IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FRIENDS OF THE WILD SWAN, *et al.*, Plaintiffs, vs. CHIP WEBER, in his official capacity as Forest Supervisor for the Flathead National Forest, et al.; DANIEL M. ASHE, in his official capacity as the Director of the U.S. Fish and Wildlife Service, *et al.*, Defendants.	CV 12–29–M–DLC ORDER

This matter comes before the Court on the parties Fed. R. Civ. P. 56 cross-motions for summary judgment. United States Magistrate Judge Lynch has entered Findings and Recommendation on the cross-motions for summary judgment. Judge Lynch recommends that Defendant's motion for summary judgment be granted and Plaintiffs' claims be dismissed.

Upon service of a magistrate judge's findings and recommendation, a party has 14 days to file written objections. 28 U.S.C. § 636(b)(1). Plaintiffs filed timely objections addressing nine of Judge Lynch's findings. (Doc. 46.)

Accordingly, the Court must make a de novo determination of those portions of the Findings and Recommendation to which objection is made. 28 U.S.C. § 636(b)(1). Those portions of the Findings and Recommendation not specifically objected to are reviewed for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981).

Plaintiffs filed a motion for a Temporary Restraining Order (doc. 47), which this Court denied (doc. 55). Plaintiffs appealed and the Ninth Circuit Court of Appeals affirmed this Court's Order denying Plaintiffs' motion for a preliminary injunction. After extensive review of the record and applicable law, and pursuant to the Ninth Circuit's Opinion (doc. 58) this Court finds Judge Lynch's Findings and Recommendation are well grounded in law and fact and adopts them in their entirety.

I. Background

Plaintiffs Friends of the Wild Swan and the Swan View Coalition (Plaintiffs) challenge the above-named Defendants' conduct in approving the United States Forest Service's Spotted Bear River Project (Spotted Bear Project) — a timber management project located in the Spotted Bear Ranger District of the Flathead National Forest, in Flathead County, Montana. As the facts of the case are familiar to the parties, they will only be discussed as necessary to explain this

order.

II. Summary Judgement Standards

Federal Rule of Civil Procedure 56(a) entitles a party to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The court views the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986). When presented with cross-motions for summary judgment on the same matters, the court must "evaluate each motion separately, giving the non-moving party the benefit of all reasonable inferences." *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003).

III. Discussion

A. Objection No. 1: Cumulative Effects Area Generally

Plaintiffs assert that "the Magistrate did not question the Forest Service's decision to exclude Soldier Addition from its cumulative effects analysis." (Doc. 46 at 5.) Plaintiffs assert that 40 C.F.R. § 1508.25 and 40 C.F.R. § 1508.7 required the Forest Service to consider the two projects' potential cumulative effects in its analysis. Section 1508.25(a) defines the scope of actions that need to be considered in an EA or EIS, while § 1508.7 defines the cumulative impacts that

must be considered in an EA or EIS.

As noted in the Court's order denying Plaintiffs' motion for a temporary restraining order (doc. 51), Plaintiffs' arguments regarding 40 C.F.R. § 1508.25(a) were not properly raised in their summary judgment motion.[1] Plaintiffs' arguments regarding the scope of the EA under § 1508.25(a) – that the Spotted Bear Project and the Soldier Addition Project may qualify as either "connected actions," "similar actions" and/or "cumulative actions" – are new, and distinct from, Plaintiffs' arguments regarding cumulative impacts under 40 C.F.R. § 1508.7.

Generally, district courts do not consider legal issues not initially raised in a party's summary judgment motion when ruling on findings and recommendations. "A district court has discretion, but is not required, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation," but it "must actually exercise its discretion, rather than summarily accepting or denying the motion." *United States v. Howell*, 231 F.3d 615, 621-22 (9th Cir. 2000). A district court is well within its discretion in barring arguments raised for the first time on objections to a magistrate's findings and recommendations absent

[1]Plaintiffs briefly mention 40 C.F.R. § 1508.25(a)(2) in their reply brief, but "legal issues raised for the first time in reply briefs are waived." *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990).

exceptional circumstances. *Greenhow v. Secretary of Health & Human Services*, 863 F.2d 633, 638-39 (9th Cir. 1988) (*overruled on other grounds*). "[A]llowing parties to litigate fully their case before the magistrate and, if unsuccessful, to change their strategy and present a different theory to the district court would frustrate the purpose of the Magistrates Act." *Id.* at 638. Further, "the Magistrates Act was [not] intended to give litigants an opportunity to run one version of their case past the magistrate, then another past the district court." *Id.*

For these reasons, and because Plaintiffs provide no explanation or reason for raising the issues for the first time at this juncture, the Court will not address Plaintiffs' new legal arguments regarding 40 C.F.R. § 1508.25(a).

That said, Plaintiffs' primary contention is that the cumulative effects analysis area is restricted in such a way that alleged potential cumulative effects of the Soldier Addition project were not analyzed. The touchstone case for analyzing this issue is *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). In *Kleppe*, the Supreme Court succinctly stated, "determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies." As noted in *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 958 (9th Cir. 2003), "[t]he task of selecting the geographic boundaries of an EIS

requires a complicated analysis of several factors, such as the scope of the project considered, the features of the land, and the types of species in the area." So long as the agency considered the relevant factors, its decision will not be overturned unless it is shown that there "has been a clear error of judgment." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989).

Plaintiffs broadly object that the "Forest Service did not consider Soldier Addition" (doc. 46 at 12) in its cumulative effects analysis, but Judge Lynch detailed, resource by resource, how the Forest Service justified the scope of its analysis. The Forest Service "does not need to explain why it excludes every imaginable area subject to possible analysis. It only needs to explain why it selected the units of analysis it chose." *Friends of the Wild Swan v. U.S. Forest Service*, 875 F.Supp.2d 1199 (2012). While it is true that "[a]t a minimum, the Forest Service must 'have considered cumulative effects in creating the boundaries of its analysis,'" it does not follow that "the Forest Service must consider nearby projects like Soldier Addition" (Doc. 46 at 12, quoting *Selkirk*, 336 F.3d at 958.) Instead, it means only that the Forest Service must consider cumulative effects within the delineated "action area" and justify the boundaries of its analysis. *Friends of the Wild Swan*, 875 F.Supp2d at 1219. Defendants adhered to these requirements. Accordingly, Plaintiffs' Objection No. 1 is without merit.

B. Objection No. 2: Cumulative Effects on Native Trout

Plaintiffs object to Judge Lynch's finding that Defendants adequately justified the geographical scope of its fisheries cumulative effects analysis. Plaintiffs assert that the "Forest Service did not take into account that the two logging projects are connected and similar actions" (doc. 56 at 13, citing § 1508.25(a), and that the Forest Service did not consider cumulative effects on native trout of sediment deposits in the South Fork.

For reasons explained above, the Court will not address Plaintiffs' new arguments under § 1508.25(a). Furthermore, as explained in Judge Lynch's Findings and Recommendation, Defendants' adequately justified the boundaries of the cumulative effects analysis with respect to fisheries. Defendants explained in the administrative record that the South Fork Flathead River serves as an appropriate boundary for the cumulative analysis area because of the "significant dilution effect" it offers in response to "any [sediment] input from proposed management actions." A-4:FS-1039. Furthermore, the Forest Service explained that any increase in sediment from the proposed management actions affects only a short segment of the South Fork "before it enters the Hungry Horse Reservoir, with its associated buffering effect." Additionally, the Forest Service explained that this relatively short section of the South Fork contains no bull trout or

cutthroat trout spawning habitat. A-4:FS-1061-63. Moreover, with respect to westslope cutthroat trout living in the South Fork, the EA concluded that populations of these fish are "robust," A-4:FS-1063, and are part of larger "meta-populations." Finally, the Forest Service concluded with respect to tributary streams in the project area, that while there may be "short-term negative effect[s] on the westslope cutthroat trout" the "project would [ultimately] result in less sediment delivery and a gradual improvement in the quality of habitat." A-4:FS-1072.

Based on the foregoing, the Court agrees with Judge Lynch that Defendants' adequately justified the boundary of its cumulative effects area for native trout. The decision to draw the boundary of the cumulative effects analysis area was not arbitrary or capricious and Plaintiffs have failed to show the decision resulted from a clear error of judgment. Accordingly, Plaintiffs' objection is without merit.

C. Objection No. 3: Cumulative Effects on Lynx

Plaintiffs object that "the Forest Service did not take into account that the two logging projects are connected and similar actions" pursuant to 40 C.F.R. § 1508.25(a), and that the Forest Service did not consider cumulative effects of the two projects on lynx. (Doc. 46 at 15.) Plaintiffs assert that the use of lynx analysis units ("LAUs") for a cumulative effects analysis "is not at issue or in

dispute." (*Id.*) As already explained, the Court will not address Plaintiffs new legal arguments made pursuant to 40 C.F.R. § 1508.25(a).

As the Ninth Circuit noted, the groups of LAUs for each project were developed independent of the projects at issue, and there is no overlap between the LAUs affected by either project in this case. (Doc. 58.) The Forest Service offered this reasonable justification for why it drew the line where it did, and did not act arbitrarily or capriciously by defining the geographic scope in this manner.

D. Objection No. 4: Cumulative Effects on Grizzly Bear

Similar to their third objection, Plaintiffs again object that "the Forest Service did not take into account that the two logging projects are connected and similar actions" pursuant to 40 C.F.R. § 1508.25(a), and that the Forest Service did not consider cumulative effects of the two projects on the grizzly bear. (Doc. 46 at 16.) As stated, the Court will not address Plaintiffs' new legal arguments made pursuant to 40 C.F.R. § 1508.25(a).

Grizzly bear subunits "represent an appropriate scale of analysis for many common activities on National Forest System (NFS) lands." A-4:FS-873. These subunits are to "provide the basic scale for the analysis of impacts associated with access management and vegetation management projects." M-33:FS-16817. As stated by Judge Lynch, and as affirmed by the Ninth Circuit, the Forest Service did

not act arbitrarily or capriciously when it used grizzly bear subunits to select a valid geographical area within which to assess cumulative effects.

E. Objection No. 5: Environmental Impact Statement

Plaintiff's object to Judge Lynch's finding that an EIS is not required because there are no significant effects. Plaintiffs argue that because the Forest Service prepared two EAs and then consolidated units from each project into one timber sale (the Tin Mule sale) that an EIS analyzing the combined impact of both projects is required.

The Forest Service prepared separate EAs for each project addressing the cumulative effects within the areas, larger than those affected by the particular project, but limited to one side of the river. As discussed above, and as stated in the Ninth Circuit's opinion, Plaintiffs have not demonstrated that the Forest Service acted arbitrarily in defining the geographic boundaries of its cumulative effects analysis. Therefore this Court agrees with Judge Lynch's finding that the Defendants may administratively manage the two timber sale projects in a combined commercial timber sale, and that an EIS is not required.

F. Objection No. 6: Viability Standard for Fisher

Plaintiffs object to Judge Lynch's finding that the Forest Service was correct in concluding that the fisher population is viable and not "in decline"

because a sufficient amount of fisher habitat will remain after Spotted Bear is implemented. (Doc. 45 at 29-30.) Plaintiffs assert that the Forest Service's use of habitat as a proxy is unreliable, arbitrary, and not allowed when fisher are virtually non-existent from the project area. *NEC v. Tidwell*, 599 F.3d 926, 933-934 (9th Cir. 2010).

The Forest Service noted that the proposed projects would affect small portions of fisher habitat but concluded that the impacts would be negligible and would not harm population viability because a significant amount of sufficient fisher habitat would remain. As noted by the Ninth Circuit, this proxy approach is appropriate "where both the Forest Service's knowledge of what quality and quantity of habitat is necessary to support the species and the Forest Service's method for measuring the existing amount of that habitat are reasonably reliable and accurate." *Native Ecosystems Council v. USFS*, 428 F.3d 1233, 1250 (9th Cir. 2005). The Ninth Circuit has accepted the use of habitat as proxy for population "absent some indication in the record that USFS's underlying methodology is flawed." *Envt'l Prot. Info. Ctr. ("EPIC") v. USFS*, 451 F.3d 1005, 1017 (9th Cir. 2006). In this case, the Forest Service utilized the best available scientific data to define potential fisher habitat. Other than to object that no fisher were actually detected, Plaintiffs do not allege specific criticisms of the Forest Service's habitat

habitat methodology. Given the fisher's solitary nature and wide dispersal patterns, the lack of detected fisher is likely due to monitoring difficulties and not necessarily indicative of a decline in population. *See Lands Council v. McNair*, 629 F.3d 1070, 1082 (9th Cir. 2010).

G. Objection No. 7: VEG S6 Compliance

Plaintiffs next object to Judge Lynch's determination that the Forest Service's new definition of "mature multi-storied hare habitat" is "merely a means by which the Forest Service assesses compliance with the standard VEG S6," (doc. 45 at 37) arguing instead that it is an impermissible replacement of the standard and that the original standard VEG S6 and its definitions should apply. In conducting its analysis of snowshoe hare habitat, Plaintiffs contend that the Forest Service used a new methodology by analyzing the amount of horizontal cover provided, as defined in the Lynx Direction.

The Lynx Direction analysis focuses on stand and stem density, but does not apparently limit the analysis to these two factors alone. Based upon a threshold value for horizontal cover developed by John Squires, a recognized authority on lynx, the Forest Service used a "cover board" to measure the percentage of horizontal cover in multi-storied stands within lynx habitat areas. M-50:FS-17371. If the horizontal cover was greater than 35% in the winter, or 48% in the

summer then the area was characterized as "snowshoe hare habitat in multi-story mature or late successional forests" to which Standard VEG S6 applied. Given that the Court must give deference to the Forest Service's scientific judgments regarding methodology and its interpretation of its own forest plans, this Court agrees with Judge Lynch's finding and the Ninth Circuit's order stating that the Forest Service's use of a methodology for assessing horizontal cover is not a change from VEG S6 but rather a means of assessing compliance with the existing standard. *See Native Ecosystems Council v. Weldon*, 697 F.3d 1043 (9th Cir. 2012).

H. Objection No. 8: Endangered Species Act "Action Area"

Plaintiffs object to Judge Lynch's finding that the Forest Service sufficiently explained that the "action area" was limited to certain watersheds on the east-side of the South Fork, LAUs, and grizzly bear subunits. Plaintiffs advance the same arguments as used in their NEPA claim, that the Forest Service utilized an unduly narrow "action area" and should have considered the two projects together. Regarding the lynx and grizzly bear, the Forest Service's justification for its choice of analysis area is the same as in the NEPA analysis discussed above. The Court concludes here that the Defendants' use of the grizzly bear subunits and the LAUs as the boundaries of the action area under the ESA is

also sufficiently justified. With respect to bull trout, because the Forest Service did include relevant portions of the main channel of the South Fork in the bull trout action area and supported its reasons and the Forest Service and the USFWS agreed that each project was not likely to affect the habitat or species adversely, the informal consultation satisfied the requirements of the ESA and no formal consultation was required. (Doc. 58 at 26).

I. Objection No. 9: Application of *Salix* decision

Plaintiffs' final objection is that *Salix* requires injunction of the Spotted Bear Project because consultation on lynx critical habitat for both projects impermissibly relied upon the 2007 Northern Rockies Lynx Amendment ("Lynx Amendment") standards, particularly the VEG S6 standards. *Salix v. United States Forest Service*, 944 F.Supp.2d 984 (D.Mont. 2013). As stated in this Court's order denying Plaintiffs' motion for a TRO, and as affirmed by the Ninth Circuit, Plaintiffs failed to raise their arguments regarding *Salix* in their 60-day notice, and this Court therefore lacks jurisdiction to address the arguments as related to the two challenged projects. Additionally, Plaintiffs failed to raise these arguments in their summary judgment motion, and have thus waived them as discussed *supra* regarding Plaintiffs' 40 C.F.R. § 1508.25(a)(2) argument.

There being no clear error in the remainder of Judge Lynch's Findings and Recommendation;

IT IS ORDERED that Judge Lynch's Findings and Recommendation (Doc. 45) is ADOPTED IN FULL. Plaintiffs' motion for summary judgment (Doc. 28) is DENIED. Defendants' motion for summary judgment (Doc. 33) is GRANTED. This case is CLOSED.

Dated this 23rd day of February, 2015.

Dana L.Christensen, Chief Judge
United States District Court