IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; SOKAOGON CHIPPEWA INDIAN COMMUNITY; ST. CROIX CHIPPEWA INDIANS OF WISCONSIN; BAD RIVER BAND OF THE LAKE SUPERIOR CHIPPEWA INDIANS; and LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,

Plaintiffs,

v.

Case No. 74-C-313-C

STATE OF WISCONSIN, WISCONSIN NATURAL RESOURCES BOARD, CATHY STEPP, KURT THIEDE and TIM LAWHERN,

Defendants.

DEFENDANTS' POST-TRIAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR RELIEF FROM JUDGMENT

INTRODUCTION

In 1991, this Court entered its final judgment in this case, and the parties agreed not to appeal adverse rulings. Dkt. 329, ¶¶ 10-11; Def. Trial Ex. 609, 610 and 652. Although Fed. R. Civ. P. 60(b) is not to be used to simply re-litigate matters that were

resolved by the original judgment in a case (*Donovan v. Sovereign Sec., Ltd.*, 726 F. 2d 55, 60 (2d Cir. 1984)), or as "a second opportunity for the losing party to make its strongest case, to rehash arguments, or to dress up arguments that previously failed" (*Kustom Signals, Inc. v. Applied Concepts, Inc.*, 247 F. Supp. 2d 1233, 1235 (D. Kan. 2003) (internal citations omitted)), the plaintiff Tribes are attempting to use this rule to do just that.

At the end of the 1989 Deer Trial, the Tribes suggested that nighttime deer hunting "could be safe under certain conditions, such as in a baited, preselected location with the hunter in a tree stand or other elevated location,"[1] but the Court declined to consider this alternative scheme. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 740 F. Supp. 1400, 1423 (W.D. Wis. 1990) (*LCO VII*). Now, twenty-four years later, the Tribes are attempting to present a similar plan to this Court, and they suggest that the concepts incorporated into their new plan are new concepts.

Final judgments are intended to be final. A Rule 60(b) motion "is clearly *not* a substitute for appeal and must be considered with the obvious need for the finality of judgments." *Brown v. McCormick*, 608 F. 2d 410, 413 (10th Cir. 1979)(emphasis in original). The rule was "not meant to relieve any litigant of strategic or tactical decision which later proved to be improvident." *Lloyd v. Carnation Co.*, 101 F.R.D. 346, 348

[1] The Tribes were then suggesting the use of sharpshooting techniques. *See also* Def. Trial Ex. 671 at 14-15 (In 1989, Tribes' attorney asked State's hunter safety expert, Homer Moe, whether tribal use of sharpshooting type techniques (elevated stand, over bait) would make their night hunting plan safer, clearly establishing the Tribes' knowledge of such methods).

(M.D.N.C. 1984) citing *Good Luck Nursing Home, Inc. v. Harris*, 636 F. 2d 572, 577 (D.C. Cir. 1980) and *Ackermann v. United States*, 340 U.S. 193, 198, 71 S. Ct. 209, 95 L. Ed. 207 (1950)("There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from"). Instead, a Rule 60(b) motion "is an extraordinary remedy and is granted only in exceptional circumstances." *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F. 2d 1202, 1204-05 (7th Cir. 1984).

Exceptional circumstances are not present here; therefore, the Tribes' motion must be denied.

ARGUMENT

I. THE TRIBES HAVE NOT SHOWN THAT SIGNIFICANT FACTUAL OR LEGAL CHANGES RENDER CONTINUED ENFORCEMENT OF THE COURT'S FINAL JUDGMENT INEQUITABLE.

A. To Prevail, the Tribes Must Show That Significant Factual or Legal Changes Render Continued Enforcement of This Court's Final Judgment Prohibiting Night Hunting of Deer Inequitable.

Federal R. Civ. P. 60(b)(5) provides that a court may relieve a party from a final judgment when "'it is no longer equitable that the judgment should have prospective application,' not when it is no longer convenient to live with" its terms. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992). As discussed in previous briefing, *Rufo* established a two-part test for Rule 60(b)(5) motions. First, the moving party must demonstrate that "a significant change in circumstances warrants revision of the decree." *Rufo*, 502 U.S. at 383. It does so "by

showing either a significant change either in factual conditions or in law." *Rufo*, 502 U.S. at 384. If the moving party makes the first showing, the court then considers whether the proposed modification to the decree "is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 383. If the moving party does not make this first showing, the Court's analysis stops (*United States v. Krilich*, 303 F. 3d 784, 792 n. 9 (7th Cir. 2002), citing *Rufo*, 502 U.S. at 383), and the motion must be denied.

At issue during the Deer Trial was whether "the state's prohibition on shining deer is a narrowly drawn, non-discriminatory restriction on plaintiffs' hunting rights that is necessary to protect the safety of persons in the ceded territory," and the Court found that this prohibition "imposes a minimal infringement on plaintiffs' rights in comparison to the great danger night hunting presents to public safety." *LCO VII*, 740 F. Supp. at 1423.

The Court did not find, as suggested by the Tribes without citation, that "there were virtually no legal examples of nighttime deer shooting anywhere in the United States," or that the State's "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." Dkt. 373 at 3.

Nighttime deer hunting in Wisconsin continues to be prohibited because of the danger it presents to public safety, and the Tribes have not shown that the law has changed, or that the facts associated with the dangers associated with night shooting have changed, to make continued enforcement of the prohibition inequitable. Since the Tribes

have not met the first prong of the *Rufo* test, the Court's analysis stops and the Tribes' motion must be denied.

B. The Tribes' Motion Must be Denied Because They Have Not Shown That a Significant Change in Factual Conditions Related to the Night Hunting or Shooting of Deer Constitutes an Exceptional Circumstance That Renders Continued Enforcement of the Court's Final Judgment Inequitable.

1. The Tribes' nighttime shooting arguments have been a moving target.

During the trial and in their Post-Trial brief, the Tribes have placed a great deal of rhetorical emphasis on what they did or did not receive from the State in response to a May 15, 2013 document production request. The Tribes had asked for all documents the State may use to counter the Tribes' arguments that there has been a significant change in factual conditions related to the night hunting or shooting of deer. Dkt. 363 at 26. The Tribes arguments have evolved in response to evidence and arguments provided by the State. When the State showed that the Tribes were incorrect (for example, that nighttime shooting was in fact authorized by law under certain circumstances), the Tribes shifted their focus to the shooting programs, demanding that the State prove night shooting occurred, etc. In the process of shifting their focus to new areas of inquiry, the Tribes have sought to shift to the State their burden of showing factual or legal changes occurred, asking the State to prove that factual or legal changes have not occurred. This section sets forth this evolution to place the Tribes' evolving arguments in the proper context.

In their March 1, 2013 Motion for Relief from Judgment, the Tribes argued that at the time of the Deer Trial, "the State did not authorize any nighttime shooting of deer" (Dkt. 276 at 2), but "[o]ver the past 20 years, . . . nighttime shooting of deer has become commonplace." *Id*. at 3. As support for this contention, the Tribes noted that night shooting of deer "has been used to limit the spread of chronic wasting disease (CWD)," and it "has also been used as a tool to eliminate or cull problem or nuisance deer herds." *Id*. The Tribes also asserted that other tribes in other states have regulations that allow night hunting of deer, and that before 2000, the United States Department of Agriculture (USDA) was not allowed by law to shoot problem deer. *Id*. at 4-5. The Court has excluded testimony about what occurs in other states, and the Tribes dropped their USDA argument after the State showed that this argument was legally and factually incorrect.

In its response to the Tribes' Motion for Relief from Judgment, the State provided evidence showing that the Tribes' statement that "the State did not authorize any nighttime shooting of deer" in 1989 (or 1991[2]) was erroneous. The State noted that the Department of Natural Resources (DNR) or its predecessor agency has been authorized by statute to destroy deer found to be causing damage since 1917 (Def. Trial Ex. 505 (Wis. Stat. § 29.595 (1917)), and the Tribes do not dispute this. Dkt. 373 at 17.

The State provided evidence showing that the Wisconsin statutes and rules prohibiting shining ("the casting of rays of a light on a field, forest or other area for the

[2] The Tribes focus on the 1989 Deer Trial, but the final judgment they seek to reopen was entered on March 19, 1991.

purpose of illuminating, locating or attempting to illuminate or locate wild animals"), while in possession of a firearm, have long exempted law enforcement officers on official business and DNR (or predecessor agency) employees on official business. The Tribes do not dispute this, and acknowledge that they understood at the time of the Deer Trial that "deer could be shot at night . . . by a law enforcement officer or a [DNR] employee on official business." Dkt. 332, ¶ 5.

In response to the Tribes' argument that nighttime sharpshooting activities to cull deer were new, the State noted that deer had been shot over bait at the University of Wisconsin Arboretum in Madison, Wisconsin between 1958 and 1981, that the Arboretum maintained an elevated baiting site with a fixed lighting system for night shooting from 1974 until at least 1984, and that in the 1970s, DNR issued permits to landowners that authorized nighttime shooting of deer under the supervision of a DNR conservation warden or a county peace officer. Dkt. 284 at 9. The State also noted that it drafted standards for issuing wildlife damage control and nuisance control permits in 1989-90, and that the resulting permanent rule, Wis. Admin. Code ch. NR 12, was promulgated in 1990. *Id*. at 10.

The Tribes have reacted to the State's response by arguing that the State should be judicially estopped from providing evidence related to legal night shooting of deer by DNR or its agents, that the State should be barred from providing evidence related to destruction of deer under agricultural damage permits because it allegedly failed to supplement a 1988 discovery response, and that even if night shooting did occur prior to

1991, this should be discounted because DNR has not produced records proving that many deer were shot. The Tribes also argue that some of the night shooting that did occur was "illegal," so it should be disregarded. These arguments will be addressed in turn.

2. The Tribes' judicial estoppel argument must be rejected.

a. The Tribes mischaracterize the facts related to their estoppel argument.

As their first argument, the Tribes assert that the State should be prevented from arguing that night shooting of deer was ever authorized prior to 1991 based on the equitable principle of judicial estoppel. In support of this argument, the Tribes assert: "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 the State's attorney, Mr. Gabryziak, told the Court that there was no legal shining of deer anywhere in the State of Wisconsin." Dkt. 373 at 6, citing Pl. Trial Ex. 12. The Tribes go on to assert without citation that the Court relied on these alleged statements, and that "the Tribes obviously relied on these statements when not asking further questions on cross-examination." *Id*.

This argument mischaracterizes the trial transcript, and improperly equates "on-reservation shining" with any and all kinds of "night shooting." Mr. Christensen was asked by Attorney Rosenberg whether he had studied "the enhanced risk of gunshot accidents arising from deer shining, legal deer shining." Pl. Trial Ex. 12 at 2-130.

Attorney Gabrysiak objected to the question because it assumed that deer shining was legal, and he stated "to my knowledge, there is no legal deer shining in the State of Wisconsin." *Id.* Attorney Rosenberg clarified that he was referring to on-reservation shining, he clarified that he was asking if the relative dangers associated with that practice had been evaluated, and he said his question did not rest "on the assumption that there is legal deer shining present in the state at this time." *Id.* at 2-130 and 131. Mr. Christensen responded by stating: "I frankly don't know how you would set up that kind of situation, in a real life type environment to be able to get the information you're talking about. To the best of my knowledge, this type of activity is not permitted across the United States and I'm not aware of where we could look at the legal practice and use information from that to be able to . . . get at it." *Id.* at 2-131. Thus, Mr. Christensen did not testify that "there was no legal nighttime shooting of deer anywhere in the United States". Dkt. 373 at 6, emphasis added. He testified that to his knowledge, on-reservation style deer shining was not permitted anywhere in the country, so he would not know how one could study the relative dangers of the practice. The Tribes argue that this testimony "obviously" kept its attorneys from asking further questions (*id.* at 6), but this is not true: Mr. Rosenberg attempted to ask additional questions about "illegal deer shining," but objections to the form of the questions were sustained. Pl. Trial Ex. 12 at 2-132. Notably, the Tribes did not prove at the Deer Trial that on-reservation style shining was lawful anywhere.

On-Reservation style "shining," which the Tribes were seeking to do throughout the ceded territory through the Deer Trial, means hunting by shining the side of the road from a moving vehicle, and shooting deer that are illuminated and temporarily frozen by the light. Chairman McGeshick described on-reservation shining at the trial through the following exchange with his attorney:

> Q. And what method have you used to shoot deer at night on the reservation?
> A. We would drive around, shine and then shoot deer.
> Q. So you're driving your vehicle around and coming to a complete stop?
> A. Not always.

Dkt. 369 at 24. Chief Warden Maulson, who testified that he began night hunting on-reservation when he was 8 years old, stated that this hunting consisted of going out in a vehicle with his father and actively shining to look for deer. Dkt. 366 at 109. If they saw a deer, they would maybe shoot it. Dkt. 366 at 110.

b. The Tribes misapply the law of judicial estoppel.

As the Seventh Circuit has explained, "Judicial estoppel may apply when (1) the later position is clearly inconsistent with the earlier position; (2) the facts at issue are the same in both cases; (3) the party to be estopped convinced the first court to adopt its position; and (4) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *United States v. Christian*, 342 F.3d 744, 745 (7th Cir. 2003) *citing New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) and *United States v. Hook*, 195 F.3d 299, 306 (7th Cir. 1999). None of these factors apply here.

"Deer Shining" and "night shooting" are not the same thing. Thus, it is not inconsistent for the State to argue that on-reservation style shining is and has long been illegal, and to also state that DNR has long had the authority to shoot deer or authorize shooting of nuisance deer under certain circumstances. Both of these statements were true at the time of the Deer Trial, and both of these statements are true now.

As noted above, on-reservation style shining, where people hunt by shining the landscape, is the type of night hunting the Tribes were seeking to do through the Deer Trial. *LCO VII*, 740 F. Supp. at 1408. Shooting deer at night on a particular property pursuant to a permit or by an authorized law enforcement officer or DNR employee on official business is not the same as hunting by shining and shooting from a roadway toward whatever property lies adjacent to that road.

The facts at issue in the original case and in this motion to reopen that case are not the same. Whether the State prohibited deer shining was not an issue at the Deer Trial. The Court found that shining deer while a hunter is in possession of a firearm or bow was prohibited by Wis. Admin. Code § NR 13.30(1)(q) (*id*. at 1408), and the existence of this regulation does not appear to have been contested. Nor is the illegality of shining and shooting contested now. Dkt. 329, ¶¶ 13-16. The State did not "convince" the Court to accept an uncontested interpretation of state law. And since the State is not asserting an inconsistent position, the fourth factor does not apply, and the Tribes' estoppel argument must be rejected.

3. The Tribes' Fed. R. Civ. P. 37 argument must be rejected.

On January 8, 1988, the State responded to the Lac Court Orielles Band's First Set of Interrogatories in the regulatory phase of this case. Pl. Trial Ex. 13 at 1. In its response, the State began by stating that to the extent that the interrogatories seek information contained in the public records maintained by the DNR, the burden for ascertaining or deriving the information is the same for both parties, and therefore, the State invited the plaintiffs to inspect all such public records at DNR's offices. *Id*. at 2.

As quoted in the Tribes' brief (Dkt. 373 at 8), Interrogatory 24 asked the State whether it had developed a wildlife damage control program, and if it did, to describe that program. *See also* Pl. Trial Ex. 13 at 4. The Tribes did not ask whether DNR had the authority to shoot deer, or to shoot deer at night. *Id*. The State responded by stating it has had formal damage control program since the 1930s, it described its current Wildlife Damage Abatement and Claims program and provided a brochure for that program. Next, the response stated: "In addition, we have permitting authority to authorize the destruction of wild animals causing damage." *Id*. at 5 (emphasis added). Third, it noted that the State administered beaver damage subsidy funds through Wis. Stat. § 29.59. *Id*. at 5.

The Lac Court Orielles Band did not take issue with this response in 1988, and it did not depose Thomas Hauge, the DNR staff person identified as the person who prepared or participated in the preparation of the answer to this interrogatory. *Id*. at 3. The subsequent set of interrogatories served by the St. Croix Band prior to the Deer Trial

(June 30, 1989) contained no questions related to deer destruction permits. Def. Trial Ex. 538.

Now, the Tribes argue that no reasonable person should have understood the State's response to mean that it had permitting authority to authorize the destruction of deer as of January 8, 1988. They argue that given the State's answer to Interrogatory 24, "there was no way for the Tribes to know that permits were being issued to destroy deer, let alone shoot them at night." Dkt. 373 at 9. They base this argument on their reading of Wis. Stat. § 29.595(1) in conjunction with § 29.596, and argue that one could only reasonably understand that the sentence referencing permitting authority referred to Wis. Stat. § 29.596, entitled "Wild Animals Causing Damage," not also Wis. Stat. § 29.595.

Since 1975 and through January 8, 1988, these sections provided:

> 29.595(1) Damages caused by deer and bear. (1) Deer or Bear Causing Damage. Upon complaint in writing by the owner or lessee of any land to the department that 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 complaint are true, the department, by its agents, may capture or destroy such wild animals or issue permits to the owner or lessee to capture or destroy such wild animals. All such wild animals captured or destroyed by permit shall immediately be turned over to the authorized department agents who shall dispose of them as provided in s. 29.06.

Dkt. 329, ¶ 20 (1975 statutes); ¶ 44 (showing Wis. Stat. § 29.595(1) did not change until 1987 Act 399 was enacted in May 1988, Pl. Trial Ex. 35; ¶ 46 (showing Wis. Stat. § 29.596 was unchanged between 1975 and 1988). Since at least 1973, "wild animal" has

been defined by law as "any mammal, bird, fish, or other creature of a wild nature endowed with sensation and the power of voluntary motion." Def. Trial Ex. 507 at 1-2; Wis. Stat. § 29.001(90)(2011-12). So despite the Tribes' aggressive arguments about how they interpret the statutes, it does not necessarily follow that a deer destruction permit could not have been issued under Wis. Stat. § 29.596.[3]

The Tribes accuse the State of providing an incomplete and evasive answer to the 1988 interrogatory because the State did not identify "the statutory or regulatory authority for the issuance of deer destruction permits" or explain that its authority to issue permits under Wis. Stat. § 29.595 authorized permits to landowners. Dkt. 373 at 9. But the interrogatory did not ask for this information, and the Tribes have always had access to the current statutes and regulations. Again, if the Tribes thought the answer was incomplete or if they wanted more information, they could have followed up with the State, they could have moved to compel a more detailed response, and they could have deposed Mr. Hauge in 1988-89. They did not.

The Tribes also argue that the State should have supplemented its response to Interrogatory 24 pursuant to Fed. R. Civ. P. 26(3)(2)(B), which requires a party to supplement a response that is no longer true when a failure to amend "is in substance a knowing concealment." Dkt. 373 at 9-10. They argue the response should have been

[3] Had they asked to see DNR's records in 1988, the Tribes would have seen that DNR issued permits allowing landowners to shoot deer under Wis. Stat. § 29.595 as DNR's agents. See, e.g., Def. Trial Ex. 508 and 509.

supplemented when the law changed before the 1989 Deer Trial. *Id*. This argument fails because the statement at issue in the response to Interrogatory 24 continued (and continues) to be true: DNR had permitting authority to authorize the destruction of wild animals causing damage (including deer) throughout 1988 and 1989 (and thereafter). Wis. Stat. § 29.596 did not change between 1975 and August 9, 1989. Dkt. 329, ¶¶ 20, 46, 51. Beginning on August 9, 1989, Wis. Stat. § 29.59 authorized DNR to remove (defined to include shoot or destroy) or authorize the removal of wild animals causing damage.[4] *Id*., ¶¶ 56-57. As noted above, deer could be destroyed under Wis. Stat. § 29.595(1) until May 17, 1988, when deer were removed from that section and permits to destroy deer causing damage were authorized under Wis. Stat. § 167.34[5] (*id*., ¶ 45; Pl. Trial Ex. 35). Wisconsin Stat. § 167.34 was suspended on August 9, 1989 when Wis. Stat. § 29.59, which also authorized the destruction of deer, became effective. Dkt. 329, ¶¶ 52-59.

The Tribes' remaining arguments on pages 11 and 12 of their brief address shooting hours under Wis. Stat. § 167.34. They argue that the authorization to destroy deer "at any time" under this statute is ambiguous, that it should not be read to mean "at any time of day," and that the introduction of this allegedly ambiguous language should

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[4] This section also provides for the destruction of animals causing a nuisance, but the interrogatory asks only about damage control.

[5] The Tribes' argument on page 11 and in footnote 4 asserts, using a opinion in a Legislative Audit Bureau (LAB) report that was not admitted for its truth, that Wis. Stat. § 167.34 may have eliminated the ability of the DNR to kill deer causing damage. Even if the LAB report author's opinion was correct, the answer to the interrogatory also remains correct.

have triggered an obligation on the part of the State to supplement its response to Interrogatory 24.

Interpretation of Wisconsin statutes begins with the plain language of the statute, and if that language is plain and unambiguous, or capable of being understood by reasonably well-informed people, the analysis stops. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶¶ 45-47, 271 Wis. 2d 633, 663-64, 681 N.W.2d 110. Generally speaking, extrinsic evidence such as "legislative history need not be and is not consulted except to resolve an ambiguity in the statutory language, although legislative history is sometimes consulted to confirm or verify a plain meaning interpretation" of a statute. *Id.* at 666-667, *citing Seider v. O'Connell*, 2000 WI 76, ¶¶ 51-52, 236 Wis. 2d 211, 612, 612 N.W.2d 659, N.W.2d 659.

There is nothing ambiguous about the phrase "at any time," and it is clear from the legislative documents provided by the Tribes that prior to and leading up to the enactment of this legislation, farmers were seeking statutory authority explicitly allowing them to shoot deer at night. Regardless, the question of whether the hours for deer destruction permits changed or did not change in 1988 has no bearing on the Tribes' Rule 26 argument. Interrogatory 24, which was served in the regulatory phase, not the Deer Trial phase, of this case, did not ask about shooting hours for permits to destroy deer. It only asked about damage programs, and the State accurately stated that it issued permits to destroy animals causing damage.

The Tribes note that a party need not supplement discovery when a change "is known to his opponent." Dkt. 673 at 10. Even if the statutes had changed in a way that made the State's answer to Interrogatory 24 inaccurate, the changes to the wildlife damage program were statutory. The Tribes were represented by several attorneys who were obligated to know the relevant law, and there is no reason to assume they were not following the changes to statutes related to deer prior to the Deer Trial.[6] We do not know what their strategy was. We do not know whether they even cared about deer shooting permits when they were seeking to permit their members to engage in unregulated shining and shooting of deer. As noted above, a Rule 60(b) motion seeks "an extraordinary remedy and is granted only in exceptional circumstances." *C.K.S. Engineers, Inc.*, 726 F.2d at 1204-05. This alleged discovery issue helps illustrate the problems with second guessing a party's litigation strategy or advocating for a new strategy more than

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[6] The Tribes argue that Jim Zorn, who was working as a Policy Analyst (not litigation counsel), "had no idea that any nighttime shooting of deer was permitted under damage permits." Dkt. 373 at 13, *citing* Dkt. 370 at 27-29. But this is not what Mr. Zorn said. He testified that "we looked at the Wisconsin statutes and the Wisconsin administrative codes that would have established hunting hours and would have looked for exemptions to those hunting hours, you know, when you could shoot outside of them." It is not clear that he looked at Wisconsin's wildlife damage laws. Dr. Gilbert testified that at that same time he was working for GLIFWC and was aware that agricultural damage permits existed, but he did not pay much attention when they were discussed by the Deer Committee because they were "tangential" to the issues he was most focused on. Dkt. 368 at 71; *see also* Dkt. 368 at 107. Also at the same time, Thomas Maulson, who was a member of the Board of Directors for the Great Lakes Indian Fish and Wildlife Commission and who may already have been Chairman of the Lac du Flambeau Band in 1985 (Dkt. 368 at 98-99), had sent DNR Secretary Besadny a letter that appears to have addressed the potential impacts on Chippewa treaty hunting rights if DNR authorized farmers to shine and shoot deer causing crop damage (Def. Trial Ex. 523 at 2). The Tribes are no longer arguing that what they knew, when, is relevant to their Rule 60(b) motion. *See* Dkt. 337 at 6-7, which is incorporated by reference here. To the extent that they continue to suggest that no tribal authorities or attorneys knew what the law provided in the 1980s or how it was changing, they have not proved that this alleged lack of knowledge is actually true, and in fact the record evidence shows it is not true.

twenty years after a case has closed. The Tribes' arguments seeking to rewrite their interrogatories and their attempts to rewrite history must be rejected.

4. The fact that deer can be shot at night under certain circumstances does not constitute a "changed circumstance" since 1991 because such shooting has long been authorized.

As noted above, the Tribes' Rule 60(b) motion argued that "the State did not authorize any nighttime shooting of deer" at the time of the Deer Trial but such shooting "has now become commonplace." In response, the State provided evidence showing that night shooting had long been authorized under certain circumstances. The State did not argue, and the Tribes have not shown, that such shooting has become "commonplace." Instead, it argued that shooting of problem deer was authorized and permitted prior to the final judgment, just as such shooting has been authorized (CWD sharpshooting) and permitted (nuisance permits) since then.

In section I. B. of their Post-Trial Brief, the Tribes argue that even if nighttime shooting of deer was authorized before the Deer Trial, such shooting was an "extremely rare" occurrence. They provide no legal support for the suggestion that there is a Rule 60(b) standard requiring that an activity authorized by law need to occur with a certain degree of frequently in order to be considered relevant to the motion. Instead, they only contend that the State had argued during the preliminary injunction phase of this case that few wolves were likely to be hunted at night compared to the number of deer that would be hunted under the Tribal plan. The Tribes then create a historical framework and a deer

control priority system that are not supported by the record, they discount and attempt to discredit the nighttime deer shooting they must admit occurred in the University of Wisconsin Arboretum, they attempt to shift the burden of production and persuasion to DNR to show that night shooting occurred with an unspecified "adequate" degree of frequently before 1991, and they present their interpretations of deer shooting statutes and rules over time to distract the Court's attention from what was actually permitted by law at the time of the 1989 Deer Trial and the 1991 Final Judgment. Each of these arguments will be addressed in turn.

a. The Tribes mischaracterize problem deer control options that were used in the 1980s and before.

The Tribes misstate the trial testimony as it relates to deer control in the 1980s. First, they assert that "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 that prohibited hunting." Dkt. 373 at 13. This statement is not accurate.

Dr. Gilbert testified that the 1984 Wildlife Management Institute Book "White-Tailed Deer Ecology and Management" was "an authoritative book on white-tailed deer management" (Dkt. 368 at 96), and this book provided:

> In areas where white-tails traditionally are not hunted, such as parks, residential communities, golf courses, airports and other open spaces in urban/suburban settings, the deer can become a serious nuisance when unregulated population growth results in extensive feeding pressure on plantings as well as native vegetation.

Def. Trial Ex. 566 at 650.

In addition, another Tribal expert, Tom Kroeplin, testified that deer were causing crop damage problems in Adams County between 1980 and 1984 when he was stationed there as a DNR warden. Dkt. 366 at 193-94. William Ishmael, who published articles about problem deer herds in the 1980s, testified that "problem deer" refers not only to those that cause damage to agricultural crops, native vegetation, ornamental landscape and shrubbery, but also to deer that cause problems in terms of the increased incidence of car/deer collisions when there is a "high density deer population in a highly developed area." Dkt. 366 at 57-58.

b. The Tribes' emphasis on Dr. Gilbert's literature review to establish when deer shooting programs began is misplaced.

The Tribes next argue that "the first" academic publication about overabundant deer was a chapter in a 1981 book (Dkt. 373 at 13-14, *citing* Dkt. 368 at 58 and Pl. Trial Ex. 7 at 19), but Dr. Gilbert did not testify that this was the first book on the topic. In his report, he identified this as "one of the early attempts to shed light on the issue of overabundant resources" (Pl. Trial Ex. 7 at 19), and at trial, he said: "In 1980, there was a book that was written that described overabundant mammals…" Dkt. 368 at 58. He testified that in looking for sources on overabundant deer prior to 1989 in the literature, he found only this book and two articles. *Id.* at 59. Clearly, his search was not exhaustive, as he did not refer to the Crop Damage and Control chapter from the authoritative 1984 book on White-tailed Deer Ecology, quoted above, and his report does not reference this chapter or Mr. Ishmael's 1984 article, "Economics of an Urban Deer

Removal Program". Def. Trial Ex. 555; (*See* Pl. Trial Ex. 7 at 19, 21-23). But in any event, management of problem deer was not driven by academics (Dkt. 366 at 71), so when and whether academics chose to write articles of books does not define the scope or timeframe for any deer management method.

c. The Tribes' suggested deer control technique hierarchy is not supported by the testimony.

The testimony provided during the trial does not support the Tribes' contentions that nighttime shooting of deer was "extremely rare" prior to 1989, or that there was a "deer management priority system that placed nighttime shooting of deer as a last resort." Dkt. 373 at 14. Contrary to the Tribes' assertion, Mr. Ishmael did not agree "that nighttime shooting of deer was an extremely rare occur[ence] in Wisconsin prior to the 1989 deer trial." *Id*. Instead, he gave the following answers to the following questions:

> Question: Is it fair to say that nighttime sharpshooting of deer was a rare occurrence prior to 1990?
>
> Answer: I guess relative to what it is now, yeah. Yes.
>
> Question: So now is it fair to say your opinion is that nighttime sharpshooting is used much more frequently to control deer populations?
>
> Answer: It is now compared to what was, you know, the scale back in the 1980s.

Dkt. 366 at 73. Even if nighttime sharpshooting were more common now, that would not mean that it is inequitable for the State to continue to prohibit night hunting of deer.

With respect to the proposed hierarchy in the Tribes' brief, Dr. Gilbert did not testify that "deer were managed almost exclusive through non-lethal abatement techniques such as fences." Dkt. 373 at 14 (*citing* Dkt. 368 at 65-66). Instead, when

asked questions about deer abatement, which he defined as management options "besides killing the deer or trapping them and moving them," he said that "a common form of deer abatement would be to fence an area" (Dkt. 368 at 65), then he said that he thinks abatement is preferable to killing deer (Dkt. 368 at 66). The Tribes' other reference is to their Exhibit 14, a pamphlet that describes Wisconsin's wildlife damage abatement program. It does not address lethal versus non-lethal options. Pl. Trial Ex. 14.

The Tribes argue, citing Dr. Gilbert and Mr. Ishmael, for the following deer control technique hierarchy: first, expanded hunting; second, non-lethal controls; and "[f]inally, if all else failed," or "as a last resort," lethal controls such as shooting. Dkt. 373 at 14. The citations do not support the argument. Dr. Gilbert, who testified that deer damage was not his area (Dkt. 368 at 71), testified that public hunting, trap-and-move, contraception, and sharpshooters were control options ("they tried lots of different methods"). Dkt. 368 at 60, 61 and 63. He stated that he thought public hunting was preferable, but acknowledged that "it fails a lot of times" and is often not feasible in suburban areas. *Id*. at 60. Mr. Ishmael did not testify that there was a hierarchy of control methods either. Instead, he stated that resource managers provide a "list of several options that communities can consider." Dkt. 366 at 60, 61, 75 and76. Warden Kroeplin's testimony that when he was a DNR warden from 1980 to 1984 he shot deer at night on farms (Dkt. 366 at 194-95) suggests that shooting was sometimes the first or only option. The University of Wisconsin reported that in its Fall 1987 Arboretum

Director's report that "[s]hooting is in widespread use as a deer population management technique." Def. Trial Ex. 532 at 1, 10.

d. Night Shooting has long been authorized at the UW Arboretum.

The Tribes acknowledge that lethal control of deer was considered in the Village of River Hills prior to 1989 (Dkt. 373 at 15), and it is undisputed that deer were legally shot at night in the UW Arboretum prior to the Deer Trial. It is undisputed that 110 deer were shot over bait between 1958 and 1981, and 35 additional deer were shot over bait during the winter of 1981-82. Def. Trial Ex. 511 at 75; 555 at 395. The available documents do not show how many deer were shot during the day or at night, but it is undisputed that many deer had been shot at night (Dkt. 366 at 27, 101-02), and that some of these had been shot under a fixed lighting system. *Id*. at 27, 37, 40-41.

The Tribes argue that all of the nighttime shooting done at the Arboretum was illegal because a 1980 statute prohibited the shining and shooting of deer by persons other than peace officers, DNR employees or persons authorized by DNR to conduct a game census. Dkt. 373 at 16, n. 5; Dkt. 329, ¶ 14. Mr. Ishmael testified that Al Koppenhaver, a DNR conservation warden who was identified in a portion of a 1978 Arboretum Director's report, shot deer at night in the Arboretum. Dkt. 366 at 35, 38, 40-41. As a conservation warden, Mr. Koppenhaver was exempt from the statutory shining prohibition. University of Wisconsin police were also exempted from the shining prohibition, and as the Tribes note, the Arboretum's 1987 permit provides that these

officers could shoot deer at the Arboretum after normal hunting hours. Def. Trial Ex. 533. The Tribes take issue with nighttime shooting done by Mr. Ishmael and the other individuals who shot deer during 1981-82, and argue that they should not have been allowed to shoot deer at night. Mr. Ishmael testified that they were required to contact the University of Wisconsin police before and after engaging in nighttime shooting activities, and that the field-dressed deer that they shot were tagged and given to the DNR. Dkt. 366 at 42-44.

The Arboretum permit in effect from October 23, 1987, to April 30, 1988, was issued pursuant to Wis. Stat. § 29.595 and allowed shooting of deer from one hour before sunrise until one hour after sunset without the use of artificial lights. Def. Trial Ex. 533 at 2. As noted in the preceding paragraph, only University of Wisconsin police were authorized to shoot deer during the hours of darkness (*id*. at 3) and these officers were exempt from the anti-shining prohibition in Wis. Stat. § 29.245. The Arboretum's Fall 1987 Directors Report confirms that night shooting is done there by authorized personnel: "Previous shooting strategies used in the Arboretum have proven quite safe, especially night shooting. Among shooting techniques, night shooting at a bait station has been advocated as being the most effective. Currently, the Department of Natural Resources allows shooting under lights only by DNR employees or uniformed officers while on duty." Def. Trial Ex. 532 at 11.

The Arboretum permit in effect from January 1, 1989 to December 31, 1989 was issued pursuant to Wis. Stat. § 167.34 and allowed shooting of deer "at any time except

during the open season for hunting deer with firearms." Def. Trial Ex. 536 at 5. This permit did not authorize any person to shine and shoot deer, providing: "This permit does not authorize the shooting of deer from a vehicle, the shooting [of] deer with the aid of artificial light, or the transportation or possession of a loaded or uncased firearms in a vehicle." *Id.* While the Tribes vigorously argue that "at any time" does not mean "day or night," this interpretation must be rejected because it contradicts the plain meaning of the statute as discussed above. This permit was in effect at the time of the Deer Trial.

The Tribes emphasize that the cover letter for the Arboretum's 1990 permit states that DNR legal services had advised the Area Wildlife Manager "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. Trial Ex. 40 at 1. However, just because DNR did not allow night shooting under this particular permit did not mean that it could not do so. Effective August 9, 1989, when Wis. Stat. §§ 29.595 and 29.596 were replaced by Wis. Stat. § 29.59, the state began authorizing two different kinds of shooting permits: those resulting from damage complaints and those resulting from nuisance complaints. See Def. Trial Ex. 567; Dkt. 329, ¶¶ 54-59. When the statute was changed, Wis. Stat. § 29.59(3) limited hunting hours for permits issued pursuant to damage complaints to "daylight hours," which were defined as from one hour before sunrise to one hour after sunset. *Id.* Wisconsin Stat. § 29.59(4) imposed no hunting hour restrictions on permits issued pursuant to nuisance complaints (nuisance permits). *Id.* Apparently, the 1990 permit was issued under Wis.

Stat. § 29.59(3), not Wis. Stat. § 29.59(4).[7] It is clear from the next permit the State found, dated February 22, 1993, that DNR subsequently issued nuisance permits with no hunting hour restrictions to the Arboretum. Def. Trial Ex. 547 at 1 (shooting allowed until 10 p.m. during the closed season for hunting deer with a gun).

The Tribes fault the State for failing to produce additional permits that were issued to the Arboretum and additional documentation of the activities that took place there. They also vigorously attempted to exclude the few documents related to the Arboretum that DNR did find. *See, e.g.*, Dkt. 365 at 122; Dkt. 366 at 34-38. The Tribes do not dispute that DNR has a ten-year document retention policy. Dkt. 329, ¶ 49. Nevertheless, they seek to shift the burden of proving what happened, when, in the 1980s to the State. They argue that because DNR did not produce more permits and other documents (and because not all of the documents related to the Arboretum were admitted), the Court must assume that additional permits were never issued. These arguments underscore the problems associated with filing a Rule 60(b) motion more than twenty years after a case is closed. Documents do not exist, potential witnesses are no longer available, and the people who are still around have difficulty remembering the details of what happened twenty-five or more years ago. It would be impossible at this point in time to document all relevant evidence from the 1980s. But it is also unnecessary. The Tribes bear the burden of showing there has been a change in circumstances since 1991. They claimed

[7] The details related to this permit are unclear because the exhibit only contains the cover letter and page 4 of the permit.

that no night shooting was authorized, and the State has shown that night shooting was in fact authorized. The Tribes' motion must therefore be denied.

e. The history of deer shooting permits in Wisconsin shows that night shooting has long been authorized in certain circumstances.

The Tribes devote twelve pages of their brief to arguments about agricultural damage permits and how the statutes and rules authorizing DNR or its agents and farmers or their agents to shoot deer under certain conditions have changed over time. The Tribes argue that it is difficult to address these permits "because the State has continually changed its claims about when such shooting occurred and under what authority" (Dkt. 373 at 16 (emphasis removed)), when it is the authority for deer shooting permits that has changed several times. The Tribes attempt to track the history of state statutes authorizing the destruction of deer causing damage from 1917 to the present. Although the history of the program is interesting, and although the selected documents the Tribes found at the Historical Society tell part of an interesting story and invite a variety of arguments, most of this story is not relevant to the motion before this Court.

Here is what is relevant to the Tribes' motion. Beginning in 1917, the predecessor agency to DNR was authorized to capture or destroy deer causing damage to private property. Wis. Stat. § 29.595 (1917); Dkt. 329, ¶ 17. In 1949, Wis. Stat. § 29.595 was amended to provide that the "commission by its agents" may capture or destroy deer. Wis. Stat. § 29.595 (1949). In 1957, the Legislature adopted Wis. Stat. § 29.596, which authorized DNR's predecessor agency to issue permits allowing landowners or lessees to

capture or destroy wild animals found to be causing damage. Dkt. 329, ¶ 19. The substance of Wis. Stat. §§ 29.595 and 29.596 did not change between 1949 and 1957, respectively, except to substitute the DNR for the Conservation Commission. *Id*., ¶ 20.

DNR found and produced two shooting permits from 1974-75 that allowed night shooting of deer under the supervision of a DNR conservation warden or a local law enforcement officer. *Id*., ¶ 49. These permits were issued under Wis. Stat. § 29.595 for damage being done at an apple orchard. Def. Trial Ex. 508 and 509. In the early 1980s, other farmers were issued permits that allowed them to shoot deer at night. Dkt. 366 at 194-95. As noted above, the Arboretum's 1987 permit was issued under Wis. Stat. § 29.595.

DNR field biologists or wildlife biologists are the people who are charged with issuing the shooting permits. Dkt. 366 at 130-31; Dkt. 365 at 81. As DNR Secretary Besadny explained in 1985, "Each complaint is investigated on a case-by-case basis by field staff authorized to exercise their judgment and take action they deem necessary or reasonable." Def. Trial Ex. 514 at 3. While some biologists issued permits allowing night shooting in the early 1980s, as noted in the preceding paragraph, others did not. Dkt. 366 at 128, 131-32, 133-34 (Mr. Hauge issued five or six shooting permits between 1982 and 1984, but none of these allowed shooting at night).

The DNR did not have any person coordinating the wildlife damage program until 1985, when Mr. Hauge was appointed to a newly created Animal Damage Coordinator position. Dkt. 366 at 135. In February 1985, DNR adopted internal directives concerning

procedures to authorize persons to destroy deer causing damage as part of its Wildlife Damage Handbook. Dkt. 329, ¶ 21. These procedures clarified that no person authorized as DNR's agent to shoot deer under Wis. Stat. § 29.595 may violate Wis. Stat. § 29.245 (the shining prohibition) or Wis. Stat. § 29.224 (prohibiting the possession of a loaded or uncased weapon in a vehicle or shooting from a vehicle). *Id.* In addition, the Handbook provided: "The agent may not be authorized to shoot during the period from one hour after sunset to one hour before sunrise." *Id.* In subsequent correspondence with legislators who required that the Handbook provisions be promulgated as a rule, Secretary Besadny explained that the first two prohibitions are based on the clear language of the statutes, and the third was based on safety concerns. Def. Trial Ex. 514 and 523.

Secretary Besadny acknowledged that while some DNR employees had authorized farmers to shine and shoot deer, this was not authorized by the Department. Def. Trial Ex. 523. However, it does not follow, as the Tribes suggest, that nighttime shooting was not authorized under Wis. Stat. § 29.595 in the 1980s. Dkt. 373 at 21. Persons exempt from the shining prohibition were still authorized to shoot deer at night pursuant to this statute, just as Mr. Kropelin was authorized to shoot deer at night when he was a DNR Conservation Warden.

DNR Enforcement Division Administrator George Meyer very publicly explained in his testimony to a legislative committee, "The shining statute authorizes state employees to shine at night to carry out the state's deer management responsibilities," and the DNR had hired "limited term employees to shine and shoot deer at night in those

situations where other abatement efforts are unsuccessful." Def. Trial Ex. 518 at 4; Dkt. 329, ¶ 26; Def. Trial Ex. 527 at 2; Dkt. 329, ¶ 35. Three limited term employees shot deer at night in 1985 in Door County, Manitowoc County, and Oconto County. Def. Trial Ex. 529 at 5; *see also* Dkt. 366 at 139-40. In addition, as noted above, the 1987 Arboretum permit allowed campus police to shoot at night pursuant to Wis. Stat. § 29.595. Def. Trial Ex. 533; see also Def. Trial Ex. 532 at 11 (1987 Arboretum Report noting that at that time, shooting at night under lights may only be done by DNR employees or uniformed officers on duty).

In 1986, the Legislature passed a bill that would have allowed a landowner or lessee to shoot deer causing damage at night, but Governor Anthony Earl vetoed this bill, explaining:

> I am vetoing Assembly Bill 439 because this bill allows night shooting with the use of artificial light which creates safety and administrative problems. I am aware that wildlife damage to agricultural crops is a major problem, but Assembly Bill 439 is not the desirable solution.
>
> Shooting at night with the use of artificial light is dangerous. The artificial light shining on the deer effectively impairs the ability to see objects behind the target deer. High caliber ammunition used in deer hunting travels a considerable distance and can easily cross property lines and roads. Assembly Bill 439 does contain a provision which requires notification of all residents within a one mile radius before nightshooting and shining is allowed. This notification requirement is not adequate to ensure safe conditions, nor is it enforceable.
>
> Assembly Bill 439 prohibits the Department of Natural Resources from placing any limitations on shooting except during the state gun deer season. Under current law, the Department limits the permits by restricting the number of people shooting deer and limiting the number of deer to be taken. Assembly Bill 439 effectively eliminates the Department control over shooting permits, hours during which the permit can be used, and number of deer taken. This impedes the Department's ability to manage herd levels and the wildlife damage program. In addition, the bill does not establish any threshold amount of damage which must be met before a permit is issued.
>
> . . .

> The Department already issues daytime shooting permits to farmers to control crop damage, and if the situation warrants it, night shooting is performed by the Department if that assistance is requested.

Def. Trial Ex. 531; Dkt. 329, ¶ 39. Governor Earl left office January 5, 1987, and Tommy G. Thompson became Governor. *Wisconsin Blue Book* 708 (2011-12). The Legislature then adopted Wis. Stat. § 167.34, the statute discussed above which allowed a landowner to shoot deer allegedly causing at least $1000 a year in damage "at any time." Def. Trial Ex. 534; Dkt. 329, ¶ 45. At least 11 permits were issued under this statute (*id*., ¶ 61), and these permits were in effect until December 31, 1989 (Def. Trial Ex. 536), thus for the duration of the Deer Trial.

The Deer Trial took place in August 1989. *LCO VII*, 740 F. Supp. at 1401. As noted above, Wis. Stat. § 167.34 remained in effect until August 9, 1989,[8] when the Legislature repealed Wis. Stat. §§ 29.595 and 29.596 and created Wis. Stat. § 29.59. Def. Trial Ex. 539; Dkt. 329, ¶ 53. As also noted above, Wis. Stat. § 29.59 authorized agricultural damage permits that restricted removal activities to daylight hours (Wis. Stat. § 29.59(3)(c), and nuisance permits that contained no restriction on hours (Wis. Stat. § 29.59(4)).[9] *See also* Def. Trial Ex. 567. The Tribes argue that Wis. Admin. Code ch. NR 12 (1990) set shooting permit hours to be from one hour before sunrise to one hour after sunset outside of the gun-deer season (Dkt. 373 at 27), but this standard was

[8] The authority to issue permits under this statute was briefly revived in 1991 (Dkt. 329, ¶ 52), but that is not relevant here.

not applied to nuisance permits. *See* Def. Trial Ex. 547 (allowing shooting at the Arboretum until 10 p.m.); see also Dkt. 365 at 115-17 (hunting hours do not apply to nuisance permits). The Tribes fail to acknowledge that these hours are in fact outside of normal hunting hours (Dkt. 369 at 67), that the section they quote was entitled "Conditions of permits to shoot deer causing damage" (Def. Trial Ex. 543), and that the code was amended to reflect the statutory language related to nuisance permits in 1994, when Wis. Admin. Code § NR 12.10(4) was created to provide:

> Nuisance Approval. An applicant meeting the approval criteria described in sub. (2)(a)(d) and (f) may be authorized to remove wild animals causing a nuisance under conditions the department considers reasonable.

Dkt. 329, ¶ 71 (emphasis added).

Thus, despite all of the Tribes' arguments to the contrary, the evidence has shown that the shooting (including nighttime shooting) of problem deer was authorized and permitted prior to the Deer Trial and prior to the final judgment in this case. Consequently, the shooting of deer authorized between 2002 and 2007 through DNR's CWD eradication program and authorized through nuisance permits does not constitute changed circumstances warranting reopening this Court's final judgment.

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[9] While night shooting is authorized, nuisance permits do not allow permittees to use an artificial light when shooting at night. *See, e.g.*, Def. Trial Ex. 548.

f. Hunting deer at night is still dangerous, so the Court's final judgment must be left unchanged.

In their brief, the Tribes have attempted to shift the burden of proof onto the State ("in the end, the State has only established . . ." (Dkt. 373 at 28)), and they attempt to create a complicated standard based on the number of deer killed under specific authorizations at different points in time in order to argue that the world has changed so significantly that they should be permitted to shoot deer at night on any open land in the ceded territory forever. They argue that up to a dozen nuisance permits are now issued a year (*id*. at 4), when, as established above, at least eleven Wis. Stat. § 167.34 permits were in effect at the time of the Deer Trial. They argue that "thousands of deer were shot at night" during the CWD eradication program (*id*. at 3), though the actual number of deer shot during the day or at night is unclear, and the program ended more than six years ago. The evidence clearly establishes that night shooting of deer has been and continues to be authorized under certain circumstances in Wisconsin. But it is also undisputed that nighttime hunting of deer outside of these circumstances is not authorized in Wisconsin.

As the Court noted in *LCO VII*, if a deer hunter shooting at "approximately the same plane" as a deer "missed, the bullet or arrow would travel through the deer and do damage to persons or property behind the deer. Such shooting violates a fundamental precept of hunting: that the hunter be able to identify his or her target and what lies beyond it before firing a shot or loosing an arrow." *LCO VII*, 740 F.Supp. at 1408. After the first trial in this case, the Court found:

> As the testimony at trial established, night hunting with high caliber weapons poses significant risks. Hunters cannot see beyond their targets to know whether a campsite or home is nearby or whether there are people in the area. Yet the force and range of their ammunition or arrows is such that people or objects far away from the hunter can be killed or badly hurt. To release a high caliber bullet or an arrow capable of killing a deer without knowing exactly what is behind the intended target is an obvious violation of the most basic hunting rules.

LCO VII at 1423. As discussed in greater detail below, the Tribes' regulations do not prevent shooting on approximately the same plane as a deer, so the risks identified by the Court in 1990 are still risks today.

The Court found in 1990 that the State's "prohibition on shining deer is a narrowly drawn, non-discriminatory restriction on plaintiffs' hunting rights that is necessary to protect the safety of persons in the ceded territory. It imposes a minimal infringement on plaintiffs' rights in comparison to the great danger night hunting presents to public safety." *Id.*

The Court's findings are as true now as they were in 1990, and it is not inequitable for its ruling to continue in full force and effect now and in the future. Night hunting poses significant risks, citizens of Wisconsin who are not members of the plaintiff Tribes are not permitted to hunt deer at night, and continuing to prohibit the plaintiffs from hunting deer at night is a non-discriminatory restriction that imposes a minimal infringement on the plaintiffs' rights in comparison to the great danger night hunting presents to the safety of Tribal members and to the safety of other people in the ceded territory.

C. The Tribes have not shown that Wisconsin's brief night wolf hunting season constitutes a significant change in factual conditions that renders continued enforcement of the Court's final judgment inequitable.

In their March 1, 2013 Motion for Relief from Judgment, the Tribes argued that because the Wisconsin Legislature authorized a nighttime wolf hunt in 2012, that must mean that it is safe to hunt big game species at night with high caliber weapons. Now, they argue that since nobody was shot during the brief 2012 season, that means that the rules in effect at that time were adequate to protect public safety. Dkt. 373 at 28. This argument is not supported in the Tribes' brief, and is not supported by the testimony of the State's safety experts.

Neither DNR Law Enforcement Division Administrator Timothy Lawhern nor Chief Warden Randall Stark testified that the wolf hunt was "safe." At the preliminary injunction hearing, Mr. Lawhern testified that "hunting is inherently dangerous," that DNR was not given a choice regarding whether or not to issues rules authorizing the night hunting of wolves, that he was not asked to give input regarding DNR's rules, and that he did not know if any other safety experts were consulted when those rules were drafted. Dkt. 271 at 14-15. Although Chief Warden Stark responded affirmatively to a question at the preliminary injunction hearing regarding whether the wolf rule was "safe," he subsequently clarified that he and other wardens can never declare something "safe" – they can only attempt to assess and minimize risk. Dkt. 367 at 66-67. Thus, the Tribes' arguments that the 2012 night wolf hunt was a new example of safe night hunting must be rejected.

But before the Court even considers the Tribes' safety arguments relative to nighttime wolf hunting, it must first find that the Tribes have shown the 2012 nighttime wolf hunt constitutes a "significant change in circumstances" that warrant modification to this Court's final judgment. *Rufo*, 502 U.S. at 383. The Tribes do not argue in their Post-Trial Brief that the 2012 night wolf hunt constitutes a changed circumstance warranting revision of this Court's final judgment. Dkt. 373 at 2-28. They only incorporate by reference arguments made in prior briefs (*id*. at 1), argue that the wolf population increased to a level which caused the federal government to remove wolves from the threatened and endangered species list (*id*. at 3), and argue that "up to 1160 members of the public" were authorized "to attempt to shoot wolves at night" (*id*. at 4), even though that number represents the total number of available wolf licenses (Dkt. 329, ¶ 147), not the number of people who had not yet taken a wolf and were therefore still permitted to hunt wolves on the day after the 2012 gun-deer season, when night hunting was first allowed. *Id.*, ¶¶ 155-56.

The Tribes did not and cannot show that the 2012 night wolf hunt constitutes a changed circumstance warranting revision of this Court's final judgment. "Change" is defined as "an alteration; a modification or addition; substitution of one thing for another." *Black's Law Dictionary* 231 (6th ed. 1990). A change is something new or different; a changed circumstance is an ongoing difference. The statutory provision allowing wolf hunting at night was removed from law effective July 2, 2013 (Dkt. 329, ¶ 164); thus, the brief time period during which there was legal night hunting of wolves

(from November 26 to December 23, 2012 (*id*., ¶ 149)) was a brief aberration, not a changed legal or factual circumstance. Further, this statutory change was made after the Tribes filed the briefs they incorporate by reference, and they do not address this change in their post-trial brief.[10] Wolf hunting and deer hunting are not the same. Dkt. 368 at 93 (Dr. Gilbert testified that it is easier to hunt deer at night, but he sees no advantage to hunting wolves at night); Dkt. 366 at 200 (it is easier to shoot a deer at night than during the day, but this is not true for wolf hunting). The Tribes have not demonstrated that the 2012 wolf hunt constitutes a changed circumstance warranting revision of this Court's final judgment. Accordingly, the State respectfully requests that the Tribes' motion be denied.

II. EVEN IF THE TRIBES DID SHOW THAT SIGNIFICANT FACTUAL OR LEGAL CHANGES RENDER CONTINUED ENFORCEMENT OF THE COURT'S FINAL JUDGMENT INEQUITABLE, THEY HAVE NOT SHOWN THAT THEIR NEW REGULATIONS ARE SUITABLY TAILORED TO CHANGED CIRCUMSTANCES OR ADEQUATE TO PROTECT PUBLIC SAFETY.

A. The Tribes do not and cannot satisfy the second *Rufo* standard because the fact that nighttime deer hunting is not safe has not changed.

The Tribes' efforts to alter this Court's final judgment to allow their members to hunt deer at night throughout the ceded territory was "triggered" by the enactment of

[10] To the extent that the Court considers the Tribes' prior briefs, the State asks the Court to consider the State's briefs in opposition as well.

Wisconsin's wolf hunting law. Dkt. 370 at 35. GLIFWC Executive Director Jim Zorn characterized this law as presenting an "unequal opportunity" even though Wisconsin does not have a nighttime deer hunting season for other state citizens (*id.*), and even though tribal members could have engaged in wolf hunting under that statute. *See* Pl. Trial Ex. 121 at 10 (Tribes were entitled to 50% of the wolf quota in 2012). The Tribes' night hunting work group created regulations based on the information its members collected, based on Chairman Chris McGeshick's recollection of the DNR's CWD sharpshooting protocols, which were based on his participation during three nights in one week during March 2003 (Dkt. 363 at 66; Dkt. 369 at 41), and based on documents that Mr. McGeshick kept after he retired from DNR. Dkt. 373 at 31.

The Tribes subsequently incorporated components of other hunting or shooting programs into their regulations and training materials, and they made some revisions to their proposal after receiving documents and feedback from DNR. Dkt. 373 at 31. Now they ask the Court to find their regulations "suitably tailored to changed circumstances" and "adequate to protect public safety" in comparison to the 2012 nighttime wolf hunting regulations that are no longer in effect, certain protocols of the 2002-07 CWD sharpshooting program that have evolved and improved over time (Dkt. 369 at 82-83; Dkt. 370 at 76), and in comparison to "components of the State's nighttime deer damage nuisance permits" (Dkt. 373 at 32), even though different standards apply to damage permits and nuisance permits, even though damage permits only authorize shooting

between one hour before sunrise to one hour after sunset, and even though damage permits do not authorize people to shoot deer on public land.

The Tribes' analytical framework, which compares and contrasts elements of the various programs, takes these elements in isolation, emphasizes unsupported, irrelevant, distracting and misleading information,[11] and invites this Court to rewrite the Tribes' regulations instead of denying the motion, sets forth the wrong framework for this Court's analysis. Night hunting of deer has not become "safe" and cannot be made safe (Dkt. 366 at 221), so there are no changed facts the Tribes can "suitably tailor" their requested relief to address. Night hunting has not become legal, so the Tribes cannot "suitably tailor" their requested relief to other laws. To the contrary, the relevant facts have not changed, and the concerns raised by the Court in 1990-91 remain concerns today.

As discussed and quoted above, this Court explicitly expressed its concern that a high caliber bullet shot at the same plane as a deer could miss its target and travel past that target toward "people or objects far away from the hunter," and that such persons

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[11] For example, the Tribes emphasize when Tamara Ryan first shot a rifle in an apparent attempt to discredit her as a sharpshooter (Dkt. 373 at 32) without establishing whether she ever in fact missed a deer that she shot at. They suggest that Brad Koele may not be a competent shooter (*id*. at 33) without addressing his hunting experience. They devote several pages to a discussion of whether blaze orange should be required for night hunting (*id*. at 52, 55-57), even though the State made clear it did not intend to raise this as an issue at the trial. Dkt. 366 at 251. They claim that Tribal treaty hunters "possess equal or greater hunting skills" (Dkt. 373 at 5) without supporting this assertion. In addition, they spend a considerable amount of time comparing and contrasting elements of their plan to the wolf emergency rule, even though the Tribes do not establish that this rule was adequate to protect public safety, and in any event is no longer in effect. The only safety language the Tribes point to with respect to the wolf rule is a DNR "green sheet" that states "it is anticipated that this extra precaution [requiring persons to hunt from a stationary position at night without hounds] will help assure public safety." *Id*. at 30, quoting Pl. Trial Ex. 121 at 6. The Tribes argue that this document "explained that public safety would be ensured" (*id*.), but "helping assure" safety is not the same as "ensuring" safety.

"could be killed or badly hurt." *LCO VII* at 1423. The Tribes revised regulations continue to present this same public safety risk, because they do not prohibit trees or brush from being used as a backstop. Dkt. 366 at 225. The fact that a Tribal member could be shooting a high caliber rifle at night toward a wooded backstop that could permit the bullet to travel up to three miles past the target (*LCO VII*, 740 F. Supp. at 1407) continues to raise serious and significant safety concerns. The Tribes' regulations also raise serious safety concerns related to notice and potential user conflicts. These concerns will be addressed in turn.

B. The Tribes' definition of a backstop creates a risk that someone may be shot.

The Tribes' regulations require an "adequate backstop," not an earthen backstop or a backstop that must capture a bullet. Dkt. 369 at 51; Dkt. 366 at 228. If a tribal member proposes to use a wooded or treeline backstop as a component of a shooting plan, Kekek Stark acknowledges "there's no guarantee that bullet will stop". Dkt. 363 at 122. However, for plans that do not need to be preapproved, the question of whether the backstop is "adequate" is left to the judgment of the tribal member. Dkt. 366 at 246. Likewise, if the plan must be preapproved by a tribal warden, whether a treeline backstop is approved is up to the discretion of the individual warden. *Id*.

If a treeline does not in fact stop a bullet, the bullet could travel beyond that treeline toward (and to) a residence, cabin, campground, road, trail, etc., that either is or is not identified on the shooting plan. *See* Dkt. 363 at 122; Dkt. 366 at 228-31; Def. Trial

Ex. 670. Just because a hunter identifies such features on a map does not mean he or she cannot shoot toward them, and if the backstop is not in fact adequate, those objects or land uses can still be in the line of fire. Dkt. 366 at 264. Furthermore, even if cabins, trails and roads in a quarter mile are identified and missed, a bullet that is not captured will travel farther than a quarter mile, and it may reach one of these features that is beyond the quarter-mile scope of the shooting plan. *Id*. at 233-34. It could also hit a person walking in the area near a cabin, road, etc., that is either identified or beyond the quarter-mile scope of a shooting plan. *Id*. at 231.

Another concern with backstops is the presence of obstructions. The question of how much vegetation and what kind of vegetation is acceptable in a shooting zone is up to the discretion of the warden who is reviewing the plan. Dkt. 369 at 48. Whether a hunter can see through the woods depends on the vegetation present. Dkt. 366 at 280. If there is vegetation in the zone of fire, a permitted night hunter may not see someone or something behind trees or brush (*see* Def. Trial Ex. 668 showing tent behind trees), and that person could subsequently be shot. In other words, the presence of vegetation may cause or permit a hunter to violate the cardinal rule of firearm safety: know your target and what is beyond it. Dkt. 366 at 281.

A third concern with backstops relates to enforceability. If a treeline backstop is not in fact adequate, the only way to prove the backstop is inadequate would be by establishing that someone or something other than a tree or the target deer was shot. Dkt. 366 at 225-26.

C. There is a risk that someone may be shot because local law enforcement, landowners, and neighbors would not be given daily notification that night hunting may take place.

The Tribes' night hunting scheme does not require daily notification of neighboring property owners, law enforcement agencies, or anyone else. Dkt. 369 at 53. Hunting could take place on privately owned managed forest lands (*id*. at 49-50), but the owners of this land would not be given notice of night hunting taking place on their land.

The Tribes' witnesses argued that they do not want to provide prior notice of night hunting activities or to require clothing that might identify tribal members hunting at night because they want to prevent tribal hunters from being harassed (Dkt. 369 at 56; Dkt. 363 at 130), even though the Tribes have provided daily notice when they intend to spearfish at night on particular lakes (Dkt. 366 at 248; Dkt. 367 at 42), even though spearfisher harassment has not been an issue for decades (Dkt. 367 at 43), and even though Wisconsin has hunter anti-harassment laws that make such conduct a violation of state law. Dkt. 366 at 252; Dkt. 363 at 131.

If people do not know that night hunting may occur on their lands (such as managed forest or forest crop law lands that are open to hunting), or if people do not know that night hunting may occur on neighboring public land they may use at night, there is a risk that these people could walk into an area subject to a shooting plan (Dkt. 367 at 130-31) and be inadvertently shot.

When DNR was engaging in night shooting as part of its CWD eradication program, it notified local law enforcement before and after engaging in that shooting.

Dkt. 370 at 136. The Tribes' failure to provide similar notice would compromise the ability of local law enforcement to respond to complaints about gunshots at night. Dkt. 367 at 131.

D. There is a risk that someone may be shot because other people may be using public or private open lands at night when Tribal members are night hunting.

The Tribes suggest that members of the public who are not associated with a tribal night hunting party are not at risk because there will not be very many people using public or open lands at night between November 1 and January 7 each year, and because tribal members' shooting plans are required to identify roads, trails, homes, and "other potential hazardous locations" (Dkt. 363 at 73) located within a quarter mile. Pl. Trial Ex. 2, § 6.20(5). The Tribes' assumptions and conclusions about who may or may not be using public or open lands were not well-researched, they discount how many people may actually be in the woods, and there is no guarantee that a requirement to identify potential conflicts will result in those areas actually being identified or will result in no people being inadvertently shot.

The Tribes rely on GLIFWC's Director of Planning and Development, James Thannum, as their expert on the topic of whether there are likely to be potential conflicts between night hunting and people engaged in recreational activities in the ceded territory between November 1 and the first week January each year. Dkt. 369 at 95; 108-09. Mr. Thannum did not conduct any surveys, but instead did internet searches and collected public information related to recreational uses. Dkt. 365 at 38-39.

Mr. Thannum did not try to figure out how many people run, ski, snowshoe, mountain bike at night, or camp in the ceded territory during that time period. Dkt. 365 at 62-63; 68-69. He did not ask tribal members other than his son where they intended to night hunt (*id*. at 44-45), and he did not factor hunting frequency into his analysis of where he thought members would hunt (*id*. at 47). He then based his opinions about where tribal members would night hunt and whether people would walk, run, mountain bike, or cross country ski at night on his personal experience, personal observations and "common sense," (*id*. at 46, 65, 67), even though he has not cross-country skied in 15 years (*id*. at 40), or been backcountry camping or snowmobiling since the 1970s (*id*. at 30, 39-40; Dkt. 364 at 96, 99).

Mr. Thannum could testify about recreational trails he was personally familiar with, (Dkt. 365 at 47), but he did not know where in the ceded territory other popular mountain biking and cross country ski trails were. *Id*. at 49-50. He assumed that anyone who may be running, skiing, snowshoeing or mountain biking would do so on a trail that would be accounted for on a shooting plan. *Id*. at 63. If the Tribes' expert does not know where many of the recreational trails in the ceded territory are, it is difficult to have confidence that every person preparing or reviewing a shooting plan will locate all of these land uses that may be hazardous for other people to be using while night hunting takes place nearby.

Chief Warden Stark and Warden Lawhern, who have been conservation wardens for 30 and 24 years, respectively, have been required as part of their job responsibilities to

know who is using public and open lands, when. Dkt. 366 at 207; Dkt. 367 at 87; Dkt. 367 at 106-110. Their opinions regarding who may be out on public or open lands when tribal members may be night hunting carry more weight and show that the danger someone may be shot is real.

Chief Warden Stark testified that trappers can legally check traps from 4 a.m. to 8 p.m. (Dkt. 366 at 236); thus, these people could be out on public or open lands when tribal members are night hunting. Raccoon hunters can hunt at night (*id*. at 241), just as they could at the time of the original Deer Trial. *LCO VII* at 1408.

Chief Stark explained that bowhunters hunt from the middle of September until January (*id*. at 238-39), and bowhunter density is greatest between the end of October and the start of the gun-deer season. *Id*. at 240. These hunters tend to hunt during the first few hours of the day and then again in the late afternoon until hunting hours end, and he testified that during the rut, bowhunters tend to hunt all day. *Id*. at 238. He also explained that bowhunters may be out at the same time as tribal members are night hunting because they may be going to their site before hunting hours and leaving that site after hunting hours close. *Id*. at 236. Many bowhunters come early and stay late so that the area will calm down or settle so that they do not give their location away. *Id*. at 236-37. There is no requirement that bow hunters leave the woods when hunting hours end; they just have to stop hunting and put their bow in a case. *Id*. at 238. And although Mr. Thannum testified that he believed bowhunters were more likely to hunt on private land, that does not mean that they do not hunt on public land. *Id*. at 240. In fact, the survey

Mr. Thannum relied upon stated that 17.2% of the 3,719 respondents stated they hunted on public land.[12] Pl. Trial Ex. 10 at 47.

Chief Stark also explained that during the time period leading up to the gun-deer season, gun hunters tend to take to the woods to scout and prepare their hunting sites. *Id.* at 241. There is no requirement that these hunters scout only during the day, and in fact some stay out after normal hunting hours. *Id.* Some hunters also get lost, and wander around after dark trying to find their way out. *Id.*

Chief Stark testified that backpacking is increasing in popularity, and he noted that during the first three weeks in November, the weather can be nice for hiking and there are no insects, so people do tend to use those trails at that time of year. *Id.* at 244. The North Country Trail cuts through the two counties where tribal members presently harvest 80% of their off-reservation deer. *Id.* at 243. Warden Stark explained that backcountry campers in the Chequamegon National Forest may camp any place they choose, provided their campsite is at least 50 feet off the trail, and he noted that Mr. Thannum had not addressed these users. Dkt. 366 at 243-44. Thus, a backpacker could inadvertently walk into or camp in a shooting zone. *Id.*; *see also* Def. Trial Ex. 670A (showing how a person could walk from a trail into a shooting zone). Tribal witnesses testified that a hunter is required to shine the zone of fire before shooting, but Chief Stark and Chairman

[12] Of the survey respondents, 0.9% and 1.6% stated they hunted on industrial forest and "forest tax law" lands, respectively. Pl. Trial Ex. 10 at 47. It is unclear from the report whether the survey respondents considered private lands enrolled in tax programs such as managed forest program to be public or private lands, or what their error rate was.

McGeshick testified that this requirement does not appear to be in the regulations. *Id*. at 245; Dkt. 371 at 70. Even if this shining were required, someone could still walk into the area after it was shined and risk being shot. Dkt. 366 at 245.

The Tribes' requirement that a permit holder pre-scout his or her site on only one day after Labor Day and prior to engaging in night shooting (Dkt. 364 at 115-16) does not ensure that third parties will not be shot. As Chief Stark explained, circumstances can change during the period of time after someone scouts during the day and before he or she next shows up in the dark. Dkt. 366 at 252-53. There could be a two- or three-month window between the time a person scouts the site and when they arrive to shoot. *Id*. at 253; *see also* Dkt. 367 at 117. A cabin could have been built within a quarter mile; a logging operation could have occurred, or other changes could have taken place. Dkt. 366 at 253. In addition, the fact that only the permittee needs to scout the site during the day while any people he or she invites can first come at night and shoot pursuant to the permit means that people who had never scouted the site during the day could be shooting at night. Dkt. 363 at 125(permittee can invite others to hunt); see also Dkt. 366 at 117 (people may show up at the site after dark never having set foot on the site before).

E. It is not the DNR's job or the Court's job to try to redesign the Tribes' night hunting scheme to attempt to mitigate safety risks.

There have been two lines of inquiry during this case. One asks how the Tribes' plan is unsafe, and the other asks how it can be improved in order to mitigate more risk or reduce risk to an "acceptable or tolerable" level. Dkt. 366 at 285. In response to the

second line of questions, State experts have identified elements of a night hunting plan that could help mitigate risk, hypothetically assuming that such hunting were to occur (Dkt. 367 at 39-40), even though State experts have repeatedly made clear that they do not believe nighttime deer hunting is "safe."

Now the Tribes argue that the State's identified safety concerns are "discriminatory and just plain absurd" (Dkt. 373 at 52), while at the same time inviting the Court to make additional modifications to the Tribes' regulations based on those same critiques in order to attempt to make the safety risks tolerable. *Id*. at 32. The Court should again decline the Tribes' request to have the Court rewrite the Tribes' night hunting scheme.

The Tribes suggest now, just as they suggested in 1989, that the Court consider amending the Tribes' night hunting plan to attempt to remedy the plan's shortcomings with respect to the protection of public safety. In this year's proceedings, the issue arose when the Court questioned whether the State may have unfairly sprung criticisms of the tribal plan for the first time at trial, and whether the State should have identified all of its safety concerns before the Tribes' plan was "set in stone." Dkt. 367 at 120-21. In response to the Court's fairness concern, the State asked its expert to limit his opinions to those criticisms of the tribal plan which had been discussed with the tribal hunting safety experts and rejected by the tribes before the plan was filed in court. *Id*. at 123-25 (limiting testimony to issues raised by Mr. Lawhern that were specifically rejected by the Tribes: pre-hunting site visits, the use of spotters, the adequacy of backstops, etc.).

The State responded to the Court's comments about regulations being "set in stone" by noting the recurring dilemma presented by judicial consideration of safety regulations which appear inadequate for protecting public safety:

> MR. DOSCH: Your Honor, I'd like to respond to your first point about the written in stone business. I have no idea how you want to approach this. Back in 1989 when you asked both parties to submit proposals and you said you go to trial with what you submitted, I thought that made perfect sense then. Here, it's a one-sided thing. The parties are coming in with a new plan. We weren't required to submit one. I don't know if you want to take the same approach you did in 1989. That's obviously totally up to you. I'm not saying it had to be written in stone, it had to be written in stone as of March 1st when they filed their motion. If you were to take the approach that you did in 1989, yes, then it's a written-in-stone standard. I don't know which standard you apply. But I'm not --
>
> THE COURT: And I haven't --
>
> MR. DOSCH: Yes. And I'm not saying you ought to do one or the other, I'm just -- I don't know what you're going to do, what test you'll apply, but if you did, then some of these things aren't in there. If you're going to take a different approach, then you'll take a different approach.

Id. at 122-123. As the transcript indicates, when this issue came up on the last day of trial, the State was not prepared to take a position on it and did not do so but instead simply expressed its concerns about the issue. Now the State urges the Court not to try to cure those shortcomings by revising the Tribes' plan.

Rather than relying on the Court to cure the safety defects of the proposed tribal night hunting plan, the Tribes should win or lose the second prong of their motion on the merits of the plan they filed on March 1, 2013. As this Court noted when the subject came up in the 1989 Deer Trial, the idea that the Court should, after trial, devise an adequate safety plan for night hunting is problematic:

> I don't think that it was contemplated by the parties that it would be my job to make up new regulations that sort of came in in the middle someplace. … I didn't contemplate that I was supposed to say, well, the state's is too broad, but the tribes' doesn't go far enough,

> so if the tribes add something over here, that might be okay. I thought I was to decide whether the tribes had considered all of the problems that they needed to consider that were necessary to preserve the species and to protect humans, so I share Mr. Dosch's concern that to proceed in this manner makes it difficult for everybody. It's not as if you haven't had a lot of opportunity to think about these things and to know exactly the nature of the state's objections to the Off-Reservation Code before it was started on Monday morning.

(Original Dkt. 1126 at 122-23; *see also id*. at 125: ("Obviously it's not always possible to draw that precise set of regulations and there may be instances where it's necessary to take that view, but I think that the party that wants the Court to take that view should be prepared to state that at the beginning of the trial so that the other party has a fair chance to respond.")

Aside from these general difficulties which have resurfaced again in 2013, if the Court entertained the Tribes' request, it would be presented with the difficult problem of revising the Tribes' night hunting regulations. To do so, the Court would have to develop tribal regulations addressing subjects including some or all of the following: how and when prior notification should be made to law enforcement agencies; how and when prior notification should be made to neighboring private property owners; how and when a hunting site should be pre-scouted (and by whom – everyone in the hunting party or only the permit holder?); when the night hunting season should start; under what conditions a spotter should be required; how other users of public or open lands can be kept safe, and how an adequate backstop should be defined and enforced. This approach does not appear to be practical or desirable in this case.

The Tribes and their experts had prior notice of the State's safety concerns, they considered and rejected the State's suggestions, and they went to trial with proposed

regulations which are demonstrably inadequate to protect public safety. Rather than try to fix all those problems for the Tribes under these circumstances, the State urges the Court to deny the Rule 60(b) motion. Doing so would allow the continued enforcement of the state law prohibition on deer shining which the Court has found *would* protect the public.

CONCLUSION

In 2009, during a celebration of the 25th anniversary of the establishment of the Great Lakes Indian Fish & Wildlife Commission, one of the tribal attorneys who helped negotiate the parties' agreement not to appeal stated:

> I think one of the powerful moments that I had the privilege of being involved with was when at the end of the litigation in the *Voigt* case and the tribes and the state were kind of doing a shadow dance about whether we should appeal to the Seventh Circuit or should we just call it a day. Both sides had lost issues that they felt were near and dear to them in this case.
>
> Looking back, I think the major tribal issues that could have gone differently were the issues of timber, timber harvest and the issue of damages for past interference with the treaty rights, and that always will remain a sore spot.

Dkt. 329, ¶ 12. The parties agreed not to appeal. *Id*., ¶¶ 10-11. Now, the Tribes are asking this Court to establish a standard by which it can reopen the final judgment and re-litigate issues it lost in the 1980s.

GLIFWC now has four attorneys working on treaty rights issues. Dkt. 363 at 97. During the trial, Mr. Zorn was asked whether there were other provisions in the final judgment that he believes it would no longer be equitable to enforce against the Tribes. Dkt. 370 at 46. His attorney unsuccessfully objected in an attempt to keep him from having to answer this question, but he nevertheless avoided answering it. *Id*. If this

Court grants the Tribes motion to reopen its judgment, the standard it sets could be used subsequent motions to reopen and re-litigate other issues, and could invite decades of relitigation and review involving disputes over "changed circumstances."

The possibility that this could be the first of several motions is supported by testimony given at the July trial. It appears, for example, that the Tribes also want to re-litigate the Court's decision in the declaratory phase of this case, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 653 F. Supp. 1420 (W.D. Wis. 1987)(*LCO III*). This is suggested by the Tribes' cultural expert, Kekek Stark's sister Dr. Heidi Stark (Dkt. 368 at 118), who testified that she sees herself as an advocate for greater recognition of tribal sovereignty. Dkt. 364 at 17. Through the report she filed with this Court, she stated that she sought to revisit the ethno-historical methodologies that were used to identify Anishinabe hunting protocols. Dkt. 368 at 120. The Tribes do not want to be "limited [by] statements that were made about when Anishinabe people harvested deer in 1837" (Dkt. 368 at 130), even though Judge Doyle relied on those reports when he decided *LCO III*, but instead would like this Court to conclude, based on Jason Schlender's interviews with six Anishinabe elders[13] (Dkt. 364 at 29), that tribal night hunting must begin November 1 because extending the season past January 7 would violate cultural protocols. Dkt. 368 at 121. Any "need" element to this claim is unsupported, and the assertion that it is culturally prohibited, therefore illegal, to hunt in

[13] Of these six elders, only three were from Wisconsin. Dkt. 364 at 19.

the winter after January 7 is contradicted by the unqualified language in the report filed by the Tribes' experts, Dr. Charles E. Cleland and Dr. Gilbert in the declaratory phase of this case.[14] It is also contradicted by the Tribes' 1989 expert witness (Def. Trial Ex. 665), St. Croix Band Chief Archie Mosay, who testified during his 1989 deposition that tribal members refrain from hunting deer between May and August for religious reasons, and that this prohibition extends to prevent hunting for religious or ceremonial reasons as well. Def. Trial Ex. 666 at 5, 18-19.

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[14] Dr. Cleland wrote:

> Since meat could not be preserved for long periods hunting was a constant activity when other food sources were scarce. The Chippewa hunted at all seasons but the winter hunt was most important precisely because alternative foods were at their lowest ebb in that season. Like all of the tribes of the eastern woodlands of the United States, the southwestern Chippewa depended to a great degree on the hunting of the whitetailed deer (Odocoileus virginianus).
>
> The importance of deer in the annual round of the interior Wisconsin Chippewa has already been alluded to in the previous chapter. It is impossible to overstate this point! Without the deer to provide winter food and clothing it would have been impossible to sustain life in that region during the nineteenth century. Perhaps because of its importance the Chippewa developed a variety of means of taking deer and judging from the immense number of hides they traded in the first third of the century, they were extremely efficient deer hunters. . . .
>
> In the last century fire arms were exclusively used in deer hunting. Because deer are by habit solitary creatures or at most animals which form small and temporary herds, the Chippewa hunted deer principally by stalking and for added efficiency in the forest environment, usually in small groups. Deer were hunted at all season as evidenced by devices used to attract does with young fawns, the use of fawn skins to store rice, and frequent references to both summer and winter hunting in nineteenth century documents.

Def. Trial Ex. 622 at 60-61. Dr. Gilbert's 1985 report on Chippewa Deer Hunting showed that 20% of the tribal members who responded to his survey indicated a desire to hunt in January, while slightly less than 10% did so; this chart also showed that tribal members both desired to hunt and did in fact hunt in February and March as well. Pl. Trial Ex. 106, Figure 3. Dr. Gilbert's 1985 report also stated "Chippewa Indians traditionally hunted deer throughout the year." *Id.* at 4.

In spite of the contradictions between her testimony and that of the Tribes' previous expert witnesses, Dr. Stark did not rule out the possibility that she might testify in support of starting night hunting when the fireflies come out, if asked. Dkt. 364 at 41. A motion to re-litigate summer hunting of deer would have to involve a motion to reopen this Court's final judgment as well. *LCO VII* at 1422-23; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 775 F. Supp. 321, 324 (W.D. Wis. 1991)(*LCO X*) (State may enforce its prohibition on summer hunting if Tribes do not). This line of inquiry begs additional questions. If the Tribes' losses related to timber and damages were highlighted as issues that remain a "sore spot" in 2009, will we see these issues again? Or allocation? Or hunting and trapping on private lands?

The problems with motions to reopen a 1991 judgment are real and significant. Many documents from the 1980s no longer exist. Some witnesses are no longer alive, and others have retired or are in the process of retiring. Witnesses who remain available have difficulty remembering what occurred over twenty years ago, and as time passes, peoples' memories are likely to get even worse. This is why cases that are closed should not also go on forever.

Defendants respectfully request that this Court deny the Tribes' motion not only because the Tribes have not shown that exceptional circumstances warrant reopening this Court's final judgment, but also because it is not prudent or equitable to continue to re-litigate a closed 1974 case forever.

Dated this 9th day of September, 2013.

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