

STEVENS, J., dissenting

SUPREME COURT OF THE UNITED STATES

Nos. 99–244 and 99–253

MOBIL OIL EXPLORATION AND PRODUCING
SOUTHEAST, INC., PETITIONER
99–244 v.
UNITED STATES

MARATHON OIL COMPANY, PETITIONER
99–253 v.
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

[June 26, 2000]

JUSTICE STEVENS, dissenting.

Since the 1953 passage of the Outer Continental Shelf Lands Act (OCSLA), 43 U. S. C. §1331 *et seq.*, the United States Government has conducted more than a hundred lease sales of the type at stake today, and bidders have paid the United States more than \$55 billion for the opportunity to develop the mineral resources made available under those leases.¹ The United States, as lessor, and petitioners, as lessees, clearly had a mutual interest in the successful exploration, development, and production of oil in the Manteo Unit pursuant to the leases executed in 1981. If production were achieved, the United States would benefit both from the substantial royalties it would

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¹ *Conoco, Inc. v. United States*, 35 Fed. Cl. 309, 315, n. 2 (1996); see also U. S. Dept. of Interior, Minerals Management Service, Mineral Revenues 1999, Report on Receipts From Federal and American Indian Leases 35 (reporting more than \$64 billion in royalties from federal offshore mineral leases from 1953–1999).

receive and from the significant addition to the Nation's energy supply. Self-interest, as well as its duties under the leases, thus led the Government to expend substantial resources over the course of 19 years in the hope of seeing this project realized.

From the outset, however, it was apparent that the Outer Banks project might not succeed for a variety of reasons. Among those was the risk that the State of North Carolina would exercise its right to object to the completion of the project. That was a risk that the parties knowingly assumed. They did not, however, assume the risk that Congress would enact additional legislation that would delay the completion of what would obviously be a lengthy project in any event. I therefore agree with the Court that the Government did breach its contract with petitioners in failing to approve, within 30 days of its receipt, the plan of exploration petitioners submitted. As the Court describes, *ante*, at 3-4, the leases incorporate the provisions of the OCSLA into their terms, and the OCSLA, correspondingly, sets down this 30-day requirement in plain language. 43 U. S. C. §1340(c).

I do not, however, believe that the appropriate remedy for the Government's breach is for petitioners to recover their full initial investment. When the entire relationship between the parties is considered, with particular reference to the impact of North Carolina's foreseeable exercise of its right to object to the project, it is clear that the remedy ordered by the Court is excessive. I would hold that petitioners are entitled at best to damages resulting from the delay caused by the Government's failure to approve the plan within the requisite time.

I

To understand the nature of the breach, and the appropriate remedy for it, it is necessary to supplement the Court's chronological account. From the time petitioners

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began discussing their interest in drilling an exploratory well 45 miles off the coast from Cape Hatteras in the fall of 1988, until (and even after) the enactment of the Outer Banks Protection Act (OBPA), §6003, on August 18, 1990, their exploration proposal was fraught with problems. It was clear to petitioners as early as October 6, 1988 (and almost certainly before), that the State of North Carolina, whose approval petitioners knew they had to have under their lease terms in order to obtain the requisite permits from the Department of the Interior (DOI), was not going to go along readily. App. 61–63 (letter from North Carolina Governor James G. Martin to Ralph Ainger, Acting Regional Manager, Minerals Management Service (MMS) (a division of the DOI)). As the Court explains, *ante*, at 3, without the State’s approval pursuant to the Coastal Zone Management Act (CZMA), 16 U. S. C. §1451 *et seq.*, incorporated into the OCSLA by multiple references, no DOI licensing, permitting, or lessee exploration of any kind could ensue, 43 U. S. C. §1340(c).

That is why petitioners pursued multiparty negotiations with the Federal Government and the State to help facilitate the eventual approval of their proposal. As part of these negotiations, petitioners entered into a memorandum of understanding with North Carolina and the Federal Government, and, according to the terms of that agreement, submitted a draft plan of exploration (POE) to DOI and to the State. App. 79–85. The Government also agreed to prepare draft and final environmental impact reports on petitioners’ draft POE and to participate in public meetings and hearings regarding the draft POE and the Government’s findings about its environmental impact. *Id.*, at 81–82. Among other things, this agreement resulted in the Government’s preparation in 1990 of a three-volume, 2,000-page special environmental report on the proposed project, released on June 1 of that year.

Although the State thereafter continued to express its

dissatisfaction with the prospect of exploration and development, voicing its displeasure with the Government's draft environmental findings, *id.*, at 86–95, and rejecting petitioners' application for a separate required permit, *id.*, at 96–97,² petitioners nonetheless submitted a final POE to DOI on August 20, 1990, pursuant to the lease contract terms. This final plan, it must be noted, was submitted by petitioners two days *after* the enactment of the OBPA—the event petitioners claim amounted to (either) an anticipatory repudiation of the lease contracts, or a total breach, Brief for Petitioner in No. 99–244, p. 19 (“[I]n enacting the OBPA, the Government anticipatorily repudiated its obligations under the leases. . . .”); Brief for Petitioner in No. 99–253, p. 21 (“The enactment of the OBPA placed the United States in total breach of the petitioners’ leases”).

Following petitioners’ submission of the final POE, DOI then had a duty, under the terms of the OCSLA as incorporated into the lease contract, to approve that plan “within thirty days of its submission.” 43 U. S. C. §1340(c)(1). In other words, DOI had until September 19, 1990, to consider the submitted plan and, provided that the plan was complete and otherwise satisfied the OCSLA criteria, to issue its statement of approval. (Issuing its “approval,” of course, is different from granting petitioners any “license or permit for any activity described in detail in an exploration plan and affecting any land use or water

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²The Federal Water Pollution Control Act, 86 Stat. 816, 33 U. S. C. §1251 *et seq.*, requires lessees to obtain a National Pollutant Discharge Elimination System (NPDES) permit from the Environmental Protection Agency (EPA) before lessees may move forward with any exploration plan that includes discharging pollutants into the ocean, §§1311(a), 1342(a). The EPA cannot issue an NPDES permit, however, before the lessee has certified to the State’s satisfaction that the discharge would comply with the State’s CZMA requirements. Unless the Secretary of Commerce overrides any state objection arising during this process, 16 U. S. C. §1456(c)(3), lessees will not receive the necessary permit.

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use” in a State’s coastal zone, §1340(c)(2); actual permission to proceed had to wait for the State’s CZMA certification.) Despite this hard deadline, September 19 came and went without DOI’s issuance of approval.

DOI’s explanation came two days later, on September 21, 1990, in a letter to Mobil Oil from the MMS’s Acting Regional Supervisor for Field Operations, Lawrence Ake. Without commenting on DOI’s substantive assessment of the POE, the Ake letter stated that the OBPA “specifically prohibit[s]” the MMS from approving any POE “until at least October 1, 1991.” App. 129. “Consequently,” Mr. Ake explained, the MMS was suspending operation on the Manteo Unit leases “in accordance with 30 CFR §250.10(b)(7),” *ibid.*, a regulation issued pursuant to the OCSLA and, of course, incorporated thereby into the parties’ lease agreement. One week after that, on September 28, 1990, the MMS’s Regional Director, Bruce Weetman, sent a letter to Governor Martin of North Carolina, elaborating on MMS’s actions upon receipt of the August 20 POE. App. to Pet. for Cert. in No. 99–253, pp. 193a–195a. According to Weetman, the POE “was deemed complete on August 30, and transmitted to other Federal Agencies and the State of North Carolina on that date. Timely comments were received from the State of North Carolina and the U. S. Coast Guard. An analysis of the potential environmental effects associated with the Plan was conducted, an Environmental Assessment (EA) was prepared, and a Finding of No Significant Impact (FONSI) was made.” *Id.*, at 193a. Based on these steps taken by the MMS, it concluded that the POE was “approvable” but that the MMS was “currently prohibited from approving it.” Thus, the letter concluded, the POE would “remain on file” pending the resolution of the OBPA requirements, and the lease suspensions would continue in force in the interim. *Id.*, at 194a.

II

In my judgment, the Government's failure to meet the required 30-day deadline on September 19, 1990, despite the fact that the POE was in a form that merited approval, was a breach of its contractual obligation to the contrary.³ After this, its statement in the September 21 Ake letter that the OBPA prohibited approval until at least October 1991 must also be seen as a signal of its intent to remain in breach of the 30-day deadline requirement for the coming year. The question with which the Court is faced, however, is not whether the United States was in breach, but whether, in light of the Government's actions, petitioners are entitled to restitution rather than damages, the usual remedy for a breach of contract.

As the Court explains, *ante*, at 2, an injured party may seek restitution as an alternative remedy only "on a breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation." Restatement (Second) of Contracts §373 (1979). Whether one describes the suspect action as "repudiation" (which itself is defined in terms of total breach, see *ante*, at 2) or simply "total breach," the injured party may obtain restitution only if the action "so substantially impairs the value of the contract to the injured party . . . that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance." Restatement (Second) §243. Although the language varies to some small degree, every major statement of contract law includes the same admonition. See, *e.g.*, 5 A. Corbin, Contracts §1104,

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³It is incorrect, in my view, to assert that the Government failed to give the proposal "timely and fair consideration," *ante*, at 15, because, as the Weetman letter establishes, the Government did engage in such an evaluation process even after the enactment of the OBPA. It was in failing to issue the approval on the heels of that evaluation that the Government ran afoul of its obligations.

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pp. 558, 562 (1964) (“Restitution is an available remedy only when the breach is of vital importance. . . . In the case of a breach by non-performance, . . . [t]he injured party, however, can not maintain an action for restitution of what he has given the defendant unless the defendant’s non-performance is so material that it is held to go to the essence; it must be such a breach as would discharge the injured party from any further contractual duty on his own part”). In short, there is only repudiation if there is an action that would amount to a total breach, and there is only such a breach if the suspect action destroys the essential object of the contract. It is thus necessary to assess the significance or “materiality” of the Government’s breach.

Beyond this, it is important to underscore as well that restitution is appropriate only when it is “just in the circumstances.” Restatement (Second) §243. This requires us to look not only to the circumstances of the breach itself, but to the equities of the situation as a whole. Finally, even if a defendant’s actions do not satisfy the foregoing requirements, an injured party presumably still has available the standard contract remedy for breach—the *damages* petitioners suffered as a result.

III

Given these requirements, I am not persuaded that the actions by the Government amounted either to a repudiation of the contracts altogether, or to a total breach by way of its neglect of an “essential” contractual provision.

I would, at the outset, reject the suggestion that there was a repudiation here, anticipatory or otherwise, for two reasons. First, and most basic, the Government continued to perform under the contractual terms as best it could

even after the OBPA's passage.⁴ Second, the breach-by-delay forecast in the Ake letter was not "of sufficient gravity that, if the breach actually occurred, it would of itself give the obligee a claim for damages for total breach." Restatement (Second) §250, and Comment *d*; see also 11 W. Jaeger, Williston on Contracts §1312 (3d ed. 1968).

While acknowledging the OBPA's temporary moratorium on plan approvals, the Ake letter to petitioner Mobil states that the Government is imposing a lease *suspension*— rather than a cancellation or rescission— and even references an existing, OCSLA regulatory obligation pursuant to which it is attempting to act. The Weetman letter explains in detail the actions the MMS took in carefully considering petitioners' POE submission; it evaluated the plan for its compliance with the OCSLA's provisions,

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⁴My rejection of the repudiation theory, of course, encompasses a rejection of the notion that the very enactment of the OBPA itself constituted an anticipatory repudiation of the parties' contract. Brief for Petitioner in No. 99–244, p.19. Repudiation, as the Court explains, is in the first instance a "statement by the obligor to the obligee indicating that the obligor will commit a breach." *Ante*, at 2 (quoting Restatement (Second) §250). Except in some abstract sense, the enactment of legislation is not typically conceived of as a "statement" of anything to any one party in particular, for it is, by its nature, addressed to the public at large. To the extent this legislation was directed to anyone in particular, it was to the Secretary of the Interior, directing him to take or not take certain actions, not to particular lessees. Finally, while it surely imposed upon the Secretary obligations inconsistent with the Secretary's existing duties under the leases, the OBPA itself contemplated that the parties to the lease contracts would continue, after a delay, to operate under the OCSLA-based contractual scheme. The Secretary was, within the confines of the newly enacted requirements, to continue to take steps to "carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in subsection (c)(1) [(i.e., approve exploration, development and production plans for lessees, or grant an application for permit to drill; permit drilling)]." §6003(d) 104 Stat. 557.

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transmitted it to other agencies and the State for their consideration, took the comments of those entities into account, conducted the requisite analyses, and prepared the requisite findings— all subsequent to the OBPA’s enactment. It cannot be doubted that the Government intended to continue performing the contract to the extent it thought legally permissible post-OBPA.

Indeed, petitioners’ own conduct is inconsistent with the contention that the Government had, as of August 18, 1990, or indeed as of September 19, 1990, fully repudiated its obligations under the parties’ contracts. As I have mentioned, it was *after* the enactment of the OBPA that petitioners submitted their final plan to the DOI— just as if they understood there still to be an existing set of contractual conditions to be fulfilled and expected to fulfill them. Petitioners, moreover, accepted the Government’s proffered lease suspensions, and indeed, themselves subsequently requested that the suspensions remain in effect “from June 8, 1992 forward” under 30 CFR §250.10(b)(6) (1990), an OCSLA regulation providing for continued lease suspension at the lessee’s request “to allow for inordinate delays encountered by the lessee in obtaining required permits or consents, including administrative or judicial challenges or appeals.”⁵

After the State of North Carolina filed its formal CZMA objections on November 19, 1990 (indicating that the State believed a contract still existed), petitioners promptly sought in December 1990— again under statutory terms

⁵ See App. 170–171 (letter from Leslie Burton, Senior Counsel for Mobil Oil, to Bruce Weetman, Regional Director, MMS, Sept. 23, 1992); see also App. to Brief for United States 1a (letter from Toni Hennike, Counsel, Mobil Oil, to Ralph Melancon, Regional Supervisor, MMS, Feb. 21, 1995) (requesting reinstatement of lease suspensions).

incorporated into the contracts— to have the Secretary of Commerce override the objections, 43 U. S. C. §1340(c)(1), to make it possible for the exploration permits to issue. In a response explainable solely on the basis that the Government still believed itself to be performing contractually obligatory terms, the Secretary of Commerce undertook to evaluate petitioners' request that the Secretary override the State's CZMA objections. This administrative review process has, I do not doubt, required a substantial expenditure of the time and resources of the Departments of Commerce and Interior, along with the 12 other administrative agencies whose comments the Secretary of Commerce solicited in evaluating the request to override and in issuing, on September 2, 1994, a lengthy "Decision and Findings" in which he declined to do so.

And petitioners were not finished with the leases yet. After petitioners received this adverse judgment from Commerce, they sought the additional lease suspensions described, see App. to Brief for United States 1a (letter from Toni Hennike, Counsel, Mobil Oil, to Ralph Melancon, Regional Supervisor, MMS, Feb. 21, 1995), insisting that "the time period to seek judicial review of the Secretary's decisions had not expired when the MMS terminated the [pre-existing] suspensions," and that "[s]ince the Secretary's decision is being challenged, it is not a final decision and will not be until it is upheld by a final nonappealable judgment issued from a court with competent jurisdiction," *id.*, at 2a. Indeed, petitioners have pending in the United States District Court for the District of Columbia at this very moment their appeal from the Secretary of Commerce's denial of petitioners' override request of North Carolina's CZMA objections. *Mobil Oil Exploration & Producing Southeast, Inc. v. Daley*, No. 95–93 SSH (filed Mar. 8, 2000).

Absent, then, any repudiation, we are left with the possibility that the nature of the Government's breach was

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so “essential” or “total” in the scope of the parties’ contractual relationship as to justify the remedy of restitution. As above, I would reject the suggestion that the OBPA somehow acted *ex proprio vigore* to render a total breach of the parties’ contracts. See *ante*, at 16 (“OBPA changed the contract-referenced procedures in several other ways as well”); Brief for Petitioner in No. 99–253, p. 21. The OBPA was not passed as an amendment to statutes that the leases by their terms incorporated, nor did the OBPA state that its terms were to be considered incorporated into then existing leases; it was, rather, an action external to the contract, capable of affecting the parties’ actions but not of itself changing the contract terms. The OBPA did, of course, impose a legal duty upon the Secretary of the Interior to take actions (and to refrain from taking actions) inconsistent with the Government’s existing legal obligations to the lessees. Had the Secretary chosen, despite the OBPA, to issue the required approval, he presumably could have been haled into court and compelled to rescind the approval in compliance with the OBPA requirement.⁶ But that this possibility remained after the passage of the OBPA reinforces the conclusion that it was not until the Secretary actually took action

⁶The result of such a proceeding may well have been the issuance of a judicial decree enjoining the Secretary’s actions. Ironically, the Secretary would then have been authorized under the regulatory provisions expressly incorporated into the parties’ contracts to suspend the leases. 30 CFR §250.10(b)(7) (1990) (“The Regional Supervisor may also direct . . . suspension of any operation or activity, including production, because . . . (7) [t]he suspension is necessary to comply with judicial decrees prohibiting production or any other operation or activity, or the permitting of those activities . . .”). Indeed, this was the very provision the DOI relied on in explaining why it was suspending petitioners’ leases. App. 129–130.

inconsistent with his contractual obligations that the Government came into breach.

In rejecting the Government's argument that the breach was insufficiently material, the Court's reliance on the danger of rendering the parties' bargain illusory, see *ante*, at 15, is simply misplaced. I do not contest that the Government was contractually obliged to give petitioners' POE prompt consideration and to approve the POE if, after that consideration, it satisfied existing OCSLA demands; nor would I suggest that petitioners did not receive as part of their bargain a promise that the Government would comply with the procedural mechanisms established at the time of contracting. But that is all quite beside the point; the question is not whether this approval requirement was part of the bargain but whether it was so "essential" to the bargain in the scope of this continuing contract as to constitute a total breach.

Whether the breach was sufficiently "substantial" or material to justify restitution depends on what impact, if any, the breach had at the time the breach occurred on the successful completion of the project. See E. Farnsworth, *Contracts* §8.16 (3d ed. 1999) ("The time for determining materiality is the time of the breach and not the time that the contract was made. . . . Most significant is the extent to which the breach will deprive the injured party of the benefit that it justifiably expected"). In this action the answer must be close to none. Sixty days after the Government entered into breach— from September 19, 1990, to November 19, 1990— the State of North Carolina filed its formal objection to CZMA certification with the United States. App. 141–148. As the OCSLA makes clear, "The Secretary *shall not grant any license or permit for any activity described* in detail in an exploration plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program . . . unless the State concurs or is conclusively presumed to concur

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with the consistency certification accompanying such plan . . . , or the Secretary of Commerce makes the finding [overriding the State's objection]." 43 U. S. C. §1340(c)(2) (emphasis added); see also §1351(d). While this objection remained in effect, the project could not go forward unless the objection was set aside by the Secretary of Commerce. Thus, the Government's breach effectively delayed matters during the period between September 19, 1990, and November 19, 1990. Thereafter, implementation was contractually precluded by North Carolina.

This fact does not, of course, relieve the Government of liability for breach. It does, however, make it inappropriate to conclude that the Government's pre-November 19 actions in breach were sufficiently "material" to the successful completion of the parties' project to justify giving petitioners all of their money back. At the time of the Government's breach, petitioners had no reasonable expectation under the lease contract terms that the venture would come to fruition in the near future. Petitioners had known since 1988 that the State of North Carolina had substantial concerns about petitioners' proposed exploration; North Carolina had already officially objected to petitioners' NPDES submission— a required step itself dependent on the State's CZMA approval. App. 106–111. At the same time, the Federal Government's own substantial investments of time and resources, as well as its extensive good-faith efforts both before and after the OBPA was passed to preserve the arrangement, gave petitioners the reasonable expectation that the Government would continue trying to make the contract work. And indeed, both parties continued to behave consistently with that expectation.

While apparently recognizing that the substantiality of the Government's breach is a relevant question, see *ante*, at 2, the Court spends almost no time at all concluding that the breach was substantial enough to award petition-

ers a \$156 million refund, *ante*, at 15-16. In a single brief paragraph of explanation, the Court first posits that the Government “did not announce an . . . approval delay of a few days or weeks, but of 13 months minimum and likely much longer.” *Ibid.* The Court here is presumably referring to the Ake letter to Mobil written a few days after the expiration of the 30-day deadline. But the Government’s “statement” to this effect could matter only in the context of evaluating an intended *repudiation*; because, as I have explained, that “announcement” cannot be seen as a repudiation of the contract, I do not see how the statement itself exacerbates the effect of the Government’s breach. What matters in evaluating a breach, of course, is not what the Government said, but what the Government did. And what the Government did was, as I have explained, continue to perform in every other way possible—evaluating the August 20 POE; suspending the leases, including suspensions in response to petitioners’ express requests (suspensions that continue in effect to this day); and responding over years to petitioners’ appeal from the State’s CZMA objection.⁷

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⁷The Court’s cursory efforts to discount this evidence of continued performance fall far short. In light of the Weetman letter’s detailed description of the Government’s efforts to evaluate the POE as submitted, the Court’s assertion that “in respect to the exploration plan, the companies received nothing,” *ante*, at 17, cannot be correct. The Court itself insists on making an indispensable part of the parties’ contract mutual promises to follow certain procedures, *ante*, at 15; if that is the case, we must credit the Government’s efforts to follow those procedures as performance of that promise, and that performance was “received” by petitioners.

The Court also suggests that the Government was obligated to extend the lease suspensions to petitioners under the terms of the parties’ separately adopted memorandum of understanding; the Government should therefore, by the Court’s logic, receive no credit under the lease contracts for continuing to perform. *Ante*, at 17-18. Whether or not the Government was separately obligated to extend the suspensions it did

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The Court also asserts, without support, that “[w]hether an applicant approaches Commerce with an Interior Department approval already in hand can make a difference (as can failure to have obtained that earlier approval).” *Ibid.* Although the Court thereby implies that the Secretary of Commerce’s handling of petitioners’ CZMA override request was somehow tied to the DOI’s failure to issue the required approval, there is record evidence that petitioners’ CZMA appeals were not “suspended, impeded, or otherwise delayed by the enactment or implementation of the . . . OBPA. . . .” App. 187 (declaration of Margo E. Jackson, *Conoco Inc. v. United States*, No. 92–331–C (Fed. Cl., Apr. 6, 1994) (Commerce Department supervisor in charge of handling Mobil’s appeals)). Whether or not the Secretary’s decision was influenced by OBPA-required findings is, of course, a question of fact that, despite the Court’s assertion, *ante*, at 17, none of the lower courts in this action decided. Regardless, there is certainly no *contractual* basis for the proposition that DOI’s approval is a condition precedent or in any respect material to overcoming a state-filed CZMA objection. That objection, petitioners most certainly knew, was coming whether or not DOI approved the submitted POE.

In the end, the Court’s central reason for finding the breach “not technical or insubstantial” is that “lengthy delays matter.” *Ante*, at 15. I certainly agree with that statement as a general principle. But in this action, that principle does not justify petitioners’ request for restitution. On its face, petitioners’ contention that time was “of

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(and of course the memorandum agreement only exists because of and as part of the parties’ efforts to fulfill the lease contract terms), both the Government in extending the initial suspensions, and petitioners, in requesting additional suspensions, expressly relied upon regulations incorporated into the OCSLA lease contracts, see *supra*, at 6–7. The Court must stretch to avoid crediting the Government’s performance.

the essence” in this bargain is difficult to accept; petitioners themselves waited seven years into the renewable 10-year lease term before even floating the Outer Banks proposal, and waited another two years after the OBPA was passed before filing this lawsuit. After then accepting a full 10 years of the Government’s above-and-beyond-the-call performance, time is now suddenly of the essence? As with any venture of this magnitude, this undertaking was rife with possibilities for “lengthy delays,” indeed “inordinate delays encountered by the lessee in obtaining required permits or consents, including administrative or judicial challenges or appeals,” 30 CFR §250.10(b)(6) (1990). The OBPA was not, to be sure, a cause for delay that petitioners may have anticipated in signing onto the lease. But the State’s CZMA and NPDES objections, and the subsequent “inordinate delays” for appeals, certainly were. The Secretary’s approval was indeed “a gateway to the companies’ enjoyment of all other rights,” but the critical word here is “a”; approval was only one gateway of many that the petitioners knew they had to get through in order to reap the benefit of the OCSLA leases, and even that gate was not closed completely, but only “narrow[ed],” *ante*, at 16. Any long-term venture of this complexity and significance is bound to be a gamble. The fact that North Carolina was holding all the aces should not give petitioners the right now to play with an entirely new deck of cards.

IV

The risk that North Carolina would frustrate performance of the leases executed in 1981 was foreseeable from the date the leases were signed. It seems clear to me that the State’s objections, rather than the enactment of OBPA, is the primary explanation for petitioners’ decision to take steps to avoid suffering the consequences of the bargain they made. As a result of the Court’s action today, peti-

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tioners will enjoy a windfall reprieve that Congress foolishly provided them in its decision to pass legislation that, while validly responding to a political constituency that opposed the development of the Outer Banks, caused the Government to breach its own contract. Viewed in the context of the entire transaction, petitioners may well be entitled to a modest damages recovery for the *two months* of delay attributable to the Government's breach. But restitution is not a default remedy; it is available only when a court deems it, in all of the circumstances, just. A breach that itself caused at most a delay of two months in a protracted enterprise of this magnitude does not justify the \$156 million draconian remedy that the Court delivers.

Accordingly, I respectfully dissent.