



File Code: 1570 (218)  
#14-01-00-0059

Date: July 17, 2014

Michael Garrity  
Alliance for the Wild Rockies  
PO Box 505  
Helena, MT 59624

Dear Mr. Garrity:

This letter is in response to your objection of the East Reservoir project located on the Libby Ranger District on the Kootenai National Forest. I have read your objection and reviewed the Final Environmental Impact Statement (FEIS), the draft Record of Decision (DROD), the content in the project file, as well as considered the comments submitted during the opportunities for public comment for this project. Based on this review, conducted in accordance with 36 CFR 218, I understand the disclosed environmental effects of this project.

The 36 CFR 218 regulations provide for a pre-decisional administrative review process in which the objector provides sufficient narrative description of the project, identifies specific issues related to the project, and suggests remedies that would resolve the objection (36 CFR 218.8). The regulations also allow, in part, for the parties to meet in order to resolve the issues (36 CFR 218.11(a)).

As specified at 36 CFR 218.11(b), I must provide a written response that sets forth reasons for the response; however, this written response need not be point-by-point. The Responsible Official and I have reviewed the project in light of the issues presented in your objection letter. I have considered your issues and suggested remedies and included my reasons for response to these issues and suggested remedies, which are detailed below. I note your remedies consisted of choosing the no action alternative or developing a new alternative based on what you claim to be current best science and that addresses the issues in your objection.

### **RESOLUTION MEETING**

The 36 CFR 218 regulations allow, in part, for the parties to meet in order to resolve the issues (36 CFR 218.11(a)). I extended an offer to meet with you in my June 6, 2014 letter accepting your objection; however, you declined this offer. Therefore, we were unable to resolve your objection or any of the issues contained within it.

### **OVERVIEW OF PROJECT**

The purpose and need for the activities proposed in the East Reservoir project are to:

- Re-establish, restore and retain landscapes that are more resistant and resilient to disturbance (insect and disease infestations, fire) and uncertain environmental conditions such as climate change;
- Create a heterogeneous landscape that provides a variety of habitats to sustain populations of terrestrial and aquatic species;
- Provide amenities, jobs and products to the communities;
- Reduce hazardous fuels adjacent to private property and across the landscape while re-introducing fire to the ecosystem;



- Enhance recreation settings and facilities with the goal of providing high quality experiences.

The following actions are proposed to meet the purpose and need: timber harvest and associated fuel treatment, including intermediate harvest and regeneration harvest; pre-commercial thinning; planting of conifer seedlings; prescribed fire; burning and/or slashing; road maintenance, road construction, temporary road construction using best management practices; change to yearlong, open access on roads to existing dispersed campsites along the Kooconusa Reservoir; access changes from motorized to non-motorized on five trails; watershed rehabilitation to include road decommissioning and intermittent stored service (storage) work; road storage; addition of some undetermined roads will be added to the National Forest System; cost-share between the Forest Service and the Montana State Department of Natural Resources and Conservation for several roads in the analysis area for access purposes; improved access to the recreation sites on the south side of the mouth of Fivemile Creek and in the Yarnell area; and a new non-motorized trail within the East Reservoir analysis area. Various design features and mitigation measures will also be implemented to maintain and protect resource values.

### **REVIEW OF THE OBJECTION (FAILURE TO COMPLY WITH 36 CFR 218)**

#### ***LACK OF SPECIFIC WRITTEN COMMENTS & OBJECTION ISSUES***

Upon review of your objection, it was immediately evident that you did not once reference the analysis in the Draft or Final EISs, or the rationale in the draft ROD, specific to the East Reservoir project. On page 14 of your objection you do reference a DEIS, pages 5 and 6; however, the information you cited was not found on pages 5 and 6 of the East Reservoir DEIS as it was determined you copied and pasted this issue from an objection submitted for the Beaver Creek project on the Idaho Panhandle NF.

I conducted a thorough content analysis of your objection and found that the majority of the content was copied and pasted from previous appeals and objections submitted on other projects in Region 1. It seems you predominantly relied on content from appeals/objections submitted on the Sparring Bulls, Minton Trout and Pilgrim Creek projects on the Kootenai National Forest (NF). Other content was also pulled from appeal/objections submitted for the Rennick Stark project on the Lolo NF; Trapper Creek, Fleecer and North Butte projects on the Beaverhead-Deerlodge NF; and Beaver Creek and Bussel 484 projects on the Idaho Panhandle NF. Some issues have been included on up to 20 appeals/objections across the region. While I will not take the time here to list each and every project, I will suffice it to say you have been provided adequate, numerous responses to these issues, which tend to be programmatic in nature (i.e. formal consultation requirements for NRLMD, identifying the minimum road system, data collection and use methods, identification and management of old growth etc.). I find no added value in continuing to respond to these issues on a project-by-project basis if you cannot demonstrate how the proposed actions of the project, as they relate to these broad topics, are contrary to law, regulation or policy.

36 CFR 218 includes a requirement for all objection issues to be based on previously submitted, specific written comments unless the issue is based on new information. The regulations place the burden on the objector to demonstrate compliance with this requirement, further specifying that the objector must include a statement that demonstrates the connection between prior specific written comments on the particular proposed project or activity and the content of the objection. In your email submitting the objection you state, "The issues raised in this objection were addressed in our comments on the East Reservoir DEIS or scoping comments or are based on new information contained in the draft ROD and FEIS." This vague claim in no way demonstrates how the content and issues raised in the objection are based on prior specific written comments, meaning the burden is then on my staff to review the comments previously submitted and determine if the objection issues are based on those comments. You have been notified in my previous letters accepting your objections that you are not meeting this requirement, yet you continue to submit objections that do not meet this requirement.

The administrative review process established by 36 CFR 218, which replaced the post-decisional appeal process under 36 CFR 215, is pre-decisional in an effort to consider public concerns earlier in the decision-making process. The requirement to base objection issues on previous specific written comments or new information, as well as the requirement for the responsible official to consider concerns prior to signing a decision, encourage a more engaged, collaborative approach throughout project development and gives the Agency multiple chances to consider and possibly alleviate concerns identified by the public.

36 CFR 218.2 defines specific written comments as follows: "...For the purposes of this rule, specific written comments should be **within the scope of the proposed action, have a direct relationship to the proposed action, and must include supporting reasons for the responsible official to consider**" (emphasis added). While your comments or objection issues may be within the scope of the proposed action and have a direct relationship to the proposed action (i.e. you raise an issue regarding grizzly bear because they are found within the project area and may be affected by the proposed actions), your comments and objection issues are not specific to the analysis or draft decision rationale for the applicable project, as demonstrated by your practice of copying and pasting comments and objection issues on numerous projects across Region 1. By not citing to the analysis or draft decision rationale specific to a project, you are not demonstrating how the analysis or rationale are inadequate; therefore, I find you are not meeting the requirement to include supporting reasons for the responsible official to consider or for the objection reviewing officer to review (36 CFR 218.2; 218.8(d)(5); 218.10(5)).

I value your continued participation with regards to Forest Service land management decisions; however, I believe your participation would allow us to reach more informed decisions if you followed the requirements of 36 CFR 218 and provided us with pertinent information specific to the project you are commenting on or objecting to. As it currently stands, your participation throughout the NEPA and administrative review processes appears to be nothing more than going through the procedural steps necessary to litigate the project.

#### ***INCORPORATION OF DOCUMENTS BY REFERENCE***

You also continue to incorporate documents by reference in your objection. 36 CFR 218.8(b) states, "Incorporation of documents by reference is not allowed, except for the following list of items that may be referenced by including date, page, and section of the cited document, along with a description of its content and applicability to the objection. All other documents must be included with the objection.

- (1) All or any part of a Federal law or regulation.
- (2) Forest Service directives and land management plans.
- (3) Documents referenced by the Forest Service in the proposed project EA or EIS that is subject to objection.
- (4) Comments previously provided to the Forest Service by the objector during public involvement opportunities for the proposed project where written comments were requested by the responsible official."

You cited the following references but did not include them with your objection.

- Bate, 1995
- Bull et al., 1986
- Camp et al., 1997
- Center for Biological Diversity et al., 2013
- Churchill, 2011
- Committee of Scientists, 1999
- *Connor v. Burford*, 848 F.2d 1441, 1454
- Dueker and Sullivan, 2001

- Gautreaux, 1999
- Goggans et al. 1987
- Harris, 1984
- Hessburg et al., 2007
- Hillis et al., 2002
- Hoffman, 1997
- Hutto, 1995
- Lacy, 2001
- Lesica, 1996
- McClelland and McClelland, 1999
- Mills, 1994
- *Nat'l Wildlife Federation v. Nat'l Marine Fisheries Service*, 524 F.3d 917, 930
- Noss, 2001
- Reynolds et al., 1992
- Ruggiero et al., 1994a
- Steeger and Dulisse in press
- Taylor unpublished data
- USFWS, 2011 (5 Year Review: Summary and Evaluation cited in Grizzly Bear issue)
- Warren, 1990
- Weinhagen, 1998

Not only did you not include the above references, but you also failed to demonstrate how the current analysis failed to consider these sources, how these sources would complement or refute the current analysis or how these sources even relate to the specific project analysis. Furthermore, you did not even include a list of literature cited; therefore, for many of these references I could not even determine the title of the reference or the author's full name.

You included the following references with your objection.

- Boulanger, 2013 (Draft)
- IGBC CYE Preliminary Results, December 2013
- Kasworm, 2013
- Squires, 2007
- Squires, 2010
- Squires et al, 2013
- USDA Wolverine Guidance, March 2013
- USGS FOIA Response, April 2014

While all of these were included, you actually only cited Squires 2010 in a lynx issue that you copied and pasted from appeals submitted for the Rennik Stark (Lolo NF) and Pilgrim Creek (Kootenai NF) projects. It appeared you were quoting, or attempting to quote, information from some of the other references you included regarding grizzly bear. I will discuss findings related to these attachments in my response to issues below.

### **RESPONSE TO ISSUES**

The only issue in your objection that I found to be specific to this project was the issue you raised regarding the Tobacco BORZ boundaries and project units within the Fivemile Creek and Upper Cripple Horse Creek areas; however, even with this issue you fail to cite any of the analysis or draft rationale specific to this project, as presented in the DEIS, FEIS or draft ROD.

Because you did not provide “a description of those aspects of the proposed project addressed by the objection, including specific issues related to the proposed project”, as required by 36 CFR 218.8(5), I am dismissing from review all other issues raised in your objection as I did not find you gave sufficient information for me to review (36 CFR 218.10(5)). Because you demonstrated the following grizzly bear issue is specific to this project, I did review it; however, you still provided very little in the way of supporting reasons to consider.

### *Issue 1: Grizzly Bear*

**The objector contends that the project violates the Access Amendment, and therefore violates NFMA, NEPA and ESA, because “the units in upper Fivemile Creek (140, 148, 60, 62 and 154 etc.) appear to be within the boundary of the Tabacco [sic] BORZ, as do the “Forest Fuels” units north of Fivemile Creek and the units in Upper Cripple Horse Creek” and the best available science was not utilized.**

**Response:** I have reviewed the comments submitted on behalf of AWR (by Michael Garrity and Liz Sedler) on the East Reservoir DEIS. While your comments on the DEIS allege the project violates the Access Amendment and doesn’t use best available science, your comments did not mention the units you now raise as concern. During the comment period you also did not identify or provide what you believed was the best available science that should have been used for the grizzly bear analysis.

In your objection you do not demonstrate how the analysis or draft decision rationale fails to adequately address the effects of activities proposed within these units. You also do not point to anything in the DEIS, FEIS or draft ROD that shows how the proposed activities are in direct violation of the Access Amendment. That being said, I have reviewed the analysis and draft decision rationale as it relates to compliance with the Access Amendment and use of best available science for grizzly bear.

### *Access Amendment*

In their response to comments on the DEIS, the Forest provided the following response to your assertion that the project violated the Access Amendment:

“These potential impacts and finding of “not likely to adversely affect,” the grizzly bear were disclosed in the DEIS, biological assessment, as well as clarifying emails, and subsequently concurred with by U.S. Fish and Wildlife Service in their letter of concurrence dated, August 8, 2013. The application of recovery zone standards for BORZ is outside the scope of this site-specific project.” [sic] (FEIS, pp. 44 and 45)

The wildlife section of the DEIS (pp. 299 and 300) contains discussion on the Access Amendment standards to conserve grizzly bear habitat in BORZ polygons and explains how the project activities are in compliance. The draft ROD (p. 15) also contains discussion on how the Access Amendment standards were considered with regards to the proposed activities for East Reservoir.

I am, however, instructing the responsible official to review the information in the EIS and ROD to ensure there is adequate discussion as to how roads within the BORZ will be managed in accordance with the Access Amendment standards both during and after project implementation. It would also be beneficial for the responsible official to include additional discussion in the decision rationale demonstrating how the project is in compliance with the Access Amendment.

*Best Available Science*

In your objection you make numerous statements regarding the Cabinet-Yaak grizzly bear population and its status. It is assumed that many of these statements and statistics come from the grizzly bear-related references included with the objection (Boulanger, 2013 (Draft); IGBC CYE Preliminary Results, December 2013; and Kasworm, 2013). As you do not provide any citations to these references in your objection, it was difficult to determine where some of these statements and numbers/statistics were coming from.

My staff endeavored to find where in the references you were getting information from and it was soon apparent that information was being presented out of context or the information could not even be found in any of the attached references. Additionally, we were unable to determine how you came up with some numbers/statistics as the same information could not be found in the attached references and you did not provide any explanation as to how you came up with these numbers/statistics. While I will not respond to each and every statement in the objection, I did review all the statements to better understand your concerns. I have responded to some statements below to demonstrate how the information is presented out of context, cannot be referenced, or is inaccurate. For example:

You state (Objection, p. 2), "Since 2008, FWS's population estimates in its annual Cabinet-Yaak grizzly bear monitoring reports – based on models and extrapolations dropped from 47 to 37 bears." No FWS annual report was included in your attachments. My staff reviewed the information contained in the IGBC CYE Preliminary Results attachment but was unable to find anything in this attachment that demonstrated grizzly bear population levels have dropped from 47 to 37 in the Cabinet-Yaak. This document shows a definite number of 42 grizzly bears detected in 2012 but does not present any information that shows population estimates declining since 2008 at the rate stated.

You state, "The minimum viable population necessary for recovery is 100 bears. The current estimated population of less than 50 Cabinet-Yaak grizzly bears demonstrates that the population is still not viable after decades of federal management." We could not find information in any of the attachments to the objection that supported this claim.

You state, "The 2013 report finds that the human-caused mortality rate has increased from "0.71 mortalities per year from 1982-1998" to "2.5 mortalities per year from 1999-2012." This information comes from Kasworm, 2013 (p. 32). However, the report also goes on to state, "Point estimates for human caused mortality occurring on public lands in the U.S. and British Columbia decreased from 1983–1998 to 1999–2012. **This apparent decrease in mortality rates on public lands is particularly noteworthy given the increase in overall mortality rates. Implementation of access management on U.S. public lands could be a factor in this apparent decline**" (p. 36) (emphasis added).

You state, "The Kootenai Forest Plan re-enforces this precautionary presumption: "[m]anagement decisions will favor the needs of the grizzly bear when grizzly habitat and other land use values compete". The Kootenai Forest Plan does contain this statement; however, it only pertains to direction for Management Situation 1 lands (Kootenai FP, p. A8-4). There are no activities proposed on Management Situation 1 lands for the East Reservoir project.

In summary, you failed to demonstrate how the grizzly bear references included with the objection would complement or refute the current analysis or draft decision rationale. I find the wildlife biologist adequately considered and appropriately applied the best available science for grizzly bear.

SUMMARY

I have reviewed your assertions that the project violates various environmental laws and regulations and the Forest Plan. The project is in compliance with all laws, regulations, and the Forest Plan, as amended by the Access Amendment; however, I believe this compliance could be better demonstrated in the EIS and ROD.

Once the Forest Supervisor completes the instructions I have provided, he may sign the Record of Decision for the East Reservoir project.

Sincerely,



DAVID E. SCHMID  
Deputy Regional Forester

cc: Christopher S Savage, Janis L Bouma, Ray G Smith

