UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANIMAL LEGAL DEFENSE FUND,

Plaintiff,

v.

OLYMPIC GAME FARM, INC., *et al.*,

Defendants.

Cause No. C18-6025RSL

ORDER GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on "Defendants' Motion for Summary Judgment." Dkt. # 126. Plaintiff alleges, among other things, that the owners and operators of an animal-based attraction on the Olympic Peninsula have violated the federal Endangered Species Act ("ESA") by taking and possessing protected species and have created a public nuisance in violation of Washington state law. Defendants seek a summary determination that its brown bears, wolves, and Canada lynx are not listed species for purposes of the ESA, that it has not harmed, harassed, or possessed any species in violation of the ESA, and that it is not a public nuisance.

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact that would preclude the entry of judgment as a matter of law. The party seeking summary dismissal of the case "bears the initial responsibility of informing the district court of the basis for its motion" (*Celotex Corp. v.*

Catrett, 477 U.S. 317, 323 (1986)) and "citing to particular parts of materials in the record" that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324. The Court will "view the evidence in the light most favorable to the nonmoving party . . . and draw all reasonable inferences in that party's favor." *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018). Although the Court must reserve for the trier of fact genuine issues regarding credibility, the weight of the evidence, and legitimate inferences, the "mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient" to avoid judgment. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. *S. Cal. Darts Ass'n v. Zaffina*, 762 F.3d 921, 925 (9th Cir. 2014). In other words, summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable fact finder could return a verdict in its favor. *Singh v. Am. Honda Fin. Corp.*, 925 F.3d 1053, 1071 (9th Cir. 2019).

Having reviewed the memoranda, declarations, and exhibits submitted by the parties and taking the evidence in the light most favorable to plaintiff, the Court finds as follows:

A. Endangered Species Act

"The Endangered Species Act of 1973 . . . contains a variety of protections designed to save from extinction species that the Secretary of the Interior designates as endangered or

threatened." *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 690, (1995). *See also* 16 U.S.C. § 1533; *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 159-60 (1978). The ESA's citizen suit provision permits "any person" to commence a civil suit to enjoin alleged violations of the ESA or the regulations issued by the Fish and Wildlife Service ("FWS") under the Act's authority. 16 U.S.C. § 1540(g)(1). Defendants argue that plaintiff's ESA claims fail because (1) some of the animals at issue are not designated as endangered or threatened and/or (2) defendants have not harmed, harassed, or possessed any species in violation of the ESA.

1. Listed Species

a. Grizzly Bears

Defendants argue that its grizzly bears were born outside of the lower 48 states of the United States and therefore do not fall within the relevant listing. The governing regulations list the grizzly bear (*Ursus arctos horribilis*) as threatened in the "U.S.A., conterminous (lower 48) States, except where listed as an experimental population" (50 C.F.R. § 17.11(h)) and provide that "no person shall take any grizzly bear in the 48 conterminous states of the United States" (50 C.F.R. § 17.40(b)(1)(i)(A)). Defendants argue, however, that because the term "grizzly bear" is defined "as any member of the species *Ursus arctos horribilis* **of** the 48 conterminous States of the United States" (50 C.F.R. § 17.40(b)(2)) (emphasis added), the bear at issue and all of its ancestors must have been born in the lower 48 to fall within the listing. This construction of the regulations puts more weight on the word "of" than it can bear and flies in the face of relevant case law.

According to defendants, FWS used the word "of" to define and identify a "distinct

population segment" ("DPS") of grizzly bears that were not only born in the lower 48, but that were also descended from grizzly bears born in the lower 48. According to defendants, grizzly bears born at Olympic Game Farm are not "of the 48 conterminous States" because one or more of their ancestors haled from Alaska or Canada. This interpretation is unreasonable. When used as a source identifier for a person or animal, "of" generally refers to that person or animal's place of birth or origin, not to the homeland of ancestors. To the extent defendants are arguing that "of" requires that the grizzly be "originally from" or "born in" the lower 48, the interpretation is not unreasonable, but "of" could just as easily mean that the animal was "found or located in" the lower 48. Defendants offer no authority in support of their preferred interpretation, and other regulatory provisions suggest they are incorrect. The actual listing, as set forth above, states simply "U.S.A., conterminous (lower 48) States," and the prohibition on taking uses the phrase "**in** the 48 conterminous states of the United States" (emphasis added). In announcing the listing, the FWS used the words "of" and "in" interchangeably, described the species by reference to the three locations where they were then found in the conterminous States, and sought "to protect any members of the species occurring elsewhere in the 48 conterminous States." Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species, 40 Fed. Reg. 31734, 31735 (July 23, 1975). There is no indication that either Congress or FWS intended the choice of preposition to have the significant and substantive impact defendants suggest. Nor is there any indication that FWS studied or made findings that grizzlies located in the lower 48 that were born elsewhere (or that descended from grizzlies that were born elsewhere) "qualify as separate 'species' or otherwise qualify for

separate legal status under the [ESA]." *Safari Club Int'l v. Jewell*, 960 F. Supp.2d 17, 44 (D.D.C. 2013) (quoting 12–Month Findings on Petitions to Delist U.S. Captive Populations of the Scimitar-horned Oryx, Dama Gazelle, and Addax, 78 Fed. Reg. 33,790, 33,797 (June 5, 2013)). The weight of the statutory and regulatory language therefore support an interpretation of "of the 48 conterminus States" to mean "located or found in the 48 conterminus States."

The relevant case law also supports this interpretation. ESA listings based on geographic boundaries have been interpreted to refer to where an animal is found, not where it was born or where its ancestors haled from. The Tenth Circuit has noted "the well-established fact [that] individual animals can and do lose Endangered Species Act protection simply by moving about the landscape." *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1235 (10th Cir. 2000).

As *amici*, Environmental Defense Fund and others aptly summarize:

> The line dividing protected and unprotected (or differently protected) populations is sometimes an international boundary (*e.g.*, grizzly bears, which south of the US-Canada border are threatened, but north of the border are unlisted [40 Fed. Reg. 31376 (July 28, 1975), codified at 50 C.F.R. § 17.11(h) (1977)]), a state boundary (*e.g.*, brown pelicans, which west of the Mississippi-Alabama state line are listed as endangered, while east of that line are unlisted [50 Fed. Reg. 4938 (Feb. 4, 1985), codified at 50 C.F.R. § 17.11(h) (1997)]), a county boundary (*e.g.*, American alligators which were once listed as endangered everywhere other than in three Louisiana parishes [40 Fed. Reg. 44412 (Sept. 26, 1975)]), a measure of latitude (*e.g.*, bald eagles, which until 1978 were listed as endangered south of 40 degrees north latitude, while those to the north were unlisted [50 C.F.R. § 17.11(i)(1977), revised at 43 Fed. Reg. 6233 (Feb. 14, 1978)]), a point on the coast (*e.g.*, coho salmon, which, if they spawn south of Cape Henry Blanco in Oregon are threatened, but which, if they spawn north of

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