

OFFICIAL TRANSCRIPT

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MOBIL OIL EXPLORATION AND PRODUCING
SOUTHEAST, INC., Petitioner v. UNITED STATES; and
MARATHON OIL COMPANY, Petitioner v. UNITED
STATES

CASE NOS: 99-244 & 99-253 *e.1*

PLACE: Washington, D.C.

DATE: Wednesday, March 22, 2000

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IN THE SUPREME COURT OF THE UNITED STATES

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MOBIL OIL EXPLORATION AND :
PRODUCING SOUTHEAST, INC., :
Petitioner :

v. : No. 99-244

UNITED STATES; :
and :
MARATHON OIL COMPANY, :
Petitioner :

v. : No. 99-253

UNITED STATES :

- - - - -X

Washington, D.C.

Wednesday, March 22, 2000

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:16 a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of
the Petitioners.

KENT L. JONES, ESQ., Assistant to the Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Respondent.

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1 P R O C E E D I N G S

2 (11:16 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 99-244, Mobil Oil Exploration and Producing
5 v. United States, Marathon Oil Company v. United States.

6 Mr. Phillips.

7 ORAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE PETITIONERS

9 MR. PHILLIPS: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 This is a contract case in which my clients have
12 paid more than \$156 million for the right, as it said
13 in -- at Pet. App. 175a, to drill for, develop, and
14 produce oil and gas resources off the Outer Banks of North
15 Carolina. Later, Congress intervened in the Outer Banks
16 Protection Act and declared, quote, that the Secretary --
17 and this at page 161a of the appendix to the petition --
18 the Secretary of Interior shall not conduct a lease sale,
19 issue any new leases, approve any exploration plan,
20 approve any development and production plan, approve any
21 application for permit to drill, or permit any drilling,
22 for a period of not less than 13 months, and potentially
23 for an indefinite period thereafter.

24 Congress could hardly have been any clearer in
25 its efforts to repudiate the basic lease obligations that

1 the United States had undertaken with respect to the Mobil
2 and Marathon leases here. Indeed, Congress specifically
3 identified by name the Mobil Oil Corporation in the
4 context of this particular statute, and said that it
5 wanted to bring this lease to a halt. Not surprisingly,
6 it had exactly that effect.

7 Not only did the Government categorically
8 repudiate its obligations under the lease, but at the
9 first opportunity in August of 1990, when Mobil, on behalf
10 of the other producers in the Manteo Unit, submitted a
11 plan of exploration, and sought approval to go forward at
12 the very first steps under this lease, what the United
13 States did, and it was quite clear about this, was it
14 said, this is approvable in all respects under the Outer
15 Continental Shelf's Lands Act, but we cannot approve it
16 because of the Outer Banks Protection Act. We are
17 prohibited from doing so, and as a consequence we
18 suspended the lease.

19 And then when the Secretary addressed the
20 question from North Carolina as to whether or not the plan
21 should be disapproved or otherwise modified, the
22 Department said categorically, we cannot do that because
23 it is approvable in all respects based on the 2,000-page
24 report that had been submitted by the United States just
25 months before this action was taken.

1 QUESTION: Mr. Phillips, may I ask, this is a
2 case with some complex provisions, and is it the case that
3 under the lease the Government had the power at least to
4 suspend the lease?

5 MR. PHILLIPS: Well, it certainly had the power
6 to suspend the lease under certain conditions in section 5
7 of the lease that said that if there is a threat of
8 irreparable injury to the environment, irreparable and
9 significant injury, there was certainly the opportunity to
10 do that.

11 But of course there's clearly, 1) never been a
12 finding by the Secretary of Interior or anyone at Interior
13 along those lines and, indeed, the Outer Banks Protection
14 Act itself cannot substitute for that finding, because the
15 Congress in the Outer Banks Protection Act made no effort
16 to conclude that there was a serious threat. All it said
17 was that there were concerns that had not been fully
18 allayed even though this was in the face of a 2,000-page
19 report.

20 QUESTION: I may not understand this. I'm
21 stopping you because I want it clarified. I thought to
22 suspend a lease is a technical activity. The suspension
23 of a lease means that the companies need not pay a series
24 of payments. The suspension of the lease does not mean
25 that they suddenly do not have a time-related obligation

1 in the Government to approve or to disapprove by a CZMA
2 the plan of exploration. Now, am I right about that, or
3 not?

4 I mean, you are suspending the lease. What
5 you're complaining about is not -- you're complaining
6 about the fact that they did not within a specified time
7 either approve or disapprove that plan, and you believe,
8 and they don't contest it, they would have had to approve
9 it under CZMA.

10 MR. PHILLIPS: Right, and part of that's
11 because --

12 QUESTION: Now, is the suspension of the
13 lease -- did they have a right under this reg? This is
14 hitting me cold suddenly. I mean, did they have a right
15 under the reg to suspend the lease, not in just the sense,
16 no payment, but in the sense that we can suspend the plan
17 of exploration approval?

18 MR. PHILLIPS: My guess is that under the Outer
19 Continental Shelf Lands Act, if they had made the specific
20 kinds of findings that are provided for in section 5, they
21 could bring all of this to a halt, including their
22 obligation under the 30-day requirement, but of course
23 prior to the time --

24 QUESTION: But those findings are environmental
25 findings?

1 MR. PHILLIPS: Yes, under the --

2 QUESTION: Serious risk?

3 MR. PHILLIPS: Serious harm, yes.

4 QUESTION: And contrary to that they had a
5 2,000-page report that said there wasn't one, isn't
6 that --

7 MR. PHILLIPS: They said there was no
8 significant risk created as a consequence of that, and
9 while the Government has made the effort in this Court to
10 suggest that there's no materiality in this context
11 because the Outer Banks Protection Act basically supplies
12 the findings that could have otherwise been supplied under
13 the Outer Continental Shelf Lands Act, it is absolutely
14 clear to me that that cannot be the case.

15 The Outer Continental Shelf Lands Act first of
16 all does have a set of timing requirements and a certain
17 specific suspension obligations that look to serious
18 threats of harm, and also examines these things on the
19 basis of environmental considerations.

20 The Outer Banks Protection Act, in stark
21 contrast, first of all has no timing element to it. Once
22 you get into the studies that are required under the Outer
23 Banks Protection Act, there is no requirement to come back
24 at any time within a reasonable period and, second of all,
25 the question of environmental concerns is completely wiped

1 away and, third of all, and I think perhaps in some ways
2 most important, there is a socioeconomic obligation to
3 collect information with respect to socioeconomic effects
4 that you might engage in on the outer continental shelf
5 lands by this exploration and production, and none of that
6 occurs in the Outer Continental Shelf Lands Act. That's
7 strictly a function of the new amendments under the Outer
8 Banks Protection Act.

9 QUESTION: Mr. Phillips, it seems to me there
10 are some factual issues here. You claim repudiation. You
11 claim a material breach. You seek restitution. The
12 Government says you may have waived by continued
13 performance. Are the findings of the -- of a claims court
14 judge in this case sufficient to support your view? In
15 other words --

16 MR. PHILLIPS: Absolutely.

17 QUESTION: -- do you have to argue for some
18 factual determination here different from that made by the
19 claims court?

20 MR. PHILLIPS: No. We have no -- there's no
21 dispute about what happened in this particular case.

22 The question is, given, 1) that Congress came in
23 and categorically repudiated all of its obligations, given
24 2) -- and these are undisputed facts -- given, 2) that the
25 Secretary refused to approve a POE approvable in all

1 respects and second, again, subsequently refused to
2 approve a POE even though it was in full compliance with
3 the Outer Banks Protection Act, so there is substantial
4 nonperformance in the face of a repudiation.

5 Hornbook law for 300 years and this Court's
6 decision in Nash v. Towne makes clear that under those
7 circumstances the violating party is not free to keep
8 something for nothing.

9 QUESTION: But the Government says you waived
10 the acceptance of the repudiation, if that's the right
11 phrase, by continued performance. Now, did the claims
12 court judge make finding -- was that raised in the claims
13 court?

14 MR. PHILLIPS: That was -- one aspect of that
15 was raised in the claims court, and the claims court I
16 think viewed it as sufficiently insubstantial. He didn't
17 bother to address it specifically.

18 They did address the suspension, our exercise of
19 our rights under the memorandum of understanding, not
20 under the lease but under the memorandum of understanding,
21 to suspend these leases during the period of time that the
22 CZMA objections were ongoing. They identified that in the
23 claims court as the only basis for waiver.

24 But even if you give the United States the
25 benefit of the opportunity to put waiver on the table at

1 this stage, based on our filing of the exploration plan --
2 based on our filing an appeal of the CZMA objection and
3 then based on the suspensions, as a matter of law that
4 cannot possibly represent an intentional relinquishment of
5 our rights under this contract, particularly in the
6 context of Court of Federal Claims litigation, where you
7 have no right to seek specific performance. You have no
8 right to seek a declaration of your rights.

9 And in this case it's even worse than in any
10 other case, because the United States could with all
11 credibility argue until 1996 that they had never breached
12 this contract because of the unmistakability doctrine and
13 the sovereign acts doctrine that this Court had not
14 repudiated at least until the Winstar decision.

15 QUESTION: Mr. --

16 MR. PHILLIPS: We didn't even know if there was
17 a breach of this contract --

18 QUESTION: Can I ask you one question? The
19 facts are a little complex here. There's another lawsuit
20 that's been pending and stayed, as I understand it, in
21 which you're challenging the decision of the Secretary of
22 Commerce not to override the State's objections. Is that
23 case still alive?

24 MR. PHILLIPS: That case is still alive.

25 QUESTION: Now, the thing I want you to explain

1 to me, and I'm sure you have an answer to this, if you
2 filed that case seeking to protect your rights under the
3 whole program, and if that's still pending, how can you
4 simultaneously say that the whole deal is off?

5 MR. PHILLIPS: Essentially for the reasons I was
6 just explaining to you, Justice Stevens. Since we didn't
7 know, and the Government even today is saying there's been
8 no breach of contract, and we have no mechanism by which
9 to obtain any kind of an assessment of what our rights
10 are. All we've done is essentially try to maintain the
11 status quo and act reasonably in response to the
12 Government's repudiation of our rights.

13 QUESTION: But let me ask you this. If -- say
14 you lost this case, just hypothetically, but yet, then you
15 went ahead with the other case and you won that case,
16 would you then not be able to develop the leases?

17 MR. PHILLIPS: Well, at that point we would be
18 able to go to the plan of exploration, but we would still
19 have -- well, at this stage now the Outer Banks Protection
20 Act has been repealed, but --

21 QUESTION: Is it not --

22 MR. PHILLIPS: -- assuming the Outer Banks
23 Protection Act was still in place, we would still have the
24 same objection.

25 QUESTION: I guess the ultimate question I'm

1 trying to ask, is it not conceivable that you could lose
2 this case and still develop the properties by winning that
3 case and get your approvals later?

4 MR. PHILLIPS: I mean, in reality, and if you're
5 asking for a practical answer as opposed to a theoretical
6 answer, as a practical answer, no, because all of the
7 other leases surrounding us have all been turned in
8 because all of the other leasehold owners had caved years
9 ago, rather than try to litigate this matter, so that the
10 Manteo Unit no longer exists as a unit. It's all -- all
11 of its participants have walked away from this.

12 QUESTION: But you would have the legal right to
13 develop it if you won that case?

14 MR. PHILLIPS: Well, we would have the legal
15 right now to have the Secretary approve our plan of
16 exploration.

17 QUESTION: And if they approved it, then you'd
18 have the legal right to go out and drill the wells. Maybe
19 you can't do it because of changed circumstances.

20 MR. PHILLIPS: Well, we would have to get -- we
21 would still have to get permits, and we would have to go
22 through all of the approvals of the Outer Continental
23 Shelf Lands Act, that's true. We try to preserve the
24 opportunity to retain our relationship with our
25 contracting partner in this context, that is, the United

1 States, as a consequence of this, given that there's no
2 mechanism for specific performance and no -- or
3 declaratory relief. All we could do is basically try to
4 preserve as much of the status quo ante as we could, while
5 at the same time being as clear as humanly possible that
6 what we really wanted was to take advantage of the
7 repudiation, seek restitution, and be out -- and be done
8 with this particular --

9 QUESTION: So --

10 QUESTION: Mr. Phillips --

11 QUESTION: -- is your answer, then, that by
12 attempting to preserve your ability to perform, you do not
13 foreclose yourself from seeking restitution when the other
14 party has repudiated the contract?

15 MR. PHILLIPS: That is exactly our position,
16 that in the ordinary course it's an election of remedies
17 issue which comes much later in the process. We didn't --
18 and all we did was to try to preserve our ability to have
19 an election of remedies at the appropriate time, and if we
20 have to elect them today, I'd take the \$156 million, Your
21 Honor.

22 QUESTION: May I take you back to where Justice
23 Stevens was, because you mentioned very quickly that
24 there's a statute in this picture, the CZMA, and as far as
25 I understand your argument, you are not in any way

1 suggesting that the States couldn't -- subject to the
2 override of the Secretary of Commerce, the States couldn't
3 say, even if you had every approval from Interior
4 promptly, the State could still say, North Carolina could
5 still say, no go, no exploration. We think you're out of
6 whack with our coastal management plan.

7 MR. PHILLIPS: Right. I mean -- and I mean,
8 it's subject to that last statement, of course, that they
9 would have -- there would have to be a reasonable basis
10 for in fact saying that there's an inconsistency with the
11 Coastal Zone Management Act.

12 But yes, subject to that, the only ability to go
13 forward under those circumstances would be to go to the
14 Secretary of Interior, or of Commerce, excuse me, and seek
15 to have the objection overridden and, indeed, in the dozen
16 cases between 1984 and 1994 in which that course has been
17 followed, the Secretary in fact did overturn State
18 objections under the CZMA.

19 QUESTION: Here he didn't, at least in the first
20 round. The Secretary of Commerce did not --

21 MR. PHILLIPS: Did not in 1994, however.

22 QUESTION: And there's one peculiar feature of
23 this case that follows on to your answer that yes, North
24 Carolina could do this subject to the override of the
25 Secretary of Commerce. It's almost as though the Outer

1 Banks act has given you a way out that you never would
2 have had without that Outer Banks act. In other words, if
3 there were only the outer continental shelf act --

4 MR. PHILLIPS: Right.

5 QUESTION: -- you could get everything you
6 wanted from Interior and North Carolina could still say
7 no. It's only because there is this other act that looks
8 like it's stopping you in your tracks that enables you to
9 repudiate, that enables you to seek --

10 MR. PHILLIPS: No, seek restitution.

11 QUESTION: -- restitution.

12 MR. PHILLIPS: There are two answers to that.
13 First of all, that may be true, because that is exactly
14 what restitution seeks to accomplish, which is to
15 acknowledge or recognize that in certain circumstances
16 events may work to the fortuity of the innocent party in a
17 way that allows them to seek restitution where -- even
18 though it's a losing contract.

19 I mean, that is the basis of the Restatement 373
20 illustration. One says that if you pay \$20,000 to buy
21 land, and the land's value drops to nothing, and the other
22 side still doesn't, for whatever reason, give you the
23 property, you are still entitled to the \$20,000. The
24 other side doesn't get something for nothing under those
25 circumstances, so you can classify it as a fortuity, but

1 it is right at the core of what 300 years of restitution
2 law is designed to allow us to do.

3 The second part of this, though is, you know,
4 the expectations of the party at that point in time, in
5 1982, was that this was going to go through quite cleanly,
6 and the evidence of that is pretty clear. First of all,
7 the first two requests for exploration plans were both
8 approved by the Secretary and by the State of North
9 Carolina with no objection at that point in time, and
10 what -- of course, it took us a while to develop the kind
11 of environmental evidence we would need in order to put
12 together this kind of a novel arrangement in this
13 particular setting, and so time certainly ran through, but
14 our expectations all along were that we would be in fact
15 able to drill.

16 I mean, that's what my clients are in the
17 business of doing. They're not in the business of
18 generating litigation. They're in the business of
19 generating oil and natural gas, while at this stage I
20 think they're quite content to walk away and try to get
21 back the money the Government took for doing nothing --

22 QUESTION: Is it part of --

23 MR. PHILLIPS: -- they would have preferred to
24 be able to drill.

25 QUESTION: Is it part of your submission that

1 had the POE been approved, you then would have been in a
2 stronger legal position to insist upon obtaining permits,
3 or of overruling the North -- North Carolina's objections
4 in a subsequent court action? Is that part of your
5 submission, or --

6 MR. PHILLIPS: I'm not sure if it --

7 QUESTION: I didn't see that in the briefs, and
8 I --

9 MR. PHILLIPS: I'm not sure it's so much in the
10 subsequent court action. I think if the POE had been
11 approved and the State had objected to the plan of
12 development at that point in time, I think we would have
13 had a very substantial argument for going to the Secretary
14 of Interior and asking the Secretary to set it aside as
15 overbalanced, instead of getting into the Outer Banks
16 Protection Act problem of saying, well, what we don't have
17 is enough information, and we don't have enough
18 information about the environment, we don't have enough
19 information about bottom blowers --

20 QUESTION: Well, at least your legal position
21 with the Secretary would have been enhanced but for what
22 you allege to be the repudiation.

23 MR. PHILLIPS: Yes. I think there's no question
24 that we would have had an opportunity -- our working
25 assuming in 1982, when we entered into this agreement,

1 was, we would get our approvals -- remember, in 1982 the
2 Outer Continental Shelf Lands Act had been in effect for
3 almost 30 years. The Secretary had never disapproved a
4 plan of exploration, and I think it's important to
5 recognize that. That was the basis, that's the essence of
6 the bargain.

7 It's not, were we ever going to ultimately get
8 oil in this case. The essence of the bargain was, were we
9 going to get performance by the United States Government?
10 That is, was it going to apply the Outer Continental Shelf
11 Lands Act and the legal standards embodied in there and
12 allow us to move forward under those circumstances? If
13 they had followed that course, we would be now drilling
14 hopefully for 6 trillion cubic foot of natural gas.

15 They didn't follow that course. They
16 repudiated, they materially breached, and the appropriate
17 course of action for the Court to follow at this stage is
18 restitution.

19 If there are no questions, I'd waive the
20 balance -- I'd reserve the balance of my time.

21 QUESTION: Very well, Mr. Phillips.

22 Mr. Jones.

23 ORAL ARGUMENT OF KENT L. JONES

24 ON BEHALF OF THE RESPONDENT

25 MR. JONES: Mr. Chief Justice, and may it please

1 the Court:

2 At page 118 of the joint appendix, Mobil tells
3 us that the leases involved in this case encompass what
4 may be the largest hydrocarbon deposit discovered in the
5 United States since the Prudhoe Bay field in Alaska in the
6 1960's. At the same time, the tract of land on which
7 these leases are located, the point of the Outer Banks off
8 of North Carolina, is unquestionably one of the most
9 unique and important environmental resources on the
10 Eastern Seaboard.

11 In this context, it is perfectly understandable
12 that it is a matter of high importance to North Carolina
13 and to the United States to determine whether this
14 enormous hydrocarbon resource could be developed without
15 causing undue harm to the environment, and the statutes
16 under which the leases are issued and to which they are
17 subject is highly protective of these important
18 environmental interests.

19 QUESTION: That's okay. They just want their
20 money back. I mean, they're perfectly willing to protect
21 the environment and call the deal off.

22 MR. JONES: Well --

23 QUESTION: But the issue before us is whether
24 they get their money back.

25 MR. JONES: Well, that is an issue before us,

1 and under the leases, under the terms of the leases that
2 are applicable to us as well as to the lessee, the United
3 States has the absolute right to suspend all operations on
4 the lease, including consideration of these kinds of
5 exploration plans, whenever the United States determines
6 that there is a threatened harm to the environment, or
7 that economic -- I'm sorry, environmental studies --

8 QUESTION: Right, but his argument is that
9 you've never determined it.

10 QUESTION: You never made that determination.

11 MR. JONES: Well, no -- I'm sorry, but I
12 disagree with both of those. In 1990, when Congress
13 enacted the OBPA, Congress determined that there were
14 threats of environmental harm --

15 QUESTION: I don't have that in your brief.

16 QUESTION: No --

17 QUESTION: That is, what I have in my -- in the
18 statute is that it says, regulation -- and here I gather
19 there was no regulation. The regulation prescribed by the
20 Secretary allows the suspension --

21 MR. JONES: Yes.

22 QUESTION: -- if there is, and these are the key
23 words, a threat of serious, irreparable, or immediate harm
24 to the environment, among other things. Then I looked at
25 the best finding that you can find as a substitute, and

1 you cannot find a regulation because there is no such
2 regulation.

3 MR. JONES: I'm sorry --

4 QUESTION: I take it there is no regulation by
5 the Secretary that says that, or that provides for -- that
6 makes that finding.

7 MR. JONES: You mean a finding by the Secretary.

8 QUESTION: No. I'm saying --

9 MR. JONES: There is a regulation.

10 QUESTION: But not that has a finding.

11 MR. JONES: There is a regulation that says we
12 can suspend whenever -- to do an environmental study, or
13 to investigate threatened environmental harms.

14 QUESTION: That -- I'm sorry.

15 MR. JONES: That's what the regulation says.

16 QUESTION: That --

17 MR. JONES: What the OBPA, what Congress found
18 in enacting the OBPA was that there were both threatened
19 environmental harms --

20 QUESTION: Why don't you say -- let me pose a
21 question, though I may not do it perfectly, then you'll
22 see what -- I thought the statute says there has to be a
23 regulation, and it says if there is a threat of serious,
24 irreparable or immediate harm.

25 Then I look to what you say in your brief about

1 that, and it seems to me the best you can do is a finding
2 by the conference committee of the Congress which says
3 that, quote, it is a reasonable action to prevent a public
4 harm that could result from lack of such information, and
5 it --

6 MR. JONES: There's --

7 QUESTION: My question is, it doesn't sound to
8 me like a finding that it would be a reasonable thing to
9 do to have the suspension. There is a finding that there
10 is a serious threat, a threat of serious, irreparable or
11 immediate harm.

12 MR. JONES: If you --

13 QUESTION: Now, that's my question.

14 MR. JONES: Okay. If you look at pages 159 and
15 160 of the petition appendix in the Marathon petition,
16 where the OBPA findings are set out, one of those findings
17 is item number --

18 QUESTION: These were in the statute?

19 MR. JONES: They're part of the Outer Banks
20 Protection Act. These are the findings that were part of
21 that act, and the third finding under (a), 6003(a)(3) is
22 that a major --

23 QUESTION: Where are you -- what page are you
24 reading from, Mr. --

25 MR. JONES: 159a of the Marathon petition.

1 QUESTION: Yes. What number?

2 MR. JONES: 159a.

3 QUESTION: 15 -- thank you.

4 MR. JONES: The petition number is 99-253. It's
5 the Marathon petition.

6 In any event, the third finding of Congress was
7 that a major industry in coastal North Carolina is subject
8 to potentially serious -- significant disruption by off-
9 shore gas development. Now, this really goes to the
10 heart --

11 QUESTION: That isn't the same finding as the
12 statute calls for.

13 MR. JONES: It is, because what the statute --
14 and that's the confusion that I need to clear up. This is
15 very important. The statute says that if there is a
16 threat of a harm to the marine coastal or human
17 environment, then -- then the lease may be suspended. The
18 statute in 1334(i), which is also in the same appendix at
19 page 102a, defines the term, human environment for the
20 purposes of this statute to include -- and I'll
21 paraphrase -- adverse effects on the local economy. This
22 is an unusual --

23 QUESTION: Where -- where --

24 MR. JONES: -- environmental determination.

25 QUESTION: Where are you reading from? What are

1 you --

2 MR. JONES: Page 102a of the Marathon
3 petition --

4 QUESTION: Yes.

5 MR. JONES: -- appendix, at the bottom, item --

6 QUESTION: Human environment?

7 MR. JONES: Human environment. In enacting the
8 OCSLA Congress did something a little different than it
9 has in normal environmental statutes. It has put into the
10 statute a requirement that the Secretary review and
11 analyze threatened harms to the -- if you'll allow me to
12 paraphrase, the local economy, and how that affects people
13 who live in the coastal environment, and that gets us to
14 one of the hearts of what Congress was concerned about in
15 the OBPA, because the National Research Council had told
16 Congress that the MMS had failed to look at this issue.

17 The environmental study panel that Congress put
18 together under the OBPA concluded that the MMS had failed
19 to look at this issue. It needed to be addressed. And
20 Secretary Lujan 2 years into his -- after -- on completion
21 of his review that Congress required also concluded that
22 the MMS needed to make further investigation of this issue
23 by ordering the two studies that Mobil wants to dismiss as
24 socioeconomic studies. These are studies --

25 QUESTION: But the need to make further

1 investigation does not equate with a finding of immediate
2 or serious danger.

3 MR. JONES: Well, there was a --

4 QUESTION: That's what you have to get to, and I
5 keep listening for --

6 MR. JONES: Immediate or serious.

7 QUESTION: -- where that finding is.

8 MR. JONES: Yes, immediate or serious, and one
9 of -- and what I quoted to you from the findings of the
10 OBPA says that a major industry is subject to potentially
11 significant disruption.

12 QUESTION: You tell me where you discuss that in
13 your brief, because I didn't -- I didn't really have that
14 one. When I looked at the brief what I had is on page 32,
15 where you discuss the finding of the conference report,
16 and now I'm --

17 MR. JONES: Well, we only --

18 QUESTION: -- totally not up to speed --

19 MR. JONES: Right.

20 QUESTION: -- on what you just read me. Can you
21 just tell me where in your brief you discuss that finding?

22 MR. JONES: I can't -- I'm not sure that we
23 discussed that finding in the brief.

24 QUESTION: Well, if that -- if that finding is
25 so obvious, then why didn't you discuss it in your brief?

1 I mean, if that's the --

2 MR. JONES: Well, I'm not sure that we had
3 enough pages to discuss every possible issue in this case.

4 QUESTION: No, no, just give -- all right,
5 but --

6 MR. JONES: I mean, that's an honest answer,
7 because I can tell you from working on this brief, there
8 were a lot of issues that had to be narrowly dealt with in
9 an abbreviated fashion, and perhaps unfortunately this was
10 one, but the point is that in --

11 QUESTION: -- cite. Let me just write it down,
12 because I want to be sure that I read it.

13 MR. JONES: Cite to which?

14 QUESTION: To the finding of Congress that you
15 think was equivalent to --

16 MR. JONES: I think there's --

17 QUESTION: -- the threat of serious, irreparable
18 or immediate harm.

19 MR. JONES: It was -- again, I quoted from it at
20 page 159a of the --

21 QUESTION: That just says potentially.

22 MR. JONES: Yes. It's a threatened harm.
23 That's all that's required, and that's also important.
24 All that's required for a suspension is that there be a
25 threat of harm, and then we're supposed to investigate,

1 and if we --

2 QUESTION: Is subject to. What is subject to?
3 Does that mean an immediate threat? It says, is subject
4 to potentially significant --

5 QUESTION: It's -- that's vague, typical
6 congressional language --

7 MR. JONES: I -- well --

8 QUESTION: -- you know, backing back and forth.

9 MR. JONES: -- from my perspective, Chief
10 Justice Rehnquist, this is authoritative congressional
11 language that directs the Secretary of Interior to conduct
12 a review to determine whether he is capable --

13 QUESTION: Okay. I agree with the -- but you're
14 saying it's not only directs the Secretary, but it
15 suffices for the finding required under the other law, and
16 I'm saying I don't think it does. Now, we can disagree on
17 that.

18 MR. JONES: The other law that applies is simply
19 a regulation that says we can conduct -- we can suspend a
20 lease whenever we need to perform an environmental study.
21 That's what the applicable law is. We can suspend the
22 lease to perform an environmental study.

23 QUESTION: No, but isn't -- isn't it --

24 MR. JONES: That's what Congress directed the
25 Secretary to do.

1 QUESTION: Isn't it the case, though, that the
2 lease, which in effect is the contract between you, was
3 referring to what the -- was referring to contingencies
4 that could occur under the law and under the regulations
5 as they stood at the time the lease was passed, and quite
6 apart from the Chief Justice's objection, if I understand
7 your argument, your argument is that this issue was raised
8 by subsequent congressional action, and if it was raised
9 by subsequent congressional action, it's irrelevant, as a
10 point in your favor, in construing the lease.0

11 MR. JONES: This issue, the effect of
12 development on the human environment, was in the statute,
13 OCSLA. It's in section 1334(i) of the OCSLA, and I'm
14 quoting a statutory provision that preceded the
15 adoption -- the enactment -- I'm sorry, any of this. I
16 mean, this goes back to the 1970's.

17 QUESTION: But all of the studies and the
18 further inquiries were being made under the Outer Banks
19 Act, and the two oil companies have gotten in the record
20 the letter, as I recall, addressed to the Governor of the
21 State saying everything's fine with respect to the law
22 except, I may not give an approval as a result of the
23 Outer Banks act.

24 MR. JONES: The letter to which you're referring
25 was not written to Mobil. It was written to a Governor of

1 North Carolina. It was written by a regional supervisor.
2 At the time that that letter was written, the Secretary of
3 the Interior had the responsibility to make these
4 determinations, not the regional supervisor.

5 QUESTION: So you're saying that does not bind
6 the Government --

7 MR. JONES: I'm saying it --

8 QUESTION: -- because it was unauthorized?

9 MR. JONES: Well, it's not binding. It's
10 certainly not binding, because --

11 QUESTION: But it was not -- in other words,
12 the Government --

13 MR. JONES: Congress had already --

14 QUESTION: It was not the Government's position,
15 in other words.

16 MR. JONES: Certainly not. Congress had already
17 enacted the OBPA and determined that additional
18 environmental analyses needed to be performed because of
19 threatened harms, not only the one that we have already
20 discussed --

21 QUESTION: But we may not consider that letter
22 even for the purpose of determining whether, under the law
23 and regs as they stood at the time of the lease, there was
24 any basis for the Government to refuse to approve the POE.
25 We cannot consider it even for that purpose, you're

1 saying?

2 MR. JONES: I frankly don't understand exactly
3 what your question is, but I will --

4 QUESTION: Let me start again. My basic premise
5 is that what the Government is authorized to do under the
6 lease depends on the terms of the lease and, to the extent
7 that there is reference to statutes or regs, it refers to
8 statutes or regs at the time the lease was signed.

9 The letter that we're referring to appears to be
10 a statement on behalf of the Government that so far as the
11 lease, statutes, and regs at the time of the lease are
12 concerned, there is no basis for the Government not to
13 approve the POE. It is nonetheless not approving the POE
14 because of obligations upon it under the Outer Banks act
15 which was subsequently passed.

16 My question is, may we consider the letter for
17 the purpose of understanding that that was the
18 Government's position when the letter was sent?

19 MR. JONES: That was not the Government's
20 position. That was a -- again, that was not a formal
21 communication to Mobil. That was a piece of
22 correspondence from a regional supervisor to another
23 interested party. The Government --

24 QUESTION: And you're saying it may not be
25 considered as evidence for any purpose. I guess that's

1 what you're saying.

2 MR. JONES: Certainly not -- it is certainly
3 incorrect. Let me put it that way.

4 The document -- the exploration plan was not
5 approvable because Congress, and, we believe, within its
6 authority, had directed the Secretary of Interior to
7 conduct an appropriate environmental investigation to
8 analyze the environmental harms that the MMS had not
9 sufficiently evaluated.

10 I mean, frankly, one of the things that we have
11 going on here is a question of who's in charge. Can
12 Congress tell the Secretary of the Interior how to perform
13 his responsibilities under this statute?

14 QUESTION: Sure it can, but it can't amend the
15 terms of the lease.

16 MR. JONES: No, it can't, and it didn't purport
17 to. What Congress did in this case is exactly like what
18 happened in 1898 in this Court's opinion in the North
19 American Commercial Company case.

20 Now, in that case there was also a Federal
21 lease. The Federal lease allowed the lessee to take
22 60,000 seals a year in Alaska, or such lesser number as
23 the Secretary of the Treasury determined was appropriate
24 to protect the species.

25 The United States, 2 years into that treaty,

1 after having allowed 60,000 seals a year to be taken, made
2 a treaty, which to protect the species limited the number
3 of seals taken to 7,500. The lessee sued saying that the
4 United States can't tell the Secretary of the Treasury --
5 I'm sorry. I may have said that wrong. It was the
6 Secretary of Treasury who was supposed to make the
7 decision there -- can't tell him how to exercise his
8 discretion, and this Court said that -- it rejected that
9 claim and found there was no breach, and the reason
10 applies directly here.

11 The Court said, the United States is the lessee,
12 is the lessor. The United States is the party to this
13 contract, not the Secretary of the Interior, or the
14 Secretary of the Treasury. The Secretary is merely the
15 agent of the United States, and the United States, as the
16 real party at interest under these leases, can direct its
17 agent, the Secretary of the Treasury or Interior, to
18 perform an act that is within the rights of the Government
19 under the lease.

20 Now, it was plainly within the rights of the
21 Government under the lease to suspend the lease
22 performance to conduct these environmental investigations.
23 It should be common ground that the Secretary of the
24 Interior had that authority, and because the Secretary had
25 that authority under the lease, the United States, as the

1 real party at interest, could direct him to do so, which
2 is what happened here.

3 QUESTION: I wouldn't say that was a -- just one
4 of a thousand issues. I'd say that's your basic point --

5 MR. JONES: That's --

6 QUESTION: -- and I take it that it's also --
7 yes.

8 MR. JONES: That is our basic point on the
9 question of breach, the first issue.

10 QUESTION: -- in the brief.

11 MR. JONES: We did. We have relied completely on
12 that --

13 QUESTION: Yes, you did, but --

14 MR. JONES: -- in our brief.

15 QUESTION: -- the key point I think, if I'm
16 right, is that was there a finding of a threat of serious,
17 irreparable, or immediate harm, and now we're back where
18 we started, is that right?

19 MR. JONES: I hope not, because I hope that it
20 is as apparent on your further review of this material as
21 it was to me that that's exactly what Congress said it was
22 concerned about. That was exactly what Congress wanted
23 the Secretary to address, and that's why it took the
24 actions that it did to compel him to exercise the rights
25 of the United States under these leases.

1 Now, I want to address briefly the suggestion --

2 QUESTION: Before we leave this point, is it
3 your position that, had Congress made this finding at
4 the -- as you call it, at the time the lease was
5 negotiated, that it's quite likely the oil companies still
6 would have entered the lease?

7 MR. JONES: I have -- I -- the only -- yes,
8 because all that Congress said is, make a realistic review
9 of these environmental issues. That should have been --

10 QUESTION: No, but you earlier said that it's a
11 finding that absolutely forecloses --

12 MR. JONES: No, no, no. I'm sorry. This -- I
13 need to get clear about this. What is needed in order to
14 conduct the review is a threat of harm. Now, if the
15 investigation of that threatened harm results in a finding
16 that there's a probable harm, then the Secretary may
17 cancel the leases, and the leases -- the moneys would be
18 returned.

19 But if, investigating the threatened harm, there
20 is no resulting finding of a probable harm, then the lease
21 suspension is terminated, operations recommence and, under
22 the regulations throughout this entire period the
23 substantial rights of the lessee are protected by an
24 automatic, rent-free extension of the lease for the period
25 that the investigation is occurring.

1 Now, one of the things that Mobil says is, but
2 there's a 30-day approval period in the statute for
3 exploration plans. Well, that, I -- I think they may have
4 backed away from that here, because it's quite clear in
5 the legislative history and, indeed, in the text of the
6 statute that that 30-day approval period, like any other
7 period that applies under this statute, may be extended
8 and suspended whenever the Government concludes that a
9 suspension is warranted and that, of course, is exactly
10 the reason that these leases were suspended by the United
11 States.

12 But even if Mobil could find a basis for saying
13 that we'd breached the lease, they still would not be
14 entitled to rescission unless they established that there
15 was a material breach, one that, in the words of the
16 Second Circuit in the Frank Felix case, goes to the root
17 of the agreement and destroys its essential object and,
18 plainly, Mobil can't satisfy that requirement for two
19 separate reasons.

20 The first is that time of performance is not the
21 sort of thing that routinely in the eyes of the law is of
22 the essence and, plainly, it was not of the essence here
23 because the document itself authorizes suspensions for
24 environmental studies to be conducted and protects the
25 rights of the lessee while those are occurring by giving

1 him rent-free extensions of the lease provisions.

2 QUESTION: Well, I mean, you know, true, time is
3 normally not of the essence, but that phrase means, you
4 know, if you're 1-minute late it's no big deal. It
5 doesn't mean that you can perform at an unreasonably late
6 time and it's okay, unless you've said you have to perform
7 within a reasonable time.

8 MR. JONES: I --

9 QUESTION: Reasonable time is of the essence,
10 and if you have not approved these operations within the
11 reasonable time that the contract envisioned, it seems to
12 me you're in breach of the contract.

13 MR. JONES: Like all other issues of
14 materiality, ultimately you're looking at a question that
15 requires you to look at all the facts and circumstances,
16 and my point is simply that the facts and circumstances of
17 this lease are plainly that these kinds of suspensions are
18 contemplated. They are understood. It's known it's going
19 to happen. Indeed, as this Court says --

20 QUESTION: Well, it was --

21 QUESTION: Known that Congress is going to pass
22 a new statute making a finding that under the contract is
23 supposed to be made by an executive official which could
24 be reviewed by a court, as I assume a congressional
25 finding cannot be?

1 MR. JONES: I don't understand that -- Congress
2 in the OBPA didn't usurp authority from the Secretary of
3 the Interior. They directed him to carefully exercise his
4 authority to conduct investigations that he had failed to
5 do and which, after Congress directed him to, on further
6 reflection he decided yes, I should do those additional
7 studies.

8 QUESTION: Well, the claims court judge -- I'm
9 reading from 71a -- it said, clearly the old -- he said,
10 clearly the OBPA imposed severe, burdensome new conditions
11 upon the Department of Interior's obligations under OCSLA
12 to approve POE's offshore North Carolina.

13 Now, I take it you disagree with that.

14 MR. JONES: Yes. The OBPA did not alter by one
15 wit or jot the substantive standards by which the
16 Secretary of Interior ultimately was -- is to determine
17 whether to approve the plan of exploration. The OBPA
18 simply said, exercise the rights of the United States
19 under this lease to investigate these important
20 environmental issues in a manner that you have so far
21 failed to do. This was --

22 QUESTION: Are you saying that --

23 MR. JONES: -- supervisory.

24 QUESTION: -- if we had nothing but the outer
25 continental shelf, that the Secretary, who was on the

1 verge of giving approval to beginning exploration, on the
2 verge of that when the second act passed, that the
3 Secretary was out of compliance with the Outer Continental
4 Shelf Act at the time the next act intervened? Is that
5 what you're saying?

6 MR. JONES: Well, I'm saying that Congress had a
7 justifiable concern about the inadequacy of the
8 environmental, including human environmental analyses that
9 had been conducted thus far. It had received information
10 from the National Research Council advising it of the
11 inadequacies of these investigations that had been
12 conducted to that date, and it directed the Secretary to
13 conduct a thorough, realistic review.

14 QUESTION: What did it buy? What was Mobile
15 buying if they weren't at least buying a promise from the
16 Government that they'd get an exploration permit? They
17 might not ever be able to drill, but at least we get our
18 exploration permit if we comply with OCSLA, or CZMA, or
19 whatever they are.

20 MR. JONES: Well, that's the question.

21 QUESTION: Yes. Well now, what else could they
22 have been buying, because in these things I'd imagine they
23 think they're never going to be able to drill --

24 MR. JONES: I mean, that's --

25 QUESTION: -- but we'll take a risk.

1 MR. JONES: That's the question. Had they
2 complied with OCSLA --

3 QUESTION: No -- oh, well --

4 MR. JONES: -- and the answer is no --

5 QUESTION: I --

6 MR. JONES: -- because the Secretary had not yet
7 been in the position to make the determination that he was
8 required to make.

9 QUESTION: Obviously, if that's so you're going
10 to win on those grounds, et cetera, if all that's
11 relevant. I'm addressing only the point of materiality.

12 MR. JONES: Okay.

13 QUESTION: I'd say on that question, what are
14 they buying if they're not at least buying a promise that,
15 look at this law. It says we give you your permission
16 within 30 days. You might never drill exploratory wells,
17 et cetera, but at least you get a certificate from us
18 within 30 days if you comply and -- you know, et cetera.

19 And now, assuming that they complied with that
20 act, that preexisting act, didn't they at least buy that
21 promise?

22 MR. JONES: Well, that, of course, is an
23 assumption that I can't follow along on your hypothetical
24 with, because plainly there was no compliance with the
25 OCSLA ultimately, and I think, however, the answer --

1 QUESTION: Did they buy the promise? You could
2 follow this far. Did they buy the promise that, if you
3 comply with the preexisting, whatever those were there,
4 you get the POE?

5 MR. JONES: I think that what they probably
6 bought was a right to pursue the procedures that are
7 established in order for them to obtain this and that, of
8 course, is where we are. We're in the middle of those
9 procedures. We haven't repudiated them. In fact, we're
10 fully ready to go forward.

11 And that leads me to the second reason why the
12 alleged breach isn't material which is that, as the court
13 of appeals correctly explained, at all times, before the
14 OBPA was enacted, while it was in effect, and even to this
15 very minute, Mobil is conclusively barred from taking any
16 actions to drill or develop these leases by the entirely
17 separate provisions of the Coastal Zone Management Act.

18 That was a statute that Congress enacted to give
19 the States a voice in the development of these leases and,
20 as this Court said in 1984 in the Secretary of Interior
21 case, lessees need to be well aware of these restrictions,
22 because they are significant, and they can cause
23 substantial delays in any development of Federal leases,
24 and one of --

25 QUESTION: Mr. Jones, you're essentially saying

1 that these savvy businessmen bought a commitment from the
2 Government that was dependent upon not just a finding by
3 some expert board, or by some Secretary, but that was
4 ultimately dependent upon whatever finding Congress --
5 that, you know --

6 MR. JONES: No, I'm not saying that.

7 QUESTION: -- that scientifically precise
8 body --

9 MR. JONES: Again --

10 QUESTION: -- was likely to make in the future?

11 MR. JONES: Again, what we're deciding is that
12 what --

13 QUESTION: This is a crazy contract --

14 MR. JONES: No, it's not --

15 QUESTION: -- if they really said, so long as
16 Congress thinks further study should be done, further
17 studies will be done, and that's what we're buying.

18 MR. JONES: Congress simply said that there's
19 enough information for it to conclude that further studies
20 need to be done. That's all -- that's really what the
21 OBPA said.

22 QUESTION: Well, but Congress --

23 MR. JONES: All --

24 QUESTION: -- in the act also suspended
25 everything for an indefinite period of time. That's

1 hardly a reasonable time, is it?

2 MR. JONES: It is -- I think it might be a
3 reasonable time, because what Congress actually
4 suspended -- it was until the Secretary could certify that
5 he had the information required to make the findings that
6 he needed to make under the OCSLA. The Secretary
7 certified that he would do that in 1992, but he found that
8 in order to make the findings required by the OCSLA he had
9 to go out and do the additional studies that MMS hadn't
10 yet done.

11 When he completed those studies in 1994, Mobil
12 didn't ask him to review the exploration plan. Mobil
13 asked him to continue the lease suspensions in effect that
14 had been in effect since before the OBPA was enacted so
15 that Mobil could continue its challenge to the State's
16 CZMA objections, and so the court of appeals said, well,
17 how can Mobil say that these leases that were materially
18 breached by these -- by the delay for Federal review when
19 the alleged delay for Federal review actually had no
20 consequence whatever on the ultimate performance of
21 protection of Mobil's rights.

22 The OBPA was just a little sliver of time in the
23 larger spectrum of things. Before it happened, the leases
24 had been suspended at Mobil's request because of the CZMA
25 objection of North Carolina, and that suspension extends

1 to today, so the Court, it seems to us, correctly found
2 there is no material breach now.

3 The last point I need to make very briefly, and
4 that is that even if there had been a material breach,
5 Mobil would not be entitled to rescission because they did
6 not make a prompt demand for it. Mobil says that the
7 leases were breached in August of 1990, when the OBPA was
8 enacted.

9 Mobil took no steps to obtain rescission until
10 October of 1992, more than 2 years later, and during that
11 interim period Mobil submitted an exploration plan,
12 challenged the State's CZMA objections, and obtained --
13 2 weeks before it filed this lawsuit obtained a perpetual
14 extension from the United States of these leases rent-
15 free so that Mobil could challenge the State's CZMA
16 objection.

17 QUESTION: That I -- no, please.

18 QUESTION: I'm just not aware of the principle
19 of contract law you're appealing to. If I have a contract
20 with someone that requires performance over a long period
21 of time, and he does not perform, I cannot press that
22 person to perform --

23 MR. JONES: You can press the --

24 QUESTION: -- for a period of a year, for a
25 period of 2 years, and finally say, look, this is just

1 useless, I want out of the contract?

2 MR. JONES: The key difference is that they
3 didn't just press. They obtained performance, even if, in
4 their view, it was imperfect performance. The rights --

5 QUESTION: What performance --

6 MR. JONES: They --

7 QUESTION: -- from the Government?

8 MR. JONES: They obtained -- the United States
9 spent 2 years doing the environmental reviews that were
10 needed to put it in the position to determine whether to
11 approve the exploration plans.

12 QUESTION: That was the quid pro quo?

13 MR. JONES: That was additional performance.

14 QUESTION: I'll pay you money, in exchange for
15 which you will do an environmental review?

16 MR. JONES: No, that wasn't the quid pro --

17 QUESTION: That's not the performance under the
18 contract.

19 MR. JONES: That was the additional performance
20 by the United States. Also, the United States and 16
21 agencies --

22 QUESTION: The performance by the United States
23 is giving them permission to drill. That was the quid pro
24 quo --

25 MR. JONES: Perform --

1 QUESTION: -- ultimately, that they were
2 seeking, certainly not --

3 MR. JONES: That may have been what they
4 ultimately wanted, but in order to get there the United
5 States had to perform many tasks, one of which was to put
6 themselves in a position to do this environmental
7 determination, which it was -- and when the United States
8 finally got itself in the position to make that
9 environmental determination, Mobil didn't ask it to do it.
10 Mobil said, we want additional lease suspensions to
11 challenge the CZMA.

12 Now, what this Court said in the Smoot's case
13 and what the Ninth Circuit more recently said in Far West
14 is that a party seeking rescission can't seek and obtain
15 some kind of imperfect performance from the other party
16 and then --

17 QUESTION: Well, what you're describing as --

18 MR. JONES: -- come back and say the contract is
19 at an end.

20 QUESTION: -- imperfect performance as I
21 understand it is the suspension of the lease payment. As
22 I -- Mobil says, please stop charging me money for giving
23 me nothing, and that's what you're characterizing as
24 performance of the contract.

25 MR. JONES: I -- well, Mobil did get a change in

1 position by getting the rent-free extensions, but that's
2 not really --

3 QUESTION: It got a rent-free extension for
4 nothing. It got nothing out of it.

5 MR. JONES: Mobil also got 16 agencies to
6 conduct a review of its lease request --

7 QUESTION: To do what it had to do --

8 MR. JONES: To do what it --

9 QUESTION: -- presumably to perform its side of
10 the contract.

11 MR. JONES: That's my --

12 QUESTION: Which it never did.

13 MR. JONES: -- point. We had to take those
14 actions to perform our side of the contract.

15 Now, rescission, the purpose of rescission is to
16 restore you to the status quo ante. You can't restore a
17 party to the status quo ante when you propel them into
18 further performance, even if it's imperfect, and then say,
19 oh, but really, let's treat the contract like an end.
20 This Court so held --

21 QUESTION: Well, in every frustration case it's
22 going to be an answer to rescission to say, gee, I tried.
23 I can't give you a thing. I can't perform one iota of
24 what I agreed to, but I tried.

25 MR. JONES: I --

1 QUESTION: And that's a benefit to --

2 MR. JONES: It's not that they're losing a
3 remedy, Justice Souter. It's that they have a different
4 remedy. Their remedy is to seek damages if they had any,
5 which they don't contend they do, and they obviously
6 didn't, because they were barred --

7 QUESTION: Well, but you can get rescission lots
8 of times when you can't get damages, just when there's an
9 early repudiation.

10 MR. JONES: Yes. You can get rescission
11 sometime when you can't get damages, but you can't get
12 rescission when you propel the other party into additional
13 performance and then, 2 years later, say, oh, well, let's
14 undo it after all.

15 Now, Mobil plainly knew what they were doing.
16 They plainly sought to perfect their rights under the
17 leases, rather than to abrogate them, and it was that 2
18 years of efforts to perfect their rights that limits them
19 so they can't get rescission.

20 Now, the other remedy they get is the one that
21 they're entitled to under these leases, which is a rent-
22 free lease extension which leaves them in the same -- they
23 have the same rights today that they had even before the
24 OBPA was enacted, because they have requested and obtained
25 10 years, now, worth of rent-free extensions of their

1 lease rights.

2 Now, through this period they say the United
3 States hasn't performed as well as it should have, but
4 they can't honestly say that the United States has not, at
5 their insistence and sometimes on its own, decided to take
6 steps to perform its obligations under the lease.

7 QUESTION: Thank you, Mr. Jones.

8 Mr. Phillips, you have 13 minutes remaining.

9 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

10 ON BEHALF OF THE PETITIONER

11 MR. PHILLIPS: Mr. Chief Justice, I'll try not
12 to use all of those 13 minutes.

13 The Government's position here is a fairly
14 astonishing one in now suggesting that we have not
15 complied with the Outer Continental Shelf Lands Act prior
16 to the time of the Outer Banks Protection Act. The reason
17 that's astonishing is, first of all, the officials
18 involved at the time said we were in full compliance with
19 the Outer Continental Shelf Lands Act.

20 The United States Government, in the court of --
21 in the Federal Circuit at page 39 of their brief said, if
22 there had never been an OBPA in 1990, plaintiffs
23 ostensibly would have received approval of their
24 exploration plan within 30 days. To come here today and
25 say, well, in order to save this case we've got to take

1 the findings of the OBPA and -- take those round findings
2 and stuff them into the square pegs of the Outer
3 Continental Shelf Lands Act suggests to me just a sense of
4 desperation. The truth is, the Government has never
5 made -- the right party has never made the right findings
6 that would justify not going forward with respect to the
7 lease.

8 QUESTION: Well, but I take it his argument,
9 which I really didn't understand till I heard it -- now I
10 think his argument -- I don't blame him for this, but I
11 think his argument --

12 MR. PHILLIPS: I might, but --

13 QUESTION: -- is the following. He says, look
14 at that finding. That finding 3 is, the major industry in
15 North Carolina, tourism, is subject to potentially
16 significant disruption, all right, by oil and gas
17 development.

18 MR. PHILLIPS: Right.

19 QUESTION: Now look at the reg.

20 MR. PHILLIPS: Right.

21 QUESTION: And what the reg says is that there
22 shall be -- the regulations shall provide for suspension
23 if there is a threat of serious harm to the environment.

24 So he says, how can you look at that finding
25 without seeing it as a finding of a threat, and a serious

1 one, and really what you have to look at OBPA as is
2 telling the Secretary, suspend the leases and use whatever
3 regulatory authority you have to do it. So that, I think,
4 is basically his argument.

5 MR. PHILLIPS: Right, and I think that --

6 QUESTION: That is not a -- that's -- I grant
7 you that reg wasn't quoted in the brief, I don't think,
8 but --

9 MR. PHILLIPS: Right. No, it wasn't quoted in
10 the brief.

11 QUESTION: But anyway, that's his argument.

12 MR. PHILLIPS: And it's subject essentially, I
13 think, to three answers. First of all, under the lease we
14 didn't buy into the idea that the Outer Banks Protection
15 Act or Congress or any other action by Congress could come
16 in and substitute for the Secretary, and this case is
17 fundamentally different from the North American case that
18 they rely on, because that case said specifically that the
19 question of how many seals you could kill is completely
20 subject --

21 QUESTION: Well, whatever about the case --

22 MR. PHILLIPS: -- to future statutory change and
23 regulation change.

24 QUESTION: Whatever about the case -- whatever
25 the case said, why isn't this a finding -- maybe it was in

1 the brief, too. I don't know -- a finding that there is a
2 threat of serious harm to the North Carolina environment?

3 MR. PHILLIPS: Well, in part because the
4 definition -- and we, of course, have not had an
5 opportunity to brief what it means to be in the human
6 environment, but recall finding number 3 is tourism. It's
7 not an environmental provision at all. It talks about
8 injury to tourism, which they now try to tie in oral
9 argument on the fly to the notion that somehow there's an
10 environmental impact here.

11 I think it actually makes my point, which is
12 that the Outer Banks Protection Act takes you out of the
13 kinds of environmental concerns that were the core of what
14 we entered into with the Outer Continental Shelf Lands
15 Act, and has added this entire socioeconomic set of
16 analyses that never had to exist before, and I think that
17 finding is specifically embraced within it and completely
18 beyond anything that the Outer Continental Shelf Lands Act
19 would have provided for.

20 So it's the wrong -- again, it's the wrong
21 entity making the wrong findings, under circumstances that
22 completely violate our agreement.

23 With respect to the question of the timing of
24 this and the notion of whether time was of the essence, I
25 would simply note that in our memorandum of understanding

1 that was entered into as part of the process in 1989, all
2 three of the parties, the State, the Secretary, and the
3 producers, specifically found at joint appendix 84 that
4 time was of the essence by that point in this process, so
5 that, frankly, is not an argument, even though I do think,
6 Justice Scalia, you're right, is that time is the essence.
7 There's got to be at least some reasonableness requirement
8 that gets imposed.

9 At the end of the day, again, it seems to me
10 what we're talking about here is the simple question of
11 when are you entitled to restitution to get something for
12 nothing. Justice Souter made it as plain as possible.
13 There was no performance by the United States. To the
14 extent that there were studies that were done, they were
15 done to comply with its obligations under the Outer Banks
16 Protection Act. The need to get clear on this is today,
17 and I ask the Court to reverse the judgment below.

18 Thank you.

19 QUESTION: May I ask you just a question perhaps
20 I should have asked Mr. Jones. It's odd that the Interior
21 is doing everything, and at the end of the line of the
22 CZMA we get another Secretary from another Department into
23 the picture. Do you know why there was that split between
24 Interior and Commerce?

25 MR. PHILLIPS: Well, I think it's not uncommon

1 in some of these cases to have Interior and Commerce
2 disagree about the right way to proceed. I mean, they are
3 answering slightly different questions.

4 QUESTION: But why would Congress assign the
5 supervising role, the control role to Interior under the
6 Outer Continental Shelf Act, and then under the CZMA give
7 the control to the Commerce Department?

8 MR. PHILLIPS: Justice Ginsburg, I think the
9 theory there is that there may be instances in which the
10 Secretary of Interior might be too wedded to environmental
11 concerns, and that there are other commercial issues that
12 are of greater importance, and in the appropriate
13 balance -- which is what he's supposed to do, because he's
14 supposed to analyze it independently --

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
16 Phillips.

17 (Whereupon, at 12:09 p.m., the case in the
18 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

MOBIL OIL EXPLORATION AND PRODUCING SOUTHEAST, INC., Petitioner v. UNITED STATES; and MARATHON OIL COMPANY, Petitioner v. UNITED STATES
CASE NOs: 99-244 & 99-253

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BY Donna Maria Federico

(REPORTER)