

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,

v.

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

Defendants.

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ORDER

74-cv-313-bbc

A hearing on plaintiffs' motion under Fed. R. Civ. P. 60(b)(5) for relief from the judgment is scheduled for July 22, 2013. The issue for the hearing is whether the judgment should be amended to allow plaintiffs to engage in nighttime deer hunting on ceded territory under certain circumstances.

Plaintiffs have filed two motions in limine, both seeking to limit the testimony of defense expert Timothy Lawhern. Dkt. ## 318 and 321. First, they say that Lawhern



should not be allowed to offer opinions about three issues because defendants failed to disclose these opinions 90 days before the hearing. These three issues are: (1) the “group hunting” provisions in plaintiffs’ revised regulations; (2) the importance of wearing blaze orange when hunting at night; and (3) nighttime hunting outside Wisconsin. Second, plaintiffs say that Lawhern should be precluded from testifying that nighttime hunting would be safer if it began after the gun deer season because Lawhern is not qualified to offer that opinion. I am denying both motions.

With respect to the first motion, the parties agree that Lawhern was not required to file an expert report. However, under Fed. R. Civ. P. 26(a)(2)(C), expert witnesses who do not provide a report must still disclose “the subject matter” of their testimony and “a summary of the facts and opinions to which the witness is expected to testify.” Plaintiffs argue that defendants’ disclosures did not include the three subjects identified above.

In their response, defendants “stipulate that [they] will not be asking Mr. Lawhern questions seeking an expert opinion about the relative safety of nighttime shooting programs,” dkt. #325 at 5 n.2, so that aspect of plaintiffs’ motion is moot. With respect to the “group hunting” provisions and wearing blaze orange, defendants do not point to any part of their disclosures that identifies those issues as subjects of expert testimony. However, a violation of Rule 26 does not require exclusion of the testimony at issue if the violation is harmless. Plaintiffs acknowledge that they were able to cross examine Lawhern about these opinions during his deposition in May 2013. Although plaintiffs say that “counsel was forced to respond to these new opinions ‘on the fly’ without the benefit of pre-deposition



preparation,” Plts.’ Br., dkt. #319 at 6, they do not identify any questions they were unable to ask or any documents they need but have been unable to obtain to respond to these opinions. More generally, they do not identify any way in which their own expert will be at an unfair disadvantage at the hearing because of any failure by defendants to disclose these opinions sooner. Particularly because the arguments on both sides have been evolving (plaintiffs acknowledge that the “group hunting” issue relates to regulations that they did not publish until February 2013), I see no reason to exclude what might otherwise be relevant information about the safety of nighttime deer hunting.

With respect to plaintiffs’ argument that Lawhern is not qualified to give an opinion about the relative safety of nighttime hunting at different times of the year, I will tell plaintiffs the same thing I told defendants when they objected to the qualifications of plaintiffs’ expert to give certain opinions. Plaintiffs are free to cross examine Lawhern about the foundation for his opinion, but I see no reason to exclude the opinion now in the context of an issue that will be resolved by the court rather than a jury.

#### ORDER

IT IS ORDERED that plaintiffs’ motions to limit the testimony of expert Timothy



Lawhern at the July 22, 2013 hearing, dkt. ##318 and 321, are DENIED.

Entered this 8th day of July, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge