



**United States
Department of
Agriculture**

**Forest
Service**

**Southwestern
Region**

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File Code: 1570-1 (LM)

Date: October 30, 1997

Mr. Jeffrey C. Zimmerman
Meyer, Hendricks, Bivens and Moyes, P.A.
Phoenix Corporate Center
3003 North Central Avenue
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Phoenix, AZ 85012-2915

CERTIFIED MAIL--RRR

RE: Appeal of FEIS and ROD for the proposed Carlota Copper Project,
Tonto National Forest (No. 97-03-00-0063-A215)

Dear Mr. Zimmerman:

This is my review decision on Appellants' appeal of the Tonto Forest Supervisor's FEIS and ROD for the approval of Carlota Copper Company's mine proposal near Globe, Arizona.

On July 22, 1997, Tonto Forest Supervisor, Charles R. Bazan, issued a ROD concerning his decision to authorize the proposed action along with three alternative components when all requirements for the approval of the Plan of Operations for the Carlota Project have been met. These conditions of approval are discussed in detail in the ROD. The Carlota Project is proposed for development on the Globe Ranger District, Tonto National Forest.

Five timely appeals were received for administrative review under 36 CFR §215. Appeals were received from the following:

Appellant	<u>Appeal Number</u>
Mineral Policy Center	97-03-00-0059-A215
American Rivers	97-03-00-0060-A215
Sierra Club, Audubon Society, SW Center for Biological Diversity	97-03-00-0061-A215
Citizens for the Preservation of Powers Gulch and Pinto Creek	97-03-00-0062-A215
L. W. Hardy, Richard G. Amado, Lupe Gaona, and heirs of John V. Bustamante Jr. (L. W. Hardy, et al.)	97-03-00-0063-A215



All appeals, except that submitted by your clients, have similar environmentally-related issues and will be addressed in a separate appeal review decision. You will be sent a copy of that decision as well.

Review of the L. W. Hardy, et al., appeal, hereinafter "appellants", was made difficult by this agency's general lack of jurisdiction over matters of claim ownership and disputes regarding associated survey boundaries, etc. In fact, the very question of appellants' standing in regard to an appeal under 36 CFR §215.11(a), was raised in Interested Party comments offered by Carlota Copper Company, due to the fact that this agency lacks jurisdiction or authority to resolve appellants' main concern and offer the full relief sought. I will discuss this further in my response. However, I conducted my review in accordance with 36 CFR §215.17. The Project Record (Record), results of the Informal Disposition meetings and field visit conducted by the Forest Supervisor, information provided through Interested Party comments, recommendations made by the Appeal Reviewing Officer, and the FEIS and ROD, were thoroughly reviewed.

As directed by 36 CFR §215.16, the Forest Supervisor met with all appellants for the purpose of seeking informal disposition of the appeals. In appellants' case, a field visit was conducted on September 26, followed by a meeting, on September 29, 1997. Both were documented in the Forest Supervisor's letter of October 3, 1997. The field visit was also documented in notes from Forest surveyor, James L. Young, and Globe District Minerals Specialist, Dean C. Morgan, finalized in letters dated October 2, and September 29, respectively. Unfortunately, no appeals issues were resolved as a result of the meetings with all appellants.

Interested Party comments were provided on a number of environmental and process issues by the White Mountain Apache Tribe, Carlota Copper Company and Ecological Environmental Experiment for Everyone, Ltd., and were considered in making my review decision (36 CFR §215.13 (e)).

APPEAL REVIEWING OFFICER (ARO) RECOMMENDATION

The ARO has recommended that I review appellants' appeal in spite of Interested Party comments that they have no standing. He also recommended that the Forest Supervisor's decision be affirmed.

BACKGROUND

The decision appealed is approval of Carlota's Copper Mine Project along with three alternative components when all requirements for the approval of a Plan of Operations have been met. The Project Alternatives are briefly: to place additional backfill into the Eder South pit; to combine low-quality water with water supply wells and dewatering wells; and, to substitute access road Alternative A for the proposed north access road. Numerous detailed requirements which will be part of the approved Plan of Operations, are described in the ROD as well.

With regard to the location of the proposed mine project, appellants have raised questions about conflicting claims and Carlota's rights to the project area. In addition, appellants have raised questions regarding the location of established boundary lines in the area, which are key to verification of disputed claim locations. There appear to have been numerous surveys and

investigations into this matter as reflected in the Record. Appellants have also expressed concern about a potential conflict between an area the Forest Service proposes to withdraw for protection of the Arizona hedgehog cactus, an issue which will be addressed separately in this decision.

Carlota, in their Interested Party comments, raises a question regarding **Standing of Appellants**, stating that appellants did not establish standing by challenging the substantive content of the ROD or EIS, or that the relief they request cannot be granted by the Forest Service. However, while your appeal may be outside the scope of the decision being appealed, it is my determination that it deserves review and comment as the Forest Service has documented its findings, in the Record, on the matter of proper surveys and claim locations, which may ultimately influence Appellant's persistence in their allegations of error and suspicion.

This review decision on this appeal is based on a standard of whether or not the Forest Supervisor's decision is consistent with laws, regulations, and policies of the Forest Service, particularly with regard to NEPA.

FINDINGS

The following is my evaluation and response to each of the issues raised by appellants.

Issue 1 - Mining claim dispute and survey boundary issues.

Contentions:

1. The Forest Supervisor's decision, to approve the Carlota Project without requiring proper proof that Carlota owns or controls the area necessary to construct and operate the Carlota Project, is premature and a possible violation of federal law, rules and policy.

2. There is overwhelming evidence that the surveys used by Carlota in planning the Carlota Project, and the property boundaries resulting from them, are suspect.

Response: The Record (Carlota/Interested Party, September 29, 1997, Attachment 3, claim map dated May 15, 1979) indicates that Messrs. Hardy and Bustamante, Jr., at that time, seemed confident in the location of geographic features and base survey lines, in relationship to their claims. In 1980, these gentlemen located the Gap claims, and described them in the S 1/2 of Section 6, T. 1 S., R. 14 E., G&SRBM, clearly well to the south and outside the area of the Carlota Project facilities and the proposed Hedgehog Cactus withdrawal. This location is documented in compliance with BLM's FLPMA Section 314 requirement in BLM's Geographic Index to Mining Claims, which has been the official record for some 17 years. Carlota has made a considerable effort to locate the appellants' claims on the ground, retracing a survey that appears consistent with the records on file with the BLM. This opinion is documented in a September 29, 1997, affidavit filed by Dave Dziubinski, Mine Superintendent of Carlota Copper Company. Lastly, as a result of the Forest Supervisor's effort to informally dispose of the appeals, a meeting (September 29, 1997) and a field visit (September 26, 1997) were conducted. Appellants had ample opportunity to demonstrate the basis for their appeal and for the alleged errors in surveys and claim locations. Tonto Forest Surveyor, James Young, documents in his letter of October 2, 1997, that appellants Amado and Gaona alleged, during the field visit, that section lines had been moved, including the Gila and Salt River Baseline, one of the oldest

surveys in the State. I find that assertion is not supported by the Record. Appellants also argued that MS 4686, the Pinto Valley Millsites, as surveyed by O. T. Smith, U.S. Mineral Surveyor, had been moved south and west by 2000 feet! A 1994 BLM survey of portions of MS 4686 confirm that it is shown in the correct location.

A plausible explanation for appellants' belief there are errors in survey locations, is our observation (documented in Dean Morgan's letter of September 29, 1997, and in BLM's memo to Group File No. 772, PR Vol 36, Doc. 7, dated March 24, 1997)) and appellants' admission that they used hand compasses without a declination adjustment to locate or verify locations. These simple compasses are absolutely unsatisfactory for the use to which they were put. They are also easily affected by metal, magnets, and powerlines. Additionally, there is evidence that the claims in question were based on old location notices, hand-drawn maps, verbal descriptions between past claim owners, estimations of distance and bearings to reference points, and other inadequate attempts to locate or verify locations of the subject claims. All this evidence and testimony would no doubt bear on the outcome of a determination of claim ownership when set before an appropriate court having jurisdiction over these disputes between claimants. I can understand appellants' passionate belief in their case for mistaken or suspicious surveys and claim locations, but the evidence and opinions of trained, professional surveyors seems to indicate otherwise.

Conclusion: Clearly, the Forest Service has no jurisdiction to resolve the boundary or claim location dispute between appellants and Carlota or any other claimant. Additionally, the Forest Service has no authority to verify the location of major base survey lines from which claim locations are traditionally made and described. As requested in appellants' appeal (p.3), the Informal Disposition process gave them the opportunity to visit the area with all parties and to prove their point and give meaning to the request for relief. The Record indicates that they were unable to demonstrate their allegations. The Forest Supervisor's decision to approve Carlota's project, based on evidence of proper claim ownership and location, is affirmed.

Issue 2 - Alleged interference with Appellants' claims created by the proposed Arizona hedgehog cactus withdrawal in Sections 6 and 7, T. 1 S., R. 14 E.

Contention:

1. That an area within the Carlota Project, which the Forest Service has fenced and requested formal withdrawal for protection of the Arizona hedgehog cactus, is in conflict with, and usurps rights to, claims owned by appellants.

Response: On July 25, 1997, the Tonto NF affected Federal Register publication of a notice of their intent to segregate and eventually withdraw, some 387.5 acres in Gila and Pinal Counties, for the purpose of protecting the Arizona hedgehog cactus. This area is alleged by appellants to interfere with their rights to mining claims as the withdrawal process was begun after those claims were located. This premise is based on a belief that appellants' claims are indeed properly located in the area proposed for the cactus withdrawal and where Carlota's group of 11 Eder and Kelly claims is located, and that the claimants have established a dominant right over Carlota's locations (a fact that has not been verified to date). It also presumes that appellants have established valid existing rights which would supplant the authority granted to the Forest Service, in 30 U.S.C. Sec. 612(b), to manage surface resources as long as such management does

not "...endanger or materially interfere with ... operations ...". Carlota has agreed to relinquish their claims in the area being withdrawn, once that is accomplished. Claimants' previous expressions of interest in mining, and subsequent FS approvals for road maintenance up until 1981, have not resulted in any exploration or mining activity, thus this would not appear to be a factor.

Conclusion: It would appear from the Record that there is no clear evidence the Arizona hedgehog cactus conservation area is in conflict with, or usurps rights to, appellants' claims. If there is indeed a conflict over ownership of claims in the area, again, the FS has no jurisdiction to resolve the dispute. It does appear that the FS has the authority to manage the cactus resource and to request withdrawal of the area from location and entry. For these reasons, the Forest Supervisor's decision to approve Carlota's project, is affirmed.

DECISION

Based on a detailed review of the record, and in consideration of this Agency's lack of jurisdiction and authority to resolve any outstanding boundary or claim location disputes, I find that the Forest Supervisor's decision is consistent with laws, regulations, policies and procedures. The Forest Supervisor's decision on the Carlota Project is affirmed.

My decision constitutes the final administrative determination of the Department of Agriculture [36 CFR §215.18 (c)].

Sincerely,

/s/ Gilbert Vigil

GILBERT VIGIL
Appeal Deciding Officer
Acting Deputy Regional Forester, Resources

Enclosure
Citizen's Appeal (0062) Decision

cc:
Carlota Copper Co. w/o enc.
Appellants w/o enc.
Tonto NF w/o enc.