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 was filed in 1974 by various bands of the Lake Superior Chippewa tribe to enforce their treaty rights with the state of Wisconsin regarding hunting, fishing and gathering on off-reservation land. Among the many issues in the case was whether plaintiffs had the right to hunt deer at night on public land. I concluded that defendants met their burden to show that the state's prohibition of this practice in Wis. Admin. Code § NR 13.30(1)(q) "is a narrowly drawn, nondiscriminatory restriction on plaintiffs' hunting rights

that is necessary to protect the safety of persons in the ceded territory." Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin, 740 F. Supp. 1400, 1423 (W.D. Wis. 1990). In the final judgment, I permitted defendants to enforce the ban unless plaintiffs enacted their own regulation that was "identical in scope and content" to state law. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin, 775 F. Supp. 321, 324 (W.D. Wis. 1991).

The case is now before the court on motions by both sides related to the ban on nighttime deer hunting. Defendants have filed a "motion to enforce the judgment," dkt. #184, in which they seek permission from the court to enforce § NR 13.30(1)(q) against plaintiffs on the ground that plaintiffs no longer have an identical regulation in place. Although plaintiffs amended their model code to include such a regulation in accordance with this court's rulings, they issued an order in November 2012 rescinding that regulation and allowing tribal members to hunt deer off-reservation at night if certain conditions are met.

Instead of responding directly to defendants' motion, plaintiffs filed a "motion for preliminary and permanent injunctive relief," dkt. #193, in which they seek to enjoin defendants from enforcing § NR 13.30(1)(q) against them. Relying on a 2011 stipulation with defendants, plaintiffs argue that they are within their rights to issue an order permitting nighttime deer hunting because defendants unreasonably withheld their consent on this issue after engaging in extended negotiations with plaintiffs. In the alternative, plaintiffs seek to amend the judgment under Fed. R. Civ. P. 60(b)(5), which applies when

"applying [the judgment] prospectively is no longer equitable." Defendants have moved to "strike" plaintiffs' first argument, dkt. #250, but I agree with plaintiffs that the motion is more appropriately viewed simply as an opposition brief. In addition, defendants filed a motion to exclude any evidence of "settlement discussions" between the parties. Dkt. #249. I am denying that motion as moot because it was not necessary to consider those discussions in resolving the other motions.

A hearing was held on December 12 and 13, 2012 to address the preliminary issue whether plaintiffs may participate in nighttime deer hunting from now until January 6, 2013, when the proposed night hunting season would end. With respect to this issue, plaintiffs rely entirely on their argument that they had unilateral authority to permit deer hunting at night because defendants acted unreasonably in withholding their consent.

Having considered the parties' arguments in the briefs and at the hearing, I am denying plaintiffs' request for preliminary injunctive relief and granting defendants' motion to enforce the judgment. Although defendants have until 4:00 p.m. this afternoon to file a post-hearing brief (plaintiffs filed their final brief on Friday), I am deciding the matter without the benefit of defendants' brief. Defendants will not be prejudiced because I am ruling in their favor at this stage, and plaintiffs are entitled to know promptly that they will not be allowed to engage in night hunting of deer this season as they had hoped.

Plaintiffs have raised legitimate questions about the fairness of defendants' disparate treatment of wolf hunting and deer hunting, but plaintiffs' decision to issue an order permitting nighttime deer hunting was premature because it was not authorized by the

judgment in this case or any agreement they had with defendants. To grant plaintiffs' request, I would have to conclude that plaintiffs are permitted to amend a judgment that is more than 20 years old without a stipulation from defendants or approval from this court. Not only is that view untenable, but the consequences of adopting it could be perilous. One of the primary reasons for the creation of courts is to prevent the dangers that often accompany self-help remedies such as plaintiffs' November 2012 order. Settling disputes by negotiation without court intervention is ideal for all the parties involved, but when negotiation fails, the parties must come to court (or submit to arbitration) to resolve the matter. The proper response cannot be for each side to decide on its own what the law permits, particularly with an issue like this one that involves public safety concerns. In these circumstances, it is essential that the parties exercise restraint and use the proper channels to resolve their dispute.

In denying plaintiffs' motion for preliminary relief, I do not decide the question whether plaintiffs may be entitled to relief from the judgment in the future because of a change in circumstances. I am deciding only that plaintiffs did not have authority to amend the judgment on their own.

BACKGROUND

In Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin, 668 F. Supp. 1233, 1235 (W.D. Wis. 1987), I concluded that the state could regulate the tribe's off-reservation treaty rights if a particular regulation: (1) was reasonable

and necessary to public health or safety or the conservation of a particular species or resource in a particular area; and (2) did not discriminate against the tribe. After that decision, I held various trials to determine whether the state had made this showing with respect to particular restrictions on specific species and resources. Before each trial, the parties stipulated to a number of issues. With respect to the deer trial, the parties divided their stipulation into six parts: (a) biology of deer management; (b) tribal enforcement and preemption of state law; (c) sale of deer; (d) wild game processing; (e) management authority; and (f) ceremonial use. Dkt. #268-1. The final judgment incorporates these stipulations.

In 2001 the parties filed a joint motion under Fed. R. Civ. P. 60(b)(6) to amend the judgment "so as to allow the parties, by mutual agreement, to modify the stipulations which were incorporated into the final judgment" in order to allow for changing circumstances. Dkt. #218. I granted the motion and amended the judgment to authorize the parties to amend the stipulations listed in the final judgment. Dkt. #217. "The amendment of any of these stipulations shall be accomplished by the execution of an amended stipulation signed by counsel of record for all parties and shall become effective upon its filing with the court." Id.

In 2009 the parties submitted their first amended stipulation, which they called "Stipulation for Technical Management and Other Updates: First Amendment of Stipulations Incorporated into Final Judgment." Dkt. #216. (The parties agree that their current dispute does not involve this stipulation.) In 2011 the parties submitted another

stipulation, which they called "Stipulation for Technical, Management and Other Updates: Second Amendment of the Stipulations Incorporated in the Final Judgment." Dkt. #207.

Section III of the 2011 stipulation is called "Technical Updates and Amendments":

> A. The parties agree that the language of: Section 7 of the Stipulation on Biological and Certain Remaining Issues; Section 7 of the Stipulation on Enforcement (Docket Number 911); Section C of the Stipulation for Miscellaneous Species and Regulatory Matters (Docket Number 1607, subpart 2); Section C of the Stipulation for Black Bear, Migratory Birds, and Wild Plants (Docket Number 1607, subpart 2); *Section E of the Stipulation for the Deer Trial* (Docket Number 1167); Section C of the Stipulation for the Wild Rice Trial (Docket Number1222); Section C of the Stipulation for Fisher, Fur Bearers, and Small Game (Docket Number 1289); and Section B of the Stipulation for Fish Species other than Walleye and Muskellunge (Docket Number 1568) will all be amended as follows:
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> 1. Upon the issuance of a Commission Order under parts III.A.2. or III.B. of this stipulation, unless a Tribe chooses to adopt more restrictive measures, the regulations established therein shall be the Tribe's regulations as provided in that Tribe's Code.
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> 2. The Great Lakes Indian Fish and Wildlife Commission Executive Administrator may, after consultation with the State and upon agreement of the parties (where consent may not be unreasonably withheld), issue a Commission Order to provide tribal members more treaty harvest opportunities consistent with those available under state law to state harvesters, subject to the stipulations previously filed in this matter and the law of this case, pertaining to other fish and game-related regulatory amendments of the Model Code.

Id. at 5-6 (emphasis added). The parties refer to this section of the 2011 stipulation as the "other liberalization amendment process."

Section E of the Stipulation for the Deer Trial, is entitled "Management Authority"

and provides:

> 1. The parties agree that the Wisconsin Department of Natural Resources's (WDNR) processes currently utilized for the management of white-tailed deer in the ceded territory shall continue to be the processes utilized for dealing with the management of white-tailed deer in the ceded territory.
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> 2. Defendants agree to officially recognize tribal representatives as official members of the following committees or processes: (a) annual deer quota setting process; (b) comprehensive review of over winter deer population goals and deer management unit boundaries every three years; (c) deer species advisory committee and any other committee to manage or impacting deer range and white-tailed deer in ceded territory.
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> 3. Plaintiffs do not waive any right to challenge any actions taken by the Department relating to the management of white-tailed deer in tribal, state or federal forums. However, the parties agree that the processes listed in paragraph 2 above shall govern and be binding upon all the parties concerning the management of white-tailed deer until and unless otherwise directed as a result of the challenges undertaken pursuant to this section.
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> 4. The parties agree that the processes listed in paragraph 2 above shall be limited to the management of white-tailed deer. The parties further agree that a consensus approach shall be utilized and agree to make all reasonable efforts to reach a consensus in the committees or processes outlined in paragraph 2 above.
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> 5. The parties agree that the issue concerning the desired population goal for deer management unit 29B will be considered through the processes described above in paragraph 2.
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> 6. Plaintiffs agree they may not conduct or implement scientific investigations under Model Code 3.07 relating to the handling, killing, capturing or sampling of any live deer or the maintaining, improving or altering of deer habitat unless plaintiffs have: (1) provided advance [sic] to WDNR of the investigation; (2) receiving WDNR approval to conduct or implement the investigation.

In April 2012 Wisconsin passed a law allowing members of the general public to obtain licenses to hunt wolves at night under certain circumstances. At some point after this

happened, plaintiffs began meeting with defendants to discuss plaintiff's interest in issuing an order that permitted tribal members to hunt deer at night. When negotiations failed, the Great Lakes Indian Fish and Wildlife Commission issued an order, effective November 26, 2012, that permitted tribal members to participate in nighttime deer hunting if certain conditions were met. Dkt. #228. On November 28 the Commission suspended that order pending resolution of the parties' motions.

OPINION

Plaintiffs acknowledge as they must that the judgment in this case prohibits them from engaging in off-reservation deer hunting at night under any circumstances. That is, the judgment authorizes defendants to enforce the state law prohibition of this practice against plaintiffs unless plaintiffs have their own regulation that is identical to state law. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin, 775 F. Supp. 321, 324 (W.D. Wis. 1991). Nevertheless, plaintiffs argue that what they call the "other liberalization amendment" in the 2011 stipulation gave them authority to issue an order permitting their members to participate in nighttime deer hunting, without obtaining approval from this court or a stipulation from defendants. Distilled, plaintiffs' position is that they have the power to amend the judgment unilaterally if they conclude in good faith that defendants have "unreasonably withheld" their consent to make a particular change that falls within the scope of the 2011 stipulation.

Plaintiffs' argument has several parts, each of which must be accepted for them to

prevail: (1) the 2001 amended judgment gave the parties authority to alter previous rulings of the court included in the judgment, so long as the parties follow the process outlined in their 2009 or 2011 stipulations; (2) the "other liberalization amendment" process in the 2011 stipulation extends to issues regarding deer hunting at night; (3) the 2011 stipulation allows plaintiffs to modify a rule without obtaining an agreement from defendants if defendants "unreasonably withheld" their consent; and (4) the Commission's order allowing night deer hunting is "consistent with" the state's regulations allowing night wolf hunting, as that term is used in the 2011 stipulation.

A threshold question relates to the standard of review. In their briefs, plaintiffs apply the standard for a motion for a preliminary injunction, which requires them to show "some likelihood of success," among other things. Stuller, Inc. v. Steak N Shake Enterprises, Inc., 695 F.3d 676, 678 (7th Cir. 2012). As I noted at the hearing, it is questionable whether it is appropriate to apply the standard for "preliminary" injunctions in a case that has been closed for 20 years. In any event, I need not choose a particular standard of review because I conclude that plaintiffs are not entitled to relief at this time under any standard.

With respect to the first issue, plaintiffs ask the court to accept what seems to be a legally impossible premise, which is that there are circumstances under which a judgment can lose its force before a court has vacated or modified it. In other words, under plaintiffs' view, a judgment somehow can be "amended" without any action from the court if the parties to the judgment have agreed to an alternative process. Not surprisingly, plaintiffs cite no authority for their far-reaching view. Once a judgment is entered, it is the law of the case

until it is modified or vacated through an appeal or a motion under Fed. R. Civ. P. 59 or 60. Even a consent decree remains in force until it is terminated by the court. E.g., Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992). To suggest that a court order may be disregarded by one party because of its interpretation of a private agreement undermines both the judicial process and the rule of law itself.

Plaintiffs' reliance on the 2001 amendment to the judgment is misplaced for two reasons. First, the amendment allows the parties to amend their own stipulations, not the rulings of this court. Of course, the parties did not file a stipulation about deer hunting at night; I held a trial on this issue and issued a ruling because the parties could not reach an agreement. Plaintiffs cite no language from the 2001 amended judgment that could be construed reasonably as permitting the parties to "stipulate" to new rules inconsistent with previous court orders. Even the 2011 stipulation states that any changes are "subject to the . . . law of this case." Second, the 2001 amended judgment provides a specific method for amending the stipulations: "The amendment of any of these stipulations shall be accomplished by the execution of an amended stipulation signed by counsel of record for all parties and shall become effective upon its filing with the court." Dkt. #217. There is no provision that allows for unilateral amendment. Again, when the parties disagree about whether a change is needed, the proper response is a motion for relief under Rule 60.

Plaintiffs argue that some parts of the 2011 stipulation modify not only previous stipulations, but also previous courts rulings, which is evidence that the parties "understood [their] authority to include [making] amendments to the Final Judgment." Plts.' Br., dkt.

#267, at 12. Although plaintiffs' argument suggests that there may be confusion about the appropriate content of amendments to the stipulation, the parties' intent cannot control the scope of a court order. In any event, I approved the 2011 stipulation, dkt. #181, so it does not represent an example of either side changing the scope of the judgment on its own. If the parties need clarification about issues that may or may not be included in an amendment, they may raise questions to that effect at the appropriate time.

My conclusion that the parties cannot amend the judgment without court approval makes it unnecessary to consider the other three issues, but I will address them briefly for the sake of completeness. With respect to the second issue, whether "the other liberalization amendment" in the 2011 stipulation applies to night deer hunting, defendants point out that the scope of that provision is limited expressly in § 3A, which lists the stipulations that may be amended under this process. The only part of the deer trial stipulation that is listed is Section E, which is titled "Management Authority." However, a review of that section (set forth in full in the background section of this opinion) does not reveal any language related to deer hunting at night specifically or the appropriate scope of plaintiffs' regulations generally. Plaintiffs say that defendants' reading of the 2011 stipulation is "hypertechnical" and "not in accord with" the parties' course of dealing, Plts.' Br., dkt. #267, at 13, but they do not explain how the language of the 2011 stipulation can support a contrary interpretation. Regardless of the parties' actions in the past, I cannot ignore unambiguous language in the stipulation. Lachmund v. ADM Investor Services, Inc., 191 F.3d 777, 789-90 (7th Cir. 1999) (allegations regarding "the parties' course of dealing are insufficient

to overcome the written contracts' unambiguous character"); State v. Grimm, 186 Wis. 154, 202 N.W. 162, 164 (1925) ("A mere course of dealing, even if it grows to a custom, would not be sufficient to vary the terms of a definite and unambiguous contract."); Restatement on Contracts (Second) § 203 ("express terms are given greater weight than . . . course of dealing"). Although an established course of dealing can modify an existing agreement, Matuszak v. Torrington Co., 927 F.2d 320, 324 (7th Cir. 1991), plaintiffs have not provided a convincing argument in support of their position that the parties tacitly modified their stipulation through their conduct.

With respect to the third issue, whether plaintiffs may make changes unilaterally if defendants unreasonably withhold consent, plaintiffs rely on the following language in the 2011 stipulation: "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 . . . ." This provision requires defendants to negotiate reasonably, but it does not say that plaintiffs are entitled to take unilateral action if, in their view, defendants are acting unreasonably. Rather, the provision expressly requires "agreement of the parties" before plaintiffs may issue an order. If I were to adopt plaintiffs' view, that requirement would be read out of the 2011 stipulation. Presumably, plaintiffs would not view any change they proposed as "unreasonable," so their reading of the provision would allow them to decide for themselves in every instance whether they were entitled to make an amendment.

Finally, the fourth issue is whether the Commission's order "provide[s] tribal

members more treaty harvest opportunities consistent with those available under state law to state harvesters." Although plaintiffs acknowledge that the state prohibits the general public from deer hunting at night, they point to the recently enacted law that allows wolf hunting at night. Because "[w]hite-tailed deer are found in the same areas as wolves, and hunters use the same weapons and ammunition to hunt these species," plaintiffs believe the Commission's order is "consistent with" the wolf hunting law. Plts.' Br., dkt. #194, at 20. This is an expansive interpretation that plaintiffs make little effort to support. Particularly when plaintiffs' view on this term is combined with their view about their authority to act unilaterally, it gives plaintiffs an unprecedented amount of discretion to make changes to the judgment and previous stipulations. However, because I have concluded for other reasons that plaintiffs did not have authority to issue the November 2012 order, it is unnecessary to determine the scope of this ambiguous term now.

In their opening brief, plaintiffs advanced an alternative argument that the judgment should be vacated under Rule 60(b)(5) to allow for deer hunting at night, but they conceded at the hearing that their request for preliminary injunctive relief rests entirely on their argument regarding the "other liberalization amendment." Accordingly, I will not address their Rule 60 motion at this time. In addition, because plaintiffs' opposition to defendants' motion to enforce the judgment rests on the same argument, I am granting defendants' motion. Finally, I will direct the clerk of court to set up a scheduling conference before the magistrate judge to determine what further proceedings the parties believe are needed to resolve plaintiffs' Rule 60 motion.

In making this determination, the parties should keep in mind that a motion under Rule 60(b)(5) is a request for equitable relief, which means that I may consider whether the parties have exhausted their good faith efforts to agree on the scope of any amendment to the judgment before I step in to resolve a particular dispute. Farmer v. Brennan, 511 U.S. 825, 847 (1994). A review of the parties' negotiations leading up to the recent motions suggests that there remains a significant possibility of an agreement between the parties. Now that the current hunting season has been removed from the table, I encourage both sides to work together in the coming months to draft a joint motion to modify the judgment in a way that adequately addresses defendants' safety concerns and provides due respect for plaintiffs' treaty rights.

ORDER

IT IS ORDERED that

1. The motion to enforce the judgment filed by defendants State of Wisconsin, Wisconsin Natural Resources Board, Cathy Stepp, Kurt Theide and Tim Lawhern, dkt. #184, is GRANTED. Defendants may enforce Wis. Admin. Code § NR 13.30(1)(q) against plaintiffs until plaintiffs re-enact a regulation that is identical in scope and content to state law or until otherwise ordered by this court.

2. The motion for a preliminary injunction filed by plaintiffs 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, dkt. #193, is DENIED.

3. Defendants' motion in limine and motion to strike, dkt. ##249 and 250, are DENIED as unnecessary.

4. The clerk of court is directed to set up a scheduling conference before the magistrate judge.

Entered this 17th day of December, 2012.

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