



File Code: 1570/2300/2700

Date: March 27, 2000

Simons, Cuddy, and Friedman  
Attn: Ms. Charlotte Hetherington  
P.O. Box 4160  
Santa Fe, NM 87502-4160

RE: Appeal #99-03-00-0076-A251 and #99-03-00-0076-A217, Cowles Historic Preservation Association, regarding the Environmental Assessment, Decision Notice and Finding of No Significant Impact for the Pecos Wild and Scenic River Management Plan, Santa Fe National Forest

Dear Ms. Hetherington:

This is my decision on your appeal filed on behalf of the Cowles Historic Preservation Association, concerning Forest Supervisor, Leonard Atencio's, final Decision Notice and Finding of No Significant Impact (DN/FONSI) for the Pecos Wild and Scenic River Management Plan and Forest Plan Amendment. The Plan provides new management direction for the Pecos Wild and Scenic River. Your notice(s) of appeal were received during July and August 1999. I am exercising the authority provided by 36 CFR §217.13 (b) and 36 CFR §251.95 (b) to consolidate the following appeals into one decision.

1. # 99-03-00-0071-A251, McConnell
2. # 99-03-00-0073-A217, LeBlanc
3. # 99-03-00-0074-A251, Jeffords
4. # 99-03-00-0076-A217, Cowles Historic Preservation Assoc., Hetherington for  
Noedel  
Turner  
# 99-03-00-0076-A251, Cowles Historic Preservation Assoc., Hetherington for  
Campbell  
Carter  
Blackstock Ginatta  
Clark  
West
5. # 99-03-00-0078-A251, Padilla
6. # 99-03-00-0079-A251, Gibbs
7. # 99-03-00-0080-A251, Ivey
8. # 99-03-00-0081-A251, Hamby
9. # 99-03-00-0082-A251, Wisenteiner
10. # 99-03-00-0083-A251, Keleher
11. # 99-03-00-0084-A251, Ray
12. # 99-03-00-0085-A251, Jackson
13. # 99-03-00-0091-A217, Dallas, C.



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|-----|-----------------------|-------------------------------|
| 14. | # 99-03-00-0092-A217, | Dallas, S.                    |
| 15. | # 99-03-00-0093-A217, | Hughes                        |
| 16. | # 99-03-00-0094-A217, | Ransdell                      |
| 17. | # 99-03-00-0095-A251, | Gandy, B.&D.                  |
| 18. | # 99-03-00-0096-A217, | Gandy, T.&K.                  |
| 19. | # 99-03-00-0097-A251, | Eden (Attorney Danelle Smith) |
| 20. | # 99-03-00-0098-A251, | Ellis                         |
| 21. | # 99-03-00-0099-A217, | Barnard                       |
| 22. | # 99-03-00-0100-A217, | Gross                         |
| 23. | # 99-03-00-0101-A251, | Townsen                       |
| 24. | # 99-03-00-0102-A217, | Yardman                       |
| 25. | # 99-03-00-0103-A251, | White                         |
| 26. | # 99-03-00-0104-A251, | Boyd                          |
| 27. | # 99-03-00-0108-A217, | Ellis & Williams              |
| 28. | # 99-03-00-0113-A251, | Ransom                        |

My review of your appeal(s) was conducted pursuant to 36 CFR §217 and 36 CFR §251, Subpart C.

### **BACKGROUND**

On June 6, 1990, the Pecos was congressionally designated as a component of the Wild and Scenic River System, under the Act of October 2, 1968, as amended [16 U.S.C. 1271-1287]. The Environmental Assessment (EA) was released for public comment on February 12, 1999. The public comment period ran through March 19, but was extended through March 29, 1999. The DN/FONSI was signed June 22, 1999, and notice of the decision was published on June 28, 1999. The management direction relating to the Cowles leases was to honor existing terms and conditions for the leases, and as each lease expires, residential use of the cabins and lots would be discontinued.

Twenty-eight appeals were filed related to the Cowles leases. Two additional appeals of this decision were filed. Mr. Richard E. and James C. Ransom intervened by letter of September 17, 1999. In October 1999 clarification of leasehold interest was sought from various appellants. The Forest Supervisor's responsive statement was sent to appellants (under 36 CFR §251) on November 19, 1999. By letter of November 24, 1999, appellants were informed: (1) that appeals were timely, (2) which rule each appeal would be processed under, (3) the timeframe for commenting on the responsive statement, (4) my intent to exercise discretionary authority to establish a timeline for this and related appeals and (5) the opportunity for appellants (under 36 CFR §251) to request an oral presentation. Written comments on the responsive statement were received from two parties (Hetherington, et al. and Padilla). The oral presentation was held on January 18, 2000, with appellants (under 36 CFR §251) present in person, by telephone or represented by attorney. Written documentation of the oral presentation was received from six

parties (Hetherington et al., Padilla, Jeffords, Eden, Gibbs and Yardman). The record was closed on March 10, 2000.

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### **APPEAL DECISION**

After a detailed review of the record, I find that the Pecos Wild and Scenic River Management Plan is not a comprehensive management plan (CMP) as required by the Act. It does not address resource protection, development of land and facilities, carrying capacity and other management practices with enough specificity to enhance and protect outstandingly remarkable values (ORV's) for which the river was designated. Therefore, I am reversing Forest Supervisor Atencio's final DN/FONSI approving the Pecos Wild and Scenic River Management Plan and Forest Plan Amendment. It is premature to make a review decision on the adequacy of NEPA for the CMP.

Regarding the consideration of the Cowles leases in the Pecos Wild and Scenic River Management Plan, I find that the Forest Service's intent for purchase of the Cowles lease area is not at issue in this decision, however, the CMP should evaluate how land underlying the leases will be managed. The Pecos CMP should address how the river area will be managed subject to valid existing rights, but the plan should not determine what those rights are. Rather, the language of each lease determines what rights exist. No termination of rights will occur if the leases are allowed to run their course and expire. Additionally, the leases are not recreation residences under Forest Service policy.

I make no finding on two issues: (1) renewal clauses in perpetuity and (2) the Cowles Lease Area Standards and Guidelines, neither of which were part of the Pecos Wild and Scenic River Management Plan decision.

See the attachment: "Review and Findings" for a more detailed discussion on the issues raised in this appeal.

### **INSTRUCTIONS**

I am directing Forest Supervisor Atencio to reanalyze and complete a CMP for the Pecos Wild and Scenic River to the standards prescribed within the Wild and Scenic Rivers Act and Forest Service policy interpreting the Act. The CMP should provide specific direction on what activities are proposed to resolve the problems identified as affecting the outstandingly remarkable values for which the river was designated, where these activities will occur, and when they will occur (i.e., an activity schedule) and criteria for scheduling treatments. The CMP should address monitoring to determine whether the implemented treatments are correcting the problems identified. The CMP must present a clear vision of the management actions, prioritizations, and mitigations needed to provide for the protection of ORV's. A revised Pecos Wild and Scenic River Management Plan and decision must be prepared within two years of this appeal decision.

I recommend that the Forest Supervisor and the leaseholders meet to see whether any differences may be resolved.

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This is the final administrative decision of the Department of Agriculture unless the Chief elects to review the decision within 15 days of receipt of this letter [36 CFR §217.7(d)(1), §217.17, §251.87(e)(1), and §251.99(f)]. By copy of this letter, I am notifying all parties to the appeal of my decision.

Sincerely,

/s/ James T. Gladen  
JAMES T. GLADEN  
Appeal Reviewing Officer  
Deputy Regional Forester, Resources

cc:  
Santa Fe National Forest  
Pecos Ranger District  
c. holbrook, R3 Recreation  
c. gonzalez, R3 Appeals  
s. segovia, WO Ecosystem Management  
r. karstaedt, WO Lands  
j. stokes, WO Recreation

## **REVIEW AND FINDINGS**

of the

**Cowles Historic Preservation Association Appeal(s) #99-03-00-0076-A251 and A217, et al.**

regarding the

### **Pecos Wild and Scenic River Management Plan**

**ISSUE 1:** The analysis of recreational use is inadequate.

**Contention:** There is no analysis of the existing opportunities to construct public recreation facilities. There is no analysis of the impact of additional public camping and other uses in lieu of the Cowles leases nor do they (DN/EA) evaluate the FS ability to manage and control litter and human waste [factual analysis indicates FS cannot manage these environmental impacts to its satisfaction in existing locations].

**Response:** The plan does not:

(1) adequately address resource protection. The plan/EA identifies problems on the ground related to recreational overuse or uncontrolled use, particularly on State land in the recreational section of the Pecos Wild and Scenic River. However, no specific management direction has been developed to resolve the problem(s). The plan fails to develop specific management actions sufficient to meet the Act's requirement to enhance and protect.

(2) The plan does not adequately address development of land and facilities. It is not clear from the plan/EA what, if any, development of recreational facilities is appropriate to improve the degraded conditions identified.

(3) The plan fails to address user capacities as required by the Act. The plan/EA does not address recreational user capacities. Therefore, it is not possible to determine what specific management actions are appropriate for the recreational section of the Pecos Wild and Scenic River.

**Finding:** The Pecos Wild and Scenic River Management Plan is not a comprehensive management plan as required by the Wild and Scenic Rivers Act and as provided by Forest Service policy. It does not address resource protection, development of land and facilities, carrying capacity and other management practices with enough specificity to ensure enhancement and protection of outstandingly remarkable values.

**ISSUE 2:** The environmental assessment is inadequate.

**Contention:** There is no evidence to support the conclusions:

- (1) that more extensive public recreational use for camping, fishing and picnicking would have no adverse impact on the scenic values of this river segment or adverse

- environmental impact on the river and riparian bank;
- (2) that the uses associated with the Cowles lease area have imposed an increased burden on this recreational area within the WSR; or
  - (3) that residential use would continue to be a potential source of pollutants and sedimentation.
  - (4) Furthermore, there is no analysis of existing opportunities to inform the public through signage or development of a system of trails, and
  - (5) the EA fails to account for the benefits of the presence of the lease-holders.

Therefore, the EA is incomplete as an analytical tool and provides insufficient factual foundation for the decision.

**Response:** The EA must be prepared in conjunction with a CMP.

**Finding:** Until a CMP for the Pecos Wild and Scenic River (prepared within the guidelines and direction established by the Wild and Scenic Rivers Act, and Forest Service policy) has been completed; it is premature to make a review decision on the adequacy of NEPA.

**ISSUE 3:** The Forest Service should apply recreation residence policy to leases. The EA/DN fails to consider recreation residence policy.

**Contention:** FS recreation residence policy (Federal Register August 16, 1988) provides that existing facilities now occupying National Forest System land under special use authorization may be maintained in place if they:

- (1) are at locations where an alternative public use has not been established,
- (2) do not constitute a material uncorrectable offsite hazard to national forest resources, and
- (3) do not endanger health or safety of the holder or the public.

Furthermore, the policy provides for a minimum of 10 years advance notice if the use is to be discontinued.

**Response:** FSM 2721.23 states: “the term ‘recreation residence’ includes only those residences that occupy planned, approved tracts or those groups established for recreation residence use”. The Cowles leases were an outstanding right at the time the United States purchased the property in 1976. They have never been designated as a recreation residence tract. It has not been the practice of the Forest Service to create new tracts since the 1960’s.

Leases and permits are different legal instruments and each is administered in accordance with its terms. “Lease” is included in the definition of special uses at FSM 2705 as “a transferable interest in NFS lands”. Permits provide that they are not transferable. It should be noted that the tenure for recreation residence permits is limited to 20 years [FSM 2721.23a (9)], and that the agency does not authorize land uses for such long durations as provided by the leases.

**Finding:** The leases are not recreation residences under Forest Service policy.

**ISSUE 4:** Rights of lease-holders under WSRA.

**Contention:** 16 USC 1277(g) requires compensation to owners and holders of rights of occupancy of improved property. Such termination of rights must be based upon a finding of reasonable cause.

**Response:** The Cowles leases do not qualify as “improved property” under the act. Section 6 (g)(3) defines improved property as a detached one family dwelling, together with the land on which it is situated “said land being in the same ownership as the dwelling”. In the case of the Cowles leases, the improvements are owned privately but the land is owned federally. Termination is defined at 36 CFR §251.51 as the cessation of a special use authorization by operation of law or by operation of a fixed or agreed-upon condition, event, or time as specified in an authorization without the necessity for any decision or action by the authorized officer; for example, expiration of the authorized term.

**Finding:** No termination of rights will occur if the leases are allowed to run their course and expire.

**ISSUE 5:** Maintaining existing patterns of use under WSRA.

**Contention:** Agency management guidelines provide that existing patterns of use and ownership should be maintained provided they remain consistent with the purpose of the Act. The conclusion that the lease area should be terminated is arbitrary.

**Response:** Agency guidelines provide that land uses and development *on private land* may be permitted to continue, however, the policy does not make such provisions for uses on public land (Federal Register, page 39459, Vol. 47, No. 173, September 7, 1982). Termination of a lease by expiration is not an action, rather it occurs by operation of law (36 CFR §251.51, Definitions). To be authorized, a use must enhance and protect Wild and Scenic River values [Oregon Natural Desert Association v. Singleton, 47 F.Supp.2d 1182].

**Finding:** The CMP should address how the river will be managed subject to valid existing rights, but the CMP does not determine what those rights are. Rather, the language of each lease determines what rights exist.

**ISSUE 6:** FS intent for purchase of Cowles area.

**Contention:** Lease-holders were not informed of the Forest Service’s intent prior to acquisition and were not afforded the opportunity to comment.

**Response:** The general intent of the FS land acquisition program is to provide public access. The Forest Service decision to purchase land was made in 1976, and the rationale for purchase at that time was to provide unrestricted fishing opportunities, provide developable acreage for construction of recreation facilities and to restore streamside land to a natural state. How the land underlying the leases will be managed to implement the objective for purchase has never been decided, and should be determined by the Wild and Scenic River Management Plan. It is also appropriate to put lease-holders on notice regarding future use.

**Finding:** The Forest Service's intent for purchase is not at issue in this decision, however, the CMP should evaluate how land underlying the leases will be managed.

**ISSUE 7:** Perpetual right of renewal.

**Contention A:** (# 99-03-00-0102-A217, Yardman) The FS should not require that the perpetual right of renewal clause be dropped from the lease acquired by the Yardman's in June 1999.

**Response A:** The decision to drop the perpetuity clause from the lease was not part of the Wild and Scenic River Management Plan decision and is not appropriately part of this appeal.

**Contention B:** (# 99-03-00-0113-A251, Ransom) Mr. Ransom asserts his perpetual right of renewal, which provides: "Tenants shall have the right as part of this lease, to a renewal thereof upon the same terms and conditions, for successive period of (5) five years at a time and nothing further shall be required for such renewal except the payment of the rental for the first year as herein provided, and such payment shall operate as binding upon both parties to a renewal for a term of (5) years."

**Response B:** No action has been taken on this lease as a result of the Wild and Scenic River Management Plan therefore; the issue is not appropriately part of this appeal.

**Finding:** Renewal clauses in perpetuity were not part of the decision being reviewed.

**ISSUE 8:** Standards and Guidelines for leases. (# 99-03-00-0078-A251, Padilla)

**Contention:** Lease-holders were not given an opportunity to comment on the Cowles Lease Area Standards and Guidelines. We specifically object to ... an arbitrary decision to limit the maximum cabin square footage.

**Response:** The Standards and Guidelines were not part of the Wild and Scenic River Management Plan decision.

**Finding:** It is inappropriate to rule on the standards and guidelines in this appeal decision.