



United States  
Department of  
Agriculture

Forest  
Service

Tonto  
National  
Forest

2324 E. McDowell Rd.  
Phoenix, AZ 85006

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File Code: 1570/2230

Date: July 20, 1998

**Cyprus Miami Mining Corporation  
Environmental Land Department  
Attn. Mr. Gary Jones  
P.O. Box 444  
Claypool, AZ 85532**

**RE: Your appeal on January 13, 1998 of the Bohme Annual Operating Plan**

Dear Mr. Jones:

This is my decision on the appeal you made on behalf of Cyprus Miami Mining Corporation (CMMC). You appealed District Ranger Larry Widner's decision to implement the Bohme Allotment 1998 Annual Operating Plan and corresponding validation of Term Grazing Permit numbers for 1998. The decision reduces the livestock numbers to be grazed on the Bohme Allotment from 66 to 20 head for the 1998 grazing season (March 1, 1998 through February 28, 1999). This review was conducted according to the provisions of the appeal regulation at 36 CFR 215. You had many issues concerning Mr. Widner's decision for grazing the Bohme Allotment by CMMC. My review will focus on your points that pertain to whether Ranger Widner's decision was warranted and made with proper authority.

## **BACKGROUND**

**Need for Action:** There was a justifiable reason for the District Ranger to take immediate action to assure that grazing management on the Bohme Allotment complies with the Tonto Forest Plan and the Endangered Species Act. The following is the rationale for considering the need for action to be urgent.

On June 5, 1996, Forest Plans were amended on the National Forests within the Southwestern Region. Implementation of this amendment was carried out consistent with the decision in the Forest Guardians, et. al. v. Dombeck et. al. 131 F.3d 1309 (9<sup>th</sup> Cir. 1997), as well as the position the Forest Service represented to the District Court in that litigation. The Biological Opinion (BO) for the amendment was issued by the U.S. Fish and Wildlife Service on December 19, 1997.



Implementation of the amended Forest Plans for the National Forests in the Southwestern Region was described by John Kirkpatrick in his February 7, 1998 declaration to the United States District Court for the District of Arizona in the Arizona Cattle Growers Association et. al. v. John R. Kirkpatrick and Mike Dombeck litigation. In his declaration Mr. Kirkpatrick described that "adjustments in grazing practices needed to protect resources are determined on an annual basis and documented in annual instructions to permittees in the form of annual operating plans (AOPs). District rangers prepare AOPs with participation of the affected permittees. For the 1998 grazing year, AOPs throughout the Southwestern Region will be prepared in consideration of the need to protect resources and to follow forest plan direction and the biological opinion for the amended forest plans issued by the U.S. Fish and Wildlife Service on December 19, 1997. AOPs are prepared at the discretion of district rangers for each grazing allotment and are responsive to individual allotment protection and unique management needs.

An allotment management plan (AMP) has not been completed for the Bohme Allotment, the NEPA process for the AMP and subsequent grazing permit has not been complete, and a current biological assessment has not been conducted. Section 7d of the Endangered Species Act prohibits Federal agencies and applicants from making any irreversible or irretrievable commitments of resources which have the effect of foreclosing reasonable and prudent alternatives which would avoid jeopardizing the continued existence of listed species, or result in the destruction or adverse modification of critical habitat. This means T&E Species or habitat for T&E species cannot be impacted by grazing practices without first consulting with U.S. Fish and Wildlife Service. Since consultation has not been completed on the Bohme Allotment, the District Ranger must assure that no irreversible or irretrievable commitments occur. The guidelines for protecting T&E Species and habitat was given in the Biological Opinion for the June 5, 1996 Amended Forest Plan.

The Biological Opinion which was subsequent to the June 5, 1996, amended Forest Plans identified management guidelines to protect threatened and endangered species. The Arizona Hedgehog Cactus, which has habitat or potential habitat located on the Bohme Allotment, is one of the species that is protected under the Endangered Species Act.

You are correct in your statement that the Forest Guardians v. Dombeck lawsuit did not force the management changes that are in effect. Mr. Kirkpatrick's February 7, 1998 declaration states: "Consistent with the language of the record of decision (ROD) and the February 10, 1997, Declaration of Charles W. Cartwright, Jr., forest managers are not required to apply the 1996 amendment grazing management standards and guidelines to permits in effect at the time the ROD was issued nor to the AOPs. However, forest managers retain discretion to apply protective measure in the utilization table found on page 94 of the ROD through the AOP process as they deem appropriate for the protection of the resource." Mr. Kirkpatrick's declaration also states: There is no mandatory requirement to apply the grazing utilization percentages, as shown on page 94 of the ROD and titled "Allowable Use Guide (percent) by Range Condition and Management strategy" to ongoing grazing activities. The guidance in this table is intended to be a broad based stewardship measure oriented specifically toward the needs of listed (threatened and endangered) species to be applied on a discretionary, as needed basis, by district

rangers pending the completion of site-specific NEPA analysis and the preparation of AMPs as called for by individual forest NEPA schedules.

**Contention:** The reduction of livestock permitted to graze the Bohme Allotment is arbitrary, capricious and not in compliance with applicable laws, rules and regulations.

**Response to the compliance with applicable laws and regulations contention:** The practice in implementing the Annual Operating Plan is specified in Forest Service Manual Region 3 Supplement 2215.04c. It states: "Prior to the grazing season, the District Ranger will prepare an operating plan with the grazing permittee. The plan will be based on the forest land and resource management plan and the allotment management plan. The plan will include statements of how the livestock will be grazed on the range that season, developments planned, improvements to be maintained, salting, herding bedding, and other instructions... "

Part 2 sections 8b and c of the grazing permit gives the District Ranger the authority to make changes in use on the allotment on an annual basis. "The number, kind, and class of livestock, period of use, and grazing allotment specified in the permit may be modified when determined by the Forest Officer in charge to be needed for resource protection. Except in extreme emergencies where resource conditions are being seriously affected by livestock use or other factors, such as fire, drought, or insect damage, notice of a scheduled reduction of numbers of livestock or period of use under a term permit will be given one (1) full year before a modification in permitted numbers or period of use becomes effective. This does not apply to annual adjustment in grazing as provided for in Section 8 (c)." With respect to section 8b, it is contended that resources on the Bohme Allotment have been damaged by grazing and prolonged drought. One of the resources affected is habitat for Threatened and Endangered Species (the Arizona Hedgehog). The emergency is the urgency of being in compliance with the Endangered Species Act.

Section 8c states: "When, in the judgement of the Forest Officer in charge, the forage is not ready to be grazed at the beginning of the designated grazing season, the permittee, upon request of the Forest Officer, will defer placing livestock on the grazing allotment to avoid damage to the resources. The permittee will remove livestock from Forest Service-administered lands before the expiration of the designated grazing season upon request of the Forest officer when it is apparent that further grazing will damage the resources."

**Response to the severity of the temporary reduction:** I evaluated the process that was used by the District Ranger in estimating a capacity for grazing the Bohme Allotment this year. His process was described in his responsive statement. I believe these methods are reasonable and equitable.

The Bohme Allotment has no Allotment Management Plan and no interior cross fences. The livestock are on the allotment year-round. The District Ranger described that based on the historic use of Pinto Creek, 66 head of cattle would utilize the vegetation there at an unreasonably high level during the

summer and at critical growth times for riparian species. Therefore, an estimate was made for 1998. The ranger estimated the capacity based on the history of the Bohme Allotment vegetation, considering that there is not an opportunity to rest portions of the allotment since there are no interior fences. Similar allotments with similar vegetation were used to estimate capacity as described in the District Rangers Responsive Statement.

## **DECISION**

After review of the record, I concluded that the District Ranger's decision on the Annual Operating Plan for the Bohme Grazing Allotment was warranted and according to the proper authority. The District Ranger's decision on the Annual Operating Plan is affirmed. According to the appeal regulations (36 CFR 251.87) you may file and appeal to the Regional Forester within 15 days of this decision. If you choose, the second level appeal must be sent to: Regional Forester, Southwestern Region, 517 Gold Avenue, SW, Albuquerque, New Mexico 87102. A copy of your appeal should also be sent to my office.

Sincerely,

/s/ Thomas J. Klabunde

TOM KLABUNDE

Deputy Forest Supervisor and Reviewing Officer

cc:

Regional Forester, R-3

District Ranger, Globe