No. 14-

In The
Supreme Court of the United States

STATE OF WISCONSIN, *et al.*,

*Petitioners*,

v.

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, *et al.*,

*Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

A moving party under Fed. R. Civ. P. 60(b)(5) must show a significant change in factual conditions or law that renders continued enforcement of a judgment detrimental to the public interest. The proceeding is not a relitigation of the underlying judgment. Here, the Seventh Circuit shifted the burden to the non-moving party (Wisconsin) to justify an underlying judgment that night hunting of deer was fundamentally unsafe.

Does Rule 60(b)(5) permit shifting the burden to the non-moving party to justify the original judgment?

## LIST OF PARTIES

Petitioners are the State of Wisconsin, the Wisconsin Natural Resources Board, Cathy Stepp in her official capacity as Secretary of the Wisconsin Department of Natural Resources (WDNR), and Kurt Theide in his official capacity as the Administrator of the WDNR Land Division (formerly the Division of Resource Management). Also named in his official capacity was Tim Lawhern as the Administrator of WDNR's Division of Enforcement and Science, whose duties have since passed to Chief Warden Todd A. Schaller. Mr. Schaller may be substituted for Mr. Lawhern pursuant to Fed. R. Civ. P. 25(d). The petitioners are referred to collectively as "Wisconsin."

Respondents are the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, the Lac du Flambeau Band of Lake Superior Indians, the Sokaogon Chippewa Community, the Bad River Band of Lake Superior Chippewa Indians, the St. Croix Chippewa Indians of Wisconsin, and the Red Cliff Band of Lake Superior Chippewa Indians (collectively, "the Tribes").

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The State of Wisconsin, the Wisconsin Natural Resources Board, Cathy Stepp, Kurt Theide, and Todd Schaller respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at 769 F.3d 543, and is reprinted at Appendix A, 1a-13a.

The opinion and order of the United States District Court for the Western District of Wisconsin denying plaintiffs-respondents' Fed. R. Civ. P. 60(b)(5) motion is reprinted at Appendix B, 14a-42a.

The opinion and order of the United States District Court for the Western District of Wisconsin holding that Wisconsin's prohibition on night hunting of deer could be enforced against Chippewa tribal members hunting in ceded territory is reported at 740 F. Supp. 1400, and is reprinted at Appendix C, 42a-110a.

## JURISDICTION

The court of appeals issued its opinion and entered its final judgment on October 9, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## PROVISIONS INVOLVED

Rule 60(b)(5) of the Federal Rules of Civil Procedure provides:

> (b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . .
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable . . . .

## STATEMENT OF THE CASE

With this Rule 60(b)(5) proceeding, Chippewa tribes in Wisconsin sought to reopen a final judgment from the District Court for the Western District of Wisconsin entered in 1991. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 775 F. Supp. 321 (W.D. Wis. 1991) ("LCO X").[1]

The 1991 judgment incorporated the district court's 1990 opinion and order and its ruling about hunting deer at night. In its opinion, the court found that public safety required that Wisconsin's prohibition on night hunting of deer be enforced against tribal members hunting off reservation on territory ceded by treaty. (Pet. App. C at 61a-62a, 101a-102a.) The 1991 judgment ended a multifaceted series of court proceedings and negotiations that had begun in 1974 and addressed many treaty-reserved hunting, fishing, and gathering rights. (*See* Pet. App. B at 15a.)

The opinion and judgment followed a 1989 court trial. Based on that trial, the district court found that night hunting of deer was fundamentally unsafe:

> a hunter shining a deer would shoot at it from approximately the same plane, so that if the hunter missed, the bullet or

[1]The courts have referred to ten major decisions that resulted from this litigation as *LCO I* through *X*.

> arrow would travel into the background area where it might damage persons or property that the hunter cannot see. Even if the hunter hits the deer, the bullet may travel through the deer and do damage to persons or property behind the deer. Such shooting violates a fundamental precept of hunting: that the hunter be able to identify his or her target and what lies beyond it before firing a shot or loosing an arrow.

(Pet. App. C at 62a.)

The court also found that the type of weapons used by deer hunters meant that bullets can travel a great distance:

> Deer hunters usually use high-powered high caliber rifles, such as the .30–.06 and .30–.30, and single slug shotguns such as a 12 gauge. A .30–.06 has a maximum range of two and one-half to three miles; a .30–.30 has a maximum range of two miles.

(Pet. App. C at 59a.)

Wisconsin did not in 1991, and does not today, allow any of its citizens to hunt deer at night. (Pet. App. B at 24a.) The district court ruled that it was proper to impose that same prohibition on tribal members who wished to hunt at night in territory

ceded by treaty. The court held that the prohibition was "a narrowly drawn, non-discriminatory restriction on plaintiffs' hunting rights that is necessary to protect the safety of persons in the ceded territory. It imposes a minimal infringement on plaintiffs' rights in comparison to the great danger night hunting presents to public safety." (Pet. App. C at 101a.) The court further concluded that "[t]o release a high caliber bullet or an arrow capable of killing a deer without knowing exactly what is behind the intended target is an obvious violation of the most basic hunting rules." (Pet. App. C at 101a-102a.)

After this lengthy and multifaceted litigation, the parties both acknowledged that they had won some issues and lost some, but that overall the balance of rights was something they could live with. (Pet. App. B. at 20a-21a.) In a public statement, the Tribes explained that they were foregoing "their right to further appeal and dispute adverse rulings . . . as a gesture of peace and friendship towards the people of Wisconsin." (Dkt. 329 at 4, ¶ 11; Dkt. 377 at 7.) Neither party appealed, and decades passed. In the interim, the Tribes and Wisconsin voluntarily entered into agreements that could allow for additional hunting, fishing, and gathering practices in the ceded territory, to the extent those activities were subject to stipulations incorporated into the 1991 judgment. (Pet. App. B at 21a-22a.)

In 2012, the Tribes returned to court, seeking to reopen the 1991 judgment in part. The Tribes

invoked Rule 60(b)(5) and argued that, because of significant changed factual circumstances regarding the night hunting of deer, the 1991 judgment was no longer equitable and should be reopened on that single topic. After a court trial, the district court denied the motion in a December 2013 opinion and order. (Pet. App. B.)

That December 2013 opinion contained both factual findings and an explanation of the court's exercise of discretion in denying the Rule 60(b)(5) motion. (Pet. App. B.) The court explained that the Tribes raised three changed factual circumstances: (1) an increase in night shooting of deer by governmental employees and agents to combat specific problems, like nuisances and the contemporary prevalence of chronic wasting disease in deer; (2) a temporary state of affairs where, for one month in 2012, Wisconsin allowed night hunting of wolves; and (3) the Tribes' proposed regulations for the night hunting of deer. (Pet. App. B at 17a.)

The district court ruled that none of these asserted changes was sufficient to warrant reopening the 1991 judgment. Indeed, the court observed that the Tribes did not propose that "night hunting of deer is no longer a safety hazard," but rather sought to prove that it "can be carried out without endangering public safety so long as it is properly regulated." (Pet. App. B at 35a.) The court observed that "[t]his is essentially the argument they made in 1989 but failed to prove." (Pet. App. B at 35a.)

As a factual matter, the court found that it had always been the case (*i.e.*, both at present and before the 1991 judgment) that private citizens in Wisconsin may not hunt deer at night for their own purposes. (Pet. App. B at 24a.) And it had always been true that governmental employees and their agents at times shot deer at night to combat particular problems, such as nuisances. (Pet. App. B at 24a-30a, 38a.) Such shooting had increased in recent years specifically to address the rise of chronic wasting disease in deer between 2002 and 2007. During that time, WDNR employees and agents shot significant numbers of deer in the chronic wasting disease program without human injury. (Pet. App. B at 27a-29a.)

The court ruled that these facts did not show a significant and relevant change in circumstances that rendered the 1991 judgment inequitable. The nuisance and chronic wasting disease shooting was special purpose governmental shooting, which was directed and controlled by the government and occurred only under limited circumstances. It was not hunting by the general public. (Pet. App. B at 39a-40a.)

The district court similarly was not persuaded by the other two reasons provided by the Tribes. It observed that night hunting of wolves no longer occurred and was only in force for one season. Thus, it was not an ongoing changed circumstance. (Pet. App. B at 40a-41a.) The court did not consider the Tribes' proposed regulations for night hunting

because the Tribes "could have presented them in 1989."[2] (Pet. App. B at 20a, 35a.) Thus, they were not changed circumstances outside the Tribes' control. The court concluded that there were insufficient changed circumstances, much less any that justified "upsetting the careful balance on which the entire construct [of rulings and stipulations] rests." (Pet. App. B at 19a.)

On October 9, 2014, the Seventh Circuit panel reversed and remanded. (Pet. App. A.) Contrary to the findings of inherent dangerousness in the district court's 1990 opinion, the Seventh Circuit asserted, without citation, the following about night hunting safety and practices:

> The night hunter doesn't shoot until the deer is a brightly lit stationary object—a perfect target. Hunting deer during the day is likely to be more dangerous because there are more people about and the hunter will often be shooting at a moving animal, which a shooter is more likely to miss than a stationary one.

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[2]During the 1989 trial, the Tribes did in fact present hunting restrictions similar to those they now propose: using "a baited, preselected location with the hunter in a tree stand or other elevated location." (Pet. App. C at 102a.) The district court declined to consider the Tribes' proposals because they were not timely presented. (*Id.*)

(Pet. App. A at 8a.) Also, regarding practices in other states, the Seventh Circuit asserted without attribution:

> And in developing their proposed regulations the Wisconsin tribes looked to Michigan and Minnesota, both states that have allowed night hunting for at least a decade, for guidance—although the proposed Wisconsin regulations are far more stringent than those of the other states. . . . So it seems reasonable that Minnesota's and Michigan's experiences with night hunting of deer by Indians might have a bearing on our case.

(Pet. App. A at 12a.)

In then reversing, the Seventh Circuit stated that "the state must justify, not merely assert, a public-safety need to restrict Indian rights," and that "[a]ll that can be said is that on the present record there is scant reason to think that safety concerns justify forbidding Indians to hunt deer." (Pet. App. A at 5a, 8a.) The Seventh Circuit concluded by placing "[t]he burden of production . . . on the state" to show that night hunting of deer was unsafe in Wisconsin and in neighboring states. (Pet. App. A at 12a-13a.)

## REASONS FOR GRANTING THE PETITION

The Seventh Circuit has applied Rule 60(b)(5) to shift the burden onto the non-moving party, Wisconsin, and to require Wisconsin to justify an underlying judgment. That doubly wrong approach undermines the proper function of the Rule, is in conflict with this Court's and other circuits' precedent, and introduces an improperly expansive approach to reopening judgments within the Seventh Circuit and, potentially, in other circuits.

The Rule is an extraordinary remedy that reflects the value our legal system places on finality. The presumption against reopening an earlier judgment is enforced by keeping the burden of proof where it belongs (on the movant), keeping the focus of the substantive inquiry where it belongs (on whether circumstances outside the movant's control have changed significantly since the entry of judgment), keeping the primary decision-making duties where they belong (with the district court whose decision is reviewed for abuse of discretion), and keeping the fact-finding duties where they belong (in the trial court).

The Seventh Circuit's approach turns these imperatives on their heads. If allowed to stand, it threatens to generate future vexatious relitigation and uncertainty in a variety of contexts. That is especially true for the States, which are commonly parties to judgments and consent decrees with ongoing effect, including those involving Indian tribes.

## I. This case presents an important question regarding the proper allocation of the burden in a Rule 60(b)(5) proceeding.

This Court's precedent teaches that Rule 60(b)(5) is not intended to provide a way to relitigate final judgments. Much less is it a mechanism to force non-moving parties to explain anew why a final judgment should stand. That is especially true, as here, where the judgment embodies a careful balance of rights and is founded on something immutable—that a night hunter of deer cannot see what is beyond her target.

By ultimately shifting the proper burden and asking the wrong question, the Seventh Circuit has upended Rule 60(b)(5): it has required the non-moving party (Wisconsin) to justify a decades-old judgment about night hunting. The Seventh Circuit's approach to Rule 60(b)(5) runs afoul of the following precedent from this Court and several courts of appeal.

When bringing a Rule 60(b)(5) motion, "a party seeking modification . . . bears the burden of establishing that a significant change in circumstances warrants revision" of the consent decree or judgment. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383 (1992). As can be seen, that proposition has two components: (1) the moving party bears the burden, and (2) the moving party must show significant and changed circumstances.

The burden and the required showing serve a clear purpose: to avoid undermining the rule in our legal system that final judgments are just that—final. Various courts have recognized that "the limits on Rule 60(b) review are designed to protect the finality of judgments." *Reid v. Angelone*, 369 F.3d 363, 370 (4th Cir. 2004). Restated, "relief under Rule 60(b) is 'circumscribed by public policy favoring finality of judgments and termination of litigation.'" *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (citation omitted). That sentiment is echoed by most other federal circuit courts. *See*, *e.g.*, *Northridge Church v. Charter Twp. of Plymouth*, 647 F.3d 606, 615 (6th Cir. 2011) (quoting *Rufo* and noting that overly liberal application of Rule "'would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements'"); *Cook v. Birmingham News*, 618 F.2d 1149, 1153 (5th Cir. 1980) (a policy underlying Rule 60(b)(5) is "need to achieve finality in litigation"); *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147, 156 (1st Cir. 1980) (approving a case that declined to grant Rule 60(b)(5) relief when lacking "sufficient evidence of circumstances so exceptional that overriding interest in finality and repose of judgments properly overcome").

Indeed, an underlying final judgment is never properly the subject of a Rule 60(b)(5) proceeding. This Court has explained that "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *Browder v. Dir.,*

*Dep't of Corr. of Ill.*, 434 U.S. 257, 263 n. 7 (1978). Nor may "Rule 60(b)(5) . . . be used to challenge the legal conclusions on which a prior judgment or order rests." *Horne v. Flores*, 557 U.S. 433, 447 (2009); *see also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making.").

In keeping with this principle, courts of appeal have correctly recognized that a "Rule 60(b) motion cannot be used to relitigate the merits of a district court's prior judgment in lieu of a timely appeal," *In re SDDS, Inc.*, 225 F.3d 970, 972 (8th Cir. 2000), and that "'[h]aving failed to appeal, movants cannot achieve the same result under the guise of a rule 60(b)(5) motion.'" *Lazare Kaplan Int'l, Inc. v. Photoscribe Tech., Inc.*, 714 F.3d 1289, 1297 (Fed. Cir. 2013) (citation omitted).

The same holds true for arguments or events that could have been, but were not, timely raised in the underlying litigation. The general rule is that "modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree," regardless of whether the party timely raised them. *See Rufo*, 502 U.S. at 385. That makes sense because Rule 60(b)(5) requires a showing of *changed* circumstances *after* the underlying judgment. Rule 60(b)(5) does not provide "a second opportunity for the losing party to make its strongest case, to rehash arguments, or to dress up arguments that previously

failed." *Kustom Signals, Inc. v. Applied Concepts, Inc.*, 247 F. Supp. 2d 1233, 1235 (D. Kan. 2003); *see also Geo. P. Reintjes Co. v. Riley Stoker Corp.*, 71 F.3d 44, 49 (1st Cir. 1995) (quoting with approval Moore's Federal Practice and the proposition that "Rule 60(b) does not license a party to relitigate, whether via motion or independent action, any 'issues that were made or open to litigation in the former action where he had a fair opportunity to make his claim or defense'").

The controlling precedent is clear: the *moving* party must make a strong showing of changed circumstances. *See*, *e.g.*, *Rufo*, 502 U.S. at 383. And that showing must point to significant and changed circumstances that are compelling enough to discard the rule that final judgments remain closed. *See Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 126 (2d Cir. 2009) ("Rule 60(b) provides 'a mechanism for extraordinary judicial relief [available] only if the moving party demonstrates exceptional circumstances'" (citation omitted)). It is especially important to strictly apply this rule where, as here, the underlying judgment encompassed a balancing of rights, and the moving party only seeks to revisit one portion of the judgment. (Pet. App. B at 34a.)

Here, the Seventh Circuit has altered these principles by shifting the burden to the non-moving party to show that night hunting of deer *remains* fundamentally unsafe, which is something that was already settled by the 1991 judgment. (Pet. App. A at

5a, 8a, 12a-13a.) That is dangerous precedent. A non-moving party has a right to the repose that comes with a final and non-appealed judgment. This improperly expansive approach to Rule 60(b)(5) in the Seventh Circuit creates bad precedent in that circuit, and a bad example for the federal courts in general. It should not be allowed to stand.

It is true that this petition is interlocutory, as the Seventh Circuit has remanded the case for further district court proceedings. Under the circumstances, however, the case presents an instance where the granting of an interlocutory petition makes sense. *See, e.g. Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (per curiam) (summarily reversing an interlocutory order). The Seventh Circuit's fundamentally flawed application of Rule 60(b)(5) necessarily infects any further proceedings in this case. The decision incorrectly imposes a burden on Wisconsin, and any further proceedings about how to modify the underlying judgment are necessarily compromised because there is no such burden.

## II. The Seventh Circuit's improper burden-shifting removed all of the Rule 60(b)(5) protections.

Contrary to this Court's precedent, the Seventh Circuit *sua sponte* addressed the underlying 1991 judgment and, based on improper burden-shifting and factual findings unmoored from the record, effectively reversed that underlying case. At every turn, the court ruled as if the non-moving party, Wisconsin, bore a burden to justify the judgment.

That can be seen both in the court's legal analysis and its discussion of the facts (or lack thereof). Indeed, the court inexplicably faulted the non-moving party, Wisconsin, for failures of proof.

In stark contrast to the Seventh Circuit, the district court properly applied Rule 60(b)(5). The district court decision was based on the fact that the moving party failed to show that anything fundamental had changed about hunting deer at night. It remained true that a hunter cannot see what is beyond her target, and that the proposed night hunting would take place on public land where other people may be present and where access is not controlled. It is an unchanged fact that a hunter simply cannot see what damage or injury could result from a missed shot or, as is possible, when a bullet travels through a deer. (*See* Pet. App. C at 59a, 61a-62a, 101a-102a.)

Indeed, the alleged changes proposed by the Tribes were not about the fundamentals of night hunting, but rather were about alleged changed practices. These alleged changes were off point because they did not address the underpinning of the 1991 judgment—that night hunting of deer was fundamentally unsafe in its very nature. And the district court correctly found that nothing relevant had changed about the practices cited by the Tribes anyway.

For example, nothing had changed about *who* could shoot deer at night. At all relevant times,

private Wisconsin citizens have been prohibited from hunting deer at night for their own purposes. (Pet. App. B at 24a.) And it had always been true that governmental employees and their agents at times shot deer at night. (Pet. App. B at 24a-30a, 38a.) The Tribes also attempted to liken hunting deer to hunting wolves, but night hunting for wolves was possible only from November 26 to December 23, 2012. (Pet. App. B at 31a.) In all, only three wolves were shot at night (Dkt. 370 at 159), and the law allowing night hunting of wolves then was repealed. (Pet. App. B. at 31a.) These alleged changes were largely irrelevant and, in any event, did not hold up to scrutiny. The district court acted well within its proper authority when declining to reopen. *See Rufo*, 502 U.S. at 389 (abuse of discretion standard applies); *accord Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (review is "limited and deferential.").[3]

In nonetheless reversing the district court, the Seventh Circuit began by reciting irrelevant and unargued facts about the efficiency of night hunting and the Tribes' poverty and health issues (none of which were alleged to be changed circumstances). (Pet. App. A at 2a-3a.) Following that recitation, the

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[3]A court of appeals does not substitute its judgment even when it disagrees with the district court: "If the District Court takes into account the relevant considerations (all of which are not likely to suggest the same result) and accommodates them in a reasonable way, then the District Court's judgment will not be an abuse of its discretion." *Rufo*, 502 U.S. at 393-94 (O'Conner, J., concurring).

Seventh Circuit noted that the Tribes alleged changed circumstances from the number of deer shot at night by state employees. (Pet. App. A at 5a-6a.) But the court never proceeded to actually explain how that fact was such a compelling changed circumstance that the district court was required to reopen the 1991 judgment. It clearly was not.[4]

Rather, to reach a different result, the Seventh Circuit had to expand the proper Rule 60(b)(5) inquiry. The court stated: "All that can be said is that on the present record there is scant reason to think that safety concerns justify forbidding Indians to hunt deer 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 long ago." (Pet. App. A at 8a.)

But the premise that night hunting of deer is fundamentally unsafe was not seriously contested in

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[4]Rule 60(b)(5) decisions are entrusted to a district court's discretion for a reason—they are fact and circumstance dependant. That reason is especially pertinent where, as here, the denial of the motion was based on the district court's decades of experience handling a complex matter, including a four-day initial trial, a two-day hearing in 2012, and a five-day bench trial on the motion in 2013. The district court, unlike the court of appeals, was privy to witness demeanor and other testimonial detail, as well as the full story of the equities in this decades-long litigation. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-234 (1995) (rule "does not impose any legislative mandate to reopen upon the courts").

this Rule 60(b)(5) proceeding. Indeed, that was the very conclusion reached in the non-appealed 1990 opinion and 1991 judgment. Nothing has changed about the pertinent fact that, at night, a person cannot see what is beyond a target. Rule 60(b)(5) does not sanction revisiting the underlying judgment, particularly where the onus is shifted to the non-moving party.

Rather, if anything, Rule 60(b)(5) should be applied more stringently to the present scenario. It involves a judgment based on something immutable—that a night hunter of deer cannot see what is beyond her target. It is not a situation where ongoing court involvement, and ongoing supervision, is contemplated or appropriate based on, for example, a changeable institutional setting. *See*, *e.g.*, *Kalamazoo River Study Grp. v. Rockwell Int'l Corp.*, 355 F.3d 574, 588 (6th Cir. 2004) (stating that "[w]e are not aware of any case in which *Rufo* has been applied to judgments other than consent decrees, declaratory judgments, and injunctions, which often require ongoing court supervision and future judicial involvement," and noting application of *Rufo* "in the school desegregation context").

Compounding the flaws, the Seventh Circuit ruled as if Wisconsin bore a burden to come forward with particular evidence supporting the underlying judgment. But the onus should have been on the Tribes to show a relevant and significant change, not on Wisconsin.

For example, without a relevant showing by the Tribes, the Seventh Circuit nonetheless proceeded to suppose that a deer at night presents "a perfect target" and that hunting during the day is "more dangerous." (Pet App. A at 8a.) That evidence is not in the record, and it is thus no wonder that the Seventh Circuit does not explain the source of these suppositions.[5] Rather, the Seventh Circuit made these assertions seemingly based on its view that it had been Wisconsin's burden to show otherwise. (*See* Pet. App. A at 12a-13a.)

The misapplication of the burden was also apparent where the Seventh Circuit discussed hunting practices in Minnesota and Michigan. Without support, the court posited that night hunting of deer occurs in both of those states. (Pet App. A at 12a.) Using that supposition as a springboard, the court then stated that Wisconsin had the burden of coming forward with evidence that there had been accidents in those states (Pet. App. A at 12a-13a.) But it was not Wisconsin's burden to show that there were safety problems in other states.

Similarly, and contrary to the Seventh Circuit's apparent view, it was not Wisconsin's burden to

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[5]Other circuits acknowledge a division of roles when it comes to fact-finding: "It is not the job of appellate courts to find facts." *United States v. Searcy*, 284 F.3d 938, 943 (8th Cir. 2002). "Appellate courts review district court judgments; we do not find facts." *Golden Bridge Tech., Inc. v. Nokia, Inc.*, 527 F.3d 1318, 1323 (Fed. Cir. 2008).

show that the Tribes' proposed hunting regulations were flawed—those regulations were not relevant because they were not changed circumstances. As the district court correctly pointed out, the regulations could have been proposed in 1991. (Pet. App. A at 8a-9a; Pet. App. B at 35a.) In any event, Wisconsin did present evidence that the regulations were insufficient to protect public safety. (*E.g.*, Dkt. 363 at 45-47, 75-76; Dkt. 364 at 118-119; Dkt. 366 at 248-50; Dkt. 367 at 130-31; Dkt. 369 at 52.)

Further, the Seventh Circuit's court-generated facts are themselves flawed. The original night-hunting trial in 1989, and the present Rule 60(b)(5) proceeding, included plentiful evidence about the relative dangers of hunting at night. In its 1990 opinion, the district court relied on evidence that: people or property might go unseen and be injured or damaged; a bullet could miss or even travel through a deer; the rifles used had a multi-mile range; and hunting under the cloak of darkness violated basic hunting rules. (Pet. App. C at 59a, 61a-62a, 101a-102a.; Pet. App. B at 35a.)

As to Michigan and Minnesota, the record does not support that night hunting of deer in fact occurs in those states in any meaningful way. Rather, the parties stipulated at the district court level that, although it was technically possible, no one had in fact hunted deer at night under Minnesota's regulations, which, notably, are significantly more

stringent than those proposed by the Tribes.[6] As to Michigan, there was no evidence that Michigan even allows night hunting of deer. There was only a single anecdotal suggestion in the record that someone had hunted there at night, but no evidence that it was legal. (Dkt. 363 at 47 & 107; Dkt. 332 at 24, ¶ 100-101.)[7]

At bottom, the Seventh Circuit based its decision on its own opinion about the safety of hunting deer at night. It improperly validated that opinion by faulting the non-moving party (Wisconsin) for failing to produce evidence showing that the underlying judgment should remain in force. (Pet. App. A at 5a, 12a.) None of that was warranted in a Rule 60(b)(5) proceeding. *See Browder*, 434 U.S. at 263 n. 7. The Rule 60(b)(5) burden is not on the non-moving party to show that something *remains* true. Rather, the

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[6]Those regulations require shooting from an elevated stand (allowing bullets to lodge into the ground), which the Tribes' current proposal would not always require, and they contain a developed public notice system, unlike the Tribes' proposals that do not include particularized notice to individuals or local authorities. (Dkt. 363 at 45-47, 75-76; Dkt. 364 at 118-119; Dkt. 366 at 248-50; Dkt. 367 at 130-31; Dkt. 369 at 52.)

[7]The Seventh Circuit also discussed the passage of time as if it supported reopening the judgment (Pet. App. A at 10a), but that alone is not reason to reopen. *See*, *e.g.*, *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 218 n. 26 (3d Cir. 2012) ("Passage of time alone is not normally regarded as a significant change of fact.").

burden should be on the moving party to show that something significant has *changed*. *See Agostini v. Felton*, 521 U.S. 203, 216 (1997); *Rufo*, 502 U.S. at 383.

There is nothing elemental about hunting at night that has changed in the last twenty years, and the Tribes did not allege otherwise. Wisconsin was entitled to rely on the non-appealed judgment, as it has done for decades in ordering its affairs and protecting its citizens.

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The Seventh Circuit has dispensed with Rule 60(b)(5)'s strictures and proper burdens. That method of applying Rule 60(b)(5) should not be allowed to stand, as it poses serious threats to fundamental principles of finality and the certainty that comes with it. More so than most litigants, the states are parties to countless structured judgments and consent decrees in complex litigation. Relaxation of the standards for opening judgments and decrees could undermine state programs and regulatory schemes that rely on them, and also the expectations of private citizens.

## CONCLUSION

For the reasons stated, this Court should grant this petition for a writ of certiorari.

Dated this January 7th, 2015.

Respectfully submitted,

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# APPENDIX

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**APPENDIX A**

In the
United States Court of Appeals
For the Seventh Circuit

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No. 14-1051

*LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, et al.,*

*Plaintiffs-Appellants,*

*v.*

*STATE OF WISCONSIN, et al.,*

*Defendants-Appellants.*

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Appeal from the United States District Court for the Western District of Wisconsin.
No. 3:74-cv-00313-bbc — **Barbara B. Crabb**, *Judge*.

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ARGUED SEPTEMBER 16, 2014 — DECIDED OCTOBER 9, 2014

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Before BAUER, POSNER, and EASTERBROOK, *Circuit Judges*.

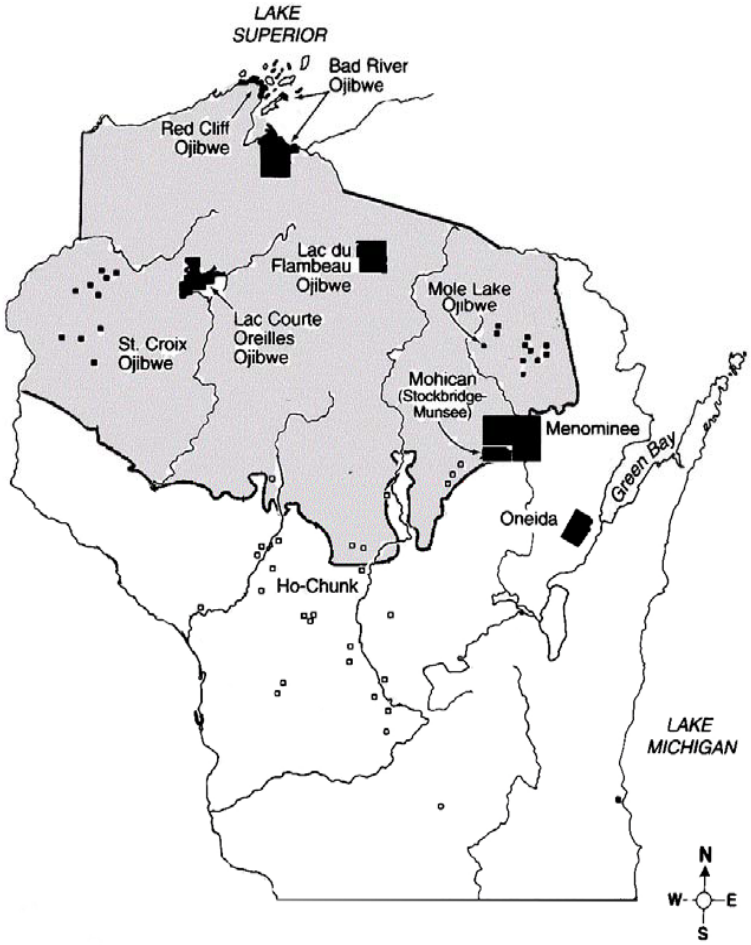
POSNER, *Circuit Judge*. The plaintiffs, Wisconsin Indian tribes, moved the district court under Fed. R. Civ. P. 60(b)(5) to relieve them from a final judgment on the ground that its continued enforcement would be, in the language of the rule, "no longer equitable." There is no deadline for

moving for relief under this provision, though a party must move within a reasonable time. See Fed. R. Civ. P. 60(c)(1). The district court denied the motion, precipitating this appeal.

The judgment in question, entered in 1991 and not appealed, upheld a state statute prohibiting members of the tribes from hunting deer at night outside the tribes' reservations. *Lac Courte Oreilles Band of Lake Superior Chippewa Indi- ans v. Wisconsin*, 775 F. Supp. 321, 324 (W.D. Wis. 1991). Wisconsin Indians had hunted deer at night since before they had electricity. Hunting deer at night is efficient because deer are more active at night, and because a bright light in a deer's visual field freezes the animal, making him a large stationary target. According to proposed findings of fact submitted by the plaintiffs, "tribal members need to hunt for subsistence purposes. Between 25% and 93% of Tribal members are unemployed. Many Tribal members that are employed still live below the poverty level." (Twenty-eight per- cent of the state's Indian population have incomes below the poverty level. Suzanne Macartney et al., "Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007–2011" 14 (Feb. 2013), www.census.gov/prod/2013pubs/acsbr11-17.pdf (visited Oct. 8, 2014, as were the other websites cited in this opinion).) Deer meat also is lean and therefore healthful (obesity is far more prevalent among Indians than among whites, see American Heart Association, *American Indian/Alaska Natives & Cardiovascular Diseases* (2013), www.heart.org/idc/groups/heart-public/@wcm/@sop/

@smd/documents/downloadable/ucm_319569.pdf). According to the plaintiffs "a disproportionate number of Tribal members have chronic diseases such as heart disease and diabetes. Cheap, high fat hamburger meat purchased with food stamps cannot replace healthy venison in tribal populations experiencing chronic health problems," and in addition "tribal members need to hunt at night for cultural and religious reasons. Fresh deer meet [*sic*] may be needed for a ceremony, and the only opportunity to obtain it may be at night."

As shown in the map below, reservation lands in Wisconsin are limited and scattered. But much of the northern third of Wisconsin that is not reservation land (the solid black regions of the map) is territory ceded by the Indian tribes to the United States in the nineteenth century (as marked by the shaded region of the map). The treaties that governed the terms of the cession reserved the Indians' rights to hunt in the ceded territory. For example, a treaty of 1842 provided that "the Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States." See *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 345 (7th Cir. 1983).




Though the treaties do not mention the states, states are allowed to regulate Indian activities in ceded territory so far as necessary "to protect [the state's] natural resources and its citizens." *Reich v. Great Lakes Indian Fish & Wildlife Commission*, 4 F.3d 490, 501 (7th Cir. 1993). State jurisdiction over Indians is limited but includes the right to take measures necessary

to protect public safety, *id.*, and safety concerns were the justification given by Wisconsin for wanting to prohibit Indians from hunting deer at night outside their reservations. But the state must justify, not merely assert, a public-safety need to restrict Indian rights recognized by treaty with the federal government. It must show, first, "that a substantial detriment or hazard to public health or safety exists or is imminent. Second, … that the particular regulation sought to be imposed is necessary to the prevention or amelioration of the public health or safety hazard. And third, … that application of the particular regulation to the tribes is necessary to effectuate the particular public health or safety interest. Moreover, the state must show that its regulation is the least restrictive alternative available to accomplish its health and safety purposes." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 668 F. Supp. 1233, 1239 (W.D. Wis. 1987); see also *Mille Lacs Band of Chippewa Indians v. Minnesota*, 952 F. Supp. 1362, 1381–82 (D. Minn. 1997).

In and before 1989, which was when the evidence was presented on which the 1991 judgment was based, there had been very little night hunting of deer other than on Indian reservations. Occasionally law enforcement officers or employees of the state's department of natural resources would shoot deer at night, but this was rare, the reason being that night hunting was considered dangerous, although there appears to have been no evidence supporting that fear.

The tribes' motion to reopen the 1991 judgment is based largely on the fact that beginning in the late 1990s the number of deer killed at night, mainly by state employees though also by some private state contractors, increased markedly because of an explosion of the deer population and the advent of chronic wasting disease, a fatal disease common among deer. Night hunting was meant to reduce the deer population in general (one reason being that deer are frequent causes of serious traffic accidents) and to eradicate chronic wasting disease in particular. The tribes' argument is that the state's greater experience with night hunting of deer since the 1991 judgment shows that it is safer than had been believed—so safe indeed that, given sensible regulations governing such hunting, there is no reason to prohibit the tribes' members from engaging in such hunting on ceded territory. Hunting accidents in general have plummeted in Wisconsin in recent years: from just over 100 in 1989 to 28 in 2012. The latter number is particularly striking since Wisconsin's population in 2012 was 5.7 million and hunting is popular in that largely rural state.

The district judge rejected the tribes' argument on several grounds. One was that most of the increased night hunting has been by employees or contractors of the state government. But there is no evidence that the safety regulations that the tribes intend to impose on off-reservation night hunting are laxer than the regulations governing night hunting by the state's hunters. (In fact the opposite is true, as we'll see.) The safety record of deer hunting on reservations is outstanding.

According to an uncontradicted expert witness's report, though there are no regulations specific to night hunting on the reservations (where night hunting is lawful) there have been only two reported incidents of a per- son being shot by a deer hunter, either day or night. Furthermore, there's no evidence that the state agents who hunt deer at night are experienced or well-trained. Apparently many are neither. In 2006 the state's department of natural resources noted that "shooters are coming to this program [eradication of chronic wasting disease by night hunting] ill prepared. … Too many do not know the basic rules of fire- arms safety. … Our trainees come from within the ranks of the department [of natural resources] and the vast majority are not seasoned shooters … ." In contrast, those Indians who hunt deer tend to be experienced hunters, because on their reservations they are allowed to hunt both during the day and at night. Moreover, to be licensed to hunt they are required to pass a marksmanship test—at night. Their safety record is sterling: since 1989 there have been only two or three recorded hunting accidents involving Indians in ceded territory. According to another expert witness's report, the tribes' proposed permit requirements for nighttime deer hunting are far more stringent than those the state imposes on its hunters.

The judge remarked that "the chronic wasting disease initiative is some evidence that night hunting with lights can be engaged in safely but it is not conclusive in that regard. I cannot say that it shows that the judgment in this case has become 'an instrument of wrong.'" It's not clear

what evidence would demonstrate "conclusively," in advance of permitting the hunting of deer at night by members of the plaintiff tribes, that such hunting was safe. All that can be said is that on the present record there is scant reason to think that safety concerns justify forbidding Indians to hunt deer 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 long ago. There are of course hunting accidents, but they are mainly to members of the shooting party—often they are self-inflicted wounds— rather than to bystanders. Between 2007 and 2011 there were 133 hunting-related injuries of which 48 were self-inflicted. Of the remaining 85 accidents, only 4 were to non-hunters—either bystanders or non-hunting members of the hunting party.

The night hunter doesn't shoot until the deer is a brightly lit stationary object—a perfect target. Hunting deer during the day is likely to be more dangerous because there are more people about and the hunter will often be shooting at a moving animal, which a shooter is more likely to miss than a stationary one. It's true that at night the hunter may well have greater difficulty seeing a person in the woods behind the deer that he's aiming at—and bullets fired from the high-powered rifles used to hunt deer carry a long way if they happen to miss the targeted deer. But in recognition of this danger the hunting regulations proposed by the tribes require the night-hunting Indians to lay out lines of sight in the daytime and submit a shooting plan for approval. Unless a hunter plans to fire from an elevated position (when be- cause of the angle the

bullet is likely to hit the ground within a safe distance), a member of the tribal conservation department or the tribe's internal regulatory agency must travel to the site and confirm that the shooting plan complies with safety standards. Further mitigating the danger is that one of the plaintiff's expert witnesses reports 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 when there are likely to be more people out both day and night.

According to data compiled by Wisconsin state agencies, between 2008 and 2011 there was a total of 1851 injuries and deaths in collisions between motor vehicles and deer, and only 37 injuries and deaths from all accidents—day and night—arising from the hunting of deer with guns, an average of 9 a year. Whether any of them were deaths from night hunting is unknown. But it is plausible—no stronger term is possible, given a dearth of evidence—that the more deer that Indians kill, the fewer deer-related accidents to humans there will be, since according to the statistics we quoted 98 percent of deer-related injuries arise from motor vehicle collisions with deer. Not that the effect will necessarily be large, though in 2013 Wisconsin hunters killed about 342,000 deer out of a population (before the hunting season) estimated at 1.4 million—24 percent of the deer population. See Deer- Friendly, "Wisconsin Deer News," www.deerfriendly. com/deer/wisconsin; Wisconsin Department of Natural Re- sources, "Total Deer Kill," http://dnr.wi.gov/topic/Wildli

feHabitat/documents/deerharvest5.pdf. A further point concerning safety is that the very small Indian population (1 percent of Wisconsin's total population) imposes a natural limit on the potential risk of Indian night hunting to public safety.

The judge said that the fact "that plaintiffs waited ten years after the chronic wasting disease reduction program started and four years after it ended before moving to re- open the judgment … in itself might be good cause for denying their motion." Not so. The longer the wait, the more evidence is accumulated bearing on the safety of night hunting of deer. The plaintiffs filed their motion to reopen and modify the judgment in 2012; had they filed earlier they would have had a thinner statistical basis for their position. And it's not as if the state is harmed by delay in reopening the judgment.

A motion to modify a judgment under Fed. R. Civ. P. 60(b)(5) must, like any motion, be made in a reasonable time, since the rules specify no deadline. But what is reasonable depends on the circumstances. If reasonable reliance on a judgment is likely to grow over time, a motion to modify it should be made sooner rather than later. But in the case of regulatory decrees, such as the judgment in this case forbid- ding night hunting of deer, often the passage of time renders them obsolete, so that the case for modification or rescission actually grows with time, as in *Horne v. Flores*, 557 U.S. 433, 447–48 (2009), *People Who Care v. Rockford Board of Education*, 246 F.3d 1073, 1075–76 (7th Cir. 2001), and *Alliance to End Repression v. City of Chicago*, 237 F.3d 799, 801 (7th

Cir. 2001). That's what seems to have happened in this case. Based on almost no experience with night deer hunting in the 1980s, the district court at the beginning of the next decade upheld on safety grounds Wisconsin's ban on off-reservation night deer hunting by Indians. Greater experience with deer hunting suggests that a total ban is no longer (if it ever was) necessary to ensure public safety. And as noted in *Reich v. Great Lakes Indian Fish & Wildlife Commission*, *supra*, 4 F.3d at 501, it is only safety (and conservation, which however is not an issue in this case) that can justify a state's forbidding a normal Indian activity, authorized to the tribes on land ceded by them to the United States.

At least four states allow Indians to hunt deer at night— Oregon, Washington, Minnesota, and Michigan. Neither the tribes nor the state has presented evidence of the accident rate in any of those states. We do not know whether such statistics are obtainable. They would prove to be of little value were there substantial differences among these states or between them and Wisconsin in such potentially relevant domains as terrain, climate, deer population, location and size of ceded territory, the length and time of year of the night deer hunting season, safety regulations, Indian population as a percentage of total state population, population density, Indian cultural and dietary practices relating to deer hunting, poverty, and unemployment. But so far as we are able to determine there are few relevant differences among Minnesota, Michigan, and Wisconsin in these respects, though considerable differences between

those three Midwestern states and Oregon and Washington. See, e.g., U.S. Department of the Interior, Bureau of Indian Affairs, *2013 American Indian Population and Labor Force Report* (Jan. 16, 2014), www.bia.gov/cs/groups/public///-024782.pdf. For example, tribal hunting in the ceded territories in Wisconsin, Minnesota, and Michigan is managed by the same organization, the Great Lakes Indian Fish and Wildlife Commission. And in developing their proposed regulations the Wisconsin tribes looked to Michigan and Minnesota, both states that have allowed night hunting for at least a decade, for guidance—although the proposed Wisconsin regulations are far more stringent than those of the other states. The Wisconsin tribes' night hunting safety course and certification program are identical to those of the Minnesota tribes. Moreover, the ceded territories in each of the three states (the upper peninsula of Michigan, the northern third of Wisconsin, and the east-central portion of Minnesota) are comparable in population density, elevation, biomass (*i.e.* tree concentration), and average temperature during the hunting season. So it seems reasonable that Minnesota's and Michigan's experiences with night hunting of deer by Indians might have a bearing on our case.

We'll leave it to the district court to decide whether to invite the parties to submit such comparative evidence. The burden of production should be placed on the state, for 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 that prohibited Indians from hunting deer at night in that territory.

The judgment is reversed and the case remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

**APPENDIX B**

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

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

Plaintiffs, OPINION & ORDER

v. 74-CV-313-bbc

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

Defendants.

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This case is before the court on the motion of plaintiffs Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Sokaogan Chippewa Indian Community of the Mole Lake Band of Wisconsin, Bad River Band of Lake Superior Chippewa Indians, St. Croix Chippewa Indians of Wisconsin and Red Cliff Band of Lake Superior Chippewa Indians for relief under Fed. R. Civ. P. 60(b) from the judgment entered in this litigation in 1991. That judgment brought to an end litigation that began in 1974, when plaintiff Lac Courte Oreilles Band of Lake Superior Chippewa Indians (later joined by the other five Wisconsin bands of Lake Superior Chippewa) sued for recognition of their members' treaty rights to hunt, fish and gather in the northern third of Wisconsin ceded to the United States by the Chippewa in nineteenth century treaties.

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

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

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

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

In moving to reopen the judgment, plaintiffs have the burden of proving that circumstances have changed so much that night hunting of deer with lights is no longer a substantial safety hazard or, if it is, that the state's ban is not the least restrictive

alternative available to accomplish the public safety purpose, and in its present form, it discriminatorily harms the Chippewa. Plaintiffs contend that they have proven the change in circumstances. First, they have produced evidence of the dramatic increase in night hunting by Department of Natural Resources employees and other law enforcement officers to stop the spread of chronic wasting disease, prevent the destruction of agricultural crops and landscaping materials and to reduce accidents on the roads and at airports. Second, the state's 2012 decision to allow wolf hunting at night with lights and high powered rifles in the ceded territory is significant additional evidence that the state no longer considers night hunting a safety hazard. Third, plaintiffs contend that their carefully revised tribal night hunting regulations demonstrate that such hunting can be carried out without presenting a substantial safety hazard to the public.

Although plaintiffs have adduced extensive evidence in support of their position, I conclude that they have failed to show that changes in conditions since the judgment was entered in 1991 prove that the night hunting ban is no longer the least restrictive alternative available to accomplish the public safety purpose or that the regulation discriminatorily harms the Indians. Neither the extensive reliance by the state on night hunting to reduce the incidence of chronic wasting disease in the deer herds from 2002-07 nor the short-lived statutory authority for night hunting of wolves with lights and high powered rifles constitutes such a change. It is appropriate to add, however, that if the state had not changed the wolf hunting laws to ban

night hunting with lights in the 2013 season, plaintiffs' motion would raise a much closer question.

BACKGROUND

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

By 1989, when trial began on the tribes' hunting rights, the parties had resolved many of the differences in their regulatory disputes by negotiation and stipulation. The state defendants acknowledged the adequacy of the tribal court system and certain regulations set out in the Great

Lakes Indian Fish and Wildlife Commission Model Off-Reservation Code, as well as the need for tribal representation on Department of Natural Resources committees established to manage deer in the ceded territory. As a result, only a few issues remained for resolution by the court. The one relevant to the present dispute was the parties' disagreement about the safety of allowing plaintiffs to engage in off-reservation hunting of deer at night with lights.

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

From the evidence adduced at the 1989 trial, I concluded that defendants had shown that night hunting of deer with lights was a substantial risk and that plaintiffs had failed to show that the state had waived its right to make this argument. Deer hunting involved the use of high caliber rifles, whereas hunting of smaller species generally

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

Final judgment was entered on all aspects of the litigation on March 19, 1991. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 755 F. Supp. 321 (W.D. Wis. 1991). Two months later, the parties announced that neither side would appeal from the final judgment. In public statements, each side explained their reasons. The state said that a further appeal "would serve no useful purpose, and might jeopardize the gains we have made" and enumerated what it considered its

victories to be in the case. Dkt. #329, ¶ 10. Plaintiffs said they were forgoing their right to appeal, "as a gesture of peace and friendship towards the people of Wisconsin, in a spirit they hope may someday be reciprocated on the part of the general citizenry and officials of this state." Id. at ¶ 11. .

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

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

> The Great Lakes Indian Fish and Wildlife Commission Executive Administrator may,

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

Id. at App. A, p. 5.

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

off-reservation night hunting against members of the plaintiff tribes.

Rather than responding to defendants' motion, plaintiffs moved for preliminary and permanent relief, dkt. #193, seeking to enjoin defendants from enforcing the state's prohibition on night hunting with the use of lights, Wis. Stat. § 29.314, against them. GLIFWC suspended its order on November 28, pending resolution of the parties' motions.

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

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

## FACTS

### A. The Legal Landscape before the 1989 Trial

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

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

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

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

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

In 1987, the department promulgated Wis. Admin. Code § NR 19.84, specifying that deer may be killed only during the hours from one hour before sunrise to one hour after sunset, Parties' Stip. of Fact, dkt. #329, at ¶ 41, and that department personnel were not to shoot deer causing damage unless an extraordinary safety risk existed or the permittee had demonstrated an inability to kill an adequate number of deer during the closed seasons and had agreed to pay any department costs not

reimbursed by the county wildlife program. Id. at 42. Under Wis. Stat. § 167.34, a landowner or occupant of land could apply for assistance from the DNR in destroying deer causing the damage. Dkt. #329 at ¶ 45. It is unknown whether any permits were issued that allowed night shooting. Id. at ¶¶ 46-50.

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

B. Night Hunting of Deer before 1989

From 1958 to 1981, volunteers killed 110 deer in the University of Wisconsin Arboretum in an effort to minimize damage to native plant communities and other research subjects. Tr. exh. # 511 at 75. During the winters of 1981-82 and 1982-83, a University of Wisconsin graduate student in wildlife ecology, William Ishmael, oversaw the shooting operations at the arboretum under a permit issued to the arboretum by the Department of Natural Resources. He scheduled the personnel

(his brother and friends of his or of his professor), assigned them to five different bait sites stocked with apples, shelled corn and alfalfa hay, reviewed with them the protocol for shooting deer and arranged for the disposition and tagging of the deer. One of the bait sites had an elevated blind and fixed lighting system that had been in place before 1981. Tr. trans., dkt. #366, 3-A-27-28, 41-46; tr. exh. #511 at 75. At the other bait sites shooters sat in vehicles and used portable spotlights. Id. Shooting began in mid-December and continued through March.

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

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

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

Between 2002 and 2007, the state authorized night shooting of deer by law enforcement officers taking part in a chronic wasting disease reduction

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

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

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

The shooting plans for the night hunting varied. In some cases, the hunters had only a landowner agreement, a plat book map and an aerial photograph of the property that did not necessarily contain any markings for structures or backstops. They were instructed to notify the local sheriff's office at the start of each day's operations and again at the end of the night. In addition, they had to fill out a daily activity log, identifying any deer shot and including a diagram of any shots taken.

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

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

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

D. Killing of Deer Constituting a Nuisance

The DNR issues some deer damage permits allowing night shooting to municipalities, the University of Wisconsin Arboretum, Audubon centers and airports. Such shooting is generally limited to police officers or employees of a sharpshooting company and requires elevated hunting over bait without lights. From 2007 to 2013, the department issued about 12 nuisance permits of this type each year. Tr. trans., dkt. #365, at 3-A-128-29. The department issues nuisance permits to individuals but does not exempt them from shooting hour restrictions. Id. at 3-A-102.

E. Hunting of Wolves

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

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

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

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

The tribes submitted their final regulations to the court on March 1, 2013. The regulations require that each member must have a permit in order to hunt. To receive a permit, members would have to show that they had completed the marksman proficiency course and examination and had taken the advanced hunter course that explains the new requirements and the new authorized methods of shooting deer at night. In addition, the member would have to submit a shooting plan that has been approved by the Conservation Department. The plan must map the areas to be hunted, the potential safety concerns, the member's stationary position, the adequacy of the backdrop within 125 yards of the stationary position and the direction of the line of fire. If the tribal member wants to shoot deer from an elevated stationary position at a distance of no more than 50 yards, the plan need not be preapproved; if the member does not want to shoot from an elevated position or wants to shoot up to 100 yards away, the plan must be preapproved. Only two shooting plans may be approved for any 40-acre parcel of land. The commission's revised regulations provide that tribal members must use a light when shooting a deer but may use it only from within an established safe zone of fire from a stationary position or to trail a wounded animal.

In writing the new regulations, the working group took into account the criticisms and suggestions made by defendant Tim Lawhern, Administrator of the DNR's Division of Enforcement and Science, at the December 2012 hearing on plaintiffs' motion for a preliminary injunction. The group incorporated Lawhern's suggestion that an

"adequate backdrop" should be defined as "an area in which a bullet will fall harmless;" added notice of hazards that Lawhern thought should be included in the shooting plans; added a requirement that each plan had to be preapproved by either a GLIFWC warden or a tribal conservation warden, Tr. trans., dkt. #363, 1-A-88, and that the site had to be visited during daylight hours during the tribal deer season, which begins the day after Labor Day; extended the night training course from four to 12 hours; required hunters to specify the direction of the line of fire and prohibited them from shooting at running deer, except in mitigating circumstances, and from shooting at a target more than 100 yards away. The group changed the opening date for night shooting to November 1, to avoid the problem of heavy tree foliage, and added a requirement for the tribes to provide advance notification of shooting plans to local, state and federal officials. It did not impose a requirement that hunters had to notify any officials of the specific date on which they would be out at night.

## OPINION

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

injunction directed to events to come is subject always to adaptation as events may shape the need."

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

It is true that later cases have rejected the holding in Swift & Co. that a party moving to modify a judgment under Rule 60(b)(5) must show nothing less than a "grievous wrong evoked by new and unforeseen conditions," id. at 120, and have emphasized the need for flexibility in administering consent decrees. E.g., System Federation No. 91, Railway Employees' Department, AFL-CIO v. Wright, 364 U.S. 642, 647 (1961) (court is not required to disregard significant changes in law or facts, "if it is 'satisfied that what it has been doing has been turned through changing circumstances into and instrument of wrong'") (citing Swift & Co., 286 U.S. at 114-15). Still, amending any aspect of the judgment in this case risks upsetting the careful balance on which the entire construct rests.

The decision resolving the disputes in the 1989 trial rested on the findings that night shooting

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

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

Plaintiffs have a third argument, which is that the new night-hunting regulations they have put into place show that night deer hunting can be carried out without risk to public safety. Again, this is an argument they made in 1989, but failed to support with fully developed night hunting regulations.

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

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

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

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

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

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

In any event, it is difficult to see the point of plaintiffs' argument about defendants' trial strategy in 1989. I agree with plaintiffs that it is not easy to determine from the statutes and regulations exactly what night hunting, if any, was allowed for either

DNR employees or persons hunting under permits issued by the DNR before 1989. I agree with them on a second point as well: considerably more night hunting went on in this state after 1991 than had ever gone on before then.

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

However, this dramatic expansion in night hunting during the years from 2007-09 does not constitute such a significant change in circumstances as to warrant relief from the

judgment. This is because the greater portion of the increase in night hunting is attributable to the state government, acting through the DNR, which has had authority to kill deer at night with lights since long before 1989. This new hunting led to a vast increase in the number of deer killed, but not to any expansion in the scope of the DNR's authorized powers. DNR employees and other law enforcement agents supervised by the department hunted for the single purpose of reducing the incidence of chronic wasting disease in areas of the state in which it had been found, not for sport or even for subsistence. It was the department that established the program, set the parameters for participation, directed the operation and used only persons subject to job discipline (by either the DNR or the agency that employed them) if they failed to observe the program rules.

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

Plaintiffs' second argument for reopening is that the 2012 legislation permitting limited night hunting of wolves cannot be squared with defendant's position that night hunting of deer with lights must be outlawed. There is some merit to plaintiffs' argument. In both cased, hunters are out

in the winter hunting with high caliber rifles and shining their prey. If the legislature had not eliminated that aspect of the wolf hunt for 2013, it might have been difficult to deny plaintiffs' motion to reopen the judgment. This decision differs significantly from the earlier decision to implement a chronic wasting disease reduction program carried out by government employees. However, now that the legislature has changed course on allowing night hunting of wolves with rifles, plaintiffs cannot rely on the wolf hunting regulations as a further ground for attacking the judgment.

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

On the second point, it is worth noting that plaintiffs waited ten years after the chronic wasting disease reduction program started and four years after it ended before moving to reopen the judgment. That in itself might be good cause for denying their motion. Although Rule 60(b)(5) have no specified time limit, a motion to modify a judgment should be made within a reasonable time. 11 Charles Alan

Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, § 2863 (2012). Of course, the situation is different with respect to the 2012 wolf hunting legislation. Plaintiffs moved for relief from the judgment promptly after that legislation became public.

ORDER

IT IS ORDERED that the motion filed by plaintiffs Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Sokaogan Chippewa Indian Community of the Mole Lake Band of Wisconsin, Bad River Band of Lake Superior Chippewa Indians, St. Croix Chippewa Indians of Wisconsin and Red Cliff Band of Lake Superior Chippewa Indians for relief under Fed. R. Civ. P. 60(b)(5) from the judgment entered in this litigation in 1991 as it relates to the hunting of deer at night with lights is DENIED.

Entered this 13th day of December, 2013.

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

## APPENDIX C

740 F.Supp. 1400
United States District Court,
W.D. 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; Lac Du Flambeau Band of Lake Superior Chippewa Indians, Plaintiffs,
v.
STATE OF WISCONSIN, Wisconsin Natural Resources Board, Carroll D. Besadny, James Huntoon, and George Meyer, Defendants.
No. 74-C-313–C. | May 9, 1990.

Action was brought to determine Indian tribe members' hunting and trapping rights in land ceded to United States by treaty. The District Court, Crabb, Chief Judge, held that: (1) Indians and non-Indians were each entitled to one half of game harvest; (2) state could properly prohibit Indians from hunting deer during the summer and at night; and (3) private riparian owners were indispensible parties to determination of Indians' right to trap on stream beds.

Ordered accordingly.

## OPINION and ORDER

CRABB, Chief Judge.

This case is before the court for a determination of certain disputed issues relating to plaintiffs' off-reservation hunting of white-tailed deer, fisher and other furbearing animals, and small game within the area of the state ceded to the United States by the plaintiff tribes. Deer hunting was the subject of a trial held in August 1989. The hunting of the other animals is the subject of stipulated facts submitted by the parties.

In this phase of the litigation, which has focused on the regulation of the harvesting of specific species, the parties have drafted separate regulatory codes governing the harvests. Plaintiffs' proposed code is set out in the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) Model Off–Reservation Conservation Code; defendants' proposals are contained in Chapter NR 13 Wis. Admin. Code, Regulation of Chippewa Treaty Rights Participants. To a great extent the parties have been able to resolve the differences between the two proposals and have asked for judicial resolution of only a few matters. For example, they have resolved all of the issues governing the harvesting of wild rice and many of the differences between them relating to the harvesting of walleye and muskellunge.

With respect to deer, the parties have also resolved many of the differences in their regulatory approaches. Plaintiffs acknowledge the biological soundness of the state's deer management program

and agree that it should operate as the primary management program. They agree that state health regulations will be enforced against members of the plaintiff tribes until such time as the tribes adopt adequate regulations of their own. They will add certain state law provisions to their own regulations prohibiting the carrying of loaded and uncased firearms in vehicles, prohibiting hunting from, on, or across any public road, prohibiting hunting one-half hour before sunrise and after sunset, prohibiting hunting unless the hunter is at least twelve years old and is accompanied by a parent or guardian, and requiring hunters born after January 1, 1977, to complete a hunter education and firearm safety course.

For their part, defendants recognize tribal representation on department committees established to manage deer in the ceded territory. They acknowledge the adequacy of the tribal court system and certain tribal regulations set out in the GLIFWC Model Off–Reservation Conservation Code, draft 5/30/89, provided each plaintiff tribe adopts regulations identical in scope and content to those in the model code. Also, defendants acknowledge plaintiffs' right to harvest deer for ceremonial or religious purposes and have reached a stipulation with plaintiffs concerning regulations to be adopted by plaintiffs governing such harvesting.

Prior to trial plaintiffs indicated that a dispute existed over their right to kill albino deer. However, defendants put in no evidence of any conservation or public safety reason for restricting the killing of

albino deer, and have made no reference to the issue in their briefs or proposed findings of fact. I conclude it is not disputed and will not consider it in this opinion.

As to fisher, other furbearers and small game, the parties have stipulated to all of the material facts and have agreed on an enforcement scheme that recognizes plaintiffs' capability to enforce a code such as plaintiffs' Model Off–Reservation Conservation Code but acknowledges plaintiffs' present inability to provide exclusive enforcement of the code and the need for cooperative enforcement by agents of the State of Wisconsin Department of Natural Resources. Defendants agree that the plaintiffs' harvesting rights apply to all natural navigable lakes and to the beds of streams, rivers and flowages owned by the state or its political subdivisions, excluding the Wisconsin–Minnesota boundary waters and Lake Superior.

The parties agree that the Wisconsin Department of Natural Resources procedures for determining the harvestable number of fisher in each fisher management zone shall continue to be used to determine the harvest of fisher. Defendants agree to recognize a tribal representative as an official member of all committees advising the Department of Natural Resources Bureau of Wildlife Management on small game and small game range in the ceded territory. Plaintiffs have agreed to make a number of modifications in their Model Code regarding the hunting of furbearers and small game.

The only matters remaining in dispute as to deer are the following:

1. Whether there is a need for a judicially-determined allocation of the deer harvest between plaintiffs and non-Indian hunters, and if so, what that allocation should be;

2. Whether plaintiffs may exercise their harvesting rights on private lands within the ceded territory when they are hunting by consent of the landowner;

3. Whether defendants may prohibit plaintiffs from hunting deer during the summer;

4. Whether defendants may prohibit plaintiffs from hunting deer by gun or bow and arrow during the twenty-four hour period immediately preceding the opening of the state deer gun season; and

5. Whether defendants may prohibit plaintiffs from hunting deer at night with a flashlight.

With respect to fisher, other furbearers and small game, the only unresolved issues of law are

1. Whether there is a need for a judicially-determined allocation between Indians and non-Indians of the harvest of fisher and, if so, what that allocation should be;

2. Whether plaintiffs may exercise their treaty rights on private lands within the ceded

territory when they are hunting by consent of the landowner;

3. Whether plaintiffs' harvesting rights entitle them to place traps on the beds of flowages and streams regardless of the private riparian's consent.

For the purpose of determining these disputed issues, I make the following findings of fact from the parties' stipulations of fact and from the evidence adduced at the trial on white-tailed deer.

## FACTS

### A. White–Tailed Deer

#### 1. Biology of the deer resource

The ceded territory contains one species of deer: the white-tailed (*Odocoileus Virginianus*), which occupies continuously throughout the year approximately 79% of the ceded territory, or 19,075 square miles of the territory's 23,929 square miles. Its range consists of land that has permanent vegetative cover.

White-tailed deer can thrive in a wide variety of habitats. In summer, they range in fields, wetlands and brushy areas, relying on herbaceous vegetation as their primary food source and developing the fat reserves that are important to their winter survival. In spring, they feed on the succulent new growth of sprouting grasses and leaves. From permanent openings in the forest they obtain high-quality,

easily digestible grasses and herbaceous vegetation in fall, spring and summer.

In winter, deer range in coniferous vegetation that provides thermal cover and woody browse. They return to their winter range as snow accumulates and tend to congregate in "yards" in dense coniferous stands during the winter months.

Male white-tailed deer produce antlers annually, beginning in their second year. The antlers grow under the skin through the spring and summer. The skin over the antlers, called the "velvet," dries off when the antlers are fully grown and sloughs off by early September.

The deer mating season begins in October and can last through December, with the peak occurring by mid-November. The young are born primarily in May and June. When newly-born, they are unable to move and they remain hidden while their mothers forage for food in order to provide milk. Within three to four days they are able to move around with the mothers, but their primary protection continues to be in remaining motionless, with the white dapples on their backs providing effective camouflage until fall when the fawns lose the dapples and take on the tawny color of adults.

The reproduction rates of white-tailed deer are a function of the breeding female's (doe's) nutrition and age. Maximum reproductive potential is reached between the ages of three and seven years. The number of fawns each doe produces is determined by habitat quality and the severity of the

winter during gestation.

Deer weight and antler development are a function of the deer range condition, the age of the animal, and its genetic makeup.

Winter stress is the major cause of overwinter mortality to the white-tailed deer in the ceded territory. Snow restricts movement and cold drains energy reserves, resulting in direct mortality and decreased reproduction. Winter severity also increases intra-uterine mortality during the winter and neonatal mortality during the spring.

Mortality from predators is not a major factor in modern day Wisconsin because there are so few large (non-human) predators present in the state. Occasionally bobcat or coyote will prey on deer in the winter, and bear, bobcat and coyote will prey on the fawns in the late spring and summer. Neither disease nor parasites play any significant role in deer mortality.

In addition to hunting and winter mortality, deer deaths are caused by road kill, wounding loss, poaching, and hay mowing. In the 1987–88 fiscal year about 9,500 deer were killed by motor vehicles in the ceded territory. Wounding losses during hunting season account for some deaths; poaching accounts for more, although the exact amount can only be estimated.

The deer population in northern Wisconsin is generally healthy because of the adaptability and resilience of the species and the increase in preferred habitat as the result of the cutting of mature

northern forests, the development of second and third growth timber stands, and habitat improvement.

**2. Deer management systems**

Wisconsin is divided into "deer management units," each of which is an area of one similar kind of habitat, with boundaries established along roads or rivers. Sixty-four of the units are in the ceded territory. Each differs in its capacity to support deer.

The Department of Natural Resources makes an annual estimate of deer abundance for each management unit and an estimate of fawn production is made for each summer observation zone, or group of management units. The number of deer in a particular management unit varies depending on the unit's habitat.

The number of deer per square mile supportable by the habitat in a particular unit is referred to as the unit's "carrying capacity." Wisconsin Department of Natural Resources wildlife managers set population goals at a percentage of a unit's carrying capacity, taking into account the long term average carrying capacity, which is determined by deer population response to habitat quality and past winters of varying severity. In the forested units, the population goals are usually set between 60 to 70% of carrying capacity. These goals are designed to minimize losses during severe winters, provide a harvestable surplus of deer, and provide a buffer to account for losses during severe winters.

The number of deer required to maintain the population at goal level is called the maximum sustained yield. It is 50 to 60% of carrying capacity. The maximum number of deer available for harvest is that number in excess of the maximum sustained yield.

Deer population goals set above the maximum sustained yield provide more deer available for viewing and hunting. Deer population goals set below the maximum sustained yield provide fewer deer for viewing and hunting, improve deer quality, and reduce crop depredations and deer-car collisions.

The population goal for the management units within the ceded territory is 355,085, an average of 18.6 deer per square mile of deer range. The major tool employed to reach the stated population goal for each management unit is the restriction on the number of antlerless deer (does and fawns) that may be killed in each unit. This is accomplished by establishing a quota, or ceiling, on the total number of those deer that can be removed from the unit's population without adverse impact on the population's ability to maintain itself. When deer abundance exceeds the population goal, the antlerless quota is set high to curtail population growth or to reduce population levels. By imposing limits on the number of antlerless deer that can be harvested, deer managers need not limit the number of antlered deer that can be harvested during a late November deer gun season. These limits are placed only on gun hunters. The Department of Natural Resources sets no quota of any kind on bow hunters.

Antlerless deer harvest quotas need to be established annually, taking into account the current overwinter deer density estimate with the established population goal and projecting the fall status of the herd based on winter severity and recruitment estimates. Ultimately a harvest quota must be established so as to bring the deer population in line with the overwinter goal.

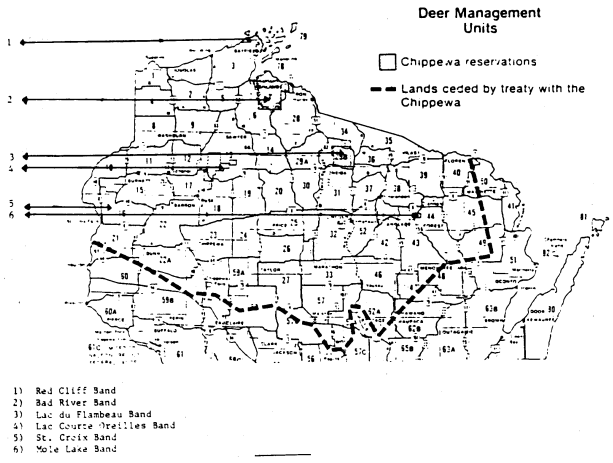
In order to determine the impact of deer harvest on population, the actual harvest in each management unit must be ascertained. The best means of doing this is by requiring the registration of each deer harvested so that its age and sex can be recorded, as well as the date of kill and the location of harvest by deer management unit and county. Age classes are determined at select registration stations. Once these determinations are made for each management unit at the completion of the hunting season, a population estimate can be made for each unit.

To meet deer population goals, seasonal restrictions on deer harvest are required, including a prohibition on any hunting at all when deer are in their winter yards after December 31, when hunting activity may place additional energy stress on the deer and increase their winter mortality. In addition, hunting should be prohibited when bucks are without antlers and hunters cannot distinguish between bucks and does. Hunting of does should be prohibited until late August when most fawns are weaned, because the fawns will die if their mothers are killed while they are nursing.

### 3. Hunting Areas

Of the 23,929 square miles in the ceded territory, 7,800 are public lands. Public lands include land currently held in fee title by federal, state, city, town or county governments, and those lands held under the forest crop or managed forest programs pursuant to Wis.Stat. ch. 77, to the extent they are required to be open to public hunting and fishing. It is likely that the total square miles of public lands will increase in the future, because the Department of Natural Resources has a policy of land acquisition.

Deer management units 3, 5, 29B and 34 are units used regularly by tribal members for hunting. These units contain more public than private land. Units 3 and 5 both contain 60.8% public land; unit 29B contains 63.8% and unit 34 contains 53.3%. Together, these four units contain over 890 square miles of public land available for tribal deer hunting. The proximity of these units to the plaintiffs' reservations is shown in the map below:



In deer management units 3, 5, 29B, and 34, plaintiffs have indicated their intent to take more deer that the NR 13 quota would permit, as shown in the following table.

| UNIT | 1989 TRIBAL DECLARATION | NR 13 QUOTA |
|---|---|---|
| 3 | 300 | 148 |
| 5 | 400 | 142 |
| 29b | 50 | 35 |
| 34 | 125 | 107 |

Historically, Chippewa hunting locations often changed because of population migrations or the opportunities of individual hunters to meet the demands of the fur trade.

**4. Harvest**

Over the past five years, defendants have worked with plaintiffs' tribal governments and with GLIFWC in determining antlerless deer quotas in the ceded territory. During this time, plaintiffs' members have not harvested their entire tribal quota for antlerless deer. Plaintiff tribal members harvested 476 deer in 1984, 945 deer in 1985, 1530 deer in 1986, 2099 in 1987 and 2468 deer in 1988. However, in 1987 plaintiffs harvested within 20% of their antlerless deer quota in 16 management units and harvested 71% of their overall quota. In 1988 they harvested within 20% of their antlerless deer

quota in 14 management units and harvested 66% of their overall quota.

Under defendants' proposal for allocating the deer quota, plaintiffs are entitled to many more deer than they are capable of harvesting. For example, if in 1988 the parties had been operating under Wis. Admin. Code § NR 13.32(2)(f), plaintiffs would have been entitled to a tribal deer quota of 11,421. In 1989 the quota would have been 14,572. Plaintiffs advised defendants they intended to harvest 4,786 deer in 1989. Their actual harvest for the year was not determined at the time of trial.

In 1988, state licensed hunters harvested a total of 121,740 deer in the ceded territory. Bow hunters took 7,722 antlered deer and 7,893 antlerless deer; gun hunters took 53,553 antlered deer and 52,572 antlerless deer.

The deer resource is limited in terms of preserving an adequate population to reproduce a harvestable surplus for the following hunting season. The deer resource is also subject to competing demands by user groups. Access and harvest quotas must be designed to insure the continued survival of the species and use of the resource by Indians and non-Indians.

**5. Seasons and Hunting Hours**

Under the Model Off-Reservation Conservation Code drafted by GLIFWC, members of the plaintiff tribes would be permitted to hunt antlered deer from July 1 until December 31; to hunt antlerless deer

from September 1 until December 31; and, during a "Middle Season," coinciding with the state deer gun season, would be required to wear blaze orange and wear a back tag furnished by the tribe.

Under Wis. Admin. Code NR 13, members of the plaintiff tribes would hunt as they have during the past five years. Section NR 13.32(2)(e) codifies the agreement the Department of Natural Resources has reached with the plaintiffs each year since 1984: the season for tribal hunting of both antlered and antlerless deer would begin on the day after Labor Day, continue through the Thursday preceding the nine-day state gun deer hunting season, resume on the Saturday preceding Thanksgiving and continue until December 31.

During the day immediately preceding the state deer gun hunting season, the public woods in the ceded territory are usually crowded with non-Indian hunters looking for hunting areas, deer trails, places where deer may be present, and locations for tree stands. In view of the number of people on public land in the ceded territory during the twenty-four hour period immediately preceding the state deer gun hunting season, permitting tribal hunters to hunt for deer during this period presents safety concerns. It also presents problems in preventing non-Indians from getting an illegally early start on hunting, because of the difficulties of distinguishing between tribal hunters hunting legally and non-Indians hunting illegally.

There is no biological reason to prohibit the

harvest of antlered deer during the months of July, August and early September.

Wis. Admin. Code §§ NR 10.04 and 10.01(3)(h) permit summer hunting of coyote and unprotected wild animals such as skunk and weasel. Although the number of tribal deer hunters who wish to hunt in summer is considerably smaller than the number of persons licensed to hunt these animals, it is much larger than the number of small game hunters who actually do hunt in the summer. Coyotes and other fur-bearing animals are generally hunted in the fall when their pelts are prime, using low caliber ammunition to avoid any unnecessary damage to the pelt. Unprotected animals killed for nuisance control are not usually "hunted," but are killed in close range of residences with low caliber rifles or shotguns with fine shot. Also, it is usual to "shine" or "bait" these animals and shoot them at short range, rather than from a distance, as with deer.

State law permits hunting during July, August and early September of snowshoe hare, opossum, skunk, weasel, starlings, English sparrows, coturnix quail, chukar partridge and other unprotected species. State law does not restrict the caliber of weapon that a state-licensed hunter may use to hunt these species. Some state-licensed hunters use high caliber weapons to shoot at and kill coyotes and fox during the summer months.

In 1987, 1690 individuals were permitted to hunt bear in Wisconsin during a period in which foliage remained on the trees.

When state small game seasons start in middle

September, the foliage has not yet started to drop.

**6. Hunting weapons and safety**

Hunters of small game usually use .22 caliber rifles or shotguns loaded with fine shot. A .22 caliber bullet can travel a mile or more. Shot can travel 500 yards or more.

Deer hunters usually use high-powered high caliber rifles, such as the .30–.06 and .30–.30, and single slug shotguns such as a 12 gauge. A .30–.06 has a maximum range of two and one-half to three miles; a .30–.30 has a maximum range of two miles. A 410 single slug has a maximum range of over 800 yards. The effective killing range for a 12 gauge shotgun loaded with a single slug shot is 100 yards or less.

Although the power of a rifle bullet decreases with distance travelled, bullets from .30–30 and .30–.06 deer hunting rifles still have over 1200 foot pounds of energy at 100 yards, and at this distance are approximately twenty times more powerful than the smaller caliber bullets from rifles used typically for small game and predator hunting. Bullets having approximately 1000 foot pounds of energy can cause fatal injury to persons.

Bullets from .30–.30 and .30–.06 rifles will travel hundreds of yards through light brush before they lose their energy. Such bullets can even travel through a deer and retain enough energy to cause damage to persons behind the deer.

The modern compound bow used for hunting

deer has approximately the same killing power as a deer rifle. The arrow has a broadhead consisting of two or more razor sharp blades that kill by causing hemorrhaging.

Buckshot sized 00 can travel 610 yards and has an effective killing distance of 50–70 yards.

Seventy percent of all two-person hunter accidents occur at distances of less than 100 yards from muzzle to wound.

During the summer months, the greater part of the ceded territory is heavily populated with persons engaged in recreation: bikers, campers, hikers, swimmers, bird watchers, persons fishing, etc. In some areas, the recreational use of the public land increases tenfold during June, July, and August. Many of the people engaged in recreation use the same areas in which plaintiffs' members wish to harvest deer. After the Labor Day weekend the recreational use of public land decreases significantly.

From approximately May 15 until the first week in October summer foliage is in full bloom and constitutes an obstruction to hunters attempting to see a target and beyond. The dappled lighting effect in the woods during the summer months adds to the difficulty of distinguishing the hunting target and what lies behind it.

Plaintiffs' safety expert, Eugene Defoe, Chief Warden for GLIFWC, agrees that deer hunting during the summer months poses safety problems.

GLIFWC's former chief warden, Charles Connors, takes the same view. Both men confirm that tribal hunting during the day preceding the beginning of the state deer gun season poses a danger to the many hunters in the area preparing to begin the hunt.

**7. Shining Deer**

Under the GLIFWC Model Code, §§ 3.14 and 6.20, tribal members would be permitted to shine deer on foot using a flashlight from September 1 through December 31, except during the state's nine-day deer gun season.

Wis. Admin. Code § NR 13.30(1)(q) prohibits shining deer (illuminating them with artificial light) when a hunter is in possession of a firearm or bow. The code permits shining raccoon, fox, coyote, opossum, skunk, weasel, starlings, English sparrow, coturnix quail, chukar partridge, snowshoe hare, and other unprotected species. (In 1987, 360,942 individuals possessed state licenses allowing them to hunt these animals at night.) These animals are generally shot with lower caliber bullets that travel shorter distances than the bullets used for deer hunting, and wholly different hunting practices are used. Many of these species are usually shot when they are treed, and the light is used to illuminate the animal in the tree, rather than to cause it to freeze, as with a deer. A bullet that misses a target in a tree will usually travel straight upward and fall harmlessly to the ground, rather than traveling straight out into the area behind the tree. By contrast, a hunter shining a deer would shoot at it

from approximately the same plane, so that if the hunter missed, the bullet or arrow would travel into the background area where it might damage persons or property that the hunter cannot see. Even if the hunter hits the deer, the bullet may travel through the deer and do damage to persons or property behind the deer. Such shooting violates a fundamental precept of hunting: that the hunter be able to identify his or her target and what lies beyond it before firing a shot or loosing an arrow.

Shining deer is an effective means of locating and killing them. Deer are nocturnal, their eyes reflect artificial light, and they tend to freeze in place when a light is focused directly into their eyes. Most other animals do not respond to light in a similar manner.

There is no biological reason not to hunt antlered deer with the aid of artificial light. However, killing a doe during the summer could cause the loss of the fawn that is still dependent on her for food. Plaintiffs concede that visibility is diminished at night, and have proposed in their code a ban on hunting by shining during the summer months when it is difficult to distinguish an antlerless deer from an antlered one.

### B. Fisher, Other Furbearing Animals and Small Game

The resources in this category include beaver, bobcat, cottontail rabbit, coyote, fisher, mink, muskrat, otter, snowshoe hare, raccoon, gray fox, red fox, gray squirrel, fox squirrel, red squirrel, sharp-tailed grouse, and ruffed grouse.

The beaver occupies streams, rivers and lakes with wooded shoreline. It gives birth in April to July to litters of two to four and dies naturally of severe weather, starvation and disease. Its estimated statewide population is 160,000, about 120,000 of which are in the ceded territory. In 1970 about 16,000 were harvested. The 1988–89 harvest estimate was 30,027.

Approximately 1,500 bobcat exist in Wisconsin, all within the ceded territory, generally in forested zones with lowland conifers. The bobcat mates in early spring and produces a litter of two to four kits approximately 62 days later. Little is known about its natural mortality. Approximately 200 are harvested each year.

The cottontail rabbit is considerably more abundant in Wisconsin. The ceded territory contains about 365,000, which is only about 8% of the state population. Its habitat preferences are diverse and it adapts well to urban and agricultural areas. It can produce three to four litters of between four to seven young each year. Predation, disease and winter deaths account for most natural mortality. The harvest in 1988–89 was 340,943, with less than 10% in the ceded territory.

The estimated state population of coyote is 14,000, of which about 10,400 are in the ceded territory. The coyote breeds in the early spring and produces five to ten young in April or May. It is a highly adaptable animal that can use a wide range of habitats that support an adequate prey base.

Disease is the main cause of natural mortality. The annual harvest averages 4,000, although the 1988–89 harvest estimate was only 971. About 80% of the harvest takes place in the ceded territory.

The most recent estimate of the state's fisher population is between 3,000 to 4,000, all of which is within the ceded territory. The fisher breeds in March or April and produces its young the following year. The average litter is three. Its habitat preference is dense stands of conifers, particularly lowland conifers, with adequate prey. Fisher suffer very little natural mortality other than kit predation and old age. The harvest averages 300 a year. The 1988–89 harvest was 260.

Approximately 60% of the state's estimated 161,000 wild mink live in the ceded territory, mainly on shorelines along lakes, marshes, streams and rivers in vegetative cover ranging from aquatic plants to brushy or woody species. Mink breed in early spring and have litters in April or May of between two to six young. Human-induced mortality is much greater than natural mortality. The 1988–89 harvest was 42,725; the average is 32,000.

The state's muskrat population is about 2 million, of which 640,000 live in the ceded territory in marshes and in the edges of ponds, lakes and streams where emergent and submerged vegetation provides food. Muskrat require water that is deep enough to prevent freezing in winter. They may have two to three litters of five to six young each year. Little is known about the causes of natural mortality. The average harvest is 795,000, with

about 33% occurring in the ceded territory.

The most recent estimate of the otter population is 5,200, about 75% of which is in the ceded territory. The otter's habitat preference is the riparian zone adjacent to lakes, streams and other wetlands. An important component of the habitat is the availability of den sites. Otter young are born in litters of one to five in April or May. River otters have few natural enemies but may be susceptible to disease and environmental contaminants. The average harvest is about 1,100.

The ceded territory contains between three and eight million snowshoe hares, which live in young brushy woodlands and swamps. They have two to three litters of two to four young each year. Natural mortality causes are predation and disease. The 1988–89 harvest in the ceded territory was 89,000.

Raccoons prefer the southern portion of the state. Only about 24,000 of the state's estimated population of more than 500,000 live in the ceded territory, along streams and lakes near wooded areas. They breed once a year and give birth to litters of between two to seven young in April or May. They are susceptible to disease. The 1988–89 statewide harvest was 175,844.

The gray fox is only an insignificant presence in the ceded territory. The red fox is somewhat more numerous, with a mid–1970's population estimate of 15,000 in the ceded territory, 52,000 statewide. The red fox gives birth to one litter of between four to nine in March or April. It prefers a mixture of forest

and open country for a habitat. The primary cause of natural mortality is disease. Twelve thousand were harvested in 1988–89 in the ceded territory.

Approximately 1.7 million gray and fox squirrels live in the ceded territory. The gray squirrel prefers hardwoods and conifer hardwoods for habitat; the fox, open country and hardwood woodlots. Both the gray and fox squirrel have two litters each year. The gray has an average litter of three to five; the fox, two to five. Approximately 250,000 of both kinds of squirrels were harvested in 1987–88 in the ceded territory.

The number of red squirrels in the ceded territory is unknown, as is the size of the harvest. The red squirrel prefers pine and spruce or mixed hardwood forest and swamps for habitat. It has two litters a year of about two to seven young.

Almost all of the state's approximately 10,000 sharp-tailed grouse live in the ceded territory, in prairie brushland or in more open habitats such as old fields, large, open deercuts, and aspen. The birds breed in the spring and give birth to clutches of ten to fourteen. The harvest is approximately 800.

The ruffed grouse numbers about 2.3 million, 1.4 million of which are in the ceded territory. It nests in the spring and has a clutch of ten to twelve. Its habitat is aspen, oak, alder and upland brush. Its populations fluctuate cyclicly. The 1987–88 harvest was 165,000 in the ceded territory.

In the preceding five years the off-reservation harvest by the plaintiff tribes of fisher, otter and

bobcat has been as shown below.

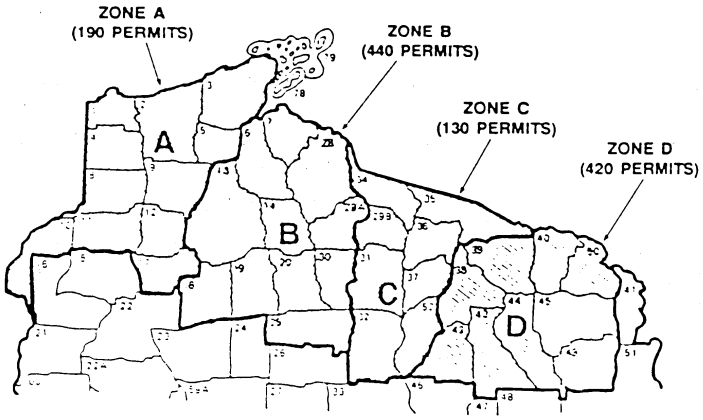
| | |
|---|---|
| 1984-1985: | Fisher 0; Otter 4: Bobcat 9; all other species unknown. |
| 1985-1986: | Fisher 4; Otter 0; Bobcat 0; all other species unknown. |
| 1986-1987: | Fisher 11; Otter 1; Bobcat 0; Fox 6; Coyote 1; Beaver 84; all other species unknown. |
| 1987-1988: | Fisher 72; Otter 27; Bobcat 0; all other species unknown. |
| 1988-1989: | Fisher 50; Otter 0: Bobcat 9: all other species unknown. |

The market values of the furs of fisher, otter and bobcat vary greatly from year to year, as demonstrated in the table below, which shows the average pelt prices for these animals for the period 1984 through 1989.

| YEAR | BOBCAT | OTTER | FISHER |
|---|---|---|---|
| 1984-1985: | $71.93 | $24.41 | - |
| 1985-1986: | 63.70 | 22.22 | 79.99 |
| 1986-1987: | 85.37 | 26.68 | 109.42 |
| 1987-1988: | 85.21 | 24.45 | 111.94 |
| 1988-1989: | 53.98 | 19.96 | 73.09 |

Fisher harvest in the ceded territory has been managed by zone. The specific geographic boundaries of the zones have developed over the last four years, as fisher have proliferated. Each zone is

comprised of several deer management zones, as shown in the map below. [See map on page 1411.]




The only furbearing species the parties intend to subject to a quota is fisher. The 1989 total quota for fisher harvest in Zones A–D and the 1989 tribal quota for fisher by zone proposed by defendants in § NR 13.32(2)(r)(2) are shown below, together with the actual 1987 tribal harvests in those zones.

| ZONE | STATE QUOTA | PERCENT PUBLIC | NR 13 QUOTA | 1987 HARVEST |
|---|---|---|---|---|
| A | 76 | 42 | 16 | 40 |
| B | 170 | 39 | 33 | 17 |
| C | 50 | 39 | 10 | 0 |
| D | 150 | 38 | 29 | 15 |

Plaintiffs have demonstrated that in some years in some management zones they are able to take

more fisher than NR 13 would provide the tribes in that zone. They have not yet demonstrated an ability to take more fisher in the ceded territory on an annual basis than defendants' NR 13 allocation formula would provide if all management zones are considered together.

Harvesting the entire harvestable surplus of fisher in any fisher management zone from only the public lands within the zone would not create any biological problems for perpetuation of the species in the ceded territory. Harvesting the entire harvestable surplus of otter and bobcat in the ceded territory from only the public lands would not create any biological problems for the perpetuation of either species in the ceded territory.

If the treaty harvest of fisher, otter, bobcat and all other species at issue on this motion is limited to public lands, the treaty harvest would be limited only by the tribes' interest and physical capacity to harvest and by any zonal and territory-wide limits on harvestable surplus. The parties possess no evidence at this time that foreclosing harvest from private lands creates a practical ceiling on the tribal harvest of these animals. The entire ceded territory or zonal quota or safe harvest of fisher, otter and bobcat could be harvested from the public lands alone without biological damage to the species.

It is reasonable to expect that fisher and bobcat populations and perhaps otter populations would be denser on public lands than on private lands in the ceded territory.

Commonly, furbearing animals are captured by trapping. The traps are placed directly on or anchored to the beds of water bodies, including natural navigable lakes, artificially created flowages, rivers and streams.

The amount of public lake and public stream frontage (not including managed forest lands or forest croplands) in the nineteen counties that lies entirely or nearly entirely within the ceded territory is shown below.

PUBLIC LAKE AND STREAM FRONTAGE IN CEDED TERRITORY

| Counties All Within Ceded Territory | Total Lake Acres | Total Lake Frontage (miles) | Total Public Frontage (miles) | % Public | Total Stream Acres | Stream Frontage Both Sides (miles) | Total Public (miles) | % Public |
|---|---|---|---|---|---|---|---|---|
| Bayfield | 22,685 | 730 | 259 | 35.4 | 991 | 1,057 | 381 | 35.9 |
| Douglas | 14,012 | 365 | 97 | 26.6 | 8,153 | 1,411 | 527 | 37.4 |
| Ashland | 4, 854 | 200 | 56 | 28 | 2,446 | 1,096 | 413 | 38 |
| Iron | 28,954 | 612 | 73 | 11.9 | 1,503 | 1,266 | 336 | 48 |
| Price | 14,623 | 420 | 80 | 19 | 3,377 | 1,374 | 432 | 31 |
| Rusk | 8,169 | 242 | 50 | 20.8 | 2,867 | 860 | 138 | 16 |
| Sawyer | 55,253 | 945 | 131 | 14 | 3,106 | 1,193 | 501 | 42 |
| Taylor | 6,116 | 168 | 68 | 10 | 1,248 | 988 | 192 | 19 |
| Barron | 17,265 | 426 | 38 | 8.8 | 1,184 | 732 | 29 | 4 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Burnett | 31,518 | 589 | 61 | 10 | 2,625 | 665 | 190 | 29 |
| Polk | 20,168 | 453 | 15 | 3.2 | 1,726 | 694 | 62 | 8.9 |
| Washburn | 30,201 | 862 | 209 | 24 | 1,561 | 662 | 271 | 41 |
| Chippewa | 19,335 | 459 | 77 | 16.7 | 1,702 | 762 | 80 | 10.4 |
| Forest | 22,324 | 427 | 166 | 38.8 | 1,770 | 1,420 | 795 | 56 |
| Oneida | 69,874 | 1,331 | 173 | 13 | 3,982 | 1,661 | 350 | 21 |
| Vilas | 93,232 | 1,499 | 352 | 23.5 | 1,274 | 804 | 344 | 43 |
| Langlade | 8,864 | 381 | 109 | 29 | 1,832 | 1,026 | 299 | 29 |
| Lincoln | 12,172 | 416 | 91 | 22 | 2,620 | 1,337 | 218 | 16 |
| Marathon (>95%) | 26,303 | 379 | 97 | 25.5 | 3,748 | 1,911 | 101 | 5.3 |
| Totals | 504,922 | 10,904 | 2,202 | 20.2 | 47,715 | 20,919 | 5,659 | 27.1 |

Additional amounts of public lake and stream frontage within the ceded territory are found in counties that lie only partially within the ceded territory.

There are approximately 11,238 lakes within the ceded territory. Approximately 10,760 of these are natural navigable lakes.

If the treaty harvest of aquatic fur bearers (beaver, otter, muskrat and mink) were limited to natural navigable lakes, publicly owned shores and beds of flowages and publicly owned banks and beds of streams in the ceded territory, the treaty harvest of these animals would be limited only by the tribes' interest and physical capacity to harvest and by

territory-wide limits on harvestable surplus. The parties possess no evidence at this time that prohibiting the placement of traps on the beds of streams or flowages where the riparians are private owners would create a practical ceiling on the tribal harvest of these animals.

Unlike the harvesting of deer, the underharvest of any of the furbearing and small game animals is not expected to cause any biological or management problem in the ceded territory. There is no biological or management need to take the quota or harvestable surplus of these animals from either public or private lands.

The law enforcement personnel of the plaintiff tribes are trained and are competent to provide effective enforcement of a code such as the GLIFWC Model Off–Reservation Conservation Code. However, at the present, they are not able to provide exclusive enforcement of the code. Plaintiffs have authorized the enforcement personnel of the Department of Natural Resources to enforce the provisions of each plaintiff tribe's Off–Reservation Conservation Code.

Each plaintiff tribe has competent and responsible leadership able to promulgate and apply tribal off-reservation harvesting regulations, through the enactment of relevant tribal ordinances and codes. Each plaintiff tribe has issued and requires photograph identification cards for those members who harvest natural resources off-reservation pursuant to tribal authorization. Each plaintiff has established a tribal court with

jurisdiction to adjudicate alleged violations by a tribal member of his or her tribe's off-reservation harvesting regulations. Each of the tribal courts is capable of adjudicating alleged violations of a code such as the Model Off–Reservation Conservation Code in a fair, uniform and diligent manner. Such adjudicatory capability is adequate to ensure effective enforcement of the provisions of the codes.

## OPINION

### *A. Allocation*

At each stage of the district court proceedings in this case the court has been asked to make a specific apportionment of the natural resources that are the subject of plaintiffs' harvesting rights. In the first phase of the litigation it was the plaintiffs that raised the issue. They did not ask the court to apportion fixed shares of the harvest but sought a declaration of their entitlement "to the natural resources in the ceded territory to the extent required to provide them with a livelihood or moderate living." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin,* 653 F.Supp. 1420, 1433 (W.D.Wis.1987) (*LCO III* ). In support of their request, plaintiffs cited *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) (*Fishing Vessel* ), in which the United States Supreme Court upheld with slight modifications the federal district court's determination that certain Indian tribes were entitled to 50% of the anadromous fish passing through their recognized tribal fishing grounds in

the state of Washington under treaties executed in 1854 and 1855.

Noting that "[a]llocation has arisen in the Washington fishing rights cases in modern times in light of the scarcity of resources, such as steelhead and salmon, and because of the intense demand by Indians and non-Indians alike for those resources," Judge Doyle denied plaintiffs' request for a legal declaration of their right to the resources at issue in this case, on the ground that the predicate for allocating a fixed share of the resources had not yet been shown: "Neither party has presented evidence that any particular species is endangered in the ceded territory." *LCO III,* 653 F.Supp. at 1434. He added that "[t]he Washington allocation cases differ from this case in significant respects: (1) no finding has been made here of the scarcities of resources; (2) the language of the Chippewa treaties is different." *Id.*

In this second, regulatory phase of the litigation, it is defendants that have asserted repeatedly the need for a judicial declaration of a legal basis for allocation of the resources. As plaintiffs did in the earlier phase, defendants cite *Fishing Vessel,* 443 U.S. 658, 99 S.Ct. 3055, for the proposition that judicially determined allocation is mandated when two groups share the right to harvest natural resources. Defendants argue that the court should make an equal division of the resources, the apportionment that was approved in *Fishing Vessel.*

At the initial trial in the regulatory phase,

plaintiffs succeeded in showing that even if the tribes could exploit every harvestable natural resource in the ceded territory, they would not derive sufficient income from those resources to provide their members with a moderate standard of living. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin,* 686 F.Supp. 226 (W.D.Wis.1988) (*LCO V*). From this, plaintiffs argued that they were entitled to all of the resources, because the 1837 and 1842 treaties guaranteed them "that level of hunting, fishing, and gathering ... necessary to provide them a moderate living ..." *LCO III,* 653 F.Supp. at 1426. Defendants disputed plaintiffs' need for all the resources, and argued that whatever those needs, plaintiffs had no entitlement to the entire harvest. Defendants pointed out that the court had held that the treaties did not give plaintiffs an exclusive harvesting right and they argued that the applicable case law mandated the placement of a ceiling of 50% on plaintiffs' rights to the available harvest. Although defendants had good reasons for securing a judicial determination of plaintiffs' share of the harvest in order to reduce the uncertainties of the state's management task, I declined to make such a determination at that time. I held that "[t]he standard of a modest living [did] not provide a practical way to determine the plaintiffs' share of the harvest potential," and that defendants had not shown that plaintiffs' harvesting was endangering any species. *LCO V,* 686 F.Supp. at 233.

I denied defendants' request for a permanent

allocation again at the conclusion of the walleye and muskellunge subphase of the litigation. Defendants had not yet shown the scarcity of a resource that would provide the predicate for making an allocation, and defendants' proposals for allocation were not sufficiently precise to permit a determination of the issue at that time. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin,* 707 F.Supp. 1034, 1058 (W.D.Wis.1989) (*LCO Walleye* ).

Although all of the disputed species (walleye, muskellunge, white-tailed deer, fisher and timber) have now been the subject of trials or stipulations of fact, there has been no showing yet that plaintiffs' harvest of any species is endangering the survival of that species. In fact, there has been no showing that plaintiffs' harvest is approaching even half the total available harvest of any species. The reality is that plaintiffs' share of the harvest of the most desirable species is only a fraction of the non-Indian harvest. For example, in 1989, the Indian spearing harvest from 102 lakes was reported to be 16,394 walleye; the non-Indian angling harvest, about 672,000 walleye from more than 800 lakes. Wisconsin State Journal, *Cultures in Conflict* (compilation of articles published from Dec. 10, 1989–April 8, 1990), p. 16 (1990). The 1988 Indian deer harvest was 2468; the non-Indian deer harvest was 121,740. The 1988–89 Indian harvest of fisher was 50, of a total harvest of 260.

Nevertheless, the cumulative weight of the

evidence adduced by the parties during the regulatory phase is that there is heavy competition in the ceded territory for the most desirable species. For example, the non-Indian hunting demand for antlerless deer exceeds the available supply. In this sense, deer hunting is unlike non-Indian angling for walleye, which is essentially self-regulating, and it is like the salmon and trout fishing that was at issue in the Washington cases.

The showing of heavy competition establishes the predicate for addressing the issue of allocation. The full development of the factual record makes it possible to do so. Therefore, despite the fact that the species at issue in this case are different in significant respects from those considered in the State of Washington cases, as are the harvesting methods and the demands placed on the resources, and despite the fact that there is no showing that any resource is in danger, I will address the issue of allocation, or apportionment, of the resources.

Although I have declined earlier requests to decide the matter of allocation, I have agreed with the parties that it would have to be addressed during the course of this litigation. The need to do so has been implicit throughout this phase of the litigation. Using plaintiffs' harvesting capacity as a cap on their harvest share was workable as a temporary measure, given the modest dimensions of that capacity. It is not a workable long-term resolution. Plaintiffs' capabilities will not remain static. They are bound to increase substantially as more of their members utilize their newly reconfirmed harvesting

opportunities.

In addressing allocation, the starting point is the treaties from which the parties derive their claims to the harvestable resources. In 1837 and again in 1842, the United States entered into treaties with the Lake Superior Chippewa for cessions of land. The Chippewa ceded the land, reserving to themselves the right to exercise their hunting, fishing and gathering rights in the ceded territory. They did not reserve an exclusive right, but understood that they would be exercising their rights of hunting, fishing and gathering, and "other usual privileges of occupancy," *in common* with the "miners, loggers and soldiers who were settling in the territory." *United States v. Bouchard,* 464 F.Supp. 1316, 1338 (W.D.Wis.1978), *rev'd on other grounds sub nom. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt,* 700 F.2d 341 (7th Cir.), (*LCO I* ), *cert. denied,* 464 U.S. 805, 104 S.Ct. 53, 78 L.Ed.2d 72 (1983). It was the Indians' further understanding that "the presence of non-Indian settlers would not require the Chippewa to forego in any degree that level of hunting, fishing and gathering, and that level of trading necessary to provide them a moderate living ..." *LCO III,* 653 F.Supp. at 1426.

Neither the Indians nor the United States anticipated a time when the natural resources of the ceded territory would be scarce. However, that is what happened. The resources that were ample in the first half of the nineteenth century have become too scarce to satisfy present demands. Plaintiffs

established in *LCO V* that even if plaintiffs were physically capable of harvesting all of the available resources in the entire ceded territory, free of competition from non-Indians, they could not meet their members' modest living needs from the natural resources.

This unexpected scarcity of resources makes it impossible to fulfill the tribes' understanding that they were guaranteed the permanent enjoyment of a moderate standard of living, whatever the harvesting competition from the non-Indians. It also makes it necessary to try to determine how the parties would have agreed to share the resources had they anticipated the need for doing so.

Plaintiffs argue that in interpreting the treaties the court must give primary recognition to plaintiffs' understanding that their moderate living needs would be guaranteed, even if those needs cannot be wholly satisfied now and even if the consequence is the elimination of all harvesting opportunities for non-Indians. This, they argue, is the essence of the agreement they made with the United States. They point to Judge Doyle's emphasis in *LCO III* on the Indians' understanding that the anticipated non-Indian settlement would not threaten their moderate standard of living.

> [The Chippewa] were aware that settlement by non-Indians had occurred and was occurring.... The Chippewa would be competing to some degree with the non-Indians for the kind of natural resources the Chippewa had been exploiting. This competition and

> accommodation would be on a scale which would not threaten in any degree the moderate living the Chippewa would continue to enjoy from the exercise of their usufructuary rights and their trading. This guarantee was permanent.... In the absence of a lawful removal order or in the absence of fresh agreement on the part of the Chippewa, the presence of non-Indian settlers would not require the Chippewa to forego in any degree that level of hunting, fishing, and gathering, and that level of trading necessary to provide them a moderate living off the land and from the waters in and abutting the ceded territory and throughout that territory.
>
> * * * * * *
>
> [T]he Chippewa at treaty time did contemplate their subsistence and did understand that the usufructuary rights they reserved would be sufficient to provide them with a moderate living.

*LCO III,* 653 F.Supp. at 1426, 1434.

Plaintiffs concede that scarcity of harvesting opportunities may be a problem now in a time of limited resources, but they contend it should not be solved by rewriting the treaties to give the Indians less than they understood they would receive. *Worcester v. Georgia,* 6 Pet. 515, 8 L.Ed. 483 (1832) (wording of treaties ratifying agreements with the Indians is not to be construed to their prejudice). *See also Morton v. Ruiz,* 415 U.S. 199, 236, 94 S.Ct.

1055, 1074–75, 39 L.Ed.2d 270 (1974); *Seminole Nation v. United States,* 316 U.S. 286, 296, 62 S.Ct. 1049, 1054, 86 L.Ed. 1480, 1777 (1942).

Under plaintiffs' view, the court should allocate to the plaintiffs the primary right to all of the harvestable natural resources, leaving to the non-Indians the opportunity to take the portion that tribal members lack the capacity to take at this time. Although there is some force to this position, it does not give recognition to the other aspect of the treating parties' understanding: that there would be competition for harvesting opportunities. The consequence that it has become impossible to fulfill plaintiffs' understanding that they were guaranteed a modest living standard does not mean that the court can or should ignore plaintiffs' other understanding that there would be competition between the parties.

The parties did not intend that the Chippewa would retain an exclusive right to harvest the ceded territory's natural resources that could be exercised whenever it became necessary. Judge Doyle found explicitly to the contrary in *Bouchard,* 464 F.Supp. 1316. Yet an exclusive harvesting right is the logical result of giving primary consideration to plaintiffs' modest living needs.

Moreover, construing the treaties to give priority to plaintiffs' needs requires reading out of them both the Indians' understanding that they would be competing with the settlers for the natural resources and the government's expectation that it was acquiring both land and the normal incidents of land

use for the non-Indian settlers.

I conclude that the parties did not intend that plaintiffs' reserved rights would entitle them to the full amount of the harvestable resources in the ceded territory, even if their modest living needs would otherwise require it. The non-Indians gained harvesting rights under those same treaties that must be recognized. The bargain between the parties included competition for the harvest.

How to quantify the bargained-for competition is a difficult question. The only reasonable and logical resolution is that the contending parties share the harvest equally.

In the Washington fishing rights cases, the courts struggled to explain why the anadromous fish resource should be shared equally between the treaty Indians and non-Indians. In the district court, the analysis rested heavily on the language in the treaties providing that the Indians' right of taking fish was held "in common" with the citizens of the territory. According to the court, it was likely that the treaty commissions used the term as it was used in contemporaneous dictionaries, as meaning " 'belonging equally to more than one, or to many indefinitely ...' " *United States v. Washington,* 384 F.Supp. 312, 356 (W.D.Wash.1974) (quoting Webster's American Language Dictionary of the English Language (1828 and 1862)).

On appeal, the Court of Appeals for the Ninth

Circuit affirmed the district court's apportionment of approximately equal shares of the fish harvest, on the grounds that (1) such an apportionment reflects the equality existing between the two bargaining parties; (2) it "best effectuates what the Indian parties would have expected if a partition of fishing opportunities had been necessary at the time of the treaties"; (3) such an apportionment is within the broad equitable discretion of the district judge; and (4) it is supported by analogies to the property laws governing cotenancy.

> A cotenant dissatisfied with his partner's exploitation of their common property may seek a partition of the property in order to protect his interest in it ... By analogy, the Indians are entitled to an equitable apportionment of the opportunity to fish in order to safeguard their federal treaty rights.... The district court's apportionment does not purport to define property interests in the fish; fish in their natural state remain free of attached property interests until reduced to possession....

*United States v. Washington,* 520 F.2d 676, 687 (9th Cir. 1975). In a related case, then Judge Kennedy found the cotenancy analogy unpersuasive, and of dubious relevance "even in an era when the supply of fish exceeded the demands of the fishing population." *Puget Sound Gillnetters Ass'n v. U.S. District Court,* 573 F.2d 1123, 1134 (9th Cir.1978) (Kennedy, J., concurring). In his view, the analogy was inadequate to resolve the conflict between treaty rights and the state's authority to conserve and

allocate a fishery that could not sustain the full demands of all the parties. "A cotenant, absent acts of waste or ouster, has the right to possess and use the entire property ... [S]erious application of the analogy might permit a fishing group to take all the fish it has the capacity to catch, a result contrary to the one we affirmed in [*United States v. Washington,* 520 F.2d 676]." *Id.* at 1134–1135.

In the Supreme Court the district court's equal apportionment was approved with only slight modifications. *Fishing Vessel,* 443 U.S. 658, 99 S.Ct. 3055. The Court concluded that an equitable measure of the common right of taking fish should begin with a division of the harvestable portion of each run into approximately equal Indian and non-Indian shares, with a downward reduction of the Indian share if tribal needs could be satisfied by a lesser amount. *Id.* at 685, 99 S.Ct. at 3074. Such a division was proper because it was consistent with earlier decisions concerning Indian treaty rights to scarce natural resources in which the Court had directed a trial judge or special master to devise an apportionment that assured that the Indians' reasonable livelihood needs would be met, *see, e.g., Arizona v. California,* 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963); *Winters v. United States,* 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908); it achieved the purpose of setting a ceiling on the Indians' apportionment "to prevent their needs from exhausting the entire resource and thereby frustrating the treaty right of 'all [other] citizens of the Territory,' " and it was manifestly logical:

> For an equal division—especially between parties who presumptively treated with each other as equals—is suggested, if not necessarily dictated, by the word "common" as it appears in the treaties. Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset, and Anglo–American common law has presumed that division, when, as here, no other percentage is suggested by the language of the agreement or the surrounding circumstances.

*Fishing Vessel,* 443 U.S. at 686 n. 27, 99 S.Ct. at 3075 n. 27 (citations omitted). The court also noted that nineteenth century treaties with Great Britain dealing with fishing rights in waters off the United States and Canada used the term "in common with," and were interpreted by the Department of State as giving each signatory country an "equal" and apportionable share of the take of fish in the treaty areas. *Id.* at 676 n. 22, 99 S.Ct. at 3070 n. 22. In summary, the Court concluded, both sides had a treaty-secured right to take a fair share of the available fish. "This, we think, is what the parties to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens." *Id.* at 685, 99 S. Ct. at 3074.

Throughout this litigation defendants have been arguing the applicability of *Fishing Vessel,* 443 U.S. 658, 99 S. Ct. 3055, insofar as it stands for an equal distribution of harvest between Indian and non-Indian groups. I have resisted the suggestion because of my concern about the differences between the circumstances of this case and those in the state

of Washington. Although I continue to believe that those differences are significant, I have become convinced that the approach taken by the Court in that case directs the basic approach that must be taken here: an equal division of the natural resources that are the subject of the treaty. That is the fairest result, and the inevitable one, whatever analysis is employed. As in *Fishing Vessel,* plaintiffs' needs for a moderate standard of living dictate their right to a full share of the harvest, subject to a ceiling set at 50% to prevent the frustration of the non-Indian treaty right.

Therefore, I will allocate the resources at issue here equally between the two groups, Indian and non-Indian.

Plaintiffs' moderate living needs drive the division. In the unlikely event that those needs decline to the point at which they can be met with less than half the harvest, the division will have to be adjusted to reflect the reduced needs.

The parties dispute whether apportionment is to apply to the entire territory or to each harvesting unit. Plaintiffs' position is that they should be permitted to take larger shares of the harvest in the lakes and management units closest to their reservations, rather than being required to diffuse their harvesting rights. Defendants argue that "[n]othing in the record even remotely suggests that at treaty time the Chippewa intended to reserve for themselves the exclusive right to harvest all the [resource] in a particular geographical area of the

ceded territory." Defendants' Post–Trial Brief for the Third Subphase of Phase II, at p. 31. They add that giving plaintiffs the opportunity to harvest all of the harvestable deer or fisher in a particular unit would have the effect of excluding the non-Indians from any opportunity to share in the harvest in that unit.

In general, I agree with defendants that the apportionment of the harvest must apply in each harvesting area, rather than on a territory-wide basis. Otherwise, as defendants point out, the consequence would be pockets of exclusivity within the territory, in contravention of the parties' understanding that they would be competing for resources. (Because the Indians' harvesting seasons are longer than the non-Indians and open earlier, in some instances the Indians could harvest all of the safe harvest of a particular resource before the non-Indians had an opportunity to hunt or fish for that resource.)

What defendants have not addressed, however, is the other half of the position they assert. If the Indians did not anticipate having exclusive harvesting rights in any particular areas of the territory, they had no reason to anticipate that the non-Indians would have such rights. The court of appeals has held definitively that plaintiffs' right to exercise their usufructuary rights is limited to lands not privately owned. *LCO I,* 700 F.2d at 364 n. 14; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin,* 760 F.2d 177 (7th Cir.1985) (*LCO II* ). (As used in this opinion, the term "private lands" refers to lands that are held

privately and are not enrolled in the forest cropland or managed forest lands programs under Wis. Stat. ch. 77. Whether the term includes the beds of streams is taken up in Section F, *infra*.) As a result, large portions of each harvesting area are closed to Indian hunters because the lands are privately held. Defendants do not explain how the court can give content to the parties' understanding of the non-exclusivity of their rights without responding to the fact that non-Indian settlement has created enormous pockets of exclusivity.

Although plaintiffs are precluded from exercising their usufructuary rights on private lands, they cannot be denied their full share of the harvestable resources. Therefore, in calculating a treaty quota the parties must begin with the total of the estimated harvest of the scarce resource in the particular harvesting area, including the portion of the resource believed to inhabit private lands, and divide it equally. Plaintiffs' portion of the harvest in a particular harvesting area cannot be determined fairly by first deducting some part of the harvest from apportionment because it is assumed to inhabit private lands. To exclude a portion of the harvest from the apportionment would violate the parties' understanding of the treaties, and give the non-Indians the pockets of exclusivity defendants object to giving the Indians. If plaintiffs cannot utilize the resulting harvesting opportunity, the portions can be adjusted to reflect the tribes' actual harvesting capacity.

It may be necessary at some times to give exclusive rights to one or the other group in some small, discrete harvesting areas in order to meet the goals of conservation and of fair distribution of the entire harvest. For example, plaintiffs are precluded from fishing by intensive methods such as spearing or netting on any lake that does not have a reliable population estimate, and from fishing intensively on any lake for more than two years in succession. As a result, in any given year, there will be many lakes closed to plaintiffs for conservation reasons. At some times it may be necessary to provide plaintiffs a larger share or all of the harvest of some of the lakes in which they can fish intensively, in order to adjust for the number of lakes that are closed to them. In addition, increases in the Indian share of the harvest on some lakes may be necessary to compensate for decreased harvesting opportunities on other lakes resulting from non-Indian harassment of the Indians who are exercising their reserved usufructuary rights.

With respect to deer, defendants' proposed Wis. Admin. Code § NR 13.32(2)(f) sets forth the maximum tribal quota for antlerless deer for each of the sixty-five deer management units within the ceded territory.

> *Tribal deer quota.* 1. Maximum quota. Maximum tribal antlerless deer quotas for each management unit located within the ceded lands territory shall be based upon the following formula: state quota x public land (including forest crop and managed forest land open to public hunting) x 50%.

> 2. Actual quota. Tribal quota shall be established based on request of the Chippewa bands provided the requests are submitted to the department prior to June 15, subject to the maximum of subd. 1. Tribal request shall be based upon past harvest performance and capacity to harvest.
>
> 3. Minimum quota. Notwithstanding the formula of subd. 1, the minimum available quota for any management unit shall be twenty-five.

Under the state's proposal, the Department of Natural Resources will establish an annual harvest quota of antlerless deer for each unit, in consultation with the plaintiff tribes. The tribal quota for each unit will be fifty percent of the total harvest quota of antlerless deer calculated to be available on public land.

This proposal does not achieve an equitable allocation of the deer resource. It excludes deer assumed to be on private lands from the total available harvest, and thereby creates exclusive hunting opportunities for non-Indians. Therefore, defendants may not enforce this regulation unless and until it is redrafted to include in the Indian quota all of the harvestable deer in the ceded territory. Because the requirement that plaintiffs base their annual requests upon past harvest performance and capacity to harvest is a reasonable one, defendants are not precluded from making it a part of the redrafted regulation and from enforcing it.

With respect to fisher, defendants have proposed the following regulation for an Indian harvesting quota in § NR 13.32(r)(2):

> (b) Maximum tribal fisher quotas for each fisher management zone as established in § NR 10.01(4), located within the ceded lands territory shall be based upon the following formula:
>
> state quota x % public land (including forest crop land and managed forest land open to public hunting) x 50%
>
> (c) Actual tribal fisher quotas shall be established based on requests of the Chippewa bands provided the requests are submitted to the department prior to August 15, subject to the maximum of subpar. b. Tribal requests shall be based upon past harvest performance and capacity to harvest.

As with deer, defendants' proposed regulation for the Indian fisher harvest quota is unenforceable because it excludes the Indians from a portion of the harvesting opportunity. Therefore, defendants may not enforce this regulation unless and until they have redrafted it to delete the reference to public land in the quota. They may include in such redrafted regulation the requirement that plaintiffs base their annual requests for fisher upon past harvest performance and capacity to harvest and may enforce such a requirement.

**B. Private Lands**

In § 6.15(2) of the Model Off–Reservation Conservation Code, plaintiffs have provided for tribal deer hunting on private lands whose owners have consented expressly to deer hunting by tribal members. In §§ 8.12 and 8.13, they have made the same provisions for hunting and trapping small game. It is their contention that tribal hunting on such lands should be governed by the Model Off-Reservation Code rather than by the state regulations applicable to non-treaty hunters.

Defendants disagree sharply with the assumption that plaintiffs' hunting rights extend to private lands under any circumstances. They view the issue of consent as legally gratuitous, recognizing on one hand that if the treaty right extends to private lands it is unnecessary for the tribes to secure the consent of the owners, and on the other, that if plaintiffs' rights do not extend to private lands the tribes cannot relieve themselves of the obligation to obey state hunting regulations simply by reaching an agreement with a property owner to hunt on private lands.

In *LCO III,* 653 F.Supp. at 1432, Judge Doyle held that

> On lands privately owned, the Chippewa have lost their reserved usufructuary rights. However, if at a given time the Chippewa can show, in a lawsuit if necessary, that this diminution in their usufructuary rights is preventing them from enjoying a modest living, appropriate measures must be taken for

> Chippewa activity on privately owned lands to permit the Chippewa to enjoy a modest living.

Plaintiffs assert that the factual predicate has been met for making private lands available for tribal deer hunting because in the future there may be years in which some of the deer management units might not provide a full tribal harvest under the state's proposed allocation formula, and because at the present, at least in some deer management units and fisher zones, the plaintiffs' share of the "public" animals is fewer than the number plaintiffs have the capacity and the need to harvest. They add that they are not seeking at this time a declaration of their right to hunt on all private lands, only the acknowledgement of their right to hunt by consent on some private lands.

The two assertions are contradictory. If plaintiffs have a right to hunt on private lands, they cannot be limited to hunting on only those private lands whose owners consent. Defendants are correct in maintaining that the issue of consent is a red herring: the issue is whether plaintiffs may exercise their usufructuary rights on private lands within the ceded territory.

In my view, that opportunity is foreclosed to plaintiffs at the present time. The decisions of the court of appeals in *LCO I,* 700 F.2d 341, and *LCO II,* 760 F.2d 177, have established that plaintiffs' rights have been extinguished on private lands. I have held that plaintiffs are not entitled to all of the resources

necessary to provide them with a moderate standard of living. Plaintiffs are entitled to an equal share of all of the resources within the ceded territory, but they may harvest those resources only from public lands. It may be in the future that they can prove not only that they have the need to take the full half of the resources to which they are entitled but that they have the capacity as well and that they cannot harvest their share without gaining access to private lands. In that event it may be necessary to take appropriate measures for Chippewa activity on privately owned lands, as Judge Doyle suggested. It may be that hunting by consent is one of those measures. I express no view on that point.

It is premature to reach the issue of private lands now. It is premature also to determine whether plaintiffs would have to establish that they are unable to harvest their full share from the entire territory or merely that they are unable to harvest their quota in a particular harvesting unit. That is another question on which I express no view.

At the present time, therefore, plaintiffs' members have no more rights than non-Indian hunters to hunt or to trap on private lands. In other words, when tribal members are hunting or trapping on private lands they are subject to state hunting and trapping regulations.

### C. Summer Deer Hunting

In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin,* 668 F.Supp. 1233 (W.D.Wis.1987), (*LCO IV* ), I held that, under certain circumstances, the state could regulate the plaintiffs' usufructuary activities for the purpose of preserving a particular species or for protecting the state's citizens from certain public health and safety hazards. I appreciate the strength of the argument to the contrary, that is, that any state regulation of such rights violates the supremacy clause of the United States Constitution. *See, e.g.,* Note, *State Regulation of Lake Superior Chippewa Off–Reservation Usufructuary Rights,* 11 Hamline L.Rev. 153 (1988); Johnson, *The States Versus Indian Off–Reservation Fishing: A United States Supreme Court Error,* 47 Wash.L.Rev. 207 (1972). I appreciate also that the basis for state regulation has never been explained satisfactorily. However, the legitimacy of state regulation in this area is not open to reconsideration. The United States Supreme Court has ruled definitively in the Washington state fishing cases that states may regulate Indian fishing rights in certain limited circumstances. *See Puyallup Tribe v. Dep't of Game,* 391 U.S. 392, 398, 88 S.Ct. 1725, 1728, 20 L.Ed.2d 689 (1968) (*Puyallup I* ) (fishing may be regulated by state in interest of conservation, "provided the regulation meets appropriate standards and does not discriminate against Indians"); *Washington Game Dep't v. Puyallup Tribe,* 414 U.S. 44, 94 S.Ct. 330, 38 L.Ed.2d 254 (1973) (*Puyallup II* ) (total ban on commercial fishing for steelhead was not a

reasonable and necessary conservation measure and it discriminated against the Indians). *See also Antoine v. Washington,* 420 U.S. 194, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975). In addition, the United States Court of Appeals for the Seventh Circuit has indicated its approval of limited state regulation in this case: "We doubt that extinction of the species ... or a substantial detriment to the public safety is a reasonable adjunct to the rights reserved by the Indians." *LCO II,* 760 F.2d at 183.

The broad language used by the Court in the *Puyallup* cases defeats the argument that the differences between the treaties in the Washington cases and the ones at issue here lead to different conclusions, so that the state regulation that is permissible under the "in common" language of the Washington treaties is not permissible here, where there is no such language in the treaties. The Court held that although the Indians' fishing rights could not be qualified or conditioned by the state, the "time and manner of fishing ... necessary for the conservation of fish," were not defined or established by the treaty and were therefore within the reach of the "overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources ..." *Puyallup I,* 391 U.S. at 399, 88 S.Ct. at 1729. The Court added the explanation that "[t]he measure of the legal propriety of those kinds of conservation methods is ... distinct from the federal constitutional standard concerning the scope of the police power of a State." *Id.* at 402 n. 14, 88 S.Ct. at 1730 n. 14. In *Puyallup II,* the Court stated that, "Rights can be controlled by the need to preserve a

species ... the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." 414 U.S. at 49, 94 S.Ct. at 334. It is notable also that in *Antoine v. Washington,* 420 U.S. at 206, 95 S.Ct. at 951, the Court rejected the suggestion that the in common nature of the Indians' preserved rights permitted the state of Washington to regulate Indian hunting.

Therefore, I conclude as I have throughout this phase of the litigation that the state may regulate for the purposes of conservation or for public safety, but only if it meets its burden of demonstrating the need for the particular proposed regulatory measure. The state must show, first, that a substantial hazard exists; second, that the particular measure sought to be enforced is necessary to the prevention of the safety hazard; third, that application of the particular regulation to the plaintiff tribes is necessary to effectuate the particular safety interest; fourth, that the regulation is the least restrictive alternative available to accomplish the public safety purpose; and fifth, that the regulation does not discriminatorily harm the Indians or discriminatorily favor non-Indian harvesters. *LCO IV,* 668 F.Supp. at 1239.

The state's prohibition on summer deer hunting meets these conditions. All hunting creates some safety hazard to humans, whatever the time of year and whatever kind of ammunition is used. Limited summer hunting with low caliber firearms is a tolerable risk, as is the use of high caliber firearms and compound hunting bows after Labor Day when

the recreational use of the woods by nonhunters has diminished sharply. However, summer deer hunting creates a substantial, unacceptable safety hazard to humans because of the dangerousness of the ammunition or arrows used for deer hunting, the heavy summer foliage and dappled light that hinder vision, and the greatly increased number of persons using the woods during the summer.

Plaintiffs argue that the state has failed to show a substantial safety concern in summer deer hunting because it licenses hunters for summer hunting of small game without restricting the type of ammunition or firearm they can use. As I have found, however, few people hunt in summer, and those that do use low caliber rifles or shotguns. Persons who hunt for pelts use the smallest caliber they can in order to preserve the pelt, and they hunt primarily in the autumn when the pelt is at its best. Persons who hunt nuisance animals in the summer have an incentive to use shotguns to increase their chances of killing their target. Because lower caliber ammunition and shotgun shells have less energy than high caliber bullets, they travel shorter distances and hit with less impact.

Plaintiffs contend that defendants have not met their burden of showing that an absolute ban on deer hunting in the summer is the least restrictive means of protecting the public from a substantial safety hazard. They argue that allowing bow hunting or 00 buckshot or both would not pose the same safety concerns because of the shorter distances that arrows and buckshot travel. Plaintiffs may be

correct, although both buckshot and hunting arrows are potentially lethal to persons, albeit within shorter distances than high caliber rifles and guns. However, I have not considered plaintiffs' contention because it was raised for the first time at trial, in violation of the understanding on which the parties and the court have been relying for this phase of the litigation. The parties were to codify their proposals for regulation in advance so that the opposing biological and safety experts could evaluate them prior to trial. Once trial started, the codifications were to be considered fixed proposals. The court's role was only to decide whether the state had succeeded in showing that its proposal was necessary, not to propose an alternative regulation.

Plaintiffs argue that their proposal for the use of arrows or buckshot for summer deer hunting should not be viewed as a substitute proposal, only as evidence that defendants' proposal is overly broad for its purpose. As I have pointed out, however, plaintiffs have not given defendants an adequate opportunity to review the adequacy of the alternative proposal and to produce expert testimony. Plaintiffs did not produce any expert to testify that buckshot or bow deer hunting in the summer would be safe. Therefore, I can make no finding that an absolute prohibition on summer deer hunting is not the least restrictive means of protecting the safety of the persons in the ceded territory.

I conclude that prohibiting summer deer hunting altogether is necessary to protect persons in the

north woods from the substantial safety hazard of hunters using high caliber rifles or guns or hunting bows. Application of the prohibition to non-Indians only would not achieve the safety purpose. No less restrictive measure would achieve the same purpose. Finally, the measure does not discriminate between the Indians and non-treaty hunters. The prohibition on summer deer hunting is narrowly drawn and imposes a minimal infringement upon the plaintiffs' usufructuary rights. Therefore, defendants will not be enjoined from enforcing this prohibition, except insofar as plaintiffs amend their tribal codes to incorporate the same prohibition.

### D. Twenty-four Hour Closure Prior to State Deer Gun Hunt

It is a closer question whether plaintiffs' members should be prohibited from hunting deer during the twenty-four hours immediately preceding the opening of the state deer gun hunt. Defendants assert that the prohibition is necessary because of the tens of thousands of prospective deer hunters who are in the ceded territory during this period, setting up tree stands, looking for good hunting spots, and planning their hunt. (Presumably they cannot be required to wear blaze orange as they must during the hunting season because they are not subject to state regulation until they actually start hunting.) Of more significance to the state is the concern that premature, illegal hunting by non-Indians would be much more difficult to monitor if Indian hunting were permissible during this time.

As substantial as these concerns are, the effect of giving them recognition would be to infringe upon the Indians' hunting rights in order to accommodate concerns about the conduct of non-Indian hunters. Essentially, the state is asking that the Indians be kept from hunting because non-Indians might refuse to wear blaze orange if not required to or because non-Indians might not observe the state deer hunting season. I conclude that the twenty-four hour closure provision fails the fifth prong of the test, that a regulation not discriminatorily harm the Indians or discriminatorily favor the non-Indians. Defendants will be enjoined from enforcing this regulation.

**E. Shining**

In contrast to the twenty-four hour closure rule, the state's prohibition on shining deer is a narrowly drawn, non-discriminatory restriction on plaintiffs' hunting rights that is necessary to protect the safety of persons in the ceded territory. It imposes a minimal infringement on plaintiffs' rights in comparison to the great danger night hunting presents to public safety.

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

knowing exactly what is behind the intended target is an obvious violation of the most basic hunting rules.

As with summer hunting, plaintiffs suggest that shining could be safe under certain conditions, such as in a baited, preselected location with the hunter in a tree stand or other elevated location. These conditions are not codified in the Model Off–Reservation Conservation Code, and the state did not have an opportunity to respond to them in detail at trial. Plaintiffs presented no expert testimony to show that specifying the conditions for shining would meet the legitimate safety concerns of the state. Therefore, I cannot find that defendants' proposed prohibition on all shining of deer is not the least restrictive measure possible for protecting human safety.

I conclude that this proposal meets the test of reasonableness identified in *LCO IV,* 668 F.Supp. 1233. Therefore, defendants will be permitted to enforce this regulation, except insofar as plaintiffs incorporate the same prohibition into their own tribal codes.

**F. Riparians' Interest in Law Suit**

Fed.R.Civ.P. 19(a)(2)(i) requires joinder of persons claiming interests relating to the subject of the action who are so situated that disposition of the action in their absence will impair or impede their ability to protect that interest. Defendants contend that this court cannot determine plaintiffs' usufructuary right to trap aquatic fur bearers on

stream beds and river bottoms to which private persons hold riparian rights unless these persons are joined as parties, because any determination of plaintiffs' trapping rights will affect the riparians' property rights, which defendants cannot represent.

Plaintiffs dispute the contention that the riparians must be joined in this action. They argue that the riparians have never had anything more than a qualified ownership interest subject to the paramount title of the state; that the Wisconsin cases holding that riparians have an exclusive right to trap on their stream beds and river bottoms are no longer good law and would be repudiated by the state supreme court were it to reach the issue; and that even if the stream beds are found to be privately owned, they are not lands needed for white settlement, and therefore are not "private lands" as that term was used in *LCO I,* 700 F.2d 341.

In Wisconsin, the beds of natural navigable lakes are owned by the state. *State v. Trudeau,* 139 Wis.2d 91, 101–102, 408 N.W.2d 337 (1987). The beds of rivers, streams and artificial flowages are owned by the riparians, that is, the persons owning the "uplands" abutting the water. *Doemel v. Jantz,* 180 Wis. 225, 193 N.W. 393 (1923). In the case of streams and rivers, the riparian's ownership rights extend to the "thread" or geographical center of the stream or river. *Chandos v. Mack,* 77 Wis. 573, 46 N.W. 803 (1890). In the case of flowages, the owner of overflowed lands retains title to the lands. *Haase v. Kingston Co-operative Creamery Ass'n,* 212 Wis. 585, 250 N.W. 444 (1933).

On non-navigable waters, the riparian's ownership right is absolute. With respect to navigable waters, the owner's title is qualified by a public easement that gives members of the public the right of navigation with all its "incidents," which include bathing, hunting, fishing, and boating. Ellis, Beuscher, Howard & DeBraal, *Water–Use Law and Administration in Wisconsin,* p. 45 (1970); *Munninghoff v. Wisconsin Conservation Comm'n,* 255 Wis. 252, 259, 38 N.W.2d 712, 715 (1949). The Supreme Court of Wisconsin has held that trapping is not an incident of navigation, but an incident of land use. *Munninghoff,* at 259, 38 N.W.2d at 715.

*Munninghoff* came to the supreme court as a challenge to the state conservation commission's refusal to issue a license to a private riparian who wanted to operate a muskrat farm. The court acknowledged that the state's police power was determinative:

> "The state, under its police power and to carry out its trust, passed the statute in question. So long as it affects the public the statute is reasonable and is not contrary to any provision of the federal or state constitutions."

*Id.* at 257, 38 N.W.2d at 715 (quoting *Krenz v. Nichols,* 197 Wis. 394, 402, 222 N.W. 300, 303 (1928)). Rather than ground its holding solely on the state's police power, however, the court went on to hold that trapping was not an "incident of navigation":

> The right to use the running water or the bed for float trapping is not included in the easement of navigation. To float-trap in navigable water constitutes a trespass upon the submerged land for which the trespasser may be prosecuted by the owner of the soil and enjoined from using the public water for that purpose.

*Munninghoff,* 255 Wis. at 259–60, 38 N.W.2d at 716.

Plaintiffs maintain that *Munninghoff* is an aberration in the development of the law governing the use of the state's navigable waters, and that it has been overruled implicitly by later cases. It is true that it is difficult to harmonize the holding in *Munninghoff* with other cases in which the state supreme court has affirmed the expansive and longstanding public right to fish and hunt in navigable rivers and streams whose banks are privately owned. *See, e.g., Willow River Club v. Wade,* 100 Wis. 86, 76 N.W. 273 (1898) (private fishing club could not preclude members of the public from fishing within the banks of the river to which the club held riparian rights); *Diana Shooting Club v. Husting,* 156 Wis. 261, 145 N.W. 816 (1914) (private hunting club that had riparian rights to navigable stream could not exclude persons who hunted from a boat poled along the bottom of the stream). One commentator has made the point that "the soundness of finding trapping to be an incident of land use, in the face of Wisconsin cases finding hunting within the public right to use navigable waters, is open to doubt as a matter of logic. Both

activities are essentially the same ..." Waite, *Public Rights in Navigable Waters,* 1958 Wis.L.Rev. 335, 344.

Whatever defects *Munninghoff* might have, it has never been overruled or repudiated by the state supreme court. Nevertheless, plaintiffs argue that the case has no precedential value, in light of two subsequent cases, *Muench v. Public Service Comm'n,* 261 Wis. 492, 53 N.W.2d 514 (1952), and *Ashwaubenon v. Public Service Comm'n,* 22 Wis.2d 38, 125 N.W.2d 647 (1963). In *Muench,* the state supreme court held that the riparian's qualified title to the beds of navigable streams is " 'subject to all those public rights which were intended to be preserved for the enjoyment of the whole people by vesting the title to the beds of such streams in [the state] in trust for their use.' " 261 Wis. at 502, 53 N.W.2d at 517–18 (quoting *Franzini v. Layland,* 120 Wis. 72, 81, 97 N.W. 499, 502 (1903)). In *Ashwaubenon,* the court reversed a public service commission order denying the town's petition to establish a bulkhead line in the Fox River. The court did not refer to riparian rights as a basis for its decision, but recognized that riparians have only a qualified title in the stream bed, that the title of the state is paramount, and that the rights of all others are subject to revocation at the pleasure of the state. *Id.* 22 Wis.2d at 49, 125 Wis.2d at 653. From these two cases, plaintiffs argue, it is clear that the present day court would not hold that riparian owners of stream beds can exclude members of the public from using the streams for any purpose including trapping. Any distinction between owners

of lake front property and owners of river and stream banks no longer exists. The property rights of both are subject to the paramount interests of the public trust.

I do not read *Ashwaubenon* as sweeping away the remaining rights of riparian owners of navigable rivers or eliminating any distinction between stream bed and lake bed riparians. Although the court reiterated its earlier holdings that riparians have only a qualified title to the stream beds, it concluded that the commission was wrong in arguing that *Muench v. Public Service Comm'n,* 261 Wis. 492, 53 N.W.2d 514, stands for the proposition "that any significant use of the riverbed by private riparians contravenes the sacred trust under which the navigable waters are held." Instead, the court held, "[A] riparian owner, with knowledge of his qualified title and his revocable rights under sec. 30.11, Stats.1959, by dint of that very statute may enjoy the use of the riverbed up to the established bulkhead line." *Id.* 22 Wis.2d at 49, 125 N.W.2d at 653.

Neither *Ashwaubenon* nor *Muench* announces a new rule that would undercut the validity of the holding in *Munninghoff.* Riparians have always had qualified rights, subject to revocation. The fact is, whatever its defects, *Munninghoff* remains the law with respect to trapping rights. *See, e.g.,* Waite, *Public Rights in Navigable Waters,* 1958 Wis.L.Rev. at 342 (mooring traps for muskrats may be one use of a stream bed that remains outside the purposes of the public easement); *see also* Ellis, Beuscher,

Howard and DeBraal, *Water–Use Law and Administration in Wisconsin,* p. 46: "[T]he state's title, if any, to the beds of navigable streams likewise is a qualified title, as the public may be excluded from making certain uses which have been held to be the exclusive right of the riparian owner" such as trapping, citing *Munninghoff,* 255 Wis. at 259–60, 38 N.W.2d at 716.

So long as the state recognizes some property interest in the riparian owners of stream beds, a decision interpreting plaintiffs' usufructuary rights as applying to trapping on privately owned stream beds would require this court to redefine state property laws. As a general rule, this is not a task for federal courts. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel,* 429 U.S. 363, 375, 97 S.Ct. 582, 589, 50 L.Ed.2d 550 (1977) (title and rights of riparian proprietors in soil below high water mark are governed by laws of states). *See also Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 484, 108 S.Ct. 791, 799, 98 L.Ed.2d 877 (1988):

> We see no reason to disturb the "general proposition [that] the law of real property is, under our Constitution, left to the individual States to develop and administer." *Hughes v. Washington,* 389 U.S. 290, 295 [88 S.Ct. 438, 441, 19 L.Ed.2d 530] (1967) (Stewart, J., concurring).

Despite plaintiffs' efforts to show that riparians do not have sufficient property interests to make them indispensable parties in this subphase of the litigation, I conclude that a decision in plaintiffs'

favor would alter the riparians' property rights with respect to the use of their stream and flowage beds, and that this interest makes the riparians indispensable parties. The riparians' interest may be only a qualified one, but it does not follow that it is not protectible.

Plaintiffs assert that the riparians' ownership rights in the stream beds are so attenuated by the public trust doctrine that it cannot be said that the lands are needed for non-Indian settlement. This assertion rests on their argument that the riparians' "bundle of property rights" has been reduced so far as to be insignificant. I disagree. I conclude that, with respect to trapping only, privately owned stream beds, river bottoms and overflowed lands are private lands within the meaning of *LCO I,* until such time as the Wisconsin courts should find that the owners cannot exclude members of the public from trapping in these areas. Whether these and other private lands may be needed at some time in the future to permit the plaintiffs access to their full share of the harvest is a question I do not reach at this time.

**ORDER**

IT IS ORDERED that

1) Defendants are enjoined from interfering in the regulation of plaintiffs' hunting and trapping on public lands within the ceded territory in Wisconsin, except insofar as plaintiffs have agreed to such regulation by stipulation and except as herein ordered;

2) Defendants' request for a judicial declaration of the parties' rights to harvest the natural resources in the ceded territory is GRANTED; all of the harvestable natural resources in the ceded territory are DECLARED to be apportioned equally between the plaintiffs and the non-Indians, with such apportionment applying to each species and to each harvesting unit with limited exceptions as set forth in this opinion; and upon the condition that no portion of the harvestable resources may be exempted from the apportionable harvest;

3) Defendants are enjoined from enforcing those portions of § NR 13.32(2)(f) and § NR 13.32(r)(2)(b) that include a percentage of "public land" as an element of the formulas for determining the maximum tribal antlerless deer quota (in NR 13.32(2)(f)) or the maximum tribal fisher quota (in NR 13.32(r)(2)(b)); 4) Plaintiffs may not exercise their usufructuary rights of hunting or trapping on private lands, that is, those lands that are held privately and are not enrolled in the forest cropland or managed forest lands programs under Wis.Stat. ch. 77; plaintiffs are subject to state hunting and trapping regulations when hunting or trapping on private lands;

5) Defendants may enforce the prohibition on summer deer hunting contained in their proposed § NR 13.32(2)(e), until such time as plaintiff tribes adopt a regulation prohibiting all deer hunting before Labor Day;

6) Defendants are prohibited from enforcing that portion of their proposed § NR 13.32(2)(e) that bars

tribal deer hunting during the twenty-four hour period immediately preceding the opening of the state deer gun period established in § NR 10.01(3)(e); and

7) Defendants may enforce the prohibition on shining of deer contained in their proposed § NR 13.30(1)(q), until such time as the plaintiff tribes adopt regulations identical in scope and content to § NR 13.30(1)(q).

FURTHER, IT IS ORDERED that the stipulations entered into by the parties relating to the enforcement of harvesting regulations for and the management of white-tailed deer, furbearers, and small game are incorporated into this order.