Forest Service

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Route To:

Subject: Appeal of the Decision Notice and Finding of No Significant Impact for the Delich Land Exchange Project Environmental Assessment Project, Bergland, Ontonagon and Watersmeet Ranger Districts, Ottawa National Forest, Appeal # 12-09-07-0009 A215 (Hovel)

To: Regional Forester, Appeal Deciding Officer

This letter constitutes my recommendation for the above-referenced Notice of Appeal (NOA) by Joe Hovel on behalf of the Partners in Forestry Cooperative and on behalf of himself as an individual. This NOA challenges the most-recent decision for the Delich Land Exchange Project on the Ottawa National Forest (ONF). ONF Staff Officer Lisa Klaus, acting on behalf of Forest Supervisor Tony Scardina, signed the Decision Notice for this project on December 28, 2011.

My review has been conducted pursuant to 36 C.F.R. Part 215 – "Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities." To ensure that the analysis and decision were completed in compliance with applicable laws, regulations, and agency policies, I have considered the issues raised by the Appellant in his NOA and have reviewed the decision documentation submitted by the ONF. My recommendation is based upon a review of the Project Record (PR), including but not limited to, the Revised Environmental Assessment (Revised EA), the Decision Notice (DN), and the Finding of No Significant Impact (FONSI).

Background

A decision document for this land exchange was originally signed by ONF Acting Forest Supervisor Keith Lannom on February 4, 2011. The Lannom decision authorized an exchange involving one parcel of non-federal land (421 acres) and five parcels of federal land (240 acres). On appeal, this decision was challenged by two appellants with standing under the 36 C.F.R. Part 215 regulations, including Mr. Hovel. The appellants generally objected to the land exchange decision because it authorized the conveyance of certain federal parcels near County Line Lake in Ontonagon County, Michigan. Some of these parcels contained stands of hemlock and cedar that had been designated as "potential" old growth by the ONF. On May 13, 2011, the Lannom decision was reversed by the Appeal Deciding Officer (ADO), who determined that the ONF "should have more clearly documented and disclosed the analysis regarding hemlock and potential old growth on the federal properties to be exchanged."

In response to the ADO's appeal decision, the ONF prepared a Revised EA to further document and disclose the analysis regarding potential old growth and hemlock, as well as incorporate new information and analysis. The Revised EA was released for public comment in October, 2011. As stated above, a new DN was prepared and signed on December 28, 2011, under Forest Supervisor Tony Scardina's authority. The legal notice for this decision was published in the *Ironwood Daily Globe* on February 12, 2012.

The Scardina decision authorized the same exchange configuration as the previous Lannom decision. Consolidation of federal landownership and acquisition of land in a semi-primitive, non-motorized area were important components of the purpose and need for the project. The Scardina decision has been appealed by seven appellants with standing under the 36 C.F.R. Part 215 regulations.

Appeal Issues

The Appellant expresses several concerns in his NOA, which have been consolidated into nine issues and addressed separately below. Many of the issues in this appeal are identical to the issues previously raised by the Appellant in his appeal of the Lannom decision. Indeed, the Appellant re-submitted a significant portion of his previous appeal.[1] The Responsible Official was not able to resolve any issues during the informal disposition meeting with the Appellants.

Issue 1: (Purpose and Need)

- *"The Purpose and Need (P&N) for the Delich exchange is seriously flawed and inadequate"* (NOA, p. 2)

Response: The Appellant believes the purpose and need (P&N) for the land exchange is "flawed and inadequate." The Council on Environmental Quality (CEQ) regulations require that agencies identify the underlying P&N in proposing a range of alternatives, including the proposed action. The P&N for this project is outlined in the scoping letter, the Original EA (pp. 1-6), the Revised EA (pp. 1-8), and the DN (DN, p. 2). As stated in the DN, "[t]he overall purpose and need for this exchange is to adjust landownership following the guidelines of the Ottawa National Forests 2006 Land and Resource Management Plan" (DN, p. 2). Based on this direction, three priorities for land exchanges were identified: (1) additional public recreation opportunities, (2) more efficient landownership patterns, and (3) lower resource management costs (see DN, p. 2; Revised EA, p. 3).

The PR indicates that, if the exchange was implemented, the non-Federal parcel would be managed under Management Area (MA) 6.1 and would provide additional semi-primitive, non-motorized recreation opportunities for the public. Additionally, the exchange would provide a more contiguous landscape of federal lands that could be more efficiently managed. Exchanging federal parcels 1-4 and 7 for non-federal parcel 8 would also reduce the length of landline and the number of property corners to be maintained, resulting in lower resource management costs (see PR, I-006b). I find that the purpose and need for this project is consistent with direction in the ONF Forest Plan (pp. 2-4, 2-12, and 2-36; DN, p. 9) and I find no violation of law, regulation, or policy.

[1] The Appellant also submitted an addendum to his NOA, which contained photographs and some appraisal information. While this addendum was not found to contain any additional appeal issues, it did contain a statement related to the appraisal that needs clarification. The Appellant appears to contend that the appraisal should not have been based on the following hypothetical condition: "as if in private ownership and for sale on the open market." This hypothetical condition is specifically mandated by 36 C.F.R. 254.9(b)(1)(ii).

The Appellant's specific concerns with the P&N for this project, as well as my findings with respect to each concern, are addressed in detail below.

- *This P&N ignores the ecological integrity of the ONF and centers only on "efficient land management" and "lower resource management costs."* (NOA, p.2)

Response: The Appellant believes the Forest Service (FS) ignored the "ecological integrity" of the ONF in developing the P&N for this exchange project. The PR demonstrates that ecological factors were considered in the project analysis. For example, a variety of ecological factors were considered in the feasibility analysis conducted pursuant to 36 C.F.R. 254.3(b). The environmental consequences of the land exchange were disclosed in the Revised EA and PR (see Revised EA, pp. 15-54; PR K03-047). As stated in the DN, the Responsible Official's determination that this exchange would serve the public interest takes into account the environmental effects to numerous resources, as discussed in the Revised EA and other PR materials (see DN, p. 3-4). The DN states that "[t]here are positive and negative effects on landowners adjacent to the parcels involved and to the general public[,] [h]owever, the negative effects, as described in the Revised EA and within this decision, are minimal and limited in scope" (DN, p. 4).

The assertion by the Appellant that the ONF is ignoring the "ecological integrity" of the ONF by consolidating land ownership and achieving management efficiencies in accordance with Forest Plan (FP) direction is unsubstantiated. The FP sets forth the desired conditions which guide management actions on the ONF. In this case, the DN stipulates that the exchange "best meets the direction outlined in the Forest Plan with regard to Goal #40, which states, 'Adjust landownership to facilitate restoration, protection and management of resources, and to provide recreation opportunities" (DN, p. 2). The disposal of isolated parcels (which do not have adequate access) in exchange for large inholdings arguably promotes the ecological integrity of the ONF over the long term (and at the landscape-scale) much more effectively than retention of small, isolated parcels. I find that the P&N statement is consistent with FP direction and I find no violation of law, regulation, or policy with respect to this issue.

- *[T]he cost to maintain the parcels near County Line Lake in reality are very low. Except for occasional line marking, the costs are quite low with no active management.* (NOA, p. 2)

- *Forest Service also mentions the exchange would "reduce the risk of encroachments or trespass." With no recorded history of trespass or encroachments on these parcels, it is unreasonable to mention this point as a reason for the exchange.* (NOA, p. 2)

Response: The Appellant disagrees with the ONF's assertion that the exchange would meet the P&N by reducing administrative costs. Also, the Appellant asserts that the FS is being unreasonable in suggesting that the exchange would reduce the risk of encroachments or trespass. The PR indicates that the current costs associated with establishing and maintaining landline and property corners on the ONF are $2,000 per mile of landline and $365 per property corner (K03-047, p. 6 and I-006b). The land exchange would result in 23 fewer property corners and 6 fewer miles of landlines. Having fewer landlines to maintain would result in lower

resource management costs and more efficient landownership patterns over time. In this regard, the Responsible Official concluded that the exchange would meet the P&N for the project.

Having fewer miles of landline to maintain would also reduce the risk of trespass or encroachments, which aligns with the FS Strategic Plan Goal 5 (Maintain Basic Management Capabilities of the FS by managing and protecting the public's ownership rights and interests of the federal estate) (DN, p. 2). It would also lower resource management costs over time and, therefore, meet the P&N for the project. The PR demonstrates that the Responsible Official considered information related to boundary expenses and reasonably concluded that the exchange would reduce administrative costs. I find that the PR contains sufficient rationale that the exchange would meet the P&N in this regard and I find no violation of law, regulation, or policy.

- *This exchange PROMOTES subdividing of the parcels near County Line Lake. … Rather than protecting the land from fragmentation, this project will assure forest fragmentation occurs.* (NOA, p. 3)

Response: The Appellant argues that the exchange does not meet the P&N because, although the exchange might protect the non-federal parcel from fragmentation, it would result in more forest fragmentation in the vicinity of County Line Lake. The Revised EA discloses that if the proposed exchange was implemented, potential future development could include the subdivision of federal parcel 1 into 5-acre lots for individual sale (Revised EA, p. 11). This would not conflict with Haight Township Zoning Ordinances and, as noted in the Revised EA, the 5-acre lots would be larger than many of the existing lots on County Line Lake. If the exchange takes place, any proposed development would also be regulated by Haight Township planning and zoning ordinances (see DN, p. 4; PR, K03-047, p. 5).

The PR demonstrates that the Responsible Official considered information related to the future use and development of the parcels in the vicinity of County Line Lake and determined that the public interest would be better served by consolidating federal ownership in the area of the non-federal property.[2] The DN stipulates that "[t]his exchange will provide improved land ownership patterns of federal land through consolidation of National Forest ownership, contributing to a contiguous land base where consistent management objectives are applied (Revised EA, p. 3), providing long term benefits to resources such as wildlife and recreation" (DN, p. 3). The DN further concludes that, with an increase of approximately 181 acres of land, "National Forest administration will be simplified and enhanced through acquisition of the non-federal land, and result in an improved ownership pattern" (DN, p. 4). I find that the Responsible Official provided adequate rationale for the conclusion that consolidation of federal ownership through the acquisition of the non-federal property would meet the P&N of the project.

- *The parcels the ONF proposes to exchange have recreational opportunities that far exceed those of the Delich parcel.* (NOA, p. 3)

[2] See Issue 7 for the discussion related to the public interest determination.

The Appellant contends that the exchange does not meet the P&N because the federal parcels provide greater recreation opportunities than the non-federal parcel. The "Recreation Resources" section of the Revised EA acknowledges that there are recreational opportunities associated with the federal parcels near County Line Lake and the non-federal parcel (See Revised EA, pp. 41-45). This section indicates that "[t]he most notable recreation experience [associated with the federal parcels] is the opportunity to visit the scenic Wildcat Falls located on Federal parcel 3" (Revised EA, p. 41). The document also acknowledges that the parcels near County Line Lake "provide a roaded natural motorized recreational environment" (Revised EA, p. 42). With respect to the non-federal parcel, the Revised EA indicates that the property is located in a "predominately natural or natural-appearing environment of moderate to large size" which is managed for semi-primitive, non-motorized recreation (Revised EA, p. 42).

The Revised EA acknowledges that, if the exchange was implemented, the recreation opportunity associated with Wildcat Falls would no longer be available and that development of parcel 1 "would result in less opportunity for wildlife viewing and general public recreation use of the area in the vicinity of County Line Lake" (Revised EA, p. 43). The Response to Comments (RTCs) states that "[i]t is acknowledged that an opportunity for public recreation within an old growth stand would be lost on these site specific parcels" (PR K03-047, p. 14). At the same time, the RTCs points out that "there are 58,038 acres of old growth forest-wide that may provide the recreating public with a similar experience" (PR K03-047, p. 14). The RTCs concludes that "[t]hrough the exchange, the public also gains a significant block of land within a semi-primitive non-motorized area directly adjacent to the Porcupine Wilderness State Park; which contains the largest tract of old growth forest in Michigan" (PR K03-047, p. 14). The Revised EA concludes that "the additional acres of land acquired within the SPNM gained through the exchange would increase the recreational opportunity in MA 6.1" which would result in additional wildlife viewing opportunities and additional protection for the North Country Scenic Trail from motorized encroachment (Revised EA, p. 43).

The PR demonstrates that the Responsible Official considered information related to the recreation opportunities of the lands in this exchange in the project decision and expressly acknowledged the loss of some recreation benefits associated with Wildcat Falls and the surrounding area (See DN, p. 8). Ultimately, the Responsible Official concluded that "[h]aving a single, larger, contiguous parcel in federal ownership, would provide better recreational access than several smaller parcels that are for the most part surrounded by private lands" and that "[t]he location of the non-federal parcel, immediately adjacent to the Porcupine Wilderness State Park and the North Country Trail, adds to the increased recreational opportunities" (DN, p. 4). I find that the Responsible Official considered available information and provided appropriate rationale for his decision that the exchange would meet the recreation components of the P&N.

Issue 2: (Strategic Plan)

- *"We are puzzled by the goals stated in the Strategic Plan"* (NOA, p. 3)

Response: The USDA FS Strategic Plan FY2007–2012 provides the strategic direction that guides the FS in delivering its mission. The FS's programs and budget are aligned with the goals and objectives in the plan. The goals and objects for Fiscal Years 2007–2012 are (1) Restore,

sustain, and enhance the nation's forests and grasslands; (2) Provide and sustain benefits to the American people; (3) Conserve open space; (4) Sustain and enhance outdoor recreation opportunities; (5) Maintain basic management capabilities of the Forest Service; (6) Engage urban America with Forest Service programs; and (7) Provide science-based applications and tools for sustainable natural resource management. Adequacy of the USDA FS Strategic Plan FY2007–2012 is outside the scope of this project.

The Appellant's specific concerns with the Strategic Plan, as well as my findings with respect to each concern, are addressed in detail below.

- *"In regards to more (Goals 2 & 4) efficient timber management based on legal access . . . there will not be sales opportunity on at least 350 of the 421 acres of the Delich tract for another 40 years . . . parcels 1, 2, 3, 4, & 7 could provide a variety of wood products now . . . [t]he DN/FONSI has this wrong, misleading at best."* (NOA, p. 3)

Response: The Appellant believes that the DN is wrong or misleading with respect to assertions that the exchange would result in more efficient timber management based on access. The Appellant states that there will not be any opportunity for timber sales on the majority of the non-federal parcel for another 40 to 80 years. In contrast, the federal parcels could provide a variety of wood products now or in the future. In the DN, the Responsible Official notes that the proposed exchange would provide an opportunity for more efficient timber management and for public use by conveying several parcels of land where the FS has no legal access while acquiring lands where FS has legal access (DN, p. 2). The exchange "would also serve to meet several goals of the USDA FS Strategic Plan" (in this case, Goal 2 (Provide and sustain benefits to the American people) and Goal 4 (Sustain and enhance outdoor recreation opportunities)). One of the means and strategies for accomplishing Goal 2 is to "Provide access to natural resources to meet the Nation's economic, social, and environmental needs," while one of the means for accomplishing Goal 4 is to "Provide recreational opportunities consistent with an area's physical, biological, and social characteristics and capabilities." As noted in the P&N for the project, the proposed land exchange will result in more efficient land ownership patterns and provide additional public recreation opportunities over time. Therefore, I find that the Responsible Official reasonably concluded that proposed land exchange would help to achieve Goals 2 and 4 of the USDA FS Strategic FP.

- *"On [the] goal for more 'public use' being a reason acquiring the Delich tract (more 6.1) this has already been debunked by the over 100,000 acres of 6.1 type state and Forest land already around the tract and with no data to show increased need . . . [t]he DN/FONSI claim the exchange serves public recreation use is just plain false."* (NOA, p.3)

Response: The Appellant believes that acquisition of additional land within MA 6.1 is not necessary and that the proposed land exchange does not enhance public recreation opportunities. Information and analysis in the PR related to recreation is described above in my response to **Issue 1**. One of the objectives of the ONF FP is to "Maintain or increase opportunities for quiet and remote experiences in semi-primitive non-motorized areas and other areas as appropriate" (p. 2-4). Once conveyed to the federal government, non-federal parcel 8 would be incorporated

into MA 6.1, increasing the amount of semi-primitive, non-motorized recreational environment on the ONF. The Revised EA acknowledges the presence of Wildcat Falls and the potential loss of public access to the site, while also recognizing the potential benefits the exchange would bring to semi-primitive non-motorized recreation. While the falls and other features in the area are appealing, they are not considered unique in regards to their particular form or character (PR, K03-047, p.11).

I find the Revised EA adequately reviewed the effects of the proposed project on recreation opportunities and the PR contains sufficient information and analysis. Ultimately, the Responsible Official concluded that "[h]aving a single, larger, contiguous parcel in federal ownership, would provide better recreational access than several smaller parcels that are for the most part surrounded by private lands" and that "[t]he location of the non-federal parcel, immediately adjacent to the Porcupine Wilderness State Park and the North Country Trail, adds to the increased recreational opportunities" (DN, p. 4). I find that the Responsible Official considered available information and provided appropriate rationale for his conclusion that the exchange would enhance recreational opportunities within the semi-primitive, non-motorized area. I also agree that the proposed land exchange would help to achieve Goal 4 (Provide recreational opportunities consistent with an area's physical, biological, and social characteristics and capabilities) of the USDA FS Strategic Plan.

- *"On 'protect' an otherwise large, contiguous expanse of land from conversion to other uses (Goal 3). We have no particular objection to acquiring the Delich tract by some direct purchase arrangement or even a less sensitive exchange of other Forest Service lands. However, Forest Service Supervisor Anthony Scardina makes a very weak case for taking the land off the private tax rolls by acquiring it for any of these reasons, including a buffer for the North Country Trail."* (NOA, p. 4)

Response: The Appellant questions the rationale for not pursuing a direct purchase arrangement or exchanging different federal parcels than those proposed for exchange. As noted in **Issue 3** below, the landowner is only interested in exchanging non-federal parcel 8 and is not interested in selling it. Purchasing the non-federal parcel was developed as an alternative considered but not in detail as it is not feasible or practical if the landowner is not interested in selling the parcel.

The DN states that the purchase of the non-federal parcel was not analyzed in detail as the landowner was not interested in selling the parcels involved; he was interested only in pursuing an exchange of lands (DN, p. 5). The Revised EA and PR reflect that adequate consideration was given to this alternative and I find no violation of law, regulation, or policy.

- *"On consolidating National Forest System Lands within a Semi-Primitive Non-Motorized (SPNM) Management Area (Goal 4): In what we can find the ONF 2006 Forest Plan, page 3-57, does not present a need, case, suggest or urge the additional acquisition of 6.1 lands as a 'goal' in itself. An acquisition may include 6.1 lands based on more determination of need than presented in this Revised EA. The DN/FONSI is misleading in suggesting additional 6.1, in itself, is a GOAL."* (NOA, p. 4)

Response: The Appellant believes that the DN is misleading when it refers to consolidation of federal lands within a semi-primitive non-motorized management area (MA 6.1) as a goal of this project. In the DN, the Responsible Official notes that consolidating National Forest System (NFS) lands within a semi-primitive non-motorized management area "would also serve to meet several goals of the USDA FS Strategic Plan" (in this case, Goal 4 (Sustain and enhance outdoor recreation opportunities)). One of the means and strategies for accomplishing Goal 4 is "Providing recreational opportunities consistent with an area's physical, biological, and social characteristics and capabilities." One of the objectives of the ONF FP is to "Maintain or increase opportunities for quiet and remote experiences in semi-primitive non-motorized areas and other areas as appropriate" (p. 2-4). As noted in the P&N for the project, the proposed land exchange would provide additional semi-primitive, non-motorized recreation opportunities for the public; therefore, the Responsible Official reasonably concluded that the proposed land exchange would also help to achieve Goal 4 (Sustain and enhance outdoor recreation opportunities).

<u>Issue 3</u>: (Range of Alternatives)

- **"***The rationale in the Decision for not fully analyzing an alternative which drops the parcels along County Line Lake Road (Fed parcels 1,2,3) from the exchange is not only inadequate but troubling, as well. We disagree with the rational in the Decision for not further exploring other alternatives."* (NOA, p. 4, 8)

- *"[T]he FS is stating that land exchanges will only have two alternatives: the proposed action and no action. This does not meet the NEPA requirement to provide a "reasonable range" of alternatives in an Environmental Analysis."* (NOA, p. 4)

- *"If the No action is never selected, it means that the entire EA process was a sham, based entirely on a foregone conclusion, and as such is a direct violation of NEPA since there was never any doubt that the proposed action would be selected regardless of public comment or any other findings."* (NOA, p. 4)

- *"Purchasing the non-federal parcel was inadequately considered, in our opinion. We also feel that NOT enough consideration was given to using Land and Water Conservation Funds as an alternative."* (NOA p. 8)

Response: The Appellant argues that the FS did not develop and consider a reasonable range of alternatives. The National Environmental Policy Act (NEPA) requires that federal agencies study, develop, and describe appropriate alternatives to proposed actions that involve unresolved conflicts or alternative uses of available resources (*See* 42 U.S.C. § 4332). The CEQ regulations require that agencies 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)). Agencies have the discretion to determine appropriate alternatives that are viable and that meet the purpose and need of the proposal. Neither the NEPA nor its regulations require that a set number of alternatives be analyzed (*See* 36 C.F.R. 220.7(b)(2)(i)).

The federal courts have held that the range of alternatives diminishes as the expected impacts diminish. *See Sierra Club v. Espy*, 38 F.3d 792, 796, 803 (5th Cir. 1994) ("While an EA must

contain a discussion of alternatives, the range of alternatives that the [agency] must consider decreases as the environmental impact of the proposed action becomes less and less substantial" [internal quotes omitted]). In other words, the agency is under no obligation to develop alternatives to a project that it has determined will have no significant environmental effects anyway. The courts have also recognized that appellants bear the burden of presenting to the agency "specific, detailed," and "feasible" alternatives. *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 576 (9th Cir. 1998), *see also Vermont Yankee Nuclear Development Corp. v. NRDC*, 435 U.S. 519, 553-554 (1978) ("cryptic and obscure" references to alternatives that someone believes should be considered are not sufficient to trigger an obligation to do so by the agency).

In this case, alternative development is appropriately confined to the parameters of this site-specific proposal. Action alternatives are bounded by the eight parcels of land proposed in this land exchange and must meet the purpose and need for this project.[3] The range of alternatives for this exchange is documented in the decision document, the Revised EA, and other documents in the PR (DN, pp. 4-5; Revised EA, pp. 10-12). Four alternatives were considered in the Revised EA for this project. Two alternatives (the proposed action and "no action") were described and analyzed in detail, while two additional alternatives were considered in the alternative development process, but were eliminated from detailed study (DN p. 5; Revised EA, pp. 10-12).

The Revised EA states that an alternative that excluded parcels 1, 2, and 3 from the land exchange was not carried forward for detailed consideration because "excluding these Federal parcels would not fully meet the purpose and need . . . [i]n particular the opportunity to consolidate NFS lands and concentrate resource management efforts in more effective blocks of land would not be achieved" (Revised EA, p. 12). The DN further states that "dropping parcels 1, 2, and/or 3 would have resulted in a failed exchange agreement . . ." (DN, p. 5; see also PR, I-026a). The Revised EA and PR demonstrate that this alternative was adequately addressed. The PR documents set forth a reasoned explanation as to why a full analysis of the alternative was not appropriate. As indicated in the DN and other PR documents, consolidation opportunities would have been considerably diminished and the non-federal party was not willing to undertake an exchange that did not involve these parcels.

It is also important to note that there should have been no need to analyze this alternative in detail because the effects of the alternative are already disclosed and analyzed in the context of the analysis of the proposed action and the "no action" alternatives. The NEPA does not require that every variant of an alternative be carried forward for detailed consideration. *See Brooks v. Coleman*, 518 F. 2d 17 (9th Cir. 1965).[4] The NEPA also does not require "a separate analysis of

[3] Chapter 1 of the Revised EA sets forth the purpose and need for the exchange proposal (Revised EA, pp. 1-8). As discussed above, the purpose and need relates to efficiencies associated with land ownership consolidation and recreational opportunities within a semi-primitive, non-motorized area.

[4] The Sixth Circuit has stated the following: "'the range of alternatives that must be discussed under the National Environmental Policy Act is a matter within an agency's discretion.' *Save Our Cumberland Mountains*, 453 F.3d at 342 (internal quotation marks omitted). Thus, an 'agency may apply a rule of reason in this area and discuss only reasonable alternatives to the proposed action.' *Id*. at 346." *Meister v. U.S. Dept. of Agriculture*, 623 F.3d 363, 377 (6th Cir. 2010). Moreover, "[a]n agency has fewer reasons to consider alternatives when it prepares an environmental assessment as opposed to when it prepares an environmental impact statement," *Save Our*

alternatives . . . which have substantially similar consequences." *Headwaters, Inc. v. BLM*, 914 F. 2d 1174, 1181 (9th Cir. 1990). In this case, the environmental effects associated with conveying parcels 4, 5, 6, and 7 are already disclosed in the Revised EA. Analysis of this alternative in detail would have resulted in nothing more than a duplication of material already present in the analysis of the proposed action.

An alternative involving the acquisition of the non-federal property by purchase (rather than by exchange) was also considered during the development of the range of alternatives. The DN states that "this [purchase] alternative was not analyzed in detail as the landowner was not interested in selling the parcels involved; he was interested only in pursuing an exchange of lands" (DN, p. 5; PR DL002, DL003, and I-026a). The DN also states that "current levels of appropriated funding for acquisitions would prevent the purchase from occurring" (DN, p. 5). The Revised EA and the PR demonstrate that the purchase alternative was addressed and set forth a reasoned explanation as to why a full analysis of the alternative was not appropriate. As the Revised EA and the PR indicate, a purchase alternative is simply not viable if the non-federal party is not interested in selling the private property to the federal government and if funding for the particular purchase has not been (and likely will not be) appropriated by Congress.

The Appellant suggests that the ONF did not consider alternatives other than the proposed action and that the decision was pre-determined. In this case, the PR documentation contains evidence that the decision was not pre-determined. First, the PR indicates that each parcel of land was evaluated separately and broken down in to "smaller units" to "allow for some decision space later if it is determined that there is a need to drop any parcel or otherwise modify the proposed action" (PR, C017, p. 2). As discussed above, other alternatives were considered; however, because they did not meet the purpose and need or were otherwise not viable options, they were not carried forward for detailed analysis. Ultimately, the decision reached by the Responsible Official approved a modified version of the proposed action, which excluded two parcels after further review (See DN, p. 2-3). For these reasons, I find that Alternative 2 was not pre-determined.

The Revised EA and PR clearly indicate that the alternatives considered but eliminated from detailed study are neither practical nor feasible; and therefore, the ONF was correct in not analyzing those alternatives in detail. The Revised EA, DN, and PR demonstrate that a reasonable range of alternatives was considered. I find no violation of law, regulation, or policy. Therefore, I recommend that the decision be affirmed with respect to this issue.

Cumberland Mountains v. Kempthorne, 453 F.3d 334, 342 (6th Cir. 2006), given the agency has determined that there will be no significant environmental impacts. Simply put, where the agency identifies few or non-significant environment effects, it has less reason to give detailed consideration to additional alternatives. As the Circuit noted in *Kempthorne*, 453 F.3d at 343: "[A]lthough consideration of some range of alternatives is essential to any environmental assessment, it makes little sense to fault an agency for failing to consider more environmentally sound alternatives to a project which it has properly determined, through its decision not to file an impact statement, will have no significant environmental effects anyway, *Sierra Club v. Espy*, 38 F.3d 792, 803 (5th Cir.1994)." While it is true that in the Sixth Circuit "'an alternative within the ambit of an existing standard . . . generally may not be abandoned without any consideration whatsoever,' *Meister*, 623 F.3d at 379, citing *Kempthorne*, 453 F.3d at 347, as discussed above, the record for the Delich Project decision demonstrates the alternative sought by the appellant was substantially similar to other alternatives analyzed in the EA.

Issue 4: (Old Growth)

- *"The Decision continues to ignore the importance of old growth hemlock and cedar communities and promotes the idea that these special features are not 'rare or unique.'"* (NOA, p. 5, 7)

Response: The Appellant is concerned that the ONF is disregarding several stands of potential old growth timber on the federal parcels and believes that these parcels should not be exchanged out of federal ownership. As explained in the PR documentation, old growth is designated or classified on the ONF based upon certain classification guidelines in the ONF's FP.[5] The FP sets forth desired future conditions related to old growth within specific "Management Areas" (MA) on a landscape-level scale.

The Revised EA and other documentation in the PR indicate that parcels 2 and 3, which are located within MA 2.1, contain approximately 61 acres of classified "potential old growth" in three separate stands.[6] The PR documents state that these existing stands were classified as potential old growth because the stands "do not contain all the desired condition characteristics [for old growth] outlined in the Forest Plan" (PR K03-047, p. 13). More specifically, the stands "possess some [old growth] characteristics (e.g. larger tree size) and lack other characteristics such as connectivity as described in the Revised EA" (PR K03-047, p. 13; Revised EA, pp. 18-20).[7]

The PR states that "[t]he land exchange would reduce the percent of old growth within MA 2.1 by approximately [0.3]%, but it would be negligible to the Forest's old growth acreage and Forest Plan goals" (PR K03-047, p. 13).[8] The Revised EA indicates that "[t]he allocation of old growth in MA 2.1 is currently at 7.7% Forest[-]wide, with a desired condition of 8-10% within the MA" (Revised EA, p. 25). The RTCs document indicates that there are currently 17,194

[5] The ONF Land and Resource Management Plan (Forest Plan) does not formally designate "old growth" areas on the Forest. Instead, old growth areas are designated on a case-by-case basis in project-level NEPA decisions. The Forest Plan sets forth desired future conditions related to old growth within specific "Management Areas" and provides a set of guidelines for the classification of old growth areas. These guidelines stipulate that old growth classifications should be based on landscape-level acreage numbers by management area. The Plan sets forth the following factors for consideration: Providing effective blocks for old growth dependent plant and animal species; providing for connectivity; enhancing or maintaining outstandingly remarkable values of Wild and Scenic Rivers; land considered unsuited for timber production; where access is poor for vegetation management; where visual quality objectives are emphasized; in water-influenced landscapes, including riparian areas; and in recreation use areas other than developed sites (PR HP004 pp. 2-23 to 2-25).

[6] As explained in the Response to Comments, "[t]he Ottawa National Forest has two classification types pertaining to old growth: (1) potential old growth, and (2) existing old growth" (PR K03-047, p. 13). The Response to Comments indicates that "[s]tands classified as potential old growth include stands that display some old growth characteristics [as set forth in the Forest Plan guidelines] . . . but are missing other key old growth characteristics" (PR K03-047, p. 13).

[7] The Appellant argues that the old growth stands on parcels 2 and 3 should be classified as existing old growth, rather than potential old growth (NOA, p. 5). The PR contains sufficient discussion related to the classification of the stands as potential old growth, therefore, I find no violation of law, regulation, or policy with respect to the Appellant's contention.

[8] There are various typographical errors in the PR related to the reduction in old growth within MA 2.1 (percentage amount) associated with the exchange. Based upon old growth data in the PR, it appears that the correct percentage is 0.3%.

acres of potential old growth and 3,620 acres of existing old growth classified within MA 2.1 across the ONF (See PR K03-047, p. 13).

Comparison of the percentages of old growth desired for each MA to the percentages of existing old growth for each MA indicates that the ONF continues to make progress toward the FP objectives. For example, the Forest is within the desired range of old growth for MAs 1.1a, 3.1a, 4.1a, and 4.2a. However, the existing percentages are still low for MA 2.1, 2.2, 6.1 and 6.2. As a result of the changes to the old growth guidelines under the 2006 FP, interdisciplinary teams must evaluate previous old growth classifications during the analysis of future projects to determine if these stands are still appropriately classified as old growth, and classify additional old growth stands as necessary (2006 M&E Report p. 26).

The PR demonstrates that the ONF did not disregard the presence of potential old growth in this project analysis. As summarized above, the Revised EA and other PR documents contain significant information and analysis regarding the direct, indirect, and cumulative impacts associated with the potential old growth stands (Revised EA, pp. 18-20, 22-25, 28-29; PR J01-002). The RTCs stipulates that "it is recognized that the federal parcels do contain old trees that have important ecological and social values, which were considered by the Responsible Official," but concludes that "[t]he exchange would not affect the ability, or the need of the Forest, to classify stands as old growth across the landscape" (PR K03-047, p. 13). The Revised EA also points out that old growth will continue to be classified (as appropriate) throughout the ONF in future project decisions as the Forest moves toward the FP's desired conditions for old growth (See Revised EA, p. 28).

The PR also demonstrates that the Responsible Official considered the concerns surrounding the potential old growth in the project decision. The DN specifically references the concerns related to the loss of potential old growth (See DN, p. 5, 6). The FONSI also references this resource and concludes that effects to these small stands would not be significant from the standpoint of context or intensity (See DN, pp. 6-9). Ultimately, the Responsible Official decided that the benefits associated with the exchange outweighed the "minimal" negative effects (DN, pp. 3-4). Although the Appellant takes issue with the decision, I find no violation of law, regulation, or policy with respect to this issue.

<u>Issue 5</u>: (Hemlock and Cedar)

- *"The decision continues to ignore the importance of old growth hemlock and cedar communities and promotes the idea that these special features are not 'rare or unique.'"* (NOA, p. 5-7)

Response: The Appellant is concerned about the harvesting of hemlock stands (primarily located on parcels 2 and 3) if the exchange was implemented. The hemlock stands are described and the effects to the hemlock stands are addressed in the "Vegetation Resources" section of the Revised EA, which contains a substantial amount of information and analysis regarding hemlock (Revised EA, pp. 16-29). Indeed, the Revised EA states that the document "[was] prepared [in part] to address concerns raised about the loss of eastern hemlock … within Federal parcels 2 and 3" (Revised EA, p. 2). The document describes the existing hemlock stands on the federal

parcels (Revised EA, pp. 16-18) and indicates that "[h]emlock occurs on approximately 19,000 acres of the Forest and in an additional 37,000 acres of hemlock-hardwood mixed stands" (Revised EA, p. 21). The Revised EA also describes the hemlock component on the non-federal property.

The Revised EA further indicates that, although hemlock has experienced some decline in the area due to various environmental factors, including deer herbivory and species competition, it is not considered "rare or unique on the Ottawa" (Revised EA, p. 21).[9] The Revised EA stipulates that, because hemlock has experienced some decline in the area, the FP "includes [forest-wide] objectives to maintain, expand, and restore hemlock to provide for ecosystems that are healthy, resilient, diverse, and functioning in a sustainable and productive manner" (Revised EA, p. 21). Additional information regarding the effects of the exchange on hemlock at the Forest-wide and MA-scale is located in the "Response to Comments" document (PR K03 047, p. 15).

The DN acknowledges that the public has concerns regarding the loss of hemlock on the federal parcels (DN, pp. 6, 7). The DN reiterates, however, that because hemlock is found throughout the Ottawa, the exchange "will not affect the overall viability of this resource at a regional, state, or even Forest level" (DN, p. 7). Again, the DN concludes that that "the natural resource values and public objectives served by the non-federal lands or interests to be acquired exceed the resource values and public objectives served by the federal land to be conveyed" (DN, p. 4). The FONSI also references this resource and concludes that effects to hemlock stands would not be significant from the standpoint of context or intensity (See DN, pp. 6-9). The FONSI stipulates that, although "many of the commenters have stated that they believe the cedar, hemlock, and old growth components found on the federal parcels near County Line Lake to be 'rare' and 'unique,' . . . [t]he Revised EA demonstrates that these resources are found throughout the Ottawa" (DN, pp. 7-8).

The Appellant is also concerned about the loss of cedar stands if the exchange was implemented. Like hemlock, the cedar stands are described and the effects to the cedar stands are addressed in the "Vegetation Resources" section of the Revised EA (Revised EA, pp. 16-29). The document describes the existing cedar stands on the parcel 2 (Revised EA, pp. 16-18) and indicates that cedar "occurs on approximately 7,300 acres, of which 4,160 acres of the total are within MA 2.1" (Revised EA, p. 21). The RTCs states that "[w]hile stands of northern white cedar account for about 7,300 acres Forest-wide, there are collectively 29,000 acres (about 2.9% of the Ottawa) of various forest types where cedar is a significant component of a given stand" (PR K03-047, p. 12). The Revised EA concludes that "this species is not considered either rare or unique on the Ottawa" (Revised EA, p. 22).

The Revised EA and the RTCs acknowledge the public concerns regarding the long-term viability of white cedar. The Revised EA indicates that "[a]s a lowland conifer, this species occupies wet areas and therefore is protected from disturbance along with other wetland and riparian features" (Revised EA, p. 22). The Revised EA also mentions Forest Plan objectives to

[9] Hemlock is also addressed in the "Response to Comments" document, which states the following: "The Revised EA acknowledges that there are challenges in the Lakes States to hemlock regeneration (pp. 21-25) as well as cedar regeneration . . . [t]he exchange out of 33 acres of hemlock forest type and 14 acres of cedar forest type is not anticipated to affect the viability of these species on the Ottawa" (PR K03 047, p. 14).

maintain cedar and other long-lived conifer types. The DN also acknowledges the concerns regarding the presence of the 14 acres of cedar on parcel 2, but also concludes that this resource is not rare or unique and that the exchange of parcel 2 "will not affect the overall viability of this resource at a regional, state, or even Forest level" (DN, p. 7).

I find sufficient evidence in the PR that the Responsible Official was adequately informed and appropriately considered the presence of the hemlock and cedar stands his decision. Although the Appellant appears to disagree with the conclusion that stands are not rare on the ONF, the Responsible Official provided adequate rationale for his determinations and there is ample evidence that this resource was thoroughly considered. I find no violation of law, regulation, or policy.

Issue 6: (Wildcat Falls and Riparian Resources)

- "*[T]he importance of Wildcat Falls to the public is simply brushed off as one opportunity in many on the ONF"* (NOA, p. 8)

The Appellant is concerned about the loss of public access to Wildcat Falls if the exchange was implemented. The presence of the waterfall and its importance to some members of the public is thoroughly discussed in the DN and other documents in the PR. The DN acknowledges that Wildcat Falls "has given some who visit it a sense of place and attachment to the area" (DN, p. 8). The DN stipulates that the public's concerns about the loss of the waterfall were considered in the decision, but concludes that "while the falls are appealing, they are in fact not unique in regards to their particular form or character" (DN, p.8). The DN points out that "the site itself is also not unique in the sense that it has no historical significance and similar sites may be found in many places in the Upper Peninsula" (DN, p.8). The existence of the waterfall and its recreational value were also discussed in the Revised EA and the "Response to Comments" (Revised EA, pp. 41-44; PR K03 047, p. 11). As stated in the RTCs, "the Revised EA acknowledges the presence of the scenic falls and the potential loss of public access to the site, while also recognizing the potential benefits the exchange would bring to SPNM recreation" (PR K03 047, p. 11).[10]

I find sufficient evidence in the PR that the Responsible Official was adequately informed and appropriately considered Wildcat Falls in the decision. The Appellant obviously disagrees with the decision of the Responsible Official and believes that the Responsible Official should have afforded the presence of this waterfall greater weight in the public interest determination. However, there is ample evidence that this resource was thoroughly considered in the decision and I find no violation of law, regulation, or policy.

- *"A .32 mile loss of perennial stream is significant when coupled with our other concerns."* (NOA, p. 8)

[10] I note that, based upon various documents in the PR, it is not clear that perfected legal access to federal parcel #2 is available for the public. Private property must be crossed in order to reach Wildcat Falls on federal parcel #2 and the PR does not disclose the presence of any recorded right-of-way easements or other avenues of legal access.

The Appellant is concerned about the loss of some riparian habitat on parcels 2, 3, and 4 associated with Scott and Howe Creek. The riparian resources associated with the federal parcels and the direct, indirect, and cumulative effects to riparian resources are generally addressed in the "Aquatic and Riparian Resources" section of the Revised EA (Revised EA, pp. 30-38). The Revised EA appears to indicate that the federal properties involved in the exchange (parcels 1-4 and 7) contain approximately one mile of stream frontage, most of which is associated with perennially flowing streams (Revised EA, pp. 31-32). In contrast, the Revised EA indicates that the non-federal property contains approximately 2.29 miles of stream frontage, including approximately one-half mile of perennially flowing stream frontage (Revised EA, p. 32). Thus, the Revised EA indicates that the exchange would result in "a slight increase in [total] stream miles," but a slight decrease in perennial flowing stream miles (Revised EA, pp. 33-34). The "Response to Comments" stipulates that "[t]he riparian areas within non-Federal parcel 8 are different than Scott and Howe Creek's riparian areas [federal parcels 2, 3, and 4], but equally important for local flora and fauna associated with the soil and stream types" (PR K03 047, p. 4).

Water-related resources are also addressed in the "Soils and Landform" section of the Revised EA, which addresses effects to wetland and floodplain acres (Revised EA, pp. 38-41). This portion of the analysis indicates that the federal parcels involved in the exchange contain approximately 64 acres of wetlands and 17 acres of floodplains, while the non-federal parcel contains approximately 66 acres of wetlands and 11 acres of floodplains (Revised EA, p. 40). As disclosed in the DN and the Revised EA, a deed covenant will be placed on federal parcels 2 and 3 to protect the 17 acres of floodplains (DN, pp. 3, 8, 9; Revised EA, p. 12).

I find that the PR contains sufficient information related to streams and other riparian resources for purposes of the Responsible Official's decision. In this case, the PR reveals that the exchange would result in slight increases in some riparian resources (such as total stream miles and wetland acreage) and slight decreases in other riparian resources (such as pond acreage and perennial stream miles). I also note that, as disclosed in the DN and the Revised EA, a deed covenant protecting the 17acres of floodplains on federal parcels 2 and 3 should afford some protection to the associated riparian areas, which accounts for much of the perennial stream frontage on the federal properties to be exchanged (DN, pp. 3, 8, 9; Revised EA, p. 12). I find no evidence that these resource tradeoffs were not adequately documented in the PR and considered by the Responsible Official in the decision. Therefore, I find no violation of law, regulation, or policy with respect to this issue.

Issue 7: (Public Interest Determination)

Response: The Appellant asserts that the subject land exchange is not in the public interest because certain resources would be conveyed out of federal ownership and would no longer be accessible or available for the public. Specifically, as previously discussed, the Appellant is concerned about the loss of Wildcat Falls, the loss of riparian resources, and the loss of hemlock and cedar old growth stands. The Appellant suggests that the loss of these resources outweighs the benefits associated with the acquisition of the non-federal property.

Provisions of 36 C.F.R. § 254.3(b) require that the Responsible Official make a determination that the public interest will be well served by a land exchange. Numerous factors must be considered when assessing the public interest.[11] The Responsible Official must ultimately find that "[t]he resource values and the public objectives served by the non-Federal lands or interests to be acquired must equal or exceed the resource values and the public objectives served by the Federal lands to be conveyed." 36 C.F.R. § 254.3(b)(2)(i).[12]

In this case, the DN contains the Responsible Official's determination that the public interest would be served by the exchange and provides the rationale associated with that determination. The DN generally indicates that consolidation of federal landownership and enhancement of recreational opportunities were viewed as important benefits of the exchange (DN, pp. 2-4). As discussed in the Revised EA and the DN, management efficiencies associated with landownership consolidation and provision of additional recreational opportunities were principle components of the P&N for the project (DN pp. 2-4; Revised EA p. 3). The DN emphasizes the benefits associated with acquiring the non-federal tract, which is a large, consolidated block of land within a semi-primitive, non-motorized recreation area and immediately adjacent to Porcupine Wilderness State Park and the North Country Trail (DN, pp. 2-4). The DN also acknowledges that "there are both positive and negative effects on landowners adjacent to the properties involved and to the general public," but concludes that "the negative effects, as described in the Revised EA and within this decision, are minimal and limited in scope (Revised EA, pp. 15-54)" (DN, p.4). As required by provisions of 36 C.F.R. § 254.3(b)(2), the DN stipulates that "the natural resource values and public objectives served by the non-federal lands or interests to be acquired exceed the resource values and public objectives served by the federal land to be conveyed (Revised EA, pp. 15-54)" and that the "intended residential and commercial timber harvesting use of the conveyed federal land will not substantially conflict with established management objectives on nearby federal land" (DN, p. 4). The DN also states that the intended use "would also not conflict with current development or zoning restrictions on adjacent private land" because "[t]ownship zoning ordinances will regulate the amount and type of any future development on the property" (DN, p. 4).
As previously mentioned, the Appellant has specific concerns related to Wildcat Falls, riparian resources, and old growth. Information and analysis in the PR related to these specific resources is set forth above in **Issue 4**, **Issue 5**, and **Issue 6**. I find sufficient evidence in the PR that the Responsible Official was adequately informed and appropriately considered these resources in the public interest determination. The Appellant obviously disagrees with the decision of the

[11] The provisions of 36 C.F.R. § 254.3(b)(1) state the following: "When considering the public interest, the authorized officer shall give full consideration to the opportunity to achieve better management of Federal lands and resources, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not limited to: protection of fish and wildlife habitats, cultural resources, watersheds, and wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of existing or planned land use authorizations (§ 254.4(c)(4)); promotion of multiple-use values; implementation of applicable Forest Land and Resource Management Plans; and fulfillment of public needs."

[12] 36 C.F.R. § 254.3(b)(2) provides: "To determine that an exchange well serves the public interest, the authorized officer must find that – (i) The resource values and the public objectives served by the non-Federal lands or interests to be acquired must equal or exceed the resource values and the public objectives served by the Federal lands to be conveyed, and (ii) The intended use of the conveyed Federal land will not substantially conflict with established management objectives on adjacent Federal land, including Indian Trust lands."

Responsible Official and believes that the Responsible Official should have afforded the presence of these resources greater weight in the public interest determination. However, there is ample evidence that the resources were thoroughly considered in the decision and I find no violation of the regulations pertaining to the public interest finding.

- *"While the exchange may improve ownership pattern, the "old growth features" discussed would require little management so the argument for better management objective[s] becomes diminished."* (NOA, p. 8).

With this comment, the Appellant takes issue with paragraph #1 in the "Decision Rationale – Public Interest Determination" section of the DN. Paragraph #1 states that "[t]his exchange will provide improved land ownership patterns of federal land through consolidation of National Forest ownership, contributing to a contiguous land base where consistent management objectives are applied" (DN, p. 3). The Appellant argues that the potential old growth stands on federal parcels 2 and 3 would require less of a commitment of management resources and, therefore, any consolidation-related benefits would be "diminished."

While I agree with the Appellant that certain types of management prescriptions might require fewer agency resources, I find significant evidence in the PR that the consolidation benefits of this exchange extend beyond the future ownership and management of the small hemlock stands on parcels 2 and 3. Once again, it's important to note that the hemlock and cedar stands on federal parcels 2 and 3 have not yet been formally designated as old growth. As previously discussed, these stands were classified as potential old growth (Revised EA, p. 19; PR K03-047, p. 13). The EA states that, if the exchange was not completed and parcel 2 remained in federal ownership, "future vegetative management of some or all of the forested stands is a possibility" (Revised EA, p. 23). More importantly, the DN and other PR materials point out that the consolidation benefits associated with the exchange extend to both the federal and non-federal parcels. The DN states the following with respect to the consolidation benefits of the exchange: "The exchange would result in an overall increase of approximately 181 acres of public ownership. National Forest administration will be simplified and enhanced through acquisition of the non-federal land, and result in an improved federal ownership pattern. The resulting consolidation of landownership would decrease administrative costs, including the cost of landline maintenance." (DN, p. 4). It's important to note that costs associated with landline maintenance are present irrespective of the management prescription for the land. The DN also states that "[h]aving a single, larger, contiguous parcel in federal ownership would provide better recreational access than several smaller parcels that are for the most part surrounded by private lands" (DN, p. 4). With respect to this issue, I find that numerous consolidation-related benefits are identified in the PR and that the Responsible Official correctly considered these benefits in the public interest determination.

- "*As stated throughout this document, we reject the idea that the resource values and public objectives are better served in this proposal."* (NOA, p. 8)

The Appellant expresses disagreement with paragraph #2 in the "Decision Rationale – Public Interest Determination" section of the DN. This paragraph states the following: "The natural resource values and public objectives served by the non-federal lands or interests to be acquired

exceed the resource values and public objectives served by the federal land to be conveyed (Revised EA, pp. 15-54)" (DN, p. 4). As indicated above, provisions of 36 C.F.R. § 254.3(b) require that the Responsible Official make the determination that "[t]he resource values and the public objectives served by the non-Federal lands or interests to be acquired must equal or exceed the resource values and the public objectives served by the Federal lands to be conveyed" (See 36 C.F.R. § 254.3(b)(2)(i)). As previously discussed, in this case, I find sufficient evidence in the PR that the Responsible Official was adequately informed and appropriately considered the full range of resource issues in the public interest determination.

- *"Township zoning is inadequate to protect water degradation, long-term cumulative effects of development, and protection of rare communities of cedar and hemlock, which feature old growth characteristics."* (NOA, p. 8).

The Appellant expresses disagreement with paragraph #3 in the "Decision Rationale – Public Interest Determination" section of the DN. This paragraph states the following: "The intended residential and commercial timber harvesting use of the conveyed federal land will not substantially conflict with established management objectives on adjacent federal land. It would also not conflict with current development or zoning restrictions on adjacent private land. Township zoning ordinances will regulate the amount and type of any future development of the property." (DN, p. 4). The Appellant asserts that township zoning would not protect various resources on the federal properties.

In this paragraph, the Responsible Official is stipulating that the reasonably foreseeable uses of the federal property will not conflict with similar uses on adjacent federal and non-federal lands.[13] Local zoning would apply to the federal properties (once those properties have been conveyed out of federal ownership) and, as a result, any applicable zoning will regulate the future uses of those properties. The Responsible Official does not state that township zoning will preclude timber harvest and/or residential development or that zoning will forever protect certain resources from such activities. Indeed, if local zoning prohibited timber removal or residential development, it is unlikely that those types of activities would be viewed as reasonably foreseeable for purposes of the environmental analysis (i.e. the reasonably foreseeable development must necessarily reflect permissible uses of the properties under local zoning). The EA and other documents in the PR analyze the effects of the exchange associated with the reasonably foreseeable development. The effects to water quality and riparian resources are addressed the "Aquatic and Riparian Resources" section of the EA (pp. 30-37), while the effects to hemlock, cedar, and potential old growth are addressed in the "Vegetation Management" section of the EA (pp. 16-28). I find no violation of law, regulation, or policy with respect to the Responsible Official's statements in paragraph #3 related to the public interest determination.

[13] Provisions of 36 C.F.R. § 254.3(b)(2)(ii) require that the authorized officer find that "[t]he intended use of the conveyed Federal land will not substantially conflict with established management objectives on adjacent Federal lands, including Indian Trust lands."

Issue 8: (Finding of No Significant Impact)

Response: The Appellant disagrees with the determination (documented in the FONSI) that the subject land exchange would not significantly affect the quality of the human environment. Specifically, the Appellant argues that the loss of hemlock stands, the loss of old growth forest, the loss of Wildcat Falls, and the environmental effects associated with reasonably foreseeable development on the federal parcels represent a significant impact on the environment. The Appellant also argues that a number of "intensity" factors associated with the FONSI were not properly considered.[14]

The National Environment Policy Act (NEPA) requires that federal agencies examine the environmental impacts of proposed actions. If a federal agency proposes a "major federal action [that] significantly affect[s] the quality of the human environment," the NEPA requires that the agency prepare an Environmental Impact Statement (EIS), which (among other things) describes "the environmental impact of the proposed action." (42 U.S.C. § 4332(C)). Under the NEPA, an EIS is not required if the agency is able to provide "sufficient evidence and analysis" in an EA that the proposed action will not significantly affect the quality of the human environment (40 C.F.R. § 1508.9). In those situations, the agency must document its conclusion that the proposed action will not significantly affect the environment in a FONSI (40 C.F.R. § 1508.13).

The CEQ regulations require consideration of "context" (significance of an action) and "intensity" (severity of an impact) when evaluating whether an action will significantly affect the environment (40 C.F.R. § 1508.27). Intensity is subdivided into ten additional factors that agencies must consider when taking a "hard look" at whether an action will have a significant environmental impact.[15]

In this case, the FONSI considered the "context" and "intensity" of the land exchange and expressly addresses the ten intensity factors of the CEQ regulations (DN, pp. 6-9). The Appellant's specific concerns with the FONSI, as well as my findings with respect to each concern, are addressed in detail below.

[14] Specific responses to the Appellant's assertions with respect to individual "intensity" factors are set forth below Appeal Issues 8(a)-(e).

[15] The ten intensity factors set forth in 40 C.F.R. § 1508.27(b) include the following: "(1) Impacts that may be both beneficial and adverse . . .; (2) The degree to which the proposed action affects public health or safety; (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas; (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial; (5) the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks; (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration; (7) Whether the action is related to other actions with individually insignificant, but cumulatively significant, impacts; (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources; (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973; (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment."

- *"Due to its rarity, hemlock forests should not be exchanged for ubiquitous aspen and second-growth northern hardwood cover types that cover Mr. Delich's property. In no way can the diminution of this rare resource be considered insignificant. In light of the fact that eastern hemlock is threatened with extinction due to the introduced invasive Hemlock Wooly adelgid, The Forest Service should make every effort to retain and protect these rare forests."* (NOA p. 7).

- *"Old growth forests are also an extremely rare feature in the Upper Midwest... .... it is not in the public interest to exchange a rare resource for one that is common."* (NOA p. 7)

- *By exchanging these parcels the Forest Service will send the message that it has no adequate policy for protecting, maintaining or enhancing rare resources . . . These important areas are declining and must be protected. It is the Forest Service's duty to protect them."* (NOA, p. 7)

Response: The Appellant asserts that the loss of hemlock and potential old growth on the federal properties would constitute a significant impact because the resources are "rare." The Appellant argues that these resources should not be exchanged for more common resources on the non-federal property and that the hemlock, in particular, should be retained and protected due to the presence of the *hemlock woolly adelgid*.

Information and analysis in the PR related to hemlock and potential old growth is disclosed above in my response to **Issue 4** and **Issue 5**. The Revised EA states that the approximately 14 acres of upland hardwoods, 33 acres of long-lived conifers (hemlock), and 14 acres of lowland conifer "were previously identified as potential old growth in Federal parcels 2 and 3" (Revised EA, p. 19). Stands considered for old growth classification should have a large tree component and at least three other characteristics according to the old growth characteristics described in the Forest Plan (p. 2-25). All three of these stands lack some of the old growth characteristics described in the FP and have been classified as potential old growth (Revised EA, pp. 19-20).

The Revised EA notes that eastern hemlock occurs on approximately 19,000 acres of the ONF and in an additional 37,000 acres of hemlock-hardwood mixed stands and is not considered either rare or unique on the ONF (Revised EA, p. 21). Cedar vegetation type (excluding stand where cedar is merely a component) occurs on approximately 7,300 acres of the ONF, of which 4,160 acres of the total is in MA 2.1. Therefore, this species is not considered rare or unique on the ONF (Revised EA, p. 22).

The Revised EA also discusses eastern hemlock and northern white cedar health, including the *hemlock woolly adelgid*, and forest health in the Vegetation Resources section of the Revised EA (Revised EA, pp. 16-29). *Hemlock woolly adelgid* is identified as an "imminent threat" (but not an immediate or current threat to hemlock stands on the ONF) in the Final Environmental Impact Statement (FEIS) for the 2006 FP (PR HP002, pp. 3-50, 3-91, 3-105). The Forest Monitoring and Evaluation Reports have not identified this invasive species on the Forest (PR HP005, HP006, HP007, HP008). The Revised EA indicates that there is a "potential threat" of *hemlock woolly adelgid* moving to the ONF (Revised EA, p. 21). However, the Revised EA indicates that

"the degree of the threat outside of the mid-Atlantic region is uncertain" (Revised EA, p. 21). Given the location of the ONF and the absence of many "pure hemlock stands," the Revised EA indicates that "it may be possible that HWD will spread to the Ottawa but will likely have little impact" (Revised EA, p. 21).

These PR materials indicate that the ONF has been aware of forest health threats regarding hemlock and that the Forest has been monitoring the spread of this invasive species. The FP includes objectives to maintain, expand, and restore hemlock to provide for ecosystems that are healthy, resilient, diverse, and functioning in a sustainable and productive manner, including habitat for a diversity of plant and animal communities (p. 2-2).

With respect to the potential old growth, the PR states that the land exchange would reduce the amount of old growth by less than one percent and that the loss "would be negligible to the Forest's old growth acreage and Forest Plan goals" (PR K03-047, p. 13). The Revised EA indicates that "[t]he allocation of old growth in MA 2.1 is currently at 7.7% Forest[-]wide, with a desired condition of 8-10% within the MA" (Revised EA, p. 25). The RTCs document indicates that there are currently 17,194 acres of potential old growth and 3,620 acres of existing old growth classified within MA 2.1 across the ONF (See PR K03-047, p. 13). As previously indicated and noted in the PR, stands consisting of hemlock, cedar and sugar maple are not unique, given other stands in the vicinity and across the ONF that share the same characteristic.

As noted above, documentation in the PR and Revised EA shows that the mature hemlock and the potential old growth are not considered unique or rare resources on the ONF, and the Responsible Official considered this issue. As a result, I find no violation of law, regulation, or policy.

- *"We strongly feel that you need to consider and disclose the cumulative/indirect effects resulting from any reasonably foreseeable future development of the land to be exchanged. We do not agree that the findings are insignificant."* (NOA, p. 9)

Response: The Appellant asserts that the indirect and cumulative effects associated with reasonably foreseeable development are not adequately disclosed and considered in the EA and other project record documents. In particular, the Appellant asserts that the analysis failed to adequately analyze reasonably foreseeable future development of the federal parcel.
The NEPA requires that federal agencies disclose, analyze, and consider the direct, indirect, and cumulative effects associated with proposed actions.[16] A cumulative effects analysis must include those effects associated with reasonably foreseeable future actions. (See 40 C.F.R. § 1508.7).
In this case, the EA identifies the reasonably foreseeable uses of the federal and non-federal properties involved in the exchange and discloses the direct, indirect, and cumulative effects of the proposal. With regards to the reasonably foreseeable uses, the EA discloses that, if the exchange was consummated, the timber on the federal property might be harvested utilizing a selection harvest method (EA, p. 11). In addition, federal parcel 1 might be subdivided into 5-

[16] 40 C.F.R. § 1508.7 defines cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." See also 40 C.F.R. § 1508.8 for information regarding direct and indirect effects.

acre lots and sold for residential development (EA, p. 11). The EA states that, under the proposed exchange alternative, the non-federal property would be managed by the ONF in accordance with direction for Management Area (MA) 6.1 for semi-primitive, non-motorized recreational areas (EA, p. 12).

The direct, indirect, and cumulative effects associated with the proposed action are disclosed and analyzed in Chapter 3 of the EA by resource type. The EA discloses effects on heritage resources (EA, pp. 29-30); aquatic and riparian resources (pp. 30-38); soils and landform (pp. 38-41); recreation resources (pp. 41-45); rare plants (pp. 45-46); non-native invasive species (pp. 46-49); wildlife resources (pp. 49-54); and vegetation resources (pp. 16-29). As a general matter, I find that the EA adequately discloses and addresses the cumulative effects associated with the above-mentioned reasonably foreseeable development. The timber operations and residential development associated with the exchange are repeatedly disclosed and analyzed throughout the Chapter 3 discussion.

Based upon various comments, the Appellant appears to be mostly concerned about the environmental effects associated with timber operations and development on federal parcels 1, 2, and 3. However, the Appellant has not provided any information or evidence concerning the reasonably foreseeable effects that has not already been considered in the analysis. The cumulative effects associated with the reasonably foreseeable activities on these particular parcels are disclosed in the EA as set forth above. I find no violation of any law, regulation, or policy with regard to the EA's disclosure and analysis of cumulative effects and I recommend that the decision be affirmed with respect to this issue.

Issue 8(a): Intensity 40 C.F.R. 1508.27(b)(1) – *"The FS states that the exchange will be beneficial overall, but there are many negative effects, including the loss of old growth cedar/hemlock, the loss of a unique waterfall, and the loss of a portion of an important perennial stream."* (NOA, p. 9)

Response: The Appellant argues that the loss of cedar/hemlock, the loss of old growth, the loss of Wildcat Falls, and the loss of perennial stream frontage are adverse effects that constitute a significant impact. Provisions of 40 C.F.R. § 1508.27(b)(1) require consideration of "[i]mpacts that may be both beneficial and adverse." This subsection of the NEPA regulations acknowledges that there are often tradeoffs associated with proposals that must be evaluated in the analysis and considered by the deciding official. The NEPA regulations acknowledge that some adverse effects may be associated with a selected alternative. At the same time, the presence of some negative effects does not necessarily give rise to the level a significant effect on the environment. The NEPA is procedural and not a results-driven statute (*i.e.* the Act does not prohibit actions that may have adverse effects). It is well-established that even an agency action with adverse environmental effects can comply with the NEPA so long as the agency has considered those adverse effects and made an informed decision. Section 1508.27(b)(1) simply requires that both beneficial and adverse effects be considered.
Information and analysis in the PR related to the hemlock, old growth, and riparian resources is disclosed above in my responses to other issues. The FONSI specifically addresses this intensity

factor on pages 7-8 of the DN.[17] My review of the PR indicates that the Forest thoroughly investigated the resources that could potentially be affected by the exchange proposal, including the specific resources mentioned by the Appellant. The PR documents that both beneficial and adverse effects on those resources were disclosed. While the Appellant questions the conclusions of the Responsible Official with respect to the finding of no significant impact, he does not provide any support for the assertion that the Forest violated Section 1508.27(b)(1) by failing to assess the beneficial and adverse effects on the resources identified by the Forest. In fact, potential adverse effects to each of the resources described by the Appellant (hemlock, old growth, waterfall, and perennial stream) were identified and considered by the ONF. I find that the DN/FONSI and other PR documents adequately identified those resources affected by the proposal and that the DN/FONSI documented both beneficial and adverse effects of the various alternatives. Therefore, I find no violation of law, regulation, or policy with respect to this issue.

Issue 8(b): Intensity 40 C.F.R. 1508.27(b)(3) – *"Wildcat Falls is an ecologically important feature, and we disagree with the lack of emphasis placed on this feature. There is also important plant and riparian resources at risk, as are discussed throughout this appeal"* (NOA, p. 9).

Response: The Appellant argues that Wildcat Falls and associated riparian resources are unique features and that the loss of these features would constitute a significant impact. Provisions of 40 C.F.R. § 1508.27(b)(3) require consideration of "unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas."[18]

Information in the PR related specifically to Wildcat Falls is disclosed above in my responses to other issues. As a threshold matter, the Appellant's reasons for characterizing Wildcat Falls as a unique ecological feature specifically for purposes of Section 1508.27(b)(3) are not clear. While the waterfall is considered scenic by some individuals and while this resource is conveniently located in closer proximity to County Line Lake than other waterfalls on the Forest, it has not been identified by the State or the ONF as a unique feature. Again, the Responsible Official determined that "[t]he site [of the waterfall] itself is also not unique in the sense that it has no historical significance and similar sites may be found in many places in the Upper Peninsula" (DN, p.8).

[17] The FONSI states the following with respect to the 40 C.F.R. 1508.27(b)(1) intensity factor: "I considered both the beneficial and adverse impacts associated with the alternatives as presented in Chapter 3 of the Revised EA. No significant adverse resource effects from implementing the project were identified in the Revised EA (see Chapter 3), or disclosed by commenters during the scoping period. Concern was expressed by commenters about future management of the currently federal parcels. However, the proposed future uses of the parcels (timber management, recreation and development of private home sites) is not inconsistent with established uses on adjacent lands and is not inconsistent with local zoning ordinances. Beneficial impacts within the project area include consolidating NFS lands for more efficient and lower resource management costs. Whereas retaining the federal parcels offer no expected opportunities for consolidating ownership. More importantly, it would also increase public recreation opportunities by providing additional lands within a semi-primitive, non-motorized area, adjacent to the Porcupine Mountains Wilderness State Park. Overall, this exchange would progress the Ottawa's landbase towards the desired conditions as outlined in the Forest Plan. I have given careful consideration to these factors and I have determined that there will be no significant impacts from implementing this project."

[18] The FONSI for the exchange decision specifically addresses the Section 1508.27(b)(3) intensity factor on page 7-8 of the DN.

Even if the waterfall was considered to be a unique feature, the Appellant has not shown that the mere presence of the waterfall requires a finding that the exchange might have a significant effect on the environment. *See Indiana Forest Alliance v. Forest Service,* 2001 WL 912751 at 13 (S.D. Ind. July 5, 2001) ("The mere presence of unique features does not require the Forest Service to prepare an EIS") affirmed, 325 F.3d 871 (7th Cir. 2003); *see also Presidio Gold Club v. NPS*, 155 F.3d 1153, 1162 (9th Cir. 1998) (proximity of a project to a sensitive area does not *per se* warrant an EIS). Again, the direct, indirect, and cumulative effects to riparian resources and wetland features are addressed in the "Aquatic and Riparian Resources" section of the EA (EA, pp. 13-21) and the "Soils and Landform" section of the document (EA, pp. 21-24). The Responsible Official specifically addressed the waterfall in the DN/FONSI and also noted that the deed covenant protecting the 17acres of floodplains on federal parcels 2 and 3 should afford some protection to the waterfall (DN, p. 8).

I find that the DN/FONSI and other PR documents adequately identified this resource concern and that the Responsible Official adequately considered the waterfall in the decision. Therefore, I find no violation of law, regulation or policy with respect to this issue.

Issue 8(c): Intensity40 C.F.R. 1508.27(b)(4) – *"The comments from the public on the prior EA indicate that there is considerable controversy about the FS exchanging out of the County Line Lake Road parcels."* (NOA, p. 9)

Response: The Appellant argues that public opposition to the exchange represents controversy for purposes of this intensity factor. In this context, the term "controversy" refers to scientific disagreement concerning the degree of the effects on the human environment, rather than opposition to the project. Numerous courts have held that public opposition to a proposal is not "controversy" as the term is utilized in Section 1508.27(b)(4). The Ninth Circuit Court of Appeals, for example, has held that scientific controversy regarding the degree of environmental effect may not be manufactured by project opponents. In other words, "controversy" is not synonymous with public opposition. *See Northwest Environmental Defense Ctr. V. BPA*, 117 F. 3d 1520, 1526 (1997); *Greenpeace Action v. Franklin*, 14 F3d 1324, 1333-1335 (9th Cir. 1993), *see also North Carolina v. FAA*, 957 F.2d 1125, 1133 (4th Cir. 1992).

I find that the DN/FONSI and other documents in the PR do not contain any evidence of controversy with regard to the degree of environmental effects.[19] Controversy in this context relates to a substantial dispute about environmental effects, and the Appellant has not provided any information regarding such a scientific dispute. Therefore, I find no violation of law, regulation, or policy with respect to this issue.

Issue 8(d): Intensity 40 C.F.R. 1508.27(b)(5) – *"The loss of old growth cedar/hemlock, and a unique waterfall do involve unknown risks. It may prove to be impossible to grow cedar/hemlock stands to this age and condition ever again (because of the numerous problems facing these tree species - climate change, disease, deer herbivory, etc) … Delich's development of the parcel*

[19] The FONSI for the exchange decision specifically addresses the Section 1508.27(b)(4) intensity factor on page 8 of the DN.

[with Wildcat Falls] may negatively affect the watershed and change the unique riparian plant and animal community found in the area near the waterfall." (NOA, p. 9)

Response: The Appellant argues that the loss of hemlock and cedar stands, the loss of potential old growth, and the loss of Wildcat Falls represent unknown risks that amount to significant impacts. The 40 C.F.R. § 1508.27(b)(5) regulations require consideration of "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks."[20]

Information and analysis in the PR related to hemlock/cedar and potential old growth is disclosed above in my response to other issues. The Appellant speculates that the loss of hemlock/cedar and potential old growth involve unknown risks "because of the numerous problems facing these tree species – climate change, disease, [and] deer herbivory" (NOA p. 9). Various landscape-scale issues such as those mentioned by the Appellant are generally addressed in the 2006 Final Environmental Impact Statement (FEIS) for the Forest Plan. The FEIS acknowledges issues with hemlock regeneration (PR HP002, pp. 3-55, 3-101), including issues related to deer herbivory, (PR HP002, pp. 3-116, 3-128). Implementation of the revised FP is expected to improve hemlock regeneration on the ONF (PR HP002, p. 3-104) and, in his decision, the Responsible Official concludes that the exchange proposal would "progress the Ottawa's landbase towards the desired conditions as outlined in the Forest Plan" (DN, p. 7).

The PR further suggests that the reasonably foreseeable timber harvest that might occur on federal parcels 2 and 3 is not generally an uncommon activity in Northern Michigan and that this type of activity on a small isolated parcel would not involve unique or unknown risks. As the PR documentation indicates, the hemlock/cedar and potential old growth are relatively small stands located on small, isolated parcels (Revised EA, pp. 16-20). As previously stated, the ONF has determined that "stands consisting of hemlock, cedar and sugar maple are not unique, given other areas in the vicinity and across the Forest share the same characteristic" (PR E045, p. 6). The Responsible Official concludes in the FONSI that "[b]ased upon my knowledge and professional experience, I am confident that we understand the effects of the selected actions" and that "[e]nvironmental effects described in the Revised EA have been analyzed in detail to determine predictable results" (DN, p. 8).

Information and analysis in the PR related to Wildcat Falls is disclosed above in my response to previous issues. The direct, indirect, and cumulative effects to riparian resources are addressed in the "Aquatic and Riparian Resources" section of the Revised EA (pp. 30-38) and the "Soils and Landform" section of the document (Revised EA, pp. 38-41). The Responsible Official specifically addressed the waterfall in the DN and also noted that the deed covenant protecting the 17 acres of floodplains on federal parcels 2 and 3 should afford some protection to the waterfall and associated riparian areas (DN, p. 8). The Appellant does not provide any information related to any unknown or uncertain risks associated with the waterfall or the riparian environment. I find sufficient evidence in the PR that the Responsible Official thoroughly considered the effects of the proposed exchange on the waterfall and associated riparian areas.

[20] The FONSI for the exchange decision specifically addresses the Section 1508.27(b)(5) intensity factor on page 7 of the DN.

The PR does not disclose any uncertain or unique/unknown risks with respect to the hemlock/cedar, potential old growth, or riparian resources and the responsible official, after consideration of all available information, reasonably concluded that no uncertainty or unique/unknown risks exist. The direct, indirect, and cumulative effects associated with the loss of these isolated lands were reviewed by the ONF's interdisciplinary team and the Responsible Official. I conclude that the PR contains sufficient information to affirm the decision with respect to this issue.

Issue 8(e): Intensity 40 C.F.R. 1508.27(b)(6) – *"We see this action as a possible precedent setting move, as the public values to be traded are very important, and if dismissed in this action, are more likely to be dismissed in future actions with similar attributes."* (NOA, p. 9-10)

Response: The Appellant is concerned that this exchange (involving resources that the Appellant feels should remain in federal ownership) could establish a precedent for future exchanges involving similar resources. The 40 C.F.R. § 1508.27(b)(6) regulations require consideration of "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration."[21]

The PR indicates that the subject parcels were identified for exchange for a variety of reasons related to the location and attributes of the specific parcels. The PR contains no evidence that this exchange is part of a phased action or process; rather, the documentation indicates that the proposal has a unique purpose and need based upon local resource conditions and circumstances. The Appellant has pointed to no evidence that the analysis or decision would establish a precedent for future actions. To the contrary, each future land exchange must be preceded by appropriate NEPA compliance, involving the consideration of site specific factors. The public will have notice and the opportunity to participate in any future analyses that might occur. Based upon my review of the DN and other documents, I find that the Responsible Official adequately considered Section 1508.27(b)(6) and documented the rationale for his finding of no significant impact. I find no violation of law, regulation, or policy with respect to this issue.

Issue 9: (Response to Comments)

Response: The Appellant believes that the FS did not adequately consider and address the public comments. The Appellant also objects to the characterization of the public comments in the DN. Forest Service regulations require public scoping for all proposed actions and also require a 30-day public comment period for all proposed actions involving the preparation of an EA. Specifically, provisions of 36 CFR 220.4(e) require scoping for all proposed actions and provisions of 36 CFR 215.6(a) provide for a 30-day public comment period for those actions involving an EA. Forest Service regulations also require that the Responsible Official consider public comments and agency responses to those comments before making a decision (See 36 CFR 215.6(b) and 36 CFR 220.4 (c)(2)).
In this case, the PR indicates that public comments were solicited and received during the scoping period (February, 2009), the 30-day comment period on the Original EA (January, 2010), and the 30-day comment period on the Revised EA (October, 2011) (See Revised EA, pp.

[21] The FONSI for the exchange decision specifically addresses the Section 1508.27(b)(6) intensity factor on page 8 of the DN.

4-6). The comments received from the public during the scoping and 30-day comment periods and Forest Service responses are included in the PR (See PR B026, E045, K03-047, Revised EA, pp. 4-6, and DN, p. 6).[22]

The PR contains a separate "Response to Comments" document for each of the 30-day comment periods. The RTCs for the Original EA addressed various comments from 14 interested parties (See PR E045). The RTCs for the Revised EA addressed a significant number of comments (by topic) from 38 interested parties (See PR K03-047).

I have reviewed the public comments, the Scoping Comment Matrix, the Revised EA Comment Matrix, and the RTCs for the Original EA and the Revised EA. Based upon this PR documentation, I find that the ONF made a diligent effort to involve the public in this project, consider the public's comments, and respond to the public's comments appropriately.

The Appellant objects to a statement in the DN and the RTCs (for the Revised EA) which stipulates that "[a] variety of public comments were received, both in support of and in objection to the proposed land exchange" (DN, p. 6; PR K03-047, p. 1). While the Appellant is correct that the majority of comments expressed opposition to the exchange proposal, I do not find that the above-referenced statement violates law, regulation, or policy. In light of the significant amount of documentation in the PR that was generated in an effort to solicit and respond to public comments, I find that that ONF complied with law, regulation, and policy.

Recommendation

After reviewing the PR materials for the Delich Land Exchange Project, and after reviewing and considering the concerns raised by the Appellant, I recommend that the decision for this project be affirmed. Although the Appellant obviously disagrees with the decision, I find no violation of law, regulation, or policy with respect to the issues in this appeal.

/s/ Jo Reyer
JO REYER
Appeal Reviewing Officer
Forest Supervisor

cc: Patricia R Rowell

[22] The majority of comments submitted in response to the initial proposal expressed concerns about conveying the federal parcels containing potential old growth and other features such as Wildcat Falls. To address these concerns, two alternatives were considered, but eliminated from detailed analysis. The rationale for eliminating these alternatives from detailed study is explained in the Revised EA and the DN (See DN, p. 5; Revised EA, pp. 10-12). It is also discussed above in my response to Issue 3.