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,

OPINION AND ORDER

Plaintiffs,

74-cv-313-bbc

v.

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

Defendants.

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On November 21, 2012, defendants State of Wisconsin, Wisconsin Natural Resources Board, Cathy Stepp, Kurt Thiede and William Lawhern moved for an order confirming that they have authority under the terms of the final judgment entered in this case to enforce the prohibition on off-reservation deer shining set out in Wis. Admin. Code § NR 13.30(l)(q) against members of the plaintiff tribes in Wisconsin courts. Plaintiffs Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Lac du Flambeau Band Superior

of Lake Superior Chippewa 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 responded by filing a motion for preliminary injunction, asking the court to issue an injunction restraining defendants from enforcing the code provisions against them. Dkt. #193. The injunction was denied. Dkt. #269. Plaintiffs then moved for relief from judgment under Fed. R. Civ. P. 60(b); after a court trial that motion was denied in an order entered on December 12, 2013. Dkt. #377.

As the prevailing parties, defendants filed a bill of costs in the amount of $18,150.86. $15,646.57 was for printed or electronically recorded transcripts and $2,504.29 was for fees and disbursements for printing. Plaintiffs opposed the bill of costs and the matter is now before the court. Having considered the parties' filings on the issue, I conclude that the costs for which defendants seek reimbursement were incurred necessarily in this action and are properly charged to plaintiffs. (Plaintiffs do not challenge the correctness of the amounts or defendants' averment that the services for which fees were charged were actually and necessarily performed.)

Plaintiffs argue that the court has the authority to deny a petition for costs when the prevailing party has sufficient resources, the losing party has more limited resources, the case was prosecuted in good faith and the issues presented were novel or close. They also say that the majority of costs itemized by defendants were incurred before the state of Wisconsin repealed its nighttime wolf hunting provision and add that they believe that if that law had

not been repealed, they would have prevailed on their motion.

On the first point, the Court of Appeals for the Seventh Circuit takes a more limited approach to awards of costs than the one espoused by plaintiffs. It views the awarding of costs to prevailing parties as a matter of course, in the absence of exceptional circumstances. Smith v. DeBartoli, 769 F.2d 451, 453 (7th Cir. 1985) (court has recognized only two exceptional circumstances: when prevailing party has engaged in some kind of misconduct or losing party is indigent); see also Overbeek v. Heimbecker, 101 F.3d 1225, 1228 (7th Cir. 1996) (court's refusal to award costs under Fed. R. Civ. P. 54(d) was not abuse of discretion in case "chock full" of exceptional circumstances, such as counsel's "inexplicable" rejection of insurer's offer of policy limits to settle case, arguing frivolously for dual coverage and disappearing for long periods of time). The cases cited by plaintiffs taking a different approach are from courts outside the circuit. This court can consider such cases, but is bound by the law pronounced by the court of appeals for this circuit.

Looking at this case in light of the cases from this circuit, I note that plaintiffs have not shown that they are indigent. Although plaintiffs assert that the average income of the members of one of the tribes is low, they say nothing about the financial situation of the tribe itself or the money that the federal government has awarded to the tribes for protecting their legal interests, as shown in the attachments to an affidavit filed by defendants' counsel, dkt. #391 (4-6). They say that their counsel served without reimbursement from the tribes, but it appears that she did so as part of her work as a professor of law with the Indian Law Clinic at William Mitchell College of Law. Dkt. #391-1. Plaintiffs have not shown any

misconduct on the part of defendants or the existence of any exceptional circumstances in this case that would justify relieving them of the requirement to pay the costs of the prevailing parties.

Plaintiffs also argue that they incurred most of their costs before the state changed the night hunting rules for the hunting and shining of wolves; had that not happened, the likelihood is that they would be the prevailing parties. Whether they are right or wrong about this, the final decision went against them; therefore, they do not qualify as prevailing parties.

Plaintiffs object to the costs sought for the transcripts alleged by defendants to have been necessary for the defense of the case, but their objections are not well founded. Defendants have shown that the transcripts they obtained were necessary "at the time" they were taken; they need not show that they were used at trial. The reason is obvious: parties preparing for trial must anticipate the case their opponents will put on; they do not know in advance what that case will be or which witnesses the other side will call. Hudson v. Nabisco Brands, Inc., 758 F.2d 1237, 1243 (7th Cir. 1985) ("determination of necessity [of deposition] must be made in light of facts known at the time of the deposition, without regard to intervening developments that later render the deposition unneeded for future use"). When defendants took their depositions of tribal witnesses Jason Schlender (identified by plaintiffs as an expert witness expected to testify at trial) and Kekek Jason Stark, along with state employees William Vander Zouwen, Scott Loomans and Thomas Van Haren, it was reasonable for them to think that those depositions were necessary to defend

their case. Each of the deponents had relevant knowledge or expertise about the case. It is irrelevant that circumstances later changed and plaintiffs did not call all of these deponents as witnesses. It is also irrelevant that the latter three witnesses were state employees. What is relevant is that they were deposed by plaintiffs and they had knowledge of critical issues in the case. (In fact, their depositions led to stipulations that made it unnecessary for either side to call them at trial, thus reducing the costs of the litigation for both sides.)

Finally, plaintiffs argue that they should not have to pay the costs associated with the wolf surveys they asked defendants to prepare, but do not offer a good reason to be relieved of these costs. They asked for the surveys and for the underlying documentation. Their only argument seems to be that they did not need all of the information at trial, but this is a result of their own trial strategy, rather than something for which defendants are responsible.

I conclude that plaintiffs have failed to support their objections to defendants' bill of costs and that they are responsible for the costs sought by defendants.

ORDER

IT IS ORDERED that costs in the amount of $18,150.86 are taxed against plaintiffs Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Lac du Flambeau Band Superior of Lake Superior Chippewa 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.

Entered this 31st day of March, 2014.

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