

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.

AFFIDAVIT OF TIM LAWHERN

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Tim Lawhern, being first duly sworn on oath, deposes and says:

1. I make this affidavit on the basis of my own personal knowledge.
2. At all times relevant to this proceeding I have been employed as a credentialed law enforcement officer with the Wisconsin Department of Natural Resources (WDNR). I have been a credentialed law enforcement officer in the State of Wisconsin for 23 years.

3. My current position with WDNR is Division Administrator for Enforcement and Science. I have held this position since 2011. My current duties include overseeing the Bureaus of Law Enforcement and Science Services, providing direction on all activities in both Bureaus. Prior to my current position, I was employed for 18 years as Hunter Education Administrator for WDNR, appointed in 1994. My duties with respect to that position were to oversee and manage the delivery of basic hunter education curriculum to citizens of the state, manage the largest volunteer hunter education instructor corps in the country, develop policy, train conservation wardens in hunting incident and accident investigation, compile annual statistics and evaluate trends related to hunting incidents and accidents, and to provide recommendations on legislative proposals and education opportunities. I have been a conservation warden throughout my career with the WDNR, and was appointed as such in 1989. Additionally, I am the only person to have twice presided as President of the International Hunter Education Association (IHEA), and I am the Co-Director of the IHEA Hunting Incident Investigation Academy. My *curriculum vitae* is attached hereto as Exhibit A.

4. I know that on April 2, 2012 the State of Wisconsin enacted 2011 Wisconsin Act 169 (Act 169) which, among other things, legalized certain forms of night hunting and shining wolves. A copy of Act 169 is attached hereto as Exhibit B.

5. I know that on August 18, 2012 WDNR promulgated certain emergency administrative rules implementing the wolf night hunting provisions of Act 169 (Rules). A copy of those Rules is hereto attached as Exhibit C.

6. I have seen and read the October 2012/November 2012 draft Great Lakes Indian Fish and Wildlife Commission Order No. 2012-05 (Commission Order), which amends the

Tribes' night hunting regulation for deer in the Wisconsin portion of the 1837 and 1842 ceded territory. A copy of this Commission Order is attached hereto as Exhibit D.

7. The Commission Order authorizes tribal members to harvest deer off reservation in a manner that is prohibited by state law. To wit:

- a. The Commission Order authorizes the possession and use of a light at the point of kill, which is prohibited for deer by Wis. Stat. § 29.314(3).
- b. The Commission Order authorizes hunting of deer from 50 minutes after sunset to 1 hour before sunrise, which is prohibited by Wis. Admin. Code § NR 10.06(2)(b).

8. In the course of my duties while employed at WDNR, I have become familiar with deer hunting regulation nationwide. To my knowledge, no other state allows night hunting of deer generally. To my knowledge, the only authorized provision for night hunting of deer occurs in Minnesota, where Chippewa tribal members are conditionally allowed to shine deer off reservation in ceded territory in that state. I am familiar with the regulation of tribal members' night hunting activities in Minnesota. I believe those regulations to be significantly more restrictive and protective of safety in than the Commission order in that the Minnesota regulations require a tribal hunter to hunt from an elevated position, to hunt over bait, to fire at targets only within a limited radius, and to illuminate a target prior to firing.

9. Based on my reading and understanding of the night hunting of wolves authorized under Act 169 and the WDNR Rules, it differs in significant respects from and is more restrictive than Wisconsin's previously authorized night hunting of coyote. A comparison of these laws and regulations, as well as the regulations established under the Commission Order is attached hereto as Exhibit E. To wit:

- a. Wolves may only lawfully be harvested at night from the first Monday after the state gun deer season (late November or early December) until the last day of February the following year, while coyotes may be harvested at night year round except during the state gun deer season.
- b. 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.

10. I maintain significant concerns regarding the safety of tribal members' hunting deer at night under the Commission Order, both to the members themselves and to the public. I believe the Commission Order contains inadequate regulation of hunter conduct to ensure safe shooting. I further believe that the Commission Order contains inadequate or ill-defined training requirements and review mechanisms to ensure safety. My specific concerns in these areas include but are not limited to those described in the attached Exhibit F.

11. On knowledge and belief, the likelihood of a significant amount of night hunting of wolves under state law is low. In the first place, night hunting is not authorized until after the state gun deer season, which this year closes on November 26. Two of the six zones for wolf hunting have been closed as of the date of this affidavit because the harvest quota has been reached in those zones. Three additional zones are nearing the established zone quota and therefore may close soon. The total number of wolves allowed to be harvested by non-tribal members in the state this year is 116. As of the date of this affidavit, 90 wolves have already been harvested. Additionally, of the 90 wolves harvested, 55 have been harvested by trapping, indicating that many harvesters prefer this method. I believe that both the limited opportunities

and the preference of the harvester will mean that few wolves will be taken by hunting at night this year.

12. The opportunity for tribal members to hunt deer at night while shining under the authority of the Commission Order appears not to be limited by the factors which limit state wolf hunting. I believe this will result in a far greater number of tribal members hunting at night than state wolf hunters hunting at night and, because the tribal quota for deer within ceded territory Deer Management Units is far greater than the state quota for wolves, many more deer than wolves will be shot at night.

13. Based on my training and experience, I believe there is a significant incentive to hunt deer at night as opposed to hunting them during the day. Through my experience as a hunter education instructor, a hunter, and a law enforcement officer, including my work on the WDNR's chronic wasting disease herd thinning program which entailed sharpshooting deer at night, I have personally witnessed the behavior of deer when subjected to a light at night. I have seen deer freeze at night under the rays of a light, making them much easier to harvest than mobile deer during the day.

14. Based on my training and experience, I believe and anticipate that if there are unresolved disputes about the authority of WDNR conservation wardens to investigate and arrest potential deer shining law violators, the potential for disputes and dangerous interactions between wardens and tribal members will be heightened. Law enforcement activity involving armed persons at night is inherently dangerous for both the officers and hunters. Violations that involve the use or possession of firearms often require or result in conservation wardens seizing the firearm as evidence of the violation. Where uncertainty exists about the parties' respective

authority under two divergent sets of regulations, the potential for disputes in the field over such an action and therefore danger to the officer and the suspected violator is heightened.

15. I make this affidavit in support of the defendants' motion to enforce the prohibition on shining deer.

Dated this 20th day of November, 2012.

/s/ Tim Lawhern
TIM LAWHERN

Subscribed and sworn to before me
this 20th day of November, 2012.

/s/ Thomas L. Dosch
Notary Public, State of Wisconsin
My Commission: is permanent