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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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