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.: 3:21-cv-00597 **PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION PURSUANT TO FED. R. CIV. P. 65**

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

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65(a), 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, hereby respectfully move this Court to preliminarily enjoin Defendants from issuing licenses for and holding the wolf hunt scheduled to begin November 6, 2021.

In their quota-setting and management of wolf hunts, including the wolf hunt scheduled to begin on November 6, Defendants have violated, and threaten to continue to violate, the

Ojibwe Tribes' fundamental rights protected by the Treaty with the Chippewa, July 29, 1837, 7 Stat. 536 ("1837 Treaty"), Art. 5, and the Treaty with the Chippewa, October 4, 1842, 7 Stat. 591 ("1842 Treaty"), Art. II. *See also* U.S. Const. art. VI, § 2 ("Treaties . . . shall be the supreme Law of the Land."); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 344-45 (7th Cir. 1983) (affirming the continued existence of the Ojibwe Tribes' treaty rights throughout their off-reservation ceded territory in Wisconsin).

The basis for the requested injunction is set forth in the accompanying memorandum in support, Plaintiffs' proposed findings of fact, and the declarations of Christopher Clark, Marvin DeFoe, Andrew Edwards, Adrian P. Wydeven, Brian Bisonette, John Johnson, Sr., Robert VanZile, Mike Wiggins, and Conrad St. John all of which are filed contemporaneously herewith. As these materials demonstrate, Plaintiffs are likely to succeed on the merits, injunctive relief is necessary to prevent irreparable harm, and the balance of harms and public interest support issuance of an injunction. Accordingly, this Court should enter an injunction prohibiting Defendants from issuing licenses for and conducting the wolf-hunting season that is scheduled to commence in November.

Plaintiffs have provided notice of this motion to the Defendants. On September 29, 2021, Plaintiffs' counsel advised Defendants' counsel of their intention to file this motion. Plaintiffs will provide actual notice to Defendants' counsel upon filing of this motion and will serve Defendants with this motion and all supporting materials by email immediately upon filing.

Because the wolf-hunting season is little more than a month away, Plaintiffs request that the Court order expedited response briefing concerning this motion. Plaintiffs request that the Court order any response briefs filed by no later than October 15, 2021. Plaintiffs further request

that the Court schedule a hearing and issue a ruling on this motion before the scheduled commencement of hunting on November 6, 2021.

Respectfully submitted this 1st day of October 2021.

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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.: 3:21-cv-00597 **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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

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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, submit this memorandum in support of their motion for a preliminary injunction which is filed contemporaneously herewith. In further support of their motion, Plaintiffs have also submitted Proposed Findings of Fact and supporting declarations.

INTRODUCTION

Plaintiffs seek preliminary injunctive relief to halt a wolf hunt authorized by Defendants that is scheduled to begin November 6, 2021, and to bar Defendants from issuing licenses to kill wolves. The November hunt would represent the second wolf hunt authorized by Defendants in 2021, and it would add to the impact of a hunt conducted in February 2021 in which non-tribal hunters dramatically exceeded the state's wolf quota in just three days, consuming the entire tribal treaty share of the wolf quota and harming the wolf population. In planning the upcoming hunt, Defendants have set the stage for yet another violation of the rights that the Ojibwe Tribes have retained under longstanding treaties with the United States. Indeed, infringing on the tribal treaty share was the express stated purpose of several of the Defendants on the Wisconsin Natural Resources Board when they established the quota for the November hunt. If the hunt were to go forward, those violations would continue and the harm to Plaintiffs would be

exacerbated. Indeed, the hunt is nothing short of a direct assault on the Ojibwe Tribes' treaty rights.

Plaintiffs are entitled to the requested injunction. Their treaty rights are well established and Defendant's violations of those rights are demonstrated by facts that cannot reasonably be disputed. Therefore, Plaintiffs are likely to prevail on the merits. Furthermore, immediate injunctive relief is essential here to avoid irreparable harm to the Ojibwe Tribes' authority to self-govern, as well as harm to the environment and to a species with which the Tribes and their members have a deep spiritual and cultural connection. Finally, both the balance of equities and the public interest support the requested injunction.

Plaintiffs are filing this motion now because the scheduled wolf hunt is little more than a month away and Plaintiffs seek relief from this Court before the hunt begins. At the same time, Plaintiffs understand, based on communications from the Wisconsin Department of Natural Resources, that the Department may attempt to modify the wolf-hunting quota previously established by the Natural Resources Board. Based on recent experience from the February 2021 hunting authorization process, Plaintiffs expect that, if that happens, litigation against the Department will ensue in state court. The experience of the February 2021 hunting season demonstrates that such litigation can quickly overturn the Department's wolf-hunting decisions. Indeed, in February, litigation in state court against the Department succeeded over the course of nine days in forcing the Department to conduct an abrupt wolf-hunting season. That hunting season resulted in immediate harm to wolves and the Ojibwe Tribes, with hunters killing 99 more wolves than the state quota in just three days. Accordingly, Plaintiffs bring this motion now to protect their rights in the face of Defendants' hunting authorization and will promptly inform the Court of any changed circumstances.

STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION

To obtain a preliminary injunction, a party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). In the Seventh Circuit, courts take a "sliding scale approach," by which they "equitably weigh[] these factors together, seeking at all times to minimize the costs of being mistaken." *Cassell v. Snyders*, 990 F.3d 539, 545 (7th Cir. 2021) (internal citations omitted). "The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor." *Id.*

Federal Rule of Civil Procedure 65(c) establishes that courts may require security in instances of a preliminary injunction; and the issuance and amount of this security is within the discretion of the court. *Wayne Chem., Inc. v. Columbus Agency Serv. Corp.,* 567 F.2d 692, 701 (7th Cir. 1977) ("[U]nder appropriate circumstances bond may be excused[.]") (citing *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972)). The Court should exercise its discretion here and waive the bond or require only a nominal amount. Previously, courts have required "only nominal bonds, if any," when enjoining environmental harm. *Wisconsin Heritages, Inc. v. Harris,* 476 F. Supp. 300, 302-03 (E.D. Wis. 1979). In addition, limited financial means constitute an appropriate circumstance for the waiver of a security bond. *See Denny v. Health and Social Services Board*, 285 F. Supp. 526, 527 (E.D. Wis. 1968) (three-judge court). Requiring the Tribes to pay a bond that is not nominal would heavily strain their already scant financial resources and thus would qualify this instance as an "appropriate circumstance" for the court to exercise its discretion. *See* Declaration of Marvin DeFoe in Support of Motion for Preliminary Injunction ("DeFoe Dec.") ¶ 3; Declaration of Robert VanZile in Support of Motion

for Preliminary Injunction ("VanZile Dec.") ¶ 1; Declaration of Brian Bisonette in Support of Motion for Preliminary Injunction ("Bisonette Dec.") ¶ 3; Declaration of Mike Wiggins in Support of Motion for Preliminary Injunction ("Wiggins Dec.") ¶ 2; Declaration of Conrad St. John in Support of Motion for Preliminary Injunction ("St. John Dec.") ¶ 2.

ARGUMENT

I. THE OJIBWE TRIBES ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIMS THAT THE PLANNED NOVEMBER 2021 WOLF HUNT VIOLATES TRIBAL TREATY RIGHTS.

The Ojibwe Tribes are likely to prevail on the merits of their claims that the November 2021 wolf hunt, as planned by Defendants, violates tribal treaty rights. Under the United States Constitution, treaties, such as the Tribes' 1837 and 1842 Treaties and the rights therein, are "the supreme Law of the Land." U.S. Const. art. VI, § 2.[1]

Under the 1837 and 1842 Treaties, the Ojibwe Tribes retain the right to a half share of virtually all the natural resources in the ceded territory. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 775 F. Supp. 321 (W.D. Wis. 1991) ("All of the harvestable natural resources to which plaintiffs retain a usufructuary right are declared to be apportioned equally between the plaintiffs and all other persons"); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 653 F. Supp. 1420, 1426-27 (W.D. Wis. 1987) (identifying wolves as a treaty protected resource); *see also Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 344-45 (7th Cir. 1983) (reaffirming the

[1] Additionally, a federal Indian law canon of interpretation provides that a treaty between the United States and Indian tribes must be interpreted liberally in favor of the Indians, and any ambiguities are to be resolved in their favor. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999). Further, treaties 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).

continued existence of the Ojibwe Tribes' treaty rights). Calculating and apportioning resources under the Treaties begins with the total of the estimated population of the resource in each harvesting area, including the portion of the resource believed to inhabit private lands, and then the total is divided equally. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 740 F. Supp. 1400, 1418 (W.D. Wis. 1990); *see also id.* at 1416-17 (discussing equal apportionment in *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) ("*Fishing Vessel*")).

The State cannot regulate the Tribes' management of their share of treaty-protected resources unless either of two limited exceptions applies. Specifically, the State can regulate the Ojibwe exercise of off-reservation usufructuary rights only if 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. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 668 F. Supp. 1233, 1237, 1242 (W.D. Wis. 1987). Even if the regulations meet one of those exceptions, they "must not discriminate against the Indians." *Id.*; *see also Puyallup Tribe v. Dept. of Game of Wash.*, 391 U.S. 392, 398 (1968) (holding that regulations can "not discriminate against the Indians"). "[I]n language and in effect," the State can "neither discriminatorily harm the Indian harvest nor discriminatorily favor non-treaty harvesters." *Lac Courte Oreilles Band*, 668 F. Supp. at 1237.

Defendants' actions with respect to the hunt scheduled for November violate the Ojibwe Tribes' rights under the 1837 and 1842 Treaties in at least three ways, each of which serves as an independent basis for concluding that the Tribes are likely to succeed on the merits. First, in setting a quota for the upcoming wolf hunt, Defendants purposefully and knowingly discriminated against the Ojibwe Tribes by acting to nullify their treaty-protected right to an

equal share of "harvestable" wolves. Second, the Defendants failed to use sound biological principles in establishing the quota for the upcoming hunt. Without sound biological principles, no harvestable surplus can be determined, and conservation of the wolf population is threatened. Third, by failing to put in place adequate safeguards to protect the Ojibwe Tribes' share, Defendants are managing wolf hunting in Wisconsin in a manner that fails to secure for the Tribes' their treaty-protected share, as evidenced by the February hunt in which state-licensed hunters exceeded the statewide quota and killed the entire tribal share of wolves.

A. Defendants Purposefully Discriminated Against The Ojibwe Tribes In Setting The November Wolf Hunt Quota.

The Ojibwe Tribes are likely to prevail on the merits of their claim that Defendants purposefully discriminated against the Tribes in setting a November wolf-hunting quota of 300. Indeed, enlarging the take to favor the state share over the Ojibwe share of the quota was the express purpose of members of the Board in establishing the 300-wolf quota. As Defendant Cole aptly stated and Defendant Kazmierski readily acknowledged, Board Defendants sought to "gerrymander" the quota number to "nullify the tribal take." Declaration of Christopher R. Clark ("Clark Dec.") Exhibit 9 at 31:24 to 32:13-14 (Transcript of Natural Resources Board Meeting, Afternoon Session, Aug. 11, 2021 ("Transcript")). Yet the "tribal take" is guaranteed by the Tribes' 1837 and 1842 Treaties with the United States.

The Defendant's consideration and discussion of different proposed quotas further reveals the discriminatory purpose and effect of Defendants' actions. Defendants arrived at a quota of 300, in large part, by more than doubling the DNR's proposed quota of 130 for the express purpose of nullifying the tribal share of the quota that DNR proposed as a "biological

surplus" of the wolf population.[2] Transcript at 67:3-12. The Board Defendants more than doubled the DNR's proposed quota so that state-licensed hunters could kill the total number of wolves that had been deemed "harvestable" by the DNR—and then some. This was the express purpose of the Board Defendants:

- Defendant Hilgenberg explained that he disagrees with the state "end[ing] up with 50 percent of" the 130 the Department determines are harvestable, Transcript at 49:7-50:2;
- Defendant Hilgenberg suggested that if the harvestable surplus is 130, then the share the state must end up with is "not with 70 and that's not 75, but it's 130," *id.* at 50:6-12;
- Defendant Prehn explained that if the quota is 300, "that would put it [the state's share] in more of the realm of what the 130 that the department [proposed], possibly a little bit higher", *id.* at 51:12-18;
- Defendant Prehn hypothesized that the Board "double that quota" proposed by the Department, *id.* at 55:12-13;
- Defendant Smith pointed out that other members of the Board were deliberating setting a higher number than the harvestable amount on the assumption that the Tribes will not kill their share, *id.* at 64:9-24.

Thus, in setting the quota for the November 2021 hunt, Defendants violated the Tribes' rights guaranteed by treaty by setting a quota specifically so non-tribal hunters can kill the

[2] As discussed *infra*, Plaintiffs dispute DNR's determination of a "biological surplus," which was not based on sound biological principles. But, regardless, Defendants' express effort to nullify the tribal share of the state wolf quota based on DNR's "biological surplus" determination represents purposeful discrimination against Tribal treaty rights in violation of the 1837 and 1842 Treaties.

Ojibwe share of "harvestable" wolves determined by DNR. This discriminatorily favors the non-Ojibwe share and harms the Ojibwe, as prohibited by *Lac Courte Oreilles Band*, 668 F. Supp. at 1237, and in violation of the Tribes' usufructuary rights guaranteed by the 1837 Treaty, art. 5 and the 1842 Treaty, art. II. For this reason alone, the upcoming hunt is unlawful and the Court should conclude that Plaintiffs are likely to prevail on the merits.

B. Defendants Set A Wolf-Hunting Quota That Is Not Based On Sound Biological Principles

The Ojibwe Tribes are also likely to prevail on their claim that the Defendants violated the tribal exercise of usufructuary rights under the 1837 and 1842 Treaties by failing to apply sound biological principles establishing a wolf-hunting quota for the November hunt.

Tribal exercise of usufructuary rights under the 1837 and 1842 Treaties necessitates management of harvestable resources based on "biologically sound principles," including a reliable population estimate to be used for the purpose of establishing quota allocations. *Lac Courte Oreilles Band*, 775 F. Supp. at 323. 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." *Id.* These same principles must apply equally to the state. The state is obligated to ensure that its management of harvestable resources does not infringe on the Tribes' reserved usufructuary rights, which depend equally 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), *aff'd by* 138 S. Ct. 1832 (2018).

In resolving species-specific disputes between the Tribes and State under the 1837 and 1842 treaties in the past, the Court has examined factors such as 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 Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 707 F. Supp. 1034, 1039-52 (W.D. Wis. 1989); *Lac Courte Oreilles Band*, 740 F. Supp. at 1403-13. This Court's examination of such factors serves to underscore the importance of biologically sound management in safeguarding the parties' respective rights under the Treaties.

In particular, as this Court has said with respect to another treaty-protected species: "Safe management of a spearing fishery requires a precise estimation of the number of fish available for a harvest," based on a "reliable population estimate" for any lake where such fishing will be authorized. *Lac Courte Oreilles Band*, 707 F. Supp. at 1048, 1057; *see also Lac Courte Oreilles Band*, 740 F. Supp. at 1418 (recognizing that "in calculating a treaty quota the parties must begin with the total of the estimated harvest of the scarce resource in the particular harvesting area"). Safe management of wolves is no less dependent on a reliable population estimate to develop a reliable estimate of the number that may be hunted. *See* Declaration of Adrian P. Wydeven ("Wydeven Dec.") ¶¶ 42-45 (explaining harms threatened by State wolf-hunting plan). Indeed, the DNR itself admitted that one of the key components of data for its quota-setting analysis was a "starting population size" for the Wisconsin wolf population. *See* Clark Dec. Exhibit 3 at 4 (Mem. from Preston D. Cole to Natural Resources Board Members (July 26, 2021) ("Cole Memo")).

Nevertheless, the Defendants did not use a precise or even reliable estimate of the Wisconsin wolf population to calculate the November quota. When the DNR proposed a total quota of 130 wolves for the November 2021 hunt, it acknowledged "inherent uncertainties" regarding the status of the Wisconsin wolf population following the excessive wolf killing that occurred in February 2021 and the associated potential impacts on wolf reproduction. *See* Cole Memo at 3, 5. The DNR lacked population data from after the February hunt, rendering it impossible to develop a post-hunt population estimate. *Id.* at 3; *see also* Transcript at 67:14-21 ("[W]e don't know what the population is right now; we don't have an estimate"). Lacking a post-hunt population estimate, the DNR simply began with a pre-hunt population estimate of 1,195 wolves and then subtracted the 218 wolves known to be killed by state-licensed hunters in February 2021 and the 42 wolves estimated to live primarily on Indian reservations to arrive at a starting population size for its quota-setting model. Wydeven Dec. ¶ 35.

There are numerous, readily apparent analytical flaws with this approach, each of which points toward the Defendants overestimating the wolf population and thereby inflating the hunting quota. First, the DNR's starting population estimate of 1,195 wolves reflects the agency's estimate of the Wisconsin wolf population in 2020—not its pre-hunt population estimate for 2021. *See* Wydeven Dec. ¶ 34. By using a 2020 estimate rather than the more recent 2021 estimate, DNR set the baseline for its back-of-the-envelope calculation 69 wolves higher than if 2021 data had been used. *Id.*

Second, DNR assumed that the February hunt—which yielded a substantial overkill in the midst of the wolves' breeding season—had no impact on wolf reproduction and recruitment. Wydeven Dec. ¶ 39 (explaining DNR assumption of "normal recruitment"). This assumption is contrary to the facts. Of the reported 218 wolves killed during the February 2021 hunt, 102 (47

percent) were female. Clark Dec. Exhibit 6 at 3 (Randy Johnson & Anna Schneider, Wisconsin Wolf Season Report: February 2021 ("Feb. Season Report")). Although the DNR had predicted that wolves taken during the hunt would typically be younger than breeding age, 39 percent of the wolves killed in the February 2021 hunt were adults and 51 percent were yearlings that were of breeding age. *Id*. at 3; Wydeven Dec. ¶ 23. The loss of adult wolves, and especially pregnant females, during breeding season undoubtedly had a negative impact on the wolf population in the state:

> As with any species, removal of pregnant females has a strong effect on population growth and reproduction. Because generally only one female wolf in a pack mates and produces pups, killing pregnant wolves generally eliminates any spring pup production in their packs. In addition, removing adult males can significantly affect wolf reproduction. This is because female wolves raising pups are extremely dependent on adult males to provide food for the pack and to defend the pack's territory against intruders that threaten pup survival.

Wydeven Dec. ¶ 22. In fact, it can reasonably be estimated that the cumulative loss of potentially pregnant females and adult males in the February 2021 hunt reduced the number of wolf packs with surviving pups to 30 to 46 percent. Wydeven Dec. ¶ 24. Thus, a quota estimate based on an assumption that the February 2021 hunt had no effect on reproduction is deeply flawed.

Third, DNR's quota calculation made no allowance for unreported wolf mortalities in the February hunt. Yet such unreported mortalities occur in any hunt and were especially likely during the February wolf hunt given the high number of hunters in the field and the intensity of hunting activity over a three-day period. Wydeven Dec. ¶¶ 21, 36. For these reasons, it is reasonable to estimate that unreported kills increased the total overkill by an even larger margin that may reasonably be estimated at 10 to 50 percent of the reported kills. *Id.* But regardless of any uncertainty about the precise margin, there was no reasonable basis to conclude that it was *zero*, as DNR did here. Here again, DNR's faulty assumptions led to an inaccurate and inflated estimate of the current wolf population and resulting quota.

The bottom line is that DNR created a quota without reliable population data and repeatedly applied unfounded assumptions in attempting to fill this analytical gap. When lacking such data, it is important and appropriate to use a more conservative form of population modeling, especially when aggressive hunting is contemplated. Such a modeling system exists, but Defendants neglected to use it. Wydeven Dec. ¶¶ 37-38.

The Board Defendants then compounded the flaws with the DNR's faulty population estimate by abandoning any pretense of using scientific principles to determine a harvestable surplus and instead choosing to set the quota at 300. As the Board Defendants more than doubled the DNR's proposed quota number without sound biological justification, the DNR's own administrator warned the Board Defendants that the proposed wolf-hunting quotas being considered by the Board were not reflective of any scientifically determined "biological surplus" for hunting. Transcript at 67: 3-12. Defendant Kazmierski followed that up by rejecting the idea of using biological models at all. Transcript at 67:25-68:2; *see also id.* at 38:6-15 (Defendant Bruins picking the midpoint number between the Department's pre-February population estimate range (1,100) and subtracting "a couple [hundred] that were killed, I'm rounding, we're at 900" without consideration of necessary factors in a population estimate, such as reproduction and replacement rates and unreported mortality).

In short, Defendants' quota for the planned November 2021 wolf-hunting season failed to reflect "biologically sound principles" consistent with "conservation of the species being harvested." *Lac Courte Oreilles Band*, 775 F. Supp. at 323. By establishing a quota for the November 2021 wolf hunt that fails to reflect sound biological principles necessary to conserve the wolf population in the face of the harms already inflicted by the excessive February 2021

hunt, Defendants violated the Tribes' usufructuary rights guaranteed by the 1837 Treaty, art. 5 and the 1842 Treaty, art. II. Therefore, Plaintiffs are likely to prevail on the merits.

C. Defendants' Practices and Lack of Safeguards Show That They Will Not Manage The November Wolf Hunt In A Manner That Will Protect The Tribal Share.

The February 2021 hunt demonstrates that the Ojibwe Tribes are likely to succeed on the merits of their claim that Defendants have and will continue to operate a state-sanctioned wolf hunt in a manner that will violate the Ojibwe's treaty-protected right to an allocation of wolves.

1. The February 2021 hunt violated the Ojibwe Tribes' treaty rights.

In February 2021, Defendants violated the Ojibwe Tribes' usufructuary rights to an equal share of wolves in the ceded territory by managing a hunt in which state-licensed hunters and trappers killed the wolves allocated to the Ojibwe Tribes. The harvestable surplus of wolves for the February hunt was set by Defendants at a quota of 200 wolves. Feb. Season Report at 2, 6 Table 2. The tribal allocation of half of the quota amount in the ceded territory 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. *Id*. State-licensed hunters, in a hunt managed by Defendants, reported killing 218 wolves in three days, taking all of the state share, all of the tribal share, and then an excess of wolves. Feb. Season Report at 3; Wydeven Dec. ¶ 14. This was a violation of the Ojibwe Tribes' usufructuary rights that is ripe for repetition under Defendants' management framework.

2. The same features of Defendants' management of the February 2021 hunt that contributed to the overkill of wolves and violation of the Ojibwe Tribes' treaty rights remain in place for the November 2021 hunt.

Defendants' management of the February 2021 hunt contributed to the overkill of wolves and violation of the Tribes' treaty rights. Defendants have failed to modify the key features of the February 2021 hunt that contributed to this overkill.

These key features include a Wisconsin law mandating that a wolf-hunting license shall entitle the holder to hunt wolves with dogs beginning shortly after the close of the state's firearm deer-hunting season, in late November or early December. Wis. Stat. § 29.185(6)(a)(2), (c)(1). The February hunt demonstrated that this type of hunting can yield a substantial overkill in a short period, as 188 of the 218 wolves reported killed (86 percent) during the three-day season were taken by hunters using dogs. Wydeven Dec. ¶ 16. There is a significant possibility that hunting with dogs will contribute to another overkill during the November 2021 hunt because the large 300-wolf quota in combination with the opening of the wolf hunt on November 6 creates a strong likelihood that the wolf season will still be open when hunting with dogs becomes authorized in late November. Wydeven Dec. ¶ 43.

Moreover, by Wisconsin statute and regulation, the DNR may not close a wolf-hunting zone until 24 hours after completing public-noticing requirements, and hunters have 24 hours after killing a wolf to register their kills. *See* Wis. Stat. 29.185(5)(c); Wis. Admin. Code § NR 10.145(8) (EmR. 1210). As was true during the February 2021 hunt, the combined effect of these provisions allows 48 hours of additional hunting even after it appears likely that a wolf-hunting zone's quota would soon be reached. Wydeven Dec. ¶¶ 17-18.

An additional factor contributing to the substantial overkill of wolves in February 2021 was the Board Defendants' decision to set the number of licenses per quota wolf at 20, which resulted in an "extraordinarily high number of hunters in the field attempting to take a wolf." Wydeven Dec. ¶ 19. Ultimately, the number of licenses actually issued represented 13 licenses

per quota wolf.[3] This represented more state-licensed wolf hunters in the state (1,548) than wolves in the state, which the DNR estimated to be a little over 1,000. Wydeven Dec. ¶ 19.

All of these features of the February 2021 hunt remain in place as the November 2021 hunting season approaches except for the 20:1 ratio of authorized licenses to quota wolves, as Defendants have not yet established the number of wolf licenses to be issued for the November hunt. Regardless, Wisconsin's statutory mandate for hunting with dogs and delayed provisions for hunting closures even when quota limits are looming create an ongoing potential for rapid overkill. Wydeven Dec. ¶ 43. Until and unless the Defendants change how they manage a wolf hunting season, each Wisconsin wolf hunt presents a threat that state-licensed hunters will exceed the state's quota share and take wolves allocated to the Tribes pursuant to the Treaties of 1837 and 1842, further violating the Tribes' rights under those treaties.

3. Defendants' mismanagement of wolf hunts will harm the Wisconsin wolf population and further violate the Ojibwe Tribes' treaty rights.

The cumulative effects of the February 2021 hunt and the planned November 2021 hunt portend an abrupt and dramatic reduction in the Wisconsin wolf population that threatens further destabilization of the population as well as a substantial contraction of the wolf's range, with a commensurate reduction in the beneficial biological impacts of wolves' presence on the landscape. *See* Wydeven Dec. ¶ 44. The avoidance of such impacts is precisely why this Court has previously insisted on wildlife management based on sound biological principles consistent with conservation of the species in defining the parties' relationship under the 1837 and 1842

[3] In contrast, the DNR authorized 5 licenses for an allocated quota of 5 bull elk during the state's northern elk herd hunt in 2020, for a 1:1 ratio of hunters to quota elk. Wydeven Dec. ¶ 19. As the Ojibwe Tribes have told the DNR, a one-to-one license per state allotted quota wolf ratio would be more protective of treaty rights. Clark Dec. Exhibit 13 (Letter from Michael J. Isham, Jr., Voigt Intertribal Task Force, to Todd Ambs, Wisconsin Dep't of Natural Resources (Sept. 29, 2021) ("Sept. 29 Letter")).

Treaties. *See Lac Courte Oreilles Band*, 707 F. Supp. at 1056-57 (recognizing that management based on a reliable population estimate is necessary to avoid excessive taking due to highly efficient methods of fishing). Put simply, tribal treaty rights to hunting, fishing, and gathering require the state to ensure that the underlying resources remain available. A state cannot decimate a resource or pre-determine how a tribe may use its share. In *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), for example, the State violated a tribal treaty right to fishing as a result of its construction of barrier culverts under roadways, blocking fish passage. *See also Colville Confederated Tribes v. Walton*, 647 F.2d 42, 49 (9th Cir. 1981) (allowing allocation of water for Tribes' spawning grounds and noting that "permitting the Indians to determine how to use reserved water is consistent with the general purpose for the creation of an Indian reservation providing a homeland for the survival and growth of the Indians and their way of life").

This conclusion is not altered by the Ojibwe Tribes' choice, to date, to refrain from hunting their quota share of wolves in the interest of conserving the wolf population. The Tribes have not deemed the biological conditions necessary for consideration of a wolf hunt to be satisfied, Clark Dec. Exhibit 4 at 2 (Testimony of James E. Zorn, Executive Administrator Great Lakes Indian Fish and Wildlife Commission on Senate Bill 411 (Feb. 27, 2012)), although some tribal members continue to request wolf-hunting opportunities, Declaration of Andrew Edwards In Support of Motion for Preliminary Injunction ("Edwards Dec.") ¶ 4; Bisonette Dec. ¶¶ 14-15. Under the 1837 and 1842 Treaties, it is up to the Tribes—not Defendants—to determine how to respond to such requests. *See Lac Courte Oreilles Band*, 668 F. Supp. at 1237, 1242 (holding State may not regulate tribal members' exercise of treaty rights except in interest of conservation or public safety). Further, the Tribes' treaty rights encompass conserving and protecting the key

species they rely upon in order to "live on the ceded lands as they had lived before the treaties were signed." *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*, 700 F.2d at 365. During the treaty negotiations, tribal representatives repeatedly demonstrated that they understood their reserved rights to include preserving key resources from loss or destruction. *See, e.g.*, Clark Dec. Exhibit 1 at 15 (*Statement Made by the Indians: A Bilingual Petition of the Chippewas of Lake Superior, 1864* (John D. Nichols, ed. 1988)) (recounting tribal representative's statement 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"); Clark Dec. Exhibit 2, App. 1 at 142 (Ronald N. Satz, *Chippewa Treaty Rights* (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)."); *see also Fishing Vessel*, 443 U.S. at 676 (holding that 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). Were the rule otherwise, the State could set a destructive quota for a species of critical interest to the Tribes—as Defendants have done here—and the Tribes could preserve their treaty rights only by participating in the slaughter. This cannot be the rule under a treaty framework that this Court has consistently construed to safeguard "the conservation of the species being harvested." *Lac Courte Oreilles Band*, 775 F. Supp. at 323.

In sum, by setting a quota for the November 2021 wolf hunt that discriminates against the Ojibwe and is not based on sound biological principles, by mismanaging the February 2021 wolf hunt, and by continuing to adhere to regulations and practices that lead to the overharvesting of

wolves, the Defendants have and will continue to violate the Ojibwe Tribes' usufructuary rights reserved in the 1837 and 1842 Treaties. Therefore, Plaintiffs are likely to prevail on the merits.

II. INJUNCTIVE RELIEF IS NECESSARY TO PREVENT IRREPARABLE HARM.

An injunction is necessary to prevent infringement of the Ojibwe Tribes' rights reserved by the 1837 and 1842 Treaties and irretrievable loss of wolves in Wisconsin. The upcoming state-sponsored hunt would cause irreparable harm to the targeted wolves, the larger wolf population still recovering from the February 2021 hunt, and to the Ojibwe Tribes who (1) regulate their members' use of ecological resources as part of their sovereignty and self-governance and (2) have a spiritual and cultural relationship with wolves.

A. Injunctive Relief Is Necessary To Prevent Irreparable Harm To Treaty Rights And Tribal Sovereignty.

An injunction is necessary to prevent the denial of the Ojibwe Tribes' reserved rights under the 1837 and 1842 Treaties. The denial of the Ojibwe Tribes' rights to declare their equal share of the harvestable wolf population and manage that share is an irreparable harm.

Treaty rights are "fundamental rights," the denial of which "can be presumed to be irreparable harm." *United States v. Michigan*, 534 F. Supp. 668, 669 (W.D. Mich. 1982) (recognizing that "the denial of treaty rights to fish in certain zones of the Great Lakes without biological justification, can be presumed to be irreparable harm."). State actions pertaining to treaty-protected resources "which reserve the entire harvestable portion of a species . . . for a special interest and purpose discriminate illegally against the treaty Indians." *U.S. v. Washington*, 384 F. Supp. 312, 404 (W.D. Wash. 1974) (granting an injunction where the state laws and regulations pertaining to a fish species reserved the fish to non-tribal members). Similarly, an injunction is appropriate where an action would harm the resources enjoyed by a tribe and upon which a tribe's treaty rights depend. *See Confederated Tribes and Bands of Yakama Nation v.*

U.S. Dep't. of Agric., No. CV-10-3050-EFS, 2010 WL 3434091 (E.D. Wa. Aug. 30, 2010) (enjoining a permit for disposal of garbage near Indian reservation because of unquantified risk of introduction of exotic species that could harm treaty-protected resources). Treaty rights are unique, and "not susceptible of definite monetary determination." *Washington,* 384 F.Supp. at 404. This Court, too, has enjoined the interference with the Ojibwe Tribes treaty-protected off-reservation rights in the past. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 759 F. Supp. 1339 (W.D. Wis. 1991) (enjoining protestors from violently interfering with the Tribes' treaty right to spear walleye in the ceded territory). *See also Lac Courte Oreilles Band,* 740 F. Supp. at 1423 (enjoining defendants from enforcing against tribal hunters a prohibition on Indian tribal hunting of deer before state deer-hunting window).

The Ojibwe Tribes have treaty rights to an equal share of the harvestable wolves in the ceded territory. *Lac Courte Oreilles Band*, 740 F. Supp. at 1416. By more than doubling the DNR's recommended number of harvestable wolves—from a quota of 130 to 300—for the express purpose of allowing the state to license hunters to kill the entire amount of wolves the DNR deemed harvestable, the Board Defendants are denying the Ojibwe Tribes their treaty right to an equal share of the harvestable population. Transcript at 51:12-18 (Defendant Prehn explaining that if the quota is 300, "that would put it [the state's share] in more of the realm of . . . the 130" that the Department proposed); *see also id*. at 49:7-50:2, 50:6-12, 55:12-13, 64:9-24. As Mike Wiggins Jr., tribal Chairperson for the Bad River Band, explains: "Our treaties represent a way of life for our tribal people . . . We view violations of our treaty rights as hostile actions against our tribal sovereignty and the very lives of tribal people." Wiggins Dec. ¶ 13. This, alone, is sufficient harm to support a preliminary injunction.

The Ojibwe Tribes also are irreparably harmed because the Defendants' treaty violations undermine the Tribes' sovereign governmental role to manage their members' use of environmental resources and wildlife. Sovereigns, like Tribes and states, are entitled to "special solicitude" in the enforcement of procedural rights guaranteed under federal law. *Massachusetts v. E.P.A.*, 549 U.S. 497, 520 (2007). Courts frequently find that an intrusion onto tribal sovereignty and governance is an irreparable, non-speculative injury for purposes of an injunction. *See Ute Indian Tribe v. Utah*, 790 F.3d 1000, 1005 (10th Cir. 2015) (Gorsuch, J.) (rejecting argument that state's disrespect for tribal sovereignty was "speculative"); *see also Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1252 (10th Cir. 2001); *Mashpee Wampanoag Tribe v. Bernhardt*, 2020 WL 3034854 (D.D.C. June 5, 2020). Injuries to tribal sovereignty are irreparable because they are not easily subject to valuation and cannot be compensated with money damages. *Prairie Band of Potawatomi Indians,* 253 F.3d at 1251.

Resource management, such as choosing whether and how to allow hunting of wolves, is a governmental role and part of the Ojibwe Tribes' self-governance. Just as Wisconsin's government aims to regulate its citizens' use of species and other natural resources within its jurisdiction, so too do the Ojibwe Tribes' governments. *Compare* Wis. Stat. §§ 23.09(1)-(2), *with* DeFoe Dec. ¶ 2 (describing the role of a multi-tribe body that recommends policies regarding inland harvest seasons and resource management issues that affect the treaty rights of Ojibwe Tribes in the territories ceded under the 1837 and 1842 Treaties); *see also Lac Courte Oreilles Band*, 707 F. Supp. at 1055 (holding that the Ojibwe Tribes can regulate tribal members' off-reservation fishing of walleye and muskellunge, and that the state cannot infringe on that right to self-regulation). Many of the Ojibwe Tribes have plans regarding their Tribe's management of,

or relationship to, wolves. *See, e.g.*, DeFoe Dec. ¶ 5 (Red Cliff); Wiggins Dec. ¶ 6 (Bad River Band); Bisonette Dec. ¶¶ 13-15 (Lac Courte Oreilles).

Each of Defendants' violations of the treaty right—setting a quota that effectively nullifies the Ojibwe Tribes' share to wolves, failing to rely on sound biological principles in setting a quota, and mismanaging wolf hunts—irreparably harms the Ojibwe Tribes' self-governance and management of treaty resources. First, by shifting what should be the tribal share of wolves to the state, the Defendants deny the Ojibwe Tribes the ability to regulate and manage their share of the quota.

Second, by setting an excessive quota and managing wolf hunts in a way that makes exceeding that quota likely, Defendants make it more likely that state-licensed hunters will diminish reservation habitat for wolves and the ability for tribes to maintain wolf packs on reservations. Wydeven Dec. ¶¶ 28, 44; *see also* Edwards Dec. ¶¶ 1-5 (describing wolf packs on Red Cliff Reservation and threat to them from state-sponsored hunting). The Ojibwe Tribes' governments are actively trying to manage and facilitate the safety and growth of reservation packs, *see, e.g.*, DeFoe Dec. ¶ 5; Wiggins Dec. ¶¶ 6-7; Bisonette Dec. ¶¶ 13-15; St. John Dec. ¶¶ 14-17, and the tribal governments' efforts to do so would be harmed by the killing of reservation wolves. Because of the size and shape of the reservations as compared to the range of the wolves, wolves that are part of reservation packs also occupy off-reservation territory. *See, e.g.*, DeFoe Dec. ¶ 5; Wiggins Dec. ¶ 7; St. John Dec. ¶¶ 15-16. Furthermore, the Board Defendants' quota of 300 wolves for the November hunt, if implemented, "would risk increased instability and reduced resilience" of the wolf population. Wydeven Dec. ¶ 44. This, in turn, would diminish the "abilities for tribes to maintain viable wolf packs on areas of suitable habitat on reservation lands," *id.*, and would have a ripple effect of harms to the broader ecology of

currently occupied wolf habitat on reservations and throughout Wisconsin, *id*; *see also id* ¶¶ 11, 45 (explaining how a wolf population promotes biodiversity and overall ecosystem health); VanZile Dec. ¶¶ 25-26; St. John Dec. ¶¶ 7-8.

Defendants' treaty violations thus operate to prevent the Ojibwe Tribes from protecting, conserving, and managing their members' use of the treaty-guaranteed share of the wolf quota within the ceded territory. Defendants' violations also prevent 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 on- and off-reservation. These are irreparable harms to fundamental treaty rights and the Tribes' right to self-govern as sovereigns.

B. Injunctive Relief Is Necessary To Prevent Irreparable Harm To Wolves And Corresponding Harms To The Ojibwe Tribes And Their Members.

An injunction also is necessary to prevent irretrievable loss of wolves in Wisconsin during the upcoming state-sponsored hunt, which comes on the heels of a February hunt concentrated during the wolves' breeding season that already severely impacted the Wisconsin wolf population. The loss of wolves is a significant harm to the Ojibwe Tribes and their members, who have deep cultural and spiritual relationships with the wolves in Wisconsin.

"Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987); *see also Sierra Club v. Franklin Cty Power of Illinois*, 546 F.3d 918, 936 (7th Cir. 2008) (same). The loss of wildlife, including wolves, is an irreparable harm that "[m]oney damages would not compensate." *See Habitat Educ. Center, Inc. v. Bosworth*, 363 F. Supp. 2d 1090, 1113 (E.D.

Wis. 2005) (granting a preliminary injunction where "[m]oney damages would not compensate for the loss of goshawk, red-shouldered hawk, marten and their habitat."). Reducing a species' population through a state-sponsored hunt or other state plan has been recognized by courts to cause irreparable harm justifying injunctive relief. *See Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 219-22 (D.D.C. 2003) (enjoining a state plan to kill 525 mute swans from a state population of 3,600); *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (enjoining a bison hunt); *Fund for Animals v. Espy*, 814 F. Supp. 142, 151 (D.D.C. 1993) (same).

Here, the environmental harm is direct and immediate because state-sponsored hunting will result in the deaths of wolves in the ceded territory. Indeed, that is the very purpose of the hunting season planned by the State Defendants to commence on November 6. Moreover, this harm will be additive to the harms the wolf population and the Ojibwe Tribes suffered as a result of the February hunt. Wydeven Dec. ¶¶ 42-45. The result is likely to be a substantially reduced wolf population—one reduced from more than 1,100 individuals to 350-400 individuals or even fewer in a single year—with an increased risk of instability and a reduced ability to bounce back from such losses. Wydeven Dec. ¶¶ 42-44. The scale of this impact to the wolf population constitutes irreparable harm warranting an injunction. For example, courts have enjoined a bison hunt that would have involved the killing of 8 percent of a herd and a state plan to kill 14 percent of a mute swan population. *Fund for Animals v. Norton*, 281 F. Supp. 2d at 220-21, *id.* at 220 n.8 (comparing percentages of populations that would have been affected but for an injunction in other cases). Even accepting the DNR's overestimate of the present Wisconsin wolf population, authorizing 300 wolves to be killed, as the Board Defendants did, would mean the Defendants are planning for the deaths of nearly one third of the Wisconsin off-reservation wolf population. Wydeven Dec ¶ 35 (noting that the DNR is using a population estimate of 935 wolves). Using a

more conservative population estimate that incorporates reduced reproduction and recruitment rates following the hunt that occurred during the February breeding season, would mean that the Board Defendants set a 300-wolf quota that would allow for approximately 44 percent of the state wolf population of 681 wolves to be killed. *See* Wydeven Dec. ¶¶ 37-38.

Injunctive relief is necessary to prevent the irreparable harm that would flow from the loss of these wolves, which will be the subject of hunting if the Court does not enjoin the state hunting season. Spiritual, cultural, recreational, scientific, vocational, educational, and aesthetic injuries that flow from harm to a species can be the basis for an injunction. *See Alliance for Wild Rockies v. Marten*, 253 F. Supp. 3d 1108, 1111 (D. Mont. 2017). For example, courts have enjoined government planned bison hunts that were intended to reduce the size of bison herds where members of the plaintiff environmental organizations enjoyed observing, photographing, and generally commiserating with the animals. *Fund for Animals v. Clark*, 27 F. Supp. 2d at 14; *see also Fund for Animals v. Espy*, 814 F. Supp. at 151 (finding irreparable harm and enjoining a program that would have removed 10 to 60 bison from a herd where the individual plaintiffs' enjoyed the bison "in much the same way as a pet owner enjoys a pet"). In *Fund for Animals v. Clark*, the court acknowledged that "even contemplating the type of treatment of the bison inherent in an organized hunt would cause [plaintiffs' members] to suffer an aesthetic injury that is not compensable in money damages." 27 F. Supp. 2d at 14. Where harm to a species impacts the health of habitats upon which a plaintiff's enjoyment depends, that, too, is an irreparable harm warranting an injunction. *See Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 822 (9th Cir. 2018) (recognizing harm where the entire ecosystem where a plaintiff organization's member boated, photographed, and recreated would be degraded by diminished levels of salmon and steelhead).

Here, the Ojibwe Tribes and tribal members have a documented interest in the survival of wolves in Wisconsin. *See* DeFoe Dec, VanZile Dec. Bisonette Dec; Declaration of John Johnson, Sr. In Support of Motion for Preliminary Injunction ("Johnson Dec."). They will suffer an irreparable spiritual, cultural, and psychological harm if this hunt goes forward. As Marvin DeFoe, tribal elder of Plaintiff Red Cliff Band, explains, following the tribe's "stories from the beginning of time," the tribe has understood that "ma'iingan walked alongside the Anishinaabe, since the earth was made." DeFoe Dec. ¶ 11. While tribal ancestors and ma'iingan each went on their own path, "it is said they will forever be linked—that what happens to the ma'iingan happens to the Anishinaabe." *Id.*: *see also* Johnson Dec. ¶ 20 ("They say what happens to the wolf happens to us. And we believe those old stories and we see it happening."). For this reason, when ma'iingan gets hunted down, Mr. DeFoe experiences it as an intense personal loss:

> When the pregnant female ma'iingan is getting killed, it is no different than the murdered Indigenous women. . . . So when the ma'iingan is being hunted and killed, you are killing our brother. It is no different. When a ma'iingan is killed it is like you are murdering one of our family members, one of our kids.

DeFoe Dec. ¶ 11, 13; *see also* VanZile Dec. ¶¶ 15-23; St. John Dec. ¶ 6. Conrad St. John, a representative on the Tribal Council of the St. Croix Chippewa Indians and former treaty rights coordinator for St. Croix, describes his experiences with wolves as "a spiritual experience" that is "humbling." St. John Dec. ¶ 18. The planned hunting season will be a spiritual and cultural harm to Mr. DeFoe, Chairman VanZile, and other tribal members; they will experience the state-licensed wolf hunting as the persecution of their brothers. *See, e.g.*, DeFoe Dec. ¶ 13; St. John Dec. ¶ 6 (saying that it is like "allowing the state to crucify a family member").

The deaths of wolves also affect the Ojibwe Tribes' subsistence and cultural practices. VanZile Dec. ¶¶ 24-27. Scientific evidence indicates that wolves' role in the ecosystem increases biodiversity and overall ecosystem health. Wydeven Dec. ¶ 11. Further, as Chairman VanZile,

Swirling Clouds, of the Sokaogon Chippewa Community explains, the wolves serve an important role in the ecosystem of removing weak deer, such as those infected with chronic wasting disease, from the herd. VanZile Dec. ¶ 25; Johnson Dec. ¶ 20 ("What if the wolves never come back? Who is going to take care of these diseased animals?"); *see also* Wydeven Dec. ¶¶ 11 (describing evidence of wolves' role in limiting chronic wasting disease). The Tribes "need strong deer herds, we need the body of the waawaashkeshi, to feed our families." VanZile Dec. ¶ 25; *see also Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 769 F.3d 543, 544-45 (7th Cir. 2014) (noting the importance of deer meat as part of tribal members' diets and subsistence). Yet the sharp reduction of the wolf population authorized by Defendants threatens to compromise these ecological benefits. Wydeven Dec. ¶ 45.

These harms to the Ojibwe Tribes satisfy the irreparable-harm requirement for injunctive relief. *See Fund for Animals v. Clark*, 27 F. Supp. 2d at 14; *Fund for Animals v. Espy*, 814 F. Supp. at 151.

III. THE BALANCE OF HARMS AND PUBLIC INTEREST FAVOR AN INJUNCTION.

The balance of equities and the public interest in preserving the Ojibwe Tribes' treaty rights and conserving the gray wolf population support issuance of injunctive relief.

In contrast to the irreparable harm to the Ojibwe Tribes if the November hunt is not enjoined, the relative absence of harmful effects to the State Defendants weighs in favor of granting the injunction. None of the interests Defendants might put forth in favor of holding a wolf hunt are sufficient to tip the scales against enjoining the hunt. *See Habitat Educ. Ctr., Inc.*, 363 F. Supp. 2d at 1114 (recognizing that where an agency has to spend additional time, effort, and resources in reviewing environmental information, it "do[es] not weigh heavily against an injunction").

Any interest the Defendants claim in controlling the wolf population in Wisconsin fails to tip the balance of the equities. Less than one year has passed since the federal government determined that the gray wolf is not "endangered" with extinction, *See* Removing the Gray Wolf (Canis lupus) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69,778 (Nov. 3, 2020), and during that year at least 218 wolves were killed as a result of a hunt managed by the State Defendants, Wydeven Dec. ¶ 14. Enjoining the November hunt will not lead to significant growth of the wolf population, let alone growth of the wolf population in excess of what the suitable habitat in Wisconsin can accommodate. *See* Wydeven Dec. at ¶ 26 (explaining that the most recent season of wolf reproduction will not compensate for the losses sustained in the February hunt); *Id.* ¶ 44 ("The most recent estimates place the gray wolf biological carrying capacity in Wisconsin at about 1,242 wolves."); *see also Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 222–24 ("Defendants' repeated references to the potential for further exponential growth in the mute swan population if the state of Maryland is not permitted to proceed with killing 525 swans in the next few weeks are, to say the least, somewhat premature . . . Conversely, if defendants are allowed to proceed with their proposed action, 525 swans will irretrievably be lost."). In fact, the DNR continues to hold Wolf Management Plan Committee meetings where it is reviewing population frameworks and revising the state's wolf management plan separate and apart from the planned November wolf hunt – an injunction will not slow down or impede this work. *See* Clark Dec. Exhibit 12 (DNR Wolf Management Plan Committee Meeting Agenda (Sept. 23, 2021)).

Additionally, any economic interests that the Defendants have in revenue from hunting licenses and encouraging hunters to travel to and spend money in the state does not shift the balance of equities where environmental harms are at stake. *See Wisconsin Gas Co. v. FERC*,

758 F.2d 669, 674 (D.C. Cir. 1985) ("It is also well settled that economic loss does not, in and of itself, constitute irreparable harm."); *see also Confederated Tribes and Bands of Yakama Nation*, 2010 WL 3434091, at *5 (noting that an agency's interest in encouraging economic growth and a state's interest in disposing of garbage were "trumped" by the potential environmental injuries posed by an unquantified risk of the introduction of exotic species near their reservation).

Finally, any interest the Defendants have in implementing the state wolf hunting statute, Wis. Stat. § 29.185(1m), cannot supersede treaty rights. Treaties are the "the supreme Law of the Land." U.S. Const. art. VI, § 2. Indeed, "Federal Indian law is replete with examples in which state law has had to accommodate tribal sovereignty." *Prairie Band of Potawatomi Indians*, 253 F.3d at 1252.

The public interest further weighs in favor of an injunction because of the treaty rights and tribal sovereignty values at stake. *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1516 (W.D. Wash. 1988) ("[T]he enforcement of rights that are reserved by treaty to the Tribes is an important public interest, and it is vital that the courts honor those rights."); *Michigan*, 534 F. Supp. at 669 ("[T]he public interest would best be served by the protection of these treaty rights to the fullest extent possible, and by encouraging and fostering the concept of tribal sovereignty."). Additionally, the public has an interest in Defendants adequately considering scientific and environmental principles, especially where their actions may harm a species, such as the gray wolf, and the public's enjoyment of that species. *Habitat Educ. Ctr., Inc.*, 363 F. Supp. 2d at 1114 (issuing an injunction based on possible irreparable harm to goshawk, red-shouldered hawk, and marten, as well as their habitat and the public's use and enjoyment of those resources). Preservation of natural resources and wildlife are an important governmental and public interest. *See LeClair v. Swift*, 76 F. Supp. 729 (E.D. Wis. 1948); *State v. Erickson*,

101 Wis.2d 224, 303 N.W.2d 850 (Wis. Ct. App. 1981). Accordingly, the public interest also favors the requested relief.

CONCLUSION

For the foregoing reasons, the Ojibwe Tribes respectfully request this Court GRANT their motion for a preliminary injunction.

Respectfully submitted this 1st day of October 2021.

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