



# United States Department of the Interior

OFFICE OF THE SOLICITOR

M-37019

**JAN 15 2009**

## Memorandum

To: Director, Minerals Management Service  
From: Solicitor  
Subject: Revival of Offshore Oil and Gas Leases

In response to a request from the Minerals Management Service (MMS) Gulf of Mexico Region, we have reexamined a memorandum, dated May 17, 1983, from the Acting Associate Solicitor of the Energy and Resources Division (predecessor to the Mineral Resources Division) to the Director of the MMS concerning an oil and gas lease in the Gulf of Mexico (1983 memorandum). The 1983 memorandum addressed the status of a lease that had been deemed expired for cessation of production, drilling, or well reworking operations and failure of its operator to seek a suspension of operations under MMS regulations. In the memorandum, the Acting Associate Solicitor concluded in part that the MMS has discretion to decline to apply its regulations, which in this case would have resulted in the expiration of the lease, and instead decide that the lease had not expired. The MMS Gulf of Mexico Region asked under what circumstances it could follow the guidance given in the 1983 memorandum and when it should follow opinions of the Interior Board of Land Appeals holding that the MMS cannot grant requests for suspensions filed after a lease has expired.

Upon reexamination of the 1983 memorandum, we have determined that its conclusion is without legal support. The 1983 memorandum contradicts the governing statute, MMS regulations, and case law. We are writing this memorandum to explain the correct legal analysis of this issue.

### I. Background

In 1983, the MMS asked the Solicitor's Office to review a decision by the Acting Regional Manager of the Gulf of Mexico Outer Continental Shelf (OCS) Region concluding that Oil and Gas Lease OCS-G-3080, Block 556, Matagorda Island, Texas, had expired. The lease was in its "secondary term"<sup>1</sup> and had been subject to several suspensions, the last of which was granted from April 1982 through November 1982. Production on Block 556 began in August

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<sup>1</sup> The continuation of a lease after its initial term is sometimes called the "secondary" or "extended term."

1982 and continued until late-September 1982. The operator then performed a workover on one of the wells on the block, completing it on October 21, 1982. Although the operator continued to drill wells on adjacent blocks, nothing happened with respect to Block 556 until the lessees requested another suspension on February 23, 1983. The Acting Regional Manager determined, based on the statute and regulations described below, that the lease on Block 556 expired automatically because the lessees had neither produced oil or gas nor conducted operations on the lease within 90 days of October 21, 1982, the date of the last activity on the lease.

The Acting Regional Manager's conclusion was the result of a straight-forward application of the MMS's governing statute and regulations in effect in 1983. An oil and gas lease issued under the authority of the OCS Lands Act is issued for an initial period, sometimes called the "primary term," of five years or some other period of time, not longer than ten years, where MMS believes a longer period is necessary to encourage exploration and development. 43 U.S.C. § 1337(b)(2)(A) and (B). The lease continues after this initial period as long as oil or gas is produced from the area in paying quantities or drilling or well reworking operations are conducted. 43 U.S.C. § 1337(b)(2). MMS regulations in effect in 1983 amplified the terms of the statute by stating that a lease is

continued in effect by production or by drilling or well reworking operations which are commenced on or before the 90th day after the date of last production or on or before the 90th day after the date of the completion of the last drilling or well reworking operations. No time lapse in drilling or well reworking activities of greater than 90 days shall be deemed to be prompt and efficient unless operations on the lease have been suspended pursuant to § 250.12 of this part.

30 C.F.R. § 250.35(a) (1983) (a comparable provision is now found at 30 C.F.R. § 250.180(d), but it allows the lessee 180 days, instead of 90 days, to restore operations before the lease will expire). Without production or operations, the only way to avoid expiration of a lease is to receive a suspension. If the MMS grants a suspension, then the term of the lease is extended for a period of time equal to the period that the suspension is in effect. *See* 30 C.F.R. §250.12(c)(1) (1983). If production or other suspended operations restart during a suspension, the suspension automatically terminates. *See* 30 C.F.R. § 250.12(c)(3) (1983).

In this case, the lease was being held by a suspension until November 1982, but that suspension was automatically terminated by production in August 1982, followed by a workover on one of the wells on the lease. The workover ended on October 21, 1982. The lessee did not perform any qualifying operations and did not seek another suspension until more than 90 days after the workover. Accordingly, the Acting Regional Manager applied the governing statute and regulations and concluded that the lease automatically expired on January 19, 1983, 90 days after the completion of the workover on October 21, 1982.

## II. The 1983 Memorandum

In the 1983 memorandum, the Acting Associate Solicitor acknowledged the result dictated by MMS regulations: “when no [suspension of production (SOP)] request was filed within 90 days of completion of the workover, the Department would ordinarily become powerless to act. If a suspension application is not filed prior to the lease expiration, there is nothing in existence for the Department to suspend.” 1983 memorandum at 4. The use of the word “ordinarily” foreshadows the memorandum’s ultimate conclusion that, despite the regulations, the MMS could revive the lease “because of the extremely unusual circumstances of this case.” *See id.* at 12.

The Acting Associate Solicitor recited the following “unusual circumstances”:

The operator and lessees of Block 556 have been diligent in their efforts to obtain production from the lease. The block contains two wells which have produced gas in paying quantities. The restrictions of the anchorage and fairway area forced the operator to conduct all drilling activity from the platform on Block 527. The operator was following prudent safety measures by shutting in the wells on Block 556 while drilling on Block 557.

*Id.* at 13.

He continues:

The only error that can be attributed to the operator is that he did not apply for an additional suspension on Block 556 within 90 days. Because the purpose of the 90-day rule is to encourage production, it may contradict a major goal of the statute to hold that the lease had terminated simply because the operator neglected to apply for another suspension. The operator, after all, was making every effort to obtain production not only on Block 556, but on Block 557 as well.

*Id.*

The Acting Associate Solicitor also notes that “the primary purpose of the OCSLA and its Amendments is to promote the rapid development of oil and gas.” *Id.* at 12. The memorandum states that if the lease is found to have expired,

it may be years before production is resumed, and it is possible that production will never be resumed. In the meantime, the government will lose the opportunity to collect royalties and taxes from production. The nation will lose the benefits of natural gas production called for under the OCS Lands Act. 43 U.S.C. § 1802(2).

*Id.* at 13 (citing the Congressional declaration of purpose that accompanied the 1978 OCS Lands Act Amendments, which declares “the need to make such resources available to meet the Nation’s energy needs as rapidly as possible”).

The memorandum concludes that,

because of the lessees’ diligence in developing the lease, the unusual restrictions faced in the anchorage and fairway area, and the harm to the national interest if this lease is held to have expired, you could lawfully hold that the lessees retain the lease on Block 556. However, if you find that the equities and the national interest require otherwise, then the decision of the Acting Regional Manager must be affirmed.

*Id.*

The Acting Associate Solicitor did not invoke any authority for his conclusion that MMS could revive the lease. He seems to have concluded that the MMS had equitable authority to reinstate the lease, or he may have believed the MMS could direct a retroactive suspension in the national interest. We will address both possibilities.

### III. Legal Analysis

The MMS, like all agencies, is bound by its regulations. *Fort Stewart Schools v. Federal Labor Relations Auth.*, 495 U.S. 641, 654 (1990) (“It is a familiar rule of administrative law that an agency must abide by its own regulations.”). The MMS regulations do not provide for either reinstatement of expired leases or suspensions not requested before a lease has expired. Furthermore, the MMS cannot change its regulations to permit these actions because these actions are not authorized by the OCS Lands Act.

#### A. Equitable Reinstatement

The 1983 memorandum advised the MMS that it could avoid applying its regulations and instead grant equitable relief when it deems that the application of its regulations would hinder oil and gas development, the “primary purpose of the OCSLA.” We examine in this opinion whether the MMS has equitable authority to revive a lease.

Federal appeals courts have cautioned that “[a]gency authority may not be lightly presumed.” *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001). Instead, “[t]he authority of administrative agencies is constrained by the language of the statute they administer.” *Texas v. United States*, 497 F.3d 491, 500-01 (5<sup>th</sup> Cir. 2007). “To determine whether the agency’s action is contrary to law, we look first to determine whether Congress has delegated to the agency the legal authority to take the action that is under dispute.” *Michigan*, 268 F.3d at 1081; *see also Texas*, 497 F.3d at 502-503.

The Property Clause of the United States Constitution states that “[t]he Congress shall have Power to dispose of ... Property belonging to the United States.” U.S. CONST. art. IV, § 3, cl. 2. Because only Congress is given this authority, Federal agencies may not dispose of Federal property, by lease or otherwise, unless Congress has delegated the power to do so. *See Justheim v. McKay*, 229 F.2d 29 (D.C. Cir. 1956) (affirming decision that Congress did not authorize leases of submerged lands in the Mineral Leasing Act of 1920); *Mineral Leasing Act*, M-34985, 60 Interior Dec. 26 (1947) (Congress did not authorize leases of submerged lands in the Mineral Leasing Act of 1920). The only authority the Department of the Interior has to dispose of property on the OCS was delegated to it by Congress in the OCS Lands Act.

The OCS Lands Act authorizes the Secretary of the Interior to grant oil and gas leases on the OCS to the highest responsible qualified bidder by competitive bidding. 43 U.S.C. § 1337(a)(1). The Secretary must issue the leases for an initial period of five years or some other period of time, not longer than ten years, where a longer period is necessary to encourage exploration and development. 43 U.S.C. § 1337(b)(2)(A) and (B). The lease continues after this initial period as long as oil or gas is produced from the area in paying quantities or drilling or well reworking operations are conducted. 43 U.S.C. § 1337(b)(2). The OCS Lands Act further directs the Secretary to include in the leases provision for suspension of the lease pursuant to 43 U.S.C. § 1334. 43 U.S.C. § 1337(b)(5). Section 1334, in turn, directs the Secretary to prescribe regulations that include provisions for suspensions, which will be discussed in more detail in the next section.

These provisions set the parameters for all oil and gas leases issued on the OCS. Leases may only be extended under the authority of 43 U.S.C. 1337(b)(2), which authorizes a secondary term, or 43 U.S.C. §§ 1334 and 1337(b)(5), which authorize suspensions in certain situations.<sup>2</sup> The OCS Lands Act grants no authority to revive or reinstate leases after they have expired.<sup>3</sup> Without that authorization by Congress in accordance with the Property Clause, the MMS cannot recognize the existence of a lease after its expiration. After a lease expires, further development

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<sup>2</sup> “Extension” and “suspension” are distinct concepts. An extension lengthens the term of the lease. This happens when a lease enters its secondary term – the term is extended beyond the primary term for as long as oil or gas is produced in paying quantities or drilling or well reworking operations are conducted. A suspension, however, stops the running of the lease term by authorizing an interruption in production or operations. One effect of a suspension is the extension of a lease. *See, e.g.*, 43 U.S.C. § 1334(a) (directing regulations authorizing “the extension of any ... lease affected by suspension ... by a period equivalent to the period of such suspension”); *Amber Resources Co. v. United States*, 538 F.3d 1358, 1362 (Fed. Cir. 2008) (“The effect of such a granted suspension is to extend the expiration date of the lease”); *Union Pacific Resources*, 149 IBLA 294, 303 (1999) (a suspension extends the lease term). The extension resulting from a suspension delays the expiration date of a lease but does not permit operations for any more days than granted in the original lease; it simply ensures that no time elapses from the lease term during the suspension. *See Oil & Gas Lease Suspension*, M-36953, 92 Interior Dec. 293, 296 (1985), for a discussion of how an extension resulting from a suspension differs from other lease extensions.

<sup>3</sup> The Mineral Leasing Act, which governs onshore oil and gas leasing, authorizes lease reinstatement in certain limited circumstances. 30 U.S.C. § 188. The OCS Lands Act has no comparable provisions.

on that parcel cannot occur unless it is re-leased through competitive bidding as provided in 43 U.S.C. § 1337(a).

In the 1983 memorandum, the Acting Associate Solicitor implied that he was invoking a “national interest” basis for reinstating the lease. He identified the loss of royalties and taxes from production as one of the reasons for his decision, stating that “[t]he nation will lose the benefits of natural gas production called for under the OCS Lands Act.” 1983 memorandum at 13. To support this argument, he cited 43 U.S.C. § 1802(2), which is the Congressional declaration of purposes that accompanied the 1978 OCS Lands Act Amendments. This section states that one of the purposes of the amendments is to

preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the Nation’s energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition[.]

While the Acting Associate Solicitor argued that the national interest, and therefore the purposes of the OCS Lands Act, would be best served by enabling the most recent lessee to retain the lease and pay royalties and taxes, he ignored the possibility that the expired parcel could be re-leased, resulting in receipt of a bonus in addition to future royalties and taxes. But regardless of which result better serves the national interest, the Acting Associate Solicitor failed to explain why this is a proper inquiry in the first place. The statement of purpose does not authorize any action by the Secretary that is not authorized in a substantive provision of the OCS Lands Act and cannot be relied upon as authorization to revive a lease. Even if an agency’s governing statute proclaims a laudable goal, an agency is not empowered to do whatever it wishes to pursue it. *See Michigan*, 268 F.3d at 1084 (reminding the Environmental Protection Agency, which administers the Clean Air Act, that “its mission is not a roving commission to achieve pure air or any other laudable goal.”).

Furthermore, an agency has no inherent equitable authority to do what is “right” or “fair.” In *Kerr-McGee Oil & Gas Corp.*, 172 IBLA 195, 201 (2007), the Interior Board of Land Appeals noted that, unlike a court of equity, the Board has no equitable authority. Instead, it observed that it “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.” *Id.* at 202 n.6 (citation omitted). Similarly, the MMS is limited to the laws, rules, and lease terms applicable to it and cannot effectuate what it deems a fairer result in contravention of those authorities.

The 1983 memorandum notes that the Department had previously ruled that a lease had not expired when there were strong equitable arguments in favor of extending the lease, citing to a memorandum dated December 22, 1975, from the Acting Solicitor to the Director of the Geological Survey regarding Hunt Oil Company Lease OCS 0466, Eugene Island Block 77, Gulf of Mexico. In that case, the Acting Solicitor determined that a regulation in effect at the time was ambiguous about whether a company could apply for approval to conduct operations for drilling or reworking after the 90-day time period specified in 30 C.F.R. § 250.35(a)(1) had elapsed. The Acting Solicitor noted that, for a different lease, the Department had previously granted an application to operate filed by Hunt Oil Company after the expiration of the 90-day period, so he determined that Hunt Oil Company could have reasonably believed that the expiration of the 90-day period did not automatically terminate a lease. Because the Acting Solicitor found the applicable regulation ambiguous, and because the company would have otherwise received inconsistent treatment, he recommended that MMS not cancel the lease.<sup>4</sup> The ambiguous regulation and the company's reliance on its own prior experience with the agency distinguish the Hunt Oil Company case from other cases where a company might seek reinstatement of a lease. Consequently, the Hunt Oil Company case is limited to its facts and cannot legally serve as precedent for other lease reinstatements.

The 1983 memorandum explained that the MMS decision to treat the lease as expired “is the result of a strict application of the regulations; however, on the facts of this case, a strict reading of the rules could run counter to their purpose.” 1983 memorandum at 1. While the 1983 memorandum implies there is an option not to strictly apply the MMS regulations, there is no such option. Nothing in the statute, implementing regulations, or case law interpreting those regulations recognizes any authority to ignore those laws in the face of equitable arguments in favor of reviving an expired lease. In fact, when presented with equitable arguments, the Interior Board of Land Appeals has rejected them in favor of the strict application of regulations. *See, e.g., Kerr-McGee Oil & Gas Corp.*, 172 IBLA at 201 (noting that even when extraordinary events occur or *force majeure* conditions exist that could prevent a lessee from resuming operations in the time period allowed by regulation, the lessee must apply for a suspension within that time period or the lease will expire.).

### *B. Suspension*

As the Board has stated, “[a]ny request for suspension filed subsequent to the expiration of a lease is simply a request for lease reinstatement.” *Harvey E. Yates*, 156 IBLA 100, 106 (2001). Nevertheless, because the cases have not uniformly refrained from discussing the issue in the terminology of “retroactive suspensions,” we will review the law pertaining to suspensions as well.

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<sup>4</sup> The Acting Solicitor also recommended that the agency eliminate any ambiguity in the regulations by deleting the section that seemed to allow lessees to apply for approval to conduct drilling or well reworking operations after production has ceased for more than 90 days. That regulation was deleted in 1979. *See Oil and Gas and Sulphur Operations in the Outer Continental Shelf*, 44 Fed. Reg. 61,886 (Oct. 26, 1979).

As mentioned above, the OCS Lands Act authorizes suspensions that act to extend the lease term in certain situations. The OCS Lands Act directs the Secretary of the Interior to prescribe regulations that include provisions

for the suspension or temporary prohibition of any operations or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition ....

43 U.S.C. § 1334(a)(1).

In the situation addressed by the 1983 memorandum, the lessee had requested a suspension over a month after the lease expired. The Acting Associate Solicitor acknowledged that the request was submitted too late to be granted. Citing *Jones-O'Brien, Inc.*, 85 Interior Dec. 89 (1978), a 1978 onshore case decided under the Mineral Leasing Act, the Acting Associate Solicitor stated, "If a suspension application is not filed prior to the lease expiration, there is nothing in existence for the Department to suspend." 1983 memorandum at 4. Indeed, a number of Interior Board of Land Appeals decisions before and since the 1983 memorandum held that the lessee must submit its request before the lease expires. For example, in *Union Pacific Resources Co.*, 149 IBLA 294, 303 (1999), an offshore case decided under the OCS Lands Act, the Board invalidated a retroactive suspension of an offshore oil and gas lease, explaining that "[i]t 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."<sup>5</sup>

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<sup>5</sup> In *Union Pacific Resources Co.*, the Board interpreted the OCS Lands Act and its implementing regulations, but it relied upon seven other Board decisions applying the Mineral Leasing Act (MLA) to onshore oil and gas leases. The Board thus found MLA precedent applicable to cases involving suspensions under the OCS Lands Act, a point it reiterated recently in *ATP Oil & Gas Corp.*, 173 IBLA 250, 262 (2007) ("the lessee's responsibility for timely action under an MLA lease is no different from that under an OCS [Lands Act] lease."). The legislative history of the OCS Lands Act reveals Congress expected that, through rulemaking, the Department would adopt provisions similar to those of the Mineral Leasing Act, including provisions relating to suspensions, for OCS leases. See *Solicitor's Opinion, M-36927*, 87 Interior Dec. 616, 622 (1980), for a discussion of the history of the OCS Lands Act. See also *Shell Offshore, Inc.*, 107 IBLA 165, 170-71 (1989); *Exxon Company, U.S.A.*, 156 IBLA 387, 399 n.8 (2002).

Among the MLA cases the Board relied upon in *Union Pacific* are *Mobil Producing Texas and New Mexico, Inc.*, 99 IBLA 5, 9 (1987) ("Since it is clear from the record in this case no request for suspension of operations was filed



After the *Union Pacific* decision, the MMS amended its regulations to specifically require lessees to submit requests for suspensions “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).” 30 C.F.R. § 250.171 (2008). See *Postlease Operations Safety*, 64 Fed. Reg. 72756 (Dec. 28, 1999). Any consideration of requests for suspension filed after the expiration of the lease term would be in violation of MMS regulations.<sup>6</sup>

For the same reasons it is impermissible to grant a request for suspension filed after a lease expired, it would also be impermissible to direct a suspension retroactively.<sup>7</sup> If a lease has already expired, then there is no lease term to suspend. Consequently, directing a retroactive suspension after lease expiration is the same as reinstating a lease. *Harvey E. Yates*, 156 IBLA at 106. As discussed above, lease reinstatements are not authorized by the OCS Lands Act and are therefore invalid under the Property Clause of the Constitution.<sup>8</sup>

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prior to the expiration of the lease, there is simply no basis for approving a suspension of appellant's lease. Hence, the lease was properly held to have expired at the end of its term.”); and *Jones-O'Brien, Inc.*, 85 Interior Dec. 89, 94 (1978) (“If a suspension application is not filed prior to the lease expiration, the lease ends totally and there is nothing in existence for the Department to suspend.”). See also *Harvey E. Yates Co.*, 156 IBLA 100, 105 (2001) (“While the Department has the authority to retroactively approve a suspension of a lease after the expiration date has passed, it can do so only if a suspension application was properly filed before the lease expired.” (citations omitted)). In citing onshore cases, the Board demonstrates that, with respect to suspensions, the governing statute is immaterial. The bottom line is that agencies cannot dispose of property, by lease extension or otherwise, without express authorization by Congress. U.S. CONST. art. IV, § 3, cl. 2.

<sup>6</sup> We have found documentation of a retroactive suspension that was granted in 1981 in a letter from Secretary of the Interior Cecil D. Andrus to Mitchell Energy Corporation regarding Lease OCS 092, Offshore Texas (Jan. 8, 1981). In that letter, the lessee’s good faith compliance with the agency-approved schedule and the company’s reliance on a misleading agency letter, in addition to diligent operations and substantial investment in a lease once thought to be depleted, led the Secretary to conclude that unique circumstances existed to support approval of a retroactive suspension in the national interest and to serve the purposes of the OCS Lands Act. This letter was issued before the Interior Board of Land Appeals issued many of its decisions condemning retroactive suspensions, including *Union Pacific Resources Co.*, 149 IBLA 294, 303 (1999), the first case expressly addressing the issue under the OCS Lands Act.

<sup>7</sup> In an anomalous decision, a Federal district court interpreting the MLA concluded that an agency could, in effect, retroactively suspend a lease by consenting to an earlier period of non-production. *Coronado Oil Co. v. Department of Interior*, 415 F. Supp. 2d 1339 (D. Wyo. 2006). The court held that communications from the Bureau of Land Management (BLM) after automatic termination of an onshore oil and gas lease for failure to have a well capable of production in paying quantities amounted to “consent” to non-production under section 17(i) of the MLA (30 U.S.C. 226(i)), *Coronado* at 1351, and thus a suspension of production that extended the term of a lease. The *Coronado* court reasoned that a clause of section 17(i) authorizing the Secretary to “consent” to non-production meant that the BLM could “consent” after termination of a lease and could offer a lessee additional time to re-establish production beyond that provided in the statute. *Id.* at 1348-49. We believe *Coronado* is limited to its facts and not an authoritative interpretation of the MLA outside of Wyoming. It has no bearing on the interpretation or implementation of the OCS Lands Act.

<sup>8</sup> Granting a retroactive suspension, which is prohibited, should be distinguished from retroactively acknowledging a directed suspension, which is permissible. See *Copper Valley Machine Works, Inc. v. Andrus*, 653 F.2d 595, 604-05 (D.C. Cir. 1981) (finding that drilling restrictions imposed by the Secretary during the primary lease term

The authority Congress granted to the Department in the OCS Lands Act to regulate suspensions must be harmonized with the provision of the OCS Lands Act setting the term of OCS leases. Because a suspension tolls the expiration of a lease and extends the lease term by the length of that suspension, granting or directing a suspension after a lease has expired would give the lessee not only the entire lease term, but additional time as well. Such a retroactive suspension would, in effect, extend the term of a lease beyond that authorized by Congress.<sup>9</sup>

Furthermore, any post-expiration “suspension” that would permit the use of the lease for a greater length of time than authorized is inconsistent with the rationale for extending the lease term during a suspension.<sup>10</sup> The Secretary cannot authorize beneficial use of a lease during a suspension of operations and production. *Oil & Gas Lease Suspension*, M-36953, 92 Interior Dec. 293, 297 (1985). In this opinion construing the Mineral Leasing Act, Solicitor Richardson stated of that statute's provision authorizing suspensions,

Section 39 cannot be used to expand the actual period [of] beneficial use granted a lessee beyond that prescribed by Congress, no matter how justified such an expansion appears in a given case. Section 39 can only serve to postpone the period of beneficial use in order to preserve the length of this use specified by the Act.

92 Interior Dec. at 297. While operations are permitted during a “suspension of production,” such a suspension may only be granted after there has been production. *Id.* at 301 (citing *H. K. Riddle*, 62 Interior Dec. 81, 87 (1955)).

The prohibition on retroactive suspensions does not unfairly burden lessees. All persons dealing with the government are presumed to have knowledge of its regulations. *Harvey E. Yates Co.*, 156 IBLA at 106 (“A lessee is expected to understand its obligations under a lease and the applicable rules.”); *Coronado Oil Co.*, 52 IBLA 308, 312 (1981) (“All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations. 44 U.S.C. §§ 1507, 1510 (1976)”). Furthermore, each lessee is responsible for protecting its own interests. *Harvey E. Yates Co.*, 156 IBLA at 106, 107. Therefore, each lessee

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amounted to a directed suspension, and, after the lease expired for lack of a well capable of production, requiring the Secretary to recognize the suspension retroactively and extend the lease).

<sup>9</sup> The lease term is not improperly extended, however, when the MMS grants, after a lease would expire, a request for a suspension that was filed before the lease expired. In that situation, the filing of the suspension request is timely, and the request tolls the expiration of the lease until the MMS acts upon the request. *See Union Pacific Resources, Co.*, 149 IBLA at 303 (“a lease cannot be suspended retroactively unless the request for a suspension is pending before the Department when the lease expires”); *Jones-O’Brien, Inc.*, 85 Interior Dec. at 94-95 (“An application filed before the lease expires can be viewed as preserving the right of the Department to act on the application.”).

<sup>10</sup> This is different than the situation where government action has already prevented the beneficial use of the lease as in *Copper Valley Machine Works, Inc.*, 653 F.2d at 604-05.

should understand that any lease continued beyond its initial period will expire unless certain activities are performed or the lessee requests a suspension before the passing of the applicable time period. It is the lessee's responsibility to protect its interests by making sure it requests a suspension on time.<sup>11</sup> This should be even easier for lessees to do than it was in 1983 because the regulations have been amended to allow more time, 180 days, to resume operations or request a suspension.

#### IV. Conclusion

Through the Property Clause of the United States Constitution, only Congress is given the authority to dispose of Federal property. An agency may dispose of property only under the authority delegated to it by Congress. Nothing in the OCS Lands Act authorizes the MMS 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 the MMS 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 the OCS Lands Act are prohibited based on the Property Clause of the Constitution and require congressional authorization to change. *Compare* Mineral Leasing Act, 30 U.S.C. § 188, which authorizes reinstatement of onshore oil and gas leases in certain situations.

Furthermore, the MMS is bound by the regulations it has promulgated under the OCS Lands Act. It cannot, for example, act on an application for suspension filed after a lease has expired. Allowing retroactive suspensions in contravention of statute and regulations would create an alternate scheme of lease maintenance that cannot be consistently applied and may not be uniformly available. Moreover, the MMS undermines its governing statute and regulations by choosing when to abide by them and when to ignore them. Lessees, in turn, might choose to ignore MMS authorities on the assumption that the MMS can forgive their failure. If lessees believe their leases may be retroactively extended or reinstated, they may be inclined to postpone diligent development of oil and gas leases until the very end of their leases, thus diminishing the ability of Federal resources to contribute to the Nation's energy supply. *Jones-O'Brien, Inc.*, 85 Interior Dec. at 94 n.9, 96. Finally, revival of expired leases undermines the direction in the OCS Lands Act to issue leases for a defined term because it would allow a lessee not only the

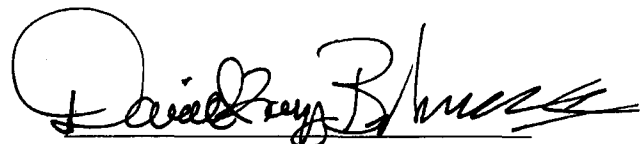
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<sup>11</sup> Not only must the request for suspension be timely, 30 C.F.R. § 250.171, but lessees must ensure that other necessary approvals have been obtained before a lease expires so that the request for suspension is credible. In *ATP Oil and Gas Corp.*, 173 IBLA at 260-61, the Board faulted the lessee for failure to have an approved exploration plan (EP) and application for permit to drill (APD) when it applied for a suspension: "Nothing in the regulatory scheme expects MMS to approve such documents for purposes of extending a lease that would otherwise expire for nondevelopment. To the extent ATP filed these documents at the last minute, expecting MMS to approve plans for a well ATP plainly could not drill before the lease term ended, it was effectively asking MMS to approve the EP and APD so it could obtain [a suspension of operations], not for lease activity that in any event it could not perform." *Id.* at 261.

entire authorized lease term, but an additional indefinite term as well. The revival of a lease would therefore act to extend the term of the lease beyond what was authorized by Congress in the OCS Lands Act.

The conclusion in the 1983 memorandum that the MMS could revive an expired lease is not supported by regulations, case law, or the terms of the lease. The MMS's only alternative is to recognize the lease as expired and reoffer it for lease in the next lease sale.<sup>12</sup> This action is the proper way to achieve the goal of the OCS Lands Act to make the OCS "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." 43 U.S.C. § 1332(3).

This opinion was prepared with the assistance of Dennis Daugherty, Assistant Solicitor for the Branch of Petroleum Resources, Division of Mineral Resources, and Silvia Murphy, Attorney-Advisor, Branch of Petroleum Resources.



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<sup>12</sup> We recognize that there are areas of the OCS where no future lease sales are planned. In those instances, the government may, as predicted by the 1983 memorandum, lose the opportunity to produce the resources covered by the lease. It is for this reason that lessees must protect their interests and avail themselves of the recourses afforded by statute and regulations.