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

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

Plaintiffs,

v. Case No. 74-C-313-C

STATE OF WISCONSIN, WISCONSIN NATURAL RESOURCES BOARD; CATHY STEPP; KURT THIEDE; and TODD SCHALLER,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR RELIEF FROM JUDGMENT

After nearly three years of litigation, the State's Response Memorandum on Remand follows a familiar pattern. The State continues to argue points that it lost on appeal to the U.S. Court of Appeals for the Seventh Circuit. The State continues to misstate and misapply the legal standard in this case. And the State has, once again, offered new objections to the Tribe's proposed nighttime hunting rule – objections that are not supported by any of the expert opinions or other evidence presented to this Court during a five-day evidentiary hearing. For the reasons stated below, and all of the cumulative briefing in this case, this Court should grant the Tribes' Rule 60(b)(5) motion and allow them to engage in nighttime deer hunting under their Revised Regulations.

I. THE STANDARD SET FORTH BY THIS COURT IN *LCO IV* GOVERNS AND PERMITS THE TRIBES TO ENGAGE IN NIGHTTIME DEER HUNTING UNDER REGULATIONS THAT ARE NO MORE STRINGENT THAN THE SAFETY REQUIREMENTS CONTAINED IN OTHER STATE PROGRAMS

The State acknowledges that the standard set forth in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 668 F. Supp. 1233, 1239 (W.D. Wis. 1987) ("*LCO IV*") governs. State Response at 4-5. Consequently, the Tribes should be permitted to engage in nighttime deer hunting under their Revised Regulations unless additional restrictions proposed by the State are (1) necessary to the prevention of a substantial public safety hazard, (2) the least restrictive alternative available to protect public safety, and (3) not discriminatory. *LCO IV*, 668 F. Supp. at 1239. The Seventh Circuit stated that "the state must justify, not merely assert" that its proposed regulations fit this test, and that the "burden of production" lies with the state because "as the record stands the evidence presented by the tribes that night hunting for deer in the ceded territory is unlikely to create a serious safety problem provides a compelling reason for vacating the 1991 judgment." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. State of Wisconsin*, 769 F.3d 543, 546, 549 (7th Cir. 2014) (*LCO XI*).

This Court must therefore look to the State's implementation of its CWD program, as well as the State's nighttime wolf hunting regulations. The State cannot seek to impose requirements on the Tribes that are more restrictive than it imposed on participants in these two programs, which did not result in any hunting incidents. Dkt #329, Stipulation ¶ 120 (no hunting incidents as a result of the CWD program); *Id.*, Stipulation ¶ 160 (no hunting incidents as a result of the wolf hunt). As Section I(A) explains below, doing so would be discriminatory.

Still, the Tribes are not required to include all of the provisions contained in both the CWD program and nighttime wolf hunting regulations. While these are the *most restrictive* requirements that can be imposed, the question remains whether the requirements of these two

programs are necessary to the prevention of a substantial public safety hazard and the least restrictive alternative to protect public safety. Thus, as Section I(B) below explains, for each additional requirement that the State has proposed in its draft regulations, this Court may only impose that requirement on the Tribes if it (1) was included in the CWD program and the wolf hunting regulations, and (2) is supported by record evidence that demonstrates such a requirement is necessary to protect public safety.

For the first time, in its post-trial remand brief, the State has suggested that its own programs are not the proper guide. Rather, this Court should supposedly look to the regulations adopted by the Mille Lacs Band in Minnesota. This claim is an about face from the State's prior briefing, which claimed that "evidence relating to the Mille Lacs nighttime deer hunting plan is irrelevant because, as the Tribes' witnesses will testify, the safety regulations there are so unattractive that no tribal member has ever even attempted to night hunt under their authority." Dkt. #337 at 17-18 (State's Pretrial Brief). Because the State's argument is being raised for the first time during post-hearing briefing, it has been waived. Even if that were not the case, however, as described in Section I(C) below, there is no basis in the record for applying the requirements in the Mille Lacs Band's regulations to the Tribes involved in these proceedings.

A. The State's Proposed Regulations Are Discriminatory

The State claims that it can impose requirements on the Tribes that were not contained in the CWD program or the nighttime wolf hunting regulations without running afoul of the U.S. Supreme Court's admonishment that state regulation of treaty rights can never discriminate against the Indians. The State's argument is as follows:

> For reasons similar to those just discussed, the Tribes' assertions about discriminatory treatment do not add up. The State agrees that it may not impose restrictions that unfairly single out the Tribes. But that is not happening here by any stretch. Rather, the Tribal members have now been granted a right *in addition to* those granted to the general public

> in Wisconsin, as the general public may not hunt deer at night. Thus, it cannot be that the Tribes are being treated discriminatorily because, under any set of regulations governing the night hunting, they have an additional right that others do not have.

State Response at 33-34. This argument is fundamentally flawed.

The Tribes were not *granted* a right during this litigation. The Tribes' right to engage in nighttime deer hunting stems from its treaties with the United States. While ceding thousands of acres to the United States, the Tribes insisted on retaining their right to hunt, fish, and gather throughout this area. *E.g.*, Treaty with the Chippewa, 1842, 7 Stat. 591 ("The Indians stipulate for the right of hunting on the ceded territory . . ."). The Tribes hunted deer at night during treaty times, and this right was therefore necessarily included in the hunting right reserved in the 1837 and 1842 treaties. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 653 F. Supp. 1420, 1426, 1428 (W.D. Wis. 1987) (noting that "[a]mong the mammals hunted at treaty time were white-tailed deer," and stating that "[d]eer were hunted by the Chippewa by shooting with firearms and bows and arrows, stalking, herding along fences, calling, baiting, *shining*, and snaring") (emphasis added). *See also* Pl. Exh. 11 at 29-30 (expert report of Heidi Stark and Jason Schlender discussing nighttime deer hunting during treaty times using specially constructed torches called *waawaashkeshi waaswaa*). Like all treaty rights, these are rights that tribes maintain that non-Indians in the general public do not have.[1] That fact does not make the State's proposed regulations non-discriminatory.

The State's approach is, and continues to be discriminatory. The State reiterates its old argument: that CWD shooting rules are not the most restrictive rules that could be imposed on Tribal-member hunters because the CWD program involved only "official shooters (those

[1] Non-Indians do not have a *right* to hunt, even on their own land. The State may grant them the ability to do so through the purchase of a license, but this is not a property right; it is revocable and subject to the complete regulation of the State. Federally protected treaty rights are very different. They are property rights and are subject to state regulation only under two narrow circumstances. *LCO IV*, 668 F. Supp. at 1239.

working for the State)." State's Response at 31.[2] The Seventh Circuit clearly stated that this was not a basis for distinguishing the CWD program from the Tribes' proposed nighttime hunting. CWD shooters did not possess greater skills than the Tribal hunters who will participate in this program. *LCO XI*, 769 F.3d at 546-47 (stating that "there's no evidence that the state agents who hunt deer at night are experienced or well-trained," while "[i]n contrast, those Indians who hunt deer tend to be experienced hunters"). The State cannot claim that the Tribal hunters should comply with additional rules that CWD hunters did not have to comply with simply because they were authorized to shoot deer at night by the State, whereas Tribal hunters are authorized to do so pursuant to their federally protected treaty right and Tribal regulations. This is the very definition of a discriminatory regulation.

The State also argues that the CWD program should not contain the maximum rules that Tribal members must adhere to because the duration of the CWD program was limited to the

[2] Elsewhere, the State claims that the Tribes "ignore that the [CWD] shooting was done as part of participants' jobs, with the oversight and repercussions that come with it on contracts or employment. Tribal hunters would not face loss of employment, for example, if they hunt in dangerous ways." State's Response at 32. There is no evidence in the record, however, establishing that shooting during one's employment results in greater compliance with rules or heightened safety when compared to subsistence hunting. First, evidence introduced at the five-day evidentiary hearing established that CWD shooters frequently failed to comply with program rules. Pl. Exh. 77 (noting that shooting was occurring without a shooting plan); Dkt. #329, Stipulated Fact ¶¶ 111-14 (noting that the majority of shooting plans in 2003 did not identify the locations from which shooters were permitted to shoot, the direction of fire, the "safe zone of fire," or the location of an adequate backstop). Second, it is not clear that CWD shooters faced any repercussions for failure to abide by the rules. An internal CWD memo from 2006 stated that "[s]omeone needs authority (who?) to remove or deny a person from shooting in this program . . . [because that person] didn't follow directions; [committed] safety violations," etc. Pl. Exh. 77. And third, even State witness Chuck Horn admitted that subsistence hunters were likely to behave much differently from sports hunters and much more like State CWD shooters:

> Answer: I think the comparison would be more similar between sharpshooting and subsistence hunting versus sharpshooting and recreational hunting in that, you know, if you're hunting for food you're really going to want to be very proficient with your weapon because you don't want to be wasting bullets because they're expensive, especially nowadays where you can't buy – find ammunition anywhere it seems.
> You know, just form a general fiscal responsibility I see it being more similar. Again, you know, you're out there to put meat on your table or you're out there to collect samples for work I mean. I don't think a subsistence hunter is necessarily one of these people that becomes so enamored with big antlers.

Tr. 3-P-146 to -147.

time frame needed to address a particular disease risk, and because the CWD shooting occurred "only in limited places, usually private lands." State Response at 31. These contentions are not supported by the record. First, the State's CWD program ran for seven years, from 2002 through 2007. Dkt. #329, Stipulated Fact ¶ 78. Hundreds of people participated as shooters, and thousands of deer were killed at night. Dkt. #329, Stipulated Fact ¶ 121 (State admission that more than 300 persons were authorized to shoot in Wisconsin's CWD program); *Id.*, Stipulated Fact ¶ 124 (State admission that in 2007 alone, 987 deer were shot in the CWD program). There is no testimony that could be used to support a claim that this substantial nighttime hunting program posed less of a safety concern than future Tribal member nighttime hunting. During the evidentiary hearing in this matter, the State's own experts refused to offer any opinions about the relative safety of the Tribe's proposed regulations as compared to the State's CWD program. It is not surprising, therefore, that the State's Response cites no record evidence in support of its claims.

Second, while the State now contends that CWD shooting only occurred in limited areas, the evidence does not support this. Shooting occurred in vast sections of the southern portion of Wisconsin. *See, e.g.*, Tr. 2-P-90 to -91; Tr. 3-P-65 to -66; Tr. 3-P-132 to -132; State Exh. 501 (map of Wisconsin as marked by witnesses). These are areas with higher population density than in the ceded territory. *Compare LCO XI*, 769 F.3d at 547 (noting that the Tribes proposed to "hunt at night in the thinly populated (by human beings) northern part of Wisconsin that consists of territory that the tribes ceded to the United States"). Furthermore, shooting occurred on both public and private lands under the CWD program, and there was no testimony introduced at the hearing that could be used to argue that shooting on private lands is safer than shooting on public lands. *See, e.g.*, Dkt #329, Stipulation ¶¶ 85 & 89 (State admission that throughout the CWD

program, deer were shot at night on both public and private lands); Tr. 2-P-83 (shooting at Big Foot Beach State Park); Tr. 3-P-156 (shooting at Turtle Valley wildlife area).

The State has offered no credible reasons for why imposing additional requirements on the Tribes that were not included in the State's CWD program would not violate the U.S. Supreme Court's prohibition on discriminatory state regulation.

B. Each One of the State's Proposed Changes to the Revised Regulations Need to be Necessary to Protect Public Safety and the Least Restrictive Means of Doing So if they are to be Adopted by this Court

The State's experts in this matter – Timothy Lawhern and Randall Stark – refused to offer opinions in this case about whether a particular rule or requirement was "adequate to protect public safety." Instead, they stated again and again that they would not pronounce *anything* to be safe; they would simply state that adding a new provision may or may not "mitigate risk." *E.g.*, Tr. 4-A-259 (testimony of Randall Stark admitted that while he had previously testified that the nighttime wolf hunting regulations were safe, he retracted this opinion in his deposition and would not offer it again at the hearing because he was not going to declare anything to be safe). The State's experts also refused to offer a comparison of the relative safety of the State's CWD program or nighttime wolf hunting regulations with the Tribe's Revised Regulations. Without any of these opinions, the State's expert witnesses provided what amounted to useless testimony. There was no way to compare the Tribe's Revised Regulations with any existing standard or with any other State program.

For example, eliminating deer drives would mitigate safety risks during the nine-day deer-gun season. Tr. 5-P-11 to -14 (testimony of Timothy Lawhern); Tr. 4-A-286 to -289 (testimony of Randall Stark). Allowing fewer persons to obtain hunting licenses (i.e., controlling hunter density) would mitigate safety risks during the nine-day deer-gun season. Tr. 4-A-283

(testimony of Randall Stark admitting that permitting only 300,000 people to obtain hunting licenses during the nine-day deer-gun season would decrease the risk of hunting incidents). Requiring hunters to have an adequate backstop before shooting would mitigate safety risks during the nine-day deer-gun season. The State's experts admitted all of this, yet they also admitted that they would not recommend that any of these restrictions be added to State law. *See, e.g.*, Tr. 4-A-278 to -281 (testimony of Randall Stark admitting that you cannot always see the distance a bullet can travel during the daytime, but noting that he would not recommend that state law be rewritten to require hunters to have an adequate backstop, even though there are 600,000 hunters in the woods during the nine-day gun-deer season). This was true even though these changes would likely substantially lower the number of hunting accidents.

Instead, the State's experts opined that the Tribes should be required, for example, to have spotters at night even though spotters were not required during most of the CWD program, spotters were never required for nighttime wolf hunters, and spotters are not required in any other hunting laws. Tr. 5-A-49 to -50 (testimony of Randall Stark admitting that he commented on the nighttime wolf regulations yet he did not propose that spotters be required); Tr. 4-A-272 to -275 (testimony of Randall Stark admitted that he assisted in drafting bear hunting regulations, but he did not recommend that a spotter be required even though high caliber weapons are used); Tr.4-A-275 to -277 (admitting that while hunting unprotected species at night no one is required to ensure an adequate backstop exists, no notifications to landowners must occur, and no spotters are required). The State's experts offered these and other changes to the Tribal regulations,

noting that they would "mitigate risk," but without ever explaining how much risk needed to be mitigated.[3]

In its Response Brief, the State shows its true position for the first time. The State believes that the Tribe needs to mitigate *all risks*. The State claims that the Tribes should be required to provide daily notification of nighttime hunting activities to law enforcement because "[t]he Tribes do not, and cannot, argue that *no one* will ever make use of that notice. That should be enough to end any dispute: if notice might help anyone avoid a potentially dangerous situation, it should be mandated."[4] State Response at 18 (emphasis in original). Likewise, the State believes that nighttime hunting should only occur when no one else could be using public lands. After all, the State says, "[e]ven taking the Tribes' assertion that run-ins will be infrequent, why risk *any?* Users should not be forced to risk being in the vicinity of the night hunting."[5] State Response at 19 (emphasis in original). The State makes no attempt to tie these statements to any legal standard – whether it be the Rule 60(b)(5) standard requiring the modification to be "suitably tailored to the changed circumstance," or the standard in *LCO IV* that requires state regulation to be necessary to the prevention of a substantial public safety hazard and the least restrictive alternative available to protect public safety.

[3] The State's witnesses admitted, however, that the Tribes had already made numerous changes to their Revised Regulations following negotiations that had served to mitigate the inherent risk of hunting at night. Tr. 5-A-4.

[4] The State claims that this would "in no way prevent[] the Tribes' night hunting of deer." State Response at 18. That is not true. As the Mille Lacs Band's regulations demonstrate, there is a point when the regulatory scheme becomes so onerous that no one will engage in the activity. And it does not require much imagination to see that requiring daily notification of nighttime hunting would prevent Tribal members from spontaneously deciding to hunt that night if they happened to get off of work early, or if other events made it possible to do so. Indeed, this very issue was addressed during cross-examination of Randall Stark by Red Cliff attorney Milt Rosenberg. Tr. 5-A-5-A-68.

[5] Of course, if the State wants to eliminate *any and all* risks to non-Tribal-member hunters or recreational users, regardless of how slim those risks are, it could pass legislation or promulgate regulations closing public lands in the ceded territory at night to all except Tribal-member-hunters.

The Tribe's expert witness – Chris McGeshick – provided the only helpful testimony here. Mr. McGeshick compared the Tribes' Revised Regulations to the State's CWD program and the State's nighttime wolf hunting regulations. He opined that the Tribal nighttime hunting regulations were safer than either of these two State-authorized programs. *See, e.g.*, Pl. Exh. 8 at 23 – 30; Pl. Exh. 131; Tr. 2-P-36 to -38. This is the testimony this Court should find persuasive.

C. The Mille Lacs Band's Regulations are Irrelevant

Confusingly, the State tries to argue that this Court should require the Tribes to adopt some of the same requirements included in the regulations adopted by the Mille Lacs Band. The State argues this now – in post-trial remand briefing – for the first time. In fact, the Mille Lacs Band regulations were not even previously part of the record before the Court. *See* State Response at 7-8 (requesting that the Court take judicial notice of the Mille Lacs Band's regulations). Regardless of whether this Court can take judicial notice of those regulations, there is no evidence to support requiring the Tribes' to adopt these restrictions.

For example, the State now argues that the Tribes should be required to "shoot[] downward from an elevated stand," because this provision is included in the Mille Lacs Band's regulations. State Response at 10. The State's witnesses seemed to support this approach during the 2012 preliminary injunction hearing in this matter, and the State cites this testimony in its response. State Response at 13. But the State jettisoned this argument once the Tribes revised their proposed regulations in February 2013 to require that shooting plans identify an "adequate backstop" within 125 yards of the shooter's stationary position. The State did so because there is no safety difference between shooting downward from an elevated stand into the ground, as

compared to shooting downward from a hill into the ground, or as compared to shooting straight into the side of a hill.[6]

Thus, during depositions, both of the State's expert witnesses admitted that they were *not* opining that the Tribes should be restricted to shooting from an elevated stand. *See, e.g.*, Tr. 5-P-16 (reading in deposition testimony of State expert witness Timothy Lawhern, stating that he would not be opining that Tribal members should be required to hunt only from a tree stand and indicating that he had no concerns with the Tribes' definition of adequate backstop). Likewise, during their testimony at the evidentiary hearing in this matter, neither expert claimed that the Tribes should be limited in this way; instead, they offered opinions about the definition of an "adequate backstop" and whether it should be rewritten to either specifically require an earthen backstop, or to explicitly note that a tree line could never be considered an adequate backstop. *See*, *e.g.*, Tr. 4-A-223 to 4-A-235 (testimony of State expert witness Randall Stark opining that the Tribes' regulations should be modified to require an earthen backstop); Tr. 5-P-14 to 5-P-15 (testimony of State expert witness Timothy Lawhern claiming that an earthen backstop is not always safe). During post-trial briefing, the State once again did not claim that shooting from an elevated position should be required. *See* Dkt #374 at 40-41 (arguing only that the Tribes' definition of adequate backstop was insufficient because it did not explicitly require an earthen backstop). Because the State conceded this point prior to, during, and after the evidentiary hearing in this case, any such argument is waived. *See, e.g., Tice v. Southington Bd. of Educ.*, 2 Fed. Appx. 152, 154 (2d Cir. 2001) (holding that argument raised for the first time in post-trial

[6] Plaintiff's expert Chris McGeshick stated this succinctly in his expert report:

> [T]he safety advantage of a tree stand is that it can help the hunter obtain an adequate backstop if the natural topography would not. But there is no safety advantage in mandating the use of a tree stand where the shooter can achieve a natural backstop by, for example, shooting from or into a hill. In fact, as the studies above demonstrate, the use of a tree stand would simply increase the risk of injury to the tribal-member hunter.

Pl. Exh. 8 at 28.

submissions is considered waived); *American Standard Inc. v. York Intern. Corp.*, 244 F. Supp. 2d 990, 993 (W.D. Wis. 2002) (holding that argument that was not raised in the party's motion or brought to the jury's attention was considered waived because "[t]o hold otherwise would unfairly prejudice defendants because they were not given the opportunity to address the matter"). Holding otherwise would prejudice the Tribes, who did not present evidence on this subject at the evidentiary hearing because of the State's concession. *See, e.g.*, Pl. Exh. 8 at 25-29 (expert report of Chris McGeshick, submitted prior to deposing the State's expert witnesses, discussing why shooting from an elevated stand does not increase safety).

More generally, however, the State offers this Court with no legal basis for looking to any of the requirements contained in the Mille Lacs Band regulations. The Mille Lacs Band's regulations included many elements that were restrictive, arcane, and did not increase safety. For example, those regulations only permit tribal members to use a small battery powered flashlight. MLB Statutes § 5059(d)(4) (preventing Band members from using "any artificial light except a self-contained, battery-operated flashlight containing 5 "D" batteries and a krypton bulb"). Use of a light *increases* safety; there is no safety justification for reducing the power of a light.[7] Additionally, the Mille Lacs Band's regulations allow Band members to hunt at night beginning on the day after Labor Day, Dkt. #329, Stipulated Fact ¶ 130 – a time when the State's expert witnesses contend that foliage would obstruct visibility and there would be increased user conflicts. As noted previously by Wisconsin in this very litigation, the U.S. District Court for the District of Minnesota never examined the Mille Lacs Band's regulations to determine whether they were adequate to protect public safety or whether they were the least

[7] As the Seventh Circuit noted, the Tribes' proposal is more stringent than that of the Mille Lacs Band. *LCO*, 769 F.3d at 549. While the State acknowledges this statement, it continues to tilt at windmills claiming that the Seventh Circuit's opinion was wrong. State Response at 7-8. The State does not support this contention with any record evidence, and this Court cannot, of course, ignore the Seventh Circuit's decision here.

restrictive means of doing so. Dkt # 337 at 17 (States' Pretrial Brief). And to the parties' knowledge, no tribal member has ever engaged in nighttime hunting in the 1837 ceded territory in Minnesota under the Mille Lacs Band's regulations since they were adopted in 1997. Dkt. #329, Stipulated Fact ¶ 131. These regulations are simply irrelevant to this proceeding.[8]

II. THE STATE'S REVISIONS MUST BE REJECTED

A. The Definition of an Adequate Backstop

As already discussed in Section I(C) above, the State cannot, for the first time in its post-hearing remand brief, claim that the Tribes' nighttime deer hunting must be limited to shooting from a tree stand. The State claims, in the alternative, that the definition should be rewritten to specifically state that only an earthen backstop is adequate. The State has no way of *compelling* this result, because it did not require this in either its CWD program or its nighttime wolf hunting program, and therefore, its attempts to require this of the Tribes is discriminatory. *E.g.*, Dkt #329, Stipulated Fact ¶¶ 98-101 (noting that CWD shooters were permitted to shoot from vehicles and ground blinds, and that even in the final two years of the program, shooting from a tree stand or tripod was not the method used in even the majority of cases).[9] With that said, the Tribes have stated again and again that only an earthen backstop is an adequate backstop. *E.g.*, Tr. 2-A-83; Tr. 2-P-51 to -52. The Tribes believe their regulatory definition is clear, and this definition can and will be uniformly enforced, because every shooting plan must be preapproved

[8] In the States' Pretrial brief filed in July 2013, the State noted that "evidence relating to the Mille Lacs nighttime deer hunting plan is irrelevant because, as the Tribes' witnesses will testify, the safety regulations there are so unattractive that no tribal member has ever even attempted to night hunt under their authority." Dkt. #337 at 18-19. This is the real reason for the State's last minute suggestion that the Mille Lacs Band's regulations be used. It is yet another attempt to preclude the Tribes from effectively engaging in an activity that the Seventh Circuit has already said is safe. *LCO XI*, 769 F.3d at 549.

[9] The State admits as much in its own brief, noting only that "the evidence was that over time the CWD practices evolved into safer iterations that included *the recommendation* to shoot from a stand downward *or from a ground blind* using bait." State Response at 11.

by a GLIFWC warden or Tribal conservation officer unless the hunter commits to shooting only from a tree stand and at a distance of 50 yards or less. Tr. 2-A-84.

Contrary to the State's assertions of bad faith, *see* State's Response at 9-10, the Tribes have not proposed to change their definition of "Adequate Backstop" to specifically reference an earthen backstop for a simple reason. The State's own experts provided the Tribes with the definition of "Adequate Backstop" as it currently exists in the Revised Regulations. Tr. 5-P-14. Then the State changed its position *after depositions* and on the eve of the evidentiary hearing, claiming that this definition was insufficient because it did not specifically refer to an earthen backstop. During the evidentiary hearing, the State's own experts could still not agree on what the definition should be, as Randall Stark wanted language requiring an earthen backstop, Tr. 4-A-224 to -225; Tr. 5-A-20 to -21, while Timothy Lawhern claimed that requiring an earthen backstop would not ensure safety. Tr. 5-P-14 to -15 ("I heard the comment today about earthen backstop as being the designation for a safe backstop. Well, frankly, that's not accurate"). Why should the Tribes keep changing a definition that they believe is clear and that they know will be uniformly interpreted when the State keeps changing its position?

Despite this, if this Court believes that the Tribes' definition is not clear enough, they are willing to modify their definition of adequate backstop as follows:

> "Adequate Backstop" means earthen terrain that will stop discharged projectiles under hunting circumstances, considering a reasonable margin of error. The maximum distance that an adequate backstop should be from the member's established stationary position at night is one-hundred twenty-five (125) yards pursuant to section 6.20(5) of this ordinance.

Either way, the State's proposed definition is inadequate, because it eliminates the 125-yard requirement referenced above.

B. The State's New Proposal to Require the Use of Bait, Topographic Maps, and Other Provisions Never Previously Discussed Must Be Rejected

For the first time, the State has suggested in its Response Brief that Tribal members should be required to use bait unless they are hunting with a spotter. State Response at 13. Because this argument was raised for the time in post-hearing remand briefing, it has been waived. None of the State's experts opined that bait should be required to ensure the public's safety. Instead, this topic was only discussed at the evidentiary hearing by Chris McGeshick, the Tribe's expert. As Mr. McGeshick explained, bait does not mitigate any of the risks of nighttime hunting. Bait may draw deer to a location, but it does not control the route that deer will take to get to the bait pile. For that reason, it does not ensure the shot taken will be in the same location where the adequate backstop exists. Tr. 2-P-4 to -9; Tr. 2-P-37 to -38. This point was illustrated by Mr. McGeshick during his testimony by using CWD Shooting Session plan sheets. Those sheets demonstrated that deer shot by CWD shooters at a baited site frequently were long distances away from the bait pile and were shot in all directions. Pl. Ex. 87 (collection of CWD Shooting Session plan sheets).

In addition to failing to mitigate risk, the use of bait in the ceded territory could cause the spread of CWD. CWD is spread from deer to deer through saliva, and the spread of the disease is therefore hastened when deer are attracted to a bait pile. For this very reason Wisconsin has banned the use of bait in several areas and the State's 15-year CWD plan advocated for a state-wide baiting ban. Tr. 2-P-3 to -4. Given the risks posed by bait and the lack of any benefit to requiring it, the Tribes rightfully decided not to include this provision in their Revised Regulations.

Bait is not the only requirement the State has suggested be added to the Tribes' Revised Regulations despite never having been raised during the evidentiary hearing, pre-trial briefing, or post-trial briefing. For example:

- the State suggests that all of the Tribes' shooting plans be placed on topographic maps "so it will be clear where the shooting will occur and so that proper elevation may be evaluated." State Response at 20. This request does not appear anywhere in the hearing transcript, and neither of the State's expert witnesses opined that the use of topographic maps would be "necessary to protect public safety."[10] Meanwhile, the Tribes' shooting plan document – which does not consist of a topographic map – was introduced as evidence during the hearing in this case, and the Tribes provided testimony explaining how that document would be completed by individual hunters. Tr. 2-A-106 to -109; Pl. Exh. 6.

- the State suggests that "the area around schools and school forests be set out in all directions for 1,700 feet on the shooting plan, consistent with Wis. Stat. § 29.301(1)(b), as opposed to the Tribes' 1,000 foot requirement. State Response at 20-21. But the Tribes' requirement in this regard has remained the same since Commission Order 2012-05, Pl. Exh. 1, § 2.6.5.1.1, and the State never made this suggestion before. There is no evidence in the record discussing this suggestion, and there is certainly no evidence suggesting that this requirement is "necessary to protect public safety."

- The State suggests that Tribal-member hunters should not be permitted to use thermal imaging lights because they "would not light up the surroundings, nor would they emit a light that is visible to (and thus more likely to freeze) a deer." Once again, this suggestion was never made by the State prior to the submission of this brief, and none of the State's expert witnesses held this opinion.

There is no basis for concluding that any of these new suggestions are necessary to protect public safety. Furthermore, by failing to raise these issues earlier, the Tribes were prevented from introducing evidence on these subjects. The State simply cannot raise issues for the first time in responsive, post-trial, post-remand briefing.

[10] Nor is it. For all shooting plans that are not limited to hunting from a tree stand at a distance of 50 yards or less, a GLIFWC warden or Tribal conservation warden must personally visit the site before approving the plan. Thus, the "elevation" of the area, which is presumably a reference to assuring that there is an adequate earthen backstop, will be evaluated in person by a qualified governmental official.

C. The Season Start Date Should Not Be Altered

The Seventh Circuit plainly stated in its opinion that "there are very few people out and about at night in the ceded territory during the night deer-hunting season, which runs from November 1 until the first Monday in January, with a break during the state's regular nine-day hunting season." *LCO XI*, 769 F.3d at 547. Despite this, the State argues that "user conflicts" will exist unless the Court requires the Tribes to wait to begin nighttime hunting until after the nine-day deer gun season. The State's argument is discriminatory, and it is not supported by the weight of the testimony and evidence in this matter.

States are not permitted to favor non-Indian uses over Indian uses. LCO IV, 668 F. Supp. at 1239 ("state regulations may not discriminatorily harm the Indians or discriminatorily favor non-treaty harvester"). For example, in *Puyallup II*, the State of Washington banned net fishing by both Indians and non-Indians for conservation purposes. *Dep't of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44, 45 (1973). 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.*

Wisconsin claims that "[t]he Tribes propose a start date that will make conflicts with other users likely." State Response at 27. The State admits that the period in early November is prime deer hunting because the rut, or mating season, results in increased deer mobility, which in turn increases their vulnerability to harvest. Tr. 4-A-240; Pl. Exh. 7 at 8-10. Yet the State claims that the Tribes should forego this prime nighttime hunting period because "[o]ther hunters are in the woods, scouting and setting up, prior to the nine-day gun-deer season," and because

bow hunters who are only allowed to hunt during the day "may linger [after dark] so as not to give away their spots." State Response at 27. In other words, according to the State, the Tribes should not engage in nighttime hunting– which is their preferred activity – during the prime hunting period of the rut, because non-Indian state hunters might be lingering in the woods at night. That is discriminatory.

The Tribes did take steps to lessen any purported risk to non-Indian hunters. It is for this very reason that the Revised Regulations preclude nighttime deer hunting from occurring until one hour after sunset, and require that hunting cease one hour before sunrise. Pl. Exh. 2, § 6.20(1). This provides persons hunting during the day with ample opportunity to exit the woods before any nighttime hunting commences.[11] State expert Randall Stark admitted that this is "a good risk reduction technique," but he claimed that it was not sufficient because "there's still the possibility that there's going to be people out there beyond that time frame." Tr. 4-A-237. Of course that "possibility," still exists in December, as the state bow hunting season runs through the first week in January. Tr. 4-A-238 to -239. Additionally, as the Tribes' expert James Thannum testified, bow hunters primarily hunt on private lands – lands that are generally off limits to Tribal hunters. Tr. 3-A-15 to -16 (relying on data showing that 80% of bow hunters hunted primarily on private lands). And data establishes that bow hunter density is low in the deer management units that are most frequently hunted by Tribal members. Tr. 3-A-16 to -19. All of these factors taken together led James Thannum to opine that there would not be a conflict between bow hunters and Tribal nighttime deer hunters. Tr. 3-A-19.

The State also claimed during the evidentiary hearing and in its briefing that conflicts could occur with backpackers engaged in disbursed camping. Tr. 4-A-245; State Response at

[11] This was not a small concession, because deer are crepuscular animals, meaning that they are typically the most active (and most vulnerable to harvest) at dawn and dusk. Pl. Exh. 7 at 7.

But State expert witness Randall Stark admitted that this risk would be eliminated if Tribal members were required to shine their light within the safe zone of fire when they arrived at their nighttime shooting location. Stark noted that the Tribes had claimed this was the case, but the Tribes' regulations did not require hunters to shine their location. Tr. 4-A-245. Thus, the Tribes modified their final version of the Revised Regulations, which now require Tribal-member hunters to either arrive at their location during daylight hours, or shine the safe zone of fire once arriving after dark.

Shooting under the State CWD program occurred year-round in more highly populated areas without any hunting incidents. Dkt. #329, Stipulated Fact ¶¶ 116-17 (noting that shooting occurred over the summer as well as during the months of October and November). The Tribes already compromised and moved their start date from mid-October under their draft Commission Order, *see* Pl. Exh. 1, to November 1st. No additional adjustments are warranted under the law.

D. Requiring a Spotter

The State's experts maintained at the evidentiary hearing in this matter that spotters should be required by the Tribe unless hunting was occurring from a tree stand or other elevated device. Tr. 5-A-124 to -127 (testimony of Timothy Lawhern). The purpose of this suggestion was supposedly to provide an extra set of eyes that could help the hunter avoid "tunnel vision." Tr. 5-A-125 to -126 (testimony of Timothy Lawhern); Tr. 4-A-254 (testimony of Randall Stark). The State now wants to expand that requirement beyond even what its own experts suggested by requiring spotters for hunters shooting from tree stands unless bait is present. State's Response at 13. No one suggested this requirement at or before the evidentiary hearing in this case, and the State offers no discussion of how two adult men or women will safely it in a tree stand, which is typically designed to hold one person.

The Tribes have strong reasons for not requiring spotters. As expert witness Chris McGeshick testified, most accidents occur at short range and include persons shooting themselves or shooting someone else in their hunting party. By requiring a spotter, there is a definite likelihood that more hunting incidents could occur. Tr. 2-P-30. Furthermore, requiring a spotter would be discriminatory. The nighttime wolf hunting regulations did not require or even suggest the presence of a spotter. And from 2003 through 2007, the State's CWD program did not require a presence of a spotter. Tr. 2-P-31 to 2-P-32; Pl. Exh. 69-71; Dkt #329, Stipulated Fact ¶ 103 (State admission that "[i]n 2005, 2006, and 2007, shooters were not required to have another person with them acting as a spotter while shooting deer at night under the CWD deer shooting program").

E. Notification of Law Enforcement and the Public

The State argues that the Tribes should be required to provide notice to State law enforcement or DNR officials at least 24 hours before each time a Tribal member goes out to hunt deer at night, and that State officials should be permitted to notify not only nearby landowners, but also the general public, of nighttime shooting locations. State Response at 18.

Once again, the State's position in his briefing is not supported even by its own expert witnesses. During the five-day evidentiary hearing, Randall Stark indicated that he believed the following notification requirements should exist: (1) law enforcement should be notified in advance of the locations where shooting plans are approved; (2) the general public should be able to go to a website to determine what locations shooting plans are approved for; and (3) landowners who live near the approved shooting plan should be "proactively" notified of this, such as through certified mail or a knock on their door. Tr. 5-A-61 to -62. Stark confirmed on multiple occasions during his testimony that he was not opining that Tribal members should have

to provide notification of the specific nights that they planned on shooting – either to law enforcement or the general public. Tr. 5-A-77 to -79; 5-A-58.

State expert Timothy Lawhern claimed that it would be helpful if law enforcement officers were notified each time that nighttime hunting would occur because this would enable them to determine whether a "shots fired" call was the result of poaching or from Tribal night hunting. Tr. 5-A-131 to -132. This testimony, however, cannot be used to support the State's request here. That is, Mr. Lawhern's opinion was based on law enforcement investigation concerns, not on safety, and States may not regulate federal treaty rights for such reasons. *Id.* (Lawhern testifying that without daily notification police will not know whether a report of shots fired means that "illegal activity [is] taking place, and for every tick of the clock the evidence leaves the scene"). Additionally, Mr. Lawhern's opinion is not logical. There is no way for 99% of the public to determine the direction of gun fire from hearing a shot, and there is no way to determine whether that gunfire comes from a high caliber deer rifle or some other weapon used to legally shoot unprotected species at night.

Contrary to the State's assertions, the CWD program did not require the notification that the State is requesting the Tribes provide. When shooting occurred on public lands there was often no notice posted to notify the public of such activities. Tr. 3-P-107 to -109 (testimony of State witness Donald Bates noting that shooting on public lands followed different procedures than shooting on private lands); Tr. 3-P-120 to -; 128; Pl. Exh. 82 (CWD document stating "[w]e do not post any notices in the parks [of nighttime shooting] since this is a very discrete way of killing deer – it is unlikely it would even be noticed by park users"). While one State witness claimed that notice was provided to adjacent private landowners when the CWD program was engaged in nighttime shooting on public lands, he admitted under cross that he never saw such

notice and that no documentation establishing notice was ever provided to the Tribes in this litigation. Tr. 3-P-126. And while notice was provided to law enforcement prior to each shoot, there is no testimony in the record establishing that this notice was provided out of safety concerns rather than simple intergovernmental cooperation/good will.

In the Tribes' newly Revised Regulations, it is now explicit that the State will have access to a database containing approved shooting plans. This is all that the Court should require.

CONCLUSION

For the reasons stated in the briefing provided to this Court, the Tribes respectfully request that their Rule 60(b)(5) motion be granted, and nighttime hunting be permitted to commence under their Revised Regulations as drafted.

Respectfully submitted this 11th day of September, 2015

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