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, MOLE LAKE BAND OF WISCONSIN; 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.

RESPONSE TO THE DEFENDANTS' MOTION TO ENFORCE PROHIBITION ON SHINING DEER

The State's *Motion to Enforce the Prohibition on Shining of Deer* ("State's Motion"),[1] omits nearly all of the relevant facts necessary for this Court to render its decision. Most importantly, the State's Motion and supporting brief fail to acknowledge that the parties have agreed to two processes by which the Tribes' Model Off-Reservation Conservation Code ("Model Code") can be amended.

As described more fully in the *Memorandum in Support of Plaintiff's Motion for Preliminary Injunction* (Docket No. 194, at p. 13-14, 17-20), in 2009, the parties entered into the

[1] Hunters use the term "shining" to refer to a person who scans an area using a light to locate deer. The Commission's Order still prohibits this type of shining. It only allows Tribal-member hunters to use a light to illuminate a deer that has already been located, just prior to shooting that deer. (Commission Order 2012-05, § 2.1) (Docket No. 228).

first amendment to the stipulations that are incorporated in the final judgment this Court rendered in *Lac Courte Oreilles Band v. Wisconsin*, 775 F.Supp. 321 (W.D. Wis. 1991) (*LCO X*). *Stipulation for Technical, Management and Other Updates: First Amendment of Stipulations Incorporated into Final Judgment* (Exhibit 14) (Docket No. 216).[2] The first amendment contains a provision allowing the Tribes to modify the Model Code, so long as the changes it proposes are "in line with" the changes made to State law. Model Code § 3.33(1)(b). This is referred to as the "technical amendment" process, and under this provision, the Commission can issue an order modifying the Model Code unilaterally, without any consultation with the State. Thus, if the Tribes wanted to engage in nighttime hunting of wolves following the State Legislature's passage of Act 169, this would have been a change "in line with" the changes made to State law, and could have been enacted by the Commission without any consultation with the State.

But the Tribes do not want to harvest wolves; they want to engage in nighttime hunting of deer. In 2011, the parties agreed to a second amendment to the stipulations that are incorporated in the final judgment. *Stipulation for Technical, Management, and Other Updates: Second Amendment of the Stipulations Incorporated in the Final Judgment,* § III(A)(2) (Exhibit 5) (Docket No. 207). In that stipulation amendment, the parties provided another amendment process, referred to as the "other liberalization" procedure. After obtaining the consent of the State, or after the State unreasonably withholds its consent despite sufficient consultation, the Commission may amend its Model Code to provide Tribal members "more treaty harvest opportunities consistent with those available under state law to state harvesters." *Id.* Using this "other liberalization" procedure, the Commission was authorized to issue Commission Order

[2] All cites to Exhibits and Affidavits refer to those documents submitted in conjunction with the *Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction* (Docket No. 194), unless otherwise indicated.

2012-05 and amend the Model Code, so long as (1) wolf hunting is "consistent with" (i.e., analogous to) -- in hours and manner (caliber of weapon, risks associated with) – nighttime deer hunting, and (2) the State unreasonably withheld its consent following adequate consultation.

I. HUNTING WOLVES AT NIGHT IS ANALOGOUS TO HUNTING WHITE-TAILED DEER AT NIGHT

In the *Defendants' Brief in Support of Motion to Enforce Prohibition on Shining Deer*, the State argues that its decision to authorize nighttime wolf hunting by the general public does not allow the Tribes to authorize nighttime deer hunting. The State's argument consists of four parts: (1) the State allowed nighttime hunting of coyote prior to the decision in *LCO X*; (2) this Court concluded that hunting coyote did not pose the same safety risks as hunting deer; (3) wolves are predators like coyote; and therefore, (4) hunting wolves is similar to hunting coyotes, and does not pose the same safety risks as hunting deer. *See, e.g.*, Defendants' Brief at 8 ("[In 1989] 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 . . .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") (emphasis in original). It is in this last step that the State falters.

As the State points out itself in its Brief at 3, during the 1989 trial conducted to determine how off-reservation deer hunting would be regulated in the ceded territory (the "Deer Trial"), this Court emphasized one difference between coyotes (a species that the State allowed night hunting for) and white-tailed deer (the species that the Tribes wanted to hunt at night).[3] *Lac Courte Oreilles Band of Indians v. Wisconsin*, 740 F.Supp. 1400 (W.D. Wis. 1990) (*LCO VII*).

[3] For other species such as raccoons, this Court emphasized that the trajectory of the shot would be different because these animals are often shot after being chased into a tree. *LCO VII*, 740 F.Supp. at 1406. Coyotes, wolves, and deer, however, are all shot on the ground.

"[C]oyotes and other fur-bearing animals are generally hunted in the fall . . . using low caliber ammunition to avoid any unnecessary damage to the pelt." *Id.* at 1406. This was an important distinction, because lower caliber bullets travel shorter distances than the higher caliber bullets used for deer hunting. *Id.* at 1408. Therefore, with coyote hunting, there is less chance that if the hunter misses, the bullet will travel into an area that the hunter cannot see. *Id*.

Wolf hunting, like deer hunting, utilizes high caliber weapons. The Wisconsin Department of Natural Resources Board recognized this fact in its own rulemaking, when it explicitly stated that persons would be required to hunt wolves from a stationary position to "address[] safety concerns about hunting in the dark with large caliber rifles and shotguns shooting slugs or buckshot." (Exhibit 24, p. 42) (Docket No. 226). Perhaps this is why after the status conference in this matter, *the State stipulated to the fact that wolves are shot with high caliber weapons*. (Affidavit of Colette Routel (submitted with this response) at ¶ 2(a)). The one difference this Court articulated between coyote hunting and deer hunting is therefore not a difference that exists between wolf hunting and deer hunting.

Throughout the months of consultation on this issue, the State never offered another reason why hunting wolves is not analogous to hunting deer. In his affidavit filed in support of the State's Motion, Tim Lawhern seems to suggest the difference is that the "likelihood of a significant amount of night hunting of wolves under state law is low," since the number of wolves available for harvest (the "quota") may be reached in all zones "soon." (Affidavit of T. Lawhern at ¶ 11) (Docket No. 187). This suggestion is a post hoc rationalization. The Wisconsin Legislature authorized nighttime wolf hunting without any information about what the wolf quotas would be, how many permits would be issued, or how many wolves would be left to harvest when the nighttime hunting season began. When the Wisconsin Department of

Natural Resources issued its regulations, it too had no idea how many wolves would be available for harvesting once nighttime hunting commenced. This is explicitly acknowledged by the Board in its "Green Sheet":

> The department proposes that licenses be issued in the number that is 10 times the harvest quota. If the state quota after tribal declarations would be 100, then the number of licenses issued would be 1000. For this first year, the department does not know the success rate of hunters or how likely an early closure may be. The department proposal is a compromise that considers the potential for: providing optimum opportunities for participation; optimum opportunities for reaching the quotas; minimum probability of closing the season before hunters and trappers get an opportunity to pursue wolves with their preferred methods; and minimum probability of exceeding the harvest before the season could be closed (e.g. opening weekend of gun season). The rule proposes that these factors be considered each year in addition to the quotas and past hunter and trapper success rates.

(Exhibit 24, at p. 12 (numbered in original as p. 10)) (Docket No. 227).[4] And when, on October 5, 2012, the State first began indicating its disapproval of the Tribes' proposal to engage in nighttime deer hunting (Affidavit of K. Stark at ¶ 11(h)) (Docket No. 199), the October 15th wolf hunting season had still not even begun.

Furthermore, Lawhern's almost 3-week old assumption that the quotas may be reached "soon" – even if it were legally relevant (which it is not) – has proven to be untrue. Three out of the six wolf harvesting zones still remain open as of the date of this brief. *See* *http://dnr.wi.gov/topic/hunt/wolf.html*. Since licenses are not tied to any particular harvesting zone, this means that more than 1,000 people could still be engaged in nighttime wolf hunting right now. *See* Wisconsin DNR Press Release, Sept. 15, 2012, *available at* *http://dnr.wi.gov/news/BreakingNews_Lookup.asp?id=2508* (noting of the 20,272 people who

[4] In fact, other states that have authorized wolf hunting failed to meet their harvest quotas, which caused many people to believe that the same would be true in Minnesota and Wisconsin. *See, e.g.*, http://www.npr.org/blogs/thetwo-way/2012/10/15/162940003/fair-game-wolf-hunting-begins-in-wisconsin-minnesota ("Everybody's gung-ho to go kill a wolf but nobody realizes how hard it's going to be," Bud Martin, a Montana-based hunting guide who shot a wolf two years ago in Idaho told the *Green Bay Gazette*. "I'll bet you a steak dinner your quota won't be met").

applied for wolf hunting licenses, the DNR had selected 1,160 applicants from a random drawing to obtain such licenses); (Exhibit 24, p. 12 (numbered in original as p.10)) (Docket No. 227) ("This rule . . . gives the department the authority to allow successful applicants to hunt or trap in any open zone. The latter is proposed for the first season in 2012-13"). By way of contrast, just 74 Tribal members currently satisfy the marksmanship proficiency requirement necessary to obtain a nighttime deer hunting permit under Commission Order 2012-05. (Affidavit of F. Maulson at ¶ 16(a)(i)) (Docket No. 197). Thus, Lawhern's attempts to distinguish nighttime hunting of wolves from deer based on the quantity of hunters, must fail.

One looks in vain throughout the State's Brief in an attempt to find any other alleged difference between deer hunting and wolf hunting. Simply repeating that coyotes and wolves are both predators is insufficient. What is important is not the class of animal being hunted, but the manner in which hunting occurs.

Wolves are found in the same location as deer. (Affidavit of J. Gilbert at ¶ 8-9) (Docket No. 198). The State agrees that hunters shoot wolves with the same high caliber weapons that they use to shoot deer. (Affidavit of C. Routel at ¶ 2(a)). If anything, hunting wolves at night poses greater risks than hunting deer at night. Deer freeze in place when a light is focused directly into their eyes. *LCO VII*, 740 F.Supp. at 1408. This tendency to freeze provides a stationary target, and the deer's larger size makes it significantly easier to ensure that any shots fired hit their intended target. Wolves are usually shot from longer distances than deer. (Second Affidavit of C. McGeshick (submitted with this response) at ¶ 8). They do not freeze when light is shined on them, making it more likely that the hunter will be shooting a smaller, moving target. *Id.* Consequently, wolf hunters are more likely to miss their target, and since they are

using a high caliber weapon, that bullet can travel a long distance at night if there is not an adequate backstop.

In developing nighttime hunting rules for white-tailed deer, the Tribes consulted safety experts such as Chris McGeshick, Tom Kroeplin, and Fred Maulson. Each of these men is an experienced hunter with decades of experience working in law enforcement, two of them with the Wisconsin Department of Natural Resources. Each of these men says that shooting wolves at night involves the same, if not greater risks as shooting deer at night. To date, the State has not offered a shred of evidence that this is not the case. Consequently, the State Legislature's and Department of Natural Resources' authorization of nighttime wolf hunting enabled the Commission to begin consulting with the State to offer tribes an opportunity "consistent with" this change: nighttime deer hunting.

II. THE STATE'S OBJECTIONS TO COMMISSION ORDER 2012-05 WERE UNREASONABLE, BECAUSE THE ORDER CONTAINS ADEQUATE MEASURES TO PROTECT PUBLIC SAFETY

During the November 28, 2012 status conference in this matter, the State agreed that in determining whether it "unreasonably" withheld its consent to Commission Order 2012-05, this Court must consider whether the Order's regulations are adequate to protect public safety.[5] In response to questions from this Court, Attorney Tom Dosch stated:

> If we have a hearing on whether the state unreasonably withheld consent, which is one of the theories I glean from the pleadings and what I've heard today, I think the essence of the trial on that issue would be is the tribes' plan adequate for public safety, which is the same one we'd have if it was a Rule 60(b) motion, because if it's not adequate for – if the state is justified in taking the position that the plan, the new plan, is not adequate for public safety, then its withholding of consent is reasonable.

[5] The State could also have reasonably withheld its consent if the Commission Order jeopardized the continued existence of the State's white-tailed deer population. But the State has stipulated that there is no conservation reason for prohibiting nighttime deer hunting as proposed by the Tribes. (Affidavit of Colette Routel at ¶ 2(b)).

(Transcript, Nov. 28, 2012 hearing, at 14) (Docket No. 245). As explained in greater detail below, the Commission Order is adequate to protect public safety, and therefore, the State unreasonably withheld its consent. Since Commission Order 2012-05 is valid, the State's motion to enforce its prohibition on nighttime deer hunting must be rejected.

A. The Commission Order Addresses The Safety Concerns Discussed in the Deer Trial

The State makes the bald assertion in its brief that "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." Defendants' Brief at 6. Even a brief examination of the transcripts from the Deer Trial, however, establishes that the State's claim is without merit.

For example, during the Deer Trial, one of the State's experts was Ralph Christensen, who was the Director of the Bureau of Law Enforcement within the Wisconsin Department of Natural Resources. (Exhibit C at 1-143, attached to the Affidavit of C. Routel). Christenson testified that the State prohibited nighttime hunting of deer for safety reasons, and when asked what the safety concerns were, he replied:

> You're shining a light and you've got a deer standing there. At that point if you intended to shoot it, you attempt to shoot it. The thing that makes this particularly dangerous is at that point, the light is illuminating a deer or part of the deer and does not illuminate much of anything else beyond that and, in fact, if you shoot in the direction of that deer, you don't know what's out there behind it. You don't know whether there's a home directly behind it. . . . the very basic problem is that you have no way of knowing in the middle of the night what, if anything, is behind that critter that might provide a safe backstop for that kind of activity.

(*Id*. at 2-16 to 2-17). Christensen then noted that this safety concern could be addressed by ensuring that there was an adequate backstop for any errant bullets. He defined "adequate backstop" as follows:

> Hav[ing] a reasonable assurance that when you fire a round, that it's going to be stopped in some manner. Now one of the ways that that can occur is if you're hunting from an elevated device, that you're shooting down. You're shooting down generally into the ground. That's a backstop in that kind of situation. You might be shooting in a situation where there is some type of hill behind what you're shooting at or you may be shooting generally towards an animal with a very heavy wooded area behind that kind of a critter and the expectation is that in a relatively short distance, that round will be stopped by the – by the trees that are there.

(*Id.* at 2-66 to 2-67).

On cross-examination, Christensen was asked a series of follow up questions in an attempt to determine why he thought nighttime coyote hunting was safe, and under what circumstances he would consider nighttime deer hunting to be safe. The relevant portions of that exchange are as follows:

> Christensen: The distinguishing characteristic [of coyote hunting] is that it would be a stationary hunt. The individual would have likely checked out the area he was hunting ahead of time and the type of firearms involved will be different.
>
> Siegler: Okay, and the problem with firearms is the backstop problem?
>
> Christensen: Yes.
>
> Siegler: So if you had a stationary hunt for deer, if you had a situation where the deer were being called into the spot of the stationary hunt and if you had a situation where there was an ascertainable backstop, wouldn't that create a safe shining situation for deer hunting?
>
> Christensen: It would be – it would be safer than what we've discussed to this point. At this point then in your example, the primary difference would be the difference in firearms and the relative effectiveness and the ability of that round to keep on going, but if we talked about trying to consider that backstop concern ahead of time, I'd say that that – that the scenario you've described would alleviate most of our safety concerns.

(*Id.* at 2-80 to 2-81). Thus, Christensen's testimony during the Deer Trial established that if deer hunting at night was conducted from a stationary position as coyote hunting typically is, this

would make it more likely that the hunter had considered whether there was an adequate backstop for any stray bullets and "would alleviate most of [the State's] safety concerns." (*Id.*)

This continues to be the State's safety position – at least outside of its litigation with the Tribes in this Court. When the Department of Natural Resources adopted its regulations for nighttime wolf hunting, one of the only restrictions it put in place was that persons be required to hunt from a stationary position. (Exhibit 24) (Docket No. 226). The rule explained:

> Hunting at night is authorized under ACT 169 and this rulemaking, however, the rule addresses safety concerns about hunting in the dark with large caliber rifles and shotguns shooting slugs or buckshot by reducing the likelihood that someone will shoot a firearm without being certain of what lies beyond their target. By requiring that a person hunt from a stationary position and prohibiting hunting with hounds at night, shooting opportunities are more likely to occur in directions where the hunter has been able to anticipate and avoid possible unsafe shooting scenarios. It is anticipated that this extra precaution will help assure public safety.

(Exhibit 24, p. 42) (Docket No. 226). Thus, just as Christensen had said during the Deer Trial that coyote hunting was safe at night because it typically involved a stationary shooter, in 2012, the Wisconsin Department of Natural Resources concluded that requiring wolf hunters to shoot from a stationary position would alleviate the safety concerns with nighttime hunting using even large caliber rifles.

Commission Order 2012-05 adopted the State's approach and requires that Tribal members shoot from a stationary position if they are hunting deer at night. Section 2.6.3.2 states that a member hunting deer at night may "only discharge a firearm, bow and arrow or crossbow from a stationary position at the point of kill." (Exhibit 25) (Docket No. 228). The Order, however, goes even further to address the concerns raised by Christensen. Rather than using the stationary shooting position to *imply* that Tribal members will anticipate and avoid unsafe shooting scenarios, as the State's wolf regulations do, the Commission's Order imposes additional requirements on Tribal members to *ensure that they consider* the risks of shooting in a

particular location. Tribal members must visit the location they intend to hunt from during the day, and they must create a shooting plan for the site that identifies their "safe zone of fire." (Section 2.6.5, Exhibit 25) (Docket No. 228). Roads, residences, buildings, and other areas that create safety risks cannot be within the "safe zone of fire." (*Id.*) Additionally, in creating this plan, Tribal members need to consider whether there is an adequate backstop to ensure that, even in the unlikely event that members of the public are wandering around public lands more than 50 minutes after sunset during the Tribal deer hunting season, they will not be injured by stray bullets. (Advanced Hunter Safety Powerpoint, Exhibit A to the Affidavit of C. Routel). The safety concerns identified in the Deer Trial have been addressed by Commission Order 2012-05, and the State's allegations are therefore unjustified.

B. The Tribes Considered Other Nighttime Hunting Regulations, But Ultimately Rejected Them Because They Were Neither Safer Nor Practical

The State claims in its Brief at 7, that it is "notable" that Commission Order 2012-05 adopts a regulatory scheme that – according to the State – is less restrictive than the plan proposed by the Tribes during the Deer Trial. As an initial matter, this is not "notable," as this Court never considered the regulatory scheme referred to by the State, because the possibility of this scheme was raised for the first time in the midst of the Deer Trial and was therefore untimely. Nevertheless, in developing Commission Order 2012-05, the Commission did consider the regulatory scheme referred to by the State, which includes a requirement that nighttime hunting occur only from an elevated position over bait. The Commission rejected this approach for a number of safety and practical reasons.

First, the Commission determined that the regulations it adopted in Commission Order 2012-05 were in fact *safer* than the plan offered in the middle of the Deer Trial. In suggesting the contours of regulations that are at issue in this case, Chris McGeshick reviewed State hunter

safety statistics. (First Affidavit of C. McGeshick at ¶ 8) (Docket No. 196). Among other things, these reports showed that the number of "hunter incidents" – hunting accidents that result in a person being mistakenly shot – has declined steadily since the time of the Deer Trial. While there were 60 shooting-related hunter incidents in 1984 during the deer gun season, there were only eight such incidents in 2011, even though more than 600,000 people hunted in the State of Wisconsin during this time. (Exhibit A at 21-22, attached to the Second Affidavit of C. McGeshick). Tribal shooting-related hunter incidents are even rarer. In fact, there have been only two or three shooting-related hunter incidents in the ceded territory since the Deer Trial was held in 1989, and none of these incidents resulted in a fatality. (Second Affidavit of C. McGeshick at ¶ 11).

While shooting-related incidents are exceedingly rare, many persons are injured while hunting. One of the most common sources of injury involves persons falling from their elevated tree stands. (Second Affidavit of C. McGeshick at ¶ 17(a)). As a result, rather than require that Tribal members use elevated tree stands, which cause numerous injuries each year, the Commission's regulation instead requires that Tribal members make sure that the safety benefits of hunting from elevated tree stands (ensuring that an adequate backstop exists) are maintained, while the risks associated with that activity are not mandated. Commission Order 2012-05 requires hunters to create a shooting plan. (Section 2.6.5, Exhibit 25) (Docket No. 228). The shooting plan must identify the "safe zone of fire," or the area in which a deer may be safely dispatched. *Id.* In determining the safe zone of fire, Tribal members need to consider whether there is an adequate backstop for any stray bullets, such as a hill, a densely wooded area, or the ground when shooting from an elevated position. (Advanced Hunter Safety Powerpoint, Exhibit A to the Affidavit of C. Routel).

Second, requiring Tribal members to shoot from a deer stand is not practical, and would make the ability to hunt at night virtually meaningless. In prior decisions, this Court has restricted the right to hunt to public lands. Yet Tribal members are not permitted to leave deer stands within public lands overnight. (Second Affidavit of C. McGeshick at 17(b)). Thus, Tribal members would have to come out to the site during the day to set up their deer stand, return to hunt at night, and then take their deer stand with them. The added flexibility that nighttime hunting is meant to provide would be eliminated as a practical matter through this approach, as would the ability of disabled Tribal members to take advantage of nighttime deer hunting. (*Id.* at ¶ 17(c)).

Finally, requiring Tribal members to hunt from an elevated position over bait as proposed during the Deer Trial, would be contrary to the State's current goals for limiting the spread of chronic wasting disease ("CWD"). The Department of Natural Resources has been advocating for a State-wide ban on the use of bait for deer, because bait causes deer to congregate, and this can hasten the spread of the disease. (Exhibit 2, WI CWD Response Plan at 4) (Docket No. 204). Rather than require the use of bait, which the State believes could have negative impacts on the deer population, the Commission Order allows other methods of nighttime deer hunting that provide the same safety benefits. Because hunting from an elevated position over bait is not "the least restrictive alternative available to accomplish [the State's] health and safety purposes," the Commission's decision not to adopt this approach has no impact on these proceedings. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 668 F.Supp. 1233, 1237 (W.D. Wis. 1987) (*LCO IV*).

C. The State cannot require the Tribes to Adopt More Stringent Regulations For Tribal Members than the State has adopted for the General Public

Through the Affidavit of Tim Lawhern, the State has provided this Court with many other complaints about the regulations contained in Commission Order 2012-05. For example, Lawhern claims that "[n]o 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." (Exhibit F to Affidavit of T. Lawhern, at p. 2) (Docket No. 187, #6). These criticisms are not legally valid.[6]

Courts have repeatedly held that when regulating treaty rights, States may not "discriminate against the Indians." *E.g., Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968) (the State may regulate treaty rights only in the interest of conservation, and "provided the regulation meets appropriate standards and does not discriminate against the Indians"); *Department of Game of Washington v. Puyallup Tribe*, 414 U.S. 44, 49 (1973) ("There is discrimination here because all Indian net fishing is barred and only hook-and-line fishing . . . is allowed"); *LCO IV*, 668 F.Supp. at 1237 ("The non-discrimination prong of the legal standard for state regulation requires that regulations, in language and in effect, neither discriminatorily harm the Indian harvest nor discriminatorily favor non-treaty harvesters"). The

[6] The Tribes contest these allegations on factual grounds as well. For example, the State contends that the length of time a shooting plan is valid (one year), does not protect public safety. In fact, a shooting plan is valid for one deer season (October 15 through early January) and cannot be used during the rest of the year. As a practical matter the vast majority of hunters will visit their site near the time they intend to hunt, and their plan will expire after the season has ended (in early January), necessitating that they visit the site again before they obtain a night hunting permit for the next season.

The State also contends that the Commission Order does not specify the direction of shooting. Establishing the safe direction of fire is a fundamental part of developing a shooting plan and designating a "safe zone of fire." The point of the safe zone of fire designation is that the hunter will consider where any hazards are located, make sure those areas are outside the safe zone, and not fire in that direction. In fact, the shooting plan form that every hunter must complete states, "Attach or draw a diagram of the area you are going to hunt, including your established "safe zone of fire" (the area and the only direction(s) in which you will discharge a weapon)." (Exhibit B attached to the Affidavit of C. Routel). Of course, it is the responsibility of each hunter to make a case-by-case assessment of the safety of taking any shot when he or she is hunting.

Likewise, the State contends that the Tribes' nighttime hunting regulations fail because they do not require the target animal to be within the safe zone of fire. The development of a safe zone of fire obviously assumes that both the hunter and the target will be within that area when the weapon is discharged. The Commission Order makes this clear by implication in the requirement that a wounded deer cannot be dispatched outside the safe zone of fire until daytime hunting hours commence (Commission Order 2012-05, section 2.6.6, Exhibit 25) (Docket No. 228).

State has not imposed any of Lawhern's suggested requirements on State citizens that engage in nighttime hunting of wolves. Demanding that Tribal members be subjected to more restrictive hunts than non-Indians, without demonstrating that there are any increased risks associated with hunting deer at night versus hunting wolves at night, is discriminatory.

To be clear, the Tribes are not arguing that the State's wolf hunting regulations are unsafe, and therefore, the Tribes' deer hunting regulations can also be unsafe. Rather, the State's wolf hunting regulations are the product of years of study of hunting-related incidents. The State realized long ago that the way to make hunting safe was not to add more and more detail to its hunting laws and regulations. Instead, in the years since the Deer Trial, the State has emphasized hunter safety training as the most effective route to reducing the number of shooting-related hunter incidents. (Second Affidavit of C. McGeshick at ¶¶ 12-13). The State's hunter safety course includes a minimum of 10 hours of training that shows individuals how to be safe hunters. (*Id.* at ¶ 13). After completing this course, each hunter understands that they need to "plan their hunt, and hunt their plan." (*Id.*) Hunters are taught to consider the conditions of the area in which they are going to hunt (for example, topography and vegetation) and the directions in which they will shoot to avoid hazards and to know what lies beyond. (*Id.*) These are fundamental precepts of hunter safety and are implicated during daytime hunts, especially during the State's deer hunting seasons, where hundreds of thousands of people take to the woods during the same nine-day period. (*Id.*)

The Tribes already require all Tribal members born after January 1, 1977 to take the same hunter safety course that is offered by the State. (Second Affidavit of C. McGeshick at ¶ 14); Model Code §3.17(1)(a). Commission Order 2012-05 then goes an extra step, and expands on the hunter safety education provided by the State. The State's hunter safety training course

contains no training in safe nighttime hunting techniques. (Second Affidavit of C. McGeshick at ¶ 15). This is true even though the State allows nighttime hunting for many different animals, and it remains true even after the State authorized nighttime wolf hunting. Realizing this deficiency existed, the Commission created its own advanced hunter safety course. This course provides an additional two hours of classroom training for Tribal members who wish to obtain a nighttime deer hunting permit. (*Id.* at ¶ 16). During this training course, Commission wardens discuss the risks associated with nighttime hunting and show participants how to develop a safe shooting plan that alleviates these risks. (*Id.*) Experience shows that this sort of emphasis on hunter training is the way to limit hunting-related incidents.

Finally, no sovereign enacts regulations that are as detailed as the ones suggested by Lawhern. (Exhibit F to Affidavit of T. Lawhern). The State would never adopt his suggestions as part of its regulatory scheme,[7] because doing so would eliminate the flexibility needed to adapt to changing circumstances. Amending State regulations takes considerable time and resources. Likewise, the Tribes are operating under a system that constrains their ability to amend the Model Code in a quick and cost-effective manner and requiring regulations that set minutia (e.g., how many times a Tribal member may fire their weapon at a target animal) in stone would be counter-productive. As this Court has already noted, the State's ability to regulate treaty hunting rights "is narrowly circumscribed." *LCO IV* at 1239. *See also U.S. v. Washington*, 384 F.Supp. 312, 342 (W.D. Wash. 1974) ("In each specific particular in which the

[7] Our limited discovery obtained from the State over the past week indicates that some of Lawhern's suggestions were incorporated into the State's CWD Procedures Handbook. But handbooks can be amended without using the procedures required for amending regulations, and thus, they typically do not have the force of law. *United States v. Fifty-Three Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982) (handbook provisions are not binding on an agency unless they "have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress," and "prescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice"). Additionally, the CWD Procedures Handbook was only created after the nighttime shooting program had been operational for more than 5 years, and there were no hunter-related shooting incidents during that time.

state undertakes to regulate the exercise of treaty right[s] all state officers responsible therefor must understand that the power to do so must be interpreted narrowly and sparingly applied"). Because the regulatory detail demanded by the State is not "necessary to effectuate the particular health or safety interest" and because the State has not imposed similar limitations on the general public's ability to hunt wolves at night, this Court must find these objections to be unreasonable.

CONCLUSION

For the aforementioned reasons, the plaintiff Tribes request that this Court deny the defendants' Motion to Enforce Prohibition on Shining Deer.

Respectfully submitted this 10th day of December, 2012

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