

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, a federally recognized Indian tribe, on its own behalf and as *parens patriae* for its members,

BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS OF THE BAD RIVER RESERVATION, a federally recognized Indian tribe, on its own behalf and as *parens patriae* for its members,

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, a federally recognized Indian tribe, on its own behalf and as *parens patriae* for its members,

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF THE LAC DU FLAMBEAU RESERVATION OF WISCONSIN, a federally recognized Indian tribe, on its own behalf and as *parens patriae* for its members,

ST. CROIX CHIPPEWA INDIANS OF WISCONSIN, a federally recognized Indian tribe, on its own behalf and as *parens patriae* for its members, and

SOKAOGON CHIPPEWA COMMUNITY, a federally recognized Indian tribe, on its own behalf and as *parens patriae* for its members,

Plaintiffs,

-v.-

PRESTON D. COLE, in his official capacity as the Secretary of the Wisconsin Department of Natural Resources,

DR. FREDERICK PREHN, in his official capacity as a person who claims to be, and is acting as, both the Chair and a member of the Wisconsin Natural Resources Board,

Civil Case No.:

<p>GREGORY KAZMIERSKI, in his official capacity as the Vice Chair and a member of the Wisconsin Natural Resources Board,</p> <p>BILL SMITH, in his official capacity as the Secretary and a member of the Wisconsin Natural Resources Board,</p> <p>SHARON ADAMS, in her official capacity as a member of the Wisconsin Natural Resources Board,</p> <p>WILLIAM BRUINS, in his official capacity as a member of the Wisconsin Natural Resources Board,</p> <p>TERRY HILGENBERG, in his official capacity as a member of the Wisconsin Natural Resources Board,</p> <p>MARCY WEST, in her official capacity as a member of the Wisconsin Natural Resources Board,</p> <p>Defendants.</p>	
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COMPLAINT

Plaintiffs Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin, Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin, St. Croix Chippewa Indians of Wisconsin, and Sokaogon Chippewa Community (collectively, “Plaintiffs” or the “Ojibwe Tribes”), through their undersigned counsel, allege as follows:

NATURE OF CASE

1. Plaintiffs ask this Court to stop a wolf hunt, scheduled to begin on November 6, 2021, that follows on the heels of a hunt earlier this year, which was described by a member of the staff of the Wisconsin Department of Natural Resources (“DNR”) as an “abomination.” Defendants’ actions with respect to the upcoming hunt violate, and threaten to continue to

violate, Plaintiffs' rights under long-standing treaties with the United States. *See* Treaty with the Chippewa, 7 Stat. 536 (1837) ("1837 Treaty") and Treaty with the Chippewa, 7 Stat. 591 (1842) ("1842 Treaty").

2. This Court is familiar with the treaty rights at issue. Over many years, this Court has considered and adjudicated the Ojibwe Tribes' off-reservation usufructuary rights under the 1837 and 1842 Treaties (the cases referenced herein are collectively referred to as the "LCO Litigation"). Each of the Plaintiffs here were parties in the LCO Litigation. The LCO Litigation established several key principles that have been violated by the Defendants. First, in setting a quota for the upcoming wolf hunt, Defendants purposefully and knowingly discriminated against the Ojibwe Tribes by acting to nullify their share. Second, the Defendants failed to use sound biological principles in establishing the quota for the upcoming hunt. Finally, by failing to put in place adequate safeguards to protect the Ojibwe Tribes' share, Defendants have managed, and are continuing to manage, wolf hunting in Wisconsin in a manner that violates Plaintiffs' treaty-protected rights.

JURISDICTION AND VENUE

3. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1362 because the action arises under the Constitution, treaties, and laws of the United States, and is brought by federally recognized Indian tribes.

4. Each of the Plaintiffs maintains a government-to-government relationship with the United States and has a governing body that is duly recognized by the Secretary of the Interior.

5. This Court may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-2202.

6. Venue is proper in the Western District of Wisconsin and in this Court under 28 U.S.C. § 1391(b).

PARTIES

Plaintiffs

7. Plaintiff Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin (“Red Cliff Band”) is a federally recognized tribe of Ojibwe people and a successor to the signatory bands of the 1837 and 1842 Treaties. It occupies a reservation on the shores of Lake Superior in Bayfield County, Wisconsin, that encompasses approximately 12,500 acres.

8. Plaintiff Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation (“Bad River Band”) is a federally recognized tribe of Ojibwe people and a successor to the signatory bands of the 1837 and 1842 Treaties. The Bad River Band’s reservation is in northern Wisconsin in Ashland and Iron counties, on the south shore of Lake Superior. The reservation has a land area of over 124,000 acres.

9. Plaintiff Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin (“LCO”) is a federally recognized tribe of Ojibwe people and a successor to the signatory bands of the 1837 and 1842 Treaties. LCO’s reservation land is in west-central Sawyer County, Wisconsin, with a land area of approximately 76,000 acres.

10. Plaintiff Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin (“Lac du Flambeau Band”) is a federally recognized tribe of Ojibwe people and a successor to the signatory bands of the 1837 and 1842 Treaties. The tribe’s reservation lies mostly in the town of Lac du Flambeau in south-western Vilas County, Wisconsin, and in the town of Sherman in south-eastern Iron County, Wisconsin. The reservation has a land area of approximately 86,000 acres.

11. Plaintiff St. Croix Chippewa Indians of Wisconsin (“St. Croix”) is a federally recognized tribe of Ojibwe people and a successor to the signatory bands of the 1837 and 1842 Treaties. The tribe is located in northwestern Wisconsin, along the St. Croix River valley and watershed. The lands constituting the St. Croix reservation (approximately 4,600 acres) are mostly in Burnett County.

12. Plaintiff Sokaogon Chippewa Community, or the Mole Lake Band of Lake Superior Chippewa (the “Mole Lake Band”) is a federally recognized tribe of Ojibwe people and a successor to the signatory bands of the 1837 and 1842 Treaties. The tribe’s reservation is located partly in the community of Mole Lake in Forest County, Wisconsin. Mole Lake Band’s reservation lands have an area of approximately 4,900 acres.

Defendants

13. Defendant Preston D. Cole is sued in his official capacity as the Secretary of the Wisconsin Department of Natural Resources. The DNR is an agency of the State of Wisconsin and was created by Wis. Stat. § 15.34(1). The agency has the authority to promulgate rules “to provide an adequate and flexible system for the protection, development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources in this state.” Wis. Stat. §§ 23.09(1) and 23.09(2). The DNR is also responsible for establishing and maintaining open and closed seasons for fishing and hunting “that will conserve the fish and game supply and ensure the citizens of this state continued opportunities for good fishing, hunting and trapping.” Wis. Stat. § 29.014(1).

14. Defendant Dr. Frederick Prehn is sued in his official capacity as a person who claims to be, and is acting as, both the Chair and a member of the Wisconsin Natural Resources

Board (“NRB” or “Board”). The NRB is a seven-member body that directs and supervises the DNR. *See* Wis. Stat. §§ 15.34(1) and 15.34(2).

15. Defendant Gregory Kazmierski is sued in his official capacity as the Vice Chair and a member of the NRB.

16. Defendant Bill Smith is sued in his official capacity as the Secretary and a member of the NRB.

17. Defendant Sharon Adams is sued in her official capacity as a member of the NRB.

18. Defendant William Bruins is sued in his official capacity as a member of the NRB.

19. Defendant Terry Hilgenberg is sued in his official capacity as a member of the NRB.

20. Defendant Marcy West is sued in her official capacity as a member of the NRB.

ALLEGATIONS

I. THE OJIBWE TRIBES’ TREATY RIGHTS

21. The Ojibwe (or Chippewa) are an Anishinaabe people based largely in the upper Midwest states of Wisconsin, Michigan, and Minnesota, as well as portions of Canada.

Wisconsin is home to six bands of Ojibwe, all of which are Plaintiffs in this action. Each of the bands is a federally recognized tribe whose members are entitled to exercise usufructuary or use rights, including rights to hunt game, fish, and gather from lands, as well as other privileges both on- and off-reservation within the territories ceded by the bands through a series of treaties with the United States government.

A. The Ojibwe Tribes' Treaty Relationship with the United States

22. The Ojibwe first entered into a treaty with the United States in 1825. Treaty of Prairie du Chien, 7 Stat. 272 (1825) (“Treaty of Prairie du Chien”). This treaty did not involve land cessions, but delineated boundaries between a number of tribes.¹ The Treaty of Prairie du Chien provided, among other things, that “no tribe shall hunt within the acknowledged limits of any other without their assent, but it being the sole object of this arrangement to perpetuate a peace among them, and amicable relations being now restored, the Chiefs of all the tribes have expressed a determination, cheerfully to allow a reciprocal right of hunting on the lands of one another, permission being first asked and obtained, as before provided for.” *Id.*, Art. 13. Thus, the United States in 1825 acknowledged that the Ojibwe and other tribes managed hunting activities within their respective territories and had the authority to cooperatively allocate their resources with one another as they saw fit.

23. Governor of the Wisconsin Territory Henry Dodge convened further treaty negotiations with members of the Ojibwe Tribes in July 1837. Dodge sought to obtain tribal land cessions encompassing, among other areas, a broad swath of land that today constitutes western Wisconsin north of the Wisconsin River so that the United States could exploit the area’s extensive pine forests for lumber. In their resulting 1837 treaty with the United States, the Ojibwe Tribes ceded a vast section of territory but, at their insistence, retained their right to hunt, fish, and gather on the ceded lands. *See Treaty with the Chippewa*, 7 Stat. 536 (1837) (“1837 Treaty”), Art. 5 (“The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed [sic] to the Indians, during

¹ The 1825 Treaty of Prairie du Chien was signed by representatives of the Sioux, Sac and Fox, Menominee, Ioway, Winnebago, Chippewa, Ottawa, Potawatomi and the United States.

the pleasure of the President of the United States.”); *See also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

24. A few years later, the United States reinitiated treaty negotiations with the Ojibwe Tribes, this time focusing on obtaining a cession of land along the shore of Lake Superior, which the United States desired for its deposits of minerals including copper. In the resulting 1842 treaty, the Ojibwe agreed to cede this large tract but again retained their right to hunt, fish, and gather, among other things, on the ceded lands. *See Treaty with the Chippewa*, 7 Stat. 591 (1842) (“1842 Treaty”), Art. II. (“The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and inter course [sic] with the whites, until otherwise ordered by Congress.”).

25. The usufructuary rights retained by the Ojibwe Tribes in these treaties are known as “reserved rights” because, under the established reserved-rights doctrine of federal Indian law, Indian treaties grant rights not to tribes, but rather to the United States. The inherent sovereign rights of tribes are retained unless they have been explicitly relinquished via treaty. *See United States v. Winans*, 198 U.S. 371, 381-82 (1905) (recognizing that a treaty is “not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted”); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, No. 74-cv-313-bbc, 2015 WL 5944238, at *2 (W.D. Wis. Oct. 13, 2015) (recognizing that Ojibwe Tribes “*retained* their hunting rights, including the right to hunt at night, when they ceded thousands of acres of northern Wisconsin to the United States in the early part of the nineteenth century”) (emphasis in original).

26. In interpreting the terms of the 1837 and 1842 Treaties, several additional principles of federal Indian law provide important guidance. First, under the United States Constitution, treaties are “the supreme Law of the Land.” U.S. Const. art. VI, § 2. Furthermore, Indian treaties are not interpreted based on their plain language, but rather by using special canons of construction. One of those canons provides that a treaty between the United States and Indian tribes must be interpreted in the way that the tribes would have understood it at the time the treaty was negotiated. *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 676 (1979). Courts routinely look to contemporaneous documents to ascertain what was said by the treaty signatories before, during, and after the treaty was executed to determine this Indian understanding. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 356 (7th Cir. 1983) (affirming trial court findings regarding “what the *Indians* believed the treaty to mean” based on “the Indians’ statements during the negotiations”) (emphasis in original). Further, Indian treaties are to be interpreted liberally in favor of the Indians, and any ambiguities are to be resolved in their favor. *Mille Lacs*, 526 U.S. at 200.

27. The history surrounding the Ojibwe Tribes’ 1837 and 1842 Treaties demonstrates that the tribes recognized that their reserved usufructuary rights included the rights to hunt, fish, and gather. That same history shows that the tribes also retained the right to conserve and protect the key species they relied upon for their livelihood, to maintain healthy populations of those species, and to ensure their continued existence. Thus, for example, tribal representatives stated during the 1837 Treaty negotiations “[t]hat you”—meaning the United States and its citizens—“may not destroy the [Wild] Rice in working the timber.” *Statement Made by the Indians: A Bilingual Petition of the Chippewas of Lake Superior, 1864* 15 (John D. Nichols, ed. 1988). Similarly, recognizing the implications of the United States planned lumbering activities, tribal

representatives explicitly retained their right to conserve and protect the oak and maple trees from which the Ojibwe derived important food sources and other values. *See id.* (“I will sell him the Pine Timber as he requests me to . . . [but] I hold in my hand the Maple Timber, also the Oak Timber[.] . . . These I do not sell.”); *see also* Ronald N. Satz, *Chippewa Treaty Rights* App. 1 at 142 (1996) (journal of 1837 treaty negotiations documenting tribal negotiator’s statement that, “[o]f all the country that we grant you we wish to hold on to a tree where we get our living The Chiefs will now show you the tree we want to reserve. This is it (placing an oak sprig upon the Table near the map).”).

28. Thus, as this Court has aptly summarized in interpreting the 1837 and 1842 Treaties, they “grant the Indians the right to live on the ceded lands as they had lived before the treaties were signed. That way of life included hunting, fishing, trapping and gathering wild rice and maple sap as a means of providing food for themselves . . . , in addition to having a place of residence.” *United States v. Bouchard*, 464 F. Supp. 1316, 1358 (W.D. Wis. 1978), *aff’d in relevant part and rev’d on other grounds sub nom. Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 700 F.2d at 341.

29. This reservation of “the right to live on the ceded lands as they had lived before the treaties were signed,” *id.*, was intentional on the part of the Ojibwe, and demonstrates that the Ojibwe expected to remain and coexist with non-Indians. *See* James M. McClurken, et al. *Fish in the Lakes, Wild Rice and Game in Abundance*, p. 28 (1st ed. 2000).

30. At the time the 1837 and 1842 Treaties were signed, the Ojibwe system was one of reciprocity, where decisions were made by consensus, and resources were apportioned on an egalitarian basis in such a way as to avoid exhaustion of natural resources in any one area. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (“LCO III”)*, 653 F.

Supp. 1420, 1425-26 (1987). The various bands moved from place to place within their territory, depending upon the season, and the United States recognized that the ceded lands had previously been held in common by the Ojibwe, for their shared use. *See e.g.*, 1842 Treaty, Article V (“Whereas, the whole country between Lake Superior and the Mississippi, has always been understood as belonging in common to the Chippewas, party to this treaty; . . . it is agreed that all the annuity due by the said treaty, as also the annuity due by the present treaty, shall henceforth be equally divided among the Chippewas of the Mississippi and Lake Superior, party to this treaty, so that every person shall receive an equal share.”).

B. Key Principles of the Tribes’ Treaty Rights

31. The federal courts have repeatedly addressed the Ojibwe Tribes’ rights under the 1837 and 1842 Treaties. This Court and the Seventh Circuit Court of Appeals have done so in long-running litigation that began with *United States v. Bouchard*, 464 F. Supp. 1316 (W.D. Wis. 1978), and proceeded through several phases to a final judgment in the LCO Litigation, *see e.g.*, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 775 F. Supp. 321 (W.D. Wis. 1991), with subsequent proceedings to modify that judgment, *see e.g.*, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 760 F.3d 543 (7th Cir. 2014), *on remand to* 2015 WL 5944238 (W.D. Wis. Oct. 13, 2015) (both addressing Tribal usufructuary right to conduct night hunting). Although the LCO Litigation did not define the full scope of the Ojibwe Tribes’ treaty rights, it repeatedly affirmed the continued existence of those rights, *see Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 700 F.2d at 344-45; *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 176-177 (1999) (affirming rights under 1837 Treaty). The LCO Litigation established several key principles.

1. The Tribes' Right to An Equal Share

32. Under the 1837 and 1842 Treaties, all harvestable resources within the Tribes' ceded territory are, with limited exceptions, to be apportioned equally between the Ojibwe bands and non-Indians, and no portion of the harvestable resources (e.g., those harvestable resources located upon private land) may be exempted from the apportionable harvest. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 740 F. Supp. 1400, 1426 (W.D. Wis. 1990). The Ojibwe reserved to themselves the right to hunt, fish and gather throughout the ceded territory, as well as other rights and privileges of occupancy. At the time the treaties were signed, the Ojibwe made use in various ways of almost all the flora and fauna in the region. *LCO III*, 653 F. Supp. at 1426-29. Accordingly, the LCO Litigation established that the Ojibwe Tribes retain the right to a half share of virtually all the natural resources in the ceded territory. To calculate a treaty quota, the parties must begin with the total of the estimated harvest of the resource in each harvesting area, including the portion of the resource believed to inhabit private lands, and divide it equally. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 740 F. Supp. at 1418.

2. No State Discrimination Against Exercise of Tribal Usufructuary Rights

33. Under this Court's interpretation of the 1837 and 1842 Treaties, Wisconsin maintains the responsibility and management authority for the natural resources in the ceded territory based upon its fiduciary obligation to manage the natural resources for the benefit of current and future users. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 707 F. Supp. 1034, 1060 (W.D. Wis. 1989) (citing *LeClair v. Swift*, 76 F. Supp. 729 (E.D. Wis. 1948) (holding that it is the right and the duty of the State, as trustee for the people, to preserve fish and wildlife for the benefit of the general public by regulating or prohibiting the taking of same, as long as such action does not violate any conflicting federal law); and *State v. Erickson*, 101 Wis.2d 224, 303 N.W.2d 850 (Wis. Ct. App. 1981) (holding that the preservation

of a natural resource of the State is an important governmental interest)). As a sovereign, the state holds the wild animals and birds in trust for the benefit of the people of the state, and conservation of those animals and birds for the good of the general public is an appropriate exercise of the state's police power. *State v. Herwig*, 17 Wis. 2d 442, 446 (1962).

34. However, the State cannot regulate the Ojibwe exercise of off-reservation usufructuary rights unless the regulations are “reasonable and necessary for conservation of a particular species or resource” or if the particular regulation is necessary to protect the public health and safety of its citizens, and the regulations “must not discriminate against the Indians.” *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 668 F. Supp. 1233, 1237, 1242 (W.D. Wis. 1987). This latter requirement means that “regulations, in language and in effect, neither discriminatorily harm the Indian harvest nor discriminatorily favor non-treaty harvesters.” *Id.* at 1237; *see also Dept of Game of Washington v. Puyallup Tribe*, 414 U.S. 44, 48 (1973) (“There is discrimination here because all Indian net fishing is barred and only hook-and-line fishing, entirely pre-empted by non-Indians, is allowed”).

35. The Great Lakes Indian Fish and Wildlife Commission (“GLIFWC”) is an inter-tribal natural resource organization established in 1984 to assist with development, management and enforcement of Ojibwe off-reservation treaty rights and associated conservation regulations. GLIFWC operates under a constitution ratified by each member tribe, and member tribes have delegated to GLIFWC the authority to enforce tribal ordinances governing off-reservation harvest by tribal members. One of GLIFWC's two committees is the Voigt Inter-Tribal Task Force Committee, which has primary responsibility for intertribal co-management and regulation of off-reservation land and resources in the territories ceded under the 1837 and 1842 Treaties. Plaintiffs all are GLIFWC member tribes, and while each member tribe retains the authority to

enact its own off-reservation harvest regulations, those regulations may not be less restrictive than those recommended by the Voigt Task Force or those in the Model Off-Reservation Conservation Code. Among other things, the Voigt Task Force ensures that the combined harvest of any species by the member tribes does not exceed the overall harvest goals and quotas for each species. GLIFWC has authority to terminate the harvest of any species if the harvest is likely to exceed harvest goals or quotas or would otherwise result in biological harm. *See, e.g., Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 707 F. Supp. at 1050-51.

3. Management Based on Sound Biological Principles to Ensure Conservation

36. This Court has repeatedly established that the scope and extent of the parties' respective rights under the 1837 and 1842 Treaties are dependent on management based on sound biological principles to ensure conservation of affected species. For example, this Court ruled that the Tribes are entitled to regulate their members' off-reservation usufructuary right to harvest walleye and muskellunge "on the condition that they enact and keep in force a management plan that provides for the regulation of their members in accordance with biologically sound principles necessary for the conservation of the species being harvested." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 775 F. Supp. at 323. This Court has further held that a reliable population estimate is an essential aspect of a management plan formulated in accordance with biologically sound principles, specifying, for example, that the Tribes' management plan for walleye and muskellunge must not authorize "highly efficient methods of fishing," such as spearing and all forms of netting, on a particular lake "unless that lake has a reliable population estimate" based on scientifically legitimate methods. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 707 F. Supp. at 1056-57.

37. These conditions are consistent with this Court's own approach in resolving disputes between the Tribes and the State of Wisconsin regarding various species-specific issues

under the 1837 and 1842 Treaties. In adjudicating such issues, the Court has conducted a careful review of certain factors including: the population, habitat, health, abundance, and uses of species at issue; the parameters and purposes of the applicable state or tribal regulations and practices; the management and harvest goals of the parties; the methods of harvest, including effectiveness of each method; and the methods used to estimate population and take of the species at issue. *See id.* at 1039-52 (reviewing the nature of the walleye and muskellunge resource, fishing methods, means of determining fish populations and fish harvests, and tribal methods of fisheries management and conservation); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 740 F. Supp. at 1403-13 (reviewing the biology, management systems, hunting areas, harvest history, hunting seasons and hours, and hunting weapons and safety with respect to white-tailed deer, fur-bearers, and small game).

38. This Court's approach underscores the importance of biologically sound management in securing the parties' respective rights and enforcing their obligations under the 1837 and 1842 Treaties. For example, under this Court's precedent, if the Tribes act pursuant to a tribal management plan for walleye and muskellunge that regulates their members' activities in accordance with "biologically sound principles necessary for the conservation of the species being harvested," then the State may not interfere in the Tribes' management of their off-reservation harvest of these species. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 775 F. Supp. at 323. Such Tribal regulation of their own members' exercise of their treaty rights "narrows [the State's] management options to a significant degree, and imposes burdens on" the State. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 707 F. Supp. at 1060. However, were the Tribes to attempt to authorize the taking of these species without a tribal management plan based on sound biological principles, including use of a

reliable population estimate, then their failure to implement such important conservation measures would “subject them, or any one of them, to regulation by [the State].” *Id.* at 1060.

39. The interest of the Tribes under the 1837 and 1842 Treaties, no less than that of the State, depends on management based on sound biological principles, including use of a reliable population estimate. This is because conservation of affected species is essential to securing the Tribes’ treaty right to an equal share of harvestable resources, and to honoring the Tribes’ treaty right to manage their members’ take, including in such a way as to conserve and protect the key species they continue to rely upon for their livelihood.

II. THE GRAY WOLF (MA’IINGAN)

40. The gray wolf (*Canis lupus*)—or Ma’iingan in the Ojibwe language—is the largest wild member of the dog family (*Canidae*). Despite its name, a gray wolf’s fur can range from white to shades of gray to coal black. Gray wolves are territorial and social animals that exhibit group hunting behavior, normally living in packs of two to eight individuals led by dominant, or “alpha,” male and female wolves. Wolves primarily prey on medium and large mammals.

41. Within the United States, including Wisconsin, studies of gray wolves show that wolves’ predations may significantly shape their ecosystems by altering the numbers and behavior of prey species, promoting biodiversity and overall ecosystem health. For instance, a scientific study published in 2015 documented dramatically reduced foraging impacts of deer on forest vegetation in areas of high wolf use in Wisconsin, resulting in greater growth of maple saplings and rare forbs that were otherwise subjected to intense browsing by deer. *See* Fligel, et al., *Natural and experimental tests of trophic cascades: gray wolves and white-tailed deer in a Great Lakes forest*, *Oecologia* (Dec. 2015). Similarly, a study published in 2013 found that percentage cover and species richness of forbs and shrubs was markedly higher in areas of high

wolf presence in northern Wisconsin, again because of the impact that wolf presence and predation had on deer foraging behavior. *See Callan, et al., Recolonizing wolves trigger a trophic cascade in Wisconsin, Journal of Ecology* (June 2013). Similar ecological ripple effects of wolf presence have been documented in the form of increased abundance of snowshoe hares and foxes in high-wolf-use areas in Wisconsin and Michigan, resulting from reduced coyote predation on these species in areas heavily used by wolves. *See Flagel, et al., Fear and loathing in a Great Lakes forest: cascading effects of competition between wolves and coyotes, 98 Journal of Mammalogy* 77 (Oct. 2016).

42. Gray wolves reach sexual maturity when they are 22 months old but generally only the alpha male and female in a pack breed and produce pups. Breeding takes place between late January and early March. Pups are born in early to mid-April. A female gray wolf typically has 4 to 8 pups, which remain at the wolves' den site for 6 to 8 weeks before being moved to rendezvous sites where the pups are kept while the adults in the pack hunt for food. By September and October, when the pups have grown large enough to travel with the adults in the pack, the pack members move together throughout their territory.

43. Historically, gray wolves were found throughout North America. With European settlement, however, came widespread persecution of wolves. In the United States, wolves were routinely hunted and killed, and this hunting, together with an active eradication program sponsored and carried out by the federal government in the early 20th century, resulted in the extirpation of wolves from more than 95 percent of their range in the lower-48 states.

44. This wolf eradication effort extended to Wisconsin. The last wolves were killed in southern Wisconsin in the 1880s, and by 1930, there were only approximately 150 wolves remaining in northern Wisconsin. By 1950, the population had dropped to fewer than 50.

Nevertheless, wolves continued to be persecuted under a state bounty program. The last surviving wolf in Wisconsin was killed in 1959.

45. As a result of this massive loss of wolf population and range, the federal government originally granted two subspecies of gray wolves protection under the Endangered Species Preservation Act of 1966. Subsequently, in January 1974, the U.S. Fish and Wildlife Service (“FWS”) granted these same wolf subspecies protection under the more comprehensive Endangered Species Act of 1973 (“ESA”), which remains the United States’ national endangered-species law today. FWS later granted other subspecies of gray wolves protections under the ESA. In 1978, after recognizing the uncertain scientific taxonomy of the subspecies and “that the entire species *Canis lupus* is Endangered or Threatened to the south of Canada,” FWS reclassified gray wolves as endangered at the species level throughout the contiguous United States, except for a remnant population in Minnesota that was listed as a threatened species. 43 Fed. Reg. 9,607 (Mar. 9, 1978). While a species is listed and protected by the ESA, it is unlawful to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect (among other prohibited acts) that species. 16 U.S.C. §§ 1532(19), 1538(a)(1).

46. Under the protections of the ESA, the remnant wolf population in Minnesota began expanding. In the winter of 1974-75, a wolf pack was discovered in the border area between Wisconsin and Minnesota, marking the wolf’s first documented return to Wisconsin after an absence of 15 years. Since then, wolves have continued to recolonize portions of their historic Wisconsin range.

A. Ma’iingan and the Ojibwe People

47. The Ojibwe people hold a unique and special relationship with Ma’iingan. According to the Ojibwe creation story, Original Man was the last species placed on Earth. However, unlike all other species, Original Man was placed on Earth alone and not in pairs.

When Original Man asked the Creator why he was alone, the Creator sent him a brother, the Ma'iingan. Original Man and Ma'iingan walked the Earth together, becoming very close to each other along their journey. Eventually, the Creator told Original Man and Ma'iingan that they would travel separate paths, though their lives would be forever linked and what shall happen to one would also happen to the other, and that they would both be forever feared and misunderstood.

48. Beyond their link through this creation story, the Ojibwe people and Ma'iingan have numerous other bonds. The Ojibwe people understand Ma'iingan to be educators, teaching lessons about hunting and working together in extended family units. They believe wolves exemplify perseverance, guardianship, intelligence, and wisdom. This relationship reflects a long history together. In Wisconsin, wolf population estimates for the period before European colonization range from 3,000 to as many as 5,000 individual wolves. The experiences of wolves and Ojibwe people on the pre-colonization Wisconsin landscape had numerous similarities:

both are significant predators who shared common prey and, in some instances, hunting techniques; both shared similar social organization, living in extended family groups in which all adults act as parents towards the young; larger Ojibwe tribes lived within a territorial distribution on the landscape in juxtaposition with other tribes, and similar to wolves, these territories often had buffer areas between them.

Peter David, *Ma'iingan and the Ojibwe*, in Adrian P. Wydeven, Edward J. Heske (ed.), *Recovery of Gray Wolves in the Great Lakes Region of the United States: An Endangered Species Success Story* (2009).

49. The Ojibwe people also understand how the presence of Ma'iingan promotes a healthy and diverse environment. As discussed above, when present in sufficient numbers, wolves affect the behavior, distribution and number of large and mid-sized mammals, thereby allowing the plant species that those mammals consume to flourish. Those plant species, in turn,

provide cover and forage for smaller animals. Consequently, the presence of wolves on the landscape in sufficient numbers fosters biodiversity. This is essential for the Ojibwe, who continue to rely on the wild plant and small game species in the ceded territory for food and medicine.

50. Ma'iingan also serves the important ecological function of removing sick and injured deer from animal stocks harvested by the Ojibwe people, who depend on deer for food. This role played by Ma'iingan has become even more important as a deadly, incurable brain disease—chronic wasting disease—has infiltrated the white-tailed deer population in Wisconsin over the past 20 years. The Centers for Disease Control and the World Health Organization both recommend that animals infected with chronic wasting disease not be consumed by humans. Evidence indicates that wolves may provide a natural defense against the spread of chronic wasting disease. Scientific study has documented that mountain lions selectively prey on deer infected with chronic wasting disease. Wolves appear at least as likely to engage in similar selective predation on infected deer, because wolves frequently chase their prey to identify and kill less fit individuals, while mountain lions typically take their prey by stealth and ambush. A 2011 modeling analysis further supports the conclusion that wolf predation may limit emergence or prevalence of chronic wasting disease in deer populations. *See Wild, et al., The Role of Predation in Disease Control: A Comparison of Selective and Nonselective Removal on Prion Disease Dynamics in Deer*, 47 *Journal of Wildlife Diseases* 78 (2011). Further, wolves do not contract chronic wasting disease and so do not serve as a reservoir for the disease. Consistent with this evidence, chronic wasting disease has proliferated in deer populations located in the southern portion of Wisconsin (and the State's attempts to slow or reverse the spread of this disease through wildlife management practices have been ineffectual) but is substantially less

prevalent within the Ojibwe ceded territory in the northern portion of Wisconsin where wolves are more abundant.

51. At the time the Ojibwe treaty rights were addressed through the LCO Litigation, the wolf was listed as an endangered species in Wisconsin under the ESA. Accordingly, hunting of wolves was not addressed in detail through the LCO Litigation or subsequent modifications to the LCO judgment. Nevertheless, this Court ruled in 1987 that the Ojibwe Tribes' treaty rights encompass wolves in addition to numerous other species that the Tribes hunted, harvested, fished, and gathered "at treaty time." *Lac Courte Oreille Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420, 1426-27 (D. Wis. 1987). Further, by stipulation, the Ojibwe Tribes and the State of Wisconsin agreed that the Wisconsin Department of Natural Resources Bureau of Wildlife Management would establish a wolf management committee "with a recognized tribal representative as an official member," and further agreed that "a consensus approach shall be utilized and agree to make all reasonable efforts to reach a consensus" in the wolf management committee. Second Amendment of the Stipulations Incorporated in the Final Judgment, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, Case No. 74-C-313-C, at 41-43 (March 15, 2011). This Court granted that stipulation and incorporated it into its final judgment in the LCO Litigation. *See* Text Only Order, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, Case No. 74-C-313-C (March 18, 2011); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 775 F. Supp. 321, 325 (W.D. Wis. 1991).

52. To date, the Wisconsin-based Ojibwe Tribes have not approved hunting of wolves by tribal members. While there is interest among some tribal members in hunting wolves, and some tribal members have requested that the Tribes issue wolf-hunting permits to them, the

Ojibwe Tribes will not consider authorizing a return to wolf hunting for tribal members until suitable habitat for wolves in Wisconsin is fully occupied and appropriate population goals consistent with such habitat occupancy are satisfied.

B. Wisconsin's 2012-2014 Wolf Hunts

53. Following the wolf's return to Wisconsin in the mid-1970s, the state's wolf population grew to approximately 197 wolves by 1999. In that year, the DNR approved a state Wolf Management Plan to manage wolves while they remained under federal ESA protections and with an eye toward a potential future reduction or removal of ESA protections from the state's wolf population. Based, in part, on a then-current analysis of the potential carrying capacity of habitat for wolves in Wisconsin, this plan established a "management goal" of 350 wolves. Wis. Dep't of Nat. Res., *Wis. Wolf Mgmt. Plan* 15 (1999). Importantly, the plan did not establish this goal as a population cap or even a management population target, but rather as "the *minimum* level at which a full array of population control activities could occur including proactive depredation control and the *possibility* of public harvest." *Id.* at 16 (emphases added).

54. In December 2011, the U.S. Fish and Wildlife Service issued a final rule that delineated the gray wolf population in the Western Great Lakes states, including Wisconsin, for separate administrative treatment under the ESA and removed that population segment from the ESA's list of endangered and threatened species. This action transferred management jurisdiction over the Wisconsin wolf population to the State of Wisconsin. At that time, the Wisconsin wolf population had grown to an estimated 782 individuals, surpassing the predicted minimum carrying-capacity analysis that underlay the management goal of the 1999 Wisconsin Wolf Management Plan.

55. Immediately upon federal wolf delisting, in April 2012, the State of Wisconsin enacted a new state statute mandating that whenever the wolf is not listed on the federal or state

“endangered list,” the DNR “shall allow the hunting and trapping of wolves.” Wis. Stat. § 29.185(1m). This statute imposed numerous other mandates, including a requirement that any state wolf license shall entitle the hunter to use “[d]ogs to track or trail wolves” beginning on the first Monday following the last day of the State’s deer-hunting season, *Id.* § 29.185(6)(a)(2), (c)(1)—thereby making Wisconsin the only state in the nation to allow the hunting of wolves with dogs. The statute also added a restriction preventing the DNR from closing any of the state’s six “wolf harvesting zones” to hunting and trapping of wolves until 24 hours after completing various public noticing requirements, *Id.* § 29.185(5)(c). The statute further required that the wolf-hunting season run through the end of February if the quota is not reached before then. *Id.* § 29.185(5)(a). This provision potentially extends wolf hunting into the wolves’ breeding season and thereby threatens to significantly disrupt the propagation of the species.

56. In 2012, the DNR began the process of enacting an emergency rule to authorize the state’s first public wolf hunt since the late 1950s. State officials proposed to establish a hunting quota of 201 wolves in an effort to drive the wolf population down to the 350-wolf level discussed in the 1999 Wisconsin Wolf Management Plan, even though the Plan did not establish that goal as a population cap or target—indeed, it was set as a “minimum” threshold for additional management options. The Ojibwe Tribes objected to this proposal on the basis, among other things, that the 1999 management goal was outdated and did not reflect current scientific information and that the State’s 201-wolf quota was excessive given the then-existing wolf population level. The Tribes stated at that time that they would not consider authorizing wolf hunting until suitable wolf habitat in Wisconsin was fully occupied and the wolf population was at or above then-current levels.

57. On August 15, 2012, the DNR rejected the Tribes' objections without further effort to reach consensus. But, at the same time, the DNR agreed "to ensure that the full half of the harvestable surplus of wolves within the Ceded Territory be made available to the Tribes, in the event that the Tribes determine at a later date this year during the State's season to implement a Tribal season, or should ceremonial harvest permits be issued on a limited basis to individual Tribal members." Letter from Cathy Stepp to James E. Zorn (Aug. 15, 2012), at 2, available at https://turtletalk.files.wordpress.com/2012/08/dnr_response_on_wolf_season_081612.pdf. This tribal treaty half-share allocation reduced the State's 2012 wolf quota for non-tribal hunters to 116 wolves.

58. The DNR then conducted a wolf hunt from October 15 to December 23, 2012. The DNR held additional wolf hunting seasons in 2013 and 2014, with the seasons in each year also ending in December. The state quota in 2012 was 116 and hunters killed 117 wolves by December 23. The state quota in 2013 was 251 and hunters killed 257 wolves, also by December 23. The state quota in 2014 was 150 and hunters killed 154 wolves by December 5. The cumulative impact of these three hunting seasons reduced the Wisconsin midwinter minimum wolf population estimate from 809 wolves in 2012 to 746 in 2015. The Ojibwe Tribes did not authorize wolf hunting by tribal members in 2012-2014.

59. On December 19, 2014, the U.S. District Court for the District of Columbia ruled that the U.S. Fish and Wildlife Service's 2011 decision to remove the Western Great Lakes states' wolf population from the Endangered Species Act's list of endangered and threatened species violated the ESA and therefore vacated the unlawful rule. *See Humane Soc'y of the United States v. Jewell*, 76 F. Supp. 3d 69 (D.D.C. 2014), *aff'd sub nom. Humane Soc'y of the United States v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017). The court's vacatur of the 2011 delisting

rule restored wolves in Wisconsin to their prior status as an endangered species under the ESA, thereby prohibiting state hunting seasons.

C. Wisconsin’s February 2021 Wolf Hunt and Its Harm to the Wolf Population

60. On November 3, 2020, the U.S. Fish and Wildlife Service acted again to remove wolves in Wisconsin from the list of endangered and threatened species under the ESA as part of a broader delisting of wolves nationwide, except for a distinct wolf subspecies in Arizona and New Mexico. The Service set an effective date of January 4, 2021, for this new delisting action.

61. One month later, the DNR announced its intention to resume public wolf hunting in November 2021. The DNR stated in a press release: “Although gray wolf management will be under state authority in early 2021, implementing a wolf season requires adequate time not only to develop a science-based harvest quota but also to engage the public and tribal partners in the development of a season plan that adequately reflects the interests of diverse stakeholders throughout Wisconsin.” Press Release, Wis. Dep’t of Nat. Res., Wisconsin DNR Announces Wolf Season Begins Nov. 6, 2021 (Dec. 4, 2020), available at <https://dnr.wisconsin.gov/newsroom/release/39871>. The DNR’s press release further stated that the agency planned to “work collaboratively and transparently to create a new wolf management plan to reflect our increased understanding of the biological and social issues relevant to wolf management.” *Id.*

62. Some state legislators quickly objected. After conducting a joint informational hearing on January 13, 2021, a dozen members of the state legislature wrote to urge the NRB to immediately commence wolf hunting in Wisconsin: “Wisconsin may not have the opportunity to manage its wolf population in the near future due to several groups having already issued a notice of intent to the U.S. Fish and Wildlife Services [sic] to file a petition.” Letter from Sen.

Rob Stafsholt, *et al.* to Dr. Frederick Prehn (undated), available at

[https://widnr.widen.net/s/kwn7csxrvn/2021-01-2a-wolf-hunt-special-meeting-green-sheet-](https://widnr.widen.net/s/kwn7csxrvn/2021-01-2a-wolf-hunt-special-meeting-green-sheet-package)

[package](#). The letter asserted that state law required immediate wolf hunting because of the Wisconsin statute mandating wolf hunting with a season running through the end of February whenever the wolf was not listed as an endangered species.

63. The NRB held a special meeting to consider the legislators' request on January 22, 2021. By a 4-to-3 margin, the Board voted against holding a February 2021 wolf hunt, instead directing the DNR to plan for a hunt beginning in November 2021.

64. However, on February 2, 2021, a Kansas-based hunter advocacy group, Hunter Nation, filed a lawsuit in Wisconsin's Jefferson County Circuit Court requesting a writ of mandamus to force the DNR to immediately hold a wolf hunt under Wis. Stat. § 29.185. On February 11, 2021, the court ordered the DNR to immediately implement a wolf hunting and trapping season pursuant to the state wolf statute. Although the DNR appealed to the state court of appeals, its appeal was dismissed on February 19, 2021, on procedural grounds.

65. To comply with the ruling, the DNR undertook to determine the wolf quota that it would recommend to the NRB for a February 2021 hunt that would occur during the wolves' breeding season. Ordinarily, the DNR would develop such a quota through meetings of a wolf advisory committee and government-to-government consultation with the Ojibwe Tribes who possess treaty hunting rights in the ceded territory. For the February 2021 hunt, however, there was no input from a wolf advisory committee and no consultation with tribal governments. Thus, the State did not attempt to obtain consensus with the Tribes. The DNR recommended a quota of 200 wolves, which it characterized as a conservative number given a pre-hunt population

estimate of 1,034 wolves based on the state's modeling analysis. The DNR further proposed that a maximum of ten wolf licenses be issued for each quota animal.

66. After being notified of the DNR's proposed quota, the Ojibwe Tribes objected on February 19, 2021, to the lack of government-to-government consultation in setting the quota and exercised their treaty right to declare that a half-share of the huntable wolves within their ceded territory be reserved for tribal members. The tribal allocation reduced the state's share of the proposed 200-wolf quota by 81 wolves, yielding a state quota of 119 wolves for non-Ojibwe hunters.

67. On February 15, 2021, the NRB approved the DNR's recommended quota at a special meeting. However, the Board amended the DNR's proposal to increase the number of licenses to be issued to 20 per quota animal, thereby enabling more hunters to seek to kill wolves during the state's abbreviated season. Members of the Board asserted that the goal of this abrupt hunting season was to move the wolf population toward the 350-wolf level discussed in the 1999 Wisconsin Wolf Management Plan, even though the Plan did not establish that level as a population cap or target. The DNR also refused to require hunters to submit the remains of wolves killed in the hunt for the purpose of assessing impacts of the hunt on wolf reproduction.

68. In addition to declaring their half-share of the huntable wolves, and under protest, the Ojibwe Tribes requested that the DNR set a buffer of a minimum of six miles around each of their reservations that are closed to wolf hunting in order to protect packs whose territory includes reservation land. Neither the DNR nor the Board took action in response to the Tribes' request. The Tribes also requested that the DNR require hunters and trappers to surrender all wolf remains, and for the DNR to provide them to the Great Lakes Indian Fish and Wildlife Commission so that biological data could be obtained. The biological data from the February

2021 hunt would be particularly important as a February hunt—in the midst of the wolves’ breeding season—had never before occurred in the state. In response, the DNR acknowledged that in the past hunters had been required to provide carcasses so that biologists could study the remains of the wolves, but that in February only remains which were voluntarily surrendered would be collected for biological data.

69. In the few days following the Board’s approval of the quota, the DNR used a lottery system to sell 1,548 licenses to wolf hunters for the February 2021 season, representing a 13:1 ratio of hunters to each of the 119 wolves in the approved quota.

70. The February 2021 Wisconsin wolf hunting season began on Monday, February 22. At 10 a.m. on Tuesday, February 23—only the second day of the season—the DNR announced closures of three of the state’s six wolf-hunting zones to hunting based on the number of wolves already killed. The DNR announced closures of the remaining three zones at 3 p.m. that same day. The DNR’s closure orders did not become effective until 24 hours after public notice was provided, so wolf hunting did not legally cease until 3 p.m. on February 24, 2021.

71. Despite the fact that Wisconsin’s February 2021 wolf season lasted only three days, state-licensed hunters and trappers reported taking 218 wolves—99 more than the 119-wolf quota set by the DNR for non-tribal hunters. Undoubtedly, unreported kills increased the total overkill by an even larger margin.

72. This extraordinary level of excessive wolf killing resulted from several factors, almost all of which are attributable to actions taken or authorizations issued by the State of Wisconsin without adequate regard for the conservation of the species or tribal treaty rights. First, the Wisconsin law authorizing the hunting of wolves with dogs after closure of the state’s deer season was a major factor contributing to the overkill. Indeed, the February 2021 hunt,

which occurred after closure of the deer season, demonstrated that hunting with dogs is a highly efficient and effective method of taking wolves. Of the 218 wolves killed, 188, or 86 percent, were taken by hunters using dogs.

73. Second, Wisconsin's law restricting the DNR from effectuating a closure order for a hunting zone until 24 hours after public notice also facilitated excessive killing because it allowed hunting to continue after the quota had been reached.

74. Third, a DNR regulation that allows hunters up to 24 hours from the time they kill a wolf to register their kill with state officials, exacerbated the overkill. *See Wis. Admin, Code § NR 10.145(8) (EmR. 1210)*. Indeed, the combined effect of these statutory and regulatory closure provisions cannot be overstated. Under Wisconsin law, even though it may appear that hunters will shortly reach the wolf quota for a particular zone or even exceed it, any closure order by the DNR is based on registered kills that may be reported up to 24 hours after the kill, plus another 24 hours from posting of closure until lawful closure. Thus, two additional days of legal hunting can occur under state law *after* the quota is reached.

75. Finally, there were many hunters in the field for the February 2021 hunt, which resulted from a large number of licenses issued in relation to the quota. The ratio of licenses issued to the quota to hunt wolves substantially exceeded the level authorized for other species subject to an allocated quota.

76. As with prior hunts, the Ojibwe Tribes claimed their half share of the wolf quota but did not authorize wolf hunting for tribal members during the February 2021 season. They again decided that wolf hunting would not be appropriate given the population data. Although the Ojibwe Tribes had claimed their share, the substantial excessive take of 99 wolves by non-

tribal hunters and trappers licensed by the DNR consumed all of the Ojibwe Tribes' treaty share of wolves (81 wolves) for the February 2021 hunt, and more.

77. Of the reported 218 wolves killed during the February 2021 hunt, 102 (47 percent) were female and 116 (53 percent) were male. Although the DNR had predicted that wolves taken during the hunt would typically be younger than breeding age, 39 percent of wolves killed in the February 2021 hunt were adults and 51 percent were subadults that were still of potential breeding age.

78. Beyond those wolves reported killed in the February 2021 hunt, it is likely that there were additional mortalities of wolves in the Wisconsin population that were not recovered or reported by hunters, such as wolves that were shot and fled before succumbing to their wounds. After the February hunt, a scientific analysis of the impact on the Wisconsin wolf population was conducted. Adrian Treves, et al., *Quantifying the effects of delisting wolves after the first state began lethal management*, PeerJ, (2021). This peer-reviewed and published study concluded that 98 to 105 Wisconsin wolves that would have lived if ESA protections were still in place likely died due to human-caused mortality after removal of ESA protections, including 55 to 58 killed by poachers, in addition to the 218 killed in the February hunt. The study further concluded that, as of April 2021, the Wisconsin wolf population likely numbered, at most, 695 to 751 wolves, representing a minimum 27-33 percent decline since the State assumed management authority following federal delisting. Previously, the U.S. Fish and Wildlife Service deemed a "large and rapid decline" of "25 percent or more from the previous year" a condition that might trigger further federal review to assess conservation of the species. U.S. Fish & Wildlife Serv., *Post-Delisting Monitoring Plan for the Western Great Lakes Distinct Population Segment of the Gray Wolf* 11 (2008).

79. In addition to such direct mortality of wolves, the February 2021 hunt diminished wolf reproduction because the hunt occurred during the wolves' breeding season. The DNR dismissed the need to collect remains of hunted wolves as unwarranted for the February 2021 hunt based on an erroneous assumption about the likely age of hunted individuals. Without the remains, it is impossible to determine how many female wolves killed in the hunt were pregnant. However, Wisconsin's Green Fire, a conservation organization that includes scientists and biologists who formerly worked for the DNR, conducted an evaluation of the February 2021 hunt. Using existing research data, the organization estimated that as many as 65 percent of the 38 adult females and 50 percent of the 53 yearling females killed in the hunt may have been pregnant. Taken together, this rate of loss could result in as many as 50 wolf packs failing to produce any pups this year due to loss of breeding females alone, according to the Green Fire analysis. In addition to the loss of breeding females, the February 2021 hunt also removed other pack members, including alpha males and other adults, that contribute to pack reproduction by obtaining food for pups, defending wolf pack territories against intruders that could kill pups, and otherwise assisting with protection and rearing of pups. In total, based on loss of bred females and alpha males, Green Fire estimated that 60 to 100 of Wisconsin's wolf packs may lose all pup production due to the February 2021 hunt. This would represent a loss of 24 to 40 percent of the expected reproduction from 245 known wolf packs outside tribal reservation lands in Wisconsin in 2021, thus compounding the February 2021 hunt's harm to the wolf population.

D. Wisconsin's Planning for The November 2021 Wolf Hunt

80. Despite these harms, in spring 2021 the DNR began planning for a fall wolf-hunting season to commence on November 6, 2021.

1. The Department of Natural Resources' Quota Proposal

81. On July 26, 2021, the DNR issued a memorandum to the NRB proposing a total quota of 130 wolves for the fall 2021 wolf hunt. The DNR asserted that this proposed quota was calculated to yield a “0% annual population change” and therefore represented a “conservative approach” that reflected the “inherent uncertainties” regarding the status of the Wisconsin wolf population following the excessive wolf take that occurred in February 2021 and the associated potential impacts on wolf reproduction. Memorandum from Preston D. Cole to Natural Resources Board Members (July 26, 2021), attached as Exhibit 1, at 3, 5.

82. The DNR’s quota calculation was based on a modeling process that was flawed. The DNR’s modeling process—designed to determine the quota that it deemed likely to yield no annual population change—lacked the necessary input of starting population size. By the DNR’s own description, the model needed “a starting population size.” *Id.* at 4. As the DNR admitted, it lacked a reliable population estimate for the Wisconsin wolf population following the February 2021 hunt. The DNR explained that its only available population estimate was based on monitoring data collected before the February 2021 hunt, and that the lack of post-hunt data rendered it impossible to develop a post-hunt population estimate. Accordingly, the DNR lacked a reliable, scientifically supported population estimate, which was essential for the operation of its quota model.

83. In an attempt to fill this void, the DNR began with a pre-February 2021 hunt population estimate of 1,195 wolves and then simply subtracted 218 wolves from its pre-hunt population estimate to reflect the wolves reported killed in the February 2021 hunt, and omitted reservation wolves. The DNR therefore utilized a starting population size of 935 wolves for its quota-setting model. However, this back-of-the-envelope approach to determining the population

size assumed no additional human-caused mortality of wolves beyond the level reported from the February 2021 wolf hunt.

84. In this regard, the DNR claimed that its quota analysis process was based on “published scientific research.” *Id.* However, the DNR ignored the Treves study, discussed above, even though it constitutes the only peer-reviewed, published scientific analysis of the impact on the Wisconsin wolf population of removing ESA protections and conducting the February 2021 hunt. The Treves study’s estimate that the Wisconsin wolf population likely numbered 695 to 751 individuals following the February 2021 hunt was substantially lower than the DNR’s estimate that the post-hunt population numbered 935 individuals. In other words, the DNR’s attempt to develop a rudimentary population estimate for the purpose of running its quota-setting model ignored the sole peer-reviewed, published scientific study regarding the post-February 2021 status of the Wisconsin wolf population, even though that study constituted precisely the type of “published scientific research” the DNR purported to rely upon for its quota analysis. *Id.*

85. Furthermore, the modeling process the DNR used to develop its proposed 130-wolf quota assumed “normal recruitment”—i.e., normal reproduction and integration of pups into the wolf population from the 2021 breeding season. *Id.* at 8. However, by the DNR’s own admission, “the timing of the February season during breeding season may have increased impacts on reproduction and annual recruitment (*e.g.*, through removal of breeding adults).” *Id.* at 3. The DNR stated that the “extent of the impact on reproduction and whether it will lead to any population change is uncertain.” *Id.* By assuming normal recruitment following the February 2021 hunt, the DNR effectively speculated that the impact of the February 2021 hunt on reproduction and recruitment was zero. In reaching such a speculative conclusion, the DNR

disregarded available evidence including the analysis of the impact of the February 2021 hunt on wolf reproduction prepared by Wisconsin's Green Fire.

86. By failing to begin with a reliable population estimate that adequately accounted for likely wolf mortality, and by assuming normal wolf recruitment despite the likely harmful impact of the February 2021 hunt on wolf reproduction, the DNR produced a quota proposal that almost certainly overestimated the number of wolves that could be removed in the fall 2021 hunt without further decreasing the Wisconsin wolf population.

2. The Board of Natural Resources' Quota Decision

87. The Wisconsin Board of Natural Resources met on August 11, 2021, to consider the DNR's proposal for a fall wolf hunt with a 130-wolf quota. The Board first heard public testimony on the proposed wolf hunt, the vast majority of which opposed the proposed hunt. Many public commenters stated that it would be irresponsible for the Board to approve the proposed hunt given the excessive take that occurred during the February 2021 hunt and the lack of reliable information concerning the status of the wolf population and wolf reproduction following that hunt.

88. After hearing public testimony, the Board began its discussion of the DNR's proposal. It quickly became apparent that a majority of Board members disagreed with the DNR's proposal for a 130-wolf quota because they believed it was too low. In particular, these members repeatedly stated their view that subtracting the Ojibwe Tribes' treaty allocation from the state quota would yield a quota for non-tribal hunters that they believed was too low to drive the wolf population downward toward the 350-wolf level discussed in the 1999 Wisconsin Wolf Management Plan. These Board members repeatedly invoked the 350-wolf discussion from that Plan as a population target, even though the Plan itself makes clear that the 350-wolf level was not established as a population cap or target.

89. These Board members advanced a series of proposals that were explicitly calculated to yield a higher quota than the DNR proposed for the fall 2021 wolf hunt to nullify the Tribes' declaration of their half-share. In so doing, these Board members presumed that the Tribes would not hunt their quota share of wolves and sought to override that choice by setting the quota at a higher level in order to undermine the declared tribal quota.

90. These proposals began with a motion by Board Vice-Chair Gregory Kazmierski calling for a 504-wolf quota. In response, Department Secretary Preston D. Cole commented that this proposal reflected an attempt to "gerrymander" the quota number to "nullify the tribal take." Transcription of Natural Resources Board Meeting, Afternoon Session, Aug. 11, 2021, attached as **Exhibit 2**, at 31:24-32:9. Vice-Chair Kazmierski promptly admitted that this was indeed his purpose. *Id.* at 32:10, 32:13-14. Later, Board Member Terry Hilgenberg said, "we know how the tribes are" and asserted that he was "not comfortable" with approving a 130-wolf quota and "we end up with 50 percent of that" because the Tribes "are going to say zero." *Id.* at 48:25-49:1, 12-16. A few minutes later, in response to apparent resistance by some Board members to Vice-Chair Kazmierski's proposed 504-wolf quota, Board Chair Frederick Prehn questioned whether the Board would support reducing the 504-wolf quota to 300 because that number "would put us more in the realm of the 130 the Department would like, possibly a little bit higher" once the tribal allocation was subtracted. *Id.* at 51:16-18. Board Chair Prehn stated that "this Board feels that 130 with the possibility of 70 kills" due to the Tribes' decision about how to utilize their treaty share "is not adequate." *Id.* at 51:22-23.

91. Subsequently, the Board voted by a margin of 4-3 to reject Vice-Chair Kazmierski's proposed 504-wolf quota. Vice-Chair Kazmierski then moved for approval of a 350-wolf quota. As the Board prepared to vote on this proposal, Keith Warnke, administrator of

the Fish, Wildlife, and Parks Division for the DNR, addressed the Board to advise that the State's stipulations with the Ojibwe Tribes in the LCO Litigation called for the DNR to establish a "biological surplus" of a wildlife species as the basis for the State hunting quota that would be subject to the tribal treaty allocation. *Id.* at 67:3-6. Administrator Warnke stated: "We are not coming up with a biological surplus here. The biological surplus that we proposed was 130." *Id.* at 67:10-12. Administrator Warnke then stated that the 130-quota reflected the "biological surplus" of wolves that the DNR determined could be hunted without changing the total annual population number, which he stated was appropriate given that "we don't know what the population is right now; we don't have an estimate." *Id.* at 67:14-21.

92. The Board then voted by a margin of 4-3 to reject Vice-Chair Kazmierski's proposal for a 350-wolf quota. Without additional substantive discussion, Board Member Hilgenberg then proposed establishing a 300-wolf quota for the fall 2021 season. The Board then voted by a margin of 5-2 to approve the 300-wolf quota. The Board's final approval decision included a proviso that, if the DNR subsequently takes administrative action to adjust the 300-wolf quota to account for the excessive killing that occurred in the February 2021 wolf hunt, any such action must be presented to the Board for approval.

93. The Board's decision to *more than double* the DNR's proposed 130-wolf quota, which already overestimated the "biological surplus" of wolves due to a flawed analysis, lacked a scientific basis. The purpose of this decision was not to meet any scientific objectives but rather to ensure that at least the DNR's proposed quota of 130 wolves would be killed by non-tribal hunters in the fall 2021 hunt even if the Ojibwe Tribes declared their half-share allocation of the quota and elected not to authorize wolf hunting for tribal members during the fall 2021 season. The Board members who approved the 300-wolf quota did not attempt to justify their

decision by grounding it in science or biology. Rather, at the end of debate, Board Vice-Chair Kazmierski asserted to Department Administrator Warnke that “sometimes, better than models is simple math.” *Id.* at 67:25-68:1.

94. Furthermore, Board Member Sharon Adams later issued a press release indicating that her vote in favor of the quota was a mistake based on confusion about the procedural status of the vote. In that statement, Board Member Adams stated: “I want to make it clear that I did not intend to vote for, nor do I support, a quota of 300 wolves for the upcoming November hunting season.” *See* Press Release, Sharon Adams, Board Member, Wisconsin DNR of Natural Resources, Statement Clarifying Aug. 11 Vote (Aug. 13, 2021), <https://www.wispolitics.com/2021/dept-of-natural-resources-statement-by-board-member-sharon-adams-clarifying-aug-11-vote/>.

3. The Ojibwe Tribes’ Response

95. Following the Board’s establishment of a 300-wolf quota for the fall 2021 season, the Ojibwe Tribes, acting through the Great Lakes Indian Fish & Wildlife Commission, wrote a letter on August 16, 2021, objecting to the Board’s decision. The letter stated:

A harvest authorization of 300 wolves is neither supported by the DNR’s own analysis nor the analysis of other scientists who have reviewed the status of the wolf population. The debate during the NR Board meeting displayed the degree to which the NR Board is willing to manipulate the quota so that it can take all of the wolves that the tribes would otherwise be entitled to, and to effectively undermine, disregard, and circumvent the tribes’ treaty reserved rights. The NR Board’s decision was clearly politically motivated and biologically arbitrary. It has no relationship to the harvestable surplus number put forward by the State.

Letter from Michael J. Isham, Jr. to Todd Ambs (Aug. 16, 2021), attached as **Exhibit 3** at 1. The Tribes further stated that a wolf-hunting season remains inappropriate at this time due to “the absence of an updated wolf management plan that would set appropriate population goals and the

management strategies that will best meet those goals.” *Id.* at 1-2. The Tribes concluded by declaring their right to one-half of the quota set by the NRB.

96. The upcoming hunt, with a quota that lacks any scientific basis, and which was set with the express intention of nullifying the Ojibwe Tribes’ share, is scheduled to begin on November 6, 2021.

STANDING

97. To establish standing, the plaintiff first must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

98. Plaintiff Tribes are successors in interest to the Lake Superior Ojibwe, signatories to a number of treaties with the United States. As described herein, the courts have recognized that the Tribes’ reservation of their rights to hunt, fish and gather, along with the other usual privileges of occupancy in the ceded territory, entitle Tribes’ members to one half of the harvestable surplus of certain species in northern Wisconsin. The treaties secure tribal members’ rights to off-reservation hunting and fishing privileges that others do not enjoy. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999).

99. Unless the Tribes agree, the State may generally not regulate the Tribes’ management of their members’ usufructuary rights unless there is a need to do so based on conservation interests or to protect the public health and safety. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 668 F. Supp. 1233, 1237, 1242 (W.D. Wis.

1987). Further, the regulations must not discriminate against the Tribes. *Id.* at 1237, 1239. Thus, the Tribes as sovereign governments have the right to generally manage and oversee their members' exercise of usufructuary rights.

100. Plaintiff tribes have a legally protected interest in one-half of the wolf harvest in ceded territories in Wisconsin. They also have the right to manage their members' off-reservation hunting and fishing activities largely free from state regulation or interference. As demonstrated by the February 2021 hunt, in which non-tribal hunters killed all of the wolves reserved for tribal take, and more, and as demonstrated by the defendants' arbitrary November 2021 wolf hunt quota, which was not based on sound biological principles and was clearly set at a level meant to deprive the tribes of their share of the harvest, the tribes' interests in managing their usufructuary rights will be harmed if the hunt is allowed to proceed. The injury is redressable by this court.

FIRST CAUSE OF ACTION
(Purposeful and Discriminatory Nullification of Tribal Share)

101. Plaintiffs hereby reallege and incorporate all preceding allegations.

102. The Ojibwe Tribes' 1837 and 1842 Treaties with the United States guarantee to the Tribes, with limited exceptions not applicable here, an equal share of all harvestable resources within their ceded territory and ensure that no portion of such harvestable resources may be exempted from the apportionable harvest. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 740 F. Supp. at 1426.

103. The Ojibwe Tribes have a treaty right to harvestable resources, including wolves, within their ceded territory. *Lac Courte Oreille Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. at 1426-27.

104. A regulation of the Tribes' usufructuary rights may not discriminatorily harm the Ojibwe share nor discriminatorily favor the non-Ojibwe share, whether in language or effect. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 668 F. Supp. at 1237.

105. The NRB's decision to establish a 300-wolf quota for the fall 2021 wolf season effectively nullifies the Tribes' treaty allocation of the wolf quota proposed by the DNR. Indeed, that was the express purpose of members of the NRB in establishing the 300-wolf quota. As DNR Secretary Cole aptly stated and Board Vice-Chair Kazmierski readily acknowledged, these Board members sought to "gerrymander" the quota number to "nullify the tribal take." **Exhibit 2** at 31:24 to 32:13-14. Yet the "tribal take" is guaranteed by the Tribes' 1837 and 1842 Treaties with the United States.

106. In setting the quota for the November 2021 hunt, Defendants violated the Tribes' rights guaranteed by treaty by (1) setting a quota for non-Ojibwe hunters to kill the Ojibwe share of wolves; (2) setting a quota to "nullify" the Ojibwe's rights; and, (3) discriminatorily favoring non-treaty harvest of wolves.

107. In doing so, Defendants violated the Tribes' usufructuary rights guaranteed by the 1837 Treaty, art. 5 and the 1842 Treaty, art. II.

SECOND CAUSE OF ACTION
**(Failure of State Management of Wolf Hunting
to Secure Tribal Share)**

108. Plaintiffs hereby reallege and incorporate all preceding allegations.

109. With limited exceptions not applicable here, the Ojibwe Tribes are entitled to an equal share of all harvestable resources within their ceded territory and no portion of such harvestable resources may be exempted from the apportionable harvest. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 740 F. Supp. at 1426.

110. The harvestable resources subject to the Tribes' usufructuary rights within their ceded territory include wolves. *Lac Courte Oreille Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. at 1426-27.

111. The February 2021 wolf hunt demonstrates that the State of Wisconsin, including the NRB and the DNR, is regulating wolf hunting in Wisconsin in a manner that threatens with each hunt to allow non-tribal hunters to consume the Ojibwe Tribes' treaty allocation. That is exactly what happened in February 2021, when the combination of a mandatory hunting season, including a mandatory authorization for highly efficient hunting with dogs, statutory and regulatory limitations on the DNR's ability to close wolf hunting zones in a timely fashion as quota limits were approached, and an excessive number of tags issued per harvestable animal yielded an excessive take of wolves by which non-tribal hunters entirely consumed the Ojibwe Tribes' treaty allocation of 81 wolves (plus 18 more). The Board's authorization of an even larger quota for fall 2021 threatens to repeat this experience.

112. By failing adequately to regulate non-Ojibwe hunters so as to ensure preservation of the Tribes' treaty allocation of wolves, Defendants have violated, and threaten to continue to violate, the Tribes' usufructuary rights guaranteed by the 1837 Treaty, art. 5 and the 1842 Treaty, art. II.

THIRD CAUSE OF ACTION
(Failure to Establish Wolf-Hunting Quota
Based on Sound Biological Principles)

113. Plaintiffs hereby reallege and incorporate all preceding allegations.

114. Tribal exercise of usufructuary rights under the 1837 and 1842 Treaties necessitates management of harvestable resources based on sound biological principles, including a reliable population estimate to be used for the purpose of establishing quota allocations. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 775 F. Supp. at 323;

Lac Courte Oreilles Band of Lake Superior Chippewa Indians, 707 F. Supp. at 1056-57. This Court established these principles in the context of ensuring that Ojibwe regulation of the Tribal harvest will be consistent with conservation of the species being harvested. These same principles are no less important to ensure that the State of Wisconsin's management of harvestable resources does not infringe on the Tribes' reserved usufructuary rights, which equally depend upon conservation of the species being harvested. *See, e.g., United States v. Washington*, 853 F.3d 946, 964-65, 970-77 (9th Cir. 2017) (holding that treaties with Pacific Northwest tribes reserving right to fish at usual and accustomed locations included "promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes," and upholding injunction requiring removal of barrier culverts that harmed fish population by impeding fish passage).

115. By establishing a wolf-hunting quota for the November 2021 hunt that lacks any basis in sound biological principles, including a reliable population estimate of the Wisconsin wolf population, the NRB and the DNR threaten to once again nullify the Tribes' treaty allocation and also threaten to inflict harm to the Wisconsin wolf population and impair the Tribes' interest in securing their treaty allocation into the future.

116. The DNR developed a proposed wolf quota without a reliable population estimate that the DNR itself acknowledges is necessary for its quota analysis. The DNR sought to compensate for the absence of a reliable population estimate by substituting a rudimentary population estimate that disregarded peer-reviewed, published scientific information and ignored apparent sources of additional wolf mortality. The DNR's quota analysis also assumed normal recruitment that was contrary to the best available scientific information. For these reasons, the

DNR's proposed quota was substantially overstated. As a result, the DNR's proposed quota is likely to yield an overkill that will cause even greater decline in the wolf population.

117. The DNR's development of this proposed quota violates the Tribes' treaty right to an equal allocation based on sound biological principles, including a reliable population estimate.

118. The DNR's failure to develop a quota based on sound biological principles also operates to prevent the Tribes from protecting, conserving, and managing their treaty share of the wolf quota within their ceded territory consistent with their reserved rights under the 1837 and 1842 Treaties.

119. The DNR's failure to develop a quota based on sound biological principles further prevents the Tribes from determining whether the conditions they deem necessary to conduct a tribal wolf hunt have been met and, if so, what level of wolf hunting may be appropriate for subsistence or cultural purposes consistent with the conservation of the wolf population. Both of these considerations are essential to the Tribes' ability to utilize their treaty allocation of the wolf quota.

120. By setting the quota at 300 instead of 130, the NRB significantly compounded these threats to the Tribes' treaty rights. The Board more than doubled the DNR's proposed quota number without sound biological justification. Indeed, the DNR's own administrator warned the Board that the proposed wolf-hunting quota levels the Board was considering were not reflective of any scientifically determined "biological surplus" for hunting. **Exhibit 2** at 67: 3-12.

121. The Board's 300-wolf quota therefore threatens an even greater infringement on the Tribes' exercise and management of their off-reservation usufructuary rights than the DNR's unscientifically determined proposal for a 130-wolf quota. By laying the groundwork for an

overkill of wolves in the fall 2021 hunt, the 300-wolf quota also threatens to inflict harm on the conservation of the wolf population, including by creating the potential to destabilize the population and render it less resilient to other natural and human-caused threats and stressors. Such harm to the wolf population would impair the Tribes' interest in managing their members' take of the treaty allocation of wolves, including decisions related to species conservation and protection, and securing their treaty allocation into the future.

122. For these reasons, by establishing a quota for the fall 2021 wolf hunt that fails to reflect sound biological principles, Defendants violated the Tribes' usufructuary rights guaranteed by the 1837 Treaty, art. 5 and the 1842 Treaty, art. II.

REQUEST FOR RELIEF

Therefore, Plaintiffs respectfully request that the Court:

- a. Declare that Defendants acted unlawfully in violation of the Plaintiffs' rights under the 1837 and 1842 Treaties in authorizing the fall 2021 Wisconsin wolf-hunting season and developing and establishing the wolf-hunting quota for that season;
- b. Grant Plaintiffs temporary, preliminary, and permanent injunctive relief to prevent violation of the Tribes' treaty rights, including by prohibiting Defendants from proceeding to further authorize and/or conduct the fall 2021 Wisconsin wolf-hunting season;
- c. Grant Plaintiffs such further and additional relief as the Court may deem just and proper; and
- d. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, associated with this litigation.

Respectfully submitted this 21st day of September 2021.

s/ Christopher Clark

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***Pro hac vice admission forthcoming*