

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' BRIEF IN SUPPORT OF MOTION
TO ENFORCE PROHIBITION ON SHINING DEER

INTRODUCTION

For more than 22 years, since shortly after this Court's decision in the deer trial sub-phase of this case, *Lac Courte Oreilles Band of Indians v. Wisconsin*, 740 F. Supp. 1400 (W.D. Wis. 1990) (*LCO VII*), the plaintiff Tribes have maintained in their off-reservation conservation codes a prohibition against shining and hunting deer at night (deer shining) "identical in scope and content to § NR 13.30(1)(q)." Under the terms of the final judgment entered in this case, these regulations protected tribal members from state court prosecutions for deer shining. *Lac Courte*

Oreilles Band of Indians v. Wisconsin, 775 F. Supp. 321, 323-324 (W.D. Wis. 1991) (Final Judgment). Effective November 26, 2012, however, the plaintiffs are revising their codes in a manner which purports to legalize forms of deer shining that are prohibited by state law.

In the interest of protecting public safety, the defendants seek an order confirming that the defendants have the right to enforce the state law prohibition on off-reservation deer shining against members of the plaintiff Tribes in the courts of the State of Wisconsin.

LEGAL AND FACTUAL BACKGROUND

I. LEGAL BACKGROUND

In 1989, this Court conducted a trial on the subject of whether and how the defendants might regulate off-reservation deer hunting by tribal members (the Deer Trial). The Court's decision on the merits of issues litigated in the Deer Trial was published as *LCO VII*.

A primary issue in the Deer Trial was whether the State of Wisconsin could enforce its prohibition on deer shining against members of the plaintiff Tribes when they engage in off-reservation deer hunting (Defendants' Proposed Findings of Fact (PFOF) at ¶2). The plaintiffs argued that their members should be able to shine and hunt deer at night because the state authorized night hunting and shining of certain predator and nuisance species like coyotes.

The Tribes' argument was based on this analogy or perceived equivalence, not on safety considerations. As the drafter of the Tribes' 1989 Model Code deer shining proposal testified:

Q: Before drafting the deer shining provision in the Model Code you didn't consult with any experts in hunter safety either, did you?

A: Was that on shining?

Q: On shining.

A: No, I didn't.

Q: Instead you relied simply on your assumption that deer hunting by shining presented no dangers in addition to those that the state tolerates for raccoon and fox and coyote hunting at night, isn't that correct?

A: I looked to the provision of Chapter 29 that define shining under state law, and I presumed that the safety involved in that was equivalent to that involved with deer, yes.

PFOF ¶3.

In its decision on the merits of the Deer Trial, the Court rejected the plaintiffs' assertion of the supposed similarity between deer shining and the night hunting of predators like coyotes:

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. The Court then upheld the state's authority to enforce its deer shining prohibition against members of the plaintiff Tribes engaged in off reservation deer hunting, at least until the Tribes adopted their own regulations prohibiting the same conduct:

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.

The Final Judgment reiterated the Deer Trial ruling, and it also included a caveat providing for state enforcement of the state's night hunting prohibition if the plaintiffs failed to enact or effectively enforce such a prohibition:

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).

...

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.

Lac Courte Oreilles v. State of Wis., 775 F. Supp. 321, 324, 325 (W.D. Wis. 1991) (Final Judgment).

II. FACTUAL BACKGROUND

On April 2, 2012, the Wisconsin legislature enacted 2011 Act 169, a law that provides for a nighttime wolf hunting season and that directs the Wisconsin Department of Natural Resources (DNR) to promulgate those rules the agency deems necessary to implement the wolf hunting law. PFOF ¶9.

The statutes and the rules the DNR subsequently promulgated provide for a potential 3-month long night hunting season for wolf in any of the six wolf management zones, but only if a harvestable surplus of wolves remains after the close of the traditional November deer gun hunting season. PFOF ¶¶ 12a, 12b. As of November 20, 2012, at least two of the six zones were closed to night hunting of wolves because the safe harvest quota of wolves has already been taken. PFOF ¶12b. It is possible that none of the six wolf management zones in Wisconsin will open for night wolf hunting after the deer gun season this year (Lawhern Aff. ¶11).

Hunters wishing to engage in the night hunting of wolves may, like coyote hunters, use lights (i.e., they may "shine" the animals) only at the point of kill. Unlike coyote hunters, however, wolf hunters in Wisconsin may only hunt at night from a stationary position, over bait or with the use of predator calling techniques. Wis. Admin. Code § NR 10.07(4); PFOF ¶12c.

On November 9, 2012, the plaintiff Tribes advised the defendants that they intended to revise their off-reservation hunting codes, effective November 26, 2012, to allow various forms of deer shining described in "proposed Commission Order 2012-05." PFOF ¶13. The proposed tribal code revisions are not "identical in scope and content to § NR 13.30(1)(q)," which prohibits deer shining. Instead, the revised Tribal Code would authorize night hunting of deer with high caliber weapons while shining. PFOF ¶14.

The plaintiffs' expressed justification for revising their off-reservation hunting codes was that doing so would be "consistent with the recent enactment of 2011 Act 169, which changed state hunting hours for wolves and provided for the use of a light at the point of kill." PFOF ¶15.

The defendant Cathy Stepp advised the Tribes on November 15, 2012, that the state would not accept the proposed legalization of tribal deer shining and she asked that GLIFWC inform her by the close of business on November 19, 2012, if they had reconsidered and decided not to legalize deer shining after all. PFOF ¶16. When she learned that GLIFWC had not yet issued its commission order, she again wrote Administrator Zorn asking GLIFWC to refrain from issuing the order. PFOF ¶¶17-18. On November 21, 2012, GLIFWC advised DNR that it had issued the Commission Order, and it purports to authorize off reservation deer shining in the ceded territory beginning November 26, 2012. PFOF ¶19.

As this Court has previously found, deer shining presents a "great danger to public safety." *LCO VII*, 740 F. Supp. at 1423. The defendants' hunting safety expert has reviewed the Tribes' latest proposed deer shining plan and has identified serious concerns about its adequacy for the purpose of protecting public safety. PFOF ¶21. These concerns include inadequacies associated with shooting plan requirements (safe zone of fire is not required to consider topography, vegetative cover; plans are valid for a year but conditions change; there are no plan review criteria; there are no training course standards) and inadequacies associated with shooter conduct (direction of shooting is not addressed; multiple shots or shooting at a moving target is not addressed; target need not be in safe zone of fire). *Id.* **In short, the safety concerns identified by this Court in 1989 and 1990 have not been addressed, and people will not be safe if tribal members are allowed to discharge high powered firearms at night in the ceded territory.**

DNR's expert also expresses the opinion that while law enforcement activity involving armed persons in the dark is inherently dangerous for the officers and the hunters, uncertainty about the parties' respective authority to enforce their deer shining regulations may increase that danger. PFOF ¶22.

Notably, this latest – effectively the third - tribal night hunting plan presented to this Court is less restrictive and protective of public safety than its immediate predecessor. That second plan was suggested by the plaintiffs during trial, asking that this Court might fashion a sort of "middle plan" more restrictive than the Tribes' initially submitted Model Off-Reservation Code, but less restrictive than the State's. *See LCO VII* at 1423 ("plaintiffs suggest that shining could be safe under certain conditions, such as in a baited preselected location with the hunter in a tree stand or other elevated location. These conditions are not codified in the Model Off-Reservation Conservation Code ..."). The Court had declined to accept that suggestion, noting: "I don't think it was contemplated ... that it would be my job to make up new regulations that sort of came in the middle someplace" (Dkt. No. 1126 at 4-121 (Tr. Fourth Day of Trial)). The plaintiffs' current deer shining plan is even less restrictive than the plan suggested at trial in that it does not limit tribal hunters to elevated positions, shooting over bait, etc. *Lawhern Aff.*, Ex. E.

ARGUMENT

The orders of this Court clearly require that the plaintiffs adopt and implement a deer shining regulation "identical in scope and content to Wis. Admin. Code § NR 13.30(1)(q)" if they wish to be free from state enforcement of the state law prohibition on deer shining. The defendants have shown, by facts believed to be undisputable, that the plaintiffs have withdrawn

from a deer shining regulatory plan which once conformed to the Court's orders. For this reason alone, the defendants should be deemed authorized to enforce Wis. Admin. Code § NR 13.30(1)(q) (incorporating Wis. Stat. § 29.314 by reference) until such time, if ever, that the plaintiffs either return to a plan incorporating the state's deer shining prohibition.

Even if the Court were not to rely solely on plaintiffs' *per se* violation of the Court's past orders as a basis for authorizing immediate state enforcement of its deer shining prohibition, the plaintiffs' asserted justification for opening the door to deer shining off-reservation is essentially identical to the Tribal contention this court rejected in the 1989 Deer Trial. Then the Tribes based their case on the "presumption" that deer hunting by shining presents no dangers in addition to those that the state tolerates for hunting *predator coyotes* at night, and contended that if state hunters could lawfully could lawfully shine coyotes Tribal members should be allowed to shine deer. PFOF ¶3. Now the tribes make the same contention, employing the same presumption, only with respect to the state's recent authorization of hunting *predator wolves* by shining. PFOF ¶15 (Tribal deer shining proposal allegedly "consistent with the recent enactment of 2011 Act 169, which changed state hunting hours for wolves and provided for the use of a light at the point of kill").

If anything, however, the recent state-authorized opportunities to shine wolves are more restrictive for public safety and other purposes (including conservation) than the long-standing provisions for shining coyotes or other predator and nuisance species. PFOF ¶12. The effect of the foregoing is this: nothing has significantly changed in terms of the nature or amount of animal shining allowed under state law, and so the Tribal argument which failed in the 1989 Deer Trial should be rejected again. What *has* changed is that the tribes have unilaterally revised their

deer shining regulations in disregard of (and without seeking relief from) the Court's orders that otherwise would have continued to immunize their members from state court prosecutions.

Finally, the defendants would emphasize the urgency of obtaining a ruling on this motion. The plaintiffs have indicated their intention to begin shining deer on Monday. This court has already determined deer shining presents a “great danger to public safety.” *LCO VII*, 740 F. Supp. at 1423; PFOF ¶5. If those dangers - and the additional potential dangers raised by uncertain or disputed law enforcement authority - are to be minimized, the requested order should be granted as soon as practicable.

CONCLUSION

For the reasons described above, the defendants respectfully request that the Court issue an order confirming the defendants have the right to enforce the prohibition on off-reservation deer shining codified in Wis. Admin. Code § NR 13.30(1)(q) (incorporating Wis. Stat. § 29.314 by reference) against members of the plaintiff Tribes.

Dated this 21st day of November, 2012.

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