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.

PLAINTIFFS' PRETRIAL BRIEF

Plaintiffs Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Red Cliff Band of Lake Superior Chippewa Indians, Sokaogon Chippewa Community of the Mole Lake Band of Wisconsin, St. Croix Chippewa Indians of Wisconsin, Bad River Band of Lake Superior Chippewa Indians, and Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribes"), submit this pre-trial brief. It describes the general testimony that will be offered at the July 22, 2013 trial in support of the Tribes' motion for relief from that portion of the final judgment entered by this Court in *Lac Courte Oreilles Band of Indians v. Wisconsin*, 775 F. Supp. 321 (W.D. Wis. 1991) (*LCO X*), which prohibits Tribal members from engaging in nighttime deer hunting throughout the territory ceded by the Tribes in 1837 and 1842 treaties with the United States. In submitting this brief, the Tribes have attempted to highlight the new

developments in this matter that have occurred during the discovery process and will be presented at trial, rather than duplicate the briefing and expert reports that have already been submitted to this Court in support of their Rule 60(b)(5) motion.

I. A SIGNIFICANT CHANGE IN CIRCUMSTANCES HAS OCCURRED SINCE THIS COURT'S DECISIONS IN *LCO VII* & *LCO X*

In August 1989, this Court conducted a trial to determine, among other things, whether nighttime hunting of deer by Tribal members should be permitted in the ceded territory ("the Deer Trial"). At the time, the State did not authorize any nighttime shooting of deer other than by law enforcement officers, or perhaps in certain circumstances, by DNR employees on official business.[1] Law enforcement officers had the authority to dispatch sick or wounded deer, but this usually only occurred at close range when, for example, a deer had been seriously injured in a deer-vehicle collision. Thus, this authority was no in any way analogous to the Tribes' proposed nighttime hunting regulations in 1989.

At the Deer Trial, the State's own attorney and expert witness claimed that there were no legal examples of deer shining anywhere in the United States:

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[1] As explained more fully in the Reply Brief in Support of the Tribes' Motion for Relief From Judgment, the 1988-89 budget bill amended Wis. Stat. § 29.594, which had previously allowed Wisconsin DNR employees and "its agents" to shoot deer that were causing damage to private property. The budget bill eliminated the authority of the DNR to shoot deer for these purposes:

> ~~Damages caused by deer and bear~~ Bear causing damage. Upon complaint in writing by an owner or lessee of land to the department that ~~deer or~~ bear are causing damage thereon, the department shall inquire into the matter; and if upon investigation, or otherwise, it ~~shall appear~~ appears to the department that the facts stated in each such complaint are true, the department by its agents may capture or destroy such ~~deer or~~ bear, and dispose of the same as provided in s. 29.06.

1987 Wisconsin Act 399. *See also* Wis. Stat. § 29.594 (1987-88) (codifying changes); Pl. Exh. 37, State of Wisconsin, Legislative Audit Bureau, *An Evaluation of Wildlife Damage Abatement and Claims Program: Department of Natural Resources* (Nov. 1988) ("this part of the new law also appears to prevent DNR staff from carrying out night shooting of deer").

Q. [Milt Rosenberg] And I take it you haven't had a study of the enhanced risk of gunshot accidents arising from deer shining, legal deer shining, is that correct?

A. That's correct.

Q. And what is the –

Mr. Gabrysiak: Objection. Your Honor, so to that question. I think the question, have you studied the effects of legal deer shining, to my knowledge there is no legal deer shining in the State of Wisconsin.

THE COURT: Sustained.

MR. ROSENBERG: Sure there is, Your Honor. It's on reservation, but you can do experiments on the practice of deer shining. There's all sorts of things you can do. I said was there any study.

MR. GABRYSIAK: The question was a little broader than that.

THE COURT: All right. You were interested in whether there had been any study of legal –

MR. ROSENBERG: Any scientific study of the effects of legal deer shining practices. You can conduct the practice for purposes of scientific studies, all different ways of scientific –

THE COURT: To determine how dangerous it is?

MR. ROSENBERG: Yeah. The relative dangers of one practice compared to another practice. I don't believe that rests on the assumption that there is legal deer shining present in the state at this time.

THE COURT: Well, I think it does, but go ahead. You can answer that.

THE WITNESS: I frankly don't know how you would set up that kind of situation, in a real life type environment to be able to get the information you're talking about. To the best of my knowledge, this type of activity is not permitted across the United States and I'm not aware of where we could look at the legal practice and use information from that to be able to –

Q. I just want to know –

A. – to get to it.

1989 Transcript 2-130- to 2-131 (Pl. Exh. 12) (emphasis added). With no other examples to use, the Tribes proposed nighttime hunting regulations were modeled after the way Tribal members had shined and shot deer on their Wisconsin reservations for generations.

The State of Wisconsin did permit nighttime hunting of raccoon, fox, coyote, opossum, skunk, weasel, starlings, English sparrow, coturnix quail, chukar partridge, snowshoe hare, and other unprotected species. *Lac Courte Oreilles Band of Indians v. Wisconsin*, 740 F.Supp. 1400, 1408 (W.D. Wis. 1990) (*LCO VII*). But the State argued that hunting these species could be distinguished from deer hunting in two ways: (1) many of these species were shot when treed, and therefore, any bullet that missed its target would travel straight upward before falling harmlessly to the ground; and (2) these species were generally "shot with lower caliber bullets that travel shorter distances than bullets used for deer hunting." *Id.* This Court agreed with the State's arguments. Since there were no examples of safe nighttime deer shooting programs outside of Indian reservations, the Court was forced to conclude that nighttime hunting with high caliber weapons posed a significant risk to public health and safety. *Id*. at 1424.

There have, however, been several significant factual changes that have occurred in the 24 years following this Court's decision in *LCO VII*.

A. The State of Wisconsin has allowed nighttime shooting of deer and wolves in the years following the Deer Trial

In recent years, the State has permitted new species – white-tailed deer and gray wolves – to be shot at night. Between 2002 and 2007, the State of Wisconsin authorized nighttime shooting of deer through its CWD program. Stipulated Fact ¶ 78. During the 2012-13 hunting season, the Wisconsin Legislature and the Wisconsin Natural Resources Board permitted wolves to be shot at night by recreational hunters using high caliber weapons on public lands. (Pl. Exh. 115 & 121). The State has also allowed "nuisance" deer to be shot at night by private companies such

as Urban Wildlife Specialists, who are contracted to do so by municipalities and other public entities.[2] Brad Koele will testify that the State has issued dozens of these "nuisance" nighttime deer shooting permits, and that nearly all of these permits have been issued since 2000.

These changes are significant, because they demonstrate that the State of Wisconsin believes there are safe means of shooting deer and other species using high caliber weapons at night. These programs also have a proven track record of safety. The State has stipulated that both the State's nighttime CWD shooting program and the State's 2012 nighttime wolf hunt had perfect safety records. Not a single hunting related incident (an incident where a hunter shot herself or another person) occurred during the seven years that nighttime shooting with high caliber weapons occurred under these programs in the State of Wisconsin. Stipulated Facts ¶¶ 120 & 160. A review of hunting incident reports produced by the State during discovery also demonstrates that there have been no hunting related incidents arising out of the State's nighttime "nuisance" deer shooting permits. This establishes that high caliber weapons can be discharged at night while still protecting public safety, and therefore, a complete ban on nighttime deer hunting is no longer "the least restrictive alternative available to accomplish its public health or safety interest." *LCO IV*, 668 F.Supp. at 1239.

The State has attempted to distinguish its nighttime shooting under the CWD program by arguing that it was undertaken to control the spread of disease, not for personal gain. But there is no *safety* difference between shooting deer at night to eradicate CWD, and shooting deer at night for subsistence purposes. The State has stipulated that CWD poses no threat to the human population, Stipulated Facts ¶ 77, and therefore, it cannot argue that its nighttime shooting

[2] This is apparently also the legal mechanism for the issuance of deer destruction permits at Wisconsin airports. None of the State's witnesses on this subject – William Ishmael, Tom Hauge, or Brad Koele – know *when* nighttime shooting at airports began. But Tom Hauge will testify that to the best of his knowledge, it began after the Deer Trial.

program risked human safety to prevent the potential risk to human health. Chuck Horn will testify that there is no difference between a person shooting deer under the State's CWD program and a Tribal subsistence hunter: in each case, the shooter is doing a job. Whether they are putting meat on their table or collecting CWD samples, the shooter is attempting to efficiently kill deer, not to collect a trophy buck. Consequently, the safety concerns are similar.

The State has also attempted to distinguish its nighttime shooting programs by claiming that only "trained professionals" shot under the CWD program. First, anyone could attempt to obtain a nighttime wolf hunting license in 2012; no special training or experience was required to apply for the lottery. Second, as Section II(A) of this brief and trial testimony will establish, the State's CWD shooters were likely less proficient in shooting deer at night than Tribal members who will be engaging in nighttime hunting under the Revised Regulations. Tribal members have experience shooting deer at night on their reservations, they will be hunting in locations familiar to them, and the stringent marksmanship qualification shoot, which must occur at night, will weed out all but the most expert Tribal-member hunters.

Lastly, the State will attempt to distinguish the nighttime wolf hunt in many ways. They will claim that the wolf hunting regulations were unsafe as written. They will claim that the 2012 wolf hunting season ended early, and that only one wolf was shot at night during the 2012 wolf hunting season.[3] According to State expert Randall Stark, this supposedly means that few people took advantage of this hunting opportunity, which reduced the risk to public safety. The

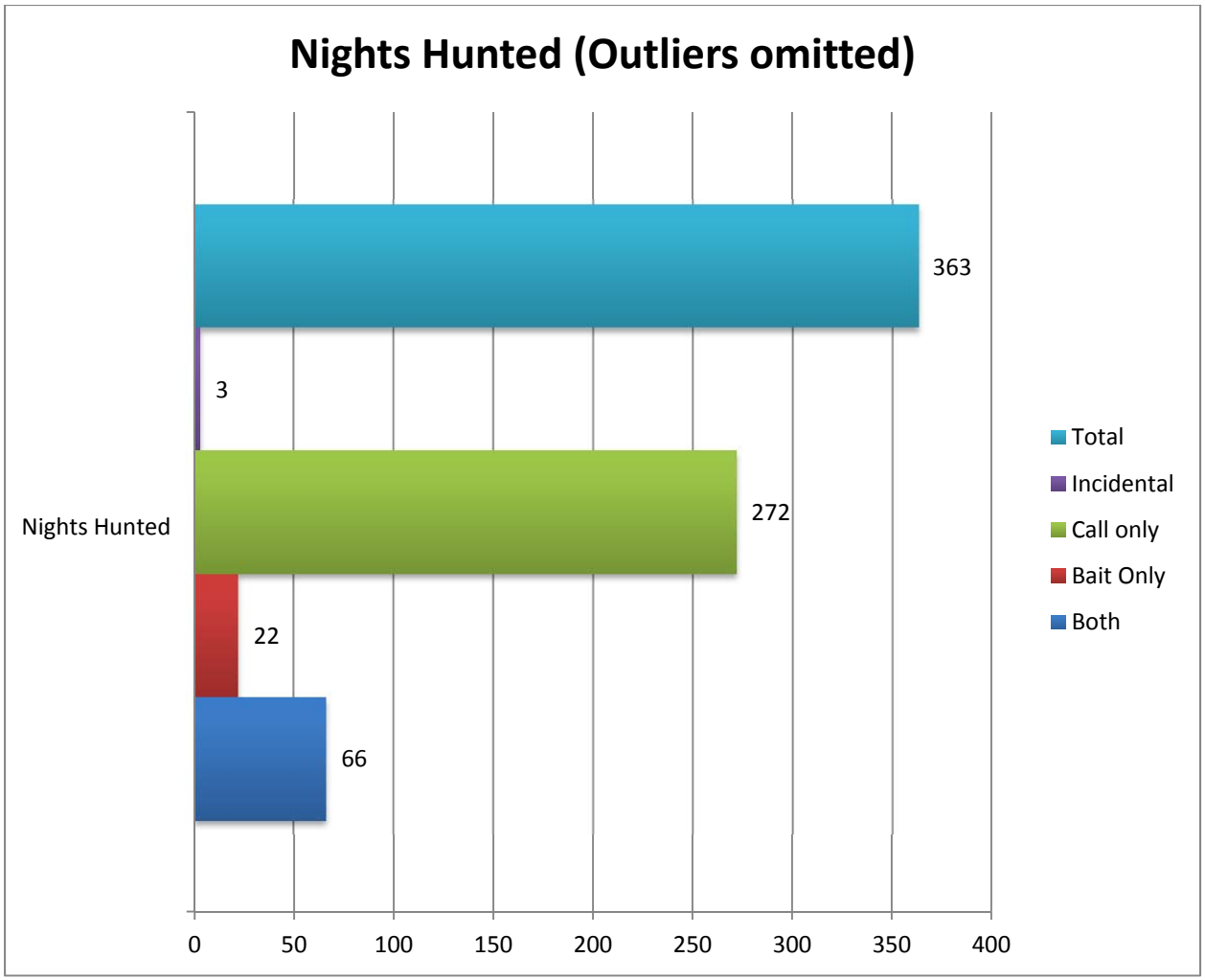
[3] The testimony of William Vander Zouwen will establish that three wolves were reported as having been shot at night. Prior to submitting an affidavit to this Court claiming that only one wolf was shot at night during the 2012 season, Vander Zouwen instructed a DNR employee to call the three people who reported killing wolves at night. After the telephone call, two people changed their reported times. What was said during these calls is unknown. No calls were made to persons who reported killing wolves during the day to determine if their reported times were mistaken, and the Tribes will argue that three wolves were shot at night during the 2012 hunting season.

State will claim that the recent budget bill repealed the nighttime wolf hunting authorization contained in 2011 Act 169. For all of these reasons, the State will argue that nighttime wolf hunting is not a changed circumstance that should be considered by this Court.

The Tribes will offer testimony that will refute these points. On July 1, 2013 (after the close of discovery), the State finally produced the surveys of State-licensed wolf hunters that were submitted to the DNR following the conclusion of the 2012 wolf hunting season. Of the persons who returned surveys, 81 people or 16.1 % indicated that they hunted wolves at night in. (Pl. Exh. 126) Extrapolating this percentage to all of the State-licensed wolf hunters would mean that more than 130 hunters engaged in nighttime wolf hunting in 2012. This number is almost double the number of Tribal-member hunters (74) who passed the marksmanship qualification course in the fall of 2012 in the hopes of hunting deer at night under Commission Order 2012-05.

The wolf surveys submitted to the DNR also indicated that the 81 people who hunted wolves at night were out hunting for at least a collective 363 days,[4] even though the nighttime wolf hunting season was only open from November 26th through December 23rd:

[4] A small number of survey responses indicated that persons had hunted wolves at night for more days than the season was legally open. These survey responses were completely excluded in the chart that follows, which leads to a more conservative estimate of hunting days. With those hunters included, State licensed hunters who responded to the survey would have spent 559 days hunting wolves at night in 2012.



Again, the frequency of this activity supports the conclusion that with no hunting related incidents attributable to the 2012 nighttime wolf hunt, that hunt was adequate to protect public safety.

The State has also stipulated to facts demonstrating that the safety of the State's nighttime wolf hunting regulations were carefully considered at the highest levels of the Wisconsin DNR prior to their enactment. Their current claims that those regulations were unsafe as drafted and were repealed by the Legislature for this reason, smack of bad faith. Through discussions with safety experts such as Tom Van Haren, who was the Law Enforcement team leader on the Wolf Regulations Taskforce, *see* Pl. Exh. 117, the Wisconsin DNR decided to craft additional

restrictions to be applied to nighttime wolf hunters that were not otherwise included by the Legislature in the Wolf Act (Act 1969). More specifically, the Taskforce apparently believed at one point that requiring hunters to shoot over bait or while using a predator call would increase safety. When this idea was presented to Tom Hauge, the Director of the Wisconsin DNR's Bureau of Wildlife Management, and Kurt Theide, Administrator for the Wisconsin DNR's Division of Lands, they "like[d] the idea of night hunting rules that would increase safety." (Pl. Exh. 118).

DNR officials also considered even more stringent rules, such as requiring wolf hunters to hunt from a tree stand. Stipulated Facts ¶¶ 141-42. The State even drafted an analysis of this proposed requirement for the wolf rule "green sheet" package, which read:

> Hunting at night is authorized under Act 169 and this rulemaking, however, the rule addresses safety concerns about hunting in the dark by reducing the likelihood that someone will hunt without being certain of what lies beyond their target. By requiring that a person hunts from a stationary position elevated over the area where a wolf is anticipated to present a shooting opportunity, the ground will be the backstop for a projectile in most situations. Hunting with hounds at night is prohibited because, with that technique, shooting opportunities are more likely to occur in locations where the hunter has not anticipated possible shooting scenarios. It is noteworthy that similar restrictions for coyote hunting have not been necessary. However, considering the trophy aspect and scarcity of this opportunity, which could result in greater incentive to harvest an animal, it is anticipated that this extra precaution will improve safety.

(Pl. Exh. 119). *See also* Pl. Exh. 120 at 6. These more stringent draft regulations were considered at a meeting of high-ranking DNR officials including Scott Gunderson, Kurt Thiede, Bill Vander Zouwen, and Tom Hauge. Scott Gunderson, however, advocated against the provision, which also failed to garner the support of Tom Van Haren, who was concerned that it would have imposed requirements on wolf hunters that are not imposed on any other State-licensed hunters. Stipulated Facts ¶¶ 141-42. These facts illustrate that the safety components of

the wolf regulations were carefully considered by the highest ranking officials within the Wisconsin DNR. Only after weighing the benefits and drawbacks of more stringent requirements and considering the potential for the Plaintiff Tribes to hunt deer at night using the requirements ultimately adopted by the DNR Board, *see* Stipulated Fact ¶¶ 141-43, they were rejected by the DNR. This, when coupled with the Governor's public statements that the repeal of the nighttime wolf hunting provision was directly tied to this litigation, establishes that any repeal was not about safety. It was about politics. And it has no bearing on this case.

B. Other States have also allowed nighttime shooting of deer in the years following the Deer Trial

As noted in the prior briefing in this case, as well as the expert report of Chris McGeshick, Wisconsin is not alone in authorizing the shooting of deer at night with or without an artificial light. Despite the time constraints involved in these proceedings, the Plaintiff Tribes have still been able to identify at least 26 states that allow some nighttime deer shooting:

- Kekek Stark will testify that nighttime deer hunting is permitted by First Nations' members throughout most of Canada under the Canadian Supreme Court's *Morris* decision. (Pl. Exh. 51). Kekek Stark will also testify that off-reservation nighttime deer hunting is permitted by Tribal members in Oregon (the Nez Perce tribe, Pl. Exh. 47; Klamath tribes), Washington (the Port Gamble S'klallam; Lummi Nation, Pl. Exh. 48; and Confederated Tribes of the Colville Reservation), Minnesota (Mille Lacs Band), Michigan (Keweenaw Bay Indian Community, Pl. Exh. 44), and Oklahoma (Chickasaw Nation, Pl. Exh. 49);

- Kekek Stark and Chris McGeshick will testify that nighttime hunting of axis deer is permitted in Texas, and nighttime hunting of white-tailed deer is permitted in certain locations in California, in both cases because they are considered an invasive species within the state;

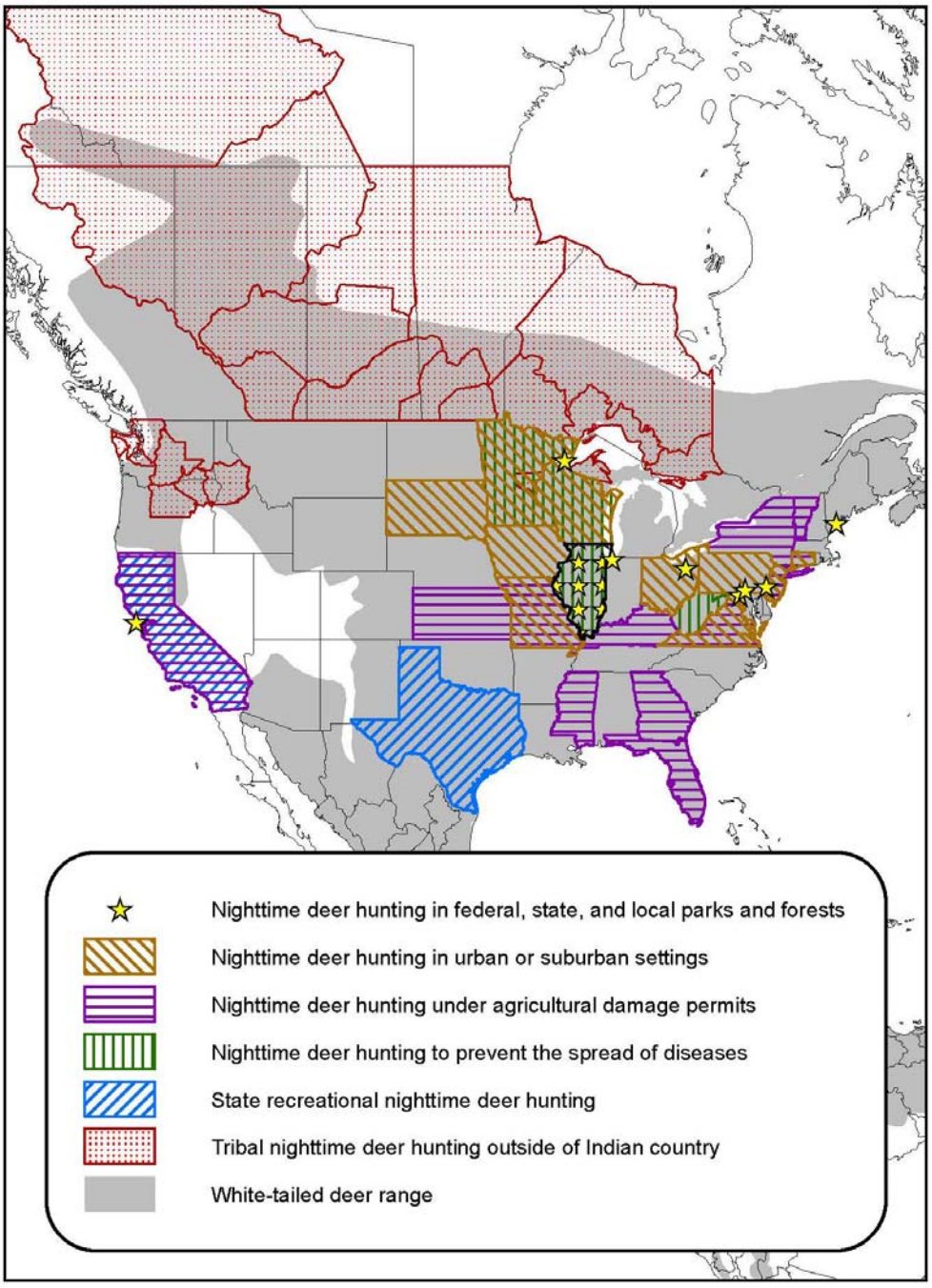
- the State has stipulated that nighttime shooting of deer has occurred in Illinois pursuant to their CWD eradication program, Stipulation Facts ¶ 129. Chris McGeshick will also testify that nighttime shooting of deer has occurred in Minnesota to successfully eradicate bovine tuberculosis within the state, and in West Virginia, as part of the State's CWD program;

- Chris McGeshick will testify that nighttime shooting of deer has occurred in federal, state, and local parks and forests throughout the deer's range in the lower 48 states. Specific examples in recent years include shooting at Valley Forge National Park (Pennsylvania), Point Reyes National Seashore (California), various parks in the State of Ohio, the Catoctin Mountain Park (Maryland), Rock Creek Park (Washington D.C.), the Indiana Dunes National Lakeshore (Indiana), and Peaks Island (Maine). Dr. Gilbert and Fred Maulson will testify about the nighttime deer shooting program that has been conducted at the Apostle Islands National Lakeshore (Wisconsin) since 2009;

- Chris McGeshick will testify about urban deer culling programs in Connecticut, Iowa, Maryland, Ohio, Pennsylvania, New Jersey, and South Dakota, and several witnesses will discuss the culling programs conducted by the U.S. Department of Agriculture's Animal and Plant Health Inspection Service ("APHIS"); and

- Chris McGeshick will testify about nighttime shooting of deer to protect private property, including crops, in states such as Florida, Iowa, Vermont, California, Georgia, Kansas, Kentucky, Mississippi, Missouri, New Jersey, New York, and Virginia.

The widespread nature of nighttime deer shooting across the lower 48 states is readily apparent by viewing the below map (Pl. Exh. 43), which depicts the jurisdictions that allow some form(s) of nighttime deer hunting:


Nighttime deer hunting in federal, state, and local parks and forests
Nighttime deer hunting in urban or suburban settings
Nighttime deer hunting under agricultural damage permits
Nighttime deer hunting to prevent the spread of diseases
State recreational nighttime deer hunting
Tribal nighttime deer hunting outside of Indian country
White-tailed deer range

C. The State cannot now argue that nighttime shining and shooting of deer occurred prior to the Deer Trial

The State cannot counter the overwhelming nature of this evidence. Instead, the State has recently decided to claim that "changed circumstances" do not exist because nighttime shooting of deer has always existed in Wisconsin, and in fact has been widespread! The State successfully argued that nighttime deer hunting was unsafe in the original deer trial, in part, because of expert testimony that legal nighttime deer shooting was "not permitted across the United States." 1989 Transcript 2-130- to 2-131 (Pl. Exh. 12). As the argument below demonstrates, the State cannot now change course and claim that nighttime hunting was commonplace prior to the Deer Trial. Additionally, their assertion, as a practical matter, is incorrect and will be disproven at trial.

1. Rule 60(b)(5) does not allow relitigation of the issue of night hunting at the time of original trial

Rule 60(b)(5) of the Federal Rules of Civil Procedure permits a court to modify or vacate a judgment or order if there is a significant change in factual conditions. *See Horne v. Flores*, 557 U.S. 433, 447 (2009). In meeting this burden, the moving party must put forth evidence showing this change. But in making this showing, the rule does not permit altering what the original factual conditions were. It has long been understood that Rule 60(b)(5) "does not allow relitigation of issues that have been resolved by the judgment. Rather, it requires a change in the conditions that makes continued enforcement inequitable." *De Filippis v. United States*, 567 F.2d 341, 343–44 (7th Cir. 1977) *overruled in part on other grounds by U.S. v. City of Chicago*, 663 F.2d 1354 (7th Cir. 1981); *see also Money Store, Inc. v. Harriscorp Finance, Inc.*, 885 F.2d 369, 373 (7th Cir. 1989) (same); *Bernegger v. Gray & Assocs. LLP*, No. 07-C-1028, 2010 WL 3835112, at *2 (E.D. Wis. Sep. 29, 2010) (same); 11 Charles Alan Wright et al., *Federal*

Practice and Procedure § 2863 (3d ed.) (same). Relitigation is precisely what the State now attempts to do.

The State seeks to present evidence showing that night shooting of deer occurred prior to the original trial and reopen that issue. But the Rule does not allow this. In this 60(b)(5) Motion, relitigation of that previously resolved question is not permitted; the debate concerning night shooting at that time is closed. Instead, the focus of this hearing can only center on whether nighttime shooting of deer has occurred since that time.

2. The doctrine of judicial estoppel bars the State from claiming there are no changed circumstances

The doctrine of judicial estoppel also prevents the State from arguing that circumstances have not changed. This doctrine states that when "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interest changed, assume a contrary position . . . ." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee* 156 U.S. 680, 689 (1895)). This rule serves to "prevent[] a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich* 530 U.S. 211, 227 n.8 (2000); *see also* 18B Charles Alan Wright et al., *Federal Practice and Procedure* § 4477 (2d. ed.) ("Absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.") The doctrine prevents the perversion of the judicial process. *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990). A court may also raise the doctrine by its own motion. *Id*. To determine if a party is judicially estopped from arguing a position, courts "examine three factors: (i) whether the party's positions in the two litigations are clearly inconsistent; (ii) whether the party successfully persuaded a court to accept its earlier position; and (iii) whether the party would derive an unfair

advantage if not judicially estopped." *Wells v. Coker*, 707 F.3d 756, 760 (7th Cir. 2013); *see also U.S. v. Christian*, 342 F.3d 744, 745 (7th Cir. 2003) (listing the same three factors and adding that the facts at issue must be the same in both cases). As all three factors are met here, the State cannot argue that there are no changed conditions.

The first factor requires that the party's positions are clearly inconsistent. Such is the case here. At the original trial, the State succeeded in arguing that night shooting of deer did not occur. Its own expert testified that night shooting "is not permitted across the United States." 1989 Transcript 2-130- to 2-131 (Pl. Exh. 12). An objection by the State was sustained on the grounds that "there is no legal deer shining in the State of Wisconsin." *Id.* Now, the State argues that because night shooting of deer occurred prior to the original trial, there are no changed circumstances. This contention by the State represents a complete reversal of its stance on the issue. This position is "clearly inconsistent" with its earlier one. By first asserting that night hunting did not occur in Wisconsin in the 1980s and now claiming that it did indeed happen, the State's position is now the exact opposite of its previous one and the first factor is met.

The second inquiry is whether the party successfully persuaded the court to accept that earlier position. This factor is also met. In addition to the sustained objection at the original trial mentioned above, the ultimate judgment in that case enjoined the Tribes from hunting at night. The basis for that holding, a concern for public safety, no doubt rested on the fact that the Court was persuaded that no night hunting occurred at that time, and therefore, there was nowhere to look to determine the safety of such a practice. To accept the State's contention now, that night shooting occurred in the 1980s, "would create 'the perception that either the first or the second court was misled.'" *New Hampshire*, 532 U.S. at 751 (quoting *Edwards v. Aetna Life Ins. Co.*,

690 F.2d 595, 599 (6th Cir. 1982). This is the "perversion of the judicial process" the doctrine seeks to prevent. *Cassidy*, 892 F.2d at 641. The State either misled this Court then, or seeks to mislead it now. Regardless of which it is, the issue should be considered closed. Because the State succeeded in that argument in the prior proceeding, the second factor favoring estoppel is met.

Finally, a court examines whether a party gains an unfair advantage if not judicially estopped. Again this factor is satisfied. The State is attempting to have its cake and eat it too. It initially argued that the Tribes should be enjoined from hunting at night because no one hunted at night. Now it says that they should continue to be enjoined from night hunting because people did shoot deer at night. By now arguing the opposite, it gains an unfair advantage by forcing the Tribes to litigate two issues: establishing circumstances in the 1980s—specifically, the circumstances the State persuaded the Court were true at the original trial—*and* how those circumstances have since changed. Rule 60(b)(5) is about showing *changed* factual conditions. If the State is not estopped, it not only wastes judicial resources but unfairly forces the Tribes to fight a battle on two fronts. But the Tribes' burden here does not involve proving what the original factual conditions were at the initial proceeding. Instead the Tribes' true burden is only demonstrating how those factual circumstances have changed. Furthermore, the State would gain an unfair advantage as allowing such an argument as it essentially permits it to circumvent the mandate that Rule 60(b)(5) forecloses "the relitigation of issues that have been resolved by the judgment." *De Filippis*, 567 F.2d at 343–44

Granted, "[n]ew information can be a basis for permitting a party to change its prior position." *Czajkowski v. City of Chicago, Ill.*, 810 F. Supp. 1428, 1436 (N.D. Ill. 1992). But it is not the State's contention that the information is new. Rather, the State claims that the shooting

at the UW Arboretum in the 1980s was common knowledge the tribes should have learned. It is absurd for the State to argue at the original trial that no night shooting occurred and now claim that this information was so prevalent that Tribes 300 miles away should have known of it. This is not "new information" that the doctrine contemplates permitting.

Admittedly, it has also been recognized that "ordinarily the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is not applied to the states." *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 369 (1946). But "[g]overnment bodies, however, are not necessarily treated differently when applying collateral estoppel to preclude the government body from disputing *fact* determinations made against the government body in prior litigation." *Czajkowski*, 810 F. Supp. at 1444 (emphasis in original); *see also Levinson v. United States*, 969 F.2d 260, 264–65 (7th Cir. 1992), *cert denied*, 506 U.S. 989 (1992) (applying standard collateral estoppel factors when the doctrine is invoked against the government). Moreover, in instances when the doctrine of judicial estoppel was invoked against the government, "the Seventh Circuit gave no indication that a different standard applies when a government body is involved." *Czajkowski*, 810 F. Supp. at 1444; *see also Eagle Foundation, Inc. v. Dole*, 813 F.2d 798, 810 (7th Cir. 1995) (holding that judicial estoppel against government failed as it did not prevail on the disputed issue in the prior suit); *Levinson*, 969 F.2d at 264–65 (listing standard judicial estoppel factors when invoked against the government). In this Circuit, judicial estoppel is applied the same regardless of whether the party it is asserted against is a state government. Because of this, the State cannot challenge that it is immune from the doctrine being invoked against it.

Furthermore, this is not "a case where the shift in the government's position is the 'the result of a change in public policy.'" *New Hampshire*, 532 U.S. at 755 (quoting *United States v.*

Owens, 54 F.3d 271, 275 (6th Cir. 1995)). The State's new position on the occurrence of night shooting does not involve public policy. Instead it is a contradictory claim about the facts and circumstances involving night shooting as it was in the 1980s. Because that claim does not involve policy, the doctrine can be invoked against the State. Finally, it has been observed that "if the government is to be judicially estopped, the estoppel must be limited to a precise argument presented by the government and accepted by the Court." *Owens*, 54 F.3d at 275. This is exactly what the Tribe is attempting to estop: the State's precise argument that circumstances have not changed because night shooting of deer occurred in the 1980s—the exact opposite of the argument the State made and this Court accepted more twenty years ago. For these reasons, the State is barred from arguing that circumstances have not changed as night shooting of deer occurred prior to the original trial.

D. Any Nighttime shining of deer that occurred in the State of Wisconsin prior to the Deer Trial was short-lived, and illegal

The State plans to present testimony at the trial in this case that nighttime shooting of deer occurred prior to 1985 (1) at the University of Wisconsin-Madison Arboretum, and (2) by farmers who were issued deer damage permits under Wis. Stat. § 29.595(1).[5] The Tribes will fully refute this testimony at trial. The latter claim is based on documents that were only provided to the Tribes weeks after the close of discovery, and contradict the testimony of the State's own witnesses during depositions. The Tribes will vehemently object to the introduction of any such evidence, which would make a mockery of the discovery process. For now,

[5] Presumably, the State will drop the claim asserted in its Response to the Tribes' Rule 60(b)(5) (and refuted in the Tribes' Reply Memorandum) that permits were issued under Wis. Stat. § 29.596 (Wild Animals Causing Damage) at any time prior to the Deer Trial. There is absolutely no documentary support for the claim that the Wisconsin DNR read the statute in this matter at any time prior to the Deer Trial, and it is based on an interpretation of the statute that is wrong as a matter of law.

however, the Tribes will address only one logical fallacy of the State's position: the Wisconsin Legislature prohibited any private persons from legally shining and shooting deer. Stipulated Facts ¶ 14. In May 1980, the Wisconsin Legislature adopted 1979 Senate Bill 260, which prohibited the possession or use of a light for shining deer while hunting or in the possession of a firearm, bow and arrow, or crossbow. This prohibition contained only three narrow exceptions for police officers, DNR employees, or persons authorized by the DNR to conduct a game census. *Id.*

State witness William Ishmael will apparently testify that he participated in nighttime shining and shooting activities at the University of Wisconsin-Madison Arboretum in 1983, despite the fact that he did not fit any of the statutory exemptions contained in 1979 Senate Bill 260. Likewise, Ishmael will testify that other volunteers and University of Wisconsin employees – not law enforcement or DNR personnel – shined and shot deer at the University of Wisconsin-Madison Arboretum. The Wisconsin DNR has not produced any permits for the University of Wisconsin-Madison Arboretum during this time period, and has offered no explanation for how this conduct was legal at the time. It is unclear who will testify that farmers shined and shot deer at night under deer damage permits prior to 1985. So far, all of the State's witnesses have disclaimed any knowledge of this purported practice. But even if the State does find someone to make this claim at trial, and this Court allows it, it once again does not explain how this conduct was legal in light of the statutory prohibition on shining.

Instead, this Court should review the Plaintiffs' Exhibits 17 – 31. These are documents that the Plaintiffs found at the Wisconsin Historical Society and voluntarily provided to the State in light of its claims. These documents establish that in February 1985, the Wisconsin DNR adopted Chapter 20 of the Wild Animal Damage Handbook, which explicitly stated that

nighttime shooting of deer could not be authorized under Wis. Stat. § 29.595(1)'s deer damage permits due to the statutory prohibition on shining and shooting from vehicles, as well as the safety hazards of shooting deer at night without the aid of a light. Stipulated Fact ¶ 21. This handbook section was adopted as an emergency regulation in May 1985, and similar provisions were adopted as permanent regulations in 1987. Stipulated Fact ¶¶ 22, 40. Plaintiffs' Exhibits 17 – 31 show that following the adoption of the prohibition on all nighttime shooting permits for private parties under Wis. Stat. § 29.595(1), a struggle ensued between the State Legislature and the Wisconsin DNR. The State Legislature tried to authorize farmers to shine and shoot deer at night and from vehicles. In testimony and secret correspondence previously unknown to the Tribes, the Wisconsin DNR seemed primarily concerned that if this proposal were adopted, the Plaintiff Tribes would have won their lawsuit and have been permitted to shine and shoot deer at night. Citing safety concerns, the Governor vetoed the bill and for years, the DNR continued to refuse to allow the issuance of any nighttime shooting permits. If anything, this history demonstrates that there was no legal shining and shooting of deer that occurred prior to the Deer Trial, and that the 2002 – 2007 CWD nighttime shooting program, and the 2012 nighttime wolf hunt, constitute "changed circumstances" that compel this Court to reopen the final judgment in this case.

II. The Tribes' Plan is Suitably Tailored to Changed Circumstances and Adequate to Protect Public Safety

The Tribes have developed a plan for nighttime hunting of white-tailed deer that is at least as safe, if not safer, than policies developed by the Wisconsin DNR for its CWD program, and the emergency regulations developed by the Wisconsin DNR for recreational nighttime wolf hunting in 2012. The first drafts of Commission Order 2012-05, which set out the nighttime hunting rules that this Court addressed at the preliminary injunction stage, were modeled after

the State's nighttime wolf hunting regulations. As information about the State's CWD program was unveiled, features of that program were incorporated into the Commission Order. In February 2013, the Tribes made additional changes to their nighttime hunting proposal to address some of the concerns raised by the State's witnesses at the preliminary injunction stage. The Revised Regulations are the final nighttime deer hunting regulations presented to this Court with the Tribes' amended motion under Rule 60(b)(5) of the Federal Rules of Civil Procedure. The Revised Regulations are suitably tailored to the changes in circumstances that have occurred since the Deer Trial, and should be approved by this Court. A description of the most important characteristics of the nighttime hunting rule follows, as does a comparison between that rule and the State's CWD policies as written and implemented, as well as the 2012 nighttime wolf hunting regulations.

A. Who Can Hunt? Marksmanship Rating and Advanced Hunter Safety Course Mitigate Risk

The Tribes will present testimony at trial that describes in detail who was eligible to participate in the State's CWD program, who was eligible to hunt in the State's 2012 nighttime wolf hunt, and finally, who will be eligible to hunt under the Tribes' Revised Regulations should this Court grant their Rule 60(b)(5) motion. A preview of that testimony follows.

Wisconsin's CWD Program. At least 300 people participated in the State's CWD nighttime shooting program between 2002 and 2007. Stipulated Fact ¶ 121. At the Preliminary Injunction stage of this case, the State attempted to distinguish its CWD program by portraying its shooters as expert marksman. In an affidavit submitted to this Court, Tamara Ryan stated that the DNR "utilized only trained professionals for sharpshooting." (Aff. of T. Ryan ¶ 4) (Docket No. 257) Those claims were made, however, before discovery was conducted. At trial, the Tribes will disprove these contentions.

Tamara Ryan herself will testify that she never owned a rifle prior to her participation in the CWD program. In fact, prior to being selected to participate in the CWD program she had only shot a rifle on a handful of occasions: when she was in summer camp, in a one-day outdoor skills course that she took as a child, and during the basic Wisconsin hunter education course. Ryan had never hunted deer prior to her participation in the CWD program; she had only hunted turkey infrequently. And Ryan had never hunted any animal at night prior to her participation in the CWD program.

Ryan's limited firearms experience is not unique. Most of the shooters in the CWD program came from the DNR Lands Division, which included employees with the Bureaus of Wildlife, Parks and Recreation, Facilities and Lands. These employees do not carry or use a firearm as part of their job; they have no professional training with weapons. They were qualified for this CWD nighttime shooting assignment based on their own personal hunting experience, if any, and the one or two training courses that they were required to take to participate as a shooter in the State's CWD program.[6] William Vander Zouwen will testify that he had never hunted any animals at night prior to his involvement with the CWD program. Brad Koele, who participated in the CWD nighttime shooting program in 2002 as a DNR Lands Division employee, had only ever hunted raccoons at night. Despite this, Mr. Koele will testify that he never took even the basic marksmanship course required prior to participation in the CWD nighttime shooting program in 2002. These State employees were not expert marksmen.

[6] Trial testimony will also establish that DNR conservation wardens, local law enforcement officers, and USDA-APHIS employees did not have to take either the basic or advanced marksmanship courses to participate in the CWD program. DNR conservation wardens were required to qualify on their department-issued rifle by firing three rounds and hitting an 8 inch circle from 100 yards. There were no guidelines for local law enforcement officers, even though most of those officers only use handguns in their day-to-day jobs, and may have no experience hunting deer.

Between 2002 and 2006,[7] there were no teaching materials for the basic CWD marksmanship course, and the course is not described or even discussed in any of the CWD protocols. (Pl. Exh. 67 to 71) The course also changed over time, which has made it impossible to figure out exactly how it was administered over the life of the program. It appears that for most of the CWD program, the basic marksmanship course was two days. A half day was devoted to classroom instruction and a very basic written examination on firearms safety. (Pl. Exh. 76). The remaining time was devoted to shooting at the range. During some years of the CWD program, the participants were required to qualify by hitting three shots within an 8-inch target at 100 yards. At other times, there does not appear to have been any shooting qualification required. (Pl. Exh. 77) ("Originally the basic CWD rifle marksmanship course was designed to train and qualify each shooter through a standardized written test and practical shooting test. . . . The standards were high and resulted in elimination of the 'qualification' aspect of the program").

The advanced marksmanship course was a one day "refresher" that was offered for the first time in 2004. Most DNR Lands Division employees appear to have taken this course at least once. The only new skill taught to participants in this course was how to acquire and shoot targets at fast speeds. It is unclear how this promoted safety. Importantly, neither the basic nor the advanced marksmanship course included any classroom instruction on nighttime shooting. Neither course included any field (shooting) instruction on nighttime shooting. And neither course required that even a portion of the qualification shoot occur at night.

[7] In 2006, Tim Lawhern began teaching the marksmanship course. He developed a lengthy powerpoint presentation for use in the course. Changes have been made to the powerpoint since it was used in the CWD program, however, and apparently no version of the presentation that was actually used in the CWD program is available. The powerpoint presentation, as subsequently revised, is Plaintiffs' Exhibit 4.

Wisconsin's 2012 Nighttime Wolf Hunt. The State's 2012 wolf hunting regulations allowed any member of the general public to apply for a license that if obtained (through a lottery), would authorize them to shoot a wolf at night. There was no requirement that license holders take an advanced hunter safety course or pass a marksmanship proficiency test. Wolf hunters were simply required to complete the basic hunting safety course that all Wisconsin hunters are required to complete before obtaining a license to shoot any game. This basic hunting safety course does not include any information on nighttime hunting. Furthermore, persons born before January 1, 1973, are exempted by statute from having to take even this basic hunting safety course under certain circumstances.

The Tribes' Revised Regulations. Commission Order 2012-05 stated that prior to receiving a nighttime hunting permit, Tribal members must take an advanced hunter safety course and obtain a marksmanship proficiency rating from the Plaintiff Tribes unless they had already received comparable training from another state or tribe. Comm'n Order § 2.6.7. The Tribes administered several sessions of this advanced hunter safety course prior to the Preliminary Injunction hearing. Tribal members took a four-hour course and were required to hit 7 out of 10 shots in the bullseye at 100 yards. (Prel. Inj. Transcript, 1st day at 121, 122-23) During the Preliminary Injunction hearing in this matter, however, Tim Lawhern testified that he was concerned about these requirements because the only training material for the advanced hunter safety course was a powerpoint presentation that he described as a "brief" and claimed that it "had little to do with safety." (Prel. Inj. Transcript, 1st day at 238; Exhibit 3) While Chris McGeshick testified that students were required to achieve a score of 70% on their marksmanship qualification shoot using a National Rifle Association target, Mr. Lawhern claimed that there was no universal NRA target size, and Tribal members might only be required

to hit "the broad side of a barn." (Prel. Inj. Transcript, 1st day at 239) Mr. Lawhern also pointed out that the Commission Order itself did not explicitly state the distance at which shots needed to be taken.

The Revised Regulations address these supposed areas of State concern. Now, every Tribal member who wishes to engage in nighttime deer hunting in the ceded territory will be required to take the advanced hunter safety course, regardless of whether they have current or former U.S. military or law enforcement experience, and regardless of any other certifications or courses that they might have taken.[8] *Compare* Comm'n Order § 2.6.7.1, *with* Revised Regulations § 6.20(7). The Tribes developed a handbook to distribute to Tribal members at this advanced hunter safety course (Plaintiffs' Exhibit 5), even though no handbook ever existed for the CWD program while it was operational. The Tribes' handbook was developed using Mr. Lawhern's 2007 rifle marksmanship presentation (Plainitffs' Exhibit 4) as a starting point, and incorporated all of the relevant information from that document. Testimony at trial will establish that the course being developed will be a two-day course that is at least 12 hours long. Following the course, Tribal members will be required to pass a marksmanship qualification shooting exam. The shoot will take place at night, and Tribal members will be required to hit 8 out of 10 shots fired within a 6 ¼ inch bulls eye at a distance of 100 yards. (Revised Regulations § 6.20(7)) The 100-yard distance was maintained because this is the maximum distance a shot may be taken under the Revised Regulations, (Revised Regulations § 6.20(1)). The target size – 6 ¼ inches – is smaller than the target used for CWD marksmanship qualification shoots.

The Tribes advanced hunter safety course and marksmanship proficiency requirement exceed the requirements of both the CWD program and the 2012 wolf regulations. They will

[8] The advanced hunter safety course is in addition to the basic hunting safety course that all Tribal hunters born after January 1, 1977 are required to take.

ensure that only those Tribal-member hunters who are extremely proficient with their weapon of choice will be able to engage in nighttime deer hunting. These will be the so-called "expert hunters" that can distribute venison to others within their extended family and community.

B. Shooting Plans Mitigate Risk vs. Using Bait and/or Calls

The Tribes will present testimony at trial that describes in detail when safety plans were required under the State's CWD program, when safety plans were not created, and what safety plans actually consisted of during the life of the program. The Tribes will also contrast the protections provided by the shooting plans required by the Revised Regulations with the requirement to use bait or predator calls for nighttime wolf hunting. A preview of that testimony follows.

Wisconsin's CWD Program. The State's CWD protocols required – on paper – that a shooting plan be created for any public or private lands prior to any deer being harvested on those lands day or night. (Pl Exh. 67 – 71). In 2002, the first year that the program was running, the CWD protocols indicated that the shooting plan should consist of a plat book page and an aerial photograph of the property. Notes were supposed to be added to the aerial photograph indicating "areas where shooting will not occur," and "safe firearm discharge zones." (P. Exh. 67, March 25, 2002 CWD Protocols; Pl. Exh. 68, July 15, 2002 CWD Protocols). In 2003, the CWD protocols stated only that shooting plans should consist of a basic plat book page and an aerial photograph of the property. (Pl. Exh. 70, Dec. 10, 2003 CWD protocol). In later years of the program, the protocols included no information about the content of shooting plans. (Pl. Exh. 71, Dec. 30. 2005).

Testimony at trial will establish that shooting plans were not prepared for every property where shooting occurred. For example, Tamara Ryan will testify that shooters were told that

they if they were driving at night to an assignment and saw a deer, they could call their supervisor and describe the location. If the supervisor agreed with them that the shot was safe, it could be taken. But the "exceptions" were far broader than this. Plaintiffs' Exhibit 78 describes an incident in 2007 where a DNR employee leaving work for the day saw a deer on the side of the road and shot it despite the lack of a shooting plan for the location, and even though he did not call his shift supervisor to receive permission prior to shooting. This incident was documented, because a woman was photographing the deer at the moment it was shot, while the deer was just a short distance from her vehicle. The investigation somehow concluded that the shooter had followed all of the CWD safety procedures even though he was not shooting pursuant to a shooting plan. Likewise, Plaintiffs' Exhibit 77, a CWD marksmanship program review completed by Timothy Lawhern in 2006, states that "it became apparent that some of our CWD marksmen are shooting deer without a shooting plan." *See also* Pl. Exh. 93.

Testimony at trial will also establish that as implemented, the majority of shooting plans consisted only of a plat book page and an aerial photograph of the property. No markings were on the majority of aerial photographs other than the location of the bait pile, if one existed. On some aerial photographs, buildings and other hazards were circled in red marker, presumably indicating locations where the shooter should not aim.[9] Very few aerial photographs indicated the safe zone of fire, the direction of fire, the backstop, or other safety requirements. Those more detailed shooting plans all seem to have come from the southeast CWD region in the later years of the program.

[9] Through requests for admissions, the State has already admitted that in 2003, the majority of shooting plans did not identify the locations from which shooters were permitted to take shots, the "safe zone of fire," the direction of fire, and the location of an adequate backstop. Stipulated Facts ¶ 111-14.

In addition to reviewing the shooting plan, CWD shooters were required to visit the location that they were going to be visiting at night during daylight hours. Shooters were instructed to eat a late lunch or pack a meal with them, arrive at the property prior to sunset so they could visually inspect it, and then, shoot deer at night. These requirements were included in the CWD protocols because the shooting plan did not need to be created by the person actually executing it (by shooting deer at night). Furthermore, many of the program's shooters were from different areas of the State and had never seen the properties they were shooting at.

CWD shooters were not required to hunt at night from a stationary position. None of the protocols developed when the CWD program was operative included such a requirement. Even though the State argued at the preliminary injunction stage that this was not the case, some of the protocols make explicit statements to the contrary. For example, the December 30, 2005 protocol states: "You may shoot deer you see at the bait site when walking into a tree stand location as long as there is a safe back stop behind the deer for a safe shot." (Exhibit 71) Additionally, shooters were permitted to shoot deer from a moving vehicle. Chris McGeshick noted this in one of the affidavits he submitted at the preliminary injunction stage, but once again, the State claimed this was not the case. Discovery has proven otherwise. Plaintiffs' Exhibit 93, an April 2007 email sent by DNR employee John Arthur to a number of other employees, including Don Bates, notes: "[f]rom comments I have heard, the shooting that occurred at various parks was more diverse then it was similar (drive by shooting with no safety plans, shooting from moving vehicles, shooting occurring after the shooter had called the captain to call it quits, et, etc)."

Wisconsin's 2012 Nighttime Wolf Hunt. The 2012 nighttime wolf hunting regulations did not require that hunters develop a shooting plan for the properties they planned to hunt.

Instead, the regulations attempted to achieve some of the benefits of shooting plans by requiring hunters to shoot from a stationary position. The Wisconsin DNR's "green sheet" for the 2012 nighttime wolf hunting regulations states as follows:

> [the wolf] 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.

(Pl. Exh. 121 at Board Order WM-09-12(E), page 6) (emphasis added). A well designed shooting plan that requires the shooter to identify their backstop, their stationary location, their direction of fire, and their "safe zone of fire" *ensures* that "shooting opportunities occur in the direction where the hunter has been able to anticipate and avoid possible unsafe shooting scenarios." Requiring a stationary position only makes that "more likely," but is obviously much easier to implement.

The Wolf Act authorized state hunters to use predator calls, including electronic calls, and bait that does not involve animal parts or animal byproducts, other than liquid scents. 2011 Wisconsin Act 169, § 6(a)(3) & (4) (Pl. Exh. 115). The Wisconsin DNR's 2012 emergency regulations required these techniques to be used. Using bait or call, however, does not necessarily make the shot taken any safer. This is because using bait or calling techniques neither controls the direction that a wolf (or deer) will enter the particular property, nor positions that wolf (or deer) for the ultimate shot taken. The truth of this statement can be seen by reviewing even a small collection of shooting logs from the CWD program's operation. Shooting logs are documents that record a shot that was previously taken by a shooter under the

program. Plaintiffs' Exh. 87 contains a collection of shooting logs obtained during the discovery process. These logs establish that the placement of bait does not determine the direction of fire or the direction that animals may approach the bait pile. While the use of bait or calling techniques may make it more likely that a wolf or deer will enter a particular property, it does not necessarily make the shot safer. William Vander Zouwen will testify that there is no requirement on how often a wolf hunter needed to call to satisfy the regulatory requirements, and therefore, for example, a hunter could operate the call two hours before a wolf entered the property, and yet she would still be permitted to shoot that wolf. *See also* Pl. Exh. 119 ("We are thinking that all it would take to comply would be possessing a mouse squeaker in your pocket, or perhaps showing that you can purse your lips").

The Tribes' Revised Regulations. In Commission Order 2012-05, the Tribes adopted the CWD program's approach of creating shooting plans for each property. By placing this requirement in the Model Off-Reservation Code, however, the Tribes' approach was designed to *ensure* that plans would be created for *all* areas where nighttime shooting took place. The Tribes retained the requirement of shooting plans for each property in their Revised Regulations, and in this simple way, the Revised Regulations are necessarily more stringent than the operation of the CWD program, which was not governed by binding regulations, and where on numerous occasions shooting plans were never created.

During the Preliminary Injunction phase, the State argued that the Tribes' shooting plans were not sufficient because the Commission Order did not explicitly require them to contain the direction of fire, even though the Tribes' shooting plan form required this. (Prel. Inj. Transcript, 1st day at 131, 148-151) The State also argued that the Tribes' shooting plans were not sufficient to protect public safety because the Commission Order did not explicitly require them to identify

the backstop that existed to stop any bullets shot. (Prel. Inj. Transcript, 1st day at 155-156) Finally, the State argued that the shooting plans should be approved by the Tribes or GLIFWC prior to becoming effective to ensure that they complied with the regulatory requirements. (Prel. Inj. Transcript, 1st day at 164-167)

In response to these concerns, the Tribes tightened their requirements even more in the Revised Regulations. If a Tribal member intends to shoot deer from between 51 and 100 yards away, or from a position that is not elevated, that member will not be issued a permit until the plan is "preapproved." Revised Regulations § 6.20(5)(a). A "preapproved shooting plan" must be inspected and approved by the tribal conservation department or a GLIFWC warden. Revised Regulations § 6.01(9). If a Tribal member intends to shoot deer from a distance of 50 yards or less and from an elevated position, he or she still needs to create and submit a shooting plan before receiving a permit, but that plan does not need to be preapproved. *Id.* at § 6.20(5)(b).

For either type of shooting plan, the Tribal member seeking the permit is responsible for scouting the area and drafting the shooting plan. (Pl. Exh. 6, Revised Shooting Plan Document). A new provision in the Revised Regulations requires Tribal members to visit or revisit the site at least one time during daytime hours from the day after Labor Day to the close of the deer season. *Id.* at § 6.20(5)(a) & (b). The plan must mark all potentially dangerous areas within a one-quarter mile of the "safe zone of fire," including any school zone, public landfill, public gravel pit, road, residence, building, dwelling, campground, public beach, public picnic area, lake or other waterway, ATV or snowmobile trail, open area, and private property. *Id.* at § 6.20(5)(a). Because the State explicitly requested at the preliminary injunction stage that cross country ski trails and hiking trails be included in this list, *see* Prel. Inj. Transcript, 1st day at 159, 191-92,

they have been added to the Revised Regulations.[10] *Id.* at § 6.20(5)(a)(vii). The one-quarter mile area was selected after examining all hunting incident report data from the deer trial (1987 and 1988) and from current incidents (2006 to the present). These incident reports established that nearly all reported accidents occurred within a one-quarter mile area. *Id.* Once all of these dangers have been identified, the Tribal member can then determine their "safe zone of fire," which becomes the "point of kill," and mark this on the plan.

The Revised Regulations now explicitly state that the "direction of intended fire" must be clearly marked on all shooting plans. They also require that the Tribal member identify an "adequate backstop present within one-hundred twenty-five (125) yards from the stationary position they plan to shoot from. *Id.* at § 6.20(5). These revisions address the concerns offered by the State at the preliminary injunction stage. *See, e.g.*, Prel. Inj. Transcript, 1st day at 190, 192 (Testimony of Defendants' Witness, Randall Stark). These Tribally-mandated shooting plans are far more stringent than the plans developed for the State's CWD program.

As noted above, the State's CWD program did not require sharpshooters to shoot deer from a stationary position. The State's wolf hunt regulations, however, do require hunting from a stationary position. Once again, the Tribes adopted the more stringent requirement and mandated that Tribal members harvest deer while "shining within an established safe zone of fire from a stationary position." Revised Regulations § 6.20(5). *See also id.* at § 6.01(12) (explicitly defining "stationary" as "not moving").

Finally, the Tribes did not require that Tribal members use either bait or calling techniques under the Revised Regulations, although these activities are permitted. Testimony by

[10] On the other hand, the Tribes will provide testimony establishing that the CWD shooting program *allowed* shooting to occur near both cross-country ski trails and hiking trails, and shooting did in fact occur in these locations.

Dr. Gilbert, Tamara Ryan, and Chairman McGeshick at trial will establish that calls are most effective on bucks during the mating season, which is also known as the "rut." The rut typically extends from mid-October through the first few weeks of November. Calls are much less effective on bucks during the month of December, when most of the does have already mated. Calls are not effective on does. The Wisconsin deer herd contains more does and antlerless deer (fawns) than bucks; the ratio is typically around 65% to 35%.[11] Unlike many state-licensed hunters who are interested in obtaining antlers, Tribal-member hunters do not select does to any greater extent than bucks. Requiring calls would not be an efficient way of hunting for Tribal members, and since calls do not improve safety, the Revised Regulations does not require them.

Bait was not required by the Revised Regulations for a different reason. Bait is known to hasten the spread of CWD. CWD was discovered in the Wisconsin ceded territory in Washburn county in 2012, and another CWD positive deer was located in Portage county in 2013. The Wisconsin Legislature has banned bait in certain counties within the ceded territory as a result of these positive CWD tests. (Pl. Exh. 86) Dr. Gilbert will testify that only 1% of Tribal-member hunters use bait. Because requiring bait in the Revised Regulations could hasten the spread of chronic wasting disease, and because bait does not necessarily improve safety, the Revised Regulations does not require it. It is telling that neither of the State's expert witnesses on hunting safety has offered an opinion in this case that the Revised Regulations should include calls or bait to protect safety. If a deer walks into a Tribal member's designated "safe zone of fire," it is safe to shoot that deer regardless of whether it came in response to bait, a call, while using a well-established deer trail, or due to sheer luck.

C. Requiring that Tribal Members Use a Light Mitigates Risk

[11] The Plaintiffs mistakenly noted different statistics in the proposed findings of fact filed with this Court on July 15, 2013. PFOF ¶ ¶ 327, 331. The content in this pre-trial brief is accurate.

Deer are most active at night and they freeze when light is shined at them, which makes them easier to harvest after dark. One of the State's expert witnesses at the preliminary injunction hearing – Timothy Lawhern – made this fact clear:

Q. If you shine a light at a deer, the light causes the deer to freeze at night; correct?
A. Yes, Ma'am.
Q. And that makes shooting the deer easier; right?
A. Yes, Ma'am.
Q. Because the deer stays still, it's frozen, and then you have an opportunity to aim and shoot.
A. So much so that my experience is that while I had never done it prior to CWD shooting, I had witnessed it. But under the CWD Program, I actually had the opportunity to do that and I was literally able to freeze a deer with a light and walk right up to it and shoot it within feet.
. . .
Q. If you shine a light at a wolf, what happens?
A. They run, unless the color of the light is red.
. . .
Q. So if it comes to using a flashlight or a non-red light at the point of kill, it's actually safer to shoot a deer that way than it would be to shoot a wolf; is that correct?
A. It's possible it could be safer.

Prel. Inj. Transcript, 2nd day at p. 6 - 9 (Testimony of Defendants' Witness, Timothy Lawhern).

The State's other expert witness on hunting safety – Chief Warden Randall Stark – testified at the preliminary injunction hearing that one of the most common causes of hunting accidents (or incidents as they are now referred to) is misidentification of the target. Prel. Inj. Transcript, 1st day at 176; Second Affidavit of R. Stark ¶¶ 5 (Docket No. 255). Mr. Stark indicated that he was concerned that this risk would be heightened if Tribal members were authorized to shoot deer at night, when visibility is more restricted.

For these reasons, while the original Commission Order did not require the use of a light, the Revised Regulations presented to the Court with this motion do. Revised Regulations § 6.20(1) (noting that permits are to be issued for "shining within an established safe zone of fire from a stationary position"). Chief Warden Stark will testify at the trial that due to this addition

to the Tribes' Revised Regulations, he no longer has concerns about the misidentification of deer at night by Tribal members.

D. The Tribes' Selected Season Dates are Culturally Appropriate and Protect Public Safety

Prior to and during the hearing on the Tribe's motion for a preliminary injunction, the State argued that the Tribes should not be permitted to begin nighttime hunting on October 15th, because visibility is still restricted at this time by foliage. Prel. Inj. Transcript, 1st day at 189, 192, 221 (Testimony of Defendants' Witness, Randall Stark). These concerns were unwarranted and discriminatory. State witness Chuck Horn admitted at the preliminary injunction hearing that the State shot deer at night under the CWD program during the summer months of 2002, when usership and foliage concerns are far more heightened than in late October. Prel. Inj. Transcript, 2nd day at 67, l. 3-5 (Testimony of Defendants' Witness, Charles Horn). After discovery and witness depositions, the State admitted that "nighttime shooting occurred under the CWD deer shooting program between the months of April – November." Stipulated Facts ¶ 115. In addition to shooting during the summer and fall months of 2002, the State has also admitted that it shot deer at night during October and November 2004. Stipulated Facts ¶ 117. The Tribes will also establish at the trial in this case that the State shot deer at night during the fall of 2005. Hunting at night is also allowed within the State of Wisconsin for unprotected species during the months of October and November.

Despite this, the Revised Regulations have moved the start of the nighttime deer season. It now starts November 1st rather than October 15th, which should eliminate any concerns about foliage. Revised Regulations § 6.20(5) (noting that permits are only valid from November 1 to the close of the regular deer season). Dr. Gilbert will testify at trial that he has conducted pellet surveys in the ceded territory for years, and that at least 75% of all of the leaves that will fall in

any given year have fallen by October 20th. Furthermore, the 100% leaf drop date has always been prior to November 1st. The State will offer no testimony to refute this.[12]

The State does claim that use of the public lands is high during the first few weeks in November, and as a result, Tribal members should be prevented from harvesting deer during this time. The Tribes, however, will present the expert testimony of James Thannum to refute this contention. Mr. Thannum currently lives in Ashland and works on the Bad River Indian Reservation, where his wife and son are enrolled members. He has lived in various locations around the ceded territory of Wisconsin for his entire life. In addition to this personal knowledge base, Mr. Thannum conducted extensive research to determine the rate and type of nighttime use that individuals make of public lands within the ceded territory during the first few weeks in November.

As Mr. Thannum will testify, tourism in the ceded territory declines substantially after Labor Day, and declines even further following the conclusion of the fall color season. The peak color season in the ceded territory typically arrives by early October and has never lasted into November. He will also testify that some of the most common outdoor recreation activities reported in Wisconsin's 2011-2016 SCORP take place during the fall color season which include walking for pleasure, viewing/photographing natural scenery, and viewing/photographing wildlife. Lastly, Mr. Thannum will testify that there are few recreational/tourist activities

[12] The State will suggest that foliage is still a concern because not all leaves will fall from oak trees by November 1st, and conifers will not lose their needles by November 1st (or ever). In doing so they will show their true hand: the State believes there are no conditions under which Tribal members should be permitted to hunt deer at night, despite the fact that nighttime shooting of deer has been and remains widespread both in the State of Wisconsin and around the country. GLIFWC conservation wardens tasked with reviewing shooting plans under the Revised Regulations can and will review the locations requested by Tribal members and have the discretion to refuse to approve shooting plans in rare locations where visibility may be obstructed by conifers or oak trees.

occurring within Northern Wisconsin's vast acreage of public lands during night time hours from November 1st to the first Monday after New Years' Day as this is one of the slowest activity periods in the year characterized by significantly reduced visitation, little recreational activity and few tourism expenditures.

D. The States' Remaining Purported Safety Objections to the Revised Regulations are Discriminatory and Just Plain Absurd

Prior the issuance of Commission Order 2012-05 in November of 2012, State hunting safety expert Timothy Lawhern created a laundry list of his concerns with the Tribes' proposal. That list was partially incorporated into an October 30, 2012 letter sent by Cathy Stepp to Jim Zorn, (Docket No. 254-1), and a longer iteration was included as Exhibit F to the affidavit that Lawhern filed with this Court. (Pl. Exh. 99). The Tribes encourage this Court to go back and read that list. In doing so, it will become apparent that the Tribes' Revised Regulations eliminate virtually all of the previously raised concerns.

The State's experts, however, still claim to have an equally long list of concerns, some stated for the first time just one month ago during their depositions. Among other things, those concerns supposedly include the fact that the Revised Regulations:

- Do not limit nighttime hunting to times when there is snow on the ground, but no heavy rain or snow falling, and no fog;
- Do not require Tribal members to wear blaze orange while hunting at night;
- Do not require Tribal-member hunters to be accompanied by a spotter;
- Do not require Tribal-member hunters to visit the site they plan to hunt at every day during daylight hours; and
- Do not require Tribal-member hunters to notify every private land owner within a one-mile radius of an approved shooting plan.

These "concerns" are fabricated, plain and simple. They are also not permitted under binding precedent, whereby a state may not require more stringent requirements of tribal hunters when exercising their treaty rights than they do of state-licensed hunters. *Lac Courte Oreilles v. State of Wisconsin (LCO IV)*, 668 F. Supp 1233, 1236 (W.D. Wis. 1987); *Puyallup Tribe v. Department of Fish and Game (Puyallup I)*, 391 U.S. 392, 398 (1968); *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981).

Weather. State expert Timothy Lawhern claims that nighttime hunting should be restricted to times when there is snow on the ground, but no heavy snow fall or heavy rain, and no fog. But Mr. Lawhern will testify that no Wisconsin laws or regulations prohibit hunting on certain days based on the weather, and that if asked for his opinion by the Wisconsin Legislature or DNR Board, he would not recommend that they change State law to prohibit hunting based on weather conditions. Instead, Mr. Lawhern would recommend that this be an issue dealt with in hunter safety training, which, in fact, it already is. Thick fog was present on the opening day of the Wisconsin gun-deer season in 2012. Thick fog was present on the opening day of the Wisconsin gun-deer season in 2009. State-licensed hunters knew – based on their training – to wait until the fog had lifted before hunting. Tribal member hunters will know to do the same as well.

The Tribes also disagree with Mr. Lawhern's insistence that snow should be on the ground when nighttime hunting commences. The presence of snow cover can increase visibility, as light reflects off the snow. But the presence of too much snow can also decrease visibility. Mr. Lawhern will testify that snow on tree branches poses the same visibility issues that leaves do on trees prior to October: snow cover may prevent the hunter from seeing her target and what is beyond. Snow cover can also increase safety concerns in other ways. Snow brings a whole

new set of users onto public lands: persons that cross-country ski, snowmobile, or engage in other winter sports. Snow can cause hunters to lose their footing and result in the accidental discharge of one's weapon, as is demonstrated by many hunting incidents reports over the past 20 years where snow was a contributing cause of the accident. The Tribes exercised good judgment when they decided to open their nighttime hunting season between November 1st and the end of the first week in January. This season allows Tribal members to engage in an efficient harvest of deer, creates the fewest conflicts with other public land users, and also acknowledges the Tribes' long held beliefs that shooting deer should not occur when the snow is deep.

Blaze Orange Attire & Notification of Private Landowners. The State's experts added a new issue after the preliminary injunction stage. They now claim that Tribal members should be required to wear blaze orange while engaged in nighttime deer hunting. This is once again discriminatory. State licensed wolf hunters in 2012 were not required to wear blaze orange while hunting at night. Persons who hunt coyote, raccoon, or other unprotected species at night are not required to wear blaze orange. And at various points in the State's CWD program, shooters were not required to, or chose not to wear blaze orange at night. (Pl Exh. 67). Likewise, Chief Warden Stark claims that Tribal members should be required to personally notify all private landowners (though a telephone call or personal meeting) within a one-mile radius of any approved shooting plan. No such notification was required or occurred under either the CWD shooting program or pursuant to the 2012 nighttime wolf hunting regulations.

Blaze orange attire is used when there is a high density of hunters, because the brilliant color can prevent the hunter from being mistaken *by another hunter* as game. It is for this reason that blaze orange attire is required during the nine-day gun-deer season, when more than 600,000 hunters take to the woods in Wisconsin. There are not, and will not be, high hunter densities on

public lands at night during the Tribal nighttime deer hunting season. The Revised Regulations ensure that there will be low hunter density among Tribal members. Before any new shooting plans are approved, the Tribal conservation department or GLIFWC warden must ensure that there are no more than two shooting plans approved for every 40-acre parcel before approving such a plan. Revised Regulations § 6.01(9). Furthermore, Chief Warden Stark, Chairman McGeshick, and Jim Thannum will all testify that there are few State licensed hunters who hunt coyote or raccoon at night on public lands in the ceded territory during the time proposed for the Tribal nighttime deer hunting season. This is for a host of reasons, including the fact that coyote pelts are not prime until mid-December, and raccoons are far less abundant in the ceded territory than they are in the southern portions of the State.

Requiring Tribal members to wear blaze orange or personally notify private landowners would likely impede their ability to exercise their hunting rights and could expose them to increased safety risks. As the State knows well, even its own conservation wardens were subjected to harassment, threats, and criminal activities while engaging in nighttime shooting of deer. The State stipulated to the fact that on at least one occasion, a private citizen deliberately shot at one of the DNR sharpshooters. Stipulated Fact at ¶ 120. When asked for permission to shoot deer on their land, CWD shooters were often faced with verbal or written threats, such as those contained in Plaintiffs' Exhibits 88 and 89. Other citizens simply tried to ensure that the CWD shooters could not kill any deer by, for example, running around bait piles in an attempt to leave behind human scents. As this Court knows, Tribal members have faced significant threats and harassment while exercising their treaty rights over the year. *Lac du Flambeau Band v. Stop Treaty Abuse-Wisconsin*, 759 F.Supp. 1339 (W.D. Wis. 1991); *Lac du Flambeau Band v. Stop Treaty Abuse-Wisconsin*, 781 F.Supp. 1385 (W.D. Wis. 1992); *Lac du Flambeau Band v. Stop*

Treaty Abuse-Wisconsin, 991 F.2d 1249 (7th Cir. 1993); *Lac du Flambeau Band v. Stop Treaty Abuse-Wisconsin*, 843 F.Supp. 1284 (W.D. Wis. 1994); *Lac du Flambeau Band v. Stop Treaty Abuse-Wisconsin*, 41 F.3d 1190 (7th Cir. 1994); *Crist v. Lac Du Flambeau Band*, 115 S.Ct. 1823 (1995). The Tribes understandably chose not to require blaze orange attire to be worn at night when doing so would single the hunter out as Tribal-member. Blaze orange attire would only protect the Tribal-member hunters themselves. The Tribes are capable of protecting their own citizens, who can, of course, individually choose to wear blaze orange attire if they so wish.

Spotter. While the State's experts claim that a spotter[13] should be required to accompany Tribal members hunting deer at night, this requirement exists nowhere else in State statutes, regulations, or policies. The CWD program did not require spotters for nearly the entirety of the program, from 2003 – 2007. State witness Chuck Horn will testify that spotters were only required in the early stages (2002) of the program because DNR officials were concerned that shooters were traveling to shoot in the CWD eradication zone from all over the State, and as a result, they would not be familiar with the particular locations they were shooting at. After 2002, while CWD shooters traveled in pairs, they were each shooters. They were able to shoot on different properties, and as William Vander Zouwen will testify, they were sometimes located miles away, outside of not only radio contact, but so far away that their "companion" could not even hear them discharge their weapon.

James Thannum and Chairman McGeshick will testify that Tribal members will likely choose to develop shooting plans for areas that they already know well, because they currently hunt there during the daytime. These are the locations that Tribal members know will be

[13] Spotters are used by military snipers. They are used because the shooter is targeting persons or objects at long distances, and the spotter is used to help "walk in" their shot. The spotter can also help locate anyone who might decide to shoot back. Neither of these scenarios is present in nighttime deer hunting.

frequented by deer, because they have years of experience hunting in those locations. Thus, a spotter is not necessary. In deciding whether to require a spotter, the Tribes also weighed the fact that vast majority of two-person (non-self-inflicted) hunting incidents involve a shooter and victim who are part of the same hunting party. Requiring an additional person to become part of the hunting party as a spotter necessarily increases the risk of a hunting incident. Instead of *requiring* a spotter, the Tribes choose to create a scenario where a spotter might be more likely to present, by offering a group hunting option. Revised Regulation § 6.20(4)(e).

The testimony presented at trial will establish that the Tribes' nighttime deer hunting plan is "suitably tailored to changed circumstances," since it includes the same or more stringent requirements as those included in the State's CWD Program and 2012 emergency nighttime wolf hunting regulations. There were no hunting incidents associated with either of those State programs, Stipulated Facts ¶¶ 120, 160, which is one objective way of establishing that those programs, even as implemented, were safe. Likewise, the Revised Regulations are adequate to protect public safety, and therefore, the Tribes should prevail on their Rule 60(b)(5) motion.

Respectfully submitted this 17th day of July, 2013

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