ROYALTY ROBBERY: HOW STATUTORY SUPREMACY AND THE *CHRISTIAN* DOCTRINE REQUIRE OIL COMPANIES TO PAY ROYALTIES ON LEASES MISSING THE DEEP WATER ROYALTY RELIEF PRICE THRESHOLD CLAUSE

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I. INTRODUCTION

With gas prices rising as high as $3.21 per gallon in some parts of the country during 2007,[1] the cost of oil is a primary concern for many Americans today. What some may not know, however, is that despite the sky-rocketing prices, oil companies drilling in offshore areas of the continental shelf have continued to reap enormous profits by avoiding royalty payments to the U.S. Government. Indeed, because of a technical blunder made during the late 1990s that led to the omission of a price threshold clause on royalty relief provisions, the American people have been robbed of billions of dollars that the oil companies owe to the U.S. Treasury under the statutory provisions of the Deep Water Royalty Relief Act,[2] which is part of the Outer Continental Shelf Lands Act.[3] This note addresses the economic and contractual issues that surround this current controversy.

This note suggests there are two doctrines that support finding that the oil companies are required to pay royalties to the U.S. Government despite the missing price threshold clause in their leases. First, the theory of statutory supremacy suggests that the oil companies should be required to pay royalties owed and that equitable estoppel should not apply against the Government in this instance. Secondly, and most central to this note, the contractual theory of the *Christian* doctrine supports incorporating the mandatory terms that were omitted from some leases entered into in 1998 and 1999, thereby requiring the oil companies to pay royalties to the United States. Even if the controversy does not come before a court, bargaining against the implications of these doctrines puts the Government in a powerful position to renegotiate these leases.[4]

Part II of this Note explores the history of the enactment of the Outer Continental Shelf Lands Act and attempts to shed light on the circumstances surrounding the omission of the mandatory price threshold clause in some oil leases entered into in 1998 and 1999. Part III explores the theory of statutory supremacy and illustrates why the Government should not be estopped from collecting royalties on those leases missing the price threshold clause. Part IV traces the development of the *Christian* doctrine. Part V suggests that, based on the particular circumstances of these leases, it would be in accordance with congressional intent and legally sound for a court either to find the royalty payments mandated by statute or to imply the omitted terms into the leases. Both the statutory and the contractual approaches require the oil companies to repay, or, at the very least, begin paying, royalties owed to the American public.

1. Energy Information Administration, Petroleum Navigator, http://tonto.eia.doe.gov/dnav/pet/hist/mg_rt_usw.htm (last visited Oct. 15, 2007).
2. 43 U.S.C. § 1337 (2000).
3. *Id.* § 1338.
4. For a full discussion of the implications of "bargaining in the shadow of the law," *see* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

II. HISTORY OF THE DEEP WATER ROYALTY RELIEF ACT

The U.S. Government has grappled with how to steward its offshore areas and resources since colonial times.[5] Under the now well-accepted doctrine of *parens patriae*, the Government controls access to the commons by holding title to public lands and resources as a trustee for its citizens.[6] Consequently, the states, as well as the Federal Government, manage an array of common resources and control their exploitation.[7]

Both the Deep Water Royalty Relief Act and its predecessor, the Outer Continental Shelf Lands Act, were born of this theory and represent a balance struck between states and the Federal Government in the mid-twentieth century.

A. *Deep Water Royalty Relief Act's Predecessor: Outer Continental Shelf Lands Act*

In the mid-1940s, geologists suggested that valuable petroleum deposits existed beneath the Gulf of Mexico.[8] Based in part on the belief that technological advances would soon permit extraction of these deposits, President Truman claimed exclusive jurisdiction over the resources on and below the outer continental shelf of the United States[9] not only against foreign governments, but also against the states.[10] As a consequence, revenue from outer continental shelf resources would be deposited to the federal rather than state treasuries, a result that the Supreme Court affirmed in a series of cases.[11]

Following these decisions, as a result of congressional lobbying efforts by states with Gulf shorelines, the states reclaimed some monetary stake in offshore resources.[12] In 1953 President Eisenhower signed the Submerged Lands Act,[13] which represented a compromise between state and federal interests in the land's resources. The Submerged Lands Act gave states title to submerged lands out to three miles.[14]

Foreseeing a time when technology would permit oil and gas production farther from shore, Congress also enacted the Outer Continental Shelf Lands

5. John A. Duff, *Offshore Management Considerations: Law and Policy Questions Related to Fish, Oil, and Wind*, 31 B.C. ENVTL. AFF. L. REV. 385, 386 (2004).
6. *Id.* at 388.
7. *Id.*
8. Proclamation No. 2667, 10 Fed. Reg. 12,303 (Sept. 28, 1945).
9. *Id.*
10. *See* United States v. California, 332 U.S. 19, 38 (1947). In *United States v. California*, filed on behalf of the United States by the attorney general, the Supreme Court effectively gave control of the outer continental shelf, which had previously been the province of the states, to the Federal Government.
11. *Id.* at 40; United States v. Texas, 339 U.S. 707, 718–19 (1950); United States v. Louisiana, 339 U.S. 699, 704 (1950).
12. *See* H.R. REP. No. 83-215, at 3, 5 (1953).
13. 43 U.S.C. §§ 1311–1313 (2000).
14. *Id.* § 1312; Duff, *supra* note 5, at 394.

Act,[15] which recognizes 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."[16] The Act delegates the power to "lease and regulate the resources"[17] from land three miles and farther from shore to the secretary of the Interior.[18]

Both technical capacity and the demand for oil and gas were steadily increasing, and already by 1947 the first rigs had been "placed out of sight of land."[19] Technology gradually enabled companies to drill farther off shore and deeper. In 1952 drilling was limited to 100 feet of water, but by 1961 advances in technology enabled exploration at 1,000 feet and by 1970 drilling was possible in 2,000 feet, though becoming operational at those depths was not yet practical.[20] In 1983 Exxon succeeded in installing a production platform in 1,000-foot-plus depths.[21] However, the economic equation still deterred most deep-water activity. Expensive labor and capital costs, along with leasing and royalty payments, prohibited the oil companies from earning enough profit to make deeper drilling an attractive investment.[22]

B. *Enactment of the Deep Water Royalty Relief Act*

Oil supplies from the shallower depths in the Gulf of Mexico became depleted by the early 1990s and, as oil and gas production waned, so too did the economies of Gulf shore states.[23] In addition, energy prices remained low, with crude oil prices around $16 a barrel.[24] Smaller exploration companies went out of business and industry leaders focused their exploration efforts abroad.[25]

Oil companies and Gulf shore states complained that requiring royalty payments to be paid immediately upon extracting oil from federally leased offshore sites impeded their exploitation of untapped oil deposits.[26] Indeed, at the time, the Outer Continental Shelf Lands Act provided for drilling

15. 43 U.S.C. § 1338 (2000).
16. *Id.* § 1332(3).
17. *Id.* § 1334(a); Duff, *supra* note 5, at 395.
18. 43 U.S.C. § 1333(a)(2)(A) (2000).
19. Duff, *supra* note 5, at 395.
20. *Id.* at 395–96; *see also* Leonard LeBlanc, *1947 Shaking the Bounds of Land, 1997 Probing 10,000 ft Depths*, OFFSHORE, May 1997, at 93, 95.
21. C.L. Wickizer, *Challenges of Future Deepwater Operations Examined*, OIL & GAS J., Oct. 24, 1988, at 64.
22. Duff, *supra* note 5, at 397.
23. *Id.*
24. Edmund L. Andrews, *Vague Law and Hard Lobbying Add Up to Billions for Big Oil*, N.Y. TIMES, March 27, 2006, at A1.
25. *Id.* at A16.
26. 139 CONG. REC. 4709 (1993) (statement of Rep. Fields, "[T]he existing prohibitions have made it virtually impossible for a company to lease, explore, and develop energy resources" in deep water reserves); Duff, *supra* note 5, at 397.

companies to pay a 12½ percent royalty "in amount or value of the production saved, removed or sold from the lease" to the lessor regardless of whether the oil or gas was extracted from a more costly offshore site or not.[27]

Consequently, oil and gas producers began lobbying for royalty relief in order to spur the technological advances that would allow them to make deep-water production a fruitful reality.[28] In 1992 efforts were underway to pass legislation that would provide royalty relief to companies investing in deep-water exploration.[29] As an incentive for companies to establish drilling sites in the outer continental shelf, the legislative proposals included provisions relieving lessees from royalty payments on production from leases in waters deeper than 200 meters until they had recovered their capital investment costs.[30] Even at this early stage of consideration, the congressmen drafting the legislation did not intend royalty relief to apply in years "when the price of oil exceed[ed] $34 per barrel for two consecutive quarters."[31] Eventually, after a three-and-a-half-year battle, three sessions of Congress, the "Republican Revolution of 1994," and opponents' cries that relief was a form of "corporate welfare,"[32] proponents' efforts paid off and the Deep Water Royalty Relief Act was signed into law in 1995.[33]

The Deep Water Royalty Relief Act provides, *inter alia*, that, in certain areas of the Gulf of Mexico, the secretary may "reduce or eliminate any royalty" in order to promote oil production on currently producing or nonproducing leases.[34] The Act details the royalty relief scheme, which establishes a tiered relief schedule, limited both by volume and by market price of oil.[35]

Congress designed the terms of the royalty suspension based on volume to promote drilling in deeper waters. Nevertheless, there has been significant confusion about how the provisions apply. Initially, there were conflicting interpretations about how the volume provision would apply. The Federal Government interpreted the provision as applying to an entire field, while the oil companies interpreted the provision as applying to each individual lease.[36] Because an oil and gas field often encompasses more than one lease, if royalty

27. 43 U.S.C. § 1335(a)(8) (2000).

28. Duff, *supra* note 5, at 397.

29. 138 Cong. Rec. 21,306 (1992) (remarks of Sen. Johnston introducing one of the first attempts at royalty relief legislation, The Outer Continental Shelf Deep Water Production Incentives Act, S. 3127, 102d Cong. (1992)).

30. *Id.*

31. *Id.*

32. 141 Cong. Rec. 20,100 (1995) (statement of Rep. Miller, "In my view, mandatory royalty relief would be nothing other than a taxpayer-subsidized holiday windfall for the oil operators in the gulf. This is new corporate welfare at its worst. If title 3 had been in effect just 3 months ago, the royalty holiday would have cost the Treasury at least $2.3 billion from the last lease sale alone.").

33. 43 U.S.C. § 1337 (2000).

34. *Id.* § 1337(a)(3)(A)–(B).

35. *Id.* § 1337(a)(3)(C)(i)–(ii), (v); *Oil and Gas Royalty Management at DOI: Hearing Before the S. Comm. on Energy and Natural Resources*, 110th Cong. 14–15 (2007) (statement of Mark Gaffigan, Acting Dir., U.S. Gov't Accountability Office) [hereinafter Gaffigan Statement].

36. Gaffigan Statement, *supra* note 35, at 15.

suspension volumes were established for each lease, rather than for the entire field, companies would likely owe fewer royalties.[37] In a victory for oil companies, the matter was resolved through litigation in *Santa Fe Snyder Corp. v. Norton*, which held that the Deep Water Royalty Relief Act granted royalty suspension volumes to each new lease, not each field.[38]

Of most significance to the current controversy is the price threshold limitation. This limiting mechanism represents a balance struck between encouraging production and providing for a fair return to the American people for lease of lands that are part of the public trust.[39] The statute provides that

> (v) [I]n any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange for light sweet crude oil exceeds $28.00 per barrel, any production of oil will be subject to royalties at the lease stipulated royalty rate.... Estimated royalty payments will be made if such average of the closing prices for the previous year exceeds $28.00. After the end of the calendar year, when the new average price can be calculated, lessees will pay any royalties due, with interest but without penalty...[40]

It is this price threshold clause that was omitted from certain leases entered into in 1998 and 1999.

C. *Omission of the Price Threshold Clause*

From 1996 through 2000, the Minerals Management Service (MMS) issued 3,401 leases under authority of the Deep Water Royalty Relief Act.[41] Though MMS included the price threshold clause in 2,370 of those leases entered into in 1996, 1997, and 2000, it did not include the clause in 1,031 leases entered into in 1998 and 1999.[42] The royalty relief scheme in the Deep Water Royalty Relief Act, and specifically the absence of the price threshold clause, has resulted in a windfall for oil companies and, concurrently, a loss of billions to the American public.[43]

With oil prices soaring, *The New York Times* broke a story in February of 2006 reporting that the Interior Department's budget plan anticipated that "companies [will] pump about $65 billion worth of oil and natural gas from federal territory over the next five years without paying any royalties to the government," amounting to more than $7 billion in royalties by 2011, even as oil prices remain above $50 a barrel.[44] Partly in response to this article,

37. *Id.*
38. 385 F.3d 884, 892 (5th Cir. 2004).
39. Gaffigan Statement, *supra* note 35, at 15.
40. 43 U.S.C. § 1337(a)(3)(C)(v). The price threshold is adjusted for inflation according to 43 U.S.C. § 1337(a)(3)(C)(vii).
41. Gaffigan Statement, *supra* note 35, at 15.
42. *Id.*
43. *Id.* at 11, 13, 15–16. In his statement, Gaffigan noted that a recent report by the Government Accountability Office estimated "that the likely fiscal impact of leases issued under the Deep Water Royalty Relief Act of 1995 is in the billions of dollars in lost royalty revenues" though precise estimates were not yet possible. *Id.* at 13.
44. Edmund L. Andrews, *U.S. Royalty Plan to Give Windfall to Oil Companies*, N.Y. TIMES, Feb. 14, 2006, at A1.

the inspector general of the Interior Department launched an investigation of MMS.[45]

That investigation concluded that "MMS intended to include price thresholds in leases issued pursuant to the Deep Water Royalty Relief Act, as evidenced in the first leases issued in 1996 and 1997, as well as in 2000...."[46] The inspector general (IG) further concluded that the omission and subsequent failure to remedy it was a result of "a shockingly cavalier management approach to an issue with such profound financial ramifications, a jaw-dropping example of bureaucratic bungling" by MMS.[47] However, the investigation determined that there was no "'smoking gun' or any evidence that this omission was deliberate"; rather, there appears to have been great confusion at MMS as to whether new regulations that were being developed at the time were going to include provisions governing the price thresholds.[48] Ultimately, the regulations did not squarely address the thresholds, nor was the threshold clause included directly in the leases, as mandated by the Deep Water Royalty Relief Act.[49] MMS mishandling of these leases continued when MMS staff first discovered the error in 2000 but failed to report it up the chain of command.[50] While the IG continues to perform oversight and investigation into MMS operations, the question remains how to remedy the defective 1998 and 1999 leases.

D. *Proposed Solutions to Recoup Royalties*

A number of potential solutions have been proposed to address the withheld royalty relief and the persistent absence of the price threshold clause in active leases. As a result of negotiations between MMS and the companies involved, six of the fifty-five companies, representing about 20 percent of all the relevant leases, have agreed to renegotiate their leases.[51]

Some Democrats on Capitol Hill assert that the remaining oil companies should be forced to renegotiate or lose their leases of government land.[52] In addition, some politicians have advocated for changes in the law so that taxpayers will receive sufficient royalties from future Gulf oil and gas.[53] This

45. *Oil and Gas Royalty Management at DOI: Hearing Before the S. Comm. on Energy and Natural Resources*, 110th Cong. 8 (2007) (statement of Earl Devaney, Inspector Gen., Dep't of the Interior) [hereinafter Devaney Statement].

46. *Id.*

47. *Id.* at 9.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Oil and Gas Royalty Management at DOI: Hearing Before the S. Comm. on Energy and Natural Resources*, 110th Cong. 19 (2007) (statement of C. Stephen Allred, Assistant Sec'y, Land and Minerals Mgmt., U.S. Dep't of the Interior); *see also* Bill Walsh, *Oil Lease Management Criticized: Blunder Ignored, Federal Probe Finds*, TIMES-PICAYUNE, Jan. 19, 2007, at C-8.

52. *Oil and Gas Royalty Management at DOI: Hearing Before the S. Comm. on Energy and Natural Resources*, 110th Cong. 19 (2007) (statement of Sen. Dorgan, "Either you [the oil companies] renegotiate with us or sorry, Charlie. You're out of luck. We're not going to do business with you.").

53. *Id.*

sentiment was echoed by a majority of the House in May 2006, when representatives voted 252 to 165 for a measure that would pressure companies to renegotiate their leases.[54]

While eighty-five of those voting in favor of attaching the measure to the Interior Department's annual spending bill were Republican,[55] many Republicans emphasize that the leases between the oil companies and the Government are binding contracts.[56] The Bush administration has indicated it will "oppose[] the legislation on the ground that it would violate the sanctity of the contracts."[57]

As legislation remains pending,[58] Senator Jeff Bingaman (D-NM) has asked, "What is your opinion as to the best way forward to try to obtain for the U.S. taxpayer, a reasonable royalty on the resources that have been and are continuing to be produced in this outer continental shelf?"[59] Indeed, the missing clause continues to have a financial effect on oil companies and the U.S. Treasury. Of the leases issued in 1998 and 1999, "[t]he most recent data indicate that approximately 17 leases are currently producing; approximately 27 have 'indications of discovery' but are not yet producing; over 500 leases are still active with no 'indications of discovery'. . . ."[60] Most recently, in September 2006, Chevron announced its discovery of a new oil field in the Gulf of Mexico on an area leased under one of the flawed contracts.[61]

Discoveries such as Chevron's only increase the exigency of resolving the bureaucratic blunder. Until the leases are corrected, the American public will continue to be robbed of royalties owed to the federal treasury. Failure to resolve the defect in the 1998 and 1999 leases will permit companies to continue to profit erroneously.[62]

As noted above, some politicians have concluded that the Government has few available options to solve this problem.[63] Others point out the success the Government has achieved in renegotiating leases with several of the large

54. Edmund L. Andrews, *Vote in House Seeks to Erase Oil Windfall*, N.Y. TIMES, May 19, 2006, at A1.

55. *Id.*

56. *Id.*

57. Manimoli Dinesh, *Shell, BP Close to Deal on Royalty Payments*, OIL DAILY, Sept. 15, 2006, at 1.

58. On January 4, 2007, Senator Barack Obama introduced the Oil SENSE Act that would suspend royalty relief to oil companies, among other measures targeted at the oil industry. Rajesh Swain, *Oil Sense Act Introduced in Senate by Sen. Obama*, U.S. FED. NEWS, Jan. 19, 2007.

59. *Oil and Gas Royalty Management at DOI: Hearing Before the S. Comm. on Energy and Natural Resources*, 110th Cong. 31 (2007) (statement of Sen. Bingaman).

60. *Congressmen Remain Adamant That Interior Department Make U.S. Whole for Royalty Losses from Missing Price Thresholds; Inspector General's Testimony Is Upheld*, FOSTER NATURAL GAS REP., Sept. 29, 2006, at 15.

61. Edmund L. Andrews, *Chevron Could Avoid Huge Royalties from Oil Find in the Gulf*, N.Y. TIMES, Sept. 12, 2006, at C1.

62. Estimates about the amount of money the United States will forgo if this error is not corrected range from $7 billion to $20 billion over the next twenty-five years. Edmund L. Andrews, *G.A.O. Sees Loss in Oil Royalties of at Least $20 Billion*, N.Y. TIMES, Mar. 29, 2006, at C2.

63. Andrews, *supra* note 54, at A1.

leaseholders, including BP, ConocoPhillips, and Shell.[64] The stakes involved for both the public and the oil companies are significant and proposals that seek to punish companies that do not renegotiate by blocking them from acquiring new federal oil and gas leases have been criticized for potentially reducing U.S. production.[65]

While renegotiation is one solution, the Government has significant bargaining power in those negotiations as a result of the statutory supremacy doctrine and the *Christian* doctrine. Furthermore, if negotiation fails and the oil companies and the Government enter litigation, the court should employ the *Christian* doctrine to incorporate the missing price threshold clause and enforce the clause against the oil companies. This note will briefly address how applying the doctrine of statutory supremacy requires the oil companies with faulty leases to pay royalties mandated by federal law. It will then address how an alternative contractual theory, the *Christian* doctrine, produces the same result.

III. STATUTORY SUPREMACY AND EQUITABLE ESTOPPEL

Based on the theory of statutory supremacy, the Government should not be estopped from recouping royalty payments due on leases missing the price threshold clause.

A. *Development of the Statutory Supremacy Doctrine*

The Supreme Court has never held that the Government can *never* be equitably estopped, but it has consistently expressed great reluctance to do so.[66] This reluctance reflects an understanding that "[t]he federal government implements hundreds of extraordinarily complicated regulatory and benefit programs" and, as a result of civil servants' daily advice and actions, error "is both inevitable and commonplace."[67] Indeed, "[e]stopping the government based on the misrepresentations of its agents would have a series of adverse effects,... [including] financial loss of some magnitude to the government."[68]

The Supreme Court's decision in *Office of Personnel Management v. Richmond* may be the closest the Court has come to finding that the Government may never be estopped.[69] In that case, the Court held that, pursuant to the

64. Cathy Landry, *U.S. Wins Back Royalty Rights on Some Offshore Leases*, PLATTS OILGRAM NEWS, Dec. 15, 2006, at 1.

65. *Id.*

66. 2 RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE 863 (4th ed. 2002); *see* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 423 (1990) ("We leave for another day whether an estoppel claim could never succeed against the Government."); Heckler v. Cmty. Health Serv., 467 U.S. 51, 60 (1984) ("we are hesitant... to say that there are *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed").

67. *Richmond*, 496 U.S. at 433; PIERCE, *supra* note 66, at 863–64.

68. PIERCE, *supra* note 66, at 864.

69. *Id.* at 865.

Appropriations Clause of the U.S. Constitution, a court may not estop the Government where estoppel would require the Government to make a payment not authorized by statute.[70] However, the Court's reasoning suggested an even broader proposition—that an estoppel claim would likely fail in any situation where estoppel would have the effect of requiring an agency to act contrary to statutory law.[71]

Subsequent cases delineate the limited instances when equitable estoppel may be available against the Government. These cases confirm that there is a very high threshold for agency misconduct that would justify the use of equitable estoppel against the Government.[72] Specifically, circuit court cases suggest that equitable estoppel is only appropriate where all the elements of equitable estoppel are met[73] and, in addition, there is "affirmative conduct going beyond mere negligence"[74] and a finding that "the public's interest will not suffer undue damage."[75]

There is a high bar for finding affirmative misconduct that supports estopping government action. *Fredericks v. Commissioner of Internal Revenue* is one of the rare cases where a court found such affirmative misconduct and estopped a government agency.[76] There, Mr. Fredericks filed a timely 1977 tax return, but the IRS took fourteen years to decide if the tax deduction he took was appropriate.[77] During the fourteen-year interlude, the IRS requested that Mr. Fredericks sign consent agreements extending the time for the Government to assess his 1977 tax return beyond the statute of limitations.[78] The IRS then misrepresented that it never received the consent agreement form from Fredericks and continued to represent that the original form was lost when it requested additional consent agreements for extensions of time, when in fact the original consent agreement had been found sometime before 1984.[79] Worse, the

70. *Richmond*, 496 U.S. at 432, 434.

71. *Id.* at 423, 432.

72. *See, e.g.*, Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 75–76 (1993) (O'Connor, J., concurring).

73. United States v. Hemmen, 51 F.3d 883, 892 (9th Cir. 1995) ("The traditional elements of equitable estoppel are that: (1) the party to be estopped knows the facts, (2) he... intends that his...conduct will be acted on . . ., (3) the party invoking estoppel must be ignorant of the true facts, and (4) he...must detrimentally rely on the former's conduct.").

74. *Id.* (courts "require a showing that the agency engaged in 'affirmative conduct going beyond mere negligence'") (quoting Watkins v. U.S. Army, 875 F.2d 699, 709 (9th Cir. 1989)); Reich v. Youghiogheny & Ohio Coal Co., 66 F.3d 111, 116 (6th Cir. 1995) ("affirmative misconduct by a government actor is required to succeed in equitably estopping the Government"); Gibson v. Resolution Trust Corp., 51 F.3d 1016, 1025 (11th Cir. 1995) ("a private party seeking to estop the government...must, at a minimum, demonstrate the traditional elements of estoppel"); United States v. Agubata, 60 F.3d 1081, 1083 (4th Cir. 1995) ("this circuit made plain that it would 'decline[] to find equitable estoppel against the federal government absent a showing of affirmative misconduct'") (omission in original) (quoting Md. Dep't of Human Res. v. United States Dep't of Agric., 976 F.2d 1462, 1484 n.24 (4th Cir. 1992)).

75. *Hemmen*, 51 F.3d at 892 (quoting *Watkins*, 875 F.2d at 707).

76. 126 F.3d 433, 435 (3d Cir. 1997).

77. *Id.*

78. *Id.*

79. *Id.*

IRS then relied on the "lost" form to assess the deficiency and imposed interest and penalties covering the duration of its investigation of the 1977 tax return.[80] Based on his reasonable reliance on the IRS's misrepresentations to him, and to his detriment, Mr. Fredericks did not exercise his right to terminate the consent agreement, which would have allowed the statute of limitations to run and thereby foreclosed the IRS's action.[81]

On the basis of these facts, the Third Circuit held that Mr. Fredericks "met his burden of proving the traditional elements of equitable estoppel, and ha[d] mounted the high hurdle of establishing other special factors applicable to estoppel claims against the government."[82] In particular, the court concluded that the IRS's continual affirmative misrepresentations that the form was lost when it asked Mr. Fredericks to sign additional time-extending agreements amounted to affirmative misconduct.[83] Additionally, the court concluded that "[t]he public-fisc consideration cuts in favor of estopping the government in the case at bar," noting that the cost to the public fisc was only $28,361.[84]

B. *Price Threshold Clause Is Statutorily Mandated and Equitable Estoppel Against the Government in This Situation Is Not Appropriate*

In this case, it would be inappropriate to estop the Government from collecting royalties due pursuant to leases missing the price threshold clause. Most significantly, allowing the oil companies with defective leases to escape royalty payments is contrary to statutory law. Furthermore, this is neither an instance where government servants' actions amounted to affirmative misconduct, nor is it a case where the public interest would not suffer if the Government were estopped.

The Deep Water Royalty Relief Act itself dictates with specificity that leases that qualify for royalty relief will nevertheless be subject to the price threshold provision.[85] Indeed, while the secretary may exercise discretion in determining that a lease qualifies for royalty relief,[86] once that determination is made, "royalty payments will be made if such average of the closing price for the previous year exceeds $28.00. After the end of the calendar year, when the new average price can be calculated, lessees will pay any royalties due, with interest but without penalty...."[87] The plain language of the statute makes clear that once the price of oil reaches a certain point, lessees will pay royalties, without exception. Therefore, permitting oil companies with leases that omit the price threshold clause to avoid royalty payments despite dramatically high oil prices would be a clear violation of statutory law. Given

80. *Id.*
81. *Id.* at 440–41.
82. *Id.* at 435.
83. *Id.* at 442.
84. *Id.* at 449–50.
85. 43 U.S.C. § 1337(a)(3)(C)(v) (2000).
86. *Id.* § 1337(a)(3)(A).
87. *Id.* § 1337(a)(3)(C)(v).

the Supreme Court's disfavor for findings that would require agency action that violates statutory law as announced in *Richmond*, it is unlikely that the Court would hold in favor of the oil companies were this controversy to come before it.

Furthermore, even if the oil companies were able to establish the basic elements of an equitable estoppel claim (and it is unlikely they would be able to do so), the oil companies would be unable to meet the burden of proving "affirmative misconduct." Unlike the IRS's affirmative cover-up of the "found" indefinite extension tax form in *Fredericks*, the findings of the Interior Department's investigation do not suggest any affirmative misconduct by MMS. To the contrary, the report concludes that the price threshold clause was mistakenly omitted at the time the leases were signed.[88] Subsequently, MMS did not make any affirmative representations to the oil companies that their leases would be protected from future royalty payments and there is no evidence that the oil companies acted in reliance on any such belief.

And surely this is not a case where "the public's interest will not suffer undue damage."[89] As outlined above, the public has already lost revenue estimated in the billions that would have been generated from royalties on oil extracted pursuant to some of the defective leases.[90]

Because the Deep Water Royalty Relief Act mandates royalty payments once the price of oil exceeds $28.00 a barrel, excusing the oil companies with missing price threshold clauses from paying these royalties would contravene statutory law. Equitable estoppel against the Government is not appropriate in this case because there has been no affirmative misconduct and the public interest would suffer undue damage if the oil companies were absolved from royalty payments. Against the backdrop of this statutory supremacy argument and the inapplicability of estoppel, the Government has a strong case against the oil companies.

IV. THE *CHRISTIAN* DOCTRINE

In addition to resolving the missing price threshold clause problem using the theory of statutory supremacy, the Christian doctrine provides an equally persuasive contractual solution.

A. *Development of the* Christian *Doctrine*

G.L. Christian & Associates v. United States involved a government contract for a large military housing project for personnel at Fort Polk, Louisiana.[91] When the Government deactivated the base and subsequently terminated

88. Devaney Statement, *supra* note 45, at 7.
89. United States v. Hemmen, 51 F.3d 883, 892 (9th Cir. 1995) (quoting Watkins v. U.S. Army, 875 F.2d 699, 707 (9th Cir. 1989)).
90. Gaffigan Statement, *supra* note 35, at 15.
91. 312 F.2d 418, 419 (Ct. Cl. 1963), *reh'g denied*, 320 F.2d 345 (Ct. Cl. 1963).

the housing project contract, the contractor sued to recover unreimbursed expenses and anticipated profits.[92] The central issue arising in the case was whether the Government had reserved the right to terminate for convenience.[93] The contract itself did not contain any provision authorizing the Government to terminate for convenience.[94] However, the Government argued that the clause should be read into the contract.[95]

The Armed Services Procurement Regulations (ASPR) section 8.703, which was issued under statutory authority, provided for insertion of a termination for convenience clause into all fixed-price construction contracts over $1,000 and prescribed the details of the clause.[96] The court concluded that "[w]e are not, and should not, be slow to find the standard termination article incorporated, as a matter of law, into plaintiff's contract if the Regulations can fairly be read as permitting that interpretation."[97] Significantly, the court understood these regulations as having "the force and effect of law."[98]

In its analysis, the court considered that the Defense Department and Congress would not have sanctioned such a large contract without providing for the power to terminate and would not have included a proscription for anticipated profits if termination did occur without retaining the power to initiate the termination.[99] Further, the court reasoned that the experienced contractor could not have been so naïve as to think that the Government might not terminate for convenience, particularly given that the contract referred to this possibility, though the termination for convenience clause was itself omitted.[100]

Significant to the court's decision, it found that the termination clause is a "limitation... deeply ingrained... [in] public procurement policy."[101] Ultimately, the court concluded that it was logical and legally sound to read the termination clause required by the procurement regulations as mandatory and incorporated it into the contract by operation of law.[102] In denying reargument, the court further emphasized that the outcome of the case also turned on concerns about protecting policies set by higher authorities from avoidance by lower officials and also protecting those dominant policies from executive encroachment.[103]

92. *Id.* at 419–20.
93. *Id.* at 424.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 426.
98. *Id.* at 424.
99. *Id.* at 426.
100. *Id.* at 427.
101. *Id.* at 426.
102. *Id.* at 427.
103. G.L. Christian & Assoc. v. United States, 320 F.2d 345, 351 (Ct. Cl. 1963); William E. Slade, *A Question of Intent*, 7 Fed. Cir. B.J. 251, 254 (1997).

The case was a groundbreaking example of exceptionalism[104] in government contract interpretation in two ways. First, the court gave government regulations the force and effect of law.[105] Secondly, the court incorporated a missing clause, the inclusion of which was mandated by regulation, and enforced the clause against the private party. The decision was heavily criticized for having a "destabilizing effect" by making the terms of a government contract unclear "since the bargained-for terms appeared valid only to the extent they were consistent with applicable procurement regulations."[106] Initially, courts were hesitant to employ the principles outlined in *G.L Christian*[107] and interpreted the case narrowly.[108]

Nevertheless, in the years following the decision, courts and boards of contract appeals have applied the court's holding to imply regulation-mandated terms into government contracts—a policy now called the "*Christian* Doctrine."[109] Indeed, the doctrine has been used in a variety of circumstances to imply numerous omitted terms into government contracts.[110]

Some commentators criticize the increased willingness to use the doctrine and suggest that "applications of the doctrine have shifted from one of principled analysis to one of pure mechanical manipulation."[111] For the purposes of this note, it is unnecessary to address whether the *Christian* doctrine has become a bright-line test or whether its use requires case-by-case analysis. Those who argue that the courts have endorsed a mechanical application of the doctrine simply suggest that courts should return to determinations that rely on whether incorporation of a clause maximizes competition, satisfies the Government's needs,[112] and expresses a "significant or deeply ingrained strand of public procurement policy."[113]

104. For the article introducing and defining the concept of exceptionalism as applied to government contracts, *see* Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 Geo. Wash. L. Rev. 633, 637–38 (1996) ("there is a tradition of 'exceptionalism,' which emphasizes that, because of its sovereign status, unique functions, and special responsibilities, the government as a contracting party is not subject to all of the legal obligations and liabilities of private contracting parties").

105. G.L. Christian & Assoc. v. United States, 312 F.2d 418, 424 (Ct. Cl. 1963); *see also G.L. Christian*, 320 F.2d at 350–51.

106. Slade, *supra* note 103, at 254.

107. Stanton G. Kunzi, *Losing Sight of Christian Values: The Evolution and (Disturbing) Implications of the* Christian *Doctrine*, Army Law., Jan. 1992, at 11, 12 (noting that only one board decision between 1963 and 1976 incorporated a mandatory clause into a contract); *see* To the Sec'y of the Army, 47 Comp. Gen. 457, 458, 1968 CPD ¶ 12 (1968).

108. *See* Chamberlain Mfg. Corp., ASBCA No. 18103, 74-1 BCA ¶ 10368, at 48,961–62 (declining to imply the government property clause because, unlike the termination for convenience clause incorporated in *G.L. Christian*, it did not serve fundamental public policies).

109. Kunzi, *supra* note 107, at 14 n.40.

110. *See* Ralph C. Nash & John Cibinic, *The "Christian Doctrine": What Is the Rule?* 10 Nash & Cibinic Rep. ¶ 48 (Sept. 1996), for a discussion of cases relying on the *Christian* doctrine to imply omitted clauses.

111. Kunzi, *supra* note 107, at 14.

112. *Id.* at 20.

113. J. Andrew Jackson, *ASBCA Redefines the* Christian *Doctrine*, 43 Fed. Law. 41 (1996) (discussing the ASBCA's refusal to incorporate an omitted but mandatory NASA government

Without deciding which approach ought to prevail and adopting the "measured approach" to application of the *Christian* doctrine for the sake of argument, the doctrine provides a legally sound contractual solution to the current controversy surrounding the outer continental shelf leases entered into in 1998 and 1999 pursuant to the Deep Water Royalty Relief Act.

B. *Applying the* Christian *Doctrine to Incorporate the Price Threshold Clause into Existing Contracts*

Applying the *Christian* Doctrine to incorporate the price threshold clause into the defective leases is appropriate because the clause itself is mandatory, the clause expresses a fundamental procurement policy, and, finally, the oil companies were on notice that the clause was missing. This note will address each of these points in turn.

1. Price Threshold Clause Is a Mandatory Clause

To the extent that the regulations issued subsequent to the Deep Water Royalty Relief Act refer to elements of each lease, it is apparent that the price threshold clause is mandatory. Under the heading "Do I keep relief if prices rise significantly?" 30 C.F.R. § 203.78 provides that "[i]f prices rise above a base price for light sweet crude oil or natural gas, set by statute..., indicated in your original lease agreement... you must pay full royalties as prescribed in this section."[114] The wording of the regulation assumes that each lease will include the price threshold set by statute. There are no indications in the regulations or the statute that suggest any lease could issue without a price threshold clause altogether.

2. Incorporation of the Price Threshold Clause Is Supported by Fundamental Procurement Policy

In addition to the regulatory language that supports the conclusion that the price threshold clause is a mandatory term of all leases entered into under the Deep Water Royalty Relief Act, the clause expresses a fundamental public procurement policy. Courts and administrative boards have frequently decided whether or not to incorporate a clause based on this prong of the *Christian* doctrine analysis. For example, in *Chamberlain Manufacturing Corporation*, the Armed Services Board of Contract Appeals (ASBCA) declined to incorporate the government property clause though it was mandated by the ASPR.[115] The ASBCA reasoned that incorporation was not required because the clause "besp[oke] no procurement policy comparable to the policy against allowance of anticipated profits which the court in *Christian* determined to be of such paramount importance that incorporation of the Termination for

property clause in Computing Applications Software Tech., Inc., ASBCA No. 47554, 96-1 BCA ¶ 28,204, because it did not express a fundamental procurement policy).

114. 30 C.F.R. § 203.78 (2006).

115. ASBCA No. 18103, 74-1 BCA ¶ 10,368, at 48,961–62.

Convenience clause into the contract by operation of law was mandated."[116] The ASBCA emphasized that "[i]ncorporation of a clause into a contract by operation of law is an extraordinary action and should be undertaken only under extraordinary circumstances."[117]

Use of the *Christian* doctrine in this instance is appropriate based on the public policy underlying the price threshold clause. Unlike the government property clause at issue in *Chamberlain Manufacturing*, here there are myriad reasons supporting the assertion that price threshold clauses represent a fundamental government procurement policy. Just as the court in *G.L. Christian* found that the termination for convenience clause was a well-established policy that protected the Government in times of change and uncertainty and had been used in thousands of similar defense contracts,[118] so too the price threshold clause is part of a longstanding U.S. tradition of providing stewardship for the nation's natural resources, while at the same time promoting competitive innovation.[119] Like the termination for convenience clause,[120] the price threshold clause is in thousands of contracts—all of those contracts entered into pursuant to the Deep Water Royalty Relief Act except those entered into in 1998 and 1999.

Furthermore, just as the court in *G.L. Christian* reasoned that "the Defense Department and the Congress would be loath to sanction a large contract which did not provide for power to terminate and at the same time proscribe anticipated profits if termination did occur,"[121] so too, given the contentious history behind passage of the Deep Water Royalty Relief Act, it is likely Congress never would have sanctioned the Act without mandating the price threshold clause.

3. Because the Oil Companies Were on Notice That the Price Threshold Clause Limited the Extent of Relief Available, Incorporating the Clause into the Contracts Is Not Unfair to the Companies

Some critics of incorporating the price threshold clause into existing contracts, ostensibly the oil companies, will likely argue that this approach is unfair and antithetical to the contractual relationship they have with the Government. However, not only did the oil companies have notice that these leases were flawed, but as sophisticated businesses who often interact with the Government, they also were aware of the longstanding principle that contracts

116. *Id.* at 48,961.

117. *Id.* at 48,962; *see also* Toke Cleaners, IBCA 1008-10-73, 74-1 BCA ¶ 10,633, at 50,444 (quoting *Chamberlain Mfg. Corp.*, 74-1 BCA ¶ 10,368).

118. G.L. Christian & Assoc. v. United States, 312 F.2d 418, 426 (Ct. Cl. 1963) (noting that termination for convenience has been a "major government principle" and used regularly since World War I).

119. *See* Duff, *supra* note 5, at 402.

120. *G.L. Christian*, 312 F.2d at 426.

121. *Id.*

with the Government are not subject to all the same contractual proscriptions as those between private parties.

Indeed, it appears that in 1998 at least one oil company entering into leases pursuant to the Deep Water Royalty Relief Act, Chevron, was aware that the price threshold clause was omitted from its lease. In a July hearing before the House committee tasked with investigating why the clause was omitted from some leases, Keith Couvillion, deep water land manager for Chevron, testified that he had raised the issue with Chris Oynes, then regional director of the Gulf of Mexico Outer Continental Shelf Region at MMS.[122] In response to his inquiry about why the price thresholds were absent from the leases, Couvillion recalled being told by Oynes that they were part of new MMS regulations.[123] After realizing that the thresholds were not part of the regulations after all, Couvillion again raised the issue with MMS and was told that Mr. Oynes's "'staff would review the issue.'"[124]

This exchange put Chevron on notice that a mistake had been made, or at a minimum that the missing provision had not been bargained for. Chevron's concern about the missing clause indicates an understanding that the royalty relief had some limitations: the measure was provided to encourage exploration and development in offshore areas, not to provide a windfall to offshore drillers. Chevron can hardly maintain that it based any decisions to expand exploration on the missing price threshold provision. Indeed, under these circumstances, suggesting that Chevron was aware that a clause had been omitted from its lease, the equities would be particularly distorted if Chevron and the other oil companies were permitted to then capitalize on this bureaucratic error. Even for those companies who did not realize the clause was missing, it would be difficult to imagine that they truly believed that the Government would give them such generous, indefinite relief from all royalties.

Furthermore, such a conclusion would set a poor precedent for encouraging open and honest dealing in future lease negotiations. If the oil companies are permitted to profit from this error, future lessees would have an incentive to let mistakes lie in the hopes that they could later recoup the benefits of the error.

V. CONCLUSION

Far from the assertion that the "Interior Department has virtually no bargaining power under current law,"[125] the theory of statutory supremacy and the *Christian* doctrine give the department sound legal principles to rest on in any potential litigation, and consequently a strong position in any negotiations.

122. Bill Walsh, *Local Official Faulted in Oil Lease Blunder: Mandeville Resident Oversees Gulf Drilling*, TIMES-PICAYUNE, Sept. 24, 2006, at A1.
123. *Id.*
124. *Id.*
125. Andrews, *supra* note 61, at C1.

Statutorily, the Deep Water Royalty Relief Act requires royalty payments once the price of oil exceeds $28.00 a barrel. Therefore, following the Supreme Court's reasoning in *Office of Personnel v. Richmond*, an estoppel claim by the oil companies would likely fail because such a claim would require MMS to act contrary to the law mandating the collection of royalties after oil reaches a certain price. Even if an affected oil company were able to establish the elements of a claim for equitable estoppel against the Government, estopping the Government in this case would still be inappropriate because there has been no affirmative misconduct by MMS and because the public interest would suffer undue damage if the oil companies were absolved from royalty payments.

Taking a contractual approach to this dilemma yields the same conclusion. It is well established that government procurement contracts are governed by "a host of statutes, executive orders, regulations, and rules not applicable to contracts between private parties."[126] The *Christian* doctrine is a prime example of this principle. Therefore, the argument that "'a lease represents a contract between two parties... and cannot be changed by one of those parties'"[127] is less persuasive in a government contracting context.

In the circumstances surrounding the omitted clause in these leases, all the elements necessary to apply the doctrine are present. Here the clause represents the fundamental underlying procurement policy that directs the Government to be a responsible steward of public lands, Congress crafted the statute and regulations to mandate inclusion of the price threshold clause, and the oil companies were effectively on notice of the mistake. Therefore, the Government could rely on the doctrine in litigation and likely prevail in having the omitted price threshold clause incorporated into existing leases and enforced against the lessees.

Unfortunately, at this point, full disgorgement of royalties owed to the U.S. Treasury is not realistic. Ironically, the oil companies seem to have escaped remunerating the Government for all lost royalties because the sum they would have to pay back is now so large that it would potentially disrupt the economy.[128] Nevertheless, it is crucial that the Government act now to avoid continued loss of royalties in the coming years. It is within legal precedent and in accordance with congressional intent for the Government to either require royalty payments as a matter of statutory mandate or seek incorporation of the missing clause into the defective leases as a matter of contract. Against the backdrop of these powerful litigation tools, the oil companies would be wise to renegotiate their leases and begin paying what is owed to the American public.

126. Slade, *supra* note 103, at 252.

127. Edmund L. Andrews, *Official Says Oil and Gas Giveaway Was Probably an Error*, N.Y. TIMES, Mar. 2, 2006, at C3.

128. *See* Landry, *supra* note 64, at 1 (reporting that the oil companies that have settled have been spared paying back prior royalties).