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.

POST-TRIAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR RELIEF FROM JUDGMENT

On March 1, 2013, the 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"), filed a revised motion for relief from judgment pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure. In addition to the briefing that accompanied that motion, the Tribes submitted a pre-trial brief in this matter. The Tribes incorporate the arguments made in those prior briefs herein, and submit this post-trial brief to direct this Court to the evidence elicited at the five-day trial held in this matter on July 22 through July 26, 2013.

That evidence establishes that the Tribes have satisfied their burden of demonstrating under Rule 60(b)(5) that (1) "a significant change in circumstances warrants revision" of this Court's decision in *Lac Courte Oreilles Band of Indians v. Wisconsin*, 740 F.Supp. 1400 (W.D. Wis. 1990), (2) the nighttime hunting regulations proposed by the Tribes are both "suitably tailored to changed circumstances," and adequate to protect public safety, and (3) equitable considerations weigh in favor of granting this motion. *See generally Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383 (1997) (setting out the legal standard for Rule 60(b) motions).

I. THE TRIBES HAVE ESTABLISHED THAT CHANGED CIRCUMSTANCES EXIST

The plaintiff Tribes possess a right to hunt white-tailed deer pursuant to their 1837 and 1842 treaties, and that right extends to the areas ceded to the United States in those treaties (the "ceded territory"). 700 F.2d 341 (7th Cir. 1983). Because this is a *federal right*, and because Indian affairs are generally governed by the *federal government* through Congress' plenary power, the State of Wisconsin generally has no jurisdiction over Tribal members exercising their treaty rights. There are only two narrow exceptions to this prohibition on State jurisdiction. State regulation is permitted where (1) the exercise of treaty rights could result in the potential extinction of a species (the conservation necessity exception); or (2) the Tribes' regulations are not adequate to protect public safety, and the State's regulations were "the least restrictive alternative available to accomplish its public health or safety interest." *Lac Courte Oreilles Band of Indians v. Wisconsin*, 668 F.Supp. 1233, 1238-39 (W.D. Wis. 1987) (*LCO IV*). Even in these cases, however, the State cannot impose regulations that discriminate against Tribal-member hunters. *Id.* at 1237-39.

In a 1989 trial, the State argued that any nighttime hunting of deer was unsafe, and therefore, that the State's complete ban on shining deer contained in Wis. Admin. Code §

13.30(1)(q), should be permitted to regulate the exercise of the Tribes' federal treaty right. *See Lac Courte Oreilles Band of Indians v. Wisconsin*, 740 F.Supp. 1400, 1423 (W.D. Wis. 1990) (*LCO VII*). This Court agreed at that time, due in large part to the fact that there were virtually no legal examples of nighttime deer shooting anywhere within the United States. Without other examples of well-established off-reservation nighttime deer shooting programs, there was no way to present the Court with information about their safety record, and there was no way to compare the relative risks associated with nighttime shooting of deer versus other hunting activities. *See, e.g.*, Pl. Exh. 12 (containing excerpt of 1989 trial transcript). Additionally, the nighttime hunting prohibition could not be considered discriminatory if no one else shot deer (or other species using high caliber weapons) at night within the State.

Since the 1989 deer trial, much as changed. The deer population has increased dramatically, *see, e.g.*, Pl. Exh. 108 (noting that the Wisconsin deer population prior to the 1989 hunting season consisted of approximately 1 million deer, as compared to the 1.8 million deer that existed prior to the 2009 hunting season), and the wolf population has increased to a level sufficient to cause the federal government to remove that species from the list of endangered and threatened species in January 2013. 76 Fed. Reg. 81,666 (Dec, 28, 2011). Following these population increases, Wisconsin has authorized various nighttime shooting programs for these species. Between 2002 and 2007, the Wisconsin DNR managed a program where thousands of deer were shot at night as part of the State's attempts to eradicate chronic wasting disease. *See, e.g.*, Pre-Trial Statement, Stipulated Facts ¶ 78 (dates of the CWD program) & ¶ 124 (noting that 987 deer were shot and killed through the CWD nighttime shooting program in 2007 alone). *See also* Trans. at 3-P-117 (testimony of Don Bates stating that "[t]here were literally thousands of individual shooting trips each year" under the CWD program). Additionally, in the late 1990s,

when the deer population was exploding, the Wisconsin DNR began issuing deer damage permits that allowed private contractors and local governmental employees to shoot deer at night. *See, e.g.*, Trans. at 3-A-90 (testimony of Bradley Koele noting that up to a dozen permits were issued each year from 2007 to the present). These permits can result in nighttime shooting of 2,000 or more deer in any given year. *See* Trans. at 3-A-109 to -111 (testimony of Bradley Koele noting that some permits issued to airports allowed the nighttime shooting of an unlimited number of deer, while the range for other permits was between 25 and 200 deer). *See also* Trans. at 3-A-86 to -87 & 3-A-110 (discussing permit issued to the Village of River Hills authorizing up to 100 deer to be shot at night, and permit issued to Village of Kohler authorizing 75 deer to be shot at night); Tran. at 3-A-97 to -100 (discussing Urban Wildlife Specialists' nighttime shooting in Wisconsin for the Mendota Mental Health Institute, the Madison city parks, and the Cities of Portage, Altoona, and Kohler, Wisconsin, each resulting in between 94 and 163 deer shoot). Lastly, in 2012, the Wisconsin Legislature and Wisconsin DNR authorized a wolf hunt that permitted up to 1,160 members of the general public to attempt to shoot wolves at night.[1] Stipulated Facts, ¶ 147.

[1] The Tribes respectfully believe that this Court erred by refusing to allow them to introduce evidence from jurisdictions throughout the country demonstrating that, since the late 1990s/early 2000s, shooting deer at night has become a commonplace activity that is recognized as being safe not only by hunting safety experts, but also through hunting incident statistics. Because the Tribes are no longer pursuing nighttime hunting through the Commission Order process, the "changed circumstances" they need to demonstrate is not limited to actions of the State of Wisconsin. The State does not need to permit nighttime deer shooting for the Tribes to be able to engage in that activity. The Tribes have a treaty right that allows them to hunt deer at night. The State can only regulate that activity if it is necessary for public safety. If the Tribes can prove that nighttime deer shooting programs in other states have been implemented since the 1989 Deer Trial, without harm to the general public, that is relevant to this Rule 60(b)(5) motion. While the Tribes believe the evidence produced at trial satisfies their burden, if this Court disagrees, it should permit a new hearing to be scheduled where evidence can be introduced on nighttime shooting activities in other states since 1989.

These nighttime shooting programs are important legally for two reasons. First, as noted above, state regulation of treaty rights can only occur if it is non-discriminatory. Allowing some persons to shoot deer or wolves at night, while continuing to maintain an absolute prohibition on nighttime hunting by Tribal treaty hunters (who possess equal or greater hunting skills), is discriminatory and is contrary to this Court's previous ruling in *LCO IV*, 668 F. Supp. at 1238-39; *Mille Lacs Band v. State of Minnesota*, 861 F. Supp. 784, 838 (D. Minn. 1994). *See also Department of Game of Washington v. Puyallup Tribe*, 414 U.S. 44, 48, 94 S.Ct. 330, 333, 38 L.Ed.2d 254 (1973) ("There is discrimination here because all Indian net fishing is barred and only hook-and-line fishing, entirely preempted by non-Indians, is allowed."). Second, these programs have an established record that demonstrates nighttime hunting with high caliber weapons can be safe. Over the six-year period that the CWD program was conducted, there was not a single hunting-related incident as a result of nighttime deer shooting activities. Pre-Trial Statement, Stipulated Facts ¶ 120. Similarly, no hunting incidents occurred as a result of the 2012 nighttime wolf hunt. This illustrates that a complete ban on nighttime hunting of deer is no longer "the least restrictive alternative available to accomplish its public health or safety interest," and therefore, the Tribes have demonstrated that circumstances have changed since the 1989 trial. *See: United States v. Oregon*, 769 F. 2d 1410, 305 (9th Cir. 1985); *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981); *Lac Courte Oreilles v. State of Wisconsin (LCO IV)*, 668 F. Supp 1233, 1236 (W.D. Wis. 1987).

Despite these compelling facts, the State continues to argue that the Tribes have not established "changed circumstances." In doing so, the State claims that nighttime shooting of deer occurred prior to the 1989 Deer Trial. Those arguments are addressed below.

A. THE STATE IS PRECLUDED FROM ARGUING THAT NIGHTTIME SHOOTING OF DEER OCCURRED IN THE STATE OF WISCONSIN PRIOR TO THE 1989 DEER TRIAL

The State argued in its pre-trial briefing that changed circumstances do not exist, because nighttime shooting of deer occurred in the State of Wisconsin prior to the 1989 Deer Trial. While the Tribes disagree with the State's factual contentions, which are refuted in Section I(B) below, the State is precluded from making such arguments as a legal matter for two reasons. First, the State's own expert witness, Ralph Christensen, testified in the 1989 trial that there was no legal nighttime shooting of deer anywhere in the United States, and State's attorney Mr. Gabrysiak told the Court that there was no legal shining of deer anywhere in the State of Wisconsin. Pl. Exh. 12 (excerpt of trial testimony). Because the Court relied on these statements in reaching its conclusion that nighttime deer hunting was unsafe, and because the Tribes obviously relied on these statements when not asking further questions on cross-examination, the State is judicially estopped from rearguing this factual point in these Rule 60(b)(5) proceedings. This argument has been fully briefed in the Tribes' Pre-Trial Brief, and rather than repeat those arguments here, the Tribes refer this Court to pages 13 to 18 from that brief.

Second, even if this Court does not find that the State is judicially estopped from re-litigating the existence of nighttime deer shooting in Wisconsin prior to the 1989 Deer Trial, the State should still be precluded from making such an argument in this case under Rule 37 of the Federal Rules of Civil Procedure. The State claimed in pre-trial briefing that Wisconsin had "longstanding statues [sic], practices and programs, predating the Deer Trial by decades, which authorized the nighttime shooting of deer for purposes of controlling nuisance situations or reducing agricultural damage," and therefore, "the continued existence of such programs cannot

constitute a significant change in factual conditions warranting revision to this Court's final judgment." State's Pre-Trial Brief at 9 (Docket No. 337). As a preliminary matter, this statement is incorrect because even if nighttime shooting of deer was *permitted* under State law prior to 1989, without evidence that such shooting *actually occurred in significant numbers*, there would be no way for the Tribes to use this information to demonstrate that nighttime shooting of deer could be conducted in a manner that was adequate to protect public safety.[2] Instead, their argument would have been limited to challenging the State's regulatory scheme as discriminatory. Regardless, the State should not be permitted to argue that nighttime shooting of deer was legally permitted and occurred prior to the 1989 Deer Trial, because it failed to disclose the information it now relies upon in response to discovery in the original trial.

[2] This Court applied similar reasoning when it decided that nighttime coyote hunting could be differentiated from nighttime deer hunting because while coyote hunters were legally *permitted* to use high caliber weapons, *in practice*, few if any chose to do so. 775 F.Supp. 321, 324 (W.D. Wis. 1991). This Court also applied similar reasoning in *LCO VII*, when it concluded that even though small game hunters were *permitted* under State law to hunt using high caliber weapons over the summer, in *practice*, they usually used low caliber weapons and waited until the fall season. *LCO VII*, 740 F.Supp. at 1422. And the State tried to use this argument in the preliminary injunction phase of this nighttime deer hunting case, when it argued that the fact that individuals were *permitted* to engage in nighttime wolf hunting did not mean that anyone would, in *practice*, decide to do so. What is good for the goose is good for the gander.

The question then, is the same as it would have been at the original trial: did nighttime shooting of deer actually occur at any appreciable rates prior to the 1989 trial? The answer to that question is "no." As discussed below, the State established at trial that fewer than 100 deer were shot at night in the University of Wisconsin Arboretum over a 25-year period. Other than that, the record reflects only 15 deer were shot at night by limited-term Wisconsin DNR employees in 1985. Pl. Exh. 30. On the other hand, the record reflects that thousands of deer have been shot at night in Wisconsin by hundreds of people in the less than 25 years since the trial. *See, e.g.*, Stipulated Facts ¶ 121 (admitting that more than 300 people shot deer at night under the Wisconsin CWD program); Trans. at 3-P-117 (testimony of Don Bates stating that "[t]here were literally thousands of individual shooting trips each year" under the CWD program). This is a changed circumstance.

The Lac Courte Oreilles Band asked the following interrogatory of the State in its first set of discovery requests during this case, which was then answered by Wisconsin DNR employee Thomas Hauge:

> INTERROGATORY NO. 24: Have you developed/do you intend to develop a wildlife damage control program? If not, explain why. If so, identify and describe the program.
>
> ANSWER 24: Yes. Since the 1930's DNR has had formal damage control procedures. Currently, DNR coordinates the Wildlife Damage Abatement and Claims program that deals with damage caused by white-tailed deer, black bear and geese. A description of this program is contained in a UW-Extension publication numbered B3408. In addition, we have permitting authority to authorize the destruction of wild animals causing damage. DNR is also charged with administration of beaver control subsidy funds. This program is described in sec. 29.59, Wis. Stats. And in proposed Administrative Rules (order WM-39-87).

Pl. Exh. 13. The document referenced in this interrogatory answer as "UW-Extension publication numbered B3408" is included in the record as Plaintiffs' Exhibit 14. Entitled *Wildlife Damage Compensation Law*, the article states that "[t]he law creates two programs – an abatement program that provides money in compensation for putting up fences and other barriers to prevent damage from wild animals, and a claim program that provides money in compensation for damage to agricultural property." *Id.* The article contains no reference to shooting deer, let alone shooting deer at night.

At trial, when asked about this interrogatory answer, Thomas Hauge's counsel implied that the Tribes should have realized that nighttime shooting permits were issued for deer based on that portion of the answer that reads: "we have permitting authority to authorize the destruction of wild animals causing damage." That is untrue. Any reasonable person reading the interrogatory answer would have concluded that this phrase referred to Wis. Stat. § 29.596, entitled "Wild animals causing damage." Not only is the title to that section identical to the language in the interrogatory, but that section – not the specific deer damage statute, Wis. Stat. §

29.595 – refers to the issuance of permits. Given this answer, there was no way for the Tribes to know that permits were being issued to destroy deer, let alone to shoot them at night.

Discovery is designed to "to make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 612, 616 (5th Cir. 1977). Answers to interrogatories must be candid, complete, and non-evasive. *See, e.g., Trane Co. v. Klutznick*, 87 F.R.D. 473, 476 (W.D. Wis. 1980) (noting that under Rule 33, "a party must give full and complete answers to interrogatories," and that "[w]hile a party may not have a duty to search out new information, it is undisputed that a party has a duty to provide all information available to him"). "A partial answer by a party reserving an undisclosed objection to answering fully is not candid. It is evasive." *Dollar*, 561 F.2d at 616.

The State did not provide any objections to the interrogatory posed by the Lac Courte Oreilles Band. Yet it did not provide a complete and non-evasive answer, as it failed to "identify and describe" the wildlife damage control program that it had in place for deer or any other animal for that matter. The State's response does not mention the statutory or regulatory authority for the issuance of deer destruction permits, the Wisconsin DNR's interpretation of Wis. Stat. § 29.595 as authorizing the agency to designate any landowner experiencing crop or other property damage as an "agent" of the Wisconsin DNR who could therefore shoot depredating deer, or the conditions placed on such permits (including the hours that shooting could occur).

Not only was the original interrogatory answer incomplete and evasive, but it was never updated to take into account a change in both the law and the agency's interpretation of the law

prior to the 1989 Deer Trial. In 1989, Rule 26(3)(2)(B) of the Federal Rules of Civil Procedure stated as follows:

> a party is under a duty seasonably to amend a prior response [to discovery] if the party knows that the response though correct when made is no longer true and the circumstances are such that the failure to amend the response though correct when made is no longer true and the circumstances are such that the failure to amend the response is in substance a knowing concealment.

In an opinion interpreting that rule, the Seventh Circuit vacated a verdict following a jury trial due to the plaintiffs' failure to supplement a response to interrogatories that would have identified the subject matter of a witnesses' subsequent trial testimony. *Fortino v. Quasar Co.*, 950 F.2d 389, 396-97 (7th Cir. 1991). While the court concluded that Rule 26 did not necessarily require supplementation of interrogatory responses in cases where the change "is known to his opponent" or "is a matter of no importance," it held that in this case, the failure to supplement "could not be shrugged off as an inadvertent or immaterial failure to supplement – the sort of thing easy to overlook in the haste and turmoil of trial preparation." *Id.* at 296. *See also Price v. Lake Sales Supply R. M., Inc.*, 510 F.2d 388, 395 (10th Cir. 1974) ("It is quite true that parties are under a continuing duty to supplement their responses"); *Cleo Wrap Corp. v. Elsner Eng'g Works, Inc.*, 59 F.R.D. 386, 389 (M.D. Pa. 1972) (holding that an adverse party was under a "continuing duty to supplement its answers to opposing party's interrogatories as relevant information became available"); *Barker v. Bledsoe*, 85 F.R.D. 545, 548 (W.D. Okla. 1979) (citing 8B Wright, Miller & Marcus, Fed. Prac. and Proc., Civ. § 2181 and Fed. R. Civ. P. 26(e) for the proposition that parties have a duty to supplement their responses to interrogatories). Rather, it was known to the plaintiffs and obviously important to the case. *Id.* The same is true here.

A few months after the interrogatory answers contained at Plaintiffs' Exhibit 13 were submitted in this case, the Wisconsin Legislature passed 1987 Wisconsin Act 399, the 1988-89 budget bill. Pl. Exh. 35. The State contends that sections of this Act (which only remained in effect until August 9, 1989)[3] permitted nighttime shooting of deer under agricultural damage permits, even though this is not readily apparent from the text of the Act. One section of the Act struck all references to "deer" from the "Deer and Bear causing damage" statute, Wis. Stat. § 29.595, which seemed to eliminate the ability of the Wisconsin DNR to kill deer causing damage to private property. Pl. Exh. 35 at 2. *See also* Pl. Exh. 37 at 10-11 ("this part of the new law also appears to prevent DNR staff from carrying out night shooting of deer").[4] Another part added a new statutory section, Wis. Stat. § 167.34 (Safe disposal of deer causing damage to land), which allowed permits to kill deer to be issued to the owner or lessee of land and noted that such permits "shall authorize the holder of the permit to destroy deer at any time, except during the open season for the hunting of deer with firearms." Pl. Exh. 35 at 3. As part of this current Rule 60(b)(5) litigation, the State produced a handful of permits issued under this provision, which it contends allowed farmers to shoot deer at night. Def. Exh. 536. While the statutory language could easily be read to allow permits to be issued during any time of *year* outside the hunting season, and not during any time of the *day* (i.e., at night), the Wisconsin DNR apparently read the language to require the latter. *See* Pl. Exh. 36 (May 26, 1988 memo permittees "may not . . .[s]hoot deer with the aid of artificial light," but that "[w]e [the Wisconsin DNR] are not authorized to limit the hours of shooting" under the permit). *But see* Def. Exh. 536 (permit form

[3] *See* 1989 Wisconsin Act 31, the 1989-90 budget bill, at Pl. Exh. 38.

[4] While this and other legal conclusions were not admitted for their truth, they are relevant here. The State is currently claiming in this litigation that the 1988-89 budget bill did not eliminate the ability of the Wisconsin DNR to shoot depredating deer. The fact that the State's Legislative Audit Bureau appears to have come to a different conclusion further supports the necessity of the State supplementing the interrogatory in question. The statutory language is ambiguous at best, and only the Wisconsin DNR knew how it was interpreting that language.

included only the ambiguous statutory language). Yet the State never supplemented its answers to interrogatories to identify this new legislative authority prior to the 1989 trial, even though the State now claims that this legislation authorized nighttime shooting of deer. And when the Wisconsin Legislature placed a moratorium on nighttime shooting permits under this statute just days prior to the 1989 trial, *see* Pl. Exh. 38, the State did not update its answers with that information either. *See* Trans. at 4-A-184 (testimony of Thomas Hauge confirming that he did not supplement the interrogatory answers because he was never asked to do so).

The State cannot claim that it did not know about this change. Plaintiffs' Exhibit 36 is a memorandum from C.D. Besadny, who was then the Secretary of the Wisconsin DNR. The May 26, 1988 memo he wrote, entitled "Deer Damage Shooting Permits – New Procedure," was sent to DNR District Directors and copied to all Wildlife Managers and DNR Wardens. In the "to" line, the State's expert safety witness from the original 1989 trial – Ralph Christensen – is included. And while the memo states that under 1987 Wisconsin Act 399 the Wisconsin DNR is "not authorized to limit the hours of shooting" for deer destruction permits, Mr. Christensen would later testify that he was not aware that nighttime shooting of deer was authorized anywhere in the United States, and he was therefore unsure how the safety of that activity could be studied and compared to the safety of deer drives. Pl. Exh. 12. The significance of this legislative change – if it indeed allowed nighttime shooting of deer under agricultural damage permits – to the Tribes' pending litigation would not have been lost on these persons. Both C.D. Besadny, the author of the memo, and George Meyer, listed in the "to" line of the memorandum, had previously written a series of letters arguing that if nighttime shooting was permitted under deer damage permits, the Tribes would win the right to hunt deer at night in their federal litigation. *E.g.*, Pl. Exh. 22, 25-27, 31.

Without the candid and supplemented answers required by the Federal Rules of Civil Procedure, there was no way that the Tribes can reasonably be charged with discovering that any nighttime shooting of deer occurred in Wisconsin prior to the 1989 deer trial. Jim Zorn, then the Policy Analyst for the Great Lakes Indian Fish & Wildlife Commission, reviewed all of Wisconsin's natural resources regulations and laws prior to drafting the nighttime hunting regulations that were a part of the original trial, yet he had no idea that any nighttime shooting of deer was permitted under damage permits. Trans. at 3-P-27 to -29. If any legal nighttime shooting of deer occurred prior to 1989, this fact was not known to the Great Lakes Indian Fish & Wildlife Commission or the Tribes, and because the State failed to provide candid answers to the original interrogatory on this subject, and then failed to supplement its interrogatory answer as required by the Federal Rules of Civil Procedure, the State should be precluded from arguing that nighttime shooting of deer existed prior to the 1989 deer trial.

B. ALTERNATIVELY, EVEN IF THE STATE IS PERMITTED TO ARGUE THAT NIGHTTIME SHOOTING OF DEER OCCURRED PRIOR TO THE 1989 DEER TRIAL, THE EVIDENCE INTRODUCED AT TRIAL ESTABLISHES THAT THIS WAS AN EXTREMELY RARE OCCURRENCE

Deer populations in the State of Wisconsin prior to the 1989 deer trial were generally at or below the goals set by the Wisconsin DNR. Pl. Exh. 108 (deer population graph using Wisconsin DNR statistics, from 1960 – 2009, reprinted in Robert C. Willging, On The Hunt: The History of Deer Hunting in Wisconsin 2008); Trans. at 1-P-54 to -55 (testimony of Dr. Jonathan Gilbert). Thus, the only "deer problems" that existed were localized and tended to occur in areas that were both especially sensitive to vegetative browsing (e.g., arboretums, Audubon centers, islands), and prohibited hunting. This was true throughout much of the deer's range in the lower 48-states, and explains why the first academic publication about deer

overabundance was a book chapter from 1981, which discussed deer population problems on an island where neither natural predators nor human hunting occurred. Trans. at 1-P-58 (testimony of Dr. Jonathan Gilbert); Pl. Exh. 7 at p.19 (Dr. Gilbert's Expert Report).

Prior to the 1980s, when increasing the population was still a goal, deer were managed almost exclusively through non-lethal abatement techniques such as fences. Trans. 1-P-65 to –66 (testimony of Dr. Gilbert); Pl. Exh. 14 (brief description of wildlife damage abatement program in 1980s). As localized instances of overabundant deer began to present themselves in the 1980s, biologists began experimenting with various lethal and non-lethal control methods to lessen their potential impacts. What developed was a rough priority system of control techniques. *See* Pl. Exh. 148. First, biologists would recommend an expanded hunting season or controlled hunt that would allow members of the public to reduce the local deer population. Trans. 1-P-60 to -61 (testimony of Dr. Gilbert); Trans. 4-A-60 to -61, 4-A-75 to -76 (testimony of Mr. Ishmael). Second, in areas where hunting was not permitted, where increased hunting opportunities had proven ineffective, or where the public advocated for non-lethal methods, "trap and move" programs or contraceptive techniques were used. Trans. 1-P-61 (testimony of Dr. Gilbert); Trans. 4-A-80 to -82, -89 (testimony of Mr. Ishmael). Finally, if all else failed, other lethal techniques, such as employing DNR or private companies to shoot deer, might be recommended. Trans. 1-P-63 (testimony of Dr. Gilbert).

With deer populations at or below goal throughout the 1980s, and given the deer management priority system that placed nighttime shooting of deer as a last resort, it should come as no surprise that both the Tribes' expert (Dr. Gilbert) and the States' expert (William Ishmael) agreed that nighttime shooting of deer was an extremely rare occurred in Wisconsin prior to the 1989 deer trial. *See*, *e.g.*, Trans. 4-A-73 (testimony of Mr. Ishmael). William

Ishmael testified that he was aware of only two areas in Wisconsin where there was a localized deer problem prior to 1989: (1) in the northern suburbs of Milwaukee (i.e., Bayside and River Hills, Wisconsin); and (2) in Madison, at the University of Wisconsin Arboretum ("UW-Arboretum"). Trans. 4-A-84 (testimony of Mr. Ishmael). Both the town of River Hills, Wisconsin, and the Schlitz Audubon Center in Bayside, Wisconsin, implemented trap and move programs to address their deer damage programs. Trans. 4-A-58 to -59 (testimony of Mr. Ishmael). River Hills considered the shooting of deer (although it is not clear whether it considered *nighttime* shooting of deer), but rejected that approach due to public opposition to lethal deer control methods. Trans. 4-A-62 (testimony of Mr. Ishmael). Mr. Ishmael did not know whether the Schlitz Audubon Center even considered nighttime shooting as an option. He did indicate, however, that "trap and move" was the most common technique used to control problem deer populations in Wisconsin prior to the 1989 deer trial. Trans. 4-A-80 (testimony of Mr. Ishmael).

In fact, Mr. Ishmael testified that he knew of only one example of nighttime shooting of deer in the State of Wisconsin prior to the original deer trial, and that was the shooting that occurred in the UW-Arboretum. Trans. at 4-A-90, -105 to -106 (testimony of Mr. Ishmael). The UW-Arboretum is especially sensitive to the impacts of deer because hunting is prohibited there, and because it was specifically established for "long-term studies of native plant communities, and research on establishment of plant communities." Def. Exh. 511. Yet even in the Arboretum, less than 200 deer were shot over a 25-year period from 1958 through 1983, and for more than half of that number, the State does not know whether they were shot during the day or night. Def. Exh. 555, at 3, 4; Trans. 4-A-101 to -102 (testimony of Mr. Ishmael). Additionally, much of the nighttime shooting that did occur at the UW-Arboretum appears to have been

illegal,[5] and the State did not provide any testimony that deer were shot at night in the Arboretum in the six years immediately preceding the 1989 deer trial.[6]

The defendants also claim that nighttime shooting occurred in the State of Wisconsin prior to the 1989 trial under permits issued to farmers when deer were causing damage to crops. It has been hard for the Tribes to investigate and respond to this assertion, because the State has continually changed its claims about *when* such shooting occurred, and under *what authority*. In its memorandum in response to the Tribes' Rule 60(b)(5) motion, the State argued that the

[5] Mr. Ishmael testified that various volunteers shot deer at night in the UW-Arboretum prior to 1984, including a retired gentleman named Christensen, (likely David Christianson, copied on the 1987 UW-Arboretum permit, *see* Def. Exh. 533), Mr. Ishmael's brother, Gary, and long-time personal friends Scott Ellarson and Bruce Ellarson. Trans. 4-A-28, 4-A-44 to -45. Mr. Ishmael noted both in his testimony and in his prior publications that these deer were being shot using lights. *E.g.*, Def. Exh. 555 at 4; Trans. 4-A-27. Yet shining and shooting deer was illegal pursuant to a statute enacted by the Wisconsin Legislature in 1979, and only peace officers, Wisconsin DNR employees, and persons authorized by the Wisconsin DNR to conduct a game census, were exempted from that prohibition. Wis. Stat. § 29.245(3)(b) (1979-80), included as Def. Exh. 503. Mr. Ishmael offered no explanation for this discrepancy, claiming only that he had never seen the permits issued to the UW-Arboretum, and he was not aware of the laws governing nighttime shooting at the time. Trans. 4-A-46 to -47, 4-A-102 to -104.

[6] During discovery in this case, the State produced only three deer permits for the UW-Arboretum that were issued prior to the entry of final judgment in this case in 1991. Those permits were admitted as Defendants' Exhibits 533 (1987 permit) and 536 (1989 permit), and Plaintiffs' Exhibit 40 (1990 permit). These permits generally indicate that no nighttime shooting was authorized in the UW-Arboretum unless the shooter was a campus police officer (no doubt because police are exempted by statute from the general shining prohibition). The cover letter to the 1990 UW-Arboretum states that "[l]egal services have also advised me that the exemption from shooting hours will not be allowed. Thus, deer may be killed legally under the permit only during the period from one hour before sunrise to one hour after sunset." Pl. Exh. 40. Similarly, the cover letter to the 1987 UW-Arboretum permit states that "daytime shooting of deer at bait stations" is permitted, but if deer "must" be shot after normal hunting hours, they could only be shot by police. Def. Exh. 533. The State will no doubt claim that the 1989 UW-Arboretum permit allowed nighttime shooting of deer. But that permit states only that "[t]he permittee may destroy deer at any time except during the open season for hunting deer with firearms." Def. Exh. 536 at 5-6. The word "time" in the permit, should naturally be read to refer to time of *year*, not time of *day*, given the subsequent reference to the "open *season* for hunting deer with firearms," which refers to the time of *year* when deer hunting is permitted. *See generally* Section I(A). Regardless, no evidence was introduced at trial establishing that any deer were killed at night in the UW-Arboretum at any time between April 1983 and the entry of final judgment in 1991.

authority to issue nighttime deer shooting permits existed since 1957, under a statute enacted during that year entitled "Wild Animals Causing Damage," Wis. Stat. § 29.245. Defendants' Brief in Opposition to Plaintiffs' Motion for Relief from Judgment at 8-9 (Docket No. 284) ("In 1957, Wisconsin's deer damage statute, Wis. Stat. § 29.595 (now Wis. Stat. § 29.885), was amended to authorize the agency to issue deer removal permits to landowners or lessees"); State's Response to PFOF ¶ 5 (Docket No. 285) ("In 1957, the [deer damage] statutes were amended to also allow the commission to issue permits to landowners or lessees allowing those individuals to capture or destroy such animals. Hauge Aff. ¶ 6"). That 1957 Act, however, applied to wild animals *other than deer*. Presumably because of their value as game animals and because the deer population was under the state-wide goal set by the Wisconsin DNR, deer and bear depredation was covered under a separate statutory provision prior to the original 1989 trial in this case.

In fact, the deer damage provision came first. In 1917, the Wisconsin Legislature enacted a statute authorizing the Conservation Commission (a predecessor to the Wisconsin Department of Natural Resources) to capture or destroy deer causing damage to private property. Def. Exh. 505 (Wis. Stat. § 29.595 (1917)). That statute remained unchanged from 1917 through 1988 except that bear was added to the deer damage provision, a separate "wild animals causing damage provision" was added in 1957, *see* Def. Exh. 506, and when the Wisconsin Department of Natural Resources became the successor to the Conservation Commission in 1967, the statutory sections were updated to reflect that change. The relevant statutory sections remained identical from at least 1969 to May 1988,[7] and read as follows:

29.595. Damages caused by deer and bear.

[7] *See* http://docs.legis.wisconsin.gov/archive (collecting Wisconsin Statutes from 1969 to the present on this governmental website).

> (1) Deer or 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 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.
>
> 29.596. Wild animals causing damage. Upon complaint in writing by an owner or lessee of land to the department that wild animals are causing damage thereon the department shall inquire into the matter; and if upon investigation, or otherwise, it appears to the department that the facts stated in each such complaint are true, *the department, by its agents, may capture or destroy such wild animals or issue permits to the owner or lessee of the land to capture or destroy such wild animals*. All such wild animals captured or destroyed by permit shall immediately be turned over to authorized department agents who shall dispose of them as provided in s. 29.06.

Wis. Stat. §§ 29.595 & 29.596 (1985-86) (emphasis added).

As the above quotation establishes, Sections 29.595 and 29.596 of the Wisconsin statutes were identical, except that depredating deer and bear could only be shot by the Wisconsin DNR's agents, while other depredating wildlife could be shot by Wisconsin DNR agents or private landowners/lessees who obtain a permit from the agency. As a result, permits to destroy deer could not be issued under Wis. Stat. § 29.596 without claiming that the "Wild animal causing damage" provision impliedly repealed Section 29.595's deer and bear damage provision. Implied repeals are disfavored, however. *Karlin v. Foust*, 188 F.3d 446, 470 (7th Cir. 1999) (citing *State v. Black*, 526 N.W.2d 132, 134 (Wis. 1994), and other cases for the proposition that "[u]nder Wisconsin law, the implied repeal of a statute by a later enactment is disfavored"). This is particularly the case when the earlier provision is specific and the later provision is general. Steve R. Johnson, When General Statutes and Specific Statutes Conflict, 57 State Tax Notes 113 (2010) (collecting cases for this "well settled" principle that "has been applied by the federal courts and by the courts of almost every state"). The Wisconsin Supreme Court has explained that:

> [a] later and an older statute will, if it is possible and reasonable to do so, be always construed together, so as to give effect not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, where such seems to have been the legislative purpose.

Jicha v. Karns, 159 N.W.2d 691, 693 (Wis. 1968). Here, there is no way to give effect to the older, more specific law (the "damages caused by deer and bear" provision) unless deer damage is covered solely by Wis. Stat. § 29.595, which allows only the Wisconsin DNR and its agents to kill depredating deer, and not the more recent general law (the "wild animals causing damage" provision) Wis. Stat. § 29.596, which also allows permits to be issued to private landowners or lessees for the destruction of wild animals.

In addition to this straightforward legal argument, none of the documents produced by the State in this case refer to the destruction of deer under Section 29.596's "Wild animals causing damage" provision, and none of their witnesses testified that deer destruction permits were issued under this provision. Instead, all of the documents point to Wis. Stat. § 29.595 as the exclusive provision governing deer damage prior to the legislative changes that began in 1988 (discussed below). *See, e.g.*, Def. Exh. 508 & 509 (permits from 1974 and 1975, completed on a form entitled "Permit to Kill Deer or Bear Doing Damage," and referring to Wis. Stat. § 29.595, not Wis. Stat. § 29.596). Not until a series of legislative and regulatory changes occurred in the late 1980s and early 1990s, did the deer damage permit system merge with the general permit system for wild animals causing damage. *See, e.g.*, Def. Exh. 540 at 8 (noting that the changes in the August 1989 budget bill were ultimately designed to "[c]reate a single set of provisions relating to the removal of beaver, deer, bear, and other wild animals causing damage"). Consequently, the claim that the State so vigorously advanced in response to the Tribes' Rule 60(b)(5) motion, was not only not proven at trial, but it was completely jettisoned.

The State has also changed its claims about when nighttime shooting occurred in Wisconsin. Thomas Hauge, the only witness designated by the State to testify on this subject, has served as the Director of the Wisconsin Department of Natural Resources Bureau of Wildlife Management since 1992. Trans. 4-A-126 (testimony of Thomas Hauge). Prior to the original deer trial, however, Mr. Hauge was a wildlife biologist in the Wisconsin DNR's Spring Green office from spring 1982 December 1984, and the Wildlife Damage Specialist (also referred to as Animal Damage Coordinator) from January 1985 until sometime in 1989. Trans. 4-A-127 to -128. In the former position he would be been responsible for issuing deer shooting permits, and in the latter position, he was responsible for supervising the entire deer damage program. Trans. 4-A-130 to -133, 4-A-135 to -136.

Mr. Hauge submitted an affidavit dated April 5, 2013, in support of the State's Response to the Tribe's Rule 60(b)(5) motion. In that affidavit, he claimed as follows:

> 4. During the late 1980s, the most common animal removal permits were permits authorizing the removal of deer, though the removal of other species was also authorized. We issued permits for deer removal in municipalities and at airports, and some of these permits authorized shooting at night. We also issued permits allowing the removal of deer causing damage to crops.
>
> . . . .
>
> 8. Based on my experience as the Animal Damage Coordinator and as the supervisor of subsequent Animal Damage Coordinators, I know that the vast majority of permits we issued that authorized night hunting of deer required the shooters to use elevated stands over baited sites.

(Docket No. 288). During discovery, Mr. Hauge abandoned his claim that municipalities and airports were issued permits in the 1980s allowing the nighttime shooting of deer, and therefore, he provided no testimony on that subject during the trial in this case. *See, e.g.*, Trans. 4-A-136 to -138 (noting that the U.S. Department of Agriculture's Animal and Plant Health Inspection Service – APHIS – was not involved in shooting deer in Wisconsin in the 1980s, but rather, only assisted in valuing the damage that deer were doing to crops for purposes of the state's

compensation system). During his deposition, Mr. Hauge also limited the claim made in paragraph 8 of his affidavit (see above), by stating that it was based on his experience from 1985 – 1992, when he was the Wildlife Damage Specialist and Section Chief of the Bureau of Wildlife Management. Trans. 4-A-162 to -163.

Following Mr. Hauge's deposition, and in light of the fact that the state had produced virtually no documentation on deer damage shooting permits from 1985 - 1992 during discovery, the Tribes' attorneys visited the Wisconsin Historical Society in an attempt to uncover the truth. That investigation produced the documents included as Plaintiffs' Exhibits 17 to 31. Those documents establish that despite Mr. Hauge's claims of nighttime deer shooting permits being issued from 1985 – 1992, the Wisconsin DNR explicitly prohibited this activity during most, if not all, of this time period.

On February 20, 1985, the Wisconsin DNR adopted a new section – Chapter 20 – for its Wild Animal Damage Handbook, entitled "Authorization to Destroy Deer." Pl. Exh. 17 (Mar. 20, 1985 letter attaching Chapter 20). In that section, the Wisconsin DNR claimed that it had the authority to issue deer destruction permits to private land owners under the statutory provision for "Damages caused by deer and bear," then found at Wis. Stat. § 29.595(1), by designating them as "agents" of the Department.[8] But the agency acknowledged that it did *not* have the authority to issue permits authorizing the shining and shooting of deer at night by such "agents." Chapter 20 of the Wild Animal Damage Handbook stated that "Section 29.245, Wis. Stats., prohibits shining wild animals. This agency may not authorize our agents to violate the

[8] This interpretation is not sound as a matter of law. If the mere issuance of a permit to a private landowner makes that landowner an "agent" of the Wisconsin DNR under at Wis. Stat. § 29.595(1) (1985), then there would be no difference between that section and Wis. Stat. § 29.596 (Wild animals causing damage), despite the fact that the latter provision explicitly authorizes permits to be issued to private landowners for the destruction of wild animals.

provision of that statute or rules adopted under it." Pl. Exh. 17 at 4 (first page of Chapter 20). *See also* Pl. Exh. 17 at 1 (first page of letter, noting that "Section 29.245 of the statutes expressly prohibits the use of artificial lights (shining) for the shooting of deer. Shining activities allowed in that safety legislation are specific. It allows department 'employees' to shine but makes no mention of agents or shining activity for purposes of deer control"). The Wisconsin DNR also concluded that nighttime shooting, even without lights, was *not* permitted by "agents" under deer destruction permits: "The agent may not be authorized to shoot during the period from one hour after sunset to one hour before sunrise." Exh. 17 at 5 (second page of Chapter 20). In a letter to the Joint Committee for Review of Administrative Rules, the Secretary of the Wisconsin DNR C.D. Besadny, stated that "[s]afety considerations and reasonable restraint of our agents due to liability exposure, require this type of activity [(i.e., nighttime shooting)] not be authorized." Pl. Exh. 17 at 2 (Mar. 20, 1985 letter).

The Joint Committee for Review of Administrative Rules (JCRAR) was unhappy with Chapter 20 of the Wild Animal Damage Handbook. Some farmers claimed that Wisconsin DNR wardens had verbally authorized them in the past to shine and shoot deer at night from their vehicles. As a result, it directed the Wisconsin DNR to adopt those provisions as formal emergency regulations. It then held a hearing on whether those regulations should be suspended by the JCRAR. *See* Pl. Exh. 19 – 23. At that hearing, George Meyer, the Administrator of the Division of Enforcement of the Department of Natural Resources, and the lead negotiator for the State of Wisconsin in connection with the Tribes' treaty hunting and fishing rights, testified as follows:

> The rules that are the subject of today's hearing are based, as Jim Christenson[9] has stated, on the unambiguous wording of the statutes. The issue of Chippewa treaty rights did and could not have legally influenced the content of the rules, -- the clear wording of the statutes dictated what the rules say.
>
> The issue of Chippewa treaty hunting rights does become relevant – if – as a result of a suspension of the rules by this committee, a bill becomes introduced changing the law allowing the shooting and shining of deer at night. If in fact such a bill is passed allowing those practices for deer damage permits, the Chippewa Indians will be able to hunt deer at night and shine deer in the northern one third of the state.
> . . .
> -- Some have stated that there is a distinction between allowing these practices to prevent serious crop damages and allowing these same practices for Indian hunting. While different purposes distinguish the two, the physical acts of shooting at night and shining would be the same, and the result, the harvest of deer would be the same. I can assure you from working with federal courts and their interpretations of Indian treaty rights, that the courts would view the different purpose as a minor technicality and that position would be easily rejected in court.

Pl. Exh. 22 at 1, 3. Other documents from this time period confirm that (1) the Wisconsin DNR repeatedly stated that it could not authorize nighttime shooting of deer by non-DNR employees because the 1979 statute did not permit the agency to grant exemptions to the Legislature's prohibition on shining; (2) the Wisconsin DNR could not authorize nighttime shooting of deer from vehicles, since this was prohibited by statute; and (3) shooting deer at night without the aid of a light posed significant safety concerns, and therefore, would not be authorized. *See, e.g.*, Pl. Exh. 24 (Memorandum from Wisconsin DNR Secretary C.D. Besadny to District Directors, dated July 26, 1985). The Wisconsin DNR maintained this position even after the JCRAR suspended the emergency rule that the DNR had promulgated to implement Chapter 20 of the Wild Animal Damage Handbook. Pl. Exh. 24. In doing so, Secretary Besadny noted if

[9] Unfortunately, the testimony of Mr. Christenson was not contained in the Wisconsin Historical Society's files. All of the documents relating to this issue that the Tribes found at the Wisconsin Historical Society were both voluntarily provided to the defendants and have been included as exhibits in this case.

nighttime shooting had ever occurred in prior years it was not authorized by the Wisconsin DNR. *See, e.g.*, Pl. Exh. 25 (Aug. 6, 1985 letter from C.D. Besadny to JCRAR). Thus, no nighttime shooting under deer damage permits could have legally occurred in 1985 despite Thomas Hauge's claims.

The Wisconsin Legislature passed an Act in 1986 that would have authorized farmers to shine and shoot depredating deer at night. 1985 Assembly Bill 439, *see* Def. Exh. 528 at 1, included three key provisions. First, it would have added a provision stating that "a person shining deer while engaged in capturing or destroying deer causing damage to land if the person is issued a permit under 29.595(1)" is exempt from the statutory shining prohibition in Wis. Stat. 29.245. Second, it would have amended Wis. Stat. § 29.595 to state that permits could be issued to owners or lessees of land to destroy deer causing damage:

> 29.595 (1) DEER OR 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 to the department that the facts stated in each such complaint are true, the department by its agents ~~may~~ shall capture or destroy such deer or bear, and dispose of the same within 24 hours and as provided in s. 29.06, or the department shall issue permits to the owner or lessee of the land on which deer are causing damage to capture or destroy such deer. All such deer captured or destroyed by permit shall immediately be turned over to authorize department agents who shall dispose of them as provided in s. 29.06.[10]

Def. Exh. 528 at 1. Finally, the Act would have included a new subsection – Wis. Stat. 29.595(2) – stating, among other things, that "[t]he department shall not limit the hours of the day during which deer causing damage to land may be captured or destroyed." *Id.* While 1985 Assembly Bill 439 passed the Wisconsin Legislature, it was vetoed by Governor Anthony Earl, who noted in his veto message that "this bill allows night shooting with the use of artificial light

[10] This proposed addition to Wis. Stat. § 29.595 is further indication that the Wisconsin DNR did not have authority to issue permits to private landowners by calling them "agents" under that section.

which creates safety and administrative problems." Def. Exh. 531 (veto message). Thus, no nighttime shooting under deer damage permits could have legally occurred in 1986, despite Thomas Hauge's claims.

In 1987, the Wisconsin DNR adopted permanent formal regulations confirming that nighttime shooting was not permitted under deer damage permits. Chapter NR 19, adopted in July 1987, was amended to insert NR 19.84, entitled "Deer shooting permits." Pl. Exh. 33, at 2. Before issuing any deer shooting permits, the Wisconsin DNR was required to determine that (1) all reasonable non-lethal abatement techniques (e.g., fencing) were being employed but had failed to reduce the damage caused to private property, and (2) that damage to commercial crops would likely exceed $1,000, or an "extraordinary public safety risk exists," or deer browsing was causing damage within an arboretum, refuge or similar sanctuary. *Id.* at 19.84(2) (Issuance Criteria). The regulations explicitly stated that "Deer may be killed only during the period from one hour before sunrise to one hour after sunset unless department personnel participate under sub. (6)." *Id.* at 19.84(4)(g). Subsection 6 stated that Wisconsin DNR employees could not shoot deer at night under deer damage permits unless an extraordinary safety risk existed, or the permittee was able to establish that he was unable to keep an adequate number of deer under his deer damage permit, his losses were not reimbursed by the county wildlife damage program, and the permittee agreed to pay the costs of a department shooter.[11] *Id.* at 19.84(6). Thus, no nighttime shooting under deer damage permits by private persons could have legally occurred in 1987, despite Thomas Hauge's claims.

Between May 1988, when 1987 Wisconsin Act 399 (the 1988-89 budget bill, Pl. Exh. 35) was adopted, and August 9, 1989, when its operation was suspended by 1989 Wisconsin Act 31,

[11] The State did not introduce any testimony or documentary evidence at trial establishing that even one deer was shot at night by Department employees under NR 19.84(6).

Pl. Exh. 38, the State claims that it was permitted to issue nighttime deer shooting permits to private citizens. As described in section I(A) above, this interpretation is questionable given the statutory language in 1987 Wisconsin Act 399, but it is supported by at least one memorandum drafted by the Secretary of the Wisconsin DNR a few weeks after its passage. Pl. Exh. 36. The State issued ten permits under this grant of authority prior to the 1989 deer trial. Def. Exh. 536 (also including one permit issued during the 1989 deer trial, on Aug. 10, 1989). The State did not, however, provide any testimony or documentary evidence indicating that a single deer was shot at night under these permits. And contrary to the assertion in paragraph 8 of Thomas Hauge's affidavit, none of these permits require that nighttime shooting be conducted from an elevated platform.

On August 3, 1989, the Wisconsin Legislature suspended the provisions of 1987 Wisconsin Act 399 that authorized the issuance of deer shooting permits. *See* 1989 Wisconsin Act 31, Pl. Exh. 38. *See also* Def. Exh. 528 at 6 (Wis. Stat. § 167.34(4) (1989-90), stating that "[t]his section does not apply to damage caused by deer that occurs during the time period beginning on Aug. 9, 1989, and ending on June 30, 1991"). Thus, beginning on August 9, 1989, the State cannot allege that any nighttime deer shooting permits were authorized under the law. The Wisconsin DNR's Form 2300-199, titled "Application and Permit to Shoot Deer Causing Agricultural Damage," was created in September 1989. Pl. Exh. 39. That form explicitly states that "Deer may be killed only during the period from one hour before sunrise to one hour after sunset during the closed season for hunting deer with a bow or a gun." *Id.* at 2. Chairman Chris McGeshick testified that when he was a Wisconsin DNR conservation warden in Clark County in early 1990s, he received and reviewed a copy of these completed permits to enforce the conditions therein, and farmers were never allowed to shoot deer more than one hour after sunset

or more than one hour before sunrise. Trans. at 2-P-59 to 2-P-60 and 2-P-66 to -67, 2-P-71 to -72. *See also* Pl. Exh. 40 (letter from Feb. 9, 1990 enclosing the UW-Arboretum's deer shooting permit and noting that "Legal Services have also advised me that the exemption from shooting hours will not be allowed").

In 1990, the Wisconsin DNR enacted formal regulations as Chapter NR 12 governing deer shooting permits. NR 12.16 stated that "the following conditions shall apply *to all* deer shooting permits: (1) Closed Season Shooting Hours. Deer may be killed only during the period from one hour before sunrise to one hour after sunset during the closed season." Def. Exh. 543. Thus, contrary to the assertion in paragraph 8 of Thomas Hauge's affidavit, deer shooting permits issued after August 9, 1989 did not permit nighttime shooting. Overall, the above discussion illustrates that despite Mr. Hague's claims about nighttime shooting permits issued by the Wisconsin DNR from 1985 – 1992, after dozens of hours of research, the Tribes were able to conclusively establish that no nighttime deer shooting permits could have legally been issued for seven out of those 8 years.

At the eleventh hour, the State now apparently claims that nighttime shooting permits were issued to private persons experiencing deer damage problems prior to 1985. The State did not produce any such permits from 1976 – 1984 in discovery, and no such permits were admitted into evidence at trial. The State insinuated that it was likely these permits were destroyed, because the Wisconsin DNR has only a 10-year document retention policy. Notably, however, the State chose not to produce or admit the DNR form on which such permits would have been issued, and it did not claim that agricultural damage permits did not exist in its files, only that no agricultural damage permits authorizing nighttime shooting could be located. *See also* Trans. 4-A-132 (testimony of Thomas Hauge admitting that he had stated in his deposition that he could

not recall issuing any permit that authorized nighttime shooting of deer even though he was a full-time field biologist for the Wisconsin DNR from 1982 through 1984, and the Wildlife Damage Specialist from 1985 - 1989).

After all of these changes in course, in the end, the State only established that (1) less than 100 deer were shined and shot at night in the UW-Arboretum, in violation of Wisconsin statutes and regulations, and (2) ten permits were issued in 1988 – 1989 that *may* have authorized nighttime shooting of deer, although no evidence was produced that any deer were shot at night under these permits. When compared with the evidence the Tribes produced at trial, which establishes that thousands of deer were shot at night in Wisconsin under the CWD program and deer nuisance permits issued from 2007 to the present, the Tribes have proven that changed circumstances exist.

II. THE TRIBES' PLAN IS SUITABLY TAILORED TO CHANGED CIRCUMSTANCES AND ADEQUATE TO PROTECT PUBLIC SAFETY

As discussed above and in previous briefing, since the 1989 Deer Trial, the State of Wisconsin has allowed nighttime shooting of big game species through its chronic wasting disease program, the 2012 nighttime wolf hunt, and nuisance deer damage permits. These programs have proved to be adequate to protect public safety, as not a single hunting related incident has been attributed to them. As explained below, the Tribes have developed a plan for nighttime hunting of white-tailed deer that is more stringent than the protocols for the CWD program (both as written and applied), the 2012 emergency nighttime wolf hunting regulations, and the common conditions attached to nuisance deer damage permits. Consequently, their plan is both suitably tailored to the changed circumstances, and adequate to protect public safety.

A. Development of the Tribal Nighttime Hunting Regulations

In April 2012, following the adoption of 2011 Wisconsin Act 169, which allowed the general public to engage in nighttime wolf hunting on private and public lands, the Voigt Intertribal Task Force directed the Great Lakes Indian Fish & Wildlife Commission (GLIFWC) to begin drafting regulations that would offer the Tribes similar opportunities to hunt big game species at night. Trans. at 1-A-34 to – 1-A-36 (testimony of Kekek Jason Stark). GLIFWC formed a tribal night hunting core workgroup consisting of Kekek Jason Stark, GLIFWC's Policy Analyst/Attorney, Fred Maulson, GLIFWC's Chief Warden, and Chris McGeshick, Chairman of the Sokaogon Chippewa Community and a hunting safety expert with more than 20 years of experience as a law enforcement officer and a conservation warden for the Wisconsin DNR and GLIFWC. Trans. at 1-A-37 to -38 (testimony of Kekek Jason Stark); Trans. at 2-A-49 to -50 (testimony of Chairman McGeshick). Additional persons with expertise in hunting safety (GLIFWC wardens Roger McGeshick, Tom Kroeplin, Dan North), deer biology and ecology GLIFWC's Wildlife Section Leader, Dr. Jonathan Gilbert), and legal expertise (GLIFWC Executive Administrator James Zorn), participated in the work group from time to time as needed. Trans. at 1-A-38 to -39.

Because the nighttime wolf hunting regulations had not yet been promulgated, the tribal night hunting workgroup began by obtaining the laws of other jurisdictions that allowed nighttime hunting of big game species, to determine if any of those laws could serve as a model for the Tribes' proposed regulations. Trans. at 1-A-39 (testimony of Kekek Jason Stark). The group reviewed the laws of other Indian tribes that authorized nighttime deer hunting or nighttime hunting of other big game species outside of Indian country, including codes from the Keweenaw Bay Indian Community (Michigan), the Nez Perce Tribe (multiple states), Yakama Tribe (Washington), Colville Tribe (Washington), Lummi Nation (Washington), Chickasaw

Nation (Oklahoma), and the Eastern Band of Cherokee (North Carolina), the Mille Lacs Band of Ojibwe (Minnesota), as well as the laws for the states of Texas and California, which permit nighttime recreational hunting of certain deer species that are considered invasive species within the state. Trans. 1-A-39 to 1-A-65; Pl. Exh. 44 (Keweenaw Bay Indian Community Code); Pl Exh. 47 (Nez Perce Tribal Code); Exh. 48 (Lummi Tribal Code); Pl. Exh. 49 (Chickasaw Code); Exh. 50 (Eastern Band of Cherokee Code). While most of these codes contained few limits on nighttime shooting of big game species with high caliber weapons, from this review, the tribal night hunting workgroup decided to incorporate certain provisions of the Mille Lacs Band of Ojibwe's Code, including (1) requiring that members obtain a specific night hunting permit, and (2) permitting the use of a light, but not restricting the use of bright lights as in the Mille Lacs Band Code, because the workgroup believed that a bright light would serve to enhance safety. Trans. at 1-A-45 to1-A-37 (testimony of Kekek Jason Stark).

In July 2012, the Wisconsin DNR published its final wolf hunting regulations and issued its "green sheet," which explains those regulations. In the green sheet, the Wisconsin DNR explained that public safety would be ensured despite nighttime wolf hunting:

> Hunting at night is authorized under Act 169 and the 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. <u>It is anticipated that this extra precaution will help assure public safety.</u>

Pl. Exh. 121 (Green Sheet, Analysis Prepared by the DNR at 6). Due to this statement, the tribal night hunting workgroup decided to require in its own draft regulations that Tribal members engage in nighttime hunting only from a stationary position. Trans. at 1-A-50 to -51. After drafting the first version of Commission Order 2012-05 using the Mille Lacs Band Code and the

Wisconsin nighttime wolf hunting regulations, Kekek Jason Stark presented that draft to the tribal night hunting workgroup. Trans. 1-A-65.

At that point, Chairman McGeshick informed the workgroup that he had shot deer at night as part of Wisconsin's chronic wasting disease program. Trans. at 1-A-66. Kekek Jason Stark began gathering all of the public information about the CWD nighttime shooting program that existed. Trans at 1-A-66 to -67. He found that there was very little information available to the public, *see, e.g.*, Pl. Exh. 64 -66, and therefore, the group relied on Mr. McGeshick's memory and the documents he had retained in his personal file from the CWD shooting program. Trans. at 1-A-67 to -68. *See also* Pl. Exh. 75 (a photocopy of an email that Chairman McGeshick retained after his retirement from the Wisconsin DNR, explaining the warden marksmanship proficiency requirements for the CWD program). At this point, the most important component of the CWD program that was incorporated into the tribal nighttime hunting regulations was the requirement that a shooting plan be identified for each site before hunting could take place there. Trans. at 1-A-68.

In November 2012, when the Tribes commenced this action, they obtained information on the State's CWD program through the testimony presented by the State at the preliminary injunction hearing, and through limited agreed upon discovery. As new information about the State's CWD program was unveiled, features of that program were incorporated into the Commission Order. Additionally, in February 2013, the Tribes made changes to their nighttime hunting proposal to address some of the concerns raised by the State's hunting safety experts. 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. Pl. Exh. 2 (Revised Regulations). 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 *in toto*. Should this Court decide, however, that the Revised Regulations should be modified further, the Court has the power to do so. 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, the 2012 nighttime wolf hunting regulations, and the components of the State's nighttime deer damage nuisance permits.

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

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 disproved these contentions.

Tamara Ryan participated as a regular shooter in the CWD program from 2003 through 2007. Trans. at 2-P-88. Ryan testified that she never owned a rifle prior to her participation in the CWD program. Trans. at 2-P-78 to -79 (testimony of Tamara Ryan). 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. Trans. at 2-P-79 to -80. Ryan had never hunted deer prior to her participation in the CWD program; in fact, the only animal she had ever hunted was turkey, and she had never shot and killed a turkey. Trans. at 2-P-88, -92.

Despite this limited experience, Tamara Ryan was permitted to shoot deer at night under the State's CWD program after attending a single marksmanship training course. Trans. at 2-P-79 to -80. The final marksmanship proficiency test required her to shoot an eight-inch target three times from 100 yards away. Neither the proficiency test nor any part of the marksmanship course was conducted at night, even though the CWD shooting program was to be conducted almost exclusively at night. Trans. at 2-P-81. But despite this oversight, Tamara Ryan indicated that she believed the training course was comprehensive enough to teach her – an individual with almost no hunting or firearms experience – how to safely and efficiently shoot and kill deer at night. *Id*. And when Ryan was promoted to a supervisory position in the southeast area office, she not only continued to shoot under the CWD program, but she also created some of the shooting plans for sites and reviewed shooting plans that were created by others. Trans. at 2-P-82.

Ryan's limited firearms experience is not unique. Brad Koele, who in 2002 was a DNR Lands Division employee (Assistant Big Game Specialist), had never hunted deer at night prior to the State's CWD program. He had never been a law enforcement officer or a conservation warden. He is not a hunting safety expert and he does not carry a weapon either as part of his current job as the Wildlife Damage Specialist, or his former job as the Assistant Game Specialist. Trans. at 3-A-80. Mr. Koele was a nighttime sharpshooter under the State's CWD program for several nights in 2002, yet he never took the State's CWD marksmanship training course. Trans. at 3-A-81.

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. *See, e.g.*, Trans. at 3-P-149 (Chuck Horn testified that "I don't believe there were many wardens

involved [in nighttime CWD shooting in 2002], possibly Mr. Lawhern. It was primarily wildlife staff"). DNR Lands Division-Wildlife staff was also responsible for creating shooting plans for the nighttime shooting sites. Trans. at 4-A-11 (testimony of Chuck Horn). These employees do not carry or use a firearm as part of their job; they have no professional training with weapons. *See, e.g.*, Trans at 3-A-80 (testimony of Brad Koele); Trans at 4-A-12 (testimony of Chuck Horn). 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.[12] These State employees were not expert marksmen.

Between 2002 and 2006,[13] 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. Trans. at 2-A-101. The remaining time was devoted to shooting at the range. During some years of the

[12] Trial testimony also established 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. *See, e.g.*, Trans. at 2-A-78 to -100 (testimony of Chairman McGeshick); Pl. Exh. 75; Trans at 3-P-95 to -96 (testimony of Don Bates).

[13] 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. *See also* Trans. at 2-A-93 to -94.

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." And later: "This program must come up with a standard qualification"). *See also* Trans. at 2-A-103 to -104. No shooting took place at night under this course.

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.

Nighttime Shooting Under Nuisance Damage Permits. There are no statutory or regulatory requirements that limit the persons who can shoot deer at night under deer nuisance damage permits. Additionally, the permits that have been customarily issued by the Wisconsin DNR state only that "[t]he permitee shall designate employees or agents authorized in writing as sharpshooters who are permitted to shoot and kill deer." Trans. at 3-A-87, Trans. at 3-P-6. The Wisconsin DNR does not approve the persons who shoot under these permits. *Id.* Although one of the State's witnesses – Bradley Koele – claimed that there would be a discussion between the

local DNR biologist and the municipality about who should shoot deer under the permit, *see* Trans. at 3-P-7, Mr. Koele had never issued a nighttime shooting permit himself, *see* Trans. at 3-P-20, had no personal knowledge of whether such conversations occurred, was not designated as an expert witness in this case, and offered contradictory testimony on this point.

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. Pl. Exh. 1 (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; Pl. Exh. 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.[14] *Compare* Pl. Exh. 1 (Comm'n Order § 2.6.7.1), *with* Pl. Exh. 2 (Revised Regulations § 6.20(7)). *See also* Trans. at 2-A-91 (testimony of Chairman McGeshick). The Tribes developed a handbook to distribute to Tribal members at this advanced hunter safety course, *see* Pl. Exh. 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, *see* Plaintiffs' Exhibit 4, as a starting point, and incorporated all of the relevant information from that document. Trans. at 2-A-93 to -93 (testimony of Chairman McGeshick). The course being developed will be a two-day course that is at least 12 hours long. A portion of the program will consist of an interactive PowerPoint *prezi* presentation, that will allow the basic content to remain standardized, but the course will also include discussion and questions with the live instructor and students. Trans. at 2-A-91. 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. Pl. Exh. 2 (Revised Regulations § 6.20(7)); Trans. at 2-A-95 to -96. The 100-yard distance was maintained because this is the maximum distance a shot may be taken under the Revised Regulations. Pl. Exh. 2 (Revised Regulations § 6.20(1)); Trans. at 2-A-96. The target size – 6 ¼ inches – is smaller than the target used for CWD marksmanship qualification shoots and for Wisconsin conservation warden proficiency exams. Trans. at 2-A-95, 2-A-97-100; Pl. Exh. 75. Tribal members will be

[14] 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. Trans. at 2-A-89 to -90 (testimony of Chairman McGeshick).

required to qualify with the weapon they are going to utilize for hunting deer at night. Trans. at 2-A-95.

The Tribes advanced hunter safety course and marksmanship proficiency requirement exceed the requirements of the CWD program, the 2012 wolf regulations, and the nuisance deer damage permits. They will 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.

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

The Tribes presented testimony at trial that described 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 also contrasted 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 summary 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." Pl. 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).

Shooting plans were not prepared for every property where shooting occurred. For example, no shooting plans exist for any CWD nighttime shooting that took place in 2002. Trans. at 3-P-93 (testimony of Don Bates). While many shooting plans were created during the remaining years of the CWD program, a CWD memorandum written by Timothy Lawhern and others in 2006, acknowledged that through their review of the program, "it became apparent that some of our CWD marksmen are shooting deer without a shooting plan." Pl. Exh. 77. *See also* Pl. Exh. 93. At times, it appears as though persons in charge of the CWD program were unaware that shooting plans were even required. For example, 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. This incident was documented, because a woman was photographing the deer at the moment it was shot, just a short distance from her vehicle. The investigation into this incident somehow concluded that the shooter had followed all of the CWD safety procedures even though he was not shooting pursuant to a shooting plan. *Id.* ("It is Wolf and Aquino's opinion that Borsecnik followed the safety procedures that were in place: he used a department issued firearm, and ammunition with fragmenting bullet, evaluated his backstop and made a well-placed shot").

Testimony at trial also established that the majority of shooting plans actually created 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. *See, e.g.*, Trans. at 3-P-93 (testimony of Don Bates). On some aerial photographs, buildings and

other hazards were circled in red marker or had red dots placed on top of them, presumably indicating locations where the shooter should not aim. Trans. at 3-P-93 (testimony of Don Bates). Very few aerial photographs indicated the safe zone of fire, the direction of fire, the backstop, or other safety requirements. Trans. at 3-P-93 to -94 (testimony of Don Bates); Stipulated Facts ¶¶ 111-14 (admitting that for 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). Those more detailed shooting plans all seem to have come from the southeast CWD region in the later years of the program.

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. This requirement was 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. Trans. at 3-P-158 (testimony of Chuck Horn).

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." Pl. Exh. 71.

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. Pl. Exh. 115 (2011 Wisconsin Act 169, § 6(a)(3) & (4)). 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. 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.

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." Pl. Exh. 2 (Revised Regulations § 6.20(5)(a)). A "preapproved shooting plan" must be inspected and approved by the tribal conservation department or a GLIFWC warden. *Id.* (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). *See also* Trans. at 2-A-106 to -107 (testimony of Chairman McGeshick describing the requirements of a tribal shooting plan). 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). *See also* Trans. at 2-A-110 (testimony of Chairman McGeshick). 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.[15] *Id.* at § 6.20(5)(a)(vii). The one-quarter mile area was selected after examining all hunting incident report data. These incident reports established that the vast majority of all hunting incidents occurred within 100 yards, and it is extremely rare for any accident to occur beyond one-quarter mile. Trans. at 2-A-110 to -111 (Chairman McGeshick testifying that 86 percent of all hunting incidents between 2007 and 2011 occurred within 100 yards, and only one hunting incident during this time period may have been near the one-quarter mile distance); Pl. Exh. 133 at 16 (2012 Hunting Incident Report showing that only two incidents were over 100 yards); Pl. Exh. 134 (2011 Hunting Incident Report showing that only two incidents were over 100 yards). 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

[15] On the other hand, 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. Trans at 2-P-26 (testimony of Chairman McGeshick); Pl. Exh. 81. Shooting also occurred near roadways. Trans. at 2-P-27 to -29; Pl. Exh. 78.

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. As Dr. Gilbert testified, calls are mostly effective on bucks during the mating season, which is also known as the "rut." Trans at 1-P-50 to 1-P-52 (testimony of Dr. Gilbert). 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 much less effective on does, even during the rut. Trans. at 1-P-51. The Wisconsin deer herd contains more does and antlerless deer (fawns) than bucks; the ratio is typically around two-thirds to one-third. Trans. at 1-P-52, lines 4-10. Unlike many state-licensed hunters who are interested in obtaining antlers, Tribal-member hunters do not select does to any greater extent than bucks. The annual Tribal deer harvest reports created by Dr. Gilbert demonstrate that the majority of deer harvested by Tribal members each year are does. Trans. at 1-P-53 lines 6-8; Pl. Exh. 101 – 105 (annual Tribal harvest reports). Requiring calls would not be an efficient way of hunting for Tribal members, Trans. at 1-P-53, and since calls do not improve safety, the Revised Regulations do not require them.

Bait was not required by the Revised Regulations for a different reason. Bait is known to hasten the spread of CWD and other diseases. Trans. at 1-P-47 to -48 (testimony of Dr. Gilbert). 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. Trans. at 1-P-48 to 1-P-49 (testimony of Dr. Gilbert). The Wisconsin Legislature has banned bait in certain counties within the ceded

territory as a result of these positive CWD tests. Trans. at 1-P-49 to -50. Only 1% of Tribal-member hunters use bait. Trans. at 1-P-47. Because requiring bait in the Revised Regulations could hasten the spread of chronic wasting disease, and because bait does not necessarily improve safety,[16] the Revised Regulations do not require it. Trans. at 2-P-4 (testimony of Chairman McGeshick). 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.

D. Requiring that Tribal Members Use a Light Mitigates Risk

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.
> . . .

[16] As Chairman McGeshick testified, bait can draw deer to an area, but it does not ensure that deer are shot in a particular location. Hunters rarely wait for the deer to reach the bait pile, because the deer could become "spooked" and run off after seeing or hearing the hunter. This is illustrated in Pl. Exh. 87, which includes a collection of CWD shooting logs where deer were shot at varying distances from the bait pile, with different trajectories. Trans. at 2-P-4 to 2-P-10.

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 indicated in his deposition 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. Trans. at 5-A-5 to -8.

E. 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. 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 informed the tribal night hunting workgroup that in his opinion, any issue of foliage obstructing vision while hunting would be resolved by November 1st. Trans. at 1-P-33 (testimony of Dr. Gilbert). At trial, Dr. Gilbert explained that this opinion was based on his personal records of leaf-fall drop dates, which he had created for a number of years as part of his deer pellet group surveys, a tool used to estimate deer population. The leaf-fall drop dates that he had recorded indicated that leaves had typically fallen from the trees somewhere between October 10th and October 15th. Trans. at 1-P-35 (testimony of Dr. Gilbert). He had never recorded a leaf-drop date after November 1st. *Id.* The State offered no testimony to refute this.[17]

[17] The State suggested at trial 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

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 State's claim, however, is based on scant "evidence" – anecdotal claims about the use of public lands made by the State's two expert witnesses: Randall Stark and Timothy Lawhern. Neither of these gentlemen have lived in the ceded territory for more than a decade; both have administrative jobs in Madison, Wisconsin. The Tribes, however, presented the expert testimony of James Thannum to refute the State's contentions. Mr. Thannum currently lives in Ashland and works on the Bad River Indian Reservation, where his wife and son are enrolled members. Trans. at 2-P-96 to -97. He was born and raised in Hayward, Wisconsin, and has lived in the ceded territory of Wisconsin for his entire life. Trans. at 2-P-95. In addition to this personal knowledge base,[18] Mr. Thannum is an expert in the analysis of demographic and recreational trends, and the use of natural resources. Prior to completing his expert report in this case, he 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 to determine whether those uses would conflict with tribal nighttime deer hunting.

Mr. Thannum reviewed five years of annual Tribal deer harvest reports to determine the number of Tribal-member hunters and the locations they hunted. *See generally* Trans. at 2-P-110 to -120. In doing so he determined that an average of 2,183 Tribal members were issued deer hunting licenses in any given year, but only around 25% of the license holders harvested a deer.

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discretion to refuse to approve shooting plans in rare locations where visibility may be obstructed by conifers or oak trees.

[18] In addition to living in the ceded territory, Mr. Thannum has hunted grouse, rabbit, squirrel, and deer in the ceded territory. Trans. at 2-P-97. He has hiked and camped in the Chequamegon National Forest, the Rainbow Lake Wilderness Area, and areas around St. Peter's Dome. *Id.* at 2-P-99. He has cross-country skied in Mt. Valhalla, by Washburn, Wisconsin. Trans. at 2-P-100.

Trans. at 2-P-121 to -122. He assumed that fewer Tribal members would engage in nighttime deer hunting, given the stringent requirements in the Revised Regulations. Trans. at 2-P-114. Then, Mr. Thannum used these same annual harvest reports to determine that nearly all of the Tribal harvest occurred in seven counties, and that this harvest concentration was due to a number of factors, including their close proximity to the Tribes' reservations and the quantity of public lands within them. Trans. at 2-P-118 to -120.

Next. Mr. Thannum testified that he attempted to determine what recreational activities would occur in these seven counties, because Tribal hunters could be expected to hunt in the same locations at night that they favor during the day. Mr. Thannum first turned to the Wisconsin Statewide Comprehensive Outdoor Recreation Plan, or SCORP, to determine the types of recreational activities undertaken in Wisconsin. Trans. at 2-P-121. But since the SCORP is a state-wide survey, he used his personal experience as well as dozens of additional sources to determine (1) if those activities occurred in the ceded territory, (2) if those activities were likely to occur in the seven counties where Tribal members primarily harvest deer, and (3) if those activities were likely to occur during the months of November and December. *See, e.g.*, Trans. at 2-P-122 to -128. He identified several activities that he sought to research in greater depth, including mountain biking, small game hunting (grouse), deer hunting (archery, nine-day), nongame hunting (coyotes, raccoons), ATV use, cross-country skiing, and snowmobiling. Trans. at 2-P-128 to 2-P-130.

For mountain biking, Mr. Thannum testified that his review of available sources indicated that persons either biked in established events, which occurred in the summer and early fall (not in November/December), or they used established trails, so there would be no conflict with tribal nighttime deer hunting. Trans. at 3-A-11 to -13. For hunting small game, Mr. Thannum noted

that the activity was legal only during the day, and because Tribal members cannot hunt deer under the Revised Regulations until one hour after sunset, there would not be any conflict. Trans. at 3-A-14 to -15. For archery deer hunting (which must also occur during the day), Mr. Thannum determined that most persons hunted on private lands, where Tribal members could not hunt under the Revised Regulations. Furthermore, density of archery hunters was extremely low in the seven counties where Tribal members harvested nearly all of their deer. Trans. at 3-A-15 to -19. Thus, Mr. Thannum concluded that even if some hunters were tracking wounded deer after hunting hours had ended, the number would be so small that it would not pose a conflict with Tribal-member hunters. Likewise, Mr. Thannum concluded that coyote hunting would not conflict with nighttime deer hunting because, among other things, most coyote hunting occurred outside of the ceded territory, and later in the winter. Trans. at 3-A-22 to 3-A-24. Finally, the remaining activities would either occur on marked trails (where nighttime hunting could not occur under the Revised Regulations), or would occur only when there is deep snow, which would then reduce or eliminate the Tribal nighttime deer harvest, so they were not expected to conflict. Trans. at 3-A-26 to 3-A-32.

Mr. Thannum concluded that 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. The most common outdoor recreation activities in Wisconsin take place during the fall color season, and there are few recreational/tourist activities 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, which is one of the slowest activity periods in the year characterized by significantly reduced visitation, little recreational activity and few tourism

expenditures. These conclusions are all supported by this Court's prior decisions. *See, e.g.*, *LCO VII* at 1407 ("During the summer months, the greater part of the ceded territory is heavily populated with persons engaged in recreation: bikers, campers, hikers, swimmers, bird watchers, persons fishing, etc. In some areas, the recreational use of the public land increases tenfold during June, July, and August. Many of the people engaged in recreation use the same areas in which plaintiffs' members wish to harvest deer. After the Labor Day weekend the recreational use of public land decreases significantly").

E. 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' Revised Regulations eliminate virtually all of the previously raised concerns. *See, e.g.* Trans. at 1-A-85 to -97.

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. *E.g.*, Trans. at 5-P-4. But no Wisconsin laws or regulations prohibit hunting on certain days based on the weather, and Mr. Lawhern stated in his deposition that he would not recommend that they change State law to prohibit hunting based on weather conditions. Trans. at 5-P-5 to -6. Thick fog has been present on the opening day of the Wisconsin gun-deer season in recent years, *see* Trans. at 5-P-5, yet State-licensed hunters knew – based on their training – to wait until the fog had lifted before hunting. The CWD shooting protocols did not state that nighttime shooting could not occur on days where fog was present, yet Mr. Lawhern testified that he had made the personal decision not to shoot deer on such nights. Trans. at 5-P-6 to -7. Tribal member hunters will know to do the same as well. This is an issue covered in basic hunter safety training, and as the annual Wisconsin hunting incident reports drafted by Mr. Lawhern repeatedly state: "[w]eather again appeared to be a nonfactor" in hunting incidents." Trans. at 5-P-8 to -9.

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. 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, does are pregnant, and deer are yarded. Trans. at 2-A-6 (testimony of Dr. Heidi Stark). While the State claimed during the trial that the Tribes' cultural beliefs were newly created or fabricated for this trial, that is simply untrue. In 1985, Dr. Gilbert completed a report entitled *Chippewa Deer Hunting: Analysis of Results & Attitudes*. Pl. Exh. 106. That document clearly and explicitly states the cultural beliefs that prevent Tribes from extending their nighttime deer hunting season into January. More than 25 years before Dr. Heidi Stark wrote her expert report, Dr. Gilbert stated, after surveying Tribal members:

> Evaluation of Season.
> The tribes felt that there were aspects of the season [which ended on January 31, 1984] that needed to be modified to accurately reflect the established guiding principles. The most important of these was the traditional season. The tribes wanted to begin hunting at the firefly season (July) and hunt through midwinter (December). Hunting in January is unpleasant and potentially harmful to yarded deer. In 1983 the St. Croix band closed the season 1 month early to avoid this situation.

> The tribes felt that important traditional methods, such as shining and night hunting should be included in future agreements.
> . . . If hunting was permitted during a longer period and with more efficient methods, then female deer, the reproductive segment of the population, could potentially be negatively impacted.

Pl. Exh. 106.

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. Trans. at 2-P-32. And at various points in the State's CWD program, shooters were not required to, or chose not to wear blaze orange at night. Trans. at 2-P-32 (testimony of Chairman McGeshick); 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); Trans. at 2-P-35 to -36. Furthermore, as Chairman McGeshick and Jim Thannum stated, there are few State licensed hunters or trappers attempted to harvest 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, raccoons are far less abundant in the ceded territory than they are in the southern portions of the State, and the top counties for coyote hunting are outside of the ceded territory. Trans. at 5-P-62 to -63 (testimony of Chairman McGeshick); Pl. Exh. 157 (Wisconsin Department of Natural Resources, Trapper Education Student Manual, including chart showing that coyote and raccoon pelts are not prime in the month of November); Trans. at 3-A-23 to -34 (testimony of James Thannum).

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. Trans. at 2-P-32 9 (noting that wearing blaze orange would mark you as a Tribal member, because no other persons are required to wear blaze orange at night). 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. When the Wisconsin DNR sent letters to private landowners requesting their permission to conducting CWD nighttime shooting on their property, those efforts were sometimes met with threats. For example, one property owner returned the letter after writing on it: "Anybody steps on my property, I'll put a bullet in them." Pl. Exh. 88. Another wrote: "What a joke! Keep Off my property or be prepared to be shot at! DNR = Destroying Natural Resources." Pl. Exh. 89. 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.[19] 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 years. *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[20] 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. Spotters were only required in the early stages of the program

[19] *See also* Trans. at 4-A-14 to -15 (testimony of Chuck Horn indicating that there was much discussion within the CWD program about how to interact with neighboring property owners who were opposed to the program).

[20] 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.

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. Trans. at 3-P-157 to -158. Thus, in 2002, spotters were required for all shooters. Trans. 2-P-30 (testimony of Chairman McGeshick); Pl. Exh. 67 & 68 (CWD protocols from 2002 referring to spotters); Trans. at 3-P-147 to -148 (testimony of Chuck Horn). In 2003, spotters were only required if the sharpshooters were shooting from vehicles. Trans. 2-P-31 (testimony of Chairman McGeshick). They were not required if shooters were using ground blinds, tree stands, or other shooting locations. *Id.*; Pl. Exh. 69 (Feb. 13, 2003 CWD protocol noting that "[t]wo shooters will work together. One will drive and drop the other at their assigned shooting site. At the end of your shift, you will work together to drag shot deer to a location near the bait site"). *See also* Trans. at 3-P-138 to -139 (noting that spotters were used when CWD shooting involved shining and shooting from vehicles, but they were not viewed as necessary when shooting occurred from a ground blind, tree stand, etc.); Trans. at 4-A-10 (testimony of Chuck Horn stating the same). After 2003, spotters were never required for CWD shooting. Trans. at 2-P-31 to -32 (testimony of Chairman McGeshick); Trans at 3-P-147 (testimony of Chuck Horn); Pl. Exh. 70 & 71 (CWD protocols for 2004 and 2005). Despite the lack of spotters in the CWD program, Mr. Lawhern admitted that he believed that program was adequate to protect public safety. Trans. at 5-P-17 to -18.

James Thannum, Chairman McGeshick, and Chief Warden Fred Maulson testified 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 frequented by deer, because they have years of experience hunting in those locations. Trans. at 4-A-111 (testimony of Chief Warden Maulson); Trans. at 2-P-199, -

120 (testimony of James Thannum). They tend to be close to the reservations on which they live. Trans. at 4-A-112 (testimony of Chief Warden Maulson); Trans. at 2-P-118 (testimony of James Thannum). 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. Trans. at 2-P-30 (testimony of Chairman McGeshick). 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 established 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 26th day of August, 2013

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