United States Department of Agriculture **Forest Service** **Mark Twain National Forest**
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File Code: 1570-1
Date: September 24, 2004

Mr. Jim Bensman
Heartwood
585 Grove Avenue
Wood River, IL 62095-1615

CERTIFIED MAIL #7002 0510 0001 5058 8334
RETURN RECEIPT REQUESTED

RE: Appeal of the Decision Notice and Finding of No Significant Impact for the Middle River II Project Environmental Assessment, Houston/Rolla/Cedar Creek Ranger District, Mark Twain National Forest, Appeal #04-09-05-0035 A215

Dear Mr. Bensman:

On August 12, 2004, you filed a notice of appeal for yourself on behalf of Heartwood and Missouri Forest Alliance, pursuant to 36 CFR 215.13. District Ranger John Bisbee signed his Decision Notice and Finding of No Significant Impact on June 25, 2004, choosing Alternative 3 of the Middle River II Project. The legal notice for the decision was published on June 29. My decision is based upon the appeal record and the recommendation of the Appeal Reviewing Officer (ARO) Wade Spang, regarding the disposition of your appeal. The Appeal Reviewing Officer's review focused on the decision documentation developed by the Responsible Official, District Ranger John Bisbee, and the issues raised in your appeal. The Appeal Reviewing Officer's recommendation is enclosed. This letter constitutes my decision on the appeal and on the specific relief requested.

FOREST ACTION BEING APPEALED

The Middle River II Project Environmental Assessment evaluates resource management alternatives (including: improvement of wildlife habitat and forest health through hardwood and cedar thinning, prescribed burning, old growth habitat designation, hardwood tree planting, and control of invasive weeds) on approximately 1300 acres of National Forest land. It includes areas identified by the Forest Service as Compartments 9 and 10, which are managed under Forest Plan standards and guidelines for Management Prescription 3.4.

APPEAL REVIEWING OFFICER'S RECOMMENDATION

The Appeal Reviewing Officer found no evidence that the Responsible Official's decision violated law, regulation or policy. He found that the decision responded to comments raised during the analysis process and comment period and adequately assessed the environmental effects of the selected action. In addition, he found that the issues raised in your appeal were

addressed, where appropriate, in the decision documentation. Based on his review, the Appeal Reviewing Officer recommended that the decision be affirmed.

DECISION

After review, I concur with the Appeal Reviewing Officer's analysis and findings regarding your specific appeal issues (e.g., no draft EA, no response to comments, failure to prepare an EIS, inadequate herbicide analysis, inadequate analysis of Threatened and Endangered Species, no valid Forest Plan, lack of population data, inadequate sensitive species data or population objectives, inadequate analysis of salamanders, no consideration of a "no-logging" alternative, concerns on MIS and MVP, inadequate supplemental information reports, violation of settlement agreement, issues related to Forest Plan Amendments 1 and 2, and economic analysis). To avoid repetition, I adopt his rationale as my own and refer you to the enclosed Appeal Reviewing Officer recommendation for further detail.

It is my decision to affirm District Ranger John Bisbee's Decision Notice and Finding of No Significant Impact for the Middle River II Project on the Mark Twain National Forest.

Pursuant to 36 CFR 215.18(c) this decision constitutes the final administrative determination of the Department of Agriculture

Sincerely,

/s/ Ronnie Raum
RONNIE RAUM
Appeal Deciding Officer
Forest Supervisor

Enclosure

cc:
Responsible Official, John Bisbee
NEPA Coordinator, Becky Bryan
ARO, Wade Spang
RO, Patricia Rowell
Jim Scheff
Kelly Johnson

United States Department of Agriculture **Forest Service** **Chippewa National Forest Deer River Ranger District** **1037 Division Street PO Box 308 Deer River, MN 56636 218-246-2123**

File Code: 1570-1 **Date:** September 23, 2004
Route To:

Subject: Appeal of the Decision Notice and Finding of No Significant Impact for the Middle River II Environmental Assessment Project, Houston/Rolla/Creek Ranger District, Mark Twain National Forest, Appeal 04-09-05-0035 A215

To: Forest Supervisor, Mark Twain National Forest (ADO)

I am the designated Appeal Reviewing Officer for this appeal. This is my recommendation on disposition of the appeal filed by Jim Bensman for Heartwood and Missouri Forest Alliance. District Ranger John Bisbee signed the Decision Notice (DN) authorizing the Middle River II Project Environmental Assessment on June 25, 2004 and the legal notice was published in the Fulton Sun, Fulton, Missouri on June 29, 2004. Heartwood was appointed as the lead Appellants for this appeal and Jim Bensman as their authorized representative would be the contact.

My review was conducted pursuant to 36 CFR 215 – "Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities (Project Record: Folder E, Document E-62)." To ensure the analysis and decision are in compliance with applicable laws, regulations, policies and orders, I have reviewed and considered each of the points raised by the Appellants and the decision documentation submitted by the Mark Twain National Forest (MTNF). My recommendation is based upon review of the Project Record, including but not limited to the scoping letter, public comments, Decision Notice (DN), Finding of No Significant Impact (FONSI), and Environmental Assessment (EA).

On August 24, 2004 District Ranger John Bisbee held an informal disposition meeting, via conference call, with Appellants Jim Bensman of Heartwood and Jim Scheff of Missouri Forest Alliance on the Middle River II Project Appeal (Project Record: Folder G, Document G-25). Attending the call from the Forest Service were District Ranger John Bisbee, Mark Hamel, Carol Trokey and Jody Eberly. Ranger John Bisbee was on a western fire detail and was reached at the California Division of Forestry. They were unable to reach resolution on any of the appeal points through informal disposition.

Appeal Issues

The Appellants raised approximately 28 issues in six broad categories in their appeal of the Middle River II Project decision. The appeal points are addressed in the order received, although each contention may not be expressly re-stated. Where issues were redundant, reference was made to similar appeal issues. Issues were also grouped where appropriate.

At several places within the Notice of Appeal, the Appellants incorporate by reference literature submitted in earlier appeals. These references are not readily available for review. Therefore, we are under no obligation and will not consider this material as part of the Appeal Record. All information the Appellants desire considered in an appeal must be attached to the appeal in question.

II. MIDDLE RIVER PROJECT (Middle River II Project)

A. NO DRAFT EA (NOA, p. 3)

1. The Regulations Are Illegal.
The Appellants state, *"The Forest Service failed to provide a Draft EA to comment on…. Allowing the Forest Service to pick and chose when to provide the comment period is not a uniform comment period. Likewise, it is not clearly defined. Therefore, the regulations are illegal."* (NOA, p. 3-4).

Response: In their 30-day comment period letter, the Appellants submitted general comments about laws, regulations, policies, and environmental assessment documents (Project Record; Folder A, Document A-27). They specifically raised concern about not having an EA for review and other concerns related to the new appeal regulations.

36 C.F.R. 215.5(a)(1) and (2) requires the Responsible Official to (Project Record: Folder E, Document E-62):

> (1) Provide notice of the opportunity to comment on a proposed action implementing the land and resource management plan.
> (2) Determine the most effective timing for publishing legal notice of the proposed action and opportunity to comment.

The Appeals Reform Act (ARA) requires the agency to provide a 30-day comment opportunity period on proposed actions implementing land and resource management plans (16 U.S.C. Sec. 1612). The Act does not use the terms [1]cited by Appellants or speak to the timing of the opportunity for public comment. Nor does the Act dictate the timing of public comment by equating review of a "proposed action" to public review of a Draft Environmental Assessment. Instead, the Act identifies a 30-day review of proposed actions for Environmental Assessments.

The emphasis of the Appeals Reform Act was to give a consistent opportunity for public review for proposed actions implementing Forest Plans. Concerned with procedural delay, Congress specified that the public comment opportunity would be limited to 30 days. Congress allowed the Forest Service to define the "proposed action" available for public comment, and in doing so gave the agency discretion as to the timing of public comment.

The June, 2003 rulemaking changed a rigid one-size-fits-all approach to the timing of public comment in favor of allowing the standard 30-day comment period to be applied at a point in the

[1] Neither the ARA nor NEPA or its regulations (40 CFR Parts 1500-1508) use the term "Draft EA."

process when it would benefit both the public and agency the most [*see* 68 Fed. Reg. 33586 (June 4, 2003)]. The agency specifically determined that flexibility in the timing of public comment "provides a clearly defined, uniform period when public comment on specific Forest Service projects and activities are solicited." Id. Rather than allow for discretion in timing of comment based on the nature and complexity of the proposal, Appellants read into the ARA a mandatory comment opportunity on a draft environmental assessment. The Appellants' approach to commenting on proposals is not required by the ARA. Instead, the agency has determined through notice and comment rulemaking that the most effective timing for public review is best determined by the local official most knowledgeable with the proposal. In many instances, (including this project) it is to the publics' and Appellants' benefit to provide comment earlier in the decision-making process.

A scoping letter with maps and project description was mailed to the District mailing list (Appellants are on that list) and adjacent neighbors on January 25, 2003 (97 addresses) (Project Record; Folder A, Document A-1) to invite comments on the project. This project has also appeared in the Forest-wide Schedule of Proposed Actions (SOPA) (Project Record: Folder C, Document C-5, C-6, C-10). Comments received after the scoping period were accepted and evaluated in the development of issues and alternatives to the proposed action. Heartwood responded with their concerns (Project Record; Folder A, Document 7). Field visits upon request were noted. The only request for a visit to the project area was by the Ozark Chapter of the Sierra Club in an e-mail message to Carol Trokey. Carol Trokey met with the Sierra Club in the field. (Project Record; Folder A, Documents A-22, A-23, and A-29). On August 6, 2003, a letter (Project Record; Folder A, Document 24) with a proposal for the Middle River Project was mailed to everyone on the District mailing list and adjacent neighbors to invite timely, comments on the proposed projects as permitted by the revised regulations for notice, comment, and appeal (36 CFR 215 located in Project Record: Folder E, Document E-62). Legal Notice of this 30-day comment period was published August 12, 2003 in the *Fulton Sun*, Fulton, Missouri (Project Record; Folder C, Document 12). Among others members of the public, Heartwood and Missouri Forest Alliance responded with their concerns (Project Record; Folder A, Document 27).

An Environmental Assessment (Project Record; Folder C, Document 24) was prepared and a Decision Notice and FONSI was signed on February 18, 2004 (Project Record; Folder C, Document 20). On April 23, 2004, Ranger John Bisbee decided to withdraw the Middle River Project decision (Project Record; Folder F, Document 9-11) in order to clarify documentation on some key points in the project records and Decision Notice. This action resulted in this Environmental Assessment titled Middle River II Project (Project Record; Folder G, Document 2). Ranger John Bisbee signed the Middle River II Project Decision Notice and FONSI on June 25, 2004 (Project Record; Folder G, Document 1). This legal notice of the decision was published in the June 29, 2004 *Fulton Sun* - Fulton, Missouri (Project Record; Folder G, Document 4). The Forest Service also mailed two letters to the Appellants and other members of the public; one on June 28, 2004 with a copy of the Decision Notice (Project Record; Folder G, Document G-5, G-6) and one letter on June 30, 2004 with maps associated to the Middle River II Project (Project Record; Folder G, Document G-7. The June 28, 2004 letter also stated that an electronic version could be accessed through the Forest Internet site.

The Forest provided a 30-day comment period for the Middle River Project. Appellants cannot deny that they had a 30-day opportunity to review documents that meet the regulatory definition of "proposed action." Indeed, their detailed substantive comments demonstrate that they understood the proposal and were able to comment upon it. An Appeal Reform Act notice and comment opportunity was provided and comments received from Appellants that influenced the decision-making process. Appellants would have preferred review of a "Draft EA," but this is not required by the Appeals Reform Act.

I find no indication of any procedural defect in the notice and comment process. The fact the Appellants do not agree with the process adopted by the agency through rulemaking does not make it illegal.

2. The Regulations Were Not Followed.

The Appellants state, "[T]*he FR* [Federal Register] *explanation addressed the 30-day comment period at three times, scoping, before the alternatives are developed, and a draft EA. Having a 30-day comment period between the Alternative Development and EA was never a possibility. Therefore, having a 30-day comment period between the development of the alternatives and preparation of the EA is illegal."* (NOA, p. 4).

Response: Refer to the above detailed response located in Section II, A, 1.

The Forest provided a 30-day comment period for the Middle River Project. The Appellants detailed comments demonstrate that they understood the nature, effects, and intended result of the proposal. An Appeals Reform Act notice and comment opportunity was provided and comments were received from Appellants that influenced the decision-making process.

The Federal Register "explanation" referenced by the Appellants was merely preamble to the proposed rule. The preamble also plainly states that these are just "examples of how the rule's flexibility allows for the most effective use of the comment period." It is clear the Forest has considerable discretion in determining the most effective time for a comment period.

I find no indication of any failing in the notice and comment process. I find no indication of a violation of law or regulation in the Responsible Official's timing of the comment period. The fact the Appellants do not agree with the process, does not make it illegal.

The Appellants further contend, "[T]*he regulations require a determination…Under the APA*[2]*, (Note we are arguing this violates the Administrative Procedures Act), an unexplained determination is arbitrary and capricious as the Forest Service is required to set forth a reasoned explanation for its actions. At the bare minimum, the Forest Service would need to give some explanation for a comment period other than the normal draft EA. The Forest Service failed to provide any explanation for why it determined this was the most effective timing…When we appealed this project the first time, we raised this issue in the appeal resolution call…Therefore, not only did the Forest Service fail to provide an explanation for its*

determination, it refused to provide one when asked. This violates the Administrative Procedures Act". (NOA, p. 5-6).

Response: Refer to the above detailed response located in Section II, A, 1.

The Appellants contend the Responsible Official must provide documented reason of why they believe the chosen timing for public review is the most effective. Whereas this may be in some instances desirable, no such documentation is required by statute or appeal regulation. Appeal regulations require the Responsible Official, in light of the nature and complexity of the proposal, to determine or choose when the timing of public review will be most effective. Both the ARA and the regulations allow the Responsible Official full discretion in choosing the best timing for public comment on their proposal. Appellants filed detailed comments on the proposal. The record here indicates that the comment opportunity was effective and satisfied the intended purpose under the ARA. The record indicates that the Forest determined that comment would be most effect at an earlier stage of project development. Based on review of the record, I concur with their assessment and conclude that this was a reasonable determination given the scope and complexity of the project.

The Responsible Official mailed a letter dated August 6, 2003 for notice and comments, with enclosure Chapters 1, 2, tables and related maps (Project Record: Folder A, Document A-24). In that letter, the Responsible Official stated that he was requesting comments at this time because "…I believe that substantive comments received early in the analysis give me the greatest opportunity to consider them in the analysis." Comments were received from the Appellants that influenced the decision-making process during this time.

Based upon my review of the record, I conclude that the Forest reasonably determined that the comment period would be most effective if it occurred earlier in project development because of the scope and complexity of the project. Thus, I find no indication of a violation of Administrative Procedures Act regarding the Responsible Official's timing of the comment period or needing to explain why they determination was the most effective time to request comments.

The Appellants also claim, *"This was not the most effective timing…Some examples of why this was not the most effective timing include: While the project has about 100 acres of herbicides use, the document sent out for the 30-day comment period gave no indication of what herbicides would be used. The first EA stated, "Registered herbicides for noxious weed control, such as glyphosate," which lets the public know at least glyphosate would be used. Buried in the BE (which was not available until after the 30-day comment period) indicated Triclopyr would be used…As mentioned above, the EA indicates Triclopyr is going to be used. There was nothing in anything available to public before the close of the 30–day comment period that disclosed Triclopyr would be used. If the Forest Service would have disclosed Triclopyr was going to be used, we would have submitted studies on it and raised issues about its use. Since the Forest Service had the 30-day comment period before it disclosed that Triclopyr was going to be used, the public was not able to provide effective comments on its use."* (NOA, p. 6-7).

Response: In the 30-day comment period letter, the Appellants did not raise any herbicide issue (Project Record; Folder A, Document A-27), although both the scoping and the agency's description of the proposed action indicated that herbicides might be involved in this proposal.

Refer to the above detailed response located in Section II, A, 1.

As noted before, under both statute and appeal regulations, the Responsible Official has full discretion to determine the timing of the comment period. The Forest provided a 30-day comment period for the Middle River II Project decision. An Appeals Reform Act notice and comment opportunity was provided and comments received from Appellants that influenced the decision-making process. I find no indication of any failing in the notice and comment process. I find no indication of a violation of law or regulation in the Responsible Official's timing of the comment period. As noted above, the fact the Appellants do not agree with the regulation adopted by the agency, or believe that they might have provided different comments if the comment opportunity had been later in the process, does not prove that the regulation is illegal or the comment period ineffective.

The Appellants' comments on the proposal did not given any indication that they objected to herbicide use, even though the possibility of spot herbicides treatments was plainly and expressly disclosed during the comment period. The Appellants state a later 30-day comment period might have allowed them to provide more comments to the Responsible Official specific to herbicide use (Glyphosate or Triclopyr). However, the Appellants were provided two opportunities to comment (the scoping period and the 30-day comment period). In the scoping letter, with enclosures dated January 25, 2003 (Project Record: Folder A, Document A-1), it was mentioned that spot herbicide treatment was proposed. In the 30-day comment period letter, with enclosures dated August 6, 2004 (Project Record: Folder A, Document 24, p. 16,) it was identified by alternative if spot herbicide treatment was to be used and on how many acres.[2] Appellants chose not to assert their objections to herbicide use based upon the notice provided to them in these two documents.

The detailed comments from the Appellants demonstrate they understood the nature, effects, and intended result of the proposal. The Appellants were able to make comments, which were considered in the decision-making process. The public and Appellants benefited from an earlier opportunity to review and influence the proposal. I have found no indication of any failing in the

[2] The record discloses other references to herbicides. For example, the Biological Assessment (referred to as a BE by Appellants) states, "Some limited use of herbicide is planned. All application rates and methods would follow the manufactures and EPA guidelines. Some limited application of Glyphosate (Roundup, Rodeo and Accord) would occur on the non-native Multi-flora Rose, which is a state listed noxious weed. Some limited application of Triclopyr (Garlon 3A and 4) would occur on approximately 60 acres to control Serecia lespedeza, which is a non-native invasive species." (Project Record: Folder C, Document C-14, pp. 8-9). The Middle River II Project decision (DN, p. 4) states that "spot treatment with approved herbicides" would be used as a control method for invasive and noxious weeds and improves the ecosystem health in the area.

notice and comment process. Based upon my review of the record, I found no indication that the public did not have adequate time to review the proposal or lacked sufficient information to provide effective comments on the use of herbicides for the project.

Last, the Appellants state, *"Another issue that we continually appeal over is the Forest Service's failure to look for Indiana bats in the project area."* (NOA, p.7)

Response: In their 30-day comment period letter, the Appellants submitted general comments about bats but nothing specific to this project. (Project Record; Folder A, Document A-27).

See response to Section II, E, 1, b (below) regarding bat surveys in the Middle River II Project area. As long as the Forest Service follows the "Reasonable and Prudent Measures", and "Terms and Conditions" located in the Programmatic Biological Opinion from the United States Fish and Wildlife Service (USFWS) there is no violation of the Endangered Species Act.

I find the Appellants' claims are not supported.

3. Requirements for Substantive Comments

The Appellants claim, *"While the Appeals Reform Act provides standing to appeal to anyone who expresses interest in the project before the close of the 30-day comment period, the new appeal regulations only allow people who submit substantive comments to appeal…For example, the Forest Service did not disclose that glyphosate would be used until after the close of the comment period. Someone who supported the rest of the project and opposed the use of glyphosate would not be able to appeal as they could not have possibly raised substantive concerns about using glyphosate without the knowledge it would be used…The Department believes that an "expression of interest," such as someone who simply requests a copy of the decision, does not meet Congressional intent for participation by those who have the "right to appeal" as expressed in the ARA language"* (NOA, p.7).

Response: The Appeals Reform Act merely requires that the agency provide a 30-day comment period on proposed actions implementing Forest Plans. The statute does not define "proposed action." The revised appeal regulation (36 C.F.R. 215.2) (Project Record: Folder E, Document E-62) defines "proposed action" as: "A proposal made by the Forest Service that is a project or activity implementing a land and resource management plan on National Forest System lands and is subject to the notice and comment provisions of this part."

The Forest Service provided a document regarding the proposed action to the public for comment. The description and discussion of the proposed action contained considerable information concerning the nature, and type of action of the proposal. While the Environmental Assessment that was ultimately prepared for the project contained additional information, this does not provide evidence that the Appellants or public were deprived of an opportunity to provide comments as intended by the Appeals Reform Act. In this instance, the Responsible Official determined that early public review and input would be most beneficial. The document

distributed to the public for review meets the regulatory definition of "proposed action." The Appeals Reform Act merely requires a 30-day comment period on the proposed action. Although the Appellants would have preferred an opportunity to review and submit comments on a "draft" EA, the law does not require this action. The public and Appellants equally had the opportunity to comment on the proposal by knowing that herbicides could be a tool used to accomplish the project objectives.

Appellants object to the appeal regulation requirement that substantive comments must be submitted to obtain standing to file an administrative appeal. It is clear that one of Congress' purposes in establishing the notice and comment procedure through the ARA was to solicit meaningful participation from the public. The ARA (subsection c) plainly specifies that a person must have been involved in the public comment process in order to be eligible to appeal. The regulatory requirement that public comments be substantive is consistent with the ARA requirement that Appellants must have been "involved" in the public comment process. As noted in the rule preamble, "[e]xperience has shown that when comments are received that are not within the scope of the proposed action or are not specific to the proposed action, or do not include supporting reasons for concerns, they are not useful for consideration in project planning." (68 Fed. Reg. at 33587). Appellants' suggestion that anyone who simply "express interest" in a project, but never meaningfully participated in the notice and comment process is contrary to the intent of Congress, and ignores the Supreme Court's view that administrative proceedings must not be a game or forum to engage in unjustified obstructionism. Vermont Yankee Nuclear Power Development Corp. v. NRDC, 435 U.S. 553-554 (1978).

My review of the documents used by the Responsible Official to solicit comment during the 30-day comment period contained enough information for the public to provide sufficient comment on the project.

The Appellants also contend, *"Assuming the Forest Service is right on the legality of requiring substantive comments, it would be illegal and unconstitutional for the Forest Service to not provide someone the opportunity to submit substantive comments in a timely manner. This is precisely what has been done here. If the Forest Service is going to require substantive comments to appeal, they have to allow an opportunity."* (NOA, p.7).

Response: Contrary to the Appellants' claim, the Responsible Official provided ample opportunity for comment in compliance with the ARA and its regulations. The Forest Service provided a document regarding the proposed action to the public for comment. The description and discussion of the proposed action contained considerable information concerning the nature and type of action of the proposal. Appellants provided substantive comments based upon the information they received, and this information was taken into consideration in project development. The Appellants clearly had an adequate opportunity to comment on the proposal.

I find the document contained enough information for the public to provide sufficient comment to the Responsible Official.

4. The Forest Service Violated NEPA and NFMA.

The Appellants state, *"The CEQ NEPA Regulations have many requirements to facilitate public participation and get information to the public… They also require the Forest Service to 'Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.' 40 CFR § 1506.6(a). CEQ's 40 Questions (Question 38) clarify this by stating, 'Section 1506.6 requires agencies to involve the public in implementing their NEPA procedures, and this includes public involvement in the preparation of EAs and FONSIs.' The NFMA and regulations also have requirements for facilitating public participation. Not letting the public comment on the EA violates these requirements."* (NOA, p.8).

Response: The National Environmental Policy Act requires agencies to "make diligent efforts to involve the public in preparing and implementing their National Environmental Policy Act procedures," (40 CFR 1506.6(a)). Implementing regulations (36 CFR 219) for the National Forest Management Act sets public participation requirements at the Forest Plan level. These regulations do not contain public participation requirements at the site-specific level for Environmental Assessments (Reference 16 U.S.C. 1604). NEPA does not require agencies to circulate Environmental Assessments. How public participation is structured is left to the discretion of the agencies. The Forest Service provided a document regarding the proposed action to the public for comment. The description and discussion of the proposed action provided to the public contained considerable information concerning the nature and type of action of the proposal.

I find this meets the public participation requirements of the National Environmental Policy Act and National Forest Management Act.

B. RESPONSE TO COMMENTS (NOA, p. 10)

1. The Forest Service is required to prepare a response to the comments.
The Appellants state, *"The Forest Service failed to adequately respond to the comments. … Based on the entire regulations and the Federal Register Notices, we believe the Forest Service is still required to prepare a response to comments. Since this subject is at issue in this appeal, we will get a final administrative determination if the Forest Service is required to prepare a response to comments. If the Forest Service indicates the Responsible Official is no longer required to prepare a response to the comments, we will amend our lawsuit over the appeal regulations to address this. … It is clear, that while the specific requirement to prepare a response to comments is no longer in the regulations, this was simply reducing the complexity and simplifying the language. The Forest Service must respond to comments."* (NOA, p.10-11)

Response: The regulations at 36 C.F.R. 215.6(b) require the Responsible Official to do the following in regard to consideration of comments (Project Record: Folder E, Document E-62):

(1) The Responsible Official shall consider all written and oral comments timely submitted and in the manner authorized by 36 C.F.R. 215.6(a).

(2) All written comments received by the Responsible Official shall be placed in the project file and shall become a matter of public record.
(3) The Responsible Official shall document and date all oral comments received in response to the legal notice and place them in the project file.

As noted above, the regulations do not mandate that the Responsible Official respond in writing to the submitted comments. Therefore, the Forest did not violate the 215 regulations.

The Appellants also contend that the Federal Register notices for the proposal and final rulemaking failed to give notice of the proposed deletion of 36 C.F.R. 215.6(d)(1982) that requires a response to comment appendix to an EA. Contrary to the Appellants' assertions, the text of the proposed rule provided ample, unambiguous notice of this proposed change. (67 Fed. Reg. 77460, column 2 (December 18, 2002)) (*see also* final rule at 68 Fed. Reg. 33587 (column 3) and 33598 (columns 2,3)(June 4, 2003). The proposed rule text for revised 36 C.F.R. 215.6(b) is quite clear that a response to comment appendix for EAs is no longer required. Instead, consideration of public comments would be reflected in the environmental documentation (Project Record: Folder G, Document G-2) for the project. Not withstanding, responding to a request from Jim Bensman, the "Issue Sorting Table" (Project Record, Folder A, Document 39) was sent to him on April 2, 2004 (Project Record, Folder B, Document 43). This document includes a list of comments and responses.

I find the Responsible Official adequately considered the public comments submitted on the proposed action. I find no violation of law or regulation.

2. The Forest Service failed to adequately respond to the comments.
The Appellants state, *"Heartwood and the Missouri Forest Alliance submitted 21 pages of comments with 10,219 words of substantive comments. The Response to Comments responded with 227 words. There is no way the response to comments could have considered all the substantive comments with this few words. The Forest Service's response to the comments* [is] *not a response."* (NOA, p.12).

Response: There are no regulations referring to a minimum number of words required to adequately respond to comments. The proposed rule text for revised 36 C.F.R. 215.6(b) (Project Record: Folder E, Document E-62) is quite clear that a response to comment appendix for EAs is no longer required. Instead, consideration of public comments would be reflected in the environmental documentation (Project Record: Folder G, Document G-2) for the project.

I find no violation of law, regulation or policy.

C. FONSI-FAILURE TO PREPARE AN EIS (NOA, p. 13-14)

The Appellants state, *"NEPA requires all federal agencies to prepare environmental impact statements (EIS's) on "major Federal actions significantly affecting the quality of the human environment." 42 USC §4332(2)(C)."* (NOA. p. 13).

Response: NEPA requires that federal agencies follow certain procedures to examine the environmental impact of their proposed actions. If an agency proposes a "major Federal action [that] significantly affect[s] the quality of the human environment," NEPA requires the agency prepare an EIS that, among other things, details "the environmental impact of the proposed action." (42 U.S.C. § 4332(C)). An EIS, however, is not required if the agency first prepares an environmental assessment (EA) providing "sufficient evidence and analysis" that no EIS is necessary because the proposed action will not significantly affect the quality of the human environment (*See* 40 C.F.R. § 1508.9). In those circumstances, the agency issues a finding of no significant impact (FONSI) rather than preparing an EIS (40 C.F.R.§ 1508.13).

In some cases, an agency will compile a large programmatic EIS and, as specific components of the program are ready to be implemented, complete a site specific EIS or EA that expands on the larger EIS. The subsequent EIS or EA need "only summarize the issues discussed in the broader statement ... [and] concentrate on the issues specific to the subsequent action." (40 C.F.R. § 1502.20). The Council on Environmental Quality (CEQ) permits this procedure to avoid "repetitive discussions of the same issues and to focus on the actual issues ripe for decision." *Id*.

CEQ has promulgated regulations detailing how agencies should fulfill their NEPA obligations. CEQ's regulations list ten considerations that agencies should take into account when taking a "hard look" at whether a project will have "significant" environmental impacts, including the "degree to which the action may adversely affect an endangered or threatened species," the "degree to which the effects on the quality of the human environment are likely to be highly controversial," the "degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks," and the "[u]nique characteristics of the geographic area such as proximity to ... park lands, ... [or] wild or scenic rivers." (40 C.F.R. § 1508.27(b)(3), (4), (5), (9)). If an agency takes a "hard look" and determines that the proposed action has no "significant" environmental impact, an EIS is unnecessary. With respect to this project, the Forest Service considered multiple alternatives (including a "No-Action" Alternative), addressed public concerns about the project in an EA, and issued a Decision Notice that included a FONSI.

The proposed action, sent out for 30-day comment, disclosed the purpose and need for the project, a "Proposed Action", a series of issues, proposed alternatives and a preliminary effects comparison. This was sufficient information to enable the public to respond if they believed the Middle River II Project was controversial. Resource specialists did not indicate there was scientific controversy surrounding this project.

The Responsible Official states (FONSI (p. 7)), "Based on public participation and the involvement of resource specialists, I do not believe effects on the quality of the human environment to be highly controversial. This does not mean that the decision to proceed with the

project will be acceptable to all people, as some will probably find that their needs and interests are not served by the proposed actions. However, it is my professional judgment that the significant biological, social and economic issues have been addressed well enough for this project for me to make an informed decision. The proposed actions are similar to other management activities recently implemented in the same vicinity; therefore the results are reasonably predictable." (Project Record: Folder C, Document 24, Chap.3-4).

I find the District Ranger was correct in his determination that an EIS was not required.

The Appellants further claim," [A]n *EIS is required due to scientific controversy...The BE stated, 'Therefore there is a May Affect - Not Likely to Adversely Affect (NLAA) determination for the Indiana bat and the Middle River project.' The USFWS, however, disagreed."* (NOA, p. 14).

Response: The USFWS issued a Biological Opinion (BO) in response to the Middle River Project BA concluding that "adverse effects are likely to occur to the Indiana bat"…but that these effects were "not likely to jeopardize [the bat's] continued existence."(Project Record: Folder C, Document 18, pg. 6-7). This is consistent with the 1999 USFWS "likely to adversely affect" determination for Indiana bat that was made for the Programmatic Biological Opinion for the Mark Twain National Forest (Project Record: Folder E, Document 54; Folder C, Document 18, p. 1).

The District Biologist's finding in the Middle River BA of "may affect-not likely to adversely affect" for the Indiana bat was not consistent with the earlier finding of the Programmatic Forest BO. An email correspondence between the District and the USFWS indicates that the USFWS decided to tier to the programmatic BO with a "likely to adversely affect" call due to the late timing of bat surveys (Project Record: Folder D, Document 24). However, I found no indication of a critical disagreement or lack of communication between the USFWS and the Forest Service. The Forest Service did formally consult with the USFWS and did analyze site-specific effects from this project. The USFWS, who is responsible for enforcing the Endangered Species Act made the final conclusion on the Middle River II Project decision:

> "[T]he actions and effects associated with the proposed Middle River Project are consistent with those identified and discussed in the Service's Programmatic BO. After reviewing the size and scope of the project, the environmental baseline, the status of Indiana bat and its potential occurrence within the project area, the effects of the action; and any cumulative effects, it is the service's biological opinion that this action is not likely to jeopardize the continued existence of the Indiana bat." (Project Record: Folder C, Document 18, p. 7).

One can expect discussion and differing points of view from the scientific community and between agencies. It is this discussion that results in increased understanding of the issues. As stated previously, the Forest has relied upon the USFWS, the consultation process, Biological Opinion, and relevant recovery plans. They have also relied upon the many scientific references listed in the project-level Biological Evaluation and Forest-level Biological Assessment.

CEQ regulations list the "degree to which the action may adversely affect endangered or threatened species" as one of the matters that must to be considered in deciding whether to issue an EA or an EIS. 40 C.F.R. § 1508.27(b)(9). Prior to reaching its decision, the Responsible Official prepared a Biological Assessment concluding that the project area had no known caves or mines that could serve as winter habitat (hibernacula) for Indiana bats. At the time the evaluation was completed, the nearest Indiana Bat caves were over 14 air miles south and east of the project area, the nearest capture of a reproductively active female Indiana bat was made approximately 70 miles from the project area and the nearest maternity colony was 70 miles south of the project area (Project Record: Folder C, Document 14, p. 19).

In addressing the Indiana bat for the Middle River Project, The Biological Opinion from the USFWS also concluded that "[t]he likelihood of cutting a tree containing an individual roosting Indiana bat ... is anticipated to be extremely low because of the large number of suitable roost trees present on the MTNF and the rarity of the species" in the area" (Project Record: Folder C, Document 18, pg. 7). In addition the USFWS expected the effects of prescribed burning to be minimal due to the low density of Indiana bats documented within the project area and the 14-mile distance to the closest occupied hibernacula. In fact, the BO states, "The prescribed burns may also have a beneficial effect by opening forest canopies and decreasing dense understory vegetation that could inhibit bat movements to foraging habitats and roosting sites." (Project Record: Folder C, Document 18, p. 6). The District biologist discusses more benefits of Alternatives 2 or 3 by stating that, "uneven-aged management would reduce the existing dense canopy closure and move it toward the 50-70% canopy closure that is ideal for Indiana bat foraging." (Project Record: Folder G, Document 2, p. 83).

The above findings support the Forest Service's ultimate "finding of no significant impact." The operative word here is "significant." While the USFWS detailed some potential impacts, it found they were unlikely to occur and would not have a significant impact on the species. The Forest Service used its expertise, along with its consultation with the USFWS, to conclude that the degree to which the project may adversely affect the endangered Indiana bat was small. (Ref *Cf. Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 374-77 (1989)).

The BO requires the Forest Service to implement "all pertinent reasonable and prudent measures ... to minimize the impact of the anticipated incidental take of Indiana bats" in order to insure that any harm that does occur is not significant. "Take" is defined under ESA to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." (16 U.S.C. § 1532(19)). By approving the Middle River II Project, the Forest Service did not give itself a green light to disregard the project's impact on the Indiana bat. Should that impact turn out to be significantly adverse, the Forest Service will be required to adjust the project accordingly.

I see no indication of a disagreement between the Forest Service and the USFWS on the final decision of effects on Indiana bat nor is their any confirmation of those effects being "significant". I find that an EIS is not required.

D. HERBICIDES (NOA, p. 16)

1. The Forest Service failed to perform the analysis required by the Forest Plan.
The Appellants state, *"The Forest Service, however, has neither adequately considered the consequences of the herbicides nor adequately considered alternatives... The Forest Plan requires: Use pesticides only after alternative analysis clearly demonstrate that pesticide use is the most effective means to meet overall management objectives. The analysis will consider environmental acceptability, economic efficiency, and biological effectiveness of alternatives. Alternatives include silviculutural, mechanical, manual, prescribed fire, biological, chemical, and regulatory practices. Forest Plan at IV-23. The analysis does not demonstrate that herbicides are the most effective means, much less clearly demonstrate. For example, the discussion on pages 145-147 do not mention what the "overall management objectives are."* (NOA, p.16-17).

Response: In their 30-day comment period letter, the Appellants did not raise this issue. (Project Record; Folder A, Document A-27).

Alternative 1 allows for future potential treatments of individual populations of non-native invasive species without the use of herbicides (Project Record: Folder G, Document 2, p.136). Therefore, this analysis has adequately considered an alternative with no herbicide use. Also, within Alternatives 2 and 3, a mix of treatments were proposed to control non-native species. Herbicide use is only proposed where it is considered the most effective means.

A "Weed Control Methods Comparison and Invasive Plant Control Methods Pros and Cons Analysis" was conducted (Project Record: Folder G, Document 2, p.145-147, Tables 22, 23). Included in this analysis is a comparison of economic efficiency and effectiveness between various types of treatments. Treatment with mechanical methods has proved to be labor intensive, expensive, and often not effective even with small weed populations (Tu et al., 2001). Treatments for controlling invasive plants other than herbicide was documented in this area. Limited success has occurred (Middle River II EA, p.135). Studies suggest control is best accomplished by an integrated management approach that combines mechanical and chemical methods (Project Record, Folder E, Documents 14, 15, 111, 113). This strategy is used in the Middle River II Project EA.

The consequences or effects of herbicide use are discussed throughout the Middle River II EA on various resources including; Soil (EA, pp.52-53), Water (EA, pp.58-59), Vegetation (EA, pp.68-69), Regional Forester Sensitive Plant Species (EA, pp.74-76), Fisheries (EA, p.103-104), Open/Semi-Open areas (EA, p.111), Range Management (EA, p.130), Invasive Plants (EA, p.137), and Impacts to Humans (EA, pp.138-142). Additional effects on Wildlife, Aquatic Species, Water Quality, and Soil Resources are also found near the end of the document (EA, p.142-144). Additional effects are disclosed in the Biological Assessment (Project Record: Folder C, Document 14, pp. 8, 9, 14, 15, 20, 21, 25, 26, 30, 31). The analysis considered environmental acceptability, economic efficiency, and biological effectiveness of alternatives.

I find the analysis has followed management direction in the Forest Plan (p. IV-23). Alternative analysis clearly shows the need for some herbicide use to meet the objectives of invasive plant management.

The Appellants also contend, "*…not all the alternates* [sic] *are discussed. If the Forest Service would have allowed us to comment on the EA, we would have pointed out farming as an alterative* [sic] *for the fescue. The Forest Service acknowledged farming is a method that can be used in some places. Yet this alterative* [sic] *is not mentioned. Another problem is the lack of consideration of combinations of methods such as mowing and then digging multiflora rose. The EA does not adequately consider the environmental acceptability of the alternatives. For example, we have several studies we would have submitted on Triclopyr if the Forest Service would have allowed us to comment on the EA or indicated before the close of comments that it was proposed to be used. Therefore, the Forest Plan has been violated."* (NOA, p.17)

Response: In their 30-day comment period letter, the Appellants did not raise this issue. (Project Record; Folder A, Document A-27).

See response to Section II, A, 2 regarding opportunity to comment. The initial public involvement letter dated January 25, 2003 included spot treatment using herbicides for multi-flora rose, sericea lespedeza, and grasses such as fescue (Project Record, Folder A, document 1, p. 6).

See response to Section II, D, 1 regarding the consideration of alternatives. A "Weed Control Methods Comparison and Invasive Plant Control Methods Pros and Cons Analysis" was conducted (Project Record: Folder G, Document 2, p.145-147, Tables 22, 23). Discussions on Fescue and multi-flora rose are included in this analysis. A failure in survival of hardwood planting due to competition with fescue has been documented (Project Record, Folder B, Document 37).

I find the analysis of alternative methods to control fescue and multi-flora rose were adequately addressed. The Appellants claims are not supported

The Appellants further state, "*The Forest Plan also requires: The decision to use herbicides versus other alternatives shall be clearly evaluated during project analysis and documented in the Decision Notice. Forest Plan at IV-20. Neither the EA nor the DN meet this requirement. As explained above, the EA did not clearly evaluate alternatives. For example, farming was not even mentioned. The DN, simply claims the requirement was met. It does not document the requirement was met."* (NOA, p.17)

Response: In their 30-day comment period letter, the Appellants did not raise this issue. (Project Record; Folder A, Document A-27).

Refer to the above response located in Section II, D, 1.

I find the analysis has followed the management direction in the Forest Plan (p. IV-20). Alternative analysis clearly shows the need for some herbicide use to meet the objectives of invasive plant management. The analysis considered environmental acceptability, economic efficiency, and biological effectiveness of alternatives. The Decision Notice documents this analysis was done (Project Record: Folder G, Document G-1, p. 4).

2. The Forest Service has not prepared a Vegetation Management EIS.
The Appellants contend, *"The index for the Forest Plan EIS does not list herbicide or pesticide and we were not able to find any discussion of them in the EIS. Therefore, the Forest Service has not prepared a legally adequate Forest level cumulative effects of pesticides analysis. This violates NEPA."* (NOA, p.17).

Response: In their 30-day comment period letter, the appellants did not raise this issue. (Project Record; Folder A, Document A-27).

The Appellants allude that the Forest Plan EIS does not mention the use of herbicides thus a cumulative effects analysis was not done. To the contrary, the Mark Twain Forest Plan EIS discusses the use of herbicides on page III-33. Herbicide use was analyzed during preparation of the Forest Plan EIS. Likewise, the Forest Plan authorizes the use of herbicides (MTNF, LRMP, IV, p. 20,23).

The Middle River II Project EA has done an analysis on effects of herbicides. Some of this may be found in the section on "Invasive Plant Management to Achieve the Desired Future Condition" (Project Record: Folder G, Document G-2, pg.136-149). Refer also to the response in Section D, 1.

I find the Forest Plan EIS has authorized the use of herbicides. Cumulative effects analysis has also been completed. I find no violation of NEPA.

E. THREATENED AND ENDANGERED SPECIES (NOA, p. 17-18)

1. INDIANA BAT.

A. ANALYSIS OF IMPACTS
The Appellants allege that the Forest Service failed to analyze all of the effects on the Indiana Bat and refer to previous appeals as a reference. They state, *"Likewise, we have raised this issue over and over again. So we will not go into detail other than point out that the BE and EA do not analyze all of the effects. Our previous appeals explain the issue. We will, however, point out that the USFWS indicated their belief that the timber sale will likely adversely affect the Indiana bat."* (NOA, p.18).

Response: In their 30-day comment period letter, the Appellants submitted general comments about bats but nothing specific to this project. (Project Record; Folder A, Document A-27).

I find no indication of a disagreement between the Forest Service and the USFWS on the final decision of effects on Indiana bat nor is their any indication of those effects being significant (See response to Section II, C related to the USFWS response to the Middle River II Project).

The rest of this comment is not specific to this project (See response located in Section II,. G regarding comments not specific to a project). The Appellants reference information submitted in earlier appeals. These references are not readily available for review. We are under no obligation and will not consider this material as part of the Appeal Record. All information the Appellants desire considered in an appeal must be attached to the appeal in question**.** Specific concerns the Appellants raised concerning the project effects analysis for the Indiana bat are addressed below in Section II, E, 1 b, c, and d.

B. SURVEYS.

The Appellants state the Forest Service is not specific enough in providing information on bat surveys. They believe the surveys are inadequate for finding maternity colonies. The Appellants state, *"Likewise we have raised this issue over and over again. So we will not cite the legal reasons again. The BE indicates the project area has been checked for Indiana bats. It, however, does not indicate how well it was checked…. The BE has not addressed if the surveys were adequate to detect a maternity colony in the areas to be logged and burned.* (NOA, p.18).

Response: In their 30-day comment period letter, the Appellants submitted general comments about bats but nothing specific to this project or the concern over inadequate surveys. (Project Record; Folder A, Document A-27).

The Biological Assessment for the Middle River Project and the EA provide a general description of what surveys have taken place (Project Record: Folder C, Document 14, pp.18-19; Project Record: Folder G, Document 2, p. 80) and lists partners involved in survey efforts. Specific information on the intensity and location of surveys can be found in the Project Record. (Project Record: Folder E, Document 8).

In their concurrence letter the USFWS states, "Surveys that utilized a combination of Anabat and mist-netting techniques were conducted in the project area in 2003 and no Indiana bats were detected or captured. However, these surveys were conducted after the recommended season, therefore, the exact status of Indiana bats within the Middle River project area is unknown. The project area is not in an Indiana bat area of influence." (Project Record: Folder C, Document 18). Based on its knowledge of the status of Indiana bats in the project area, the USFWS determined that the proposed action was *"not likely to jeopardize the continued existence of the Indiana bat."* (Project Record: Folder C, Document 18, p. 7).

In the opinion of the District wildlife biologist, "The information available on Threatened, Endangered, Proposed, and Sensitive (TES) Species locations and potential habitats in the Middle River Project Area is of sufficient quantity, quality, and relevance to make an accurate and complete analysis of potential effects on TES species in the project area. Enough

information is available to make a reasoned management decision; therefore additional surveys are not needed for this project decision." (Project Record: Folder G, Document 2, p. 80).

The Appellants argue that the Forest Service survey methods are inadequate because they failed to find a maternity colony in the Pine Ridge Timber Sale area. It is unlikely that any survey technique would locate bats with a 100% effectiveness; therefore the safest approach is to assume that bats may be present in an area regardless of whether or not any were detected. The Biological Assessment for the Middle River Project clearly documents that while no Indiana bats are known to be present, there is potentially suitable roosting and foraging habitat in the project area (Project Record: Folder C, Document 14, pg 17-24). It analyzes the project area with this premise in mind and the USFWS agreed with this analysis (Project Record; Folder C, Document 18, p. 7).

After reviewing the Record, I find the Appellants' claims unfounded. As long as the Forest Service follows the "Reasonable and Prudent Measures", and "Terms and Conditions" located in the Programmatic Biological Opinion, there will be no violation of the Endangered Species Act.

C. TOP PRIORITY ON THE BATS.

The Appellants state, *"The Forest Service has violated the Mark Twain Forest Plan and the ESA by failing to place top priority on the bats. See, Bensman v. United States Forest Service, 984 F.Supp. 1242 (W.D.Mo. (1997)) & House v. United States Forest Service, 974 F.Supp. 1022 (E.D.Ky. 1997)."* (NOA, p.18).

Response: In their 30-day comment period letter, the Appellants submitted general comments about bats but nothing specific to this claim. (Project Record; Folder A, Document A-27).

The Mark Twain National Forest has a long history of addressing the Indiana bat. In 1984, the Forest Service requested formal consultation with the USFWS on the Mark Twain National Forest Land and Resource Management Plan (Forest Plan). On August 8, 1985 the USFWS issued a non-jeopardy biological opinion for seven federal species: Curtis' pearly mussel, pink mucket pearly mussel, Higgins' eye pearly mussel, bald eagle, Indiana bat, gray bat, and Ozark big-eared bat. Two species: Ozark big-eared bat and Higgins' eye pearly mussel are now considered by the USFWS and the Missouri Department of Conservation (MDC) to be extirpated from the State.

In 1998, the Forest Service reinitiated programmatic consultation for continued implementation of the Forest Plan. Further consultation was needed to incorporate information gathered about federally threatened and endangered species over the previous decade. A programmatic Biological Assessment (BA), including nine federal species, was submitted to USFWS in September 1998 (Project Record: Folder E, Document 48). Determinations of "no effect" or "not likely to adversely affect" were made for five of the nine species: running buffalo clover, Tumbling Creek cavesnail, Topeka shiner, Curtis' pearly mussel, and pink mucket pearly mussel. The USFWS concurred with these determinations as seen on page 2 of the 1999 Biological Opinion (BO).

On June 23, 1999, the USFWS issued a non-jeopardy Biological Opinion including the other four federal species: Mead's milkweed, bald eagle, Indiana bat, and the gray bat (Project Record: Folder E, Document 54). This history of working with the USFWS (for Threatened, Endangered, and Proposed species) shows the high priority the Forest Service has for listed animals. The Mark Twain National Forest has a 7 (a)(1) Conservation Plan in place, signed by the USFWS, which further indicates the priority placed on Threatened and Endangered species.

The Indiana bat, as well as other threatened, endangered and sensitive species, is specifically discussed in the BA and BE for the Middle River Project (Project Record: Folder C, Document 14, 15). Documentation of surveys to determine the potential presence of the Indiana bat on the Houston-Rolla-Cedar Creek Ranger District and the Mark Twain National Forest illustrate how seriously this issue is viewed (Project Record: Folder E, Document 8).

I find the Appellants claims are not supported.

D. BEST SCIENTIFIC AND COMMERCIAL DATA AVAILABLE.

The Appellants claim, *"Section 7 requires the Forest Service to use the "best scientific and commercial data available." The decision violates the ESA due to his failure to use the best scientific and commercial data available."* (NOA, p.18).

Response: In their 30-day comment period letter, the Appellants submitted general comments about bats but nothing specific to this project. (Project Record; Folder A, Document A-27).

The requirement that agencies use the "best scientific and commercial data available,"16 U.S.C 1536(a)(2), does not require an agency to conduct new studies when new information becomes available (See *Southwest Ctr. For Biological Diversity v. Babbit*, 215 F.3d 58, 60 (D.C. Cir. 2000)). All that is required of the agencies is to seek out and consider all existing scientific information relevant to the decision at hand (See id. At 60-61). Agencies cannot ignore existing data, which they did not do in this case.

The USFWS considered all new information (changed conditions, etc) and determined:

> "[T]*he actions and effects associated with the proposed Middle River Project are consistent with those identified and discussed in the Service's Programmatic BO. After reviewing the size and scope of the project, the environmental baseline, the status of Indiana bat and its potential occurrence within the project area, the effects of the action; and any cumulative effects, it is the service's biological opinion that this action is not likely to jeopardize the continued existence of the Indiana bat."* (Project Record: Folder C, Document 18).

The USFWS indicated no violation of the Endangered Species Act.

I find the Appellants claim is not supported.

2. OTHER SPECIES.

The Appellants contends, *"Most of the problems documented for the Indiana bat such as failure to consider the impact of different alternatives apply to the other listed species as well."* (NOA, p.18).

Response: In their 30-day comment period letter, the Appellants did not raise this issue. (Project Record; Folder A, Document A-27).

The comment is not specific. However, the Environmental Assessment does address the impact of the different alternatives on listed species (Project Record: Folder G, Document 2, pp. 72-77, 81-85, 104-105). In addition, the Biological Assessment "identifies the site-specific effects of the proposed action on federal threatened, endangered and proposed species." (Project Record: Folder C, Document 14). The Middle River Project Biological Assessment was reviewed by the USFWS and they responded with a Biological Opinion dated November 17th, 2003 (Project Record: Folder C, Document 18). This letter does not state any problems for any listed species nor did it indicate any problem with the analysis used. Likewise the Biological Evaluation for this project (Project Record: Folder C, Document 15) evaluates impacts to many species..

I find the Appellants' claims are not supported.

F. NO VALID FOREST PLAN (NOA, pp. 18-19)

1. Forest Plan Statement.

The Appellants claim, *"The National Forest Management Act requires a Forest Plan for the Mark Twain National Forest. Timber sales cannot be approved without a valid Forest Plan. While NFMA allows a Forest Plan to be issued for a 10-15 year period, the Mark Twain Forest Plan was only issued for a 10-year period and the Plan has now expired. … Therefore, the 1986 Forest Plan expired and ceased to exist in 1996. Therefore, the Mark Twain does not have a Forest Plan and these timber sales cannot go forward until the Mark Twain has a valid Forest Plan."* (NOA, pp.18-19).

Response: In their 30-day comment period letter, the Appellants did not address this specific issue (Project Record; Folder A, Document A-27).

NFMA states Forest Plans "shall be revised from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every 15 years…." 16 U.S.C. 1604(f)(5). The Mark Twain National Forest Plan was approved in June 1986. Since adoption, the Forest Plan has been amended 29 times. The Mark Twain National Forest published the Notice of Intent (NOI) for the Forest Plan Revision in 2002. The decision for the revised Forest Plan is scheduled for 2005.

The Appellants contend that the Middle River II Project decision (specifically Timber Sales) may not be approved or implemented until the Mark Twain National Forest Plan revision is completed. There is no express requirement in the National Forest Management Act (NFMA) or

its regulations to halt management activities if a Forest cannot meet the 15-year target in the statute.

In addition, Congress stated (Consolidated Appropriations Resolution, 2003):

> "Sec.320. REVISION OF FOREST PLANS. Prior to October 1, 2003, the Secretary of Agriculture shall not be considered to be in violation of subparagraph 6(f)(5)(A) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(5)(A) solely because more than 15 years have passed without revision of the plan for a unit of the National Forest System. Nothing in this section exempts the Secretary from any other requirement of the Forest and Rangeland Resources Planning Act (16 U.S.C. 1600 et seq.) or any other law: *Provided,* That if the Secretary is not acting expeditiously and in good faith, within the funding available, to revise the plan for a unit of the National Forest System, this section shall be void with respect to such plan and a court of proper jurisdiction may order completion of the plan on an accelerated basis."

A Forest Plan does not expire. I find the Forest Plan has been adequately updated through amendments; the schedule for Forest Plan revision in no way affects the applicability of the current Forest Plan. The Forest is acting expeditiously and in good faith in revising its Forest Plan.

2. NFMA Requirements.
The Appellants state, *"Even if the Plan did not expire in 1996, NFMA requires the plan to be revised "at least every fifteen years." 16 USC § 1604(f)(5). The Mark Twain Plan was approved on June 23, 1986. Therefore, the NFMA required the Mark Twain to have a new plan by June 23, 2001."* (NOA, p.19)

Response: Refer to the above response located in Section II, F, 1.

G. POPULATION DATA (NOA, p. 19)

The Appellants contend, *"Likewise we have raised this issue over and over again. So we will not go into detail other than point out that the BE and EA do have the population data required by law. Our previous appeals explain the issue."* (NOA, p.19).

Response: In their 30-day comment period letter, the Appellants raised general concerns about populations and the need to collect baseline data but nothing specific to this project (Project Record; Folder A, Document A-27).

This comment is not specific. The regulations at 36 CFR 215 (Project Record: Folder E, Document E-62) specifically state that "it is the appellant's responsibility to provide project or activity specific sufficient written evidence and rationale, focusing on the decision, to show why the Responsible Official's decision should be reversed." (36 CFR 215.14(a)). Incorporation of other appeals by reference is not allowed. Appellants have not adequately provided sufficient information in support of this appeal issue.

Appellants need to show some rationale as to why they believe a decision should be reversed. A mere assertion with reference to an appeal on a totally different project is not enough to reverse the Responsible Officials decision. Regardless, population data was used in the analysis (See response to Section II, H).

H. SENSITIVE SPECIES DATA (NOA, p. 20)

The Appellants state, *"The 11 Circuit also ruled the Forest Service was required to obtain population data for sensitive species. Page 87 of the Forest Plan also requires the Forest Service to obtain data on sensitive species. This data has not been gathered."* (NOA, p.20)

Response: In their 30-day comment period letter, the Appellants raised general concerns about populations and the need to collect baseline data but nothing specific to this project (Project Record; Folder A, Document A-27).

See response located in Section II, G regarding comments not specific to a project.

The Appellants contend that the 11th Circuit Court of Appeals held that the Forest Service was required to obtain population data for sensitive species and that this data has not been gathered. This is not incorrect. The 11th Circuit ruled the Forest Service was required to obtain population data for sensitive species, where a Forest Plan requires the collection of such data. I was unable to find the reference to sensitive species in the Forest Plan (p. 87) that the Appellants refer to. The MTNF LRMP does not require the collection of population data for sensitive species; therefore the 11th Circuit ruling does not apply to the MTNF (Project Record: Folder H, Document 21). Additionally, the 11th Circuit Court ruling affects activities for National Forest System lands located in the States of Florida, Georgia, and Alabama and, therefore, is not binding on National Forest System lands in Missouri.

Regardless, the District Biologist for the Middle River II Project analysis obtained population data through numerous references including a Supplemental Information Report to the LRMP for the February 29th, 2000 Regional Forester Sensitive Species list (Project Record: Folder C, Document 15, p. 4). Effects to sensitive species populations were considered when making determinations in the Biological Evaluation (Project Record: Folder C, Document 15, pp. 7, 10-11).

I find the EA and BE adequately address the impacts to sensitive species.

I. SENSITIVE SPECIES POPULATION OBJECTIVES (NOA, p. 20)

The Appellants claim, *"Likewise we have raised this issue over and over again. So we will not go into detail other than point out that there are not Sensitive Species population objectives. Our previous appeals explain the issue."* (NOA, p.20).

Response: In their 30-day comment period letter, the Appellants raised general concerns about populations and the need to collect baseline data but nothing specific to this project or issue. (Project Record; Folder A, Document A-27).

This comment is not specific to this project. See response located in Section II, G.

Page IV-51 of the Mark Twain Forest Plan discusses species with specialized habitats by stating, "During the Plan period the completion of an inventory of threatened and endangered and sensitive species and species of concern will be emphasized. This will be done in coordination with the Missouri Department of Conservation in the establishment of the Heritage database." The Forest has worked closely with the Missouri Department of Conservation and has developed a database for threatened, endangered, and sensitive species, which is referenced in the Biological Evaluation for this project (Project Record: Folder C, Document 15, p. 4). Page IV also states, "Emphasize the inventory, identification, and protection of species associated with these specialized habitats."

Forest Service Manual (FSM) 2672.1 states, "Sensitive species of native plant and animal species must receive special management emphasis to ensure their viability and to preclude trends toward endangerment that would result in the need for Federal listing. There must be no impacts to sensitive species without an analysis of the significance of adverse effects on the populations, its habitat, and on the viability of the species as a whole. It is essential to establish population viability objectives <u>when making decisions that would significantly reduce sensitive species numbers</u> (emphasis added)."

The BE addresses the requirements of FSM 2672.1 by indicating there will be no appreciable cumulative effects of this activity on sensitive species when added to the other impacts from past, present, and reasonably foreseeable future activities (Project Record: Folder C, Document 15, pgs. 7, 10-11). The Henslow's sparrow is the only sensitive species in the Middle River Project with a "may impact" determination but any impact is "not likely to contribute to a trend towards federal listing or loss of viability for all alternatives". Analysis determined there would be "no impact" on other sensitive species (Project Record: Folder C, Document 15, pp. 7, 10-11). Therefore, the conclusion of the BE is that these alternatives would not significantly reduce sensitive species numbers.

I find the Appellants claims are not supported.

J. SALAMANDERS (NOA, p. 20)

The Appellants contend, *"Likewise we have raised this issue over and over again. So we will not go into detail other than point out that the EA does not address the impacts on salamanders as documented in the study on the Mark Twain. Our previous appeals explain the issue."* (NOA, p.20).

Response: In their 30-day comment period letter, the Appellants raised a general comment regarding global populations of salamanders. (Project Record; Folder A, Document A-27).

This issue is not specific to this project. See response located in Section II, G.

The Forest Plan (pp. IV 51-58) states that salamanders use specialized habitats and provides management objectives for maintaining, enhancing, or protecting these habitats. The Forest Plan acknowledges the importance of mature/over mature forest with dead, downed, and rotten woody debris and requires a percentage of the forest be maintained in mature and old growth forest. It further protects special habitats such as springs, seeps, fens, fishless ponds, caves, and glades that harbor salamander species. A SIR dated May 21, 2001, reviewed new information associated with plethodontid (lungless) salamanders and concluded that the Forest Plan adequately provides for salamanders by ensuring adequate amounts of the specialized habitat they use (Project Record: Folder E, Document 50). The Middle River II Project EA incorporates the 5/21/01 SIR by reference in the analysis of effects associated with salamanders (Project Record: Folder G, Document 2, p. 13) and discusses effects on specialized habitats (Project Record: Folder C, Document 15, p. 108-111).

I find these references indicate the District biologist did consider impacts to salamanders in the Middle River II Project assessment contrary to the Appellants assertion.

K. NO-LOGGING ALTERNATIVES (NOA, p. 20)

The Appellants claim, *"Likewise we have raised this issue over and over again. So we will not go into detail other than point out that the EA does not develop and consider no-logging alternatives. Our previous appeals explain the issue."* (NOA, p.20).

Response: In their 30-day comment period letter, the Appellants brought up this issue. (Project Record; Folder A, Document A-27).

NEPA requires federal agencies to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts of alternative uses of available resources (42 U.S.C. 4332). The Council on Environmental Quality (CEQ) regulations implementing NEPA discusses alternative development. Agencies are to rigorously explore and objectively evaluate all reasonable alternatives, and briefly discuss the reasons for eliminating alternatives from detailed study (40 C.F.R. 1502.14(a)). While regulations require that a range of alternatives be analyzed, the "No Action Alternative" is the only alternative specifically required as an option to the proposed action (40 C.F.R. 1502.14(d)). There is no set number of alternatives required in order to reflect a reasonable range. Agencies have discretion to determine appropriate alternatives based upon the purpose of the proposal.

In reviewing Forest Service decisions similar to this project, courts have found that the range of alternatives may be limited to those alternatives that meet the purpose of the proposed action. See e.g. Allegheny Defense Project v. Forest Service, No 01-895 (W. D. Pa 2003) (Forest limited the scope of a T&E Amendment to requirements of a Biological Opinion – Court upheld the narrow purpose and need -- Forest did not need to consider in detail alternatives that did not accomplish the purpose and need for the action.); Krichbaum v. Kelley, 844 F. Supp. 1107, 1109 (W.D. Va. 1994), aff'd 61 F.3d 900 (4th Cir. 1995) (Forest need not consider a "no logging"

alternative that does not meet forest plan goals); Sierra Club v. Robertson, 810 F. Supp. 1021, 1029 (W.D. Ark. 1992), aff'd 28 F.3d 753 (8th Cir. 1994) (NEPA does not require an agency to consider alternatives that do not meet the purpose of the proposed action).

Three alternatives were evaluated in detail and two alternatives were considered but dropped from further evaluation (Project Record: Folder G, Document G-2, p. 15) in the Middle River II Project EA. The "No Action Alternative" (Alternative 1, analyzed in detail) as well as a "No Logging Alternative" (considered, but eliminated from detailed study) both respond directly to the public issue of no harvest. The "No Action Alternative" is an alternative that does not include logging. The effects of not logging in the project area are described in the EA. In addition, non-logging activities are proposed in all alternatives. Alternatives 2 and 3 include projects such as designating old growth, providing diverse amphibian habitat, improving watershed health, improving parking areas for recreation, and reducing non-native invasive noxious weeds.

A "No Logging" alternative was considered, but eliminated from detailed consideration. Providing no logging on the Mark Twain National Forest was addressed during the development of the Forest Plan. The "No Logging Alternative" was eliminated because it was not responsive to the public's issues or the management concerns identified. There are laws that govern the Forest Service or authorize/direct the Forest Service to utilize timber harvest, including The Organic Act, The Weeks Law, the Multiple Use Sustained Yield Act and the National Forest Management Act.

I find the Middle River II Project Environmental Analysis adequately considered alternatives dealing with "no-logging". The Appellants' claims are not supported.

L. MIS & MVP (NOA, p. 20)

The Appellants claim**,** *"As discussed in the section on SIRs, the new study shows the Forest Service is not maintaining a MVP of salamanders and the species they depend on. The Forest Service also needs to designate a salamander(s) as a MIS."* (NOA, p.20).

Response*:* In the 30-day comment period letter, the Appellants raised a general comment regarding global populations of salamanders. (Project Record; Folder A, Document A-27).

This comment is not specific to this project. See response to Section II, G. Also see response to Section II, J regarding effects to salamanders.

I find the Appellants concerns related to including an MIS in the Forest Plan are beyond the scope of this Middle River II Project.

III. COMPLETED SUPPLEMENTAL INFORMATION REPORTS (NOA, pp. 21-30)

The Appellants state, *"Since the recent SIRs are plan level analysis, if they are not legally adequate, the Carman Springs decision must be reversed as the Forest Service has not adequately addressed these issues. In order for these projects to go forward, the Forest Service must have legally adequate Plan level analysis and site-specific analysis. Chip Mills, Salamanders, and Sensitive Species SIR's raised.* (NOA, pp. 21-30).

Response: The Appellants did not raise this issue during the 30-day comment period (Project Record; Folder A, Document A-27).

This response is based on the assumption the Appellants were actually referring to the Middle River II Project rather than the Carmen Springs Project.

The Appellants state that the Supplemental Information Reports (SIRs) completed by the Mark Twain National Forest were inadequate. These SIRs documented the Forest's analysis and determination that the programmatic Environmental Impact Statement prepared for the Forest Plan should not be supplemented as a result of alleged "significant new circumstances or information relevant to environmental concerns" regarding chip mills, salamander research, and the updated Regional Forester's sensitive species list, (40 CFR 1502.09(c); FSH 1909.15, Section 18).

The Appellants did not demonstrate how the mentioned inadequacies of the Plan level SIRs render the Middle River II Project decision illegal. The Appellants rely heavily upon the presumption that a legal defect in the SIRs, if there is one, invalidates the project NEPA document. The Appellants provide no record concerning any defect in the environmental analysis for the Middle River II Project related to the SIRs. The review indicates the environmental analysis for the Middle River II Project considered the environmental consequences of the proposal (Project Record: Folder G, Document 2, Chapter 3, pp. 35-125; Chapter 4, pp. 127-149).

The Forest Service prepared three SIRs on Chip Mills; one dated December 6, 2000, one dated April 5, 2001, and a SIR dated March 7, 2002, dealing specifically with and exploring the "operation and existence" of chip mills (Exhibit D, Document 38).

The SIRs required under the Settlement Agreement have been completed. The claims by the Appellant are not supported.

IV. COURT ORDER/SETTLEMENT AGREEMENT (NOA, p. 30)

A. VIOLATION OF COURT ORDER/SETTLEMENT AGREEMENT

The Appellants state**,** *"Approving this timber sale violates the Court Order/Settlement Agreement for our lawsuits over the Pleasant Valley Timber Sale. The Court Order does not*

allow the Mark Twain [N]*ational Forest to "make any new timber sales decision" until the agreed upon SIRs are completed. The Forest Service has not completed the Sirs."* (NOA, p. 30).

Response: The Appellants did not raise this issue during the 30-day comment period (Project Record; Folder A, Document A-27).

The Appellants allege that approving the Middle River II Project violates a court order/settlement agreement pertaining to the Pleasant Valley Timber Sale. In that settlement agreement, the Forest Service agreed to do SIRs to determine whether the Mark Twain Forest Plan and its accompanying Environmental Impact Statement need to be changed as a result of new information on salamanders, chip mills, and Regional Forester Sensitive Species. The Appellants allege that since the Forest Plan SIRs are inadequate, the Middle River II Project violates the court order.

The Forest Service prepared three SIRs on Chip Mills, one dated December 6, 2000, one dated April 5, 2001, and a SIR dated March 7, 2002, dealing specifically with and exploring the "operation and existence" of chip mills (Exhibit D, Document 38).

I find the SIRs required under the Settlement Agreement have been completed. The Appellants have failed to demonstrate how the alleged defects in the SIRs relate to the project level decision.

V. FOREST PLAN AMENDMENT 1 (NOA, pp. 32-57)

In this section of the appeal, the Appellants are challenging the Mark Twain T&E Species Forest Plan Amendment. The Appellants identified numerous sub-issues that deal with this Amendment such as failure to prepare an EIS, an arbitrary and capricious FONSI, inadequate range of alternatives, impacts to the Indiana bat, impacts to other species, cumulative effects, inadequate population data, impacts to sensitive species, and Minimum Variable Populations. (NOA, pp. 32-57)

Response: The Appellants did not raise this issue during the 30-day comment period (Project Record; Folder A, Document A-27).

In March 2001, the Mark Twain National Forest issued its Threatened and Endangered Species Amendment to the Mark Twain National Forest Land and Resources Management Plan. That amendment was subject to appeal pursuant to 36 CFR 217. The amendment was not appealed.

The Appellants claim the Middle River II Project must be reversed due to the Plan Amendment being legally inadequate. No new information was provided in this appeal to convince me the Forest Plan Amendment was inadequate and needed additional review. I find no reason to consider these Amendment issues further.

VI. FOREST PLAN AMENDMENT 2

The Appellants state, *"We hereby include by reference Heartwood and Jim Bensman's appeal of the November 16, 2001 Decision by Randy Moore, Forest Supervisor to approve the Amendment to the Mark Twain National Forest Land and Resource Management Plan Establishing Areas of Influence and Management Strategies for Indiana Bat Hibernacula. Our appeal argues that the Forest Service should have provided more protection for bats, these sales would not have been approved, or at least not in this manner. Our appeal establishes, the amendment decision was illegal. Therefore, these three project are also illegal."* (NOA, p. 57).

Response: The Appellants did not raise this issue during the 30-day comment period (Project Record; Folder A, Document A-27).

The regulations at 36 CFR 215 do not allow for other appeals to be incorporated by reference. 36 CFR 215.2; 36 CFR 215.17(b). The regulations expressly state that for each appeal "[i]t is the appellant's responsibility to provide sufficient written evidence and rationale to show why the Responsible Official's decision should be remanded or reversed."

In November 2001, the Mark Twain National Forest issued its Management Strategies for Indiana Bat Hibernacula Amendment to the LRMP. That amendment was subject to appeal pursuant to 36 CFR 217. Heartwood and Mr. Bensman appealed this decision in December 2001. The Regional Forester, in a decision dated April 15, 2002, upheld Supervisor Randy Moore's decision on that Amendment.

The Appellants state that the Amendment should have provided more protection for the bats, and had it done so, these sales would not have been approved. This Amendment to the Mark Twain Forest Plan established Management Area Prescription 3.5 (MA 3.5). This Management Area prescription protects Indiana bats and their habitat in and around hibernacula and known sites of reproductively active females. No MA 3.5 lands fall in or around the Middle River II Project area. The USFWS states in their Biological Opinion, "[T]he project area is not in an Indiana bat area of influence". (Project Record: Folder C, Document 18, p. 5).

The Forest Service prepared a Biological Assessment concluding that the Middle River project area had no known caves or mines that could serve as winter habitat (hibernacula) for Indiana bats. At the time the evaluation was completed, the nearest Indiana Bat caves were over 14 air miles south and east of the project area, the nearest capture of a reproductively active female Indiana bat was made approximately 70 miles from the project area and the nearest maternity colony was 70 miles south of the project area (Project Record: Folder C, Document 14, pg. 19; Project Record: Folder D, Document 22).

The Forest Service formally consulted with the USFWS and did analyze site-specific effects from this project. The USFWS, who is responsible for enforcing the Endangered Species Act made the final conclusion on the Middle River II Project: "[T]he actions and effects associated with the proposed Middle River Project are consistent with those identified and discussed in the Service's Programmatic BO. After reviewing the size and scope of the project, the environmental baseline, the status of Indiana bat and its potential occurrence within the project

area, the effects of the action; and any cumulative effects, it is the service's biological opinion that this action is not likely to jeopardize the continued existence of the Indiana bat." (Project Record: Folder C, Document 18, p. 7)

I find this claim by the Appellants does not meet the requirements identified at 36 CFR 215.14 for content of an appeal. Since the Appellants fail to show how their allegations apply to the Middle River II Project decision under appeal, the contents of those items are not independently considered further as part of this appeal review.

VII. PLAN REVIEW (NOA, pp. 57-58)

The Appellants state, *"… we think the conditions in Missouri have significantly changed since the Plan was adopted. Federal regulations state: The Forest Supervisor shall review the conditions on the land covered by the plan at least every 5 years to determine whether conditions or demands of the public have change significantly 36 CFR 219.10(g). We wrote the Forest Supervisor a letter asking about this. He responded that the Ozark-Ouachita Highlands Assessment met the requirements for this review. If the Forest Service obeyed the law, it would have found conditions had significantly changed. This would have kicked in a revision of the Plan. This would have enabled a Plan that would not have allowed these projects.* (NOA, pp. 57-58).

Response: The Appellants did not raise this issue during the 30-day comment period (Project Record; Folder A, Document A-27).

The Mark Twain Nation Forest - Forest Plan was approved in June 1986. Since adoption, the Plan has been amended 29 times. The Mark Twain National Forest - Forest Plan is a dynamic document that has been updated to reflect new information and monitoring data. The Mark Twain National Forest is currently in the process of revising its Forest Plan. The Notice of Intent for the Plan Revision acknowledges that conditions on the Mark Twain National Forest have changed, and was published in the Federal Register on April 16, 2002. The DEIS for Plan Revision is anticipated to be available for public review in 2005.

I find the Appellants claim is not supported. Refer to Section II, F, 1.

VIII. ECONOMIC ANALYSIS (NOA, p. 58)

The appellants claim, *"We include by reference the General Accounting Report: GAO-01-1101R Forest Service Timber Costs. The GAO found the Forest Service's accounting practices so fraudulent..... the public cannot adequately consider and comment on the economic claims made in these EAs. The Forest Service's failure to have an accounting system that would that would enable the public and decision makers to judge the economics of these timber sales violates NEPA. We would point out that the Forest Service is required to address economic issues in the EA. 1909.15 FSH 15. This cannot be done with the Forest Service's accounting*

system. If the Forest Service's accounting practices are so bad and fraudulent,…, the public cannot adequately consider and comment on the economic claims made in these EA's." (NOA, p. 58).

Response: The Appellants raised this issue during the 30-day comment period (Project Record; Folder A, Document A-27, p.18).

The Appellants claim the Forest Service's internal policy and guidance manuals provide direction requiring an economic analysis. Here are some provisions in those references: "An economic efficiency analysis is not required, but may provide important information to the decision process particularly where the sale is designed primarily to achieve forest stewardship objectives or where effects on non-market costs and benefits are substantial" (Forest Service Manual 2432.04) and; "The responsible line officer determines the scope, appropriate level, and complexity of economic and social analysis needed." (Forest Service Manual 1970.6).

I am unaware as to what "these EA's" the Appellants are referring to. The Middle River II Project Environmental Assessment (Project Record: Folder G, Document G-2, pp. 122-125) includes an economic analysis as directed by Forest Service Handbook (FSH) 2409.18 Section 32. Specifically, the Handbook directs the responsible line officer to complete analyses that provides information on overall timber sale program financial and economic efficiency. The information is used to compare the cost efficiency of each alternative. An analysis of direct and indirect effects on economics by alternative was completed as part of the environmental assessment document (Project Record: Folder G, Document G-2, page 122-125, Appendix D p. D-1 to D-4). This analysis includes costs associated with proposed alternatives and estimates of revenues associated with timber production. This analysis displayed both short and long term effects on employment, timber production, revenues to counties, and revenue/cost ratio where applicable. The "Economic Returns by Alternative Table", (EA, p. 124) displays a comparison of priced activities in each alternative for a relative comparison. The "Economic of Existing Stands by Alternatives Tables", in the Environmental Assessment Appendix D, (Project Record: Folder G, Document G-2, Appendix D, pp. D-1 to D-4) displays a comparison of costs, revenues, and other costs in each action alternative.

The accounting system for the whole Forest Service is beyond the scope of this project. I find the Environmental Assessment adequately addresses the economic requirements for the Middle River II Project. The Appellants have not demonstrated specifically how the GAO report on Forest Service accounting practices relates to the project level decision.

RECOMMENDATION

After reviewing the Project Record for the Middle River II Project, and considering each issue raised by the Appellants, I recommend District Ranger John Bisbee's Decision Notice of June 25, 2004 be affirmed.

/s/ Wade A. Spang
WADE A. SPANG
Appeal Reviewing Officer
District Ranger

cc:
Pat Rowell, RO