

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

PEOPLE FOR THE ETHICAL TREATMENT)
OF ANIMALS, INC.,)

Plaintiff,)

v.)

No. 4:17-cv-00186-RLY-DML

WILDLIFE IN NEED AND WILDLIFE IN)
DEED, INC.,)

TIMOTHY L. STARK,)

MELISA D. STARK, and)

JEFFREY L. LOWE,)

Defendants.)

**ENTRY (1) ON PETA'S MOTION FOR APPOINTMENT OF SPECIAL MASTER
AND FOR DETERMINATION OF SANCTUARIES FOR PLACEMENT OF BIG
CATS, (2) CLARIFYING SCOPE OF PERMANENT INJUNCTION, AND (3)
APPROVING TRANSFER OF BIG CATS**

This case concerns the treatment of tigers, lions, and hybrids ("Big Cats") under the Endangered Species Act of 1973, 16 U.S.C. § 1531, *et seq.* ("ESA"). People for the Ethical Treatment of Animals, Inc. ("PETA") filed this lawsuit against Timothy Stark, Melisa Lane¹, and their nonprofit zoo in Charlestown, Indiana, Wildlife in Need and Wildlife in Deed, Inc. ("WIN") (collectively the "WIN Defendants"). Jeff Lowe was added as a defendant after four of Stark's Big Cats were transferred to Lowe's zoo in Oklahoma.

¹ Lane and Stark were married at the time this litigation commenced. The two have since divorced, and Melisa has changed her name from Melisa Stark to Melisa Lane. (Filing No. 349, the WIN Defendants' Response Brief at 1 n. 2).

On August 3, 2020, the court granted PETA's motion for partial summary judgment, finding Defendants violated the ESA by declawing Big Cats and prematurely separating Big Cat Cubs from their mothers to use in hands-on public encounters called Tiger Baby Playtime. The court then directed PETA to name a special master to oversee the final transfer of the Big Cats and identify sanctuaries to permanently house them. On August 25, 2020, PETA filed (1) a Motion for Appointment of Special Master and (2) a Motion for Determination of Sanctuaries. The WIN Defendants responded on September 3, 2020. This Entry addresses these motions.

Motion for Appointment of a Special Master

The original plan was to appoint a special master to oversee the transfer of the Big Cats, but recent developments make appointing a master impracticable. First, Mr. Stark explained in an affidavit in the Seventh Circuit that the animals at WIN would be deprived of necessary resources if it did not stay his USDA license revocation. (*See* Filing No. 384-7, Stay Petition). The Seventh Circuit ultimately dismissed his appeal, so he remains unlicensed. Second, an Indiana state court has ordered a receiver to remove all of WIN's animals—not including Big Cats—by September 18, 2020. That court determined that if the animals remained at WIN, they would face imminent harm. Considering those developments, the court finds immediate transfer best serves the purposes of the court's injunction. The court therefore **DENIES** PETA's motion to appoint a special master.

Motion for Determination of Sanctuaries

PETA identified two sanctuaries for placement of the Big Cats in its motion: Turpentine Creek Wildlife Refuge in Eureka Springs, Arkansas, and the Wild Animal Sanctuary in Keenesburg, Colorado. The WIN Defendants do not object to the Turpentine Creek Wildlife Refuge as a relocation sanctuary.

They do object, however, to the Wild Animal Sanctuary. They say it does not meet basic necessities and engages in activities inconsistent with GFAS² standards. Specifically, the WIN Defendants contend the Wild Animal Sanctuary pulls Big Cat Cubs from their mothers and houses Big Cats in inadequate shelters. Defendants also assert that three Big Cats transferred from a Maryland zoo have suffered at the Wild Animal Sanctuary.

The court overrules this objection. The Wild Animal Sanctuary currently cares for more than 600 rescued animals, and it is accredited by GFAS, so it has to comply with strict standards. (*See* Filing No. 394-1, Declaration of Patrick Craig ¶¶ 3 – 18). Defendants' contention that the care is inadequate is simply unfounded. With respect to the three Big Cats transferred from Maryland, they arrived in horrible condition, *see People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Maryland, Inc.*, 424 F.Supp.3d 404, 426 – 28 (D. Md. 2019), but now are doing fine. (Craig Decl. ¶¶ 10 – 12). The court therefore approves the Wild Animal Sanctuary. *Tri-State Zoological Park*, 424 F.Supp.3d at 434 (finding zoo owners violated the ESA and transferring their Big Cats to the Wild Animal Sanctuary).

² GFAS stands for Global Federation of Animal Sanctuaries. GFAS accredited sanctuaries typically meet high standards for Big Cat husbandry.

Defendant's Argument that Not All Cats are Subject to the Injunction

In their response to PETA's motion for determination of sanctuary, the WIN Defendants assert not all Big Cats are subject to the court's injunction and orders. The WIN Defendants contend that only three Big Cats are covered by the order because (1) many of the Big Cats were not identified as “endangered” prior to being declawed or used in Tiger Baby Playtime, and (2) many of the Big Cats are “hybrids” which are not covered by the ESA.

The court rejects this argument for multiple reasons. First, it is procedurally improper because Defendants assert it in a response brief. *See* S.D. Ind. L.R. 7-1(a) (motions seeking affirmative relief must not be contained within a response). The WIN Defendants' contention that only three Big Cats are subject to transfer is not a response to *where* the Big Cats will be located; it is a request to redetermine *which* Big Cats are subject to the court's orders. This is essentially a request to reconsider the merits of the court's previous orders, and so it is improper for the WIN Defendants to assert it in a response brief.

Second, it comes too late. The WIN Defendants never raised these issues at summary judgment and now assert them more than twenty-eight days after the court granted PETA's motion for partial summary judgment and request for a permanent injunction. Since they have not shown any extreme hardship as to why they could not present this argument earlier, their requests are untimely. *King v. Newbold*, 845 F.3d 866, 866 (7th Cir. 2017).

Third, this argument is based on newly disclosed evidence. Defendants for the first time have fully disclosed the age of each Big Cat when it was acquired and whether it was used in Tiger Baby Playtime. This information should have been disclosed during discovery, and the WIN Defendants' related arguments should have been presented at summary judgment. It is simply too late now. *See also Uphoff v. Elegant Bath, Ltd.*, 176 F.3d 399, 410 (7th Cir. 1999) (district court properly denied motions seeking to alter the judgment in ways that could have been presented at summary judgment); *see also Dal Pozzo v. Basic Machinery Co., Inc.*, 463 F.3d 609, 615 (7th Cir. 2006) (“Motions to alter or amend judgments are no place to start giving evidence that could have been presented earlier.”) (citations omitted).

Finally, the WIN Defendants' argument fails on the merits. The court has broad remedial authority under the ESA to protect endangered species:

There is little guidance for courts exercising injunctive power under the ESA to relocate privately-owned animals. However, the express purpose of the ESA . . . is the conservation of endangered species. Conservation is defined as all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which ESA protections are no longer necessary. I believe this general principle . . . should inform courts exercising their injunctive powers in cases such as these.

Kuehl v. Sellner, 887 F.3d 845, 856 (8th Cir. 2018) (Goldberg, J. concurring) (internal quotations and citations omitted). That authority not only includes protecting animals that have already been taken under the ESA, but also preventing *future* harms to endangered species who have yet to be taken. *See Tri-State Zoological Park*, 424 F.Supp.3d at 434 (permanently enjoining zoo owners from owning or possessing any endangered species after owners harmed nine federally protected animals); *Kuehl v.*


Sellner, 161 F.Supp.3d 678, 719 (N.D. Iowa 2016), *aff'd* 887 F.3d 845, 856 (8th Cir. 2018) (permanently enjoining animal owners from acquiring new endangered species without first receiving court approval). In other words, if a zoo owner has five animals and has harmed four of them, the court can relocate the fifth one preemptively. Indeed, it makes little sense if the court can relocate animals that have been harmed but must wait for harm to occur for it to relocate others. So even if certain Big Cats were never declawed or used in Tiger Baby Playtime—or were declawed or used prior to being listed as an endangered species—the court has the authority to relocate them to prevent *future* harm. *Tri-State Zoological Park*, 424 F.Supp.3d at 434. In light of the evidence discussed more thoroughly in the court's summary judgment order, the ESA authorizes the court to transfer all of the WIN Defendants' Big Cats, which the court determines to mean all Big Cats that have been within the ownership, possession, custody, or control of any of the WIN Defendants in Indiana, or any of their agents or any other people or entities under their direct or indirect control, during the pendency of this litigation, including the lion in the possession of Daniel Chambers, and the four lions in defendant Jeffrey L. Lowe's possession that were within the ownership, possession, custody, or control of the WIN Defendants.

One final point. The WIN Defendants contend hybrids are not covered under the ESA. That is not true: hybrids of *protected* species are covered under the ESA. *United States v. Kapp*, 419 F.3d 666, 673 (7th Cir. 2005). Although it is true that hybrids of *unprotected* species are *not* covered, Defendants never offered any evidence to create a question of fact as to whether the Big Cats at issue were covered. Since tigers and lions

and their subspecies are protected, *see* 50 C.F.R. § 17.11(h), Defendants' assertion that their hybrids are not covered is unpersuasive.

For those reasons, PETA's Motion for Appointment of a Special Master (Filing No. 381) is **DENIED**. PETA's Motion for Determination of the Sanctuaries (Filing No. 382) is **GRANTED**. The court will modify its injunction to clarify that all of the WIN Defendants' Big Cats, as defined above, are subject to the court's injunction. The court approves Turpentine Creek Wildlife Refuge in Eureka Springs, Arkansas, and the Wild Animal Sanctuary in Keenesburg, Colorado, as relocation sanctuaries and directs that all of the WIN Defendants Big Cats be transferred to such sanctuaries in such manner directed by separate order.

SO ORDERED this 15th day of September 2020.


RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

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