



United States  
Department of  
Agriculture

Forest  
Service

R3 Regional Office

333 Broadway SE  
Albuquerque, NM 87102  
FAX (505) 842-3800  
V/TTY (505) 842-3292

---

File Code: 1570-1/2720

Date: June 12, 2002

Jeffrey Stebbins  
HC 78 Box PC 14  
Ranchos de Taos, NM 87557

Re: Appeal #02-03-00-0016-A215, Talpa and Peñasco Transmission Line, Carson National Forest.

Dear Mr. Stebbins:

This is my review decision concerning the appeal you filed regarding the Record of Decision, which authorized the construction of an electric transmission line between Talpa and Peñasco, New Mexico.

### **BACKGROUND**

Forest Supervisor Martin Chavez issued the decision on January 11, 2002. The Forest Supervisor is identified as the Responsible Official, whose decision is subject to administrative review under 36 CFR 215 appeal regulations.

Pursuant to 36 CFR 215.16, an attempt was made to seek informal resolution of your appeal. The record indicates that informal resolution was not reached.

My review of this appeal has been conducted in accordance with 36 CFR 215.17. I have thoroughly reviewed the appeal record and the recommendation of the Appeal Reviewing Officer. My decision incorporates the appeal record.

### **APPEAL REVIEWING OFFICER'S RECOMMENDATION**

The Appeal Reviewing Officer has recommended that the Responsible Official's decision be affirmed and that your request for relief be denied. The evaluation concluded: (a) decision logic and rationale were generally clearly disclosed; (b) the benefit of the proposal was identified; (c) the proposal and decision are consistent with agency policy, direction and supporting information; (d) public participation and response to comments were adequate; and (e) all of the major issues raised by the appellants were adequately addressed in the project record.



**APPEAL DECISION**

After a detailed review of the record and the Appeal Reviewing Officer's recommendation, I affirm the Responsible Official's decision concerning the approval of the transmission line between Talpa and Peñasco.

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

Sincerely,

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

cc:  
Forest Supervisor, Carson National Forest  
District Ranger, Camino Real District

**REVIEW AND FINDINGS**

of the

**Tim and Luisa Mylet Appeal #02-03-00-0014-A215**

and

**Jeffrey Stebbins Appeal #02-03-00-0016-A215**

**Regarding**

**A Proposal To Add A New Electrical Transmission Line In An Existing Corridor Between Talpa And Peñasco, New Mexico**

**ISSUE 1 (Mylet/Stebbins):** The decision violates the National Historic Preservation Act (NHPA).

**Contention:** The decision violates NHPA because it has adverse effects on the Pot Creek Cultural/interpretive site and because it precludes the inclusion of the site in the National Register of Historic Places. The selected alternative has the highest cultural site density and should have been eliminated. A cultural resources survey should have been conducted on all alternatives, not just the selected alternative. The results of site evaluations were not considered.

**Response:** The record documents that the potential effects of each alternative on heritage sites were identified, compared, and disclosed (Appeal Record [AR] 283a, p. 78; Draft Environmental Impact Statement [DEIS], p. 31). The higher site density in alternative C and potential effects on the Pot Creek Cultural/interpretive site were discussed and considered. NHPA does not require that all alternatives be intensively surveyed; nor does it require that alternatives be eliminated based on the number of heritage sites potentially affected. A survey was conducted of the preferred alternative, and nine heritage sites were identified in the proposed construction area. Of these, five were determined eligible for the National Register of Historic Places, and four are of undetermined eligibility. Based on the site-specific information and the proposed mitigation measures requiring site protection, the State Historic Preservation Officer concurred in a finding of no adverse effect for the preferred alternative. The Pot Creek Cultural/interpretive site will not be adversely affected by the decision. The Record of Decision (ROD) documents that the Responsible Official considered the effects on heritage sites in the decision rationale (ROD, p. iv).

**Finding:** The decision is in compliance with NHPA (AR 407; ROD, p. vi; FEIS, p. 48).

**ISSUE 2 (Mylet/Stebbins):** The decision violates the Endangered Species Act (ESA).

**Contention:** The decision violates ESA because the transmission line would be constructed near willow flycatcher and goshawk habitat. The statement in the Finale Environmental Impact Statement (FEIS) on page 32 for alternative C under the “Ecosystem Health” is not accurate. Moving power poles closer to the habitat for T&E species should be considered a negative impact.

In the analysis of alternatives, it is not consistent to say that alternative C does not affect the Southwestern willow flycatcher, and then to state that A might, or that alternative B would affect the goshawk but not the Southwestern willow flycatcher.

**Response:** The Forest Service consulted with the U.S. Fish and Wildlife Service (FEIS Chapter 3, page 57; Project Record (PR) #376). The U.S. Fish and Wildlife Service has concurred with the Forest Service effect determination of “not likely to adversely effect” on the Southwestern willow flycatcher (PR #398). Alternative C (the preferred alternative) is predicted to reduce threats to the Southwestern willow flycatcher and its habitat (FEIS Chapter 3, page 57; PR #398). The realignment of the transmission line as proposed under Alternative C will increase the distance from occupied flycatcher sites and allow repairs or maintenance of damaged line without the possibility of disturbing an occupied nest site (FEIS Chapter 3, page 63; PR #280). Furthermore, several mitigation measures, including breeding season restrictions, will be implemented to further reduce effects to the Southwestern willow flycatcher (PR #350, 376, 398). In combination, these factors will serve to eliminate negative effects to the species in the long-term.

The Northern goshawk (*Accipiter gentiles*) is not a listed or proposed species as designated by the ESA (FEIS Chapter 3, page 57). The Northern goshawk is a Forest Service Region 3 sensitive species and is designated as a Management Indicator Species on the Carson National Forest (FEIS Chapter 3, page 57; PR #390). In 1996, the Forest Service’s Southwestern Regional Forester signed a ROD for an Amendment of Forest Plans in Arizona and New Mexico, requiring the implementation of *The Management Recommendations for the Northern Goshawk in the Southwestern United States* (FEIS Chapter 3, page 57; PR #390). These management guidelines were incorporated into the design of this transmission line project (FEIS Chapter 3, page 57; Project Record 169, 390).

The environmental effects of each alternative on the Southwestern willow flycatcher and Northern goshawk are disclosed in the FEIS as follows:

Alternative A has the potential for future adverse effects to the Southwestern willow flycatcher (direct mortality, nest failure, chick death, site abandonment) (FEIS Chapter 3, page 63, PR #376). Alternative A would not result in effects to the Northern goshawk (FEIS Chapter 2, page 32).

Alternative B would affect the Northern goshawk (nest/nesting territory abandonment, nest failure, etc.) through clearing portions of an active nest and portions of alternate nest stands (FEIS Chapter 3, page 63). Alternative B would result in no effect to the Southwestern willow flycatcher.

Alternative C results in a short-term minor effects and long-term beneficial effects to the Southwestern willow flycatcher (FEIS Chapter 3, page 63; PR #376). There would be no effects to the Northern goshawk under Alternative C (FEIS Chapter 3, page 32). It is therefore logical, and consistent, for Alternative C to be chosen as the preferred alternative.

**Finding:** Based on my review of the record, the proposed action does not violate the ESA with respect to the listed Southwestern willow flycatcher. The Forest Service fulfilled ESA requirements for this species. The Northern goshawk is not an ESA listed species and does not require Section 7 Consultation.

The environmental effects of the alternatives on the Southwestern willow flycatcher and the Northern goshawk were adequately disclosed in the project record and FEIS. Furthermore, the record shows that the Responsible Official chose minor short-term impacts to the Southwestern willow flycatcher to avoid long-term significant impacts to the goshawks associated with the project area.

**ISSUE 3 (Mylet):** The decision violates the Native American Graves Protection and Repatriation Act (NAGPRA).

**Contention:** It is unrealistic to assume the area would not have numerous gravesites. Avoidance is the only prudent course.

**Response:** The record indicates that the potential for disturbance of human remains was an issue of concern to several tribes (41, 209, 233, 253, 24). NAGPRA does not require avoidance of areas that might contain gravesites. The mitigation measures include protection of identified archaeological sites as well as, a provision for the development of an MOU or other agreement with the tribes regarding possible unanticipated discoveries of human remains during construction activities (FEIS page 101).

**Finding:** The decision is in compliance with NAGPRA.

**ISSUE 4 (Stebbins):** The decision ignores the concerns of the Pot Creek area residents.

**Contention:** The choice of alternative C as the selected alternative shows that the concerns of the Pot Creek area residents have been ignored.

**Response:** There were many differences of opinion from the various commentators about the effects of the different alternatives and many different statements for preferences of an alternative that did not agree with the residents of Pot Creek (AR 361).

One of the primary concerns from the Pot Creek residents was the visual effect of an aboveground transmission line between Talpa and the southern boundary of the private land in the Pot Creek area. As noted in the ROD (page iii, item 1), decisions regarding options for treatment of electrical lines within

the highway corridor, which is not National Forest System land in that area, are outside Forest Service jurisdiction. However, the concern about burial of the line was incorporated into the alternative formulation process (FEIS, Chapter 2) and was analyzed (FEIS, Chapter 3).

Other concerns of the Pot Creek residents regarding safety issues are addressed in issue number 8 of this document.

The Responsible Official evaluated all the alternatives and made a decision, which best balanced all of the competing issues and demands.

**Finding:** The Responsible Official appropriately considered input for the decision from the Pot Creek residents.

**ISSUE 5 (Mylet/Stebbins):** Tribal concerns are not adequately addressed.

**Contention:** Tribal concerns were ignored or manipulated. The EIS ignored the concerns of the Picuris and Taos Indians.

**Response:** The record documents extensive tribal consultation and efforts to identify and accommodate tribal concerns in the formulation and evaluation of alternatives (AR 38, 41, 46, 47, 55, 56, 67, 77, 78, 226, 242, 269, 273, 282, 285, 289, 294, 303, 315, 323, 337, 407; FEIS p.45). Although the alternative favored by the pueblos was not the preferred alternative, the pueblos visited the Alternative C corridor and provided recommendations that would partially alleviate their concerns (AR 372, 389). These recommendations were incorporated into the FEIS (p.45, p. 101-102).

**Findings:** Tribal concerns were adequately considered and addressed.

**ISSUE 6 (Mylet/Stebbins):** The decision does not follow the analysis.

**Contention:** Other alternatives address the issues better. Alternative F avoids more cultural sites, avoids more tree clearing, is the least visible of all the alternatives, and is generally better than alternative C. Alternatives D and F avoid temporary road construction and minimize effects on threatened and endangered species. Alternative F would establish a better firebreak than alternative C and affects wildlife habitat the least. The decision avoids the use of an existing utility corridor in Miranda Canyon. The Forest Service must pick the alternative that affects the fewest number of people.

**Discussion:** NEPA (1501.2(c)) requires the Forest Service to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

Further, NEPA (1505.2) requires the agency to (a) State what the decision was, and (b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable...An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

Examination of the record indicates that the rationale for the decision was explained in the Record of Decision (PR #416 pgs. iv and v). The rationale for the decision addresses cultural sites, road construction, wildlife, minimizing effects on people, and other concerns. The Responsible Official is required to select the alternative that best responds to the Purpose and Need described for the project.

**Finding:** The Responsible Official followed the requirements of NEPA, conducted a thorough analysis, selected an alternative that best responds to the purpose and need, and explained the rationale for that decision.

**ISSUE 7 (Stebbins):** The purpose and need statement does not justify the project.

**Contention:** The need for this project is not adequately explained.

**Response:** NEPA (1502.13) requires that the EIS shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action. The Purpose and Need for the project is described in the FEIS (PR #416 pgs. 1 and 2) and in the response to comments (PR #416 pg. 132). The need to improve reliability of electrical service and to be able to accommodate increasing demands for electrical service into the foreseeable future are clearly explained in the purpose and need section cited in the previous sentence.

For this project, the need was actually considered as one of the significant issues. That issue is described and addressed in the FEIS (PR #416, pg. 6).

**Finding:** The Responsible Official has adequately described and discussed the purpose and need for this project, the proposed action (in response to the purpose and need) and alternatives to the purpose and need in the FEIS consistent with the requirements of NEPA.

**ISSUE 8 (Stebbins):** The decision creates safety problems.

**Contention:** Alternative C creates highway safety problems and exposes the local residents to the highest level of electromagnetic fields (EMF).

**Response:** Potential highway safety problems are disclosed in the FEIS on page 29 under the section for alternative C. The ROD, page iii, describes the lack of Forest Service jurisdiction with the regard to the portion of alternative C between Talpa and the southern end of the private land in the Pot Creek area.

The New Mexico State Highway and Transportation Department (NMSHTD) has the responsibility to assure that any placement of transmission lines within the highway corridor meets appropriate safety standards.

Possible EMF effects are disclosed in the FEIS starting on page 92. Paragraphs four and five on page 94 of the FEIS describe the Forest Service rationale for proceeding with a decision without more conclusive studies. Correspondence with the Rural Utilities Service (AR 264a) corroborates the inconclusive nature of current studies.

**Finding:** The Responsible Official has appropriately disclosed the potential safety issues created by alternative C. Based on the analysis, the selection of alternative C - an action alternative - is appropriate.

**ISSUE 9 (Stebbins):** The option to bury the transmission lines should have been considered more seriously in the alternatives.

**Contention:** Burial of the lines was considered only for alternative C, but should have been considered for all alternatives.

**Response:** Burying as an option for the entire transmission line under every alternative was considered in the FEIS (PR #416, page 147), but was dropped from further consideration because of the cost differential. The information on cost differential was verified with sources other than Kit Carson Electric Coop (KCEC) (PR #416, FEIS, page 137, part C). The main concerns about burying arose for the portion of the project, as described under alternative C, between Talpa and the south boundary of the private land in the Pot Creek area where there is a safety concern related to the road. The federal government does not own the highway corridor between those points (AR 300). The deed from the estate of Ralph M. Rounds to the USA specifically excludes the highway corridor. Therefore, the Forest Service has no jurisdiction and cannot control how portions of alternatives C, E, and F will be treated within the highway corridor.

The effects of the transmission line on scenic values are discussed in the FEIS starting on page 25, including the effects of burial for alternative C. The effects of that portion of alternative E within the highway corridor are considered similar to the effects of Alternative C. Alternative F affects scenic values related to the highway to a very minor degree at the Talpa end of the project.

**Finding:** The Responsible Official adequately discussed burial as an option that could affect alternative formulation.

**ISSUE 10 (Stebbins):** The selected alternative adversely affects scenic quality.

**Contention:** The decision has unacceptable effects on scenic and visual quality. Concerns of the residents are not taken as seriously as those of visitors and the effects of Alternative C are understated. The decision prevents the designation of State Highway 518 as a scenic byway.

**Response:** The record indicates that concerns, many of which were expressed by local residents regarding the proposed action's potential impacts on scenic and visual quality, were identified as issues in the environmental analysis process (AR 30, 32, 33, 34, 35, 36, 43, 59, 65, 72, 80a, 81, 101, 136, 143, 144, 148a, 163, 171, 180, 184, 191, 194, 201, 203, 204, 220, 222, 233, 246, 247, 249, 250, 251, 254, 255, 256, 263, 264, 278, 283a, 288, 299, 303, 305, 335, 355, 358, 361, 363, 367, 368, 369, 373, 382, and 399, ROD page ii and FEIS pages 5 and 7).

The Forest Land Management Plan for the Carson National Forest completed in 1986, established Visual Quality Objectives (VQO's)--FEIS pages 49-50 and they define the degree of acceptable alteration of the landscape based upon the importance of esthetics. The VQO's were established by considering the inherent scenic attractiveness of the landscape (Variety Classes), the public's concern (both residents and visitors) for scenery (Sensitivity Levels), and landscape visibility (Distance Zones).

Variety Classes measure the intrinsic scenic attractiveness of the landscape based upon the diversity of landforms, vegetative patterns and composition, surface water characteristics, and land use patterns and cultural features.

Sensitivity Levels measure the degree of public importance placed on the landscape as viewed from travel ways and use areas which include residential areas, and take into account things, such as; type of viewers (residents and visitors), importance of scenery to viewers (residents and visitors), number of viewers, etc.

Distance Zones measure the relative importance of and sensitivity of what is seen and perceived in the landscape and take into account the position of viewers in the landscape (foreground, middle ground, and background).

All of the alternatives have some affect on scenic and visual quality (FEIS pages 25-26 and 50-55). WO Amendment 2300-90-1 effective 6/1/90 Chapter 2380 – Landscape Management (Forest Service Manual) contains the policy and planning requirements for managing the visual resource and it does not preclude activities that have effects on scenic or visual quality. Alternatives A and C are the only alternatives that meet the Forest Plan VQO's---ROD page iv and FEIS 25-26 and 50.

When analyzing concerns for scenery, residents' concerns are given the same consideration as visitors' (National Forest Landscape Management, Volume 2, Chapter 1, The Visual Management System pages 18-21 and Landscape Aesthetics, A Handbook for Scenery Management pages 3-4 and 4-7 to 4-9).

Table 1, page 31 and 32 of the FEIS is a brief comparison of the effects by alternative. Detailed descriptions of the effects by alternative are in the FEIS on pages 50-55.

The construction of transmission lines as proposed under alternative C, or any of the other alternatives, does not preclude NM 518 from being nominated or designated as a State or National Scenic Byway.

A Scenic Byway is a public road having special qualities that have been recognized through legislation or some other official declaration. To be designated as a State or National Scenic Byway, a road or highway must significantly meet at least one of the six scenic byway intrinsic qualities:

- a. Scenic quality;
- b. Natural quality;
- c. Historic quality;
- d. Cultural quality;
- e. Archeological quality;
- f. Recreational quality.

There are no stipulations in the requirements, nomination process, or designation criteria of the State or National Scenic Byways Program directions that exclude a road with transmission lines from being nominated and designated as a scenic byway. If NM 518 significantly possesses at least one of the six intrinsic qualities, with or without transmission lines, the route is eligible to be nominated as a scenic byway (23 United States Code [USC] 131(s), 23 USC 315, 49 Code of Federal Regulations 1.48.0).

**Finding:** Visual concerns were addressed and the effects were disclosed. The decision follows established policy and land management plan guidance and does not preclude the possibility that State Highway 518 could be designated as a scenic byway.

**ISSUE 11 (Stebbins):** The environmental analysis process was skewed to favor alternative C.

**Contention:** Decisions were either made or avoided and data is misrepresented to make alternative C appear better. The Forest Service avoided designating State Highway 518 as a scenic highway to avoid having to pick an alternative other than alternative C.

The Forest Service used an invalid issue to pre-select Alternative C. That issue is the contention that alternatives B, D or F would open up the forest to more access and therefore, more access related problems such as poaching, erosion from new roads, trespass onto adjoining ownerships, etc. Problems created by additional access should be dealt with as administration issues rather than as reasons to avoid selection of an alternative that would create more access.

To say in the environmental consequences section that Alternative B might require pole placement by helicopter, automatically removed this alternative from serious consideration because that requirement has never been used and would not be applied to KCEC.

**Response:** The appellant states that problems resulting from the creation of new access under certain alternatives should be handled administratively and that this access issue should not have any bearing on the selection of alternatives. To the contrary, public input showed this issue to be of significant concern to a number of responders (AR 114, 151, 155, 182, 194, 211, 232, 233, 238, 239, 240, 241, 246, 254). The whole point of scoping and public involvement is to identify

the criteria against which the alternatives will be evaluated. Administration is certainly a phase of implementation, but the public input suggests problems with the decision that would create the need for administration.

The appellant states that the possibility of the requirement for helicopter use to place poles under alternative B automatically eliminates that alternative from serious consideration. Cost (helicopter use) is just one of the many factors that the Responsible Official uses to pick the selected alternative. If helicopter use had been required by the selected alternative, the requirement would have been enforced through the special use authorization.

**Finding:** The effects of alternatives were appropriately discussed and displayed. The access issue was appropriately used to distinguish among alternatives. The Responsible Official appropriately used legal discretion to weigh the effects of all the alternatives and to select an alternative that was judged to have the least overall impact.

**ISSUE 12 (Stebbins):** A Forest Plan amendment should have been prepared for every alternative.

**Contention:** Alternatives other than alternative C did not receive adequate consideration because a Forest Plan amendment was not prepared.

**Response:** This issue indicates a misunderstanding of the plan amendment process. For all alternatives, the analysis that was documented in the FEIS would provide the basis for any appropriate plan amendments. If any such amendments had been supported by the analysis, the Responsible Official would have included a decision in the ROD to amend the Forest Plan. In other words, an amendment would have been the end result of the process.

**Finding:** Forest Plan amendments are not required before the decision is made to select an alternative. A Forest Plan amendment is not necessary for the selected alternative.

**ISSUE 13 (Stebbins):** Project mitigation measures are not complete and the monitoring plan is not clear.

**Contention:** The EPA has specified some mitigation measures that are not included in the FEIS (AR 361-101, 361-149). It's not clear how the application of mitigation measures will be monitored. The removal of poles from the wetlands will create a big mess.

**Response:** Chapter 4 of the FEIS provides a detailed discussion of the monitoring process and a detailed listing of specific mitigation measures. The mitigation measures will be used to select appropriate special use authorization clauses, the application of which are then administered by the Forest Service through the terms of the special uses authorization.

**Finding:** The mitigation measures and the monitoring plan are adequate.

**ISSUE 14 (Stebbins):** The residents of Pot Creek were not adequately informed about the project.

**Contention:** Public involvement opportunities for the residents of Pot Creek were not adequate.

**Response:** The FEIS contains a very detailed analysis of the public participation outreach attempts and opportunities starting on page 4. Information on Forest Service contacts for the project was published starting in March of 2000, including the distribution of the information to all customers by KCEC. Various public notices, newspaper advertisements, and press releases were published to encourage comments. A number of public meetings were also held.

**Finding:** The record demonstrates that opportunities for public involvement, including the residents of the Pot Creek Area, were adequate.

**ISSUE 15 (Stebbins):** The decision adversely affects property values.

**Contention:** The decision adversely affects property values in the Pot Creek area. Additional studies are needed to assess the effects on property value of alternative C.

**Response:** Most of the impacts to property values relating to the visual effects exist now because alternative C follows the route of an existing distribution line with minor alignment changes between Talpa and Pot Creek. Alternative C would cause every other existing pole to be replaced with a taller pole. The FEIS discloses potential effects of the transmission line in a general section starting on page 91 and again in a specific section for alternative C on page 95.

Visual effects are addressed in detail in the response to issue number 10. Potential effects from EMF are discussed in the response to issue number 8.

**Finding:** The potential effect on property value was properly disclosed and the decision complies with policy and Forest Plan direction. No additional studies are needed.