IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

ALLIANCE FOR THE WILD ROCKIES,	)	CV 08-168-M-DWM
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
TOM TIDWELL, et al.,	)	
	)	
Defendants.	)	

I. Introduction

United States Magistrate Judge Jeremiah C. Lynch entered Findings and Recommendation in this matter on December 23, 2009, on the parties' cross-motions for summary judgment. Judge Lynch recommended granting in part and denying in part both parties' motions for summary judgment. Plaintiff timely objected on January 21, 2010 and is therefore entitled to de novo review of those portions of the Findings and Recommendation to which it objected. 28 U.S.C. § 636(b)(1). The portions of the Findings and Recommendation not specifically objected to will be reviewed for clear error. McDonnell Douglas Corp. v.

Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981).

Because I agree with Judge Lynch's analysis and conclusions, I adopt his Findings and Recommendation in full. The parties are familiar with the factual background of this case, so it will not be fully restated here.

II. Analysis

Plaintiff first objects to Judge Lynch's finding regarding the Forest Service's determination that aerial spraying in the Project area will result only in "short-term avoidance of the treatment area" by grizzly bears. Plaintiff claims this finding is inconsistent with the record because the only study to address the issue suggests that grizzly bears will abandon an area where there is even infrequent overflights by small aircraft. However, the document relied on by Plaintiff does not demonstrate that grizzly bears will permanently abandon areas following overflights. Instead, it reflects possible conflicts in the science relating to grizzly bear responses. At one point it states that a single study found grizzly bears have been noted to abandon areas in response to overflights, although this study does not state that grizzlies will permanently abandon an area after an overflight. AR 6:111 at 17.[1] However, the document also cites numerous other studies

[1]Citations to the Administrative Record are formatted as follows: AR [volume number]:[chapter number] at [page number].

suggesting that grizzlies may hide, run, and have "mild" behavior responses to overflights. Id. at 7. Given the conflict in the evidence, the Forest Service's conclusion that overflights may cause temporary grizzly displacement is consistent with the record. See Trout Unlimited v. Lohn, 559 F.3d 946, 955-56 (9th Cir. 2009) (upholding agency decision under the ESA where the agency did not disregard conflicting information in the record, but reached a good faith conclusion about which science to rely on).

Next, Plaintiff objects to the finding that 2,4-D pesticide is not likely to adversely affect or result in take of grizzly bears and that use of 2,4-D is compatible with grizzly bear needs. Plaintiff argues the Forest Service admits that 2,4-D can have mild toxic effects on bears and may affect male grizzlies' reproductive capacity, and thus it will adversely affect the bears. However, as Judge Lynch found, the Final EIS addresses concerns about the potentially toxic effects of 2,4-D and reaches a conclusion, supported by the record, that the application rate of 2,4-D proposed here is not likely to adversely affect grizzly bears. For example, the Final EIS notes that high levels of herbicides are required to have an adverse effect, but '[h]igh application rates [of 2,4-D] would not occur on potential spring foraging habitat." AR 2:17 at 3-80. Further, bears would be unlikely to consume 100% contaminated vegetation "because bears are highly

mobile and heavy weed infestation would not be attractive as a food source." Id. In the cumulative effects analysis for bears, the Final EIS also concludes that bears' mobility will prevent heavy consumption of 2,4-D contaminated forage and, because 2,4-D and other proposed herbicides are water soluble, they are rapidly excreted and do not accumulate in animal tissues. Id. at 3-83. On this record, the Forest Service did not err in determining that use of 2,4-D is not likely to adversely affect and will not result in take of grizzly bears.

Plaintiff also objects to Judge Lynch's refusal to permit Plaintiff to supplement the record with a letter from the EPA dated after the decision in this case that related to 2,4-D's impacts on a frog and snake species. As Judge Lynch correctly stated, the Court will not review evidence not before the agency at the time of its decision. Northcoast Environmental Ctr v. Glickman, 136 F.3d 660, 665 (9th Cir. 1998). Further, while the letter addresses 2,4-D, it does not address impacts on grizzly bears, and Plaintiff offers nothing to suggest that 2,4-D's impacts on frogs and snakes are analogous to impacts on bears. Judge Lynch correctly denied Plaintiff's request to supplement the record.

Plaintiff next objects to Judge Lynch's finding that effects on spring forage caused by the Project are not likely to adversely affect or result in take of grizzly bears. While Plaintiff argues that herbicide treatments will eliminate foliage, the

record actually shows that there will be short term reductions, with increased foraging capacity 2-3 years after treatment. AR 6:25 at 9-10. Further, the Final EIS includes mitigation measures by limiting the application of herbicide in grizzly bear spring habitat. Id.; AR 2:16 at 2-14. Thus, the record does not support Plaintiff's argument that the impacts on spring forage will adversely affect grizzly bear or result in an unauthorized take because the impacts will not "significantly disrupt" grizzly bear feeding. 50 C.F.R. § 17.3 (defining "harass" as to what constitutes a take). The single study relied on by Plaintiffs post-dates the decision and is not part of the administrative record, and the Court will, therefore, not consider it. Northcoast Environmental Ctr, 136 F.3d at 665. The Court agrees with Judge Lynch that the short-term, minor impacts to spring foliage are not likely to adversely affect or result in take of grizzly bears.

Plaintiff objects to Judge Lynch's finding that the Forest Service considered a reasonable range of alternatives in the Weeds Plan EIS, because the Forest Service did not consider alternatives that included standards to prevent weed infestation. However, as Judge Lynch correctly found, all of the alternatives incorporate best management practices, which address prevention measures to be applied to logging, grazing, and road building and maintenance. AR 2:16 at 2-16; AR 2:45 at App. A. While the EIS could have addressed prevention measures

through an alternative that included standards for prevention, it did not. Instead, the Forest Service chose to address prevention through the use of best management practices. Plaintiff's claim, in essence, is a disagreement with the Forest Service's methods of management, rather than a claim that no alternatives were considered that address prevention. Such a debate over the Forest Service's policies regarding weed management is "not the proper subject of a NEPA action." Northwest Coalition for Alternatives to Pesticide v. Lyng, 844 F.2d 588, 591 (9th Cir. 1988). The Forest Service complied with NEPA by considering a reasonable range of alternatives than included prevention.

Next, Plaintiff objects to the finding that the Forest Service is complying with NFMA's requirement to "ensure native plant diversity" by incorporating best management practices in the Final EIS. Pl.'s Obj. at 12. Plaintiff argues these practices have already been used in the past and have proven insufficient to stop the spread of noxious weeds, and thus do not ensure plan diversity, and Plaintiff claims the Forest Service admits these practices will increase weed infestation. However, the citations Plaintiff relies on do not support this proposition. In fact, these portions of the record show that, while weeds will likely continue to spread under Alternative 2 (the chosen alternative), the rate of weed spread will be greatly reduced from the current rate. E.g. AR 2:17 at 3-14, 3-101. Thus, the Final EIS

complies with NFMA because it shows that best management practices, combined with other management practices for weeds, will help reduce the spread of weeds and protect native vegetation.

As to plant diversity, Plaintiff also attempts to raise an "indirect challenge to the Forest Plan" by arguing that the Forest Plan itself does not have adequate standards, and the Weeds Plan violates NFMA for following the flawed Forest Plan. Pl.'s Obj. at 14. However, as Judge Lynch correctly found, this argument was first raised in Plaintiff's reply brief and the Complaint does not plead such a claim. It does not assert that the Forest Plan violates NFMA, but that the Forest Service violated NFMA by failing to comply with the Forest Plan.[2] First Amd. Compl., ¶¶ 48-55. There is no need to address claims that were not properly pled in the Complaint. See Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1080 (9th Cir. 2008).

Plaintiff also objects to Judge Lynch's finding that the EIS adequately assesses future impacts and that annual NEPA analysis, in the form of an EA, is not required. Plaintiff reasserts its argument from earlier briefing that the Final

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[2]Plaintiff asserts in the objections that the First Amended Complaint raises this claim by asserting that the Forest Service "did not consider any EIS alternative with preventive measures, such as Forest-wide thresholds or standards, that address the causes of the noxious weed problem." First Amd. Compl., ¶ 54. This argument is unavailing. There is no suggestion in this single sentence that the Plaintiff challenges the validity of the Forest Plan itself.

EIS is not site-specific because it states that there will be future, site-specific plans and reviews of weed treatment proposals. "A comprehensive programmatic impact statement generally obviates the need for a subsequent site-specific or project-specific impact statement, unless new and significant environmental impacts arise that were not previously considered." Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1349 (9th Cir. 1994). In Salmon River, the Ninth Circuit concluded that a programmatic EIS that addressed weed spraying over six million acres complied with NEPA, and the agency had represented that it would comply with its obligation to conduct future NEPA reviews, if necessary. Id. at 1357-58. The same reasoning applies here. As Judge Lynch correctly found, the Final EIS is site specific because all potential treatment sites throughout the forest were mapped and the Final EIS evaluated the effects of herbicide use on all of these areas. Like Salmon River, the agency will conduct further NEPA analysis in the future if needed to address any new issues that arise.[3]

Further, Plaintiff objects to Judge Lynch's finding that the Court presumes the Forest Service will comply with its NEPA obligations and will conduct annual

[3]In the response to Plaintiff's objections, Defendants correctly note that the Forest Service is not automatically required to complete a supplemental EIS if it determines in the future there will be additional impacts. A supplemental EIS is required only if there are potentially significant new impacts not analyzed in the FEIS. 40 C.F.R. § 1502.9(c).

reviews to determine if there are significant new impacts. However, the agency is entitled to a presumption that it will comply with the law. The Court "assume[s] that government agencies will . . . comply with their NEPA obligations in later stages of development." Id. at 1358 (quoting Conner v. Burford, 848 F.2d 1441, 1448 (9th Cir. 1988)). While Plaintiff asserts that the agency has not been complying with its obligation to conduct reviews, the Defendants correctly point out that the record contradicts this assertion, because it shows that there are pesticide use proposals reviewing potential weed treatment projects. AR 13:1 to 13:15; AR 14:1 to 14:12.[4]

Plaintiff objects to the finding that the Forest Service adequately assessed the possible impacts on migratory songbirds. The Plaintiff argues that, while the Final EIS says adequate songbird habitat will be maintained, it offers only conclusory statements and nothing that assesses the habitat needs of songbirds or quantifies how much habitat loss may result from weed treatment. See Sierra Club v . Bosworth, 510 F.3d 1016, 1029-30 (9th Cir. 2007) (holding that conclusory statements in an EIS about cumulative impacts were insufficient without "quantified or detailed information").

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[4]In addition, as Defendants note, any review of 2009 and 2010 proposals is not part of the record and post dates the decision. The Court will only review the record in existence at the time of the decision. Northcoast Environmental Ctr, 136 F.3d at 665.

In contrast to Bosworth, where the cumulative impacts analysis involved only brief statements with no discussion, the Final EIS here contain an adequate discussion of the possible impacts on migratory songbirds. AR 2:17 at 3-94 to 3-97. The Final EIS discusses possible effects on songbirds from weed spraying, including herbicide exposure through eating sprayed insects, disturbances during treatment, and also the benefits from reductions in weed infestations. Id. at 3-95. Ultimately, the Forest Service concluded that, despite the negative effects under Alternative 2, it would positively impact songbirds in the long run by reducing weed infestation and minimizing loss of native plant communities upon which songbirds depend for habitat. Id. at 3-97. Further, as Judge Lynch points out, the Kootenai Forest Plan does not have any specific standards for songbird numbers or habitat, other than the general goal of "[m]aintain[ing] diverse age classes of vegetation for viable population of all existing native, vertebrate, wildlife species." AR 2:17 at 3-97. Thus, the Forest Service's analysis, that despite short-term impacts from spraying weeds habitat will be maintained over the long run, is consistent with the Forest Plan. The Forest Service's analysis of impacts on migratory songbirds complies with NEPA.

Plaintiff next objects to the finding that the Forest Service took a hard look at proposed mitigation measures for aerial herbicide spraying and the issue of

aerial drift. Specifically, Plaintiff argues the Forest Service failed to disclose and discuss the recommendations for aerial spraying in the Felsot study and fails to explain why the Final EIS adopted less stringent mitigation measures than recommended by the study. However, as Judge Lynch found, the Final EIS discusses the Felsot study, along with numerous other studies addressing aerial drift. AR 2:17 at 3-125-128. Further, the Final EIS sets forth multiple design criteria for aerial spraying, which Judge Lynch correctly found incorporate some of the Felsot requirements. AR2:16 at 2-14. The Forest Service provides a reason for the measures it adopts:

> Alternative 2 would not significantly affect the health of the general public or adversely affect water quality, provided design criteria . . . are implemented to avoid drift. . . . Application will be made when there is an organized wind less than 6 mph blowing away from sensitive areas. This practice combined with a buffer adjacent to sensitive areas and a drift reduction agent would like result in no significant offsite drift.

AR 2:17 at 3-128. To comply with NEPA, the Forest Service need only discuss mitigation measures "in sufficient detail to ensure that environmental consequences have been fairly evaluated." Robertson v. Methow Valley Citizens Counsel, 490 U.S. 332, 352 (1989). The Forest Service did so, by discussing possible concerns with aerial drift, reviewing multiple studies, and concluding that the design criteria, with the other limitations mentioned above, were sufficient to

address the environmental consequences.

Last, Plaintiff objects to Judge Lynch's finding that the Forest Service's disclosure of potential adverse human health effects from aerial herbicide spraying complied with NEPA. Plaintiff contends the Forest Service did not adequately disclose known health risks, relying on a recent Ninth Circuit case, which states that the public should not have to "cull through" the record to "cobble together" the analysis on an issue. Natl. Parks & Conservation Assn. v. BLM, 586 F.3d 735, 750 (9th Cir. 2009). The Final EIS contain an extensive section devoted to disclosing and discussing the potential human health impacts. AR 2:17 at 3-118 to 3-133. Thus, contrary to Plaintiff's assertion, the public does not have "cull through" the record to find it because it is clearly set forth in one section. The Court agrees with Judge Lynch that the discussion of human health impacts in the Final EIS complies with NEPA.

I find no clear error in Judge Lynch's remaining findings and recommendations. Accordingly,

IT IS HEREBY ORDERED that Judge Lynch's Findings and Recommendation (dkt #37) are adopted in full.

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment (dkt #19) is GRANTED IN PART and DENIED IN PART. It is GRANTED to the

extent it claims Defendants acted arbitrarily and capriciously in determining that aerial spraying contemplated by the Project is not likely to adversely affect the grizzly bear. It is DENIED in all other respects.

IT IS FURTHER ORDERED that Defendants' motion for summary judgment (dkt #24) is GRANTED IN PART and DENIED IN PART. It is DENIED as to whether aerial spraying contemplated by the Project is likely to adversely affect the grizzly bear. It is GRANTED in all other respects.

IT IS FURTHER ORDERED that this matter is REMANDED to the Forest Service for purposes of addressing the frequency with which overflights will be allowed during any given aerial application period and whether the aerial application contemplated by the Project is likely to adversely affect the grizzly bear. The Project may go forward as planned in all other respects, except aerial spraying.

The Clerk is directed to enter judgment and close the case.

Dated this 30th day of March, 2010.

14:21 pm

Donald W. Molloy, District Judge
United States District Court