UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14-1051

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

v.

STATE OF WISCONSIN; WISCONSIN NATURAL RESOURCES BOARD; CATHY STEPP; KURT THEIDE; and TIM LAWHERN,
Defendants/Appellees.

PLAINTIFFS'/APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Seventh Circuit Rule 26.1, the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, the Lac du Flambeau Band of Lake Superior Indians, the Sokaogon Chippewa Community, the Bad River Band of Lake Superior Chippewa Indians, the St. Croix Chippewa Indians of Wisconsin, and the Red Cliff Band of Lake Superior Chippewa Indians (collectively, the "Tribes") make the following disclosures:

1. The Tribes are not subsidiaries or affiliates of any publicly owned corporation. They are government entities recognized by the federal government as "domestic dependent nations." Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 78 Fed. Reg. 26,384 (May 6, 2013); *Worcester v. Georgia*, 21 U.S. 515, 519 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831).

2. There are no publicly owned corporations that have financial interests in the outcome of this appeal.

3. Aside from Colette Routel, Co-Director of the William Mitchell College of Law Indian Law Clinic[1] and Counsel of Record for the Lac du Flambeau Band of Lake Superior Chippewa Indians, the Sokaogon Chippewa Community and the Red Cliff Band of Lake Superior Chippewa Indians, each of the undersigned is in-house counsel for his/her respective Plaintiff/Appellant. No private law firms have represented the parties in these proceedings before the U.S. District Court or on appeal to this Court.

[1] Indian Law Clinic students Amy Krupinski, Melissa Lorentz, and Peter Rademacher assisted on this brief.

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STATEMENT REGARDING ORAL ARGUMENT

The Plaintiffs/Appellants request oral argument, and believe that it will aid the Court in its decisional process.

JURISDICTIONAL STATEMENT

The United States District Court for the Western District of Wisconsin ("District Court") possessed jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." This lawsuit arises under treaties between the United States and the Plaintiffs. *See* Br. at 3. In these treaties, the Plaintiffs reserved the right to hunt deer on the lands they ceded to the United States. *Id.* Despite these federally protected treaty rights, the District Court upheld the State of Wisconsin's complete ban on nighttime deer hunting after conducting a trial on the issue in 1989. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 740 F. Supp. 1400, 1423 (W.D. Wis. 1990) ("*LCO VII*"). In 2012, the Plaintiffs brought a motion for relief from judgment under Rule 60(b)(5) of the Federal Rules of Civil Procedure, and asserted that due to changed circumstances, continued enforcement of the nighttime deer hunting ban was no longer equitable. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, No. 74-cv-313-bbc, slip op. at 2 (W.D. Wis. Dec. 13, 2013) ("*D.Ct. Decision*"). The District Court denied the Plaintiffs' motion in a final opinion and order issued on December 13, 2013. *Id.* at 25-26.

Jurisdiction over this appeal is conferred by 28 U.S.C. § 1291, which grants appellate review of all final decisions of the U.S. District Courts. This appeal was timely filed on January 9, 2014, within 30 days of the District Court's final decision in accordance with Fed. R. App. P. 4(a)(1)(A). It is an appeal as a matter of right pursuant to Fed. R. App. P. 3(a)(1). The U.S.

Court of Appeals for the Seventh Circuit is the proper forum for this appeal, as it is the circuit that embraces the Western District of Wisconsin. 28 U.S.C. § 1294(1).

STATEMENT OF ISSUES

1. Rule 60(b)(5) of the Federal Rules of Civil Procedure requires a court to relieve a party from a final judgment upon proof that there has been a significant change in statutory law or factual conditions that renders continued enforcement of the judgment inequitable. In 1989, the District Court upheld a complete ban on nighttime deer hunting by tribal members exercising federally protected treaty rights, because it determined that hunting at night with high caliber weapons could not be accomplished in a manner that would protect public safety. Since 2002, the State of Wisconsin has authorized private companies and State employees to shoot thousands of deer at night under certain conditions, and in 2012, the Wisconsin Legislature enacted a bill that enabled members of the general public to shoot wolves at night using high caliber weapons. There were no hunting incidents related to either of these programs. Under these circumstances, did the District Court abuse its discretion when it denied the Plaintiffs' Rule 60(b)(5) motion?

   Most apposite cases:
   Horne v. Flores, 557 U.S. 433 (2009)
   Agostini v. Felton, 521 U.S. 203 (1997)
   Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992)

2. Evidence is relevant if it has any tendency to make the existence of a fact of consequence more probable than it would be without the evidence. Evidence that nighttime hunting with high caliber weapons has been conducted throughout the lower 48 states since 1989 was offered at trial to prove that it is now generally accepted that such hunting can be conducted in a manner that protects the public safety. Did the District Court commit reversible error by excluding all evidence of nighttime hunting outside of the State of Wisconsin by claiming that it was irrelevant to establishing a significant change in conditions?

   Most apposite authority:
   Fed. R. Evid. 401 & Advisory Committee's note
   Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

3. Rule 60(b)(5) motions must be filed "within a reasonable time." The circumstances in each case dictate what constitutes a reasonable amount of time. The court must consider not only the length of the delay, but any explanations for the delay, the prejudice to the opposing party caused by the delay, and whether the dispute involves a purely private disagreement or a matter of public interest. The Plaintiffs' filed their initial Rule 60(b)(5) motion just one day after the first State nighttime wolf hunt began, and within five years of the conclusion of nighttime deer hunting under Wisconsin's program to control chronic wasting disease. The Plaintiffs believed that nighttime hunting under the latter program was still ongoing when they filed their motion, due to the secrecy of the program

and the language in Wisconsin's 15-year chronic wasting disease response plan. The Defendants never alleged that they suffered any prejudice by the failure of the Plaintiffs to bring this motion sooner. Did the District Court err by only considering the amount of time between the end of the State's chronic wasting disease program and the filing of the original Rule 60(b)(5) motion while deciding that the Tribes' motion was untimely?

Most apposite cases:
Shakman v.City of Chicago, 426 F.3d 925 (7th Cir. 2005)
Doe v. Briley, 562 F.3d 777 (6th Cir. 2009)
Salazar v. District of Columbia, 633 F.3d 1110 (D.C. Cir. 2011)

STATEMENT OF THE CASE

I. THE ORIGINAL TREATY LITIGATION

A. The Tribes' Usufructuary Rights Under the 1837 and 1842 Treaties: Declaratory Phase of the Litigation

In several treaties with the United States, the six Wisconsin Ojibwe tribes that are parties to this appeal (the "Tribes") ceded vast sections of land in Wisconsin, Michigan, and Minnesota to the United States. Treaty with the Chippewa, 1837, 7 Stat. 536 ("1837 Treaty"); Treaty with the Chippewa, 1842, 7 Stat. 591 ("1842 Treaty"); Treaty with the Chippewa, 1854, 10 Stat. 1109 ("1854 Treaty"). The United States wanted these lands because they were rich in timber and mineral resources. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 344-45 (7th Cir. 1983) ("*LCO I*"). Before agreeing to these land cessions, however, the Tribes insisted that their existing rights to hunt, fish, and gather throughout the ceded territory must continue to be protected by the United States. *Id.* *See also id.* at 364 (noting that the Tribes were "heavily dependent on the exercise of their usufructuary activities throughout the ceded region at the time of the treaty negotiations"). The United States agreed, and explicit language protecting these usufructuary rights was included in the 1837, 1842, and 1854 treaties. 1837 Treaty, art. 5 ("The privilege of hunting, fishing, and gathering . . . is guarantied [sic] to the Indians, during the pleasure of the President of the United States"); 1842 Treaty, art. 2 ("The

Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States . . . ."); 1854 Treaty, art. 11 ("[the Indians who] reside in the territory hereby ceded shall have the right to hunt and fish therein, until otherwise ordered by the President").

Unfortunately, what the United States promised, the State of Wisconsin attempted to deny. For well over a century, Wisconsin officials enforced state hunting and fishing laws against tribal members in the ceded territory, thereby preventing the tribes from achieving any of the benefits of having reserved these treaty rights. *See, e.g.*, *In re Blackbird*, 109 F. 139, 140, 145 (W.D. Wis. 1901) (overturning state court conviction of tribal member for net fishing within the 1854 treaty area); *State v. Morrin*, 117 N.W. 1006, 1007 (Wis. 1908) (ignoring *Blackbird* and holding that the treaty rights to harvest fish under the 1842 and 1854 treaties were abrogated by Wisconsin's admission into the Union and regardless, could not be relied upon by a tribal member who was also a U.S. citizen). This longstanding and consistent violation of the Tribes' rights was acknowledged by the federal courts, but the Tribes were never compensated for the State's wrongdoing. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 749 F. Supp. 913, 922 (W.D. Wis. 1990) (*LCO VIII*) (lamenting that the Tribes could not receive monetary damages after stating that "the State of Wisconsin has violated plaintiffs' treaty rights for over 130 years").

In the 1970s, the Tribes filed suit seeking a declaratory judgment regarding the continued existence and scope of their treaty rights to hunt, fish and gather in the ceded territory in Wisconsin free from State interference. *See United States v. Bouchard*, 464 F. Supp. 1316, 1321–22 (W.D. Wis. 1978). The Tribes' claim was rejected by the U.S. District Court for the Western District of Wisconsin, which claimed that the 1854 treaty implicitly extinguished any

rights the Tribes may have enjoyed from their prior treaties. *Id.* at 1361. The U.S. Court of Appeals for the Seventh Circuit reversed that decision.[2] *LCO I*, 700 F.2d at 365. After finding that their usufructuary rights survived and remained in force, this Court remanded the case for a determination of the scope of the Tribes' usufructuary rights and the extent to which the State of Wisconsin could permissibly regulate those rights. *Id.*

B. The Extent of Permissible State Regulation of Treaty Rights: Regulatory Phase of the Litigation

On remand, the District Court was guided by U.S. Supreme Court precedent regarding the scope of Indian treaty rights. As a general rule, the Supreme Court has held that states cannot regulate tribal members' exercise of treaty-protected hunting, fishing and gathering rights, even if those rights are being exercised off-reservation. *See, e.g.*, *Antoine v. Washington*, 420 U.S. 194, 205 (1974) (holding that application of state laws prohibiting the hunting of deer during the closed season against members of the Confederated Colville Tribes was "precluded by force of the Supremacy Clause, and neither an express provision precluding state qualification nor the consent of the State was required to achieve that result"). Instead, such rights are to be regulated by the tribes themselves, and if necessary, the federal government. The Supreme Court has articulated only one narrow exception to this prohibition on state regulation of Indian treaty rights: states may regulate treaty-protected harvests where such regulations are necessary for the conservation (i.e., continued existence) of a particular species. *Dep't of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44, 49 (1973) ("*Puyallup II*") (rejecting the ability of Washington to apply its prohibition against net fishing of steelhead trout against tribal members, but noting that "[w]e do not imply that these fishing rights persist down to the very last steelhead in the river.

[2] In a related case involving the same 1837 Treaty, the U.S. Supreme Court similarly held that the Mille Lacs Band of Ojibwe did not relinquish its usufructuary rights through an 1855 treaty with the United States. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

Rights can be controlled by the need to conserve a species."); *Tulee v. Washington*, 315 U.S. 681, 685 (1942) (rejecting Washington's attempts to require tribal members to obtain a state fishing license because "it is clear that . . . the imposition of license fees is not indispensable to the effectiveness of a state conservation program").

The District Court applied this Supreme Court precedent to the Tribes' treaty rights, but added one additional area of state regulation. The court concluded that the State of Wisconsin could regulate tribal hunting rights if those regulations were "reasonable and necessary to prevent or ameliorate a substantial risk to the public health or safety, and do not discriminate against the Indians." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 668 F. Supp. 1233, 1239 (W.D. Wis. 1987) ("*LCO IV*"). The District Court recognized, however, that this was a narrow power:

> I emphasize that the state's ability to regulate the plaintiff tribes' off-reservation usufructuary rights in the interest of public health and safety is narrowly circumscribed. "[I]n each specific particular in which the state undertakes to regulate the exercise of treaty right [usufructuary activity], all state officers responsible therefor must understand that the power to do so must be interpreted narrowly and sparingly applied, with constant recognition that *any* regulation will restrict the exercise of a right guaranteed by the United States Constitution." *Washington*, 384 F. Supp. at 342 (emphasis in original). State regulations that burden treaty-reserved rights must be closely drawn to ensure the minimum possible infringement upon the tribes' treaty rights consistent with accomplishment of the specific recognized interests of the state.

Id. at 1239. *See also LCO VII*, 740 F. Supp. at 1421-22 (noting that state regulation can only apply if it is "the least restrictive alternative available to accomplish the public safety purpose").

Having established the narrow standard for permissible state regulation of treaty rights, the parties were now left with the task of applying this standard to each species the Tribes harvest. In 1984, the Tribes formed the Great Lakes Indian Fish and Wildlife Commission ("GLIFWC"), a regulatory agency charged with administering the Tribes' hunting, fishing, and

gathering rights in the ceded territory. *Reich v. GLIFWC*, 4 F.3d 490, 492 (7th Cir. 1993); App. at Tr. 1-A-29 to -30. GLIFWC's activities are directed by the Voigt Intertribal Task Force, which is composed of representatives from ten member tribes who are parties to the 1837 and 1842 treaties, including each of the Tribes that are plaintiffs in this litigation. Tr. 1-A-33. The Task Force proposed the substance of tribal regulations for each species, and these regulations were then developed into a Model Off-Reservation Conservation Code ("Model Code") by GLIFWC's staff. *Id.*

The Tribes negotiated most aspects of the Model Code with the State of Wisconsin. *See LCO VII*, 740 F. Supp. at 1401. Only the issues that remained unresolved were brought before the District Court to determine whether state regulation was necessary for safety or conservation purposes. *Id.* Still, many issues were litigated. In 1989 alone, the District Court heard claims relating to the harvest of walleye and muskellunge, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 707 F. Supp. 1034, 1038 (W.D. Wis. 1989) ("*LCO VI*"), deer hunting, *LCO VII*, 740 F. Supp. at 1402, and the harvest of furbearing animals. *Id.* In the midst of this rapid series of drafting regulations and negotiating interim agreements and stipulations with the State, one issue that proved impossible to resolve through negotiations was whether the State could completely prohibit nighttime deer hunting. *Id.*

C. The 1989 Deer Trial (*LCO VII*)

Nighttime deer hunting is an efficient way to harvest deer for at least three reasons. App. at 173 (Pre-Trial Statement, Stipulations of Law and Fact, and Admissions ¶ 165 (July 12, 2013) ("Stipulated Facts")). First, deer are more active during the evening,[3] and movement makes animals vulnerable to harvest. App. at 262-63, 269; Tr. 1-P-29 to -31. Second, deer eyes reflect

[3] Deer are crepuscular animals, which means they are the most active during dawn and dusk. App. at 262 (Expert Report, Dr. Gilbert). Additionally, deer change their behavior to avoid human activity, and hence, are known to "go nocturnal" during hunting season. *Id.* at 263.

light at night, which makes it easy for hunters to locate them. *See* App. at 268. Lastly, when light is shined directly into a deer's eyes it momentarily causes the deer to freeze in place, which provides the hunter with a large, stationary target. App. at 268, 272-73, 317. *See also LCO VII*, 740 F. Supp. at 1408 (noting that "[s]hining deer is an effective means of locating and killing them. Deer are nocturnal, their eyes reflect artificial light, and they tend to freeze in place when a light is focused directly onto their eyes").

Tribal members hunt for subsistence purposes, and therefore, employing efficient hunting techniques has always been important. *See* App. at 319. Thus, it is not surprising that nighttime deer hunting was a common Ojibwe practice at the time the Treaties of 1837, 1842, and 1854 were executed with the United States. Throughout the nineteenth century, the Ojibwe used specially constructed pitch torches to illuminate deer at night, therefore increasing the efficiency of their harvest. App. at 316-17; Tr. 2-A-7 to -8. Nighttime deer hunting continues to this day on the Tribes' reservations, where it remains an important cultural activity passed down from generation to generation. App. at Tr. 2-A-52 to -53, 4-A-108 to -110.

Conversely, nighttime hunting of deer is not part of the traditions of non-Indian sportsman, who often talk about wanting a challenging hunting experience or a "fair chase." The State of Wisconsin did not permit its citizens to hunt deer at night when the District Court considered the scope of the Tribes' treaty right in the 1989 deer trial, and State officials claimed that this prohibition was necessary for safety reasons due to decreased visibility at night. App. at 156 (Stipulated Facts ¶ 33). The State did (and still does), however, permit nighttime hunting of various unprotected species, including raccoon, fox, and coyote.[4] *LCO VII*, 740 F. Supp. at 1408. The Tribes believed that hunting these unprotected species at night was no different than

[4] The state also permitted night shooting of opossum, skunk, weasel, starlings, English sparrow, coturnix quail, chukar partridge, and snowshoe hare.

hunting deer at night, and therefore, the State could not reasonably argue that nighttime deer hunting posed a substantial threat to public safety so long as it was conducted in a similar manner. *See* Tr. 3-P-27, 3-P-44 to -45.

Prior to the 1989 trial, the Tribes created draft provisions of the Model Code that would have allowed nighttime deer hunting in the off-reservation ceded territory under the same circumstances that non-Indians were permitted to hunt coyotes and other unprotected species, except that the Tribes' hunting season would be more limited in duration. *See LCO VII*, 740 F. Supp. at 1406, 1408 (noting that while coyote and other unprotected species could be shot during the summer months, the Tribes proposed a ban on nighttime hunting of deer during the summer months); Tr. 3-P-26 to -27 (testimony of James Zorn discussing the development of the original nighttime deer hunting regulations to mirror the State's regulations for hunting coyotes and other unprotected species); App. at 148 (Stipulated Fact ¶ 4). The regulations were designed to permit Tribal members to stalk deer on foot at night, and dispatch the deer with a firearm. *LCO VII*, 740 F. Supp. at 1408. A flashlight could be used to illuminate the deer while shooting. *Id.*

During the trial that followed, the State admitted that there was no conservation concern with hunting deer at night. *Id.* Instead, it argued that the Tribes' proposed nighttime deer hunting regulations were not adequate to protect public safety. All hunting activities create safety concerns because firearms are involved. App. at 296-97. *See generally* Tr. 4-A-285 to -289. The State argued, however, that nighttime deer hunting was unreasonably dangerous and more dangerous than nighttime coyote hunting, because deer hunters typically used high caliber weapons that enabled the bullet to travel further, while coyote hunters used low caliber weapons to preserve the pelt. *LCO VII*, 740 F. Supp. at 1406, 1408. The State also claimed that nighttime deer hunting was more dangerous than nighttime raccoon, sparrow, or quail hunting, because

those species were typically shot in the air or while treed, and therefore, the bullet was more likely to fall to the ground harmless. *Id.* at 1408.

These arguments were necessarily theoretical, because at the time of the 1989 trial there was virtually no information available on the relative safety of nighttime deer hunting as compared to other hunting or non-hunting activities. Virtually no nighttime shooting of deer occurred in the State of Wisconsin.[5] *D.Ct. Decision* at 21; Tr. 4-A-72 to -73. In fact, the State claimed during the trial that there was no available information on the risks of nighttime deer hunting because it did not exist anywhere in the country. The following exchange occurred on cross-examination of the State's key expert witness in the 1989 deer trial, Ralph Christensen:

> Q. And I take it you haven't had a study of the enhanced risks of gunshot accidents arising from deer shining, legal deer shining, is that correct?
>
> A. That's correct.
>
> Q. And what is the –
>
> MR. GABRYSIAK: Objection, Your Honor, as to that question. I think the question, have you studied the effects of legal deer shining, to my knowledge there is no legal deer shining in the State of Wisconsin.
>
> THE COURT: Sustained.
>
> MR. ROSENBERG: Sure there is, Your Honor. It's on reservation, but you can do experiments on the practice of deer shining. There's all sorts of things you can do. I said was there any study.
>
> MR. GABRYSIAK: The question was a little broader than that.
>
> THE COURT: All right. You were interested in whether there had been any study of legal –

[5] While nighttime deer hunting existed on the Tribes' reservations in 1989, both parties agreed that this activity was not directly analogous. Many areas of the Tribes' reservations are completely undeveloped and Tribal members are very familiar with the area, as they typically have hunted there since childhood. Additionally, Tribal members are permitted to engage in hunting activities on the reservation, such as shining and shooting from a vehicle, that were not permitted under the Tribes' draft Model Code regulations for the ceded territory. *See, e.g.*, Tr. 4-A-108 to -114.

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

THE COURT: To determine how dangerous it is?

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

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

THE WITNESS: I frankly don't know how you would set up that kind of a situation, in a real life type environment to be able to get the kind of 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 –

BY MR. ROSENBERG:

Q. I just want to know—

A. -- to get to it.

App. at 323-24.

As the above excerpt illustrates, the State emphasized that there was no legal nighttime shooting of deer in Wisconsin or anywhere in the United States, and this was obviously important to the District Court when it determined that nighttime deer hunting was a dangerous activity.[6] Without much further explanation, the Court accepted the State's distinctions between nighttime hunting of unprotected species and nighttime hunting of deer. *LCO VII*, 740 F. Supp.

[6] When pressed, the State's expert witness indicated for the first time on re-direct examination that there may be instances where nighttime deer hunting could be conducted safely, even though it was not occurring anywhere within the State of Wisconsin. The Tribes argued in post-trial briefing that this testimony demonstrated that a complete ban on nighttime deer hunting of was not the "least restrictive alternative available to accomplish the public safety purpose." App. at 32-34; *LCO VII*, 740 F. Supp. at 1422. Nevertheless, the District Court held that a complete ban was still appropriate since there were not any alternative regulations drafted or discussed in detail at the trial. *Id.* at 1423.

at 1408, 1423. In doing so, the court held that a complete ban on nighttime deer hunting was the least restrictive means of protecting public safety. *Id*. at 1423.

II. An Unexpected Consequence: Tribal Laws are Frozen in Time

By the conclusion of the regulatory phase of this treaty litigation, the parties had finalized a lengthy series of stipulations and the District Court had issued numerous decisions on disputed issues, including its decision to preclude the Tribes from engaging in nighttime deer hunting. These stipulations and decisions combined to create the Tribes' complete Model Off-Reservation Conservation Code, which was incorporated into the final judgment issued in 1991. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 775 F. Supp. 321, 324 (W.D. Wis. 1991) (*LCO X*). Since the entire Model Code became part of the final judgment, the Tribes' hunting, fishing and gathering laws were frozen in time, permanently tied to the Tribal policies and knowledge that existed in the 1980s. Prelim. Inj. Tr. 38-39 (Dec. 12, 2012) ("1 Prelim. Inj. Tr.").

Throughout the years that followed, the State's conservation and safety policy continued evolving to reflect scientific, technological, and social developments. 1 Prelim. Inj. Tr. 38-39; Tr. 3-P-46 to -48. The State was free to amend its own laws to reflect these continuing policy developments, but the Tribes were not. 1 Prelim. Inj. Tr. 38-39; Tr. 3-P-47 to -48. Ironically, the State ended up with more flexibility than the Tribes, even though the Tribes have a federally protected treaty right that can only be regulated by the State under narrowly defined circumstances. Ultimately, both parties realized that the static nature of the final judgment was unworkable and it needed to be reopened. Tr. 3-P-46 to -48.

In 2001, the parties filed a joint Rule 60(b)(6) motion requesting modification of the final judgment. In the motion, the State acknowledged that "[e]ffective natural resource management

requires adaptation to ever-changing circumstances." *D.Ct. Decision* at 7; App. at 41. In particular, the motion explained that "new information, new data, or other changes in circumstances" may render some regulations "unnecessary for health, safety, or conservation purposes." App. at 41-42. The parties requested the ability to negotiate changes to the Model Code that would be memorialized in written stipulations filed with the court. The District Court granted this motion. *D.Ct. Decision* at 7.

Although the parties immediately commenced the Model Code revision process that was envisioned by their Rule 60(b)(6) motion, it took eight years to finalize the first set of stipulated amendments to the Model Code. *Id.*; App. at 50 (*Stipulation for Technical Management and Other Updates: First Amendment of the Stipulations Incorporated in the Final Judgment* (2009) ("*First Stipulation*")); Tr. 3-P-48 to -50. Realizing that it would be unworkable to go through this lengthy process every time the Tribes sought to change a minor provision in the Model Code, a "technical amendment" provision was included in the First Stipulation. 1 Prelim. Inj. Tr. 38-39. This provision allows the Tribes to unilaterally make changes to the Model Code, so long as those changes mirror changes in state law. App. at 56 (*First Stipulation*, § V(A)(2)(a)).[7] After all, if State law permits a particular activity, the State cannot credibly claim that the same activity must be prohibited for conservation or safety purposes when conducted by Tribal members; to do so would be discriminatory. *LCO IV*, 668 F. Supp. at 1238-39.

In 2011, the parties agreed to a second set of stipulated changes to the Model Code. In addition to dozens of specific changes, the Second Stipulation included a new process for "other liberalization amendments." Under the "other liberalization" provision, the Tribes can amend

[7] Technical amendments become effective when GLIFWC issues a Commission Order, even though that Order is not filed with the District Court until the next round of stipulation amendments are completed by the parties. *See, e.g.*, Prelim. Inj. Tr. 50 (noting that when the State enacted a mentored hunting law, which allowed an individual who had not yet been certified to hunt with a mentor, GLIFWC issued a Commission Order that also allowed tribal members to engage in mentored hunting).

the Model Code in ways that are different than, but similar to, changes made in state law. Commission Orders issued under this process normally become effective when the State gives its consent, but that consent cannot be unreasonably withheld. App. at 98-99 (*Stipulation for Technical, Management and Other Updates: Second Amendment of the Stipulations Incorporated in the Final Judgment*, § III.A.2 (2011) ("*Second Stipulation*")). Since 2011, several Commission Orders have been issued under the "other liberalization" provision. 1 Prelim. Inj. Tr. 60, 66 (noting that when the State began allowing wild turkey hunting with dogs during the fall, the Tribes sought to include a similar provision in the Model Code, but for both the fall and spring wild turkey season); *id.* at 67 (pointing to three other Commission Orders issued under the "other liberalization" process).

These existing processes, however, are not and cannot be the only means of modifying the final judgment and the Model Code incorporated therein. As discussed in Section I(B) above, the State has limited ability to regulate Tribal treaty rights: it can only do so if it is reasonable and necessary for conservation or safety purposes, is the least restrictive means of achieving those purposes, and the regulation does not discriminatorily harm the Indians or favor non-treaty harvesters. *LCO IV*, 668 F. Supp. at 1238-39. The stipulation process requires either the State's consent to changes to the Model Code, or a change in State law that the Tribes chooses to mirror in their Model Code. This process has always been fraught with delay (or completely stalled) by changes in the political landscape and shifting priorities within the Wisconsin DNR. Tr. 3-P-48 to -50. No new stipulation amendments have been agreed to since 2011, and the Tribes remain unable to act as other sovereigns do: change their laws in response to changing circumstances.

III. Changes in the Background: Increased Safety of Hunting

A. Hunting in Wisconsin Has Become Significantly Safer Due to Mandatory Hunter Safety Education

Hunting in general – regardless of the time of day or species being pursued – poses dangers to the general public because weapons (typically firearms) are used. *See, e.g.*, App. at 296-97; Tr.4-A-221. Despite this, all hunting incidents,[8] including nighttime hunting incidents, could be prevented if each individual hunter followed the four basic rules of firearm safety, referred to by the mnemonic device TAB-K: **T**reat every firearm as if it is loaded; **A**lways point the muzzle in a safe direction; **B**e certain of your target and what's beyond; **K**eep your finger outside the trigger guard until ready to shoot. App. at 554; Tr. 2-A-71, 5-P-8.

The State of Wisconsin has long realized this basic fact and thus, rather than implementing regulatory changes as a way to reduce hunting incidents, it has focused its attention almost exclusively on hunter safety education.[9] It was not until 1985, however, that hunter safety education was made mandatory for all hunters born after 1973. App. at 556; 1 Prelim. Inj. Tr. 252. Thus, mandatory hunter safety education was still in its infancy at the time of the original 1989 deer trial and its full benefits had yet to be realized. Since 1989, there has been a 70% reduction in the number of hunting related incidents in the State of Wisconsin. App. at 555 (2012 Hunting Incident Report showing the downward trend of hunting incidents as well as the fact that in 1989 there were more than 100 hunting related incidents, while in 2012, there were just 28 incidents); Tr. 4-A-282. Indeed, there are only four hunting related incidents for

[8] Experts use the phrase "hunting incident" rather than "hunting accident," to acknowledge that all hunting incidents are preventable and should be considered the responsibility of the shooter, even if criminal liability does not attach.

[9] The only major regulatory change that has contributed to a decline in hunting incidents is the requirement that hunters wear blaze orange during the nine-day gun-deer season, which typically attracts more than 600,000 hunters. App. at 556.

every 100,000 hunters in the State. App. at 556. Even this number is deceptively high when one considers that 30-50% of all hunting incidents involve self-inflicted wounds (e.g., the hunter shooting him or herself due to improper handling of the firearm). Tr. 2-A-71 to -72, 4-A-287 to -88, 5-P-10. It is far more likely that a resident of Wisconsin will be involved in a deer-vehicle collision than in a hunting related incident. App. at 296-98; 1 Prelim. Inj. Tr. 259.

The State has attributed this decline in hunting incidents to the success of its hunter education program. *See, e.g.*, App. at 554 (2012 Hunting Incident Report, stating: "[t]hanks to the efforts of our hunter education program hunting is a safe activity in Wisconsin and getting safer all the time"). Still, the number of hunting incidents could be greatly reduced if a few simple regulatory changes were made. For example, deer drives have proven to be a particularly dangerous hunting practice, accounting for at least one-quarter of all non-self-inflicted injuries during the nine-day deer gun season. Tr. 2-A-73 to -79, 4-A-288, 5-P-11 to -12. Yet despite the risk, the State has never considered, let alone implemented, a ban on deer drives. Tr. 4-A-288, 5-P-13 to -14. *See also* Tr. 2-A-78 to -79. In crafting hunting laws, State legislators and Wisconsin DNR officials make policy judgments about the acceptable level of risk for various hunting related practices, while also considering the wishes of their constituents.

B. The Tribes' Capacity to Effectively Regulate Hunting To Protect Public Safety Has Now Been Proven

GLIFWC, the inter-tribal agency that regulates the Tribes usufructuary rights, was formed in 1984, just a few years prior to the original deer trial. *Reich*, 4 F.3d at 492. Today, GLIFWC has significantly expanded its capabilities and has a strong track record of protecting public safety. *See, e.g.*, Tr. 3-P-23 (testimony of James Zorn describing the growth of GLIFWC's Conservation Enforcement Division). GLIFWC has more than twenty-five conservation officers that enforce the Model Code against Tribal members hunting in the ceded

territory. Tr. 4-A-107. In the twenty-five years since the original deer trial, there have been only three hunting incidents involving Tribal members, including both on-reservation and off-reservation hunting in the ceded territory. App. at 303; Tr. 5-P-69. Like the State of Wisconsin, the Tribes have implemented a mandatory hunter safety education program for all members born after 1977. Tr. 2-A-89. Additionally, Tribal hunters tend to be more experienced than State-licensed hunters, because they have longer hunting seasons both on- and off-reservation than State-licensed hunters, and many take advantage of this opportunity given the cultural importance of hunting. App. at 302-03.

IV. Changed Circumstances: Significant Increases in Nighttime Hunting of Large Mammals Using High Caliber Weapons

During the 1989 deer trial, the State's attorney and expert witness informed the court that there was "no legal deer shining in the State of Wisconsin," and that "this type of activity is not permitted across the United States." App. at 323-24. In the years since the final judgment, however, nighttime hunting of deer has become increasingly common in the State of Wisconsin and across the United States as deer populations have increased. *D.Ct. Decision* at 22-23; App. at 203-13 (Pl. Proposed Findings of Fact ("PPFOF") ¶¶ 99–155). In recent years, deer have been shot at night in significant numbers to prevent the spread of chronic wasting disease in Wisconsin and other states. *D.Ct. Decision* at 14, 23; App. at 164, 168 (Stipulated Facts ¶¶ 78, 121); App. at 205-06 (PPFOF ¶¶ 111–116). Deer are also shot at night to prevent them from posing a nuisance at airports, to stop them from eating decorative shrubbery, to reduce agricultural damage, and to decrease their populations in urban and suburban locations. *D.Ct. Decision* at 23; Tr. 3-A-98, 3-A-109 to -112; App. at 207-13 (PPFOF ¶¶ 125–155). Additionally, in 2012, Wisconsin permitted nighttime hunting of wolves, even though hunters admittedly use the same high caliber weapons to shoot wolves at night as they do to shoot deer at

night. *D.Ct. Decision* at 15, 24; App. at 171-72 (Stipulated Facts ¶¶ 145, 159). These increased nighttime hunting activities – which have not resulted in hunting incidents[10] – have provided the information necessary for the Tribes to conclusively demonstrate that a complete ban on nighttime deer hunting by Tribal members in the ceded territory is no longer the "the least restrictive alternative available to accomplish the public safety purpose," *LCO VII*, 740 F. Supp. at 1422, and they form the basis of the Tribes' Rule 60(b)(5) motion. Mem. in Supp. of Pl.'s Mot. for Relief from J. at 5.

A. Nighttime Hunting to Control "Nuisance" Deer

During the same time that hunting incidents were declining in Wisconsin, the deer population was rising. Throughout the 1980s, the deer population after the conclusion of the annual hunting season was at or near the Wisconsin DNR's population goal. App. at 508; Tr. 1-P-53 to -56. In the mid-1990s, however, hunting was no longer keeping the deer population in check. *See* App. at 508. By the turn of the century, the deer population in Wisconsin was 400,000 above goal. App. at 508; Tr. 1-P-53 to -56. *See also D.Ct. Decision* at 23 (acknowledging deer population explosion). As a result of this significant change in circumstances, wildlife management policy shifted from concern about increasing or preserving the deer population to dealing with overpopulation problems, including impacts on crops and urban or suburban areas. App. at 273-74; Tr. 1-P-57 to -59. Formerly a management technique of last resort, nighttime deer culling gradually became one of the most significant methods of dealing with deer overabundance. App. at 274-75; Tr. 1-P-60 to -64.

Not long after the conclusion of the original deer trial, the Wisconsin DNR promulgated regulations that authorized the issuance of permits to private persons and municipalities to shoot "nuisance" deer. App. at 161 (Stipulated Facts ¶ 63). But neither these regulations nor any

[10] App. at 167, 172 (Stipulated Facts ¶¶ 120, 160).

statutory provision permitted nuisance deer to be shot at night. *Id.* At trial, Wisconsin DNR employee Brad Koele testified that a 2005 regulation[11] authorized the issuance of nighttime shooting permits to municipalities dealing with nuisance deer. *D.Ct. Decision* at 14; Tr. 3-A-90 to -94, 3-A-102 to -103. Since 2007, when Mr. Koele began working as the Wildlife Damage Specialist, the Wisconsin DNR has issued an average of one dozen permits per year that permit municipalities to shoot nuisance deer at night. *D.Ct. Decision*, at 15; Tr. 3-A-79, 3-A-90. Typically, between 25 and 200 deer can be shot per permit, but some permits allow for an unlimited number of deer to be shot at night. *D.Ct. Decision* at 23; Tr. 3-A-109 to -112. Thus, simple math establishes that between 300 and 2,400 deer are authorized to be shot at night under deer nuisance permits issued each year in the State of Wisconsin.

While these deer nuisance permits are only issued to municipalities, those municipalities contract with private companies to shoot the deer. Tr. 3-A-117 to -118. *See also* Tr. 3-A-98 (noting that Urban Wildlife Specialists removed 94 deer from Madison City Parks and 163 deer from the Mendota Mental Health Institute under permits that authorized nighttime shooting). There are no regulations or written policies that require these private companies or their employees to possess any particular expertise to shoot deer at night, and there are no regulations or written policies that specify the safety guidelines that these private companies must follow while shooting deer at night under municipal nuisance damage permits. Tr. 3-A-96 to -97.

B. Nighttime Hunting to Control Chronic Wasting Disease

Nighttime shooting under deer nuisance permits was not the only new program developed by the Wisconsin DNR since the 1989 deer trial. Chronic wasting disease ("CWD") was first

[11] 2005 amendment to N.R. 12.10, *available at* https://docs.legis.wisconsin.gov/code/admin_code/nr/001/12/I/10/3?view=section ("The landowner, lessee, occupant or other persons assisting in the removal of wild animals causing damage or nuisance shall comply with all hunting and trapping rules specified under ch. NR 10 or ch. 29, Stats., . . . *unless otherwise provided* under this chapter, ch. 29, Stats., or *by permit*.") (emphasis added).

discovered in Wisconsin's deer population in 2002. App. at 164 (Stipulated Facts ¶ 76). CWD is an infectious and fatal nervous system disease, with no available treatments or vaccines. App. at 392. Although CWD poses no risk to humans, it can devastate deer populations if left unchecked. App. at 164 (Stipulated Facts ¶ 77). With no treatment options available, the Wisconsin DNR believed that shooting deer was desirable to determine the origin of the CWD outbreak within the State, its current locations, and ultimately, to eradicate all of the deer within the infected areas in an attempt to contain the outbreak. *Id.* (Stipulated Facts ¶¶ 80–81); Tr. 3-P-54.

Because nighttime shooting is the most efficient way to harvest deer, the Wisconsin DNR conducted nearly all of its CWD shooting at night. App. at 164 (Stipulated Facts ¶ 79). During the first two years of the program, sometimes referred to as the "targeted surveillance" phase, the primary goal was to collect samples necessary to track the spread of the disease. *See id.* (Stipulated Facts ¶ 80). In 2002, shooting was done primarily by wildlife staff from the Wisconsin DNR that focused their efforts on strategic areas. Tr. 3-P-60 to -61, 3-P-149. In 2003, the Department stepped up its efforts and "state conservation wardens, DNR Lands Division employees (Bureau of Wildlife, Parks and Recreation, Facilities and Lands), USDA-APHIS employees, City of Beloit police officers, Dane County law enforcement officers, and Illinois Department of Natural Resources biologists" participated as shooters. App. at 164 (Stipulated Facts ¶ 83).

The program grew over the next few years. Beginning in 2004, the goal had evolved from tracking the disease to eradicating as many deer as possible in the zones where CWD was present. *See* App. at 164 (Stipulated Facts ¶ 81). This is sometimes referred to as the "herd reduction" phase of the CWD program. *See, e.g.*, Prelim. Inj. Tr. 79-80 (Dec. 13, 2012) ("2

Prelim. Inj. Tr."). In 2006, the Wisconsin DNR began hiring additional personnel who became involved in the shooting. Tr. 3-P-137. The program utilized more than 300 different shooters, App. at 168 (Stipulated Facts ¶ 121); *D.Ct. Decision* at 14, and thousands of deer were shot at night between 2002 and 2007. Tr. 3-P-77. In 2007 alone, 987 deer were shot under the State's CWD program. *D.Ct. Decision* at 14; App. at 168 (Stipulated Facts ¶ 124). This was the first time that an organized program existed in Wisconsin that resulted in significant numbers of deer being shot at night by DNR personnel.

To shoot in the program, Wisconsin DNR employees did not need to have any experience hunting deer, hunting at night, or even handling a rifle. *See, e.g.*, Tr. 2-P-78 to -81 (testimony of State employee Tamara Ryan, indicating that she participated and later held a leadership role in the CWD nighttime shooting program, even though she did not own a rifle at the time, and had only shot a rifle at summer camp as a child and during her hunter safety training course). Rather, the Wisconsin DNR created internal policies that governed the shooting of deer at night under the CWD program, including pre-scouting of shooting locations and a training program for participants. App. at 460-76; App. at 165-66 (Stipulated Facts ¶¶ 93, 109). Even though the shooting took place in densely populated sections of southern Wisconsin, and some of its participants had limited hunting experience, no hunting incidents occurred as a result of the five year operation of the CWD program. *D.Ct. Decision* at 14; App. at 167 (Stipulated Fact ¶ 120); Tr. 3-P-116 to -117. Thus, the Wisconsin DNR shot thousands of deer at night while still protecting public safety.

Culling deer was politically unpopular, however, so the Wisconsin DNR attempted to conceal the nature and extent of its activities. Even today it is difficult for members of the public to learn about the program. Tr. 1-A-67 to -68. *See also* App. at 275 (Expert Report of Dr.

Gilbert noting that nighttime culling in general is hidden from the public). The DNR decided not to post notices at some of the parks where sharpshooting was occurring. App. at 165 (Stipulated Facts ¶ 88); App. at 481; Tr. 3-P-123. In press releases the Wisconsin DNR simply referred to its "sharpshooting" program, without indicating that this shooting would take place at night. *See* Tribal 60(b)(5) Reply Brief at 24. Even though the Wisconsin DNR believed the nighttime shooting program was necessary to contain or at least slow the spread of CWD, it was discontinued in 2007 for political reasons. Tr. 3-P-82. The Tribes did not learn that the program had ended until after they had filed their original Rule 60(b)(5) motion, however, and the Wisconsin DNR's fifteen-year *Chronic Wasting Disease Response Plan*, indicates that nighttime sharpshooting may be used as a management tool in the future. App. at 427, 447.

C. Nighttime Recreational Wolf Hunting

In April 2012, the State of Wisconsin amended its laws to permit the general public to hunt gray wolves, which had recently been removed from the federal list of endangered and threatened species. App. at 169 (Stipulated Facts ¶ 136). As part of this new legislation, the Wisconsin Legislature authorized individuals to engage in nighttime wolf hunting. App. at 509, 511 (2011 Wisconsin Act 169, the "Wolf Act"). Wolves are substantially larger than the unprotected species (e.g., fox, coyote, raccoon) that could be shot at night by the general public in 1989. *See* App. at 171 (Stipulated Facts ¶ 150). As a result, most wolf hunters use the same high caliber weapons they use to hunt deer. App. at 172 (Stipulated Facts ¶ 159).

Despite this, the Wisconsin DNR also seemed unconcerned about any public safety risks associated with nighttime wolf hunting. While drafting implementing regulations, its Lands Division Administrator advised the committee not to include too many restrictions and to move the drafting process along quickly. App. at 170 (Stipulated Facts ¶ 138). The Wisconsin DNR's

regulations ultimately required the hunter to shoot from a stationary position using either bait or predator calling techniques, but it rejected other, more significant safety measures, including a requirement that hunters use a light at the point of kill or that hunters shoot only from an elevated device or position. *Id.* (Stipulated Facts ¶ 141); App. at 551; Tr. 2-P-36. The administrative history of the regulation, commonly referred to as the "green sheet," stated as follows:

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

App. at 534. While drafting these regulations, the Wisconsin DNR admitted that it had internal discussions about the possibility that nighttime wolf hunting might enable the Tribes to claim that they should be entitled to nighttime deer hunting. The State claimed these discussions were privileged, however, and refused to reveal them. App. at 171 (Stipulated Facts ¶ 143).

The wolf hunting regulations were issued on August 18, 2012, and nighttime hunting commenced later that fall. *Id.* (Stipulated Facts ¶¶ 144, 149). There was widespread participation in the 2012 wolf hunt. The State made 1,160 wolf licenses available, and hunters harvested 117 wolves. *Id.* (Stipulated Facts ¶¶ 147, 148). At least three of these wolves were shot at night. Tr. 3-P-159. The State reached its wolf harvest quota so fast that it had to close the season early. Although the nighttime hunting season was originally scheduled to run from November 26, 2012 to February 28, 2013, it ended two months early on December 23, 2012. App. at 171 (Stipulated Facts ¶ 149). Notably, there were no hunter safety incidents during the course of the wolf hunt. App. at 172 (Stipulated Facts ¶ 160).

D. Liberalization of Nighttime Hunting of Deer Throughout the United States

These liberalizations in Wisconsin policy are also reflective of increased nighttime hunting in other states. The Tribes sought to prove this point at trial through direct evidence, exhibits, and expert testimony. The Tribes' proposed findings of fact identified roughly forty instances of nighttime hunting across the country. *See* App. at 203-13 (PPFOF ¶¶ 99–155). Over half of these involved citizens hunting in nongovernmental capacities. App. at 203-05, 207-08, 210-13 (*Id.* at ¶¶ 99–110, 125, 141–55).

For example, in Michigan, Minnesota, Oregon, and Washington, other Indian tribes with treaty-protected hunting rights engage in off-reservation nighttime hunting of deer and other large mammals. App. at 168-69 (Stipulated Facts ¶¶ 130, 132-33); Tr. 1-A-41 to -47, 1-A-52 to -59, 1-A-61 to -62. Indian tribes with treaty rights in Canada have also won the right to engage in nighttime deer hunting in the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, and Ontario. *Ivan Morris et al. v. Her Majesty The Queen*, 2 R.C.S. 915 (2006); App. at 205 (PPFOF ¶¶ 109–10). All of these Indian tribes gained recognition of their nighttime hunting rights after the original 1989 deer trial. Tr. 1-A-137 to -139.

The Tribes also planned to introduce evidence that nighttime deer hunting has occurred in other states to combat the spread of diseases, including CWD and bovine tuberculosis. *E.g.*, App. at 168 (Stipulated Facts ¶ 128-29). Nighttime deer hunting has also been conducted for other purposes, including as a response to overpopulation, ecological damage, crop damage, property damage, the presence of deer as exotic species, and for scientific purposes. App. at 207-08, 210-13 (PPFOF ¶¶ 125, 141–42, 144–55). In fact, nighttime deer hunting has occurred in Connecticut, California, Texas, Florida, Iowa, Vermont, Georgia, Kansas, Kentucky, Mississippi, Missouri, New Jersey, New York, and Virginia in recent years. *Id.* Unfortunately,

as discussed in Argument Section II, all of this evidence was improperly excluded by the District Court, because it believed that nighttime deer hunting outside the State of Wisconsin was not relevant to these proceedings. *D.Ct. Decision* at 24-25.

V. The Tribes' Attempts to Negotiate With the State and Ensuing Litigation

A. Development of the Night Hunting Proposal

In April 2012, when the State passed legislation authorizing the general public to shoot wolves at night using high caliber weapons, the Tribes began to consider their own proposal for nighttime hunting. Tr. 1-A-36. Most Ojibwe are opposed to wolf hunting for cultural reasons, and therefore, nighttime wolf hunting was not considered. Tr. 1-A-37. Nighttime deer hunting was considered. Since the 1989 deer trial, the Tribes have been unable to realize the full benefit of their treaty right to hunt deer. While they are entitled to take up to one-half of the deer available for harvest in the ceded territory in any given year – a number that would likely exceed 150,000 deer[12] – Tribal members typically harvest less than 2,000 deer annually in the Wisconsin ceded territory. App. at 492 (recording harvest of 1,387 deer in 2011); App. at 500 (recording harvest of 1,440 deer in 2010); App. at 507 (recording harvest of 1,386 deer in 2009). This is fewer deer than the Tribes harvested before the 1989 deer trial. *LCO VII*, 740 F. Supp. at 1406 (noting that the Tribes had harvested 2,468 deer in 1988).

Consequently, in May 2012, the Tribes notified the State that given all of the above-described developments, a complete ban on nighttime deer hunting was no longer the least restrictive means of protecting the public, and an amendment to the Model Code was necessary. App. at 175 (Stipulated Facts ¶ 186-187); *see* App. at 231 (Commission Order No. 2012-05, subdiv. 1.2). Since the Tribes wanted to harvest a different species at night (deer) than the new

[12] In 1989, before the major deer population increase in Wisconsin, the population goal within the ceded territory was 355,085 deer. *LCO VII*, 740 F. Supp. at 1404.

State law had authorized (wolves), they proposed to use the "other liberalization" amendment process described in Statement of the Case, Section II, *supra*. App. at 231 (Commission Order No. 2012-05, subdiv. 1.2); Tr. 3-P-33. The Voigt Intertribal Task Force passed a motion directing GLIFWC to begin drafting new safety regulations and negotiating with the State to obtain their consent to these changes. Tr. 1-A-34, 1-A-36. GLIFWC formed a working group consisting of experts in hunting safety,[13] deer biology,[14] and the law.[15] That working group reviewed the regulations and policies adopted by other jurisdictions that permitted nighttime deer hunting, and it used that information and its members' own expertise to craft new draft nighttime deer hunting regulations. Tr. 1-A-37.

On August 1, 2012, the Tribes provided the Wisconsin DNR with a copy of their proposal to amend the Model Code through the "other liberalization amendment" process. Tr. 1-A-718. Complete drafts of the commission order were presented to the Wisconsin DNR in September and October, 2012. App. at 175 (Stipulated Facts ¶¶ 192–93). The State did not raise safety concerns with the Tribes' proposal until the parties met on October 22, 2012. Despite the time constraints posed by the upcoming hunting season, the Tribes still attempted to incorporate many of the State's suggestions into a revised commission order, which it provided to the State in early November. App. at 230; App. at 175 (Stipulated Facts ¶ 195). At that point, however, it

[13] The working group included Chris McGeshick, who is now the Chairman of the Sokaogon Chippewa Indian Community. Tr.1-A-37, 2-A-48. Prior to his political career, Chairman McGeshick spent more than fifteen years working for the Wisconsin DNR as a conservation warden, warden supervisor, and section chief. Tr. 2-A-49 to -51. He has also worked as a police officer and a GLIFWC conservation warden. *Id.* Another core member of the working group was Fred Maulson, a Lac du Flambeau Tribal member and GLIFWC's Chief Warden. Tr.1-A-37. From time-to-time the working group consulted other hunting safety experts including Thomas Kroeplin, Roger McGeshick and Dan North, each of whom are GLIFWC conservation wardens. Tr. 1-A-38.

[14] Jonathan Gilbert, who holds a PhD from the University of Wisconsin-Madison and has worked as Wildlife Section Leader for GLIFWC for almost thirty years, consulted on issues relating to deer biology. Tr. 1-A-38, 1-P-5 to -7.

[15] Kekek Jason Stark, GLIFWC's Policy Analyst/Attorney advised the working group on legal issues. Tr. 1-A-30 to -37.

became apparent that the State would not consent to any nighttime deer hunting proposal offered by the Tribes. Believing that the State had unreasonably withheld its consent, GLIFWC issued its final Commission Order on November 21, 2012. App. at 231, 232, 215.

B. The Preliminary Injunction Hearing

In spite of its own nighttime wolf hunt, which began on November 26, 2012, the State filed a motion to enforce the ban on nighttime deer hunting against Tribal members. App. at 215 (Prelim. Inj. Order at 2). In response, the Tribes moved to enjoin the State from enforcing the nighttime hunting ban. *Id.* The Tribes argued that the GLIFWC Commission Order was automatically effective because the State had unreasonably withheld its consent. *Id.* In the alternative, the Tribes argued that the judgment should be reopened due to changed circumstances. *Id.* at 215-16.

A preliminary injunction hearing was held on December 12-13, 2012, solely on the issue of whether the Tribes could proceed to hunt at night during the remainder of the season. *Id.* The Tribes' Rule 60(b)(5) motion was not at issue in the preliminary injunction hearing; only the Commission Order process was addressed. *Id.* The District Court ultimately granted the State's motion to enforce the judgment. *Id.* The court emphasized that where the parties cannot agree to a stipulation amendment, as in this case, the appropriate medium to amend a provision of the final judgment is through a Rule 60(b) motion. *Id.* at 222-23.

Prior to the preliminary injunction hearing, the State had only expressed vague safety concerns regarding the Revised Regulations. Tr. 1-A-118. When pressed at the hearing, the State finally articulated some concrete areas of concern. *See, e.g.*, 1 Prelim. Inj. Tr. 208-09 (direction of fire should be stated in shooting plan); 2 Prelim. Inj. Tr. 19-21 (testimony of Timothy Lawhern). Following the trial, the Tribes incorporated several measures into their

nighttime hunting regulations in an attempt to address the State's concerns. *D.Ct. Decision* at 17. The Tribes also attempted to negotiate with the State once again. App. at 176 (Stipulated Facts ¶ 197). In the order denying the Tribes' request for a preliminary injunction, the District Court stated that it would need to be sure that the parties had "exhausted their good faith efforts to agree on the scope of any amendment to the judgment" before issuing a final decision. App. at 227 (Prelim. Inj. Order at 14). To address this concern, the Tribes met with the State's safety experts twice in February of 2013, in an attempt to come to a negotiated agreement. App. at 176 (Stipulated Facts ¶ 197). Even though the Tribes made additional changes to their safety regulations, *see* App. at 244, and even though the Tribes' nighttime hunting regulations were now unquestionably more stringent than the State's own nighttime wolf hunting regulations or CWD shooting guidelines, the State continued to claim that it had significant safety concerns.

C. The Tribes' Final Night Hunting Proposal

The Tribes made every effort to address the State's purported safety concerns. The Tribes' proposal requires extensive training before any Tribal member can hunt deer at night in the ceded territory. App. at 301-03. This training includes a twelve-hour advanced hunter safety education course, developed after consultation with the State's own expert witness Timothy Lawhern, and geared specifically toward night hunting. Tr. 1-A-81. Furthermore, after taking this course, Tribal members are required to take a stringent marksmanship test conducted at night. App. at 173 (Stipulated Facts ¶¶ 171-172); App. at 244 (Final Revised Regulations §6.20(7)(a)); App. at 301; Tr. 1-A-71, 1-A-79 to -81, 2-A-89 to -98. Tribal night hunters are also required to use a light to illuminate the target, which both "freezes" the deer in a stationary position, and ensures proper visibility. App. at 244, 250 (Revised Regulations § 6.20(3)(a)); App. at 174 (Stipulated Facts ¶ 179); Tr. 1-A-72, 2-A-80; *LCO VII*, 740 F. Supp. at 1408.

Tribal night hunters cannot hunt just anywhere under the Revised Regulations; they are required to pick not only a specific area, but also the specific stationary location where they will remain while hunting. App. at 244, 250 (Revised Regulations § 6.20(3)(b)). The hunter must scout the location ahead of time and draw out a "shooting plan." App. at 174 (Stipulated Facts ¶ 177); App. at 244, 251 (Revised Regulations § 6.20(2)). If the hunter does not plan to shoot from both an elevated position and within 50 feet of a backstop,[16] a GLIFWC warden or tribal conservation officer must visit the proposed area and pre-approve the shooting plan. App. at 244, 251 (Revised Regulations § 6.20(5)); App. at 174 (Stipulated Facts ¶¶ 175-176); Tr. 1-A-75, 2-A-84. Tribal shooting plans include five key components. The hunter must: (1) mark a stationary shooting position on the map; (2) mark the direction of intended fire; (3) show that there is an adequate backstop within 125 yards from the shooting position; (4) mark any potentially hazardous locations, including residences or recreational trails; and (5) indicate the safe zone of fire.[17] App. at 173 (Stipulated Facts ¶ 173); App. at 244, 251 (Revised Regulations § 6.20(5)(a)); App. at 304-05, 551; Tr. 1-A-73 to -74, 2-P-36. GLIFWC has agreed to retain copies of these shooting plans and make them available to local law enforcement. App. at 244, 254 (Revised Regulations § 6.20(8)); Tr. 1-A-84 to -85. Thus, Tribal members would be authorized to hunt at night only while following a well-thought-out plan in communication with GLIFWC, tribal conservation departments, and their State counterparts. These regulations stand in contrast to the State-authorized wolf hunt, which did not require State citizens to even visit

[16] An "adequate backstop" is defined as "a condition upon which a hunter should know that their discharged bullets will fall harmless." App. at 244, 248 (Revised Regulations § 6.01(1)). For example, a hill that would stop a bullet would be an adequate backstop. Tr. 2-A-81 to -82. The ground also serves as a backstop when shooting downward from an elevated position. *Id.*; App. at 308.

[17] "Safe zone of fire" is defined as "the area and direction in which a hunter may safely discharge a weapon," and the maximum safe zone of fire range that a hunter may establish on a shooting plan is 180°. App. at 244, 249 (Revised Regulations § 6.01(11)).

their hunting location ahead of time, let alone create a shooting plan and coordinate with local law enforcement. App. at 172 (Stipulated Facts ¶¶ 155-156).

D. Hearing on the Rule 60(b)(5) Motion and the District Court's Decision

As negotiations with the State repeatedly proved fruitless, the Tribes moved to modify the original judgment based on changed circumstances. An amended the Rule 60(b)(5) motion was filed on March 1, 2013, along with the Tribes' final proposed nighttime hunting regulations. Mot. for Relief from. J. After a brief period of discovery, a hearing was held before the District Court from July 22 to 26, 2013. Less than three weeks before the trial, the Wisconsin Legislature repealed the provision that allowed nighttime wolf hunting. *D.Ct. Decision* at 15; App. at 172 (Stipulated Fact ¶ 164). At trial, the State argued that this repeal eliminated the Tribes' changed circumstances argument. *See* State's Pre-Trial Br. at 15-16. Additionally, the State attempted to introduce new evidence – not introduced in the 1989 deer trial – that nighttime hunting of deer was widespread *prior to* the original trial! The State claimed that because nighttime deer hunting existed prior to 1989, the District Court should not view nighttime shooting under nuisance permits or pursuant to the CWD program, as changed circumstances. State's Pre-Trial Br. at 9.

In December 2013, the District Court issued its final decision denying the Tribes' Rule 60(b)(5) motion. *D.Ct. Decision* at 25–26. In that decision, the court seemed to believe that the Tribes needed to establish a change in State *law*, and not a change in *facts* (i.e., facts demonstrating that nighttime deer hunting could be conducted in a safe manner). *See id.* at 23–24. With respect to nighttime deer hunting, the court admitted that "before 1989, official records show that only a few deer were shot at night in any year," and that "[s]tarting in 2002, DNR employees and law enforcement officers made thousands of individual night hunting trips each

year as part of the state's chronic wasting disease eradication project." *Id.* at 23. But the court claimed that this was not a "significant change in circumstances as to warrant relief from the judgment . . . [because] [t]his new hunting led to a vast increase in the number of deer killed, but not to any expansion in the scope of the DNR's authorized powers." *Id.*

With respect to nighttime wolf hunting, the court stated: "If the legislature had not eliminated that aspect of the wolf hunt for 2013, it might have been difficult to deny plaintiffs' motion to reopen the judgment." *Id.* at 24. The District Court believed that the Wisconsin Legislature's repeal eliminated any argument that changed circumstances existed. Because the court held there were no changed circumstances, it did not reach the issue of whether the Tribes' proposal was narrowly tailored to the change in circumstances. As an aside, the court recited the number of years that had passed since the beginning of the CWD program and speculated that the motion may not have been brought within a reasonable time. *Id.* at 25.

The court also reiterated the decision it made during trial to exclude evidence from other states, which the Tribes had intended to use to further establish changed circumstances. *Id.* at 24–25. Looking at the opinion as a whole, the court's exclusive focus on whether there was a change of law within the State of Wisconsin is more reflective of the requirement for an "other liberalization" stipulation amendment instead of the type of change required for a Rule 60(b)(5) motion. *See* App. at 94, 98 (*Second Stipulation*, § III(A)(2)).

SUMMARY OF ARGUMENT

Through a series of treaties ratified in the 1800's, the Tribes ceded the northern third of Wisconsin to the United States. In return, they insisted that the federal government protect their right to continue hunting throughout the ceded territory. *LCO I*, 700 F.2d at 344-45. Deer is the most important species that Tribal members hunt, both today and at the time of treaty making.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1428 (W.D. Wis. 1987); *see* App. at 259-61. Because hunting at night with a light is the most efficient way to harvest deer, App. at 262-63, 267-68, 272-73; Tr. 1-P-29 to -31, Tribal members have engaged in this activity for at least 200 years. App. at 316-17 (Expert Report, Dr. Stark & Mr. Schlender noting that Tribal members traditionally used birch bark torches to hunt at night). Nevertheless, in 1989, voicing concern for the public's safety, the District Court concluded that the State could prohibit Tribal members from all off-reservation nighttime deer hunting. *LCO VII*, 740 F. Supp. at 1423.

Due in part to this prohibition on night hunting, the Tribes' right to take up to one-half of all harvestable deer in the ceded territory–which would amount to at least 150,000 deer annually–has proven illusory. *See LCO X*, 775 F. Supp. at 323 (harvestable deer equally apportioned between tribal and non-tribal hunters); App. at 508 (showing deer population). Today, Tribal members only take between 1,000 and 4,000 deer each year. App. at 492 (recording harvest of 1,387 deer in 2011). This is hardly the promise the Tribes bargained for.

The Tribal harvest does not mirror trends in the State deer population. Since the 1989 trial, the deer population in Wisconsin has exploded; it is now more than 400,000 deer above the State's management goal. App. at 508. This has led to liberalization of nighttime deer hunting within the State. App. at 273-75. Municipalities can now obtain a permit from the Wisconsin DNR that authorizes them to shoot "nuisance" deer at night, and they frequently contract with private companies to carry out this shooting. Tr. 3-A-96 to -98, 3-A-118. Deer are shot at night at airports within the State, and also within federal areas such as the Apostle Islands. *D.Ct. Decision* at 22-23 (noting night shooting at airports); App. at 275-76. Tr. 1-P-73 to -76, 3-A-83. For five years, the Wisconsin DNR conducted a large-scale program to combat CWD that

resulted in shooting thousands of deer at night. *D.Ct. Decision* at 13, 23. And Wisconsin is not alone. A similar increase in nighttime hunting has occurred throughout the country as other states have dealt with burgeoning deer populations. *See* App. at 203-13 (PPFOF at ¶¶ 99–155).

During the same time period that the State has demonstrated that nighttime deer hunting can be conducted safely, the Tribes have demonstrated they can safely regulate Tribal-member hunting. There have been only three hunting related incidents caused by Tribal members since 1989, both on- and off-reservation. App. at 303; Tr. 5-P-69. Given these changes, in 2012, the Tribes filed a motion for relief under Rule 60(b)(5) of the Federal Rules of Civil Procedure, which states that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment . . . [if] applying it prospectively is no longer equitable." In their motion, the Tribes argued that continuing the complete prohibition on their treaty-protected right is unjust now that nighttime hunting of deer and other large animals has been widely practiced in Wisconsin and many other states. Mem. in Supp. Pl.'s Mot. for Relief from J. at 5.

Even though the District Court made the factual findings requested by the Tribes, it denied their Rule 60(b)(5) motion. *D.Ct. Decision* at 22-26. In doing so, it committed a number of legal errors. As described in Section I below, the Court erroneously applied the outdated standard in *United States v. Swift & Co*, 286 U.S. 106 (1932), and claimed that the Tribes must prove that the final judgment was a "grievous wrong" or an "instrument of wrong" for their motion to be granted. *D.Ct. Decision* at 18-19. The Court insinuated that this heightened standard was necessary because the Tribes had failed to appeal the original final judgment. *Id.* at 18. The U.S. Supreme Court, however, has explicitly stated that a failure to appeal is *not* a factor that district courts can consider in Rule 60(b)(5) cases. *Horne v. Flores*, 557 U.S. 433, 452-53 (2009). More generally, the District Court's opinion seems confused. The Court makes

differing statements about what the Tribes needed to prove to satisfy their burden, and the decision seems to mistakenly conclude that only changes in law, not factual changes, can form the basis of a Rule 60(b) motion. *See D.Ct. Decision* at 3-4, 19, 22-23.

Because the Court was unsure about what the Tribes needed to prove to satisfy their burden under Rule 60(b)(5), it made a blanket, incorrect evidentiary ruling. *D.Ct. Decision* at 24-25. As addressed in Section II below, the Court claimed that all evidence of nighttime hunting outside of Wisconsin was irrelevant to the Tribes' motion, even though this evidence would have conclusively established that a complete ban on nighttime deer hunting was no longer the least restrictive means of protecting public safety. *See id.* As a result, the District Court barred the introduction of evidence that would have provided at least forty examples of nighttime deer hunting from around the country. *See* App. at 203-13 (PPFOF at ¶¶ 99–155).

The Tribes had also claimed that the State's attempts to prevent Tribal members from engaging in nighttime deer hunting, while permitting its own employees and citizens from engaging in similar activities, was discriminatory. *Puyallup II*, 414 U.S. at 48-49; *D.Ct. Decision* at 19. The District Court addressed this claim with only one conclusory phrase, claiming that Wisconsin's CWD program did not conclusively demonstrate that the final judgment was "in need of amendment for any other reason, such as being evidence of discriminatory treatment of the Chippewa." *D.Ct. Decision* at 24. The Court saw no problem with the fact that the State continues to enact laws permitting nighttime hunting of large animals with high caliber weapons, and then, as soon as the Tribes attempt to engage in nighttime deer hunting, the State repeals this authorization.

Finally, the Court indicated that the Tribes' motion might have been properly denied on independent grounds because it was not filed in a reasonable time. *Id.* at 25. In doing so, the

Court considered only one factor: the passage of time between the end of Wisconsin's CWD program and the date the Tribes' brought their Rule 60(b) motion. *Id.* This and other Circuits, however, have clearly stated that whether a motion is filed within a reasonable time depends on a variety of factors, including the nature of the litigation (private or public interest), whether there was any prejudice to the non-moving party, and the reasons for the delay. *See, e.g.*, *Shakman v. City of Chicago*, 426 F.3d 925, 934 (7th Cir. 2005); *Associated Builders & Contractors v. Michigan Dept. of Labor and Economic Growth*, 543 F.3d 275, 278 (6th Cir. 2008). The District Court's failure to consider these factors constitutes reversible error. *See Salazar v. District of Columbia*, 633 F.3d 1110, 1119 (D.C. Cir. 2011).

This court can and should take the factual findings of the District Court, apply the appropriate legal standard, and determine that the Tribes have established their burden of proving changed circumstances. This matter should then be remanded to the District Court for it to determine, in the first instance, whether the Tribes' proposed nighttime hunting rule "is suitably tailored to changed circumstances," or whether modifications to that rule should be required. Alternatively, this court should reverse the District Court's decision and remand for a new evidentiary hearing that would allow the Tribes to present evidence of nighttime hunting outside of Wisconsin, which would enable the Tribes to prove that it is no longer equitable to completely ban the exercise of the their treaty right to hunt deer at night.

ARGUMENT

Over the past twenty-five years, the U.S. Supreme Court has issued several opinions interpreting Rule 60(b)(5) of the Federal Rules of Civil Procedure. In those opinions, the Court has concluded that the moving party bears the burden of demonstrating that "a significant change in circumstances warrants revision of the decree." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S.

367, 383 (1992). The change relied on by the moving party may be to factual conditions, statutory law, or decisional law. *Agostini v. Felton*, 521 U.S. 203, 215 (1997). Once this burden is met, the court must consider whether the proposed modification "is suitably tailored to the changed circumstance," or whether a different modification should be required. *Rufo*, 502 U.S. at 383.

On appeal, "de novo review is appropriate for the question as to which legal standard should be used to assess a party's Rule 60(b)(5) motion." *Bellevue Manor Associates v. U.S.*, 165 F.3d 1249, 1252 (9th Cir. 1999). Otherwise, the denial of a Rule 60(b)(5) motion is reviewed for abuse of discretion. *Browder v. Dir., Dep't of Corr. Ill.*, 434 U.S. 257, 274 n.7 (1978). Under abuse of discretion review, a district court's decision must be reversed if it applied the incorrect legal standard, misapplied the correct legal standard, or relied upon clearly erroneous findings of fact. *United States v. Tennessee*, 615 F.3d 646, 652 (6th Cir. 2010). This is true even if the trial court has had years of experience with the case. *Kindred v. Duckworth*, 9 F.3d 638, 641 (7th Cir. 1993).

I. THE DISTRICT COURT FAILED TO APPLY THE CORRECT LEGAL STANDARD FOR RULE 60(B)(5) MOTIONS, AND HAD IT DONE SO, THE TRIBES' MOTION WOULD HAVE BEEN GRANTED

A. The District Court Decision is Fraught with Legal Errors

The District Court committed a number of legal errors in denying the Tribes' motion for relief from the final judgment. To begin with, the Court applied the wrong legal standard. Instead of citing *Rufo*, *Agostini*, *Horne*, or any of the Rule 60(b)(5) cases decided by the U.S. Supreme Court over the past twenty-five years, it applied the outdated standard contained in *Swift*, 286 U.S. 106, and *System Federation No. 91, Railway Employees' Department, AFL-CIO v. Wright*, 364 U.S. 642 (1961). *D.Ct. Decision* at 18-19, 24. The Court claimed that the latter

case stood for the proposition that a "court is *not required to disregard* significant changes in law or facts, if it is satisfied that what it has been doing has been turned through changing circumstances into and [sic] instrument of wrong." *Id.* at 19 (emphasis added, internal quotations omitted).[18] The modern Rule 60(b)(5) standard, however, contains the opposite emphasis. If a moving party carries its burden of proving a significant change in circumstances, the court is *required* to grant its motion. *Horne*, 557 U.S. at 447 ("a court abuses its discretion 'when it refuses to modify an injunction or consent decree in light of such changes'").

The District Court did not attempt to distinguish *Horne* or any of the other recent Supreme Court precedent on Rule 60(b) motions; the Court never cited any of these cases. The State may claim, however, that these decisions apply only to "institutional reform litigation," and that the Tribes' litigation does not qualify as such. This argument is precluded by binding precedent, as the Seventh Circuit has previously held that the *Rufo* standard applies even to purely private litigation. *Protectoseal Co. v. Barancik*, 23 F.3d 1184, 1187 (7th Cir. 1994) (applying the *Rufo* standard to a shareholder's request to modify the permanent injunction preventing him from sitting as a director of a corporation, over the objection of the non-moving party, which claimed "that *Rufo*, which concerned prison reform litigation, is inapplicable in the commercial context"); *Matter of Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993) (applying *Rufo* to modification of defendant's bankruptcy discharge and noting that the "flexible standard adopted in *Rufo* . . ., is no less suitable to other types of equitable case[s]"). *See also Bellevue Manor Associates*, 165 F.3d at 1255 (noting that "we join a significant number of other Courts of Appeals in finding that *Rufo* sets forth a general, flexible standard for all petitions brought under

[18] The court repeated on more than one occasion that the Tribes needed to show that the final judgment was a "grievous wrong" or an "instrument of wrong." *D.Ct. Decision* at 18, 19, 24.

the equity provision of Rule 60(b)(5)," and citing comparable cases from the First, Second, Third, Seventh and D.C. Circuit Courts of Appeal).

Additionally, even if *Rufo* only applies to institutional reform litigation, this case qualifies as such. The Supreme Court created a "flexible standard" to be applied to Rule 60(b) motions in institutional reform litigation, because unlike most private civil litigation, final judgments and injunctions in these cases continue to remain in force and affect prospective behavior for many years. *Horne*, 557 U.S. at 447-48, 450-51; *Rufo*, 502 U.S. at 380. "[T]he passage of time frequently brings about changed circumstances – changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights – that warrant reexamination of the original judgment." *Horne*, 557 U.S. at 448. The Supreme Court also expressed concern about continuing to apply outdated provisions of the final judgment to state officials given federalism concerns. *Rufo*, 502 U.S. at 392, n.14. In most of these cases the federal courts are enforcing minimum protections under the U.S. Constitution in a core area of state sovereignty. *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 246-48 (1991). Newly elected state officials must be permitted to "bring new insights and solutions to problems," and that "[w]here 'state and local officials inherit overbroad or outdated consent decrees that limit their ability to respond to the priorities and concerns of their constituents', they are constrained in their ability to fulfill their duties as democratically-elected officials." *Horne*, 557 U.S. at 449. *See also Frew v. Hawkins*, 540 U.S. 431, 441 (2004) ("If not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designated legislative and executive powers."). Each of these concerns exist in this case, albeit in a slightly different context.

Indian affairs are primarily within the province of the federal government, not the states, and Indian treaty rights are federal rights protected by the Supremacy Clause. *See, e.g.*, U.S. Const. art. I, § 8, cl.3 (Indian commerce clause); U.S. Const. art. VI, cl.2 (Supremacy Clause); *Antoine*, 420 U.S. at 205. States possess the ability to regulate Indian treaty rights only under the narrowest of circumstances: when such regulation is reasonable and necessary to either ensure the continued existence of a species or to protect public safety. Even then, state regulation can only pass muster if it does not discriminate against Indian hunters. *LCO IV*, 668 F. Supp. at 1239. Thus, the State's authority in these matters is limited, and the final judgment in *LCO X*, has the ability to do significant damage unless the Tribes are permitted to request modifications to that judgment from time-to-time under the flexible *Rufo* standard. Indian tribes are sovereigns with the power to make their own laws and be ruled by them free of state interference. *Williams v. Lee*, 358 U.S. 217, 220 (1959); *Worcester v. Georgia*, 31 U.S. 515, 561 (1832). *See also U.S. v. Wheeler*, 435 U.S. 313, 322 (1978) (noting that the tribal right of "self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions"). Tribal officials are elected by their constituents and they must be permitted to "bring new insights and solutions to problems." *Horne*, 557 U.S. at 449. Yet, the State of Wisconsin would have the Tribes' Model Off-Reservation Conservation Code remain frozen in time forever, even when there have been significant changes in circumstances. *Rufo*, 502 U.S. at 383 n.7 (noting that one of the problems with institutional reform litigation is that "[i]n these cases the entire architectural program became part of the decree binding on the local authorities. Hence, any change in the program technically required a change in the decree, absent a provision in the program exempting certain changes"). This result cannot be acceptable.

The District Court did not address any of these concerns and applied a more stringent standard because it was apparently swayed by the fact that the Tribes had not taken an appeal from the original final judgment in 1991. In its most extended discussion of the Rule 60(b)(5) standard to be applied, the Court stated:

> In this case, plaintiffs are trying to undo a judgment that both sides in this litigation accepted, not because they believed it was a perfect resolution but because it was good enough to persuade them that the known result was better than the uncertainty of appeal. By choosing to live with the judgment, flawed as it might be, each side could take comfort in the fact that both sides had lost disputed issues of great importance to them. In this circumstance, the party asking for amendment of one single aspect of the judgment carries as heavy burden. . . . [A]mending any aspect of the judgment in this case risks upsetting the careful balance on which the entire construct rests.

D.Ct. Decision at 18 – 19. Once again, the District Court applied the wrong standard.

In *Horne*, the Supreme Court explicitly stated that the moving party's decision not to appeal the final judgment could not be considered when later evaluating their Rule 60(b) motion:

> In attributing such significance to the defendants' failure to appeal the District Court's original order, the Court of Appeals turned the risks of institutional reform litigation into reality. By confining the scope of its analysis to that of the original order, it insulated the policies embedded in the order . . . from challenge and amendment. . . . Instead of focusing on the failure to appeal, the Court of Appeals should have conducted the type of Rule 60(b)(5) inquiry prescribed in *Rufo*. *This inquiry makes no reference to the presence or absence of a timely appeal*. It takes the original judgment as a given and asks only whether "a significant change either in factual conditions or in law" renders continued enforcement of the judgment "detrimental to the public interest."

Horne, 557 U.S. at 453 (emphasis added) (internal citations omitted). This makes logical sense. A Rule 60(b)(5) motion is based on changes that occur *after* the final judgment is entered, and therefore, it involves changes in facts or law that were not considered by the district court. Appealing the district court's decision could not help the litigants address changes that had not yet occurred. Thus, in choosing not to appeal the District Court's 1989 decision, the Tribes admitted that the decision was correct *at the time*. They did not waive the opportunity to raise

changes in law or fact that occurred after the final judgment was entered.[19]

The District Court's confusion did not end there. The Court did not seem to understand how to determine what the Tribes needed to prove to succeed. In one part of the opinion, the Court agreed with the Tribes' position and stated that they needed to prove that changed circumstances made it such that "the state's ban is not the least restrictive alternative available to accomplish the public safety purpose" anymore. *D.Ct. Decision* at 3-4. Elsewhere in its opinion, however, the Court claimed that "[i]n their motion to reopen, plaintiffs do not assert that night hunting of deer is no longer a safety hazard, which, if true, might well justify reopening the judgment." *D.Ct. Decision* at 19.[20]

Furthermore, the District Court did not seem to realize that factual changes could support a Rule 60(b)(5) motion, not simply legal changes. The Court made the precise factual findings that the Tribes had sought with respect to post-1989 nighttime deer hunting:

> In the years since the original trial was held in this case, the state has allowed significant night hunting of deer in an effort to combat chronic wasting disease,

[19] While the State now claims otherwise, this was also the understanding it had when it chose not to appeal the final judgment. Several years after the final judgment in *LCO X*, the U.S. Supreme Court granted certiorari in *Mille Lacs Band*, 526 U.S. 172. That case involved the same 1837 Treaty that was the subject of the *LCO* litigation, and the State of Minnesota made arguments similar to those that had been previously made by the State of Wisconsin in *LCO I* (i.e., that the right to hunt and fish in the ceded territory had been abrogated by an 1850 Executive Order or a later treaty). Wisconsin filed an amicus brief in support of the Minnesota in that case. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 1998 WL 470126 (Aug. 6, 1998) (Brief of Amici Curiae States of California, Michigan, Montana, South Dakota, Utah, Wisconsin and Wyoming). It was no doubt hoping that the Supreme Court would decide the right to hunt and fish under the 1837 treaty no longer existed. Then, Wisconsin could have used the decision to support its own Rule 60(b)(5) motion. Because the Mille Lacs Band prevailed in the litigation, however, Wisconsin was never presented with this opportunity.

[20] If the Tribes were required to prove that night hunting is no longer a safety hazard, the judgment could never be modified. *All* hunting poses safety risks, whether it occurs during the day or at night. Tr. 4-A-221, 4-A-268. The question is how to mitigate those risks and how much mitigation should be required. *See* Tr. 2-A-78 to -79, 4-A-288. *See also* Tr. 5-P-13 to -14 (testimony of Timothy Lawhern discussing State's decision not to ban deer drives). The same is true of driving and other common day-to-day activities. *See* App. at 296-98. Still, no one argues that all driving should be banned; they argue for the conduct to be regulated (e.g., driver's education, driver's test, speed limits).

> damage to farm crops and landscaping materials, interference with tree and plant research and potential accidents on roads and at airports. As defendants note, before 1989, official records show that only a few deer were shot at night in any year. . . . However, with the explosion of the deer population in the late 1990s and the emergence of chronic wasting disease, the number of deer killed at night increased significantly. Starting in 2002, DNR employees and law enforcement officers made thousands of individual night hunting trips each year as part of the state's chronic wasting disease eradication project. From 2007 to the time of the trial, the DNR issued up to 12 permits a year allowing private contractors and local governmental employees to do night shooting of nuisance deer, with dozens of deer killed under each permit.

D.Ct. Decision at 22-23. Despite this, the Court denied the Tribes' motion. In doing so it concluded that "the greater portion of the increase in night hunting is attributable to the state government, acting through the DNR, which has had authority to kill deer at night with lights since long before 1989. This new hunting led to a vast increase in the number of deer killed, but not to any expansion in the scope of the DNR's authorized power." *D.Ct. Decision* at 23.

While the latter statement may be true, factual changes can be the basis of a Rule 60(b)(5) motion, not just legal changes. *Agostini*, 521 U.S. at 215 (holding that if significant factual changes are established, a "court errs when it refuses to modify an injunction or consent decree in light of such changes"); *David B. v. McDonald*, 116 F.3d 1146, 1149 (7th Cir. 1997) (reversing the district court and noting that the Supreme Court did not "distinguish between legal and factual circumstances, or between state and federal law; changes in any of these things may justify modification"). The question is whether those factual changes would have resulted in a different decision by the District Court had they existed prior to 1989. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576, n.9 (1984).[21] As the discussion in Section I(B) indicates, they would have.

[21] This was true even under the more stringent *Swift* standard. In *Swift*, a group of meat-packers petitioned for modification of the final judgment in an antitrust case, arguing that conditions in the meat-packing and grocery industries had changed. 286 U.S. at 113. The Court rejected their claim, "finding that the meat-packers were positioned to manipulate transportation costs and fix grocery prices in 1930,

Any of the District Court's legal errors would individually constitute reversible error. Collectively, there can be no doubt that the District Court abused its discretion by failing to articulate and apply the proper legal standards for Rule 60(b)(5) motions.

B. If the District Court Applied the Correct Legal Standard, There Could Be No Doubt that the Tribes Proved the Existence of Changed Conditions

The District Court admitted that twenty-five or fewer deer were shot at night annually by the Wisconsin DNR prior to 1989. *D.Ct. Decision* at 23. Thus, while DNR employees had the *authority* to shoot deer at night prior to 1989, they were not *exercising* that authority, and there was therefore no way to know whether nighttime hunting could be conducted safely. *Id.* at 22; App. at 323-25. Unlike in recent years, there was no nighttime shooting "program." There were no State policies or regulations to govern nighttime shooting with high caliber weapons. And there were no statistics establishing the number of hunting incidents that were likely to arise from legal nighttime deer shooting.

Today, the situation has changed. The State's first program for nighttime hunting of large species occurred as a result of the CWD outbreak in Wisconsin in 2002. App. at 164 (Stipulated Facts ¶¶ 78, 79). As part of its CWD program, the Wisconsin DNR developed policies designed to efficiently kill deer at night while still protecting public safety. These policies required participants to take a marksmanship course, pass a marksmanship proficiency test, and create shooting plans for the locations where hunting would occur to identify potential hazards in advance of any hunting activities. App. at 165-66 (Stipulated Facts ¶¶ 86, 92, 93, 108); App. at 460-76 (CWD shooting policies). Over the next five years, the Wisconsin DNR

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just as they had been in 1920." *Rufo*, 502 U.S. at 379. Thus, the Supreme Court refused to modify the decree in *Swift* because there were insufficient factual changes. *See also Board of Education of Oklahoma City Public Schools*, 498 U.S. at 247 (refusing to apply *Swift*'s standard but noting that *Swift* "must be read in the context of the continuing danger of unlawful restraints on trade which the Court had found still existed").

tested the efficacy of these policies. More than 300 different individuals participated in nighttime hunting under the CWD program, and thousands of deer were shot at night. *D.Ct. Decision* at 14, 23; App. at 168 (Stipulated Facts ¶ 121). Not one hunting incident occurred, even though several of the shooters had little to no experience hunting deer, let alone hunting deer at night, prior to their participation in the program. App. at 167 (Stipulated Facts ¶ 120); Tr. 2-P-78 to -81.

At the same time, culling was becoming increasingly necessary to deal with an exploding deer population. In 2005, the Wisconsin DNR amended its regulations to allow municipalities to shoot deer at night under nuisance permits. Just two years later, there was a dramatic expansion in night hunting under these permits. *D.Ct. Decision* at 23; Tr. 3-A-98. *See, e.g.*, Tr. 3-A-90 (testimony of Bradley Koele noting that up to a dozen permits were issued each year from 2007 to the present). Nighttime deer hunting under these permits was primarily conducted by private contractors. *D.Ct. Decision* at 14; Tr. 3-A-97 to -100. These permits typically result in nighttime shooting of 2,000 or more deer in any given year. *See* Tr. 3-A-109 to -111. Yet the Wisconsin DNR does not have any regulations that impose particular safety requirements on persons who shoot deer at night under these nuisance deer permits. Tr. 3-A-87 to -90, 3-P-5 to -10 (testimony of Brad Koele discussing varying criteria in permits).

Finally, Wisconsin authorized the general public to hunt wolves at night. *D.Ct. Decision* at 15. Unlike the species that were hunted at night in 1989, both wolves and deer are hunted using high caliber weapons, and thus, there are similar safety concerns associated with hunting both species. *LCO VII*, 740 F. Supp. at 1423; App. at 172 (Stipulated Facts ¶ 159); *D.Ct. Decision* at 24. The Wisconsin DNR was tasked with developing regulations to ensure that public safety was protected while nighttime wolf hunting was on-going. The regulations

required: (1) the use of bait or calling techniques; (2) shooting from a stationary position; and (3) a ban on the use of hunting dogs at night. App. at 171 (Stipulated Facts ¶ 144). The legislative history for the nighttime wolf regulations confirms that the Wisconsin DNR believed these regulations would protect public safety. App. at 513, 534.

In 2012, Wisconsin granted its citizens 1,160 licenses that authorized nighttime wolf hunting, and at least three wolves were shot at night. App. at 171 (Stipulated Facts ¶ 147); Tr. 3-P-159 (State admission). The State admitted that there were no safety incidents associated with the nighttime wolf hunt, just as there are no hunting incidents reported for any of the State's nighttime deer hunting programs. App. at 167, 172 (Stipulated Facts ¶¶ 120, 160); *D. Ct. Decision*, at 14.

The above summary relies on facts that were stipulated to by the State or found by the District Court. Together, they conclusively establish that nighttime hunting with high caliber weapons can be done safely, a fact that could not be proven based on the data available to anyone in 1989. *See* App. at 323-25. The Tribes have utilized this evidence to create a night hunting program that has more safety protections in place than any of the State's individual programs, including mandated use of a light, a twelve-hour advanced hunter safety course, a stringent marksmanship test conducted at night, shooting only from a stationary position, and requirements for detailed shooting plans with a backstop to catch any stray bullets. App. at 173 (Stipulated Facts ¶¶ 171); App. at 551; Tr. 1-A-80 to -81. With such abundant night hunting activity occurring within Wisconsin, a complete ban on the Tribes' treaty-protected right to harvest deer at night can no longer be the least restrictive alternative available to protect public safety. *See LCO IV*, 668 F. Supp. at 1239. If the District Court had applied the correct legal

standard, it would have been required to grant the Tribes' request for relief from the final judgment.

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY EXCLUDING ALL EVIDENCE OF NIGHTTIME HUNTING OUTSIDE OF WISCONSIN

Fed. R. Evid. 401 provides that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:2 (3d ed. 2007 & Supp. 2009). This is a liberal standard. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993). After all, "[a] brick is not a wall," 1 McCormick on Evidence § 185 (Kenneth S. Broun ed., 7th ed. 2013), and "[a]ny more stringent [standard would be] unworkable and unrealistic." Fed. R. Evid. 401 advisory committee's note.

Appellate courts review a district court's relevancy determination under Fed. R. Evid. 401 for abuse of discretion. *Williams v. Jader Fuel Co., Inc.*, 944 F.2d 1388, 1403 (7th Cir. 1991). But "[d]iscretion does not mean immunity from accountability," and if a district court "applies an improper legal standard" as the basis for refusing to allow testimony or documents from being admitted into evidence, the court's decision "obviously constitutes an abuse of discretion." *See Sherrod v. Berry*, 856 F.2d 802, 804 (7th Cir. 1988) (en banc) (citing, in part, Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence*, ¶ 401[03] (1975)). Additionally, for an appellate court to reverse a district court's erroneous relevancy determination, there must be a significant chance that it affected the outcome of the case. *Cerabio LLC v. Wright Medical Technology, Inc.*, 410 F.3d 981, 994 (7th Cir. 2005); *Old Republic Ins. Co. v. Employers Reinsurance Corp.*, 144 F.3d 1077, 1082 (7th Cir. 1998).

At trial, the Tribes had the burden to show that there were "changes in conditions . . . prov[ing] that the night hunting ban is no longer the least restrictive alternative available to accomplish the public safety purpose." *D.Ct. Decision* at 3–4. To that end, the Tribes were prepared to offer expert and lay testimony, an expert report, and exhibits establishing that a substantial amount of nighttime deer hunting has occurred throughout the country since 1989, by both government employees and private persons.

The State objected to the Tribes' admission of Chairman McGeschick's expert report into evidence to the extent that it discussed nighttime hunting outside of Wisconsin. App. at 282-94; Tr. 2-A-63. The State simultaneously objected to *all other evidence* pertaining to nighttime hunting outside of Wisconsin, claiming that such evidence was irrelevant to proving changed conditions. Tr. 2-A-63. The Tribes responded with an offer of proof, providing the substance and relevance of the evidence. Tr. 2-A-64 to -65. Specifically, the Tribes argued that the fact that nighttime hunting is now occurring nationwide demonstrates that it is no longer viewed as unsafe, and that it can be regulated by less restrictive means than a complete prohibition. Tr. 2-A-64 to -65.

The District Court made a broad ruling from the bench during trial, which excluded all evidence of nighttime hunting outside of Wisconsin over the Tribes' objections. Tr. 2-A-65. The Tribes restated their position in post-trial briefing and requested a new hearing, *see* Appellant's Post-Trial Br. 4 n.1, but in the final opinion denying the Tribes' Rule 60(b)(5) motion, the District Court reaffirmed its decision to exclude the evidence as irrelevant. *D.Ct. Decision* at 24–25. Somehow, the Court had determined that evidence of the existence of

widespread nighttime hunting with high caliber weapons outside of Wisconsin and after 1989, did not matter to the outcome of the case:[22]

> Plaintiffs argue that the court handicapped them in the recent trial by refusing to allow them to introduce evidence about other states' experiences in night hunting with lights and rifles in the years since final judgment was entered in this case. Such evidence might have been useful if plaintiffs' motion turned on the safety of night hunting in general. Since it turned instead on the nature and extent of the alleged changes in conditions *in Wisconsin* and whether those changes were so significant as to justify reopening the judgment, plaintiffs have shown no reason why the evidence should have been received.

D.Ct. Decision at 24-25 (emphasis added). In doing so, the Court committed reversible error because: (1) the evidence was relevant; and (2) refusal to admit the evidence was not harmless.

A. The District Court Abused Its Discretion by Determining that the Existence of Nighttime Hunting Outside Wisconsin Was Not Relevant

Prior to trial, the Tribes submitted Proposed Findings of Fact containing the factual allegations that it was prepared to prove at trial. Those proposed findings referenced approximately forty examples of nighttime hunting outside of Wisconsin. *See* App. at 203-13 (PPFOF at ¶¶ 99–155). These examples established that Wisconsin's CWD program, nuisance deer permit system, and nighttime wolf hunt were not isolated instances of nighttime hunting with high caliber weapons. In fact, they were reflective of a nationwide trend. Simply stated, the fact that nighttime hunting was occurring, *regardless of where it was occurring*, established that it was viewed as a reasonably safe activity that could be properly regulated without a complete prohibition. This was the "changed condition" the Tribes had to prove. The District Court disagreed with this argument, and ruled that only evidence of nighttime hunting in Wisconsin was relevant. Tr. 2-A-65. It did so based on a misunderstanding of the law.

[22] The Court did not rest its determination on the first relevancy requirement. That is, there is no indication that the Court believed the evidence offered by the Tribes would not tend to prove that since 1989, nighttime hunting was occurring outside of Wisconsin while still protecting public safety.

It is certainly true that if the State authorizes its own citizens to engage in a particular hunting activity, it cannot then prevent the Tribes from engaging in this activity by arguing that it is necessary for conservation or to protect public safety. The U.S. Supreme Court has long ago indicated that discriminatory state regulations are barred, and if the state provides a particular opportunity to its own hunters it would be discriminatory to claim that the same opportunity should be denied to Tribal hunters. *Puyallup II*, 414 U.S. at 48. This is precisely why the Tribes argued below that Wisconsin's nighttime wolf hunt automatically authorized them to engage in nighttime deer hunting. App. at 231 (Commission Order § 1, subdiv. 1.2); Tr. 1-A-34 to -36, 1-A-62. More broadly, this is also why the Tribes and the State agreed in the First Stipulation (filed with the District Court in 2009), that changes in State law after the final judgment should provide the Tribes with the right to issue a technical amendment to the Model Code (via a Commission Order) that would automatically[23] provide Tribal hunters with the same substantive right. *See* Statement of the Case, Section II, *supra* (discussing the First Stipulation and explaining the technical amendment process). Importantly, however, the prohibition on discriminatory state regulation does not explain the full extent of Indian treaty rights.

For 100 years, states have argued that treaty hunting rights gave Indians nothing more than the right to engage in those activities the state allows all of its citizens to engage in. This so-called "equal opportunity" argument, however, has been rejected by the Supreme Court time and time again. *See, e.g.*, *Washington v. Wash. Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979) (noting that in each of its seven Stevens Treaty cases, "more or less explicitly rejected the State's 'equal opportunity' approach," and that "[w]hatever opportunities the treaties assure Indians with respect to fish are admittedly not 'equal' to, but are to some extent greater

[23] Such a change is "automatic" in the sense that the State does not have to consent to the Model Code amendment, and the change is effective before it is even filed with the District Court.

than, those afforded other citizens"); *United States v. Winans*, 198 U.S. 371, 380 (1905) (rejecting the defendants' argument that by treaty, "the Indians acquired no rights but what any inhabitant of the territory or state would have," noting that this would be "an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more"). The Tribes' rights are *federal* rights protected by the Supremacy Clause, they are not dependent on State law. *Mille Lacs Band*, 526 U.S. at 204-05; *Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392, 398 (1968) (*Puyallup I*). Furthermore, the State can only regulate such rights under narrow conditions: when it is necessary for the continued existence of the species or to protect the public safety. *Antoine*, 420 U.S. at 205; *Puyallup II*, 414 U.S. at 49; *LCO IV*, 668 F. Supp. at 1239; Statement of the Case, Section I(B), *supra*. Consequently, even if the State does not permit a particular activity for its own hunters, it still cannot prohibit that activity for Tribal hunters unless it is necessary for conservation or public safety.

In this case then, even though the State does not permit the precise activity the Tribes seek to engage in–nighttime deer hunting by non-Wisconsin DNR employees–that does not mean that the State can prohibit this activity. The question is whether a complete ban on nighttime deer hunting is the least restrictive means of protecting public safety. While the State did demonstrate this in the original 1989 trial, *LCO VII*, 740 F. Supp. at 1423, the Tribes are arguing that changed conditions establish that the complete ban is no longer appropriate. It should therefore be obvious that evidence demonstrating dozens of other states and tribes have recently permitted nighttime deer hunting is relevant to the Tribes' Rule 60(b)(5) motion. *See* App. at 203-05, 207, 210-13 (PPFOF at ¶¶ 99-110, 125, 141-55). The District Court held otherwise because of a mistake in the legal standard to be applied, and its decision was an abuse of discretion. *Sherrod*, 856 F.2d at 804.

This conclusion is also supported by caselaw outside of the treaty rights context where courts have held that evidence external to the parties' relationship is relevant. In *Renton v. Playtime Theatres, Inc.*, the U.S. Supreme Court determined that Renton "was entitled to rely on the experiences of Seattle and other cities . . . in enacting its adult theater zoning ordinance." 475 U.S. 41, 51 (1986). The Court stated that the Ninth Circuit "imposed on the city an unnecessarily rigid burden of proof" by requiring independent evidentiary studies. *Id.* at 50. That holding has been cited with approval in numerous subsequent opinions by the U.S. Supreme Court and this Court. *See, e.g.*, *Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000); *Andy's Restaurant & Lounge, Inc. v. Gary*, 466 F.3d 550, 555–56 (7th Cir. 2006); *Ben's Bar, Inc. v. Somerset*, 316 F.3d 702, 725-26 (7th Cir. 2003).

Likewise, in *Ross v. Black & Decker, Inc.*, the Seventh Circuit upheld the admission of evidence of a safety standard published by a private organization that did not govern the relationship of the parties to a common-law product liability suit. 977 F.2d 1178, 1183–84 (7th Cir. 1992). In that case, this Court noted: "[i]n product liability actions . . . , standards may be relevant in determining whether or not the condition of the product is unreasonably dangerous." *Id.* at 1184 (citation omitted). In accord with *Ross*, other circuit courts have found that district courts abused their discretion by excluding evidence of safety standards even if they did not directly govern the relationship between the parties. *E.g.*, *Campbell v. Keystone Aerial Surveys, Inc.*, 138 F.3d 996, 1002–03 (5th Cir. 1998); *Rolick v. Collins Pine Co.*, 975 F.2d 1009, 1013–14 (3d Cir. 1992).

Given the fact that a change in Wisconsin law or practice was not necessary for the District Court to grant the Tribes' Rule 60(b)(5) motion, and because in analogous cases evidence from external sources has been found to be relevant, it was unreasonable to determine

that examples of nighttime deer hunting outside of Wisconsin were of no consequence to determining whether such hunting is now recognized as reasonably safe and manageable by less restrictive means than a complete prohibition. The evidence was relevant and should not have been excluded.

B. The District Court's Erroneous Exclusion of Evidence Was Not Harmless

For the District Court's erroneous evidentiary ruling to be reversed, the Tribes must also show that there exists a substantial chance that the court's error affected the outcome of the case. *E.E.O.C. v. Mgmt. Hospital of Racine, Inc.*, 666 F.3d 422, 440 (7th Cir. 2012). This standard is satisfied here for three reasons. First, the Court's exclusion was a blanket evidentiary ruling that prevented the Tribes from introducing large quantities of evidence without the Court ever inquiring into the nature of each piece of evidence that the Tribes wanted to introduce. Second, the evidence would have conclusively demonstrated that nighttime deer hunting is now recognized as reasonably safe and manageable through less restrictive means than a complete prohibition – the condition the Tribes argued changed – by showing that over the past decade, it has occurred in some manner in nearly every U.S. state where deer are found. Lastly, the Tribes contest the District Court's apparent belief that only nighttime hunting by members of the general public for subsistence or sport matters to the changed circumstances determination. *D.Ct. Decision* at 20, 23-24. Even if this were true, however, the evidence the Court excluded would have established that private persons legally engage in nighttime hunting of deer and other large mammals with high caliber weapons for sport or subsistence purposes in many different states, a fact which, once again, would have established that a complete ban is no longer the least restrictive means of protecting public safety. Each of these arguments is discussed in turn below.

While trial courts receive some deference in evidentiary rulings, this Court has "not hesitated to overturn blanket evidentiary rulings where [it is] not satisfied that the district court exercised sufficient discretion." *Cerabio LLC*, 410 F.3d at 994 (citing *Mihailovich v. Laatsch*, 359 F.3d 892, 913–14 (7th Cir. 2004) (an exclusion of all evidence regarding prior accidents created a significant chance that the outcome of the trial was affected)); *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987) (an exclusion of all evidence of events prior to a particular time warranted a new trial); *Pub. Serv. Co. of Ind., Inc. v. Bath Iron Works Corp.*, 773 F.2d 783, 790 (7th Cir.1985) (an exclusion of evidence prevented the party from presenting its entire case and therefore prejudiced its substantial rights)). The District Court's actions in this case contained just such a blanket ruling. The court precluded *any* evidence of nighttime hunting outside of Wisconsin, without giving any consideration to each piece of evidence. The ruling was based on the incorrect presumption that such evidence could have no bearing on facts of consequence to the case. Once the correct legal standard is applied, it is obvious that there would be no way for the court to know whether the evidence was relevant without inquiring as to each piece of evidence the Tribes wished to introduce. Therefore, the District Court's error prejudiced a substantial right of the Tribes and created a significant chance that the outcome of the case was affected.

Second, the overwhelming quantity of the evidence excluded by the District Court would have shown that nighttime deer hunting is now widely recognized as a reasonably safe activity. The Court's ruling limited the Tribes' evidence regarding changed conditions to Wisconsin's CWD program, nuisance deer permits, and the 2012 wolf hunt. This was a microcosm of the myriad of programs the Tribes intended on presenting to the court. The Tribes sought to present evidence on nighttime hunting by governmental authorities in ten other U.S. states and on

numerous federal lands, App. at 205-09 (PPFOF at ¶¶ 113, 115-16, 118-23, 125-29, 130-32), nighttime off-reservation hunting by Indians in six other U.S. states and five Canadian provinces, App. at 203-05 (*id.* ¶¶ 99, 102-10), and nighttime hunting by non-Indians in fourteen other U.S. states. App. at 208-13 (*Id.* ¶¶ 130-31, 141-42, 144-55). With all of these lawful programs spanning North America, it would have bordered on absurd for the District Court to determine that nighttime hunting is not recognized as a reasonably safe activity and manageable by less restrictive means than a complete prohibition.

Lastly, in its opinion, the District Court claimed that evidence of nighttime hunting in Wisconsin's CWD program was not persuasive because it was conducted by Wisconsin DNR employees, and such employees have always had the legal authority to shoot diseased or injured animals at night, even if they rarely exercised this authority. *D.Ct. Decision* at 23. In Section I(A) above, we address the flaws in this argument. But even if it were somehow correct that the Tribes needed to demonstrate that members of the general public – not DNR employees– had been authorized to shoot deer at night since the entry of the final judgment in this case, the Tribes could have presented such proof if the District Court had not erroneously excluded all evidence from outside of Wisconsin.

As the Tribes' proposed findings of fact and Chairman McGeshick's expert report demonstrate, nighttime deer hunting is conducted by members of the general public throughout the country. For example, in 1997, the New Jersey legislature passed section 23:4-4-42.1, which allows farmers to "kill any sex deer at any time of day or night." App. at 293 (excluded section of Expert Report, Chairman McGeshick). Around the same time, New Jersey also authorized the creation of "community based deer management programs" – that is, groups of citizens – to assist "cooperators" (e.g., municipalities, county governing bodies) in managing their deer

populations by hunting deer at night. App. at 285. In 2003 alone, hunters under this program harvested nearly 800 deer. *Id.* New Jersey is just one example. Many states allow farmers to shoot deer at night. App. at 290-93.

The District Court also implied that the Wisconsin CWD program and nuisance deer permits were not persuasive because they did not involve shooting of deer for either subsistence or sport. *D.Ct. Decision* at 23. The court did not explain how the hunter's *purpose* in harvesting deer impacts the *safety* of the activity engaged in.[24] Regardless, however, the Tribes were prepared to offer several examples of nighttime hunting with high caliber weapons for subsistence or sport purposes. The Tribes sought to introduce testimony relating to nighttime deer hunting in California and Texas by sports hunters. App. at 210 (PPFOF at ¶¶ 141-42).[25] They sought to introduce testimony relating to nighttime hunting (deer and other large mammals) that is engaged in by Indian tribes in Michigan, Washington, Oregon and other states in their off-reservation ceded territories. App. at 203-04 (PPFOF at ¶¶ 99-108).[26] They sought to introduce

[24] The purpose of the hunt should be irrelevant. If it has any relevancy, however, the Tribes would argue that subsistence hunters are *safer* than sports hunters because of the difference in regulatory schemes. The State generally only permits sports hunters to hunt deer using high caliber weapons during the nine-day gun-deer season each fall, and hunters are typically only permitted to bag one deer. Wis. Admin. Code NR 10.01 Table (3)(e) (2014), *available at* http://docs.legis.wisconsin.gov/code/admin_code/nr/001/10/01/3. Sports hunters usually prefer shooting large bucks, as many seek to preserve the head of the deer for later display. When a hunter sees a large buck, they may rightfully be concerned that this will be their only opportunity to harvest such a deer during this year's season, and they may be willing to take a riskier shot (e.g., one with less visibility) to ensure that they can kill the deer. *See* Tr. 3-P-147 (referring to "buck fever"). Tribal subsistence hunters, on the other hand, are able to harvest deer over a hunting season both on and off-reservation that runs for many months. App. at 260. The Tribes do not impose bag limits, and Tribal hunters do not prefer bucks to does. App. at 260, 272. Therefore, the incentive to take a riskier shot simply does not exist. *See* Tr. 3-P-144 to -147.

[25] While *California's* purpose was to reduce the population of an invasive species – white-tailed deer – thereby protecting the resident population of black-tailed deer, the individual *hunter's* purpose was nevertheless to harvest deer for sport.

[26] The District Court allowed one Tribal witness to provide testimony on the subject to explain the research he had done while developing the rule, and several Tribal codes were introduced into evidence. Tr. 1-A-39 to -47, 1-A-52 to -62, 1-A-137 to -138. But the court limited the use of their testimony to the

testimony relating to nighttime deer hunting that is engaged in by aboriginal groups in Canada. App. at 205 (PPFOF at ¶¶ 109-10). The Tribes also sought to introduce testimony relating to the hunting of wild boar, bear, and other large mammals with large caliber weapons for sport and subsistence purposes.[27] App. at 211-12 (PPFOF at ¶¶ 146, 149); Tr. 1-A-61 to -62. All of this evidence was precluded by the District Court's blanket evidentiary ruling.

Had the court admitted evidence of nighttime hunting outside of Wisconsin, it would have seen that such hunting is a common occurrence for a variety of purposes, including sport, subsistence, agricultural damage, disease control, and nuisance prevention. Nearly all of this hunting has begun *after* the 1989 deer trial, and it continues to this day, demonstrating that nighttime deer hunting can be conducted safely. If this evidence had been introduced, it would likely have forced the court to reevaluate its stance on whether or not there has been "changes in conditions since the judgment was entered in 1991 prov[ing] that the night hunting ban is no longer the least restrictive alternative available to accomplish the public safety purpose." *D.Ct. Decision* at 3–4. Since there is a substantial chance that this evidence would have affected the outcome in this case, the erroneous exclusion of this evidence was not harmless. *Old Republic Ins. Co.*, 144 F.3d at 1082; *Cerabio LLC*, 410 F.3d at 994. The District Court's decision must therefore be vacated, and this matter should be remanded for further proceedings.

III. THE COMPLETE BAN ON NIGHTTIME DEER HUNTING DISCRIMINATES AGAINST TRIBAL MEMBERS

The State may only regulate a treaty right if "the regulation meets appropriate standards and does not discriminate against the Indians." *Puyallup I*, 391 U.S. at 398. This discrimination standard is distinct from an equal protection claim under the Fourteenth Amendment to the U.S.

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development of the Tribes' own safety regulations and refused to consider this evidence when deciding whether changed circumstances were present to support the Tribes' motion. *See* Tr. 2-A-65.

[27] GLIFWC's Chief Warden Fred Maulson was prepared to testify, for example, about several states that permitted the hunting of wild boar at night.

Constitution, because a facially neutral state regulation may be discriminatory even absent discriminatory intent. *See LCO IV*, 668 F. Supp. at 1237 ("It is well established in the case law that a facially neutral state regulation applied in a non-discriminatory manner nonetheless may discriminate against tribal usufructuary rights."). For example, in *Puyallup II*, the State of Washington banned net fishing by both Indians and non-Indians for conservation purposes. 414 U.S. at 45. Even though the state did not enact the regulation for the purpose of discriminating against the exercise of treaty rights, and despite the fact that the ban applied to both groups of persons, the U.S. Supreme Court held that the regulation was discriminatory. *Id.* at 48. While non-Indians practiced hook-and-line fishing, the Puyallup preferred net fishing, and the state had failed to adjust its regulations accordingly. *Id.*

A stringent discrimination standard is necessary because treaty rights are the supreme law of the land. U.S. Const. art. VI, cl. 2; *Antoine*, 420 U.S. at 205 ("State qualification of the rights is therefore precluded by force of the Supremacy Clause, and neither an express provision precluding state qualification nor the consent of the State was required to achieve that result."). The federal government has a trust responsibility to protect these rights from intrusion by states, as the Supreme Court articulated in *Worcester*, 31 U.S. at 520. Thus, states may only intrude on the ability of Indian tribes to regulate treaty rights under the narrowest of circumstances. *See LCO IV*, 668 F. Supp. at 1239. Allowing even unintentional discrimination violates this principle.

Regardless of whether the State of Wisconsin has intended to be discriminatory, the complete ban on tribal night hunting has created a discriminatory result: the Tribes have been unable to realize their full share of the harvest. *Compare LCO X*, 775 F. Supp. at 323 (apportioning harvestable deer equally between tribal and non-tribal hunters), *and* App. at 508

(showing deer population), *with* App. at 492 (recording harvest of 1,387 deer in 2011). State regulation cannot favor one method of harvest over another, even if the regulations, when enacted, were meant to serve a conservation or safety purpose. *Puyallup II*, 414 U.S. at 48; *LCO IV*, 668 F. Supp. at 1239. Nighttime hunting is an efficient way to harvest the venison needed for subsistence and ceremony. App. at 173 (Stipulated Facts ¶ 165). The State used nighttime deer hunting as part of its CWD program, and it continues to allow such hunting under its nuisance permit program. *See* Statement of the Case, Section IV(A),(B), *supra*. The State and its political subdivisions are taking advantage of a hunting technique that they have precluded the Tribes from using.

There is also evidence, however, that the State's actions *have* been motivated by a discriminatory intent. That is, the State has been repealing laws just prior to litigation with the Tribes solely to preserve its claims that nighttime hunting is unsafe. In a series of documents from the 1980s, State officials clearly debate whether they should allow non-Indian farmers to engage in nighttime shooting to protect their crops from deer damage. Ultimately, the State chose not to do so, because it realized that if it permitted farmers to shoot deer at night, it would be barred from arguing that Tribal members should be subject to a complete nighttime shooting ban. Likewise, when it became apparent that the Wolf Act was prompting the Tribes to renew their claims to nighttime deer hunting, the State deliberately stalled and delayed until it could repeal that Act. The State's decisions are not based on protecting public safety; a review of the documents establishes that they are tied, in large part, to a desire to try to prevent the Tribes from exercising their federally protected treaty right. This is discriminatory.

Shortly before the 1989 deer trial, the State considered and rejected a proposal to allow night hunting of deer in limited circumstances. Even though State law had long prohibited

nighttime shining and shooting of deer, in the early 1980s, some Wisconsin conservation wardens were verbally authorizing famers – without any legal authority – to shoot deer at night to protect their crops from damage.[28] App. at 344 (Pl. Exh. 25). When high-ranking officials at the Wisconsin DNR learned about this practice, those same officials were also meeting with the Tribes to discuss their draft Model Code, which would have included nighttime deer hunting. *See* App. at 336 (Pl. Exh. 22). In February 1985, the Wisconsin DNR issued Chapter 20 of its Wild Animal Damage Handbook, the first official guidance to DNR employees on the issuance of deer damage permits. App. at 152 (Stipulated Facts ¶ 21); App. at 326-32 (Pl. Exh. 17). The Handbook explicitly prohibited any DNR employees from authorizing permits that allowed the shooting of deer at night, with or without the use of a light. App. at 329-30. Officials claimed that this guidance was necessary to ensure complete compliance with existing laws and protect public safety. App. at 327 (letter from C.D. Besadny stating that "[s]afey considerations and reasonable restraint of our agents due to liability exposure, require this type of activity [(i.e., nighttime shooting)] not be authorized").

Farmers complained to their legislators, and this prompted the Joint Committee for Review of Administrative Rules (JCRAR) to become involved. The JCRAR directed the Wisconsin DNR to adopt those handbook provisions as formal emergency regulations. App. at 153 (Stipulated Facts ¶ 22). It then held a hearing on whether those regulations should be suspended by the JCRAR. App. at 154 (Stipulated Facts ¶ 25); App. at 333 (Pl. Exh. 18); App. at 334-35 (Pl. Exh. 19). At that hearing, George Meyer, the Administrator of the Division of Enforcement of the Wisconsin DNR and also the lead negotiator for the State of Wisconsin in connection with the Tribes' treaty hunting rights, testified as follows:

[28] As Dr. Gilbert explained at trial, there is a difference between local and statewide overabundance. This difference explains why there can be local nuisance problems even if the deer population is at or below goal, such as it was in the 1980s. Tr. 1-P-56 to -57.

> The issue of Chippewa treaty hunting rights does become relevant – if – as a result of a suspension of the rules by this committee, a bill becomes introduced changing the law allowing the shooting and shining of deer at night. If in fact such a bill is passed allowing those practices for deer damage permits, the Chippewa Indians will be able to hunt deer at night and shine deer in the northern one third of the state.
>
> How can we be so certain that would be the result? In 1983, the Wisconsin Supreme Court in the Le Meiux case held that since the legislature had adopted an exemption for handicap hunters to the otherwise total statutory prohibition against the possession and discharge of loaded and uncased guns in vehicles, the state also had to allow tribal members exercising treaty hunting rights to have loaded and uncased guns in vehicles and to shoot from vehicles. Because of this court ruling, the Department in its negotiations has had to allow the practice. I am sure that you will recall the great public uproar on this issue in northern Wisconsin last fall. The great majority of citizens, not just the vocal anti-Indian groups, spoke out strongly on the issue. . . . To their credit, Senator Kincaid and Representative Holperin, in response to the strong and legitimate concerns of their constituents have introduced bills making corrective modifications to the loaded and uncased gun statute. . . .
>
> Because of the total prohibitions against [nighttime deer shooting], the courts have not allowed treaty hunters to use these practices and the Department has been able to retain the prohibition in our negotiations with the Chippewa. What would happen when as a result of legislative changes, the courts allow the Chippewa to hunt deer at night. . . . Some have stated that there is a distinction between allowing these practices to prevent serious crop damage and allowing these same practices for Indian hunting. While different purposes distinguish the two, the physical acts of shooting at night and shining would be the same, and the result, the harvest of deer would be the same. I can assure you from working with federal courts and their interpretations of Indian treaty rights, that the courts would view the different purpose as a minor technicality. . .
>
> That leaves two problems to be solved: The first is not worsening the current Chippewa treaty hunting right situation in northern Wisconsin. . . . The first problem is solved by not changing laws and regulations prohibiting shining or hunting deer at night.

App. 336-38 (Pl. Exh. 22).

When the JCRAR ignored this testimony and suspended the emergency rule that the DNR had promulgated to implement Chapter 20 of the Wild Animal Damage Handbook, App. at 340-42 (Pl. Exh. 23), the Wisconsin DNR refused to comply. *See* App. at 155 (Stipulated Facts ¶¶ 29-30). The DNR issued guidance to its employees explaining that they could not permit any

nighttime deer hunting by farmers. App. at 154 (Stipulated Facts ¶ 28); App. at 343 (Pl. Exh. 24); App. at 344 (Pl. Exh. 25). Wisconsin DNR officials also continued to press the Governor and the Legislature. App. at 349-50 (Pl. Exh. 27). A bill was introduced in the Legislature to specifically authorize nighttime deer shooting by farmers. App. at 154 (Stipulated Facts ¶ 27). The Wisconsin DNR vigorously opposed this bill and both DNR officials and the Wisconsin Attorney General sent correspondence indicating that they were opposing the bill to ensure that Tribal members could not hunt deer at night. App. at 155-56, 158 (Stipulated Facts ¶¶ 31-33, 38); App. at 346-48 (Pl. Exh. 26); App. at 349-50 (Pl. Exh. 27); App. at 356 (Pl. Exh. 31). The Secretary of the DNR was concerned that the legislation would effectively permit "unlimited deer harvest rights." App. at 351-53 (Pl. Exh. 28). When the Wisconsin Legislature passed the bill, the Governor vetoed it. App. at 158 (Stipulated Facts ¶ 39). The provisions of Chapter 20 of the Wild Animal Damage Handbook were later adopted in 1987 as formal regulations, and they explicitly banned any nighttime deer hunting. App. at 361a-e (Pl. Exh. 33).[29]

History is now repeating itself. In 2012, the Wisconsin Legislature authorized a nighttime wolf hunt. *D.Ct. Decision* at 15; App. at 171 (Stipulated Facts ¶ 145). The Tribes immediately indicated their intention to engage in nighttime deer hunting, believing that the State could no longer object on public safety grounds when its own citizens were engaging in the same conduct. Tr. 1-A-34, -36. During discovery, the State withheld documents related to the Wisconsin DNR's development of the nighttime wolf hunting regulations, claiming attorney-client privilege. It admitted, however, that the Wisconsin DNR discussed and considered the impact of the wolf hunt on the ability of the Tribes to exercise their treaty right to hunt deer at night when drafting the regulations. *See* App. at 171 (Stipulated Facts ¶ 143) ("In deciding

[29] The Tribes did not have access to any of this correspondence prior to the original deer trial. Furthermore, it was not provided by the State during discovery in this case, and instead, it was discovered by the Tribes' attorneys at the Wisconsin Historical Society. Tr. 1-A-27 to -28.

whether or not to include specific provisions in the night wolf hunting regulations, [the primary drafter of the wolf regulations] considered the impact the regulation would have on the ability of tribes to hunt at night in the ceded territory. He discussed this possibility with [DNR legal counsel] Tim Andryk, Tom Van Haren, and Bill Vander Zouwen.").

The State then stalled negotiations with the Tribes, refusing to provide concrete feedback on the Tribes' nighttime hunting proposal. Tr. 1-A-118. In August, the State asked the Tribes to delay the issuance of any Commission Order, without providing an explanation. App. at 230. The Tribes' attempts to negotiate with the State over the next year continued to be in vain, as the State found new objections to the Tribes' proposal even when the Tribes repeatedly incorporated changes to respond to the States' objections. Tr. 4-A-260 to -271. Finally, less than three weeks before the District Court trial, Wisconsin repealed the night hunting provision from the wolf bill. *See D.Ct. Decision*, at 15; App. at 172 (Stipulated Facts ¶ 164). It did so even though there were no hunting incidents during the course of the wolf hunting season. App. at 172 (Stipulated Facts ¶ 160).

In a press conference, the Governor of Wisconsin said that "the biggest reason" he sought repeal of the nighttime hunting provision was that it was unnecessary in order to meet the wolf quota. App. at 296. The Governor also admitted, however, that the Tribes' proposed nighttime deer hunt played a role in his request that the Legislature repeal the nighttime wolf hunt. App. at 295. State hunters suffered no decrease in the chance to harvest wolves by losing the night hunting provision. In contrast, the Tribes lost their ability to decrease the gap between their federally guaranteed right to harvest up to one-half of the available deer in the ceded territory, and the actual harvest achieved by Tribal members, which is less than one percent of the available deer.

The repeal of the wolf bill was crucial to the District Court's ultimate decision to deny the Tribes' Rule 60(b) motion:

> If the legislature had not eliminated that aspect of the wolf hunt for 2013, it might have been difficult to deny plaintiffs' motion to reopen the judgment. . . . However, now that the legislature has changed course on allowing night hunting of wolves with rifles, plaintiffs cannot rely on the wolf hunting regulations as a further ground for attacking the judgment.

D.Ct. Decision, at 24. The District Court claimed that the State's actions were not discriminatory, but it made no factual findings in this regard. *See id.* ("I cannot say that it shows that the judgment in this case . . . is in need of amendment for any other reason, such as being evidence of discriminatory treatment of the Chippewa.").

The State's behavior is consistent with a pattern of interfering with the Tribes' treaty rights that goes back more than a century. *See LCO VIII*, 749 F. Supp. at 922 ("the State of Wisconsin has violated plaintiffs' treaty rights for over 130 years"). This interference should not be permitted to continue.

IV. THE DISTRICT COURT SHOULD HAVE CONCLUDED THAT THE TRIBES' MOTION WAS FILED IN A REASONABLE TIME

Rule 60(b)(5) motions must be filed "within a reasonable time." Fed. R. Civ. P. 60(c)(1). In determining whether a motion was timely filed, it is necessary for the court to consider a variety of factors and apply them to the unique facts of each case. These factors include the interest in finality, the reasons for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, the prejudice to the non-moving party caused by the delay in seeking relief, and whether the nature of the dispute involves a purely private disagreement or a matter of public interest. *Shakman*, 426 F.3d at 934; *Associated Builders*, 543 F.3d at 278.

The "reasonable time" determination is *not* based solely on the length of time accrued between the changed circumstance and the date the relief is requested. Fed. R. Civ. P. 60

(Commentary: Reasonable Time); 11 Charles Alan Wright, et al., *Federal Practice and Procedure*, § 2863 (3d 2012). For example, in *Doe*, the plaintiff had filed suit in 1973 against Tennessee officials for alleged due process violations that occurred when those officials disseminated the arrest records of persons who were never charged with or convicted of crimes. 562 F.3d at 779. The suit was ultimately settled by two consent decrees, one of which barred the state from providing arrest records to persons who were never convicted of the charges upon which the arrest was predicated. *Id.* at 780. Five years after the consent decree was entered, the U.S. Supreme Court issued an opinion that made it clear that due process is not violated by the distribution of such arrest records. *Id.* (citing *Paul v. Davis*, 424 U.S. 693 (1976)). Nevertheless, the State of Tennessee failed to seek relief under Rule 60(b) for more than thirty years. *Id.* at 781.

Even after this lengthy delay, the Sixth Circuit concluded that the Rule 60(b) motions were timely. The court acknowledged that "the motions were filed long after they could have been filed," and the "Defendants' explanation for the delay—basically, that they had forgotten about the decree—is hardly compelling." *Id.* at 781. But the court noted that this was not the only factor to be considered when evaluating the timeliness of the motion. No prejudice had been suffered by the failure to file the motion sooner, and denying the motion would have a detrimental effect on the public, which would not gain access to arrest records even though such information was not constitutionally prohibited from disclosure. *Id.* These other factors tipped the "reasonable time" determination in favor of the State. *Id. See also Shakman*, 426 F.3d at 934 (holding that a nineteen-year delay in filing a motion for relief from judgment was not untimely given the public nature of the institutional reform litigation involved and that there was no prejudice to the non-moving party); *U.S. v. Holtzman*, 762 F.2d 720, 725 (9th Cir. 1985) (holding

that a four-year delay was not unreasonable because the opposing party was not prejudiced and the prospective nature of the injunction required leniency in determining what constitutes reasonable time); *Clark v. Burkle*, 570 F.2d 824, 831 (8th Cir. 1978) (finding that a motion was filed within a reasonable time after a six-year delay).

Unlike *Shakman* and *Doe*, the District Court in this case claimed that the Tribes' motion may have been untimely after only considering the length of time between each of the individual changed circumstances and the filing of the Rule 60(b)(5) motion:

> [I]t is worth noting that plaintiffs waited ten years after the chronic wasting disease reduction program started and four years after it ended before moving to reopen the judgment. That in itself might be good cause for denying their motion. Although Rule 60(b)(5) have no specified time limit, a motion to modify a judgment should be made within a reasonable time. 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, § 2863 (2012). Of course, the situation is different with respect to the 2012 wolf hunting legislation. Plaintiffs moved for relief from the judgment promptly after that legislation became public.

D.Ct. Decision at 25. This statement embodies the full extent of the District Court's reasonable time analysis. Because the District Court failed to even consider the *Shakman* factors, it committed reversible error. *See Salazar v. District of Columbia*, 633 F.3d 1110, 1119 (D.C. Cir. 2011) (holding that the district court erred by only considering the period of delay and not addressing factors such as the prejudice to the non-moving party or the nature of the litigation).

When one considers all of the factors that are part of a "reasonable time" analysis, it is apparent that the Tribes' motion was timely. First, the State of Wisconsin never provided any argument or evidence that it has been prejudiced by the delay between the end of its CWD program in 2007, and the commencement of this action in 2012. In fact, the Tribes' delay simply allowed the State to operate without Tribal nighttime deer hunting for several more years. In other words, the delay *benefited* the State by ensuring that the Tribes would have less

opportunity to take their treaty-protected share of the deer harvest. *Compare Associated Builders & Contractors*, 543 F.3d at 279 (holding that by delaying the suit, Michigan "gave the association and its members more time to be free of these allegedly burdensome regulations and more time for all concerned to see how other courts construed the 1997 Supreme Court ERISA decisions," and therefore, the fourteen-year delay between the change of law and the State's motion was reasonable), *with In re Whitney-Forbes Inc.*, 770 F.2d 692 (7th Cir. 1985) (holding that a ten-year delay in filing the motion was not reasonable where the non-moving party had spent considerable time refining the patent secured by the final judgment during this period, and that party "might not have put forth [that effort] if they had known they would have to share in the benefits of their toil"), *and Ingram v. Merrill Lynch*, 371 F.3d 950, 951-52 (7th Cir. 2004) (noting that there would be prejudice if the plaintiffs' motion were granted, because during the almost five-year delay in bringing the motion, over 900 members of the class action lawsuit had already brought their claims and 94 percent of those claims had been resolved). It is an abuse of discretion to conclude that a Rule 60(b) motion is not filed within a reasonable time without finding that the movant's delay has prejudiced the non-moving party. *Salazar*, 633 F.3d at 1119.

Second, the Tribes provided the District Court with the reasons for their delay in filing the motion, yet the Court failed to address these reasons in its opinion. *See* Reply Brief in Support of the Plaintiffs' Motion for Relief From Judgment, at 22-24 (April 26, 2013) (hereinafter, "Tribal 60(b)(5) Reply Brief"). Those reasons are as follows: (1) Tribal leadership and GLIFWC employees were unaware that nighttime shooting was occurring under the program until after the program had ended in 2007[30]; (2) when the Tribes filed their initial Rule 60(b)(5)

[30] Only one Tribal member–Chris McGeshick–is known to have been a shooter in the State's CWD program, and he only shot in the program during one week in 2003. App. at 164 (Stipulation of Facts ¶ 84). At that time, Mr. McGeshick was not involved in Tribal politics in any way, and he did not know the legal significance that the State's nighttime shooting could have on the Tribes' treaty hunting rights.

motion in November 2012, they believed that nighttime shooting under the CWD program was still on-going; and (3) it was only *after* the Tribes filed the motion and commenced discovery that they were able to obtain information on the extent of nighttime shooting that was conducted and the program's safety record, both of which were essential to the Tribes' changed circumstances argument.

All of the CWD shooting occurred in southern Wisconsin, far away from the Tribes' reservations and outside of the ceded territory. *See* App. at 164 (Stipulated of Facts ¶ 82). The Wisconsin DNR issued few press releases regarding its CWD shooting program, and almost none[31] of those press releases or readily available public documents admitted that nighttime shooting was occurring. *See* Tribal 60(b)(5) Reply Brief at 24. Instead, the Wisconsin DNR talked about "collecting samples" or "sharpshooting," with no indication that this activity was occurring at night. *See* Tr. 1-A-66 to -68; App. at 371 (Controlling Chronic Wasting Disease in Wisconsin: A Progress Report and Look Toward the Future (WI DNR 2005)); App. at 447, 449 (Wisconsin's Chronic Wasting Disease Response Plan: 2010–2025 (WI DNR 2010)).

The agency's lack of transparency about its shooting program was likely a deliberate decision. The Wisconsin DNR's decision to shoot deer in an attempt to contain CWD was controversial, not only for animal rights activists opposed to all types of hunting, but also to hunters, who believed that it was wasteful to shoot large numbers of deer when only a tiny percentage of the population was believed to be infected. App. at 401, 409, 483; Tr. 1-P-62 to -63, 4-A-61. Some Wisconsin DNR employees were harassed while on the job. App. at 477, 481; Tr. 3-P-121 to -123. For example, private landowners who were notified that the DNR

When Mr. McGeshick was asked to participate in GLIFWC's nighttime hunting workgroup in 2012, he informed the group of his CWD shooting experience. Tr. 1-A-38, 1-A-66.

[31] The only publicly available reference to nighttime shooting that the Tribes were able to find, even while they were expressly looking for such references prior to filing their motion for preliminary relief, was a 2006 Wisconsin DNR Report. App. at 389-96.

wished to shoot deer on their property returned the agency's letter after scribbling down threats or profanity. App. at 483, 484. One Wisconsin DNR employee was even shot at. App. at 167 (Stipulated Facts ¶ 120). To protect the integrity of its operation, the Wisconsin DNR did not publicize its activities and sometimes refused to even post signs in the public parks where shooting was occurring. App. at 481; Tr. 3-P-123. While the Wisconsin DNR was free to make these choices to protect its operation, after doing so, it cannot complain that the Tribes' motion was untimely when they did not learn about the existence of nighttime shooting during the life of the program.

Second, the Tribes believed that the CWD shooting program was still ongoing when they filed their initial motion for relief from judgment in November 2012. *See* App. at 229a (using publicly available documents to argue that "while public support for aggressive CWD management, including nighttime sharpshooting of deer has waned in recent years, it continues to be a tool employed by the Department") (internal citations omitted). Publicly available documents fueled the Tribes' belief. For example, the State completed a *Chronic Wasting Disease Response Plan: 2010-2025* (2010), which is an official document of the Wisconsin DNR. App. at 423. That Response Plan contains a section on deer sharpshooting that certainly leads the reader to believe that culling efforts are on-going. The report states that "[s]harpshooting *will be used* as a strategic, complementary tool for disease management," and "[s]harpshooting *will be used* tactically along the periphery of the known CWD affected area." App. at 447 (emphasis added). It was reasonable for the Tribes to believe that CWD shooting program was still on-going given this information.

Finally, there was no publicly available information on the number of deer shot under the CWD program until 2007, when a press release announced that nearly 1,000 deer had been shot

during that year's efforts. Even that press release, however, did not indicate how many of those deer had been shot at *night*, which was a necessary fact from the perspective of bringing a Rule 60(b) motion.[32] Additionally, one of the key elements of the Tribes' argument that changed circumstances exist is the fact that the CWD program had a five-year track record with no hunting related incidents. It was certainly reasonable for the Tribes to wait to expend thousands of dollars on litigation expenses until they knew they had a winning case. This is precisely why a court must be more lenient in its reasonableness evaluation when the changed circumstance is caused by a gradual shift in the law or the facts. Otherwise parties would be forced to seek relief prematurely, which would waste judicial resources and result in the denial of their motion. *Associated Builders & Contractors*, 543 F.3d at 279.

By failing to consider the reasons for the Tribes' delay and the lack of prejudice to the State, the District Court committed reversible error. Instead, the court vaguely speculated that the length of time between the end of the CWD program and the filing of the Tribes' Rule 60(b) motion "in itself might be good cause for denying [the] motion." *D.Ct. Decision* at 25. Contrary to the court's conclusory assertion, "[t]he circuits have . . . rejected an unduly strict interpretation of the 'reasonable time' requirement." *Salazar*, 633 F.3d at 1117-18 (internal quotations omitted). A reasonable time analysis should be flexible and must consider each of the factors discussed in *Shakman* and other controlling precedent. The District Court's failure to address these factors was an abuse of discretion.

[32] It was not until the Tribes commenced discovery that they were able to determine that virtually all of the sharpshooting that occurred under the CWD program was conducted at night.

CONCLUSION

The Tribes respectfully requests this Court vacate the District Court's decision and hold that (1) changed circumstances do exist to support the Tribes' Rule 60(b)(5) motion, and (2) the Tribes' motion was timely filed. This matter should then be remanded to the District Court so it can determine whether the Tribes' proposed nighttime deer hunting regulations are suitably tailored to the changed circumstances.

In the alternative, this Court should hold that the District Court improperly excluded evidence of nighttime hunting outside of the State of Wisconsin since 1989. This Court should vacate the District Court's decision and remand this matter so the Tribes may present such evidence to establish that factual conditions have changed since the original deer trial such that enforcement of the final judgment no longer equitable.

Dated: March 24, 2014

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface requirements of Cir. R. 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6), because the brief has been prepared in a proportionally spaced typeface using Microsoft Word and set in 12-point Times New Roman type style for the main text and 11-point Times New Roman type style for the footnote text.

2. This brief complies with the page limits in the Court's March 18, 2014 Order, because it contains seventy pages, excluding the parts of the brief that are exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

The undersigned certifies that the Opening Brief of the Plaintiffs/Appellants and the Appendix were electronically filed with the U.S. Court of Appeals for the Seventh Circuit on March 24, 2014, by utilizing the appellate CM/ECF system.

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APPENDIX

All of the materials required by Circuit Rule 30(b) are included in a separate appendix, bound in two volumes and paginated 0001 – 0576. The Table of Contents for the Appendix is included in each Volume. Pursuant to Circuit Rule 30(a), the District Court's decision in this case is included with the Plaintiffs'/Appellants' Opening Brief.

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

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

Plaintiffs,

OPINION AND ORDER

74-cv-313-bbc

v.

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

Defendants.

- -

This case is before the court on the motion of plaintiffs Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Sokaogan Chippewa Indian Community of the Mole Lake Band of Wisconsin, Bad River Band of Lake Superior Chippewa Indians, St. Croix Chippewa Indians of Wisconsin and Red Cliff Band of Lake Superior Chippewa Indians for relief under Fed. R. Civ. P. 60(b) from the judgment entered in this litigation in 1991. That judgment brought to an end

litigation that began in 1974, when plaintiff Lac Courte Oreilles Band of Lake Superior Chippewa Indians (later joined by the other five Wisconsin bands of Lake Superior Chippewa) sued for recognition of their members' treaty rights to hunt, fish and gather in the northern third of Wisconsin ceded to the United States by the Chippewa in nineteenth century treaties.

Now, after the judgment has been in effect for 22 years, plaintiffs contend that conditions involving one aspect of the judgment (hunting of white-tailed deer) have changed so much that it is no longer equitable to apply the ban on plaintiffs' off-reservation night hunting and shining of deer. Defendants State of Wisconsin, the Wisconsin Natural Resources Board, Department Secretary Cathy Stepp and department administrators Kurt Theide and Tim Lawhern oppose the motion to reopen, arguing that plaintiffs have not shown that conditions have changed sufficiently to warrant reopening the comprehensive, multi-faceted litigated judgment.

In the regulatory phase of this litigation it was determined that the state could regulate plaintiffs' usufructuary rights to hunt, fish and gather for conservation purposes or for public safety, only if it met its burden of demonstrating the need for the particular proposed regulatory measure.

> The state must show, first, that a substantial hazard exists; second, that the particular measure sought to be enforced is necessary to the prevention of the safety hazard; third, that application of the particular regulation to the plaintiff tribes is necessary to effectuate the particular safety interest; fourth, that the regulation is the least restrictive alternative available to accomplish the public safety purpose; and fifth, that the regulation does not discriminatorily harm the Indians or discriminatorily favor the non-Indians.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 740 F. Supp. 1400, 1421-22 (W.D. Wis. 1990). I found in 1990 that the state had met that burden in the 1989 trial on hunting rights with respect to off-reservation hunting of deer at night with lights. Such hunting represented a substantial safety hazard and the state's prohibition of such hunting was a narrowly drawn and non-discriminatory regulation.

In moving to reopen the judgment, plaintiffs have the burden of proving that circumstances have changed so much that night hunting of deer with lights is no longer a substantial safety hazard or, if it is, that the state's ban is not the least restrictive alternative available to accomplish the public safety purpose, and in its present form, it discriminatorily harms the Chippewa. Plaintiffs contend that they have proven the change in circumstances. First, they have produced evidence of the dramatic increase in night hunting by Department of Natural Resources employees and other law enforcement officers to stop the spread of chronic wasting disease, prevent the destruction of agricultural crops and landscaping materials and to reduce accidents on the roads and at airports. Second, the state's 2012 decision to allow wolf hunting at night with lights and high powered rifles in the ceded territory is significant additional evidence that the state no longer considers night hunting a safety hazard. Third, plaintiffs contend that their carefully revised tribal night hunting regulations demonstrate that such hunting can be carried out without presenting a substantial safety hazard to the public.

Although plaintiffs have adduced extensive evidence in support of their position, I conclude that they have failed to show that changes in conditions since the judgment was

entered in 1991 prove that the night hunting ban is no longer the least restrictive alternative available to accomplish the public safety purpose or that the regulation discriminatorily harms the Indians. Neither the extensive reliance by the state on night hunting to reduce the incidence of chronic wasting disease in the deer herds from 2002-07 nor the short-lived statutory authority for night hunting of wolves with lights and high powered rifles constitutes such a change. It is appropriate to add, however, that if the state had not changed the wolf hunting laws to ban night hunting with lights in the 2013 season, plaintiffs' motion would raise a much closer question.

BACKGROUND

As noted, this litigation began in 1974, when plaintiffs sued for judicial recognition of their retained rights to hunt, fish and gather in the ceded territory. That issue was not resolved until 1983, when the Court of Appeals for the Seventh Circuit determined that the tribes did retain usufructuary rights. Lac Courte Oreilles Band of Lake Superior Chippewa Indians, 700 F.2d 341 (7th Cir. 1983). Thereafter, the case proceeded in two phases in the district court. In what was referred to as the declaratory phase, the court determined how the tribes had utilized the natural resources at the time of the treaties, the manner in which they had expected to utilize the resources in the future and the justification, if any, for state regulation of harvesting rights. After it was determined that the state still had a regulatory role to play, the second phase, on regulation, began in 1987. Determining the nature and extent of any regulation to which the tribes would be subject took up the next four years.

Separate trials were held on the scope of plaintiffs' fishing, hunting and timber rights and the extent to which the state could regulate those rights.

By 1989, when trial began on the tribes' hunting rights, the parties had resolved many of the differences in their regulatory disputes by negotiation and stipulation. The state defendants acknowledged the adequacy of the tribal court system and certain regulations set out in the Great Lakes Indian Fish and Wildlife Commission Model Off-Reservation Code, as well as the need for tribal representation on Department of Natural Resources committees established to manage deer in the ceded territory. As a result, only a few issues remained for resolution by the court. The one relevant to the present dispute was the parties' disagreement about the safety of allowing plaintiffs to engage in off-reservation hunting of deer at night with lights.

Earlier in the litigation, I held that the state of Wisconsin could regulate the treaty-guaranteed rights of the tribes in only two narrowly-defined circumstances: (1) when regulation was absolutely necessary to preserve the species and (2) when there was a substantial risk to public health and safety. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233, 1239 (W.D. Wis. 1987). At the deer trial, defendants took the position that night hunting of deer using lights for shining was a substantial risk to public safety. (No one argued that preservation of the species was an issue.) The tribes argued that the state had waived its right to make this argument by permitting the public to hunt at night with light for smaller species, such as raccoons, coyotes, opossums, snowshoe hare and other unprotected species.

From the evidence adduced at the 1989 trial, I concluded that defendants had shown that night hunting of deer with lights was a substantial risk and that plaintiffs had failed to show that the state had waived its right to make this argument. Deer hunting involved the use of high caliber rifles, whereas hunting of smaller species generally involved lower caliber firearms. (Deer hunting can also be done with a bow and arrow or a crossbar. The night hunting prohibition on shining applies to these forms of hunting as well as hunting with rifles. Wis. Stat. § 29.314(3).) In addition, many of the smaller species were shot when they were treed, so the hunter was not shooting off into the distance and any bullet that missed the target was likely to fall back to earth harmlessly, and any shining was done to illuminate the animal in the tree. I found that night hunting of deer posed a great danger to public safety because of the hunters' inability to see beyond their targets when they were firing high caliber weapons. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 740 F. Supp. 1400, 1408 (W.D. Wis. 1990). At the time, plaintiffs had not developed a comprehensive plan for self-regulation of night hunting for deer. I concluded that the state regulations prohibiting off-regulation night hunting constituted the least restrictive measure possible for protecting human safety. Id. at 1425. Thereafter, plaintiffs incorporated into their own hunting regulations the state's prohibition on off-reservation night hunting of deer while shining.

Final judgment was entered on all aspects of the litigation on March 19, 1991. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 755 F. Supp. 321 (W.D. Wis. 1991). Two months later, the parties announced that neither side would appeal

from the final judgment. In public statements, each side explained their reasons. The state said that a further appeal "would serve no useful purpose, and might jeopardize the gains we have made" and enumerated what it considered its victories to be in the case. Dkt. #329, ¶ 10. Plaintiffs said they were forgoing their right to appeal, "as a gesture of peace and friendship towards the people of Wisconsin, in a spirit they hope may someday be reciprocated on the part of the general citizenry and officials of this state." Id. at ¶ 11. .

In 2001, the parties filed a joint motion with the court asking for modification of the final judgment to allow them to modify the stipulations and revisions to the Tribes' Model Code by mutual agreement. Dkt. #218. The impetus for the motion was the parties' recognition that "[e]ffective natural resource management requires adaption to ever-changing circumstances," which was not possible under the final judgment. Dkt. #217. The motion was granted.

In their first amendment of stipulations filed in 2009, the parties agreed to undertake biannual review of their harvesting stipulations and set out the framework for doing so. Dkt. #168. They agreed on a modification that would allow the Executive Director of GLIFWC to make technical updates by commission order, "reflecting new circumstances or liberalizations in State law applicable to non-members of the plaintiff tribes, relating to" specified aspects of hunting and provide trial members more harvesting opportunities "consistent with those provided under state law to state harvesters." Id. at 5. In a second amendment filed on March 15, 2011, dkt. #173, the parties agreed that

> The Great Lakes Indian Fish and Wildlife Commission Executive Administrator may, after consultation with the State and upon agreement of

> the parties (where consent may not be unreasonably withheld), issue a Commission Order to provide tribal members more treaty harvest opportunities in line with state harvesters subject to the Voigt Stipulations and Case parameters pertaining to other fish and game related regulatory amendments of the Model Code . . . .

Id. at App. A, p. 5.

In April 2012, the state enacted a law permitting members of the general public to hunt wolves at night with high powered rifles and with lights, under certain circumstances. Wis. Stat. § 29.185. Sometime later, plaintiffs began meeting with defendants to discuss the tribes' interest in amending the final judgment to allow them to hunt deer at night with lights. The effort failed, but the Great Lakes Indian Fish and Wildlife Commission issued a unilateral order to take effect on November 26, 2012, permitting tribal members to engage in night hunting of deer under specified conditions. Dkt. #228. Before the order took effect, defendants moved in this court moved to enforce the prohibition on shining deer. Dkt. #184. According to defendants, plaintiffs had written to defendant Stepp to say that they intended to engage in the night hunting of deer by shining while using high caliber firearms in off-reservation areas of the ceded territory. Defendants sought a declaration from the court that the state ban on night hunting continued to apply to plaintiffs' members, as well as an order confirming the state's authority to continue to enforce the prohibition on off-reservation night hunting against members of the plaintiff tribes.

Rather than responding to defendants' motion, plaintiffs moved for preliminary and permanent relief, dkt. #193, seeking to enjoin defendants from enforcing the state's prohibition on night hunting with the use of lights, Wis. Stat. § 29.314, against them.

GLIFWC suspended its order on November 28, pending resolution of the parties' motions.

A hearing on the motions was held on December 12-13, 2012, after which defendants' motion for a declaration was granted and plaintiffs' motion for a preliminary injunction was denied. I concluded that the parties could not amend the final judgment as it related to hunting without the agreement of both parties or approval of the court and that plaintiffs' issuance of new regulations permitting night hunting was neither authorized by the judgment in this case nor by the terms of any agreement they had with defendants. Dec. 17, 2012 order, dkt. #269.

A full trial to the court on the merits of plaintiffs' claim of entitlement to engage in off-reservation night hunting was held in July 2013. From the evidence adduced at that trial, I find the following facts.

FACTS

A. The Legal Landscape before the 1989 Trial

At the time of the 1989 deer trial, state law prohibited the possession or use of a light while a person was hunting deer or was in possession of a firearm, crossbow or bow and arrow. Wis. Stat. § 29.245 (enacted 1979). The prohibition did not apply to peace officers or employees of the Wisconsin Department of Natural Resources on official business or any person authorized by the department to conduct a game census. Id. The same prohibition and the same exceptions are in effect today, along with two additional exceptions not relevant to this case. Wis. Stat. § 29.314(3)(b).

Since at least 1917, employees of the department or its predecessor have been authorized to capture or destroy deer on private land when the deer are causing damage. Wis. Stat. § 29.59 (1917). Agents could be authorized to act for the department, but could not possess an uncased or loaded firearm in a vehicle or use a light to shine a deer, could not shoot from a highway or within 50 feet from the center of the road and were not to shoot during the period one hour after sunset to one hour before sunrise.

Before 1989, the DNR issued permits to owners or occupants of land to shoot deer causing significant agricultural damage. Although few if any records of these permits still exist, it does not appear that many such permits were issued in any year.

In July 1985, a legislative committee suspended the department's rules and considered legislation that would have authorized landowners with department-issued permits to shoot deer at night from vehicles and with lights. Parties' Stip. of Fact, dkt. #329, at ¶ 27. The proposals met with resistance from the DNR, which pointed out that if changes were made to allow individuals to shoot deer from the highway with lights under permits issued to cope with destruction of crops, it was likely that the courts would allow members of the plaintiff tribes to engage in the same kind of hunting, without the need for permits. Id. at ¶¶ 28-31.

Despite the department's opposition, the legislature passed a bill allowing private individuals to engage in night hunting with lights under DNR-issued deer destruction permits. The legislation was vetoed by the governor the following spring. Id. at ¶ 39. At the time, the governor noted that the DNR authorized the daytime shooting of deer under deer damage permits and, "if the situation warrants it, night shooting is performed by the

Department if that assistance is requested." Id.

In 1987, the department promulgated Wis. Admin. Code § NR 19.84, specifying that deer may be killed only during the hours from one hour before sunrise to one hour after sunset, Parties' Stip. of Fact, dkt. #329, at ¶ 41, and that department personnel were not to shoot deer causing damage unless an extraordinary safety risk existed or the permittee had demonstrated an inability to kill an adequate number of deer during the closed seasons and had agreed to pay any department costs not reimbursed by the county wildlife program. Id. at 42. Under Wis. Stat. § 167.34, a landowner or occupant of land could apply for assistance from the DNR in destroying deer causing the damage. Dkt. #329 at ¶ 45. It is unknown whether any permits were issued that allowed night shooting. Id. at ¶¶ 46-50.

The September 1989 version of the Application and Permit to Shoot Deer Causing Ag Damage authorized the permit holder to hunt deer only during daylight hours (one hour before sunrise to one hour after sunset) and only during regular hours during the open gun or bow season. Id. at ¶ 62. Also in 1989, the DNR promulgated NR ch. 12 as an emergency rule governing wildlife nuisance and damage control. Id. at ¶ 63. The regulations allowed private persons to obtain permits to remove wild animals from their property, in compliance with all hunting and trapping rules, except that deer could be killed during closed season but only during the period from one hour before sunrise to one hour after sunset. Id. ¶¶ 65-68.

B. Night Hunting of Deer before 1989

From 1958 to 1981, volunteers killed 110 deer in the University of Wisconsin

Arboretum in an effort to minimize damage to native plant communities and other research subjects. Tr. exh. #511 at 75. During the winters of 1981-82 and 1982-83, a University of Wisconsin graduate student in wildlife ecology, William Ishmael, oversaw the shooting operations at the arboretum under a permit issued to the arboretum by the Department of Natural Resources. He scheduled the personnel (his brother and friends of his or of his professor), assigned them to five different bait sites stocked with apples, shelled corn and alfalfa hay, reviewed with them the protocol for shooting deer and arranged for the disposition and tagging of the deer. One of the bait sites had an elevated blind and fixed lighting system that had been in place before 1981. Tr. trans., dkt. #366, 3-A-27-28, 41-46; tr. exh. #511 at 75. At the other bait sites shooters sat in vehicles and used portable spotlights. Id. Shooting began in mid-December and continued through March.

Ishmael was required to notify the university police before and after any shooting operations. Tr. trans., dkt. #366, at 43-44. At the time, it was illegal for anyone to shine deer, except peace officers, Wisconsin DNR employees and persons authorized by the DNR to conduct a game census. Wis. Stat. § 29.245(3)(b) (1979-80); tr. exh. #503.

In 1987-88, University of Wisconsin police officers were allowed to shoot deer at the arboretum from one hour before sunrise until one hour after sunset without the aid of artificial lights. In the permit issued the following year, the police officers were allowed to shoot at any time, except during open hunting season, again, without artificial lights.

C. Night Hunting as Part of Chronic Wasting Disease Reduction Program

Between 2002 and 2007, the state authorized night shooting of deer by law enforcement officers taking part in a chronic wasting disease reduction program. The program utilized state conservation wardens, DNR Lands Division employees, employees of the United States Department of Agriculture, City of Beloit police officers, Dane County law enforcement officers and Illinois Department of Natural Resources biologists to shoot deer in areas known to be infected with chronic wasting disease. The participants in the program shot deer on public and private land at night, primarily in the southern third of the state. When hunters shot on private land, the DNR secured permission in advance from the landowners.

Conservation wardens participating in the program were required to take a qualifying marksmanship course in order to shoot at night, although the course did not test for night shooting capability. The wardens were not limited to sites that had been baited; some were permitted to shoot from vehicles, but only from stationary vehicles pulled off the traveled part of the road onto the shoulder or into the field. Hunters could shoot from ground blinds at night or from a tree stand or tripod. Some shot deer at distances greater than 100 feet.

In 2002, DNR hunters were required to have a spotter with them when they were hunting at night. No such requirement applied from 2005-07. At no time were hunters required to shoot only when snow had fallen or when it was not raining or snowing or foggy. Some hunters in the chronic wasting disease reduction program used night vision goggles or other night vision equipment.

The shooting plans for the night hunting varied. In some cases, the hunters had only a landowner agreement, a plat book map and an aerial photograph of the property that did not

necessarily contain any markings for structures or backstops. They were instructed to notify the local sheriff's office at the start of each day's operations and again at the end of the night. In addition, they had to fill out a daily activity log, identifying any deer shot and including a diagram of any shots taken.

In 2004, the DNR removed deer from the Cherokee Marsh in Madison, using several shooters that were neither employed by the department nor by a private sharpshooting company authorized to remove wildlife. These additional shooters included a university professor and a retired employee of the United States Fish and Wildlife agency.

No sharpshooters or bystanders were injured during the chronic wasting disease reduction program, although more than 300 people were authorized to shoot deer at night. In 2007, 987 deer were shot and killed. None of the deer were retained by any shooter; instead, after the carcasses were deemed unnecessary for scientific purposes, they were either donated to local food pantries, given to the private landowners who had allowed the shooter onto their property or taken to large cat sanctuaries.

The state of Illinois has a sharpshooter program in chronic wasting disease areas and allows shooting at night for the purpose of reducing the spread of chronic wasting disease.

D. Killing of Deer Constituting a Nuisance

The DNR issues some deer damage permits allowing night shooting to municipalities, the University of Wisconsin Arboretum, Audubon centers and airports. Such shooting is generally limited to police officers or employees of a sharpshooting company and requires

elevated hunting over bait without lights. From 2007 to 2013, the department issued about 12 nuisance permits of this type each year. Tr. trans., dkt. #365, at 3-A-128-29. The department issues nuisance permits to individuals but does not exempt them from shooting hour restrictions. Id. at 3-A-102.

E. Hunting of Wolves

On April 2, 2012, the Wisconsin legislature enacted legislation relating to night hunting and shining of wolves that permitted possessing and using a flashlight at the point of kill by a person hunting on foot. Wis. Stat. § 29.314. The season was to begin on October 15, 2012 (about five to six weeks before the start of the deer-gun season) and end on February 28, 2013. If any hunting units had unfilled quotas after the end of the deer-gun season, a night hunting season would begin on the first Monday following the last day of the regular deer season. In 2012, night hunting for wolves was possible only from November 26 (the last day of deer season) to December 23, 2012, when all the wolf hunting zones closed because their quotas had been filled.

The law governing wolf hunting did not require hunters to use a light at the point of kill, did not require hunters to file a hunting plan and did not require hunters to visit the site during the day to identify potential hazards. No hunting-related accidents were reported. During the nine-day deer-gun season, seven hunting related accidents were reported in the state. On July 2, 2013, the legislature repealed subsection (6)(d) of Wis. Stat. § 29.185, which had allowed night hunting of wolves.

F. Tribal Regulations for Off-Reservation Night Hunting of Deer

In April 2012, the Great Lakes Fish and Wildlife Commission began drafting an order that would change the laws for hunting deer in the same way as the state had changed the rules for hunting wolves. The commission established a tribal night hunting work group that proposed requirements for a specific permit for night hunting (to allow the tracking of persons hunting at night), the type of light that could be used, a marksmanship examination and notice to public officials. When the state issued a "green sheet" setting out the recommended wolf hunting rules for approval by the state's Natural Resources Board, the commission's working group adopted the rule requiring hunting from a stationary position and obtaining prior approval of any hunting plan, which was to include the stationary position of the hunter, the safe zone, the direction in which the bullet would travel and any potential hazards, such as a campground or a trail.

The tribes submitted their final regulations to the court on March 1, 2013. The regulations require that each member must have a permit in order to hunt. To receive a permit, members would have to show that they had completed the marksman proficiency course and examination and had taken the advanced hunter course that explains the new requirements and the new authorized methods of shooting deer at night. In addition, the member would have to submit a shooting plan that has been approved by the Conservation Department. The plan must map the areas to be hunted, the potential safety concerns, the member's stationary position, the adequacy of the backdrop within 125 yards of the stationary

position and the direction of the line of fire. If the tribal member wants to shoot deer from an elevated stationary position at a distance of no more than 50 yards, the plan need not be preapproved; if the member does not want to shoot from an elevated position or wants to shoot up to 100 yards away, the plan must be preapproved. Only two shooting plans may be approved for any 40-acre parcel of land. The commission's revised regulations provide that tribal members must use a light when shooting a deer but may use it only from within an established safe zone of fire from a stationary position or to trail a wounded animal.

In writing the new regulations, the working group took into account the criticisms and suggestions made by defendant Tim Lawhern, Administrator of the DNR's Division of Enforcement and Science, at the December 2012 hearing on plaintiffs' motion for a preliminary injunction. The group incorporated Lawhern's suggestion that an "adequate backdrop" should be defined as "an area in which a bullet will fall harmless;" added notice of hazards that Lawhern thought should be included in the shooting plans; added a requirement that each plan had to be preapproved by either a GLIFWC warden or a tribal conservation warden, Tr. trans., dkt. #363,1-A-88, and that the site had to be visited during daylight hours during the tribal deer season, which begins the day after Labor Day; extended the night training course from four to 12 hours; required hunters to specify the direction of the line of fire and prohibited them from shooting at running deer, except in mitigating circumstances, and from shooting at a target more than 100 yards away. The group changed the opening date for night shooting to November 1, to avoid the problem of heavy tree foliage, and added a requirement for the tribes to provide advance notification of shooting plans to local, state and

federal officials. It did not impose a requirement that hunters had to notify any officials of the specific date on which they would be out at night.

OPINION

Fed. R. Civ. P. 60(b)(5) governs plaintiffs' motion for relief from the 1991 judgment in this case. The rule allows such relief when the party asking for it can show that "applying [the judgment] prospectively is no longer equitable." Rule 60(c)(1). The rule incorporates the holding in United States v. Swift & Co., 286 U.S. 106, 114 (1932), that courts of equity have the power to modify an injunction "in adaptation to changed conditions, though it was entered by consent . . . . A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need."

In this case, plaintiffs are trying to undo a judgment that both sides in this litigation accepted, not because they believed it was a perfect resolution but because it was good enough to persuade them that the known result was better than the uncertainty of appeal. By choosing to live with the judgment, flawed as it might be, each side could take comfort in the fact that both sides had lost disputed issues of great importance to them. In this circumstance, the party asking for amendment of one single aspect of the judgment carries a heavy burden.

It is true that later cases have rejected the holding in Swift & Co. that a party moving to modify a judgment under Rule 60(b)(5) must show nothing less than a "grievous wrong evoked by new and unforeseen conditions," id. at 120, and have emphasized the need for flexibility in administering consent decrees. E.g., System Federation No. 91, Railway

Employees' Department, AFL-CIO v. Wright, 364 U.S. 642, 647 (1961) (court is not required to disregard significant changes in law or facts, "if it is 'satisfied that what it has been doing has been turned through changing circumstances into and instrument of wrong'") (citing Swift & Co., 286 U.S. at 114-15). Still, amending any aspect of the judgment in this case risks upsetting the careful balance on which the entire construct rests.

The decision resolving the disputes in the 1989 trial rested on the findings that night shooting of deer was a substantial safety hazard ("night hunting with high caliber weapons poses significant risks," Lac Courte Oreilles Band, 740 F. Supp. at 1423) and that the "state's prohibition on shining deer [was] a narrowly drawn, non-discriminatory restriction on plaintiffs' hunting rights that is necessary to protect the safety of persons in the ceded territory." Id. In their motion to reopen, plaintiffs do not assert that night hunting of deer is no longer a safety hazard, which, if true, might well justify reopening the judgment. Instead they argue that the increased incidence of night hunting since 1989 demonstrates that such hunting can be carried out without endangering public safety so long as it is properly regulated. This is essentially the argument they made in 1989 but failed to prove.

Plaintiffs also argue that when the state created a wolf hunt in 2012 allowing hunters to shoot wolves at night using lights and high caliber firearms, it confirmed the safety of this kind of hunting. By not extending a similar right to tribal hunters pursuing deer, plaintiffs contend that the state discriminated against plaintiffs and their members.

Plaintiffs have a third argument, which is that the new night-hunting regulations they have put into place show that night deer hunting can be carried out without risk to public

safety. Again, this is an argument they made in 1989, but failed to support with fully developed night hunting regulations.

Defendants deny that conditions have changed sufficiently to warrant reopening the judgment. They acknowledge that the state allowed far more night hunting with lights during the chronic wasting disease reduction program than it had in earlier years, but maintain that this was not a significant "change in conditions" because DNR agents had been engaged in night hunting for many years before 1989. Any change was only one of degree. Moreover, the only night hunting done for the chronic wasting disease program was done by DNR agents and law enforcement agents, not by the general public, and therefore, does not support open hunting by the public, whether Indian or non-Indian. As for the wolf hunt, defendants point out that the legislature eliminated the night hunting provision for the 2013 hunt and argue that the court should not place any weight on the one-year experiment that took place in 2012. Finally, defendants challenge the sufficiency of the new night hunting regulations that plaintiffs have put in place, but I am not giving any consideration to those regulations because plaintiffs could have presented them in 1989.

The determinative inquiry is whether plaintiffs have shown that conditions have changed so much that the judgment requires adaptation. At the outset, plaintiffs say that the court should assume that no night hunting with lights existed before 1989. They admit that the state has shown in this proceeding that such hunting was allowed by DNR employees on official business, but they argue that defendants should be estopped from relying on this evidence because in 1989, they withheld from plaintiffs all evidence of night hunting and

denied that any had taken place in the state. They also say that the published statutes and regulations were not clear about who could engage in lighted night hunting, if anyone. The point of this argument seems to be that if no night hunting ever took place or if the court must presume that it did not, then plaintiffs have a better chance of establishing the significance of the alleged changes in conditions. The argument is not persuasive or even necessary. However confusing the pretrial statutes on night hunting were, it is clear that relatively little night hunting took place before 1989. Nevertheless, I will touch briefly on the parties' dispute about the evidence.

Plaintiffs argue that the state defendants failed to produce evidence before the 1989 trial of the legal hunting they now say was going on at that time and that they misled plaintiffs by telling them and the court that no legal night hunting was allowed in Wisconsin. As a result, plaintiffs say, they never had a fair opportunity in 1989 to argue that night hunting was safe. In support of this argument, plaintiffs cite the 1989 testimony of the state's expert witness, Ralph Christensen, and a statement by defendants' counsel at the time, Jeffrey Gabrysiak. Contrary to plaintiffs' assertions, neither Christensen nor Gabrysiak said that no legal night *hunting* went on in the state, but rather that no legal *shining* took place. Plts.' tr. exh. #12. Technically, legal shining did take place: night hunting with lights was allowed on plaintiffs' reservations and permitted for law enforcement officers and DNR employees well before 1989. Wis. Stat. § 29.314(3)(b). It is not clear whether Christensen and Gabrysiak understood the questions to refer to night hunting with lights or about deer shining as practiced on plaintiffs' reservations, which could include shooting at night from a moving

vehicle. What is evident is that plaintiffs have not shown that they followed up on these statements with questions that would have clarified the ambiguity and produced the information they were seeking. Tr. trans. of 1989 trial, dkt. #1146, at 2-130. Plaintiffs have cited one interrogatory and the trial testimony in support of their claim, but it does not provide what they need to prove that they were denied access to information about night hunting or shining by law enforcement officers or DNR employees. Neither does that evidence show that either plaintiffs or the court had reason to be misled about the legality of night deer hunting with lights at the time of that trial.

Plaintiffs admit in their own proposed findings of fact, dkt. #332, ¶ 5, that they understood in 1989 that deer could be shot at night by a law enforcement officer or a DNR employee on official business. They say that they thought this meant only that an officer could shoot a sick deer or that was injured by a car, but they have no evidence that they attempted to clarify their understanding through interrogatories directed to this particular question.

In any event, it is difficult to see the point of plaintiffs' argument about defendants' trial strategy in 1989. I agree with plaintiffs that it is not easy to determine from the statutes and regulations exactly what night hunting, if any, was allowed for either DNR employees or persons hunting under permits issued by the DNR before 1989. I agree with them on a second point as well: considerably more night hunting went on in this state after 1991 than had ever gone on before then.

In the years since the original trial was held in this case, the state has allowed significant

night hunting of deer in an effort to combat chronic wasting disease, damage to farm crops and landscaping materials, interference with tree and plant research and potential accidents on roads and at airports. As defendants note, before 1989, official records show that only a few deer were shot at night in any year. Shooting at the university arboretum resulted in a harvest of only 110 deer over a period of 25 years and other deer damage permits led to fewer than 20 deer killed each year. However, with the explosion in the deer population in the late 1990s and the emergence of chronic wasting disease, the number of deer killed at night increased significantly. Starting in 2002, DNR employees and law enforcement officers made thousands of individual night hunting trips each year as part of the state's chronic wasting disease eradication project. From 2007 to the time of the trial, the DNR issued up to 12 permits a year allowing private contractors and local governmental employees to do night shooting of nuisance deer, with dozens of deer killed under each permit.

However, this dramatic expansion in night hunting during the years from 2007-09 does not constitute such a significant change in circumstances as to warrant relief from the judgment. This is because the greater portion of the increase in night hunting is attributable to the state government, acting through the DNR, which has had authority to kill deer at night with lights since long before 1989. This new hunting led to a vast increase in the number of deer killed, but not to any expansion in the scope of the DNR's authorized powers. DNR employees and other law enforcement agents supervised by the department hunted for the single purpose of reducing the incidence of chronic wasting disease in areas of the state in which it had been found, not for sport or even for subsistence. It was the department that

established the program, set the parameters for participation, directed the operation and used only persons subject to job discipline (by either the DNR or the agency that employed them) if they failed to observe the program rules.

The chronic wasting disease initiative is some evidence that night hunting with lights can be engaged in safely but it is not conclusive in that regard. I cannot say that it shows that the judgment in this case has become "an instrument of wrong," System Federation No. 91, 364 U.S. at 647, or that it is in need of amendment for any other reason, such as being evidence of discriminatory treatment of the Chippewa.

Plaintiffs' second argument for reopening is that the 2012 legislation permitting limited night hunting of wolves cannot be squared with defendant's position that night hunting of deer with lights must be outlawed. There is some merit to plaintiffs' argument. In both cased, hunters are out in the winter hunting with high caliber rifles and shining their prey. If the legislature had not eliminated that aspect of the wolf hunt for 2013, it might have been difficult to deny plaintiffs' motion to reopen the judgment. This decision differs significantly from the earlier decision to implement a chronic wasting disease reduction program carried out by government employees. However, now that the legislature has changed course on allowing night hunting of wolves with rifles, plaintiffs cannot rely on the wolf hunting regulations as a further ground for attacking the judgment.

Two points remain. Plaintiffs argue that the court handicapped them in the recent trial by refusing to allow them to introduce evidence about other states' experiences in night hunting with lights and rifles in the years since final judgment was entered in this case. Such

evidence might have been useful if plaintiffs' motion turned on the safety of night hunting in general. Since it turned instead on the nature and extent of the alleged changes in conditions in Wisconsin and whether those changes were so significant as to justify reopening the judgment, plaintiffs have shown no reason why the evidence should have been received.

On the second point, it is worth noting that plaintiffs waited ten years after the chronic wasting disease reduction program started and four years after it ended before moving to reopen the judgment. That in itself might be good cause for denying their motion. Although Rule 60(b)(5) have no specified time limit, a motion to modify a judgment should be made within a reasonable time. 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, § 2863 (2012). Of course, the situation is different with respect to the 2012 wolf hunting legislation. Plaintiffs moved for relief from the judgment promptly after that legislation became public.

ORDER

IT IS ORDERED that the motion filed by plaintiffs Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Sokaogan Chippewa Indian Community of the Mole Lake Band of Wisconsin, Bad River Band of Lake Superior Chippewa Indians, St. Croix Chippewa Indians of Wisconsin and Red Cliff Band of Lake Superior Chippewa Indians for relief under Fed. R. Civ. P. 60(b)(5) from the

judgment entered in this litigation in 1991 as it relates to the hunting of deer at night with lights is DENIED.

Entered this 13th day of December, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge