

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.

SECOND AFFIDAVIT OF CATHY STEPP

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Cathy Stepp, being first duly sworn on oath, deposes and says:

1. I make this affidavit on the basis of my own personal knowledge, and to the best of my recollections.

2. Since January 2011, I have served as the Secretary of the Wisconsin Department of Natural Resources (WDNR). In that position I administer the WDNR, an agency which has the responsibility for implementing state and federal laws that protect and enhance Wisconsin's

natural resources, including its air, land, water, forests, wildlife, fish, and plants, and the responsibility for providing outdoor recreational and natural resource harvesting opportunities for people. I understand that the WDNR has primary management authority with respect to all of the natural resources of the State of Wisconsin.

3. One of my responsibilities as WDNR Secretary has been to work with the six plaintiff Wisconsin Chippewa Bands on numerous issues, including the implementation of their off-reservation treaty rights to harvest natural resources in the “ceded territory” of Wisconsin. In that context, I have regularly attended meetings, engaged in telephone conversations, written and received correspondence, and consulted with WDNR staff.

4. I am aware that a meeting took place in Stevens Point, Wisconsin, on August 1, 2012, between WDNR and Tribal representatives. It is my understanding that the purpose of this meeting was to continue reviewing those topics being considered during the bi-annual stipulation amendment review process. Although I did not attend that meeting, I was made aware by WDNR Executive Assistant Scott Gunderson and WDNR Attorney Quinn Williams, who did attend in person, that off-reservation night hunting by Tribal members was one of 43 issues raised by the Tribes for future discussions. Mr. Gunderson and Mr. Williams informed me that although they had agreed to continue discussions on all 43 issues, no final resolution was reached with respect to any one issue—including night hunting.

5. Based on my conversations with Mr. Gunderson and Mr. Williams, it is my understanding that the Tribes did not mention the possibility of pursuing night hunting by issuing a commission order through the “other liberalization amendment” procedure at the August 1, 2012, meeting. Rather, Mr. Gunderson and Mr. Williams informed me that they left that meeting with the understanding that any future discussions on night hunting—and indeed, on

all 43 potential stipulations topics—would move forward through the stipulation amendment review process.

6. On August 21, 2012, I spoke with Jim Zorn, Executive Director of the Great Lakes Indian Fish and Wildlife Commission (GLIFWC), on the telephone, along with Mr. Gunderson and Mr. Williams. During that call, I confirmed my understanding of what occurred at the August 1, 2012, meeting—that details were not addressed but DNR had raised concerns about safety and enforcement. Although I did not propose a specific timeline for discussions on night hunting, I did indicate that I would need adequate time to consult with WDNR staff, seek legal review of their proposed language, and educate constituents about the issue. At no point during our conversation did I promise that either myself or the WDNR would agree to an off-reservation night hunting proposal.

7. On August 23, 2012, I attended a meeting on the Lac du Flambeau Reservation for the purpose of discussing off-reservation night hunting by Tribal members. Lac du Flambeau Band of Lake Superior Chippewa President Tom Maulson, WDNR Northern Regional Director John Gozdziwski, and other Tribal representatives attended the meeting in person. Mr. Gunderson and Mr. Williams appeared by telephone. During this meeting, Mr. Maulson stated that it was his understanding, based on statements purportedly made by Mr. Gunderson at the August 1, 2012 meeting, that the WDNR had “no objection” to off-reservation night hunting by tribal members (Tom Maulson Aff., ¶ 4.c.i). Mr. Gunderson indicated that Mr. Maulson had misunderstood his message, and clarified that WDNR could not commit to a night hunting agreement before it had time to review the Tribes' draft proposal. During the meeting, I also reiterated the same message I had conveyed during my August 21, 2012, phone call with Mr. Zorn. In particular, I recall stressing the need for adequate time for WDNR staff to evaluate

and educate constituents on any night hunting proposal. Although I did express concern that night hunting would be a contentious issue among constituents and therefore could negatively impact the stipulation process, at no point did I threaten to walk away from stipulation negotiations on this or any other issue. Rather, it was my impression that the meeting concluded very amicably with a clear message that the WDNR was committed to continued discussion of all 43 topics through the stipulation amendment process. During this August 23 meeting, we were directly informed for the first time that the Tribes were considering adopting night hunting provisions through a commission order rather than a stipulation amendment. We responded by stating that WDNR would not agree to such an order, and stressed the need to work through the stipulation process.

8. A meeting with the Voigt Task Force in Lac Vieux Desert was scheduled for October 4, 2012. On September 28, 2012—just six business days before this meeting, I received from Mr. Zorn a draft commission order on off-reservation night hunting of deer. Although I immediately committed WDNR staff to a review of this document, I soon realized that six days was not an adequate amount of time to pull together a team to provide a thorough analysis, identify questions and prepare a response. I cancelled the October 4, 2012, meeting to ensure that WDNR staff could conduct a proper review—not because, as Mr. Zorn suggests, I was “not happy with the Tribes’ desire to hunt deer at night” (Zorn Aff. ¶ 13).

9. On October 5, 2012, I sent a letter to Mr. Zorn in response to the draft commission order. The purpose of this letter was to advise Mr. Zorn of what I believed to be an ongoing pattern of the Tribes' stepping outside of the mutually agreed-upon stipulation review process. I cited the draft commission order as an example, and explained my reasoning. Plaintiffs' Exhibit 29 is a true and correct copy of my October 5, 2012 letter to Mr. Zorn.

10. On October 12, 2012, I received a response from Mr. Zorn, along with a revised commission order (Plaintiffs' Ex. 29). In his letter, Mr. Zorn suggested a deadline of November 1, 2012, for concluding consultation on night hunting. Although I felt that WDNR could not conduct a meaningful review of the revised commission order by November 1, 2012, I again committed staff to the task, despite their heavy workloads in other areas (for example, preparing for the nine-day gun deer hunting season). I, 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. I 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.

11. I, along with numerous WDNR and Tribal representatives, met in Stevens Point, Wisconsin, on October 22, 2012. During this meeting, WDNR staff asked Mr. Zorn and Jason Stark, GLIFWC Policy Analyst, a number of clarifying questions about the Tribes' night hunting proposal. I gained several impressions as a result of this meeting. First, based on statements made by several tribal members, I believed 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, based on the questions asked by WDNR staff and the responses elicited from Tribal Representatives, I believed that the Tribes' interpretation of the revised commission order was not adequately captured in the language of the order, and that WDNR staff had accordingly identified a number of legitimate public safety concerns. Third, based on unambiguous statements made by Mr. Maulson, it was the Tribes' intent to issue a commission order regardless of any review by the WDNR, and that it 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 WDNR conservation wardens. In response to these impressions and statements, I reiterated my position that a commission order was not the proper mechanism for pursuing night hunting, and made clear my belief that a failure to work through the appropriate mechanism would enable the State to enforce its prohibition against shining towards Tribal members acting under a night hunting commission order.

12. After the October 22, 2012, meeting I directed staff to continue their review of the draft commission order. On October 30, 2012, I sent Mr. Zorn a letter which captured the findings of this review. In this letter, and based on the conclusions of WDNR attorneys, I corrected my prior statement that night hunting could be addressed through the stipulation process, and instead noted, as it had become clear to me, that an out-of-court mechanism did not exist for resolving the night hunting issue. I also laid out the specific safety concerns which WDNR had identified to date. Attached to this affidavit as Exhibit E is a true and correct copy of my October 30, 2012 letter to Mr. Zorn.

13. On November 9, 2012, I received a response from Mr. Zorn, along with a second revised commission order, which I attached to my initial affidavit as Exhibit A. In his letter, Mr. Zorn indicated disagreement with the legal and public safety concerns addressed in my October 30, 2012, letter. Mr. Zorn also indicated that the newest draft commission order would go into effect on November 26, 2012. Based on this statement, it was my impression that the Tribes did not intend to engage in further consultation, despite the fact that WDNR had not yet been afforded an opportunity to review this latest draft order. It was not clear, however, whether Mr. Zorn had already issued the order. Despite this, I again committed staff to a review of the latest draft order, with a specific emphasis on evaluating revisions.

14. On November 15, 2012, I sent a letter to Mr. Zorn reiterating the WDNR's position that night hunting could not be addressed out of court, and advising that not all of the safety concerns identified in my October 30, 2012, letter had been resolved by the latest revisions to the draft commission order. I also sought clarification regarding whether the Tribes intended to issue the commission order. This letter was attached to my first affidavit as Exhibit B.

15. On November 19, 2012, I was advised by Mr. Williams of a phone call from Mr. Stark, in which Mr. Stark indicated that Mr. Zorn had not yet issued a night hunting commission order. The following day, I wrote a letter to Mr. Zorn urging him not to do so in light of the concerns raised in my earlier letters. I also urged Mr. Zorn to provide the WDNR with at least one week's notice before implementation in the event he issued the order to ensure that the public could be informed of any safety risks. A copy of my November 20 letter was attached to my first affidavit as Exhibit C.

16. On November 21, 2012, the very next day after I sent my letter, I received a phone call from Mr. Zorn advising me that he would indeed be issuing the commission order, and that it would go into effect on November 26, 2012. The state promptly filed its motion to enforce the state's prohibition on shining deer.

Dated this 6th day of December, 2012.

/s/ Cathy Stepp

CATHY STEPP

Subscribed and sworn to before me
this 6th day of December, 2012.

/s/ Quinn L. Williams

Notary Public, State of Wisconsin
My Commission: is permanent.

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October 30, 2012

James E. Zorn
Executive Administrator
Great Lakes Indian Fish and Wildlife Commission
P.O. Box 9
Odanah, WI 54861

Re: *Lac Courte Oreilles Indians v. State of Wisconsin* – Proposed Tribal Night Hunting
Regulations/Commission Order 2012-05

Dear Administrator Zorn:

Thank you for your letter of October 12, 2012, (Letter) and the opportunity to meet on October 22, 2012, (Meeting) with the six Plaintiff Ojibwe Bands (Tribes) involved in the third round of possible stipulation amendments in the *Voigt* case (*Lac Courte Oreilles Indians v. State of Wis.*, 775 F. Supp. 321(W.D. Wis. 1991)). The subject of both the Letter and the Meeting was the Tribes' recent proposal for off-reservation night hunting of deer by tribal members, set forth in "Final Revised Draft – KJTS (10/12/12) GREAT LAKES INDIAN FISH AND WILDLIFE COMMISSION ORDER, Order No. 2012-05" (Commission Order). You have asked that the Department agree to or deny the Commission Order by November 1, 2012. Having considered your proposal, the Department cannot approve the Commission Order at this time.

It is the Department's position that the Tribes do not have the authority to adopt and implement the Commission Order. The Parties are both aware that at the conclusion of the 1989 *Voigt* deer hunting trial, Judge Crabb rejected the Tribes' contention that they should be allowed to hunt by shining deer at night because the State had allowed the nighttime hunting of coyotes. For that reason, the Final Judgment—entered two years after that trial—provides 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]." *LCO Final Judgment*, 775 F.Supp.321, 324 (W.D.Wis. 1991). This aspect of the Final Judgment remains valid law.

Importantly, the Department is not aware of any avenue out of court through which the Parties can agree to modify the terms of the Final Judgment. Although the Parties entered into and filed a joint motion to facilitate the amendment of prior stipulations which had been incorporated by reference into the Final Judgment, we expressly disavowed any intention to alter—"affect the finality of"—the Final Judgment itself:

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.

For that reason, the Department disagrees with the Tribes' position that the "technical update/other liberalization" provisions of the 2009 and 2011 stipulation amendments can be interpreted as allowing the unilateral legalization of off-reservation night hunting for deer. Indeed, such an interpretation is plainly inconsistent with the Parties' commitment to the conclusiveness of the Final Judgment.

But even if the “technical amendment/other liberalization” provisions had *potential* application to an issue covered by the Final Judgment, they cannot apply here. That is because such amendments can only be sought for the purpose of providing tribal members with “more treaty harvest opportunities *in line with state harvesters.*” Because the State does not currently authorize any form of night hunting by state harvesters for deer, the treaty harvest opportunities extended by the Commission Order are not in line with—but rather contradict—those opportunities available for state harvesters.

Even if an out-of-court mechanism did exist by which the Parties could alter the terms of the Final Judgment, the November 1 deadline is inadequate to allow for careful consideration of the health, safety and welfare impacts that off-reservation night hunting of deer would have. The Department is not aware of any jurisdiction—state or tribal—which presently authorizes night hunting of deer in the manner proposed in the Commission Order, and as a result feels that this is an issue that should not be rushed into without a more extensive evaluation of the risks involved.

Notably, the Department believes the Commission Order is unsafe for the following reasons:

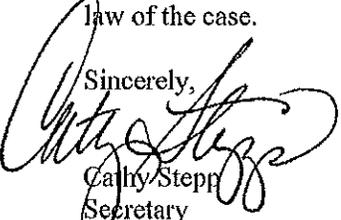
- **Visibility:** The Commission Order would permit tribal night hunting for deer during the months of October and November—a time of year when visibility is limited due to foliage, and public usership remains high. In contrast, the legislatively created wolf season and follow-up administrative rules limited the night hunting of wolves to the first Monday that follows the last day of the “regular” deer gun season in recognition of the safety hazards that result when low visibility and high usership exist simultaneously.
- **Safe Zone of Fire:** Although the Commission Order requires hunters to establish a “safe zone of fire” within which the firearm must be shot, it fails to clarify, for example, (1) the criteria for determining whether an area qualifies as a safe zone of fire; (2) the procedure for designating a safe zone of fire; (3) the permissible size restrictions of a safe zone of fire; and (4) the limitations on where a hunter can aim (i.e. Near a school? At a target outside the safe zone of fire?). Without such clarifications, the safe zone of fire provides limited—if any—real safety benefits.
- **Posting:** Under the Commission Order, night hunting would be prohibited within school grounds, school forests, landfills, and public quarries *only* where such areas are posted as closed to hunting. Because many such areas lack the requisite posting, they would be open to night hunting regardless of any safety concerns. This is particularly troubling as it relates to schools on or near public lands, where notice is rarely posted notwithstanding the prohibition against hunting with firearms within 1,000 feet of schools.
- **Shooting Plans:** Although the Commission Order would require hunters to prepare a shooting plan and file it with the tribal conservation department, it fails to establish any mechanism for the review and approval of the plan—rendering its filing a mere formality. Likewise, the Commission Order does not require the hunter to carry a copy of the shooting plan while hunting, or to display it to law enforcement upon request. Without these requirements, neither hunters nor law enforcement personnel can be sure that the hunter is hunting in accordance with the shooting plan.
- **Tracking:** Although the Commission Order would require hunters to shoot their firearms from within the safe zone of fire, it is silent regarding the tracking and follow-up shooting of wounded deer that travel outside hunters’ safe zones of fire and into areas not identified in the shooting plan. Once outside the safe zone of fire, the likelihood that hunters be familiar with their surroundings, and will be able to identify their targets and what lies beyond would be significantly diminished—a violation of the most fundamental principle of safe hunting.

- Familiarity: The Commission Order would not require hunters to visit the areas identified in their shooting plans before hunting or during daylight hours for the purpose of gaining familiarity. As a result, some—if not most—hunters will assess their hunting areas for the first time in the dark, when their ability to detect obstacles and hazards, and to identify what lies beyond their targets, will be greatly hindered.
- Illumination & Spotting: While the Commission Order would permit hunters to illuminate potential targets for the purposes of identification, such is not required. As a result, hunters who choose not to illuminate deer at the point of kill would limit their ability to accurately identify the target as legal game and be certain that a safe backstop exists for the bullet. The Commission Order similarly does not require a spotter, who could otherwise assist with illumination or act as a second set of eyes.
- Training: The minimal training required by the Commission Order is not specific to hunting at night, nor does it require that safety issues related to shooting at night be covered in any training attended by the hunter. Simply knowing the basics about handling and shooting a firearm (marksmanship) does not mean the hunter will understand all the safety issues which come into play when shooting at night—whether with or without the aid of a light.

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 concerns, 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.

In light of the Department's analysis, I respectfully request that the Tribes refrain from adopting and implementing the Commission Order at this time. I must also confirm that, in light of the Final Judgment's language permitting State regulation in this area, the State intends to enforce its laws prohibiting the shining and night hunting of deer against all violators—including tribal members. Nonetheless, I assure you that the Department remains committed to working in good faith on other treaty rights issues through the court-approved stipulation process or, if that is not applicable, as otherwise authorized by the rules of federal procedure and the law of the case.

Sincerely,



Cathy Stepp
Secretary

Wisconsin Department of Natural Resources