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 DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on "Plaintiff's Motion for Partial Summary Judgment." Dkt. # 160.[1] 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 protected species and have created a public nuisance in violation of Washington state law. Plaintiff seeks a summary determination that Olympic Game Farm, Inc., and its shareholders have (1) taken, harmed, and/or harassed tigers and grizzly bears in violation of the ESA and (2) maintained a public nuisance through their taking and/or possession of tigers, grizzly bears, Canada lynx, gray wolves, Roosevelt elk, and Sika deer.

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

[1] A redacted version of plaintiff's motion can be found at Dkt. # 147.

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 defendants, 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). Plaintiff seeks a summary determination that defendants are violating the ESA by "taking" tigers and grizzly bears.

The term "take" is defined in the ESA as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The term "harass" is relevant here and means:

> an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include generally accepted:
>
> (1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,
>
> (2) Breeding procedures, or
>
> (3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.

50 C.F.R. § 17.3. The term "harass" has "a different character when applied to an animal in captivity than when applied to an animal in the wild." *People for the Ethical Treatment of*

Animals, Inc. v. Miami Seaquarium, 189 F. Supp.3d 1327, 1350 (S.D. Fla. 2016). The regulatory definition of "harass" is intended "to exclude proper animal husbandry practices that are not likely to result in injury from the prohibition against 'take.'" Captive-bred Wildlife Regulation, 63 FR 48634-02, 48636 (Sept. 11, 1998).[2] In promulgating the captive wildlife regulations, the agency concluded that "[s]ince Congress chose not to prohibit the mere possession of lawfully-taken listed species in section 9(a)(1) of the Act, . . . congressional intent supports the proposition that measures necessary for the proper care and maintenance of listed wildlife in captivity do not constitute 'harassment' or 'taking'." *Id.*

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[2] FWS reasoned that the purposes of the ESA are "best served by conserving species in the wild along with their ecosystems." Captive animals, the FWS noted, are "removed from their natural ecosystems and have a role in survival of the species only to the extent that they maintain genetic integrity." 63 FR at 48636.

> It is true that the Act applies to all specimens that comprise a "species" (as defined in the Act) that has been listed as endangered or threatened, and in general does not distinguish between wild and captive specimens thereof. However, the definition of "take" in the Act clearly applies to individual specimens or groups of specimens, and the captive or non-captive status of a particular specimen is a significant factor in determining whether particular actions would "harass" that specimen or whether such actions would "enhance the propagation or survival" of the species.
>
> To decide otherwise would place those persons holding captive specimens of a listed species in an untenable position. If providing for the maintenance and veterinary care of a live animal were considered to be "harassment", those persons holding such specimens in captivity would be forced to obtain a permit or give up possession since any failure to provide proper care and maintenance would be an unlawful "taking".

Id.

a. Grizzly Bears

Plaintiff asserts that defendants have harassed their ESA-protected grizzly bears[3] "by, among other things, (1) housing them in muddy, unsanitary, cheatgrass-infested pens and then failing to provide them with adequate vet care for their grossly infected cheatgrass wounds; (2) withholding regular meals and pain medication for severe arthritis in favor of tourists feeding the bears excessive amounts of bread, which only compounds their obesity and joint pain and inflammation; and (3) anesthetizing bears without a vet present and without critical monitoring and support." Dkt. # 192 at 9. *See also* Dkt. # 160 at 18-26. Defendants argue that a determination of liability, standing alone, is outside the scope of the citizen suit provision of the ESA, that the Court lacks jurisdiction over the cheatgrass, veterinary/medical care, and anesthesia claims because plaintiff failed to give written notice of these violations, and that the sole remaining claim regarding the feeding of bread fails because the practice does not adversely affect the bears' nutrition and does not pose a serious threat of harm to the animals.[4]

i. Citizen Suit Provision

The ESA authorizes "any person" to "commence a civil suit . . . to enjoin any person . . .

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[3] Plaintiff identifies the protected bears as Donald, Moxie, Connie, Lillie, Fee, Fie, and Fumm (still living) and Patches, Good Momma, Marsha, and Samantha (now deceased). Dkt. # 160 at 17. Plaintiff has stipulated that Miska, Yuri, Tug, and Bella are not protected by the ESA.

[4] Defendants also argue that their bears are not protected by the ESA because they are not *"Ursus arctos horribilis* of the 48 conterminous States of the United States" (50 C.F.R. § 17.40(b)(2)). For the reasons set forth in the Order Granting in Part Defendants' Motion for Summary Judgment, of even date, the Court finds that the ESA protects from "taking" members of the species *Ursus arctos horribilis* located or found in the lower 48 states, including Donald, Moxie, and the grizzly bears that were born at the Olympic Game Farm.

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