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Subject: ARO Letter - Darroch-Eagle Creek TS DN - Gallatin NF - Appeal #04-01-00-0030  
- Native Ecosystems Council

To: Appeal Deciding Officer

This is my recommendation on disposition of the appeal filed by Sara Jane Johnson, on behalf of Native Ecosystems Council, protesting the Darroch-Eagle Creek Timber Sale Decision Notice (DN) on the Gallatin National Forest (Gardiner Ranger District).

The Forest Supervisor's decision adopts Alternative D-Modified, which includes harvest of approximately 1.5 million board feet (MMBF) of live and insect-killed or damaged trees on an estimated 195 acres, construction of approximately 0.9 mile of new temporary road, reconstruction of approximately 3.6 miles of existing road, and conifer planting on approximately 26 acres. New seasonal road closures (October 15 – June 30) will be implemented on 3 miles of the Bear Fork Road #6961, and on 3.6 miles of the Bald Mountain Road #6945 beginning in the fall of 2004 in order to improve the Habitat Effective Index (HEI) ratings during the general hunting season. The decision also includes two project-specific amendments: one on Elk Effective Cover as measured by the HEI; and the other on Vegetative Diversity.

My review was conducted pursuant to, and in accordance with, 36 CFR 215.19 to ensure the analysis and decision are in compliance with applicable laws, regulations, policy, and orders. The appeal record, including the appellant's objections and recommended changes, has been thoroughly reviewed. Although I may not have listed each specific issue, I have considered all the issues raised in the appeal and believe they are adequately addressed below.

The appellant alleges violations of the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), the Endangered Species Act (ESA), the Administrative Procedures Act (APA), and the Forest Plan. The appellant requests a remand of the DN. An informal meeting was held via conference call, but no resolution of the issues was reached.

#### ISSUE REVIEW

**Issue 1. The entire appeal revolves around impacts to grizzly bear. Many of the appellant's concerns with the proposed Darroch-Eagle Timber Sale deal with the alleged failure of the Gallatin National Forest to provide sound, effective, conservation direction for grizzly bear. In the appeal the appellant states, "There is an almost complete lack of any meaningful standards to preserve the grizzly bear and its habitat. What few actual meaningful standards that exist, as per the Forest Plan, are not being followed in the proposed project. The Gallatin National Forest needs to develop and implement effective conservation strategies for grizzly bear recovery habitat, such as the Darroch-Eagle**



**Timber Sale site, through the Forest Planning process. This process needs to include the developments of a methodology to address cumulative disturbance and mortality risk impact throughout grizzly bear recovery habitat on the Forest. During the interim period that new and effective conservation strategies and a cumulative effects analysis methodology are developed for the grizzly bears, all management activities that disturb, displace and increase the mortality risk of grizzly bears should be terminated.”**

**Response:** The EA discusses the management direction for grizzly bear (Appendix C, pp. C-9 to C-10). The Gallatin Forest Plan provides direction for management of threatened and endangered species (Forest Plan, pp. II-1, III-40 to III-45, and Appendix G, pp. G-1 to G-38). After the Plan was signed, new information on the effects of roads and trails became available through the Interagency Grizzly Bear Committee. The Forest Plan was amended to address the new information (EA, Appendix C, p. C-10).

Conservation strategy for Yellowstone grizzly bear was finalized in 2003. It describes and summarizes the coordinated efforts to manage the grizzly bear population. The strategy specifies population, habitat, and nuisance bear standards, and documents the existing programs being used to maintain the recovered population. The Forest and this project use all the above-mentioned guidance to manage and conserve the grizzly bear population. The Gallatin National Forest is providing sound, effective grizzly bear conservation direction.

When the Gallatin National Forest begins planning, grizzly bear management can certainly be one of the topics considered. Until then, it is clear that Congress did not intend management to cease if the 15-year date for Plan revision was not met. NFMA, Section 1604(c), illustrates this point. In the development of the original Forest Plans, Congress specifically allowed management of the forests to continue under existing resource plans pending approval of the first NFMA Forest Plan for each administrative unit. On several occasions, Congress allowed management to continue under existing Plans while work to complete the original Forest Plans was underway (*see, e.g.* 16 U.S.C. 1604 note), demonstrating Congress' intent that on-the-ground forest management continue while the agency developed programmatic planning documents. On other occasions, Congress halted funding for Forest Plan revisions (delaying the completion of Plan revisions) without halting any site-specific projects or activities. The appellant's arguments that resource management must be halted pending completion of Plan revision are contrary to Congressional intent.

**Issue 2. The analysis of the grizzly bear impacts from the Darroch-Eagle project will violate NEPA.**

**Response:** The implementing regulations for NEPA require the agency to encourage and facilitate public involvement in the decision [40 CFR 1500.2(d)]; and analyze the environmental consequences of the alternatives (40 CFR 1502.16), including the direct, indirect, and cumulative effects (40 CFR 1508.8). Grizzly bear was considered an issue in the decision and was analyzed and discussed in detail in the Environmental Assessment (EA). Specifically, the project is located in Grizzly Bear Management Situation 1 habitat, and there is concern the project may affect the habitat and the use of the area by grizzly bear (EA, p. 2-3). The analysis considered

loss of foraging habitat, changes in hiding and security cover, increased potential for mortality, changes in denning habitat, changes in prey base, and increased availability of human attractions.

The EA considered five alternatives in detail. Alternative A, the No Action Alternative; Alternative B, the Proposed Action; Alternative C, the 'higher value' alternative; Alternative D, the 'no large openings' alternative; and Alternative D-Modified, the Preferred Alternative. The EA discusses in detail features of each of these alternatives in Chapter 2, including the distance-to-hiding cover standard (EA, pp. 2-9 and 2-15), and grizzly bear mitigation measures (EA, p. 2-25). The EA also considered and discussed five other alternatives that were eliminated from detailed study (pp. 2-35 to 2-37). These were Alternative E, manage vegetation to avoid a vegetation diversity Forest Plan amendment; Alternative F, no harvest of old growth; Alternative G, maximize biodiversity and wildlife habitat; Alternative H, harvest of other timber stands; and Alternative I, no road construction. The reasons for not considering these alternatives in detail are discussed in the EA (Ibid).

Chapter 3 of the EA analyzes and displays the affected environment of the project area and the environmental consequences of the alternatives (EA, p. 3-1), including the cumulative impact of past, other present, and reasonably foreseeable future activities (EA, pp. 3-2 to 3-3). This chapter forms the scientific and analytical basis for comparing the alternatives. The first issue discussed in this chapter is grizzly bear (EA, pp. 3-3 to 3-12). The analysis displays the direct and indirect impact each alternative would have on foraging habitat, changes in hiding and security cover, potential for mortality, population viability, changes in denning habitat, changes in prey base, and increased availability of human attractions. The EA then discusses cumulative effects. The analysis of the effects of the alternatives is based on information and analysis found in the BA of grizzly bear for the Darroch-Eagle project (EA, Appendix C, pp. C-3 to C-35).

Starting in 1996, the Forest involved the public in designing the timber sales that would be part of the Big Sky Lumber timber-for-land exchange (DN, p. 4). The public has been involved through the comment period following the release of the January 2004 EA. The Forest Supervisor considered public comments as one of her decision criteria when weighing the merits of the various alternatives (DN, p. 9) and in finally choosing Alternative D-Modified (DN, p. 1). Through the use of the EA and the project file, the Forest Supervisor determined the project is not a major federal action that would significantly affect the quality of the human environment, including grizzly bear. Therefore, an EIS was not needed. She documented that determination in the FONSI (DN, pp. 25 to 27). The grizzly bear analysis is in compliance with NEPA.

### **Issue 3. The impacts to grizzly bear from the Darroch-Eagle project will violate ESA.**

**Response:** The ESA directs agencies to carry out conservation programs for listed species, and ensure that any action not likely jeopardizes the continued existence of any listed species or results in destruction or adverse modification of critical habitat (50 CFR 402.01). In the case of this particular project and appeal, the mandate is to not jeopardize the continued existence of grizzly bear or adversely modify critical habitat (EA, Appendix C, p. C-3). In order to determine the effects on grizzly bear and the other threatened species in the project area, a BA was conducted on the Preferred Alternative (EA, Appendix C, pp. C-1 to C-76). The BA described the analysis area, the Preferred Alternative (Alternative D-Modified), the management direction

for the project area, and the impacts to grizzly bear from the implementation of the Preferred Alternative. The *Analysis of Impacts* section displays the effects the Preferred Alternative would have on foraging habitat, changes in hiding and security cover, potential for mortality, population viability, changes in denning habitat, changes in prey base, increased availability of human attractions, and cumulative effects (EA, Appendix C, pp. C-3 to C-35).

The wildlife biologist, in consultation with the U. S. Fish and Wildlife Service (USFWS) (EA, Appendix C, p. C-42) determined the project may affect, not likely adversely affect grizzly bear. The finding was commensurate with the constraints outlined for land on the Gallatin National Forest designated as Management Area 13, which is available for timber harvest, provided grizzly bear habitat objectives are met. This finding is also appropriate in the context of the USFWS amended Biological Opinion for the Gallatin Forest Plan. The project was also determined to meet the constraints of the Interagency Grizzly Bear Committee (IGBC) access standards (EA, Appendix C, p. C-41). The BA also contained three stipulations from the Forest Plan and six provisions that would be put into the timber sale contract to help protect grizzly bear (EA, Appendix C, pp. 41 to 42).

The BA was submitted to the USFWS for their review and concurrence in accordance with 50 CFR 402.13 (PF, Vol. 6, Chapter 2, Doc. 2-29). After review of the BA, the USFWS concurred with the determination of 'may affect, but not likely to adversely affect grizzly bear' (PF, Vol. 6, Chapter 2, Doc. 2-30). The project will not jeopardize the continued existence of grizzly bear or result in destruction or adverse modification of critical habitat. The Forest is in compliance with the ESA.

#### **Issue 4. The impacts to grizzly bear from the Darroch-Eagle project will violate NFMA.**

**Response:** The implementing regulations for NFMA require that fish and wildlife habitat be managed to maintained viable populations (36 CFR 219.19) and projects be consistent with the Forest Plan [36 CFR 219.10(e)]. As discussed in Issue 3 (above), it was determined in the BA that the project 'may affect, but not likely to adversely affect grizzly bear.' In reaching that determination, the BA analyzes grizzly bear viability (PF, Vol. 6, Chapter 2, Doc. 2-24, pp. 29 to 34). The concluding paragraph states, "In a spatial context, the proposed timber sale does not represent a threat to the viability of the Yellowstone grizzly bear [population]. The sale would involve 0.3 square miles, while the P[rietary] C[onservation] A[rea] is 9,209 square miles. Similarly, it is limited temporally; harvesting would occur over three summers. Moreover, harvesting timber on 195 acres in the Bear Creek drainage does not present any specific or inordinate potential sources of mortality for the grizzly bear in the short-term or long-term. In this context, there is no evidence that implementing the Darroch-Eagle Creek Timber Sale will compromise the viability of the Yellowstone grizzly bear [population] or cause departures from positive trends towards meeting established population recovery parameters" (PF, Vol. 6, Chapter 2, Doc. 2-24, p. 34).

Beyond the BA, the EA discusses in considerable detail the viability of species of concern, including grizzly bear (EA, Appendix H). The viability analysis discusses grizzly bear recovery criteria, human-bear confrontations and conflicts, and grizzly bear mortality data. The concluding paragraph states, "The fact that most recovery criteria have been met or exceeded

indicates a favorable status for the Yellowstone grizzly bear population. However a documented increase in mortality rates is one cause for concern, although this is not unexpected given that the population is increasing in numbers and distribution. As a consequence of these favorable indicators, delisting of the grizzly bear is being discussed... The actions of the Gallatin National Forest are consistent with and promote grizzly bear recovery both on the Forest and in the [Greater Yellowstone Area]" (EA, Appendix H, p. H-7).

The EA discusses the Forest Plan Management direction (p. 3-1). The BA also lists the management direction that must be followed in implementing the Darroch-Eagle project. This direction includes Forest Plan Goals, Standards, and Guidelines for grizzly bear and other listed species (EA, Appendix C, p. C-9). The EA then discusses how each alternative would or would not meet the Forest Plan management direction for grizzly bear (pp. 3-6 to 3-7), and finishes with Table 3-2 (pp. 3-8) to display how each alternative would or would not meet Forest Plan management. The BE also contains a discussion of how the Preferred Alternative would meet the Forest Plan and other management direction for grizzly bear (EA, Appendix C, pp. C-10 to C-15). The concluding paragraph states, "Implementing this proposal will not compromise Forest Plan standards for size and shape of harvest units, hiding and thermal cover, or duration of activity. It will not compromise the IGBC standards for grizzly bear/motorized access management. Secure (core) area would not decrease during Season 1 and would increase by 1 percent in Season 2. Open road and total road density would not change. With the screening cover of timber removed, grizzly bears may be less likely to forage at or near the project site during the daylight or at times of higher human use. However, grizzlies should find the project site suitable for foraging at other times; the affected area will serve as grizzly bear habitat after harvesting. Non-forested areas provide feeding opportunities not present in the larger matrix of mature forests" (EA, Appendix C, p. C-15). The project is following the Forest Plan, and is maintaining grizzly bear viability. The project is in compliance with NFMA.

**Issue 5. The Darroch-Eagle project will violate APA because the agency erroneously and arbitrarily claims that the proposed Darroch-Eagle Timber Sale will not have any "significant" adverse impacts on the threatened grizzly bear.**

**Response:** APA at 5 U.S.C. § 706 states, "The reviewing court shall...(2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law..." As has been discussed in Issues 2, 3, and 4 (above), the wildlife biologist conducted an extensive and thorough analysis of the impacts the project would have on grizzly bear and its habitat. This analysis was conducted in consultation with the USFWS (EA, Appendix C, p. C-42). The determination that the project may affect, but is not likely to adversely affect grizzly bear is not arbitrary, but, instead, is based on the analysis of the effects found in the BA, the EA, and the FONSI, which documents the lack of any significant impacts from the project.

The BA was submitted to the USFWS for their review and concurrence in accordance with 50 CFR 402.13 (PF, Vol. 6, Chapter 2, Doc. 2-29). After review of the BA, the USFWS concurred

with the determination of ‘may affect, but not likely to adversely affect grizzly bear’ (PF, Vol. 6, Chapter 2, Doc. 2-30).

The grizzly bear Standards and Guidelines in the Gallatin Forest Plan are “within the frame work and intent of the Interagency Grizzly Bear Guidelines, 1986, and the ‘Grizzly Bear Recovery Plan’ (1982)” (Forest Plan, Appendix G, p. 2). “These Standards and Guidelines are also a consensus of numerous discussions and reviews with research and management personnel of the State, National Park Service, Forest Service, U.S. Fish and Wildlife Service, and personnel of the National Audubon Society and other citizen groups” (Ibid). The development and wording of the Standards and Guidelines are not arbitrary and have helped the Gallatin National Forest in meeting their responsibilities in the recovery of grizzly bear in the Greater Yellowstone Area. The project and analysis is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The project and analysis is in compliance with APA.

### RECOMMENDATION

I have reviewed the record for each of the contentions addressed above and have found that the analysis and decision adequately address the issues raised by the appellant. I recommend the Forest Supervisor’s decision be affirmed and the appellant’s requested relief be denied.

/s/ Lesley W. Thompson  
LESLEY W. THOMPSON  
Appeal Reviewing Officer  
Forest Supervisor - Lewis & Clark National Forest