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Subject: ARO Letter - Darroch-Eagle Creek TS DN - Gallatin NF - Appeal #04-01-00-0028
- Bear Creek Council

To: Appeal Deciding Officer

This is my recommendation on disposition of the appeal filed by David Keltner, on behalf of Bear Creek 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 Multiple Use Sustained Yield Act (MUSYA), and the Organic Act. The appellant requests a remand of the sale and the Environmental Assessment (EA). An informal meeting was held but no resolution of the issues was reached.

ISSUE REVIEW

Issues 1 and 27. The sale was awarded while under appeal before the NEPA process was completed. The 1st and 2nd revisions of the EA were written while the sale was under contract to RY Timber, Inc. The NEPA process was conducted to justify a decision that was already made.

Response: The timber sale was advertised and awarded after the Federal District Court found in the favor of the Forest Service, well after the NEPA process was complete (EA, Appendix I, p. I-18). It was only after the District Court's ruling was overturned in the 9th Circuit that the Forest



had to revisit the NEPA process. The Appeals Court enjoined the implementation of the project until two procedural errors, concerning a site-specific road density amendment and the use of bear management units to analyze impacts, were corrected. The court did not require the Forest to break the contract and start the analysis over, but only to remedy the deficiencies (EA, p. 1-2). The analysis and Decision are in compliance with NEPA and the court order.

Issue 2. The Forest Service has attempted to make Alternative D-Modified appear to be a new alternative when it is the sale under contract. The reduction in size from 266 to 195 acres, based on extensive field reconnaissance is illusionary and misleading. The Forest Service has misled the public with regard to the amount of acreage disturbed and the number of miles of road constructed by the sale. This violates the requirement under 40 CFR 1506.6. Administration of the sale is not adequately explained.

Response: The Forest is not attempting to make Alternative D-Modified appear to be a new alternative, nor are they attempting to mislead the public. They are trying to accurately reflect how Alternative D-Modified now exists (DN, pp. 5 to 9), and compare Alternative D-Modified with the other alternatives (EA, pp. 2-31 to 2-35). It appears the appellant is confused by the terms used in the NEPA documents concerning roadwork and the standard definitions and language used to describe these work items in a timber contract. The District Ranger explained the situation in a letter to the Bear Creek Council (PF, Vol. 7, Chapter 2, Doc. 2) in response to their letter questioning some apparent discrepancies between the contract language and the use of terms in the EA (PF, Vol. 7, Chapter 2, Doc. 1). The analysis is in compliance with 40 CFR 1506.6.

Administration of a timber sale is not a NEPA decision, and does not vary among the alternatives. There is no need to clutter the document with information concerning how the contract will be administered because contract administration does not bear on the decision.

Issue 3. The Forest Service failed to use the best available information in the development of the EA as required by 40 CFR 1500.1(b). It would make more sense to use the data from the timber cruise for Alternatives B, C, and D than it does to use the old data from the database. The inconsistency of timber volume in the EA prevents the Forest Service from analyzing the environmental consequences of the sale.

Response: The Forest discussed this in the Response to Comments (EA, Appendix I, pp. I-8, I-9, I-29, and I-30), and also in a letter to the Bear Creek Council (PF, Vol. 7, Chapter 2, Doc. 2). In order to compare alternatives, the same type of data must be available for all alternatives. Timber cruises are done post decisional in order to prepare the timber sale contract. They are not used in weighing the environmental impacts of various alternatives. Timber cruises were not done for stands that were not part of Alternative D-Modified since those stands were not in the final contract. Extrapolating the data from stands in Alternative D-Modified to other stands would not be reliable. Because the timber volume is extremely variable depending on the quality of the trees in a stand, the environmental impacts of the project are better predicted by the acres harvested and the miles of road constructed and reconstructed, rather than board feet of timber extracted. Therefore, the analysis uses acres harvested, miles of road constructed or

reconstructed, and other information to compare the alternatives (EA, pp. 2-31 to 2-35) and assess the impact (EA, Chapter 3).

Issue 4. The Forest Service failed to provide a reasonable range of alternatives, in violation of NEPA, the Forest Service Handbook, and Manual.

Response: The Agency's Deciding Official has the discretion to determine the purpose and need for a project proposal. In this case, the purpose and need is to sell timber to generate funds so the Forest can repay the Land and Water Conservation Fund that the Forest borrowed from in order to complete the Big Sky Lumber Company land purchase (EA, pp. 1-1, 1-3, and Appendix I, p. I-5). Alternatives must be responsive to the project purpose and need. The alternatives presented in the EA (pp. 2-5 to 2-35) respond to the purpose and need, are within the management direction identified in the EA, respond to the public scoping comments, and are reasonable for this project. The Forest also considered other alternatives that were eliminated from detailed study (EA, pp. 2-35 to 2-37). The range of alternatives does not prematurely foreclose any option that might protect, restore, and enhance the environment. The project is in compliance with NEPA, the Handbook, and the Manual.

Issues 5 and 6. The decision rendered was arrived at without adequate public involvement. The Forest did not conduct scoping on the draft EA.

Response: The Forest Service does not conduct scoping on a draft EA. Scoping is conducted at the beginning of a project to determine the scope of the issues and to identify significant issues (40 CFR 1501.7). An EA is not released to the public in a draft form, as an EIS is. The completed EA is released to the public and comments are accepted on it. In the case of *this* project, first the court and then the Deciding Official determined further analysis was needed, so revised EAs were written.

The project has been through an extensive public involvement process (EA, pp. 2-1 and 4-1 to 4-6; Appendix I, p. I-17, Comment 19-c) that started several years before the Gallatin Range Consolidation and Protection Act was signed on October 1, 1993, by President Clinton. More specific to the Darroch-Eagle Timber Sale, a series of formal and informal public meetings were held in May 1997, public scoping was conducted in May 1998, the first EA was released in March 1999, and the DN and FONSI were released in May 1999. After litigation, a revised EA was released in November 2002, with another 30-day comment period. Comments on the revised EA led to the decision to do another revision, which was released with another 30-day comment period. It is very clear the Forest was involving the public, and responding to their concerns about this project.

Issue 7. The Forest Service lost nearly 40 comments and ignored other comments. Putting the onus on the public to prove they submitted comments is unfair. Because the public and Forest Service has no way of knowing the number or content of lost comments, a decision cannot be correctly rendered.

Response: When the Forest was alerted to the fact that electronic comments had not shown up in the computer in-box, they contacted the Regional Office and, in turn, the Washington Office

about the problem. When the problem was eliminated, the “missing” comments immediately appeared in the inbox. None were lost. This was confirmed by tests done in the Regional Office and Washington Office. The Forest Service regrets the confusion the early use of the electronic comment in-box may have caused some commenters.

The regulations [36 CFR 215.6(4)(iii)] concerning electronically-mailed comments are very clear as to the commenter’s responsibility: “For electronically mailed comments, the sender should normally receive an automated electronic acknowledgement from the agency as confirmation of receipt. If the sender does not received an automated acknowledgement of the receipt of the comments, it is the sender’s responsibility to ensure timely receipt by other means.” That is why the Forest asked for the confirmation receipt when told comments were emailed to the Forest, but not considered. The Forest was following the regulations.

All electronic comments correctly addressed and sent in a timely manner were considered and incorporated into the project record (EA, Appendix I, pp. 1 to 2). In the case where Mr. Poinsette and Ms. Drotos’s letter was resubmitted, the Acting Forest Supervisor took special care to review their letter and make sure their comments had been considered (PF, Vol. 7, Chapter 5, Doc. 11). He found their comments were similar to others that had already been submitted, so in a personal letter back to them he identified where their concerns had already been addressed in the Response to Comments, the EA, and the DN. When comments from members of the public are similar or identical, they are not ignored, but in an effort to reduced redundancy they are answered as one comment. This is in compliance with 40 CFR 1503.4. The Decision took into account the concerns of the public and was correctly rendered.

Issue 8. The Responses to Comments are vague, uninformative, and inadequate.

Response: The Response to Comments (EA, Appendices F and I) attempted to answer questions as specifically and informatively as possible. The Responses to Comments are adequate and in compliance with the requirements at 40 CFR 1503.4.

Issue 9. The Forest Service has misled the public through the use of maps that to most viewers are unintelligible.

Response: There was no attempt to mislead the public using the maps in the EA. While some of the maps could be clearer, the maps are adequate for the analysis.

Issues 10 and 21. The Forest Service has misrepresented to the public the impact the sale will have on old growth forest in the area by including designated wilderness in the analyzed compartments. The Decision threatens old growth and site diversity.

Response: The organisms that use old growth do not recognize compartment boundaries and whether or not the compartment boundaries cross over into a wilderness or not. The important thing is the availability of old growth in the area. The EA analyzed the amount of old growth forest in Compartments 305 and 306 (EA, Appendix A, pp. A-10 to A-11). There are 20,255 acres of old growth in the analysis area. This is 38.5 percent of the total area of the compartments and 58.4 percent of the forested land in the compartments. After implementation

of Alternative D-Modified there would still be 38.2 percent of the compartments covered in old growth forest. Across the Forest there is approximately 40 percent old growth on the forested lands (EA, Appendix A, p. A-10). These amounts are well beyond the 10 percent old growth the Forest Plan says the Forest is supposed to “strive to develop” (Forest Plan, p. II-20).

Issue 11. The public has been misled with regard to the amount of roads that the sale involves.

Response: District Ranger Ken Britton wrote a letter to Julia Page attempting to clarify the alleged discrepancy between the Timber Sale Report and Alternative D-Modified as described in the EA (PF, Vol. 7, Chapter 2, Doc. 2-2). The project involves construction of approximately 0.9 mile of new temporary road and reconstruction of approximately 3.6 miles of existing road to facilitate logging systems. The additional miles of roadwork described in the bid form are typical road maintenance. The public has not been misled in the amount of temporary road construction and reconstruction required to implement the project.

Issue 12. Closing closely parallel roads should not be counted as reducing road density, which is what is claimed in the EA.

Response: It is true that closing one of a pair of close, parallel roads is not as effective at increasing the HEI as closing the only road in an area. That is why Forest Road 3243 is gated in the NE ¼ of Section 6, T9S, R9E, with restrictions to motor vehicles from October 15 to June 30 (DN, Map 3 of Selected Alternative). The closure effectively eliminates motorized access in Section 5, T9S, R9E; Sections 30, 31, and 32 of T8S, R9E; and Section 36 of T8S, R8E. This increases the HEI during the hunting season when it is most effective.

Issue 13. The EA and Decision Notice fail to analyze the cumulative impacts on grizzly bear.

Response: 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 Chapter 3 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 (EA, Appendix C, pp. C-3 to C-35), which also considers the cumulative effects of the project (pp. C-34 and C-35).

Issue 14. The EA and Decision Notice fail to analyze critical impacts on lynx and wolverine.

Response: The wildlife biologist analyzed the impact the project would have on lynx and lynx habitat (EA, Appendix C, pp. C-38 to 42). The biologist determined the project (Alternative D-

Modified) would result in a short-term loss of 195 acres of lynx foraging habitat (EA, Appendix A, p. A-2). This amount of temporary habitat loss is well within what the conservation measures allowed for in the Canada Lynx Conservation Assessment and Strategy (EA, Appendix C, p. C-41). The determination of not likely to adversely affect lynx, and the documentation to support that determination was submitted to the U.S. Fish and Wildlife Service (USFWS). The USFWS concluded the project was not likely to jeopardize the continued existence of Canada lynx, there would be no incidental take, and that no reasonable and prudent measures or terms and conditions were necessary (PF, Vol. 6, Chapter 2, Doc. 31).

The wildlife biologist analyzed the type of habitat wolverine uses (EA, Appendix H, p. H-10), and found the project would decrease potential denning habitat by about 57 acres. He determined the project may impact individuals or habitat but will not likely contribute to a trend towards federal listing or a loss of viability to the population or species (EA, Appendix B, p. B-14). The lynx and wolverine analyses are in compliance with NEPA, NFMA, and ESA.

Issue 15. The EA and Decision Notice fail to analyze the cumulative impacts of the sale in conjunction with past and future timber sales and other activities.

Response: At the beginning of the *Environmental Consequences* chapter the EA discusses a variety of the past, present, and reasonably foreseeable future activities that may produce environmental effects that are relevant to the project (EA, pp. 3-2 to 3-3). The list includes nine timber sales in the past and present; harvest of firewood, house logs, posts and poles; precommercial thinning; and the Windmill Timber Sale in the future. The past, present, and reasonably foreseeable activities are then considered in the analysis for each resource. The analysis is in compliance with NEPA.

Issue 16. The EA and Decision Notice show unfamiliarity with the area to be analyzed in regard to vegetation. The EA and Decision Notice do not adequately inform the public of the probable loss of vegetative diversity as consequences of this action.

Response: The project analyzes the impacts the project would have on vegetative diversity (EA, pp. 3-21 to 3-22, Appendix E, p. E-8; PF, Vol. 2, Chapter 2, Docs. 2-1, 2-2, 2-3, 2-5, and 2-7).

Issue 17. The EA and Decision Notice fail to adequately address the aesthetic and visual impacts of the sale.

Response: The EA adequately addresses the direct, indirect, and cumulative impact the project would have on scenic resources (EA, Appendix A, pp. 21 to 23), and mitigates the impact the project would have on them (EA, pp. 2-28 to 2-29).

Issue 18. The Decision Notice is confusingly written and is a hindrance to the facilitation of public involvement in decision-making, violating 40 CFR 1506.6.

Response: The DN clearly states the decision (pp. 5 to 9) and the rationale for the decision (pp. 9 to 11). The DN is in compliance with NEPA and 40 CFR 1506.6.

Issue 19. The Decision Notice is inadequate; an Environmental Impact Statement (EIS) is needed for the sale. The sale is actually two spatially separated sales with two separate haul roads and involves endangered species habitat in close proximity to Yellowstone National Park and the Absaroka-Beartooth Wilderness.

Response: The regulations at 40 CFR 1501.4(c) provide for the preparation of an EA to determine whether or not to prepare an EIS. As documented in the DN and FONSI, the Forest Supervisor determined that this project is not a major federal action with significant effects on the quality of the human environment (DN, pp. 25 to 27). As discussed in the FONSI (DN, p. 26), the project would not significantly impact any threatened or endangered species. The analysis considered impacts to Yellowstone National Park and the Absaroka-Beartooth Wilderness in cumulative effects and as necessary in discussions of resources that cross the boundaries. The EA is in compliance with NEPA.

Issue 20. The EA and Decision Notice are in violation of NFMA. The EA and Decision Notice violate the Forest Plan and contradict the Travel Plan. Rather than taking strides to lessen the road density to bring it into compliance with the Forest Plan, the Forest Service has chosen to increase road density, which goes against the purpose of NFMA. The EA and DN acknowledge that the sale will require a Forest Plan Amendment with regard to road density.

Response: The DN and EA discuss and analyze the problems with meeting the Forest Plan standard of 70 percent effective cover due to the number of existing roads in the project area (DN, pp. 1, 7, and 8; EA, pp. 1-5 to 1-9). In order to meet the Forest Plan standard the Forest would have to close roads it does not have jurisdiction over and main roads that are needed to access wilderness trailheads. The wildlife biologist analyzed the cumulative impact to elk from site-specific Forest Plan amendments on effective cover in Appendix G of the EA. He found there is no evidence that timber sales and open road densities have had measurable direct, indirect, or cumulative effects on the elk herd (EA, Appendix G, p. G-8). The Forest Supervisor determined the site-specific Forest Plan amendments were not a significant impact on implementation of the Forest Plan (DN, p. 21). The EA and DN are in compliance with NFMA.

Issue 21 is discussed above with Issue 10.

Issue 22. The Forest Service is rushing this sale before the issue of Habitat Effectiveness Index (HEI) is resolved. This issue should be dealt with in the Forest Plan or Travel Plan Revision.

Response: As discussed in Issues 5 and 6 (above), this project is one of the many projects being used to implement the Gallatin Range Consolidation and Protection Act that was signed on October 1, 1993, by President Clinton. This specific project began with a series of formal and informal public meetings in May 1997, and public scoping was started in May of 1998. This sale is not being 'rushed.' The Gallatin National Forest has been wrestling with the HEI since the Forest Plan was signed (EA, Appendix G, p. G-1). The appellants are correct about the HEI issue; the final resolution of the HEI issue will have to be done as part of Forest Plan revision.

Until that time, each project will have to attempt to meet the Forest Plan Standard or consider a site-specific amendment as part of the decision.

Issue 23. The Decision is in violation of NFMA because it fails to address stream quality degradation in the Bear Creek watershed. The sale is proposed to occur before the Total Maximum Daily Loads are set for Darroch Creek.

Response: The hydrologist analyzed the impact the project would have on water quality (PF, Vol. 4, Chapter 8, Doc. 1-2, and Vol. 6 Chapter 2, Doc. 6-7). Based on the analyses, the water quality issue was eliminated from detailed study due to effective mitigation and the minor effect to the watershed from the project (Appendix A, pp. A-12 to A-16). The project is expected to meet the Gallatin sediment standards, State of Montana Water Quality standards, Montana Forestry BMPs and stream management zone provisions, and would maintain downstream beneficial uses. The project is in compliance with NFMA.

Issue 24. The Decision rendered violates the one major activity per decade standard for lands in Grizzly Bear Management Situation 1 (MS-1).

Response: Major activities in MS-1 habitat are restricted to not longer than 3 years, with at least 7 years of inactivity between major entries. Harvest activities with this project will be concluded in 3 years. The last major entry in the project area was in 1988 to 1989. Reentry could occur any time after 1996, which was 8 years ago (EA, pp. 2-7, 3-5, and Appendix C, pp. C-14 and C-15; PF, Vol. 6, Chapter 2, Doc. 2-35).

Issue 25. The EA and Decision Notice also violate MUSYA, the Organic Act of 1897, and Forest Service's implementing regulations.

Response: The Organic Act allows for the continuous supply of timber from the National Forests, as well as favorable water flows. This project allows for both. MUSYA states National Forests are to be administered for recreation, range, timber, watershed, wildlife, and fish. MUSYA also recognizes that all uses cannot be maintained on every acre of land, and that choices would have to be made. The Gallatin National Forest and this project are in compliance with MUSYA, the Organic Act, and the implementing regulations.

Issue 26. This sale is ill conceived and environmentally does not stand on its own merits. Other funds should be used to complete repayment of the Gallatin II land exchange. The revenue estimates for this sale should be considered insignificant to contribute to Gallatin II.

Response: As discussed in the EA (pp. 1-1 to 1-3), Congress intended for funds from timber sales conducted on the Gallatin to be used to pay for the land exchange. In the Gallatin Land Consolidation Act Congress found "it is in the interest of the United States to establish a logical and effective ownership pattern for the Gallatin National Forest, reducing long-term costs for taxpayers and increasing and improving public access to the forest..." This project is part of the action the Gallatin National Forest is taking to fulfill Congress' intent to benefit the public through the Gallatin Land Consolidation Act.

Issue 27 is discussed above with Issue 1.

Issue 28. The fact that wilderness signs in the Eagle Creek area have been moved or removed during the analysis period of 1998 to present has never been addressed.

Response: The Forest responded to this question in the Response to Comments (EA, Appendix I, p. I-31), which states, “The wilderness boundary...was surveyed and posted...in 1984. While working in the area on August 27, 2001, survey crews found the 1984 wilderness boundary posts next to Pine Creek Trail. These posts were 1,600 feet northwesterly of the large wooden ‘Absaroka-Beartooth Wilderness’ sign that was located in the saddle NE of Palmer Mountain. It was the assumption that the wooden sign had been in place for many years and the district failed to move it when the wilderness boundary was officially surveyed in 1984. The survey crew told the district about their findings. Dan Tyers contacted them in May, 2001, indicating that he had plans to move the wooden sign to the proper location.”

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