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DCOR, LLC

IBLA 2017-28 Decided May 7, 2021

Appeal from a decision of the Pacific Outer Continental Shelf Region of the Bureau of Safety and Environmental Enforcement, holding that two oil and gas leases expired by operation of law. OCS-P 0234 & OCS-P 0346.

Affirmed; Motion to Apply Amended Regulations Denied.

APPEARANCES: Anthony C. Marino, Esq., and Kathleen L. Doody, Esq., Liskow & Lewis, New Orleans, Louisiana, for DCOR, LLC; Joanna K. Brinkman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, DC, for the Bureau of Safety and Environmental Enforcement.

OPINION BY ACTING ADMINISTRATIVE JUDGE LEVINE[1]

DCOR, LLC appeals from a September 16, 2016, decision of the Pacific Outer Continental Shelf (OCS) Region of the Bureau of Safety and Environmental Enforcement (BSEE), determining that two oil and gas leases, OCS-P 0234 and OCS-P 0346, expired by operation of law on March 15, 2016. BSEE based its determination on regulations in effect at the time, which provided that a lease in its extended term expired at the end of the 180th day after the operator stopped conducting lease-holding operations.

We affirm BSEE's decision based on the regulation in effect at the time. We also hold that a subsequent change in the regulations, mandated by Congress, which extended the 180-day period to one year, does not apply to this appeal. Because DCOR's leases expired by operation of law before the amended regulations went into effect, and Congress did not provide for the amended regulations to apply retroactively, neither

[1] Administrative Judge Haugrud and Former Acting Administrative Judge Ballenger took no part in the consideration or decision of this appeal.

BSEE nor this Board has the authority to apply the new regulations to revive the expired leases. Accordingly, we affirm BSEE's decision.

BACKGROUND

Legal Background

The Outer Continental Shelf Lands Act (OCSLA) authorizes the Secretary of the Interior to grant oil and gas leases on the OCS.[2] Such leases "entitle the lessee to explore, develop, and produce the oil and gas contained within the lease area, conditioned upon due diligence requirements."[3] OCSLA also directs the Secretary to "prescribe such rules and regulations as may be necessary to carry out" the statute.[4] "[S]uch rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under" the statute.[5]

Lease Duration and Expiration

OCSLA provides that leases shall "be for an initial period of [five to ten years], and as long after such initial period as oil or gas is produced from the [leased] area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon."[6]

The Department's regulations specify when a lease that is past its initial period will expire. At the time of the events giving rise to this appeal, the regulations stated:

> If you stop conducting operations on a lease that has continued beyond its primary term, your lease will expire unless you resume operations or receive [a suspension of operations or a suspension of production] from the Regional Supervisor . . . *before the end of the 180th day after you stop operations*.[7]

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[2] 43 U.S.C. § 1337(a)(1). All citations to statutes are to the current version of the official U.S. Code, published in 2018.
[3] § 1337(b)(4); *see Statoil Gulf of Mex. LLC*, 42 OHA 261, 266 (2011).
[4] 43 U.S.C. § 1334(a).
[5] *Id.*
[6] *Id.* § 1337(b)(2).
[7] 30 C.F.R. § 250.180(d) (emphasis added). As noted in the main text, the regulations at issue in this decision were amended in 2017. Unless otherwise indicated, all citations to regulations in this decision are to the version of the official Code of Federal Regulations that predated those amendments, which was published in 2016.

OCSLA and the regulations allow BSEE to delay the expiration of a lease at the lessee's request in one of two ways. First, BSEE can grant a request from the operator "to allow [the operator] more than 180 days to resume operations . . . when operating conditions warrant," if the agency "determine[s] that the longer period is in the National interest, and it conserves resources, prevents waste, or protects correlative rights."[8]

Second, BSEE can grant a suspension of operations or a suspension of production (which we refer to collectively as a suspension), which has the effect of extending the life of the lease by the length of the suspension.[9] The regulations in effect at the time of the events in question required the lessee to submit a request for a suspension to BSEE "before the end of the lease term (*i.e.*, end of primary term, *end of the 180-day period following the last leaseholding operation*, and end of a current suspension)."[10] If a lessee submits a request for a suspension on time – that is, before the lease term ends – BSEE can approve the suspension even after the term would otherwise have ended.[11]

Although BSEE may delay the expiration of a lease by granting an extension or a suspension, OCSLA does not provide any mechanism for BSEE to revive or reinstate a lease once it has expired (other than by approving a suspension request that was submitted before the lease expired).[12] Because Congress did not provide such a

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[8] § 250.180(e).

[9] *See* 43 U.S.C. § 1334(a)(1) (requiring the Secretary to provide by regulation "for the suspension . . . of any operation or activity, including production," under certain circumstances, "and for the extension of any permit . . . affected by suspension . . . by a period equivalent to the period of such suspension"); 30 C.F.R. §§ 250.169(a), 250.180(d) (noting that a suspension will extend the lease term). *See generally* 30 C.F.R. § 250.168-177 (specifying conditions and procedures for suspensions).

[10] 30 C.F.R. § 250.171 (emphasis added).

[11] *See Union Pac. Res. Co.*, 149 IBLA 294, 303 (1999).

[12] *See id.* ("It is well established that a lease cannot be suspended retroactively unless the request for a suspension is pending before the Department when the lease expires. As has been often stated, unless the request is made before the lease expires, there is nothing in existence which could be suspended."); *accord* Office of the Solicitor, M-Opinion 37019, Revival of Offshore Oil and Gas Leases at 5, 10 & n.9 (Jan. 15, 2009), https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37019.pdf (last visited May 6, 2021) (M-Opinion 37019); *Statoil Gulf of Mex.*, 42 OHA at 269-270 & n.8.

mechanism by statute, neither BSEE nor this Board has the discretion to reinstate a lease that has expired by operation of law.[13]

Lease-Holding Operations

OCSLA and the regulations also define the activities that must take place within the 180-day period in order to prevent a lease from expiring (in the absence of an extension or a suspension). We refer to these activities as "lease-holding operations."

As noted above, the statute provides that a lease will not expire so long as "oil or gas is produced from the [leased] area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon."[14] The regulations, echoing this statutory provision, identify three kinds of lease-holding operations: "drilling, well-reworking, [and] production in paying quantities."[15] The regulations further specify that "[t]he objective of the drilling or well-reworking must be to establish production in paying quantities on the lease."[16]

Both the statute and the regulations define "production" to mean "those activities which take place after the successful completion of any means for the removal of minerals, including such removal, field operations, transfer of minerals to shore, operation monitoring, maintenance, and work-over drilling."[17]

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[13] *See* M-Opinion 37019, *supra* note 12, at 11 ("Nothing in [OCSLA] authorizes [BSEE] to revive expired leases, thereby granting rights to property that has, by operation of law, reverted to the United States. This prohibition on the revival of expired leases is not something [BSEE] can overcome by regulation. Whether the action is called a reinstatement, revival, or retroactive suspension is immaterial. Any of these actions taken with respect to a lease issued under [OCSLA] are prohibited based on the Property Clause of the Constitution and require congressional authorization to change."); *see also Kerr-McGee Oil & Gas Corp.*, 172 IBLA 195, 202 & n.6 (2017) (rejecting an OCSLA lessee's request for reinstatement under a theory of *force majeure*, and explaining that "[t]his Board . . . must apply the laws, rules, lease terms, and applicable policies of the Department in deciding cases presented to us and does not sit as a tribunal for meting out equitable relief"). *Cf. Savoy Energy, L.P.*, 178 IBLA 313, 320 n.10 (2010) ("Solicitor's M-Opinions are binding on this Board.").
[14] 43 U.S.C. § 1337(b)(2).
[15] 30 C.F.R. § 250.180(a)(2); *see id.* § 250.180(d).
[16] § 250.180(a)(2).
[17] 43 U.S.C. § 1331(m); *accord* 30 C.F.R. § 250.105.

Neither the statute nor the regulations define the phrase "in paying quantities." In a Notice to Lessees and Operators issued in 2008, BSEE's predecessor explained:

> [P]roduction in paying quantities, for the purpose of continuing the lease beyond its primary term, means the production of enough oil, gas, sulfur, or other minerals, as specified in the lease, to yield a positive stream of income after subtracting normal expenses (i.e., operating costs), which include the sum of (1) minimum royalty or actual royalty payments, whichever is greater, and (2) the direct lease operating costs.[18]

This Board has noted this definition approvingly, and adopted our own definition based on it:

> For the purpose of continuing an OCS lease beyond its initial term, we believe "production in paying quantities" means sufficient production to yield a net profit when normal expenses (*e.g.*, royalties and direct lease operating costs such as labor costs and fixed and variable operating costs incurred on or allocated to the lease) are subtracted from lease revenues.[19]

In the related context of onshore oil and gas leasing, we have similarly defined "production in paying quantities" as "a sufficient quantity of oil and/or gas to yield a reasonable profit after the payment of all the day-to-day costs incurred after the initial drilling and equipping of the well, including the costs of operating the well, rendering the oil or gas marketable, and transporting and marketing that product."[20]

Putting together these authorities, we arrive at the following definition of lease-holding operations. First, lease-holding operations include "production in paying quantities," which means that the lessee is engaged either in the "removal [of minerals]" or in activities that support the ongoing removal of minerals, such as "field operations, transfer of minerals to shore, operation monitoring, maintenance, and work-over

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[18] Administrative Record (AR), Tab A-4, U.S. Minerals Management Service, NTL No. 2008-N09, Notice to Lessees and Operators of Federal Oil and Sulfur Leases in the Outer Continental Shelf, Extension of Lease and Unit Terms by Production in Paying Quantities at unpaginated (unp.) 1 (Oct. 29, 2008) (NTL 2008-N09). BSEE has submitted two versions of the AR in this appeal, a "Non-Public Sealed Copy" and a "Public Copy" containing redactions. All citations in this decision are to the public copy.

[19] *Kerr-McGee*, 172 IBLA at 203.

[20] *See Coastal Petro. Co.*, 190 IBLA 347, 353-354 (2017) (quotation marks omitted). *Cf.* M-Opinion 37019, *supra* note 12, at 8-9 n.5 (noting that onshore and offshore leasing laws are often interpreted analogously).

drilling," and that the lessee is obtaining a net profit from the sale of the removed minerals.[21] Second, lease-holding operations also include "drilling or well reworking operations as approved by the Secretary," so long as those operations are conducted with "[t]he objective of . . . establish[ing] production in paying quantities."[22]

Factual Background

The History of the Leases

The United States awarded leases OCS-P 0234 and OCS-P 0346 to DCOR's predecessors in interest in 1968 and 1979, respectively.[23] The leases are located off the coast of Santa Barbara, California.[24] Between 1983 and 2015, the leases produced over 230 billion cubic feet of natural gas, peaking in January 1985 at 102.5 million cubic feet per day.[25]

In September 2013, BSEE granted DCOR a suspension of production, which lasted through June 2014.[26] Although production resumed in July 2014, the volume produced was low.[27] At the end of 2015, the platform producing from the leases, known as Platform Habitat, was shut in, and production ceased.[28]

On May 25, 2016, BSEE wrote to DCOR, informing the company that "June 26, 2016 will mark 180 days without production on" Platform Habitat, and advising DCOR

[21] *See* 43 U.S.C. §§ 1331(m), 1337(b)(2); 30 C.F.R. §§ 250.105, 250.180(a)(2); *Kerr-McGee*, 172 IBLA at 203; NTL 2008-N09, *supra* note 18.
[22] 43 U.S.C. § 1337(b)(2); 30 C.F.R. § 250.180(a)(2).
[23] AR, Tab A-1, Bureau of Land Management (BLM) Form 3380-1, Lease Agreement Between the United States and Gulf Oil Corp. (Mar. 1, 1968); AR, Tab A-2, BLM Form 3300-1, Lease Agreement Between the United States and Union Oil Co. of California (Aug. 1, 1979).
[24] AR, Tab B-7, Email from Drew Mayerson, BSEE, to Kevin Karl, BSEE (Dec. 15, 2016), Attachment at unp. 2-3; *accord* AR, Tab B-5, Letter from Andrew L. Prestridge, DCOR, to BSEE (June 17, 2016) (June 2016 DCOR Letter), Attachment, DCOR, Application for Suspension of Production at 4 (June 2016) (Suspension Application).
[25] Suspension Application, *supra* note 24, at 4.
[26] AR, Tab B-2, Email from Bobby Kurtz, BSEE, to Drew Mayerson, BSEE (Mar. 3, 2016) (March 2016 BSEE Email).
[27] *Id.*
[28] *Id.*; AR, Tab B-1, Email from Christine Baver, BSEE, to Drew Mayerson, BSEE (Mar. 2, 2016); Suspension Application, *supra* note 24, at 4.

to request a suspension "in order to protect the lease."[29] The same day, DCOR responded that it "concur[red] with [BSEE's] June 26, 2016 date," and was "preparing a [suspension] application."[30]

On June 17, 2016, DCOR submitted an application asking BSEE to "grant a suspension of production for a period of five (5) years in order to perform facility modifications and well work to restore production."[31] Attached to DCOR's application was a spreadsheet showing monthly and annual production, revenue, and expenses for Platform Habitat for 2015. The table showed 14.1 million cubic feet of gas produced over the course of the year, with monthly production ranging from a high of 2.9 million cubic feet in February to a low of 0 cubic feet in July.[32] DCOR's revenue from production totaled $37,958 for the year, with a high of $8,161 in February.[33] The table also reported over $2.6 million in operating expenses, over $3.0 million in capital expenses, and over $675,000 in overhead expenses for the year.[34] For each month of 2015, DCOR reported a net monthly operating loss of at least $140,000, and a net total monthly cash flow loss (including capital expenses and overhead) of at least $185,000.[35]

BSEE's Show-Cause Letter and DCOR's Response

On July 8, 2016, BSEE sent DCOR a letter (the Show-Cause Letter) informing DCOR that the spreadsheet included with its June 17 suspension application "show[ed] monthly revenue and expenses for Platform Habitat for 2015 that appeared to illustrate that DCOR has not been producing in paying quantities from these leases since January 2015."[36] The letter therefore instructed DCOR to "show cause as to why the aforementioned leases did not expire automatically by operation of law prior to the submission of [DCOR's] suspension request."[37]

[29] AR, Tab B-3, Email from Bobby Kurtz, BSEE, to Bob Garcia, DCOR (May 25, 2016).
[30] AR, Tab B-4, Email from Bob Garcia, DCOR, to Bobby Kurtz, BSEE (May 25, 2016).
[31] June 2016 DCOR Letter, *supra* note 24, at unp. 1.
[32] Suspension Application, *supra* note 24, Attachment, Schedule of Revenues and Expenses – Calendar 2015 (June 17, 2016) (June 2016 Revenue Schedule).
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] AR, Tab C-1, Letter from Drew Mayerson, BSEE, to Andrew Prestridge, DCOR (July 8, 2016).
[37] *Id.*

On August 25, 2016, DCOR responded to BLM's Show-Cause Letter.[38] DCOR described various activities that took place on Platform Habitat between April 20, 2015, and September 16, 2015, and stated "that the wellhead hot tapping activity conducted on September 16, 2015 [was] the last lease-holding activity on the Subject Leases."[39] DCOR acknowledged that "DCOR would, then, have had 180 days from [September 16, 2015] . . . to bring the Subject Leases back into production in paying quantities."[40] In other words, DCOR conceded that it had until March 14, 2016, to bring the leases back into production in paying quantities or otherwise resume lease-holding operations.

Nonetheless, DCOR presented three reasons why BSEE should not find that its lease expired after March 14, 2016. First, DCOR explained that the shut-in that began on December 31, 2015, was the result of a dispute between DCOR and its purchaser, Southern California Gas Co. (SCG), which culminated in SCG shutting in Platform Habitat's sales meter on December 31.[41] SCG's actions "effectively preclud[ed] DCOR from producing [gas from] the Subject Leases because . . . SCG represents the only viable natural gas market in the area where the Subject Leases are located."[42] DCOR therefore asked BSEE to "exercise [its] discretionary authority" to approve the suspension application, notwithstanding the fact that the application was filed more than 180 days after the end of lease-holding operations on September 16, 2015.[43]

Second, DCOR provided BSEE an amended version of its production, revenue, and expenses spreadsheet, which included two changes.[44] First, the amended spreadsheet reduced DCOR's labor costs for December 2015 by $348,500, by omitting a one-time charge corresponding to "[Platform] Habitat's allocation of a $6,000,000 wage and hour Class-Action Settlement which covered the period of February 2011 to October 2011."[45] Second, the amended spreadsheet increased DCOR's revenue for December 2015 by $592,860.[46] DCOR explained that this newly reported revenue reflected certain emission

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[38] AR, Tab C-16, Letter from W.M. Templeton, DCOR, to Drew Mayerson, BSEE (Aug. 25, 2016) (August 2016 DCOR Letter).
[39] *Id.* at 2.
[40] *Id.* at 2-3.
[41] *Id.* at 3.
[42] *Id.*
[43] *Id.*
[44] *See id.* at 4; *id.* Attachment 6, Lease Operating Report 2015 – Habitat 88ths (Revised Revenue Schedule).
[45] *See* August 2016 DCOR Letter, *supra* note 38, at 4; Revised Revenue Schedule, *supra* note 44.
[46] *See* Revised Revenue Schedule, *supra* note 44.

reduction credits to which DCOR became entitled under California law when it deactivated the platform's production equipment on December 31, 2015, and which DCOR "intend[ed] to sell . . . on the open market."[47] As a result of these changes, DCOR now claimed that "December [2015 was] a profitable month," and that the 180-day period for requesting a suspension therefore "commenced on December 31, 2015" – less than 180 days before DCOR filed its application on June 17, 2016.[48]

Finally, DCOR appealed again to BSEE's discretionary authority "to maintain the Subject Leases as active leases," this time invoking the national interest in maintaining oil and gas leasing in the Pacific OCS region, in light of the low likelihood that the minerals covered by the leases would be made available for leasing again if DCOR's leases were found to have expired.[49]

BSEE's Decision

On September 16, 2016, BSEE issued a decision determining that DCOR's leases expired by operation of law on March 15, 2016.[50] BSEE agreed with DCOR that DCOR's work on September 16, 2015 constituted lease-holding operations.[51] Accordingly, BSEE determined that the leases expired after the end of the 180-day period that began after that date – that is, on March 15, 2016.[52]

BSEE rejected DCOR's argument that the 180-day clock reset in December 2015, when the company allegedly earned $592,860 in emission reduction credits, rendering the leases profitable for the month.[53] BSEE explained that "[t]he only revenues which are considered in making the determination that there was production in paying quantities are those revenues derived from the sale of oil and gas production originating from Leases OCS-P 0234 and OCS-P 0346."[54]

BSEE also rejected DCOR's arguments that BSEE could exercise its discretion to grant a suspension requested more than 180 days after the end of lease-holding operations, either on account of the circumstances created by SCG's shut-in of Platform

[47] *See* August 2016 DCOR Letter, *supra* note 38, at 4 & n.3.
[48] *Id.* at 4.
[49] *See id.* at 4-6.
[50] AR, Tab C-18, Letter from Drew Mayerson, BSEE, to W.M. Templeton, DCOR at unp. 1 (Sept. 16, 2016) (BSEE Decision).
[51] *Id.*
[52] *Id.*
[53] *Id.* at 2.
[54] *Id.*

Habitat's meter or on account of the national interest.[55] While acknowledging that the circumstances involving the meter may have justified a request for a suspension or an extension if such a request had been presented within 180 days after the end of lease-holding operations, BSEE noted that it lacked "the legal authority, much less discretion," to grant an extension or a suspension requested after the end of the 180-day period.[56]

On November 14, 2016, DCOR filed a notice of appeal and a petition for stay.[57] BSEE informed the Board that it consented to a stay, without conceding the merits of DCOR's appeal.[58] Based on BSEE's consent, we granted a stay.[59] On April 27, 2017, DCOR filed its statement of reasons.[60] BSEE filed its answer on May 26, 2017.[61]

The Amended Regulations

In May 2017, Congress enacted the Consolidated Appropriations Act for 2017 (the Appropriations Act).[62] Section 121 of the Appropriations Act directed the Secretary, "[n]ot later than 30 days after the date of enactment of [the] Act," to amend the regulations governing the expiration of OCSLA leases to replace the 180-day period with a one-year period.[63] On June 9, 2017, almost a year after DCOR submitted its request for a suspension and more than 20 months after DCOR's last lease-holding operations, the Department issued a final regulation implementing this direction, which went into effect the same day.[64] As a result, lessees now have one year from the end of lease-holding operations to resume operations or to request an extension or a suspension.[65]

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[55] *Id.*
[56] *Id.*
[57] DCOR Notice of Appeal (filed Nov. 14, 2016); DCOR Petition for a Stay Pending Appeal (filed Nov. 14, 2016).
[58] BSEE Response to Petition for Stay (filed Nov. 22, 2016).
[59] *See* Order, Petition for Stay Granted (Dec. 6, 2016); Corrected Order, Petition for Stay Granted (Dec. 13, 2016).
[60] DCOR Statement of Reasons for Appeal (filed Apr. 27, 2017) (SOR).
[61] BSEE Answer (filed May 26, 2017).
[62] Pub. L. No. 115-31, 131 Stat. 135.
[63] *Id.* § 121, 131 Stat. at 463.
[64] *Oil and Gas and Sulphur Operations in the Outer Continental Shelf – Lease Continuation Through Operations; Final Rule*, 82 Fed. Reg. 26,741 (June 9, 2017).
[65] *See* 30 C.F.R. §§ 250.171, 250.180(d), (e) (2017); *see also* 82 Fed. Reg. at 26,742 (explaining that "[t]he term 'year' as used in revised § 250.180 refers to the 365-day (or

On October 26, 2020, we ordered the parties to file supplemental briefs addressing whether we should apply the amended regulations to DCOR's appeal.[66] On January 11, 2021, DCOR filed a supplemental brief and a "motion to apply [the] amended regulations to this appeal."[67] That same day, BSEE filed a supplemental brief urging the Board to affirm its decision because "the leases expired by operation of law, and neither BSEE nor the Board has the power or authority to revive the expired leases."[68] On February 10, 2021, DCOR filed a response to BSEE's supplemental brief, as allowed by our order.[69] BSEE did not file a response to DCOR's supplemental brief.

We have jurisdiction over this appeal under 43 C.F.R. §§ 4.1(b)(2) and 4.410(a).

DISCUSSION

Introduction and Standard of Review

We address DCOR's appeal in two parts. First, we review BSEE's determination that DCOR's leases expired by operation of law on March 15, 2016, under the regulations in effect at that time, and find no error in that determination. Next, we consider whether we should apply the amended regulations that went into effect on June 9, 2017, and conclude that we lack the authority to do so.

When a party challenges a determination by BSEE that a lease expired by operation of law, "the burden is on the party challenging that determination to prove by a preponderance of the evidence that the lease was then producing in paying quantities or that other [lease-holding] operations took place during [the 180-day] period."[70]

BSEE Correctly Determined That the Leases Expired Under the Regulations in Effect at the Time

We first consider whether BSEE erred by determining that DCOR's leases expired by operation of law on March 15, 2016, under the regulations in effect at the time.

366-day during leap years) period after the end of the last leaseholding operation," rather than "to the end of a specific calendar year").

[66] Order, Supplemental Briefing Ordered (Oct. 26, 2020).

[67] DCOR Amended Supplemental Briefing for and Motion to Apply Amended Regulations to this Appeal at 7 (filed Jan. 11, 2021) (DCOR Supplemental Brief).

[68] BSEE Supplemental Brief at 1 (filed Jan. 11, 2021).

[69] DCOR Response to BSEE's Supplemental Briefing (filed Feb. 10, 2021) (DCOR Response Brief).

[70] *Kerr-McGee*, 172 IBLA at 203.

Because DCOR failed to demonstrate that it conducted lease-holding activities between September 16, 2015, and March 15, 2016, we find no error in BSEE's determination.

DCOR argues first on appeal that a list of "well and wellhead work" activities performed on the leases, included as an exhibit to its statement of reasons, "is evidence of lease-holding activities on the Subject Leases" that extended "from January 2015 until June 2016."[71] But the last entry on DCOR's list is dated September 16, 2015 – the same date identified by BSEE as the date of DCOR's last lease-holding operations, and 180 days before the date on which BSEE determined that the leases expired.[72] This list of activities therefore does not show any error in BSEE's determination.

Second, DCOR argues that the 180-day period reset on December 31, 2015, when DCOR allegedly realized $592,860 in revenue by permanently deactivating production equipment, thereby entitling it to receive emission reduction credits under California law.[73] BSEE rejected this argument, explaining that only "revenues derived from the sale

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[71] SOR at 2.

[72] *See id.* Schedule E, Sequence of Events Evidencing Lease Holding Activities.

[73] *See* SOR at 5-6 ("DCOR currently has multiple pieces of equipment on Platform Habitat associated with the Subject Leases that are given allowable values for emissions that are constant since their original installation. . . . When a company decides to remove any equipment that contain these emission values, the emission values become commoditized in the form of Emission Reduction Credits ('ERC') through an application process through the [Santa Barbara County Air Pollution Control District]. When the pipeline was shut in at 3:00 pm on December 31, 2015, those ERCs became commoditize[d]; thus, recognizing a significant income. The value of those ERCs for Platform Habitat when sold on the open market is approximately $592,000 of recognizable revenue for the month of December 2015." (footnote omitted)); *accord* August 2016 DCOR Letter, *supra* note 38, at 4 n.3 ("We believe that when the pipeline was shut in on December 31, 2015, those ERC's became commoditized, thus recognizing a significant income. We intend to sell those ERC's on the open market and believe Habitat could receive a revenue of about $592,860 for December . . . ."); *see also* Santa Barbara County Air Pollution Control District Rule 806(D)(1) (2016), https://www.ourair.org/wp-content/uploads/Rule806.pdf (last visited May 6, 2021) (District Rule 806(D)(1)) (requiring emission reductions that qualify for emission reduction credits to be "permanent"). *Cf.* Cal. Health & Safety Code §§ 40710-40711 (requiring approval from the local air pollution control district before an emission reduction credit may be registered and transferred); *accord* District Rule 806(D), (G)-(I), *supra*; DCOR Supplemental Brief at 1 n.1 (stating that "these credits were sold for revenue in 2017," without specifying the sales price, or when the credits were approved by the District).

of oil and gas production" can be "considered in making the determination that there was production in paying quantities" from the leases.[74]

We note first that even if DCOR were correct that BSEE should have considered the emission reduction credits, DCOR would still not have carried its burden of "prov[ing] by a preponderance of the evidence that the lease was . . . producing in paying quantities."[75] In order to set aside BSEE's finding that DCOR's leases expired 180 days after September 16, 2015, we would need to find that DCOR obtained a net profit from production *over the 180-day period as a whole* – that is, that DCOR's production revenue during those 180 days exceeded its costs for those 180 days.[76] In its response to BSEE's Show-Cause Letter, DCOR only argued that "December [2015 was] a profitable month," and only provided financial information through the end of 2015 – roughly halfway through the 180-day period.[77] This argument fell short of what DCOR was required to prove.[78] On appeal, DCOR argues more generally that the emission reduction credits "actually caused profits to be realized from the operations of the Subject Leases during the 180-day period in question."[79] Nonetheless, DCOR has not provided any new financial information to show that its production revenue exceeded "the amount of expenses properly attributable to the lease during the 180-day period."[80] Therefore, DCOR has failed to carry its burden on appeal for this reason alone.

Even if we were to assume that including the emission reduction credits would make the leases profitable over the entire 180-day period, however, we would still find no error in BSEE's determination. We agree with BSEE that permanently deactivating production equipment does not constitute "production." As noted above, OCSLA defines "production" to mean "those activities which take place after the successful completion of any means for the removal of minerals, including such removal, field operations, transfer

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[74] BSEE Decision, *supra* note 50, at 2.
[75] *See Kerr-McGee*, 172 IBLA at 203.
[76] *See id.* at 202-203 ("[L]essees must not allow their production to fall below paying quantities during any 180-day period or they risk termination of their lease. . . . Whether the October 2005 production constituted production in paying quantities depends on the amount of expenses properly attributable to the lease during the 180-day period before January 3, 2006.").
[77] *See* August 2016 DCOR Letter, *supra* note 38, at 4; Revised Revenue Schedule, *supra* note 44.
[78] *See Kerr-McGee*, 172 IBLA at 202 (rejecting the argument that a single month of profitable production "started a new 180-day clock").
[79] SOR at 4.
[80] *See Kerr-McGee*, 172 IBLA at 203.

of minerals to shore, operation monitoring, maintenance, and work-over drilling."[81] Although permanently deactivating production equipment may be, in a literal sense, an "activit[y] which take[s] place after the successful completion of any means for the removal of minerals,"[82] not all such activities necessarily fall within the statutory definition. Rather, "context dictates precisely which" such activities fall within the statute's definition of "production," and the activities that are specifically enumerated in the definition "establish illustrative applications of the general principle."[83] Each of the enumerated activities ("field operations, transfer of minerals to shore, operation monitoring, maintenance, and work-over drilling") is an activity that supports the ongoing removal of minerals.[84] Accordingly, as we noted in our discussion of the definition of "lease-holding operations," the statutory term "production" refers to the removal of minerals *and other activities that support such ongoing removal*.[85] Permanently deactivating production equipment is not covered by this definition, and revenue generated by such deactivation – whether from selling emission reduction credits, or from selling the used equipment for scrap – cannot be used to demonstrate that the lessee is engaged in "production."

Nonetheless, DCOR asserts that this conclusion does not completely put to rest its arguments. It is undisputed that DCOR *did* engage in "production" from the two leases during the 180-day period – for example, it produced 1.3 million cubic feet of gas in December 2015, which it sold for $3,556.[86] The question, then, according to DCOR, is whether this production occurred "in paying quantities" – that is, whether this production was "sufficient . . . to yield a net profit when normal expenses (*e.g.*, royalties and direct lease operating costs such as labor costs and fixed and variable operating costs incurred on or allocated to the lease) are subtracted from lease revenues."[87] DCOR invites us to hold that income from sources other than the sale of severed minerals, which cannot be used to demonstrate that a lessee was engaged in "production," can

[81] 43 U.S.C. § 1331(m).
[82] *Id.*
[83] *See Alabama v. North Carolina*, 560 U.S. 330, 341 (2010) (quotation marks and alterations omitted).
[84] *See* 43 U.S.C. § 1331(m).
[85] *See supra* text accompanying note 21.
[86] *See* Revised Revenue Schedule, *supra* note 44; June 2016 Revenue Schedule, *supra* note 32.
[87] *Kerr-McGee*, 172 IBLA at 203.

nonetheless be used to offset the normal expenses of a lessee who *did* engage in production, and show that the lessee succeeded in obtaining a net profit.[88]

Even if, as DCOR asserts, it would be appropriate to treat *some* form of non-production revenue as an offset to production expenses (a question that we need not decide in this appeal), the revenue at issue in this appeal is not entitled to such treatment. Revenue that is obtained by *permanently* deactivating production equipment, and that exceeds the actual value of production over the relevant period by a factor of 50,[89] is not an offset to the "normal expenses" of ongoing production.[90] Therefore, DCOR has not carried its burden of "prov[ing] by a preponderance of the evidence that the lease was . . . producing in paying quantities" after September 16, 2015.[91]

Aside from these arguments, DCOR's remaining arguments on appeal rely on the premise that BSEE should have exercised its discretion to keep the leases in effect, either because SCG's actions in shutting in the platform's meter constituted events beyond DCOR's control, or because of the national interest in maintaining oil and gas leasing on the Pacific OCS.[92] But both our case-law and the Department's binding interpretation of the law are clear that BSEE has no discretion to revive or reinstate a lease once it has expired, unless the lessee submitted a request for a suspension before the lease expired.[93] BSEE did not err by refusing to exercise discretion that it did not have.

For these reasons, BSEE correctly determined, based on the regulations in effect at the time, that DCOR's leases expired by operation of law on March 15, 2016.

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[88] *See* SOR at 5.
[89] *See* Revised Revenue Schedule, *supra* note 44 (reporting less than $12,000 in production revenue from September through December 2015).
[90] *See Kerr-McGee*, 172 IBLA at 203 (defining "production in paying quantities" as "sufficient production to yield a net profit when normal expenses . . . are subtracted from lease revenues"); *see also Coastal Petro.*, 190 IBLA at 353-354 (defining "production in paying quantities," in the onshore context, as "a sufficient quantity of oil and/or gas to yield a reasonable profit after the payment of all the day-to-day costs incurred after the initial drilling and equipping of the well").
[91] *See Kerr-McGee*, 172 IBLA at 203.
[92] SOR at 2-4, 6-7.
[93] *Union Pac. Res.*, 149 IBLA at 303; M-Opinion 37019, *supra* note 12, at 5, 10 n.9, 11.

We Lack the Authority to Apply the Amended Regulations

Prompted by our order requesting supplemental briefing, DCOR urges us to apply in this appeal the amended regulations that went into effect on June 9, 2017.[94] In support of this request, DCOR cites our decision in *Forest Oil Corp.*, in which we stated: "[I]t is well established that, in the absence of countervailing public policy reasons or intervening rights, the amended version of a regulation may be applied to a pending matter if such application will benefit the affected party."[95]

If the amended regulations had been in effect at the time of the events leading to this appeal, DCOR would have had one year after September 16, 2015 to resume lease-holding operations or to seek an extension or a suspension.[96] DCOR's June 17, 2016, suspension request would have been timely, and BSEE would have considered it on its merits. We conclude, however, that we lack the authority to apply the amended regulations retroactively.

The doctrine relied on in our *Forest Oil* decision originates in a 1957 decision of the Assistant Secretary, *Henry Offe*.[97] In *Offe*, the Assistant Secretary held that an application for renewal of a lease should be adjudicated under the regulations in effect at the time that the renewal application was filed, rather than the regulations in effect at the time that the original lease was issued, where the change in the regulations benefitted the lessee.[98] The Assistant Secretary explained:

> As no one else has any rights which would be impaired by giving the appellant the benefits of the new regulation and as it does not appear that any interests of the United States would be adversely affected by such action, I conclude that the appellant was entitled to apply for a renewal in accordance with the new regulation.[99]

Eight years later, the Assistant Solicitor reached a similar conclusion in *Norman H. Nielson*, validating a preference-right applicant's bid for a tract of land on the basis that the applicant had complied with an amended regulation that went into effect during the course of the events giving rise to the appeal, although not with the regulation in effect

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[94] DCOR Supplemental Brief at 2-3.
[95] 107 IBLA 1, 3 (1989); *see* DCOR Supplemental Brief at 2-3.
[96] *See* 30 C.F.R. §§ 250.171, 250.180(d), (e) (2017).
[97] 64 I.D. 52 (1957).
[98] *Id.* at 54-56.
[99] *Id.* at 56.

at the beginning of those events.[100] Notably, in both *Offe* and *Nielson*, the regulations applied by the Department on appeal took effect before the end of the events giving rise to the appeal, and not during the pendency of the appeal.

In 1973, this Board applied the *Offe* doctrine for the first time in a published decision, and while doing so, expanded the doctrine to the situation in which an amended regulation took effect while an appeal was pending. In *Edgar L. Cerday*, we relied on *Offe* to excuse retroactively an appellant's failure to pay a $5 filing fee in light of a subsequent regulatory amendment that eliminated the filing fee requirement.[101]

Since our decision in *Cerday*, we have relied on *Offe* and its progeny in over a dozen published decisions to apply retroactively an amended regulation that went into effect while an appeal was pending before this Board (including in *Forest Oil*, the decision cited by DCOR).[102] We have also cited *Offe* and its progeny in several dozen published decisions where we declined to apply a regulatory amendment retroactively

[100] 72 I.D. 514, 514-517 (1965).
[101] 12 IBLA 270, 271-272 (1973).
[102] *See Robert D. Thompson*, 140 IBLA 70, 74-75 (1997); *Conoco, Inc.*, 115 IBLA 105, 106 (1990); *Forest Oil*, 107 IBLA at 3; *High Country Commc'ns, Inc.*, 105 IBLA 14, 19 & n.4 (1988); *Conoco, Inc.*, 102 IBLA 230, 233 (1988); *Willard Pease Oil & Gas Co.*, 89 IBLA 236, 240 (1985); *Dorius v. Bureau of Land Mgm't*, 83 IBLA 29, 38 (1984); *Frances Kunkel*, 80 IBLA 333, 337 & n.4 (1984); *George Dolezal, Jr.*, 75 IBLA 298, 299-300 (1983); *James E. Strong*, 45 IBLA 386, 388 (1980); *Howard S. Bugbee*, 29 IBLA 30, 32 (1977); *Duncan Miller*, 28 IBLA 292, 293 (1976); *Christopher A. Marks*, 26 IBLA 84, 85 (1976); *see also Jicarilla Arch. Svcs.*, 110 IBLA 57, 59-60 (1989) (reaching a similar conclusion without citing *Offe* or its progeny); *Somont Oil Co.*, 91 IBLA 137, 140 (1986) (relying on the *Offe* doctrine to apply a proposed regulation before its formal adoption). *Cf. Cemex, Inc.*, 194 IBLA 125, 170 & n.263 (2019) (citing *Offe* to apply a regulation that went into effect during the events at issue but before the agency decision under review); *Maxus Explo. Co.*, 140 IBLA 124, 132-133 (1997) (similar to *Cemex*); *Mobil Explo. & Prod. U.S., Inc.*, 119 IBLA 76, 80 (1991) (same); *Exxon Corp.*, 95 IBLA 165, 175 (1987) (same); *Wilfred Plomis*, 34 IBLA 222, 228-229 (1978) (same); *Peacock Oil Co.*, 30 IBLA 103, 105 (1977) (citing *Offe* when reinstating a non-OCSLA lease on equitable grounds, in a case that does not involve a regulatory amendment).

either because doing so would prejudice the rights of other parties or of the United States, or because applying the amended regulation would not benefit the appellant.[103]

For purposes of this appeal, we assume that our previous decisions applying amended regulations that took effect during the pendency of an appeal were correctly decided.[104] This appeal requires us to recognize an important caveat that we have not always recognized in those decisions, however: because the *Offe* doctrine relies on the exercise of our discretion,[105] we may not rely on that doctrine to reach an outcome that lies outside the Department's discretionary authority.

We recognized this caveat, albeit indirectly, in one of our earliest cases applying the *Offe* doctrine. In *Howard S. Bugbee*, decided in 1977, we set aside a decision of the

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[103] *See Merrion Oil & Gas Corp.*, 147 IBLA 258, 263-264 (1999); *Trigg Drilling Co.*, 138 IBLA 375, 377 (1997); *Bruce Anderson*, 80 IBLA 286, 295-296 (1984); *Hal Carlson, Jr.*, 78 IBLA 333, 335 n.3 (1984); *LBS Assocs., Inc.*, 74 IBLA 192, 194 n.1 (1983); *LSMJ Explo. Grp.*, 74 IBLA 185, 187 n.1 (1983); *Pandora Petro. Co.*, 74 IBLA 173, 177 n.1 (1983); *SOC Oil Co.*, 73 IBLA 350, 350 n.1 (1983); *Albert Whitehurst*, 70 IBLA 168, 168 n.1 (1983); *Richard S. Talbert*, 70 IBLA 145, 146 n.1 (1983); *Anglo Res., Inc.*, 70 IBLA 106, 109 n.2 (1983); *Howard K. Davis*, 70 IBLA 7, 8 n.1 (1983); *Westates Grp. No. 8*, 69 IBLA 186, 187 n.1 (1982); *Paul Mirialakis*, 69 IBLA 121, 123 n.2 (1982); *G.C. Fajardo*, 69 IBLA 70, 71 n.1 (1982); *William K. Monk*, 68 IBLA 339, 339 n.1 (1982); *Alvin B. Gendelman*, 67 IBLA 333, 335 n.1 (1982); *Patricia C. Alker*, 67 IBLA 214, 215 n.1 (1982); *Raymond K. Steitz*, 67 IBLA 173, 174 n.1 (1982); *Marilyn S. Watson*, 67 IBLA 67, 69 n.1 (1982); *Rockies Energy Corp.*, 66 IBLA 313, 314 n.1 (1982); *Arthur H. Kuether*, 65 IBLA 184, 186 n.4 (1982); *Redwood Empire Land & Royalty Co.*, 64 IBLA 267, 269 n.1 (1982); *Impel Energy Corp.*, 64 IBLA 92, 94 n.1 (1982); *RDM Interests*, 57 IBLA 163, 164 n.2 (1981); *Utah Power & Light Co.*, 52 IBLA 105, 108 n.1 (1981); *U.S. Steel Corp.*, 50 IBLA 190, 193 n.1 (1980); *B.B. Wadleigh*, 44 IBLA 11, 15 (1979); *Beverly J. Steinbeck*, 27 IBLA 249, 252 (1976); *see also Kathleen K. Rawlings*, 137 IBLA 368, 372 (1997) (declining to apply a new regulation retroactively on the basis that the new regulation was enacted under a different statute than the prior regulation).

[104] *But see Conoco*, 115 IBLA at 113 (Arness, A.J., dissenting) (urging the Board to hold "that current regulations apply to current [agency] actions").

[105] *See, e.g.*, *Forest Oil*, 107 IBLA at 3 (noting that "the amended version of a regulation *may be applied* to a pending matter" (emphasis added)); *Conoco*, 102 IBLA at 233 (noting that "*it may be appropriate* to apply the amended version of a regulation to a pending matter" (emphasis added)); *Dorius*, 83 IBLA at 38 (noting that "the Department *may* . . . apply the amendment to pending cases" (emphasis added)); *accord Kunkel*, 80 IBLA at 337 n.4; *Dolezal*, 75 IBLA at 300; *Strong*, 45 IBLA at 388; *Miller*, 28 IBLA at 293.

Bureau of Land Management (BLM) canceling an oil and gas lease for failure to pay a so-called "known geological structure bond," on the grounds that the regulation requiring the lessee to pay this bond had been rescinded while the lessee's appeal was pending before the Board.[106] Importantly, we noted that under the governing statute, cancellation of an oil and gas lease was "discretionary and not mandatory," and that a "lease need not be canceled [under that statute] because of the failure of the lessee to file a bond required by regulation."[107] Because BLM's decision to cancel the lease was discretionary, the outcome of our decision – setting aside BLM's cancelation of the lease – lay within the Department's discretion. In *Forest Oil*, similarly, while modifying a penalty assessment in light of a subsequent regulatory amendment, we noted that the Department "uses discretion in assessing" such penalties.[108]

In the years since *Bugbee*, we have not always been diligent about ensuring that the outcome that resulted from our retroactive application of a regulatory amendment was one that lay within the Department's discretion. Nonetheless, we believe that the caveat we identify in this appeal – that we cannot exercise our discretion to apply an amended regulation retroactively if the resulting outcome falls outside the Department's discretionary authority – is one that has always applied to the *Offe* doctrine, whether or not we observed it in a particular case. The authority exercised by this Board is derived from the authority granted by Congress to the Secretary, and whatever limits exist on the Secretary's powers limit our powers, as well.[109] Therefore, our decision in this appeal clarifies, rather than modifies, the *Offe* doctrine.[110]

To the extent that our decision in this appeal is viewed as a departure from our past decisions, however, we believe that such a departure is justified by the need to recognize the limits of the powers delegated to the Secretary (and thus to this Board) by

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[106] 29 IBLA at 31-32.
[107] *Id.* at 32; *see also Miller*, 28 IBLA at 293 (decided on similar facts to *Bugbee*).
[108] *See* 107 IBLA at 2.
[109] *See* 43 C.F.R. § 4.1; *Exxon Co.*, 15 IBLA 345, 353 (1974) ("In matters of adjudication properly before this Board its authority is coextensive with that of the Secretary."); *accord Statoil Gulf of Mex.*, 42 OHA at 289; *see also Kerr-McGee*, 172 IBLA at 202 n.6 ("This Board . . . must apply the laws, rules, lease terms, and applicable policies of the Department in deciding cases presented to us and does not sit as a tribunal for meting out equitable relief.").
[110] *But see supra* note 104.

Congress.[111] We also note that the *Offe* doctrine cannot, by its nature, engender any reliance interests, because parties doing business with the Department cannot reasonably rely on the possibility that favorable changes in regulations may occur in the future.[112] Therefore, to the extent that this decision modifies the *Offe* doctrine, we believe that this modification is necessary and appropriate.

In this case, this caveat proves decisive. In order to apply the amended regulations retroactively, we would need to have the authority to revive leases that expired by operation of law before the amended regulations went into effect. As we noted at the outset, OCSLA does not authorize us to revive expired leases once the associated property rights have, "by operation of law, reverted to the United States."[113] Therefore, a new act of Congress would be needed to authorize us to do so.[114]

In this case, the only act of Congress that could conceivably empower us to revive or reinstate expired leases is Section 121 of the Appropriation Act. That statute does not confer such powers on us, however. The plain language of Section 121 does no more than instruct the Department to replace the references in the regulations to a 180-day period with references to a one-year period.[115] The provision has no relevant legislative history, and the legislation does not fit neatly within any of the established judicial presumptions either in favor of, or against, retroactivity.[116] At the same time, there is

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[111] *See Encino Motorcars, LLC v. Navarro*, --- U.S. ---, ---, 136 S. Ct. 2117, 2125-2126 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. . . . [T]he agency must at least display awareness that it is changing position and show that there are good reasons for the new policy." (quotation marks and citations omitted)).

[112] *Id.* at 2126 ("In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." (quotation marks omitted)).

[113] *See* M-Opinion 37019, *supra* note 12, at 11; *accord id.* at 5, 10 n.9; *Union Pac. Res.*, 149 IBLA at 303; *Statoil Gulf of Mex.*, 42 OHA at 269-270 & n.8.

[114] *See* M-Opinion 37019, *supra* note 12, at 11.

[115] Pub. L. No. 115-31 § 121, 131 Stat. at 463; *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) ("When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach.").

[116] *See Landgraf*, 511 U.S. at 273-275, 280; *accord Enterprise Field Svcs., LLC*, 193 IBLA 313, 322 (2018); *see also Republic of Austria v. Altmann*, 541 U.S. 677, 694 (2004) ("Though seemingly comprehensive, [the analysis in *Landgraf*] does not provide a clear answer in this case.").

language in OCSLA suggesting that Congress did not intend for regulations issued under that statute to govern events that took place before their effective dates.[117] On balance, therefore, we conclude that Section 121 of the Appropriations Act did not revive leases that had already expired by the effective date of the ensuing regulations, or confer on the Department the discretion to revive them.[118]

Finally, our conclusion that we lack discretionary authority to apply the amended regulation is not affected by the fact that we stayed BSEE's decision before the amended regulations took effect.[119] The effect of our stay was to relieve DCOR, pending this appeal, from the consequences of BSEE's determination that its leases had expired, such as the requirement to begin removing DCOR's platform from the leases.[120] Our stay did not suspend or delay the expiration of the lease, which happened by operation of law at the end of the 180th day after DCOR's last lease-holding operations, and which did not rely on BSEE's subsequent determination for its legal effect.[121] Therefore, the existence of the stay did not extend, revive, or reinstate the leases.

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[117] *See* 43 U.S.C. § 1334(a) (providing that regulations issued by the Secretary "shall, *as of their effective date*, apply to all operations conducted under a lease issued or maintained under" OCSLA (emphasis added)).

[118] *Cf. Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 283 (1969) (applying a federal regulation providing due process rights to tenants facing eviction retroactively to the case of a tenant who was previously ordered to vacate but "has not yet vacated"); *accord Landgraf*, 511 U.S. at 276.

[119] *See* DCOR Supplemental Brief at 4; DCOR Response Brief at 2.

[120] *See Prima Explo., Inc.*, 96 IBLA 80, 82 (1987) ("[A stay pending an] appeal from a decision denying [a lease] extension does not operate to extend the term or suspend the running of the lease term during the pendency of the appeal. Thus, only the effect of BLM's decision is suspended; the underlying lease which is the subject of the decision is not."). *See generally* 30 C.F.R. § 250.1725(a) ("You must remove all platforms and other facilities within 1 year after the lease or pipeline right-of-way terminates . . . .").

[121] *See* 30 C.F.R. § 250.180(d) ("If you stop conducting operations on a lease that has continued beyond its primary term, *your lease will expire* unless you resume operations or receive [a suspension] before the end of the 180th day after you stop operations." (emphasis added)); *Statoil Gulf of Mex.*, 42 OHA at 297 n.39 ("It should be noted that the period for the companies to [complete their suspension application] was not extended by the fact that IBLA granted their request for a stay."); *accord Prima Explo., Inc.*, 96 IBLA at 82; *see also Union Pac. Res.*, 149 IBLA at 305 (holding that a letter from BSEE's predecessor agency "was not a decision or formal notice that the lease had expired, as no such decision or notice is required to effect the expiration").

For these reasons, we lack discretionary authority to apply the amended regulations retroactively in a manner that would revive DCOR's leases.

CONCLUSION

DCOR has shown no error in BSEE's determination that the leases expired, under the regulations in effect at the time, on March 15, 2016. Because DCOR's leases expired by operation of law before the amended regulations went into effect on June 9, 2017, we have no authority to apply the amended regulations retroactively to revive or reinstate DCOR's leases. Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,[122] the decision appealed from is affirmed, and DCOR's motion to apply the amended regulations is denied.

HANINAH LEVINE
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Date: 2021.05.07 09:47:10 -04'00'

Haninah Levine
Acting Administrative Judge

I concur:

JASON HILL
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Date: 2021.05.07 13:18:11 -04'00'

Jason A. Hill
Chief Administrative Judge

[122] 43 C.F.R. § 4.1.