NOTE

A PROPOSAL TO END OFFSHORE LEASE SALES ON THE OUTER CONTINENTAL SHELF

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INTRODUCTION

It is no secret that the climate crisis is an existential threat to the human species and that the production and consumption of fossil fuels are a major cause of the crisis. Despite this, the United States continues to produce huge amounts of fossil fuels. In 2021, the combined production of U.S. fossil fuels was equivalent to over thirteen billion barrels of oil.[1] The U.S. Energy Information Administration predicts continually increasing domestic oil production, including over 13.2 and 13.7 million barrels *per day* of crude oil production in 2024 and 2025 respectively.[2] Already, the "United States produces more crude oil than any country, ever."[3] These numbers are concerning in light of scientific evidence showing that, in order to avoid the most catastrophic effects of the climate crisis, we must retire existing fossil fuel infrastructure and cancel new projects immediately.[4]

One of the major challenges in reducing the United States' contributions to the climate crisis is curtailing this massive amount of production. A significant site of oil and gas production within the United States occurs on the Outer Continental Shelf (OCS), which is a "vast underwater expanse nearly equal in size to the Australian continent" that contains large amounts of natural gas, oil, and minerals.[5] It is estimated that the OCS contains 283 to 378 trillion cubic

[1] *See* Ornella Kaze, *EIA Expects U.S. Fossil Fuel Production to Reach New Highs in 2023*, U.S. ENERGY INFO. ADMIN. (Jan. 21, 2022), https://www.eia.gov/todayinenergy/detail.php?id=50978.

[2] *See* U.S. ENERGY INFO. ADMIN., SHORT-TERM ENERGY OUTLOOK 2 (2024), https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf. *See also id.*

[3] Erik Kreil, *United States Produces More Crude Oil Than Any Country, Ever*, U.S. ENERGY INFO. ADMIN. (Mar. 11, 2024), https://www.eia.gov/todayinenergy/detail.php?id=61545.

[4] *See* Clea Schumer et al., *6 Takeaways from the 2022 IPCC Climate Change Mitigation Report*, WORLD RES. INST. (Apr. 4, 2022), https://www.wri.org/insights/ipcc-report-2022-mitigation-climate-change.

[5] RICHARD REVESZ ET AL., ENVIRONMENTAL LAW AND POLICY 1236 (Robert V. Percival et al. eds., 4th ed. 2019). The OCS is located within U.S. territorial waters and is within the exclusive jurisdiction of the federal government. *See* 43

feet of natural gas and 77 to 104 billion barrels of oil.[6] Approximately seventy-two percent of all oil production on federal lands and eighteen percent of total U.S. production of oil takes place on the OCS.[7] The OCS is also the site of about twenty-seven percent of all natural gas produced on federal lands and four percent of total natural gas production in the country.[8]

The Outer Continental Shelf Lands Act (OCSLA) governs federal oil and gas leasing and extraction on the OCS and outlines how, when, and where the Department of the Interior (Interior) may lease and permit the extraction of resources on the OCS.[9] Section 18(a) of OCSLA requires the Secretary of the Interior to "prepare and periodically revise, and maintain an oil and gas leasing program" for five-year periods.[10] These five-year plans list all of the possible sites and timings for which lease sales and development could occur within the five-year period after the plan's approval.[11]

This Note analyzes one way under OCSLA that Interior could stop future oil and gas leases on the OCS: issuing a five-year plan with no or very few leases in it. Part I of this Note summarizes the background of OCSLA and the five-year plans, detailing how these plans are created and why they offer an optimal point of

U.S.C. § 1333(a)(1)(A) (stating "[t]he Constitution and laws and civil and political jurisdiction of the United States are extended, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . . .").

[6] *See* BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, FREQUENTLY ASKED QUESTIONS: OIL AND GAS RESOURCES ON THE OCS (2019), https://www.boem.gov/sites/default/files/oil-and-gas-energy-program/Leasing/Five-Year-Program/2019-2024/DPP/NP-O-and-G-Resources-FAQ.pdf.

[7] *See Evaluating Federal Offshore Oil and Gas Development on the Outer Continental Shelf: Hearing Before the Subcomm. on Energy & Min. Res. of the H. Comm. on Nat. Res.*, 115th Cong. 8 (2017) (statement of Katharine MacGregor, Acting Assistant Sec'y Land & Min. Mgmt., U.S. Dep't of the Interior).

[8] *See id.*

[9] *See* 43 U.S.C. §§ 1334, 1337; Ctr. for Biological Diversity v. Dep't of Interior, 563 F.3d 466, 472 (D.C. Cir. 2009).

[10] 43 U.S.C. § 1344(a).

[11] *See e.g.*, BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, 2017–2022 OCS OIL AND GAS LEASING PROPOSED FINAL PROGRAM S-1 (2016), https://www.boem.gov/sites/default/files/oil-and-gas-energy-program/Leasing/Five-Year-Program/2017-2022/2017-2022-OCS-Oil-and-Gas-Leasing-PFP.pdf.

intervention. Part II describes the sections of OCSLA and the related case law that are central to this Note's analysis. This Part also explains the relevant standards of judicial review that the Secretary would need to meet to defend a no-lease five-year plan against a challenge. Part III analyzes various arguments the Secretary could employ to justify a no-lease five-year plan based on the statute and case law. Part IV considers and responds to the main counterarguments the Secretary would likely face in a challenge to a no-lease five-year plan, including that issuing a no-lease five-year plan would violate the plain text and policies of OCSLA and would run afoul of the newly minted major questions doctrine.

Underscored throughout the Note is the idea that the approach detailed here is not the only way to achieve a no-lease future nor is it necessarily the best way to achieve that result. Rather, the most foolproof way to end lease sales on the OCS would be for Congress to amend OCSLA to preserve the territory, remove agency authority to issue oil and gas leases at all, or, at minimum, make clear that the Secretary is not required to issue oil and gas leases in the five-year plans. Short of that, the Note concludes that, while a no-lease five-year plan is legally feasible, the most prudent way for the Secretary to achieve a no-lease future is to issue a five-year plan that contains only a few unattractive (meaning unlikely to be bid on by developers) leases. This Note provides some of the basic arguments that a motivated Secretary of the Interior could rely on to justify a no-lease five-year plan—arguments that can also be used to justify reducing the number of leases offered more generally. There are many additional arguments that are not detailed in the Note that the Secretary could also rely on to justify this. Moreover, development on the OCS is just one of many sources of fossil fuel production in the United States today, so stopping all future fossil fuel production in the country requires an assessment of those other sources as well.

I. THE BACKGROUND OF OCSLA AND THE FIVE-YEAR PLANS

A. *Background of OCSLA*

In the 1950s, oil production had become the second-largest revenue generator for the federal government.[12] Motivated to develop

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[12] *See OCS Lands Act History*, BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, https://www.boem.gov/oil-gas-energy/leasing/ocs-lands-

and manage the fossil fuel reserves in the OCS, Congress passed the first iteration of OCSLA—the U.S. Submerged Lands Act—in 1953,[13] which codified the federal government's ownership of the submerged lands, subsoil, and seabed of the OCS, beginning three to nine miles off each coastal state's coastline and ending at the seaward extent of federal jurisdiction under international law, generally about two hundred miles offshore.[14] This early version of OCSLA gave the Secretary "virtually unlimited discretion" in their leasing decisions.[15]

In 1978, however, Congress overhauled the 1953 law and produced the OCSLA statute that remains in place today.[16] The 1978 amendments were motivated by three major events that "moved OCS development into the forefront of the national consciousness."[17] The first was the Santa Barbara Oil Spill in 1969, which released three million gallons of crude oil into the Pacific Ocean, spreading over more than eight hundred square miles.[18] States and local governments became greatly concerned about the impacts of potential oil spills on their coastlines and the invasive onshore development that offshore drilling relies on.[19] Commercial and recreational fishing interests feared the harms oil and gas development could wreak on their activities.[20] Environmental and citizen groups raised serious concerns about how offshore development would damage marine ecosystems.[21] The second event was the 1973 oil crisis, in which member countries of the Organization of the Petroleum Exporting Countries imposed an oil embargo against the

act-history (last visited Feb. 2, 2024) (noting income tax as the highest revenue generator).

13 *See* Submerged Lands Act of 1953, Pub. L. No. 83-31, 67 Stat. 29.

14 *See* REVESZ ET AL., *supra* note 5, at 1236; 43 U.S.C. § 1331(a).

15 California v. Watt (*Watt I*), 668 F.2d 1290, 1296 (D.C. Cir. 1981).

16 *See* Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629.

17 *Watt I*, 668 F.2d at 1295.

18 *See* Kate Wheeling & Max Ufberg, *"The Ocean is Boiling": The Complete Oral History of the 1969 Santa Barbara Oil Spill*, PACIFIC STANDARD (Nov. 7, 2018), https://psmag.com/news/the-ocean-is-boiling-the-complete-oral-history-of-the-1969-santa-barbara-oil-spill.

19 *See Watt I*, 668 F.2d at 1295–96.

20 *See id.* at 1296.

21 *See id.*

United States for its military support of Israel.[22] This event raised concerns about the country's dependence on foreign sources of oil.[23] The third event was that, in response to the embargo, President Nixon directed that ten million acres of the OCS be leased in a single year.[24] The ten million-acre area was massive in comparison to previous lease programs—it made available almost the same amount of territory that had been leased in the entire twenty-year-plus history of the OCS program and included regions that had never been developed before, such as areas off the Atlantic and Pacific coasts and Alaska.[25] Ultimately, these events crystallized the need to both produce more domestic energy sources and protect the OCS and the nation's coastal communities.[26] In 1974, legislation to amend the 1953 statute was introduced and, four years later, Congress passed the Outer Continental Shelf Lands Act Amendments of 1978.[27]

B. *OCSLA's Five-Year Plan Requirement*

Under OCSLA, the Bureau of Ocean Energy Management (BOEM), located within Interior, prepares and maintains "forward-looking" five-year plans for proposed oil and gas lease sales on the OCS.[28] These plans are mandated by OCSLA's section 18(a), which requires the Secretary of the Interior to "prepare and periodically revise, and maintain an oil and gas leasing program" for the five-year period following the program's approval.[29] These plans dictate when and where lease sales *may* occur but do not themselves issue leases or approve drilling.

[22] *See Oil Embargo, 1973–1974*, OFF. OF THE HISTORIAN, DEP'T OF STATE, https://history.state.gov/milestones/1969-1976/oil-embargo (last visited Feb. 2, 2024).

[23] *See id.*

[24] *See Watt I*, 668 F.2d at 1295.

[25] *See id.*

[26] *See* REVESZ ET AL., *supra* note 5, at 1236. *See also* H.R. REP. NO. 94-1084, pt. 5, at 73–74 (1976) (noting aggressive OCS leasing "crystalized growing concern on the part of many in Congress and elsewhere about the open-ended authority granted in the 23-year-old legislation").

[27] *See* REVESZ ET AL., *supra* note 5, at 1236.

[28] LAURA B. COMAY, CONG. RSCH. SERV., R44692, FIVE-YEAR OFFSHORE OIL AND GAS LEASING PROGRAM: STATUS AND ISSUES IN BRIEF 1 (2021).

[29] 43 U.S.C. § 1344(a).

Rather, the five-year plan is the first step in a five-step process for developing and selling exploited oil and gas from the OCS. Once the five-year program is created, leases are sold, followed by exploration, then development and production on the leased plots, and, finally, the sale of the extracted oil, gas, and related minerals.[30] This five-step process is often described as "pyramidic," as it "proceed[s] from broad-based planning to an increasingly narrower focus as actual development grows more imminent."[31] Developing a five-year plan typically takes BOEM two to three years to complete.[32] When developing the plan, BOEM considers all potentially available leasing areas and then removes areas from the plan, according to environmental, social, and economic considerations, to arrive at a final leasing schedule.[33]

Generally, in the first step in this process, BOEM publishes a "Request for Information and Comments" (RFI) in the Federal Register where affected parties are invited to provide BOEM with information pertaining to the anticipated five-year plan during a forty-five-day comment period (see Figure 1 below).[34] Second, BOEM publishes a Draft Proposed Program (DPP) and a notice of intent (NOI) to publish a programmatic environmental impact statement (PEIS) for the leasing program, as required by the National Environmental Policy Act.[35] Taking the comments into account, BOEM

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30 *See* BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, OCS OIL AND GAS LEASING, EXPLORATION, AND DEVELOPMENT PROCESS, https://www.boem.gov/sites/default/files/oil-and-gas-energy-program/Leasing/Five-Year-Program/2017-2022/Process-Diagram.pdf, (last visited May 20, 2024).

31 California v. Watt (*Watt II*), 712 F.2d 584, 588 (D.C. Cir. 1983).

32 *See* COMAY, *supra* note 28, at 1.

33 *See id*. *See also* LAURA B. COMAY ET AL., CONG. RSCH. SERV., R44504, FIVE-YEAR PROGRAM FOR OFFSHORE OIL AND GAS LEASING: HISTORY AND PROGRAM FOR 2017–2022, at 8 (2019).

34 *See* BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, 2017–2022 OCS OIL AND GAS LEASING PROPOSED FINAL PROGRAM 3-1 (2016), https://www.boem.gov/sites/default/files/oil-and-gas-energy-program/Leasing/Five-Year-Program/2017-2022/2017-2022-OCS-Oil-and-Gas-Leasing-PFP.pdf. *See also* Request for Information and Comments on the Preparation of the 2017–2022 Outer Continental Shelf (OCS) Oil and Gas Leasing Program, 79 Fed. Reg. 115 (June 16, 2014); COMAY ET AL., *supra* note 33, at 8.

35 *See* COMAY ET AL., HISTORY AND PROGRAM, *supra* note 33, at 8. *See also* 42 U.S.C. § 4332.

then analyzes all of the areas available for leasing and creates a tentative lease schedule, which it adds to the DPP.[36] There is then a sixty-day notice and comment period for the DPP.[37] Third, BOEM publishes a proposed program (PP) that incorporates feedback received on the DPP.[38] The PP further refines the locations and timing of lease sales from the DPP.[39] BOEM also publishes a draft PEIS at this stage.[40] The PP is submitted to Congress, state governors, select federal agencies, and to the public again for comment.[41] There is then a ninety-day comment period for the PP.[42] Fourth, BOEM publishes the third and final version of the five-year plan, the proposed final program (PFP), as well as a final PEIS.[43] The PFP draws on the comments as well as the statutorily mandated considerations of section 18 of OCSLA.[44] BOEM publishes the PFP in the Federal Register and submits it to Congress and the President for at least sixty days, which gives the legislature an opportunity to introduce legislation that could override or affect the five-year plan.[45] The fifth and final step of creating a five-year plan is to secure approval from the Secretary of the Interior.[46] Once a period of at least sixty days passes, the Secretary may approve the PFP, making it final, after which the Secretary publishes a record of their decision.[47]

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[36] *See* COMAY ET AL., HISTORY AND PROGRAM, *supra* note 33, at 8.

[37] *See National OCS Oil and Gas Leasing Program*, BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, https://www.boem.gov/national-ocs-oil-and-gas-leasing-program (last visited Feb. 18, 2024).

[38] *See* COMAY ET AL., HISTORY AND PROGRAM, *supra* note 33, at 8.

[39] *See id*. *See also* California v. Watt (*Watt I*), 668 F.2d 1290, 1298 (D.C. Cir. 1981).

[40] *See* COMAY ET AL., HISTORY AND PROGRAM, *supra* note 33, at 9.

[41] *See id.*

[42] *See National OCS Oil and Gas Leasing Program*, BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, https://www.boem.gov/national-ocs-oil-and-gas-leasing-program (last visited Feb. 18, 2024).

[43] *See* COMAY ET AL., HISTORY AND PROGRAM, *supra* note 33, at 9.

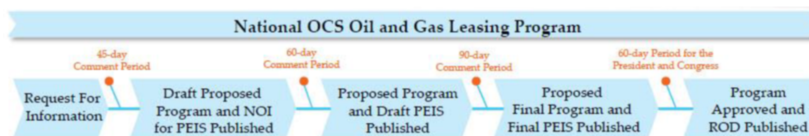
[44] *See id.*

[45] *See id.*

[46] *See id.*

[47] *See id.*

Figure 1: BOEM Five-Year Plan Development Process[48]



C. *Importance of the Five-Year Plans*

The first stage in the five-step "pyramidic" process—the five-year plan stage—is one of several possible points of intervention in the OCSLA leasing process to halt fossil fuel development on the OCS. Other points are the sales of the specific oil and gas leases, the exploration and development permitting stage, the development and production plan approval stage, and the lease cancellation stage.[49] This Note, however, focuses on the five-year plan stage for two main reasons. First, if the Secretary of the Interior is legally able to issue a "no-lease" five-year plan, it would be one of the simplest ways to end future oil and gas development on the OCS, short of congressional legislation or presidential withdrawal of all lands governed by OCSLA.[50] Halting the process at this stage would reduce administrative costs by limiting the work required in later stages. It would also eliminate the risk that leases slip through the cracks in subsequent, more diffuse stages. Second, the five-year

48 *See* LAURA B. COMAY & ADAM VANN, CONG. RSCH. SERV., R44504, FIVE-YEAR OFFSHORE OIL AND GAS LEASING PROGRAM: HISTORY AND BACKGROUND 7 (2022).

49 *See* Eric Biber & Jordan Diamond, *Keeping It All in the Ground?*, 63 ARIZ. L. REV. 279, 313, 318 (2021). *See also* REVESZ ET AL., *supra* note 5, at 1238 ("Interior is directed to consider economic, social, and environmental values of OCS resources at every phase in its four-step process. In reviewing a lessee's exploration plans at the third stage, for example, Interior must ensure that, among other things, such plans 'will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance.' . . . In analyzing a lessee's development plans at the fourth stage, Interior must ensure, among other things, that such development will not 'probably cause serious harm or damage . . . to the marine, coastal or human environments.'") (quoting 43 U.S.C. §§ 1340(g)(3), 1351(h)(1)(D)(i)).

50 *See* 43 U.S.C. § 1341 ("The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.").

plan stage carries great "practical and legal significance."[51] As explained by the Court of Appeals for the D.C. Circuit in *Center for Sustainable Economy v. Jewell*, "[t]he key national decisions as to the size, timing, and location of OCS leasing—as well as the basic economic analyses and justifications for such decisions—are made at this first stage."[52] The five-year plans create important reliance interests for federal, state, and local governments, developers, energy providers, and local and national companies alike, which orient their activities and future plans around the information contained in these five-year programs.[53]

II. OCSLA Section 18(a), Case Law, and Standards of Review

A. *OCSLA Section 18(a)*

Section 18(a) of OCSLA establishes the substantive requirements for the management, timing, and location of leasing activity in the five-year plans.[54] It requires that the five-year leasing program "consist of a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which [the Secretary] determines will best meet national energy needs[55] for the five-year period following its approval or reapproval."[56] The section also requires the program "be prepared and

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[51] California v. Watt (*Watt I*), 668 F.2d 1290, 1299 (D.C. Cir. 1981).

[52] Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 595 (D.C. Cir. 2015).

[53] *See Jewell*, 779 F.3d at 595. *See also Watt I*, 668 F.2d at 1299 ("Once the Secretary approves the leasing program, it achieves important practical and legal significance. No lease may be issued for any area unless the area is included in the approved leasing program and unless the lease contains provisions consistent with the approved program. The approved program also becomes the basis for future planning by all affected entities, from federal, state and local governments to the oil industry itself.").

[54] *See* 43 U.S.C. § 1344(a).

[55] This Note does not fully analyze the meaning or implications of the phrase "will best meet national energy needs," but Interior has developed more information on how "national energy needs" are calculated. *See* BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, CONSUMER SURPLUS AND ENERGY SUBSTITUTES FOR OCS OIL AND GAS PRODUCTION: THE 2021 REVISED MARKET SIMULATION MODEL (MARKETSIM) (2021), https://www.boem.gov/sites/default/files/documents//MarketSim%20Model%20Documentation.pdf.

[56] 43 U.S.C. § 1344(a).

maintained in a manner consistent with" the following four substantive principles:[57]

> (1) Management of the outer Continental Shelf shall be conducted in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf, and the potential impact of oil and gas exploration on other resource values of the outer Continental Shelf and the marine, coastal, and human environments.
>
> (2) Timing and location of exploration, development, and production of oil and gas among the oil- and gas-bearing physiographic regions of the outer Continental Shelf shall be based on a consideration of—
>
> > (A) existing information concerning the geographical, geological, and ecological characteristics of such regions;
> >
> > (B) an equitable sharing of developmental benefits and environmental risks among the various regions;
> >
> > (C) the location of such regions with respect to, and the relative needs of, regional and national energy markets;
> >
> > (D) the location of such regions with respect to other uses of the sea and seabed, including fisheries, navigation, existing or proposed sealanes, potential sites of deepwater ports, and other anticipated uses of the resources and space of the outer Continental Shelf;
> >
> > (E) the interest of potential oil and gas producers in the development of oil and gas resources as indicated by exploration or nomination;
> >
> > (F) laws, goals, and policies of affected States which have been specifically identified by the Governors of such States as relevant matters for the Secretary's consideration;
> >
> > (G) the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf; and
> >
> > (H) relevant environmental and predictive information for different areas of the outer Continental Shelf.
>
> (3) The Secretary shall select the timing and location of leasing, to the maximum extent practicable, so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone.

[57] *Id.*

> (4) Leasing activities shall be conducted to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government.[58]

Relevant to this Note's analysis, section 18(a) requires the Secretary to balance environmental, social, and economic factors when they create their five-year plan.[59] To do this, the Secretary must perform some form of a cost-benefit analysis, weighing the environmental, social, and economic costs and benefits of leasing particular areas of the OCS.[60] OCSLA does not mandate that all section 18(a) factors be weighted equally at the five-year plan stage; rather, each must be considered and "balanced"[61] so as to "best meet national energy needs."[62] In *California v. Watt* (*Watt I*), the D.C. Circuit Court of Appeals recognized that the Secretary's "broad" discretion to weigh the section 18(a) factors is supported by the statute's language, which states that the timing and location of leasing must strike the proper balance of these factors "to the maximum extent practicable."[63] To justify a no- or few-lease five-year plan, the Secretary must balance these listed factors in a manner consistent with the statute and relevant case law.

58 *Id.*

59 *See id.*

60 *See id.* § 1344(a)(3). *See also* REVESZ ET AL., *supra* note 5, at 1237; California v. Watt (*Watt I*), 668 F.2d 1290, 1318 (D.C. Cir. 1981) ("It is reasonable to conclude that within [§ 18(a)(3)'s] 'proper balance' there is some notion of 'costs' and 'benefits' . . . . We also agree with the Secretary's view that an area should be included within the program for further consideration when its potential 'benefits' exceed its potential 'costs.'").

61 *Watt I*, 668 F.2d at 1317.

62 43 U.S.C. § 1344(a). *See Watt I*, 668 F.2d at 1307 ("Although the continual collection and assimilation of pertinent information must of course continue throughout the OCS process, and although the speculative nature of any information may well affect the weight the Secretary attached thereto in drawing up the leasing program, section 18(a)(2) nonetheless requires the Secretary at the program stage to consider, each factor listed therein on the basis of the best information available, and to base the leasing program upon the information thereby obtained.").

63 *See Watt I*, 668 F.2d at 1317; 43 U.S.C. § 1344(a)(3).

B. *Interpretation of Section 18(a) and Treatment of Climate Change Factors in the Case Law*

Litigation involving the five-year plans has revealed how courts have interpreted OCSLA to require the Secretary to take section 18(a) factors into account and the standards of judicial review for the Secretary's decisions. The most important cases for this Note's analysis are: *Watt I* (challenging the 1980–1985 five-year program);[64] *California v. Watt* (*Watt II*) (challenging the 1982–1987 five-year program);[65] *Natural Resources Defense Council, Inc. v. Hodel* (challenging the 1987–1992 five-year program);[66] *Center for Biological Diversity v. U.S. Department of Interior* (*CBD*) (challenging the 2007–2012 five-year program);[67] and *Jewell* (challenging the 2012–2017 five-year program).[68] These cases also nod to several key issues, including the prospect of no-leasing alternatives and consideration of the climate crisis under section 18(a). This Part offers short summaries of these cases' most pertinent issues and holdings for the Note's analysis regarding whether Interior can issue a no-lease five-year plan on the basis of the climate crisis.

Watt I was the first case in which the D.C. Circuit reviewed OCSLA section 18(a) on substantive grounds since the passage of the 1978 amendments. It set out the major guideposts for future decisions regarding section 18(a), defining the standards of judicial review and explaining how the Secretary should view the section 18(a) factors when balancing the environmental, social, and economic costs. In *Watt I*, the court held that the Secretary must consider all the section 18(a) factors at the five-year plan stage and must base the timing and location of leasing activity in the plan on these factors.[69] In this case, the Secretary failed to properly assess the section 18(a) factors, so the court set the plan aside.[70]

[64] *See Watt I*, 668 F.2d at 1290.

[65] *See* California v. Watt (*Watt II*), 712 F.2d 584 (D.C. Cir. 1983).

[66] *See* NRDC v. Hodel, 865 F.2d 288, 291–93 (D.C. Cir.1988).

[67] *See* Ctr. for Biological Diversity v. Dep't of Interior, 563 F.3d 466 (D.C. Cir. 2009).

[68] *See* Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 595 (D.C. Cir. 2015).

[69] *See Watt I*, 668 F.2d at 1305.

[70] *See id.* at 1313, 1326.

The *Watt I* court made several other important holdings that set the stage for future decisions. First, the court recognized that much of the information that the Secretary will consider when making timing and location decisions based on section 18(a) is speculative in nature.[71] The Secretary is permitted, and in some cases may be required, to make decisions based on this speculative information, so long as it is the "best 'existing information'" available.[72] The Secretary is not required to "predict the future with absolute precision."[73] Second, the court clarified that the Secretary must explicitly state how each section 18(a) factor was considered and the impact it had on the final timing and location decisions in the five-year plan.[74] Third, the court stated that, in the section 18(a)(3) balancing test, the "potential for the discovery of oil and gas" factor should be weighed more heavily than "the potential for environmental damage . . . and the potential for adverse impact on the coastal zone" factors.[75] It justified this holding by referencing the stated policy of OCSLA: that "the outer Continental Shelf is a vital national resource . . . which should be made available for orderly and expeditious development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs."[76] The court interpreted this to mean that the primary purpose of OCSLA is to "expedite exploration and development of the OCS," which is qualified by the statute's goal to "eliminate or minimize the risks attendant to that exploration and development," recognizing that "some degree of adverse impact is inevitable."[77] The court went on to explain that the Secretary's "obligation . . . is to look at all factors and then balance the results . . . so as to 'best meet national energy needs,'" not to balance all factors equally.[78] In this analysis, the court also remarked that the "weight of these elements may well shift with changes in technology, in environment, and in the nation's energy needs, meaning that the

[71] *See id.* at 1309.

[72] *Id.*

[73] *Id.*

[74] *See id.* at 1314.

[75] 43 U.S.C. § 1344(a)(3).

[76] *Watt I*, 668 F.2d at 1315 (quoting 43 U.S.C. § 1332(3)).

[77] *Id.* at 1316.

[78] *Id.* at 1317 (quoting 43 U.S.C. § 1344(a)).

proper balance for 1980–85 may differ from the proper balance for some subsequent five-year period."[79]

In *Watt II*, the D.C. Circuit reviewed Interior's second attempt at a five-year plan and the challenges brought against it by the state of California and several state agencies.[80] In this case, petitioners challenged the Secretary's methodology, factual findings, and policy judgments—not his interpretation of the statute.[81] Consequently, the court afforded a great deal of deference to the agency, ultimately upholding its decision-making.[82] The *Watt II* court also made and reiterated several points about the five-year plan development process that are important for this Note's analysis. First, the court held that, in determining environmental sensitivity and marine productivity in the OCS regions under section 18(a)(2)(G), the Secretary need only "make a good faith determination . . . based upon the best 'existing information' available to him."[83] The Secretary was therefore free to choose any methodology "so long as it [was] not irrational."[84] Furthermore, the *Watt II* court reiterated *Watt I*'s notion that the Secretary may, and sometimes must, rely on data and methodologies that are on the "frontiers of scientific knowledge" to promulgate the five-year plan.[85] These determinations are not only acceptable but "entitled to substantial deference."[86] Using this rationale, the court also held that it is not irrational for the Secretary to make assumptions about costs and cost distributions, particularly when the factors that would determine those costs are unknown or highly variable.[87] Second, the court reiterated a holding from *Watt I*: the Secretary must determine that "none of the section 18(a)(2) factors pose an 'absolute or categorical impediment to leasing a particular area.'"[88] These holdings provide the Secretary significant

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79. *Id.* at 1317.
80. *See* California v. Watt (*Watt II*), 712 F.2d 584 (D.C. Cir. 1983).
81. *See id.* at 591.
82. *See id.* at 591, 611.
83. *Id.* at 596 (quoting *Watt I*, 668 F.2d at 1313).
84. *Watt II*, 712 F.2d at 596 (quoting *Watt I*, 668 F.2d at 1320).
85. *Id.* at 600 (quoting *Watt I*, 668 F.2d at 1301).
86. *Id.*
87. *See id.* at 604.
88. *Id.* at 597 (quoting *Watt I*, 668 F.2d at 1313).

deference in the balancing process, which a Secretary issuing a no- or few-lease five-year plan could rely on to justify their plan.

In *Hodel*, various states and environmental groups challenged Interior's 1987–1992 five-year plan on several grounds, including alleged violations of OCSLA section 18.[89] In *Hodel*, the D.C. Circuit discussed what the requirements for the Secretary are in the face of predictive uncertainty and in situations where experts come to conflicting conclusions.[90] The court reaffirmed *Watt I* and *II*'s holdings that OCSLA "sets only broad standards and leaves much to the Secretary's discretion in achieving its goals."[91] The court also emphasized how the values used in cost-benefit determinations are only estimates (and, therefore, do not need to be extremely precise determinations of future values) and can be focused on long-term considerations and expectations.[92] For matters that are "'largely predictive in nature' [the court should] accord[] 'great deference' to the Secretary."[93]

In the 2009 case *CBD*, environmental groups and the Native Village of Point Hope, Alaska challenged the 2007–2012 five-year plan, specifically its approval of Alaskan offshore oil and gas leasing.[94] Of significance, this is the first case dealing with OCSLA section 18(a) that mentions climate change.[95] In *CBD*, petitioners made two climate change-related claims. First, petitioners argued that the Secretary violated sections 18(a)(1) and (a)(3) by failing to account for the environmental costs due to climate change that would result from the consumption of fossil fuels extracted from the OCS.[96] Second, petitioners claimed that Interior violated section 18(a)(2)(H) by failing to adequately consider the present and future costs of climate

89 *See* NRDC v. Hodel, 865 F.2d 288, 290–91 (D.C. Cir.1988).

90 *See id.* at 309.

91 *Id.* at 302.

92 *See id.* at 307.

93 *Id.* (quoting *Watt II*, 712 F.2d at 602).

94 *See* Ctr. for Biological Diversity v. Dep't of Interior, 563 F.3d 466, 471 (D.C. Cir. 2009).

95 *See id.*

96 *See id.* at 484.

change on OCS areas, as well as the costs that would be accrued by consumption of these OCS fossil fuels.[97]

In its analysis, the *CBD* court clearly distinguished consideration of the impacts of "consumption" from the impacts of "production" of fossil fuels.[98] In response to the "consumption"-based claims, the court was quick to hold that OCSLA does not require Interior to consider the global environmental impact or the "derivative environmental impact on OCS areas" of oil and gas consumption before approving a five-year plan.[99] The court went on to state that OCSLA "does not authorize—much less require—Interior to consider the environmental impact of post-exploration activities such as consuming fossil fuels on either the world at large, or the derivative impact of global fossil fuel consumption on OCS areas."[100] The court noted that "Interior simply lacks the discretion to consider any global effects that oil and gas consumption may bring about."[101] However, while the court stated that Interior lacks the discretion to consider effects caused by *consumption* of the fossil fuels produced on the OCS (such as their downstream use to generate energy) as a factor in its section 18(a)(3) balancing test, Interior may consider the global and local effects that the *production* activities (such as extraction) included in five-year plans will have.[102]

Though *CBD*'s limitation on Interior's ability to consider the impacts of oil and gas consumption may be a hurdle for the Secretary in justifying a no-lease five-year plan on the basis of the climate crisis, it does not pose an insurmountable challenge. In fact, many environmental advocates read the opinion to hold only that the Secretary is not required to consider the impacts of fossil fuel consumption and that the language precluding the analysis is simply non-binding dicta.[103] There are also other bases under which the climate

[97] *See id.*

[98] *Id.* at 485.

[99] *Id.* at 484.

[100] *Id.* at 485.

[101] *Id.*

[102] *See id.* at 485–86.

[103] *See* LAURA FIGUEROA ET AL., INST. FOR POL'Y INTEGRITY, INTERIOR'S AUTHORITY TO CONSIDER DOWNSTREAM EMISSIONS FROM OFFSHORE LEASING 2–3 (2022), https://policyintegrity.org/files/publications/Interior_s_Authority_to_Consider_Downstream_Emissions_from_Offshore_Leasing.pdf ("[T]hose

crisis could be considered in section 18(a), which are further discussed in Part III of this Note.[104] Relevant to those other bases, the *CBD* court found a deficiency in the agency's section 18(a)(2) and (a)(3) determinations and asserted that the agency must determine whether its "environmental sensitivity analysis warrants the exclusion of any proposed area in the [five-year plan]."[105]

Finally, *Jewell* is a recent case in which the D.C. Circuit considered OCSLA section 18(a). Here, petitioners challenged the 2012–2017 five-year plan on the basis that Interior failed to satisfy section 18(a) of OCSLA and to "rationally . . . strike an appropriate balance between environmental costs and national energy needs as required under the Administrative Procedure Act."[106] Relevant to this Note's analysis is the court's holding regarding Interior's cost-benefit analysis of environmental costs (including ecology and air quality), social costs (including recreation, property values, subsistence harvests, and commercial fishing), and costs from activities "associated with exploration, development, production and transportation that might occur with new OCS production and *its most likely replacement*."[107] Here, the court held that it was reasonable for Interior to consider the costs and benefits of replacements to

statements [that OCSLA does not authorize Interior to consider downstream environmental effects] were 'unnecessary for [the] disposition of the case' and are therefore dicta. Indeed, the D.C. Circuit later characterized its [*CBD*] holding as narrow, stating that [*CBD*] 'conclude[s] that OCSLA was sufficiently ambiguous to *permit* Interior to forgo consideration of climate-related effects of burning OCS-derived fossil fuels, and to *allow* Interior to limit its consideration of the environmental impact of OCS leasing.' Because courts are 'not bound by dicta,' Interior need not heed [*CBD*'s] stray comments on the scope of Interior's discretion—particularly in light of the dicta's conflict with the D.C. Circuit's later analysis in *Center for Sustainable Economy v. Jewell* and the Ninth Circuit's analysis in *Center for Biological Diversity v. Bernhardt* . . . .") (citing Telecomms. Rsch. & Action Ctr. v. FCC, 917 F.2d 585, 588 (D.C. Cir. 1990) (Silberman, J., concurring); Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 606–07, 608 n.11 (D.C. Cir. 2015); Kerry v. Din, 576 U.S. 86, 94 (2015); Ctr. for Biological Diversity v. Bernhardt, 982 F.3d 723, 740 (9th Cir. 2010)).

104 *See* discussion *infra* Part III.

105 Ctr. for Biological Diversity v. Dep't of Interior, 563 F.3d 466, 489 (D.C. Cir. 2009).

106 *Jewell*, 779 F.3d at 600. Of note, because OCSLA does not have a citizen suit provision, the Administrative Procedure Act is the primary vehicle for bringing a challenge under OCSLA.

107 *Id.* at 603.

fossil fuels extracted from the OCS, including renewable energy resources.[108]

Further, the court held that it was reasonable for Interior to consider the nationwide effects of a leasing decision, not just the impacts that occur directly in OCS areas.[109] Relatedly, the court stated that, while sections 18(a)(2)(B) and (G) refer to "relative" costs and benefits between OCS regions, Interior is by no means limited to considering intra-region comparisons and can permissibly base its leasing decisions on information regarding effects outside of these regions, when relevant.[110] *Jewell* thus opened the door for future Secretaries to consider the nationwide impacts of leasing decisions in their cost-benefit analyses.[111]

The *Jewell* court also held that Interior's failure to account for the information value of delaying OCS lease sales, which refers to the benefits accrued from waiting (for the development of safer technologies and renewable energy sources, for instance), was not unreasonable.[112] The court justified this decision on the basis that "the informational value of delay [was not] yet so readily quantifiable that Interior acted unreasonably in choosing not to quantify it in this planning cycle."[113] However, the court suggested that the information value of delay could include climate change factors, asserting that the "true costs of tapping OCS energy resources are better understood as more becomes known about the damaging effects of

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[108] *See id.*

[109] *See id.* at 604–05 (accepting as reasonable Interior's decision to assess environmental and social harms created by these replacements "wherever in the United States they were likely physically to occur; it did not restrict its assessment to costs that would be felt within an OCS Region or area's geographic boundaries").

[110] *See id.*

[111] While this Note does not address the validity of *CBD* or any other case holdings, the *Jewell* court's acceptance of Interior's decision to consider the downstream, nationwide environmental effects of the no-lease alternative undercuts *CBD*'s stance that the impact of post-exploration activities is an improper factor in a section 18(a) analysis. If Interior may properly consider the downstream environmental effects of a decision *not* to lease, why should Interior not be able to consider the downstream environmental effects of a decision *to* lease?

[112] *See Jewell*, 779 F.3d at 610.

[113] *Id.*

fossil fuel pollutants."[114] The court also suggested that, while Interior at the time was not required to quantify the information value of delay, it could have done so and, if this value had been quantified in the past, it might be irrational for a Secretary not to also quantify it in the future.[115]

The overall thrust of the case law shows that the Secretary can rely on a wide array of information and methodologies to determine what (and what not) to include in the five-year plans. Courts generally afford Interior a great deal of deference in making these decisions and are reluctant to overturn the five-year plans. While the Secretary must explicitly consider all the section 18 factors,[116] they are permitted to determine the details of any lease sales (such as timing and location) based the "best 'existing information,'"[117] which can include speculative information and data and methodologies on the "frontiers of scientific knowledge,"[118] so long as they do so in a manner that "is not irrational."[119] These determinations are "entitled to substantial deference."[120] Additionally, while Interior is not required to consider the downstream impacts of offshore oil drilling,[121] the choice to consider them is arguably not foreclosed, and the Secretary is permitted to consider the nationwide impacts of their leasing decisions, including the effect on other energy sources, such as renewables.[122]

C. *Standards of Judicial Review*

In order to create a five-year plan, the Secretary of the Interior must determine the costs and benefits of different leasing scenarios and weigh them based on factual findings (their own and findings

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[114] *Id.*

[115] *See id.* at 612 ("Had the path been well worn, it might have been irrational for Interior not to follow it. Under the circumstances it faced, Interior might permissibly have blazed a new trail.").

[116] *See* California v. Watt (*Watt I*), 668 F.2d 1290, 1305 (D.C. Cir. 1981).

[117] *Id.* at 1309.

[118] California v. Watt (*Watt II*), 712 F.2d 584, 600 (D.C. Cir. 1983).

[119] *Id.* at 596.

[120] *Id.* at 600.

[121] *See* Ctr. for Biological Diversity v. Dep't of Interior, 563 F.3d 466, 484 (D.C. Cir. 2009).

[122] Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 603 (D.C. Cir. 2015).

submitted during the notice and comment periods), policy judgments, and their interpretations of ambiguous provisions of OCSLA itself. In reviewing these findings, judgments, and interpretations, courts generally chart the "typical contours of administrative review"[123] and follow the "hybrid" approach put forth in *Watt I* to determine whether the agency has created a five-year plan in accordance with OCSLA.[124]

Factual findings can take the form of "studies, raw empirical data, predictive analyses, and descriptive information."[125] A court's review of the agency's factual findings is limited to the substantial evidence test, required by OCSLA section 23(c)(6) and laid out in *Watt I* and related case law.[126] The substantial evidence test provides that "[t]he findings of the Secretary, if supported by substantial evidence, shall be conclusive."[127] "Substantial evidence" has been interpreted to mean "'more than a scintilla,' but [potentially] less than a preponderance of the evidence."[128] A court will set aside an agency decision if it represents a "clear error of judgment" or is "irrational."[129] In practice, when the Secretary makes a factual finding, it should be supported in the record.[130] The Secretary is also required to calculate and consider costs and benefits that would be irrational to ignore when making a factual finding. For example, for the Secretary to find that the benefits of drilling in a particular area on the OCS outweigh the costs, the agency must have calculated and considered the readily quantifiable costs and benefits of the environmental and social activities that are affected by oil and gas drilling, such as tourism and fishing.[131]

Policy judgments are cost-benefit determinations that rely on data and/or a methodology that is on the "frontiers of scientific

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[123] *Id.* at 600.

[124] California v. Watt (*Watt I*), 668 F.2d 1290, 1300 (D.C. Cir. 1981).

[125] *Id.* at 1301.

[126] *See* 43 U.S.C. § 1349(c)(6); *Watt I*, 668 F.2d at 1302. *See also Jewell*, 779 F.3d at 600; NRDC v. Hodel, 865 F.2d 288, 300 (D.C. Cir.1988).

[127] 43 U.S.C. § 1349(c)(6).

[128] Ctr. for Biological Diversity v. Dep't of Interior, 563 F.3d 466, 484 (D.C. Cir. 2009).

[129] *Watt I*, 668 F.2d at 1302.

[130] *See id.*

[131] *See id.* at 1319.

knowledge."[132] Policy judgments differ from factual determinations on the basis that, at the time of decision-making, sufficient data does not completely support them, and the agency must, therefore, make these decisions based on what information is available and according to its policy objectives.[133] Because policy judgments cannot be resolved solely by reference to the factual record, they are subject to a stricter, though still very deferential, standard of review.[134] As stated by the court in *Watt I*,

> [w]hen reviewing the policy judgments made by the Secretary, including those predictive and difficult judgmental calls the Secretary is called upon to make, [the court] will subject them to searching scrutiny to ensure that they are neither arbitrary nor irrational—in other words, [the court] must determine whether "the decision is based on a consideration of the relevant factors and whether there has been a clear error of judgment."[135]

For example, the Secretary must be able to identify "the reasons why he chooses to follow one course rather than another" and, if the Secretary claims to be relying on certain determinable facts, "the Secretary must . . . find those facts from evidence in the record."[136] Further, "when the Secretary is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, he should so state and go on to identify the considerations he found persuasive."[137] Relatedly, the *Watt II* court further clarified that even if evidence in the record supports other conclusions that conflict with the Secretary's ultimate decision, the court shall only inquire into whether the ultimate decision was rational and has support in the record, rather than looking at each possible conclusion.[138] Ultimately, the court is "required to sustain the

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132 *Id.* at 1301.

133 *See id.*

134 *See id.* at 1302.

135 *Id.* (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)).

136 *Id.* (quoting Indus. Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 474–76 (D.C. Cir. 1974)).

137 *Id.*

138 *See* California v. Watt (*Watt II*), 712 F.2d 584, 606 (D.C. Cir. 1983).

methodology and assumptions made by the Secretary if they are reasonable."[139]

Finally, Interior also must occasionally interpret ambiguous provisions of OCSLA to decide which methodologies and information it may use and consider in its cost-benefit analyses. An example of this legal interpretation includes instances in which Interior has interpreted sections 18(a)(2)(B) and (G) to allow the agency to consider the nationwide, rather than OCS-specific, costs and benefits of drilling on the OCS, as was the case in *Jewell*.[140] Interior's legal interpretations of OCSLA are also subject to deferential review by the courts.[141] A court will "sustain the agency's interpretation of its authorizing statute so long as they find [the interpretation] to be legally permissible."[142] This inquiry is guided by *Chevron*'s two-step standard of review: "(1) unless [the interpretation] is contrary to Congress's clear intent (2) [the court will] defer to an agency's reasonable construction of its governing statute."[143]

III. Ways to Support a No-Lease Five-Year Plan

In order to approve a no-lease five-year plan on the basis of the climate crisis that can survive a legal challenge, the Secretary will need to work around the limiting case law and base their decision in sound factual findings, policy judgments, and statutory interpretations.[144] This Note treats the statements in *CBD* that Interior may not consider the impacts of the consumption of fossil fuels extracted

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139 *Id.* at 600.

140 *See* Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 603 (D.C. Cir. 2015).

141 *See id.* at 600.

142 *Id.*

143 *Id.* at 605 (referencing Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)). Of note, this standard of review may be impacted by cases set to be reviewed by the Supreme Court in early 2024, notably *Relentless, Inc. v. U.S. Department of Commerce*, in which the Court will consider whether to overrule or otherwise narrow *Chevron*.

144 This Part offers primarily textualist arguments to support a no-lease five-year plan and does not examine legislative history or explore purposivist arguments. A five-year plan with no or very few leases could also be supported by arguments using those lenses, and some purposivist arguments are discussed in this Note's counterargument section, Part IV.

from the OCS[145] as binding and offers suggestions as to how the Secretary could incorporate costs due to the climate crisis into their cost-benefit analysis without actually considering the downstream effects of greenhouse gas emissions from the oil and gas extracted on the OCS. This is to ensure that the Secretary's plan can withstand a legal challenge regardless of whether a future court considers the language in *CBD* to be binding. The Note's analysis is limited to OCSLA's sections 18(a)(1) through (3), though these are not the only OCSLA sections under which the Secretary might achieve the same result. Other ways to end lease sales on the OCS include the President withdrawing all OCSLA-regulated land under section 12(a);[146] Interior denying permits and leases at a later stage under OCSLA; a congressional ban on leasing;[147] or terminating all existing leases.[148]

The most relevant subsections of section 18(a) for this Note's analysis are section 18(a)(1); sections 18(a)(2)(A), (B), (D), (E), (G), and (H); and section 18(a)(3). Each of these subsections interacts with section 18(a)'s overarching mandate that the Secretary determine that "the size, timing, and location of leasing activity" included in the five-year plan "will best meet national energy needs for the five-year period following its approval or reapproval."[149]

Section 18(a)(1) states: "Management of the outer Continental Shelf shall be conducted in a manner which considers *economic, social, and environmental* values of the renewable and nonrenewable resources contained in the outer Continental Shelf, and the potential impact of oil and gas exploration on other resource values of the outer Continental Shelf and the marine, coastal, and human environments."[150] Section 18(a)(2) states:

[145] *See* Ctr. for Biological Diversity v. Dep't of Interior, 563 F.3d 466, 485 (D.C. Cir. 2009).

[146] *See* 43 U.S.C. § 1341(a).

[147] *See* COMAY, *supra* note 28, at 10 ("No offshore oil and gas lease sales have occurred in the Atlantic region since 1983, due in part to congressional bans on Atlantic leasing in annual Interior appropriations acts from FY1983 to FY2008, along with presidential moratoria on leasing in the region during those years.").

[148] *See* Biber & Diamond, *supra* note 49, at 286.

[149] 43 U.S.C. § 1344(a).

[150] *Id.* § 1344(a)(1) (emphasis added).

> Timing and location of exploration, development, and production of oil and gas among the oil- and gas-bearing physiographic regions of the outer Continental Shelf shall be based on a consideration of—
> (A) existing information concerning the *geographical, geological, and ecological characteristics* of such regions;
> (B) an equitable sharing of developmental benefits and *environmental risks* among the various regions;
> . . .
> (D) the location of such regions with respect to *other uses of the sea and seabed*, including fisheries, navigation, existing or proposed sealanes, potential sites of deepwater ports, and other anticipated uses of the resources and space of the outer Continental Shelf;
> (E) the interest of potential oil and gas producers in the development of oil and gas resources *as indicated by exploration or nomination*;
> . . .
> (G) the relative *environmental sensitivity and marine productivity* of different areas of the outer Continental Shelf; and
> (H) relevant *environmental and predictive information* for different areas of the outer Continental Shelf.[151]

For the Secretary to approve a no-lease five-year plan, section 18(a)(3) requires them to conclude that the plan properly balances "the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone"[152] and "best meet[s] national energy needs."[153]

Sections 18(a)(2) and (a)(3) are generally considered to be overlapping sections, as the (a)(2) factors identify specific criteria that must be considered in the (a)(3) analysis.[154] Therefore, the section 18(a)(3) analysis is often just a balance of the (a)(2) factors.[155] As previously stated, Interior complies with section 18(a) by completing a cost-benefit analysis. Typically, this involves Interior calculating each planning area's "net social values" and comparing

[151] *Id.* § 1344(a)(2) (emphasis added).
[152] *Id.* § 1344(a)(3).
[153] *Id.* § 1344(a).
[154] *See* California v. Watt (*Watt I*), 668 F.2d 1290, 1315 (D.C. Cir. 1981).
[155] *See id*.

those values in alternative leasing scenarios.[156] For example, Interior could compare the net social values of a no-leasing alternative, a full leasing alternative (leasing every area in the OCS), and an alternative that includes some leases and leaves other areas undeveloped. The net social value of each alternative is calculated by subtracting the "social costs (environmental and socio-economic costs)" from the "net economic value (the market value of expected resources less the cost of production and transportation)" of the leasing activity.[157] As stated in *Hodel*, these values are only estimates (not necessarily precise determinations of future values) and "can be focused on long-term considerations and price expectations."[158] The adequacy of Interior's consideration of the section 18(a) factors (as opposed to whether Interior considered them at all) is an inquiry into the factual findings and policy judgments of the agency and, thus, is subject to the lower standards of review described in Part II.[159]

For the Secretary to conclude that a no-lease five-year plan "best meet[s] national energy needs"[160] and properly balances "the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone,"[161] the Secretary will need to leverage the section 18(a)(2) factors in support of their plan. In simpler terms, the Secretary will need to find that the environmental, social, and economic costs of future leases in the OCS outweigh their benefits. Factual research into the (a)(2) factors with a consideration of the climate crisis, described below, suggests that the Secretary could find support for this decision in the record and withstand a potential legal challenge.

A. *Considering Environmental and Ecological Factors*

Sections 18(a)(2)(A), (B), (G), and (H) require Interior to consider the environmental and ecological costs of leasing[162] and are,

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156 NRDC v. Hodel, 865 F.2d 288, 306 (D.C. Cir. 1988).

157 *Id*. at 306 (internal quotations omitted).

158 *Id*. at 307.

159 *See* California v. Watt (*Watt II*), 712 F.2d 584, 590–91 (D.C. Cir. 1983); *supra* notes 54–143 and accompanying text.

160 43 U.S.C. § 1344(a).

161 *Id.* § 1344(a)(3).

162 *See id.* §§ 1344(a)(2)(A), (B), (G), (H).

therefore, some of the most critical sections under which the Secretary could find support to justify a no-lease five-year plan. Here, the Secretary could rely on these factors, which must be described in the record, to demonstrate how costly leasing on the OCS is, particularly in the face of the climate crisis. Section 18(a)(2) states that the

> [t]iming and location of exploration, development, and production of oil and gas among the oil- and gas-bearing physiographic regions of the outer Continental Shelf shall be based on a consideration of—(A) existing information concerning the *geographical, geological, and ecological characteristics* of such regions; (B) an equitable sharing of developmental benefits and *environmental risks* among the various regions; . . . (G) the relative *environmental sensitivity and marine productivity* of different areas of the outer Continental Shelf; and (H) relevant *environmental and predictive information* for different areas of the outer Continental Shelf.[163]

While the *CBD* court held that Interior cannot consider the downstream impacts of the consumption of oil and gas from the OCS, the court still required the agency to "determine whether its environmental sensitivity analysis warrants the exclusion of any proposed area in the [five-year plan]."[164] Under this holding, the Secretary could justify excluding OCS areas due to the current and projected vulnerabilities of the regions caused by the climate crisis generally, if they can show that the no-leasing option has the highest net social value in the face of these trends.

The current and projected effects of the climate crisis on the four OCS regions (the Gulf of Mexico, the Pacific, Alaska, and the Atlantic)[165] are well-documented. The Gulf of Mexico is experiencing increasingly dire effects from the climate crisis. For example, devastating weather events, such as storm surges and super high tides that used to occur every hundred years are, by 2100, expected to occur one to two times per year.[166] Scientists also predict that sea

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163 *Id.* (emphasis added).

164 Ctr. for Biological Diversity v. Dep't of Interior, 563 F.3d 466, 485, 489 (D.C. Cir. 2009).

165 *See* Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 692, 608 (D.C. Cir. 2015).

166 *See* Travis Lux, *UN Climate Report Suggests Major Changes in Store for Gulf Coast*, WWNO 89.9 (Sept. 30, 2019), https://www.wwno.org/coastal-

levels will rise 3.6 feet by 2100[167] and that wet and dry spells and marine heatwaves will increase and intensify.[168] Ecosystems are being, and will continue to be, destroyed as marine species get smaller in size and die due to ocean acidification, warming, and loss of oxygen.[169]

Similarly, the climate crisis is destabilizing the Pacific OCS region. Sea levels along the West Coast are expected to rise one to four feet by 2100, which would submerge wetlands and estuaries, harm local fisheries, and may destroy essential intertidal feeding habitats for migratory birds.[170] The Pacific coast has already experienced unprecedented marine heat waves, harmful and record breaking algal blooms, and a "significant loss" of its kelp forests.[171] The degradation and destruction of coastal and marine ecosystems in the Pacific is well-documented.[172]

As for Alaska, scientists project that the state will be completely free of sea ice by the 2030s (which historically has covered roughly six million square miles of ocean surface) because of the climate crisis.[173] This creates pathways for invasive species to enter the ecosystem; destroys habitat for animals, such as walruses and polar bears; and increases flooding and erosion of the coastlines.[174]

Lastly, the Atlantic region is also extremely vulnerable to environmental risks due to the climate crisis.[175] Because of its low-

desk/2019-09-30/un-climate-report-suggests-major-changes-in-store-for-gulf-coast.

[167] *See id.*

[168] *See id.* (explaining that marine heatwaves are "actual heatwaves of ocean water").

[169] *See id.*

[170] *See* EPA, WHAT CLIMATE CHANGE MEANS FOR CALIFORNIA 2 (2016), https://www.epa.gov/sites/default/files/2016-09/documents/climate-change-ca.pdf.

[171] *FAQ: Climate Change in California*, SCRIPPS INST. OF OCEANOGRAPHY, https://scripps.ucsd.edu/research/climate-change-resources/faq-climate-change-california (last visited Apr. 7, 2024).

[172] *See id.*

[173] *See Climate Impacts in Alaska*, EPA (Jan. 13, 2017), https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-alaska_.html.

[174] *See id.*

[175] *See A Closer Look: Land Loss Along the Atlantic Coast*, EPA (July 21, 2023), https://www.epa.gov/climate-indicators/atlantic-coast.

elevation coastlines, the Mid-Atlantic coast has already experienced major sea level rise, which has destroyed dry and wetlands.[176] Sea level rise is causing more frequent and more severe flooding, especially in recent superstorms and surges.[177] Additionally, ocean acidification has depleted marine animal populations, particularly those that build protective skeletons and shells.[178]

When balancing the section 18(a)(3) factors, the Secretary would need to articulate how each one makes development in the OCS unduly costly. They could do this by explaining that, because these regions are already extremely vulnerable, the costs associated with leasing activities have greatly increased and, ultimately, outweigh the benefits of leasing. In other words, while the environmental costs of offshore oil and gas leasing activities have always been high, these costs increase in the face of extreme environmental vulnerability and an increasingly erratic climate.[179] Some of the existing environmental costs of offshore fossil fuel development are outlined below.

The most devastating environmental costs associated with offshore oil and gas development are oil spills. Oil spills are impossible to fully remediate with current methods, which means that most oil from a spill remains in the ocean, where it affects ecosystems for decades and threatens already vulnerable species.[180] Marine animals, including "mammals, sea birds, fish, shellfish, and other sea life are extremely vulnerable to oil pollution and the long-term toxic effects [of a spill] can impair [their] reproductive success for

[176] *See id.*

[177] *See Climate Change Indicators: Oceans*, EPA (July 26, 2023), https://www.epa.gov/climate-indicators/oceans.

[178] *See id.*

[179] *See* Adeline L. Ford, *Climate Change Impacts to Oil Spill Risk and Assessing California's Preparedness* 4, 49 (May 19, 2023) (Masters Project, University of San Francisco) (on file with Master's Projects and Capstones, University of San Francisco). *See also* NAT. RES. DEF. COUNCIL, PROTECTING OUR OCEAN AND COASTAL ECONOMIES 2 (2009), https://www.nrdc.org/sites/default/files/offshore.pdf.

[180] *See* NAT. RES. DEF. COUNCIL, *supra* note 179, at 3. *See also* Mace G. Barron et al., *Long-Term Ecological Impacts from Oil Spills: Comparison of Exxon Valdez, Hebei Spirit, and Deepwater Horizon*, 54 ENV'T. SCI. TECH. 6456, 6458, 6463 (2020) (stating that remnants from oil spills can last for decades in affected ecosystems).

generations."[181] Even amounts of oil as small as one part per billion have been shown to harm species.[182] Oil spills are also extremely costly in economic terms. For example, the cleanup costs for the Exxon Valdez oil spill alone are estimated to be as high as $7 billion.[183] According to the National Oceanic and Atmospheric Administration, "thousands of oil spills occur in U.S. waters annually."[184]

In addition to oil spills, oil and gas drilling produces many toxic wastes and other forms of pollution, including tens of thousands of gallons of waste that contains mercury, lead, and cadmium.[185] These substances have been shown to "bioaccumulate and biomagnify in marine organisms" and actually appear in seafood consumed by humans.[186] The drilling process also creates a byproduct called "produced water," which contains benzene, arsenic, lead, toluene, and radioactive pollutants.[187] According to a 2001 environmental impact statement on a lease sale in the Gulf of Mexico, an average oil and gas exploration well discharges about fifty tons of nitrogen oxides, thirteen tons of carbon monoxide, six tons of sulfur oxides, and five tons of volatile organic chemicals.[188]

Another environmental harm caused by offshore leasing activity is the use of high-decibel explosive impulses during exploration to map the seafloor.[189] These extremely loud sounds damage and kill fish eggs and larvae and degrade the health of fish by impairing their hearing, leaving them vulnerable to predators and "unable to

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181 NAT. RES. DEF. COUNCIL, *supra* note 179, at 4.

182 *See id.*

183 *See* Susan Lyon & Daniel J. Weiss, *Oil Spills by the Numbers*, CTR. FOR AM. PROGRESS (Apr. 30, 2010) https://www.americanprogress.org/article/oil-spills-by-the-numbers/.

184 *Largest Oil Spills Affecting U.S. Waters Since 1969*, NOAA, https://response.restoration.noaa.gov/oil-and-chemical-spills/oil-spills/largest-oil-spills-affecting-us-waters-1969.html (last updated Mar. 21, 2024).

185 *See* NAT. RES. DEF. COUNCIL, *supra* note 179, at 3.

186 *Id.*

187 *See id.*

188 *See id.* (referencing MINS. MGMT. SERV., FINAL ENVIRONMENTAL IMPACT STATEMENT: GULF OF MEXICO OCS OIL AND GAS LEASE SALE 181 (2001)).

189 *See id.*

locate prey or mates or communicate with each other."[190] The high-decibel impulses also disrupt marine migratory patterns, which threatens marine animal survival and is associated with increased instances of whale beaching and stranding.[191] Offshore drilling also damages onshore areas, as drilling relies on the construction and operation of significant onshore infrastructure.[192] Louisiana, for example, loses about twenty-four miles of coastal wetlands per year due to this construction, leaving its coastlines even more vulnerable to damage from storms and oil spills.[193]

These harmful impacts are exacerbated by the effects of the climate crisis on the OCS. For example, the interaction of oil drilling infrastructure and natural disasters can be incredibly damaging. In 2008, Hurricane Ike "destroyed oil platforms, tanks, and pipelines throughout the Gulf of Mexico, releasing at least a half-million gallons of crude oil."[194] In 2005, Hurricanes Katrina and Rita triggered 125 oil spills into the OCS and 470 onshore spills (from onshore infrastructure), which resulted in the release of millions of gallons of oil.[195] As natural disasters increase in intensity due to the climate crisis, oil spills will likely be more frequent and more devastating.[196] Similarly, as the climate crisis decimates animal species and habitats, the cost of offshore leasing activity that further threatens them increases because the activity's harm compounds when, for example, species populations that used to be able to recover are now unable to.[197]

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[190] *Id*. at 3.

[191] *See id*.

[192] *See id*.

[193] *See id*.

[194] *Id*. at 2.

[195] *See id*.

[196] *See* Julia Jacobo, *Risk of Oil Spills May Rise as Climate Change Creates More Monster Storms*, ABC NEWS (Sept. 29, 2021), https://abcnews.go.com/US/risk-oil-spills-rise-climate-change-creates-monster/story?id=80038873. *See also* Ford, *supra* note 179.

[197] Another factor that the Secretary could consider under section 18(a)(2)(H) that is not covered in this Note is the effect of future oil and gas leases on property values and the social and cultural values associated with preserving biodiversity and habitats, as well as traditional forms of hunting, recreation, and cultural practice, particularly as these factors are threatened in the face of the climate crisis.

Another environmental factor for the Secretary to consider under section 18(a)(2) is the possibility of energy replacements, such as renewables, when drilling on the OCS is foregone. The *Jewell* court stated that "Interior [is mandated to] reasonably assess the impact of additional OCS leasing on the nation's supply of *energy* when necessary."[198] It also held that it is reasonable for Interior to compare the net social value of leasing in the OCS with the net social value of energy replacements, including replacement by renewable energy.[199] The court approved Interior's decision to consider the nationwide costs and benefits that were likely to occur as a result of their leasing decisions.[200] Therefore, if the Secretary demonstrates that the net social value of energy replacements is higher than the net social value of leasing in the OCS, they could use that information to justify approving a no-lease plan.

The inquiry into whether the net social value of energy replacements, such as renewable energy, is more net-beneficial than the net social value of leasing on the OCS requires a detailed factual analysis that goes beyond the scope of this Note, but it is clear that, at the very least, renewable energy resources are environmentally, socially, and economically preferable to oil and gas exploitation.[201] This is not to say that, at this moment in time, the replacement of OCS oil and gas would be completely or even mostly supplied by renewable energy sources. Rather, this analysis highlights that, as renewable energy becomes a more likely replacement, the costs of continuing to offer leases for oil and gas development on the OCS increase and, at some point, may be outweighed by replacement energy sources.

Renewable energy production is much less harmful to the environment than fossil fuel extraction. For example, wind and solar power generation emit no air pollution and have relatively minimal

[198] Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 608 n.11 (D.C. Cir. 2015).

[199] *See id*. at 603.

[200] *See id*. at 605.

[201] *See, e.g.*, *Renewable Energy – Powering a Safer Future*, U.N., https://www.un.org/en/climatechange/raising-ambition/renewable-energy (last visited Apr. 7, 2024).

negative environmental effects,[202] while fossil fuel production in the United States causes hundreds of oil spills each year and generates more than eighteen billion barrels of waste fluids annually.[203] Renewable energy is, by many estimates, the world's cheapest form of energy to produce, especially compared to fossil fuel extraction, and it is getting progressively cheaper as better technologies develop.[204] Empirical evidence also shows that renewable energy sources are rapidly increasing in market-share.[205] The more that renewable energy infrastructure develops and takes up a larger share of nationwide energy production, the more the section 18(a)(3) calculus favors a no-lease result. If the Secretary can demonstrate that these energy replacements have a higher net social value than drilling on the OCS, the Secretary should be able to defend a no-lease five-year plan under *Jewell*. The Secretary would need to include more factual findings in the record than are described here to demonstrate the high environmental and social costs of offshore fossil fuel leasing, but this preliminary overview suggests that a record of that sort could be established to support a no-lease five-year plan.

Under section 18(a)(2)(H), the Secretary could also consider the information value of delay. While the court at the time of *Jewell* was not prepared to say that Interior would be acting irrationally if it did not quantify the information value of delay because of its relative nascence, today, there is much more information regarding the "true costs" of exploiting oil and gas resources on the OCS.[206] By quantifying the information value of delay in the record, Interior could support two ends that serve the larger goal of issuing no-lease five-year plans. First, Interior could use this information to justify

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[202] *See* Dev Millstein et al., *The Climate and Air-Quality Benefits of Wind and Solar Power in the United States*, 2 NATURE ENERGY 1 (2017).

[203] *See* Sarah Giltz, *Dirty and Dangerous Offshore Drilling Pollutes Our Ocean and Coastal Communities*, OCEANA (Oct. 6, 2020), https://usa.oceana.org/blog/dirty-and-dangerous-offshore-drilling-pollutes-our-ocean-and-coastal-communities/.

[204] *See* Victoria Masterson, *Renewables Were the World's Cheapest Source of Energy in 2020, New Report Shows*, WORLD ECON. F. (July 5, 2021), https://www.weforum.org/agenda/2021/07/renewables-cheapest-energy-source/.

[205] *See* Joel Jaeger, *Explaining the Exponential Growth of Renewable Energy*, WORLD RES. INST. (Sept. 20, 2021), https://www.wri.org/insights/growth-renewable-energy-sector-explained.

[206] Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 610 (D.C. Cir. 2015).

its own decision to issue a no-lease five-year plan because adding the information value of delay to the record provides an additional benefit to the no-lease alternative. Second, the court in *Jewell* suggested that, while Interior at the time was not required to quantify the information value of delay, it could have done so and, if this value had been quantified in the record previously, it might have been irrational for the Secretary not to quantify it for consideration in a later plan.[207] Therefore, by quantifying the information value of delay, Interior could not only support its own plan but also set a precedent that would require future Secretaries to quantify this information too. Because the information value of delay will always favor delaying lease sales, forcing future Secretaries to quantify this value will always lend support for a plan with fewer leases in it.

In sum, today, there are many demonstrable costs to offshore oil drilling—costs that continue to increase in the face of the climate crisis. The Secretary should balance the benefits of issuing additional lease sales far into the future against these costs, the energy alternatives to offshore fossil fuels,[208] and the benefits of not leasing, such as ecological preservation and the information value of delay. The argument under sections 18(a)(2)(A), (B), (G), and (H) is not that stopping lease sales will avoid the expected future impacts of the climate crisis on the OCS; rather, it is that the region has become so ecologically vulnerable that the costs of future development are now too high to justify additional future fossil fuel production, particularly when those costs are combined with the additional costs outlined in the sections below. Thus, by considering these factors fully, the Secretary should be able to produce a record to support a no- or few-lease plan.

B. *Considering Other Uses of the OCS*

The next section 18(a)(2) factor the Secretary could use to highlight the high costs of OCS leasing is section 18(a)(2)(D),

[207] *See id*. at 612 ("Had the path been well worn, it might have been irrational for Interior not to follow it. Under the circumstances it faced, Interior might permissibly have blazed a new trail."). *See also* Michael A. Livermore, *Patience is an Economic Virtue: Real Options, Natural Resources, and Offshore Oil*, 84 U. COLO. L. REV. 581 (2013) (providing background information on the information value of delay).

[208] *See Jewell*, 779 F.3d at 606 (stating Interior may consider energy alternatives).

which requires the Secretary to consider "*other uses of the sea and seabed*, including *fisheries*, navigation, existing or proposed sealanes, potential sites of deepwater ports, and *other anticipated uses of the resources and space of the outer Continental Shelf*."[209] Under this section, the Secretary should highlight the uses of the OCS that are negatively impacted by leasing the area for oil and gas development and how those impacts have become more severe in light of the climate crisis. These uses include fisheries, offshore wind development, tourism, and recreation. The argument here is very similar to the arguments made under the other section 18(a)(2) factors: the cost of issuing new leases to develop fossil fuels has always been high given how leasing impacts other uses of the OCS, but that cost has greatly increased in the face of the climate crisis due to the region's increased vulnerabilities and depleted resources. Consequently, the costs now outweigh the benefits.

The climate crisis has greatly impacted the fishing economy, with increasingly acidic and warm ocean waters hurting marine species and commercial fisheries.[210] For example, the Gulf of Mexico has already developed a "dead zone" of over 5,300 square miles in which oxygen levels are so low that aquatic species are unable to survive.[211] Marine animal populations in the Gulf are expected to decline by fifteen percent, and commercial fisheries are expected to decline by twenty-one to twenty-four percent by 2100.[212] Fish species are already dying and getting smaller in size due to warming and loss of oxygen.[213] Likewise, fisheries in the Pacific region have experienced, and are projected to continue to experience, serious adverse effects due to the climate crisis. The loss of kelp forests, for example, has destabilized Pacific fisheries and marine environments.[214] "Commercially-important" fish species, such as rockfish,

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[209] 43 U.S.C. § 1344(a)(2)(D) (emphasis added).

[210] *See* Lux, *supra* note 166.

[211] *See id*. *See also Larger-Than-Average Gulf of Mexico 'Dead Zone' Measured*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Aug. 3, 2021), https://www.noaa.gov/news-release/larger-than-average-gulf-of-mexico-dead-zone-measured.

[212] *See* Lux, *supra* note 166.

[213] *See id*.

[214] *See FAQ: Climate Change in California*, SCRIPPS INST. OF OCEANOGRAPHY, https://scripps.ucsd.edu/research/climate-change-resources/faq-climate-change-california (last visited Feb. 10, 2024).

are negatively affected by warming waters, which destroy their habitats.[215] In the Alaskan region, changes in sea ice caused by the climate crisis affect the timing and location of plankton blooms, which disrupt commercial fisheries.[216] Atlantic fisheries contend with historic overfishing compounded by the impacts of the climate crisis, which threaten critical fish populations (such as cod) and diminish their capacity to repopulate.[217]

The economic value of fishing is also high. In 2008, for example, the fish and shellfish that were sold domestically from commercial fishing operations located along the OCS had an estimated value of almost $2 billion.[218] Offering leases in the OCS not only displaces fishing operations but also depletes already-struggling fish populations by harming their habitats, contaminating their water (through oil spills and otherwise), and engaging in destructive exploration practices. The costs of these impacts have increased due to the effects of the climate crisis, which have made fish populations increasingly vulnerable. The Secretary could use this information to justify a finding that the costs of issuing new leases on the OCS outweigh the benefits.

Similarly, the OCS is a significant site for tourism and recreation economies. Tourism in states located along the OCS has been valued at around $291 billion, generating over 3.5 million jobs.[219] While oil spills and the other harms associated with offshore drilling have always put coastal tourism at risk, the climate crisis has made these economies even more vulnerable, increasing the value of uncontaminated coastlines and oceans and, consequently, the cost of choosing to develop oil and gas resources there. Concerns about the ecological vulnerability and harm to coastal tourism on the OCS have already been used to justify congressional and presidential

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[215] *Id.*

[216] *See* EPA, WHAT CLIMATE CHANGE MEANS FOR CALIFORNIA 2 (2016), https://www.epa.gov/sites/default/files/2016-09/documents/climate-change-ca.pdf.

[217] *See* Andrew Pershing et al., *Slow Adaptation in the Face of Rapid Warming Leads to Collapse of the Gulf of Maine Cod Fishery*, 350 SCI. 809 (2015).

[218] *See* NAT. RES. DEF. COUNCIL, *supra* note 179, at 2.

[219] *See id.*

moratoria on drilling in the Atlantic and Pacific regions, as well as parts of the Gulf of Mexico and Alaska regions.[220]

Another, relatively new, use of the OCS that is affected by the sale of future oil and gas leases is offshore wind energy production. Interior has announced that it plans to hold offshore wind lease sales on the OCS for developers to create wind farms, which could interfere with oil and gas development on the OCS.[221] The Secretary could, therefore, consider the cost of displacing windfarm developments in their assessment of the net social value of issuing new leases and, conversely, the benefits of leaving space for these windfarms in their assessment of the net social value of the no-lease alternative. The Secretary should also consider the benefits of displacement in favor of issuing the leases, so as not to be found irrational in future judicial review.

Significantly, however, the 2022 Inflation Reduction Act (IRA) added a requirement to OCSLA, which shifted Interior's five-year plan cost-benefit analysis of offshore wind leasing in a surprising way:

> [d]uring the 10-year period beginning on the date of enactment of this Act . . . the Secretary may not issue a lease for offshore wind development . . . unless—(A) an offshore [oil and gas] lease sale has been held during the 1-year period ending on the date of the issuance of the lease for offshore wind development; and (B) the sum total of acres offered for lease in offshore [oil and gas] lease sales during the 1-year period ending on the date of the issuance of the lease for offshore wind development is not less than 60,000,000 acres.[222]

In other words, in order for Interior to issue any offshore wind leases between now and August 16, 2032, DOI must (1) have held at least one offshore oil and gas lease sale in the year preceding the issuance

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[220] *See* Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 592 (D.C. Cir. 2015).

[221] *See Reflecting America's Rapid and Accelerating Shift to Clean Energy, Interior Department Announces Fewest Offshore Oil and Gas Lease Sales in History in Proposed Final Program for 2024–2029*, U.S. DEP'T OF THE INTERIOR (Sept. 29, 2023), https://www.doi.gov/pressreleases/reflecting-americas-rapid-and-accelerating-shift-clean-energy-interior-department; Kerry McGrath et al., *Five Things You Should Know About Offshore Wind Development Right Now*, THE NICKEL REPORT (Oct. 20, 2021), https://www.huntonnickelreportblog.com/2021/10/five-things-you-should-know-about-offshore-wind-development-right-now/.

[222] Inflation Reduction Act § 50265(b), 43 U.S.C. § 3006(b).

of any offshore wind lease and (2) offered at least sixty million acres in the sale(s).

This provision changes the way the Secretary should calculate the costs and benefits of offering a no-lease five-year plan and raises two considerations for the Secretary in contemplating issuing a no-lease five-year plan. The section changes the calculus of the costs and benefits of a no-lease five-year plan by making offshore wind leasing, at least in part, a *benefit* of offering offshore oil and gas lease sales (rather than a cost), until the provision expires in 2032.

The first consideration raised by the IRA provision for the Secretary's analysis is how, in the short term, this impacts Interior's cost-benefit analysis under OCSLA section 18 (and, in turn, the decision to issue a no-lease five-year plan). The Secretary must consider the nation's energy needs between now and 2032, including how much renewable energy capacity exists already and whether it is necessary to issue new offshore wind leases on the OCS before 2032 to meet renewable energy goals and rapidly decarbonize. Here, the Secretary should consider the capacity for offshore wind development in state waters, onshore renewable energy options, such as solar, and the lifespan of other energy sources. If there is no urgent need to add offshore wind on the OCS, then the Secretary could simply do nothing and wait the provision out. Additionally, the Secretary should consider the long-term impacts of making the offshore-wind-for-offshore-oil bargain required under the IRA because any offshore oil and gas sales that result in the actual issuance of leases and permits later in the process (which could occur under a fossil-fuel-friendly administration) will have long-term impacts, such as the option for those leaseholders to extract oil and gas decades from now. Most importantly, however, this section of the IRA requires Interior to hold lease sales and *offer* at least sixty million acres—it does not require Interior to actually sell the leases nor permit any extractive activities down the line. Therefore, the significance of this provision should not be overstated because the Secretary retains significant discretion as to which areas to offer for sale (Interior could offer only unattractive parcels), whether to accept any bids, and whether and how to permit any development.[223]

[223] *See* Inflation Reduction Act § 50265(a)(2)(B), 43 U.S.C. § 3006(a)(2)(B) (stating that the issuance of a lease will result only if "acceptable bids have been received"). Notably, the Biden Administration has decided that offshore wind

The second consideration is how this provision will affect Interior's decision-making in the long-term. Overall, it does not have a significant long-term impact because the section is time limited and will expire in 2032. Already, the Biden Administration is drafting a five-year plan that ends in 2029,[224] and subsequent plans will be able to skirt this IRA requirement by waiting to issue any number of offshore wind leases until after the provision expires and could do so without holding a single offshore oil and gas lease sale. The only long-term impacts of this section, therefore, are the ones that will come from issuing oil and gas leases between now and the expiration of the provision, emphasizing the importance of the Secretary carefully weighing the costs and benefits of offshore wind leases and hosting offshore oil and gas sales (in addition to deciding which parcels to offer and on what terms to accept an offer) in the interim. Additionally, while, in the short-term, offshore wind leasing could be considered a benefit of hosting offshore oil and gas lease sales, after the expiration of the provision, displacement of offshore wind should be considered a cost of offering offshore oil and gas lease sales because offshore wind energy production is a competing use of the OCS that is affected by the sale of oil and gas leases and should be considered under section 18(a)(2)(D).[225]

C. *Considering Developers' Actual Exploration and Nomination of the OCS*

Section 18(a)(2)(E) is another factor under which the Secretary could highlight the high costs of future OCS leasing. This section requires the Secretary to consider "the interest of potential oil and

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energy is important enough to reach its goal of "30 gigawatts of offshore wind by 2030" and has proposed to offer a maximum of three lease sales in the 2024–2029 five-year plan in order to expand its offshore wind leasing program. *See Reflecting America's Rapid and Accelerating Shift to Clean Energy, Interior Department Announces Fewest Offshore Oil and Gas Lease Sales in History in Proposed Final Program for 2024–2029*, U.S. DEP'T OF THE INTERIOR (Sept. 29, 2023), https://www.doi.gov/pressreleases/reflecting-americas-rapid-and-accelerating-shift-clean-energy-interior-department.

[224] *See* BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, 2024–2029 NATIONAL OUTER CONTINENTAL SHELF OIL AND GAS LEASING PROGRAM: FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT (2023), https://www.boem.gov/sites/default/files/documents/oil-gas-energy/leasing/2024-2029NatOCSOilGasLeasing_FinalPEISVol2_0.pdf.

[225] *See* 43 U.S.C. § 1344(a)(2)(D).

gas producers in the development of oil and gas resources *as indicated by exploration* or nomination."[226] This section directs Interior to use the actual exploration and nomination of OCS areas by developers as an indication of their interest in the resources.

Research shows that producers do not actually explore or develop most of the leases they secure. For example, as of 2012, producers were not using seventy-two percent of the total acres leased offshore,[227] including thousands of unused leases in the Gulf of Mexico.[228] In 2021, that figure rose to eighty percent.[229] It is projected that producers are "sitting on up to a 10-year cushion of unused leases and drilling permits," despite "claims of immediate and severe job losses" if leasing is paused by industry stakeholders.[230]

The Secretary could use this information to help justify two points in their determination that a no- or few-lease five-year plan is the most net beneficial option under section 18(a)(3). First, the fact that producers are not using the leases they have indicates a low level of interest in the development of the oil and gas resources under section 18(a)(2)(E). Second, the fact that producers will continue to have access to a great number of valid, unused leases—providing access to 9.6 million acres of exploitable territory—highlights how much lower the costs of a no-lease five-year plan actually are to the oil and gas industry in light of this generous cushion. This information is also relevant to the Secretary's energy replacement analysis because, even if it is true that there is not sufficient energy capacity to replace offshore fossil fuel sources, the fact that significant OCS reserves remain available suggests that national energy

[226] 43 U.S.C. § 1344(a)(2) (emphasis added).

[227] *See DOI Releases Update on Unused Oil and Gas Leases*, U.S. DEP'T OF THE INTERIOR (May 15, 2012), https://www.doi.gov/news/pressreleases/DOI-Releases-Update-on-Unused-Oil-and-Gas-Leases.

[228] *See* Edward Markey, *Use It or Lose It: Big Oil Not Using Drilling Leases in the Gulf of Mexico*, COMM. ON NAT. RES. (Oct. 22, 2012), https://www.markey.senate.gov/imo/media/doc/2012-10-19_UseItOrLoseIt_1.pdf.

[229] *See* Josh Axelrod, *Course Correction: Federal Oil and Gas Leasing Needs Fixing*, NAT. RES. DEF. COUNCIL (Mar. 18, 2021), https://www.nrdc.org/experts/josh-axelrod/course-correction-federal-oil-and-gas-leasing-needs-fixing.

[230] *Id.*

needs can continue to be met through the exploitation of these unused leases and that new, additional leases are unnecessary.[231]

D. *Balancing All the Section 18(a)(2) Factors to Support a No-Lease Five-Year Plan*

Finally, after the Secretary has considered all of the factors under section 18(a)(2)—which would also include the costs (including those incurred by the oil and gas industry) as well as the benefits of issuing offshore leases—the Secretary would then need to demonstrate that the costs of leasing outweigh the benefits under the section 18(a)(3) balancing test. This requires the Secretary to consider all of the section 18(a)(2) factors and determine what amount of leasing properly balances those factors and "best meet[s] national energy needs."[232] While this analysis will require a robust methodology that goes beyond the scope of this Note, this Part highlighted some of the factors the Secretary could rely on to justify a determination that the costs of issuing leases outweigh the benefits.

Because some of the determinations described in this Part involve a degree of speculation, they would likely be considered policy judgments and subject to a deferential, but still "searching," degree of review by a court.[233] The Secretary, therefore, must ensure that support for their conclusion can be found in the record, even if there are conflicting expert opinions. They must also articulate how their plan maximizes net social value, according to their chosen methodology, which they must be able to demonstrate included a consideration of all the relevant factors and was not irrational.[234] For costs and benefits that are difficult or impossible to quantify, the Secretary may consider these factors in qualitative terms and weigh them according to their reasonable discretion in the section 18(a)(3) balancing test.[235]

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[231] Of course, the Secretary should also consider the level of interest demonstrated by the 20% of oil and gas leases that are being used so as not to be found arbitrary.

[232] 43 U.S.C. § 1344(a).

[233] California v. Watt (*Watt I*), 668 F.2d 1290, 1302 (D.C. Cir. 1983) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)).

[234] *See id.*

[235] *See id.* at 1317.

IV. ADDRESSING COUNTERARGUMENTS

A. *No-Lease Five-Year Plans Do Not Frustrate the Purpose of OCSLA*

Assuming the Secretary properly considers and weighs all the relevant factors under section 18(a)(3), there is a central challenge that Interior would likely face in issuing a no-lease five-year plan. Section 18(a) directs the Secretary to "prepare and periodically revise, and maintain an oil and gas leasing program to implement the policies of this subchapter."[236] "The policies of this subchapter" refers to 43 U.S.C. § 1332, which provides that "the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs."[237] Courts have interpreted this section to articulate a "primary emphasis on expeditious development of the OCS, qualified by the recognition of a need for measures to alleviate or minimize its adverse impacts."[238] This interpretation is also reflected in OCSLA's legislative declaration.[239] A no-lease five-year plan, therefore, may fail to meet section 18's requirements because it would not make the OCS available for development.

Watt I evaluated the section 18(a)(3) test in light of this argument and stated that, because "the Act has an objective—the expeditious development of OCS resources," the three elements in

[236] 43 U.S.C. § 1344(a).

[237] *Id.* § 1332.

[238] *Watt I*, 668 F.2d at 1315.

[239] *See* 43 U.S.C. § 1802 (stating that OCSLA's purpose overall is to: "(1) establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade; (2) preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition"). *See also Watt I*, 668 F.2d at 1315.

18(a)(3)—"the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone"[240]—are not necessarily equally important.[241] In the court's words, "[t]he environmental and coastal zone considerations are undoubtedly important, but the Act does not require they receive a weight equal to that of potential oil and gas discovery."[242] Further, Interior should discount the cost of environmental damage by the potential to mitigate such harm.[243] Ultimately, the court explained, the Secretary's primary requirement is to "weigh the elements so as to 'best meet national energy needs,'" which, at the time of *Watt I*, was taken for granted that this was done by exploiting fossil fuel resources.[244] The court conceded, however, that the "weight of these elements may well shift with changes in technology, in environment, and in the nation's energy needs."[245]

While this interpretation of OCSLA's policy makes the Secretary's task of justifying a no-lease five-year plan more burdensome, it is by no means foreclosed by the language of section 18 nor the holdings of the court. What the statute and the holdings suggest, rather, is that the Secretary must weigh the benefits of issuing leases to develop fossil fuels more heavily than they weigh the costs. There is a thumb on the scale, but a balancing test is still required, and, if the costs are high enough, they could still outweigh the benefits. The burden, therefore, is on the Secretary to establish in the record that the costs of issuing future leases is not only higher, but significantly higher, than the benefits of doing so. Because neither the court nor the statute articulate exactly how much more heavily the benefits should be weighed, the more costly the Secretary can show the leasing to be, the more justified their decision to issue a no-lease five-year plan will become. Based on the analysis provided in Part III of this Note, it is feasible that a motivated Secretary could establish a record that meets this potentially high bar, particularly in light of the

[240] 43 U.S.C. § 1344(a)(3).

[241] *Watt I*, 668 F.2d at 1316.

[242] *Id*. at 1316–17.

[243] *See id*. at 1317.

[244] *Id*. (quoting 43 U.S.C. § 1344(a)).

[245] *Id*.

climate crisis, which has made virtually every environmental harm more costly.[246]

Further, while implicit in the *Watt I* holdings, it is worth noting that, though the language of sections 18 and 12 may suggest that the primary purpose of OCSLA is the "expeditious and orderly development" of the OCS's resources, environmental safeguards are also a fundamental part of OCSLA's mandate.[247] At virtually every stage in the five-step process—from creating the five-year plan to the development of extracted resources—Interior is directed to consider environmental and social costs.[248] The 43 U.S.C. § 1332 policy statement itself articulates that development is subject to environmental safeguards, and concerns about the ecological vulnerability and harm to coastal tourism on the OCS have already been used to justify moratoria on drilling in the Atlantic and Pacific regions, as well as parts of the Gulf of Mexico and Alaska regions for over twenty-five years.[249] To require Interior to host lease sales, despite extraordinary environmental and social costs, would be to read a fundamental part of the mandate out of the statute.

Finally, as emphasized by the court in *Watt I*, the Secretary's ultimate task is to "weigh the elements so as to 'best meet national energy needs.'"[250] Echoing the words of the court, "changes in technology, in environment, and in the nation's energy needs" may require the Secretary to weigh the section 18(a) factors differently than they have in the past to achieve the "proper balance" under the statute.[251] Indeed, today, the United States and the rest of the world are in a much different place technologically and environmentally than in the 1980s. The coastal environments of the OCS are significantly more vulnerable than they have ever been in the history of OCSLA and are expected to become progressively more sensitive due to the climate crisis. Similarly, alternative uses of the OCS, such as fishing, windfarms, tourism, and recreation, have more to lose from an oil spill or other harm caused by offshore oil and gas development than before, due to the existing and increasing

[246] *See* discussion *supra* Part III.

[247] 43 U.S.C. § 1332.

[248] *See* REVESZ ET AL., *supra* note 5, at 1238.

[249] *See* Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 592 (D.C. Cir. 2015).

[250] *Watt I*, 668 F.2d at 1317 (quoting 43 U.S.C. § 1344(a)).

[251] *Id*. at 1317.

vulnerabilities created by the climate crisis. Further, technology and the nation's energy supply are shifting away from oil and gas, as renewable energy sources increase their market share and decrease in price, showing a shift in the country's energy needs.[252] These factors not only change the section 18(a)(3) calculus: they adjust the meaning of "best" in section 18(a)'s requirement that the five-year plans "best meet national energy needs."[253] It is increasingly clear that a plan that "best meet[s] national energy needs"[254] is one that contemplates these trends and determines whether to issue leases accordingly.

B. *No-Lease Five-Year Plans Do Not Defy the Plain Text of OCSLA*

Another counterargument that Interior is likely to face is that the plain text of section 18(a) requires the Secretary to actively maintain an oil and gas leasing program with at least two proposed lease sales in it. In fact, this was exactly the argument asserted by Interior during the Trump Administration to support an interpretation of OCSLA that required the sale of oil and gas leases.[255] The argument is supported by the text of section 18(a) which states, in relevant part:

> The Secretary, pursuant to procedures set forth in subsections (c) and (d) of this section, *shall* prepare and periodically revise, and *maintain* an oil and gas leasing program to implement the policies of this subchapter. The leasing program *shall consist of a schedule of proposed lease sales* indicating, as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year period following its approval or reapproval.[256]

[252] *See* ENERGY INFO. ADMIN., SHORT-TERM ENERGY OUTLOOK (2024), https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf.

[253] 43 U.S.C. § 1344(a).

[254] *Id.*

[255] *See* Memorandum from the Solicitor of the U.S. Dep't of the Interior to the Secretary of the U.S. Dep't of the Interior 1 (Jan. 13, 2021), https://www.doi.gov/sites/doi.gov/files/m-37062.pdf.

[256] 43 U.S.C. § 1344(a) (emphasis added).

Section 18(a) uses mandatory language ("shall"). First, it requires the Secretary to "maintain"[257] (defined as to "keep in an existing state," sustain, or continue[258]) a five-year plan, meaning that a failure to produce a plan at all would be a violation of the statute. Second, the section arguably requires the Secretary to produce a plan that actually includes scheduled lease sales. This is based on the section's language, "the leasing program shall consist of a schedule of proposed lease sales,"[259] which suggests that a schedule without proposed lease sales would not meet the requirements of the statute. Additionally, the plural term "sales" could be read to require the Secretary to include a minimum of two lease sales in each plan. Third, the phrase "oil and gas leasing program" in the first sentence could be read to modify the terms "leasing program" and "proposed lease sales" in the second sentence, meaning that "leasing program" and "proposed lease sales" refer only to oil and gas lease sales and not to other offshore lease sales, such as for wind energy.[260]

This counterargument is strong because of section 18(a)'s mandatory language. Nevertheless, the Secretary can make several text-based arguments in response to such a challenge. For instance, the Secretary could argue that the "proposed lease sales" language of section 18(a)[261] is not modified by the phrase "oil and gas leasing program" and is capacious enough to include not only oil and gas leases but also other lease sales, including offshore wind lease sales. As described in Part II.C of this Note, Interior's legal interpretations of OCSLA are subject to a relatively deferential review.[262] A court will "sustain the agency's interpretation of its authorizing statute so long as [the court] find[s] [the interpretation] to be legally permissible,"[263] and the court will follow *Chevron*'s two-step standard of review: "(1) unless [the interpretation] is contrary to Congress's

[257] *Id.*

[258] *Maintain,* MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/maintain (last updated Apr. 4, 2024).

[259] 43 U.S.C. § 1344(a).

[260] *Id.*

[261] *Id.*

[262] *See* Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 600 (D.C. Cir. 2015).

[263] *Id.*

clear intent (2) [the court will] defer to an agency's reasonable construction of its governing statute."[264]

Under *Chevron*, the Secretary could withstand judicial scrutiny if the reviewing court accepts their arguments regarding statutory interpretation. The Secretary can strengthen their argument by referring to other, complementary parts of section 18 and OCSLA's text, including that the Secretary is tasked with creating a schedule that "best meet[s] national energy needs" (a very capacious and deferential mandate); the requirement that the "[t]iming and location of exploration, development, and production of oil and gas . . . be based on a consideration of [the section 18(a) balancing factors]," including the environmental factors; and the text of 43 U.S.C. § 1332, which articulates the policies of OCSLA (including its policies of environmental protection)[265] and which section 18 tasks the Secretary to implement via the five-year plans.[266]

However, as the courts become more hostile to agency action—particularly action they perceive to be broad or far reaching—there is a safer way for the Secretary to deal with the potential mandate that they issue a five-year plan with at least some lease sales in it. The Secretary could offer two extremely small or otherwise unattractive parcels which oil and gas developers would be very unlikely to want to bid on or which, even if they were leased, would not produce much oil and gas. This would functionally meet section 18's requirements that the Secretary create a "schedule of proposed lease sales" but would achieve the same or a substantially similar result as a no-lease five-year plan.

The Secretary would also have an easier time justifying this kind of five-year plan, as opposed to a no-lease five-year plan for at least two major reasons. First, courts afford more deference to an agency's policy judgments than they do agency interpretations of law.[267] The decision to include only two unattractive parcels in a

[264] *Id*. at 605 (referencing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

[265] 43 U.S.C. § 1332.

[266] *See* 43 U.S.C. § 1344(a) ("The Secretary, pursuant to procedures set forth in subsections (c) and (d) of this section, shall prepare and periodically revise, and maintain an oil and gas leasing program *to implement the policies of this subchapter*.") (emphasis added).

[267] *See* California v. Watt (*Watt I*), 668 F.2d 1290, 1302 (D.C. Cir. 1981); *Jewell*, 779 F.3d at 600.

five-year plan would likely be challenged as a policy judgment, not an interpretation of law (which is subjected to a slightly higher standard of review). If it were to be challenged as an unreasonable interpretation of law, that challenge would likely fail because section 18(a) authorizes the Secretary to decide "the size, timing, and location of leasing activity which he determines will best meet national energy needs."[268] Therefore, the Secretary making this determination would be in accordance with the law.

Rather, the Secretary's decision would likely be challenged as an improper weighing of the costs and benefits of different leasing options and an improper determination of what leasing scenario "best meet[s] national energy needs."[269] Policy judgments, "including those predictive and difficult judgmental calls," however, are upheld by courts so long as "they are neither arbitrary nor irrational" and are "based on a consideration of the relevant factors and whether there has been a clear error of judgment."[270] Under this very deferential standard, the Secretary would likely be able to justify a five-year plan containing only two unattractive parcels, so long as their decision to do so is supported by the record—including by the arguments discussed throughout this Note.

Second, the Secretary's ultimate task under section 18(a) is to create a schedule that "best meet[s] national energy needs."[271] If they can demonstrate (in a manner that meets the deferential standard of review for policy judgments) that national energy needs are best met by not issuing oil and gas leases, then the Secretary can use this capacious grant of discretion to support a decision to schedule only two unattractive sales. It seems likely that the Secretary could defend a determination of this kind, supported by, for example, the fact that many existing leases remain unexploited[272] and that

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[268] 43 U.S.C. § 1344(a).

[269] *Id.*

[270] *Watt I*, 668 F.2d at 1302 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)).

[271] 43 U.S.C. § 1344(a).

[272] *See* ONLOCATION, NRDC-NEMS ANALYSIS OF A MORATORIUM ON NEW OFFSHORE LEASING IN THE GULF OF MEXICO 5 (2022), https://355898.fs1.hubspotusercontent-na1.net/hubfs/355898/NRDC-GOM%20Final%20Offshore%20Moratorium%20Scenario%20Results_0511.pdf ("Total U.S. crude oil production is 1.3% and 2.3% lower in 2030 and 2035 in 'No new leasing' scenario relative to the Reference case, respectively."). *See also* NAT.

markets anticipate a significant and sustained drop in fossil field consumption in the near future.[273]

C. *No-Lease Five-Year Plans Do Not Violate the Major Questions Doctrine*

Another challenge Interior would likely face if it were to issue a no-lease five-year plan is the invocation of the recently minted major questions doctrine.[274] The major questions doctrine requires a clear statement from Congress authorizing a particular agency action when that action raises a "major question" for the court.[275] Though the definition of what exactly constitutes a "major question" remains unclear, the Supreme Court has tended to rely on "three indicia of majorness" to make these determinations.[276] As summarized by legal theorists:

RES. DEF. COUNCIL, THE CASE AGAINST NEW OFFSHORE OIL AND GAS LEASING ON THE OUTER SHELF (2022), https://www.nrdc.org/sites/default/files/case-against-new-offshore-oil-gas-leasing-ocs-ib.pdf (noting that "impacts on U.S. oil and gas production would be negligible for at least the next decade (a projected reduction of only 2 percent by 2035), in large part because of the substantial reserves already under lease").

[273] *See* NAT. RES. DEF. COUNCIL, *supra* note 272 ("[A] decline in offshore oil and gas production with no new leasing would be more than offset by an anticipated drop in fuel consumption. Rhodium Group, a leading independent energy research firm, forecast the effects of federal and state vehicle and utility sector policies that were on the books as of May 2021. Analysts found that by 2027, demand for transportation fuels (which accounts for about 70 percent of U.S. petroleum consumption) will be 8 to 12 percent below 2019 levels, and that by 2030, demand will be 10 to 15 percent below 2019 levels.").

[274] As a preliminary matter, this Part seeks to briefly analyze the likely effect of the major questions doctrine on the Secretary's decision to issue a no-lease five-year plan and to suggest some solutions that would allow the Secretary to achieve the overall goal of no new lease sales on the OCS in the face of this doctrine. It is by no means an exhaustive account of the doctrine nor all the potential arguments or counterarguments. The Part also does not discuss the validity or soundness of the doctrine as a legal framework. Some valuable critiques of the doctrine can be found in Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023) and Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174 (2022), https://virginialawreview.org/articles/antideference-covid-climate-and-the-rise-of-the-major-questions-canon/.

[275] *See* West Virginia v. EPA, 597 U.S. 697, 735 (2022).

[276] Deacon & Litman, *supra* note 274, at 1012.

> [First,] politically significant or controversial policies are more likely to be major and thus require clear authorization. Second, the Court has signaled that the novelty of a policy—i.e., the fact that the agency had never promulgated a similar policy before—is a reason to think that the policy is a major one. Finally, the Court has considered the majorness of other, theoretically possible agency policies not actually before the Court but that might be supported by the agency's broader rationale in determining whether the agency's current claim of interpretive authority is major.[277]

How many or which factors are needed to classify a policy as "major" is still unclear; but "none of the factors appear to be sufficient, by themselves, to elevate a policy to major status."[278]

Looking at these three indicia, it is a real possibility that a no-lease five-year plan could trigger the major questions doctrine and, in turn, a court's heightened scrutiny. Under the first factor, in *West Virginia v. EPA*, the Supreme Court found that agency action which affected the nation's mix of energy sources was politically significant and controversial.[279] The Supreme Court found the Environmental Protection Agency's (EPA) action to be "major" in part because the "basic scheme EPA adopted 'ha[d] been the subject of an earnest and profound debate across the country.'"[280] A court could find Interior's decision to issue a no-lease five-year plan similarly "suspect."[281] Indeed, both the program in *West Virginia* and the action of issuing a no-lease five-year plan are embroiled in essentially

[277] *Id*. at 1012–13 (referencing NFIB v. OSHA, 142 S. Ct. 661, 665 (2022) (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021))); *NFIB v. OSHA*, 142 S. Ct. at 666 ("This 'lack of historical precedent,' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach.") (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505 (2010)); *West Virginia v. EPA*, 597 U.S. at 743 (Gorsuch, J., concurring) (explaining that an issue may be major where "certain States were considering" the issue or "when Congress and state legislatures were engaged in robust debates"); *id*. at 700–02 (invoking novelty of the regulation as an indicium of majorness); *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (using implications of agency's theory of authority as indicia of majorness)).

[278] Deacon & Litman, *supra* note 274, at 1050.

[279] *See West Virginia v. EPA*, 597 U.S. at 730–31.

[280] *Id.* at 732 (quoting Gonzales v. Oregon, 546 U.S. 243, 267–68 (2006)).

[281] *Id*.

the same political controversy: how to address the climate crisis and abate greenhouse gas emissions.[282] Additionally, offshore drilling on the OCS specifically has been the subject of significant public debate and is economically significant.[283] It is, therefore, likely that the first factor would be met.

Second, the issuance of a no-lease five-year plan could, but is less likely to, meet the "novelty" factor. Under *West Virginia*, the Court views the "novelty of an agency's regulatory approach [as] an indication that the policy is major and therefore likely not authorized by statute"[284] and looks to whether the agency has previously interpreted the statute to impose a limitation on its own authority under the section.[285] In his concurrence, Justice Gorsuch further explains the role that novelty plays in the Court's analysis, stating, "sometimes old statutes may be written in ways that apply to new and previously unanticipated situations. . . . But an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority."[286] The *West Virginia* Court found that EPA's action was novel in part because the statutory provision relied upon for authority was a "long-extant, but rarely used . . . gap filler" part of the Clean Air Act that had "rarely been used in the preceding decades."[287]

Challengers to a no-lease five-year plan would likely claim the action is novel because such a plan has never been issued by Interior before. This argument, however, is weaker than the arguments that

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[282] *See id.* at 731–32.

[283] *See, e.g.*, Jeff Stein & Anna Phillips, *Manchin Rejects Offshore Drilling Ban Amid Broader Standoff over Biden Agenda*, WASH. POST (Dec. 16, 2021), https://www.washingtonpost.com/climate-environment/2021/12/16/manchin-offshore-drilling-arctic/.

[284] *West Virginia v. EPA*, 597 U.S. at 701. *See also* Deacon & Litman, *supra* note 274, at 1070.

[285] *See e.g.*, *West Virginia v. EPA*, 597 U.S. at 702 ("It is pertinent to the Court's analysis that EPA has acted consistent with such a limitation [to interpret the "statutory phrase 'system of emission reduction' to refer *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the" best system of emission reduction] for four decades.").

[286] *Id.* at 747.

[287] *Id.* at 700, 724.

supported the finding in *West Virginia*. Section 18(a) is not a "long-extant, but rarely used . . . gap filler"[288] part of OCSLA. The section is regularly used by Interior—roughly every five years, as required by the statute[289]—and it is one of the most fundamental parts of the overall statute. While a five-year plan with no leases in it at all would be the first plan of its exact variety, it is similar to previous agency policies executed under section 18, including decisions to exclude huge swaths of the OCS from development.[290] Interior's method of decision-making to support the plan is also similar "in kind" to previous actions because the Secretary would employ the same process of excluding territories from the leasing program for environmental, social, economic, and other reasons that it always has under the section.[291] Therefore, the action is not "novel" in the way articulated by the Court in other major questions doctrine case law. Consequently, the consistent and similar use of section 18 (as compared to the infrequent and irregular use of section 111(d) of the Clean Air Act in *West Virginia*) suggests that the Secretary's action could be better defended against a major questions doctrine challenge.

Finally, the third factor of majorness—"other, theoretically possible agency policies not actually before the Court but that might be supported by the agency's broader rationale"[292]—is of questionable relevance because issuing a no-lease five-year plan is the most

[288] *Id.* at 700.

[289] *See* 43 U.S.C. § 1344(a) (referring to a "five-year period," thus necessitating the five-year plans).

[290] *See, e.g.*, BUREAU OF OCEAN ENERGY MGMT, 2017–2022 OUTER CONTINENTAL SHELF OIL AND GAS LEASING: PROPOSED PROGRAM S-2–S-3 (2016), http://www.boem.gov/2017-2022-Proposed-Program-Decision/. BOEM explained its removal of the only lease sale offered in the Atlantic region stating, "the Mid- and South Atlantic Program Area lease sale proposed for 2021 in the DPP has been removed from the Proposed Program for a number of reasons, including strong local opposition, conflicts with other ocean uses, and current market dynamics." There was no leasing offered in the Atlantic region at all in the 2017–2022 five-year plan. *See id.* at S-2–S-3.

[291] *West Virginia v. EPA*, 567 U.S. at 697 (articulating that the EPA action that was not struck down under the major questions doctrine was permissible because it was "similar in kind to those that EPA had previously identified . . . in other Section 111 rules").

[292] Deacon & Litman, *supra* note 274, at 1013.

extreme action that could be supported by Interior's rationale.[293] Therefore, while the Supreme Court has generally used this factor to root out a slippery-slope scenario,[294] a no-lease five-year plan puts us at the bottom of the slide. Rather, it seems more likely that a court would focus on the significance of the action itself under pre-major questions doctrine frameworks, asking whether, for example, the action has "vast economic and political significance."[295]

Analyzing the action through these indicia suggests that issuing a no-lease final plan could trigger the major questions doctrine, particularly in front of a hostile court. Importantly, however, the action is not as "major" or "eyebrow-rais[ing]"[296] as other actions struck down under the doctrine because a no-lease five-year plan is not exactly a novel program but, rather, the furthest point on a sliding scale Interior has used for decades. Thus, the Secretary can make many arguments to defend against a major questions doctrine challenge.

Regardless, if a court does find that the action is "major," section 18 also offers Interior a clearer mandate than section 111(d) of the Clean Air Act gave EPA, offering some hope that Interior could survive the doctrine's review. In *West Virginia*, the majority took issue with EPA's use of section 111(d) of the Clean Air Act to define the "best system of emission reduction," stating that EPA used the section to "restructur[e] the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030."[297] The Court considered this a major action which was not supported by a clear statement from Congress. If the Secretary were to issue a no-lease five-year plan by determining that zero leasing activity "best meet[s] national energy needs,"[298] a challenger could

[293] Except for, perhaps, the decision to lease all unprotected areas in the OCS, though this would likely have more support from the plain text of Section 18 because the plan would include lease sales.

[294] *See West Virginia v. EPA*, 567 U.S. at 728 ("[O]n this view of EPA's authority, it could go further, perhaps forcing coal plants to 'shift' away virtually all of their generation—*i.e.*, to cease making power altogether."). *See also* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Services, 141 S. Ct. 2485, 2489 (2021).

[295] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

[296] *West Virginia v. EPA*, 597 U.S. at 770 (Kagan, J., dissenting).

[297] *Id*. at 720.

[298] 43 U.S.C. § 1344(a).

characterize this action as similarly "restructuring the Nation's overall mix of electricity generation"[299] without a clear mandate from Congress. However, the Secretary of Interior has a clearer directive in section 18(a) to make decisions regarding national energy policy than EPA did under section 111(d) because the text of section 18(a) explicitly directs the Secretary to make a determination of national energy needs and to base the five-year plans on that determination.[300] These explicit directives could be read as clear statements authorizing the Secretary to act, even in a "major" way.

However, as discussed, the plain text of section 18 has other language which could be read to preclude the issuance of no-lease five-year plan, notably that section 18(a) can be interpreted to require at least some oil and gas lease sales. This text is particularly damning in the context of the major questions doctrine because it undercuts the argument that the statute provides a clear authorization. Additionally, recent decisions suggest that even actions that appear to be very clearly authorized by Congress can be struck down under the major questions doctrine.[301] Given the doctrine's lack of development at this point, it is difficult to speculate as to how this analysis would shape up or what exact inquiry a court would undertake. However, the combination of this unpredictable doctrine and the plain text issues makes a no-lease five-year plan more difficult to support.

Therefore, the most foolproof way to survive the major questions doctrine would be for Congress to amend OCSLA. The amendment could add a clear authorization in the statute for the action—something to the effect of "The Secretary may issue a five-year program containing no scheduled lease sales." Beyond a

[299] *West Virginia v. EPA*, 597 U.S. at 720.

[300] *See* 43 U.S.C. § 1344(a) ("The leasing program shall consist of a schedule of proposed lease sales *indicating, as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet national energy needs* for the five-year period following its approval or reapproval.") (emphasis added).

[301] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2359, 2368 (2023) (holding that the authorization under the HEROES Act for the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency," 20 U.S.C. § 1098bb(a)(1), did not empower the Secretary to cancel student loan debt").

congressional amendment to the statute (which is difficult to achieve), Interior could lessen the appearance of majorness by issuing a five-year plan with only a few unattractive leases in it—the same solution offered to satisfy the plain text counterarguments. This would strengthen the Secretary's argument that the action is not major in the first place and, particularly, that the action is not novel. While a challenger may be able to persuasively characterize a no-lease five-year plan as fundamentally different from prior plans, it would be difficult for them to characterize a five-year plan with fewer or less attractive leases as truly novel. Additionally, even if the action were deemed major, Interior could still succeed on the clear statement requirement because the Secretary would be issuing leases based on the nation's energy needs—exactly what the agency is statutorily mandated to do. Given the difficulty of amending the law, the judiciary's hostility to the administrative state, the likelihood that a no-lease five-year plan would be challenged under the major questions doctrine, and the potential textual issues, a five-year plan with only a few available leases is likely the Secretary's most pragmatic way to achieve the goal of no new lease sales on the OCS.

CONCLUSION

Ending the production of fossil fuels in the United States is a daunting and complicated task. This Note offers a solution to halt future lease sales on one significant site of production: the OCS. If the Secretary can establish a record that accounts for the full cost of issuing leases for future fossil fuel development—particularly one that highlights how the pre-existing costs have increased in the face of the climate crisis—they could likely demonstrate that these costs overwhelm the potential benefits and, thereby, justify issuing a no-lease five-year plan. Additionally, as soon as the Secretary considers and quantifies these costs in a five-year plan, they will lay the groundwork to require future Secretaries to also consider them. Many of these costs, such as the information value of delay, will always weigh against issuing new leases; thus, the sooner they are considered, the sooner they will start justifying plans with fewer leases in them.

The most prudent way for the Secretary to avoid issuing offshore oil and gas leases may be to offer a plan with only a few unattractive leases in it. This would undermine textualist and major questions doctrine challenges to the Secretary's action while

achieving the goal of no new oil and gas leases on the OCS. While the arguments presented in this Note might attract only a particularly motivated Secretary who is concerned about the country's commitments to fossil fuel production far into the future, a five-year plan that results in no oil and gas lease sales is legally feasible. It is also the obvious outcome of balancing the section 18 factors in a way that fully accounts for the environmental, social, and economic costs of future drilling.