STATE OF IDAHO)
County of KOOTENAI)ss

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

CITIZENS AGAINST RANGE EXPANSION, et al,

Plaintiff,

vs.

IDAHO DEPARTMENT OF FISH AND GAME, an agency of the STATE OF IDAHO, et al.,

Defendant.

Case No. **CV 2005 6253**

MEMORANDUM DECISION AND ORDER ON MOTIONS TO STRIKE, DEFENDANT'S MOTION FOR VIEW, DEFENDANT'S MOTION PARTIAL LIFTING OF INJUNCTION AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; and ORDER SCHEDULING COURT TRIAL

I. FACTUAL BACKGROUND.

This case is before this Court on a variety of motions by each party. At the heart of the present controversy is Idaho Department of Fish and Game's (IDFG) claim that the Idaho Outdoor Sport Shooting Range Act solves the "noise" concerns set forth in this Court's February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law and Order, and Citizens Against Range Expansion's (CARE) claim that the Idaho Outdoor Sport Shooting Range Act is unconstitutional. This Court finds the Idaho Outdoor Sport Shooting Range Act violates Idaho State Constitution Article III, Section 19, and its prohibition against "special laws" contained therein.

The Farragut Wildlife Management Area was formerly the site of the Farragut Naval Training Center established by the United States Navy in 1942. Land began being acquisitioned by the IDFG in 1949, when four separate parcels bordering Lake

Pend Oreille were purchased. IDFG's ownership at Farragut Park presently consists of approximately 1,413 acres. This is made up of four parcels totaling 157 acres on the shore of Lake Pend Oreille and one 1,256-acre parcel located west of Bayview, Idaho. The Farragut Shooting Range occupies a site of approximately 160 acres and has been used as a shooting range since the land was owned by the United Sates Navy. The surrounding neighborhood consists of private residential houses, a public road (Perimeter Drive), school bus stops and hiking trails.

The use of the Farragut Shooting Range has expanded a great deal since 2002. Use went from 176 shooters in 2002, to 370 shooters in 2004, to 509 in 2005 only through August of that year. Plaintiffs' Brief in Support of Motion for Summary Judgment, p. 25, n. 2.

A public proposal for the improvement of the Farragut Shooting Range made by the IDFG seems to be what precipitated this lawsuit. In 2004, the IDFG published a proposal to improve the Farragut Shooting Range with the investment of $3,600,000. That proposal was based on the Vargas Master Plan. The Vargas Master Plan proposed making improvements to the Farragut Shooting Range in the areas of public safety, public access, noise mitigation, facility quality and management.

Plaintiff CARE is an unincorporated non-profit association formed for the purpose of stemming unwarranted expansion of the Farragut Shooting Range (Complaint, p. 2, ¶ 1), and the individual plaintiffs who live near the Farragut Shooting Range. CARE claims these expansions cannot be done safely because the IDFG does not own enough property nor have enough money to make these improvements safe. CARE seeks to enjoin IDFG from carrying out the Vargas Master Plan. CARE claims that although the plan purports to make improvements to the shooting range, the plan will

also expand the shooting range by lengthening the range from 500 to 600 yards, adding berms, parking and intermediate firing positions, and including trap and skeet fields, mounted cowboy action areas, and 130 shooting stations.

IDFG claims there is no plan to *expand* the Farragut Shooting Range, either in geographic size, shooter capacity, or types of shooting activity, but only to *improve* it.

In 1996, Clark Vargas, a professional engineer, published a paper for the 1996 Third National Shooting Range Symposium, which was intended to provide a general review of range design criteria when selecting a shooting range site. This paper set forth nationally-recognized safety standards for construction and operation of shooting ranges. The Vargas Master Plan is inconsistent with the range design criteria Vargas discussed in his 1996 Third Shooting Range Symposium.

II. PROCEDURAL BACKGROUND.

On August 22, 2005, plaintiff CARE filed its Complaint in this matter. Defendant IDFG filed an Answer on September 16, 2005. On November 9, 2005, this Court set the matter for a five-day jury trial scheduled to begin on July 17, 2006. On February 9, 2006, CARE filed an Amended Complaint. On March 13, 2006, this Court, pursuant to the parties' stipulation, vacated the July 17, 2006, trial and scheduled this for a jury trial beginning September 18, 2006. Following a hearing on June 2, 2006, this Court granted CARE's motion to vacate the trial date of September 18, 2006, and scheduled this matter for jury trial beginning December 11, 2006.

On July 26, 2006, CARE filed a Motion for Summary Judgment upon their first and second causes of action in the Amended Complaint as follows:

> 1. For a permanent injunction prohibiting defendant Idaho Fish and Game Department, its agents and employees from operating or allowing anyone to use the existing Farragut Shooting Range as a shooting range in its present condition.

> 2. For a permanent injunction prohibiting defendant Idaho Fish and Game Department, its agents and employees from any further action to implement or carry out the Vargas Master Plan and Definitive Drawings, Farragut Shooting Range, July 2004.

Motion for Summary Judgment, p. 2. CARE sought summary judgment, asking this court to permanently enjoin the IDFG from continued operation of the range and future implementation of the Vargas Master Plan. Specifically, CARE asked this Court in their first cause of action for a permanent injunction that requires IDFG to restore and close the outer access gate, prohibit any other or different access road to the range and restore the operational policy that existed in July of 2003. CARE's second cause of action asked the Court for a permanent injunction against any expansion to the shooting range and restoring it to its July 2003 operations. CARE at the time asserted that if summary judgment were entered in the first two causes of action, CARE would stipulate to a dismissal of all claims for damages and would dismiss with prejudice their third, fourth and fifth causes of action.

Briefing was submitted by both sides. Additionally, the Court considered: "Plaintiffs' Statement of Material Facts Not in Dispute", "Plaintiffs' Appendix of Relevant Publications in Support of Motion for Summary Judgment", Affidavits of Marcelle Richman, Duane Nightengale and Roy H. Ruel; "Defendants' Statement of Material Facts in Dispute", "Defendants' Appendix of Relevant Documents" and affidavits of Clark Vargas, P.E., Randall Butt and David Leptich. On September 5, 2006, CARE filed "Plaintiffs' Reply Brief in Support of Motion for Summary Judgment" and various certifications of documents. On September 7, 2006, CARE re-filed "Plaintiffs' Reply Brief in Support of Motion for Summary Judgment", this time attaching a "Comparison Vargas Affidavit With Vargas Design Criteria".

Oral argument on CARE's Motion for Summary Judgment was held on September

13, 2006. That motion was taken under advisement. CARE had also filed a Motion to Strike the Affidavit of David Leptich to the extent it included the Range Evaluation Report prepared by Edward M. Santos. The Court granted the motion as it was hearsay. At oral argument on September 13, 2006, IDFG's attorney tendered to the Court for filing the Affidavit of Edward M. Santos, attaching his Range Evaluation Report. CARE objected as to the timeliness of Santos' affidavit. The Court in its discretion overruled CARE's objection as to timeliness, as the parties had been aware of the Range Evaluation Report for some time.

On September 19, 2006, this Court denied CARE's Motion for Summary Judgment, and ordered the parties to submit simultaneous briefing on the issues of: the applicable standard(s), the legal or factual nature of the standards, and what the Court and jury must decide at trial. Memorandum Decision and Order Denying Plaintiffs' Motion for Summary Judgment, and Order Setting Briefing Schedule, pp. 14-15. That briefing was submitted.

On February 23, 2007, this Court issued its sixty-page Memorandum Decision, Findings of Fact, Conclusions of Law and Order. In that decision, this Court stated:

> **IT IS HEREBY ORDERED** plaintiffs are entitled to an injunction ordering defendants Idaho Department of Fish and Game and Director Steven M. Huffaker to close the Farragut Wildlife Management Area to all persons with pistols, rifles and firearms using or intending to use live ammunition until a baffle is installed over every firing position. The baffle must be placed and be of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target. Once baffles are installed and either 1) plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target, or 2) if the plaintiffs cannot agree, the Court so finds after a view of the premises, the injunction will be lifted, and IDF&G may operate that range in the same manner in which it historically has (ie., without any on site supervision), up to 500 shooters per year. Once IDF&G has realized that number in a given year, it must close the range for the remainder of that calendar year.

> **IT IS FURTHER ORDERED** the Idaho Department of Fish and Game is free to seek any funding it wishes. The Idaho Department of Fish and Game is free to build any improvements upon its property. However, use levels will remain capped at 500 shooters per year unless the following two concerns have been adequately addressed: **1) Safety:** include safety measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G, and **2) Noise:** include noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence. Even if the solution to these two concerns are agreed upon by the parties, in order to close this case IDF&G will need to obtain an order from the Court to exceed 500 shooters per year. The first concern (safety) can be satisfied only by the "No Blue Sky" rule, or "totally baffled…so that a round cannot escape", as espoused by the nation's preeminent authority on range design and designer of the Vargas Master Plan, Clark Vargas. Exhibit 2, p. 5. Once bullet containment is achieved, it matters not for purposes of this litigation if the range is supervised (with bullet containment, supervision would only inure to the benefit of the participants, an important consideration, but not the subject of this lawsuit). The second concern (noise) is a function of the number of shooters (per year or per day) and peak decibel level. For example, it may be that 500 shooters per year in an unmitigated range producing 65 decibels is less desirable than 50,000 shooters per year from a range that only produces 30 decibels. It would seem logical for the parties to agree as to noise levels and shooter numbers in advance of any construction, but it is not the Court's place to force such agreement in advance. If the parties in the future cannot agree as to noise levels and maximum shooter numbers, the Court will make that determination with additional evidence. If IDF&G makes improvements but does not successfully address safety and noise concerns, IDF&G will not be allowed to exceed 500 shooters per year.

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, pp. 61-62 (emphasis in original). No appeal was taken from that order.

Since 2007, IDFG has made changes to the Farragut Shooting Range. IDFG now requests the Court lift the February 23, 2007, injunction "as it applies to the renovated 100-yard portion of the Farragut Range and, as to noise abatement, adopt the noise standard of the Idaho Sport Shooting Range Act, codified at Idaho Code §§ 67-9101 to 67-9105, as the standard applicable to operation of the Farragut Shooting Range." Brief in Support of Motion for Partial Lifting of Injunction, p. 12.

On September 16, 2010, the parties submitted a Joint Case Management Plan, and this Court entered its Order on the Joint Case Management Plan on September 17, 2010. The Plan set forth discovery deadlines along with the timeline within which the parties are to file briefs in support of or opposition to the partial lifting of the injunction.

On December 12, 2010, IDFG filed its Brief in Support of Summary Disposition of Defendants' Motion for Partial Lifting of Injunction. Along with the brief, IDFG filed a Statement of Undisputed Facts and the Affidavits of David Leptich, Kerry O'Neal, and Jon Whipple. On December 20, 2010, CARE filed its Motion to Strike the Affidavits of Jon Whipple and Kerry O'Neal, and a Motion to Strike the Testimony of Kerry O'Neal Based on Lack of Expertise and Lack of Foundation. IDFG filed its memoranda opposing both motions, supported by the Affidavit of Kathleen Trever, on January 3, 2010. Oral argument on these motions was held on January 11, 2011. Following that hearing, this Court took these motions under advisement.

Hearing on IDFG's Motion to Strike Affidavit of James Caulder, IDFG's Motion for Summary Disposition of Motion for Partial Lifting of Injunction, and IDFG's Motion for View, as well as CARE's Motion for Summary Judgment were all held on February 14, 2011. Following that hearing, this Court took those motions under advisement as well.

III. CARE'S MOTIONS TO STRIKE.

A. Introduction.

This matter is before the Court on IDFG's motion for Partial Lifting of Injunction. Before that issue is discussed, the Court must make evidentiary rulings.

On December 20, 2010, CARE filed "Plaintiff's Motion to Strike Testimony of Kerry O'Neal Based on Lack of Expertise and Lack of Foundation", and "Plaintiff's Motion to Strike the December 9, 2010 Affidavits of Jon Whipple and Kerry O'Neal".

The briefing on these motions was contained within the motions. On December 27, 2010, CARE filed the "Affidavit of Harvey Richman", which had attached deposition transcripts of Jim Caulder and Kerry O'Neal. On January 3, 2011, IDFG filed "Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike Affidavits of Jon Whipple and Kerry O'Neal", "Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike Affidavit of Kerry O'Neal Based on Lack of expertise and Lack of Foundation", and the "Affidavit of Kathleen Trever in Opposition to Motion to Strike Affidavits of Jon Whipple and Kerry O'Neal and Motion to Strike Affidavit of Kerry O'Neal." On January 7, 2011, CARE filed its "Consolidated Reply Brief of Plaintiffs to Motions to Strike."

B. Standard of Review.

When considering evidence presented in support of or opposition to a motion for summary judgment, a court can only consider material which would be admissible at trial. *Gem State Ins. Co. v. Hutchinson,* 145 Idaho 10, 13, 175 P.3d 172, 175 (2007), *citing Petricevich v. Salmon River Canal, Co.,* 92 Idaho 865, 869, 452 P.2d 362, 366 (1969). If the admissibility of evidence presented in support of a motion for summary judgment is raised by objection by one of the parties, the court must first make a threshold determination as to the admissibility of the evidence "before proceeding to the ultimate issue, whether summary judgment is appropriate. *Id., citing Bromley v. Garey,* 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999), *quoting Ryan v. Beisner,* 123 Idaho 42 45, 844 P.2d 24, 27 (Ct.App. 1992).

> The admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial. *Gem State Ins. Co. v. Hutchinson,* 145 Idaho 10, 13, 175 P.3d 172, 175 (2007) (citing

> *Carnell v. Barker Mgmt., Inc.,* 137 Idaho 322, 327, 48 P.3d 651, 656 (2002)). This Court applies the abuse of discretion standard when reviewing a trial court's determination of the admissibility of testimony in connection with a motion for summary judgment. *Id.,* at 15, 175 P.3d at 177. (citing *McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC,* 144 Idaho 219, 221, 159 P.3d 856, 858 (2007)).

J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford, 146 Idaho 311, 314-15, 193 P.3d 858, 861-62 (2008). Abuse of discretion involves a three-tiered inquiry by the appellate court, "to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *Id., citing Sun Valley Shopping Center, Inc. v. Idaho Power Co.,* 119 Idhao 87, 94, 803 P.2d 993, 1000 (1991).

C. Analysis.

In its motions to strike, CARE makes two arguments: (1) the testimony of Kerry O'Neal should be stricken because he is not an expert and his opinions are unsupported, and therefore lack foundation; and (2) the December 9, 2010, Affidavit of Kerry O'Neal and the Affidavit of Jon Whipple should be stricken as untimely under the parties' joint case management plan.

1. CARE'S Motion to Strike Affidavit of Kerry O'Neal Based on Lack of Expertise and Lack of Foundation.

CARE moves to strike the testimony of Kerry O'Neal, arguing "he is not qualified to speak as an expert and testimony elicited in his affidavits of June 6, 2009 and December 9, 2010 are without foundation." Motion to Strike Testimony of Kerry O'Neal Based on Lack of Expertise and Lack of Foundation, p. 2. CARE states O'Neal's affidavit shows no qualifications based on knowledge, skill, training or education; it

references experience alone. *Id.,* pp. 2-3. CARE criticizes O'Neal's experience as being "…self-taught, non-peer reviewed, not tested, and not in conformance with any recognized industry accepted reference books." *Id.,* p. 2. CARE notes O'Neal did not rely on professional standards or reference manuals in forming his opinion, and has failed to set forth the basis of his opinion as required by I.R.C.P. 26(b)(4)(A)(i). *Id.* CARE argues because O'Neal does not have a public works license for a project of the nature and scope at issue, he is "therefore not competent to even perform the services provided." *Id.,* p. 3.

In response, IDFG argues the language of Idaho Rule of Evidence 702 is disjunctive; therefore, an expert may be qualified by virtue of his knowledge, skill, experience, training, *or* education. IDFG quotes *Idaho Department of Health and Welfare v. Doe,* 235 P.3d 1195, 1198 (2010), for the propositions that formal training or a degree are not necessary to qualify a witness as an expert, and ultimately the question for the Court is whether the expert's knowledge will assist the trier of fact. Defendants' Memorandum in Opposition to Motion to Strike, p. 3. IDFG notes O'Neal's affidavit and *curriculum vita* properly address his extensive experience regarding the range industry and his personal observations of the Farragut Shooting Range, thus O'Neal is qualified as an expert and has laid the foundation for his opinion. *Id.* IDFG also argues CARE's criticism of O'Neal concerning his lack of a public works license is a misapplication of the statute because O'Neal was retained as a consultant and construction activities were performed by properly licensed contractors. *Id.,* p. 4.

IDFG's arguments are well-taken. Rule 702 reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

I.R.E. 702. The decision to permit or deny expert witness testimony is one left to the discretion of the Court. *J-U-B Engineers,* 146 Idaho 311, 314-15, 193 P.3d 858, 861-62. And, upon making that decision, the Court (as trier of fact at the summary judgment stage of proceedings) is also entitled to give such testimony the weight to which it deems such testimony is entitled. *Christensen v. Nelson,* 125 Idaho 663, 666, 873 P.2d 917, 920 (Ct.App. 1994) ("As a trier of fact, the district court was allowed to make the final decision on how much weight, if any, to give to an expert's testimony. Provided that the trier of fact does not act arbitrarily, an expert's opinion may be rejected even when uncontradicted. *Simpson v. Johnson,* 100 Idaho 357, 362, 597 P.2d 600, 605 (1979).") A proper foundation for O'Neal's opinions has been laid here. Idaho Rule of Evidence 703 permits the facts or data upon which an expert's opinion are based to be "those perceived by or made known to the expert at or before the hearing." I.R.E. 703. There is no dispute here that O'Neal perceived certain facts and data regarding the Farragut Shooting Range and formed his opinion from the facts and data he observed. To the extent O'Neal relies exclusively upon facts or data not "reasonably relied upon by experts in [his] particular field", this Court may nonetheless admit his opinion testimony if it finds the probative value in assisting the trier of fact to evaluate O'Neal's opinion substantially outweighs any prejudicial effect. I.R.E. 703. While the objections raised by CARE may go to the extent of the probative value of O'Neal's affidavit, and thus the weight given by the Court to opinions contained in O'Neal's affidavit, O'Neal's opinion still has probative value. CARE has not articulated any prejudice which would result from the admission of O'Neal's opinion.

At oral argument, the focus of CARE's attorney turned to *Carnell v. Barker Management, Inc.,* 137 Idaho 322, 48 P.3d 651 (2002), a case not mentioned in either

side's briefing, for the proposition that the expert must explain his or her methodology, and a failure to explain that methodology makes that expert's opinion inadmissible. A review of *Carnell* shows that the "expert's" failure to explain his methodology was but one of several defects in that expert's affidavit (the most fatal according to the Idaho Supreme Court was the fact that this "expert" had never been *disclosed* as an expert) which resulted in the trial court's striking that expert's affidavit. That decision was upheld by the Idaho Supreme Court. The pertinent portion of *Carnell* reads:

> The district court was cognizant of the fact that this Court has not adopted *Daubert,* and conducted a bare analysis of Bidstrup's second affidavit under I.R.E. 104 and 702. In its decision, the court first addressed whether Bidstrup was qualified as a fire causation and origin expert. Citing the lack of information in his affidavit concerning his education, training, and experience in the area of fire investigation, coupled with no mention of how Bidstrup gained his knowledge in fire causation, the district court found that Bidstrup was "unqualified to testify as to the cause, place of origin, or spread of fire...." The court next tried to determine if Bidstrup's testimony was based on "scientific, technical, or other specialized knowledge" as required by I.R.E. 702. The court found that other than the one sentence stating that fire burns towards fuel or oxygen, a common fact known by most lay people, there was no other explanation of the methodology Bidstrup used to determine the cause of the fire or exclude possible causes. The court also found that Bidstrup's testimony lacked factual foundation. Even though Bidstrup claimed to have reviewed the depositions in the case, his conclusions contradicted the testimony given in those depositions. The court also noted that much of Bidstrup's affidavit was nothing more than conclusions as to questions of law. Witnesses are not allowed to give opinions on questions of law; thus, the district court properly found that those conclusions were not admissible.

137 Idaho 322, 328, 48 P.3d 651, 657. This Court's reading of *Carnell* is that it does not *require* "methodology" be set forth, but "methodology" is certainly a factor to be considered by the trial court. In his affidavit, O'Neal sets forth his experience (he owns a business established to meet the service needs of the firing range industry including design and construction of new indoor and outdoor firing ranges, Affidavit of Kerry O'Neal, p. 2, ¶ 1, he has designed more then 100 municipality shooting range facilities,

Id., and he is familiar with the NRA Range Source Book and other range guidance documents, *Id.,* ¶ 4), and his foundation (he was retained by IDFG as a consultant for this range's improvements, *Id.,* ¶ 6, he has inspected the 100-yard shooting area, *Id.,* p. 3, ¶ 8, he has reviewed this Court's orders, *Id.,* p. 2, 4, ¶¶ 5, 18). Affidavit of Kerry O'Neal, pp. 2-4.

O'Neal claims:

> Based on my experience and observation, the renovations at the 100-yard shooting area ensure that any rounds fired that hit and skip will be contained within the boundaries owned and controlled by IDFG.
>
> Based on my inspection, experience and observation, it is my opinion that the improvements at the Farragut Shooting Range have satisfied the conditions for bullet containment set by the Court's Order to re-open the 100-yard portion of the range.

Id., p. 4, ¶¶ 22, 25. The Court agrees there is little methodology, but that goes to the issue of weight, not admissibility, at least in this case. O'Neal sets forth his expertise and foundation for his opinions. The lack of methodology, somewhat conclusory nature of his opinions, and the fact that his affidavit omits the exhibits he relied upon in making his opinion (they are not attached to the affidavit filed with the Clerk of Court) all go to the weight of his opinion.

Given that this matter is left to the discretion of the Court, both as to admissibility and weight of O'Neal's testimony, CARE's motion to strike O'Neal's affidavits in whole on the grounds of lack of expertise and lack of foundation is denied.

2. CARE's Motion to Strike the December 9, 2010, Affidavits of Jon Whipple and Kerry O'Neal.

CARE also moves to strike the December 9, 2010, Affidavits of Jon Whipple and Kerry O'Neal as untimely under the parties' joint case management plan. CARE states the parties stipulated to October 4, 2010, as the deadline for filing of expert witness

disclosures. Motion to Strike the December 9, 2010, Affidavits of Jon Whipple and Kerry O'Neal, p. 2. CARE states IDFG "provided little more than the names of the purported experts" and failed to set forth the basis for opinions as required by I.R.C.P. 26(b)(4)(A)(i). *Id.* As such, CARE was unable to "anticipate questions relative to any Defense expert…" and "could not and did not posit, to the Plaintiff's expert, any questions to traverse the opinions of defendants [sic] surprise expert Whipple or the new opinions of Mr. O'Neal…" *Id.* In response, IDFG argues neither the Court's Order on the parties' Joint Case Management Plan, nor the Joint Case Management plan itself required expert witness disclosure to include all of the information required by Rule 26(b)(4). Defendants' Memorandum in Opposition to Motion to Strike, p. 3. "Consistent with the Joint Case Management Order, IDFG disclosed the identity of its expert witnesses, the subject matter of the expert testimony, and the substance of the expert opinions"; IDFG states the opinions of both Whipple and O'Neal were disclosed in this manner. *Id.* IDFG goes on to note that CARE availed itself of the opportunity to depose O'Neal and to proffer an interrogatory directed at the information addressed by Rule 26(b)(4)(A)(i) as to Whipple. *Id.,* p. 4. Further, IDFG argues the Exhibit to Whipple's December 9, 2010, Affidavit had previously been provided to CARE on September 15, 2010. *Id.*

Idaho Rule of Civil Procedure 26(b)(4)(A)(i) identifies the facts known and opinions held by experts expected to testify which must be disclosed. That rule states such facts and opinions may be obtained by interrogatory and/or deposition, and include:

> A complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any qualifications of the witness, including a list of all publications authored by the witness in the

> preceding ten years; the compensation to be paid for the testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

I.R.C.P. 26(b)(4)(A)(i).

Here, the disclosure of the facts known by and opinions disclosed by Whipple were fully disclosed in response to CARE's Interrogatory No. 1 on December 1, 2010. Exhibit D to the Affidavit of Kathleen Trever, pp. 2-3. This discovery response set forth the underlying basis of Whipple's opinion in a manner much more thorough and complete than the Defendants' Disclosure of Experts regarding Whipple had been. No objection was made by CARE regarding the October 4, 2010, Defendants' Disclosure of Experts. October 4, 2010, was the date to which the parties stipulated expert witness disclosure would be due. Nor is there any evidence before the Court that CARE sought to depose Whipple, and was unable to do so because of insufficient disclosure by IDFG by the October 4, 2010, deadline. Further, as to O'Neal, the expert witness disclosure on October 4, 2010, was more thorough than that for Whipple. And, it is well within the Court's province to find that O'Neal's December 9, 2010, Affidavit is a supplementation of previously given discovery responses within the meaning of I.R.C.P. 26(e).

At oral argument, counsel for IDFG claimed counsel for CARE did not speak to the issue of "surprise", in CARE's argument, which is an accurate claim. In response, CARE's attorney mentioned *Carnell v. Barker Management, Inc.,* 137 Idaho 322, 48 P.3d 651, "only pertains to the issue of surprise." This Court has read *Carnell*, and while the defects in the affidavit in question in that case were numerous, surprise was not really an issue in *Carnell*.

CARE had the option of seeking information known to Whipple and O'Neal by deposition, interrogatory, or both. CARE opted to depose only O'Neal and to utilize

interrogatories more fully with regard to Whipple. However, this Court does not find that IDFG acted improperly in disclosing either their expert witnesses or the opinions of the individuals indentified.

D. Conclusion.

For the reasons set forth above, the Court denies both of CARE's Motions to Strike: Plaintiff's Motion to Strike Testimony of Kerry O'Neal Based on Lack of Expertise and Lack of Foundation, and Plaintiff's Motion to Strike the December 9, 2010, Affidavits of Jon Whipple and Kerry O'Neal.

IV. IDFG'S MOTION TO STRIKE AFFIDAVIT OF JAMES CAULDER.

A. Standard of Review.

The standard of review has been set forth above in this Court's discussion of CARE's Motions to Strike. The Court is mindful of that standard but will not reiterate such here in its discussion of IDFG's motion to strike.

B. Analysis.

On January 10, 2011, IDFG filed its "Motion to Strike and/or Exclude Testimony of James Caulder (CARE's expert)", which contained some briefing in support of that motion. On January 19, 2011, CARE responded to this issue in part of its brief entitled "Consolidated Reply Brief in Support of Plaintiff's Motion for Summary Judgment and Motion to Strike and/or Exclude Testimony of James Caulder." On January 24, 2011, IDFG filed "Defendant's Brief in Support of Motion to Strike." On January 28, 2011, CARE filed "Plaintiff's Reply to the Defendant's 24 January 2011 Brief in Support of Motion to Strike Testimony of James Caulder."

IDFG moves to strike the testimony of James Caulder (Caulder), arguing Caulder:

> …may demonstrate expertise regarding Air Force range standards. However, his testimony does not meet Idaho Rule of Evidence 702's requirement to demonstrate "knowledge, skill, experience, training, or education' as to the safety requirements for Farragut Range as established by the Court's February 23, 2007 Order."

Brief in Support of Motion to Strike, p. 2. IDFG argues Caulder's knowledge of Air Force safety criteria is sufficiently distinct from the criteria established by this Court such that his testimony would not assist the trier of fact within the meaning of I.R.E 702. *Id.* IDFG argues there exists a fundamental difference between Air Force small arms range design standards and this Court's requirements regarding Farragut Range. *Id.,* p. 3. IDFG notes for the Court how problematic it is that Caulder "was unable to acknowledge differences" between Air Force standards and those set forth by this Court and "also does not demonstrate comprehension of the Court's criteria." *Id.,* p. 4, *et seq.* Caulder's discussion of Air Force criteria, 2007 drawings by Clark Vargas and NRA Sourcebook drawings, and on-range shooter safety is, according to IDFG, not relevant to the Court's February 23, 2007, Order and therefore would not assist the Court in evaluating IDFG's compliance with the Court's requirements for lifting the injunction. *Id.,* pp. 6-8. IDFG points out for the Court that its February 23, 2007, Order did not require containment of ricochet rounds within berms; the Court actually required the prevention of bullet escapement from IDFG's property. *Id.,* p. 7.

In its reply, CARE asserts that no expert for either party has suggested a difference exists between civilian and military ranges with regard to safety issues or the behavior of bullets fired. Plaintiff's Reply to the Defendant's 24 Jan. 2011, Brief in Support of Motion to Strike Testimony of James Caulder, p. 2. CARE argues Caulder's opinions are based upon his review of documentation provided by IDFG, pictures and video taken by the parties, his own engineering experience, and review of current

literature *inter alia. Id.,* pp. 3-4. CARE argues reference to Air Force standards was "not intended to be incorporated as the law applicable to Farragut, it is rather a standard to look to, to aid and assist in describing when bullets will escape the range and under what circumstances." *Id.,* p. 4. CARE asserts Caulder's opinion on the issue of ricochet bullets goes to the heart of the Court's Order where such ricocheting bullets travel over the back berm and/or leave the property owned and controlled by IDFG. *Id.* CARE urges the Court to admit the testimony of Caulder as his methodology and resulting conclusions are helpful to the Court. *Id.,* p. 7

Again, the language of Idaho Rule of Evidence 702 is disjunctive; therefore, an expert may be qualified by virtue of his knowledge, skill, experience, training, *or* education; the ultimate question is whether the expert's knowledge will assist the trier of fact. Rule 702 reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

I.R.E. 702. The decision to permit or deny expert witness testimony is one left to the discretion of the Court. *J-U-B Engineers,* 146 Idaho 311, 314-15, 193 P.3d 858, 861-62. And, again, upon making that decision, the Court (as trier of fact at the summary judgment stage of proceedings) is also entitled to give such testimony the weight to which it deems such testimony is entitled. *Christensen,* 125 Idaho 663, 666, 873 P.2d 917, 920; *Simpson,* 100 Idaho 357, 362, 597 P.2d 600, 605.

A proper foundation for Caulder's opinions has been laid here. Idaho Rule of Evidence 703 permits the facts or data upon which an expert's opinions are based to be "those perceived by or made known to the expert at or before the hearing." I.R.E. 703. There is no dispute here that Caulder perceived certain facts and data regarding the

Farragut Shooting Range and formed his opinion from the facts and data he observed. Given that this matter is left to the discretion of the Court, both as to admissibility of and weight to be given to Caulder's testimony, IDFG's motion to strike Caulder's affidavit must be denied.

V. CARE'S MOTION TO STRIKE AMENDED AFFIDAVIT OF KERRY O'NEAL.

A. Standard of Review.

The standard of review has been set forth above in this Court's discussion of CARE's Motions to Strike, *supra*. The Court is mindful of that standard but will not reiterate such here in its discussion of CARE's motion to strike the *amended* affidavit of O'Neal.

B. Analysis.

On February 10, 2011, shortly before hearing on the motions before the Court, CARE filed a Motion to Strike and Objection to the Amended Affidavit of Kerry O'Neal. This motion was not noticed up for hearing. The Amended Affidavit of Kerry O'Neal was filed on February 4, 2011. CARE argues that the affidavit is untimely under summary judgment standards and that CARE is prejudiced by its inability to respond to an affidavit it received one week before hearing on the matter. Motion to Strike and Objection to the Amended Affidavit of Kerry O'Neal, Dated February 3, 2011, pp. 4-5. CARE goes on to list its individualized objections to the Amended Affidavit of Kerry O'Neal and clarifies that the motion is also supported by the arguments CARE made in support of its earlier motion to strike the affidavits of O'Neal and John Whipple. IDFG did not respond to this motion prior to the hearing on February 14, 2011.

Again, the decision to permit or deny expert witness testimony is one left to the discretion of the Court. *J-U-B Engineers,* 146 Idaho 311, 314-15, 193 P.3d 858, 861-

62. And, the weight, if any, to be given an expert's testimony is also well within the province of the Court. *Christensen,* 125 Idaho 663, 666, 873 P.2d 917, 920. CARE argues ¶ 14 of O'Neal's February 3, 2011, fails to comply with the Court's February 23, 2007, Order and, when taken in conjunction with ¶ 15, the hearsay in ¶ 15 makes ¶ 14 an "admission of non-compliance." Motion to Strike and Objection to the Amended Affidavit of Kerry O'Neal, Dated February 3, 2011, p. 5. O'Neal states in ¶ 14 that IDFG must maintain baffles as repeated strikes would eventually lead to penetration, and it is O'Neal's "understanding" that IDFG will conduct inspection and maintenance. Amended Affidavit of Kerry O'Neal, p. 3, ¶ 14. Paragraph 15 states O'Neal was informed no .50 caliber or greater rounds (along with armor-penetrating, incendiary, or tracer rounds) would be permitted at the range; this statement (likely not offered for the truth of the matter asserted) qualifies the first statement in ¶ 15 that, based on O'Neal's experience, baffles would not stop .50 caliber rounds. *Id.,* at ¶ 15. O'Neal testifies to the fact that baffles must be maintained and are more susceptible to penetration when certain large caliber bullets are used. Given there is no authority to strike testimony for "admission of non-compliance" (which would weigh in favor of CARE if present) and given that O'Neal being told .50 caliber rounds not being permitted is likely not offered for the truth of the matter asserted, there is no basis upon which to strike the paragraphs. CARE next takes issue with ¶ 20, stating it is at odds with IDFG's own evidence; it is CARE's contention that the term "downrange" contemplates more than merely "the designated impact area or a safe direction of fire" or "the intended impact area, which is the earthen backstop." Motion to Strike and Objection to the Amended Affidavit of Kerry O'Neal, Dated February 3, 2011, pp. 6-7, citing Amended Affidavit of Kerry O'Neal, p. 4, ¶ 20. CARE argues O'Neal's observation in ¶ 21 is fallacious and

made without a proper methodology. *Id.,* p. 7. O'Neal's testimony in ¶ 21 is that he made downrange observations from shooting positions at the 100-yard area and observed no blue sky from any position between prone to standing. Amended Affidavit of Kerry O'Neal, p. 4, ¶ 21. This statement is likely not an opinion without foundational basis in fact, but is rather an observation made based on facts perceived by O'Neal within the meaning of I.R.E. 703. CARE's problem with ¶¶ 23 and 24 is that while the Court has required zero bullet escapement, O'Neal discusses the possibility of bullets striking the floor of the range and then traveling over the berm. CARE's argument to strike these paragraphs is inapt; there is no support for the contention that testimony which does not support IDFG's ability to achieve zero bullet escapement must be stricken (and, in fact, this testimony likely weighs in favor of CARE's position). Paragraph 26 is challenged on the basis of hearsay; the paragraph refers to Exhibits 4 and 5, which are copies of letters of reference. *Id.,* p. 8, citing Amended Affidavit of Kerry O'Neal, p. 4, ¶ 26. Because O'Neal does not testify he received these letters and has not provided affidavits authenticating these Exhibits from their authors, CARE's objection thereto is proper. CARE's objection to ¶ 27 is, again, that no proper methodology is set forth. Motion to Strike and Objection to the Amended Affidavit of Kerry O'Neal, Dated February 3, 2011, p. 8. But, no methodology need be set forth regarding O'Neal's mere statement that range projects with which he has been involved have been tested through actual operational use. Amended Affidavit of Kerry O'Neal, p. 4, ¶ 27. CARE challenges ¶ 28, a correction of previous deposition testimony that O'Neal's company had a public works license (when it in fact had an Idaho Contractor's Board license), as "cast[ing] a pall over the entirety of his testimony." Motion to Strike and Objection to the Amended Affidavit of Kerry O'Neal, Dated February 3, 2011, p. 8.

Again, the decision to admit expert testimony and the weight to be given to such testimony is a matter committed to this Court's discretion; correcting previous deposition testimony goes to the weight, not admissibility, of O'Neal's testimony. CARE challenges ¶¶ 29 and 30, regarding O'Neal's patented bullet containment system, are irrelevant; and ¶ 31 is an "unsubstantiated self-aggrandizing statement." O'Neal's testimony in this regard may more properly belong in his curriculum vitae, but certainly speaks to his expertise regarding ranges and bullet containment. The Court remains free to give the testimony the weight to which it feels it is entitled. Similarly, ¶¶ 32-34, which CARE argues are irrelevant, simply set forth O'Neal's experience. Contrary to CARE's contention, there is simply no requirement in I.R.E. 702 and 703 that an expert is not qualified "unless and until he has formalized training or peer review or researched outside his own zone of comfort or other similar expert basis…" Motion to Strike and Objection to the Amended Affidavit of Kerry O'Neal, Dated February 3, 2011, p. 9. Other than ¶ 26, and the attendant Exhibits 4 and 5, the Court denies CARE's motion to strike the Amended Affidavit of O'Neal. CARE has responded to the substance of the affidavit and, regardless of the untimeliness of the affidavit, has likely not been prejudiced by its filing. Nor has CARE set forth proper grounds for this Court to strike any portion of the Affidavit, save for ¶26, and the attendant Exhibits.

VI. DEFENDANT'S MOTION FOR COURT VIEW.

On January 24, 2011, IDFG moved the Court for a view of the 100-yard shooting area pursuant to both the Court's February 23, 2007, Order and I.R.C.P. 43(f). In its motion IDFG states, "Plaintiff's Counsel indicates that Plaintiffs oppose a view by the Court at this time." Motion for Court View, p. 2. IDFG states that "Because of the straightforward nature of this motion, IDFG submits this motion without additional briefing." The Court

can understand why IDFG would consider its present request for a view to be "straightforward" because the Court years ago viewed the site, but only to gain general perspective of the location (the only reference this Court can find regarding the view was in its Memorandum Decision, Findings of Fact, Conclusions of Law and Order, pp. 22-23, Finding of Fact No. 30, where the Court stated: "The Court viewed the area. It is rural. During the day it was completely quiet. There is no reason to believe nighttime would be otherwise."). Since the time of that first view, an Idaho Supreme Court case has issued which shows the motion for a view is far from straightforward. CARE did not file a pleading directly aimed at the motion for a view, but CARE stated its position in its brief in response to IDFG's motion for partial lifting of the injunction:

> Plaintiffs agree that the Court is entitled to and should view the premises, but only after the appropriate gathering of discovery and presentation of evidence which will permit the Court to enter an informed judgment.

Response to Motion for Partial Lifting of Injunction, p. 2.

A motion for court view is addressed to the sound discretion of the court. *Golden Condor, Inc. v. Bell,* 106 Idaho 280, 283, 678 P.2d 72, 75 (Ct.App. 1984). In *Golden Condor,* the Idaho Court of Appeals found no error in the district court's denial of a motion to view the site where the issue was whether Golden Condor had performed certain required annual labor on disputed claims during the summer of 1978. *Id.* "The physical appearance of the site when the case was tried would have had little or no probative impact upon the annual labor question." *Id.* The facts of this case are readily distinguishable from those in *Golden Condor.* While at first blush the physical appearance of the range (and the impact of improvements made by IDFG) may seem to have a probative impact on the question of whether or not the Court is to lift the injunction as requested by IDFG, ultimately, that is not the case.

The Idaho Supreme Court's opinion in *Akers v. Mortenson and D.L. White Construction, Inc.,* 147 Idaho 39, 205 P.3d 1175 (2009), was preceded by an opinion issued six months earlier on June 4, 2008. That decision, 2008 Opinion No. 68, can still be found on the Idaho Supreme Court's website as civil opinion no. 309, and was published as 08.12 ISCR 555. The earlier decision was particularly instructive on the issue of a court view. The published decision in 2009 inexplicably mentions not a word about the court view. This Court finds that even though the 2008 opinion was withdrawn, it at least shows the thinking of the Idaho Supreme Court in 2008 as pertains to a court view and the facts of that case, and its recitation of the law is controlling:

> The district court relied upon its personal on-site view of the subject property to find certain facts relating to the scope of Appellants' prescriptive easement. This was error. * * *
>
> The district court's finding that Appellants' prescriptive easement was 12.2. feet wide was based substantially on its view of the property. The district court specifically found that "[Appellants'] argument that the easement should be 25 feet wide is simply unsupported by the record and a view of the premises." Appellants argued that the easement should be 25 feet wide, including ditches and shoulders. The district court, however, found that: "The view and the exhibits show that not all of the length of the roadway has ditches on either or both sides, nor did the view show any consistent 'shoulders.'" We conclude that the district court's reliance on its site view was error. It is well established in Idaho that the knowledge obtained by a jury view of a premises can only be used to determine the weight and applicability of the evidence introduced at trial and that a view of the premises "is not of itself evidence upon which a verdict may be based." *Tyson Creek R.R. Co. v. Empire Mill Co.,* 31 Idaho 580, 590, 174 P. 1004, 1007 (1918). When construing a prior Idaho statute that permitted a jury to view the premises in question, this Court held: "'The purpose of the statue is not to permit the taking of evidence out of court, but simply to permit the jury to view the place where the transaction is shown to have occurred, in order that they may the better understand the evidence that has been introduced.'" *State v. McClurg,* 50 Idaho 762, 796, 300 P. 898, 911 (1931)(quoting *State v. Main,* 37 Idaho 449, 459, 216 P. 731, 734 (1923)). Although these cases involve a viewing of the property by a jury, for purposes of appellate review, there is no analytical difference between a jury view and a court view. The policy underlying this rule of law is clear: the record must reflect the evidence upon which the finder of fact made its decision. This Court is simply unable to evaluate the basis of factual determinations made upon the basis of a view.

> The rules remained intact when this Court adopted the Idaho Rules of Civil Procedure in 1958. Under I.R.C.P. 43(f), during a trial, the court may order that the court or jury may view the property that is subject to the action. This Court addressed the substantive weight afforded to a court view in *Lobdell v. State ex rel. Bd. Of Highway Dir.,* a case involving an inverse condemnation. 89 Idaho 559, 407 P.2d 135 (1965). In *Lobdell,* after the judge had viewed the property in question, the district court granted an offset to the plaintiff for restoration of access to their property that had been limited by curbing constructed by the defendant. *Id.* At 563, 407 P.2d at 137. This Court held the district court erred when it entered findings based on the results of an examination of the premises and noted that an inspection of the premises is only useful to evaluate and apply the evidence submitted at trial. *Id.* at 567-68, 407 P.2d at 139-40.
>
> Idaho is not alone in adhering to this rule: *Bd. Of Educ. Of Claymont Special Sch. Dist. V. 13 Acres of Land in Brandywine Hundred,* 131 A.2d 180 (Del. 1957); *Dade County v. Renedo,* 147 So.2d 313 (Fla. 1962); *Derrick v. Rabun County,* 129 S.E.2dd 583 (Ga. 1963); *State v. Simerlein,* 325 N.E.2d 503 (Ind.App. 1975); *Guinn v. Iowa & St. L. R. Co.,* 109 N.W. 209 (Iowa 1096); *State v. Lee,* 63 P.2d 135 (Mont. 1936); *State by State Highway Comm'r v. Gorga,* 149 A.2d 266 (N.J. 1959); *Myra Found v. U.S.,* 267 F.2d 612 (8th Cir. 1959)(applying North Dakota law); *In re Appropriation of Worth,* 183 N.E.2d 159 (Ohio 1962); *Port of Newport v. Haydon,* 478 P.2d 445 (Or.App. 1970); *Durika v. Sch. Dist. Of Derry Twnship,* 203 A.2d 474 (Pa. 1964); *Ajootian v. Dir of Pub. Works,* 155 A.2d 244 (R.I. 1959)(stating rule in dicta only); *Townsend v. State,* 43 N.W.2d 458 (Wis. 1950).

08.12 ISCR 555, 556-57, 2008 Opinion No. 68, Idaho Supreme Court's website civil opinion no. 309, pp. 6-7. This Court is of the opinion that while it may make sense at first blush for this Court to have a view, no good can come from such. This is an expert intensive case. What really matters is whether a bullet can escape. A view is unlikely to be probative on that fact, and if it were probative, the Court shouldn't be looking at the site and having that view be part of its evidence taken. Neither party has explained how this Court's view of the premises could be used "to determine the weight and applicability of the evidence introduced at trial," the only legitimate reason for a view according to the Idaho Supreme Court. A view of the premises is an invitation to commit error. The motion for a view of the premises must be denied.

VII. CROSS MOTIONS FOR SUMMARY JUDGMENT:

-CARE'S MOTION FOR SUMMARY JUDGMENT.
-IDFG'S MOTION TO LIFT PARTIAL INJUNCTION.

A. Introduction.

Since this Court's February 23, 2007, decision, IDFG has made changes to the Farragut Shooting Range. On June 9, 2010, IDFG filed its Motion for Partial Lifting of Injunction and Brief in Support of Motion for Partial Lifting of Injunction. This motion is "partial" in that it only pertains to the 100-yard portion of the Farragut Range, and not the 50-yard range or the 200-yard range. IDFG requests the Court lift the February 23, 2007, injunction "as it applies to the renovated 100-yard portion of the Farragut Range, and, as to noise abatement, adopt the noise standard of the Idaho Sport Shooting Range Act, codified at Idaho Code §§ 67-9101 to 67-9105, as the standard applicable to operation of the Farragut Shooting Range." Brief in Support of Motion for Partial Lifting of Injunction, p. 12. The Idaho Sport Shooting Range Act, which went into effect on July 1, 2008, established noise standards for state outdoor shooting ranges.

On August 30, 2010, this Court held a scheduling conference and determined the parties should seek relief via the procedure applicable to motions for summary judgment. Thereafter, IDFG filed its motion for summary disposition of defendants' motion for partial lifting of injunction, and CARE, filed its brief supporting its cross motion for summary judgment.

On September 16, 2010, the parties submitted a Joint Case Management Plan and this Court entered its Order on the Joint Case Management Plan on September 17, 2010. The Plan set forth discovery deadlines along with the timeline within which the parties are to file briefs in support of or opposition to the partial lifting of the injunction.

On December 12, 2010, IDFG filed its Brief in Support of Summary Disposition of Defendants' Motion for Partial Lifting of Injunction; along with the brief, IDFG filed a

Statement of Undisputed Facts and the Affidavits of David Leptich, Kerry O'Neal, and Jon Whipple. Pertinent to these cross-motions for summary judgment are the motions made by both sides to strike the other side's expert witness affidavits and IDFG's motion for a view. As discussed above, those motions have been denied. Hearing on the motion for partial lifting of the injunction was held on February 14, 2011.

B. Standard of Review.

Idaho Rule of Civil Procedure 56 sets forth that, in considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.,* 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

Where, as here, both parties file motions for summary judgment relying on the same facts, issues and theories, the judge, as trier of fact, may resolve conflicting inferences if the record reasonably supports the inferences. *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982). Where both parties file motions for summary judgment relying on the same facts, issues and theories, the fact that both parties have filed summary judgment motions alone does not in itself establish that there is no genuine issue of material fact. 103 Idaho 515, 518, 650 P.2d 657, 661,

n. 1. This is so because by filing a motion for summary judgment a party concedes that no genuine issue of material fact exists under the theory that he is advancing, but does not thereby concede that no issues remain in the event that his adversary seeks summary judgment upon different issues of theories. *Id.*

In any case which will be tried to the court, rather than to a jury, the trial judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but instead, can arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.*

Regarding constitutionality, the Idaho Supreme Court has stated:

> A challenge to the constitutionality of a statute is a question of law over which this Court exercises free review. *Lu Ranching Co. v. U.S.,* 138 Idaho 606, 608, 67 P.3d 85, 87 (2003). "The challenge must show the statute to be unconstitutional as a whole, without any valid application." *Id.* "When a constitutional challenge is made, every presumption is in favor of the constitutionality of the statute, and the burden of establishing the unconstitutionality of a statutory provision rests upon the challenger." *Osmunson v. State,* 135 Idaho 292, 294, 17 P.3d 236, 238 (2000).

Idaho Schools of Equal Educational Opportunity v. State of Idaho, 140 Idaho 586, 590, 97 P.3d 453, 457 (2004). (*ISSEO IV*).

C. Analysis of Cross-Motions for Summary Judgment.

1. Introduction.

On June 9, 2010, IDFG filed its initial Brief in Support of Motion for Partial Lifting of Injunction. IDFG first argued baffles had been installed over every firing position, resulting in shooters being unable to fire above the berms behind targets. Brief in Support of Motion for Partial Lifting of Injunction, p. 4. IFDG posited it had fulfilled the Court's requirements as to the 100-yard portion of the range for up to 500 shooters per year. *Id.,* p. 5. IDFG's second argument was that it had complied with the Court's conditions regarding: (a) safety, by implementing the "No Blue Sky Rule" to the 100-

yard range; and (b) noise concerns, by implementing the standard established in 2008 as part of the Idaho Sport Shooting Range Act. *Id.,* pp. 5 *et seq.*

In its response to IDFG's opening brief, CARE admitted that some improvements to the Farragut range had been made, but that the range had not been brought into compliance with the Court's Order. CARE also argued the Court's February 23, 2007, Order is subject to the principles of *res judicata,* issue preclusion, collateral estoppel, and estoppel by judgment, *inter alia,* and CARE emphasized its position that I.C. § 67-9101 *et seq.* (the Idaho Sport Shooting Range Act) is unconstitutional and therefore has no application to this case. Response to Motion for Partial Lifting of Injunction, p. 2.

IDFG argues CARE has failed to meet its burden regarding *res judicata,* an affirmative defense which CARE must prove by a preponderance of the evidence as to each essential element. Reply Brief in Support of Partial Lifting of Injunction, p. 3. IDFG goes on to argue that, because the Court left open the final determination of appropriate noise standards (leaving the same to an agreement of the parties or a determination by the Court following the taking of additional evidence), the noise issue had not been finally decided such that issue or claim preclusion would apply. *Id.,* p. 4. Finally, IDFG argues the Idaho Sport Shooting Range Act's adoption was a proper exercise of legislative power, does not implicate any protected class, does not punish or rise to the level of a bill of attainder, and applies to all persons and subject matter in like situations, therefore not operating as a prohibited special law. *Id.,* pp. 5-9.

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2. Noise Abatement Issues and the Idaho Sport Shooting Range Act.

a. The Idaho Sport Shooting Range Act is a Prohibited "Special Law" and is Unconstitutional.

In its December 10, 2010, Brief in Support of Summary Disposition of Defendants' Motion for Partial Lifting of Injunction, IDFG asserts the Idaho Legislature in 2008 passed the Idaho Sport Shooting Range Act which established noise level requirements which had not been in existence at the time the Court entered its February 23, 2007, Order. IDFG states:

> As to future operation of the Farragut Shooting Range, the February 23 Order has thus been superseded by the 2008 legislation. Prospective relief via injunction should only be given or continued under current law, not past law. *Landgraf v. USI Film Product,* 511 U.S. 244, 273-274 (1994) (finding "'relief by injunction operates *in futuro,'* and that the plaintiff had no 'vested right' in the decree entered by the trial court"; intervening statutes should be applied to prospective relief). The Court must now give effect to the 2007 Act's noise standard as set forth in Idaho Code § 67-9102.

Brief in Support of Motion for Partial Lifting of Injunction, p. 6. Idaho Code § 67-9102 is part of the Idaho Outdoor Sport Shooting Range Act, and reads:

> **State outdoor sport shooting ranges – Operation and use – Noise standards – Measurement. –**
>
> (1) The state agencies responsible for managing state outdoor sport shooting ranges shall establish criteria for the operation and use for each range. The provisions of chapter 26, title 55, Idaho Code, shall not apply to state outdoor sport shooting ranges.
>
> (2) The legislature finds that state outdoor sport shooting ranges should be subject to uniform noise standards as specified in this section.
>
> (3) The noise emitted from a state outdoor sport shooting range shall not exceed an Leq(h) of sixty-four (64) dBA.

Subsections (4), (5) and (6) explain the methodology used to arrive at the maximum 64 dBA. The Act also has a section which reads:

> **Preemption of local authority. –** Local governmental law is herein preempted and local governments (defined in I.C. § as a "county, city or town") shall not have authority to regulate the operation and use of state outdoor sport shooting ranges nor shall they have authority to establish noise standards for state outdoor sport shooting ranges.

I.C. § 67-9105.

In response, CARE argues this Court did, in fact, set forth the "level of, method, manner and place of measuring noise at Farragut". Brief in Response to Defendants [sic] Summary Disposition of the Cause and Brief in Support of Plaintiff's Motion for Summary Judgment, p. 13. CARE writes:

> This Court's Conclusion of Law was that the allowable maximum noise level was 55 dBA. That is the law of this case. Defendant Department did not appeal.

Id., p. 19. As discussed below, this claim by CARE is not accurate. CARE argues IDFG undertook to change the law (and succeeded) and argues this new statute allows for greater noise pollution emissions by utilizing a diluted noise measurement further diluted over time to reduce overall noise measurements. *Id.,* p. 15. CARE argues the Idaho Outdoor Sport Shooting Range Act is "special legislation" designed to only affect the outcome of the instant litigation. *Id.* CARE apparently makes this argument under Article III, § 19 of the Idaho Constitution, which provides: "The legislature shall not pass local or special laws in any of the following enumerated cases…" *Id.,* p. 18. CARE also makes this argument under Article V, § 13 of the Idaho Constitution, which specifies: "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government." *Id.,* p. 18. The Idaho Outdoor Sport Shooting Range Act applies only to state outdoor shooting ranges, of which there are two: the Farragut range and Black's Creek range. CARE argues Black's Creek's down range is uninhabited desert land without any residents in earshot of the range. *Id.,* p. 16. [CARE also notes that, to the extent the Garden Valley and George Nourse shooting ranges are also state owned, they are also, unlike Farragut, rural and "totally isolated from inhabited dwellings." *Id.,* p. 16]. CARE

argues the legislation was drafted in response to the underlying lawsuit in this matter, "altering the procedure of the existing lawsuit", and affecting only the parties to this case, not a wide class of parties. *Id.,* p. 18 quoting *ISEEO v. State of Idaho,* 140 Idaho 586, 592, 97 P.3d 453, 459 (2004).

IDFG responds Article III, § 19 of the Idaho Constitution does not directly address regulation of shooting ranges or of noise in its prohibition of local or special laws. Defendants' Reply Brief in Support of Summary Disposition of Motion for Partial Lifting of Injunction, pp. 4-5. IDFG posits the Idaho Sport Shooting Range Act is not "special", i.e. arbitrary, capricious, or unreasonable, because its terms and provisions apply to and operate on all persons and subject matter in like situations. *Id.,* p. 5. IDFG points out that the legislature enacted other laws (Senate Bill 1441 and House Bill 604) in 2008 which also addressed sport shooting safety and noise; "[t]he 2008 legislature explicitly preempted establishment of outdoor shooting range noise standards more restrictive than those established by the Legislature, regardless of whether the outdoor sport shooting range is state-owned, law enforcement or private." *Id.,* p. 7. [This is discussed by the Court at the end of this section of this opinion]. IDFG states the noise standards in the Idaho Outdoor Sport Shooting Range Act apply prospectively, do not retroactively legalize past violations by state agencies, and do not alter or amend noise standards established by Court order. *Id.,* 9.

First, the parties' positions and history of this litigation must be analyzed. As mentioned above, CARE argues:

> This Court's Conclusion of Law was that the allowable maximum noise level was 55 dBA. That is the law of this case. Defendant Department did not appeal.

Brief in Response to Defendant's Summary Disposition of the Cause and Brief in

Support of Plaintiff's Motion for Summary Judgment, p. 19. That statement is not accurate, but the Court appreciates it could have made the issue more clear. The only reference this Court made to a 55 dBA limit was in the following finding of fact:

> 30. The Court viewed the area. It is rural. During the day it was completely quiet. There is no reason to believe nighttime would be otherwise. The Court finds Nightingale credible that DNL should not be used in measuring noise levels at a gun range. In the rural community of Bayview, which has background ambient sound levels in the range of 25 dBA to 35 dBA, the acceptable sound pressure level at the private property line should not exceed 55 dBA, as measured with a certified sound measuring device with an IMPULSE filter. This finding is in accordance with the Shomer studies relied upon by Nightingale and the guidelines of the World Health Organization (WHO). Plaintiffs' Exhibit 16.

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, pp. 22-23, Finding of Fact No. 30. In making that finding, the Court merely stated what "should" be an "acceptable" limit, given Nightingale's opinion: "In the rural community of Bayview, which has background ambient sound levels in the range of 25 dBA to 35 dBA, the acceptable sound pressure level at the private property line *should* not exceed 55 dBA, as measured with a certified sound measuring device with an IMPULSE filter." *Id.* (italics added). The Court made it clear in the following Conclusion of Law that the parties were to try to agree to a reasonable noise limit in the first instance, and then, absent such agreement, to return to the Court in the second instance:

> * * * The second concern (noise) is a function of the number of shooters (per year or per day) and peak decibel level. For example, it may be that 500 shooters per year in an unmitigated range producing 65 dB or more is less desirable than 50,000 shooters per year from a range that only produces 45 dB maximum. It would seem logical for the parties to agree as to noise levels and shooter numbers in advance of any construction, but it is not the Court's place to force such agreement in advance. If the parties in the future cannot agree as to noise levels and maximum shooter numbers, the Court will make that determination after taking additional evidence. If IDF&G makes improvements but does not successfully address safety and noise concerns, IDF&G will not be allowed to exceed 500 shooters per year.

Id., p. 51, Conclusion of Law No. 9. That concept was reiterated in this Court's Order:

> **IT IS FURTHER ORDERED** the Idaho Department of Fish and Game is free to seek any funding it wishes. The Idaho Department of Fish and Game is free to build any improvements upon its property. However, use levels will remain capped at 500 shooters per year unless the following two concerns have been adequately addressed: **1) Safety:** include safety measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G, and **2) Noise:** include noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence. Even if the solution to these two concerns are agreed upon by the parties, in order to close this case IDF&G will need to obtain an order from the Court to exceed 500 shooters per year. The first concern (safety) can be satisfied only by the "No Blue Sky" rule, or "totally baffled…so that a round cannot escape", as espoused by the nation's preeminent authority on range design and designer of the Vargas Master Plan, Clark Vargas. Exhibit 2, p. 5. Once bullet containment is achieved, it matters not for purposes of this litigation if the range is supervised (with bullet containment, supervision would only inure to the benefit of the participants, an important consideration, but not the subject of this lawsuit). The second concern (noise) is a function of the number of shooters (per year or per day) and peak decibel level. For example, it may be that 500 shooters per year in an unmitigated range producing 65 decibels is less desirable than 50,000 shooters per year from a range that only produces 30 decibels. It would seem logical for the parties to agree as to noise levels and shooter numbers in advance of any construction, but it is not the Court's place to force such agreement in advance. If the parties in the future cannot agree as to noise levels and maximum shooter numbers, the Court will make that determination with additional evidence. If IDF&G makes improvements but does not successfully address safety and noise concerns, IDF&G will not be allowed to exceed 500 shooters per year.

Id., Conclusion and Order, pp. 59-60. CARE's "law of the case" argument fails. CARE's *res judicata,* issue preclusion, collateral estoppel and estoppel by judgment arguments likewise fail. The Court did not conclude that the allowable maximum noise level was 55 dBA. Again, the Court appreciates the misunderstanding the finding of fact in its 2007 opinion may have created. However, this Court finds the noise limit is still at issue.

Rather than follow this Court's directive that the parties were to try to agree to a reasonable noise limit in the first instance, and then, absent such agreement, to return to

the Court in the second instance, IDFG chose another route…legislation in the 2008 legislative session. Certainly, nothing in this Court's 2007 order prohibited such a course of action. CARE now claims the way this course was pursued, the legislation passed is a "special law" and is unconstitutional.

In turning to the "special law" analysis, the Court is mindful that CARE faces the steep burden of overcoming the presumption that a statute is constitutional. The Idaho Supreme Court has stated:

> There is a presumption in favor of the constitutionality of the challenged statute or regulation, and the burden of establishing that the statute or regulation is unconstitutional rests upon the challengers. An appellate court is obligated to seek an interpretation of a statute that upholds it [sic] constitutionality. The judicial power to declare legislative action unconstitutional should be exercised only in clear cases.

Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res., 143 Idaho 862, 869, 154 P.3d 433, 440 (2007) (internal citations omitted).

With that in mind, the Court turns its attention to the "special law" analysis. In this Court's February 23, 2007, sixty-page Memorandum Decision, Findings of Fact, Conclusions of Law and Order, this Court set up a specific protocol to address the noise issue in a civilized, organized manner. Since that time, the Idaho Legislature has passed House Bill 515, which became Idaho Code §67-9101, et.seq., Idaho Session Law §1, p. 233 (2008). The question this Court must now answer is whether the legislature in its adoption of the Idaho Outdoor Sport Shooting Range Act inappropriately passed a "special law" in violation of Article III, § 19, of the Idaho Constitution.

IDAHO CONST. Article III, § 19. Article III, § 19 reads:

> **Local and special laws prohibited. –** The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:

* * *

For limitation of civil or criminal actions.

Although CARE in its briefing does not explicitly state which of the enumerated instances of Article III § 19 was purportedly violated, presumably CARE refers to the prohibition of "limitation of civil and criminal actions."

In *Moon v. North Idaho Farmers Ass'n,* 140 Idaho 536, 96 P.3d 637 (2004), the Idaho Supreme Court distinguished between "special" laws and "local" laws:

> A law "is not special when it treats all persons in similar situations alike." *Sun Valley Co. v. City of Sun Valley,* 109 Idaho 424, 429, 708 P.2d 147, 152 (1985); *Twin Falls Clinic and Hospital Bldg. v. Hamill,* 103 Idaho 19, 26, 644 P.2d 341, 348 (1982). Nor is a law local "when it applies equally to all areas of the state." *Sun Valley Co.,* 109 Idaho at 429, 708 P.2d 147; *School Dist. No. 25 v. State Tax Comm'n,* 101 Idaho 283, 291, 612 P.2d 126, 134 (1980). "A law is not special simply because it may have only a local application or apply only to a special class, if in fact it does apply to all such classes and all similar localities and to all belonging to the specified class to which the law is made applicable." *Bd. of County Comm'rs of Lemhi County v. Swensen,* 80 Idaho 198, 201, 327 P.2d 361, 362 (1958), *citing Mix v. Bd. of Comm'rs,* 18 Idaho 695, 705, 112 P. 215 (1910).

140 Idaho 536, 546, 96 P.3d 637, 647. Thus, we now know a law is "special" when it fails to treat all persons in similar situations alike. We now know a law is "local" when it does not apply equally to all areas of the state. This part of *Moon* is fairly clear. The Idaho Supreme Court in *Moon* then immediately turned its attention to "test" to be applied to "special" laws, and the separate "test" to be applied to "local" laws. This portion of *Moon* is not as easily read. In *Moon*, the Idaho Supreme Court wrote:

> The standard for determining whether a law is local or special was most recently set forth in *Concerned Taxpayers of Kootenai County v. Kootenai* County, 137 Idaho 496, 499, 50 P.3d 991, 994 (2002). The Court stated therein, "The test for determining whether a law is local or special is whether the classification is arbitrary, capricious, or unreasonable." *Id.* at 499, 50 P.3d at 994. This enunciation of the test was derived from *Sun Valley Co.,* 109 Idaho at 429, 708 P.2d 147, *citing Washington County v. Paradis,* 38 Idaho 364, 369, 222 P. 775, 777 (1923). A close reading of *Paradis,* however, indicates the source of the test as *Jones v. Power*

County, 27 Idaho 656, 150 P. 35 (1915), where the Court said in discussing general and special laws:

> A statute is general if its terms apply to, and its provisions operate upon, all persons and subject matters in like situation. (*See* DILLON ON MUNICIPAL CORPORATIONS, 5th ed., sec. 142.) The true test seems to be: Is the classification capricious, unreasonable or arbitrary?

Id. at 665, 150 P. at 37. Local and special laws are defined separately and apply to different situations. The *Jones* case applies the "capricious, unreasonable arbitrary" test to special laws not local laws. To the extent *Sun Valley Co. v. City of Sun Valley,* is said to apply to local laws, it is disavowed.

The district court in its memorandum decision rephrased the test for analyzing whether a law is local or special, when it stated: "The test for determining whether a law is local or special is basically whether the legislature has singled out 'persons or corporations for preferred treatment.'" *Concerned Taxpayers of Kootenai County v. Kootenai County,* 137 Idaho at 499, 50 P.3d at 994, *citing Jones v. Bd. of Medicine,* 97 Idaho 859, 877, 555 P.2d 399, 417 (1976). This test also incorrectly links the local and special laws under the same test. In *Jones,* the court specifically held:

> It has been indicated that the distinction between general and special legislation is that a law is general if "all persons subject to it are treated alike as to privileges, protection and in every other respect." *Wanke v. Ziebarth Const. Co.,* 69 Idaho 64, 202 P.2d 384, 393 (1948). Stated in other terms, "A statute is general if its terms apply to, and its provisions operate upon, all persons and subject-matter in like situation[s]." *Jones v. Power County,* 27 Idaho 656, 150 P. 35, 37 (1915); *In re Bottjer,* 45 Idaho 168, 260 P. 1095 (1927). "It is well settled that a law is not special in character 'if all persons subject to it are treated alike, under similar circumstances and conditions, in respect to both the privileges conferred and the liabilities imposed.' " *State v. Horn,* 27 Idaho 782, 793, 152 P. 275, 279 (1915). [Citations omitted.]
>
> Clearly it is arguable at least that the Act in question here is special in that it selects from a class of persons otherwise subject to liability for their negligent acts, physicians and hospitals, and releases or extinguishes, in part at least, their otherwise liability contrary to the interdiction of special laws in Art. III, § 19.

140 Idaho 536, 546, 96 P.3d 637, 647, citing *Jones v. Bd. of Medicine,* 97 Idaho 859, 876-77, 555 P.2d 399, 416-17. Hats off to anyone who can read that in one sitting and

then articulate the present test for what "special laws", the present test for "local laws", and what prior appellate precedent is abrogated.

To illustrate that this portion of *Moon* is not easily read, consider that the editorial board of West's Publishing, had this to say in the editorial comments at the beginning of *Moon:*

> (5) "capricious, unreasonable, arbitrary test applies to special laws, not local laws, abrogating *Concerned Taxpayers of Kootenai County v. Kootenai County,* 137 Idaho 496, 50 P.3d 991 [(2002)], *Sun Valley Co. v. City of Sun Valley,* 109 Idaho 424, 708 P.2d 147 [(1985)].

140 Idaho 536, 537, 96 P.3d 637, 638. The only problem is nowhere in *Moon* does the Idaho Supreme Court say that it is "abrogating" either *Concerned Taxpayers* or *Sun Valley Co.* The Idaho Supreme Court in Moon only stated: "To the extent *Sun Valley Co. v. City of Sun Valley,* is said to apply to local laws, it is disavowed." This Court finds West's editorial board mis-read this portion of *Moon*. West's editorial board is correct that "capricious, unreasonable, arbitrary test applies to special laws, not local laws", as set forth in *Moon*. Part of the difficulty in reading this portion of *Moon* is that the Idaho Supreme Court discusses two different *Jones* cases:.1) *Jones v. Power County,* 27 Idaho 656, 150 P. 35 (1915), to which the genesis of the "special laws" test is traced by the *Moon* Court, and 2) *Jones v. State Bd. of Medicine,* 97 Idaho 859, 555 P.2d 399 (1976), to which the *Moon* Court noted the district court in *Moon* had cited along with *Concerned Taxpayers*, but at least as to *Concerned Taxpayers*, the *Moon* Court stated the district court errantly relied upon *Concerned Taxpayers* because it "incorrectly links the local and special laws under the same test." 140 Idaho 536, 546, 96 P.3d 637, 647. The end of the lengthy quote from *Moon* above, is a direct quote from *Jones v. State Bd. of Medicine*, and that quote does not indicate that *Jones v. State Bd. of Medicine* "incorrectly link[ed] the local and special laws under the same test."

The Idaho Supreme Court in *Moon* stated:

> The *Jones [v. State Bd. of Medicine]* case applies the "capricious, unreasonable arbitrary" test to special laws not local laws. To the extent *Sun Valley Co. v. City of Sun Valley,* is said to apply to local laws, it is disavowed.

140 Idaho 536, 546, 96 P.3d 637, 647. To clarify, the Idaho Supreme Court said in analyzing a claim of "special laws", the "capricious, unreasonable, arbitrary" test applies to special laws, **along with** the test that "all persons subject to it are [not] treated alike as to privileges, protection and in every other respect". Implicitly, the Idaho Supreme Court seems to be saying the "capricious, unreasonable, arbitrary" test does not apply to a "local law" analysis.

A close reading of the above quote from *Moon* shows the following: First, the Idaho Supreme Court in *Moon* makes the observation that; "The standard for determining whether a law is local or special was most recently set forth in *Concerned Taxpayers of Kootenai County v. Kootenai* County, 137 Idaho 496, 499, 50 P.3d 991, 994 (2002)" and "The Court stated therein [in *Concerned Taxpayers*], 'The test for determining whether a law is local or special is whether the classification is arbitrary, capricious, or unreasonable.' *Id.* at 499, 50 P.3d at 994." The underlined portion shows the key distinction which the Idaho Supreme Court *later* in *Moon* declares is error, but only as to "local law" analysis. The Idaho Supreme Court truly could have made this portion of *Moon* crystal clear if, after writing; "The standard for determining whether a law is local or special was most recently set forth in *Concerned Taxpayers*…", the Idaho Supreme Court would have then written; "The tests for local legislation is different from the test for special legislation, and we, the Idaho Supreme Court, confused that fact in both *Concerned Taxpayers* and *Sun Valley Co*." But they did not.

The Idaho Supreme Court was direct in stating the test used by the district court

in *Moon* was erroneous when the Supreme Court wrote: "This test also incorrectly links the local and special laws under the same test." The Idaho Supreme Court was able to ignore the fact that the district court was applying the linked local and special law test that the Idaho Supreme Court itself had handed down in *Concerned Taxpayers* and *Sun Valley Co*. The Idaho Supreme Court was more oblique when turning the mirror on itself, as it wrote; "To the extent *Sun Valley Co. v. City of Sun Valley,* is said to apply to local laws, it is disavowed." 140 P. 2d Idaho 536, 546, 96 P.3d 637, 647. The Idaho Supreme Court could have just as easily written in *Moon*: "In two of our earlier decisions we errantly combined the test for local laws and for special laws, and in this case the district court committed error in relying those two earlier decisions, and to that extent *Concerned Taxpayers* and *Sun Valley Co.* are overruled as is the district court in this case."

So, what <u>is</u> the test for "special laws"? The Idaho Supreme Court in *Moon* stated the "capricious, unreasonable and arbitrary test" found in *Concerned Taxpayers* " was "derived from *Sun Valley Co.*", which cited *Washington County v. Paradis,* 38 Idaho 364, 369, 222 P. 775, 777 (1923)", and "[a] close reading of *Paradis,* however, indicates the source of the test as *Jones v. Power County,* 27 Idaho 656, 150 P. 35 (1915), where the Court said in discussing general and special laws; "A statute is general if its terms apply to, and its provisions operate upon, all persons and subject matters in like situation." But then *Jones v. Power County,* as noted and quoted by the Idaho Supreme Court in *Moon*, after citing DILLON ON MUNICIPAL CORPORATIONS, states; "The true test seems to be: Is the classification capricious, unreasonable or arbitrary?" It is confusing because the Idaho Supreme Court starts out seeming to knock the "arbitrary, capricious, or unreasonable" test, but then after tracing the roots back comes up with <u>both</u> that test

and the test that it "operates upon all persons and subject matters in like situation." A more condensed reading of the sequence is as follows, and at least allowed this Court to conclude the Idaho Supreme Court wants both tests to be used to determine if a statute is special legislation: The "arbitrary, capricious, or unreasonable test" most recently set forth in *Concerned Taxpayers,* was built on *Sun Valley Co*., which was built on *Paridis*, but a close reading of *Paradis* shows the source of the test as *Jones v. Power Co.,* which has both the arbitrary, capricious or unreasonable test and the "operates upon all persons and subject matters in like situation" test. It takes a few readings of the *Moon* decision, but it is clear that the Idaho Supreme Court in *Moon* quotes from *Jones v. Power County* with complete approval. That portion of *Jones v. Power County*, quoted immediately above within *Moon*, only concerns the rule to be used to determine if legislation is constitutionally prohibited "special laws" or "special legislation" (this Court comes to that conclusion because nowhere in *Jones v. Power County* are "local laws" discussed). From that quoted portion of *Jones v. Power County* found in *Moon*, coupled with the extensive quote from *Jones v. Bd. of Medicine* found in *Moon* (which also only discusses "special legislation" and never discusses "local legislation"), it can be distilled that *the* feature of "special laws" or "special legislation" is: all persons subject to it are not treated alike as to privileges, protection and in every other respect (or, stated differently, *the* feature of "special laws" or "special legislation" is that: the statute does not apply to all persons and subject-matter in like situations) and, the legislation is "capricious, unreasonable or arbitrary" language is added to that test (under *Jones v. Power County,* as recognized in *Moon*).

The Idaho Supreme Court in *Moon*, citing *Jones v. Bd. of Medicine*, noted:

> Clearly it is arguable at least that the Act in question here is special in that it selects from a class of persons otherwise subject to liability for their

> negligent acts, physicians and hospitals, and releases or extinguishes, in part at least, their otherwise liability contrary to the interdiction of special laws in Art. III, § 19.

140 Idaho 536, 546, 96 P.3d 637, 647. This is the "all persons subject to it are not treated alike as to privileges, protection and in every other respect" part of the test for "special laws." While the Idaho Supreme Court found the former I.C. § 22-4803 (later repealed and now found in I.C. 39-114) in *Moon* was not a "local and a special law" as it applied to all farmers in the State of Idaho regardless of location of the farm and regardless of the crop grown, and immunized those farmers for burning their residue, the Idaho Supreme Court in *Jones v. State Bd. of Medicine* held the Hospital-Medical Liability Act which immunized physicians and acute care hospitals against malpractice actions over $150,000, as noted by the Idaho Supreme Court in *Jones v. Bd. of Medicine*: "…is special in that it selects from a class of persons otherwise subject to liability for their negligent acts, physicians and hospitals, and releases or extinguishes, in part at least, their otherwise liability contrary to the interdiction of special laws in Art. III, § 19."

That seeming incongruity may be explained by the fact that while the Idaho Supreme Court concluded that the field burning statue was not a local or special law ("We reverse the district court's conclusion that the statute is a local and a special law", 140 Idaho 536, 548, 96 P.3d 637, 649), it is clear from the analysis preceding that conclusion that the Idaho Supreme Court was analyzing the field burning statue in *Moon* under the "local law" standard, not the "special law" standard. This Court reaches that conclusion because: 1) the Idaho Supreme Court noted that the district court in *Moon* concluded there was "simply no proof that the legislature has singled out 'persons or corporations for preferred treatment'" (140 Idaho 536, 547, 96 P.3d 637, 648), and 2)

because the Idaho Supreme Court at the conclusion of that analysis held "…therefore, I.C. § 22-4803A(6) is not a local law." 140 Idaho 536, 548, 96 P.3d 637, 649.

The Idaho Outdoor Sport Shooting Range Act itself, as conceded by CARE, applies equally to both Farragut range in Kootenai County and Black's Creek range in Elmore County (and arguably the Garden Valley and Nourse ranges as well). This would be the "local law" analysis, which does not seem to be an issue in the present case. CARE argues it is problematic that the ranges subject to the Act, other than Farragut Range, are isolated and do not have adjacent private residences. However, the law itself does not operate to limit its applicability only to ranges within earshot of private residences. Also, as IDFG argues, Black's Creek and Garden Valley ranges do have a small number of residences within a mile and further and are near private land with the potential for future development. Reply Brief in Support of Motion for Lifting of Injunction, p. 7, fn. 4.

In *Moon,* the Idaho Supreme Court reversed the district court's conclusion that I.C. § 22-4803A was specific to the ten northern counties, and was thus, arbitrary, capricious, and unreasonable. 140 Idaho 536, 547, 96 P.3d 637, 648. Because the Idaho Supreme Court found that, despite some particularized reference to the ten northern counties including stricter requirements on Northern Idaho Counties in the statute, the statute applied to all Idaho counties, it reversed the district court's conclusion that the statute was a special or local law. 140 Idaho 536, 548, 96 P.3d 637, 649. While the Idaho Supreme Court did reverse the district court's conclusion that the field burning statute was a special or local law, the above discussion also shows the Idaho Supreme Court's analysis was focused on the "local law" issue, not the "special law" issue.

Similarly, in the instant matter, although the Idaho Outdoor Sport Shooting Range Act has specific impact upon the Farragut range, and the litigation before this Court was discussed and referred to by the legislature with regard to the Act, the Act applies equally to all state-owned shooting ranges in the State of Idaho. That is the analysis of the "local law" constitution prohibition, and again the Idaho Sport Shooting Range Act does not seem to run afoul of that "local law" constitutional provision.

But that is not the end of the inquiry. The Court must analyze whether the Idaho Sport Shooting Range Act is a "special law." To establish the Idaho Outdoor Sport Shooting Range Act is a "special law", CARE must demonstrate to this Court that Act "does not apply to all persons and subject-matter in like situations" and is "arbitrary, capricious or unreasonable."

The parties have cited this Court to cases other than *Moon*. This Court will discuss each of these cases, and others, which interpret the prohibition of "special laws."

In *Idaho Schools of Equal Educational Opportunity v. State of Idaho,* 140 Idaho 586, 592, 97 P.3d 453, 459 (2004) (*ISSEO IV*), the plaintiff Idaho Schools for Equal Education Opportunity (ISEEO) was an unincorporated association of school district superintendents of several Idaho public school districts and several parents of school children attending public schools in Idaho who brought suit against the State alleging the Idaho Legislature had failed to carry out its constitutionally mandated duty to provide "a general, uniform and thorough system of public, free common schools" as required by Article IX, § 1 of the Idaho Constitution. 140 Idaho 586, 588-89, 97 P.3d 453, 455-56. Over the course of a decade, that case resulted in several district court decisions which made three trips to the Idaho Supreme Court. On remand from the third trip, the district judge found unconstitutional HB 403 from the 2003 legislative session, which

established among other requirements: that the plaintiffs and the State sue school districts where unsafe school buildings exist; that venue for these suits would be changed to the judicial districts in which the defendant school districts lie; that the parties of the current case would be dismissed if they did not follow the procedures of HB 403; and that state district courts could impose an educational necessity levy to repair or replace unsafe school buildings. 140 Idaho 586, 589-90, 97 P.3d 453, 456-57. The appeal resulted in *ISSEO IV*, the 2004 Idaho Supreme Court decision. In that decision, the Idaho Supreme Court held:

> A special law applies only to an individual or number of individuals out of a single class similarly situated and affected or to a special locality. A law is not special simply because it may have only a local application or apply only to a special class if, in fact, it does apply to all such cases and all similar localities and to all belonging to the specified class to which the law is made applicable. A statute is general and not special if its terms apply to and its provisions operate upon all persons and subject matters in like situations.
>
> *School Dist. No. 25, Bannock County v. State Tax Commission,* 101 Idaho 283, 291, 612 P.2d 126, 134 (1980). "The test for determining whether a law is local or special is whether the classification is arbitrary, capricious, or unreasonable." *Concerned Taxpayers of Kootenai County v. Kootenai County,* 137 Idaho 496, 499, 50 P.3d 991, 994 (2002). In evaluating whether legislation passed by the Idaho Legislature was special or local, this Court has found that when the Legislature was pursuing a legitimate interest in protecting citizens of the state and the statute passed was not arbitrary, capricious, or unreasonable, then the law was not special. *Kirkland v. Blaine County Medical Center,* 134 Idaho 464, 470, 4 P.3d 1115, 1121 (2000).

140 Idaho 586, 591, 97 P.3d 453, 458. In the present case, it is difficult to see what "legitimate interest in protecting the citizens of the state" is accomplished by the Idaho Outdoor Sport Shooting Range Act. The Act preempts not only the people living around a range from having any say in any amount of expansion of a state range. The Act also preempts any county from having any say in any amount of expansion of that state

range. I.C. § 67-1905. Who is being "protected" by this Act? It certainly is not the citizens surrounding the Farragut range. It certainly is not the citizens of the State of Idaho. The Act protects the Idaho Department of Fish and Game. Certainly there is a noise standard being established, and that protects citizens, but the real focus of the Act is to immunize the "state". In reality, since the Farragut Range is the only applicable range, the focus of the Act is to immunize IDFG for the Farragut Range expansion. That fact is made more unpalatable by the fact that it was the IDFG that created this expansion and thus, created this litigation because IDFG obtained a grant which would increase the use of this range several hundred-fold. IDFG created its own expansion and when confronted with the not unexpected reality that surrounding residents might be concerned, IDFG proposed to the legislature a bill which would set an arbitrary noise limit and forever immunize the IDFG for its actions in expanding the Farragut range.

IDFG argues: "Plaintiffs' Response does not identify which provision of [the Act] would constitute unconstitutional 'special law'…" Reply Brief in Support of Partial Lifting of Injunction, p. 8. *ISSEO IV* shows the analysis is not limited to the language of the Act, but encompasses the context in which the Act was discussed before and passed by the Idaho Legislature.

In *ISSEO IV*, the Idaho Legislature wore its feelings on its House Bill sleeve. House Bill 403 stated in section one:

> The Legislature finds that over twelve years of litigation regarding Idaho's system of school funding has not productively used the state's resources to ensure that there is a general, uniform and thorough system of public, free common schools. Trial was held in the spring of 2000, but no final judgment or appealable order has been issued and no findings of fact specifying which school districts are unable to provide safe and healthy school facilities under the current system of school financing have been issued. Current proceedings are likely to be even more protracted if a special master is appointed and there is further delay until final judgment, an appealable order, or findings of fact specifying which school districts

> are unable to provide safe and healthy school facilities under the current system of school financing have been issued. The Legislature therefore determines it can best exercise its constitutional duty to establish and maintain a general, uniform and thorough system of public, free common schools by altering the procedure of the existing lawsuit to bring it under the Constitutionally Based Educational Claims Act, which will allow the parties to focus on districts having the most serious health and safety problems, and to provide a remedy of an educational necessity levy as necessary to abate unsafe or unhealthy conditions.

140 Idaho 586, 592, 97 P.3d 453, 459. The Idaho Supreme Court made short work of finding this to be a "special law". The Idaho Supreme Court held:

> Particular to these findings is the Legislature's indication that this bill was specifically drafted in response to the ISEEO lawsuit and that the bill was meant to apply to the ISEEO case by "altering the procedure of the existing lawsuit" by changing the language of the Constitutionally Based Educational Claims Act (CBECA) statutes. Section Three of the bill changes the wording of I.C. § 6-2215, which had previously excluded the ISEEO case from its application, to specifically include any case which had not reached final judgment at the effective date of the legislation; that could only mean the currently pending ISEEO case. Section Three also contains provisions that act to dismiss certain parties to the ISEEO suit and to redefine the defendants and plaintiffs in this litigation under new claims and causes of action. Section Three also establishes that venue for all such suits brought against the school districts pursuant to this law shall be brought in the judicial district where the school district is located.
>
> From the above it is very clear that, though the State asserts on appeal the Legislature intended to create a general law applicable to a wide class of parties, the Legislature was in reality enacting special legislation directed specifically at the ISEEO case and particularly, the Plaintiffs and their cause of action against the Legislature. Though the State argues that HB 403 applies to all school districts equally, the language of the bill plainly states that it is meant to specifically apply to the current litigation. HB 403 is aimed at essentially disbanding the ISEEO case and restructuring it in a manner that destroys the Plaintiffs' cause of action against the Legislature. This is a special enactment designed only to affect one particular lawsuit and is clearly a special law in violation of Article III, § 19.

140 Idaho 586, 592, 97 P.3d 453, 459.

> We also find HB 403 to be a special law pertaining to the practice of the courts aimed specifically at this lawsuit and these plaintiffs, and accordingly find that portion of HB 403 amending I.C. § 6-2215 of the Idaho Code is unconstitutional.

140 Idaho 586, 593, 97 P.3d 453, 460. In the present case, the Idaho Legislature seems to have learned from its mistake made public in *ISSEO IV* where it advertised its legislative response to a judicial action in the first paragraph of the bill, because the Idaho Legislature in the present case did not reference this lawsuit in the text of 2008 House Bill 515. While not boldly proclaiming its intent in the text of the actual legislation, the Legislative Record has been presented to the Court. It speaks for itself. The Idaho Outdoor Sport Shooting Range Act appears to have started in Boise before the Idaho Legislature on January 15, 2008, when Tony McDermott, Idaho Fish & Game Commissioner from the Panhandle Region, was introduced to the House Resources & Conservation Committee by Cameron Wheeler, "a former [State of Idaho] Representative who is now Chairman of the IDFG Commission". House Resources & Conservation Committee – January 15, 2008, Minutes, p. 1. Those minutes read:

> Cameron Wheeler took the podium to introduce Mr. **McDermott who reported on the controversy surrounding the Farragut Shooting Range** which is located at the Southeast end of Lake Pend O'Reille. This controversy involves a group called CARE (Citizens Against Range Expansion) who have filed a **lawsuit** against the shooting range. Mr. McDermott reported that this group has refused to compromise on the issue and **their lawsuit** will have a devastating effect on shooting ranges throughout the State. **He urged the committee to do all it can to remedy the problem.**

Id., p. 2. (bold added). This is just as egregious as the opening stanza of the bill in *ISSEO IV*. Not only is the "purpose" of the bill flawed and illegal, but this unsubstantiated claim by Idaho Fish & Game Commissioner McDermott that "this lawsuit will have a devastating effect on shooting ranges throughout the State" has two glaring problems. **First**, it finds no support in the legislative record. This Court is unable to find *any* reference to the Legislature, to *any* other State range, military range or private range found anywhere in the State of Idaho, in any of the record of the 2008

Idaho legislative session, *other* than a) one reference by Sharon Kiefer, Legislative Liason for IDFG on February 19, 2008, to the House Resources and Conservation Committee, where she references "future concerns at other ranges" after mentioning "litigation over use of shooting range at Farragut State Park", and b) a reference by Kiefer on March 5, 2008, to the Senate Resources and Environment Committee, where she referenced "…and last but not least, a need to properly manage future noise issues at Blacks Creek, our other outdoor state-owned range…" *Everything* else in the legislative record specifically references *only* the Farragut Shooting Range. **Second**, the statement made by Idaho Fish & Game Commissioner McDermott to the State of Idaho House Resources & Conservation Committee, that "this lawsuit will have a devastating effect on shooting ranges throughout the State", is also *patently false*. There is nothing about this litigation that pertains to anything other than the Farragut range. There is nothing about this Court's prior decision that pertains to anything other than the Farragut range.

The next day, on January 16, 2008, Idaho Fish & Game Commissioner McDermott told the State of Idaho House Resources & Conservation Committee the following:

> The topic he was given for review was the Farragut Shooting Range and what has occurred there during the past year. There is a group called CARE (Citizens Against Range Expansion) living along the northern boundary of the range road. **They filed a lawsuit** in 2006 to stop Fish and Game's plan to improve and expand the range. The Judge made a decision in 2007 and imposed severe restrictions. (1) No rounds would leave the range; (2) The noise decibel level cannot exceed 55 decibels; and (3) Restricted 'users days' to 500 days per year. A 'user day' is one shooter, one day, one round. The Department purchases the land in 1950 and it consisted of 3,850 acres. In 1964, 2,500 acres was transferred to the federal government and through negotiations by the Department of Parks and Recreation, they now own it. There are two portions – Farragut Wildlife Management Area and the Farragut State Park. The shooting range is on the north side and is co-managed by Parks and Rec. User

> groups of the range include individual citizens, Boy Scout troops, hunter education, agency clinics, law enforcement officers, as well as some military training. Mr. McDermott said in the past, 'user days' averaged about 2,000 'user days' per year. The Commission would like to increase it to 3,000 and they plan to petition the judge.

House Resources & Conservation Committee – January 16, 2008, Minutes, p. 3. (bold added). There are a host of inaccuracies in this statement. The lawsuit was filed in 2005, not 2006. This Court did not state that "The noise decibel level cannot exceed 55 decibels". That has been discussed above. The "restriction" to 500 days per year is correct, but hardly a "restriction" given the fact that in 2002 and before the range was used by an average of less than one shooter per day. Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 9, pp. 49-50. The documentation showed 182 users in 2002, and this Court more than doubled that to give IDFG the benefit of the doubt that there could have been 500 shooters per day historical use. *Id.,* pp. 47-48. There is no concept of "user day" mentioned in this Court's decision; there is no restriction as to the number of rounds that could be fired by any user (and certainly "one round", or one shot is palpably absurd). But what takes the cake is the statement by Idaho Department of Fish & Game Commissioner McDermott that the Commission would like to increase the amount of users to 3,000 per year. This Court previously found as an established matter of fact:

> 19. Idaho Department of Fish and Game made a grant application to the National Rifle Association (NRA). The IDF&G told the NRA that based on the area population, IDF&G expected up to 46,426 people per month (or 557,112 shooters per year) to use the facility. Plaintiffs' Exhibit 22, Table 2. This is broken down to 25,063 handgun participants per month and 21,363 rifle participants per month. Further, IDF&G told the NRA "For purposes of this range, we need to assume this facility will capture 100% of the market share because there is so much open land around that whatever is built will compel shooters to come and shot [sic] in an organized fashion." *Id.* There are 450 parking spaces in the paved parking lot in the Vargas Master Plan. David Leptich is the Regional Habitat Biologist and manager of the IDF&G property at Farragut State

> Park. Leptich testified that IDF&G has approved its goal of $3.6 million being invested in the implementation of the Vargas Master Plan.
>
> 20. IDF&G's estimate of 557,112 shooters per year is **471 times** the 1,181 shooters in the year 2005, and more than **three thousand times** the 182 shooters in 2002. What is being proposed by the IDF&G greatly exceeds a "significant increase" in the 2005 use of the range, let alone the use of the range back in 2002.

Id., p. 19. (emphasis in original). The findings were based on IDFG's own evidence submitted to this Court. IDFG did not appeal this decision or any part of it. There is a difference between 182 shooters per year (historic established use by IDFG in 2002) and 500 (what this Court allowed with improvements). There is a difference between 500 shooters and 3,000 shooters per year. But there is a HUGE difference between 500 or 3,000 shooters per year and 557,112 shooters per year. So IDFG tells the granting authority one thing to get the $3.6 million, and an entirely different thing to the Idaho Legislature in its effort to circumvent this litigation in which it finds itself.

The records of the State of Idaho House Resources and Conservation Committee on February 9, 2008, read:

> HB515 The last item of business on the agenda was HB 515. Rep. Eskridge presented this bill which creates a new section in Idaho Code to provide for the operation and use of State outdoor sport shooting ranges. **Rep. Eskridge explained that this bill also helps deal with the litigation issue at Farragut State Park** and will help protect the State against similar litigation in the future. * * *
>
> Sharon Kiefer Sharon Kiefer, representing the Idaho Fish & Game Dept. (IF&G) stood to testify in favor of HB515. She reviewed the merits of this bill and related that **IF&G has worked closely with the Attorney General's Office to address noise related issues raised in litigation at Farragut State Park** and future concerns at other ranges. In the absence of any established state noise standard in the issue at Farragut State Park, the Judge was confronted with the decision of balancing noise related concerns of neighbors with the public's use of the shooting range. Therefore, this bill establishes a uniform noise standard for state outdoor sport shooting ranges.

House Resources & Conservation Committee – February 19, 2008, Minutes, p. 3. (bold added). No other "State outdoor sport shooting range" is identified *other* than Farragut.

Representative Eskridge was candid in explaining to his colleagues: "…this bill also helps deal with the litigation issue at Farragut State Park…" *Id.* Sharon Keifer was nearly as candid in her February 19, 2008, letter to the House Resources and Conservation Committee (which appears to be her actual testimony as compared to what is found in the minutes: "As I noted, our [IDFG] interest in this legislation partly stems from current litigation opposing expansion of the Farragut Shooting Range." Certification on Idaho State Legislative History Records: House Bill 515, February 19, 2008, letter of Sharon Keifer to the House Resources and Conservation Committee, p. 1. At no point in that two-page letter does Sharon Keifer identify any other state gun range. Keifer tells the House Resources and Conservation Committee that, "The noise metric measure is straightforward and will provide certainty for all." *Id.,* pp. 2-3. But of course there is no mention in her letter as to what that metric is, and the legislation itself incorporates a metric that this Court found flawed, as explained at length in its earlier decision. Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 21. That determination was made by this Court after reviewing much material on the subject and listening to expert testimony from both sides. Even Mr. Hansen, the expert IDFG used before this Court (but not before the Idaho Legislature) "…admitted IMPULSE is maybe a more true measure of the impulsive nature of sounds." *Id.* Of course that was not mentioned by Keifer. In fact, Keifer's statement in her letter that, "The noise metric measure is straightforward…" is the only "technical" bit of "testimony" apparently ever given to the House Resources and Conservation Committee. Certification on Idaho State Legislative History Records: House Bill 515, February 19, 2008, letter of Sharon Keifer to the House Resources and Conservation Committee, p. 1. Kiefer apparently read into the record before the Senate Resources & Environment

Committee on March 5, 2008, the same February 19, 2008, letter read to the House Resources and Conservation Committee. Senate Resources & Environment Committee March 5, 2008, Minutes, p. 7. Kiefer tells them: "I won't go into the technical specifics of the noise standard, which is adequately defined in the legislation." At least Kiefer gave this committee a "handout" as to how noise is measured (*Id.*), but omitted from that "handout" was any reference to what IDFG's own expert Hansen had testified to before this Court regarding the fact that the "IMPULSE is maybe a more true measure of the impulsive nature of sounds."

On March 5, 2008, Representative Eskridge told the Senate Resources and Environment Committee HB 515 "does not affect military and law enforcement ranges and private sports shooting ranges". Senate Resources and Environment, March 5, 2008, Minutes, p. 4. This will be discussed further in the analysis of "special laws". Representative Eskridge did not reference this instant litigation before the Senate Resources and Environment Committee, but Representative Pence certainly did: "There has surfaced a need to address noise related concerns raise in litigation over the use of the shooting range at Farragut State Park and to properly manage future concerns at other ranges. *Id.,* p. 5. Sharon Kiefer mentioned the situation at Farragut State Park and then stated: "…and last but not least, a need to properly manage future noise issues at Blacks Creek, our other outdoor state-owned range." *Id.*

To sum up, to the extent the Idaho Legislature *was* given information about House Bill 515, at every juncture it included a reference to this litigation. The information given was at every juncture incomplete (compared to the information given this Court) and at one occasion, the information about the litigation and the range was almost completely false. In reality, there is very little to distinguish the facts of this case

from *ISSEO IV*.

At oral argument, counsel for CARE argued *Jones v. State Board of Medicine,* 97 Idaho 859, 555 P.2d 399 (1976), as being instructive. In that case, the Idaho Supreme Court made an extensive analysis of whether the 1975 Hospital-Medical Liability Act (which set a $150,000 limit for malpractice actions against physicians and acute care hospitals, and required all physicians and hospitals to obtain malpractice insurance as a condition for licensure) was consistent with Article I, § 18 of the Idaho Constitution and consistent with due process and equal protection considerations. Then, the Idaho Supreme Court, since it was remanding the matter to district court, *sua sponte* raised the issue of whether that Act was consistent with Article III, § 19 of the Idaho Constitution, which provides: "The legislature shall not pass local or special laws in any of the following enumerated cases…" 97 Idaho 859, 876-77, 555 P.2d 399, 416-17. The Idaho Supreme Court stated the general purpose of Article III, § 19:

> That provision of the Idaho Constitution was patterned after those which occurred in many state constitutions in the late nineteenth century following a proliferation of special and local laws in post-Civil War legislatures. Clow & Marcus, 'Special and Local Legislation,' 24 Ky.Law Journal 351, 355-358 (1936). The general purpose of such constitutional provisions was 'to prevent legislation bestowing favors on preferred groups or localities. *State ex rel. Idaho State Park Board v. City of Boise,* 95 Idaho 380, 383, 509 P.2d 1301, 1304 (1973).

97 Idaho 859, 876, 555 P.2d 399, 416. If the "general purpose" of Article III, § 19 is "to prevent legislation bestowing favors on preferred groups or localities", then this Court finds without a doubt the Idaho Outdoor Sport Shooting Range Act violates that general purpose. The legislation on its face only inures to the benefit of the State, and the legislative history shows it was designed to inure to the benefit only of IDFG and only (or at least primarily) for *this* litigation. Then, the Idaho Supreme Court in *Jones v. State Bd. of Medicine* stated the "test" used

to determine if the Act was "special legislation", and engaged in some analysis of that question (without actually deciding that question, as presumably they recognized they were remanding back to district court):

> It has been indicated that the distinction between general and special legislation is that a law is general if 'all persons subject to it are treated alike as to privileges, protection and in every other respect.' *Wanke v. Ziebarth Const. Co.,* 69 Idaho 64, 202 P.2d 384, 393 (1948). Stated in other terms, 'A statute is general if its terms apply to, and its provisions operate upon, all persons and subject-matter in like situation(s).' *Jones v. Power County,* 27 Idaho 656, 150 P. 35, 37 (1915); In re *Bottjer,* 45 Idaho 168, 260 P. 1095 (1927). 'It is well settled that a law is not special in character 'if all persons subject to it are treated alike, under similar circumstances and conditions, and respect to both the privileges conferred and the liabilities imposed.'' *State v. Horn,* 27 Idaho 782, 793, 152 P. 275, 279 (1915). *See also, In re Crane*, 27 Idaho 671, 151 P. 1006 (1915); *Ada County v. Wright,* 60 Idaho 394, 92 P.2d 134 (1939); *State v. Lindstrom,* 68 Idaho 226, 191 P.2d 1009 (1948).
>
> Clearly it is arguable at least that the Act in question here is special in that it selects from a class of persons otherwise subject to liability for their negligent acts, physicians and hospitals, and releases or extinguishes, in part at least, their otherwise liability contrary to the interdiction of special laws in Art. III, § 19. The limitations of Art. III, § 19, are not, however, absolute in their application.

97 Idaho 859, 876-77, 555 P.2d 399, 416-17. Finally, the Idaho Supreme Court stated:

> If as asserted by appellants here the Act in question is found to have been enacted in response to a problem of statewide concern in Idaho and by alleviation of that problem, it is found to serve the health and welfare of the people of the state of Idaho, and the means adopted in the Act are held to be reasonably related to the solution of those problems, then the Act will survive the challenge that it is offensive to Art. III, § 19, of the Idaho Constitution. Therefore, the challenges posed to the Act as offensive to Art. III, § 19, are likewise remanded to the district court for additional evidence, findings and conclusions by that court.

97 Idaho 859, 877, 555 P.2d 399, 417.

What this Court takes away from *Jones v. State Bd. of Medicine* is that while the usual test is: "A statute is general if its terms apply to, and its provisions operate upon, all persons and subject-matter in like situation(s)", other factors come into play. **First** is the extent of the "like situation". Is the "like situation" all doctors in a specific area in

Idaho, is it all doctors in Idaho as compared to other professions in Idaho? In *Jones v. State Bd. of Medicine*, the Idaho Supreme Court made it clear it was the latter. In other words, the "like situation" was pretty general. The Idaho Supreme Court in *Jones v. State Bd. of Medicine* held that even though the statute in that case treated all doctors and hospitals in the State of Idaho alike, the Idaho Supreme Court obviously had difficulty with the fact that it treated those individuals and entities different than other individuals, other professions and other entities. "Clearly it is arguable at least that the Act in question here is special in that it selects from a class of persons otherwise subject to liability for their negligent acts, physicians and hospitals, and releases or extinguishes, in part at least, their otherwise liability contrary to the interdiction of special laws in Art. III, § 19…" In the present case, other than the Farragut range, there *is no other* state gun range that exists around other resident citizens. So on a specific comparison, there is no "like basis" upon which to compare. As Farragut is the one and only, the only conclusion can be that this is "special legislation." That is a specific comparison. As just mentioned above, the comparison in *Jones v. State Bd. of Medicine* was general. That general comparison gets even worse for IDFG, as on March 5, 2008, Representative Eskridge told the Senate Resources and Environment Committee HB 515 "does not affect military and law enforcement ranges and private sports shooting ranges". Senate Resources and Environment, March 5, 2008, Minutes, p. 4. Thus, the Idaho Legislature in HB 515 is treating the Farragut Range and one other State range entirely different than military, law enforcement and private ranges. That is a bad thing for the Idaho Legislature to do, because it creates a "special law". But that bad thing is exactly what the IDFG asked the Idaho Legislature to do. If the Idaho Supreme Court in *Jones v. State Bd. of Medicine* held that even though the

statute in that case treated all doctors and hospitals in the State of Idaho alike, the Idaho Supreme Court obviously had difficulty with the fact that it treated those individuals and entities different than other individuals and entities, then how can HB 515 survive that same analysis? House Bill 515 admittedly treats the Farragut Range *different* than military, law enforcement and private ranges. Under this sort of general analysis, the Idaho Outdoor Sport Shooting Range Act truly is a "special law."

Second, the Idaho Supreme Court in *Jones v. State Bd. of Medicine* made it clear that if the legislation addresses a "statewide problem", it is not special legislation. The Idaho Supreme Court held: "If as asserted by appellants here the Act in question is found to have been enacted in response to a problem of statewide concern in Idaho and by alleviation of that problem [then the Act will survive the "special legislation" challenge]." That distinction illustrates a problem with the present case. The materials submitted by CARE establish that the Idaho Sport Shooting Range Act was created to address IDFG's "problems" that have developed only with the Farragut range, specifically, only the *litigation* involved in the Farragut range.

A case cited in *Moon* is helpful. As mentioned above, the Idaho Supreme Court in *Moon*, in discussing special laws wrote:

> "A law is not special simply because it may have only a local application or apply only to a special class, if in fact it does apply to all such classes and all similar localities and to all belonging to the specified class to which the law is made applicable." *Bd. of County Comm'rs of Lemhi County v. Swensen,* 80 Idaho 198, 201, 327 P.2d 361, 362 (1958), *citing Mix v. Bd. of Comm'rs,* 18 Idaho 695, 705, 112 P. 215 (1910).

140 Idaho 536, 546, 96 P.3d 637, 647. It does seem the Idaho Outdoor Sport Shooting Range Act has only a "local application" to the Farragut range since, of the other three other ranges in the State of Idaho to which the Act could apply, one (the one referenced to the Idaho Legislature) has no people and no residences around it, and the other two

have little or no people or residences around those them. Under *Board of County Commissioners of Lemhi County v. Swensen,* 80 Idaho 198, 201, 327 P.2d 361, 362 (1958), the legislation in the present case certainly appears to be a law having "only a local application". But *Swensen* tells us that such in and of itself is not fatal (ie., not a "special law"). But it is only not fatal "…if in fact it does apply to all such classes and all similar localities and to all belonging to the specified class to which the law is made applicable." Note the language in *Swensen* is the conjunctive "and", meaning all three must be present for a law with a "local application" to not be a "special law". In other words this law which has "local application", must 1) apply to all such classes, and 2) apply to all similar localities, and 3) apply to all belonging to the specified class to which the law is made applicable, in order to avoid being a "special law." The important issue under *Swensen,* then, is the fact a law which has a "local application" is something that can be overcome "…if in fact [the Act] does apply to all such classes and *all similar localities* and to all belonging to the specified class to which the law is made applicable." (emphasis added). Representative Eskridge tells us the Act meets *none* of these three requirements, and again, all three must be present to overcome the "local application" problem. On March 5, 2008, Representative Eskridge told the Senate Resources and Environment Committee HB 515 "does not affect military and law enforcement ranges and private sports shooting ranges". Senate Resources and Environment, March 5, 2008, Minutes, p. 4. The Act does not apply to "all such classes". The Act does not apply to "all similar localities" as mentioned in *Swensen*. Accordingly, it is a "special law." When *Swensen* mentions "similar localities", what is the "locality"? Is it the locality of the range or of the citizens surrounding the range? It really does not matter as HB 515 fails in either regard. It would seem to be the latter, the "locality" is the "citizens

surrounding the range". In this case, we know the Farragut range is the only state range with people in residences in its path. We also know HB 515 is in direct response to this litigation. Thus, there is absolutely no way this legislation applies to "all similar localities." This is the only locality. If the "locality" is the "range" itself, then there are no comparisons as well. There was one other state range referenced before the legislature, there are perhaps two others, and none of them have people in residences in their path. Turning from the language in *Swensen* to the language in *Jones v. State Bd. of Medicine*, the comparisons of the "citizens surrounding the range" are not "subject matters in like situation" because there are no "like situations" in the State of Idaho to "other citizens surrounding other ranges." If the comparison is to the "range" itself, then under the language of *Jones v. State Bd. of Medicine*, there is no "subject matters in like situation" because there are no "other ranges."

In *Swensen*, the State of Idaho Auditor (Swensen) was sued for a writ of mandate by the Lemhi Board of County Commissioners because Swensen refused to issue a $35,000 warrant to Lemhi County, even though the Idaho State Legislature had appropriated that money to Lemhi County for road repairs. The Auditor claimed the act of the Legislature violated Article III, Section 19, prohibiting special and local laws. The Idaho Supreme Court agreed with Swensen, found Senate Bill 41 of the 1957 Session Laws, Chapter 295 to be a local and special law prohibited by Article III, § 19, and quashed the writ of mandate sought by the Lemhi Board of County Commissioners. 80 Idaho 198, 201, 327 P.2d 361, 362. The Idaho Supreme Court's analysis in *Swensen* is as follows:

> We have heretofore discussed this constitutional provision in *Ada County v. Wright,* 60 Idaho 394, 92 P.2d 134, 138. The rule as laid down in that case is well established and supported by prior decisions of this Court. It is said therein:

> It is next contended that the act is a local and special law and, as such violates par. 7. sec. 19, of art. 3, of the Const. That contention is unsound. The act applies to all counties alike; it applies to all highways and good road districts alike. Its application is general and uniform as to all that fall within its classifications. A special law applies only to an individual or number of individuals out of a single class similarly situated and affected, or to a special locality. A law is not special simply because it may have only a local application or apply only to a special class, if in fact it does apply to *all such classes* and *all similar localities* and to *all belonging to the specified class* to which the law is made applicable. *Mix v. Board of Com'rs, etc.,* 18 Idaho 695, 705, 112 P. 215, 32 L.R.A.,N.S., 534; *Hettinger v. Good Road District No. 1,* 19 Idaho 313, 318, 113 P. 721; *In re Crane,* 27 Idaho 671, at page 690, 151 P. 1006, L.R.A.1918A, 942.

80 Idaho 198, 201, 327 P.2d 361, 362. (Italics in original). The italicized portion was obviously critical to the Idaho Supreme Court's decision in *Swensen*. The quoted portion in *Swensen* comes from *Ada County v. Wright*, 60 Idaho 394, 92 P.2d 134 (1939). In that case, Wright, the State Auditor was sued. The claim was made by the Ada County Commissioners that a new statute authorizing appropriations to counties from state highway fund for highway purposes was a local or special law. As shown by the above quoted portion of *Wright* within *Swensen,* the Idaho Supreme Court disagreed, because that statute which authorized the laying out, opening, altering, maintaining, working on or vacating highways, and "the statute applied to all counties, highways and good roads districts alike." 60 Idaho 394, 403, 92 P.2d 134, 138-39. *Mix v. Board of County Commissioners of Nez Perce County,* 18 Idaho 695, 112 P. 215 (1910), is another case cited in the quote from *Wright* found within *Swensen*. The facts of Mix are not on point. An action was brought to determine the applicability of the State of Idaho's local option law (which gave the counties the ability to determine whether liquor would be sold within the county) to the city of Lewiston. Nez Perce County decided to forbid liquor sales and the City of Lewiston wished to have liquor sales so the

city challenged the State of Idaho local option law. However, the law and analysis in *Mix* is pertinent.

> A special law is one which applies only to an individual or to a number of individuals selected out of the class to which they belong, or to a special locality. *State v. Cal. Min. Co.,* 15 Nev. 234. A law may be general, however, and have but a local application, and it is none the less general and uniform because it may apply to a designated class if it operates equally upon all subjects for which the rule is adopted. In determining whether a law is general or special, the court will look to its substance and necessary operation as well as to its form and phraseology. *Ladd v. Holmes,* 40 Or. 167, 66 Pac. 714, 91 Am. St. Rep. 457; 7 Words & Phrases, pp. 6578, 6579; Black's Law Dictionary, p. 535, under title "General Law."
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> In *People v. Hoffman,* 116 Ill. 587, 5 N. E. 596, 56 Am. Rep. 793, the court had under consideration the question whether a certain law was general or special, and said: "Whether laws are general or not does not depend upon the number of those within the scope of their operation. They are general, 'not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the laws.' Nor is it necessary, in order to make a statute general, that 'it should be equally applicable to all parts of the state. It is sufficient if it extends to all persons doing or omitting to do an act within the territorial limits described in the statute.'" *See, also, Cox v. State,* 8 Tex. App. 254, 34 Am. Rep. 746; *People v. Wright,* 70 Ill. 388.
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> In the case of *Paul v. Gloucester Co.,* 50 N. J. Law, 585, 15 Atl. 272, 1 L. R. A. 86, the court had under consideration a local option law. The law was attacked on the ground that it was local or special in its application, and the court held: "The law is not in contravention of our constitutional provision that 'the Legislature shall not pass private, local or special laws regulating the internal affairs of towns and counties.' This inhibition in the Constitution is not intended to secure uniformity in the exercise of delegated police powers, but to forbid the passing of a law vesting in one town or county a power of local government not granted to another." The local option law is of general application to every county in the state. While it is left with the people of each county to say whether it shall be enforced in the county, that fact does not make it any the less a general law. It is applicable to every county in the state, and under its terms and provisions the electors of each county have a right to vote upon the question whether the sale or disposal of intoxicating liquors as a beverage shall be prohibited in such county. Every county in the state may accept or reject it upon the same terms and conditions. It is clearly a "general law" within the meaning of that phrase as defined by the leading law writers and the courts of last resort of the nation. The Legislature has undertaken by this act to make a general law applicable to all of the

> counties in the state alike, as to whether the sale of intoxicating liquors shall be prohibited or not.

18 Idaho 695, 705-07, 112 P. 215, 218-19. The beginning quote: "A special law is one which applies only to an individual or to a number of individuals selected out of the class to which they belong, or to a special locality" (18 Idaho 695, 705, 112 P. 215, 218, citing *State v. California Mining. Co.,* 15 Nev. 234 (1880), certainly seems to apply to the citizens around the Farragut range. The "class to which they belong" are citizens of Idaho, and, given the fact that the other ranges are in uninhabited areas where sound isn't a factor, this Act applies only to these citizens around the Farragut range. The next phrase: "A law may be general, however, and have but a local application, and it is none the less general and uniform because it may apply to a designated class if it operates equally upon all subjects for which the rule is adopted" (18 Idaho 695, 705-06, 112 P. 215, 218, citing *Ladd v. Holmes,* 40 Or. 167, 66 Pac. 714 (1901), 91 Am. St. Rep. 457;) is also applicable. The Act is general in that it applies all over the State of Idaho, but the Act has a "local application" to only possibly four ranges (three of which are in uninhabited areas), and it does not "operate equally upon all subjects for which the rule is adopted", if "subjects" are citizens of Idaho. And, unlike the local option law which is "of general application to every county in the state" and "every county in the state may accept or reject it", the citizens around the Farragut range are saddled with a noise *statute* which was passed on a state level, but which only truly impacts these citizens. A statute in which, unlike a local ordinance, those citizens had comparatively little input.

There is a quote from *State v. California Mining. Co.,* 15 Nev. 234 (1880) which places the entire issue before this Court in the appropriate context: "The question is, not what a court of last resort may do in defiance of law, but what the legislature may expressly authorize an officer to do, who has and can have no judicial powers." 1880

WL 4278, p. 13. Certainly IDFG's position would be that this Court would by defying the Idaho Legislature if it were not to follow the terms of the Idaho Outdoor Sport Shooting Range Act. In reality, if this is a "special law", then the State of Idaho Legislature has authorized the State of Idaho Department of Fish and Game, one of the state's agencies, to have powers that would prohibit and completely preempt local government and the courts that uphold that local government. I.C. § 67-9105. Another quote from the *California Mining* case is applicable:

> "It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances, or that any one should be subjected to losses, damages, suits, or actions, from which all others, under like circumstances, are exempted." (*Holden v. James, Adm'r,* 11 Mass. 404.)

1880 WL 4278, p. 14. *California Mining* concerned a Nevada district attorney who compromised a tax case for back taxes against a mine by waiving all penalties when the statute in force did not allow that discretion. Given that context, the converse of that quote would apply to the citizens around the Farragut range: "It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should [suffer detriments] which are [spared] to all others under like circumstances, or that any one should be subjected to losses, damages, suits, or actions, from which all others, under like circumstances, are exempted."

Hettinger v. Good Road District No. 1, 19 Idaho 313, 113 P. 721 (1911) is cited by the Idaho Supreme Court in *Swensen*. In finding the "good roads law" did not violate Article III, § 19 as a "special law", the Idaho Supreme Court held:

> This section of the Constitution prohibits the Legislature from passing a law which is local or special with reference to "opening, altering, maintaining, working on, or vacating roads, highways," etc. The good roads law, however, is not local or special as used in this section of the Constitution. It is general in its application, and applies alike to all sections

> of the state where the taxpayers thereof are willing to assume the burden of additional taxation for the purpose of improving the roads within such section, and applies to all good road districts within the state, and relates to all of a class, and is like, in its operation to the organization of cities and villages within the state, irrigation districts and other municipalities, which are provided for by a general law. *Boise Irrigation, etc., v. Stewart,* 10 Idaho, 38, 77 Pac. 25, 321.

19 Idaho 313, 318, 113 P. 721, 723. The Idaho Outdoor Sport Shooting Range Act applies to the entire state, but it only affects four possible ranges, and the noise requirement really only affects the Farragut range. And, unlike the "good roads law", the local government is not only not allowed to decide how it will affect its taxpayers, the Act preempts all local authority. I.C. § 67-9105.

This Court finds the Idaho Outdoor Sport Shooting Range Act, I.C. § 67-9101, et seq., violates the "special law" prohibition of Article III, § 19 of the Idaho Constitution, and is thus, unconstitutional. For that reason alone, the injunction cannot be lifted in favor of IDFG at the present time. CARE is entitled to summary judgment in its favor as to the unconstitutional nature of the Act. This Court appreciates that it is obligated to seek an interpretation of the Act that upholds its constitutionality, and that its power to declare legislative action unconstitutional should be exercised only in clear cases. *Stuart v. State,* 149 Idaho 35, 232 P.3d 813, 818 (2010), *quoting American Falls Reservoir Dist. No 2 v. Idaho Dep't of Water Resources,* 143 Idaho 862, 869, 154 P.3d 433, 440 (2007). For the reasons set forth above, this Court is unable to find an interpretation of the Act that upholds its constitutionality. This is a clear case where the Act is unconstitutional.

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b. Arbitrary, Capricious and Unreasonable Analysis.

As mentioned above, the other part of the "special law" test is whether the

proposed legislation is arbitrary, capricious or unreasonable. *Moon, Jones v. Power County* and *Jones v. Bd. of Medicine.* The specific language is set in the disjunctive "or", meaning only one of the three need be found. This Court finds all three. Since the Idaho Legislature passed a law regarding noise limitations, and in doing so: a) did not ask for any scientific information, b) accepted information which is incomplete and at times false, and c) either failed to realize (best case) or ignored the fact (worst case) that what they were being asked to do was in direct response to litigation, the action of the legislature in passing this Act was "arbitrary." The action of the legislature was "capricious". The action of the legislature was "unreasonable." But, again, the legislature did exactly what it was being asked to do, by IDFG.

c. Police Power Analysis.

The right to own and enjoy property is of the highest order, but may nonetheless be subject to reasonable limitation and regulation by the state in the interest of common welfare; "a statute imposing any limit upon the right must be supported by such purpose." *Newland v. Child,* 73 Idaho 530, 537, 254, P.2d 1066, 1069 (1953) (citing *State v. Omaechevviaria,* 27 Idaho 797, 152 P. 280 (1915), 246 U.S. 343, 38 S.Ct. 323 (1918); *Chambers v. McCollum,* 47 Idaho 74, 272 P. 707 (1928). In *Ex Parte Hull,* 18 Idaho 475, 110 P. 256 (1910), the Idaho Supreme Court held that prohibition of public amusements on Sunday, pursuant to the Sunday Rest Law, to be upheld as an exercise of the State's police power, must be necessary for the protection of public morals, public health, or public peace and safety. 18 Idaho 475, 481, 110 P. 256, 257. The questions for this Court, with regard to whether the Idaho Outdoor Sport Shooting Range Act is a valid exercise of the State's police power, are whether in enacting the Act: (1) did the state act to protect the public health, morals or public safety; and (2) did

the state have a real and substantial relation to the object of protection? *See Ex Parte Crane,* 27 Idaho 671, 674, 151 P. 1006, 1008 (1915).

In the so-called "Milk Case" the United States Supreme Court held that police power of the state to regulate business in the public interest included price-fixing for commodities. *Nebbia v. People of New York,* 291 U.S. 502, 54 S.Ct. 505 (1934). The United States Supreme Court wrote:

> Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for the government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work for harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.

291 U.S. 502, 510, 54 S.Ct. 505, 523. The United States Supreme Court went on to quote Justice Barbour:

> …it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.

291 U.S. 502, 510, 54 S.Ct. 505, 523-24, quoting *City of New York,* 36 U.S. 102, 139 (1837).

"Pursuant to the state's police power, the Idaho Legislature has the authority to 'enact laws concerning the health, safety and welfare of the people so long as the regulations are not arbitrary or unreasonable.'" *Van Orden v. Department of Health & Welfare,* 102 Idaho 663, 667, 637 P.2d 1159, 1163 (1981). But, every statute enacted is not necessarily a legitimate exercise of the state's police power. *See Ex Parte Crane,*

27 Idaho 671, 675, 151 P. 1006, 1009 (1915). Although every presumption is indulged in favor of the validity of a statute, there are limits beyond which legislation cannot go. *Id.,* citing *Union Pacific Railroad Co. v. United States, Central Pacific Railroad Co. v. Gallatin,* 99 U.S. 700 (1878) (Sinking Fund Cases). Where a statute purports to have been enacted to protect the public health, safety and morals, but has no substantial relation to those objects, or where the legislation is a palpable invasion of fundamental rights, courts must give effect to the Constitution by deeming such legislation unlawful. *Ex Parte Crane,* 27 Idaho 671, 675, 151 P. 1006, 1009.

It is difficult to see how the Idaho Outdoor Sport Shooting Range Act protects the public health, safety or morals. It does provide a cap on decibels an outdoor state range can emit from a noise standpoint, and that could be a "public health" reason. However, when one considers the purpose of the Act as stated to the Idaho legislature (as discussed above), was to whipsaw the negotiated or litigated decibel limit in the present litigation, this legislation isn't in any way about protecting "public health". This legislation is about the legislature establishing an arbitrary decibel limit, with little or no scientific input, the sole purpose of which was to circumvent this litigation. While that is an unflattering thing to say about the Idaho legislature, the legislature simply did what they were asked to by IDFG. This Court finds this is not an appropriate use of police power.

IDFG argues:

> "Control of noise is of course deep-seated in the police power of the States." *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624, 538 [93 S.Ct. 1854, 1862] (1973).

Brief in Support of Motion for Partial Lifting of Injunction, p. 6; Reply Brief in Support of Partial Lifting of Injunction, pp. 5-6. While that is a quote from *City of Burbank,* a

reading of that case shows that it is a "preemption" analysis engaged in by the United States Supreme Court, not a "police power" analysis. *City of Burbank* is simply not applicable to the questions before this Court.

IDFG makes the argument: "The Legislature's actions did not modify standards consented to by the parties or noise standards set by the Court, since no such standards had been established." *Id.*, p. 7. That is a true statement, but one which must be placed in context to understand the non-sequitur involved. Prior to 2002, the use of the range was so limited in use that witnesses testified before this Court they had no idea there was even a range existing. Arms being discharged at the range were so infrequent that it raised no suspicion with the landowners who testified, they simply thought it was another landowner using a firearm on his or her own land. That testimony is understandable. In 2002 there were 182 users. So up to 2002, *there was no need for a noise standard* because the range was so under-utilized that some residents did not even know it existed. The *only* reason there is now a need for a noise standard is due to this litigation, and the *only* reason for this litigation is IDFG's increased use of the Farragut range and the impact that will have on surrounding residents. In 2008, IDFG told the legislature they want to take that to 3,000 users per year and IDFG told the granting source they want to increase use to 557,112 shooters per year. Essentially, IDFG created the expansion of the range with a grant, the expansion of the range would cause a increase in annual use from 182 shooters per year to an anticipated 557,112 shooters per year, that increased caused concern for the surrounding residents who filed this lawsuit, and IDFG was able to convince the Idaho Legislature that the Idaho Outdoor Sport Shooting Range Act was a good idea. The Act is a way for IDFG to insulate itself from liability for a situation which it, and only it,

created. That is not a valid use of police power.

In this Court's review of "police power" cases, this Court was only able to locate cases that dealt with regulation of activity, and this Court was unable to find a case where the legislation effectively created, expanded or established more rights to the government while simultaneously "taking" from its citizens. That is essentially what is occurring here. The United States Supreme Court in *Nebbia* stated above: "But neither property rights nor contract rights are absolute; for the government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work for harm." The citizens down range of the Farragut range are not "using their property to the detriment of their fellows", and as a result, need to be "regulated" by a valid use of the State's "police power." The citizens down range of the Farragut range are simply "existing", using their property for their residences. The Idaho Outdoor Sport Shooting Range Act does not regulate their activity, it regulates the State's activity. However, it does much more than "regulate" the State's activity, it "insulates" the State's activity. In so doing, it effectively "takes" (or partially takes) plaintiffs' land without any compensation. The Act is simply not a valid exercise of the State's police power.

d. Article V, § 13 of the Idaho Constitution was Violated.

Also at issue is whether the legislature interfered with this litigation and violated Article V, § 13 of the Idaho Constitution. Article V, § 13 of the Idaho Constitution specifies: "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government." CARE argues the following quote from *ISSEO IV*:

> Consequently, we find that there is no necessity present pursuant to Article V. §13 of the Idaho Constitution meriting the legislature's attempt to

> legislate itself out of this lawsuit by rewriting the Idaho Rules of Civil Procedure. We also find HB403 to be a special law pertaining to the practice of the courts aimed specifically at this lawsuit and these plaintiffs, and accordingly find that portion of HB 403 amending I.C. §6-2215 of the Idaho Code is unconstitutional.

Brief in Response Defendants' Summary Disposition of the Cause and Brief in Support of Plaintiff's Motion for Summary Judgment, p. 19. There are certainly similarities in the present case. In the present case the State of Idaho, through its agency the Department of Fish and Game, asked the Idaho Legislature to "legislate itself" [IDFG] out of this lawsuit. That is precisely what IDFG is asking this Court to do in its motion to partially lift the stay. While IDFG did not ask the Idaho Legislature to rewrite the Idaho Rules of Civil Procedure (as the Idaho Supreme Court found the legislature did in *ISSEO IV*), nothing in Article V, § 13 requires so egregious an act. This Court finds the Idaho Legislature, in passing the Idaho Outdoor Sport Shooting Range Act, violated Article V, § 13.

e. Miscellaneous.

Discussed in this Court's earlier decision:

> In 1996, the Idaho Legislature added a provision that codifies the doctrine of "coming to the nuisance" for "sport shooting ranges." Idaho Code § 55-2601 *et. seq.* Specifically, Idaho Code § 55-2602(1) reads: "Except as provided in this section, a person may not maintain a nuisance action for noise against a shooting range located in the vicinity of that person's property if the shooting range was established as of the date the person acquired the property." There is no dispute that all individual plaintiffs fall under that category. That section continues: "If there is a substantial change in use of the range after the person acquires the property, the person may maintain a nuisance action if the action is brought within three (3) years from the beginning of the substantial change."

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 10. The Idaho Sport Shooting Range Act, specifically I.C. § 67-9103 states a person may not maintain a public or private nuisance action for noise against a state outdoor sport

shooting range that is in compliance with this chapter. There was a concomitant modification in 2008 that was made in I.C. § 55-2604 (3) and (4), which specifically excepts out of the "Sport Shooting Ranges" Act (I.C. § 55-2601 et.seq.), any "Outdoor sport shooting range" described in the Idaho Outdoor Sport Shooting Range Act (I.C. § 67-9101, et.seq.). I.C. § 55-2604(4)(b). Let's contemplate what this means. If IDFG builds this range, and, as IDFG told the granting entity would occur, over a half-million people a year visit this range (up from 182 per year in 2002), no citizen in the area, no resident in the area, will ever be able to do anything about that, even though one statute, I.C. § 55-2602, up until 2008 anyway, specifically gave them three years to bring a lawsuit for "substantial change in the use of the range." Not only that, but no local governmental entity will ever be able to do anything about any of this. I.C. § 67-9105, I.C. § 55-2605.

Finally, CARE raises claims that the Act violates equal protection and claims the Act is a bill of attainder. Because the Court finds the Act is unconstitutional for the reasons stated above, this Court will not reach the equal protection and bill of attainder claims.

2. Safety Issues.

With regard to the Court's safety concerns, IDFG argues it has installed ballistic baffles and side berms at the 100-yard portion of the range to prevent firing above the backstop (the berm behind the target area.) Brief in Support of Motion for Partial Lifting of Injunction, p. 4. IDFG argues: "Having satisfied the Court's condition as it related to safety for the 100-yard portion of the range for up to 500 shooters per year, IDFG is entitled to lifting of that component of the injunction." *Id.,* p. 5. IDFG goes on to argue it has satisfied the Court's safety conditions to open the 100-yard portion of the range for

more than 500 shooters per year in light of its compliance with noise standards (by virtue of complying with the Idaho Sport Shooting Range Act, discussed *supra*) and with the No-Blue-Sky Rule. *Id.,* p. 5 *et seq.* IDFG lists its improvements to the 100-yard range as including: an armored shooting shed enclosing the firing line, a series of ballistic baffles, side berms, recycled wood mulch on the range floor, and a screened sand backstop. *Id.,* p. 5. IDFG goes on to argue its expert, Kerry O'Neal, evaluated the firing positions at the 100-yard range in standing and prone positions and "did not observe blue sky downrange between firing positions and the target area." *Id.,* citing Affidavit of Kerry O'Neal, ¶ 5. O'Neal also testified in his affidavit that any direct fire and any ricochets "will be contained within IDFG's property boundaries." *Id.,* at ¶ 6.

CARE concedes that IDFG made "improvements", but argues the expert testimony set forth by IDFG regarding the efficacy of these improvements has failed to meet the summary judgment standard "by providing conclusions only, through an incompetent range designer, and limited input from Fish and Game's staff engineer Whipple." Brief in Response Defendants [sic] Summary Disposition of the Cause and Brief in Support of Plaintiff's Motion for Summary Judgment, p. 7. CARE argues the inappropriateness of the partial lifting of the injunction IDFG now seeks:

> When the Court closed the range, it spoke to the entirety of the old Navy range. Nothing in that Court Order authorized or allowed for a subdividing so that a portion of the range could be opened with the remainder of the range closed. This is not a glass of water that can be half empty. This is more like a pregnant mare. She is in foal or not.

Id. CARE argues issues of fact remain which preclude a grant of summary judgment in favor of IDFG. CARE notes that nothing would prevent a shooter from shooting at a range distance other than the 100-yard portion IDFG now seeks to reopen; and, O'Neal's testimony regarding there being No-Blue-Sky and no bullet escapement at the

standing and prone positions from the 100-yard line does not address the Court's requirement that the range be totally baffled from "all potential shooting positions" and from "impromptu locations that can be anticipated and available to be established by shooters." *Id.,* pp. 7-8. CARE goes on to note that, while the Court required 100% bullet containment, IDFG's expert, O'Neal, only states it would be "highly improbable" that rounds from the 100-yard shooting area would leave IDFG's property. *Id.,* pp. 11-12. CARE's argument is that the Court adopted a zero bullet escapement standard, and by IDFG's own admission, this is not the standard which has been met. *Id.,* pp. 12-13. CARE notes:

> O'Neal admits that bullets can and will go through the unarmored sidewall of the shooting shed or leave the range and bullets can and will go through the unarmored overhead canopy above the 10:30 o'clock high and leave the range and bullets will go through the "open space" or as the Court and Plaintiffs refer to it as "blue sky" openings, and go over the back berm and leave the range, add ricochets and the impromptu areas and the range is a bullet sieve.

Id., p. 13.

CARE argues that the No-Blue-Sky rule and "fully contained range" concept has not been met in at least two locations, the left and right extremes of the 100-yard range and the proposed 50-yard and 200-yard ranges. Consolidated Reply Brief in Support of Plaintiff's Motion for Summary Judgment and Motion to Strike and/or Exclude Testimony of James Caulder, p. 7. CARE also cites the Affidavit of Jeanne Hom-Holder, stating that she can fire a rifle from the 600-yard firing line over the berm and hit her own house. *Id.,* p. 13. CARE concedes that baffles were placed over the 100-yard shooting positions, but argues that the Court required a baffle over every firing position, from all potential shooting positions including impromptu locations. *Id.,* p. 18.

In its Order, this Court required a baffle be placed over every firing position. For

the injunction to be lifted:

> The baffle must be placed and be of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target. Once baffles are installed and either 1) plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target, or 2) if the plaintiffs cannot agree, the Court so finds after a view of the premises…

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, pp. 61-62. If this standard is met, and the injunction is lifted, IDFG may only open the range to more than 500 shooters per year *if* the noise abatement issues, *supra*, are addressed *and* safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by IDF&G are in place. The No-Blue-Sky Rule is the standard applicable to IDFG's request to open the range to more than 500 shooters per year, not lifting the injunction for up to 500 shooters per year. Although not addressed directly by IDFG, CARE cites no authority for its contention that the injunction must be lifted in whole and cannot be lifted in part by the Court. In fact, the Court's February 23, 2007, Order contemplates different standards and requirements for addressing different portions of the injunction.

The summary judgment standard of review is not affected by the fact that both parties have filed cross-motions for summary judgment; "rather, each motion must be separately considered on its own merits, with the court drawing all reasonable inferences against the party whose motion if under consideration." *Treasure Valley Gastroenterology Specialists, PA v. Woods,* 135 Idaho 485, 489, 20 P.3d 21, 25 (Ct.App. 2001) (citing *Stafford v. Klosterman,* 134 Idaho 205, 998 P.2d 1118, 1119 (2000); *Bear Isalnd Water Ass'n, Inc. v. Brown,* 125 Idaho 717, 721, 874 P.2d 528, 532 (1994)). The issue before the Court is whether IDFG has installed a baffle over every firing position such that a shooter cannot fire his or her weapon above the berm behind

the target from any shooting position. If this requirement *alone* is met by IDFG, the injunction can be lifted for up to 500 shooters per year. Only after this requirement has been met will the Court consider the requirements for lifting the injunction for more than 500 shooters per year: safety measures to prevent bullet escapement and noise abatement must be in place. The Court has stated that for each of these requirements, the parties may agree that the requirements have been met, or the Court will make such a determination after a view of the premises and consideration of additional evidence. As set forth above, there will be no additional view of the premises. There will need to be a trial on this issue.

The parties set forth conflicting evidence with regard to whether the baffles installed over the 100-yard shooting area prevent a shooter from firing over the berm. At this juncture, neither party has set forth sufficient evidence, even when all inferences are taken in favor of either CARE or IDFG, such that summary judgment is appropriate. IDFG has not made the claim that the 100-yard range will be monitored (except for a passing reference by its counsel in oral argument), such that people using the 100-yard range could not go over and shoot at the un-baffled 50 and 200 yard ranges without an IDFG attendant or monitor noticing. Nor has IDFG made the claim that the 50 and 200 yard ranges will be made secure such that no one can go into those un-baffled ranges and shoot.

VIII. CONCLUSION AND ORDER.

For the reasons set forth above;

IT IS HEREBY ORDERED plaintiff CARE's Motion to Strike Testimony of Kerry O'Neal Based on Lack of Expertise and Lack of Foundation, is DENIED, and CARE's Motion to Strike the December 9, 2010 Affidavits of Jon Whipple and Kerry O'Neal is

DENIED.

IT IS FURTHER ORDERED IDFG's motion to strike Caulder's affidavit is DENIED.

IT IS FURTHER ORDERED other than ¶ 26, and the attendant Exhibits 4 and 5, CARE's motion to strike the Amended Affidavit of O'Neal is DENIED.

IT IS FURTHER ORDERED IDFG's motion for a view of the premises is DENIED. Any future action which contemplated a view of the premises by the Court will have to be accomplished by trial.

IT IS FURTHER ORDERED this Court finds the Idaho Outdoor Sport Shooting Range Act, I.C. § 67-9101, et seq., violates the "special law" prohibition of Article III, § 19 of the Idaho Constitution, and is thus, unconstitutional. CARE's motion for summary judgment as to the unconstitutional nature of the Act is GRANTED.

IT IS FURTHER ORDERED due solely to the finding that the Idaho Outdoor Sport Shooting Range Act is unconstitutional, due to failure to address noise considerations alone, IDFG's motion to partially lift the injunction and IDFG's motion for summary disposition of its motion to partially lift the injunction are DENIED at this time.

IT IS FURTHER ORDERED this Court finds the Idaho Outdoor Sport Shooting Range Act, I.C. § 67-9101, et seq., violates the Article V, § 13 of the Idaho Constitution, and is thus, unconstitutional. CARE's motion for summary judgment as to the unconstitutional nature of the Act is GRANTED.

IT IS FURTHER ORDERED cross motions for summary judgment on the issue of range safety are DENIED as material issues of fact remain. Issues of material fact remain in dispute as to range safety issues (as well as noise issues since the Idaho Outdoor Sport Shooting Range Act has been found to be unconstitutional) to allow

IDFG to expand beyond 500 users per year. Issues of material fact remain in dispute both as to the injunction to prevent IDFG opening the range to up to 500 persons per year. While it is beyond dispute that baffles have been installed, the following criteria imposed by the Court on February 23, 2007, have not been met:

> Once baffles are installed and either 1) plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target, or 2) if the plaintiffs cannot agree, the Court so finds after a view of the premises, the injunction will be lifted, and IDF&G may operate that range in the same manner in which it historically has (ie., without any on site supervision), up to 500 shooters per year.

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 61. As the Court has decided any additional view of the premises is not appropriate, the determination of whether safety considerations have been met (whether any shooter in any position cannot fire a round above the berm behind the target) will be through trial before the Court.

IT IS FURTHER ORDERED that a Court trial on the issue of safety considerations for up to 500 shooters is scheduled to begin June 13, 2011, at 9:00 a.m.

ENTERED this 10th day of March, 2011.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Scott W. Reed	208 765-5117	Harvey Richman	Via mail
W. Dallas Burkhalter and Kathleen E. Trever	208 334-2148		

_____
Secretary