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

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

Plaintiffs,

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

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

Defendants.

MEMORANDUM IN SUPPORT OF PLAINFIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Red Cliff Band of Lake Superior Chippewa Indians, Sokaogon Chippewa Community of the Mole Lake Band of Wisconsin, St. Croix Chippewa Indians of Wisconsin, Bad River Band of Lake Superior Chippewa Indians, and Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribes") submit this brief in support of plaintiff's motion for a preliminary injunction, which seeks to enjoin the defendants from enforcing the provisions of § NR 13.30(1)(q) against Tribal members.

INTRODUCTION

In 1837 and 1842 treaties, the Tribes ceded to the United States much of the land in what is now the State of Wisconsin. In those same treaties, however, the Tribes explicitly retained the right to hunt, fish, and gather throughout the ceded territory. Treaty of 1837, 7 Stat. 536, Art. V; Treaty of 1842, 7 Stat. 591, Art. II. In 1983, the U.S. Court of Appeals for the Seventh Circuit rejected contrary decisions issued by Wisconsin courts and held that these off-reservation usufructuary rights had not been extinguished by an 1850 Executive Order or by a later treaty negotiated in 1854. *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir. 1983). On remand, both the Tribes and the State called upon this Court to apportion the natural resources in the ceded territory between the parties. Ultimately, this Court decided those resources should be allocated "equally between the two groups, Indian and non-Indian." *Lac Courte Oreilles Band v. Wisconsin*, 740 F.Supp. 1400, 1418 (W.D. WI 1990) (*LCO VII*).

One of the resources included within the Tribes' treaty right is the ability to harvest white-tailed deer, and therefore, this Court's decision in *LCO VII* entitles the Tribes to take 50% of the harvestable deer in the ceded territory. Despite this ruling, the Tribes are presently harvesting less than 1% of the deer. In 2010, Tribal members took just 1,440 deer in the off-reservation ceded territory within the State of Wisconsin. *See* Jonathan Gilbert, *Results of the 2010 Treaty Waawaashkshi (Deer) and Makkwa (Bear) Hunting Seasons in the 1837 and 1842 ceded Territories in Wisconsin and Minnesota* 7, 9-10 (Feb. 2012) (Exhibit 1); Affidavit of J. Gilbert at ¶ 5 (noting that the Tribes have harvested between 700 and 4,500 deer annually since confirmation of their usufructuary rights by the Seventh Circuit, which equals just 1-4% of the total harvest within the ceded territory). Meanwhile, the non-Indian harvest in the State of Wisconsin has averaged 470,000 white-tailed deer annually for the past ten years, and much of this harvest has come from the ceded territory which contains the bulk of the State's public

lands. *Wisconsin's Chronic Wasting Disease Response Plan: 2010-2025*, Wisconsin Department of Natural Resources 8 (2010) ("WI CWD Response Plan") (Exhibit 2). Tribes are harvesting fewer deer now (both in terms of the number killed and the percentage of the overall take) than they did at the time of the *LCO VII* trial, even though both the deer population and the number of enrolled Tribal members have grown substantially in the intervening years. *See, e.g.*, *LCO VII*, 740 F.Supp. at 1414 (noting that, in 1988, the Plaintiff tribes harvested 2,468 deer while the non-Indian harvest was 121,740 deer in the ceded territory); U.S. Dep't of Interior, Bureau of Indian Affairs, Office of Indian Services, *2005 American Indian Population and Labor Force Report* 9, 20 (2006) ("2005 Labor Force Report") (Exhibit 3) (establishing that, as of 2005, there were more than 24,000 members of the Tribes).

One of the reason that the Tribes are unable to realize the true benefits of their right to off-reservation hunting of white-tailed deer is the State of Wisconsin's ban on night hunting. The Tribes have unemployment rates that range from a low of 25% (St. Croix) to a high of 93% (Sokaogon Chippewa). 2005 Labor Force Report at 9 (Exhibit 3). They need and are entitled to hunt white-tailed deer for subsistence and commercial purposes. Night hunting is the only efficient way to harvest deer, since they are primarily active during the night. The State's motion makes this fact abundantly clear through the Affidavit of Tim Lawhern, who notes that "there is a significant incentive to hunt deer at night as opposed to hunting them during the day," because "deer freeze at night under the rays of a light, making them much easier to harvest than mobile deer during the day." Affidavit of T. Lawhern, at ¶ 13. Hunting for deer during the day is primarily for sports hunters. When efficiency is the goal, as it is for subsistence, commercial and some management purposes, hunting occurs at night. *See, e.g.*, *Washington v. Puyallup Tribe*,

414 U.S. 44, 48 (1973) (holding that the State of Washington's ban on all net fishing of steelhead, which favored hook-and-line sports fishermen, was discriminatory and illegal).

While this Court held in *LCO VII* that the Tribes could not hunt white-tailed deer at night due to safety concerns, there have been significant legal and factual developments in this regard over the past 20 years. First, in 1997, the U.S. District Court for the District of Minnesota interpreted the same 1837 treaty that is the subject of these proceedings, and concluded that members of the Mille Lacs Band of Ojibwe could hunt white-tailed deer at night in the ceded territory in Minnesota. *Mille Lacs Band v. Minnesota*, 952 F.Supp. 1362, 1379-82 (D. Minn. 1997). Second, in recent years, dozens of states have permitted white-tailed deer to be killed at night under certain circumstances. Wisconsin is one of these states. Since 2002, the Department of Natural Resources (the "Department") has authorized nighttime shooting of white-tailed deer in the hopes of dramatically reducing the size of the deer population in certain counties where chronic wasting disease has been confirmed. *See, e.g.*, *Report 06-13: An Evaluation of Chronic Wasting Disease,* Department of Natural Resources 36-39 (Nov. 2006) (Exhibit 4). The neighboring states of Illinois, Minnesota, Iowa, and Michigan have similarly authorized nighttime shooting of white-tailed deer to prevent the spread of diseases or lessen the negative impact deer can have on urban and suburban locations. *See* pages 9-11, *infra*. Finally and importantly, in April 2012, the Wisconsin Legislature authorized a nighttime wolf hunt for the general public that will begin on November 26, 2012 and run through February 28, 2013. 2011 Wis. Act 169 (Exhibit 17). This action provided the trigger for the Tribes to begin discussions regarding the potential for them to commence night hunting, not for wolves but for deer. The prevalence of nighttime hunting in Wisconsin and other states demonstrate that white-tailed deer can now be safely and effectively shot at night.

Over the past several months, the Tribes have consulted with the State of Wisconsin about their plans to implement a nighttime hunt of white-tailed deer.[1] At first, State officials told Tribal representatives that they did not object to a nighttime deer hunt. Later, when Secretary Stepp became involved in the consultations, she requested that the Tribes wait until next year to implement night hunts, due to her concerns about public relations, not public safety. It was only last month that the Department began to insist that the night hunt proposed by the Tribes was unsafe. The Tribes revised their proposal to address the State's safety concerns, even though this resulted in a plan where Tribal members are subjected to more stringent rules than those applied to non-Indians who – within the same geographic area, and with the same high-powered rifles -- can hunt wolves at night. Yet even after making these concessions, the State alleges that the Tribes cannot move forward with their night hunt. That is not the case.

The Great Lakes Indian Fish & Wildlife Commission ("GLIFWC") has issued an order authorizing nighttime deer hunting beginning on November 26, 2012. *See* Commission Order 2012-05 (Exhibit 25). As explained more fully in the materials below, this order was issued in accordance with the "other liberalization amendment" provision of the *Stipulation for Technical, Management, and Other Updates: Second Amendment of Stipulations Incorporated into Final Judgment.* (Exhibit 5). Alternatively, even if the night hunt cannot be implemented through the Commission Order process, circumstances have changed so as to justify this Court in exercising its power pursuant to Fed. R. Civ. P. 60(b)(5), to modify the final judgment entered on March 19, 1991. *Lac Courte Oreilles Band v. Wisconsin*, 775 F.Supp. 321 (W.D. Wis. 1991) (*LCO X*). The Court should allow the Tribes to engage in night hunting of deer in accordance with procedures

[1] The Tribes were under the belief that the parties had agreed to keep the substance of the consultation sessions confidential. The State, however, selectively submitted letters detailing the events of some of those consultation sessions to this Court in support of its Motion to Enforce Prohibition on Shining Deer. Therefore, the Tribes feel compelled to provide the Court with a complete picture of the parties' negotiations.

detailed in Commission Order 2012-05, because those procedures ensure the safety of the public, and because the State has offered no conservation reason that can limit the Tribes' treaty rights.

FACTUAL BACKGROUND

A. *LCO VII* and the Prohibition on Night Hunting of Deer

In 1989, when this Court was hearing testimony in *LCO VII*, the State permitted non-Indians to hunt a number of unprotected species at night, including raccoon, fox, coyote, opossum, skunk, weasel, starlings, English sparrow, coturnix quail, chukar partridge, and snowshoe hare. This Court concluded that there were two main differences between hunting these species at night and hunting deer at night: (1) these animals were typically shot with lower caliber bullets that travel shorter distances than bullets used for deer hunting; and (2) many of these species were shot while treed, so any bullet that missed its target would travel straight upward and ultimately fall harmlessly to the ground. *LCO VII*, 740 F.Supp. at 1408. Deer hunting, on the other hand, uses higher caliber bullets and hunters who miss their targets or whose bullet strikes the deer and passes completely through it, risk shooting members of the public who may be located in the vicinity. Thus, the State's decision to allow night hunting of these non-game animals could not be used as evidence that hunting deer at night would be safe.

The Court was then required to decide whether night hunting of deer created significant safety concerns for the general public. The parties presented two opposite proposals. The Tribes' wanted unregulated night hunting. The State wanted a complete ban on all nighttime hunting of deer. When faced with this dilemma, the Court concluded that the Tribes could not hunt deer at night. *Id.* at 1423. The tribes have followed this judgment for the past 21 years. Recently, however, changed circumstances have shown that night hunting of deer, wolves, and other species can be safe when proper regulations are in place.

B. Changed Circumstances: Increased Prevalence of Nighttime Deer Hunting

Wisconsin. In February 2002, the State first determined that deer within the southern portion of Wisconsin (just west of Madison) had been infected with chronic wasting disease ("CWD"), a fatal nervous system disease. The disease is thought to be caused by an abnormal form of a normally occurring protein called a prion. Clinical signs of the disease usually appear more than 1.5 years after infection, as the accumulation of abnormal prions results in the destruction of brain tissues. In the later stages of the disease animals exhibit behavioral changes, weight loss, and eventually death.

While there is no threat to humans from CWD, the State believes that the disease could drastically reduce the white-tailed deer population over the next several decades if its spread is not halted. There are no available treatments or vaccines for deer infected with the disease. Therefore, population reduction is one method that has been tried to prevent its spread. For that reason, beginning in March 2002, the Wisconsin Department of Natural Resources used approximately 100 of its own staff to shoot deer in areas where CWD-infected deer have been found. *Report 06-13: An Evaluation of Chronic Wasting Disease,* Department of Natural Resources 36 (Nov. 2006) ("2006 WI CWD Report") (Exhibit 4). *See also* Affidavit of C. McGeshick at ¶ 5; Affidavit of T. Kroeplin at ¶ 3. These staff members are referred to as "sharpshooters," and they operate almost exclusively at night. Starting in 2004, the Department began supplementing its staff by paying private citizens to act as sharpshooters. 2006 WI CWD Report at 36 (Exhibit 4). *See also* Affidavit of F. Maulson at ¶ 15. Night shooting of deer under the State's CWD program has continued for the past 10 years.

The Department's sharpshooters are generally experienced hunters, marksmen or law enforcement personnel. Press Release, Wisconsin Department of Natural Resources, *State Sharpshooting Effort Effective at Removing Positive Deer in CWD Zones* (April 12, 2007)

("Press Release") (Exhibit 7). They are required to go through two or three days of training on firearms use prior to beginning work. *See, e.g.*, Email from D. Waldera to WI DNR Wardens, dated Aug. 23, 2002 (Exhibit 32); 2006 WI CWD Report at 36 (Exhibit 4). Plans are developed for each property so that sharpshooters are aware of any potential hazards or unsafe shooting areas or directions. 2006 WI CWD Report at 38 (Exhibit 4); Affidavit of C. McGeshick at ¶ 9(b)(v). Sharpshooters are permitted to shoot deer at night on public lands and, if the owner gives permission, private lands. Press Release (Exhibit 7). These rules were developed informally through email correspondence and do not appear to have been promulgated through regulations. Nonetheless, deer hunting at night using sharpshooters has occurred from 2002 - 2011 in the CWD zones using these basic requirements.

In 2006, the Department informed the Wisconsin Legislature that sharpshooting was "an effective tool," and despite the fact that hunters and interest groups were opposed to their use, the Department had no intention of discontinuing nighttime deer shooting at that time. 2006 WI CWD Report at 38 (Exhibit 4). More specifically, the Department told the Legislature that it:

> has the authority to shoot deer at night, which is prohibited for other hunters under NR 10.06, Wis. Admin. Code. Some hunters do not believe it is appropriate for sharpshooters to shoot deer outside of normal hunting hours, but DNR staff assert that because deer are largely nocturnal between January and March, shooting at night is necessary for their efforts to be most effective.

Id. at 38-39. There is absolutely no discussion of any safety risks posed by nighttime hunting in this report.

Nighttime sharpshooting of deer was also given continued approval in *Wisconsin's Chronic Wasting Disease Response Plan: 2010-2025* (2010). In drafting the plan, the Department noted that "sharpshooting remains very controversial." Memorandum on the Approval of the Five Year CWD Management Plan from Matthew J. Frank to the Natural

Resources Board at 5 (July 24, 2009) ("CWD Memorandum") (Exhibit 36). The majority of those who commented on the sharpshooting proposal were opposed to it and concerns were expressed "about the costs of sharpshooting, the strife created among neighbors, concern that sharpshooting actually dampens recreational hunter harvest, and concern that the use of bait for sharpshooting poses an unacceptable disease risk and is hypocritical when the department is pursuing a statewide ban." *Id*. No concerns relating to safety were raised by either the DNR or the general public. The DNR ultimately concluded that night sharpshooting was "an important tool," and that "[c]ontingent upon available funding, the Department will then use DNR-trained citizens in conjunction with agency employees when instituting sharpshooting and will work with cooperating landowners to select shooting sites." *Id*.

Thus, while public support for aggressive CWD management, including nighttime sharpshooting of deer has waned in recent years, *see DNR trying to combat chronic wasting disease*, The Chippewa Herald (Nov. 16, 2010) (Exhibit 6), it continues to be a tool employed by the Department. Press Release (Exhibit 7) (noting that in 2007, these sharpshooters killed 987 white-tailed deer. It is the Department's own CWD management plan that served as the basis for the Tribes' night deer hunting regulations that are currently before the Court.

Minnesota. The State of Minnesota has also used nighttime sharpshooters as needed to cull deer herds. For example, in 2007, there was an outbreak of bovine tuberculosis among deer in Skime, Minnesota. The Minnesota Department of Natural Resources contracted with the U.S. Department of Agriculture to obtain sharpshooters to eradicate the deer population in this area, thereby preventing the spread of the disease. Between February and May 2008, sharpshooters baited dozens of sites with corn and then returned under the cover of darkness. Sharpshooters used stationary sites and shot from a ground blind, or in some cases, permanent stands with

landowner permission. *See Bovine TB sharpshooters in northwestern Minnesota thin deer herd*, High Plains/Midwest Ag. Journal (March 17, 2008) (Exhibit 8); Dave Schad, Director of the Minnesota Department of Natural Resources, Minnesota State Report (June 9, 2008) (Exhibit 13).

Additionally, members of the Mille Lacs Band of Ojibwe shoot deer at night through the exercise of their usufructuary rights under the 1837 treaty, the same treaty at issue in this litigation. In 1997, the U.S. District Court for the District of Minnesota held that the State of Minnesota's prohibition of all nighttime hunting was over broad, and that the Band had developed a comprehensive set of regulations that would govern tribal-member conduct. *Mille Lacs Band*, 952 F.Supp. at 1379-82. In doing so, the court rejected Minnesota's contention that regulation was necessary to the conservation of the species because "shining deer over bait is such an effective method of hunting [that] the Band members use of such method may thwart the State's careful management of deer through its harvest management unit system." *Id.* at 1379. Band members have continued to hunt deer at night, without incident, since the court issued its decision.

Illinois. Chronic wasting disease was first reported in the State of Illinois in 2002. Illinois began to employ sharpshooters in 2004, and have continued to do so for the past 9 years. Sharpshooting is conducted four nights a week for two and one-half months during the winter. Deer are shot over bait to control the zone of fire since "many of the shooting locations have a very limited field of fire because of houses and other development." Baiting the sites allows sharpshooters to position deer in a particular spot that has a suitable backstop, so they can be taken "with the utmost safety in mind." An artificial light source can be used if necessary. Illinois Department of Natural Resources, *Chronic Wasting Disease Management in Illinois:*

Fact or Fiction? (Nov. 2010) (Exhibit 9); Illinois Department of Natural Resources, *Chronic Wasting Disease: What Illinois' Hunters and Landowners Need to Know* (Nov. 2009); University of Illinois, *Chronic Wasting Disease Management Strategy,* available at http://web.extension.illinois.edu/ deer/strategy.cfm?SubCat=9100 (last visited Nov. 26, 2012) (Exhibit 10). Illinois is currently considering whether it should abandon its sharpshooting program, but like in Wisconsin, the reasons are not related to public safety, but rather public relations. *Saving bucks on bucks: State evaluating deer management program, grapples with chronic wasting disease*, Chicago Tribune (May 4, 2012) (Exhibit 12).

Other states. Nighttime sharpshooting of deer has, in fact, become widespread. For example, it has been used in:

- Iowa City, Iowa; Princeton, New Jersey; and Solon, Ohio. In each of these areas, sites were baited with whole kernel corn three weeks in advance of the shooting efforts. Then sharpshooters returned after dark. "Human safety was ensured by shooting only when there was a known earthen backstop created through the shooter's relative elevation (e.g., tree stand) or topography." Anthony J. DeNicola & Scott C. Williams, *Sharpshooting suburban white-tailed deer reduces deer-vehicle collisions*, 2(1) Human-Wildlife Conflicts 28, 29 (2008) (Exhibit 18).

- Cities and towns in the State of Virginia, including Wintergreen and Lynchburg. They use citizens who obtain a sharpshooting permit to cull the deer population. "Sharpshooting is dependent on late night taking of deer using a firearm," and deer are identified using night vision equipment. Permit holders ensure safety by taking a shot only when there is rising terrain or a shoot-down capability. Ad Hoc Committee on Lethal Control, *Lethal Control of Deer at Lake Monticello* 1, 20 (May 1, 2012) (Exhibit 19).

- Rock Creek Park, Washington, D.C., to protect the park's vegetation. Sharpshooting was done "mainly at night during late fall and winter." *Park Service to Utilize Sharpshooters To Thin Pock Creek Park Deer Herd,* CBS News (May 31, 2012) (Exhibit 20).

Many of these nighttime deer hunts are authorized in urban and suburban communities, where any potential safety concerns would seem heightened. In the robust literature that has developed

over the past several years, however, experts conclude that while risks many be "perceived" by the general public, they are actually fairly minimal with a properly designed program. Greg Creacy, *Deer Management Within Suburban Areas,* Texas Parks and Wildlife (April 2006) (Exhibit 28) ("many safety concerns are only perceived, rather than real"). Experts agree that programs should consider the level of experience of the persons involved in night hunting, shooting deer from a fixed location (e.g., tree stand, ground blind, or from a vehicle), and selecting the head or neck to shoot to ensure a quick and humane death. Anthony J. DeCiola et. al, *Managing White-Tailed Deer in Suburban Environments: A Technical Guide* 27 (2000) (Exhibit 27).

C. Changed Circumstances: Wisconsin's Night Wolf Hunt

In April 2012, the Wisconsin Legislature authorized a nighttime wolf hunt for the general public that begins on November 26, 2012 and runs through February 28, 2013. 2011 Wis. Act 169 ("A person may hunt wolves during nighttime beginning with the first Monday that follows the last day of the regular season that is open to hunting deer with firearms and ending on the last day of February of the following year") ("Wolf Act"). On July 17, 2012, the Wisconsin Natural Resources Board approved Board Order WM-09-12E, which established the rules governing this year's wolf hunt. These rules provide that the holder of a wolf hunting permit may hunt at night if they: (1) use calling techniques or bait the site; (2) shoot from a stationary position; and (3) do not use dogs. (Exhibit 24). The Wolf Act itself permits the use of a flashlight at the point of kill, but neither the Act nor the regulations require it.

While the State has attempted to characterize the wolf hunt as similar to night hunting of coyote (which was in place at the time of *LCO VII*), it is not analogous. Wolves are typically two to three times the size of coyotes. For this very reason, the majority of hunters will and

should use high caliber cartridges -- including the same cartridges used for killing deer -- when shooting wolves. *See, e.g.*, http://www.huntwolves.com/the-best-rifles-for-hunting-wolves/ (last visited Nov. 26, 2012) (Exhibit 23); Affidavit of F. Maulson at ¶ 8; T. Kroeplin at ¶ 4(c). The Wisconsin Legislature's decision to authorize night wolf hunting by private citizens across the State, and the Wisconsin Department of Natural Resources' decision to only impose minimal regulations on night hunting, constitute significant factual changes since this Court rendered its decision in *LCO VII*.

D. Commission Order Procedures

The Tribes and the State anticipated that changes in facts and law that could not have been foreseen during the litigation, would nevertheless occur. In 2001, the parties submitted a joint motion to this Court requesting modification of the final judgment entered in *LCO X* on March 19, 1991. In that motion, the State admitted that "[e]ffective natural resource management requires adaptation to ever-changing circumstances." Joint Motion at ¶ 2 (Exhibit 16). For example, the State noted that "new information, new data, or other changes in circumstances" may render some regulations – previously approved by the Court – "unnecessary for health, safety, or conservation purposes." *Id.* at ¶ 3. In addition, State laws could change to provide greater harvest opportunities for state licensees than the regulations approved by the Court for Tribal members. For these reasons, the parties asked that the Court allow modifications to the stipulations and revisions to the Tribes' Model Off-Reservation Conservation Code ("Model Code") to be made by the parties' mutual consent. On June 13, 2001, this Court granted the parties' motion under Federal Rule of Civil Procedure 60(b)(6). (Exhibit 15).

In 2009, the Parties submitted the first stipulation amendment, which contained a provision allowing the Tribes to modify the Model Code in response to State liberalizations in

four areas: hunting hours, season length, new locations for hunting, and caliber restrictions. *See* Model Code §3.33(1)(b); *Stipulation for Technical, Management and Other Updates: First Amendment of Stipulations Incorporated into Final Judgment*. (Exhibit 14). These amendments are referred to as "technical amendments."

During the second stipulation review, finalized in 2011, another type of amendment was agreed upon by the Parties. *Stipulation for Technical, Management and Other Updates: Second Amendment of the Stipulations Incorporated in the Final Judgment,* § III(A)(2) (2011) (Exhibit 5). Unlike the "technical amendments," changes made to the Model Code would not exactly mirror the changes in State law. Because this was a significant expansion of the amendment process, this type of amendment, referred to as the "other liberalization" procedure, requires consultation between the State and Tribes and can only be put into effect if the State either consents to the amendment, or unreasonably withholds its consent. Model Code §3.33(1)(c). Both types of Model Code amendments are accomplished through a Commission Order, signed by the Great Lakes Indian Fish and Wildlife Commission ("GLIFWC") Executive Administrator.

These amendment provisions have been used to issue eleven Commission Orders. Three of these orders were under the "technical amendment" provision, seven were issued with the consent of the State under the "other liberalization" procedure, and one – Commission Order 2012-05 (at issue in these proceedings) – was issued under the "other liberalization" procedure, after the State unreasonably withheld its consent following appropriate consultation as explained below. *See* Letter from J. Zorn to C. Stepp (Oct. 12, 2012) (Exhibit 22).

E. Consultation Between the Tribes and Wisconsin and Issuance of the Commission Order

The Tribes' engaged in substantial consultation with the State before implementing their own night hunting regulations for white-tailed deer. At meetings held on May 23rd, July 31st and

August 1st at Stevens Point, the Tribes indicated to the State their desire to have GLIFWC issue an order permitting nighttime deer hunting using the "other liberalization amendment" procedures. At the July and August meetings, the Department told the Tribes that it had no objection to the implementation of this Order. Affidavit of K. Stark at ¶ 8(a)-(c); Affidavit of T. Maulson at ¶ 4(b); Affidavit of M. Isham Jr. at ¶ 13. *See also* Letter from J. Zorn to C. Stepp (Oct. 12, 2012) (Exhibit 22) ("the Department stated to the Tribes that it had no reasonable objection to the implementation of this proposed Order at a meeting of the Parties in Stevens Point on August 1").

Several weeks later, on August 23, 2012, Secretary Stepp met with Chairman Maulson and representatives of the Lac du Flambeau Band. At this meeting, the Department once again stated that it did not object to the Tribes' proposal to hunt deer at night. This time, however, the Department requested that the Tribes wait until next year to enact the Order and commence nighttime hunting. Affidavit of T. Maulson at ¶ 4(c). The Tribes rejected this proposal as "unreasonable" under the stipulations agreed to, since it called for delay without benefit or justification. Yet the Department continued to repeat its bare request for a delay, which it asserted was necessary for public relations, through phone calls and other interactions with GLIFWC staff and Commission members. Letter from J. Zorn to C. Stepp (Oct. 12, 2012) (Exhibit 22) ("the Department has also expressed the desire that the Tribes not pursue this option for the current year, asking the Tribes instead to wait until next year. While this may be the Department's policy preference, that desire does not address the merits of the proposal, and thus is an insufficient basis on which to object to the Order's issuance").

On September 28, 2012, the tribes provided the Department with an initial draft of proposed Commission Order 2012-05. Email from J. Stark to Q. Williams (Sept. 28, 2012)

(Exhibit 26); Affidavit of K. Stark at ¶ 8(g). An exchange of letters followed, in which the Department claimed that the "other liberalization amendment" process could not be applied because the State only allowed harvesting of wolves at night, not deer, Letter from C. Stepp to J. Zorn (Oct. 5, 2012) (Exhibit 29), while the Tribes argued that this was precisely what the process was designed to cover. Letter from J. Zorn to C. Stepp (Oct. 12, 2012) (Exhibit 22).

The parties met once again on October 22, 2012 at Stevens Point, and exchanged additional correspondence thereafter. This meeting and correspondence was the first time that the State raised any substantive concerns about safety and commented on the Tribes' night hunting proposal. Affidavit of K. Stark ¶ 8(j). Nevertheless, the Tribe quickly responded to the State's concerns by making several changes to its proposal. Commission Order 2012-05 was adopted on November 21, 2012, and authorizes night hunting of deer under certain circumstances. *Id.* at ¶ 8(a). The Tribes' night hunting rules are modeled after the State's long-standing CWD night shooting program for deer, and are far more protective than either that program, or the State's 2012 night wolf hunting legislation and regulations.

ARGUMENT

In the Seventh Circuit, when deciding whether a preliminary injunction should be granted, a district court must consider whether the: (1) moving party has a likelihood of success on the merits; (2) moving party will have an adequate remedy at law if the injunction does not issue; (3) moving party will be irreparably harmed if the injunction does not issue; (4) threatened injury to the moving party outweighs the threatened harm an injunction may inflict on the other party; and (5) granting of a preliminary injunction will serve the public interest. *Pelfresne v. Village of Williams Bay*, 865 F.2d 877, 882 (7th Cir. 1988); *Lac du Flambeau Band of Lake*

Superior Chippewa Indians v. Stop Treaty Abuse – Wisconsin, Inc., 759 F.Supp. 1339, 1348 (W.D. Wis. 1991).

The Tribes must first show that they have some likelihood of success on the merits. *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 387 (7th Cir. 1984). This "threshold is low," because it is enough "that the plaintiff's chances are better than negligible." *Id.* Then, the Tribes must show that there is no adequate remedy at law, and that it is probable that irreparable harm will result if the requested relief is denied. *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300 (7th Cir. 1997); *Kinney v. International Union of Operating Engineers*, 994 F.2d 1271, 1275 (7th Cir. 1993). If the Tribes can make these showings, the Court must move on to balance the relative harms and the public interest, considering all of these factors under a "sliding scale" approach. *Roland*, 749 F.2d at 387.

I. THE TRIBES HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Commission Order is Valid

1. The Commission Order falls firmly within the "other liberalization amendment" procedures

Through an order dated June 13, 2001, this Court amended the final judgment rendered in *LCO X* pursuant to Rule 60(b)(6) and upon joint motion of the parties (the "Amended Judgment"). (Exhibit 15). In the Amended Judgment, this Court stated that the parties could "modify the stipulations which were incorporated into the final judgment," by executing an amended stipulation signed by counsel for all the parties that "shall become effective upon its filing with court." *Id* at ¶ 2. Since 2001, the parties have filed two such amendments with the Court.

The first amendment authorizes GLIFWC to unilaterally issue "technical amendments" to the Model Code if those amendments are prompted by and identical to changes in State law that have occurred subsequent to the judgment:

> The GLIFWC Executive Administrator may, without consultation with the State, issue a Commission Order to provide tribal members more treaty harvest opportunities in line with opportunities provided under State law to non-members of the plaintiff Tribes, subject to the parameters of the final judgment

Stipulation for Technical, Management, and Other Updates: First Amendment of Stipulations Incorporated into Final Judgment, § V(2)(a) (2009) ("First Amendment") (Exhibit 14). This amendment procedure has been used by GLIFWC on three different occasions since it became effective in 2009. Letter from J. Zorn to C. Stepp (Oct. 12, 2012) (Exhibit 22). For example, in 2011, the Wisconsin Legislature amended its laws regulating the safe use and transportation of firearms and bows. These changes made State law less restrictive than the current tribal regulations. As a result, GLIFWC issued an order in November 2011, which amended the Model Code to conform to the newly enacted State laws. *See* Commission Order 2011-06 (Exhibit 30).

While the "technical amendment" procedure was and is valuable, in later negotiations the parties realized that it was too restrictive. As a result, in the second amendment to the stipulations that are incorporated within the final judgment in *LCO X*, the parties agreed to another procedure called the "other liberalization amendment" process. That process is described as follows:

> 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 consistent with those available under state law to state harvesters, subject to the stipulations previously filed in this matter and the law of this case, pertaining to other fish and game-related regulatory amendments of the Model Code.

Stipulation for Technical, Management and Other Updates: Second Amendment of the Stipulations Incorporated in the Final Judgment, § III(A)(2) ("*Second Amendment*") (Exhibit 5). This new tool differs from the procedure and circumstances for adopting "technical amendments" in three material ways.

First, "technical amendments" may be adopted unilaterally by the Commission, but "other liberalization amendments" may be adopted only after obtaining the consent of the State, or if the State unreasonably withholds its consent. *Second Amendment* § III(A)(2) (Exhibit 5). Second, technical amendments provide that the Tribes need only notify the State of the issuance of the Commission Order after the fact, *see First Amendment*, § V(4)(a) (Exhibit 14); while "other liberalization amendments" require consultation with the State prior to the issuance of the Order. *Second Amendment*, § III(A)(2) (Exhibit 5). Finally, "technical amendments" must be "in line with" or identical to changes in State law, *see First Amendment* § V(2)(a) (Exhibit 14), while "other liberalization amendments" need only be "consistent with [the opportunities] available under state law to state harvesters." *Second Amendment*, § III(A)(2) (Exhibit 5).[2]

Commission Order 2012-05 was promulgated under the "other liberalization amendment" procedures. In 2012, the State of Wisconsin authorized a nighttime recreational wolf hunt. 2011 Wis. Act 169. The Tribes do not want to participate in this wolf hunt. As the State is well

[2] Using the "technical amendment" procedure, the "other liberalization amendment" procedure, and the stipulation negotiations have enabled the parties to adapt to changing circumstances. For example, in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 758 F.Supp. 1262 (W.D. Wis. 1991) (*LCO IX*), this Court held that the Tribes had a usufructuary right to gather forest products in the ceded territory. The Tribes failed, however, to offer the Court specific regulations that would be applied to Tribal harvesters. The Court noted that "[t]his lack of specificity does not provide any assurance that the tribes would ensure that their members' gathering activities are consistent with the state's and counties' valid conservation goals," and therefore, the Court authorized State regulation of the Tribes treaty-guaranteed gathering rights. *Id*. at 1275-76.

Despite this, years later, the State and the Tribes worked together to develop gathering regulations for the Model Code. The regulatory scheme created was included in the *Second Amendment*, which has been lodged with this Court, thereby modifying the final judgment in *LCO X*. *See Second Amendment* § XII Tribal Gathering on State Lands – Two Year Joint Assessment (Exhibit 5).

aware, the Tribes are opposed to wolf hunting on biological, cultural, and religious grounds. Mary Annette Pember, *Wisconsin Tribes Struggle to Save Their Brothers the Wolves From Sanctioned Hunt*, Indian Country Today (Aug. 14, 2012) (Exhibit 21). Thus, the Commission did not issue an amendment providing this identical opportunity to Tribal members. Instead, the Tribes sought to hunt another big game species -- white-tailed deer -- at night, under the "other liberalization amendment" procedure. White-tailed deer are found in the same areas as wolves, and hunters use the same weapons and ammunition to hunt these species, so this revision to the Model Code is "consistent with [the opportunities] available under state law to state harvesters." *See, e.g.*, http://www.huntwolves.com/the-best-rifles-for-hunting-wolves/ (last visited Nov. 26, 2012) (Exhibit 23); Affidavit of J. Gilbert at ¶¶ 8-9; Affidavit of F. Maulson at ¶¶ 10-11.

The Tribes consulted at length with the State. This consultation consisted of at least four different meetings between May and October 2012. Affidavit of K. Stark at ¶ 11. The State received a copy of the draft Commission Order in August 2012, *id.* at ¶ 11(c), and was provided updated copies in September, *id.* at ¶ 11(g), and November 2012. *Id.* at ¶ 11(l), Consultation also included extensive correspondence exchanged between Secretary Stepp and GLIFWC Executive Administrator Zorn. *See, e.g.*, Exhibits 22 & 29. Through these meetings and correspondence, the State was provided ample opportunity to express its views on the amendment, fulfilling the consultation requirement. Unfortunately, the State unreasonably withheld its consent to Commission Order 2012-05, as described below.

2. The State's objections were not reasonable

During consultation sessions, the State initially indicated that it would agree to the Tribes' nighttime hunting of deer in light of the State's increased nighttime shooting opportunities for deer and wolves. Affidavit of K. Stark at ¶ 11(c); Affidavit of T. Maulson at ¶ 4(b); Letter from J. Zorn to C. Stepp, dated Oct. 12, 2012 (Exhibit 22). Only later did the State

raise concerns, complaining that the Commission Order would cause confusion and resentment among the general public and other hunters if it were implemented this season.

Even if these public relations concerns were certain to occur, this would not be a "reasonable" objection that would permit the State to reject the use of the "other liberalization amendment" process. An episode from 1989 is instructive. The State of Wisconsin asked this court to stop tribal spearfishing (a practice outlawed by state statute), so that tribal harvest activities would not overlap with the opening day of state sport fishing. This request was based out of fear that State citizens would resort to violence. This Court rejected the State's arguments, noting: "If this court holds that violent and lawless protests can determine the rights of the residents of this state, what message will that send? Will that not encourage others to seek to resolve disputes by physical intimidation? And will that not make the next peacekeeping effort even more difficult than this one has been? As a matter of law, the fact that some are acting illegally and creating justified fears of violence, does not justify abridging the rights of those who have done nothing illegal or improper." *Lac Courte Oreilles Indians v. State of Wisconsin,* Docket No. 1030, No. 74-C-313-C (W.D. Wis. June 5, 1989) (Exhibit 31). In this regard, the state "may not force treaty Indians to yield their own protected interests in order to promote the welfare of the state's other citizens." *Lac Courte Oreilles Indians v. State of Wisconsin*, 668 F. Supp. 1233, 1238 (W.D. Wis. 1987) (*LCO IV*) (citing *United States v. Washington,* 520 F.2d 676, 686 (9th Cir.1975)).

Perhaps realizing this, the State shifted its objections in late October, alleging that the Tribes' proposal did not adequately protect public safety. The State's own laws and policies, however, prevent it from arguing that a complete ban on Tribal nighttime deer hunting remains necessary. The state now permits hunting for big game at night for at least two species under

certain circumstances. 2011 Wisconsin Act 169 (authorizing wolf hunt) (Exhibit 17); 2006 WI CWD Report at 36-38 (discussing the State's CWD sharpshooting program) (Exhibit 4). If it is not necessary to impose a complete ban on non-Indian hunters, it is equally unnecessary, and indeed, discriminatory and impermissible, to apply it to tribal members. Commission Order 2012-05 incorporates reasonable conditions, mirroring many of those that the state already requires, that provide for a safe and controlled hunting environment.

These precautions, described in detail below, satisfy what this court has characterized as a "fundamental precept of hunting: that the hunter be able to identify his or her target and what lies beyond it before firing a shot or losing an arrow." *LCO VII*, 740 F. Supp. at 1408.

a. Commission Order 2012-05 is modeled after the State's CWD program, yet it exceeds the requirements of both that program, and the State's recently authorized wolf hunt

In developing Commission Order 2012-05, the Tribes' safety experts followed models developed for deer night hunting in CWD management areas, which are often relatively populated locations near cities and suburbs. *See, e.g.*, *Managing White-Tailed Deer in Suburban Environments: A Technical Guide* 27 (2000) (Exhibit 27). The Tribes' experts then made their requirements more stringent than either the CWD program or the recently authorized State wolf hunt. A piece-by-piece comparison of the most important provisions follows.

(1) Marksmanship Rating and Hunter Safety Courses. The State's CWD program requires all of the non-staff shooters to be State wardens, law enforcement personnel, or certified marksmen. *See* Press Release (Exhibit 7). It also requires all sharpshooters to go through two or three days of training on firearms use prior to beginning work. *See, e.g.*, Email from D. Waldera to WI DNR Wardens, dated Aug. 23, 2002 (Exhibit 32); 2006 WI CWD Report at 36 (Exhibit 4). On the other hand, the State's wolf hunting rules do not contain any of these features. Any

member of the general public may obtain a permit that allows them to shoot wolves at night. *See also* Affidavit of T. Kroeplin at ¶¶ 4-6.

The Tribes have adopted the more restrictive approach. Section 2.6.7 of Commission Order 2012-05 requires marksmanship training and marksmanship proficiency ratings for all Tribal members seeking a nighttime hunting permit. Commission Order 2012-05 at p. 7 (Exhibit 25). *See also* Affidavit of T. Kroeplin at ¶¶ 5(a) ("Tribal members are required to attend training in advanced hunter safety and to receive a firearms proficiency rating of 70 percent before they are eligible to receive a night hunting permit"). It also requires Tribal members to have "completed an advanced hunter safety course." *Id.* These requirements and the contents of the hunter safety course were designed to mirror the requirements of the advanced hunter safety course approved in the *Mille Lacs v. Minnesota* litigation, *see* Affidavit of F. Maulson at ¶ 16(a), as well as the State's CWD sharpshooting program. This ensures that "only informed, highly trained, and proficient shooters receive night hunting permits." Affidavit of C. McGeshick at ¶ 9(c). As a result of these stringent requirements, to date, there are 74 hunters out of more than 24,000 Tribal members who have established their eligibility for a nighttime hunting permit. Affidavit of F. Maulson at ¶ 16(a)(i).

(2) Shooting Plan. The State's CWD program required a shooting plan if deer were to be harvested on private land with the owner's permission. Affidavit of C. McGeshick at ¶ 9(b)(v). No shooting plan was required on public lands, where the majority of the nighttime shooting took place. *Id.* Additionally, the shooting plan did not have to be created by the person who was executing it (i.e., shooting the deer). *Id.* The State's rules for hunting wolves at night do not require shooting plans under any circumstances.

The Tribes' regulations are more stringent. A shooting plan must be submitted prior to the issuance of the hunting permit. Commission Order 2012-05 § 2.6.5 (Exhibit 25). The Tribal member seeking the permit is the person responsible for scouting the area during daylight hours and drafting the shooting plan. *Id.* The plan must mark all potentially dangerous areas within a one-quarter mile of the "safe zone of fire," including any school zone, public landfill, public gravel pit, road, residence, building, dwelling, campground, public beach, public picnic area, lake or other waterway, ATV or snowmobile trail, open area, and private property. *Id.* The one-quarter mile area was selected after examining all hunting incident report data from the deer trial (1987 and 1988) and from current incidents (2006 to the present). Affidavit of C. McGeshick at ¶ 8. These incident reports established that *all* reported accidents occurred within a one-quarter mile area. *Id.* Once all of these dangers have been identified, the Tribal member can then determine their "safe zone of fire," which becomes the "point of kill," and mark this on the plan. By scouting the location in advance and creating a shooting plan, Tribal members can choose a location where there will be an adequate backstop due to the angle of the shot (e.g., shooting from a tree stand) or topography (e.g., shooting into a hill), such that errant shots or through-and-through shots will not have the potential to hit a person. These Tribally-mandated shooting plans are far more stringent than the plans developed for the State's CWD program.

(3) Stationary Shooting. The State's CWD program did *not* require sharpshooters to shoot deer from a stationary position. The State's wolf hunt regulations, however, do require hunting from a stationary position. Affidavit of C. McGeshick at ¶ 16(d) ("In my experience participating in the State's nighttime CWD eradication hunt, I was not required to harvest from a stationary position, but was allowed to hunt from all types of situations, including hunting from a moving vehicle"). Once again, the Tribes have adopted the more stringent requirement and

mandated that Tribal members harvest deer "from a stationary position at the point of kill." Commission Order 2012-05, § 2.6.3.2 (Exhibit 25); Affidavit of F. Maulson at ¶ 16(d).

There is not a single safety requirement in the State's CWD sharpshooting program that has not been adopted by the Tribe in Commission Order 2012-05. There is only one provision in the State's wolf hunt regulations that has not been adopted by the Tribes: the requirement that hunting be with the aid of calling techniques or over bait. The Tribes *permit* bait or the use of calls, but they have not mandated this requirement because Tribal members are already required to harvest from a stationary position within their designated "safe zone of fire." If no deer enter their "safe zone of fire," they cannot take a shot. If they use calling techniques or bait to lure a deer into their safe zone of fire, they can shoot. If they do not use these techniques, and an unsuspecting deer still wanders within their zone of fire, they can still take the shot. There is no additional public safety risk by not requiring calling or baiting.

This comparison is important, because in adopting the wolf hunt regulations in July 2012, the Wisconsin Natural Resources Board concluded that:

> [the wolf rule] 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.

Board Order WM-09-12(E), page 6 (Exhibit 24). If the State's nighttime wolf hunt is safe, the Tribes' nighttime deer hunt is certainly safe. The State's failure to acknowledge this fact was unreasonable, and permitted the issuance of Commission Order 2012-05.

b. The State's remaining concerns are unreasonable

In its letter of October 30, 2012, the State raises a number of safety objections to the draft Commission Order that the tribes submitted for discussion. The final Commission Order addresses many of these concerns, but does not address concerns that do not meet the standard for reasonableness defined in the legal test discussed above.

Specifically, the state's letter raises questions about visibility for hunting and public usership during October and November. In considering when night hunting would begin (October 15 in each year after 2012), the tribes considered fall foliage. Peak color typically occurs during early October, with most leaves off the trees by the 15th. Affidavit of F. Maulson at ¶ 17(b). The State daytime wolf hunting season starts on October 15th, as does the State bear season. *Id.* Hunting is also allowed for unprotected species during this time. *Id.* Finally, the State recently enacted the Wisconsin Sporting Heritage Act of 2012, and as part of the implementation of that Act, the Department has proposed to open state parks and trails to hunting on October 15th. *Id.* These State laws and proposals establish that October 15 is an appropriate date for nighttime deer hunting to begin, and suggest that neither foliage nor public usage is a significant concern by that date.

The State also raises a number of concerns about the "safe zone of fire." As described above, the tribes have incorporated and clarified a number of the issues raised, however the Commission Order does not restrict the size of a zone of fire, so long as the other requirements (visiting the area, delineating areas where discharge of a firearm would be unsafe, requirement to discharge within the zone) are met. The size of the zone of fire will largely be determined by the area the hunter plans to hunt. For example, if the Tribal member plans to hunt in the middle of the national forest the "safe zone of fire" may appropriately be larger than if it were near a residential area.

Lastly, the state's concerns about illumination, spotting and training are not reasonable. The state does not require either the use of a light, a spotter or any specialized training for wolf hunting, or for hunting other small game such as raccoons at night. It is not reasonable to require of Tribal hunters what is not required of state hunters -- who will be conducting the same night hunting activity in the same location with the same weapons, and merely aiming at a different species.

In *LCO IV*, this Court found that effective tribal self-regulation of a particular resource or activity precludes state regulation of that resource or activity as to the tribes. *LCO IV* at 1241. Through the enactment of Commission Order 2012-05, the Tribes have met legitimate conservation and public health and safety goals and provided an opportunity for Tribal members to engage in an activity now permitted under state law. The Tribes have shown that Commission Order 2012-05 was promulgated appropriately and in accordance with Model Code § 3.33, and adequately regulates tribal members to ensure both the perpetuation of the resource as well as the protection of the public health and safety. For these reasons, the continued application of NR 13.30(1)(q) is not necessary and its enforcement should be enjoined by the court

B. Alternatively, the Tribes Should Be Granted Relief From the 1991 Judgment Pursuant to Rule 60(b)

Rule 60(b)(5) of the Federal Rules of Procedure states that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment . . .[if] it prospectively is no longer equitable." The U.S. Supreme Court has issued several opinions interpreting this Rule, and 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). If the moving party meets this

standard, the court must then consider whether the proposed modification "is suitably tailored to the changed circumstance." *Id.* We discuss these requirements in turn.

1. A significant change in circumstances has occurred since this Court's decision in *LCO VII*

There have been two important legal and factual changes since this Court's decision in *LCO VII*. First, the State has permitted new species – white-tailed deer and gray wolves – to be shot at night. *See* pages 7-9 & 12-13, *supra*. Deer are shot at night by Department staff and select citizens as part of the State's management of chronic wasting disease. Wolves can be shot at night by recreational hunters throughout the ceded territory. Second, sharpshooting programs designed to kill a large number of white-tailed deer have been implemented in states across the country, and these programs all authorize (and in fact, encourage) nighttime shooting.

These changes are significant, because the Tribes have a treaty right to hunt in the ceded territory. This is a federal right, and therefore, "[t]he treaty-guaranteed usufructuary rights of the plaintiff tribes may be regulated by the state *only* in certain narrowly defined circumstances." *Lac Courte Oreilles Indians v. State of Wisconsin*, 668 F. Supp. 1233, 1238 (W.D. Wis. 1987) (*LCO IV*) (emphasis added). Those narrowly defined circumstances are (1) when regulation is absolutely necessary for the preservation of the species, or (2) when there is a substantial risk to public health or safety. *LCO IV*, 668 F. Supp. at 1238-39 (citing *Puyallup I*, 391 U.S. at 398, 88 S. Ct. at 1728). The State has never contended that the prohibition on night hunting is necessary for conservation purposes, nor could it. Affidavit of J. Gilbert at ¶¶ 7, 10. Deer are abundant in the State, and the Tribes are currently taking just 1% of the deer harvested in the ceded territory. Instead, the State's main contention in *LCO VII*, was that hunting deer at night was unsafe. This proposition has now been conclusively disproved.

The State has allowed deer to be shot at night for the past 10 years through its CWD program. Nowhere in the vast literature available on-line about this program are any concerns expressed for the safety of the general public as a result of this night hunting. And the Tribes have not been able to find any reports of shooting accidents that have occurred as a result of the State's program. The State may argue that the safety record of the program is due to the training of the persons involved. The State only allows Department wardens, law enforcement personnel, and experienced hunters who are certified marksmen to participate in its CWD nighttime shooting program. But for this precise reason, the Tribes mirrored this requirement in Commission Order 2012-05. Section 2.6.7 of the Model Code has been amended to state that a night hunting permit may only be issued to members who have completed an advanced hunter safety course and received marksmanship training and a marksmanship proficiency rating from a tribe, state, U.S. Armed Forces, Reserves, National Guard, or law enforcement agency. The Tribes have and will continue to apply this limitation in a stringent manner. As of November 26, 2012, out of more than 24,000 Tribal members, only 74 are eligible for a night hunting permit. Affidavit of Fred Maulson at ¶ 13(a)(i).

While the State claims in this Court that it is concerned about safety, the facts belie this assertion and establish that the State's actions are discriminatory. The State's Legislature recently authorized night wolf hunting. The Department was therefore tasked with implementing this law by promulgating rules for the distribution of permits, and the requirements for obtaining such permits. The Department did so in July 2012, and concluded that *anyone* could obtain a wolf hunting permit. No marksmanship rating is required. This is true even though shooting a gray wolf is similar to shooting a deer, not as the State alleges, shooting a coyote. To put down a

wolf cleanly with one shot hunters will need to use to use the same weapons and ammunition used in deer hunting. As one wolf hunting website succinctly states:

> A lot of people start hunting wolves with their coyote rifle. The problem is the average coyote only weighs 40-55 lbs. Wolves are 2-3 times that size! The average weight of a gray wolf is between 80-100 lbs, and it is not uncommon for a wolf to weigh 120-150 lbs. The biggest of wolves can even tip the scales at 175lbs. That's closer to the size of a white tail deer than a coyote. If you wouldn't feel comfortable shooting a deer with a rifle, you probably shouldn't be using that rifle for wolves.

http://www.huntwolves.com/. Shooting a wolf is similar to shooting a deer. Yet State citizens are permitted to do the former, with very little regulation, while Tribal citizens are prevented from doing the latter.

The inequitable nature of the current arrangement is nowhere more visible than in the case of Chris McGeshick, who is vice-chairman of the GLIFWC Board and the President-Elect of the Sokaogon Chippewa Indian Community (Mole Lake Band of Wisconsin). Affidavit of C. McGeshick at ¶¶ 1 & 2. Vice Chairman McGeshick was formerly employed by the State as a Department warden. *Id*. at ¶ 3. As part of his job duties, he participated in the Department's CWD program. Under State law, he was considered fit to shoot deer at night for the purpose of eradicating CWD (which poses no risk to the human population) and he did in fact shoot and kill deer at night pursuant to this program. *Id.* at ¶ 5. The State argues, however, that Vice Chairman McGeshick should be prohibited from shooting deer for subsistence and commercial purposes pursuant to his federally protected treaty right for "safety" reasons. This argument cannot be permitted to stand.

2. Commission Order 2012-05 is suitably tailored to the change in circumstances because it mirrors the change in State law

Commission Order 2012-05 is suitably tailored to the change in circumstances because it was crafted using the State's own CWD program requirements as an initial guide, and then those requirements were made even more stringent. *See* Section I(A)(2)(a), *supra*.

3. Neither party anticipated these changes in circumstances during the deer trial in 1989

Finally, courts have found that relief from the judgment should not be granted when a party is relying on events that were actually anticipated at the time the judgment was entered. *Rufo*, 502 U.S. at 385. There is no indication that the State contemplated authorizing night hunting under any circumstances when this issue was litigation in 1989. Chronic wasting disease did not infiltrate the State for another 12 years, and nighttime sharp shooting programs to stop the spread of this disease were not in existence at the time of the deer trail. Likewise, there was no way to anticipate in 1989 that the Wisconsin Legislature would eventually authorize a public wolf hunt. Wolves were listed as endangered species and could not be hunted pursuant to federal law. In fact, there were fewer than 25 wolves in the entire State at the time this Court was deciding *LCO VII*. *See* http://dnr.wi.gov/topic/wildlifehabitat/wolf/documents/historyofwolves_2011.pdf (Exhibit 33) (noting that in 1980 there were only 25 wolves in the entire State of Wisconsin, and that the number of wolves had dropped to 14 in 1985, when parvovirus reduced pup survival and killed adults). Because the Tribes did not know, and because there was no reasonable way that they could know that the State would authorize nighttime shooting of deer and wolves in 2002 and 2012 respectively, this factor cannot act as a bar to the Tribes' ability to seek relief from the final judgment.

II. THE TRIBES DO NOT HAVE AN ADQUATE REMEDY AT LAW

To obtain a preliminary injunction, the moving party must show that there is "no adequate remedy at law." This means that there is no *legal remedy* (i.e., an award of damages),

that provides sufficient relief to the moving party and therefore the resort to an *equitable remedy* (i.e., and injunction) is proper. *See* Black's Law Dictionary 1407-08 (9th ed. 2009) (defining "adequate remedy at law," "legal remedy," and "equitable remedy"). For example, there is no adequate remedy at law if a damage award "comes too late, if the plaintiff cannot finance a lawsuit without revenues that will be lost absent an injunction, or if damages are difficult to calculate." *Kinney*, 994 F.2d at 1279.

Here, there is *no* remedy at law. The State of Wisconsin possesses sovereign immunity under the Eleventh Amendment, which states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State

U.S. Const., amend. XI. *See also Hans v. Louisiana*, 134 U.S. 1 (1890) (Eleventh Amendment precludes suits against states, even by their own citizens). The Eleventh Amendment protects the State from all lawsuits and court processes, and it also bars suits against government officials when the government is the "real, substantial party in interest." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 1010 (1984); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Importantly, sovereign immunity is routinely held to bar courts from issuing any award of money damages against the State or Federal Government unless an explicit waiver of immunity has been obtained. *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (holding that if a court's order would "expend itself on the public treasury . . . or interfere with the public administration," sovereign immunity bars the court action).

This Court is intimately familiar with Eleventh Amendment immunity, as it was the subject of litigation between these very parties. In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v.* Wisconsin, 595 F.Supp. 1077 (W.D. Wis. 1984), Judge Doyle held that

Congress abrogated the states' sovereign immunity in suits brought by Indians when it enacted 28 U.S.C. § 1362. This Court later reopened and reversed that decision based on the arguments of the State. *Lac Courte Oreilles Band of Lake Superior Chippewa v.* Wisconsin, 749 F.Supp. 913 (W.D. WI 1990) (*LCO VIII*). *See also Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Eleventh Amendment immunity bars suits brought by Indian tribes and limiting Congress' ability to abrogate that immunity). In doing so, this Court recognized that the Tribes would be left without any recourse for the 130 years where the State illegally prevented them from exercising their treaty rights:

> The result of applying the Supreme Court's *Eleventh Amendment analysis leaves the plaintiff tribes without an adequate remedy for the wrongs they have suffered*. After more than sixteen years of litigation during which this court and the Court of Appeals for the Seventh Circuit have determined that the State of Wisconsin has violated plaintiffs' treaty rights for over 130 years, plaintiffs are left with no means of recovering monetary damages from the state.

LCO VIII, 749 F.Supp. at 922-23 (emphasis added). While the Tribes can obtain declaratory and injunctive relief – including this requested preliminary injunction – against state officials who violate the Tribes' federally protected treaty rights under the doctrine developed in *Ex parte Young*, 209 U.S. 123 (1908), money damages are not possible, and therefore, there is no adequate remedy at law.

III. THE TRIBES WILL SUFFER IRREPARABLE HARM IF A PRELIMINARY INJUNCTION IS NOT GRANTED

In addition to the inadequacy of a remedy at law, the Tribes will suffer irreparable harm if the injunction does not issue. The Seventh Circuit has defined irreparable harm as "harm that cannot be prevented or fully rectified by the final judgment after trial." *Roland*, 749 F.2d at 386. *See also Kinney*, 994 F.2d at 1275 n.5 (noting that the irreparable injury requirement "is intended to thwart temporary injunctions in cases where a legal remedy is insufficient but relief can wait

until the end of the trial"). If the harm is continuing in nature, courts have been inclined to find the harm to be irreparable. *See Lac du Flambeau*, 759 F.Supp. at 13 53 (plaintiffs "face irreparable harm from the continuing nature of the private defendants' illegal activities") (citing *New York State National Organization of Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989) (defendant intent to continue blockades of abortion clinics in face of serious legal and financial consequences to show continuing harm sufficient to justify injunction)). The Tribes can easily satisfy this requirement.

The Department has made it plain to the Tribes and to this Court that it intends to cite Tribal members who hunt deer at night pursuant to the terms of Commission Order 2012-05. The Tribes and their members are therefore given a "choice": forego the exercise of their treaty guaranteed hunting rights for yet another year, or subject themselves to civil and criminal penalties that include jail time and the forfeiture of property. "Choosing" either of these options would result in irreparable harm.

Forcing Tribal members to refrain from night hunting of deer for another year would interfere with important cultural practices and religious beliefs held by all Ojibwe tribes. Tribal members have a special relationship with white-tailed deer, and harvesting activities are necessary to their cultural and physical well-being. Affidavit of M. Isham at ¶ 6. *See also* WI CWD Response Plan at 9 (Exhibit 2) (State acknowledgment of the important role that deer and deer hunting plays in Ojibwe culture). Deer meat is a primary staple of Ojibwe feasts and ceremonies (e.g., naming ceremony, funeral, healing ceremony). Affidavit of M. Isham at ¶ 8. If fresh deer meat is needed for a ceremony, the only opportunity to obtain it may be at night. *Id.* Night hunting will also provide elderly and disabled Tribal members the opportunity to continue their cultural and religious tradition of hunting deer, because it involves shooting deer from a

stationary position, rather than traveling through miles of forest on foot. The State's demand that Tribal members refrain from night hunting of deer is thus an interference with important cultural and religious practices and constitutes irreparable harm. *Lac du Flambeau*, 759 F.Supp. at 1352 ("plaintiffs have alleged that they have suffered . . . interference with an important cultural and religious practice. . . Only an injunction will ensure plaintiffs' right to spear unimpeded by the illegal actions of the private defendants").

Night hunting is also necessary for Tribal members who need to harvest venison for subsistence purposes with increased efficiency and cost effectively. Deer are most active at night and they freeze when light is shined at them, which makes them easier to harvest after dark. Nighttime deer hunting is subsistence hunting; day hunting is for sportsmen. This difference is analogous to the difference between fishing with a net for subsistence purposes and fishing with a hook-and-line for sport. *Puyallup Tribe*, 414 U.S. at 48.

Tribal members have high rates of poverty, *see* 2005 Labor Force Report at 9 (Exhibit 3), and must minimize costs by harvesting as much venison as possible in a single hunting trip. Tribal members who are unemployed (*see* page 3 *supra*) have more time to hunt, but they have less money for gasoline to travel to their hunting locations. Tribal members who are currently employed may have no opportunity to hunt under the State's regulations, because they work mostly at jobs that pay an hourly wage and have no vacation benefits. These members still *need* to hunt for subsistence purposes, as the vast majority of employed Tribal members still have an income below poverty guidelines. *See* 2005 Labor Force Report at 9 (Exhibit 3) (noting, for example, that 79% of *employed* Sokaogon Chippewa Community members still have income levels below the poverty guidelines). Unfortunately, employed Tribal members cannot supplement their food intake or income with hunting because during the fall season, the sun sets

between 4:00 and 6:00 p.m.,[3] while they are still getting home from work. At best, that means Tribal members must confine their fall hunting to weekends. At worst, it means they have no opportunity to hunt deer at all.

Harvesting larger quantities of deer is also important because a disproportionate number of Native Americans have chronic disease such as heart disease and diabetes. *See, e.g., Community Health Data Profile: Michigan, Minnesota, and Wisconsin Tribal Communities 2010*, Great Lakes Inter-Tribal Epidemiology Center, Great Lakes Inter-Tribal Council, Inc. (2011) (Exhibit 34); Indian Health Service Fact Sheets (Exhibit 35). Cheap, high fat hamburger meat purchased with food stamps cannot replace healthy venison in tribal populations experiencing chronic health problems.

The State's actions are also analogous to court decisions holding that the deprivation of a constitutional right constitutes *per se* irreparable harm. *Lac du Flambeau*, 759 F.Supp. at 1353 (issuing a preliminary injunction where treaty-guaranteed right to fish was interfered with and stating that "[w]hen deprivation of a constitutional right is shown most courts require no further showing of irreparable harm before issuing a preliminary injunction"); *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 518 F.Supp. 993 (S.D. Tx 1981) (preliminary injunction was issued where defendants interfered with the rights of Vietnamese fishermen to shrimp during shrimping season, and where plaintiffs alleged that the defendants acted out of class-based animus against Vietnamese persons. The court granted preliminary injunction, holding that "[i]t is well established that victims of discrimination suffer an irreparable injury regardless of actual pecuniary damage."). Tribal usufructuary rights are federally protected treaty rights, and under the U.S. Constitution, they are the "supreme law of the land." For this reason, courts routinely find that irreparable harm has been demonstrated when it can be shown

[3] *See, e.g.*, http://www.timeanddate.com/worldclock/astronomy.html?n=158 (on-line sunrise and sunset calculator).

that treaty rights are being interfered with. *See, e.g., United States v. Michigan*, 534 F.Supp. 668 (W.D. Mich. 1982) (denial of a fundamental right, "such as the denial of treaty rights to fish in certain zones of the Great Lakes without biological justification," "can be presumed to be irreparable harm").

IV. THE THREAT OF IRREPARABLE HARM TO THE TRIBES SIGNIFICANTLY OUTWEIGHS ANY PERCEIVED HARM BY THE STATE

"The purpose of a preliminary injunction is to minimize the hardship to the parties pending the ultimate resolution of the lawsuit." *Faheem–El v. Klincar*, 841 F.2d 712, 717 (7th Cir.1988). "The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor in order to get the injunction; the less likely he is to win, the more it need weigh in his favor." *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1371-72 (7th Cir.1989). If the plaintiff meets its burden of showing some likelihood of success on the merits and a lack of an adequate remedy at law and that it will suffer "irreparable harm" if preliminary relief is denied, then the district court engages a "sliding scale" analysis by balancing the harms to the parties and the public interest. *Roth*, 57 F.3d at 1453; *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11–12 (7th Cir.1992) (citations omitted); *Ping*, 870 F.2d at 1371 (emphasis in original).

The threat of interference with the Tribes' exercise of self-regulatory authority over treaty-guaranteed hunting rights far outweighs any perceived harm to the State. The Ninth Circuit, no stranger to questions of treaty rights, has found that, where tribes responsibly insure that conservation and public health and safety goals are being met, legitimate interests of the state are not contravened. *United States v. Washington*, 520 F.2d at 686. As demonstrated above, Commission Order 2012-05 puts in place safety requirements for Tribal hunters that are far more stringent than those required by the State for hunters acting pursuant to the State deer CWD plan and the new night wolf hunting emergency rule. Secondly, an injunction on the

enforcement of § NR 13.30(1)(q) will not prohibit the State from enforcing § NR 13-30(1)(q) against non-tribal deer hunters or against tribal deer hunters that violate Commission Order 2012-05. The balance of harms tips heavily in favor of the Tribes.

V. GRANTING A PRELIMINARY INJUNCITON WILL SERVE THE PUBLIC INTEREST

An order granting or denying a preliminary injunction may have consequences beyond the immediate parties. If so, the "public interest" must be considered as a final element in the weighing process. *Roland Machinery Co.*, 749 F.2d at 388. In this case, enjoining the State against enforcing §NR 13.01(1)(q) will promote the public interest. As this Court has previously stated, "[t]he public has a strong interest in protecting the rights of all persons from unlawful interference from others." *Lac du Flambeau*, 759 F.Supp. at 1354. Furthermore, encouraging tribal self-government and economic self-sufficiency has been recognized to be within the public interest by numerous federal court opinions and congressional actions. *See, e.g., Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1252, 1253 (10th Cir. 2001) ("case law suggests that tribal self-government may be a matter of public interest"); *Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) ("the injunction promotes the paramount federal policy that Indians develop independent sources of income and strong self-government"); *Michigan*, 534 F.Supp at 669 (W.D. Mich. 1982) ("the public interest would best be served by the protection of these treaty rights to the fullest extent possible, and by encouraging and fostering the concept of tribal sovereignty").

CONCLUSION

For the above-stated reasons, the Tribes ask this Court to issue a preliminary injunction preventing the defendants from enforcing the provisions of § NR 13.30(1)(q) against Tribal members until this Court has an opportunity to rule on the merits of this appeal.

Respectfully submitted this 27th day of November, 2012

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