

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CERTIFICATE OF SERVICE

Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. v. State of Wisconsin, et al.
Case No.: 74-CV-0313

I hereby certify that on December 10, 2012, I electronically filed the following documents:

**DEFENDANTS' MOTION IN LIMINE REGARDING EVIDENCE OF SETTLEMENT
DISCUSSIONS;**

**DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' CLAIM BASED UPON THE
"OTHER LIBERALIZATION AMENDMENT" OF THE PARTIES' 2011 STIPULATION;**

**DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTIVE
RELIEF AND IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE;**

**DEFENDANTS' PROPOSED FINDINGS OF FACT IN OPPOSITION TO PLAINTIFFS'
MOTION FOR INJUNCTIVE RELIEF;**

**DEFENDANTS' RESPONSE TO PROPOSED FINDINGS OF FACT IN SUPPORT OF
PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF;**

SECOND AFFIDAVIT OF CATHY STEPP;

SECOND AFFIDAVIT OF RANDALL STARK

AFFIDAVIT OF DAVID ZEBRO;

AFFIDAVIT OF TAMARA RYAN;

AFFIDAVIT OF CHARLES S. HORN;

AFFIDAVIT OF SCOTT GUNDERSON;

AFFIDAVIT OF QUINN WILLIAMS;

AFFIDAVIT OF MICHAEL LUTZ; AND

AFFIDAVIT OF DIANE L. MILLIGAN

using the ECF system which will notify:

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Dated this 10th day of December 2012.

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THE UNITED STATES DISTRICT Court
FOR THE WESTERN DISTRICT OF WISCONSIN

LAC COURTE OREILLES BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS;
RED CLIFF BAND OF LAKE SUPERIOR
CHIPPEWA INDIANS; SOKAOGON
CHIPPEWA INDIAN COMMUNITY;
ST. CROIX CHIPPEWA INDIANS OF
WISCONSIN; BAD RIVER BAND OF THE
LAKE SUPERIOR CHIPPEWA INDIANS;
and LAC DU FLAMBEAU BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS,

Plaintiffs,

v.

Case No. 74-C-313-C

STATE OF WISCONSIN, WISCONSIN
NATURAL RESOURCES BOARD,
CATHY STEPP, KURT THIEDE and
TIM LAWHERN,

Defendants.

DEFENDANTS' MOTION IN LIMINE
REGARDING EVIDENCE OF SETTLEMENT DISCUSSIONS

PLEASE TAKE NOTICE that the defendants, State of Wisconsin, et al., by their counsel, Wisconsin Attorney General J. B. Van Hollen and Assistant Attorneys General Diane L. Milligan and Thomas L. Dosch, move the Court for an order excluding evidence of the substance of the parties' settlement discussions. As grounds for this motion the defendants state:

1. In support of their motion for preliminary and permanent injunctive relief, the plaintiffs have submitted affidavits and exhibits extensively reflecting the substance of the parties' settlement negotiations. Under the scheduling order relating to the hearing of the

plaintiffs' motion, the defendants' responsive materials are required to be filed today, December 10, 2012, and to demonstrate factual disputes about various of the plaintiffs' representations, defendants have filed responsive affidavits and exhibits which also include evidence about the substance of settlement negotiations.

2. The plaintiffs presumably submitted this evidence in support of their legal theory that the so-called "other liberalization" amendment (deriving from Section III.A.2, of the parties' 2011 *Stipulation for Technical Management and Other Updates: Second Amendment of the Stipulations Incorporated In The Final Judgment*) authorized the issuance of the disputed Great Lakes Indian Fish & wildlife Order, and that any evidence bearing on the "unreasonableness" of the defendants' refusal to consent to the GLIFWC Order is therefore somehow relevant to the order's authority (even though the stipulation requires consent prior to issuance of any order).

3. If the Court strikes the plaintiffs' "other liberalization claim," however, as defendants request it to do in their separately filed motion to strike and in the Defendants' Brief In Opposition To Plaintiffs' Motion Preliminary and Permanent Injunctive Relief, evidence of the substance of the parties' settlement discussions would appear not to be material to any remaining issues before the Court. In that event such evidence, though already submitted, should not be considered by the Court.

4. If the Court does not strike the plaintiffs' "other liberalization claim," various of the statements purportedly made in settlement discussions may be inadmissible for other reasons, depending on the circumstances of each and its intended use in Court (e.g., to prove the fact of "consultation," or to prove the reasonableness of an offer made or the unreasonableness of its rejection, etc.). Under Fed.R.Evid. 408, evidence of statements made by defendants during settlement may not be used to "disprove the validity" of the state's claim that state regulation of

deed shining continues to be necessary for the protection of public safety, nor should it be admitted to impeach state officials by means of prior inconsistent statements.

Wherefore, the defendants that the Court enter an order excluding evidence of the substance of the parties' settlement discussions.

Dated this 10th day of December, 2012.

J.B. VAN HOLLEN
Attorney General

/s/ Diane L. Milligan

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IN THE UNITED STATES DISTRICT COURT
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LAC COURTE OREILLES BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS;
RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA
INDIANS; SOKAOGON CHIPPEWA INDIAN COMMUNITY;
ST. CROIX CHIPPEWA INDIANS OF WISCONSIN;
BAD RIVER BAND OF THE LAKE SUPERIOR
CHIPPEWA INDIANS; and LAC DU FLAMBEAU
BAND OF LAKE SUPERIOR CHIPPEWA
INDIANS,

Plaintiffs,

v.

Case No. 74-C-313-C

STATE OF WISCONSIN, WISCONSIN
NATURAL RESOURCES BOARD,
CATHY STEPP, KURT THIEDE and
TIM LAWHERN,

Defendants.

DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' CLAIM BASED UPON THE
"OTHER LIBERALIZATION AMENDMENT" OF THE PARTIES' 2011 STIPULATION

PLEASE TAKE NOTICE that the defendants, State of Wisconsin, et al., by their counsel, Wisconsin Attorney General J. B. Van Hollen and Assistant Attorneys General Diane L. Milligan and Thomas L. Dosch, move the Court, pursuant to Rule 12(f)(2), Fed.R.Civ.P., to strike the claim in the plaintiffs' *Motion for Preliminary and Permanent Injunctive Relief* that Section III.A. of the parties' 2011 *Stipulation for Technical Management and Other Updates: Second Amendment of the Stipulations Incorporated In The Final Judgment*, sometimes referred to as the "other liberalization amendment process," authorized the issuance of Great Lakes Indian Fish & Wildlife Commission (GLIFWC) Order No. 2012-05.

As grounds for this motion, the defendants state:

1. The plaintiffs and their agent GLIFWC lacked authority under the parties' stipulation to issue the Order because it concerns matters outside the scope of the "other liberalization amendment process."

2. The "other liberalization amendment process" cannot operate to allow the parties effectively to amend the court's rulings or to provide a means to circumvent the constraints of the court's orders.

3. The "other liberalization amendment process" cannot authorize the issuance of GLIFWC orders in the absence of the parties' agreement.

Wherefore, the defendants ask that the court enter an order striking plaintiffs' "other liberalization amendment process" based claim as legally insufficient and immaterial.

Dated this 10th day of December, 2012.

J.B. VAN HOLLEN
Attorney General

/s/ Diane L. Milligan
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Assistant Attorney General
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THOMAS L. DOSCH
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BAND OF LAKE SUPERIOR CHIPPEWA
INDIANS,

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Case No. 74-C-313-C

STATE OF WISCONSIN, WISCONSIN
NATURAL RESOURCES BOARD,
CATHY STEPP, KURT THIEDE and
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Defendants.

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR
INJUNCTIVE RELIEF AND IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE

INTRODUCTION

By their motion Plaintiffs ask this Court to enjoin Defendants from enforcing against their members the prohibition against off-reservation night hunting of deer found in Wis. Admin. Code § NR 13.30(1)(q). Plaintiffs make clear they rely upon one primary legal theory and another in the alternative. The first is that the commonly-called "other liberalization amendment" provision in Section III.A of the Parties' 2011 *Stipulation for*

Technical Management and Other Updates: Second Amendment of the Stipulations Incorporated In the Final Judgment 20 authorized the Executive Administrator of Great Lakes Fish & Wildlife Commission (GLIFWC) to issue a "commission order" legalizing the hunting of deer at night.¹ Alternatively,² Plaintiffs contend they are entitled an injunction under Fed.R.Civ.P. 60(b) because the GLIFWC Order is "suitable."³

In response, Defendants have filed a motion to strike as legally insufficient Plaintiffs' claim that Section III.A. of the Parties' 2011 stipulation—the "other liberalization amendment" provision—can operate to authorize the issuance the GLIFWC Order. Plaintiffs' alternative legal theory, depending as it does on the validity of the GLIFWC Order, would also fail if the motion to strike if were to be granted.

This brief is submitted both in support of Defendants' motion to strike and in opposition to Plaintiffs' motion. It will demonstrate not only that Plaintiffs' claims should be dismissed without an evidentiary hearing, but that even if they are not dismissed outright Plaintiffs have not demonstrated entitlement to temporary injunctive relief.

¹ See Plaintiffs' Notice of Mot. and Mot. for Prelim. and Permanent Injunctive Relief, ¶ 16; Memorandum In Support of Plaintiffs' Mot. for Prelim. Injunctive Relief brief at 19; and Affidavit of Jim Zorn, ¶ 8.

² See Pls.' Mot., ¶ 17; Pls' Mem. at 27-31.

³ See Pls.' Mem. at 30. Although Plaintiffs don't argue it in such terms, the Defendants assume (because its relevance would otherwise be unclear, that their reference to "suitability" is to the "adequacy" standard for tribal regulations which can preclude enforcement of a state law counterpart. See *Lac Courte Oreilles Band of Lake Superior Chippewa*, 668 F.Supp. 1233, 1241 (W.D.Wis. 1987) ("*LCO IV*").

FACTS

Defendants' Proposed Findings of Fact in Opposition to Plaintiffs' Motion for Injunctive Relief (DFOF) and Defendants' Responses to Proposed Findings of Fact in Support of Plaintiffs' Motion for Injunctive Relief (Defs.' Rebuttal Facts) are incorporated by reference here.

ARGUMENT

I. PLAINTIFFS' MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION SHOULD BE DISMISSED BECAUSE A COMMISSION'S ORDER ON NIGHT HUNTING OF DEER IS NOT AUTHORIZED BY LAW.

- A. The "other liberalization amendment procedure is inapplicable as a matter of law.

GLIFWC expressly issued the disputed Order No. 2012-05 ("the GLIFWC Order") "in the implementation of *Section III.A. of the Stipulation for Technical, Management and Other Updates: Second Amendment of the Stipulation[s] Incorporated into the Final Judgment. ...*" Defendants' Proposed Findings of Fact ("DFOF"), ¶ 182. Section III.A.2. of the cited *Second Amendment of the Stipulations* reads:

- A. The parties agree that the language of: Section 7 of the Stipulation on Biological and Certain Remaining Issues; Section 7 of the Stipulation on Enforcement (Docket Number 911); Section C of the Stipulation for Miscellaneous Species and Regulatory Matters (Docket Number 1607, subpart 2); Section C of the Stipulation for Black Bear, Migratory Birds, and Wild Plants (Docket Number 1607, subpart 2); Section E of the Stipulation for the Deer Trial (Docket Number 1167); Section C of the Stipulation for Fisher, Fur Bearers, and Small Game (Docket Number 1289); and Section B of the Stipulation for Fish Species other than Walleye and Muskellunge (Docket Number 1568) will be amended as follows:

...

2. The [GLIFWC] Executive Administrator may, after consultation with the State and upon agreement of the Parties (where consent may not be unreasonably withheld), issue a Commission Order to provide tribal members more treaty harvest opportunities consistent with those available under state law to state harvesters, subject to the stipulations previously filed in this matter and the law of the case, pertaining to fish and game-related regulatory amendments of the Model Code.

DFOF ¶ 24; Pls.' Ex. 5). This provision—sometimes referred to as the "other liberalization amendment process" or the "other liberalization amendment"—establishes the process by which the Parties can amend the specifically listed stipulations, or enumerated parts thereof, which had been incorporated by reference into this Court's 1991 final judgment.⁴

As shown above, Plaintiffs to rely on the "other liberalization amendment" as the legal authority for GLIFWC's promulgation of a commission order on night hunting of deer. There are several reasons why, as a matter of law, "other liberalization amendment" does not and cannot provide legal authority for the disputed GLIFWC order.

1. The 2001 Amended Judgment and the "other liberalization amendment" developed under it were not intended, and cannot operate to, allow the Parties to amend or deviate from this Court's rulings.

The 2011 *Stipulated Second Amendment* in which the "other liberalization amendment process" was established was the second in the series of stipulations the Parties have entered into under the authority of this Court's June 13, 2001 Amended

⁴ *Lac Courte Oreilles Indians v. State of Wis.*, 775 F.Supp., 321 (W.D.Wis. 1991).

Judgment. Dkt 1798; Pls. Ex. 15. Prior to issuing the Amended Judgment, the Parties lacked the flexibility and authority to amend any stipulation incorporated into this Court's Final Judgment. Recognizing this, the Parties jointly moved the Court, pursuant to Fed. R. Civ. P. 60(b)(6), to amend the Final Judgment to permit the Parties "to modify the stipulations which were incorporated into the final judgment" by "mutual agreement." *Id.* (emphasis added).

The Parties' motion, however, did not seek unlimited amendment authority. Rather, it specifically clarified that:

The parties intend and understand, as provided in Fed.R.Civ.P. 60(b), that *neither this motion*, nor any stipulations filed pursuant to a judgment amended as requested by this motion, *shall affect the finality of the final judgment* entered in this matter on March 19, 1991, nor suspends its operation.

Pl. Ex. 16. (emphasis added). The Parties, therefore, sought only the authority to make mutually-agreeable, out-of-court changes to the list of pre-trial stipulations which were incorporated into the Final Judgment, but not the authority to "undo" or circumvent provisions of the final judgment.

This Court, in entering its Amended Judgment, granted the Parties' motion as written. In doing so, the Court acknowledged that the joint motion was intended *only* to authorize the Parties "to amend the stipulations listed in the final judgment at 775 F. Supp. 324-325 and there referenced to as docket numbers 911, 912, 913, 914, 1167, 1222, 1271, 1289, 1568 and 1607." Dkt 1798; Pl. Ex. 15 at 1. As requested by the

Parties, the Amended Judgment did not authorize the Parties to amend the terms of the Final Judgment itself.

Importantly, off-reservation night hunting of deer is not the subject of one of the specifically-listed pre-trial stipulations which the Parties are permitted to amend out-of-court. Rather, it was addressed in the 1989 Deer Trial decision (docket number 1558), in which this Court held that "Defendants may enforce the prohibition on shining of deer contained in s. NR 13.30(1)(q) until such time as Plaintiffs adopt regulations identical and scope and content" *Lac Courte Oreilles Indians v. State of Wis.*, 775 F. Supp. 321, 324 (W.D. Wis. 1991). Because that holding was later incorporated into the Final Judgment (docket number 1636), it is a matter which the Amended Judgment does *not* authorize the Parties to amend out of court.

By issuance of the GLIFWC Order, Plaintiffs have effectively turned the terms of the Amended Judgment on its head: one Party, by unilateral action, can circumvent—if not altogether rewrite—the terms of the Final Judgment. If an action such as this were permitted to stand, this Court would establish an unprecedented circumstance in which its decision would no longer be treated as binding.

2. By its express terms, the "other liberalization amendment" does not apply to the subject of tribal deer hunting ordinances which may preempt state laws.

Plaintiffs contend that the Section III.A. of the "other liberalization amendment" has operated to authorize the GLIFWC Executive Administrator to modify tribal nighttime deer hunting regulations so as to preempt (or more accurately "preclude") the

enforcement of state law—specifically, the state's prohibition against off-reservation shining of deer. In making this argument, however, Plaintiffs overlook an insurmountable legal obstacle the "other liberalization amendment" pertains *only* to the subject of deer resource management, and not to preemption of the state's deer hunting law.

The list of stipulations and parts of stipulations to which the "other liberalization amendment" applies includes "*Section E of the Stipulation for the Deer Trial* (Docket Number 1167)", but tellingly makes no reference to any other part of the deer stipulation.

DFOF ¶ 24. Section E of the deer trial stipulation addresses only deer "Management Authority"—that is, matters such as the deer resource management processes the Parties will employ, tribal representation on DNR deer resource management committees, etc. DFOF ¶ 25. "Provisions related to Tribal Enforcement and Preemption of State Law," however, is not included in Section E, but rather the separate Section B, (DFOF ¶ 26; Dkt 1167 at 3-16) which includes a long list of tribal code provisions and identifies the correlating preempted state regulations. Similarly, Ceremonial Use ("the harvest and utilization of deer for religious and/or ceremonial purposes") is also not encompassed in Section E, but rather Section F.

Neither Section B nor Section F are listed in the "other liberalization amendment" of Section IIIA.2. of the 2011 *Second Amendment of the Stipulations*.⁵ DFOF ¶¶ 28, 29. As a result, the Plaintiffs' attempt to unilaterally preempt state law which prohibits off-reservation night-shining of deer is simply outside the scope of the "other liberalization amendment." DFOF ¶ 30. The GLIFWC Order, therefore, must be deemed invalid.

3. The "other liberalization amendment process" does not authorize the issuance of GLIFWC orders in the absence of the Parties' agreement.

There is a third critical flaw with Plaintiffs' legal theory: nothing in the "other liberalization amendment process" provides that in the event the State's consent is "unreasonably withheld" the GLIFWC Executive Administrator may nonetheless unilaterally issue a commission order to authorize a change in tribal code. However, that is what he has done here.⁶ If such a unilateral action was permitted, the requirement in

⁵ Perhaps tellingly, when GLIFWC first identified the Plaintiffs' interest in legalizing deer shining on May 23 and July 29, 2012 in their "Issue set # IX" in GLIFWC's "Issue Set Summary" entitled "Tribal Shining Regulatory Amendment," (Williams Aff. ¶ 7, 11; Defs. Exs. H and N). as well as their July 30, 2012 "Issue Set # IX – Proposed Stipulation Change: Tribal Shining Regulatory Amendment" (Williams Aff. ¶13, Defs. Ex. T.) they characterized it as follows: "[t]he language of *Section B.3* of the *Stipulation for the Deer Trial* (Docket Number 1167), . . . [is] proposed to be amended to reflect these regulatory changes.)

⁶ In his affidavit the GLIFWC Commissioner acknowledges this is not spelled out in the stipulation but that's how he has chosen to interpret it. (Zorn Aff. ¶ 9)

Section III.A.2. that a commission order may only be issued "upon agreement of the Parties" would have no meaning.⁷

While it is true that the other liberalization amendment provision provides that consent to the issuance cannot be unreasonably withheld, it most certainly does not state that in the event the Plaintiffs subjectively perceive that Defendants have unreasonably withhold consent, they are free to issue a commission order anyway. The "other liberalization amendment" is altogether silent on whether *any* remedy may be sought. The "other liberalization amendment process" simply provides no legal authority for the plaintiff's "self-help" promulgation of tribal laws in contravention of this Court's rulings and the Parties' stipulations.

⁷ This consent requirement is reiterated in Model Code Section 3.33(1)(c), the language of which the Parties agreed to and was arguably incorporated by reference in section III.B. of the 2011 Stipulated Second Amendment:

(c) Other Liberalization Amendments: The Great Lakes Indian Fish and Wildlife Commission Executive Administrator may, after consultation with the State and *upon agreement of the Parties* (where consent may not be unreasonably withheld), issue a Commission Order to provide tribal members more treaty harvest opportunities in line with state harvesters subject to the Voigt Stipulations and Case parameters pertaining to other fish and game related regulatory amendments of the Model Code;

See Pls. Ex. 5 at 58 (emphasis added).

- B. Even if the "other liberalization amendment" were legally applicable here and provided the requested kind of remedy, Plaintiffs' claim would still fail.

- 1. Consent by the State was not "unreasonably withheld."

The State does not violate Section III.A.2. of the 2011 Stipulation when it declines to consent to the issuance of a GLIFWC Order unless its consent is "unreasonably withheld." Here the evidence is clear that the state *reasonably* withheld its consent to the proposed legalization of tribal night hunting of deer.

- a. Determining whether or not the State's refusal to consent was "reasonable" should be subject to a rational basis test, and not "subject to the stipulations previously filed in this matter and the law of the case."

It has been suggested in at least two of Plaintiffs' submissions (See Kekek Jason Stark Aff. ¶ 8; Zorn Aff. ¶ 16.h.), if not argued in their brief, that the word "unreasonably" in Section III.A.2. should be construed to mean that the State may only withhold consent to a commission order for the same reasons that it may seek to regulate the exercise of the Plaintiffs' off-reservation rights in the first instance: conservation or public health and safety. However, that is simply not how the stipulation is worded.

The other liberalization amendment provision provides:

The [GLIFWC] Executive Administrator may, after consultation with the State and upon agreement of the Parties (where consent may not be unreasonably withheld), *issue a Commission Order to provide tribal members more treaty harvest opportunities consistent with those available under state law to state harvesters, subject to the stipulations previously filed in this matter and the law of the case*, pertaining to fish and game-related regulatory amendments of the Model Code.

(emphasis added) (see also DFOF ¶ 34). As written, the clause "after consultation with the state and upon agreement of the Parties" modifies, or conditions, the first clause of the paragraph. That is, it triggers at the point that the GLIFWC Executive Administrator may carry out the actions described in the paragraph. However, the clause "subject to the stipulations previously filed in this matter and the law of this case" modifies only the immediately preceding clause. That is, it constrains the subject matter of a commission order "issue[d] by the GLIFWC Administrative Director."

By this plain language analysis, it is clear the other liberalization amendment procedure does not restrict the reasons by which the State may permissibly withhold consent its consent to a proposed commission order to the law of the case. Rather, the State may withhold consent for any reason, as long as it is reasonable. This is consistent with the State's lead negotiator's intent, practice and analysis, and with his observation that the Tribes, until this case, have never articulated this position, either during the negotiation of the language at issue or prior to this disputed Commission Order (Lutz Aff. ¶ 5).

- b. Even if determining whether or not the State's refusal to consent was "reasonable" is "subject to . . . the law of the case," the State meets this standard.
 1. The "law of the case" allows the State to enforce the prohibition on shining of deer under state law.

Even if Mr. Stark's and Mr. Zorn's unsupported assertions were to be believed, the "law of the case" provides that the State may enforce the prohibition on shining of deer contained in DNR until such time as the Tribes adopt regulations identical in scope and content to that Code. This point was made by Secretary Stepp to Mr. Zorn on November 15, 2012:

Additionally, we disagree with your statement that the "applicable precedent" obligates the State to adopt the Tribes' evolving deer shining proposal. The Parties' stipulation provides only that "consent may not be unreasonably withheld," and does not limit the State's reasons for withholding consent to "the law of the case" or to strictly legal objections. Even so, we believe that the Amended Order is inconsistent with the law of the case, since the State "may enforce the prohibition on shining of deer contained in [DNR Code] until such time as [the Tribes] adopt regulations identical in scope and content to [that Code]." *Id* at 324. As a result, the Department must withhold its agreement to the issuance of the Amended Order.

(Stepp Aff. Ex. B).

2. Even if the State's "reasonableness" in withholding consent is "subject to . . . the law of the case," the State's safety concerns regarding the Tribal order meet this standard.

Even if this Court's determination that the State "may enforce the prohibition on shining of deer contained in [DNR Code] until such time as [the Tribes] adopt regulations

identical in scope and content to [that Code]," (*Lac Courte Oreilles Indians v. State of Wis.*, 775 F. Supp. 321 at 324 (W.D. Wis. 1991)) was not "the law of the case," Plaintiffs do not and cannot argue that the States unreasonably withheld consent when it asserted that the GLIFWC Order does not adequately protect public health, safety and welfare. Pls. Mem. at 6, 21 - 27.

As shown in Section I.B.1.c. and II.B.2. below, the State's safety concerns are significant; indeed they are significant enough to warrant denial of the Tribes' alternative Rule (60)(b) motion. The Tribes ask this Court to ignore the State's safety concerns and instead rule that it is the Tribes, not this Court, that determines whether not a particular objection based on the "law of the case" is sufficient to constitute a "reasonable" withholding of consent. This construction would allow the Tribes to unilaterally pre-empt state law on an issue that was heavily litigated 25 years ago, and for which there remains substantive and substantial disagreement as to safety. It would also allow the Tribes to circumvent the any other aspect of this Court's final judgment if they decided the State did not reasonably agree that the judgment should be changed. Such a construction cannot stand.

- c. The State reasonably withheld consent based on concerns related to public health, safety, and welfare.

One of the reasons the State refused to consent to the tribal deer night hunting proposal was because the proposal raised numerous serious safety concerns which were not resolved before the GLIFWC Executive Administrator issued the GLIFWC Order

without the state's consent. *See, e.g.*, DFOF at ¶¶ 9, 135-177, 187-192. These concerns are both significant and reasonable, and for the purposes of this paragraph, the State incorporates Section II.B.2. of its brief to further substantiate this point. (Note: pursuant to the relief requested, it may be unnecessary to reach the issue of whether the Plaintiffs will prevail in meeting their burden under Rule 60(b) to establish the relative safety of their Commission Order for a variety of reasons, including mootness/ripeness should the State's motion to dismiss be granted).

- d. The State reasonably withheld consent based on insufficient time to educate the public and enforcement staff for any implementation of the tribal proposal this year.

Another reason the State reasonably withheld consent was that the State had insufficient time to adequately educate or advise the public or relevant state and local law enforcement staff about this potentially significant change in Tribal harvest activity, a problem compounded by the frequently shifting proposed timeframes and regulatory schemes laid out by the Tribes. DFOF ¶¶ 108, 109, 112, 115, 121, 173, 174, 177, 185. This position was well-defined in the State's letter to the Tribes on October 30, 2012, (Second Affidavit of Cathy Stepp Aff. ¶ 12, Def. Ex E), which stated:

These, of course, are just the issues that the Department has been able to address in the short time since the Commission Order was presented. And, while we certainly appreciate the willingness of the Tribes to narrow the scope of the Commission Order to only night hunting of deer in the hopes of aiding more focused consultation, there has not been sufficient time for the Parties to properly consider the Department's concern, or to adequately prepare for the significant public outreach and education that would be necessary if any such proposal was put into place for this year.

The problem of short notice was further exacerbated by the Tribes' ongoing insistence that the negotiations be kept confidential under the rubric of confidential stipulation/settlement negotiations, a request which was honored by the State.⁸ "PRIVILEGED AND CONFIDENTIAL," Williams Aff. Def. Ex. A; Pl. Ex. 26; Pl. Ex. 29; First Stepp Aff. Def. Ex. A. Notably, educating the "general public in issues and events related to [the exercise of usufructuary rights reserved in the Treaties of 1837 and 1842]" is a laudable goal of the Voigt Task Force, and by extension, GLIFWC. (DFOF ¶ 37, section 9). The importance of public notice and outreach cannot be understated, particularly given that not only is the shining/night hunting of deer something that has historically never happened in Wisconsin, but particularly since the type of shining/night hunting detailed in the Plaintiffs' Commission Order is not found anywhere else in the country. DFOF ¶¶ 193, 194, 195. The Plaintiffs' unilateral action, without opportunity for effective joint public outreach and education, does nothing but

⁸ Although Plaintiffs, in passing in a footnote on the bottom of page 5 of their brief note that "the Tribes were under the belief that the Parties had agreed to keep the substance of the consultation sessions confidential," notwithstanding the change to a completely new, and arguably not confidential, "other liberalization" process, and assert that "[t]he State, however, selectively submitted letters detailing the events of some of those consultation sessions to this Court in support of its Motion to Enforce Prohibition on Shining Deer," and that "[t]herefore, the Tribes feel compelled to provide the Court with a complete picture of the Parties' negotiation," it appears that, notwithstanding the State's motion to strike predicated on the inadmissibility of the communications and subjects of confidential negotiations, this footnote is somewhat self-serving to the extent that evidence of these "confidential" sessions are the basis for Plaintiffs' contention under Section I.A.1. at 20 of their brief that "[t]he Tribes consulted with the State at length," and support Plaintiffs' Findings of Fact at paragraphs 27 and 28, and presumably would have been included in Plaintiffs' response.

further the potential for misinformation and lack of public awareness and understanding of their usufructuary rights.

- e. The State reasonably withheld consent because the tribal proposal was not "consistent with [the opportunities] available under state law to state harvesters."

Another reason the State reasonably refused to consent was that the Plaintiffs' proposal for night hunting of deer simply was not—in the terminology of the "other liberalization amendment"—"consistent with those [opportunities] available under state law to state harvesters." *See* DFOF ¶¶ 136, 137, 193 -195, 215-268. Plaintiffs' contend that this language in the "other liberalization amendment" allows for "changes made to the Model Code [that] would not exactly mirror the Model Code⁹ changes in State law," (Plaintiffs' memo, page 14, "Factual Background" Section D) noting that "'technical amendments' must be 'in line with' or identical to changes in State law . . . while 'other liberalization amendments' need only be 'consistent with [the opportunities] available

⁹ Model Code Section 3.33(1)(c), the language of which the Parties agreed to and was arguably incorporated by reference in section III.B. of the 2011 Stipulated Second Amendment, states:

(c) Other Liberalization Amendments: The Great Lakes Indian Fish and Wildlife Commission Executive Administrator may, after consultation with the State and upon agreement of the Parties (where consent may not be unreasonably withheld), issue a Commission Order to provide tribal members more treaty harvest opportunities *in line* with state harvesters subject to the Voigt Stipulations and Case parameters pertaining to other fish and game related regulatory amendments of the Model Code;

(emphasis added)

under state law to state harvesters.'" (Plaintiff's memo, page 19, Section I.A.1.) Setting aside the apparent contradiction in this analysis by virtue of the identical "in line with" language in the corresponding "other liberalization amendment" language found in section 3.33(1)(c) of the Model Code. This is not "consistent" with the plain language of the "other liberalization amendment." Notably, there is no definition provided in the stipulations or the Model Code to support Plaintiffs' analysis. As such, the Court may look to a plain language dictionary definition (Sanders v. Jackson, 209 F. 3d 998, 1000 (7th Cir. 2000) (courts use dictionary definitions to determine plain meanings of words). Merriam-Webster's online dictionary (<http://www.merriam-webster.com/> (last visited Dec. 9, 2012) defines the term "consistent" as "marked by harmony, regularity, or steady continuity: free from variation or contradiction." Apparently, Plaintiffs' interpretation is that, so long as the *method* is available to state harvesters is consistent with the *method* used in the Plaintiffs' Commission Order, that is sufficient to meet the definition of "consistent" in the "other liberalization amendment."¹⁰ (Jim Zorn Aff. ¶ 8, Kekek Jason Stark Aff. ¶ 7) This "selective consistency" of the Commission Order with 2001 Wisconsin Act 169 and its corresponding rule regarding the harvest of wolves is not "marked by harmony, regularity, or steady continuity," and is hardly "free from variation

¹⁰ Further, Plaintiffs' proposed method is also not "consistent" with the methods allowed by the State for night hunting of wolves under 2011 Wisconsin Act 169, since there is no requirement that Tribal members hunt over bait or use predator calls to draw the animal in. DFOF ¶ 107.

or contradiction." As discussed in greater detail below, however, the State does not currently, and has never before, extended night hunting opportunities for deer to state harvesters. With respect to those few other species for which night hunting is currently permitted, tribal members are afforded identical opportunities as those provided to state harvesters. Accordingly, affirming the GLIFWC Order would extend opportunities to tribal harvesters which exceed, and therefore are not consistent with, opportunities available to state harvesters. As a result, the "other liberalization amendment" is not, in the Defendants' view, even applicable to this subject matter, and Defendants' decision to withhold consent to the GLIFWC Order was not unreasonable.

2. Plaintiffs own actions allowed Defendants insufficient time for consultation.

Adequate consultation requires both Parties to have all of the relevant information regarding the issue subject to discussions. The facts, however, prove that Plaintiffs consistently provided minimal notice and opportunity for review by the state, effectively preventing Defendants from engaging in adequate consultation despite their best efforts.

The State and the Tribes began the current "Stipulation for Technical, Management, and Other Updates: Third Amendment of Stipulations Incorporated into the Final Judgment" in October 2011, when GLIFWC Attorney/Policy Analyst Jason Stark sent WDNR Attorney Quinn Williams a three-page list of potential stipulation amendment issues that were being proposed by the Tribes as part of the Parties' third round of biennial stipulation review negotiations, did not include any proposed amendments related to Tribal shining or night hunting of deer. DFOF ¶¶ 71, 72. Even so,

the stipulation issue (not Commission Order) entitled "Tribal Shining Regulatory Amendment" related to the night hunting of a number of species, including deer, was not provided to the State as even a general concept until May 21, 2012 (DFOF ¶¶ 76, 77, 79, 80 and 81). The Tribe and the State continued to have the understanding that all of the issues subject to discussion were part of the agreed-upon stipulation process (DFOF ¶¶ 77, 79, 82, 83, 85, 88, 90, 96, 99, 100, 101).

On approximately August 15, 2012, the Tribes decided to change the process by which they wanted to address the "Tribal Shining Regulatory Amendment" related to the night hunting of a number of species, including deer. (DFOF ¶ 103). This "other liberalization" process change was informally presented to the Department on August 21, 2012 (DFOF ¶¶ 108, 109, 110), and formally on August 23, 2012 (DFOF ¶¶ 111, 112), and the first formal document identifying the Tribes new "other liberalization" process and proposal regarding the former stipulation related to the night hunting of a number of species, including deer, was provided on September 28, 2012. (DFOF ¶¶ 113, 114). The DNR relayed to the tribes early and often that the "other liberalization" process was not the agreed upon process for the former stipulation related to the night hunting of a number of species, including deer. (DFOF ¶¶ 115, 116, 129, 132). The unilateral change by the Tribes from a defined and mutually agreed-upon process with set timelines, review teams, and resources, to the truncated self-help "other liberalization" process made effective consultation on tribal proposal for night hunting of a number of species, including deer, impossible.

The current "Stipulation for Technical, Management, and Other Updates: Third Amendment of Stipulations Incorporated into the Final Judgment" process was set to follow the Parties agreed upon stipulation process for reviewing items of discussion, with a rough deadline of March, 2013 (DFOF ¶ 70). This timeframe changed after the Tribe's unilateral decision to formally change the process on September 28, 2012 when the proposed implementation date for the Tribe's then proposed "Great Lakes Indian Fish and Wildlife Commission Order – Order No. 2012-05 – Wisconsin 1837 and 1842 Ceded Territory Tribal Night Hunting Regulations" became October 4, 2012 (Pl. Ex. 26). Subsequently, on October 12, 2012, the Tribes appear to recognize, fairly late in the game, that the nature and complexity of the Tribe's proposal was such that, at a minimum, the issue needed to be simplified to only address the implementation of a now "deer only" Commission Order by pushing such a Commission Order to November 1, 2012. (Kekek Jason Stark Aff. ¶ 11i & Pls. Ex. 29, DFOF ¶¶ 127, 128). Finally, on the Tribes settled on November 9, 2012, after threatening implementation on November 1, 2012, the Tribes settled on the final date, if not final language, for the proposal to be implemented as November 26, 2012 (DFOF ¶ 178), although this was not finally made clear by the Tribes until November 21, 2012 (DFOF ¶¶ 183, 185, 186). During these shifting threatened implementation dates presented by the Tribes, the State clearly articulated that the "other liberalization" process would not provide sufficient time to review the Tribes proposal (DFOF ¶¶ 117, 120, 126, 126, 134, 185). Finally, the ever changing detail, language and scope of the Tribal proposal, from first applying to a number of species in

addition to deer changing between September 28, 2012 to October 12, 2012 (DFOF Pl.'s Ex. 26, Kekek Jason Stark Aff. ¶ 11i & Pls. Ex. 29, DFOF ¶¶ 127, 128), to the changing language that the Tribes unilaterally determined, without additional consultation, was responsive to some of the State's articulated concerns (DFOF ¶¶ 125, 126, 132, 133, 134, 178, 181, 182). Most troublingly, up until it was provided on Friday, December 7, 2012, the State had not been apprised of the current "Marksmanship Course" which is not only a requirement of the Commission Order (DFOF ¶¶ 126, 199), and it is unclear under which "Marksmanship Course" the Tribes have been training potential Tribal deer night hunters (F. Maulson Aff. ¶ 16.a.i.). Consultation on these specific language changes and details finally proposed and implemented by the Tribes has, to date, never happened.

As a result, based on the shifting nature of the Tribes unilaterally determined position on the appropriate process, timing of implementation and timing for appropriate, consultation, there was insufficient time for consultation on the changing Commission Order language still changing "Marksmanship Course" language and details to adequately review, discuss, and address the tribal deer hunting proposal.

- C. If the court dismisses Plaintiffs' "other liberalization amendment process" claim, the "alternative" 60(b) should also be dismissed as unripe.

As noted earlier, Plaintiffs' alternative claim is dependent upon their primary claim: they contend they should get relief under Fed.R.Civ.P. 60(b) because the disputed GLIFWC Order establishes "suitable" regulation of night deer hunting. But if the GLIFWC Order is invalid, as just demonstrated, there is no "suitable" tribal regulation to

preempt state law and justify the issuance of the requested injunction. It may be that Plaintiffs could promulgate the same tribal ordinances by other means and then pursue relief from the judgment under the rule. At this point, however, because the GLIFWC Order is invalid, a Rule 60(b) motion for an injunction is simply not ripe.

II. THE MOTION SHOULD BE DENIED BECAUSE PLAINTIFFS HAVE NOT MET THEIR BURDEN FOR ENTITLEMENT TO PRELIMINARY INJUNCTIVE RELIEF

A. Introduction

Plaintiffs contend that they should be entitled to a preliminary injunction which restrains Defendants from enforcing Wis. Admin. Code § NR 13.30(1)(q) (incorporating Wis. Stat. § 29.314 by reference) against tribal members in state courts. Pls.' Mot. at 1. This Court must consider four factors—not five, as Plaintiffs claim—in deciding whether a preliminary injunction should be granted. See Pls.' Mem. at 16. These factors are:

- 1) whether the plaintiff has a reasonable likelihood of success on the merits;
- 2) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue;
- 3) whether the threatened injury to the plaintiff outweighs the threatened harm an injunction may inflict on defendant; and
- 4) whether the granting of a preliminary injunction will disserve the public interest.

Pelfresne v. Vill. of Williams Bay, 865 F.2d 877, 882 (7th Cir. 1989). Plaintiffs concede that they, as the moving party, bear the burden of demonstrating that these factors have been met. Pls.' Mem. at 1. See also *AM Gen. Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 803 (7th Cir. 2002). Plaintiffs have not met their burden with respect to all—let alone any—of the four factors.

B. Plaintiffs cannot demonstrate the first factor: a likelihood of success on the merits.

1. Plaintiffs cannot prevail on their argument that a Commission Order can be used to authorize off-reservation night hunting of deer.

As shown in Section I of this brief, Plaintiffs' cannot use the "other liberalization amendment to change this Court's *Final Judgment*.

2. Plaintiffs cannot prevail on their argument that this Court's Final Judgment should be amended pursuant to Fed. R. Civ. P. 60(b)(5).

a. Plaintiffs must prove they are entitled to the judgment they seek.

Plaintiffs concede that they, as the moving party, bear the burden of demonstrating that "a significant change in circumstances warrants revision of the [Court's] decree." Pls.' Mem. at 27, citing *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383 (1992). Plaintiffs also concede that they must meet this burden before the Court may consider the second question, whether the modification they propose "is suitably tailored to the changed circumstances." Pls.' Mem. at 28, citing *Rufo* at 383.

b. Plaintiffs have not and cannot show that a significant change in circumstances warrants a change to this Court's final judgment.

Plaintiffs argue that two significant things have changed since this Court ruled that night hunting of deer was unsafe: wolves and deer have both been allowed to be shot at night in Wisconsin. Neither of Plaintiffs' analogies constitutes a significantly changed

circumstance that somehow makes off-reservation night hunting of deer safe, and neither is actually analogous to their new plan.

Wisconsin's Chronic Wasting Disease (CWD) eradication sharpshooting program, which took place from 2002 to 2007 (DFOF ¶¶ 233, 245, 265), was not a hunting program, and contrary to Plaintiffs' assertions, private citizens were not allowed to participate—only public employees and WDNR contractors. (DFOF ¶¶ 238-39.) Plaintiffs argue that other states and cities also allow night "hunting" (Pls. Mem. at 7), but none of the programs they mention, other than the practices of the allowed for tribal members in Minnesota, constitute actual "hunting." Pls. Mem. at 9-11. No other states allow night deer hunting (DFOF ¶¶ 200-01), and the programs mentioned by Plaintiffs are generally government-sponsored sharpshooting programs wherein deer are shot over baited sites from ground blinds or stands for the sole purpose of culling disease. Pls. Mem. at 9-12 & Exs. 4, 8-10, 13, 19, 20, 27. Unlike Plaintiffs' proposed practices, the Minnesota regulations are similarly restrictive, as they require a tribal hunter to hunt from an elevated position so a backstop is always present, to hunt over bait, to fire at targets only within a limited radius, and to illuminate a target prior to firing. DFOF ¶ 203.

Wisconsin's new wolf hunting law is not an analogous changed circumstance either. This law allows for night hunting after the conclusion of the "regular" gun deer season if and only if a harvestable surplus remains in a management zone. DFOF ¶ 106. This year, 90 of the 116 available wolves were harvested as of November 20, 2012, five days before the end of the gun-deer season, and two of the six zones were closed so that

night hunting would never be allowed in them. DFOF ¶¶ 106, 216-17, 219. As of December 6, 2012, three zones were closed and only 12 wolves remained available for harvest. DFOF ¶ 221. Wolf hunters are only permitted to kill one wolf, and the majority of the successful hunters used traps, not guns. DFOF ¶¶ 214-15, 218. As of December 6, 2012, only one wolf was shot after normal daytime hunting hours, and this wolf was shot at 5:00 p.m. DFOF ¶ 222.

In contrast, Plaintiffs want to hunt deer at night because it is easier and more efficient than hunting during the day. DFOF ¶ 208. This is because deer freeze under the rays of a light, making them much easier to harvest than a mobile deer during the day. DFOF ¶ 207. There is no individual Tribal bag limit on deer, and the only limit on the total harvest is that it be one-half the established quota in a management unit. DFOF ¶ 210. There were 1,869 Tribal deer hunters in 2010 (DFOF ¶ 209), and the total Tribal deer harvest for 2010-2011 was 1,493, up from 1,386 the previous year (DFOF ¶ 42). The possibility that only a few people may ever hunt wolves at night, versus the certainty that Tribal members would prefer night hunting and would have almost 2,000 hunters in the woods with virtually limitless harvesting opportunities, makes wolf hunting very different from night deer hunting.

- c. Even if Plaintiffs could show a significant change in circumstances, they cannot show their proposal is suitably tailored to those circumstances.

Even if Plaintiffs were found to have met their burden of showing changed circumstances, they have not met and cannot meet their burden of showing their proposed regulations have been suitably tailored to those changed circumstances. In fact, they have not even tried to make this showing. Instead, they argue only that their hunting proposal is similar to other laws or practices that are not before this Court.

Even if Plaintiffs were allowed another chance to present their new plan as an alternative for the Court to consider, that plan must be rejected for the same reason as their previous plan—because it would be unsafe. This Court has found that Plaintiffs bear the burden of demonstrating that they have "responsibly insure[d]" that Defendants' legitimate health and safety concerns have been met. *LCO IV*, 668 F. Supp. 1233, 1241 (W.D. Wis. 1987). See also *United States v. Washington*, 384 F. Supp. 312, 340 (W.D. Wash. 1974) ("To qualify for self-regulation of off reservation treaty right fishing as above provided, *a tribe must establish* to the satisfaction of either Fisheries and Game or the court" that it will meet the state's legitimate concerns). They have not and cannot do so.

This Court has specifically found that night hunting of deer presents a great danger to public safety. DFOF ¶ 135. Plaintiffs cannot show that their contemplated regulatory scheme is adequate to protect against those dangers. *Id.*, ¶¶ 140-177, 187-199. Misidentification of a target and failing to identify persons in the line of fire are

legitimate public safety concerns associated with deer hunting; these concerns are necessarily heightened after dark. *Id.*, ¶ 195. However, the GLIFWC Order provides inadequate regulation of hunter conduct to ensure a basic tenant of hunter safety: a hunter must know his target and what is beyond before he may fire a shot. *Id.*, ¶¶ 140, 155-172; see also *LCO VII*, 740 F. Supp. at 1408 (this is a "fundamental precept of hunting: that the hunter be able to identify his or her target and what lies beyond it before firing a shot or losing an arrow"). The GLIFWC Order also lacks both a meaningful training requirement and the necessary review of permit applications to mitigate the risk. *Id.*, ¶¶ 141, 152-154. These deficiencies have been brought to the attention of Plaintiffs, yet have not been addressed. *Id.*, ¶¶ 133, 187-189. As such, the Commission Order cannot be considered to provide adequate protection of public safety.

Plaintiffs argue that regulation of night hunting for deer under the Commission Order is adequate to protect public safety because the requirements are more stringent than those for night hunting of wolves. Pl. Mem. at I.A.2.a. However, the underlying premise of this argument is inaccurate and the conclusion does not follow. First, while regulation under the GLIFWC Order is more stringent than state regulation for wolves in some respects, it is less stringent in several important respects that are designed specifically to protect public safety. DFOF ¶ 107. Second, under the GLIFWC Order the opportunity to hunt at night, and thus the potential for many more shots fired in to the darkness, is far greater both in terms of the number of hunters and the length of the season. *Id.*, ¶¶ 204-223. Third, the unique geographic and temporal concentration of

Tribal hunters differs significantly from that of wolf hunters and other outdoor recreational users, presenting safety concerns. *Id.*, ¶¶ 224-232.

Plaintiffs also seem to argue that regulation under the GLIFWC Order is adequate to protect public safety in part because WDNR's CWD management efforts were used as the basis for the regulations. Pls. Mem. at I.A.2.a. This argument is fundamentally flawed for two reasons. First, the WDNR CWD management efforts were highly structured operations that utilized only trained government sharpshooters. DFOF ¶¶ 238-239, 251. Plaintiffs, however, incongruously attempt to extend concepts borrowed from these limited and well-defined programs to create a general regulatory scheme for their members. Second, and contrary to Plaintiffs' claims, regulation under the GLIFWC Order is in fact far less stringent than the manner in which the WDNR CWD programs actually operated. *Id.*, ¶¶ 251-264. Plaintiffs' reliance on similarities between these WDNR programs and their regulatory scheme is misplaced, and simply does not equate to adequate protection of public safety.

- C. Plaintiffs cannot demonstrate the second factor: that there is no adequate remedy at law, or that they will be irreparably harmed if no injunction is issued.

Plaintiffs contend that they are entitled to a preliminary injunction because no adequate remedy at law exists, and alternatively that they will be irreparably harmed if no injunction is issued. Pls' Mem. at 31, 33. However, Plaintiffs' arguments must fail with respect to both aspects of this factor.

1. This Court has effectively determined that Defendants' enforcement of Wis. Admin. Code § NR 13.30(1)(q) neither warrants a remedy, nor causes irreparable harm.

By virtue of the 1989 Deer Trial decision, this Court has, in essence, already determined that Defendants' enforcement of Wis. Admin. Code § NR 13.30(1)(q) neither warrants a remedy, nor causes irreparable harm. There, this Court ruled that:

the state's prohibition on shining deer is a narrowly drawn, non-discriminatory restriction on Plaintiffs' hunting rights that is necessary to protect the safety of persons in the ceded territory. It imposes a minimal infringement on Plaintiffs' rights in comparison to the great danger night hunting presents to public safety.

LCO VII at 1423. In so holding, this Court foreclosed any argument that Plaintiffs are entitled to a remedy—whether in equity or at law—and determined that any harm to Plaintiffs would be minimal. Harm which is minimal is not irreparable within the meaning of the law.

As discussed above, Plaintiffs fail to demonstrate any facts which would call this Court's earlier decision into question.

2. An adequate remedy at law is available.

Regardless of this Court's 1989 Deer Trial decision, Plaintiffs cannot meet their burden of proving that no adequate remedy at law exists. While it is true that the Eleventh Amendment of the United States Constitution bars Defendants from seeking monetary damages in connection with this case, the history of this case demonstrates not only that an alternative remedy at law exists, but that Plaintiffs have obtained relief on this basis in the past.

As earlier discussed, the Parties to this suit have previously and jointly sought modification of the Final Judgment pursuant to Fed. R. Civ. P. (60)(b)(6), which establishes that a court may provide relief from a final judgment if the judgment is prospectively is no longer equitable. Pl. Ex. 16. In doing so, the Parties identified Rule 60(b) as an appropriate mechanism for seeking a remedy at law. By virtue of granting the motion, this Court affirmed that the Parties had followed the proper procedure—that is, that Rule 60(b) provides an adequate remedy at law which is available to either party in this case. Dkt 1798, Pl. Ex. 15.

Although Defendants submit that Plaintiffs have not met their burden of demonstrating changed circumstances, as previously discussed, the fact that Plaintiffs have again looked to Rule (60)(b) as a means of providing alternative relief in this proceeding demonstrates their own concession that an adequate remedy at law is indeed available.

3. Plaintiffs have not provided sufficient evidence showing their night hunting proposal is based on need; to the contrary it appears to be based only on desire and in response to the State's decision to allow wolf hunting.

Plaintiffs state that they are not harvesting as many deer as they are entitled to, and they argue, without providing adequate support, that they need to harvest more deer and to hunt at night because nationwide Native American unemployment and chronic disease rates are high, work schedules make it difficult for Tribal members to hunt during the day,

and that Tribal members need to hunt at night for cultural and religious reasons. Pls. Mem. at 3, 34-36; Defs. Rebuttal Facts, ¶¶ 1-2, 32-34.

At no point during the Deer Trial did Plaintiffs ever contend or attempt to prove that they or their members had an urgent need to engage in night deer hunting, nor did they suggest, contend or attempt to prove that they or their members would be irreparably harmed by a prohibition on night hunting deer. DFOF ¶ 7. And contrary to statements now made by one of Plaintiffs' fact witnesses, Plaintiffs' expert witness during the trial testified that it was against Plaintiffs' religious and ceremonial teachings to shine and shoot deer at night. DFOF ¶ 5.

Since the Deer Trial and prior to the State's adoption of the wolf hunting law, Plaintiffs had not asserted a need to harvest more deer, and they had not sought to change state or tribal regulations prohibiting off-reservation night hunting of deer. The 2011-2012 minutes of the Voigt Task Force and the Tribes' proposed issue sets for the third round of stipulation negotiations tell this story well.

The Voigt Task Force is charged with overseeing Tribal natural resources management and advocating for the full exercise of the Tribes' treaty rights. DFOF ¶ 36. GLIFWC staff work with the Voigt Task Force "to facilitate the development and coordination of intertribal positions that are then negotiated with the State of Wisconsin. DFOF ¶ 38. During the Voigt Task Force monthly meetings in 2011, discussions regarding deer addressed deer harvest numbers and the Tribes' desires to influence the Governor's Review of Deer Management. DFOF ¶¶ 40-54. GLIFWC staff reported to

the Voigt Task Force that deer harvest numbers were going up, and that no tribal declaration or quota would be needed for 2011. DFOF ¶¶ 40, 42, 45-6, 49-50. Then in April 2012, after Plaintiffs learned that the State had adopted a wolf hunting law, the Voigt Task Force minutes reflect a new desire on the part of the committee to issue a commission order allowing members to hunt deer at night. DFOF ¶ 61. Notably, this discussion took place as part of the Task Force's discussion of wolf hunting, not deer management. DFOF ¶ 61. Wisconsin's Deer Trustee, Dr. James Kroll, was at this meeting (DFOF ¶¶ 51, 57), but the minutes do not reflect that anyone told Dr. Kroll that Tribal members needed to get more deer more easily, or that they needed to hunt at night. DFOF ¶ 58. The Voigt Task Force minutes make it clear that night hunting of deer was raised as a response to wolf hunting, not because the Tribes had a need to engage in the practice.

The evolving agendas for the Parties' stipulation negotiations also show that night hunting of deer became an issue as a reaction to wolf hunting, not because it reflected tribal needs. When Plaintiffs first presented their list of issues for the 2012-13 biennial stipulation negotiations in October 2011, this list did not include any proposed amendments relating to Tribal shining or night hunting of deer. DFOF ¶¶ 71-72. An issue was added in November 2011, but it did not relate to night hunting of deer. DFOF ¶ 73. The wolf hunting law was enacted April 2, 2012. DFOF ¶ 55. On the eve of the May 23, 2012 stipulation meeting, Plaintiffs added night hunting and deer shining issues to the lists of potential stipulation amendments they wanted to discuss. DFOF ¶¶ 76-79.

This timing makes it clear that night hunting was a reaction to the wolf hunt law, not a tribal need. Indeed, the Tribes admit in their brief that something other than need for venison prompted the night hunting proposal: "Wis. Act 169 [the wolf hunting law]... provided the trigger for the Tribes to begin discussions regarding the potential for them to commence night hunting, not for wolves but for deer." Pls.' Mem. at 4.

As just discussed, there is no general need for tribal members to hunt deer at night off-reservation in the ceded territory. For the same reasons, there is no urgent need for 74 Tribal members (Maulson Aff. ¶ 16.a.i.) to hunt deer right now and for the three and a half weeks, after the December 12 hearing and before the close of their proposed night hunting season on January 6, 2012 (Stepp Aff. Ex. D at 10). And even if the Court found that there was some evidence of a need for more Tribal harvesting opportunities, there is no evidence proving that night hunting during the next three and a half weeks would fix any of the problems mentioned by the Tribes (diabetes, starvation, poverty). Further, any need that members have to harvest more deer for subsistence purposes can be harvested anywhere in the ceded territory during daytime, or at night on-reservation, over the next three weeks.

- D. Tribes cannot demonstrate the third factor: that the threatened injury to them would outweigh the harm an injunction may inflict on Defendants.

As just discussed, the harm Plaintiffs may suffer if denied three and a half weeks of nighttime deer hunting is speculative at best with respect to the problems of chronic disease or poverty. Their contention that denying an injunction would force tribal hunters

to choose between arrest and exercising their treaty rights (Plf.'s Mem. at 34) is also problematic, as it assumes the existence of an unqualified "treaty right" to engage in night hunting for deer. However, this Court has already held that Plaintiffs do not have such a right. It also raises the obvious question of how several more weeks of such deprivation can constitute irreparable harm when the tribes have gone without night hunting for deer (off-reservation at least) for decades.

The contention that requiring tribal members "to refrain from night hunting ... would interfere with important cultural practices," (*ibid.*) is belied by the only qualified evidence in the record on the religious aspects of hunting deer at night and the religious acceptability of substituting other resources like wild rice for fresh venison at a ceremony if the latter is not available. DFOF ¶¶ 5-6. Additionally, tribal members have expansive ceremonial harvest opportunities available to them under Section F. of the "Stipulation for the Deer Trial," (Dkt 1167 at 20 – 22). On the other side of the balance, this Court has already found that night hunting deer presents a "great danger . . . to public safety." *LCO VII*, 740 F. Supp. at 1423. And although the tribes' latest deer shining plan is no doubt safer than what they proposed in 1989—a plan which Plaintiffs themselves characterize as "unregulated night hunting" (Pls' Mem. at 6)—it is not yet adequately safe for the protection of the public, for the many reasons addressed above.

- E. Tribes cannot demonstrate the fourth factor: that an injunction would serve the public interest.

Given that the public's interest is essentially synonymous with the defendant officials' interests, the same factors which tip the preceding balance in favor of Defendants apply here. An injunction against the enforcement of the state deer shining law would not serve the public interest in safety.

CONCLUSION

For all of the reasons set forth here, defendants respectfully request that this Court deny Plaintiffs' motion for a preliminary injunction and alternative motion to amend this Court's final judgment.

Dated this 10th day of December, 2012.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LAC COURTE OREILLES BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS;
RED CLIFF BAND OF LAKE SUPERIOR
CHIPPEWA INDIANS; SOKAOGON
CHIPPEWA INDIAN COMMUNITY;
ST. CROIX CHIPPEWA INDIANS OF
WISCONSIN; BAD RIVER BAND OF THE
LAKE SUPERIOR CHIPPEWA INDIANS;
and LAC DU FLAMBEAU BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS,

Plaintiffs,

v.

Case No. 74-C-313-C

STATE OF WISCONSIN, WISCONSIN
NATURAL RESOURCES BOARD,
CATHY STEPP, KURT THIEDE and
TIM LAWHERN,

Defendants.

DEFENDANTS' PROPOSED FINDINGS OF FACT IN OPPOSITION
TO PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

The defendants by their attorneys, Attorney General J.B. Van Hollen and Assistant Attorneys General Thomas L. Dosch and Diane L. Milligan, submit these proposed findings of fact in opposition to plaintiffs' motion for injunctive relief.

THE 1989 DEER TRIAL

1. In 1989, this Court conducted a trial (the Deer Trial) on the subject of whether and how the defendants might regulate the exercise of off-reservation deer hunting treaty rights by plaintiff Tribal members. *Lac Courte Oreilles Band of Indians v. Wisconsin*, 740 F. Supp. 1400 (W.D. Wis. 1990) (*LCO VII*).

2. The plaintiffs asked the Court to decide "Whether as a matter of law and fact plaintiffs' members may be prohibited from hunting deer at night when such method is permitted under state law for non-Indians for other species." Dkt. # 1114, Plaintiffs' Statement of Contested Issues.

3. James Zorn, the drafter of the Tribes' 1989 Model Code deer shining provision, testified at trial that he drafted the Tribes' proposed deer shining ordinance based on his belief that tribal members should be authorized to shine and hunt deer at night because state law authorized non-members to engage in night hunting and shining of predator and nuisance species like fox, raccoon, and coyote. Dkt. # 1124: 3-26 (Trial Test. of James Zorn) (Milligan Aff. Ex. A).

4. Zorn did not consult with any experts in hunter safety before drafting the 1989 night hunting provision. *Id.*

5. The Tribes' designated religious/ceremonial use expert, Archie Mosay, testified during his pre-trial deposition, that it was against the Ojibway/Chippewa Indians' religious and ceremonial teachings to shine and shoot deer at night. Dkt. 1106, July 25, 1989 Dep. of Archie Mosay at 6:11-13 (named as expert); 11:19 to 13:6 (deer shining contrary to tribal religion); 28: 19-22 (deer shining contrary to tribal religion); 16-34; Pls.' Statement of Expert Witnesses, Docket No. 1048 (named as expert).

6. Mr. Mosay also testified that if a deer is desired for a ceremonial purpose but tribal religion prohibits harvesting it at that time or by certain means, another resource like wild rice could be substituted in the ceremony. Dkt. 1106, July 25, 1989 Dep. of Archie Mosay at 26:11-16.

7. At no point in the Deer Trial did the plaintiffs ever contend or attempt to prove that they or their members had an urgent need to engage in night deer hunting, nor did they suggest, contend or attempt to prove that they or their members would be irreparably harmed by a prohibition on night hunting deer. Docket as a whole.

8. At the conclusion of the Deer Trial this Court found that:

Coyotes and other fur-bearing animals are generally hunted in the fall when their pelts are prime, using low caliber ammunition to avoid any unnecessary damage to the pelt. Unprotected animals killed for nuisance control are not usually "hunted," but are killed in close range of residences with low caliber rifles or shotguns with fine shot. Also, it is usual to "shine" or "bait" these animals and shoot them at short range, rather than from a distance, as with deer.

...

[State law] code permits shining ... fox, coyote ... and other unprotected species. ... These animals are generally shot with lower caliber bullets that travel shorter distances than the bullets used for deer hunting, and wholly different hunting practices are used. Many of these species are usually shot when they are treed, and the light is used to illuminate the animal in the tree, rather than to cause it to freeze, as with a deer. ... By contrast, a hunter shining a deer would shoot at it from approximately the same plane, so that if the hunter missed, the bullet or arrow would travel into the background area where it might damage persons or property that the hunter cannot see. Even if the hunter hits the deer, the bullet may travel through the deer and do damage to persons or property behind the deer. Such shooting violates a fundamental precept of hunting: that the hunter be able to identify his or her target and what lies beyond it before firing a shot or loosing an arrow.

Shining deer is an effective means of locating and killing them. Deer are nocturnal, their eyes reflect artificial light, and they tend to freeze in place when a light is focused directly into their eyes. Most other animals do not respond to light in a similar manner.

LCO VII at 1406-08.

9. The Court also found that night hunting presents a "great danger . . . to public safety." *LCO VII*, 740 F. Supp. at 1423.

10. In the Deer Trial, this Court ruled that:

the state's prohibition on shining deer is a narrowly drawn, non-discriminatory restriction on plaintiffs' hunting rights that is necessary to protect the safety of persons in the ceded territory. It imposes a minimal infringement on plaintiffs' rights in comparison to the great danger night hunting presents to public safety.

...

Defendants may enforce the prohibition on shining of deer contained in their proposed § NR 13.30(1)(q) [incorporating Wis. Stat. § 29.324 by reference], until such time as the plaintiff tribes adopt regulations identical in scope and content to § NR 13.30(1)(q).

LCO VII at 1423, 1427.

11. In the final judgment entered in this case on March 19, 1991, the Court again specifically addressed the subject of the State's authority to enforce its prohibition on deer shining:

Defendants are enjoined from interfering in the regulation of plaintiffs' hunting and trapping on public lands within the ceded territory in Wisconsin, except insofar as plaintiffs have agreed to such regulation by stipulation, on the condition that plaintiffs enact and keep in force an effective plan of self-regulation that conforms to the orders of the court.

Lac Courte Oreilles Indians v. State of Wis., 775 F. Supp. 321, 323 (W.D. Wis. 1991) (Final Judgment);

Defendants may enforce the prohibition on shining of deer contained in § NR 13.30(1)(q) until such time as plaintiffs adopt regulations identical in scope and content to § NR 13.30(1)(q).

Id. at 324; and

Plaintiffs' failure to enact an effective plan of self-regulation that conforms with the orders of the court, or their withdrawal from such a plan after enactment, or their failure to comply with the provisions of the plan, if established in this court, will subject them or any one of them to regulation by defendants.

Id., at 325.

POST-JUDGMENT PROCEEDINGS: Stipulations to Amend Stipulations

12. Following this Court's issuance of the Deer Trial decision, the plaintiff Tribes revised the Off-Reservation Model Code and adopted tribal deer shining regulations identical in scope and content to Wis. Admin. Code § NR 13.30(1)(q). Pls.' Mot. for Prelim. Injunctive Relief, ¶ 2.

13. On March 19, 1991, the parties filed a Joint Motion to Amend Judgment. Pl. Ex. 16.

14. The motion states that the parties, by their counsel "hereby jointly move the court, pursuant to Fed. R. Civ. P. 60(b)(6), to modify the final judgment entered in this matter on March 19, 1991, so as so as to allow the parties, by mutual agreement, to modify the stipulations which were incorporated into the final judgment." *Id.* (emphasis added).

15. The Joint Motion further provided in its opening paragraph that: "The parties intend and understand, as provided in Fed. R. Civ. P. 60(b), that neither this motion, nor any stipulations filed pursuant to a judgment amended as requested by this motion, shall affect the finality of the final judgment entered on March 19, 1991, nor suspend its operation." *Id.* (emphasis added).

16. The Joint Motion also stated that the parties agreed "that nothing in this stipulated motion, or in any stipulations entered into under the authority of an amended judgment entered pursuant to this motion, shall be construed as an admission of fact or law by any of the parties in any subsequent litigation between the parties . . ." *Id.*, ¶ 6 (emphasis added).

17. In granting the parties' Joint Motion and entering its Amended Judgment, this Court acknowledged that the "joint motion was intended to modify the stipulations which were incorporated into the final judgment," and it specifically authorized the parties "to amend the

stipulations listed in the final judgment at 775 F. Supp. 324-325 and there referred to as docket numbers 911, 912, 913, 914, 1167, 1222, 1271, 1289, 1568 and 1607." Dkt 1798; Pl. Ex. 15 at 2 (Am. Judgment, June 13, 2001).

18. The Amended Judgment did not authorize the parties to stipulate to the amendment of the Court's final judgment in this case. *Id.*

19. In 2009, the parties filed a document they entitled: *Stipulation for Technical, Management and Other Updates: First Amendment of the Stipulations Incorporated in the Final Judgment*. This was the first stipulation developed by the parties under the authority of the 2001 Amended Judgment. Pl. Ex. 14.

20. The 2009 stipulation provided that it was being submitted in accordance with the Court's June 13, 2001 Amended Judgment "authorizing the parties, by mutual agreement, to modify the stipulations which the Court had incorporated into the final judgment . . . and there referred to as docket numbers 330, 911, 912, 913, 914, 1167, 1222, 1271, 1289, 1568, 1607, and Joint Exhibit P054 from the 12/85 Trial." *Id.*

21. The 2009 joint stipulation provided:

The parties agree that the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) Executive Administrator may issue a Commission Order, thereby amending the pertinent portion of the Parties' stipulation(s), referred to as docket numbers 914, 1167, 1289, and 1607, reflecting new circumstances, changes, or liberalizations in State law applicable to non-members of the plaintiff Tribes pertaining to the following: hunting hours, season length, new places to hunt (i.e., state parks), or caliber restrictions.

1. Basic Standard:

- a. The stipulations which the Court incorporated into the final judgment provide for the basis regulation standard;

2. Technical Amendments:

- a. The GLIFWC Executive Administrator may, without consultation with the State, issue a Commission Order to provide tribal members more treaty harvest opportunities in line with opportunities provided under State law to non-members of the plaintiff Tribes, subject to the parameters of the final judgment;

3. Mechanism for Amendment:

- a. A Commission Order can be administered detailing the technical amendment to be updated in the tribal off-reservation conservation code;

4. Consultation:

- a. The Tribes agree that they will inform the State of the issuance of a Commission Order;
- b. In the event that the State disputes whether a particular Commission Order involves a "technical amendment" authorized by this stipulation, it shall promptly notify the Commission of its dispute and thereafter the parties shall attempt in the first instance to resolve the dispute by informal consultation in an effort to reach consensus on the matter. No party, however, waives any right to make, or to challenge in Court, any order or technical amendment, or to challenge a refusal to consent to any such order or technical amendment;

Id.

22. In 2011, the parties filed a document they entitled: *Stipulation for Technical, Management and Other Updates: Second Amendment of the Stipulations Incorporated in the Final Judgment*. This was the second stipulation developed by the parties under the authority of the 2001 Amended Judgment. Pl. Ex. 5.

23. The 2011 stipulation provided that it was being submitted in accordance with the Court's June 13, 2001 Amended Judgment "authorizing the parties, by mutual agreement, to modify the stipulations which the Court had incorporated into the final judgment . . . and there

referred to as docket numbers 330, 911, 912, 913, 914, 1167, 1222, 1271, 1289, 1568, 1607, and Joint Exhibit P054 from the [December 1985] Trial" and this stipulation stated that it was amending seven of these specifically identified stipulations. *Id.*

24. Section III. of the 2011 Stipulation, entitled "Technical Updates and Amendments," which is specifically referred to as the "Other Liberalization Procedure" provision of the 2011 stipulation, provides:

A. The parties agree that the language of: *Section 7 of the Stipulation on Biological and Certain Remaining Issues*; *Section 7 of the Stipulation on Enforcement* (Docket Number 911); *Section C of the Stipulation for Miscellaneous Species and Regulatory Matters* (Docket Number 1607, subpart 2); *Section C of the Stipulation for Black Bear, Migratory Birds, and Wild Plants* (Docket Number 1607, subpart 2); *Section E of the Stipulation for the Deer Trial* (Docket Number 1167); *Section C of the Stipulation for Fisher, Fur Bearers, and Small Game* (Docket Number 1289); and *Section B of the Stipulation for Fish Species other than Walleye and Muskellunge* (Docket Number 1568) will be amended as follows:

1. Upon the issuance of a Commission Order under parts III.A.2. or III.B. of this stipulation, unless a Tribe chooses to adopt more restrictive measures, the regulations established therein shall be the Tribes regulations as provided in the Tribe's Code.
2. The [GLIFWC] Executive Administrator may, after consultation with the State and upon agreement of the parties (where consent may not be unreasonably withheld), issue a Commission Order to provide tribal members more treaty harvest opportunities consistent with those available under state law to state harvesters, subject to the stipulations previously filed in this matter and the law of the case, pertaining to fish and game-related regulatory amendments of the Model Code.

Id. at 5-6.

25. Section E of the *Stipulation for the Deer Trial* (Docket No. 1167), is entitled

"Management Authority" and reads:

1. The parties agree that [the DNR's] processes currently utilized for the management of white-tailed deer in the ceded territory shall continue to be the processes utilized for dealing with the management of white-tailed deer in the ceded territory.
2. Defendants agree to officially recognize tribal representatives as official members of the following committees or processes: (a) annual deer quota setting process; (b) comprehensive review of over winter deer population goals and deer management unit boundaries every three years; [and] (c) deer species advisory committee and any other committee to manage or impacting deer range and white-tailed deer in ceded territory.
3. Plaintiffs do not waive any right to challenge any actions taken by the Department relating to the management of white-tailed deer in tribal, state or federal forums. However, the parties agree that the processes listed in paragraph 2 above shall govern and be binding upon all the parties concerning the management of white-tailed deer until and unless otherwise directed as a result of the challenges undertaken pursuant to this section.
4. The parties agree that the processes listed in paragraph 2 above shall be limited to the management of white-tailed deer. The parties further agree that a consensus approach shall be utilized and agree to make all reasonable efforts to reach a consensus in the committees or processes outlined in paragraph 2 above.
5. The parties agree that the issue concerning the desired population goal for deer management unit 29B will be considered through the processes described above in paragraph 2.
6. Plaintiffs agree they may not conduct or implement scientific investigations under Model Code 3.07 relating to the handling, killing, capturing or sampling of any live deer or the maintaining, improving or altering of deer habitat unless plaintiffs have: (1) provided advance [notice] to WDNR of the investigation; (2) receiving WDNR approval to conduct or implement the investigation.

Dkt. 1167 at 18-20.

26. The Stipulation for the Deer Trial includes a separate section B entitled "Tribal Enforcement and Preemption of State Law," which addresses matters including the enforcement of hunting hours. Dkt. 1167 at 3-16.

27. Section B of the Stipulation for the Deer Trial is not referenced in the 2011 stipulation's "Other Liberalization Procedure" provision. Pls.' Ex. 5.

28. Provisions related to Ceremonial Use ("the harvest and utilization of deer for religious and/or ceremonial purposes") are included in Section F of the Stipulation for the Deer Trial, not section E. Dkt. 1167 at 20-22.

29. Section F of the Stipulation for the Deer Trial is not referenced in the 2011 stipulation's "Other Liberalization Procedure" provision. Pls.' Ex. 5.

30. None of the stipulations referenced in the Other Liberalization Procedure addresses or provides for off-reservation night hunting of deer. (Dkt. 911, § 7; Dkt. 1607, subpart 2, § C; Dkt. 1607, subpart 2, § C; Dkt. 1167, § E; Dkt. 1289, § C; Dkt. 1568, § B).

31. Unlike the 2009 Stipulation, the 2011 Stipulation requires both consultation with and agreement by the State of Wisconsin before a Commission Order may be issued. Lutz Aff. ¶ 4.

32. This State-approval process was added due to the State's concern that even a good faith effort to translate the language of a State law into the language of the Model Code could have unanticipated consequences which could result in a change to the Model Code that was broader than what is allowed by State law and unacceptable to the State for that reason. *Id.*

33. At no time during the negotiations which resulted in the 2011 Stipulation was there any discussion or agreement that the State's approval (i.e. "where consent may not be unreasonably withheld") would be constrained by the standards of the prior court decisions as

stated in Mr. Stark's November 27, 2012 affidavit. The State was never told of this interpretation by the Tribes and would not have agreed to it if that was the case or if the plain language of the final stipulation required such a standard. Lutz Aff. ¶ 5.

34. DNR's lead attorney for the stipulation negotiations understood and still understands that the term "unreasonably" in the stipulation is essentially a rational basis test, and that a plain reading of the phrase "subject to the stipulations previously filed in this matter and the law of the case" shows that it limits or conditions the immediately preceding phrase concerning the Commission's issuance of orders, not the earlier phrase regarding the State's consent. Lutz Aff. ¶¶ 3, 5.

35. The first ten Commission Orders that were issued are attached in Milligan Aff. Exs. D-M.

**TRIBES PURSUE NIGHT HUNTING OF DEER IN RESPONSE TO WOLF HUNT
Voigt Task Force first raises night hunting as response to wolf law**

36. GLIFWC staffs the Voigt Intertribal Task Force committee (Voigt Task Force), which carries out the responsibilities delegated to it the Chippewa Intertribal Agreement Governing Resource Management and Regulation of Off-Reservation Treaty Rights in the Ceded Territory. J. Stark Aff. ¶ 4.

37. The purpose of the Voigt Task Force is to:
- 1) Develop the capabilities of its member tribes to regulate their use of natural resources.
 - 2) Develop biological expertise in inland fish, wildlife, and plant species, communities, and ecosystems.
 - 3) Develop resource management plans.
 - 4) Assist tribes to develop resource regulations suitable for tribal adoption and adequate to protect the environment.

- 5) Develop law enforcement capabilities adequate to insure compliance with resource regulations.
- 6) Assist tribes in the development of judicial systems adequate to adjudicate cases arising under tribal resource regulations.
- 7) Assist tribes to secure through negotiation, litigation, arbitration, or any other lawful and appropriate means, the full exercise of the usufructuary rights reserved in the Treaties of 1837 and 1842.
- 8) Develop the capability to recognize, analyze, and recommend action on actual and potential environmental degradation which may impair the opportunity to engage in usufructuary activities within the territories ceded by the Treaties of 1837 and 1842.
- 9) Educate tribal membership, tribal leadership, and the general public in issues and events related to the other purposes stated herein.

http://www.glifwc.org/About/Voigt_Task_Force.html (last visited December 4, 2012).

38. GLIFWC staff work with Plaintiff tribal attorneys, tribal representatives on GLIFWC's Board, and the Voigt Task Force "to facilitate the development and coordination of intertribal positions that are then negotiated with the State of Wisconsin." *Id.* ¶ 6.

39. The Voigt Task Force meets monthly, and it often invites DNR staff to discuss tribal resource management concerns at those meetings. *Milligan Aff. Exs. N-II.*

40. At its January 2011 meeting, the Voigt Task Force discussion on deer was limited to a deer season update noting that 1275 deer had been harvested as of December 1, 2010 (up from 1119 the year before). *Milligan Aff. Ex. N at 5.*

41. At its February 2011 meeting, Mr. Zorn welcomed DNR Secretary Stepp, and the minutes state:

He noted that there are many issues that the state and tribes interact on including wolf, wild rice, fish, habitat and others. Mr. Zorn noted the need to finalize the last round of Voigt stipulation review, and indicated that staff would be follow up

with regard to issues that were not resolved in that round, specifically with regard to spring walleye harvest.

Milligan Aff. Ex. O at 2.

42. The February 2011 Voigt Task Force minutes contain a deer update noting that the total harvest at the end of 2010 was 1,493 deer, up from 1,386 the previous year. Milligan Aff. Ex. O at 5.

43. The minutes for the March 2011 Voigt Task Force meeting do not reflect any discussion of deer. Milligan Aff. Ex. P.

44. The April 2011 Voigt Task Force minutes show that the only discussion of deer was Jonathan Gilbert's update on the state's deer population, during which he noted that some units were below their population goals and others were above their goals. Milligan Aff. Ex. Q at 9.

45. The May 2011 Voigt Task Force minutes show that the only discussion of deer was Jonathan Gilbert's report on harvestable surplus, and the minutes reflect:

In no unit did the tribal harvest of antlerless deer surpass the established threshold value for antlerless deer, and thus, there is no unit for which a tribal declaration or tribal quota is needed.

Milligan Aff. Ex. R at 5.

46. The June 2011 Voigt Task Force minutes show that the only discussion of deer was Jonathan Gilbert's report that DNR "agreed that in no case did the tribal harvest exceed the calculated threshold value and that for 2011 no tribal declaration or tribal antlerless deer quota would be required." Milligan Aff. Ex. S at 5.

47. The July through September 2011 Voigt Task Force minutes do not reference any discussion of deer. Milligan Aff. Exs. T, U, V.

48. The only reference to deer in the October 2011 Voigt Task Force minutes is a reference to a proposed Commission Order to bring tribal deer permit regulations in line with recently amended and less restrictive state rules. Milligan Aff. Ex. W at 3.

49. The only references to deer in the November 2011 Voigt Task Force minutes are a deer season harvest update, noting that 710 deer had been harvested by November 1, compared with 492 at the same time the previous year, and a discussion of the registration process. Milligan Aff. Ex. X at 3.

50. The only references to deer in the December 2011 Voigt Task Force minutes are a harvest update (1,326 as of November 30, 2011, as compared to 1,275 at the end of November 2010 and 1,119 at the end of November 2009), and a discussion of the DNR's granting the Lac du Flambeau Band's request that it issue fewer antlerless permits to state hunters in units bordering their reservation in order to provide more harvest opportunities for tribal hunters. Milligan Aff. Ex. Y at 6, 7.

51. In January 2012, the Voigt Task Force discussed a planned roundtable discussion regarding Governor's Review of Deer Management with Wisconsin's Deer Trustee, Dr. James Kroll. The Task Force voted to send staff to this meeting to discuss the tribes, their treaty rights, and the current off-reservation harvest and management framework. Milligan Aff. Ex. Z at 4-5.

52. In February 2012, the Voigt Task Force minutes discuss a conference call with Dr. Kroll regarding tribal involvement in his review of Wisconsin deer management, and brief discussion on units surrounding the reservations and food plots. Milligan Aff. Ex. AA at 7, 8.

53. The February 2012 Voigt Task Force minutes note that staff just learned a bill had been introduced to the State Assembly requiring the DNR to implement a wolf harvest in the state. *Id.* at 10.

54. Deer were not discussed at the March 2012 Voigt Task Force meeting. Milligan Aff. Ex. BB.

55. On April 2, 2012, the State of Wisconsin enacted 2011 Act 169, which legalized certain forms of night hunting and shining of wolves and required the DNR to "promulgate any rules necessary to implement" the new wolf hunting law. Lawhern Aff., ¶¶ 6, 9; Milligan Aff. Exs. W-II.

56. As a result of the enactment of Act 169, the Wisconsin statutes relevant to night hunting wolves now reads, in pertinent part:

29.314(4) SHINING WILD ANIMALS WHILE HUNTING OR POSSESSING WEAPONS PROHIBITED. (a) *Prohibition.* No person may use or possess with intent to use a light for shining wild animals while the person is hunting or in possession of a firearm, bow and arrow or crossbow.

(b) *Exceptions.* This subsection does not apply:

...

2. To a person who possesses a flashlight or who uses a flashlight at the point of kill while hunting on foot for wolves or for raccoons, foxes, coyotes, or other unprotected animals during the open season for the animals hunted.

Lawhern Aff., ¶¶ 6-7 & Ex. 3; Wis. Stat. § 29.314.

57. Dr. Kroll attended the April 5, 2012 Voigt Task Force meeting and his interim report was discussed. The minutes reflect that:

The tribes discussed various concerns, including the units and their habitats, baiting on private land, the blame placed on wolves, and the various hunting seasons. . . .

The tribes discussed the fact that they and the state seem to have different world views, i.e. the tribes don't view hunting as a sport, and many people don't get that. There was discussion about the need for more communication, as well as

how accurate the population estimates really are in Wisconsin. The tribes also explained that the state has to realize that the changes they make for sport hunters also affect the tribes.

. . . The tribes discussed how they had previously owned all the land and stressed the importance of subsistence hunting to the tribes, given their economic hardships. They discussed the issue of sovereignty and how the tribes have been managers of the resource much longer than the state of Wisconsin.

Milligan Aff. Ex. CC.

58. According to the minutes, nobody told Dr. Kroll that tribal members needed to get more deer more easily, or that they needed to hunt at night. *Id.*

59. The next item on the April 2012 agenda, "Wisconsin Deer Issues," which included a discussion of Chronic Wasting Disease (CWD) in the ceded territory, and population estimates in the ceded territory for 2012. *Id.* at 3-5.

60. Item 11 on the April 2012 Voigt Task Force agenda was "Minnesota and Wisconsin Wolf Issues Update." The minutes reflect that Peter David of GLIFWC first updated the Task Force on recent legislative developments in both states, then there was a discussion of tribal management plans, declaring wolf quotas, and the need to develop wolf stipulations and protocols. *Id.* at 7-8.

61. During the discussion of wolf hunting legislation, the minutes reflect:

[Mole Lake] made a motion to look into issuing a Commission order to hunt deer at night, similar to what is allowed for hunting wolves at night; second by [Lac du Flambeau]. Vote: 10 for, 0 against; 0 abstaining. Motion carried.

Discussion followed regarding objections regarding land owned by non-tribal members and about reservation packs and off-reservation packs. Mole Lake asked to see the entire bill with the amendments. Staff explained that they will try and receive a copy. Kekek explained that there are two types of Commission orders: the automatic amendments, and the ones that need consensus. Ann stated that staff needs to sit down and compare to the model code, and that they need time to analyze the liberalizations.

Id. at 8.

62. During the May 2012 Voigt Task Force meeting, the only discussions of deer during the committee's open session related to finding CWD in Washburn County and the fact that there will be a harvestable surplus of deer in 2012: "The 2012 tribal deer season in Wisconsin will provide an unlimited tribal harvest; thus the harvest quotas are only applicable to state hunters." Milligan Aff. Ex. DD at 2-4.

63. During the June 2012 Voigt Task Force meeting, there were no discussions of deer during the committee's open session. Milligan Aff. Ex. EE.

64. During the July 2012 Voigt Task Force meeting, the only discussion of deer during the committee's open session was an update on Dr. Kroll's report. Milligan Aff. Ex. FF at 3.

65. The July 2012 minutes reflect that the Voigt Task Force raised "other issues affecting the deer populations, including wolf depredation and CWD," but there was no reference to the committee's raising any urgency regarding inadequate tribal deer harvest, any need for member tribes to take additional deer, or any need for tribal members to take deer at night. *Id.*

66. During the August 2012 Voigt Task Force meeting, there were no discussions of deer during the committee's open session. Milligan Aff. Ex. GG.

67. During the September 5, 2012 Voigt Task Force meeting, there were no discussions of deer during the committee's open session, but after emerging from closed session on the topic "Wisconsin Wolf Season / WDNR Response to Task Force Claim / Night Hunting for Other Species – Executive Session," the minutes state:

Motion by [Keweenaw Bay Indian Community] to have legal staff draft up a Commission Order regarding the use of artificial light for night hunting and to have legal staff draft up regulations allowing Voigt member tribes to harvest deer, bear and other small game with the use of artificial light; second by [Lac du Flambeau]. Vote: 10 for, 0 against, 0 abstaining. Motion carried.

Milligan Aff. Ex. HH at 2.

68. During the October 4, 2012 Voigt Task Force meeting, the only discussion regarding deer during the committee's open session was a harvest update in which 251 deer were reported harvested as of September 28, 2012. Milligan Aff. Ex. II at 5.

69. At no time do the January 2011- October 2012 Voigt Task Force minutes reference to any urgency regarding inadequate tribal deer harvest, any need for member tribes to take additional deer, or any need of tribal members to hunt deer at night. Milligan Aff. Exs. N-II.

Tribes add night hunting to stipulation negotiation process

70. The parties' 2011 Stipulation provides

The parties agree to make good faith efforts to coordinate discussion of proposed management and regulatory issues pertaining to the amendment of the Lac Court Orielles Indians v. State of Wis., stipulations as established in the parties' 2001 joint motion to amend the final judgment. To facilitate the cooperative intent of its paragraph and to provide a regular schedule for stipulation review and possible amendment, the parties shall try to review and propose appropriate changes to the stipulations no less than biennially. Where the parties agree on particular stipulation amendments, they will first seek approval of those amendments by their respective legal counsel, and after legal counsel have executed a stipulation proposing such amendment, the parties will seek approval by the court.

The parties agree to make good faith efforts to: exchange a list of potential stipulation amendment issues in the first six months of a given biennium; to conduct an initial meeting to discuss the issues during the first summer of the biennium; to refer issues to study committees as necessary during the second six months of the biennium; and to follow the foregoing with further negotiations during the third six month period of the biennium. New issues may be added for discussion at any time during the first three six month periods of the biennium or as otherwise mutually agreed upon by the parties.

Pl. Ex. 5 at 4.

May 23, 2012 Initial Stipulation Meeting

71. In October 2011, GLIFWC Attorney/Policy Analyst Jason Stark sent DNR Attorney Quinn Williams a three-page list of potential stipulation amendment issues that were being proposed by the Tribes as part of the parties' third round of biennial stipulation review negotiations. Williams Aff. ¶ 3 & Ex. A.

72. The Tribes' October 2011 list of potential stipulation issues did not include any proposed amendments related to Tribal shining or night hunting of deer. *Id.*

73. On November 22, 2011, Mr. Stark sent DNR an email adding one item relating to the transportation of firearms and bows to the list of potential stipulation amendment issues. Williams Aff. ¶ 4 & Ex. B.

74. On January 30, 2012, Mr. Stark sent Mr. Williams an email suggesting that since the Wisconsin Legislature may allow wolf hunting at night, "Maybe we can get the bear hunters to ask for shooting from a roadway [as] well? Make our job a lot easier. . ." Williams Aff. Ex. C.

75. As of May 11, 2012, DNR staff were working off Mr. Stark's October 11 and November 22, 2011 issue lists in preparation for the first Voigt stipulation discussions. Zebro Aff. ¶ 7.

76. On May 21, 2012, GLIFWC provided the Tribes' proposed agenda and issue summary for the opening meeting on Voigt Stipulations Round III scheduled at Red Cliff for May 23. Williams Aff. ¶ 7 & Ex. G.

77. These meeting agenda and Issue Summary documents contained several potential stipulation amendment issues that were being raised with DNR for the first time, including Tribal Night Hunting Hours Extension (Issue 8) and the Tribal Shining Regulatory Amendment (Issue 9). Williams Aff. ¶ 8.

78. Issue 8 in the May 2012 Issue Set Summary states:

The Tribes propose to amend their regulatory provisions pertaining to tribal hunting hours establishing an extension to tribal hunting hours including revision to model code § 6.12(1), §7.15, and § 8.10(2)(a) extending tribal deer, bear, small game hunting hours by 15 minutes in the morning and evenings to 45 minutes before sunrise to 35 minutes after sunset.

The language of *Section B.3.1* of the *Stipulation for the Deer Trial* (Docket Number 1167), *Section 5* of the *Stipulation for Black Bear, Migratory Birds and Wild Plants* (Docket Number 1607, subpart 1), and *Section C.5.r* of the *Stipulation for Fisher, Fur Bearers and Small Game* (Docket Number 1289) are proposed to be amended to reflect these regulatory changes.

Williams Aff., Ex. H at 2.

79. Issue 9 in the May 2012 Issue Set Summary states:

The Tribes propose to amend their regulatory provisions pertaining to shining establishing revision to model code §3.14, §6.20, §7.26, and §8.16(1), §15.20, and §16.20 thereby allowing shining while hunting on foot with the use of a flashlight at the point of kill for deer, bear, raccoon, fox, coyote, unprotected species, elk and wolves.

The language of *Section B.3* of the *Stipulation for the Deer Trial* (Docket Number 1167), *Section 5* of the *Stipulation for Black Bear, Migratory Birds and Wild Plants* (Docket Number 1607, subpart 1), *Section C.5* of the *Stipulation for Fisher, Fur Bearers and Small Game* (Docket Number 1289), and *Section C.6.a* of the *Stipulation for Miscellaneous Species and Regulatory Matters* (Docket Number 1607, subpart 2) are proposed to be amended to reflect these regulatory changes.

Williams Aff. ¶ 7 & Ex. H;

80. No specific regulatory language had been provided to explain the proposed shining stipulation amendments. Williams Aff. ¶ 8.

81. Attorney Williams noted that some of the issues, such as hunting hours, appeared to be new, and Attorney Stark did not respond. Williams Aff. Ex. G at 2.

82. The Tribes' agenda for the May 23, 2012 meeting listed "Tribal Hunting Hours Extension" and "Tribal Shining Regulatory Amendment" as Issues 8 and 9 out of a total of 42 issues were proposed to be discussed at the one-day meeting. Williams Aff. Ex. I.

83. Substantive issues were not discussed at the May 23, 2012 opening meeting of *Voigt* Round III Stipulation negotiations, with the exception of wolf no-harvest tribal zones, and a rough outline of which issues should be assigned to which working group. Williams Aff. ¶ 9; Gunderson Aff. ¶ 4.

84. The "Tribal Shining Regulatory Amendment" was assigned to the "Enforcement Team." *Id.*

85. There was no discussion of or indication during the May 23 meeting that the Tribes wanted to institute a night hunt for deer or other animals during 2012; Commission Orders were not identified as being contemplated as part of the *Voigt* Stipulation amendment Round III process, and there was no agreement on the substance of any issues during the meeting. Williams Aff. ¶ 9.

June 30, 2012 Enforcement Team Meeting and August 1, 2012 Second Meeting

86. On June 29, 2012, the DNR Enforcement Team flagged the Tribes' tribal hours extension proposal, noting concerns about safety, shooter knowledge of the target and beyond, and target identification. Williams Aff. ¶ 10 & Ex. K at 2.

87. DNR's Enforcement Team also initially identified health, safety and welfare concerns related to the Tribes' proposed "Shining" amendment. *Id.*

88. On July 29, 2012, GLIFWC provided DNR with a revised version of the 43 issues to be discussed at the second stipulation review meeting to be held on August 1, 2012 between

GLIFWC staff, the Voigt Task Force, plaintiff tribal chairs and representatives and DNR representatives. Williams Aff., ¶ 11 & Exs. M and N; J. Stark Aff. ¶ 11c.

89. The hunting hours and tribal shining provisions remained unchanged between May and July, 2012. Williams Aff., Exs. H & N.

90. The draft meeting agenda for August 1, 2012, listed 7 items as potential issues to be addressed as technical amendments or miscellany; night hunting or shining of deer were identified by GLIFWC as enforcement related issues, not technical amendment issues. Williams Aff. Ex. O.

91. The Enforcement Team met to discuss proposed amendments with enforcement implications on July 30, 2012. Williams Aff. ¶ 10; Zebro Aff. ¶ 10.

92. The Law Enforcement team discussed approximately 15 stipulations they felt were within their areas of expertise, including the Tribes' newly proposed night hunting stipulation, but there was no discussion of how the tribes intended to implement or regulate night hunting and the use of lights to illuminate or shine wild animals. Zebro Aff. ¶ 10.

93. The majority of the team's discussion focused on the concepts in the proposed stipulations and how they would be implemented, not on any specific regulatory language. Zebro Aff. ¶ 10.

94. GLIFWC staff questioned DNR staff about the new night hunting of wolf regulations and current state statutes pertaining to hunting coyote, fox and raccoon at night. Zebro Aff. ¶ 10.

95. At no time during this meeting did DNR agree to the proposed night hunting deer stipulation or state that night hunting of the animals noted in the proposed "Tribal Shining" stipulations was safe. Zebro Aff. ¶ 10.

96. During the July 30, 2012 meeting, DNR received a digital copy of the text of draft model code language for the proposed Tribal stipulations to be discussed during the August 1 meeting. Williams Aff. ¶ 12 & Exs. P-T.

97. DNR had no time to analyze and discuss draft stipulation language during the July 30 meeting or the August 1 meeting. Williams Aff. ¶ 12; Gunderson Aff. ¶ 6.

98. The July 30 meeting included a general discussion that addressed the Tribes' discriminatory treatment arguments related to night hunting of wolves, but there was no agreement on language for a stipulation, and no agreement that night hunting was safe. Williams Aff. ¶ 12; Zebro Aff. ¶ 10.

99. The August 1, 2012 Voigt Stipulation meeting in Stevens Point addressed the Tribes' proposed night hunting stipulation as one of 43 proposed "Issue Sets" and proposed language revisions. Williams Aff. ¶ 14; Gunderson Aff. ¶ 5.

100. No specific language was discussed during the meeting, and DNR noted that it would need to review draft regulatory language before making a decision and that it would at a minimum want reversionary language in any stipulation it agreed to. Williams Aff. ¶ 14.

101. There was no proposal during the August 1, 2012 meeting that the night hunting issue set would be proposed as a commission order, nor was there any agreement or statement that the State had "no reasonable objections" to such an order. Williams Aff. ¶ 15; Gunderson Aff. ¶ 5.

102. DNR raised concerns regarding enforcement, safety, and public education during the August 1 meeting, and it agreed to continue to work on this issue with the Tribes after we had the opportunity to sit down with them and discuss proposed language. Williams Aff. ¶ 15.

State adopts Wolf Hunt Rule and Tribes contemplate unilateral action

103. On August 15-16, 2012, emails began circulating between DNR staff indicating that the Tribes intended to institute night hunting of deer sometime in October, 2012. Williams Aff. ¶ 16 & Exs. U-W; Zebro Aff. ¶¶ 12-13 & Exs. A-B.

104. On August 18, 2012 the DNR promulgated rules implementing the wolf night hunting provisions of Wisconsin 2011 Act 169. Lawhern Aff., ¶ 5 & Ex. C.

105. The forms of night hunting of wolves authorized by 2011 Wisconsin Act 169 and the administrative regulations promulgated under it are at least as restrictive and at least as protective of public safety as the Wisconsin laws providing for the night hunting of coyotes that the Court considered in the 1989 Deer Trial. *Id.*, ¶ 9 & Ex. E.

106. The night hunting season for wolves in a particular management unit may never open if there is no harvestable surplus of wolves remaining in the management zone after the conclusion of the traditional 9-day deer hunting season on November 25, 2012, and as of November 20, 2012, two of Wisconsin's' six wolf management zones were closed to night hunting before it could begin. *Id.*, ¶ 11.

107. Wolves may only be hunted at night from a stationary position, over bait or with the use of predator calling techniques. *Id.*, ¶ 9b and Ex. E.

108. On August 21, 2012, DNR Secretary Stepp, EA Gunderson, Attorney Williams and GLIFWC Executive Director Jim Zorn discussed the parties' understanding of what occurred at the August 1, 2012, meeting, and DNR reiterated that although it was willing to continue to discuss night hunting and the other 42 issues raised by the Tribes, we had safety, enforcement, and public education concerns related to night hunting. Gunderson Aff. ¶ 6.

109. DNR did not propose a specific timeline for discussions on night hunting, but rather indicated that it would need adequate time to consult with staff, seek legal review of proposed stipulation language, and educate constituents about the issues. *Id.*

110. At no point during the August 21, 2012 conversation did DNR indicate it would agree to an off-reservation night hunting proposal. *Id.*

111. On August 23, 2012, during a meeting with the Lac du Flambeau Tribal Council, DNR staff first formally learned that the Tribes were contemplating adopting a night hunting provision through the Other Liberalization Amendment process, and DNR indicated during that meeting that it would not agree to such a commission order. Second Stepp Aff., ¶ 7; Williams Aff. ¶ 20; Gunderson Aff. ¶ 7.

112. DNR told GLIFWC staff, Voigt Task Force Chair Maulson and the Lac du Flambeau Tribal Council that night hunting did not fit under the "other liberalization amendment process" because night hunting of the species they desired to hunt at night (bear, deer, elk, turkey) would not be consistent with the state law change allowing the night hunting of wolves, that there would be insufficient time for adequate public education and outreach, and that law enforcement would need time for education and coordination. Williams Aff. ¶ 20.

Tribes Draft Commission Order and DNR objects

113. On Friday, September 28, 2012, GLIFWC provided DNR with the text of a draft Tribal Night Hunting Regulations Commission Order, via email. J. Stark Aff. ¶ 11.g. & Pl. Ex. 26; Second Stepp Aff. ¶ 8; Gunderson Aff. ¶ 8.

114. Attorney Stark explained:

This Commission Order is being proposed as an "other liberalization amendment" in order to establish culturally appropriate regulations to provide tribal members more treaty harvest opportunities in line with state harvesters. As

you are aware, the Wisconsin Legislature recently amended its rules allowing hunting at night. This change in State law is less restrictive than the current tribal regulations. As a result, this Order is being presented as a way to provide the tribes with more harvest opportunities in a manner that is the least restrictive possible. This Order is proposed to establish amendments to the Tribes' night hunting regulations for the Wisconsin portion of the 1837 and 1842 ceded territory pursuant to the authority granted by §3.33 of the Tribes' Off-Reservation Conservation Codes to amend §3.14, §6.12, §6.20, §7.26, §8.10, §8.16 and §8.26 of each Tribe's Code.

Pl. Ex. 26.

115. Secretary Stepp formally responded to GLIFWC's introduction of the Commission Order on October 5, 2012, by sending a letter to Mr. Zorn. Second Stepp Aff. ¶ 9; J. Stark Aff. ¶ 11h; Pl. Ex. 29.

116. In her October 5 letter, Secretary Stepp advised Mr. Zorn of what she believed to be an ongoing pattern of the Tribes' stepping outside of the mutually agreed-upon stipulation review process by taking unilateral action, and she cited the draft commission order as the most recent example of the Tribes' resorting to self-help rather than the Court-approved stipulation process to. Second Stepp Aff. ¶ 9 & Pl. Ex. 29 at 1.

117. Secretary Stepp's letter noted that "the State will – as it must – take a hard look at the public safety and conservation issues raised by the commission's wide-ranging proposed night hunting order before [it] can meaningfully consult with" the Tribes, and she noted that DNR "believed those issues to be significant." Pl. Ex. 29 at 2; J. Stark Aff. ¶ 11h.

118. On October 12, 2012, GLIFWC, on behalf of the plaintiff Tribes, responded to Secretary Stepp's October 5 letter by sending her a letter arguing that the Other Liberalization Amendment process was appropriate and "provided the Department with a revised proposed Order effective for deer only," which shall be referred to hereafter as the draft Commission Order. J. Stark Aff. ¶ 11i. & Pls. Ex. 29.

119. In his letter, Mr. Zorn suggested a deadline of November 1, 2012, for concluding consultation on night hunting. Second Stepp Aff. ¶ 10; Pl. Ex. 29 at 1.

120. Secretary Stepp was concerned that the DNR could not conduct a meaningful review of the revised commission order by November 1, 2012, but she committed staff to the task, despite their heavy workloads in other areas, such as preparations for the nine-day gun deer hunting season. Second Stepp Aff. ¶ 10

121. Secretary Stepp, along with numerous staff—including but not limited to law enforcement, legal, wildlife and administrative personnel—worked diligently to evaluate the revised commission order and identify areas for clarification, and DNR also agreed to meet with the Tribes on October 22, 2012, for the purpose of continued consultation and clarification on the legal, public education, enforcement, and safety concerns. *Id.*

122. DNR law enforcement staff did not receive information about the Tribes' planned marksmanship course and shooting plan requirements until October 19, 2012. Zebro Aff. ¶ 17 & Exs. C and D.

123. At the October 22, 2012 meeting, DNR staff asked Mr. Zorn and Mr. Stark a number of clarifying questions about the Tribes' night hunting proposal. Second Stepp Aff. ¶ 11; Gunderson Aff. ¶ 9.

124. Statements made by several tribal members made it appear that the primary motivation behind the night hunting proposal was to express frustration about the recent wolf hunting legislation and the likelihood of future mining legislation that would impact the Ceded Territory. Second Stepp Aff. ¶ 11; Gunderson Aff. ¶ 9.

125. The Tribes' interpretation of the revised commission order was not adequately captured in the language of the order, and DNR staff identified a number of legitimate public safety concerns. Second Stepp Aff. ¶ 11; Gunderson Aff. ¶ 9.

126. DNR Enforcement and Science Division Administrator Tim Lawhern, Chief Warden Randy Stark, Bureau of Law Enforcement Policy Officer Tom Van Haren and Warden Zebro presented a number of the safety-related concerns they had identified during the short period of time since they had received a copy of the most recent draft Commission Order, shooting plan and marksmanship course materials. Zebro Aff. ¶ 18.

127. President Maulson, the Voigt Task Force Chair (T. Moulson Aff. ¶¶ 1-2), made it clear that the Tribes' intended to issue a commission order regardless of any review by the DNR, and the commission order would go into effect on November 1, 2012—leaving little, if any, time for public outreach and education, or to alert local law enforcement and adequately prepare DNR Conservation Wardens. Second Stepp Aff. ¶ 11.

128. It was clear that the Tribes wanted to adopt the Commission Order despite knowing DNR had safety concerns. Zebro Aff. ¶ 20.

129. Secretary Stepp reiterated DNR's position that a commission order was not the proper mechanism for pursuing night hunting, and made clear her belief that a failure to work through the appropriate mechanisms would enable the State to enforce its prohibition against shining towards Tribal members acting under a night hunting commission order. Second Stepp Aff. ¶ 11; Gunderson Aff. ¶ 9.

130. No agreements were made by the DNR during the October 22 meeting to indicate that the proposed code changes would provide adequate safety to protect the public or officers investigating complaints of suspected illegal night hunting or shining of deer. Zebro Aff. ¶ 19.

131. After the October 22, 2012 meeting, Secretary Stepp directed DNR staff to continue their review of the draft commission order. Second Stepp Aff. ¶ 12.

132. On October 30, 2012, Secretary Stepp sent Mr. Zorn a letter which summarized the findings of DNR's review by noting that night hunting could not be addressed through the commission order or other out-of-court mechanism, and by identifying all of the specific safety concerns that DNR had identified to date. Second Stepp Aff. ¶ 12 & Ex. E; J. Stark Aff. ¶ 11k ("The Department explained that, having considered the Tribes[] proposal, the Department could not approve the Commission Order, questioning the Commission's ability to issue the Order and citing a number of safety concerns").

133. Secretary Stepp's October 30, 2012 letter specifically identifies eight concerns that the Commission Order does not adequately or safely address (visibility, safe zone of fire, posting, shooting plans, tracking, familiarity, illumination and spotting, training) and it describes these concerns in depth. Second Stepp Aff. Ex. E at 2-3.

134. Secretary Stepp's letter goes on to clarify that the issues identified in the previous paragraph are only the issues that the DNR has been able to address in the short time since the Commission Order was presented, and to state that there has not been sufficient time for the parties to properly consider the DNR's concerns. *Id.* at 3.

Safety Concerns Regarding the Commission Order

135. Hunting deer at night presents a great danger to public safety. *LCO VII* at 1423.

136. The draft Commission Order is not "identical in scope and content to § NR 13.30(1)(q)." Lawhern Aff., ¶¶ 8-9 & Ex. E.

137. The draft Commission Order authorizes the possession and use of a light at the point of kill, which is prohibited for deer by Wis. Stat. § 29.314(3). *Id.* ¶ 7a.

138. The draft Commission Order authorizes hunting of deer from 50 minutes after sunset to 1 hour before sunrise, which is prohibited by Wis. Admin. Code § NR 10.06(2)(b). *Id.* ¶ 7b.

139. The draft Commission Order allows for significant safety risks for tribal members who are hunting deer at night for other people. *Id.* ¶ 10.

140. The draft Commission Order contains inadequate regulation of hunter conduct to ensure safe shooting. *Id.*

141. The draft Commission Order contains inadequate or ill-defined training requirements and review mechanisms to ensure safety. *Id.*

142. The shooting plans contemplated by the draft Commission Order are not safe because those plans are presumed compliant if the "safe zone of fire" marked on a plan does not contain specific structures or land uses within a quarter mile (school grounds, residences, lake, ATV/snowmobile trails, etc.). Lawhern Aff. ¶ 10 & Ex. F at 1, 1.a.; Lawhern Aff. Ex. D at 12.

143. The absence of schools, residences, picnic areas, etc., within a designated "safe zone of fire" on a shooting plan does not automatically render the plan safe. Topography, natural features, and vegetative cover also factor into whether it is safe to shoot a gun in a particular area. Lawhern Aff. ¶ 10 & Ex. F at 1, ¶ 1.a.i.; Lawhern Aff. Ex. D at 12.

144. The draft Commission Order defines "Safe Zone of Fire" as "an area in which a hunter may safely discharge a weapon," but it contains no standards (other than proximity to specific structures or land uses) by which to judge if an area marked on a map is actually a safe area to discharge a firearm. Lawhern Aff. ¶ 10 & Ex. F at 1, ¶ 1.b.

145. Safe hunting requires a hunter to establish his or her ability to safely discharge a firearm immediately prior to shooting, not months in advance by delineating features on a map. Lawhern Aff. ¶ 10 & Ex. F at 1, ¶ 1.b.i.

146. The conditions that establish where and when a hunter may safely discharge a firearm change from moment to moment. The manner in which a firearm is discharged may be safe in one moment or area but unsafe in another, depending on the specific circumstances. Lawhern Aff. ¶ 10 & Ex. F at 1, ¶ 1.b.ii.

147. While some landscape features may be permanent, the location of property, animals, and especially people is not guaranteed to be, so it is not safe to rely on a previously designated "safe zone of fire." Lawhern Aff. ¶ 10 & Ex. F at 1, ¶ 1.b.ii.

148. Under the draft Commission Order, a shooting plan is valid from April 1 to March 31 of the following year. Lawhern Aff. ¶ 10 & Ex. F at 1, ¶ 1.c.

149. While there is a requirement in the draft Commission Order that a member have visited the area in daytime hours, this requirement has the potential of only providing illusory safety enhancement because conditions may have changed significantly between the time of the visit and the October-January hunting season. Lawhern Aff. ¶ 10 & Ex. F at 1, ¶ 1.c.i.

150. The draft Commission Order fails to ensure safety because there is no review mechanism for the shooting plan or the representations made in them. While there is a penalty for providing false information, there is no way to verify the accuracy of the information submitted or to make any meaningful safety determination from the information provided. Lawhern Aff. ¶ 10 & Ex. F at 1, ¶ 1.d.

151. The draft Commission Order requires hunters to attend an advanced hunter safety course and marksmanship training prior to obtaining a permit, but these requirements do not

guarantee safety because no standards for these courses are provided other than the reference to a marksmanship proficiency rating. Lawhern Aff. ¶ 10 & Ex. F at 1, ¶ 1.e.

152. The Tribes have not consulted with DNR hunter safety training professionals regarding the adequacy of their hunter safety program to address the DNR's concerns. Lawhern Aff. ¶ 10 & Ex. F at 1, ¶ 1.e.i.

153. An adequate training course for night hunting would need to be very involved in order to protect the safety of both the public and the member hunter. Lawhern Aff. ¶ 10 & Ex. F at 1, ¶ 1.e.iii.

154. The absence of any codified standards or additional information regarding hunter training is a serious safety concern. Lawhern Aff. ¶ 10 & Ex. F at 1-2, ¶ 1.e.iii.

155. The draft Commission Order's standards of conduct aimed at ensuring safe shooting are inadequate. Lawhern Aff. ¶ 10 & Ex. F at 2.

156. No standards exist for the direction a hunter may safely shoot, when and whether shooting at a running target or shooting multiple times is allowed, or appropriate distance within which to shoot at a target. Lawhern Aff. ¶ 10 & Ex. F at 2, 2.a.

157. The "safe zone of fire" included in the shooting plan only limits where a hunter must stand when discharging a firearm. Lawhern Aff. ¶ 10 & Ex. F at 2, 2.b.

158. There is no requirement that the target also be within the zone, which limits the efficacy of establishing a zone in the first place. Lawhern Aff. ¶ 10 & Ex. F at 2, 2.b.

159. The limited requirements in the draft Commission Order do little if anything to require a hunter to identify their target and beyond. Lawhern Aff. ¶ 10 & Ex. F at 2, 2.c.

160. Hunters are authorized, but not required to illuminate their target prior to shooting. Lawhern Aff. ¶ 10 & Ex. F at 2, 2.c.ii.

161. Without requiring illumination, identification of the target and surrounding conditions is difficult, if not impossible. *Id.*

162. Visiting an area during the day (even assuming a recent visit) does not guarantee the same or safe conditions at night. *Id.*

163. Even if a hunter chooses to illuminate a potential target, there is no guarantee that the hunter will be able to correctly identify the target. Lawhern Aff. ¶ 10 & Ex. F at 2, 2.c.iii.

164. When a deer is illuminated, the first and often only thing a person will see is the reflection from their eyes. *Id.*

165. Deer are not the only animal whose eyes shine in the dark: the eyes of raccoons, dogs, and other animal reflect in the same manner, making it possible for a hunter to confuse another animal for a deer. *Id.*

166. The draft Commission Order does not provide for safe hunting because there is no requirement that a hunter be in an elevated position (so a backstop is always present) and only shoot within a limited radius. Lawhern Aff. ¶ 10 & Ex. F at 2, 2.c.iv.

167. The draft Commission Order does not provide for safe hunting because hunters are not required to use a spotter to assist in verifying that the discharge of a firearm at a target is safe. Lawhern Aff. ¶ 10 & Ex. F at 2, 2.c.v.

168. The draft Commission Order provides that the night hunting season will open October 15 beginning next year. Lawhern Aff. ¶ 10 & Ex. F at 2, 2.d.

169. In October, foliage is still thick so as to make identifying a target (especially at night) difficult. *Id.*

170. Public use of outdoor spaces for non-hunting activities is still high in October, which raises user conflict concerns. *Id.*

171. The draft Commission Order does not require hunters to notify nearby landowners, the DNR, or local law enforcement before hunting at night. Lawhern Aff. ¶ 10 & Ex. F at 3, 2.e.

172. Unassuming people could easily wander in to a hunting area on public land, which, combined with the lack of a requirement to illuminate a target, creates a safety risk. *Id.*

173. The number of law enforcement contacts in a potentially dangerous environment is likely to rise, as law enforcement officers must ascertain if a non-member is breaking state law. Lawhern Aff. ¶ 10 & Ex. F at 2, 2.f.

174. If there are unresolved disputes about the authority of DNR conservation wardens to investigate and arrest potential deer shining law violators, the potential for disputes and dangerous interactions between wardens and tribal members will be increased. Lawhern Aff. ¶ 14.

175. Law enforcement activity involving armed persons at night is inherently dangerous for both the officers and hunters. *Id.*

176. Violations that involve the use or possession of firearms often require or result in conservation wardens seizing the firearm as evidence of the violation. *Id.*

177. Where uncertainty exists about the parties' respective authority under two divergent sets of regulations, the potential for disputes in the field over such an action, and therefore danger to the officer and the suspected violator, is heightened. *Id.*

Commission Order finalized and signed

178. On November 9, 2012, Zorn advised the DNR that the plaintiff Tribes intended to revise their off-reservation hunting codes to allow the various forms of deer shining described in

proposed Commission Order 2012-05, which would "be effective on November 26, 2012."
Stepp Aff., Ex. A

179. When he introduced the November 9 draft, Zorn stated: "As I previously expressed, this proposed Commission Order was drafted to be, and is, consistent with the recent enactment of 2011 Wisconsin Act 169, which changed state hunting hours for wolves and provided for the use of a light at the point of kill." Stepp Aff., ¶ 4 & Ex. A at 1.

180. Zorn acknowledges that "the issue involved here has been triggered by a change in state law that involves a manner and method of hunting at night that is significantly different than the deer shining issue that has been previously litigated in this case" and he focuses his argument on safety comparisons between wolf hunting and the Tribes' proposed night hunting of deer, not on whether deer hunting at night is actually safe. Zorn Aff. ¶ 16, 16a-f.

181. Zorn's November 9 letter stated that the draft Commission Order had been revised to (1) require members to possess a copy of their "signed and certified" shooting plan for the location to be hunted; (2) visit their proposed harvest site during daytime hours; (3) adequately define "safe zone of fire"; (4) include a presumption against shooting toward identified features such as campgrounds, lakes and roads; (5) prohibits hunting within 1000 feet of a school; (6) close night hunting the night before the gun-deer season; and (7) close hunting for 30 minutes between night hunting and day hunting hours. Stepp Aff., ¶ 4 & Ex. A at 1.

182. Zorn's letter also asserted that the tribes had updated their hunter safety training to specifically address shooting at night. *Id.*

183. By letter dated November 15, 2012, Secretary Stepp advised the GLIFWC Executive Administrator that the defendants would not agree to the Tribes' proposed legalization of deer shining and she asked Mr. Zorn to advise her, before the close of business on Monday,

November 19, 2012, if the Tribes had reconsidered and decided not to revise their codes in this manner. Stepp Aff., ¶ 5 & Ex. B.

184. At approximately 5:00 p.m. on November 19, 2012, Secretary Stepp learned that a GLIFWC attorney had just telephoned a DNR Bureau of Legal Services attorney to say, in response to her November 15, 2012 letter, that GLIFWC had not yet issued the proposed deer shining order and, contrary to Mr. Zorn's representation in his November 9, 2012 letter, GLIFWC did not know when the deer shining order would be issued. Stepp Aff., ¶¶ 5, 7.

185. On November 20, 2012, in response to the GLIFWC communication of November 19, 2012, referred to in the preceding paragraph, Secretary Stepp wrote Mr. Zorn a letter in which she reiterated the state's opposition to the Tribes' deer shining proposal, again asked GLIFWC not to issue an order purporting to authorize off-reservation deer shining and hunting, and, in the interest of protecting public safety, requested a minimum of one week's notice prior to the issuance of any GLIFWC order purporting to authorize off-reservation deer shining. Stepp Aff., ¶ 8 & Ex. C.

186. On November 21, 2012, GLIFWC advised the defendants that it had issued an order purporting to authorize off-reservation deer shining in the ceded territory beginning on November 26, 2012. Stepp Aff., ¶ 9 & Ex. D; Jason Stark Aff. ¶ 11.m.

187. The final signed Order does not adequately address or resolve the safety concerns identified by Division Administrator Lawhern, and it only tangentially addresses two safety concerns. Randall Stark Aff. ¶ 6.

188. The final Commission Order had been revised to clarify that a firearm may not be discharged until a member has accurately identified a deer. Randall Stark Aff. ¶ 6.a. & Ex. A at 4.

189. The change identified in the preceding paragraph is not a substantive change of the section, and does nothing to reduce human error associated with identifying a target, especially at night. Randall Stark Aff. ¶ 6.

190. On numerous occasions over the last 29 years, Wisconsin hunters have mistakenly shot a person when they thought they were shooting a deer. Randall Stark Aff. ¶¶ 2, 6a; Second Stark Aff. ¶ 2.

191. People in Wisconsin have also been shot, and in some cases killed, by a deer hunter who could not or did not identify the victim beyond the target deer because of terrain, vegetation, or reduced light conditions. Second Stark Aff. ¶ 2.

192. Between 1989 and 2009, there were 44 reported incidents in Wisconsin where a deer hunter shot another person because the hunter failed to properly identify his or her target. Second Stark Aff. ¶ 3 & Ex. B.

193. Of the 44 reported incidents, 15 were fatal. Second Stark Aff. ¶ 3 & Ex. B.

194. Between 2010 and 2012, there were two additional reported instances where a Wisconsin deer hunter shot another person because the hunter failed to properly identify his or her target. Second Stark Aff. ¶ 4 & Ex. C.

195. Misidentification of the target and failure to identify persons in the line of fire is a public safety concern associated with deer hunting, and the State of Wisconsin has invested significant effort to mitigate this safety concern to the extent possible. Second Stark Aff. ¶ 5.

196. The night hunting regulations contemplated under the final Commission Order do not adequately mitigate the public safety concerns of misidentification of the target or identification of persons in the line of fire. Second Stark Aff. ¶ 7.

197. The final Commission Order had been revised to exclude the reference to a shooting plan being presumed as compliant if no areas specified in that section are included in the "safe zone of fire." Randall Stark Aff. ¶ 6b & Ex. A at 5.

198. The revision identified in the previous paragraph is not accompanied by any other standards, and the final Commission Order does not address the safety concern that a "safe zone of fire" cannot automatically be established based on proximity to the specified areas alone. Randall Stark Aff. ¶ 6b.

199. Although Mr. Zorn stated that the tribes had updated their hunter safety training in his November 9 letter (Stepp Aff. ¶ 4 & Ex. A at 1), as of December 6, 2012, DNR's Northern Region Regional Conservation Warden had still not been provided with the updated version of the Night Shooting Training he has requested on several occasions. Zebro Aff. ¶ 21.

DIFFERENCES BETWEEN TRIBAL PLAN AND OTHER LAWS OR PRACTICES Other States

200. No other state allows night hunting of deer generally. Lawhern Aff. ¶ 8.

201. The Vermont, North Dakota, South Dakota, Michigan, Oregon, Mississippi, and Florida regulatory schemes do not allow the night hunting of deer or hunting deer with the aid of an artificial light. Second Stark Aff. ¶ 9.

202. The only authorized provision for night hunting of deer occurs in Minnesota, where Chippewa tribal members are conditionally allowed to shine deer off reservation in ceded territory in that state. Lawhern Aff. ¶ 8.

203. The regulations pertaining to tribal members' night hunting activities in Minnesota are significantly more restrictive and protective of safety in that the draft Commission Order in the Minnesota regulations require a tribal hunter to hunt from an elevated position so a backstop

is always present, to hunt over bait, to fire at targets only within a limited radius, and to illuminate a target prior to firing. *Id.*; Lawhern Aff. ¶ 10 & Ex. F at 2, 2.a.i.

Wolf Hunting

204. If tribal off-reservation deer hunting while shining is allowed, many more deer will be shot at night than wolves, given the much larger tribal deer quota and the significant incentive to hunt deer at night. Lawhern Aff., ¶¶ 12-13; *LCO VII* at 1408.

205. The public safety concerns related to night hunting of deer by Tribal members are greater than those associated with night hunting of wolf by hunters because the relative risk increases with the number of hunters and the popularity of each method. Second Stark Aff. ¶ 8.

206. Many more incidents of shots being fired in the darkness, with the associated public safety implications, will occur under the proposed Tribal night hunting program. Second Stark Aff. ¶ 8a.

207. There is a significant incentive to hunt deer at night as opposed to hunting them during the day. This is because deer freeze at night under the rays of a light, making them much easier to harvest than mobile deer during the day. Lawhern Aff. ¶ 13.

208. Plaintiffs acknowledge that night hunting is an "efficient method of hunting" deer. Isham Aff. ¶ 7.

209. In 2010, there were 1,869 Tribal hunters from the Plaintiff Tribes. Second Stark Aff. ¶ 8a. vi; Plaintiffs' Ex. 1 at 5.

210. There is no individual Tribal bag limit on deer, and the only limit on the total harvest is one half of an established quota in a Deer Management Unit. Second Stark Aff. ¶ 8a. v.

211. In contrast, the likelihood of a significant amount of night hunting of wolves under state law is low. Lawhern Aff. ¶ 11.

212. Both the limited opportunities and the preference of the harvester will mean that few wolves will be taken by hunting at night this year. Lawhern Aff. ¶ 11.

213. The opportunity for tribal members to hunt deer at night while shining under the authority of the Commission Order is not limited by the factors which limit state wolf hunting. Lawhern Aff. ¶ 12.

214. Wisconsin wolf hunters are limited to a single license that allows them to harvest a single wolf during that license year. Second Stark Aff. ¶ 8a. iv.

215. Trapping wolves is a more popular harvest method than shooting. Second Stark Aff. ¶ 8a. i. (57.7% have been trapped this year).

216. The total number of wolves allowed to be harvested by non-tribal members in the state during the 2012-13 season is 116. Lawhern Aff. ¶ 11.

217. As of November 20, 2012, 90 wolves have already been harvested. *Id.*

218. Of the 90 wolves harvested by November 20, 2012, 55 were harvested by trapping, indicating that many harvesters prefer this method. *Id.*

219. Two of the six zones for wolf hunting were closed before November 20, 2012 because the harvest quota has been reached in those zones. *Id.*

220. On November 20, 2012, three additional zones were nearing the established zone quota and were expected to close shortly thereafter. *Id.*

221. As of December 6, 2012, only 3 zones remain open and a total quota of 12 remains available for harvest. Second Aff. of Randall Stark, ¶¶ 8a. i and ii.

222. Between November 26, 2012, the date when night hunting of wolves in the state opened, and December 6, 2012, only one wolf was registered as having been shot after normal daytime hunting hours, and this was at approximately 5:00 pm in Barron County. Second Aff. of Randall Stark, ¶ 8a. iii.

223. Daytime hunting hours in Barron County had ended at 4:43 pm on the day the wolf was harvested; thus, this wolf was harvested 13 minutes before Tribal hunters would be allowed to hunt deer at night under the Commission Order. *Id.*

224. The geographic concentration of successful Tribal deer hunters in seven counties within the Ceded Territories also presents a safety concern as compared to the concentration of wolf hunters distributed across the primary wolf range in Wisconsin. Second Stark Aff. ¶8. b.

225. The tribal quota for deer within ceded territory Deer Management Units is far greater than the state quota for wolves, so many more deer than wolves will be shot at night. Lawhern Aff. ¶ 12.

226. In 2010, 1,152 deer, or 80% of the total Wisconsin Tribal harvest occurred in seven counties that are all within the Ceded Territories: Bayfield, Burnett, Douglas, Oneida, Sawyer, Vilas, and Washburn. Second Stark Aff. ¶ 8b. i, Plaintiffs' Ex. 1 at 13.

227. In contrast, the Wisconsin wolf harvest takes place statewide in six management zones, and to date, in the seven counties in the Ceded Territories where 80% of the Tribal deer harvest is concentrated, a total of 12 wolves have been taken by firearm, and none of these were taken after normal daytime hunting hours. Second Stark Aff. ¶ 8b. ii.

228. The temporal concentration of successful Tribal deer hunters within the Ceded Territories, also presents a safety concern in relation to other Tribal hunters and other people engaged in a variety of outdoor recreational pursuits. Second Stark Aff. ¶ 8c.

229. Night hunting for wolves does not begin until after the gun deer season, in either late November or early December, when foliage is down and public use has diminished significantly. Lawhern Aff. ¶ 10 & Ex. F at 2, 2.d.i.

230. In 2010, 67% of the total Tribal deer harvest occurred between September 7th and November 19th, before the Tribes' Middle Deer Season that year. Second Stark Aff. ¶ 8c.i., Plaintiffs' Exhibit 1 at 18.

231. In 2013, the proposed Tribal night hunting program contemplates beginning on October 15. Second Stark Aff. ¶ 8c. ii, Plaintiffs' Ex. 25.

232. The combination of this concentrated harvest effort during a period in which there is a higher presence of the public engaged in outdoor recreation, such as trappers, dog trainers and other outdoor users, creates increased safety concerns. Second Stark Aff. ¶ 8c. iii.

DNR's CWD Sharpshooting Program

233. In February and March of 2002, after CWD was detected in southern Wisconsin, DNR set up an Incident Command Structure and implemented a response plan that included scheduling of sharpshooters, logistics, public meetings, and an overall incident command response to the initial CWD finding. Ryan Aff. ¶ 3.

234. Sharpshooting of wild deer occurred only in the CWD Management Zone in roughly the southern third of Wisconsin, with the exception of a single operation in Portage County, immediately surrounding the Stan Hall deer farm in response to a breach in the fence. Ryan Aff. ¶ 5 & Ex. A.

235. DNR used sharpshooting as a tactical tool in known affected areas, and it proved to be an effective tool for removing additional deer. The sharpshooting operations also provided

the opportunity for DNR to enhance disease surveillance outside of sampling deer harvested by hunters during hunting seasons. Ryan Aff. ¶ 6.

236. DNR used sharpshooting as a management tool to: (a) reduce the number of CWD-positive animals; (b) reduce the number of susceptible deer through overall herd reduction, and, (c) limit the accumulation of infectious CWD prions in the environment. Ryan Aff. ¶ 7.

237. DNR's CWD management activities utilizing sharpshooting did not constitute a recreational pursuit. CWD sharpshooting and hunting differ in several significant respects: (a) the sharpshooting efforts supported a scientific approach to disease management; (b) a CWD sample extraction was taken from each deer collected, the results of which were extensively used by DNR to monitor disease prevalence and spread; (c) sharpshooting was not undertaken for any personal benefit. Ryan Aff. ¶ 8.

238. DNR utilized only trained professionals for sharpshooting as a strategic disease management tool for CWD in the southern Wisconsin deer herd. Ryan Aff. ¶ 4 & Ex. C at 1.

239. At no time were private citizens involved in CWD management activities. The only personnel engaged in the management activities were trained government employees: DNR conservation wardens and trained Lands Division employees, USDA-APHIS employees, City of Beloit police officers, Dane County law enforcement officers, and Illinois Department of Natural Resources biologists. Horn Aff. ¶ 9.

240. None of the deer collected were ever retained by any sharpshooter. All deer collected were either donated to local food pantries, to the private landowners who granted permission to collect on their lands, or to large cat sanctuaries when the carcasses were deemed not necessary for scientific purposes. Ryan Aff. ¶ 8b.

Initial Targeted Surveillance

241. Initial targeted surveillance and deer collection efforts in southwestern Wisconsin were conducted exclusively by DNR conservation wardens, and occurred on public and private lands in or near the five positive sample sites in Iowa and Richland counties, and in each of the five civil townships in Rock County that border the State of Illinois. Horn Aff. ¶¶ 4-5.

242. Wardens contacted landowners and secured permission to harvest deer during daylight hours, as well as by shining and shooting deer during the hours of darkness. Horn Aff. ¶ 5a.

243. A Private Land Access and Shooting Authorization Agreement required a safety plan to be prepared prior to conducting any shooting activities. Horn Aff. ¶ 5a & Ex. A.

244. Safe shooting plans were developed for each property where management activities took place. Horn Aff. ¶ 5b & Ex. B.

2002-2003 Deer Collection Teams

245. Beginning in the winter of 2002-2003, DNR began scheduling teams to collect deer in the affected areas for CWD sampling. Horn Aff. ¶ 6.

246. These teams were comprised of DNR conservation wardens, DNR Lands Division (Bureaus of Wildlife, Parks and Recreation, Facilities and Lands) employees, and United States Department of Agriculture Animal and Plant Health Inspection Service (USDA-APHIS) employees. In addition, City of Beloit police officers assisted in collecting deer for testing within the Beloit city limits and in surrounding areas in the Township of Beloit, Rock County. *Id.*

247. DNR conservation wardens who participated had qualified on the basis of a rifle proficiency test. Horn Aff. ¶ 6a.

248. Lands Division employees who participated had qualified on the basis of having undergone rifle training. Horn Aff. ¶ 6b.

249. Qualified DNR employees initially used their own personal rifles, with suitable calibers designated by supervisory staff. Horn Aff. ¶ 6c.

250. The City of Beloit was issued a Scientific Collectors permit to be able to allow participation in the effort. Horn Aff. ¶ 6d & Ex. C.

Night Sharpshooting Operations

251. Sharpshooting operations that occurred at night were highly structured to maintain safety and to coordinate with local law enforcement. Horn Aff. ¶ 7.

252. A shooting captain was assigned for each night of shooting operations, and this shooting captain was typically a DNR law enforcement supervisor. Horn Aff. ¶ 7a.

253. Before beginning night sharpshooting operations, participating personnel were given an operation briefing that explained shooting protocols, and personnel were provided with safety instructions, local law enforcement contact information, and shooting plans for their assigned property. Horn Aff. ¶ 7b & Ex. D.

254. Night shooting operation personnel were assigned to two-person teams, with one designated as the shooter and the other designated as the spotter. Horn Aff. ¶ 7c.

255. Teams were assigned to specific geographic areas, they were required to view the properties where sharpshooting would occur during daylight hours, and this viewing took place on or near the same day as the operation. Horn Aff. ¶ 7d.

256. Personnel were required to check in with the shooting captain and, in some cases, the local sheriff's department prior to beginning shooting operations. Horn Aff. ¶ 7e.

257. Shooting took place primarily from elevated stands over baited sites. Horn Aff. ¶ 7f & Ex. E.

258. Personnel were allowed to shine and shoot from a stationary vehicle, but only after pulling off the traveled portion of the road on to the shoulder or in to field access. Additionally, personnel intending to shoot from a vehicle were required to ascertain if the potential shot would follow the safety protocol. Horn Aff. ¶ 7g.

259. At no time were personnel advised that it was permissible to shoot from a moving vehicle, and if this activity occurred, it did so without the knowledge and approval of the Warden Supervisor. Horn Aff. ¶¶ 2, 7h.

260. At the end of each shift, personnel were required to check in with the shooting captain, and they were required to report the number of deer collected as well as any other pertinent information pertaining to the operation, such as citizen contacts and equipment concerns. Horn Aff. ¶ 7i.

261. Each deer collected was identified for sampling with a CWD sampling tag and paperwork, which indicated the date and location taken. Horn Aff. ¶ 7j.

262. Each sharpshooter was required to fill out a daily activity log which included the surveillance location, number of deer seen, number of deer collected, number of rounds fired, and safety or other concerns. Horn Aff. ¶ 7k & Ex. F.

263. Collected deer were turned over to DNR Bureau of Wildlife personnel for transportation to testing facilities. Horn Aff. ¶ 7l.

264. Each shooting captain notified the local sheriff's department at the start of each day's operations and again when all personnel had check in and the operation was concluded for the day. Horn Aff. ¶ 7m.

Live-Trapping and Herd Reduction Sharpshooting Program

265. In 2003, after finding CWD in two Walworth County deer, DNR conducted a surveillance response in that county that included both sharpshooting and live-trapping then euthanasia, and both of these tools were used through March 2007. Ryan Aff. ¶ 3.

266. In 2004, the focus of the sharpshooting efforts turned from disease sampling to herd reduction. Horn Aff. ¶ 8.

267. The herd reduction took place in the vicinity of where CWD was originally discovered in Wisconsin as well as where subsequent testing indicated its presence, on both public and private lands. *Id.*

268. While the management efforts differed in some respects from the previous efforts, the program remained highly structured to protect safety and inform the affected public. *Id.* & Exs. G-I.

269. The operations protocol notes that the "process will be primarily bait and shoot[;] Secondary process will be shine and shoot." Horn Aff. Ex. G.

270. The DNR's fact sheet pertaining to sharpshooting on private lands confirms that only permanent DNR employees that have been certified are allowed to be sharpshooters. Horn Aff. Ex. H at 2.

271. The herd reduction program was supervised by three duty officers, a conservation warden and two DNR wildlife biologists. Horn Aff. ¶ 8a & Ex. J.

272. A DNR Lands Division staff member was assigned as a liaison, or town captain, to each civil township in the affected area, and the Town Captain contacted landowners to secure permissions to collect deer on their property for CWD testing and herd reduction. Horn Aff. ¶ 8b.

273. The town captain was also responsible for creating a shooting plan for each site and stocking and replenishing bait piles on the property. Horn Aff. ¶ 8b & Ex. K.

274. The DNR maintained a list of available sharpshooters, which was comprised of DNR law enforcement personnel and trained DNR staff. Horn Aff. ¶ 8c & Ex. L (the most current list).

275. Sharpshooters were given weekly assignments generally consisting of a target property, the shooting plan for the property, and relevant instructions. Horn Aff. ¶ 8d.

276. A chain of communication was established to ensure that activities were closely monitored: sharpshooters were required to check in with their respective town captain at the start of their operation, and check back in when they were finished for the night; town captains were responsible for notifying the shooting captains when sharpshooters were beginning operations, had concluded operations, and the collection totals for the night; and shooting captains were responsible for notifying the local sheriff's department at the beginning and end of daily operations and to document any concerns. Horn Aff. ¶ 8e.

277. The majority of the herd reduction effort involved shooting deer over bait piles. Sharpshooters shot from either a tree stand or ground blind. Tree stand safety training was required before a sharpshooter could use a tree stand. Horn Aff. ¶ 8f.

278. Sharpshooters were required to have completed DNR Wildlife Management Shooting School, DNR Law Enforcement rifle qualification, or the USDA Wildlife Services shooting qualification program. Horn Aff. ¶ 8g.

279. Sharpshooters were assigned to specific properties and specific hours. Horn Aff. ¶ 8h.

280. The shooting plans established for each property identified the location of the bait piles on the property and the location where sharpshooters would be located. Horn Aff. ¶ 8i.

281. These herd reduction efforts took place during the winter months until March of 2007, and no DNR sharpshooting efforts have taken place in the state since that time. Horn Aff. ¶ 8j; Ryan Aff. ¶ 9.

282. The DNR has and continues to engage in active removal of sick or injured deer, but only in response to public reports or incidental observations of sick or injured animals by DNR staff. These activities have occurred primarily in the southwest part of Wisconsin. Ryan Aff. ¶ 10.

2007 Sharpshooting Protocols

283. The DNR has developed comprehensive shooting protocols for CWD and other disease control by formalizing sections of its CWD Procedures Handbook, which became effective July 1, 2007. Ryan Aff. ¶ 11.

284. A protocol has been established for ongoing targeted sick deer removal. Ryan Aff. ¶ 11 & Ex. B.

285. A protocol has also been established should DNR receive funding to resume sharpshooting for disease control. Ryan Aff. ¶ 11 & Ex. C.

286. The DNR's shooting protocols were developed to maintain the highest level of safety and communication with local law enforcement. Specifically:

- (a) DNR staff are required to notify DNR Law Enforcement, the county sheriff's dispatch and their first-line supervisor prior to responding to a report of a sick or injured deer;

- (b) Immediately prior to dispatching a targeted deer, the area within 200 yards of the deer must be observable or physically checked to assure no person, livestock or equipment is present in order to eliminate the risk of injury;
- (c) If members of the public are present, they are to be asked to leave or position themselves in a safe area;
- (d) Shooters must follow the state's basic hunter safety guidelines;
- (e) For both response to sick deer and sharpshooting, a maximum acceptable and safe distance for nighttime shooting has been identified as 100 yards;
- (f) Shooters are not allowed to shoot through brush; and
- (g) Shooters are advised to shoot only at deer that are standing or lying still, and not to shoot at running deer.

Ryan Aff. ¶ 12.

Dated this 10th day of December, 2012.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LAC COURTE OREILLES BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS;
RED CLIFF BAND OF LAKE SUPERIOR
CHIPPEWA INDIANS; SOKAOGON
CHIPPEWA INDIAN COMMUNITY;
ST. CROIX CHIPPEWA INDIANS OF
WISCONSIN; BAD RIVER BAND OF THE
LAKE SUPERIOR CHIPPEWA INDIANS;
and LAC DU FLAMBEAU BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS,

Plaintiffs,

v.

Case No. 74-C-313-C

STATE OF WISCONSIN, WISCONSIN
NATURAL RESOURCES BOARD,
CATHY STEPP, KURT THIEDE and
TIM LAWHERN,

Defendants.

DEFENDANTS' RESPONSE TO PROPOSED FINDINGS OF FACT IN SUPPORT OF
PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF

The defendants by their attorneys, Attorney General J.B. Van Hollen and Assistant Attorneys General Thomas L. Dosch and Diane L. Milligan, submit these responses to plaintiffs' proposed findings of fact.

INTRODUCTION

Plaintiffs' submissions should be rejected because they do not conform with this Court's Procedures to be Followed on Motions for Injunctive Relief. Specifically, the majority of the proposed findings fail to "cite with precision to the source of that proposition, such as pleadings, affidavits, exhibits, deposition transcripts, or a detailed proffer of testimony that will be presented at an evidentiary hearing." Here, plaintiffs have referenced exhibits that are not introduced by affidavit or marked, and they have referenced multi-page exhibits without providing any specific page numbers. In addition, many of plaintiffs' proposed factual contentions are not factual, but are instead statements of opinion, including legal opinion. At the same time, the Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction relies on numerous factual contentions that are not provided in their Proposed Findings of Fact, and it references numerous additional exhibits that have not been properly introduced.

Defendants have attempted to respond to the plaintiffs' findings, and are submitting their own Proposed Findings of Fact to provide this Court with all facts relevant to the pending motions. However, in light of the deficiencies noted herein, defendants respectfully request that the Court exercise its discretion to summarily deny the motion for injunctive relief, cancel the hearing or postpone the hearing so that defendants may respond to properly supported propositions.

DEFENDANTS' RESPONSES

1. The Tribes are currently harvesting less than 1% of the deer in the ceded territory, and over the past several years, they have never harvested more than 4% of the deer in the ceded territory. Affidavit of J. Gilbert at ¶ 1; Exhibit 1.

RESPONSE: Disputed and not relevant. The citation to Mr. Gilbert's affidavit does not support this assertion, ¶ 4 of his affidavit does not contain adequate foundation, and it is unclear where in Plaintiffs' Exhibit 1 this data can be found. Plaintiffs' Exhibit 1 shows that 2,493 tribal members hunted deer in 2009, 1,974 members hunted deer in 2010, and the success rate increased from 27% in 2009 to 33% in 2010. Pls. Ex. 1 at 5. This document also shows that 80% of the tribal deer harvest takes place in 7 counties (Pls. Ex. 1 at 13), likely because those counties are in "units where tribal members prefer to hunt, are close to reservations, have a large amount of public land, and have had adequate antlerless deer quotas to meet tribal needs in the past" (*id.* at 9).

2. Hunting for deer during the day is primarily designed for sports hunters. When efficiency is the goal, as it is for subsistence, commercial, and some management purposes, hunting occurs at night. Affidavit of J. Isham, Jr. at ¶¶ 6-8.

RESPONSE: Disputed in part. Mr. Isham has not established any foundation for knowing what anybody but himself does, or more specifically for what "sports hunters" do or what any other person's hunting goals and objectives are. Defendants do not dispute that Mr. Isham is a member of the Lac Courte Orielles Band who resides on its reservation and hunts to provide for his family, or that he chooses to hunt deer at night because it is an efficient method of hunting, but defendants dispute the remainder of the assertions on paragraphs 6-8 of his affidavit based on lack of foundation. Plaintiffs' designated deer trial expert on the subject of the

religious and cultural aspects of tribal deer hunting testified at his deposition that it was contrary to the plaintiffs' religion to hunt deer at night. Docket Record #1106 at pages 6 and 12, *et seq.* See also defendants' response to plaintiffs' proposed finding number 33.

3. Beginning in 2002, the State of Wisconsin authorized nighttime hunting of white-tailed deer as part of its chronic wasting disease (CWD) eradication program. Exhibit 4; Affidavit of F. Maulson at ¶ 15; Affidavit of C. McGeshick at ¶ 5; Affidavit of T. Kroeplin at ¶ 3.

RESPONSE: Disputed in part. Defendants do not dispute that the State of Wisconsin authorized sharpshooting as part of its CWD eradication program, and that this program commenced in 2002. Ryan Aff. ¶ 3. Defendants do not dispute that some sharpshooting activities occurred at night. Defendants dispute that the program continues: it ended in March 2007. *Id.* DNR also disputes that its CWD management activities using sharpshooting were recreational. CWD sharpshooting is not the same as hunting. Ryan Aff. ¶ 8. The purpose of the CWD program was to eradicate and manage the disease. Ryan Aff. ¶ 7.

4. The CWD program hired State wardens, law enforcement officers, experienced hunters, and marksmen to shoot deer in areas known to be infected with CWD. Exhibit 4; Exhibit 7; Affidavit of C. McGeshick at ¶ 9(c).

RESPONSE: Disputed in part. DNR utilized only trained professionals for sharpshooting. Ryan Aff. ¶ 4. All shooters were either DNR employees or certified DNR contractors, not just "experienced hunters." Ryan Aff. Ex. C at 1.

5. Sharpshooters shot deer on public lands. They also shot deer on private lands with the permission of the landowner. Exhibit 7; Affidavit of C. McGeshick at ¶ 9(b)(v).

RESPONSE: Undisputed, but these deer were only shot by DNR's employees or certified contractors. Ryan Aff. Ex. C at 1.

6. Shooting plans were required if deer were to be killed on private lands. No shooting plans were required on public lands. Affidavit of C. McGeshick at ¶ 9(b)(v).

RESPONSE: Disputed. Safe shooting plans were developed for each property where CWD management sharpshooting took place, whether public or private. Horn Aff. at ¶ 5.a.-b.; Ryan Aff. Ex. C at 1.

7. Sharpshooters were not required to shoot from a stationary position. Affidavit of C. McGeshick at ¶ 9(d).

RESPONSE: Disputed. Shooting took place primarily from elevated stands over bait. Shooters were allowed to shine and shoot from a stationary vehicle, but at no time did sharpshooting take place from moving vehicles. Additionally, at no time were sharpshooters advised that it was permissible to shoot from a moving vehicle. Horn Aff. at ¶ 7.f.-h., Ex. H at 2. Shooting from a moving vehicle is specifically prohibited by WDNR policy developed to be used in the event sharpshooting activities are resumed by WDNR. Ryan Aff. Ex. C at 4.

8. Sharpshooters were not required to use a light at the point of kill. Exhibit 4; Exhibit 7.

RESPONSE: The two exhibits cited in support of this proposition, believed to be an April 7, 2007 DNR news release and a November 2006 Legislative Audit Bureau report on Chronic Wasting Disease, do not address whether or not lights are required. The use of night vision equipment at night was preferred. Horn Aff. Ex. H at 2.

9. Sharpshooters were not required to use bait or calling techniques. Exhibit 4; Exhibit 7.

RESPONSE: The two exhibits cited in support of this proposition, believed to be an April 7, 2007 DNR news release and a November 2006 Legislative Audit Bureau report on Chronic Wasting Disease, do not address whether bait or calling techniques were required. However, safe shooting plans were required, and shooting took place primarily from elevated stands over bait. Horn Aff. at ¶¶ 5.b., 7.f., 8.f., 8.i., Ex. E at 1, Ex. G at 1, Ex. I at 4.

10. Members of the plaintiff Tribes participated in the State's CWD program. Affidavit of C. McGeshick at ¶ 5.

RESPONSE: Disputed as written. This proposed finding implies that tribal members participated in DNR's CWD program as tribal members, rather than as DNR employees or DNR contractors. Mr. McGeshick's affidavit establishes that he participated in DNR's CWD sharpshooting program while he was a DNR warden, and this is undisputed. This proposed finding does not cite proper support for the proposition that any other tribal member participated in DNR's program.

11. Many states and local governments have authorized nighttime deer hunting over the last decade to cull the deer population. Exhibit 8; Exhibit 10; Exhibit 12; Exhibit 13.

RESPONSE: Disputed. Collection and eradication efforts conducted by trained government professionals are very different from hunting activities. Ryan Aff. at ¶ 8. No state allows general nighttime hunting for deer. Second Stark Aff. at ¶ 9, Lawhern Aff. at ¶ 8. Further, the exhibits cited by plaintiffs in support of this contention do not support it. Exhibit 8, believed to be a news article entitled "Bovine TB sharpshooters in northwestern Minnesota thin deer herd" describes a disease eradication program, not a hunting program. Exhibit 10, believed

to be a CWD pamphlet distributed by the State of Illinois, mentions state sharpshooting efforts to manage CWD, not night hunting. Exhibit 12, believed to be a news article discussing Illinois' CWD-control sharpshooter program, says nothing about daytime or nighttime shooting. Exhibit 13, believed to be a Minnesota State Report, discusses a special bovine tuberculosis deer permit program, not a night hunting program. Ex. 13 at 7.

12. Many of these nighttime deer shooting programs have occurred in urban and suburban areas. Exhibit 18; Exhibit 19; Exhibit 20; Exhibit 27; Exhibit 28.

RESPONSE: Undisputed that government-sponsored night time culling has been used in urban and suburban areas around the country to manage deer populations, but government programs are not hunting programs.

13. In April 2012, the Wisconsin Legislature authorized nighttime wolf hunting for the general public that begins on November 26, 2012 and runs through February 28, 2013. Exhibit 17.

RESPONSE: Disputed in part. The hunt runs until the quotas are reached or February 28, 2013, whichever come first. Night hunting of wolves opened on November 26, 2012, but Wisconsin's law provides that each of the six zones is closed when no harvestable surplus remains. Lawhern Aff. ¶ 11. In 2012, two of the zones were closed before night hunting could begin, and the remainder were expected to close shortly thereafter. *Id.*

14. Members of [the] public may obtain a wolf hunting permit allowing them to shoot wolves at night. There is no requirement that permit holders be State wardens, law enforcement officers, experienced hunters, or marksmen. Exhibit 17; Exhibit 24; Affidavit of T. Kroepelin at ¶¶ 4-6.

RESPONSE: Disputed in part. A person may obtain a Wolf Harvest License that authorizes wolf hunting if that person is eligible for such a license and if that person is issued a license. Plaintiffs' Ex. 24 at 28-29; 2011 Act 169.

15. Wolf hunters are not required to use a light at the point of kill. Exhibit 17; Exhibit 24.

RESPONSE: Undisputed; however, wolf hunters must also hunt from a stationary location over bait or using a predator call. Lawhern Aff., ¶ 9b and Ex. E.

16. Wolf hunters are not required to file a shooting plan. Exhibit 17; Exhibit 24.

RESPONSE: Undisputed.

17. Wolf hunters are not required to visit the place where they plan to hunt during the day, to identify potential hazards. Exhibit 17; Exhibit 24.

RESPONSE: Undisputed.

18. Wolves are found throughout the ceded territory in the same locations as white-tailed deer. Affidavit of J. Gilbert at ¶ 8.

RESPONSE: "The same locations" is a broad characterization, but this is generally true, so undisputed.

19. Hunting wolves is not analogous to hunting coyotes. Most coyotes tend to be hunted with lower caliber weapons to preserve the pelt. Wolves are significantly larger than coyotes. Hunting wolves with lower caliber weapons is not effective, and most wolf hunters should and will use the same high caliber cartridges while shooting wolves that they use when shooting deer. Affidavit of F. Maulson at ¶¶ 10-11; Exhibit 23.

RESPONSE: This proposition consists mainly of opinion and speculation, not factual assertions. Mr. Maulson is competent to testify as to his own practices as a hunter, but his affidavit does not establish that he knows what other hunters do or want to do, and he has not established that he has hunted wolves. Undisputed that adult wolves are significantly larger than coyotes. No weapon or caliber data has been collected regarding this first year of wolf hunting, and no studies have been done regarding what wolf hunters want to do with wolf pelts. There is no source, author or other foundation for Plaintiffs' Exhibit 23, so it should be disregarded.

20. Commission Order 2012-05 authorizes limited night hunting of deer, while still protecting the public safety. Exhibit 25; Affidavit of T. Kroepelin at ¶ 7.

RESPONSE: Disputed in part. Commission Order 2012-05 does authorize off-reservation night hunting of deer by tribal members, but it does not adequately protect public safety. Lawhern Aff. ¶ 10 & Ex. F.

21. Tribal members can only receive a permit to hunt deer at night if they have received a marksmanship proficiency rating. Affidavit of F. Maulson at ¶ 16(a); Affidavit of T. Kroepelin ¶ 5(a); Affidavit of C. McGeshick at ¶ 9(a); Exhibit 25.

RESPONSE: Undisputed; however it is unclear what a marksmanship proficiency rating actually means. A "proficient" rating does not guarantee the tribal member will always be able to clearly identify his or her target or what is beyond it, especially when shooting into the dark at

what looks like a set of glowing eyes of a deer, if a light is used, or simply the shape of a deer if a light is not used.

22. Tribal members can only receive a permit if they attend an advanced training course in which hunter safety and safe hunting techniques are covered. This hunter safety course parallels the course that was approved by the U.S. District Court for the District of Minnesota in *Mille Lacs v. Minnesota*. Affidavit of F. Maulson at ¶ 16(a); Affidavit of C. McGeshick at ¶ 9(c); Exhibit 25.

RESPONSE: Disputed in part. Do not dispute that the Commission Order provides that Tribal members can only receive a permit if they attend an advanced training course in which hunter safety and hunting techniques are covered, but dispute that the course content promotes safety. Lawhern Aff. ¶ 10 & Ex. F. Dispute the contention that this course "parallels" the Minnesota course. Mr. Maulson's affidavit does not provide any foundation for his assertion that the courses are "parallel," and Mr. McGeshick's affidavit does not address this contention. Defendants cannot further address this contention because they do not possess an updated version of the training materials. Zebro Aff. ¶ 21. Since the hunting techniques allowed under the Commission Order for hunting deer in Wisconsin are far less specific/restrictive than the techniques allowed for a tribal member hunting in Minnesota (Lawhern Aff. ¶ 10 & Ex. F), it seems likely that the safety courses are not the same.

23. Tribal members can only receive a permit if they have developed a shooting plan that maps the areas to be hunted, notes potential safety concerns, and identifies a "safe zone of fire." Affidavit of F. Maulson at ¶ 16(b); Affidavit of T. Kroepelin at ¶ 5(b); Affidavit of C. McGeshick at ¶ 9(b); Exhibit 25.

RESPONSE: Undisputed that these items are required, but disputed that all potential safety concerns are addressed or that the "safe zone of fire" properly addresses safety concerns. Lawhern Aff. ¶ 10 & Ex. F.

24. Tribal members may only fire at deer at night from a stationary position. Affidavit of F. Maulson at ¶ 16(d); Exhibit 25.

RESPONSE: Undisputed. However, this condition only means that Tribal hunters cannot shoot while walking or riding in a moving vehicle. It does not prohibit hunters from changing positions frequently or simply stopping while moving from one location to another and shooting immediately upon stopping.

25. Tribal members may not hunt deer until 50 minutes after sunset, which provides ample time for persons in the woods to safely leave before any nighttime hunting commences. Tribal members are also prohibited from hunting for one hour before sunrise, allowing persons to enter the woods in safety. Affidavit of F. Maulson at ¶ 16(e); Exhibit 25.

RESPONSE: Disputed in part. Undisputed that Tribal members may not hunt deer until 50 minutes after sunset or during the hour before sunrise, but disputed that these time restrictions makes the woods safe for other people. This statement makes the assumption that ALL persons in the woods or field shall or must leave before the tribal night hunting commences. There is no law requiring other people to leave the woods for their own safety, or any guarantee that they will do so voluntarily. There is also no guarantee that those other individuals in the woods or fields

would even be aware that night hunting is about to commence, and therefore would not perceive a need to leave for their own safety.

26. By October 15, when the Tribal nighttime deer hunting season commences, most of the leaves have fallen off the trees, alleviating any concern about foliage obscuring a hunter's target. Affidavit of F. Maulson at ¶ 17(b).

RESPONSE: Dispute. In October, foliage is still thick so as to make identifying a target (especially at night) difficult. Lawhern Aff. ¶ 10 & Ex. F at 2, 2.d.

27. The Tribes had several in-person meetings with the State where they discussed their general intention and specific proposal to implement [a nighttime] deer hunt. Affidavit of K. Stark at ¶ 11; Affidavit of T. Maulson at ¶ 4; Affidavit of M. Isham, Jr. at ¶¶ 10-13.

RESPONSE: Disputed in part and inadmissible because relevant only to a legally insufficient claim (that the GLIFWC Order is authorized by the "other liberalization amendment") and because evidence of settlement communications is barred by Fed. R. Evid. 408. At the May 23, 2012 and August 1, 2012 in-person meetings, the parties discussed the Tribes' request that the parties negotiate a stipulation amendment allowing tribal night hunting in general terms. Williams Aff. ¶¶ 8, 9, 14. The Tribes had not proposed specific language for a stipulation amendment until July 30, 2012. Williams Aff. ¶ 12. During an August 23, 2012 meeting, the parties discussed the Tribes' general intention to adopt a night hunting provision as a commission order. Williams Aff. ¶ 20. On October 22, 2012, the parties discussed the Tribes' second draft Commission Order. Second Stepp Aff. ¶¶ 10-11.

28. The State was provided adequate time and opportunity to comment on the Tribe's nighttime hunting proposal, the consultation required by Model Code section 3.3(c)(1) was held, and the tribes adequately responded to the State's concerns relating to conservation and public

safety. Affidavit of K. Stark at ¶ 11; Affidavit of T. Maulson at ¶ 4; Affidavit of M. Isham, Jr. at ¶ 10-13.

RESPONSE: This contention asserts opinions and legal conclusions regarding adequate time and opportunity to comment, what it means to consult, and whether the tribes "adequately responded," not facts, and defendants dispute and disagree with these opinions and conclusions. The Tribes did not adequately address or respond to DNR's safety concerns or other legitimate reasons for not implementing the draft Commission Order, including public education and awareness, legality of the use of the "other liberalization amendment" process, and the need to educate and coordinate with Tribal and DNR/State/local law enforcement (Stepp Aff. ¶¶ 8-15), and DNR was not given the opportunity to review the final order before it was issued (Stepp Aff. Ex. C).

29. The "reasonableness" requirement that constrains the ability of the State to withhold its consent to a Commission Order issued under Model Code section 3.3(c)(1) is the same standard of reasonableness defined by this Court in *Lac Courte Oreilles Indians v. State of Wisconsin*, 668 F.Supp. 1233 (W.D. Wis. 1987)(*LCO IV*). Thus, the State may only withhold its consent if necessary for public health and safety or conservation, and then only in a non-discriminatory manner. Affidavit of J. Zorn at ¶ 16(h).

RESPONSE: This paragraph consists of legal argument, not factual propositions, and the State defendants will address these arguments in its brief and at the hearing.

30. The State unreasonably withheld its consent to an otherwise valid Commission Order enacted through the proper use of Model Code section 3.33(c)(1). Affidavit of J. Zorn at ¶ 16(j).

RESPONSE: This paragraph consists of legal argument, not factual propositions, and the State defendants will address these arguments in its brief and at the hearing.

31. The State's failure to consent was also unreasonable because it discriminates against the valid exercise of the Tribe's usufructuary rights in the same manner as the State now allows for State hunters under the 2011 Wisconsin Act 169. Affidavit of J. Zorn at ¶ 16(k).

RESPONSE: This paragraph consists of legal argument, not factual propositions, and the State defendants will address these arguments in its brief and at the hearing.

32. Tribal members need to hunt for subsistence purposes. Between 25% and 93% of Tribal members are unemployed. Many Tribal members that are employed still live below the poverty level. Exhibit 3.

RESPONSE: This proposition is unsupported by pleadings, affidavits, the cited exhibit, or other appropriate documentation or admissible evidence. Exhibit 3 is an unauthenticated 51-page document entitled "2005 American Indian Population and Labor Force Report" and is inadmissible hearsay under the Federal Rules of Evidence. It states that its purpose is to provide "2005 calendar year data on tribal enrollment, service population, and labor force information for the Nation's 561 federally recognized Indian tribes." Ex. 3 at ii. It does not appear to address the unemployment statistics for the Plaintiff tribes or any purported need of tribal members to hunt deer or hunt deer at night.

33. Tribal members need to hunt at night for cultural and religious reasons. Fresh deer meat may be needed for a ceremony, and the only opportunity to obtain it may be at night. Affidavit of M. Isham at ¶¶ 6 & 8.

RESPONSE: This proposition lacks proper foundation, and is disputed. There is no foundation establishing that Mr. Isham is qualified to give opinions regarding the necessity for tribal night hunting for cultural or religious reasons. Further, his opinions are disputed by Plaintiffs' designated religious/ceremonial use expert, Archie Mosay, who testified during his pre-trial deposition, that it was against the Ojibway/Chippewa Indians' religious and ceremonial teachings to shine and shoot deer at night. Dkt. 1106, July 25, 1989 Dep. of Archie Mosay at 6:11-13 (named as expert); 11:19 to 13:6 (deer shining contrary to tribal religion); 28: 19-22 (deer shining contrary to tribal religion); 16-34; Pls.' Statement of Expert Witnesses, Docket No. 1048 (named as expert). Mr. Mosay also testified that if a deer is desired for a ceremonial purpose but tribal religion prohibits harvesting it at that time or by certain means, another resource like wild rice could be substituted in the ceremony. Dkt. 1106, July 25, 1989 Dep. of Archie Mosay at 26:11-16. Plaintiffs' proposition regarding the need to night hunt is also undercut by their Exhibit 1, which shows that they harvested 1,440 deer during 2010 without hunting at night. Pls. Ex. 1 at 7.

34. A disproportionate number of Tribal members have chronic diseases such as heart disease and diabetes. Cheap, high fat hamburger meat purchased with food stamps cannot replace healthy venison in tribal populations experiencing chronic health problems. Exhibit 34; Exhibit 35.

RESPONSE: Defendants do not dispute that too many American Indians, and too many Americans, generally, suffer from chronic diseases and diabetes, but the exhibits cited by

plaintiffs do not establish plaintiffs' second contention. Obviously, health is a multi-faceted issue that involves diet, exercise, heredity, behaviors, and habits and that requires holistic attention. Plaintiffs do not establish the health benefits of eating more venison or suggest that the alternative to venison is cheap hamburger. One of the suggested inferences, that consuming more venison will reduce the incidence chronic diseases, is a matter of expert (epidemiological) opinion for which no admissible, evidence is cited. The May 2012 Voigt Task Force meeting minutes note that "The 2012 tribal deer season in Wisconsin will provide an unlimited tribal harvest; thus the harvest quotas are only applicable to state hunters" (Milligan Aff. Exs, N-II) so defendants dispute that plaintiffs have a need to acquire any more deer by hunting at night.

Dated this 10th day of December, 2012.

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