



INTERIOR BOARD OF INDIAN APPEALS

Navajo Nation v. Navajo Regional Director, Bureau of Indian Affairs

40 IBIA 108 (09/29/2004)

Related Board case:  
28 IBIA 210



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

NAVAJO NATION,	:	Order Affirming Decision
Appellant,	:	
	:	
v.	:	
	:	Docket No. IBIA 02-22-A
NAVAJO REGIONAL DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee.	:	September 29, 2004

The Navajo Nation (Nation) appeals an October 26, 2001, decision of the Navajo Regional Director, Bureau of Indian Affairs (Regional Director; BIA), in which the Regional Director declined to issue a notice of noncompliance to the Pittsburg & Midway Coal Mining Company (P&M) for failure to comply with an approved mining plan. The Nation contends that P&M's mining plan obligated it to mine what is referred to as the "Green" seam of coal in a portion of the McKinley Mine located on tribal lands within the Navajo Reservation, and that it failed to do so. <sup>1/</sup> For the reasons discussed below, the Board of Indian Appeals (Board) affirms the Regional Director's decision.

This matter previously has been before the Board, but with P&M as the appellant. In Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director, 28 IBIA 210 (1995), P&M appealed from a 1995 BIA notice of noncompliance and penalty assessment, which were based on P&M's same failure to mine the Green seam coal that is at issue in the present appeal. In that case, the Board vacated the notice-of-noncompliance portion of the Area (now Regional) Director's decision because it had been issued pursuant to a regulation that the Board held to be inapplicable. The Board dismissed the penalty portion of the appeal for lack of jurisdiction, because the penalty decision was subject to review by the Bureau of Land Management (BLM) supervisor. Six years later, as further described below, the Regional Director issued her October 26, 2001, decision, in which she declined to reissue a notice of noncompliance to P&M. The Nation now appeals that decision.

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<sup>1/</sup> In the McKinley Mine, different coal-bearing strata within the geologic column or stratigraphy have been named by color designations, one of which is referred to as the "Green seam" or "Green seams." (P&M Mot. to Intervene at 6; P&M Answer Br. at 4.)

## Background

The McKinley Mine is a large coal mine operated by P&M, which is located in McKinley County, New Mexico. A portion of the mine is located within the boundaries of the Navajo reservation, on tribal trust lands leased in 1964 from the Nation by P&M. In the lease, entered into pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a–396g (2000) (IMLA), P&M agreed to comply with existing and future applicable regulations, including but not limited to the IMLA regulations, 25 C.F.R. Part 211, and the Mineral Leasing Act of 1920 (MLA) regulations, 43 C.F.R. Part 3480. (1964 Lease art. X.) <sup>2/</sup> In 1985, the Nation and P&M amended the lease, making the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101–2108 (IMDA), and its implementing regulations, 25 C.F.R. Part 225, potentially applicable as well.

Under the lease, BLM is designated as the “mining supervisor, \* \* \* authorized and empowered to supervise and direct operations.” (1964 Lease art. XXIV, ¶ 2.) <sup>3/</sup> Similarly, under the IMLA and IMDA regulations for Indian coal leases, BLM is vested with its mining oversight and supervisory functions, authority, and responsibilities identified in 43 C.F.R. Part 3480 of the MLA regulations. See 25 C.F.R. §§ 211.1(c), 211.3, 211.4, 225.1(c), 225.3, 225.4. Under 43 C.F.R. Part 3480, BLM’s responsibilities include oversight and inspection of coal mining operations, and determining compliance with approved mining plans, referred to as “resource recovery and protection plans” (R2P2s). 43 C.F.R. § 3480.0–6(d), (d)(4).

The MLA regulations require operators or lessees to conduct coal mining operations in accordance with an approved R2P2. 43 C.F.R. § 3481.1(b). An R2P2 is subject to BLM’s approval, and BLM has the authority to require modifications to existing R2P2s, and to approve or disapprove R2P2 modifications that are proposed by operators or lessees. See id. §§ 3480.0–6(d)(2); 3482.2(b)(2), (c)(2).

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<sup>2/</sup> In the 1964 lease, the IMLA regulations are referenced as 25 C.F.R. Part 171, which was later redesignated as 25 C.F.R. Part 211, 47 Fed. Reg. 13327 (Mar. 30, 1982). The lease references 30 C.F.R. Part 211 for the MLA regulations for coal mining. Those regulations are now found at 43 C.F.R. Part 3480. See 43 C.F.R. Part 3480 Note 2.

The MLA applies to leases of Federal — not Indian — coal, but the MLA’s implementing regulations include provisions that directly or by incorporation in the IMLA and IMDA regulations apply to Indian coal leases, or which otherwise may be relevant to Indian coal mining operations.

<sup>3/</sup> The 1964 lease refers to the mining supervisor as an official of the U.S. Geological Survey, but under the current regulations, BLM performs that function. See 43 C.F.R. Part 3480 Note 2.

Neither the IMLA nor the IMDA regulations provide BIA with a role in the approval of R2P2s. As the agency with jurisdiction over Indian leased lands and minerals, however, BIA is vested with the general role of “superintendent.” See 1964 Lease art. XXIV, ¶ 1; 25 C.F.R. § 211.3. Both the IMLA and IMDA regulations vest BIA with an enforcement role when an operator or lessee fails to comply with the terms of a lease or with applicable regulations, including failure to follow an approved mining plan. See 25 C.F.R. §§ 211.54(a); 225.36(a); Final Rule, 61 Fed. Reg. 35634, 35650 col. 1-2 (July 8, 1996).

In 1986, the portion of the McKinley Mine located on the Nation’s leased lands was included in a “logical mining unit” (LMU), approved by BLM. The LMU allowed P&M to treat the McKinley Mine as an operational unit, despite multiple owners of the coal in different parts of the Mine. <sup>4/</sup> The LMU did not purport to change the regulatory authority over the tribally leased lands, or to modify the terms and conditions of the Nation’s lease with P&M. See Letter from Zah to Jordan of Oct. 14, 1986; Letter from Jordan to Zah of Nov. 17, 1986.

P&M then prepared an R2P2 for the McKinley Mine LMU, which covered mining operations for certain Federal coal leases and for the portion of the tribal lease area that is at issue in this appeal. BLM approved the R2P2 in 1987. The R2P2 set out four criteria for what constituted “recoverable coal”: (1) a minimum coal seam thickness of 18 inches; (2) coal less than 180 feet in depth from the surface; (3) coal having greater than 9,500 BTU/lb.; and (4) coal having no more than a 20:1 stripping ratio. <sup>5/</sup>

In September 1991, P&M notified BLM that it would discontinue the recovery of Green seam coal in Area 2 of the Mine, an area located wholly within the Navajo coal lease lands. P&M stated that the decision was “based upon several factors, some of which include strip ratio, seam thickness, loaded quality, seam depth and the logistics of mining this seam, as it relates to the overall mine operation.” (Letter from Justis to Beecham of Sept. 4, 1991.)

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<sup>4/</sup> In addition to the tribal lands within the boundaries of the Navajo Reservation that are the subject of this appeal, the portion of the McKinley Mine located south of the reservation boundary includes lands subject to Federal coal leases, private lands, and individual Indian allotted trust lands.

<sup>5/</sup> In oversimplified terms, “stripping ratio” refers to a ratio between the amount of material dug in a strip mining operation and the amount of coal recovered from the operation. As illustrated by this case, there may be significant differences among more specific definitions and in how to calculate the ratio in a given context.

On October 1, 1991, BLM responded to P&M, characterizing P&M's letter to BLM as a "request" to discontinue mining the Green seam coal in Pit 2. <sup>6/</sup> BLM stated: "Based on field observations and reviews of our files, BLM approves the modification to your current mine plan." (Letter from Beecham to Justis of Oct. 1, 1991.)

In 1994, the Secretary of the Interior received an anonymous note from a Departmental employee, alleging that BLM's 1991 approval for P&M to discontinue mining the Green seam coal had occurred without a proper, in-depth review. The note alleged that a significant amount of coal that originally was considered mineable would be left in place because of BLM's decision, to the detriment of the Nation.

In response, BLM established a "Green Seam Review Team" (Review Team), which included representatives from the Navajo Nation Minerals Department, BIA, the Office of Surface Mining, and BLM. In January 1995, the Review Team finished its report. The report focused on three criteria in P&M's 1987 R2P2 to determine whether the Green seam coal was mineable: depth, quality (BTU content), and stripping ratio. The report rejected depth and quality as justifications to discontinue mining the Green seam. The Review Team had more difficulty evaluating stripping ratio. According to the Review Team, "'stripping ratio' was interpreted differently" by BLM, P&M, and even within the R2P2. (Green Seam Review Report, at 4.) Ultimately, however, the Review Team decided what it considered to be the appropriate interpretation of stripping ratio, and then rejected stripping ratio as a justification for P&M to discontinue mining the Green seam coal. Id. The Review Team concluded that "there is not enough quality information at this time to warrant the approval of the discontinuance of mining the Green zone coal seams by BLM-Farmington." Id.

On March 2, 1995, the BLM Farmington District Manager wrote to the McKinley Mine Manager of Engineering, advising P&M of the results of the Green Seam Review Team investigation. The letter gave P&M 30 days to satisfactorily explain "why [an improper] by-pass has in fact not occurred," or be subject to a notice of noncompliance for failure to follow the approved mine plan, and subject to penalties. (Letter from Pool to Whitman of Mar. 2, 1995.) The letter did not mention BLM's 1991 letter approving P&M's actions.

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<sup>6/</sup> The nomenclature for identifying areas of the mine is not entirely uniform in the record. As the Board understands it, the McKinley Mine is divided into several large "Areas" of mining operations, each area of which may contain numerous successive "pits," which are dug and subsequently covered and reclaimed during the strip mining operation. The specific portion of the mine involved in the controversy in this case is variously referred to as "Area 2;" "Pit 2;" and in pre-1990 reports, the "950 Pit."

On April 18, 1995, BLM sent a memo to BIA stating that P&M had not responded within the time frame specified, and recommending that BIA “proceed with issuance of a Notice of Noncompliance to [P&M] for failure to comply with their approved R2P2.” <sup>7/</sup> (Memorandum from BLM Farmington District Manager to BIA Navajo Area Director of Apr. 18, 1995.) The memo stated that “[t]he Review Team determined that prior to July 1994 approximately 1,000,000 tons of minable (sic) reserves meeting the criteria outlined in the approved 1987 R2P2 were bypassed and therefore the McKinley Mine was in non-compliance with their approved R2P2.” Id. The memo did not mention BLM’s 1991 letter approving P&M’s actions.

On June 19, 1995, the BIA Acting Navajo Area Director issued a notice of noncompliance and assessment of penalties to P&M, pursuant to 25 C.F.R. § 216.10 and Article X of the lease, the section of the lease requiring P&M to comply with all applicable regulations. Part 216 of 25 C.F.R. provides regulations for the protection and conservation of nonmineral resources during mining operations on Indian lands, and section 216.10 contains the inspection and enforcement provisions. Under section 216.10, if the BLM mining supervisor determines that an operator has failed to comply with a mining plan, BIA “shall” serve a notice of noncompliance upon the operator.

P&M appealed the Area Director’s June 19, 1995, decision to the Board, and also filed a request for a hearing before the BLM supervisor regarding the penalty assessment. On October 4, 1995, the Board decided the appeal without reaching the underlying merits. The Board vacated the Area Director’s notice of noncompliance because the Board concluded that 25 C.F.R. Part 216 was not applicable to the lease, a conclusion upon which the parties had come to agree during the course of the appeal. Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director, 28 IBIA 210, 213, 215 (1995). The Board dismissed the penalty portion of the appeal as outside of the Board’s jurisdiction and as properly before the BLM supervisor. Id. at 214-15. Subsequently, on December 15, 1995, BLM rescinded the civil penalty assessment portion of BIA’s June 19, 1995, notice of noncompliance. (Letter from Pool to Haller of Dec. 15, 1995.)

In its decision, the Board noted that the Area Director “may intend to reissue the vacated part of his June 19, 1995, decision under 25 CFR 225.36, as [was] suggested in his reply brief,” 28 IBIA at 215, although the Board expressed no opinion whether 25 C.F.R. Part 225 was applicable. The Board did not, however, remand the case to BIA or require further action by the Area Director.

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<sup>7/</sup> P&M contends that it had promptly requested an extension of time from BLM, because BLM had not provided it with a copy of the Green Seam Review Report.

BIA did not reissue the notice of noncompliance. Instead, in September 1996, BIA retained a private engineering firm, Lyntek, Inc., to perform an analysis of the events relating to the Green seam controversy, and to assess whether P&M was justified to discontinue mining the Green seam coal in October 1991. In May 1997, Lyntek finalized its report. (Mineability of the Green Seam Pit 2, North McKinley Mine, McKinley County, New Mexico; Lyntek, Inc. May 1997 (Lyntek Report).) Noting that there are several possible definitions of “stripping ratio,” Lyntek found that under one approach, the Green seam coal would satisfy the stripping ratio criteria in the 1987 R2P2; under another approach it would not. The problem, in Lyntek’s opinion, was “that no supporting data were supplied by P&M in 1991 which would lead a person to approve this mining change.” *Id.* at 9. In addition to discussing the “mineability” criteria, the Lyntek Report noted that there was some evidence, including BLM field notes taken from mine inspections, that difficult mining conditions might have contributed to the decision not to mine the Green seam coal. *See id.* at 11.

Three years later, on May 8, 2000, BIA, BLM, and Navajo Nation Minerals Department representatives met to discuss P&M coal mining issues, including the Green seam issue. At the meeting, BLM indicated that operational and safety issues were among the reasons for its 1991 approval for P&M to discontinue mining the Green seam coal, although admittedly those reasons had not been communicated to the Nation at the time. Those issues had, however, been documented in BLM inspection reports prior to 1991, and a summary of those reports was provided to the Nation at the meeting. The BLM and BIA representatives informed the Nation that they proposed not to pursue P&M about the Green seam. The Nation asked for a decision in writing. Notes from the meeting indicate that BLM would prepare a “decision letter,” which BIA would review and concur with.

On June 6, 2000, the BLM New Mexico State Director wrote to the Regional Director, referencing the May 8 meeting with tribal representatives, in which “[t]he BLM representatives articulated BLM’s position supporting our decision in 1991 to allow P&M to cease mining the Green Seam in Area #2.” (Letter from Chávez to Chicharello of June 6, 2000.) BLM’s letter asserted that the Lyntek study supported BLM’s 1991 decision, and concluded: “The BLM has examined the issue of mining the Green Seam in Area #2. We have determined that the Farmington Field Office Decision of 1991 was justified and no further action on our part is warranted on this matter.” *Id.*

In a short transmittal letter dated July 21, 2000, the Regional Director then forwarded to the Nation a copy of BLM’s June 6, 2000, letter, which the Regional Director described as “contain[ing] the BLM decision on the Green Seam issue.” The Regional Director did not state a BIA position on the issue.

Approximately nine months later, in two follow-up letters, the Director of the Navajo Nation Minerals Department wrote to the Regional Director, noting BLM’s June 6, 2000,

letter reaffirming BLM's 1991 decision, but expressing doubt about the Lyntek report and stating that the Nation needed to know BIA's official position on the matter. In the letters, the Nation asked whether BIA intended to issue a notice of noncompliance to P&M for failure to follow its approved R2P2. (Letter from Zaman to Chicharello of April 12, 2001; Letter from Arthur to Chicharello of May 16, 2001.)

On October 26, 2001, the Regional Director responded to the Nation. The letter noted that BLM had reaffirmed its 1991 decision to allow P&M to cease mining the Green seam. The letter stated: "Because the BLM has determined that P&M's actions were in compliance with the mining plan, the BIA will not issue a notice of non-compliance requiring that either the operator mine the area in question or compensate the Navajo Nation for coal not mined." (Letter from Chicharello to Begaye of Oct. 26, 2001.) Despite the Board's earlier decision in Pittsburg & Midway Coal Mining Co., 28 IBIA 210, holding that 25 C.F.R. Part 216 was inapplicable to the lease, the only regulation cited by the Regional Director was 25 C.F.R. § 216.10(b).

The Nation appealed to the Board. On receipt of the Nation's notice of appeal, the Board expressed two concerns about the Regional Director's October 26, 2001, decision: First, the only regulation cited was 25 C.F.R. § 216.10, which the Board had held inapplicable. Second, the Regional Director's decision contained no analysis and no explanation for the change from the 1995 Departmental position, other than its reference to the letter from BLM. Navajo Nation v. Navajo Regional Director, Docket No. IBIA 02-22-A (Nov. 26, 2001) (pre-docketing notice and order for briefing from Regional Director). The Board ordered briefing from the Regional Director to show the regulatory basis for her decision, and also ordered the Regional Director to provide an analysis to support the decision.

The Regional Director responded, citing 25 C.F.R. §§ 211.54(k) and 225.36(a), from the IMLA and IMDA regulations, as authority for her decision. Section 211.54(k) provides that BIA and BLM should consult with one another before bringing an enforcement action, and section 225.36(a) provides that if the Secretary determines that an operator has failed to comply with a mining plan, the Secretary may pursue enforcement measures. The Regional Director also discussed the relative roles of BIA and BLM in the oversight of mining operations under the IMLA and IMDA regulations, citing provisions from 25 C.F.R. Part 211 and 225, and 43 C.F.R. Part 3480. On January 16, 2002, the Board accepted the Regional Director's response as an amendment to her October 26, 2001, decision. Navajo Nation v. Navajo Regional Director, Docket No. IBIA 02-22-A (Jan. 16, 2002) (order accepting amended authority citation and requesting record).

## Standard of Review

In reviewing BIA decisions based on BIA's exercise of its discretion, the Board does not substitute its judgment for that of BIA. Instead, the Board reviews such decisions "to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limitations on its discretion established in regulations." City of Eagle Butte, South Dakota v. Aberdeen Area Director, 17 IBIA 192, 196 (1989). The Board may review whether the administrative record is adequate to support the decision. ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, 23 IBIA 228, 240 (1993). Even when the decision itself is left to BIA's discretion, BIA has an obligation to provide a reasonable explanation for its decision, and the Board has authority to review the adequacy of that explanation. Id. at 239. An appellant bears the burden of proving that BIA did not properly exercise its discretion. City of Lincoln City, Oregon v. Portland Area Director, 33 IBIA 102, 104 (1999). In contrast to the limited role of the Board in reviewing discretionary determinations, the Board reviews BIA legal determinations de novo. Id.; Citizen Band Potawatomi Indian Tribe of Oklahoma v. Anadarko Area Director, 28 IBIA 169, 178 (1995).

## Discussion

Intervenor P&M raises a threshold challenge to the Board's jurisdiction. P&M contends that the actual relief sought by the Nation — an enforcement action by BIA against P&M — is time-barred by two federal statutes of limitations, which, according to P&M, apply equally to administrative as well as judicial proceedings. P&M argues that a BIA enforcement action against P&M for money damages (including any claim for the royalty value of unmined coal) is barred by the 6-year statute of limitations in 28 U.S.C. § 2415, citing Oxy USA, Inc. v. Babbitt, 268 F.3d 1001 (10th Cir. 2001). P&M also asserts that any penalty assessment by the Department would be barred by 28 U.S.C. § 2462, citing Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996) and 3M Co. v. Browner, 17 F.3d 1453, 1461 (D.C. Cir. 1994). Therefore, P&M contends, a Board decision could at best only be advisory in nature because even if the Board reverses the Regional Director's decision, she could not pursue the enforcement action sought by the Nation.

The Nation responds that it would be premature for the Board to consider P&M's jurisdictional argument, because unless and until BIA were to decide, on remand, to take an enforcement action, the issue is not ripe for review.

We agree with the Nation that P&M's statute of limitations argument against the Board's jurisdiction is not ripe for review. Although it is clear that the Nation's desired outcome in this matter would be an enforcement action against P&M by BIA, the specific relief sought from the Board is a ruling that BIA did not adequately justify its decision, legally misinterpreted its role in relation to BLM, or did not have a sufficient basis in the existing

administrative record to support its decision. According to the Nation, it “brought this appeal primarily because neither the Bureau of Land Management nor BIA provided an adequate explanation for their decisions.” (Navajo Nation’s Request for Release of Docs. from the Admin. Rec. at 4-5.)

Undoubtedly, the “guidance” that the Nation urges the Board to provide in a ruling would severely constrain BIA’s ability to decline to pursue an enforcement action, but the Nation does not preclude that possibility, and neither could the Board if it returned the matter to the Regional Director. We also note that were BIA to decide to pursue an enforcement action, it is not at all clear that its remedies would be limited to those that P&M argues are barred — damages and penalties — and therefore it is not clear what law might apply to such an enforcement action. Therefore, we conclude that P&M’s statute of limitations argument is not ripe for Board review and that the Board has jurisdiction to consider the merits of the Nation’s appeal.

Addressing the merits of this appeal, the Nation contends by failing to mine the Green seam coal, P&M violated its approved mining plan — the 1987 R2P2 — thereby also violating the regulations and the lease. According to the Nation, once BLM accepted the 1987 R2P2, with its physical criteria for defining mineable coal, “the Plan became a mining contract that P&M is obligated to comply with.” (Appellant’s Opening Br. at 3.) The Nation also argues that because the Green Seam Review Team found that the Green seam coal met all of the criteria set forth in the 1987 R2P2 for mineable coal, P&M was obligated to mine it.

The Nation asserts that the Regional Director’s decision was arbitrary, capricious, an abuse of discretion, not in compliance with law, and not supported by substantial evidence. It contends that the Regional Director “reversed” her 1995 decision without any reasonable explanation and that her sole justification was BLM’s June 6, 2000, decision. The Nation argues that the Regional Director could not permissibly rely on BLM here because BLM’s June 6 letter was itself so vague that it was impossible to determine BLM’s reasoning behind its decision to reaffirm the 1991 decision. According to the Nation, BIA’s trust obligation to the Nation required that BIA exercise independent judgment and provide its own separate justification, and that it select the reasonable course of action that best promotes the Nation’s interest. See Appellant’s Opening Br. at 15 (citing Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir. 1986); Becko Oil and Gas Corp. v. Acting Muskogee Area Director, 18 IBIA 202, 204 (1990)).

The Regional Director contends that under the regulatory scheme, BLM is the “mining supervisor,” and BIA is merely the administrator of the mining supervisor’s recommendations. While conceding that the Board previously held that 25 C.F.R. Part 216 is not applicable here, the Regional Director nevertheless invokes Part 216 as illustrating that BIA takes the lead

from BLM in pursuing enforcement actions. Relying on Parts 211 and 225 of 25 C.F.R., the Regional Director argues that those regulations expressly refer to 43 C.F.R. Part 3480 as defining the underlying authority for BLM's supervisory role in the management of Indian coal mining operations. According to the Regional Director, BIA may rely on BLM for technical expertise and mine inspections, and the only issue here is whether BIA committed reversible error in choosing not to take an action contrary to BLM's recommendation. The Regional Director also contends that a review of the merits of BLM's decision would be governed by 43 C.F.R. § 4.410(a), before the Interior Board of Land Appeals, but is not within this Board's jurisdiction.

Responding to the Nation's arguments on the merits, intervenor P&M contends that there was no violation of the mining plan because BLM approved a modification in 1991 and, except during the enforcement proceedings that began and ended in 1995, BLM has consistently taken the position that P&M was justified in not mining the Green seam in Area 2. P&M takes issue with the Nation's characterization of the R2P2 as a "mining contract," characterizing it instead as a regulatory document that was subject to modification by P&M and BLM. P&M also contends that the Regional Director's decision was an exercise of discretionary authority, entitled to a deferential standard of review.

Whether or not the Regional Director considered her decision as an exercise of discretion, or whether she considered herself bound by BLM's decision, her October 26, 2001, decision, and her supplemental explanation, relied largely if not entirely on BLM's June 6, 2000, decision as the factual basis for her decision. The issue for the Board to decide then, is whether the Regional Director committed legal error or improperly exercised her discretion, when she relied on BLM's decision as the factual basis for her decision not to reissue a notice of noncompliance.

The Board concludes that when BLM reaffirmed its 1991 decision, which expressly had modified P&M's mining plan to allow P&M to discontinue mining the Green seam coal, BIA had no legal or factual basis to issue a notice of noncompliance for failure to comply with an approved mining plan. BLM — not BIA — had authority to approve mining plans and modifications to mining plans, and under the regulations, BLM's authority on this matter is not subject to BIA concurrence. See 43 C.F.R. §§ 3480.0-6(d)(2); 3482.2(b)(2), (c)(2); cf. 25 C.F.R. § 216.7(a) (for mining plans under Part 216, mining supervisor must "consult" with BIA with respect to surface protection and reclamation). §/ Therefore, once BLM reaffirmed its 1991 decision, there was no basis for BIA to issue a notice of noncompliance.

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§/ If BIA disagreed with BLM's decision, it was of course free to ask BLM to reconsider, consistent with the consultation provisions in 25 C.F.R. §§ 211.54(k) and 225.36(j).

In addition, under these circumstances, we conclude that the Regional Director was not required to provide more explanation than she did in making a decision not to pursue the requested enforcement action against P&M, because she was entitled to rely on BLM's decision in making her decision, and her supplemental explanation was adequate to fill in the regulatory framework that was missing from her October 26, 2001, decision. We agree with the Nation that both BIA and BLM, as components of the Department, share the Secretary's trust responsibility to the Nation for lands held for it in trust by the United States. But, in this case, BLM ultimately controls the mining plan, and the trust responsibility does not vest in BIA a role or responsibility regarding that plan beyond what is provided in the regulations. Neither Supron, 782 F.2d 855 (10th Cir. 1986) nor Becko Oil and Gas, 18 IBIA 202 (1990) lead us to a different conclusion, because BIA's decision whether to issue a notice of noncompliance for failure to follow the mining plan was constrained by BLM's control over the contents of that plan. Under the circumstances present here, for the Regional Director to unilaterally issue a notice of noncompliance was not a reasonable alternative.

We agree with the Regional Director that the merits of BLM's decision are not within the scope of this appeal or subject to our jurisdiction. BLM decisions are appealable to the Board of Land Appeals, not to this Board. Even assuming, for purposes of this appeal, that BLM's decision was not adequately supported, BIA could not simply ignore the fact that BLM had reaffirmed its 1991 decision modifying the R2P2 to allow P&M's conduct. 9/

We disagree with the Nation that the 1987 R2P2 was a "mining contract," but even if it were viewed as a contract, it was between P&M and BLM, and subject to modification. The Nation does not contend that the lease, apart from the R2P2, required P&M to mine the Green seam coal. Nor does the Nation contend that BIA should have pursued an enforcement action based solely on the lease, and not on the R2P2. As such, the only source of P&M's obligation raised in this appeal, and the only alleged predicate for a BIA enforcement action, is the R2P2.

The Nation criticizes both BLM and BIA for ignoring the Department's 1995 enforcement action, and for failing to explain the reversal in the Department's position in their 2000 and 2001 decisions. As already discussed, the merits of BLM's decision are not subject to our review. And while it may have been advisable for the Regional Director to provide a more complete explanation, the Board does not believe that she committed reversible error in failing to do so. In both 1995 and 2001, BIA followed BLM's lead, and provided little or no separate

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9/ The Review Team itself, while evaluating "mineability" of the Green seam coal under the 1987 R2P2 criteria, noted that BLM had handled the matter "as a 'modification' of the 1987 Resource Recovery and Protection Plan (R2P2)." (Green Seam Review Report, at 1.) Indeed, although the Nation contends that the R2P2 was a "contract," it does not dispute the fact that BLM's decision in 1991 was made in the form of a "modification" to the R2P2. See Appellant's Notice of Appeal at 4.

