the ESA and FLPMA.[117]

Section 7 of the ESA prevents federal agencies from conducting any actions that would “jeopardize the continued existence” of a species listed for protection under the Act, unless an exemption is issued by a cabinet-level Endangered Species Committee.[118] Agencies must consult with the wildlife agencies (the U.S. Fish and Wildlife Service (“FWS”) or the National Oceanic and Atmospheric Administration (“NOAA”)) about proposed actions to determine whether jeopardy will occur;[119] the consulting agencies can provide a biological opinion to the action agency indicating whether the proposed action will cause jeopardy or whether reasonable and prudent alternatives exist that will allow the agency action to proceed without causing jeopardy.[120] An agency action includes federal permission for a private party to undertake an action; accordingly, the issuance and administration of oil and gas leases would constitute agency action

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lessee rights and lumped “all other applicable statutes and regulations” into a separate category. *See* Mobil Oil Expl. & Producing Se., Inc. v. United States, 530 U.S. 604, 615–16 (2000) (internal quotation marks omitted).

In any case, the issue is only relevant for leases issued before the enactment of the primary statutes that we are focused on—the ESA (enacted in 1973 and subsequently amended through the late 1980s) and FLPMA (enacted in 1976). Again, many existing leases will have been entered into subsequent to these statutes.

116. *See* BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, FORM 3100-11, OFFER TO LEASE AND LEASE FOR OIL AND GAS (2008). The lease makes existing regulations and orders restrictive of lessee rights; there is no contrary language in the regulation.

117. *See* BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, IB 2007-119, EXISTING SURFACE MANAGEMENT AUTHORITY FOR OIL AND GAS LEASES att. 1 at 2–3 (2007) (noting that both FLPMA and the ESA, among other statutes, might be the basis for restricting oil and gas lease operations).

118. 16 U.S.C. § 1536(a)(2). The Committee has only issued one exemption in its almost forty-year history. *See* DALE GOBLE & ERIC FREYFOGLE, WILDLIFE LAW 1265–66 (2d ed. 2010).

119. 16 U.S.C. § 1536(a)(2).

120. *Id.* § 1536(b).

covered by § 7.[121] The § 7 consultation process and no-jeopardy standard is a nondiscretionary one.[122]

Section 9 of the ESA prohibits anyone (including federal agencies) from "taking" any individual member of a listed species.[123] "Take" is defined in the statute to include killing or harming members of listed species; harm, in turn, is defined in the implementing regulations to include actions that degrade habitat in a manner that harms listed species.[124] The Supreme Court, in upholding this latter regulation, emphasized that the causal link between an action and the harm to a member of listed species must meet proximate-cause standards in order to constitute a take.[125] Federal agencies may get an incidental take statement exempting their actions from the § 9 "take" prohibition if they proceed through the § 7 consultation process.[126]

Both §§ 7 and 9 of the ESA might be implicated by greenhouse gas emissions from the combustion of fossil fuels produced on federal oil and gas leases. There are a number of species that have been listed under the ESA because of the threat of climate change;[127] many more species that were listed on other grounds will presumably be adversely affected by climate change. FWS and NOAA's current positions are that greenhouse gas emissions from an individual source are not sufficiently traceable to the harm to species to trigger § 7 consultation duties for federal actions that produce greenhouse gas emissions.[128] However, the agencies

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121. Section 7 consultation requirements do not apply where an agency has no discretion about whether to take an action. Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 669 (2007). However, because the lease terms specifically provide that statutes such as the ESA restrict lessee rights, and because the MLA gives the Secretary the authority to cancel or forfeit leases for violation of lease terms, including restrictions of lessee rights such as the ESA, the agency has discretion under the lease and the MLA, and thus ESA consultation requirements would apply.

122. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 198 (1978); Thomas v. Peterson, 753 F.2d 754, 763–64 (9th Cir. 1985); *see also* Wyo. Outdoor Council v. Bosworth, 284 F. Supp. 2d. 81, 90–93 (D.D.C. 2003) (holding that the ESA is "nondiscretionary" for purposes of oil and gas leases); Kaiser & Hardt, *supra* note 81, § 19.04[3] (stating that ESA § 7 prohibition on agency action causing jeopardy would be a nondiscretionary statutory provision under lease terms).

123. 16 U.S.C. § 1538(a)(1)(B).

124. 50 C.F.R. § 17.3 (2019). These regulations were promulgated in 1981, Endangered and Threatened Wildlife and Plants; Final Redefinition of "Harm," 46 Fed. Reg. 54,748 (Nov. 4, 1981) (codified at 50 C.F.R. pt. 17), so even if the lease only incorporates preexisting regulations, the ESA regulations defining "take" would apply to many current leases.

125. Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687 (1995).

126. 16 U.S.C. § 1536(b)(3).

127. *See, e.g.*, Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (Ursus maritimus) Throughout Its Range, 73 Fed. Reg. 28,212 (May 15, 2008) (codified at 50 C.F.R. pt. 17) [hereinafter Determination of Threatened Status for the Polar Bear] (listing polar bear).

128. *See id.* at 28,300 ("GHGs that are projected to be emitted from a facility would not, in and of themselves, trigger formal section 7 consultation for a particular licensure action unless it is established that such emissions constitute an 'indirect effect' of the proposed

could change their position on this point, and any such conclusion would likely receive substantial deference from a reviewing court, as would an FWS or NOAA conclusion that greenhouse gas emissions from fossil-fuel sources would jeopardize the existence of listed species. Whether the greenhouse gas emissions from a particular oil and gas lease would constitute proximate cause of the harm to a member of a listed species such that § 9 "take" prohibitions would be triggered is a more difficult question,[129] in part because courts may be less likely to defer to agency conclusions on this point.[130] However, again, this is a plausible outcome, particularly if the agencies promulgate a regulation or issue some other definitive interpretation of the ESA that reaches this result.[131]

Of course, there are a range of challenges for agencies that choose to rely on the ESA to revoke fossil-fuel leases. Most importantly, the collateral effects of agency conclusions that the greenhouse gas emissions from fossil-fuel leases violate § 7 or 9 would be substantial, as those conclusions might implicate a wide range of other federal actions, including environmental permitting of oil and gas refineries. On the other hand, at least for the largest leases (especially coal leases), the significant magnitude of the emissions might allow the agency to distinguish leases from most or almost all other federal actions in terms of the sheer amount of emissions and their impact on climate change.[132]

The other primary "specific, nondiscretionary" statute is FLPMA, which imposes a mandatory duty on the BLM to "prevent unnecessary or undue

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action."). Recent revisions to the regulations implementing § 7 may make it more difficult to address climate change through § 7. *See* Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019) (codified at 50 C.F.R. pt. 402); *see also* Eric Biber, *Analyzing the Revised ESA Regulations (Part IV)*, LEGALPLANET (Nov. 24, 2019), https://legal-planet.org/2019/11/24/analyzing-the-revised-esa-regulations-part-iv/ (providing analysis of the implications of these changes for consideration of climate change under § 7).

129. *See* Matthew Gerhart, *Climate Change and the Endangered Species Act: The Difficulty of Proving Causation*, 36 ECOLOGY L.Q. 167 (2009).

130. *See* Ariz. Cattle Growers' Assoc. v. U.S. Fish & Wildlife, 273 F.3d 1229 (9th Cir. 2001) (carefully reviewing and striking down findings of take by agency related to grazing on cattle allotments).

131. The agencies have exempted from the § 9 take prohibition all greenhouse gas emissions from outside the range of the polar bear, the most prominent species listed under the ESA because of climate change. *See* Ctr. for Biological Diversity v. Salazar, 818 F. Supp. 2d 214 (D.D.C. 2011). However, this rule would not apply to other listed species who face negative impacts from climate change; in any case, the agencies could repeal the rule with respect to polar bears.

132. Another possible challenge to relying on the ESA to cancel leases would be that the ESA only applies where there is an agency action that triggers consultation under § 7, *see* Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1020 (9th Cir. 2012), and the mere existence of a lease may not be an action. Section 7 would nonetheless be triggered by subsequent development actions on the leases, such as applications by lessees for permission to drill on the lease (whether for exploration or production) and could be relied on to deny those applications without payment of compensation given the terms of the lease. In addition, the agency regulations implementing § 9 allow for ESA liability for inaction in certain circumstances, although the causation issues identified above would apply equally here as well.

degradation of the [public] lands."[133] As noted above, it is quite plausible that the BLM could conclude that emissions of greenhouse gases from the combustion of fossil fuels produced by leases on federal lands causes "unnecessary or undue degradation" of public lands by contributing to climate change. That would trigger a nondiscretionary duty to stop that degradation by canceling the leases.[134]

One important argument against the application of the ESA (and presumably also FLPMA) to justify the cancellation of existing leases is caselaw that required the DOI to conduct a full review under NEPA of the potential environmental impacts of leases before issuance, on the grounds that after issuance the agency would not have the ability to prevent all surface-disturbing lease operations in order to protect the environment.[135] The argument would be that these cases have established that lessees have an absolute right to develop the leases and therefore that they cannot be canceled for climate change reasons consistent with the lease terms.[136]

There is some language in these cases that would support such an argument.[137] But we also believe there are important reasons why a court today would not read these cases in that manner. First, not all of the caselaw is consistent with this reading; the Tenth Circuit has concluded that oil and gas leases impose "mitigating . . . restrictions requiring further environmental appraisal before any surface disturbing activities commence" and that there is "continuing supervision of the federal agencies involved over future [lease] activities."[138] Moreover, leases

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133. 43 U.S.C. § 1732(b).

134. As noted above, the savings clause of FLPMA that prohibits the Secretary from infringing on "valid existing rights" may only apply to rights in existence as of the enactment of FLPMA. *See supra* note 90. In any case, since the lease specifically incorporates restrictions from specific, nondiscretionary statutes, and since that would include FLPMA's UUD standard, imposing the FLPMA UUD standard to restrict lease operations would not violate "valid existing rights."

135. *See* Conner v. Burford, 848 F.2d 1441, 1448–51 (9th Cir. 1988); Sierra Club v. Peterson, 717 F.2d 1409, 1411, 1414–15 (D.C. Cir. 1983); *see also* Bob Marshall All. v. Hodel, 852 F.2d 1223, 1227–28 (9th Cir. 1988) (applying *Conner*).

136. If the lessee has such a right to develop, § 7 of the ESA would not apply because it does not apply where an agency has no discretion in the action it is proposing to take. *See* Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644 (2007).

137. *See Conner*, 848 F.2d at 1444 (stating that leases "do not authorize the government to preclude [surface-disturbing] activities altogether"); *see also id.* at 1450 ("[I]t would clearly be inconsistent with the purpose of the leases if the government prevented all drilling, roadbuilding, pipe-laying, and other lease-related surface-disturbing activities."); *Peterson*, 717 F.2d at 1411 (regarding relevant leases, "the Department *cannot* deny the permit to drill; it can only impose 'reasonable' conditions which are designed to mitigate the environmental impacts of the drilling operations"); *id.* at 1414 n.7 ("We conclude from the language of the lease stipulations . . . that once the land is leased the Secretary cannot *preclude* surface disturbing activities . . . ."); San Luis Valley Ecosystem Council v. U.S. Bureau of Land Mgmt., No. 14–cv–00680–RM, 2015 WL 3826644, at *7 (D. Colo. June 19, 2015) (reaching similar conclusion).

138. *See* Park City Res. Council, Inc. v. U.S. Dep't of Agric., 817 F.2d 609, 624 (10th Cir. 1987) (upholding agency finding of no significant impact under NEPA and issuance of an environmental assessment, when issuing an oil and gas lease), *overruled on other*

issued after the enactment of the Federal Oil and Gas Leasing Reform Act in 1987 might differ in relevant ways from post-1987 leases, granting more powers to the agencies to restrict development.[139]

Second, and more importantly, the Ninth and D.C. Circuit cases can be understood as reaching the conclusion they did on the basis that the relevant leases did not give the agency the absolute right to prevent surface-disturbing activities no matter what kind of environmental impacts were at issue. In other words, the concern was not that the agency might not have the power in some circumstances to prevent all surface-disturbing activities, but that the agency did not have the power to prevent any and all surface-disturbing activities no matter what kind of environmental impacts might be at issue, even if the agency could constrain all surface-disturbing impacts under some environmental-law statutes. This reading of the cases is consistent with the universal nature of NEPA, which covers all relevant environmental impacts, not just those regulated under particular environmental statutes. An agency that only retains the power to protect against certain environmental impacts based on certain environmental statutes does not have the capacity to comply with NEPA's mandate to avoid an "irreversible and irretrievable commitment of resources" before the agency analyzes the environmental impacts of the proposed action.[140] Language in *Conner v. Burford* supports this reading of these cases, with the court noting that under the ESA the agency might be able to prevent all surface-disturbing activities, but "[b]ecause that authority does not extend to the myriad of significant environmental effects outside the narrow issue of species survival," that authority did not change the court's NEPA analysis.[141] In contrast, we are analyzing the possibility of canceling leases based on a particular environmental issue (climate change impacts) based on specific environmental statutes (the ESA and FLPMA's UUD mandate).[142]

More broadly, lessees might argue that while NEPA and the ESA are preexisting statutes that constrain lessee activity and are part of the terms of the leases, new applications or interpretations of these statutes in the context of climate

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grounds by Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970, 973 (10th Cir. 1992); Wyo. Outdoor Council v. Bosworth, 284 F. Supp. 2d 81, 90–93 (D.D.C. 2003) (dismissing environmentalist NEPA challenge to issuance of oil and gas leases as unripe on grounds that agency retained authority to protect environment from leasing activities, even after issuing lease: "while the lessee clearly has a legal right to apply for permission to conduct oil and gas operations, his right to development of the lease parcel is far from certain").

139. *See* Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, §5101, 10 Stat. 1330, 1330-256 (codified at 30 U.S.C. §§ 181–196); *Bosworth*, 284 F. Supp. 2d at 90–93 (noting possible difference between current leases and leases at issue in *Peterson* and *Conner*).

140. *Conner*, 848 F.2d at 1446; *see also id.* (stating that agency must do NEPA analysis when it can "retain[] a maximum range of options" (quoting *Peterson*, 717 F.2d at 1414)).

141. *Id.* at 1449 n.18.

142. The UUD mandate of FLPMA is fairly broad, as it covers "unnecessary and undue degradation." However, it is plausible that the UUD standard sets a higher bar than a "significant environmental impact" under NEPA that triggers the obligation to prepare an EIS.

change are improper modifications of the lease terms. We have not found caselaw on point on these questions—the leading Supreme Court case, *Mobil Oil Exploration & Producing Southeast v. United States*, involved subsequent legislation by Congress.[143] A key question, therefore, will be the extent to which courts might interpret leases as placing the risk of changes in the interpretation of laws on the government or lessees.

2. Coal Leases

The analysis for coal leases is similar to that for oil and gas leases. The statutory provisions are the same, and the regulations allow for cancellation where a lessee "[f]ails to comply with the provisions of the [MLA]" or "fails to comply with any applicable general regulations" or "defaults in the performance of any of the terms, covenants, and stipulations of the lease."[144] The standard lease terms require the lessee to "carry on all operations . . . having due regard for the prevention of . . . degradation to any land, air, water, cultural, biological, visual, and other resources."[145] The lease is also "subject to the Clean Water Act, the Clean Air Act, and to all other applicable laws pertaining to exploration activities, mining operations, and reclamation, including the Surface Mining Control and Reclamation Act of 1977."[146] These provisions are consistent with those in the oil and gas leases, and indeed are broader—it seems very likely these provisions would (as with the oil and gas leases) include restrictions on leasing activities that violate the ESA and FLPMA.

3. Additional Issues

The MLA does require that where leases are canceled, but there are still valid interests associated with the lease, then the agency is required to offer those interests through competitive bidding.[147] It is possible that this could require the

143. Mobil Oil Expl. & Producing Se., Inc. v United States, 530 U.S. 604 (2000). In *Mobil Oil*, the Court held that enactment by Congress of subsequent legislation altering the provisions of leases and making their completion impossible was a breach of the lease. *Id.* at 620–21.

144. 43 C.F.R. § 3452.2-1(a) (2019).

145. *See* BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, FORM 3400-12, COAL LEASE § 7 (2018).

146. *See id.* § 14 (internal citations omitted).

147. 30 U.S.C. § 184(h)(2). Examples of this kind of situation include an option to buy the lease or a future interest in the lease, or where only part of the lease is canceled. *See, e.g.*, Home Petrol. Corp., 54 Interior Dec. 194 (IBLA 1981) (discussing dispute over cancellation of federal oil and gas leases where prior lessees had retained royalty interests in leases they had assigned to other parties).

The agency also has regulations that require it to put out for competitive leasing any lands that were covered by a canceled lease. 43 C.F.R. § 3120.1-1(a) (stating that "[l]ands in oil and gas leases that have terminated, expired, been cancelled or relinquished . . . shall be offered for competitive bidding"). This regulation was added by the agency to facilitate the identification of lands that would be suitable for competitive leasing; presumably, lands that had already been leased would have sufficient industry interest to be worth the time and resources of running an auction. *See* Thomas L. Sansonetti & William R. Murray, *A Primer on the Federal Onshore Oil and Gas Leasing Reform Act of 1987 and Its* agency to recycle canceled leases on some occasions, most likely where some future interest or option is connected to a current lease. However, this provision of the MLA is in tension with the general discretionary authority that the agency has to decide whether to lease under the MLA, and in any case the agency might be able to impose stringent conditions on the newly offered leases.[148]

We also believe that it is unlikely that the agency could easily change the lease terms for existing leases to eliminate its power to cancel them under the provisions we have highlighted. Such revisions would, at the least, trigger a requirement to comply with the ESA for agency consultation.[149] They might also be void because the agency would not have the power to issue leases that would eliminate its authority under the ESA or FLPMA to prevent UUD. In addition, FLPMA requires the Secretary to impose in all authorizations to use public lands a revocation provision for violation of "Acts applicable to the public lands"[150]—leases without such provisions would violate FLPMA. Finally, the MLA requires that various environmental protections be included in leases.[151]

Regulations, 25 LAND & WATER L. REV. 375, 389–90 (1990). The agency could amend this regulation if it chose.

148. To the extent that these new conditions constitute an infringement on the rights of the future interests associated with the rebid leases, compensation might be owed to those rights holders.

149. Any changes would also require changing the relevant agency regulations.

150. 43 U.S.C. § 1732(c).

151. Section 226 requires the Secretary of the Interior to "regulate all surface-disturbing activities conducted pursuant to any lease issued under" the MLA, and to "determine reclamation and other actions as required in the interest of conservation of surface resources." 30 U.S.C. § 226(g).

One additional pathway for terminating existing onshore oil and gas leases is based on the requirement in the BLM Lease that lessees "exercise reasonable diligence in developing and producing" resources from leases. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, FORM 3100-11, OFFER TO LEASE AND LEASE FOR OIL AND GAS § 4, at 3 (2008); *see also* 30 U.S.C. § 187 (requiring that all federal leases "contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property"). The requirement to use "reasonable diligence" in development and production of leases parallels a doctrine applied by the courts in the context of private oil and gas leases—implied covenants that require lessees to act as reasonable and prudent operators in the development and exploitation of leases. John Burritt McArthur, *Stewarding Public Oil, Gas, and Hard Minerals: The Express and Implied Development Rights that Protect Public Resources*, 9 TEX. J. OIL GAS & ENERGY L. 215, 225 (2013). These implied covenants have been interpreted to support the cancellation of portions of leases that have not been adequately developed or explored by lessees, particularly where courts conclude that the lessee is holding the lease for speculative purposes. *See* Sauder v. Mid-Continent Petrol. Corp., 292 U.S. 272, 280–81 (1934); Gary B. Conine, *Speculation, Prudent Operation, and the Economics of Oil and Gas Law*, 33 WASHBURN L.J. 670, 672–73 (1994); Keith B. Hall, *The Continued Role of Implied Covenants in Developing Leased Lands*, 49 WASHBURN L.J. 313, 325–27 (2010).

IV. OFFSHORE LEASING

The United States has jurisdiction over the minerals and resources of the seabed out to 200 nautical miles from shore.[152] Jurisdiction within that territory is divided between the federal government and the states. As mentioned previously, in 1953, Congress passed the Submerged Lands Act and granted states control of coastal waters out to 3 (or, in some cases, 9) nautical miles from shore.[153] The area from the boundary of state jurisdiction out to 200 nautical miles from shore is referred to as the outer continental shelf ("OCS"). Later that same year, Congress passed the OCSLA, establishing a framework for the leasing of the federal offshore submerged lands for mineral development.[154]

Offshore lands provide a significant portion of oil and gas production in the United States. The percentage has declined in recent years as onshore production has increased, but in 2019, total crude-oil production from the Gulf of Mexico reached a per-day, all-time high and accounted for 15% of total domestic production.[155] As of the writing of this Article, there are 2,597 active leases of offshore federal lands for oil and gas, representing 13.8 million acres.[156]

Table 1. Current OCS Leasing[157]

	Blocks/Leases	Acreage	% of Total Acreage
Producing Leases	725	3,616,192	1%
Nonproducing Leases	1,872	10,397,283	3%
Total Active Leases	2,597	13,803,197	4%
Total Blocks	58,319	318,792,157	100%

152. President Truman first asserted U.S. jurisdiction over the natural resources of the subsoil and seabed of the continental shelf via proclamation shortly after the end of World War II. Proclamation No. 2667, 10 Fed. Reg. 12,305 (Sept. 28, 1945). In accordance with but not pursuant to the international-zones regime established by the United Nations Convention on the Law of the Sea in 1982, President Reagan officially declared a 200-nautical-mile Exclusive Economic Zone in 1983. Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983). The proclamation asserted the United States' "sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters." *Id.*

153. 43 U.S.C. §§ 1301–1315.

154. *Id.* §§ 1331–1356b.

155. *Short-Term Energy Outlook*, U.S. ENERGY INFO. ADMIN., tbl.4a (Mar. 4, 2021), https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf.

156. *Combined Leasing Report*, BUREAU OF OCEAN ENERGY MGMT., https://www.boem.gov/sites/default/files/documents//Combined%20Leasing%20Report%20May%202020.pdf (last updated May 1, 2020).

157. *Id.*

Today, following multiple amendments and agency reorganizations, OCSLA remains the primary instrument for managing offshore federal oil and gas operations.[158] It sets up a multi-phase process through which the Secretary of the Interior may determine eligible lands for leasing and then grant leases to the highest qualified bidder. First, the DOI develops a five-year program for oil and gas development that outlines eligible lease sites and establishes a schedule for lease sales.[159] After preparation of an environmental impact statement, the DOI solicits sealed, competitive lease bids.

After the lease sale, the DOI conducts a fair market value analysis and then issues the lease. The default term for a lease is five years unless the lease is in "unusually deep water or involves other unusually adverse conditions" necessitating a longer duration of up to ten years. The lease automatically expires at the end of the initial period unless the lessee is producing oil and gas in paying quantities, engaged in approved drilling or well reworking, or similarly active.[160]

After obtaining a lease, the leaseholders must develop and receive permits first for exploration plans for any geological, geophysical, and other exploratory activities, and then for oil and gas development and production plans.[161] The lease will be forfeited if a development and production plan is not submitted within five years of lease issuance.[162]

Oversight for these activities was originally concentrated in the Minerals Management Service ("MMS"). Following the 2010 Deepwater Horizon disaster, however, Secretary of the Interior Ken Salazar reorganized MMS into three separate entities: the BOEM, which oversees permitting and other activities; the BSEE,

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158. The most significant set of amendments passed in 1978, following several years of bipartisan legislative effort. *See* U.S. COMM'N ON OCEAN POLICY, *supra* note 18, at 52 (noting that the 1978 amendments were "designed to encourage leasing subject to new planning requirements, more rigorous environmental standards, and measures to ensure that the views of state and local governments were taken into account").

159. 43 U.S.C. § 1344. The 2017–2022 leasing program (National OCS Program) was finalized in January 2017. A few months later in May 2017, following the issuance of Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (Apr. 28, 2017), the Interior Secretary issued an order directing the agency to develop a revised National OCS Program. U.S. DEP'T OF THE INTERIOR, ORDER NO. 3350, AMERICA-FIRST OFFSHORE ENERGY STRATEGY (2017). The 2019–2024 draft proposed program was issued in January 2018. As of the writing of this Article, it has not been finalized, and the agency continues to operate under the existing program.

160. 43 U.S.C. §§ 1337, 1346; 30 C.F.R. §§ 556.600–.601 (2019) (specifying default lease terms); *id.* § 556.1100 (outlining extension terms); *id.* § 250.180 (delineating what a lessee must do to keep a lease term in effect).

161. 43 U.S.C. § 1340 (exploration plans); *id.* § 1351 (development and production plans).

162. *Id.* § 1351(h).

which enforces lessee obligations; and the ONRR, which oversees collection of royalties and other revenue.[163]

A. Environmental Protection in OCSLA

The following Section examines if and how climate change might serve as a basis for canceling an OCS oil and gas lease.[164] This begins with a review of how OCSLA's lease-cancellation provisions developed.

As enacted in 1953, OCSLA contained a simple and general cancellation provision that required the lessee to be at fault. Leases could be canceled if the lessee was guilty of fraud, misrepresentation, or failure to comply with a provision of OCSLA, pursuant regulations, or the lease agreement.[165]

In the wake of the Santa Barbara Oil Spill of 1969, which at the time was the largest offshore spill in U.S. history, there was both a move to strengthen offshore governance as well as a push to increase oil and gas development.[166] The early 1970s saw the creation of the federal coastal zone management program, which provided twin incentives in the form of funding and federal consistency review for states to implement coastal management programs.[167] At the same time, there was significant pressure to reduce dependency on foreign oil. On the heels of concerns triggered by the 1973 Middle East Oil Embargo, in January of 1974 President Nixon directed the Secretary of the Interior to increase OCS leasing to private industry from 3 to 10 million acres (almost equivalent to the entirety of OCS leasing to date).[168] The following year, President Ford's State of the Union address included energy goals of reducing oil imports "to end vulnerability to economic disruption by foreign suppliers by 1986, and to . . . have the ability to supply a significant share of the energy needs of the free world by the end of the century."[169]

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163. U.S. DEP'T OF THE INTERIOR, ORDER NO. 3299, ESTABLISHMENT OF THE BUREAU OF OFFSHORE ENERGY MANAGEMENT, THE BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, AND THE OFFICE OF NATURAL RESOURCES REVENUE (2010).

164. In this Section, we use "cancellation" because under OCSLA, that term can refer to termination of a lease with or without compensation, depending on the basis for cancellation. *See supra* note 51.

165. Outer Continental Shelf Lands Act, ch. 345, §§ 5(b), 8(i), 67 Stat. 462, 464, 469 (1953) (codified at 43 U.S.C. §§ 1331–1356b).

166. In the wake of the spill, the federal government sought to limit or delay some of the oil and gas lease development in the Santa Barbara Channel. The litigation over those efforts led to a series of lawsuits in which courts narrowly construed agency authority to cancel or suspend leases under OCSLA. We discussed the implications of those cases for broader agency authority to limit leases in the absence of express statutory authority. *See supra* Section III.A. The 1978 amendments to OCSLA, which gave the agency the explicit authority to cancel leases, can be understood in part as a response to that caselaw.

167. The National Oceanic and Atmospheric Administration ("NOAA") within the Department of Commerce administers the Coastal Management Program under authorities from the Coastal Zone Management Act of 1972. 16 U.S.C. §§ 1451–1466. Today, 34 of the 35 eligible coastal states have active, federally approved coastal management programs (Alaska is the exception, as the state-authorizing legislation provided for a sunset in 2012 and the timeline was not extended).

168. H.R. REP. NO. 95-590, at 100 (1977).

169. *Id.* at 76–82.

During the same period, however, there was increasing awareness of the risks associated with offshore development. A series of oil spills followed in the next two years, including the *Argo Merchant* running aground offshore Nantucket (December 1976, 7.6 million gallons heavy crude), the *Olympic Games* running aground in the Delaware River (December 1976, 133,500 gallons light crude), a Panamanian tanker splitting apart offshore of Wilmington (March 1977, 546,000 gallons aboard), and internationally, the Ekofisk Bravo Platform blowout in the North Sea (April 1977, 147,000 barrels—or 6.17 million gallons—creating a slick nearing 300 square miles).[170] According to a House committee report, the Bravo Platform blowout "demonstrated the environmental threat posed by offshore drilling, the inadequacy of offshore pollution-cleanup technology and the inadequacy of onsite safety equipment and regulation."[171] U.S. towns and counties and members of the public were voicing opposition to proposals to increase oil and gas leasing offshore of California (1.6 million acres) and New York (10 million acres), and environmental organizations and elected representatives unsuccessfully sought an injunction against lease sales offshore of California and the Gulf Coast.[172]

The sum of these tensions was the enactment of substantial amendments to OCSLA. Unlike the original passage of OCSLA in 1953, which went "almost unnoticed" and was "never hotly controversial in the national sense,"[173] the debate over amendments was substantial and extensive. The first proposals were put forward in fall 1974, and the final amendments were enacted in late 1978.[174] The intervening years saw in-depth debate and consideration within both houses of Congress.[175]

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170. *Id.* at 81–87, 107–10.

171. *Id.* at 87.

172. *Id.* at 76–82.

173. Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23, 23–24 (1953).

174. H.R. REP. NO. 95-590, at 74–89; Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 630.

175. Due to the multi-committee nature of the OCSLA provisions, in April 1975, the House established the Ad Hoc Select Committee on the Outer Continental Shelf. H.R. REP. NO. 95-590, at 96–100. Over the subsequent year the Committee met frequently, holding hearings in Washington, D.C., and in the field (they heard from over 300 witnesses), visiting sites, requesting reports, and engaging in a series of markup sessions (compiling a hearing record over 8,000 pages long). In April 1976, the House bill was reported out of committee. After conciliation with a Senate-passed bill, a conference report was filed in September 1976. A motion passed to delete or change two provisions, which ran out the clock on congressional action for the term.

The 1977 session started with a recognition of the need to take action and for reintroduction of the bill and reestablishment of the Ad Hoc Committee. Comments stressed the need for amendment, and the Office of Technology Assessment issued a report in November 1976 discussing the challenges of outer continental shelf development, with recommendations that paralleled the provisions of the proposed legislation. *Id.* at 106. After the bills were reintroduced in the House and Senate in early 1977, the Committee was reestablished and engaged in another series of hearings and sessions, resulting in a significantly amended version of the bill. *See* H.R. 1614, 95TH CONG. (1978). Early 1977 also

President Carter's signing statement declared that the amendments "provide a new and more effective balance" between concerns over oil and gas effects on coastal areas and the degree of energy industry competition for OCS leases by "reducing the great uncertainty associated with many aspects of the OCS program in recent years and by placing a proper emphasis on environmental protection and other important objectives."[176]

In short, the 1978 OCSLA amendments were the result of substantial deliberation, supported by an extensive legislative record. The Ad Hoc Select Committee on Outer Continental Shelf produced thousands of pages of hearing records, added to numerous markup session records, submitted reports, and more during the course of the development of the amendments. Significant consideration was given to the balance between environmental protection and the call for competitive development of offshore oil and gas.

One of the key amendments for this discussion was the revision of the suspension and cancellation provisions through significantly expanded authorities that include consideration of environmental protection.[177] As mentioned above, the 1953 version of OCSLA explicitly provided for lease cancellation only when the lessee failed to comply with the terms of the Act, regulations, or lease itself, or if

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saw statements of support from incoming Interior Secretary delegate Cecil Andrus, President-elect Jimmy Carter, and the Interior Department's Outer Continental Shelf Advisory Board. H.R. REP. NO. 95-590, at 99, 104.

A bill passed the Senate in July 1977, although it took another year for deliberation with the House to produce a conference report that passed both houses in August 1978. The amendments were enacted on September 18, 1978. Outer Continental Shelf Lands Act Amendments of 1978, 92 Stat. 630.

176. Presidential Statement on Signing the Outer Continental Shelf Lands Act Amendments of 1978, 2 PUB. PAPERS 1530 (Sept. 18, 1978). In 1990, the opening comments to a joint hearing offered this characterization of the updated cancellation provisions: "As envisioned by Congress and the Administration in 1978, the need to suspend or cancel a lease would result because some element of the balance between the advantages of oil and gas drilling and the possibility of environmental damage had changed." *Outer Continental Shelf Lease Cancellation and Compensation Process: Joint Hearing on H.R. 2945, H.R. 5317, and H.R. 4908 Before the Subcomms. on Oversight and Investigations, Oceanography and Great Lakes, and Panama Canal/Outer Cont'l Shelf of the H. Comm. on Merchant Marine and Fisheries*, 101st Cong. 1–2 (1990) (statement of Rep. Thomas M. Foglietta, Chairman, H. Comm. on Merchant Marine and Fisheries).

177. In a statement accompanying submission of the Committee Conference Report on Senate Bill 9, Senator Clifford Hansen of Wyoming stated:

> To find out what the Secretary absolutely needed to carry out a safe and efficient leasing and development program on the OCS, I wrote to the Secretary of Interior just before the Conference started asking him what provisions in either the House amendment or the Senate bill represented new authority, other than that contained in the 1953 OCS Act, which he needed to handle offshore operations problems. The response I received from the Secretary indicated that only three provisions were necessary. One was the authority for the Secretary to cancel a lease and to provide compensation to the lessee subsequent to cancellation . . . .

124 CONG. REC. 27,263 (1978).

the lease was obtained through fraud or misrepresentation.[178] Cancellation under this provision required wrongdoing on the part of the lessee. Via the 1978 Amendments, OCSLA adopted a framework that enables suspending or canceling leases in both at-fault and no-fault conditions.[179]

B. Authority to Suspend or Cancel a Lease Due to Risk of Environmental Harm

The Supreme Court has held that an OCSLA lease does not automatically and immediately convey all property rights. In *Secretary of Interior v. California*, the Court emphasized that each phase of development was separate and required separate authorization.[180] "A lessee does not . . . acquire an immediate or absolute right to explore for, develop, or produce oil or gas on the OCS; those activities require separate, subsequent federal authorization."[181] Rather than acquire a right to engage in these activities, the lessee receives "only a priority in submitting plans to conduct [them]."[182] It is debated whether this strengthens the ability to consider environmental factors, in recognizing that they apply at each stage, or weakens it, by diluting the importance of fully considering environmental harm at the lease sale stage.[183]

This is the logical result of the Secretary's authority to suspend or cancel leases. OCSLA directs the Secretary to establish regulations that allow for the

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178. Outer Continental Shelf Lands Act, ch. 345, §§ 5(b), 8(i), 67 Stat. 462, 464, 469 (1953) (codified at 43 U.S.C. §§ 1331–1356b).

179. The legislative history for OCSLA indicates that Congress believed that the Secretary of the Interior did not have authority to unilaterally cancel offshore oil and gas leases under current law—an understanding that would have been based on the recent Santa Barbara Channel litigation. As noted *supra* Section III.A, this legislative history might weigh in favor of the conclusion that the Secretary of the Interior lacks the authority to end onshore leases without explicit statutory authority. The 1953 OCSLA language is very similar to the relevant MLA language. On the other hand, the Supreme Court's 1963 decision in *Boesche v. Udall*, 373 U.S. 472 (1963), which identified an inherent power for the agency to cancel leases under the MLA, occurred ten years after the 1953 enactment of OCSLA. In addition, as we discussed earlier, there are good reasons to believe that the courts in the Santa Barbara Channel litigation misunderstood the Executive's power to end leases through breach of contract. Finally, congressional creation of an explicit cancellation process in the 1978 OCSLA amendments can be consistent with the existence of background principles of inherent executive powers to terminate leases. Congress has simply identified the process that the President must follow in exercising that power (and as noted above, Congress can eliminate that power).

180. 464 U.S. 312, 336 (1984).

181. *Id.* at 317.

182. *Id.* at 339; *see* Edward A. Fitzgerald, Conoco Inc. v. United States*: Sovereign Authority Undermined by Contractual Obligations on the Outer Continental Shelf*, 27 PUB. CONT. L.J. 755, 766 (1998); John K. Van de Kamp & John A. Saurenman, *Outer Continental Shelf Oil and Gas Leasing: What Role for the States?*, 14 HARV. ENVTL. L. REV. 73, 99 (1990).

183. For a discussion of how the "statutory scheme . . . acts to generate momentum toward development," see Robert B. Wiygul, *The Structure of Environmental Regulation on the Outer Continental Shelf: Sources, Problems, and the Opportunity for Change*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 75, 119–20 (1992); M. David Kurtz, *Managing Alaska's Coastal Development: State Review of Federal Oil and Gas Lease Sales*, 11 ALASKA L. REV. 377, 398 (1994) ("Once an OCS area has been leased, a certain amount of inertia tends to drive the area toward development.").

suspension or temporary prohibition of an operation or activity for reasons including national security interests and the threat of serious, irreparable, or immediate harm or damage to life or the marine, coastal, or human environment.[184] Suspensions of operations or production may be directed by the Regional Supervisor or requested by the leaseholder.[185] The statute requires the extension of the lease for a period equivalent to the suspension or temporary prohibition, unless it resulted from gross negligence or willful violation of a lease, permit, or accompanying regulations.[186]

OCSLA also directs the Secretary to establish regulations to guide cancellation of leases if three conditions are present: (1) continued activity would "probably cause" harm or damage to life, property, any mineral, national security or defense, or the marine, coastal, or human environment; (2) the threat will not sufficiently decrease within a "reasonable" period of time; and (3) the benefits of cancellation outweigh the benefits of continued performance.[187] This language is similarly incorporated in the framework for issuing exploration plans and development and production plans.[188] Before a lease can be canceled, operations must have been suspended or temporarily prohibited for at least five years (unless less time is requested by the lessee).[189]

Current regulations closely mirror the statutory conditions. As relevant to environmental considerations, the regulations state that BOEM may cancel a lease at any time upon hearing and determination:

> that continued activity will probably cause serious harm or damage to life (including fish and other aquatic life), property, any mineral, national security or defense, or the marine, coastal, or human environment; that the threat of harm or damage will not disappear or decrease to an acceptable level within a reasonable period of time; and the advantages of cancellation outweigh the advantages of continuing the lease.[190]

BOEM may also decline to approve an exploration plan based on the serious harm or damage provision, if it is not possible to adjust the activity to avoid the harm; in such cases, after five years of prohibition, the Secretary may cancel the lease if there is still remaining time on the primary lease term. A similar process applies to development and production plans, with an added provision allowing for reapplication for approval of the same or a modified plan.[191]

In addition to the above circumstances, leases may be canceled, or transfers restricted, if the lessee does not comply with applicable laws, regulations, and lease

184. 43 U.S.C. § 1334(a)(1).
185. 30 C.F.R. §§ 250.168–.177 (2019).
186. 43 U.S.C. § 1334(a)(1).
187. *Id.* § 1334(a)(2)(A).
188. *Id.* § 1340(c) (exploration plans); *id.* § 1351(h)(1)(D) (development and production plans).
189. *Id.* § 1334(a)(2)(B); 30 C.F.R. § 550.181(d).
190. 30 C.F.R. § 556.1102(d); *id.* § 550.181.
191. 30 C.F.R. § 550.182 (exploration plans); *id.* § 550.183 (development and production plans).

terms.[192] The lease may be canceled if obtained through fraud or misrepresentation, or if the lessee fails to provide a bond or alternative security instrument acceptable to the oversight bureau.[193] If the lease is nonproducing, the Secretary may cancel the lease when the lessee is in default for 30 days after notice is mailed; if the lease is producing, the Secretary may initiate a proceeding for forfeiture or cancellation in any U.S. district court with jurisdiction.[194]

The compensation framework is clearly delineated within the statute.[195] Canceled leases entitle the lessee to the lesser of either the fair value of the canceled rights as of the date of cancellation, including anticipated revenue and anticipated costs (including compliance and liability costs), or the excess over the lessee's revenues of lease payments and direct expenditures made in connection with exploration or development.[196] Two exceptions exist. First, pre-1978 leases, if canceled, entitle the lessee to the first of the above options. Second, in the case of joint leases canceled due to lack of exercise of due diligence, the innocent parties

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192. 43 U.S.C. § 1334(c).

193. 30 C.F.R. § 556.1102(c), (f).

194. 43 U.S.C. § 1334(b)–(d); 30 C.F.R. § 550.185(c)–(e).

195. For sample projections of lease cancellation payments, see generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED91-93, MINERAL REVENUES: POTENTIAL COST TO REPURCHASE OFFSHORE OIL AND GAS LEASES 3 (1991). The report analyzed the potential cost to the federal government if it were to cancel 123 offshore oil and gas leases (off Alaska, Florida, and North Carolina) and repurchase them under OCSLA. In addition to the original purchase price of the lease and expenditures, two significant considerations in cost calculations are bonus payments and what interest rate is used.

196. § 1334(a)(2)(C). Cancellation:

> shall entitle the lessee to receive such compensation as he shows to the Secretary as being equal to the lesser of (i) the fair value of the canceled rights as of the date of cancellation, taking account of both anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or damages, or both, in the case of an oilspill, and all other costs reasonably anticipated on the lease, or (ii) the excess, if any, over the lessee's revenues, from the lease (plus interest thereon from the date of receipt to date of reimbursement) of all consideration paid for the lease and all direct expenditures made by the lessee after the date of issuance of such lease and in connection with exploration or development, or both, pursuant to the lease (plus interest on such consideration and such expenditures from date of payment to date of reimbursement), except that (I) with respect to leases issued before September 18, 1978, such compensation shall be equal to the amount specified in clause (i) of this subparagraph; and (II) in the case of joint leases which are canceled due to the failure of one or more partners to exercise due diligence, the innocent parties shall have the right to seek damages for such loss from the responsible party or parties and the right to acquire the interests of the negligent party or parties and be issued the lease in question.

Id.

Note that this compensation tracks fairly closely with the compensation that would be owed under contract damages if the government breached the lease provisions. *See infra* Part V.

can seek damages from the responsible parties.[197] No compensation is provided if BOEM disapproves a development and production plan due to consistency review findings under the Coastal Zone Management Act, no development plan is submitted, a development plan fails due to lack of compliance with federal law, or the lessee fails to comply with OCSLA.[198]

C. Lease Cancellation for Climate Change

The Interior Secretary unarguably has the authority to suspend and cancel leases in specified circumstances. The question considered is whether the risks and impacts of climate change are sufficient to trigger this authority.

In *Mobil Oil*, the Supreme Court made clear that legislation passed after the federal government enters a lease contract does not alter the lessee's rights.[199] That case involved delays of over four years in plan approvals subsequent to the enactment of the Outer Banks Protection Act, which prohibited the approval of offshore exploration plans pending a new environmental review process.[200] The Court found that the government's refusal to approve plans pursuant to the new statutory framework constituted repudiation of the lease contracts.[201] The statute's explicit application of "all other applicable statutes and regulations" has not been held to include application of new laws to existing leases.[202]

Here, however, we do not consider the effect of new legislation; rather, we consider new environmental impacts that may not have been fully foreseen at the time of statutory enactment. Thus, we narrow the question to whether climate change could be considered a qualifying event under the current statutory scheme.

OCSLA explicitly authorizes cancellation of leases when continued activity "would probably cause serious harm or damage to life (including fish and other aquatic life) . . . or to the marine, coastal, or human environment."[203] Before the 1978 OCSLA amendments were finalized that endowed this authority, in May 1977 President Carter issued a broad environmental message to Congress that described how the proposed amendments would "require a pause between exploration and development of the [OCS] and cancellation of leases with

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197. § 1334(a)(2)(C).

198. 30 C.F.R. § 550.185(b)–(e).

199. *See* Mobil Oil Expl. & Producing Se., Inc. v. United States, 530 U.S. 604 (2000).

200. *Id.* at 621.

201. *Id.* at 620–21.

202. *See id.* at 615; Fitzgerald, *supra* note 182, at 765. In 1999, during testimony before the House Subcommittee on Energy and Mineral Resources, then-Director of MMS, Walt Rosenbusch, commented on a proposed bill (H.R. 33) that would enact a drilling moratorium off the coast of Florida until various research and assessments were completed, noting that the *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 335 (1996) litigation (the Supreme Court opinion had not been issued yet) suggested that such a moratorium "could set the stage for extensive litigation and possible buyback." *Imposing Certain Restrictions and Requirements on the Leasing Under the Outer Continental Shelf Lands Act of Lands Offshore Florida, and for Other Purposes: Hearing on H.R. 33 Before the Subcomm. on Energy and Mineral Res. of the H. Comm. on Nat. Res.*, 106th Cong. 43 (1999).

203. 43 U.S.C. § 1334(a)(2)(i).

compensation where development could create unacceptable environmental risks."[204]

Climate change creates clear risks for the marine environment. Ocean acidification, rising sea surface temperatures, and other impacts are affecting species and ecosystems. And the key driver of climate change is the burning of fossil fuels. The questions are whether the statute's environmental-protection language encompasses an impact as far-reaching and diffuse as climate change, and whether fossil-fuel extraction causes serious harm or damage to the marine, coastal, or human environment that cannot be decreased to an acceptable extent within a reasonable period of time.

Three factors weigh in favor of climate change as a qualifying cause for cancellation. First, although climate change was not as widely known or well understood in the 1970s as it is today, it was already a concern. In the minority views expressed in the House report on the amendments, the parties discussed "[r]ecent studies warning of possible adverse changes in the climate of the earth."[205] They suggested this was due to increased use of coal and thus stated it as a rationale for needing to maximize petroleum production; although their understanding of causes was wrong, they were aware of the impact.[206] Second, commentators have observed that the D.C. Circuit has "concluded that [OCSLA] contemplated future consideration by the Secretary of environmental problems developing after the lease sale."[207]

Third, and more generally, the statute is explicitly intended to balance development and environmental protection.[208] The magnitude of risk and already observed marine harm associated with climate change suggests heavy weight on the environmental protection side of the scale. The need to decrease dependence on fossil fuels is recognized domestically and internationally.

Conversely, climate change is an indirect result of oil and gas extraction. That is, the act of extraction does not release greenhouse gases (at least, not in appreciable quantities for this analysis). Rather, it is the subsequent burning of the oil and gas that exacerbates climate change. Given the specific language of the cancellation provision, such as its requirement that the risk of harm or damage cannot be abated sufficiently, it is possible that a direct threat may be required. But the linear progression from oil and gas extraction to refining to burning is clear enough that it could suffice.

It is difficult to define the parameters of what environmental harm would be considered a sufficient trigger for the lease cancellation provisions based on the scant relevant caselaw. The most prominent, the *Mobil Oil* series of cases (which started as *Conoco Inc. v. United States*) mentioned above, focuses primarily on

204. H.R. REP. NO. 95-590, at 88 (1977).

205. *Id.* at 301.

206. *Id.*

207. Village of False Pass v. Watt, 565 F. Supp. 1123, 1135 (D. Alaska 1983), *aff'd sub nom.* Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984).

208. § 1802(2)(B) (noting that one purpose of the chapter is to "balance orderly energy resource development with protection of the human, marine, and coastal environments").

prescriptions on development resulting from subsequent government action. Despite this, it gives the best example of the equivalent of an offshore lease cancellation on environmental concern grounds, although it was determined to be a breach of contract.

The distilled fact pattern is as follows. In 1989, following the Exxon Valdez Oil Spill, Congress enacted a moratorium on oil and gas development in the North Aleutian Basin in Alaska and the southeastern Gulf of Mexico offshore of Florida.[209] There were 23 leases in the North Aleutian Basin that were affected, for which the lessees had paid $95.4 million, and 73 off the southwestern coast of Florida, which went for $107.6 million.[210] The Outer Banks Protection Act ("OBPA"), which prevented development in lease areas offshore of North Carolina, was passed in 1990, affecting another 53 leases.[211] *Conoco Inc. v. United States* involved the lessees from all three areas—Alaska, Florida, and North Carolina—suing the government for breach of contract due to inability to proceed with oil and gas activities in any of the three regions.[212]

In 1995, all but a handful of the leaseholders settled, including all of those holding leases in Alaska and Florida.[213] Those remaining in the litigation held a small number of leases offshore of North Carolina. As discussed previously, the trial court and the Supreme Court found the federal government breached its contracts with the North Carolina lessees (the appellate court disagreed, and when it reached the Supreme Court, Justice Stevens dissented from the majority opinion).[214] The holding was not a balancing of potential harm versus benefit, however, but rather an analysis of contract law:

> Contract law expresses no view about the wisdom of OBPA. We have examined only that statute's consistency with the promises that the earlier contracts contained. We find that the oil companies gave the United States $156 million in return for a contractual promise to follow the terms of pre-existing statutes and regulations. The new statute prevented the Government from keeping that promise.[215]

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209. Department of the Interior and Related Agencies Appropriations Act 1990, Pub. L. No. 101-121, §§ 110–111, 103 Stat. 701, 720 (1989). The moratorium was effectuated through the appropriations act; no funds were allowed to be spent on relevant activities.

210. MINERALS MGMT. SERV., U.S. DEP'T OF THE INTERIOR, LEASING OIL AND NATURAL GAS RESOURCES: OUTER CONTINENTAL SHELF 36 (2005); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 195, at 3 tbl.2.

211. MINERALS MGMT. SERV., *supra* note 210, at 36.

212. Conoco Inc. v. United States, 35 Fed. Cl. 309, 314–15 (1996). For a discussion of the case history, see *supra* note 50. For an in-depth discussion and analysis of the case, see Fitzgerald, *supra* note 182.

213. MINERALS MGMT. SERV., *supra* note 210, at 36; *see also* MINERALS MGMT. SERV., U.S. DEP'T OF THE INTERIOR, NORTH ALEUTIAN BASIN OCS PLANNING AREA: ASSESSMENT OF UNDISCOVERED TECHNICALLY-RECOVERABLE OIL AND GAS AS OF 2006 (2006).

214. For an in-depth discussion of the lower court's findings, see generally Fitzgerald, *supra* note 182.

215. Mobil Oil Expl. & Producing Se., Inc. v. United States, 530 U.S. 604, 624 (2000).

Consistent with the finding of a substantial breach of contract, it is significant to note that the Court's decision identified the appropriate remedy as restitution of the $156 million the companies had paid for the leases at issue, rather than OCSLA's compensation framework for a lease cancellation.[216] While instructive regarding remedies, the caselaw does not yield insight into the definition or balancing of environmental harm.

In a separate dispute, the District Court of Alaska offered in dicta that "in order to protect environmental values, Congress has given the Secretary [of the Interior] broad, continuing powers of supervision, including the power to modify, suspend, or even cancel the leases during the course of development when necessary to protect the environment."[217] While affirming the Secretary's discretion and authority to act in the interest of the environment, this likewise does not provide clear guidance of what constitutes environmental harm nor how direct the harm must be. (Cancellation based on other natural resources statutes, such as the ESA, is examined in this Article and applies here with the same analysis.)

On balance, it appears likely that an offshore lease could be canceled based on concerns about climate change impacts on the human, coastal, or marine environments. But if such cancellations were to take place, the lessees would likely still be owed compensation pursuant to the statutory scheme.

In contrast to the environmental harm sections, the compensation provisions provide a clear map of monies due to a lessee if a lease is canceled (as opposed to a contract breached, as above). The matter of compensation was considered carefully and at length by the conference committee trying to resolve differences between the proposed Senate and House bills when the cancellation amendments were passed in the 1970s.[218] Key issues included balancing the need for certainty on the part of lessees against flexibility on the part of the Interior Secretary.[219] The result is a framework that differentiates between pre- and post-1978 leases and accounts for sunk costs and lost revenue. As for where the compensation comes from, in 1990, legislation was introduced in the House that

216. *Id.* at 623–24. For an analysis of the relationship between contract law and offshore drilling leasing, including discussion of the subsequent decision in *Century Exploration New Orleans, LLC v. United States*, where the court found subsequently enacted regulations following the Deepwater Horizon disaster did not constitute a breach of contract, see Jordan M. Steele, Note, *Offshore Drilling: Combating Regulatory Uncertainty with Contract Law Protection*, 13 BROOK. J. CORP. FIN. & COM. L. 515 (2019).

217. Village of False Pass v. Watt, 565 F. Supp. 1123, 1134 (D. Alaska 1983), *aff'd sub nom.* Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984).

218. *See, e.g.*, *Hearing on S. 9 Before the H. Ad Hoc Select Comm. on Outer Cont'l Shelf and S. Comm. on Energy & Nat. Res.*, 95th Cong. 44–64 (1978) (on file with author) (hearing debate around the extent of the contractual and property rights associated with a lease and the appropriate compensation metrics and methods in); *see also Hearing on H.R. 1614 Before the H. Ad Hoc Select Comm. on [sic] Outer Cont'l Shelf*, 95th Cong. 108–13 (1977) (on file with author) (considering but not passing alternative language to the compensation provision); H.R. REP. NO. 95-590, at 132–33 (1977) (emphasizing that environmental cancellations do not entail any fault by the lessee or permittee, and the need for adequate compensation when a no-fault cancellation occurs).

219. *See* sources cited *supra* note 175.

would allow for alternate forms of compensation to cash payments, such as a credit for future royalties to be paid by the leaseholder, or bonus, permit fee, or rent payments, but the bill did not make it out of committee.[220]

V. JUDICIAL REVIEW AND REMEDIES

If the agencies do end the leases—either by claiming that the lease terms allow cancellation or that there is authority under the governing statute for an agency to end the lease—what possibility of judicial review and what remedies might the lessees have? Our analysis here indicates that, if the claim by the lessees is only that there has been a breach of the lease provisions, the only remedy the lessees probably would have is damages. Only if the lessees can demonstrate that the agencies have violated a constitutional, statutory, or regulatory provision in ending the lease can the lessees obtain injunctive relief requiring the continuation of the leases.[221] Of course the latter types of claims—claims that the government does not have the power to cancel, terminate, or forfeit leases in general or a particular lease, or made a legal error in interpreting the lease provisions to allow cancellation, termination, or forfeiture of a lease—may be the dominant form of litigation, at least initially as the courts clarify the relevant legal framework. But assuming the government has the power to end a lease (on whatever basis) and all that the lessee is left is a claim for breach of contract, then damages are the only remedy available.

For our purposes, that means that if a court concludes that an agency does have discretion under the governing statute to end or breach contracts with lessees, the only remedy that the lessees would have would be damages. We also provide a brief overview of the different kinds of damages measures that might apply for any breach of leases by the federal government.

There are two main options for judicial review by the lessees for agency actions to end the leases: the Administrative Procedure Act ("APA") and the Tucker Act. The APA allows courts to "hold unlawful and set aside agency action" where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;" or "without observance of procedure required by law."[222] District courts have jurisdiction to hear claims under the APA pursuant to general federal-question jurisdiction.[223] The APA provides a waiver of sovereign immunity for claims brought pursuant to the APA so long as the plaintiff is "seeking relief other than money damages," no "other statute that grants consent to suit expressly or

220. Offshore Lease Buyback Act of 1990, H.R. 4908, 101st Cong. (as introduced by Rep. Smith on May 23, 1990).

221. For an example of a challenge by a lessee to an agency termination of a contract as in violation of the APA and underlying law, rather than as a breach of contract terms, see Solenex LLC v. Bernhardt, 962 F.3d 520 (D.C. Cir. 2020) (rejecting claims that delay by agency or reliance interests on part of lessee prevented cancellation of oil and gas lease).

222. 5 U.S.C. § 706(2)(A), (C)–(D).

223. 28 U.S.C. § 1331.

impliedly forbids the relief which is sought,"[224] and "there is no other adequate remedy in a court" for the plaintiff's lawsuit.[225]

The Tucker Act provides both jurisdiction and a waiver of sovereign immunity in the Court of Federal Claims for "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[226] The Tucker Act only allows for lawsuits for money damages, though the court can provide equitable relief "as an incident of and collateral to" any judgment in money damages.[227]

For purposes of our analysis, the key distinction is between claims that could be brought pursuant to the APA, for which injunctive relief would be available,[228] and claims that could be brought pursuant to the Tucker Act, for which only monetary relief is available.[229] The caselaw is clear that the APA is only

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224. 5 U.S.C. § 702. This waiver of sovereign immunity was added by Congress in 1976. An Act to Amend Chapter 7, Title 5, of the United States Code, Pub. L. No. 94-574, 90 Stat. 2721 (1976).

225. 5 U.S.C. § 704.

226. 28 U.S.C. § 1491(a)(1). Cases cannot be brought in the Court of Federal Claims if there is a pending proceeding in another court based on the same claims. *Id.* § 1500.

227. *Id.* § 1491(a)(2); *see also* Randall v. United States, 95 F.3d 339, 346–47 (4th Cir. 1996) (noting limitation of Court of Federal Claims jurisdiction to incidental equitable remedies, and stating that a request for retroactive promotion by a military plaintiff exceeded that power); Rig Masters v. United States, 42 Fed. Cl. 369, 373 (1998) ("It is well established that [the Court of Federal Claims] does not have jurisdiction over claims for specific performance."). The so-called Little Tucker Act allows for concurrent jurisdiction for monetary claims in federal district courts where the amount in dispute is under $10,000; given the low limit, we think this is unlikely to apply to claims about government actions to end MLA leases. Appeals from both Little Tucker Act judgments and Court of Federal Claims judgments go exclusively to the Federal Circuit. 28 U.S.C. § 1295(a)(2)–(3).

228. The APA prohibits relief for money damages. In *Bowen v. Massachusetts*, the Supreme Court held that the APA could allow for injunctive relief that might produce monetary payments from the government in at least limited circumstances. 487 U.S. 879 (1988); *see also* Normandy Apartments v. U.S. Dep't of Hous. & Urban Dev., 554 F.3d 1290 (10th Cir. 2009) (allowing prospective relief under the APA that will result in monetary payments against the United States where claims were based on agency regulations). In determining whether a complaint improperly seeks monetary damages outside the Court of Claims, courts will "'pierce' the pleadings so that artful pleading does not undercut the jurisdiction of the Claims Court" and will look at the "essence" of the plaintiff's claim. Amoco Prod. v. Hodel, 815 F.2d 352, 361–62 (5th Cir. 1987); *see also* 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3657 (4th ed. 2010) ("The critical inquiry is whether the prime objective or essential purpose of the action is to obtain money from the federal government." (internal quotation marks omitted)).

229. One other possible avenue for claims based on disputes over oil, gas, and coal leases might be the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a(a), which allows for lawsuits against the United States "to adjudicate a disputed title to real property in which the United States claims an interest." To the extent that an oil, gas, or coal lease is understood as creating a property right (e.g., an easement or profit), that might support a claim that there is a dispute

available for claims based on the Constitution or agency violations of statutory or regulatory provisions, not for claims that are solely based on contracts with the federal government.[230] Contract claims against the United States in general must be brought pursuant to the Tucker Act, and only monetary damages will be allowed.

"[O]ne of the most enduring limitations on government liability [is] the rule barring specific performance in contract actions against the federal government and thereby limiting contract claimants to a damage remedy."[231] The rule dates back long

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over title to real property such that QTA jurisdiction would exist. However, the QTA excludes actions "which may be or could have been brought" under the Tucker Act. *Id.* Given our analysis below, it seems likely to us that a court would hold that any claims based on a lease would constitute a dispute over a contract such that Tucker Act jurisdiction is exclusive. *See* McKay v. United States, 516 F.3d 848, 851 (10th Cir. 2008) (rejecting QTA lawsuit based on a claimed violation of a settlement agreement involving a land dispute because a contract claim should be brought under Tucker Act based in part on the principle that specific performance for contracts is not available against the government). In particular, there are cases in which courts have held that leases of property to the federal government are covered by the Contracts Dispute Act ("CDA"), which is part of the overall Tucker Act adjudicatory system. *See, e.g.*, Up State Fed. Credit Union v. Walker, 198 F.3d 372 (2d Cir. 1999) (holding that a dispute about a lease of land by the U.S. Army to a private party was covered by the CDA and not the QTA). We discuss the CDA in more detail *infra* note 235. In addition, as noted *supra* note 102, the Supreme Court has indicated, in *Udall v. Tallman*, that the MLA grants very limited property rights. 380 U.S. 1, 19 (1965).

230. *See* Perry Capital, LLC v. Mnuchin, 864 F.3d 591, 618–19 (D.C. Cir. 2017); Robbins v. U.S. Bureau of Land Mgmt., 438 F.3d 1074, 1082 (10th Cir. 2006); *Walker*, 198 F.3d at 375; Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 646–47 (9th Cir. 1998); Coggeshall Dev. Corp. v. Diamond, 884 F.2d 1, 3 (1st Cir. 1989); Sharp v. Weinberger, 798 F.2d 1521, 1523–24 (D.C. Cir. 1986) (stating that "[t]he waiver of sovereign immunity in the [APA] does not run to actions seeking . . . specific performance in contract cases" but also that statutory and regulatory claims seeking equitable relief can be pursued under the APA); N. Side Lumber Co. v. Block, 753 F.2d 1482, 1484–86 (9th Cir. 1985); *see also* Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 627–36 (2003) (summarizing the caselaw). The only contrary court of appeals precedent is *Hamilton Stores, Inc. v. Hodel*, 925 F.2d 1272 (10th Cir. 1991), which has been subsequently distinguished by the Tenth Circuit. *See Robbins*, 438 F.3d at 1082.

There is also stray dictum in a Supreme Court decision, *Bowen v. Massachusetts*, that "equitable action[] for monetary relief under a contract" might be an example of relief involving money that would be permissible under the APA. 487 U.S. 879, 895 (1988). No court of appeals has followed this dictum, and the commentary has sharply criticized it. *See* Suburban Mortg. Assocs. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116, 1123–26 (Fed. Cir. 2007); Transohio Sav. Bank v. Dir. of Office of Thrift Supervision, 967 F.2d 598, 611–12 (D.C. Cir. 1992); *see also* Vill. W. Assocs. v. R.I. Hous. & Mortg. Fin. Corp., 618 F. Supp. 2d 134, 139 n.7 (D.R.I. 2009) (rejecting the dicta); Sisk, *supra*, at 632 (criticizing the dicta as unfounded and unsound).

231. Sisk, *supra* note 230, at 605; *see also* Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 155 (1998) ("[T]he government has always been immune from awards of specific performance in contract actions, on the theory that this type of relief would unduly interfere with government operations.").

before the enactment of the APA in 1946[232] and the APA revisions in 1976 that explicitly waived sovereign immunity for claims against the United States pursuant to the APA.[233] Courts that have since applied the statutory language in the 1976 APA amendments have drawn on two main rationales why Congress has continued to prevent specific performance against the United States based on contract claims. First, courts have noted that the APA does not waive sovereign immunity where another "statute that grants consent to suit expressly or impliedly forbids the relief which is sought."[234] The reasoning here is that the Tucker Act implicitly forbids any grant of specific performance based on contract claims against the government and therefore excludes such relief under the APA.[235] Second, courts have held that, for

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232. *See* Seamon, *supra* note 231, at 168–81 (providing overview of this history); Sisk, *supra* note 230, at 606–15 (same); *see also* United States v. Jones, 131 U.S. 1, 1 (1889) (rejecting a claim for specific performance based on a claimed contract by the federal government to dispose of public lands under the public land laws).

233. *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) (rejecting specific performance contract claim against government as barred by sovereign immunity); Seamon, *supra* note 231, at 181–82 (noting 1976 APA amendments).

234. 5 U.S.C. § 702.

235. *See Perry Capital*, 864 F.3d at 618–19; United States v. Park Place Assocs., 563 F.3d 907, 930–31 (9th Cir. 2009); *Robbins*, 438 F.3d at 1082; *Walker*, 198 F.3d at 375; *Tucson Airport Auth.*, 136 F.3d at 646–47; *Sharp*, 798 F.2d at 1523–24; *Block*, 753 F.2d at 1484–85; *see also* Seamon, *supra* note 231, at 182–83 (summarizing the argument).

The Tucker Act nowhere explicitly states that other forms of relief besides damages on claims against the government are prohibited. Indeed, since the Tucker Act does allow for money damages against the government based on constitutional, statutory, or regulatory claims, it cannot be interpreted as prohibiting all alternative forms of relief for all claims that can be brought under the Tucker Act—that might well render the APA a nullity. *See* Seamon, *supra* note 231, at 183. Thus, courts have had to draw on the jurisprudential history of contract claims against the government, as well as the legislative history of the APA amendments in 1976, to reach the conclusion that the Tucker Act implicitly prohibits injunctive relief for only contract claims, for purposes of the "impliedly forbids" language of the APA. *See Robbins*, 438 F.3d at 1082–83 (same); *Block*, 753 F.2d at 1485 (citing legislative history); *see also* Seamon, *supra* note 231, at 183–85 (summarizing that legislative history); *id.* at 191–96 (arguing that Congress in 1976 was presumably aware of the judicial precedent prohibiting specific performance of government contracts and legislated with that background understanding in mind); Sisk, *supra* note 230, at 629–32 (summarizing the legislative and caselaw history); Marathon Oil Co. v. United States, 16 Cl. Ct. 332, 341 (1989) (drawing on legislative history to conclude that APA does not cover contractual claims, including claims over oil and gas leases).

There is statutory language that does explicitly preclude jurisdiction by any other federal court besides the Court of Federal Claims for certain contract claims, and therefore explicitly excludes specific performance for those contract claims. Disputes over contracts that fall within the CDA, 41 U.S.C. §§ 7101–7109, must be brought before the Court of Federal Claims. *See* 28 U.S.C. § 1346(a)(2) (eliminating jurisdiction in district courts for any claims "founded upon any express or implied contract with the United States . . . which are subject to" the CDA). However, the CDA only applies to a limited range of contracts. It includes all contracts for "the procurement of property, other than real property in being" and contracts for "the disposal of personal property." 41 U.S.C. § 7102(a)(1), (4). Leases *to* the federal government have been found to fall within the "procurement of property," because the "real property in being" exclusion only covers the acquisition of existing property rights, contract claims, the general rule is that money damages under the Tucker Act provide "adequate" relief, such that injunctive relief pursuant to the APA is unavailable.[236] We think the first argument (that the Tucker Act "impliedly forbids" APA jurisdiction) is a better one in the context of specific performance for MLA leases. That is because in the context of private disputes over oil, gas, and coal leases, courts are more likely to order specific performance since they are contracts that relate to land, and they can be understood as creating a limited property right. In other words, there is a stronger argument that money damages might not be "adequate" relief for government breach of MLA leases. However, even for these leases, we think a court would be likely to conclude that the Tucker Act "impliedly forbids" specific performance of the lease provisions against the United States.[237]

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rather than the creation of new ones such as through a lease. However, leases of property *by* the federal government are presumably examples of "disposal" of property, and the CDA only covers disposal of personal property. Courts have held that concession contracts where the federal government leases land to entities for business operations are not covered by the CDA. *See* Frazier v. United States, 67 Fed. Cl. 56, 59 (2005), *aff'd*, 186 Fed. Appx. 990 (Fed. Cir. 2006); YRT Servs. Corp. v. United States, 28 Fed. Cl. 366, 392 n.23 (1993). *But see Walker*, 198 F.3d at 372 (finding lease by the U.S. Army to a private party was covered by CDA). We therefore think it unlikely that MLA leases would fall within the CDA, which includes a mandatory administrative exhaustion process. *See* 41 U.S.C. §§ 7103–7104.

Another argument for centralizing all contract claims against the United States in the Court of Federal Claims and the Federal Circuit, where only monetary damages can be granted, is that it ensures uniform application of the federal common law of contracts. Sisk, *supra* note 230, at 614–15. This has been an important goal for Congress in setting up the Tucker Act jurisdictional system. United States v. Hohri, 482 U.S. 64, 71–72 (1987) (noting that a "motivating concern of Congress in creating the Federal Circuit was the 'special need for nationwide uniformity' in certain areas of law," and therefore, "Congress decided to confer jurisdiction on the Federal Circuit in 'all federal contract appeals in which the United States is a defendant'").

236. *See* Suburban Mortg. Assocs. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116, 1125–26 (Fed. Cir. 2007) ("If [the Court of Federal Claims] can provide an adequate remedy—if a money judgment will give the plaintiff essentially the remedy he seeks—then the proper forum for resolution of the dispute is not a district court under the APA but the Court of Federal Claims under the Tucker Act.") (holding that money damages will generally provide adequate compensation for breach of contract).

237. *See* Coggeshall Dev. Corp. v. Diamond, 884 F.2d 1, 3 (1st Cir. 1989) (finding no specific performance allowed in contract with federal government even though contract in question was a transfer of land); *see also* United States v. Jones, 131 U.S. 1, 1 (1889) (rejecting specific performance of claimed contract with the federal government in the context of the disposal of public lands).

The Tucker Act does not prohibit alternative forms of relief where Congress has identified alternative specific paths for private parties to enforce contract rights against the government. *See, e.g.*, Bowen v. Massachusetts, 487 U.S. 879, 910 n.48 (1988) (stating that Tucker Act jurisdiction is "'exclusive' only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court"); McGuire v. United States, 550 F.3d 903, 911 (9th Cir. 2008) (same); Vill. W. Assocs. v. R.I. Hous. & Mortg. Fin. Corp., 618 F. Supp. 2d 134, 138 (D.R.I. 2009); *see also* Del-Rio Drilling Programs v. United States, 146 F.3d 1358, 1367 (Fed. Cir. 1998) (noting the possibility of alternative remedies and listing examples). However, we have not found any courts relying

In addition, there are separation-of-powers arguments for why courts should not issue specific performance for government breach of contracts, including MLA leases. As in the sovereign-acts context, there is a tension between holding the government accountable to contract promises that it makes and allowing future governments to adjust policy in response to changes in public policy and the public interest.[238] Judicial orders requiring specific performance, absent clear congressional instruction that specific performance of contracts should be allowed, could produce "undue judicial interference with discretionary decisions of the political branches."[239] Interests of private contractors (and the government's own interest in making credible commitments that it will meet its contract promises) can generally be protected with contract damages.[240] Specific performance against the government also raises the risk of disposal of federal property without explicit authorization by Congress, which conflicts with the exclusive grant to Congress in the Property Clause of the power to "dispose" of federal lands.[241]

Accordingly, claims based solely on the lease itself, and that the government breached the lease, would not support injunctive relief against the government. We also think it unlikely that any constitutional claims here would support injunctive relief—the most plausible constitutional claim is under the Takings Clause of the Fifth Amendment, where the remedy is also money damages.[242] And while it can be at times difficult to separate out statutory and

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on this reasoning to allow the pursuit of specific performance for a contract in district court under the APA or other statutes.

238. *See Larson*, 337 U.S. at 704 ("The Government . . . cannot be stopped in its tracks by any plaintiff who presents a disputed . . . contract right. . . . [I]n the absence of a claim of constitutional imitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event."); Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1566–67 (1992) ("Congress has been reluctant to force the executive branch to continue a contract that is no longer deemed in the public interest, because to lock the government into a contract would tie its hands when flexibility is needed."); Seamon, *supra* note 231, at 158–59 (stating that the prohibition against specific performance for government contracts "allows the government to get out of contracts that are determined no longer to serve the public interest").

239. Seamon, *supra* note 231, at 159. We do believe that Congress can reserve to itself the power to breach contracts and pay compensation.

240. *See id.* at 201 (stating that allowing damages but not specific performance "allow[s] the government, for a price (the price of contract damages), to get out of contracts that are deemed no longer to be in the public interest"); *see also* United States v. Winstar Corp., 518 U.S. 839, 881 (1996) (plurality opinion) (arguing that damages remedies against government breach of contracts do not improperly interfere with government's sovereign powers to change policy). Of course, for some types of private contracts, courts generally conclude that monetary damages are inadequate and specific performance should be ordered—particularly for contracts involving land. However, the ability of the government to take property for public purposes and pay compensation is well established. *See* Seamon, *supra* note 231, at 212–13 (noting the analogy).

241. *See* Biber, *supra* note 64.

242. Accordingly, such claims would need to be brought in the Court of Federal Claims since monetary relief is adequate. *See, e.g.*, Consol. Edison Co. of N.Y. v. U.S. Dep't

regulatory claims from contract claims in an area such as the MLA where the two are deeply intertwined,[243] we think that the basic principle that would apply here is that unless the plaintiffs can show that the agency termination of a lease violated a specific regulatory or statutory provision,[244] the plaintiffs must be left to damages remedies under the Tucker Act. Of course, if a court concludes that the agency does not have authority under the MLA to breach leases, that would support injunctive relief preventing the agency from breaching the leases.[245]

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of Energy, 247 F.3d 1378, 1385 (Fed. Cir. 2001). *But see* Transohio Sav. Bank v. Dir. of Office of Thrift Supervision, 967 F.2d 598, 613 (D.C. Cir. 1992) (stating that if monetary compensation is "so inadequate that the plaintiff would not be justly compensated for the seizure of his property . . . an injunctive remedy is not barred by sovereign immunity"), *abrogated by* Perry Capital, LLC v. Mnuchin, 864 F.3d 591, 619–20 (D.C. Cir. 2017).

243. For instance, many of the lease terms are mandated by regulatory or statutory provisions, and there is independent authority for the government to cancel leases based on the MLA. *See* discussion *supra* Section III.A. For caselaw exploring the difficulty of separating contract from statutory and regulatory claims, see, for example, United States. v. Park Place Assocs., 563 F.3d 907, 930–31 (9th Cir. 2009) (lawsuit seeking to confirm arbitration award against United States was contract-based claim); *Transohio Sav. Bank*, 967 F.2d at 609 (lawsuit challenging savings and loans regulation based on both contract and statutory claims); Nat'l Helium Corp. v. Morton, 455 F.2d 650, 654–55 (10th Cir. 1971) (allowing APA review of agency general policy to terminate helium contracts based on claim that policy violated NEPA, distinguishing caselaw that prohibits specific performance of contracts). Courts have looked at "both . . . the source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought (or appropriate)." Robbins v. U.S. Bureau of Land Mgmt., 438 F.3d 1074, 1083 (10th Cir. 2006) (internal marks omitted) (quoting Megapulse, Inc. v. Lewis, 672 F.2d 959, 968 (D.C. Cir. 1982)); *see also* Up State Fed. Credit Union v. Walker, 198 F.3d 372, 375–76 (2d Cir. 1999) (also applying the *Megapulse* test).

In a few cases, courts seem to have allowed APA jurisdiction over claims that involve a mix of contract and statutory claims. *See* Christopher Vill. Ltd. P'ship v. Retsinas, 190 F.3d 310, 316–17 (5th Cir. 1999) (allowing declaratory judgment against the United States based on regulatory and contractual claims, but never addressing the issue of whether the court had jurisdiction to issue relief based on contractual claims); Diamond Shamrock Expl. Co. v. Hodel, 853 F.2d 1159, 1161 (5th Cir. 1988) (allowing declaratory judgment by oil and gas lessee challenging royalty determinations by federal agency based on statutory and contract claims). However, the better view is that such claims should be disaggregated, with the contract claims either dismissed or transferred to the Court of Federal Claims. *See, e.g.*, Skokomish Indian Tribe v. United States, 410 F.3d 506, 510–11 (9th Cir. 2005); Rowe v. United States, 633 F.2d 799, 800–01 (9th Cir. 1980) (dismissing contract damages claims but allowing statutory injunction claim to proceed); Sharp v. Weinberger, 798 F.2d 1521, 1523–24 (D.C. Cir. 1986); *see also* N. Side Lumber Co. v. Block, 753 F.2d 1482, 1484–85 (9th Cir. 1985) (noting that while language in *Rowe* seems to allow injunctive relief for a contract remedy, it involved a statutory claim).

244. *See Megapulse, Inc.*, 672 F.2d at 969 ("[T]he jurisdictional bar of sovereign immunity in property disputes arising from contractual relationships does not necessarily apply where the government defendants are charged with having acted beyond the scope of their statutory authority.").

245. *See* Normandy Apartments v. U.S. Dep't of Hous. & Urban Dev., 554 F.3d 1290, 1300 (10th Cir. 2009) ("[W]hen a party asserts that the government's breach of contract is contrary to federal regulations, statutes, or the Constitution, and when the party seeks relief other than money damages, the APA's waiver of sovereign immunity applies and the Tucker

The damages that would be available to lessees should the government have the authority to breach the leases could be measured in three ways.[246] The most standard measure is expectation damages, which are intended to give the nonbreaching party the benefit of the bargain struck in the contract.[247] In this context, the most likely measure would be lost profits for the lessee over the presumed term of the lease.[248] However, expectation damages will not be provided if they prove too speculative to establish.[249] In the context of fossil-fuel leasing, proving lost profits might be difficult; the price of the resource fluctuates substantially in global markets, and (at least for oil and gas production) many leases do not eventually produce paying wells.

An alternative measure of damages is performance-based damages, in which the nonbreaching party is restored to the position they held before the contract was entered into.[250] Damages might be assessed based either on the value of any

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Act does not preclude a federal district court from taking jurisdiction."); *Megapulse, Inc.*, 672 F.2d at 969. On the other hand, the fact that interpretation of the contract or lease requires resolution of questions of law will not convert a contract claim into one outside the exclusive jurisdiction of the Court of Federal Claims. *See* Greenhill v. Spellings, 482 F.3d 569, 573–74 (D.C. Cir. 2007); *Transohio Sav. Bank*, 967 F.2d at 610 ("[A] federal district court may accept jurisdiction over a statutory or constitutional claim for injunctive relief even where the relief sought is an order forcing the government to obey the terms of a contract . . . .").

246. RESTATEMENT (SECOND) OF CONTRACTS § 347 (AM. LAW INST. 1981) (stating that the measure of damages in general for breach of contract is expectation damages which are measured by "the loss in the value to him of the other party's performance caused by its failure or deficiency"). Of course, if the government can establish that the lease provisions allow termination, as discussed *supra* Part III, no damages would be owed by the government.

In identifying contract law for lawsuits involving contracts with the federal government, federal courts have drawn heavily on the *Restatement (Second) of Contract*s. *See, e.g.*, Mobil Oil Expl. & Producing Se., Inc. v. United States, 530 U.S. 604, 608 (2000).

247. "The general rule in common law breach of contract cases is to award damages sufficient to place the injured party in as good a position as he or she would have been had the breaching party fully performed." San Carlos Irrigation & Drainage Dist. v. United States, 111 F.3d 1557, 1562–63 (Fed. Cir. 1997) (citing Estate of Berg v. United States, 687 F.2d 377, 379 (Ct. Cl. 1982)).

248. *See* Glendale Fed. Bank, FSB v. United States, 239 F.3d 1374, 1380 (Fed. Cir. 2001) (stating that primary measure of expectation damages is "lost profits" although other measures can be included as well).

249. *See* Energy Capital Corp. v. United States, 302 F.3d 1314, 1325 (Fed. Cir. 2002) (stating requirement that "a sufficient basis exists for estimating the amount of lost profits with reasonable certainty"). However, courts need not attempt "a quixotic case for delusive precision" such that certainty becomes "an insurmountable barrier to any recovery." Franconia Assocs. v. United States, 61 Fed. Cl. 718, 746 (2004).

250. *See* Hansen Bancorp, Inc. v. United States, 367 F.3d 1297, 1309 (Fed. Cir. 2004) (describing this as "a fall-back position" for the injured party who is unable to prove expectancy damages"); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38 (AM. LAW INST. 2011). In putting the nonbreaching party back in the position they were in before the contract was entered into, courts must be careful not to provide the nonbreaching party with a windfall and generally must also put the breaching party back into the position they held before the contract was entered into as well. The nonbreaching party cannot obtain more in performance-based damages than they could have expected to receive under the

benefits given by the nonbreaching party to the breaching party, or by the cost of performance by the nonbreaching party up until the time of breach.[251] In the context of oil, gas, and coal leases, damages likely would include payments made by the lessee to the government to acquire the lease (bonus bids), and lease payments made before production occurred (rental payments);[252] these would likely be offset by any profits the lessee earned from production on the lease until the time of breach.[253] It might also include investments by the lessee in production and transportation infrastructure on the lease, to the extent these have not been recouped by production from the lease.[254]

A final remedy is rescission of the contract—similar to reliance or restitution damages, the purpose here is to put the parties back in the position before the contract was entered into by "undoing" or rescinding the contract.[255] It is a

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contract itself, had it been adequately performed. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, *supra*, § 38 cmts. c & d. Thus, damages measured by the cost of the nonbreaching party's performance are offset "to the extent the defendant can prove that the plaintiff would have suffered a loss had the contract been performed." *Id.* This limit would not apply to the remedy of rescission. *See* discussion *infra* notes 254–59. Damages measured by the value provided to the breaching party are similarly capped by any price term in the contract. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, *supra*, § 38 cmts. c & d.

251. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38(2) (AM. LAW INST. 2011). Measuring damages by the costs undertaken by the nonbreaching party in performance of the contract is often called "reliance" damages. *See id.* § 38 cmt. b.

252. Under the federal oil and gas leasing system, the lessee pays a "bonus bid" to the federal government at the lease sale for the right to sign the lease with the federal government; the lease then provides a primary term (usually ten years) in which the lessee must either make rental payments to the federal government or develop the lease for production, or it will lose the lease; after the ten year primary period, the lease is generally only extended if the lessee has developed the lease and is producing oil and gas in paying quantities; the lessee pays the federal government royalties on oil and gas produced on the lease, a set percentage of the revenue from production. *See* CONG. BUDGET OFFICE, OPTIONS FOR INCREASING FEDERAL INCOME FROM CRUDE OIL AND NATURAL GAS ON FEDERAL LANDS 5–8 (2016) (providing an overview of the payment process).

In general, we think that if Congress were to enact legislation buying out leases, or if the Executive were to develop an overall policy for lease retirement with compensation, that refunding bonus bids and rental payments to lessees would be at the top of the list for compensation to lessees.

253. *See Hansen Bancorp*, 367 F.3d at 1315 ("[T]he non-breaching party may be compensated only for the *net* loss that results from the defendant's breach.").

254. *But see* Amber Res. Co. v. United States, 538 F.3d 1358, 1379–81 (Fed. Cir. 2008) (refusing to compensate lessees for costs of exploratory drilling under breached lease because benefit to government was unclear).

255. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37(1) (AM. LAW INST. 2011); Mobil Oil Expl. & Producing Se., Inc. v. United States, 530 U.S. 604, 608 (2000). Total breach means "material, substantial, essential, or vital." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, *supra*, § 37 cmt. c (internal quotation marks omitted). This does not mean that the defendant must "have failed to render *any part* of the promised contractual performance." *Id.*; *see also Hansen Bancorp*, 367 F.3d at 1311 (defining total breach as one that "so substantially impairs the value of the contract to the

remedy generally limited to repudiation of the contract by the breaching party or actions by the breaching party that constitute total breach of the contract.[256] We think it likely that government termination of MLA leases would constitute repudiation or total breach—the Supreme Court found that imposition of extended and indefinite delays on approval of exploration and development permits for offshore oil and gas leases constituted repudiation.[257] In the context of MLA leases, rescission would also mean returning any payments made by the lessees to acquire the leases, and lease payments made before production occurred;[258] again, as with reliance or restitution damages, these would likely be offset by any profits the lessee earned from any production on the lease.[259]

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injured party at the time of the breach that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance" (quoting RESTATEMENT (SECOND) OF CONTRACTS § 243(4) (AM. LAW INST. 1981)).

The Supreme Court called this remedy restitution. *Mobil Oil*, 530 U.S. at 608. The recent *Restatement (Third) of Restitution and Unjust Enrichment* notes that restitution covers a wide range of potential remedies or damage measures for breach of contract. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT ch. 4, topic 2, intro. note (AM. LAW INST. 2011). It specifically identifies rescission as one of those remedies—and it is rescission that covers the remedy that the Supreme Court used in *Mobil Oil*. *See id.* § 54. As *Mobil Oil* shows, courts have inconsistently used terminology in this area of law over the years, using "restitution" to refer to performance-based or reliance damages and to rescission. *See id.* ch. 4, topic 2, intro. note; *see also id.* § 37 reporter's note b. The *Restatement* distinguishes between rescission as "an alternative remedy for breach" compared with "performance-based damages" or reliance damages which are an alternative to "damages based on lost profit or expectation." *Id.* §§ 37–38. We follow the most recent *Restatement* in our use of terminology, even though the Federal Circuit and Supreme Court have at times used the terms in different ways.

256. *Mobil Oil*, 530 U.S. at 608; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37(1) (AM. LAW INST. 2011) ("[A] plaintiff who is entitled to a remedy for the defendant's material breach or repudiation may choose rescission as an alternative to enforcement.").

257. *Mobil Oil*, 530 U.S. at 607; *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37 cmt. b, illus. 1 (AM. LAW INST. 2011) (using *Mobil Oil* as an example of repudiation justifying rescission).

258. *Mobil Oil*, 530 U.S. at 608 (stating that in the context of oil and gas leases, restitution or rescission requires the government to "give the companies their money back" whether the leases "would, or would not, ultimately have proved financially beneficial to the companies"); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37 cmt. b, illus. 1 (AM. LAW INST. 2011). Because MLA leases often require large up-front payments by lessees in the competitive bidding process, at least for undeveloped leases where lost profits based on future production would be highly speculative, rescission might be a much more beneficial remedy for the lessees. *Id.* § 37 cmt. b (noting that at times, rescission will allow a nonbreaching party to recover more than they would have obtained in compensatory damages, particularly when the nonbreaching party has paid a substantial amount of money up front); *id.* § 54 cmt. f ("Rescission permits the claimant to escape from a failed transaction without proof of damages. It therefore offers inherent advantages to the claimant whenever damages would be difficult (or merely expensive) to prove.").

259. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37 cmt. a (AM. LAW INST. 2011) ("Rescission ostensibly requires each party to return to the other

One other question about damages is the source of funds for the government to pay them. The Anti-Deficiency Act ("ADA") prohibits government employees from entering into commitments, including contracts, which obligate government funds that have not been appropriated by Congress.[260] The ADA has been relied upon by the courts to reject claims that government employees made open-ended, implied contractual commitments to private parties.[261] We think the ADA might restrict the ability of agencies to enter into buy-outs of leases outside the context of litigation. However, if a contract does become the subject of litigation, then the government can pay damages pursuant to a court judgment or a negotiated settlement out of the Judgment Fund, which is an ongoing appropriation for the payment of government litigation expenses.[262] Accordingly, if the government files suit in court to end a lease (either because of violations of the terms of the lease or because it claims the power to breach the lease unilaterally) or if a lessee files a lawsuit arguing the government has breached the lease, there would be no barrier under the ADA for payment of funds to the lessees.[263] If the lessee owes money to the United States, any damages might be offset by those obligations.[264]

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whatever has been received by way of performance."); *see also id.* § 37 cmt. d ("Rescission is mutual: a plaintiff seeking to be restored to the status quo ante must likewise restore to the defendant whatever the plaintiff has received in the transaction."); *id.* § 54(2) (stating that rescission requires that each party "restore[] property received from the other, to the extent such restoration is feasible" and "accounts for additional benefits obtained at the expense of the other as a result of the transaction and its subsequent avoidance, as necessary to prevent unjust enrichment," and "compensates the other for loss from related expenditure as justice may require"); *id.* § 54(3) (limiting rescission to "cases in which counter-restitution by the claimant will restore the defendant to the status quo ante"); *id.* § 54 cmt. g; *see also* Marathon Oil Co. v. United States, 236 F.3d 1313, 1315 (Fed. Cir. 2001) (stating that restitution requires compensation for partial performance by breaching party). In the context of MLA leases, this would require the lessees to return to the government any benefits they had received from the exploitation of oil, gas, or coal under the leases.

260. 31 U.S.C. § 1341.

261. *See, e.g.*, Hercules, Inc. v. United States, 516 U.S. 417, 426–28 (1996). However, if there is a valid contract, the ADA is not a bar to a judicial finding that the government is liable for breach of contract. *See, e.g.*, Mass. Bay Transp. Auth. v. United States, 129 F.3d 1226, 1232 (Fed. Cir. 1997); Wetsel-Oviatt Lumber Co. v. United States, 38 Fed. Cl. 563, 570–71 (1997).

262. 31 U.S.C. § 1304; VIVIAN S. CHU & BRIAN T. YEH, CONG. RESEARCH SERV., R42835, THE JUDGMENT FUND: HISTORY, ADMINISTRATION, AND COMMON USAGE 5–6 (2013) (describing the Fund as a "permanent, indefinite appropriation" for the payment of money damages). Judgment Funds cannot be used to pay for money damages ordered by administrative awards. CHU & YEH, *supra*, at 6. If there is any other appropriated fund which can pay the damages, such as the agency's own appropriations, the damages are paid out of those funds. § 1304(a)(1)(D).

263. *See, e.g.*, *Wetsel-Oviatt Lumber*, 38 Fed. Cl. at 570–71 (noting possibility of payment from Judgment Fund for breach by government of timber sale contract).

264. § 3728; CHU & YEH, *supra* note 262, at 7–8.

VI. POLICY IMPLICATIONS

Just because there are plausible arguments that existing leases can be terminated does not mean they should be terminated, at least not immediately and at least not for all resources.

Termination of fossil-fuel leases are a version of what have been characterized as supply-side policies to respond to climate change—policies that seek to reduce the supply of fossil fuels, rather than reduce the demand for fossil fuels (such as cap-and-trade regulatory programs).[265] Supply-side policies have in general received much less attention from scholars and policymakers.[266]

Supply-side policies have a range of potential advantages. They can be relatively simple to monitor or enforce, especially compared to restrictions that focus on individual consumption.[267] In the context of fossil-fuel leasing, enforcement against illegal exploitation of coal, oil, and gas on federal lands is fairly straightforward. In contrast, changing how individual Americans drive their cars to reduce demand for oil is much more challenging. By expanding the range of policy tools available to address climate change, supply-side policies can reduce the overall cost of addressing climate change.[268] Indeed, some studies have found that supply-side policies can be quite cheap compared to other alternatives like regulation.[269] And supply-side policies may have some political appeal for voters. By directly targeting fossil-fuel production, they might be seen as more directly related to the local or regional pollution from fossil fuels that voters are often as or more motivated to address compared to climate change.[270] Supply-side policies may also be seen as more direct responses to address the problems of climate change by going after the root source of carbon emissions and can fit in with moral arguments about holding fossil-fuel producers responsible for the harms from fossil-fuel combustion.[271]

The most significant issue with any supply-side policy—including termination of federal fossil-fuel leases—is what is called "leakage": the possibility that the reduction in supply from one jurisdiction is offset by increases in production

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265. Fergus Green & Richard Denniss, *Cutting with Both Arms of the Scissors: The Economic and Political Case for Restrictive Supply-Side Climate Policies*, 150 CLIMATIC CHANGE 73, 74 (2018); Michael Lazarus & Harro van Asselt, *Fossil Fuel Supply and Climate Policy: Exploring the Road Less Taken*, 150 CLIMATIC CHANGE 1, 1 (2018).

266. Green & Denniss, *supra* note 265, at 74; Lazarus & van Asselt, *supra* note 265, at 6 tbl.1.

267. Green & Denniss, *supra* note 265, at 78.

268. Cathrine Hagem & Halvor Briseid Storrøsten, *Supply- Versus Demand-Side Policies in the Presence of Carbon Leakage and the Green Paradox*, 121 SCANDINAVIAN J. ECON. 379, 389–90 (2019); Lazarus & van Asselt, *supra* note 265, at 4.

269. *See* Peter Erickson & Michael Lazarus, *Would Constraining U.S. Fossil Fuel Production Affect Global CO2 Emissions? A Case Study of U.S. Leasing Policy*, 150 CLIMATIC CHANGE 29, 37 (2018) (finding that abatement costs for ending coal leases have a cost of about $20/ton of CO_2, as low or lower than costs of other policies that were proposed during the Obama Administration).

270. Green & Denniss, *supra* note 265, at 80.

271. *Id.* at 81; Lazarus & van Asselt, *supra* note 265, at 4; *see also* Fergus Green, *Anti-Fossil Fuel Norms*, 150 CLIMATIC CHANGE 103, 108–09 (2018).

from other jurisdictions.[272] If that increased production is used and is as large as the original production that was curtailed, then the supply-side policy has been ineffective. Indeed, if the new production is dirtier—e.g., produces even more emissions than the original production, such as tar-sands production from Canada—then the supply-side policy has been positively harmful. In general, the reduction of supply in one country in a global fossil-fuel market will increase the global price for the fossil fuel, which in turn should trigger increased production in other countries. On the other hand, the increased price for the fossil fuel will also reduce demand globally.[273] How the two factors play out depends on the price elasticity of supply and demand—how much supply and demand respond to changes in price. If the price elasticity for demand of a fossil fuel is high relative to the price elasticity of supply, then the decline in demand will more than offset any increases in supply, leakage will be less, and a supply-side policy will be more effective.[274]

Elasticity can vary greatly from fossil fuel to fossil fuel, and from market to market.[275] If there are feasible substitutes for a fossil fuel whose supply is being restricted, then elasticity of demand for that fuel will be higher, and demand for the fuel will decline more as prices rise—as a result, there will be less of an increase in offsetting production from other sources.[276] If the substitutes have lower carbon emissions, then that will further increase the emissions benefits of supply-side reductions.[277] Fossil fuels that have more regional or local markets are more amenable to unilateral supply-side policies because it is harder for exports to replace the loss in production.

Another form of leakage is intertemporal leakage. Producers who know that restrictions will come in the future may increase production now, so they can make money off of their fossil-fuel resources while they can. The promise of stricter future regulations can cause more pollution now—economists have called this the "green paradox."[278] The green paradox has been developed in theoretical literature, though it is unclear how likely it is to actually occur in practice.[279] A countervailing pressure is divestment—fossil-fuel producers faced with future restrictions might reduce investments in additional production, knowing that those investments will

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272. Lazarus & van Asselt, *supra* note 265, at 5.

273. Green & Denniss, *supra* note 265, at 77–78; Hagem & Storrøsten, *supra* note 268, at 380, 386.

274. Green & Denniss, *supra* note 265, at 83; Paul Collier & Anthony J. Venables, *Closing Coal: Economic and Moral Incentives*, 30 OXFORD REV. ECON. POL'Y 492, 497–98 (2014); Katinka Holtsmark, *Supply-Side Climate Policy in Norway*, *in* NORDIC ECONOMIC POLICY REVIEW 2019: CLIMATE POLICIES IN THE NORDICS 198, 203–05 (Lars Calmfors et al. eds., 2019).

275. Michael Lazarus et al., *Supply-Side Climate Policy: The Road Less Taken* 14–15 (Stockholm Envtl. Inst., Working Paper No. 2015-13, 2015).

276. Collier & Venables, *supra* note 274, at 497–98; Holtsmark, *supra* note 274, at 210.

277. The worst-case scenario is the substitutes have higher carbon emissions!

278. Svenn Jensen et al., *An Introduction to the Green Paradox: The Unintended Consequences of Climate Policies*, 9 REV. ENVTL. ECON. & POL'Y 246, 246–47 (2015); Hans-Werner Sinn, *Public Policies Against Global Warming: A Supply Side Approach*, 15 INT'L TAX & PUB. FIN. 360, 380 (2008).

279. Jensen et al., *supra* note 278, at 259–61.

eventually become unproductive. This pressure will be particularly strong where extraction or use of the fossil-fuel resource is very capital intensive.[280]

While leakage has been the primary argument against supply-side approaches, a range of studies have found that supply-side approaches can be very effective at minimizing or eliminating leakage, both geographical and intertemporal.[281] Indeed, any unilateral climate change policy—including demand-side approaches—pursued by an individual jurisdiction is vulnerable to the possibility of leakage, and supply-side approaches may have less vulnerability than demand-side approaches. However, whether any particular supply-side approach will be vulnerable to leakage will depend on the policy's nature, the fossil fuel targeted, and the affected markets.[282]

This framework helps provide some guidance as to whether and how to proceed with terminating existing fossil-fuel leases on federal lands. Studies indicate that restricting or ending coal leasing on federal lands likely would produce meaningful reductions in U.S. emissions.[283] In part, that is because the climate change impacts of coal far exceed those of oil or natural gas, at least if fugitive methane emissions from oil and gas production are adequately controlled.[284] Coal produces over 200 pounds of CO_2 emissions per million British thermal units of

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280. *See generally* Nico Bauer et al., *Divestment Prevails over the Green Paradox When Anticipating Strong Future Climate Policies*, 8 NATURE CLIMATE CHANGE 130, 131–33 (2018).

281. Hagem & Storrøsten, *supra* note 268, at 381, 385, 387; *see also* Collier & Venables, *supra* note 274, at 493; Holtsmark, *supra* note 274, at 210–12 (summarizing the literature).

282. Another risk that leakage produces is that it can result in a transfer of wealth from the jurisdictions that restrict its supply to other jurisdictions that increase their production in response. *See* Holtsmark, *supra* note 274, at 219; Severin Borenstein, *Should California Keep Its Oil in the Ground?*, ENERGY INST. BLOG (Aug. 6, 2018), https://energyathaas.wordpress.com/2018/08/06/should-california-keep-its-oil-in-the-ground/.

283. Collier & Venables, *supra* note 274, at 492; Erickson & Lazarus, *supra* note 269, at 36–37 (finding that ending coal leasing in the United States would reduce emissions by 240 Mt CO_2, as much or more than any other policy proposed under the Obama Administration). Similarly, a study found that imposing higher costs on federal coal-mining activities would produce real emissions reductions. Todd D. Gerarden et al., *Federal Coal Program Reform, the Clean Power Plan, and the Interaction of Upstream and Downstream Climate Policies*, 12 AM. ECON. J. 167, 197 (2020) (finding that royalty surcharge on coal production in the United States could produce significant emissions reductions) ("We conclude that, in the absence of ideal, economically efficient regulation, a carbon surcharge on federal coal royalties could provide meaningful, cost-effective emissions reductions.").

284. Uncontrolled methane emissions from natural-gas production can offset the lower emission rates of natural-gas combustion, and there are published estimates of methane leakage that are that high for the United States. *See, e.g.*, Ramón Alvarez et. al., *Assessment of Methane Oil and Gas Supply Chain*, 361 SCIENCE 186 (July 13, 2018); Benjamin Hmiel et. al., *Preindustrial CH4 Indicates Greater Anthropogenic Fossil CH4 Emissions*, 578 NATURE 409 (2020). However, these excess methane emissions could be addressed through stricter regulation of methane emissions and enforcement of existing regulations, such as the strict methane regulations for oil and gas facilities on and off federal lands that the Obama Administration implemented, regulations that the Trump Administration sought to eliminate.

energy, compared to around 160 for gasoline or diesel fuel, or 120 to 140 for natural gas and propane.[285]

But it is also the case that restrictions on coal supplies would likely have low leakage. There are lots of substitutes for many uses of coal that have lower carbon emissions—for instance, both natural gas and renewables can replace coal in electric-power generation. In addition, coal markets tend to be more national or regional, rather than global, reducing the possibility of increased supply from other jurisdictions.[286]

Oil might be a lower priority. There are currently fewer good substitutes for oil use in transportation, which is where most oil is consumed in the United States. In addition, the oil market is global, allowing other countries to increase production to offset reductions in U.S. production.[287] Finally, gas might be the least attractive for termination of leases. The substitutes for the use of natural gas would be either coal, oil, or renewables—only renewables have lower carbon emissions, and coal has much higher emissions.[288] Natural gas has played an important role in displacing coal in electricity production in the United States and is an important current component of electricity production across the country.[289]

Even if termination of leases is an effective approach to address climate change, the cost of the policy must be considered: how would the plausible damages that would be owed for terminating leases (if any) compare to reasonable estimates of the social cost of carbon that would be emitted if those leases continued to produce? Estimates of the social cost of carbon have high variation: ranging from \$1 to \$7 per ton (estimates by the Trump Administration) to \$50 per ton (Obama

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285. *Frequently Asked Questions*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/tools/faqs/faq.php?id=73&t=11 (last reviewed June 17, 2020).

286. Green & Denniss, *supra* note 265, at 83; Collier & Venables, *supra* note 274, at 497–98. There may also be increased production on private lands in the United States, but one study found that was unlikely to offset the reductions on federal lands. Erickson & Lazarus, *supra* note 269, at 36–37.

287. Lazarus et al., *supra* note 275, at 15; Erickson & Lazarus, *supra* note 269, at 34–35, 37–38 (finding that ending oil leases would have a smaller impact on emissions (39 Mt CO_2) at substantially higher cost, though cost declines as the price of oil declines); Borenstein, *supra* note 282 (noting risk that foreign production might offset reductions in U.S. production). For a recent study finding that ending future oil and gas leases on federal lands would produce a significant net decline in greenhouse gas emissions, see generally Brian Prest, *Supply-Side Reforms to Oil and Gas Production on Federal Lands: Modeling the Implications for Climate Emissions, Revenues, and Production Shifts* (Res. for the Future, Working Paper No. 20-16, 2020), https://media.rff.org/documents/RFF_WP_20-16_Prest.pdf.

288. Phillipe Le Billon & Berit Kristoffersen, *Just Cuts for Fossil Fuels? Supply-Side Carbon Constraints and Energy Transition*, 52 ENV'T & PLANNING A 1072, 1085 (2020) ("Gas should be the least likely candidate for supply cuts.").

289. The importance of natural gas at the current moment does not mean that policymakers might not want to stop future oil and gas leasing on federal lands to reduce emissions in the future and avoid infrastructure lock-in for fossil fuels.

Administration) to $417 per ton (in one academic study).[290] While we find the lowest estimates improbable, we also believe that to the extent legally feasible any such estimates should take into account the global harms from greenhouse gas emissions, not just harms within the United States.[291]

In addition to climate change, there may be a range of other environmental reasons to terminate existing fossil-fuel leases. Oil, gas, and coal production on federal lands can cause serious local and regional environmental harms, including air pollution that negatively affects public health, impacts on wildlife habitat, and water-quality impacts. These factors might weigh in favor of targeted termination of leases in particular locations.

There are also critical and complex questions associated with the economic and social impacts of lease termination on the communities dependent on leasing activity. While a transition from a fossil-fuel-dependent economy is unavoidable in the long term, even if only when we deplete our reserves, it requires proactive social and economic planning to ensure a just transition for the communities that have long depended on—and in many cases also borne the brunt of—fossil-fuel-based economies. How well prepared are fossil-fuel communities for the economic transition associated with lease terminations, and what can be done to assist them? In short, what does a just transition look like?

Finally, to the extent that reclamation funding for existing operations is dependent on lease proceeds, would termination of leases have an adverse environmental impact on reclamation and restoration efforts?[292] What funding sources might be available to compensate the loss of reclamation funding, and can lease terms in new leases and renewals be introduced to make up the difference? And are there policy alternatives to terminating leases? In light of the potential costs and legal uncertainties, are there viable alternatives—such as a phase-out program—

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290. *Compare* U.S. ENVTL. PROT. AGENCY, EPA-452/R-18-006, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING ELECTRIC UTILITY GENERATING UNITS, REVISIONS TO EMISSION GUIDELINE IMPLEMENTING REGULATIONS; REVISIONS TO NEW SOURCE REVIEW PROGRAM (2018), https://www.epa.gov/sites/production/files/2018-08/documents/utilities_ria_proposed_ace_2018-08.pdf (Trump Administration estimates), *with* INTERAGENCY WORKING GRP. ON SOC. COST OF GREENHOUSE GASES, TECHNICAL UPDATE OF THE SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS (2016) https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf (Obama Administration estimates), *and* Katharine Ricke, *Country-Level Social Cost of Carbon*, 8 NATURE CLIMATE CHANGE 895, 897 (2018), https://doi.org/10.1038/s41558-018-0282-y.

291. Focusing on only the cost of harms within the United States leads to much lower estimates of costs, and was the approach taken by the Trump Administration. However, this approach is blind to the global nature of harms produced by any greenhouse gas emissions.

292. The balance in the federal Reclamation Fund at the end of fiscal year 2018 was $16.6 billion and revenue has usually exceeded appropriations for the past 25 years. *Reclamation Fund*, NAT. RESOURCES REVENUE DATA, https://revenuedata.doi.gov/how-it-works/reclamation-fund/ (last visited June 12, 2020). However, 90% of the receipts into the fund come from natural resource royalties and hydropower sales. *The Reclamation Fund*, CONG. RESEARCH SERV., https://fas.org/sgp/crs/misc/IF10042.pdf (last updated May 21, 2019).

and what should their environmental and social impacts be? And how would our actions here in the United States translate to other jurisdictions? How could our actions set meaningful precedent for a world that needs to leave billions of dollars in fossil-fuel assets in the ground to achieve essential climate targets?

Fully answering these questions is beyond the scope of our Article, but the questions remain important subjects for future research. They must be answered before decision-makers can make informed decisions about whether, how, and when we might want to consider terminating existing leases.