VALID ENERGY, INC.

192 IBLA 7 Decided October 31, 2017
VALID ENERGY, INC.

IBLA 2015-84

Decided October 31, 2017

Appeal from a State Director Review decision affirming a field office's issuance of a Notice of Incidents of Noncompliance for unauthorized surface disturbance on an oil and gas lease. SDR No. LLCA 921014-01.

Affirmed.

1. Administrative Procedure: Burden of Proof; Rules of Practice: Appeals: Burden of Proof

A BLM decision made in the exercise of its discretionary authority must have a rational basis that is stated in the decision and supported by facts of record demonstrating that the decision is not arbitrary, capricious, or an abuse of discretion. An appellant challenging such a decision has the burden to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that its decision is not supported by a record showing it gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

2. Oil and Gas Leases: Incidents of Noncompliance

BLM's oil and gas regulations, at 43 C.F.R. Subpart 3162, impose an affirmative duty on the operator to submit a surface use plan of operations to BLM whenever surface disturbance is anticipated. There is no statutory or regulatory provision requiring BLM to affirmatively request that an operator submit such a plan; it is not BLM's responsibility to discern, from a sundry notice,
whether the operator should have also submitted a surface plan of operations since the operator is in the best position to know the details of its proposal, including whether surface disturbing activities will occur.

3. Oil and Gas Leases: Incidents of Noncompliance: Rules of Practice: Appeals

Even where an oil and gas operator asserts that it acted in good faith, the Board will not invoke equitable principles to allow the operator to avoid the consequences of violating BLM’s regulations.


OPINION BY ADMINISTRATIVE JUDGE SOSIN

Valid Energy, Inc., appeals from a November 20, 2014, State Director Review (SDR) Decision of the California State Office of the Bureau of Land Management (BLM). In the SDR Decision, the Deputy State Director affirmed a June 4, 2014, Notice of Incidents of Noncompliance (INC) issued by the Bakersfield (California) Field Office of BLM. In its INC, the Field Office found violations of the oil and gas regulations based on Valid Energy’s failure to obtain BLM authorization and file a Surface Use Plan of Operations (SUPO) prior to surface disturbance on Valid Energy’s Federal oil and gas lease. In the INC, the Field Office required Valid Energy to provide a surety bond or letter of credit for the monetary value of one acre of habitat to mitigate the impacts of the surface disturbance.

SUMMARY

Under BLM’s oil and gas regulations, an operator must obtain BLM approval of a surface plan of operations before undertaking surface-disturbing activities on a Federal oil and gas lease. Here, Valid Energy submitted to BLM a sundry notice notifying the Bureau that Valid Energy was re-installing power to the lease, but Valid Energy did not submit a surface plan of operations seeking approval for surface disturbance. After BLM discovered that new surface disturbance had occurred on the lease impacting habitat for species listed under the Endangered
Species Act (ESA), it issued to Valid Energy an INC for failure to have the proper authorization for the disturbance, and required Valid Energy to provide a surety bond or letter of credit for the monetary value of purchasing one acre of compensatory habitat. On SDR, the Deputy State Director affirmed the INC.

Valid Energy’s burden on appeal to the Board is to demonstrate error in the Deputy State Director’s decision. But Valid Energy does not demonstrate any error in BLM’s methodology, analysis, or conclusions. Moreover, the administrative record shows that Valid Energy did not comply with the regulatory requirement to seek approval prior to undertaking surface disturbing activities, and that the disturbance impacted habitat suitable for species listed under the ESA. Because Valid Energy does not meet its burden to show error, we affirm the Deputy State Director’s decision.

BACKGROUND

A. New Surface Disturbance on Valid Energy’s Oil and Gas Lease

At issue in this appeal are activities undertaken by Valid Energy on its Federal oil and gas lease (CA 2040666) in Kern County, California. On May 9, 2013, Continental Energy (which, with Valid Energy, owns 50% record title of the lease) filed a sundry notice with BLM to restore production to the Vedder Parkford #3 well on the lease. In its cover letter for the sundry notice, Continental explained that it was “necessary for Continental to restore electricity” on the lease, and that “as soon as electricity has been restored . . . our company will commence rework operations.” In the sundry notice itself, Continental stated that after [Pacific Gas and Electric] reinstalled power to the site, rework operations would begin, including “[i]nstall[ing] wellhead, and return[ing] to production . . .” On May 17, 2013, BLM stamped the sundry notice as “ACCEPTED FOR THE RECORD.”

On December 16, 2013, BLM conducted an on-site inspection to evaluate a new well on the lease, the Vedder Parkford #12-26. During the inspection, BLM

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3 Id.
4 Id.
5 Id.
found that new surface disturbance had occurred during the recompletion of the Vedder Parkford #3 well. At that time, BLM reported that it and Valid Energy disagreed about whether the company had authority to conduct the new surface disturbance. Although Valid Energy indicated to the BLM biologist conducting the inspection that the company had BLM approval for the surface disturbance, the BLM biologist informed Valid Energy that it "did not have authority to conduct new surface disturbance."

Over the next several months, BLM and Valid Energy continued to disagree about the company’s authority to disturb the surface of the lease. BLM states that it told Valid Energy "numerous times in the field, on the phone, and in email correspondence" that it did not have approval to conduct the surface disturbance. One of these communications was a January 9, 2014, e-mail from BLM to Valid Energy, concerning the biological and cultural surveys BLM required Valid Energy to conduct prior to drilling into the lease. In that communication, BLM informed Valid Energy that "any destruction of potential habitat for [ESA-] listed species will require the purchase of off-site mitigation credits or lands (e.g., Kern Water Bank)," and that such mitigation habitat would have to be purchased at a 3 to 1 ratio for permanent disturbance, and a 1.1 to 1 ratio for temporary disturbance.

On January 20, 2014, Valid Energy submitted to BLM an Application for Permit to Drill or Renter (APD) for the new well, the Vedder Parkford #12-26. On February 4, 2014, BLM notified Valid Energy in a 10-Day letter that its APD was "Incomplete/Deficient" because it lacked a SUPO. Valid Energy then submitted a SUPO, and on March 14, 2014, BLM notified Valid Energy that its APD was

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7 Id.
8 Id. at 3, ¶ 11; see id. at ¶ 10 ("[A]ny permit approval would have been in error since it should have included stipulations and conditions of approval for conducting new surface disturbance.").
9 Id. at 3, ¶ 11; see also Answer, Att. 6, E-mails (Jan. 9, 2014), Att. 8, 10-Day Letter (Feb. 4, 2014), Att. 9, E-mails (Feb. 5, 2014, Feb. 11, 2014), Att. 10, E-mails (March 14, 2014), and Att. 17, E-mail (May 21, 2014).
10 Answer, Att. 6, E-mails (Jan. 9, 2014).
11 Id.
12 Answer, Att. 7, Approved APD (July 9, 2014).
13 See Onshore Order No. 1, Section III.E.2.a, 82 Fed. Reg. 2906, 2915 (Jan. 10, 2017) ("Within 10 days of receiving an application, the BLM . . . will notify the operator as to whether or not the application is complete.").
14 Answer, Att. 8, 10-Day Letter (Feb. 4, 2014).
complete." BLM stated that “the 10 Day Letter was written with the understanding that a generator would power the site until powerline plans were finalized.” BLM further informed Valid Energy that because “it is likely that power installation activities would result in vegetation disturbance,” Valid Energy should submit a sundry notice for these activities, including “a project description, maps of new and existing facilities, and a Sensitive Species Review Form.” Valid Energy acknowledged BLM’s request for a sundry notice.

At some point after March 28, 2014, but before May 28, 2014, and before BLM approved Valid Energy’s APD for the Vedder Parkford #12-26, Valid Energy had work performed on the lease to install new electric service consisting of powerlines, service panel, and perimeter fence.

B. BLM’s June 4, 2014, INC

BLM then issued its INC on June 4, 2014. In the INC, BLM cited Valid Energy for “proceed[ing] with power installation without the proper approval . . .” BLM specifically cited Valid Energy for failing to comply with three provisions of BLM’s oil and gas regulations at 43 C.F.R. Subpart 3162 (Requirements for Operating Rights Owners and Operators), which were in effect at the time of its decision: (1) Valid Energy’s failure to submit a SUPO with its sundry notice for the Vedder Parkford #3 violated 43 C.F.R. § 3162.3-2 (2014); (2) the surface disturbance conducted by Valid Energy prior to approval of its APD for the Vedder Parkford #12-26 violated 43 C.F.R. § 3162.3-1 (2014); and (3) Valid Energy’s failure to submit a sundry notice for re-installation of power to the Vedder Parkford #3 and the Vedder Parkford #12-26 violated 43 C.F.R. § 3162.3-3 (2014).

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15 Answer, Att. 10, E-mails (March 14, 2014).
16 Id.
17 Id.
18 Id. (“We have had internal discussion on the testing, no problem we will make sure this happens per specifications. Understood on the Sundry also for the generator/power activity.”).
19 Answer, Att. 29, Photographs and captions (May 28, 2014), Att. 19, E-mails (May 27-28, 2014), Att. 20, E-mails (May 29, 2014), and Att. 21, E-mails (May 30, 2014) (“Based on photographs we were able to determine that the poles were installed sometime after the March 28, 2014, site visit.”).
20 Answer, Att. 22, INC (June 4, 2014).
21 Id. at unpaginated (unp.) 2.
22 Id. at unp. 2-3.
In the INC, BLM identified the new surface disturbance as totaling 0.43 acres, some of which was permanent disturbance (for “Power Poles Excavation” and “Meter Pad Grading”), and some of which was temporary disturbance (for “Pole Installation Off-Road Travel”).\(^{23}\) Based on the compensation ratios of 3 to 1 for permanent disturbance and 1.1 to 1 for temporary disturbance, BLM calculated that Valid Energy was required to provide 0.745 acres in compensation for the disturbance.\(^{24}\) BLM therefore required as corrective action that Valid Energy provide a surety bond or letter of credit for the monetary value of one acre purchased at Kern Water Bank.\(^ {25}\)

C. BLM’s SDR Decision and Valid Energy’s Appeal

Valid Energy provided a surety bond as required by the INC,\(^ {26}\) but requested SDR of the INC and asked to be released from the bond.\(^ {27}\) Valid Energy argued to the State Director that any disturbance on the lease was authorized under the May 2013 sundry notice BLM “accepted for the record,” stating: “There is a clear statement, right in the approved Sundry [] that disturbance would take place . . . . When you ‘reinstall’ something it clearly indicates there will be new installation.”\(^ {28}\) Valid Energy further argued it was not required to submit a SUPO because its activities were authorized by the sundry notice and because BLM did not inform Valid Energy that a SUPO was required.\(^ {29}\) And Valid Energy disagreed with BLM’s habitat mitigation requirement, stating that any disturbance on the lease was not compensable because the well site was previously disturbed and because there is no evidence that the site contains habitat for any ESA-listed species.\(^ {30}\)

\(^{23}\) Id. at unp. 2.  
\(^{24}\) Id.  
\(^{25}\) Id. at unp. 3.  
\(^{26}\) Answer, Att. 24, Decision, Individual Compensation Oil and Gas Lease Bond Accepted, Surety Bond filed as Security for Bond (June 17, 2014).  
\(^{27}\) Answer, Att. 26, Valid Energy Request for SDR (June 26, 2014).  
\(^{28}\) Id. at 2.  
\(^{29}\) See id. (“There were no requirements issued from BLM to provide a SUPO.”).  
\(^{30}\) See id. at 7-12 (citing report provided by Valid Energy’s consultant, Stantec (May 8, 2014)): id. at 9 (“The statements of fact as presented by our Biological consultant clearly show [], with full evidence, that the area they recommended does not require compensation.”).
On November 20, 2014, the BLM Deputy State Director issued the decision now on appeal, affirming the INC. In the decision, the Deputy State Director rejected each of Valid Energy’s arguments.

The Deputy State Director determined that Valid Energy had no approval from BLM for conducting the disturbance associated with reinstalling power on the lease based on the May 2013 sundry notice for the Vedder Parkford #3 well. He explained that the sundry notice was “accepted for the record,” but was not approved because the notice did not indicate “that there would be new surface disturbance or other resource concerns, which would have triggered a National Environmental Policy Act (NEPA) review and the subsequent development of conditions of approval.” The Deputy State Director stated: “Disturbance was not approved. Approval was given for downhole-related operations and Valid’s [sundry notice] provided no indication that surface disturbance was contemplated or planned.”

The Deputy State Director also rejected Valid Energy’s argument that because BLM approved the sundry notice without requesting a SUPO, no SUPO was required. While the Deputy State Director acknowledged that BLM did not request a SUPO, he stated that this was because the sundry notice provided no indication that surface disturbance would occur. The Deputy State Director explained that “the operator is responsible for following all laws and regulations regardless if they were expressly spelled out in the [sundry notice]. Valid obviously contemplated surface disturbance, admits to the surface disturbance, and yet gave no clear indication of such disturbance in the [sundry notice].”

The Deputy State Director further rejected Valid Energy’s argument that because the site was previously disturbed, no new, compensable disturbance could occur. Citing 43 C.F.R. § 3162.3-2 (2014), which provides that “additional surface

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31 SDR Decision at 2.
32 Id.; see id. at 3 (“Valid also does not use the word ‘disturbance’ in the [sundry notice]. . . . Valid is asking that BLM lead to a conclusion that rework operations implies reinstalling power poles, which in turn implies surface disturbance.”).
33 Id. at 2 (“[T]he [sundry notice] was ‘Accepted for the Record’ only and a SUPO was not requested because surface disturbance was not anticipated.”).
34 Id. at 3 (Noting that at an on-site meeting, a Valid Energy representative “explained that the disturbance was a result of the workover operations related to the [Vedder Parkford] #3 well site”).
35 Id. at 6.
disturbance" requires a SUPO, the Deputy State Director stated that any existing disturbance at the site is "irrelevant." Moreover, the Deputy State Director noted that BLM had communicated to Valid Energy several times that disturbance at the site would require compensation. The Deputy State Director therefore concluded:

Surface disturbance occurred on the VP #3 site based on approval by BLM of a [sundry notice] that did not specifically propose any new, additional surface disturbance. . . . Valid, however, was subsequently and repeatedly advised that any new disturbance at either the VP #3 or VP #12-26 sites would require compensation. BLM has documented disturbance to ESA-listed species habitat as occurring after Valid was notified about the compensation requirement.

Valid Energy timely appealed and petitioned for a stay of the effect of BLM’s decision. We granted Valid Energy’s petition for a stay, based on BLM’s non-opposition to a stay.

**DISCUSSION**

**A. Standard of Review and Burden of Proof**

[1] A BLM decision made in the exercise of its discretionary authority must have a rational basis that is stated in the decision and supported by facts of record demonstrating that the decision is not arbitrary, capricious, or an abuse of discretion. An appellant challenging such a decision has the burden to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that its decision is not supported by a record showing it gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made. As we have stated,

[b]ecause the Department is entitled to rely upon the reasoned analysis of its experts in matters within their expertise, the Board will

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36 Id.
37 Id. at 7 (quoting e-mail, dated Feb. 11, 2014, in which BLM informed Valid Energy that any new disturbance would “be compensable”).
38 Id. at 8.
39 Order, Petition for Stay Granted (March 26, 2015).
41 Id.; see also Contango Oil and Gas, Inc., 187 IBLA 262, 267 (2016).
not set an INC aside absent a showing of error by a preponderance of the
evidence; a mere difference of opinion will not suffice to reverse the
reasoned opinions of the Department’s technical staff.\footnote{Contango Oil and Gas, Inc., 187 IBLA at 267.}

Here, then, Valid Energy’s burden is to demonstrate error in the Deputy State Director’s decision affirming the INC. As we explain below, we conclude that Valid Energy has not met this burden.

B. Valid Energy Does Not Meet Its Burden to Show that the Deputy State Director Erred in Affirming the INC

On appeal, Valid Energy argues that BLM erred in the SDR Decision. First, Valid Energy argues that the Deputy State Director erred in the decision by affirming the Field Office’s conclusions in the INC that Valid Energy violated BLM’s oil and gas regulations. Valid Energy bases this argument on its position that the May 2013 sundry notice provided a clear statement to BLM that surface disturbance activities would occur when power was restored on the lease.\footnote{Statement of Reasons (SOR) at 4.} Valid Energy therefore argues that any surface disturbance was authorized and no SUPO was required. Second, Valid Energy argues that the Deputy State Director erred in his decision by concluding that compensable surface disturbance occurred. According to Valid Energy, it did not “admit” to any disturbance and, based on a report by its consultant, Stantec, any disturbance was not compensable because the area was previously disturbed, and there was no evidence of long-term wildlife occupation with the project area.\footnote{Id. at 4, 9-10.} And third, Valid Energy argues that the Deputy State Director erred because he did not “take into account [Valid Energy’s] good faith efforts to comply with BLM regulations and requests . . .”\footnote{Id. at 4.}

We address each argument below.

1. Valid Energy Has Not Shown Error in the SDR Decision’s Affirmance of the Regulatory Violations Cited in the INC

In the SDR Decision, the Deputy State Director affirmed the Field Office’s findings that Valid Energy had violated the regulations at 43 C.F.R. Subpart 3162 by undertaking surface disturbance activities without first: including a SUPO with
its May 2013 sundry notice for the Vedder Parkford #3 (43 C.F.R. § 3162.3-2(a) (2014)); obtaining approval of its APD for the Vedder Parkford #12-26 (43 C.F.R. § 3162.3-1(c) (2014)); and submitting a sundry notice for the re-installation of power on the lease (43 C.F.R. § 3162.3-3 (2014)).

Valid Energy argues, however, that the May 2013 sundry notice gave BLM sufficient notice of a surface disturbance based on its “clear notification . . . that power restoration activity was going to occur.” Valid Energy explains that BLM “knew” the power connections on the lease had been vandalized and that restoration of power on the site “would more likely than not require some substantial construction activity,” and BLM “turn[ed] a blind eye to the obvious . . . .”

BLM disagrees, stating that the sundry notice did not indicate, or provide any “clear statement” that surface disturbance would occur. Contrary to Valid Energy’s assertion that BLM should have known that the re-installation of power would require significant construction activity, BLM states that “[t]he need for additional surface disturbance in any such situation is dependent upon the work required to restore power and the environment in which the work is to be conducted.” BLM argues that Valid Energy did not provide it with any such information and that its sundry notice stated only that electricity was to be restored on the lease.

[2] However, regardless of whether the sundry notice adequately indicated that surface disturbance would occur on the lease as part of power restoration activities, the regulations impose an affirmative duty on the operator to submit a SUPO to BLM whenever surface disturbance is anticipated. As noted above, 43 C.F.R. § 3162.3-2(a) (2014) requires the operator to submit a SUPO with any sundry notice when a proposal will cause additional surface disturbance. And 43 C.F.R. § 3162.3-3 (2014) requires the operator to submit a SUPO before beginning any operations on a leasehold that will result in additional surface disturbance.

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46 SDR Decision at 8.
47 SOR at 6.
48 Id. at 7.
49 Answer at 10.
50 Id.
Valid Energy argues that it was BLM's responsibility to request a SUPO if one was required.\textsuperscript{51} Valid Energy states that the SDR Decision "submits no authority for its erroneous conclusion that a SUPO or some other information should have been automatically submitted with the [sundry notice]."\textsuperscript{52} Valid Energy therefore appears to believe that BLM had a duty to request a SUPO after seeing the sundry notice, and that BLM's failure to request a SUPO excuses any obligation of Valid Energy to submit one. But there is no statutory or regulatory provision requiring BLM to affirmatively request that an operator submit a SUPO. Rather, as we just noted, the regulations are explicit in making the operator responsible for submitting a SUPO to BLM when surface disturbance is anticipated. It is not BLM's responsibility to discern, from a sundry notice, whether the operator should have also submitted a SUPO; the operator is in the best position to know the details of its proposal, including whether surface disturbing activities will occur. Moreover, contrary to Valid Energy's assertion, the fact that the sundry notice form does not include specific instructions about submitting a SUPO is immaterial since there is a regulatory requirement to submit a SUPO with a sundry notice when surface disturbance is anticipated, and Valid Energy is responsible for knowing and complying with the regulations.\textsuperscript{53}

Valid Energy makes a further argument in support of its position, stating that even if a SUPO was required, Valid Energy should be excused from this obligation because the Deputy State Director "erroneously confuse[d]" the well circumstances at the Vedder Parkford #3, where the power restoration occurred, with the well application circumstances at the Vedder Parkford #12-26.\textsuperscript{54} Valid Energy asserts that this confusion should be resolved in its favor.\textsuperscript{55} But we see no indication of confusion in the SDR Decision regarding the Vedder Parkford #3 and the Vedder Parkford #12-26. In determining that Valid Energy did not have appropriate authorization to conduct surface disturbance on the lease, the Deputy State Director addressed both wells in the SDR Decision. He explained that neither the sundry notice for the Vedder Parkford #3, nor the SUPO that had been

\textsuperscript{51} Id. at 8.
\textsuperscript{52} Id.; see id. (stating neither the sundry notice form "general instructions" nor "local BLM regulations" specify any requirement to submit a SUPO).
\textsuperscript{53} See Black Hills Plateau Production, LLC, 188 IBLA 368, 371 (2016) ("[A]ll persons dealing with the Government are presumed to have knowledge of relevant statutes and regulations.").
\textsuperscript{54} SOR at 7.
\textsuperscript{55} Id.
submitted, but not yet approved, for the Vedder Parkford #12-26, gave Valid Energy authorization for its surface disturbance activities.\(^{56}\)

We find that Valid Energy has not met its burden to show that the Deputy State Director’s decision affirming the Field Office’s finding of regulatory violations was in error. Valid Energy had an obligation under the regulations to submit a SUPO for any surface disturbance, and it did not do so. Valid Energy has not shown any material error in BLM’s factual analysis, nor has it shown that the Deputy State Director’s Decision lacks record support.

2. Valid Energy Has Not Shown Error in the SDR Decision’s Affirmance of the INC’s Finding of Compensable Disturbance

The SDR Decision also affirmed the Field Office’s finding in the INC that the area disturbed by the re-installation of power required compensation through the purchase of surety bond or letter of credit for the monetary value of one acre of habitat. In the INC, BLM “conservatively estimated” the disturbance area and compensation acres.\(^{57}\) BLM calculated that the disturbance affected a total of 0.43 acres, and applied a compensation ratio of 3 to 1 for areas not expected to recover within two years, and 1.1 to 1 ratio for areas expected to recover within two years.\(^{58}\) In affirming the INC, the Deputy State Director concluded that surface disturbance to habitat of ESA-listed species (San Joaquin kit fox and blunt-nosed lizard) had occurred after BLM had repeatedly notified Valid Energy that disturbance would require such compensation.\(^{59}\)

Valid Energy argues that the Deputy State Director erred in concluding that compensable disturbance had occurred. First, Valid Energy argues that BLM relied on an alleged “admission” by Valid Energy that disturbance had occurred, but that Valid Energy made no such admission, and “the mere passing reference” by a Valid Energy representative at an on-site meeting that disturbance had occurred “was not an admission that was binding on Appellant . . .” Second, Valid Energy argues that the Deputy State Director “merely assumes that there was compensable surface disturbance,” but the SDR Decision contains no analysis or admissible

\(^{56}\) SDR Decision at 5; see also Answer at 10.

\(^{57}\) Answer, Att. 22 (INC) at unp. 2.

\(^{58}\) Id.

\(^{59}\) SDR Decision at 8.

\(^{60}\) Id. at 9.
evidence to support this conclusion.\textsuperscript{61} Relying on a report prepared by its consultant, Valid Energy states that the evidence shows that no compensable disturbance, in fact, occurred because the site was already disturbed and there was no evidence of long-term wildlife occupation at the site.\textsuperscript{62} Valid Energy states: “\textsuperscript{63}The evidence was that the affected area had been completely scraped during prior abandonment of the VP3 drill site area . . . .”\textsuperscript{64} Valid Energy further states that its consultant’s biological survey revealed that the area consisted of “highly disturbed” and “fragmented” habitat “unlikely to provide high-quality habitat for any wildlife species.”\textsuperscript{65}

The Board finds first, that in stating that Valid Energy “admitted” to the disturbance, the Deputy State Director properly relied on information in the record reflecting Valid Energy’s acknowledgment that disturbance had occurred.\textsuperscript{66} But regardless of any such “admission,” BLM’s conclusion that a disturbance occurred is based on ample evidence in the record, including photographic documentation of the installation of power poles sometime after March 28, 2014, and e-mail correspondence between BLM and Valid Energy in which BLM repeatedly notified Valid Energy that any disturbance would require compensation.\textsuperscript{67} Valid Energy’s claim that it did not admit to any disturbance is unsupported and provides no basis for finding error in the SDR Decision.

Further, we find that the administrative record supports the Deputy State Director’s conclusion that the disturbance was compensable. The Deputy State Director relied on BLM experts – two wildlife biologists, a botanist, and an ecologist

\textsuperscript{61} SDR Decision at 3; see also Answer, Att. 3, Declaration of John Hodge, at 4, ¶ 10 (stating that at the onsite inspection on December 16, 2013, “Valid indicated that they had BLM approval for the [new disturbance]”); Answer, Att. 9, E-mail (Feb. 4, 2014) (“It would appear that [BLM’s ecologist] did not get the understanding of the existing Sundry with regards to disturbance.”); id., E-mail (Feb. 5, 2014) (“[I]t is [Valid Energy’s] understanding that our sundry notice authorized us to work on that existing drill site . . . . All disturbances to date are what has been required to work on the existing drill site and covered under the approved sundry notice.”).

\textsuperscript{62} See Answer, Att. 29, Photographs and captions (May 28, 2014).

\textsuperscript{63} See, e.g., Answer, Att. 10, E-mails (Mar. 14, 2014), Att. 11, E-mails (Mar. 28–Apr. 1, 2014), and Att. 15, E-mail (May 20, 2014).
who concluded that the disturbance impacted habitat of ESA-listed species. For example, the wildlife biologists submitted photographs documenting the disturbance by showing the site before and after installation of the power poles.\textsuperscript{68} In addition, the photographs show that “[t]he new meter and power poles . . . have been placed within areas that previously contained typical non-native annual grassland habitat.”\textsuperscript{69} Contrary to the conclusion reached by Valid Energy’s consultant, BLM states that such habitat is “suitable for the support of two ESA-listed species in the area – the San Joaquin kit fox and the blunt-nosed lizard.”\textsuperscript{70} As BLM further explains, BLM informed Valid Energy that it considered such non-native annual grassland habitat to be compensable.\textsuperscript{71} In addition, the administrative record shows that BLM’s ecologist told Valid Energy that power installation activities “would result in vegetation disturbance” and that any disturbance would require a sundry notice that included, among other things, a “Sensitive Species Review Form (quantity and map any habitat disturbance.).”\textsuperscript{72} And after the re-installation of power occurred, the ecologist concluded that the disturbance, which occurred over “an unnecessarily large area,” would require compensation.\textsuperscript{73}

Moreover, in rebutting Valid Energy’s consultant’s report and conclusion that no compensable disturbance occurred, BLM points out that the area assessed by Valid Energy’s consultant was limited to the well pad area for the Vedder Parkford #12-26, but did not include the area along the power corridor, which is where the disturbance occurred and for which compensation was required.\textsuperscript{74} BLM states that Valid Energy’s consultant examined only the existing well pad and a 0.23-acre expansion area, which “is due north of the well pad . . . , while the power corridor is due east . . . , an area that is not included in Stantec’s biological report.”\textsuperscript{75} As such, BLM argues that the consultant’s report provides no support for Valid Energy’s

\textsuperscript{68} See Answer at 14 (citing Att. 29, Photographs and captions (May 28, 2014)).
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 14-15; see id. at 14 (citing U.S. Fish and Wildlife Service five-year reviews for the San Joaquin kit fox and blunt-nosed lizard, which state that these species occupy sparsely vegetated habitat).
\textsuperscript{71} Id. at 15: see also id., Att. 11, E-mails (Mar. 28, 2014-Apr. 1, 2014).
\textsuperscript{72} Id., Att. 10, E-mails (Mar. 14, 2014).
\textsuperscript{73} Id., Att. 15, E-mail (May 20, 2014).
\textsuperscript{74} See Answer at 15: id. at 18 (“Appellant appears to confuse Stantec’s assessment of the Project Area with the power corridor.”).
\textsuperscript{75} Id. at 15.
And, as noted above, BLM concludes that the consultant’s general description of the habitat in the area surrounding the well pad supports BLM’s conclusion that the disturbed area is suitable for ESA-listed species: “[R]ather than supporting Appellant’s argument that the power re-installation disturbance was not compensable, the biological report describes the general area as possessing features typical of habitat for species listed under the Endangered Species Act of 1973, including blunt-nosed lizard and San Joaquin kit fox habitat.”

As this Board has repeatedly held, BLM is entitled to rely on the professional opinion of its technical experts concerning matters within the realm of their expertise, when such opinion is reasonable and supported by the record. Here, we find that the administrative record supports BLM’s determination that disturbance resulting from power re-installation activities on the lease occurred, and was compensable because it impacted habitat of the San Joaquin kit fox and blunt-nosed lizard. Valid Energy’s consultant disagrees, but bases his findings on the limited area of the well pad, and not on the area where the disturbance occurred. Moreover, Valid Energy’s consultant does not demonstrate, by a preponderance of the evidence, error in the methodology, analysis or conclusions of BLM’s experts. The consultant’s difference of opinion with BLM’s own experts is insufficient to satisfy Valid Energy’s burden to demonstrate error.

Finally, we reject Valid Energy’s argument that the SDR Decision was in error because BLM did not follow its own guidance in determining that compensable mitigation was required. Valid Energy asserts that BLM did not comply with a 2005 BLM Instruction Memorandum (IM), Interim BLM Offsite Compensatory Mitigation for Oil, Gas, Geothermal and Energy Rights-of-Way Authorizations, including the IM’s guidance to consider other forms of onsite

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76 Id. at 15-16.
77 Id. at 16 (citing id., Att. 30, San Joaquin Kit Fox (Vulpes macrotis mutica), 5-Year Review: Summary and Evaluation (Feb. 12, 2010), and Att. 31, Blunt-nosed leopard lizard (Gambelia sila), 5-Year Review: Summary and Evaluation (February 2010).
78 See, e.g., Clayton Valley Minerals, LLC, 186 IBLA 1, 15 (2015); Salinas Ramblers Motorcycle Club, 171 IBLA 396, 400 (2007); Yates Petroleum Corp., 188 IBLA at 329 (citing West Cow Creek Permittees, 142 IBLA 224, 238-42 (1998)).
79 See Contango Oil and Gas, Inc., 187 IBLA at 267.
80 SOR at 10-11.
81 IM No. 2005-069 (Feb. 1, 2005).
mitigation before requiring offsite mitigation, and implement offsite mitigation requirements "generally for the same or similar impacted species or habitats . . .."82

The 2005 IM, however, was an interim policy that is no longer in effect. BLM issued a revised policy in 2008,83 and again in 2013.84 Valid Energy acknowledges that the 2005 policy is no longer in effect, but argues that "it is still being referenced by DOI/BLM as guidance for local BLM offices . . . ."85

While it is correct that the 2013 IM referenced the 2005 IM, it was mentioned only as part of the background information, and the 2013 IM expressly stated that the new IM, and the Draft Regional Mitigation Manual Section attached to it, replaced previous guidance.86 Moreover, we find that BLM's decision to require compensation for Valid Energy's unauthorized surface disturbance was consistent with the 2013 policy and draft manual. The draft manual emphasized a regional approach to mitigation and stated that in some cases, "it may be appropriate to compensate for the direct and indirect impacts of a BLM authorization by conditioning that authorization on the performance of mitigation outside the area of impact."87 For example, under the 2013 policy and draft manual BLM could consider offsite mitigation when the direct and indirect impacts of an action would not be mitigated to an acceptable level onsite and mitigation outside the area of impact could succeed in mitigating impacts to an acceptable level.88 Further, the draft manual specifically contemplated that mitigation may be "out-of-kind," i.e., mitigation involving different resources or values than what was being impacted.89

Here, Valid Energy proceeded with power re-installation activities without the proper authorization from BLM, and, therefore, as BLM states, this meant that Valid Energy "denied BLM an opportunity to implement on-site mitigation" as part of any authorization to conduct the surface disturbing activities.90 BLM's

82 SOR at 11.
83 IM No. 2008-204, Offsite Mitigation (Sept. 30, 2008).
85 SOR at 10 n.1.
87 Answer, Att. 34, Draft MS-1794 – Regional Mitigation Manual Section at 1-5.
88 Id. at 1-7.
89 Id. at 1-9.
90 Answer at 17.
requirement that Valid Energy purchase one acre of offsite compensation habitat for the onsite surface disturbance that occurred during power re-installation was entirely consistent with BLM’s 2013 policy, and we find no showing of error in Valid Energy’s assertions to the contrary.

3. Valid Energy Has Not Shown Error in the SDR Decision Based on Its Confusion or Innocent Misunderstanding and Good Faith Efforts

Valid Energy contends that the Deputy State Director erred by failing to properly take into account its “confusion or innocent misunderstanding” based on BLM’s acceptance of the May 2013 sundry notice, which referenced the power restoration activity, and Valid Energy’s “good faith efforts to comply with BLM regulations and requests with respect to the restoration of the [Vedder Parkford #3] well.”

Valid Energy asserts that the record demonstrates “substantial good faith” through “numerous cooperative and informative emails . . . demonstrating a sincere effort at compliance . . .” BLM disagrees that Valid Energy acted in good faith or that even if it did, “this somehow excuses its resulting conduct.”

BLM has discretion to determine the consequences of a regulatory violation, including requiring the purchase of compensatory habitat as mitigation. Indeed, in the SDR Decision, the Deputy State Director exercised his discretion to excuse Valid Energy’s violations relating to surface disturbance that occurred at the Vedder Parkford #3 prior to March 14, 2014. The Deputy State Director explained that because there may have been “potential confusion,” and BLM “could not document any ‘take’ of an individual listed species under the ESA, BLM used its discretion to not charge compensation” for this disturbance. The Deputy State Director then exercised his discretion differently with respect to the surface disturbance that occurred after March 14, 2014. Based on BLM’s repeated notice to Valid Energy that any new disturbance either at the Vedder Parkford #3 or the Vedder Parkford #12-26 would require compensation, and BLM’s finding that there was disturbance to habitat for ESA-listed species, the Deputy State Director affirmed the Field...
Office's finding of regulatory violations and mitigation requirement. We find no error in BLM's action.

Valid Energy urges the Board to give weight to its "confusion or innocent misunderstanding." But we have already concluded that the Deputy State Director's decision is supported by the record, and that Valid Energy has not shown any error in BLM's methods, analysis or conclusions. And this Board will not invoke equitable principles to allow an appellant to avoid the consequences of violating BLM's regulations.

CONCLUSION

We conclude that Valid Energy has not met its burden to show error in the Deputy State Director's decision affirming the INC. Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, we affirm the November 20, 2014, SDR Decision.

/s/
Amy B. Sosin
Administrative Judge

I concur:

/s/
James F. Roberts
Deputy Chief Administrative Judge

96 Id. at 7-8.
97 SOR at 12.
98 See Pacific Energy and Mining Co., 189 IBLA 85, 94 (2016) ("[W]e find no precedent for invoking equitable principles to allow [appellant] to avoid the contractual consequences for failure to satisfy the diligent drilling obligations set forth in section 9 of the Unit Agreement.").