



United States
Department of
Agriculture

Forest
Service

Mark Twain National Forest

401 Fairgrounds Road
Rolla, Missouri 65401
(573) 364-4621 TTY (573) 341-7453
FAX (573) 364-6844

File Code: 1570-1

Date: June 3, 2004

Mr. Jim Bensman
Forest Watch Coordinator
Heartwood
585 Grove Ave.
Wood River, IL 62095-1615

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
#7002 0510 0001 5058 7696

Re: Appeal of the Decision Notice and Finding of No Significant Impact for the NE Corner Project Environmental Assessment, Doniphan/Eleven Point Ranger District, Mark Twain National Forest, Appeal 04-09-05-0018 A215

Dear Mr. Bensman:

On April 19, 2004, you filed a notice of appeal for yourself and on behalf of Heartwood, and Jim Scheff for himself and on behalf of Missouri Forest Alliance, pursuant to 36 CFR 215.18. District Ranger Jerry Bird signed his Decision Notice and Finding of No Significant Impact on February 20, 2004, choosing Alternative 2 of the Northeast Corner (NE) Projects. The legal notice for the decision was published on March 3. I have reviewed the appeal record and have also considered the recommendation of the Appeal Reviewing Officer (ARO) Jeffrey Hammes, regarding the disposition of your appeal. The Appeal Reviewing Officer's review focused on the decision documentation developed by the Responsible Official, District Ranger Jerry Bird, 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 Northeast Corner Projects evaluate resource management alternatives within the National Forest managed under the Mark Twain National Forest Land and Resource Management Plan.

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 careful review of the Project File and the appeal, I concur with the Appeal Reviewing Officer's analysis and findings regarding your specific appeal issues. 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 Jerry Bird's Decision Notice and Finding of No Significant Impact for the NE Corner Project Environmental Assessment, Mark Twain National Forest.

This project may be implemented on, but not before, the 15th business day following the date of this letter (36 CFR 215.9(b)).

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

Sincerely,

/s/ Michael M. Sanders
MICHAEL M. SANDERS
Appeal Deciding Officer
Acting Forest Supervisor

Enclosure

cc:
Responsible Official, Jerry Bird
ARO, Jeff Hammes
Jim Scheff
MO Forest Alliance
20 Crabtree Ct.
St. Louis, MO 63132



File Code: 1570-1

Date: June 1, 2004

Route To: (Pat Rowell)

Subject: Appeal of the Decision Notice and Finding of No Significant Impact for the Northeast Corner Projects Environmental Assessment on the Doniphan-Eleven Point Ranger District, Mark Twain National Forest, Appeal 04-09-05-0018 A215 (ARO)

To: Appeal Deciding Officer

This letter constitutes my recommendation for the subject appeal filed by Jim Bensman for himself and on behalf of Heartwood, Jim Scheff for himself and on behalf of Missouri Forest Alliance for the Northeast Corner (“NE”) Projects on the Doniphan-Eleven Point District of the Mark Twain National Forest. District Ranger Jerry Bird signed this Decision Notice on February 20, 2004 and the legal notice of the decision was published on March 3, 2004

My review was conducted pursuant to 36 CFR 215 – “Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities.” 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. My recommendation is based upon review of the Project File and Appeal 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 April 27, District Ranger Jerry Bird called Mr. Bensman regarding an informal resolution meeting and subsequently a telephone call was arranged. On Monday, May 3, a conference call was held between Jerry Bird, David Doss, Mr. Bensman and Jim Scheff representing themselves, Heartwood and Missouri Forest alliance. They were unable to reach resolution on any of the appeal points.

Appeal Issues

The Appellants raised seven main issues in their appeal of the NE Corner Project decision. These appeal points will be addressed in the order in which they were presented in the appeal.

II. NE CORNER

A. No Draft EA.

1. The Regulations Are Illegal.

The Appellants allege the administrative appeal regulations at 36 CFR 215 are illegal because they fail to provide for a uniform comment period. The Appellants assert that the Forest did not provide a draft EA to the public for comment.



Response: The Appellants take issue with the revised appeal regulation provision at 36 C.F.R. 215.5(a)(2):

Determine the most effective timing for publishing the legal notice of the proposed action and opportunity to comment.

Appellants argue that a “uniform public involvement process” is required, citing to legislative history (colloquy) in support of their position.

The Appeals Reform Act (ARA) requires the agency to provide a thirty-day comment opportunity period on proposed actions implementing land and resource management plans, 16 U.S.C. Sec. 7, 1612 (note). The Act does not use the terms cited by plaintiffs 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 simply mandates a thirty-day review of proposed actions.

The emphasis of the Appeals Reform Act was 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 thirty 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. Appellants have cited to no provision of the ARA requiring public comment on a draft environmental assessment. Instead, they interpret one sentence of a legislative colloquy as mandating an opportunity to comment on a draft environmental assessment. This interpretation is not supported by statute.

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

At root, Appellants challenge the Responsible Official’s determination that comment on a description of the proposal-as opposed to a draft environmental assessment – was the most favorable timing for soliciting comment. Rather than allow for discretion in timing of comment based on the nature and complexity of this proposal, Appellants read into the ARA a mandatory comment opportunity on a draft environmental assessment. This administrative straight-jacket is neither warranted nor desirable. The most effective timing for public review is best determined by the local officials most knowledgeable of the proposal. In many instances, (including this project) it is to the public’s and Appellant’s benefit to provide comment earlier in the decisionmaking process. On February 5, 2003, the Forest Service placed a legal notice in *The Current Wave* regarding the Northeast Corner Proposal. The notice asked for comments on the proposal and indicated that information regarding the project was available through the Doniphan

District Ranger. On January 31, 2003, the Forest Service also mailed a letter with a copy of the scoping report which contained information regarding the project to the Appellants, as well as to other members of the public. In the letter, the Forest Service asked for concerns regarding the project. Heartwood responded with a twenty-page letter listing their concerns.

On October 8, 2003, the Forest Service again placed a legal notice in *The Current Wave* announcing the official thirty-day comment period on the Northeast Corner Project. The notice described the project and stated that additional information could be obtained at the district office. It also stated that the proposed action, maps and spreadsheets could be accessed through the Forest internet site.

The Forest Service further sent a letter to interested parties including the Appellants with a copy of a twenty-page report describing the proposed action. This also included maps. The Appellants responded with 21 pages of comments.

As described above, the Forest provided a thirty-day comment period for the NE Corner decision. Appellants do not deny that they had a thirty-day opportunity to review documents that meet the regulatory definition of “proposed action” as discussed above. Indeed, their detailed substantive comments demonstrate that they understood the nature, effects, and intended result of the proposal. There is no evidence here of any defect in the notice and comment process: an ARA notice and comment opportunity were provided and substantive 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 ARA.

2. The Regulations Were Not Followed.

The Appellants claim the regulations at 36 C.F.R. 215.5(a)(2) were not followed because the Responsible Official provided notice and thirty-day comment period between alternative development and development of an EA. Appellants quote extensively from the Federal Register preamble for the proposed rulemaking setting forth possible changes to 36 C.F.R. 215 and assert that “[h]aving a 30-day comment period between Alternative Development and the 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.” (Notice of Appeal, p. 5). In addition, Appellants argue that the regulations require a documented determination explaining why the comment period was timed as it was. Finally, Appellants argue at length that the comment period provided was not the most effective timing for public review.

Response: With regard to the Appellants’ first contention, I agree that 36 C.F.R. 215.5(a)(2) simply requires the Responsible Official to:

[d]etermine the most effective timing for publishing legal notice of the proposed action and opportunity to comment.

As discussed above, the ARA does not specify the timing of the public comment period, but merely mandates application of public notice and thirty-day comment opportunity for proposed actions implementing forest plans. The timing of the ARA notice and comment opportunity is left to the agency's discretion.

In this case, the Responsible Official determined that notice and comment on a thorough, twenty-page description of the proposal would be most effective for both the public and the Forest. Neither the ARA nor regulatory text quoted by the Appellants prohibit this approach. Appellants' preferences as to the timing of the comment period notwithstanding, there is simply no violation of law or regulation in the Responsible Official's timing of the comment period.

Appellants quote the Federal Register preamble for the proposed rule revising 36 C.F.R. 215 in support of their argument. Although informative as to the agency's rationale, this text is merely *preamble* explanation for a *proposed* rule. Moreover, the quoted preamble clearly states that these are possibilities or examples of the timing of public comment:

[t]hese are *examples* of how the rule's flexibility allows for the most effective use of the comment period significantly earlier in project planning than the current rule permits. [emphasis added]

The preamble does not state that these are the *only* possibilities for timing of comment periods, nor does it suggest that the proposed rule eliminated the opportunity to comment between scoping and development of the EA. The final rule text provides full flexibility and discretion to the Responsible Official; nothing limits the timing of the comment period to the examples given in the proposed rule preamble.

At root, Appellants' challenge is premised upon their mistaken belief that the ARA mandates a notice and comment opportunity for review of a draft EA. As described above, this is simply not the case. Both statute and revised appeal regulation provide the Responsible Official with discretion to choose the timing of public review. There is no evidence that the Appellants lacked an understanding of the proposed action, or were in any way deprived of the notice and comment opportunity prescribed by the ARA. Appellants read the ARA as mandating review of a particular document at a particular time in the decisionmaking process; this requirement simply does not exist.

Likewise, Appellants also contend that the Responsible Official must provide documented evidence of why he or she believes 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. Appellants read a legal requirement into the word "determine" where none exists. Appeal regulations simply 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. Despite the extensive substantive comments by Appellants here, they obviously disagree with the timing chosen by the Responsible Official in this case. Although they believe their comments would have been better if the timing were different, they have

provided no evidence that the public comment opportunity was defective under the ARA. Both statute and appeal regulation allow the Responsible Official full discretion in choosing the best timing for public comment on his or her proposal.

Appellants' final contention discusses why they believe a later ARA thirty-day comment period would have allowed them to provide more comments to the Responsible Official. Appellants do not deny that (in addition to the NEPA scoping involvement) they were provided a twenty-page description for review, and based upon that review, they were able to make substantive comments which were considered in the decisionmaking process. Appellants' argument is simply that if they had more information, they could have submitted more comments.

While this may be true, the agency has determined through rulemaking that the Responsible Official is best suited to determine the appropriate timing of the ARA thirty-day comment period. As noted above, under both statute and appeal regulations, the Responsible Official has full discretion to determine the timing of the comment period. Appellants argue that if they were provided the opportunity to comment on a draft EA, they would have been able to say more. However, more is not always better, or in this instance, most effective. The public, and Appellants benefited from an earlier opportunity to review and influence the proposal. Appellants do not provide evidence of the ineffectiveness of the timing of the comment period. Indeed, the comments submitted by the Appellants and the consideration of their concerns in the decisionmaking process sharply contradict Appellants' belief that they have not been heard. The opportunity to be heard-codified as a notice and comment opportunity-is all that the law provides.

3. Requirements for Substantive Comments

The Appellants contend that the Forest Service failed to provide adequate information on the proposed action to allow them to submit meaningful comments.

Response: The ARA merely requires that the agency provide a thirty-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) define "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.

Appellants' real concern here is, as before, the lack of a draft EA to review. They would have preferred an opportunity to comment on the additional analysis that was documented in the EA prepared for the project. Without citation to statutory or regulatory requirement, the Appellants equate a meaningful opportunity to comment with review of a particular document-a draft EA-at a later phase of decisionmaking.

As noted above, the agency has determined through notice and comment rulemaking that both the public and the agency are better served by allowing the Responsible Official full discretion to determine the timing of the ARA thirty-day comment period. Neither statute nor appeal regulation prescribe the timing or precise nature of the document that must be provided to the public for review.

The Forest Service provided a twenty-page document regarding the proposed action to the public for comment. This document included the location of the project area, attached maps showing treatment stands by compartment, a description of the goals of the project and what specific actions would meet each goal, and a description of the preliminary public and internal issues surrounding the project. The document also described the different alternatives that would be considered. These descriptions included the specific acreages of the different type of cuts and the specific roads that would be maintained or reconstructed. The document further contained a preliminary alternative effects comparison for all resources.

The description and discussion of the proposed action provided to the public contained considerable information concerning the nature, type of action, possible effects, and intended consequences of the proposal. While the EA that was ultimately prepared for the project contained additional information, this does not provide evidence that the Appellants were deprived of an opportunity to provide substantive comments as intended by the ARA. In this instance, the Responsible Official determined that early public review and input would be most beneficial. The document distributed here to the public for review meets the regulatory definition of “proposed action.” The ARA merely requires a thirty-day comment period on the proposed action. Although Appellants would have preferred (here and in all cases) an opportunity to review and submit comments on a draft EA, such is not required by the law.

I find that the document provided for public comment contained enough information for the public to provide substantive comments.

4. The Forest Service Violated NEPA and NFMA.

The Appellants believe that not letting the public comment on the draft EA violates the public participation requirements of NEPA and NFMA.

Response: While the Appellants are correct that NEPA requires agencies to “make diligent efforts to involve the public in preparing and implementing their NEPA procedures,” 40 CFR 1506.6(a),¹ NEPA does not require agencies to circulate draft EAs. How public participation is structured is left to the discretion of the agencies.

As set forth above, the Forest provided a twenty-page document for public comment. I find this meets the public participation requirements of NEPA.

¹ NFMA has public participation requirements at the Forest Plan level. NFMA does not contain public participation requirements at the site-specific level for draft EAs. See 16 U.S.C. 1604.

B. Response to Comments.

The Appellants are concerned that the Forest failed to respond to any of their comments on the NE Corner Proposal.

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:

- (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.

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 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 would no longer be required. Instead, consideration of public comments would be reflected in the environmental documentation for the project. Based upon my review of the appeal record, I find that the Forest adequately considered the public comments submitted on the proposed action.

C. Clearcutting/Even aged Management

1. Optimality Finding- EA Provides No Justification For Clearcutting.

The Appellants claim that the optimality analysis does not address the objectives and requirements of the relevant land management plan. They allege the Ranger fails to explain how the stands to be clearcut are any different from other stands and why no other cutting methods will work.

Response: The Forest and Rangeland Renewable (Resources) Planning Act of 1974 as amended by the National Forest Management Act of 1976 allows for clearcutting when it is determined to be the optimum method to meet the objectives and requirements of the relevant land management plan. 16 U.S.C. 1604. Appendix D (Harvest Methods) of the Mark Twain National Forest (MTNF) Land and Resource Management Plan ("LRMP") (p. D-9) lists conditions where clearcutting may be considered optimum. Among others, the conditions include:

- Residual trees left from partial cutting would be damaged or lost to windthrow because of soil conditions or location.
- There is a multiple use management objective that requires the continuance of shade-intolerant species to be regenerated on relatively short rotations (less than 80 years).
- Living, dead and declining tree species must be harvested at one time to obtain stump sprouting from the declining trees while this option is still viable (before starch reserves are depleted and while trees can still sprout).

Three hundred thirty eight (338) acres are proposed for clearcut harvest in the NE Corner Project, and fall within Management Area 4.1-12 (MA 4.1-12). The MTNF Forest Plan desired future condition for this MA states that “[F]orest age and size class distribution will vary across the landscape.” One of the needs for this project, in response to the desired future condition, is to “[P]rovide for temporary increase in forage in woodland habitat through creation of 0-9 year old forest vegetation.” Currently, the 0-9 woodland habitat for the project area is 0% (based on the planning period of 1998-2007; the management area being 1%). The Forest Plan objective is 8-15% (1,4,5).” EA, page 5.

In Alternative 2, 338 acres would be clearcut and the justification is as follows. Page 91 of the EA states that “A significant component of mature, low quality or high risk black and scarlet oak, along with the absence of sufficient number of trees of other species to maintain shelterwood or seedtree overstories and the need to utilize existing coppice (stump sprouting) potential and advanced regeneration to regenerate these sites favor clearcutting as the optimum method of regeneration and production of woodland habitat in the 0-9 year age class.” In addition, the DN/FONSI also includes documentation on the optimality of prescribing a clearcut for this stand (DN/FONSI, p. 14).

Based on my review of the Forest Plan, EA, and project record, I recommend that the District Ranger’s decision be affirmed.

2. Appropriateness Finding.

The Appellants allege the EA does not address the appropriateness of even-aged management systems.

Response: The National Forest Management Act (“NFMA”) allows for the use of even-aged management systems where they are determined to be appropriate to meet the objectives and requirements of the relevant land management plan (16 U.S.C. 1604 (g)(3)(f)).

A total of 2,268 acres are prescribed for even-aged regeneration treatments (EA, p. 2-26, Table 2.5). All even-aged regeneration treatments (seed tree, shelterwood, or clearcut) in the selected alternative (2) of the NE Corner Project fall within MA 4.1-12 (EA, Table 2.8, pages 2-30 to 2-35). The NE Corner Projects is entirely within Management Area (MA) 4.1-12 (7,414 acres), which states that “Forest age and size class distribution will vary across the landscape.”

The use of even-aged management versus uneven-aged management on the Mark Twain National Forest was addressed during development of the Forest Plan. Appendix D (Harvest Methods) of the LRMP considered various harvest methods, and states the primary harvest cutting methods for managing the timber types on the Forest are those used under the even-aged management system, namely clearcutting, shelterwood, and seed-tree. The uneven-aged management system is applied to some of these timber types based on species composition, site productivity or multiple use objectives. When the uneven-aged management system is applied, the group selection system will normally be used. The decision on which harvest cutting method, i.e. clearcutting, shelterwood, seed tree, or selection, to use in any given stand is based on management objectives, stand conditions, and the silvicultural characteristics of the species present or desired (MTNF LRMP, Appendix D, p. D-4).

As stated in the silvicultural prescriptions and on page 14 of the DN/FONSI of the NE Corner Project EA, even-aged management (EAM) is appropriate for timber management purposes on these stands. Also EAM is appropriate to meet objectives of the Land and Resource Management Plan of the Mark Twain National Forest for MA 4.1-12.

Alternatives 2 and 3 propose a combination of even-aged and uneven-aged methods. There is ample evidence that the silviculturist, the interdisciplinary team, and the decision maker did consider a variety of management techniques that include both even-aged management and uneven-aged management. Review of the EA demonstrates that the Forest has adequately considered the appropriateness of even-aged management in light of MA 4.1-12 Forest Plan direction, as well as specific desired conditions for the NE Corner Project Area.

On page 19 of the EA there is a reference to the Eastwood project area. After reviewing the assessment and the notes from the informal resolution meeting, it is apparent that this is an editorial error. The analysis and supporting documentation is site specific to the NE Corner Project area.

I recommend that the District Ranger's decision be affirmed on this point.

3. Range of Alternatives

The Forest did not consider an adequate range of alternatives. Specifically, the Appellants would like an alternative with more unevenaged management.

Response: The National Environmental Policy Act (NEPA) 42 U.S.C. 4321, 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. The Council on Environmental Quality's (CEQ's) regulations (40 CFR 1502.14) implementing NEPA discuss 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 CFR 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 CFR 1502.14(d). There are no set numbers of alternatives that are required in order to reflect a reasonable range. CEQ's 40 Questions (Question 1b) and

Forest Service Direction (FSH 1909.15, Chapter 40, Section 14) only require that examples across the range of reasonable alternatives be analyzed in detail. The same Forest Service direction notes that reasonable alternatives are to be developed from the results of scoping and the issues raised. Agencies have discretion to determine appropriate alternatives based upon the purpose of the proposal.

Scoping completed for the NE Corner Project identified four key issues to be analyzed in detail. One of these issues centered on silvicultural treatment methods, which includes the use of even-aged management as opposed to uneven-aged management.

The project considered five alternatives. Four of these were carried forward for detailed analysis, and one was dropped from further consideration. An “All Uneven-aged Management” alternative was considered, but eliminated from detailed consideration. It was determined that this alternative would not meet the goals and objectives of the project (EA, p. 2-21). Using strictly uneven-aged harvest methods would not address forest health issues or provide diverse wildlife habitats.

Four alternatives were carried forward for detailed analysis. Alternative 1 is the No Action alternative that does not include any harvest activities, including even-aged management. Alternative 2 is the proposed action, and responds to the need to enhance declining wildlife habitats, improve forest health and provide further dispersed recreational opportunities in the NE Corner Project. It proposes the use of traditional silviculture methods while using a balance of even-aged and uneven-aged management to improve wildlife habitats and forest health (EA, p. 2-15 and 2-16). Alternative 3 is the open-woodlands/savannah restoration alternative, and is designed to restore and enhance open woodlands and savannahs. It emphasizes forested habitat with a 20 to 30% ground cover component. This alternative uses various intensities of thinning, even-aged and uneven-aged harvest methods, and prescribed fire to restore the natural stand structure and species composition that developed under a higher fire frequency (EA, p. 2-18). Alternative 4 is the no commercial harvest/prescribed fire only alternative, and is designed to meet desired conditions by using only prescribed fire (EA, p. 2-19).

Table 2.5 of the EA (p. 2-26) displays how each alternative responds to the issues, including Issue 2, Silvicultural Treatment methods. Alternative 1 (No Action) proposes no even-aged or uneven-aged management. Alternative 2 (the proposed action) proposes 582 acres of even-aged regeneration harvesting, 1,407 acres of uneven-aged management, and 1,276 acres of thinning. Alternative 3 (open-woodland/savannah restoration) proposes 123 acres of even-aged regeneration harvesting, 233 acres of uneven-aged management, and 3,435 acres of thinning. Alternative 4 (no commercial harvest/prescribed fire Only) proposes no even-aged or uneven-aged vegetation management through the use of commercial timber harvest.

The District Ranger and interdisciplinary team agreed that the alternatives considered represent the range of concerns of the Forest Service, local residents, other agencies, and most members of the public that responded to the Forest Service during the public involvement phase of the project (EA, p. 2-15).

Based on a review of the EA, I find the range of alternatives with regard to the use of even-aged management to be adequate.

D. Threatened and Endangered Species.

In this section, the Appellants make numerous bare assertions of why the NE Corner Project violates the Endangered Species Act and will harm the endangered Indiana bat. To support these assertions, Appellants state that their previous appeals explain the issue, but offer no evidence as it pertains to this project.

Response: The regulations at 36 CFR 215 specifically state that “it 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.” 36 CFR 215.14(a). Incorporation of other appeals by reference is not allowed. By stating that their previous appeals explain the issue, Appellants are in essence admitting that they have not adequately provided sufficient evidence in support of this appeal. In addition, Appellants have provided no evidence related to this project in support of their allegations.

An Appellant needs to show some rationale as to why he or she believes a decision should be reversed. A mere assertion with reference to an appeal on a totally different project is not enough to reverse the District Ranger’s decision.

E. Finding of No Significant Impact (FONSI).

1. National Park Service Concerns

The Appellant claims that the District Ranger was arbitrary and capricious because he did not address or mention serious concerns raised by the National Park Service about the impacts of this project on Big Springs in the FONSI.

Response: The National Park Service did express a concern about the effects of the NE Corner Project on water quality. They encouraged the District to adopt alternatives and mitigation measures that minimize sediment from roads. After a thorough review of the analysis, it is apparent that the District did incorporate these concerns into their alternative design and mitigation measures.

Page 37 of the EA discloses that the analysis of water quality from the US Geological Survey surface discharge gaging station at Big Springs has determined that water quality standards were met for the selected parameters during the years examined. Table #4 on page 38 displays the state standards used for comparison at the Big Spring gaging station. These standards include temperature, pH, and dissolved oxygen. On page 10 of the DN/FONSI the District Ranger states “I am confident that water quality issues are well addressed by the application of the specified soil and watershed mitigation measures. These mitigation measures meet or exceed Best Management Practices (BMP’s) developed to protect water quality. Implementing similar management activities within the Big Spring recharge area under the guidance of the Forest Plan

for over 15 years has adequately protected both the quality and the quantity at the spring.” These mitigation measures are listed on page 29 and 30 of the EA.

2. Controversial Effects

The Appellant questions how the District Ranger can claim that there are no controversial effects in the FONSI when he did not allow the public to review the EA.

Response: The proposed action that was sent out for thirty 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 that the NE Corner Projects was controversial. The district did not receive any comments indicating that the public believed that the project’s effects were controversial. Resource specialists also did not indicate that there was scientific controversy surrounding this project as this is a typical timber sale.

The FONSI (page 15) states that “Based on public participation and the involvement of resource specialists, I do not expect the effects on the quality of the human environment to be highly controversial. It is my professional judgment that the significant biological, social, and economic issues have been addressed well enough in the EA for this project to avoid major scientific controversy over environmental effects.” The District Ranger was correct in this determination.

3. Threatened and Endangered Species

The Appellant claims that the FONSI is arbitrary and capricious because its standard is whether the impacts to Threatened & Endangered (T&E) species are beyond those addressed in the June 23, 1999 Biological Opinion (BO); it does not discuss what impact the project will have on T and E Species.

Response: The FONSI is based on the EA and the BE. There are three T&E species within the NE Corner Project area, specifically the gray bat, the Indiana bat, and the bald eagle. The BE discusses in depth the effects of the project on these species. (BE, Pages H1 to H26). While the BE makes conclusions as to compliance with the Biological Opinion, it also discusses the actual impacts to the species. Specifically, it notes that the NE Corner activities (all alternatives) may affect but are not likely to adversely affect the bald eagle, Indiana bat, and gray bat. (BE, H21, H25, H15.)

4. Length of the EA

The Appellant asserts that the FONSI must address the length of the EA.

Response: There is no legal requirement to address the length of the EA in the FONSI. Also, there are no mandated page limits for EAs. Courts have held the length of an EA does not establish the need for an EIS. Heartwood v. United States Forest Service, No. 1:02-CV-54 (E.D. Mo. July 29, 2003).

I recommend that the District Ranger's decision be affirmed.

F. No Valid Forest Plan.

The Appellants assert the Mark Twain does not have a valid Forest Plan, and these timber sales cannot go forward until the Forest has a new Forest Plan. The National Forest Management Act required the Mark Twain to have a new plan by June 23, 2001.

Response: 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 MTNF Forest Plan was approved in June 1986. Since adoption, the Plan has been amended 29 times. The MTNF published a notice of intent for the Plan revision in the Federal Register on April 16, 2002. The draft environmental impact statement for Plan Revision is anticipated to be available for public review in November 2004, with a final decision for the revised Forest Plan scheduled to be signed in 2005.

Appellants argue, without supporting citation to statute, regulation, or policy, that the NE Corner Projects may not be implemented until the MTNF Forest Plan revision is completed. Taken to its logical conclusion, the Appellants' argument would halt management and resource protection activities on the MTNF pending completion of an updated planning document. There is no express requirement in NFMA or its regulations to halt management activities if a Forest cannot meet the 15-year target in the statute.

Moreover, Congress did not intend management to cease if the 15-year target date for plan revision was not met. NFMA, Section 1604(c), illustrates this point. In the development of the original forest plans, Congress specifically allowed management of the forests to continue under existing resource plans pending approval of the first NFMA forest plan for each administrative unit. (See e.g. 16 U.S.C.A. 1604 note). This demonstrates Congress' intent that on-the-ground forest management continue while the agency developed programmatic planning documents. On other occasions, Congress halted funding for forest plan revisions. Appellants' arguments that resource management must be halted pending completion of plan revision are contrary to Congressional intent.

Appellants provide no evidence of a particular flaw in the existing Forest Plan to support their argument. As noted previously, the MTNF Forest Plan has been amended 29 times since its adoption. The Mark Twain Plan is a dynamic document that has been updated to reflect new information and monitoring data. Appellants provide no evidence that the standards and guidelines and other information used in the development of the NE Corner Projects will fail to protect forest resources. To the contrary, the project record demonstrates that the standards and guidelines used in project development are effective in providing resource protection and mitigating potential adverse environmental effects. Notwithstanding Appellants' desire for something new, they present no evidence that the existing plan direction used in the development of this project was inadequate.

I recommend that the District Ranger's decision be affirmed.

G. Population Data

Appellants make the bare assertion that the BE and EA do not have the population data required by law. They then assert that their previous appeals explain this issue.

Response: The regulations at 36 CFR 215 specifically state that “it 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.” 36 CFR 215.14(a). Incorporation of other appeals by reference is not allowed. By stating that their previous appeals explain the issue, Appellants are in essence admitting that they have not adequately provided sufficient evidence in support of this appeal. In addition, Appellants have not provided evidence related to this project in support of their allegations.

An Appellant needs to show some rationale as to why he or she believes a decision should be reversed. A mere assertion with reference to an appeal on a totally different project is not enough to reverse the District Ranger’s decision.

H. Sensitive Species.

The Appellants assert the Forest Service is required to obtain population data for sensitive species.

Response: 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 true. The 11th Circuit ruled that the Forest Service was required to obtain population data for sensitive species, where a Forest Plan requires the collection of such data. 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. 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.

Pages 70 to 81 of the EA and pages H30 to H37 of the biological evaluation discuss the site-specific effects of the NE Corner Project on the Regional Forester’s (Eastern Region) Sensitive Species. Species presence or absence was determined using the Missouri Heritage Database. Of 127 species, 59 were found on or adjacent to the Doniphan/Eleven Point Ranger District. Of these, there are two documented locations for Regional Forester Sensitive Species in the project area (plants). On page 81 of the EA it states that “[t]here would be no direct effects to these species from activities proposed in any of the alternatives. There would be no indirect effects to potential habitat for 18 Eastern Region Sensitive Species (ERSS) in the NE Corner Project Area, and therefore No Impact to any of the ERSS species evaluated.” (EA, page 70).

I find that the EA and BE adequately addresses sensitive species.

I. No Sensitive Species Population Objectives.

In this section, the Appellants state that they have raised this issue over and over again so they will not go into any detail other than to point out that there are no sensitive population objectives. To support these assertions, Appellants state that their previous appeals explain the issue, but offer no evidence as it pertains to this project.

Response: The regulations at 36 CFR 215 specifically state that “[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.” 36 CFR 215.14(a). Incorporation of other appeals by reference is not allowed. By stating that their previous appeals explain the issue, Appellants are in essence admitting that they have not adequately provided sufficient evidence in support of this appeal. In addition, Appellants have provided no evidence related to this project in support of their allegations.

An Appellant needs to show some rationale as to why he or she believes a decision should be reversed. A mere assertion with reference to an appeal on a totally different project is not enough to reverse the District Ranger’s decision.

J. No impacts on salamanders were discussed.

Response: See response to issue I.

K. The EA did not develop a no logging alternative.

Response: See response to issue I.

L. MIS/MVP. As discussed in the section on SIRs, the new study shows the FS is not maintaining a MVP of salamanders and the species they depend on.

Response: See response to issue I.

III. SUPPLEMENTAL INFORMATION REPORTS

Appellants challenge the adequacy of the Supplemental Information Reports (SIRs) recently completed by the MTNF pursuant to a litigation settlement with one appellant, Missouri Heartwood. These SIRs documented the Forest’s analysis and determination that the programmatic Environmental Impact Statement (EIS) prepared for the Mark Twain 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, see 40 CFR 1502.09(c); FSH 1909.15, Section 18.

Response: Heartwood’s administrative appeal of the NE Corner Project states:

“Since the recent SIRS are plan level analysis, if they are not legally adequate, the Carmen Springs decision must be reversed as the Forest Service has not adequately addressed these

issues.” (This is a quote from the NE Corner Project appeal, so it is assumed that the Appellant was actually referring to the NE Corner Project, rather than the Carmen Springs Project.)

Appellants allege a nexus between the Plan level SIRs and the NE Corner Project, but fail to articulate the reasons substantiating their belief. Specifically, they fail to demonstrate how the alleged inadequacies of the Plan level SIRs render the NE Corner Project illegal. Appellants merely assert that the SIRs are inadequate, and conclude that the project may not be implemented. Appellants also made this assertion in their administrative appeal of the Eastwood II Project and the Carmen Springs Project on the Mark Twain National Forest. The decision in the Eastwood II and the Carmen Springs appeal put the Appellants on notice that they provided no evidence or argument concerning any defect in the SIRs that related to the project. That same degree of evidence or lack thereof is present here.

Appellants’ argument here, as in their Eastwood II and Carmen Springs appeal relies heavily upon the presumption that a legal defect in the SIRs, if there is one, invalidates the project NEPA document. Without citation or support, Appellants argue that the programmatic SIRs are defective; therefore, the project may not proceed. To the contrary, my review of the record indicates that the environmental analysis for the NE Corner Projects thoroughly considered the environmental consequences of the proposal (EA, Environmental Consequences, Pages 36 to 121). Lacking any specific evidence of a legal defect relating to the project on appeal, Appellants have failed to provide a basis for overturning the Responsible Official’s decision. Mere assertions of illegality in programmatic documents without evidence of legal defect in the project decision on appeal do not constitute enough evidence to overturn a project decision.

Based upon my analysis of the appeal record, I recommend that the District Ranger’s decision be affirmed.

IV. COURT ORDER/SETTLEMENT AGREEMENT

Response: The Appellants allege that approving the NE Corner 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 EIS need to be changed as a result of new information on salamanders, chip mills, and Regional Forester Sensitive Species. Appellants allege that since the Forest Plan SIRs are inadequate, the NE Corner Projects violates the court order.

However, as set forth above, Appellants have failed to demonstrate how the alleged defects in the SIRs relate to the project level decision. Accordingly, I recommend the District Ranger’s decision be affirmed.

V. FOREST PLAN AMENDMENT

Appellants challenge the Threatened and Endangered Species Amendment for the Mark Twain National Forest.

Response: In March 2001, the Mark Twain National Forest issued its Threatened and Endangered Species (TES) Amendment to the MTNF Land and Resource Management Plan

(LRMP). That amendment was subject to appeal pursuant to 36 CFR 217. The amendment was not appealed.

The Appellants allege that the NE Corner Project needs to be reversed due to the Plan Amendment being legally inadequate. However, like their challenges to the Forest Plan SIRs, the Appellants do not explain how the legal inadequacies of the TES Plan Amendment render the NE Corner Project illegal. Therefore, since the Appellants have not provided evidence that the NE Corner Project is illegal, I recommend that the District Ranger's decision be affirmed.

VI. FOREST PLAN AMENDMENT 2.

Appellants state that they incorporate 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 Forest Plan Establishing Areas of Influence and Management Strategies for Indiana Bat Hibernacula. They argue that the Amendment should have provided more protection for the bats and had it done so, these "sales" would not have been approved.

Response: 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 regulation at 36 CFR 215.14 expressly states 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." The Appellants have filed dozens of appeals, and therefore should be very aware of this provision.

Appellants argue 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 provides management to protect 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 NE Corner Project Area (EA, p. 1-1; Decision Notice, p. 1). The Biological Evaluation for the project states the nearest Indiana bat hibernacula to the NE Corner Project Area is 16.5 miles south, the nearest capture site of a reproductive female is 55 miles northeast, and the nearest maternity colony is 200 miles south (EA, Appendix H, p. H9 to H10). Activities proposed in the NE Corner Project may effect but are not likely to adversely affect the Indiana bat beyond those that were previously disclosed and discussed in the Service's Programmatic BO of June 23, 1999 (EA, Appendix H, p. H-21 and H43, p2). The United States Fish and Wildlife Service (USFWS) concurred with this determination (Project File, H43, p. 1, 2).

Based on my analysis of the appeal record and project record, I recommend that the District Ranger's decision be affirmed.

VII PLAN REVIEW

The Appellants are concerned that the Mark Twain has not revised its Forest Plan. They assert that conditions in Missouri have significantly changed and a revision needs to be done. They further assert that a revision of the Forest Plan would not allow these projects.

Response: The MTNF Forest Plan was approved in June 1986. Since adoption, the Plan has been amended 29 times. The MTNF 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 November 2004, with a final decision for the revised Forest Plan scheduled to be signed in 2005.

The Appellants' implication that a revision of the Plan would not allow "these projects" does not specifically state why "these projects" would not be allowed (to proceed). We are unaware as to what projects the Appellants are referring to. If they are referring to the NE Corner Projects, they did not specifically state their concerns with this project. They provide no evidence of a particular flaw in the existing Forest Plan to support their argument, nor how it would affect the NE Corner Projects.

VIII. ECONOMIC ANALYSIS.

The Appellants assert that because a General Accounting Report criticized the Forest Service for its accounting practices, the public cannot adequately consider and comment on the economic claims made in "these EAs."

Response: I am unaware as to what EAs the Appellants are referring to. If they are referring to the NE Corner EA, the EA 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 provide 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 document (EA, p. 117 to 118). This analysis clearly states that it only includes costs associated with proposed alternatives and finite estimates of revenues associated with timber production. This analysis displayed both short and long term effects on employment, timber production and resulting revenues to counties, present net values and revenue/cost ratio where applicable. The Economic Returns by Alternative Table (EA, p. 120) displays a comparison of priced activities in each alternative for a relative comparison. It should not be considered actual yield or losses, nor does it attempt to analyze all resource values (EA, p. 18). On pages C2 to C7 of Appendix C in the EA, it clearly displays all costs and revenues used in the economic analysis for each alternative, with frequency, year, quantity, value, inflation rates, and base year.

The Appellants have failed to demonstrate specifically how the GAO report on Forest Service accounting practices relates to the project level decision. Accordingly, I recommend the District Ranger's decision be affirmed.

RECOMMENDATION

My review was conducted pursuant to and in accordance with 36 CFR 215.19. I reviewed the appeal record, including the comments received during the comment period and how the District Ranger considered this information and the Appellants' objections and recommended changes.

Based on my review of the record, I recommend the District Ranger's decision be affirmed.

/s/ Jeffery J. Hammes
JEFFERY J. HAMMES
Appeal Reviewing Officer
District Ranger

cc:
Appellants: Jim Bensman, Jim Scheff
Mark Twain NF:
Responsible Official, Jerry Bird
Forest Supervisor
NEPA Coordinator, Becky Bryan