

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

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

Plaintiffs,

v.

Case No. 74-C-313-C

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

Defendants.

PROPOSED FINDINGS OF FACT IN SUPPORT OF DEFENDANTS' MOTION
TO ENFORCE PROHIBITION ON SHINING DEER

With respect to the defendants' motion for an order confirming that the defendants may immediately resume enforcement of the prohibition on off-reservation deer hunting while shining (deer shining) in Wis. Admin. Code § NR 13.30(1)(q) (incorporating Wis. Stat. § 29.314 by reference) against members of the plaintiff Tribes who violate that law, the Court finds:

1. In 1989 this Court conducted a trial (the Deer Trial) on the subject of whether and how the defendants might regulate the exercise of off-reservation deer hunting treaty rights by plaintiff Tribal members. The Court's decision on the merits of issues litigated in the Deer Trial

was published as *Lac Courte Oreilles Band of Indians v. Wisconsin*, 740 F. Supp. 1400 (W.D. Wis. 1990) (*LCO VII*).

2. A primary issue addressed by the parties and the Court in the Deer Trial was whether the State of Wisconsin could enforce its prohibition on deer shining against members of the plaintiff tribes when they engage in off-reservation deer hunting. As the plaintiffs framed the issue prior to trial:

... the following ... contested issues ... will be tried to the court during the deer regulatory phase trial ...

6. Whether as a matter of law and fact plaintiffs' members may be prohibited from hunting deer at night when such method is permitted under state law for non-Indians for other species.

Dkt. # 1114, Plaintiffs' Statement of Contested Issues (copy attached as Ex. 1).

3. In the course of the Deer Trial, the plaintiffs argued that they should be able to shine and hunt deer at night. The primary basis for their argument was their contention that they should be allowed to hunt and shine deer because state law authorized night hunting and shining of certain predator and nuisance species like coyotes. As the drafter of the Tribes' 1989 Model Code deer shining provision testified:

Q: Before drafting the deer shining provision in the Model Code you didn't consult with any experts in hunter safety either, did you?

A: Was that on shining?

Q: On shining.

A: No, I didn't.

Q: Instead you relied simply on your assumption that deer hunting by shining presented no dangers in addition to those that the state tolerates for raccoon and fox and coyote hunting at night, isn't that correct?

A: I looked to the provision of Chapter 29 that define shining under state law, and I presumed that the safety involved in that was equivalent to that involved with deer, yes.

Dkt. # 1124: 3-26, Tr. of Testimony of James Zorn (copy of excerpt attached as Ex. 2).

4. In the Deer Trial this Court found that:

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] code permits shining ... fox, coyote ... and other unprotected species. ... 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. ... 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.

LCO VII at 1406-08.

5. The Court also found that night hunting presents a "great danger . . . to public safety." *LCO VII*, 740 F. Supp. at 1423.

6. In the Deer Trial this Court ruled that:

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.

...

Defendants may enforce the prohibition on shining of deer contained in their proposed § NR 13.30(1)(q) [incorporating Wis. Stat. § 29.324 by reference], until such time as the plaintiff tribes adopt regulations identical in scope and content to § NR 13.30(1)(q).

LCO VII at 1423, 1427.

7. In the final judgment entered in this case on March 19, 1991, the Court again specifically addressed the subject of the State's authority to enforce its prohibition on deer shining:

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, on the condition that plaintiffs enact and keep in force an effective plan of self-regulation that conforms to the orders of the court.

Lac Courte Oreilles Indians v. State of Wis., 775 F. Supp. 321, 323 (W.D. Wis. 1991) (Final Judgment);

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

Id. at 324; and

Plaintiffs' failure to enact an effective plan of self-regulation that conforms with the orders of the court, or their withdrawal from such a plan after enactment, or their failure to comply with the provisions of the plan, if established in this court, will subject them or any one of them to regulation by defendants.

Id., at 325.

8. Following this Court's issuance of the Deer Trial decision, the plaintiff Tribes revised the Off-Reservation Model Code and adopted tribal deer shining regulations identical in scope and content to Wis. Admin. Code § NR 13.30(1)(q).

9. On April 2, 2012, the State of Wisconsin enacted 2011 Act 169. Among other things, Act 169 legalized certain forms of night hunting and shining of wolves. Section 21 of the

Act also required the Wisconsin Department of Natural Resources (DNR) to "promulgate any rules necessary to implement" the new wolf hunting law. Lawhern Aff., ¶¶ 6, 9 & Ex. B.

10. As a result of the enactment of Act 169 in April 2012, the Wisconsin statutes relevant to night hunting wolves now read, in pertinent part:

29.314(4) SHINING WILD ANIMALS WHILE HUNTING OR POSSESSING WEAPONS PROHIBITED. (a) *Prohibition*. No person may use or possess with intent to use a light for shining wild animals while the person is hunting or in possession of a firearm, bow and arrow or crossbow.

(b) *Exceptions*. This subsection does not apply:

...

2. To a person who possesses a flashlight or who uses a flashlight at the point of kill while hunting on foot for wolves or for raccoons, foxes, coyotes, or other unprotected animals during the open season for the animals hunted.

Lawhern Aff., ¶¶ 6-7; Wis. Stat. § 29.314 (copy attached as Ex. 3).

11. On or about August 18, 2012 the DNR promulgated certain rules implementing the wolf night hunting provisions of Wisconsin 2011 Act 169. Lawhern Aff., ¶ 5 & Ex. C.

12. The forms of night hunting of wolves authorized by 2011 Wisconsin Act 169 and the administrative regulations promulgated under it are at least as restrictive and at least as protective of public safety as the Wisconsin laws providing for the night hunting of coyotes that the Court considered in the 1989 Deer Trial for reasons including, but not limited to, the following:

- a. The legal wolf night hunting season is open a maximum of approximately 3 months, rather than being open all year as for coyotes. *Id.*, ¶ 9 & Ex. E;
- b. The night hunting season for wolves in a particular management unit may never open if there is no harvestable surplus of wolves remaining in the management zone after the conclusion of the traditional 9-day deer hunting season on November 25, 2012. As of November 20, 2012, during this first year of legalized

wolf hunting, this factor had already foreclosed the night hunting of wolves in two of Wisconsin's six management zones. *Id.*, ¶ 11.

- c. Wolves may only be hunted at night from a stationary position, over bait or with the use of predator calling techniques. These requirements do not exist for hunting coyote at night. *Id.*, ¶ 9b and Ex. E.

13. On November 9, 2012, James E. Zorn, Executive Administrator of the Great Lakes Indian Fish & Wildlife Commission (GLIFWC), an agency of the plaintiff Tribes, advised the defendants that the plaintiff Tribes intended to revise their off-reservation hunting codes to allow the various forms of deer shining described in "proposed Commission Order 2012-05." In that letter, Mr. Zorn stated that the proposed order would "be effective on November 26, 2012." Stepp Aff., Ex. A.

14. The proposed tribal code revisions are not "identical in scope and content to § NR 13.30(1)(q)" within the meaning of the Final Judgment. Instead of prohibiting deer hunting while shining, they would authorize it and do so in a manner which is less stringent in terms of safety regulation than in any other off-reservation area in this country. Lawhern Aff., ¶¶ 8-9 & Ex. E.

15. The plaintiffs' asserted justification for revising their tribal off-reservation hunting codes is that doing so is "consistent with the recent enactment of 2011 Act 169, which changed state hunting hours for wolves and provided for the use of a light at the point of kill." Stepp Aff., ¶ 4 & Ex. A at 1.

16. By letter dated November 15, 2012, defendant DNR Secretary Cathy Stepp advised the GLIFWC Executive Administrator that for various reasons the defendants would not agree to the Tribes' proposed legalization of deer shining and she asked Mr. Zorn to advise her,

before the close of business on Monday November 19, 2012, if the Tribes had reconsidered and decided not to revise their codes in this manner. Stepp Aff., ¶ 5 & Ex. B.

17. At approximately 5:00 p.m. on November 19, 2012, Secretary Stepp learned that a GLIFWC attorney had just telephoned a DNR Bureau of Legal Services attorney to say, in response to her November 15, 2012 letter, that GLIFWC had not yet issued the proposed deer shining order and, contrary to Mr. Zorn's representation in his November 9, 2012 letter, GLIFWC did not know when the deer shining order would be issued. Stepp Aff., ¶¶ 5, 7.

18. On November 20, 2012, in response to the GLIFWC communication of November 19, 2012, referred to in the preceding paragraph, Secretary Stepp wrote Mr. Zorn a letter in which she reiterated the state's opposition to the Tribes' deer shining proposal, again asked GLIFWC not to issue an order purporting to authorize off-reservation deer shining and hunting, and, in the interest of protecting public safety, requested a minimum of one week's notice prior to the issuance of any GLIFWC order purporting to authorize off-reservation deer shining. Stepp Aff., ¶ 8 & Ex. C.

19. On November 21, 2012, GLIFWC advised the defendants that it had issued an order purporting to authorize off-reservation deer shining in the ceded territory beginning on November 26, 2012. Stepp Aff., ¶ 9 & Ex. D.

20. The final signed Order does not adequately address the safety concerns identified by Division Administrator Lawhern. Stark Aff. ¶ 6.

21. At most, only several dozen wolves may be lawfully harvested by means of shining in Wisconsin during this winter's hunting season. Lawhern Aff., ¶ 11. If tribal off-reservation deer hunting while shining is allowed, however, it is reasonable to expect that many

more deer will be shot at night than wolves, given the much larger tribal deer quota and the significant incentive to hunt deer at night. Lawhern Aff., ¶¶ 12-13; *LCO VII* at 1408.

22. Hunting deer at night presents a great danger to public safety. *LCO VII* at 1423. The defendants have identified a list of specific safety concerns associated with the Tribes' most recent deer shining proposal. Lawhern Aff., ¶ 10 & Ex. F.

23. Aside from the risks to the public presented by unlawful night hunting, the enforcement of laws prohibiting deer shining is also inherently dangerous for law enforcement officers and for hunters because the investigations and arrests almost always occur in the dark when visibility is poor, and because they involve violators armed with high-powered firearms. Lawhern Aff., ¶ 14. State law enforcement officials also reasonably believe that if there are unresolved disputes about their authority to investigate and arrest persons engaged in deer shining, the potential for dangerous interactions with hunters will be increased. *Id.*

Respectfully submitted this 21st day of November, 2012.

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